Air pollution control, Hazardous substances, Intergovernmental relations.

Authority: 42 U.S.C. 7401, *et seq.*

Dated: August 26, 1998.

Gail Ginsberg,

Acting Regional Administrator, Region V.

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LEGAL SERVICES CORPORATION

45 CFR Parts 1606 and 1625

Termination and Debarment Procedures; Recompetition; Denial of Refunding

AGENCY: Legal Services Corporation.

ACTION: Final rule.

SUMMARY: This final rule rescinds the Corporation's rule on denial of refunding and removes it from the Code of Federal Regulations. It also substantially revises the Corporation's rule governing the termination of financial assistance. These revisions are intended to implement major changes in the law governing certain actions used by the Corporation to deal with post-award grant disputes. The termination rule now includes new provisions authorizing the Corporation to recompete service areas and to debar recipients for good cause from receiving additional awards of financial assistance.

DATES: This rule is effective on December 23, 1998.

FOR FURTHER INFORMATION CONTACT: Suzanne B. Glasow, 202–336–8817.

SUPPLEMENTARY INFORMATION: The Operations and Regulations Committee (Committee) of the Legal Services Corporation's (LSC or Corporation) Board of Directors (Board) met on April 5, 1998, in Phoenix, Arizona, to consider proposed revisions to the Corporation's rules governing procedures for the termination of funding, 45 CFR Part 1606, and denial of refunding, 45 CFR Part 1625. The Committee made several changes to the draft rule and adopted a proposed rule that was published in the **Federal Register** for public comment at 63 FR 30440 (June 4, 1998). On September 11, 1998, during public hearings in Chicago, Illinois, the Committee considered public comments on the proposed rule. After making additional revisions to the rule, the Committee recommended that the Board adopt the rule as final, which the Board did on September 12, 1998.

This final rule is intended to implement major changes in the law governing certain actions used by the Corporation to deal with post-award grant disputes. Prior to 1996, LSC recipients could not be denied refunding, nor could their funding be suspended or their grants terminated, unless the Corporation complied with Sections 1007(a)(9) and 1011 of the LSC Act, 42 U.S.C. 2996 et seq., as amended. For terminations and denials of refunding, the Corporation was required to provide the opportunity for a ''timely, full and fair hearing'' before an independent hearing examiner.

In 1996, the Corporation implemented a system of competition for grants that ended a recipient's right to yearly refunding. Under the competition system, grants are now awarded for specific terms, and, at the end of a grant term, a recipient has no right to refunding and must reapply as a competitive applicant for a new grant.[1] Accordingly, this rule rescinds 45 CFR part 1625, the Corporation's regulation on the denial of refunding, and removes it from the Code of Federal Regulations as no longer consistent with applicable law.

Comments expressed concern about the effect of the removal of this rule in the new competitive environment. The concern was that, rather than providing a new grant to an applicant, the Corporation might use month-to-month or short term grants within the competitive process to avoid providing hearing rights to recipients. One comment urged the Corporation to refrain from using repeated short term grants to troubled programs about which it has questions about future funding as a means to obviate the need for a due process hearing. According to the comment, short term funding should be used only in those situations where the Corporation fully intends to make a grant for the remainder of the grant term once a specific identified issue is resolved.

The Board requested that the preamble clarify that short term funding is not intended by the Corporation as a means to avoid hearing rights. It is a means to ensure continued legal representation in a service area when the Corporation determines no applicants in a competitive process warrant a long term grant. This could occur for a variety of reasons. For example, in a particular competition, one applicant may not be viable and the other, a current recipient, may be under investigation by the Corporation. Short term funding until the investigation is final is warranted in such a situation. The Corporation would not want to foreclose giving a long term grant to the program if the investigation reveals no substantive noncompliance issues. On the other hand, if the investigation reveals substantive noncompliance by the recipient, the Corporation would have been derelict in its duty if it had made a long term grant to a recipient it had reason to believe could not provide quality legal assistance or comply with grant terms and conditions.

Congress clearly intended the competition process to be a means for the Corporation to ensure that the most qualified programs receive LSC grants. Accordingly, the Corporation's competition rule provides discretion to the Corporation to take all practical steps to ensure continued legal assistance in a service area when the Corporation determines no applicants are qualified for a long term grant. See § 1634.8(c). Short term grants provide one means to that end. Nevertheless, it is not the intent of the Corporation that short term grants be used to avoid applicable hearing rights. They should only be used when they are warranted and appropriate, as discussed above.

The FY 1998 appropriations act made additional changes to the law affecting LSC recipients' rights to continued funding. See Pub. L. 105–119, 111 Stat. 2440 (1997). Section 504 provides authority for the Corporation to debar a recipient from receiving future grant awards upon a showing of good cause. Section 501(c) authorizes the Corporation to recompete a service area when a recipient's financial assistance has been terminated. Finally, Section 501(b) of the appropriations act provides that the hearing rights prescribed by Sections 1007(a)(9) and 1011 are no longer applicable to the provision, denial, suspension, or termination of financial assistance to recipients. This rule implements Section 501(b) as it applies to terminations and denials of refunding. Also in this publication of the **Federal Register** is a related final rule, 45 CFR Part 1623, which implements Sec. 501(b) as it applies to the suspension of financial assistance to recipients.

The change in the law on hearing rights does not mean that grant recipients have no rights to a hearing before the Corporation may terminate funding or debar a recipient. Sections 501(b) and 501(c) of the FY 1998

[1] It is well established that absent express statutory language to the contrary or a showing that the applicant's statutory or constitutional rights have been violated, pre-award applicants for discretionary grants have no protected property interests in receiving a grant and thus have no standing to appeal the funding decision by the grantor. See Cappalli, Federal Grants and Cooperative Agreements, § 3.28; Stein, J., Administrative Law, § 53.02[3][a] (1998); and *Legal Services Corporation of Prince Georges County* v. *Ehrlich*, 457 F. Supp. 1058, 1062–64 (D. Md. 1978).

appropriations act require the Corporation to provide a recipient with ''notice and an opportunity for the recipient to be heard'' before it can terminate a grant or debar a recipient from future grants. In addition, constitutional due process generally requires that a discretionary grant recipient is entitled to ''some type of notice'' and ''some type of hearing'' before its grant funding can be suspended or terminated during the term of the grant period. Stein, Administrative Law at § 53.05[4]. However, the new law in the appropriations act emphasizes a congressional intent to strengthen the ability of the Corporation to ensure that recipients are in full compliance with the LSC Act and regulations and other applicable law. See H. Rep. No. 207, 105th. Cong., 1st Sess. 140 (1997). Accordingly, under this rule, the hearing procedures in part 1606 have been streamlined. The changes are intended to emphasize the seriousness with which the Corporation takes its obligation to ensure that recipients comply with the terms of their grants and provide quality legal assistance. At the same time, the Corporation intends that recipients be provided notice and a fair opportunity to be heard before any termination or debarment action is taken.

The Corporation received three comments on the proposed rule. The commenters generally agreed that the proposed rule represented an appropriate implementation of statutory requirements. However, they also raised several due process concerns and made suggestions for clarification of the terms of certain provisions in the rule. An analysis of the comments and the Corporation's response is set out in the section-by-section analysis below.

Section-by-Section Analysis of Part 1606

Section 1606.1 Purpose

One purpose of this rule is to ensure that the Corporation is able to terminate grants or debar recipients from receipt of future grants in a timely and efficient manner when necessary to meet its obligation to ensure compliance by recipients with the terms of their LSC grants or contracts. Another purpose of the rule is to ensure that scarce LSC funds are provided to recipients who can provide the most effective and economical legal assistance to the poor. Finally, the rule is also intended to ensure that a recipient is provided notice and an opportunity to be heard before it may be debarred or before its grant may be terminated by the Corporation.

