



OFFICE OF LEGAL AFFAIRS

**ADVISORY OPINION
AO-2013-08**

SUBJ: Recipient Use of Tribal Funds to Represent Clients Without Verifying Citizenship or Eligible Alien Status

DATE: November 5, 2013

Question Presented

Whether LSC-funded recipients may use funds received from a tribe to represent individuals without verifying the individuals' citizenship or eligible alien status.

Brief Answer

Section 1010(c) of the LSC Act and section 504(d)(2)(A) of Public Law 104-134 ("Section 504") authorize LSC-funded recipients to use tribal funds to provide assistance to clients in accordance with the purposes for which the funds were received. 42 U.S.C. § 2996i(c); Pub. L. 104-134, Title V, § 504 (Apr. 16, 1996). Neither statute places any additional limitations on the use of tribal funds. Both statutes except the use of tribal funds by LSC-funded recipients from prohibitions on the use of non-LSC funds to carry out activities that would violate restrictions (including restrictions on the representation of aliens) contained in either law.

LSC adopted rules implementing these statutory provisions in 45 C.F.R. Part 1610, Use of Non-LSC Funds, Transfers of LSC Funds, Program Integrity. 62 Fed. Reg. 27698 (May 21, 1997). Section 1610.4(a) authorizes recipients to use tribal funds for the specific purposes for which they were received. Within section 1610.4, subsection (a), covering use of tribal funds, is unique in its lack of additional restrictions. Each of the three subsequent subsections, 45 C.F.R. §§ 1610.4(b)-(d), permits the use of other categories of non-LSC funds but, in each instance, explicitly precludes the use of such funds for any activity that is prohibited by the LSC Act or prohibited by or inconsistent with Section 504.

Given the language of the LSC Act, Section 504, and the LSC regulations, and applying a standard canon of statutory and regulatory interpretation, we conclude that recipients may use tribal funds to represent individuals without verifying citizenship or alienage.

Background

OCE conducted a site visit at the Montana Legal Services Association (MLSA) in 2012. During that visit, OCE discovered that MLSA maintained case files that lacked citizenship

attestations or verification of alien eligibility to receive LSC-funded legal assistance. The Executive Director told OCE she believed that because the assistance in question was wholly supported by tribal funds and did not use LSC funds, MLSA did not need to verify citizenship or alienage. She reasoned that 45 C.F.R. § 1610.4(a) authorizes recipients to use tribal funds for the purposes for which they were provided, without restriction, thereby allowing MLSA to represent anyone that the tribal funds were intended to serve.

MLSA reported that it provides public defender services and civil legal assistance to the Crow Tribe pursuant to a contract. MLSA provided OCE with a copy of the contract, which defines “eligible defendants” as those whose income does not exceed 125% of the Federal poverty guidelines. Defendants charged with stalking or domestic violence are not eligible for public defender services under the contract. The contract defines individuals eligible for civil legal services as “members of the Crow Tribe, persons married to members of the Crow Tribe, and [] other Indians having strong ties to the Crow Tribe who reside on or near the Crow Reservation.”

Relevant Statutory and Regulatory Provisions

Section 1010(c) of the LSC Act prohibits recipients from using non-LSC funds “for any purpose prohibited by this subchapter[.]” 42 U.S.C. § 2996i(c). There are two exceptions to this prohibition, only one of which is relevant here. Recipients are not precluded from receiving and using “other public funds or tribal funds (including foundation funds benefiting Indians or Indian tribes) and expending them in accordance with the purposes for which they are provided.” *Id.*

In LSC’s fiscal year 1996 appropriations act, Congress enacted numerous additional restrictions on the purposes for which LSC recipients could use not only LSC funds, but also other public funds and private funds. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. 104-134, Title V, § 504; 110 Stat. 1321, 1353- 57(Apr. 16, 1996). As it had in the LSC Act, however, Congress exempted tribal funds from the restrictions. *Id.* § 504(d)(2)(A) (“Paragraph (1) shall not prevent a recipient from . . . receiving Indian tribal funds (including funds from private nonprofit organizations for the benefit of Indians or Indian tribes) and expending the tribal funds in accordance with the specific purposes for which the tribal funds are provided[.]”).

LSC adopted rules implementing these statutory provisions in 45 C.F.R. Part 1610, Use of Non-LSC Funds, Transfers of LSC Funds, Program Integrity. 62 Fed. Reg. 27698 (May 21, 1997). Section 1610.4 sets forth the exceptions to the restrictions on the use of non-LSC funds:

§ 1610.4 Authorized use of non-LSC funds.

