COMMENTS ON LSC'S REGULATORY AGENDA FOR 2005-2006

SUBMITTED BY
THE CENTER FOR LAW & SOCIAL POLICY
ON BEHALF OF
THE CIVIL POLICY GROUP
OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION

June 17, 2005

On May 20, 2005, LSC published in the *Federal Register* a request for comments regarding suggestions for a regulatory agenda for LSC for 2005-2006. Comments are due on June 20, 2005. These comments are submitted to LSC by the Center for Law & Social Policy (CLASP) on behalf of the Civil Policy Group (CPG) of the National Legal Aid & Defender Association (NLADA). NLADA is a membership organization that represents civil legal services programs, including those funded by LAC. CLASP serves as counsel to NLADA. The CPG sets policy for NLADA's Civil Division.

Before addressing specific regulatory issues, we would like to make several general observations about the LSC regulations and the LSC regulatory agenda. First, NLADA would like to suggest that, absent a compelling need to make changes in existing rules, LSC should consider not adopting an extensive regulatory agenda or none at all. For the most part, the current regulations are working well, with the exceptions discussed below. Both recipients and LSC compliance staff generally understand the rules and are reasonably comfortable with the requirements and procedures prescribed by the regulations. We are not aware of any serious compliance problems that need to be addressed, and we are not aware of any particular pressure on LSC to make additional changes to the existing rules. As was clear from the effort to revise Part 1611, the regulatory revision process can be a very long and difficult process that consumes a great deal of Operations & Regulations Committee and LSC staff time and resources and should not be initiated without a compelling reason.

Second, we would like to make a general comment on those regulations that implement the 1996 appropriations act restrictions, including, among others, the rules on attorneys' fees, class actions, prisoner representation, solicitation and the use of non-LSC funds. We believe that the current restrictions undermine efficiency and create real burdens on very vulnerable clients and the programs that serve them. We acknowledge that these regulations hew fairly closely to the restrictions imposed by Congress, and we are not suggesting that LSC undertake regulatory revisions to change these rules, which are unlikely to produce significant beneficial changes. Instead, we ask LSC to communicate our concerns about the impact of these restrictions to Congress and to work to either eliminate the restrictions or to minimize their impact on the client community.

We would also like to comment on several regulations that we are not recommending should be part of the Committee and Board's regulatory agenda at this time. With regard to **Parts 1607 and 1616 (Governing Bodies and Attorney Hiring)**, suggestions have been made that the diversity provisions of these rules should be strengthened. Diversity and cultural competence are critically important goals for the legal services community, especially with regard to program staffing and local Board composition. While we have no specific recommendations for revising the diversity language of these rules at the present time, nevertheless, we encourage LSC to work with NLADA and other stakeholders to continue to move forward on a diversity agenda in a larger context, outside of the regulatory framework. In the event that LSC does decide to revise these rules, NLADA would like to have the opportunity to work with LSC and other stakeholders to craft new language to help ensure that there is appropriate diversity on program boards and within program staff.

With regard to **Part 1614 (PAI)**, we urge the committee not to undertake any revisions to Part 1614 at this time. While we recognize that the PAI requirements have imposed significant constraints upon our programs, they have also resulted in substantial benefits in terms of support for legal services from the private bar. NLADA, the American Bar Association, LSC, representatives of both field programs and the pro bono community, as well as other stakeholders all have a significant interest in the PAI system and the role of pro bono representation in legal services delivery and should engage in a serious conversation, outside of the regulatory context, that at some time in the future might lead to regulatory changes. However, we do not believe that any changes should be made in Part 1614 until that conversation has been initiated and is well underway, and the participants have had an opportunity to consider the rule in the overall context of the discussion around PAI and pro bono.