Section 1606.2 Definitions

Paragraph (a) of this section defines ''debarment'' as an action to prohibit a recipient from receiving another grant award from the Corporation or from entering into a future agreement with another recipient for LSC funds. Thus, for the period of time stated in the debarment decision, a recipient would not be permitted to participate in future competitions for LSC grants or contracts. Nor could the debarred recipient enter into any future subgrant, subcontract or similar agreement for LSC funds with another recipient for the time set out in the debarment decision. The definition is similar to those used in various Federal agency debarment regulations.

A definition of *knowing and willful* has been added to clarify one of the criteria included to determine whether there has been a substantial violation for the purposes of § 1606.3(b)(5). See discussion of § 1606.3(b)(5) for the Corporation's interpretation and the effect of using the term.

Paragraph (c) defines ''recipient'' as any grantee or contractor receiving funds from the Corporation under Section 1006(a)(1)(A) of the LSC Act, which generally refers to recipients who provide direct legal assistance to eligible clients.

Termination. Paragraph (d) defines ''termination.'' The proposed rule defined a termination as a permanent reduction of funding to distinguish it from a temporary withholding of funds under a suspension. The definitions of termination and suspension were intended to clarify that when funds are suspended, they are returned to the recipient at the end of the suspension period, either because the issue has been or is in the process of being cured, or the Corporation initiates a termination process; whereas, in a termination, it was intended that the funds taken or withheld by the Corporation would not be returned to the recipient at a later date.

One comment pointed out that the use of ''permanently'' in the definition caused confusion in that the term, as applied to a partial termination, could be interpreted as meaning that the termination should be applied to every year of a multi-year grant period. The proposed rule attempted to preclude such an erroneous interpretation by including in the definition a statement that a partial termination will affect only the recipient's current year's funding unless provided otherwise in the termination decision. However, the commenter suggested that the word ''permanently'' be deleted from the definition and instead, a direct statement be added to the definition that clarifies that funds withheld in a termination will not be restored to the recipient. The Board agreed to include language on this point but placed it in § 1606.13(b) rather than the definition of ''termination.'' In addition, the Board deleted the word ''permanently'' from the definition of ''termination.''

A termination may be ''in whole or in part.'' A termination ''in whole'' means that the recipient's grant with the Corporation is completely terminated and the recipient no longer receives LSC funds under the grant. A partial termination or a termination ''in part'' means that only a percentage of the recipient's grant with the Corporation is terminated. The recipient is still a grantee of the Corporation but receives less funding under the grant. The definition of termination also includes language that clarifies that partial terminations will reduce only the amount of the recipient's current year's funding, unless the Corporation provides otherwise in the final termination decision.

Reprogramming. A partial termination does not affect the amount of funding required by statute to be allocated in competition to the affected recipient's service area. The Corporation's appropriations act currently requires that such funding be provided to service areas based on the census count in the area.

This statutory requirement, however, does not mean that the Corporation cannot recover funds awarded under a grant when it sanctions a recipient for cause. The legislative history of the funding provision makes it clear that the Corporation may withhold or recover grant funds for good cause. According to relevant law and Corporation policy, when funds are recovered, they may be reprogrammed and used for similar purposes. The preamble to the proposed rule requested comments on the use of funds recovered by the Corporation. Two comments stated the view that recovered funds should generally stay in the same service area following a recovery. One comment stated that the Corporation should be required to seek another grantee or provide interim contracts in the same service area with the recovered funds.

Applicable law allows the Corporation to reprogram appropriated funds under certain circumstances. See Pub. L. 105–119; See Principles of Federal Appropriations Law, United States General Accounting Office (GAO Redbook) at 2–25. According to the

GAO, the authority to reprogram is implicit in an agency's fiscal responsibilities and exists even absent express statutory authority. Section 605 of the Corporation's FY 1998 appropriations act, permits reprogramming but requires notice to the Corporation's congressional oversight committees for certain types of reprogrammings.

Reprogramming is the utilization of funds within an appropriation for purposes other than those contemplated at the time of the appropriation; it is the shifting of funds from one object to another within an appropriation. GAO Redbook at 6–26. However, reprogrammed funds must be used for activities or uses within the general purposes of the appropriation and may not be used for any purposes in violation of any other specific limitation or prohibition. *Id.* at 2–25; 31 U.S.C. § 1301(a). Basic field funds are appropriated under strict limitations and are thus generally not available for reprogramming before they are used for grant awards. They must be used for basic field grants, allotted to service areas according to a statutory formula and must be awarded pursuant to the Corporation's competition regulations. Once such grants are made, however, it is clear in the legislative history of the Corporation's appropriations acts that the Corporation may recover basic field funds for good cause, see, e.g., 129 Cong. Rec. S14448 (Oct. 21, 1983), and reprogram the recovered funds.

Because it is not feasible or practical to use the recovered funds in exact accordance with all of the strict limitations governing their original allocation, the Corporation may reprogram such funds for other uses as long as the funds are used within the general purposes of the original appropriation. For example, a recovery of basic field funds from a recipient pursuant to a termination certainly cannot be returned to the same grantee and there may not be another grantee in the same service area.

The Board determined that the Corporation should have discretion to determine the best use of recovered funds and not be required to use them for activities it determines are fiscally or programmatically unsound, as long as the Corporation's actions are consistent with the law on reprogramming. The Corporation's current policies provide for reprogramming discretion and are consistent with applicable law as discussed above. The LSC Board's Consolidated Operating Budget Guidelines provide authority variously to the Board and the LSC President to reprogram or reallocate recovered funds for basic field purposes, such as when, pursuant to the competition process, a new recipient replaces another recipient as the recipient of the LSC grant for a particular service area, or when there is a need for emergency relief to particular grantees due to flood or fire damage. To implement this policy, the Board added a provision in § 1606.13 stating that funds recovered by the Corporation pursuant to a termination shall be used in the same service area from which they were recovered or will be reprogrammed by the Corporation for basic field purposes.

Actions that do not constitute a ''termination.'' Paragraph (d)(2)(i) through (d)(2)(v) clarify what is not intended to be included within the definition of termination. Paragraph (d)(2)(i) provides that a reduction or rescission of a recipient's funding required by law is not a termination for the purposes of this part. For example, in 1995, the Corporation was required to reduce its recipients' funding pursuant to Congressional legislation that rescinded the amount of appropriations for Corporation grants and required the termination of a category of recipients.

Paragraphs (d)(2)(ii) and (d)(2)(iii) provide that a recovery of funds pursuant to § 1628.3(c) of the Corporation's rule on fund balances or § 1630.9(b) of the Corporations's regulations on costs standards and procedures do not constitute a termination. The Board added another provision to the list that was not included in the proposed rule to clarify that a withholding of funds pursuant to the Corporation's Private Attorney Involvement rule at 45 CFR Part 1614 is not a termination. See § 1606.2(d)(2)(iv).

Lesser Sanctions. Finally, paragraph (d)(2)(v) provides that a reduction of funding of less than 5 percent of a recipient's current annual level of financial assistance does not constitute a termination. The preamble to the proposed rule explained that administrative hearings are costly and time-consuming for all parties involved and, for certain compliance issues, the Corporation may wish to utilize sanctions less drastic than suspensions or termination, such as less than 5% funding reductions, hereinafter referred to as ''lesser sanctions.'' A policy to utilize lesser sanctions has been implicit in the Corporation's regulations since the early days of the Corporation as indicated in 45 CFR Parts 1618 (in addition to defunding actions, the Corporation may take other actions) and Part 1625 (a denial of refunding does not include a reduction of less than 10% of annualized funding).

