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Via email: [JonathanBr@fortlauderdale.gov](mailto:JonathanBr@fortlauderdale.gov)

FROM : Anthony J. Karrat  
Executive Director  
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RE: 2013 HOPWA Grant Funds – RFP No. 825-11034  
Memorandum No. 12-0146 dated September 24, 2012 (hereinafter “Memorandum”)

DATE: October 5, 2012

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## **I. Introduction**

24 C.F.R. §574.310(e) addresses the termination of HOPWA recipients from housing programs assisted under HOPWA funding. Of significant note, 24 C.F.R. §574.310(e) (2)(i) states :

Violation of requirements—(i) Basis. Assistance to participants who reside in housing programs assisted under this part **may be terminated** if the participant violates program requirements or conditions of occupancy. **Grantees must ensure that supportive services are provided, so that a participant's assistance is terminated only in the most severe cases** (emphasis added).

**The proposal submitted by Legal Aid Service of Broward County, Inc. (LASBC) ensures that “supportive services are provided, so that a participant's assistance is terminated only in the most severe cases”.**

The representation by an attorney provides a necessary component of the requirements of due process. Indeed, the mere *proposal for termination* by a HOPWA provider is not a final decision regarding termination. The participant is entitled to a due process hearing at which time the provider must establish that the participant has violated rules governing the HOPWA program. An attorney assists the participant in establishing why he/she has not violated the program, so long as a meritorious defense can be formulated.

There is no conflict of interest for the City in funding both sub recipients at a termination hearing : one who is recommending termination and the other who is defending against it. The Committee created by the City to review the HOPWA proposals *specifically addressed this concern* in its open meeting on September 6, 2012 at which time Jeri Pryor, in her advisory role, requested the Committee consider the possibility of this exact conflict.

Michael McGuigan, President/CEO of Broward House, a HOPWA sub recipient, commented during the discussion. He opined that Legal Aid’s proposal demonstrated the exceptional opportunity for the City, as funder of the sub recipients, to determine a fact in dispute between two sub recipients. Strikingly, it should be noted that Broward House administers the Tenant Based Voucher Program (TBRV) and is therefore a specific provider which might be seeking termination; i.e.: Mr. McGuigan recognized the due process protection offered by LASBC’s proposal was crucial, even in proceedings initiated by his own organization and at which LASBC would be his organization’s adversary. Mr. McGuigan’s position highlights the recognition that our American system of resolving disputes, while an adversary process, is a fair one which affords protections to all persons and where an impartial decisionmaker resolves those differences.

Discussion by the Committee also included the recognition that if a person was entitled to representation, the Committee should not impede that relationship. Using competitive ranking criteria, the Committee rated Legal Aid's proposal as the number one eligible activity in the non-housing supportive services category thereby finding the proposal meets the national objectives established by HUD.

24 C.F.R. §574.625, which governs the HOPWA program, defines a conflict of interest in those situations where an :

employee, agent, consultant, officer, or elected or appointed official of the grantee or project sponsor and who exercises or has exercised any functions or responsibilities with respect to assisted activities, or who is in a position to participate in a decision making process or gain inside information with regard to such activities, may obtain a financial interest or benefit from the activity, or have an interest in any contract, subcontract, or agreement with respect thereto, or the proceeds there under, either for himself or herself or for those with whom he or she has family or business ties, during his or her tenure or for one year thereafter.

No conflict of interest exists according to this Federal Regulation or any other law raised by the City Memorandum.

## **II. Similar Funding Source Does Not Create A Conflict of Interest**

A similar funding source of two opposing providers does not create a conflict of interest. As support for that proposition, Legal Aid specifically argues that several other government functions which must operate within the restrictions and requirements of due process, fund opposing positions; there is no concern for a "conflict of interest" between the providers. The system recognizes that the common funding source does not alter or impede the funded body from operating as it is legally mandated to do. To wit:

