

## SUBCHAPTER C—THE ADMINISTRATION FOR COMMUNITY LIVING

### PART 1321—GRANTS TO STATE AND COMMUNITY PROGRAMS ON AGING

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AUTHORITY: 42 U.S.C. 3001 *et seq.*; title III of the Older Americans Act, as amended.

SOURCE: 53 FR 33766, Aug. 31, 1988, unless otherwise noted.

#### Subpart A—Introduction

##### § 1321.1 Basis and purpose of this part.

(a) This part prescribes requirements State agencies shall meet to receive grants to develop comprehensive and coordinated systems for the delivery of supportive and nutrition services under title III of the Older Americans Act, as amended (Act). These requirements include:

- (1) Designation and responsibilities of State agencies;
- (2) State plans and amendments;
- (3) Services delivery; and
- (4) Hearing procedures for applicants for planning and services area designation.

(b) The requirements of this part are based on title III of the Act. Title III provides for formula grants to State agencies on aging, under approved State plans, to stimulate the development or enhancement of comprehensive and coordinated community-based systems resulting in a continuum of services to older persons with special emphasis on older individuals with the greatest economic or social need, with

particular attention to low-income minority individuals. A responsive community-based system of services shall include collaboration in planning, resource allocation and delivery of a comprehensive array of services and opportunities for all older Americans in the community. The intent is to use title III funds as a catalyst in bringing together public and private resources in the community to assure the provision of a full range of efficient, well coordinated and accessible services for older persons.

(c) Each State agency designates planning and service areas in the State, and makes a subgrant or contract under an approved area plan to one area agency in each planning and service area for the purpose of building comprehensive systems for older people throughout the State. Area agencies in turn make subgrants or contracts to service providers to perform certain specified functions.

### § 1321.3 Definitions.

*Act* means the Older Americans Act of 1965 as amended.

*Altering or renovating*, as used in section 307(a)(14) of the Act with respect to multipurpose senior centers, means making modifications to or in connection with an existing facility which are necessary for its effective use as a center. These may include renovation, repair, or expansion which is not in excess of double the square footage of the original facility and all physical improvements.

*Constructing*, as used in section 307(a)(14) of the Act with respect to multipurpose senior centers, means building a new facility, including the costs of land acquisition and architectural and engineering fees, or making modifications to or in connection with an existing facility which are in excess of double the square footage of the original facility and all physical improvements.

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

*Direct services*, as used in this part, means any activity performed to provide services directly to an individual older person by the staff of a service provider, an area agency, or a State

agency in a single planning and service area State.

*Fiscal year*, as used in this part, means the Federal Fiscal Year.

*Frail*, as used in this part, means having a physical or mental disability, including having Alzheimer's disease or a related disorder with neurological or organic brain dysfunction, that restricts the ability of an individual to perform normal daily tasks or which threatens the capacity of an individual to live independently.

*Human services*, as used in § 1321.41(a)(1) of this part, with respect to criteria for designation of a statewide planning and service area, means social, health, or welfare services.

*In-home service*, as used in this part, includes: (a) Homemaker and home health aides; (b) visiting and telephone reassurance; (c) chore maintenance; (d) in-home respite care for families, including adult day care as a respite service for families; and (e) minor modification of homes that is necessary to facilitate the ability of older individuals to remain at home, and that is not available under other programs, except that not more than \$150 per client may be expended under this part for such modification.

*Means test*, as used in the provision of services, means the use of an older person's income or resource to deny or limit that person's receipt of services under this part.

*Official duties*, as used in section 307(a)(12)(J) of the Act with respect to representatives of the Long-Term Care Ombudsman Program, means work pursuant to the Long-Term Care Ombudsman Program authorized by the Act or State law and carried out under the auspices and general direction of the State Long-Term Care Ombudsman.

*Periodic*, as used in sections 306(a)(6) and 307(a)(8) of the Act with respect to evaluations of, and public hearings on, activities carried out under State and area plans, means, at a minimum, once each fiscal year.

*Reservation*, as used in section 305(b)(4) of the Act with respect to the designation of planning and service areas, means any federally or State recognized Indian tribe's reservation, pueblo, or colony, including former reservations in Oklahoma, Alaskan Native

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regions established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688), and Indian allotments.

*Service provider*, as used in section 306(a)(1) of the Act with respect to the provision of supportive and nutrition services, means an entity that is awarded a subgrant or contract from an area agency to provide services under the area plan.

*Severe disability*, as used to carry out the provisions of the Act, means a severe chronic disability attributable to mental and/or physical impairment of an individual that:

- (a) Is likely to continue indefinitely; and
- (b) Results in substantial functional limitation in 3 or more of the following major life activities:
  - (1) Self-care,
  - (2) Receptive and expressive language,
  - (3) Learning,
  - (4) Mobility,
  - (5) Self-direction,
  - (6) Capacity for independent living, and
  - (7) Economic self-sufficiency.

### § 1321.5 Applicability of other regulations.

Several other regulations apply to all activities under this part. These include but are not limited to:

- (a) 45 CFR part 16—Procedures of the Departmental Grant Appeals Board;
- (b) 45 CFR part 75—Uniform Administrative Requirements, Cost Principles, and Audit Requirements for HHS Awards, except § 75.206;
- (c) 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;
- (d) 45 CFR part 81—Practice and Procedures for Hearings Under Part 80 of this title;
- (e) 45 CFR part 84—Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Participation;
- (f) 45 CFR part 91—Nondiscrimination on the Basis of Age in HHS Programs or Activities Receiving Federal Financial Assistance;

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(g) [Reserved]

(h) 45 CFR part 100—Intergovernmental Review of Department of Health and Human Services Programs and Activities; and

(i) 5 CFR part 900, subpart F, Standards for a Merit System of Personnel Administration.

[53 FR 33766, Aug. 31, 1988, as amended at 81 FR 3022, Jan. 20, 2016]

### Subpart B—State Agency Responsibilities

#### § 1321.7 Mission of the State agency.

(a) The Older Americans Act intends that the State agency on aging shall be the leader relative to all aging issues on behalf of all older persons in the State. This means that the State agency shall proactively carry out a wide range of functions related to advocacy, planning, coordination, interagency linkages, information sharing, brokering, monitoring and evaluation, designed to lead to the development or enhancement of comprehensive and coordinated community based systems in, or serving, communities throughout the State. These systems shall be designed to assist older persons in leading independent, meaningful and dignified lives in their own homes and communities as long as possible.

(b) The State agency shall designate area agencies on aging for the purpose of carrying out the mission described above for the State agency at the sub-State level. The State agency shall designate as its area agencies on aging only those sub-state agencies having the capacity and making the commitment to fully carry out the mission described for area agencies in § 1321.53 below.

(c) The State agency shall assure that the resources made available to area agencies on aging under the Older Americans Act are used to carry out the mission described for area agencies in § 1321.53 below.

#### § 1321.9 Organization and staffing of the State agency.

(a) The State shall designate a sole State agency to develop and administer the State plan required under this part

and serve as the effective visible advocate for the elderly within the State.

(b) The State agency shall have an adequate number of qualified staff to carry out the functions prescribed in this part.

(c) The State agency shall have within the State agency, or shall contract or otherwise arrange with another agency or organization, as permitted by section 307(a)(12)(A), an Office of the State Long-Term Care Ombudsman, with a full-time State ombudsman and such other staff as are appropriate.

(d) If a State statute establishes a State ombudsman program which will perform the functions of section 307(a)(12) of the Act, the State agency continues to be responsible to assure that all of the requirements of the Act for this program are met regardless of the State legislation or source of funds. In such cases, the Governor shall confirm this through an assurance in the State plan.

#### § 1321.11 State agency policies.

(a) The State agency on aging shall develop policies governing all aspects of programs operated under this part, including the ombudsman program whether operated directly by the State agency or under contract. These policies shall be developed in consultation with other appropriate parties in the State. The State agency is responsible for enforcement of these policies.

(b) The policies developed by the State agency shall address the manner in which the State agency will monitor the performance of all programs and activities initiated under this part for quality and effectiveness. The State Long-Term Care Ombudsman shall be responsible for monitoring the files, records and other information maintained by the Ombudsman program. Such monitoring may be conducted by a designee of the Ombudsman. Neither the Ombudsman nor a designee shall disclose identifying information of any complainant or long-term care facility resident to individuals outside of the Ombudsman program, except as otherwise specifically provided in §1324.11(e)(3) of this chapter.

[53 FR 33766, Aug. 31, 1988, as amended at 80 FR 7758, Feb. 11, 2015; 81 FR 35645, June 3, 2016]

#### § 1321.13 Advocacy responsibilities.

(a) The State agency shall:

(1) Review, monitor, evaluate and comment on Federal, State and local plans, budgets, regulations, programs, laws, levies, hearings, policies, and actions which affect or may affect older individuals and recommend any changes in these which the State agency considers to be appropriate;

(2) Provide technical assistance to agencies, organizations, associations, or individuals representing older persons; and

(3) Review and comment, upon request, on applications to State and Federal agencies for assistance relating to meeting the needs of older persons.

(b) No requirement in this section shall be deemed to supersede a prohibition contained in a Federal appropriation on the use of Federal funds to lobby the Congress.

#### § 1321.15 Duration, format and effective date of the State plan.

(a) A State may use its own judgment as to the format to use for the plan, how to collect information for the plan, and whether the plan will remain in effect for two, three or four years.

(b) An approved State plan or amendment, as identified in §1321.17, becomes effective on the date designated by the Commissioner.

(c) A State agency may not make expenditures under a new plan or amendment requiring approval, as identified in §1321.17 and §1321.19, until it is approved.

#### § 1321.17 Content of State plan.

To receive a grant under this part, a State shall have an approved State plan as prescribed in section 307 of the Act. In addition to meeting the requirements of section 307, a State plan shall include:

(a) Identification by the State of the sole State agency that has been designated to develop and administer the plan.

(b) Statewide program objectives to implement the requirements under Title III of the Act and any objectives established by the Commissioner through the rulemaking process.

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(c) A resource allocation plan indicating the proposed use of all title III funds administered by a State agency, and the distribution of title III funds to each planning and service area.

(d) Identification of the geographic boundaries of each planning and service area and of area agencies on aging designated for each planning and service area, if appropriate.

(e) Provision of prior Federal fiscal year information related to low income minority and rural older individuals as required by sections 307(a) (23) and (29) of the Act.

(f) Each of the assurances and provisions required in sections 305 and 307 of the Act, and provisions that the State meets each of the requirements under §§ 1321.5 through 1321.75 of this part, and the following assurances as prescribed by the Commissioner:

(1) Each area agency engages only in activities which are consistent with its statutory mission as prescribed in the Act and as specified in State policies under § 1321.11;

(2) Preference is given to older persons in greatest social or economic need in the provision of services under the plan;

(3) Procedures exist to ensure that all services under this part are provided without use of any means tests;

(4) All services provided under title III meet any existing State and local licensing, health and safety requirements for the provision of those services;

(5) Older persons are provided opportunities to voluntarily contribute to the cost of services;

(6) Area plans shall specify as submitted, or be amended annually to include, details of the amount of funds expended for each priority service during the past fiscal year;

(7) The State agency on aging shall develop policies governing all aspects of programs operated under this part, including the manner in which the ombudsman program operates at the State level and the relation of the ombudsman program to area agencies where area agencies have been designated;

(8) The State agency will require area agencies on aging to arrange for outreach at the community level that

identifies individuals eligible for assistance under this Act and other programs, both public and private, and informs them of the availability of assistance. The outreach efforts shall place special emphasis on reaching older individuals with the greatest economic or social needs with particular attention to low income minority individuals, including outreach to identify older Indians in the planning and service area and inform such older Indians of the availability of assistance under the Act.

(9) The State agency shall have and employ appropriate procedures for data collection from area agencies on aging to permit the State to compile and transmit to the Commissioner accurate and timely statewide data requested by the Commissioner in such form as the Commissioner directs; and

(10) If the State agency proposes to use funds received under section 303(f) of the Act for services other than those for preventive health specified in section 361, the State plan shall demonstrate the unmet need for the services and explain how the services are appropriate to improve the quality of life of older individuals, particularly those with the greatest economic or social need, with special attention to low-income minorities.

(11) Area agencies shall compile available information, with necessary supplementation, on courses of post-secondary education offered to older individuals with little or no tuition. The assurance shall include a commitment by the area agencies to make a summary of the information available to older individuals at multipurpose senior centers, congregate nutrition sites, and in other appropriate places.

(12) Individuals with disabilities who reside in a non-institutional household with and accompany a person eligible for congregate meals under this part shall be provided a meal on the same basis that meals are provided to volunteers pursuant to section 307(a)(13)(I) of the Act.

(13) The services provided under this part will be coordinated, where appropriate, with the services provided under title VI of the Act.

(14)(i) The State agency will not fund program development and coordinated

activities as a cost of supportive services for the administration of area plans until it has first spent 10 percent of the total of its combined allotments under Title III on the administration of area plans;

(ii) State and area agencies on aging will, consistent with budgeting cycles (annually, biannually, or otherwise), submit the details of proposals to pay for program development and coordination as a cost of supportive services, to the general public for review and comment; and

(iii) The State agency certifies that any such expenditure by an area agency will have a direct and positive impact on the enhancement of services for older persons in the planning and service area.

(15) The State agency will assure that where there is a significant population of older Indians in any planning and service area that the area agency will provide for outreach as required by section 306(a)(6)(N) of the Act.

**§ 1321.19 Amendments to the State plan.**

(a) A State shall amend the State plan whenever necessary to reflect:

(1) New or revised Federal statutes or regulations,

(2) A material change in any law, organization, policy or State agency operation, or

(3) Information required annually by sections 307(a) (23) and (29) of the Act.

(b) Information required by paragraph (a)(3) of this section shall be submitted according to guidelines prescribed by the Commissioner.

(c) If a State intends to amend provisions of its plan required under §§ 1321.17 (a) or (f), it shall submit its proposed amendment to the Commissioner for approval. If the State changes any of the provisions of its plan required under § 1321.17 (b) through (d), it shall amend the plan and notify the Commissioner. A State need only submit the amended portions of the plan.

**§ 1321.21 Submission of the State plan or plan amendment to the Commissioner for approval.**

Each State plan, or plan amendment which requires approval of the Com-

missioner, shall be signed by the Governor or the Governor's designee and submitted to the Commissioner to be considered for approval at least 45 calendar days before the proposed effective date of the plan or plan amendment.

**§ 1321.23 Notification of State plan or State plan amendment approval.**

(a) The Commissioner approves a State plan or State plan amendment by notifying the Governor or the Governor's designee in writing.

(b) When the Commissioner proposes to disapprove a State plan or amendment, the Commissioner notifies the Governor in writing, giving the reasons for the proposed disapproval, and informs the State agency that it has 60 days to request a hearing on the proposed disapproval following the procedures specified in subpart E of this part.

**§ 1321.25 Restriction of delegation of authority to other agencies.**

A State or area agency may not delegate to another agency the authority to award or administer funds under this part.

**§ 1321.27 Public participation.**

The State agency shall have a mechanism to obtain and shall consider the views of older persons and the public in developing and administering the State plan.

**§ 1321.29 Designation of planning and service areas.**

(a) Any unit of general purpose local government, region within a State recognized for area wide planning, metropolitan area, or Indian reservation may make application to the State agency to be designated as a planning and service area, in accordance with State agency procedures.

(b) A State agency shall approve or disapprove any application submitted under paragraph (a) of this section.

(c) Any applicant under paragraph (a) of this section whose application for designation as a planning and service area is denied by a State agency may appeal the denial to the State agency, under procedures specified by the State agency.

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(d) If the State denies an applicant for designation as a planning and service area under paragraph (a) of this section, the State shall provide a hearing on the denial of the application, if requested by the applicant, as well as issue a written decision.

### § 1321.31 Appeal to Commissioner.

This section sets forth the procedures the Commissioner follows for providing hearings to applicants for designation as a planning and service area, under § 1321.29(a), whose application is denied by the State agency.

(a) Any applicant for designation as a planning and service area under § 1321.29(a) whose application is denied, and who has been provided a hearing and a written decision by the State agency, may appeal the denial to the Commissioner in writing within 30 days following receipt of a State's hearing decision.

(b) The Commissioner, or the Commissioner's designee, holds a hearing, and issues a written decision, within 60 days following receipt of an applicant's written request to appeal the State agency hearing decision to deny the applicant's request under § 1321.29(a).

(c) When the Commissioner receives an appeal, the Commissioner requests the State Agency to submit:

(1) A copy of the applicant's application for designation as a planning and service area;

(2) A copy of the written decision of the State; and

(3) Any other relevant information the Commissioner may require.

(d) The procedures for the appeal consist of:

(1) Prior written notice to the applicant and the State agency of the date, time and location of the hearing;

(2) The required attendance of the head of the State agency or designated representatives;

(3) An opportunity for the applicant to be represented by counsel or other representative; and

(4) An opportunity for the applicant to be heard in person and to present documentary evidence.

(e) The Commissioner may:

(1) Deny the appeal and uphold the decision of a State agency;

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(2) Uphold the appeal and require a State agency to designate the applicant as a planning and service area; or

(3) Take other appropriate action, including negotiating between the parties or remanding the appeal to the State agency after initial findings.

(f) The Commissioner will uphold the decision of the State agency if it followed the procedures specified in § 1321.29, and the hearing decision is not manifestly inconsistent with the purpose of this part.

(g) The Commissioner's decision to uphold the decision of a State agency does not extend beyond the period of the approved State plan.

### § 1321.33 Designation of area agencies.

An area agency may be any of the types of agencies under section 305(c) of the Act. A State may not designate any regional or local office of the State as an area agency. However, when a new area agency on aging is designated, the State shall give right of first refusal to a unit of general purpose local government as required in section 305(b)(5)(B) of the Act. If the unit of general purpose local government chooses not to exercise this right, the State shall then give preference to an established office on aging as required in section 305(c)(5) of the Act.

### § 1321.35 Withdrawal of area agency designation.

(a) In carrying out section 305 of the Act, the State agency shall withdraw the area agency designation whenever it, after reasonable notice and opportunity for a hearing, finds that:

(1) An area agency does not meet the requirements of this part;

(2) An area plan or plan amendment is not approved;

(3) There is substantial failure in the provisions or administration of an approved area plan to comply with any provision of the Act or of this part or policies and procedures established and published by the State agency on aging; or

(4) Activities of the area agency are inconsistent with the statutory mission prescribed in the Act or in conflict with the requirement of the Act that it function only as an area agency on aging.

(b) If a State agency withdraws an area agency's designation under paragraph (a) of this section it shall:

(1) Provide a plan for the continuity of area agency functions and services in the affected planning and service area; and

(2) Designate a new area agency in the planning and service area in a timely manner.

(c) If necessary to ensure continuity of services in a planning and service area, the State agency may, for a period of up to 180 days after its final decision to withdraw designation of an area agency:

(1) Perform the responsibilities of the area agency; or

(2) Assign the responsibilities of the area agency to another agency in the planning and service area.

(d) The Commissioner may extend the 180-day period if a State agency:

(1) Notifies the Commissioner in writing of its action under paragraph (c) of this section;

(2) Requests an extension; and

(3) Demonstrates to the satisfaction of the Commissioner a need for the extension.

#### § 1321.37 Intrastate funding formula.

(a) The State agency, after consultation with all area agencies in the State, shall develop and use an intrastate funding formula for the allocation of funds to area agencies under this part. The State agency shall publish the formula for review and comment by older persons, other appropriate agencies and organizations and the general public. The formula shall reflect the proportion among the planning and service areas of persons age 60 and over in greatest economic or social need with particular attention to low-income minority individuals. The State agency shall review and update its formula as often as a new State plan is submitted for approval.

(b) The intrastate funding formula shall provide for a separate allocation of funds received under section 303(f) for preventive health services. In the award of such funds to selected planning and service areas, the State agency shall give priority to areas of the State:

(1) Which are medically underserved; and

(2) In which there are large numbers of individuals who have the greatest economic and social need for such services.

(c) The State agency shall submit its intrastate formula to the Commissioner for review and comment. The intrastate formula shall be submitted separately from the State plan.

#### § 1321.41 Single State planning and service area.

(a) The Commissioner will approve the application of a State which was, on or before October 1, 1980, a single planning and service area, to continue as a single planning and service area if the State agency demonstrates that:

(1) The State is not already divided for purposes of planning and administering human services; or

(2) The State is so small or rural that the purposes of this part would be impeded if the State were divided into planning and services areas; and

(3) The State agency has the capacity to carry out the responsibilities of an area agency, as specified in the Act.

(b) Prior to the Commissioner's approval for a State to continue as a single planning and service area, all the requirements and procedures in § 1321.29 shall be met.

(c) If the Commissioner approves a State's application under paragraph (a) this section:

(1) The Commissioner notifies the State agency to develop a single State planning and service area plan which meets the requirements of section 306 and 307 of the Act.

(2) A State agency shall meet all the State and area agency function requirements specified in the Act.

(d) If the Commissioner denies the application because a State fails to meet the criteria or requirements set forth in paragraphs (a) or (b) of this section, the Commissioner notifies the State that it shall follow procedures in section 305(A)(1)(E) of the Act to divide the State into planning and service areas.



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**§ 1321.43 Interstate planning and service area.**

(a) Before requesting permission of the Commissioner to designate an interstate planning and service area, the Governor of each State shall execute a written agreement that specifies the State agency proposed to have lead responsibility for administering the programs within the interstate planning and service area and lists the conditions, agreed upon by each State, governing the administration of the interstate planning and service area.

(b) The lead State shall request permission of the Commissioner to designate an interstate planning and service area.

(c) The lead State shall submit the request together with a copy of the agreement as part of its State plan or as an amendment to its State plan.

(d) Prior to the Commissioner's approval for States to designate an interstate planning and service area, the Commissioner shall determine that all applicable requirements and procedures in §1321.29 and §1321.33 of this part, shall be met.

(e) If the request is approved, the Commissioner, based on the agreement between the States, increases the allotment of the State with lead responsibility for administering the programs within the interstate area and reduces the allotment(s) of the State(s) without lead responsibility by one of these methods:

(1) Reallotment of funds in proportion to the number of individuals age 60 and over for that portion of the interstate planning and service area located in the State without lead responsibility; or

(2) Reallotment of funds based on the intrastate funding formula of the State(s) without lead responsibility.

**§ 1321.45 Transfer between congregate and home-delivered nutrition service allotments.**

(a) A State agency, without the approval of the Commissioner, may transfer between allotments up to 30 percent of a State's separate allotments for congregate and home-delivered nutrition services.

(b) A State agency may apply to the Commissioner to transfer from one al-

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lotment to the other a portion exceeding 30 percent of a State's separate allotments for congregate and home-delivered nutrition services. A State agency desiring such a transfer of allotment shall:

(1) Specify the percent which it proposes to transfer from one allotment to the other;

(2) Specify whether the proposed transfer is for the entire period of a State plan or a portion of a plan period; and

(3) Specify the purpose of the proposed transfer.

**§ 1321.47 Statewide non-Federal share requirements.**

The statewide non-Federal share for State or area plan administration shall not be less than 25 percent of the funds used under this part. All services statewide, including ombudsman services and services funded under Title III-B, C, D, E and F, shall be funded on a statewide basis with a non-Federal share of not less than 15 percent. Matching requirements for individual area agencies are determined by the State agency.

**§ 1321.49 State agency maintenance of effort.**

In order to avoid a penalty, each fiscal year the State agency, to meet the required non-federal share applicable to its allotments under this part, shall spend under the State plan for both services and administration at least the average amount of State funds it spent under the plan for the three previous fiscal years. If the State agency spends less than this amount, the Commissioner reduces the State's allotments for supportive and nutrition services under this part by a percentage equal to the percentage by which the State reduced its expenditures.

**§ 1321.51 Confidentiality and disclosure of information.**

(a) A State agency shall have procedures to protect the confidentiality of information about older persons collected in the conduct of its responsibilities. The procedures shall ensure that no information about an order person, or obtained from an order person by a service provider or the State or area

agencies, is disclosed by the provider or agency in a form that identifies the person without the informed consent of the person or of his or her legal representative, unless the disclosure is required by court order, or for program monitoring by authorized Federal, State, or local monitoring agencies.

(b) A State agency is not required to disclose those types of information or documents that are exempt from disclosure by a Federal agency under the Federal Freedom of Information Act, 5 U.S.C. 552.

(c) A State or area agency on aging may not require a provider of legal assistance under this part to reveal any information that is protected by attorney client privilege.

#### § 1321.52 Evaluation of unmet need.

Each State shall submit objectively collected and statistically valid data with evaluative conclusions concerning the unmet need for supportive services, nutrition services, and multipurpose senior centers gathered pursuant to section 307(a)(3)(A) of the Act to the Commissioner. The evaluations for each State shall consider all services in these categories regardless of the source of funding for the services. This information shall be submitted not later than June 30, 1989 and shall conform to guidance issued by the Commissioner.

### Subpart C—Area Agency Responsibilities

#### § 1321.53 Mission of the area agency.

(a) The Older Americans Act intends that the area agency on aging shall be the leader relative to all aging issues on behalf of all older persons in the planning and service area. This means that the area agency shall proactively carry out, under the leadership and direction of the State agency, a wide range of functions related to advocacy, planning, coordination, inter-agency linkages, information sharing, brokering, monitoring and evaluation, designed to lead to the development or enhancement of comprehensive and coordinated community based systems in, or serving, each community in the planning and service area. These systems shall be designed to assist older

persons in leading independent, meaningful and dignified lives in their own homes and communities as long as possible.

(b) A comprehensive and coordinated community based system described in paragraph (a) of this section shall:

(1) Have a visible focal point of contact where anyone can go or call for help, information or referral on any aging issue;

(2) Provide a range of options;

(3) Assure that these options are readily accessible to all older persons: The independent, semi-dependent and totally dependent, no matter what their income;

(4) Include a commitment of public, private, voluntary and personal resources committed to supporting the system;

(5) Involve collaborative decision-making among public, private, voluntary, religious and fraternal organizations and older people in the community;

(6) Offer special help or targeted resources for the most vulnerable older persons, those in danger of losing their independence;

(7) Provide effective referral from agency to agency to assure that information or assistance is received, no matter how or where contact is made in the community;

(8) Evidence sufficient flexibility to respond with appropriate individualized assistance, especially for the vulnerable older person;

(9) Have a unique character which is tailored to the specific nature of the community;

(10) Be directed by leaders in the community who have the respect, capacity and authority necessary to convene all interested persons, assess needs, design solutions, track overall success, stimulate change and plan community responses for the present and for the future.

(c) The resources made available to the area agency on aging under the Older Americans Act are to be used to finance those activities necessary to achieve elements of a community based system set forth in paragraph (b) of this section. For the purpose of assuring access to information and services for older persons, the area agency

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shall work with elected community officials in the planning and service area to designate one or more focal points on aging in each community, as appropriate. The area agency shall list designated focal points in the area plan. It shall be the responsibility of the area agency, with the approval of the State agency, to define "community" for the purposes of this section. Since the Older Americans Act defines focal point as a "facility" established to encourage the maximum collocation and coordination of services for older individuals, special consideration shall be given to developing and/or designating multi-purpose senior centers as community focal points on aging. The area agency on aging shall assure that services financed under the Older Americans Act in, or on behalf of, the community will be either based at, linked to or coordinated with the focal points designated. The area agency on aging shall assure access from the designated focal points to services financed under the Older Americans Act. The area agency on aging shall work with, or work to assure that community leadership works with, other applicable agencies and institutions in the community to achieve maximum collocation at, coordination with or access to other services and opportunities for the elderly from the designated community focal points. The area agency may not engage in any activity which is inconsistent with its statutory mission prescribed in the Act or policies prescribed by the State under §1321.11.

**§ 1321.55 Organization and staffing of the area agency.**

(a) An area agency may be either:

(1) An agency whose single purpose is to administer programs for older persons; or

(2) A separate organizational unit within a multi-purpose agency which functions only for purposes of serving as the area agency on aging. Where the State agency on aging designates, as an area agency on aging, a separate organizational unit of a multipurpose agency which has been serving as an area agency, the State agency action shall not be subject to section 305(b)(5)(B) of the Act.

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(b) The area agency, once designated, is responsible for providing for adequate and qualified staff to perform all of the functions prescribed in this part.

(c) The designated area agency continues to function in that capacity until either:

(1) The area agency informs the State agency that it no longer wishes to carry out the responsibilities of an area agency; or

(2) The State agency withdraws the designation of the area agency as provided in §1321.35.

**§ 1321.57 Area agency advisory council.**

(a) *Functions of council.* The area agency shall establish an advisory council. The council shall carry out advisory functions which further the area agency's mission of developing and coordinating community-based systems of services for all older persons in the planning and service area. The council shall advise the agency relative to:

(1) Developing and administering the area plan;

(2) Conducting public hearings;

(3) Representing the interest of older persons; and

(4) Reviewing and commenting on all community policies, programs and actions which affect older persons with the intent of assuring maximum coordination and responsiveness to older persons.

(b) *Composition of council.* The council shall include individuals and representatives of community organizations who will help to enhance the leadership role of the area agency in developing community-based systems of services. The advisory council shall be made up of:

(1) More than 50 percent older persons, including minority individuals who are participants or who are eligible to participate in programs under this part;

(2) Representatives of older persons;

(3) Representatives of health care provider organizations, including providers of veterans' health care (if appropriate);

(4) Representatives of supportive services providers organizations;

(5) Persons with leadership experience in the private and voluntary sectors;

- (6) Local elected officials; and
- (7) The general public.

