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**Department of
Health, Education,
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Office of Human Development Services

Developmental Disabilities Program

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office of Human Development
Services

45 CFR Parts 1385, 1386, and 1387

Developmental Disabilities Program

AGENCY: Department of Health, Education, and Welfare, Office of Human Development Services (HDS), Rehabilitation Services Administration (RSA).

ACTION: Notice of proposed rulemaking.

SUMMARY: The Rehabilitation Services Administration (RSA) in HDS proposes new and revised regulations. The basis for these regulations is the Developmental Disabilities legislation. In these proposed rules, RSA is also revising and clarifying the current policies and regulations that will have continued applicability. The proposed rules do not include regulations for the university affiliated facilities program, which have been issued separately under 45 CFR Part 1388 (August 6, 1979, Vol. 44, No. 152), except for a new requirement for an assurance regarding the rights of persons with developmental disabilities.

DATE: Comments on the proposed rulemaking must be received on or before August 7, 1980.

ADDRESS: Comments should be addressed to Commissioner, Rehabilitation Services Administration, U.S. Department of Health, Education, and Welfare, Washington, D.C. 20201. Comments are available for public inspection in the Bureau of Developmental Disabilities, RSA, Room 3070, Mary E. Switzer Building, 330 C Street S.W., Washington, D.C. 20201, Monday through Friday, 8:30 a.m. to 5:00 p.m., telephone (202) 245-0335.

FOR FURTHER INFORMATION CONTACT: Ms. Marjorie Kirkland, Bureau of Developmental Disabilities, Washington, D.C. 20201, Telephone: (202) 245-0335.

SUPPLEMENTARY INFORMATION:

General

We are proposing new regulations to implement Title V of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, as well as to meet additional needs of the program which have become apparent. The title of the new Act is the Developmental Disabilities Assistance and Bill of Rights Act. It provides for a three-year extension of the authorizations of

appropriations for: (1) The basic State program; (2) systems for protection and advocacy of individual rights; (3) the university affiliated facilities programs for administration and operation of training and service programs; and (4) special project grants including projects of national significance. The following seven sections present the major changes made to the developmental disabilities programs by the 1978 amendments. The policies and purposes of the changes are discussed in the section-by-section analysis of the proposed regulations.

Parts of the Rehabilitation Services Administration will soon be transferred to the new Department of Education; the Developmental Disabilities Office will remain in the Department which will become the Department of Health and Human Services. Changes resulting from the reorganization will be made in the final regulations.

Definition of Developmental Disability

A major change brought about by the 1978 amendments is in the definition of developmental disability. The new definition is based on a study mandated by Pub. L. 94-103. It states that a developmental disability: (1) is severe and chronic; (2) is attributable to a mental or physical impairment; (3) is manifested before age 22; (4) is expected to continue indefinitely; (5) results in substantial functional limitation in three of seven specified areas of major life activities; and (6) reflects the need for lifelong and individually planned services.

The House Conference Report No. 95-1789, accompanying H.R. 12467, p. 104, 95th Congress, Second Session, noted that "the definition is intended to cover everyone currently covered under the definition and it is also intended to add other individuals with similar characteristics. . . . It is not the intent to exclude anyone who legitimately should have been included under the definition in current law."

Rights of the Developmentally Disabled

Section 111 of Pub. L. 94-103 contained a series of "findings" respecting the rights of developmentally disabled persons, including the following:

- (1) Persons with developmental disabilities have a right to appropriate treatment for their disabilities;
- (2) Treatment should be designed to maximize the developmental potential of the person;
- (3) The Federal government and the States both have an obligation to assure that public funds are not provided to any institutional or other residential

program for persons with developmental disabilities that does not meet certain stated standards;

(4) Nonresidential programs must be appropriate to the persons served.

No authority was included in that Act to allow the Department to withhold funds from States on the basis of failure to meet the findings.

The 1978 amendments, however, added a requirement to the basic State grant program that the State assure the Secretary that the rights of developmentally disabled people are to be protected consistent with Sec. 111. The Department has decided to require that all programs authorized under the Act, except for the protection and advocacy systems, comply with Sec. 111 of the Act. The protection and advocacy systems are exempted because they are an extension of the "Rights" provisions and the systems do not provide services, treatment or habilitation. The Department believes that applying this policy to the other programs is within the intent of Congress. Recipients of funds under the Act are to assure the State and the Commissioner that they will provide services which comply with the requirements of Sec. 111 (Rights). Failure to comply with the assurance may result in the loss of Federal funds.

Protection and Advocacy Systems

The 1978 amendments made several changes in the protection and advocacy provisions. They are a prohibition against the State planning council's administration of the State's system; a requirement that a report describing the State's activities be submitted to the Secretary at least once every three years; and a requirement that a program performance report be submitted annually. Failure to have an approvable system in place will result in the loss of Federal funds for the basic State grant program as well as for the protection and advocacy system. Minimum allotments of \$50,000 are established for the States.

State Planning Councils

Several changes in the Act affect State planning councils. One-half, instead of one-third, of the members are to be consumers and their representatives. The principal State agencies represented on the council remain the same as in the prior Act, but, in addition, higher education training facilities and local agencies must now be represented. The Governor is to appoint all members and provide for appropriate rotation of the members.

The State council is so constituted that it provides a forum for consumer

involvement in policy and priority determinations.

The council also provides a means for exploring all avenues for the provision of services through State and local, private, and public agencies. Unlike the prior system the council must now develop the State plan jointly with the administering agency.

State Plan

The major part of the Developmental Disabilities Program is the basic State plan. In 1970, the program was seen as a planning and coordinating mechanism, with some funds for augmenting services provided by other agencies. The amendments of 1978 have to a considerable degree, changed the programs to provide services. The priority service areas are: (a) case management; (b) child development; (c) alternative community living arrangements; and (d) non-vocational social-development.

The Act provides that until the appropriation exceeds \$80 million a year, a State is required to fund at least one, but not more than two, priority service areas. The State may fund three priority service areas when the Federal appropriation is more than \$80 million. Regardless of the Federal appropriation, however, the State must spend at least 65 percent or \$100,000 (whichever is greater) of its allotment for services.

For those States which would have to reduce the amount of Federal funds spent on planning activities in order to meet these requirements, however, the Act provides a transitional period. Those States need not reduce the amount spent for planning in the fiscal years ending September 30, 1979 and September 30, 1980. By October 1, 1980, however, all States must allocate at least 65 percent for services. These transitional provisions are not included in the regulations because the Department believes they are self-implementing, and because they will soon expire.

The State plan now must be revised at least every three years, instead of annually, as before. It must, however, be reviewed annually by the State council for needed changes in priority service areas. There are now eight major sections of the State plan instead of the 30 previously required.

Allotments

The 1978 amendments increase from \$100,000 to \$250,000 the minimum allotment each State and Puerto Rico may receive for the basic State program. Minimums for the other Territories are increased to \$100,000. The Northern

Mariana Islands may participate in the program if it chooses.

Special Project Grants

New grant authority is available to support the development and demonstration of methods to attract and retain professional personnel to serve developmentally disabled people, and the demonstration of methods to expand or improve protection and advocacy services. The Commissioner is to establish procedures to ensure the involvement of developmentally disabled persons and their parents in the determination of priorities for these grants.

Overview of Regulations

The regulations in these parts are reorganized and rewritten for clarity and simplicity in accordance with HEW's Operation Common Sense.

The following regulations were previously promulgated in 45 CFR parts 1385, 1386, and 1387 and are not changed, but are included in these regulations for the sake of clarity and completeness.

New Location of Regulations Promulgated in 1977, Not Substantively Changed

Present section and title	Proposed section
1385.7—Recovery	1385.5
1385.9—Cooperative or joint effort between States and agencies	1385.5
1385.10—Awards	1385.5
1385.1(b)—Purpose and assurances	1385.48
1385.2(a), (b), (c), (e)—Plan submission and approval	1385.42
1385.3—Designation of State agency(ies) for administration	1385.41
1385.4—Identification of administrative program unit	1385.41(c)
1385.10(a), (b)—Allotments to States	1385.1
1385.11—Redistribution of funds	1385.2
1385.12(a)—Conditions on use of allotment	1385.90a
1385.13—Federal share	1385.5
1385.14—Nonduplication	1385.5
1385.15(a)—Payments for planning, administration, services, and construction	1385.9
1385.16(a)—Withholding of payments	1385.11
1385.20—Methods of administration	1385.43
1385.21—Personnel administration	1385.12
1385.22—Fiscal administration	1385.41(a)
1385.23—Special financial and technical assistance to poverty areas	1385.47(b)
1385.24—Reports	1385.41(a)
1385.25(a)—Methods of evaluation	1385.49
1385.26—Use of volunteers	1385.50
1385.47—Habitatation plans	1385.52
1385.51—Establishment of State planning councils	1385.41
1385.80-.112—Subpart D: Practice and Procedure for Hearings to States on Conformity of Developmental Disabilities Plans to Federal Requirements	1385.80-.112
1387.2—Application content	1387.4
1387.3—Eligible applicants	1387.3
1387.20-.23—Special project grants	

In proposing the new regulations, we maintain the underlying purpose of the regulations as stated in the Preamble to the Proposed Rules published in the Federal Register on August 30, 1978 (Part II, Vol. 41, No. 169). That purpose is to ensure the continued targeting of funds

and resources to services to developmentally disabled individuals through a national, State, and local partnership. To this end, the goal of the program is to enable States to increase the provision of quality services to persons with developmental disabilities. The goal is to be reached through the design and implementation of a comprehensive and continuing State plan which makes optimal use of Federal, State, local, and private resources, and assures the rights and dignity of all those being served.

The following is a section-by-section analysis of the proposed regulations. (The references in parentheses in the headings are to the applicable sections of the Act.)

Part 1385—General

This part sets out the provisions applicable to two or more of the developmental disabilities programs. We believe that this organization will make it easier for members of the public to locate common policies and procedures, and that it will avoid unnecessary duplication.

Section 1385.1 Purpose of the regulations. (Sec. 100)

This section sets forth the purpose of these regulations which is to implement the Act, and to provide operational and administrative information needed by users to understand the requirements and to act appropriately.

Section 1385.2 Definitions. (Sec. 102)

This section includes definitions used in Parts 1386, 1387, and 1388 of this chapter. Terms relating only to construction have been omitted because the Act no longer provides authority for construction activities.

We have quoted the definition of developmental disabilities from the Act without elaboration. Some people have expressed concern that we need to clarify several terms in the definition. For example, "severe disability" and "substantial functional limitation" are subject to varied interpretations, so that one State might find an individual eligible for services under the Act, but another might not. The Department believes that all of the specifications taken together constitute an adequate definition without further definition of the component terms.

We welcome comments regarding problems encountered in using this definition. We are particularly interested to know whether the term "substantial functional limitations" needs to be defined; also, whether the seven areas of life activity need further definition. We hope to learn whether the

unelaborated definition will bring about greater ease of planning, administration and programming; and, most of all, if it results in providing services to the developmentally disabled population.

Section 1385.3 Rights of persons with developmental disabilities (Rights). (Sec. 117)

The "Rights of the Developmentally Disabled," which was included in but not implemented by Pub. L. 94-103, is being applied by the Rehabilitation Services Administration in relation to all programs authorized under the Act (except the protection and advocacy program for the reasons stated above in "Rights of the Developmentally Disabled"). However, the 1978 amendments require implementation of the provision. The regulations elaborate on the "Rights" in the following ways: (1) we have added to the list of "rights" standards for compliance with Medicare fire protection requirements. The Medicare standards have been proposed in order to avoid confusion for providers of services and States; (2) we have added standards for nonresidential programs; and (3) we have prohibited the award of State and Federal funds to programs or activities which do not meet the standards. Paragraph (b) provides that each grantee, except for the protection and advocacy program, must give an assurance that no Federal or State funds will be used by any project, program, activity, or facility that does not comply with this section. Failure to comply with this assurance may result in the loss of Federal funding.

Section 1385.4 Grants administration requirements.

This section incorporated 45 CFR Part 74, and other Departmental grants requirements that are applicable to developmental disabilities programs. A new provision has been added providing for a notification and hearing if a specific claim is to be disallowed.

The proposed regulation, in paragraph (c), provides for the first time that States may appeal disallowances to the Departmental Grant Appeals Board. The decision of the Board shall constitute the final agency decision on the disallowances.

Paragraph (d) pertains to the examination of all records of grantees and sub-grantees receiving funds under the Act by authorized representatives of the Secretary or the Comptroller General of the United States. The proposed regulation, although included in 45 CFR Part 74, is added to emphasize the need for access to records, including all records of the protection and advocacy system relating to Federally

funded activities, in order for the Department to carry out its responsibilities and to assure proper use of Federal funds. Some States and agencies have objected to this activity in the past.

Section 1385.5 - Awards

Section 1385.6 Recovery of Federal funds used for construction of facilities. (Sec. 107)

No substantive changes are proposed from the present regulations.

Section 1385.7 Assurances regarding evaluation system. (Sec. 110(a))

As a condition to the receipt of Federal funds under the Act beginning October 1, 1980, each State must assure the Commissioner that it will submit a time-phased plan for implementation of a comprehensive system for the evaluation of services to persons with developmental disabilities provided under the Act. By October 1, 1982, the State must also assure the Commissioner that it is using the evaluation system. Failure to do so may result in the loss of Federal funding. Except for a revision of the time schedule for planning and implementation, these provisions are the same as those in present regulations. The Commissioner will issue instructions to the States on planning and implementing the evaluation system.

