



Send by e-mail to: LSCGrantAssurances@lsc.gov

May 18, 2015

Stefanie K. Davis
Assistant General Counsel
Legal Services Corporation
3333 K Street NW
Washington, D.C. 20007

**RE: Comments to Notice of Proposed Revisions for the LSC Grant Assurances for Calendar
Year 2016 Funding (80 FR 21264, April 17, 2015)**

Dear Ms. Davis:

This letter is submitted in response to LSC's request for comments on proposed revisions to the LSC Grant Assurances for Calendar Year 2016 Funding. The comments are submitted on behalf of NLADA by its Civil Policy Group, the elected representative body that establishes policy for the NLADA Civil Division, and its Regulations and Policy Committee.

We want to thank LSC for the inclusive process LSC employed in considering revisions to the 2016 Grant Assurances by providing for notice and a public comment period in the Federal Register.

1. Grant Assurances 2016 - New Paragraph 13

LSC has indicated in its supplementary comments to the proposed revisions to 2016 Grant Assurances that a new paragraph is being added to promote program governance and oversight. The new paragraph 13 requires a federal grantee to have a written whistleblower policy that encourages reporting and prohibits retaliation and a written conflicts of interest policy; and further requires written documentation of distribution and training on these two policies. These two policies are standard policies that LSC funded programs are required to have in place.¹ 2016 Grant Assurance paragraph 1 already requires LSC funded programs to:

¹ The Internal Revenue Service, Form 990, requires that non-profit programs document written conflict of interest and whistleblower policies.

“...comply with the requirements of the Legal Services Corporation Act of 1974 as amended (LSC Act), any applicable appropriations acts and any other applicable law, rules, regulations, policies, guidelines, instructions, and other directives of the Legal Services Corporation (LSC), including, but not limited to, LSC Audit Guide for Recipients and Auditors, the Accounting Guide (2010 Edition), the CSR Handbook (2008 Edition, as amended 2011), the 1981 LSC Property Manual (as amended) and the Property Acquisition and Management Manual, and with any amendments of the foregoing adopted before or during the period of this grant. It will comply with both substantive and procedural requirements, including recordkeeping and reporting requirements.”

If LSC has reason to believe that programs do not have these requisite written policies, or the policies are not being followed, these concerns can be remedied without singling out specific policies for inclusion in LSC Grant Assurances. LSC maintains significant oversight of programs with bi-annual, annual and other mandated reporting as well as thorough detailed oversights of programs' compliance with a myriad of programmatic, regulatory and fiscal requirements by three different divisions of the LSC - the Office of Compliance Enforcement, (OCE) the Office of Program Compliance (OPP) and the Office of the Inspector General (OIG). LSC also annually issues program letters summarizing common compliance concerns found during these visits which includes specific guidance for programs. The current Grant Assurances, particularly paragraph 1 and Internal Revenue Service obligations, as well as LSC's intensive oversight, are more than adequate to insure that programs have whistleblower and conflict of interest policies in place and, if not, that any possible concerns are efficiently remedied. Putting specific written policy requirements in LSC's Grant Assurances each time there is a compliance concern is unnecessary and unwieldy.

Furthermore, mandating documentation of training on these two policies in LSC's Grant Assurances calls for an unnecessary level of detailed management of a grantee's program. LSC funded programs should be able to determine how to most appropriately use their limited resources to insure compliance with their written policies while at the same time striving to meet the vast, critical legal needs of their client community.

NLADA proposes that LSC not add the new paragraph 13 and continue to monitor these requirements, as LSC has done for many years, as part of LSC's oversight for grantees' compliance with general principles of sound program management and statutory and regulatory requirements.

2. Grant Assurance 2016 – Paragraph 14

NLADA recognizes that protections for whistleblowers are very important and play a vital role in insuring that employees who become aware of fraud, misconduct or other wrongdoing by federal grantees will report this conduct. On the other hand, LSC investigations of unfounded anonymous reports of improper conduct by LSC grantees are burdensome for programs and waste valuable and limited LSC resources. While we want to protect true whistleblowing, reports are sometimes used for internal political and other inappropriate purposes.

The current language in Paragraph 14 protects employees from retaliatory action by an employer when the employee's conduct is based on "appropriate cooperation". LSC's proposed revision replaces this standard with a "good faith" standard. This substitution broadens protections for employee whistleblowers so that, even when an employee's cooperation is not "appropriate", an objective standard, the employee is protected by a subjective good faith standard. NLADA recommends that the standard of "reasonable belief" be used in lieu of "good faith" which achieves a balance between the goals of protecting whistleblowers while at the same time discouraging unfounded reports.

This is the standard contained in the Sarbanes-Oxley Act ("SOX"), 18 U.S.C. § 1514A, a federal statute that provides whistleblower protection for employees disclosing information about delineated fraudulent conduct including certain criminal fraud statutes. Federal courts interpret this standard as including both an objective standard— a reasonable belief that conduct complained of constitutes a violation and a subjective standard - that the employee was acting in good faith interpret the standard. See *Day v. Staples, Inc.*, 555 F.3d 42, 53 (1st Cir. Mass. 2009).

NLADA recommends revising the language in the 2016 Grant Assurances as follows:

14. It will not take or threaten to take any disciplinary or other retaliatory action against any person ~~acting upon a reasonable belief, for good faith because of any appropriate~~ cooperation with or the appropriate release of information to LSC, including the OIG, or other entity authorized to receive such cooperation or information ~~pursuant to applicable procedures and~~ consistent with any applicable law, ~~code of ethics,~~ or rule of professional ~~responsibility~~conduct. It will notify its employees and volunteers in writing that it will not take any disciplinary or other retaliatory action against an employee or volunteer (including board members) for any ~~appropriate good faith~~ cooperation, based upon a reasonable belief, -with LSC, including the OIG, or other entity authorized to receive such cooperation.

3. Grant Assurance 2016 - Paragraph 17

Paragraph 17 requires a grantee to report to LSC's Office of Compliance and Enforcement (OCE) when "any of a grantee's key officials (e.g., executive director, chief financial officer, or other key financial official) are charged with fraud, misappropriation, embezzlement, theft, or any similar offense, or is subjected to suspension, loss of license, or other disciplinary action by a bar or other professional licensing organization."

The main revision to this paragraph mandates that notification must be submitted to LSC within 10 days instead of the current requirement "within 20 days"; adds that in addition to notifying LSC's Office of Compliance and Enforcement, a recipient must also notify the Office of the Inspector General; and the list of employees whose actions must be reported has been expanded to include "any employee with fiscal responsibilities."

Overall, the above revisions are reasonable requests for assurances from a grantee. However, NLADA recommends that, in fairness, language should be added to indicate that a grantee's

obligation begins when they become aware of the charges or disciplinary actions that must be reported. NLADA also recommends that the term “any employee with fiscal responsibilities” be more clearly defined. This current definition could be interpreted very broadly to include virtually all employees such as attorneys, paralegals or legal assistants who have responsibilities for financial matters, such as keeping track of costs and fees while working on a client’s case. LSC should consider further defining the term to only encompass “employees with fiscal responsibilities for overall program operation”. Conduct by any employee which involves criminal or fraudulent actions involving the grantee, such as theft, or embezzlement is already covered by paragraph 16 with more stringent reporting requirements.

Thank you again the opportunity to present comments regarding changes to the 2016 Grant Assurances.

Sincerely,

Steve D. Eppler-Epstein, Chair, Civil Policy Group (CPG)
Silvia Argueta, Chair, CPG Regulations and Policies Committee
Robin C. Murphy, Chief Counsel for Civil Programs,
National Legal Aid and Defender Association