



National Legal Aid & Defender Association

September 5, 2012

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FOR THE PEOPLE.

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

Re: Further Notice of Proposed Rulemaking on Termination, Limited Reductions in Funding, and Debarment Procedures; Recompensation; Enforcement; Suspension Procedures

Dear LSC Board of Directors:

NLADA and its Civil Policy Group offer the following comments to the Further Notice of Proposed Rulemaking on Termination, Limited Reductions in Funding, and Debarment Procedures; Recompensation; Enforcement; Suspension Procedures, published on August 8, 2012 in the Federal Register.

We appreciate the opportunity to comment on the proposed changes made to the January 31, 2012 Notice of Proposed Rulemaking (NPRM). We notice and appreciate that the changes have been made in response to some of the concerns raised in the public comments received to date. However, we continue to oppose the creation of additional sanctions and increasing the possible suspension period from thirty to ninety days because they (1) are unsupported by any actual need; (2) fail to consider that LSC already has sufficient tools to encourage compliance, (3) will harm clients and potential clients, (4) lack fundamental due process protections, (5) do not have necessary standards for their application and (6) were not recommended by the GAO or LSC's Fiscal Oversight Task Force. We offer the following comments to the questions raised in the Further Notice of Proposed Rulemaking.

Q1: Comments are sought on the question whether the lesser reduction procedures are better handled as proposed in the NPRM or as proposed herein

By providing that an initial decision to impose a less than five percent sanction on an LSC-funded program will be made by a person in the position of deputy director or above (1606.2(i)), allowing the program to appeal that decision to the LSC President (1606.10(b)) and including a provision that the LSC President or designee would have no prior involvement in the recommended sanction (1606.10(d)), the new proposed changes provide

additional due process and are an improvement over what was proposed in the original NPRM. We support this direction and believe LSC is heading down the right path. However, we urge the board to travel farther down that path and build in additional due process guarantees.

Q2: Comments are sought on the changes to the procedures affecting lesser reductions.

At a minimum, the following additional due process procedures and standards should be established prior to any imposition of the less than five percent sanctions or suspensions:

1. A requirement of a finding that a program's conduct be knowing and willful prior to the imposition of any sanction or suspension and that program acting in good faith reliance on a reasonable interpretation of state or federal law not be considered to have acted in a knowing and willful manner. It is recommended that the definitions of *knowing and willful* (1606.2(b)) and *substantial violation* (1606.2(h)) be changed as follows, with the new language in **bold**:

1606.2 Definitions

(b) *Knowing and willful* means that the recipient had actual knowledge of the fact that its action or lack thereof constituted a violation and despite such knowledge undertook or failed to undertake the action. **If a program has relied in good faith on a reasonable interpretation of state or federal law in taking action or inaction, a program will not be considered to have acted in a knowing and willful manner.**

(h) *Substantial violation* means a **knowing and willful** violation that merits action under this part based on consideration of the following criteria by the Corporation:

- (1) The number of restrictions or requirements 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.~~

2. A provision that a program facing a suspension or a less than five percent sanction that exceeds \$10,000 will have additional due process protections. For those proposed suspensions and sanctions that exceed \$10,000, a program will have the appeal rights currently provided for five percent or greater sanctions or terminations. We recommend the following changes to 1606.8 and 1606.9:

§ 1606.8 Hearing for a termination, ~~or~~ debarment, ~~suspension or a limited reduction in funding of more than \$10,000~~

(a) For terminations, ~~or~~ debarments, **suspensions or limited reductions in funding of more than \$10,000** only, the recipient may make a written request for a hearing within 30 days of its receipt of the preliminary determination or within 15 days of receipt of the written determination issued by the designated employee after the conclusion of the informal conference.

(b) Within 10 days after receipt of a request for a hearing, the Corporation shall notify the recipient in writing of the date, time and place of the hearing and the names of the hearing officer and of the attorney who will represent the Corporation. The time, date and location of the hearing may be changed upon agreement of the Corporation and the recipient.

