30. In § 174.680, paragraph (a) would be revised to read as follows:

§ 174.680 Division 6.1 (poisonous) materials with foodstuffs.

(a) A carrier may not transport any package bearing a POISON or POISON INHALATION HAZARD label in the same car with any material marked as or known to be a foodstuff, feed, or any other edible material intended for consumption by humans or animals.

* * * * *

PART 175—CARRIAGE BY AIRCRAFT

31. The authority citation for Part 175 would continue to read as follows:

Authority: 49 App. U.S.C. 1803, 1804, 1807, 1808, 49 CFR Part 1.

32. In § 175.33, the first sentence of paragraph (b) would be revised to read as follows:

§ 175.33 Notification of pilot-in-command.

* * * * *

(b) A copy of the written notification of pilot-in-command shall be readily available to the pilot-in-command during flight and a copy must be made readily available to authorities, including emergency response personnel, in the event of an accident, incident involving the hazardous material, or inspection. * * *

33. Section 175.630 would be revised to read as follows:

§ 175.630 Special requirements for Division 6.1 (poisonous) material and Division 6.2 (infectious substance) material.

(a) A hazardous material bearing a POISON, POISON INHALATION HAZARD, KEEP AWAY FROM FOOD, or INFECTIOUS SUBSTANCE label may not be carried in the same compartment of an aircraft with material which is marked as or known to be a foodstuff, feed, or any other edible material intended for consumption by humans or animals unless either the Division 6.1 (poisonous) material or material in Division 6.2 (infectious substance) and the foodstuff, feed, or other edible material are loaded in separate unit load devices which, when stowed on the aircraft, are not adjacent to each other, or the Division 6.1 (poisonous) material or material in Division 6.2 (infectious substance) are loaded in one closed unit load device and the foodstuff, feed or other material is loaded in another closed unit load device.

(b) No person may operate an aircraft that has been used to transport any package bearing a POISON or POISON INHALATION HAZARD label unless, upon removal of such package, the area in the aircraft in which it was carried is visually inspected for evidence of leakage, spillage, or other contamination. All contamination discovered must be either isolated or removed from the aircraft. The operation of an aircraft contaminated with such Division 6.1 (poisonous) materials is considered to be the carriage of poisonous materials under paragraph (a) of this section.

PART 176—CARRIAGE BY VESSEL

34. The authority citation for Part 176 would continue to read as follows:

Authority: 49 App. U.S.C. 1803, 1804, 1805, 1808; 49 CFR Part 1.53, App. A to Part 1.

35. In § 176.30, the third sentence of paragraph (a) introductory text would be revised to read as follows:

§ 176.30 Dangerous cargo manifest.

(a) * * * This document must be kept in a designated holder on or near the vessel's bridge and must be made readily available to authorities, including emergency response personnel, in the event of an accident, incident involving materials listed on the manifest, or inspection. * * *

* * * * *

36. In § 176.600, paragraph (a) would be revised to read as follows:

§ 176.600 General stowage requirement.

(a) Each package required to have a POISON GAS, POISON INHALATION HAZARD, or POISON label thereon being transported on a vessel must be stowed clear of living quarters and any ventilation ducts serving living quarters and separate from foodstuffs.

* * * * *

PART 177—CARRIAGE BY PUBLIC HIGHWAY

37. The authority citation for Part 177 would continue to read as follows:

Authority: 49 App. U.S.C. 1803, 1804, 1805; 49 CFR Part 1.

§ 177.817 [Amended]

38. In the introductory text of paragraph (e) of § 177.817, the phrase "authorities in the event of accident or inspection." would be replaced with the phrase "authorities, including emergency response personnel, in the event of accident, incident involving a hazardous material, or inspection.".

39. In § 177.841, paragraph (e) introductory text would be republished and paragraphs (e)(1) and (e)(2) would be revised to read as follows:

§ 177.841 Division 6.1 (poisonous) and Division 2.3 (poisonous gas) materials.

* * * * *

(e) A motor carrier may not transport a package:

(1) Bearing a POISON or POISON INHALATION HAZARD label in the same motor vehicle with material that is marked as or known to be a foodstuff, feed or edible material intended for consumption by humans or animals unless the inside package is overpacked in a liquid-tight and dust proof container identified as package 4000 in the National Motor Freight Classification 100–1 or is overpacked in a metal drum as specified in § 173.25(c) of this subchapter;

(2) Bearing or required to bear a POISON, POISON GAS or POISON INHALATION HAZARD label in the driver's compartment (including a sleeper berth) of a motor vehicle; or

* * * * *

Issued in Washington, DC on August 4, 1994, under authority delegated in 49 CFR Part 106, Appendix A.

Alan I. Roberts,

Associate Administrator for Hazardous Materials Safety.

[FR Doc. 94–19490 Filed 8–12–94; 8:45 am]

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Monday
August 15, 1994

Part IV

Department of Labor

Office of the Secretary
Employment and Training Administration

20 CFR Part 655
29 CFR Parts 18 and 24
Amendment of Filing and Service Requirements in Proceedings Before the Office of Administrative Law Judges; Interim Final Rule

DEPARTMENT OF LABOR

Office of the Secretary

Employment and Training Administration

20 CFR 655

29 CFR Part 18 and 24

Amendment of Filing and Service Requirements in Proceedings Before the Office of Administrative Law Judges

AGENCY: Office of the Secretary, Labor.

ACTION Interim final rule; request for comments.

SUMMARY: Interim final rule amends regulations governing the filing and service of documents in proceedings before the Department of Labor's Office of Administrative Law Judges generally, and in one instance, the Regional Administrator's service of a notice of denial of temporary labor certification. The amendments modify regulations which heretofore required filing or service by mailgram or telegram, substituting therefore the option to file or serve those documents by facsimile (fax), telegram or other means normally assuring next day delivery. The amendments also provide guidelines for the filing and service of documents by facsimile, *limiting such filings to instances when they are explicitly permitted by statute or regulation, or by the presiding administrative law judge.* Finally, the amendments eliminate the routine filing of documents relating to discovery, limiting such filings to instances when there is a reason for their submission.

DATES:

Effective Date: This interim rule is effective September 14, 1994.

Comments: Comments on the interim rule shall be submitted by mail and must be received by October 14, 1994 to ensure consideration.

ADDRESSES: Send comments to John M. Vittone, Deputy Chief Administrative Law Judge, Room 4250, Office of Administrative Law Judges, 800 K Street, NW., Suite 400, Washington, DC 20001–8002.

FOR FURTHER INFORMATION CONTACT: John M. Vittone, Deputy Chief Administrative Law Judge, Office of Administrative Law Judges. Telephone: (202) 633–0341.

SUPPLEMENTARY INFORMATION:

Purpose of Amendments

These amendments are grounded in the notion that procedural regulations should reflect practical realities. In today's business world, when a document needs to be delivered quickly, overnight couriers and facsimile transmissions are extremely effective methods. Thus, in programs administered by the Department of Labor when speedy filing or service of a document is essential, the amendments permitting the use of facsimile or overnight couriers conform the regulations to modern business practice.