- Atlanta Legal Aid Society, Inc. has been a HOPWA sub recipient for the last 15-18 years through their HOPWA Administrator, the *City of Atlanta*. Atlanta Legal Aid provides legal representation to HOPWA clients, including but not limited to, representation at termination proceedings initiated by other sub recipients of the HOPWA grants.
- The State of Florida through individual Counties, funds the State Attorney's Office to prosecute crimes while also funding the Public Defender's Office and the Office of Criminal Conflict and Civil Regional Counsel to provide free defense to those accused. On page two of the Memorandum, the City emphasizes that a participant must be given the opportunity to be represented by *their own counsel*, as if that phrase in the HUD regulations means the participant must pay for his/her own counsel. That simply is not so. This provision recognizes that the defending participant must have the opportunity to be represented by their own counsel. Many HOPWA participants cannot afford private counsel. Therefore, the funding of LASBC to provide free legal counsel to HOPWA participants clearly and necessarily furthers the mandate of being given the opportunity to have their own counsel.
- The State of Florida funds the Department of Children and Families to oversee the administration of the foster care system and the removal of children from their parents. Other State funding is provided to the Office of Criminal Conflict and Civil Regional Counsel to represent parents who seek to dispute the removal of their children.

- Akin to the City's other concern, that of funding the "arbiter of the legal/administrative challenge by the terminated participant", the State likewise funds the Judiciary system which, as an independent and impartial body, adjudicates criminal and foster care disputes.
- On December 1, 2011, The Department of Veteran Affairs issued an availability of funds for a supportive services grant under the Supportive Services for Veteran Families (SSVF). This grant, similar to the HOPWA program, funds a Continuum of Care for the provision of supportive services for a targeted population. Specifically authorized under this grant is the provision of free legal representation to Veterans in issues including, but not limited to, the administrative appeal of the denial of Veteran and other government benefits.
- LASBC was a sub recipient of the federally funded Homeless Prevention Rapid Re-Housing Program (HPRP). As a collaborative partner in this extremely successful program, Legal Aid was funded to represent tenants in various landlord/tenant issues. Included amongst those responsibilities was our presence at administrative informal reviews on behalf of applicants who had been denied rent assistance by one of the other HPRP providers.

**III. Providing the opportunity to have their own legal counsel fosters dignity, assists HOPWA clients in participating meaningfully in the life of the community, and allows them to meet their basic needs for housing which is a fundamental goal of the HOPWA program.**

Courts across the nation have held that continued participation in a Section 8 program is an essential, protected property interest because eligible participants rely on the subsidy to meet their basic need for housing. *Basco v. Machin*, 514 F.3d 1177 (11<sup>th</sup> Cir. 2008); *Clark v. Alexander*, 85 F.3d 146 (4<sup>th</sup> Cir. 1996). "Welfare provides the means to obtain essential food, clothing, housing, and medical care", (emphasis added), *Id* citing *Nash v. Florida Industrial Commission*, 389 U.S. 235, 239, 88 S.Ct. 362, 366, 19 L.Ed.2d. 438 (1967).

The public policy considerations behind the United States welfare system are overwhelming. This country has historically been committed to fostering "the dignity and well-being of all persons within its borders" and the recognition that poverty is oftentimes thrust upon the poor by forces outside of their control, *Goldberg v. Kelly*, 397 U.S. 254, 265 (1970).

Welfare is designed to meet some of the basic needs of the poor in an attempt to offer the impoverished the same opportunities of "others to participate meaningfully in the life of the community", *Id*. Section 8 benefits are "welfare" as they provide the means to obtain essential housing. Welfare is an essential source of security to qualified recipients, however traditionally, the rights of the poor to their "entitlements, although recognized by public policy, have not been effectively enforced", *Goldberg* at 263, FN 8, citing *Reich, Individual Rights and Social Welfare : The Emerging Legal Issues*, 74 Yale L.J. 1245, 1255 (1965), *Reich, The New Property*, 73 Yale L.J. 733 (1964).

**IV. The mere allegation of a program violation does not terminate the participant.**

The City's position treats the *proposal to terminate* HOPWA benefits as equivalent to the *termination*. Specifically, in several instances, the City Memorandum refers to the participant as "terminated" prior to an administrative hearing. A participant is not "terminated" until the review process has been completed. Therefore, these classifications appear to be a pre-determination by the City that if a HOPWA sub recipient recommends termination, it will be upheld by the hearing officer. For example,

