

Part 1606 showing draft further revisions for incorporating lesser reductions in funding.

Original NPRM changes are indicated in **red**.

Further NPRM proposed changes are indicated in **blue**.

§ 1606: TERMINATION, LIMITED REDUCTION IN FUNDING, AND DEBARMENT PROCEDURES; RECOMPETITION

§ 1606.1 Purpose.

The purpose of this rule is to:

- (a) Ensure that the Corporation is able to take timely action to deal with incidents of substantial noncompliance by recipients with a provision of the LSC Act, the Corporation's appropriations act or other law applicable to LSC funds, a Corporation rule, regulation, guideline or instruction, or the terms and conditions of the recipient's grant or contract with the Corporation;
- (b) Provide timely and fair due process procedures, proportional to the proposed action, when the Corporation has made a preliminary decision to terminate a recipient's LSC grant or contract, ~~or~~ to debar a recipient from receiving future LSC awards of financial assistance, or to impose a lesser reduction in funding; and
- (c) Ensure that scarce funds are provided to recipients who can provide the most effective and economical legal assistance to eligible clients.

§ 1606.2 Definitions.

For the purposes of this part:

- (a) *Debarment* means an action taken by the Corporation to exclude a recipient from receiving an additional award of financial assistance from the Corporation or from receiving additional LSC funds from another recipient of the Corporation pursuant to a subgrant, subcontract or similar agreement, for the period of time stated in the final debarment decision.
- (b) *Knowing and willful* means that the recipient had actual knowledge of the fact that its action or lack thereof constituted a violation and despite such knowledge, undertook or failed to undertake the action.
- (c) *Limited reduction in funding* means a reduction in funding of less than ~~five~~ percent of a recipient's current annual level of financial assistance imposed by the Corporation in accordance with the procedures and requirements of this part. ~~§1606.15 of this Part~~. A limited reduction in funding will affect only the recipient's current year's funding, unless the Corporation provides otherwise in the final termination decision.
- (d) *Recipient* means any grantee or contractor receiving financial assistance from the Corporation under section 1006(a)(1)(A) of the LSC Act.
- (e) (1) *Termination* means that a recipient's level of financial assistance under its grant or contract with the Corporation will be reduced in whole or in part prior to the expiration of the term of a recipient's current grant or contract. A partial termination will affect only

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the recipient's current year's funding, unless the Corporation provides otherwise in the final termination decision.

(2) A termination does not include:

(i) A reduction of funding required by law, including a reduction in or rescission of the Corporation's appropriation that is apportioned among all recipients of the same class in proportion to their current level of funding;

(ii) A reduction or deduction of LSC support for a recipient under the Corporation's fund balance regulation at 45 C.F.R. Part 1628;

(iii) A recovery of disallowed costs under the Corporation's regulation on costs standards and procedures at 45 C.F.R. Part 1630;

(iv) A withholding of funds pursuant to the Corporation's Private Attorney Involvement rule at 45 C.F.R. Part 1614; or

(v) A limited reduction of funding as defined in this ~~section~~ paragraph.

~~(v) A reduction of funding of less than 5 percent of a recipient's current annual level of financial assistance imposed by the Corporation in accordance with regulations promulgated by the Corporation. No such reduction shall be imposed except in accordance with regulations promulgated by the Corporation.~~

(f) Substantial noncompliance means either a substantial violation, as defined in this section, or a substantial failure, as defined in this part at § 1606.3(a).

(g) Violation means a violation by the recipient of a provision of the LSC Act, the Corporation's appropriations act or other law applicable to LSC funds, or a Corporation rule, regulation, guideline or instruction, or a term or condition of the recipient's grant or contract.

