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July 26, 2012

Ms. Cheryl Nolan
Legal Services Corporation
3333 K Street, N.W., 3d Floor
Washington, D.C. 20007

Re: LSC Strategic Plan

Dear Ms. Nolan:

The event about which I write occurred on July 18, which is past the July 11 deadline for comments on the LSC strategic plan. Since you will be involved in some aspects of the plan's promulgation, I thought that I might send you the following illustration of the question in my mind, which is how the LSC can fairly measure quality lawyering with metrics.

Legal Action has just concluded a case entitled *Bratcher v. Housing Authority of the City of Milwaukee*. Four years ago, in April of 2008, LeVerna Bratcher, the mother of five children, sought our representation because she had applied for Section 8 Rent Assistance and been denied by the Housing Authority of the City of Milwaukee (HACM). Legal Action's staff attorney, April Hartman, wrote a letter to HACM requesting that Ms. Bratcher's application be granted. HACM denied this request.

At this point, Attorney Hartman could have closed the file and counted it as 1 case for our CSRs. She could not have counted it as a Legal Action Outcome 60p – "Preserved or gained admission to Section 8 program" because HACM unreasonably and unlawfully denied the relief sought by Attorney Hartman in her letter. When applying quantitative or qualitative metrics to this case at this point, is Legal Action performing well or poorly? We furnished assistance to one more family, a family of six people, but we do not have an outcome to show for it.

At this point, we faced a decision as to whether to sue HACM. Prior to filing suit, we had two Housing Unit meetings to consider how this case might fit into our overall Section 8 strategy and whether it warranted the investment of the resources required by litigation. This work on our part can be measured by hours, but not by outcomes. Had there been compelling reasons not to sue, and had we not sued, Legal Action would have been efficient in not wasting resources, and productive in saving resources for use on behalf of other clients in other cases, but how do metrics measure the efficiency and productivity of the road not taken? Is Legal Action a "higher-performing grantee" because of this prudent use of resources shown through some metric, or is it a "lower-performing grantee" because it cannot show, metrically, "identified benefits for individual clients, as well as other societal benefits and governmental savings," or, metrically, "how invested federal grant dollars translate into an amount of legal services delivered"?

As it happened, our Housing Unit discussions produced a decision that litigation was warranted.

Our experience has led us to conclude that a large expenditure of advocacy resources, whether in litigation or short of litigation, that results in the securing of relief for a single client or family is an inefficient use of resources if the defendant (here, HACM), is free to repeat the illegal denial for our client family or to perpetrate it against others. Individually specific relief, such as reinstatement to Section 8, has not served as a deterrent to widespread constitutional violations by housing authorities. Since money talks, we believe that a more effective, and efficient, deterrent remedy is a damages remedy. If housing authorities and their insurers must pay out significant sums when we establish that the housing authority has unlawfully denied decent and affordable housing to our client, they will be much less likely to do so in the future. Thus, we have been attempting to establish entity liability on the part of housing authorities, and LeVerna Bratcher's case fit into that attempt.

A problem with establishing a damages remedy for violations of the Due Process Clause, in addition to the *Parratt* doctrine, is the well-established doctrine in 42 U.S.C. §1983 law that there is no vicarious, *respondeat superior* liability for damages. Individual government employees can be personally liable for damages caused by their unprivileged acts outside the scope of their qualified immunity, but the government entity is not vicariously liable for the bad acts of its employee. Damages can only be awarded against the entity when the acts of the entity itself cause the damages.

This entity liability for damages can occur in two circumstances: First, if a policy or custom of the entity violates the rights protected by federal law; second, if the person who violated the right protected by federal law is so high in the governmental decisionmaking process as to constitute the "government entity."

The prohibition against vicarious liability is a problem because government entities never adopt a "policy" to violate the Due Process Clause. The "policy" is to obey the law. Similarly, the actual violations of the Due Process Clause are generally not committed by people high in the legislative or executive branches of the entity. Defective Section 8 notices are issued by comparatively low-level administrative workers. Inadequate Section 8 hearings are conducted by relatively low-level hearing officers.

When we filed LeVerna Bratcher's case on April 7, 2008, in the complaint Legal Action claimed that the Due Process Clause violations committed by HACM are so common that it can be said that they constitute a custom, and that the entity can thus be held liable because that is its custom.

