



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

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PROGRAM REGULATION

To: Directors, State Protection and Advocacy
Agencies
Directors, State Administering Agencies
Executive Directors, State Planning Councils
Chairpersons, State Planning Councils
Directors, University Affiliated Programs
and Satellite Centers

Subject: Notice of Proposed Rulemaking (NPRM) for the
Developmental Disabilities Program

Legal & Related
Reference: Public Law 100-146, Developmental
Disabilities Assistance and Bill of Rights
Act Amendments of 1987

Discussion: Attached is the NPRM for the Developmental
Disabilities Program - 45 CFR Part 1385,
1396, 1397 and 1388 published
December 7, 1988 (53 FR 49332)

This rule proposes to amend the regulations
that implement the Developmental
Disabilities Assistance and Bill of Rights
Act Amendments of 1987 (P.L. 100-146). The
regulations propose standards for
determining whether a State has used Federal
funds to supplement and not supplant State
and local funds. They also propose to
establish a peer review process for
applications under the University Affiliated
Programs.

Agencies, organizations, and interested
individuals have a 60-day comment period to
submit comments. The comment period ends
February 6, 1989.

Inquiries:

Administration on Developmental Disabilities
Attn: Elsbeth Porter Wyatt
Wilbur J. Cohen Building
330 Independence Ave., S.W.
Washington, D.C. 20201
Telephone: (202) 245-7719

Regional Administrators, HDS, Regions III,
VI, VII, and IX.

Will Wolstein
for Carolyn Doppelt Gray
Commissioner
Administration on Developmental
Disabilities

Copy to : Regional Administrators, HDS

Attachment: (1)

Humphrey Building, 200 Independence Avenue SW., Washington, DC 20201.
 * Monday through Friday, 9:00 a.m. to 4:00 p.m., telephone (202) 245-2896.

FOR FURTHER INFORMATION CONTACT:

* Ms. Elisabeth Porter Wyatt, (202) 245-2894.

SUPPLEMENTARY INFORMATION:

A. Program History

In 1963, the Mental Retardation Facilities and Construction Act (Pub. L. 88-164) was enacted to provide for planning activities and construction of facilities to provide services to the mentally retarded. This legislation was subsequently amended by the Developmental Disabilities Services and Facilities Construction Amendments of 1970 (Pub. L. 91-517) which constituted the first Congressional effort to address the needs of a group of persons with handicaps designated as developmental disabilities. The 1970 Amendments defined developmental disability to include individuals with mental retardation, cerebral palsy, epilepsy, and other neurological conditions closely related to mental retardation which originated prior to age 18 and constituted a substantial handicap. It also created State Planning Councils to advocate for, plan, monitor and evaluate services for persons with developmental disabilities; it also authorized grants for constructing, administering and operating University Affiliated Facilities.

The legislation authorizing the Developmental Disabilities program has been revised periodically. The major changes of note included the following: (1) The 1975 Amendments (Pub. L. 94-103) deleted the construction authority, authorized studies to determine the feasibility of having University Affiliated Facilities establish Satellite Centers, established the Protection and Advocacy System, and added a section on "Rights of the Developmentally Disabled;" (2) the 1978 amendment (Pub. L. 95-602) included a functional definition of developmental disabilities; and (3) the Developmental Disabilities Amendments of 1984 (Pub. L. 98-527) added a new emphasis regarding the purpose of the program, i.e., to assist States to assure that persons with developmental disabilities receive the care, treatment and other services necessary to enable them to achieve their maximum potential through increased independence, productivity, and integration into the community.

The 1987 amendments extend authorization of appropriations for programs under the Developmental Disabilities Assistance and Bill of Rights

Act (the Act) through FY 1990, and made other revisions to the Act. The amendments revise definitions of priority activities under State plans; require additional activities under State protection and advocacy systems; and require a variety of new reviews, studies, and reports. They also require the Secretary to consider applications for four new university affiliated programs or satellite centers each year through FY 1990.