On the other hand, given the large number of cases docketed by the Office of Administrative Law Judges each year, the use of facsimile—although often convenient to parties—is not administratively practical for routine matters. The Department generally agrees with the Judicial Conference Guidelines for Filing by Facsimile Transmission, which are referenced by Rule 5 of the Federal Rules of Civil Procedure. *See* Malkin, *Judicial Conference Guidelines For Filing By Facsimile Transmission*, Court Administration Bulletin (Dec. 1991). The Judicial Conference concluded that "basic facsimile technology has not reached a level that would allow for routine filing by facsimile without placing an undue administrative and resource burden on the courts." *Id.* Practical concerns noted by the Judicial Conference included technical problems with facsimile transmissions, the cost of equipment and supplies, and the burden on administrative staff.

When filing or service is routine, regular mail usually is sufficient. Even when time is of the essence, an overnight courier normally provides an adequate means of filing a document quickly. Thus, these amendments limit the use of facsimile to file documents to those instances in which such a filing is explicitly permitted by statute or regulations (*see, e.g.*, 20 CFR 655.820(e), 655.1020(d); 29 CFR 506.630(e), 507.820(e), 508.1020(d)) or by the presiding administrative law judge. In designing the amendments to govern filings by facsimile, the Department has taken into consideration the practice of the federal courts (*see* Fed. R. App. P. 25 and Fed. R. Civ. P. 5), the rules of other federal agencies (*see, e.g.*, 29 CFR Part 102.114 (NLRB); 29 CFR 2200.9(f) (OSHA); 34 CFR Parts 76, 81, 86, 218, 222, 300, 361, 581 (DOE); 49 CFR 1162.2(e)(3) (ICC)), the rules of assorted state courts (*see, e.g.*, Ark. Code § 16–20–109; Cal Rules of Court R 2010, 2005, 2009; La R.S. 13:850; Tenn Code Ann. § 16–3–408) and various legal commentary (*see, e.g.*, Malkin, *Judicial Conference Guidelines For Filing By Facsimile Transmission*, Court Administration Bulletin (Dec. 1991); Koenig, *Courts in the Fax Lane: The Use of Facsimile Technology by State Courts*, 14 State Court Journal 13 (Winter 1991); *Study Shows Limited Fax Use By Majority of State Courts*, The National L.J., Oct. 8, 1990, at 17; Note, *Telefacsimile Documents: A Survey of Uses in the Legal Setting*, 36 The Wayne L. Rev. 1361 (1990)).

Finally, the amendments include elimination of routine filing of discovery documents. As a practical matter, such documents are generally not needed for the administrative record unless a party submits them in support of a motion (*e.g.* a motion to compel attendance at a deposition) or the document is being submitted as evidence. The present system of routinely filing copies of such documents with the presiding administrative law judge only results in an administrative record cluttered with unneeded papers.

Rules of Special Application

These amendments do not purport to cover all rules of special application governing the conduct of hearings before the Office of Administrative Law Judges under specific Department of Labor programs. At least some rules of special application contain service and filing requirements that are inconsistent with these amendments. For example, the Office of Federal Contract Compliance Programs' rules at 41 CFR 60–30.4 (a) and (b) require the filing of all litigation documents with the Office of Administrative Law Judges, including documents relating to discovery, and specify that parties shall serve and file litigation documents by personal delivery or mail. *Rules of special application control to the extent that the general rules of practice and procedure found in 29 CFR Part 18 are inconsistent. See* 29 CFR 18.1(a).

Technical Comments

Most of the amendments simply replace a telegram requirement with less restrictive language. Less obvious changes, however, are discussed below.

The amendment to 20 CFR 655.212 deletes "by telegram." Not only was this phrase unnecessary, it was also inappropriate for several sections such as 655.211, which do not set time frames or other procedures for requesting a review. The amendment to 20 CFR 655.212 also corrects the spelling of "countervailing."

The new paragraph (f) to 29 CFR 18.3 governs filing or service by facsimile. It permits such a filing when explicitly permitted by statute or regulation or when directed or permitted by the presiding administrative law judge. The presiding judge's discretion to direct or permit a filing by facsimile permits flexibility in application, although it is contemplated that filing by facsimile generally will be limited to emergency situations or other compelling circumstances. Nevertheless, *litigants should note that permission to file by facsimile must be obtained, and those who choose to file by facsimile without permission do so at the risk that the filing will not be recognized.*

Subparagraph (f)(4) requires the use of a cover sheet identifying the sender. This requirement reflects fax etiquette, but more importantly, it is helpful if the transmission is bad.

Subparagraph (f)(5) governs the submission of original documents. Although many fax rules contemplate having the original document sent within a few days following a fax transmission, the Department believes that this approach only doubles the amount of paper that must be processed. Thus, this rule requires submission of the original only when so ordered by the presiding administrative law judge, in the event of an original signature requirement, or in disputes over the accuracy of the transmission or the authenticity of the document. The ten day requirement for filing a required original signature conforms the rule to the new attestation regulations. *See, e.g.*, 20 CFR 655.1020.

Subparagraph (f)(6) limits the length of filings by facsimile, although the presiding judge has the discretion to permit a longer filing. In addition, length is not regulated when it is subject to a requirement over which the transmitting party has no control, such as a requirement to file a complaint or determination letter. Long documents hold up fax machines, use government paper (not an inconsequential consideration for an agency that regularly dockets 9,000 cases a year), and extend wear and tear to the mechanical parts of the machine.

Subparagraph (f)(7) indicates that filings by facsimile should normally be done during regular business hours. Fax machines are not monitored at night. This paragraph, however, is directory rather than mandatory, since a blanket prohibition on filing during nonbusiness hours would defeat much of the utility of facsimile machines.

In *Prince* v. *Poulos*, 876 F.2d 30 (5th Cir. 1989), the Fifth Circuit held that an overnight courier service is not a public authority, and therefore not a form of "mail" for purposes of Rule 25 of the Federal Rules of Appellate Procedure. The experience of the Office of Administrative Law Judges, however, has been that overnight courier services are generally reliable and do not present some of the administrative and legal problems presented by filing by facsimile. Thus, paragraph (g) has been added to Part 18 of Title 29 to designate use of courier service as the equivalent of regular mail for purposes of Part 18.

Paragraph (d) is being added to section 18.4 to govern the time a filing or service by facsimile is effective. Using the time printed by the receiving fax machine as the date stamp lessens the need for monitoring of the fax machine and saves one step in the filing process.

Recently, amendments to 29 CFR Part 24 were published for notice and comment. *See* 59 Fed. Reg. 12506 (1994). Those proposed amendments include changes to 29 CFR 24.4 (which will be renumbered as section 24.5) that permit the filing of a request for a hearing in an employee protection proceeding by "facsimile (fax), telegram, hand delivery, or next-day delivery service". 51 Fed. Reg. at 12509. Presently, section 24.4 only authorizes filing of the request by telegram. In addition, the proposed regulatory amendments require the party requesting a hearing to send a copy of the request to the opposing party and the Administrator by "facsimile (fax), telegram, hand delivery, or next-day delivery service". *Id.* Many other changes to Part 24 are also made in the March 16, 1994 Notice of proposed rulemaking. As a temporary measure, the instant interim final rule incorporates the proposed changes to section 24.4 that provide for alternatives to filing by telegram and that require same day notice of the request to the opposing party and the Administrator.

