
45 CFR Part 1611

Eligibility

AGENCY: Legal Services Corporation.

ACTION: Final rule.

SUMMARY: This final rule revises the Corporation's regulations governing determination of eligibility for legal services. This revision is needed to clarify the rule, strengthen enforcement procedures, and better focus resources on those in need of legal assistance. This rule sets more specific eligibility standards, provides for better documentation and verification of eligibility, and slightly narrows the categories of persons and organizations eligible.

EFFECTIVE DATE: December 30, 1983.

FOR FURTHER INFORMATION CONTACT:
John C. Meyer, Deputy General Counsel,
(202) 272-4010.

SUPPLEMENTARY INFORMATION:**General**

The Corporation had considered this regulation extensively before the Operations and Regulations Committee meeting July 18, 1983. The regulation was postponed at that time and was considered at an August 23, 1983, committee meeting at which it was published for comment (August 29, 1983; 48 FR 39086).

The Corporation received extensive comments by the comment deadline of September 28, 1983. There was opposition to the proposed changes in this regulation, specifically to the section on assets. Section 1611.8 has been rewritten in response to the comments, as will be detailed under the discussion of that section below.

There were comments that no change in the eligibility regulation were needed or that the decision on these changes should be postponed. The regulation has been revised because the current language has given rise to repeated issues of interpretation, particularly as to allowable group representation and whether criteria other than income in the current § 1611.5 should operate to deny representation to persons within the income limits, as well as to allow representation of persons above those limits. Furthermore, most recipients had not established any objective guidelines as to the level of assets above which an applicant should not be served. Another problem was that when complaints as to eligibility have been received, the Corporation has had difficulty in obtaining the necessary information on which to make a determination. Finally, the limited amount of Corporation resources has prompted a reexamination of eligibility criteria so as to focus those resources on those persons in most need.

It has been suggested that a Board consisting of recess appointees should not take any action. The Board of Directors, however, has the same fiduciary responsibilities as any other corporate board and cannot abdicate them. Furthermore, the Board of Directors cannot postpone decisions on the basis of the prospect of a confirmed Board at some uncertain time in the future without paralyzing the Corporation for an indefinite period. The issues surrounding the eligibility regulation have been extensively considered and it is the conclusion of the Corporation that it is in the best interests of the Legal Services program to make a decision.

A substantial number of comments were received advocating changes in language which had not been changed

from the current regulation; except in a few instances these comments are not discussed due to the issues raised concerning changes that were in fact made. The significant changes from the proposed regulation and significant issues raised by the comments on the proposed regulation are discussed below, section by section.

Section 1611.1 Purpose.

This section was unchanged and no comments were received on it.

Section 1611.2 Definitions.

This section was not significantly changed in the proposed rule. In the final rule, the definition of "Governmental income maintenance program" was deleted because this term is no longer used in the regulation.

Several comments were received advocating changes in the definitions. There was criticism of "gross income" as the standard for eligibility. The Corporation consistently has considered "gross income" to be the correct eligibility standard under the Act and believes that the factors listed in § 1611.5(b)(1) cover any inequities resulting therefrom. The Corporation has considered and rejected the suggestion of basing eligibility on weekly or monthly, rather than annual income. Such a standard would be subject to manipulation and abuse, and would result in excessively frequent changes in eligibility.

Section 1611.3 Maximum Income Level.

This section remains unchanged except for technical corrections. A few comments were received suggesting different income standards, but no change was considered, owing to the need for massive, lengthy, and expensive research to establish the necessary data base to enable the Corporation to consider a change in this basic eligibility criterion and the lack of convincing evidence that a change in the income eligibility level is needed.

Section 1611.4 Authorized Exceptions.

Three changes were made in this section. The first is that the proposed rule sets an absolute ceiling of 150 percent of the recipient's maximum income level, whereas the final rule sets a uniform national absolute ceiling at 150 percent of the "national eligibility level." The "national eligibility level" is 125 percent of the poverty line. Thus no one whose income is over 187.5 percent of poverty could be served. In response to comments, one exception to this absolute ceiling was added in

§ 1611.5(b)(1)(B) to address the situation where a person's income is primarily committed to medical or nursing home expenses.

