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Re: Comments on Draft Program Letter No. 12-1 - Financial Eligibility Screening Guidelines

I write to comment on Program Letter 12-1 as it pertains to online intake. More specifically as it pertains to automated online intake used to support pro bono services. **It is strange that at the same time that LSC's Board is asking a Blue Ribbon panel to develop strategies to expand pro bono services to a larger population, especially in rural areas, that LSC is proposing internal policies which will restrict the ability of programs to use technology to do just that.** These proposed internal policies on automated intake endanger the continuation of some of the most innovative, successful and cost effective pro bono projects in the country. Legal Services of Northern Michigan's Internet representation Project as detailed below, brings pro bono counsel and advice service to people in the most remote rural areas, using the internet, at a cost of approximately \$4.00 per client.

Others have concerns about the Program Letter's impact in-house intake. This letter will focus on the impact of and our concerns related to footnote five. Footnote five applies the program letter to PAI delivery models without any analysis or consideration of the different regulations, qualities and program involvement in these models.

With staff attorney delivery models there are significant LSC resources being expended to deliver the services to clients. These resources are mostly used to provide direct legal assistance. In contrast, non-contract PAI delivery models, involve very little LSC resources. In PAI delivery models the resources are being used, not to deliver the legal assistance to clients, but to facilitate access to a private attorney. At a recent LSC Pro Bono Task Force meeting, these delivery models were referred to as "matching services" and their value was lauded. The speaker continued by opining that there are tremendous benefits and should be no real obstacles to such sites. Unfortunately, LSC's proposed Program Letter 12-1 creates obstacles where none existed. The letter creates obstacles by failing to recognize that the private attorney, not the LSC program, is delivering the legal assistance. This difference is significant and should impact on what is deemed "reasonable" intake and screening under 45 CFR 1614.



Before we get into the differences surrounding 1614 however, we need to look at some provisions which were omitted from Program Letter 12-1 that are relevant to this conversation:

1611.1 Indicates that “This part also seeks to ensure that financial eligibility is determined in a manner conducive to development of an effective attorney-client relationship.” It is important to understand that 1611 was enacted to replace an older, more cumbersome system and was proposed after a review of intakes failed to find “widespread instances of services being provided to financially ineligible persons”.¹

1611.7(b) was omitted from the Program Letter and it mandates that a program “adopt simple intake forms and procedures to obtain information from applicants and groups to determine financial eligibility in a manner that promotes the development of trust between attorney and client”. Nothing in the Program Letter promotes the use of simple intake forms and procedures nor does it speak to promoting the development of trust between the attorney and client.

1611.7(c) was also omitted from the Program Letter. This section is the safeguard. It provides appropriate additional inquiry “(i)f there is substantial reason to doubt the accuracy of the financial eligibility information provided by an applicant”. As no direction was given on this, it might be assumed that the requirement of “direct follow-up” is to determine whether there is substantial reason to doubt the accuracy of the financial eligibility of the applicant. It does seem, however, that this is a lower standard than that set forth in the Program Letter which seems to require verification regardless of whether there is a substantial reason to doubt. The verification would also seem a bit demeaning to the applicant as it, in reality is asking “Are you smart enough to understand our questions and if so are your answers lies”?

With a better understanding of 1611 requirements, we should turn to section 1614 and how it differs. The most significant difference is contained in 1614.1(c) which reads:

Because the Corporation’s PAI requirement is based upon an effort to generate the most possible legal services for eligible clients from available, but limited resources, recipients should attempt to assure that the market value of PAI activities substantially exceeds the direct and indirect costs being allocated to meet the requirements of this Part.

Section 1614.1(c)’s cost benefit analysis is echoed in section 1614.2 which requires that such funds “be expended in an economic and efficient manner” and in 1614.3(c)(2) which requires “effective and economic delivery”. Finally section 1614.4(2) requires a program develop a (PAI) plan which considers the legal needs of eligible clients in the geographic area served and “delivery mechanisms potentially available to provide the opportunity to meet the established priority legal needs of eligible clients in an economical and effective manner”.

Section 1611 contains no provision requiring a cost effective delivery. When evaluating the “reasonableness” of intake and delivery system cost effectiveness must be taken in consideration. Instead of providing guidance for PAI intake systems using the dictates of section 1614 Program

¹70 FR 45559 & 45560.

Letter 12-1 merely lumps PAI intake in with staff based intake by way of a footnote. No separate analysis and no consideration of the different costs and involvement in the provision of legal assistance.

A PAI system does not provide legal assistance to applicants, it merely enables private attorneys to provide the assistance to those with the highest need. The drafter's of 1614 wanted to make certain that PAI systems maximized the availability of legal assistance to the client population. Requiring every intake to be screened by a legal service program employee defeats that purpose and violates the statutory mandate that the PAI services be delivered in an "economical and effective manner."

