



National Legal Aid & Defender Association

Sent by email to [mcohan@lsc.gov](mailto:mcohan@lsc.gov)

April 2, 2012

Board of Directors  
Legal Services Corporation  
c/o Mattie Cohan, Senior Assistant General Counsel  
Office of Legal Affairs  
Legal Services Corporation  
3333 K Street NW  
Washington DC 20007

EQUAL JUSTICE.  
OF THE PEOPLE.  
FOR THE PEOPLE.

Re: Comments on Notice of Proposed Rulemaking on termination procedures, enforcement, and suspension procedures (45 CFR Parts 1606, 1618, and 1623)

Dear LSC Board of Directors:

The National Legal Aid and Defender Association and its Civil Policy Group, after carefully considering the proposed regulatory changes, strongly opposes the additional sanctions and 90 day suspension period as they (1) were not recommended by the GAO or LSC's Fiscal Oversight Task Force, (2) lack a demonstrated need particularly given the current tools LSC has to encourage compliance, (3) will harm clients and potential clients, (4) lack fundamental due process protections and (5) do not have necessary standard for their application. We also oppose the proposal to eliminate the long-standing LSC policy that recovered funds be used in the same service area as the change will alter the census-based allocation formula and will harm clients and potential clients. We support the proposed change allowing for the imposition of special grant conditions during the grant year if it is done in a fair manner and has a reasonable basis.

**A. Proposed Limited Reduction in Funding (1606.15) and Proposed Increase in Period of Suspension (1623.4(e))**

The proposed regulation 1606.15 adds a new sanction of less than 5% of the annual LSC grant. Similarly, proposed regulation 1623.4(e) increases the maximum time limit for the suspension of an LSC grant from 30 to 90 days. The additional sanction and the increased suspension period apply if LSC determines that an LSC-funded program has violated an applicable provision of law, or a rule, guideline or instruction issued by LSC, or a term or condition of the recipient's current grant or contract with LSC. The rationale provided is that the less than 5% sanction and 90 day suspension period are responsive to concerns raised by the Government Accountability Office (GAO) and are additional tools necessary to ensure compliance with LSC requirements. (See Notice of Proposed Rulemaking, Vol. 77, No. 20, Federal Register, pages 4749-4750.)

1. Additional Sanctions and a 90 day Suspension Period Have Neither Been Recommended by GAO nor by LSC's Fiscal Oversight Task Force

The GAO report relied on, *Legal Services Corporation: Improved Internal Controls Needed in Grants Management and Oversight*, GAO-08-37 (December 2007), neither reflects GAO's specific concern of the need for nor recommends that LSC impose additional sanctions or increase its suspension period. The GAO recommends the LSC Board of Directors and LSC Management take specific enumerated actions to help LSC improve its internal control and oversight of grantees. None of these recommendations mentions the need for sanctions or suspensions. (See pages 20-21 of GAO-08-37.) In the narrative of the report, the GAO states that "[e]ffective grantee monitoring is especially important for LSC because it has limited options for sanctioning or replacing poor-performing grantees." (p. 17.) This sentence in the report is immediately followed by a discussion of the difficulty in finding a replacement program in the event an LSC-funded program is terminated and "[t]herefore it is particularly important that LSC effectively and efficiently oversee its grantees to ensure that grant funds are used for intended purposes..." (p. 18.) The emphasis of this section of the report is on the need for LSC to improve grantee monitoring and oversight, not on any need for additional grantee sanctions or a longer suspension period. The GAO report does not reflect a concern about the lack of grantee sanctions or a long-enough suspension period.

Similarly, LSC's Fiscal Oversight Task Force looked carefully at LSC's fiscal oversight process. Despite making numerous recommendations, the Task Force makes no recommendation of the need for new sanctions or an increase in the period of suspension of a grant as necessary oversight tools. (See Fiscal Oversight Task Force Report to the Board of Directors, July 28, 2011, pages 12-20.)

2. There is no demonstrated need for the additional sanctions and a 90 suspension period; LSC has adequate tools to encourage compliance

In the Notice of Proposed Rulemaking, LSC states: "The majority of LSC recipients are in substantial compliance with LSC requirements most of the time. When non-compliance occurs, recipients almost always work diligently and cooperatively with LSC staff to come promptly into compliance, but there have been exceptions." (See Notice of Proposed Rulemaking, Vol. 77, No. 20, Federal Register, p. 4749.) No examples of exceptions are provided. In the absence of examples of the conduct LSC seeks to prevent, it is impossible to evaluate whether the additional sanctions proposal will address the alleged problem(s).

