State Budget Cuts and Welfare Reform

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Advocacy Responses to State Budget Cuts and Reform Proposals

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[Editor’s Note: At the time this article went to press, Congress was considering legislation reauthorizing the Legal Services Corporation Act. Be sure to read the enclosed box on changes that the new legislation would make regarding activities that legal services staff may engage in. As always, all advocacy questions should be directed to the Center for Law and Social Policy.]

I. Introduction

The federal legal services program was established to provide persons "unable to afford adequate legal counsel" and "who seek redress of grievances" with access to our system of justice in order to "serve best the ends of justice and assist in improving opportunities for low-income persons". /1/ That task is extraordinarily difficult today.

II. The Poor and Legal Services Today

The number of poor people has risen dramatically over the last decade. According to the Census Bureau, between 1980 and 1990, the number of poor people (as defined by the poverty index) increased 16 percent. Today, there are close to 33 million poor people; in 1981, there were 27 million. Moreover, the poor are increasingly made up of poor families with children. /2/ Today, one of out five children is poor. Among children in single-parent families, over 50 percent live below the poverty line; among children in black or Hispanic single-parent families, two-thirds live below the poverty line. Working and young families with children have been increasingly pushed into poverty; the poverty rate of young families has doubled over the last two decades. /3/

Our economic and social services systems have not responded satisfactorily. The labor market has failed to provide jobs with wages sufficient to adequately support a family. In fact, over the economic expansion of the 1980s, although poor families worked more, their real wages fell. /4/ Two-parent families increasingly put a second worker into the work force and/or expanded the hours of work of that parent; single-parent families could not do the same. /5/ Not only do jobs lack adequate pay, many do not provide or offer only prohibitively expensive health insurance. Further, affordable child care is difficult for poor families to find.
The child support system has failed to provide sufficient financial support for children. Approximately six million children live in families headed by single mothers. Of these families, 57 percent do not have a support award. Of those without an award, almost 85 percent sought payments but were unable to obtain them, generally because the father could not be located or paternity could not be established. Of the 43 percent with an award, only two-thirds actually receive some payment. Yet, an effective child support system with appropriate guidelines could result in between $33 and $43 billion a year in money going to single-parent families, including $5.8 billion going to families currently on AFDC.

The failure of the labor market and the child support system to provide minimum economic security for poor families has not been alleviated by government programs for families with children. In fact, there has been a substantial decline in the effectiveness of these programs.

Over the last two decades, AFDC benefits, the primary cash assistance program for poor families, have been dramatically reduced. During the last two years, states have reduced benefits even more. Last year, for example, AFDC benefits were reduced in 9 states and frozen in 31 others. In addition, AFDC sharply penalizes families for getting or staying married and imposes high, effective tax rates when single parents enter employment. Since child health care may not be available when a family loses AFDC, the parent is essentially forced to choose between low-wage work without health care benefits or an inadequate welfare system that stigmatizes and isolates the poor.

The failure to provide adequate income only exacerbates the problems faced by the poor: (1) inadequate and unaffordable housing, and homelessness; (2) domestic violence, child abuse, and termination of parental rights; (3) repossessions, wage garnishments, and inability to obtain necessary credit; and (4) health and mental health problems. Moreover, an economy that generates only low-skill, low-wage jobs makes it difficult to effectively utilize job training programs to help the poor escape poverty. It also fails to generate the incentives necessary to improve an education system that is currently failing the poor.

The impact on legal services has been severe. There are increasing numbers of clients, with extraordinarily difficult problems seeking help in a climate where the poor are despised and increasingly isolated.

Legal services programs have been unable to fully respond. Funding has been severely reduced; even with IOLTA and private funds, some programs have never regained the funding level of the federal FY-1981 appropriations. In addition to financial losses, programs lost a substantial pool of talent, as experienced staff members left to pursue better paying, less stressful, and more secure careers elsewhere. While private bar PAI efforts have helped, studies across the country have consistently shown than only 15 to 20 percent of the legal needs of the poor are met by existing resources.

New barriers have been created to access to the courts at both the federal and state levels. Courts have also been far less willing than in the 1960s and 1970s to develop new rights, or effectively implement federal law. These external developments have occurred at the same time that Congress and the Legal Services Corporation (LSC) have attempted to impose
prohibitions on, or extremely burdensome requirements for, critical types of advocacy. The fight for the survival of an effective, professional legal services program continues in Congress, with the Administration, and within LSC. /11/

### III. A New Vision

Legal services advocates must be able to respond both to new challenges arising from state efforts to restructure the welfare system by emphasizing the personal responsibility and behavior of AFDC recipients, and to new rounds of state budget cuts in AFDC, GA, and Medicaid directly targeted on the poor. To respond effectively, however, requires a new way of thinking about our advocacy and knowledge of what legal services advocates can do for clients.

