



OFFICE OF LEGAL AFFAIRS

ADVISORY OPINION

Advisory Opinion # AO – 2009 – 1006

Subject: Inquiry into Income Prospects Pursuant to 45 CFR §1611.7(a)

Date: September 3, 2009

This Office was asked for an opinion on whether recipients must inquire as to the income prospects of each applicant for LSC-supported legal assistance, or whether recipients may choose not to ask such applicants about income prospects unless the applicant otherwise provides information indicating that there may be an upcoming change to his or her current income.

Brief Answer

As part of their financial eligibility screening, recipients are required by 45 CFR §1611.7(a) to make a reasonable inquiry into the income prospects of each applicant for LSC-funded legal assistance.

Background

In the course of Case Service Report/Case Management System reviews of two recipients, LSC's Office of Compliance and Enforcement found that the recipients were not inquiring into the income prospects of all applicants for LSC-supported legal assistance during financial eligibility screening. As a result, the two programs were instructed by OCE to begin inquiring into the income prospects of all applicants for LSC-supported legal assistance. The two recipients acknowledged that the OCE finding was accurate, but each has taken issue with OCE's instruction. The challenges to the instruction are based on a contention that the financial eligibility regulation at 45 CFR Part 1611 does not require recipients to inquire into the income prospects of all applicants for LSC-supported legal assistance. The recipients have inquired with this Office regarding this point.

Analysis

Under 45 CFR Part 1611, *Financial Eligibility*, recipients are permitted to accept as clients and provide LSC-supported legal assistance only to applicants who have been determined to be financially eligible for such legal assistance in accordance with the requirements of 45 CFR Part 1611 and the financial eligibility policies adopted by the recipient. 45 CFR §1611.4. Section 1611.7(a) provides that “[i]n making financial eligibility determinations regarding individual applicants, a recipient **shall make reasonable inquiry regarding** sources of the applicant's income, **income prospects** and assets.” (Emphasis added.) Generally accepted

principles of statutory construction, which apply equally to regulations, provide that when the language of a statute is clear and unambiguous on its face it is to be given its plain language meaning. *Public Citizen, Inc. v. Rubber Manufacturers Association*, 533 F3d 810 (C.A.D.C. 2008); see also, 73 C.J.S. Public Administrative Law and Procedure § 211. It is my considered opinion that the language of this regulatory provision is “clear and unambiguous” on its face. Neither the plain language of §1611.7(a), nor the plain language of any other section of Part 1611 contains any limitation on or exception to the requirements relating to the manner of determining financial eligibility. Rather, the regulation on its face expressly requires that a reasonable inquiry into an applicant’s income prospects be part of the financial eligibility determination in all cases. Therefore, giving the regulation its plain language meaning, there is no basis to interpret the income prospects inquiry requirement of §1611.7(a) as limited to only those situations in which the recipient already has a reason to believe that the income prospects of the applicant are likely to change in the near future.¹

One recipient argues that because the term “current income prospects” is used in the section addressing exceptions to the income ceiling (45 CFR §1611.5(a)(4)(i)), the term only has “substantive meaning” in that particular regard. Therefore, it is argued, because that particular exemption is stated as “current income prospects, taking into account seasonal variations in income” the use of the term “income prospects” by itself in §1611.7(a) regarding the “[m]anner of determining financial eligibility” may only mean income prospects related to seasonal variations in income. I find this contention unpersuasive.

The term “income prospects” is used in three different contexts in Part 1611; each use compliments the others for a more complete understanding of how to inquire about and consider them. The three uses do not, as has been suggested, limit or constrain each other. Section 1611.7(a) gives a general rule, quoted above, that the recipient shall make a reasonable inquiry about income prospects as part of the initial financial eligibility determination. Section 1611.5 deals with the separate question of exceptions to the annual income ceiling that can be considered **after** the preliminary income determination is made. In that context “current income prospects, taking into account seasonal variations in income” can be considered as a reason to determine that an otherwise over-income applicant is financially eligible. The fact that a

¹ Although neither recipient raised this specific argument, it has been suggested that had the provision in question been intended to require an inquiry into prospective income in all cases, the regulation could have read “shall inquire” rather than “shall make reasonable inquiry.” In my opinion the problem with this argument is that it could similarly be claimed that if the provision in question had been intended to mean that inquiry into income prospects was only required when the recipient deemed it reasonable, the regulation could have read “shall make inquiry [into income prospects] when the recipient deems such inquiry reasonable.” Just because there could have been different linguistic constructions of the phrase, the failure to use any such different construction is not dispositive.

Moreover as a matter of English construction, in the sentence “the recipient shall make reasonable inquiry regarding sources of the applicant’s income, income prospects and assets,” the appearance of the word “reasonable” directly before the noun “inquiry” indicates that it is an adjective intended to modify the noun, rather than a conditional which is typically indicated by the use of another conditional signifier, such as if, when, or unless. Thus, the phrase “reasonable inquiry” is best interpreted as an inquiry that is reasonable, not an inquiry performed when it is deemed reasonable. And the use of the direct command form “shall” further indicates that the inquiry is mandatory, rather than permissive.

recipient has discretion to consider seasonal income variations as an exception to the income ceiling has no bearing on its obligation to inquire about any income prospects (seasonal or otherwise) as part of a financial eligibility determination.

