Legal Services Corporation
America's Partner For Equal Justice

OFFICE OF LEGAL AFFAIRS

ADVISORY OPINION
AO-2013-010

SUBJECT: Management Information Exchange Journal Article/LSC Restrictions on Lobbying, Legislative and Administrative Activities

DATE: December 10, 2013

Question Presented

This opinion addresses whether the preparation during business hours by an employee of an LSC recipient of an article published in the Management Information Exchange Journal (the "Article") complies with LSC statutory and regulatory restrictions on lobbying, legislative, and other advocacy activities (the "LSC restrictions"). The Article recommends that legal services programs and lawyers take steps to support state legislative or executive action to expand Medicaid under the Affordable Care Act ("ACA").[1]

Brief Answer

The restrictions establish, with certain exclusions and exceptions, four categories of prohibited activity: (1) grassroots lobbying; (2) training; (3) organizing; and (4) attempts to influence legislation, executive activity, or administrative decisions. For the reasons described below, we conclude that the preparation of the article does not violate the first three categories of restrictions—grassroots lobbying, training, and organizing—but does constitute an impermissible "attempt to influence" state law-making and/or executive action.

The language of the attempt-to-influence restrictions is broad, and the legislative history and judicial interpretations relating to the attempt to influence provisions indicate that the provisions are intended to be broadly construed. The LSC Act provides that LSC shall "insure that no funds made available to recipients by the Corporation shall be used at any time, *directly or indirectly*, to influence the issuance, amendment, or revocation of any executive order or similar promulgation by any . . . State . . . agency, or to undertake to influence the passage or defeat of any legislation by . . . any State or local legislative bodies, or State proposals by initiative petition." 42 U.S.C. § 2996(f)(a)(5)(emphasis added). LSC's appropriations legislation contains materially similar substantive prohibitions. Pub. L. 104-134, § 504(a)(2), (3). The 1996 House Committee report explains the legislative intent behind the restrictions:

[1] This opinion addresses the issue whether LSC recipient's participation in the preparation and publication of the article complied with the LSC restrictions. The issue whether other LSC recipients would violate the LSC restrictions if they undertook any of the series of potential future actions recommended in the Article would require fact-based assessments of such actions on a case-by-case basis and is not addressed here.

> The Committee understands that advocacy on behalf of poor individuals for social and political change is an important function in a democratic society. However, the Committee does not believe such advocacy is an appropriate use of Federal funds. The Committee notes that there are hundreds of private organizations which can and do fulfill this advocacy role. The Committee notes that any funding devoted to advocacy is funding taken away from basic legal assistance.

H.R. Rep. No. 104-196, at 119-21 (1996).

The LSC regulations implement these statutory restrictions, providing, *inter alia,* that recipients "shall not attempt to influence . . . [t]he passage or defeat of any legislation . . ." (45 C.F.R. § 1612.3(a)(1)), and that "recipients shall not participate in or attempt to influence any rule-making, or attempt to influence the issuance, amendment, or revocation of any executive order" (45 C.F.R. § 1612.3(b)).

In interpreting these provisions, the Second Circuit has stated that "the restrictions here placed on grantees are not narrow; they are extremely broad" and that the "language imposes a sweeping restriction on grantee activity." *Velazquez v. Legal Services Corp.,* 164 F.3d 757, 766, 767-68 (2d Cir. 1999), *aff'd*, 531 U.S. 533 (2001).

In view of the language of the LSC Act, the appropriations legislation, legislative history, and the attempt-to-influence regulations, and the judicial statements underscoring the breadth of these restrictions, we conclude that the preparation of the Article constitutes an attempt to influence state law-making and/or executive action. In short, the article (1) identifies legislation and executive action under active consideration by legislatures and governors (potential actions taken pursuant to the Medicaid expansion provision of the ACA); (2) advocates a position on the outcome of decisions on the expansion; and (3) proposes a series of actions for legal services programs and legal services lawyers to achieve the outcome of ensuring enactment of the expansion. As such, it constitutes an impermissible attempt to influence government action.

In addition, we believe the Article describes the LSC restrictions incompletely and imprecisely, and in so doing understates their breadth. LSC issued Program Letter 13-5 on December 3, 2013, which described more completely the restrictions and exceptions in order to address any misunderstandings created by the Article.

Factual Background---Summary of the Article and Its Preparation

The Article is entitled *Medicaid Expansion of the Affordable Health Care Act and the Supreme Court's Decision: Will Legal Services Programs Rise to the Challenge?*, and is attached hereto as Exhibit 1. The author of the Article is an employee of an LSC-funded program. Article, page 3, n. 1. The Management Information Exchange Journal ("MIEJ") describes itself as "the premiere publication for managers in the legal aid community" and "as a forum for the legal services community." MIEJ website, http://mielegalaid.org/journal/journal.htm.

The Article makes recommendations as to how legal services lawyers and programs can work to expand Medicaid coverage under the ACA. Under the ACA and the Supreme Court's decision upholding it, *National Federation of Independent Businesses v. Sebelius*, 132 S. Ct. 2566 (2012), each state has the option of accepting or declining the expansion of Medicaid authorized by the ACA. The decision whether to expand Medicaid is being made by governors and legislatures across the country. The decision-making process varies from state to state. In some states, governors have announced they will refuse the expansion. In other states, governors have endorsed the expansion and are proposing that state legislatures enact the expansion. In still others, legislatures have initiated studies of the options.

The first section of the Article, entitled "Introduction," describes the expansion decision and explains that:

> Each state will now have to decide whether to implement this critical provision of the ACA, and it will be up to policymakers and advocates in each state to determine if this critical benefit of the ACA—health security for low income Americans—is realized. *This article discusses the role that legal services programs must play in that decision-making process.*

Article, page 3 (emphasis added).

The second section, entitled "The Supreme Court's Decision and Medicaid," describes how the Supreme Court's decision on the ACA has left the expansion decision to states. The Article discusses the consequences of state decisions not to expand Medicaid and calls on legal services programs to take action:

> The possibility that the ACA survives but that the lowest income population most important to legal services programs would continue to go without any health insurance would be a devastating result for our clients and one that should not be allowed to happen. *The sheer magnitude of this negative outcome demands that legal services programs take on the challenge of ensuring Medicaid expansion in their states.*

Id., page 4 (emphasis added).

The next section, entitled "The Advocacy Challenge," describes the author's view of the challenges for advocates generally. *Id.*

The following section is entitled "Role of Legal Services Lawyers." *Id.* The author begins this section by acknowledging that "Legal Services Corporation (LSC)-funded attorneys cannot lobby or do grass roots or political work like other groups," but concludes that "most of the work that is needed from legal services lawyers can be performed under LSC regulations." *Id.* He adds that

> [t]he continuing importance of broad-based advocacy in legal services programs is well documented . . . . Working on implementation of the Medicaid expansion is a seminal example of such broad-based advocacy.

Id.

The author then describes a series of activities legal services lawyers are "well-positioned" to undertake, including:

- "provide clear and timely policy analysis regarding the Medicaid expansion";
- "combat misinformation about the current Medicaid program and the ACA's expansion based on our knowledge of how the program actually works and whom it benefits";
- "analyze the impact of the Supreme Court's decision";
- "write clear and concise analyses of complex issues of law and policy."

Id., page 5.

In this section, the author also proposes collaboration with "non-legal services advocates":

> We also have sophisticated advocacy skills that can help us navigate the difficult terrain of the various groups affected by the ACA's Medicaid expansion. We can make smart and well informed judgments about the type of advocacy needed at the appropriate time and can help other advocates come to the right decisions. And we can answer technical and legal questions that will come up at various points in efforts to implement the expansion and help other advocates and stakeholders better understand the choices before them.

Id.

The author concludes this section by addressing legal services lawyers' role in implementing benefits in states that enact the Medicaid expansion:

> The ACA also included a host of other provisions that affect Medicaid and low-income clients, . . . includ[ing] new options to preserve home and community based services, new initiatives for dual eligible (those eligible for both Medicare and Medicaid), more streamlined Medicaid eligibility and enrollment mechanisms, and potentially different benefits packages for newly eligible adults. Legal services lawyers must be at the table for decisions on these important issues as well. Strong legal services advocacy is required even in states whose governors or legislative leaders have already committed to implementing the expansion. In an environment that makes it more difficult to litigate in order to maintain and improve services for their clients, the ACA provides many Medicaid

> options that can achieve substantially more benefits for our clients than we could win through any lawsuit.

Id., page 6.

The next section, "What We Must Do," identifies four categories of activities for legal services lawyers and programs: "[p]olicy [a]nalysis," "[c]ommunity [e]ducation," "[p]rovide technical assistance and collaboration," and "[m]eet with state policymakers on implementation issues." *Id.*, pages 6-7. The author describes a series of activities in each of these categories:

<u>Policy Analysis</u>. The author proposes that legal services programs:

- "write timely and accurate policy analyses, papers, reports and/or fact sheets that describe the costs and benefits of the expansion";
- "engage in fiscal analysis regarding the impact of the expansion and the significant federal funding that will come into each state";
- "analyze financial information and state cost estimates to ensure that they accurately reflect the impact of the Medicaid expansion";
- "explain how the ACA's Medicaid expansion will have a positive financial impact on state budgets . . . ."

Id.

<u>Community education</u>. The author recommends that legal services programs:

- "educate service providers, advocates, and members of the community about the expansion and what is at stake";
- "give public presentations about the Supreme Court's decision and what it means for residents of our states . . . for the state budget, the state social safety net, and the state and local economies";
- "communicate the positive health impact of expanding Medicaid for a state's low-income uninsured residents";
- "explain the ramifications of failing to implement the ACA's Medicaid expansion when other mandatory ACA provisions that will cut Medicaid spending for safety net providers will still go forward . . . ."

Id.

<u>Provide technical assistance and collaboration</u>. The author states that legal services programs "can work with other organizations to provide technical assistance on the expansion." *Id.* He also proposes collaboration with non-LSC funded organizations:

> [t]here will clearly be an array of interest groups affected by state decisions whether to expand or not, including hospitals . . . , disability rights groups and disease specific organizations. We need to be

> collaborating with these and other groups who will have such an important stake in the outcome of state policy debates.

Id., pages 6-7.