First, and foremost, legal services advocates must consider, and work to achieve, an affirmative vision of improving opportunities for clients. Developing such a vision should be done in conjunction with clients and could be undertaken as part of the priority setting process.

An alternative vision must take into account current public misperceptions and political realities. Today, the public perceives the welfare system, particularly the AFDC program, as out of control. Instead of encouraging work, it is perceived as rewarding those who do not work. Instead of helping families obtain a basic income to bridge them over difficult times, it is perceived as creating long-term dependency among young mothers who do not want to work. Some believe that mothers move from state to state in search of higher welfare benefits. Others believe that AFDC mothers have additional children to get additional welfare benefits, or that mothers receiving AFDC do not care enough to send their children to school.

These beliefs, the harsh budget realities faced by states, and public frustration, have led many states to propose several "new" approaches to restructuring the welfare system. For example, New Jersey, California, and Wisconsin have obtained federal waivers for "family cap" proposals that deny additional AFDC benefits to a family when the mother has another child while eligible for AFDC. Wisconsin and Illinois are proposing to restrict AFDC benefits to new residents under the theory that high-benefit states "draw" poor families from lower-benefit states. Other states, following the example of Wisconsin, which pioneered the "learnfare" program, reduce a family's AFDC grant if a child misses more than a designated number of days of school. Maryland has secured a federal waiver to tie a family's grant to the successful immunization/preventive health screenings of children in the family by reducing grants $25 if the family fails to meet the immunization schedule.

A number of states are sharply reducing benefits under the professed theory that such reductions are necessary in order to create a work incentive. Several states have proposed such measures as Norplant and sterilization to mandate or encourage use of contraceptives. Undoubtedly, state officials, welfare reform commissions, and proponents of behavior change will suggest other proposals to modify the behavior of AFDC recipients and to reduce benefits even further.
A. Problems with These Proposals

There are two basic problems with these proposals: faulty premises and flawed solutions. Some are based on false premises and thus address a problem that does not exist. For example, the theory that parents will move to receive higher AFDC benefits lacks a factual basis. The idea that capping grant levels encourages contraception has been researched, and compelling evidence suggests that the premise is wrong.

Other proposals suggest flawed, counterproductive solutions that do not realistically address problems. For example, the theory behind "learnfare" is quite reasonable; children, especially poor children, should be attending school. Therefore, all available tools should be used to get parents concerned about their children's school attendance and ensure that the children go to school and benefit by it. In practice, learnfare has very serious problems.

There is no evidence that learnfare actually leads to improved school attendance. Learnfare also has the wrong focus. Instead of encouraging parents, schools, and social services agencies to work together to address the needs of children, it makes them adversaries. Moreover, learnfare diverts scarce resources. Schools can identify many things they could use to improve educational outcomes for poor children, but attendance-tracking bureaucracies is not high on the list. Learnfare also hurts innocent children and other family members. Decreasing the family's welfare grant may punish a teenager refusing to attend school, but it also punishes everyone else in the home, and may leave the family without sufficient income to pay the rent.

In short, these proposals are an attempt to require certain behavior from welfare recipients under the misperception that welfare encourages childbearing, encourages people to move, leads to poor school attendance, or undermines preventive health care. However, articulating the problems with these proposals is not a response likely to persuade many legislators, officials, or the public.

B. Welfare Reform--An Alternative Perspective

A careful examination of the welfare system, specifically the AFDC program, from the perspective of clients, suggests that the fundamental problems are different than those perceived by the public and many state officials. For example, AFDC does not provide basic income support for families in need. AFDC does little to provide education, training, and employment services to families it is designed to serve. Moreover, the AFDC system is anti-work and anti-family; it imposes sharp penalties on families when they attain employment and penalizes families for getting or staying married.

An alternative vision of reform should take into account the political realities and the real problems faced by clients and, in the course of advocacy for clients, it would suggest a different set of proposals.

One critical approach is to improve child support enforcement and enact a child support assurance program. In order to foster "responsible behavior" in childbearing, instead of
imposing a "family cap," a state should change the signal it sends to fathers. Too often, our child support enforcement system not only fails to provide adequate income to children, but it allows men to father children without incurring any fiscal liability. States can send the right signal and help children to more adequate income and necessary parental involvement by strengthening support enforcement, rather than adding to the penalties already imposed on mothers and children who must survive on inadequate benefits.

