January 29, 2001

Larry T. Harley, Esq.
Executive Director
Southwest Virginia Legal Aid Society
227 West Cherry Street
Marion, Virginia 24354

RE: ***Request for an Opinion Regarding Composition of New, Merged Board of Directors, EX 2001-1001***

Dear Mr. Harley:

I am writing in response to your recent inquiry to John Eidleman regarding the composition of your program's Board of Directors upon the merger of Client Centered Legal Services of Southwest Virginia ("CCLSSV") and the Legal Aid Society of New River Valley, Inc. ("LASNRV") into Southwest Virginia Legal Aid Society, Inc. ("SVLAS"). You indicated that in preparation for the merger, each of the three existing programs will appoint attorney members of its current board to the new, merged board for a two year period. At the end of this two year period, the board of the merged program will reconstitute itself with attorneys to be appointed by the bar associations of the new, merged service area. All of the attorney board members of the three merging programs were appointed to those boards by their respective bar associations and qualify as McCollum attorneys on their present boards.

Issue Presented

Your specific inquiry to John Eidleman is "if an attorney on the New River Valley board was appointed to that board by a local bar association, if the NRV board appoints that attorney to the new board that we are composing does that appointment satisfy the LSC regulations for a McCollum attorney appointment or does it not since the attorney was not appointed to the new board by the bar association itself?" Restated in more general terms, your inquiry is whether the members of a new consolidated board resulting from the merger of three Virginia recipient programs need to be re-approved/re-appointed by the appointing bar associations, or if their appointments to the boards of the merging entities carry over.

750 First Street, NE 11th Floor
Washington, DC 20002-4250
Phone 202.336.8800 Fax 202.336.8959
www.lsc.gov

Summary

The Office of Legal Affairs of the Legal Services Corporation ("LSC") has previously considered your question in the context of other merging programs. The answer to your question is that the appointment of attorney board members from the existing programs to the Board of Directors for the new, merged program satisfies the LSC requirements for board composition outlined in 45 C.F.R. • 1607.3, provided that the attorney board members from the existing programs were originally appointed in compliance with • 1607.3 (i.e. by local bar associations), as you have indicated is the case at hand. No statutory provisions or regulations require the reappointment of board members by local bar associations in this circumstance. The lack of such a requirement, combined with the fact that rulemaking history supports a flexible approach to regulating the process by which program board members are appointed, demonstrates that reappointment is unnecessary. This position is further supported by the fact that policy considerations favor minimization of bureaucratic obstacles to state planning. This conclusion is discussed in greater detail below.

Although formal reappointment of board members is unnecessary, informal consultation with the appointing bars would be prudent. In creating a new, consolidated board, the merging programs should also be mindful of the need for continued compliance with the requirements of §1607.3 (e.g. at least 60% of the merged board should be attorney members; the attorney members of the new board should reasonably reflect the diversity of the legal community and the population served by the recipient, including race, ethnicity, gender and other similar factors; etc.)

Analysis

I. The Statutory and Regulatory Provisions Addressing the Appointment and/or Composition of Governing Bodies Do Not Require Reappointment of Members of a Merged Board.

Section 1007(c) of The Legal Services Corporation Act governs the formation and composition of recipient programs' governing bodies. *See* 42 U.S.C. §2996f(c). The Act requires that "any recipient organized solely for the purpose of providing legal assistance to eligible clients is governed by a body at least 60 percent of which consists of attorneys who are members of the bar of a State in which the legal assistance is to be provided . . . and at least one-third of which consists of persons who are, when selected, eligible clients who may also be representatives of associations or organizations of eligible clients."[1] This section speaks primarily to the composition of governing bodies and provides no instruction on, or requirements for, the process of merging multiple boards into one. It also lacks indirect guidance for such a procedure.

[1] 42 U.S.C. §2996f(c).

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Part 1607 of the LSC Regulations expounds on the requirements of §1007(c) of the Act and is codified at 45 C.F.R. §1607.1 *et seq*. Section 1607.3 addresses the composition of governing bodies.[2] It imposes multiple requirements on recipients with respect to the appointment and composition of boards, and provides further guidance which is discretionary in nature.[3] The mandatory conditions and discretionary guidance contained in §1607.3 do not address the procedure for merging multiple boards into one, nor do they shed light on the inquiry indirectly. Accordingly, this section does not enumerate, or even suggest, procedural requirements for such a merger.

Because the provisions of §1607.3 do not inform the present inquiry, they will not be discussed in detail in this opinion letter. It is important to note, however, that the new, consolidated board formed by the merging entities must comply with the mandates of this section (e.g. sixty percent of the board must be attorney members; a majority of members must be attorneys appointed by a state or local bar association; attorney members must reflect the diversity of the legal community and the populations served by the recipient; at least one-third of members must be eligible clients when appointed, etc.). Programs should be mindful of maintaining the diversity of governing bodies when merging two boards into one. Committees formed to effectuate such mergers should not categorically deselect members with certain interests or demographic characteristics from the new, consolidated board.

