



OFFICE OF LEGAL AFFAIRS

MEMORANDUM

TO: Operations & Regulations Committee

THROUGH: Helaine M. Barnett *HMB*
President

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

DATE: July 11, 2006

SUBJECT: Staff Report on 45 CFR Part 1624 Rulemaking

Introduction

On October 29, 2005, the Board of Directors directed that LSC initiate a rulemaking to consider revisions to LSC's regulation on prohibitions against discrimination on the basis of handicap at 45 CFR Part 1624. On May 12, 2006, LSC published a Notice of Proposed Rulemaking (NPRM) proposing minor changes to the regulation. The comment period for this NPRM closed on June 26, 2006. LSC received 5 timely and one late comment on the NPRM. A summary of the changes proposed by the NPRM and the comments received is set forth below.

Summary of the NPRM

LSC proposed minor changes to the regulation intended to improve the utility of the regulation for LSC, its grantees and other interested persons. First, LSC proposed to update the nomenclature used throughout the regulation to refer to "person with a disability" or "persons with disabilities" instead of "handicapped person(s)." This proposed change is not intended to create any substantive change in meaning, but rather is intended to reflect a more current terminology.

Second, LSC proposed to add a reference to the Americans with Disabilities Act (ADA) to the regulation. The new language would note that requirements of this Part apply in addition to any responsibilities legal services programs may have under applicable requirements of the ADA and applicable implementing regulations of the Department of Justice and the Equal Employment Opportunity Commission. The proposed language is not 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.

Third, LSC proposed to use the term “auxiliary aids and/or other assistive technologies” instead of the term “auxiliary aids” and to add a definition of this term to the regulation in order to better serve users of the regulation by having a formal definition of the term in the definitions section of the regulation than an informal definition elsewhere. In addition, expanding the term to include “other assistive technologies,” combined with the proposed definition, should 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.

Fourth, LSC proposed to add language to the enforcement provision setting forth LSC policy regarding investigation of complaints of violation of this regulation. When such complaints have been filed with the Office of Compliance and Enforcement, LSC’s practice 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 order the relief being sought. 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. 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. This proposed change is intended to clarify expectations for LSC enforcement staff, grantees, and potential claimants alike.

Fifth, LSC proposed to eliminate the current section 1624.7 of the regulation on self-evaluation since this section does not contain a continuing requirement for self-evaluation and, as such, is now obsolete. The NPRM notes that section 1624.5 serves to ensure that facilities are, to the maximum extent feasible, accessible to persons with disabilities and ensures that grantees are taking accessibility issues into consideration in providing services.

Finally, LSC also proposes to make a number of technical and grammatical corrections to the regulation.

Summary of the Comments

Wayne State University Disability Law Clinic

The Wayne State University Disability Law Clinic (WSU) submitted comments on its own behalf and on behalf of the National Disability Rights Network, the Disability Rights Legal Center, Judge David L. Bazelon Center for Mental Health Law, the Center for Law and Education and four law professors who supervise law school clinics that represent low-income persons with disabilities. (Throughout this summary the abbreviation WSU shall be used to refer to all of the organizations and individuals represented by the comments.)

WSU supports the proposal to change the terms “handicapped person” to “person with a disability,” and “auxiliary aids and/or other assistive technologies” for “auxiliary aids.”

WSU opposes the proposed elimination of the self-evaluation requirement from Part 1624. WSU argues instead the LSC should require ongoing self-evaluation every five years. WSU is of the opinion that such a requirement will not be unduly burdensome, and will help ensure that recipients are appropriately and consistently taking accessibility issues into consideration in providing services. WSU also notes that many recipients may not have performed the initial self-evaluation because they were not in existence in 1980.

WSU also opposes the proposal to codify LSC's current practices regarding enforcement of complaints of violation of Part 1624. WSU argues that, rather than generally refer complainants to other agencies, LSC should use its "unique expertise and leverage" with recipients to investigate such claims.

Lastly, WSU suggests that LSC add a requirement to the regulation to expressly require grantees to make reasonable modifications to avoid discriminating on the basis of disability. Such a requirement is warranted, WSU argues, because without such a requirement recipients may have policies that present barriers to persons with disabilities seeking services.

United States Equal Employment Opportunity Commission

The United States Equal Opportunity Employment Commission (EEOC) concurs in the proposal to change the term "handicapped" in its various formulations to "disability" or "individual with a disability."

The EEOC suggests the definitions in section 1624.3 be cross-referenced with those in the Americans with Disabilities Act at 29 C.F.R. section 1630.2 (such as "reasonable accommodation," "undue hardship" and "direct threat") so that recipients will be fully informed of key terms applicable to disability-related employment matters.

The EEOC also recommends cross-referencing section 1624.6 (Employment) with ADA's 29 C.F.R Part 1630, and provides proposed text that would accomplish this proposal.

Center for Law & Social Policy, on behalf of the National Legal Aid and Defender Association

NLADA agrees with all the revisions proposed except one; those that discuss enforcement requirements. NLADA argues the language of proposed section 1626.7 is not sufficiently specific or definitive to be included in the regulatory text and is better suited for inclusion in the preamble. The comment sets forth suggested alternative language. NLADA specifically comments that it appreciates that LSC is not proposing to impose any new or additional requirements on recipients.

Marc Dubin, Esq. (Director of Advocacy, Center for Independent Living of Broward commenting in his personal capacity)

Mr. Dubin suggests that the current section 1624.4 is inconsistent with Title III of the ADA, because Title III does not contain a 15 employee requirement.

Mr. Dubin recommends that LSC adopt section 36.303 of the ADA verbatim to better define the term “auxiliary aids and services.”

Mr. Dubin recommends that as part of its enforcement efforts, LSC create a tracking system to flag repeat offenders to help LSC determine patterns of non-compliance. The comment does not state whether the regulatory text should reference such a system. Mr. Dubin also suggests that LSC should increase its efforts to represent individuals who file complaints regarding disability-based discrimination with LSC and to adopt a policy whereby LSC is permitted to retain appropriate cases for investigation and enforcement.

Olegario D. Cantos, Esq., Associate Director for Domestic Policy, The White House

Mr. Cantos associated himself with the comments of Mr. Dubin.

Paralyzed Veterans of America

The Paralyzed Veterans of America (PVA) supported the proposals to update the terminology used through the regulation, to add a reference to the ADA, and to codify LSC’s current policy and practice regarding enforcement of alleged violations of Part 1624.

PVA opposes the proposed elimination of current section 1624.7 and its self-evaluation requirement. PVA argues that there should be a continuing obligation for recipients to engage in self-evaluation and that the requirements of section 1624.5 are not sufficient to ensure that recipients are providing accessible service other than as pertains to physical access to recipient offices.

Management Recommendation

Management is currently considering the comments received and anticipates having a Draft Final Rule to present to the Committee for its review and action at its meeting in October, 2006. As such, Management recommends that the Operations and Regulations Committee take no action at this time.