Publication as Interim Final Rule

These amendments are being issued as interim final rules because they are rules of agency procedure and practice for which notice and comment is not required, see 5 U.S.C. 553(b)(A).

Procedural Matters

This is not a significant regulatory action as defined by Executive Order 12866. The Agency Head has certified that this rule, if promulgated, will not have a significant economic impact upon a substantial number of small entities as defined in the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). The rule does not contain any information collection or recordkeeping requirements as defined in the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.).

List of Subjects

20 CFR Part 655

Administrative practice and procedure, Aliens, Employment, Migrant labor.

29 CFR Part 18

Administrative practice and procedure.

29 CFR Part 24

Employment, Environmental protection.

Accordingly, Part 655 of Title 20, and Part 18 and Part 24 of Title 29 of the Code of Federal Regulations are amended as follows:

TITLE 20—EMPLOYEES' BENEFITS

PART 655—TEMPORARY EMPLOYMENT OF ALIENS IN THE UNITED STATES

1. The authority citation for Part 655 continues to read:

Authority: Section 655.0 issued under 8 U.S.C. 1101(a)(15)(H)(i) and (ii), 1182(m) and (n), 1184, 1188, and 1288(c); 29 U.S.C. 49 *et seq.*; 3(c)(1), Pub. L. 101–238, 103 Stat. 2099, 2103 (8 U.S.C. 1182 note); sec. 221(a), Pub. L. 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note); and 8 CFR 214.2(h)(4)(i).

Section 665.00 issued under 8 U.S.C. 1101(a)(15)(h)(ii), 1184, and 1188; 29 U.S.C. 49 *et seq.*; and 8 CFR 214.2(h)(4)(i).

Subparts A and C issued under 8 U.S.C. 1101(a)(15)(H)(ii)(b) and 1184; 29 U.S.C. 49 *et seq.*; and 8 CFR 214.2(h)(4)(i).

Subpart B issued under 8 U.S.C. 1101(a)(15)(H)(ii)(a), 1184, and 1188; and 29 U.S.C. 49 *et seq.*

Subparts D and E issued under 8 U.S.C. 1101(a)(15)(H)(i)(a), 1182(m) and 1184, 29 U.S.C. 49 *et seq.*; and sec. 3(c)(1), Pub. L. 101–238, 103 Stat. 2099, 2103 (8 U.S.C. 1182 note).

Subparts F and G issued under 8 U.S.C. 1184 and 1288(c); and 29 U.S.C. 49 *et seq.*

Subparts H and I issued under 8 U.S.C. 1101(a)(15)(H)(i)(b), 1182(n), and 1184; and 29 U.S.C. 49 *et seq.*

Subparts J and K issued under 29 U.S.C. 49 *et seq.*; and sec. 221(a), Pub. L. 101–649, 104 Stat. 4978, 5027 (8 U.S.C. 1184 note).

2. In § 655.104, paragraph (c)(3) is revised to read as follows:

§ 655.104 Determinations based on acceptability of H–2A applications.

* * * * *

(c) * * *

(3) Offer the applicant an opportunity to request an expedited administrative review of or a *de novo* administrative hearing before an administrative law judge of the nonacceptance; the notice shall state that in order to obtain such a review or hearing, the employer, within seven calendar days of the date of the notice, shall file by facsimile

(fax), telegram, or other means normally assuring next day delivery a written request to the Chief Administrative Law Judge of the Department of Labor (giving the address) and simultaneously serve a copy on the RA; the notice shall also state that the employer may submit any legal arguments which the employer believes will rebut the basis of the RA's action; and

* * * * *

3. Section 655.112 is amended by revising paragraphs (a)(2) and (b)(2) to read as follows:

§ 655.112 Administrative review and de novo hearing before an administrative law judge.

(a) * * *

(2) *Decision.* Within five working days after receipt of the case file the administrative law judge shall, on the basis of the written record and after due consideration of any written submissions submitted from the parties involved or *amici curiae*, either affirm, reverse, or modify the RA's denial by written decision. The decision of the administrative law judge shall specify the reasons for the action taken and shall be immediately provided to the employer, RA, the Director, and INS by means normally assuring next-day delivery. The administrative law judge's decision shall be the final decision of the Secretary and no further review shall be given to the temporary alien agricultural labor certification application or the temporary alien agricultural labor certification determination by any DOL official.

(b) * * *

(2) *Decision.* After a *de novo* hearing, the administrative law judge shall either affirm, reverse, or modify the RA's determination, and the administrative law judge's decision shall be provided immediately to the employer, RA, Director, and INS by means normally assuring next-day delivery. The administrative law judge's decision shall be the final decision of the Secretary, and no further review shall be given to the temporary alien agricultural labor certification application or the temporary alien agricultural labor certification determination by any DOL official.

4. In § 655.204, paragraph (d)(2) is revised to read as follows:

§ 655.204 Determinations based on temporary labor certification applications.

* * * * *

(d) * * *

(2) Offer the employer an opportunity to request an expedited administrative-judicial review of the denial by a Department of Labor (DOL) Hearing Officer. The notice shall state that in order to obtain such a review, the employer must, within five calendar days of the date of the notice, file by facsimile (fax), telegram, or other means normally assuring next day delivery a written request for such a review to the Chief Administrative Law Judge of the Department of Labor (giving the address) and simultaneously serve a copy on the Regional Administrator. The notice shall also state that the employer's request for review should contain any legal arguments which the employer believes will rebut the basis of the RA's denial of certification; and

* * * * *

5. In § 655.206, paragraph (c) is revised to read as follows:

§ 655.206 Determinations of U.S. worker availability and adverse effect on U.S. workers.

* * * * *

(c) If the RA denies the temporary labor certification in whole or part, the RA shall notify the employer in writing by means normally assuring next-day delivery. The notice shall contain all of the statements required in § 655.204(d). If a timely request is made for an administrative-judicial review by a DOL Hearing Officer, the procedures of § 655.212 shall be followed.

* * * * *

6. Section 655.212 is revised to read as follows:

§ 655.212 Administrative-judicial reviews.

(a) Whenever an employer has requested an administrative-judicial review of a denial of an application or a petition in accordance with §§ 655.204(d), 655.205(d), 655.206(c), or 655.211, the Chief Administrative Law Judge shall immediately assign a Hearing Officer to review the record for legal sufficiency, and the Regional Administrator shall send a certified copy of the case file to the Chief Administrative Law Judge by means normally assuring next day delivery. The Hearing Officer shall not have authority to remand the case and shall not receive additional evidence. Any countervailing evidence advanced after decision by the Regional Administrator shall be subject to provisions of 8 CFR 214.2(h)(3)(i).