II. The rulemaking history for Section 1607.3 suggests a flexible approach to regulating the process by which board members are appointed, and policy considerations favor minimal bureaucratic obstacles to state planning.

Although the LSC Act and Regulations do not illuminate the issue at hand, the rulemaking history of §1607.3 is very instructive, in that it consistently expresses a functional approach that favors loose guidance rather than strict mandates in the formation of governing bodies. The theme of flexibility dominates the discussion both substantively[4] and procedurally.

The Preamble to §1607.3 indicates that LSC has adopted a flexible and functional approach to regulating the process by which program board members are appointed.[5] In revising §1607.3(b) in 1994, LSC chose to draft the rule in a manner that fosters collaboration between the program boards and the appointing bars.[6] During the rulemaking process, LSC received comments suggesting that the ability to limit board members' terms should lie exclusively with programs and should be addressed through their bylaws.[7] "The [LSC Board of Directors] did not incorporate

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[2] *See* 45 C.F.R. §1607.3
[3] *Id.*
[4] For example, substantively, 1607.3(a)'s composition requirements are intended to suggest goals rather than impose quotas. *See* 59 Fed. Reg. 65251.
[5] *See generally*, 59 Fed. Reg. 65250-52.
[6] *Id.* at 65251.
[7] *Id.*

the suggested change, because it [felt] that *recipients should be allowed to work out those differences on a local level with the appointing organizations*."[8] Likewise, in revising §1607.3(b)(2), the LSC Board approved a version that permits the recipient board itself to appoint up to 10 percent of its board members.[9] Furthermore, §1607.3(f), which enumerates the methods by which a recipient board member may be chosen,[10] was amended to preserve the program's authority over specifics of the appointment process.[11] "This section now deals only with the method of selection and is intended to revise the current rule by deleting language which could be incorrectly interpreted to give LSC authority to veto particular methods of selecting local board members."[12]

In addition to specific rules and comments, there are certain themes and references which run throughout the preamble for section 1607.3. One such repeated theme is a series of references to subsection (h), which is the provision that allows a recipient to recommend board candidates to the appointing organization(s).[13] In the preamble to §1607.3(a), for example, the rule appears to contemplate consultation rather than a strict appointment process. In discussing the goal of demographic diversity on recipient boards, the preamble states "[i]n this regard, §1607.3(h) will allow *programs to consult with the appointing organizations to insure that the appointments are made consistent with LSC guidelines*."[14]

Another example of pervasive flexibility is in frequent references to §1607.6, which allows the President of LSC to waive requirements set forth in Part 1607.[15] Both §1607.3(h) and §1607.6 indicate leeway and flexibility in the intent and application of Part 1607.

Considered as a whole, the rulemaking history of Part 1607 conveys a strong preference for flexibility and leniency between programs and appointing bodies, rather than a strict, mechanical procedure through which bar associations dictate the composition of recipient boards. This history, combined with the policy consideration favoring minimal bureaucratic obstacles to state planning,[16] support the conclusion that reappointment of the board members of the merging organizations is unnecessary.

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[8] *Id.*
[9] *See* 45 C.F.R. §1607.3(b)(2); S*ee also* 59 Fed. Reg. 65251 ("For the additional ten percent of the board members who must be attorneys, but who are not covered by the McCollum Amendment, the final rule now explicitly states what is implicit in the language of the current regulation, i.e., that they may be selected by the recipient's governing body, if it so chooses.").
[10] *See* 45 C.F.R. §1607.3(f).
[11] *See* 59 Fed. Reg. 65252 (section analysis for §1607.3(f)).
[12] *Id.*
[13] *See e.g.* 59 Fed. Reg. 65251-65252 (section analysis for §§1607.3(a), 1607.3(c), 1607.3(f)).
[14] *See* 59 Fed. Reg. 65251 (*emphasis added*).
[15] *See* 45 C.F.R. §1607.6.
[16] *See generally,* LSC Program Letter 98-1.

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III. Informal consultation between the recipients and the bar associations is suggested, notwithstanding the lack of requirement for reappointment.

Although reappointment is unnecessary, informal consultation between the recipients and the bar associations would be prudent in this circumstance. As discussed above, the rulemaking history of Part 1607 suggests a spirit of consultation and collaboration among these entities. Communicating with local bar associations about planned mergers will likely foster amiable relations which should ease the transition of multiple programs into one.

Conclusion

In closing, the proposed initial board appointment procedure for the merger of CCLSSV, LASNRV and SVLAS is acceptable under the board composition requirements of 45 C.F.R. • 1607.3. As stated above, however, we recommend that the three merging programs consult, and at the very least communicate, with local bar associations throughout the process of the merger.

I hope that I have adequately responded to your inquiry. If you have questions or need additional assistance, please feel free to contact me at (202)336-8871.

Sincerely,

Dawn M. Browning
Assistant General Counsel

Victor M. Fortuno
General Counsel

750 First Street, NE 11th Floor
Washington, DC 20002-4250
Phone 202.336.8800 Fax 202.336.8959
www.lsc.gov

dbrowning@lsc.gov
(202) 336-8871

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