(h) Substantial violation means a violation that merits action under this part based on consideration of the following criteria by the Corporation:

(1) The number of restrictions or requirements violated;

(2) Whether the violation represents an instance of noncompliance with a substantive statutory or regulatory restriction or requirement, rather than an instance of noncompliance with a non-substantive technical or procedural requirement;

(3) The extent to which the violation is part of a pattern of noncompliance with LSC requirements or restrictions;

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(4) The extent to which the recipient failed to take action to cure the violation when it became aware of the violation; and

(5) Whether the violation was knowing and willful.

(i) Corporation, when used to refer to decisions by the Legal Services Corporation, means that those decisions are made by an individual at the level of an office director, deputy director, or higher.

(j) Receipt of materials shall mean that the materials were sent to the normal address for physical mail, e-mail, or fax transmission, and there is reliable secondary confirmation of delivery. For physical delivery, confirmation may be provided through tracking information from the delivery service. For other forms of delivery, confirmation may be provided through a document such as a confirmation e-mail or a fax sent from an authorized person at the recipient. Receipt of materials by the LSC recipient is sufficient for the running of applicable time periods. Proof of receipt by the Board Chair is not necessary unless delivery to the recipient itself cannot be reasonably accomplished.

(k) Days shall mean the number of actual days as determined by the rules for computing time in the Federal Rules of Civil Procedure, Rule 6, except that computation of business days shall exclude Saturdays, Sundays, and legal holidays (as defined in those rules).

§ 1606.3 Grounds for a termination or a lesser reduction in funding.

(a) A grant or contract may be terminated when:

(1) There has been a substantial violation by the recipient ~~of a provision of the LSC Act, the Corporation's appropriations act or other law applicable to LSC funds, or Corporation rule, regulation, guideline or instruction, or a term or condition of the recipient's grant or contract~~, and the violation occurred less than 5 years prior to the date the recipient receives notice of the violation pursuant to § 1606.6(a); or

(2) There has been a substantial failure by the recipient to provide high quality, economical, and effective legal assistance, as measured by generally accepted professional standards, the provisions of the LSC Act, or a rule, regulation, including 45 CFR 1634.9(a)(2), or guidance issued by the Corporation.

(b) The Corporation may impose a limited reduction of funding when the Corporation determines that there has been a substantial violation by the recipient but that termination of the recipient's grant, in whole or in part, is not warranted.

(c) A determination of whether there has been a substantial violation for the purposes of ~~paragraph (a)(1) of this section~~, **and the magnitude of any termination, in whole or in part, or any lesser reduction in funding**, will be based on consideration of the ~~following~~ criteria set forth in the definition of "substantial violation" in this part.

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~~(1) The number of restrictions or requirements violated;~~

~~(2) Whether the violation represents an instance of noncompliance with a substantive statutory or regulatory restriction or requirement, rather than an instance of noncompliance with a non-substantive technical or procedural requirement;~~

~~(3) The extent to which the violation is part of a pattern of noncompliance with LSC requirements or restrictions;~~

~~(4) The extent to which the recipient failed to take action to cure the violation when it became aware of the violation; and~~

~~(5) Whether the violation was knowing and willful.~~

§ 1606.4 Grounds for debarment.

(a) The Corporation may debar a recipient, on a showing of good cause, from receiving an additional award of financial assistance from the Corporation.

(b) As used in paragraph (a) of this section, “good cause” means:

(1) A termination of financial assistance to the recipient pursuant to part 1640 of this chapter;

(2) A termination of financial assistance in whole of the most recent grant of financial assistance;

(3) The substantial violation by the recipient of the restrictions delineated in § 1610.2 (a) and (b) of this chapter, provided that the violation occurred within 5 years prior to the receipt of the debarment notice by the recipient;

(4) Knowing entry by the recipient into:

(i) A subgrant, subcontract, or other similar agreement with an entity debarred by the Corporation during the period of debarment if so precluded by the terms of the debarment; or

(ii) An agreement for professional services with an IPA debarred by the Corporation during the period of debarment if so precluded by the terms of the debarment; or

(5) The filing of a lawsuit by a recipient, provided that the lawsuit:

(i) Was filed on behalf of the recipient as plaintiff, rather than on behalf of a client of the recipient;

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(ii) Named the Corporation, or any agency or employee of a Federal, State, or local government as a defendant;

(iii) Seeks judicial review of an action by the Corporation or such government agency that affects the recipient's status as a recipient of Federal funding, except for a lawsuit that seeks review of whether the Corporation or agency acted outside of its statutory authority or violated the recipient's constitutional rights; and

(iv) Was initiated after the effective date of this rule.

