

7050-01-P-01-P

LEGAL SERVICES CORPORATION

45 CFR Part 1624

Prohibition Against Discrimination on the Basis of Disability

AGENCY: Legal Services Corporation

ACTION: Final Rule.

SUMMARY: This Final Rule amends the Legal Services Corporation's regulation on prohibitions against discrimination on the basis of disability. These changes are intended to improve the utility of the regulation for LSC, its grantees and other interested persons, by updating the terminology used throughout the regulation, to add a reference to compliance with the Americans with Disabilities Act and by adding language to the enforcement provision setting forth LSC policy regarding investigation of complaints of violation of this regulation.

DATES: This Final Rule is effective on [insert date 30 days from date of publication].

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SUPPLEMENTARY INFORMATION:

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, Legal Services Corporation (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 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 regulation implementing the non-discrimination requirements in Section 504 in 1979. The regulation has not been amended since that time.

On October 29, 2005, the LSC Board of Directors directed that LSC initiate a rulemaking to consider revisions to LSC's regulation at 45 CFR Part 1624. At the Board's further direction, prior to the development of this Notice of Proposed Rulemaking ("NPRM"), LSC convened a Rulemaking Workshop¹ to consider revisions to this Part. The intention of the rulemaking proceeding was intended to provide the opportunity for an unlimited and thorough review of the regulation with the intent of updating and improving the rule as appropriate.

LSC convened a Rulemaking Workshop on December 13, 2005 to discuss Part 1624. The following persons participated in the Workshop: John "Chip" Gray, South Brooklyn Legal Services; John Herrion, United Spinal Association; Linda Perle, Center for Law and Social Policy; Don Saunders, National Legal Aid and Defender Association; Helaine Barnett, LSC President (welcoming remarks only); Karen Sarjeant, LSC Vice

¹ 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 to develop detailed alternatives or to obtain consensus on regulatory proposals." 67 Fed. Reg. 69762, 69763 (November 19, 2002).

President for Programs and Compliance; Charles Jeffress, LSC Chief Administrative Officer; Mattie Condray, LSC Office of Legal Affairs; Curtis Goffe, LSC Office of Compliance and Enforcement; Tillie Lacayo, LSC Office of Program Performance; Mark Freedman, LSC Office of Legal Affairs; and Treefa Aziz, LSC Office of Government Relations and Public Affairs.

The discussion was wide-ranging. The highlights of the discussion are summarized as follows. There was a general assessment that grantees appear to be in compliance with the regulation and that LSC does not receive many complaints of non-compliance. It was noted that most of the complaints that do come to LSC are from grantee staff and are related to employment discrimination, rather than accessibility of services for applicants or clients with disabilities. LSC's staff practice is to refer such complainants to the appropriate Federal, state or local agency. At the same time, it was noted that the language of the regulation could be updated in places and that there are new assistive technologies which could be referenced in the regulation.

The participants discussed the fact that LSC's enforcement expertise and resources are limited and that claimants, with the passage of the Americans with Disabilities Act ("ADA"), have recourse to other agencies and private actions for the pursuit of redress for discrimination on the basis of disability. The notion that the regulation could be amended to reflect these facts was raised. In addition, the participants also discussed other avenues of raising awareness of accessibility issues, such as the issuance of guidance from LSC in the form of a Program Letter, focusing on accessibility in program visits and in competition, better sharing of best practices and emphasis on opportunities through LSC's Technology Initiative Grant Program.

LSC Management made a presentation to the Operations and Regulations Committee of the LSC Board of Directors on the Rulemaking Workshop at its meeting on January 27, 2006. The Committee then voted to recommend that the Board of Directors instruct Management to continue the rulemaking and develop an NPRM, proposing such changes as deemed appropriate. On January 28, 2006, the Board of Directors voted to accept the recommendation of the Operations and Regulations Committee. A Draft NPRM was then presented to the Operations and Regulations Committee at its meeting on April 28, 2006. The Committee voted to recommend that the Board of Directors approve the NPRM for publication. The following day the Board of Directors voted to accept the Committee's recommendation and directed LSC to issue an NPRM for public comment. The NPRM was subsequently published on May 12, 2006 (71 Fed. Reg. 27654).

LSC received five timely and one late comment on the NPRM. All of the comments have been carefully considered. The comments are discussed in detail below in the section-by-section analysis.

Summary of Proposed Changes

LSC is adopting only relatively minor changes to the regulation, but LSC believes that these changes will improve the utility of the regulation for LSC, its grantees and other interested persons. First, LSC is updating the nomenclature used throughout the regulation to refer to "person with a disability" or "persons with disabilities" instead of "handicapped person(s)." This change is not intended to create any substantive change in meaning, but rather is intended to reflect a more current terminology. Second, LSC is adding a reference to compliance with the Americans with Disabilities Act to the

regulation. This change is discussed in greater detail in the section-by-section analysis section under the discussion of proposed section 1624.1. Third, LSC is adding language to the enforcement provision setting forth LSC policy regarding investigation of complaints of violation of this regulation. This change is discussed in greater detail in the section-by-section analysis section under the discussion of proposed section 1624.8. LSC is also proposing to make a number of technical and grammatical corrections to the regulation.

