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August 30, 2012

Mr. Mark Freedman
Senior Assistant General Counsel
Office of Legal Affairs
Legal Services Corporation
3333 K Street NW
Washington, D.C. 20007

Re: Northwest Justice Project's Comments on Proposed Changes to 45 C.F.R. §§1606 and 1618

Dear Mr. Freedman:

These comments are submitted on behalf of the Northwest Justice Project, LSC's sole grantee for the state of Washington. We are grateful for the opportunity to comment on the proposed procedures related to the potential implementation of "limited reduction in funding" sanctions under 45 CFR §1606, and on the proposed amendments to 45 CFR §1618 set out in 77 Fed. Reg. 46995-47003 (Aug. 7, 2012). Please note, however, NJP continues to oppose the creation of new or additional sanctions that are not afforded the same degree of due process provided for termination or debarment. We propose that the same due process requirements attach to any limited reduction in funding (over a minimum) that can have a deleterious effect on the ability of an LSC recipient to carry out its chief mission, *e.g.* amounts in excess of $10,000.

Prior to addressing the substance of the proposed amendments in response to the questions on which LSC seeks comment, we have some specific observations that we hope will be helpful. These are briefly set out below:

- "Limited reduction in funding" is the term of art used by LSC and is defined in proposed §1606.2(c). As written, the definition is not expressly limited to a reduction in funding of less than five percent of a recipient's current annual level of financial assistance *from LSC*. Because we believe that it will clarify the intent that the rule would impact only a recipient's LSC grant, the language should expressly limit application of the sanction to funds "from LSC". This would also be consistent with the language in §§1606.2(d) and (e)(1). Hence, we recommend that the language be changed to read:

"*Limited reduction in funding means a reduction in funding of less than five percent of a recipient's current annual level of financial assistance from the Corporation imposed ~~[by the Corporation]~~ in accordance with the procedures and requirements of this part.*"

- Also for consistency with the stated definition, we recommend changing the "of" in subsection §1606.2(e)(2)(v) to "in". It would read: "A limited reduction *in* funding as defined in this section."

- Similarly, and also for purposes of consistency, in §§1606.5(b), 1606.6(a), 1607(a)(ii), 1606.10 (title), and 1618.5(b), and anywhere else in which the term may be used, we recommend changing the terminology from the currently used "lesser reduction(s) in funding" to the actual defined terminology of "*limited reduction in funding.*"

With respect to the procedures affecting limited reductions in funding, we appreciate that LSC has attempted to respond to Comments similar to those reflected in our March 30, 2012 letter, which concerned in part the lack of detail for the proposed informal conference to review preliminary determinations to impose limited reductions. However, in our reading of the current version of the procedures set out in §§1606.5(b), 1606.6, 1606.7 and 1606.10, we find the process ambiguous and likely impractical to implement. We do not understand the distinction (or the reason therefore) between a "preliminary determination" and a "recommended decision" in §1606.10(a), (b) and (e). The term "recommended decision" seems to have been carried forward from §1606.9 relating to recommended hearing decisions for terminations or debarment. Use of the varying terms with respect to "limited reductions in funding" is confusing. If there is a relevant distinction, then the terms should be separately defined for these purposes and included in the definitions, along with "final decision". If there is no distinction, then make the terminology consistent throughout.

Similarly, and apropos the above comments, the terms "informal conference" and "informal meeting" are used variously (compare §§1606.7(d) and (e)). There appears to be no distinction in the terms and again one term should be used consistently throughout the regulation to avoid confusion.

Finally, we are concerned that limited reductions in funding may become the preferred sanction to address recipient conduct that flows from a legitimate factual or legal disagreement or good faith misinterpretation of an applicable rule. Because the standard for the imposition of a limited reduction in funding is the same as for termination (*e.g.*, a "knowing and willful" "substantial violation" (§§1606.2 (h); 1606.3(b)), we believe these terms should be expressly defined to exclude such legitimate disagreements or good faith misinterpretations.

As to the actual review process, we address the sections in the order they appear in the proposed regulation:

- Proposed §1605.5(b) states that *"prior to a preliminary determination involving a [limited] reduction in funding, the Corporation shall designate either the President or another senior Corporation employee to conduct any final review that is requested pursuant to Sec. 1606.10 of this part. The Corporation shall ensure that the person so designated has had no prior involvement in the preliminary and/or final determinations so as to meet the criterion set out in Sec. 1606.10(d) of this part."* "Corporation" is defined in §1606.2(i) to include "*an office...deputy director...*".

