



OFFICE OF LEGAL AFFAIRS

EXTERNAL OPINION

External Opinion # EX-2009-1001

To: Andrew Scherer
Executive Director & President
Legal Services NYC
350 Broadway, 6th Floor
New York, NY 10013

Date: March 6, 2009

Subject: 45 C.F.R. § 1610.6 Applicability

This opinion is provided in response to your letter regarding whether Legal Services NYC's Brooklyn Family Defense Project qualifies under the provisions of 45 C.F.R. § 1610.6.

Brief Answer

Based on our interpretation of 45 C.F.R. § 1610.6 and consideration of the specific circumstances of the Brooklyn Family Defense Project (the "Project") of Legal Services NYC ("LS-NYC"), we believe that the Project qualifies under this provision.

Background

As we understand the situation from the information that you have provided to us,¹ as well as from the support letters from the Office of the Criminal Justice Coordinator ("CJC")² and the Center for Law and Social Policy ("CLASP"),³ the Project is a separately funded program within LS-NYC that provides court-appointed counsel to low income clients in child protective proceedings in Brooklyn Family Court. Created in 2007, the Project is almost entirely funded by New York City (the "City") as part of the City's public defender system, pursuant to a contract between the CJC and LS-NYC. The City and some small private foundation grants provide all start-up and operating costs for the Project, and the Project does not receive any Legal Services Corporation ("LSC") funds.

The Project is appointed as counsel for the parent(s) in child protective proceedings that are brought by the City's Administration for Children's Services ("ACS"), in which the Family Court determines whether child abuse or neglect exists. In connection with these proceedings,

¹ See August 28, 2008 Letter from LS-NYC to LSC.

² See August 14, 2008 Letter from CJC to LSC.

³ See September 3, 2008 Email from CLASP to LSC.

the Family Court can temporarily and/or permanently terminate a parent's right to the custody, care, and control of his/her children, as well as imprison the parent for up to six months. In addition, the parents often simultaneously face criminal charges in Brooklyn Criminal Court, which in many cases arise from the same incidents of concern in the child protective proceedings. As a result, the Project often assists and works with clients' criminal defense counsel as the cases are often interrelated and can affect each other's outcome.

New York law provides a constitutional right to the assistance of counsel for indigent parents in Family Court matters, including child protective proceedings and any other proceedings in which a court determines assigned counsel is mandated by the state or federal constitution.⁴ In addition, New York requires public defender services (including the Project) to follow these constitutional and statutory obligations.⁵ Some of the LSC restrictions would otherwise prevent LS-NYC from providing Project services to clients who are entitled to counsel and whom the City considers covered by the Project. Consequently, the City has requested that the Project comply with City policy and offer its public defender services to all eligible indigent parents. Pursuant to that inquiry, you asked for an external opinion to determine whether the Project qualifies under 45 C.F.R. § 1610.6 regarding the applicability of some of the LSC restrictions to public defender projects and appointments for criminal and related cases.

Analysis

The LSC Act and appropriations riders set out restrictions on activities by LSC grantees.⁶ As a general matter, LSC grantees cannot use their non-LSC funds for restricted activities. 45 C.F.R. Part 1610 provides the framework for applying these restrictions to LSC grantees' non-LSC public and private funds.⁷ Section 1010(c) of the LSC Act generally requires that if a grantee's LSC funds are subject to a prohibition under the LSC Act, then their non-LSC funds are also subject to that prohibition.⁸ It provides certain exceptions to this requirement, however, including ones for the use of other public funds and for making grants to "legal aid societies having separate public defender programs."⁹

45 C.F.R. § 1610.6 implements this provision of the Act by providing that certain restrictions will not apply to (a) a "recipient's or subrecipient's separately funded public

⁴ N.Y. Fam. Ct. Act § 261, 262; *see In re Ella B*, 30 N.Y.2d 352, 356–57 (1972).

⁵ N.Y. County Law § 722.

⁶ *See* 42 U.S.C. § 2996 *et. seq.* ("LSC Act") and Omnibus Consolidated Rescissions and Appropriations Act ("OCRAA") of 1996, Pub. L. No. 104-134, § 504, 110 Stat. 1321-53–56 (1996), incorporated by reference thereafter in subsequent LSC appropriations through reenactment in Departments of Commerce, Justice, and State, and the Judiciary and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-119, § 502, 111 Stat. 2440-510 (1997). Subsequent legislation has modified some of the OCRAA restrictions not at issue here.

⁷ The LSC statutes also permit grantees to use tribal funds for the purposes for which they were provided regardless of the LSC restrictions. *See* 42 U.S.C. § 2996i(c); OCRAA § 504(d)(2)(A); 45 C.F.R. § 1610.4(a).

⁸ *See* 42 U.S.C. § 2996i(c).

⁹ *Id.*

defender program or project” or to (b) “criminal or related cases accepted by a recipient or subrecipient pursuant to a court appointment.”