The second change is that the proposed rule deleted the current § 1611.4(c), which is the "income disregard" section allowing benefits from a governmental income maintenance program not to be counted in income for the purposes of determining eligibility. The Corporation received numerous comments opposing this change on the grounds that it increases the number of eligibility determinations needed, since recipients of welfare, SSI, unemployment, etc., could no longer automatically be deemed eligible. The income disregard never made anyone automatically eligible. Moreover, ease of administration is not sufficient to justify serving one person with a higher income, some or all of which derives from a governmental income benefit program, while a person who is working and who makes less total income is not served. The Corporation has not seen a convincing answer in the comments to its contention that a governmental dollar is just as good as an earned dollar (and indeed sometimes better, because it is tax-free). In many states, unemployment compensation, alone, can total more than 125 percent of the Federal Poverty Income Guidelines. The change made does not affect the text of current § 1611.4(b) (in the final regulation § 1611.4(a)(2)), which allows for representation of persons "seeking legal assistance to secure benefits provided by a governmental program for the poor," e.g. SSI benefits, even if they are above the recipient's maximum income level.

The third change in Section 1611.4 was added in the final rule; it is that the former paragraphs (a) and (b) have become subparagraphs (1) and (2) of paragraph (a) and a new paragraph (b) is added. This new paragraph (b) requires recipients to document and include in the client's file the reasons for serving any client whose income exceeds 125 percent of poverty. It further requires the recipient to keep such other records (without client identification) "as will provide information to the Corporation as to the number of clients so served and the factual bases for the decision made." The purpose of this provision is to assure the existence of a record sufficient for the Corporation to review such eligibility determinations.

Section 1811.5 Determination of Eligibility—Paragraphs (a) and (b).

There was one minor change made in Section 1811.5(a). The next annual review of eligibility guidelines must be made by January 30, 1984, in order to include all the changes in eligibility criteria made in this regulation.

Section 1811.5(b) was extensively revised in the proposed rule, splitting the current § 1811.5(b) into two lists of criteria, those in Section (b)(1) which may be used to serve a client above the maximum income level and those in § 1811.5(b)(2) which shall be used not to serve a client at or below the maximum income level. In response to comments, the final rule uses the statutory language "shall be used in the determination of" for both Sections (b)(1) and (b)(2). Also, in response to comments, a new Section (b)(3) was added providing that if a client is to be served based on the factors in Section (b)(1), the factors in (b)(2) shall also be used before a final determination is made, and if a client is not to be served based on the factors in Section (b)(2), the factors in Section (b)(1) shall be used before a final determination is made. For example, if an over-income client were tentatively to be served based on medical expenses, assets would also have to be considered in the final determination; likewise, if a client were tentatively not to be served based on assets, medical expenses would also have to be considered in the final determination.

Section 1811.5(b)(2)(D) concerning assets was changed, in response to comments, to comport with the terminology of revised § 1811.6 and to include the explicit requirement that only assets "available to the applicant" be counted. The extensive changes in the treatment of assets will be discussed under § 1811.6.

One other change made in the proposed regulation, the change from "taxes" to "unpaid taxes" in § 1811.5(b)(1)(C), was criticized by numerous commentators. Nevertheless, it is retained because the general scheme of the regulation is to consider gross income and then use special circumstances as a basis for exceeding the gross income limits. Taxes, in general, are not a special circumstance, and thus are distinguishable from such factors as medical expenses or expenses associated with age or infirmity. Unpaid taxes, however, are a special circumstance and an indicator of financial distress. Consequently, the final regulation retains this language.

Section 1811.5 Determination of Eligibility—Paragraph (c).

Section 1811.5(c) was amended in the proposed regulation to restrict group eligibility to groups composed primarily of eligible clients and to require each group to provide information that it lacks funds to retain private counsel. These changes are retained in the final regulation. The current regulation allows a group composed primarily of eligible clients to be served regardless of its collective means and also allows service to a group that "has as its primary purpose furtherance of the interests of" eligible clients, if it lacks means to retain private counsel.

This section was criticized for making advocacy groups not composed primarily of eligible clients ineligible for services. It is the purpose of this section to ensure that scarce legal services resources are reserved for representation of eligible individual clients and organizations composed of and controlled by eligible individuals, consequently excluding advocates groups not primarily composed of eligible individual clients. It was also criticized because it would make impossible the representation of such individual clients as those in nursing homes, mental institutions, etc., with the assistance of advocacy groups. The Corporation believes this contention is erroneous. There is nothing in this paragraph preventing an advocacy group from assisting an eligible client in a nursing home or mental hospital in obtaining representation from a recipient. This paragraph merely requires that there be an *eligible client*—that each case taken have an actual client whose actual interests are being vindicated by legal representation, and whose case fits the priorities as determined by the recipient under 45 CFR Part 1820. It is a requirement that concrete benefit to an individual eligible client must be sought and, as such, should not be an obstacle to any group genuinely operating in the "furtherance of the interests of" eligible clients.