Part 1386—Formula Grant Programs

The purpose of this part of the proposed regulations is to specify policies and procedures for the conduct of the formula grant programs, including the implementation of the changes in the 1978 amendments. Part 1386 is divided into four subparts. Subpart A contains the general provisions pertaining to one or both of the formula grant programs, except where noted. Subpart B provides details of the requirements of the protection and advocacy system. Subpart C deals with the basic grant program including provisions regarding the State planning councils. Subpart D explains the practices and procedures for hearings when a question of conformity or compliance has been raised.

Subpart A—General

Section 1386.1 Formula for determining allotments. (Sec. 132(a))

No substantive changes are proposed from the present regulations.

Section 1386.2 Allotment for basic grant program. (Sec. 132(a)(2) (A) & (B))

This section informs the States and Territories of the new minimum allotments, increased from \$150,000 to \$250,000 for States, the District of Columbia, and Puerto Rico. The other Territories are to be allotted \$135,000 as a result of this reasoning:

(1) Sec. 132(a)(2)(A) states that the allotment to the Territories may not be less than \$100,000;

(2) Sec. 133(b)(4)(B) states that "not less than \$100,000 or 65 percent * * *, whichever is greater, will be expended (on services * * *) (Emphasis added.)

(3) In order for the Territories to spend \$100,000 (the greater amount) and still have funds for planning and administration, it is evident that their allotment must be more than \$100,000.

(4) We are allotting 35 percent of \$100,000 to the Territories for planning and administration, or a total of \$135,000 to each.

Section 1386.3 Allotment for protection and advocacy system. (Sec. 113(b)(1)(A))

This section incorporates into the regulations provisions contained in the 1978 amendments for allotments for protection and advocacy systems. This section also establishes a minimum allotment of \$30,000 per year (instead of the previous \$20,000 per year) for Guam, the Commonwealth of the Northern Mariana Islands, American Samoa, the Virgin Islands, and the Trust Territories of the Pacific Islands since minimum allotments were not included in the Act. The Department believes these minimums are essential for those Territories to operate a protection and advocacy system in their areas.

The regulations also provide that in the event the appropriation is less than the amount necessary to make allotments to the States and Territories under the previous paragraph, the State's allotment shall be equal to the ratio which the State's allotment bears to the total amount appropriated.

Section 1386.4 Reallotment. (Sec. 132(d))

Section 1386.5 Cooperative or joint effort between States and between agencies. (Sec. 132(c))

Section 1386.6 Federal and non-Federal shares for the basic State grant program. (Sec. 103)

No substantive changes from the present regulations are proposed.

Section 1386.7 Obligation by grantees and subgrantees.

This new section specifies the period of time during which grantees and subgrantees may obligate funds under the Act.

Section 1386.8 Nonduplication. (Sec. 136)

Section 1386.9 Payments. (Sec. 134)

No substantive changes from the present regulations are proposed.

Section 1386.10 Liquidation of obligations. (Sec. 134)

This new section has been added because the Act (Sec. 134) requires that expenditures be made under the State's current, approved State plan. In the past, funds have sometimes been held for long periods without being used for program purposes. We believe good management practice allows not more than one additional year for liquidating of costs resulting from obligations.

Section 1386.11 Withholding of payments. (Sec. 135)

This section restates the existing regulations. The proposed regulation also extends this provision to the protection and advocacy program. In the previous regulations, this provision inadvertently failed to refer to the protection and advocacy system. We are correcting that omission in this section of the regulations.

Section 1386.12 Standards for a merit system of personnel administration.

This section incorporates the standards for a Merit System of Personnel Administration as promulgated by the Office of Personnel Management (OPM). The standards apply to persons employed by State and local governments under the protection and advocacy system and the basic State program funded under Subparts B and C of Part 1386, including the staff of the State planning council. The Department has adopted these standards which were published in the Federal Register, Vol. 44, No. 34, February 16, 1979. They are available from the OPM, and HEW Regional Offices.

Section 1386.13 Fair hearings.

This section sets out a new requirement which is added because of the 1978 amendments' emphasis on the provision of services. The Department believes that all reasonable means must be used to assure: (1) that persons applying for services are not arbitrarily denied them, and (2) that no one receiving services has them terminated

or reduced without a hearing. To accomplish these purposes we have adopted the language used in the regulations for Title XX of the Social Security Act (Social Services). (See 45 CFR 228.14.)

Subpart B—State System for Protection and Advocacy of Individual Rights

As a condition for a State to receive Federal funds for the basic State program, the act requires that the State must have in operation a system to protect and advocate the rights of the developmentally disabled. Failure to meet this requirement may result in the loss of Federal funds under Subparts B and C of this Part and also under Part 1387 (because the State in which a special project is to be carried out must have a State plan approved under Part C).

The Department has had over two years' experience in administering the protection and advocacy program. Based on this experience, it is proposing several new and more detailed regulations.

Section 1386.20 Requirements for participation in the developmental disabilities program. (Sec. 113(a))

The legislative requirements for the system are restated from the Act in order to emphasize their importance. In addition, the regulations clarify the population that is to be served. We do not believe Congress intended to exclude the group most urgently in need of advocacy: those persons with developmental disabilities who are not receiving services. We have, therefore, made "all individuals with developmental disabilities in the State" eligible for assistance by the system.

Section 1386.20(c)(2) requires that protection and advocacy systems have the authority to institute legal and administrative proceedings to redress the rights of institutionalized developmentally disabled persons without the necessity of representing a named client. Exercise of this authority is contingent upon the protection and advocacy system certifying to the court or administrative body that certain steps have been taken in an attempt at non-judicial resolution.

The Department is particularly interested in knowing if there are any state constitutional, statutory or judicial barriers to this provision. If there are, is the state willing to eliminate these barriers? What would such changes entail and how long would they take?

Sections 1386.20(3) and (4) require that protection and advocacy system have access to the medical and personal records of institutionalized

developmentally disabled persons. In the case of judicially declared mentally incompetent individuals, their guardians must be given reasonable notice of the protection and advocacy system's intent to examine the records. If the institutionalized person is not mentally impaired, the protection and advocacy system must obtain that person's consent before being allowed access to the records. However, the protection and advocacy system must establish procedures to protect the confidentiality of the records examined.

The Departmental believes that these provisions are essential and will provide the protection and advocacy systems with the necessary mechanisms to adequately protect the rights of institutionalized developmentally disabled persons.

On the basis of our experience, we have required that the protection and advocacy system have physical access to persons with developmental disabilities who are in any institution or program.

Section 1386.21 Designated State protection and advocacy office. (Sec. 113(a))

This section specifies what the State must do in designating the State's protection and advocacy office and the limitations on its choices. The present policy of allowing States to select public or private nonprofit agencies to carry out the protection and advocacy program is maintained.

Some States have proposed to place the protection and advocacy office in an agency which provides guardianship. The Department considers guardianship a service. Since Sec. 113(a)(2) requires that the protection and advocacy system be independent of any agency which provides services to persons with developmental disabilities, we believe guardianship and protection and advocacy may not be combined. There is a potential conflict in guardianship cases because guardianship arrangements, especially involving adults, impose limitations on the ward's rights. Our policy will be to assume that a conflict exists any time a reasonable question is raised. This policy is necessary in order to best protect the interests of the individuals because of assuring the independence of the system from service providers.

Section 1386.22 Report on the State system. (Sec. 113(a)(3)(A))

This proposed regulation establishes for the first time the kinds of information which the State must include in the statutorily required report to the Commissioner on the protection and

advocacy system. The report must describe the activities to be carried out, including activities to coordinate and cooperate with other protection and advocacy systems in the State, for example, rehabilitation and aging programs.

Section 1386.23 Submittal of the report on the State system.

Section 1386.24 Amendments to the report on the system.

These sections indicate the manner in which the triennial reports on the system and revisions to the system are to be submitted to and approved by the Governor prior to their being forwarded to the Commissioner for final approval. The basis for these regulations is found in Section 113(a) of the Act.

Section 1386.25 Annual reports. (Sec. 113(a)(3)(B))

The new statute requires an annual report describing the activities carried out, and any changes made in the system, during the previous year. The regulation establishes what the annual report must contain. In addition, States must submit annually a proposed budget. The purpose of the regulation is to ensure that the Department has the information necessary to determine if the protection and advocacy program in each State is properly carried out.

Section 1386.26 Federal financial participation.

This section sets forth the conditions under which Federal financial participation is available in the cost of services. Subsection (a) states that Federal financial participation is allowable for activities included in the approved reports of the system. Information and referral services are allowable even when provided to persons who are not developmentally disabled. This exemption is made because a large portion of the requests are made by telephone and mail, and under those circumstances it is infeasible to ascertain eligibility.

Subsection (b) lists expenditures in which Federal financial participation is not allowable: those made to liquidate obligations beyond the allowable time; those made on behalf of ineligible persons; those not included in the approved reports; and those made to solve problems which are not related to the person's disability.

The purpose of protection and advocacy systems is to meet the special needs of persons with developmental disabilities which arise because of their disabilities. The Act emphasizes that the system is to protect and advocate the

rights of the system's clients. The system is not intended to meet all the legal and advocacy needs of persons with developmental disabilities. For example, developmentally disabled persons share with the general populace occasional need for assistance in drafting a will, or instituting or defending against a divorce action. These needs do not fall within the role of the protection and advocacy system and thus are not eligible for Federal financial participation.

Section 1386.27 Prohibition of use of protection and advocacy system funds for lobbying. (Sec. 113(b)(2))

The statute requires that Section 1913 of Title 18, U.S.C. be applied to the protection and advocacy program. This section of the regulations restates the statutory requirement, and adds that unsolicited communication with members of Congress for the purpose of influencing their actions is prohibited.

Subpart C—State Plan for Provision of Services for Persons With Developmental Disabilities

State Planning Council

The first four sections of this Subpart, § 1386.30 through § 1386.33, deal with the establishment, composition, duties and staff of the State planning council. The purpose of the regulations is to implement the 1978 amendments relating to the council. The new requirements are that: (1) the State planning council must now consist of at least 50 percent consumer representation; and (2) the council must now develop the State plan jointly with the designated State agency. There is no change, however, in the primary role of the State planning council: planning, monitoring, evaluating, and advocating on behalf of all developmentally disabled people. The council chairperson continues to submit the State plan to the Commissioner.

Section 1386.30 Establishment of the State planning council. (Sec. 137(a)(1))

This section makes it mandatory for a State to establish a State planning council in order to receive Federal funds.

Section 1386.31 Makeup of the council. (Sec. 137(a))

Subsection (a) provides that the Governor appoints all members of the council and makes appropriate provisions for rotation of all members except the representatives of State/Federal programs. The State plan is to include a statement of the State's policies on rotation of the council

members. The policies must provide for continuity among the consumer members and consumer representatives. Representatives of the State/Federal programs must not rotate since they are members of the Governor's cabinet or staff, generally serve at his or her pleasure, and continuously represent their programs.

We decided not to specify which or how many handicapping conditions must be represented on the council because the number is so large that a listing could lead to a council of unmanageable size.

We have specified in subsection (b) the State/Federal program representation on State planning councils because the State planning councils need to have the benefit of information from the various Federally assisted programs. The principal programs are identified in Section 133(b)(2)(B) of the Act. The regulation proposes that each program be represented by an individual who has knowledge of and authority to speak for and act for that program. We believe it is not possible for one or a few individuals to have sufficient knowledge concerning all these programs, and, at the same time, possess the authority to speak for them and to provide the State council with the guidance that Congress intended they provide in making policy decisions. The Department will consider a waiver under § 1386.31(b) upon a showing by the Governor of the State that the State officials appointed do have the experience and authority to speak and act for the programs represented.

Subsections (c) and (d) reflect major changes enacted by the 1978 amendments. Formerly, consumer representatives comprised one-third of the total membership of the council. The new requirement is that at least one-half of the membership of the council consist of a combination of persons who are developmentally disabled and relatives or guardians of such persons. Of this half, at least one-third must be parents, other immediate relatives, or guardians of persons with mentally impairing developmental disabilities; and at least one-third must be consumers—that is, persons who are themselves developmentally disabled.

The Department believes that minorities must be included in the membership of the council.

Subsection (e) restates a part of Sec. 137(a)(2) of the Act. Based on sections 1124(a)(3) and 1126(b) of the Social Security Act (cited in the 1978 amendments), this subsection describes persons who cannot be placed on the council as consumer representatives.

The purpose of this requirement is to avoid all possible conflict of interest, and to assure that consumers' concerns are adequately addressed in the council's activities.

Section 1386.32 Duties of the council. (Sec. 137(b) and 143(d))

The purpose of this regulation is to explain the required duties of the council. Subsection (a)(1) states that the council and State agency(ies) shall jointly develop the State plan; subsection (b) requires the council chairperson to submit the State plan and annual review of the priority service areas to the Commissioner. The legislation is silent as to who shall submit the State plan. However, both the Senate and House reports are quite clear that the councils and State agencies are to "work together as equal partners" (Senate Report No. 95-890, page 37, 95th Cong. 2d Session), and "the council is not to replace the State agency as the responsible party for administration of the program" (House Report No. 95-1188, page 13, 95th Cong. 2d Session).

