



**FINAL REPORT**  
**LEGAL SERVICES CORPORATION**  
**Office of Compliance and Enforcement**

**East River Legal Services, Inc.**  
September 15-18, 2008  
Case Service Report/Case Management System Review

Recipient No. 542026

## **I. EXECUTIVE SUMMARY**

**Finding 1:** ERLS' use of its automated case management system ("ACMS") is sufficient to ensure that information necessary for the effective management of cases is accurately and timely recorded. However, the ACMS has crucial defaults and other programming issues which must be addressed immediately.

**Finding 2:** Based on staff interviews and review of program documentation, improvements to ERLS' eligibility policies and forms and its ACMS are required to ensure that its intake procedures fully support the program's compliance-related requirements.

**Finding 3:** ERLS maintains the income eligibility documentation required by 45 CFR § 1611.4, CSR Handbook (2001 Ed.), ¶ 5.3, CSR Handbook (2008 Ed.), § 5.3, and applicable LSC instructions for clients whose income does not exceed 125% of the Federal Poverty Guidelines.

**Finding 4:** Case review demonstrated that ERLS is in substantial compliance with asset eligibility documentation as required by 45 CFR §§ 1611.3(c) and (d), CSR Handbook (2001 Ed.), ¶ 5.4, and CSR Handbook (2008 Ed.), § 5.4. However, as noted above in Finding No. 2, the program's asset policy must be revised.

**Finding 5:** ERLS is in non-compliance with 45 CFR Part 1626 (Restrictions on legal assistance to aliens).

**Finding 6:** ERLS is in substantial compliance with the retainer requirements of 45 CFR § 1611.9.

**Finding 7:** ERLS is in compliance with the requirements of 45 CFR Part 1636 (Client identity and statement of facts).

**Finding 8:** Sampled cases evidenced compliance with the requirements of 45 CFR §§1620.4 and 1620.6(c) (Priorities in use of resources).

**Finding 9:** ERLS is in non-compliance with CSR Handbook (2001 Ed.), ¶ 5.1 and CSR Handbook (2008 Ed.), § 5.6 (Description of legal assistance provided). There were several staff case files which contained no description of the legal assistance provided.

**Finding 10:** ERLS' application of the CSR case closure categories is inconsistent with Section VIII, CSR Handbook (2001 Ed.) and Chapters VIII and IX, CSR Handbook (2008 Ed.).

**Finding 11:** ERLS is in compliance regarding the requirements of CSR Handbook (2001 Ed.), ¶ 3.3 and CSR Handbook (2008 Ed.), § 3.3.

**Finding 12:** Sampled cases evidenced compliance with the requirements of CSR Handbook (2001 Ed.), ¶ 3.2 and CSR Handbook (2008 Ed.), § 3.2 regarding duplicate cases.

**Finding 13: Sampled cases evidenced compliance with the requirements of 45 CFR Part 1608 (Prohibited political activities).**

**Finding 14: Sampled cases evidenced compliance with the requirements of 45 CFR Part 1609 (Fee-generating cases).**

**Finding 15: A review of ERLS' accounting and financial records indicate compliance with 45 CFR Part 1610 (Use of non-LSC funds, transfer of LSC funds, program integrity).**

**Finding 16: ERLS is in compliance with 45 CFR Part 1614 which is designed to ensure that recipients of LSC funds involve private attorneys in the delivery of legal assistance to eligible clients. However, the program is in non-compliance with the PAI timekeeping requirement for paralegals and with the annual development of a PAI plan.**

**Finding 17: ERLS is in compliance with 45 CFR § 1627.4(a) which prohibits programs from utilizing LSC funds to pay membership fees or dues to any private or nonprofit organization.**

**Finding 18: ERLS is in compliance with 45 CFR § 1614.3(d)(3) which requires oversight and follow-up of cases.**

**Finding 19: ERLS is in compliance with 45 CFR Part 1635 (Timekeeping requirement).**

**Finding 20: Sampled cases evidenced compliance with the requirements of 45 CFR Part 1642 (Attorneys' Fees).**

**Finding 21: Sampled cases reviewed and documents reviewed evidenced compliance with the requirements of 45 CFR Part 1612 (Restrictions on lobbying and certain other activities).**

**Finding 22: Sampled cases evidenced compliance with the requirements of 45 CFR Parts 1613 and 1615 (Restrictions on legal assistance with respect to criminal proceedings and actions collaterally attacking criminal convictions).**

**Finding 23: Sampled cases evidenced compliance with the requirements of 45 CFR Part 1617 (Class actions).**

**Finding 24: Sampled cases evidenced compliance with the requirements of 45 CFR Part 1632 (Redistricting).**

**Finding 25: Sampled cases evidenced compliance with the requirements of 45 CFR Part 1633 (Restriction on representation in certain eviction proceedings).**

**Finding 26: Sampled cases evidenced compliance with the requirements of 45 CFR Part 1637 (Representation of prisoners).**

**Finding 27: Sampled cases evidenced compliance with the requirements of 45 CFR Part 1638 (Restriction on solicitation).**

**Finding 28: Sampled cases evidenced compliance with the requirements of 45 CFR Part 1643 (Restriction on assisted suicide, euthanasia, and mercy killing).**

**Finding 29: Sampled cases evidenced compliance with the requirements of certain other LSC statutory prohibitions (42 USC 2996f § 1007 (a) (8) (Abortion), 42 USC 2996f § 1007 (a) (9) (School desegregation litigation), and 42 USC 2996f § 1007 (a) (10) (Military selective service act or desertion)).**

## II. BACKGROUND OF REVIEW

On September 15 through 18, 2008, the Legal Services Corporation's ("LSC") Office of Compliance and Enforcement ("OCE") conducted a Case Service Report/Case Management System ("CSR/CMS") on-site visit at East River Legal Services, Inc. ("ERLS"). The purpose of the visit was to assess the program's compliance with the LSC Act, regulations, and other applicable laws. The visit was conducted by a team of two attorneys and a fiscal analyst. The two attorneys and the fiscal analyst were OCE staff members.

The on-site review was designed and executed to assess the program's compliance with basic client eligibility, intake, case management, regulatory and statutory requirements and to ensure that ERLS has correctly implemented the 2008 CSR Handbook. Specifically, the review team assessed ERLS for compliance with regulatory requirements 45 CFR Part 1611 (Financial Eligibility); 45 CFR Part 1626 (Restrictions on legal assistance to aliens); 45 CFR §§ 1620.4 and 1620.6 (Priorities in use of resources); CFR § 1611.9 (Retainer agreements); 45 CFR Part 1636 (Client identity and statement of facts); 45 CFR Part 1608 (Prohibited political activities); 45 CFR Part 1609 (Fee-generating cases); 45 CFR 1610 (Use of non-LSC funds, transfers of LSC funds, program integrity); 45 CFR Part 1614 (Private attorney involvement);<sup>1</sup> 45 CFR Part 1627 (Subgrants and membership fees or dues); 45 CFR Part 1635 (Timekeeping requirement); 45 CFR Part 1642 (Attorneys' fees); 45 CFR 1630 (Cost standards and procedures); 45 CFR Part 1612 (Restrictions on lobbying and certain other activities); 45 CFR Parts 1613 and 1615 (Restrictions on legal assistance with respect to criminal proceedings and Restrictions on actions collaterally attacking criminal convictions); 45 CFR Part 1617 (Class actions); 45 CFR Part 1632 (Redistricting); 45 CFR Part 1633 (Restriction on representation in certain eviction proceedings); 45 CFR Part 1637 (Representation of prisoners); 45 CFR 1638 (Restriction on solicitation); 45 CFR Part 1643 (Restriction on assisted suicide, euthanasia, or mercy killing); and 42 USC 2996f § 1007 (Abortion, school desegregation litigation and military selective service act or desertion).

The OCE team interviewed members of ERLS' executive staff. ERLS' case intake, case acceptance, case management, and case closure practices and policies in all substantive units were assessed. In addition to interviews, a case file review was conducted. The sample case review period was from January 1, 2006 through July 31, 2008. Case file review relied upon randomly selected files as well as targeted files identified to test for compliance with LSC requirements, including eligibility, potential duplication, timely closing, and proper application of case closure categories. In the course of the on-site review, the OCE team reviewed approximately 169 case files which included 72 targeted files.

ERLS is an LSC recipient that operates one office in Sioux Falls, South Dakota. The ERLS' executive staff consists of an Executive Director, Program Administrator, and paralegal.

In 2007, ERLS received a grant award from LSC in the amount of \$397,530.

For 2007, ERLS reported 508 closed cases in its CSR data. ERLS' 2007 self-inspection report indicated a 1.2 % error rate with exceptions noted in 1 file out of 81 reviewed. The problem area

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<sup>1</sup> In addition, when reviewing files with pleadings and court decisions, compliance with other regulatory restrictions was reviewed as more fully reported *infra*.

identified was: case in which asset eligibility was not documented. For 2006 ERLS reported approximately 494 closed cases in its CSR data. ERLS' 2006 self-inspection report indicated a 1.2 % error rate with exceptions noted in 1 file out of the 81 cases reviewed. The problem area identified was a case in which asset eligibility was not documented.