Meet with state policymakers on implementation issues. The author states that legal services lawyers "need to be at the table for discussions on these critical 'nuts and bolts' issues, including "technical aspects of the ACA's Medicaid provisions that will affect low-income clients." *Id.*, page 7. The author identifies implementation of "no wrong door" policies, insurance affordability programs, and benefits packages for the expansion group as additional examples of the issues to be addressed with state policymakers. *Id.*

The next section, "What about the LSC Restrictions," discusses the LSC lobbying and advocacy regulations and references portions of the regulations that delineate permissible activities. *Id.*, pages 7 & 13, notes 14 & 15. The author begins this section with the statement:

> All of what has been described above is permissible under Legal Services Corporation regulations. None of it involves lobbying, legislative advocacy, or rulemaking. If those avenues become necessary, there are certainly *permissible* ways to do such advocacy within LSC regulations, but often we will not want or need to be the public messenger on key issues when it comes to actual state legislation.

Id., page 7 (emphasis in original). He adds that

> [LSC] rules should not be a barrier to advocacy in this area. . . . [I]t is crucial not to let unfounded fear of the restrictions get in the way of work that is appropriate under the regulations. While a full discussion of the LSC rules is beyond the scope of this article, Legal Services programs may consult with the National Legal Aid and Defender Association or the Center for Law and Social Policy for more information about LSC requirements and policy advocacy.

Id.

In footnotes to this section, the author refers to three of the exceptions in the LSC restrictions that delineate permissible activity, which are discussed in greater detail in the analysis section of this opinion. Article, page 13, notes 14, 15. The author's references to the law are not comprehensive; while he notes that there are LSC regulations governing this area and that those regulations create exceptions that permit certain activities, he omits reference to several of the restrictions, including the attempt-to-influence restrictions.

The following section, "Technical Support," identifies organizations that may serve as resources for information. *Id.*, page 7. The author states that "these resources will make it much easier for legal services advocates to engage in these issues on the state level." *Id.*

The next section is entitled "Management Issues." *Id*. The author writes that "[l]egal services programs should treat the Medicaid expansion like any other systemic advocacy project . . . ." *Id*. The author calls for programs to "allocate resources to this effort." *Id*. He suggests that [p]rograms may want to pull together teams of advocates or create task forces to work on the expansion. He says it may be beneficial to work across programs in states that have multiple legal services programs. *Id*.

The article ends with a short "Conclusion." *Id*. The author repeats his view that the health care issue is significant and that the Supreme Court decision jeopardizes components of the ACA that are important for low-income citizens. *Id*. He closes by stating that legal services programs "cannot afford to let our clients be left behind," that legal services lawyers "must rise to meet this challenge," and that "legal services must support these efforts." *Id*.

During review of issues relating to the Article by LSC's Office of Enforcement and Compliance ("OCE"), the recipient submitted responses to OCE requests for information. Legal Services of Eastern Missouri letter to Legal Services Corporation, dated June 19, 2013 (the "LSEM June 19, 2013 Letter"). In that letter, the recipient stated that the author is a member of the LSEM management team and that he wrote and submitted the article with the knowledge and support of the Executive Director of LSEM. *Id*., page 2. The recipient acknowledged that the author worked on the article during LSEM business hours, that he used LSEM computers to work on the article, and that the recipient authorized the author's use of LSEM facilities, computer, research account, and phone to work on the article. *Id.*, pages 2, 3.

Analysis

Statutory restrictions on lobbying and on legislative and administrative activity are set forth in the LSC Act and in the LSC fiscal year 1996 appropriations legislation (as renewed in subsequent appropriations acts). 42 U.S.C. §§ 2996(f)(a)(5), 2996(f)(b)(6), (7) (restrictions and exceptions in the LSC Act); Pub. L. 104-134, 110 Stat. 1321, §§ 504(a)(2), (3), (4), 504(e) (restrictions and exceptions in the appropriations legislation). The LSC lobbying and advocacy regulations implementing these statutory mandates are codified at 45 C.F.R. Part 1612 (entitled "Restrictions on Lobbying and Certain Other Activities"). The statutes and LSC lobbying and advocacy regulations govern grant recipients' conduct with respect to four categories of activities:

1) Grassroots lobbying, codified in the regulations at 45 C.F.R §§ 1612.2 and 1612.4.

2) Training programs on public policies, codified in the LSC Act, 42 U.S.C. § 2996f(b)(6); in the appropriations legislation, 104-134, 110 Stat. 1321, § 504(a)(12); and in the regulations, 45 C.F.R. § 1612.8.

3) Organizing, codified in the LSC Act, 42 U.S.C. § 2996f(b)(7); and in the regulations, 45 C.F.R. § 1612.

4) Prohibited attempts to influence legislative, executive and administrative activities, codified in the LSC Act, 42 U.S.C. § 2996f(a)(5); in the appropriations legislation, Pub. L. 104-134, 110 Stat. 1321, §§504(a)(2), (3), (4); and in the regulations, 45 C.F.R. § 1612.3.

All of these restrictions apply to recipients of LSC funding. Because the recipient acknowledges that the author prepared the article during recipient work time, in recipient facilities, with the use of recipient computers and research accounts, and that this was done with the knowledge and authorization of the recipient's Executive Director, the preparation of the Article is attributable to the recipient and is subject to the potential application of restrictions on recipient activity.

We now address the substance of each of the four regulatory restrictions, as well as exclusions and exceptions, to determine whether the preparation of the Article is permissible under LSC's statutory and regulatory provisions.

I. GRASSROOTS LOBBYING

A. The Applicable Regulations[2] and Prior Administrative Opinions Interpreting Grassroots Lobbying Regulations

Section 1612.4 of the LSC regulations states that "[a] recipient shall not engage in any grassroots lobbying." 45 C.F.R. § 1612.4. Grassroots lobbying is defined as:

> any . . . communication or any advertisement, telegrams, letter, article, newsletter, or other printed or written matter or device which contains a direct suggestion to the public to contact public officials in support of or opposition to pending or proposed legislation, regulations, executive decisions or any decision by the electorate on a measure submitted to it for a vote . . . [or]
>
> financial contributions by recipients to, or participation by recipients in, any . . . lobbying campaign, letter writing or telephone campaign for the purpose of influencing the course of such legislation, rulemaking, decisions by executive bodies, or any decision by the electorate on a measure submitted to it for a vote.

45 C.F.R. § 1612.2(a)(1).

[2] There is no explicit statutory prohibition on "grassroots lobbying" as appears in the regulations. The other statutory restrictions discussed below, however, particularly the prohibitions on attempts to influence legislation and policymaking, would likely also address activities falling within the grassroots lobbying prohibition in the regulation.

The regulation includes an exception to these proscriptions. Grassroots lobbying "does not include communications which are limited solely to reporting on the content or status of, or explaining, pending legislation or regulations." 45 C.F.R. § 1612.2(a)(2).

Several opinions of the U.S. Government Accountability Office ("GAO") address grassroots lobbying restrictions on LSC and other agencies. The GAO has "adopted a bright-line rule in determining whether an agency's communication violates these provisions, that is, evidence that the agency made a clear, explicit appeal to the public to contact [legislators] in support of the agency's position on legislation pending before [the legislature]." GAO Opinion B-319075, page 6 (April 23, 2010) (addressing several statutory prohibitions on grassroots lobbying). *See also* GAO Opinion B-304715, page 3 (April 27, 2005) (addressing statutory prohibition on grassroots lobbying) ("before we would agree that the prohibitions on grassroots lobbying had been violated, we required evidence that the agency made a clear or explicit appeal to the public to contact congressional members in support of the agency's position").

The GAO has rejected the argument that it "relax the bright line rule and apply the prohibition to statements from which a reader might infer a direction to contact [legislators]," describing this as "a more subjective standard." GAO Opinion B-319075, page 6-7. Similarly, the GAO declined to replace the "clear and explicit appeal" standard with "an approach that assesses the agency's 'intent' and whether the agency's message would be likely to influence the public to contact the [legislature] in support of the agency's position." GAO Opinion B-304715, page 3. The GAO concluded that "[a]ssessing whether an agency statement is 'likely to influence' the public to contact [the legislature] is highly speculative and we harbor significant reservations about our ability to objectively make such a determination." *Id*.

Similarly, LSC internal opinions interpreting the grassroots lobbying regulation have required a direct call to initiate contact or some affirmative language facilitating contact with policy makers, such as providing contact information. *See, e.g.,* August 3, 1995 Memorandum to Danilo Cardona from Suzanne B. Glasow, page 4 (contact suggested and contact information provided); December 13, 1990 Memorandum to Emilia DiSanto from Suzanne B. Glasow, page 4 (contact information provided).

B. Application of the Grassroots Lobbying Restrictions to the Article

Preparation of the Article does not fall within the definition of prohibited grassroots lobbying under Part 1612. The regulation prohibits "a direct suggestion to the public to contact public officials in support of or opposition to pending or proposed legislation, regulations, [or] executive decisions." 45 C.F.R. § 1612.2(a)(1). With respect to grassroots lobbying proscriptions, the GAO has required a "clear and explicit appeal to the public to contact" legislators. GAO Opinion B-304715, page 3.

The Article does not make the type of direct suggestion or clear and explicit calls for contact with policymakers that the regulation and the GAO opinions prohibit. Nor does the Article recommend that recipients seek such contacts.

The Article states that legal aid attorneys can "identify the key decision-makers," Article, at page 7, but does not clearly, directly, or explicitly call for others to contact legislators, governors, or other public officials regarding the issue of Medicaid expansion. The GAO has rejected application of the grassroots lobbying prohibitions under such circumstances.

II. TRAINING PROGRAMS ON PUBLIC POLICY

A. The Applicable Statutes and Regulations

The LSC Act establishes a *fund-based* restriction for training related to public policy, prohibiting the use of LSC funds

> to support or conduct training programs for the purpose of advocating particular public policies or encouraging political activities, labor or antilabor activities, boycotts, picketing, strikes, and demonstrations, as distinguished from the dissemination of information about such policies and activities, except that this provision shall not be construed to prohibit the training of attorneys or paralegal personnel necessary to prepare them to provide legal assistance to eligible clients.

42 U.S.C. § 2996f(b)(6). The appropriations legislation goes further, providing that no appropriated funds may be used to provide financial assistance to *any recipient*

> that supports or conducts a training program for the purposes of advocating a particular public policy or encouraging a political activity, a labor or antilabor activity, a boycott, picketing, a strike, or a demonstration, including the dissemination of information about such a policy or activity, except that this paragraph shall not be construed to prohibit the provision of training to an attorney or a paralegal to prepare the attorney or paralegal to provide—
> (A) adequate legal assistance to eligible clients; or
> (B) advice to any eligible client as to the legal rights of the client.