Under these circumstances, the Project appears to be “separately funded,” as required in § 1610.6(a). Your letter states that the Project receives all of its start-up and operating funds from the City and other funders, and it receives no LSC funds. As such, this opinion does not analyze that requirement.

The central issue, therefore, is whether the Project constitutes a “public defender program” under § 1610.6(a) and/or if the cases handled qualify as “criminal or related cases” handled through court appointment under § 1610.6(b). The LSC regulations and statutes do not define these terms, and the legislative and regulatory history does not provide any guidance on the intent of these provisions in regards to civil right to counsel situations.¹⁰ We previously issued an opinion that touched on this issue in dicta, but that opinion involved the public defender exception to the Part 1637 prohibition on criminal cases and did not analyze the issues presented here.¹¹ While traditionally public defender programs are thought of as involving criminal defense work, there is no indication that Congress or LSC intended to exclude situations like this one in which a city’s criminal justice division handles civil right to counsel cases in matters often related to criminal cases.¹²

While the regulations and statutes do not provide any definition for the term “related cases” in § 1610.6(b), it is clear that the phrase “[c]riminal or related cases” must include some

¹⁰ While there are many discussions of the development and applicability of this provision, none of them touch on the questions raised herein. *See* 41 Fed. Reg. 18,528 (May 5, 1976) (Proposed Rule) (exempting but not defining separate public defender programs from definition of recipient); 41 Fed. Reg. 25,901 (June 23, 1976) (Final Rule) (providing for a waiver of restrictions on non-LSC funds for separate public defender programs but not defining them); 61 Fed. Reg. 41,960, 41,961–63 (Aug. 13, 1996) (Interim Rule) (changing waiver to exception for “criminal or related cases” handled by separately funded public defender programs or through court appointment but not discussing the meaning of “related cases” or “public defender programs”); 61 Fed. Reg. 63,749, 63,751 (Dec. 2, 1996) (Final Rule) (discussing changes to the provision eliminating reference to subcontracts to private attorneys and limiting the exception to court appointments and public defender programs without defining “public defender” or “related cases,” noting that public defender programs are ones which ordinarily provide the types of services otherwise prohibited but not discussing other services that they may provide); 62 Fed. Reg. 27,695, 27,696 (May 21, 1997) (Final Rule) (providing that the exception applies to criminal cases in public defender programs but not addressing civil cases in such programs). *See also* Transcript of LSC Board of Directors, Operations and Regulations Committee at 240–44 (July 8, 1996) (discussing private attorney subcontract provision); Transcript of LSC Board of Directors, Operations and Regulations Committee at 170, 229 (July 19, 1996) (referencing Congressional concern regarding civil cases in 1996 and continuing exception for “criminal and related cases” without defining them); Transcript of LSC Board of Directors, Joint Meeting of Operations and Regulations Committee and the Provision for the Delivery of Legal Services Committee at 337–39 (Sept. 29, 1996) (discussion of § 1610.6 in relation to the LSC Act and the 1996 Congressional restrictions and adopting changes implemented in the Dec. 2, 1996, final rule).

¹¹ *See* Permissibility of Contracts for Public Defender Services by LSC Recipients, External Opinion EX-2000-1017 (LSC, July 20, 2000).

¹² Although the legislative and regulatory history discussed above often focused on the criminal/civil distinction, the LSC Act refers to “public defender programs” and not to “criminal cases” and the regulation has maintained the phrase “criminal and related cases” in the scope of the exception.

civil cases. Nothing in the statutes, regulations or legislative or regulatory histories precludes the inclusion of some civil representation cases as “related” cases.

Furthermore, we believe that the circumstances of the Project are consistent with the purpose and policy of § 1610.6. The Project’s cases involve the same issues that underlie the *Gideon*¹³ right to counsel in criminal cases. Each of the Project’s clients face the loss of their fundamental right to the care, control, and custody of their children, as well as the threat of imprisonment for up to six months. In addition, the Project’s clients often face criminal charges, as the abuse and neglect cases are often intertwined with the clients’ simultaneous criminal cases. As a result, counsel actively participate in assisting their clients in these cases at Criminal Court in addition to the Family Court proceedings. Moreover, New York statutory and case law provides a due process right to counsel in these cases due to the possible infringement of these fundamental liberty interests on the clients’ parental rights and threat of criminal charges.¹⁴ Furthermore, since the Project is funded through the Office of the Criminal Justice Coordinator and considered part of the City’s public defender system, allowing § 1610.6 to apply to the Project is consistent with the regulation’s intent not to inhibit any legal services provided through separately funded public defender programs or court appointment for criminal or related cases.

Therefore, we find that an analysis of the regulation and the Project’s specific circumstances demonstrate that the Project qualifies for the § 1610.6 exception. We do not need to determine at this time whether § 1610.6 would apply to other civil right to counsel situations.

Please contact us if you have any further questions.

Very truly yours,



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¹³ See *Gideon v. Wainwright*, 372 U.S. 335 (1963).

¹⁴ See N.Y. Fam. Ct. Act § 261; *In re Ella B.*, 30 N.Y.2d at 356–57.