

PRESENT

Romulo L. Diaz, Jr., of the Commission, presiding.

William I. Harkaway, 1750 Pennsylvania Avenue, N.W., Washington, D.C. 20006, on behalf of the Federal Power Bar Association.

Jerome J. McGrath, John H. Cheatham, III, of the Interstate Natural Gas Association, on behalf of the Interstate Natural Gas Association.

William G. Porter, Jr., of Porter, Stanly, Platt & Arthur, 37 W. Broad Street, Columbus, Ohio, on behalf of Alabama Power Co., et al.

Richard M. Merriman, of Reid & Priest, 1701 K Street, Northwest, Washington, D.C. 20006, on behalf of the Federal Power Bar Association.

Francis J. Walsh, 1101 17th Street, Northwest, Washington, D.C., on behalf of Union Texas.

C. R. Tilley, of Columbia Gas System Service Corporation, 1625 I Street, N.W., Washington, D.C. 20006, on behalf of Columbia Gas System Service Corporation and Columbia Gas Transmission Corporation.

Frederick T. Searls, of Debevoise and Liberman, 806 15th Street, Northwest, Washington, D.C. 20005, on behalf of Alabama Power Company, et al.

Thomas F. Ryan, Jr., 831 15th Street, Northwest, Washington, D.C. 20005, on behalf of himself.

Kenneth Richardson, Joseph J. Solters, William Baglert, Robert Scarbrough, Lilo Schifter, H. H. Hammond, William W. Lindsay, of the Federal Power Commission, on behalf of the Federal Power Commission.

Mary Jane Klipple, Room 500, 1101 17th Street, N.W., Washington, D.C. 20036, on behalf of Foster Associates.

Carl W. Ulrich, of Chapman, Gadsby, Hannah and Duff, 1700 Pennsylvania Avenue, N.W., Washington, D.C. 20006, on behalf of Colorado Interstate Gas Company.

George L. Weber, of Consolidated Natural Gas Service Co., Inc., 1101 16th Street, N.W., Washington, D.C., on behalf of Consolidated Natural Gas Co.

William Warfield Ross, 1320 19th Street, N.W., Washington, D.C. 20036, on behalf of the Administrative Law Section, American Bar Association.

Harry L. Albrecht, 1120 Connecticut Avenue, N.W., Washington, D.C. 20037, on behalf of Natural Gas Pipeline Co.

Anthony D. Pryor, P.O. Box 2511, Houston, Texas 77001, on behalf of Tennessee Gas Pipeline Co.

Morton L. Simons, of Simons & Simons, 1629 K Street, N.W., Washington, D.C. 20006.

[FR Doc. 77-7795 Filed 3-11-77; 5:01 pm]

Title 20—Employees' Benefits

CHAPTER III—SOCIAL SECURITY ADMINISTRATION, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

PART 401—DISCLOSURE OF OFFICIAL RECORDS AND INFORMATION

PART 422—ORGANIZATION AND PROCEDURES

Freedom of Information

In order to conform current regulations to the requirements of the Freedom of Information Act as amended by the Government in the Sunshine Act, Pub. L. 94-409, section 5(b) effective March 12, 1977, the Secretary of Health, Education, and Welfare is issuing the interim amendment to 20 CFR Part 401 set out below. The rules for disclosure of social security records contained in 20 CFR Part 401, the Social Security Administration's Regulation No. 1, were the sub-

ject of a Notice of Intent and Hearings published by the Commissioner of Social Security on November 22, 1976 (41 FR 51425). The notice solicited public comments and testimony on the Social Security Administration's disclosure policy in anticipation of a proposal to amend Regulation No. 1. The Department is currently studying the testimony received at public hearings and the written comments as part of an indepth evaluation of existing policy and preparation of a notice of proposed rulemaking. The Secretary has determined that an interim Regulation No. 1 is needed immediately so that the disclosure rules for social security information will be consistent with the requirements of the amended Freedom of Information Act. For that reason the Secretary finds that prior notice and public comment on the interim regulation, as well as a delayed effective date, are impracticable and contrary to the public interest. Although the interim regulation contains the general disclosure policy for social security information, a final set of rules (which will be established as soon as practicable after notice of proposed rulemaking and further opportunity for public comment) will explain the application of the disclosure policy in a much more specific manner.

Social security information, as referred to herein, includes information obtained by the Department in administering titles II, XVI, and XVIII of the Social Security Act, irrespective of the organizational component within the Department responsible for the administration of the programs authorized by those titles.

Prior to the Government in the Sunshine Act, any social security information protected by Regulation No. 1 pursuant to section 1106(a) of the Social Security Act was also immune from disclosure under the Freedom of Information Act. Such information constituted matter "specifically exempted from disclosure by statute" within the meaning of exemption (3) of the Freedom of Information Act, 5 U.S.C. 552(b)(3). The Government in the Sunshine Act amended exemption (3) with the result that the Department can no longer cite section 1106(a) as authority for denying a Freedom of Information Act request. The Congressional Conference Committee specifically noted section 1106(a) as an example of a statute whose terms would not bring it within the amended exemption (3). See House of Representative Report No. 94-1441, 94th Cong., 2d Sess. (August 26, 1976) p. 25. Accordingly any social security information previously withheld on this basis must be made available unless another Freedom of Information Act exemption applies or another statute, which qualifies under amended exemption (3), prohibits disclosure. The Social Security Administration has applied the Freedom of Information Act rules to nonpersonal information since the July 1975 amendment to Regulation No. 1, 40 FR 27649, and the Department will now apply these rules to personal information as well.

While the Freedom of Information Act does not apply to disclosure to Federal agencies, Federal and State courts, or to instances where no specific request is made, the Department considers that a single consistent set of interim rules best promotes the public interest. Therefore, the interim regulation incorporates the principles of the Freedom of Information Act as the general rules for determining whether social security information may be disclosed, whether or not the Freedom of Information Act specifically applies. If, considering the circumstances of the disclosure, the information would not be exempt under 5 U.S.C. 552(b), the information may be disclosed (unless, of course, disclosure would be prohibited by another statute such as the Privacy Act or the Internal Revenue Code as amended by the Tax Reform Act of 1976). If the information would be exempt under the Freedom of Information Act, then the information will generally not be disclosed. The rules provide that information arguably exempt—for example, internal memoranda under 5 U.S.C. 552(b)(5) or investigatory records under 5 U.S.C. 552(b)(7)—may nevertheless be released under criteria for "waiving" an exemption. The interim regulation also expressly incorporates the access requirements of the Privacy Act and the mandatory disclosure provisions of the Freedom of Information Act, as well as the disclosure restrictions of other applicable laws.

In applying the interim rules to social security information, in all likelihood the most pertinent Freedom of Information Act exemption will be exemption (6), 5 U.S.C. 552(b)(6). Exemption (6) protects

personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

This exemption requires the Department to weigh the individual's interest in privacy against the public interest served by disclosure. The Department anticipates that application of this balancing test to the records of workers and beneficiaries will produce results similar to the existing rules in Regulation No. 1. Therefore, a significant change in the availability of beneficiary or worker information is not intended or anticipated. Nevertheless unforeseen differences could occur in some cases, since the outcome of the balancing test depends on the precise facts of the case to which it is applied.

The balancing test may have a different impact on some other information currently protected by Regulation No. 1, for example, payments to individual physicians under the Medicare program. Although this information reflects at least to some degree the physician's income, a matter in which he has a privacy interest, disclosure would serve the strong public interest in the accountability of government programs, revealing how public funds are spent and the extent to which the funds are paid to individuals when acting in a business or professional capacity. The Department's past disclo-

sure of the amounts paid to physicians under the Medicaid program would be consistent with a determination that releasing the same information regarding Medicare payments does not involve a "clearly unwarranted" invasion of privacy.

Furthermore, exemption (4), while it may affect the new rules for disclosure of some social security data, would not appear to preclude disclosure of Medicare payments. Exemption (4), 5 U.S.C. 552 (b) (4), applies to "trade secrets and commercial or financial information obtained from a person and privileged or confidential." Since Medicare payment information is generated by the Department and its carriers, the data are not "obtained from" a source outside the Executive Branch as required by current case law on exemption (4).

In addition to exemptions (4) and (6), the new disclosure rules will also require the Department in some instances to apply exemption (3), the "statutory" exemption in 5 U.S.C. 552(b) (3). Although section 1106(a) no longer qualifies, there are other statutes affecting social security information which appear to meet the exemption (3) criteria as amended by the Sunshine Act. For example, the Tax Reform Act of 1976 will still govern the redisclosure of tax "returns" and "return information" in the possession of the Department. Section 1865(a) (2) of the Social Security Act, which protects the confidentiality of accreditation survey reports submitted by the Joint Commission on Accreditation of Hospitals, will continue to do so under the new disclosure rules. Sections 1106 (d) and (e) of the Social Security Act, which protect certain official reports dealing with the operation of the health programs established by title XVIII of the Act, qualify under exemption (3) and will remain binding. The rules of these and other qualifying statutes are incorporated in the new Regulation No. 1 simply by reference to the "Freedom of Information Act rules," which include, by definition, exemption (3).

The regulation also provides that the procedural rules in 20 CFR Part 422, Subpart E, will apply to requests for disclosure governed by the substantive rules in Part 401. Under this provision, the fee schedules in 20 CFR Part 422 and the Department public information regulation, 45 CFR Part 5, will be applied to requests pursuant to the Freedom of Information Act. The fees for access by individuals to information about them in program record systems under the Privacy Act are limited, of course, by the Privacy Act, 5 U.S.C. 552a(f) (5), as implemented by the Department Privacy Act regulation, 45 CFR 5b.13. Fees for all other disclosures will be determined in accordance with section 1106(b) of the Social Security Act. It is anticipated that determinations thereunder will follow the prior rules established in 20 CFR 401.6 before amendment.

Accordingly, the principles of the Freedom of Information Act are adopted as interim rules for disclosure in the amendments to 20 CFR Part 401 set forth

below. The Secretary finds that new statutory requirements resulting from the Government in the Sunshine Act establish good cause for dispensing with prior notice and a delayed effective date. Therefore, as authorized by the Administrative Procedure Act, 5 U.S.C. 553 (b) and (c), the amendments are adopted effective immediately.

If you have questions, please contact Mr. Kenneth Dyer, Acting Legal Assistant, 6401 Security Boulevard, Baltimore, Maryland 21235, telephone (301) 594-7454.

(Secs. 205, 1102, and 1106 of the Social Security Act; 49 Stat. 624, as amended, 647, as amended, 53 Stat. 1398, as amended; sec. 290, 66 Stat. 234; (42 U.S.C. 405, 1302, 1306; 8 U.S.C. 1360; 5 U.S.C. 552a) (Privacy Act of 1974); (5 U.S.C. 552) (Freedom of Information Act), as amended by Pub. L. 94-409, 90 Stat. 1241; 26 U.S.C. 6103, as amended by Pub. L. 94-455, 90 Stat. 1667 (Tax Reform Act of 1976))

(Catalog of Federal Domestic Assistance Programs No. 13.800-13.807, Social Security Programs.)

NOTE: The Department has determined that this document does not contain a major proposal requiring preparation of an Economic Impact Statement under Executive Order 11821 amended by Executive Order 11949 and OMB Circular A-107.

Dated: March 11, 1977.

JOSEPH A. CALIFANO, JR.,
Secretary of Health,
Education, and Welfare.

Parts 401 and 422 of Chapter III of Title 20 of the Code of Federal Regulations are amended as follows:

1. Part 401 is amended by deleting §§ 401.4 through 401.6 and amending §§ 401.1 through 401.3 as follows:

§ 401.1 Purpose and scope.

(a) The regulations in this part implement section 1106(a) of the Social Security Act. As authorized by section 1106 (a), these regulations prescribe rules for the disclosure of information protected by section 1106(a). The rules apply to information obtained by officers or employees of the Department in the course of administering titles II, XVI, and XVIII of the Social Security Act, information obtained by Medicare intermediaries or carriers in the course of carrying out agreements under sections 1816 and 1842 of the Social Security Act, information obtained by State agencies in the course of carrying out agreements for making disability or blindness determinations under sections 221 and 1833 of the Social Security Act, information obtained during the course of a consultative examination under Part 404, § 404.1527 or Part 416, § 416.927 of this chapter, and any other information subject to section 1106(a) of the Social Security Act. The rules do not govern disclosure of information which is not subject to the prohibitions of section 1106(a), such as employee personnel records or other information maintained solely for purposes of personnel management.

(b) Except as authorized by the rules in this part, no information described in paragraph (a) of this section shall be

disclosed. The procedural rules in Part 422, Subpart E, of this chapter shall be applied to requests for information which is subject to the rules for disclosure in this part.

(c) Requests for information which may not be disclosed according to the provisions of this part shall be denied under authority of section 1106(a) of the Social Security Act and this part, and furthermore, such requests which have been made pursuant to the Freedom of Information Act shall be denied under authority of an appropriate Freedom of Information Act exemption, 5 U.S.C. 552 (b).

§ 401.2 Definitions.

For purposes of this part: (a) The term "Freedom of Information Act rules" means the substantive mandatory disclosure provisions of the Freedom of Information Act, 5 U.S.C. 552 (including the exemptions from mandatory disclosure, 5 U.S.C. 552(b), as implemented by the Department's public information regulation, 45 CFR Part 5, Subpart F and by Part 422, Subpart E of this chapter);

(b) The term "subject individual" means an individual whose record is maintained by the Department in a system of records, as the terms "individual," "record," and "system of records" are defined in the Privacy Act of 1974, 5 U.S.C. 552a(a);

(c) The term "person" means a person as defined in the Administrative Procedure Act, 5 U.S.C. 551(2). This includes State or local agencies, but does not include Federal agencies or State or Federal courts.

§ 401.3 Rules for disclosure.

(a) *General rule.* The Freedom of Information Act rules shall be applied to every proposed disclosure of information. If, considering the circumstances of the disclosure, the information would be made available in accordance with the Freedom of Information Act rules, then the information may be disclosed regardless of whether the requester or recipient of the information has a statutory right to request the information under the Freedom of Information Act, 5 U.S.C. 552, or whether a request has been made.

(b) *Application of the general rule.* Pursuant to the general rule in paragraph (a) of this section,

(1) Information shall be disclosed—

(i) To a subject individual when required by the access provision of the Privacy Act, 5 U.S.C. 552a(d), as implemented by the Department Privacy Act regulation, 45 CFR Part 5b; and

(ii) To a person upon request when required by the Freedom of Information Act, 5 U.S.C. 552;

(2) Unless prohibited by any other statute (e.g., the Privacy Act of 1974, 5 U.S.C. 552a(b), the Tax Reform Act of 1976, 26 U.S.C. 6103, or section 1106 (d) and (e) of the Social Security Act), information may be disclosed to any requester or recipient of the information, including another Federal agency or a State or Federal court, when the information would not be exempt from man-

datory disclosure under Freedom of Information Act rules or when the information nevertheless would be made available under the Department's public information regulation's criteria for disclosures which are in the public interest and consistent with obligations of confidentiality and administrative necessity, 45 CFR Part 5, Subpart F, as supplemented by Part 422, Subpart E of this chapter.

