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September 2, 2011

Mark Freedman
Senior Assistant General Counsel
Legal Services Corporation
3333 K St., NW
Washington, D.C. 20007

RE: Request for Comments—Poverty Data and LSC Funding Distribution: **Federal Register / Vol. 76, No. 153**

Dear Mr. Freedman

Thank you for the opportunity to offer comments on the proposed changes for funding allocation determinations made by LSC. There are two separate issues and concerns Anishinabe Legal Services would like to address.

1) Under LSC's Funding Distribution Memorandum dated July 13th, 2011 and Federal Registrar Vol. 76, No. 153 dated August 9th, 2011, LSC management recommends allocation of LSC program funding "as determined by the Bureau of the Census." However, LSC's proposed rule intentionally avoids identifying a specific American Community Survey (ACS) data set for allocation purposes, and in doing so, appears to contravene this deference to the Census Bureau by disregarding the Bureau's own warnings against making comparisons between 1, 3, and 5-year ACS Reports, which is at least contemplated by LSC in refusing to identify a specific data set under this proposed allocation rule, and can easily be mitigated by including language specifying that the same data set report be used for all program funding allocation determinations.

The United States Census Bureau issued a report entitled "U.S. Census Bureau, A Compass for Understanding and Using American Community Survey Data: What General Data Users Need to Know" in October 2008 to identify best practices for using the ACS data sets; this report can be found at http://www.census.gov/acs/www/guidance_for_data_users/handbooks/

In this report, it specifically and repeatedly cautions against comparing data reports taken over periods of differing length. For example, in A-19 of the Appendix, under the heading "Comparisons Across Time Periods" the US Census Bureau cautions, "Users are advised against comparing multiyear estimates of differing lengths (e.g., comparing 2006-2008 with 2009-2014), as they are measuring the characteristics of the population in two different ways, so differences between such estimates are difficult to interpret." For another example, A-5 of the appendix plainly states, "1-year estimates should

only be compared with other 1-year estimates, 3-year estimates should only be compared with other 3-year estimates, and 5-year estimates should only be compared with other 5-year estimates.” (also see the example given on pages 9-10 for comparing Boston to Nantucket, which applied here states that best practices would be for LSC to use 5-year ACS data only when determining allocations, as a significant number of rural and/or Indian Legal Service LSC funded programs only have 5-year ACS reports issued for their client communities).

Under the Census Bureau’s current income surveying methods for small rural communities (with populations under 20,000), which includes the vast majority of Indian Reservations, data is only reported over a 5-year period by the Census/ACS, while every other population group/area has ACS reports issued over a 1 or 3-year period. In the United States Department of the Census’ own report, it cautions against making these comparisons. Claiming that allocation is to be based “as determined by the Bureau of the Census” but then disregarding the Census Bureau’s own instructions for interpreting the data and their clear and explicit warnings against comparing data sets of varying length, simply in order to avoid the possibility of having to revisit the allocation issue if the Census Bureau stops taking the 5-year surveys, is illogical. At least, illogical when LSC can also choose to alleviate this possibility by including a provision simply stating that the same ACS data set report will be used for all program funding allocation decisions. That way, there is no risk of comparing data sets of varying length, and does not compel LSC to identify a particular data set report, in case that report would later become unavailable.

We propose allocation cycles based on 5-year ACS data reports only for LSC program funding allocation purposes. As the US Census Bureau states in their Compass for Understanding and Using American Community Survey Data, “you certainly can compare characteristics with populations of 30,000 to 100,000 but you should use the data set that they have in common. In this example you could use the 3-year or the 5-year estimates because they are available for areas of 30,000 and areas of 100,000.” Or, as the US Census Bureau States in their U.S. Census Bureau, A Compass for Understanding and Using American Community Survey Data: What Users of Data for American Indians and Alaska Natives Need to Know (2009),

Suppose you are responsible for developing and administering a grant program. How would you instruct potential grant applicants regarding what kind of data are acceptable? You should require that all potential applicants use the same kind of estimate (for example, requiring everyone to submit data based on a 5-year estimate, rather than allowing some applicants to use single-year estimates and others to use 3- or 5-year estimates). In addition, applicants should be required to use estimates representing the same period of time (e.g., requiring that all applicants use the 5-year estimate for a specific period, for example, 2008–2012, rather than allowing applicants to submit data representing any 5-year period estimate). The same approach should be used in comparing estimates for one area to those for another area. Suppose you wanted to compare characteristics for one reservation, for which both 3-year and 5-year estimates are available, to those for a smaller reservation, for which only 5-year estimates are available. You should compare 2005–2009 ACS 5-year estimates for the smaller reservation with 2005–2009 ACS 5-year estimates for the larger reservation, even though more recent 3-year estimates are available for the larger reservation.

