

LEGAL SERVICES CORPORATION**45 CFR Part 1637****Representation of Prisoners****AGENCY:** Legal Services Corporation.**ACTION:** Final rule.

SUMMARY: This final rule implements a restriction in the Legal Services Corporation's ("LSC" or "Corporation") FY 1996 appropriations act that is currently incorporated by reference in the Corporation's FY 1997 appropriations act which prohibits recipients from participating in any civil litigation on behalf of prisoners. The restriction also prohibits recipients from providing representation to prisoners in any administrative proceeding challenging the conditions of incarceration. Finally, this rule provides guidance for recipients on how to deal with the brief incarceration of their clients.

DATES: Effective May 21, 1997.

FOR FURTHER INFORMATION CONTACT: Victor M. Fortuno, General Counsel, (202) 336-8910.

SUPPLEMENTARY INFORMATION: Section 504(a)(15) of the Corporation's FY 1996 appropriations act, Public Law 104-134, 110 Stat. 1321 (1996), prohibits the participation of LSC recipients in any litigation on behalf of a person incarcerated in a Federal, State or local prison. On May 19, 1996, the Operations and Regulations Committee ("Committee") of the LSC Board of Directors ("Board") requested the LSC staff to prepare an interim rule to implement the restriction. The Committee held hearings on staff proposals on July 9 and 19 and the Board adopted an interim rule on July 20 for publication in the **Federal Register**. The interim rule was published on August 29, 1996, at 61 FR 45754.

The Corporation received 14 timely comments on the interim rule, and the Committee held public hearings on the rule on December 13, 1996, and January 5, 1997. The Committee made a few changes and recommended a final rule, which the Board adopted on January 6, 1997, for publication as a final rule.

The Corporation's FY 1997 appropriations act became effective on October 1, 1996, see Pub. L. 104-208, 110 Stat. 3009 (1996). It incorporated by reference the § 504 condition on LSC grants included in the FY 1996 appropriations act implemented by this rule. Accordingly, the preamble and text of this rule continue to refer to the appropriate section number of the FY 1996 appropriations act.

Generally, this rule prohibits any involvement by recipients in litigation on behalf of persons who are incarcerated in Federal, State or local prisons. It also prohibits recipients from providing representation to prisoners in any administrative proceeding challenging the conditions of incarceration.

A section-by-section discussion of this final rule is provided below.

Section 1637.1 Purpose

This rule is intended to ensure that LSC recipients are not involved in any civil litigation on behalf of any person who is incarcerated in a Federal, State or local prison. The word "civil" has been added to this final rule to clarify that the restriction applies only to civil litigation. Other statutory restrictions in the LSC Act already prohibit most criminal representation by LSC recipients.

Section 1637.2 Definitions

The statutory restriction prohibits LSC recipients from participating in any litigation on behalf of a person who is incarcerated in a Federal, State or local prison. To provide guidance regarding the reach of this restriction, the definition section defines the terms "incarcerated" and "Federal, State or local prison." In response to public comments on the interim rule's definitions, both technical and substantive changes have been made to these two definitions in this final rule. The technical changes have been made to delete unnecessary terms.

Many of the public comments received by the Corporation came from mental health organizations, which were concerned about the discussion in the interim rule of the definitions of "incarcerated" and "Federal, State or local prison." The commentary stated that:

The definitions would include persons who are held involuntarily in a mental health facility if they were committed as a result of their arrest for a crime. On the other hand, a person held in a mental health facility because of a civil commitment would not be incarcerated and could be represented.

The comments were concerned about the effect of the rule on the ability of the mentally ill to receive much needed legal assistance. Others were concerned about the stigma that would result by the association of mental illness with criminal activity.

Two specific objections were raised about the interpretation of the definitions in the commentary. First, commenters were of the view that the interpretation goes beyond the intent of the language of the underlying statute.

Section 504 (a)(15) prohibits the Corporation from giving a grant to a recipient that "participates in any litigation on behalf of a person incarcerated in a Federal, State, or local prison." The comments maintained that a mental health facility is not a prison. Prisons are generally understood to be penal institutions intended to house criminals, not persons with mental illnesses. One comment pointed out that, depending on the local law or police policies, persons may be arrested and charged for a minor crime, such as loitering, shoplifting, or disturbing the peace and then put in jail, only to be moved to a mental facility when they are determined to have psychological problems. Under the interim rule's interpretation, if a person were arrested under such circumstances and placed in a mental facility, that person would not be eligible for legal assistance from an LSC recipient. Another comment pointed out that such people are often indistinguishable in regard to their diagnosis or behavior from those in a mental health facility who are civilly committed. The Board agreed that the commentary's interpretation went beyond the intent of the statutory restriction and revised the definition of "Federal, State or local prison" so that the restriction clearly applies only to incarceration in a penal institution intended to house criminals.

The term "Federal, State or local prison" is thus defined in this final rule as a "penal facility maintained under governmental authority" and includes local jails and private facilities under contract with State corrections departments to house convicted criminals. "Incarcerated" is defined as "the involuntary physical restraint of a person who has been arrested for or convicted of a crime."

Section 1637.3 Prohibition

This section states the prohibition on participation in civil litigation on behalf of a person who is incarcerated in a Federal, State or local prison. It also prohibits recipients from representing such a person in any administrative proceeding challenging the conditions of incarceration.

