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May 9, 2003

By Hand

Honorable Frederic Block
United States District Judge
United States District Court for the
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: Velazquez v. Legal Services Corp., 97 CV 00182 (FB);
Dobbins v. Legal Services Corp., 01 CV 8371 (FB)

Dear Judge Block:

We are writing on behalf of defendant LSC to respond to the letter submitted by the plaintiffs on April 25, 2003 and to provide the Court with LSC's response to the "Configuration Proposal" attached to plaintiffs' letter. A copy of LSC's response is attached to this letter at Tab A.

As the Court can see from the Configuration Proposal and LSC's response thereto, the Proposal is not actually a concrete proposal for two specific organizations to enter into a particular plan of affiliation; it is a generalized outline of a set of hypothetical affiliations. For example, the Proposal is submitted by at least three grantee plaintiffs who propose an affiliation with organizations that have not yet been formed or even named. Proposal at p. 1 n. 1.

Moreover, the Proposal provides that the LSC entity and the non-LSC entity "may operate in the same physical premises. *Id.* at p. 3 (emphasis supplied). But the Proposal does not state what the two entities will actually do: share all, some, or none of the space. Thus, it is possible that the LSC entity and the non-LSC entity will share all of the space and have no physical separation whatsoever.

Similarly, the Proposal states that the "two affiliates" "may" share some or all of a Board of Directors, "legal, support and supervisory personnel (including an Executive Director, who may direct both programs)," and "common intake and allocation mechanism to refer clients and cases between the two affiliates. . . ." *Id.* (emphasis supplied). Thus, according to the Proposal, it is possible that the two entities will have all the same directors, supervisors, and employees and have no separation of personnel whatsoever.

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LSC cannot agree that this Proposal satisfies the Program Integrity Regulations. Broadly speaking, the Proposal suffers from two general defects.

First, the purported “proposal” lacks any meaningful explanation of how the LSC grantee and the non-LSC entity will actually work together. For LSC to evaluate a proposal, the proposal must contain concrete representations as to how the two organizations “will” affiliate, not open-ended suggestions of how they “may” affiliate. While LSC often construes concrete plans under the Program Integrity Regulations, LSC has never construed a plan as vague and hypothetical as the plan currently before the Court. Thus, LSC has invited the Brennan Center to submit an actual plan for affiliation which includes specific and concrete information.

Second, to the extent the Proposal contains any information about the proposed affiliation, the only restrictions on that affiliation amount to “mere bookkeeping separation.” The Proposal does not include any suggestion that the “two affiliates” will have any physical separation whatsoever, any separation of personnel whatsoever, or any financial separation whatsoever. Mere bookkeeping separation is explicitly proscribed by the Program Integrity Regulations.

LSC’s response to this Proposal does not give rise to an “as applied” challenge, for three reasons.

First, as with the QLSC proposal from 1997, the Proposal violates the *facial* language of the Program Integrity Regulations. Specifically, the Proposal violates the facial requirement that any affiliation include some physical and financial separation beyond mere bookkeeping separation. Thus, in refusing to state that this Proposal would satisfy the Regulations, LSC did not actually have to *apply* the Program Integrity Regulations at all.

Put differently, if the Court were to order LSC to allow the three plaintiff grantees to enter into the proposed affiliate relationships, the Court would not be granting a limited exception to the Regulations so that they would not be applied unconstitutionally as to specific grantees; the Court would be overturning the Regulations lock, stock and barrel. Such relief is the hallmark of a facial challenge, not an “as applied” challenge. *Prayze FM v. F.C.C.*, 214 F.3d 245, 247, 251 (2d 2000) (broadcaster challenging licensing policy that has not been applied to it has standing to bring facial challenge seeking to invalidate statute but not standing to bring “as applied” challenge seeking to bar FCC from enforcing statute against it.).

Second, the Proposal itself is not meaningful and does not present a concrete dispute for resolution; it asks LSC for an advisory opinion on an extraordinarily broad hypothetical. In fact, plaintiffs’ primary complaint about LSC’s interpretation of the Program Integrity Regulations is that “grantee plaintiffs [are] unable, by applying to LSC, to obtain a ruling on the configuration that will allow the greatest possible exercise of their First Amendment rights consistent with the government’s legitimate interests, [and] they cannot even obtain a explanation as to how to configure themselves to allow the greatest exercise of their First Amendment rights consistent with LSC’s program integrity regulations.” Pl. Reply Mem. at 12. The Court does not have jurisdiction to issue an advisory opinion on that question. *Flynt*



v. *Rumsfeld*, 245 F.Supp.2d 94, 102 (D.D.C. 2003) ("Courts do not exist to provide advisory opinions ungrounded in the rights of an injured party").

Third, LSC has offered to evaluate a more concrete plan of affiliation, if plaintiffs submit one. Thus, plaintiffs' dispute is not ripe for adjudication. *Air Espana v. Brian*, 165 F.3d 148, 151-52 (2d Cir. 1999) (ripeness doctrine precludes "as applied" challenge to regulations before agency review is complete); *McDonough v. U.S. Dept. of Labor*, 646 F. Supp. 478, 481-82 (D. Me. 1986) (Court has no jurisdiction over "as applied" challenge to regulations when agency has not yet considered plaintiff's case).

For all these reasons, the Court should hold that plaintiffs have not presented a genuine "as applied" challenge to the congressional restrictions or the LSC Regulations and lack standing to assert their claims. The motion for a preliminary injunction should be denied, and the complaints dismissed.

Finally, the plaintiffs ask the Court to consider only their two-year-old preliminary injunction motion and, apparently, to defer consideration of LSC's motion to dismiss the complaint. LSC does not see any basis for deciding this case piecemeal. To the contrary, given the jurisdictional nature of LSC's motion to dismiss, LSC believes it is incumbent to decide the standing questions at this time. This litigation has been ongoing for six years. LSC has an important interest in seeing this case decided with finality.

Respectfully submitted,

Stephen L. Ascher

Enclosure

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