In addition, LSC proposed to eliminate the current section 1624.7 of the regulation on self-evaluation. This section required legal services programs to evaluate by January 1, 1980, their facilities, practices and policies to determine the extent to which they complied with the requirements of this Part. This section does not contain a continuing requirement for self-evaluation and, as such, is now obsolete.

Two commenters specifically opposed this proposal. One commenter notes that DOJ considers self-evaluation to be an ongoing requirement under section 504, while the other commenter notes that many recipients may never have conducted any self-evaluation. Both of the commenters recommend adoption of ongoing self-evaluation requirements.

Although DOJ may consider ongoing self-evaluation to part of the Section 504 obligations, DOJ's regulations at 28 CFR Part 41 do not contain any explicit self-evaluation requirement. Moreover, the absence of a specific self-evaluation requirement does not necessarily mean that recipients do not engage in any self-evaluative process. Recipients are required to agree to be in compliance with the regulations (including this

Part) and to so certify with each new grant cycle.² This gives both recipients and LSC sufficient opportunity for an annual look at recipients' efforts in this area. In addition, if LSC started to see an increase in complaints or an increase in the incidence of disability-based discrimination issues, LSC could ask recipients to conduct reviews as appropriate. Finally, LSC is concerned about adding new undue administrative burdens on recipients that become compliance responsibilities. For example, if LSC adopted a self-evaluation requirement, a recipient otherwise fully compliant but which misses reporting a self-evaluation would be in violation even if the recipient was otherwise a model program with respect to disability related issues. Accordingly, LSC is eliminating the obsolete self-evaluation requirement and declines to adopt an ongoing self-evaluation requirement.

Section-by- Section Analysis

Section 1624.1 – Purpose

LSC proposed changing the terms “handicapped persons” as they appear in this section to “persons with disabilities.” In addition, LSC proposed adding language to make reference to the ADA. LSC received several comments supporting the proposed changes to this section and none in opposition. Accordingly, LSC is adopting the changes as proposed.

With respect to the new language being added making reference to the ADA, LSC notes that the provision states that requirements of this Part apply in addition to any responsibilities legal services programs may have under applicable requirements of the Americans with Disabilities Act and applicable implementing regulations of the

² This is also the reason why LSC does not believe that the lack of the originally required initial self-evaluation by “newer” recipients is problematic. For these recipients, unlike those recipients existing prior to the adopt of the regulation, Part 1624 has always been part of the regulatory landscape and compliance a necessity from the beginning of their operations.

Department of Justice and the Equal Employment Opportunity Commission. The new language is neither intended to impose any new obligations on grantees with respect to LSC-related regulatory compliance matters, nor assume LSC authority for enforcing the ADA that LSC does not possess.

Section 1624.2 - Application

LSC did not propose any changes to this section. LSC received no suggestions for change to this section. Accordingly, LSC is not making any changes to this section.

Section 1624.3 – Definitions

LSC proposed changing the term “handicapped person” to “person with a disability” in section 1624.3(c)(1). Similarly, LSC proposed to change the term “qualified handicapped person” in section 1624.3(d) to “qualified person with a disability.” LSC received several comments in support and no comments in opposition to these proposed changes. Accordingly, LSC is adopting them as proposed. In neither case is the change intended to create any substantive change to the regulation, but rather to reflect updated and preferred nomenclature.

LSC also proposed to add a definition of the term “auxiliary aids and/or other assistive technology.” Under the existing section 1624.4, grantees with more than fifteen employees have been required to provide appropriate “auxiliary aids” when necessary to clients and applicants to make services accessible. Although the current regulation uses the term “auxiliary aids,” it has not contained a formal definition of the term in the definition section. Rather, current section 1624.4 provides that for the purposes of that section, “auxiliary aids include, but are not limited to, brailled and taped material, interpreters, telecommunications equipment for the deaf, and other aids for persons with

impaired vision and hearing.” Although this informal definition of “auxiliary aids” appears to be limited to aids for persons with impaired vision or hearing, the provision of the regulation which requires their use calls for auxiliary aids for persons “with impaired sensory, manual or speaking skills,” which is broader than simply vision or hearing impairments. LSC believes that this discrepancy should be rectified. In addition, although the term “auxiliary aids” is not currently used in the section on employment (1624.6), a similar concept appears there. Under section 1624.6(e), grantees are required to make reasonable accommodations for otherwise qualified employees and job applicants with disabilities. The regulation specifies that, among other things, “reasonable accommodations” include (but are not limited to) “the modification of equipment or devices, the provision of readers or interpreters and other similar actions.”