§§ 401.4-401.6 [Deleted]

§ 422.426 [Amended]

2. Section 422.426 of Subpart E of Part 422 is amended by deleting paragraph (b) and redesignating paragraph (c) as paragraph (b).

[FR Doc. 77-7754 Filed 3-11-77; 4:14 pm]

[Regs. No. 4, 16]

PART 404—FEDERAL OLD-AGE, SURVIVORS, AND DISABILITY INSURANCE

PART 416—SUPPLEMENTAL SECURITY INCOME FOR THE AGED, BLIND, AND DISABLED

Rights and Benefits Based on Disability; Determination of Disability or Blindness; Additional Medical Criteria for Determinations of Disability for Children Under Age 18

On December 3, 1976, there was published in the FEDERAL REGISTER (41 FR 53042) a notice of proposed rule making with proposed amendments to Subpart P, Regulations No. 4 and Subpart I, Regulations No. 16. The proposed amendments provided: (1) Additional medical criteria for the determination of disability of children under age 18 under title XVI of the Social Security Act; and (2) For the use of these criteria when evaluating disability under title II of a wage earner under age 18. Section 501(b) of Pub. L. 94-566, enacted October 20, 1976, requires that we publish these criteria within 120 days of enactment. Interested parties were given 45 days from the date of publication of that notice within which to submit any data, views, or arguments to the Social Security Administration, Department of Health, Education, and Welfare.

These criteria were developed in consultation with the Social Security Administration's Medical Consultant Staff, augmented by physicians with expertise in specific subspecialties of pediatrics. Several groups in the medical community were requested to comment on these medical criteria as they were being formulated.

The definition of disability in title XVI closely parallels that in title II, with the exception that title XVI provides specifically for eligibility for children under age 18 on the basis of disability. Within the basic definition of disability (i.e., an inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months), title

XVI provides for a finding of disability in the case of a child under the age of 18 if the child suffers from any medically determinable physical or mental impairment of comparable severity.

In determining "comparable severity," it is necessary to recognize that the manifestations of certain disease processes in children may be different than in adults, even where the diagnosed disease is the same.

The basic requirements for the determination of disability for children under age 18 are found in Regulations No. 16, Subpart I, § 416.904. Section 416.904 provides, in part, that disability will be deemed to exist for a child under age 18 if the child is not engaging in substantial gainful activity and his impairment(s) meets the requisite durational requirement and is either listed in the published appendix to Subpart I or, with appropriate consideration of the particular effect of disease processes in children, is medically the equivalent of a listed impairment. Thus, determinations of disability of children have been made and will continue to be made under the authority provided in § 416.904 and in consideration of the basic requirements stated therein.

The Listing of Impairments in the published appendix to Subpart I is identical to that in the appendix to Subpart P of Regulations No. 4. These criteria had originally been developed for the purpose of determining disability with respect to the essentially adult claimant population of the title II disability insurance program. When these criteria were adopted for the title XVI program, it was recognized that for a number of impairments, the medical criteria published in the appendix were directly applicable for determining disability of children, as well as of adults, and that these criteria could readily be used in children's claims.

Conversely, it was also recognized from the outset that some of the published criteria would not be directly applicable for determining disability of children because those criteria are based primarily on experience with impairments in adults. Additionally, it was recognized that some diseases and impairments generally seen only in young children were not addressed in the published appendix. Experience gained in evaluating impairments of children since January 1974 indicates the advisability of providing additional medical criteria at this time.

These proposed additional criteria do not alter the basic requirements for determining disability for children under § 416.904. They will, however, facilitate the decision making process because the criteria are directly applicable for determining disability for children. Because these proposed additional medical criteria are based on the concept of "comparable severity" to the Listing of Impairments published in the appendix to Subpart I, there should not be any transitional problems upon a child's attainment of age 18. Absent medical improvement, an impairment or a combination

of impairments which meets or equals the proposed additional medical criteria for children until the attainment of age 18 would be expected to meet or equal the comparable existing medical criteria after the attainment of age 18.

The proposed amendments also contain technical revisions; specifically, the appendix has been redesignated "Appendix 1" and subdivided into Parts A and B. Part A contains the Listing of Impairments in the published appendix and is applicable to all individuals age 18 and over and to children under age 18 where it is clear, based upon the medical facts of the case, that the criteria are appropriate. Part B, which is herewith published as a Final Regulation, is applicable only to the evaluation of children's impairments where the criteria in Part A do not give appropriate consideration to the particular effect of disease processes in childhood. Thus, where additional criteria are included in Part B, the impairment categories are, to the extent feasible, numbered in such a way as to maintain a relationship with their counterparts in Part A.

We are also amending Regulations No. 4, Subpart P, § 404.1506 to refer to Part B when evaluating disability under title II of a wage earner under age 18 where the adult criteria are not applicable. Though not conclusive of the issue of disability in title II claims, use of the criteria in Part B will facilitate the title II decision making process in those cases where an applicant under age 18 applies for disability benefits on the basis of his own earnings.

In response to the Notice of Proposed Rule Making various interested parties submitted comments which were considered in preparing these final regulations. There follows a discussion of the comments received from 30 sources.

1. One writer stated that the proposed amendments to the regulations do not show how the Department arrived at the proposed medical criteria nor how the impairments are disabling; and another inquired about the extent of input from practicing physicians. The medical criteria were developed and formulated over a 2-year period by the Social Security Administration Medical Consultant Staff together with practicing physicians, and other professionals, such as psychologists, who are experts in various specialties, primarily pediatrics. In identifying these impairments and the level of severity which would establish disability, these professionals placed primary emphasis on the effects of physical and mental impairments in children, the impact of the impairment on the child's activities, and the restrictions on growth, learning, and development imposed on the child by the impairments. Those impairments which were determined to impact on the child's development to the same extent that the adult criteria have on an adult's ability to engage in substantial gainful activity were deemed to be of "comparable severity" to the adult listing. All the listed impairments have a severe impact on the child's development in one form or another—

physical, mental, emotional, or social. Thus, within this context, we believe that we have complied with Congressional intent and the law.

2. Another commentator stated that the Social Security Administration interprets severity in medical rather than functional terms. Such an interpretation is necessary because the proposed amendments to the regulations are derived from section 1614(a)(3)(C) of the Social Security Act, which specifies that a physical or mental impairment is one which is "demonstrable by medically acceptable clinical and laboratory diagnostic techniques." The medical criteria proposed, however, do result in functional limitations or restrictions, depending on the nature of the impairments, and these have been considered.

3. One writer questioned the use of the term "medically determinable" in § 416.904, pointing out that the exact cause of mental deficiency is not known in many cases. The term "medically determinable" is not meant to imply that the specific etiology of a disabling condition must be determined, but that its effect and limitations are discernible by the use of techniques commonly employed and accepted by medical professionals. In the case of mental deficiency, this can include detailed accounts of the child's daily activities, based on the observations of professional persons, as explained in section 112.00 of the Appendix.

4. Several writers commented that the proposed amendments to the regulations provide for a finding of childhood disability only when the particular child's impairment fits within one of the impairments enumerated in the regulations and that they do not make provision for a situation where a child has several impairments which involve more than one body system. The impairments listed in Appendix 1 provide a means to efficiently and equitably evaluate the more common impairments. The enumeration of these impairments does not preclude a finding of disability for children who have an impairment that is not included in the Appendix, nor does it preclude a favorable decision in cases where the child has a combination of impairments—where the individual impairments are less severe than a listed impairment. Decisions in such cases are made within the framework of § 416.904(b), which provides for evaluating unlisted impairments or a combination of multiple impairments. These decisions are made on the basis of whether the unlisted impairment, or the totality of impairments, are of a severity equivalent to a listed impairment.

5. One writer stated that the Listing is simply a modification of that used for adults. We agree that for those impairments common to both adults and children the proposed Listing corresponds to the adult Listing, with modifications of the adult criteria, where necessary, to take into account the different impact on children. In addition, the Listing contains impairments that are generally seen only in children.

6. Some writers indicated that the regulations should be broadened to include developmental needs. The medical criteria in Appendix 1 do consider developmental levels. Many of the criteria were established by considering disability in terms of departures from developmental norms at various levels. Developmental needs, however, such as counseling, special education, training, rehabilitation, guidance, etc., are not considered because they are not within the scope of the law.

7. Other writers suggested that the regulations should be based on a definition of disability which responds specifically to the physical, mental, and emotional development of the child; and several commentators believed that children must be evaluated according to developmental milestones. In applying the law, we considered those medical factors which relate to physical, mental, and emotional development. We also considered developmental milestones and, where they apply, these criteria were incorporated into the Listing so that the regulations do describe childhood impairments that interfere with the child's development.

8. A number of writers suggested that title XVI should include additional provisions for the general welfare and health needs of disabled children. Several writers suggested that the proposed regulations be broadened to help all children in need of medical care. Another writer recommended that responsibility for the care of children found disabled under the regulations be linked with a State program for crippled children. Another writer was concerned about the absence of a provision for dental care. Finally, one writer observed that the regulations should weigh the effect of the child's familial and educational development. While we concur that disabled children require many services, the intent of Congress is to provide benefits for children who meet the definition of disability. Because none of the above concerns relate to "disability," no changes are being made. To the writer who suggested a link with a State program for crippled children, however, Public Law 94-566, enacted on October 20, 1976, amends section 1615 of title XVI and provides for the referral of those children found blind or disabled under the title XVI criteria to a State agency, such as one providing crippled children's services, for appropriate counseling, medical, educational, developmental, rehabilitative, and social services.

9. One writer noted that § 416.902 gives consideration to education and indicated that consideration of education in an infant or child is inappropriate. We agree that consideration of education is inappropriate in determining disability in children under age 18. Section 416.902 does not apply to children under age 18; it refers to individuals age 18 and over.

10. Section 416.904 states that a child under age 18 will be found to be disabled as defined in § 416.901(b)(1) if he has a

medically determinable physical or mental impairment of comparable severity to that which qualifies an individual age 18 or over. Several writers expressed concern about the phrase "if the child is not engaging in substantial gainful activity" as contained in § 416.904. A recommended substitution for "substantial gainful activity" was "age-appropriate major daily activities." This portion of § 416.904 is derived from section 1614(a)(3) and does not enter into the medical evaluation process. It covers the unusual situation where a child is actually working and deriving substantial earnings therefrom despite the presence of a severe impairment. As required by section 1614(a)(3)(D) of the Social Security Act, such a situation would preclude a finding of disability. Further, we believe that to set a standard based on "age-appropriate major daily activities" for all impairments is unduly restrictive and not within the intent of the law.

11. Other writers stated that it seems inappropriate to use a work-related definition for children. Recognizing that children are not expected to engage in work activity, disability in children has been defined in terms of a child's activity, growth, and development. Thus, the child's theoretical capacity to engage in work activity is not considered in determining disability under the listing in Appendix A.

12. Another writer states that a child's performance of substantial gainful work should not be a conclusive factor in denying supplemental security income benefits. This writer points out that some disabled children may be in situations where they are found to engage in employment. Not all employment situations constitute substantial gainful activity as defined elsewhere in the regulations (§§ 416.932, 416.933, and 416.934). Most persons who are denied under this provision (which applies to adults as well as children) are those who have developed special skills that permit them to perform substantial work despite a severe impairment. It would be unusual for a child who has a severe impairment to find and successfully perform substantial gainful activity. In that event, however, section 1614(a)(3)(D) of the Social Security Act requires a denial of the disability claim.

13. One writer was concerned that "substantial gainful activity" could be interpreted to mean attendance in a school classroom. The term substantial gainful activity as defined in §§ 416.932-416.934 of the regulations refers only to that activity within a work situation which is usually performed for remuneration, pay, or profit. Thus, school attendance cannot be construed as substantial gainful activity.

14. Appendix 1, Part B, section 112.00B states that developmental milestone criteria may be the sole basis for adjudication only in cases where the child's young age or condition preclude formal standardized testing by a psychologist or psychiatrist experienced in testing children. One writer commented that the

proposed amendments to the regulations limit the identification of mental disorders to physicians; additionally, he suggested that psychologists are limited to a testing role. Under the title XVI statutory provisions, evidence from a medical source is necessary to establish the existence, severity, and duration of an impairment. Psychologists are recognized as a source of medical evidence as pointed out in Appendix I, Part A, section 12.00D, which indicates that "the severity of a mental disorder should be evaluated on the basis of psychiatrists' reports, hospital reports, psychologists' reports and description of daily activities." Consequently, psychologists' reports represent primary sources of medical evidence and are included in determining whether disability exists. Additionally, section 112.00B of the proposed amendments to the regulations indicates that standardized intelligence test results are essential to the adjudication of all cases of mental retardation that are not clearly covered under the provisions of section 112.05A. Thus, many cases may include psychologists' reports containing a composite of information pertaining to the claimant's daily activities and current behavior, as well as laboratory findings including the results of standardized psychological tests. Because the validity of these test results are important in the documentation and evaluation of mental deficiency, the regulations simply emphasize that they should be administered by qualified and experienced psychologists or psychiatrists. Reference to psychologists in this capacity is not intended to imply that their role is limited to this function. Because all symptoms, signs, and laboratory findings by psychologists are considered medical evidence and because their role is not limited to that of testing, no change in the proposed regulatory language is required.

15. One writer commented that the medical criteria of the regulations should be reviewed in light of the medical advances. Consistent with traditional policies of the Social Security Administration, the need for ongoing review of the regulations in light of progress in medicine is fully appreciated and undertaken periodically. Future revisions will be made based on these medical advances and operating experience.

16. One commenter was concerned that investigations of continuing medical severity, after entitlement, will infringe upon privacy. Periodic redeterminations of disability do not constitute an invasion of the individual's privacy if he wishes benefits. In scheduling future reexaminations to determine whether medical recovery has occurred, emphasis is placed on those who have impairments which have a definite potential for improvement.

17. Another writer objected to the use of the pronouns "her," "his," and "him." This accords with §416.120(c)(11) of the regulations which states that the masculine gender includes the feminine, unless otherwise indicated.

18. One writer raised a question as to the clarity of the criteria for growth impairment and pointed out that the requirement of one standard deviation of bone age delay would include too many normal children. Appropriate changes have been made to section 100.00 Growth Impairment in response to this comment.

19. Three writers advised using additional higher frequency tone levels in evaluating hearing impairments, and one writer advised other clarifying language for evaluating hearing impairments. These changes have been incorporated in sections 102.00, and 102.08.

20. Two writers recommended clarifying language for section 104.00 Cardiovascular Impairments. A number of these have been adopted. The others are under study.

21. Two writers questioned the specific identification of Down's syndrome under section 112.00. Because there is an adequate basis for adjudication of impairments associated with this diagnosis elsewhere in the Regulations, the reference to Down's syndrome in sections 112.00 and 112.05 have been removed.