As stated in the preamble to the proposed regulation, it is assumed that a group composed primarily of eligible clients will be governed by those eligible clients. As a result, there is an inherently close relationship between the group's interests and the actual interests of its individual eligible clients. There is no such inherent relationship in the case of a group formed in furtherance of their interests. The fundamental premise of the Legal Services program is to provide legal representation by which eligible clients can assert *their own* interests, not to

assist groups which pursue their ideas as to what the interests of eligible clients are or ought to be. There can be and are differences of opinion on the subject of what these interests are. There is, however, an objective standard as to who is an eligible client. This regulation insures that recipients determine eligibility according to this objective standard and not the subjective and arguable standard or what is in furtherance of the interests of eligible clients.

Section 1811.6 Asset Ceilings.

This section was a new section in the proposed regulation entitled "Maximum Allowable Assets." It has been retitled and completely redrafted in response to public comment. The biggest objections were to the numerical asset ceilings, especially \$15,000 equity in a house, and the grant of authority to set specific asset guidelines to the Corporation rather than the recipient. The final regulation meets these objections by transferring the responsibility for setting guidelines, including specific asset ceilings, to the recipient programs, under general guidance from the Corporation.

Section 1811.6(a) requires that recipients set guidelines "incorporating specific and reasonable asset ceilings" and transmit these guidelines to the Corporation by January 30, 1984, and annually thereafter. These guidelines are required to include both liquid and non-liquid assets and to consider local economic and cost-of-living factors.

Section 1811.6(b) requires the recipient's guidelines to be consistent with the recipient's priorities under 45 CFR 1820 and to give special consideration to the elderly, institutionalized and handicapped. This provision meets the criticism that some members of these groups may have greater assets than the general public and yet be more in need, owing to their particular circumstances.

Section 1811.6(c) requires that all liquid and non-liquid assets of all persons who are resident members of a family unit be considered. In response to public comment, it provides that a recipient may exclude the principal residence of a client. It also provides for the consideration of impediments to a person's access to assets, as in the case of a battered wife or separated spouse.

Section 1811.6(d) retains, without any numerical ceiling, the provision in the proposed rule that reasonable equity in work-related equipment needed for the employment of a family member is not to be used to disqualify an applicant, provided its owner is producing or attempting to produce income with it.

Section 1611.8(e) allows for waiver by the project director of the recipient's asset guidelines in "unusual or extremely meritorious situations," requires that each waiver be documented in the client's file, and requires that the recipient keep separate records (without individual identification) of the numbers and reasons for such waivers. It is not expected that the granting of such waivers will be a frequent occurrence.

Criticism was made of counting assets for the entire resident family unit, rather than only the assets of the client. This method of counting assets is consistent with the method of counting gross income used under this regulation and, consequently, it has not been changed. Recipients may well decide to use a scale of asset ceilings adjusted for family size, as are the income guidelines. To neglect the assets of a member of a family unit would leave a potential for real abuse, as one member of a family unit can own extensive assets while another owns few or none. There is sufficient flexibility in the revised asset section to cope with any problems that may arise, while maintaining the principle of considering all the resources of the family unit.

Finally, there was criticism of the inclusion of non-liquid assets. Again, it is clear that non-liquid assets can contribute to the ability to afford legal assistance. With the flexibility of this revised section, recipients have ample room to devise guidelines which take into account the difficulty of liquidating non-liquid assets.

An issue was raised as to the Corporation's interpretation of Section 1007(a)(2) of the Legal Services Corporation Act. Subsection 1007(a)(2)(B) list four factors, the first of which is "(i) the liquid assets and income level of the client." From this, some comments deduce a lack of authority to require recipients to consider non-liquid assets. However, the list goes on to include "(iv) such other factors as relate to financial inability to afford legal assistance"; non-liquid assets definitely so relate, and thus the Corporation has authority to require their consideration by recipients in setting their eligibility standards.

Section 1611.7 Manner of Determining Eligibility.