In addition to the two contexts already discussed, §1611.6(b)(1) also discusses “income prospects” in connection with the manner of determining eligibility for groups seeking LSC funded legal assistance from recipients. The fact that income prospects must be also considered for groups does not affect the need to inquire about them for non-group applicants, nor does the discussion of seasonal income prospects alter the need to inquire about a group’s income prospects. As such, the term must have “substantive meaning” apart from its use in §§1611.5(a)(4)(i) and 1611.6(b)(1) .

It has also been argued that a different reading is supported by the definition of “income” in §1611.2(i) because it includes only “actual current annual total cash receipts” To the contrary, that definition has no bearing on the inquiry into income prospects. Section 1611.7(a)(1) requires “reasonable inquiry regarding sources of the applicant’s income, income prospects and assets.” The definition of “income” does not affect the need to also inquire into income prospects and assets.

Rather, making a reasonable inquiry into all applicants’ income prospects furthers the purpose of the regulation, while limiting the applicability of the income prospect inquiry works at cross-purposes to the regulation. An applicant’s financial eligibility is based in the applicant’s ability to afford legal assistance; the required inquiry is important in all cases as a particular applicant’s income prospects might be relevant to the financial eligibility determination precisely because the applicant’s income prospects might not otherwise be obvious. Without asking, the recipient cannot make the reasonable determination required. Furthermore, failure to make a reasonable inquiry could create a situation in which a recipient accepts an applicant as a client only to have to shortly thereafter discontinue representation of that client with LSC funds (unless professional responsibility requires otherwise) under §1611.8.

Both recipients suggested that requiring an inquiry into an applicant’s income prospects in all cases would require recipients and applicants to speculate wildly about a variety of scenarios which might or might not occur which could affect an applicant’s income prospects. However, the regulation does not require applicants or recipients to speculate about the entire universe of events which could potentially have an effect on an applicant’s income. Rather, *as with the inquiry into income and assets*, the inquiry need only be “reasonable” in its scope.

Although the regulation does not define the word “reasonable,” the following may serve as a guide to what is intended: after inquiring about an applicant’s income, the intake screener could ask a question along the lines of “Do you have any reason to believe that your income is likely to change significantly in the near future?” If the applicant’s response is “yes,” further inquiry would appear to be appropriate. If, however, the applicant’s response is in the negative, unless something else about the information provided gives the recipient some reasonable basis to inquire further, the inquiry would end. This is no different than the reasonableness of the inquiry required of recipients into income and assets.

It should be noted that during the rulemaking in which the current requirement was adopted, the “reasonable inquiry” standard was specifically proposed and endorsed by many recipients as appropriate and, in fact, consonant with their current practice. The preamble to the current version of Part 1611 contains the following discussion of the matter:

LSC is including a requirement that in making financial eligibility determinations a recipient shall make reasonable inquiry regarding sources of the applicant’s income, income prospects and assets and shall record income and asset information in the manner specified for determining financial eligibility in section 1611.4. This requirement replaces the process currently required by section 1611.5, whereby a recipient is effectively required to conduct a lengthy and often cumbersome inquiry as to the applicant’s income, assets and income prospects, including inquiry into a detailed list of factors relating to an applicant’s specific financial situation and ability to afford private counsel. The Working Group discussed this issue at length and representatives of the field noted that conducting such a detailed inquiry in most cases is a task which is often difficult to accomplish efficiently at the point of intake, especially as much of intake is performed by volunteers, interns or receptionists. Rather, many recipients, in practice, conduct a somewhat abbreviated version of the otherwise required process, inquiring into current income, assets, income prospects and probing for additional information based on the responses provided, the requirements of the regulation and their knowledge of local circumstances. This approach, the field representatives noted, is less prone to error and assists in fostering an appropriate attorney-client relationship with individuals accepted as clients. As LSC is not finding widespread instances of service being provided to financially ineligible persons, it was agreed that the process required by the existing regulation is unduly complicated and that the simplified requirement proposed would be adequate to ensure that recipients are making sufficient inquiry into applicants’ financial situations to determine financial eligibility status under the regulation while being less administratively burdensome for recipients and more conducive to the development of the attorney-client relationship.

70 Fed. Reg. 45545, at 45560 (August 8, 2005).² As such, there is no reason to believe that the “reasonable inquiry” standard cannot be implemented by recipients with respect to inquiries into income prospects.

One of the recipients further argues that even an inquiry into “imminently realistic possibilities for future income” would have “no bearing on the applicant’s eligibility for program services.” Presumably the argument is that absent absolute certainty, any prospective income should not be considered. In adopting this requirement, the LSC Board determined otherwise.

² Moreover, in addition to the Working Group negotiations in 2002, as discussed by the quote above, the revised language was subject to informal general public comment throughout 2005 as the LSC Board of Directors (and its Operations and Regulations Committee) reviewed the draft NPRM and formal public comment upon the publication of the NPRM. LSC received no comments during that time evidencing confusion over the meaning of the provision or suggesting that making a reasonable inquiry in all cases would be administratively problematic.

Reasonable inquiries into income prospects are required for all applicants. While the answer may be “no” in most cases, the recipient is required to find out whether the answer is yes and then consider the specific available information in making a reasonable financial eligibility determination.

A handwritten signature in blue ink, appearing to read "Victor M. Fortunato". The signature is stylized and somewhat cursive, with a prominent initial "V" and a long, sweeping tail.

Victor M. Fortunato

Vice President & General Counsel