(see page 24 of Compass for American Indians and Alaska Natives, which can also be found at the website listed above).

As many LSC program service areas are only surveyed on a 5-year basis, the Census Bureau's own instructions for using ACS data plainly indicate that using 5-year surveys for all program allocation determinations is best practice for LSC. LSC may want to avoid identifying a particular data set in case it becomes unavailable for usage in the future, but in recommending allocations through ACS reports only, LSC either must identify the 5-year ACS survey as the only survey data set to be used, or be willing to run afoul of the Census Bureau's own instructions for ACS usage and warnings regarding the unreliability of comparing survey sets of varying lengths (i.e. comparing data between 1, 3, and 5-year ACS reports). In the alternative to specifically naming the 5-year ACS as the data report to be used in determining allocations, we ask that LSC at least include language in the rule clearly stating that all allocation decisions will be made from the same data set issued by the Census Bureau. It should be noted that the State of Minnesota recently determined their state legal aid funding allocations, in part, by comparing 1-year ACS reports to 5-year ACS reports; we want to ensure that this is not done on the federal level as well.

2) Refusal to allow LSC to consider the United States Bureau of Indian Affairs' (BIA) American Indian Population and Labor Force Report in the allocation determination disregards historical under-reporting of Indians by the United States Census Bureau, which remains so prevalent that the United States Government uses this separate survey/report, outsourced by the BIA to the Tribes themselves, to obtain similar information as is contained within the ACS reports. These reports are then used by the Federal Government to determine allocation of federal funding through the BIA to Tribes.

Public Law 102-477, the Indian Employment, Training and Related Services Demonstration Act of 1992 mandates that the BIA publish this report no less than every 10 years, on the Native American populations that are eligible for services provided by the Secretary of the Interior to American Indian and Alaska Native people (see 2005 BIA American Indian Population and Labor Report, page ii, under "Purpose"). While the BIA is tasked for collecting this data from the Tribes and issuing the reports based on data collected; the actual surveying done for these reports is carried out by the Tribes themselves. If census undercounting did not persist on Reservations today, there would be no need to continue mandating the BIA to issue American Indian Population and Labor Force reports under PL 102-477. Much of the information contained within these reports can also be found in 5-year ACS surveys. There is recognition here (correctly) by the Federal Government that tribal members are far more likely to report personal (and for many, sensitive) information to their own Tribal Governments than to the Federal Government.

There is no questioning that there is generally a significantly higher level of mistrust and suspicion of the Federal Government on Indian Reservations, for reasons not needed to be rehashed here. It bears noting that the most recent 5-year ACS report had, on average, significantly higher Margins of Error for Indian Reservations than off. For instance, in Minnesota, the Margin of Error (MOE) on the 2005-2009 ACS report for the Red Lake Indian Reservation 12.2%, while on the whole, the MOE for the entire state of Minnesota is 0.2%, with the majority of Minnesota counties having MOE percentages around 1-2%. This is not one isolated example either; Margin of Error rates (MOEs) for other Reservations in Minnesota, on average, are significantly higher than those for the Counties

This is not unique to Minnesota; Reservation data reported by the 5-year ACS report is neither timely nor accurate when compared to the vast majority of off-reservation population numbers and MOE rates reported. (*compare also*, 2005-2009 MOEs for the Zuni and Hopi Reservations to 2005-2009 MOEs for the States and Counties of New Mexico and Arizona, MOEs for the Mississippi Choctaw Reservation relative to the State and County MOEs for Mississippi, Warm Spring Reservation MOEs to Oregon State/County MOEs, etc.). While MOEs will generally move in indirect proportion to total population numbers, and the majority of Indian Reservations are rural with smaller sample sizes, the sample size alone does not explain these vast discrepancies. It also bears noting that while many Indian Reservations have very small population numbers with very high MOE rates in the most recent 5-year ACS, these error rates cannot be looked at in isolation and ignored due to small population sizes. Totaling together the aggregate population numbers of sparsely populated Reservations (most of which have MOEs greater than 25%) results in hundreds of thousands of Native Americans residing on Reservations around the Country with average MOE rates greater than 25% (more than 100 times the average MOE for a similarly populated State or County). We do not believe it is fair to base crucial funding allocation decisions solely on such speculative data, at least where there are additional studies and reports from Federal Agencies to draw upon, such as the BIA American Indian Population and Labor Force Report.

Additionally, significant efforts made by the US Census Bureau to increase the level of turnout for the 2010 Census demonstrates the fact that the Federal Government clearly recognizes that census under-reporting on Indian Reservations continues to exist today. For instance, the Census Bureau partnered with groups such as the National Congress of American Indians, and representatives from the Federal Government made formal presentations to all 564 federally recognized Indian Tribes to recognize, foster and promote government-to-government relationships, and ensure the highest return rate for tribal members living on Reservations as possible. It is critical to note that these same efforts were NOT extended to the US Census' American Community Surveys, which is now the only income survey and report issued by the US Census Bureau, and the only resource utilized to determine allocations under LSC's proposed rule.