Developmental Disabilities Program

Basic State Grants

Formula grants are made to States for planning, coordinating and administering services for citizens with developmental disabilities. This program assists States in developing and implementing a comprehensive plan to ensure that persons with developmental disabilities have the range of services available to them which best promote self-sufficiency.

Protection and Advocacy

Formula grants are made to States for the establishment of a system to protect and advocate for the rights of persons with developmental disabilities. This system must have the authority to pursue legal, administrative, and other appropriate remedies to ensure the protection of the rights of developmentally disabled individuals who are receiving, or who are eligible to receive, treatment or habilitation services.

University Affiliated Programs

Awards are made to universities, or public or nonprofit entities associated with universities, to establish University Affiliated Programs or Satellite Centers. Such programs carry out interdisciplinary training, conduct demonstrations of exemplary services, provide technical assistance, and disseminate information which will assist in improving the service delivery system.

Projects of National Significance

This program provides funding through grants and contracts for projects to educate policymakers, develop an ongoing data collection system, determine the feasibility and desirability of developing a nationwide information and referral system, and pursue Federal interagency initiatives and other projects of national significance which hold promise of expanding or otherwise improving opportunities for persons with developmental disabilities.

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of Human Development Services

45 CFR Parts 1385, 1386, 1387, and 1388

Developmental Disabilities Program

AGENCY: Administration on Developmental Disabilities, ADJ Office of Human Development Services, (OHDS), Department of Health and Human Services.

ACTION: Notice of proposed rulemaking.

SUMMARY: This rule proposes to amend current regulations to implement changes made by the Developmental Disabilities Assistance and Bill of Rights Act Amendments of 1987 (Pub. L. 100-146). The regulations propose standards for determining whether a State has used Federal funds to supplement and not supplant State and local funds. They also propose to establish a peer review process for applications under the University Affiliated Programs and make other clarifying, technical, and conforming changes.

DATE: To ensure consideration comments must be submitted on or before February 8, 1989.

ADDRESS: Please address comments to: Commissioner, Administration on Developmental Disabilities, Room 348-F (Regulations), Hubert H. Humphrey Building, 200 Independence Avenue SW., Washington, DC 20201. Attention: Ms. Elisabeth Porter Wyatt.

It would be helpful if agencies and organizations submitted comments in duplicate. Two weeks after the close of the comment period, comments and letters will be available for public inspection in Room 347D, Hubert H.

***ADDRESS:** 5300 Wilbur J. Cohen Bldg., 330 Independence Ave.

***TELEPHONE:** (202) 245-7719

B. Summary of Proposed Regulations

A section-by-section discussion of the changes we are proposing follows:

Part 1385 Requirements Applicable to the Developmental Disabilities Program

Editorial and technical changes are proposed in Part 1385 to comport with statutory changes. See §§ 1385.1, 1385.3, 1385.4, 1385.5 and 1385.9. In § 1385.3 we propose to amend the definition of "Act" to cite the U.S. Code and thus eliminate the need for revision each time the law is amended. In addition, we propose to define "ADD" and "OHDS."

Part 1376 Formula Grant Programs

Pursuant to section 125(b) and 142(c) of the Act, we are proposing to clarify in paragraph (a) of § 1386.2, Obligation of funds, that Federal funds will be available for obligation by States for a two year period beginning with the first day of the fiscal year in which the grant is awarded.

Current regulations at § 1386.23(c) require the State Protection and Advocacy agency to submit financial status reports quarterly. These reports 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.

We are proposing new language in paragraph (c) to continue the requirement that State agencies must submit financial status reports, but we have deleted the regulatory language specifying a time period for submittal. However, we will implement this requirement administratively through an OHDS Program Instruction rather than through language in regulations. This will avoid the need to amend the rules in the future.

In § 1386.30, State plan requirements, we propose to revise paragraph (e)(4) pursuant to section 124(c)(1) of the Act. The proposed change clarifies that each State Planning Council shall receive from the State administering agency the amount of funds the State deems necessary to hire staff and obtain the services of other technical, professional, and clerical staff.