Pub. L. 104-134, 110 Stat. 1321, § 504(a)(12). The appropriations restriction on training differs from the LSC Act restriction because the LSC Act restriction is fund-based while the appropriations act restriction is entity-based. The appropriations legislation restriction prohibits LSC from providing funds to any recipient that engages in disallowed training activity, *regardless* of whether the recipient uses LSC or non-LSC funds.

Section 1612.8 of the LSC regulations implements the statutory restrictions on training with an entity-based prohibition that bars recipients from engaging in disallowed training activities *regardless* of the source of funding:

> A recipient may not support or conduct training programs that:

(1) [a]dvocate particular public policies;

(2) [e]ncourage or facilitate political activities, labor or anti-labor activities, boycotts, picketing, strikes or demonstrations, or the development of strategies to influence legislation or rulemaking;

(3) [d]isseminate information about such policies or activities; or

(4) [t]rain participants to engage in activities prohibited by the Act, other applicable law, or Corporation regulations, guidelines or instructions.

45 C.F.R § 1612.8(a)(1)-(4).

The regulation establishes the following exception: "[n]othing in this section shall be construed to prohibit training of any attorneys or paralegals, clients, lay advocates or others involved in the representation of eligible clients necessary for preparing them: (1) [t]o provide adequate legal assistance to eligible clients; or (2) [t]o provide advice to any eligible clients as to the legal rights of the client." 45 C.F.R. § 1612.8(b)(1)-(2).

A 1983 GAO Comptroller General Opinion concluded that training sessions conducted by LSC grantees with the use of LSC funds violated the LSC Act training restrictions. GAO Opinion B-210338, B-202116, pages 6-7 (September 19, 1983) ("1983 GAO Opinion"). In the 1983 Opinion, the GAO found that an officially LSC-sponsored training function violated the training restrictions. *Id.*, pages 6-7. LSC funded the function and attendees included Corporation officials and employees of grant recipients. *Id.*, page 4. The agenda for the meeting included sessions and workshops on strategy, coalition-building, networking, and mobilization. *Id.*, pages 4-6. Speakers from the Corporation and recipients advocated public policies, encouraged political activities, and encouraged opposition to objectives that would reduce benefits programs. *Id.* Among the activities promoted was the building of coalitions and networks with other organizations with shared interests to establish a grassroots lobbying campaign to influence Congress on behalf of LSC and benefits programs. *Id.*, page 6.

The GAO determined that "Corporate officials and grantee representatives advocated a public policy of fighting threatened cuts in the Legal Services and other Federal social benefit and entitlement programs and encouraged persons in attendance to engage in political activities including the building of networks and coalitions so as to effectively operate a nationwide grassroots campaign to lobby Congress in support of policies advocated by the Corporation." *Id.*, page 8.

B. Application of the Training Restrictions to the Article

Preparation of the MIEJ Article did not violate the prohibition on training. The Article's recommendations on information-sharing with other organizations fall short of constituting the "support or conduct" of a "training program." This conclusion is supported by the 1983 GAO Opinion. (There is no other guidance in the statutes or regulations that defines what constitutes

a "training program," or "support" of such a program.) The 1983 GAO Opinion illustrates the collection of activities that together constitute conduct of a training program, including meetings, an agenda, speakers, and specific proposals on policy advocacy, and coalition building. The Article itself is not the conduct of this type of actual training program, nor does it propose or support a program with the level of development described in the 1983 GAO Opinion.

III. ORGANIZING

A. The Applicable Statute and Regulations

The LSC Act prohibits recipients from using LSC funds

> [t]o initiate the formation, or act as an organizer, of any association, federation or similar entity, except that this paragraph shall not be construed to prohibit the provision of legal assistance to eligible clients.

42 U.S.C. § 2996f(b)(7).

Section 1612.9 of the LSC regulations sets forth the following restriction on organizing:

> Recipients may not use funds provided by the Corporation or by private entities to initiate the formation, or to act as an organizer, of any association, federation, labor union, coalition, network, alliance, or any similar entity.

45 C.F.R. § 1612.9(a). The regulatory restriction on organizing goes beyond the LSC Act, because the regulation prevents the use of LSC *and private funding* for prohibited organizing, while the statutory bar is limited to use of LSC funds.

The regulatory restriction does not apply to (1) informational meetings attended by persons engaged in the delivery of legal services at which information about new developments in the law and pending cases or matters are discussed, or (2) organizations composed exclusively of eligible clients formed for the purpose of advising a legal services program about the delivery of legal services. 45 C.F.R. § 1612.9(b)(1),(2). Recipients and their employees may provide legal advice or assistance to eligible clients who desire to plan, establish or operate organizations. 45 C.F.R § 1612.9(c).

The 1983 GAO Opinion discussed in the preceding analysis of training restrictions also interpreted the LSC Act restriction on organizing, observing that "the legislative history makes it plain that grantees and contractors may not use funds provided by the Corporation to initiate the formation, or act as organizer, of any organization, network or coalition." 1983 GAO Opinion, page 10. The GAO concluded that the conduct of LSC and the recipients violated the restrictions on organizing. Factors on which the GAO relied in that finding were the establishment of informal organization through networking and coalition-building, as well as

more formal elements such as communication links, core roles for recipients in state coalitions, hiring of staff, financial support, and plans to establish a lobbying entity and to formally incorporate. *Id*.

The 1983 GAO Opinion noted that "providers of legal services may give advice to eligible clients and assist them with matters that would enable them to plan, establish and operate an organization that the clients believe is in their best interest." *Id.,* page 10. However, "recipients should not act as organizers of organizations on the basis of the recipients' perception that a particular organization would be beneficial to clients as a class." *Id.*

B. Application of the Restrictions on Organizing to the MIEJ Article

Preparation of the Article did not violate the organizing restrictions. Although the Article's proposal that programs engage in collaborative action with each other and with non-LSC entities could, if followed, result in a violation of the restrictions on organizing, preparation of the Article does not constitute the development of a network, coalition or similar entity that was found to violate the organizing prohibition in the 1983 GAO Opinion.

IV. ATTEMPTS TO INFLUENCE LEGISLATIVE, EXECUTIVE AND ADMINISTRATIVE ACTIVITIES

A. The Attempt-to-Influence Restrictions and Exceptions

1. The applicable statutes and regulations

The LSC Act provides that the Corporation shall:

> insure that no funds made available to recipients by the Corporation shall be used at any time, *directly or indirectly*, to influence the issuance, amendment, or revocation of any executive order or similar promulgation by any Federal, State or Local agency, or to undertake to influence the passage or defeat of any legislation by the Congress of the United States, or by any State or local legislative bodies, or State proposals by initiative petition.

42 U.S.C. § 2996(f)(a)(5)(emphasis added).

The appropriations legislation contains materially similar substantive prohibitions and adds language that bars "attempts to influence" executive or agency actions "of general applicability and future effect." Pub. L. 104-134, § 504(a)(2),(3). Under Section 504,

> [n]one of the funds appropriated in this Act to the Legal Services Corporation may be used to provide financial assistance to any person or entity (which may be referred to in this section as a recipient)—

> that attempts to influence the issuance, amendment, or revocation of any executive order, regulation, or other statement of general applicability and future effect by any Federal, State or local agency;
>
> that attempts to influence any part of any adjudicatory proceeding of any Federal, State, or local agency if such part of the proceeding is designed for the formulation or modification of any agency policy of general applicability and future effect;
>
> that attempts to influence the passage or defeat of any legislation, constitutional amendment, referendum, initiative, or any similar procedure of the Congress or a State or local legislative body.

Id. (section numbers omitted). These "attempt-to-influence" restrictions are entity restrictions – they preclude LSC from providing financial assistance "to any person" engaging in the enumerated activities *regardless* of the funding source for those activities.

The legislative intent behind the appropriations restrictions was expressed in a 1996 House Committee report:

> [T]he Committee has included numerous terms and conditions which target scarce resources to programs whose mission is to provide basic legal assistance to the poor. The Committee understands that advocacy on behalf of poor individuals for social and political change is an important function in a democratic society. However, the Committee does not believe such advocacy is an appropriate use of Federal funds. The Committee notes that there are hundreds of private organizations which can and do fulfill this advocacy role. The Committee notes that any funding devoted to advocacy is funding taken away from basic legal assistance.

H.R. Rep. No. 104-196, at 119-121 (1996)("House Statement").

The LSC regulations implement these statutory entity-restrictions. Section 1612.3 provides:

> (a) Except as provided in §§ 1612.5 and 1612.6, recipients shall not attempt to influence:
> (1) The passage or defeat of any legislation or constitutional amendment;
> (2) Any initiative, or any referendum or any similar procedure of the Congress, any State legislature, any local council, or any similar governing body acting in any legislative capacity;
> (3) Any provision in a legislative measure appropriating funds to, or defining or limiting the functions or authority of, the recipient or the Corporation; or,
> (4) The conduct of oversight proceedings concerning the recipient or

> the Corporation.
>
> (b) Except as provided in §§ 1612.5 and 1612.6, recipients shall not participate in or attempt to influence any rulemaking, or attempt to influence the issuance, amendment or revocation of any executive order.

45 C.F.R. § 1612.3(a) & (b).

2. **The attempt to influence restrictions are broader than the grassroots lobbying restriction**

The attempt-to-influence prohibitions in section 1612.3 are separate and distinct from the grassroots lobbying restrictions set forth in sections 1612.2 and 1612.4. To cite one difference as an example, no language in the attempt-to-influence restrictions imposes a requirement that the proscribed conduct involve a direct or explicit appeal to the public to contact policymakers. So as not to render the attempt to influence restrictions superfluous, they should be read to prohibit conduct different from what the LSC restrictions against grassroots lobbying prohibit.

The GAO's decisions on Interior Department Appropriations Act provisions are instructive in addressing restrictions that prohibit conduct in addition to direct solicitation of public contact with policymakers. In those cases, the GAO applied several restrictions, one of which prevented explicit requests to contact government officials. GAO Opinion, Forest Service Violations of Section 303 of the Interior Department Appropriations Act, B-281637, page 3 (May 14, 1999), *citing* GAO Opinion B-262234, 59 Comp. Gen. 115, 117-118 (1979). A separate provision stated that "[n]o part of any appropriations contained in this Act shall be available for any activity or the publication or distribution of literature which in any way tends to promote public support or opposition to any legislative proposal on which congressional action is not complete." Pub. L. No. 95-74, § 303 (1997).

