



OFFICE OF LEGAL AFFAIRS

EXTERNAL OPINION

External Opinion # EX-2008-1003

To: Chris Allery
Interim Executive Director
Anishinabe Legal Services
411 1st Street, P.O. Box 157
Cass Lake, MN 56633

Date: September 10, 2008

Subject: Minors Represented through Court Appointment: Retainers and Eligibility Issues

Michael Klinkhammer, the former Executive Director to Anishinabe Legal Services (“ALS”), asked this Office for an Opinion regarding the sufficiency of citizenship attestations, retainer agreements, and financial eligibility information that ALS has proposed to use for purposes of including in its Legal Services Corporation (“LSC”) Case Service Reports (“CSR”) extended service cases involving ALS’s representation of minors in juvenile delinquency proceedings, when such representation was being provided under a contract with the Leech Lake Reservation Criminal & Juvenile Defense Corporation (hereinafter “the Leech Lake Defense Contract”).¹ Specifically, he asked:

- (1) Whether it is permissible to report the juvenile cases as extended service cases where ALS obtains a signed citizenship attestation [from the minor client only] and supplies [a] letter from the judge stating that the judge has reviewed the financial guidelines and to the best of [the judge’s] knowledge and belief the juvenile meets those guidelines; and
- (2) Whether it is permissible to report juvenile cases as extended services where ALS obtains a signed retainer agreement from the juvenile and the juvenile completes the intake form indicating the household’s income and assets to the best of [the minor’s] knowledge and belief.

¹ According to Mr. Klinkhammer’s email of February 28, 2008, this contract with the Leech Lake Reservation Criminal and Juvenile Defense Corporation (a/k/a Alternative Defense Corporation) expired on February 28, 2008. See Email from Michael Klinkhammer, Executive Director, Anishinabe Legal Services, to Patricia Soh, Office of Legal Affairs, Legal Services Corporation, dated February 28, 2008 (hereinafter “February 28, 2008 Email”). In his letter of November 28, 2007, Mr. Klinkhammer advised that the representation under the Leech Lake Defense Contract involved juveniles charged with misdemeanors in the State of Minnesota. See Letter from Michael Klinkhammer, Executive Director, Anishinabe Legal Services, to Office of Legal Affairs, Legal Services Corporation, dated November 28, 2007 (hereinafter “November 28, 2007 Letter”).

During a telephone conference with this Office on March 27, 2008, Mr. Klinkhammer explained that, in some of these Leech Lake Defense Contract cases, the parents or guardians of the minor clients were not readily available and that, based on his understanding of the general demographics of ALS's service area,² those minors were very likely to be U.S. citizens and financially eligible for LSC funded legal assistance.

While Mr. Klinkhammer's request was couched in terms of CSR reporting, his concerns involved the underlying applicable statutory and regulatory requirements. This opinion addresses the rules regarding how LSC's citizenship or eligible alien verification, retainer agreement, and financial eligibility requirements apply to the Leech Lake Defense Contract extended service cases.³ We understand from Mr. Klinkhammer's communications with this Office that none of the cases subject to his inquiry has included or would include any representation of minors in a criminal proceeding.⁴ We also understand from his communications that no LSC funds were used to support any of these cases, but that ALS would like to be able to use LSC funds for these types of cases, as a general matter, in the future.⁵ I am providing this guidance to you as Mr. Klinkhammer's successor. If you have any unanswered CSR questions that are not addressed in this response, please discuss them with LSC's Office of Information Management ("OIM") or Office of Compliance and Enforcement ("OCE").

Brief Answer

All recipients must satisfy LSC's "citizenship or eligible alien verification" and "signed written retainer agreement" requirements in each of their extended service cases. *See* 45 C.F.R. Parts 1611 and 1626. Under the circumstances presented here, involving the representation of minors under the Leech Lake Defense Contract, ALS may satisfy LSC's citizenship attestation and retainer agreement requirements by obtaining a written declarative statement of the court regarding the minor's U.S. citizenship, as permitted under 45 C.F.R. § 1626.6(b)(2), and by obtaining a written retainer agreement signed by the public defense corporation to which the court had given authority to provide for the representation of the minor.