The differences in data between the 2005-2009 ACS report for numbers of people in poverty on Indian Reservations is drastically different than findings contained within the 2005 BIA American Indian Population and Labor Force Report, which reports, on average, dramatically higher levels of persons in poverty, percentages of population unemployed, percentages of population not available for work, etc.

Significantly, as a whole, Native population numbers residing on Reservations are dramatically higher under the most recent BIA labor report than the 2005-2009 ACS. Taking the earlier example of Red Lake discrepancies, it is worth noting that the 2005 BIA Study reported 10,338 Native Americans eligible for BIA services on or near the Red Lake Reservation (meaning 10,338 with over ¼ Native blood quantum), while the 2005-2009 ACS survey had the total (Native and non-Native) Red Lake Reservation Population at 5,331. Despite the fact that these reported numbers are based on slightly different factors, geographic regions, and time periods, the total difference in the numbers is shocking, but unfortunately not uncommon when comparing data reports from the 2005-2009 ACS and the 2005 BIA Report across all Reservations in the United States. Like with the MOE rates, these discrepancies are not found solely on the Red Lake Reservation, or within the State of Minnesota

Strengthening this probability of ACS under-counting even further in light of the vast discrepancies under the ACS and BIA American Indian Population and Labor Force Report, is the fact that numbers of people in poverty are far more likely to be UNDER-reported than OVER-reported. Some level of under-reporting is inevitable on population and income surveys; you cannot force anybody to report and expecting a 100% return rate is naïve and unrealistic. Some level of under-counting is always going to exist on population and income surveys. Over-reporting the number of people in poverty, on the other hand, typically requires negligence or fraud, since people would have to either be double counted, or numbers would have to be invented out of thin air for over-reporting to occur.

There is no way to reconcile these vast discrepancies in population numbers and MOEs without concluding that either the 2005-2009 ACS is under-reporting population numbers, or the 2005 BIA Population and Labor Report is over-reporting these numbers. Considering the history of maltreatment of Native persons by the Federal Government, historical trauma and mistrust, well documented history and federal recognition of past under-counting of Native populations on Reservations by the US Census, efforts made by the Census Bureau to increase turnout of Native participation in the 2010 census (but not for the ACS), and the fact that it is much more likely for numbers to be under-reported than over-reported, the studies themselves show prima facie evidence that significant Census undercounting of Native populations on Reservations continue today.

LSC's proposed rule claims deference to one branch of the Federal Government (Census Bureau), while disregarding another (the BIA), and disregards the Federal Government's overall policy of allocating federal funding to Native Americans residing on or near Reservations by allowing the Tribes themselves to collect their own data, which is then reported to the BIA/Federal Government to analyze the data and issue the findings/report. This also furthers the Federal Government's policy of recognizing and respecting tribal sovereignty and fostering positive government-to-government relations with the Tribes; it also recognizes the special trust relationship and responsibility the Federal Government has with Tribes and tribal members residing on Reservations. The 2010 BIA report is due for release and publication before the end of 2011, and can be utilized as a resource for the next scheduled allocation under LSCs proposed rule.

For reasons stated above, we ask that LSC please, 1) identify the 5-year ACS report as the specific data set from the U.S. Census Bureau to be used in determining program funding allocations, which will ensure that comparisons will not be made between data sets of differing length for any and all allocation determinations (as is clearly and repeatedly recommended by the US Census Bureau), or in the alternative, include language in the rule that allocation decisions will be made from the same set of data reports for all LSC funded programs (without identifying a specific data set), and 2) Reconsider NLADA's recommendation of determining the number of people in poverty for allocation purposes, "on the best available data identified by LSC through consultations with the Census Bureau," which would allow LSC flexibility to consider BIA American Indian Population and Labor Force reports, along with the 5-year ACS reports in determining funding allocations for Indian Legal Service Programs.

We are not asking LSC to determine numbers solely based on the BIA Population and Labor Reports, or even for LSC to be mandated to consider them; we are just asking that LSC have at least some degree of flexibility and the option to consider them in light of the above information, should they see fit. It is our position that LSC should be given the same discretion that virtually every other federal agency has to determine the "best available data" in allocating funding among its grantees; this is especially

compelling when it comes to funding allocation decisions for federal dollars going towards services for low-income Native Americans on Reservations, which touches upon the trust relationship between the Federal Government and Indian Tribes, and strong federal policies favoring recognition of tribal sovereignty and positive government-to-government relationships between the Federal Government and the Tribes.

We at ALS all truly appreciate your consideration of these requests.

Sincerely



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