The preamble to the proposed rule stated the policy preferred by the Committee that the Corporation should promulgate regulations setting out standards and procedures for applying lesser sanctions before such actions could be taken by the Corporation. One comment expressed agreement with this policy. No change has been made to the policy in the final rule; however, the Board decided to state the policy in the text of the rule by including a provision that states that no lesser sanction shall be imposed except in accordance with regulations promulgated by the Corporation. See § 1606.2(c)(2)(v).

One comment also recommended including a statement in the rule that a lesser reduction of funding should be treated as a dissallowed cost under Part 1630. The Board did not agree. Part 1630 is already available to the Corporation when an action falls within its terms but a questioned cost action is limited to recovering costs identified as specific disallowed expenditures and does not provide authority to impose a fine, for example.

The preamble to the proposed rule asked for comments on whether 5% was the appropriate cutoff to distinguish between a termination and a lesser sanction or whether a dollar amount was appropriate. Two comments stated that a 5% reduction for a large grantee would constitute a substantial reduction of funding and urged the Corporation to adopt a cutoff of 5% or $25,000, whichever is less. Part of the concern of the commenters was that large amounts of funds would be taken from grantees without any due process hearings.

The Board did not agree that 5% is too high a cutoff for large grantees or that the rule should include a dollar amount as a cutoff. It is difficult to state a dollar amount that would be equitable to all recipients, because of the varying sizes of the services areas and the grant amounts provided to recipients. In addition, the 5% was determined to be a level that would not cripple a program but would be sufficient to get the program's attention.

Section 1606.3 Grounds for a Termination

This section sets out the grounds for a termination. Paragraph (a)(1) permits termination for a substantial violation by a recipient of applicable law or the terms or conditions of its grant with the Corporation.

Criteria for substantial violation. Paragraph (b) of this section includes the criteria the Corporation will consider to determine whether there has been a *substantial violation* under paragraph (a)(2). The prior rules on

termination and denial of refunding included two different undefined standards. Terminations were undertaken for *substantial violations* and a denial of refunding for *significant violations.* There has been some confusion over the years about the scope of the meaning of the two standards.

The proposed rule set forth five criteria. One comment criticized certain of the criteria as too vague to be consistent with the fundamental precepts of due process and another comment indicated that the rule attempted to define unclear terms with other unclear terms. One criterion in the proposed rule was ''the importance and number of restrictions or requirements violated.'' One comment suggested deleting this criterion.

In response to the comment the Board revised the criterion in part. Reference to the ''importance'' of the restriction or requirement was taken out as too vague to be useful but the reference to the number of restrictions or requirements violated was retained. How many violations occurred is important to determine the scope of noncompliance and the scope of noncompliance would help determine whether a partial or full termination would be appropriate.

Although not always the case, the number of violations may be distinguished from a pattern of noncompliance in § 1606.3(b)(3), in that a pattern of noncompliance refers to a habit of noncompliance over a period of time while a number of violations may occur as the result of an action taken in one particular case or during a short period of time.

Another criterion in the proposed rule was ''the seriousness of the violation.'' Two comments challenged this standard as too vague. The Board agreed and replaced it with a consideration of ''whether the violation represents an instance of noncompliance with a substantive statutory or regulatory restriction or requirement, rather than an instance of noncompliance with a non-substantive technical or procedural requirement.'' Recipients should refer to the list of statutory restrictions and requirements listed in § 1610.2(a) and (b) which generally constitute substantive restrictions and requirements while a failure to meet a deadline to submit a report would be a non-substantive requirement.

Another criterion addressed by the comments was ''whether the violation was intentional.'' The proposed rule specifically asked for comments on whether this was the appropriate standard and, based on comments, the Board changed the standard to ''knowing and willful'' and included a definition of the term in the rule. It was felt that a definition was necessary because research indicated that there are many variances to the definitions of ''willful and knowing.'' *Knowing and willful* is defined in the rule to mean that the recipient had actual knowledge of the fact that its action or failure to take a required action would constitute a violation and, despite such knowledge, undertook or failed to undertake the action. An example of an application of this standard would be the following. If a recipient has been provided a copy of the Corporation's eligibility regulation which requires that the recipient execute a retainer agreement with each client who receives legal assistance from the recipient and the recipient consistently fails to execute retainer agreements for its clients, then the failure to comply would be knowing and willful. A recipient cannot claim lack of knowledge because its management failed to read the LSC grant requirements and restrictions or properly train recipient staff. Recipients are presumed to have read and agreed to the requirements and restrictions when they sign the terms of the grant awards. On the other hand, if the recipient takes an action where there is arguably insufficient guidance in a rule and the recipient took action based on a good faith interpretation of the rule, and the Corporation subsequently determines the recipient's action to be a violation, it would be reasonable to find that the action was not knowing and willful. When in doubt whether an action may be a violation, recipients should seek guidance from the Corporation prior to taking such an action.

The Corporation will also consider whether the instance of noncompliance is part of a pattern of practice by the recipient and whether the recipient took appropriate action to correct the problem when it became aware of the violation.

Finally, the application of the criteria in this final rule to a particular set of circumstances would permit the Corporation to take action for a single violation or a number of violations.

Retroactive application. The prior rule expressly stated that action would be taken against a recipient only for a substantial violation that occurred at a time when the law violated by the recipient was in effect. This final rule deletes such language as unnecessary. Retroactive application of law is strongly disfavored in the law, and the Corporation may not sanction recipients for violations of a law that was not in effect at the time of the violation.

Violations by staff. Finally, one comment urged that language should be added distinguishing between a violation committed by a member of the recipient's management or board and a violation by a staff member without the knowledge of the board or management. The Board did not agree. The distinction is already implicated in both the fourth and fifth criteria which consider the knowledge of the recipient of the action and the extent to which the recipient took action to cure a problem upon its discovery. However, the recipient has a responsibility to ensure that its staff are fully informed of and act in accordance with the LSC grant requirements and restrictions.

Criteria for a Substantial Failure. Paragraph (a)(2) includes as a ground for termination the substantial failure of the recipient to provide high quality, economical, and effective legal assistance. This provision was in the prior rule. Although the Corporation's competition process provides another method for making quality judgments about and eliminating recipients that perform poorly, this provision has been retained so that the Corporation may act when necessary during the term of a grant or contract to terminate a recipient that has substantially failed to provide high quality, economical, and effective legal assistance.

The preamble to the proposed rule asked for comments on what criteria should be considered for determining ''a substantial failure.'' One comment suggested that, at a minimum, the Corporation should clarify the meaning of ''generally accepted professional standards'' by including references to specific standards, such as the ABA Standards for Providers of Civil Legal Assistance (ABA Standards''), LSC's Performance Measures or other appropriate indicators of quality legal services. Another comment, on the other hand, not only opposed using ''generally accepted professional standards,'' because the term is too vague, it also stated that it would be inappropriate to rely on the ABA Standards because they are somewhat outdated and are aspirational and not intended to state the minimum expectations of a quality program. Thus, it would be inappropriate to rely on the standards as a basis to deny funding to a provider.

