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Sent by email: SubgrantRulemaking@lsc.gov and to 1628rulemaking@lsc.gov

May 19, 2015

Ms. Stefanie K. Davis
Assistant General Counsel
Legal Services Corporation
3333 K Street NE
Washington, D.C. 20007

Re: Comments to Notice of Proposed Rulemaking for Part 1627, 1610, 1630 (Subgrants), 80 FR 21692, April 20, 2015, and Part 1628 (Fund Balance), 80 FR 21700, April 20, 2015

Dear Ms. Davis:

The Northwest Justice Project (NJP) is pleased to submit comments on proposed revisions to 45 C.F.R. Parts 1627, 1610, 1630 and Part 1628. Our goal in submitting these comments is to address some ambiguities in language in 1627 and the need to encourage maximum use of private attorneys in the delivery of legal services for the poor. Recent changes to 45 C.F.R. Part 1614 permit greater flexibility in the allocation and use of private attorney involvement funds, which in turn promotes increased private attorney involvement in the day-to-day delivery of legal assistance to the poor. However, the proposed revisions that consolidate sub-grant requirements into Part 1627 create barriers to recipient utilization of the options now available under 1614. The barriers can be addressed through modest language changes that clarify the intent and ensure that the goals of 1614 are not undermined.

We address each of the proposed revisions on which we have concerns below, followed with our comment on the two items on which LSC expressly seeks input: (1) the need to increase the amount for judicare arrangements to be a subgrant in 1627.2(e); and, (2) applying the timekeeping requirements of Part 1635 to subrecipients. NJP also submits comments in support of the proposed changes to Part 1628 related to fund balance waiver requests.

Part 1627.2 Definitions

NJP agrees that the definition of “private attorney” in 1627 should be the same as in 1614. However, NJP reads the definition of “programmatic” in subsection (b) as too broad and inconsistent for the purposes it appears intended to achieve. “Subgrant” is defined in subsection (d)(1) to mean “an award of LSC funds provided by a recipient to a

subrecipient...to carry our part of the recipient's programmatic activities." It appears LSC intends "programmatic" to be limited the actual provision of legal assistance to eligible clients. It expressly excludes "goods and services to vendors or consultants."

But the language used in both subsections (b) and (d)(1) can be construed to go beyond the provision of legal assistance as it includes "activities or functions carried out" to provide legal assistance. The current regulation explicitly defines the types of "programmatic" activities that could be provided through a "subgrant" and includes "representation of clients, or which provide direct support to a recipient's legal assistance activities or such activities as client involvement, training or state support activities." 45 C.F.R. 1627.2(b)(1).

The proposed definition of "programmatic" as "*activities and functions carried out to provide*" legal assistance is far broader. "Activities and functions carried out to provide legal assistance" is virtually everything an LSC recipient program undertakes, regardless of whether it is the direct provision of legal assistance. Such activities and functions include paying bar dues, conference registration fees, office rent, travel reimbursements to staff, providing fee-for-service contracts to lawyers or legal organizations that provide ongoing expertise in support of recipients' delivery of legal assistance, none of which are "vendors or consultants". While subgrants would appear to be limited to the activities and functions that have the characteristics set out in proposed 1627.3, those characteristics refer only to distinctions between a subgrant and procurement contract and do not include payments made to support "activities and functions" such as those identified above that are necessary to carry out the provision of legal assistance.

If the goal is to limit subgrants to the direct delivery of legal assistance then "programmatic" should be defined accordingly as follows:

(b) *Programmatic* means the delivery of legal assistance to eligible clients, as defined in § 1002 of the LSC Act, 42 U.S.C. 2996a(5). Programmatic does not include the provision of goods and services provided by vendors or consultants in the normal course of business that the recipient would not be expected to provide itself, and activities conducted by entities not directly involved in the delivery of legal assistance to eligible clients.

Part 1627.3 Characteristics of subgrants

Proposed §1627.3 seems intended to provide LSC recipients with guidance on when they need to obtain LSC approval for a subgrant versus other type of contractual arrangement. However, by setting out characteristics (not all of which will be present in all cases), and by authorizing recipients to "use judgment" in classifying each agreement as a subgrant or procurement contract, recipients are placed at risk of making judgments that differ from how LSC would judge the relationship. If this occurs, the expenditure of funds could be a "questioned cost" or subject to limited sanctions, creating disincentives for recipients to exercise any judgment.