By letter dated July 15, 2008, OCE requested that ERLS provide a list of all cases reported to LSC in its 2006 CSR data submission ("closed 2006 cases"), a list of all cases reported in its 2007 CSR data submission ("closed 2007 cases"), a list of all cases closed between January 1, 2008 and July 31, 2008 ("closed 2008 cases"), and a list of all cases which remained open as of July 31, 2008 ("open cases"). OCE requested that the lists contain the client name, the file identification number, the name of the advocate assigned to the case, the opening and closing dates, the CSR case closing category assigned to the case and the funding code assigned to the case. OCE requested that two sets of lists be compiled - one for cases handled by ERLS staff and the other for cases handled through ERLS' PAI component. ERLS was advised that OCE would seek access to such cases consistent with Section 509(h), Pub.L. 104-134, 110 Stat. 1321 (1996), LSC Grant Assurance Nos. 9 and 10, and the LSC *Access to Records* (January 5, 2004) protocol. ERLS was requested to promptly notify OCE, in writing, if it believed that providing the requested material, in the specified format, would violate the attorney-client privilege or would be otherwise protected from disclosure.

During the visit, access to case-related information was provided through staff intermediaries. Pursuant to the OCE and ERLS agreement of September 3, 2008 and a telephone conversation on September 3, 2008 between the Team Leader and ERLS Executive Director, ERLS staff maintained possession of the file and discussed with the team the nature of the client's legal problem and the nature of the legal assistance rendered. In order to maintain confidentiality, such discussion, in some instances, was limited to a general discussion of the nature of the problem and the nature of the assistance provided.<sup>2</sup> ERLS' management and staff cooperated fully in the course of the review process. As discussed more fully below, ERLS was made aware of any compliance issues during the on-site visit. This was accomplished by informing intermediaries of any compliance issues during case review as well as the Executive Director.

Thereafter, an effort was made to create a representative sample of cases which the team would review during the on-site visit. The sample was created proportionately among 2006, 2007, 2008 closed and 2008 open cases, as well as a proportionate distribution of cases from ERLS' office. The sample consisted largely of randomly selected cases, but also included targeted cases selected to test for compliance with the CSR instructions relative to timely closings, proper application of the CSR case closing categories, duplicate reporting, etc.

At the conclusion of the visit on September 18, 2008, OCE conducted an exit conference during which ERLS was made aware of the areas in which a pattern of non-compliance was found. No distinctions between 2006, 2007, and 2008 cases were found. OCE cited instances of non-compliance in the areas of case management, execution of citizenship attestations, documentation of legal advice, application of closing codes, and PAI oversight. ERLS was advised that they would receive a Draft Report that would include all of OCE's findings and they would have 30 days to

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<sup>2</sup> In those instances where it was evident that the nature of the problem and/or the nature of the assistance provided had been disclosed to an unprivileged third party, such discussion was more detailed, as necessary to assess compliance.

submit comments. Afterwards, a Final Report would be issued that would include ERLS' comments.

ERLS was provided a Draft Report ("DR") and given an opportunity to comment. ERLS' comments were received on February 3, 2009. The comments have been incorporated into this Final Report, where appropriate, and are affixed as an exhibit. ERLS also noted in its comments "factual inaccuracies" contained in Finding 2. The errors cited were corrected and are included in this Final Report.

### III. FINDINGS

**Finding 1: ERLS' use of its automated case management system ("ACMS") is sufficient to ensure that information necessary for the effective management of cases is accurately and timely recorded. However, the ACMS has crucial defaults and other programming issues which must be addressed immediately.**

Recipients are required to utilize ACMS and procedures which will ensure that information necessary for the effective management of cases is accurately and timely recorded in a case management system. At a minimum, such systems and procedures must ensure that management has timely access to accurate information on cases and the capacity to meet funding source reporting requirements. *See* CSR Handbook (2001 Ed.), ¶ 3.1 and CSR Handbook (2008 Ed.), § 3.1.

In general, ERLS' ACMS software sufficiently ensures that relevant screening and case information is accurately recorded. Case review revealed one of 80 reviewed files had instances of inconsistent information between the case file and the ACMS. *See* closed 2007 Case No. 07E-1011847, a case in which the case file noted the problem code as 33 but the ACMS noted it as 93.

ERLS' ACMS, however, has some programming issues that result in a case management system that is not fully compliant with LSC requirements. Staff interviews revealed that the ACMS software has not been updated since its installation in 1998 and a review of a dummy intake screen on the ACMS revealed the presence of several significant compliance defaults, including citizenship, case type "S" (staff), unduplicated service, closing code A.<sup>3</sup> The citizenship default is particularly alarming as it calls into question any brief service case resolved entirely by telephone. Because ERLS resolves the majority of its cases through in-person representation, this default has a less significant effect than, for example, for a hotline program. However, the presence of these defaults is in direct contradiction with LSC Program Letter 02-6 (June 6, 2002) and CSR Handbook (2001 Ed.), ¶ 3.6 and must be resolved immediately through a re-programming of the ACMS.

In addition, the program has no code or field to mark cases for deselection. ERLS currently uses the "R", or reject, code to denote deselection but, as noted in CSR Handbook (2001 Ed.), ¶ 3.5, there is a difference between files that are rejected and those that are deselected for CSR purposes and programs must have codes for both. Again, the program must resolve these issues via re-programming of its ACMS.

In another coding issue, the ACMS has not been altered to fully reflect the new closing codes established in the CSR Handbook (2008 Ed.) as the program is currently using closing code J (the former closing code for "Change in Eligibility Status") for the new closing code L – Extensive Service. The program, however, noted that although it uses J, it reports the cases as L – Extensive Service to LSC and sees no reason to alter this practice. As the program understands that L is what must be reported to LSC, there is no need to change its use of the J code. However, if a programmer

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<sup>3</sup> Other ACMS defaults included 33 for age, female for gender, English for language, Atlanta, GA for city, and DeKalb County for county.

is working on other required coding issues within the software, it is recommended that the program change closing code J to L.

The comments to the DR stated that while ERLS is currently able to accurately and timely record sufficient information in its automated case management system, it understands that there are programming issues that must be addressed as soon as possible. ERLS stated that in attempting to address the problems with default settings, they discovered that it will be necessary to purchase upgraded software from Kemps to do this, which will cost several thousand dollars in addition to contract labor, which will also cost several thousand dollars. Because of ERLS' limited budget and resources, this may take longer than desired to accomplish.

ERLS comments further stated it should be noted that despite the above described problems with the ACMS, the quarterly CSR reports provided to LSC by East River Legal Services are accurate.

**Finding 2: Based on staff interviews and review of program documentation, improvements to ERLS' eligibility policies and forms and its ACMS are required to ensure that its intake procedures fully support the program's compliance-related requirements.**

ERLS' intake procedures require improvement in order to fully support the program's compliance-related requirements. The following represents a description of individual intake procedures in ERLS' sole office in Sioux Falls, SD.

Intake is conducted by telephone and in-person during the hours of 9:00 a.m. to 12:00 p.m. every Tuesday and Thursday. Walk-in applicants or applicants who call during non-intake hours are told to call back during intake hours. Walk-in applicants are not provided with access to a telephone to call the 800 number. Only emergency applicants are processed outside of intake hours. ERLS intake staff noted that approximately 80% of its intake is performed by telephone.

Applicants call into ERLS' 800 number and are preliminarily screened for eligibility by the program's receptionist. The receptionist inquires about an applicant's legal problem, the number of persons living in the household, the county in which the applicant resides, and the income of each adult in the household. If the applicant is preliminarily eligible, the receptionist will forward the applicant to the intake paralegal for a more involved eligibility screening. The intake paralegal will then ask applicants about their legal problem, household size, household income, assets (including vehicles, home, CDs, stocks, bonds, and land), citizenship or alien eligibility, name, and the names of any opposing parties that could create a conflict. Conflicts checks are performed at the end of intake as are potential duplicate checks. The intake paralegal noted that she inquired about prospective income and recorded such income, if any, in the notes section of the applicant's intake form. In reference to over-income case acceptance, the intake paralegal indicated that ERLS uses a "spend-down" to qualify eligible over-income applicants under the exceptions described in 45 CFR Part 1611. The intake paralegal also noted that the program will go up to 200% of the federal poverty guidelines for domestic violence cases, does not have a government benefits exemption, and does not currently have any group clients.

ERLS holds a case acceptance meeting every Wednesday and Friday which includes the program's Executive Director, all staff attorneys, and the intake paralegal. In the meeting, staff decides whether an applicant will be accepted for services, rejected, or referred to another entity. If a client is accepted for brief services, a staff attorney will generally call the client back within a day to provide legal advice or brief services. If accepted for extended services, a letter is sent to the client with a retainer agreement, citizenship attestation, and statement of facts "packet", usually within a day from the time of acceptance. The program will not perform any legal assistance for a client until the "packet" is returned and fully executed. If the client is a legal alien, staff will check alien eligibility documents prior to initiating services. In the event an applicant is rejected for services due to priorities, they are sent a letter indicating that ERLS cannot take their case and they may be referred to the Access to Justice Project, the South Dakota Lawyer's Referral Service or another entity.

ERLS participates in Thursday evening clinics with the local law school approximately 7 months during the year. Attendees do not receive individualized legal advice but are provided with the program's "800" number to schedule an appointment. In addition, ERLS attorneys do perform some outreach, primarily through presentations on senior and welfare issues. ERLS also hosts booths at veterans' events. However, no legal assistance is provided for individuals attending any such outreach presentations or events. If an attendee desires individualized legal assistance, they are encouraged by staff to call the ERLS "800" line during intake hours.<sup>4</sup> The program has informational brochures regarding common legal issues but they are not counted as cases.

