



U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
Administration on Developmental Disabilities

1. Log No. ADD-PI-85-1

2. Issuance Date: 2/22/85

3. Originating Office: Administration on Developmental
Disabilities

4. Key Word: Construction
Recovery

5.

6.

7.

PROGRAM INSTRUCTION

TO : Executive Directors, State Planning Councils
Chairpersons, State Planning Councils
Directors, State Administering Agencies
Directors, University Affiliated Facilities

SUBJECT : Recovery of Federal Funds -- Project Grants for
Construction of University Affiliated Facilities
for the Developmentally Disabled and State Grants for
Construction of Facilities for the Developmentally
Disabled

BACKGROUND: The Mental Retardation Facilities and Community Health
Centers Construction Act of 1963, P.L. 88-164, Title I,
Parts B and C, authorized the Secretary to award (1)
project grants to public and other nonprofit facilities
which are associated with a college or university for
the purpose of assisting in the construction of
clinical facilities providing, as nearly as
practicable, a full range of inpatient and outpatient
services for the developmentally disabled and
facilities which will aid in demonstrating provision of
specialized services for the diagnosis and treatment,
education, training, or care of the developmentally
disabled or in the clinical training of physicians and
other specialized personnel needed for research,
diagnosis and treatment, education, training or care of
the developmentally disabled; and (2) State grants for
the planning, providing of services, and construction
and operation of facilities for persons with
developmental disabilities.

The Federal share under Part B--Project Grants for Construction of University Affiliated Facilities for the Developmentally Disabled--may not exceed seventy-five (75) percent of the necessary costs of construction. Under Part C--State Grants for Construction of Facilities for the Developmentally Disabled--the Federal participation over the years is as follows:

- o Public Law 88-164, dated October 31, 1963: The Federal share may not exceed 66 2/3 percent of the costs for construction (See Section 402 of the Act);
- o Public Law 91-517, dated October 30, 1970: The Federal share may not exceed 66 2/3 percent of the costs of construction (See Section 102 of the Act). The States were required to specify in the State Plan the percent of the State's allotment (under Section 132 of the Act) for any year which is to be devoted to construction of facilities. The percent shall be not more than 50 percent of the State's allotment or such lesser percent as the Secretary may from time to time prescribe. (See Section 134(b)(15) of the Act.)
- o Public Law 94-103, dated October 4, 1975: The Federal share for any project provided through allotments under Part C of the Act may not exceed 75 percent of the necessary costs thereof as determined by the Secretary, except that if the project is located in an urban or rural poverty area, the Federal share may not exceed 90 percent of the project's necessary costs as so determined. (See Section 103(a) of the Act.) Section 134(b)(15) of Public Law 91-517 was amended to strike out "50 percent" and insert in lieu thereof "10 percent" relative to the specification of the percent of the State allotments received under Section 132 of the Act which was to be devoted to construction of the facilities. (See Section 111(a)(7) of the Act.)

LEGAL AND
RELATED

REFERENCES: Mental Retardation Facilities and Community Health
Center Construction Act of 1963, as amended by
Public Laws 90-170, 91-517, 94-103, 95-602, 97-35,
and 98-527
45 CFR Part 1385, Developmental Disabilities
Program, Final Regulations
45 CFR Part 74, Administration of Grants
45 CFR Part 16, Departmental Grant Appeal Board
Regulations

PURPOSE : The purpose of this program instruction is to establish
procedures for the administration and the recovery of
Federal funds under the Administration on Develop-
mental Disabilities (ADD) construction grant programs
awarded in part or in whole with funds provided under
the Mental Retardation Facilities and Community Health
Centers Construction Act of 1963, as amended by Public
Laws 90-170, 91-517, 94-103, 95-602, 97-35, and
98-527.

