federal register

Tuesday
March 27, 1984

Part V

Department of Health and Human Services

Office of Human Development Services

45 CFR Parts 1385, 1386, and 1387
Developmental Disabilities Program; Final Rule

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of Human Development Services

45 CFR Parts 1385, 1386, and 1387

Developmental Disabilities Program

AGENCY: Department of Health and Human Services (HHS), Office of Human Development Services (HDS), Administration on Developmental Disabilities (ADD).

ACTION: Final rule.

SUMMARY: The Department is issuing final rules for the Developmental Disabilities programs. This final regulation implements the Developmental Disabilities Assistance and Bill of Rights Act of 1978, as amended, and contains management and administrative procedures which will reduce reporting and paper work requirements. These rules do not include requirements for the University Affiliated Facilities (UAF) except for the requirement that a UAF must provide an assurance regarding the rights of persons with developmental disabilities. Regulations for the UAF program are found at 45 CFR Part 1388.

EFFECTIVE DATE: April 26, 1984.

FOR FURTHER INFORMATION CONTACT: Jean K. Elder, Ph.D., Commissioner, Administration on Developmental Disabilities, Room 336–E Hubert H. Humphrey Building, 200 Independence Avenue, SW., Washington, D.C. 20201. Telephone: (202) 245–2890.

SUPPLEMENTARY INFORMATION:

Background

Amendments to the Developmental Disabilities Assistance and Bill of Rights Act of 1978, and 1981 require some major modifications in the regulations to reflect statutory changes. In addition, Departmental policy and regulatory principles governing Executive Order 12291 and the Paper Work Reduction Act of 1981 are reflected in these final rules.

Description of Program

The Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C. 6001 et seq.), "the Act," has traditionally served a target population who, by virtue of their severe handicapping conditions, have been underserved or not served at all through existing programs.

Legislation originally enacted in 1963 as the Mental Retardation Facilities and Construction Act (Pub. L. 88–164) authorized planning activities and construction of facilities in which services were to be provided to the mentally retarded. Public Law 88–164 was subsequently amended by the Developmental Disabilities and Facilities Construction Act of 1970 (Pub. L. 91–517) which further expanded the target population to include individuals with cerebral palsy, epilepsy and other neurological disorders. It also created State Planning Councils to advocate for, plan, monitor and evaluate services for the developmentally disabled.

Public Law 91–517 and successive amendments to the Act emphasized that the purpose of the Developmental Disabilities Program was to strengthen, rather than supplant existing services, and to fill gaps in the human service delivery system. Section 101(a)(5) of the Findings and Purpose Section in the Act (42 U.S.C. 6000(a)(5)) explicitly states that "it is in the national interest to strengthen specific programs, especially programs that reduce or eliminate the need for institutional care * * *"

Public Law 94–103, the 1975 Amendments, deleted the construction authority, emphasized advocacy, and added a new requirement for States to establish a Protection and Advocacy system (42 U.S.C. 6012). It also introduced Section 111, "Rights of the Developmentally Disabled," (42 U.S.C. 6010) which stated findings with respect to the rights of persons with developmental disabilities.

The 1978 amendments (Pub. L. 95–602) introduced the provision of priority services to assist States in focusing their energies on specific areas needing remediation (42 U.S.C. 6001(8)).

In addition, these amendments added a new definition of developmental disabilities (42 U.S.C. 6001(7)). The term "developmental disability" in the 1978 amendments was defined as "* * * 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 self-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."

This definitional change was arrived at following an extensive study and emphasizes functional deficits rather than clinical conditions. It is estimated that 3.9 million people in the United States now meet the functional definition of developmental disability.

The Omnibus Budget Reconciliation Act of 1981 (Pub. L. 97–35) extends the Developmental Disabilities Program through September 30, 1984. It authorizes appropriations for the programs in the Act which include: (1) The basic State grant program (42 U.S.C. 6061–6068); (2) a system for protection and advocacy of individual rights (42 U.S.C. 6012); (3) the university affiliated facilities programs for administration and operation of interdisciplinary training, research and service programs (42 U.S.C. 6031–6033); and (4) special project grants for projects of national significance (42 U.S.C. 6081).

In addition, Section 912 of Pub. L. 97–35 repeals the requirement formerly contained in Section 110 of the Act (42 U.S.C. 6009) for a specific evaluation system for services furnished to persons assisted under the Developmental Disabilities Program.

The Department published a Notice of Proposed Rulemaking (NPRM) in the **Federal Register** on February 23, 1983 (45 FR 7700–7712). Interested persons were given sixty days in which to send written comments, suggestions or objections regarding the proposed regulations. During the sixty day comment period seventy letters containing approximately two hundred and twenty-five comments were received. In addition informal discussions on the NPRM were held in three major cities.

All written comments were analyzed and form the basis for changes which the Department has made in these final rules.

Part 1385 contains provisions which apply to all of the Developmental Disabilities programs. Part 1386 regulates the two formula grant programs: the Basic State Grant program authorized by Part C of the Act; and the Protection and Advocacy (P&A) program authorized by Section 113 of the Act. Part 1387 applies to Special Projects of National Significance authorized by Section 145 of the Act. Although rules for the University Affiliated Facilities program (UAF) are in 45 CFR Part 1388, these rules require an assurance by the UAFs of compliance with Section 111 of the Act regarding the rights of persons with developmental disabilities.

Summary of Major Comments, Departmental Response and Changes

The sections which follow include a summary of major comments, our response to those comments, and discussion of all significant changes that we have made in the NPRM to produce these final regulations.

PART 1386

Subpart A—Basic Requirements

Section 1386.2 Obligation of Funds.

Section 1386.2(c)(1) Obligation Based on Estimate.

Section 1386.2(c)(1) of the NPRM proposed that Protection and Advocacy Offices be permitted to obligate funds prior to the end of the fiscal year based on an estimate of potential costs to be incurred when an appearance in judicial and administrative proceedings on behalf of a person with developmental disabilities (litigation costs) is contemplated.

Comment: One commenter recommended that at least twelve months be allowed to reobligate funds which have been obligated for litigation purposes prior to the end of the fiscal year in which the funds become available.