As mentioned, the *Bratcher* case involved the denial of a Rent Assistance application. The Due Process issue was, as in five other Legal Action Section 8 cases – *Driver, Guerrero, Black, Collins and Thorn* – the adequacy of the form notice given by the housing authority. The procedural posture of *Bratcher* was, however, different from our other cases because, in *Bratcher*, Legal Action combined the §1983 federal civil rights claim with a state court *certiorari* proceeding. (This combination was approved in *Hanlon v. Town of Milton*, 2000 WI 61, 235 Wis. 2d 597, 612 N.W.2d 44.) The trial court adjudicated the narrow *certiorari* proceeding first. On July 20, 2009, it reversed HACM's denial of Rent Assistance to LeVerna Bratcher and her children on the ground that its notice violated the federal regulations. That part of the case that was the *certiorari* remedy was remanded by the Circuit Court with an order requiring HACM to hold a new hearing, after giving a constitutionally sufficient notice. Significantly, the Circuit Court ordered that at this second hearing HACM was barred from presenting new evidence in support of its case, accepting Legal Action's argument that *Snajder v. State* 74 Wis. 2d 303, 310, 246 N.W.2d 665 (1976), bars the agency which has violated the Constitution from using a re-hearing as a second opportunity to prove its case. The Circuit Court retained jurisdiction to determine what additional remedy might be available after the renewed hearing. Despite this court order, HACM refused for nine months to hold a new hearing.

On August 21, 2009, HACM appealed the Circuit Court's order. While the appeal of the *certiorari* order was pending, Legal Action conducted discovery on the §1983 claim at the Circuit Court level. The purpose of this discovery was to establish that the defective notice was not some "random and unauthorized," aberrant mistake, but in fact was HACM's customary practice. On February 15, 2010, the Circuit Court granted Legal Action's motion for summary judgment on the §1983 claim, holding that the notices were a customary practice for which HACM, as an entity, could be held liable. The Circuit Court ordered, for the second time, that HACM hold a new and proper hearing, and that it do so within 60 days.

HACM waited another 51 days, then held the court-ordered hearing on April 7, 2010. With no additional evidence presented, HACM issued a new decision, again denying LeVerna Bratcher's Section 8 application. On May 25, 2010, Legal Action filed a new *certiorari* action challenging the sufficiency of the evidence and the inadequacy of the second decision, which mixed the two applicable legal standards.

On June 8, 2010, the Wisconsin Court of Appeals affirmed the Circuit Court's July 20, 2009 order. HACM petitioned for Supreme Court review. The Supreme Court denied.

On December 22, 2010, the Circuit Court reversed HACM again. This time the Circuit Court said, *in dicta*, that the evidence was sufficient to establish grounds to deny the Section 8 application, but held that, under HACM's own Administrative Plan, the incident was too stale to be considered. HACM filed a motion for reconsideration. We opposed this, and asked the Circuit Court to include in its order that it was final for purposes of appeal. It did so. The final order was entered on February 1, 2011. HACM did not appeal.

All of this litigation and these court decisions left the §1983 claim pending before the Milwaukee County Circuit Court. The posture of the case was that the faulty notice issue had been adjudicated in the *certiorari* proceeding, and a summary judgment in the §1983 proceeding had been granted, establishing that the defective notices were the HACM's custom. Thus, HACM the entity was liable for damages to LeVerna Bratcher. A jury trial on damages was set for July 23, 2012.

Negotiations with HACM's insurer ensued. Legal Action took a firm stand, expressing to the insurer that we were quite prepared to go to trial.

On July 18, the case settled. LeVerna Bratcher has been accepted into the Section 8 Rent Assistance program, and will receive $23,500 in damages. Legal Action will receive $75,245.73 in attorneys' fees and costs. Thus, we obtained nearly $100,000 in total payments from the insurance company that insured a housing authority that had deprived our client and her five children of their constitutional and federal legal rights. It was a four-year effort, with litigation up and down between the Circuit Court, the Court of Appeals and the Supreme Court, and with multiple proceedings in the Circuit Court. It ended as a huge success.

My purpose in reciting all of this is to query how metrics would be applied to this, how metrics would be used to determine whether Legal Action is a "higher-performing" or a "lower-performing grantee." Is this simply 1 case, worth 1 point, or 2 cases, worth 2 points, given the appeal? Is it 100,000 points because we won $100,000? Is it 6 points because there were 6 family members? Is the metric the number of hours invested in the case? The LSC Performance Criteria are much better able to evaluate this effort than are "metrics." We are quite concerned that the hasty application of metrics in judging the value, or merit, of legal services law firms, will render impossible the kind of representation of low-income people, and the results, described above. We need to take care not to turn ourselves into widget factories, where the speed of the assembly line and the volume of widgets are the measures of success.

Thank you for your consideration of my concerns.

Yours truly,

John F. Ebbott
Executive Director

JFE:caj