A second proactive strategy that states should consider is removing barriers to work. There are four critical barriers to work: (1) the need for education, particularly among the 50 percent of AFDC parents who lack a high school diploma; (2) the need for health care coverage so that a parent does not jeopardize his or her children's health by taking a job without health care benefits; (3) the need for child care assistance; and (4) the need for income assistance so that parents working a low-wage job can meet their family's basic needs.

The current AFDC system does little to address these barriers. Instead, when a family goes to work, it may wind up with less income than it needs to live. As a result, it may wind up with no health care coverage because the benefit reduction rate for AFDC is exceptionally high. When AFDC families enter employment, their AFDC grant is sharply cut. Moreover, if the family loses AFDC eligibility, it may also lose Medicaid and job-related child care coverage.

An approach to removing the barriers to work would fully fund and operate the education components of the Job Opportunities and Basic Skills Program (JOBS) under the Family Support Act and increase health care, child care, and income assistance to the working poor, so that it becomes possible for a single parent to meet family needs while in a low-wage job. Increasing participation in JOBS can help AFDC families increase their chances of getting jobs that pay above-poverty wages. States should use their resources under the Family Support Act to strengthen the linkages between welfare and education, and to emphasize school completion for AFDC children. These efforts appear to be promising. However, nothing in the experience of states to date suggests that an attendance tracking system for AFDC children is a constructive or effective approach to helping AFDC children complete school.

Finally, the anti-family effect of AFDC needs to be eliminated. Under existing rules, when parents marry, the system sharply reduces or eliminates assistance. The AFDC-UP (Unemployed Parent) Program restricts assistance in three important ways: (1) requiring a level of "work history" that many cannot meet; (2) denying eligibility to a family if the principal wage earner is employed for 100 hours a month, even if the wages from employment are so low that the family is still eligible for AFDC; and (3) limiting AFDC-UP benefits. The AFDC program also penalizes families when a mother gets married because much of the income from the stepparent is taken into account and deducted from the grant when calculating the family's eligibility. This means the family can lose eligibility even if the stepparent is working at a minimum wage job.

In short, the problem with AFDC is not that it encourages childbearing, or moving, or poor school attendance. The real problems are that AFDC fails to provide effective education and training programs, it fails to provide adequate transitional support, and it punishes poor families for working and for being married. Thus, any effective advocacy on behalf of clients in response to the current proposals to reform AFDC must not stop at providing policymakers
with information about what is wrong with the current proposals and the harsh impact they will have on clients. Effective advocacy must also, and more critically, suggest what changes need to be made to address the real problems.

IV. Effective and Efficient Advocacy

Legal services programs can not effectively represent their clients unless they utilize the full range of advocacy approaches that are available to lawyers representing more affluent clients. Under current law and regulations, such advocacy can be carried out either with LSC or non-LSC funds, although there are a number of restrictions or limitations on using LSC funds. /17/

A. Courts and Administrative Agencies

Some of the legal problems that clients present will be litigated in federal and state courts. Some will require advocacy through formal agency adjudicatory processes or negotiation with caseworkers responsible for administering the programs directly affecting a particular client. There are few restrictions on such advocacy under current law.

Clients can be represented in all adjudicatory proceedings and in formal or informal negotiations with agencies or private parties on civil matters so long as (1) the program obtains a written retainer agreement; (2) the client is eligible for legal services from that program; /18/ and (3) the representation does not involve certain issues. /19/ Class actions can be maintained and appeals pursued, but certain procedural requirements must be met when using both LSC and private funds. /20/

B. Agency Rulemaking Proceedings or Similar Processes

If an eligible client seeks representation in a rulemaking proceeding or similar policymaking process, the program can provide representation, including commenting on proposed regulations, if the rulemaking or proposed policies affect the client's legal rights or interests. /21/ Specifically, using LSC funds, programs can provide representation on a particular application, claim, or case, that directly involves the client's legal rights or responsibilities. /22/

Moreover, programs can respond to requests by agency officials to engage in rulemaking and policy development and comment upon proposed rules or policies regardless of whether they represent clients. /23/ Such requests can be specific, individual requests or requests made to a list of people. /24/ Programs cannot use LSC funds to solicit or arrange a request in order to respond to a proposed rulemaking. /25/ There are also documentation requirements when using LSC and private funds. /26/