(c) *Review by advisory council.* The area agency shall submit the area plan and amendments for review and comment to the advisory council before it is transmitted to the State agency for approval.

**§ 1321.59 Submission of an area plan and plan amendments to the State for approval.**

The area agency shall submit the area plan and amendments to the State agency for approval following procedures specified by the State agency in the State policies prescribed by § 1321.11.

**§ 1321.61 Advocacy responsibilities of the area agency.**

(a) The area agency shall serve as the public advocate for the development or enhancement of comprehensive and coordinated community-based systems of services in each community throughout the planning and service area.

(b) In carrying out this responsibility, the area agency shall:

- (1) Monitor, evaluate, and, where appropriate, comment on all policies, programs, hearings, levies, and community actions which affect older persons;
- (2) Solicit comments from the public on the needs of older persons;
- (3) Represent the interests of older persons to local level and executive branch officials, public and private agencies or organizations;
- (4) Consult with and support the State's long-term care ombudsman program; and
- (5) Undertake on a regular basis activities designed to facilitate the coordination of plans and activities with all other public and private organizations, including units of general purpose local government, with responsibilities affecting older persons in the planning and service area to promote new or expanded benefits and opportunities for older persons; and

(c) Each area agency on aging shall undertake a leadership role in assisting communities throughout the planning and service area to target resources from all appropriate sources to meet the needs of older persons with greatest economic or social need, with par-

ticular attention to low income minority individuals. Such activities may include location of services and specialization in the types of services must needed by these groups to meet this requirement. However, the area agency may not permit a grantee or contractor under this part to employ a means test for services funded under this part.

(d) No requirement in this section shall be deemed to supersede a prohibition contained in the Federal appropriation on the use of Federal funds to lobby the Congress; or the lobbying provision applicable to private non-profit agencies and organizations contained in OMB Circular A-122.

**Subpart D—Service Requirements**

**§ 1321.63 Purpose of services allotments under Title III.**

(a) Title III of the Older Americans Act authorizes the distribution of Federal funds to the State agency on aging by formula for the following categories of services:

- (1) Supportive services;
- (2) Congregate meals services;
- (3) Home delivered meals services;
- (4) In-home services;
- (5) Ombudsman services;
- (6) Special needs services;
- (7) Elder abuse services;
- (8) Preventive health services; and
- (9) Outreach services.

Funds authorized under these categories are for the purpose of assisting the State and its area agencies to develop or enhance for older persons comprehensive and coordinated community based systems as described in § 1321.53(b) throughout the State.

(b) Except for ombudsman services, State agencies on aging will award the funds made available under paragraph (a) of this section to designated area agencies on aging according to the formula determined by the State agency. Except where a waiver is granted by the State agency, area agencies shall award these funds by grant or contract to community services provider agencies and organizations. All funds awarded to area agencies under this part are for the purpose of assisting area agencies to develop or enhance

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comprehensive and coordinated community based systems for older persons in, or serving, communities throughout the planning and service area.

### § 1321.65 Responsibilities of service providers under area plans.

As a condition for receipt of funds under this part, each area agency on aging shall assure that providers of services shall:

(a) Provide the area agency, in a timely manner, with statistical and other information which the area agency requires in order to meet its planning, coordination, evaluation and reporting requirements established by the State under § 1321.13;

(b) Specify how the provider intends to satisfy the service needs of low-income minority individuals in the area served, including attempting to provide services to low-income minority individuals at least in proportion to the number of low-income minority older persons in the population serviced by the provider;

(c) Provide recipients with an opportunity to contribute to the cost of the service as provided in § 1321.67;

(d) With the consent of the older person, or his or her representative, bring to the attention of appropriate officials for follow-up, conditions or circumstances which place the older person, or the household of the older person, in imminent danger;

(e) Where feasible and appropriate, make arrangements for the availability of services to older persons in weather related emergencies;

(f) Assist participants in taking advantage of benefits under other programs; and

(g) Assure that all services funded under this part are coordinated with other appropriate services in the community, and that these services do not constitute an unnecessary duplication of services provided by other sources.

### § 1321.67 Service contributions.

(a) For services rendered with funding under the Older Americans Act, the area agency on aging shall assure that each service provider shall:

(1) Provide each older person with an opportunity to voluntarily contribute to the cost of the service;

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(2) Protect the privacy of each older person with respect to his or her contributions; and

(3) Establish appropriate procedures to safeguard and account for all contributions.

(b) Each service provider shall use supportive services and nutrition services contributions to expand supportive services and nutrition services respectively. To that end, the State agency shall:

(1) Permit service providers to follow either the addition alternative or the cost sharing alternatives as stated in 45 CFR 75.307(e)(2) and (3); or

(2) A combination of the two alternatives.

(c) Each service provider under the Older Americans Act may develop a suggested contribution schedule for services provided under this part. In developing a contribution schedule, the provider shall consider the income ranges of older persons in the community and the provider's other sources of income. However, means tests may not be used for any service supported with funds under this part. State agencies, in developing State eligibility criteria for in-home services under section 343 of the Act, may not include a means test as an eligibility criterion.

(d) A service provider that receives funds under this part may not deny any older person a service because the older person will not or cannot contribute to the cost of the service.

[53 FR 33766, Aug. 31, 1988, as amended at 81 FR 3022, Jan. 20, 2016]

### § 1321.69 Service priority for frail, homebound or isolated elderly.

(a) Persons age 60 or over who are frail, homebound by reason of illness or incapacitating disability, or otherwise isolated, shall be given priority in the delivery of services under this part.

(b) The spouse of the older person, regardless of age or condition, may receive a home-delivered meal if, according to criteria determined by the area agency, receipt of the meal is in the best interest of the homebound older person.

**§ 1321.71 Legal assistance.**

(a) The provisions and restrictions in this section apply only to legal assistance providers and only if they are providing legal assistance under section 307(a)(15) of the Act.

(b) Nothing in this section is intended to prohibit any attorney from providing any form of legal assistance to an eligible client, or to interfere with the fulfillment of any attorney's professional responsibilities to a client.

(c) The area agency shall award funds to the legal assistance provider(s) that most fully meet the standards in this subsection. The legal assistance provider(s) shall:

(1) Have staff with expertise in specific areas of law affecting older persons in economic or social need, for example, public benefits, institutionalization and alternatives to institutionalization;

(2) Demonstrate the capacity to provide effective administrative and judicial representation in the areas of law affecting older persons with economic or social need;

(3) Demonstrate the capacity to provide support to other advocacy efforts, for example, the long-term care ombudsman program;

(4) Demonstrate the capacity to provide legal services to institutionalized, isolated, and homebound older individuals effectively; and

(5) Demonstrate the capacity to provide legal assistance in the principal language spoken by clients in areas where a significant number of clients do not speak English as their principal language.

(d) A legal assistance provider may not require an older person to disclose information about income or resources as a condition for providing legal assistance under this part.

(e) A legal assistance provider may ask about the person's financial circumstances as a part of the process of providing legal advice, counseling and representation, or for the purpose of identifying additional resources and benefits for which an older person may be eligible.

(f) A legal assistance provider and its attorneys may engage in other legal activities to the extent that there is no conflict of interest nor other inter-

ference with their professional responsibilities under this Act.

(g) No provider shall use funds received under the Act to provide legal assistance in a fee generating case unless other adequate representation is unavailable or there is an emergency requiring immediate legal action. All providers shall establish procedures for the referral of fee generating cases.

(1) "Fee generating case" means any case or matter which, if undertaken on behalf of an eligible client by an attorney in private practice, reasonably may be expected to result in a fee for legal services from an award to a client, from public funds, or from the opposing party.

(2) Other adequate representation is deemed to be unavailable when:

(i) Recovery of damages is not the principal object of the client; or

(ii) A court appoints a provider or an employee of a provider pursuant to a statute or a court rule or practice of equal applicability to all attorneys in the jurisdiction; or

(iii) An eligible client is seeking benefits under title II of the Social Security Act, 42 U.S.C. 401, *et seq.*, Federal Old Age, Survivors, and Disability Insurance Benefits; or title XVI of the Social Security Act, 42 U.S.C. 1381, *et seq.*, Supplemental Security Income for Aged, Blind, and Disabled.

(3) A provider may seek and accept a fee awarded or approved by a court or administrative body, or included in a settlement.

(4) When a case or matter accepted in accordance with this section results in a recovery of damages, other than statutory benefits, a provider may accept reimbursement for out-of-pocket costs and expenses incurred in connection with the case or matter.

(h) A provider, employee of the provider, or staff attorney shall not engage in the following prohibited political activities:

(1) No provider or its employees shall contribute or make available Older Americans Act funds, personnel or equipment to any political party or association or to the campaign of any candidate for public or party office; or for use in advocating or opposing any ballot measure, initiative, or referendum;

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(2) No provider or its employees shall intentionally identify the title III program or provider with any partisan or nonpartisan political activity, or with the campaign of any candidate for public or party office;

(3) While engaged in legal assistance activities supported under the Act, no attorney shall engage in any political activity;

(i) No funds made available under the Act shall be used for lobbying activities, including but not limited to any activities intended to influence any decision or activity by any nonjudicial Federal, State or local individual or body. Nothing in this section is intended to prohibit an employee from:

(1) Communicating with a governmental agency for the purpose of obtaining information, clarification, or interpretation of the agency's rules, regulations, practices, or policies;

(2) Informing a client about a new or proposed statute, executive order, or administrative regulation;

(3) Responding to an individual client's request for advice only with respect to the client's own communications to officials unless otherwise prohibited by the Older Americans Act, title III regulations or other applicable law. This provision does not authorize publication of lobbying materials or training of clients on lobbying techniques or the composition of a communication for the client's use; or

(4) Making direct contact with the area agency for any purpose;

(5) Providing a client with administrative representation in adjudicatory or rulemaking proceedings or negotiations, directly affecting that client's legal rights in a particular case, claim or application;

(6) Communicating with an elected official for the sole purpose of bringing a client's legal problem to the attention of that official; or

(7) Responding to the request of a public official or body for testimony, legal advice or other statements on legislation or other issues related to aging; provided that no such action will be taken without first obtaining the written approval of the responsible area agency.

(j) While carrying out legal assistance activities and while using re-

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sources provided under the Act, no provider or its employees shall:

(1) Participate in any public demonstration, picketing, boycott, or strike, except as permitted by law in connection with the employee's own employment situation;

(2) Encourage, direct, or coerce others to engage in such activities; or

(3) At any time engage in or encourage others to engage in:

(i) Any illegal activity; or

(ii) Any intentional identification of programs funded under the Act or recipient with any political activity.

(k) None of the funds made available under the Act may be used to pay dues exceeding \$100 per recipient per annum to any organization (other than a bar association), a purpose or function of which is to engage in activities prohibited under these regulations unless such dues are not used to engage in activities for which Older Americans Act funds cannot be used directly.

**§ 1321.73 Grant related income under Title III-C.**

States and sub-grantees must require that their subgrantees' grant related income be used in either the matching or cost sharing alternative in 75.307(e)(3) or the additive alternative in 75.307(e)(2) or a combination of the two. The deductive alternative described in 75.307(e)(1) is not permitted.

[53 FR 33766, Aug. 31, 1988, as amended at 81 FR 3022, Jan. 20, 2016]

**§ 1321.75 Licenses and safety.**

The State shall ensure:

(a) That, in making awards for multipurpose senior center activities, the area agency will ensure that the facility complies with all applicable State and local health, fire, safety, building, zoning and sanitation laws, ordinances or codes; and

(b) The technical adequacy of any proposed alteration or renovation of a multipurpose senior center assisted under this part, by requiring that any alteration or renovation of a multipurpose senior center that affects the load bearing members of the facility is structurally sound and complies with all applicable local or State ordinances, laws, or building codes.

**Subpart E—Hearing Procedures for State Agencies****§ 1321.77 Scope.**

(a) Hearing procedures for State plan disapproval, as provided for in section 307(c) and section 307(d) of the Act are subject to the provisions of 45 CFR part 213 with the following exceptions:

(1) Section 213.1(a); § 213.32(d); and § 213.33 do not apply.

(2) Reference to SRS Hearing Clerk shall be read to mean HHS Hearing Clerk.

(3) References to Administrator shall be read to mean Commissioner on Aging.

(b) Instead of the scope described in § 213.1(a), this subpart governs the procedures and opportunity for a hearing on:

(1) Disapproval of a State plan or amendment:

(2) Determination that a State agency does not meet the requirements of this part:

(3) Determination that there is a failure in the provisions or the administration of an approved plan to comply substantially with Federal requirements, including failure to comply with any assurance required under the Act or under this part.

**§ 1321.79 When a decision is effective.**

(a) The Commissioner's decision specifies the effective date for AoA's reduction and withholding of the State's grant. This effective date may not be earlier than the date of the Commissioner's decision or later than the first day of the next calendar quarter.

(b) The decision remains in effect unless reversed or stayed on judicial appeal, or until the agency or the plan is changed to meet all Federal requirements, except that the Commissioner may modify or set aside his or her decision before the record of the proceedings under this subpart is filed in court.

**§ 1321.81 How the State may appeal.**

A State may appeal the final decision of the Commissioner disapproving the State plan or plan amendment, finding of noncompliance, or finding that a State agency does not meet the re-

quirements of this part to the U.S. Court of Appeals for the circuit in which the State is located. The State shall file the appeal within 30 days of the Commissioner's final decision.

**§ 1321.83 How the Commissioner may reallocate the State's withheld payments.**

The Commissioner disburses funds withheld from the State directly to any public or nonprofit private organization or agency, or political subdivision of the State that has the authority and capacity to carry out the functions of the State agency and submits a State plan which meets the requirements of this part and which contains an agreement to meet the non-federal share requirements.

**PART 1322—GRANTS TO INDIAN TRIBES FOR SUPPORT AND NUTRITION SERVICES**

Sec.

1322.1 Basis and purpose of this part.

1322.3 Definitions.

1322.5 Applicability of other regulations.

1322.7 Confidentiality and disclosure of information.

1322.9 Contributions.

1322.11 Prohibition against supplantation.

1322.13 Supportive services.

1322.15 Nutrition services.

1322.17 Access to information.

1322.19 Application requirements.

1322.21 Application approval.

1322.23 Hearing procedures.

AUTHORITY: 42 U.S.C. 3001; Title VI, Part A of the Older Americans Act.

SOURCE: 53 FR 33774, Aug. 31, 1988, unless otherwise noted. Redesignated and amended at 81 FR 35645, June 3, 2016.

**§ 1322.1 Basis and purpose of this part.**

This program was established to meet the unique needs and circumstances of American Indian elders on Indian reservations. This part implements title VI (part A) of the Older Americans Act, as amended, by establishing the requirements that an Indian tribal organization shall meet in order to receive a grant to promote the delivery of services for older Indians that are comparable to services provided under Title III. This part also



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prescribes application and hearing requirements and procedures for these grants.

#### § 1322.3 Definitions.

*Acquiring*, as used in section 307(a)(14) of the Act, means obtaining ownership of an existing facility in fee simple or by lease for 10 years or more for use as a multipurpose senior center.

*Altering or renovating*, as used in section 307(a)(14) of the Act with respect to multipurpose senior centers, means making modifications to or in connection with an existing facility which are necessary for its effective use as a center. These may include renovation, repair, or expansion which is not in excess of double the square footage of the original facility and all physical improvements.

*Budgeting period*, as used in §1322.19, means the intervals of time into which a period of assistance (project period) is divided for budgetary and funding purposes.

*Constructing*, as used in section 307(a)(14) of the Act with respect to multipurpose senior centers, means building a new facility, including the costs of land acquisition and architectural and engineering fees, or making modifications to or in connection with an existing facility which are in excess of double the square footage of the original facility and all physical improvements.

*Department*, means the Department of Health and Human Services.

*Indian reservation*, means the reservation of any Federally recognized Indian tribe, including any band, nation, pueblo, or rancharia, any former reservation in Oklahoma, any community on non-trust land under the jurisdiction of an Indian tribe, including a band, nation, pueblo, or rancharia, with allotted lands, or lands subject to a restriction against alienation imposed by the United States, and Alaskan Native regions established, pursuant to the Alaska Native Claims Settlement Act (84 Stat. 688).

*Indian tribe*, means any Indian tribe, band, nation, or organized group or community, including any Alaska Native Village, regional or village corporation as defined in or established pursuant to the Alaska Native Claims

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Settlement Act (85 Stat. 688) which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians (25 U.S.C. 450b).

*Means test*, as used in the provision of services, means the use of an older Indian's income or resources to deny or limit that person's receipt of services under this part.

*Older Indians*, means those individuals who have attained the minimum age determined by the tribe for services.

*Project period*, as used in §1322.19, means the total time for which a project is approved for support, including any extensions.

*Service area*, as used in §1322.9(b) and elsewhere in this part, means that geographic area approved by the Commissioner in which the tribal organization provides supportive and nutritional services to older Indians residing there. A service area may include all or part of the reservation or any portion of a county or counties which has a common boundary with the reservation. A service area may also include a non-contiguous area if the designation of such an area will further the purpose of the Act and will provide for more effective administration of the program by the tribal organization.

*Service provider*, means any entity that is awarded a subgrant or contract from a tribal organization to provide services under this part.

*Tribal organization*, as used in §1322.7 and elsewhere in this part, means the recognized governing body of any Indian tribe, or any legally established organization of Indians which is controlled, sanctioned or chartered by such governing body or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities. Provided that in any case where a contract is let or grant made to an organization to perform services benefiting more than one Indian tribe, the approval of each Indian tribe shall be a prerequisite to the letting or making of the contract or grant (25 U.S.C. 450b).

**§ 1322.5 Applicability of other regulations.**

The following regulations in title 45 of the Code of Federal Regulations apply to all activities under this part:

- (a) Part 16—Procedures of the Departmental Grant Appeals Board;
- (b) [Reserved]
- (c) 45 CFR part 75—Uniform Administrative Requirements, Cost Principles, and Audit Requirements for HHS Awards.
- (d) 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;
- (e) Part 81—Practice and Procedure for Hearings under part 80 of this Title;
- (f) Part 84—Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving Benefits from Federal Financial Participation; and
- (g) Part 91—Nondiscrimination on the Basis of Age in Programs or Activities Receiving Federal Financial Assistance from HHS.

[53 FR 33774, Aug. 31, 1988, as amended at 81 FR 3022, Jan. 20, 2016]

**§ 1322.7 Confidentiality and disclosure of information.**

A tribal organization shall have confidentiality and disclosure procedures as follows:

- (a) A tribal organization shall have procedures to ensure that no information about an older Indian or obtained from an older Indian by any provider of services is disclosed by the provider of such services in a form that identifies the person without the informed consent of the person or of his or her legal representative, unless the disclosure is required by court order, or for program monitoring by authorized Federal or tribal monitoring agencies.
- (b) A tribal organization is not required to disclose those types of information or documents that are exempt from disclosure by a Federal agency under the Federal Freedom of Information Act, 5 U.S.C. 552.

**§ 1322.9 Contributions.**

- (a) Each tribal organization shall:
  - (1) Provide each older Indian with a free and voluntary opportunity to contribute to the cost of the service;

- (2) Protect the privacy of each older Indian with respect to his or her contribution;

- (3) Establish appropriate procedures to safeguard and account for all contributions;

- (4) Use all services contributions to expand comprehensive and coordinated services systems supported under this part, while using nutrition services contributions only to expand services as provided under section 307(a)(13)(c)(ii) of the Act.

- (b) Each tribal organization may develop a suggested contribution schedule for services provided under this part. In developing a contribution schedule, the tribal organization shall consider the income ranges of older Indians in the service area and the tribal organization's other sources of income. However, means tests may not be used.

- (c) A tribal organization that receives funds under this part may not deny any older Indian a service because the older Indian will not or cannot contribute to the cost of the service.

**§ 1322.11 Prohibition against supplantation.**

A tribal organization shall ensure that the activities provided under a grant under this part will be in addition to, and not in substitution for, comparable activities provided without Federal assistance.

**§ 1322.13 Supportive services.**

- (a) A tribal organization may provide any of the supportive services mentioned under title III of the Older Americans Act, and any other supportive services that are necessary for the general welfare of older Indians.

- (b) If an applicant elects to provide multipurpose senior center activities or uses any of the funds under this part for acquiring, altering or renovating a multipurpose senior center facility, it shall comply with the following requirements:

- (1) The tribal organization shall comply with all applicable local health, fire, safety, building, zoning and sanitation laws, ordinances or codes.

- (2) The tribal organization shall assure the technical adequacy of any proposed alteration or renovation of a multipurpose senior centers assisted

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under this part. The tribal organization assures technical adequacy by requiring that any alteration or renovation of a multipurpose senior center that affects the load bearing members of the facility is structurally sound and complies with all applicable local or State ordinances, laws, or building codes.

(c) If an applicant elects to provide legal services, it shall substantially comply with the requirements in §1321.71 and legal services providers shall comply fully with the requirements in §§1321.71(c) through 1321.71(p).

**§ 1322.15 Nutrition services.**

(a) In addition to providing nutrition services to older Indians, a tribal organization may:

(1) Provide nutrition services to the spouses of older Indians;

(2) Provide nutrition services to non-elderly handicapped or disabled Indians who reside in housing facilities occupied primarily by the elderly, at which congregate nutrition services are provided;

(3) Offer a meal, on the same basis as meals are provided to older Indians, to individuals providing volunteer services during meal hours; and

(4) Provide a meal to individuals with disabilities who reside in a non-institutional household with and accompany a person eligible for congregate meals under that part.

(b) Each tribal organization may receive cash payments in lieu of donated foods for all or any portion of its funding available under section 311(a)(4) of the Act. To receive cash or commodities, the tribal organization shall have an agreement with the U.S. Department of Agriculture's Food and Nutrition Service (FNS) to be a distributing agency.

(c) Where applicable, the tribal organization shall work with agencies responsible for administering other programs to facilitate participation of older Indians.

**§ 1322.17 Access to information.**

A tribal organization shall:

(a) Establish or have a list of all services that are available to older Indians in the service area,

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(b) Maintain a list of services needed or requested by the older Indians; and

(c) Provide assistance to older Indians to help them take advantage of available services.

**§ 1322.19 Application requirements.**

A tribal organization shall have an approved application. The application shall be submitted as prescribed in section 604 of the Act and in accordance with the Commissioner's instructions for the specified project and budget periods. The application shall provide for:

(a) Program objectives, as set forth in section 604(a)(5) of the Act, and any objectives established by the Commissioner.

(b) A description of the geographic boundaries of the service area proposed by the tribal organization;

(c) Documentation of the ability of the tribal organization to deliver supportive and nutrition services to older Indians, or documentation that the tribal organization has effectively administered supportive and nutrition services within the last 3 years;

(d) Assurances as prescribed by the Commissioner that:

(1) A tribal organization represents at least 50 individuals who have attained 60 years of age or older;

(2) A tribal organization shall comply with all applicable State and local license and safety requirements for the provision of those services;

(3) If a substantial number of the older Indians residing in the service area are of limited English-speaking ability, the tribal organization shall utilize the services of workers who are fluent in the language spoken by a predominant number of older Indians;

(4) Procedures to ensure that all services under this part are provided without use of any means tests;

(5) A tribal organization shall comply with all requirements set forth in §1322.7 through 1322.17; and

(6) The services provided under this part will be coordinated, where applicable, with services provided under title III of the Act.

(e) A tribal resolution(s) authorizing the tribal organization to apply for a grant under this part; and

(f) Signature by the principal official of the tribe.

**§ 1322.21 Application approval.**

(a) Approval of any application under section 604(e) of the Act, shall not commit the Commissioner in any way to make additional, supplemental, continuation, or other awards with respect to any approved application or portion thereof.

(b) The Commissioner may give first priority in awarding grants to grantees which have effectively administered such grants in the prior year.

**§ 1322.23 Hearing procedures.**

In meeting the requirements of section 604(d)(3) of the Act, if the Commissioner disapproves an application from an eligible tribal organization, the tribal organization may file a written request for a hearing with the Commissioner.

(a) The request shall be postmarked or delivered in person within 30 days of the date of the disapproval notice. If it requests a hearing, the tribal organization shall submit to the Commissioner, as part of the request, a full written response to each objection specified in the notice of disapproval, including the pertinent facts and reasons in support of its response, and any and all documentation to support its position. Service of the request shall also be made on the individual(s) designated by the Commissioner to represent him or her.

(b) The Administration on Aging shall have the opportunity to respond with 30 days to the merits of the tribal organization's request.

(c) The Commissioner notifies the tribal organization in writing of the date, time and place for the hearing.

(d) The hearing procedures include the right of the tribal organization to:

(1) A hearing before the Commissioner or an official designated by the Commissioner;

(2) Be heard in person or to be represented by counsel, at no expense to the Administration on Aging;

(3) Present written evidence prior to and at the hearing, and present oral evidence at the hearing if the Commissioner or designated official decides that oral evidence is necessary for the proper resolution of the issues involved, and

(4) Have the staff directly responsible for reviewing the application either present at the hearing, or have a deposition from the staff, whichever the Commissioner or designated official decides.

(e) The Commissioner or designated official conducts a fair and impartial hearing, takes all necessary action to avoid delay and to maintain order and has all powers necessary to these ends.

(f) Formal rules of evidence do not apply to the hearings.

(g) The official hearing transcript together with all papers, documents, exhibits, and requests filed in the proceedings, including rulings, constitutes the record for decision.

(h) After consideration of the record, the Commissioner or designated official issues a written decision, based on the record, which sets forth the reasons for the decision and the evidence on which it was based. The decision is issued within 60 days of the date of the hearing, constitutes the final administrative action on the matter and is promptly mailed to the tribal organization.

(i) Either the tribal organization or the staff of the Administration on Aging may request for good cause an extension of any of the time limits specified in this section.

## **PART 1323—GRANTS FOR SUPPORTIVE AND NUTRITIONAL SERVICES TO OLDER HAWAIIAN NATIVES**

Sec.

1323.1 Basis and purpose of this part.

1323.3 Definitions.

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1323.17 Access to information.

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1323.21 Application approval.

1323.23 Hearing procedures.

AUTHORITY: 42 U.S.C. 3001; Title VI Part B of the Older Americans Act.

SOURCE: 53 FR 33777, Aug. 31, 1988, unless otherwise noted. Redesignated and amended at 81 FR 35645, 35646, June 3, 2016

## § 1323.1

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### § 1323.1 Basis and purpose of this part.

This program was established to meet the unique needs and circumstances of Older Hawaiian Natives. This part implements title VI (part B) of the Older Americans Act, as amended, by establishing the requirements that a public or nonprofit private organization shall meet in order to receive a grant to promote the delivery of services for older Hawaiian Natives that are comparable to services provided under title III. This part also prescribes application and hearing requirements and procedures for these agrants.

### § 1323.3 Definitions.

*Acquiring*, as used in section 307(a)(14) of the Act, means obtaining ownership of an existing facility in fee simple or by lease of 10 years or more for use as a multipurpose senior center.

*Act*, means the Older Americans Act of 1965, as amended.

*Altering or renovating*, as used in section 307(a)(14) of the Act with respect to multipurpose senior centers, means making modifications to or in connection with an existing facility which are necessary for its effective use as a center. These may include renovation, repair, or expansion which is not in excess of double the square footage of the original facility and all physical improvements.

*Budgeting period*, as used in § 1323.19, means the intervals of time into which a period of assistance (project period) is divided for budgetary and funding purposes.

*Constructing*, as used in section 307(a)(14) of the Act with respect to multipurpose senior centers, means building a new facility, including the costs of land acquisition and architectural and engineering fees, or making modifications to or in connection with an existing facility which are in excess of double the square footage of the original facility and all physical improvements.

*Department*, means the Department of Health and Human Services.

*Eligible organization*, means a public or nonprofit private organization having the capacity to provide services under this part for older Hawaiian Natives.

*Grantee*, as used in this part, means an eligible organization that has received funds to provide services to older Hawaiians.

*Hawaiian Native*, as used in this part, means any individual any of whose ancestors were native of the area which consists of the Hawaiian Islands prior to 1778.

*Means test*, as used in the provision of services, means the use of an older Hawaiian Native's income or resources to deny or limit that person receipt of services under this part.

*Older Hawaiian*, means any individual, age 60 or over, who is an Hawaiian Native.

*Project period*, as used in § 1323.19, means the total time for which a project is approved for support, including any extensions.

*Service area*, as used in § 1323.9(b) and elsewhere in this part, means that geographic area approved by the Commissioner in which the grantee provides supportive and nutritional services to older Hawaiian Natives residing there.

### § 1323.5 Applicability of other regulations.

The following regulations in title 45 of the Code of Federal Regulations apply to all activities under this part:

(a) Part 16-Procedures of the Departmental Grant Appeals Board;

(b) [Reserved]

(c) 45 CFR part 75—Uniform Administrative Requirements, Cost Principles, and Audit Requirements for HHS Awards.

(d) 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;

(e) Part 81-Practice and procedures for hearings under part 80;

(f) Part 84-Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving Benefits from Federal Financing Participation; and

(g) Part 91-Nondiscrimination on the Basis of Age in Programs or Activities Receiving Federal Financial Assistance from HHS.

[53 FR 33777, Aug. 31, 1988, as amended at 81 FR 3022, Jan. 20, 2016]

**§ 1323.7 Confidentiality and disclosure of information.**

A grantee shall have confidentiality and disclosure procedures as follows:

(a) The grantee shall have procedures to ensure that no information about an older Hawaiian Native or obtained from an older Hawaiian Native is disclosed in a form that identifies the person without the informed consent of the person or of his or her legal representative, unless the disclosure is required by court order, or for program monitoring by authorized Federal monitoring agencies.