LSNM's Internet Representation Project (IRP) is the longest running example of a cost effective PAI system. Clients² are screened electronically and are then able to post a question on-line. Volunteer attorneys monitor the site and respond to the questions posted by client as time and expertise allow. LSNM staff involvement is limited to maintaining the server (reboot required three or four times a year) and monitoring posts for priority cases which should come directly to the staff offices. Total program cost is estimated at \$4.00 per case at the current volume of 350 cases per year. If the project is scaled up, the cost should drop to \$2.00 per case. Requiring every post be screened by a live person with direct contact to the poster will easily triple or quadruple the costs. However, it is not difficult to avoid the extra cost and comply with statutory mandates. The information provided by the electronic intake system should be deemed to be the "simple intake form and procedure" as mandated by 1611.7(b). The private attorneys could then be trained to spot eligibility anomalies and make additional inquiries pursuant to 1611.7(c).

The requirement of direct contact by program staff is not just a financial issue. The increased scrutiny of personal information and contact between the person seeking PAI services and program personnel will create conflicts of interest. Mandating an intake system which creates conflicts is contrary to 1614.3(c)(4) which provides in part:

(c) The specific methods to be undertaken by a recipient to involve private attorneys in the provision of legal assistance to eligible clients will be determined by the recipient's taking into account the following factors:

(1) The priorities established pursuant to part 1620 of these regulations;

(2) The effective and economic delivery of legal assistance to eligible clients;

(3) The linguistic and cultural barriers to effective advocacy.

(4) The actual or potential conflicts of interest between specific participating attorneys and individual eligible clients; and . . . (emphasis added).

²The term "clients" is used to refer to the persons posting the question and is not used as a term of art within the LSC lexicon. Whether the questioner's are classified as clients or as something else is a counting issue and should be separate from the delivery system.

Since 1614.4(a)(1) and 1614.3(c)(1) require PAI services to be consistent with program priorities and needs, and since most programs have representation of domestic violence victims as a core priority, and since most bar associations determine that collecting personal data can create a conflict, a program is left with only two choices. The first is to not provide any pro bono services which allow direct delivery of services to clients. Or second, screen out of the PAI services any potential clients with domestic issues (divorce, child support, custody etc...). Domestic violence is, of course, the subject area of the greatest unmet need. It would seem that neither option complies with the intent of 45 CFR 1614.

There appears to be an assumption that software based screening is less accurate than person based screening. However, there has never been any testing upon which to base that premise. A statistical comparison between LSNM's staff intake and that of the IRP show little variance. The average poverty percentage of an in-house client in 2011 was 63%. The average poverty percentage of a IRP client in 2011 was 55%. LSNM staff offices turn away three or four clients per every one accepted. The IRP site screened out over 1,100 posters and screened in 323 in 2011. It appears the screening module is working as intended which leads us back to 1611.1 which notes a lack of "widespread instances of services being provided to ineligible persons."³

Technology must be used as a method to expand resources not retract them. The expansion of services through technology has been a part of nearly every LSC public address for the last five or more years. Yet LSC's inflexible approach to technology and regulation compliance has been a major barrier to pro bono initiatives. The whole idea behind technology is to free up personnel resources not to place additional burdens on them. This is especially true with the difficult task of enabling pro bono services to those in rural areas. The proposed intake policy is likely to mandate the termination of successful pro bono programs in order to avoid conflicts and diversion of resources.

LSC needs to embrace online intake procedures which are coupled to inexpensive and efficient PAI delivery. When determining what is reasonable in such a system, care must be taken to remember the mandates of 1614 for efficient and economical delivery models. Any regulations on electronic intake must have consideration for what the purpose of the screening is. Those which screen staff intake where the expenditure of thousands of dollars of attorney time may be possible, can reasonably be more robust. However, those that screen to allow contact with a private attorney where no legal assistance is being delivered by the program or with LSC or program dollars, must be allowed flexibility. Technology has the potential to reduce delivery costs and expand services, but it cannot be successful if old paradigms continue to be mandated. At the very least, the issues presented by automated (on-line) intake in relation to 45 CFR 1614 should be discussed separately and with consideration of the unique issues and regulations of these systems, instead of being buried in a footnote.

³If it is believed that a significant number of unqualified people are being determined eligible by online intake systems, this premises should be tested. It would be easy to fund a pilot project where in an in-person follow-up intake is conducted on a statistically relevant sample of those screened on-line. The results would show what, if any, holes exist in on-line intake.

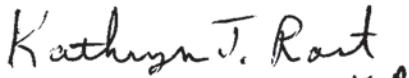
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