The existing regulation requires that the State plan and other reports be transmitted by the State planning council. The Department is proposing to continue this requirement.

The Department has considered, but rejected, the suggestion that the State plan be submitted to the Department by official representatives of both the State planning council and the State agency as co-signers. The Department is, instead, proposing that both parties sign the State plan indicating that the result is a joint endeavor.

Since enactment of the 1978 amendments requiring "joint development" of the plan by the State planning council and the State agency the Department has become aware of confusion at the State level about the roles of each. The proposed regulation makes clear that "joint development" does not mean that the council and the agency(ies) must agree on all parts of the final plan. When there is disagreement, the Governor will make the decision. Thus, Section 1386.21(a), first paragraph, represents a departure in the role of the councils from past practice. The proposed regulations provide that the State planning councils will set broad policy, determine priority service areas and set goals. This is essentially the same as in the past. However, the proposed regulations require that State plans be developed by the councils jointly with the State agencies which administer the plans. This is consistent with Section 137(b)(1) of the Act, as amended in 1978, which

requires that the plans be jointly developed with the administering agencies, including specification of areas of service.

The Department has interpreted the requirement for joint development to mean that each party has a voice in the adoption of policies, including the selection of priority service areas. This requirement for joint development creates the potential for a deadlock, or an inability to act, if the councils and the agencies cannot resolve differences which may arise between them. To deal with the possibility of a deadlock, the Department believes it necessary to provide a means for resolving any impasses which may arise. The proposed regulations meet this problem of potential impasses by specifying that the Governor of the State will be the one to resolve them.

Paragraphs (2) through (5) set forth other duties and responsibilities of State planning councils. A new requirement is that the council submit an annual report of its activities to the Secretary, through the Governor. This report was previously incorporated in the program performance report.

Subsections (b) and (c) continue existing requirements to assure that plans are submitted in a timely manner, and through proper channels. Subsection (d) repeats the legislative mandate that the State planning council not administer the protection and advocacy system.

Section 1386.33 Council staff. (Sec. 133(b)(1)(A))

Subsection (a) of the proposed regulations implements Section 133(b)(1)(A) of the Act, which requires that the State council have staff responsible to it and adequate to carry out its responsibilities and duties. The Commissioner has determined that a full-time director and a secretary are required in each State. This staff is the minimum for any State, and subsection (b) provides for the many States that will need additional staff, depending on the States' unique needs and resources since government agencies and the public must be able to communicate with the council on a daily basis. The basis for the Commissioner's decision is a report, "Administrative Environment Project," December 1977, developed with a grant from the Department.

State Plan Requirements

The general provisions pertaining to State plans are in § 1386.40 through § 1386.54. These regulations are designed to implement the requirements of Section 133 of the Act in regard to

State plans, and to define further what is required.

Section 1386.40 General. (Sec. 133(a) and (b))

In order to participate in this program a State must have a State plan which meets the requirements of these regulations and has been approved by the Commissioner. This section implements Sec. 133(a) and (b) of the Act.

Section 1386.41 Designation of the State Planning council and the State agency. (Sec. 133(b)(1)(A))

No substantive changes are proposed from the present regulation.

Section 1386.42 Plan submittal and approval. (Sec. 133(c))

Subsection (a) contains major change brought about by the 1978 amendments which provides that the State plan must set forth the activities to be supported by funds allotted to the State under the Act. These activities may be carried out over a three year period. In the intervening years, the State is to submit an annual report of its review and description of the extent and scope of services to be provided, as required by Section 133(b)(2)(C) of the Act. This regulation (in subsection (a)) is designed to produce better planning and services, and to reduce paperwork.

Subsection (b) requires that the State plan contain a statement that it was developed jointly by the State Council and the designated State agency, and that it be signed by the chairperson of the council and the official representative of the State agency.

The remaining paragraphs contain no substantive changes from the present regulation.

Section 1386.43 Methods of administration.

No substantive changes are proposed from the present regulation.

Section 1386.44 Description of objectives and services. (Sec. 133(b)(2)(A) and (B))

The purpose of subsection (a) is to ensure that the plan contains clear goals and objectives; that resources are directed toward the achievement of these goals; and that there will be greater congruence among the States than when each State was free to select its own goals entirely.

The next subsection, (b), requires that Federal developmental disabilities funds be used to augment rather than duplicate or replace, existing services provided by other Federal/State programs. We believe that this provision

is essential to assure that States develop a comprehensive plan to bring together all available resources so that the developmentally disabled may be served in the most effective, efficient way. It continues policy now in existing regulations.

Subsection (c) requires that the State plan describe the extent and scope of priority services which will be provided each year under the plan. We expect that the annual review will lead to a shift from one area to another if the State determines that the change will result in more or better services.

Subsection (d) requires the establishment of a method and criteria for evaluating the effectiveness of the State plan in meeting its objectives. No substantive change from the present regulation is proposed.

Section 1396.45 Priority services. (Sec. 133(b)(4))

Since 1970, the Developmental Disabilities Act and its amendments including the 1978 amendments, have contained a list of 16 specialized services needed by persons with developmental disabilities at various periods throughout their lifetimes. This list was intended to be illustrative rather than restrictive. The purpose has been to suggest the variety of services needed.

Instead of leaving States free to choose one of these 16 services for support by funds under this Subpart, the Act now establishes four priority service areas for the use of Federal funds. The House Report states several advantages to focusing on the four priority service areas instead of leaving the selection entirely to the discretion of the States. (H. Rept. 95-1188, *supra*, p. 10)

The four priority services are: (1) case management services, (2) child development services, (3) alternative community living arrangement services, and (4) nonvocational social-developmental services. They are further described in this section.

States may not provide activities in their State plan that are necessary but subordinate parts of one priority service as a separate priority service area. For example, alternative community living arrangement services obviously are focused on one's residence and the services directly related to residence. Case management services are focused on the need for people in residential and non-residential settings. If a place to live is to be provided under the plan, the alternative community living arrangement services would be the priority area selected. Case management services provided to people in the community living setting may not be

identified as a separate priority service area.

Section 1396.46 Use of funds. (Sec. 133(b)(3))

No substantive changes are proposed from the present regulation.

Section 1396.47 Provision of priority services. (Sec. 133(b)(4))

Subsection (a) requires the State council to select one or more priority service areas for which Federal funds will be expended. The priority service areas selected must be identified in the State plan. Paragraph (2) states the statutory criteria for determining the number of service areas that may be funded in any year. Until the appropriation exceeds \$60 million per year, a State is required to fund one, but not more than two, of the priority service areas. No more than three priority service areas may be funded if the appropriation exceeds \$60 million but is less than \$80 million per year.

Paragraph (3) authorizes a State, once it has selected a Federal priority service area, to select a service area of its own choice as a substitute for one or more additional Federal priority service areas.

Paragraph (4) allows a State to request that the Commissioner grant a waiver of the limitations set forth in the two previous paragraphs. The waiver allows the State to fund additional service areas. This paragraph states the conditions on the granting of the waiver. The purpose of providing for a waiver is to allow States, under limited circumstances, to use Federal funds for a service other than those specified in the Act. The basis for the waiver is Section 133(b)(4)(C) of the Act.

Subsection (b) requires the State council and State agency to review annually the priority service areas and the need for continuing them. Changes may be made if needed.

Subsection (c) allows the State to put into effect its plan for comprehensive services immediately, or not later than October 1, 1980. The basis for this is Section 133(b)(4)(A)(ii). The Department has interpreted this section to mean that a State must meet the priority service requirements not later than the start of the 1981 fiscal year.

Subsection (d) requires that the State plan indicate what portion of its allotment is being expended in the priority service areas. The amount specified must be not less than \$100,000 or 65 percent of the State's allotment, whichever is the greater.

Subsection (e) lists the activities costs of which may be assigned to "service activities." The purpose is to allow

States to support activities necessary to the provision of high quality services.

Subsection (f) continues the previous provision of the Act and regulations for special financial and technical assistance to urban and rural poverty areas. States shall use the areas designated by the State Health Planning and Development Agencies (HPDA) and approved by the Secretary. The list of those areas was published in the Federal Register, Vol. 43, No. 19, January 27, 1978, and is available from the State HPDA and HEW Regional Offices.

Section 1396.48 Standards for services and protection of rights. (Sec. 133(b)(5))

This section of the proposed regulations lists other assurances that must be in the State plan. The plan must assure the Commissioner that: (a) The facilities in which services are furnished comply with the Architectural Barriers Act, (b) individual habilitation plans will be developed for each individual served, (c) the human rights of each person (especially those persons without familial protection) will be protected, and (d) affirmative steps will be taken to ensure an opportunity for participation of the developmentally disabled population in programs with special attention given to minority groups.

The required assurances described in (a), (b), and (c) above are consistent with policies issued previously by the Department. The assurance required by subsection (d) is a statutory requirement.

Section 1396.49 Professional assessment and evaluation programs. (Sec. 133(b)(6))

The State plan must provide for assessing the adequacy of the training of personnel providing service to developmentally disabled people, and of the State programs supporting training of professional and paraprofessional personnel. The State plan must further indicate how these training activities will bring about high quality services. Among other resources, university affiliated facilities must be utilized in States where they are available and appropriate.

Subsection (c) requires planning and implementation of a comprehensive system for the evaluation of services provided to developmentally disabled persons assisted under the Act, as mandated by Section 110 of the Act. As a condition for the receipt of Federal funds, the States must submit a plan for implementing the system by October 1980 and must implement it by October 1982.

Section 1386.50 Utilization of community resources and volunteers. (Sec. 133(b)(7)(A))

No substantive changes are proposed from present regulation.

Section 1386.51 Protection of employees' interests. (Sec. 133(b)(7)(B))

The Act requires that a State which selects alternative community living arrangement services for priority funding must provide for the protection of the interests of employees whose jobs in institutions are placed in jeopardy. The proposed regulation has been expanded considerably from the present one. We have found that there is confusion as to what is required for employees' protection and that the present regulations are being misinterpreted or ignored. The proposed regulation states specifically the statutory requirements. We have added performance standards States and institutions must follow in providing for fair and equitable arrangements to protect the interests of employees affected by alternative community living arrangement services assisted under the Act. These arrangements were developed in consultation with the Secretary of Labor.

Section 1386.52 Individual habilitation plans. (Sec. 112)

No substantive changes are proposed from present regulation.

Section 1386.53 Federal financial participation.

The purpose of this regulation is to state the conditions under which Federal financial participation in expenditures is allowable. Allowable and nonallowable costs specified are in addition to those listed in 45 CFR Part 74.

Section 1386.54 Additional information and assurances. (Sec. 133(b)(8))

This section permits the Commissioner to request additional information and assurances in the State plan when he finds them necessary to carry out the provisions and purposes of the Act and these regulations.

Section 1386.55 Final disapproval of the State plan.

This section outlines steps that must be taken before any State plan is finally disapproved. The purpose is to ensure that the State's interests are protected while ensuring adherence by the State to the Act and regulations.

Subpart D—Practice and Procedure for Hearings Pertaining to States Conformity and Compliance With Developmental Disabilities Plans and Federal Requirements

Subpart D continues the practice and procedure for hearings to States when questions of conformity of State plans for the developmentally disabled with Federal requirements, as well as questions of compliance of States with their plans and Federal requirements, have been raised. It also adds provisions relating to the protection and advocacy system, and makes technical changes, including cross-references to appropriate sections of the regulations.

The changes in Part 1386, Subpart D, were made to ensure that an appeal of a ruling unfavorable to a State would be to an official that was not involved in the decision at a lower level.

No substantive changes are proposed from present regulation, except in § 1386.92. We are proposing that hearings be held in locations which will minimize travel costs for all concerned.

Part 1387—Special Projects

Section 1387.1 Purposes of projects. (Sec. 145 (a) and (c))

The program of special projects provides a means of increasing the effectiveness and efficiency of services provided under the formula grant programs by supporting activities which benefit a number of States. The purpose of § 1387.1 is to incorporate into the regulations the statutory purposes for which grants may be made.

Section 1387.2 Projects of national significance. (Sec. 145(g))

This section sets forth criteria for projects of national significance. These criteria are presently stated in the definitions section of the regulations. Otherwise there are no substantive changes from the present regulations. The availability of these grants will be announced periodically in program announcements issued by the Commissioner.

Section 1387.3 Eligible applicants. (Sec. 145(a))

Section 1387.4 Application content and procedure. (Sec. 145(d))

No substantive changes are proposed from present regulation.

Section 1387.5 Amount of grant. (Sec. 145(e))

This section states conditions for determining amount of a grant.

Authority: These regulations are issued under the authority of Sec. 109 of Title I of the Mental Retardation Facilities and Community

Mental Health Centers Construction Act of 1963, as amended by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Assistance and Bill of Rights Act.

45 CFR, Chapter XIII Parts 1385, 1386 and 1387 are superseded and new parts 1385, 1386 and 1387 are added.

(Catalog of Federal Domestic Assistance Program, Nos. 13.630 Developmental Disabilities—Basic Support; and 13.631 Developmental Disabilities—Special Projects)

Dated: April 29, 1980.

Cesar A. Parnes,

Acting Assistant Secretary for Human Development Services.

Approved: May 2, 1980.

Patricia Roberts Harris,
Secretary.

Chapter XIII of Title 45 of the Code of Federal Regulations is amended as follows:

PART 1385—GENERAL

1. Part 1385 is revised to read as follows:

Sec.