After extensive discussion, the Board revised § 1606.3(a)(2) to include reference to § 1634(a)(2) which lists a criterion used by the Corporation to select a grantee under its competition process. This criterion includes consideration of the quality, feasibility and cost-effectiveness of a recipient's

legal services delivery and delivery approach in relation to the Corporation's Performance Criteria and the American Bar Association's Standards for Providers of Civil Legal Services to the Poor. This ground for terminating funding complements the competition process by providing another method for acting on judgments regarding recipients that perform badly. Unlike its use in the competition process where the Corporation would choose the best among competitors, its use in this rule requires a showing that the recipient has *substantially failed* to meet the standards. The Board did not agree that the reference to ''generally accepted professional standards'' is too vague to meet due process requirements. The term has a well understood meaning that can be determined by reference to the various audit, accounting or other performance guidelines to which LSC recipients are subject.

Opportunity to cure. The prior rule required that a recipient be given notice of a violation by the Corporation and an opportunity to take effective corrective action before the Corporation initiated a termination action. The proposed rule eliminated a recipient's right to take corrective action, but left it within the discretion of the Corporation to permit the recipient an opportunity to cure the problem. The comments urged the Corporation to provide some opportunity or a recipient to take corrective action before terminating a grant. One comment urged that, absent unusual circumstances, a decision to terminate a grant should only be made after a recipient has been made aware of problems through such actions as investigations or questioned cost proceedings, has been given ample time to correct the problem and has failed to take the necessary corrective action.

The Board decided to retain the language of the proposed rule which leaves it within the discretion of the Corporation whether to give a recipient an opportunity to cure. The legislative intent underlying Sections 501(b) and (c) of the Corporation's FY 1998 appropriations act was to enable the Corporation to streamline its due process procedures in order to ensure that recipients are in full compliance with LSC grant requirements and restrictions. To provide an opportunity to cure in all instances would slow down the process and tie the Corporation's hands when there is a need to act more quickly. A recipient that has substantially violated the terms of its grant is not entitled to a second chance as a matter of right. Nevertheless, nothing in this rule prohibits the Corporation from giving a recipient an opportunity to cure before acting to terminate. If the Corporation identifies a problem where there is potential for easy correction pursuant to a corrective action plan, the Corporation has discretion to work with the recipient to resolve the matter. In addition, one of the factors considered by the Corporation when determining whether there is a substantial violation is whether the recipient, upon learning of the violation, took prompt corrective action.

Section 1606.4 Grounds for Debarment

Section 504 of the Corporation's FY 1998 appropriations act provides authority for the Corporation to debar a recipient from receiving future grant awards upon a showing of good cause. Debarments are common in the Federal government for both procurement contracts and assistance grants. Causes for debarment range from fraud, embezzlement, and false claims, to a Federal grantee's longstanding unsatisfactory performance or the failure to pay a substantial debt owed to the Federal government. *Principles of Federal Appropriations Law* at 10–28, United States Government Accounting Office (GAO); Grants Management Advisory Service at § 558 (1995).

This section implements Section 501(c) of the Corporation's appropriations act and sets out the grounds for debarment in paragraph (b). The grounds include a prior termination of a recipient for violations of Federal law related to the use of Federal funds, such as Federal law on fraud, bribery, or false claims against the government; or substantial violations by a recipient of the terms of its grant with the Corporation. Also, similar to Federal practice, recipients may also be debarred for knowingly entering into any subgrant or similar agreement with an entity debarred by the Corporation. Clarifying revisions were made to this provision.

Section 1606.4(a)(5), which implements Section 504(c)(5) of the Corporation's appropriations act, permits the Corporation to debar a recipient if the recipient seeks judicial review of an agency action taken under any Federally-funded program for which the recipient receives Federal funds, regardless of the source of funding used by the recipient for the litigation. This provision applies when the recipient files a lawsuit on behalf of the recipient and the lawsuit is related to a program for which the recipient receives Federal funds. It does not apply when the recipient files a lawsuit on behalf of a client of the recipient which seeks judicial review of an agency action that affected the client.

Comments on this ground for debarment expressed serious concerns about the constitutionality of the rule's interpretation of the provision. In response to comments and the legal analysis set out below, the Board revised this ground for debarment to be consistent with constitutional and other applicable law.

It is well-settled in law that Congress has authority to immunize agency decision-making from judicial review, as long as the intent is clear in the law. Where judicial review is precluded, a court has no jurisdiction to hear a dispute over an agency action. Nevertheless, courts are not thereby precluded from conducting a limited review to consider whether the agency acted *ultra vires*, that is, outside of its statutory limits, or violated the Constitution. *Schneider* v. *United States*, 27 F. 3d 1327, 1332 (8th Cir. 1994); *Carlin* v. *McKean*, 823 F.2d 620, 622 (DC Cir. 1987); *Morazsan* v. *United States*, 852 F. 2d 1469, 1477 (7th Cir. 1988). See also *Magana-Pizano* v. *INS*, 1998 WL 550111, 152 F.3d 1213 (9th Cir. 1998).

This law is reflected in the final rule which now provides that recipients will be subject to debarment for seeking judicial review of any agency action under any of their Federally-funded programs, except for limited constitutional or *ultra vires* claims.

Comments also suggested that the language setting out this ground for a debarment be revised for clarity. The Board agreed and the language has been revised.

Section 1606.5 Termination and Debarment Procedures

This section states the due process requirement that, before a recipient's grant or contract may be terminated or a recipient may be debarred, the recipient will be provided notice and an opportunity to be heard according to the procedures in this part.

Section 1606.6 Preliminary Determination

This section sets out the requirements for providing notice to the recipient of the Corporation's preliminary determination to terminate a recipient's funding or to debar a recipient. Under this section the Corporation may simultaneously take action to terminate and debar a recipient in the same proceeding.

The term proposed decision used in this section in the proposed rule has been changed to *preliminary*

determination to be consistent with changes made to the burden of proof provisions, as discussed below.

Paragraph (a) of this section requires that the notice of the preliminary determination be in writing and that it provide the grounds for termination or debarment in a manner sufficiently detailed to inform the recipient of the charges against it, the legal and factual bases of the charges, and the proposed sanctions. Paragraph (b) requires that the recipient be told of its right to request an informal conference and a hearing. Paragraph (c) sets out the circumstances in which a preliminary determination becomes final.

Section 1606.7 Informal Conference

This section is generally the same as § 1606.5 in the prior rule, but has been renumbered and restructured for clarity. It allows the Corporation and recipient to have an informal conference either to resolve the matter at issue through compromise or settlement or to narrow the issues and share information so that any subsequent hearing might be rendered shorter or less complicated.

Language in the proposed rule dropped language from the prior rule stating that the preliminary conference may be adjourned for deliberation or consultation. One comment urged the Corporation to return the adjournment language to the rule stating that adjournments can be of great importance to a recipient that has learned of allegations during the conference that require further investigation before a response can be formulated.

The deletion of the adjournment language was not intended to preclude an adjournment if one is deemed appropriate by the Corporation. It was deleted as unnecessary. Nothing in this section requires that the conference must be completed under any particular time frame and, indeed, the language in this section emphasizes the informality of the conference, thus providing the Corporation a large measure of discretion in determining how the conference will be conducted. Accordingly, the Board did not revise the proposed rule to include adjournment as a matter of right.

This proposed rule has also eliminated the provisions providing a right for the recipient or the Corporation to request a pre-hearing conference. The intent is to simplify and shorten the hearing procedures available for terminations. The informal conference section already provides an opportunity for the parties in the dispute to narrow and define issues and to determine whether compromise or settlement is possible.

Section 1606.8 Hearing

This section delineates the procedures for the due process hearing that will be provided to a recipient before it may be debarred or before its grant may be terminated. The prior process has been simplified by deleting provisions permitting third party participation in the hearing and other unnecessary provisions. The deletion is not intended to mean that third parties may never participate in a hearing. However, the proposed rule would no longer provide a recipient with the right to demand such participation.