No evidence has been presented as to why the current 30-day suspension is inadequate. We are not aware of any such evidence. Tripling the length of the suspension period to 90 days, absent compelling need, should be rejected.

The LSC Board of Directors should be exacting in requiring sufficient evidence demonstrating a need for LSC's additional sanction and suspension proposals prior to implementing such major changes in regulations. The proposed regulations appear to be a very broad approach to what may turn out to be a much narrower issue. If, for example, the need is for LSC to have a monetary penalty to punish programs that knowingly and willfully

violate a Congressional restriction, when questioned costs procedures under 45 CFR §1630 and other tools mentioned below are perceived to be inadequate, then a much more narrowly tailored regulation should be explored. Such an approach would need to have clear and detailed standards for its application and adequate due process protections for programs, the needs for which are discussed below.

The additional sanctions and increased suspension period are not necessary to ensure compliance with LSC requirements. Existing tools are adequate and effective. Those tools currently available to LSC to encourage compliance include:

- Required Corrective Actions
- Special Grant Conditions
- Short-term funding, including month-to-month funding
- Questioned costs under 45 CFR §1630
- Suspension of funding for up to 30 days under 45 CFR §1623
- Terminations under 45 CFR §1606.3. (Note that under 1606.2 a “termination” includes reductions of between 5% and 100% of a grant. Thus, LSC currently has the authority to reduce a grant from 5% to 100%. LSC lacks regulatory authority to impose less than 5% sanctions.)
- Debarment under 45 CFR §1606.4
- Decisions not to refund a program during the competition process – 45 CFR §1634

The above-listed eight mechanisms provide LSC with powerful enforcement tools. LSC can require programs to perform corrective actions, require programs to perform certain actions through grant conditions, change funding to month-to-month, question any costs deemed to be contrary to LSC requirements, suspend funding for up to 30 days, reduce a grant from 5% to 100% (termination), debar a program from further receipt of funding, and decide not to refund a program during the competition process. Given these tools, it is unclear why a sanction of less than 5% would be more effective in convincing a program to comply with LSC requirements, when the existing sanction of 5% to 100%, a decision not to refund a program and debarment, would not.

### 3. Reductions in funding will harm clients and potential clients

LSC-funded programs operate on very limited budgets. Reserves are either very low or exhausted. The penalties as proposed could very well result in staff layoffs and the reduction in services. Programs are currently struggling with having to institute layoffs, reductions in service and office closures due to the nearly 19% reduction in LSC funds over the past two years and continued anemic IOLTA funding. Further, many grantees face significant additional LSC reductions over the next two years as a result of the census readjustment. Even during times when funding has been more stable, legal needs studies have shown that programs are unable to handle the demand for services. Additional reductions in funding due to the proposed sanctions will adversely impact existing client service. We should not lose sight of why LSC was established: “to provide high quality legal assistance to those who would be otherwise unable to afford adequate legal counsel.” Section 1001(2) of the LSC Act.

#### 4. The proposals lack fundamental due process protections

The proposals have a process built in for a program to contest a proposed sanction or suspension. But *due process* is glaringly absent. With the additional sanctions proposal, a program is only provided an opportunity to request an informal meeting with someone in LSC within 5 business days and to submit additional documents within 10 business days. (See proposed regulation 1606.15, which has an appeal process that is very similar to that set forth in current 1623.4 for suspensions.) This is clearly insufficient due process considering the possible loss involved. For a \$5 million grant, the loss could be as high as almost \$250,000. Similarly, the proposal to expand the maximum period of suspension from 30 to 90 days could result in the loss of use of up to \$250,000 for a \$1 million award and up to \$1.25 million from a \$5 million grant.

There is more due process when LSC questions costs under 45 CFR §1630. Regulation 1630.7 provides for an appeal by a program of LSC's notice of intent to disallow costs, first to LSC management (1607(c)) and, if the disallowed costs exceeds \$2,500, later to the LSC President (1630.7(e).) If the LSC President has prior involvement in the issue, he or she will designate an uninvolved senior LSC employee to make the decision (1607(f)), which must be based on the written record (1607(g).) In addition, the new proposals have less due process than the draft notice on this same issue presented to the Board in 2008, where for the up to 5% sanctions it was proposed that, following the informal meeting with LSC, there be a right to seek a review by the LSC President and that a decision be made solely on the information contained in the record with any additional submissions to supplement the record.

If, despite the concerns raised, LSC decides to move forward with the proposals, due process should be provided similar to that provided by federal agencies that award grants for legal services. When sanctions and suspensions are applied, federal agencies build in far more due process guarantees in their grants to legal aid programs than those proposed here. A couple of examples make this point clear.