CONTENT : Statutory and Regulatory Requirements

A. Section 105 of P.L.98-527, enacted on October 19,
1984, authorizes the recovery of construction
funds if any facility with respect to which funds
have been paid in part or in whole under Part B,
"Federal Assistance for Planning and Service
Activities for Persons with Developmental Disabili-
ties", or Part D, "University Affiliated
Facilities", shall if within twenty (20) years
after the completion of construction:

1. be sold or transferred to any persons,
agency, or organization which is not a
public or nonprofit private entity, or
2. ceases to be a public or other nonprofit
facility for persons with developmental
disabilities;

the United States shall be entitled to recover from
either the transferor or the transferee (or in the
case of a facility which has ceased to be a public
or other nonprofit facility for persons with develop-
mental disabilities, from the owners thereof) an
amount bearing the same ratio to the then value (as

determined by the agreement of the parties or by action brought in the district court of the United States for the district in which the facility is situated) of so much of such facility as constituted an approved project or projects, as the amount of Federal participation bore to the cost of the construction of such project or projects. Such right to recovery shall not constitute a lien upon such facility prior to judgement.

B. Section 105 of the Act and Section 1385.7 of the Administration on Developmental Disabilities final regulations, published in the Federal Register on March 27, 1984, authorize the Commissioner, Administration on Developmental Disabilities, to grant a waiver of the provisions of the Section 105 of the Act with respect to alternative use of facilities constructed in part or in whole with funds under the Act if the following criteria are met:

1. The waiver request provides a basis for alternative use or sale of a facility constructed with funds appropriated under the Act.
2. The clients served in the facility are or will be served in a facility of equal or higher quality.
3. The alternative use must serve some other public purpose.

INSTRUCTION: The ADD Construction Recovery Procedures

A. Transfer of Facility to an Eligible Person, Agency, or Organization Which is a Public or Nonprofit Private Entity for Continued Service to Persons With Developmental Disabilities

1. The State Administering Agency, the State Planning Council, or both, and the University Affiliated Facility must promptly notify the appropriate Office of Human Development Services' (OHDS) Regional Administrator if at

any time within twenty (20) years after completion of construction any facility which received funds in part or in whole under Part B and Part D of the Act, is transferred to an eligible person, agency, or organization which is a public or nonprofit private entity for continued service to persons with developmental disabilities. A listing of the OHDS Regional Administrators with their respective geographical locations and area of responsibility is included in the "INQUIRIES TO" section of this program instruction.

2. A waiver from Section 105 of the Act pursuant to Section 1385.7 of the Regulations is not needed if a facility is transferred to an eligible person, agency, or organization which is a public or nonprofit entity who will continue to serve the developmentally disabled. However, the transferor and the transferee must provide the following documentation to the State Administering Agency, the State Planning Council, or both, and the OHDS regional office:
 - a. The transferor must provide a detailed description of the facility being transferred, including all equipment, name and location. (Reference: 45 CFR 74.134.)
 - b. A transfer agreement must be drawn-up by the transferor transferring the title of the facility, all equipment, or both, to the transferee. This agreement must stipulate the purpose for which the facility is to be used, the current condition of the facility and equipment, and the "then value" of the facility and equipment.

The transferee must draw up an agreement assuming all the rights and obligations of the transferor set forth in the terms and agreement of the construction grant award, including all pertinent legislative and regulatory requirements applicable at the

time the construction grant was awarded. The agreement must recognize that the Federal Government retains an interest in the facility and equipment for the remaining years of the 20-year period.

3. The State Administering Agency, the State Planning Council, or both, and the OHDS regional office shall do the following upon receipt of the above documents:

- a. the State Administering Agency, the State Planning Council, or both, should review the documents and submit recommendations to the OHDS regional office;
- b. the OHDS regional office should review the documents received from the transferor, the transferee, and the State and submit them, along with the region's recommendation, to the Commissioner, ADD, for final decision.