Section 102.02 has been revised to clarify that the standard for evaluating impairment of central visual acuity in adults also applies to children under age 18. Minor editorial changes have also been made. According, these amendments to the regulations are adopted as set forth below.

(Secs. 223, 1102, 1614, 1631, of the Social Security Act, as amended; 70 Stat. 815, 49 Stat. 647, as amended, 86 Stat. 1471, 86 Stat. 1475; 42 U.S.C. 423, 1302, 1383c, 1383.)

Effective date: The amendments shall be effective March 16, 1977.

(Catalog of Federal Domestic Assistance Programs No. 13.802, Social Security-Disability Insurance, No. 13.807, Supplemental Security Income Program.)

NOTE: The Social Security Administration has determined that this document does not contain a major proposal requiring preparation of an Economic Impact Statement under Executive Order No. 11821 and OMB Circular A-107.

Dated: February 16, 1977.

J. B. CARDWELL,
Commissioner of
Social Security.

Approved: March 9, 1977.

JOSEPH A. CALIFANO, Jr.,
Secretary of Health,
Education, and Welfare.

Parts 404 and 416 of Chapter III of Title 20 of the Code of Federal Regulations are amended as follows:

1. Section 404.1506 is amended by inserting a new paragraph (e) to read as follows:

§ 404.1506 Listing of impairments in appendix.

(e) In determining whether a wage earner under age 18 has an impairment which is disabling on medical considerations alone (see § 404.1502(a)), reference shall also be made to Part 416, Subpart I, Appendix 1, Part B.

2. The entries for section 416.906, and Appendix in the Table of Contents for Part 416, Subpart I are revised as follows:

Subpart I—Determination of Disability or Blindness

416.906 Listing of impairments in Appendix 1.

APPENDIX 1—LISTING OF IMPAIRMENTS

Part A.—Criteria Applicable to Individuals Age 18 and Over and to Children Under Age 18 Where Criteria are Appropriate.

Part B.—Additional Medical Criteria for the Evaluation of Impairments of Children.

3. Paragraph (a) of § 416.902 is revised to read as follows:

§ 416.902 Evaluation of disability for individuals age 18 or over.

(a) Whether or not an impairment in a particular case constitutes a disability, as defined in § 416.901(b)(1), is determined from all the facts of that case. Primary consideration is given to the severity of the individual's impairment. Consideration is also given to such other factors as the individual's age, education and work experience. Medical considerations alone can justify a finding that the individual is not under a disability where the only impairment is a slight neurosis, slight impairment of sight or hearing, or other slight abnormality or a combination of slight abnormalities. On the other hand, medical considerations alone (including physiological and psychological manifestations of aging) can, except where other evidence rebuts a finding of "disability," e.g., the individual is actually engaging in substantial gainful activity, justify a finding that the individual is under a disability where his impairment is one that meets the duration requirement in § 416.901(b)(1), and is listed in Part A of Appendix 1 to this Subpart I, or the Social Security Administration determines his impairment (or combined impairments) to be medically the equivalent of a listed impairment (see § 416.905).

4. Section 416.904 is revised to read as follows:

§ 416.904 Evaluation of disability of a child under age 18.

A child under age 18 will be found to be disabled as defined in § 416.901(b)(1) if he has a medically determinable physical or mental impairment of comparable severity to that which qualifies an individual age 18 or over. Disability shall be deemed to be of comparable severity and to exist under § 416.901(b)(1) if the child is not engaging in substantial gainful activity, and if:

(a) His impairment or impairments meet the durational requirements in § 416.901(b)(1), and are listed in Appendix 1 to this Subpart I; or

(b) His impairment or impairments are not listed in Appendix 1 to this Subpart I but singly or in combination meet the durational requirement in § 416.901(b)(1) and are determined by the Social

Security Administration, with appropriate consideration of the particular effect of disease processes in childhood, to be medically the equivalent of a listed impairment (see § 416.905).

5. Section 416.905 is revised to read as follows:

§ 416.905 Determining medical equivalence.

(a) An individual's impairment or impairments shall be determined to be medically the equivalent of an impairment listed in Appendix 1 to this Subpart I, only if the medical findings with respect thereto are at least equivalent in severity and duration to the listed findings of the listed impairment.

(b) Any decision with respect to disability made under the criteria in § 416.901(b) as to whether an individual's impairment or impairments are medically the equivalent of an impairment listed in Appendix 1 to this Subpart I, shall be based on medical evidence demonstrated by medically acceptable clinical and laboratory diagnostic techniques, including a medical judgment furnished by one or more physicians designated by the Social Security Administration, relative to the question of medical equivalence. A "physician designated by the Social Security Administration" shall include a physician in the employ of or engaged for this purpose by the Social Security Administration or State agency authorized to make determinations of disability.

6. Section 416.906 is amended by revising the title, redesignating the existing paragraphs (b), (c), and (d) as (c), (d), and (e) respectively, incorporating technical revisions in the existing paragraphs (a) and (c), and inserting a new paragraph (b) to read as follows:

§ 416.906 Listing of impairments in appendix 1.

(a) With respect to § 416.901(b)(1), the Listing of Impairments in Appendix 1 to this Subpart I describes, for each of the major body systems, impairments which:

(1) Are of a level of severity which can justify a finding that the individual is disabled, except where other evidence rebuts such a finding; and

(2) Are expected to result in death or to last for a continuous period of not less than 12 months.

(b) The Listing of Impairments consists of two parts—A and B. Part A contains medical criteria that are applicable to all individuals age 18 and over. The medical criteria in Part A may also be applied in the evaluation of impairments in children under age 18 where the disease processes have similar impairment impact on children and adults. Part B contains additional medical criteria applicable only to the evaluation of impairments of children under age 18. Part B is used where the criteria in Part A do not give appropriate consideration to the particular effects of the disease processes in childhood; i.e., when the disease process is generally found only

in children or when the disease process differs in its effect on children than on adults. Where additional criteria are included in Part B, the impairment categories are, to the extent feasible, numbered to maintain a relationship with their counterparts in Part A. The method for adjudicating claims for children under age 18 is to look first to Part B. Where the medical criteria in Part B are not applicable, the medical criteria in Part A should be used.

(d) An impairment shall not be considered to be one listed in Appendix 1 to this Subpart I solely because it has the name of a listed impairment. To be considered a listed impairment, it must also have such attendant findings as are recited in the Listing for the impairment.

7. Subpart I of Part 416 is amended by designating the existing Listing of Impairments as Part A entitled as follows:

APPENDIX 1

LISTING OF IMPAIRMENTS

Part A

Criteria applicable to individuals age 18 and over and to children under age 18 where criteria are appropriate.

Sec.	
1.00	Musculoskeletal System.
2.00	Special Sense Organs.
3.00	Respiratory System.
4.00	Cardiovascular System.
5.00	Digestive System.
6.00	Genito-Urinary System.
7.00	Hemic and Lymphatic System.
8.00	Skin.
9.00	Endocrine System.
10.00	Multiple Body Systems.
11.00	Neurological.
12.00	Mental Disorders.
13.00	Neoplastic Diseases—Malignant.

8. Subpart I of Part 416 is further amended by adding to Appendix 1 a new Part B, which read as follows:

Part B

Additional medical criteria for the evaluation of impairments of children under age 18 (where criteria in Part A do not give appropriate consideration to the particular disease process in childhood).

Sec.	
100.00	Growth Impairment.
101.00	Musculoskeletal System.
102.00	Special Sense Organs.
103.00	Respiratory System.
104.00	Cardiovascular System.
105.00	Digestive System.
106.00	Genito-Urinary System.
107.00	Hemic and Lymphatic System.
108.00	Endocrine System.
109.00	Multiple Body Systems.
110.00	Neurological.
111.00	Mental and Emotional Disorders.
112.00	Neoplastic Diseases—Malignant.

100.00 GROWTH IMPAIRMENT

A. Impairment of growth may be disabling in itself or it may be an indicator of the severity of the impairment due to a specific disease process.

Determinations of growth impairment should be based upon the comparison of current height with at least three previous determinations, including length at birth, if

available. Heights (or lengths) should be plotted on a standard growth chart, such as derived from the National Center for Health Statistics: NCHS Growth Charts. Height should be measured without shoes. Body weight corresponding to the ages represented by the heights should be furnished. The adult heights of the child's natural parents and the heights and ages of siblings should also be furnished. This will provide a basis upon which to identify those children whose short stature represents a familial characteristic rather than a result of disease. This is particularly true for adjudication under § 100.02B.

B. Bone age determinations should include a full descriptive report of roentgenograms specifically obtained to determine bone age and must cite the standardization method used. Where roentgenograms must be obtained currently as a basis for adjudication under § 100.03, views of the left hand and wrist should be ordered. In addition, roentgenograms of the knee and ankle should be obtained when cessation of growth is being evaluated in an older child at, or past, puberty.

C. The criteria in this section are applicable until closure of the major epiphyses. The cessation of significant increase in height at that point would prevent the application of these criteria.

100.01 CATEGORY OF IMPAIRMENTS, GROWTH

100.02 Growth Impairment, considered to be related to an additional specific medically determinable impairment, and one of the following:

A. Fall of greater than 15 percentiles in height which is sustained; or

B. Fall to, or persistence of, height below the third percentile.

100.03 Growth impairment, not identified as being related to an additional, specific medically determinable impairment. With:

A. Fall of greater than 25 percentiles in height which is sustained; and

B. Bone age greater than two standard deviations (2 SD) below the mean for chronological age (see § 100.00B).

101.00 MUSCULOSKELETAL SYSTEM

A. Rheumatoid arthritis. Documentation of the diagnosis of juvenile rheumatoid arthritis should be made according to an established protocol, such as that published by the Arthritis Foundation, *Bulletin on the Rheumatic Diseases*, Vol. 23, 1972-1973 Series, p. 712. Inflammatory signs include persistent pain, tenderness, erythema, swelling, and increased local temperature of a joint.

B. The measurements of joint motion are based on the technique for measurements described in the "Method of Measuring and Recording," published by the American Academy of Orthopedic Surgeons in 1965, or "The Extremities and Back" in *Guides to the Evaluation of Permanent Impairment*, Chicago, American Medical Association, 1971 Chapter 1, pp. 1-48.

C. Degenerative arthritis may be the end stage of many skeletal diseases and conditions, such as traumatic arthritis, collagen disorders, septic arthritis, congenital dislocation of the hip, aseptic necrosis of the hip, slipped capital femoral epiphyses, skeletal dysplasias, etc.

101.01 CATEGORY OF IMPAIRMENTS, MUSCULOSKELETAL

101.02 Juvenile rheumatoid arthritis. With:

A. Persistence or recurrence of joint inflammation despite six months of medical treatment and one of the following:

1. Limitation of motion of two major joints of 50 percent or greater; or

2. Fixed deformity of two major weight-bearing joints of 30 degrees or more; or
3. Radiographic changes of joint narrowing, erosion, or subluxation; or
4. Persistent or recurrent systemic involvement such as iridocyclitis or pericarditis; or

B. Steroid dependence.

101.03 Deficit of musculoskeletal function due to deformity or musculoskeletal disease and one of the following:

- A. Walking is markedly reduced in speed or distance despite orthotic or prosthetic devices; or
- B. Ambulation is possible only with obligatory bilateral upper limb assistance (e.g. with walker, crutches); or
- C. Inability to perform age-related personal self-care activities involving feeding, dressing and personal hygiene.

101.05 Disorders of the spine.

A. Fracture of vertebra with cord involvement (substantiated by appropriate sensory and motor loss).

B. Scoliosis (congenital idiopathic or neuromyopathic). With:

1. Major spinal curve measuring 60 degrees or greater; or
2. Spinal fusion of six or more levels. Consider under a disability for one year from the time of surgery; thereafter evaluate the residual impairment; or
3. FEV (vital capacity) of 50 percent or less of predicted normal values for the individual's measured (actual) height.

C. Kyphosis or lordosis measuring 90 degrees or greater.

101.08 Chronic osteomyelitis with persistence or recurrence of inflammatory signs or drainage for at least 6 months despite prescribed therapy and consistent radiographic findings.

102.00 SPECIAL SENSE ORGANS

A. Visual impairments in children. Impairment of central visual acuity should be determined with use of the standard Snellen test chart. Where this cannot be used, as in very young children, a complete description should be provided of the findings using other appropriate methods of examination, including a description of the techniques used for determining the central visual acuity for distance.

The accommodative reflex is generally not present in children under 6 months of age. In premature infants, it may not be present until 6 months plus the number of months the child is premature. Therefore absence of accommodative reflex will be considered as indicating a visual impairment only in children above this age (6 months).

Documentation of an ophthalmologic disorder must include description of the ocular pathology.

B. Hearing impairments in children. The criteria for hearing impairments in children take into account that a lesser impairment in hearing which occurs at an early age may result in a severe speech and language disorder.

Improvement by a hearing aid, as predicted by the testing procedure, must be demonstrated to be feasible in that child, since younger children may be unable to use a hearing aid effectively.

The type of audiometric testing performed must be described and a copy of the results must be included. The pure tone air conduction in § 102.08 are based on American National Standard Institute Specifications for Audiometers, S 3.6-1969 (ANSI-1969). The report should indicate the specifications used to calibrate the audiometer.

The finding of a severe impairment will be based on the average hearing levels of the four frequencies, 500, 1000, 2000, and 3000 Hertz (Hz) in the better ear, and on speech discrimination, as specified in § 102.08.

102.01 CATEGORY OF IMPAIRMENTS, SPECIAL SENSE ORGANS

102.02 Impairment of central visual acuity.

A. Remaining vision in the better eye after best correction is 20/200 or less.

B. For children below 3 years of age at time of adjudication:

1. Absence of accommodative reflex (see § 102.00A for exclusion of children under 6 months of age); or
2. Retrolental fibroplasia with macular scarring or neovascularization; or
3. Bilateral congenital cataracts with visualization of retinal red reflex only or when associated with other ocular pathology.

102.08 Hearing impairments.

A. For children below 5 years of age at time of adjudication, inability to hear air conduction thresholds at an average of 40 decibels (db) hearing level or greater in the better ear.

B. For children 5 years of age and above at time of adjudication:

1. Inability to hear air conduction thresholds at an average of 70 decibels (db) or greater in the better ear or
2. Speech discrimination scores at 40 percent or less; or
3. Inability to hear air conduction thresholds at an average of 40 decibels (db) or greater in the better ear, and a speech and language disorder which significantly affects the clarity and content of the speech and is attributable to the hearing impairment.

103.00 RESPIRATORY SYSTEM

A. Documentation of pulmonary insufficiency. The reports of spirometric studies for evaluation under Table I must be expressed in liters. The reported FEV₁ should represent the largest of at least three satisfactory attempts, and should be within 10 percent of another FEV₁. The appropriately labeled spirometric tracing of three FEV₁ maneuvers must be submitted with the report, showing distance per second on the abscissa and distance per liter on the ordinate. The unit distance for volume on the tracing should be at least 15 mm. per liter and the paper speed at least 20 mm. per second. The height of the individual without shoes must be recorded.