(c) A hearing officer shall be appointed by the President or designee and may **not** be an employee of the Corporation. The hearing officer shall not have been involved in the current termination, ~~or~~ debarment, **suspension or limited reduction in funding of more than \$10,000** action and the President or designee shall determine that the person is qualified to preside over the hearing as an impartial decision maker. An impartial decision maker is a person who has not formed a prejudgment on the case and does not have a pecuniary interest or personal bias in the outcome of the proceeding.

(d) The hearing shall be scheduled to commence at the earliest appropriate date, ordinarily not later than 30 days after the notice required by paragraph (b) of this section.

(e) The hearing officer shall preside over and conduct a full and fair hearing, avoid delay, maintain order, and insure that a record sufficient for full disclosure of the facts and issues is maintained.

(f) The hearing shall be open to the public unless, for good cause and the interests of justice, the hearing officer determines otherwise.

(g) The Corporation and the recipient shall be entitled to be represented by counsel or by another person.

(h) At the hearing, the Corporation and the recipient each may present its case by oral or documentary evidence, conduct examination and cross-examination of witnesses, examine any documents submitted, and submit rebuttal evidence.

(i) The hearing officer shall not be bound by the technical rules of evidence and may make any procedural or evidentiary ruling that may help to insure full disclosure of the facts, to maintain order, or to avoid delay. Irrelevant, immaterial, repetitious or unduly prejudicial matter may be excluded.

(j) Official notice may be taken of published policies, rules, regulations, guidelines, and instructions of the Corporation, of any matter of which judicial notice may be taken in a Federal court, or of any other matter whose existence, authenticity, or accuracy is not open to serious question.

(k) A stenographic or electronic record shall be made in a manner determined by the hearing officer, and a copy shall be made available to the recipient at no cost.

(l) The Corporation shall have the initial burden to show grounds for a termination, ~~or~~ debarment, **suspension or limited reduction in funding of more than \$10,000**. The burden of persuasion shall then shift to the recipient to show by a preponderance of evidence on the record that its funds should not be terminated, ~~or~~ that it should not be ~~disbarred~~, **suspended or should not have a limited reduction in funding of more than \$10,000 imposed**.

§ 1606.9 Recommended decision for a terminations, ~~or~~ debarments-, **suspensions or limited reductions in funding of more than \$10,000**

(a) For termination or debarment or hearings under § 1606.8, within 20 calendar days after the conclusion of the hearing, the hearing officer shall issue a written recommended decision which may:

- (1) Terminate financial assistance to the recipient as of a specific date; or
- (2) Continue the recipient's current grant or contract, subject to any modification or condition that may be deemed necessary on the basis of information adduced at the

hearing; and/or

(3) Debar the recipient from receiving an additional award of financial assistance from the Corporation.

(b) For hearings on suspensions or limited reductions in funding of more than \$10,000 under 1606.8, within 20 calendar days after the conclusion of the hearing, the hearing officer shall issue a written recommended decision which may uphold, reduce or eliminate the recommended suspension or limited reduction in funding;

(c)(b) The recommended decision shall contain findings of the significant and relevant facts and shall state the reasons for the decision. Findings of fact shall be based solely on the record of, and the evidence adduced at the hearing or on matters of which official notice was taken.

Q3: Comments are sought on the question whether any of these proposed changes to the structure of the rule would result in substantive changes affecting terminations or debarment.

We do not notice any changes in the Further Notice of Proposed Rulemaking to the structure of the rule on terminations or debarment that would result in substantive changes.

Q4: Comments are sought on the new definitions

It is recommended that the definitions of *knowing and willful* (1606.2(b)) and *substantial violation* (1606.2(h)) be changed as mentioned in response to question 2, above.

Q5: Comments are sought on the proposed final appeal process

We recommend that suspensions and limited reductions in funding of more than \$10,000 contain the due process provisions currently in place under 1606 for terminations or sanctions of five percent and greater. See comments offered in response to question 2, above.