(b) A grantee is not required to disclose those types of information or documents that are exempt from disclosure by a Federal agency under the Federal Freedom of Information Act, 5 U.S.C. 552.

**§ 1323.9 Contributions.**

(a) Each grantee shall:

(1) Provide each older Hawaiian Native with a free and voluntary opportunity to contribute to the cost of the service;

(2) Protect the privacy of each older Hawaiian Native with respect to his or her contribution;

(3) Establish appropriate procedures to safeguard and account for all contributions;

(4) Use all supportive services contributions to expand the services provided under this part; and

(5) Use all nutrition services contributions only to expand services as provided under section 307(a)(13)(c)(ii) of the Act.

(b) Each grantee may develop a suggested contribution schedule for services provided under this part. In developing a contribution schedule, the grantee shall consider the income ranges of older Hawaiian Natives in the service area and the grantee's other sources of income. However, means tests may not be used.

(c) A grantee may not deny any older Hawaiian a service because the older Hawaiian will not or cannot contribute to the cost of the service.

**§ 1323.11 Prohibition against supplantation.**

A grantee shall ensure that the activities provided under a grant under

this part will be in addition to, and not in substitution for, comparable activities provided without Federal assistance.

**§ 1323.13 Supportive services.**

(a) A grantee may provide any of the supportive services specified under title III of the Older Americans Act and any other supportive services, approved in the grantee's application, that are necessary for the general welfare of older Hawaiian Natives.

(b) If a grantee elects to provide multipurpose senior center activities or uses any of the funds under this part for acquiring, altering or renovating a multipurpose senior center facility, it shall comply with the following requirements:

(1) The grantee shall comply with all applicable local health, fire, safety, building, zoning and sanitation laws, ordinances or codes.

(2) The grantee shall assure the technical adequacy of any proposed alteration or renovation of a multipurpose senior center assisted under this part. The grantee shall assure technical adequacy by requiring that any alteration or renovation of a multipurpose senior center that affects the load bearing members of the facility is structurally sound and complies with all applicable local or State ordinances, laws, or building codes.

(c) If a grantee elects to provide legal services, it shall substantially comply with the requirements in § 1321.71 and legal services providers shall comply fully with the requirements in §§ 1321.71(c) through 1321.71(p).

**§ 1323.15 Nutrition services.**

(a) In addition to providing nutrition services to older Hawaiian Natives, a grantee may:

(1) Provide nutrition services to the spouses of older Hawaiian Natives;

(2) Provide nutrition services to non-elderly handicapped or disabled Hawaiian Natives who reside in housing facilities occupied primarily by the elderly, at which congregate nutrition services are provided;

(3) Offer a meal, on the same basis as meals are provided to older Hawaiian Natives, to individuals providing volunteer services during meal hours; and

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(4) Provide a meal to individuals with disabilities who reside in a non-institutional household with and accompany a person eligible for congregate meals under that part.

(b) Each grantee may receive cash payments in lieu of donated foods for all or any portion of its funding available under section 311(a)(4) of the Act. To receive cash or commodities, the grantee shall have an agreement with the U.S. Department of Agriculture's Food and Nutrition Service (FNS) to be a distributing agency.

(c) Where applicable, the grantee shall work with agencies responsible for administering other programs to facilitate participation of older Hawaiian Natives.

**§ 1323.17 Access to information.**

A grantee shall:

(a) Establish or have a list of all services that are available to older Hawaiian Natives in the service area;

(b) Maintain a list of services needed or requested by the older Hawaiians; and

(c) Provide assistance to older Hawaiian Natives to help them take advantage of available services.

**§ 1323.19 Application requirements.**

To receive funds under this part, an eligible organization shall submit an application as prescribed in section 623 of the Act and in accordance with the Commissioner's instructions for the specified project and budget periods. The application shall provide for:

(a) Program objectives, as set forth in section 623(a)(6) of the Act, and any objectives established by the Commissioner;

(b) A description of the geographic boundaries of the service area proposed by the eligible organization;

(c) Documentation of the organization's ability to serve older Hawaiian Natives;

(d) Assurances as prescribed by the Commissioner that:

(1) The eligible organization represents at least 50 older Hawaiian Natives who have attained 60 years of age or older;

(2) The eligible organization shall conduct all activities on behalf of older Hawaiian natives in close coordination

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with the State agency and Area Agency on Aging:

(3) The eligible organization shall comply with all applicable State and local license and safety requirements for the provision of those services;

(4) The eligible organization shall ensure that all services under this part are provided without use of any means tests;

(5) The eligible organization shall comply with all requirements set forth in §§ 1323.7 through 1323.17; and

(6) The services provided under this part will be coordinated, where applicable, with services provided under title III of the Act.

(e) Signature by the principal official of the eligible organization.

**§ 1323.21 Application approval.**

(a) Approval of any application under section 623(d) of the Act, shall not commit the Commissioner in any way to make additional, supplemental, continuation, or other awards with respect to any approved application or portion thereof.

(b) The Commissioner may give first priority in awarding grants to eligible applicant organizations that have prior experience in serving Hawaiian Natives, particularly older Hawaiian Natives.

**§ 1323.23 Hearing procedures.**

In accordance with section 623(c)(3) of the Act, if the Commissioner disapproves an application from an eligible organization, the organization may file a written request for a hearing with the Commissioner.

(a) The request shall be postmarked or delivered in person within 30 days of the date of the disapproval notice. If it requests a hearing, the organization shall submit to the Commissioner, as part of the request, a full written response to each objection specified in the notice of disapproval, including the pertinent facts and reasons in support of its response, and any and all documentation to support its position. Service of the request shall also be made on the individual(s) designated by the Commissioner to represent him or her.

(b) The Administration on Aging shall have the opportunity to respond

within 30 days to the merits of the organization's request.

(c) The Commissioner notifies the organization in writing of the date, time and place for the hearing.

(d) The hearing procedures include the right of the organization to:

(1) A hearing before the Commissioner or an official designated by the Commissioner;

(2) Be heard in person or to be represented by counsel, at no expense to the Administration on Aging;

(3) Present written evidence prior to and at the hearing, and present oral evidence at the hearing if the Commissioner or the Commissioner's designee decides that oral evidence is necessary for the proper resolution of the issues involved, and

(4) Have the staff directly responsible for reviewing the application either present at the hearing, or have a deposition from the staff, whichever the Commissioner or the Commissioner's designee decides.

(e) The Commissioner or the Commissioner's designee conducts a fair and impartial hearing, takes all necessary action to avoid delay and to maintain order and has all powers necessary to these ends.

(f) Formal rules of evidence do not apply to the hearings.

(g) The official hearing transcript together with all papers documents, exhibits, and requests filed in the proceedings, including rulings, constitutes the record for decision.

(h) After consideration of the record, the Commissioner or the Commissioner's designee issues a written decision, based on the record, which sets forth the reasons for the decision and the evidence on which it was based. The decision is issued within 60 days of the date of the hearing, constitutes the final administrative action on the matter and is promptly mailed to the organization.

(i) Either the organization or the staff of the Administration on Aging may request, for good cause, an extension of any of the time limits specified in this section.

## PART 1324—ALLOTMENTS FOR VULNERABLE ELDER RIGHTS PROTECTION ACTIVITIES

### Subpart A—State Long-Term Care Ombudsman Program

Sec.

1324.1 Definitions.

1324.11 Establishment of the Office of the State Long-Term Care Ombudsman.

1324.13 Functions and responsibilities of the State Long-Term Care Ombudsman.

1324.15 State agency responsibilities related to the Ombudsman program.

1324.17 Responsibilities of agencies hosting local Ombudsman entities.

1324.19 Duties of the representatives of the Office.

1324.21 Conflicts of interest.

### Subpart B [Reserved]

AUTHORITY: 42 U.S.C. 3001 et seq.

SOURCE: 80 FR 7758, Feb. 11, 2015, unless otherwise noted. Redesignated and amended at 81 FR 35645, 35646, June 3, 2016

### Subpart A—State Long-Term Care Ombudsman Program

#### § 1324.1 Definitions.

The following definitions apply to this part:

*Immediate family*, pertaining to conflicts of interest as used in section 712 of the Act, means a member of the household or a relative with whom there is a close personal or significant financial relationship.

*Office of the State Long-Term Care Ombudsman*, as used in sections 711 and 712 of the Act, means the organizational unit in a State or territory which is headed by a State Long-Term Care Ombudsman.

*Representatives of the Office of the State Long-Term Care Ombudsman*, as used in sections 711 and 712 of the Act, means the employees or volunteers designated by the Ombudsman to fulfill the duties set forth in § 1324.19(a), whether personnel supervision is provided by the Ombudsman or his or her designees or by an agency hosting a local Ombudsman entity designated by the Ombudsman pursuant to section 712(a)(5) of the Act.

*Resident representative* means any of the following:



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(1) An individual chosen by the resident to act on behalf of the resident in order to support the resident in decision-making; access medical, social or other personal information of the resident; manage financial matters; or receive notifications;

(2) A person authorized by State or Federal law (including but not limited to agents under power of attorney, representative payees, and other fiduciaries) to act on behalf of the resident in order to support the resident in decision-making; access medical, social or other personal information of the resident; manage financial matters; or receive notifications;

(3) Legal representative, as used in section 712 of the Act; or

(4) The court-appointed guardian or conservator of a resident.

(5) Nothing in this rule is intended to expand the scope of authority of any resident representative beyond that authority specifically authorized by the resident, State or Federal law, or a court of competent jurisdiction.

*State Long-Term Care Ombudsman, or Ombudsman*, as used in sections 711 and 712 of the Act, means the individual who heads the Office and is responsible to personally, or through representatives of the Office, fulfill the functions, responsibilities and duties set forth in §§ 1324.13 and 1324.19.

*State Long-Term Care Ombudsman program, Ombudsman program, or program*, as used in sections 711 and 712 of the Act, means the program through which the functions and duties of the Office are carried out, consisting of the Ombudsman, the Office headed by the Ombudsman, and the representatives of the Office.

*Willful interference* means actions or inactions taken by an individual in an attempt to intentionally prevent, interfere with, or attempt to impede the Ombudsman from performing any of the functions or responsibilities set forth in § 1324.13, or the Ombudsman or a representative of the Office from performing any of the duties set forth in § 1324.19.

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**§ 1324.11 Establishment of the Office of the State Long-Term Care Ombudsman.**

(a) The Office of the State Long-Term Care Ombudsman shall be an entity which shall be headed by the State Long-Term Care Ombudsman, who shall carry out all of the functions and responsibilities set forth in § 1324.13 and shall carry out, directly and/or through local Ombudsman entities, the duties set forth in § 1324.19.

(b) The State agency shall establish the Office and, thereby carry out the Long-Term Care Ombudsman program in any of the following ways:

(1) The Office is a distinct entity, separately identifiable, and located within or connected to the State agency; or

(2) The State agency enters into a contract or other arrangement with any public agency or nonprofit organization which shall establish a separately identifiable, distinct entity as the Office.

(c) The State agency shall require that the Ombudsman serve on a full-time basis. In providing leadership and management of the Office, the functions, responsibilities, and duties, as set forth in §§ 1324.13 and 1324.19 are to constitute the entirety of the Ombudsman's work. The State agency or other agency carrying out the Office shall not require or request the Ombudsman to be responsible for leading, managing or performing the work of non-ombudsman services or programs except on a time-limited, intermittent basis.

(1) This provision does not limit the authority of the Ombudsman program to provide ombudsman services to populations other than residents of long-term care facilities so long as the appropriations under the Act are utilized to serve residents of long-term care facilities, as authorized by the Act.

(2) [Reserved]

(d) The State agency, and other entity selecting the Ombudsman, if applicable, shall ensure that the Ombudsman meets minimum qualifications which shall include, but not be limited to, demonstrated expertise in:

(1) Long-term services and supports or other direct services for older persons or individuals with disabilities;

(2) Consumer-oriented public policy advocacy;

(3) Leadership and program management skills; and

(4) Negotiation and problem resolution skills.

(e) *Policies and procedures.* Where the Ombudsman has the legal authority to do so, he or she shall establish policies and procedures, in consultation with the State agency, to carry out the Ombudsman program in accordance with the Act. Where State law does not provide the Ombudsman with legal authority to establish policies and procedures, the Ombudsman shall recommend policies and procedures to the State agency or other agency in which the Office is organizationally located, and such agency shall establish Ombudsman program policies and procedures. Where local Ombudsman entities are designated within area agencies on aging or other entities, the Ombudsman and/or appropriate agency shall develop such policies and procedures in consultation with the agencies hosting local Ombudsman entities and with representatives of the Office. The policies and procedures must address the matters within this subsection.

(1) *Program administration.* Policies and procedures regarding program administration must include, but not be limited to:

(i) A requirement that the agency in which the Office is organizationally located must not have personnel policies or practices which prohibit the Ombudsman from performing the functions and responsibilities of the Ombudsman, as set forth in §1324.13, or from adhering to the requirements of section 712 of the Act. Nothing in this provision shall prohibit such agency from requiring that the Ombudsman, or other employees or volunteers of the Office, adhere to the personnel policies and procedures of the entity which are otherwise lawful.

(ii) A requirement that an agency hosting a local Ombudsman entity must not have personnel policies or practices which prohibit a representative of the Office from performing the duties of the Ombudsman program or from adhering to the requirements of section 712 of the Act. Nothing in this provision shall prohibit such agency

from requiring that representatives of the Office adhere to the personnel policies and procedures of the host agency which are otherwise lawful.

(iii) A requirement that the Ombudsman shall monitor the performance of local Ombudsman entities which the Ombudsman has designated to carry out the duties of the Office.

(iv) A description of the process by which the agencies hosting local Ombudsman entities will coordinate with the Ombudsman in the employment or appointment of representatives of the Office.

(v) Standards to assure prompt response to complaints by the Office and/or local Ombudsman entities which prioritize abuse, neglect, exploitation and time-sensitive complaints and which consider the severity of the risk to the resident, the imminence of the threat of harm to the resident, and the opportunity for mitigating harm to the resident through provision of Ombudsman program services.

(vi) Procedures that clarify appropriate fiscal responsibilities of the local Ombudsman entity, including but not limited to clarifications regarding access to programmatic fiscal information by appropriate representatives of the Office.

(2) *Procedures for access.* Policies and procedures regarding timely access to facilities, residents, and appropriate records (regardless of format and including, upon request, copies of such records) by the Ombudsman and representatives of the Office must include, but not be limited to:

(i) Access to enter all long-term care facilities at any time during a facility's regular business hours or regular visiting hours, and at any other time when access may be required by the circumstances to be investigated;

(ii) Access to all residents to perform the functions and duties set forth in §§1324.13 and 1324.19;

(iii) Access to the name and contact information of the resident representative, if any, where needed to perform the functions and duties set forth in §§1324.13 and 1324.19;

(iv) Access to review the medical, social and other records relating to a resident, if—

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(A) The resident or resident representative communicates informed consent to the access and the consent is given in writing or through the use of auxiliary aids and services;

(B) The resident or resident representative communicates informed consent orally, visually, or through the use of auxiliary aids and services, and such consent is documented contemporaneously by a representative of the Office in accordance with such procedures; and

(C) Access is necessary in order to investigate a complaint, the resident representative refuses to consent to the access, a representative of the Office has reasonable cause to believe that the resident representative is not acting in the best interests of the resident, and the representative of the Office obtains the approval of the Ombudsman;

(v) Access to the administrative records, policies, and documents, to which the residents have, or the general public has access, of long-term care facilities;

(vi) Access of the Ombudsman to, and, upon request, copies of all licensing and certification records maintained by the State with respect to long-term care facilities; and

(vii) Reaffirmation that the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule, 45 CFR part 160 and 45 CFR part 164, subparts A and E, does not preclude release by covered entities of resident private health information or other resident identifying information to the Ombudsman program, including but not limited to residents' medical, social, or other records, a list of resident names and room numbers, or information collected in the course of a State or Federal survey or inspection process.

(3) *Disclosure.* Policies and procedures regarding disclosure of files, records and other information maintained by the Ombudsman program must include, but not be limited to:

(i) Provision that the files, records, and information maintained by the Ombudsman program may be disclosed only at the discretion of the Ombudsman or designee of the Ombudsman for such purpose and in accordance with

the criteria developed by the Ombudsman, as required by § 1327.13(e);

(ii) Prohibition of the disclosure of identifying information of any resident with respect to whom the Ombudsman program maintains files, records, or information, except as otherwise provided by § 1327.19(b)(5) through (8), unless:

(A) The resident or the resident representative communicates informed consent to the disclosure and the consent is given in writing or through the use of auxiliary aids and services;

(B) The resident or resident representative communicates informed consent orally, visually, or through the use of auxiliary aids and services and such consent is documented contemporaneously by a representative of the Office in accordance with such procedures; or

(C) The disclosure is required by court order;

(iii) Prohibition of the disclosure of identifying information of any complainant with respect to whom the Ombudsman program maintains files, records, or information, unless:

(A) The complainant communicates informed consent to the disclosure and the consent is given in writing or through the use of auxiliary aids and services;

(B) The complainant communicates informed consent orally, visually, or through the use of auxiliary aids and services and such consent is documented contemporaneously by a representative of the Office in accordance with such procedures; or

(C) The disclosure is required by court order;

(iv) Exclusion of the Ombudsman and representatives of the Office from abuse reporting requirements, including when such reporting would disclose identifying information of a complainant or resident without appropriate consent or court order, except as otherwise provided in § 1327.19(b)(5) through (8); and

(v) Adherence to the provisions of paragraph (e)(3) of this section, regardless of the source of the request for information or the source of funding for the services of the Ombudsman program, notwithstanding section 705(a)(6)(c) of the Act.

(4) *Conflicts of interest.* Policies and procedures regarding conflicts of interest must establish mechanisms to identify and remove or remedy conflicts of interest as provided in § 1324.21, including:

(i) Ensuring that no individual, or member of the immediate family of an individual, involved in the employment or appointment of the Ombudsman is subject to a conflict of interest;

(ii) Requiring that other agencies in which the Office or local Ombudsman entities are organizationally located have policies in place to prohibit the employment or appointment of an Ombudsman or representatives of the Office with a conflict that cannot be adequately removed or remedied;

(iii) Requiring that the Ombudsman take reasonable steps to refuse, suspend or remove designation of an individual who has a conflict of interest, or who has a member of the immediate family with a conflict of interest, which cannot be adequately removed or remedied;

(iv) Establishing the methods by which the Office and/or State agency will periodically review and identify conflicts of the Ombudsman and representatives of the Office; and

(v) Establishing the actions the Office and/or State agency will require the Ombudsman or representatives of the Office to take in order to remedy or remove such conflicts.

(5) *Systems advocacy.* Policies and procedures related to systems advocacy must assure that the Office is required and has sufficient authority to carry out its responsibility to analyze, comment on, and monitor the development and implementation of Federal, State, and local laws, regulations, and other government policies and actions that pertain to long-term care facilities and services and to the health, safety, welfare, and rights of residents, and to recommend any changes in such laws, regulations, and policies as the Office determines to be appropriate.

(i) Such procedures must exclude the Ombudsman and representatives of the Office from any State lobbying prohibitions to the extent that such requirements are inconsistent with section 712 of the Act.

(ii) Nothing in this part shall prohibit the Ombudsman or the State agency or other agency in which the Office is organizationally located from establishing policies which promote consultation regarding the determinations of the Office related to recommended changes in laws, regulations, and policies. However, such a policy shall not require a right to review or pre-approve positions or communications of the Office.

(6) *Designation.* Policies and procedures related to designation must establish the criteria and process by which the Ombudsman shall designate and refuse, suspend or remove designation of local Ombudsman entities and representatives of the Office.

(i) Such criteria should include, but not be limited to, the authority to refuse, suspend or remove designation a local Ombudsman entity or representative of the Office in situations in which an identified conflict of interest cannot be adequately removed or remedied as set forth in § 1327.21.

(ii) [Reserved]

(7) *Grievance process.* Policies and procedures related to grievances must establish a grievance process for the receipt and review of grievances regarding the determinations or actions of the Ombudsman and representatives of the Office.

(i) Such process shall include an opportunity for reconsideration of the Ombudsman decision to refuse, suspend, or remove designation of a local Ombudsman entity or representative of the Office. Notwithstanding the grievance process, the Ombudsman shall make the final determination to designate or to refuse, suspend, or remove designation of a local Ombudsman entity or representative of the Office.

(ii) [Reserved]

(8) *Determinations of the Office.* Policies and procedures related to the determinations of the Office must ensure that the Ombudsman, as head of the Office, shall be able to independently make determinations and establish positions of the Office, without necessarily representing the determinations or positions of the State agency or other agency in which the Office is organizationally located, regarding:

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(i) Disclosure of information maintained by the Ombudsman program within the limitations set forth in section 712(d) of the Act;

(ii) Recommendations to changes in Federal, State and local laws, regulations, policies and actions pertaining to the health, safety, welfare, and rights of residents; and

(iii) Provision of information to public and private agencies, legislators, the media, and other persons, regarding the problems and concerns of residents and recommendations related to the problems and concerns.

**§ 1324.13 Functions and responsibilities of the State Long-Term Care Ombudsman.**

The Ombudsman, as head of the Office, shall have responsibility for the leadership and management of the Office in coordination with the State agency, and, where applicable, any other agency carrying out the Ombudsman program, as follows.

(a) *Functions.* The Ombudsman shall, personally or through representatives of the Office—

(1) Identify, investigate, and resolve complaints that—

(i) Are made by, or on behalf of, residents; and

(ii) Relate to action, inaction, or decisions, that may adversely affect the health, safety, welfare, or rights of residents (including the welfare and rights of residents with respect to the appointment and activities of resident representatives) of—

(A) Providers, or representatives of providers, of long-term care;

(B) Public agencies; or

(C) Health and social service agencies.

(2) Provide services to protect the health, safety, welfare, and rights of the residents;

(3) Inform residents about means of obtaining services provided by the Ombudsman program;

(4) Ensure that residents have regular and timely access to the services provided through the Ombudsman program and that residents and complainants receive timely responses from representatives of the Office to requests for information and complaints;

(5) Represent the interests of residents before governmental agencies, assure that individual residents have access to, and pursue (as the Ombudsman determines as necessary and consistent with resident interests) administrative, legal, and other remedies to protect the health, safety, welfare, and rights of residents;

(6) Provide administrative and technical assistance to representatives of the Office and agencies hosting local Ombudsman entities;

(7)(i) Analyze, comment on, and monitor the development and implementation of Federal, State, and local laws, regulations, and other governmental policies and actions, that pertain to the health, safety, welfare, and rights of the residents, with respect to the adequacy of long-term care facilities and services in the State;

(ii) Recommend any changes in such laws, regulations, policies, and actions as the Office determines to be appropriate; and

(iii) Facilitate public comment on the laws, regulations, policies, and actions;

(iv) Provide leadership to statewide systems advocacy efforts of the Office on behalf of long-term care facility residents, including coordination of systems advocacy efforts carried out by representatives of the Office; and

(v) Provide information to public and private agencies, legislators, the media, and other persons, regarding the problems and concerns of residents and recommendations related to the problems and concerns.

(vi) Such determinations and positions shall be those of the Office and shall not necessarily represent the determinations or positions of the State agency or other agency in which the Office is organizationally located.

(vii) In carrying out systems advocacy efforts of the Office on behalf of long-term care facility residents and pursuant to the receipt of grant funds under the Act, the provision of information, recommendations of changes of laws to legislators, and recommendations of changes of regulations and policies to government agencies by the Ombudsman or representatives of the Office do not constitute

lobbying activities as defined by 45 CFR part 93.

(8) Coordinate with and promote the development of citizen organizations consistent with the interests of residents; and

(9) Promote, provide technical support for the development of, and provide ongoing support as requested by resident and family councils to protect the well-being and rights of residents; and

(b) The Ombudsman shall be the head of a unified statewide program and shall:

(1) Establish or recommend policies, procedures and standards for administration of the Ombudsman program pursuant to §1324.11(e);

(2) Require representatives of the Office to fulfill the duties set forth in §1324.19 in accordance with Ombudsman program policies and procedures.

(c) *Designation.* The Ombudsman shall determine designation, and refusal, suspension, or removal of designation, of local Ombudsman entities and representatives of the Office pursuant to section 712(a)(5) of the Act and the policies and procedures set forth in §1324.11(e)(6).

(1) Where an Ombudsman chooses to designate local Ombudsman entities, the Ombudsman shall:

(i) Designate local Ombudsman entities to be organizationally located within public or non-profit private entities;

(ii) Review and approve plans or contracts governing local Ombudsman entity operations, including, where applicable, through area agency on aging plans, in coordination with the State agency; and

(iii) Monitor, on a regular basis, the Ombudsman program performance of local Ombudsman entities.

(2) *Training requirements.* The Ombudsman shall establish procedures for training for certification and continuing education of the representatives of the Office, based on model standards established by the Director of the Office of Long-Term Care Ombudsman Programs as described in section 201(d) of the Act, in consultation with residents, resident representatives, citizen organizations, long-term

care providers, and the State agency, that—

(i) Specify a minimum number of hours of initial training;

(ii) Specify the content of the training, including training relating to Federal, State, and local laws, regulations, and policies, with respect to long-term care facilities in the State; investigative and resolution techniques; and such other matters as the Office determines to be appropriate; and

(iii) Specify an annual number of hours of in-service training for all representatives of the Office;

(3) Prohibit any representative of the Office from carrying out the duties described in §1324.19 unless the representative—

(i) Has received the training required under paragraph (c)(2) of this section or is performing such duties under supervision of the Ombudsman or a designated representative of the Office as part of certification training requirements; and

(ii) Has been approved by the Ombudsman as qualified to carry out the activity on behalf of the Office;

(4) The Ombudsman shall investigate allegations of misconduct by representatives of the Office in the performance of Ombudsman program duties and, as applicable, coordinate such investigations with the State agency in which the Office is organizationally located, agency hosting the local Ombudsman entity and/or the local Ombudsman entity.

(5) Policies, procedures, or practices which the Ombudsman determines to be in conflict with the laws, policies, or procedures governing the Ombudsman program shall be sufficient grounds for refusal, suspension, or removal of designation of the representative of the Office and/or the local Ombudsman entity.

(d) *Ombudsman program information.* The Ombudsman shall manage the files, records, and other information of the Ombudsman program, whether in physical, electronic, or other formats, including information maintained by representatives of the Office and local Ombudsman entities pertaining to the cases and activities of the Ombudsman program. Such files, records, and other

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information are the property of the Office. Nothing in this provision shall prohibit a representative of the Office or a local Ombudsman entity from maintaining such information in accordance with Ombudsman program requirements.

(e) *Disclosure.* In making determinations regarding the disclosure of files, records and other information maintained by the Ombudsman program, the Ombudsman shall:

(1) Have the sole authority to make or delegate determinations concerning the disclosure of the files, records, and other information maintained by the Ombudsman program. The Ombudsman shall comply with section 712(d) of the Act in responding to requests for disclosure of files, records, and other information, regardless of the format of such file, record, or other information, the source of the request, and the sources of funding to the Ombudsman program;

(2) Develop and adhere to criteria to guide the Ombudsman's discretion in determining whether to disclose the files, records or other information of the Office; and

(3) Develop and adhere to a process for the appropriate disclosure of information maintained by the Office, including:

(i) Classification of at least the following types of files, records, and information: medical, social and other records of residents; administrative records, policies, and documents of long-term care facilities; licensing and certification records maintained by the State with respect to long-term care facilities; and data collected in the Ombudsman program reporting system; and

(ii) Identification of the appropriate individual designee or category of designee, if other than the Ombudsman, authorized to determine the disclosure of specific categories of information in accordance with the criteria described in paragraph (e) of this section.

(f) *Fiscal management.* The Ombudsman shall determine the use of the fiscal resources appropriated or otherwise available for the operation of the Office. Where local Ombudsman entities are designated, the Ombudsman shall approve the allocations of Federal and

State funds provided to such entities, subject to applicable Federal and State laws and policies. The Ombudsman shall determine that program budgets and expenditures of the Office and local Ombudsman entities are consistent with laws, policies and procedures governing the Ombudsman program.

(g) *Annual report.* The Ombudsman shall independently develop and provide final approval of an annual report as set forth in section 712(h)(1) of the Act and as otherwise required by the Assistant Secretary.

(1) Such report shall:

(i) Describe the activities carried out by the Office in the year for which the report is prepared;

(ii) Contain analysis of Ombudsman program data;

(iii) Describe evaluation of the problems experienced by, and the complaints made by or on behalf of, residents;

(iv) Contain policy, regulatory, and/or legislative recommendations for improving quality of the care and life of the residents; protecting the health, safety, welfare, and rights of the residents; and resolving resident complaints and identified problems or barriers;

(v) Contain analysis of the success of the Ombudsman program, including success in providing services to residents of, assisted living, board and care facilities and other similar adult care facilities; and

(vi) Describe barriers that prevent the optimal operation of the Ombudsman program.

(2) The Ombudsman shall make such report available to the public and submit it to the Assistant Secretary, the chief executive officer of the State, the State legislature, the State agency responsible for licensing or certifying long-term care facilities, and other appropriate governmental entities.