Response: The Department cannot legally allow for obligation or reobligation of funds after the fiscal year in which those funds are appropriated and cannot change Section 1386.2(a) which provides for obligation of all funds within the same fiscal year they are appropriated. We believe that we are providing additional flexibility in this area by allowing an estimate of litigation costs to appear on an obligation document. We suggested that if litigation activity on behalf of an individual is tentative, the Protection and Advocacy System may obligate funds for that purpose in sufficient time during the fiscal year which will allow for reobligation in that same year in the event that litigative activity becomes unnecessary.

Section 1386.2(c)(2) Definition of litigation.

This section defines litigation as it relates to Section 1386.2(c)(1).

Comment: Five commenters indicated that the definition of litigation in § 1386.2 (c)(2) was too restrictive and suggested that the definition be expanded to include monitoring activities associated with court orders or consent decrees.

Response: We concur with this opinion and have expanded the definition of litigation costs to include the expenditure of funds for monitoring, review and oversight of the outcome of litigation. This cannot include salaries of P&A employees, as suggested by several individuals, since salaries are daily expenditures and cannot be part of an obligation to an outside agent or agency.

In addition, we want to clarify that funds used for salaries and expenses incurred in the day-to-day operation of the Protection and Advocacy Systems are part of the operating budget of the grantee. These funds cannot be utilized beyond the end of the fiscal year and cannot be treated in the same way as funds which are obligated to an outside agent or agency to achieve a specific objective, such as litigation and associated activities.

Section 1386.3 Liquidation of Obligations.

The NPRM stipulated that all obligations must be liquidated within one year of the close of the Federal fiscal year in which the funds were made available, or else they revert back to the Federal government.

Comment: There were more than twenty comments on this section proposing a longer liquidation period to address contingencies such as (1) start-up lag by subgrantees, (2) coordination of grant cycles with other State agencies, (3) reappropriation of funds by State Legislatures, and (4) previous time lag between the beginning of a fiscal year and States' receipt of allotment. In addition, commenters recommended that we consider a liquidation period which would coincide with the three year State plan cycle. Many individuals felt that there was a need for a thirty-six month period in which to liquidate obligations. An equal number recommended a twenty-four month period.

Response: The Department believes it has the latitude to establish a reasonable liquidation period which will not impose undue hardships on the States. As there was virtual unanimity that twelve months following the close of the fiscal year in which funds were allotted was too restrictive for liquidation of obligations, we have determined that a two year liquidation period will ease problems articulated by commenters. Section 1386.3 has been revised to reflect this decision and calls for all obligations to be liquidated within two years (twenty-four months) of the close of the Federal fiscal year in which the funds were made available or else they revert back to the Federal government.

Section 1386.4 Eligibility for Services.

Section 1386.4(b) Clients Previously Served.

This section addresses the "Grandfather Clause" in Pub. L. 95–602 which allows continued receipt of services by individuals who met the definition of developmental disability in Pub. L. 94–103, and who actually received one or more services under the Act between October 1, 1968 and October 1, 1978 and whose Individual Habilitation Plan (IHP) indicated a continuing need for those same services.

Comment: Eight of the commenters recommended that language in this section be changed to permit the continued eligibility for services under the Act of persons who were eligible under the former categorical definition of developmental disability, but who do not meet the criteria of the functional definition, provided their IHP specifies that they still need the same services as they did at the time of their entry into the DD service delivery system.

Two other respondents advocated that this "Grandfather Clause" be deleted from the regulation.

Other commenters indicated a need to delete the words "those same" from this section because client needs for services change as they mature and as a result of remediation.

Response: The Report of the Conference Committee accompanying HR 12467 noted that the functional "definition is intended to cover everyone currently covered under the [categorical] 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." HR Report No. 95–1789, 95th Congress, Second Session 104 (1978).

We believe that the NPRM addressed continued eligibility for individuals who were previously served under the categorical definition, but agree that services, in order to meet current needs of individuals, will change over a period of years and should be reflected in Individual Habilitation Plans. We have, therefore, deleted the words "those same" from this section

We believe that this section should not be deleted as commenters suggested because it conveys the intent of Congress not to exclude anyone who was previously served and continues to be eligible under the functional definition.

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

Section 1386.20 Designated State Protection and Advocacy Office.

Section 1386.20(a) Accountable State Official.

Paragraph (a) of this section of the NPRM proposed that the Governor designate the State official or public or private agency accountable for the proper use of funds and conduct of the State Protection and Advocacy System.

Comment: One respondent pointed out that requiring Governors to designate State protection and advocacy agencies imposed restrictions on the States not intended by the Congress. In some States, for example, the legislature may wish to assume responsibility for designating the Protection and Advocacy agency, or may wish to place that responsibility on an officer of the legislature or on the Chief Justice of the State Supreme Court.

Five commenters apparently misinterpreted § 1386.20(a) as introducing another element of control over a State Protection and Advocacy System. This section relates only to designation of the agency to be responsible for the Protection and Advocacy System.

Response: The Department concurs that States should be given the maximum flexibility for designation of the State Protection and Advocacy System and have added the phrase "or other State official or entity" following the word "Governor."

Section 1386.20(b) Non-designation of Guardianship Agency.

This paragraph of the NPRM proposed to preclude an agency of the State which provides guardianship services from being designated as the Protection and Advocacy agency.

Comment: Seventeen commenters supported the prohibition against designation of agencies providing guardianship services. They agreed with the Department that guardianship should be considered a service and that allowing providers of guardianship services to receive the protection and advocacy designation would inherently promote conflict of interest for those agencies.

Five commenters felt that clarification was needed to determine if this section precluded the Protection and Advocacy agencies from representing clients in guardianship proceedings.

Response: The Department wishes to make clear the intent of this section. It prohibits designation as the Protection and Advocacy agency of any agency which provides direct services, including those which provide guardianship services, in order to avoid conflicts of interest. This section is not intended to dictate the kinds of cases which Protection and Advocacy agencies can handle. We have clarified § 1386.20(b) by inserting the following phrase after the word *State:* "or private agency providing direct services, including." States affected by this section will be given one year from the date of issuance of this regulation to redesignate their Protection and Advocacy agencies in the event that redesignation is necessary to comply with § 1386.20(b).

Section 1386.20(c) Responsible State Official.

This paragraph calls for the appointment of a responsible State official to receive notices of compliance actions and disallowances when an entity outside of State government is designated a the protection and advocacy agency.

Comment: Three commenters supported, without reservation, this section, four opposed it, and five indicated that it should be modified. Those in opposition or seeking modification felt that the independence of the Protection and Advocacy agency would be compromised.