The GAO found that the prohibition of "activity . . . *which in any way tends to promote public support or opposition* to any legislative proposal on which . . . action is not complete" reached conduct different from that prohibited by the grassroots lobbying restriction, which barred direct solicitation of contact with policymakers. The GAO stated that "[g]iven the existence of . . . [multiple] prohibitions on grassroots lobbying . . . we concluded . . . in interpreting the ["tends to promote"] provision that it was meant to cover actions not reached by these other two [grassroots lobbying] restrictions." GAO Opinion B-281637, page 3, *citing* 59 Comp. Gen. 115, 118-19 (emphasis added).

The LSC grassroots lobbying prohibition and the attempt to influence restrictions should be interpreted in a similar manner: the separate regulatory provisions should be read to prohibit different activities. The grassroots lobbying restriction prohibits explicit requests for the public to contact policy-makers. If the "attempt-to-influence" restrictions in section 1612.3 covered solely the same activities, they would be superfluous. The attempt to influence prohibition should be interpreted as restricting *additional* activities that constitute efforts to influence, even though they may not include direct requests to contact lawmakers.

Judicial opinions provide further guidance in applying these restrictions. In particular, in upholding the statutory and regulatory attempt to influence restrictions against constitutional challenge, the Second Circuit Court of Appeals emphasized the breadth of the restrictions:

> *The restrictions here placed on grantees are not narrow; they are extremely broad*. Grantees are prohibited outright from engaging in attempts to influence government's adoption of laws.

Velazquez v. Legal Services Corp., 164 F.3d 757, 766 (2d Cir. 1999), *aff'd,* 531 U.S. 533 (2001) (emphasis added). The Court described the attempt-to-influence provisions as "broad restrictions" and acknowledged that the "*language imposes a sweeping restriction on grantee activity*." *Id.* at 767-68 (emphasis added).

3. Activities permitted under the attempt-to-influence restrictions

The contours of the attempt-to-influence prohibitions are also defined by the statutory and regulatory exceptions to those restrictions. The LSC statutes and regulations establish several categories of activities that are permitted under the attempt-to-influence limitations, including (a) representation of clients, (b) responses to requests from governmental officials, (c) participation in rulemaking, and (d) reporting regarding the status or content of legislation or regulations.

a. Representation of clients

One category of permitted activities relates to *representation of clients*. The LSC Act includes an exception to its prohibition of direct or indirect influence of governmental action, permitting:

> representation by an employee of a recipient for any eligible client [where] necessary to the provision of legal advice and representation with respect to such client's legal rights and responsibilities.

42 U.S.C. § 2996f(a)(5)(A).

Section 1612.5 of the regulations implements this statutory exception by permitting recipients to undertake the following client-related activity with LSC or non-LSC funds:

> provid[ing] administrative representation for an eligible client in a proceeding that adjudicates the particular rights or interests of such eligible client or in negotiations directly involving that client's legal rights or responsibilities, including pre-litigation negotiation and negotiation in the course of litigation . . . ;
>
> [i]nforming clients, other recipients, or attorneys representing eligible clients about new or proposed statutes, executive orders, or administrative regulations . . . ;

> [a]dvising a client of the client's right to communicate directly with an elected official.

45 C.F.R. §§ 1612.5(a), (c)(3), (c)(6). This is not an exhaustive list of activities that are permissible under section 1612.5. Rather, these are examples of "activities that are not prohibited by the rule." 62 Fed. Reg. 19400, 19401 (Apr. 21, 1997) (preamble to the final rule).

The client-representation provisions cited above would apply to recipients' work with individuals as well as with non-LSC organizations, if such organizations are clients. LSC regulations permit the representation of groups that (1) lack the means to obtain funds to retain counsel and (2) are primarily composed of individuals financially eligible for LSC assistance or serve persons eligible for legal services as a principal activity (with the legal assistance provided related to that activity). 45 C.F.R § 1611.6(a).

b. <u>Responding to government requests</u>

A second category of permissible activity allows recipients to use non-LSC funds to *respond to requests from legislators and other government officials*. The LSC Act establishes an exception permitting recipients to use non-LSC funds to respond to government requests when:

> a governmental agency, legislative body, a committee, or a member thereof . . . requests personnel of the recipient to testify, draft, or review measures or to make representations to such agency, body, committee or member.

42 U.S.C. § 2996f(B)(i). The appropriations legislation contains a similar "response to request" exception, stating that

> [n]othing in this section shall be construed to prohibit a recipient from using funds derived from a source other than the Legal Services Corporation to comment on public rulemaking or to respond to a written request for information or testimony from a Federal, State or local agency, legislative body, or committee, or a member of such an agency, body, or committee, so long as the response is made only to the parties that make the request and the recipient does not arrange for the request to be made.

Pub. L. 104-134, § 504(e).

Section 1612.6(a) of the regulation implements these statutes by allowing a recipient to respond to requests using non-LSC funds as follows:

> Recipients and their employees may use non-LSC funds to respond to a written request from a governmental agency or official thereof, elected official, legislative body, committee, or member thereof to:
>
> (1) [t]estify orally or in writing;
>
> (2) [p]rovide information which may include analysis of or comments upon existing or proposed rules, regulations or legislation, or drafts of proposed rules, regulations or legislation;
>
> (3) [p]articipate in negotiated rulemaking under the Negotiated Rulemaking Act of 1990 . . . or comparable State or local laws.

45 C.F.R. § 1612.6(a)(1), (2), (3).

The "response to request" exception is not available if the recipient solicits the request. The appropriations legislation prohibits recipients from arranging for requests to be made and limits recipients to responding to the parties who make requests. Pub. L. 104-134, 110 Stat. 1321, § 504(e). The LSC lobbying regulation similarly states that "no employee of a recipient shall solicit or arrange a request," 45 C.F.R. § 1612.6(c), and requires that responses "be distributed only to the party or parties that made the request and to other persons or entities only to the extent that such distribution is required to comply with the request." 45 C.F.R. § 1612.6(b).

c. <u>Participation in public rulemaking</u>

A third category of exception relates to *participation in public rulemaking*. Comment on public rulemaking is allowed with the use of non-LSC funds under the appropriations legislation. Pub. L. 104-134, 110 Stat. 1321, § 504(e). The LSC regulations implement the legislation by permitting recipients to use non-LSC funds to "provide oral or written comment to an agency and its staff in a public rulemaking proceeding." 45 C.F.R. § 1612.6(3). Comments to public rulemaking need not be directly requested.

d. <u>Reporting regarding the status or content of legislation or regulations</u>

A fourth category of permissible activity arises from the exclusion from the grassroots lobbying prohibition, which allows "communications which are limited solely to reporting on the content or status of, or explaining, pending or proposed legislation or regulations." 45 C.F.R. § 1612.2(a)(2). For this exclusion to have any meaningful effect, it cannot be overridden simply because it could also implicate the "attempt-to-influence" provisions. Otherwise, reporting concerning proposed legislation or regulations – which is explicitly permitted by the grassroots lobbying exclusion – would be eliminated anytime such reporting could be characterized as an "attempt-to-influence" the governmental proposals that are the subject of the reporting, and recipients would be effectively foreclosed from making factual statements about the content and consequences of enacted and pending legislation and policy.

B. Application of the Attempt-to-Influence Restrictions to the Article

1. The Article is an attempt to influence legislation and executive decisions

The attempt-to-influence" provisions establish broad prohibitions on recipients engaging in policy-making advocacy. The legislative history states that Congress intended that the "mission [of legal services recipients] is to provide basic legal assistance to the poor" rather than "advocacy on behalf of poor individuals for social and political change" and that such advocacy "is not an appropriate use of federal funds." House Statement, pp. 119-21. The Second Circuit described the attempt-to-influence provisions as "extremely broad," as "sweeping restrictions", and concluded that under the provisions "[g]rantees are prohibited outright from engaging in attempts to influence government's adoption of laws." *Velazquez*, 164 F.3d at 766-68.

In light of the language of the LSC Act, the appropriations legislation, and the attempt-to-influence regulations, and the congressional and judicial statements underscoring the breadth of these restrictions, we conclude that preparation of the Article—calling for legal services programs to take a series of actions to promote Medicaid expansion—is an attempt to influence state government actions, insofar as the article: (1) identifies specific legislation and executive actions under active consideration by legislatures and governors (potential actions taken pursuant to the Medicaid expansion provision of the ACA); (2) advocates a position on the outcome of decisions on the expansion; and (3) proposes a series of actions for legal services programs and legal services lawyers to achieve the outcome of ensuring enactment of the expansion.

With respect to the first of these factors, the Article promotes enactment of specific legislation and/or executive actions—expansion of Medicaid under the Medicaid expansion provision in the ACA. The Article refers to that provision and expressly calls for legal services programs to be involved in state-by-state decisions on whether to enact the expansion provision:

> [T]he Medicaid expansion provision . . . would extend coverage to another 17 million low-income individuals. Each state will have to decide whether to implement this critical provision of the ACA, and it will be up to policymakers and advocates in each state to determine if this critical benefit of the ACA—health security for low-income Americans—is realized. This article discusses the role that legal services programs must play in that decision-making process.

Article, page 3.

As to the second factor, taking a position on the outcome of the expansion debate, the Article sets out a goal for legal services programs in this passage:

> The possibility that the ACA survives but that the lowest income population most important to legal services programs would continue to go without any health insurance would be a *devastating result* for our

> clients and *one that should not be allowed to happen. The sheer magnitude of this negative outcome demands that legal services programs take on the challenge of ensuring Medicaid expansion in their states.*

Id., page 4 (emphasis added).

The third factor, a call for action, is repeated throughout the Article, with the author writing that the expansion "demands" action, that there are actions programs "must do," that there is a role programs "must play," and that management "must support" efforts of legal services lawyers. *Id.*, pages 2, 4, 6, 8. Moreover, the Article is specific about what legal aid organizations should do to promote Medicaid expansion. The bulk of the Article is a description of over two dozen specific acts the author urges legal aid organizations to take to support state legislative or executive expansion of Medicaid/ in various states. *Id.,* pages 4-8.

The conclusion that the preparation of the Article constitutes an impermissible "attempt to influence" government action is supported by the GAO's analysis in determining whether Interior Department restrictions that extended beyond grassroots lobbying had been violated:

> [a]mong the factors we have considered in analyzing whether a violation has occurred are the timing, setting, audience, content, the reasonably anticipated effect of the questioned activity, and whether the communication was intended to promote support or opposition to a legislative proposal.

