

Drawing Lines for Dollars

Scientists get federal and private funding under one roof. Why can't legal aid lawyers?

By Laura K. Abel

No one has ever called the stem cell debate rational or straightforward. But when it comes to understanding how the government tries to control privately funded initiatives—even in seemingly unrelated areas like civil legal aid for the poor—the stem cell debate can be brilliantly illuminating.

In 2001, President George W. Bush warned that “a fundamental moral line” prevented the federal government from endorsing

Points of View

or funding stem cell research that would result in “further destruction of human embryos.” Based on the president’s directive, and on federal policy in place since 1994, scientists working on stem cell research had been compelled to establish two separate laboratories: one for their publicly funded stem cell research, the other for the privately funded stem cell research prohibited by the federal government.

Such duplication is incredibly expensive. Who can afford two sets of laboratory equipment? What scientist wants to squander precious time moving back and forth between labs? What edge in conquering disease is lost when scientists operate in relative isolation from each other, without the benefit of views routinely shared by colleagues occupying the same office space? How many talented scientists avoid the entire field of stem cell research because of these bureaucratic hurdles?

SIDE-BY-SIDE DOLLARS

Recognizing these concerns, this past spring the National Institutes of Health told government-funded scientists that it is OK to conduct privately funded stem cell research alongside their federally funded research, so long as they use rigorous bookkeeping methods to ensure that only private dollars pay for

the stem cell experiments. This directive follows government-wide accounting standards that have been in place for more than a quarter-century.

Lawyers for the poor whose work is financed with both federal and private funding have been paying close attention to the NIH’s instructions. In 1996, Congress prohibited these legal aid lawyers from using private funds to engage in a wide range of activities. These activities include representing low-income people in class actions, representing many documented immigrants, representing clients before legislatures and administrative agencies, and many other important activities. The Legal Services Corp., which funnels the federal money to the lawyers, instructed the lawyers that in order to engage in these activities they must set up physically separate offices that receive no federal funding.

Like the federally funded scientists, lawyers representing the poor have found operating out of two sets of offices to be wasteful, duplicative, and bureaucratic. Ultimately, it is vulnerable clients who suffer the consequences. Just as the forced duplication of research drains resources from efforts to cure diseases, the forced duplication of legal aid programs drains resources needed by low-income women seeking protection from domestic violence, children attempting to secure essential medical treatment, elderly citizens fighting predatory lenders, and farmers struggling to save their land.

Under the current rules, lawyers are forced to pay for two sets of offices, computer systems, and other equipment. Lawyers must spend time commuting between different offices, wasting time that their clients desperately need. And, perhaps most destructive of all is the effect on lawyers conducting class action litigation offering the prospect of relief to substantial numbers of individuals. Those lawyers paid for with private money find it hard to communicate with the lawyers working to meet day-to-day legal needs of individual clients with federal funding, making both sets of lawyers less effective.

Legal aid lawyers and their clients find hope in the NIH's common-sense policy clarification. The federal government wants neither to fund, nor to endorse, forbidden stem cell research. The NIH policy, which reflects cost principles that have been in place since at least the Reagan administration, recognizes that physically separate facilities are not needed to achieve these goals. All that is required is adherence to rigorous bookkeeping practices that follow accepted accounting principles, so that auditors can determine that government funds were not spent on the disallowed activities.

THE SAME SOLUTION

It would seem that Congress should embrace this same solution for its concerns about LSC grantees, allowing the duplication and inefficiencies faced by legal aid to come to a stop. But instead, the government has spent the last five years in federal court, relentlessly resisting a constitutional challenge to the physical-separation requirement for legal aid lawyers.

The government's inconsistent positions in the stem cell research context and in the legal aid context are surprising. The importance of medical research weighs strongly in favor of allowing stem cell research to continue unimpeded with private funding. There are equally strong (if not stronger) policy and constitutional arguments in favor of allowing legal aid lawyers to use their private funding to represent low-income clients who would otherwise have no access to our system of justice.

After all, there is no federal policy against using the class action mechanism. Indeed, Congress and the courts have recognized that class actions can have significant benefits for litigants and for the judicial system. Nor is there a federal policy against providing the representation that helps protect immigrants against exploitation (and in the process assists courts that would otherwise have to expend resources dealing with unrepresented

litigants). Nor is there a federal policy against helping low-income individuals educate legislatures about the problems facing their communities. On the contrary, the interests of equal justice for all are better served when legal aid attorneys engage in each of these activities.

This lack of a policy justification for the physical-separation requirement is particularly appalling because the requirement intrudes on the constitutionally protected ability of legal aid lawyers and their clients to associate together in order to enforce the clients' rights. As the Supreme Court has warned, "Collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment."

For many thousands of poor people, legal aid offices that receive some federal funding offer the only avenue to justice. And, for many legal aid clients, it is about even more than justice. Like the patients who hope stem cell research will save their lives, they are focused on basic survival: a roof over their heads, escape from a batterer, the ability to buy food and protect their children. By requiring costly physical separation instead of the standard accounting practices that can ensure that federal dollars do not fund certain types of legal aid, Congress and the LSC have severely hobbled legal aid advocates, undermining their efficiency, interrupting their clients' lives, and impeding the goal of equal justice for all. Justice demands that they re-examine this decision.

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