Response: In response to those commenters who expressed concern that this section would adversely affect the independence of the Protection and Advocacy agencies, the Department wishes to make clear that this was not the intention of § 1386.20(c). The State official referred to in this section is to act in a liaison capacity in cooperation with the Protection and Advocacy agency in the event that there are instances of disallowance of funds or compliance actions. We have modified this section, for purposes of clarity, by making necessary technical changes which address this concern.

Section 1386.21 Requirements of the Protection and Advocacy System.

Section 1386.21(b)(1) Federal Access to Records.

This section of the NPRM provided for access to client records by authorized Federal officials.

Comment: Two respondents indicated that the opportunity for access afforded representatives of the Federal government in this section was too broad and violated confidentiality of records.

Response: The Department has addressed this issue by amending this section to tie Federal access to clients' records to official audit or other reviews conducted by the Federal government. The Department will fulfill its obligations to maintain confidentiality of personal records.

Comments: Three commenters indicated that granting unlimited access by parents or guardians to the records of minor clients would, in some cases, violate the Protection and Advocacy System's responsibilities to these clients. (e.g. where minors are represented in instances of alleged child abuse).

Response: The Department has amended this Section to protect client confidentiality and to recognize the primacy in these instances, not only of State law but also of court order and attorney-client privilege by adding the terms "court order" and "attorney-client privilege."

Section 1386.22 Triennial report on the State Protection and Advocacy System.

We have made technical changes to this section for clarity and, in one instance, have indicated an OMB clearance number.

Section 1386.23 Periodic Reports.

This section identifies required reports in addition to the triennial report.

Comment: One respondent indicated that it was not clear whether the responsibility for submitting the annual report resides with the Protection and Advocacy agency or with the State. Another commenter questioned whether it was appropriate to require that quarterly and final financial status reports be submitted by the Governor or appropriate State financial official.

Response: We agree and in each case have changed the requirement so that these reports must be submitted directly to the Department by the State Protection and Advocacy agency. In addition, we have revised the language for clarity.

Section 1386.24 Federal financial Participation: Allowable and non-allowable costs for Protection and Advocacy Systems.

Section 1386.24(b)(1) Costs incurred for activities not included in the triennial report are disallowed.

This section of the NPRM precluded Federal financial participation for activities not included in the triennial report.

Comment: One commenter noted that as new activities will occur after the triennial report has been submitted and as the annual report will be a summary of activities which have already taken place, problems for the State would

arise if this section remained as written in the NPRM.

Response: We concur that the rigidity of this provision would cause unnecessary problems for Protection and Advocacy Systems and have deleted section 1386.24(b)(1).

Section 1386.24(b)(2) Non-allowable Costs.

The NPRM proposed, in this section, that costs incurred for activities to solve problems not directly related to an individual's disability and which are faced by the general populace (e.g. drawing up of wills or divorce actions) would not be eligible for Federal financial participation.

Comment: Four commenters indicated that the examples cited in this section are sometimes part of an activity directly related to a person's disability and would inhibit the Protection and Advocacy Systems from carrying out their mandate.

Response: The Department concurs that if activities listed in the examples are part of the overall tasks of the Protection and Advocacy System in resolving a client's problem, then they should be allowable. We have decided to delete the example but retain the paragraph to convey that if a client seeks assistance solely to resolve a problem faced by the general populace, the client should be referred to other counsel or sources of assistance.

Access To Institutional Records

A section on "access to records" was not included in the regulation part of the NPRM but was discussed in the preamble section which described an earlier NPRM dated May 9, 1980. Numerous responses were received to the request for comment on this issue.

These comments stressed the importance of insuring that State Protection and Advocacy Systems are able to serve developmentally disabled persons residing in institutions as well as persons in the community. They felt that the intent of Congress was quite clear regarding the mandate of Protection and Advocacy Systems to employ all appropriate methods for ensuring the rights of *all* developmentally disabled persons, including those residing in institutions.

Response: As developmentally disabled persons residing in institutions are less likely to have access to a Protection and Advocacy System and less likely to understand the services afforded them by that system than are their counterparts residing in the community, special communication efforts may have to be made to insure that the services offered by Protection and Advocacy Systems are understood by and available to institutionalized developmentally disabled persons.

Where problems of access to records and facilities exist, it is important that States take action to address these systemic issues, e.g. through negotiation with individual institutions and agencies.

The Department does not wish to issue regulations granting blanket access to records because of potential conflict with the rights of persons who are competent and do not wish their records reviewed, especially if they receive no Federal or State assistance. However, we will endeavor to identify "best practices" and issue an information memorandum containing model agreements, practices and procedures.

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

Section 1386.30 (a) and (c)(2) Priority Areas.

These sections of the NPRM proposed to require that the States prepare and submit plans which meet the requirements of Section 133(b) and Section 137(b) of the Act, and that States select the priority area(s) in which sixty-five percent of the Federal allotment will be spent.

Comment: Two respondents commented that these provisions do not reflect the role of the Councils in conducting needs assessment, selecting the priorities, and developing the plans. One suggested that the language in the May 9, 1980 NPRM (1386.32) be included in this section. The May, 1980 NPRM described the specific responsibilities of the Council in the planning and priority selection process.

Response: It was not our intent to exclude the Councils from the planning and decisionmaking process. Consequently, the final rules have been modified to specify that States and Councils will jointly prepare and submit the State Plan which will include jointly selected priority areas.

Section 1386.30(c) State Plan Format.

This section of the NPRM supports Executive Order 12372 which allows States to submit their plans in any format they choose, as long as the plans contain all the required information and assurances.

Comment: Twelve commenters wanted the regulation changed to require States to use the State Plan Format which was jointly developed by the Administration on Developmental Disabilities (ADD) and the National Association of Developmental Disabilities Councils (NADDC).

The rationale for this suggestion was that the State plan is the most important document to assure the intent of the Act is being carried out, to provide consistent, comparable data, and to assist States in helping each other. There are twelve commenters who expressed concern that, without a standardized format, these important roles of the plans would be diluted.

One commenter supported the absence of a mandatory format in favor of "simplicity, flexibility, and substitution."

Response: The Department is maintaining its previous position in support of Executive Order 12372. This section in the regulation will allow for a State plan format of the States' choice (including use of the voluntary format developed by NADDC and ADD) as long as States submit plans which meet the requirements of Sections 133 and 137(b) of the Act and provide assurances regarding the development of individual habilitation plans.