If ALS would like to include the Leech Lake Defense Contract cases in its Case Service Reports (or use LSC funds for similar cases in the future), ALS must be able to demonstrate that each case involving the representation of a minor under contract with a public defense corporation meets the Part 1611 LSC financial eligibility requirements. The required financial eligibility determination must be made on a case-by-case basis and based upon a reasonable

² *See* November 28, 2007 Letter.

³ Please see the applicable edition of the *Legal Services Corporation Case Service Report Handbook* for the list of requirements that must be met for each case recorded and reported in a recipient's CSR.

⁴ Subject to certain exceptions, in Minnesota, a juvenile delinquency proceeding is not to be deemed a criminal proceeding. *See* Minn. Stat. §§ 260B.245 (Effect of Juvenile Court Proceedings), 260B.255 (Juvenile Court Disposition Bars Criminal Proceeding) (2007).

⁵ *See* February 28, 2008 Email.

inquiry into the income and assets of the relevant household of the minor applicant. As such, LSC cannot accept the proposed use of a blanket approach to making a financial eligibility determination, particularly if the approach relies on the representations of the minor and the local demographics of a recipient's service area. In addition, although there may be certain circumstances in which a recipient may reasonably rely on information provided by the court and the minor for purposes of making a financial eligibility determination, for example, where the court and/or the minor demonstrate sufficient knowledge of the relevant facts, those circumstances must be considered on a case-by-case basis and the recipient's reliance on such information will be subject to the same reasonable inquiry standard applicable to a recipient's approach to making a financial eligibility determination in any other context.

Background

According to Mr. Klinkhammer's letter of November 28, 2007,⁶ during a follow-up visit conducted by OCE in late October 2005, concerns were raised regarding ALS reporting in its Case Service Report extended service cases involving ALS's representation of minors in juvenile delinquency proceedings under the Leech Lake Defense Contract. The concerns focused primarily on ALS's satisfaction of the following three LSC requirements: (1) citizenship or eligible alien verification, (2) retainer agreement, and (3) financial eligibility.

In that letter and a subsequent email of February 28, 2008,⁷ Mr. Klinkhammer stated that ALS was interested primarily in qualifying the aforementioned extended service cases for inclusion in ALS's Case Service Reports, and ALS had not used any LSC funds to support its representation of minors in juvenile delinquency proceedings. At the same time, ALS wanted to know if it could use LSC funds to support future representation of minors in juvenile delinquency proceedings. ALS asked whether, for CSR purposes, the three earlier mentioned LSC requirements could be met with the documentation specifically identified and described in two (previously quoted) specific questions ALS presented to OLA in writing for a response. As a backdrop to those questions, Mr. Klinkhammer provided a statement regarding his understanding of the general demographics of ALS's client community in his letter of November 28, 2007.

On March 27, 2008, during a follow-up teleconference with this Office, Mr. Klinkhammer provided additional details regarding the circumstances surrounding ALS's representation of juveniles under the Leech Lake Defense Contract.⁸ Specifically, he advised us of the following: The public defense corporation with which ALS contracted – namely, Leech Lake Reservation Criminal and Juvenile Defense Corporation – was the court-appointed counsel

⁶ See November 28, 2007 Letter.

⁷ See February 28, 2008 Email.

⁸ On March 27, 2008, Michael Klinkhammer, Executive Director, Anishinabe Legal Services, spoke with Mark Freedman and Patricia Soh, Assistant General Counsel of the Office of Legal Affairs, to discuss in greater detail the circumstances surrounding ALS's representation of minors under the Leech Lake Defense Contract.