We realize that there may be some impetus to take up revisions to **Part 1626 (Aliens).** However, we urge LSC to not revise Part 1626 at this time. First, it is possible that the substantive law around aliens and their eligibility for legal services may well change in the near future, given the Administration's initiative on immigration, the reauthorization of the Violence Against Women Act and other legislative activity. Second, despite the fact that there was a substantial effort made by the negotiated rulemaking (reg-neg) working group in 2002 to develop a revised version of the alien regulation, unlike Part 1611, no draft of a revised rule was ever prepared, nor were revisions to Part 1626 ever published as a NPRM. When the reg-reg group worked on Part 1611, it reached consensus on virtually all issues except for group representation and retainer agreements. In contrast, despite meeting for a total of eight full days, the reg-neg group that was working on Part 1626 failed to reach consensus on a large number of contentious issues that were addressed during its discussions. If it were to begin work on Part 1626, the Operations & Regulations Committee would have no draft rule to work from and would be essentially starting over in its efforts to develop a NPRM for Part 1626. Given the complexity of the rule, the difficulty of the previous reg-neg

process and the large number of fairly contentious issues that the reg-neg process failed to resolve, we urge the Board not to take up Part 1626.

RECOMMENDATIONS FOR REGULATORY ACTION

Despite our suggestion that LSC should not undertake any regulatory action absent a compelling need, we recognize that LSC has asked for affirmative recommendations for regulatory action. Therefore, we make the following comments on possible revisions to several current regulations.

PART 1610—Program Integrity: In keeping with Clint Lyons' January 11, 2005, letter to LSC in the wake of the *Dobbins* decision, we urge LSC to make minor revisions to Part 1610 (§1610.8) or to its interpretation to make it consistent with Judge Block's decision in *Dobbins/Velazquez*. Such changes would make the terms of the decision applicable to all recipients, not just to the plaintiffs in the case. These revisions could be made on an interim basis, pending the outcome of the appeal in the case.

Part 1621—Client Grievance Procedures: We suggest that LSC could resume work on revisions to Part 1621 that were begun in the early 1990s and that were published for notice and comment in 1994. In addition to the revisions that were proposed previously, there may be other provisions of the rule that should be revisited. For example, it would be helpful to make it clear that it is not necessary to have an "in-person" hearing for complaints about quality of service. Although the current rule does not specifically require such an in-person hearing, it does require that the complainant have an opportunity to submit an oral and written statement to a board grievance committee and that the complainant may be accompanied by another person, both of which do suggest that an in-person hearing. With the geographical expansion of many programs as a result of mergers, it has become much more difficult and time-consuming to convene in-person hearings of board committees. At the same time, significant advances in technology, that have been made since the rule was first adopted in the 1970s and the revisions were first proposed in the early 1990s, have made communication much easier and made in-person hearings less necessary.

Part 1624—Handicap Discrimination: This rule was adopted in 1979 and has never been updated or revised in light of the passage of the Americans with Disabilities Act. The substantive law on which the rule is based has changed significantly in the last quarter century and the regulation is now substantially outdated. If LSC does decide to revise Part 1624, we urge the creation of a negotiated rulemaking working group to ensure that there is full participation by LSC recipients as well as representatives of the disabilities rights community. Clearly, the rule should reflect developments in the substantive law that have occurred in recent years. However, the rule's current self-assessment and enforcement provisions appear to be working well. Thus, we would encourage LSC to focus on the substance of the rule and to avoid imposing

additional administrative burdens on legal services grantees or taking over legitimate enforcement functions by other appropriate agencies.

Part 1631—Policy Application: This rule should be eliminated in its entirety. It deals with restrictions on funds appropriated for expenditure during FY 1986 and long since spent by LSC recipients that received them. This rule has no applicability at the current point in time.

We assume that the LSC staff will be making recommendations to the Operations & Regulations Committee and Board regarding a regulatory agenda for LSC for 2005-2006. Before the Committee adopts an agenda NLADA would like to have the opportunity to comment on the staff's specific recommendations.

NLADA appreciates the opportunity to share these comments with LSC. If you have any questions or concerns about any issues raised by these comments, please feel free to contact NLADA's counsel, Linda Perle at CLASP (202-906-8002 or lperle@clasp.org).