Section 1386.30(c)(3) Identification of Council Members.

This section of the NPRM called for the identification in the State Plan of the members of the officially appointed State Planning Council.

Comment: One organization believed that identification of Council members in the State plan was too prescriptive and unnecessarily intrusive.

Response: We concur with this comment and have deleted Sections 1386.30(c)(3) and 1386.30(c)(4).

Section 1386.30(c)(4) Council Staffing.

This section of the NPRM set forth the requirement that the State assign a Director and such support staff as deemed necessary.

Comment: Twenty respondents commented on this position. Seven suggested that the language be amended to specify that the director and support staff should be solely responsible to the State Planning Council and eight respondents suggested that the Council should determine what support staff are necessary.

One commenter suggested that it is the State's prerogative to determine adequate support staff, and one suggested that such decisions should be made jointly by that State and the Council.

One respondent supported the deletion of the May 1980 NPRM requirement that the director be full time, and two advocated that a full time director be mandatory.

Response: ADD recognizes that there have been instances when Councils feel that States have not allocated sufficient staff to permit them to carry out their mandated responsibilities. A requirement that the need for support staff be determined by the Council and that the director and support staff be solely responsible to the Council might eliminate that problem.

However, it is the general policy of the Department to permit States to organize their governments as they see fit. While there may be occasions when Federal requirements necessitate a departure from this policy, we do not believe this is the case in this instance. In order to be responsive to comments and recognizing that a Council's views on what constitutes adequate staff are important in assisting a State in arriving at a proper decision, we have changed the regulation to require State agency consultation with the Council in determining staffing requirements.

The regulation clearly requires the State to identify and assign staff to the Council. This identification and assignment assures that Councils will have specific staff who will carry out the executive and administrative functions under council auspices. We decided that a full time director should not be required because in many States the assignment of a full time director precludes the assignment of part time support staff, a circumstance that restricts the flexibility of Councils to retain staff with a variety of skills. The proposed language has been modified to reflect that the authority for the determination of necessary staff, while still vested with the State, should be made with advice from the Council. These requirements are to be included in the State plan through an assurance rather than a description in section 1386.30(e)(4).

Section 1386.33 Protection of Employees Interests.

This section of the NPRM proposed to provide for fair and equitable arrangements to protect the interests of employees affected by actions under a State plan to provide alternative community living arrangement services.

Comment: There were twenty-two comments on this section, each addressing one of the following five points of view.

(1) Three commenters requested that the regulation contain language from the preamble which explicitly calls for "the protection of the interests of employees who work in institutions when the State has selected the priority area of alternative community living arrangements causing the return of clients from institutions to the community."

(2) Three commenters concluded that the protection of employee interests should be the responsibility of State civil service systems.

(3) Six commenters took issue with that portion of the preamble which referred to the protection of employee interests when the State plan identified alternative community living arrangements as a priority. They maintained that the law requires this protection when alternative community living arrangements services are provided irrespective of their selection as a priority.

(4) Three commenters felt that the regulation should take into account the types of alternative living arrangement services which would adversely affect institutional employment. They felt that the provision of respite care and aid to families of individuals (services under alternative community living arrangements) who had never been institutionalized was not a basis for providing employee protection and would be inappropriate and destructive to the objective of providing individuals with the least restrictive environment.

(5) Seven commenters maintained that Councils lack the authority to develop and implement a plan to protect the interests of employees.

Response: The Department agrees with the first comment that an employee protection plan must relate to institutional employees affected by alternative living arrangement services. In addition, we recognize that there was an error in the preamble of the NPRM, as pointed out in the third comment, stating that a plan for the protection of employees' interests is necessary when a State selects the priority area of alternative community living arrangements as a priority service. The Act requires an employee protection plan when any alternative community living arrangement services are provided, and not only when the priority area is selected (as erroneously stated in the preamble of the NPRM).

With regard to the second comment, the Act (Section 133(b)(7)(B)) requires development of an employee protection plan as discussed in the previous paragraph. Therefore, the Department has rejected the suggestion that the employee protection plan be left to State merit systems.

We also agree with the point of view expressed in paragraph four (4) above. However, since the provision of respite care for, and other aid to, families of individuals who have never been institutionalized can have no adverse effect on employees of institutions, no employee protection plan can logically be required or developed when these services are provided. Consequently, no change in regulation is called for.

The fifth issue regarding Councils' lack of authority to plan and implement a plan to protect the interests of employees fails to take into account that the State plan must be jointly developed by the Council and State administering agency. The plan is implemented by the State agency which is empowered to carry out an employee protection plan. The extent of Council authority is prescribed by the statute and the regulation is consistent with the statute. Since the Department cannot change the law by regulation, it has rejected this comment.

Section 1386.34 Provision of Priority Services.

This section addresses requirements that the State plan identify one or two priority areas in which sixty-five percent of the allotment is to be expended.

Comment: Four commenters requested that preamble language of the NPRM describing the Department's interpretation regarding priority services be included in the regulation.

Response: We concur and have added appropriate language to Section 1386.34.

Section 1386.35(b)(3) Nonallowable Cost.

In the NPRM, this paragraph listed non-allowable costs for basic State grants, including issuances of the Office of Management and Budget.

Comment: Two commenters expressed confusion on what specific issuances were referred to in this section, and suggested that the final rules list those applicable issuances

Response: We concur that all responsible parties should be informed of the policies to which they must adhere. However, most of these policy issuances emanate from separate agencies, such as the Office of Management and Budget, and are subject to change. Any addition or deletion of a particular requuirement would necessitate amendment of these regulations should these policies be delineated in the final rules. Consequently, ADD will disseminate information on these issuances to all affected parties through an information memorandum which can be updated as needed.

Miscellaneous Comments

Minimum Allotments

Establishment of a minimum allotment level for State Developmental Disabilities Programs.

Comment: Two respondents suggested that language in current regulations establishing the amount of formula grant funds for minimum allotment States be inserted in the final rules.

Response: The statute is very explicit about the minimum amounts to which States are entitled, leaving little room for elaboration or clarification. Thus, including the suggested language in the regulations would constitute a restatement of the law. We consider such redundacy unnecessary.

Subpart D—Hearings

Section 1386.60 General.

This subpart in the NPRM set forth the requirements regarding the practice and procedure for hearings for States when issues of compliance arise. It also made these provisions applicable to the Protection and Advocacy System.