of record responsible for the representation of the minor in each case subject to the Leech Lake Defense Contract; and ALS provided the actual legal representation to the juveniles as a “contractor” to that public defense corporation.⁹ Procedurally, the first notice ALS would receive of a juvenile case would be in the form of a “paper” file received by the ALS office about a day or two before the date of the hearing, which timing denied ALS of the opportunity to meet and discuss the case with the minor client in person before the date of the hearing. The first in person meeting with the minor client would occur at the courthouse on the date of the hearing. If a parent or legal guardian appeared at the hearing with the minor client, the appearing ALS attorney would have the parent or legal guardian complete the necessary citizenship attestation forms and sign the required retainer agreement on the minor client’s behalf. If the minor client were to appear in person without a parent or legal guardian, the appearing ALS attorney would have the minor client complete the forms and sign the retainer agreement, and keep that documentation in the client’s file with a copy of the court appointment or assignment letter. In general, Mr. Klinkhammer estimated that about 90% of the cases ALS received under the Leech Lake Defense Contract would be resolved on the date of the hearing, with the remaining 10% of cases going into litigation as “highly contested” cases. As for the cases that would go into litigation, ALS would have an opportunity to meet the minor client’s parent or legal guardian at a follow-up visit at the ALS office. Under those circumstances, ALS would have the opportunity to engage the minor client’s parents or legal guardians in the process of obtaining the necessary citizenship attestation and signed retainer agreement forms.

Analysis

I. Documentation Requirements for All Extended Service Cases

Regardless of whether ALS would like to include in its Case Service Reports extended service cases in which ALS represents minors in juvenile delinquency proceedings under the Lake Leech Defense Contract, ALS is obligated to meet LSC’s “citizenship or eligible alien verification” and “signed written retainer agreement” requirements in each of its extended service cases. *See* 45 C.F.R. Parts 1611 and 1626.

a. Citizenship or Eligible Alien Verification Requirement

Recipients may not provide extended services to most aliens, regardless of the source of funds used for the representation:¹⁰ Section 504(a)(11) of Public Law 104-134 and LSC’s

⁹ *See supra* note 8. *See also* Letter from Michael Klinkhammer, Executive Director, Anishinabe Legal Services, to Patricia Soh, Assistant General Counsel, Office of Legal Affairs, Legal Services Corporation, dated March 27, 2008 (hereinafter “March 27, 2008 Letter”) (transmitting a sample Attorney Contract between Leech Lake Reservation Criminal and Juvenile Defense Corporation and Anishinabe Legal Services dated July 1, 2006, which was one of the contracts into which ALS entered with that public defense corporation to provide representation to minors in juvenile delinquency proceedings).

¹⁰ 45 C.F.R. Part 1626 spells out LSC’s alien eligibility requirements and exceptions, including an exception in §1626.4 for non-LSC funded representation in some situations involving domestic violence in a family. Congress has created additional exceptions not referenced in Part 1626, pursuant to the Trafficking Victims Protection Act (“TVPA”) of 2000, Pub. L. No. 106-386, as amended by the Trafficking Victims Reauthorization Act of 2003; and

implementing regulation, 45 C.F.R. Part 1626, prohibit LSC from funding any recipient that provides legal assistance to ineligible aliens.¹¹

To ensure compliance with this restriction, and subject to narrow exceptions, recipients are required to obtain verification of citizenship or eligible alien status from all applicants for extended services. *See* 45 C.F.R. §§ 1626.6-1626.7.¹² This verification requirement applies regardless of whether a recipient seeks to include or exclude an extended service case in its Case Service Reports.¹³ Part 1626 of the LSC regulations sets forth the available methods by which a client's U.S. citizenship or eligible alien status may be verified.

In cases involving a client who is a minor and purports to be a U.S. citizen, the citizenship attestation has traditionally been made by a parent, legal guardian, or other legal representative of the minor; however, in the alternative, the minor's citizenship can be established by one of the methods set forth in section 1626.6(b). Section 1626.6(b)'s list of methods include having the recipient review a copy of the minor's birth certificate, baptismal certificate, or other authoritative document from a court or governmental agency, or having the recipient obtain a notarized statement by a third party attesting to the citizenship of the minor applicant.

Accordingly, a court order or other authoritative document from the court which includes a court provided statement evidencing the minor's U.S. citizenship can serve as independent proof of a minor's citizenship status in satisfaction of this regulatory requirement. ALS may obtain and rely on such a written declaration of the court to establish the U.S. citizenship of the minor client ALS seeks to represent.

b. Retainer Agreement Requirement

Equally applicable to all extended service cases (and not solely to those cases a recipient seeks to include in its Case Service Reports) is the requirement that a recipient providing extended services to a client execute a written retainer agreement with the client at the time the

the Violence Against Women Act ("VAWA") 2006 Amendments, Pub. L. 103-322. *See also* Program Letters 05-2 (re: TVPA) and 06-2 (re: VAWA 2006 Amendments).