§ 1606.5 ~~Termination and debarment~~ Procedures.

(a) Before any final action is taken under this part a recipient's grant or contract may be terminated or a recipient may be debarred, the recipient will be provided notice and an opportunity to be heard as set out in this part.

(b) Prior to a preliminary determination involving a lesser reduction in funding, the Corporation shall designate either the President or another senior Corporation employee to conduct any final review that is requested pursuant to § 1606.10 of this part. The Corporation shall ensure that the person so designated has had no prior involvement in the preliminary and/or final determinations so as to meet the criterion set out in § 1606.10(d).

§ 1606.6 Preliminary determination.

(a) When the Corporation has made a preliminary determination that a recipient's grant or contract should be terminated, that a lesser reduction in funding shall be imposed, and/or that a recipient should be debarred, the Corporation ~~employee who has been designated by the President as the person to bring such actions (hereinafter referred to as the "designated employee")~~ shall issue a written notice to the recipient and the Chair~~person~~ of the recipient's governing body. The notice shall:

(1) State the grounds for the proposed action;

(2) Identify, with reasonable specificity, any facts or documents relied upon as justification for the proposed action;

(3) Inform the recipient of the proposed amount and effective date for the proposed action sanctions;

(4) Advise the recipient of its procedural rights for review of the proposed action under this part; to request:

(i) An informal conference under §1606.7; and

(ii) a hearing under §1606.8; and

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(5) Inform the recipient of its right to receive interim funding pursuant to § 1606.13; and

(6) Specify what, if any, corrective action the recipient can take to avoid the proposed action.

(b) If the recipient does not request ~~an informal conference or a hearing within the time prescribed in §1606.7(a) or §1606.8(a), review, as provided for in this part, then~~ the preliminary determination shall become final, at LSC's discretion, after the relevant time limits have expired. The Corporation shall provide the recipient with the final decision, and no further appeal or review will be available under this part.

§ 1606.7 Informal conference, review of written materials, and final determination.

(a) A recipient may submit written materials in opposition to the preliminary determination and/or a request for an informal conference as follows:

(i) for terminations or debarments, within 30 calendar days of its receipt of the preliminary determination; or the proposed decision.

(ii) for lesser reductions in funding, within 10 business days of receipt of the preliminary determination.

(b) Within 5 business days of receipt of ~~a the~~ request for a conference, the ~~Corporation designated employee~~ shall notify the recipient of the time and place the conference will be held, which shall be at the Corporation's discretion. Some or all of the participants in the conference may attend via telephone, unless the recipient requests an in-person meeting between the Corporation and at least one representative of the recipient. If the recipient requests an in-person meeting, then other participants may attend via telephone. Alternative means of participation other than the telephone are permissible at the sole discretion of LSC.

(c) ~~The designated employee shall conduct t~~The informal conference shall be conducted by the Corporation employee who issued the preliminary determination.

(d) At the informal conference, the ~~designated employee~~ Corporation and the recipient shall both have an opportunity to state their case, seek to narrow the issues, ~~and~~ explore the possibilities of settlement or compromise, and submit written materials.

(e) If an informal meeting is conducted and/or written materials are submitted by the recipient, the Corporation shall consider any written materials submitted by the recipient in opposition to the limited reduction in funding and any oral presentation or written materials submitted by the recipient at an informal meeting. Based on the written materials and/or the informal conference, the Corporation~~The designated employee~~ may modify, withdraw, or affirm the preliminary determination through a final determination in writing, ~~a copy of~~ which shall be provided to the

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recipient within ~~10-15~~ calendar days of the conclusion of the informal conference. The final determination shall conform to the requirements of § 1606.6(a).