The intake staff did not have copies of the CSR Handbook (2008 Ed.) but did receive a training on the new Handbook's changes in January 2008. Changes to screening or other LSC requirements are generally conveyed in the bi-weekly case acceptance meetings, once a month all-staff meetings, or via memos from the Executive Director. Interviewed staff was aware of income guidelines, program priorities, citizenship/eligible alien requirements, and the VAWA 2006 Amendments. The program uses a closing checklist to ensure all compliance requirements are evidenced within closed case files.

ERLS' compliance issues related to intake stem primarily from old eligibility policies and forms that have not been updated to fit current LSC requirements and the program's ACMS which has not been updated since 1998.

## **POLICY & FORMS ISSUES**

Discussions with the Executive Director revealed that certain eligibility policies, including the documents entitled "Client Eligibility" and "Asset Guidelines", had not been reviewed in some time. Both documents should be reviewed and revised in accordance with 45 CFR Part 1611. For example, the policy should state that the household (not "*applicant*" as currently noted in the ERLS guidelines) income needs to be considered, ensure that all over-income exceptions under the regulation are noted, and include the requirement to ask about prospective income (the policy currently states that staff should inquire about the "applicant's good faith estimate of income for the twelve months *preceding* that application") (emphasis added).

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<sup>4</sup> ERLS staff members bring cards with the program's toll free telephone number to outreach events.

In another issue related to the program's asset policy, the asset screening questions asked by the intake staff do not capture the assets set out in the ERLS policy. If the program decides to keep its current asset policy, intake staff needs to ask additional questions regarding household assets in order to be compliant with 45 CFR Part 1611. For example, under the current ERLS policy, the equity value of work tools is exempt if the tools are used to produce income. According to interviews, intake staff is not inquiring about work tools – primarily, intake staff is only asking about those assets listed in the ACMS (vehicles, residence, stocks, bonds, bank account, etc.). To be in compliance with its own asset policy and 45 CFR Part 1611, staff must ask about the equity value of the tools and whether they are used to produce income – only then are is the equity value exempt.

The program's paper intake form also appears to have been in use for some time without revision. It only details applicant financial information, as opposed to household, and does not have any space to list assets.

In reference to case acceptance, there is no written case acceptance policy. While the program has broad priorities, there are some specific case acceptance policies that were understood to be oral only. For example, the program only accepts divorces in the event children or domestic violence is involved. Although this case acceptance policy is generally known by staff, it is not part of any official program policy. ERLS must draft a written policy reflecting its case acceptance procedures.

## **ACMS ISSUES**

As noted above in Finding 1, ERLS has major defaults in its ACMS. Clearly, this has an effect on intake screening procedures and must be ameliorated immediately. However, another ACMS issue was noted in assessing the program's intake procedures. As mentioned earlier, ERLS uses a "spend-down" for over-income applicants eligible under the exceptions described in 45 CFR § 1611.5(a)(3) and 45 CFR § 1611.5(a)(4). While use of a "spend-down" is perfectly acceptable, the regulation requests that programs "shall keep such records as may be necessary to inform LSC of the specific facts and factors relied on to make such a determination." *See* 45 CFR § 1611.5(b), CSR Handbook (2001 Ed.), ¶ 5.3, and CSR Handbook (2008 Ed.), § 5.3. In order to facilitate the keeping of such records, CSR Handbook (2008 Ed.), § 5.3 mandates that the original income amount provided by the applicant - before any exceptions are applied – be permanently retained in the ACMS. Currently, ERLS' ACMS only retains the amount *after* the original income has been spent-down.

The comments to the DR stated that it should be noted that applicants for service call either the ERLS "800" number OR a local number (which rolls among 4 lines) in order to make a telephone application for services. The comments further noted that while ERLS accepts domestic violence cases for applicants up to 200% of federal poverty guidelines, the program does not report those cases that are above the 125% poverty guidelines as LSC cases unless they have been brought down to 125% pursuant to 45 CFR part 1611. Case acceptance meetings are normally held on Tuesday or Thursday afternoon after the Tuesday and Thursday morning intake. In the event that the case acceptance meetings are not held on a Tuesday or Thursday afternoon because of conflicts in the schedules of the case handler or because not enough case handlers are available to have the meeting, they are held on Wednesdays or Fridays following the Tuesday or Thursday intake.

ERLS stated in its comments that the law school clinics are held on the third Thursday of each month during 7 months of the academic year. There are no law school clinics in December or May to avoid final exams. However, clients accepted into the law school clinic do receive legal representation with their cases. Each client is assigned a law student to personally assist them with their legal matter and to help draft pleadings. In addition, all clients receive assistance from an East River Legal Services attorney who signs the pleadings and makes appearances in the case as that client's attorney.

ERLS stated in its comments that all East River Legal Services staff have now been provided with copies of the CSR Handbook for future reference and had previously been provided training in the CSR Handbook's contents. The ERLS Executive Director is in the process of reviewing all eligibility policies and forms to bring them up to date and in to compliance in 2009. All case acceptance policies regarding priorities and assets eligibility will be reduced to writing in 2009. This includes the paper intake form used for emergencies. ERLS indicated that copies of said policies and the paper intake form will be provided to LSC in response to this Final Report.

East River Legal Services according to comments to the DR does retain the original income amount of any applicant who is "spent down" from 200% or less of the poverty level to the 125% poverty level. This is done on the eligibility page of the intake application, a copy of which is attached to this letter. The original income is first listed and then the exceptions are used to bring the applicant down to 125% of the federal poverty guidelines. These are listed by item and amount as negative figures which the system then subtracts from the original income. This results in a net figure, which, in the Kemps systems, is labeled as "total income." This page is accessible at any time and the information remains in the system and a paper copy of this is inserted into the file of the client.

**Finding 3: ERLS maintains the income eligibility documentation required by 45 CFR § 1611.4, CSR Handbook (2001 Ed.), ¶ 5.3, CSR Handbook (2008 Ed.), § 5.3, and applicable LSC instructions for clients whose income does not exceed 125% of the Federal Poverty Guidelines.**

Recipients may provide legal assistance supported with LSC funds only to individuals whom the recipient has determined to be financially eligible for such assistance. *See* 45 CFR § 1611.4(a). Specifically, recipients must establish financial eligibility policies, including annual income ceilings for individuals and households, and record the number of members in the applicant's household and the total income before taxes received by all members of such household in order to determine an applicant's eligibility to receive legal assistance.<sup>5</sup> *See* 45 CFR § 1611.3(c)(1), CSR Handbook (2001 Ed.), ¶ 5.3, and CSR Handbook (2008 Ed.), § 5.3. For each case reported to LSC, recipients shall document that a determination of client eligibility was made in accordance with LSC requirements. *See* CSR Handbook (2001 Ed.), ¶ 5.2 and CSR Handbook (2008 Ed.), § 5.2.

In those instances in which the applicant's household income before taxes is in excess of 125% but

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<sup>5</sup> A numerical amount must be recorded, even if it is zero. *See* CSR Handbook (2001 Ed.), ¶ 5.3 and CSR Handbook (2008 Ed.), § 5.3.

no more than 200% of the applicable Federal Poverty Guidelines (“FPG”) and the recipient provides legal assistance based on exceptions authorized under 45 CFR § 1611.5(a)(3) and 45 CFR § 1611.5(a)(4), the recipient shall keep such records as may be necessary to inform LSC of the specific facts and factors relied on to make such a determination. *See* 45 CFR § 1611.5(b), CSR Handbook (2001 Ed.), ¶ 5.3, CSR Handbook (2008 Ed.), § 5.3.

For CSR purposes, individuals financially ineligible for assistance under the LSC Act may not be regarded as recipient “clients” and any assistance provided should not be reported to LSC. In addition, recipients should not report cases lacking documentation of an income eligibility determination to LSC. However, recipients should report all cases in which there has been an income eligibility determination showing that the client meets LSC eligibility requirements, regardless of the source(s) of funding supporting the cases, if otherwise eligible and properly documented. *See* CSR Handbook (2001 Ed.), ¶ 4.3(a) and CSR Handbook (2008 Ed.), § 4.3.

ERLS’ revised Income Guidelines were adopted by its Board in March 2008. The Financial Standards indicate that financial eligibility will be determined pursuant to the income guidelines most recently promulgated by LSC.

Sampled cases evidenced that ERLS is in substantial compliance with 45 CFR § 1611.4, CSR Handbook (2001 Ed.), ¶ 5.3, CSR Handbook (2008 Ed.), § 5.3, and applicable LSC instructions for clients whose income does not exceed 125% of the FPG.

One case reviewed evidenced non-compliance with the income requirements of 45 CFR Part 1611. *See* open Case No. 08E-1012792. As such, the program is in substantial compliance with the income eligibility requirements of 45 CFR Part 1611.

No comments were submitted for this Finding.

**Finding 4: Case review demonstrated that ERLS is in substantial compliance with asset eligibility documentation as required by 45 CFR §§ 1611.3(c) and (d), CSR Handbook (2001 Ed.), ¶ 5.4, and CSR Handbook (2008 Ed.), § 5.4. However, as noted above in Finding No. 2, the program’s asset policy must be revised.**

As part of its financial eligibility policies, recipients are required to establish reasonable asset ceilings in order to determine an applicant’s eligibility to receive legal assistance. *See* 45 CFR § 1611.3(d)(1). For each case reported to LSC, recipients must document the total value of assets except for categories of assets excluded from consideration pursuant to its Board-adopted asset eligibility policies.<sup>6</sup> *See* CSR Handbook (2001 Ed.), ¶ 5.4 and CSR Handbook (2008), § 5.4.