¹¹ *See also* External Opinion from Suzanne B. Glasow, Senior Assistant General Counsel of LSC, to Juan A. Gonzales, Executive Director of Legal Aid Society of Albuquerque, dated April 10, 1998. *See supra* note 10 for exceptions.

¹² Documentation is not required when the assistance provided is restricted to brief advice and consultation by telephone and does not include continuous representation. *See* 45 C.F.R. §§ 1626.6-1626.7. *See supra* note 10 for exceptions.

¹³ *See* Section 504(a)(11), Pub. L. 104-134, 110 Stat. 132 (1996); 45 C.F.R. § 1626.3 (Prohibition). *See also* *Legal Services Corporation Case Service Report Handbook* (2008 Edition), § 5.5; *Legal Services Corporation Case Service Report Handbook* (2001 Edition), § 5.5 (citing Program Letters 05-2 and 06-2 in the Handbook's Appendix).

representation commences or as soon thereafter as practicable. *See* 45 C.F.R. § 1611.9(a).¹⁴ The purpose of the retainer agreement requirement is to establish a legally binding, written agreement between the parties setting forth the legal rights, responsibilities, and obligations of each party, and identifying the relationship between the client and the recipient, the matter in which representation is sought, and the nature of the legal services to be provided to the client. *See* 45 C.F.R. Part 1611. There is no exception to the retainer agreement requirement for cases involving the provision of extended services to minor clients. *See id.*

Traditionally, if the client is a minor and thus legally incompetent to enter into such a legal agreement, a recipient would have the minor client's parent or legal guardian sign the retainer agreement on the minor's behalf. This has been the Corporation's longstanding practice with respect to minors.

However, where a state court has appointed and entrusted a public defense corporation with the legal representation of a minor in a specific legal or court proceeding, presumably because the minor's parents are unavailable, unable, or unwilling to provide for such legal representation on the minor's behalf, that court-appointed public defense corporation would appear to have sufficient authority to contract with ALS for the full advocacy and protection of the minor's legal interests in connection with that particular legal or court proceeding. Since the court-appointment inherently involves an assumption of obligations by the state and the state's appointee, namely, the public defense corporation, to ensure the full and adequate representation of the minor's legal interests in the legal or court proceeding that is the subject of the court appointment, for purposes of satisfying LSC's signed retainer agreement requirement, the state and its appointee may be deemed to be acting *in loco parentis*¹⁵ for that specific and limited purpose.

Therefore, where a state court has appointed a public defense corporation to serve as a minor's legal representative in connection with a specific legal or court proceeding, that court-

¹⁴ *See also* 70 Fed. Reg. 45545, 45562 (Aug. 8, 2005); 48 Fed. Reg. 54201, 54204 (Nov. 30, 1983) ("The Corporation considers the universalization of this practice [of requiring signed written retainer agreements] to be professionally desirable and in accordance with its mandate under Section 1007(a)(1) of the Act to assure the maintenance of the highest quality of service and professional standards and to assure that there is no misunderstanding as to what services are to be rendered. Retainer agreements protect the attorney and recipient in case of an unfounded malpractice claim, and protect the client if the attorney and the recipient should fail to provide legal assistance measuring up to professional standards."). This Office has previously interpreted this requirement to apply equally to all cases in which legal assistance is rendered pursuant to the Act, for purposes of protecting all parties – the client, the attorney, the local program, and the Corporation. *See* External Opinion from Alan Swendiman, General Counsel of LSC, to James L. Beck, Executive Director of Wisconsin Judicare Incorporated, dated February 13, 1984. An exception to this general requirement exists "when the only service to be provided is brief advice and consultation." 45 C.F.R. § 1611.8(b).