Programs cannot use LSC funds to engage in grassroots lobbying activity regarding rulemaking or proposed agency policies. /27/ This is a broad prohibition and prohibits any oral or written communication "which contains a direct suggestion, or, when taken as a whole,
amounts to a direct suggestion to the public at large or to persons outside of the recipient program . . . to contact public officials in support of or in opposition to pending or proposed" administrative rules or policies. Furthermore, a neutral communication about pending or proposed regulations or policies "may not provide information about whom to contact or how to support or oppose such pending or proposed (rules or policies)." The only exceptions are for communications to a client or group of clients currently represented by a program regarding a matter directly related to the legislation, or their counsel or co-counsel. /28/

On the other hand, private funds can be used for grassroots lobbying as long as it is necessary to the provision of legal advice and representation with respect to a client's legal rights and responsibilities. /29/

There are no restrictions on the use of non-LSC public funds, including IOLTA funds, for any and all advocacy on administrative rules or policies, so long as use of such funds is in accordance with the purpose for which they are provided. /30/

Thus, legal services programs have ample legal authority to provide full and effective representation to clients adversely affected by existing or proposed agency rules, policies, or practices. In fact, programs can use LSC funds to carry out most, if not all, of the regulatory representation that is necessary on behalf of clients. Within the context of recent state budget reductions or reform proposals, programs can protect their clients' interests before state or local agencies engaged in rulemaking or policy development. They can also represent clients adversely affected when states seek waivers from the Department of Health and Human Services (HHS). /31/

**C. State Welfare Reform Commissions**

At least twelve states established welfare reform commissions in 1992; Alaska, Colorado, Connecticut, Florida, Georgia, Iowa, Kansas, Maryland, Missouri, Oklahoma, Oregon, and Virginia. Rhode Island's commission was created in 1991. Other states may establish commissions before the current legislative sessions end. Some commissions were established by legislation; others were created by the executive. Legal services staff may be asked to participate on these commissions as members or advisors to commission members. They may do so using LSC and non-LSC funds because such participation falls within the permissible activity in response to a request from an elected or governmental official. /32/

Moreover, such commissions may request legal services staff to provide information, testimony, or analyses. This is permissible under the same rules that govern responding to requests. However, with LSC funds, the information or analyses requested can only be provided to the person or staff requesting the information.

Since these commissions will likely consider the full range of welfare reform and income support issues that were raised in 1992, as well as new issues, clients' perspectives are critically important. Commission members need to know how various proposals will impact clients, what alternatives exist, and what real reform issues should be considered. Representation of clients before these commissions is governed by the same rules that apply to
representation before administrative agencies or legislative bodies. Which rules apply will likely be determined by how the Commission is structured within any particular state.

**D. Legislative Bodies**

Over the next year, most of the decisions to reduce welfare budgets or change the existing welfare system will occur in state legislatures. A few decisions may be made at the federal level, such as congressional consideration of child support reform and the child support assurance initiative. Representation of affected clients before these bodies may be necessary to protect a client's existing legal rights and to assist clients in need of relief from existing policies or practices. Unfortunately, the rules governing such representation are extremely complicated and confusing and depend upon whether the program uses LSC funds, private funds, or non-LSC public funds, such as IOLTA funds. /33/

1. **Use of LSC Funds**

Programs can represent clients who are in need of relief from existing policies by contacting legislators or their staff about the matters affecting the clients. /34/ Programs can send letters, telephone, meet with officials or staff, testify in committee hearings, draft proposed legislation and amendments, and keep in contact with legislators or staff about proposed or pending legislation.

However, such representation can only be undertaken under four conditions. /35/ First, the program must obtain a written retainer agreement and specify the legal interest of each client as identified by the client. Second, clients must exhaust appropriate judicial and administrative remedies. The determination of "appropriate" will depend upon the circumstances and is a professional judgment to be made by the program. Third, the project director must approve any employee undertaking communications and determine that the exhaustion requirement has been met. Fourth, the director must determine that the participation is not in accordance with a coordinated campaign orchestrated by others. This latter requirement does not preclude communicating with, or receiving information from, other organizations, but would probably preclude participating in a broad coalition effort. Additionally, programs cannot solicit clients in order to undertake such communications.

Programs can respond to a request from a legislator about a specific matter, such as a pending proposal for reducing benefits or making reforms in the welfare system. However, programs can only respond to the requestor, although they could testify before a committee and deliver their testimony to committee staff. Programs cannot solicit or arrange for a request, but can inform legislators and their staff about LSC requirements and program expertise. /36/

Programs can monitor and track legislative activities in any legislative body. Programs can communicate about any proposed legislation to their staff and board, to other programs, to current clients (if the matter directly relates or would affect their case or representation), and to private attorneys in PAI programs. Such communications must be objective and factual analyses of the status or impact of the legislation, and must not provide information about
whom to contact or how to support or oppose such legislation. However, program newsletters supported with LSC funds cannot include articles about pending or proposed legislation but can include references to pending or proposed legislation when incidental to an article discussing issues that are related.