Comment: Eight respondents commented on the length and detail of these requirements. Their concerns centered around their imposing an undue administrative burden on ADD.

One respondent specifically supported provisions which addressed the recognition of individuals and groups to participate as *amici curiae* in the proceedings.

Response: The Department appreciates the concern expressed about potential administrative burdens. However, experience has shown that most compliance issues are resolved through negotiations during the process of developing and approving State plans. It is rarely necessary to engage in formal hearings. When such cases arise, however, it is important that the practice and procedures for such hearings be clearly delineated, including all essential protections for affected parties. As a result this subpart, except for some minor technical corrections, has been retained in the final rules and is essentially unchanged.

PART 1387

Special Projects—Projects of National Significance

Section 1387.1 General.

This section of the NPRM proposed that all projects supported with funds under Section 145 of the Act be of national significance. Since the 1981 amendments to the Act are quite explicit, we chose not to repeat that language in the regulation and have indicated that pertinent information concerning format, content of application, submittal procedures and priority areas would be included in the consolidated HDS discretionary grant announcement published in the Federal Register.

Comment: Four commenters expressed concerns that the developmentally disabled might not be served if projects of national significance were announced in the consolidated HDS Federal Register announcement of availability of funds.

They recommended that regulatory language require that funds available under Section 145 must be used for projects related specifically to the developmentally disabled. These commenters also expressed concern that some "cross-cutting" projects awarded with section 145 funds might be too broad to be of value to the developmentally disabled target group.

Response: The Department feels that all projects supported with Section 145 funds in the joint HDS discretionary grant process have directly benefitted or will directly benefit the developmentally disabled and does not concur with the recommendations. However, we have amended this section to include language which reflects the intent of Section 145 of the Act.

Impact Analysis

These proposed regulations have little economic impact since they closely follow the statute. Further, the regulations primarily affect State agencies, which are not considered small entities under the Regulatory Flexibility Act. Therefore, the Secretary certifies, pursuant to 5 U.S.C. 605(b), enacted by the Regulatory Flexibility Act, that this regulation will not have a significant impact on a substantial number of small entities.

For the same reasons, this proposed rule does not meet the threshold requirements contained in Executive Order 12291 and, therefore, does not constitute a major rule.

Recordkeeping and Reporting Requirements

Sections 1386.22 (Triennial Report), 1386.23(a) (Annual Report) and 1386.30–1386.31 and 1386.33–1386.34 (State Plan) of this rule contain information collection requirements. As required by section 3504(h) of the Paperwork Reduction Act of 1980, we submitted a copy of this rule to the Office of Management and Budget (OMB) for its review of these information collection requirements.

There will be no specified format for the submittal of the State plan requirements established in §§ 1386.30–1386.31 and 1386.33–1386.34. States may select any format they wish as long as they comply with the requirements in the Act and in these regulations. These regulations reflect the aims of Executive Order 12372 to allow for State Plan simplification, consolidation or substitution.

List of Subjects

45 CFR Part 1385

Grant programs/education, Grant programs/social programs, Handicapped, Reporting and recordkeeping requirements.

45 CFR Part 1386

Administrative practice and procedure, Grant programs/education, Handicapped, Reporting and recordkeeping requirements.

45 CFR Part 1387

Colleges and Universities, Grant programs/education, Grant programs/social programs, Handicapped, Research.

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

Dated: October 26, 1983.

Dorcas R. Hardy,

Assistant Secretary for Human Development Services.

Approved: February 23, 1984.

Margaret Heckler,

Secretary.

For the reasons set forth in the Preamble, Chapter XIII of Title 45 of the Code of Federal Regulations is amended as follows:

1. In Title 45, Chapter XIII, the Subchapter heading for Subchapter I is revised to read as follows:

SUBCHAPTER I—THE ADMINISTRATION ON DEVELOPMENTAL DISABILITIES, DEVELOPMENTAL DISABILITIES PROGRAM

2. Parts 1385, 1386, and 1387 of Chapter XIII of the Code of Federal Regulations are revised as follows:

PART 1385—REQUIREMENTS APPLICABLE TO PARTS 1386, 1387 and 1388

Sec.

Authority: Pub. L. 88–164, 77 Stat. 282, as amended by Pub. L. 90–170, 81 Stat. 527; Pub. L. 91–517, 84 Stat. 1316; Pub. L. 94–103, 89

Stat 486; Pub. L. 95-602, 92 Stat. 2955; Pub. L. 97-35, 95 Stat 563 (42 U.S.C. 6001 et seq.)

§1385.1 General.

Except as specified in § 1385.4, the requirements in this Part are applicable to programs and projects carried out under Parts 1386, 1387, and 1388:

(a) State Systems for Protection and Advocacy of Individual Rights of Persons with Developmental Disabilities;

(b) State Basic Program for Planning, Administration and Services on Behalf of Persons with Developmental Disabilities;

(c) Special Projects—Projects of National Significance; and

(d) University Affiliated Programs.

§1385.2 Purpose of the regulations.

These regulations implement the Developmental Disabilities Assistance and Bill of Rights Act as amended (42 U.S.C. 6000, et seq.).

§ 1385.3 Definitions.

In addition to the definitions in Section 102 of the Act (42 U.S.C. 6001), the following definitions apply:

Act means the statutory authority for the developmental disabilities programs as enacted in Pub. L. 88-164 and amended by Pub. L. 90-170, Pub. L. 91-517, Pub. L. 94-103, Pub. L. 95-602 and Pub. L. 97-35. It may be cited as the Developmental Disabilities Assistance and Bill of Rights Act.

Commissioner means the Commissioner of the Administration on Development Disabilities, Office of Human Development Services, Department of Health and Human Services or his or her designee.

Department means the U.S. Department of Health and Human Services (HHS).

Fiscal year means the Federal fiscal year unless otherwise specified.

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

Secretary means the Secretary of the Department of Health and Human Services.

§ 1385.4 Rights of persons with developmental disabilities.

(a) Section 111 of the Act, *Rights of Persons with Developmental Disabilities* (42 U.S.C. 6010), is applicable to the programs authorized under the Act, except for the Protection and Advocacy system.

(b) In order to comply with Section 133(b)(5)(C) of the Act (42 U.S.C. 6063(b)(5)(C)), regarding the rights of developmentally disabled persons, the State must meet the requirements of § 1386.30(e)(3) of these regulations.

