

David Moss, Director
Assistant Clinical Professor

Phone: 313-577-3970
Fax: 313-577-9379

June 26, 2006

Mattie Cohan Condray, Senior Assistant General Counsel
Office of Legal Affairs
Legal Services Corporation
3333 K Street, N.W.
Washington, DC 20007

RE: Notice of Proposed Rulemaking, 45 C.F.R. Part 1624

Dear Ms. Condray:

This letter is written in response to the Legal Services Corporation's notice of proposed changes to its rules prohibiting discrimination on the basis of disability, published in the Federal Register on May 12, 2006. It presents the views of four nationally prominent disability rights organizations – the National Disability Rights Network, the Disability Rights Legal Center, the Judge David L. Bazelon Center for Mental Health Law, and the Center for Law and Education – and four law professors who supervise law school clinics that represent low-income people with disabilities – Michael J. Churgin, William S. Koski, Daniel E. Manville, and David R. Moss.

The proposed changes to 45 C.F.R. Part 1624 are a mixed bag. While we support LSC's proposals to change the term "handicapped person" to "person with a disability" and to substitute the term "auxiliary aids and/or other assistive technologies" for "auxiliary aids," we are troubled by LSC's proposals to eliminate Part 1624's self-evaluation requirement and to codify its current practice of referring disability discrimination complainants to other agencies. Furthermore, we are disappointed that LSC has passed up this opportunity to propose additions to its rules that would expressly require grantees to make reasonable modifications in their policies, practices, or procedures when such modifications are needed to avoid discriminating on the basis of disability.

Statement of Interest

The National Disability Rights Network, formerly known as the National Association of Protection and Advocacy Systems or "NAPAS," is the membership organization of protection and advocacy ("P&A") agencies in all fifty states, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Northern Mariana Islands. P&As are mandated under various federal statutes to provide legal representation and related advocacy services on behalf of persons with disabilities. In fiscal year 2004, P&As served over 76,000 persons with disabilities. The P&A system is the nation's largest provider of legally-based advocacy services for persons with disabilities.

The Disability Rights Legal Center (“DRLC”), formerly known as the Western Center for Disability Rights, is the nation’s oldest cross-disability legal services organization. Founded in memory of Milton A. Miller, a Los Angeles attorney dedicated to the rights of people then referred to as “the handicapped,” the DRLC has consistently promoted the rights of people with disabilities and the public interest in and awareness of those rights by providing legal and related services. With a modest staff of twenty-six, thirty-five law student externs, and dozens of volunteer attorneys, the DRLC advocates, educates, and solves problems for people with disabilities, putting it in the vanguard of the disability rights movement.

The Judge David L. Bazelon Center for Mental Health Law is a national nonprofit organization that advocates for the legal rights of people with mental disabilities. Founded in 1972 as the Mental Health Law Project, the Center uses litigation, policy advocacy, education, and training to promote the rights of individuals with mental disabilities to enjoy equal access to many aspects of community living, including housing, education, health care, and voting. Much of the Center’s work focuses on the Americans with Disabilities Act (“ADA”) and Section 504 of the Rehabilitation Act.

The Center for Law and Education (“CLE”), a national advocacy center and former LSC grantee, strives to make the right of all students to quality education a reality, with an emphasis on assistance to low-income students and communities. For more than thirty-five years, CLE has worked to bring about school and district-wide change across the country in order to improve education outcomes, particularly for low-income students. Throughout its history, CLE has been a recognized leader in advancing the rights of students with disabilities. As one of the few national organizations that is firmly rooted in disability rights and school reform, CLE has focused increasingly on bringing the two together – in order to help ensure, for example, that individualized education programs and assessment practices are aimed at ensuring that students with disabilities meet high standards, rather than being vehicles for lower expectations.

Michael J. Churgin is the Raybourne Thompson Centennial Professor at the University of Texas School of Law in Austin, Texas. A specialist in mental health law, Professor Churgin supervises the University of Texas School of Law’s Mental Health Clinic, which represents low-income people with disabilities who face commitment to mental hospitals.

