



## Program Letter 15-5

**TO:** All Executive Directors

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**DATE:** November 19, 2015

**SUBJ:** Permissible Representation of Incarcerated and Formerly Incarcerated Individuals

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This Program Letter sets out guidance regarding the services LSC funding recipients (recipients) may provide to incarcerated and formerly incarcerated individuals consistent with LSC's regulation at 45 C.F.R. Part 1637.

### Summary

Part 1637 does not apply to **formerly incarcerated** individuals. A recipient may engage in **any type** of civil legal service on behalf of a **formerly incarcerated** individual, as long as the representation is consistent with other LSC requirements. Part 1637 only limits a recipient from providing certain legal services to **incarcerated individuals**. The restriction does not apply to individuals released from jail or prison, including those on parole or under house arrest. Furthermore, the restriction only limits a recipient from engaging in the following activities on behalf of incarcerated individuals: (1) **civil litigation**; and (2) **administrative work challenging the conditions of incarceration**. Furthermore, Part 1637 does not apply to any "legal information" activities (as opposed to "legal assistance" involving client representation).

### Part 1637

Section 504(a)(15) of LSC's 1996 Appropriations Act states that "[n]one of the funds appropriated in this Act to [LSC] may be used to provide financial assistance to any person or entity . . . that participates in any litigation on behalf of a person incarcerated in a Federal, State or local prison." Public Law 104-134, 110 Stat. 1321 (1996) (incorporated by reference thereafter in LSC's subsequent appropriations). Part 1637 implements this statutory restriction providing, in pertinent part:

A recipient may not participate in any civil litigation on behalf of a person who is incarcerated in a Federal, State or local prison, whether as a plaintiff or as a defendant, nor may a recipient participate on behalf of such an incarcerated person in any administrative proceeding challenging the conditions of incarceration.

45 C.F.R. § 1637.3.

Several factors must be present for this restriction to be triggered. First, a person must be “incarcerated.” Section 1637.2(a) defines the term “incarcerated” as “the involuntary physical restraint of a person who has been arrested for or convicted of a crime.”

Second, the person’s incarceration must be in a “Federal, State or local prison.” Section 1637.2(b) defines “Federal, State or local prison” as “any *penal* facility maintained under governmental authority.” [Emphasis added.] Thus, persons released from prison, even if they are subject to parole or probationary house arrest, would not be included in this definition because a private residence is not a “penal facility maintained under governmental authority.” [LSC External Opinion dated July 10, 1998](#). Furthermore, persons confined to mental health facilities, regardless of the reason for the confinement, are not subject to the restriction in § 1637.3 because a mental health facility is not a penal facility. [LSC External Opinion dated May 29, 1997](#).

Finally, § 1637.3 prohibits only two types of representation of incarcerated individuals: (1) civil litigation and (2) representation in administrative proceedings challenging the conditions of the prisoner’s incarceration. Thus, representation that *does not include litigation* or *does not challenge the conditions of incarceration* is not prohibited.

For example, a recipient may provide “brief services” and “advice and counsel” to incarcerated individuals, because “the kinds of activities that qualify as ‘counsel and advice’ and ‘brief services’ do not rise to the level of, or include, litigation or participation in an administrative proceeding challenging the conditions of incarceration.” [LSC External Opinion 2002-1006 \(June 14, 2002\)](#) (explaining that a recipient could provide advice and counsel and/or brief services through an intake system to a person incarcerated in a prison, relying on the LSC Case Service Report Handbook (CSR) for definitions of “brief services” and “advice and counsel”).

Furthermore, while a recipient may not represent an incarcerated individual in a prison disciplinary hearing challenging that individual’s conditions of confinement (for example, a transfer to administrative segregation), the recipient may represent that incarcerated individual in other, non-conditions-of-incarceration, federal and state administrative proceedings (such as challenging the denial of veterans’ benefits or Social Security benefits, or overpayment collection actions).

Additionally, Part 1637 does not prohibit any non-representation activities that qualify as “legal information” limited to “the provision of substantive information not tailored to address a person’s specific legal problem.” LSC CSR Handbook, § 2.3 and 45 C.F.R. § 1614.3(f). By contrast, the two types of prohibited representation are both “legal assistance” activities. *Id.* at §§ 2.2 and 1614.3(e).

### **Examples of Permissible Activities**

There are many types of legal services a recipient may provide to incarcerated persons consistent with the restriction in Part 1637. For example, a recipient may provide representation for:

- Expunging criminal records.
- Correcting inaccurate criminal records.
- Reinstating revoked or suspended driver's licenses.
- Modifying child support orders.
- Securing health insurance for individuals soon to be released from prison.
- Administrative proceedings *that do not challenge the conditions of that person's incarceration*, such as those involving veterans' benefits, Social Security or SSI benefits, or overpayment collections.
- Preparing documents such as powers of attorney, medical directives and wills.