


## RULEMAKING OPTIONS PAPER

**TO:** Helaine M. Barnett  
President

**FROM:** Victor M. Fortuno   
Vice President & General Counsel

**DATE:** October 11, 2005

**SUBJ:** Revision of 45 CFR Part 1624 – Prohibition Against  
Discrimination on the Basis of Handicap

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The Operations & Regulations Committee of LSC's Board of Directors determined that it wanted to take up the issue of whether to initiate a rulemaking to consider revisions to Part 1624. This Rulemaking Options Paper ("ROP") has been prepared in accordance with the LSC Rulemaking Protocol to assist you in responding to the Committee on the issue.<sup>1</sup>

<sup>1</sup> Under the Rulemaking Protocol:

In most instances, prior to undertaking a rulemaking LSC's Office of Legal Affairs ("OLA"), in close consultation with appropriate Corporation staff, will develop a *Rulemaking Options Paper* ("ROP"). The ROP will contain a discussion of the subject for the potential rulemaking, and will include an outline of the policy and legal issues involved. The ROP shall also recommend whether the potential rulemaking should be accomplished by *Notice and Comment Rulemaking*, including whether holding a Rulemaking Workshop would be appropriate, or whether it should be *Negotiated*.

Once the ROP is developed and approved by the LSC President, it will be submitted to the Committee. The Committee will have the opportunity to deliberate and determine whether to recommend to the Board that the Board initiate a rulemaking. If the Committee recommends that the Board initiate a rulemaking, the Committee deliberations will also provide an opportunity for the Committee to recommend policy direction on the scope and issues expected to be involved in the rulemaking. As noted

## ***Background***

Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §706), as amended, prohibits discrimination on the basis of handicap by recipients of Federal assistance. As recipients of federal assistance, LSC grant recipients are subject to the non-discrimination requirements of Section 504. At the same time, while the Corporation is not obligated to enforce Section 504 of the Rehabilitation Act (since, under the LSC Act, it is “not an agency, department or instrumentality of the Federal government”), it does have the authority to ensure that LSC grant recipients comply with its provisions. LSC chose to exercise this authority and adopted the Part 1624 regulations implementing the non-discrimination requirements in Section 504 in 1979. The regulations have not been amended since that time.

## ***Summary of Major Issues***

Although Section 504 remains applicable to LSC recipients, the passage of the Americans with Disabilities Act of 1991 (“ADA”) has imposed similar, but independent requirements relating to non-discrimination in services and employment on LSC grantees. Specifically, LSC recipients are directly subject to the non-discrimination provisions of Title I of the ADA (relating to discrimination in employment) and Title III of the ADA (relating to public accommodations) and their respective implementing Equal Employment Opportunity Commission (“EEOC”) and Department of Justice regulations. The Part 1624 regulations, having been adopted prior to the passage of the ADA, do not address the ADA.

I note, at the outset, that LSC does not receive a significant number of complaints under Part 1624. In fact, LSC’s Office of Compliance and

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above, the Board will make decisions regarding whether to undertake a rulemaking, the method to be used for the rulemaking, and any policy direction to be given to staff at the outset. The appropriate rulemaking process shall be selected on a case-by-case basis consistent with the objectives of this Protocol.

67 Fed. Reg. 60762, 69763 (November 19, 2002).

Enforcement reports having received only a few complaints alleging discrimination by a grantee on the basis of disability. Similarly, LSC's Office of Program Performance has not found widespread issues relating to deficiencies in grantee provision of legal services to persons with disabilities or with regard to employment of persons with disabilities.

Although infrequent, complaints do occasionally arise and, when they do, they raise some interesting issues. One such interesting issue relates to LSC's enforcement authority and obligations. Part 1618 of LSC's regulations, Enforcement procedures, sets forth LSC's duties with regard to enforcing compliance with the LSC Act, regulations and grant conditions. Specifically, §1618.5(a) provides:

Whenever there is reason to believe that a recipient or an employee may have violated the Act, or failed to comply with a term of its Corporation grant or contract, the Corporation shall investigate the matter promptly and attempt to resolve it through informal consultation with the recipient.<sup>2</sup>

Thus, under Part 1618, LSC has an obligation to investigate claims of violations of Part 1624<sup>3</sup> prohibiting discrimination on the basis of disability.<sup>4</sup>

LSC's obligation under Part 1618 to investigate violations of 1624 applies by its own terms and exists independently of any proceeding that may be occurring at a state, local or federal agency. Thus, whether or not a complaint is pending before another entity, LSC remains obligated to

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<sup>2</sup> Although regulations are not specifically mentioned in §1618.5(a), §1618.2 defines "Act" to include "rules and regulations issued by the Corporation."

<sup>3</sup> Moreover, §1624.8 expressly provides that the "procedures described in Part 1618 of these regulations shall apply to any alleged violation of this part by a legal services program."

