

Colorado Legal Services

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Board of Directors
c/o Mattie Cohan, Senior Assistant General Counsel
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Legal Services Corporation
3333 K Street, N.W.
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VIA email: mcohan@lsc.gov

Re: Comments on Proposed Revisions to
Rules 45 CFR, Part 1606, 1618 and 1623
(Additional Sanctions)

Dear LSC Board of Directors:

Colorado Legal Services submits the following comments on the Proposed Revisions to Rules 1606, 1618 and 1623 providing for Additional Sanctions published in the Federal Register on January 31, 2012.

Introduction and No Documented Need. The proposed revisions to 45 CFR Part 1606, 1618 and 1623 raise a number of issues and concerns. Each of these issues and concerns will be addressed in these comments. Possibly of even greater concern, however, is a lack of clear examples in the Supplementary Information as to the nature of compliance issues that the revisions to the rules are intended to address. Except for a program's failure to provide documents to LSC, for which it is asserted that a 30-day suspension of funding may be inadequate, there are no specific instances in which current sanctions have not been adequate. Identification of the specific grantee would not be appropriate, but providing examples of the nature of the compliance issue requiring Additional Sanctions not currently available to LSC would inform the consideration of the proposed revisions. Greater clarity is needed as to the type of non-compliance or violation of rules or regulations or other requirements that might warrant such Additional Sanctions.

There are a number of assertions in the Supplementary Information that, though logical, have not been fully tested, utilized or documented. It is asserted, for example, that termination of funding is a burdensome and overly punitive process. While that may be correct, LSC has not initiated such a termination proceeding in a long, long time. This may be a legitimate concern



with the process and the result, but there is no substantiation for either assertion. There is no documented need for the Additional Sanctions.

Many programs and Executive Directors have repeatedly requested that Legal Services Corporation staff initiate proactive training and efforts to increase programs' regulatory compliance. It has been suggested, for example, that monthly or periodic webinars for Executive Directors and program staff be offered on issues of concern identified by LSC, in compliance visits, program performance visits, and Office of the Inspector General visits. Despite these requests and overtures, there has been no systematic effort to increase compliance through proactive efforts by LSC to surface concerns, offering training and, when possible, preventing any such regulatory or compliance issues by programs. Before moving to Additional Sanctions, LSC should undertake efforts to prevent and appropriately remedy regulatory issues before adding to its arsenal of more punitive and potentially harmful and destructive sanctions.

Severe Penalties. The proposed Additional Sanctions, including a penalty of up to 5% of an LSC grantee's funding, and up to a 90-day suspension of LSC funding, are much more severe and onerous than implied in the Supplementary Information. For example, were Colorado Legal Services to have suffered a 5% reduction in LSC funding last year, it would have equaled approximately \$200,000. Even this year, with significantly less LSC funding, a 5% penalty would exceed \$160,000. This would translate into reduced staff that would necessarily adversely impact the program beyond the time that a program would require to come in to compliance and would severely reduce the service provided to clients.

A 90-day suspension of funding would cripple a program such as Colorado Legal Services. Many of the grants and contracts that support the work of Colorado Legal Services pay on a quarterly fee for service or reimbursement basis. CLS is able to enter in to such contracts and accept such grants only because of its steady funding from LSC. The suspension of that funding for 90 days would impose huge cash flow problems that would require significant and almost immediate reductions in staff, imposition of extensive furloughs and a very great disruption of program services. At one time, bank loans to a program or a line of credit might have sustained it for 90 days, but given the current financial climate, such a loan or line of credit are far less available and are not likely to be made.

Current Tools are Adequate. The Legal Services Corporation currently has and utilizes a wide variety of mechanisms to secure program attention and to ensure regulatory compliance. The most notable current remedies include decisions not to refund a program during the competition process (45 CFR Part 1634), debarment of programs and vendors (45 CFR Part 1606.4), termination of funding including reductions in funding of more than 5%, suspension of funding of up to 30 days (45 CFR Part 1623), month to month or other short term funding of programs which has often been utilized by LSC, questioned costs and special grant conditions and required corrective actions. LSC has ample tools available to it currently to meet its

statutory and regulatory responsibilities. There are few situations for which a 4.9% penalty would be adequate, but a 5% penalty would be excessive. Yet, the rights and protections provided to grantees would be very different. These rights should be protected, not eliminated. The proposed revisions to Parts 1606, 1618 and 1623 are unnecessary and would provide overly broad and ambiguous standards for the imposition of such sanctions, and are woefully deficient in the due process protections provided to grantees when such sanctions are contemplated and imposed by LSC.

The real victims of such a penalty or suspension are not the grantees but the clients that the programs would be unable to serve. This problem is compounded by a lack of adequate standards for the imposition of the sanctions, a lack of due process protections, and by the ability of the Corporation to redirect the funding withheld from the program to other Corporation functions other than the direct delivery of legal services to those in need.