The Department of Justice (DOJ) applies the hearing and appeal procedures found in 28 CFR Part 18 for grantee sanctions in its Legal Assistance for Victims program under the Violence Against Women Act. As specified in DOJ's OFW Fiscal Year 2012 Grant Program Solicitation Reference Guide, <http://www.ovw.usdoj.gov/docs/resource-guidebook.pdf>,

Before imposing sanctions, OVW will provide reasonable notice to the recipient of its intent to impose sanctions and will attempt to resolve the problem informally. Hearing and appeal procedures will follow those in DOJ regulations in 28 CFR Part 18. (p. 22.)

A grantee facing a sanction in DOJ's Legal Assistance for Victims program has the right to a hearing before a hearing officer. (28 CFR § 18.5). The hearing officer is either an administrative law judge or a DOJ employee who has no prior involvement in the issue. (§18.6(a)) The hearing officer has detailed powers, including the power to issue subpoenas, administer oaths, examine witnesses, rule on offers of proof and to receive evidence, take depositions, hold settlement conferences, and rule on procedural requests and other matters. (§18.6(c)) The

hearing officer renders a recommended decision (§18.8) to a designated senior agency official for a final agency decision. (§18.9) A grantee also has the additional right of requesting a rehearing before the senior agency official. (§18.10)

The Housing and Urban Development's (HUD's) Housing Counseling Program provides that sanctions may be applied and a grant may be suspended or terminated in accordance with the procedures found in 2 CFR Parts 180 and 2424. Section 6-4 (Consequences of a Performance Review) of the HUD Housing Counseling Program Handbook, Handbook 7610.1 (May, 2010), <http://www.hud.gov/offices/adm/hudclips/handbooks/hsg/7610.1/76101HSGH.pdf>, provides:

If a determination is made that the agency did violate the requirements of the housing counseling program in any way, HUD may terminate the agency's approval or participation and may impose sanctions in accordance with 2 CFR Parts 180 and 2424 (p. 62.) (Also see section 6-6 (Suspension, Termination, Debarment and Limited Denial of Participation), p. 63, for a similar provision.)

The procedures made applicable to the HUD Housing Counseling Program allow a grantee to appeal to a hearing officer. "In all HUD suspensions, the official who shall conduct additional proceedings where disputed material facts are challenged shall be a hearing officer." 2 CFR §2424.747. A "*Hearing Officer* means an Administrative Law Judge or Office of Appeals Judge authorized by HUD's Secretary or by the Secretary's designee..." 2 CFR §2424.952. HUD's hearing procedures set forth in 24 CFR part 26, specifically made applicable to administrative sanction hearings under 2 CFR §2424 by 24 CFR §26.1, grant the hearing officer the authority to administer oaths, issue subpoenas, rule on offers of proof and receive evidence, order or limit discovery, hold settlement conferences and consider and rule on all procedural and other motions. 24 CFR §26.2. These same due process procedures also apply to HUD's Fair Housing Initiatives Program (FHIP.)

LSC, an organization whose focus is on equal justice, should not provide less due process to its grantees than that provided by federal agencies that award grants to legal aid programs. Many LSC-funded programs also receive funds from DOJ and HUD. The proposal for the additional sanctions only provides an opportunity to request an informal meeting with someone in LSC within 5 business days and to submit additional documents within 10 business days. This proposed appeal process is very similar to that currently set forth in 1623.4 for suspensions. Before any sanction or a suspension is applied to an LSC-funded program there needs to be an opportunity for a hearing before a hearing officer or administrative law judge, who has ample powers and authority, with a decision based on the record. The hearing officer could be either an administrative law judge or an LSC employee who has no prior involvement in the issue. The hearing rights set out in current §§ 1606.6 through 1606.10, providing for an informal conference, a hearing before a hearing officer and an appeal to the LSC President should also be applied to up to 5% sanctions and to all suspensions. Current regulation 1623.4 on suspensions should be amended to add these same fundamental due process guarantees.

In the event that the Board decides not to apply these basic procedural due process safeguards and still desires to go ahead with the proposed regulations, at the very least there should be: (1) a right for a program following an informal conference, to appeal to the LSC President who would base his or her decision on the record for any

sanction or suspension that is \$5,000 or less; (2) a right for a program, following an informal conference, to appeal to a hearing officer (who could be an LSC employee with no prior involvement in the issue) who would make a recommended decision to the LSC President, with right to review by the LSC President (all protections currently provided in §§ 1606.6 through 1606.10 for 5% to 100% sanctions) for any sanction or suspension that is more than \$5,000; and (3) detailed standards for application of the sanction or suspension including the requirement that any violation be (a) knowing and willful; (b) be of the LSC Act, as amended, appropriation acts, or LSC regulations; and that (c) any adverse affect on clients, potential clients and the program be considered prior to its application.