Programs cannot use LSC funds to engage in grassroots lobbying. Generally, programs cannot contact a third party and ask them to advocate for or against a particular legislative proposal. However, while engaged in direct communications, staff can discuss their position on pending or proposed legislation.

Programs also cannot use LSC funds to transport persons to a legislative session or administrative proceeding. Exceptions include program staff and law students directly engaged in advocacy permitted by the regulations, or witnesses entering appearances in such proceedings on behalf of clients. Where appropriate and necessary, programs can use LSC funds to transport a client or a client's family to a legislative or administrative proceeding. Programs cannot transport lay advocates, staff not directly engaged in advocacy, clients, or others to legislative or administrative rulemaking proceedings.

Nor can programs use LSC funds to conduct or transport persons to an event if a primary purpose of the expenditure is to facilitate participation in legislative or administrative advocacy that is not otherwise permitted. Thus, program staff cannot use LSC funds to attend a conference and then, on their own time, engage in legislative advocacy.

2. Use of Private Funds

Programs can use private funds to represent eligible clients before legislative bodies as long as it is necessary to protect the clients' legal rights or responsibilities. There are no exhaustion requirements nor restrictions on participation in coordinated campaigns. Solicitation of clients, in violation of professional responsibilities, is not permitted.

Programs can also use private funds to respond to a request of a legislator and are not limited by the restrictions when using LSC funds. Programs can use private funds to engage in grassroots lobbying, to monitor legislative activities, to communicate to anyone about pending or proposed legislation, and can include articles about pending or proposed legislation in newsletters funded solely with private funds.

Thus, clients who would have statutory rights affected by, or responsibilities increased by, state welfare reform proposals can be represented by programs before state legislative bodies. Programs could continue such representation before Congress or in the HHS waiver review process.

3. Use of Public Funds, Including IOLTA Funds

Public funds, including IOLTA funds and tribal funds (including foundation funds benefitting Indians or Indian tribes), can be used for all legislative activities, including grassroots lobbying,
if the grantor permits such use. /42/ Some caution is necessary, however, because many public funding sources impose restrictions on the use of funds. For example, many federal funding sources restrict legislative activity either through federal regulations, such as Older American Act Funds, /43/ or through incorporation of OMB Circulars in the grant or contract with a federal agency. /44/ In short, while LSC does not restrict public and IOLTA funds when they are used in accordance with the purposes for which they were provided, /45/ program managers need to make sure that public funds can be used for legislative activities which they support.

**E. Meetings and Coalitions**

Effective representation of clients affected by budget cuts and welfare reform initiatives may require that advocates attend meetings of coalitions or other organizations. However, LSC regulations prohibit knowingly assisting others to engage in legislative activities that the program can not otherwise undertake. They specifically prohibit using LSC funds to attend meetings of coalitions if a principal purpose of the meeting is to discuss or engage in legislative activities. /46/

These restrictions do not prohibit participation in all meetings. For instance, programs can use LSC funds to attend meetings of advocates, task forces, low-income groups, social welfare agencies, United Ways, legislators, and administrative officials. Advocates can discuss pending or proposed legislation if they do not engage in grassroots lobbying. Advocates can attend coalition meetings as long as the primary purpose of the meeting is not to discuss legislative activities. They can also participate in meetings or serve on committees of bar associations, as long as they do not engage in grassroots lobbying. /47/ Of course, advocates can attend coalition and other meetings using non-LSC funds.

**F. Training and Community Legal Education**

Advocates with clients directly affected by welfare legislation may need to attend training programs in order to obtain the necessary information to provide effective representation. Some programs may want to conduct trainings for staff and non-staff advocates and for clients. Moreover, programs may want to conduct community legal education about proposed legislation in order to inform clients about the potential impact of the legislation.

The restrictions on training with LSC funds do not prohibit effective training programs or community legal education. /48/ Advocates can attend trainings conducted by others and conduct trainings that provide information on pending or proposed legislation or administrative rules. Programs can conduct community legal education about legislation or rules. Indeed, under recent LSC General Counsel opinions, programs can conduct trainings for clients that provide information about existing law, pending or proposed legislation, or administrative rules. /49/ However, programs cannot use LSC funds to attend or conduct trainings that teach advocates how to lobby or engage in administrative rulemaking advocacy, and advocates cannot engage in grassroots lobbying in the guise of training or community legal education.
If legal services advocates use non-LSC funds, they can attend and conduct trainings without the restrictions imposed on LSC funds. This includes programs for clients and non-staff members, and could include training on how to lobby or engage in administrative rulemaking.