1385.1 Purpose of the regulations.

1385.2 Definitions.

1385.3 Rights of persons with developmental disabilities (rights).

1385.4 Grants administration requirements.

1385.5 Awards.

1385.6 Recovery of Federal funds used for construction of facilities.

1385.7 Assurances regarding evaluation system.

Authority: Section 109, Pub. L. 88-164, as amended by Pub. L. 95-602.

§ 1385.1 Purpose of the regulations.

These regulations implement the provisions of the 1978 amendments to the Developmental Disabilities Assistance and Bill of Rights Act (Pub. L. 95-602) and meet additional program needs which have become apparent. The goal of the regulations is to help States and localities to provide care, treatment and other services necessary to enable persons with developmental disabilities to achieve their highest possible level of functioning and greatest possible enjoyment of life.

§ 1385.2 Definitions.

For purposes of this Part and Parts 1386 and 1387—

"Act" means the statutory authority for the developmental disabilities programs as originally enacted in Pub. L. 88-164 as amended by Pub. L. 90-170, Pub. L. 91-517, Pub. L. 94-103, and Pub. L. 95-602.

"Commissioner" means the Commissioner of the Rehabilitation Services Administration, Office of Human Development Services, Department of Health, Education, and Welfare.

"Consumer" means a person who meets the requirements of the definition of developmental disabilities.

"Consumer representatives" means a parent, other immediate relative, or guardian of a consumer.

"Department" means the Department of Health, Education, and Welfare.

"Director" means the Director, Bureau of Developmental Disabilities, Rehabilitation Services Administration.

"Developmental disability" means a severe, chronic disability of a person which—

(a) Is attributable to a mental or physical impairment or combination of mental and physical impairments;

(b) Is manifested before the person attains age twenty-two;

(c) Is likely to continue indefinitely;

(d) Results in substantial functional limitations in three or more of the following areas of major life activity: (i) self-care, (ii) receptive and expressive language, (iii) learning, (iv) mobility, (v) self-direction, (vi) capacity for independent living, and (vii) economic sufficiency; and

(e) Reflects the person's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services which are of lifelong or extended duration and are individually planned and coordinated.

"Facility for persons with developmental disabilities" means a facility, or a specified portion of a facility, designed primarily for the delivery of one or more services to persons with developmental disabilities.

"Governor" means the chief executive officer of the State or Territory, or his or her designee who has been formally deputized to act for the Governor in carrying out the requirements of the Act and these regulations.

"Institution" means any residential facility in which a person with a developmental disability is housed with non-related persons.

"Poverty area" means an urban or rural area that meets the criteria contained in § 1386.47(f) of these regulations.

"Protection and advocacy office" means the instrumentality designated by the Governor or legislature to administer the State's protection and advocacy system.

"Protection and advocacy system" means all protection and advocacy services and the means used to provide them described in the approved report required by § 1386.22.

"Public agency" means any State, unit of local government, combination of States or units, or any department, agency, or instrumentality of them, including State institutions of higher

education, hospitals and any Indian tribal government.

"Recipient" means a developmentally disabled person or his or her parent, guardian or close relative receiving services assisted under the Act.

"Secretary" means the Secretary of Health, Education, and Welfare, and references to the Secretary include any individual authorized to carry out the Act by delegation or redelegation.

"Services for persons with developmental disabilities" means priority services (as defined in § 1386.45), and any other specialized services or special adaptations of generic services for persons with developmental disabilities. "Special adaptations of generic services" are services that are generally available to the public and require modification to meet the special needs of the developmentally disabled person. Generic services include diagnosis, evaluation, treatment, personal care, day care, domiciliary care, special living arrangements, training, education, sheltered employment, recreation, counseling of the individual with a developmental disability and of his family, protective and other social and socio-legal services, information and referral services, follow-along services, and transportation services necessary to assure delivery of services to persons with developmental disabilities.

"State" means the 50 States, the District of Columbia, Puerto Rico, the Virgin Islands, the Commonwealth of the Northern Mariana Islands, Guam, American Samoa, and the Trust Territory of the Pacific Islands, except as otherwise provided in the Act or regulations.

"State agency" means the State agency or agencies designated in the State plan to administer or supervise the administration of all or designated portions of the State plan.

"State plan" means the approvable document or documents submitted by the State to comply with the requirements for participation under Parts 1385 and 1386.

"State planning council" (also referred to as "State council" or "council") means a body which meets the standards of § 1386.30.

"University affiliated facility" means a public or non-profit facility that is associated with, or is an integral part of, a college or university. These facilities must provide for at least the following activities: interdisciplinary training for personnel concerned with developmental disabilities; demonstration of the provision of exemplary services; dissemination of findings of those and other

demonstrations; and furnishing researchers and government agencies sponsoring service-related research with information on the needs for further service-related research.

"Volunteer" means a person who provides a service without compensation, except for reimbursement of actual expenses.

§ 1385.3 Rights of persons with developmental disabilities (rights).

(a) Section 111 of the Act, "Rights of Persons with Developmental Disabilities", is applicable to the programs authorized under the Act, except for the protection and advocacy system. The basic State plan and all applications for university affiliated facilities or special projects grants must contain an assurance to the Commissioner that the grantee will not provide Federal, State or other public funds to any activity which serves persons with developmental disabilities that is not in compliance with these Rights.

(b) Failure to comply with this assurance may result in the loss of Federal funds under the Act.

(c) The Rights include:

(1) Persons with developmental disabilities have a right to appropriate treatment, services, and habilitation for such disabilities.

(2) The treatment, services, and habilitation for persons with developmental disabilities shall be designed to maximize the developmental potential of the person and shall be provided in the setting that is least restrictive of the person's personal liberty.

(3) Federal and State funds shall not be expended or provided to any institutional or other residential program for persons with developmental disabilities that—

(i) does not provide treatment, services, and habilitation which are appropriate to their needs; or

(ii) does not meet the following minimum standards:

(A) Provides a nourishing, well-balanced daily diet to the persons with developmental disabilities being served by the program;

(B) Provides appropriate and sufficient medical and dental services;

(C) Prohibits the use of physical restraint unless absolutely necessary and prohibit the use of physical restraint as a punishment or as a substitute for a habilitation program;

(D) Prohibits the excessive use of chemical restraints, and the use of chemical restraints as punishment or as a substitute for a habilitation program;

(E) Provides for close relatives to visit them a reasonable hours without prior notice;

(F) Complies with fire protection standards set forth in 42 CFR §§ 442.507, 442.508, and 442.509.

(4) All programs for persons with developmental disabilities shall meet standards designed to assure the most favorable possible result for those served, and—

(i) In the case of residential programs serving persons who need comprehensive health-related, habilitative, or rehabilitative service, standards which are at least equivalent to those applicable to intermediate care facilities for the mentally retarded (42 CFR Part 442, (1978)) where appropriate, taking into account the size of the institutions and their service delivery arrangements;

(ii) In the case of other residential programs, standards which assure that: (A) care is appropriate to the needs of the persons being served by such programs; (B) program facilities admit only persons whose needs can be met through services provided by the facilities; and (C) these facilities are sanitary, provide for humane care of their residents, and protect the residents' rights;

(iii) In the case of non-residential programs, standards which assure that the services meet the standards of (1) and (2) of this section, and also meet at least the health and safety codes of the local and State governments and applicable Federal standards of any program which provides Federal funds for developmentally disabled people.

§ 1385.4 Grants administration requirements.

(a) The following parts of Title 45 CFR apply to grants funded under Parts 1386, 1387, and 1388 of this chapter.

45 CFR Part 16—Department Grant Appeals Process.

45 CFR Part 46—Protection of Human Subjects.

45 CFR Part 74—Administration of Grants.

45 CFR Part 75—Informal Grant Appeals Procedures (Indirect Cost Rates and Other Cost Allocations).

45 CFR Part 80—Nondiscrimination under Programs Receiving Federal Assistance Through the Department of Health, Education, and Welfare—Effectuation of Title VI of the Civil Rights Act of 1964.

45 CFR Part 81—Practice and Procedure for Hearings Act of 1964.

45 CFR Part 84—Nondiscrimination on the Basis of Handicap in Federally Assisted Programs.

(b) The Departmental Grant Appeals Board has jurisdiction over appeals by grantees who have received grants under sections 121, 122 and 145 of the

Act. The scope of the Board's jurisdiction concerning these appeals is described in 45 CFR 16.5.

(c) The Departmental Grant Appeals Board shall also have jurisdiction to decide appeals brought by the States concerning any disallowances taken by the Commissioner with respect to specific expenditures incurred by States, or by contractors or subgrantees of States. This jurisdiction relates to funds provided under the two formula grant programs establishing by sections 113 and 132 of the Act. Appeals filed by States shall be decided in accordance with 45 CFR Part 16 as modified by 45 CFR 16.91.

(d) In making audits, examinations, excerpts and transcripts of records of grantees and subgrantees, including the protection and advocacy system, as provided for in 45 CFR Part 74, the Secretary will keep information about individual clients confidential to the extent permitted by law and regulations.

§ 1385.5 Awards.

All grants awarded under Parts 1386, 1387, and 1388 must be in writing, and must set forth the duration and amount of the grant awarded.

§ 1385.6 Recovery of Federal funds used for construction of facilities.

(a) The United States Government retains a right-of-recovery from either the transferee or the transferor of an amount bearing the same ratio to the then value of Federal funds used for constructing and equipping facilities under title I, Parts B or C of the Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963. This right-of-recovery is for a period of 20 years after completion of construction of the facility and is applicable only if (1) the facility is sold or transferred to any person who is ineligible to apply for a grant, or (2) the facility is no longer used as a public or nonprofit facility for developmentally disabled people. This provision applies instead of 45 CFR 74.134.

(b) The State council or the appropriate university affiliated facility official is to notify the Commissioner immediately, in writing, if any of the conditions in subsection (a) occurs. The Commissioner may waive the recovery provisions if he determines there is good cause to do so. The value of the facility is to be determined by agreement between the parties or, if they cannot agree on a value, by action of the United States District Court for the district in which the facility is located. The Federal share to be recovered is to be in the proportion that Federal funds bore to the cost of the project.

(c) This right-of-recovery is not to constitute a lien on the property prior to judgment.

§ 1385.7 Assurances regarding evaluation system.

(a) In order for a State to receive Federal financial assistance under the Act, it must submit to the Commissioner by October 1, 1980, a plan to provide for a system to evaluate services rendered to developmentally disabled people assisted under the Act. This plan is to contain a schedule for implementation of the system and is to be in effect no later than October 1, 1982.

(b) By October 1, 1982, each State must provide assurances satisfactory to the Commissioner that it is using the evaluation system.

PART 1386—FORMULA GRANT PROGRAMS

2. Part 1386 is revised to read as follows:

Subpart A—General

Allotments, Federal Share, and Payments

Sec.

1386.1 Formula for determining allotments.

1386.2 Allotment for basic grant program.

1386.3 Allotment for protection and advocacy system.

1386.4 Reallocation.

1386.5 Cooperative or joint effort between States and between agencies.

1386.6 Federal and non-Federal shares for the basic State grant program.

1386.7 Obligation by grantees and subgrantees.

1386.8 Nonduplication.

1386.9 Payments.

1386.10 Liquidation of obligations.

1386.11 Withholding of payments.

1386.12 Standards for a merit system of personnel administration.

1386.13 Fair hearings.

Subpart B—State System for Protection and Advocacy of Individual Rights

1386.20 Requirements for participation in the developmental disabilities program.

1386.21 Designated State protection and advocacy office.

1386.22 Report on the State system.

1386.23 Submittal of the report on the State system.

1386.24 Amendments to the report.

1386.25 Annual reports.

1386.26 Federal financial participation.

1386.27 Prohibition of use of protection and advocacy system funds for lobbying.

Subpart C—State Plan for Provision of Services for Persons with Developmental Disabilities

State Planning Council

1386.30 Establishment of the State planning council.

1386.31 Makeup of the council.

1386.32 Duties of the council.

1386.33 Council staff.

State Plan Requirements for Planning, Administration and Services

- 1386.40 General.
- 1386.41 Designation of the State planning council and the State agency.
- 1386.42 Plan submittal and approval.
- 1386.43 Methods of administration.
- 1386.44 Description of objectives and services.
- 1386.45 - Priority services.
- 1386.46 Use of funds.
- 1386.47 Provision of priority services.
- 1386.48 Standards for services and protection of rights.
- 1386.49 Professional assessment and evaluation programs.
- 1386.50 Utilization of community resources and volunteers.
- 1386.51 Protection of employees' interests.
- 1386.52 Individual habilitation plans.
- 1386.53 Federal financial participation.
- 1386.54 Additional information and assurances.
- 1386.55 Final disapproval of the State plan.

Subpart D—Practice and Procedure for Hearings Pertaining to States' Conformity and Compliance With Developmental Disabilities Plans and Federal Requirements

General

- 1386.80 Definitions.
- 1386.81 Scope of rules.
- 1386.82 Records to be public.
- 1386.83 Use of gender and number.
- 1386.84 Suspension of rules.
- 1386.85 Filing and service of papers.

Preliminary Matters—Notice and Parties

- 1386.90 Notice of hearing or opportunity for hearing.
- 1386.91 Time of hearing.
- 1386.92 Place.
- 1386.93 Issues at hearing.
- 1386.94 Request to participate in hearing.