<sup>4</sup> Furthermore, under the Grant Assurances, grantees agree to refrain from discrimination on the basis of disability, as well as other bases, such as race, color, national origin, gender, religion, sexual orientation, and age. LSC 2005 Grant Assurances, Grant Assurance 7.

conduct its own investigation. LSC, however, is not an agency with a significant expertise in conducting discrimination investigations and legitimate questions can be posed as to whether LSC's enforcement resources would be better put to other uses.

With respect to claims of violation of the ADA, LSC has no authority to directly enforce the ADA. Rather, the EEOC and Department of Justice are responsible for enforcement of the ADA and implementing regulations (in their respective areas of authority), and persons wishing to file complaints about recipients should take up those complaints individually or with those agencies. However, this distinction is a fine one because it is unlikely that a violation of the ADA would not also violate Part 1624, which LSC has, as noted above, a duty to investigate. Part 1624 is based on the Rehabilitation Act and the standards of both acts are "largely the same." *Rogers v. Department of Health and Environmental Control*, 174 F.3d 431, 433 (4<sup>th</sup> Cir. 1999).

In the employment context, the Rehabilitation Act was amended after passage of the ADA to provide that the standards for determining whether there has been a violation of the employment discrimination provisions of the Rehabilitation Act shall be the same as for determining whether there has been a violation of Title I of the ADA. 29 U.S.C. §794(d). While the public accommodations provisions of the Rehabilitation Act do not contain such a specific cross reference, courts have "examined Rehabilitation Act precedent in examining the scope of coverage under the ADA." *Menkowitz v. Pottstown Memorial Medical Center*, 154 F. 3d 113, 120 (3<sup>rd</sup> Cir. 1998). *See also Berkovitch v. Baldwin School, Inc.* 133 F.3d 141, 152 (1<sup>st</sup> Cir. 1998) (treating "the ADA and the Rehabilitation Act as imposing parallel requirements.") If anything, the public accommodation standards under the Rehabilitation Act may be more stringent than those under the ADA. *See John W. Parry, Public Accommodations Under the Americans with Disabilities Act: Nondiscrimination on the Basis of Disability*, 16 Mental & Physical Disability L. Rep. 92, at 43-44.

A related issue here is that although LSC has a duty to investigate and authority to determine if violations have occurred, the scope of LSC's power to fashion a remedy for a complainant is limited. Under 45 CFR

§1618.5(b) if there is “substantial reason to believe that a recipient has persistently or intentionally violated the Act<sup>5</sup> . . . ] and attempts at informal resolution have been unsuccessful, the Corporation may proceed to suspend or terminate financial support of the recipient [. . . .]” Thus, if LSC determines that a recipient is in violation of Part 1624, LSC has the authority to attempt to broker a voluntary solution, and to suspend or terminate that recipient’s grant. LSC does not appear to have authority under the Act or regulations to impose an equitable remedy or to impose any monetary penalty upon a recipient (other than termination or suspension of the grant) or make any award to an aggrieved complainant.

Although the regulations provide considerable latitude to LSC in determining the scope of the investigation required and some latitude in negotiating settlements with grantees,<sup>6</sup> it might be preferable for the regulations to squarely address these issues. Moreover, revising Part 1624 need not necessarily entail the imposition of additional regulatory burdens on our grantees. It may, for instance, be appropriate to consider following the example of the Department of Transportation, which has regulations which cross-reference the ADA and address the interplay between section 504 and the ADA, without setting forth a separate set of ADA-based regulations. LSC could also consider the example of Department of Justice

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<sup>5</sup> Although the language of §1618.5(b) does not speak to violations of grant conditions, it would effectuate neither the purpose of the regulation, nor LSC’s statutory duty to ensure the “maintenance of the highest quality of service and professional standards” (see §1007(a)(1) of the LSC Act), if §1618.5(b) did not apply to such violations. In any event, the termination and suspension procedures, set forth in Parts 1606 and 1623, respectively, each provide independent authority for LSC to terminate or suspend grant funding for violations of grant terms and conditions. See 45 CFR §1606.3 and §1623.3.

<sup>6</sup> Currently, the only guidance provided by the regulations is that the duty to investigate is triggered when LSC “has reason to believe” that a violation “may” have occurred and that LSC must attempt to resolve the matter through informal consultation with the recipient. 45 CFR §1618.5(a). LSC, therefore, may determine the proper scope and course of investigations on a case-by-case basis. LSC may also take other proceedings into account in conducting its investigation and/or may consider any opinions issued by such other agencies.

regulations which address coordination of investigations between agencies and the EEOC in complaints of disability-based employment discrimination.

Approaching the matter from another direction altogether, one could question whether LSC should continue to have a separate regulation on disability-based discrimination at all. As noted above, LSC does not have a specific duty to “enforce” Section 504 of the Rehabilitation Act, just as it has no duty to enforce other various Federal anti-discrimination statutes applicable to recipients of Federal financial assistance (e.g., Titles VI and VII of the Civil Rights Act, the ADA, the Age Discrimination Act). Similarly, LSC has no obligation to issue regulations implementing these other statutes. Although LSC has chosen to adopt regulations implementing section 504, it has not chosen to adopt regulations on other types of civil rights discrimination. As such, LSC could consider eliminating Part 1624 altogether.