(f) If the recipient does not request further process, as provided for in this part, then, after the relevant time limits have expired, LSC shall notify the recipient that no further appeal or review will be available under this part and may proceed to implement the final determination as a final decision.

§ 1606.8 Hearing for a termination or debarment.

(a) For terminations or debarments only, ~~t~~The recipient may make a written request for a hearing within 30 days of its receipt of the preliminary determination or within 15 days of receipt of the written determination issued by the designated employee after the conclusion of the informal conference.

(b) Within 10 days after receipt of a request for a hearing, the Corporation shall notify the recipient in writing of the date, time and place of the hearing and the names of the hearing officer and of the attorney who will represent the Corporation. The time, date and location of the hearing may be changed upon agreement of the Corporation and the recipient.

(c) A hearing officer shall be appointed by the President or designee and may be an employee of the Corporation. The hearing officer shall not have been involved in the current termination or debarment action and the President or designee shall determine that the person is qualified to preside over the hearing as an impartial decision maker. An impartial decision maker is a person who has not formed a prejudgment on the case and does not have a pecuniary interest or personal bias in the outcome of the proceeding.

(d) The hearing shall be scheduled to commence at the earliest appropriate date, ordinarily not later than 30 days after the notice required by paragraph (b) of this section.

(e) The hearing officer shall preside over and conduct a full and fair hearing, avoid delay, maintain order, and insure that a record sufficient for full disclosure of the facts and issues is maintained.

(f) The hearing shall be open to the public unless, for good cause and the interests of justice, the hearing officer determines otherwise.

(g) The Corporation and the recipient shall be entitled to be represented by counsel or by another person.

(h) At the hearing, the Corporation and the recipient each may present its case by oral or documentary evidence, conduct examination and cross-examination of witnesses, examine any documents submitted, and submit rebuttal evidence.

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(i) The hearing officer shall not be bound by the technical rules of evidence and may make any procedural or evidentiary ruling that may help to insure full disclosure of the facts, to maintain order, or to avoid delay. Irrelevant, immaterial, repetitious or unduly prejudicial matter may be excluded.

(j) Official notice may be taken of published policies, rules, regulations, guidelines, and instructions of the Corporation, of any matter of which judicial notice may be taken in a Federal court, or of any other matter whose existence, authenticity, or accuracy is not open to serious question.

(k) A stenographic or electronic record shall be made in a manner determined by the hearing officer, and a copy shall be made available to the recipient at no cost.

(l) The Corporation shall have the initial burden to show grounds for a termination or debarment. The burden of persuasion shall then shift to the recipient to show by a preponderance of evidence on the record that its funds should not be terminated or that it should not be disbarred.

§ 1606.9 Recommended decision for a terminations or debarment.

(a) For termination or debarment hearings under § 1606.8, w~~W~~ithin 20 calendar days after the conclusion of the hearing, the hearing officer shall issue a written recommended decision which may:

(1) Terminate financial assistance to the recipient as of a specific date; or

(2) Continue the recipient's current grant or contract, subject to any modification or condition that may be deemed necessary on the basis of information adduced at the hearing; and/or

(3) Debar the recipient from receiving an additional award of financial assistance from the Corporation.

(b) The recommended decision shall contain findings of the significant and relevant facts and shall state the reasons for the decision. Findings of fact shall be based solely on the record of, and the evidence adduced at the hearing or on matters of which official notice was taken.

§ 1606.10 Final decision for a termination, debarment, or lesser reduction.

(a) If neither the Corporation nor the recipient requests review by the President, a final determination or a recommended decision shall become a final decision ~~10 calendar business~~ days after receipt by the recipient.