(h) Through adoption of memoranda of understanding and other means, the Ombudsman shall lead state-level coordination, and support appropriate local Ombudsman entity coordination, between the Ombudsman program and other entities with responsibilities relevant to the health, safety, well-being or rights of residents of long-term care facilities including, but not limited to:

- (1) Area agency on aging programs;
  - (2) Aging and disability resource centers;
  - (3) Adult protective services programs;
  - (4) Protection and advocacy systems, as designated by the State, and as established under the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (42 U.S.C. 15001 *et seq.*);
  - (5) Facility and long-term care provider licensure and certification programs;
  - (6) The State Medicaid fraud control unit, as defined in section 1903(q) of the Social Security Act (42 U.S.C. 1396b(q));
  - (7) Victim assistance programs;
  - (8) State and local law enforcement agencies;
  - (9) Courts of competent jurisdiction; and
  - (10) The State legal assistance developer and legal assistance programs, including those provided under section 306(a)(2)(C) of the Act.
- (i) The Ombudsman shall carry out such other activities as the Assistant Secretary determines to be appropriate.

**§ 1324.15 State agency responsibilities related to the Ombudsman program.**

- (a) In addition to the responsibilities set forth in part 1321 of this chapter, the State agency shall ensure that the Ombudsman complies with the relevant provisions of the Act and of this rule.
- (b) The State agency shall ensure, through the development of policies, procedures, and other means, consistent with § 1324.11(e)(2), that the Ombudsman program has sufficient authority and access to facilities, residents, and information needed to fully perform all of the functions, responsibilities, and duties of the Office.
- (c) The State agency shall provide opportunities for training for the Ombudsman and representatives of the Office in order to maintain expertise to serve as effective advocates for residents. The State agency may utilize funds appropriated under Title III and/or Title VII of the Act designated for direct services in order to provide access to such training opportunities.
- (d) The State agency shall provide personnel supervision and management

for the Ombudsman and representatives of the Office who are employees of the State agency. Such management shall include an assessment of whether the Office is performing all of its functions under the Act.

(e) The State agency shall provide monitoring, as required by § 1321.11(b) of this chapter, including but not limited to fiscal monitoring, where the Office and/or local Ombudsman entity is organizationally located within an agency under contract or other arrangement with the State agency. Such monitoring shall include an assessment of whether the Ombudsman program is performing all of the functions, responsibilities and duties set forth in §§ 1324.13 and 1324.19. The State agency may make reasonable requests of reports, including aggregated data regarding Ombudsman program activities, to meet the requirements of this provision.

(f) The State agency shall ensure that any review of files, records or other information maintained by the Ombudsman program is consistent with the disclosure limitations set forth in §§ 1324.11(e)(3) and 1327.13(e).

(g) The State agency shall integrate the goals and objectives of the Office into the State plan and coordinate the goals and objectives of the Office with those of other programs established under Title VII of the Act and other State elder rights, disability rights, and elder justice programs, including, but not limited to, legal assistance programs provided under section 306(a)(2)(C) of the Act, to promote collaborative efforts and diminish duplicative efforts. Where applicable, the State agency shall require inclusion of goals and objectives of local Ombudsman entities into area plans on aging.

(h) The State agency shall provide elder rights leadership. In so doing, it shall require the coordination of Ombudsman program services with, the activities of other programs authorized by Title VII of the Act as well as other State and local entities with responsibilities relevant to the health, safety, well-being or rights of older adults, including residents of long-term care facilities as set forth in § 1324.13(h).

(i) *Interference, retaliation and reprisals.* The State agency shall:



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(1) Ensure that it has mechanisms to prohibit and investigate allegations of interference, retaliation and reprisals:

(i) by a long-term care facility, other entity, or individual with respect to any resident, employee, or other person for filing a complaint with, providing information to, or otherwise cooperating with any representative of the Office; or

(ii) by a long-term care facility, other entity or individual against the Ombudsman or representatives of the Office for fulfillment of the functions, responsibilities, or duties enumerated at §§ 1324.13 and 1324.19; and

(2) Provide for appropriate sanctions with respect to interference, retaliation and reprisals.

(j) *Legal counsel.* (1) The State agency shall ensure that:

(i) Legal counsel for the Ombudsman program is adequate, available, has competencies relevant to the legal needs of the program and of residents, and is without conflict of interest (as defined by the State ethical standards governing the legal profession), in order to—

(A) Provide consultation and representation as needed in order for the Ombudsman program to protect the health, safety, welfare, and rights of residents; and

(B) Provide consultation and/or representation as needed to assist the Ombudsman and representatives of the Office in the performance of their official functions, responsibilities, and duties, including, but not limited to, complaint resolution and systems advocacy;

(ii) The Ombudsman and representatives of the Office assist residents in seeking administrative, legal, and other appropriate remedies. In so doing, the Ombudsman shall coordinate with the legal services developer, legal services providers, and victim assistance services to promote the availability of legal counsel to residents; and

(iii) Legal representation, arranged by or with the approval of the Ombudsman, is provided to the Ombudsman or any representative of the Office against whom suit or other legal action is brought or threatened to be brought in

connection with the performance of the official duties.

(2) Such legal counsel may be provided by one or more entities, depending on the nature of the competencies and services needed and as necessary to avoid conflicts of interest (as defined by the State ethical standards governing the legal profession). However, at a minimum, the Office shall have access to an attorney knowledgeable about the Federal and State laws protecting the rights of residents and governing long-term care facilities.

(3) Legal representation of the Ombudsman program by the Ombudsman or representative of the Office who is a licensed attorney shall not by itself constitute sufficiently adequate legal counsel.

(4) The communications between the Ombudsman and legal counsel are subject to attorney-client privilege.

(k) The State agency shall require the Office to:

(1) Develop and provide final approval of an annual report as set forth in section 712(h)(1) of the Act and § 1327.13(g) and as otherwise required by the Assistant Secretary.

(2) Analyze, comment on, and monitor the development and implementation of Federal, State, and local laws, regulations, and other government policies and actions that pertain to long-term care facilities and services, and to the health, safety, welfare, and rights of residents, in the State, and recommend any changes in such laws, regulations, and policies as the Office determines to be appropriate;

(3) Provide such information as the Office determines to be necessary to public and private agencies, legislators, the media, and other persons, regarding the problems and concerns of individuals residing in long-term care facilities; and recommendations related to such problems and concerns; and

(4) Establish procedures for the training of the representatives of the Office, as set forth in § 1327.13(c)(2).

(5) Coordinate Ombudsman program services with entities with responsibilities relevant to the health, safety, welfare, and rights of residents of long-term care facilities, as set forth in § 1324.13(h).

**§ 1324.17 Responsibilities of agencies hosting local Ombudsman entities.**

(a) The agency in which a local Ombudsman entity is organizationally located shall be responsible for the personnel management, but not the programmatic oversight, of representatives, including employee and volunteer representatives, of the Office.

(b) The agency in which a local Ombudsman entity is organizationally located shall not have personnel policies or practices which prohibit the representatives of the Office from performing the duties, or from adhering to the access, confidentiality and disclosure requirements of section 712 of the Act, as implemented through this rule and the policies and procedures of the Office.

(1) Policies, procedures and practices, including personnel management practices of the host agency, which the Ombudsman determines conflict with the laws or policies governing the Ombudsman program shall be sufficient grounds for the refusal, suspension, or removal of the designation of local Ombudsman entity by the Ombudsman.

(2) Nothing in this provision shall prohibit the host agency from requiring that the representatives of the Office adhere to the personnel policies and procedures of the agency which are otherwise lawful.

**§ 1324.19 Duties of the representatives of the Office.**

In carrying out the duties of the Office, the Ombudsman may designate an entity as a local Ombudsman entity and may designate an employee or volunteer of the local Ombudsman entity as a representative of the Office. Representatives of the Office may also be designated employees or volunteers within the Office.

(a) *Duties.* An individual so designated as a representative of the Office shall, in accordance with the policies and procedures established by the Office and the State agency:

(1) Identify, investigate, and resolve complaints made by or on behalf of residents that relate to action, inaction, or decisions, that may adversely affect the health, safety, welfare, or rights of the residents;

(2) Provide services to protect the health, safety, welfare, and rights of residents;

(3) Ensure that residents in the service area of the local Ombudsman entity have regular and timely access to the services provided through the Ombudsman program and that residents and complainants receive timely responses to requests for information and complaints;

(4) Represent the interests of residents before government agencies and assure that individual residents have access to, and pursue (as the representative of the Office determines necessary and consistent with resident interest) administrative, legal, and other remedies to protect the health, safety, welfare, and rights of the residents;

(5)(i) Review, and if necessary, comment on any existing and proposed laws, regulations, and other government policies and actions, that pertain to the rights and well-being of residents; and

(ii) Facilitate the ability of the public to comment on the laws, regulations, policies, and actions;

(6) Promote, provide technical support for the development of, and provide ongoing support as requested by resident and family councils; and

(7) Carry out other activities that the Ombudsman determines to be appropriate.

(b) *Complaint processing.* (1) With respect to identifying, investigating and resolving complaints, and regardless of the source of the complaint (*i.e.* complainant), the Ombudsman and the representatives of the Office serve the resident of a long-term care facility. The Ombudsman or representative of the Office shall investigate a complaint, including but not limited to a complaint related to abuse, neglect, or exploitation, for the purposes of resolving the complaint to the resident's satisfaction and of protecting the health, welfare, and rights of the resident. The Ombudsman or representative of the Office may identify, investigate and resolve a complaint impacting multiple residents or all residents of a facility.

(2) Regardless of the source of the complaint (*i.e.* the complainant), including when the source is the Ombudsman or representative of the Office, the

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Ombudsman or representative of the Office must support and maximize resident participation in the process of resolving the complaint as follows:

(i) The Ombudsman or representative of Office shall offer privacy to the resident for the purpose of confidentially providing information and hearing, investigating and resolving complaints.

(ii) The Ombudsman or representative of the Office shall personally discuss the complaint with the resident (and, if the resident is unable to communicate informed consent, the resident's representative) in order to:

(A) Determine the perspective of the resident (or resident representative, where applicable) of the complaint;

(B) Request the resident (or resident representative, where applicable) to communicate informed consent in order to investigate the complaint;

(C) Determine the wishes of the resident (or resident representative, where applicable) with respect to resolution of the complaint, including whether the allegations are to be reported and, if so, whether Ombudsman or representative of the Office may disclose resident identifying information or other relevant information to the facility and/or appropriate agencies. Such report and disclosure shall be consistent with paragraph (b)(3) of this section;

(D) Advise the resident (and resident representative, where applicable) of the resident's rights;

(E) Work with the resident (or resident representative, where applicable) to develop a plan of action for resolution of the complaint;

(F) Investigate the complaint to determine whether the complaint can be verified; and

(G) Determine whether the complaint is resolved to the satisfaction of the resident (or resident representative, where applicable).

(iii) Where the resident is unable to communicate informed consent, and has no resident representative, the Ombudsman or representative of the Office shall:

(A) Take appropriate steps to investigate and work to resolve the complaint in order to protect the health, safety, welfare and rights of the resident; and

(B) Determine whether the complaint was resolved to the satisfaction of the complainant.

(iv) In determining whether to rely upon a resident representative to communicate or make determinations on behalf of the resident related to complaint processing, the Ombudsman or representative of the Office shall ascertain the extent of the authority that has been granted to the resident representative under court order (in the case of a guardian or conservator), by power of attorney or other document by which the resident has granted authority to the representative, or under other applicable State or Federal law.

(3) The Ombudsman or representative of the Office may provide information regarding the complaint to another agency in order for such agency to substantiate the facts for regulatory, protective services, law enforcement, or other purposes so long as the Ombudsman or representative of the Office adheres to the disclosure requirements of section 712(d) of the Act and the procedures set forth in §1324.11(e)(3).

(i) Where the goals of a resident or resident representative are for regulatory, protective services or law enforcement action, and the Ombudsman or representative of the Office determines that the resident or resident representative has communicated informed consent to the Office, the Office must assist the resident or resident representative in contacting the appropriate agency and/or disclose the information for which the resident has provided consent to the appropriate agency for such purposes.

(ii) Where the goals of a resident or resident representative can be served by disclosing information to a facility representative and/or referrals to an entity other than those referenced in paragraph (b)(3)(i) of this section, and the Ombudsman or representative of the Office determines that the resident or resident representative has communicated informed consent to the Ombudsman program, the Ombudsman or representative of the Office may assist the resident or resident representative in contacting the appropriate facility representative or the entity, provide

information on how a resident or representative may obtain contact information of such facility representatives or entities, and/or disclose the information for which the resident has provided consent to an appropriate facility representative or entity, consistent with Ombudsman program procedures.

(iii) In order to comply with the wishes of the resident, (or, in the case where the resident is unable to communicate informed consent, the wishes of the resident representative), the Ombudsman and representatives of the Office shall not report suspected abuse, neglect or exploitation of a resident when a resident or resident representative has not communicated informed consent to such report except as set forth in paragraphs (b)(5) through (7) of this section, notwithstanding State laws to the contrary.

(4) For purposes of paragraphs (b)(1) through (3) of this section, communication of informed consent may be made in writing, including through the use of auxiliary aids and services. Alternatively, communication may be made orally or visually, including through the use of auxiliary aids and services, and such consent must be documented contemporaneously by the Ombudsman or a representative of the Office, in accordance with the procedures of the Office;

(5) For purposes of paragraphs (b)(1) paragraph (3) of this section, if a resident is unable to communicate his or her informed consent, or perspective on the extent to which the matter has been satisfactorily resolved, the Ombudsman or representative of the Office may rely on the communication of informed consent and/or perspective regarding the resolution of the complaint of a resident representative so long as the Ombudsman or representative of the Office has no reasonable cause to believe that the resident representative is not acting in the best interests of the resident.

(6) For purposes of paragraphs (b)(1) through (3) of this section, the procedures for disclosure, as required by §1327.11(e)(3), shall provide that the Ombudsman or representative of the Office may refer the matter and disclose resident-identifying information to the appropriate agency or agencies

for regulatory oversight; protective services; access to administrative, legal, or other remedies; and/or law enforcement action in the following circumstances:

(i) The resident is unable to communicate informed consent to the Ombudsman or representative of the Office;

(ii) The resident has no resident representative;

(iii) The Ombudsman or representative of the Office has reasonable cause to believe that an action, inaction or decision may adversely affect the health, safety, welfare, or rights of the resident;

(iv) The Ombudsman or representative of the Office has no evidence indicating that the resident would not wish a referral to be made;

(v) The Ombudsman or representative of the Office has reasonable cause to believe that it is in the best interest of the resident to make a referral; and

(vi) The representative of the Office obtains the approval of the Ombudsman or otherwise follows the policies and procedures of the Office described in paragraph (b)(9) of this section.

(7) For purposes of paragraphs (b)(1) through (3) of this section, the procedures for disclosure, as required by §1327.11(e)(3), shall provide that, the Ombudsman or representative of the Office may refer the matter and disclose resident-identifying information to the appropriate agency or agencies for regulatory oversight; protective services; access to administrative, legal, or other remedies; and/or law enforcement action in the following circumstances:

(i) The resident is unable to communicate informed consent to the Ombudsman or representative of the Office and has no resident representative, or the Ombudsman or representative of the Office has reasonable cause to believe that the resident representative has taken an action, inaction or decision that may adversely affect the health, safety, welfare, or rights of the resident;

(ii) The Ombudsman or representative of the Office has no evidence indicating that the resident would not wish a referral to be made;

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(iii) The Ombudsman or representative of the Office has reasonable cause to believe that it is in the best interest of the resident to make a referral; and

(iv) The representative of the Ombudsman obtains the approval of the Ombudsman.

(8) The procedures for disclosure, as required by §1327.11(e)(3), shall provide that, if the Ombudsman or representative of the Office personally witnesses suspected abuse, gross neglect, or exploitation of a resident, the Ombudsman or representative of the Office shall seek communication of informed consent from such resident to disclose resident-identifying information to appropriate agencies;

(i) Where such resident is able to communicate informed consent, or has a resident representative available to provide informed consent, the Ombudsman or representative of the Office shall follow the direction of the resident or resident representative as set forth paragraphs (b)(1) through (3) of this section; and

(ii) Where the resident is unable to communicate informed consent, and has no resident representative available to provide informed consent, the Ombudsman or representative of the Office shall open a case with the Ombudsman or representative of the Office as the complainant, follow the Ombudsman program's complaint resolution procedures, and shall refer the matter and disclose identifying information of the resident to the management of the facility in which the resident resides and/or to the appropriate agency or agencies for substantiation of abuse, gross neglect or exploitation in the following circumstances:

(A) The Ombudsman or representative of the Office has no evidence indicating that the resident would not wish a referral to be made;

(B) The Ombudsman or representative of the Office has reasonable cause to believe that disclosure would be in the best interest of the resident; and

(C) The representative of the Office obtains the approval of the Ombudsman or otherwise follows the policies and procedures of the Office described in paragraph (b)(9) of this section.

(iii) In addition, the Ombudsman or representative of the Office, following

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the policies and procedures of the Office described in paragraph (b)(9) of this section, may report the suspected abuse, gross neglect, or exploitation to other appropriate agencies for regulatory oversight; protective services; access to administrative, legal, or other remedies; and/or law enforcement action.

(9) Prior to disclosing resident-identifying information pursuant to paragraph (b)(6) or (8) of this section, a representative of the Office must obtain approval by the Ombudsman or, alternatively, follow policies and procedures of the Office which provide for such disclosure.

(i) Where the policies and procedures require Ombudsman approval, they shall include a time frame in which the Ombudsman is required to communicate approval or disapproval in order to assure that the representative of the Office has the ability to promptly take actions to protect the health, safety, welfare or rights of residents.

(ii) Where the policies and procedures do not require Ombudsman approval prior to disclosure, they shall require that the representative of the Office promptly notify the Ombudsman of any disclosure of resident-identifying information under the circumstances set forth in paragraph (b)(6) or (8) of this section.

(iii) Disclosure of resident-identifying information under paragraph (b)(7) of this section shall require Ombudsman approval.

### § 1324.21 Conflicts of interest.

The State agency and the Ombudsman shall consider both the organizational and individual conflicts of interest that may impact the effectiveness and credibility of the work of the Office. In so doing, both the State agency and the Ombudsman shall be responsible to identify actual and potential conflicts and, where a conflict has been identified, to remove or remedy such conflict as set forth in paragraphs (b) and (d) of this section.

(a) *Identification of organizational conflicts.* In identifying conflicts of interest pursuant to section 712(f) of the Act, the State agency and the Ombudsman shall consider the organizational

conflicts that may impact the effectiveness and credibility of the work of the Office. Organizational conflicts of interest include, but are not limited to, placement of the Office, or requiring that an Ombudsman or representative of the Office perform conflicting activities, in an organization that:

(1) Is responsible for licensing, surveying, or certifying long-term care facilities;

(2) Is an association (or an affiliate of such an association) of long-term care facilities, or of any other residential facilities for older individuals or individuals with disabilities;

(3) Has any ownership or investment interest (represented by equity, debt, or other financial relationship) in, or receives grants or donations from, a long-term care facility;

(4) Has governing board members with any ownership, investment or employment interest in long-term care facilities;

(5) Provides long-term care to residents of long-term care facilities, including the provision of personnel for long-term care facilities or the operation of programs which control access to or services for long-term care facilities;

(6) Provides long-term care coordination or case management for residents of long-term care facilities;

(7) Sets reimbursement rates for long-term care facilities;

(8) Provides adult protective services;

(9) Is responsible for eligibility determinations regarding Medicaid or other public benefits for residents of long-term care facilities;

(10) Conducts preadmission screening for long-term care facility placements;

(11) Makes decisions regarding admission or discharge of individuals to or from long-term care facilities; or

(12) Provides guardianship, conservatorship or other fiduciary or surrogatedecision-making services for residents of long-term care facilities.

(b) *Removing or remedying organizational conflicts.* The State agency and the Ombudsman shall identify and take steps to remove or remedy conflicts of interest between the Office and the State agency or other agency carrying out the Ombudsman program.

(1) The Ombudsman shall identify organizational conflicts of interest in the Ombudsman program and describe steps taken to remove or remedy conflicts within the annual report submitted to the Assistant Secretary through the National Ombudsman Reporting System.

(2) Where the Office is located within or otherwise organizationally attached to the State agency, the State agency shall:

(i) Take reasonable steps to avoid internal conflicts of interest;

(ii) Establish a process for review and identification of internal conflicts;

(iii) Take steps to remove or remedy conflicts;

(iv) Ensure that no individual, or member of the immediate family of an individual, involved in the designating, appointing, otherwise selecting or terminating the Ombudsman is subject to a conflict of interest; and

(v) Assure that the Ombudsman has disclosed such conflicts and described steps taken to remove or remedy conflicts within the annual report submitted to the Assistant Secretary through the National Ombudsman Reporting System.

(3) Where a State agency is unable to adequately remove or remedy a conflict, it shall carry out the Ombudsman program by contract or other arrangement with a public agency or nonprofit private organization, pursuant to section 712(a)(4) of the Act. The State agency may not enter into a contract or other arrangement to carry out the Ombudsman program if the other entity, and may not operate the Office directly if it:

(i) Is responsible for licensing, surveying, or certifying long-term care facilities;

(ii) Is an association (or an affiliate of such an association) of long-term care facilities, or of any other residential facilities for older individuals or individuals with disabilities; or

(iii) Has any ownership, operational, or investment interest (represented by equity, debt, or other financial relationship) in a long-term care facility.

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(4) Where the State agency carries out the Ombudsman program by contract or other arrangement with a public agency or nonprofit private organization, pursuant to section 712(a)(4) of the Act, the State agency shall:

(i) Prior to contracting or making another arrangement, take reasonable steps to avoid conflicts of interest in such agency or organization which is to carry out the Ombudsman program and to avoid conflicts of interest in the State agency's oversight of the contract or arrangement;

(ii) Establish a process for periodic review and identification of conflicts;

(iii) Establish criteria for approval of steps taken by the agency or organization to remedy or remove conflicts;

(iv) Require that such agency or organization have a process in place to:

(A) Take reasonable steps to avoid conflicts of interest, and

(B) Disclose identified conflicts and steps taken to remove or remedy conflicts to the State agency for review and approval.

(5) Where an agency or organization carrying out the Ombudsman program by contract or other arrangement develops a conflict and is unable to adequately remove or remedy a conflict, the State agency shall either operate the Ombudsman program directly or by contract or other arrangement with another public agency or nonprofit private organization. The State agency shall not enter into such contract or other arrangement with an agency or organization which is responsible for licensing or certifying long-term care facilities in the state or is an association (or affiliate of such an association) of long-term care facilities.

(6) Where local Ombudsman entities provide Ombudsman services, the Ombudsman shall:

(i) Prior to designating or renewing designation, take reasonable steps to avoid conflicts of interest in any agency which may host a local Ombudsman entity.

(ii) Establish a process for periodic review and identification of conflicts of interest with the local Ombudsman entity in any agencies hosting a local Ombudsman entity.

(iii) Require that such agencies disclose identified conflicts of interest

with the local Ombudsman entity and steps taken to remove or remedy conflicts within such agency to the Ombudsman.

(iv) Establish criteria for approval of steps taken to remedy or remove conflicts in such agencies, and

(v) Establish a process for review of and criteria for approval of plans to remove or remedy conflicts with the local Ombudsman entity in such agencies.

(7) Failure of an agency hosting a local Ombudsman entity to disclose a conflict to the Office or inability to adequately remove or remedy a conflict shall constitute grounds for refusal, suspension or removal of designation of the local Ombudsman entity by the Ombudsman.

(c) *Identifying individual conflicts of interest.* (1) In identifying conflicts of interest pursuant to section 712(f) of the Act, the State agency and the Ombudsman shall consider individual conflicts that may impact the effectiveness and credibility of the work of the Office.

(2) Individual conflicts of interest for an Ombudsman, representatives of the Office, and members of their immediate family include, but are not limited to:

(i) Direct involvement in the licensing or certification of a long-term care facility;

(ii) Ownership, operational, or investment interest (represented by equity, debt, or other financial relationship) in an existing or proposed long-term care facility;

(iii) Employment of an individual by, or participation in the management of, a long-term care facility in the service area or by the owner or operator of any long-term care facility in the service area;

(iv) Receipt of, or right to receive, directly or indirectly, remuneration (in cash or in kind) under a compensation arrangement with an owner or operator of a long-term care facility;

(v) Accepting gifts or gratuities of significant value from a long-term care facility or its management, a resident or a resident representative of a long-term care facility in which the Ombudsman or representative of the Office provides services (except where there is

a personal relationship with a resident or resident representative which is separate from the individual's role as Ombudsman or representative of the Office);

(vi) Accepting money or any other consideration from anyone other than the Office, or an entity approved by the Ombudsman, for the performance of an act in the regular course of the duties of the Ombudsman or the representatives of the Office without Ombudsman approval;

(vii) Serving as guardian, conservator or in another fiduciary or surrogate decision-making capacity for a resident of a long-term care facility in which the Ombudsman or representative of the Office provides services; and

(viii) Serving residents of a facility in which an immediate family member resides.

(d) *Removing or remedying individual conflicts.* (1) The State agency or Ombudsman shall develop and implement policies and procedures, pursuant to §1324.11(e)(4), to ensure that no Ombudsman or representatives of the Office are required or permitted to hold positions or perform duties that would constitute a conflict of interest as set forth in §1324.21(c). This rule does not prohibit a State agency or Ombudsman from having policies or procedures that exceed these requirements.

(2) When considering the employment or appointment of an individual as the Ombudsman or as a representative of the Office, the State agency or other employing or appointing entity shall:

(i) Take reasonable steps to avoid employing or appointing an individual who has an unremedied conflict of interest or who has a member of the immediate family with an unremedied conflict of interest;

(ii) Take reasonable steps to avoid assigning an individual to perform duties which would constitute an unremedied conflict of interest;

(iii) Establish a process for periodic review and identification of conflicts of the Ombudsman and representatives of the Office, and

(iv) Take steps to remove or remedy conflicts.

(3) In no circumstance shall the entity, which appoints or employs the Om-

budsman, appoint or employ an individual as the Ombudsman who:

(i) Has direct involvement in the licensing or certification of a long-term care facility;

(ii) Has an ownership or investment interest (represented by equity, debt, or other financial relationship) in a long-term care facility. Divestment within a reasonable period may be considered an adequate remedy to this conflict;

(iii) Has been employed by or participating in the management of a long-term care facility within the previous twelve months.

(iv) Receives, or has the right to receive, directly or indirectly, remuneration (in cash or in kind) under a compensation arrangement with an owner or operator of a long-term care facility.

(4) In no circumstance shall the State agency, other agency which carries out the Office, or an agency hosting a local Ombudsman entity appoint or employ an individual, nor shall the Ombudsman designate an individual, as a representative of the Office who:

(i) Has direct involvement in the licensing or certification of a long-term care facility;

(ii) Has an ownership or investment interest (represented by equity, debt, or other financial relationship) in a long-term care facility. Divestment within a reasonable period may be considered an adequate remedy to this conflict;

(iii) Receives, directly or indirectly, remuneration (in cash or in kind) under a compensation arrangement with an owner or operator of a long-term care facility; or

(iv) Is employed by, or participating in the management of, a long-term care facility.

(A) An agency which appoints or employs representatives of the Office shall make efforts to avoid appointing or employing an individual as a representative of the Office who has been employed by or participating in the management of a long-term care facility within the previous twelve months.

(B) Where such individual is appointed or employed, the agency shall take steps to remedy the conflict.



## Subpart B [Reserved]

## PART 1325—REQUIREMENTS APPLICABLE TO THE DEVELOPMENTAL DISABILITIES PROGRAM

## Sec.

- 1325.1 General.
- 1325.2 Purpose of the regulations.
- 1325.3 Definitions.
- 1325.4 Rights of individuals with developmental disabilities.
- 1325.5 [Reserved]
- 1325.6 Employment of individuals with disabilities.
- 1325.7 Reports to the Secretary.
- 1325.8 Formula for determining allotments.
- 1325.9 Grants administration requirements.

AUTHORITY: 42 U.S.C. 15001 *et seq.*

SOURCE: 80 FR 44807, July 27, 2015, unless otherwise noted. Redesignated and amended at 81 FR 35645, 35646, June 3, 2016

**§ 1325.1 General.**

Except as specified in § 1325.4, the requirements in this part are applicable to the following programs and projects:

- (a) Federal Assistance to State Councils on Developmental Disabilities;
- (b) Protection and Advocacy for Individuals with Developmental Disabilities;
- (c) Projects of National Significance; and
- (d) National Network of University Centers for Excellence in Developmental Disabilities Education, Research, and Service.

**§ 1325.2 Purpose of the regulations.**

These regulations implement the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (42 U.S.C. 15001 *et seq.*).

**§ 1325.3 Definitions.**

For the purposes of parts 1325 through 1328 of this chapter, the following definitions apply:

*ACL.* The term “ACL” means the Administration for Community Living within the U.S. Department of Health and Human Services.

*Act.* The term “Act” means the Developmental Disabilities Assistance and Bill of Rights Act of 2000 (DD Act of 2000) (42 U.S.C. 15001 *et seq.*).

*Accessibility.* The term “Accessibility” means that programs funded

under the DD Act of 2000 and facilities which are used in those programs meet applicable requirements of section 504 of the Rehabilitation Act of 1973 (Pub. L. 93-112), its implementing regulation, 45 CFR part 84, the Americans with Disabilities Act of 1990, as amended, Title VI of the Civil Rights Act of 1964 (Pub. L. 88-352), and its implementing regulation, 45 CFR part 80.

(1) For programs funded under the DD Act of 2000, information shall be provided to applicants and program participants in plain language and in a manner that is accessible and timely to:

(i) Individuals with disabilities, including accessible Web sites and the provision of auxiliary aids and services at no cost to the individual; and

(ii) Individuals who are limited English proficient through the provision of language services at no cost to the individual, including:

(A) Oral interpretation;

(B) Written translations; and

(C) Taglines in non-English languages indicating the availability of language services.