In § 1386.32 Periodic reports: Basic State grants, we are proposing to make the same change regarding financial status reports as we proposed in § 1386.23(c). OHDS will continue to require quarterly reports and will implement this requirement administratively through an OHDS Program Instruction rather than through language in the regulations. The new language proposed in paragraph (a) continues the requirement that the State agency must submit financial status

reports but deletes the regulatory language specifying a time period for submittal.

Technical changes have been made in § 1386.33(a), Protection of employee's interests, to reflect the new statutory citations.

In § 1386.35, Allowable and non-allowable costs for Basic State grants, we are proposing to add a new paragraph (c) to specify objective standards for use in determining whether a State is in compliance with the provision in section 122(b)(4)(D) of the Act that basic State grant funds must be used to supplement and not supplant Federal funds. These provisions are proposed in response to Congressional concern expressed in the Joint Senate-House Explanatory statement on S. 12417. See S. Rep. No. 100-113, 100th Cong., 1st Sess. (1987).

Part 1387 Projects of National Significance

§ 1387.1(a), the statutory reference has been corrected to comport with the 1987 Amendments. Also, we are proposing to add in a new paragraph (b), that proposed priorities for projects under this part will be published in the Federal Register and a 60 day public comment period will be allowed. Finally, the current paragraph (b) has been redesignated as paragraph (c) and amended to delete an unnecessary word "services" and incorporate the requirement that final priority areas will be announced in the Federal Register pursuant to Section 162(c) of the Act.

Part 1388 University Affiliated Programs

The title of Part 1388—The University Affiliated Facilities Program—would be revised to read the University Affiliated Programs, based on Part D of the Act.

In § 1388.5, Program criteria—training, we are proposing to specify new priority areas for training in paragraph (f)(3) pursuant to sections 152(b) (2), (3) and (4) of the Act. Paragraph (f)(3) proposes that training priorities must consider national manpower needs with particular attention in the areas of early intervention, the elderly developmentally disabled, and community-based programs.

Throughout all of Part 1388, the term University Affiliated Facilities has been changed to University Affiliated Programs (UAPs).

A new § 1388.9, Peer review, has been proposed regarding peer review of UAPs applications pursuant to section 153 (e)(1) and (e)(2) of the Act. In paragraph (a) we are proposing a statement of the reason a peer review process is being established to review UAP applications.

In paragraph (b) we are proposing that all applications for funding opportunities under Part D of the Act must be evaluated through the peer review process. In paragraph (c) we are proposing the requirements regarding the composition of the panel which is to include individuals with expertise and experience in the fields appropriate to the activities conducted by UAPs and Satellite Centers. (See S. Rep. No. 100-113, 100th Cong., 1st Sess. (1987)). Examples of disciplines related to the mentally retarded and developmentally disabled populations, are not limited to, but may include the following: (1) Administration; (2) audiology; (3) child psychiatry; (4) dentistry; (5) genetics; (6) gerontology; (7) medicine; (8) language/speech; (9) law; (10) neurology; (11) nursing; (12) occupational/physical therapy; (13) ophthalmology/optometry; (14) pediatrics; (15) program evaluation; (16) psychology; (17) social work; (18) special education; and (19) vocational rehabilitation. In addition, the following areas of expertise and experience may also be considered: (1) Experience in the UAPs, Mental Retardation and/or Developmental Disabilities networks; (2) demonstrated knowledge of UAP/Satellite Center mandates and program goals and objectives; and (3) professional association with national mental retardation/developmental disabilities organizations.

Impact Analysis**Executive Order 12291**

Executive Order 12291 requires that a regulatory impact analysis be prepared for major rules—defined in the Order as any rule that has an annual effect on the national economy of \$100 million or more, or certain other specified effects. These regulations primarily affect State agencies and University Affiliated Programs. The basic requirements of the program are established by the statute, not these regulations. Therefore, the Department concludes that these regulations are not major rules within the meaning of the Executive Order, because they do not have an effect on the economy of \$100 million or more or meet the other threshold criteria.