Impartial hearing officer. Paragraph (c) provides for an impartial hearing officer who will be appointed by the President or designee. Reference to a designee is included because, occasionally, the President may be disqualified from choosing a hearing officer. Delegation would be appropriate, for example, if the President has had prior involvement in the matter under consideration.

Under the prior rule, which was promulgated to implement Section 1011 of the LSC Act, an independent hearing examiner was required to preside over the hearing. The independent hearing examiner was required to be someone who was not employed by the Corporation or who did not perform duties within the Corporation. Because Section 1011 no longer applies to hearing procedures under this part, recipients no longer have a right to an independent hearing examiner.[2]

Constitutional due process, however, requires that, before funding for a recipient of Federal grants may be terminated during the grant term, the recipient must be provided a hearing before an impartial decision maker. Stein, Administrative Law at § 53.05[4]. An impartial decision maker may be an employee of the Corporation as long as that employee has not prejudged the adjudicative facts and has no pecuniary interest or personal bias in the decision. *Id.; Spokane County Legal Services* v. *Legal Services Corporation,* 614 F. 2d 662, 667–668 (9th Cir. 1980). In order to ensure against such prejudgment, this rule requires that a hearing officer be a person who has not been involved in the pending action.

Comments expressed concern about the elimination of the recipient's right to have an independent hearing examiner, who was required to be a person not employed by the Corporation. Noting that LSC staff is substantially smaller than it has been in previous years, comments stated that there may often be no staff available that would qualify as an impartial hearing officer. One comment suggested that the rule should explicitly state that, in such a case, a person outside of the Corporation could be appointed to preside over the hearing. Two comments urged the Corporation to go beyond what is required by law to provide recipients with a right to an independent hearing examiner.

The Board did not agree that the Corporation should provide a right to an independent hearing examiner in the rule. The rule already permits the Corporation to use an outside hearing officer because it states that the hearing officer ''may'' be an employee of the Corporation. There is also nothing in the rule that requires that the President must first determine if any employee of the Corporation is available before designating an outside person. To require an outside hearing examiner would suggest that the Corporation has ignored the statutory changes adopted by Congress. It is the view of the Corporation that the hearing procedures in the final rule comply with the requirements of due process, in part because it permits the Corporation to appoint a person not employed by the Corporation when necessary to ensure that the hearing officer is impartial.

Open hearings. Comments on paragraph (f) of this section urged that the hearing proceedings should not be closed to the public except for extraordinary circumstances. The standard for closing a meeting in the prior and proposed rules was ''for good cause and the interests of justice.'' In addition, the proposed rule provided that a decision to close a hearing would be made by an impartial hearing officer. One comment viewed this standard as too broad and subject to abuse, but provided no practical or factual reasons why the standard should be higher. The Board made no revisions to this paragraph since experience has not indicated any problems with the current standard.

Burden of proof. The Corporation had the burden of proof under the prior rule. Section 1606.8(l) of the proposed rule placed the entire burden of proof on the recipient. Comments urged the Corporation to place the burden on the Corporation. Comments also pointed out that various statements on the burden in

[2] Section 501(b) of the Corporation's FY 1998 appropriations act provides that Section 1011 of the LSC Act is no longer applicable to the provision, denial, suspension, or termination of financial assistance to recipients. Section 1011 has provided recipients with a right to an independent hearing examiner since 1977.

the preamble and the text appeared to be inconsistent with other provisions of the text of the proposed rule. While § 1606.8(l) put the burden on the recipient, the grounds for debarment required the Corporation to show ''good cause'' before it could debar a recipient, suggesting that the Corporation at least has the initial burden of proof.

The Board decided to revise the rule to place the initial burden on the Corporation to show it has grounds for initiating a termination or debarment action in order to ensure that an action by the Corporation would be based on sufficient evidence to establish grounds for the action. The burden would then shift and the recipient would have to show by a preponderance of evidence on the record that its funds should not be terminated or that it should not be debarred based on the alleged grounds. Shifting the burden in this manner is consistent with the emphasis in current law on strengthening the Corporation's ability to sanction recipients and recompete service areas, see H. Rep. No. 207, 105th Cong., 1st Sess. 140 (1997) and the statutory language that authorizes the Corporation to debar a recipient upon a showing of ''good cause.''

The Board made other revisions to the rule to be consistent with the change to the burden of proof. As noted above, the term ''proposed decision'' was changed to ''preliminary determination.'' The change in this term means that, based on the evidence before it, the Corporation has made an initial determination that it has grounds to take action against the recipient. It does not mean that the recipient could not have a fair hearing because the Corporation has already made up its mind. It simply means that the Corporation employee designated to bring such actions has made a preliminary decision that grounds exist for taking the action. The recipient will have the opportunity to rebut the evidence before an impartial hearing officer who was not involved in making the preliminary decision and to present any legal, factual or equitable arguments it wishes to state its case. The recipient could also appeal the hearing officer's decision to the President of the Corporation.

Section 1606.9 Recommended Decision

Only minor changes have been made to this section, which sets out the requirements for the recommended decision issued by the hearing officer. A reference to the informal conference in paragraph (b) was deleted when an objection was raised to including discussions or documents of the informal conference in the hearing record. Including such discussions and documents would mean that offers of settlement, conditional admissions and other information could then be included in the findings of fact. This is not consistent with standard procedures for settlement conferences and would risk undercutting the ability of parties to negotiate and discuss matters informally in order to avoid a full hearing.

Section 1606.10 Final Decision

Mostly technical revisions are made to this section, which delineates the process by which a party to the termination proceeding may request a review of the recommended decision by the President. Language has been added, however, requiring that the President's review be based solely on the record of the hearing below and any additional submissions requested by the President. A decision by the President is a final decision.

Additional submissions and administrative record. The rule requires that the recommended decision contain findings of significant and relevant facts and state the reasons for the decision. It also requires that all findings of fact be based solely on the record of the hearing or on matters of which official notice was taken. When the recommended decision is appealed to the President, or in a separate debarment proceeding, the rule permits additional submissions to supplement the record.

Comments pointed out that recipients should be able to respond to any additional submissions, especially if such submissions become part of the administrative record. The Board agreed and added additional language to do so in Paragraph (c) in this section. A similar revision was also made to Paragraph (c)(2) in § 1606.11 which includes qualifications to the hearing procedures.

Section 1606.11 Qualifications on Hearing Procedures

The primary intent of this section is to clarify that, if a recipient has already been provided a termination hearing on the underlying grounds for the debarment, the recipient is not due a second full termination hearing under this part. Rather, the recipient will be given a brief review process set out in paragraph (c) of this section. In many cases, the Corporation may utilize the procedure delineated in paragraph (b) of this section, which permits the Corporation to take action simultaneously to terminate and debar a recipient within the same hearing procedure.

One comment noted that provision was not made in this section for circumstances where a debarment action is not based on a prior termination and suggests that the Corporation clarify in the rule that, where debarment is not based on a prior termination hearing, the recipient will receive the full hearing procedures provided for termination actions. Because this was the intent of the proposed rule, the Board revised the rule by adding a new paragraph (a) which provides that the full hearing rights set out in this rule apply to any debarment or termination actions unless the action is based on a prior termination. Thus, in any debarment action where the recipient has not already been provided a termination hearing, the recipient will be provided the same hearing procedures set out in this rule for terminations.