*AIDD.* The term “AIDD” means the Administration on Intellectual and Developmental Disabilities, within the Administration for Community Living at the U.S. Department of Health and Human Services.

*Advocacy activities.* The term “advocacy activities” means active support of policies and practices that promote systems change efforts and other activities that further advance self-determination and inclusion in all aspects of community living (including housing, education, employment, and other aspects) for individuals with developmental disabilities, and their families.

*Areas of emphasis.* The term “areas of emphasis” means the areas related to quality assurance activities, education activities and early intervention activities, child care-related activities, health-related activities, employment-related activities, housing-related activities, transportation-related activities, recreation-related activities, and other services available or offered to individuals in a community, including formal and informal community supports that affect their quality of life.

*Assistive technology device.* The term “assistive technology device” means any item, piece of equipment, or product system, whether acquired commercially, modified or customized, that is used to increase, maintain, or improve functional capabilities of individuals with developmental disabilities.

*Assistive technology service.* The term “assistive technology service” means any service that directly assists an individual with a developmental disability in the selection, acquisition, or use of an assistive technology device. Such term includes: Conducting an evaluation of the needs of an individual with a developmental disability, including a functional evaluation of the individual in the individual’s customary environment; purchasing, leasing, or otherwise providing for the acquisition of an assistive technology device by an individual with a developmental disability; selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing or replacing an assistive technology device; coordinating and using another therapy, intervention, or service with an assistive technology device, such as a therapy, intervention, or service associated with an education or rehabilitation plan or program; providing training or technical assistance for an individual with a developmental disability, or, where appropriate, a family member, guardian, advocate, or authorized representative of an individual with a developmental disability; and providing training or technical assistance for professionals (including individuals providing education and rehabilitation services), employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of, an individual with developmental disabilities.

*Capacity building activities.* The term “capacity building activities” means activities (e.g. training and technical assistance) that expand and/or improve the ability of individuals with developmental disabilities, families, supports, services and/or systems to promote, support and enhance self-determination, independence, productivity and inclusion in community life.

*Center.* The term “Center” means a University Center for Excellence in De-

velopmental Disabilities Education, Research, and Service (UCEDD) established under subtitle D of the Act.

*Child care-related activities.* The term “child care-related activities” means advocacy, capacity building, and systemic change activities that result in families of children with developmental disabilities having access to and use of child care services, including before-school, after-school, and out-of-school services, in their communities.

*Culturally competent.* The term “culturally competent,” used with respect to services, supports, and other assistance means that services, supports, or other assistance that are conducted or provided in a manner that is responsive to the beliefs, interpersonal styles, attitudes, language, and behaviors of individuals who are receiving the services, supports or other assistance, and in a manner that has the greatest likelihood of ensuring their maximum participation in the program involved.

*Department.* The term “Department” means the U.S. Department of Health and Human Services.

*Developmental disability.* The term “developmental disability” means a severe, chronic disability of an individual that:

- (1) Is attributable to a mental or physical impairment or combination of mental and physical impairments;
- (2) Is manifested before the individual attains age 22;
- (3) Is likely to continue indefinitely;
- (4) 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
  - (viii) Economic self-sufficiency.
- (5) Reflects the individual’s need for a combination and sequence of special, interdisciplinary or generic services, individualized supports, or other forms of assistance that are of lifelong or extended duration and are individually planned and coordinated.

(6) An individual from birth to age nine, inclusive, who has a substantial developmental delay or specific congenital or acquired condition, may be considered to have a developmental disability without meeting three or more of the criteria described in paragraphs (1) through (5) of this definition, if the individual, without services and supports, has a high probability of meeting those criteria later in life.

*Early intervention activities.* The term “early intervention activities” means advocacy, capacity building, and systemic change activities provided to infants and young children described in the definition of “developmental disability” and their families to enhance the development of the individuals to maximize their potential, and the capacity of families to meet the special needs of the individuals.

*Education activities.* The term “education activities” means advocacy, capacity building, and systemic change activities that result in individuals with developmental disabilities being able to access appropriate supports and modifications when necessary, to maximize their educational potential, to benefit from lifelong educational activities, and to be integrated and included in all facets of student life.

*Employment-related activities.* The term “employment-related activities” means advocacy, capacity building, and systemic change activities that result in individuals with developmental disabilities acquiring, retaining, or advancing in paid employment, including supported employment or self-employment, in integrated settings in a community.

*Family support services.* The term “family support services” means services, supports, and other assistance, provided to families with a member or members who have developmental disabilities, that are designed to: Strengthen the family’s role as primary caregiver; prevent inappropriate out-of-the-home placement of the members and maintain family unity; and reunite, whenever possible, families with members who have been placed out of the home. This term includes respite care, provision of rehabilitation technology and assistive technology, personal assistance serv-

ices, parent training and counseling, support for families headed by aging caregivers, vehicular and home modifications, and assistance with extraordinary expenses associated with the needs of individuals with developmental disabilities.

*Fiscal year.* The term “fiscal year” means the Federal fiscal year unless otherwise specified.

*Governor.* The term “Governor” means the chief executive officer of a State, as that term is defined in the Act, or his or her designee who has been formally designated to act for the Governor in carrying out the requirements of the Act and the regulations.

*Health-related activities.* The term “health-related activities” means advocacy, capacity building, and systemic change activities that result in individuals with developmental disabilities having access to and use of coordinated health, dental, mental health, and other human and social services, including prevention activities, in their communities.

*Housing-related activities.* The term “housing-related activities” means advocacy, capacity building, and systemic change activities that result in individuals with developmental disabilities having access to and use of housing and housing supports and services in their communities, including assistance related to renting, owning, or modifying an apartment or home.

*Inclusion.* The term “inclusion”, used with respect to individuals with developmental disabilities, means the acceptance and encouragement of the presence and participation of individuals with developmental disabilities, by individuals without disabilities, in social, educational, work, and community activities, that enable individuals with developmental disabilities to have friendships and relationships with individuals and families of their own choice; live in homes close to community resources, with regular contact with individuals without disabilities in their communities; enjoy full access to and active participation in the same community activities and types of employment as individuals without disabilities; and take full advantage of

their integration into the same community resources as individuals without disabilities, living, learning, working, and enjoying life in regular contact with individuals without disabilities.

*Individualized supports.* The term “individualized supports” means supports that: Enable an individual with a developmental disability to exercise self-determination, be independent, be productive, and be integrated and included in all facets of community life; designed to enable such individual to control such individual’s environment, permitting the most independent life possible; and prevent placement into a more restrictive living arrangement than is necessary and enable such individual to live, learn, work, and enjoy life in the community; and include early intervention services, respite care, personal assistance services, family support services, supported employment services support services for families headed by aging caregivers of individuals with developmental disabilities, and provision of rehabilitation technology and assistive technology, and assistive technology services.

*Integration.* The term “integration,” means exercising the equal rights of individuals with developmental disabilities to access and use the same community resources as are used by and available to other individuals.

*Not-for-profit.* The term “not-for-profit,” used with respect to an agency, institution or organization, means an agency, institution, or organization that is owned or operated by one or more corporations or associations, no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

*Personal assistance services.* The term “personal assistance services” means a range of services provided by one or more individuals designed to assist an individual with a disability to perform daily activities, including activities on or off a job, that such individual would typically perform if such individual did not have a disability. Such services shall be designed to increase such individual’s control in life and ability to perform everyday activities, including activities on or off a job.

*Prevention activities.* The term “prevention activities” means activities that address the causes of developmental disabilities and the exacerbation of functional limitation, such as activities that: Eliminate or reduce the factors that cause or predispose individuals to developmental disabilities or that increase the prevalence of developmental disabilities; increase the early identification of problems to eliminate circumstances that create or increase functional limitations; and mitigate against the effects of developmental disabilities throughout the lifespan of an individual.

*Productivity.* The term “productivity” means engagement in income-producing work that is measured by increased income, improved employment status, or job advancement, or engagement in work that contributes to a household or community.

*Protection and Advocacy (P&A) Agency.* The term “Protection and Advocacy (P&A) Agency” means a protection and advocacy system established in accordance with section 143 of the Act.

*Quality assurance activities.* The term “quality assurance activities” means advocacy, capacity building, and systemic change activities that result in improved consumer and family-centered quality assurance and that result in systems of quality assurance and consumer protection that include monitoring of services, supports, and assistance provided to an individual with developmental disabilities that ensures that the individual will not experience abuse, neglect, sexual or financial exploitation, or violation of legal or human rights; and will not be subject to the inappropriate use of restraints or seclusion; include training in leadership, self-advocacy, and self-determination for individuals with developmental disabilities, their families, and their guardians to ensure that those individuals will not experience abuse, neglect, sexual or financial exploitation, or violation of legal or human rights; and will not be subject to the inappropriate use of restraints or seclusion; or

include activities related to inter-agency coordination and systems integration that result in improved and enhanced services, supports, and other assistance that contribute to and protect the self-determination, independence, productivity, and integration and inclusion in all facets of community life of individuals with developmental disabilities.

*Rehabilitation technology.* The term “rehabilitation technology” means the systematic application of technologies, engineering methodologies, or scientific principles to meet the needs of, and address the barriers confronted by individuals with developmental disabilities in areas that include education, rehabilitation, employment, transportation, independent living, and recreation. Such term includes rehabilitation engineering, and the provision of assistive technology devices and assistive technology services.

*Required planning documents.* The term “required planning documents” means the State plans required by §1326.30 of this chapter for the State Council on Developmental Disabilities, the Annual Statement of Goals and Priorities required by §1326.22(c) of this chapter for P&As, and the five-year plan and annual report required by §1328.7 of this chapter for UCEDDs.

*Secretary.* The term “Secretary” means the Secretary of the U.S. Department of Health and Human Services.

*Self-determination activities.* The term “self-determination activities” means activities that result in individuals with developmental disabilities, with appropriate assistance, having the ability and opportunity to communicate and make personal decisions; the ability and opportunity to communicate choices and exercise control over the type and intensity of services, supports, and other assistance the individuals receive; the authority to control resources to obtain needed services, supports, and other assistance; opportunities to participate in, and contribute to, their communities; and support, including financial support, to advocate for themselves and others to develop leadership skills through training in self-advocacy to participate in coalitions, to educate policymakers,

and to play a role in the development of public policies that affect individuals with developmental disabilities.

*State.* The term “State”:

(1) Except as applied to the University Centers of Excellence in Developmental Disabilities Education, Research and Service in section 155 of the Act, includes each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

(2) For the purpose of UCEDDs in section 155 of the Act and part 1388 of this chapter, “State” means each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, and Guam.

*State Council on Developmental Disabilities (SCDD).* The term “State Council on Developmental Disabilities (SCDD)” means a Council established under section 125 of the DD Act.

*Supported employment services.* The term “supported employment services” means services that enable individuals with developmental disabilities to perform competitive work in integrated work settings, in the case of individuals with developmental disabilities for whom competitive employment has not traditionally occurred; or for whom competitive employment has been interrupted or intermittent as a result of significant disabilities; and who, because of the nature and severity of their disabilities, need intensive supported employment services or extended services in order to perform such work.

*Systemic change activities.* The term “systemic change activities” means a sustainable, transferable and replicable change in some aspect of service or support availability, design or delivery that promotes positive or meaningful outcomes for individuals with developmental disabilities and their families.

*Transportation-related activities.* The term “transportation-related activities” means advocacy, capacity building, and systemic change activities that result in individuals with developmental disabilities having access to and use of transportation.

*UCEDD.* The term “UCEDD” means University Centers for Excellence in Developmental Disabilities Education, Research, and Service, also known by the term “Center” under section 102(5) of the Act.

*Unserved and underserved.* The term “unserved and underserved” includes populations such as individuals from racial and ethnic minority backgrounds, disadvantaged individuals, individuals with limited English proficiency, individuals from underserved geographic areas (rural or urban), and specific groups of individuals within the population of individuals with developmental disabilities, including individuals who require assistive technology in order to participate in community life.

**§ 1325.4 Rights of individuals with developmental disabilities.**

(a) Section 109 of the Act, Rights of Individuals with Developmental Disabilities (42 U.S.C. 15009), is applicable to the SCDD.

(b) In order to comply with section 124(c)(5)(H) of the Act (42 U.S.C. 15024(c)(5)(H)), regarding the rights of individuals with developmental disabilities, the State participating in the SCDD program must meet the requirements of 45 CFR 1386.30(f).

(c) Applications from UCEDDs also must contain an assurance that the human rights of individuals assisted by this program will be protected consistent with section 101(c) (see section 154(a)(3)(D) of the Act).

**§ 1325.5 [Reserved]**

**§ 1325.6 Employment of individuals with disabilities.**

Each grantee which receives Federal funding under the Act must meet the requirements of section 107 of the Act (42 U.S.C. 15007) regarding affirmative action. The grantee must take affirmative action to employ and advance in employment and otherwise treat qualified individuals with disabilities without discrimination based upon their physical or mental disability in all employment practices such: Advertising, recruitment, employment, rates of pay or other forms of compensation, selection for training, including apprentice-

ship, upgrading, demotion or transfer, and layoff or termination. This obligation is in addition to the requirements of 45 CFR part 84, subpart B, prohibiting discrimination in employment practices on the basis of disability in programs receiving assistance from the Department. Recipients of funds under the Act also may be bound by the provisions of the Americans with Disabilities Act of 1990 (Pub. L. 101-336, 42 U.S.C. 12101 *et seq.*) with respect to employment of individuals with disabilities. Failure to comply with section 107 of the Act 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 E of 45 CFR part 1326.

**§ 1325.7 Reports to the Secretary.**

All grantee submission of plans, applications and reports must label goals, activities and results clearly in terms of the following: Area of emphasis, type of activity (advocacy, capacity building, systemic change), and categories of measures of progress.

**§ 1325.8 Formula for determining allotments.**

The Secretary, or his or her designee, will allocate funds appropriated under the Act for the State Councils on Developmental Disabilities and the P&As as directed in sections 122 and 142 of the Act (42 U.S.C. 15022 and 15042).

**§ 1325.9 Grants administration requirements.**

(a) The following parts of this title and title 2 CFR apply to grants funded under parts 1326 and 1328 of this chapter, and to grants for Projects of National Significance under section 162 of the Act (42 U.S.C. 15082):

(1) 45 CFR part 16—Procedures of the Departmental Grant Appeals Board.

(2) 45 CFR part 46—Protection of Human Subjects.

(3) 45 CFR part 75—Uniform Administrative Requirements, Cost Principles, and Audit Requirements for HHS Award.

(4) 2 CFR part 376—Nonprocurement Debarment and Suspension.

(5) 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.

(5) 45 CFR part 81—Practice and Procedure for Hearings under part 80 of this title.

(6) 45 CFR part 84—Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving Federal Financial Assistance.

(7) 45 CFR part 86—Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving Federal Financial Assistance.

(8) 45 CFR part 91—Nondiscrimination on the Basis of Age in Programs or Activities Receiving Federal Financial Assistance from HHS.

(9) 45 CFR part 93—New Restrictions on Lobbying.

(b) The Departmental Appeals Board also has jurisdiction over appeals by any grantee that has received grants under the UCEDD programs or for Projects of National Significance. The scope of the Board's jurisdiction concerning these appeals is described in 45 CFR part 16.

(c) The Departmental Appeals Board also has jurisdiction to decide appeals brought by the States concerning any disallowances taken by the Secretary, or his or her designee, with respect to specific expenditures incurred by the States or by contractors or sub grantees of States. This jurisdiction relates to funds provided under the two formula programs—subtitle B of the Act—Federal Assistance to State Councils on Developmental Disabilities, and subtitle C of the Act—Protection and Advocacy for Individuals with Developmental Disabilities. Appeals filed by States shall be decided in accordance with 45 CFR part 16.

(d) In making audits and examination to any books, documents, papers, and transcripts of records of SCDDs, the P&As, the UCEDDs and the Projects of National Significance grantees and sub grantees, as provided for in 45 CFR part 75, the Department will keep information about individual clients confidential to the maximum extent permitted by law and regulations.

(e)(1) The Department or other authorized Federal officials may access

client and case eligibility records or other records of a P&A system for audit purposes, and for purposes of monitoring system compliance pursuant to section 103(b) of the Act. However, such information will be limited pursuant to section 144(c) of the Act. No personal identifying information such as name, address, and social security number will be obtained. Only eligibility information will be obtained regarding the type and level of disability of individuals being served by the P&A and the nature of the issue concerning which the system represented an individual.

(2) Notwithstanding paragraph (e)(1) of this section, if an audit, monitoring review, evaluation, or other investigation by the Department produces evidence that the system has violated the Act or the regulations, the system will bear the burden of proving its compliance. The system's inability to establish compliance because of the confidentiality of records will not relieve it of this responsibility. The P&A may elect to obtain a release regarding personal information and privacy from all individuals requesting or receiving services at the time of intake or application. The release shall state that only information directly related to client and case eligibility will be subject to disclosure to officials of the Department.

## PART 1326—FORMULA GRANT PROGRAMS

### Subpart A—Basic Requirements

Sec.

- 1326.1 General.
- 1326.2 Obligation of funds.
- 1326.3 Liquidation of obligations.
- 1326.4 [Reserved]

### Subpart B—Protection and Advocacy for Individuals With Developmental Disabilities (PADD)

- 1326.19 Definitions.
- 1326.20 Agency designated as the State Protection and Advocacy System.
- 1326.21 Requirements and authority of the State Protection and Advocacy System.
- 1326.22 Periodic reports: State Protection and Advocacy System.
- 1326.23 Non-allowable costs for the State Protection and Advocacy System.

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**Subpart A—Basic Requirements**

**§ 1326.1 General.**

All rules under this subpart are applicable to both the State Councils on Developmental Disabilities and the agency designated as the State Protection and Advocacy (P&As) System.

**§ 1326.2 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.

(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, or when the State Council on Developmental Disabilities enters into an Interagency Agreement with an agency of State government for acquisition of personal property or for the performance of work.

(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) A Protection & Advocacy System may elect to treat entry of an appearance in judicial and administrative proceedings on behalf of an individual with a developmental disability 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 (c), *litigation costs* means expenses for court costs, depositions, expert witness fees, travel in connection with a case and similar costs, and costs resulting



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from litigation in which the agency has represented an individual with developmental disabilities (*e.g.*, monitoring court orders, consent decrees), but not for salaries of employees of the P&A. All funds made available for Federal assistance to State Councils on Developmental Disabilities and to the P&As obligated under this paragraph (c) are subject to the requirement of paragraph (a) of this section. These funds, if reobligated, may be reobligated only within a two-year period beginning with the first day of the Federal fiscal year in which the funds were originally awarded.

#### § 1326.3 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 Secretary, or his or her designee, may waive the requirements of 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 revert to the Federal Government.

### § 1326.4 [Reserved]

## Subpart B—Protection and Advocacy for Individuals With Developmental Disabilities (PADD)

### § 1326.19 Definitions.

As used in this subpart and subpart C of this part, the following definitions apply:

*Abuse.* The term “abuse” means any act or failure to act which was performed, or which was failed to be performed, knowingly, recklessly, or intentionally, and which caused, or may have caused, injury or death to an individual with developmental disabilities, and includes but is not limited to such acts as: Verbal, nonverbal, mental and emotional harassment; rape or sexual assault; striking; the use of excessive force when placing such an individual in bodily restraints; the use of bodily

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or chemical restraints which is not in compliance with Federal and State laws and regulations, or any other practice which is likely to cause immediate physical or psychological harm or result in long term harm if such practices continue. In addition, the P&A may determine, in its discretion that a violation of an individual’s legal rights amounts to abuse, such as if an individual is subject to significant financial exploitation.

*American Indian Consortium.* The term “American Indian Consortium” means any confederation of 2 or more recognized American Indian Tribes, created through the official resident population of 150,000 enrolled tribal members and a contiguous territory of Indian lands in two or more States.

*Complaint.* The term “complaint” includes, but is not limited to, any report or communication, whether formal or informal, written or oral, received by the P&A system, including media accounts, newspaper articles, electronic communications, telephone calls (including anonymous calls) from any source alleging abuse or neglect of an individual with a developmental disability.

*Designating official.* The term “designating official” means the Governor or other State official, who is empowered by the State legislature or Governor to designate the State official or public or private agency to be accountable for the proper use of funds by and conduct of the agency designated to administer the P&A system.

*Full investigation.* The term “full investigation” means access to service providers, individuals with developmental disabilities and records authorized under these regulations, that are necessary for a P&A system to make a determination about whether alleged or suspected instances of abuse and neglect are taking place or have taken place. Full investigations may be conducted independently or in cooperation with other agencies authorized to conduct similar investigations.

*Legal guardian, Conservator, and Legal representative.* The terms “legal guardian,” “conservator,” and “legal representative” all mean a parent of a minor, unless the State has appointed

another legal guardian under applicable State law, or an individual appointed and regularly reviewed by a State court or agency empowered under State law to appoint and review such officers, and having authority to make all decisions on behalf of individuals with developmental disabilities. It does not include persons acting only as a representative payee, persons acting only to handle financial payments, executors and administrators of estates, attorneys or other persons acting on behalf of an individual with developmental disabilities only in individual legal matters, or officials or their designees responsible for the provision of services, supports, and other assistance to an individual with developmental disabilities.

*Neglect.* The term “neglect” means a negligent act or omission by an individual responsible for providing services, supports or other assistance which caused or may have caused injury or death to an individual with a developmental disability(ies) or which placed an individual with developmental disability(ies) at risk of injury or death, and includes acts or omissions such as failure to: establish or carry out an appropriate individual program plan or treatment plan (including a discharge plan); provide adequate nutrition, clothing, or health care to an individual with developmental disabilities; or provide a safe environment which also includes failure to maintain adequate numbers of trained staff or failure to take appropriate steps to prevent self-abuse, harassment, or assault by a peer.

*Probable cause.* The term “probable cause” means a reasonable ground for belief that an individual with developmental disability(ies) has been, or may be, subject to abuse or neglect, or that the health or safety of the individual is in serious and immediate jeopardy. The individual making such determination may base the decision on reasonable inferences drawn from his or her experience or training regarding similar incidents, conditions or problems that are usually associated with abuse or neglect.

*State Protection and Advocacy System.* The term “State Protection and Advocacy System” is synonymous with the

term “P&A” used elsewhere in this regulation, and the terms “System” and “Protection and Advocacy System” used in this part and in subpart C of this part.

**§ 1326.20 Agency designated as the State Protection and Advocacy System.**

(a) The designating official must designate the State official or public or private agency to be accountable for proper use of funds and conduct of the Protection and Advocacy System.

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

(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.

(d)(1) Prior to any redesignation of the agency which administers and operates the State Protection and Advocacy System, the designating official must give written notice of the intention to make the redesignation to the agency currently administering and operating the State Protection and Advocacy System by registered or certified mail. The notice must indicate that the proposed redesignation is being made for good cause. The designating official also must publish a public notice of the proposed action. The agency and the public shall have a reasonable period of time, but not less than 45 days, to respond to the notice.

(2) The public notice must include:

(i) The Federal requirements for the State Protection and Advocacy System for individuals with developmental disabilities (section 143 of the Act); and where applicable, the requirements of other Federal advocacy programs administered by the State Protection and Advocacy System;

(ii) The goals and function of the State's Protection and Advocacy System including the current Statement of Goals and Priorities;

(iii) The name and address of the agency currently designated to administer and operate the State Protection and Advocacy System, and an indication of whether the agency also operates other Federal advocacy programs;

(iv) A description of the current agency operating and administering the Protection and Advocacy System including, as applicable, descriptions of other Federal advocacy programs it operates;

(v) A clear and detailed explanation of the good cause for the proposed redesignation;

(vi) A statement suggesting that interested persons may wish to write the current agency operating and administering the State Protection and Advocacy System at the address provided in paragraph (d)(2)(iii) of this section to obtain a copy of its response to the notice required by paragraph (d)(1) of this section. Copies must be in a format accessible to individuals with disabilities (including plain language), and language assistance services will be provided to individuals with limited English proficiency, such as translated materials or interpretation, upon request;

(vii) The name of the new agency proposed to administer and operate the State Protection and Advocacy System under the Developmental Disabilities Program. This agency will be eligible to administer other Federal advocacy programs;

(viii) A description of the system which the new agency would administer and operate, including a description of all other Federal advocacy programs the agency would operate;

(ix) The timetable for assumption of operations by the new agency and the estimated costs of any transfer and start-up operations; and

(x) A statement of assurance that the proposed new designated State Protection and Advocacy System will continue to serve existing clients and cases of the current P&A system or refer them to other sources of legal advocacy as appropriate, without disruption.

(3) The public notice as required by paragraph (d)(1) of this section, must be in a format accessible to individuals with disabilities, and language assistance services will be provided to individuals with limited English proficiency, such as translated materials or interpretation, upon request to individuals with developmental disabilities or their representatives. The designating official must provide for publication of the notice of the proposed redesignation using the State register, statewide newspapers, public service announcements on radio and television, or any other legally equivalent process. Copies of the notice must be made generally available to individuals with developmental disabilities and mental illness who live in residential facilities through posting or some other means.

(4) After the expiration of the public comment period required in paragraph (d)(1) of this section, the designating official must conduct a public hearing on the redesignation proposal. After consideration of all public and agency comments, the designating official must give notice of the final decision to the currently designated agency and the public through the same means used under paragraph (d)(3) of this section. This notice must include a clear and detailed explanation of the good cause finding. If the notice to the currently designated agency states that the redesignation will take place, it also must inform the agency of its right to appeal this decision to the Secretary, or his or her designee, the authority to hear appeals by the Secretary, or his or her designee, and provide a summary of the public comments received in regard to the notice of intent to redesignate and the results of the public hearing and its responses to those comments. The redesignation shall not be effective until 10 working days after notifying the current agency that administers and operates the State Protection and Advocacy System or, if the agency appeals, until the Secretary, or his or her designee, has considered the appeal.

(e)(1) Following notification as indicated in paragraph (d)(4) of this section, the agency that administers and

operates the State Protection and Advocacy System which is the subject of such action, may appeal the redesignation to the Secretary, or his or her designee. To do so, the agency that administers and operates the State Protection and Advocacy System must submit an appeal in writing to the Secretary, or his or her designee, within 20 days of receiving official notification under paragraph (d)(4) of this section, with a separate copy sent by registered or certified mail to the designating official who made the decision concerning redesignation.

(2) In the event that the agency subject to redesignation does exercise its right to appeal under paragraph (e)(1) of this section, the designating official must give public notice of the Secretary's, or his or her designated person's, final decision regarding the appeal through the same means utilized under paragraph (d)(3) of this section within 10 working days of receipt of the Secretary's, or his or her designee's, final decision under paragraph (e)(6) of this section.

(3) The designating official within 10 working days from the receipt of a copy of the appeal must provide written comments to the Secretary, or his or her designee, (with a copy sent by registered or certified mail to the Protection and Advocacy agency appealing under paragraph (e)(1) of this section), or withdraw the redesignation. The comments must include a summary of the public comments received in regard to the notice of intent to redesignate and the results of the public hearing and its responses to those comments.

(4) In the event that the designating official withdraws the redesignation while under appeal pursuant to paragraph (e)(1) of this section, the designating official must notify the Secretary, or his or her designee, and the current agency, and must give public notice of his or her decision through the same means utilized under paragraph (d)(3) of this section.

(5) As part of their submission under paragraph (e)(1) or (3) of this section, either party may request, and the Secretary, or his or her designee, may grant an opportunity for a meeting with the Secretary, or his or her designee, at which representatives of both

parties will present their views on the issues in the appeal. The meeting will be held within 20 working days of the submission of written comments by the designating official under paragraph (e)(2) of this section. The Secretary, or his or her designee, will promptly notify the parties of the date and place of the meeting.

(6) Within 30 days of the informal meeting under paragraph (e)(5) of this section, or, if there is no informal meeting under paragraph (e)(5) of this section, within 30 days of the submission under paragraph (e)(3) of this section, the Secretary, or his or her designee, will issue to the parties a final written decision on whether the redesignation was for good cause as defined in paragraph (d)(1) of this section. The Secretary, or his or her designee, will receive comments on the record from agencies administering the Federal advocacy programs that will be directly affected by the proposed redesignation. The P&A and the designating official will have an opportunity to comment on the submissions of the Federal advocacy programs. The Secretary, or his or her designee, shall consider the comments of the Federal programs, the P&A and the designating official in making his final decision on the appeal.

(f)(1) Within 30 days after the redesignation becomes effective under paragraph (d)(4) of this section, the designating official must submit an assurance to the Secretary, or his or her designee, that the newly designated agency that will administer and operate the State Protection and Advocacy System meets the requirements of the statute and the regulations.

(2) In the event that the agency administering and operating the State Protection and Advocacy System subject to redesignation does not exercise its rights to appeal within the period provided under paragraph (e)(1) of this section, the designating official must provide to the Secretary, or his or her designee, documentation that the agency was redesignated for good cause. Such documentation must clearly demonstrate that the Protection and Advocacy agency subject to redesignation was not redesignated for any actions or activities which were carried out under

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section 143 of the Act, this regulation or any other Federal advocacy program's legislation or regulations.

### **§ 1326.21 Requirements and authority of the State Protection and Advocacy System.**

(a) In order for a State to receive Federal funding for Protection and Advocacy activities under this subpart, as well as for the State Council on Developmental Disabilities activities (subpart D of this part), the Protection and Advocacy System must meet the requirements of section 143 and 144 of the Act (42 U.S.C. 15043 and 15044) and that system must be operational.