The ventilatory function studies should not be performed during or soon after an acute episode or exacerbation of a respiratory illness. In the presence of acute bronchospasm, or where the FEV₁ is less than that stated in Table I, the studies should be repeated after the administration of a nebulized bronchodilator. If a bronchodilator was not used in such instances, the reason should be stated in the report.

A statement should be made as to the child's ability to understand directions and to cooperate in performance of the test, and should include an evaluation of the child's effort. Where tests cannot be performed or completed, the reason (such as a child's young age) should be stated in the report.

B. Cystic fibrosis. This section discusses only the pulmonary manifestations of cystic fibrosis. Other manifestations, complications, or associated disease must be evaluated under the appropriate section.

The diagnosis of cystic fibrosis will be based upon appropriate history, physical examination, and pertinent laboratory findings. Confirmation based upon elevated concentration of sodium or chloride in the sweat should be included, with indication of the technique used for collection and analysis.

103.01 CATEGORY OF IMPAIRMENTS, RESPIRATORY

103.03 Bronchial asthma. With evidence of progression of the disease despite therapy and documented by one of the following:

- A. Recent, recurrent intense asthmatic attacks requiring parenteral medication; or
- B. Persistent prolonged expiration with wheezing between acute attacks and radiographic findings of peribronchial disease.

103.13 Pulmonary manifestations of cystic fibrosis. With:

A. FEV₁ equal to or less than the values specified in Table I (see § 103.00A for requirements of ventilatory function testing); or

- B. For children where ventilatory function testing cannot be performed:
1. History of dyspnea on mild exertion or chronic frequent productive cough; and
2. Persistent or recurrent abnormal breath sounds, bilateral rales or rhonchi; and
3. Radiographic findings of extensive disease with hyperaeration and bilateral peribronchial infiltration.

Table I

Height (in centimeters):	FEV ₁ equal to or less than (liters)
110 or less	0.6
120	.7
130	.9
140	1.1
150	1.3
160	1.5
170 or more	1.6

104.00 CARDIOVASCULAR SYSTEM

A. General. Evaluation should be based upon history, physical findings, and appropriate laboratory data. Reported abnormalities should be consistent with the pathologic diagnosis. The actual electrocardiographic tracing, or an adequate marked photocopy, must be included. Reports of other pertinent studies necessary to substantiate the diagnosis or describe the severity of the impairment must also be included.

B. Evaluation of cardiovascular impairments in children requires two steps:

1. The delineation of a specific cardiovascular disturbance, either congenital or acquired. This may include arterial or venous disease, rhythm disturbance, or disease involving the valves, septa, myocardium or pericardium; and
2. Documentation of the severity of the impairment, with medically determinable and consistent cardiovascular signs, symptoms, and laboratory data. In cases where impairment characteristics are questionably secondary to the cardiovascular disturbance, additional documentation of the severity of the impairment (e.g., catheterization data, if performed) will be necessary.

C. Chest roentgenogram (6 ft. PA film) will be considered indicative of cardiomegaly if:

1. The cardiothoracic ratio is over 60 percent at age one year or less, or 55 percent at more than one year of age; or
2. The cardiac size is increased over 15 percent from any prior chest roentgenograms; or
3. Specific chamber or vessel enlargement is documented in accordance with established criteria.

D. Tables I, II, and III below are designed for case adjudication and not for diagnostic purposes. The adult criteria may be useful for older children and should be used when applicable.

E. Rheumatic fever, as used in this section, assumes diagnoses made according to the revised Jones Criteria.

104.01 CATEGORY OF IMPAIRMENTS, CARDIOVASCULAR

104.02 Chronic congestive failure. With two or more of the following signs:

- A. Tachycardia (see Table I).
- B. Tachypnea (see Table II).
- C. Cardiomegaly on chest roentgenogram (see § 104.00C).

D. Hepatomegaly (more than 2 cm. below the right costal margin in the right mid-clavicular line).

E. Evidence of pulmonary edema, such as rales or orthopnea.

F. Dependent edema.

G. Exercise intolerance manifested as labored respiration on mild exertion (e.g., in an infant, feeding).

TABLE I—TACHYCARDIA AT REST

Age	Apical Heart (beats per minute)
Under 1 yr.	150
1 through 3 yr.	130
4 through 9 yr.	120
10 through 15 yr.	110
Over 15 yr.	100

TABLE II—TACHYPNEA AT REST

Age	Respiratory rate over (per minute)
Under 1 yr.	40
1 through 5 yr.	35
6 through 9 yr.	30
Over 9 yr.	25

104.03 Hypertensive cardiovascular disease. With persistently elevated blood pressure for age (see Table III) and one of the following:

A. Impaired renal function as described under the criteria in § 106.02; or

B. Cerebrovascular damage as described under the criteria in § 111.06; or

C. Congestive heart failure as described under the criteria in § 104.02.

TABLE III—ELEVATED BLOOD PRESSURE

Age	Systolic (over) In mm. Hg	Diastolic (over) In mm. Hg
Under 6 mo.	95	60
6 mo. to 1 yr.	110	70
1 through 8 yrs.	115	80
9 through 11 yrs.	120	80
12 through 15 yrs.	130	80
Over 15 yrs.	140	80

104.04 Cyanotic congenital heart disease. With one of the following:

A. Surgery is limited to palliative measures; or

B. Characteristic squatting, hemoptysis, syncope, or hypercyanotic spells; or

C. Chronic hematocrit of 55 percent or greater or arterial O₂ saturation of less than 90 percent at rest, or arterial oxygen tension of less than 60 Torr at rest.

104.05 Cardiac arrhythmia, such as persistent or recurrent heart block or A-V dissociation (with or without therapy). And one of the following:

A. Cardiac syncope; or

B. Congestive heart failure as described under the criteria in § 104.02; or

C. Exercise intolerance with labored respirations on mild exertion (e.g., in infants, feeding).

104.07 Cardiac syncope. With at least one documented syncope episode characteristic of specific cardiac disease (e.g., aortic stenosis).

104.08 Recurrent hemoptysis. Associated with either pulmonary hypertension or extensive bronchial collaterals due to documented chronic cardiovascular disease.

104.09 Chronic rheumatic fever or rheumatic heart disease. With:

A. Persistence of rheumatic fever activity for 6 months or more, with significant murmur(s), cardiomegaly (see § 104.00C), and other abnormal laboratory findings (such as elevated sedimentation rate or electrocardiographic findings); or

B. Congestive heart failure as described under the criteria in § 104.02.

105.00 DIGESTIVE SYSTEM

A. Disorders of the digestive system which result in disability usually do so because of interference with nutrition and growth, multiple recurrent inflammatory lesions, or other complications of the disease. Such lesions or complications usually respond to treatment. To constitute a listed impairment, these must be shown to have persisted or be expected to persist despite prescribed therapy for a continuous period of at least 12 months.

B. Documentation of gastrointestinal impairments should include pertinent operative findings, radiographic studies, endoscopy, and biopsy reports. Where a liver biopsy has been performed in chronic liver disease, documentation should include the report of the biopsy.

C. Growth retardation and malnutrition. When the primary disorder of the digestive tract has been documented, evaluate resultant malnutrition under the criteria described in § 105.08. Evaluate resultant growth impairment under the criteria described in § 100.03. Intestinal disorders, including surgical diversions and potentially correctable congenital lesions, do not represent a severe impairment if the individual is able to maintain adequate nutrition, growth, and development.

D. Multiple congenital anomalies. See related criteria, and consider as a combination of impairments.

105.01 CATEGORY OF IMPAIRMENTS, DIGESTIVE

105.03 Esophageal obstruction, caused by atresia, stricture, or stenosis. With malnutrition as described under the criteria in § 105.08.

105.05 Chronic liver disease. With one of the following:

A. Inoperable biliary atresia demonstrated by X-ray or surgery; or

B. Intractable ascites not attributable to other causes, with serum albumin of 3.0 gm./100 ml. or less; or

C. Esophageal varices (demonstrated by angiography, barium swallow, or endoscopy or by prior performance of a specific shunt or plication procedure); or

D. Hepatic coma, documented by findings from hospital records; or

E. Hepatic encephalopathy. Evaluate under the criteria in § 112.02; or

F. Chronic active inflammation or necrosis documented by SGOT persistently more than 100 units or serum bilirubin of 2.5 mg. percent or greater.

105.07 Chronic inflammatory bowel disease (such as ulcerative colitis, regional enteritis), as documented in § 105.00. With one of the following:

A. Intestinal manifestations or complications, such as obstruction, abscess, or fistula formation which has lasted or is expected to last 12 months; or

B. Malnutrition as described under the criteria in § 105.08; or

C. Growth impairment as described under the criteria in § 100.03.

105.08 Malnutrition, due to demonstrable gastrointestinal disease causing either a fall of 15 percentiles of weight which persists or the persistence of weight which is less than the third percentile (on standard growth charts). And one of the following:

A. Stool fat excretion per 24 hours:

1. More than 15 percent in infants less than 6 months.

2. More than 10 percent in infants 6-18 months.

3. More than 6 percent in children more than 18 months; or

B. Persistent hematocrit of 30 percent or less despite prescribed therapy; or

C. Serum carotene of 40 mcg./100 ml. or less; or

D. Serum albumin of 3.0 gm./100 ml. or less.

106.00 GENITO-URINARY SYSTEM

A. Determination of the presence of chronic renal disease will be based upon the following factors:

1. History, physical examination, and laboratory evidence of renal disease.

2. Indications of its progressive nature or laboratory evidence of deterioration of renal function.

B. Renal transplant. The amount of function restored and the time required to effect improvement depend upon various factors including adequacy of post-transplant renal function, incidence of renal infection, occurrence of rejection crisis, presence of systemic complications (anemia, neuropathy, etc.) and side effects of corticosteroid or immunosuppressive agents. A period of at least 12 months is required for the individual to reach a point of stable medical improvement.

C. Evaluate associated disorders and complications according to the appropriate body system listing.

106.01 CATEGORY OF IMPAIRMENTS, GENITO-URINARY

106.02 Chronic renal disease. With:

A. BUN of 30 mg./100 ml. or greater; or

B. Serum creatinine of 3.0 mg./100 ml. or greater; or

C. Creatinine clearance equal to or less than 42 ml./min./1.73 m²; or

D. Chronic renal dialysis program for irreversible renal failure; or

E. Renal transplant. Consider under a disability for 12 months following surgery; thereafter, evaluate the residual impairment (see § 106.00B).

106.06 Nephrotic syndrome, with edema not controlled by prescribed therapy. And:

A. Serum albumin less than 2 gm./100 ml.; or

B. Proteinuria more than 2.5 gm./1.73 m²/day.

107.00 HEMIC AND LYMPHATIC SYSTEM

A. Sickle cell disease refers to a chronic hemolytic anemia associated with sickle cell hemoglobin, either homozygous or in combination with thalassemia or with another abnormal hemoglobin (such as C or F).

Appropriate hematologic evidence for sickle cell disease, such as hemoglobin electrophoresis must be included. Vaso-occlusive, hemolytic, or aplastic episodes should be documented by description of severity, frequency, and duration.

Disability due to sickle cell disease may be solely the result of a severe, persistent anemia or may be due to the combination of chronic progressive or episodic manifestations in the presence of a less severe anemia.

Major visceral episodes causing disability include meningitis, osteomyelitis, pulmonary infections or infarctions, cerebrovascular accidents, congestive heart failure, genito-urinary involvement, etc.

B. Coagulation defects. Chronic inherited coagulation disorders must be documented by appropriate laboratory evidence such as abnormal thromboplastin generation, coagulation time, or factor assay.

C. Acute leukemia. Initial diagnosis of acute leukemia must be based upon definitive bone marrow pathologic evidence. Recurrent disease may be documented by peripheral blood, bone marrow, or cerebrospinal fluid examination. The pathology report must be included.

Section 107.11 contains the designated duration of disability implicit in the finding

of a listed impairment. Following the designated time period, a documented diagnosis itself is no longer sufficient to establish a severe impairment. The severity of any remaining impairment must be evaluated on the basis of the medical evidence.

107.01 CATEGORY OF IMPAIRMENTS, HEMIC AND LYMPHATIC

107.03 Hemolytic anemia (due to any cause). Manifested by persistence of hematocrit of 26 percent or less despite prescribed therapy, and reticulocyte count of 4 percent or greater.

107.05 Sickle cell disease. With:
A. Recent, recurrent, severe vaso-occlusive crises (musculoskeletal, vertebral, abdominal); or

B. A major visceral complication in the 12 months prior to application; or

C. A hyperhemolytic or aplastic crisis within 12 months prior to application; or

D. Chronic, severe anemia with persistence of hematocrit of 26 percent or less; or

E. Congestive heart failure, cerebrovascular damage, or emotional disorder as described under the criteria in § 104.02, § 111.00ff, or § 112.00ff.

107.06 Chronic idiopathic thrombocytopenic purpura of childhood. With purpura and thrombocytopenia of 40,000 platelets/cu. mm. or less despite prescribed therapy or recurrent upon withdrawal of treatment.

107.08 Inherited coagulation disorder. With:

A. Repeated spontaneous or inappropriate bleeding; or

B. Hemarthrosis with joint deformity.

107.11 Acute leukemia. Consider under a disability:

A. For 2½ years from the time of initial diagnosis; or

B. For 2½ years from the time of recurrence of active disease.

109.00 ENDOCRINE SYSTEM

A. Cause of disability. Disability is caused by a disturbance in the regulation of the secretion or metabolism of one or more hormones which are not adequately controlled by therapy. Such disturbances or abnormalities usually respond to treatment. To constitute a listed impairment these must be shown to have persisted or be expected to persist despite prescribed therapy for a continuous period of at least 12 months.

B. Growth. Normal growth is usually a sensitive indicator of health as well as of adequate therapy in children. Impairment of growth may be disabling in itself or may be an indicator of a severe disorder involving the endocrine system or other body systems. Where involvement of other organ systems has occurred as a result of a primary endocrine disorder, these impairments should be evaluated according to the criteria under the appropriate sections.

C. Documentation. Description of characteristic history, physical findings, and diagnostic laboratory data must be included. Results of laboratory tests will be considered abnormal if outside the normal range or greater than two standard deviations from the mean of the testing laboratory. Reports in the file should contain the information provided by the testing laboratory as to their normal values for that test.

D. Hyperfunction of the adrenal cortex. Evidence of growth retardation must be documented as described in § 100.00. Elevated blood or urinary free cortisol levels are not acceptable in lieu of urinary 17-hydroxycorticosteroid excretion for the diagnosis of adrenal cortical hyperfunction.

E. Adrenal cortical insufficiency. Documentation must include persistent low plasma cortisol or low urinary 17-hydroxycorticosteroids or 17-ketogenic steroids and

evidence of unresponsiveness to ACTH stimulation.