(c) Applications from university affiliated facilities or for special project grants must also contain an assurance that the human rights of persons assisted by these programs will be protected consistent with Section 111.

§ 1385.6 Employment of handicapped individuals.

Each grantee who receives Federal funding under this Act must meet the requirements of Section 106 of the Act (42 U.S.C. 6005) regarding affirmative action. Failure to comply with Section 106 may result in loss of Federal funds under the Act. If a compliance action is taken, the State will be given reasonable notice and an opportunity for a hearing as provided in Subpart D of Part 1386.

§ 1385.7 Waivers.

Applications for a waiver of the provisions of Section 107 of the Act (42 U.S.C. 6006) with respect to alternative use of facilities constructed with funds under the Act may be granted by the Commissioner if the following criteria are met:

(a) The waiver request provides a basis for alternative use or sale of a facility constructed with funds appropriated under the Act.

(b) The clients served in the facility are or will be served in a facility of equal or higher quality.

(c) If the waiver request is for an alternate use, that use must serve some other public purpose.

§ 1385.8 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 are 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 is 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), (42 U.S.C. 402(d)(1)(B)(ii)).

§ 1385.9 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—Procedures of the Departmental Grant Appeals Board.
45 CFR Part 46—Protection of Human Subjects
45 CFR Part 74—Administration of Grants.
45 CFR Part 75—Informal Grant Appeals Procedures
45 CFR Part 80—Nondiscrimination under Programs Receiving Federal Assistance Through the Department of Health and Human Services—Effectuation of Title VI of the Civil Rights Act of 1964.
45 CFR Part 81—Practice and Procedure for Hearings Act under Part 80 of this title.
45 CFR Part 84—Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Assistance.
45 CFR Part 91—Nondiscrimination on the Basis of Age in Programs or Activities Receiving Federal Financial Assistance from HHS

(b) The Departmental Grant Appeals Board also has jurisdiction over appeals by grantees who have received grants under the University Affiliated program or for a Special Project.

The scope of the Board's jurisdiction concerning these appeals is described in 45 CFR Part 16.

(c) The Departmental Grant Appeals also has 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—the Basic State Grant program and the State Protection and Advocacy system. Appeals filed by States shall be decided in accordance with 45 CFR Part 16.

(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 Department will keep information about individual clients confidential to the extent permitted by law and regulations.

PART 1386—FORMULA GRANT PROGRAMS

Subpart A—Basic requirements

Subpart B—State system for protection and advocacy of individual rights

Subpart C—State plan for provision of services for persons with developmental disabilities

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

General

Preliminary Matters—Notice and Parties

Hearing Procedures

Posthearing Procedures, Decisions

Authority: Pub. L. 88–164, 77 Stat. 282, as amended by Pub. L. 90–170, 81 Stat. 527; Pub. L. 91–517, 84 Stat. 1316, Pub. L. 94–103, 89 Stat. 486; Pub. L. 95–602, 92 Stat. 2955; Pub. L. 97–35, 95 Stat. 563 (42 U.S.C. 6000 et seq.).

Subpart A—Basic Requirements

§ 1386.1 General.

All rules under this subpart are applicable to both the Protection and Advocacy System and State Basic Support Program.

§ 1386.2 Obligation of funds.

(a) Funds which the Federal Government allots under this Part during a Federal fiscal year are available for obligation by States only within the same Federal fiscal year.

(b)(1) A State incurs 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) A State incurs 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.

(c)(1) Protection and Advocacy offices may elect to treat entry of an appearance in judicial and administrative proceedings on behalf of a person with developmental disabilities as a basis for obligating funds for the litigation costs. The amount of the funds obligated must not exceed a reasonable estimate of the costs, and the way the estimate was calculated must be documented.

(2) For the purpose of this paragraph, litigation costs mean expenses for court costs, depositions, expert witness fees, travel in connection with a case and similar costs and costs resulting from litigation in which the agency has represented a developmentally disabled person (e.g. monitoring court orders, consent decrees), but not for salaries of employees of the Protection and Advocacy system. All funds made available to the State Basic Support Program and to the P&A System obligated under this paragraph are subject to the requirement of paragraph (a) of this section. These funds, if reobligated, may be reobligated only within the same fiscal year in which the funds were originally obligated

§ 1386.3 Liquidation of obligations.

(a) All obligations incurred pursuant to a grant made under the Act for a specific Federal fiscal year, must be liquidated within two years of the close of the Federal fiscal year in which the grant was awarded.

(b) The Commissioner may waive the requirements in paragraph (a) of this section when State law impedes implementation or the amount of obligated funds to be liquidated is in dispute.

(c) Funds attributable to obligations which are not liquidated in accordance with the provisions of this section rever to the Federal Government.

§ 1386.4 Eligibility for services.

(a) All persons who meet all of the criteria of the definition of developmental disability set forth in Section 102 of the Act (42 U.S.C. 6001) are eligible for available and appropriate services.

(b) In addition, a person who met the definition of developmental disability as provided in Pub. L. 94–103 and who was actually receiving one or more services under the Act during the period October 1, 1968 through November 30, 1978, is eligible to continue to receive ~~same~~ * services, provided that person's Individual Habilitation Plan (IHP) indicates a continuing need for ~~same~~ * services.

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

§ 1386.20 Designated State Protection and Advocacy Office.

(a) The Governor or other State official or entity so empowered must designate the State official or public or private agency to be accountable for the proper use of funds and conduct of the State Protection and Advocacy system.

(b) An agency of the State or private agency providing direct services, including guardianship services may not be designated as a Protection and Advocacy agency.

(c) In the event that an entity outside of the State government is designated to carry out the program, the designating official or entity must assign a responsible State official to receive, on behalf of the State, notices of disallowances and compliance actions as the State is accountable for the proper and appropriate expenditure of Federal funds.

§ 1386.21 Requirements of the Protection and Advocacy System.

(a) In order for a State to receive Federal financial participation for Protection and Advocacy activities under this subpart, as well as the Basic Support Program (subject C), the Protection and Advocacy system must meet the requirements of Section 113(a) of the Act (42 U.S.C. 6012(a)) and that system must be operational.

(b) The client's record is the property of the Protection and Advocacy system

* A correction notice will be published in the Federal Register to reflect this change.

which must protect it from loss, damage, tampering, or use by unauthorized individuals. The Protection and Advocacy system must:

(1) Keep confidential all information contained in a client's records including information contained in an automated data bank; this requirement in no way limits or restricts access by the Department or other authorized Federal officials to the client's records or other records of the protection and advocacy system for purposes of carrying out the responsibilities of their offices. It also does not limit access by parents or legal guardians of minors unless prohibited by State law, court order or the rules of attorney-client privilege.