Hearing Procedures

- 1386.100 Who presides.
- 1386.101 Authority of presiding officer.
- 1386.102 Rights of parties.
- 1386.103 Discovery.
- 1386.104 Evidentiary purpose.
- 1386.105 Evidence.
- 1386.106 Exclusion from hearing for misconduct.
- 1386.107 Unsponsored written material.
- 1386.108 Official transcript.
- 1386.109 Record for decision.

Posthearing Procedures, Decisions

- 1386.110 Posthearing briefs.
- 1386.111 Decisions following hearing.
- 1386.112 Effective date of decision by the Assistant Secretary.

Authority: Section 103, Pub. L. 95-164, as amended by Pub. L. 95-602.

Subpart A—General

Allotments, Federal Share, and Payments

§ 1386.1 Formula for determining allotments.

The Commissioner will allocate funds appropriated under the Act for the purpose of the basic State program (see

Subpart C—State Plan for Provision of Services for Persons with Developmental Disabilities) and the protection and advocacy system (see Subpart B—State System for Protection and Advocacy of Individual Rights) on the following basis:

(a) Two-thirds of the amount appropriated shall be allotted to each State according to the ratio the population of each State bears to the population of the United States. This ratio is weighted by the relative per capita income for each State. The data used to compute allotments are supplied by the U.S. Department of Commerce, for the three most recent consecutive years for which satisfactory data are available.

(b) One-third of the amount appropriated shall be allotted to each State on the basis of the relative need for services of persons with developmental disabilities. The relative need is determined by the number of persons receiving benefits under the Childhood Disabilities Beneficiary Program (Section 202(d)(1)(B)(ii) of the Social Security Act).

§ 1386.2 Allotment for basic grant program.

The minimum allotment for the basic formula grant program to each State, the District of Columbia, and Puerto Rico, in any fiscal year is \$250,000 or the amount of the allotment received by the State for the fiscal year ending September 30, 1978, whichever is greater. For the Virgin Islands, American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, and the Trust Territory of the Pacific Islands, the allotment in any fiscal year shall not be less than \$135,000.

§ 1386.3 Allotment for protection and advocacy system.

(a) The minimum allotment for the protection and advocacy system to each State, the District of Columbia, and Puerto Rico, in any fiscal year is \$50,000, or the amount of the allotment received by the State for the fiscal year ending September 30, 1978, whichever is greater. For the Virgin Islands, American Samoa, the Commonwealth of the Northern Mariana Islands, Guam, and the Trust Territory of the Pacific Islands, the allotment in any fiscal year shall not be less than \$30,000.

(b) If the total of the allotments to the States under Subsection (a) for any fiscal year exceeds the amount appropriated, the allotment will be equal to the ratio which the State's allotment bore to the total amount appropriated in fiscal year 1978. In all cases, each State

and Territory will receive its minimum allotment.

§ 1386.4 Reallocation.

If the Commissioner determines that any portion of the allotment to a State will not be required for allowable costs during the period for which it is available, the Commissioner may reallocate it. If funds are to be reallocated, the Commissioner will publish a notice in the Federal Register 30 days prior to reallocating the funds. Reallocations are to be made in the same proportion as the original allotments.

§ 1386.5 Cooperative or joint effort between States and between agencies.

If the State plan provides for joint effort between public or private agencies in more than one State, portions of funds allotted to one or more of the cooperative States may be combined according to agreements between the agencies involved.

§ 1386.6 Federal and non-Federal shares for the basic State grant program.

(a) *Federal share.* (1) The Federal share for a State may not exceed 75 percent of the allowable costs under the approved State plan.

(2) If any activity funded under this program is located in and serves primarily people who live in a poverty area, the Federal share may not exceed 90 percent of the total cost of the project or activity.

(b) *Non-Federal share.* Rules for satisfying the requirements for the non-Federal share of any project, program, or activity assisted by a grant under this Subpart are in 45 CFR, Part 74, Subpart G.

§ 1386.7 Obligation by grantees and subgrantees.

(a) Funds which the Federal government obligates under this Part during a Federal fiscal year are available for obligation by grantees and subgrantees through the end of that same Federal fiscal year.

(b)(1) Grantees and subgrantees incur an obligation for acquisition of personal property or for the performance of work on the date it makes a binding, legally enforceable, written commitment.

(2) Grantees and subgrantees incur an obligation for personal services, for services performed by public utilities, for travel or for rental of real or personal property on the date it receives the services, its personnel takes the travel, or it uses the rented property.

§ 1386.8 Nonduplication.

The Commissioner is to determine the Federal share of allowable costs incurred by the State under its approved

State plan. In making this determination, he is to disregard the amount of any other Federal funds expended and the amount of any non-Federal funds required for matching. Any exception must be expressly provided for by Federal statute.

§ 1386.9 Payments.

(a) The Commissioner will pay the Federal share of expenditures incurred in the fiscal year under the approved State plan, and under the approved report on the protection and advocacy system. For purposes of this Part the term "expenditures incurred" is interpreted to mean allowable costs pertaining to that year. A cost resulting from an obligation incurred during a year is deemed to pertain to that year.

(b) An authorized State official may request the Commissioner to pay from the State's allotment under Subpart C of this Part not more than 50 percent of the costs of administering the State plan. The payment is not to exceed 5 percent of the allotment or \$50,000, whichever is less. In order to receive this payment, the State must expend from its own sources, for the current fiscal year, an amount equal to or greater than that expended in the previous fiscal year for administration of the State plan. Costs of administering the State plan do not include costs for planning activities or provision of services.

§ 1386.10 Liquidation of obligations.

All obligations made by the State agency or subgrantees under the State plan and the report on the description of the State's protection and advocacy system must be liquidated within one year of the close of the Federal fiscal year in which obligations were incurred. This requirement may be waived only where the validity of the obligation or the amount of the obligation is being actively disputed by the State agency or subgrantee.

§ 1386.11 Withholding of payments.

After notice to the State and an opportunity for a hearing, the Secretary may withhold payments to the State with respect to costs resulting from obligations incurred after opportunity for the hearing or after a final decision following a hearing if he finds that there is a failure to comply substantially with the State plan, or with the report on the description of the protection and advocacy system, or the Act, or applicable regulations. Hearing procedures will be conducted in accordance with Subpart D of this part.

§ 1386.12 Standards for a merit system of personnel administration.

The State plan and the report on the protection and advocacy system must provide that methods of personnel administration and affirmative action plans for equal employment opportunity in the State and local agencies administering the programs will conform to the Standards for a Merit System of Personnel Administration, Subpart F, Part 900, and other standards prescribed by the Office of Personnel Management. The standards for a Merit System were published in the Federal Register, Vol. 44, No. 34, page 10238, February 16, 1979. The affirmative action plan must be available to the Secretary for review, upon request.

§ 1386.13 Fair hearings.

The State plan shall provide for a system of hearings under which applicants or recipients or their representatives may appeal the denial, reduction, or termination of a service, or failure to act upon a request for service with reasonable promptness. The procedures and provisions of 45 CFR 205.10 govern these hearings.

Subpart B—State System for Protection and Advocacy of Individual Rights

§ 1386.20 Requirements for participation in the developmental disabilities program.

(a) In order for a State to receive an allotment under Subpart C, it must have in effect a system to protect and advocate the rights of persons with developmental disabilities.

(b) Failure to submit a report of or to carry out an approved system to protect and advocate the rights of persons with developmental disabilities will result in the loss of Federal funds for programs authorized under this subpart and Subpart C (State Plan for Provision of Services).

(c) The Protection and Advocacy (P&A) System must meet the following requirements—

(1) The P&A System must have the authority to pursue legal, administrative, and other appropriate remedies to ensure the protection of the rights of all individuals with developmental disabilities who are receiving services or are eligible for services in the State.

(2) The P&A System must have the authority to institute administrative and legal proceedings to redress the rights of institutionalized persons with developmental disabilities without the necessity of representing a named client. At the time of commencement of any proceeding under this section, the P&A

System shall certify to the administrative body or court that:

(i) The P&A System has endeavored to eliminate the alleged conditions and practices by informal methods, including discussion with appropriate officials of the possible costs and fiscal impacts of alternative remedial measures;

(ii) The P&A System is satisfied that the appropriate officials have had a reasonable time to take appropriate action to correct such conditions or practices but have failed to do so;

(iii) The P&A System believes that administrative or legal proceedings are of general public importance and will materially further the protection of the rights, privileges, or immunities of developmentally disabled individuals secured by the Constitution or laws of the United States or of any State or locality.

(3) The P&A System must have appropriate access to the personal, medical, and other records pertaining to the care of institutionalized developmentally disabled persons who have been judicially declared mentally incompetent after giving reasonable notice to the guardians of such persons. In the case of an institutionalized developmentally disabled person who is not mentally impaired, the P&A System must have appropriate access to that person's relevant records after obtaining the consent of that person.

(4) The P&A System must establish procedures to protect the confidentiality of the records examined under 1386.20(c)(3). These procedures must conform to the requirements of 42 CFR Part 442.502. This requirement, however, in no way limits or restricts the Department's access to the records of the P&A System.

(5) The P&A System may not be administered or controlled by the State Planning Council.

(6) The P&A System must be independent of any agency, public or private, which provides treatment, services or habilitation to persons with developmental disabilities.

(7) The P&A System must have the authority on its own initiative to obtain access to institutions and programs serving persons with developmental disabilities. This right to access shall include the right to meet with persons with developmental disabilities in residential and non-residential facilities to explain the purposes of the protection and advocacy system, assistance that is available to them, and other details of the program. Exercise of this authority shall not require advance notice as long as the visits take place at a time and in a manner that does not disrupt the operation of the facility or program, for

example, a visit during normal visiting hours.

§ 1386.21 Designated State protection and advocacy office.

(a) The Governor shall designate the office for administering the State protection and advocacy system.

(b) The State protection and advocacy office must be a public or private, non-profit entity.

§ 1386.22 Report on the state system.

(a) At least once every three years the Governor shall submit an approvable report to the Commissioner describing the State system. The report must conform to these regulations and with guidelines issued by the Commissioner.

(b) The report must include—

(1) Assurances that the system will comply with the requirements listed in § 1386.20, including—

(i) An assurance that members and staff of the State planning council together with providers of services do not constitute a majority of a quorum of any board of directors of the system; and

(ii) An assurance that the staff of the State planning council will not serve as staff of the protection and advocacy office.

(2) An explanation of the administrative structure of the system including the executive order or a citation to the law establishing the system and the following information:

(i) If it is a public entity, an explanation of the office's location within the State structure; or

(ii) If it is a private non-profit entity, the name and title of the person in State government to whom it reports, and a copy of the articles of incorporation and bylaws;

(3) The goals and objectives for the system;

(4) The methods being used to ensure that the system is available to persons with developmental disabilities, especially those residing in institutions, and those not receiving services;

(5) The procedures by which the office determines which clients will be served, if choices must be made;

(6) A statement of the ways legal, administrative and other appropriate remedies are utilized by the system to achieve its goals;

(7) An explanation of the facilities and resources that are being used to operate the system;

(8) A list of other protective and advocacy services in the State which relate to this program, and explanations of cooperative relationships with them;

(9) Other information the Commissioner may require.

§ 1386.23 Submittal of the report on the State system.

(a) The report must be submitted by the Governor to the Commissioner for approval. The report must be submitted to the appropriate HEW Regional Office 60 days prior to the period for which it is applicable.

(b) Failure to submit an approvable report prior to the beginning of the period covered by the report shall result in the loss of Federal financial participation in costs resulting from obligations incurred during the period of the fiscal year for which an approvable description or revision has not been submitted. Failure to submit an approvable report at the appropriate time may also result in loss of Federal funds under the State plan submitted under Subpart C.

(c) The Secretary will not disapprove any report describing the protection and advocacy system or revision of the system until he or she has given the State reasonable notice and opportunity for a hearing governed by Subpart D of this part.

§ 1386.24 Amendments to the report on the system.

The Governor shall approve and submit to the Commissioner a description of any change in the system which will affect the way it is to carry out its required functions. These amendments must be submitted to and approved by the Commissioner prior to their implementation. The amendments must include a procedure for providing continuity of services to persons with developmental disabilities during the transition.

§ 1386.25 Annual reports.

(a) The following reports must be submitted to the Commissioner annually:

(1) Proposed budget for the next Federal fiscal year;

(2) Program performance report; and

(3) Financial status report.

(b) The program performance report shall describe the activities carried out under the system and any changes made in the system during the previous fiscal year.

(c) The proposed budget and the program performance report must be submitted by the Governor to the appropriate HEW Regional Office. The proposed budget for the next Federal fiscal year must be received in the regional Office 60 days prior to the beginning of the fiscal year to which it is applicable. The Financial Status Report must be submitted by either the Governor or the appropriate State financial official.

§ 1386.26 Federal financial participation.

(a) Federal financial participation is allowable for costs incurred—

(1) Under the State's approved report on the State system;

(2) For providing information and referral services to persons who contact the system for aid whether or not those persons are developmentally disabled;

(3) To solve or alleviate problems of discrimination or denial of rights related to the eligible person's disabilities.