Rather than continue to have these similar concepts set forth in different parts of the regulation with different terminology, LSC proposed to use the single term “auxiliary aids and/or other assistive technology” in both sections and to add a definition of that term to the definitions section. Since the original adoption of the regulation in 1979 there have been significant advances in technology which are available to persons with disabilities to help them access and benefit from legal services programs’ services. The proposed definition is based on a definition of “assistive technologies” found in the Individuals with Disabilities Education Act, 20 U.S.C. §1400, et seq., and is intended to broadly refer to the range of aids or technologies which grantees can make available to applicants, clients and employees with disabilities, as appropriate and necessary, to comply with the requirements of this Part. LSC wishes to note that the list of

technologies included in the definition is specifically intended to be illustrative and not exhaustive.

One commenter suggested that LSC failed to define the term “auxiliary aids and/or other assistive technologies” and proposed that LSC use the definition of “auxiliary aids and services” found in Title III of the ADA. Although this commenter was addressing a different section, because the comment is specifically about defining a term used throughout the regulation, LSC is responding to this comment here. LSC notes at the outset that LSC did in fact propose a definition for the term “auxiliary aids and other assistive technologies.” The proposed definition is discussed at length above.

Turning to the suggestion that LSC adopt the definition of the “auxiliary aids and services” in Title III of the ADA, LSC notes that the definitions section in Title III of the ADA (Section 301) does not contain a definition of the term “auxiliary aids and services.” However, LSC assumes that the commenter was referring to a provision of the Department of Justice regulations implementing Title III discussing auxiliary aids and services. That provision states:

The term “auxiliary aids and services” includes -

1. Qualified interpreters, notetakers, computer-aided transcription services, written materials, telephone handset amplifiers, assistive listening devices, assistive listening systems, telephones compatible with hearing aids, closed caption decoders, open and closed captioning, telecommunications devices for people who are deaf (TDDs), videotext displays, or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

2. Qualified readers, taped texts, audio recordings, Brailled materials, large print materials, or other effective methods of making visually delivered materials available to individuals with visual impairments;
3. Acquisition or modification of equipment or devices; and,
4. Other similar services and actions.

28 CFR Sec. 36.303.

LSC believes that the definition it proposed for the term “auxiliary aids and/or other assistive technologies” is in no way inconsistent with the DOJ regulation quoted above. As such, and in light of the fact that no other commenters opposed the LSC proposed definition, LSC believes that its proposed definition is appropriate for LSC purposes. Accordingly, LSC adopts the definition of “auxiliary aids and/or other assistive technologies” as proposed.

The Equal Employment Opportunity Commission (EEOC) suggested that LSC cross-reference the definitions of “reasonable accommodation,” “undue hardship” and “direct threat” found in the EEOC’s regulations at 29 CFR §1630.2 for the purposes of those terms’ use in the proposed employment section, 1624.6. LSC agrees that the EEOC’s definitions of these terms are appropriate for use in the context of the proposed employment section. However, rather than simply cross-reference the definitions in the text of the regulation, LSC believes it will be more useful for LSC and recipients for LSC to reprint those definitions in this preamble. This will provide LSC staff and recipients a ready reference without having to have a full copy of the EEOC’s regulations at hand.

The EEOC’s definitions of the terms “reasonable accommodation,” “undue hardship” and “direct threat” are, respectively:

Reasonable accommodation. (1) The term reasonable accommodation means:

(i) Modifications or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or

(ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or

(iii) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

(2) Reasonable accommodation may include but is not limited to:

(i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.

(3) To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

Undue hardship--(1) In general. Undue hardship means, with respect to the provision of an accommodation, significant difficulty or expense incurred by a covered entity, when considered in light of the factors set forth in paragraph (p)(2) of this section.

(2) Factors to be considered. In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include:

(i) The nature and net cost of the accommodation needed under this part, taking into consideration the availability of tax credits and deductions, and/or outside funding;

(ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;

(iii) The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities;

(iv) The type of operation or operations of the covered entity, including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the covered entity; and

(v) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

Direct threat means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a “direct threat” shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:

- (1) The duration of the risk;
- (2) The nature and severity of the potential harm;
- (3) The likelihood that the potential harm will occur; and
- (4) The imminence of the potential harm.

29 CFR §§1630.2(o), (p), and (r). LSC will refer to these definitions in interpreting and enforcing the provisions of proposed 1624.6.

Section 1624.4 – Discrimination prohibited

LSC proposed two notable amendments to this section. First, in each instance in which the term “handicapped person” or “handicapped persons” appears, LSC proposed to replace it with “person with a disability” or “persons with disabilities” as grammatically appropriate. As noted above, LSC intended no substantive change, but rather to reflect updated and preferred nomenclature. LSC also proposed to use the term “auxiliary aids and/or other assistive technologies” instead of the term “auxiliary aids” in section 1624.4(d)(1) and (2) and to delete the text appearing at 1624.4(d)(3). As discussed above, LSC believes that users of the regulation will be better served by having a formal definition of the term in the definitions section of the regulation than an informal definition elsewhere. In addition, LSC believes that expanding the term to include “other assistive technologies,” combined with the proposed definition, will better reflect the range of systems and devices existing in the market that grantees may choose from to help make their services accessible to persons with disabilities.