B. Transfer of Facility to an Eligible Person, Agency, or Organization Which is a Public or Nonprofit Private Entity for Alternative Use of Facility

1. The State Administering Agency, the State Planning Council, or both, and the University Affiliated Facility must promptly notify the appropriate OHDS Regional Administrator if at any time within twenty (20) years after completion of the construction any facility which received funds in part or in whole under Part B and Part D of the Act, is transferred to an eligible person, agency, or organization which is a public or nonprofit entity for alternative use.
2. If a facility is transferred to an eligible person, agency, or organization which is a public or nonprofit entity for alternative use, a waiver from Section 105 of the Act pursuant to Section 1385.7 of the Regulations is needed. The transferor must request a waiver from the Act and Regulations if the following criteria are met for alternative use of the facility:

- a. The waiver request provides a basis for alternative use or sale of a facility constructed in part on in whole 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. The alternative use must serve some other public purpose.
3. The transferor and the transferee must provide the following documentation to the State and the OHDS regional office:
- a. The transferor must provide a detailed description of the facility being transferred, including all equipment, name and location. (Reference: 45 CFR 74.134).
 - b. A transfer agreement must be drawn-up by the transferor transferring the title of the facility, all equipment, or both, to the transferee. This agreement must stipulate the purpose for which the facility is to be used, the current condition of the facility and equipment, and the "then value" of the facility and equipment.

The transferee must draw up an agreement assuming all rights and obligations of the transferor set forth in the terms and agreement of the construction grant award, including all pertinent legislative and regulatory requirements applicable at the time the construction grant was awarded. The agreement must recognize that the Federal Government retains an interest in the facility and equipment for the remaining years of the 20-year period.

4. The State Administering Agency, the State Planning Council, or both, and the OHDS regional office shall do the following upon receipt of the above:
 - a. The State Administering Agency, the Planning Council, or both, should review the documents and submit recommendations to the OHDS regional office.
 - b. The OHDS regional office should review the documents received from the organization and the State Agency, the Planning Council, or both, and submit them, along with the regional recommendation, to the Commissioner, ADD for final decision.
- C. Utilization of the Entire Proceeds Received From the Sale of a Facility for the Purpose of Relocation and Construction of a New Facility of Equal Quality or Better to Serve the Developmentally Disabled
 1. The State Administering Agency, the State Planning Council, or both, and the University Affiliated Facility must promptly notify the appropriate OHDS Regional Administrator if at any time within twenty (20) years after completion of construction any facility which received funds in part or in whole under Part B and Part D of the Act the organization intends to sell the facility and utilize the proceeds received from the sale of the facility for the purpose of relocation and construction of a new facility of equal quality or better to serve the developmentally disabled.
 2. If the current grantee reinvests the entire proceeds received from the sale of the facility to build a new facility, which is equal to or better than the existing facility to serve the developmentally disabled, a waiver from Section 105 of the Act is needed to release the grantee from its obligation to repay the Federal Government the Federal share of the "then value" of the current facility. The following information is to be provided to the State and the OHDS regional office by the current entity:

- a. A description of how the services to the developmentally disabled will be continued during the interim period while the new facility is being built.

A statement as to whether the existing facility will be used during the interim period to continue serving the developmentally disabled, or will another facility which is equal to or superior to the existing facility be used?

- b. Provide a schedule for (1) the estimated date of the sale of the current facility, (2) the estimated time period for construction of the new facility, and (3) the estimated completion date of the new facility.

If during the interim period the existing facility will be used to continue serving the developmentally disabled, the interim period will be included in the calculation of the 20-year statutory limitation requirement for the State's monitoring of the existing facility. If there are eight (8) years of the 20-year statutory limitation remaining for the State to monitor the original facility and the existing facility is used for one (1) year to continue serving the developmentally disabled while the new facility is being built, then the 1 year will be subtracted from the 8 years remaining for the State to monitor the new facility.

However, if during the interim period another facility which is equal to or superior to the existing facility is being used to serve the developmentally disabled, the period of time remaining in the 20-year statutory limitation requirement for the State's monitoring of the original facility will be credited against the new facility, if there are eight (8) years of the 20-year statutory limitation remaining for the State to monitor the original facility, upon completion of the new facility, the State will be required to monitor the new facility for the remaining 8 years).