(b) Costs for which Federal financial participation is not allowable are—

(1) Payments made after the end of the Federal fiscal year following the fiscal year in which the underlying obligation was initially incurred. (Sec. 1386.9, Liquidation of obligations);

(2) Except for information and referral services, costs incurred on behalf of persons who do not meet the definition of developmental disability in § 1385.2;

(3) Costs incurred for activities not included in the approved description of the system;

(4) Costs incurred for activities on behalf of persons with developmental disabilities to solve problems not directly related to their disabilities and which are faced by the general populace, for example, drawing up wills and initiating or defending against divorces; and

(5) Costs not allowed under applicable regulations.

§ 1386.27 Prohibition of use of protection and advocacy system for lobbying.

No money available under this subpart shall be used to lobby Congress as set forth in 18 U.S.C. 1913. For this purpose, lobbying means any unsolicited communication with members of the Congress for the purpose of influencing their actions relating to any legislation or appropriation before or after introduction of a bill.

Subpart C—State Plan for Provision of Services for Persons with Developmental Disabilities

State Planning Council

§ 1386.30 Establishment of the State planning council.

Each State which receives Federal assistance under this part must establish a State planning council.

§ 1386.31 Makeup of the council.

(a) The Governor shall appoint the members of the council from among the residents of the State, and shall make appropriate provisions for rotation of all members except the representatives of State/Federal programs. The State plan shall contain a statement of the policies

governing the rotation of council membership. The policies must ensure that all the consumers and their representatives are not replaced in a single year to assure the efficacy of the council's advocacy role, and to the extent possible, membership on the council must include representatives from minority groups.

(b) The council must at all times include in its membership a separate representative from each of the following State/Federal programs: developmental disabilities program, education for the handicapped, vocational and other rehabilitation programs, public assistance, medical assistance, social services, maternal and child health, crippled children's services, comprehensive health planning, mental health services, and mental retardation services. The Secretary may waive this requirement upon a request from the Governor of the State showing that State officials designated to represent more than one Federal/State program have the knowledge and authority to speak for and act for those programs. The council shall also include a representative of higher education training facilities (including a representative of a university affiliated facility if one is located in the State), and a single, different representative from each of the following groups: local governmental agencies, and non-governmental agencies and groups concerned with services to persons with developmental disabilities.

(c) At least one-half of the membership of the council shall consist of (1) persons who are themselves developmentally disabled, and (2) relatives or guardians of such persons.

(d) Of the number in (c) above, at least one-third shall be developmentally disabled persons themselves; and at least one-third shall be parents, other immediate relatives, or guardians of persons who are unable to represent themselves because of a mentally impairing developmental disability. One of the latter group shall represent an institutionalized person with a developmental disability.

(e) Consumer representatives shall not be employees of a State agency which receives funds or provides services under this Subpart, or managing employees of an entity providing services or receiving funds under this Subpart. In addition, an owner or person with a controlling interest in any entity receiving funds or providing services under this Subpart may not be a consumer representative.

The terms "managing employees," "owner or person with controlling interest" are defined in Sections 1126(b)

and 1124(a)(3), respectively, of the Social Security Act.

§ 1386.32 Duties of the council.

(a) It shall be the duty of the council to advocate programs and policies for persons with developmental disabilities in order to improve the State's programs of care, treatment, habilitation, and other services for them. The council shall set broad policy, determine priorities among service needs, and set goals and objectives for the State program of services for persons with developmental disabilities. In the case of disagreements between a council and an administering agency concerning the adoption of a goal or policy of the State plan, the Governor shall have the final authority for making the decision. In addition, the council shall—

(1) Develop the State plan jointly with the designated State agency(ies), including the specification of areas of priority services under § 1386.47 of this subpart;

(2) Monitor, review, and evaluate the implementation of the State plan, not less often than annually;

(3) Review and comment on all State plans which relate to programs affecting persons with developmental disabilities, to the maximum extent feasible;

(4) Review and comment on applications for grants under Part 1387, except applications for projects of national significance;

(5) Submit to the Commissioner, through the Governor, an annual report of its activities. This report is part of the program performance report required under § 1386.41(d).

(b) The council chairperson shall submit the State plan, plan amendments, annual reviews (subparagraph (a)(2) of this section), and related documents to the Governor, as required by Office of Management and Budget Circular A-95. The Governor shall have 45 days to review the materials prior to their submission to the Commissioner. Any comments the Governor makes shall be transmitted to the Commissioner with the documents.

(c) The council chairperson shall submit the State plan and related documents to the Commissioner 60 days prior to the fiscal year to which they are applicable.

(d) The council shall not exert any authority or control over policy or activity of the protection and advocacy office. The council shall not administer the office in any way.

§ 1386.33 Council staff.

(a) In order to carry out its responsibilities and duties, the State council must have a staff responsible to

the State council. The staff must be qualified to carry out the following functions: planning, monitoring, evaluation, advocacy, and management. The size of the professional staff will vary among States; however, each council shall have at least one full-time director and one full-time clerk/secretary.

(b) In determining the need for additional staff, the State shall take into account the particular needs of the council and the resources available to it.

(c) If necessary for the performance of its functions, the State council may employ consultants and may contract with individuals or entities for services.

State Plan Requirements for Planning, Administration and Services

§ 1386.40 General.

In order to receive Federal financial assistance under this Subpart, a State shall have in effect a State plan which meets the requirements of § 1386.41 through § 1386.54 and which is approved by the Commissioner.

§ 1386.41 Designation of the State planning council and the State agency.

The State plan shall provide for—

(a)(1) The establishment of a State council, in accordance with § 1386.30; (2) for the assignment to the council of adequate personnel to enable the council to carry out its duties; and (3) the identification of the staff.

(b) Identification of the State agency which has been designated by the Governor to administer or supervise the administration of the State plan. If there is more than one agency, the portion of the State plan for which each is responsible shall be stated, and amounts of the allotment apportioned among the agencies shall be specified; and

(c) Identification of a program unit within the designated State administering agency which has primary responsibility for proper and efficient administration of the State plan.

§ 1386.42 Plan submittal and approval.

(a) All of the following documents must be submitted by the council chairperson to the Commissioner for approval prior to their implementation:

(1) The State plan must be revised at least once every three years;

(2) The State plan must be amended at any time that substantive changes affect its administration or priorities;

(3) A description of the extent and scope of services provided or to be provided as required by § 1386.44(c) must be submitted annually in order for the State to receive Federal funds under this Subpart.

(b) The State plan must contain a statement that it was jointly developed by the State council and the designated State agency. This statement must be signed by the chairperson of the State planning council and by the appropriate official(s) of the State agency.

(c) Failure to submit an approvable plan, plan amendments, or annual review prior to the fiscal year for which they are applicable shall result in the loss of Federal financial participation in the costs resulting from obligations incurred during the period of the fiscal year for which they were not submitted.

(d) The Commissioner shall approve any State plan, amendment, or revision provided it meets the requirements of the Act, these and other applicable regulations, and performance standards issued by the Commissioner.

§ 1386.43 Methods of administration.

The State plan must describe the policies, procedures, and methods to be employed for the proper and efficient administration of the State plan, including application procedures for subgrantees. It must describe methods to be used to inform the general public in the State of the kinds and locations of services and facilities which are or will be available. It must also describe methods to be used to notify interested persons in the State as to where and when the State plan can be examined.

§ 1386.44 Description of objectives and services.

The State plan must—

(a) State the specific objectives to be achieved and list the programs and resources to be used to meet the objectives;

(b) Describe the extent and scope of services being provided or to be provided to developmentally disabled persons under other State plans for Federally assisted State programs. These programs included, but are not limited to, education for the handicapped, vocational and other rehabilitation programs, public assistance, medical assistance, social services, maternal and child health, crippled children's services, comprehensive health, mental health, aging, mental retardation and other plans the Commissioner specifies. The State plan must describe how the State's allotment will be used to complement and augment, rather than duplicate or replace, services for persons with developmental disabilities who are eligible for Federal assistance under these programs;

(c) Assess and describe the extent and scope of the priority services

(§ 1386.45) being or to be provided for each fiscal year; and

(d) Describe the method established for the periodic evaluation of the State plan's effectiveness in meeting the objectives described above.

§ 1386.45 Priority services.

For purposes of the State plan, priority services include case management, child development, alternative community living arrangements, and nonvocational social-developmental services. Priority services are defined as follows:

"Case management services" are services to assist in gaining access to needed social, medical, educational, and other services. The term includes: (1) follow-along services such as consultation and evaluation which ensure that the changing needs of the person and the family are recognized and appropriately met; and (2) coordination services which provide to persons with developmental disabilities support, access to other services, and monitoring of that person's progress.

"Child development services" are services to assist in the prevention, identification, and alleviation of developmental disabilities in children. They include: (1) early intervention services; (2) counseling and training of parents; (3) early identification of developmental disabilities; and (4) diagnosis and evaluation of developmental disabilities.

"Alternative community living arrangement services" are services to assist in maintaining suitable residential arrangements in the community. They include in-house services, for example personal aides and attendants, and other domestic assistance and supportive services; family support services; foster care services; group living services; respite care; and staff training, placement, and maintenance services.

"Nonvocational social-developmental services" are services to assist in the performance of daily living and work activities, for example: day activities, transportation, financial matters, recreation, civic concerns, and personal-social matters.

§ 1386.46 Use of funds.

The State plan must contain assurances that the State's Federal allotment will be used in whole or in part to—

(a) Make a significant contribution toward strengthening services for persons with developmental disabilities through agencies in the various political subdivisions of the State;

(b) Assist public or non-profit private entities;

(c) Supplement and increase the level of funds that would otherwise be made available for the purposes for which Federal funds are provided and not to supplant non-Federal funds; and

(d) provide for reasonable State financial participation in the cost of carrying out the State plan.

§ 1386.47 Provision of priority services.

(a)(1) The State plan must identify one or more priority service areas (§ 1386.45) on which Federal funds will be expended.

(2) The number of Federally funded priority service areas to be supported is determined by the appropriation for the fiscal year under Sec. 131 of the Act. Until the Federal appropriation exceeds \$80 million for a year, a State is required to fund one, but not more than two, of the priority service areas identified in the State plan. No more than three priority service areas may be funded when the appropriation exceeds \$80 million but is less than \$90 million per year.

(3) A State must select one Federal priority service area. At its option, depending on the size of the Federal appropriation (see paragraph (2) above), the State may select and identify one or two additional Federal priority service areas or one or two additional other service areas.

(4) The Commissioner, upon written application from the State council, may approve a waiver of the limitations described in paragraphs (a)(2) and (3) of this section. The application must demonstrate that—

(i) The funding of an additional area of priority services will not result in a disproportionate decrease in services in the other priority service areas;

(ii) Non-Federal expenditures for service activities in the fiscal year for which the waiver is requested will be not less than those reported on the Financial Status Report to the Secretary on Form HEW 200 for the fiscal year ended September 30, 1978; and

(iii) Insofar as possible, the requested area of service to be funded is one of the four Federal priority service areas. If the State finds that its need for another optional service (in addition to the one it found under paragraph (a) of this section) has a higher priority for that State than the remaining Federally established priority service areas, the State shall explain this finding in the application for the waiver. The application must be submitted to the Commissioner 90 days prior to the fiscal year for which funding is requested.

(b) The State council and State agency shall periodically (at least once every three years), examine the priority

service areas and the need for continuing them, and shall determine if changes are needed.

(c) The State, at its option, may implement its comprehensive plan for statewide services immediately or on a gradual basis. Whatever the decision of the council and agency, the State plan pertaining to priority service area or areas must be in full operation not later than October 1, 1980.

(d) The State plan must indicate that \$100,000 or 65 percent of the State's Federal allotment, whichever is greater, will be expended for providing service activities in the priority areas identified in the plan.

(e) The State plan may include the following additional service activities if they are components of the selected priority service areas: (1) model service programs; (2) activities to increase the capacity of institutions and agencies to provide services; (3) coordinating the provision of services in the area with other services; (4) outreach related to the service area; and (5) training of personnel to provide the services.

(f) Special financial and technical assistance must be given to agencies providing services to residents of urban or rural poverty areas. The list of areas designated by the State Health Planning and Development Agencies (HPDA) and approved by the Secretary under Title XVI, Sec. 1824(13) Pub. L. 93-641, as amended by Pub. L. 96-79, shall be used for this purpose. This list was published in the Federal Register, Vol. 43, No. 19, January 27, 1978, and is available from the State HPDA and HEW Regional Offices.

§ 1386.48 Standards for services and protection of rights.

The State plan must assure that and describe how—

(a) Services are rendered on an individualized basis as provided for in § 1386.52 (Individual habilitation plans);

(b) The human rights of persons with developmental disabilities (especially those without familial protection) are protected, consistent with § 1385.3 (Rights of persons with developmental disabilities);

(c) Buildings used for delivery of services meet the standards adopted under the Architectural Barriers Act of 1968, 42 U.S.C. 4151-4157 and applicable Federal regulations. An exception may be made only if the grantee certifies, before the grant award is issued, that the facility will be in compliance in the period covered by the award; and

(d) Affirmative steps have been taken to assure participation in programs authorized under the Act of individuals generally representative of the

developmentally disabled population, with special attention given to members of minority groups. The State plan shall provide that applications for subgrants contain detailed information on the total number of developmentally disabled people in the geographic area to be served, the number of minority persons with developmental disabilities in the area, the manner in which the services to be provided by the project will be made known to them, and what arrangements will be made to meet their special needs as members of minority groups.