Section 1611.7 (a) and (b) reflect no changes. All of current § 1611.7(c) is retained, but the proposed rule added, and the final rule retains, an exception allowing disclosure to the Corporation of client financial eligibility information under certain narrow conditions. These conditions are:

(1) That the Corporation is investigating allegations questioning the eligibility of a previously identified client;

(2) Only information relating to the financial eligibility of that client is sought;

(3) The information is needed to confirm or deny specific allegations concerning that client's eligibility; and

(4) The information sought is not protected by attorney-client privilege.

The Corporation is required not to disclose the information to anyone except Corporation employees, and the recipient is required to notify the client prior to release of the information to the Corporation.

Comment was received contending that the regulation would require a violation of attorneys' and recipients' professional responsibilities.

The Corporation has in the past obtained such financial information under carefully restricted circumstances when needed to determine the validity of an allegation regarding the eligibility of a particular client. This section is intended to clarify existing Corporation policy without which it would not be possible for the Corporation to make determinations as to the eligibility of a client as required by Section 1006(b)(1)(B) of the Act. The limited information required to be made available to the Corporation is essential to this process of reviewing eligibility determinations. In the past, some recipients have provided such information while others have refused to do so. This section is needed to set a uniform and enforceable policy.

The Corporation has reviewed the regulation for possible infringement of the attorney-client relationship, and safeguards have been written into the regulation. First, there is a clear and explicit statement in subparagraph (c)(4) that if the information is protected by attorney-client privilege, it is exempt from disclosure to the Corporation. Second, the Corporation may not reveal it to any other person and may use it only in an eligibility determination review. Third, this review cannot be a random review, but only one in response to a specific allegation naming the client in question.

On the basis of these restrictions, the Corporation had concluded that this section will not require any attorney or recipient to violate professional responsibilities. This information would only be revealed to the Corporation in cases of an allegation of financial ineligibility and where the client has been identified. Consequently, it falls within the scope of Rule 1.6 of the newly adopted Code of Professional

Responsibility which allows an attorney to reveal such information to the extent the lawyer believes it necessary to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning a lawyer's representation of the client. In the explanation accompanying Rule 1.6, it is noted that the lawyer has a right to respond when the allegation is made. The lawyer is not required to wait for the commencement of a proceeding, so the information can be disclosed by responding directly to a third party who has made the allegation.

Section 1611.8 Retainer Agreement.

This section requiring a written retainer agreement is new in the proposed rule. The only change in the final rule is that a retainer agreement is not required prior to rendering services in an emergency situation if the emergency is such as to require action before it is possible to complete a retainer agreement, in which case the retainer agreement must be completed as soon as is practicable.

Some comments disapproved of the requirement of a retainer agreement because it would be burdensome when only brief advice or telephone contact is involved. These commentators appear to have overlooked § 1611.8(b) which provides that a retainer agreement is not required when only "brief advice and consultation" is required.

Some commentators opposed the general idea of requiring retainer agreements, although two specifically supported it. Many recipients already routinely use retainer agreements. The Corporation considers the universalization of this practice to be professionally desirable and in accordance with its mandate under Section 1007(a)(1) of the Act to assure the maintenance of the highest quality of service and professional standards and to assure that there is no misunderstanding as to what services are to be rendered. Retainer agreements protect the attorney and recipient in case of an unfounded malpractice claim, and protect the client if the attorney and the recipient should fail to provide legal assistance measuring up to professional standards.

Section 1611.9 Change in Circumstances.

The content of this section is completely unchanged; it has been renumbered from Section 1611.7 in the current regulation. Several comments disapproved of the section on the basis

that it requires a redetermination of eligibility each time a client visits the program. The section does not so require, but only requires that any known change in circumstances affecting eligibility be taken into account.

List of Subjects in 45 CFR Part 1611

Eligibility, Legal services.

For the reasons set out in the preamble, 45 CFR Part 1611 is amended by revising §§ 1611.1 through 1611.7 and the authority citation and by adding §§ 1611.8 and 1611.9 as follows:

PART 1611—ELIGIBILITY

- Sec.
- 1611.1 Purpose.
- 1611.2 Definitions.
- 1611.3 Maximum income level.
- 1611.4 Authorized exceptions.
- 1611.5 Determination of eligibility.
- 1611.6 Asset ceilings.
- 1611.7 Manner of determining eligibility.
- 1611.8 Retainer agreement.
- 1611.9 Change in circumstances.

Appendix A—Legal Services Corporation Poverty Guidelines

Authority: Sections 1006(b)(1), 1007(a)(1), 1007(a)(2) Legal Services Corporation Act of 1974, as amended (42 U.S.C. 2996e(b)(1), 2996f(a)(1), 2996f(a)(2)).