- On page one, the City states that “Legal Aid’s representation, as expressly defined in its response, has historically, and continues to include, legal counsel to, and/or the representation of, *terminated program participants* through the formal administrative process mandated by 24 CFR §574.310(e)(2), as a result of Program requirement violations or conditions of occupancy” (emphasis added).
- Also on page one, the City identifies what seems to be its assumption that Legal Aid cannot simultaneously agree that clients who violate HOPWA regulations should be terminated and also represent persons proposed for termination in administrative proceedings. However, this suggested dichotomy simply does not exist. Legal Aid agrees that if it is proven that a person violated a program rule, after completion of the review process, the law provides for the termination of the offender from the program. However, at that pre-termination hearing, the participant has a right to present a defense which may include procedural defects in the process as well as factual evidence in direct contradiction to the provider’s case. Undeniably, there may be situations where termination is proposed but is unwarranted; just as there may be terminations proposed that are warranted.
- On page two, the City again likens the proposal to terminate to a foregone conclusion that termination will occur by raising the “third” concern that the “funding of Legal Aid’s representation of *terminated participants* and simultaneous funding of the sub recipient providing housing, would be an ineffective, inefficient and counter-productive use of Program funds” (emphasis added). Legal Aid suggests that our proposal is one of the *most effective, efficient and productive* uses of the Program funds. In light of the intent of 24 C.F.R. §574.310(e) that termination occur only *in the most severe cases*, Legal Aid’s participation will be an additional guarantee that City sub recipients comply with this mandate. Without our participation, it is not inconceivable to imagine that some HOPWA participants will be wrongfully terminated and thereby placed at risk of homelessness and a deteriorated medical condition. If Legal Aid assists a participant in preventing an unlawful termination, the payment for our services proves to be :
  - *effective* because the participant is not wrongfully terminated;
  - *efficient* because the assistance of counsel promotes the effective administration of the process which ultimately leads to the effective administration of justice;
  - *productive* in the provision of services which comport with due process.
- In affirming the right to a pre-termination hearing, the U.S. Supreme Court stated “the stakes are simply too high for the welfare recipient, and the *possibility for honest error or irritable misjudgment too great*”, *Goldberg v. Kelly*, 397 U.S. 254, 266 (1970). Additionally, the U.S. Supreme Court stated that the “uninterrupted provision of welfare, coupled with the State’s interest in avoiding the erroneous termination clearly outweighed the State’s competing concern to prevent any increase in its fiscal and administrative burdens”, *Goldberg v. Kelly*, 397 U.S. 254, 266 (1970). By way of extension, the *possibility for honest error or irritable misjudgment is too great* and the stakes are too high for the HOPWA participant to be denied free legal counsel at termination hearings.
- The rights expressed by the *Goldberg* Court were extended to public housing recipients in *Caulder v. Durham Housing Authority*, 433 F.2d 998 (1970) and *Escalera v. New York City Housing Authority*, 425 F.2d 853 (1970). The *Caulder* Court stated “(t)he “privilege” or the “right” to occupy publicly subsidized low-rent housing seems to us to be no less entitled to due process protection than entitlement to welfare benefits which were the subject of decision in *Goldberg* or the other rights and privileges referred to in *Goldberg*. The program of subsidized low-cost public housing has been undertaken to serve a variety of state interests. *Should an*

*eligible tenant be wrongfully evicted, some frustration of these interests will result. The impact on the tenant is no less.* Not only is he, by definition, one of a class who cannot afford acceptable housing so that he is "condemned to suffer grievous loss," but should it be subsequently determined that his eviction was improper the wrong cannot be speedily made right because of the demand for low-cost public housing and the likelihood that the space from which he was evicted will be occupied by others. In short, both governmental and individual interests are furthered by affording due process in the eviction procedure", *Id* at 1003 (emphasis added).

- Finally, in its "fifth" point, the City raises a fear that Legal Aid's representation at termination hearings impedes the ability to effectively administer the Program for "eligible" persons and its ability to comply with its HUD regulations regarding administration of the Program.
  - 24 C.F.R. §574.300 defines eligible activities which are available to eligible persons. 24 C.F.R. §574.3 defines "eligible person" as a "person with acquired immunodeficiency syndrome or related diseases who is a low-income individual, as defined in this section, and the person's family..."
  - According to the aforementioned Federal Regulations, eligibility defines a status for entry into the HOPWA program. It is not a factor in termination from the program. Although the City refers to "eligible" persons, the reference is somewhat misplaced in that the definition of eligibility does not reference the termination process. Therefore, a violation of program rules can lead to termination from the Program, but it does not affect or alter the person's "eligibility".
  - The City states that "Legal Aid's express non-housing legal services *challenging terminations of Program participants would be benefitting non-eligible, terminated participants of the Program*" (emphasis added). Once again, the City incorrectly assumes the mere proposal to terminate renders the participant ineligible and is inherently "inconsistent with the City's obligations and responsibilities in funding financial assistance, housing and supportive services programs that assist people living with HIV/AIDS ..." The City's exclusion of Legal Aid's defense at termination hearings violates the language and spirit of HOPWA. Clearly, and as stated earlier, a participant is not terminated from the Program upon the mere allegation of a violation. A violation does not transform into a termination until the review process is completed.