To the extent that Grant Assurance 7 prohibits discrimination on the basis of disability, removal of Part 1624 would put discrimination on the basis of disability on the exact same footing as other forms of civil rights discrimination (with respect to how it is treated by LSC). Moreover, since LSC would retain an obligation under Part 1618 to investigate claims of discrimination in violation of the grant assurances just as it does claims of discrimination in violation of Part 1624, there would likely be little practical difference and there is no reason to conclude that such complaints which LSC would receive in the future would not receive appropriate attention.

On the other hand, because LSC would retain its obligation to investigate claims of violation of the grant assurance prohibition on discrimination, there would likely be little practical difference to LSC in terms of improving resource allocation (i.e., relieving LSC of the need to devote resources to investigation of claims of discrimination on the basis of disability). Moreover, Part 1624 does sets forth basic standards for grantees as to what constitutes discrimination on the basis of disability. To the extent that such discrimination would continue to be prohibited, removal of Part 1624 would have the effect of creating potential confusion as to what the standards for compliance are, to the detriment of LSC and grantees. Most problematic, however, is that removal of Part 1624 might

be viewed as signaling that LSC no longer finds prohibiting discrimination on the basis of disability to be important. On balance, it appears that removal of part 1624 might create more problems than it would solve.

As such, it appears appropriate at this time to take a closer look at the statutory requirements and the regulations adopted by other agencies, as well as the significant body of case law which has developed over the years. The field (as represented by the Center for Law and Social Policy on behalf of the Civil Policy Group of the National Legal Aid and Defenders Association) has also recognized that Part 1624 may be ripe for rulemaking.<sup>7</sup> More specifically, although the CLASP comments stop short of endorsing the initiation of rulemaking, the CLASP comments note:

Clearly, the rule should reflect developments in the substantive law that have occurred in recent years. However, the rule's current self-assessment and enforcement provisions appear to be working well. Thus, we would encourage LSC to focus on the substance of the rule and to avoid imposing additional administrative burdens on legal services grantees or taking over legitimate enforcement functions by other appropriate agencies.

If LSC were to initiate rulemaking, there is a question as to what rulemaking process would be appropriate. In the CLASP comments, they note:

If LSC does decide to revise Part 1624, we urge the creation of a negotiated rulemaking<sup>[8]</sup> working group to ensure that there

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<sup>7</sup> See page 3 of the Comments of the Center for Law and Social Policy (on behalf of the Civil Policy Group of the National Legal Aid and Defenders Association), dated June 17, 2005 and submitted to LSC in response to LSC's Federal Register notice soliciting comments on LSC's Regulatory Agenda for 2005-2006,

<sup>8</sup> Under LSC's Rulemaking Protocol, a Negotiated Rulemaking involves the formal appointment of a Working Group composed of LSC representatives, grantee representatives and other interested parties. The Working Group meets with the assistance of a professional, third-party facilitator, with the intention of developing a consensus-based Notice of Proposed Rulemaking, which would subsequently be

is full participation by LSC recipients as well as representatives of the disabilities rights community.

The need to contract with a third-party facilitator and hold in-person meetings means that a negotiated rulemaking would be resource intensive (in terms of both costs and staff time). Although we believe that conducting a negotiated rulemaking would likely be successful in producing a mutually satisfactory result, we are not convinced that this particular rulemaking demands such a process with the attendant necessary expense. Rather, conducting a Notice and Comment Rulemaking and convening a Rulemaking Workshop<sup>9</sup> prior to the development of an NPRM would provide interested Board members, staff, grantees and other interested parties such as disability rights advocates, client representatives and grantee staff employee representatives with the opportunity for a frank, in-person exchange of ideas which would inform the development of an NPRM, yet would entail significantly lower costs and not require the same investment of time as a negotiated rulemaking.

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published for written public comment. 67 Fed. Reg. 69762, 69764 (November 19, 2002).

<sup>9</sup> Under LSC's Rulemaking Protocol, a Rulemaking Workshop is a meeting at which the participants (which may include LSC Board members, staff, grantees and other interested parties) "hold open discussions designed to elicit information about problems or concerns with the regulation (or certain aspects thereof) and provide an opportunity for sharing ideas regarding how to address those issues. .... [A] Workshop is not intended develop detailed alternatives or to obtain consensus on regulatory proposals." 67 Fed. Reg. 69762, 69763 (November 19, 2002). After the Workshop, management would report back to the Board for "policy guidance on the issues discussed to aid staff in the development of the *Draft Notice of Proposed Rulemaking* ("NPRM")." *Id.*



***Recommendation for Action***

**Accordingly, staff recommends that LSC undertake a rulemaking to revise 45 CFR Part 1621 through Notice and Comment Rulemaking, and that prior to the development of an NPRM, LSC convene a Rulemaking Workshop.**

**RECOMMENDATION APPROVED:**



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Helaine M. Barnett, President

Date: 10/13/05