109.01 CATEGORY OF IMPAIRMENTS, ENDOCRINE

109.02 Thyroid Disorders.

A. Hyperthyroidism (as documented in § 109.00C). With clinical manifestations despite prescribed therapy, and one of the following:

1. Elevated serum thyroxine (T₄) and either elevated free T₄ or resin T₄ uptake; or

2. Elevated thyroid uptake of radioiodine; or

3. Elevated serum triiodothyronine (T₃).

B. Hypothyroidism. With one of the following, despite prescribed therapy:

1. IQ of 69 or less; or

2. Growth impairment as described under the criteria in § 100.02B and C; or

3. Precocious puberty.

109.03 Hyperparathyroidism (as documented in § 109.00C). With:

A. Repeated elevated total or ionized serum calcium; or

B. Elevated serum parathyroid hormone.

109.04 Hypoparathyroidism or Pseudohypoparathyroidism. With:

A. Severe recurrent tetany or convulsions which are unresponsive to prescribed therapy; or

B. Growth retardation as described under the criteria in § 100.02B and C.

109.05 Diabetes insipidus, documented by pathologic hypertonic saline or water deprivation test. And one of the following:

A. Intracranial space-occupying lesion, before or after surgery; or

B. Unresponsiveness to Pitressin; or

C. Growth retardation as described under the criteria in § 100.02B and C; or

D. Unresponsive hypothalamic thirst center, with chronic or recurrent hypernatremia; or

E. Decreased visual fields attributable to a pituitary lesion.

109.06 Hyperfunction of the adrenal cortex (Primary or secondary). With:

A. Elevated urinary 17-hydroxycorticosteroids (or 17-ketogenic steroids) as documented in § 109.00C and D; and

B. Unresponsiveness to low-dose dexamethasone suppression.

109.07 Adrenal cortical insufficiency (as documented in § 109.00C and E). With recent, recurrent episodes of circulatory collapse.

109.08 Juvenile diabetes mellitus (as documented in § 109.00C) requiring parenteral insulin. And one of the following, despite prescribed therapy:

A. Recent, recurrent hospitalizations with acidosis; or

B. Recent, recurrent episodes of hypoglycemia; or

C. Growth retardation as described under the criteria in § 100.02B and C; or

D. Impaired renal function as described under the criteria in § 106.00ff.

109.09 Iatrogenic hypercortisol state. With chronic glucocorticoid therapy resulting in one of the following:

A. Osteoporosis; or

B. Growth retardation as described under the criteria in § 100.02B and C; or

C. Diabetes mellitus as described under the criteria in § 109.08; or

D. Myopathy as described under the criteria in § 111.06; or

E. Emotional disorder as described under the criteria in § 112.00ff.

109.10 Pituitary dwarfism (with documented growth hormone deficiency). And growth impairment as described under the criteria in § 100.02C.

109.11 Adrenogenital syndrome. With:

A. Recent, recurrent salt-losing episodes despite prescribed therapy; or

B. Inadequate replacement therapy manifested by accelerated bone age and virilization; or

C. Growth impairment as described under the criteria in § 100.02B and C.

109.12 Hypoglycemia (as documented in § 109.00C). With recent, recurrent hypoglycemic episodes producing convulsion or coma.

109.13 Gonadal Dysgenesis (Turner's Syndrome), chromosomally proven. Evaluate the resulting impairment under the criteria for the appropriate body system.

110.00 MULTIPLE BODY SYSTEMS

A. Catastrophic congenital abnormalities or disease. This section refers only to very serious congenital disorders, diagnosed in the newborn or infant child.

B. Immune deficiency diseases. Documentation of immune deficiency disease must be submitted, and may include quantitative immunoglobulins, skin tests for delayed hypersensitivity, lymphocyte stimulative tests, and measurements of cellular immunity mediators.

110.01 CATEGORY OF IMPAIRMENTS, MULTIPLE BODY SYSTEMS

110.08 Catastrophic congenital abnormalities or disease. With:

A. A positive diagnosis (such as anencephaly, trisomy D or E, cyclopia, etc.), generally regarded as being incompatible with extrauterine life; or

B. A positive diagnosis (such as cri du chat, Tay-Sachs Disease) wherein attainment of the growth and development level of 2 years is not expected to occur.

110.09 Immune deficiency disease.

A. Hypogammaglobulinemia or dysgammaglobulinemia. With:

1. Recent, recurrent severe infections; or

2. A complication such as growth retardation, chronic lung disease, collagen disorder, or tumors.

B. Thymic dysplastic syndromes (such as Swiss, diGeorge).

111.00 NEUROLOGICAL

A. Seizure disorder must be substantiated by at least one detailed description of a typical seizure. Report of recent documentation should include an electroencephalogram and neurological examination. Sleep EEG is preferable, especially with temporal lobe seizures. Frequency of attacks and any associated phenomena should also be substantiated.

Young children may have convulsions in association with febrile illnesses. Proper use of § 111.02 and § 111.03 requires that a seizure disorder be established. Although this does not exclude consideration of seizures occurring during febrile illnesses, it does require documentation of seizures during non-febrile periods.

There is an expected delay in control of seizures when treatment is started, particularly when changes in the treatment regimen are necessary. Therefore, a seizure disorder should not be considered to meet the requirements of § 111.02 or § 111.03 unless it is shown that seizures have persisted more than three months after prescribed therapy began.

B. Minor motor seizures. Classical petit mal seizures must be documented by characteristic EEG pattern, plus information as to age at onset and frequency of clinical seizures. Myoclonic seizures, whether of the typical infantile or Lennox-Gastaut variety after infancy, must also be documented by the characteristic EEG pattern plus information as to age at onset and frequency of seizures.

C. Motor dysfunction. As described in § 111.06, motor dysfunction may be due to any neurological disorder. It may be due to static or progressive conditions involving any area of the nervous system and producing any type of neurological impairment. This

may include weakness, spasticity, lack of coordination, ataxia, tremor, athetosis, or sensory loss. Documentation of motor dysfunction must include neurologic findings and description of type of neurologic abnormality (e.g., spasticity, weakness), as well as a description of the child's functional impairment (i.e., what the child is unable to do because of the abnormality). Where a diagnosis has been made, evidence should be included for substantiation of the diagnosis (e.g., blood chemistries and muscle biopsy reports), wherever applicable.

D. *Impairment of communication.* The documentation should include a description of a recent comprehensive evaluation, including all areas of affective and effective communication, performed by a qualified professional.

111.01 CATEGORY OF IMPAIRMENT, NEUROLOGICAL

111.02 Major motor seizure disorder.

A. *Major motor seizures.* In a child with an established seizure disorder, the occurrence of more than one major motor seizure per month despite at least three months of prescribed treatment. With:

1. Diurnal episodes (loss of consciousness and convulsive seizures); or
2. Nocturnal episodes manifesting residuals which interfere with activity during the day.

B. *Major motor seizures.* In a child with an established seizure disorder, the occurrence of at least one major motor seizure in the year prior to application despite at least three months of prescribed treatment. And one of the following:

1. IQ of 69 or less; or
2. Significant interference with communication due to speech, hearing, or visual defect; or
3. Significant emotional disorder; or
4. Where significant adverse effects of medication interfere with major daily activities.

111.03 *Minor motor seizure disorder.* In a child with an established seizure disorder, the occurrence of more than one minor motor seizure per week, with alteration of awareness or loss of consciousness, despite at least three months of prescribed treatment.

111.05 *Brain tumors.* A. Malignant gliomas (astrocytoma—Grades III and IV, glioblastoma multiforme), medulloblastoma, ependymoblastoma, primary sarcoma, or brain stem gliomas; or

B. Evaluate other brain tumors under the criteria for the resulting neurological impairment.

111.06 *Motor dysfunction (due to any neurological disorder).* Persistent disorganization or deficit of motor function for age involving two extremities, which (despite prescribed therapy) interferes with age-appropriate major daily activities and results in disruption of:

- A. Fine and gross movements; or
- B. Gait and station.

111.07 *Cerebral palsy.* With: A. Motor dysfunction meeting the requirements of § 111.06 or § 101.03; or

B. Less severe motor dysfunction (but more than slight) and one of the following:

1. IQ of 69 or less; or
2. Seizure disorder, with at least one major motor seizure in the year prior to application; or
3. Significant interference with communication due to speech, hearing, or visual defect; or
4. Significant emotional disorder.

111.08 *Meningocele (and related disorders).* With one of the following despite prescribed treatment:

A. Motor dysfunction meeting the requirements of § 111.06 or § 111.03; or

B. Less severe motor dysfunction (but more than slight), and:

1. Urinary or fecal incontinence when inappropriate for age; or
2. IQ of 69 or less; or
3. Four extremity involvement; or
4. Noncompensated hydrocephalus producing interference with mental or motor developmental progression.

111.09 *Communication impairment, associated with documented neurological disorder.* And one of the following:

- A. Documented speech deficit which significantly affects the clarity and content of the speech; or
- B. Documented comprehension deficit resulting in ineffective verbal communication for age; or
- C. Impairment of hearing as described under the criteria in § 102.08.

112.00 MENTAL AND EMOTIONAL DISORDERS

A. *Introduction.* This section is intended primarily to describe mental and emotional disorders of young children. The criteria describing medically determinable impairments in adults should be used where they clearly appear to be more appropriate.

B. *Mental retardation. General.* As with any other impairment, the necessary evidence consists of symptoms, signs, and laboratory findings which provide medically demonstrable evidence of impairment severity. Standardized intelligence test results are essential to the adjudication of all cases of mental retardation that are not clearly covered under the provisions of § 112.05A. Developmental milestone criteria may be the sole basis for adjudication only in cases where the child's young age and/or condition preclude formal standardized testing by a psychologist or psychiatrist experienced in testing children.

Measures of intellectual functioning. Standardized intelligence tests, such as the Wechsler Preschool and Primary Scale of Intelligence (WPPSI), the Wechsler Intelligence Scale for Children (WISC), the Revised Stanford-Binet Scale, and the McCarthy Scales of Children's Abilities, should be used wherever possible. Key data such as subtest scores should also be included in the report. Tests should be administered by a qualified and experienced psychologist or psychiatrist, and any discrepancies between formal test results and the child's customary behavior and daily activities should be duly noted and resolved.

Developmental milestone criteria. In the event that a child's young age and/or condition preclude formal testing by a psychologist or psychiatrist experienced in testing children, a comprehensive evaluation covering the full range of developmental activities should be performed. This should consist of a detailed account of the child's daily activities together with direct observations by a professional person; the latter should include indices or manifestations of social, intellectual, adaptive, verbal, motor (posture, locomotion, manipulation), language, emotional, and self-care development for age. The above should then be related by the evaluating or treating physician to established developmental norms of the kind found in any widely used standard pediatric text.

C. *Profound combined mental-neurological-musculoskeletal impairments.* There are children with profound and irreversible brain damage resulting in total incapacitation. Such children may meet criteria in either neurological, musculoskeletal, and/or mental sections; they should be adjudicated under the criteria most completely substantiated by the medical evidence submitted. Frequently, the most appropriate criteria will be found under the mental impairment section.

112.01 CATEGORY OF IMPAIRMENTS, MENTAL AND EMOTIONAL

112.02 *Chronic brain syndrome.* With arrest of developmental progression for at least six months or loss of previously acquired abilities.

112.03 *Psychosis of infancy and childhood.* Documented by psychiatric evaluation and supported, if necessary, by the results of appropriate standardized psychological tests and manifested by marked restriction in the performance of daily age-appropriate activities; constriction of age-appropriate interests; deficiency of age-appropriate self-care skills; and impaired ability to relate to others; together with persistence of one (or more) of the following:

- A. Significant withdrawal or detachment; or
- B. Impaired sense of reality; or
- C. Bizarre behavior patterns; or
- D. Strong need for maintenance of sameness, with intense anxiety, fear, or anger when change is introduced; or
- E. Panic at threat of separation from parent.

112.04 *Functional nonpsychotic disorders.* Documented by psychiatric evaluation and supported, if necessary, by the results of appropriate standardized psychological tests and manifested by marked restriction in the performance of daily age-appropriate activities; construction of age-appropriate interests; deficiency of age-appropriate self-care skills; and impaired ability to relate to others; together with persistence of one (or more) of the following:

- A. Psychophysiological disorder (e.g., diarrhea, asthma); or
- B. Anxiety; or
- C. Depression; or
- D. Phobic, obsessive, or compulsive behavior; or
- E. Hypochondriasis; or
- F. Hysteria; or
- G. Asocial or antisocial behavior.

112.05 *Mental retardation.*—A. Achievement of only those developmental milestones generally acquired by children no more than one-half the child's chronological age; or

- B. IQ of 59 or less; or
- C. IQ of 60-69, inclusive, and a physical or other mental impairment imposing additional and significant restriction of function or developmental progression.

13.00 *NEOPLASTIC DISEASES, MALIGNANT.*—A. *Introduction.* Determination of disability in the growing and developing child with a malignant neoplastic disease is based upon the combined effects of:

1. The pathophysiology, histology, and natural history of the tumor; and
2. The effects of the currently employed aggressive multimodal therapeutic regimens. Combinations of surgery, radiation, and chemotherapy or prolonged therapeutic schedules impart significant additional morbidity to the child during the period of greatest risk from the tumor itself. This period of highest risk and greatest therapeutically-induced morbidity defines the limits of disability for most of childhood neoplastic disease.

B. *Documentation.* The diagnosis of neoplasm should be established on the basis of symptoms, signs, and laboratory findings. The site of the primary, recurrent, and metastatic lesion must be specified in all cases of malignant neoplastic diseases. If an operative procedure has been performed, the evidence should include a copy of the operative note and the report of the gross and microscopic examination of the surgical specimen, along with all pertinent laboratory and X-ray reports. The evidence should also include a recent report directed especially at describing whether there is evidence of local or regional recurrence, soft

part or skeletal metastasis, and significant post-therapeutic residuals.

C. *Malignant solid tumors*, as listed under § 113.03, include the histiocytosis syndromes except for solitary eosinophilic granuloma. Thus, § 113.03 should not be used for evaluating brain tumors (see § 111.05) or thyroid tumors, which must be evaluated on the basis of whether they are controlled by prescribed therapy.

D. *Duration of disability* from malignant neoplastic tumors is included in § 113.02 and § 113.03. Following the time periods designated in these sections, a documented diagnosis itself is no longer sufficient to establish a severe impairment. The severity of a remaining impairment must be evaluated on the basis of the medical evidence.

113.01 *Category of impairments*, neoplastic diseases—malignant.