- c. If more than one construction grant was awarded by ADD to construct the facility in part or in whole with funds provided under the Act, identification of the completion dates for each of the construction grants awarded. If the organization received Federal funds from another Federal agency to construct the facility, the organization must identify the other Federal agency and the amount of Federal and non-Federal funds received.
- d. If an approximate negotiated amount of the proceeds to be received from the sale of the facility is known, the organization must identify the Federal Government's and the State's share.
- e. Identification of the location of the new facility, city and State. Advise as to whether the new facility will continue to serve the same developmentally disabled population.
- f. Identification of an independent engineer who will certify that the new facility meets the requirements of the original purpose of the construction grant(s) and that the new facility is either equivalent or better than the original facility. This engineer must also be involved in the review of the plans and specifications for the construction of the new facility and be available to discuss the plans and specifications with the State and OHDS regional office officials during their review and approval of the documents. The transferor and the transferee must pay the engineer's fees and costs.
- g. If the request to use the proceeds received from the sale of the facility to relocate and construct an equivalent or better facility is approved, the State will be required to place the proceeds

received from the sale in escrow in a financial institution. The State must identify the financial institution to be used. The financial institution will, upon notification from the State, disburse funds for the construction of the new facility.

3. The State Administering Agency, the State Planning Council, or both, and the OHDS regional office shall do the following upon receipt of the above documents:
 - a. the State Administering Agency, the Planning Council, or both should review the documents and submit recommendations to the OHDS regional office.
 - b. the OHDS regional office should review the documents received from the organization and the State and submit them, along with the regional recommendation, to the Commissioner, ADD for final decision.
4. If the existing entity desires to use only the profits received from the sale of the facility to build or acquire a new facility, the Federal Government is entitled to its share of the funds used to construct the existing facility. If the facility is worth more than when it was originally built, the entity must refund all of the original construction grant costs. This is so since the sum of the original construction grant, plus other funds, plus profits, constitute the "then value," or sale price, of the original facility and Section 105 of the Act requires the entity to repay the Federal share of the "then value" upon the sale of the facility. If only profits are used to build the new facility, there is no legal basis for the original grant funds to be retained by the grantee.

D. Sale of Facility to an Ineligible Person,
Agency, or Organization

1. The State Administering Agency, the State Planning Council, or both, and the University Affiliated Facility must promptly notify the appropriate OHDS Regional Administrator if at any time within twenty (20) years after completion of construction any facility which received funds in part or in whole under Part B and Part D of the Act is:

- a. sold to an ineligible person, agency, or organization;
- b. the facility ceases to be used to serve the developmentally disabled.

If the State Administering Agency, the State Planning Council, or both, receive notice that a change of status as described above is pending, they must notify the appropriate OHDS regional office of the pending change of status and provide as much information as is available about the change, including future plans for the facility. The OHDS is not required to await notification by the State but may initiate inquiry if indicated.

2. After reviewing the material submitted, the OHDS regional office shall:

- a. Determine whether recovery action is to be initiated.
- b. Determine the value of the project at the time it ceases to be an eligible facility by any reasonable method, several of which are listed below:

- (1) Representatives of the organization, the State Administering Agency, the State Planning Council, or both, and the Department of Health and Human Services (DHHS) may arrive at the current depreciated value of the property. It is possible that the current value of a facility may have appreciated rather than depreciated in value. In such cases, recovery will be based on the appreciated value.