Q6: Comments are sought on the new proposed language for Part 1618

The board should adopt a knowing and willful standard prior to the imposition of suspensions and less than five percent sanctions, as mentioned above. We recommend that the language in 1618.5(b) be changed as follows:

1618.5 Duties of the Corporation

(b) Whenever there is substantial reason to believe that a recipient has **in a knowing and willful manner committed a substantial violation of** ~~persistently or intentionally violated~~ the LSC requirements, or, after notice, has **willfully** failed to take appropriate remedial or disciplinary action to ensure compliance by its employees with the LSC requirements, and attempts at informal resolution have been unsuccessful, the Corporation may proceed to suspend or terminate financial support of the recipient, or impose a lesser reduction in funding, pursuant to the procedures set forth in parts 1623 and 1606 or may take other action to enforce compliance with the LSC requirements. **For purposes of this section, *knowing and willful* is defined as provided in 1606.2(b) and *substantial violation* is defined as provided in 1606.2(h).**

Comments on Suspensions - 1623

Currently, the regulation for grant suspensions, 1623, has inadequate due process guarantees. The board should put suspensions on the right due process path as well. The procedural due process provisions proposed in the Further Notice of Proposed Rulemaking for terminations and five percent and greater sanctions should also apply to grant suspensions under 1623. Thus, the initial decision to suspend should be made by a person in the position of deputy director or above and the program should be allowed to appeal that decision to a hearing officer and the LSC President under 1606. At no time would the LSC President have prior involvement in the recommended sanction.

The monetary amounts of sanctions, particularly if they are for ninety days, can far exceed for example a ten percent sanction. A ten percent sanction on a \$1 million LSC grant equals \$100,000, while a ninety day suspension on that same grant amount is \$250,000. The fact that programs would later receive the suspended funds after the ninety days does not eliminate the need to use the funds during the ninety day period. Most programs have very small carryover balances. Many have laid off employees and some closed offices. They simply are not in the financial position to go without LSC funds for ninety days. Further, the disruption to client services would remain longer than the ninety day suspension period.

PART 1623—SUSPENSION PROCEDURES

§ 1623.1 Purpose.

The purpose of this rule is to:

- (a) Ensure that the Corporation is able to take prompt action when necessary to safeguard LSC funds or to ensure the compliance of a recipient with applicable provisions of law, or a rule, regulation, guideline or instruction issued by the Corporation, or the terms and conditions of a recipient's grant or contract with the Corporation; and
- (b) Provide procedures for prompt review that will ensure informed deliberation by the Corporation when it has made a proposed determination that financial assistance to a recipient should be suspended.

§ 1623.2 Definitions.

For the purposes of this part:

- (a) Knowing and willful means that the recipient had actual knowledge of the fact that its action or lack thereof constituted a violation and despite such knowledge, undertook or failed to undertake the action. **If a program has relied in good faith on a reasonable interpretation of state or federal law in taking action or inaction, a program will not be considered to have acted in a knowing and willful manner.**
- (b) Recipient means any grantee or contractor receiving legal assistance from the Corporation under section 1006(a)(1)(A) of the LSC Act.
- (c) ***Substantial violation* is defined in 1606.2(h).**

(d) Corporation, when used to refer to decisions by the Legal Services Corporation, is defined in 1606.2(i).

~~(e)~~ (e) Suspension means an action taken during the term of the recipient's current grant or contract with the Corporation that withholds financial assistance to a recipient, in whole or in part, until the end of the suspension period pending corrective action by the recipient or a decision by the Corporation to initiate termination proceedings.

§ 1623.3 Grounds for suspension.

(a) Financial assistance provided to a recipient may be suspended when the Corporation determines that there has been a substantial violation by the recipient of an applicable provision of law, or a rule, regulation, guideline or instruction issued by the Corporation, or a term or condition of the recipient's current grant or contract with the Corporation; and the Corporation has reason to believe that prompt action is necessary to:

(1) Safeguard LSC funds; or

(2) Ensure immediate corrective action necessary to bring a recipient into compliance with an applicable provision of law, or a rule, regulation, guideline or instruction issued by the Corporation, or the terms and conditions of the recipient's grant or contract with the Corporation.

(b) A determination of whether there has been a substantial violation for the purposes of paragraph (a) of this section will be based on consideration of the following criteria:

(1) The number of restrictions or requirements 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.~~

(c) Financial assistance provided to a recipient may also be suspended by the Corporation pursuant to a recommendation by the Office of Inspector General when the recipient has failed to have an acceptable audit in accordance with the guidance promulgated by the Corporation's Office of Inspector General.

