



OFFICE OF LEGAL AFFAIRS

## ADVISORY OPINION

Advisory Opinion # AO – 2009 – 1006

Subject: Inquiry into Income Prospects Pursuant to 45 CFR §1611.7(a)

Date: September 3, 2009

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This Office was asked for an opinion on whether recipients must inquire as to the income prospects of each applicant for LSC-supported legal assistance, or whether recipients may choose not to ask such applicants about income prospects unless the applicant otherwise provides information indicating that there may be an upcoming change to his or her current income.

### *Brief Answer*

As part of their financial eligibility screening, recipients are required by 45 CFR §1611.7(a) to make a reasonable inquiry into the income prospects of each applicant for LSC-funded legal assistance.

### *Background*

In the course of Case Service Report/Case Management System reviews of two recipients, LSC's Office of Compliance and Enforcement found that the recipients were not inquiring into the income prospects of all applicants for LSC-supported legal assistance during financial eligibility screening. As a result, the two programs were instructed by OCE to begin inquiring into the income prospects of all applicants for LSC-supported legal assistance. The two recipients acknowledged that the OCE finding was accurate, but each has taken

principles of statutory construction, which apply equally to regulations, provide that when the language of a statute is clear and unambiguous on its face it is to be given its plain language meaning. *Public Citizen, Inc. v. Rubber Manufacturers Association*, 533 F3d 810 (C.A.D.C. 2008); see also, 73 C.J.S. Public Administrative Law and Procedure § 211. It is my considered opinion that the language of this regulatory provision is “clear and unambiguous” on its face. Neither the plain language of §1611.7(a), nor the plain language of any other section of Part 1611 contains any limitation on or exception to the requirements relating to the manner of determining financial eligibility. Rather, the regulation on its face expressly requires that a reasonable inquiry into an applicant’s income prospects be part of the financial eligibility determination in all cases. Therefore, giving the regulation its plain language meaning, there is no basis to interpret the income prospects inquiry requirement of §1611.7(a) as limited to only those situations in which the recipient already has a reason to believe that the income prospects of the applicant are likely to change in the near future.<sup>1</sup>

One recipient argues that because the term “current income prospects” is used in the section addressing exceptions to the income ceiling (45 CFR §1611.5(a)(4)(i)), the term only has “substantive meaning” in that particular regard. Therefore, it is argued, because that particular

recipient has discretion to consider seasonal income variations as an exception to the income ceiling has no bearing on its obligation to inquire about any income prospects (seasonal or otherwise) as part of a financial eligibility determination.

In addition to the two contexts already discussed, §1611.6(b)(1) also discusses “income prospects” in connection with the manner of determining eligibility for groups seeking LSC funded legal assistance from recipients. The fact that income prospects must be also considered for groups does not affect the need to inquire about them for non-group applicants, nor does the discussion of seasonal income prospects alter the need to inquire about a group’s income prospects. As such, the term must have “substantive meaning” apart from its use in §§1611.5(a)(4)(i) and 1611.6(b)(1) .

It has also been argued that a different reading is supported by the definition of “income” in §1611.2(i) because it includes only “actual current annual total cash receipts . . . .” To the contrary, that definition has no bearing on the inquiry into income prospects. Section 1611.7(a)(1) requires “reasonable inquiry regarding sources of the applicant’s income, income prospects and assets.” The definition of “income” does not affect the need to also inquire into income prospects and assets.

Rather, making a reasonable inquiry into all applicants’ income prospects furthers the


It should be noted that during the rulemaking in which the current requirement was adopted, the “reasonable inquiry” standard was specifically proposed and endorsed by many recipients as appropriate and, in fact, consonant with their current practice. The preamble to the current version of Part 1611 contains the following discussion of the matter:

LSC is including a requirement that in making financial eligibility determinations a recipient shall make reasonable inquiry regarding sources of the applicant’s income, income prospects and assets and shall record income and asset information in the manner specified for determining financial eligibility in section 1611.4. This requirement replaces the process currently required by section 1611.5, whereby a recipient is effectively required to conduct a lengthy and often cumbersome inquiry as to the applicant’s income, assets and income prospects, including inquiry into a detailed list of factors relating to an applicant’s specific financial situation and ability to afford private counsel. The Working Group discussed this issue at length and representatives of the field noted that conducting such a detailed inquiry in most cases is a task which is often difficult to accomplish efficiently at the point of intake, especially as much of intake is performed by volunteers, interns or receptionists. Rather, many recipients, in practice, conduct a somewhat abbreviated version of the otherwise required process, inquiring into current income, assets, income prospects and probing for additional information based on the responses provided, the requirements of the regulation and their knowledge of local circumstances. This approach, the field representatives noted, is less prone to error and assists in fostering an appropriate attorney-client relationship with individuals accepted as clients. As LSC is not finding widespread instances of service being provided to financially ineligible persons, it was agreed that the process required by the existing regulation is unduly complicated and that the simplified requirement proposed would be adequate to ensure that recipients are making sufficient inquiry into applicants’ financial situations to determine financial eligibility status under the regulation while being less administratively burdensome for recipients and more conducive to the development of the attorney-client relationship.

70 Fed. Reg. 45545, at 45560 (August 8, 2005).<sup>2</sup> As such, there is no reason to believe that the “reasonable inquiry” standard cannot be implemented by recipients with respect to inquiries into income prospects.

One of the recipients further argues that even an inquiry into “imminently realist( te)5.37 incp F

Reasonable inquiries into income prospects are required for all applicants. While the answer may be “no” in most cases, the recipient is required to find out whether the answer is yes and then consider the specific available information in making a reasonable financial eligibility determination.

A handwritten signature in blue ink, appearing to read "Victor M. Fortuno", is written over a background of horizontal lines. The signature is fluid and cursive.

Victor M. Fortuno

Vice President & General Counsel