(b) The Hearing Officer, within five working days after receipt of the case file shall, on the basis of the written record and due consideration of any written memorandums of law submitted, either affirm, reverse or modify the RA's denial by written decision. The decision of the Hearing Officer shall specify the reasons for the action taken and shall be immediately provided to the employer, RA, Administrator, and INS by means normally assuring next-day delivery. The Hearing Officer's decision shall be the final decision of the Department of Labor and no further review shall be given to the temporary labor certification determination by any Department of Labor official.

TITLE 29—LABOR

PART 18—RULES OF PRACTICE AND PROCEDURE FOR ADMINISTRATIVE HEARINGS BEFORE THE OFFICE OF ADMINISTRATIVE LAW JUDGES

7. The authority citation for Part 18 continues to read as follows:

Authority: 5 U.S.C. 301; 5 U.S.C. 551–553; 5 U.S.C. 581; E.O. 12778; 57 Fed. Reg. 7292.

8. Section 18.3 amended by revising paragraph (b) and adding paragraphs (f) and (g) to read as follows:

§ 18.3 Service and filing of documents.

* * * * *

(b) *By parties.* All documents shall be filed with the Office of Administrative Law Judges, except that notices of deposition, depositions, interrogatories, requests for documents, requests for admissions, and answers and responses thereto, shall not be so filed unless the presiding judge so orders, the document is being offered into evidence, the document is submitted in support of a motion or a response to a motion, filing is required by a specialized rule, or there is some other compelling reason for its submission. Service of all documents shall be made upon all parties, and when a party is represented by an attorney or other representative, service also shall be made upon the attorney or representative. Service of any document upon any party may be made by personal delivery or by mailing a copy to the last known address. The person serving the document shall certify to the manner and date of service.

* * * * *

(f) *Filing and service by facsimile.*

(1) *Filing by a party; when permitted.* Filings by a party may be made by facsimile (fax) when explicitly permitted by statute or regulation, or when directed or permitted by the administrative law judge assigned to the case. If prior permission to file by facsimile cannot be obtained because the presiding administrative law judge is not available, a party may file by facsimile and attach a statement of the circumstances requiring that the document be filed by facsimile rather than by regular mail. That statement does not ensure that the filing will be

accepted, but will be considered by the presiding judge in determining whether the facsimile will be accepted *nunc pro tunc* as a filing.

(2) *Service by facsimile; when permitted.* Service upon a party by another party or by the administrative law judge may be made by facsimile (fax) when explicitly permitted by statute or regulation, or when the receiving party consents to service by facsimile.

(3) *Service sheet and proof of service.* Docments filed or served by facsimile (fax) shall include a service sheet which states the means by which filing and/or service was made. A facsimile transmission report generated by the sender's facsimile equipment and which indicates that the transmission was successful shall be presumed adequate proof of filing or service.

(4) *Cover sheet.* Filings or service by facsimile (fax) shall include a cover sheet that identifies the sender, the total number of pages transmitted, and the caption and docket number of the case, if known.

(5) *Originals.* Documents filed or served by facsimile (fax) shall be presumed to be accurate reproductions of the original document until proven otherwise. The party proferring the document shall retain the original in the event of a dispute over authenticity or the accuracy of the transmission. The original document need not be submitted unless so ordered by the presiding judge, or unless an original signature is required by statute or regulation. If an original signature is required to be filed, the date of the facsimile transmission shall govern the effective date of the filing provided that the document containing the original signature is filed within ten calendar days of the facsimile transmission.

(6) *Length of document.* Documents filed by facsimile (fax) should not exceed 12 pages including the cover sheet, the service sheet and all accompanying exhibits or appendices, except that this page limitation may be exceeded if prior permission is granted by the presiding judge or if the document's length cannot be conformed because of statutory or regulatory requirements.

(7) *Hours for filing by facsimile.* Filings by facsimile (fax) should normally be made between 8:00 am and 5:00 pm, local time at the receiving location.

(g) *Filing and service by courier service.* Documents transmitted by courier service shall be deemed transmitted by regular mail in proceedings before the Office of Administrative Law Judges.

9. Section 18.4 is amended by adding paragraph (d) to read as follows:

§ 18.4 Time computations.

* * * * *

(d) *Filing or service by facsimile.* Filing or service by facsimile (fax) is effective upon receipt of the entire document by the receiving facsimile machine. For purposes of filings by facsimile the time printed on the transmission by the facsimile equipment constitutes the date stamp of the Chief Docket Clerk.

10. Section 18.18 is amended by revising paragraph (a) as follows:

§ 18.18 Written interrogatories to parties.

(a) Any party may serve upon any other party written interrogatories to be answered in writing by the party served, or if the party served is a public or private corporation or a partnership or association or governmental agency, by any authorized officer or agent, who shall furnish such information as is available to the party. A copy of the interrogatories, answers, and all related pleadings shall be served on all parties to the proceeding. Copies of interrogatories and responses thereto shall not be filed with the Office of Administrative Law Judges unless the presiding judge so orders, the document is being offered into evidence, the document is submitted in support of a motion or a response to a motion, filing is required by a specialized rule, or there is some other compelling reason for its submission.

* * * * *

11. Section 18.19 is amended by revising paragraph (f) to read as follows:

§ 18.19 Production of documents and other evidence; entry upon land for inspection and other purposes; and physical and mental examination.

* * * * *

(f) A copy of each request for production and each written response shall be served on all parties, but shall not be filed with the Office of Administrative Law Judges unless the presiding judge so orders, the document is being offered into evidence, the document is submitted in support of a motion or a response to a motion, filing is required by a specialized rule, or there is some other compelling reason for its submission.

12. Section 18.20 is amended by revising paragraph (g) to read as follows:

§ 18.20 Admissions.

* * * * *

(g) A copy of each request for admission and each written response shall be served on all parties, but shall not be filed with the Office of Administrative Law Judges unless the presiding judge so orders, the document is being offered into evidence, the document is submitted in support of a motion or a response to a motion, filing is required by a specialized rule, or there is some other compelling reason for its submission.

13. Section 18.22 is amended by revising paragraph (c) to read as follows:

§ 18.22 Depositions.

* * * * *

(c) *Notice.* Notice shall be given for the taking of a deposition, which shall not be less than five (5) days written notice when the deposition is to be taken within the continental United States and not less than twenty (20) days written notice when the deposition is to be taken elsewhere. A copy of the Notice shall not be filed with the Office of Administrative Law Judges unless the presiding judge so orders, the document is being offered into evidence, the document is submitted in support of a motion or a response to a motion, filing is required by a specialized rule, or there is some other compelling reason for its submission.

* * * * *

PART 24—PROCEDURES FOR THE HANDLING OF DISCRIMINATION COMPLAINTS UNDER FEDERAL EMPLOYEE PROTECTION STATUTES

14. The authority citation for Part 24 continues to read as follows:

Authority: 42 U.S.C. 300j–9(i); 33 U.S.C. 1367; 15 U.S.C. 2622; 42 U.S.C. 6971; 42 U.S.C. 7622; 42 U.S.C. 5851.

15. Section 24.4 is amended by revising paragraph (d)(2) (i), (ii), (d)(3) (i) and (ii) to read as follows:

§ 24.4 Investigations.