§ 1623.4 Suspension procedures.

(a) When the Corporation has made a proposed determination, based on the grounds set out in §1623.3, that financial assistance to a recipient should be suspended, the Corporation shall serve a written proposed determination on the recipient. The proposed determination shall:

(1) State the grounds and effective date for the proposed suspension;

- (2) Identify, with reasonable specificity, any facts or documents relied upon as justification for the suspension;
- (3) Specify what, if any, corrective action the recipient can take to avoid or end the suspension;
- (4) Advise the recipient that it may request, within 5 days of receipt of the proposed determination, an informal meeting with the Corporation at which it may attempt to show that the proposed suspension should not be imposed; and
- (5) Advise the recipient that, within 10 days of its receipt of the proposed determination and without regard to whether it requests an informal meeting, it may submit written materials in opposition to the proposed suspension.
- (b) If the recipient requests an informal meeting with the Corporation, the Corporation shall designate the time and place for the meeting. The meeting shall occur within 5 days after the recipient's request is received.
- (c) The Corporation shall consider any written materials submitted by the recipient in opposition to the proposed suspension and any oral presentation or written materials submitted by the recipient at an informal meeting. If, after considering such materials, the Corporation determines that the recipient has failed to show that the suspension should not become effective, the Corporation may issue a written ~~final~~ determination to suspend financial assistance to the recipient in whole or in part and under such terms and conditions the Corporation deems appropriate and necessary.
- (d) The ~~final~~ determination shall be promptly transmitted to the recipient in a manner that verifies receipt of the determination by the recipient, and, **if the recipient does not appeal the determination under 1606**, the suspension shall become effective when the ~~final~~ determination is received by the recipient or on such later date as is specified therein.
- (e) The recipient has the right to appeal the determination to a hearing officer and later to the LSC President under 1606.**
- ~~(e)~~ (f) The Corporation may at any time rescind or modify the terms of the final determination to suspend and, on written notice to the recipient, may reinstate the suspension without further proceedings under this part. Except as provided in paragraph (f) of this section, the total time of a suspension shall not exceed **90** days, unless the Corporation and the recipient agree to a continuation of the suspension without further proceedings under this part.
- ~~(f)~~ (g) When the suspension is based on the grounds in §1623.3(c), a recipient's funds may be suspended until an acceptable audit is completed.

§ 1623.5 Time extensions and waiver.

- (a) Except for the time limits in §1623.4(e), any period of time provided in this part may be extended by the Corporation for good cause. Requests for extensions of time shall be considered in light of the overall objective that the procedures prescribed by this part ordinarily shall be concluded within 30 days of the service of the proposed determination.

(b) Any other provision of this part may be waived or modified by agreement of the recipient and the Corporation for good cause.

(c) Failure by the Corporation to meet a time requirement of this part shall not preclude the Corporation from suspending a recipient's grant or contract with the Corporation.

§ 1623.6 Interim funding.

(a) Pending the completion of suspension proceedings under this part, the Corporation shall provide the recipient with the level of financial assistance provided for under its current grant or contract with the Corporation.

(b) Funds withheld pursuant to a suspension shall be returned to the recipient at the end of the suspension period.

Other comments

Finally, as a technical matter, "limited reduction in funding" and "lesser reduction in funding" appear to be used interchangeably leading to the possibility of confusion. *Limited reduction in funding* is in the heading in 1606.1, defined in 1606.2(c) and is in 1606.2(e)(2)(v), 1606.3(b), 1606.7(e) and 1606.13(a)-(d). *Lesser reduction in funding* appears in 1606.1(b), 1606.3 (section heading), 1606.3(c), 1606.5(b), 1606.6(a), 1606.7(a)(ii), 1601.10 (section heading) and 1618.5(b). It is recommended that one term or phrase be used throughout the proposed regulations.

Thank you for the opportunity to comment and considering our suggestions. We would be happy to discuss this further if requested by the board or LSC management.

Sincerely,



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Chair, Restrictions and Regulations Committee



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