Given the definitions in § 1637.2, the prohibition in this part would apply to pre-trial detainees even though they are persons who have not been convicted of a crime. Conversely, it would not apply to parolees and probationers, even though they are persons who have been convicted of a crime and are still under the jurisdiction of the corrections department, because they are no longer physically held in custody in a prison. The prohibition would also not apply to

juvenile offenders who have not been charged as adults because charges against juveniles are generally considered to be civil in nature. Finally, it would not apply to persons who are held involuntarily in mental health facilities.

Intermittent imprisonment poses close questions, which will be resolved on a case-by-case basis by the Corporation, determined by whether the person is predominantly incarcerated or free. For example, persons on furlough or on daytime work-release should be considered to be incarcerated; however, persons serving a term of successive weekends in prison would be considered not to be incarcerated.

Section 1637.4 Change in Circumstances

This section addresses the situation where there is a change of circumstances after litigation is undertaken on behalf of an eligible client and the individual becomes incarcerated. Such a change poses special practical problems. When a program learns that its client has become incarcerated in a prison, it must use its best efforts to discontinue representation of the individual. Incarceration, however, may be of short duration and, in some circumstances, by the time the recipient has succeeded in withdrawing from the matter consistent with its ethical duty to the client, the incarceration may have ended and with it the basis for the prohibition. To address such a situation, the rule provides an exception to the general prohibition. The exception would allow the continued representation by the recipient when the anticipated duration of the incarceration is likely to be brief and the litigation will outlast the period of the incarceration. As a guideline, the recipient should consider incarceration which is expected to last less than 3 months to be brief. This exception for a brief incarceration does not permit a recipient to take on new issues or matters for the client during the brief incarceration.

When incarceration has occurred after litigation has begun and its duration is uncertain, there may be circumstances where a court will not permit withdrawal in spite of the recipient's best efforts to do so, generally because withdrawal would prejudice the client and is found to be inconsistent with the recipient's professional responsibilities. One comment urged the Corporation to deal with this issue by adding language to the text. The Board determined that a commentary discussion of the matter provides sufficient guidance to recipients. The LSC Act includes

provisions requiring recipients to comply with the applicable codes of professional responsibility, and it is not necessary to include a reference to that requirement in every regulation where it might apply. Accordingly, whether continued representation in such circumstances would be deemed to violate the regulation will be determined on a case-by-case basis by the Corporation. Recipients are advised to document their efforts to withdraw and renew their efforts if it appears that the incarceration will be of longer duration than originally anticipated.

During the period in which the recipient is seeking alternate counsel or other proper ways to conclude its involvement in such litigation, it may file such motions as are necessary to preserve its client's rights in the matter under litigation. The recipient may not file any additional, related claims on behalf of that client, however, unless failure to do so would jeopardize an existing claim or right of the client.

Section 1637.5 Recipient Policies, Procedures and Recordkeeping

This section requires recipients to establish written policies and procedures to ensure compliance with this part. Recipients are also required to maintain documentation adequate to demonstrate compliance with this part.

List of Subjects in 45 CFR Part 1637

Grant programs; Legal services; Prisoners

For the reasons set forth in the preamble, 45 CFR Part 1637 is revised as follows:

PART 1637—REPRESENTATION OF PRISONERS

Sec.

- 1637.1 Purpose.
- 1637.2 Definitions.
- 1637.3 Prohibition.
- 1637.4 Change in circumstances.
- 1637.5 Recipient policies, procedures and recordkeeping.

Authority: 42 U.S.C. 2996g(e); Pub. L. 104-208, 110 Stat. 3009; Pub. L. 104-134, 110 Stat. 1321.

§ 1637.1 Purpose.

This part is intended to ensure that recipients do not participate in any civil litigation on behalf of persons incarcerated in Federal, State or local prisons.

§ 1637.2 Definitions.

(a) *Incarcerated* means the involuntary physical restraint of a person who has been arrested for or convicted of a crime.

(b) *Federal, State or local prison* means any penal facility maintained under governmental authority.

§ 1637.3 Prohibition.

A recipient may not participate in any civil litigation on behalf of a person who is incarcerated in a Federal, State or local prison, whether as a plaintiff or as a defendant, nor may a recipient participate on behalf of such an incarcerated person in any administrative proceeding challenging the conditions of incarceration.

§ 1637.4 Change in circumstances.

If, to the knowledge of the recipient, a client becomes incarcerated after litigation has commenced, the recipient must use its best efforts to withdraw promptly from the litigation, unless the period of incarceration is anticipated to be brief and the litigation is likely to continue beyond the period of incarceration.

§ 1637.5 Recipient policies, procedures and recordkeeping.

Each recipient shall adopt written policies and procedures to guide its staff in complying with this part and shall maintain records sufficient to document the recipient's compliance with this part.

Dated: April 14, 1997.

Victor M. Fortuno,
General Counsel.

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LEGAL SERVICES CORPORATION

45 CFR Part 1638

Restriction on Solicitation

AGENCY: Legal Services Corporation.

ACTION: Final rule.

SUMMARY: This final rule implements a restriction contained in the Legal Services Corporation's ("LSC" or "Corporation") FY 1996 appropriations act that is currently incorporated by reference in the Corporation's FY 1997 appropriations act, which prohibits an LSC recipient from representing an individual who had not sought legal advice from the recipient but whom the recipient advised to seek legal representation or take legal action. In addition to setting out the prohibition on solicitation, this final rule also provides guidance on activities that do not fall within the restriction, such as the representation of clients under a statutory or private ombudsman program.

DATES: Effective May 21, 1997.