As written, the characteristics are themselves ambiguous and lacking in definition. For example, it is unclear how or whether a recipient should delegate “programmatically *decision making*” or *responsibility* for adherence to LSC program requirements to a subrecipient. Yet the proposed language would assume this to be a characteristic of a subgrant. Does LSC intend that these characteristics *must* be part of a subgrant, or that a recipient could or ever should delegate responsibility for adhering to LSC requirements to a subrecipient?

As a result of ambiguity mistakes are likely to occur in the application of these characteristics. In order to avoid the consequence of a mistake in exercising judgment, recipients will likely err on the side of caution and unnecessarily seek approval for a range of contracts and transactions instead of risking the error. This will result in significant administrative burden for both recipients and LSC, will cause significant delays in recipient activities involving purchase and use of services needed to carry out legal assistance activities, and will likely impair efficient delivery of legal services through unnecessary bureaucratic oversight.

In order to avoid this unintended consequence, LSC should add a subsection to this provision that protects good faith exercises of judgment from adverse consequences. Such language could read as follows:

(d) If in applying the characteristics of a subgrant a recipient mischaracterizes a transaction as a contract, LSC will not impose limited sanctions or questioned costs if the recipient’s exercise of judgment was in good faith and based on a reasonable consideration of the characteristics.

1627.3(c) Subgrants to be supported by LSC funds

LSC explains that subsection (c) of 1627.3 is proposed because LSC has learned that some recipients provide in kind support for their approved PAI activities without obtaining prior approval of the in kind contribution as a subgrant. This stated rationale seems to confuse cost allocation to PAI with the notion of a subgrant. 45 CFR 1614.4(b) expressly authorizes recipients to allocate costs for support of allowable PAI activities to their PAI obligation, including “the provision of training, technical assistance, research, advice and counsel or *the use of recipient facilities, libraries, computer assisted legal research systems or other resources.*” Is LSC intending to eliminate recipients’ ability to allocate the costs of in kind contributions to PAI? At best subsection §1627.3(c) is inconsistent with §1614.4(b) and creates gross ambiguity.

The added language that any subgrant must be supported “using LSC funds” is also inconsistent with the ability of recipients to meet their PAI obligations through the use of non-LSC funds. While NJP has no concern about language deeming any funds “used by a recipient” as a payment for a PAI subgrant as LSC funds for purposes of application of the restrictions, a requirement that subgrants may *only* use LSC funds impairs recipients’ need for flexibility in maximizing the allowable uses of all of their funding, including use of some non-LSC funding to support its subgrants.

If the goal is to ensure that subgrants mean the payment of LSC funds to a third party to carry out legal assistance activities, the definition of “subgrants” in proposed §1627.2(d)(1) is adequate to accomplish this purpose. If further clarification is desired, greater clarity can be obtained through revising the definition of “subgrant.” Moreover, accounting for the use of LSC funds through auditing both subgrants and PAI cost allocations is adequate to ensure that LSC funds are spent consistent with governing statutes and regulations. To ensure clarity, the definition of “subgrant” in §1627.2 could be changed to read as follows:

(d)(1) *Subgrant* means a commitment by a recipient to pay LSC funds to a subrecipient to carry out part of the recipient’s programmatic activities.

NJP asks LSC to strike proposed subsection (c) in total because it is unnecessary and striking it would avoid inconsistency with the PAI regulations and prevent confusion as recipients endeavor to interpret and implement the regulations.

1627.2(d)(2) Subgrant Amount for Private Attorney Agreements

LSC seeks comments from grantees on whether it should amend the \$25,000 threshold for requiring subgrant approval for PAI fee for service (judicare) contracts. NJP identified the low threshold as a barrier to the effective implementation of PAI program activities during the workshops leading to the revision of Part 1614. NJP urges LSC to increase the threshold to at least \$60,000 - a level that is meaningful in 2015 dollars - to promote efficient program operation.

Fee-for-service contracts with private attorneys benefit LSC programs and their clients. The contracts provide a way to secure legal assistance for eligible clients on priority legal problems in a way that assures accountability to the grantee and that provides incentive for private attorneys to take on cases that may be outside their usual area of practice or that are particularly challenging and might not be appealing on a pro bono basis. In many cases, NJP has been able to secure legal assistance for clients through fee-for-service contracts on highly contested domestic relations cases, for clients with mental health challenges, and on cases requiring specific expertise within the private bar. The \$25,000 threshold was set by regulation in 1983, presumably with reference to the quantity of service the amount would purchase in 1983 at 50% of prevailing legal fees. Due to inflation over the past 33 years, approximately \$60,000 is now required to purchase a similar amount of legal assistance. This assumes that legal fees have risen at the rate of inflation and not at a greater pace.

