



To: Operations and Regulations Committee
From: James J. Sandman, President *JJS*
Mark Freedman, Senior Assistant General Counsel *MAF*
Re: Management Response to Comments on the August 8, 2012, Further Notice of Proposed Rulemaking Regarding Enforcement Mechanisms
Date: December 19, 2012

INTRODUCTION

On September 18, 2012, LSC provided the Operations and Regulations Committee (Committee) with a summary, attached, of the comments received regarding the August 8, 2012, Further Notice of Proposed Rulemaking (FNPRM) for additional enforcement mechanisms. This memorandum provides Management's response to those comments. Meanwhile, Management is working on a draft final rule for the Committee's consideration at the January meeting. Management continues to recommend adoption of changes to the rules with a number of modifications based on the comments, recommendations from board members, and Management's own analysis. The draft final rule will address the Committee's suggestion that LSC add language regarding informal attempts at resolution of compliance issues within the Dept

COMMENTS SUBMITTED

In response to the FNPRM published on August 8, 2012, LSC received comments from the following entities:

- The LSC Office of Inspector General (OIG),
- American Bar Association Standing Committee on Legal Aid and Indigent Defendants (SCLAID),
- National Legal Aid & Defender Association (NLADA),
- New York State Bar Association Committee on Legal Aid (CoLA),
- Legal Services Association of Michigan (thirteen legal aid programs),
- Midwest Project Directors Group (twenty-one legal aid programs),
- All six LSC recipients in New York State outside of New York City, and
- Northwest Justice Project (NJP) (Washington State).

None of the comments opposed the FNPRM changes to the original proposed rules. Generally, the comments supported the changes as improvements, but many still opposed the

Sect. 1011. The Corporation shall prescribe procedures to insure that—

(1) financial assistance under this title shall not be *suspended* unless the grantee, contractor, or person or entity receiving financial assistance under this title has ~~been given reasonable notice and opportunity to show cause why such action~~

should not be taken, and

(2) financial assistance under this title shall not be *terminated* or *annulment* for

suspensions to thirty days. Those provisions of Part 1623 are still in effect, even though

had provided for suspensions lasting longer than thirty days, then, prior to 1996, the full advance

Full Legislative Intent of the 2012-13 Budget

[REDACTED]

substantially violated the terms of its grant is not entitled to a second chance as a matter of right.” *Id.*

LSC replaced the non-LSC independent hearing examiner requirement with an impartial hearing officer, who could be an LSC employee. 45 C.F.R. § 1606.8.

LSC also created a new category for reductions of a current grant by less than five



adopted regulations to do so, which the Board has not yet done; the necessary regulations are the subject of this rulemaking. *Id.* See 63 Fed. Reg. 64,636 (1998) (preamble to revised Parts 1606 and 1625), 63 Fed. Reg. 64,646 (1998) (preamble to revised Part 1623).

Lastly, LSC retained the thirty-day limit on suspensions because a “suspension is intended to be used for extraordinary circumstances when prompt intervention is likely to bring

SCLAID also proposed adding appeals to the LSC President prior to any suspensions and, for those appeals, using a process that is similar to the proposed limited reduction in funding appeals. In cases in which the President is precluded from hearing the appeal because the President had prior involvement in the suspension, SCLAID proposed appointment of a non-LSC independent hearing examiner to hear the appeal.

In a related comment on impartiality in suspension decisions, NLADA proposed requiring that a senior LSC employee make suspension decisions, as is the case for limited reductions of funding in the FNPRM. NLADA recommended using the full-time 1006 Post 1006

termination, prior-appeal process involving a hearing before a non-LSC independent hearing examiner for suspensions of funding in amounts over \$10,000. NJP recommended excluding deputy directors from the list of decision makers for suspensions, terminations, debarments, and limited reductions.

Management agrees with the comments that some type of an appeal is appropriate for suspensions. Management disagrees, however, with the proposals to return to the use 1006

Corporation, or the terms and conditions of a recipient's grant or contract with the Corporation; and

(b) Provide procedures for *prompt review* that will ensure informed deliberation by the Corporation when it has made a proposed determination that financial assistance to a recipient should be suspended.

45 C.F.R. § 1623.1 (emphasis added) The regulation then provides for immediate suspensions

of up to thirty days subject to an advance informal conference, which meets the pre-1996 statutory requirement for notice and an opportunity to be heard. 45 C.F.R. § 1623.4; see 43 Fed. Reg 21,883 (1978) (original Part 1623).

~~As discussed above, in 1996 Congress lifted the suspension-related procedural provisions~~

of the LSC Act. In 1998, Congress further provided that *terminations* could occur “after notice and opportunity for the recipient to be heard,” but Congress was silent regarding new *suspension* requirements. Nonetheless, LSC has maintained the requirement of notice and an opportunity to

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1008 in response to statutory changes to the LSC Act's provisions regarding suspensions.

terminations, and refunding. Management does not recommend changing those standards.

