Legal Services Corporation
America's Partner For Equal Justice

October 22, 2001

President
John N. Erlenborn

Board of Directors
Douglas S. Eakeley
Roseland, NJ
Chairman

LaVeeda M. Battle
Birmingham, AL
Vice Chair

Hulett H. Askew
Atlanta, GA

John T. Broderick, Jr.
Manchester, NH

John N. Erlenborn
Issue, MD

Edna Fairbanks-Williams
Fairhaven, VT

F. Wm. McCalpin
St. Louis, MO

Maria Luisa Mercado
Galveston, TX

Nancy H. Rogers
Columbus, OH

Thomas F. Smegal, Jr.
San Francisco, CA

Ernestine P. Watlington
Harrisburg, PA

David B. Neumeyer
Executive Director
Virginia Legal Aid Society, Inc.
513 Church Street
Lynchburg , VA 24505-6058

RE: Question Regarding 45 CFR Part 1611, External Opinion Number EX-2001-1015

Dear Mr. Neumeyer:

This letter responds to your recent inquiry regarding applicant eligibility under 45 C.F.R. Part 1611. You indicated that in trying to comply with Part 1611, your program has established a practice of qualifying an applicant with gross income between 125% and 187.5% of the poverty level, only if the listed factors in §1611.5(b)(1) reduce the applicant's net income to 125% of poverty. Someone recently suggested to you that the factors in §1611.5(b)(1) need not reduce net income to 125% of poverty, because the *mere presence* of any such factor would be enough to make an applicant eligible if the program's income policy were written to allow such. In light of this suggestion, you requested guidance on the application of §1611.5(b)(1).

Your program has, indeed, been interpreting §1611.5(b)(1) more strictly than is necessary. Section 1611.5(b) states that "[i]n addition to gross income, a recipient *shall* consider the other relevant factor**s** listed in paragraphs (b)(1) and (b)(2) of this section before determining whether a person is eligible to receive legal assistance." [Emphasis added.] The regulation thus requires recipients to consider all relevant factors listed in §1611.5(b)(1) [and (b)(2)], some of which are quantifiable (e.g. medical expenses; fixed debts; child care, transportation and other expenses necessary for employment; and expenses associated with age or physical infirmity of resident family members), and some of which are not quantifiable (e.g. 'current income prospects, taking into account seasonal variations in income,' and 'other significant factors related to financial inability to afford legal assistance'). Because the regulation requires consideration of *non-quantifiable* factors prior to a determination of eligibility, construing the rule to require that *quantifiable* factors reduce gross income to 125% of poverty is inconsistent and unduly strict.

Notwithstanding this conclusion, however, the alternative interpretation that has been suggested to you (i.e. that 'the *mere presence* of any such factor would be enough to

750 First Street, NE 11th Floor
Washington, DC 20002-4250
Phone 202.336.8800 Fax 202.336.8959
www.lsc.gov

make an applicant eligible if the program's income policy were written to allow such') is overly broad. The regulatory history of Part 1611 suggests that when eligibility is questionable, a recipient should conduct a comprehensive evaluation of an applicant's financial situation prior to determining whether the applicant is qualified, and provide documentation of the reasons for serving any client whose income exceeds 125% of poverty.

Section 1611.5(b)(3)(A) requires that if a recipient tentatively determines to serve a client over the maximum income level based on factors listed in §1611.5(b)(1), factors which clearly *favor* eligibility, the factors listed in §1611.5(b)(2), which primarily *disfavor* eligibility, shall also be used before reaching a final determination. Section 1611.5(b)(3)(B) requires the reverse, again mandating that if an applicant's financial eligibility is questionable, all relevant factors, including those that favor and disfavor eligibility, shall be considered prior to a determination.

Subsection b(3) of §1611.5 was not included in the interim version of the rule published on August 29, 1983. 48 FR 39086. It was only after receiving multiple comments on the interim rule that the LSC Board of Directors decided to insert this new provision requiring an all-inclusive evaluation of eligibility for applicants with questionable qualifications for services. The decision to require this comprehensive evaluation was thus concerted and consciously made. That being so, it would be inconsistent with the intent (and possibly the plain language) of the regulation for a program to formulate its income policy in a way that permits representation of an applicant based on the *mere presence* of one of the factors listed in §1611.5(b)(1). The plain language of the regulation, particularly that contained in §§1611.5(b)(3)(A) and (B), makes clear that when an applicant's financial eligibility is questionable, a recipient should evaluate representation carefully, based on a totality of the circumstances.

The alternative interpretation of §1611.5(b)(1) that has been suggested to you would also likely fail to achieve the quality of documentation sought in Part 1611. LSC revised Part 1611 in 1983, in part, due to the difficulty of evaluating eligibility determinations under the prior version of the rule. In the 'Supplementary Information' preceding both the proposed rule and the final rule, LSC noted that a "problem [with the prior version of the regulation] was that when complaints as to eligibility have been received, the Corporation has had difficulty in obtaining the necessary information on which to make a determination." 48 FR 39086 (August 29, 1983) and 48 FR 54201, 54202 (November 30, 1983). To address this concern, the LSC Board of Directors added §1611.4(b) to the final rule, which requires recipients to document and include in a client's file the reasons for serving any client whose income exceeds 125% of poverty. The regulatory history of §1611.4(b) notes that its purpose "is to assure the existence of *a record sufficient for the Corporation to review such eligibility determinations*." 48 FR 54201, *54202 (November 30, 1983) [Emphasis added.]

It is unlikely that a recipient eligibility policy that qualifies an applicant based on the *mere presence* of factors in §1611.5(b)(1), would promote the quality of documentation intended by §1611.4(b). Even (and perhaps especially) when an applicant is determined financially eligible based on a non-quantifiable factor listed in

750 First Street, NE 11th Floor
Washington, DC 20002-4250
Phone 202.336.8800 Fax 202.336.8959
www.lsc.gov

§1611.5(b)(1), a recipient should endeavor to provide as much explanation as possible for the determination, rather than stating, for example, that "the applicant is qualified pursuant to §1611.5(b)(1)(F), based on the presence of 'other significant factors related to financial inability to afford assistance.'"

In summary, while your program has been applying §1611.5(b)(1) more strictly than is necessary, the alternative interpretation that has been suggested to you is problematic. In evaluating the eligibility of applicants with income in excess of 125% of poverty, recipients should be mindful of completing the analysis mandated by §1611.5(b)(3), and where necessary, providing the documentation necessitated by §1611.4(b).

Although Part 1611 was written to provide some flexibility in evaluating the multitude of factors that affect a person's ability to afford legal assistance, it should not be used to subvert the purpose of the LSC Act to assist persons who are genuinely financially unable to afford legal assistance.

I hope that this information is helpful. If you have any questions or if you would like to further discuss this matter, please feel free to contact me at (202)336-8871.

Sincerely,

Dawn M. Browning
Assistant General Counsel

Victor M. Fortuno
General Counsel

750 First Street, NE 11th Floor
Washington, DC 20002-4250
Phone 202.336.8800 Fax 202.336.8959
www.lsc.gov