§ 1611.1 Purpose.

This part is designed to ensure that a recipient will determine eligibility according to criteria that give preference to the legal needs of those least able to obtain legal assistance, and afford sufficient latitude for a recipient to consider local circumstances and its own resource limitations. The part also seeks to ensure that eligibility is determined in a manner conducive to development of an effective attorney-client relationship.

§ 1611.2 Definitions.

"Governmental program for the poor" means any Federal, State or local program that provides benefits of any kind to persons whose eligibility is determined on the basis of financial need.

"Income" means actual current annual total cash receipts before taxes of all persons who are resident members of, and contribute to, the support of a family unit.

"Total cash receipts" include money wages and salaries before any deduction, but do not include food or rent in lieu of wages; income from self-employment after deductions for business or farm expenses; regular payments from public assistance; social security; unemployment and worker's compensation; strike benefits from union funds; veterans benefits; training

stipends; alimony, child support and military family allotments or other regular support from an absent family member or someone not living in the household; public or private employee pensions, and regular insurance or annuity payments; and income from dividends, interest, rents, royalties or from estates and trusts. They do not include money withdrawn from a bank, tax refunds, gifts, compensation and/or one-time insurance payments for injuries sustained, and non-cash benefits.

§ 1611.3 Maximum income level.

(a) Every recipient shall establish a maximum annual income level for persons to be eligible to receive legal assistance under the Act.

(b) Unless specifically authorized by the Corporation, a recipient shall not establish a maximum annual income level that exceeds one hundred and twenty-five percent (125 percent) of the current official Federal Poverty Income Guidelines. The maximum annual income levels are set forth in Appendix A.

(c) Before establishing its maximum income level, a recipient shall consider relevant factors including:

- (1) Cost-of-living in the locality;
 - (2) The number of clients who can be served by the resources of the recipient;
 - (3) The population who would be eligible at and below alternative income levels; and
 - (4) The availability and cost of legal services provided by the private bar in the area.
- (d) Unless authorized by Section 1611.4, no person whose income exceeds the maximum annual income level established by a recipient shall be eligible for legal assistance under the Act.

(e) This part does not prohibit a recipient from providing legal assistance to a client whose annual income exceeds the maximum income level established here, if the assistance provided the client is supported by funds from a source other than the Corporation.

§ 1611.4 Authorized exceptions.

(a) A person whose gross income exceeds the maximum income level established by a recipient but does not exceed 150 percent of the national eligibility level (125% of poverty) may be provided legal assistance under the Act if:

- (1) The person's circumstances require that eligibility should be allowed on the basis of one or more of the factors set forth in Section 1611.5(b)(1); or

(2) The person is seeking legal assistance to secure benefits provided by a governmental program for the poor.

(b) In the event that a recipient determines to serve a person whose gross income exceeds 125% of poverty, that decision shall be documented and included in the client's file. The recipient shall keep such other records as will provide information to the Corporation as to the number of clients so served and the factual bases for the decisions made.

§ 1611.5 Determination of eligibility.

(a) The governing body of a recipient shall adopt guidelines, consistent with these regulations, for determining the eligibility of persons seeking legal assistance under the Act. By January 30, 1984, and annually thereafter, guidelines shall be reviewed and appropriate adjustments made.

(b) In addition to gross income, a recipient shall consider the other relevant factors listed in paragraphs (b)(1) and (b)(2) of this section before determining whether a person is eligible to receive legal assistance.

(1) Factors which shall be used in the determination of the eligibility of clients over the maximum income level shall include:

(A) Current income prospects, taking into account seasonal variations in income;

(B) Medical expenses, and in exceptional instances, with the prior, written approval of the project director based on written documentation received by the recipient and available for review by the Corporation, if a person's gross income is primarily committed to medical or nursing home expenses, a person may be served even if that person's gross income exceeds 150 percent of the national eligibility level;

(C) Fixed debts and obligations, including unpaid Federal, state and local taxes from prior years;

(D) Child care, transportation, and other expenses necessary for employment;

(E) Expenses associated with age or physical infirmity of resident family members; and

(F) Other significant factors related to financial inability to afford legal assistance.

(2) Factors which shall be used in the determination of the eligibility of clients under the maximum income level shall include:

(A) Current income prospects, taking into account seasonal variations in income;