GAO Opinion B-281637, page 6.

Application of the factors enunciated by the GAO in its interpretation of the Interior Department regulations supports the conclusion that the Article is an attempt to influence legislative, administrative, and executive action. As to timing, the Article was written when the expansion decision was being considered by governors and legislatures throughout the country. On setting and audience, the Article was published in a professional journal with an audience that includes legal services personnel. The content of the Article is a call to action for legal services programs and lawyers, in conjunction with other advocates, to work for Medicaid expansion. As to intent to promote support or opposition to policy, as described above, the Article calls for advocates to ensure Medicaid expansion and describes the rejection of the expansion as an outcome that should not be allowed to happen.

Put simply, the Article proposes that legal services programs act as advocates--individually, collectively with each other, and in concert with outside organizations--to promote Medicaid expansion. The Article states that there is a "role legal services programs must play in [the] decision-making process" on expansion and urges that "legal services programs take on the challenge of ensuring Medicaid expansion in their states." *Id.*, pages 3, 4. Given that the decision whether to enact the expansion is being considered by state legislatures and governors throughout the country, the Article is an attempt to influence passage of legislation that would

expand Medicaid and defeat of any legislation that would reject expansion, as well as an attempt to influence the issuance, amendment or revocation of executive orders.[3]

2. The arguments made by LSEM do not establish that the article complies with the restrictions.

The recipient has raised six arguments in support of the proposition that preparation of the Article was permissible under the LSC restrictions. We analyze each of these arguments in turn.

a. Argument 1: The purpose of the Article was to inform and educate and, as such, is permitted under 45 C.F.R. § 1612.5(c)(3)

The recipient contends that the Article proposes a series of permissible activities, including education on the ACA and the Supreme Court decision on the ACA, and provided information on the implementation of the ACA and the impact of the ACA on the rights and responsibilities of clients. LSEM June 19, 2013 Letter, page 4. These types of activities could indeed fall within the provisions that permit analysis or explanation related to pending public policy proposals. The Article, however, is not limited to such explanations or analyses, but instead includes extensive and overt calls for a campaign to achieve a particular legislative or executive policy result.

In support of its contention, the recipient cites 45 C.F.R. § 1612.5(c)(3), which establishes an exception for "informing clients, other recipients, or attorneys representing eligible clients about new or proposed statutes, executive orders, or administrative regulations." *Id.* The preamble to the provision elaborates on its purpose as follows:

> Under subparagraph (c)(3), recipients and their employees can inform clients, other recipients, or attorneys representing eligible clients about new or proposed statutes, executive orders, or administrative regulations. Thus, recipients can advise clients about the effect of agency rules and policies, analyze them and explain proposed changes and their effect, and advise their clients about their right to participate on their own behalf in agency rulemaking proceedings.

[3] The Article may also constitute an attempt to influence rulemaking in contravention of 45 C.F.R. § 1612.3(b). Section 1612.2(d) defines "rulemaking" to include "the customary procedures that are used by an agency to formulate and adopt proposals for the issuance, amendment or revocation of regulations or other statements of general applicability and future effect[.]" Id. § 1612.2(d)(2). The provision of the Social Security Act governing Medicaid State plans does not prescribe the process by which States develop or amend their plans. 42 U.S.C. § 1396a. Because the procedures for amending State plans are left largely to State law, the decision to adopt the Medicaid expansion and, subsequently, the amendment of the State plan will likely occur at the Medicaid State agency level in some States. To the extent that State agencies, rather than the governor or the legislature, have the authority under State law to adopt or revise policy and amend the Medicaid State plan accordingly, the Article would seem to represent an attempt to influence rulemaking. It would not fall within 45 C.F.R. § 1612.6(e), permitting recipients to use non-LSC funds to provide comments to an agency in a rulemaking.

62 Fed. Reg. 19402 (Apr. 21, 1997).

The Article extends beyond the scope of Section 1612.5(c)(3). The Article goes beyond "informing" about legislation or policy, analyzing or explaining effects of policy, or advising clients about their advocacy rights—which are permitted—to encouraging legal services providers to advocate for a specific outcome of legislation or policy as it is being enacted—which is not permitted.

b. Argument 2: The attempt-to-influence restrictions bar only "direct lobbying activity"

The recipient maintains that the Article was not a violation of the attempt-to-influence provision in 45 C.F.R. § 1612.3, citing a different provision of the regulations, 45 C.F.R. § 1612.1, to contend that only direct lobbying is barred. LSEM June 19, 2013 Letter, page 4. This is incorrect for a number of reasons. First, the LSC Act prohibition prohibits *both* "direct and indirect" influence. 42 U.S.C. § 2996f(a)(5). Second, neither the appropriations legislation nor the LSC regulatory prohibitions of attempts to influence are limited to direct contacts with policymakers. Pub. L. 104-134, 110 Stat. 1321, § 504(a)(2), (3), (4), (5); 45 C.F.R. § 1612.3. Third, the 1612.1 reference to "direct lobbying" is not part of, and is not a limitation on, the attempt-to-influence provision. Instead, it is part of an introductory section of the LSC regulations that explains the overall purpose of the regulations and contains a non-exhaustive list of the activities prohibited:

> The purpose of this part is to ensure that LSC recipients and their employees do not engage in certain prohibited activities, *including* representation before legislative bodies or other direct lobbying activity, grassroots lobbying, participation in rulemaking, public demonstrations, advocacy training, and certain organizing activities.

45 C.F.R. § 1612.1 (emphasis added). Section 1612.1 cannot reasonably be read to support the conclusion that the restrictions contained in Part 1612 are limited to "direct lobbying activity."

c. Argument 3: Lack of prior interpretations

The recipient contends that section "1612 has never been interpreted by LSC and others to prohibit this type of article," that nothing in the regulations or preamble suggests that publishing this type of article violates section 1612, and that the article is consistent with LSC Performance Criteria encouraging recipients to contact the government on behalf of clients as well as other American Bar Association standards for legal aid providers. LSEM June 19, 2013 Letter, pages 4-5. Taking the last contentions first, the LSC Performance Criteria specifically state that "the Criteria reflect congressional directives and restrictions and should be applied consistent with funding source requirements." Legal Services Corporation Performance Criteria, page 2 (March 2007). Those directives, restrictions, and funding source requirements include the prohibition on attempts to influence government policy. Similarly, the ABA

standards cited by the recipient state that providers should engage in advocacy "when appropriate," a limitation that would exclude advocacy prohibited by statute and regulation.

Further, the absence of prior LSC opinions on the issues presented here simply reflects the fact that LSC has not been previously presented with the issues raised here. The fact that advocacy articles are not specifically mentioned in the regulations, or the preamble is also not dispositive. The relevant statutes, regulations and judicial decisions make clear that the prohibition on attempts to influence public policy is a broad restriction, not limited to any specific vehicle used in the "attempt to influence," and thus would apply to such attempts if made in journal articles or similar publications.

d. Argument 4: LSEM relied on long-standing interpretations of LSC regulations by the "legal aid community"

The recipient argues that it "justifiably relied on long standing interpretation of LSC regulations in the legal aid community that publication of articles like [the author's] was permissible." LSEM June 19, 2013 Letter, page 5. Commentaries written by authors not affiliated with LSC and published by entities other than LSC do not provide binding legal interpretations regarding LSC's regulations. Moreover, such commentaries could not override the broad language of the statutes, legislative history, regulations and judicial guidance quoted above. Further, the articles the recipient cites do not endorse advocacy pieces, such as the Article. For example, one example typical of the literature cited by the recipient states:

> You may also publish newsletters and other written materials which report the content or status of pending or proposed legislation or regulations, explain the meaning of such legislation with regard to the rights and responsibilities of low-income clients and explain how such legislation would affect legal representation.

Alan W. Houseman, Short Primer on Policy Advocacy, CLASP, Sept. 2007, at 3. As explained above, the Article goes beyond reporting about the content or status of legislation or policy, or explaining effects of policy, or advising clients about their advocacy rights—which are permitted—by urging recipients to advocate for a specific outcome of legislation or policy—which is not permitted.

e. Argument 5: Application of the regulations to the Article would violate the First Amendment to the Constitution

The recipient argues that application of the regulations to the Article would violate the First Amendment to the Constitution and would impermissibly restrict the expression of opinions. LSEM June 19, 2013 Letter, page 6. This is incorrect. It is well settled that the LSC statutory and regulatory restrictions—including the attempts-to-influence restriction—are constitutional on their face. *Legal Aid Services of Oregon v. Legal Services Corp.*, 608 F.3d 1084, 1094, 1097 (9th Cir. 2010); *Brooklyn Legal Services Corp. v. Legal Services Corp.*, 462 F.3d 219, 223, 233 (2nd Cir. 2006), *cert. denied*, 552 U.S. 810 (2007); *Velazquez v. Legal Services Corp.*,

164 F.3d 757, 767 (2d Cir. 1999), *aff'd*, 531 U.S. 533 (2001); *Legal Aid Society of Hawaii v. Legal Services Corp.,* 145 F.3d 1017, 1021, 1024 (9th Cir.), *cert. denied* 525 U.S. 1015 (1998) ("*LASH*") (rejecting facial challenge).

The argument that the attempt-to-influence restrictions constitute an unconstitutional discrimination against viewpoint expression has been rejected. *Velazquez*, 164 F.3d at 768. Considering each of the categories of government decision-making that recipients are prohibited from attempting to influence, the Second Circuit in *Velazquez* found that, because the legislative restriction applies to efforts to promote the passage *or* defeat of legislation, it applies regardless of viewpoint. *Id.* Regarding the prohibition on participation in agency rulemaking, the court noted that there was "nothing in this language that burdens one viewpoint more than another; the restriction permits grantees to participate in neither side of a rule changing adjudicatory proceeding." *Id.* The executive branch provision, according to the court, "define[s] a limitation on program content, without favoring policy continuity over change or otherwise discriminating against any viewpoint." *Id.*

In reasoning that is fully applicable to the question considered here, the cases upholding the attempt-to-influence restrictions rely on LSC's adoption of additional regulations allowing the funding and support of restricted activities through separate and independent entities, so long as LSC funds are not used for such support. *Velazquez*, 164 F.3d at 767; *LASH*, 145 F.3d at 1024-25. These regulations, known as "program integrity" requirements, are codified at 45 C.F.R. § 1610.8, and were based on regulations approved by the Supreme Court in *Rust v. Sullivan*, 500 U.S. 173 (1991).