William S. Koski is the Eric and Nancy Wright Professor of Clinical Education and Professor of Law at Stanford Law School in Stanford, California. A specialist in education law, Professor Koski supervises Stanford Law School’s Youth and Education Law Project, which represents low-income children with disabilities and their families in special education and school discipline matters.

Daniel E. Manville is an Adjunct Professor and Clinical Staff Attorney at Wayne State University Law School in Detroit, Michigan. A specialist in prisoners’ civil rights, Professor Manville supervises Wayne State University Law School’s Civil Rights Litigation Clinic, which represents low-income prisoners with disabilities in ADA and Section 504 cases.

David R. Moss is an Assistant Clinical Professor at Wayne State University Law School in Detroit, Michigan. Formerly an attorney with an LSC grantee and a P&A, Professor Moss teaches Disability Discrimination Law at Wayne State University Law School and supervises the Law School's Disability Law Clinic, which represents low-income individuals with disabilities in SSI, Medicaid, special education, and disability discrimination cases.

Proposed Changes in Terminology

We support LSC's proposal to change the term "handicapped person" to "person with a disability" throughout Part 1624. The term "handicapped person" was not widely considered offensive when Section 504 of the Rehabilitation Act was enacted in 1973, or when LSC adopted its current rules six years later. Today, however, many people consider "handicapped person" to be a derogatory term, some out of the (mistaken) belief that "handicapped" is derived from "cap in hand," referring to beggars, others because "handicapped person" fails to use person-first language, as in "person with a disability," and still others for other reasons. Recognizing this change in public attitudes, Congress amended the Rehabilitation Act in 1992, substituting the term "individual with a disability" for "handicapped individual" throughout the statute. The time has come for LSC to amend Part 1624 in a similar manner.

We also support LSC's proposal to substitute the term "auxiliary aids and/or other assistive technologies" for "auxiliary aids" throughout Part 1624. We note, however, that the term "auxiliary aids" remains unmodified in Section 1624.4(d)(2) of the proposed rules, even though the commentary to the proposed rules states that a change was intended. See 71 Fed. Reg. 27654, 27656 (May 12, 2006). The term "auxiliary aids and/or other assistive technologies" should be substituted for "auxiliary aids" in Section 1624.4(d)(2).

Proposal to Eliminate Part 1624's Self-Evaluation Requirement

We are troubled by LSC's proposal to eliminate Part 1624's self-evaluation requirement. Part 1624 currently requires grantees, with the assistance of individuals with disabilities or organizations representing persons with disabilities, to evaluate their facilities, policies, and practices for compliance with Section 504 by January 1, 1980, and to develop a plan and timeline for correcting deficiencies revealed through that evaluation. See 45 C.F.R. § 1624.7 (2005). Instead of abandoning its self-evaluation requirement, LSC should amend its rules to make self-evaluation a recurring obligation.

Retaining Part 1624's self-evaluation requirement and making that requirement a recurring obligation are important for several reasons. First, periodic self-evaluation is essential to ensure that grantees regularly monitor their facilities, policies, and practices for compliance with Section 504 and voluntarily take corrective action. Administrative complaints and private rights of action are inadequate by themselves to ensure compliance, given the significant barriers low-income individuals with disabilities face to enforcing their rights. Second, self-evaluation encourages grantees to view their facilities, policies, and practices through the eyes of persons

with disabilities, making it more likely that grantees will consider the needs of individuals with disabilities before making changes in their facilities, policies, and practices that might discriminate against such individuals. Third, many current grantees did not begin receiving LSC funding until long after the deadline for completing self-evaluations had passed. These grantees are unlikely ever to have evaluated their facilities, policies, and practices for compliance with Section 504, and unlikely ever to have developed or implemented plans for correcting deficiencies. Fourth, most grantees that completed their self-evaluations prior to the deadline have very different policies and practices today than they did back then, reflecting new technologies and new models of service delivery that may have the effect of discriminating against individuals with disabilities. For example, many grantees today use touch-tone systems for routing telephone calls that streamline communication for most callers but may present significant barriers to deaf individuals, persons with mental disabilities, and persons with disabilities affecting fine motor function. Similarly, many grantees today provide community legal education information via the worldwide web, but their websites may not be accessible to blind individuals who access the web by using screen-reader software. Periodic self-evaluation helps ensure that new policies and practices are assessed for compliance with Section 504.