LSC received several comments supporting the proposed changes to this section. LSC also received one comment suggesting that this section as proposed is inconsistent with the ADA and “misstates” the law. At the outset, LSC believes that it is important to keep in mind that LSC’s regulations are not implementing the ADA. Although the ADA may well impose additional requirements on recipients, LSC does not wish to place more of its own burdens on recipients. LSC does not intend to create new or additional requirements for which recipients will be responsible to LSC and which LSC will be responsible for enforcing.

Turning to the suggestion that the portion of the proposed regulation imposing the requirement that recipients with fifteen or more employees must provide auxiliary aids

when necessary “misstates” the law, LSC notes that this provision dates to the original adoption of Part 1624 and that LSC is not proposing any substantive change to this particular requirement. Rather than misstating the ADA, this provision reflects LSC’s policy determination from 1979:

first, that a program with fifteen employees will have a sufficiently large budget to enable it to obtain access to such aids without jeopardizing the program’s other activities; and second, that a program of that size will serve a sufficiently large population to have a significant number of clients who could benefit by the availability of the aids.

44 Fed. Reg. 22482, 22484 (April 16, 1979); *see also*, 44 Fed. Reg. 55175, 55176 (September 25, 1979). The reason why LSC made a distinction between recipients with fifteen employees and those with fewer employees continues to make sense today. Further, the current and proposed LSC requirement does not impose any responsibility which contradicts responsibilities recipients have under the ADA (i.e., complying with the LSC requirement does not preclude compliance with ADA requirements). In fact, a recipient’s compliance with a more stringent requirement will only serve to ensure that the recipient is in compliance with Part 1624. As such, LSC does not believe it is necessary or desirable to change LSC’s regulation in this matter.

LSC also received one comment suggesting that LSC substitute the term “auxiliary aids and/or other assistive technologies” for “auxiliary aids” in proposed 1624.4(d)(2). LSC agrees with this comment and adopts this suggestion.

Section 1624.5 – Accessibility of legal services

LSC proposed two notable amendments to this section. First, in each instance in which the term “handicapped person” or “handicapped persons” appears, LSC proposed to replace it with “person with a disability” or “persons with disabilities” as grammatically appropriate. As noted above, LSC intended no substantive change, but rather to reflect updated and preferred nomenclature. Second, LSC proposed to replace the reference to “the appropriate Regional Office” in section 1624.5(c) with “LSC.” At the time Part 1624 was originally adopted LSC had Regional Offices, but it no longer does. All LSC business is conducted out of its Washington, D.C. offices. As such, the statement required by section 1624.5(c) can no longer be submitted to a “Regional Office” and such statements are simply submitted to LSC. The regulation should reflect this fact. LSC received several comments supporting and no comments opposing these changes. Accordingly, LSC adopts them as proposed.

LSC received one comment suggesting that LSC add a subsection (e) to require recipients to “make reasonable modifications in policies, practices and procedures” to avoid engaging in discrimination on the basis of disability. LSC agrees with the commenter that recipients should not have policies, practices or procedures which have the effect of discriminating on the basis of disability and expects that part of a recipient’s obligation to be in compliance with Part 1624 is to ensure that it does not have policies, practices or procedures which result in discrimination on the basis of disability. However, LSC is not convinced that it is necessary to add such an express provision to the regulation. Proposed sections 1624.4, 1624.5 and 1624.6 collectively set forth the substantive requirements that recipients not engage in discrimination on the basis of disability. If a recipient had policies, practices or procedures which had the effect of

discriminating on the basis of disability, the recipient would be in violation of one or more of the sections referenced above. Put another way, for a recipient to be in compliance with the substantive requirements of Part 1624, the recipient cannot have policies, practices or procedures which result in or have the effect of discriminating on the basis of disability. As such, the imposition of an additional provision specifically and separately requiring recipients to modify policies, practices and procedures to avoid discrimination would not appear to add anything of substantive value to the regulation.

Section 1624.6 – Employment

LSC proposed two notable amendments to this section. First, in each instance in which the term “handicapped person” or “handicapped persons” appears, LSC proposed to replace it with “person with a disability” or “persons with disabilities” as grammatically appropriate. As noted above, LSC intended no substantive change, but merely the use of updated and preferred nomenclature. LSC also proposed to use the term “auxiliary aids and/or other assistive technologies” instead of the words “readers or interpreters” in section 1626(e)(1). As discussed above, LSC believes that users of the regulation will be better served by using a standardized and formally defined term. LSC believes that using the term “auxiliary aids and/or other assistive technologies” in this section, combined with the proposed definition of that term, will better reflect the range of systems and devices existing in the market that grantees may choose from to make reasonable accommodations in employment for otherwise qualified job applicants and employees with disabilities. LSC received several comments supporting and no comments opposing these changes. Accordingly, LSC adopts them as proposed.