* * * * *

(d) * * *

(2) * * *

(i) If on the basis of the investigation the Administrator determines that the complaint is without merit, the notice of determination shall include, or be accompanied by notice to the complainant that the notice of determination shall become the final order of the Secretary denying the complaint unless within five calendar days of its receipt the complainant files with the Chief Administrative Law Judge by facsimile (fax), telegram, hand delivery, or next-day delivery service, a request for a hearing on the complaint. The notice shall give the address and the facsimile number of the Chief Administrative Law Judge.

(ii) Copies of any request for a hearing shall be served by the complainant on the respondent (employer) and on the Administrator on the same day that the hearing is requested by facsimile (fax), telegram, hand delivery, or next-day delivery service.

(3) * * *

(i) If on the basis of the investigation the Administrator determines that the alleged violation has occurred, the notice of determination shall include an appropriate order to abate the violation, and notice to the respondent that the order shall become the final order of the Secretary unless within five calendar days of its receipt the respondent files with the Chief Administrative Law Judge by facsimile (fax), telegram, hand delivery, or next-day delivery service, a request for a hearing. An order issued pursuant to this paragraph (d)(3)(i) shall be in accordance with the relevant provisions of the statute violated. The notice shall give the address and facsimile number of the Chief Administrative Law Judge.

(ii) Copies of any request for a hearing shall be sent by the respondent to the complainant and to the Administrator on the same day that the hearing is requested by facsimile (fax), telegram, hand delivery, or next-day delivery service.

Signed at Washington, D.C. this 8th day of August 1994.

Robert Reich,

Secretary of Labor.

[FR Doc. 94–19703 Filed 8–12–94; 8:45 am]

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federal register

Monday
August 15, 1994

Part V

Department of Education

34 CFR Part 364, et al.
Independent Living Services Programs; Final Rule

DEPARTMENT OF EDUCATION

34 CFR Parts 364, 365, 366, and 367

RIN 1820–AB18

Independent Living Services Programs

AGENCY: Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary issues new regulations and amends existing regulations governing the State Independent Living Services (SILS), Centers for Independent Living (CIL), and Independent Living Services for Older Individuals Who Are Blind (OIB) programs. These regulations are needed to implement Chapters 1 and 2 of Title VII of the Rehabilitation Act of 1973 (Act), as amended.

EFFECTIVE DATE: These regulations take effect either 45 days after publication in the **Federal Register** or later if the Congress takes certain adjournments. If you want to know the effective date of these regulations, call or write the Department of Education contact person. A document announcing the effective date will be published in the **Federal Register**.

FOR FURTHER INFORMATION CONTACT: John Nelson, U.S. Department of Education, 400 Maryland Avenue, S.W., Room 3326, Mary E. Switzer Building, Washington, D.C. 20202–2741. Telephone or TDD: (202) 205–9362.

SUPPLEMENTARY INFORMATION: These regulations add a new Part 364 and revise Parts 365, 366, and 367 of the regulations governing the SILS, CIL, and OIB programs. The Secretary will issue final regulations on Subpart G of Part 366 in a separate notice in the **Federal Register**.

The SILS, CIL, and OIB programs are an important part of the National Education Goals. These programs support the National Education Goal that, by the year 2000, every adult American will be literate and will possess the knowledge and skills necessary to compete in a global economy and exercise the rights and responsibilities of citizenship.

On May 12, 1994, the Secretary published a notice of proposed rulemaking (NPRM) in the **Federal Register** (59 FR 24814) proposing to issue new regulations and to amend existing regulations for the SILS, CIL, and OIB programs. The major issues related to these programs were discussed in the preamble to the NPRM.

In general, the commenters agreed with the NPRM. However, in response to public comments, there are some changes between the NPRM and the final regulations. The final regulations clarify the joint responsibility for the development of the State plan for IL; clarify that a State may submit only one State plan for IL; require a service provider to review a determination that an applicant is ineligible for IL services whenever the service provider determines that the applicant's status has materially changed; add as a selection criterion the extent to which consumers are involved in developing a center's application for a grant; and strengthen a consumer's control over the release of personal information by a service provider.

The final regulations also clarify that an existing center that applies for a grant as a new center by establishing a separate center at a new location does not need to establish a separate governing board for that new center; and impose a deadline of 90 days after the end of the fiscal year for submitting the annual performance report required for continuation funding.

Analysis of Comments and Changes

In response to the Secretary's invitation in the NPRM, 40 parties submitted comments on the proposed regulations. An analysis of the comments and of the changes in the regulations since publication of the NPRM follows. General comments are discussed first, followed by comments on specific sections of the regulations. Technical and other minor changes—and suggested changes the Secretary is not legally authorized to make under the applicable statutory authority—are not addressed.

General Comments

Comments: One commenter suggested that the 30-day comment period on the NPRM be extended.

Discussion: The Secretary considered a 30-day comment period necessary because a longer comment period would not have left enough time to make competitive awards for new centers for independent living (centers) under the CIL program for fiscal year (FY) 1994. The Secretary also considered a 30-day comment period adequate because of the extensive opportunity for input and comment that was afforded to the public prior to publishing the NPRM.

Changes: None.

Comments: Two commenters agreed and two commenters disagreed with changing the term "severe" to "significant." Several commenters approved of the regulations as written, without specifically addressing the change in terms. The remainder of the commenters did not address this issue, although they did address other issues.

Discussion: The Secretary published a notice of proposed rulemaking on the nomenclature change from "severe" to "significant" on October 27, 1993 (58 FR 57938). In its response to that nomenclature NPRM, the independent living (IL) community expressed support for the change. Therefore, the Secretary does not believe a change is necessary.

Changes: None.

Part 364

Definitions (§ 364.4)

Comments: One commenter was concerned that the proposed definition of "advocacy" may be interpreted to mean that only an attorney may be an advocate or representative for a consumer. Another commenter suggested a broader definition of "advocacy" that takes into account different "levels of advocacy."

Discussion: The definition of "advocacy" in these regulations does not require an advocate to be an attorney except in those situations where State law or the rules of an agency require that an advocate representing another individual be an attorney. In addition, the definition of "advocacy" includes "individual advocacy," "systemic advocacy," and "self advocacy," which the Secretary believes are sufficient to encompass all situations.

Changes: None.

Comments: Commenters suggested that the proposed definition of "attendant care" be revised to allow this service to be provided on the job and in the community, as well as at home.

Discussion: The Secretary believes that the definition of "attendant care" provides adequate flexibility to allow attendant care in a variety of situations.

Changes: None.

Comments: Commenters questioned why the words "cognitive" and "sensory" do not appear in the proposed definition of "significant disability." Another commenter suggested deleting the words "cognitive" and "sensory" from the proposed definition of an "individual with a disability" to make this definition consistent with the Americans with Disabilities Act and section 504 of the Act.

Discussion: The Secretary agrees that the definitions of "individual with a disability," "individual with a significant disability," and "significant disability" should be consistent with each other and also that these definitions should be consistent with the definitions in the Act. The Secretary believes that the concepts of "physical" and "mental" impairments in the statutory definitions include the concepts of "sensory" and "cognitive" impairments, respectively. Therefore, inclusion of the terms is not inconsistent.