We recommend that LSC amend Part 1624 as follows to make self-evaluation a recurring obligation:

§ 1624.7 Self-evaluation.

(a) By January 1, ~~1980~~ 2007, and every five years thereafter, a legal services program shall evaluate, with the assistance of interested persons including ~~handicapped~~ persons with disabilities or organizations representing ~~handicapped~~ persons with disabilities, its current facilities, policies and practices and the effects thereof to determine the extent to which they may or may not comply with the requirements of this part and the cost of structural or other changes that would be necessary to make each of its facilities accessible to ~~handicapped~~ persons with disabilities.

(b) The results of the self-evaluation, including steps the legal services program plans to take to correct any deficiencies revealed and the timetable for completing such steps, shall be made available for review by the Corporation and interested members of the public.

Requiring self-evaluation every five years will not be unduly burdensome for grantees. Once grantees conduct the initial self-evaluation, they only will need to assure themselves that deficiencies revealed in previous self-evaluations have been corrected, and to evaluate facilities, policies, and practices that have changed since the most recent self-evaluation.

Proposal to Codify Practice of Referring Complainants to Other Agencies

We similarly are troubled by LSC's proposal to codify its practice of referring disability discrimination complainants to other agencies while merely retaining "discretion" to maintain an open complaint file during the other agency's investigation. LSC is not just a conduit through which federal funding flows. LSC is itself a recipient of federal financial assistance. As such, LSC is responsible not only for ensuring its own compliance with Section 504, but also for ensuring that it does not distribute federal funds to grantees that violate Section 504. LSC would abdicate this responsibility if it referred complainants to other agencies without processing their complaints at the conclusion of the other agency's investigation.

While we applaud LSC for notifying complainants that the Department of Justice and EEOC are available to investigate disability discrimination claims against grantees, LSC should investigate and process all claims alleging that grantees have discriminated against clients or potential clients with disabilities. In addition, under 29 C.F.R. § 1640.6 (2005) (EEOC regulation regarding employment discrimination complaints filed with agencies other than the EEOC), LSC should investigate and process all claims alleging that grantees have engaged in a pattern or practice of disability-based employment discrimination, and should investigate and process all individual employment discrimination claims when the complainant requests that LSC investigate rather than the EEOC. Finally, pursuant to 29 C.F.R. § 1640.10 (2005) (EEOC regulation regarding Section 504 agency review of deferred complaints), LSC should process all individual employment discrimination claims it refers to the EEOC once the EEOC has completed its investigation.

LSC is in a unique position to investigate and process Section 504 claims against grantees. First, neither the Department of Justice nor the EEOC has expertise comparable to LSC regarding the provision of civil legal services to persons of limited means, and neither one has the wealth of data that LSC possesses regarding grantees' facilities, policies, and practices. Second, the Department of Justice and the EEOC do not have the authority to order injunctive relief directly – the commentary to the proposed rules incorrectly suggests that they do, see 71 Fed. Reg. 27654, 27656 (May 12, 2006) – and these agencies receive so many complaints that they only are able to pursue injunctive relief through the courts in the most egregious cases. Third, neither the Department of Justice nor the EEOC has comparable leverage over grantees: LSC's authority to modify funding, and to reallocate funding through the competitive bidding process, provide powerful incentives for grantees to cooperate with LSC monitors and to resolve complaints when LSC finds that violations have occurred.