(2) Have written policies governing access to duplication of, and release of information from the client's record; and

(3) Obtain written consent from the client, if competent, or his or her guardian, before it releases information to individuals not otherwise authorized to receive it.

§ 1386.22 Triennial report on the State protection and advocacy system.

In order to receive Federal financial assistance for a State's Protection and Advocacy system:

(a) At least once every three years the Protection and Advocacy office must submit through the designating official or entity to the appropriate Regional Office of the Department, a report describing the system. The report may be in the format of the State's choice. Unless State law provides differently, the report must be signed by the designating official or entity.

(b) The triennial report on the State Protection and Advocacy system must state how requirements of Section 113(a)(1) and (2) of the Act are being met and address those items contained in the request for information outline to be issued by the Department.

(c) The Department will not terminate or deny funding of the Protection and Advocacy system until it has given the State reasonable notice and opportunity for a hearing in accordance with Subpart D of this Part.

(Approved by the Office of Management and Budget under control number 0980-0053 expiration date 6/30/85)

§ 1386.23 Periodic reports.

In addition to the triennial report, the State Protection and Advocacy Agency must submit:

(a) An annual report describing the activities carried out under the system and any changes made in the system during the previous year and addresses such other items as prescribed by the Secretary and approved under the Paperwork Reduction Act. ~~These items contained in the request for information submitted for approval to OMB.~~ The report may be in the format of the State's choice.

(Approved by the Office of Management and Budget under control number 0980-0160 expiration date 12/31/86)

(b) Quarterly financial status reports from the Protection and Advocacy Agency which are due 30 days after the close of each quarter of the Federal fiscal year, except for the final report which is due 90 days following the close of the fiscal year.

(Approved by the Office of Management and Budget under control number 0980-0054)

§ 1386.24 Federal financial participation: Allowable and nonallowable costs for Protection and Advocacy System.

(a) Federal financial participation is allowable for costs incurred, in accordance with the Act and regulations:

(1) For carrying out activities described in the State's triennial report on the State Protection and Advocacy system (see § 1386.22); and

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

(b) Federal financial participation is not allowable for:

(1) 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, ~~e.g., drawing wills and initiating or defending divorce actions,~~ * and

(2) Costs not allowed under other applicable statutes, Departmental regulations and issuances of the Office of Management and Budget.

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

§ 1386.30 State plan requirements.

(a) In order to receive Federal financial assistance under this Subpart, Councils and States must prepare, submit and have in effect a State plan which meets the requirements of Section 133(b) and Section 137(b) of the Act (42 U.S.C. 6063(b) and 6067(b)) and these regulations.

(b) Failure to comply with State plan requirements may result in loss of Federal funds as described in Section 135 of the Act (42 U.S.C. 6065).

(c) the State plan may be submitted in any format the State selects as long as the items contained in the Act are addressed. The plan must:

(1) Identify the program unit(s) responsible for administration of the plan within the designated State agency or agencies;

(2) Identify the priority areas selected by the Council and by the State in which 65% of Federal allotment will be expended.

(Approved by the Office of Management and Budget under control number 0980-0162 expiration date 3/31/87)

(d) The State plan must be reviewed at least once every three years.

(e) The State plan must contain assurances that:

(1) The State will comply with all applicable Federal statutes and regulations in effect during the time that the State is receiving formula grant funding;

(2) The State meets the requirements regarding individual habilitation plans as set forth in Section 112 of the Act (42 U.S.C. 6011); and

(3) The human rights of developmentally disabled persons will be protected consistent with Section 111.

(4) The State planning council has a staff assignment to assist it in carrying out its function and responsibilities identified in the Act and the staff consist of at least a director and such support staff as the State in consultation with the Council has deemed necessary.

§ 1386.31 Plan submittal and approval.

(a) The State plan must be submitted to the appropriate Regional Office of the Department 45 days prior to the fiscal year for which it is applicable. Unless State law provides differently, the State plan and amendments or related documents must be approved by the Governor or the Governor's designee as may be required by any applicable Federal issuances.

(b) Failure to submit an approvable State plan or amendment prior to the Federal fiscal years for which it is applicable may result in the loss of Federal financial participation. Costs resulting from obligations incurred during the period of the fiscal year for which an approved plan is not in effect are not eligible for Federal financial participation.

(c) The Commissioner must approve any State plan or plan amendment provided it meets the requirements of the Act and these regulations.

(d) Amendments to the State plan are required when substantive changes are contemplated in plan content.

§ 1386.32 Financial reports.

The State must submit quarterly financial status reports on the programs funded under this part and must be

* A correction notice will be published in the Federal Register to reflect these changes.

submitted by either the Governor or the appropriate State financial official. These reports are due 30 days following the close of each quarter except for the final report which is due 90 days following the close of the Federal fiscal year.

(Approved by the Office of Management and Budget under control number 0960–0055)

§ 1386.33 Protection of employee's interests.

(a) Based on Section 133(b)(7) of the Act (42 U.S.C. 6063(b)(7)), the State plan must provide for fair and equitable arrangements to protect the interest of all institutional employees affected by actions under the plan to provide alternative community living arrangements. Specific arrangements for the protection of affected employees must be developed through negotiations between the appropriate State authorities and employees or their representatives. Fair and equitable arrangements must include procedures that provide for the impartial resolution of disputes between the State and an employee concerning the interpretation, application, and enforcement of protection arrangements. The State must inform employees of the State s decision to provide alternative community living arrangements.

(b) To the maximum extent practicable, fair and equitable arrangements must include provisions for:

(1) The preservation of rights and benefits;

(2) Guaranteeing employment to employees affected by action under the plan to provide alternative community living arrangements; and

(3) Employee training and retraining programs.

§ 1386.34 Provision of priority services.

(a) As part of the State plan requirements in Section 133(b)(4)(A) of the Act (42 U.S.C. 6063(b)(4)(A)), a State must identify its selection of at least one, but not more than two priority areas defined in Section 102(8)(B) of the Act (42 U.S.C. 6001(8)(B)), although the second selection may be in an area not identified in the Act but which is of special significance to the individual State.