¹⁵ According to the Minnesota Supreme Court, "The term 'in loco parentis,' according to its generally accepted common-law meaning, refers to a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption and embodies the two ideas of assuming the parental status and discharging the parental duties." *London Guar. & Acc. Co. v. Smith*, 64 N.W.2d 781, 784 (Minn. 1954).

appointed public defense corporation may, for purposes of LSC's regulations, execute, on the minor's behalf, a written retainer agreement with the recipient providing for the recipient's representation of the minor in the legal matter or proceeding assigned by the court, provided that such representation would not involve any LSC restricted activities and a copy of the documentation evidencing the underlying court appointment for such representation is kept in the recipient's files.

II. Financial Eligibility Determination and Documentation Requirements for Extended Service Cases to Be Included in ALS's Case Service Reports

If ALS wishes to provide extended services representation to juvenile delinquents under a contract like the Leech Lake Defense Contract, or in any other case, and support that representation using, in whole or in part, LSC funds, then ALS must meet all LSC financial eligibility requirements for each case.¹⁶ If the representation in a case is supported wholly by non-LSC funds and ALS wants to include that case in its CSR, then ALS must, for each case reported (1) ensure that the client in such case meets all LSC financial eligibility requirements and (2) comply with all documentation requirements.¹⁷ Although recipients may provide non-LSC funded extended services representation to financially ineligible clients, *see* 45 C.F.R. § 1611.4(a), they cannot report such representation in their CSR.

When making financial eligibility determinations, a recipient is required to make a "reasonable inquiry" into the income, income prospects, and assets of an applicant. *See* 45 C.F.R. 1611.7(a)(1). That is, a recipient must act as a reasonably prudent recipient would under similar circumstances. "If there is substantial reason to doubt the accuracy of the financial eligibility information provided by an applicant or group, a recipient shall make appropriate inquiry to verify the information, in a manner consistent with the attorney-client relationship." 45 C.F.R. 1611.7(c). The reasonableness of the inquiry made will depend on all of the surrounding circumstances, including but not limited to the minor's age and ability to understand and adequately respond to the intake questions asked; the minor client's apparent familiarity with the income and assets of his or her household members; the nature, logic, and consistency of the minor client's responses to a recipient's intake questions; and the minor client's mannerisms and disposition for purposes of making a credibility determination. A financial eligibility determination cannot depend on speculated facts and assumptions about the general demographics of the recipient's client community. Since the inquiry is fact intensive, a financial eligibility determination must be made on a case-by-case basis.

¹⁶ Under section 1007 of the LSC Act and LSC's implementing regulations at 45 C.F.R. Part 1611, recipients must ensure that LSC funded legal assistance is provided only to persons who are financially eligible to receive such assistance. *See Legal Services Corporation Case Service Report Handbook* (2008 Edition), § 4.3; *Legal Services Corporation Case Service Report Handbook* (2001 Edition), § 4.3.

¹⁷ *See, e.g.*, Footnote 3 to section 2.1 of the *Legal Services Corporation Case Service Report Handbook* (2008 Edition) provides that "[i]f an applicant is financially ineligible under LSC criteria, but not under non-LSC criteria, service to that client may be provided with non-LSC funds, but the case may not be reported to LSC for CSR purposes[.]" *See also Legal Services Corporation Case Service Report Handbook* (2008 Edition), § 4.3; *Legal Services Corporation Case Service Report Handbook* (2001 Edition), § 4.3.

A financial eligibility determination requires an inquiry into the income and assets of the applicant and all resident members of the applicant's household who contribute to the support of the applicant's household. *See* 45 C.F.R. § 1611.2(d), (i).¹⁸ The analysis consists of a two-step process by which the recipient must determine whether there are any resident members of the applicant's household and, if so, whether any of those resident members contribute to the support of the household. The recipient retains the discretion, within reason, to define the term "household" for purposes of determining whether there are any resident members of the applicant's household, and to define the phrase "contribute to the support of" by specifying what criteria are to be considered.¹⁹ This inquiry is fact intensive and relies heavily upon the recipients' reasonable exercise of discretion. Not only must the recipients' determinations be reasonable, but they must also be based upon the particular facts and circumstances of each case. Recipients are expected to ask sufficient questions of the applicant to determine the total amount of household income with reasonable accuracy.²⁰