113.02 *Lymphoreticular malignant neoplasms*. Consider under a disability:

A. For 2½ years from the time of initial diagnosis; or

B. For 2½ years from the time of recurrence of active disease.

113.03 *Malignant solid tumors*. Consider under a disability:

A. For 2 years from the time of initial diagnosis; or

B. For 2 years from the time of recurrence of active disease.

113.04 *Neuroblastoma*. With one of the following:

A. Extension across the midline; or

B. Distant metastasis; or

C. Recurrence; or

D. Onset at age 1 year or older.

113.05 *Retinoblastoma*. With one of the following:

A. Bilateral involvement; or

B. Metastases; or

C. Extension beyond the orbit; or

D. Recurrence.

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Title 28—Judicial Administration

CHAPTER I—DEPARTMENT OF JUSTICE PART 16—PRODUCTION OR DISCLOSURE OF MATERIAL OR INFORMATION

Public Observation of Parole Commission Meetings

On February 3, 1977 42 FR 6610, the United States Parole Commission published a notice of proposed rules implementing the requirements of 5 U.S.C. 552b, subsections (b) through (f), ("The Government in the Sunshine Act"). Following the period announced for the submission of public comment, the Commission voted to adopt its rules with the single change that § 16.200(e) (5) was expanded to clarify the functions of the study committees referred to in that section.

The only comment received was from Rep. Richardson Preyer, Chairman of the Government Information and Individual Rights Subcommittee of the House Committee on Government Operations. This letter raised several points of criticism, specifically discussed below.

1. Section 16.202(b) was criticized for prohibiting the use of "any mechanical or electronic device" to record an open meeting. The comment suggested consideration be given to permitting recording methods whose operation would not disturb the proceedings. The Commission

reserves in its rule the right to grant prior permission for the use of such methods in appropriate circumstances. The Commission believes that as a general policy, a limitation to observation and note-taking prevents the possibility of disruption while providing members of the public with the opportunity to keep memoranda of points of interest to them.

2. Section 16.203(a) (4) was criticized for varying from the language of exemption 4 of the Act. However, the Commission believes that one proper function of agency rules is to apply a general law such as the Sunshine Act to the specific context within which the agency operates, and to explain its practical significance to day to day agency operations. No criticism was made that the type of financial information involved in applications for exemptions under 29 U.S.C. 504 and 1111, would not fall within the exemption for "financial information" set forth at section (c) (4), whenever obtained upon a promise of confidentiality.

3. Section 16.203(b) was criticized for not setting up a formal, two-step procedure by which the Commission would apparently first vote whether a meeting could be closed, and second, whether the meeting should be opened in the public interest, notwithstanding an available exemption under the law. However, such a procedural formality is not, in the Commission's view, required by the law. The Commission believes that it is implicit in its regulation, and it is the Commission's intent, that it will in all cases consider the public interest, and that it will open its meetings whenever feasible notwithstanding the available exemptions.

4. Section 16.203(d) (4) was criticized for failing to require certification by the General Counsel before a meeting may be closed. The Commission agrees that the better practice, as suggested in H. Rep. 94-1441, p. 19, is to obtain certification prior to the holding of a closed meeting, and will endeavor to make it its practice to do so. Moreover, the relative infrequency of Commission business and policy meetings (as compared with other agencies), makes the possibility of late certification generally unlikely. Only in the case of meetings to decide individual parole cases would the rare emergency be likely to arise (under statutory deadlines for decision-making) necessitating late certification.

5. Finally, § 16.204(c) (2) was criticized because it would permit deletion of items without notice; however, this deletion provision applies only to closed meetings. Thus, no member of the public planning to attend a meeting would be inconvenienced by such a deletion.

Accordingly, pursuant to the authority of 18 U.S.C. 4203(a) (1) and 5 U.S.C. 552b(g), a new Subpart F is added to 28 CFR, Chapter I, Part 16 as follows, effective March 12, 1977.

Dated: March 10, 1977.

GEORGE J. REED,
Acting Vice Chairman,
United States Parole Commission.

Subpart F—Public Observation of Parole Commission Meetings

Sec.	
16.200	Definitions.
16.201	Voting by the Commissioners without joint deliberation.
16.202	Open meetings.
16.203	Closed meetings, formal procedure.
16.204	Public notice.
16.205	Closed meetings, informal procedure.
16.206	Transcripts, minutes, and miscellaneous documents concerning Commission meetings.
16.207	Public Access to non-exempt transcripts and minutes of closed Commission meetings, documents used at meetings, record retention.
16.208	Annual report.

AUTHORITY: 18 U.S.C. 4203(a) (1), 5 U.S.C. 552b(g).

Subpart F—Public Observation of Parole Commission Meetings

§ 16.200 Definitions.

As used in this part: (a) The term Commission means the United States Parole Commission and any subdivision thereof authorized to act on its behalf.

(b) The term meeting refers to the deliberations of at least the number of Commissioners required to take action on behalf of the Commission where such deliberations determine or result in the joint conduct or disposition of official Commission business.

(c) Specifically included in the term meeting are:

(1) Meetings of the Commission required to be held by 18 U.S.C. 4203(a);

(2) Special meetings of the Commission called pursuant to 18 U.S.C. 4204(a) (1);

(3) Meetings of the National Commissioners in original jurisdiction cases pursuant to 28 CFR 2.17(a);

(4) Meetings of the entire Commission to determine original jurisdiction appeal cases pursuant to 28 CFR 2.27; and

(5) Meetings of the National Appeals Board pursuant to 28 CFR 2.26.

(6) Meetings of the Commission to conduct a hearing on the record in conjunction with applications for certificates of exemption under section 504(a) of the Labor-Management Reporting and Disclosure Act of 1959, and section 411 of the Employee Retirement Income Security Act of 1974 (28 CFR 4.1-17 and 28 CFR 4a.1-17).

(d) Specifically excluded from the term meeting are:

(1) Determination made through independent voting of the Commissioners without the joint deliberation of the number of Commissioners required to take such action, pursuant to § 16.201;

(2) Original jurisdiction cases determined by sequential vote pursuant to 28 CFR 2.17;

(3) Cases determined by sequential vote pursuant to 28 CFR 2.24 and 2.25;

(4) National Appeals Board cases determined by sequential vote pursuant to 28 CFR 2.26;

(5) Meetings of committees of Commissioners, not constituting a quorum of the Commission, which shall be established by the Chairman to report and make recommendations to the Commis-

sion and the Chairman on any matter, including (i) policy, (ii) budget, (iii) personnel and training, and (iv) research; in addition, such committees may from time to time be approved by a majority of the Commission and Chairman regarding policies and procedures of the Commission;

(6) Determinations required or permitted by these regulations to open or close a meeting, or to withhold or disclose documents or information pertaining to a meeting.

(e) All other terms used in this part shall be deemed to have the same meaning as identical terms used in Chapter I, Part 2, of Title 28, of the Code of Federal Regulations.

§ 16.201 Voting by the Commissioners without joint deliberation.

(a) Whenever the Commission's Chairman so directs, any matter which (1) does not appear to require joint deliberation among the members of the Commission, or (2) by reason of its urgency, cannot be scheduled for consideration at a Commission meeting, may be disposed of by presentation of the matter separately to each of the members of the Commission. After consideration of the matter each Commission member shall report his vote to the Chairman.

(b) Whenever any member of the Commission so requests, any matter presented to the Commissioners for disposition pursuant to paragraph (a) of this section shall be withdrawn and scheduled instead for consideration at a Commission meeting.

(c) The provisions of § 16.206(a) of these rules shall apply in the case of any Commission determination made pursuant to this section.

§ 16.202 Open meetings.

(a) Every portion of every meeting of the Commission shall be open to public observation unless closed to the public pursuant to the provisions of § 16.203 (Formal Procedure) or § 16.205 (Informal Procedure).

(b) The attendance of any member of the public is conditioned upon the orderly demeanor of such person during the conduct of Commission business. The public shall be permitted to observe and to take notes, but unless prior permission is granted by the Commission, shall not be permitted to record or photograph by means of any mechanical or electronic device any portion of meetings which are open to the public.

(c) The Commission shall be responsible for arranging a suitable site for each open Commission meeting so that ample seating, visibility, and acoustics are provided to the public and ample security measures are employed for the protection of Commissioners and Staff. The Commission shall be responsible for recording or developing the minutes of Commission meetings.

(d) Public notice of open meetings shall be given as prescribed in § 16.204 (a), and a record of votes kept pursuant to § 16.206(a).

§ 16.203 Closed meetings—formal procedure.

(a) The Commission, by majority vote, may close to public observation any meeting or portion thereof, and withhold from the public announcement concerning such meeting any information, if public observation or the furnishing of such information is likely to:

(1) Disclose matters (i) specifically authorized under criteria established by an executive order to be kept secret in the interests of national defense or foreign policy and (ii) in fact properly classified pursuant to such executive order;

(2) Relate solely to the internal personnel rules and practices of the Commission or any agency of the Government of the United States;

(3) Disclose matters specifically exempted from disclosure by statute (other than 5 U.S.C. 552, or the Federal Rules of Criminal Procedure): *Provided*, That such statute or rule (i) requires that the matters be withheld in such a manner as to leave no discretion on the issue, or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld, including exempted material under the Privacy Act of 1974 or the Commission's Alternate Means of Access under the Privacy Act of 1974, as set forth at 28 CFR 16.65;

(4) Disclose a trade secret or commercial or financial information obtained from any person, corporation, business, labor or pension organization, which is privileged or obtained upon a promise of confidentiality, including information concerning the financial condition or funding of labor or pension organizations, or the financial condition of any individual, in conjunction with applications for exemption under 29 U.S.C. 504 and 1111, and information concerning income, assets and liabilities of inmates, and persons on supervision;

(5) Involve accusing any person of a crime or formally censuring any person;

(6) Disclose information of a personal nature, where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(7) Disclose an investigatory record compiled for law enforcement purposes, or information derived from such a record, which describes the criminal history or associations of any person under the Commission's jurisdiction or which describes the involvement of any person in the commission of a crime, but only to the extent that the production of such records or information would:

(i) Interfere with enforcement proceedings;

(ii) Deprive a person of a right to a fair trial or an impartial adjudication;

(iii) Constitute an unwarranted invasion of personal privacy;

(iv) Disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source;

(v) Disclose investigative techniques and procedures, or

(vi) Endanger the life or physical safety of law enforcement personnel;

(8) Disclose information, the premature disclosure of which would be likely to significantly frustrate implementation of proposed Commission action except where:

(i) The Commission has already publicly disclosed the content or nature of its proposed action or

(ii) The Commission is required by law to make such disclosure on its own initiative prior to taking final Commission action on such proposal;

(9) Specifically concern the Commission's issuance of subpoena or participation in a civil action or proceeding; or

(10) Specifically concern the initiation, conduct, or disposition of a particular case of formal adjudication pursuant to the procedures in 5 U.S.C. 554, or of any case involving a determination on the record after opportunity for a hearing. Included under the above terms are:

(A) Record review hearings following opportunity for an in-person hearing pursuant to the procedures of 28 CFR 4.1-17 and 28 CFR 4a.1-17 (governing applications for certificates of exemption under the Labor-Management Reporting and Disclosure Act of 1959 and the Employee Retirement Income Security Act of 1974, and

(B) The initiation, conduct, or disposition by the Commission of any matter pursuant to the procedures of 28 CFR 2.1-58 (parole, release, supervision, and recommitment of prisoners, youth offenders, and juvenile delinquents).

(b) *Public Interest Provision.* Notwithstanding the exemptions at paragraph (a) (1)-(10) of this section, the Commission may conduct a meeting or portion of a meeting in public when the Commission determines, in its discretion, that the public interest in an open meeting clearly outweighs the need for confidentiality.

(c) *Nonpublic matter in announcements.* The Commission may delete from any announcement or notice required in these regulations information the disclosure of which would be likely to have any of the consequences described in paragraph (a) (1)-(10) of this section, including the name of any individual considered by the Commission in any case of formal or informal adjudication.

(d) *Voting and certification.* (1) A separate recorded vote of the Commission shall be taken with respect to each meeting or portion thereof which is proposed to be closed, and with respect to any information which is proposed to be withheld pursuant to this section. Voting by proxy shall not be permitted. In the alternative, the Commission may, by a single majority vote, close to public observation a series of meetings, or portion(s) thereof or withhold information concerning such series of meetings, provided that:

(i) Each meeting in such series involves the same particular matters and

(ii) Each meeting is scheduled to be held no more than thirty days after the initial meeting in the series.

(2) Upon the request of any Commissioner, the Commission shall make a determination as to closure pursuant to this subsection if any person whose interests may be directly affected by a portion of a meeting requests the Commission to close such portion or portions to the public observation for any of the grounds specified in paragraph (a) (5) (6) or (7) of this section.

(3) The determination to close any meeting to public observation pursuant to this section shall be made at least one week prior to the meeting or the first of a series of meetings as the case may be. If a majority of the Commissioners determines by recorded vote that agency business requires the meeting to take place at any earlier date, the closure determination and announcement thereof shall be made at the earliest practicable time. Within one day of any vote taken on whether to close a meeting under this section, the Commission shall make available to the public a written record reflecting the vote of each Commissioner on the question, including a full written explanation of its action in closing the meeting, portion(s) thereof, or series of meetings, together with a list of all persons expected to attend the meeting(s) or portion(s) thereof and their affiliation, subject to the provisions of paragraph (c) of this section.

(4) For every meeting or series of meetings closed pursuant to this section, the General Counsel of the Parole Commission shall publicly certify that, in Counsel's opinion, the meeting may be closed to the public and shall state each relevant exemptive provision.

§ 16.204 Public notice.

(a) *Requirements.* Every open meeting and meeting closed pursuant to § 16.203 shall be preceded by a public announcement posted before the main entrance to the Chairman's Office at the Commission's headquarters, 320 First Street, Northwest, Washington, D.C., and, in the case of a meeting held elsewhere, in a prominent place at the location in which the meeting will be held. Such announcement shall be transmitted to the FEDERAL REGISTER for publication and, in addition, may be issued through the Department of Justice, Office of Public Information, as a press release, or by such other means as the Commission shall deem reasonable and appropriate. The announcement shall furnish:

(1) A brief description of the subject matter to be discussed;

(2) The date, place, and approximate time of the meeting;

(3) Whether the meeting will be open or closed to public observation; and

(4) The name and telephone number of the official designated to respond to requests for information concerning the meeting. See § 16.205(d) for the notice requirement applicable to meetings closed pursuant to that section.

(b) *Time of notice.* The announcement required by this section shall be released to the public at least one week prior to the meeting announced therein except where a majority of the members

of the Commission determines by a recorded vote that Commission business requires earlier consideration. In the event of such a determination, the announcement shall be made at the earliest practicable time.

(c) *Amendments to notice.* The time or place of a meeting may be changed following the announcement only if the Commission publicly announces such change at the earliest practicable time. The subject matter of a meeting, or determination of the Commission to open or close a meeting, or portion of a meeting, to the public may be changed following the announcement only if:

(1) A majority of the entire membership of the Commission determines by a recorded vote that Commission business so requires and that no earlier announcement of the change was possible, and

(2) The Commission publicly announces such change and the vote of each member upon such change at the earliest practicable time: *Provided*, That individual items which have been announced for Commission consideration at a closed meeting may be deleted without notice.