5. The proposals lack standards for the implementation of sanctions and suspensions

There are no real standards for LSC to impose sanctions. The proposal for the up to 5% sanctions is that a “substantial violation” will be determined by looking at “(1) The number of restrictions or requirement violated; (2) Whether the violation represents an instance of noncompliance with a substantive statutory or regulatory restriction or requirement, rather than an instance of noncompliance with a non-substantive technical or procedural requirement; (3) The extent to which the violation is part of a pattern of noncompliance with LSC requirements or restrictions; (4) The extent to which the recipient failed to take action to cure the violation when it became aware of the violation; and (5) Whether the violation was knowing and willful.” (By reference to existing 1606.3 applying to terminations and debarment proceedings.)

These are factors to be considered in determining whether a substantial violation has occurred. They are not standards that limit the discretion of LSC. For example, there is no requirement that the violation be knowing and willful - only that it be a factor to consider. The proposal lacks clarity as to which alleged violations are considered more serious. These sanctions apply not only to an alleged violation of a law or regulation, but also to an instruction, rule and guideline. LSC has various detailed and lengthy guides and handbooks, such as the Property Acquisition and Management Manual, the CSR Manual, the Accounting Guide, the Audit Guide, etc. On occasion, LSC has changed the interpretation of its own regulations and policies, making it difficult for programs. What happens when a program has a good faith difference of opinion of LSC’s interpretation of a requirement? Also, there have been times when different offices of LSC have opposing opinions about a particular LSC requirement. Would sanctions be appropriate in that situation?

Adequate standards should at the minimum require that a program’s violation be (a) knowing and willful (add requirement to 1606.3(a), proposed 1606.15(b) and 1623.3(a)); (b) be of the LSC Act, as amended, appropriation acts, or LSC regulations (add requirement to 1606.3(a), proposed 1606.15(b) and 1623.3(a)); and that (c) any adverse affect on clients, potential clients and the program be considered prior to its application (add requirement to 1606.3(b), proposed 1606.15(b) and 1623.3(b).)

**B. Proposal to eliminate the long-standing LSC policy that recovered funds be used in the same service area (1606.13(d))**

Elimination of the current LSC policy that recovered funds be used in the same service area will reduce the funding formula based on the poverty population and will result in harm to clients and potential clients

This proposal changes LSC's long-term policy as reflected in current 1606.13(d) that "[f]unds recovered by the Corporation pursuant to a termination will be used in the same service area from which they were recovered or will be reallocated by the Corporation for basic field purposes" to "[f]unds recovered by the Corporation pursuant to a termination or limited reduction in funding shall be reallocated by the Corporation for basic field purposes at its sole discretion." The "will be used in the same service area" language has been eliminated. (Proposed revision to Regulation 1006.13(d) – Interim and termination funding; reprogramming.)

Keeping funds in the same service area continues the allocation of funds based on poverty population. Removing funds from a service area reduces the allocation formula with resulting harm to clients and potential clients, as discussed above. If for some reason it is impractical to return recovered funds to the same service area, current regulation 1606.13(d) allows LSC management the flexibility to reallocate the funds to other areas for basic field purposes. The current regulation allows the long-standing LSC policy that recovered funds be used in the same service area with management discretion for when that it not practical to remain in place. This proposal changes that thoughtful balancing of interests and should therefore be turned down.

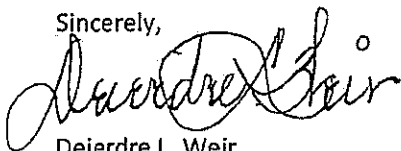
**C. Proposal allowing for the imposition of special grant conditions during the grant year (1618.5)**

We support the proposed change imposing Special Grant Conditions if it is done in a fair manner

This proposed regulation provides LSC the authority to "impose Special Grant Conditions on the recipient during the grant year." (Proposed revision to Regulation 1618.5(b) - Enforcement Procedures) If Special Grant Conditions have a reasonable basis and are imposed in a fair manner, we support this proposed change.

Thank you for the opportunity to comment on the proposed regulatory changes and for considering our comments. We would be happy to discuss the above-raised issues further, if desired by the Board or LSC management

Sincerely,



Deirdre L. Weir  
Chair, Civil Policy Group



Dennis Groenenboom  
Chair, Restrictions and Regulations Committee



Chuck Greenfield  
Chief Counsel for Civil Programs