- (2) The organization may have sold the building, equipment, or both. If they have been properly advertised for sale and appropriate competition has been involved, the sale price may be used as a basis for establishing the value of the facility.
 - (3) The value of the facility may be established by use of a professional appraiser. Payment of a professional appraiser will be based on a contract between the appraiser and the OHDS. Such a contractual agreement will be arranged by the Regional Public Health Service Engineer through the OHDS Regional Director of Fiscal Operations. In particularly small facilities where a sale is not involved, the organization, State agency, and OHDS may negotiate and agree upon the reasonable value of the facility.
3. When a project ceases to be an eligible facility, the organization may wish to transfer part or all of the equipment to other eligible facilities to be used to serve the developmentally disabled. In such cases, recovery would be in order on the building but would not be required on the equipment. The organization must furnish the State agency and the OHDS regional office a list of the transferred equipment with the name and location of the facility(ies) to which the transfer is made (Reference 45 CFR 74.134). The procedures identified in paragraph A "Transfer of Facility to an Eligible Person, Agency, or Organization Which is a Public or Nonprofit Private Entity for Continued Service to Persons with Developmental Disabilities" are to be used.
4. After the amount of the "then value," has been established, the OHDS regional office will complete and forward two (2) copies of the Organization Report on Proposal to Settle

Federal Claim Under the Recovery Provision of Title I of the Act (Exhibit A attached) and two (2) copies of the Recovery Agreement Pursuant to Section 105 of the Act (Exhibit B attached) to the organization through the State agency. If the organization concurs with the terms of the settlement, the authorized official should sign the copies and return one (1) signed copy of the Recovery Agreement and one (1) signed copy of the Report, along with a certified check, paid to the order of the U.S. Department of Health and Human Services, in the amount of the Federal Government's claim, to the OHDS regional office through the State Agency.

Upon receipt of the certified check and a copy of the Recovery Agreement by the OHDS, the recovery shall be considered completed. The organization will have in its possession one (1) copy of the Report and Recovery Agreement. The State agency should be sent one (1) copy of both forms for its records.

5. Should the Commissioner, ADD, determine that there is good cause to recover OHDS construction funds and the organization is unwilling or of divergent opinion, the Commissioner shall inform the organization, in writing, that for the stated reasons, ADD has determined that the organization is no longer operating its facility to serve the developmentally disabled, that no grounds exist for releasing the organization from its obligation for "good cause," and that a claim on behalf of the United States for the "then value" of the facility is being asserted.

The written notification will include the following:

- (a) Section 105 of the Act's recovery authority and other appropriate Sections of the Act and Regulations with respect to the requirements which have not been fulfilled.

- (b) Identification of the facility and equipment constructed or purchased in part or in whole with funds provided under the Act.
- (c) Identification of the "then value" of the facility and equipment at the time the facility ceased to be operated to serve the developmentally disabled.
- (d) Instructions as to how to submit the Federal share of the "then value" and if needed, an extended payment plan can be negotiated. If the extended payment plan is negotiated, advise that interest will be charged for late payments.
- (e) The completion of Exhibit A should be done and attached to the written notification.
- (f) Under the Departmental Grant Appeals Board Regulation, 45 CFR Part 16, the State can appeal the decision. The decision shall be the final decision of the Department unless, within thirty (30) days after the State receives the decision, a written notice of appeal is delivered or mailed, registered or certified mail to:

Departmental Grant Appeals Board
Department of Health and Human
Services, 300 C Street, S.W., Room
2004, Washington, D. C. 20201

The State must attach to the notice of appeal a copy of the decision, state the amount in dispute, and briefly state why the State thinks that the decision is wrong.

A copy of the notice of appeal should be mailed to the appropriate OHDS Regional Administrator.

ATTACHMENTS : Exhibit A -- Organization Report on Proposal to Settle Federal Government Claim Under the Recovery Provisions of Title I of the Mental Retardation Facilities and Community Health Centers Act of 1963, As Amended.

Exhibit B -- Recovery Agreement Pursuant to Section 105, Title I of Public Law 98-527

EFFECTIVE
DATE : Date of Issuance

INQUIRIES
TO : Regional Administrator, OHDS

EASTERN REGION

States : Connecticut, Delaware, District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Puerto Rico, Rhode Island, Vermont, Virgin Island, Virginia, West Virginia

Contact : Eileen Bradley
Regional Administrator, OHDS
Post Office Box 13716
3535 Market Street
Philadelphia, Pennsylvania 19101
Commercial (215) 596-6818
FTS (8) 596-0351