(b) Allotments must be used to supplement and not to supplant the level of non-Federal funds available in the State for activities under the Act, which shall include activities on behalf of individuals with developmental disabilities to remedy abuse, neglect, and violations of rights as well as information and referral activities.

(c) A P&A shall not implement a policy or practice restricting the remedies that may be sought on behalf of individuals with developmental disabilities or compromising the authority of the P&A to pursue such remedies through litigation, legal action or other forms of advocacy. Under this requirement, States may not establish a policy or practice, which requires the P&A to: Obtain the State's review or approval of the P&A's plans to undertake a particular advocacy initiative, including specific litigation (or to pursue litigation rather than some other remedy or approach); refrain from representing individuals with particular types of concerns or legal claims, or refrain from otherwise pursuing a particular course of action designed to remedy a violation of rights, such as educating policymakers about the need for modification or adoption of laws or policies affecting the rights of individuals with developmental disabilities; restrict the manner of the P&A's investigation in a way that is inconsistent with the System's required authority under the DD Act; or similarly interfere with the P&A's exercise of such authority. The requirements of this paragraph (c) shall not prevent P&As, including those functioning as agencies within

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State governments, from developing case or client acceptance criteria as part of the annual priorities identified by the P&A as described in § 1326.23(c). Clients must be informed at the time they apply for services of such criteria.

(d) A Protection and Advocacy System shall be free from hiring freezes, reductions in force, prohibitions on staff travel, or other policies, imposed by the State, to the extent that such policies would impact system program staff or functions funded with Federal funds, and would prevent the system from carrying out its mandates under the Act.

(e) A Protection and Advocacy System shall have sufficient staff, qualified by training and experience, to carry out the responsibilities of the system in accordance with the priorities of the system and requirements of the Act. These responsibilities include the investigation of allegations of abuse, neglect and representations of individuals with developmental disabilities regarding rights violations.

(f) A Protection and Advocacy System may exercise its authority under State law where the State authority exceeds the authority required by the Developmental Disabilities Assistance and Bill of Rights Act of 2000. However, State law must not diminish the required authority of the Protection and Advocacy System as set by the Act.

(g) Each Protection and Advocacy System that is a public system without a multimember governing or advisory board must establish an advisory council in order to provide a voice for individuals with developmental disabilities. The Advisory Council shall advise the Protection and Advocacy System on program policies and priorities. The Advisory Council and Governing Board shall be comprised of a majority of individuals with disabilities who are eligible for services, have received or are receiving services, parents, family members, guardians, advocates, or authorized representatives of such individuals.

(h) Prior to any Federal review of the State program, a 30-day notice and an opportunity for public comment must be published in the FEDERAL REGISTER. Reasonable effort shall be made by

AIDD to seek comments through notification to major disability advocacy groups, the State Bar, disability law resources, the State Councils on Developmental Disabilities, and the University Centers for Excellence in Developmental Disabilities Education, Research, and Service, for example, through newsletters and publication of those organizations. The findings of public comments may be consolidated if sufficiently similar issues are raised and they shall be included in the report of the onsite visit.

(i) Before the Protection and Advocacy System releases information to individuals not otherwise authorized to receive it, the Protection and Advocacy System must obtain written consent from the client requesting assistance or his or her guardian.

(j) *Contracts for program operations.* (1) An eligible P&A system may contract for the operation of part of its program with another public or private nonprofit organization with demonstrated experience working with individuals with developmental disabilities, provided that:

(i) The eligible P&A system institutes oversight and monitoring procedures which ensure that any and all subcontractors will be able to meet all applicable terms, conditions and obligations of the Federal grant, including but not limited to the ability to pursue all forms of litigation under the DD Act;

(ii) The P&A exercises appropriate oversight to ensure that the contracting organization meets all applicable responsibilities and standards which apply to P&As, including but not limited to, the confidentiality provisions in the DD Act and regulations, ethical responsibilities, program accountability and quality controls;

(2) Any eligible P&A system should work cooperatively with existing advocacy agencies and groups and, where appropriate, consider entering into contracts for protection and advocacy services with organizations already working on behalf of individuals with developmental disabilities.

**§ 1326.22 Periodic reports: State Protection and Advocacy System.**

(a) By January 1 of each year, each State Protection and Advocacy System shall submit to AIDD, an Annual Program Performance Report. In order to be accepted, the Report must meet the requirements of section 144(e) of the Act (42 U.S.C. 15044), the applicable regulation and include information on the System's program necessary for the Secretary, or his or her designee, to comply with section 105(1), (2), and (3) of the Act (42 U.S.C. 15005). The Report shall describe the activities, accomplishments, and expenditures of the system during the preceding fiscal year. Reports shall include a description of the system's goals and the extent to which the goals were achieved, barriers to their achievement; the process used to obtain public input, the nature of such input, and how such input was used; the extent to which unserved or underserved individuals or groups, particularly from ethnic or racial groups or geographic regions (*e.g.*, rural or urban areas) were the target of assistance or service; and other such information on the Protection and Advocacy System's activities requested by AIDD.

(b) Financial status reports (standard form 425) must be submitted by the agency administering and operating the State Protection and Advocacy System semiannually.

(c) By January 1 of each year, the State Protection and Advocacy System shall submit to AIDD, an Annual Statement of Goals and Priorities, (SGP), for the coming fiscal year as required under section 143(a)(2)(C) of the Act (42 U.S.C. 15043). In order to be accepted by AIDD, an SGP must meet the requirements of section 143 of the Act.

(1) The SGP is a description and explanation of the system's goals and priorities for its activities, selection criteria for its individual advocacy and training activities, and the outcomes it strives to accomplish. The SGP is developed through data driven strategic planning. If changes are made to the goals or the indicators of progress established for a year, the SGP must be amended to reflect those changes. The SGP must include a description of how the Protection and Advocacy System

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operates, and where applicable, how it coordinates the State Protection and Advocacy program for individuals with developmental disabilities with other Protection and Advocacy programs administered by the State Protection and Advocacy System. This description must include the System's processes for intake, internal and external referrals, and streamlining of advocacy services. If the System will be requesting or requiring fees or donations from clients as part of the intake process, the SGP must state that the system will be doing so. The description also must address collaboration, the reduction of duplication and overlap of services, the sharing of information on service needs, and the development of statements of goals and priorities for the various advocacy programs.

(2) Priorities as established through the SGP serve as the basis for the Protection and Advocacy System to determine which cases are selected in a given fiscal year. Protection and Advocacy Systems have the authority to turn down a request for assistance when it is outside the scope of the SGP, but they must inform individuals when this is the basis for turning them down.

(d) Each fiscal year, the Protection and Advocacy System shall:

(1) Obtain formal public input on its Statement of Goals and Priorities;

(2) At a minimum, provide for a broad distribution of the proposed Statement of Goals and Priorities for the next fiscal year in a manner accessible to individuals with developmental disabilities and their representatives, allowing at least 45 days from the date of distribution for comment;

(3) Provide to the State Councils on Developmental Disabilities and the University Centers for Excellence in Developmental Disabilities Education, Research and Service a copy of the proposed Statement of Goals and Priorities for comment concurrently with the public notice;

(4) Incorporate or address any comments received through public input and any input received from the State Councils on Developmental Disabilities and the University Centers for Excellence in Developmental Disabilities

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Education, Research and Service in the final Statement submitted; and

(5) Address how the Protection and Advocacy System, State Councils on Developmental Disabilities, and University Centers for Excellence in Developmental Disabilities Education Research and Service will collaborate with each other and with other public and private entities.

**§ 1326.23 Non-allowable costs for the State Protection and Advocacy System.**

(a) Federal financial participation is not allowable for:

(1) Costs incurred for activities on behalf of individuals with developmental disabilities to solve problems not directly related to their disabilities and which are faced by the general populace. Such activities include but are not limited to: Preparation of wills, divorce decrees, and real estate proceedings. Allowable costs in such cases would include the Protection and Advocacy System providing disability-related technical assistance information and referral to appropriate programs and services; and

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

(b) Attorneys' fees are considered program income pursuant to 45 CFR part 75 and must be added to the funds committed to the program and used to further the objectives of the program. This requirement shall apply to all attorneys' fees, including those earned by contractors and those received after the project period in which they were earned.

**§ 1326.24 Allowable litigation costs.**

Allotments may be used to pay the otherwise allowable costs incurred by a Protection and Advocacy System in bringing lawsuits in its own right to redress incidents of abuse or neglect, discrimination and other rights violations impacting the ability of individuals with developmental disabilities to obtain access to records and when it appears on behalf of named plaintiffs or a class of plaintiff for such purposes.

**Subpart C—Access to Records,  
Service Providers, and Individ-  
uals With Developmental Dis-  
abilities**

**§ 1326.25 Access to records.**

(a) Pursuant to sections 143(a)(2), (A)(i), (B), (I), and (J) of the Act, and subject to the provisions of this section, a Protection and Advocacy (P&A) System, and all of its authorized agents, shall have access to the records of individuals with developmental disabilities under the following circumstances:

(1) If authorized by an individual who is a client of the system, or who has requested assistance from the system, or by such individual's legal guardian, conservator or other legal representative.

(2) In the case of an individual to whom all of the following conditions apply:

(i) The individual, due to his or her mental or physical condition, is unable to authorize the system to have access;

(ii) The individual does not have a legal guardian, conservator or other legal representative, or the individual's guardian is the State (or one of its political subdivisions); and

(iii) The individual has been the subject of a complaint to the P&A system, or the P&A system has probable cause (which can be the result of monitoring or other activities including media reports and newspaper articles) to believe that such individual has been subject to abuse and neglect.

(3) In the case of an individual, who has a legal guardian, conservator, or other legal representative, about whom a complaint has been received by the system or, as a result of monitoring or other activities, the system has determined that there is probable cause to believe that the individual with developmental disability has been subject to abuse or neglect, whenever the following conditions exist:

(i) The P&A system has made a good faith effort to contact the legal guardian, conservator, or other legal representative upon prompt receipt (within the timelines set forth in paragraph (c) of this section) of the contact information (which is required to include but not limited to name, address, tele-

phone numbers, and email address) of the legal guardian, conservator, or other legal representative;

(ii) The system has offered assistance to the legal guardian, conservator, or other legal representative to resolve the situation; and

(iii) The legal guardian, conservator, or other legal representative has failed or refused to provide consent on behalf of the individual.

(4) If the P&A determines there is probable cause to believe that the health or safety of an individual is in serious and immediate jeopardy, no consent from another party is needed.

(5) In the case of death, no consent from another party is needed. Probable cause to believe that the death of an individual with a developmental disability resulted from abuse or neglect or any other specific cause is not required for the P&A system to obtain access to the records. Any individual who dies in a situation in which services, supports, or other assistance are, have been, or may customarily be provided to individuals with developmental disabilities shall, for the purposes of the P&A system obtaining access to the individual's records, be deemed an "individual with a developmental disability."

(b) Individual records to which P&A systems must have access under section 143(a)(2), (A)(i), (B), (I), and (J) of the Act (whether written or in another medium, draft, preliminary or final, including handwritten notes, electronic files, photographs or video or audiotape records) shall include, but shall not be limited to:

(1) Individual records prepared or received in the course of providing intake, assessment, evaluation, education, training and other services; supports or assistance, including medical records, financial records, and monitoring and other reports prepared or received by a service provider. This includes records stored or maintained at sites other than that of the service provider, as well as records that were not prepared by the service provider, but received by the service provider from other service providers.

(2) Reports prepared by a Federal, State or local governmental agency, or



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a private organization charged with investigating incidents of abuse or neglect, injury or death. The organizations whose reports are subject to this requirement include, but are not limited to, agencies in the foster care systems, developmental disabilities systems, prison and jail systems, public and private educational systems, emergency shelters, criminal and civil law enforcement agencies such as police departments, agencies overseeing juvenile justice facilities, juvenile detention facilities, all pre- and post-adjudication juvenile facilities, State and Federal licensing and certification agencies, and private accreditation organizations such as the Joint Commission on the Accreditation of Health Care Organizations or by medical care evaluation or peer review committees, regardless of whether they are protected by federal or state law. The reports subject to this requirement describe any or all of the following:

(i) The incidents of abuse, neglect, injury, and/or death;

(ii) The steps taken to investigate the incidents;

(iii) Reports and records, including personnel records, prepared or maintained by the service provider in connection with such reports of incidents; or,

(iv) Supporting information that was relied upon in creating a report including all information and records that describe persons who were interviewed, physical and documentary evidence that was reviewed, and the related investigative findings;

(3) Discharge planning records; and

(4) Information in professional, performance, building or other safety standards, and demographic and statistical information relating to a service provider.

(c) The time period in which the P&A system must be given access to records of individuals with developmental disabilities under sections 143(a)(2)(A)(i), (B), (I), and (J) of the Act, and subject to the provisions of this section, varies depending on the following circumstances:

(1) If the P&A system determines that there is probable cause to believe that the health or safety of the individual with a developmental disability

is in serious and immediate jeopardy, or in any case of the death of an individual with a developmental disability, access to the records of the individual with a developmental disability, as described in paragraph (b) of this section shall be provided (including the right to inspect and copy records as specified in paragraph (d) of this section) to the P&A system within 24 hours of receipt of the P&A system's written request for the records without the consent of another party.

(2) In all other cases, access to records of individuals with developmental disabilities shall be provided to the P&A system within three business days after the receipt of such a written request from the P&A system.

(d) A P&A shall be permitted to inspect and copy information and records, subject to a reasonable charge to offset duplicating costs. If the service provider or its agents copy the records for the P&A system, it may not charge the P&A system an amount that would exceed the amount customarily charged other non-profit or State government agencies for reproducing documents. At its option, the P&A may make written notes when inspecting information and records, and may use its own photocopying equipment to obtain copies. If a party other than the P&A system performs the photocopying or other reproduction of records, it shall provide the photocopies or reproductions to the P&A system within the time frames specified in paragraph (c) of this section. In addition, where records are kept or maintained electronically they shall be provided to the P&A electronically.

(e) The Health Insurance Portability and Accountability Act Privacy Rule permits the disclosure of protected health information (PHI) without the authorization of the individual to a P&A system to the extent that such disclosure is required by law and the disclosure complies with the requirements of that law.

(f) Educational agencies, including public, private, and charter schools, as well as, public and private residential and non-residential schools, must provide a P&A with the name of and contact information for the parent or guardian of a student for whom the

P&A has probable cause to obtain records under the DD Act.

**§ 1326.26 Denial or delay of access to records.**

If a P&A system's access is denied or delayed beyond the deadlines specified in §1326.25, the P&A system shall be provided, within one business day after the expiration of such deadline, with a written statement of reasons for the denial or delay. In the case of a denial for alleged lack of authorization, the name, address and telephone number of individuals with developmental disabilities and legal guardians, conservators, or other legal representative will be included in the aforementioned response. All of the above information shall be provided whether or not the P&A has probable cause to suspect abuse or neglect, or has received a complaint.

**§ 1326.27 Access to service providers and individuals with developmental disabilities.**

(a) Access to service providers and individuals with developmental disabilities shall be extended to all authorized agents of a P&A system.

(b) The P&A system shall have reasonable unaccompanied access to individuals with developmental disabilities at all times necessary to conduct a full investigation of an incident of abuse or neglect.

(1) Such access shall be afforded upon request, by the P&A system when:

(i) An incident is reported or a complaint is made to the P&A system;

(ii) The P&A system determines that there is probable cause to believe that an incident has or may have occurred; or

(iii) The P&A system determines that there is or may be imminent danger of serious abuse or neglect of an individual with a developmental disability.

(2) A P&A system shall have reasonable unaccompanied access to public and private service providers, programs in the State, and to all areas of the service provider's premises that are used by individuals with developmental disabilities or are accessible to them. Such access shall be provided without advance notice and made available immediately upon request. This authority shall include the opportunity to inter-

view any individual with developmental disability, employee, or other persons, including the person thought to be the victim of such abuse, who might be reasonably believed by the system to have knowledge of the incident under investigation. The P&A may not be required to provide the name or other identifying information regarding the individual with developmental disability or staff with whom it plans to meet; neither may the P&A be required to justify or explain its interaction with such persons.

(c) In addition to the access required under paragraph (b) of this section, a P&A system shall have reasonable unaccompanied access to service providers for routine circumstances. This includes areas which are used by individuals with developmental disabilities and are accessible to individuals with developmental disabilities at reasonable times, which at a minimum shall include normal working hours and visiting hours. A P&A also shall be permitted to attend treatment planning meetings concerning individuals with developmental disabilities with the consent of the individual or his or her guardian, conservator or other legal representative, except that no consent is required if the individual, due to his or mental or physical condition, is unable to authorize the system to have access to a treatment planning meeting; and the individual does not have a legal guardian, conservator or other legal representative, or the individual's guardian is the State (or one of its political subdivisions).

(1) Access to service providers shall be afforded immediately upon an oral or written request by the P&A system. Except where complying with the P&A's request would interfere with treatment or therapy to be provided, service providers shall provide access to individuals for the purpose covered by this paragraph. If the P&As access to an individual must be delayed beyond 24 hours to allow for the provision of treatment or therapy, the P&A shall receive access as soon as possible thereafter. In cases where a service provider denies a P&A access to an individual with a developmental disability on the grounds that such access would interfere with the individual's

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treatment or therapy, the service provider shall, no later than 24 hours of the P&A's request, provide the P&A with a written statement from a physician stating that P&A access to the individual will interfere with the individual's treatment and therapy, and the time and circumstances under which the P&A can interview the individual. If the physician states that the individual cannot be interviewed in the next 24 hours, the P&A and the service provider shall engage in a good faith interactive process to determine when and under what circumstances the P&A can interview the individual. If the P&A and the service provider are unable to agree upon the time and circumstance, they shall select a mutually agreeable independent physician who will determine when and under what circumstances the individual may be interviewed. The expense of the independent physician's services shall be paid for by the service provider. Individuals with developmental disabilities subject to the requirements in this paragraph include adults and minors who have legal guardians or conservators.

(2) P&A activities shall be conducted so as to minimize interference with service provider programs, respect individuals with developmental disabilities' privacy interests, and honor a recipient's request to terminate an interview. This access is for the purpose of:

(i) Providing information, training, and referral for programs addressing the needs of individuals with developmental disabilities, information and training about individual rights, and the protection and advocacy services available from the P&A system, including the name, address, and telephone number of the P&A system. P&As shall be permitted to post, in an area which individuals with developmental disabilities receive services, a poster which states the protection and advocacy services available from the P&A system, including the name, address and telephone number of the P&A system.

(ii) Monitoring compliance with respect to the rights and safety of individuals with developmental disabilities; and

(iii) Access including, but is not limited to inspecting, viewing,

photographing, and video recording all areas of a service provider's premises or under the service provider's supervision or control which are used by individuals with developmental disabilities or are accessible to them. This authority does not include photographing or video recording individuals with developmental disabilities unless they consent or State laws allow such activities.

(d) Unaccompanied access to individuals with developmental disabilities including, but not limited to, the opportunity to meet and communicate privately with individuals regularly, both formally and informally, by telephone, mail and in person. This authority shall also include the opportunity to meet, communicate with, or interview any individual with a developmental disability, including a person thought to be the subject of abuse, who might be reasonably believed by the P&A system to have knowledge of an incident under investigation or non-compliance with respect to the rights and safety of individuals with developmental disabilities. Except as otherwise required by law the P&A shall not be required to provide the name or other identifying information regarding the individual with a disability with whom it plans to meet; neither may the P&A be required to justify or explain its interaction with such persons.

**§ 1326.28 Confidentiality of State Protection and Advocacy System records.**

(a) A P&A shall, at minimum, comply with the confidentiality provisions of all applicable Federal and State laws.

(b) Records maintained by the P&A system are the property of the P&A system which must protect them from loss, damage, tampering, unauthorized use, or tampering. The P&A system must:

(1) Except as provided elsewhere in this section, keep confidential all records and information, including information contained in any automated electronic database pertaining to:

(i) Clients;

(ii) Individuals who have been provided general information or technical assistance on a particular matter;

(iii) The identity of individuals who report incidents of abuse or neglect, or who furnish information that forms the basis for a determination that probable cause exists; and

(iv) Names of individuals who have received services, supports or other assistance, and who provided information to the P&A for the record.

(v) Peer review records.

(2) Have written policies governing the access, storage, duplication and release of information from client records, including the release of information peer review records.

(3) Obtain written consent from the client, or from his or her legal representative; individuals who have been provided general information or technical assistance on a particular matter; and individuals who furnish reports or information that form the basis for a determination of probable cause, before releasing information concerning such individuals to those not otherwise authorized to receive it.

(c) Nothing in this subpart shall prevent the P&A system from issuing a public report of the results of an investigation which maintains the confidentiality of the individuals listed in paragraph (a)(1) of this section, or reporting the results of an investigation in a manner which maintains the confidentiality of such individuals, to responsible investigative or enforcement agencies should an investigation reveal information concerning the service provider, its staff, or employees warranting possible sanctions or corrective action. This information may be reported to agencies responsible for service provider licensing or accreditation, employee discipline, employee licensing or certification, or criminal investigation or prosecution.

(d) Notwithstanding the confidentiality requirements of this section, the P&A may make a report to investigative or enforcement agencies, as described in paragraph (b) of this section, which reveals the identity of an individual with developmental disability, and information relating to his or her status or treatment:

(1) When the system has received a complaint that the individual has been or may be subject to abuse and neglect, or has probable cause (which can be the

result of monitoring or other activities including media reports and newspaper articles) to believe that such individual has been or may be subject to abuse or neglect;

(2) When the system determines that there is probable cause to believe the health or safety of the individual is in serious and immediate jeopardy; or

(3) In any case of the death of an individual whom the system believes may have had a developmental disability.

#### **Subpart D—Federal Assistance to State Councils on Developmental Disabilities**

##### **§ 1326.30 State plan requirements.**

(a) In order to receive Federal funding under this subpart, each State Developmental Disabilities Council must prepare and submit a State plan which meets the requirements of sections 124 and 125 of the Act (42 U.S.C. 15024 and 15025), and the applicable regulation. Development of the State plan and its periodic updating are the responsibility of the State Council on Developmental Disabilities. As provided in section 124(d) of the Act, the Council shall provide opportunities for public input and review (in accessible formats and plain language requirements), and will consult with the Designated State Agency to determine that the plan is consistent with applicable State laws, and obtain appropriate State plan assurances.

(b) Failure to comply with the State plan requirements may result in the loss of Federal funds as described in section 127 of the Act (42 U.S.C. 15027). The Secretary, or his or her designee, must provide reasonable notice and an opportunity for a hearing to the Council and the Designated State Agency before withholding any payments for planning, administration, and services.

(c) The State plan must be submitted through the designated system by AIDD which is used to collect quantifiable and qualifiable information from the State Councils on Developmental Disabilities. The plan must:

(1) Identify the agency or office in the State designated to support the Council in accordance with section

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124(c)(2) and 125(d) of the Act. The Designated State Agency shall provide required assurances and support services requested from and negotiated with the Council.

(2) For a year covered by the State plan, include for each area of emphasis under which a goal or goals have been identified, the measures of progress the Council has established or is required to apply in its progress in furthering the purpose of the Developmental Disabilities Assistance and Bill of Rights Act through advocacy, capacity building, and systemic change activities.

(3) Provide for the establishment and maintenance of a Council in accordance with section 125 of the Act and describe the membership of such Council. The non-State agency members of the Council shall be subject to term limits to ensure rotating membership.

(d) The State plan must be updated during the five-year period when substantive changes are contemplated in plan content, including changes under paragraph (c)(2) of this section.

(e) The State plan may provide for funding projects to demonstrate new approaches to direct services that enhance the independence, productivity, and integration and inclusion into the community of individuals with developmental disabilities. Direct service demonstrations must be short-term, with a strategy to locate on-going funding from other sources after five years. Any State desiring to receive assistance beyond five years, under this subtitle, shall include in the State plan the information listed in paragraphs (e)(1) through (3) of this section, and AIDD reserves the right as the overseeing agency to deny the continuation of the demonstration project beyond five years.

(1) The estimated period for the project's continued duration;

(2) Justifications of why the project cannot be funded by the State or other sources and should receive continued funding; and

(3) Provide data outcomes showing evidence of success.

(f) The State plan may provide for funding of other demonstration projects or activities, including but not limited to outreach, training, technical assistance, supporting and educating

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communities, interagency collaboration and coordination, coordination with related councils, committees and programs, barrier elimination, systems design and redesign, coalition development and citizen participation, and informing policymakers. Demonstrations must be short-term, with a strategy to locate on-going funding from other sources after five years. Any State desiring to receive assistance beyond five years, under this subtitle, shall include in the State plan the information listed in paragraphs (f)(1) through (3) of this section, and AIDD reserves the right as the overseeing agency to deny the continuation of the demonstration project beyond five years.

(1) The estimated period for the project's continued duration;

(2) Justifications on why the project cannot be funded by the State or other resources and should receive continued funding; and

(3) Provide data showing evidence of success.

(g) The State plan must contain assurances that are consistent with section 124 of the Act (42 U.S.C. 15024).

**§ 1326.31 State plan submittal and approval.**

(a) The Council shall issue a public notice about the availability of the proposed State plan or State plan amendment(s) for comment. The notice shall be published in formats accessible to individuals with developmental disabilities and the general public (*e.g.* public forums, Web sites, newspapers, and other current technologies) and shall provide a 45-day period for public review and comment. The Council shall take into account comments submitted within that period, and respond in the State plan to significant comments and suggestions. A summary of the Council's responses to State plan comments shall be submitted with the State plan and made available for public review. This document shall be made available in accessible formats upon request.

(b) The State plan or amendment must be submitted to AIDD 45 days prior to the fiscal year for which it is applicable.

(c) Failure to submit an approvable State plan or amendment prior to the

Federal fiscal year for which it is applicable may result in the loss of Federal financial participation. Plans received during a quarter of the Federal fiscal year are approved back to the first day of the quarter so costs incurred from that point forward are approvable. 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.

(d) The Secretary, or his or her designee, must approve any State plan or plan amendment provided it meets the requirements of the Act and this regulation.

**§ 1326.32 Periodic reports: Federal assistance to State Councils on Developmental Disabilities.**

(a) The Governor or appropriate State financial officer must submit financial status reports (AIDD-02B) on the programs funded under this subpart semiannually.

(b) By January 1 of each year, the State Council on Developmental Disabilities shall submit to AIDD, an Annual Program Performance Report through the system established by AIDD. In order to be accepted by AIDD, reports must meet the requirements of section 125(c)(7) of the Act (42 U.S.C. 15025) and the applicable regulations, include the information on its program necessary for the Secretary, or his or her designee, to comply with section 105(1), (2), and (3) of the Act (42 U.S.C. 15005), and any other information requested by AIDD. Each Report shall contain information about the progress made by the Council in achieving its goals including:

(1) A description of the extent to which the goals were achieved;

(2) A description of the strategies that contributed to achieving the goals;

(3) To the extent to which the goals were not achieved, a description of factors that impeded the achievement;

(4) Separate information on the self-advocacy goal described in section 124(c)(4)(A)(ii) of the Act (42 U.S.C. 15024);

(5) As appropriate, an update on the results of the comprehensive review and analysis of the extent to which

services, supports, and other assistance are available to individuals with developmental disabilities and their families, including the extent of unmet needs for services, supports, and other assistance for those individuals and their families, in the State as required in section 124(c)(3) of the Act (42 U.S.C. 15024);

(6) Information on individual satisfaction with Council supported or conducted activities;

(7) A description of the adequacy of health care and other services, supports, and assistance that individuals with developmental disabilities in Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICF/IID) receive;

(8) To the extent available, a description of the adequacy of health care and other services, supports, and assistance received by individuals with developmental disabilities served through home and community-based waivers (authorized under section 1915(c) of the Social Security Act);

(9) An accounting of the funds paid to the State awarded under the DD Council program;

(10) A description of resources made available to carry out activities to assist individuals with developmental disabilities directly attributable to Council actions;

(11) A description of resources made available for such activities that are undertaken by the Council in collaboration with other entities; and

(12) A description of the method by which the Council will widely disseminate the annual report to affected constituencies and the general public and will assure that the report is available in accessible formats.

(c) Each Council must include in its Annual Program Performance Report information on its achievement of the measures of progress.

**§ 1326.33 Protection of employees interests.**

(a) Based on section 124(c)(5)(J) of the Act (42 U.S.C. 15024(c)(5)(J)), the State plan must assure fair and equitable arrangements to protect the interest of all institutional employees affected by actions under the plan to provide community living activities. The State

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must inform employees of the State's decision to provide for community living activities. Specific arrangements for the protection of affected employees must be developed through negotiations between the appropriate State authorities and employees or their representatives.

(b) 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. To the maximum extent practicable, these 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 Designated State Agency.**

(a) The Designated State Agency shall provide the required assurances and other support services as requested and negotiated by the Council. These include:

(1) Provision of financial reporting and other services as provided under section 125(d)(3)(D) of the Act; and

(2) Information and direction, as appropriate, on procedures on the hiring, supervision, and assignment of staff in accordance with State law.

(b) If the State Council on Developmental Disabilities requests a review by the Governor (or State legislature, if applicable) of the Designated State Agency, the Council must provide documentation of the reason for change, and recommend a new preferred Designated State Agency by the Governor (or State legislature, if applicable).

(c) After the review is completed by the Governor (or State legislature, if applicable), and if no change is made, a majority of the non-State agency members of the Council may appeal to the Secretary, or his or her designee, for a review of the Designated State Agency if the Council's independence as an advocate is not assured because of the actions or inactions of the Designated State agency.

