

MATTIE COHAN CONDRAY

From: Marc Dubin [m_dubin@comcast.net]
Sent: Wednesday, June 14, 2006 9:34 AM
To: MATTIE COHAN CONDRAY
Cc: 'Cantos, Olegario D.'; 'karen dickerhoof'; Soflacial@aol.com; alvarez33161@comcast.net; akarret@legalaid.org
Subject: Comments to Proposed changes to LSC's Prohibition Against Discrimination on the Basis of Disability
Importance: High

Wednesday, June 14, 2006

Mattie Cohan Condray
Senior Assistant General Counsel
Office of Legal Affairs
Legal Services Corporation
3333 K Street, NW.
Washington, DC 20007
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Dear Ms. Condray:

I respectfully submit my comments, set forth below, concerning proposed changes to LSC's Prohibition Against Discrimination on the Basis of Disability.

Comments To Legal Services Corporation Regarding Proposed Changes to Its Prohibition Against Discrimination on the Basis of Disability.

Submitted by Marc Dubin, Esq.
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Former Senior Trial Attorney, U.S. Department of Justice, Civil Rights Division, Disability Rights Section, Washington, D.C.

Background:

Form 1993-2005, I served as a Senior Trial Attorney at the U.S. Department of Justice, in the Disability Rights Section of the Civil Rights Division. In that capacity, I was responsible for nationwide enforcement of the ADA and the Rehabilitation Act on behalf of the United States. In addition to investigating and litigating alleged violations, I was also responsible for providing technical assistance, writing or reviewing much of the technical assistance materials issued. I have reviewed LSC's proposed changes, and have several concerns, set forth below. Please feel free to contact me if I can be of any further assistance.

Proposed Change:

LSC is also proposing to add a definition of the term "auxiliary aids and/or other assistive technology." Under section 1624.4, grantees with more than fifteen employees are required to

provide appropriate "auxiliary aids" when necessary to clients and applicants to make services accessible.

Comment:

Section 1624.4, as described above, violates title III of the ADA. The section misstates the law. The issue of the number of employees (15 or more) only applies in the context of employment, under title I of the ADA. Under title III, which covers legal services offices as places of public accommodation, does not have the same requirement regarding the number of employees. The number of employees a place of public accommodation has is irrelevant under title III. I recommend that this be clarified.

Proposed Change:

“Although the current regulation uses the term "auxiliary aids," it does not contain a formal definition of the term in the definition section. Rather, section 1624.4 provides that for the purposes of that section, "auxiliary aids include, but are not limited to, brailled and taped material, interpreters, telecommunications equipment for the deaf, and other aids for persons with impaired vision and hearing.”

Comment:

Title III of the ADA provides a definition of this term, and I recommend that LSC adopt it verbatim, and place it into a definition section. It is set forth below:

Sec.36.303 Auxiliary aids and services.

The term "auxiliary aids and services" includes --

- (1) Qualified interpreters, notetakers, computer-aided transcription services, written materials, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for deaf persons (TDD's), videotext displays, or other effective methods of making aurally delivered materials available to individuals with hearing impairments;
- (2) Qualified readers, taped texts, audio recordings, Brailled materials, large print materials, or other effective methods of making visually delivered materials available to individuals with visual impairments;
- (3) Acquisition or modification of equipment or devices; and
- (4) Other similar services and actions.

Using this definition would be helpful in many ways, most notably in providing consistency with the ADA.

Proposed Change:

Section 1624.7--Enforcement

The current regulation specifies only that LSC's enforcement procedures at 45 CFR part 1618 shall apply to alleged violations of this Part. Under part 1618, LSC is obligated to investigate complaints of violations of the LSC Act, appropriations acts, LSC regulations or grant assurances and to work with grantees to resolve matters informally when possible. Ultimately, if no informal resolution is agreed upon, LSC's enforcement powers involve reducing or eliminating funding generally. LSC does not have authority to directly order "injunctive relief" however, as do other Federal, state and local agencies charged with ADA and other disability-based discrimination law enforcement. Moreover, LSC's Office of Compliance and Enforcement, although taking those complaints of disability-based discrimination it

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receives seriously, has limited resources available and does not generally have significant expertise in investigating these types of claims.

In light of the above, LSC's policy when such complaints have been filed with the Office of Compliance and Enforcement has been to recommend that complainants pursue claims with appropriate Federal, state or local agencies which may be in a better position to investigate their claims and order the relief being sought. In cases where a claim is filed with another agency, LSC generally defers to that investigation during its pendency and relies upon the findings of the other agency in resolving the complaint filed with LSC. LSC has found this policy to be efficient and effective. Accordingly, LSC is proposing to explicitly incorporate this policy into the regulation.

LSC believes this action will clarify expectations for LSC enforcement staff, grantees, and potential claimants alike. Of course, LSC retains the discretion and authority to conduct its own investigations into any claim of disability-based discrimination grounded in this Part or the grant assurances and make its own findings upon the conclusion of such investigation, irrespective of whether a complaint based on the same circumstances is pending at another agency.

Comment:

I recommend that LSC create a tracking system to flag repeat offenders, to help LSC determine patterns of noncompliance among its grantees. Absent such a tracking mechanism, recipients with patterns of noncompliance may continue to violate the law without adequate consequences. I also recommend that LSC engage in increased efforts to represent individuals with disabilities who bring allegations of the ADA to the attention of LSC, rather than have a practice of referring these cases elsewhere. Engaging in these cases will likely increase the number of legitimate claims coming to the attention of LSC, and will increase the experience of LSC attorneys and staff with ADA violations and the ADA regulations. LSC should also consider hiring ADA consultants to train staff and to consult on cases. I suggest that the proposed change be modified so as to allow LSC to retain for purposes of enforcement those cases which it believes appropriate for enforcement by LSC, as a policy of referring out all cases would likely result in LSC failing to identify patterns of discrimination among its recipients, and a higher number of referrals being delayed in enforcement.

Respectfully submitted,

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