G. Organizing Clients and Representation of Organized Clients

When faced with budget cuts or reform legislation, clients may want to organize themselves or organize with others to effectively impact the proposed legislation. Neither LSC nor private funds can be used to organize or assist in organizing clients or coalitions. However, this broad prohibition does not prevent representation of client groups that attempt to organize, as long as the representation provided is legal representation on issues involved in the process of organizing (such as incorporation, tax matters, and legal requirements).

The regulations permit the use of LSC and private funds to organize a clients council if the council is limited to advising a program about the delivery of legal services. This exception does not authorize the use of LSC or private funds to organize a clients council that engages in advocacy around budget cuts or reform legislation. In addition, LSC and private funds can be used to organize a task force of advocates concerned about budget cuts and welfare reform issues, when the task force is primarily composed of poverty law advocates and meets only to discuss issues arising from existing or proposed legislation.

Of course, programs can use LSC funds to represent organizations that are primarily made up of eligible clients as long as the organization lacks, and has no practical means of obtaining, funds to retain private counsel. Such representation can include advocacy before legislative and administrative bodies if the rules governing such representation are observed. Programs can represent any organization using private and non-LSC public funds (assuming it is permitted by the funding source).

H. Reporting and Accounting Requirements

LSC regulations impose a host of reporting and accounting requirements that programs must comply with in order to carry out advocacy before administrative rulemaking and legislative bodies. Programs are given some leeway in how they design necessary accounting and reporting systems to meet these requirements.

V. Conclusion

Welfare reform and budget proposals under consideration by many states present a severe challenge to legal services programs and the clients they represent. Some proposals are flawed in concept and will adversely affect the lives of many clients. Others are potentially constructive initiatives that seek to address real flaws in the welfare system. There are even opportunities to make affirmative changes in policy affecting poor children. Under any circumstance, the perspectives of clients are critically important as executive, administrative,
and legislative bodies consider these and other proposals. In many instances, clients will seek representation from programs on these issues. As this article seeks to demonstrate, such representation can be provided under existing rules. In short, advocacy is possible and vitally necessary to help our clients improve their opportunities for the future.

footnotes

1. See Legal Services Corporation Act, 42 U.S.C. Sec. 2996 [hereinafter LSC Act].

2. This is not to suggest that the elderly, who today comprise a smaller share of the official poverty population than in 1970, are no longer in need of legal services. While they have slightly lower poverty rates than the population as a whole, poverty among black and Hispanic elderly is severe and many elderly persons have income just above the poverty line. See RONALD POLLACK, ON THE OTHER SIDE OF EASY STREET: MYTHS AND FACTS ABOUT THE ECONOMICS OF OLD AGE 12-14 (1987).


8. In 1979, approximately 30% of individuals in single-parent families were removed from poverty as a result of means-tested transfers, food and housing benefits, and Federal tax policy. By 1989, this had declined to 17%. 1991 GREEN BOOK, supra note 5, at 1161.


11. At the time this article was written, Congress had not completed deliberations on legislation reauthorizing LSC nor set forth the rules that will govern the LSC appropriation. Since future activities may well be governed by rules different from those which govern current activities, a brief discussion of two reauthorization bills is provided separately.

12. I am indebted to my CLASP colleagues Mark Greenberg and Jodie Levin-Epstein for providing much of the thought that went into this section, although responsibility for what is said rests entirely with me.

13. The recent study commissioned by, and then sharply criticized by, the State of Wisconsin could find no evidence of improved school attendance among teens subject to learnfare.

14. This happens because learnfare reduces the family's grant if a child missed more than a certain number of days without good cause. So, the school, welfare department, and parent must put all their attention on disputes about how many days a child missed two months ago, and for what reason, rather than working together to help the child.

15. For a mother with two children and no income, the median state AFDC payment is $372 a month, 39% of the federal poverty level. If food stamps are included, the combined income from AFDC and food stamps brings the median payment to 67% of the federal poverty line. In 9 states, the monthly grant to a family of 3 with no income is less than $250. Overall, the real value of AFDC benefits has dropped over 40% since 1970. Even when food stamps are counted as income, the combined value of AFDC and food stamps dropped by 27% since 1972.