(d) The following steps apply to the appeal of the Governor's (or State legislature, if applicable) designation of the Designated State Agency.

(1) Prior to an appeal to the Secretary, or his or her designee, the State Council on Developmental Disabilities, must give a 30 day written notice, by certified mail, to the Governor (or State legislature, if applicable) of the majority of non-State members' intention to appeal the designation of the Designated State Agency.

(2) The appeal must clearly identify the grounds for the claim that the Council's independence as an advocate is not assured because of the action or inactions of the Designated State Agency.

(3) Upon receipt of the appeal from the State Council on Developmental Disabilities, the Secretary, or his or her designee, will notify the State Council on Developmental Disabilities and the Governor (or State legislature, if applicable), by certified mail, that the appeal has been received and will be acted upon within 60 days. The Governor (or State legislature, if applicable) shall within 10 working days from the receipt of the Secretary's, or his or her designated person's, notification provide written comments to the Secretary, or his or her designee, (with a copy sent by registered or certified mail to the Council) on the claims in the Council's appeal. Either party may request, and the Secretary, or his or her designee, may grant, an opportunity for an informal meeting with the Secretary, or his or her designee, at which representatives from both parties will present their views on the issues in the appeal. The meeting will be held within 20 working days of the submission of written comments by the Governor (or State legislature, if applicable). The Secretary, or his or her designee, will promptly notify the parties of the date and place of the meeting.

(4) The Secretary, or his or her designee, will review the issue(s) and provide a final written decision within 60 days following receipt of the appeal from the State Council on Developmental Disabilities. If the determination is made that the Designated State Agency should be redesignated, the

Governor (or State legislature, if applicable) must provide written assurance of compliance within 45 days from receipt of the decision.

(5) Anytime during this appeals process the State Council on Developmental Disabilities may withdraw such request if resolution has been reached with the Governor (or State legislature, if applicable) on the Designated State Agency. The Governor (or State legislature, if applicable) must notify the Secretary, or his or her designee, in writing of such a decision.

(e) The Designated State Agency may authorize the Council to contract with State agencies other than the Designated State Agency to perform functions of the Designated State Agency.

**§ 1326.35 Allowable and non-allowable costs for Federal assistance to State Councils on Developmental Disabilities.**

(a) Under this subpart, Federal funding is available for costs resulting from obligations incurred under the approved State plan for the necessary expenses of administering the plan, which may include the establishment and maintenance of the State Council, and all programs, projects, and activities carried out under the State plan.

(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 rights of individuals with developmental disabilities in section 109 of the Act (42 U.S.C. 15009).

(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.

(c) Expenditure of funds that supplant State and local funds are not allowed. Supplanting occurs when State or local funds previously used to fund activities under the State plan are replaced by Federal funds for the same purpose. However, supplanting does not occur if State or local funds are replaced with Federal funds for a par-

ticular activity or purpose in the approved State plan if the replaced State or local funds are then used for other activities or purposes in the approved State plan.

(d) For purposes of determining aggregate minimum State share of expenditures, there are three categories of expenditures:

(1) Expenditures for projects or activities undertaken directly by the Council and Council staff to implement State plan activities, as described in section 126(a)(3) of the Act, require no non-Federal aggregate of the necessary costs of such activities.

(2) Expenditures for projects whose activities or products target individuals with developmental disabilities who live in urban or rural poverty areas, as determined by the Secretary, or his or her designee, but not carried out directly by the Council and Council staff, as described in section 126(a)(2) of the Act, shall have non-Federal funding of at least 10 percent in the aggregate of the necessary costs of such projects.

(3) All other projects not directly carried out by the Council and Council staff shall have non-Federal funding of at least 25 percent in the aggregate of the necessary costs of such projects.

(e) The Council may vary the non-Federal funding required on a project-by-project, activity-by-activity basis (both poverty and non-poverty activities), including requiring no non-Federal funding from particular projects or activities as the Council deems appropriate so long as the requirement for aggregate non-Federal funding is met.

**§ 1326.36 Final disapproval of the State plan 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 AIDD for review. If after contacting the State on issues with the plan with no resolution, a detailed written analysis of the reasons for recommending disapproval shall be prepared and provided to the State Council and State Designated Agency.

(b) Once the Secretary, or his or her designee, has determined that the



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State plan, in whole or in part, is not approvable, notice of this determination shall be sent to the State with 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 subpart E of this part.

(c) The Secretary's, or his or her designee's, decision has been forwarded to the State Council and its Designated State Agency by certified mail with a return receipt requested.

(d) A State has filed its request for a hearing with the Secretary, or his or her designee, within 21 days of the receipt of the decision. The request for a hearing must be sent by certified mail to the Secretary, or his or her designee. 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 E—Practice and Procedure for Hearings Pertaining to States' Conformity and Compliance With Developmental Disabilities State Plans, Reports, and Federal Requirements**

GENERAL

**§ 1326.80 Definitions.**

For purposes of this subpart:

*Payment or allotment.* The term "payment" or "allotment" means an amount provided under part B or C of the Developmental Disabilities Assistance and Bill or Rights Act of 2000. This term includes Federal funds provided under the Act irrespective of whether the State must match the Federal portion of the expenditure. This term shall include funds previously covered by the terms "Federal financial participation," "the State's total allotment," "further payments," "payments," "allotment" and "Federal funds."

*Presiding officer.* The term "presiding officer" means anyone designated by the Secretary to conduct any hearing held under this subpart. The term in-

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cludes the Secretary, or the Secretary's designee, if the Secretary or his or her designee presides over the hearing. For purposes of this subpart the Secretary's "designee" refers to a person, such as the Administrator of ACL, who has been delegated broad authority to carry out all or some of the authorizing statute. The term designee does not refer to a presiding officer designated only to conduct a particular hearing or hearings.

**§ 1326.81 Scope of rules.**

(a) The rules of procedures in this subpart govern the practice for hearings afforded by the Department to States pursuant to sections 124, 127, and 143 of the Act. (42 U.S.C. 15024, 15027 and 15043).

(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 that are, or otherwise would be, considered at the hearing. Negotiation 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.

**§ 1326.82 Records to the 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.

**§ 1326.83 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.

**§ 1326.84 Suspension of rules.**

Upon notice to all parties, the Secretary or the Secretary's designee 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.

**§ 1326.85 Filing and service of papers.**

(a) All papers in the proceedings must be filed with the designated individual 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

**§ 1326.90 Notice of hearing or opportunity for hearing.**

Proceedings are commenced by mailing a notice of hearing or opportunity for hearing from the Secretary, or his or her designee, to the State Council on Developmental Disabilities and the Designated State Agency, or to the State Protection and Advocacy System or designating official. The notice must state the time and place for the hearing and the issues that will be considered. The notice must be published in the FEDERAL REGISTER.

**§ 1326.91 Time of hearing.**

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

**§ 1326.92 Place.**

The hearing must be held on a date and at a time and place determined by the Secretary, or his or her designee with due regard for convenience, and necessity of the parties or their representatives. The site of the hearing shall be accessible to individuals with disabilities.

**§ 1326.93 Issues at hearing.**

(a) Prior to a hearing, the Secretary or his or her designee 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 Secretary or his or her designee.

(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 Secretary, or his or her designee, 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 Secretary, or his or her designee, must terminate the hearing.

(2) Prior to the removal of an issue, in whole or in part, from a hearing involving issues relating to the conformity with Federal requirements under part B of the Act, of the State plan or the activities of the State Protection and Advocacy System, the Secretary, or his or her designee, 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 hearing and the reasons for that decision. A copy of the proposed State plan provision or document explaining changes in the activities of the State's Protection and Advocacy System on which the State and the Secretary, or his or her designee, 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 under part B of the Act, with the State plan or with Federal requirements, or compliance of the State Protection and Advocacy System with Federal requirements, the same procedure set forth in paragraph (c)(2) of this section must be followed with respect to any report or evidence resulting in a conclusion by the Secretary, or his or her designee, 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

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in §1326.90 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.

### § 1326.94 Request to participate in hearing.

(a) The Department, the State, the State Council on Developmental Disabilities, the Designated State Agency, and the State Protection and Advocacy System, 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 designated individual 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 §1326.85(b). The petition must concisely state:

(i) Petitioner's interest in the proceeding;

(ii) Who will appear for petitioner;

(iii) The issues the petitioner wishes to address; and

(iv) Whether the petitioner intends to present witnesses.

(c)(1) Any interested person or organization wishing to participate as amicus curiae must file a petition with the designated individual 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 the petitioner intends to present argument.

(2) The presiding officer may grant the petition if he or she finds that the petitioner has a legitimate interest in the proceedings and that such participation will not unduly delay the outcome and may contribute materially to the proper disposition of the issues.

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(3) 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 also may submit a brief or written statement at such time as the parties submit briefs and must serve a copy on each party.

### HEARING PROCEDURES

#### § 1326.100 Who presides.

(a) The presiding officer at a hearing must be the Secretary, his or her designee, or another person specifically designated for a particular hearing or hearings.

(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.

#### § 1326.101 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 the time for filing motions, petitions, briefs, or other items in matters pending before him or her;

(10) If the presiding officer is the Secretary, or his or her designee, make a final decision;

(11) If the presiding officer is a person other than the Secretary or his or her designee, the presiding officer shall certify the entire record, including recommended findings and proposed decision, to the Secretary or his or her designee; and

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

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

(c) If the presiding officer is a person other than the Secretary or his or her designee, 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 payments or allotments should be withheld with respect to the entire State plan or the activities of the State's Protection and Advocacy System, or whether the payments or allotments should be withheld only with respect to those parts of the program affected by such noncompliance.

#### § 1326.102 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; and

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

#### § 1326.103 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.

#### § 1326.104 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.

#### § 1326.105 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,

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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.

### § 1326.106 Exclusion from hearing for misconduct.

Disrespectful, disorderly, or rebellious 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.

### § 1326.107 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.

### § 1326.108 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

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be voice recording devices, unless otherwise agreed by all of the parties and the presiding officer.

### § 1326.109 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.

## POST-HEARING PROCEDURES, DECISIONS

### § 1386.110 Post-hearing briefs.

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

### § 1326.111 Decisions following hearing.

(a) If the Secretary, or his or her designee, is the presiding officer, he or she must issue a decision within 60 days after the time for submission of post-hearing briefs has expired.

(b)(1) If the presiding officer is another person designated for a particular hearing or hearings, he or she must, within 30 days after the time for submission of post-hearing briefs has expired, certify the entire record to the Secretary (or his or her designee) including the recommended findings and proposed decision.

(2) The Secretary, or his or her designee, must serve a copy of the recommended findings and proposed decision upon all parties and amici.

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

(4) The Secretary, or his or her designee, must review the recommended decision and, within 60 days of its issuance, issue his or her own decision.

(c) If the Secretary, or his or her designee, concludes:

(1) In the case of a hearing pursuant to sections 124, 127, or 143 of the Act, that a State plan or the activities of

the State's Protection and Advocacy System does not comply with Federal requirements, he or she shall also specify whether the State's payment or allotment for the fiscal year will not be authorized for the State or whether, in the exercise of his or her discretion, the payment or allotment will be limited to the parts of the State plan or the activities of the State's Protection and Advocacy System not affected by the noncompliance.

(2) In the case of a hearing pursuant to section 127 of the Act that the State is not complying with the requirements of the State plan, he or she also must specify whether the State's payment or allotment will be made available to the State or whether, in the exercise of his or her discretion, the payment or allotment will be limited to the parts of the State plan not affected by such noncompliance. The Secretary, or his or her designee, may ask the parties for recommendations or briefs or may hold conferences of the parties on these questions.

(d) The decision of the Secretary, or his or her designee, 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 128 of the Act (42 U.S.C. 15028). The Secretary's, or his or her designee's, decision must be promptly served on all parties and amici.

**§ 1326.112 Effective date of decision by the Secretary.**

(a) If, in the case of a hearing pursuant to section 124 of the Act, the Secretary, or his or her designee, concludes that a State plan does not comply with Federal requirements, and the decision provides that the payment or allotment will be authorized but limited to parts of the State plan not affected by such noncompliance, the decision must specify the effective date for the authorization of the payment or allotment.

(b) In the case of a hearing pursuant to sections 127 or 143 of the Act, if the Secretary, or his or her designee, concludes that the State is not complying with the requirements of the State plan or if the activities of the State's

Protection and Advocacy System do not comply with Federal requirements, the decision that further payments or allotments will not be made to the State, or will be limited to the parts of the State plan or activities of the State Protection and Advocacy System not affected, must specify the effective date for withholding payments or allotments.

(c) The effective date may not be earlier than the date of the decision of the Secretary, or his or her designee, 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 1327—DEVELOPMENTAL DISABILITIES PROJECTS OF NATIONAL SIGNIFICANCE**

AUTHORITY: 42 U.S.C. 15001 *et seq.*

SOURCE: 80 FR 44807, July 27, 2015, unless otherwise noted. Redesignated and amended at 81 FR 35645, 35647.

**§ 1327.1 General requirements.**

(a) All projects funded under this part must be of national significance and serve or relate to individuals with developmental disabilities to comply with subtitle E of the Act, sections 161–163 (42 U.S.C. 15081–15083).

(b) In general, Projects of National Significance (PNS) provide technical assistance, collect data, demonstrate exemplary and innovative models, disseminate knowledge at the local and national levels, and otherwise meet the goals of Projects of National Significance section 161 (42 U.S.C. 15081).

(c) Projects of National Significance may engage in one or more of the types of activities provided in section 161(2) of the Act.

(d) In general, eligible applicants for PNS funding are public and private non-profit entities, 42 U.S.C. 15082, such as institutions of higher learning, State and local governments, and Tribal governments. The program announcements will specifically state any further eligibility requirements for the priority areas in the fiscal year.

(e) Faith-based organizations are eligible to apply for PNS funding, providing that the faith-based organizations meet the specific eligibility criteria contained in the program announcement for the fiscal year.

**PART 1328—THE NATIONAL NETWORK OF UNIVERSITY CENTERS FOR EXCELLENCE IN DEVELOPMENTAL DISABILITIES, EDUCATION, RESEARCH, AND SERVICE**

- Sec.  
 1328.1 Definitions.  
 1328.2 Purpose.  
 1328.3 Core functions.  
 1328.4 National training initiatives on critical and emerging needs.  
 1328.5 Applications.  
 1328.6 Governance and administration.  
 1328.7 Five-year plan and annual report.

AUTHORITY: 42 U.S.C. 15001 *et seq.*

SOURCE: 80 FR 44807, July 27, 2015, unless otherwise noted. Redesignated and amended at 81 FR 35645, 35647, June 3, 2016.

**§ 1328.1 Definitions.**

*States.* For the purpose of this part, “State” means each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, and Guam.

**§ 1328.2 Purpose.**

(a) The Secretary, or his or her designee awards grants to eligible entities designated as University Centers for Excellence in Developmental Disabilities Education, Research, and Service (“UCEDDs”, or “Centers”) in each State to pay for the Federal share of the cost of the administration and operation of the Centers. Centers shall:

(1) Provide leadership in, advise Federal, State, and community policymakers about, and promote opportunities for individuals with developmental disabilities to exercise self-determination, be independent, be productive, and be integrated and included in all facets of community life.

(2) Be interdisciplinary education, research, and public service units of universities or public not-for-profit entities associated with universities that engage in core functions, described in

§ 1388.3, addressing, directly or indirectly, one or more of the areas of emphasis, as defined in § 1385.3 of this chapter.

(b) To conduct National Training Initiatives on Critical and Emerging Needs as described in § 1388.4.

**§ 1328.3 Core functions.**

The Centers described in § 1388.2 must engage in the core functions referred to in this section, which shall include:

(a) Provision of interdisciplinary pre-service preparation and continuing education of students and fellows, which may include the preparation and continuing education of leadership, direct service, clinical, or other personnel to strengthen and increase the capacity of States and communities to achieve the purpose of the DD Act of 2000.

(b) Provision of community services:  
 (1) That provide training or technical assistance for individuals with developmental disabilities, their families, professionals, paraprofessionals, policymakers, students, and other members of the community; and

(2) That may provide services, supports, and assistance for the persons listed in paragraph (b)(1) of this section through demonstration and model activities.

(c) Conduct of research, which may include basic or applied research, evaluation, and the analysis of public policy in areas that affect or could affect, either positively or negatively, individuals with developmental disabilities and their families.

(d) Dissemination of information related to activities undertaken to address the purpose of the DD Act of 2000, especially dissemination of information that demonstrates that the network authorized under Subtitle D of the Act is a national and international resource that includes specific substantive areas of expertise that may be accessed and applied in diverse settings and circumstances.

**§ 1328.4 National training initiatives on critical and emerging needs.**

(a) Supplemental grant funds for National Training Initiatives (NTIs) on critical and emerging needs may be reserved when each Center described in

section 152 of the DD Act has received a grant award of at least \$500,000, adjusted for inflation.

(b) The grants shall be awarded to Centers to pay for the Federal share of the cost of training initiatives related to the unmet needs of individuals with developmental disabilities and their families.

(c) The grants shall be awarded on a competitive basis, and for periods of not more than 5 years.

#### § 1328.5 Applications.

(a) To be eligible to receive a grant under §1388.2 for a Center, an entity shall submit to the Secretary, or his or her designee, an application at such time, in such manner, and containing such information, as the Secretary, or his or her designee, may require for approval.

(b) Each application shall describe a five-year plan that must include:

(1) Projected goal(s) related to one or more areas of emphasis described in §1385.3 of this chapter for each of the core functions.

(2) Measures of progress.

(c) The application shall contain or be supported by reasonable assurances that the entity designated as the Center will:

(1) Meet the measures of progress;

(2) Address the projected goals, and carry out goal-related activities, based on data driven strategic planning and in a manner consistent with the objectives of subtitle D of the Act, that:

(i) Are developed in collaboration with the Consumer Advisory Committee established pursuant to paragraph (c)(5) of this section;

(ii) Are consistent with, and to the extent feasible complement and further, the Council goals contained in the State plan submitted under section 124 of the DD Act of 2000 and the goals of the Protection and Advocacy System established under section 143 of the DD Act of 2000; and

(iii) Will be reviewed and revised annually as necessary to address emerging trends and needs.

(3) Use the funds made available through the grant to supplement, and not supplant, the funds that would otherwise be made available for activities described in §1388.2(a)(1) and (2).

(4) Protect, consistent with the policy specified in section 101(c) of the DD Act of 2000 the legal and human rights of all individuals with developmental disabilities (especially those individuals under State guardianship who are involved in activities carried out under programs assisted under subtitle D of the Act).

(5) Establish a Consumer Advisory Committee:

(i) Of which a majority of the members shall be individuals with developmental disabilities and family members of such individuals;

(ii) That is comprised of:

(A) Individuals with developmental disabilities and related disabilities;

(B) Family members of individuals with developmental disabilities;

(C) A representative of the State Protection and Advocacy System;

(D) A representative of the State Council on Developmental Disabilities;

(E) A representative of a self-advocacy organization described in section 124(c)(4)(A)(ii)(I) of the DD Act of 2000 (42 U.S.C. 15024(c)(4)(A)(ii)(I)); and

(F) Representatives of organizations that may include parent training and information centers assisted under section 671 or 672 of the Individuals with Disabilities Education Act (20 U.S.C. 1471, 1472), entities carrying out activities authorized under section 104 or 105 of the Assistive Technology Act of 1998 (29 U.S.C. 3003, 3004), relevant State agencies, and other community groups concerned with the welfare of individuals with developmental disabilities and their families.

(iii) That reflects the racial and ethnic diversity of the State;

(iv) That shall:

(A) Consult with the Director of the Center regarding the development of the five-year plan;

(B) Participate in an annual review of, and comment on, the progress of the Center in meeting the projected goals contained in the plan;

(C) Make recommendations to the Director of the Center regarding any proposed revisions of the plan that might be necessary; and

(v) Meet as often as necessary to carry out the role of the committee, but at a minimum twice during each grant year.



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(6) To the extent possible, utilize the infrastructure and resources obtained through funds made available under the grant to leverage additional public and private funds to successfully achieve the projected goals developed in the five-year plan;

(7) Have a director with appropriate academic credentials, demonstrated leadership, expertise regarding developmental disabilities, significant experience in managing grants and contracts, and the ability to leverage public and private funds; and

(i) Allocate adequate staff time to carry out activities related to each of the core functions described in §1388.3.

(ii) [Reserved]

(8) Educate, and disseminate information related to the purpose of the DD Act of 2000 to the legislature of the State in which the Center is located, and to Members of Congress from such State.

(d) All applications submitted under this section shall be subject to technical and qualitative review by peer review groups as described under paragraph (d)(1) of this section.

(1) Each peer review group shall include such individuals with disabilities and parents, guardians, or advocates of or for individuals with developmental disabilities, as are necessary to carry out this section.

(2) [Reserved]

(e)(1) The Federal share of the cost of administration or operation of a Center, or the cost of carrying out a training initiative, supported by a grant made under subtitle D of the Act may not be more than 75 percent of the necessary cost of such project, as determined by the Secretary, or his or her designee.

(2) In the case of a project whose activities or products target individuals with developmental disabilities who live in an urban or rural poverty area, as determined by the Secretary, or his or her designee, the Federal share of the cost of the project may not be more than 90 percent of the necessary costs of the project, as determined by the Secretary, or his or her designee.

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**§ 1328.6 Governance and administration.**

(a) The UCEDD must be associated with, or an integral part of, a university and promote the independence, productivity, integration, and inclusion of individuals with developmental disabilities and their families.

(b) The UCEDD must have a written agreement or charter with the university, or affiliated university that specifies the UCEDD designation as an official university component, the relationships between the UCEDD and other university components, the university commitment to the UCEDD, and the UCEDD commitment to the university.

(c) Within the university, the UCEDD must maintain the autonomy and organizational structure required to carry out the UCEDD mission and provide for the mandated activities.

(d) The UCEDD Director must report directly to, or be, a University Administrator who will represent the interests of the UCEDD within the University.

(e) The University must demonstrate its support for the UCEDD through the commitment of financial and other resources.

(f) UCEDD senior professional staff, including the UCEDD Director, Associate Director, Training Director, and Research Coordinator, must hold faculty appointments in appropriate academic departments of the host or an affiliated university, consistent with university policy. UCEDD senior professional staff must contribute to the university by participation on university committees, collaboration with other university departments, and other university community activities.

(g) UCEDD faculty and staff must represent the broad range of disciplines and backgrounds necessary to implement the full inclusion of individuals with developmental disabilities in all aspects of society, consonant with the spirit of the Americans with Disabilities Act (ADA).

(h) The management practices of the UCEDD, as well as the organizational structure, must promote the role of the UCEDD as a bridge between the University and the community. The UCEDD must actively participate in

community networks and include a range of collaborating partners.

(i) The UCEDD's Consumer Advisory Committee must meet regularly. The membership of the Consumer Advisory Committee must reflect the racial and ethnic diversity of the State or community in which the UCEDD is located. The deliberations of the Consumer Advisory Committee must be reflected in UCEDD policies and programs.

(j) The UCEDD must maintain collaborative relationships with the SCDD and P&A. In addition, the UCEDD must be a permanent member of the SCDD and regularly participate in Council meetings and activities, as prescribed by the Act.

(k) The UCEDD must maintain collaborative relationships and be an active participant with the UCEDD network and individual organizations.

(l) The UCEDD must demonstrate the ability to leverage additional resources.

(m) The university must demonstrate that the UCEDD have adequate space to carry out the mandated activities.

(n) The UCEDD physical facility and all program initiatives conducted by the UCEDD must be accessible to individuals with disabilities as provided for by section 504 of the Rehabilitation Act and Titles II and III of the Americans with Disabilities Act.

(o) The UCEDD must integrate the mandated core functions into its activities and

programs and must have a written plan for each core function area.

(p) The UCEDD must have in place a long range planning capability to enable it to respond to emergent and future developments in the field.

(q) The UCEDD must utilize state-of-the-art methods, including the active participation of individuals, families and others of UCEDD programs and services to evaluate programs. The UCEDD must refine and strengthen its programs based on evaluation findings.

(r) The UCEDD Director must demonstrate commitment to the field of developmental disabilities, leadership, and vision in carrying out the mission of the UCEDD.

(s) The UCEDD must meet the "Employment of Individuals with Disabil-

ities" requirements as described in section 107 of the Act.

#### **§ 1328.7 Five-year plan and annual report.**

(a) As required by section 154(a)(2) of the DD Act of 2000 (42 U.S.C. 15064), the application for core funding for a UCEDD shall describe a five-year plan, including a projected goal or goals related to one or more areas of emphasis for each of the core functions in section 153(a)(2) of the DD Act of 2000 (42 U.S.C.15063).

(1) For each area of emphasis under which a goal has been identified, the UCEDD must state in its application the measures of progress with the requirements of the law and applicable regulation, in accordance with current practice.

(2) If changes are made to the measures of progress established for a year, the five-year plan must be amended to reflect those changes and approved by AIDD upon review.

(3) By July 30 of each year, a UCEDD shall submit an Annual Report, using the system established or funded by AIDD. In order to be accepted by AIDD, an Annual Report must meet the requirements of section 154(e) of the Act (42 U.S.C. 15064) and, the applicable regulations, and include the information necessary for the Secretary, or his or her designee, to comply with section 105(1), (2), and (3) of the Act (42 U.S.C. 15005) and any other information requested by AIDD. The Report shall include information on progress made in achieving the UCEDD's goals for the previous year, including:

(i) The extent to which the goals were achieved;

(ii) A description of the strategies that contributed to achieving the goals;

(iii) The extent to which the goals were not achieved;

(iv) A detailed description of why goals were not met; and

(v) An accounting of the manner in which funds paid to the UCEDD for a fiscal year were expended.

(4) The Report also must include information on proposed revisions to the goals and a description of successful efforts to leverage funds, other than

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funds under the Act, to pursue goals consistent with the UCEDD program.

(5) Each UCEDD must include in its Annual Report information on its achievement of the measures of progress.

(b) [Reserved]

**PART 1330—NATIONAL INSTITUTE FOR DISABILITY, INDEPENDENT LIVING, AND REHABILITATION RESEARCH**

**Subpart A—Disability, Independent Living, and Rehabilitation Research Projects and Centers Program**

Sec.

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**Subpart B—Requirements for Awardees**

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1330.20 Peer review purpose.

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**Subpart D—Disability, Independent Living, and Rehabilitation Research Fellowships**

1330.30 Fellows program.

**Subpart E—Special Projects and Demonstrations for Spinal Cord Injuries**

1330.40 Spinal cord injuries program.

AUTHORITY: 29 U.S.C. 709, 3343.

SOURCE: 81 FR 29159, May 11, 2016, unless otherwise noted.

**Subpart A—Disability, Independent Living, and Rehabilitation Research Projects and Centers Program**

**§ 1330.1 General.**

(a) The Disability, Independent Living, and Rehabilitation Research

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Projects and Centers Program provides grants to establish and support:

(1) The following Disability, Independent Living, and Rehabilitation Research and Related Projects:

(i) Disability, Independent Living, and Rehabilitation Research Projects;

(ii) Field-Initiated Projects;

(iii) Advanced Rehabilitation Research Training Projects; and

(2) The following Disability, Independent Living, and Rehabilitation Research Centers:

(i) Rehabilitation Research and Training Centers;

(ii) Rehabilitation Engineering Research Centers.

(b) The purpose of the Disability, Independent Living, and Rehabilitation Research Projects and Centers Program is to plan and conduct research, development, demonstration projects, training, dissemination, and related activities, including international activities, to:

(1) Develop methods, procedures, and rehabilitation technology, that maximize the full inclusion and integration into society, employment, education, independent living, family support, and economic and social self-sufficiency of individuals with disabilities, especially individuals with the most severe disabilities; and

(2) Improve the effectiveness of services authorized under the Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.*

**§ 1330.2 Eligibility for assistance and other regulations and guidance.**

(a) Unless otherwise stated in this part or in a determination by the NIDILRR Director, the following entities are eligible for an award under this program:

(1) States.

(2) Public or private agencies, including for-profit agencies.

(3) Public or private organizations, including for-profit organizations.

(4) Institutions of higher education.

(5) Indian tribes and tribal organizations.

(b) Other sources of regulation which may apply to awards under this part include but are not limited to:

(1) 45 CFR part 16—Procedures of the Departmental Grant Appeals Board.

(2) 45 CFR part 46—Protection of Human Subjects.

(3) 45 CFR part 75—Uniform Administrative Requirements, Cost Principles, and Audit Requirements for HHS Awards.

(4) 2 CFR parts 376 and 382—Nonprocurement Debarment and Suspension and Requirements for Drug-Free Workplace (Financial Assistance).

(5) 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.

(6) 45 CFR part 81—Practice and Procedure for Hearings under part 80 of this title.

(7) 45 CFR part 84—Nondiscrimination on the Basis of Handicap in Programs or Activities Receiving Federal Financial Assistance.

(8) 45 CFR part 86—Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance.

(9) 45 CFR part 87—Equal Treatment of Faith-Based Organizations.

(10) 45 CFR part 91—Nondiscrimination on the Basis of Age in Programs or Activities Receiving Federal Financial Assistance from HHS.

(11) 45 CFR part 93—New Restrictions on Lobbying.

### § 1330.3 Definitions.

As used in this part:

(a) *Secretary* means the Secretary of the Department of Health and Human Services.

(b) *Administrator* means the Administrator of the Administration for Community Living.

(c) *Director* means the Director of the National Institute on Disability, Independent Living, and Rehabilitation Research.

(d) *Research* is classified on a continuum from basic to applied:

(1) *Basic research* is research in which the investigator is concerned primarily with gaining new knowledge or understanding of a subject without reference to any immediate application or utility.