LSC should not codify its current practice of referring disability discrimination complainants to other agencies, as it proposes to do in Section 1624.7(b) of the proposed rules. LSC should instead investigate and process their claims itself, using its unique expertise and leverage vis-à-vis grantees.

Reasonable Modifications in Policies, Practices, and Procedures

We are disappointed that LSC has passed up this opportunity to propose additions to its rules that would expressly require grantees to make reasonable modifications in their policies, practices, or procedures when such modifications are needed to avoid discriminating on the basis of disability. Part 1624 currently includes a general non-discrimination provision, see 45 C.F.R. § 1624.4(a) (2005), and specific provisions addressing auxiliary aids, see 45 C.F.R. § 1624.4(d) (2005), effective communication, see 45 C.F.R. § 1624.4(e) (2005), and accessibility of facilities, see 45 C.F.R. § 1624.5 (2005). It does not, however, contain a specific provision addressing the need to make reasonable modifications in policies, practices, or procedures. This omission should be remedied.

Section 504 requires recipients of federal financial assistance to make “reasonable accommodations” for qualified individuals with disabilities. See e.g. Alexander v. Choate, 469 U.S. 287, 299-301 (1985). Reasonable accommodations required by Section 504 include making reasonable modifications in policies, practices, or procedures, unless such modifications would fundamentally alter the nature of the recipient’s services, programs, or activities. See e.g. Juvelis by Juvelis v. Snider, 68 F.3d 648, 653 (3d Cir. 1995).

Many LSC grantees have policies, practices, and procedures that may present barriers to people with disabilities seeking services. For example, some grantees have policies prohibiting staff from interviewing clients in clients’ homes. While such policies are designed to protect staff and promote efficiency, the failure to make reasonable modifications to such policies would prevent people who are unable to leave their homes due to physical or mental disabilities from receiving representation. Similarly, some grantees will only do an intake when the eligible individual contacts them directly. While this practice is designed to ensure that it is the eligible individual who wants representation, rather than the person calling on his or her behalf, refusal to make reasonable modifications to this practice may prevent persons with severe communication or mental disabilities from receiving representation.

We recommend that LSC amend Part 1624 as follows to expressly require grantees to make reasonable modifications in their policies, practices, and procedures:

Section 1624.5 Accessibility of legal services.

...

(e) A legal services program shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the legal services program can demonstrate that making the modifications would fundamentally alter the nature of its services, programs, or activities.

While this language is borrowed from the Department of Justice's rules implementing Title II of the ADA, see 28 C.F.R. § 35.130(b)(7) (2005), Title II of the ADA protects the very same rights as Section 504, see 42 U.S.C. § 12133. Thus, this language is consistent with Section 504 as well.

Conclusion

We very much appreciate being given the opportunity to comment on LSC's proposed changes to its rules prohibiting discrimination on the basis of disability. As indicated above, we enthusiastically support LSC's proposed changes in terminology, but oppose LSC's proposals to eliminate Part 1624's self-evaluation requirement and to codify its current practice of referring disability discrimination complainants to other agencies. We recommend that LSC require grantees to evaluate their facilities, policies, and practices every five years for compliance with Section 504, and that LSC process all Section 504 complaints that it receives itself. Finally, we recommend that LSC expressly require grantees to make reasonable modifications in their policies, practices, and procedures when modifications are needed to avoid discriminating on the basis of disability. We would be delighted to discuss these comments further with LSC staff.

Sincerely,

David R. Moss

Assistant Clinical Professor

cc: Kenneth Shiotani, National Disability Rights Network
Eve Hill & Barbara Schwerin, Disability Rights Legal Center
Ira Burnim & Jennifer Mathis, Judge David L. Bazelon Center for Mental Health Law
Kathleen Boundy, Center for Law and Education
Michael J. Churgin, University of Texas School of Law
William S. Koski, Stanford Law School
Daniel E. Manville, Wayne State University Law School