§ 1386.49 Professional assessment and evaluation programs.

(a) The plan must provide for—

(1) An assessment of the adequacy of the skill level of persons, professional and paraprofessional, providing direct and indirect services; and

(2) An assessment of the adequacy of the State programs and plans supporting training of such professionals and paraprofessionals.

(b) The State plan must address the needs, disclosed by the two assessments, which must be met in order to achieve and maintain high quality of services. In developing this part of the plan, the State shall utilize resources of university affiliated facilities, where available and appropriate, and of other State and Federal manpower programs.

(c) The State plan must provide for planning and implementing the evaluation system in accordance with Section 110 of the Act.

§ 1386.50 Utilization of community resources and volunteers.

The plan must provide for the maximum utilization of all available community resources including volunteers (VISTA) serving under the Domestic Volunteer Service Act of 1973 (Pub. L. 93-113) and other appropriate voluntary organizations. Volunteer services must supplement, and must not be in lieu of, services of paid employees.

§ 1386.51 Protection of employees' interests.

(a) The State plan must provide for fair and equitable arrangements to protect the interests of all employees affected by actions under the plan to provide alternative community living arrangements. Specific arrangements for the protection of affected employees shall be developed through negotiations between the appropriate State authorities and employees or their representatives. Employees are to be given written notice prior to implementation of this priority service.

The arrangements must include, without being limited to, provisions for—

(1) To the maximum extent practicable, the preservation of rights, privileges, and benefits (including continuation of pension rights and benefits) under existing collective bargaining agreements or otherwise;

(2) The continuation of collective bargaining rights;

(3) To the maximum extent practicable, the protection of individual employees against a worsening of their positions with respect to their employment;

(4) Maximum efforts to guarantee employment to employees of any State political subdivision thereof who will be affected by any program funded in whole or in part under provisions of the Act; and

(5) Employee training or retraining programs.

(b) *Performance standards.* The terms and conditions of such protective arrangements must include the following performance standards:

(1) *Preservation of rights and benefits.* The preservation of rights and benefits requires that any new job offer to an employee displaced due to alternative community living arrangement services will not result in the termination of accrued benefits, including pension benefits, vacation benefits, health and insurance benefits, seniority rights or similar benefits. This provision applies only to jobs offered by the State or local governments and not to jobs found independently by a terminated employee seeking alternative employment.

(2) *Continuation of collective bargaining rights.* This provision applies when:

(i) The administration of a facility would be turned over from one governmental unit to another (for example, from State to county); and

(ii) An entire employee group would be moved intact to a new facility.

(3) *Worsening of position.* A state cannot fulfill its responsibility to protect an employee against a worsening of his or her position when the job is terminated because of alternative community living arrangement services by offering a job at less pay, lower status, different functions, or with a substantial increase in health or safety hazard, unless such a position is the only one available.

(4) *Assurances of employment.* A displaced State or local government employee must be offered a job that conforms with these requirements if any is available. In order to meet this requirement the State agency shall

initiate policies and procedures to ensure that:

- (i) Affected State and local government employees have transfer rights to employment in community facilities for the developmentally disabled operated by State or local governments;
- (ii) All appropriate job vacancies are posted at locations convenient for employees;
- (iii) Affected employees have the right to transfer to jobs in other State or local government departments;
- (iv) Employees upon transfer to a new place of employment more than 50 miles beyond their previous employment have the right to relocation expenses; and
- (v) Employees who qualify under State civil service have the right to early retirement.

(5) *Training and retraining.* Program policies must provide that training or retraining will be:

- (i) In or near present place of employment of employee;
- (ii) At no expense to employee; and
- (iii) That employee's compensation will not be adversely affected during training.

§ 1386.52 Individual habilitation plans.

(a) The State plan must contain an assurance that each program (including programs of any agency, facility, or project) which receives funds from the State's allotment under this Subpart has a habilitation plan in effect for each developmentally disabled person who receives services from or under the program. The habilitation plan must be reviewed at least annually.

(b) The State plan must describe the methods to be used to facilitate an annual review of the habilitation plan. The State plan must include the following requirements for habilitation plans:

- (1) Be in writing;
- (2) Be developed jointly by—
 - (i) Representative(s) of the program primarily responsible for delivering or coordinating the delivery of services to the person with a developmental disability for whom the plan is established;
 - (ii) The developmentally disabled person; or
 - (iii) Where appropriate, that person's parents, or guardian, or other representative; and
- (3) Be signed by the person or his or her representative, and the principal program representative;
- (4) Contain a statement of the long-term habilitation goals for the person and the intermediate habilitation objectives relating to the attainment of the goals. The objectives shall be

expressed in behavioral or other terms that provide measurable indices of progress;

(5) Describe how the objectives will be achieved and the barriers that might interfere with the achievement of them;

(6) State objective criteria and an evaluation procedure and schedule for determining whether such goals and objectives are being achieved;

(7) Provide for a program coordinator who will be responsible for the implementation of the plan;

(8) Contain a statement (in readily understandable form) of specific habilitation services to be provided, identify the agency which will deliver each service, describe the personnel (and their qualifications) necessary for the provision of those services, and specify the date of the initiation of each service to be provided and the anticipated duration of each service;

(9) Specify the role and objectives of all parties to the implementation of the plan; and

(10) Be reviewed at least annually by the agency which is primarily responsible for delivering or coordinating the delivery of services to the person with developmental disabilities. In the course of the review, the person and the person's parents, or guardian, or other representative shall be given an opportunity to review and participate in revising the plan.

§ 1386.53 Federal financial participation.

(a) Under this Subpart, Federal financial participation is available in costs resulting from obligations incurred under the approved State plan for the necessary expenses of the State council, the administration and operation of the State plan, and training of personnel.

(b) Expenditures which are not allowable for Federal financial participation are—

- (1) Costs incurred by institutions or other residential or non-residential programs which do not comply with § 1385.3 of these regulations;
- (2) Payments made after the end of the fiscal year following the fiscal year in which the underlying obligation was initially incurred (§ 1386.10, Liquidation of obligations);
- (3) Costs incurred for activities not provided for in the approved State plan;
- (4) Costs for construction and renovation of facilities and acquisition of land; and
- (5) Unallowable costs identified in 45 CFR Part 74.

§ 1386.54 Additional information and assurances.

The State plan must contain such additional information and assurances

as the Commissioner may find necessary to carry out the provisions and purposes of this part.

§ 1386.55 Final disapproval of the State plan.

Final disapproval of any State plan will be determined only after the following procedures have been complied with:

(a) The State plan has been submitted to the appropriate HEW Regional Office, and the Regional Office and State have been unable to resolve their differences.

(b) The Regional Office has prepared a detailed written analysis of its reasons for recommending disapproval and has transmitted its analyses and all other relevant material to the Commissioner, and provided the State council and State agency with copies of the material.

(c) The Commissioner, after review of the records and the recommendation of the Regional Office, has determined whether the State plan, in whole or in part, is not approvable. This determination has been sent to the State and contains appropriate references to the records, statutory and regulatory provisions, and all relevant interpretations of applicable laws and regulations. The notification of the decision must inform the State of its right to appeal in accordance with 45 CFR Part 1386, Subpart D.

(d) The Commissioner's decision has been forwarded to the State council and agency by registered mail with a return receipt requested.

(e) A State has filed its request for a hearing with the Assistant Secretary for Human Development Services (ASHDS) within 21 days of the receipt of the decision. The request for a hearing must be sent by registered mail to the ASHDS. The date of mailing the request is considered the date of filing if it is supported by independent evidence of mailing, otherwise the date of receipt shall be considered the date of filing.

Subpart D—Practice and Procedure for Hearings Pertaining to States' Conformity and Compliance with Developmental Disabilities Plans and Federal Requirements

General

§ 1386.60 Definitions.

For purposes of this Subpart: "Assistant Secretary" means the Assistant Secretary for Human Development Services (HDS) or a presiding officer.

"BDD" means Bureau of Developmental Disabilities, Rehabilitation Services Administration.

"Presiding officer" means anyone appointed by the Assistant Secretary to conduct any hearing held under this Subpart. The term includes the Assistant Secretary if the Assistant Secretary presides over the hearing.

§ 1386.81 Scope of rules.

(a) The rules of procedure in this Subpart govern the practice for hearings afforded by the Department to States pursuant to § 1386.11, 1386.23, 1386.24 and 1386.42.

(b) Nothing in this Part is intended to preclude or limit negotiations between the Department and the State, whether before, during, or after the hearing to resolve the issues which are, or otherwise would be, considered at the hearing. Negotiations and resolution of issues are not part of the hearing, and are not governed by the rules in this Subpart, except as otherwise provided in this Subpart.

§ 1386.82 Records to be public.

All Pleadings, correspondence, exhibits, transcripts of testimony, exceptions, briefs, decisions, and other documents filed in the docket in any proceeding are subject to public inspection.

§ 1386.83 Use of gender and number.

As used in this Subpart, words importing the singular number may extend and be applied to several persons or things, and vice versa. Words importing either gender may be applied to the other gender or to organizations.

§ 1386.84 Suspension of rules.

Upon notice to all parties, the Assistant Secretary may modify or waive any rule in this Subpart, unless otherwise expressly provided, upon determination that no party will be unduly prejudiced and justice will be served.

§ 1386.85 Filing and service of papers.

(a) All papers in the proceedings shall be filed with the HDS Hearing Clerk in an original and two copies. Only the originals of exhibits and transcripts of testimony need be filed.

(b) All papers in the proceedings shall be served on all parties by personal delivery or by mail. Service on the party's designated representative will be deemed service upon the party.

Preliminary Matters—Notice and Parties

§ 1386.90 Notice of hearing or opportunity for hearing.

Proceedings are commenced by mailing a notice of hearing or opportunity for hearing from the Commissioner to the State council and

the designated State agency, or to the State protection and advocacy office or official. The notice shall state the time and place for the hearing, and the issues which will be considered. The notice will be published in the Federal Register.

§ 1386.91 Time of hearing.

The hearing shall be scheduled not less than 30 days nor more than 60 days after the date notice of the hearing is mailed to the State.

§ 1386.92 Place.

The hearing shall be held at a date, time, and place determined by the Assistant Secretary with due regard for the convenience and necessity of the parties or their representatives.

§ 1386.93 Issues at hearing.

(a) Prior to a hearing, the Assistant Secretary may notify the State in writing of additional issues which will be considered at the hearing. That notice shall be published in the Federal Register. If that notice is mailed to the State less than 20 days before the date of the hearing, the State or any other party, at its request, shall be granted a postponement of the hearing to a date 20 days after the notice was mailed, or such later date as may be agreed to by the Assistant Secretary.

(b) If any issue is resolved in whole or in part, but new or modified issues are presented, the hearing shall proceed on the new or modified issues.

(c)(1) If at any time, whether prior to, during, or after the hearing, the Assistant Secretary finds that the State has come into compliance with Federal requirements on any issue in whole or in part, he or she shall remove the issue from the proceedings in whole or in part as may be appropriate. If all issues are removed the Assistant Secretary shall terminate the hearing.

(2)(i) Prior to the removal of an issue, in whole or in part, from a hearing involving issues relating to the conformity of State plan or report on the description of the protection and advocacy system with Federal requirements, the Assistant Secretary shall provide all parties other than the Department and the State (see § 1386.94(b)) with the Statement of his or her intention to remove an issue from the hearings and the reasons for that decision. A copy of the proposed State plan provision or report on the description of the protection and advocacy system on which the State and the Assistant Secretary have settled shall be sent to the parties. The parties shall have an opportunity to submit in writing within 15 days their views as to,

or any information bearing upon, the merits of the proposed provision and the merits of the reasons for removing the issue from the hearing.

(ii) In hearings involving questions of noncompliance of a State's operation of its program with the State plan or system description, or with Federal requirements, the same procedure set forth in paragraph (2)(i) of this Subsection shall be followed with respect to any report or evidence resulting in a conclusion by the Assistant Secretary that a State has achieved compliance.

(d) The issues considered at the hearing shall be limited to those issues of which the State is notified as provided in § 1386.90 and paragraph (a) of this Section, and new or modified issues described in paragraph (b) of this Section, and shall not include issues or parts of issues removed from the proceedings pursuant to paragraph (c) of this Section.

§ 1386.94 Request to participate in hearing.

(a) The Department, the State council, the designated State agency, and the State protection and advocacy office, as appropriate, are parties to the hearing without making a specific request to participate.

(b)(1) Other individuals or groups may be recognized as parties if the issues to be considered at the hearing have caused them injury and their interests are relevant to the issues in the hearing.

(2) Any individual or group wishing to participate as a party shall file a petition with the HDS Hearing Clerk within 15 days after notice of the hearing has been published in the Federal Register, and shall serve a copy on each party of record at that time in accordance with § 1386.85(b). Such petition shall concisely state (i) petitioner's interest in the proceeding, (ii) who will appear for petitioner, (iii) the issues petitioner wishes to address and (iv) whether petitioner intends to present witnesses.

(3) Any party may file comments within 5 days of receipt of such petition.

(4) The presiding officer shall promptly determine whether each petitioner has the requisite interest in the proceedings and shall permit or deny participation accordingly. Where petitions to participate as parties are made by individuals or groups with common interests, the presiding officer may request all of the petitioners to designate a single representative, or he or she may recognize one or more of the petitioners to represent all of them. The presiding officer shall give each petitioner written notice of the decision on its petition. If any petition is denied,

the presiding officer shall briefly state the grounds for denial.