Part 1618 requires that enforcement actions meet one of three criteria, two of which include a standard with intent. Only "persistent" violations can be acted on without a required showing of intent; even then, LSC must consider the five criteria for a substantial violation in Part 1606, two of which involve intent. Before taking enforcement action, LSC must determine

[REDACTED]

LSC to proceed to consider an enforcement action. Thereafter, under either Part 1606 or Part 1623, LSC must consider the five criteria for determining if a substantial violation has occurred. As discussed above, two of those criteria include intent. The remaining three factors involve (1) the "number of restrictions or requirements violated" (?), whether they are substantive or [REDACTED]

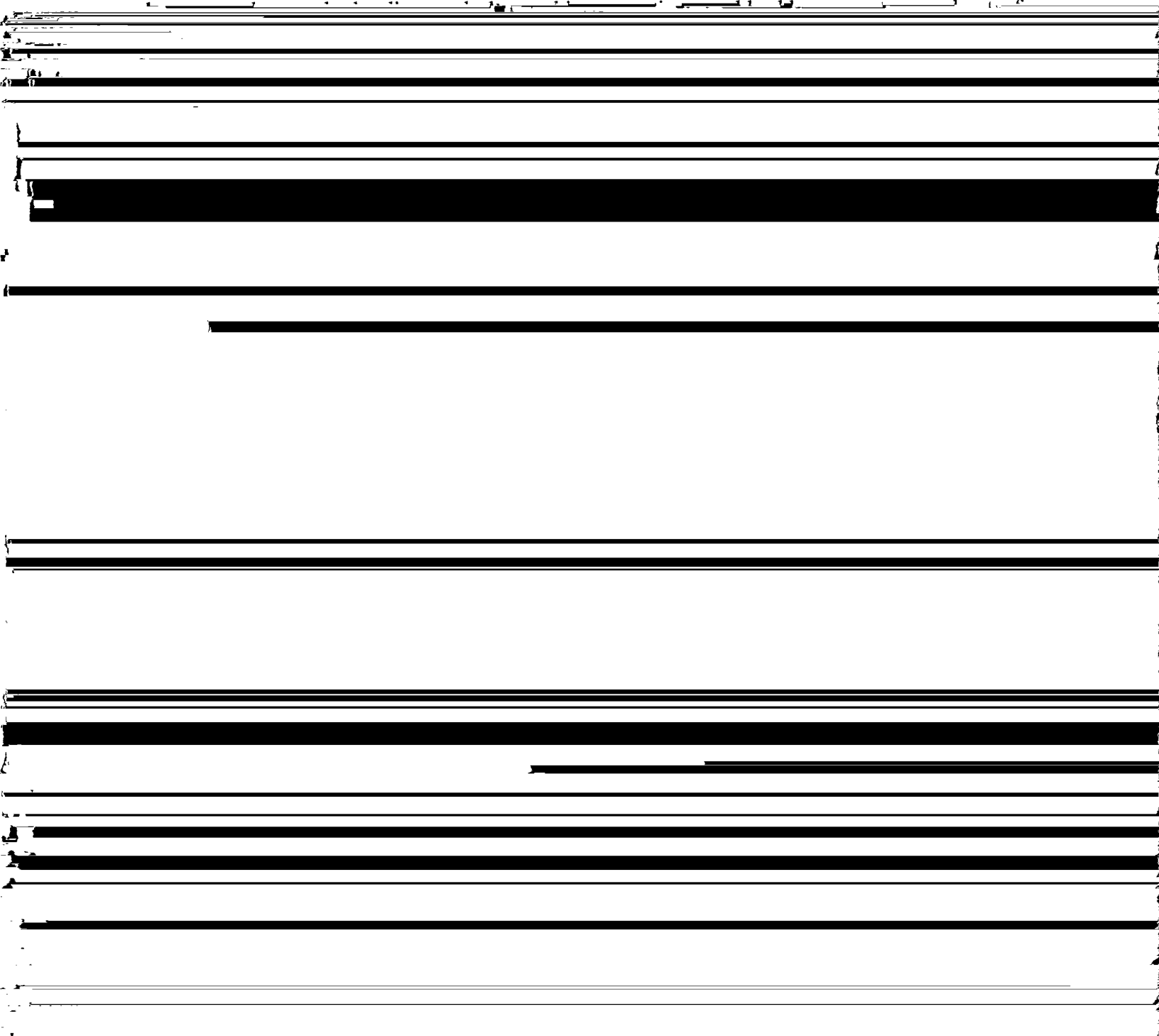
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recipient had to comply with the requirements, as interpreted by LSC, or risk suspension or termination. At that point the recipient could not rely on any other interpretations of the rules.

In 1998, LSC converted this requirement into the fifth factor for consideration in Parts 1606 and 1623 regarding the “extent to which the recipient failed to take action to cure the violation when it became aware of the violation . . .” 45 C.F.R. § 1606.3(2)(d). LSC eliminated the pre-1998 presumption against taking remedial actions without an opportunity to cure. LSC determined that Congress intended LSC to streamline its compliance procedures, and LSC

regarding the amount of funding misused, mentioned above, and another three factors regarding the availability of other funds and the impact of the reduction in funding on the recipient and on client services. Similarly, SCLAID proposed adding a new section to Part 1623 for consideration of nine factors regarding the length of a suspension. Those factors would be similar to the ones proposed for Part 1606.

Management opposes this suggestion for two reasons. First, as with the proposed



factors to the longstanding regulatory structure. There has been no showing that the current rules are insufficient in this area. Second, adding an impact analysis would unnecessarily complicate the rules in a way that could dilute the emphasis on ensuring compliance. LSC has never included impact as a specific factor for consideration when taking enforcement actions. LSC

opposite direction of the earlier statutory changes. Instead, Management recommends emphasizing that the LSC President should not be involved in the initial decisions for enforcement actions. The regulations can preserve the option of appointing another senior LSC employee if necessary. The purpose of the appeal is to create an opportunity for a fresh look at the situation. Management believes that this process, modeled on the longstanding Part 1630 appeal process, provides the best balance of administrative burdens of the process against procedural fairness concerns for limited reductions of funding of less than five percent.

Publication of Final Decisions

The OIG recommended a publication requirement for final decisions regarding terminations, debarments, or limited reductions. The OIG noted that publication would provide

absence of review by an independent hearing examiner. Management agrees with this recommendation. Those decisions are already subject to FOIA.

Need for New Enforcement Mechanisms