(a) A recipient may receive tribal funds and expend them in accordance with the specific purposes for which the tribal funds were provided.

(b) A recipient may receive public or IOLTA funds and use them in accordance with the specific purposes for which they were provided, *if the funds are not used for any activity prohibited by or inconsistent with Section 504.*

(c) A recipient may receive private funds and use them in accordance with the purposes for which they were provided, *provided that the funds are not used for any activity prohibited by the LSC Act or prohibited or inconsistent with Section 504.*

(d) A recipient may use non-LSC funds to provide legal assistance to an individual who is not financially eligible for services under part 1611 of this chapter, *provided that the funds are used for the specific purposes for which those funds were provided and are not used for any activity prohibited by the LSC Act or prohibited by or inconsistent with Section 504.*

45 C.F.R. § 1610.4(a) (emphasis added).

Section 1610.2 defines the purposes and activities prohibited by the LSC Act and Section 504, respectively. 45 C.F.R. § 1610.2. Specifically, section 1610.2(b)(7) includes assistance to ineligible aliens as a prohibited activity under Section 504. Id. § 1610.2(b)(7). Before providing assistance to an individual, LSC's regulations require that a recipient verify either that the individual is a citizen or has an alien status that makes him or her eligible to receive LSC-funded services. Id. §§ 1626.6 (requiring verification of citizenship); 1626.7 (requiring verification of eligible alien status).

Analysis

Unlike the other provisions placing restrictions on the use of non-LSC funds, section 1010(c) of the LSC Act and Section 504(d)(2)(A) place no restrictions on the use of tribal funds other than that they be used in accordance with the specific purposes for which they were provided. 42 U.S.C. § 2996i(c); Pub. L. 104-134, Tit. V, § 504; see also 45 C.F.R. § 1610.4(a) (implementing section 1010(c) and section 504(d)(2)(A)). Consistent with the statutory language, subsection (a) of 45 C.F.R § 1610.4 places no restrictions on the use of tribal funds, other than that the funds be used for the specific purposes for which they were provided.

Within section 1610.4, subsection (a), covering use of tribal funds, is unique in its lack of additional restrictions. Subsection (b) allows public or IOLTA funds to be used “in accordance with the purposes for which they were provided,” so long as the use is not inconsistent with or prohibited by Section 504. Id. § 1610.4(b) (implementing 42 U.S.C. § 2996i(c) with respect to public funds). Subsection (c) allows a recipient to use private funds in accordance with the purposes for which they were provided, so long as they are not used for any activity that is “prohibited by the LSC Act or prohibited by or inconsistent with Section 504.” Id. § 1610.4(c) (implementing Section 504(d)(1)). Finally, section 1610.4(d) reflects the language in section

504(d)(2)(B), which allows recipients to use non-LSC funds to assist over-income clients, so long as the assistance is consistent with the purposes for which the funds are provided and does not use funds for any activity prohibited by the LSC Act or prohibited by or inconsistent with Section 504. Id. § 1610.4(d). Because the plain language of subsection 1610.4(a) does *not* include the limitations on use explicitly included in the following three subsections, 45 C.F.R. § 1610.4(b)-(d), that language supports the conclusion that those limitations do not apply to subsection 1610.4(a).

This conclusion also is supported by a standard canon of statutory and regulatory construction, *expressio unius est exclusion alterius* (the expression of one is the exclusion of the other). The canon provides that, if the legislating body had intended to include a given provision or limitation in a statute or regulation, it would have done so expressly. See, e.g., Marx v. General Revenue Corp., 133 S.Ct. 1166, 1175 (2013); U.S. v. Okoye, 2013 WL 5394287 (1st Cir. 2013). Thus, where, as here, a limitation is present in three subsections but not in another, the canon supports the conclusion that the limitation is meant to apply only to the subsections in which it is found.