  If under §1606.10(b), the "appeal" process is limited to review by the President then it should be unnecessary for the Corporation to designate the President to conduct any final review requested. The President should simply not be involved in making a preliminary recommendation to impose a limited reduction in funding. The final determination should rest with the President and not with a designee. Moreover, the designation of the President or another senior Corporation employee to conduct any final review *prior to* a preliminary determination seems to pre-suppose that a preliminary determination to impose a limited reduction in funding will indeed occur prior to consideration of the factors that might lead to this. If the intent is to have the President involved in a preliminary determination then the final determination seems beside the point. We agree that the preliminary determination should be made at the level of an office director or Vice President. As such, we believe that for a decision as serious as a limited reduction in funding, the preliminary determination should not be authorized solely by an office deputy director. Therefore, we suggest that "deputy director" be eliminated from §1606.2(i), along with reference to the President in §1606.5(b).

- §1606.6 sets out the notice requirements for a preliminary determination and subsection (a)(6) would require the notice to "[s]pecify what, if any, corrective action the recipient can take to avoid the proposed action." Subsection (b) then provides that if the recipient does not request review, the preliminary decision shall become final. The proposed regulation does not provide the recipient the option to cure the problem by taking the corrective action specified in the notice. The only way to avoid the proposed limited reduction in funding is to "request review". If the intent is to permit a recipient to avoid the reduction in funding by taking corrective action, then the regulation should provide for this response. If not, then there is no point in having the notice include the corrective action information. We submit that if a recipient in good faith agrees to take the corrective action, this option should be available in lieu of seeking review. We are also confused by the difference between the "final determination" and "final decision" as to what is actually reviewable in this context, and thus, also recommend that subsection (b) be clarified. We do not read subsection (b) to preclude the President's review of a final determination, if a recipient fails to submit the written materials, request an informal conference review or take corrective action. But again, clarification is needed. We recommend that

subsection (b) be revised to incorporate the corrective action option and clarify the result as follows:

"(b) If the recipient does not request review, *or express its intent in writing to take the corrective action specified in the notice,* as provided for in this part, then the preliminary decision shall become *the final determination,* at LSC's discretion, after the relevant time limits have expired…."

- §1606.7 sets out the process for an informal conference to effectively mediate the situation in order to "seek to narrow the issues, explore the possibilities of settlement or compromise…" The informal conference is to be conducted by the same Corporation employee who issued the preliminary determination. This sets up very little possibility of accomplishing any kind of narrowing of issues, settlement or compromise. In our experience it is virtually impossible to accomplish this outcome with the very person who made the preliminary determination in the first place. If a true goal of the informal conference is to avoid further review and prevent the limited reduction in funding, then the informal conference should be conducted by a third party who can bring at least a minimum degree of neutrality to the discussion. This could be a professional mediator or other high level manager (*e.g.*, Deputy Director) of the Corporation who may not be as wedded to the proposed sanction as the employee who issued the preliminary determination. We do not recommend that this person be the President of the Corporation who should be solely responsible for the final review and determination.

- As mentioned above, we find the language of §1606.10 confusing. For clarity, unless the due process requirements for termination and debarment are extended to a limited reduction in funding over a specified amount, we recommend that the concept of "recommended decision" be omitted from throughout the §1606.10 sections as related to the limited reduction in funding sanction. Effectively, this would limit the review by the President to review of a final determination to impose a limited reduction sanction. The President's review and determinations made under subsection (e) should become the "final decision" for purposes of §1606.13(b).

- While LSC does not seek comment on the substance of proposed §1606.13, as written subsection (b) is awkward and conceptually inaccurate. The current language speaks in terms of a recipient losing "all rights to the … reduced funds". As to the imposition of a limited reduction sanction, the language should more accurately reflect that the reduced grant funds are being withheld and reallocated. Hence, we recommend that the language be changed to read as follows:

  "After a final decision has been made to terminate a recipient's grant or contract, a recipient loses all rights to the terminated funds *and the service area grant will be reallocated as provided by subsection (d) and §1606.14. After a final decision has been made to impose a limited reduction in funding, the reduced amount will*

> *be withheld and reallocated by the Corporation in accordance with subsection (d).*"

Other than what has already been referenced above with respect to consistency of terminology, we offer no additional recommendations with respect to 45 CFR §1618. We support the additional protective language in proposed §1618.4(c). Again, we thank you for the opportunity to submit these comments and trust that you will give them serious consideration.

Sincerely,

Deborah Perluss

Deborah Perluss
Director of Advocacy/General Counsel

C César E. Torres, Executive Director