Changes: The Secretary has added the words "cognitive" and "sensory" to the definitions of "individual with a significant disability" and "significant disability" in the final regulations.

Comments: One commenter suggested revising the definition of "nonresidential" to allow centers to own and operate rental housing that is available to the general public if the center has received a residential facility as a bequest or trust intended primarily to enable the center to benefit from the income of the property.

Discussion: The definition of "center for independent living" in section 702(1) of the Act and the definition of "eligible agency" in section 726 of the Act both include the term "nonresidential." Congress clearly intended centers and eligible agencies that receive funds under Chapter 1 of Title VII of the Act to be "nonresidential." The Secretary believes that the definition of "nonresidential" in the final regulations accurately reflects the intent of Congress. This definition prohibits a center from receiving funds under Title VII of the Act if the center operates or manages housing or shelter for individuals with significant disabilities as an IL service on either a temporary or long-term basis, unless the housing or shelter is incidental to the overall operation of the center, necessary so that the individual may receive an IL service, and limited to a period not to exceed eight weeks during any six-month period. Therefore, a center may not operate or manage a residential facility in a manner that is inconsistent with this definition.

Changes: None.

Allowable Costs (§ 364.5)

Comments: Commenters objected to the limitation in proposed § 364.5 on reallocating expenditures after the initiation of an audit or compliance review. These commenters considered this limitation punitive and contrary to ordinary accounting procedures.

Discussion: The Secretary does not intend to require accounting practices that are not widely practiced and acceptable. In addition, the Secretary has decided that the policy on offsetting costs that have been disallowed as a result of an audit or a monitoring review should be uniform for all U.S. Department of Education (Department) programs. No rationale exists for treating IL programs differently from other Department programs.

Changes: The Secretary has deleted proposed § 364.5.

Program Income (§ 364.5)

Comments: Commenters questioned whether funds raised by centers pursuant to their statutory obligation to develop funding resources other than Chapter 1 of Title VII of the Act are program income.

Discussion: The definition of program income in § 364.5 includes gross income received by a grantee under Title VII of the Act that is directly generated by an activity supported under 34 CFR Parts 365, 366, or 367. The Secretary does not believe any adequate reason exists to exempt funds raised by centers pursuant to their statutory obligation to develop funding resources other than Chapter 1 of Title VII of the Act from this definition.

Changes: The Secretary has deleted proposed § 364.6(c) to clarify that the carryover provision in section 19(a)(2) of the Act applies to program income received under the IL programs.

Obligation of Federal Funds and Program Income (§ 364.6)

Comments: Commenters suggested that the resource development requirement in evaluation standard 7 in section 725(b)(7) of the Act should be interpreted to permit centers to accumulate funds over several years to create, among other long-term financial instruments, endowments and reserves.

Discussion: Pursuant to § 364.6, which implements section 19(a)(2) of the Act, any program income received by a center that is not obligated and expended prior to the beginning of the fiscal year succeeding the fiscal year in which these funds were received remains available for obligation and expenditure by the center during the succeeding fiscal year. Therefore, program income, which includes funds received by a center through fundraising activities carried out with Title VII funds, may be available for obligation and expenditure for a maximum of almost two years after it is received.

The Secretary agrees that centers should be allowed to use program income to establish or augment endowments and other similar financial instruments if the principal and income generated from the endowment and other similar financial instruments are used solely to carry out the purposes of the CIL program authorized under Part C of Chapter 1 of Title VII of the Act. However, any program income received by a center must be obligated and expended in accordance with § 364.6(b).

The Secretary recognizes that the notice inviting applications for new awards (application notice) published in the **Federal Register** on July 6, 1994 (59 FR 34597) indicated that the Secretary anticipated revising proposed §§ 364.5 and 364.6. However, because nothing in the proposed regulations prohibited centers from establishing or augmenting endowments or other similar instruments, the Secretary has decided that §§ 364.5 and 364.6 do not need to be revised for this purpose. This action does not affect the competition for new awards under the CIL program.

Changes: None.

Approval of State Plans (§ 364.12)

Comments: Commenters expressed concern that paragraphs (c), (d), and (e) of proposed § 364.12 refer only to the designated State unit (DSU) or the State and do not properly reflect the role of the Statewide Independent Living Council (SILC) in the development of the State plan. Similar concerns were expressed with respect to various provisions in proposed §§ 364.13 and 364.20.

Discussion: The Secretary has reviewed §§ 364.12, 364.13, and 364.20 of the proposed regulations to ensure that the final regulations reflect the appropriate role of the SILC.

Changes: The Secretary has added language to §§ 364.12(c), 364.13(c) and 364.20 (e), (g), (h), and (i) of the final regulations to clarify the SILC's role in the development of the State plan.

Withholding, Reduction, Limitation, or Termination (§ 364.13)

Comments: One commenter found the references to the "Department's final decision" in proposed § 364.13(h) and to the "Secretary's final decision" in proposed § 364.13(i) inconsistent and confusing.

Discussion: The references to the final decisions of the Department and the Secretary in § 364.13 (h) and (i) of these regulations are consistent with 34 CFR 81.44, which applies to all Department programs. The Secretary finds no reason to change these references for the IL programs.

Changes: None.

Comments: One commenter suggested that proposed § 364.13(f) be revised to allow the SILC to seek review of an administrative law judge's initial decision.

Discussion: Only a recipient of grant funds that receives a written notice of a disallowance decision may appeal the Department's attempt to recover grant funds. Pursuant to 34 CFR 81.7, a non-party (i.e, a non-recipient) may apply to participate in a recovery of funds proceeding under 34 CFR Part 81. Section 364.13(f) is consistent with 34 CFR Part 81.

Changes: None.

Comments: One commenter asked whether the reference to "State" in proposed § 364.13(i) means the DSU, the SILC, or both. Discussion: The reference to "State" in § 364.13(i) means only the DSU.

Changes: None.

State Plan Requirements (§ 364.20)

Comments: Two commenters objected to the prohibition against separate State plans in those States in which one State agency is responsible for providing vocational rehabilitation (VR) services to the general population and a separate agency is responsible for providing VR services to individuals who are blind. One commenter suggested that the definitions in the Act and the long-established policy of the Rehabilitation Services Administration allow a separate State plan for providing VR services to individuals who are blind. Other commenters noted that, although the preamble to the proposed regulations indicates that only a single State plan is permitted under Title VII (even in States with an agency that provides VR services to individuals who are blind), the proposed regulations are not as clear on this issue.

Discussion: Section 704 of the Act requires "a State plan" that addresses how IL services will be provided to all individuals with a significant disability in the State. The words "a State plan" indicate a single State plan for IL, not two or more State plans for IL, regardless of the existence of two or more agencies that may provide services to different groups of individuals with a significant disability in the State.

In addition, a State plan that only addresses the IL services to be provided to individuals with a significant disability who are blind could not be comprehensive enough to satisfy the requirement in section 704(g) of the Act that the State plan include a design for the establishment of a statewide network of centers that comply with the standards and assurance in section 725 of the Act.