SOUTHERN REGION

States : Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, New Mexico, North Carolina, Oklahoma, South Carolina, Tennessee, Texas

Contact : William Acosta
Regional Administrator, OHDS
1200 Main Tower Building
Dallas, Texas 75202
Commercial (214) 767-4540
FTS (8) 729-4540

MIDWESTERN REGION

States : Colorado, Illinois, Indiana, Iowa, Kansas,
Michigan, Missouri, Montana, Nebraska, North
Dakota, Ohio, South Dakota, Utah, Wisconsin,
Wyoming

Contact : Linda Carson
Regional Administrator, OHDS
601 East 12th Street
Room 384
Kansas City, Missouri 64106
Commercial (816) 374-3981
FTS (8) 758-3981

WESTERN REGION

States : Alaska, Arizona, California, Guam, Hawaii, Idaho,
Nevada, Northern Marianna Island, Oregon, American
Samoa, Trust Territory of Pacific Islands,
Washington

Contact : Lucy Ellison
Regional Administrator, OHDS
50 United Nations Plaza
San Francisco, California 94102
Commercial (415) 556-4027
FTS (8) 556-4027



Jean K. Elder, Ph.D.
Commissioner, Administration on
Developmental Disabilities

cc: Regional Administrators, Regions
III, VI, VII, and IX
Regional Program Director, ADD,
Regions III, VI, VII, and IX
Regional Directors, Office of
Fiscal Operations, Regions III,
VI, VII, and IX

Sample Form For OHDS Use Only

Exhibit A

Organization Report on Proposal to Settle Federal
Claim Under the Recovery Provisions of Title
I of the Mental Retardation Facilities
and Community Health Centers Construction
Act of 1963, As Amended

1. Project Number _____
2. Name and Location (City and State _____
_____)
3. Cost:
 - a. Total cost of project \$ _____
 - b. Total cost in which Federal Government participated \$ _____
 - c. Federal share (amount) \$ _____
 - d. Rate of participation _____
percent
 - e. Amount of State aid, if any \$ _____
4. Description of project:
5. Date when project was completed: (The date the facility began to provide services to the developmentally disabled)
6. Date on which project ceased to operate as an eligible facility:
7. Explanation of why facility ceased to operate as an eligible facility:
8. Explanation of how the facility will be used in the future:
9. What disposition has or will be made of the equipment? Attach lists of equipment transferred to other eligible facility(ies) to used for eligible purposes. Identify the name and location of the facility(ies) to which the equipment was transferred.

EXHIBIT A (Continued)

10. What is the current value of the facility? \$ _____

Explain and breakdown how the current value of the facility was determined. If the value was determined by a professional appraiser, attach a copy of the report.

11. Amount offered to settle Federal Government claim \$ _____

Approval: _____
Commissioner, Administration on
Developmental Disabilities

Date: _____

Organization Approval: _____
Authorized Official

Date: _____

Sample Form For OHDS Use Only

Exhibit B

Recovery Agreement Pursuant to Section 105,
Title I of Public Law 98-527

In accordance with the provisions of Section 105, of Public Law 98-527, the Department of Health and Human Services and the _____ (owner) mutually agree that the value of the approved project _____ (identify) _____ in which the United States of America, hereinafter referred to as the Government, participated pursuant to said Act was, on _____ (date) _____, at which time the said facility for the developmentally disabled was sold to a non-approved organization or ceased to be used as a facility for developmentally disabled in the provision of comprehensive developmental disabilities services, \$ _____ as itemized below:

Listing of Items

Agreed Value

Total Value \$ _____

It is further agreed that the total cost of construction of said approved project was \$ _____; that Government participation in said project amounted to \$ _____; and that, pursuant to above referred Act, the sum of \$ _____ which represents the proportionate Government share of the value of the project as agreed upon herein. Upon payment of said amount to the Treasurer of the United States, the claim of the Government under Section 105 of the Act shall be released and satisfied.

On behalf of the United States of
America

Commissioner, Administration on
Developmental Disabilities

Date

Authorized Official of the
Organization

Date