



OFFICE OF LEGAL AFFAIRS

MEMORANDUM

TO: Operations & Regulations Committee

THROUGH: Helaine M. Barnett
President

FROM: Victor M. Fortuno
Vice President and General Counsel

DATE: October 12, 2006

SUBJECT: Staff Report on 45 CFR Part 1624 Rulemaking –Draft Final Rule

Introduction

On October 29, 2005, the Board of Directors directed that LSC initiate a rulemaking to consider revisions to LSC's regulation on prohibitions against discrimination on the basis of handicap at 45 CFR Part 1624. On May 12, 2006, LSC published a Notice of Proposed Rulemaking (NPRM) proposing minor changes to the regulation. The comment period for this NPRM closed on June 26, 2006. LSC received 5 timely and one late comment on the NPRM.

Management has considered all of the comments received and has prepared the attached Draft Final Rule for your consideration and action.

Summary of the Draft Final Rule

The Draft Final Rule contains only one change to the regulatory text made in response to a comment received. Specifically, the commenter pointed out one place where the term "auxiliary aids" should have been changed to "auxiliary aids and/or other assistive technologies." This was an oversight in the original drafting and management recommends that this change be made. Otherwise, management recommends that LSC adopt as final all of the remaining changes to part 1624 as proposed.

The preamble to the Draft Final Rule addresses the comments LSC received. Most of the comments either supported the proposed changes or did not oppose the proposed changes. However, most of the commenters also raised some particular objections and/or made suggestions for additional changes to the rule. Although management is recommending only making one change to the regulatory text itself, the preamble discussion of the comments includes some discussion in which management agrees, at least to a certain extent, with the commenters, but believes the issue was more appropriately addressed in the preamble. There are other instances, however, where management disagrees with the commenter, or believes that the

commenter has misread or misunderstood the proposed change. The preamble discussion addresses these comments at length.

Section 1624.1 – Purpose

LSC proposed changing the terms “handicapped persons” as they appear in this section to “persons with disabilities.” In addition, LSC proposed adding language to make reference to the ADA. LSC received several comments supporting the proposed changes to this section and none in opposition. Accordingly, the Draft Final Rule recommends adopting the changes as proposed.

Section 1624.2 - Application

LSC did not propose any changes to this section. LSC received no suggestions for change to this section. Accordingly, the Draft Final Rule recommends not making any changes to this section.

Section 1624.3 – Definitions

LSC proposed changing the term “handicapped person” to “person with a disability” in section 1624.3(c)(1). Similarly, LSC proposed to change the term “qualified handicapped person” in section 1624.3(d) to “qualified person with a disability.” LSC received several comments in support and no comments in opposition to these proposed changes. Accordingly, the Draft Final Rule recommends adopting them as proposed.

LSC also proposed to add a definition of the term “auxiliary aids and/or other assistive technology” and to use the single term “auxiliary aids and/or other assistive technology” throughout the regulation.

One commenter suggested that LSC failed to define the term “auxiliary aids and/or other assistive technologies” and proposed that LSC use the definition of “auxiliary aids and services” found in Title III of the ADA. The Draft Final Rule notes first that LSC did in fact propose a definition for the term “auxiliary aids and other assistive technologies.” The Draft Final Rule further notes that the definitions section in Title III of the ADA (Section 301) does not contain a definition of the term “auxiliary aids and services.” However, Management assumes that the commenter was referring to a provision of the Department of Justice (DOJ) regulations implementing Title III discussing auxiliary aids and services. LSC believes that the definition it proposed for the term “auxiliary aids and/or other assistive technologies” is in no way inconsistent with the DOJ regulation. As such, and in light of the fact that no other commenters opposed the LSC proposed definition, the Draft Final Rule recommends adopting the definition of “auxiliary aids and/or other assistive technologies” as proposed.