In *Rust*, the Court stated that "when the Government appropriates public funds to establish a program, it is entitled to define the limits of that program," *id.*, at 194, and that it would not violate the First Amendment to require the recipients of public funding "to conduct [restricted] activities through programs that are separate and independent from the [funded] project." *Id.*, at 196.

In *LASH*, the Ninth Circuit held that the LSC attempt-to-influence restrictions did not violate the First Amendment because the program integrity regulation was "nearly identical to the regulations upheld in *Rust*," adding

> as in *Rust*, the LSC regulations do not force a recipient to give up prohibited activities . . . If an organization wishes to engage in prohibited activities, it simply is required to conduct those activities through entities that are separate and independent from the organization that receives LSC funds.

LASH, 145 F.3d at 1025.

The Second Circuit in *Velazquez* reached the same conclusion, noting that "Congress may burden the First Amendment rights of recipients of government benefits if the recipients are left with adequate alternative channels for protected expression." *Velazquez*, 164 F.3d at 768.

Observing that the Supreme Court has upheld cases when there are "adequate alternative avenues for expression through affiliates," the Second Circuit held that "*Rust* is consistent with these cases, and tends to support their suggestion that the program we consider here can withstand at least a facial challenge *despite its broad restrictions on the speech of LSC grantees*." *Id*., at 767 (emphasis added).

The Supreme Court's decision in *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001), cited by the recipient, is not on point. *Velazquez* concerned LSC's restrictions on lawsuits challenging welfare restrictions—not the lobbying restrictions. The decision was based largely on the Court's conclusion that the welfare restriction deprived clients of legal advocacy in the context of lawsuits, that such deprivation was not remedied by availability of other representation, and that, as a result, the welfare restrictions compromised the judicial function. *Id*. The LSC lobbying and policy advocacy restrictions do not affect the availability of legal counsel or the integrity of the judicial function. The fact that the LSC lobbying and advocacy restrictions have been repeatedly upheld as constitutional *after* the Supreme Court's *Velazquez* decision supports the conclusion that the Supreme Court's ruling did not invalidate those restrictions.

f. Argument 6: The Article made clear that LSC-funded programs must comply with LSC regulations

The recipient argues that the Article "made clear that Legal Services programs must comply with LSC regulations when advocating for their low income clients or engaging in education activities under the Affordable Care Act." LSEM June 19, 2013 Letter, page 6. This argument conflates two separate and different questions: whether the activities the Article recommends that legal services programs undertake in the *future* would be permissible under the LSC restrictions—a question *not* considered here—and whether the preparation of the Article itself was permissible under the LSC restrictions—the question presented here. As explained previously, the preparation of the Article was not permissible under the restrictions against attempts to influence government policy.

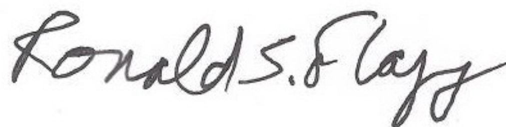
This conclusion does not depend on whether the Article cautioned LSC grantees about potential future compliance with LSC regulations in advocating on the public policy matter. To conclude otherwise would permit a recipient of LSC funding to prepare an article during business hours directed explicitly and solely to organizations *not* receiving funding from LSC, and advocating the passage or defeat of legislation or enactment or rescission of an executive order. Such an article would clearly violate the prohibition in the LSC Act that LSC "insure that no funds made available to recipients by the Corporation shall be used at any time, *directly or indirectly*, to influence the issuance, amendment, or revocation of any executive order or similar promulgation by any Federal, State for local agency, or to undertake to influence the passage or defeat of any legislation by the Congress of the United States, or by any State or local legislative bodies. . . ." 42 U.S.C. § 2996(f)(a)(5)(emphasis added). As this example demonstrates, the recipient's interpretation would effectively permit a recipient to engage in otherwise prohibited advocacy by simply referencing the fact that restrictions on LSC grantees exist and/or directing such advocacy solely at organizations not receiving LSC funding.

The recipient's reference to the cautionary language in the Article leads us to one final observation: the Article understates the scope of the LSC restrictions in several key respects. The "attempt-to-influence" provisions, which contain the broadest of the prohibitions, are not mentioned at all in the Article. Nor is there any mention of the LSC rules with respect to training or organizing. This is a significant omission in view of the collaborative activity with other organizations the Article recommends. The Article states that "[a]ll of what has been described [in the article] is permissible under Legal Services Corporation regulations." Article, page 7. This statement suggests that the all of the broad range of activity recommended in the article would invariably comply with the restrictions, when in fact compliance would depend on an assessment of what a recipient actually does. The Article's discussion could thus lead recipients to engage in prohibited activity under the misimpression that LSC restrictions impose few if any limits on published communications related to public policymaking.

Conclusion

The Article (1) identifies specific legislative or executive actions under active consideration by legislatures and governors (pursuant to the Medicaid expansion provision of the ACA); (2) advocates a position on the outcome of decisions on the expansion; and (3) proposes a series of actions for legal services programs and legal services lawyers to achieve the outcome of ensuring passage of the expansion. In view of the language of the LSC Act, the appropriations legislation and the attempt-to-influence regulations, and the judicial statements underscoring the breadth of these restrictions, we conclude that the Article constitutes an impermissible attempt to influence state law-making and/or executive action.

In addition, we believe the Article describes the LSC restrictions incompletely and imprecisely, and in so doing understates their breadth. In response, LSC issued Program Letter 13-5 on December 3, 2013, which described more completely the restrictions and exceptions in order to address any misunderstandings created by the article.



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MIE JOURNAL

MANAGEMENT INNOVATION EXCELLENCE FOR LEGAL AID

VOLUME XXVI NO. 4 • WINTER 2012

From the *Journal* Committee 2

Articles

Medicaid Expansion of the Affordable Care Act and the Supreme Court's Decision: Will Legal Services Programs Rise to the Challenge? 3
By Joel Ferber, Director of Advocacy, Legal Services of Eastern Missouri

The Rewarding Experience of Legal Aid 9
By The Honorable Matthew F. Cooper, Justice of the Supreme Court, New York County

Features

Crossword Puzzle: Sunday Mornin' Comin' Down 11

Book Review: So Rich, So Poor: Why It's So Hard to End Poverty in America 12
By Peter Edelman. Reviewed by Patrick McIntyre

SPECIAL FEATURE: Beyond Boarding Up the Windows: Preparing for and Recovering from Natural Disasters

Not Springsteen's "Sandy" — Lessons from the Great 2012 New Jersey and New York Surge and Blowdown 14
By Melville D. Miller, Jr., President and General Counsel, Legal Services of New Jersey

Destruction in Joplin 17
By Janice Franklin, Managing Attorney, Legal Services of Western Missouri

In the Time of Malhado 20
By Paul Furrh, Chief Executive Officer, Lone Star Legal Aid

The Role of the Legal Services Corporation in Disaster Preparedness and Response: From Katrina to Sandy 24
By John Eidelman, Senior Program Counsel, Office of Program Performance, LSC

A Lawyerly Response When Disaster Strikes: Lessons Learned from the Legal Community's Response to Victims of Katrina 29
By Patricia Mullahy Fugere, Executive Director, Washington Legal Clinic for the Homeless

Lessons Learned from Tropical Storm Irene 32
By Margaret Frye, Staff Attorney, Legal Services Law Line of Vermont, and Jessica Radbord, Staff Attorney, Vermont Legal Aid

Tackling the Task of Disaster Planning 35
By Elizabeth Leman, AmeriCorps VISTA, Legal Services National Technology Assistance Project, Montana Legal Services Association

Online Disaster Preparation and Recovery Resources 39
By William Jones, Technology, Information and Content Coordinator, ABA Center for Pro Bono

The Cloud and Disaster Recovery 42
By David Bonebrake, Program Counsel, Office of Program Performance, LSC

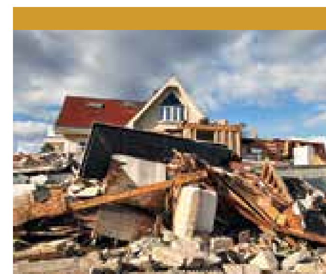
A Crisis May Present an Opportunity to Strengthen Your Program 43
By Mark Moreau, Executive Director, and Timothy McEvoy, Staff Attorney, Southeast Louisiana Legal Services

Steps to Disaster Planning for Legal Services Providers 48
By State Bar of California

Worth a Look! 52

New York's Online Disaster and Recovery Resources 54
By Liz Keith, LawHelp Program Manager, Pro Bono Net

The Back Page 55
By Dave Pantos, Executive Director, Legal Aid of Nebraska



SPECIAL FEATURE: Beyond Boarding Up the Windows: Preparing for and Recovering from Natural Disasters

Medicaid Expansion of the Affordable Care Act and the Supreme Court's Decision: Will Legal Services Programs Rise to the Challenge?

By Joel Ferber, Director of Advocacy[1]
Legal Services of Eastern Missouri

Introduction

As readers of the MIE *Journal* know, on June 28, 2012, the Supreme Court upheld the constitutionality of the Affordable Care Act (ACA), including the so-called "individual mandate" to purchase health insurance. Thus, many beneficial components of the ACA such as health insurance exchanges and premium tax credits, insurance market reforms, closing the Medicare donut hole, and allowing children to remain on their parents' health insurance until the age of twenty-six were also upheld.[2] The Supreme Court's decision also means that numerous important provisions of the ACA affecting low-income clients served by legal services programs were upheld and can continue to go forward.

However, the Supreme Court handed legal services programs and other advocates the advocacy challenge of a lifetime by effectively making the Medicaid provisions optional for the states. This aspect of the Court's decision places the lives and health of many thousands of low-income individuals (*i.e.*, legal services clients) in jeopardy by threatening what is arguably much more of a central component of the ACA than the individual mandate — the Medicaid expansion provision that would extend coverage to another 17 million low-income individuals. Each state will now have to decide whether to implement this critical provision of the ACA, and it will be up to policymakers and advocates in each state to determine if this critical benefit of the ACA — health security for low-income Americans — is realized. This article discusses the role that legal services programs must play in that decision-making process.