(b) The recipient or the Corporation may seek review by the President of a final determination or a recommended decision. A request shall be made in writing within 10 business days after

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receipt of the recommended decision by the party seeking review and shall state in detail the reasons for seeking review.

(c) The President's review shall be based solely on the information in the administrative record of the ~~termination or debarment~~ proceedings, including the appeal to the President, and any additional submissions, either oral or in writing, that the President may request. A recipient shall be given a copy of, and an opportunity to respond to, any additional submissions made to the President. All submissions and responses made to the President shall become part of the administrative record. Upon request, the Corporation shall provide a copy of the written record to the recipient.

(d) For a direct appeal of a final determination pursuant to § 1606.7, in which there is no hearing under § 1606.8, the President may not review the appeal if the President has had prior involvement in the preliminary and/or final determinations. If the President cannot review the appeal, or the President chooses not to do so, then the President shall designate another senior Corporation employee who has not had prior involvement in the preliminary and/or final determinations.

(ed) As soon as practicable after receipt of the request for review of a recommended decision, but not later than 30 days after the request for review, the President or designee may adopt, modify, or reverse the recommended decision or final determination, or direct further consideration of the matter. In the event of modification or reversal of a recommended decision pursuant to § 1606.9, the President's this decision shall conform to the requirements of § 1606.9(b). In the event of modification or reversal of a final determination pursuant to § 1606.7, the decision shall conform to the substantive requirements of § 1606.6(a).

(fe) The ~~President's~~ decision of the President or designee under this section shall become final upon receipt by the recipient.

§ 1606.11 Qualifications on hearing procedures.

(a) Except as modified by paragraph (c) of this section, the hearing rights set out in §§ 1606.6 through 1606.10 shall apply to any action to debar a recipient or to terminate a recipient's funding.

(b) The Corporation may simultaneously take action to debar and terminate a recipient within the same hearing procedure that is set out in §§ 1606.6 through 1606.10 of this part. In such a case, the same hearing officer shall oversee both the termination and debarment actions.

(c) If the Corporation does not simultaneously take action to debar and terminate a recipient under paragraph (b) of this section and initiates a debarment action based on a prior termination under § 1606.4(b)(1) or (2), the hearing procedures set out in § 1606.6 through 1606.10 shall not apply. Instead:

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- (1) The President shall appoint a hearing officer, as described in § 1606.8(c), to review the matter and make a written recommended decision on debarment.
 - (2) The hearing officer's recommendation shall be based solely on the information in the administrative record of the termination proceedings providing grounds for the debarment and any additional submissions, either oral or in writing, that the hearing officer may request. The recipient shall be given a copy of and an opportunity to respond to any additional submissions made to the hearing officer. All submissions and responses made to the hearing officer shall become part of the administrative record.
 - (3) If neither party appeals the hearing officer's recommendation within 10 days of receipt of the recommended decision, the decision shall become final.
 - (4) Either party may appeal the recommended decision to the President who shall review the matter and issue a final written decision pursuant to § 1606.9(b).
- (d) All final debarment decisions shall state the effective date of the debarment and the period of debarment, which shall be commensurate with the seriousness of the cause for debarment but shall not be for longer than 6 years.
- (e) The Corporation may reverse a debarment decision upon request for the following reasons:
- (1) Newly discovered material evidence;
 - (2) Reversal of the conviction or civil judgment upon which the debarment was based;
 - (3) Bona fide change in ownership or management of a recipient;
 - (4) Elimination of other causes for which the debarment was imposed; or
 - (5) Other reasons the Corporation deems appropriate.

§ 1606.12 Time and waiver.

- (a) Except for the 6-year time limit for debarments in § 1606.11(c), any period of time provided in these rules may, upon good cause shown and determined, be extended:
- (1) By the designated employee who issued the preliminary decision until a hearing officer has been appointed;
 - (2) By the hearing officer, until the recommended decision has been issued;
 - (3) By the President at any time.