LSC also received a comment from the EEOC suggesting that the proposed provision appears to be modeled after a 1980 DOJ regulation and suggesting, as an alternative, that LSC add a cross-reference to the EEOC's regulations and should embody language contained in the 1994 joint EEOC/DOJ rule regarding coordination between Section 504 and the ADA. Proposed section 1624.6 is essentially the same as the existing section 1624.6, with the only changes proposed being the nomenclature changes and use of the term "auxiliary aids and/or other assistive technologies" as discussed above. The existing section predates the 1980 DOJ regulation and is actually modeled on the then-Department of Health, Education and Welfare (HEW) guidelines, with some modifications. *See* 44 Fed. Reg. at 22484; 44 Fed. Reg. at 55177. LSC chose the HEW guidelines as a model because the Executive Order obligating agencies to adopt regulations implementing Section 504 required them to use the HEW guidelines as the model. Although LSC was not obligated to comply with the Executive Order, LSC determined that using the HEW guidelines as a model was appropriate with respect to its voluntary adoption of Section 504 implementing regulations.

LSC believes the current LSC requirements continue to be appropriate. LSC notes also that the current DOJ rules implementing Section 504 with respect to employment (28 CFR §§41.52 – 41.55) are essentially the same as LSC's current and proposed section 1624.6. The section that the EEOC cites to (28 CFR §37.12) does not substitute for the provisions cited above. Rather, that section addresses coordination between DOJ and EEOC in procedures for coordinating investigation of complaints. LSC is addressing enforcement issues in proposed section 1624.7. Moreover, LSC is not convinced it is necessary, given LSC's enforcement policy, to explicitly incorporate the

ADA standards into this regulation and, further, to do so only in the context of complaints involving claims of discrimination in employment. Rather, to the extent that LSC might receive and investigate any complaint without deferring to the investigation of another agency, LSC would look to this Part and, as necessary, the current law of Section 504 in carrying out its duties. LSC is confident that recipients understand and anticipate that this is the case.

Section 1624.7 – Enforcement

The current regulation specifies only that LSC’s enforcement procedures at 45 CFR Part 1618 shall apply to alleged violations of this Part. Under Part 1618, LSC is obligated to investigate complaints of violations of the LSC Act, appropriations acts, LSC regulations and grant assurances and to work with grantees to resolve matters informally when possible. Ultimately, if no informal resolution is agreed upon, LSC’s enforcement powers involve reducing or eliminating funding generally. LSC does not have authority to represent individuals or to go to court on their behalf to obtain “injunctive relief” however, as do other Federal, state and local agencies charged with ADA and other disability-based discrimination law enforcement. Moreover, OCE, although taking those complaints of disability-based discrimination it receives seriously, has limited resources available and does not generally have significant expertise in investigating these types of claims.

In light of the above, LSC’s policy when such complaints have been filed with OCE has been to recommend that complainants pursue claims with appropriate Federal, state or local agencies which may be in a better position to investigate their claims and assist them in obtaining specific relief. In cases where a claim is filed with another

agency, LSC generally defers to that investigation during its pendency and relies upon the findings of the other agency in resolving the complaint filed with LSC. LSC has found this policy to be efficient and effective. Accordingly, LSC proposed to explicitly incorporate this policy into the regulation. LSC continues to believe this action will clarify expectations for LSC enforcement staff, grantees, and potential claimants alike. Of course, LSC retains the discretion and authority to conduct its own investigations into any claim of disability-based discrimination grounded in this Part or the grant assurances and make its own findings upon the conclusion of such investigation, irrespective of whether a complaint based on the same circumstances is pending at another agency.

One commenter stated that it agreed with the substance of the policy and with LSC's proposal to formalize the policy by placing it in the regulation. The commenter expressed its concern, however, that the language proposed is "not sufficiently clear or definitive." This commenter suggested the following alternative language:

LSC will promptly refer a complainant who alleges a violation that appears to fall within the scope of this Part to the appropriate Federal, state or local agency or agencies with authority to investigate discrimination on the basis of disability. Pending completion of such agency's investigation, LSC may also investigate the complaint. As part of the investigation, LSC may also use such agency's findings, conclusion or information that the other agency makes available to LSC.