In the event that a recipient authorizes a waiver of the asset ceiling due to the unusual circumstances of a specific applicant, the recipient shall keep such records as may be necessary to inform LSC of the reasons relied on to authorize the waiver. *See* 45 CFR § 1611.3(d)(2).

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<sup>6</sup> A numerical total value must be recorded, even if it is zero or below the recipient’s guidelines. *See* CSR Handbook (2001 Ed.), ¶ 5.4 and CSR Handbook (2008 Ed.), § 5.4.

The revisions to 45 CFR Part 1611 changed the language regarding assets from requiring the recipient's governing body to establish, "specific and reasonable asset ceilings, including both liquid and non-liquid assets," to "reasonable asset ceilings for individuals and households." *See* 45 CFR § 1611.6 in prior version of the regulation and 45 CFR § 1611.3(d)(1) of the revised regulation. Both versions allow the policy to provide for authority to waive the asset ceilings in unusual or meritorious circumstances. The older version of the regulation allowed such a waiver only at the discretion of the Executive Director. The revised version allows the Executive Director or his/her designee to waive the ceilings in such circumstances. *See* 45 CFR § 1611.6(e) in prior version of the regulation and 45 CFR § 1611.3(d)(2) in the revised version. Both versions require that such exceptions be documented and included in the client's files.

One case reviewed evidenced non-compliance with the asset eligibility requirements of 45 CFR Part 1611. *See* closed 2007 Case No. 06E-1010133. As such, the program is in substantial compliance with the asset eligibility requirements of this regulation.

In addition, as noted above in Finding 2, the program's asset policy requires revision so that intake staff fully covers all asset policy provisions during screening.

No comments were submitted for this Finding.

**Finding 5: ERLS is in non-compliance with 45 CFR Part 1626 (Restrictions on legal assistance to aliens).**

The level of documentation necessary to evidence citizenship or alien eligibility depends on the nature of the services provided. With the exception of brief advice or consultation by telephone, which does not involve continuous representation, LSC regulations require that all applicants for legal assistance who claim to be citizens execute a written attestation. *See* 45 CFR § 1626.6. Aliens seeking representation are required to submit documentation verifying their eligibility. *See* 45 CFR § 1626.7. In those instances involving brief advice and consultation by telephone, which does not involve continuous representation, LSC has instructed recipients that the documentation of citizenship/alien eligibility must include a written notation or computer entry that reflects the applicant's oral response to the recipient's inquiry regarding citizenship/alien eligibility. *See* CSR Handbook (2001 Ed.), ¶ 5.5 and CSR Handbook (2008 Ed.), § 5.5. *See also*, LSC Program Letter 99-3 (July 14, 1999). In the absence of the foregoing documentation, assistance rendered may not be reported to LSC. *See* CSR Handbook (2001 Ed.), ¶ 5.5 and CSR Handbook (2008 Ed.), § 5.5.

Prior to 2006, recipients were permitted to provide non-LSC funded legal assistance to an alien who had been battered or subjected to extreme cruelty in the United States by a spouse or parent, or by a member of the spouse's or parent's family residing in the same household, or an alien whose child had been battered or subjected to such cruelty.<sup>7</sup> Although non-LSC funded legal assistance was permitted, such cases could not be included in the recipient's CSR data submission. In January 2006, the Kennedy Amendment was expanded and LSC issued Program Letter 06-2, "Violence Against Women Act 2006 Amendment" (February 21, 2006), which instructs recipients that they may use LSC funds to provide legal assistance to ineligible aliens,

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<sup>7</sup> *See* Kennedy Amendment at 45 CFR § 1626.4.

or their children, who have been battered, subjected to extreme cruelty, is the victims of sexual assault or trafficking, or who qualify for a “U” visa. LSC recipients are now allowed to include these cases in their CSRs.

ERLS is in non-compliance with 45 CFR § 1626.6, as there were 12 case files reviewed that were not in compliance. See closed 2007 Case Nos. 07E-1011440, 07E-1011241, 07E-1012034, 07E-1012008, 07E-1011902, 06E-1010969, and 07E- 1012019. (These seven cases failed to have a citizenship attestation because the client did not return the citizenship/retainer agreement packet sent out to clients prior to commencement of legal assistance by the program.) See closed 2006 Case Nos. 06E-1010400, 06E-1010752, 06E-1010242, 06E-1010117, and 06E-1009622. (These five files were all court appointed guardianships where the client signed the attestation as a minor or was incompetent.)

Comments to the DR stated 12 individual files were noted in the Draft Report as being non-compliant. Seven of the files were emergency situations where clients required immediate representation because of a pending hearing or a written response to a pleading to preserve the client's rights. These clients later moved and could not be found in order to sign the Retainer Agreement. The other five files were cases where East River Legal Services had been court appointed in guardianships to represent clients that were incompetent because of mental health conditions or the fact that they were juveniles. In the latter five situations, this problem has been resolved by having such cases assigned to the Second Circuit Pro Bono Project, where private attorneys assume the representation. A copy of the new court orders appointing these cases is attached. These cases are no longer included in the CSRs reported to LSC.

**Finding 6: ERLS is in substantial compliance with the retainer requirements of 45 CFR § 1611.9.**

Pursuant to 45 CFR § 1611.9, recipients are required to execute a retainer agreement with each client who receives extended legal services from the recipient. The retainer agreement must be in a form consistent with the applicable rules of professional responsibility and prevailing practices in the recipient’s service area and shall include, at a minimum, a statement identifying the legal problem for which representation is sought, and the nature of the legal service to be provided. *See* 45 CFR § 1611.9(a).

The retainer agreement is to be executed when representation commences or as soon thereafter is practical and a copy is to be retained by the recipient. *See* 45 CFR §§ 1611.9(a) and (c). The lack of a retainer does not preclude CSR reporting eligibility.<sup>8</sup> Cases without a retainer, if otherwise eligible and properly documented, should be reported to LSC.

According to staff, ERLS’ policy is that retainers are obtained primarily in extended representation cases. All cases reviewed that required retainer agreements were included in the files. The majority of retainer agreements reviewed generally stated brief descriptions of the subject matter with no mention of the scope of the representation (i.e. “guardianship” or

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<sup>8</sup> However, a retainer is more than a regulatory requirement. It is also a key document clarifying the expectations and obligations of both client and program, thus assisting in a recipient’s risk management.

“custody”). *See* 2007 closed Case Nos. 1011262 and 06E-1010174. Staff indicated that despite the brevity of description, it was understood by both the client and staff that the program was going to represent the client through the court or administrative hearing on the matter. As such, ERLS is in substantial compliance with 45 CFR § 1611.9(a). However, in some cases, retainers were reviewed that were more descriptive. *See* closed 2007 Case No. 07E-1011678 (the retainer agreement stated “TANF appeal”. This clearly stated both the scope of the representation and its subject matter).

No comments were submitted for this Finding.

**Finding 7: ERLS is in compliance with the requirements of 45 CFR Part 1636 (Client identity and statement of facts).**

LSC regulations require that recipients identify by name each plaintiff it represents in any complaint it files, or in a separate notice provided to the defendant, and identify each plaintiff it represents to prospective defendants in pre-litigation settlement negotiations. In addition, the regulations require that recipients prepare a dated, written statement signed by each plaintiff it represents, enumerating the particular facts supporting the complaint. *See* 45 CFR §§ 1636.2(a)(1) and (2).

The statement is not required in every case. It is required only when a recipient files a complaint in a court of law or otherwise initiates or participates in litigation against a defendant, or when a recipient engages in pre-complaint settlement negotiations with a prospective defendant. *See* 45 CFR § 1636.2(a).

Case files reviewed indicated that ERLS is in compliance with the requirements of 45 CFR Part 1636.

No comments were submitted for this Finding.

**Finding 8: Sampled cases evidenced compliance with the requirements of 45 CFR § 1620.4 and § 1620.6(c) (Priorities in use of resources).**

LSC regulations require that recipients adopt a written statement of priorities that determines the cases which may be undertaken by the recipient, regardless of the funding source. *See* 45 CFR § 1620.3(a). Except in an emergency, recipients may not undertake cases outside its priorities. *See* 45 CFR § 1620.6.

Prior to the visit, ERLS provided LSC with a list of its priorities. The priorities are stated as “supporting families, preserving the home, maintaining economic stability, safety, stability, and health of citizenship/families, and protection of individuals/families with special vulnerabilities”. ERLS is in compliance with 45 CFR Part 1620. None of the sampled files reviewed revealed cases that were outside of ERLS’ priorities.

No comments were submitted for this Finding.

**Finding 9: ERLS is in non-compliance with CSR Handbook (2001 Ed.), ¶ 5.1 and CSR Handbook (2008 Ed.), § 5.6 (Description of legal assistance provided). There were several staff case files which contained no description of the legal assistance provided.**

LSC regulations specifically define “case” as a form of program service in which the recipient provides legal assistance. *See* 45 CFR §§ 1620.2(a) and 1635.2(a). Consequently, whether the assistance that a recipient provides to an applicant is a “case”, reportable in the CSR data, depends, to some extent on whether the case is within the recipient’s priorities and whether the recipient has provided some level of legal assistance, limited or otherwise.

If the applicant’s legal problem is outside the recipient’s priorities, or if the recipient has not provided any type of legal assistance, it should not report the activity in its CSR. For example, recipients may not report the mere referral of an eligible client as a case when the referral is the only form of assistance that the applicant receives from the recipient. *See* CSR Handbook (2001 Ed.), ¶ 7.2 and CSR Handbook (2008 Ed.), § 7.2.