Regulatory Flexibility Act of 1980

Consistent with the Regulatory Flexibility Act (5 U.S.C. Ch. 6), we try to anticipate and reduce the impact of rules and paperwork requirements on small businesses. For each rule with a "significant economic impact on a substantial number of small entities", we prepare an analysis describing the rule's impact on small entities. The

primary impact of these regulations is on the States, which are not "small entities" within the meaning of the Act. For these reasons, the Secretary certifies that these rules will not have a significant impact on a substantial number of small entities.

Paperwork Reduction Act

Under the Paperwork Reduction Act of 1980, Pub. L. 96-511, all Departments are required to submit to the Office of Management and Budget for review and approval any reporting or recordkeeping requirement contained in a proposed or final rule. This proposed rule does not contain information collection requirements or increase Federal paperwork burden on the public or private sector.

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 1387

Grant programs/education, Grant programs/social programs, Handicapped.

45 CFR Part 1388

Colleges and universities, Grant programs/education, Grant programs/social programs, university affiliated program, satellite center.

(Catalog of Federal Domestic Assistance Program Nos. 13.630 Developmental Disabilities Basic Support and 13.631 Developmental Disabilities—Projects of National Significance, and 13.632 Developmental Disabilities—University Affiliated Program)

Dated: July 27, 1988.

Sydney Olson,

Assistant Secretary for Human Development Services.

Approved: August 31, 1988.

Otis R. Bowen,

Secretary.

For the reasons set forth in the preamble, Chapter XIII of title 45 of the Code of Federal Regulations is proposed to be amended as follows:

Subchapter 1—The Administration on Developmental Disabilities, Developmental Disabilities Program

PART 1385—REQUIREMENTS APPLICABLE TO THE DEVELOPMENTAL DISABILITIES PROGRAM

1. The authority citation for Part 1385 is revised to read as follows:

Authority: 42 U.S.C. 6000 et. seq.

2. Section 1385.1 is amended by revising paragraphs (b), (c) and (d) to read as follows:

§ 1385.1 General.

(b) State Basic Program for Planning Priority Area Activities for Persons with Developmental Disabilities.

(c) Projects of National Significance; and

(d) University Affiliated Programs (UAPs)

3. Section 1385.3 is amended by revising the definition of "Act" and by adding the definition of "ADD" and "OHDS" to read as follows. The introductory text is republished for the convenience of the reader.

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

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

OHDS means the Office of Human Developmental Services within the Department of Health and Human Services.

4. Section 1385.4 is amended by revising paragraphs (b) and (c) to read as follows:

§ 1385.4 Rights of persons with developmental disabilities.

(b) In order to comply with section 122(b)(6)(C) of the Act (42 U.S.C. 6022 (b)(6)(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 programs or for projects of national significance grants must also contain an assurance that the human rights of persons assisted by these programs will be protected consistent with section 110 (see section 153(b)(3) and section 162(b)).

5. Section 1385.5 is amended by revising paragraph (b) to read as follows:

§ 1385.5 Recovery of Federal funds used for construction of facilities.

(b) The State Council or the appropriate UAP official must submit detailed documentation to the Commissioner of all transactions as specified in paragraph (a) of this section which occurred prior to this publication.

6. Section 1385.9 is amended by revising paragraph (a) introductory text to read as follows:

§ 1385.9 Grants administration requirements.

(a) The following parts of Title 45 CFR apply to grants funded under Parts 1386 and 1388 of this chapter and to projects of national significance under section 162 of the Act (42 U.S.C. 6082).

PART 1386—FORMULA GRANT PROGRAMS

7. The authority citation for Part 1386 is revised to read as follows:

Authority: 42 U.S.C. 6000 et. seq.

Subpart A—Basic Requirements

8. Section 1386.2 is amended by revising paragraph (a) to read as follows:

§ 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 for a two year period beginning with the first day of the Federal fiscal year in which the grant is awarded.

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

9. Section 1386.23 is amended by revising paragraph (c) and the OMB statement to read as follows:

§ 1386.23 Periodic reports: Protection and Advocacy System.

(c) Financial Status reports must be submitted by the Protection and Advocacy Agency according to a frequency interval which will be specified by OHDS. In no case will such reports be required more frequently than quarterly.