The Supreme Court's Decision and Medicaid

While the Supreme Court upheld the controversial "individual mandate" and the constitutionality of the Affordable Care Act, it also did what no district or appellate court had done — finding that the ACA's provision allowing the federal government to remove all federal Medicaid funding for states that do not expand coverage to 133% of the federal poverty level was unconstitutional, even though the *expansion itself* is constitutional.[3] The Court treated the ACA's expansion of the Medicaid program as if it were a *new* program and decided the federal government could not condition funds for the existing Medicaid program on participation in the "new program" created by the ACA.[4] This ruling did not technically make the Medicaid expansion an "optional" program for states (*e.g.*, it is still listed as a mandatory provision of the Medicaid Act), but this decision will have the same effect by stripping the Secretary of Health and Human Services (HHS) of meaningful enforcement authority to require states to implement the ACA's mandatory expansion. Such action is very significant since *more than half* of the uninsured individuals projected to receive coverage under the ACA would receive such coverage only pursuant to the Medicaid expansion. The remaining uninsured would largely be covered through the premium tax credits available to individuals purchasing coverage through the newly created health insurance exchange (Exchange).

The premium tax credits for Exchange coverage — untouched by the Supreme Court's decision — are generally available only to people with incomes between 100% and 400 % of the federal poverty level.[5] Therefore, of those eligible for the Medicaid expansion, only those between 100% and 133% of the federal poverty level would be covered by the premium credits offered through the Exchange if a State chooses not to

Medicaid Expansion of the Affordable Care Act
Continued from page 3

implement the expansion. Thus, without the Medicaid expansion, some of the lowest income Americans — the clients of legal services programs — will have no coverage at all, while people with more moderate incomes will have coverage through the Exchange. Even people with coverage through the Exchange could well cycle *on and off of coverage* when their income fluctuates and have no expanded Medicaid program though which to continue health care coverage. This scenario is highly problematic in terms of ensuring any continuity of coverage and access to care for low income working Americans.[6]

The possibility that the ACA survives but that the lowest income population most important to legal services programs would continue to go without any health insurance would be a devastating result for our clients and one that should not be allowed to happen. The sheer magnitude of this negative outcome demands that legal services programs take on the challenge of ensuring Medicaid expansion in their states.

It is also important to note that the Court only struck down the provision of the ACA that would allow HHS to terminate all Medicaid funding of a state that did not adopt the expansion. It did **not** invalidate any other Medicaid provision of the ACA, including the provisions that authorize 100% federal funding for such expansion during the first three years (gradually is lowered to 90% by 2020), in contrast to the current Medicaid program in which funds are matched at a 57% rate on average.[7] The Court's decision left intact other critical Medicaid provisions such as the "maintenance of effort" requirement, streamlined eligibility and enrollment, new tests for determining income eligibility, new opportunities for home and community based services, and special programs for the dual eligibles. The continuing legal force of these Medicaid provisions of the ACA creates additional advocacy opportunities for legal services programs.

> Legal services lawyers have sophisticated knowledge of public programs, including Medicaid, and therefore, are well-positioned to provide clear and timely policy analysis regarding the Medicaid expansion and other Medicaid provisions of the ACA.

The Advocacy Challenge

In light of the Supreme Court's decision, the challenge for advocates should be obvious. One cannot assume that state policymakers will simply decide to cover low-income individuals because it is good for them or good for the state. There is serious political pressure on many governors and other legislators *not* to implement this expansion of coverage. For one, the "politics" of implementing a key provision of "ObamaCare" will cause (and has already caused) some politicians to react negatively to implementing the Medicaid expansion. Second, some state policymakers are legitimately concerned about the impact of the expansion on their state budgets. Many of them have been cutting services and programs over the last several years and may be leery of putting even more state funds into Medicaid. The many advantages — including the fiscal advantages — of doing so may not be readily apparent to state policymakers. It is going to take significant research, analysis, education, coalition building, and political pressure to make the Medicaid expansion a reality in many states. For these reasons, the need for strong advocacy in every state is critical.

Role of Legal Services Lawyers

While the need for advocacy should be clear, the need for advocacy by legal services lawyers may not seem quite as obvious. After all, Legal Services Corporation (LSC)-funded attorneys cannot lobby or do grass roots or political work like other groups. Moreover, programs are facing significant budget cuts and are overwhelmed with their caseloads. Nevertheless, there are many reasons why legal services involvement is critical.

For one, the ACA's Medicaid expansion has the potential for significant impact — dwarfing anything that can be accomplished with any one case or group of cases. The continuing importance of broad-based advocacy in legal services programs is well-documented and has been covered extensively in the MIE *Journal*.[8] Working on implementation of the Medicaid expansion is a seminal example of such broad-based advocacy. And unlike the filing of class actions and other restricted areas, most of the work that is needed from legal services lawyers can be performed under LSC regulations.

Legal services lawyers have sophisticated knowledge of public programs, including Medicaid, and therefore, are well-positioned to provide clear and timely policy analysis regarding the Medicaid expansion and other Medicaid provisions of the ACA. We know, better than anyone, who is affected by state decisions concerning the Medicaid program; we know whose eligibility has already been cut (*e.g.*, in previous budget cuts) and who stands to gain from the expansion. Our detailed technical knowledge of the program gives us a leg up in understanding the potential state *savings* from implementing the expansion, for example, by moving individuals from current coverage groups that provide a lower federal match to the new expansion group that is funded at a much higher match rate.[9]

We also are well-positioned to combat misinformation about the current Medicaid program and the ACA's expansion based on our knowledge of how the program actually works and whom it benefits. It is this unique vantage point that makes legal services involvement so critical: we are connected to real people — we have the clients who stand to benefit so greatly from the Medicaid expansion — something most other advocacy and provider groups do not have. Having actual clients to put a human face on the benefits of the expansion creates instant credibility. Our knowledge of Medicaid and other public programs and our direct client experience are indispensable to the advocacy effort that will be required in every state in which the Medicaid expansion is considered and debated.

Moreover, while non-legal services advocates may be able to do some of this work (depending on the advocacy resources in a given state), one should not underestimate the credibility and the expertise that legal services lawyers can bring to the table. Because we are *lawyers*, we have the essential expertise to analyze the impact of the Supreme Court's decision, which is the basis for the new state flexibility on the Medicaid expansion. We not only understand the legal underpinnings of the basic choice that is before states (whether or not to implement the expansion) but also the many nuances of that decision and the potential disputed areas resulting from that decision. Legal expertise is important to any discussion of the ramifications of a state's decisions around Medicaid and the ACA. Our legal background gives us credibility that spills over into other areas —even areas that would not necessarily require legal expertise. Moreover, we bring skills and expertise that many non-legal advocates may not possess. We think analytically; we can write clear and concise analyses of complex issues of law and policy; we can craft more comprehensive and detailed analyses to the extent needed. We also have sophisticated advocacy skills that can help us navigate the difficult terrain of the various interest groups affected by the ACA's Medicaid expansion. We can make smart and well-informed judgments about the type of advocacy needed at the appropriate time and can help other advocates come to the right decisions. And we can answer technical and legal questions that will come up at various points in efforts to implement the expansion and help other advocates and stakeholders better understand the choices before them.

Another reason for legal services advocates to play a key role is that our clients will be so dramatically affected by state decision-making on the expansion. We

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Medicaid Expansion of the Affordable Care Act
Continued from page 5

are the ones who will see the clients falling through the cracks between the Exchange and Medicaid (if a state expands) or between the Exchange and no coverage at all (if the state does not expand). If a state does expand, we are the ones who will need to weigh in about the various ways of setting up the benefits package for the expansion group, the exceptions from more narrow "benchmark" coverage, and the processes for ensuring that people with disabilities and others get the benefits they need. It is far better for us to be at the table now rather than jump in later when the health reform train has already left the station.

The ACA also included a host of other provisions that affect Medicaid and low-income clients, survived the Supreme Court's Medicaid decision, and invite opportunities for legal services advocacy. These provisions include new options to preserve home and community based services, new initiatives for dual eligibles (those eligible for both Medicare and Medicaid), more streamlined Medicaid eligibility and enrollment mechanisms, and potentially different benefits packages for newly eligible adults. Legal services lawyers must be at the table for decisions on these important issues as well. Strong legal services advocacy is required even in states whose governors or legislative leaders have already committed to implementing the expansion. In an environment that makes it more difficult to litigate in order to maintain and improve services for their clients, the ACA provides many Medicaid options that can achieve substantially more benefits for our clients than we could win through any lawsuit.

In particular, legal services attorneys can pay a critical role in discussions that modify the health care delivery system for dual eligibles or that modify the way that long term care is provided to seniors and people with disabilities. Legal services advocates need to weigh in with their states and CMS through comments on the structure of "dual eligible" demonstration projects regarding such issues as notice and appeal rights and automatic assignments to new managed care plans for duals and on other protections needed to ensure that planned savings do not result in denials of care. Legal services attorneys should also be at the table when their states design new applications, notices and appeal rights for Medicaid, advanced premium tax credits under the Exchange, and systems for evaluating eligibility for Medicaid and other insurance affordability programs. We also want to be at the table in influencing the adoption and design of new state initiatives to design home and community based services options as opposed to nursing home care.

What We Must Do

Policy Analysis: Legal services lawyers can write timely and accurate policy analyses, papers, reports, and/or fact sheets that describe the costs and benefits of the expansion.[10] We can engage in fiscal analysis regarding the impact of the expansion and the significant federal funding that will come into each state. We can also analyze financial information and state cost estimates to ensure that they accurately reflect the impact of the Medicaid expansion and do not overstate the costs of the expansion or understate the positive fiscal impact. And we can explain how the ACA's Medicaid expansion will have a positive financial impact on state budgets by funding services that are now paid solely with state funds.[11]

Community education: Legal services programs can educate service providers, advocates, and members of the community about the expansion and what is at stake in the decision of whether to implement the expansion. We can give public presentations about the Supreme Court's decision and what it means for residents of our states, including low-income individuals, but also what it means for the state budget, the social safety net, and the state and local economies. It is important for us to communicate the positive health impact of expanding Medicaid for a state's low-income uninsured residents.[12] We can also explain the ramifications of failing to implement the ACA's Medicaid expansion when other mandatory ACA provisions that cut Medicaid spending for safety net providers will still go forward, unaffected by the Supreme Court's decision.

Provide technical assistance and collaboration: Legal services programs can work with other organizations to provide technical assistance on the expansion. Other advocacy groups and provider organizations may not be attuned to the impact of the Supreme Court's decision on Medicaid and the ramifications for clients, "safety net providers," or the State budget. There will clearly be an array of interest groups affected by state decisions whether to expand or not, including hospitals who will face dramatic cuts to their budgets without the expansion, disability rights groups, and disease-specific organizations (like the Alzheimer's Association or the Cancer Society) whose constituents will greatly

benefit from expanded health coverage for adults. We need to be collaborating with these and other groups who will have such an important stake in the outcome of state policy debates.

