



LEGAL SERVICES CORPORATION

750 1st St., NE, 11th FL, Washington, D.C. 20002-4250

(202) 336-8800

Fax (202) 336-8959

Alexander D. Forger
President

Writer's Direct Telephone
(202)

PROGRAM LETTER 96 - 4

TO: All LSC Program Directors

FROM: John A. Tull and Merceria L. Ludgood
Office of Program Operations

DATE: November 22, 1996

RE: New Restrictions on LSC Grantees

Later this month, LSC will publish four regulations which on September 30, 1996, the LSC Board of Directors adopted as final rules to be effective January 1, 1997. Those regulations are 45 CFR Parts 1610 (Use of Non-LSC Funds), 1617 (Class Actions), 1632 (Redistricting) and 1633 (Restrictions on Representation in Certain Eviction Proceedings). The purpose of this letter is to apprise you of certain issues of immediate importance related to two of those regulations, and to call your attention to Section 502(a)(2)(C) of the FY1997 Omnibus Consolidated Appropriations Bill (the "Kennedy Amendment"). Copies of the pertinent regulations, and the relevant portion of the pertinent amendment, are attached to this letter.

Section 502(a)(2)(C) -- The Kennedy Amendment

As you know, the current appropriation under which LSC and its recipients are funded incorporates the restrictions contained in Public Law 104-134, the FY 1996 LSC Appropriation. Section 504(a)(11) of that law prohibits recipients from using any funds to provide legal assistance to aliens, except for those in certain enumerated categories. The Kennedy Amendment to the 1997 appropriation provides that Section 504(a)(11) shall not be construed to prohibit recipients from using non-LSC funds to provide related legal assistance to an alien who has been battered or subjected to extreme cruelty by a spouse or parent, as defined in the amendment. Related legal assistance is defined as "... legal assistance directly related to the prevention of, or obtaining of relief from, the battery or cruelty"

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The LSC Board of Directors will not have an opportunity until January 1997 to address the requirements of the Kennedy Amendment by amending 45 CFR Part 1626, the interim regulation which pertains to the representation of aliens. Because Congress has now construed Section 504(a)(11) to permit representation of certain aliens, LSC will interpret Part 1626 as permitting representation of specified aliens pursuant to the Kennedy Amendment from the date of its enactment on September 30 and will not enforce the restrictions of Part 1626 with respect to non-LSC funded representation of aliens who come within the provisions of the Kennedy Amendment.

Part 1610

Part 1610 governs the use of non-LSC funds by LSC recipients and other entities that receive funds from LSC. Part 1610.7 addresses how the prohibitions and requirements enumerated in the regulation apply when funds are transferred by a recipient to another entity. The interim rule governed transfers of a recipient's non-LSC funds, while transfers of LSC funds continued to be governed by Part 1627. The interim rule provided that when non-LSC funds were transferred to entities to carry out programmatic activities, the prohibitions or requirements only apply to the funds transferred and not to any other funds of the entities. In a memorandum dated December 11, 1995 giving programs guidance on subgrants and in commentary to interim rule Part 1610, the Corporation announced a policy regarding transfers of LSC funds to another entity pursuant to Part 1627 (i.e., a "subgrant" under that rule). That policy stated that when LSC funds were transferred to another entity under a subgrant, the restrictions on those funds would also apply to all the funds of the subrecipient.

Comments to the interim rule noted that strict application of this policy, which subjected all other funds of an LSC subgrantee to LSC restrictions, would seriously undermine private attorney involvement (PAI) because it would deter bar associations and other organizations from continuing to participate in PAI programs. To address this problem and other issues, the Board revised the interim rule to address transfers of both LSC and non-LSC funds. Specifically, the Board adopted Section 1610.7(d), which provides that when LSC or non-LSC funds are transferred to entities for the sole purpose of funding private attorney involvement activities, the prohibitions or requirements only apply to the funds transferred and not to any other funds of the entities.

The effective date of the final version of Part 1610 is January 1, 1997. Because the earlier, narrower interpretation was never formally adopted in a regulation, however, LSC will interpret the new policy as having immediate effect as of the date of its adoption by the Board on September 30, 1996.

Part 1617

We also want to bring to your attention language in the regulation on class actions (45 CFR Part 1617) regarding what activities are permissible in relation to an order granting final relief in a class action. Any participation in a class action is prohibited, including participation after entry of a final order. In adopting the interim rule, however, the LSC Board identified a narrow range of non-adversarial activities after entry of a final judgment which would not be

considered to be participation in a class action. Specifically, the interim rule stated that "Initiating or participating in any class action ... does not include non-adversarial monitoring of an order granting relief or involvement in the enforcement or administration of an order on behalf of an individual client seeking the benefit of the order."

The term "monitoring" used in the interim rule may have been understood by recipients to imply a more active role than was intended by the Board. In the final regulation, therefore, the Board replaced the term "monitoring" with the term "activities," and more explicitly defined the kind of activities permitted. The final rule states that "(2) *Initiating or participating in any class action* does not include representation of an individual client seeking to withdraw from or opt out of a class or obtain the benefit of relief ordered by the court, or *non-adversarial activities, including efforts to remain informed about, or to explain, clarify, educate or advise others about the terms of an order granting relief.*" (Emphasis supplied.)

This change was not intended to create a different standard from that set forth in the interim regulation, but, because the interim rule may have been unclear, the Board believes that it is necessary to clarify what non-adversarial activities the Board deems permissible. If your interpretation of the language in the interim rule has resulted in your participation in activities beyond the scope of the final regulation, you should take immediate steps to withdraw from further participation and should not be participating in such cases as of the effective date of the final rule on January 1, 1997.