16. The problem is far more extensive than modifying a few AFDC rules. Poor families who have left AFDC will continue to need some form of income support to remain above poverty. In 1992, a full-time worker at the minimum wage has earnings that fall $2,400 below the poverty line for a family of three. Increasing child support collections is an essential strategy. In addition, the Earned Income Tax Credit could be implemented so that families can receive advanced payments in their regular paychecks and not a lump sum at the filing of their income tax returns.

17. The discussion in this part necessarily leaves out a number of issues that advocates will encounter when representing clients in administrative rulemaking or policy making and before legislative bodies. Specific advice can be obtained from the Center for Law and Social Policy.

18. Financial eligibility is determined under 45 C.F.R. Sec. 1611. Alien eligibility is determined under 45 C.F.R. Sec. 1626.

19. There are restrictions on representation involving abortion issues [LSC Act Sec. 1007(b)(8) and Pub. L. 102-140], redistricting cases [45 C.F.R. Sec. 1632], certain habeas corpus proceedings [LSC Act Sec. 1007(b)(3) and 45 C.F.R. Sec. 1615], school desegregation issues
involving elementary or secondary schools [LSC Act Sec. 1007(b)(9)] or Selective Service or desertion from the armed forces [LSC Act Sec. 1007(b)(10)]. There is no prohibition on representing gay people or individuals or families alleged to be involved in drug dealing.

20. Class actions brought with LSC and private funds are governed by 45 C.F.R. Sec. 1617. There are further restrictions on class actions against governmental entities using LSC funds in the appropriation rider: that the class relief must be sought for the primary benefit of eligible clients and that the project director must determine, before approval is granted, that (a) for the class affected, the government entity is not likely to change the policy or practice in question; (b) the policy or practice will continue to adversely affect eligible clients; (c) notice of the recipient's intention to seek class relief has been given to the government entity; and (d) responsible efforts to resolve without litigation the adverse effects of the policy or practice have not been successful or would be adverse to the interest of the clients. Appeals are covered by 45 C.F.R. Sec. 1605.

21. LSC General Counsel opinions do suggest, however, that rulemaking representation cannot be provided on matters that programs are prohibited from litigating such as abortion issues. The redistricting regulation, 45 C.F.R. Sec. 1632, prohibits all redistricting activity including administrative and legislative activity.

22. See 45 C.F.R. Sec. 1612.5(b). Private funds can be used for rulemaking or policy representation as long as the representation is necessary to protect a client's legal rights and responsibilities. See LSC Act Sec. 1007(a)(5), supra note 1, and 45 C.F.R. Sec. 1612.13(b).

23. See 45 C.F.R. Sec. 1612.6(a).

24. LSC has never resolved the question of whether the response provision permits recipients to respond to a notice of proposed rulemaking that is generally published (e.g., in the Federal Register) when the program is not representing a particular client. Clearly programs can do so if they use non-LSC public funds. However, the limitations on the use of LSC or even private funds would counsel against using such funds to respond to a general notice of proposed rulemaking.

25. See 45 C.F.R. Sec. 1612.6(b).

26. See 45 C.F.R. Sec. 1612.6(c).

27. See 45 C.F.R. Sec. 1612.7(a).

28. See 45 C.F.R. Sec. 1612.1(m).

29. See 57 Fed. Reg. 33699 (July 30, 1992). While this is only a proposed regulation, this interpretation is consistent with testimony of LSC officials before Congress and with a provision in the appropriation rider that prohibits LSC from imposing restrictions on private funds with regard to legislative and administrative activity except to the extent that such restrictions are explicitly authorized by the LSC Act.
30. See LSC Act Sec. 1010(c), supra note 1.

31. Because many proposed reform proposals deviate from current federal law, states must seek a federal waiver. Until 1992, federal waivers were often perceived as an arduous process that entailed considerable federal review and often required Congressional action. However, in his 1992 State of the Union address, the President stated that waivers would be given expedited review. Since that time, HHS has considered waivers at a relatively break-neck pace. Recently, Wisconsin, New Jersey, California, Michigan, Utah, Oregon, Missouri, Virginia, and Maryland have been granted waivers. Three others are pending.

32. See 45 C.F.R. Sec. 1612.6(a).

33. The confusion resulted from the failure of Congress to enact reauthorization legislation since 1977. Since 1981, Congress has legislated through appropriation riders that usually affect only LSC funds. In the early 1980s, Congress imposed new restrictions on legislative advocacy; subsequently, Congress corrected LSC interpretations that went far beyond Congressional intent. Thus, LSC funds are currently governed by appropriation riders, private funds by the LSC Act [1007(a)(5)], and non-LSC public funds by the requirements imposed by grantors. Further, Part 1612 (the regulatory provision on legislative advocacy) is extremely confusing. Some of the provisions on private funds are also barred by the appropriation riders. Some of this confusion may be cleared up when Congress acts this fall.