(c)(1) Any interested person or organization wishing to participate as *amicus curiae* shall file a petition with the HDS Hearing Clerk before the commencement of the hearing. Such petition shall concisely state (i) the petitioner's interest in the hearing, (ii) who will represent the petitioner, and (iii) the issues on which petitioner intends to present argument. The presiding officer may grant the petition if he or she finds that the petitioner has a legitimate interest in the proceedings, that such participation will not unduly delay the outcome and may contribute materially to the proper disposition of the issues.

(2) An *amicus curiae* may present a brief oral statement at the hearing at the point in the proceedings specified by the presiding officer. It may submit a written statement of position to the presiding officer prior to the beginning of a hearing, and shall serve a copy on each party. It may also submit a brief or written statement at such time as the parties submit briefs, and shall serve a copy on each party.

Hearing Procedures

§ 1386.100 Who presides.

(a) The presiding officer at a hearing shall be the Assistant Secretary or someone designated by the Assistant Secretary.

(b) The designation of a presiding officer shall be in writing. A copy of the designation shall be served on all parties and *amici curiae*.

§ 1386.101 Authority of presiding officer.

(a) The presiding officer shall have the duty to conduct a fair hearing, avoid delay, maintain order, and make a record of the proceedings. The presiding officer shall have all powers necessary to accomplish these ends, including, but not limited to, the power to:

(1) Change the date, time, and place of the hearing, upon notice to the parties. This includes the power to continue the hearing in whole or in part;

(2) Hold conferences to settle or simplify the issues in a proceeding, or to consider other matters that may aid in the expeditious disposition of the proceedings;

(3) Regulate participation of parties and *amici curiae* and require parties and *amici curiae* to state their positions with respect to the issues in the proceeding;

(4) Administer oaths and affirmations;

(5) Rule on motions and other procedural items on matters pending before him or her, including issuance of protective orders or other relief to a party against whom discovery is sought;

(6) Regulate the course of the hearing and conduct of counsel therein;

(7) Examine witnesses;

(8) Receive, rule on, exclude, or limit evidence or discovery;

(9) Fix the time for filing motions, petitions, briefs, or other items in matters pending before him or her;

(10) If the presiding officer is the Assistant Secretary, make a final decision;

(11) If the presiding officer is a hearing examiner, certify the entire record, including recommended findings and proposed decision, to the Assistant Secretary;

(12) Take any action authorized by the rules in this Subpart or 5 U.S.C. 551-559.

(b) The presiding officer does not have authority to compel the production of witnesses, papers, or other evidence by subpoena.

(c) If the presiding officer is a hearing examiner, his or her authority is to render a recommended decision with respect to program requirements which are to be considered at the hearing. In case of any noncompliance, he or she shall recommend whether Federal financial participation should be withheld with respect to the entire State plan or the report of the system description, or whether Federal financial participation should be withheld only with respect to those parts of the program affected by such noncompliance.

§ 1386.102 Rights of parties.

All parties may:

(a) Appear by counsel, or other authorized representative, in all hearing proceedings;

(b) Participate in any prehearing conference held by the presiding officer;

(c) Agree to stipulations of facts which will be made a part of the record;

(d) Make opening statements at the hearing;

(e) Present relevant evidence on the issues at the hearing;

(f) Present witnesses who then must be available for cross-examination by all other parties;

(g) Present oral arguments at the hearing;

(h) Submit written briefs, proposed findings of fact, and proposed conclusions of law, after the hearing.

§ 1386.103 Discovery.

The Department and any party named in the Notice issued pursuant to § 1386.90 shall have the right to conduct discovery (including depositions) against opposing parties as provided by the Federal Rules of Civil Procedure. There shall be no fixed rule on priority of discovery. Upon written motion, the

presiding officer shall promptly rule upon any objection to discovery action. The presiding officer shall also have the power to grant a protective order or relief to any party against whom discovery is sought and to restrict or control discovery so as to prevent undue delay in the conduct of the hearing. Upon the failure of any party to make discovery, the presiding officer may issue any order and impose any sanction other than contempt orders authorized by Rule 37 of the Federal Rules of Civil Procedure.

§ 1386.104 Evidentiary purposes.

The hearing is directed to receiving factual evidence and expert opinion testimony related to the issues in the proceeding. Argument will not be received in evidence; rather, it must be presented in statements, memoranda, or briefs, as directed by the presiding officer. Brief opening statements, which shall be limited to a statement of the party's position and what it intends to prove, may be made at hearings.

§ 1386.105 Evidence.

(a) *Testimony.* Testimony shall be given orally under oath or affirmation by witnesses at the hearing. Witnesses shall be available at the hearing for cross-examination by all parties.

(b) *Stipulations and exhibits.* Two or more parties may agree to stipulations of fact. Such stipulations, or any exhibit proposed by any party, shall be exchanged at the prehearing conference or at a different time prior to the hearing if the presiding officer requires it.

(c) *Rules of evidence.* Technical rules of evidence shall not apply to hearings conducted pursuant to this part, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination shall be applied where reasonably necessary by the presiding officer. A witness may be cross-examined on any matter material to the proceeding without regard to the scope of his or her direct examination. The presiding officer may exclude irrelevant, immaterial, or unduly repetitious evidence. All documents and other evidences offered or taken for the record shall be open to examination by the parties and opportunity shall be given to refute facts and arguments advanced on either side of the issues.

§ 1386.106 Exclusion from hearing for misconduct.

Disrespectful, disorderly, or contumacious language or contemptuous conduct, refusal to comply with directions, or continued use of dilatory tactics by any person at the hearing

before a presiding officer shall constitute grounds for immediate exclusion of such person from the hearing by the presiding officer.

§ 1386.107 Un-sponsored written material.

Letters expressing views or urging action and other unsponsored written material regarding matters in issue in a hearing will be placed in the correspondence section of the docket of the proceeding. These data are not deemed part of the evidence or record in the hearing.

§ 1386.108 Official transcript.

The Department will designate the official reporter for all hearings. The official transcript of testimony taken, together with any stipulations, exhibits, briefs, or memoranda of law filed with them shall be filed with the Department. Transcripts of testimony in hearings may be obtained from the official reporter by the parties and the public at rates not to exceed the maximum rates fixed by the contract between the Department and the reporter. Upon notice to all parties, the presiding officer may authorize corrections to the transcript which involve matters of substance. Transcripts shall be taken by stenotype machine and not by voice recording devices, unless otherwise agreed by all of the parties and the presiding officer.

§ 1386.109 Record for decision.

The transcript of testimony, exhibits, and all papers and requests filed in the proceedings, except the correspondence section of the docket, including rulings and any recommended or initial decision, shall constitute the exclusive record for decision.

Posthearing Procedures, Decisions

§ 1386.110 Posthearing briefs.

The presiding officer shall fix the time for filing posthearing briefs. This time shall not exceed 30 days after termination of the hearing and receipt of the transcript. Briefs may contain proposed findings of fact and conclusions of law. If permitted, reply briefs may be filed no later than 15 days after filing of the posthearing briefs.

§ 1386.111 Decisions following hearing.

(a) If the Assistant Secretary is the presiding officer, he or she shall issue a decision within 60 days after the time for submission of posthearing briefs has expired.

(b)(1) If a hearing examiner is the presiding officer, he or she shall, within 30 days after the time for submission of posthearing briefs has expired, certify the entire record to the Assistant

Secretary including recommended findings and proposed decision. The Assistant Secretary shall serve a copy of the recommended findings and proposed decision upon all parties and amici.

(2) Any party may, within 20 days, file exceptions to the recommended findings and proposed decision and supporting brief or statement with the Assistant Secretary.

(3) The Assistant Secretary shall review the recommended decision and, within 60 days of its issuance, issue his or her own decision.

(c) If the Assistant Secretary concludes:

(1) In the case of a hearing under § 1386.23, § 1386.24 or § 1386.42 that a State plan or report on the State's protection and advocacy system does not comply with Federal requirements, he or she shall also specify whether the State's total allotment for the fiscal year will not be authorized for the State or whether, in the exercise of his or her discretion, the allotment will be limited to parts of the State plan or the report not affected by the noncompliance.

(2) In the case of a hearing pursuant to § 1386.11, that the State is not complying with requirements of the State plan or the report on the description of the State's protection and advocacy system, he or she shall also specify whether Federal financial participation will not be made available to the State or whether, in the exercise of his or her discretion, Federal financial participation will be limited to categories under the State plan or the report on the description of the State's protection and advocacy system not affected by such noncompliance. The Assistant Secretary may ask the parties for recommendations or briefs or may hold conferences of the parties on these questions.

(d) The decision of the Assistant Secretary under this Section shall be the final decision of the Secretary and shall constitute "final agency action" within the meaning of 5 U.S.C. 704 and the "Secretary's action" within the meaning of Section 138 of the Act. The Assistant Secretary's decision shall be promptly served on all parties and amici.

§ 1386.112 Effective date of decision by the Assistant Secretary.

(a) If, in the case of a hearing pursuant to § 1386.11, the Assistant Secretary concludes that a State plan or the report on the description of the State's protection and advocacy system does not comply with Federal requirements, and the decision provides that the allotment will be authorized but limited to parts of the State plan or the report on the description of the State's

protection and advocacy system not affected by such noncompliance, the decision shall specify the effective date for the authorization of the allotment.

(b) In the case of a hearing pursuant to § 1386.23, § 1386.24, or § 1386.42, if the Assistant Secretary concludes that the State is not complying with requirements of the State plan or the report on the description of the State's protection and advocacy system, the decision that further payments will not be made to the State, or that payments will be limited to parts of the State plan or the report on the description of the State's protection and advocacy system not affected, shall specify the effective date for the withholding of Federal funds.

(c) The effective date shall not be earlier than the date of the decision of the Assistant Secretary and shall not be later than the first day of the next calendar quarter.

(d) The provisions of this section may not be waived pursuant to § 1386.84.

PART 1387—SPECIAL PROJECTS.

3. Part 1387 is revised to read as follows:

- Sec.
1387.1 Purposes of projects.
1387.2 Projects of national significance.
1387.3 Eligible applicants.
1387.4 Application content and procedure.
1387.5 Amount of grant.

Authority: Section 108, Pub. L. 96-164, as amended by Pub. L. 95-602.

§ 1387.1 Purposes of projects.

Special project grants may be made by the Commissioner to support a variety of means of increasing the effectiveness and efficiency of services provided under the two State formula grant programs. Not less than 25 percent of the appropriation under Sec. 145(f) of the Act must be used for projects of national significance, defined in § 1387.2.

(a) Special project grants may be made to assist in meeting the costs of conducting an activity or program (referred to here as a "Project") for—

(1) Demonstrations, including research, training, technical assistance and evaluation, for establishing programs to expand or otherwise improve services, particularly priority services, to persons with developmental disabilities who are disadvantaged or multi-handicapped;

(2) Demonstrations for establishing programs which hold promise of expanding or otherwise improving the State protection and advocacy systems. These demonstration projects may include research, training, and technical

assistance, and evaluation in connection with the service.

(b) Applications for grants under (a) may request assistance to carry out one or more of the following activities for developmentally disabled people:

- (1) Public awareness and public education programs to assist in the elimination of social, attitudinal, and environmental barriers;
- (2) Coordinating and using all available community resources to meet needs of recipients (especially those with disadvantaged backgrounds);
- (3) Demonstrations of the provision of services to recipients disadvantaged because of their economic status;
- (4) Technical assistance relating to planning, administration, services, and facilities;
- (5) Training of specialized personnel needed for the provision of services for research directly related to such training;
- (6) Developing or demonstrating new or improved techniques for the provision of services, including model integrated service projects;
- (7) Gathering and disseminating information relating to developmental disabilities;
- (8) Improving the quality of services; and
- (9) Developing or demonstrating innovative methods to attract and retain professionals to serve in rural areas.

§ 1367.2 Projects of national significance.

(a) In order for a project to qualify as a project of national significance, it must be—

- (1) Designed to have a major impact on developmental disabilities programs throughout the country;
- (2) Have an objective which, if achieved, could be replicated and result in an improved delivery system for developmental disabilities services, or affect national policies or standards; or
- (3) Involve activities to be conducted in a number of sites in various parts of the country as part of a unified program.

§ 1367.3 Eligible applicants.

Applications may be made by public and other non-profit agencies, organizations, and institutions of higher education, including community and junior colleges.

§ 1367.4 Application content and procedure.

(a) Priorities for projects to be funded will be announced, and criteria for judging applications will be listed in program announcements published from time to time in the Federal Register.

(b) Applications for grants must be submitted in accordance with

procedures and deadline dates, as prescribed by the Commissioner in program announcements.

(c) The applicant shall provide a copy of the application for a grant under this subpart, except for projects of national significance, to the appropriate State planning council for review and comment, at the same time it submits the application to the Commissioner. The State planning council must submit its comments to the Commissioner with regard to a particular application within 30 days from the date of submission by the applicant in order to assure consideration of such comments.

§ 1367.5 Amount of grant.

The amount of any grant shall be determined by the Commissioner. In determining the amount of any grant under this Subpart, the Commissioner will exclude the amount of any other Federal grant for the project. The amount of any non-Federal funds required to be expended as a condition of any other Federal grant will be excluded from the cost of a grant under this Subpart.

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