

Comment on Legal Services Corporation's (LSC) Further Notice of Proposed Rulemaking on Termination, Limited Reductions in Funding, and Debarment Procedures; Recompetition; Enforcement; Suspension Procedures

by

COMMITTEE ON LEGAL AID

Legal Aid #2

September 6, 2012

MEMORANDUM PREPARED BY THE COMMITTEE ON LEGAL AID

The New York State Bar Association Committee on Legal Aid (CoLA) offers the following comments to the Further Notice of Proposed Rulemaking on Termination, Limited Reductions in Funding, and Debarment Procedures; Recompensation; Enforcement; Suspension Procedures, published on August 8, 2012 in the Federal Register.

The proposed changes made to the January 31, 2012 Notice of Proposed Rulemaking (NPRM) address some of the concerns raised in the comments to the original rules, and we appreciate the attention to our concerns. We continue to oppose the creation of the additional sanctions for the reasons stated in our original comments: primarily that the need for the additional level of sanctions has not been demonstrated; that the exercise of these sanctions will cause needless harm to the clients of affected programs; that standards for imposition of these sanctions are lacking; and that they were not recommended by the GAO or LSC's Fiscal Oversight Task Force.

We wish to thank the Board for its modifications of the proposed rules as related to our concerns about the lack of due process contained in the originally proposed rules. We believe that more should be done to assure due process, but that the overarching concerns about the lack of need for the rules make adjustments to due process less than optimum as a response.

For these reasons we reiterate our original comments and attach a copy of them for your convenience. As to the specific questions raised for comment in the NPRM, CoLA joins in the comments made by the National Legal Aid and Defenders Association. We particularly wish to emphasize that the definition of a violation under 1602.2 should contain language that sets out with particularity a definition of "knowing and willful" that

includes an exception for a program that acts on good faith following a reasonable interpretation of federal or state law or regulation when making its decision to act or not act that leads to the violation.

Thank you for the opportunity to comment. We would be happy to discuss this further if requested by the Board or LSC management.

Co-Chairs of the Committee:

Lewis G. Creekmore, Esq.
Edwina Frances Martin, Esq.

Comment on Legal Services Corporation's (LSC) Proposed Rule

by

COMMITTEE ON LEGAL AID

Legal Aid #1

April 2, 2012

MEMORANDUM PREPARED BY THE COMMITTEE ON LEGAL AID

The New York State Bar Association's Committee On Legal Aid is charged with the duty of considering methods and proposals for rendering legal aid to the poor and of maintaining a continuing study of the administration of justice as it affects the poor. We work closely with the leadership of legal services providers from throughout the State, both LSC and non-LSC funded providers. We write in strong opposition to LSC's proposal for additional sanctions per your notice of Proposed Rulemaking dated January 31, 2012.

Our experience in New York demonstrates that there is no need for additional (termed "lesser") sanctions. In addition, the proposal as put forth by LSC is fundamentally flawed with respect to the lack of due process prior to implementation of drastic financial sanctions.

In the first instance, we believe that LSC currently has adequate tools to ensure compliance including:

- Required corrective actions;
- Special Grant Conditions;
- Short-term funding, including month-to-month funding;
- Questioned costs under 45 CFR 1630;
- Suspension of funding for up to 30 days under 45 CFR 1623;
- Terminations under 45 CFR 1606.3 including reductions of between 5% and 100% of a grant;
- Debarment under 45 CFR 1606.4; and
- Decisions not to refund a program during the competition process – 45 CFR 1634.

Given the wealth of LSC's current tools, there is no demonstrated need for additional sanctions. LSC management has put forth no evidence that the above-existing mechanisms to encourage and enforce compliance have failed. Indeed, in your Notice of Proposed Rulemaking, LSC states: "The majority of LSC recipients are in substantial compliance with LSC requirements most of the time. When non-compliance occurs, recipients almost always work diligently and cooperatively with LSC staff to come promptly into compliance, but there have been exceptions." No exceptions are elucidated; nor do we know of any instances of such non-compliance in New York or nationally that could not have been addressed through LSC's current tools.

We also note that the report of LSC's own Fiscal Task Force never identified a need for any additional sanctions. Nor did the Task Force include any evidence of non-compliance that additional sanctions might be needed to address.

We are particularly concerned that the reductions in funding embodied in this proposal will harm clients and applicants of LSC-funded programs and non-LSC funded programs. All legal services providers operate on very limited budgets. Reserves are either very low or exhausted. Many providers are currently struggling with instituting or avoiding layoffs, reductions in service, and the potential for office closures due to the nearly 19% reduction in our LSC funding over the last two years. The penalties as proposed could very well result in additional staff layoffs and further reductions in services. In New York, LSC providers also face significant additional LSC reductions over the next two years as a result of Census readjustments. These anticipated reductions and the sanctions permitted by the proposed regulation would impact both LSC providers and the non-LSC providers with whom they collaborate, as layoffs and office closures by LSC grantees will certainly increase the demand on their partners.

These types of cuts are particularly threatening given the intense need for civil legal services. In 2010, the Chief Judge's Task Force to Expand Access to Civil Legal Services found that 47% of all low income New Yorkers will experience at least one legal problem annually. This is at least 2,835,102 people statewide per year. The November 2011 Task Force Report also found that current legal services providers (LSC funded and non-LSC funded) meet the needs of only 20% of those who need assistance. Sanctions such as the ones permitted by LSC's proposal will have an immediate impact on the already limited services available to New Yorkers in need. In fact, the new Notice of Proposed Rulemaking has less due process than the draft notice presented by LSC in 2008. This belies LSC's commitment to ensuring justice, as justice should surely be provided to those who ensure justice for others.

Finally, there are no real standards for LSC to impose these considerable sanctions. The proposal states that a "substantial violation" will be determined by looking at "(1) The number of restrictions or requirement violated; (2) Whether the violation represents an instance of noncompliance with a substantive statutory or regulatory restriction or requirement, rather than an instance of noncompliance with a non-substantive technical

or procedural requirement; (3) The extent to which the violation is part of a pattern of noncompliance with LSC requirements or restrictions; (4) The extent to which the recipient failed to take action to cure the violation when it became aware of the violation; and (5) Whether the violation was knowing and willful.”

LSC lists only factors that might be considered in determining whether “a substantial violation” has occurred. These are not standards that would limit the discretion of an LSC employee. For example, there is no requirement that the violation be willful, only that willfulness is a factor to consider. LSC’s proposal also lacks clarity as to when an alleged violation might be considered “more serious”. The sanctions as written apply not only to an alleged violation of a law or regulation, but also to an instruction, rule and guideline – perhaps even an individual employee’s interpretation. LSC’s various handbooks and guides, such as the Property Acquisition and Management Manual, the CSR Handbook, the Accounting Guide, the Audit Guide, are, on occasion, interpreted differently by varying LSC departments and employees. What happens when a program has a good faith difference of opinion with an LSC employee’s interpretation of a substantial, statutory requirement?

For the foregoing reasons, the Committee **OPPOSES** the subject proposal:

Co-Chairs of the Committee: Lewis G. Creekmore, Esq.
Edwina Frances Martin, Esq.