(2) *Applied research* is research in which the investigator is primarily interested in developing new knowledge,

information, or understanding which can be applied to a predetermined rehabilitation problem or need.

(e) *Development activities* use knowledge and understanding gained from research to create materials, devices, systems, or methods beneficial to the target population, including design and development of prototypes and processes.

(f) *Products* encompass models, methods, tools, applications, and devices, but are not necessarily limited to these types.

### § 1330.4 Stages of research.

For any Disability, Independent Living, and Rehabilitation Research Projects and Centers Program competition, the Department may require in the application materials for the competition that the applicant identify the stage(s) of research in which it will focus the work of its proposed project or center. The four stages of research are:

(a) *Exploration and discovery* mean the stage of research that generates hypotheses or theories through new and refined analyses of data, producing observational findings and creating other sources of research-based information. This research stage may include identifying or describing the barriers to and facilitators of improved outcomes of individuals with disabilities, as well as identifying or describing existing practices, programs, or policies that are associated with important aspects of the lives of individuals with disabilities. Results achieved under this stage of research may inform the development of interventions or lead to evaluations of interventions or policies. The results of the exploration and discovery stage of research may also be used to inform decisions or priorities;

(b) *Intervention development* means the stage of research that focuses on generating and testing interventions that have the potential to improve outcomes for individuals with disabilities. Intervention development involves determining the active components of possible interventions, developing measures that would be required to illustrate outcomes, specifying target populations, conducting field tests, and

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assessing the feasibility of conducting a well-designed intervention study. Results from this stage of research may be used to inform the design of a study to test the efficacy of an intervention;

(c) *Intervention efficacy* means the stage of research during which a project evaluates and tests whether an intervention is feasible, practical, and has the potential to yield positive outcomes for individuals with disabilities. Efficacy research may assess the strength of the relationships between an intervention and outcomes, and may identify factors or individual characteristics that affect the relationship between the intervention and outcomes. Efficacy research can inform decisions about whether there is sufficient evidence to support “scaling-up” an intervention to other sites and contexts. This stage of research may include assessing the training needed for wide-scale implementation of the intervention, and approaches to evaluation of the intervention in real-world applications; and

(d) *Scale-up evaluation* means the stage of research during which a project analyzes whether an intervention is effective in producing improved outcomes for individuals with disabilities when implemented in a real-world setting. During this stage of research, a project tests the outcomes of an evidence-based intervention in different settings. The project examines the challenges to successful replication of the intervention, and the circumstances and activities that contribute to successful adoption of the intervention in real-world settings. This stage of research may also include well-designed studies of an intervention that has been widely adopted in practice, but lacks a sufficient evidence base to demonstrate its effectiveness.

### § 1330.5 Stages of development.

For any Disability, Independent Living, and Rehabilitation Research Projects and Centers Program competition, the Department may require in the notice inviting applications for the competition that the applicant identify the stage(s) of development in which it will focus the work of its proposed

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project or center. The three stages of development are:

(a) *Proof of concept* means the stage of development where key technical challenges are resolved. Stage activities may include recruiting study participants, verifying product requirements; implementing and testing (typically in controlled contexts) key concepts, components, or systems, and resolving technical challenges. A technology transfer plan is typically developed and transfer partner(s) identified; and plan implementation may have started. Stage results establish that a product concept is feasible.

(b) *Proof of product* means the stage of development where a fully-integrated and working prototype, meeting critical technical requirements is created. Stage activities may include recruiting study participants, implementing and iteratively refining the prototype, testing the prototype in natural or less-controlled contexts, and verifying that all technical requirements are met. A technology transfer plan is typically ongoing in collaboration with the transfer partner(s). Stage results establish that a product embodiment is realizable.

(c) *Proof of adoption* means the stage of development where a product is substantially adopted by its target population and used for its intended purpose. Stage activities typically include completing product refinements; and continued implementation of the technology transfer plan in collaboration with the transfer partner(s). Other activities include measuring users’ awareness of the product, opinion of the product, decisions to adopt, use, and retain products; and identifying barriers and facilitators impacting product adoption. Stage results establish that a product is beneficial.

### Subpart B—Requirements for Awardees

#### § 1330.10 General requirements for awardees.

(a) In carrying out a research activity under this program, an awardee must:

(1) Identify one or more hypotheses or research questions;

(2) Based on the hypotheses or research question identified, perform an intensive systematic study in accordance with its approved application directed toward:

(i) New or full scientific knowledge; or

(ii) Understanding of the subject or problem being studied.

(b) In carrying out a development activity under this program, an awardee must create, using knowledge and understanding gained from research, models, methods, tools, systems, materials, devices, applications, or standards that are adopted by and beneficial to the target population. Development activities span one or more stages of development.

(c) In carrying out a training activity under this program, an awardee shall conduct a planned and systematic sequence of supervised instruction that is designed to impart predetermined skills and knowledge.

(d) In carrying out a demonstration activity under this program, an awardee shall apply results derived from previous research, testing, or practice to determine the effectiveness of a new strategy or approach.

(e) In carrying out a utilization activity under this program, a grantee must relate research findings to practical applications in planning, policy making, program administration, and delivery of services to individuals with disabilities.

(f) In carrying out a dissemination activity under this program, a grantee must systematically distribute information or knowledge through a variety of ways to potential users or beneficiaries.

(g) In carrying out a technical assistance activity under this program, a grantee must provide expertise or information for use in problem-solving.

**§ 1330.11 Individuals with disabilities from minority backgrounds.**

(a) If the director so indicates in the application materials or elsewhere, an applicant for assistance under this program must demonstrate in its application how it will address, in whole or in part, the needs of individuals with disabilities from minority backgrounds.

(b) The approaches an applicant may take to meet this requirement may include one or more of the following:

(1) Proposing project objectives addressing the needs of individuals with disabilities from minority backgrounds.

(2) Demonstrating that the project will address a problem that is of particular significance to individuals with disabilities from minority backgrounds.

(3) Demonstrating that individuals from minority backgrounds will be included in study samples in sufficient numbers to generate information pertinent to individuals with disabilities from minority backgrounds.

(4) Drawing study samples and program participant rosters from populations or areas that include individuals from minority backgrounds.

(5) Providing outreach to individuals with disabilities from minority backgrounds to ensure that they are aware of rehabilitation services, clinical care, or training offered by the project.

(6) Disseminating materials to or otherwise increasing the access to disability information among minority populations.

**Subpart C—Selection of Awardees**

**§ 1330.20 Peer review purpose.**

The purpose of peer review is to insure that:

(a) Those activities supported by the National Institute on Disability, Independent Living, and Rehabilitation Research (NIDILRR) are of the highest scientific, administrative, and technical quality; and

(b) Activity results may be widely applied to appropriate target populations and rehabilitation problems.

**§ 1330.21 Peer review process.**

(a) The Director refers each application for an award governed by these regulations in this part to a peer review panel established by the Director.

(b) Peer review panels review applications on the basis of the applicable selection criteria in § 1330.23.

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### § 1330.22 Composition of peer review panel.

(a) The Director selects as members of a peer review panel scientists and other experts in disability, independent living, rehabilitation or related fields who are qualified, on the basis of training, knowledge, or experience, to give expert advice on the merit of the applications under review.

(b) The scientific peer review process shall be conducted by individuals who are not Department of Health and Human Services employees.

(c) In selecting members to serve on a peer review panel, the Director may take into account the following factors:

(1) The level of formal scientific or technical education completed by potential panel members.

(2) The extent to which potential panel members have engaged in scientific, technical, or administrative activities appropriate to the category of applications that the panel will consider; the roles of potential panel members in those activities; and the quality of those activities.

(3) The recognition received by potential panel members as reflected by awards and other honors from scientific and professional agencies and organizations outside the Department.

(4) Whether the panel includes knowledgeable individuals with disabilities, or parents, family members, guardians, advocates, or authorized representatives of individuals with disabilities.

(5) Whether the panel includes individuals from diverse populations.

### § 1330.23 Evaluation process.

(a) The Director selects one or more of the selection criteria to evaluate an application:

(1) The Director establishes selection criteria based on statutory provisions that apply to the Program which may include, but are not limited to:

(i) Specific statutory selection criteria;

(ii) Allowable activities;

(iii) Application content requirements; or

(iv) Other pre-award and post-award conditions; or

(2) The Director may use a combination of selection criteria established

under paragraph (a)(1) of this section and selection criteria from § 1330.24 to evaluate a competition.

(3) For Field-Initiated Projects, the Director does not consider § 1330.24(b) (Responsiveness to the Absolute or Competitive Priority) in evaluating an application.

(b) In considering selection criteria in § 1330.24, the Director selects one or more of the factors listed in the criteria, but always considers the factor in § 1330.24(n) regarding members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability.

(c) The maximum possible score for an application is 100 points.

(d) In the application package or a notice published in the FEDERAL REGISTER, the Director informs applicants of:

(1) The selection criteria chosen and the maximum possible score for each of the selection criteria; and

(2) The factors selected for considering the selection criteria and if points are assigned to each factor, the maximum possible score for each factor under each criterion. If no points are assigned to each factor, the Director evaluates each factor equally.

(e) For all instances in which the Director chooses to allow field-initiated research and development, the selection criteria in § 1330.25 will apply, including the requirement that the applicant must achieve a score of 85 percent or more of maximum possible points.

### § 1330.24 Selection criteria.

In addition to criteria established under § 1330.23(a)(1), the Director may select one or more of the following criteria in evaluating an application:

(a) *Importance of the problem.* In determining the importance of the problem, the Director considers one or more of the following factors:

(1) The extent to which the applicant clearly describes the need and target population.

(2) The extent to which the proposed activities further the purposes of the Rehabilitation Act.

(3) The extent to which the proposed activities address a significant need of individuals with disabilities.

(4) The extent to which the proposed activities address a significant need of rehabilitation service providers.

(5) The extent to which the proposed activities address a significant need of those who provide services to individuals with disabilities.

(6) The extent to which the applicant proposes to provide training in a rehabilitation discipline or area of study in which there is a shortage of qualified researchers, or to a trainee population in which there is a need for more qualified researchers.

(7) The extent to which the proposed project will have beneficial impact on the target population.

(b) *Responsiveness to an absolute or competitive priority.* In determining the application's responsiveness to the application package or the absolute or competitive priority published in the FEDERAL REGISTER, the Director considers one or more of the following factors:

(1) The extent to which the applicant addresses all requirements of the absolute or competitive priority.

(2) The extent to which the applicant's proposed activities are likely to achieve the purposes of the absolute or competitive priority.

(c) *Design of research activities.* In determining the extent to which the design is likely to be effective in accomplishing the objectives of the project, the Director considers one or more of the following factors:

(1) The extent to which the research activities constitute a coherent, sustained approach to research in the field, including a substantial addition to the state-of-the-art.

(2) The extent to which the methodology of each proposed research activity is meritorious, including consideration of the extent to which:

(i) The proposed design includes a comprehensive and informed review of the current literature, demonstrating knowledge of the state-of-the-art;

(ii) Each research hypothesis or research question, as appropriate, is theoretically sound and based on current knowledge;

(iii) Each sample is drawn from an appropriate, specified population and is of sufficient size to address the proposed hypotheses or research ques-

tions, as appropriate, and to support the proposed data analysis methods;

(iv) The source or sources of the data and the data collection methods are appropriate to address the proposed hypotheses or research questions and to support the proposed data analysis methods;

(v) The data analysis methods are appropriate;

(vi) Implementation of the proposed research design is feasible, given the current state of the science and the time and resources available;

(vii) Input of individuals with disabilities and other key stakeholders is used to shape the proposed research activities; and

(viii) The applicant identifies and justifies the stage of research being proposed and the research methods associated with the stage.

(3) The extent to which anticipated research results are likely to satisfy the original hypotheses or answer the original research questions, as appropriate, and could be used for planning additional research, including generation of new hypotheses or research questions, where applicable.

(4) The extent to which the stage of research is identified and justified in the description of the research project(s) being proposed.

(d) *Design of development activities.* In determining the extent to which the project design is likely to be effective in accomplishing project objectives, the Director considers one or more of the following factors:

(1) The extent to which the proposed project identifies a significant need and a well-defined target population for the new or improved product;

(2) The extent to which the proposed project methodology is meritorious, including consideration of the extent to which:

(i) The proposed project shows awareness of the state-of-the-art for current, related products;

(ii) The proposed project employs appropriate concepts, components, or systems to develop the new or improved product;

(iii) The proposed project employs appropriate samples in tests, trials, and other development activities;



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(iv) The proposed project conducts development activities in appropriate environment(s);

(v) Input from individuals with disabilities and other key stakeholders is obtained to establish and guide proposed development activities; and

(vi) The applicant identifies and justifies the stage(s) of development for the proposed project; and activities associated with each stage.

(3) The new product will be developed and tested in an appropriate environment.

(e) *Design of demonstration activities.* In determining the extent to which the design of demonstration activities is likely to be effective in accomplishing the objectives of the project, the Director considers one or more of the following factors:

(1) The extent to which the proposed demonstration activities build on previous research, testing, or practices.

(2) The extent to which the proposed demonstration activities include the use of proper methodological tools and theoretically sound procedures to determine the effectiveness of the strategy or approach.

(3) The extent to which the proposed demonstration activities include innovative and effective strategies or approaches.

(4) The extent to which the proposed demonstration activities are likely to contribute to current knowledge and practice and be a substantial addition to the state-of-the-art.

(5) The extent to which the proposed demonstration activities can be applied and replicated in other settings.

(f) *Design of training activities.* In determining the extent to which the design is likely to be effective in accomplishing the objectives of the project, the Director considers one or more of the following factors:

(1) The extent to which the proposed training materials are likely to be effective, including consideration of their quality, clarity, and variety.

(2) The extent to which the proposed training methods are of sufficient quality, intensity, and duration.

(3) The extent to which the proposed training content:

(i) Covers all of the relevant aspects of the subject matter; and

(ii) If relevant, is based on new knowledge derived from research activities of the proposed project.

(4) The extent to which the proposed training materials, methods, and content are appropriate to the trainees, including consideration of the skill level of the trainees and the subject matter of the materials.

(5) The extent to which the proposed training materials and methods are accessible to individuals with disabilities.

(6) The extent to which the applicant's proposed recruitment program is likely to be effective in recruiting highly qualified trainees, including those who are individuals with disabilities.

(7) The extent to which the applicant is able to carry out the training activities, either directly or through another entity.

(8) The extent to which the proposed didactic and classroom training programs emphasize scientific methodology and are likely to develop highly qualified researchers.

(9) The extent to which the quality and extent of the academic mentorship, guidance, and supervision to be provided to each individual trainee are of a high level and are likely to develop highly qualified researchers.

(10) The extent to which the type, extent, and quality of the proposed research experience, including the opportunity to participate in advanced-level research, are likely to develop highly qualified researchers.

(11) The extent to which the opportunities for collegial and collaborative activities, exposure to outstanding scientists in the field, and opportunities to participate in the preparation of scholarly or scientific publications and presentations are extensive and appropriate.

(g) *Design of dissemination activities.* In determining the extent to which the design is likely to be effective in accomplishing the objectives of the project, the Director considers one or more of the following factors:

(1) The extent to which the content of the information to be disseminated:

(i) Covers all of the relevant aspects of the subject matter; and

(ii) If appropriate, is based on new knowledge derived from research activities of the project.

(2) The extent to which the materials to be disseminated are likely to be effective and usable, including consideration of their quality, clarity, variety, and format.

(3) The extent to which the methods for dissemination are of sufficient quality, intensity, and duration.

(4) The extent to which the materials and information to be disseminated and the methods for dissemination are appropriate to the target population, including consideration of the familiarity of the target population with the subject matter, format of the information, and subject matter.

(5) The extent to which the information to be disseminated will be accessible to individuals with disabilities.

(h) *Design of utilization activities.* In determining the extent to which the design of utilization activities is likely to be effective in accomplishing the objectives of the project, the Director considers one or more of the following factors:

(1) The extent to which the potential new users of the information or technology have a practical use for the information and are likely to adopt the practices or use the information or technology, including new devices.

(2) The extent to which the utilization strategies are likely to be effective.

(3) The extent to which the information or technology is likely to be of use in other settings.

(i) *Design of technical assistance activities.* In determining the extent to which the design of technical assistance activities is likely to be effective in accomplishing the objectives of the project, the Director considers one or more of the following factors:

(1) The extent to which the methods for providing technical assistance are of sufficient quality, intensity, and duration.

(2) The extent to which the information to be provided through technical assistance covers all of the relevant aspects of the subject matter.

(3) The extent to which the technical assistance is appropriate to the target population, including consideration of

the knowledge level of the target population, needs of the target population, and format for providing information.

(4) The extent to which the technical assistance is accessible to individuals with disabilities.

(j) *Plan of operation.* In determining the quality of the plan of operation, the Director considers one or more of the following factors:

(1) The adequacy of the plan of operation to achieve the objectives of the proposed project on time and within budget, including clearly defined responsibilities, and timelines for accomplishing project tasks.

(2) The adequacy of the plan of operation to provide for using resources, equipment, and personnel to achieve each objective.

(k) *Collaboration.* In determining the quality of collaboration, the Director considers one or more of the following factors:

(1) The extent to which the applicant's proposed collaboration with one or more agencies, organizations, or institutions is likely to be effective in achieving the relevant proposed activities of the project.

(2) The extent to which agencies, organizations, or institutions demonstrate a commitment to collaborate with the applicant.

(3) The extent to which agencies, organizations, or institutions that commit to collaborate with the applicant have the capacity to carry out collaborative activities.

(l) *Adequacy and reasonableness of the budget.* In determining the adequacy and the reasonableness of the proposed budget, the Director considers one or more of the following factors:

(1) The extent to which the costs are reasonable in relation to the proposed project activities.

(2) The extent to which the budget for the project, including any sub-contracts, is adequately justified to support the proposed project activities.

(3) The extent to which the applicant is of sufficient size, scope, and quality to effectively carry out the activities in an efficient manner.

(m) *Plan of evaluation.* In determining the quality of the plan of evaluation, the Director considers one or more of the following factors:

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(1) The extent to which the plan of evaluation provides for periodic assessment of progress toward:

(i) Implementing the plan of operation; and

(ii) Achieving the project's intended outcomes and expected impacts.

(2) The extent to which the plan of evaluation will be used to improve the performance of the project through the feedback generated by its periodic assessments.

(3) The extent to which the plan of evaluation provides for periodic assessment of a project's progress that is based on identified performance measures that:

(i) Are clearly related to the intended outcomes of the project and expected impacts on the target population; and

(ii) Are objective, and quantifiable or qualitative, as appropriate.

(n) *Project staff.* In determining the quality of the project staff, the Director considers the extent to which the applicant encourages applications for employment from persons who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability. In addition, the Director considers one or more of the following:

(1) The extent to which the key personnel and other key staff have appropriate training and experience in disciplines required to conduct all proposed activities.

(2) The extent to which the commitment of staff time is adequate to accomplish all the proposed activities of the project.

(3) The extent to which the key personnel are knowledgeable about the methodology and literature of pertinent subject areas.

(4) The extent to which the project staff includes outstanding scientists in the field.

(5) The extent to which key personnel have up-to-date knowledge from research or effective practice in the subject area covered in the priority.

(o) *Adequacy and accessibility of resources.* In determining the adequacy and accessibility of the applicant's resources to implement the proposed project, the Director considers one or more of the following factors:

(1) The extent to which the applicant is committed to provide adequate facilities, equipment, other resources, including administrative support, and laboratories, if appropriate.

(2) The quality of an applicant's past performance in carrying out a grant.

(3) The extent to which the applicant has appropriate access to populations and organizations representing individuals with disabilities to support advanced disability, independent living and clinical rehabilitation research.

(4) The extent to which the facilities, equipment, and other resources are appropriately accessible to individuals with disabilities who may use the facilities, equipment, and other resources of the project.

(p) *Quality of the project design.* In determining the quality of the design of the proposed project, the Director considers one or more of the following factors:

(1) The extent to which the goals, objectives, and outcomes to be achieved by the proposed project are clearly specified and measurable.

(2) The quality of the methodology to be employed in the proposed project.

(3) The extent to which the design of the proposed project includes a thorough, high-quality review of the relevant literature, a high-quality plan for project implementation, and the use of appropriate methodological tools to ensure successful achievement of project objectives.

(4) The extent to which the design of the proposed project is appropriate to, and will successfully address, the needs of the target population or other identified needs.

(5) The extent to which the proposed development efforts include adequate quality controls and, as appropriate, repeated testing of products.

(6) The extent to which the proposed project will be coordinated with similar or related efforts, and with other appropriate community, State, and Federal resources.

(7) The extent to which the design of the proposed project reflects up-to-date knowledge from research and effective practice.

(8) The extent to which the proposed project represents an exceptional approach to the priority or priorities established for the competition.

**§ 1330.25 Additional considerations for field-initiated priorities.**

(a) The Director reserves funds to support field-initiated applications funded under this part when those applications have been awarded points totaling 85 percent or more of the maximum possible points under the procedures described in § 1330.23.

(b) In making a final selection from applications received when NIDILRR uses field-initiated priorities, the Director may consider whether one of the following conditions is met and, if so, use this information to fund an application out of rank order:

(1) The proposed project represents a unique opportunity to advance rehabilitation and other knowledge to improve the lives of individual with disabilities.

(2) The proposed project complements or balances research activity already planned or funded by NIDILRR through its annual priorities or addresses the research in a new and promising way.

(c) If the Director funds an application out of rank order under paragraph (b) of this section, the public will be notified through a notice on the NIDILRR Web site or through other means deemed appropriate by the Director.

**Subpart D—Disability, Independent Living, and Rehabilitation Research Fellowships**

**§ 1330.30 Fellows program.**

(a) The purpose of this program is to build research capacity by providing support to highly qualified individuals, including those who are individuals with disabilities, to perform research on rehabilitation, independent living, and other experiences and outcomes of individuals with disabilities.

(b) The eligibility requirements for the Fellows program are as follows:

(1) Only individuals are eligible to be recipients of Fellowships.

(2) Any individual is eligible for assistance under this program who has

training and experience that indicate a potential for engaging in scientific research related to rehabilitation and independent living for individuals with disabilities.

(3) This program provides two categories of Fellowships: Merit Fellowships and Distinguished Fellowships.

(i) To be eligible for a Distinguished Fellowship, an individual must have seven or more years of research experience in subject areas, methods, or techniques relevant to disability and rehabilitation research and must have a doctorate, other terminal degree, or comparable academic qualifications.

(ii) The Director awards Merit Fellowships to individuals in earlier stages of their careers in research. To be eligible for a Merit Fellowship, an individual must have either advanced professional training or experience in independent study in an area which is directly pertinent to disability and rehabilitation.

(c) Fellowships will be awarded in the form of a grant to eligible individuals.

(d) In making a final selection of applicants to support under this program, the Director considers the extent to which applicants present a unique opportunity to effect a major advance in knowledge, address critical problems in innovative ways, present proposals which are consistent with the Institute's Long-Range Plan, build research capacity within the field, or complement and significantly increases the potential value of already planned research and related activities.

**Subpart E—Special Projects and Demonstrations for Spinal Cord Injuries**

**§ 1330.40 Spinal cord injuries program.**

(a) This program provides assistance to establish innovative projects for the delivery, demonstration, and evaluation of comprehensive medical, vocational, independent living, and rehabilitation services to meet the wide range of needs of individuals with spinal cord injuries.

(b) The agencies and organizations eligible to apply under this program are described in § 1330.2.

**PART 1331—STATE HEALTH INSURANCE ASSISTANCE PROGRAM**

Sec.

- 1331.1 Basis, scope, and definition.
- 1331.2 Eligibility for grants.
- 1331.3 Availability of grants.
- 1331.4 Number and size of grants.
- 1331.5 Limitations.
- 1331.6 Reporting requirements.
- 1331.7 Administration.

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SOURCE: 81 FR 5918, Feb. 4, 2016, unless otherwise noted.

**§ 1331.1 Basis, scope, and definition.**

(a) *Basis.* This part implements, in part, the provisions of section 4360 of Public Law 101–508 by establishing a minimum level of funding for grants made to States for the purpose of providing information, counseling, and assistance relating to obtaining adequate and appropriate health insurance coverage to individuals eligible to receive benefits under the Medicare program.

(b) *Scope of part.* This part sets forth the following:

- (1) Conditions of eligibility for the grant.
- (2) Minimum levels of funding for those States qualifying for the grants.
- (3) Reporting requirements.

(c) *Definition.* For purposes of this subpart, the term “State” includes (except where otherwise indicated by the context) the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, and American Samoa.

**§ 1331.2 Eligibility for grants.**

To be eligible for a grant under this subpart, the State must have an approved Medicare supplemental regulatory program under section 1882 of the Act and submit a timely application to ACL that meets the requirements of—

- (a) Section 4360 of Public Law 101–508 (42 U.S.C. 1395b–4);
- (b) This subpart; and
- (c) The applicable solicitation for grant applications issued by ACL.

**§ 1331.3 Availability of grants.**

ACL awards grants to States subject to availability of funds, and if applicable, subject to the satisfactory progress

in the State’s project during the preceding grant period. The criteria by which progress is evaluated and the performance standards for determining whether satisfactory progress has been made are specified in the terms and conditions included in the notice of grant award sent to each State. ACL advises each State as to when to make application, what to include in the application, and provides information as to the timing of the grant award and the duration of the grant award. ACL also provides an estimate of the amount of funds that may be available to the State.

**§ 1331.4 Number and size of grants.**

(a) *General.* For available grant funds, up to and including \$10,000,000, grants will be made to States according to the terms and formula in paragraphs (b) and (c) of this section. For any available grant funds in excess of \$10,000,000, distribution of grants will be at the discretion of ACL, and will be made according to criteria that ACL will communicate to the States via grant solicitation. ACL will provide information to each State as to what must be included in the application for grant funds. ACL awards the following type of grants:

- (1) New program grants.
- (2) Existing program enhancement grants.

(b) *Grant award.* Subject to the availability of funds, each eligible State that submits an acceptable application receives a grant that includes a fixed amount (minimum funding level) and a variable amount.

(1) A fixed portion is awarded to States in the following amounts:

- (i) Each of the 50 States, \$75,000.
- (ii) The District of Columbia, \$75,000.
- (iii) Puerto Rico, \$75,000.
- (iv) American Samoa, \$25,000.
- (v) Guam, \$25,000.
- (vi) The Virgin Islands, \$25,000.

(2) A variable portion which is based on the number and location of Medicare beneficiaries residing in the State is awarded to each State. The variable amount a particular State receives is determined as set forth in paragraph (c) of this section.

(c) *Calculation of variable portion of the grant.* (1) ACL bases the variable portion of the grant on—

(i) The amount of available funds, and

(ii) A comparison of each State with the average of all of the States (except the State being compared) with respect to three factors that relate to the size of the State's Medicare population and where that population resides.

(2) The factors ACL uses to compare States' Medicare populations comprise separate components of the variable amount. These factors, and the extent to which they each contribute to the variable amount, are as follows:

(i) Approximately 75 percent of the variable amount is based on the number of Medicare beneficiaries living in the State as a percentage of all Medicare beneficiaries nationwide.

(ii) Approximately 10 percent of the variable amount is based on the percentage of the State's total population who are Medicare beneficiaries.

(iii) Approximately 15 percent of the variable amount is based on the percentage of the State's Medicare beneficiaries that reside in rural areas ("rural areas" are defined as all areas not included within a metropolitan Statistical Area).

(3) Based on the foregoing four factors (that is, the amount of available funds and the three comparative factors), ACL determines a variable rate for each participating State for each grant period.

(d) *Submission of revised budget.* A State that receives an amount of grant funds under this subpart that differs from the amount requested in the budget submitted with its application must submit a revised budget to ACL, along with its acceptance of the grant award, which reflects the amount awarded.

#### § 1331.5 Limitations.

(a) *Use of grants.* Except as specified in paragraph (b) of this section, and in the terms and conditions in the notice of grant award, a State that receives a grant under this subpart may use the grant for any reasonable expenses for planning, developing, implementing and/or operating the program for which the grant is made as described in the

solicitation for application for the grant.

(b) *Maintenance of effort.* A State that receives a grant to supplement an existing program (that is, an existing program enhancement grant)—

(1) Must not use the grant to supplant funds for activities that were conducted immediately preceding the date of the initial award of a grant made under this subpart and funded through other sources (including in-kind contributions).

(2) Must maintain the activities of the program at least at the level that those activities were conducted immediately preceding the initial award of a grant made under this subpart.

#### § 1331.6 Reporting requirements.

A State that receives a grant under this subpart must submit at least one annual report to ACL and any additional reports as ACL may prescribe in the notice of grant award. ACL advises the State of the requirements concerning the frequency, timing, and contents of reports in the notice of grant award that it sends to the State.

#### § 1331.7 Administration.

(a) *General.* Administration of grants will be in accordance with the provisions of this subpart, 45 CFR part 75 ("Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments"), the terms of the solicitation, and the terms of the notice of grant award. Except for the minimum funding levels established by § 1331.4(b)(1), in the event of conflict between a provision of the notice of grant award, any provision of the solicitation, or of any regulation enumerated in 45 CFR part 75, the terms of the notice of grant award control.

(b) *Notice.* ACL provides notice to each applicant regarding ACL's decision on an application for grant funding under § 1331.4.

(c) *Appeal.* Any applicant for a grant under this subpart has the right to appeal ACL's determination regarding its application. Appeal procedures are governed by the regulations at 45 CFR part 16 (Procedures of the Departmental Grant Appeals Board).