Recipients are instructed to record client *and* case information, either through notations on an intake sheet or other hard-copy document in a case file, or through electronic entries in an ACMS database, or through other appropriate means. For each case reported to LSC such information shall, at a minimum, describe, *inter alia*, the level of service provided. *See* CSR Handbook (2001 Ed.), ¶ 5.1(c) and CSR Handbook (2008 Ed.), § 5.6.

ERLS is not in compliance with CSR Handbook (2001 Ed.), ¶ 5.1(c) and CSR Handbook (2008 Ed.), § 5.6 as staff case files reviewed did not contained a description of the legal assistance provided.

Case review evidenced that ERLS is in non-compliance with CSR Handbook (2001 Ed.), ¶ 5.1(c) and CSR Handbook (2008 Ed.), § 5.6. Eight files reported in the program’s 2007 CSR contained either no description or an insufficient description of the legal assistance provided. As documentation of legal assistance is an essential element to qualifying a case as reportable for CSR purposes, ERLS erroneously reported these cases in its 2007 CSR. Seven of the 8 cases should not have been reported because the client never returned an executed citizenship attestation and, as such, no legal assistance was provided. *See* closed 2007 Case Nos. 07E-1011440, 07E-1011241, 07E-1012034, 07E-1012008, 07E-1011902, 06E-1010969, and 07E-1012019. Also *see* closed 2006 Case Nos. 06E-1010011, 06E-1010144, 06E-1010103, 06E-1010722, 06E-1010399, 06E-1010432, 06E-1009747, 06E-1009617, 06E-1010014, 06E-1010690, 05E-1009434, and 05E-1009428. These cases were not marked as rejected (or deselected) but were instead incorrectly closed as “E – Client Withdrew” cases. One incorrectly reported case involved a conflict of interest which was discovered after case acceptance but prior to the provision of legal assistance. *See* Closed 2007 Case No.06E-1010861. This case, too, should have been marked as rejected (or deselected) to ensure it would not be reported in ERLS’ 2007 CSR submission.

Comments to the DR stated ERLS has resolved the problem of closing codes by elimination of closing code E - "client withdrew or did not return." These noncompliant cases were cases where the program accepted the application for service but the client failed to return or withdrew before any representation was undertaken.

**Finding 10: ERLS' application of the CSR case closure categories is inconsistent with Section VIII, CSR Handbook (2001 Ed.) and Chapters VIII and IX, CSR Handbook (2008 Ed.).**

The CSR Handbook defines the categories of case service and provides guidance to recipients on the use of the closing codes in particular situations. Recipients are instructed to report each case according to the type of case service that best reflects the level of legal assistance provided. *See* CSR Handbook (2001 Ed.), ¶ 6.1 and CSR Handbook (2008 Ed.), § 6.1.

The files reviewed demonstrated that ERLS' application of the CSR case closing categories is inconsistent with Section VIII, CSR Handbook (2001 Ed.) and Chapters VIII and IX, CSR Handbook (2008 Ed.). There were numerous instances of case closing code errors. See closed 2006 Case Nos. 06E-1010011, 06E-1010144, 06E-1010103, 06E-1010722, 06E-1010399, 06E-1010432 06E-1009747, 06E-1009617, 06E-1010014, 1010690, 05E-1009434, and 05E-1009428, and closed 2007 Case Nos. 07E-1011630 and 07E-1011411 (all closed with the closing code of "client withdrew" when the cases should have been rejected).

It is recommended that ERLS ensure that its staff receives training on proper usage of closing codes, especially closing code E.

Comments to the DR stated that with the changes to closing codes, which eliminated closing code E after January 1, 2008, these cases now become rejects and are not counted as cases in the LSC CSR's. ERLS does not use closing code E any longer.

**Finding 11: ERLS in compliance regarding the requirements of CSR Handbook (2001 Ed.), ¶ 3.3 and CSR Handbook (2008 Ed.), § 3.3.**

To the extent practicable, programs shall report cases as having been closed in the year in which assistance ceased, depending on case type. Cases in which the only assistance provided is counsel and advice, brief service, or a referred after legal assessment (CSR Categories, A, B, and C), should be reported as having been closed in the year in which the counsel and advice, brief service, or referral was provided. *See* CSR Handbook (2001 Ed.), ¶ 3.3(a).<sup>9</sup> There is, however,

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<sup>9</sup> The time limitation of the 2001 Handbook that a brief service case should be closed "as a result of an action taken at or within a few days or weeks of intake" has been eliminated. However, cases closed as limited action are subject to the time limitation on case closure found in CSR Handbook (2008 Ed.), § 3.3(a) this category is intended to be used for the preparation of relatively simple or routine documents and relatively brief interactions with other parties.

an exception for cases opened after September 30, and those cases containing a determination to hold the file open because further assistance is likely. *See* CSR Handbook (2001 Ed.), ¶ 3.3(a) and CSR Handbook (2008 Ed.), § 3.3(a). All other cases (CSR Categories D through K, 2001 CSR Handbook and F through L, 2008 CSR Handbook) should be reported as having been closed in the year in which the recipient determines that further legal assistance is unnecessary, not possible or inadvisable, and a closing memorandum or other case-closing notation is prepared. *See* CSR Handbook (2001 Ed.), ¶ 3.3(b) and CSR Handbook (2008 Ed.), § 3.3(b). Additionally LSC regulations require that systems designed to provide direct services to eligible clients by private attorneys must include, among other things, case oversight to ensure timely disposition of the cases. *See* 45 CFR § 1614.3(d)(3).

ERLS is in compliance regarding the requirements of the CSR Handbook (2001 Ed.), ¶ 3.3 and CSR Handbook (2008 Ed.), § 3.3(a) and staff case files were closed in a timely manner.

No comments were submitted for this Finding.

**Finding 12: Sampled cases evidenced compliance with the requirements of CSR Handbook (2001 Ed.), ¶ 3.2 and CSR Handbook (2008 Ed.), § 3.2 regarding duplicate cases.**

Through the use of automated case management systems and procedures, recipients are required to ensure that cases involving the same client and specific legal problem are not recorded and reported to LSC more than once. *See* CSR Handbook (2001 Ed.), ¶ 3.2 and CSR Handbook (2008 Ed.), § 3.2.

When a recipient provides assistance more than once within the same reporting period to the same client who has returned with essentially the same legal problem, as demonstrated by the factual circumstances giving rise to the problem, the recipient is instructed to report the repeated instances of assistance as a single case. *See* CSR Handbook (2001 Ed.), ¶ 6.3 and CSR Handbook (2008 Ed.), § 6.3. Recipients are further instructed that related legal problems presented by the same client are to be reported as a single case. *See* CSR Handbook (2001 Ed.), ¶ 6.4. and CSR Handbook (2008 Ed.), § 6.4.

Case lists were reviewed in advance and potentially duplicate files were identified for review. No duplicate files were identified among the sampled files.

No comments were submitted for this finding.

**Finding 13: Sampled cases evidenced compliance with the requirements of 45 CFR Part 1608 (Prohibited political activities).**

LSC regulations prohibit recipients from expending grants funds or contributing personnel or equipment to any political party or association, the campaign of any candidate for public or party

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More complex and/or extensive cases that would otherwise be closed in this category should be closed in the new CSR Closure Category L (Extensive Service).

office, and/or for use in advocating or opposing any ballot measure, initiative, or referendum. *See* 45 CFR Part 1608.

Sampled files reviewed, and interviews with staff indicate, that ERLS is not involved in such activity. Discussions with the Executive Director also confirmed that ERLS is not involved in these prohibited activities.

No comments were submitted for this Finding.

**Finding 14: Sampled cases evidenced compliance with the requirements of 45 CFR Part 1609 (Fee-generating cases).**

Except as provided by LSC regulations, recipients may not provide legal assistance in any case which, if undertaken on behalf of an eligible client by an attorney in private practice, reasonably might be expected to result in a fee for legal services from an award to the client, from public funds or from the opposing party. *See* 45 CFR §§ 1609.2(a) and 1609.3.

Recipients may provide legal assistance in such cases where the case has been rejected by the local lawyer referral service, or two private attorneys; neither the referral service nor two private attorneys will consider the case without payment of a consultation fee; the client is seeking, Social Security, or Supplemental Security Income benefits; the recipient, after consultation with the private bar, has determined that the type of case is one that private attorneys in the area ordinarily do not accept, or do not accept without pre-payment of a fee; the Executive Director has determined that referral is not possible either because documented attempts to refer similar cases in the past have been futile, emergency circumstances compel immediate action, or recovery of damages is not the principal object of the client's case and substantial attorneys' fees are not likely. *See* 45 CFR §§ 1609.3(a) and 1609.3(b).

LSC has also prescribed certain specific recordkeeping requirements and forms for fee-generating cases. The recordkeeping requirements are mandatory. *See* LSC Memorandum to All Program Directors (December 8, 1997).

None of the sampled files reviewed involved legal assistance with respect to a fee-generating case. Discussions with the Executive Director also confirmed that ERLS is not involved in any fee-generating case.

No comments were submitted for this Finding.

**Finding 15: A review of ERLS' accounting and financial records indicate compliance with 45 CFR Part 1610 (Use of non-LSC funds, transfer of LSC funds, program integrity).**

Part 1610 was adopted to implement Congressional restrictions on the use of non-LSC funds and to assure that no LSC funded entity engage in restricted activities. Essentially, recipients may not themselves engage in restricted activities, transfer LSC funds to organizations that engage in

restricted activities, or use its resources to subsidize the restricted activities of another organization.