LSC does not agree that the proposed alternative language is preferable to the language LSC proposed. Elimination of the word "generally" in the first sentence of paragraph (b) does create more specificity, but at the expense of necessary LSC

discretion. There may be good reason why LSC would not automatically refer a complainant to another agency; for example, if the complainant states that he/she is already pursuing or has pursued a complaint with another agency. Requiring LSC to refer a complainant to another agency under those circumstances would be unnecessary. Nor does LSC agree that elimination of the phrase “retains the discretion” and the use of the word “may” in its place would improve the clarity or definitiveness of the regulation. LSC prefers the language as proposed because it plainly indicates an exercise of discretion. The word “may” does also imply the exercise of discretion, but perhaps less explicitly. Since the commenter is not suggesting the development and adoption of specific published standards for making determinations about when LSC would choose to directly investigate a complaint rather than defer to another agency’s investigation (which would be very difficult given the fact-specific nature of these cases), LSC prefers to be explicit about its discretion in this matter.

Another commenter took the opposite position, urging LSC not to codify its current policy. This commenter suggested that LSC should instead adopt a new policy under which LSC would commit to investigating and processing all complaints directly without referral or reference to any other agency’s investigations. The commenter argues that LSC’s expertise in legal services makes it uniquely qualified to do so and that LSC has better leverage to force recipients to provide specific relief to complainants.

LSC, like any other agency with oversight responsibilities, has limited resources available to it. Although LSC takes all complaints about violations (of any applicable LSC requirements) seriously and retains the discretion to fully process any complaint it receives, LSC must and does exercise discretion in the processing of complaints

(regardless of subject matter), taking into account the specific facts of the case and the resources available to LSC. Thus, LSC believes that adopting any policy which expressly limits that discretion with respect to a particular subset of complaints is inappropriate.

In this particular area, although LSC has expertise in legal services, it is not an expert as to what constitutes discrimination on the basis of disability. Moreover, as difficult as it may be for a complainant to have DOJ or EEOC take an individual's case to court, LSC is not authorized to seek court-ordered relief for a complainant at all.³ In addition, there may be a local enforcement agency option or direct legal action that would be available to a complainant – again, assistance that LSC cannot provide. With respect to LSC's "leverage," it is LSC's experience that LSC's leverage is a blunt instrument not well suited to obtaining relief for individual complainants with these types of complaints. LSC can impose additional grant conditions at the time of grant renewal or put a recipient on month-to-month funding at the end of the grant term. Both of these actions, however, are dependent upon the recipient happening to be at the end of a grant year or grant term (respectively) for them to potentially be effective. During the grant term, LSC could institute suspension or termination proceedings, but these are resource intensive and likely a disproportionate response to all but the most egregious of violations. At the same time, the current policy appears to have functioned well for LSC and recipients, and as well for complainants as is practicable within LSC's authority. LSC, accordingly, declines to adopt the commenter's suggestion and instead adopts the language in proposed section 1624.7 as proposed.

³ To the extent that the preamble to the NPRM may have appeared to suggest "direct" DOJ/EEOC enforcement authority, such a suggestion was not intended. Rather, LSC intended to note, as the commenter states, that DOJ and the EEOC have the authority to seek court ordered relief.

LSC received one other comment on this section. This commenter suggests that LSC: (1) create a tracking system to flag repeat offenders; (2) engage in increased efforts to represent individuals with disabilities who bring allegations of violations of the ADA to the attention of LSC, including obtaining consulting assistance and training for OCE staff; and (3) that the language of the regulation allow for LSC to retain for the purpose of enforcement cases at its discretion.

LSC reiterates that it receives very few complaints and has no reason to believe that there are “repeat offenders” going undetected. Nonetheless, current OCE policy and practice already enables LSC to identify repeat offenders (should there be any) and take action as necessary.

With respect to the second suggestion, LSC is, as noted above, without legal authority to represent individuals. In complaint investigations LSC is not representing the complainant, but rather is exercising its oversight authority over the recipient. As such, LSC can only take limited action against the recipient (as discussed above). Indeed, the inability of LSC to represent individual claimants and LSC’s limited ability to force a recipient to provide specific relief to a complainant is exactly what led to the development and adoption of the current enforcement policy which LSC has proposed to codify. In addition, with respect to the suggestion that LSC obtain additional training or consultant assistance, although LSC agrees that such activities would be helpful to increase LSC’s level of in-house expertise, LSC regrets that it is faced with the reality of limited resources. Given the infrequency of complaints received and the existence of other investigatory agencies with greater expertise, LSC does not believe that making a

significant investment in the manner suggested would be the most effective or efficient use of its limited resources.

Regarding the commenter's third suggestion, LSC notes that the language proposed does expressly reserve to LSC the discretion to retain jurisdiction over any complaint it receives as the commenter proposes. Therefore, LSC believes that no change or addition to the proposed language is necessary.

For reasons set forth above, and under the authority of 42 U.S.C. 2996g(e), LSC revises 45 CFR Part 1624 as follows:

PART 1624—PROHIBITION AGAINST DISCRIMINATION ON THE BASIS OF DISABILITY

Sec.