Inadequate Standards. The Proposed Revisions provide no minimum standards for the imposition of sanctions but refer only to factors to be considered. Thus, while the proposal would require LSC to consider whether the violation was knowing and willful, it doesn't require that sanctions be imposed only when the violation is willful. The standards would require LSC, similarly, to consider the number of restrictions or requirements violated, but would not require that the violations be numerous or less frequent, but very serious. It does not give any indication of what might be considered an instance of non compliance with a "substantive statutory or regulatory restriction or requirement" rather than an instance of non compliance with a non-substantive, technical or procedural requirement. It is not clear what LSC would consider substantive rather than non-substantive. Furthermore, LSC would have to consider whether the recipient failed to take action to cure the violation when it became aware of the violation. Such a standard would subject a program with a valid disagreement with LSC over the interpretation of a regulation with a severe penalty and would necessarily simply concede, right or wrong, to LSC's interpretation. LSC has, over the years, changed its interpretation of regulations, provided further clarification and has sometimes had strong disagreements within various offices of LSC and with programs as to the meaning and interpretation of certain regulations. The Supplementary Information references LSC's concern that a grantee, having committed a serious violation, but then having rectified it without a penalty or fine, would "get away with" the violation. Given the severity of Additional Sanctions, programs would necessarily concede even erroneous or questionable interpretations of rules and regulations by LSC, rather than risk the imposition of crippling sanctions. Thus, rather than the program being able to "get away with it," under the proposed revisions LSC would now almost always "get away with it."

Lack of Due Process. The procedural protections provided in the proposed revisions are inadequate, at best. To provide only 5 days in which to ask for an informal meeting with LSC and only 10 days in which to submit additional documents, do not provide a program with a reasonable opportunity to consult with counsel and to prepare a defense, accumulate additional

documents, if necessary, and are wholly inadequate given the severity of the possible sanction. The timelines should be doubled at least. Furthermore, providing no opportunity for a meeting with the LSC President and providing only a meeting with anyone within LSC is not the model of protection that LSC would expect its grantees to advocate for and possibly litigate on behalf of low income clients faced with a reduction or termination of their economic benefits. LSC should model the rule of law, procedural protection and due process. Thus, at a very minimum, even if an objective outside fact finder and decision maker is not provided, as many federal agencies do before a fine or penalty is imposed, at least more adequate time to respond to potential sanctions and the opportunity to meet with the President of the Legal Services Corporation should be afforded to a grantee faced with serious sanctions and the disruption of program operations that would inevitably flow from such sanctions.

Retain the Character of the Funds. If such Additional Sanctions are to be allowed and the revisions to the rules made, the funds from the penalty or funds withheld, consistent with Congressional intent, if not actual mandate, should be retained to provide legal services in the service area or certainly remain in basic field funding.

Conclusions. The Supplementary Information references the GAO Report of December 2007 that noted that LSC has "limited options for sanctioning or replacing poor-performing recipients." While true, GAO did not recommend that LSC secure Additional Sanctions. It recommended that LSC provide improved grant management and oversight. To improve grant management and oversight does not require the proposed revisions to the rules.

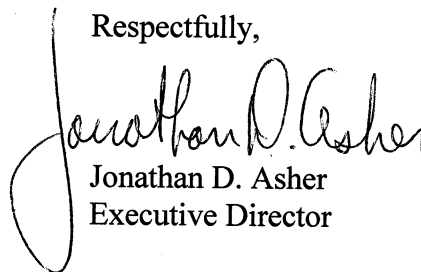
Lastly, Colorado Legal Services is profoundly concerned with the arsenal of Additional Sanctions that the current and well intended LSC Board and administration will leave behind for other possibly less responsible and well intended LSC administrations and staff. There are examples over the last almost four decades of LSC leadership who were less concerned with the professionalism and quality of its grantees than is the present LSC Board and administration. Many of us have lived through periods when the Legal Services Corporation, rather than supporting and trying to improve the work of its grantees, as well as ensuring regulatory compliance, overtly set out to undermine and unduly restrict, if not actually eliminate, the work of its grantees. Thus, while Colorado Legal Services recognizes that the current administration might well use Additional Sanctions infrequently, appropriately and responsibly, some of its predecessor LSC administrations and staff, and possibly future ones as well, may use the same Additional Sanctions more frequently, punitively and inappropriately. Before putting additional arrows in the LSC administration's and staff's quill, Colorado Legal Services most respectfully requests that the LSC Board consider the potential damage to program clients and its grantees it may inadvertently cause by putting such arrows in the hands of potentially malevolent successors. None of us should be unmindful of the unintended, but possibly devastating, effects of our current actions and decisions.

It has been asserted by some at LSC that the revision of these rules is work to be completed by LSC. The prior Board, however, did not leave this matter hanging; it determined and decided not to proceed. This initiative is not the completion of unfinished business, but is the resurrection of what had been laid to rest. Implementation of these revisions and adoption of these Additional Sanctions may be this Board's most lasting and most unfortunate legacy.

Colorado Legal Services appreciates the Legal Services Corporation's serious consideration of these comments. CLS looks forward to LSC's action, preferably in not adopting any of the proposed revisions to the current regulations, 45 CFR Part 1606, 1618 and 1626, or at least to better designed and crafted regulations which, although not needed, may enhance LSC's ability to ensure program compliance, but which also add significant substantive and procedural protections to grantees facing possible Additional Sanctions.

If you have any questions concerning these comments, or if Colorado Legal Services can be of any further assistance in the Corporation's consideration of these proposed revisions to the rules, or the Board's deliberation, please inform me at your convenience.

Respectfully,



Jonathan D. Asher
Executive Director

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