(b) In order to select more than two priority areas when the appropriation level does not exceed $90,000,000 (See Section 133(b)(4)(B)(ii)(II) of the Act (42 U.S.C. 6063(b)(4)(ii)(II)), the Commissioner, upon written application from the State, may approve a waiver of the priority service limitations described in paragraph (a) of this section and allow for an additional priority area to be designated. (See Section 133(b)(4)(C) of the Act (42 U.S.C. 6063(b)(4)(C)).

(c) The use of 65% of the State allotment in selected priority areas (as required by Section 133(b)(4)(B) of the Act) is a mechanism to assist the State developmental disabilities program in concentrating on planning, coordinating, and providing technical assistance.

§ 1386.35 Allowable and non-allowable costs for basic State grants.

(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 approved State plan for the necessary expenses of the State Council, the administration and operation of the State plan, and training of personnel.
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 the Congressional findings with respect to the developmentally disabled in Section 111 of the Act (42 U.S.C. 6010):

(2) Costs incurred for activities not provided for in the approved State plan; and

(3) Costs not allowed under other applicable statutes. Departmental regulations or issuances of the Office of Management and Budget.

§ 1386.36 Final disapproval of the State plan amendments or plan amendments.

The Department will disapprove any State plan or plan amendment only after the following procedures have been complied with:

(a) The State plan has been submitted to the appropriate HHS 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 has 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. Notice of this determination has been sent to the State and contains appropriate references to the records, provisions of the statute and regulations, 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 certified 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 certified 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, Reports, and Federal Requirements

General

§ 1386.80 Definitions.

For purposes of this Subpart:

"*Assistant Secretary*" means the Assistant Secretary for Human Development Services (HDS) or a presiding officer.

ADD means Administration on Developmental Disabilities, Office of Human Development Services.

Presiding officer means anyone 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 Sections 113, 133, and 135 of the Act. (42 U.S.C. 6012, 6063 and 6065.)

(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 must 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) Copies of papers in the proceedings must be served on all parties by personal delivery or by mail. Service on the party's designated representative is 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 Assistant Secretary to the State council and the designated State agency, or to the State protection and advocacy office or official. The notice must state the time and place for the hearing, and the issues which will be considered. The notice must be published in the **Federal Register.**

§ 1386.91 Time of hearing.

The hearing must 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 must 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 must 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, must 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 must 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 must remove the issue from the proceedings in whole or in part as may be appropriate. If all issues are removed the Assistant Secretary must 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 with Federal requirements of State plan or report on the description of the protection and advocacy system with Federal requirements, the Assistant Secretary must 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 must be sent to the parties. The parties must 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.

(d) 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 (c)(2) of this Subsection must be followed with respect to any report or evidence resulting in a conclusion by the Assistant Secretary that a State has achieved compliance.

(e) The issues considered at the hearing must 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 may 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 must file a petition with the HDS Hearing Clerk within 15 days after notice of the hearing has been published in the **Federal Register,** and must serve a copy on each party of record at that time in accordance with § 1386.85(b). The petition must 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 must promptly determine whether each petitioner had 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 interest, 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 must give each petitioner written notice of the decision on its petition. If any petition is denied, the presiding officer must briefly state the grounds for denial.

(c)(1) Any interested person or organization wishing to participate as amicus curiae must file a petition with the HDS Hearing Clerk before the commencement of the hearing. The petition must 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 must serve a copy on each party. It may also submit a brief or written statement at such time as the parties submit briefs and must serve a copy on each party.

Hearing Procedures

§ 1386.100 Who presides.

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

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

§ 1386.101 Authority of presiding officer.

(a) The presiding officer has the duty to conduct a fair hearing, avoid delay, maintain order, and make a record of the proceedings. The presiding officer has 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 for 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 person designated by the Assistant Secretary, examiner, certify the entire record, including recommended findings and proposed decision, to the Assistant Secretary;

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

(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 person designated by the Assistant Secretary, 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 has the right to conduct discovery (including depositions) against opposing parties as provided by the Federal Rules of Civil Procedure. There is no fixed rule on priority of discovery. Upon written motion, the presiding officer must promptly rule upon any objection to discovery action. The presiding officer also has 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 purpose.

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 by witnesses at the hearing is given orally under oath or affirmation. Witnesses must 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, must 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 do not apply to hearings conducted pursuant to this subpart, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination are 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 evidence offered or taken for the record is open to examination by the parties and opportunity must 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 Unsponsored written material.

Letters expressing views or urging action and other unsponsored written material regarding matters in issue in a hearing is placed in the correspondence section of the docket of the proceeding. This material is 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 is 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 must be taken by stenotype machine and not be 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, constitute the exclusive record for decision.

Posthearing Procedures, Decisions

§ 1386.110 Posthearing briefs.

The presiding officer must fix the time for filing posthearing briefs. This time may not exceed 30 days after termination of the hearing and receipt of the transcript. Briefs may contain proposed fundings 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 must issue a decision within 60 days after the time for submission of posthearing briefs has expired.

(b)(1) If the presiding officer is a person designated by the Assistant Secretary, he or she must, 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 must 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 must 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 Sections 113, 133 and 135 of the Act 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 Section 135 of the Act 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 must 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 is the final decision of the Secretary and constitutes "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 must 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 Section 135 of the Act, 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 must specify the effective date for the authorization of the allotment.

(b) In the case of a hearing pursuant to Section 113, 133 if the Assistant Secretary concludes that the State is not complying with requirements of the State plan or 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, must specify the effective date for the withholding of Federal funds.

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

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

PART 1387—SPECIAL PROJECT—PROJECTS OF NATIONAL SIGNIFICANCE

Sec.

1387.1 General requirements.

Authority: Pub. L. 88–164, 77 Stat. 282, as amended by Pub. L. 91–517, 84 Stat. 1316, Pub. L. 94–103, 89 Stat. 486. Pub. L. 95–602. 92 Stat 9555. Pub. L. 97–35. 95 Stat. 583 (42 U.S.C. 8000 et seq.).

§ 1387.1 General requirements.

(a) All projects funded under this Part must be of national significance and serve or relate to the developmentally disabled to comply with Section 145 of the Act.

(b) The requirements concerning format and content of the application, submittal procedures, eligible applicants and priority areas of services will be published in program announcements in the Federal Register.

(c) Projects of national significance must be exemplary models and hold potential for replication.

[FR Doc. 84-8070 Filed 3-26-84; 8:45 am]
BILLING CODE 4130-01M