Absent the demonstration of circumstances justifying an alternative determination, a minor who is living with his or her parent or legal guardian would appear to be dependent upon the income or assets of his or her parent or legal guardian, and the income and assets of the parent or legal guardian (the head of the household) should be counted as income that contributes to the support of the household. Since minors are typically deemed legally incompetent to enter into a variety of transactions and often lack the knowledge to make a fully informed attestation regarding household finances, it may be appropriate for ALS to make a more careful and probing inquiry beyond the minor's representations regarding household financial eligibility²¹

¹⁸ The term "income" in LSC's financial eligibility regulation is defined to mean the "actual current annual total cash receipts before taxes of all persons who are resident members and contribute to the support of an applicant's household, as that term is defined by the recipient." 45 C.F.R. § 1611.2(i). The term "assets" in LSC's financial eligibility regulation is defined to mean "cash or other resources of the applicant or members of the applicant's household that are readily convertible to cash, which are currently and actually available to the applicant." 45 C.F.R. § 1611.2(d).

¹⁹ Neither the term "household" nor the phrase "contribute to the support of" are defined in LSC's financial eligibility regulation. *See generally* 45 C.F.R. Part 1611 (wherein section 1611.2(i) refers to the term household "as that term is defined by the recipient"); Preamble to Final Rule 1611, 70 Fed. Reg. 45545, 45548 (Aug. 8, 2005) ("recipients already have considerable discretion and flexibility to determine the scope of an applicant's household"). This Office has previously issued guidance listing the criteria a recipient may choose to consider in making a reasonable determination regarding whether an individual is to be considered part of an applicant's household, which list includes but is not limited to factors such as living arrangements, familial relationships, legal responsibility, financial responsibility, and family unit definitions used by government benefits agencies. *See* Office of Legal Affairs EX-2000-1012; EX-2003-1007; EX-1999-1018.

²⁰ *See, e.g., Legal Services Corporation Case Service Report Handbook* (2001 Edition), § 5.3, n. 5 ("Programs' intake procedures must include instructions to ask sufficient questions of the applicant to determine the total amount of household income with reasonable accuracy and the programs must be able to provide reasonable evidence that staff practice follows these procedures.").

²¹ This approach is consistent with the logic and practice of requiring the participation or involvement of the minor's parent or legal guardian in the citizenship or eligible alien verification process and/or the retainer agreement transaction.

Generally, recipients cannot rely on the financial eligibility determinations of others. *See generally* 45 C.F.R. § 1611.4. Under the Leech Lake Defense Contract and by state statute, ALS provided legal representation to minors predetermined by the court to be indigent and financially eligible to receive publicly funded legal representation through the public defense corporation with which ALS had contracted.²² ALS cannot rely on those financial eligibility determinations in satisfaction of its obligations under LSC's regulations. Under LSC's regulations, recipients must make financial eligibility determinations on their own and in accordance with their own financial eligibility policies. *See generally* 45 C.F.R. §§ 1611.3-4.²³

To make any LSC required financial eligibility determinations, ALS will need to conduct a specific inquiry into the facts of the individual client's situation. Depending on the circumstances, the information from the court and the minor might be sufficient, especially if the court and/or the minor demonstrate sufficient knowledge of the relevant facts. In any event, the case file should document that a reasonable inquiry was made using information with sufficient indicia of reliability.

If you have any remaining questions or need further guidance, please do not hesitate to ask.

Very truly yours,



Victor M. Fortunato
Vice President & General Counsel

²² *See* March 27, 2008 Letter. *See also* Minn. Stat. 611.216, sub. 1 (Criminal and Juvenile Defense Grants; Eligible Recipients); 611.18 (Appointment of Public Defender).

²³ Note that, under 45 C.F.R. § 1611.4, “[c]onsistent with the recipient’s policies, a recipient may determine an applicant to be financially eligible without making an independent determination of income or assets, if the applicant’s income is derived solely from a governmental program for low-income individuals or families, provided that the recipient’s governing body has determined that the income standards of the governmental program are at or below 125% of the Federal Poverty Guidelines amounts and that the governmental program has eligibility standards which include an assets test.” Even under the circumstances described in section 1611.4, a recipient must make an independent determination as to whether an applicant’s income is derived solely from a qualified governmental program recognized and accepted under the recipient’s governing body’s adopted policies.