Meet with state policymakers on implementation issues: As indicated earlier, there are many technical aspects of the ACA's Medicaid provisions that will affect low-income clients, including how states implement the "no wrong door" policies, notices and streamlined applications for eligibility for Medicaid and other insurance affordability programs (like the premium tax credits available for participation in the Exchange), and the benefits package for the expansion group. We need to be at the table for discussions on these critical "nuts and bolts" issues.

Legal services lawyers have unique skills and experience to perform these important functions that will be so critical to states' decisions concerning the ACA's Medicaid expansion.

What about the LSC Restrictions?

All of what has been described above is permissible under Legal Services Corporation regulations.[13] None of it involves lobbying, legislative advocacy, or rulemaking.[14] If those avenues become necessary, there are certainly *permissible* ways to do such advocacy within LSC regulations, but often we will not want or need to be the public messenger on key issues when it comes to actual state legislation. It will often be more powerful advocacy to let others like hospitals, safety net providers, faith-based groups, or organizations like the American Cancer Society be the public face regarding a particular issue or advocacy effort. It is not so critical to be the ones to *write the legislation* that expands Medicaid in a particular state (though that also can be done within LSC guidelines if necessary), as it is for legal services lawyers to do some of the heavy lifting in explaining to other stakeholders and advocates the consequences of implementing or not implementing the Medicaid expansion.[15] Explaining the law is an important aspect of what LSC attorneys can do, as well as analyzing the policy environment and identifying the key decision-makers and stakeholders with an interest in the Medicaid expansion.[16]

The community education, policy analysis, and technical assistance described herein are all permissible under LSC rules. Those rules should not be a barrier to advocacy in this area. The role of executive directors in supporting and encouraging this work is critical here. In particular, it is crucial not to let unfounded fear of the restrictions get in the way of work that is appropriate under the regulations. While a full discussion of the LSC rules is beyond the scope of this article, Legal Services programs may consult with the National Legal Aid and Defender Association or the Center for Law and Social Policy for more information about LSC requirements and policy advocacy.[17]

Technical Support

Legal services lawyers not only have the ability and the savvy to play a critical role in this important endeavor, but they have the supportive resources to do it. The National Health Law Program (NHeLP) — the nation's leading public interest health law firm and a former legal services back-up center — is providing extensive legal and policy analysis, resources, and support for advocates in all fifty states who want to engage in this endeavor, including a special Medicaid Expansion Toolbox on its webpage with links to all of the important national and state resources on the issue and series of conference calls on ACA Medicaid issues.[18] These resources will make it much easier for legal services advocates to engage in these issues at the state level. Moreover, NHeLP has assigned ten lawyers (five states each plus Washington, D.C.) to work with state advocates. As of this writing, they are in the process of contacting legal services, disability and health lawyers in each state to offer assistance with developing educational and policy information and to provide ongoing help with legal and policy issues as they arise. Other national groups such as Families USA and the Center on Budget and Policy Priorities also provide helpful resources and support. This backup support makes it possible for legal services lawyers to remain ahead of the curve and play a leading role in Medicaid discussions within their states.

Management Issues

Legal services programs should treat the Medicaid expansion like any other systemic advocacy project,

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Medicaid Expansion of the Affordable Care Act
Continued from page 7

such as major litigation or a significant piece of legislative or administrative advocacy. Decisions about how best to allocate resources to this effort will naturally be specific to each program. Programs may want to pull together teams of advocates or create task forces to work on the expansion. It may well be beneficial to work across programs in states that have multiple legal services programs. And staff who work on this project certainly need not be limited to those who regularly work on Medicaid or public benefits. The program-specific details of how to allocate resources for this work should not be an obstacle to undertaking this important effort. The key point for executive directors and advocacy directors to recognize is that the Supreme Court's decision has important implications for how they manage their programs to enable clients to get the full benefit of health reform.

Conclusion

Health reform is likely the most significant issue affecting legal services clients to come along in decades. The Supreme Court's decision puts in jeopardy the components of the ACA that are most important for low-income Americans. We cannot afford to let our clients be left behind as implementation of the ACA moves forward. Legal services lawyers must rise to meet this challenge as they always have. And legal services management, including executive directors, and litigation/advocacy directors, must support these efforts.

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2 *National Federation of Independent Businesses, et al. v. Sebelius, et al.*, 132 S.Ct. 2566 (2012).

3 Patient Protection and Affordable Care Act, 111 P.L. 148, § 2001(a) (hereinafter ACA). The law actually expands coverage to individuals at or below 138% of the poverty level given the 5% income disregard in the law. Health Care and Education Reconciliation Act, 111 P.L. 152, §1004(e).

4 The court reasoned that Medicaid was initially designed to provide health care to people who are blind, disabled or elderly, or families with dependent children, and that the ACA would transform the program into a universal insurance program for all non-elderly Americans. The Court viewed this as a change in kind, rather than a mere change in degree. *National Federation of Independent Business,* 132 S.Ct. at 2605-06.

5 ACA, § 1401(c)(1). Certain *legal* immigrants with incomes below the poverty level who are not eligible for Medicaid can receive premium credits.

6 See Mathew Buettgens et al, "Churning under the ACA and State Policy Options for Mitigation," Urban Institute, June 2012; Benjamin D. Sommers and Sara Rosenbaum, "Issues In Health Reform: How Changes In Eligibility May Move Millions Back And Forth Between Medicaid And Insurance Exchanges," *Health Affairs,* February 2011 30(2) 228-36.

7 January Angeles and Matt Broaddus, "Federal Government Will Pick Up Nearly All Costs of Health Reform's Medicaid Expansion," Center on Budget and Policy Priorities, March 28, 2012, at 2 (available at: *http://www.cbpp.org/files/4-20-10health2.pdf*).

8 For additional information on such advocacy in Legal Services Corporation-funded programs, see Joel Ferber, "Doing Broad-Based Advocacy in a Legal Services Program," Management Information Exchange *Journal*, Spring 2011; Hannah Lieberman, "Building Successful Broad-Based Advocacy: The 'Top 16' Most Important Factors for Program Leaders," Management Information Exchange *Journal*, Spring 2011.

9 See Stan Dorn, Considerations in Assessing State-Specific Fiscal Effects of the ACA's Medicaid Expansion, Urban Institute, August 2012 (revised version 8/20/12), for further discussion of this issue.

10 Among the areas for timely and well-reasoned policy analysis are the financial impact on a state's economy of bringing hundreds of millions of federal funds into a state, with very little state expenditure, and demonstrating how these federal funds can replace certain state-only expenditures, thereby saving the state money; the positive health impact that Medicaid coverage will upon the health of those individuals who gain coverage under the expansion; the impact of the uninsured on premiums; the racial and ethnic disparities that will be addressed by the expansion; the interaction between the expansion and other provisions of the Act, such as severe cuts to states' federal funding for uncompensated care required under the ACA; opportunities for replacing current Medicaid spending with spending that is funded at a higher match rate if the expansion is adopted; and how decisions on Medicaid benefits packages could produce state savings under the Medicaid expansion.

11 The Tennessee Justice Center (TJC) has written and circulated a number of well-written and concise fact sheets on the ramifications of the state's decision regarding whether to adopt the Medicaid expansion. While TJC is a non-LSC funded program, such fact

Continued on page 13

Medicaid Expansion of the Affordable Care Act
Continued from page 8

sheets could just as easily be written by an LSC-funded program.

12 For more information about the health impact of states decisions regarding the Medicaid expansion, see Benjamin T. Sommers, M.D. Ph.D, et al, "Mortality and Access to Care Among Adults After State Medicaid Expansions," *New England Journal of Medicine*, July 25, 2012.; Amy Finkelstein, Sarah Taubman, et al, "The Oregon Health Experiment: Evidence from the First Year," The National Bureau of Health Research, undated (available at: *http://www.nber.org/papers/w17190.pdf?new_window=1*).

13 If a type of advocacy is not specifically prohibited, it is allowed, and does not need a special exception (for example, working to change state practices and procedures through means other than legislation or rulemaking), not to mention the activities for which there are specific exceptions in the regulations. For further discussion of permissible activities under the LSC restrictions, see Alan W Houseman, Policy Advocacy, Center for Law and Social Policy, July 2001; Alan W Houseman and Linda E. Perle, CLASP Guide to Part 1612: The Regulation on Lobbying and Other Activities, November 12, 1997.

14 Legal Services Corporation-funded programs may not engage in "Grassroots lobbying" which means making a "direct suggestion" to the public to contact public officials regarding legislation, rulemaking, executive decision or referendum, or participation in demonstrations, or campaigns. 45 C.F.R. § 1612.4. However, such lobbying does not include "communications which are limited solely to reporting on the content or status or explaining pending or proposed legislation or regulations." We can also advise clients, community groups, and others about pending or proposed legislation and analyze and explain proposed changes and their effect on our clients. 45 C.F.R. §§ 1612.2, 1612.5.

15 LSC-funded attorneys can respond to written requests for assistance on legislative matters, including testifying on proposed legislation or drafting legislation using non-LSC funds pursuant to 45 C.F.R. § 1612.6(a)(1) and (2). Such requests may not be solicited by the LSC-funded program. 45 C.F.R. § 1612.6(e).

16 It should be noted that LSC attorneys can certainly play a significant and helpful role in the implementation of many other aspects of the ACA such as the development of health insurance exchanges, essential benefits, and private insurance reforms, but in an environment with limited resources, the Medicaid expansion and related Medicaid issues ought to be priority number one.

17 LSC programs may consult with Chuck Greenfield, Chief Counsel for Civil Programs at the National Legal

Continued on p. 28

MEDICAID EXPANSION OF THE AFFORDABLE CARE ACT
Continued from page 13

Aid and Defender Association, *c.greenfield@nlada.org*, 202-452-0620 x238, or Alan Houseman, Executive Director, Center for Law and Social Policy, *Ahouse@clasp.org*, 202-906-8001.

18 NHeLP's Medicaid Expansion Toolbox can be found at *www.healthlaw.org*. For a good list of the policy arguments for implementing the Medicaid expansion, see Jane Perkins, "50 Reasons Medicaid Expansion is Good for Your State," National Health Law Program, August 2, 2012 (available at: *http://www.healthlaw.org/images/stories/2012_08_02_50_reasons.pdf*).