



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

1. Log No. ADD-PR-89-2

2. Issuance Date: 12/8/89

3. Originating Office: Administration on Developmental Disabilities

4. Key Word: Final Rules

5. 1987 Amendments

6.

7.

PROGRAM REGULATION

**TO:**

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

**SUBJECT:**

Final Rule for the Developmental  
Disabilities Program

**LEGAL AND RELATED  
REFERENCES:**

Public Law 100-146, Developmental  
Disabilities Assistance and Bill of  
Rights Act Amendments of 1987

**DISCUSSION:**

The Department published a Notice of  
Proposed Rulemaking in the FEDERAL  
REGISTER on December 7, 1988  
(53 FR 49332). All written comments  
were analyzed and form the basis for the  
minor editorial and technical changes  
which the Department has made in the  
attached final rule.

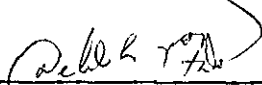
The final rule implements the  
Developmental Disabilities Assistance  
and Bill of Rights Act Amendments of  
1987 (Pub. L. 100-146). The rule  
includes standards for determining  
whether a state has used Federal funds  
to supplement and not supplant state and  
local funds. It also establishes a peer  
review process for applications under  
the University Affiliated Programs.

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EFFECTIVE DATE: December 20, 1989

INQUIRIES TO: Administration on Developmental  
Disabilities  
ATTN: Elsbeth Porter Wyatt  
Room 325D, Hubert H. Humphrey  
Bldg., 200 Independence Avenue,  
S.W. Washington, D.C. 20201  
Telephone: (202) 245-0841 or

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

  
\_\_\_\_\_  
Deborah L. McFadden  
Commissioner  
Administration on Developmental  
Disabilities

Copy To: Regional Administrators, HDS

Attachments: (1)

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**DEPARTMENT OF HEALTH AND  
HUMAN SERVICES**
**Office of Human Development  
Services****45 CFR Parts 1385, 1386, 1387, and  
1388****RIN 0980-AA36****Developmental Disabilities Program****AGENCY:** Administration on  
Developmental Disabilities, Office of  
Human Development Services, HHS.**ACTION:** Final rule.

**SUMMARY:** The Department is issuing final rules for the Developmental Disabilities program. These final rules implement the Developmental Disabilities Assistance and Bill of Rights Act Amendments of 1987 (Pub. L. 100-146). The rules include standards for determining whether a State has used Federal funds to supplement and not supplant State and local funds and a peer review process for applications under the University Affiliated Programs.

**EFFECTIVE DATE:** December 20, 1989.**FOR FURTHER INFORMATION CONTACT:**  
Will Wolstein, Deputy Commissioner,  
Administration on Developmental  
Disabilities, Telephone: (202) 245-2890.**SUPPLEMENTARY INFORMATION:****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.

#### *Notice of Proposed Rulemaking*

The Department published a Notice of Proposed Rulemaking (NPRM) in the *Federal Register* on December 7, 1988, (53 FR 49332-49335). Interested persons were given sixty days in which to send written comments regarding the proposed rules. During the sixty (60) day comment period, fifteen (15) letters containing seventeen (17) comments were received.

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 for Planning Priority Area Activities for Persons with Developmental Disabilities authorized by part B of the Act, and the Protection and Advocacy (P&A) program authorized by part C of the Act. Part 1387 applies to Projects of National Significance; and part 1388 applies to University Affiliated Programs authorized by part D of the Act.

#### *Summary of Comments and the Departmental Response*

The discussion which follows includes a summary of all comments, our

responses to those comments, and a description of the changes that have been made in the final rule as a result of the comments.

#### **PART 1385—REQUIREMENTS APPLICABLE TO THE DEVELOPMENTAL DISABILITIES PROGRAM**

Section 1385.9(a) has been amended to add 45 CFR parts 88 and 92 to the list of references applicable to grants under parts 1386 through 1388. This is a technical and conforming change made by the Department.