The regulations contain a list of restricted activities. *See* 45 CFR § 1610.2. They include lobbying, participation in class actions, representation of prisoners, legal assistance to aliens, drug related evictions, and the restrictions on claiming, collecting or retaining attorneys' fees.

Recipients are instructed to maintain objective integrity and independence from any organization that engages in restricted activities. In determining objective integrity and independence, LSC looks to determine whether the other organization receives a transfer of LSC funds, and whether such funds subsidize restricted activities, and whether the recipient is legally, physically, and financially separate from such organization.

Whether sufficient physical and financial separation exists is determined on a case by case basis and is based on the totality of the circumstances. In making the determination, a variety of factors must be considered. The presence or absence of any one or more factors is not determinative. Factors relevant to the determination include:

- i) the existence of separate personnel;
- ii) the existence of separate accounting and timekeeping records;
- iii) the degree of separation from facilities in which restricted activities occur, and the extent of such restricted activities; and
- iv) the extent to which signs and other forms of identification distinguish the recipient from the other organization.

*See* 45 CFR § 1610.8(a); *see also*, OPO Memo to All LSC Program Directors, Board Chairs (October 30, 1997).

Recipients are further instructed to exercise caution in sharing space, equipment and facilities with organizations that engage in restricted activities. Particularly if the recipient and the other organization employ any of the same personnel or use any of the same facilities that are accessible to clients or the public. But, as noted previously, standing alone, being housed in the same building, sharing a library or other common space inaccessible to clients or the public may be permissible as long as there is appropriate signage, separate entrances, and other forms of identification distinguishing the recipient from the other organization, and no LSC funds subsidize restricted activity. Organizational names, building signs, telephone numbers, and other forms of identification should clearly distinguish the recipient from any organization that engages in restricted activities. *See* OPO Memo to All LSC Program Directors, Board Chairs (October 30, 1997).

While there is no *per se* bar against shared personnel, generally speaking, the more shared staff, or the greater their responsibilities, the greater the likelihood that program integrity will be compromised. Recipients are instructed to develop systems to ensure that no staff person engages in restricted activities while on duty for the recipient, or identifies the recipient with any restricted activity. *See* OPO Memo to All LSC Program Directors, Board Chairs (October 30, 1997).

The review of ERLS' program integrity documents and its accounting and financial records for the review period did not reveal any transaction(s) that was inconsistent with LSC requirements and restrictions on the use of non-LSC funds and the transfer of LSC funds. The program maintain its independence and program integrity, does not have any relationships with outside organizations that engages in restricted activities and does not use its resources to subsidize another organization.

Discussion with program management revealed that the program failed to notify its non-LSC donors of the application of LSC requirements on its non-LSC funds as required by 45 CFR §1610.5 and Program Letter 96-3. However, while on-site the program developed and will send a donor notification letter to its non-LSC funding sources. Review of the newly created donor notification letter found the letter contained the required language and is in compliance with the notification requirement of this Part and the program letter.

Review of certain general ledger expense accounts for 2006, 2007 and 2008, as of June 30, 2008, and audited financial statements for the years ended December 31, 2006 and 2007 as well as the general ledger as of June 30, 2008, found compliance with the accounting and fiscal requirements of 45 CFR Part 1610 and the OPP Memo. Further, discussions with program management confirmed that the program is not involved in any restricted activities and its use of non-LSC funds, transfer of LSC funds, and its program integrity were not inconsistent with this regulation.

No comments were submitted for this Finding.

**Finding 16: ERLS is in compliance with 45 CFR Part 1614 which is designed to ensure that recipients of LSC funds involve private attorneys in the delivery of legal assistance to eligible clients. However, the program is in non-incompliance with the PAI timekeeping requirement for paralegals and with the annual development of a PAI plan.**

LSC regulations require LSC recipients to devote an amount of LSC and/or non-LSC funds equal to 12.5% of its LSC annualized basic field award for the involvement of private attorneys in the delivery of legal assistance to eligible clients. This requirement is referred to as the "PAI" or private attorney involvement requirement.

Activities undertaken by the recipient to involve private attorneys in the delivery of legal assistance to eligible clients must include the direct delivery of legal assistance to eligible clients. The regulation contemplates a range of activities, and recipients are encouraged to assure that the market value of PAI activities substantially exceed the direct and indirect costs allocated to the PAI requirement. The precise activities undertaken by the recipient to ensure private attorney involvement are, however, to be determined by the recipient, taking into account certain factors. *See* 45 CFR §§ 1614.3(a), (b), (c), and (e)(3). The regulations, at 45 CFR § 1614.3(e)(2), require that the support and expenses relating to the PAI effort must be reported separately in the recipient's year-end audit. The term "private attorney" is defined as an attorney who is not a staff attorney. *See* 45 CFR § 1614.1(d). Further, 45 CFR § 1614.3(d)(3) requires programs to

implement case oversight and follow-up procedures to ensure the timely disposition of cases to achieve, if possible, the results desired by the client and the efficient and economical utilization of resources.

The accounting requirements of 45 CFR Part 1614 require that the recipient utilize a financial management system and procedures that maintain supporting documentation to document PAI cost allocations, identify and account for separately direct and indirect costs related to its PAI effort and report the support and expenses relating to the PAI effort separately in the recipient's year-end audit.

ERLS was required to spend \$45,413 for 2006 and \$48,708 for 2007 on PAI. The program's audited financial statements for those years disclosed that the program spent \$48,216 (13.7%) and \$54,076 (13.8%), respectively on PAI.

The review of ERLS' audited financial statements and discussion with the Program Administrator revealed that the program underreports in its PAI costs by \$51,000 to \$55,000 in that it does not recognize and report in its financial statements PAI expenses paid with non-LSC funds. ERLS' 2006 and 2007 audited financial statements and discussion with program management found that the program does not recognize and report PAI costs paid with non-LSC funds (VAWA funds).

The program's financial statement disclose an expense captioned "Contract services to clients" in the amounts of \$51,288 in 2006 and \$55,417 in 2007.<sup>10</sup> To recognize the entire allocation of Judicare payments as PAI activity, ERLS is required to recognize and report as PAI costs all payments made to private attorneys.

The review of ERLS' accounting records and systems and discussion with program management found that the program is in compliance with the accounting requirements of 45 CFR Part 1614. However, discussion with the Program Administrator and review of the PAI cost allocation worksheets revealed that the program uses a percentage to allocate paralegal PAI time to its PAI effort.

ERLS' cost allocation narrative for 2008 states that "By totaling the amount of time spent on all intake and group case, and using the percentage of 2007 opened and closed cases that were Judicare cases (223 of 1147 = 19%), it was determined that 8% of the paralegal's time is spent on Judicare. (7.0 hours per week are spent on intake; 3 hours a week for group case; 4 hours a week for acceptance/rejection correspondence = 14 hours per week total on all cases.) 19% of 14 hours = 3 hours rounded 3 hours divided by 37.5 hours per week equals 8%."

ERLS' cost allocation narrative for 2007 and 2006 computed a PAI allocation percentage for a paralegal at 32% and 18%, respectively. In response, the Program Administrator indicated that the paralegal's PAI time is not a large amount, does not warrant requiring the paralegal to record actual PAI time in order to meet the 12½% expenditure requirement and that the paralegal's PAI

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<sup>10</sup> The Program Administrator stated that this line item represents Judicare payments to private attorneys who provide legal assistance to eligible clients in a rural section of the program's service area.

time will not be counted. Computation of ERLS' PAI costs without the amount recognized for the paralegal's PAI time does not result in a PAI shortfall greater than 1% to 1.5%, so the program will still be considered in compliance.

Discussions with program management revealed that the program has not developed a PAI plan that is presented annually to the local bar associations within the service area for review and comment as required by 45 CFR § 1614.4(b). While on-site the program developed a PAI plan narrative that it indicates will be sent to the state bar association. No exceptions were noted with the program's proposed PAI plan that will be sent to the state bar association.

Comments to the DR stated non-LSC donors have now been notified that their funds are subject to LSC regulations as required by 45 CFR § 1610.5 and Program Letter 96-3. The comments further indicated that this will be done annually in the future.

Comments also stated that, in the future, ERLS will report PAI expenses paid with non-LSC funds to private attorneys as part of the program's PAI obligation. An example of this would be the contract funds paid to private attorneys under our VAWA Grant.

Additionally, the comments indicated that ERLS has now eliminated counting and reporting of the paralegal's PAI time as it is a minimal amount of time and this omission does not keep the program from meeting its PAI requirement under the LSC regulations. Also, ERLS has now developed a written PAI Plan for annual presentation to its Bar Association throughout the state. A copy is attached. The Plan was published in the State Bar Newsletter in October 2008. This will be done annually in the future.

**Finding 17: ERLS is in compliance with 45 CFR § 1627.4(a) which prohibits programs from utilizing LSC funds to pay membership fees or dues to any private or nonprofit organization.**

LSC regulation 45 CFR § 1627.4(a) requires that:

- a) LSC funds may not be used to pay membership fees or dues to any private or nonprofit organization, whether on behalf of a recipient or an individual.
  
- b) Paragraph (a) of this section does not apply to the payment of membership fees or dues mandated by a government organization to engage in a profession, or to the payment of membership fees or dues from non-LSC funds.