The Equal Employment Opportunity Commission (EEOC) suggested that LSC cross-reference the definitions of “reasonable accommodation,” “undue hardship” and “direct threat” found in the EEOC’s regulations at 29 CFR §1630.2 for the purposes of those terms’ use in the

proposed employment section, 1624.6. Management agrees that the EEOC's definitions of these terms are appropriate for use in the context of the proposed employment section. However, rather than simply cross-reference the definitions in the text of the regulation, the definitions have been reprinted in the preamble to the Draft Final Rule so that LSC staff and recipients would have a ready reference without having to have a full copy of the EEOC's regulations at hand.

Section 1624.4 – Discrimination prohibited

LSC proposed two notable amendments to this section. First, in each instance in which the term “handicapped person” or “handicapped persons” appears, LSC proposed to replace it with “person with a disability” or “persons with disabilities” as grammatically appropriate. LSC also proposed to use the term “auxiliary aids and/or other assistive technologies” instead of the term “auxiliary aids” in section 1624.4(d)(1) and (2) and to delete the text appearing at 1624.4(d)(3). As discussed above, LSC believes that users of the regulation will be better served by having a formal definition of the term in the definitions section of the regulation than by an informal definition elsewhere. LSC received several comments supporting the proposed changes to this section.

LSC also received one comment suggesting that this section as proposed is inconsistent with the ADA and “misstates” the law. The Draft Final Rule explains that, since the provision being objected to is not based in the ADA, but rather was adopted in 1979, there is no misstatement of the law. The Draft Final Rule goes on to explain the current and proposed LSC requirement does not impose any responsibility which contradicts responsibilities recipients have under the ADA (i.e., complying with the LSC requirement does not preclude compliance with ADA requirements). As such, it does not appear necessary or desirable to change LSC's regulation in this matter.

LSC also received one comment suggesting that LSC substitute the term “auxiliary aids and/or other assistive technologies” for “auxiliary aids” in proposed 1624.4(d)(2). Management agrees with this comment and the Draft Final Rule reflects this suggestion.

Section 1624.5 – Accessibility of legal services

LSC proposed two notable amendments to this section. First, in each instance in which the term “handicapped person” or “handicapped persons” appears, LSC proposed to replace it with “person with a disability” or “persons with disabilities” as grammatically appropriate. Second, LSC proposed to replace the reference to “the appropriate Regional Office” in section 1624.5(c) with “LSC.” LSC received several comments supporting and no comments opposing these changes. Accordingly, the Draft Final Rule recommends adopting them as proposed.

LSC received one comment suggesting that LSC add a subsection (e) to require recipients to “make reasonable modifications in policies, practices and procedures” to avoid engaging in discrimination on the basis of disability. The Draft Final Rule agrees with the commenter that recipients should not have policies, practices or procedures which have the effect of

discriminating on the basis of disability and expects that part of a recipient's obligation to be in compliance with Part 1624 is to ensure that it does not have policies, practices or procedures which result in discrimination on the basis of disability. However, Management is not convinced that it is necessary to add such an express provision to the regulation because for a recipient to be in compliance with the substantive requirements of Part 1624, the recipient cannot have policies, practices or procedures which result in or have the effect of discriminating on the basis of disability. The Draft Final Rule does not include the suggested new subsection.

Section 1624.6 – Employment

LSC proposed two notable amendments to this section. First, in each instance in which the term “handicapped person” or “handicapped persons” appears, LSC proposed to replace it with “person with a disability” or “persons with disabilities” as grammatically appropriate. LSC also proposed to use the term “auxiliary aids and/or other assistive technologies” instead of the words “readers or interpreters” in section 1626(e)(1). LSC received several comments supporting and no comments opposing these change. Accordingly, the Draft Final Rule recommends adopting them as proposed.