#### **PART 1386—FORMULA GRANT PROGRAMS**

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

##### *Section 1386.23 Periodic Reports: protection and Advocacy System*

Section 1386.23 of the NPRM proposed new language in paragraph (c) which reiterated current reporting requirements for the submission of financial status reports and deleted the specifics regarding the time periods for submittal. We proposed that the time period requirements would be provided through a Program Instruction rather than through language in rules.

*Comment:* One commenter expressed the view that the rule would be revising current reporting requirements.

*Response:* The proposed rule did not revise current reporting requirements but deleted from the rule the specifics regarding the time periods for submittal. Therefore, no change will be made in § 1386.23(c).

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

##### *Section 1386.30 State Plan Requirements*

Section 1386.30(e)(4) proposed that each State 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.

*Comment:* Twelve commenters stated that the proposed language in § 1386.30(e)(4) did not accurately reflect the role and the authority of the State Planning Council pursuant to section 124(c)(1) of the Act in regard to the hiring of Council staff. The commenters indicated that the State Planning Councils, not the designated agency or the State, have the authority to hire staff as long as it is done in a manner consistent with State law.

*Response:* The Department agrees that State Planning Councils have the authority to hire staff. Therefore, we

have revised the language of the final rule to further clarify this fact.

##### *Section 1386.33 Protection of Employee's Interests*

Section 1386.33 of the NPRM regarding protection of employee's interests was amended to reflect a new statutory citation.

*Comment:* We received three comments regarding employee protection which interpreted this section as containing substantive changes.

*Response:* Since this section was revised only to include a new statutory citation in paragraph (a), we have not made a change in the final rule.

#### **PART 1387—PROJECTS OF NATIONAL SIGNIFICANCE**

##### *Section 1387.1 General Requirements*

The NPRM proposed language for a new paragraph (b) in § 1387.1. The current regulatory language of § 1387.1(c) then became paragraph (d).

*Comment:* One commenter expressed the view that as all references to model demonstrations and direct services have been eliminated by the 1987 Amendments, projects funded under this part need not be "exemplary models" which can be "replicated," and therefore paragraph (d) should be deleted from the rules.

*Response:* The Department concurs with the comment that the word "model" does have a direct service delivery connotation and will delete such reference in the rule. However, we believe that projects of national significance must be exemplary and have potential for replication or otherwise clearly meet the goals of Part E of the Act. Therefore, paragraph (d) will be retained but revised accordingly.

#### **PART 1388—THE UNIVERSITY AFFILIATED PROGRAMS**

##### *Section 1388.9 Peer Review*

Section 1388.9(b) of the NPRM proposed that all applications for funding opportunities under Part D of the Act must be evaluated through the peer review process.

*Comment:* Following further consideration of the proposed language for Section 1388.9(b) we concluded that the phrase "including applications for" suggested that grants under the University Affiliated Programs (UAPs) provisions could be for purposes other than (1) core UAPs and Satellite Center funding, (2) feasibility studies, and (3) training projects in areas of emerging national significance.

*Response:* Since these are the only purposes for which funding is available

to UAPs under the Act, we have deleted the word "including" and substituted the term "consisting of."

#### 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: August 1, 1989.

Mary Sheila Gall,

Assistant Secretary for Human Development Services.

Approved: November 1, 1989.

Louis W. Sullivan,

Secretary.

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

#### SUBCHAPTER I—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(a) is amended by adding 45 CFR parts 86 and 92 in numerical order to the list of references applicable to grants under sections 1386–1388.

##### § 1385.9 Grants administration requirements.

45 CFR Part 86—Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance.

45 CFR Part 92—Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments.

**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 0980-0160 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 may, at its option, hire staff and obtain the services of other technical, professional, and clerical staff, that the council determines is necessary to carry out its functions. The designated State Agency shall disburse funds for such personnel consistent with State Law.

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 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.

[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**

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 have potential for replication or otherwise meet the goals of part E of the Act.

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.

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, consisting of 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 field appropriate to the activities conducted by UAP and Satellite Centers.

[FR Doc. 89-28935 Filed 11-17-89; 8:45 am]

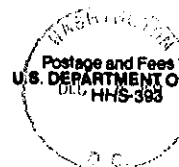
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U.S. DEPARTMENT OF  
HEALTH AND HUMAN SERVICES  
Washington, D.C. 20201

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