Increasing this threshold will promote efficient program operation, both at NJP and at LSC because it will focus on the larger contracts and decrease the number of contracts for which subgrant approval must be obtained. Preparation of a subgrant requires a significant commitment of time. In addition to the contract, the recipient must prepare two additional documents, a profile and a budget. The documents must then be uploaded to LSC’s online subgrant approval request function and a questionnaire must be filled out, including an index to certain sections of the subgrant agreement. LSC must then go through a process of reviewing and approving the subgrant.

While we welcome the proposed process that would allow a recipient to convert a contract to a subgrant mid-year should a case or cases unexpectedly become far more time-consuming than anticipated, we also propose reducing the need to do so repeatedly for small contracts by raising the subgrant threshold in order to be more efficient and to focus efforts on higher risk / higher value contacts.

Increasing the threshold to \$60,000 will bring the current requirement in line with LSC's intent at the time the requirement went into effect, which was to require subgrant approval where a substantial amount of money is being paid to a third party to provide legal assistance to eligible clients. LSC should adopt the reasoning that led to adoption of a \$25,000 threshold in 1983 and update the threshold amount to an equivalent amount in 2015 dollars.

1627.5 Timekeeping Requirements

LSC also seeks comment on the proposed application of the timekeeping requirements of 45 C.F.R. Part 1635 to all subrecipients, including PAI subgrant recipients. NJP strongly urges LSC to not impose the timekeeping requirements of Part 1635 on private attorney subrecipients.

Currently, private attorney subrecipients must sufficiently document their time spent on recipient client activities to justify billings and payment under a fee-for-service contract. Typically, private attorneys maintain timekeeping systems that support their billings and activities, by client, and may or may not keep time for activities that would not support a billing. Thus, because they detail bill for services by the hour they have no need to invest in LSC compliant case management systems and record their time on the basis of LSC's criteria of "case, matter and supporting activity." 45 C.F.R. §1635.3. Even if a private attorney could be compelled to keep their time specifically according to "case, matter and supporting activity", a private attorney would not necessarily be able or willing to designate "matter and supporting activity time" to identified "categories of action" required by §1635.3(2).

Further, many private attorneys will likely be unwilling to agree to make their personal time records and timekeeping systems subject to examination by auditors and representatives of LSC as required for LSC recipients under §1635.4. While fully documented billings for services rendered and paid for under a PAI subgrant should be maintained by the grantee, compelling private attorneys to change timekeeping systems and make their systems subject to LSC inspection will create a significant disincentive for private attorneys to enter into judicare contracts to serve eligible clients.

Part 1628.3 and 1628.4 Fund balance waiver

NJP supports the proposed changes to 1628 to provide LSC more discretion to evaluate and approve requests for a fund balance waiver in excess of 25% of a recipient's LSC support. This proposal provides LSC greater discretion to evaluate larger requests (in excess of 25%) by removing narrow limitations on what specific extraordinary and compelling circumstances may apply. Providing LSC with the ability to assess these larger extraordinary requests based upon the facts and circumstances rather than a specific narrow list of specific

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acceptable reasons will allow LSC to reasonably consider other valid waiver circumstances that may not be expressly contemplated in the regulation.

Also, allowing grantees to formally request an excess fund balance waiver in excess of 25% in advance of the annual audit (rather than after) is also beneficial. This allows for grantee communication, LSC guidance and LSC approval of larger extraordinary fund balance carry-overs when the grantee is aware that it is likely to occur. Early action and approval (or not) will provide the grantee a measure of certainty and facilitate timely planning, budgeting and implementation of plans for disposition of the extraordinary excess fund balance.

NJP also supports the continuation of the time frame for the more routine fund balance waiver requests (those that fall between 10% and 25%) to be submitted after completion of the annual audit. These requests are more than likely to be approved and the use of audited information assures that the approved excess amount agrees to the final audited carry-over.

We look forward to LSC's consideration of these comments. Thank you.

Sincerely,



Deborah Perluss
Director of Advocacy/General Counsel

C: César E. Torres, Executive Director
Steve Pelletier, Director of Finance