LSC also received a comment from the EEOC suggesting that the proposed provision appears to be modeled after a 1980 DOJ regulation and suggesting, as an alternative, that LSC add a cross-reference to the EEOC's regulations and should embody language contained in the 1994 joint EEOC/DOJ rule regarding coordination between section 504 and the ADA. Management believes the current LSC requirements continue to be appropriate. The Draft Final Rule notes that the current DOJ rules implementing Section 504 with respect to employment (28 CFR §§41.52 – 41.55) are essentially the same as LSC's current and proposed section 1624.6. The Draft Final Rule also explains that the section that the EEOC cites to (28 CFR §37.12) does not substitute for the provisions cited above. Rather, that section addresses coordination between DOJ and EEOC in procedures for coordinating investigation of complaints and LSC proposed to address enforcement issues in proposed section 1624.7.

Section 1624.7 – Enforcement

LSC proposed to explicitly incorporate into the regulation its current policy that when complaints of violations of Part 1624 are filed with LSC's Office of Compliance and Enforcement (OCE), OCE generally recommends that complainants pursue claims with appropriate Federal, state or local agencies which may be in a better position to investigate their claims and assist them in obtaining specific relief. In cases where a claim is filed with another agency, LSC generally defers to that investigation during its pendency and relies upon the findings of the other agency in resolving the complaint filed with LSC. Of course, LSC retains the discretion and authority to conduct its own investigations into any claim of disability-based discrimination grounded in this Part or the grant assurances and make its own findings upon the conclusion of such investigation, irrespective of whether a complaint based on the same circumstances is pending at another agency.

One commenter stated that it agreed with the substance of the policy and with LSC's proposal to formalize the policy by placing it in the regulation. The commenter expressed its concern, however, that the language proposed is "not sufficiently clear or definitive." The Draft Final Rule explains that the proposed alternative language does not appear to be preferable to the language LSC proposed because the proposed alternative language, while creating more specificity, does so at the expense of necessary LSC discretion. The Draft Final Rule also continues to recommend the language as proposed because it more plainly indicates LSC's exercise of discretion.

Another commenter took the opposite position, urging LSC not to codify its current policy. This commenter suggested that LSC should instead adopt a new policy under which LSC would commit to investigating and processing all complaints directly without referral or reference to any other agency's investigations. The commenter argues that LSC's expertise in legal services makes it uniquely qualified to do so and that LSC has better leverage to force recipients to provide specific relief to complainants. The Draft Final Rule explains that LSC's limited resources, combined with limited ability to obtain injunctive relief mitigate against such a policy. The Draft Final Rule further notes that the current policy appears to have functioned well for LSC and recipients, and as well for complainants as is practicable within LSC's authority. The Draft Final Rule, accordingly, recommends against adopting the commenter's suggestion and instead adopting the language in proposed 1624.7 as proposed.

LSC received one other comment on this section. This commenter suggests that LSC: (1) create a tracking system to flag repeat offenders; (2) engage in increased efforts to represent individuals with disabilities who bring allegations of violations of the ADA to the attention of LSC, including obtaining consulting assistance and training for OCE staff; and (3) that the language of the regulation allow for LSC to retain for the purpose of enforcement cases at its discretion. The Draft Final Rule explains that current OCE policy and practice already enables LSC to identify repeat offenders (should there be any) and take action as necessary. The Draft Final Rule further notes that LSC is without legal authority to represent individuals, and that in complaint investigations LSC is not representing the complainant, but rather is exercising its oversight authority over the recipient. In addition, with respect to the suggestion that LSC obtain additional training or consultant assistance, although Management agrees that such activities would be helpful to increase LSC's level of in-house expertise, LSC is faced with the reality of limited resources. Given the infrequency of complaints received and the existence of other investigatory agencies with greater expertise, Management does not believe that making a significant investment in the manner suggested would be the most effective or efficient use of its limited resources. Finally, regarding the commenter's third suggestion, the Draft Final Rule makes clear that language proposed does expressly reserve to LSC the discretion to retain jurisdiction over any complaint it receives as the commenter proposes. Therefore, no change or addition to the proposed language appears necessary.

Management Recommendation

Management recommends that the Operations and Regulations Committee recommend that the Board of Directors adopt the changes to the Part 1624 as provided in the Draft Final Rule and approve the Final Rule for publication.