Paragraph (d) permits the Corporation to reverse a debarment decision if there has been a reversal of the conviction or civil judgment upon which the debarment was based, new material evidence has been discovered, there has been a bona fide change in the ownership or management of the recipient, the causes for the debarment have been eliminated, or for other reasons the Corporation finds appropriate. This paragraph is patterned after Federal debarment regulations. See, e.g., 29 CFR § 1471.320.

One comment suggested that a similar reversal provision should also be included in the rule for terminations. The Board did not agree. If a debarment decision is reversed, it permits the recipient to take part in the next competition. However, if a termination is reversed, the funds may no longer be available to return to the recipient. Either the funds may have been reprogrammed or a new recipient may have been awarded the grant for the applicable service area. The Corporation should not bind itself by regulation to a commitment it might not have the means to keep.

Section 1606.12 Time and Waiver

With two exceptions, paragraph (a) is essentially the same as in the prior rule. Paragraph (b) in the prior rule has been deleted in this rule because it implemented a time limit to the proceedings required under law that no longer has effect. Also, paragraph (c) in the prior rule is not included because it provides for the waiver or modification of any provision in this part. Such a sweeping waiver provision has the potential to undo the due process rights of recipients that are required under the

Constitution. The rule already provides sufficient discretion and flexibility.

The only change made to this section from the proposed rule is the addition of paragraph (b) which is moved from § 1606.13 in the proposed rule. Paragraph (b) provides that a failure of the Corporation to meet a time requirement does not preclude the Corporation from terminating funding or debarring a recipient from receiving additional funding. *See Brock* v. *Pierce County*, 476 U.S. 253 (1986).

Section 1606.13 Interim and Termination Funding; Preprogramming

Paragraph (a) of this section requires the Corporation to continue funding the recipient at its current level until the termination proceeding set out in this part is completed. This is consistent with the prior rule and the due process requirement that funding not be terminated until a fair hearing has been provided. It also assures the continuance of service to clients in the affected service area.

Paragraph (b) clarifies that when a recipient's funds are terminated, the recipient loses all rights to the terminated funds. See discussion on definition of termination.

Paragraph (c) was not in the proposed rule and has been added in response to a comment that recommended that the rule explicitly provide for termination funding when the Corporation terminates financial assistance to a recipient in whole. Termination funding is contemplated for some circumstances in § 1606.14 which provides that after a termination, until a new recipient is awarded a grant, the Corporation shall take all practical steps to ensure the continued provision of legal assistance in the service area. This could include termination funding so that the outgoing recipient could finish or transfer pending cases. Transitional funding is also contemplated in the competition rule in § 1634.10 and in the rule on cost standards and procedures in § 1630.5(b)(1).

Paragraph (d) is also new and has been added in response to comments. It provides that funds recovered pursuant to a termination will be used in the same service area from which they are recovered or will be reprogrammed by the Corporation for basic field purposes. See discussion of reprogramming in discussion of § 1606.2.

Section 1606.14 Recompetition

Section 501(c) of Public Law 105–119 authorizes the Corporation to recompete a service area when a recipient's financial assistance has been terminated after notice and an opportunity to be heard. Accordingly, this section authorizes the Corporation to recompete any service area where a final decision has been made under this part to terminate in whole a recipient's grant for any service area. It also provides that until a new recipient has been awarded a grant for the service area pursuant to the competition process, the Corporation shall take all practical steps to ensure the continued provision of legal assistance in the service area pursuant to § 1634.11 of the Corporation's rule on competition procedures.

List of Subjects in 45 CFR Parts 1606 and 1625

Administrative practice and procedures, Legal services.

For reasons set out in the preamble, LSC revises 45 CFR part 1606 to read as follows:

PART 1606—TERMINATION AND DEBARMENT PROCEDURES; RECOMPETITION

Sec.

Authority: 42 U.S.C. 2996e (b)(1) and 2996f(a)(3); Pub. L. 105–119, 111 Stat. 2440, Secs. 501(b) and (c) and 504; Pub. L. 104–134, 110 Stat. 1321.

§ 1606.1 Purpose.

The purpose of this rule is to:

(a) Ensure that the Corporation is able to take timely action to deal with incidents of substantial noncompliance by recipients with a provision of the LSC Act, the Corporation's appropriations act or other law applicable to LSC funds, a Corporation rule, regulation, guideline or instruction, or the terms and conditions of the recipient's grant or contract with the Corporation;

(b) Provide timely and fair due process procedures when the Corporation has made a preliminary decision to terminate a recipient's LSC grant or contract, or to debar a recipient from receiving future LSC awards of financial assistance; and

(c) Ensure that scarce funds are provided to recipients who can provide the most effective and economical legal assistance to eligible clients.

§ 1606.2 Definitions.

For the purposes of this part:

(a) *Debarment* means an action taken by the Corporation to exclude a recipient from receiving an additional award of financial assistance from the Corporation or from receiving additional LSC funds from another recipient of the Corporation pursuant to a subgrant, subcontract or similar agreement, for the period of time stated in the final debarment decision.

(b) *Knowing and willful* means that the recipient had actual knowledge of the fact that its action or lack thereof constituted a violation and despite such knowledge, undertook or failed to undertake the action.

(c) *Recipient* means any grantee or contractor receiving financial assistance from the Corporation under section 1006(a)(1)(A) of the LSC Act.

(d)(1) *Termination* means that a recipient's level of financial assistance under its grant or contract with the Corporation will be reduced in whole or in part prior to the expiration of the term of a recipient's current grant or contract. A partial termination will affect only the recipient's current year's funding, unless the Corporation provides otherwise in the final termination decision.

(2) A termination does not include:

(i) A reduction of funding required by law, including a reduction in or rescission of the Corporation's appropriation that is apportioned among all recipients of the same class in proportion to their current level of funding;

(ii) A reduction or deduction of LSC support for a recipient under the Corporation's fund balance regulation at 45 CFR part 1628;

(iii) A recovery of disallowed costs under the Corporation's regulation on costs standards and procedures at 45 CFR part 1630;

(iv) A withholding of funds pursuant to the Corporation's Private Attorney Involvement rule at 45 CFR Part 1614; or

(v) A reduction of funding of less than 5 percent of a recipient's current annual level of financial assistance imposed by the Corporation in accordance with regulations promulgated by the Corporation. No such reduction shall be imposed except in accordance with regulations promulgated by the Corporation.

§ 1606.3 Grounds for a termination.

(a) A grant or contract may be terminated when:

(1) There has been a substantial violation by the recipient of a provision of the LSC Act, the Corporation's appropriations act or other law applicable to LSC funds, or Corporation rule, regulation, guideline or instruction, or a term or condition of the recipient's grant or contract, and the violation occurred less than 5 years prior to the date the recipient receives notice of the violation pursuant to § 1606.6(a); or

(2) There has been a substantial failure by the recipient to provide high quality, economical, and effective legal assistance, as measured by generally accepted professional standards, the provisions of the LSC Act, or a rule, regulation, including 45 CFR 1634.9(a)(2), or guidance issued by the Corporation.

(b) A determination of whether there has been a substantial violation for the purposes of paragraph (a)(1) of this section will be based on consideration of the following criteria:

(1) The number of restrictions or requirements violated;

(2) Whether the violation represents an instance of noncompliance with a substantive statutory or regulatory restriction or requirement, rather than an instance of noncompliance with a non-substantive technical or procedural requirement;

(3) The extent to which the violation is part of a pattern of noncompliance with LSC requirements or restrictions;

(4) The extent to which the recipient failed to take action to cure the violation when it became aware of the violation; and

(5) Whether the violation was knowing and willful.

§ 1606.4 Grounds for debarment.