[Information collection requirements contained in paragraph (b) under control

number 0980-0180 and paragraph (c) under control number 0348-0039 are approved by the Office of Management and Budget.]

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

10. Section 1386.30 is amended by revising paragraph (e)(4) to read as follows:

§ 1386.30 State plan requirements.

(e) . . .

(4) Each Planning Council shall receive from the State administering agency funds to hire staff and obtain the services of other technical, professional, and clerical staff, consistent with State law to allow States to comply with this requirement however they see fit.

11. Section 1386.32 is amended by revising paragraph (a) and the OMB statement to read as follows:

§ 1386.32 Periodic reports: Basic State grants.

(a) The Governor or the appropriate State financial official must submit quarterly financial status reports on the programs funded under this part. These reports are due thirty (30) days after the close of each quarter. The final financial report is due two (2) years and ninety (90) days after the last day of the Federal fiscal year in which the grant was awarded. The quarterly reports must be submitted until the final report is submitted for each fiscal year.

[Information collection requirements contained in paragraph (a) under control number 0348-0039 and paragraph (b) under control number 0980-0172 are approved by the Office of Management and Budget.]

12. Section 1386.33 is amended by revising paragraph (a) to read as follows:

§ 1386.33 Protection of employee's interests.

(a) Based on section 122(b)(7)(B) of the Act (42 U.S.C. 6022(b)(7)(B)), 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.

13. In § 1386.35 a new paragraph (c) is added to read as follows:

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

(c) Expenditure of funds which supplant State and local funds will be disallowed. Supplanting occurs when State or local funds previously used to fund activities in the developmental disabilities State Plan are replaced by Federal funds which are then used for the same purpose. However, supplanting does not occur if State or local funds are replaced with Federal funds for a particular activity or purpose in the approved State Plan if the State or local funds are then used for other activities or purposes in the approved State Plan.

14. Part 1387 is revised to read as follows:

PART 1387 PROJECTS OF NATIONAL SIGNIFICANCE

§ 1387.1 General requirements.

Authority: 42 U.S.C. 6000 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 162 of the Act.

(b) Based on section 162(c), proposed priorities for grants and contracts will be published in the Federal Register and a 60 day period for public comments will be allowed.

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

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

15. The heading of Part 1388 is revised to read as follows:

PART 1388—THE UNIVERSITY AFFILIATED PROGRAMS

16. The authority citation for Part 1388 continues to read as follows:

Authority 42 U.S.C. 6000 et. seq.

PART 1388—NOMENCLATURE CHANGE

17. In part 1388 wherever the term UAF is used, it is changed to UAP, and wherever the term University Affiliated Facilities is used, it is changed to University Affiliated Programs.

18. Section 1388.5 is amended by revising paragraph (f)(3) to read as follows:

§ 1388.5 Program criteria—training

(f) . . .

(3) Training priorities must consider national manpower needs with particular attention to the following areas:

- (i) Early intervention programs;
- (ii) Programs for elderly persons with developmental disabilities; and
- (iii) Community based programs.

19. A new § 1388.9 has been added to read as follows:

§ 1388.9 Peer review

(a) The purpose of the peer review process is to provide the Commissioner, ADD, with technical and qualitative evaluation of UAP and Satellite Center applications.

(b) Peer review panels will evaluate all applications under Part D, Section 152, including applications for:

(1) Core UAP and Satellite Center funding;

(2) Feasibility studies; and

(3) Training projects in areas of emerging national significance.

(c) Panels will be composed of individuals with expertise and experience in the fields appropriate to the activities conducted by UAP and Satellite Centers.

[FR Doc. 88-28044 Filed 12-6-88; 2:45 am]
BILLING CODE 4250-01-8

*See attached corrected language

Section 1386.32(a) should read as follows:

- (a) The Governor or the appropriate State financial officer must submit financial status reports on the programs funded under this subpart according to a frequency interval which will be specified by OHDS. In no case will such reports be required more frequently than quarterly.

U.S. DEPARTMENT OF
HEALTH AND HUMAN SERVICES
Washington, D.C. 20201

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