The review of accounting records and detailed general ledger expense accounts captioned fees and dues for 2006, 2007, and 2008, as of September 15, 2008, along with discussions with program management disclosed that ERLS is in compliance with 45 CFR § 1627.4(a). The payments charged to the LSC grants were for mandatory bar dues paid to the state for its

attorneys to practice within the program's service area. The program charged the LSC grant for fees and dues: \$638 in 2006, \$0 in 2007 and, as of September 15, 2008, \$100.

No comments were submitted for this Finding.

**Finding 18: ERLS is in compliance with 45 CFR § 1614.3(d)(3) which requires oversight and follow-up of the PAI cases.**

LSC regulations require LSC recipients to devote an amount of LSC and/or non-LSC funds equal to 12.5% of its LSC annualized basic field award for the involvement of private attorneys in the delivery of legal assistance to eligible clients. This requirement is referred to as the "PAI" or private attorney involvement requirement.

Activities undertaken by the recipient to involve private attorneys in the delivery of legal assistance to eligible clients must include the direct delivery of legal assistance to eligible clients. The regulation contemplates a range of activities, and recipients are encouraged to assure that the market value of PAI activities substantially exceed the direct and indirect costs allocated to the PAI requirement. The precise activities undertaken by the recipient to ensure private attorney involvement are, however, to be determined by the recipient, taking into account certain factors. *See* 45 CFR §§ 1614.3(a), (b), (c), and (e)(3). The regulations, at 45 CFR § 1614.3(e)(2), require that the support and expenses relating to the PAI effort must be reported separately in the recipient's year-end audit. The term "private attorney" is defined as an attorney who is not a staff attorney. *See* 45 CFR § 1614.1(d). Further, 45 CFR § 1614.3(d)(3) requires programs to implement case oversight and follow-up procedures to ensure the timely disposition of cases to achieve, if possible, the results desired by the client and the efficient and economical utilization of resources.

ERLS' PAI plan involves private attorneys in the delivery of legal assistance to eligible clients through its Judicare Program. ERLS' Judicare Program consists of regular and VAWA contracts. ERLS also coordinates a pro bono clinic with the Second Judicial Circuit Bar Association and the R.D. Hurd Volunteer Law School Society. Working under the supervision of the ERLS Executive Director, students from the law school provide assistance to low income clients residing in Minnehaha County.

At the time of the review, there were 129 private attorneys in the ERLS service area participating in its regular Judicare Program and three private attorneys participating in its VAWA Judicare program.

PAI Oversight

The Program Administrator coordinates ERLS' PAI program. The Program Administrator uses a tickler system to effectuate PAI oversight. When a client is accepted as a PAI case, an acceptance letter is sent to the client. The letter explains that their case has been referred and accepted by a Judicare attorney and that they must contact the attorney. If after a period of 30 days, the client does not contact the attorney, a warning letter is sent to the client telling them their case will be closed if they do not make contact with the attorney. If the Program

Administrator does not hear from the client after five more days, she closes the case. If the client contacts the Judicare attorney, every 90 days the Program Administrator sends a letter to the Judicare attorneys requesting an update on the status of their case(s).

ERLS is in compliance with 45 CFR § 1614.3(d)(3) which requires oversight of the PAI case files. No PAI case files reviewed were dormant or untimely closed.

No comments were submitted for this Finding.

**Finding 19: ERLS is in compliance with 45 CFR Part 1635 (Timekeeping requirements).**

The timekeeping requirement, 45 CFR Part 1635, is intended to improve accountability for the use of all funds of a recipient by assuring that allocations of expenditures of LSC funds pursuant to 45 CFR Part 1630 are supported by accurate and contemporaneous records of the cases, matters, and supporting activities for which the funds have been expended; enhancing the ability of the recipient to determine the cost of specific functions; and increasing the information available to LSC for assuring recipient compliance with Federal law and LSC rules and regulations. *See* 45 CFR § 1635.1.

Specifically, 45 CFR § 1635.3(a) requires that all expenditures of funds for recipient actions are, by definition, for cases, matters, or supporting activities. The allocation of all expenditures must satisfy the requirements of 45 CFR Part 1630. Time spent by attorneys and paralegals must be documented by time records which record the amount of time spent on each case, matter, or supporting activity. Time records must be created contemporaneously and account for time by date and in increments not greater than one-quarter of an hour which comprise all of the efforts of the attorneys and paralegals for which compensation is paid by the recipient. Each record of time spent must contain: for a case, a unique client name or case number; for matters or supporting activities, an identification of the category of action on which the time was spent. The timekeeping system must be able to aggregate time record information on both closed and pending cases by legal problem type. Recipients shall require any attorney or paralegal who works part-time for the recipient and part-time for an organization that engages in restricted activities to certify in writing that the attorney or paralegal has not engaged in restricted activity during any time for which the attorney or paralegal was compensated by the recipient or has not used recipient resources for restricted activities.

To track its casehandlers' time spent on cases, matters and supporting activity, the program utilizes the timekeeping component of its case management software, requires all staff to maintain their time in the case management system and uses the timekeeping data generated along with other reasonable operating data and methods to determine and support its cost allocations.

The review of ERLS' timekeeping policies and procedures and a sample of completed time records for an attorney and a paralegal along with discussion with the program administrator disclosed that time records are electronically and contemporaneously kept. The time spent on

each case, matter or supporting activity is recorded in compliance with 45 CFR §§ 1635.3(b) and (c).

No comments were submitted for this Finding.

**Finding 20: Sampled cases evidenced compliance with the requirements of 45 CFR Part 1642 (Attorneys' fees).**

Except as provided by LSC regulations, recipients may not claim, or collect and retain attorneys' fees in any case undertaken on behalf of a client of the recipient. *See* 45 CFR § 1642.3. The regulations define "attorneys' fees" as an award to compensate an attorney of the prevailing party made pursuant to common law or Federal or State law permitting or requiring the award of such fees or a payment to an attorney from a client's retroactive statutory benefits. *See* 45 CFR § 1642.2(a).

Review of ERLS' accounting records and audited financial statements for 2006 and 2007 and the general ledger trial balance as of September 15, 2008, along with discussion with program management found that the program did not recognize and report the receipt of any attorneys' fees or court-awarded payments. Further, the team members confirmed that ERLS is not involved in any cases where attorney's fees have been requested.

No comments were submitted for this Finding.

**Finding 21: Sampled cases reviewed and documents reviewed evidenced compliance with the requirements of 45 CFR Part 1612 (Restrictions on lobbying and certain other activities).**

The purpose of this part is to ensure that LSC recipients and their employees do not engage in certain prohibited activities, including representation before legislative bodies or other direct lobbying activity, grassroots lobbying, participation in rulemaking, public demonstrations, advocacy training, and certain organizing activities. This part also provides guidance on when recipients may participate in public rulemaking or in efforts to encourage State or local governments to make funds available to support recipient activities, and when they may respond to requests of legislative and administrative officials.

None of the sampled files and documents reviewed, including the program's legislative activity reports, evidenced any lobbying or other prohibited activities. Discussions with the Executive Director also confirmed that ERLS is not involved in any prohibited activity.

No comments were submitted for this Finding.

**Finding 22: Sampled cases complied with the requirements of 45 CFR Parts 1613 and 1615, (Restrictions on legal assistance with respect to criminal proceedings and actions attacking criminal convictions).**

Recipients are prohibited from using LSC funds to provide legal assistance with respect to a criminal proceeding. *See* 45 CFR § 1613.3. Nor may recipients provide legal assistance in an action in the nature of a habeas corpus seeking to collaterally attack a criminal conviction. *See* 45 CFR § 1615.1.

None of the sampled files reviewed involved legal assistance with respect to a criminal proceeding, or a collateral attack in a criminal conviction. Discussions with the Executive Director also confirmed that ERLS is not involved in this prohibited activity.

No comments were submitted for this Finding.

**Finding 23: Sampled cases complied with the requirements of 45 CFR Part 1617(Class actions).**

Recipients are prohibited from initiating or participating in any class action. *See* 45 CFR § 1617.3. The regulations define “class action” as a lawsuit filed as, or otherwise declared by a court of competent jurisdiction, as a class action pursuant Federal Rules of Civil Procedure, Rule 23, or comparable state statute or rule. *See* 45 CFR §1617.2(a).

None of the sampled files reviewed involved initiation or participation in a class action lawsuit. Discussions with the Executive Director also confirmed that ERLS is not involved in this prohibited activity.

No comments were submitted for this Finding.

**Finding 24: Sampled cases evidenced compliance with the requirements of 45 CFR Part 1632 (Redistricting).**

Recipients may not make available any funds , personnel, or equipment for use in advocating or opposing any plan or proposal, or representing any party, or participating in any other way in litigation, related to redistricting. *See* 45 CFR § 1632.3.

None of the sampled files reviewed revealed participation in litigation related to redistricting. Discussions with the Executive Director also confirmed that ERLS is not involved in this prohibited activity.

No comments were submitted for this Finding.

**Finding 25: Sampled cases evidenced compliance with the requirements of 45 CFR Part 1633 (Restriction on representation in certain eviction proceedings).**

Recipients are prohibited from defending any person in a proceeding to evict the person from a public housing project if the person has been charged with, or has been convicted of, the illegal sale, distribution, manufacture, or possession with intent to distribute a controlled substance, and the eviction is brought by a public housing agency on the basis that the illegal activity threatens the health or safety or other resident tenants, or employees of the public housing agency. *See* 45 CFR § 1633.3.

None of the sampled files reviewed involved defense of any such eviction proceeding. Discussions with the Executive Director also confirmed that ERLS is not involved in this prohibited activity.