(a) The Corporation may debar a recipient, on a showing of good cause, from receiving an additional award of financial assistance from the Corporation.

(b) As used in paragraph (a) of this section, ''good cause'' means:

(1) A termination of financial assistance to the recipient pursuant to part 1640 of this chapter;

(2) A termination of financial assistance in whole of the most recent grant of financial assistance;

(3) The substantial violation by the recipient of the restrictions delineated in § 1610.2 (a) and (b) of this chapter, provided that the violation occurred within 5 years prior to the receipt of the debarment notice by the recipient;

(4) Knowing entry by the recipient into:

(i) A subgrant, subcontract, or other similar agreement with an entity debarred by the Corporation during the period of debarment if so precluded by the terms of the debarment; or

(ii) An agreement for professional services with an IPA debarred by the Corporation during the period of debarment if so precluded by the terms of the debarment; or

(5) The filing of a lawsuit by a recipient, provided that the lawsuit:

(i) Was filed on behalf of the recipient as plaintiff, rather than on behalf of a client of the recipient;

(ii) Named the Corporation, or any agency or employee of a Federal, State, or local government as a defendant;

(iii) Seeks judicial review of an action by the Corporation or such government agency that affects the recipient's status as a recipient of Federal funding, except for a lawsuit that seeks review of whether the Corporation or agency acted outside of its statutory authority or violated the recipient's constitutional rights; and

(iv) Was initiated after the effective date of this rule.

§ 1606.5 Termination and debarment procedures.

Before a recipient's grant or contract may be terminated or a recipient may be debarred, the recipient will be provided notice and an opportunity to be heard as set out in this part.

§ 1606.6 Preliminary determination.

(a) When the Corporation has made a preliminary determination that a recipient's grant or contract should be terminated and/or that a recipient should be debarred, the Corporation employee who has been designated by the President as the person to bring such actions (hereinafter referred to as the ''designated employee'') shall issue a written notice to the recipient and the Chairperson of the recipient's governing body. The notice shall:

(1) State the grounds for the proposed action;

(2) Identify, with reasonable specificity, any facts or documents relied upon as justification for the proposed action;

(3) Inform the recipient of the proposed sanctions;

(4) Advise the recipient of its right to request:

(i) An informal conference under § 1606.7; and

(ii) a hearing under § 1606.8; and

(5) Inform the recipient of its right to receive interim funding pursuant to § 1606.13.

(b) If the recipient does not request an informal conference or a hearing within the time prescribed in § 1606.7(a) or § 1606.8(a), the preliminary determination shall become final.

§ 1606.7 Informal conference.

(a) A recipient may submit a request for an informal conference within 30 days of its receipt of the proposed decision.

(b) Within 5 days of receipt of the request, the designated employee shall notify the recipient of the time and place the conference will be held.

(c) The designated employee shall conduct the informal conference.

(d) At the informal conference, the designated employee and the recipient shall both have an opportunity to state their case, seek to narrow the issues, and explore the possibilities of settlement or compromise.

(e) The designated employee may modify, withdraw, or affirm the preliminary determination in writing, a copy of which shall be provided to the recipient within 10 days of the conclusion of the informal conference.

§ 1606.8 Hearing.

(a) The recipient may make written request for a hearing within 30 days of its receipt of the preliminary determination or within 15 days of receipt of the written determination issued by the designated employee after the conclusion of the informal conference.

(b) Within 10 days after receipt of a request for a hearing, the Corporation shall notify the recipient in writing of the date, time and place of the hearing and the names of the hearing officer and of the attorney who will represent the Corporation. The time, date and location of the hearing may be changed upon agreement of the Corporation and the recipient.

(c) A hearing officer shall be appointed by the President or designee and may be an employee of the Corporation. The hearing officer shall not have been involved in the current termination or debarment action and the President or designee shall determine that the person is qualified to preside over the hearing as an impartial decision maker. An impartial decision maker is a person who has not formed a prejudgment on the case and does not have a pecuniary interest or personal bias in the outcome of the proceeding.

(d) The hearing shall be scheduled to commence at the earliest appropriate date, ordinarily not later than 30 days after the notice required by paragraph (b) of this section.

(e) The hearing officer shall preside over and conduct a full and fair hearing, avoid delay, maintain order, and insure

that a record sufficient for full disclosure of the facts and issues is maintained.

(f) The hearing shall be open to the public unless, for good cause and the interests of justice, the hearing officer determines otherwise.

(g) The Corporation and the recipient shall be entitled to be represented by counsel or by another person.

(h) At the hearing, the Corporation and the recipient each may present its case by oral or documentary evidence, conduct examination and cross-examination of witnesses, examine any documents submitted, and submit rebuttal evidence.

(i) The hearing officer shall not be bound by the technical rules of evidence and may make any procedural or evidentiary ruling that may help to insure full disclosure of the facts, to maintain order, or to avoid delay. Irrelevant, immaterial, repetitious or unduly prejudicial matter may be excluded.

(j) Official notice may be taken of published policies, rules, regulations, guidelines, and instructions of the Corporation, of any matter of which judicial notice may be taken in a Federal court, or of any other matter whose existence, authenticity, or accuracy is not open to serious question.

(k) A stenographic or electronic record shall be made in a manner determined by the hearing officer, and a copy shall be made available to the recipient at no cost.

(l) The Corporation shall have the initial burden to show grounds for a termination or debarment. The burden of persuasion shall then shift to the recipient to show by a preponderance of evidence on the record that its funds should not be terminated or that it should not be disbarred.

§ 1606.9 Recommended decision.

(a) Within 20 calendar days after the conclusion of the hearing, the hearing officer shall issue a written recommended decision which may:

(1) Terminate financial assistance to the recipient as of a specific date; or

(2) Continue the recipient's current grant or contract, subject to any modification or condition that may be deemed necessary on the basis of information adduced at the hearing; and/or

(3) Debar the recipient from receiving an additional award of financial assistance from the Corporation.

(b) The recommended decision shall contain findings of the significant and relevant facts and shall state the reasons for the decision. Findings of fact shall be based solely on the record of, and the evidence adduced at the hearing or on matters of which official notice was taken.

§ 1606.10 Final decision.

(a) If neither the Corporation nor the recipient requests review by the President, a recommended decision shall become final 10 calendar days after receipt by the recipient.

(b) The recipient or the Corporation may seek review by the President of a recommended decision. A request shall be made in writing within 10 days after receipt of the recommended decision by the party seeking review and shall state in detail the reasons for seeking review.

(c) The President's review shall be based solely on the information in the administrative record of the termination or debarment proceedings and any additional submissions, either oral or in writing, that the President may request. A recipient shall be given a copy of and an opportunity to respond to any additional submissions made to the President. All submissions and responses made to the President shall become part of the administrative record.

(d) As soon as practicable after receipt of the request for review of a recommended decision, but not later than 30 days after the request for review, the President may adopt, modify, or reverse the recommended decision, or direct further consideration of the matter. In the event of modification or reversal, the President's decision shall conform to the requirements of § 1606.9(b).

(e) The President's decision shall become final upon receipt by the recipient.

§ 1606.11 Qualifications on hearing procedures.

(a) Except as modified by paragraph (c) of this section, the hearing rights set out in §§ 1606.6 through 1606.10 shall apply to any action to debar a recipient or to terminate a recipient's funding.

(b) The Corporation may simultaneously take action to debar and terminate a recipient within the same hearing procedure that is set out in §§ 1606.6 through 1606.10 of this part. In such a case, the same hearing officer shall oversee both the termination and debarment actions.