1624.1 Purpose.

1624.2 Application.

1624.3 Definitions.

1624.4 Discrimination prohibited.

1624.5 Accessibility of legal services.

1624.6 Employment.

1624.7 Enforcement.

AUTHORITY: 49 U.S.C. 794; 42 U.S.C. 2996f(a) (1) and (3).

§ 1624.1 Purpose.

The purpose of this part is to assist and provide guidance to legal services programs supported in whole or in part by Legal Services Corporation funds in removing any

impediments that may exist to the provision of legal assistance to persons with disabilities eligible for such assistance in accordance with section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. section 794 and with sections 1007(a) (1) and (3) of the Legal Services Corporation Act, as amended, 42 U.S.C. sections 2996f(a) (1) and (3), with respect to the provision of services to and employment of persons with disabilities. The requirements of this Part apply in addition to any responsibilities legal services programs may have under applicable requirements of the Americans with Disabilities Act and applicable implementing regulations of the Department of Justice and the Equal Employment Opportunity Commission.

§ 1624.2 Application.

This part applies to each legal services program receiving financial assistance from the Legal Services Corporation.

§ 1624.3 Definitions.

As used in this part, the term:

(a) *Legal services program* means any recipient, as defined by § 1600.1 of this chapter, or any other public or private agency, institution, organization, or other entity, or any person to which or to whom financial assistance is extended by the Legal Services Corporation directly or through another agency, institution, organization, entity or person, including any successor, assignee, or transferee of a legal services program, but does not include the ultimate beneficiary of legal assistance;

(b) *Facility* means all or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property or interest in such property;

(c) (1) *Person with a disability* means any person who:

(i) Has a physical or mental impairment which substantially limits one or more major life activities,

(ii) has a record of such an impairment, or (iii) is regarded as having such an impairment;

(2) As used in paragraph (c)(1) of this section the phrase:

(i) *Physical or mental impairment* means: (A) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or (B) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities; The phrase includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism;

(ii) *Major life activities* means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working;

(iii) *Has a record of such impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities;

(iv) *Is regarded as having an impairment* means: (A) Has a physical or mental impairment that does not substantially limit major life activities but is treated by a legal services program as constituting such a limitation; (B) has a physical or mental

impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairments; or (C) has none of the impairments defined in paragraph (c)(2)(i) of this section but is treated by a legal services program as having such an impairment;

(d) *Qualified person with a disability* means:

(1) With respect to employment, a person with a disability who, with reasonable accommodation, can perform the essential functions of the job in question;

(2) with respect to other services, a person with a disability who meets the eligibility requirements for the receipt of such services from the legal services program.

(e) *Auxiliary aids and/or other assistive technologies* means any item, piece of equipment, or product system whether acquired commercially off the shelf, modified or customized, that is used to increase, maintain, or improve functional capabilities of individuals with disabilities. Auxiliary aids and/or other assistive technologies include, but are not limited to, brailled and taped material, interpreters, telecommunications equipment for the deaf, voice recognition software, computer screen magnifiers, screen reader software, wireless amplification systems, and other aids.

§ 1624.4 Discrimination prohibited.

(a) No qualified person with a disability shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination by any legal services program, directly or through any contractual or other arrangement.

(b) A legal services program may not deny a qualified person with a disability the opportunity to participate in any of its programs or activities or to receive any of its services provided at a facility on the ground that the program operates a separate or

different program, activity or facility that is specifically designed to serve persons with disabilities.

(c) In determining the geographic site or location of a facility, a legal services program may not make selections that have the purpose or effect of excluding persons with disabilities from, denying them the benefits of, or otherwise subjecting them to discrimination under any program or activity of the legal services program.

(d) (1) A legal services program that employs a total of fifteen or more persons, regardless of whether such persons are employed at one or more locations, shall provide, when necessary, appropriate auxiliary aids and/or other assistive technologies to persons with impaired sensory, manual or speaking skills, in order to afford such persons an equal opportunity to benefit from the legal services program's services. A legal services program is not required to maintain such aids at all times, provided they can be obtained on reasonable notice.

(2) The Corporation may require legal services programs with fewer than fifteen employees to provide auxiliary aids and/or other assistive technologies where the provision of such aids would not significantly impair the ability of the legal services program to provide its services.

(e) A legal services program shall take reasonable steps to ensure that communications with its applicants, employees, and beneficiaries are available to persons with impaired vision and hearing.

(f) A legal services program may not deny persons with disabilities the opportunity to participate as members of or in the meetings or activities of any planning or advisory board or process established by or conducted by the legal services program, including but

not limited to meetings and activities conducted in response to the requirements of 45 CFR Part 1620.

§ 1624.5 Accessibility of legal services.

(a) No qualified person with a disability shall, because a legal services program's facilities are inaccessible to or unusable by persons with disabilities, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination by any legal services program.