As with all canons of construction, this canon can be overcome by evidence that Congress intended that the apparently unlimited provision be subject to the limits set forth in the other provisions. See, e.g., Marx, 133 S.Ct. at 1175 (“We have long held that the *expressio unius* canon does not apply unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it, and that the canon can be overcome by contrary indication that adopting a particular rule or statute was probably not meant to signal any exclusion”) (internal quotations and citations omitted); RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 132 S.Ct. 2065, 2072(2012) (“[T]he [] canon is not an absolute rule, but is merely a strong indication of statutory meaning that can be overcome by textual indications that point in the other direction.”). Section 504 does not contain any indication that Congress intended that the nineteen restrictions established in Section 504(a) should govern the use of purely tribal funds despite the specific provision in Section 504(d)(2)(A) authorizing tribal funds to be spent for the purposes for which they were provided. To the contrary, Section 504 contains three other exceptions to the general entity restriction in Section 504(a). Each of those other exceptions allows recipients to use non-LSC funds to carry out activities that would otherwise be prohibited, but places additional, different conditions on those activities. See Pub. L. 104-134, § 504(b) (allowing recipients to use non-LSC funds to communicate with State or local agencies or legislative bodies, but only with respect to funding for the recipient); (d)(2)(B) (allowing recipients to use non-LSC funds to serve over-income individuals, but prohibiting funds from being used to support “any purpose prohibited by this Act” or the LSC Act); (e) (allowing recipients to use non-LSC funds to comment on public rulemaking or respond to requests for information or testimony from a Federal, State, or local agency, legislative body, or committee, but only if the response is made only to the requester and the recipient does not arrange for the

request to be made). Likewise, nothing in the LSC Act suggests that Congress intended to do anything other than to free tribal funds from the restrictions applicable to all other non-LSC funds. Against this background, it is reasonable to conclude that Congress's decision to allow recipients to receive and spend tribal funds in accordance with the purposes for which they were provided, without additional restriction, should govern over the restrictions on recipients' use of other funds.

Applying this canon to the LSC regulations, section 1610.4(a), which authorizes the use of tribal funds without the restrictions imposed by the LSC Act and Section 504, would control over sections 1626.6 and 1626.7, which require recipients to verify citizenship or eligible alien status before using any funds to provide assistance to an individual. Therefore, as long as the tribal funds were being used in accordance with the specific purposes for which they were provided, a recipient using solely tribal funds to assist an individual would not need to comply with 45 C.F.R. §§ 1626.6 and 1626.7.

In this instance, MLSA entered into a contract with the Crow Tribe to provide the tribe with two types of services: trial-level representation as the Crow Tribe Public Defender, and civil legal assistance to "members of the Crow Tribe, persons married to members of the Crow Tribe, and to other Indians having strong ties to the Crow Tribe who reside on or near the Crow Reservation." Under the contract, only those individuals whose "household income does not exceed 125%" of the Federal Poverty Guidelines are eligible to receive public defender services. Additionally, the contract does not extend public defender services provided through MLSA to defendants charged with domestic abuse or stalking. The contract is silent about citizenship and alienage status.

OCE reported that the MLSA cases that lacked citizenship attestations and did not meet any of the eligible alien categories contained in 45 C.F.R. Part 1626 were cases that MLSA handled using only tribal funds. Additionally, OCE reviewed the case files and determined that each case pertained to an individual being provided public defender services consistent with the contract. Because MLSA reported that it was using exclusively tribal funds for these cases, and the purpose of the funds was to provide public defender services according to the terms of MLSA's contract with the Crow Tribe, MLSA did not need to verify citizenship or alienage status pursuant to 45 C.F.R. § 1610.4(a).

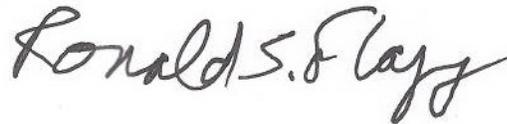
CONCLUSION

The LSC Act and section 504 of the fiscal year 1996 appropriations act authorize LSC-funded recipients to use tribal funds to provide assistance to clients in accordance with the purposes for which the funds were received. LSC incorporated this authority into its regulation at 45 C.F.R. § 1610.4. Unlike other public funds, IOLTA funds, or private funds received by a recipient, tribal funds are not subject to the LSC Act and Section 504 restrictions. There is no

evidence in the applicable statutes that Congress intended for the general restrictions on recipients' use of funds to extend to recipients' use of purely tribal funds to provide legal assistance, as long as the funds are being used in accordance with the purposes for which they were provided. In this case, where MLSA reports that it is using only tribal funds to provide assistance, and where the assistance MLSA is providing is in accordance with the purpose for which the tribal funds were provided, MLSA does not need to verify citizenship or eligible alien status under 45 C.F.R. §§ 1626.6 and 1626.7.

A handwritten signature in blue ink that reads "Stefanie K. Davis". The signature is written in a cursive style with a large, stylized initial "S".

Stefanie K. Davis
Assistant General Counsel

A handwritten signature in black ink that reads "Ronald S. Flagg". The signature is written in a cursive style with a large, stylized initial "R".

Ronald S. Flagg
Vice President and General Counsel