An agency that is authorized to provide VR services to individuals who are blind may not provide IL services to individuals with a significant disability who are not blind. Section 725(b)(2) requires that centers provide IL services on a "cross-disability basis." This means that a center may not restrict the services that it provides to individuals with any particular type or combination of types of disabilities. An agency that is authorized to provide VR services to individuals who are blind could not comply with this requirement. Therefore, an agency that is authorized to provide VR services to individuals who are blind may not submit a separate State plan for IL.

Changes: The Secretary has added language to § 364.22(c) of the final regulations to clarify that an agency that is authorized to provide VR services to individuals who are blind may not submit a separate State plan for IL.

Comments: Commenters recommended that proposed § 364.20(e) be amended to require that the Director of the Client Assistance Program (CAP) be given the opportunity to participate in public hearings or contribute as a member of the SILC. Two commenters suggested that the Director of the CAP should not be involved in the review of the State plan.

Discussion: Nothing in § 364.20(e) or any other section of these regulations prevents the Director of the CAP from participating at any public hearings held by either the DSU or SILC on the development of the State plan.

Changes: None.

Statewide Independent Living Council (§ 364.21)

Comments: One commenter suggested that the regulations should contain a dispute resolution process to resolve impasses between a SILC, a DSU, and the Office of the Governor. This commenter was concerned that, as a result of the single State plan provision, a smaller State agency for individuals who are blind may hold up IL services for all individuals with a significant disability in the State because it disagrees with the State plan.

Discussion: The resolution of issues that may arise between the DSU and the SILC during the development of the State plan should be resolved at the State level.

Changes: None.

Comments: One commenter recommended adding a provision to allow the public to challenge the qualifications of SILC members appointed by the Governor.

Discussion: If a question arises whether a SILC member appointed by the Governor meets the qualifications in § 364.21(c), the issue may be raised to the Governor or to the Secretary in the same manner as any other question regarding the proper implementation of these regulations.

Changes: None.

Comments: Commenters suggested that the conflict of interest provision in proposed § 364.21(l) either be deleted or revised to exempt SILC members who are affiliated with a center. These commenters considered this provision to be too broad and easily subject to abuse.

Discussion: The Secretary agrees that it is unnecessary to have a conflict of interest provision for IL programs that differs from the conflict of interest provision applicable to all Department programs.

Changes: The Secretary has revised § 364.21(l) of the final regulations to apply the code of conduct provisions in 34 CFR 74.162 and the conflict of interest provisions in 34 CFR 75.524 and 75.525 to members of the SILC.

Staffing Requirements (§ 364.23)

Comments: One commenter objected to the requirement in proposed § 364.23(b)(2) that each center provide non-English language interpreters.

Discussion: The Secretary believes that centers should be required, to the maximum extent feasible, to make available personnel able to communicate in the native languages of individuals with significant disabilities whose English proficiency is limited and who apply for or receive IL services under Title VII of the Act. A center is not required to hire non-English language interpreters as full-time employees. However, a center is required to ensure that someone is available as needed to comply with this requirement.

Changes: None.

Staff Development (§ 364.24)

Comments: One commenter objected to the requirement in proposed § 364.24 that each center provide staff development programs.

Discussion: The Secretary believes that staff development programs are necessary for the proper and efficient administration of IL programs funded under Chapter 1 of Title VII of the Act.

Changes: None.

IL Services for Older Individuals Who Are Blind (§ 364.28)

Comments: One commenter recommended including older individuals who are blind in the selection of new methods and approaches for the provision of IL services pursuant to proposed § 364.28.

Discussion: The selection and incorporation into the State plan of any new approaches for the provision of IL services to older individuals who are blind requires a revision to the State plan. Because § 366.20(g) requires the DSU and the SILC to hold public hearings prior to the submission of the State plan to the Secretary and prior to any revisions to the State plan, the Secretary believes that the views of older individuals who are blind will be adequately addressed by this requirement.

Changes: None.

Outreach (§ 364.32)

Comments: One commenter objected to proposed § 364.32, which the commenter believes permits SILCs to define the "unserved" and "underserved" groups for which individual centers must provide "aggressive outreach."

Discussion: Section 364.32(b) of these regulations requires that the State plan must identify the "unserved and underserved" populations to be designated for targeted outreach efforts and the geographic areas in which these populations reside. Both the DSU and the SILC are jointly responsible for the development of the State plan. In addition, the DSU and the SILC must give the public an opportunity to comment on the State plan before it is submitted to the Secretary for approval. Therefore, it is inaccurate to state that the SILC is permitted to define "unserved and underserved populations" for purposes of § 364.32(b).

Changes: None.

Access to Records (§ 364.37)

Comments: Commenters expressed concern that the access to records proposed in § 364.37(c) may be unnecessarily intrusive and inconsistent with commitments that providers make to their consumers. These commenters also suggested that the regulations should permit centers to expunge personal information from consumer case records or files.

Discussion: Access to individual case records or files, or consumer service records, including personal information that may be included in those records or files, is necessary for the proper and efficient administration and monitoring of IL programs. Section 364.37(c) limits this access to the Secretary and the Comptroller General of the United States, or any of their duly authorized representatives for the purpose of conducting audits, examinations, and compliance reviews. The Secretary does not believe that this access is unreasonable.

Changes: None.

Assurances Regarding Eligibility (§ 364.41)

Comments: One commenter objected to proposed § 364.41(b), which the commenter characterized as requiring every center to serve every person who requests services regardless of the person s residence. This commenter stated that this requirement is an unfair cost burden and will force centers to incur the costs of serving persons who should be served by other centers.

Discussion: The Secretary believes that a service provider should provide IL services to any individual who is present in a State and who is otherwise eligible for IL services. This policy is consistent with section 101(a)(14) of the Act and with most other Federal programs.

Changes: None.

Objectives and Information in the State Plan (§ 364.42)

Comments: Commenters suggested that proposed § 364.42(a)(2) be amended to include identification of the various funding sources that the State plans to use to fund the various activities under the State plan.

Discussion: The Secretary agrees that identification of the various funding sources that the State plans to use to fund the various activities under the State plan will assist the Department in determining the effectiveness of the State's compliance with section 704(j) and (k) of the Act. Section 704(j) is implemented by § 364.27 of these regulations and requires the coordination of IL services with other services to avoid unnecessary duplication with other Federal, State, and local programs. Section 704(k) of the Act is implemented by § 364.29 of these regulations and requires the coordination of Federal and State funding for centers and IL services also to avoid unnecessary duplication with other Federal, State, and local programs. Requiring the identification of the Federal and non-Federal funds that the DSU intends to use to meet the objectives of the State plan will assist the Secretary in determining a State's compliance with §§ 364.27 and 364.29.

Changes: The Secretary has revised § 364.42(a)(2) of the final regulations to provide that the financial plan required under this section must include the identity and amounts of other Federal and non-Federal funds that the DSU anticipates using to meet the objectives in the State plan.

Determinations of Eligibility or Ineligibility (§ 364.51)

Comments: Commenters were concerned that the requirement in proposed § 364.51(b)(2)(i) that an advocate or representative must be "legally authorized" may be misinterpreted to require an advocate or representative to be an attorney or legal guardian. Another commenter suggested that proposed § 364.51(b)(2)(i) be amended to permit the consumer to choose as an advocate or representative an individual who may not be technically "legally authorized" to act on behalf of the consumer.