(b) A legal services program shall conduct its programs and activities so that, when viewed in their entirety, they are readily accessible to and usable by persons with disabilities. This paragraph does not necessarily require a legal services program to make each of its existing facilities or every part of an existing facility accessible to and usable by persons with disabilities, or require a legal services program to make structural changes in existing facilities when other methods are effective in achieving compliance. In choosing among available methods for meeting the requirements of this paragraph, a legal services program shall give priority to those methods that offer legal services to persons with disabilities in the most integrated setting appropriate.

(c) A legal services program shall, to the maximum extent feasible, ensure that new facilities that it rents or purchases are accessible to persons with disabilities. Prior to entering into any lease or contract for the purchase of a building, a legal services program shall submit a statement to LSC certifying that the facilities covered by the lease or contract will be accessible to persons with disabilities, or if the facilities will not be accessible, a detailed description of the efforts the program made to obtain accessible space, the reasons why the inaccessible facility was nevertheless selected, and the

specific steps that will be taken by the legal services program to ensure that its services are accessible to persons with disabilities who would otherwise use that facility. After a statement certifying facility accessibility has been submitted, additional statements need not be resubmitted with respect to the same facility, unless substantial changes have been made in the facility that affect its accessibility.

(d) A legal services program shall ensure that new facilities designed or constructed for it are readily accessible to and usable by persons with disabilities. Alterations to existing facilities shall, to the maximum extent feasible, be designed and constructed to make the altered facilities readily accessible to and usable by persons with disabilities.

§ 1624.6 Employment.

(a) No qualified person with a disability shall, on the basis of disability, be subjected to discrimination in employment by any legal services program.

(b) A legal services program shall make all decisions concerning employment under any program or activity to which this part applies in a manner that ensures that discrimination on the basis of disability does not occur, and may not limit, segregate, or classify applicants or employees in any way that adversely affects their opportunities or status because of disability.

(c) The prohibition against discrimination in employment applies to the following activities:

- (1) Recruitment, advertising, and the processing of applications for employment;
- (2) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;
- (3) Rates of pay or any other form of compensation and changes in compensation;

(4) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

(5) Leaves of absence, sick leave, or any other leave;

(6) Fringe benefits available by virtue of employment, whether or not administered by the legal services program;

(7) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training;

(8) Employer sponsored activities, including social or recreational programs; and

(9) Any other term, condition, or privilege of employment.

(d) A legal services program may not participate in any contractual or other relationship with persons, agencies, organizations or other entities such as, but not limited to, employment and referral agencies, labor unions, organizations providing or administering fringe benefits to employees of the legal services program, and organizations providing training and apprenticeship programs, if the practices of such person, agency, organization, or other entity have the effect of subjecting qualified applicants or employees with disabilities to discrimination prohibited by this paragraph.

(e) A legal services program shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability unless the accommodation would impose an undue hardship on the operation of the program.

(1) For purposes of this paragraph (e), reasonable accommodation may include:

(i) making facilities used by employees readily accessible to and usable by persons with disabilities; and

(ii) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, the provision of auxiliary aids and/or other assistive technologies, and other similar actions.

(2) In determining whether an accommodation would impose an undue hardship on the operation of a legal services program, factors to be considered include, but are not limited to, the overall size of the legal services program with respect to number of employees, number and type of facilities, and size of budget, and the nature and costs of the accommodation needed.

(3) A legal services program may not deny any employment opportunity to a qualified employee or applicant with a disability if the basis for the denial is a need to make reasonable accommodation to the physical or mental limitations of the employee or applicant.

(f) A legal services program may not use employment tests or criteria that discriminate against persons with disabilities, and shall ensure that employment tests are adapted for use by persons who have disabilities that impair sensory, manual, or speaking skills.

(g) A legal services program may not conduct a pre-employment medical examination or make a pre-employment inquiry as to whether an applicant is a person with a disability or as to the nature or severity of a disability except under the circumstances described in 45 CFR §§84.14(a) through (d)(2). The Corporation shall have access to relevant

information obtained in accordance with this section to permit investigations of alleged violations of this Part.

(h) A legal services program shall post in prominent places in each of its offices a notice stating that the legal services program does not discriminate on the basis of disability.

(i) Any recruitment materials published or used by a legal services program shall include a statement that the legal services program does not discriminate on the basis of disability.

§ 1624.7 Enforcement.

(a) The procedures described in Part 1618 of these regulations shall apply to any alleged violation of this Part by a legal services program.

(b) When LSC receives a complaint of a violation of this Part, LSC policy is generally to refer such complainants promptly to the appropriate Federal, state or local agencies, although LSC retains the discretion to investigate all complaints and/or to maintain an open complaint file during the pendency of an investigation being conducted by such other Federal, state or local agency. LSC may use, at its discretion, information obtained by such other agency as may be available to LSC, including findings of such other agency of whether discrimination on the basis of disability occurred.

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