§ 16.205 Closed meetings — Informal procedures.

(a) *Finding.* Based upon a review of the meetings of the U.S. Parole Commission since the effective date of the Parole Commission and Reorganization Act (May 14, 1976), the regulations issued pursuant thereto (28 CFR Part 2) the experience of the U.S. Board of Parole, and the regulations pertaining to the Commission's authority under 29 U.S.C. 504 and 29 U.S.C. 1111 (28 CFR Parts 4 and 4a), the Commission finds that the majority of its meetings may properly be closed to the public pursuant to 5 U.S.C. 552 (d) (4) and (c) (10). The major part of normal Commission business lies in the adjudication of individual parole cases, all of which proceedings commence with an initial parole or revocation hearing and are determined on the record thereof.

Original jurisdiction cases are decided at bi-monthly meetings of the National Commissioners (28 CFR 2.17) and by the entire Commission in conjunction with each business meeting of the Commission (held at least quarterly) (28 CFR 2.27).

The National Appeals Board normally decides cases by sequential vote on a daily basis, but may meet from time to time for joint deliberations. In the period from October, 1975 through September, 1976, the National Appeals Board made 2,072 Appellate decisions.

Finally, over the last two years the Commission determined eleven cases under the Labor and Pension Acts, which are proceedings pursuant to 5 U.S.C. 554. The only meetings of the Commission not of an adjudicative nature involving the most sensitive inquiry into the personal background and behavior of the individual concerned, or involving sensitive financial information concerning the parties before the Commission, are the normal business meetings of the Commis-

sion, which are held at least quarterly.

(b) *Meetings to which applicable.* The following types of meetings may be closed in the event that a majority of the Commissioners present at the meeting, and authorized to act on behalf of the Commission, votes by recorded vote at the beginning of each meeting or portion thereof, to close the meeting or portions thereof:

(1) Original jurisdiction initial and appellate case deliberations conducted pursuant to 28 CFR 2.17 and 2.27;

(2) National Appeals Board deliberations pursuant to 28 CFR 2.26;

(3) Meetings of the Commission to conduct a hearing on the record regarding applications for certificates of exemption pursuant to the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 504, and the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1111 (28 CFR 4.1-17 and 29 CFR 4a.1-17).

(c) *Written record of action to close meeting.* In the case of a meeting or portion of a meeting closed pursuant to this section, the Commission shall make available to the public as soon as practicable:

(1) A written record reflecting the vote of each member of the Commission to close the meeting; and

(2) A certification by the Commission's General Counsel to the effect that in Counsel's opinion, the meeting may be closed to the public, which certification shall state each relevant exemptive provision.

(d) *Public notice.* In the case of meetings closed pursuant to this section the Commission shall make a public announcement of the subject matter to be considered, and the date, place, and time of the meeting. The announcement described herein shall be released to the public at the earliest practicable time.

§ 16.206 Transcripts, minutes, and miscellaneous documents concerning Commission meetings.

(a) In the case of any Commission meeting, whether open or closed, the Commission shall maintain and make available for public inspection a record of the final vote of each member on rules, statements of policy, and interpretations adopted by it: 18 U.S.C. 4203(d).

(b) The Commission shall maintain a complete transcript or electronic recording adequate to record fully the proceedings of each meeting, or portion of a meeting, closed to the public pursuant to § 16.203. In the case of a meeting, or portion of a meeting, closed to the public pursuant to § 16.205 of these regulations, the Commission may maintain either the transcript or recording described above, or a set of minutes unless a recording is required by Title 18, U.S.C. 4208(f). The minutes required by this section shall fully and clearly describe all matters discussed and shall provide a full and accurate summary of any actions taken, and the reasons therefor, including a description of each of the views expressed on any item and the record of any rollcall vote (reflecting the vote of each Com-

missioner on the question). All documents considered in connection with any action shall be identified in such minutes.

(c) The Commission shall retain a copy of every certification executed by the General Counsel's Office pursuant to these regulations, together with a statement from the presiding officer of the meeting, or portion of a meeting to which the certification applies, setting forth the time and place of the meeting, and the persons present.

(d) Nothing herein shall affect any other provision in Commission procedures or regulations requiring the preparation and maintenance of a record of all official actions of the Commission.

§ 16.207 Public access to non-exempt transcripts and minutes of closed Commission meetings—documents used at meetings—record retention.

(a) *Public access to records.* Within a reasonable time after any closed meeting, the Commission shall make available to the public, in the Commission's Public Reading Room located at 320 First Street Northwest, Washington, D.C., the transcript, electronic recording, or minutes of the discussion of any item on the agenda, or of any item of the testimony of any witness received at such meeting, maintained hereunder, except for such item or items of such discussion or testimony which contain information exempt under any provision of the Government in the Sunshine Act (Pub. L. 94-409), or of any amendment thereto. Copies of non-exempt transcripts, or minutes, or a transcription of such recording disclosing the identity of each speaker, shall be furnished to any person at the actual cost of duplication or transcription.

(b) Access to documents identified or discussed in any Commission meeting, open or closed, shall be governed by Department of Justice regulations at this Part 16, Subparts (c) and (d). The Commission reserves the right to invoke statutory exemptions to disclosure of such documents under 5 U.S.C. 552 and 552a, and applicable regulations. The exemptions provided in U.S.C. 552b(c) shall apply to any request made pursuant to 5 U.S.C. 552 or 552a to copy and inspect any transcripts, recordings or minutes prepared or maintained pursuant hereto.

(c) *Retention of records.* The Commission shall maintain a complete verbatim copy of the transcript, or a complete copy of the minutes, or a complete electronic recording of each meeting, or portion of a meeting, closed to the public, for a period of at least two years after such meeting, or until one year after the conclusion of any Commission proceeding with respect to which the meeting or portion thereof was held, whichever occurs later.

§ 16.208 Annual report.

The Commission shall report annually to Congress regarding its compliance with Sunshine Act requirements, including a tabulation of the total number of meetings open to the public, the total number of meetings closed to the public, the reasons for closing such meetings,

and a description of any litigation brought against the Commission under this section, including any costs assessed against the Commission in such litigation and whether or not paid.

[FR Doc. 77-7663 Filed 3-15-77; 8:45 am]

Title 29—Labor

CHAPTER X—NATIONAL MEDIATION BOARD

PART 1209—PUBLIC OBSERVATION OF NATIONAL MEDIATION BOARD MEETINGS

Government in the Sunshine Act

Notice is hereby given that Chapter X, Title 29 Code of Federal Regulations, is amended by the addition of a new Part 1209, entitled "Public Observation of National Mediation Board Meetings." A notice of proposed rulemaking with respect to Part 1209 was published in the FEDERAL REGISTER on February 9, 1977, (42 FR 8155). The final text of Part 1209 reflects minor non-substantive editorial and organizational changes from the proposed text.

Part 1209 implements the provisions of the Government in the Sunshine Act, 5 U.S.C. 552b. This part sets forth the regulations under which the National Mediation Board shall engage in public decisionmaking processes, make public announcement of meetings at which a quorum of Board Members consider and determine official agency actions, and inform the public of which meetings they are entitled to observe.

These amendments are issued pursuant to the authority of 5 U.S.C. 552b (g) and 44 Stat. 577, as amended (45 U.S.C. 151 et seq.).

The regulations as adopted read as set forth below and shall be effective for all meetings as defined therein held on or after March 12, 1977.

By direction of the National Mediation Board.

ROWLAND K. QUINN, Jr.,
Executive Secretary.

29 CFR, Chapter X, is amended by the addition of a new Part 1209, reading as follows:

Sec.	
1209.01	Scope and purpose.
1209.02	Definitions.
1209.03	Conduct of National Mediation Board Business.
1209.04	Open meetings.
1209.05	Public announcement of meetings.
1209.06	Special meetings.
1209.07	Change in meeting plans subsequent to public announcement.
1209.08	Providing information to the public.
1209.09	Federal Register notices.
1209.10	Capacity of public observers.
1209.11	Provisions under which meetings may be closed.
1209.12	Procedures for closing meetings.
1209.13	Public availability of recorded vote to close meetings and explanation therefore.
1209.14	Maintaining records of closed meetings.
1209.15	Availability of records to the public.
1209.16	Requests for records under Freedom of Information Act.

AUTHORITY: 5 U.S.C. 552b(g); 44 Stat. 577, as amended (45 U.S.C. 151 et seq.)

§ 1209.01 Scope and purpose.

(a) The provisions of this part are intended to implement the requirements of section 3(a) of the Government in the Sunshine Act, 5 U.S.C. 552b.

(b) It is the policy of the National Mediation Board that the public is entitled to the fullest practicable information regarding its decisionmaking processes. It is the purpose of this part to provide the public with such information while protecting the rights of individuals and the ability of the agency to carry out its responsibilities.

§ 1209.02 Definitions.

For purposes of this part:

(a) The term "Board" means the National Mediation Board, a collegial body composed of three Members appointed by the President with the advice and consent of the Senate.

(b) The term "meeting" means the deliberations of at least two Members of the Board where such deliberations determine or result in the joint conduct or disposition of official agency business, but does not include deliberations to determine whether a meeting shall be closed to public observation, or with respect to any information proposed to be withheld under 5 U.S.C. 552b(c).

§ 1209.03 Conduct of National Mediation Board Business.

Members shall not jointly conduct or dispose of agency business other than in accordance with this part.

§ 1209.04 Open meetings.

Every portion of every Board meeting shall, except as otherwise provided by § 1209.11, be open to public observation.

§ 1209.05 Public announcement of meetings.

(a) Except as provided in §§ 1209.06 and 1209.07, the Board shall make a public announcement at least one week before the scheduled meeting, to include the following:

(1) Time, place, and subject matter of the meeting, except as qualified by paragraph (b) of this section;

(2) Whether the meeting is to be open or closed to the public; and

(3) Name and telephone number of the agency official who will respond to requests for information concerning the meeting.

(b) If announcement of the subject matter of a closed meeting would reveal information, the nature of which would frustrate the purpose for closing the meeting, the subject matter shall not be announced.

§ 1209.06 Special meetings.

Notwithstanding § 1209.05, where agency business so requires, the Board Members may determine, by majority recorded vote, to schedule a meeting for a date earlier than one week subsequent to public announcement. Under such circumstances, the information to be conveyed to the public pursuant to § 1209.05 shall be publicly announced at the earliest practicable time.

§ 1209.07 Change in meeting plans subsequent to public announcement.

(a) Following public announcement of a meeting pursuant to § 1209.05 or § 1209.06, the time or place of a meeting may be changed only if the change is announced publicly at the earliest practicable time in a manner otherwise in conformance with § 1209.05.

(b) Following public announcement of a meeting, the subject matter of a meeting or the determination to open or close a meeting may be changed only if both of the following conditions are met:

(1) A majority, recorded vote of the Members of the Board determines that agency business requires the change and that no earlier announcement of such change was possible; and

(2) A public announcement of the change and of the individual Board Members' votes is made at the earliest practicable time.

§ 1209.08 Providing information to the public.

Information available to the public in accordance with this part shall be posted on a bulletin board maintained for such purpose at the Board's offices, 1425 K Street NW., Washington, D.C. Interested individuals or organizations may request the Executive Secretary, National Mediation Board, Washington, D.C. 20572 to place them on a mailing list for receipt of information available under this part.

§ 1209.09 Federal Register notices.

Immediately following each public announcement required by this part, the following information, as applicable, shall be submitted for publication in the FEDERAL REGISTER.

(a) Notice of the time, place, and subject matter of a meeting;

(b) Whether the meeting is open or closed;

(c) Any change in one of the preceding; and

(d) The name and telephone number of the agency official who will respond to requests for information about the meeting.

§ 1209.10 Capacity of public observers.

The public may attend open Board meetings for the sole purpose of observation. Observers may not participate in meetings unless expressly invited or otherwise interfere with the conduct and disposition of agency business. When a portion of a meeting is closed to the public, observers will leave the meeting room upon request to enable discussion of the exempt matter therein under consideration.

§ 1209.11 Provisions under which meetings may be closed.

A meeting as defined in § 1209.02 or portion thereof, may be closed to public observation where the Board determines that portions of the meeting are likely to incorporate deliberations subject to the exemptions enumerated in 5 U.S.C. 552b(c).

§ 1209.12 Procedures for closing meetings.

(a) The Board may determine to close to public observation a particular meeting or portions thereof, only if at least two Board Members vote on the record to take such action. No proxy votes shall be permitted. A single vote may be taken with respect to a series of meetings, or portions thereof, which are proposed to be closed to the public, so long as each meeting in such series involves the same particular matters and is scheduled to be held no more than thirty days after the initial meeting in the series.

(b) Whenever any person, whose interests may be directly affected by a portion of a meeting, requests that the Board close such portion to the public for any of the reasons referred to in 5 U.S.C. 552b(c) (5), (6) or (7), the Board, upon request of any of the Members thereof, shall determine by recorded vote whether to close such portion.

(c) For every meeting or portion thereof which Members of the Board have voted to close, the General Counsel of the National Mediation Board shall publicly certify whether, in his or her opinion, the meeting may properly be closed to the public. In addition, the General Counsel shall state each relevant exemptive provision as set forth in 5 U.S.C. 552b(c). A copy of the General Counsel's certification, together with a statement from the presiding officer of the meeting setting forth the time and place of the meeting and listing the persons present, shall be retained by the Board's Executive Secretary.

§ 1209.13 Public availability of recorded vote to close meetings and explanation therefor.

Within one day of any vote taken on a proposal to close a meeting, the Board shall make publicly available a record reflecting the vote of each Member on the question. In addition, within one day of any vote which closes a portion or portions of a meeting to the public, the Board shall make publicly available a full written explanation of its closure action together with a list naming all persons expected to attend and identifying their affiliation, unless such disclosure would reveal information, the nature of which would frustrate the purpose for closing the meeting.

§ 1209.14 Maintaining records of closed meetings.

(a) A record of each meeting or portion thereof which is closed to the public will be made and retained for two years or for one year after the conclusion of the agency proceeding involved in the meeting, whichever is longer. Such record shall consist of a verbatim transcript or electronic recording of the meeting except as provided by § 1209.14(b).

(b) In lieu of a transcript or recording, a comprehensive set of minutes may be produced if the closure decision was made pursuant to 5 U.S.C. 552b(c) (8), (9) (A), or (10). Such minutes shall fully and clearly describe all matters dis-

cussed, provide a full and accurate summary of any actions taken and the reasons expressed therefor, and include a description of each of the views expressed on any item. The minutes shall also reflect the vote of each Member on any action taken during the proceedings and identify all documents produced at the meeting.

§ 1209.15 Availability of records to the public.

(a) The Board shall make promptly available to the public the transcript, electronic recording, or minutes maintained as a record of closed meetings, except for such records exempt from disclosure pursuant to 5 U.S.C. 552b(f) (2). Copies of such nonexempt transcripts, minutes, or electronic recordings, disclosing the identity of each speaker, shall be furnished to any person at the actual cost of duplication or transcription.