## **V. Conclusion**

Legal Aid Service of Broward County, Inc. asserts that no conflict of interest has been demonstrated by the City and further, there is no conflict which would prevent LASBC from receiving funding to provide this vital opportunity for HOPWA participants to have their own counsel.

LASBC is recognized by over 150 Broward County agencies as a vital resource and community partner. Included amongst those agencies which routinely seek our legal assistance are HOPWA partners: CareResource, Broward House, Broward Regional Health Planning Council, SunServe, Minority Development & Empowerment, Mount Olive and Susan B. Anthony. These organizations, and the persons they serve, will benefit from Legal Aid's participation in the HOPWA termination process.

The Housing Opportunities for Persons with AIDS (HOPWA) Program was authorized by the National Affordable Housing Act of 1990 and revised under the Housing and Community Development Act of 1992 to provide states and localities with the resources to devise and implement long-term comprehensive strategies for meeting the housing needs of low-income persons with AIDS and related diseases and their families. As an eligible municipality, the City of Fort Lauderdale receives a HOPWA formula grant award from HUD annually which is administered by its Housing and Community development division (HCD) of the Department of Planning and Zoning. In turn, HCD allocates these funds to eligible project

sponsors such as LASBC, following an application process. The proposal submitted by LASBC is consistent with HUD's HOPWA Program goals of maintaining housing stability and preventing homelessness. The proposal presents an innovative strategy to provide supportive services to further the City's objective as stated in the 2010-2015 Consolidated Plan to increase housing stability and reduce homelessness thereby increasing access to care through the Ryan White Care Act Program administered by Broward County.

As was discussed in great length at the City Commissioners' Meeting on September 18, 2012, the purpose of the HOPWA program is to provide safe housing to as many HOPWA clients as is possible under the Continuum of Care. The LAS proposal supports the Continuum of Care because our advocates will work with Program partners in assuring that Program objectives are not compromised and that unlawful terminations from the Program do not occur.

In Policy Perspective on Housing and HIV/AIDS, Henry Cisneros asserts that persons living with HIV/AIDS can survive "indefinitely with the right medicines and appropriate therapies *if they are in a stable and safe living environment*" and that the "death rate for persons with HIV/AIDS who are homeless is five times that of persons with HIV/AIDS who are in stable housing", AIDS Behav (2007) 11:S7-S8, June 2007 (emphasis added). Cisneros, the former Secretary of the US Department of Housing and Urban Development, states "housing in and of itself is a first-step intervention for the prevention and treatment of HIV/AIDS" and cites to the 2005 Housing and HIV/AIDS Housing Coalition for the critical proposition that "housing is a pre-condition for effectively assisting homeless persons who are vulnerable to HIV/AIDS".

Recommendations from the HIV/AIDS Coalition included supportive housing services; Legal Aid highly recommends that the City adopt all of our proposed legal services as a critical component of supportive housing services. Legal Aid supports Cisneros' conclusions that there is a direct relationship between effective HIV/AIDS prevention and stable housing.

Housing by itself doesn't guarantee the end of the desperate spiral of personal decline. But a stable place to live does make it possible to begin to untie the knot of challenges of life with HIV/AIDS. It stops the disorienting acceleration of deterioration, the unforgiving cycle of complications, offering instead a place to rest, to be safe, to receive regular therapies, and a place to gather one's thoughts for the challenges ahead. Housing is a place to safeguard possessions, to eat regularly, to gather family members, to pray, to study, to groom, to heal. A place to call home is respite from the mean streets and it is a new chance at life. Policy Perspective on Housing and HIV/AIDS, AIDS Behav (2007) 11:S7-S8, June 2007.

Legal Aid Service of Broward County, Inc. is pleased to have been provided this opportunity to respond to the City's concerns. Our attorneys and staff eagerly await the opportunity to provide the full range of services offered in our HOPWA proposal.

If you require additional information, please do not hesitate to contact me. I look forward to a prompt resolution of these issues so that services to HOPWA recipients are no longer delayed.