



May 7, 2002

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**RE: Permissibility of Program Assistance to Homeless Clients on
Misdemeanor Warrants and Tickets, External Opinion No. EX-
2002-1005**

Dear Mr. Vickery:

I am writing in response to your inquiry to Victor Fortuno, dated April 18, 2002, regarding the permissibility of proposed work under a Housing and Urban Development ("HUD") grant for which your program would like to apply. Your program is a former Legal Services Corporation ("LSC") grantee and a current sub-grantee of West Texas Legal Services, an existing LSC grantee.

You indicated that a number of social services providers and representatives from the City of Dallas and Dallas Metro Homeless Alliance have asked Legal Services of North Texas ("LSNT") to apply for a new type of HUD grant. This grant would fund an attorney to provide legal aid to homeless people with tickets and outstanding warrants for misdemeanors, based on recognition that tickets and outstanding warrants often impede the homeless from reintegrating into mainstream society by securing jobs, housing and other forms of assistance.¹ Generally, the types of tickets and warrants at issue are for 'Class C' offenses (e.g. sleeping in public, public intoxication, urination in public, disorderly conduct, criminal trespass, etc.), which are punishable only by fine (as opposed to jail time) and handled through the local municipal court or justice of the peace. The homeless are not entitled to court-appointed counsel in these cases because public defenders only work in courts of higher jurisdiction, representing defendants charged with offenses for which they may be incarcerated. There are no existing organizations in your community other than LSNT that are able to serve this client base, and previous attempts to recruit volunteers for this work have failed.

¹ You have indicated that the work under this grant would involve traditional, civil legal work in addition to assistance with the resolution of tickets and outstanding warrants, but this opinion will only address the assistance with tickets and warrants, as this is the work that is potentially problematic under the LSC Act and Regulations.

Although the proposed work would be funded entirely by a HUD grant, and would thus not involve the use of LSC funds, you have inquired whether this work would be permissible under 45 CFR Part 1610, which prohibits recipients or sub-grantees of LSC funds from using non-LSC funds for any purpose prohibited by the LSC Act or regulations.

LSC has three existing regulations that restrict the use of LSC funds in criminal proceedings. Regulation 1615 prohibits the use of LSC funds to provide legal assistance in actions that seek to collaterally attack criminal convictions, and regulation 1637 prohibits the use of LSC funds for assistance in civil actions on behalf of persons incarcerated in Federal, state or local prisons, or assistance in administrative proceedings challenging the conditions of incarceration. The work contemplated by LSNT under the HUD grant would not involve actions attacking criminal convictions or actions on behalf of prisoners, and would thus not implicate the aforementioned regulations.

The third regulation restricting use of LSC funds in criminal proceedings is regulation 1613. Part 1613 generally provides that “[c]orporation funds shall not be used to provide legal assistance with respect to a criminal proceeding unless otherwise authorized by this part.”² 45 C.F.R. § 1613.3. ‘Criminal proceeding’ is defined in the regulation as “the adversary judicial process prosecuted by a public officer and initiated by a formal complaint, information, or indictment charging a person with an offense denominated ‘criminal’ by applicable law *and punishable by death, imprisonment, or a jail sentence*. A misdemeanor or lesser offense tried in an Indian tribal court is not a ‘criminal proceeding’.” [Emphasis added.] 45 C.F.R. § 1613.2. Because the warrants and tickets with which LSNT would assist under the HUD grant are not punishable by death, imprisonment or a jail sentence, they would not qualify as ‘criminal proceedings’ under § 1613.2, and would thus not be prohibited by regulations 1613 and 1610.

If, during the course of providing assistance to homeless clients under the HUD grant, LSNT encounters clients with offenses punishable by death, imprisonment or a jail sentence, the cases may qualify as ‘criminal proceedings’ under Part 1613 (provided they meet all other elements of the aforementioned definition), and further analysis of the regulation may be necessary before determining the permissibility of accepting the cases.

Regulation 1613 provides two exceptions to the general prohibition on assistance with criminal proceedings. The first exception generally permits representation in a criminal proceeding when it is undertaken pursuant to a court

² This regulation implements § 1007(b)(2) of the LSC Act, which provides that “[n]o funds made available by the Corporation . . . may be used . . . (2) to provide legal assistance with respect to any criminal proceeding, except to provide assistance to a person charged with a misdemeanor or lesser offense or its equivalent in an Indian tribal court.” 42 U.S.C. § 2996f(a)(2)(C).

appointment made under a statute or court rule or practice of equal applicability to all attorneys in the jurisdiction. 45 C.F.R. § 1613.4(a).

The second exception permits assistance with a criminal proceeding “[w]hen professional responsibility requires representation³ in a criminal proceeding arising out of a transaction with respect to which the client is being, or has been, represented by a recipient.” 45 C.F.R. § 1613.4(b). This exception has been interpreted by LSC’s Office of Legal Affairs (“OLA”) to apply only to criminal proceedings for which charges are brought *after* an attorney-client relationship has been established by the client and the LSC recipient (or sub-grantee) in a civil case, and for proceedings which arise out of the civil case. The section does not authorize representation in a criminal proceeding if the defendant has not previously requested assistance from the LSC recipient (or sub-grantee) in connection with the subject matter of the criminal charge.⁴

In summary, based on the information with which you have provided LSC, it appears as if the work contemplated under the HUD grant (i.e. assistance with the resolution of tickets and warrants which are ‘Class C’ offenses and punishable only by fine rather than jail time) is not prohibited by the LSC Act or regulations. Again, however, if your program is awarded the grant and encounters a client who has an outstanding warrant for an offense that is punishable by jail time and that meets all other elements of the definition of ‘criminal proceeding’ under regulation 1613, additional analysis will be necessary to determine whether assistance with the matter is permissible.

After receiving your inquiry, I had several conversations or correspondences with you in which we discussed whether a petition to expunge the criminal record of a homeless client would violate the LSC Act or regulations. OLA has previously determined that such proceedings do not violate the Act or regulations if expungement petitions are administrative in nature in the relevant jurisdiction.⁵

Although the work that your program is contemplating under the HUD grant does not appear to be prohibited by the LSC Act or regulations, the Supplementary Information published when regulation 1613 was implemented cautions that activities not specifically prohibited by the regulation should be evaluated by the program based on the program’s own priorities and resources and other available legal services

³ LSC’s Office of Legal Affairs (formerly known as the “Office of General Counsel”) has previously held that a recipient attorney may represent a client in a related criminal matter if the attorney is satisfied, after consultation with her managing attorney, that there is no viable alternative to her involvement, and professional responsibility therefore requires the attorney to continue. See February 11, 1981 opinion of Phyllis K. Fong, LSC Assistant General Counsel, appended hereto as Attachment A.

⁴ See January 19, 1977 opinion of Linda Hanten, LSC Deputy General Counsel, appended hereto as Attachment B.

⁵ See June 8, 1984 opinion of LSC Assistant General Counsel Richard N. Bagenstos, appended hereto as Attachment C.

in the community. 41 Fed. Reg. 38506 (1976).⁶ In determining whether work under this grant would be an efficient use of your program's time and resources, you might also consider the level of expertise that will be required to handle the cases, as well as the amount of preparation time involved.⁷

I hope that this information adequately answers your question. If you would like to further discuss this issue, please feel free to contact me at (202)336-8871.

Sincerely,

Dawn M. Browning
Assistant General Counsel

Victor M. Fortuno
General Counsel

⁶ See also, February 14, 1990 opinion of Carl E. Mergele, appended hereto as Attachment D.

⁷ See Attachment A.