34. See 45 C.F.R. Sec. 1612.5(c).

35. 45 C.F.R. Sec. 1612.5(c).

36. See 45 C.F.R. Sec. 1612.6.

37. See 45 C.F.R. Sec. 1612.7.

38. See 45 C.F.R. Sec. 1612.3(b).

39. 45 C.F.R. Sec. 1612.3(c).

40. See 45 C.F.R. Sec. 1612.13(b) and LSC Act Sec. 1007(a)(5), supra note 1.


42. See LSC Act Sec. 1010(c), supra note 1. The restriction on non-LSC funds is directed to funds "received for the provision of legal assistance" and expended "for any purpose prohibited by this title [the LSC Act]." There is a continuing dispute over whether all private (and public) funds received by a program are covered. Part 1612 specifically attempts to include all private funds, but the appropriation rider limits the restrictions to private funds restricted by section 1010(c).

43. See 45 C.F.R. Sec. 1321.71 for restrictions on Older American Act funds under Title IIIb.

45. Prior LSC staff have sought to determine whether a program was using IOLTA funds consistent with the purposes for which they were provided, even when the IOLTA Board issued an opinion indicating that the use was permissible. However, LSC's effort to reduce the grant of one program was enjoined by a district court in National Center for Youth Law v. LSC, 749 F. Supp. 1013 (N.D. Cal. 1990).

46. See 45 C.F.R. Sec. 1612.3(e) prohibiting knowingly assisting others and Sec. 1612.3(f) on coalition meetings.

47. See 45 C.F.R. Sec. 1612.5(h)(4).


49. See 45 C.F.R. Sec. 1612.9.

50. See LSC Act Sec. 1007(b)(7), supra note 1; 45 C.F.R. Sec. 1612.10.

51. See 45 C.F.R. Sec. 1612.10(a).

52. See 45 C.F.R. Sec. 1611.5(c).

53. See, e.g., 45 C.F.R. Secs. 1612.11, 1630.4, and 1630.5

Legislative Update

At the time this article was written, Congress was considering legislation reauthorizing the Legal Services Corporation Act. The House adopted H.R. 2039 in May 1992. The Senate is scheduled to take up its bill, the Rudman-Kennedy bill S. 2870, in September 1992. If this legislation becomes law, the rule governing activities legal services staff can engage in will differ from the guidelines suggested in this article. It is important to note some of the critical changes that may occur, although a more detailed discussion will be available through the Clearinghouse if the law is changed.

Litigation. Both bills maintain the existing procedures for class actions, appeals, and written retainer agreements. However, both include provisions requiring legal services programs to adopt policies, consistent with applicable ethical rules, to require (or encourage) professional staff to attempt, when appropriate, to negotiate settlements and to use alternative dispute resolution mechanisms before filing suit. In addition, both bills would expand the categories of aliens who could be represented with LSC funds and repeal the prohibition against representation in elementary and secondary school desegregation cases. H.R. 2039 would restrict alien representation with private funds.
Administrative Rulemaking. Both bills continue the provisions of current law that control administrative rulemaking representation with LSC funds. The House bill restricts private funds to the same extent as LSC funds. S. 2870 would impose no restrictions on private funds. Neither bill imposes restrictions on public funds, including IOLTA funds.

Legislative Representation. The two bills differ in their approach to legislative advocacy. S. 2870 would continue current law when using LSC funds but would remove all restrictions on private and non-LSC public funds. H.R. 2039 would impose the same restrictions on both LSC and private funds. Specifically, under the House bill, programs could respond to requests from officials without limitation. They could also engage in legislative activity on behalf of an eligible client when the client is in need of relief that can be provided by the legislative body. While there are no exhaustion requirements or restrictions on participation in coordinated campaigns under H.R. 2039, requirements for project director approval and documentation would continue. H.R. 2039 also prohibits the use of any funds for grassroots lobbying, while S. 2870 only prohibits the use of LSC funds for such activity.

Training. Both bills continue existing restrictions on training with LSC funds. S. 2870 would remove any restriction on the use of private funds for training. H.R. 2039 would apply the same restrictions to private funds that control LSC funds.

Organizing. Neither bill removes the prohibition against organizing clients. However, S. 2870 would permit the use of non-LSC funds for such organizing efforts.