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(b) Failure by the Corporation to meet a time requirement of this part does not preclude the Corporation from terminating a recipient's grant or contract with the Corporation.

§ 1606.13 Interim and termination funding; reprogramming.

(a) Pending the completion of termination or limited reduction in funding proceedings under this part, the Corporation shall provide the recipient with the level of financial assistance provided for under its current grant or contract with the Corporation.

(b) After a final decision has been made to terminate a recipient's grant or contract or to impose a limited reduction in funding, the recipient loses all rights to the terminated or reduced funds.

(c) After a final decision has been made to terminate a recipient's grant or contract, the Corporation may authorize termination funding if necessary to enable the recipient to close or transfer current matters in a manner consistent with the recipient's professional responsibilities to its present clients.

(d) Funds recovered by the Corporation pursuant to a termination or limited reduction in funding shall be ~~used in the same service area from which they were recovered or will be~~ reallocated by the Corporation for basic field purposes at its sole discretion.

§ 1606.14 Recompensation.

After a final decision has been issued by the Corporation terminating financial assistance to a recipient in whole for any service area, the Corporation shall implement a new competitive bidding process for the affected service area. Until a new recipient has been awarded a grant pursuant to such process, the Corporation shall take all practical steps to ensure the continued provision of legal assistance in the service area pursuant to § 1634.11.

All of the provisions of the proposed § 1606 .15 in the NPRM would be incorporated in Part 1606 as indicated above. The revised NPRM would have no § 1606.15. It is repeated here for reference only.

Sec. 1606.15 Limited reductions of funding

(a) The Corporation may, in accordance with the procedures and requirements set forth in this section, impose a limited reduction of funding by reducing a recipient's funding in an amount less than 5% of the recipient's current annual level of financial assistance.

(b) Grounds for limited reduction in funding. A limited reduction of funding may be imposed when the Corporation determines that termination in whole or in part of the recipient's grant is not warranted, but that there nevertheless has been a substantial violation by the recipient of an applicable provision of law, or a rule, regulation, guideline or instruction issued by the Corporation, or a term or condition of the recipient's current grant or contract with the Corporation.

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~~(c) A determination whether there has been a substantial violation for the purposes of paragraph (b) of this section, and the magnitude of the limited reduction in funding, will be based on consideration of the criteria set forth in §1606.3(b).~~

~~(d) When the Corporation has made a determination to impose a limited reduction in funding in accordance with this section, the Corporation shall provide a written determination to the recipient and the Chair of the recipient's governing body. The determination shall:~~

~~(1) State the grounds, the amount, and the effective date for the limited reduction in funding;~~

~~(2) Identify, with reasonable specificity, any facts or documents relied on as justification for the limited reduction in funding;~~

~~(3) Specify what, if any, corrective action the recipient can take to avoid the limited reduction in funding;~~

~~(4) Advise the recipient that it may request, within five business days of receipt of the determination, an informal meeting with the Corporation at which it may attempt to show that the limited reduction in funding should not be imposed; and~~

~~(5) Advise the recipient that, within 10 days of its receipt of the determination and without regard to whether it requests an informal meeting, it may submit written materials in opposition to the limited reduction in funding.~~

~~(e) If the recipient requests an informal meeting with the Corporation, the Corporation shall designate the time and place for the meeting. The meeting shall occur within five business days after the recipient's request is received.~~

~~(f) If the recipient neither requests an informal meeting nor submits any written materials in opposition to the determination, the determination will be deemed effective at the end of the 10-day period following recipient's receipt of the determination.~~

~~(g) If an informal meeting is conducted and/or written materials are submitted by the recipient, the Corporation shall consider any written materials submitted by the recipient in opposition to the limited reduction in funding and any oral presentation or written materials submitted by the recipient at an informal meeting. After considering such materials, the Corporation shall decide within 30 days whether the limited reduction in funding should become effective and shall notify the recipient and the recipient's Board Chair in writing of its decision.~~