(c) If the Corporation does not simultaneously take action to debar and terminate a recipient under paragraph (b) of this section and initiates a debarment action based on a prior termination under § 1606.4(b)(1) or (2), the hearing procedures set out in § 1606.6 through 1606.10 shall not apply. Instead:

(1) The President shall appoint a hearing officer, as described in § 1606.8(c), to review the matter and make a written recommended decision on debarment.

(2) The hearing officer's recommendation shall be based solely on the information in the administrative record of the termination proceedings providing grounds for the debarment and any additional submissions, either oral or in writing, that the hearing officer may request. The recipient shall be given a copy of and an opportunity to respond to any additional submissions made to the hearing officer. All submissions and responses made to the hearing officer shall become part of the administrative record.

(3) If neither party appeals the hearing officer's recommendation within 10 days of receipt of the recommended decision, the decision shall become final.

(4) Either party may appeal the recommended decision to the President who shall review the matter and issue a final written decision pursuant to § 1606.9(b).

(d) All final debarment decisions shall state the effective date of the debarment and the period of debarment, which shall be commensurate with the seriousness of the cause for debarment but shall not be for longer than 6 years.

(e) The Corporation may reverse a debarment decision upon request for the following reasons:

(1) Newly discovered material evidence;

(2) Reversal of the conviction or civil judgment upon which the debarment was based;

(3) Bona fide change in ownership or management of a recipient;

(4) Elimination of other causes for which the debarment was imposed; or

(5) Other reasons the Corporation deems appropriate.

§ 1606.12 Time and waiver.

(a) Except for the 6-year time limit for debarments in § 1606.11(c), any period of time provided in these rules may, upon good cause shown and determined, be extended:

(1) By the designated employee who issued the preliminary decision until a hearing officer has been appointed;

(2) By the hearing officer, until the recommended decision has been issued;

(3) By the President at any time.

(b) Failure by the Corporation to meet a time requirement of this part does not preclude the Corporation from terminating a recipient's grant or contract with the Corporation.

§ 1606.13 Interim and termination funding; reprogramming.

(a) Pending the completion of termination proceedings under this part, the Corporation shall provide the recipient with the level of financial assistance provided for under its current grant or contract with the Corporation.

(b) After a final decision has been made to terminate a recipient's grant or contract, the recipient loses all rights to the terminated funds.

(c) After a final decision has been made to terminate a recipient's grant or contract, the Corporation may authorize termination funding if necessary to enable the recipient to close or transfer current matters in a manner consistent with the recipient's professional responsibilities to its present clients.

(d) Funds recovered by the Corporation pursuant to a termination shall be used in the same service area from which they were recovered or will be reallocated by the Corporation for basic field purposes.

§ 1606.14 Recompetition.

After a final decision has been issued by the Corporation terminating financial assistance to a recipient in whole for any service area, the Corporation shall implement a new competitive bidding process for the affected service area. Until a new recipient has been awarded a grant pursuant to such process, the Corporation shall take all practical steps to ensure the continued provision of legal assistance in the service area pursuant to § 1634.11.

PART 1625—[REMOVED AND RESERVED]

For the reasons set out in the preamble, and under the authority of 42 U.S.C. 2996g(e), 45 CFR part 1625 is removed and reserved.

Dated: November 18, 1998.

Victor M. Fortuno,

General Counsel.

[FR Doc. 98–31251 Filed 11–20–98; 8:45 am]

BILLING CODE 7050–01–P

LEGAL SERVICES CORPORATION

45 CFR Part 1623

Suspension Procedures

AGENCY: Legal Services Corporation.

ACTION: Final rule.

SUMMARY: This final rule substantially revises the Legal Services Corporation's rule on procedures for the suspension of financial assistance to recipients to implement changes in the law governing certain actions used by the Corporation to deal with post-award grant disputes.

DATES: This rule is effective on December 23, 1998.

FOR FURTHER INFORMATION CONTACT: Suzanne Glasow, Office of the General Counsel, 202–336–8817.

SUPPLEMENTARY INFORMATION: The Operations and Regulations Committee (Committee) of the Legal Services Corporation's (LSC) Board of Directors (Board) met on April 5, 1998, in Phoenix, Arizona, to consider proposed revisions to the Corporation's rule on procedures for suspending funding to LSC recipients. The Committee made several changes to the draft rule and adopted a proposed rule that was published in the **Federal Register** for public comment at 63 FR 30446 (June 4, 1998). On September 11, 1998, during public hearings in Chicago, Illinois, the Committee considered public comments on the proposed rule. After making additional revisions to the rule, the Committee recommended that the Board adopt the rule as final, which the Board did on September 12, 1998.

This final rule is intended to implement major changes in the law governing certain actions used by the Corporation to deal with post-award grant disputes. Prior to 1996, LSC recipients could not be denied refunding, nor could their funding be suspended or their grants terminated, unless the Corporation complied with Sections 1007(a)(9) and 1011 of the LSC Act, 42 U.S.C. 2996 et seq., as amended. For suspensions, the Corporation could not suspend financial assistance unless the recipient had been provided reasonable notice and an opportunity to show cause why the action should not be taken. For terminations and denials of refunding, the Corporation was required to provide the opportunity for a ''timely, full and fair hearing'' before an independent hearing examiner.

In 1996, the Corporation implemented a system of competition for grants that ended a recipient's right to yearly refunding. Under the competition system, grants are now awarded for specific terms, and, at the end of a grant term, a recipient has no right to refunding and must reapply as a competitive applicant for a new grant.

The FY 1998 appropriations act made additional changes to the law affecting LSC recipients' rights to continued funding. See Pub. L. 105–119, 111 Stat. 2440 (1997). Section 501(b) of the appropriations act provides that a recipient's hearing rights under Sections 1007(a)(9) and 1011 are no longer applicable to the provision, denial, suspension, or termination of financial assistance to recipients. This rule implements this new law as it applies to suspensions. Another final rule, also in this publication of the **Federal Register**, deals with the new law as it applies to terminations and denials of refunding. See final rule 45 CFR part 1606, which would revise the Corporation's policies and procedures for terminations and adds provisions dealing with debarments and recompetition.

The change in the law regarding suspensions does not mean that grant recipients have no hearing rights before their funds are suspended. Constitutional due process generally requires that a discretionary grant recipient is entitled to ''some type of notice'' and ''some type of hearing'' before its grant funding can be suspended or terminated during the grant period. Stein, Administrative Law at § 53.05[4]. However, the new law emphasizes a congressional intent to strengthen the ability of the Corporation to ensure that recipients are in full compliance with the LSC Act and regulations. See H. Rep. No. 207, 105th. Cong., 1st Sess. 140 (1997). Accordingly, under this rule, the hearing procedures for suspensions have been streamlined. The changes emphasize the seriousness with which the Corporation takes its obligation to ensure that recipients comply with the terms of their grants and provide quality legal assistance but, at the same time, to provide recipients with notice and a fair opportunity to be heard before any suspension action is taken.

The Corporation received three comments on the proposed rule. The commenters generally agreed that the proposed rule represented an appropriate implementation of statutory requirements, but made recommendations for clarifications or revisions for policy changes. An analysis of comments and recommendations for changes to the proposed rule is provided below.

Section-by-Section Analysis

Section 1623.1 Purpose

This section is revised from the prior rule to clarify the purpose of a suspension, as opposed to other sanctions the Corporation might choose to apply to a recipient. A suspension is one of several actions that may be taken by the Corporation to ensure the compliance of LSC recipients with the terms of their LSC grants. A suspension is generally used by Federal agencies as a temporary withdrawal of a grantee's authority to obligate or receive grant funds, pending corrective action by the