No comments were submitted for this Finding.

**Finding 26: Sampled cases evidenced compliance with the requirements of 45 CFR Part 1637 (Representation of Prisoners).**

Recipients may not participate in any civil litigation on behalf of a person incarcerated in a federal, state, or local prison, whether as plaintiff or defendant; nor may a recipient participate on behalf of such incarcerated person in any administrative proceeding challenging the condition of the incarceration. *See* 45 CFR § 1637.3.

None of the sampled files reviewed involved participation in civil litigation, or administrative proceedings, on behalf of an incarcerated person. Discussions with the Executive Director also confirmed that ERLS is not involved in this prohibited activity.

No comments were submitted for this Finding.

**Finding 27: Sampled cases evidenced compliance with the requirements of 45 CFR Part 1638 (Restriction on solicitation).**

In 1996, Congress passed, and the President signed, the Omnibus Consolidated Rescissions and Appropriations Act of 1996 (the "1996 Appropriations Act"), Pub. L. 104-134, 110 Stat. 1321 (April 26, 1996). The 1996 Appropriations Act contained a new restriction which prohibited LSC recipients and their staff from engaging a client which it solicited.<sup>11</sup> This restriction has been contained in all subsequent appropriations acts.<sup>12</sup> This new restriction is a strict prohibition from being involved in a case in which the program actually solicited the client. As stated

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<sup>11</sup> *See* Section 504(a)(18).

<sup>12</sup> *See* Pub. L. 108-7, 117 Stat. 11 (2003) (FY 2003), Pub. L. 108-199, 118 Stat. 3 (2004) (FY 2004), Pub. L. 108-447, 118 Stat. 2809 (2005) (FY 2005), and Pub. L. 109-108, 119 Stat. 2290 (2006) (FY 2006).

clearly and concisely in 45 CFR § 1638.1: “This part is designed to ensure that recipients and their employees do not solicit clients.”

None of the sampled files, including documentation, such as community education materials and program literature indicated program involvement in such activity. Discussions with the Executive Director also confirmed that ERLS is not involved in this prohibited activity.

No comments were submitted for this Finding.

**Finding 28: Sampled cases evidenced compliance with the requirements of 45 CFR Part 1643 (Restriction on assisted suicide, euthanasia, and mercy killing).**

No LSC funds may be used to compel any person, institution or governmental entity to provide or fund any item, benefit, program, or service for the purpose of causing the suicide, euthanasia, or mercy killing of any individual. No may LSC funds be used to bring suit to assert, or advocate, a legal right to suicide, euthanasia, or mercy killing, or advocate, or any other form of legal assistance for such purpose. *See* 45 CFR § 1643.3.

None of the sampled files reviewed involved such activity. Discussions with the Executive Director also confirmed that ERLS is not involved in these prohibited activities.

No comments were submitted for this Finding.

**Finding 29: Sampled cases evidenced compliance with the requirements of certain other LSC statutory prohibitions (42 USC 2996f § 1007 (a) (8) (Abortion), 42 USC 2996f § 1007 (a) (9) (School desegregation litigation), and 42 USC 2996f § 1007 (a) (10) (Military selective service act or desertion)).**

Section 1007(b) (8) of the LSC Act prohibits the use of LSC funds to provide legal assistance with respect to any proceeding or litigation which seeks to procure a non-therapeutic abortion or to compel any individual or institution to perform an abortion, or assist in the performance of an abortion, or provide facilities for the performance of an abortion, contrary to the religious beliefs or moral convictions of such individual or institution. Additionally, Public Law 104-134, Section 504 provides that none of the funds appropriated to LSC may be used to provide financial assistance to any person or entity that participates in any litigation with respect to abortion.

Section 1007(b) (9) of the LSC Act prohibits the use of LSC funds to provide legal assistance with respect to any proceeding or litigation relating to the desegregation of any elementary or secondary school or school system, except that nothing in this paragraph shall prohibit the provision of legal advice to an eligible client with respect to such client's legal rights and responsibilities.

Section 1007(b) (10) of the LSC Act prohibits the use of LSC funds to provide legal assistance with respect to any proceeding or litigation arising out of a violation of the Military Selective Service Act or of desertion from the Armed Forces of the United States, except that legal assistance may be provided to an eligible client in a civil action in which such client alleges that he was improperly classified prior to July 1, 1973, under the Military Selective Service Act or prior law.

All of the sampled files reviewed demonstrated compliance with the above LSC statutory prohibitions. Interviews conducted further evidenced and confirmed that ERLS was not engaged in any litigation which would be in violation of Section 1007(b) (8) of the LSC Act, Section 1007(b) (9) of the LSC Act, or Section 1007(b) (10) of the LSC Act.

No comments were submitted for this Finding.

#### IV. RECOMMENDATIONS<sup>13</sup>

As a result of this review and consistent with the findings of this report, it is recommended that ERLS:

1. Update its paper application to mirror its ACMS intake form.
- 2.

Comments to the DR stated ERLS Executive Director is in the process of reviewing all eligibility policies and forms to bring them up to date and in to compliance in 2009. All case acceptance policies regarding priorities and assets eligibility will be reduced to writing in 2009. This includes the paper intake form used for emergencies. Copies of said policies and the paper intake form will be provided to LSC in response to the final report.

3. Review and revise the documents entitled “Client Eligibility” and “Asset Guidelines” in accordance with 45 CFR Part 1611.

Comments to the DR stated the ERLS Executive Director is in the process of reviewing all eligibility policies and forms to bring them up to date and in to compliance in 2009.

4. Ensure that staff receives training on proper usage of closing codes; especially closing code E client withdrew.

Comments to the DR stated that ERLS Legal Services has resolved this problem of closing code usage by elimination of closing code E -“client withdrew or did not return”

Further, comments to the DR stated all ERLS staff have now been provided with copies of the CSR Handbook for future reference and had previously been provided training in the CSR Handbook contents.

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<sup>13</sup> Items appearing in the “Recommendations” section are not enforced by LSC and therefore the program is not required to take any of the actions or suggestions listed in this section. Recommendations are offered when useful suggestions or actions are identified that, in OCE’s experience, could help the program with topics addressed in the report. Often recommendations address potential issues and may assist a program to avoid future compliance errors. By contrast, the items listed in “Required Corrective Actions” must be addressed by the program, and will be enforced by LSC.

## V. REQUIRED CORRECTIVE ACTIONS

As a result of this review, and consistent with the findings of this report, ERLS is required to take the following corrective actions:

1. Must immediately revise its software to capture the original income amount when the spend down method is used to determine financial eligibility for over-income applicants.

Comments to the DR stated ERLS does retain the original income amount of any applicant who is "spent down" from 200% or less of the poverty level to the 125% poverty level. This is done on the eligibility page of the intake application, a copy of which is attached to this letter. The original income is first listed and then the exceptions are used to bring the applicant down to 125% of the federal poverty guidelines. These are listed by item and amount as negative figures which the system then subtracts from the original income. This results in a net figure, which, in the Kemps systems, is labeled as "total income." This page is accessible at any time and the information remains in the system and a paper copy of this is inserted into the file of the client.

2. Ensure that all cases reported to LSC document the legal advice or assistance provided to the client pursuant to CSR Handbook (2001 Ed.), ¶ 5.1(c).

Comments to the DR stated 12 individual files were noted in the Draft Report as being non-compliant. Seven of the files were emergency situations where clients required immediate representation because of a pending hearing or a written response to a pleading to preserve the client's rights. These clients later moved and could not be found in order to sign the Retainer Agreement. The other five files were cases where East River Legal Services had been court appointed in guardianships to represent clients that were incompetent because of mental health conditions or the fact that they were juveniles. In the latter five situations, this problem has been resolved by having such cases assigned to the Second Circuit Pro Bono Project, where private attorneys assume the representation. These cases are no longer included in the CSRs reported to LSC.

3. Must draft a written policy reflecting its case acceptance procedures.

Comments to the DR stated all ERLS staff have now been provided with copies of the CSR Handbook for future reference and had previously been provided training in the CSR Handbook contents. The ERLS Executive Director is in the process of reviewing all eligibility policies and forms to bring them up to date and in to compliance in 2009. All case acceptance policies regarding priorities and assets eligibility will be reduced to writing in 2009. This includes the paper intake form used for emergencies. Copies of said policies and the paper intake form will be provided to LSC in response to the final report.

4. If ERLS decides to keep its current asset policy, intake staff must ask additional questions regarding household assets in order to be compliant with 45 CFR Part 1611. To be in compliance with its own asset policy and 45 CFR Part 1611, staff must ask about the equity value of the tools and whether they are used to produce income.

Comments to the DR stated the ERLS Executive Director is in the process of reviewing all eligibility policies and forms to bring them up to date and in to compliance in 2009. All case acceptance policies regarding priorities and assets eligibility will be reduced to writing in 2009. This includes the paper intake form used for emergencies. Copies of said policies and the paper intake form will be provided to LSC in response to this Final Report.

5. Recognize the entire allocation of Judicare payments as PAI activity.

Comments to the DR stated ERLS will report PAI expenses paid with non-LSC funds to private attorneys as part of their PAI obligation.

6. Document by time sheet accounting, the time spent on PAI activities (if allocated as a cost to PAI) for any direct or indirect time of staff attorneys or paralegals.

Comments to the DR stated ERLS has now eliminated counting and reporting of the paralegal's PAI time and this omission does not keep ERLS from meeting their PAI requirement under the LSC regulation.