(b) Requests for transcripts, minutes, or electronic recordings of Board meetings shall be directed to the Executive Secretary, National Mediation Board, Washington, D.C. 20572. Such requests shall reasonably identify the records being sought and include a statement that whatever costs are involved in furnishing the records will be acceptable or, alternatively, that costs will be acceptable up to a specified amount. The Board may determine to require prepayment of costs associated with this Subsection.

§ 1209.16 Requests for records under Freedom of Information Act.

Requests to review or obtain copies of agency records other than notices or records prepared under this Part may be pursued in accordance with the Freedom of Information Act (5 U.S.C. 552), part 1208 of the Board's rules addresses the requisite procedure under that Act.

[FR Doc. 77-7728 Filed 3-11-77; 3:23 pm]

Title 45—Public Welfare

CHAPTER II—SOCIAL AND REHABILITATION SERVICE (ASSISTANCE PROGRAMS), DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

PART 205—GENERAL ADMINISTRATION—PUBLIC ASSISTANCE PROGRAMS

Quality Control System; Revocation of Disallowance Provisions

The Administrator of the Social and Rehabilitation Service, with the approval of the Secretary of Health, Education, and Welfare, hereby amends § 205.40 and revokes § 205.41 of Title 45 of the Code of Federal Regulations. Current regulations in § 205.40 provide for a Quality Control system for the Aid to Families with Dependent Children program, and, in Puerto Rico, the Virgin Islands and Guam, for the programs of financial assistance to the aged, blind or disabled. This section requires States to sample their caseloads to determine their rates of erroneous payments thereunder for 6-month reporting periods, and to take corrective action to reduce the inci-

dence of these erroneous payments. As amended on August 5, 1975 (40 FR 32954) after proposed rulemaking published on May 19, 1975 (40 FR 21737), the regulations at § 205.41 provided for the disallowance of Federal financial participation in payments to ineligible and overpayments exceeding the prescribed tolerance levels of 3 percent and 5 percent, respectively. The disallowances were to be taken for all reporting periods beginning with the July 1-December 31, 1975 reporting period.

Two factors form the basis for the Department's revocation of § 205.41. First on May 14, 1976, the United States District Court for the District of Columbia issued an Order and Opinion in the case of *State of Maryland v. Mathews* which involved a challenge by 14 States to the validity of the disallowance provisions.

The Court ruled, contrary to the plaintiff States' argument, that the Social Security Act does not require Federal matching of all erroneous payments, and therefore concluded that a regulation providing for the disallowance of such payments exceeding specified levels is authorized by the Act. However, the Court ruled that the Act does contemplate Federal matching of a reasonable level of erroneous payments.

The Court found the tolerance levels of 3 percent and 5 percent to be inadequately justified, and, based upon the evidence before it, unreasonably strict. Accordingly, the Court enjoined the Department from enforcing § 205.41 against the plaintiff States.

Second, the Department has been discussing with representatives of a number of States the possibility of revising the Quality Control program. The Department decided not to appeal the *Maryland* decision as a demonstration of its good faith in these discussions. The Department also believes that it would be unfair, and certainly contrary to the spirit of cooperation necessary for successful completion of these discussions, to take the disallowances against those States which did not attain the prescribed tolerance levels and were not parties to the *Maryland* action.

Therefore, the Department is retroactively revoking § 205.41 to comply with the *Maryland* decision, and to demonstrate its good faith in discussion with the States to seek a fair alternative to the present Quality Control regulations. Accordingly, no disallowances will be taken for any periods pursuant to the § 205.41 provisions that are being revoked.

The revocation of the current content of § 205.41 does not exempt the States from the requirements of § 205.40. Thus, States are still required to sample their caseloads, report the results of these samples, and develop and implement corrective action plans to reduce the incidence of erroneous payments as specified under that section.

It should be noted that the revocation of § 205.41 also results in States being held fiscally accountable for individually identified payments to ineligible and

overpayments which are made after the date of publication of this revocation. The regulations at 45 CFR 233.10(b)(1) provide that Federal financial participation is available only in proper payments. Therefore, absent the provision of § 205.41 which, in effect, provide for FFP in these improper payments not exceeding the prescribed tolerance levels, the Department is now required to disallow FFP in all such individual improper payments identified by the State or through Federal reviews.

The Department finds that there is good cause to dispense with proposed rulemaking for two reasons. First, the revocation, effective retroactively, will relieve States of the potential fiscal burden of disallowances for prior periods. Second, immediate publication is necessary to enable those States which were not parties to the *Maryland* action to plan their budgets with full knowledge of the Department's intentions.

In addition to the revocation of § 205.41, two changes are being made in § 205.40:

1. Section 205.40(b)(3)(iv) incorporates by cross-reference the tolerance levels "specified in paragraph (a) of § 205.41 of this chapter"; § 205.40 (a) and (c) refer to § 205.41. The revocation of § 205.41 requires that tolerance levels be reflected in § 205.40 for purposes of corrective action plans; and that the references to § 205.41 be deleted. The revisions do not require proposed rulemaking procedures since they are purely technical and do not result in any substantive change.

2. The Department recognizes that the Child Support Enforcement Program under Title IV-D of the Act is a major Federal/State undertaking which cuts across many aspects of the eligibility and grant determination process for a large portion of the AFDC caseload, and that States continue to experience significant difficulty in fully implementing these provisions. Accordingly, § 205.40(c) is amended to extend, through June 30, 1977, the time period during which IV-D-related errors will not be counted as case errors.

The purpose of this change is to provide the States with an additional period of time during which to fully implement the cited requirements. The basis for the extension is the Department's belief that to cite case errors associated with the IV-D program would be unreasonable and not in the best interest of the goal of improved management of the AFDC program and uniform national application of quality control.

This amendment does not exempt the States from implementing the statutory and regulatory program requirements. Failure to substantially comply with such requirements could still result in withholding of Federal financial participation. The Department finds that there is good cause to waive public participation procedures because the extension benefits State agencies without having any adverse effects on applicants for, or recipients of, assistance.

Both the *Maryland* decision and the decision in similar actions, *State of Ohio*

v. Mathews and *State of Georgia v. Mathews*, clearly allow the Department to establish new tolerance levels for overpayments and payments to ineligible, under regulations similar to those contained at § 205.41 prior to this revocation, as a basis for disallowing FFP in the future. Accordingly, the Department has prepared a draft proposal to establish new tolerance levels for use as the basis for future disallowances of FFP. The draft proposal is currently in the review process and is available prior to its publication in the *FEDERAL REGISTER*. Copies of the draft proposal may be obtained from:

Dr. Victor Kugalevsky, Office of Special Initiatives, Social and Rehabilitation Service, U.S. Department of Health, Education, and Welfare, Room 5092, MES Building, 330 C Street SW., Washington, D.C. 20201, 202-245-0330.

Accordingly, Chapter II, Title 45 of the Code of Federal Regulations is revised as set forth below:

1. Section 205.40 is revised by deleting all cross-references to § 205.41 and amending paragraphs (b)(3)(iv) and (c) to read as set forth below:

§ 205.40 Quality control system.

(a) *Definitions.* For purposes of this section, notwithstanding any other regulations in this chapter:

(b) *State plan requirements.*—A State plan under title IV-A or I, X, XIV or XVI of the Social Security Act must provide for a continuing system of quality control for assuring that assistance is furnished in accordance with permissible State practice (as defined herein). Under this requirement:

(3) The State agency shall submit to the Social and Rehabilitation Service, in such form and at such times as it prescribes:

(iv) A corrective action plan for reducing the case error rates of ineligibility, overpayments, and underpayments, within 90 days of the close of the 6-month sampling period to which they apply (January 1 through June 30, or July 1 through December 31), even after achieving case error rates of:

- (A) 3 percent for ineligibility;
- (B) 5 percent for overpayments; and
- (C) 5 percent for underpayments; and

(c) *Temporary exception.* Through June 30, 1977, for the purpose of this section, the term "case error" shall not include errors that result solely from the State's:

(1) Failure to apply, or improper or incomplete application of, the following provisions:

- (i) 45 CFR 232.10 Furnishing of social security numbers;
- (ii) 45 CFR 232.11 Assignment of rights to support; and
- (iii) 45 CFR 232.12 Cooperation in obtaining support; and

(2) Treatment of child support collected and distributed under the State

IV-D plan and support or contribution income received directly from a legally liable individual by the AFDC family, when the recipient's support rights have been assigned to the State agency.

2. Section 205.41 is revoked, retroactive to July 1, 1975.

§ 205.41 [Reserved]

(Sec. 1102, 49 Stat. 647 (42 U.S.C. 1302).)

Effective date. This amendment is effective July 1, 1975.

(Catalog of Federal Domestic Assistance Program No. 13.761, Public Assistance—Maintenance Assistance (State Aid))

NOTE.—The Social and Rehabilitation Service has determined that this document does not require preparation of an inflationary impact statement under Executive Order 11821 and OMB Circular A-107.

Answers to specific questions may be obtained by calling Victor Kugajevsky, 202-245-0330.

Dated: February 7, 1977.

DON I. WORTMAN,
Acting Administrator, Social and
Rehabilitation Service.

Approved: March 10, 1977.

JOSEPH A. CALIFANO, JR.,
Secretary.

[FR Doc.77-7756 Filed 3-15-77;8:45 am]

CHAPTER VI—NATIONAL SCIENCE FOUNDATION

PART 614—GOVERNMENT IN THE SUNSHINE ACT REGULATIONS OF THE NATIONAL SCIENCE BOARD

The following regulations implement the policy of the United States and of the National Science Board (NSB) to give the public open access to the decisionmaking of the Board to the fullest extent that is practicable, consistent with the rights of individuals, and consistent with the ability of the Board and the Federal Government generally to carry out their responsibilities. It will be the general rule of the Board that every portion of every meeting of the National Science Board will be open to public observation. Certain exceptions to this rule will be made to protect the rights of citizens and the functioning of the Board and the Foundation. The following regulations identify the conditions under which meetings may be closed under these exceptions and under which certain other information may be withheld. They also prescribe procedures for closing meetings, for handling the transcripts or recordings of closed meetings, and for making public announcements of Board meetings and meeting changes.

These regulations were published in proposed form in 41 FR 54956 on December 16, 1976. Comments received have been carefully considered. The principal points raised and the Foundation's responses follow:

1. *Comment.* The Board should be required to decide by majority vote whether any document considered at a Board meeting shall be kept secret. *Response.* The Foundation's currently effective

Freedom of Information Act regulations (45 CFR Part 612) cover the availability of documents, including documents considered at Board meetings. Meaningful detailed consideration by the full National Science Board of what parts of what documents may be and should be withheld would be impractical and a poor use of its limited time.

2. *Comment.* The regulations should permit requests from the public for reconsideration of decisions to close meetings. *Response.* Inclusion of a formal provision is not required by law and appears unnecessary. The staff of the Board will consider any such requests and bring them to the attention of the Chairman.

3. *Comment.* Any decision not to release all or parts of the transcript of a closed meeting should be taken in the same manner as a decision to close all or parts of the meeting—by record vote of the Board. *Response.* Such a requirement is conspicuously absent in 5 U.S.C. 552b(f)(2). Section 614.4(c) of the Board's regulations, which provides for release by the Chairman or his designee, should speed and simplify the release of information, since the Board meets as a whole only at intervals of a month or more.

4. *Comment.* Budget deliberations of the Board are not per se exempt under the Act. *Response.* The regulations do not make budget deliberations per se exempt. The Board will generally follow Administration guidance on interpretation of the Act in determining what budget deliberations to conduct in closed session.

5. *Comment.* The preamble to the NSB regulations indicates that there will be cases in which Board recommendations to the President will be considered in closed session to prevent premature disclosure. Agency recommendations to the President are not ipso facto within exemption 9B. *Response.* The proposed regulations do not require recommendations to the President to be considered in closed session. However, the Board may find in individual cases that deliberations on some such recommendations are within the exemption. This is consistent with its legislative history.

6. *Comment.* Section 614.2(a) should be amended to require, besides a finding that the subject matter falls within a specific exemption, a finding that the public interest mandates a closed meeting. *Response.* Proposed § 614.2(a) states that the Board may close portions of meetings if it properly determines that the subjects under discussion fall within one of the exemptions. In other words, the section is permissive, not mandatory. In deciding whether or not to close any discussion the Board will naturally be guided by the public interest provision of the Act.

7. *Comment.* Section 614.2(a)(9)(i), which reflects exemption 9A of the Act, is not available to the Board and should be deleted from the regulations. *Response.* The Board may conceivably receive information from a government agency within the scope of 9A. The provision which would allow the Board to consider any such information in closed

session might be used in such a rare circumstance, but not otherwise.

8. *Comment.* Section 614.3(a) should be amended to make clear that the General Counsel's certificate must be presented before a meeting may be closed. *Response.* The Act says only that "for every meeting closed" the General Counsel shall certify. It does not say when he shall certify. The certificate normally will nonetheless be executed before any meeting of the Board is closed. Instances may arise in which the certificate will not be reduced to written form before the the closed meeting, however, even though the Board's resolution to close will be made with advice from the General Counsel. This might occur, for example, when items that cannot be postponed are added to a closed-meeting agenda at the last minute. Thus, § 614.3 is consistent with the text of the Act and provides appropriate flexibility for special circumstances.

9. *Comment.* Section 614.4(a) should be amended to make the transcript or recording of a closed meeting publicly available on the Board's own initiative, whether or not a public request for it is made. *Response.* The Act does not require that the transcript be made available before a request is made. The Board has been conducting its meetings under the Act for several months, during which no request for a transcript or recording has yet been made. Preparation of a transcript or recording for release, with accompanying decisions on what will and will not be withheld, is costly. The Board's experience thus far indicates that anticipatory expenditure of the taxpayers' money for this purpose would be unjustified. Should the frequency of requests for transcripts materially increase, however, the Board will reconsider this matter.

10. *Comments.* Section 614.5(b) should be amended to provide for the posting on public notice boards of meeting announcements and related information. *Response.* This has been done.

Accordingly, Part 614 of Title 45 of the Code of Federal Regulations is promulgated as set forth below, effective March 12, 1977.

NORMAN HACKERMAN,
Chairman, National Science Board.

MARCH 11, 1977.

- Sec. 614.1 General rule.
- 614.2 Grounds for closing meetings.
- 614.3 Materials relating to closed portions of meetings.
- 614.4 Opening of transcript or recording.
- 614.5 Public announcement.
- 614.6 Meeting changes.
- 614.7 Record vote.
- 614.8 Application to Board Executive Committee.

AUTHORITY: Government in the Sunshine Act, sec. 552b of Title 5, United States Code; 90 Stat. 1241.

§ 614.1 General rule.

Except as otherwise provided in these regulations, every portion of every meeting of the National Science Board will be open to public observation.