Discussion: An individual's authority to represent or advocate on behalf of an individual with significant disabilities is determined pursuant to State law. Similarly, a consumer may choose as an advocate or representative an individual who may not be technically "legally authorized" to the extent such a choice is permitted by State law. Nothing in § 364.51(b)(2) of these regulations requires that an advocate or representative must be an attorney or legal guardian. However, the Secretary recognizes that clarification of this issue is necessary.

Changes: The Secretary has added a definition of "legally authorized advocate or representative" to § 364.4 of the final regulations. This new definition recognizes that non-attorneys may advocate for or represent a consumer if permitted by State law.

Comments: One commenter suggested that language should be added to proposed § 364.51(c) to require a service provider to review an ineligibility determination if the individual's status changes. This commenter was concerned that a service provider could satisfy the review requirement in proposed § 364.51(c) by conducting a review of the ineligibility determination on the same day that the determination is made and, thus, circumvent the intent of this provision.

Discussion: The Secretary agrees that a service provider must review an ineligibility determination whenever there has been a material change in an applicant's status.

Changes: The Secretary has added language to § 364.51(c) of the final regulations that requires a service provider to review a determination of ineligibility whenever the service provider determines that the applicant's status has materially changed but no less than once within 12 months after making the ineligibility determination.

IL Plan (§ 364.52)

Comments: Two commenters objected to the absence of requirements in proposed § 364.52 regarding the content of a waiver. One of these commenters also suggested that the service provider be required to advise the consumer, before obtaining a waiver, of the need for and importance of an IL plan and how an IL plan helps to protect a consumer's rights. Another commenter suggested deleting proposed § 364.52(d) or revising it to allow the consumer to choose whether or not to comply with this provision, which requires that the development of a consumer's IL plan and the provision of IL services be coordinated with the individualized written rehabilitation program (IWRP) for VR services, the individualized habilitation program (IHP) prepared under the Developmental Disabilities Assistance and Bill of Rights Act, and the individualized education program (IEP) prepared under Part B of the Individuals with Disabilities Education Act.

Discussion: The Secretary does not believe it is necessary to prescribe what should be included in the waiver permitted by § 364.52(a)(2) of these regulations. However, the Secretary agrees that it is important to add safeguards to this provision to prevent the possibility of service providers coercing consumers to sign waivers. Finally, the Secretary believes that requiring service providers to coordinate a consumer's IL plan with the consumer's IWRP, IHP, and IEP is necessary to avoid unnecessary duplication of services provided by these programs.

Changes: The Secretary has added the words "knowingly and voluntarily" before the word "signs" in § 364.52(a)(2) of the final regulations.

Maintenance of Records (§ 364.53)

Comments: Commenters suggested that proposed § 364.53 be revised to recognize the fact that records may be electronic as well as written.

Discussion: The Secretary recognizes that records may be produced electronically and supports the recording of information by electronic means.

Changes: The Secretary has revised § 364.53 in the final regulations to clarify that records may be maintained either electronically or in written form, except that all IL plans, if consumers choose to develop one, and all waivers of an IL plan, if consumers choose to sign one, must be in writing.

Comments: One commenter objected to the recordkeeping requirements in proposed § 364.53. This commenter believed that "a simple record showing that an identified consumer has one or more identified disabilities and received specific services on a specific date is sufficient."

Discussion: The Secretary believes that the recordkeeping requirements in § 364.53 of these regulations are necessary for the proper and efficient administration of IL programs funded under Title VII of the Act. In addition, the Secretary believes these requirements are necessary to ensure that determinations of eligibility are made in accordance with the Act and these regulations; service providers comply with the IL plan and waiver requirements; the IL services provided to consumers are the IL services requested by consumers; and service providers record the IL goals and objectives established and achieved by consumers. However, the Secretary does not believe a center should be required to maintain a case service record for individuals who seek or receive only information and referral services from a center.

Changes: The Secretary has revised § 364.53 of the final regulations to exempt individuals who seek or receive only information and referral services from the requirement that a center maintain consumer service records for individuals who apply for or receive IL services.

Standards for Service Providers (§ 364.55)

Comments: Commenters suggested that the standards developed by the DSU pursuant to proposed § 364.55(a) should not exceed the standards in section 725 of the Act.

Discussion: The standards referred to in proposed § 364.55 are the standards that the DSU is required to develop pursuant to § 365.31 for those service providers that are not centers and for centers that are providing specialized IL services under a contract with the DSU. These standards may or may not exceed the standards in section 725 of the Act.

Changes: The Secretary has revised § 365.31 of the final regulations to clarify that State standards developed pursuant to this section may differ from the standards in section 725 of the Act and may apply to centers that are providing specialized IL services under a contract with the DSU.

Protection, Use, and Release of Personal Information (§ 364.56)

Comment: One commenter suggested deleting proposed § 364.56(a)(3)(v) or specifying the agencies that will routinely receive personal information about a consumer.

Discussion: The Secretary does not believe it is necessary or possible to identify in these regulations the agencies to which each service provider may routinely release information.

Changes: None.

Comments: One commenter objected to the words "other information" in proposed § 364.56(c)(2) because service providers may use this language to withhold information from a consumer.

Discussion: Section 364.56(c)(2) of these regulations does not permit a service provider to withhold information from a consumer. Section 364.56(c)(2) merely requires that, if a service provider determines that releasing medical, psychological, or other information may be harmful if released directly to the consumer, the service provider shall release this information to the consumer through a qualified medical or psychological professional or the individual's legally authorized representative.

Changes: None.

Comments: One commenter suggested deleting proposed § 364.56(e)(2) because this provision does not provide consumer control over personal information that is maintained by a service provider. This commenter also noted that routine release of information to other agencies is contrary to the IL philosophy of consumer control.

Discussion: The Secretary agrees that a consumer should have control over the release (pursuant to § 364.56(e)(2) of these regulations) of medical or psychological information to another agency or organization by a service provider.

Changes: The Secretary has revised § 364.56(e)(2) of the final regulations to require a consumer's informed written consent to release to another agency or organization medical or psychological information.

Financial Needs Test (§ 364.59)

Comments: One commenter suggested that proposed § 364.59 be revised to clarify that a State may choose whether or not to adopt a financial needs test for receiving IL services.

Discussion: Implicit in proposed § 364.59 was the fact that a State is neither required nor prohibited from requiring consumers to contribute to the costs of the IL services they seek from a service provider. Also implicit in proposed § 364.59 was the fact that, if a State chooses to require consumers to contribute to the costs of the IL services they seek from a service provider, a State is neither required nor prohibited from applying a financial needs test to determine the amount that a particular consumer may be required to contribute to the costs of the IL services he or she seeks from a service provider. The Secretary agrees with the need to revise proposed § 364.59 to clarify its meaning.

Changes: The Secretary has revised § 364.59 of the final regulations to clarify that the decision to allow service providers to charge consumers for the cost of providing IL services or to allow service providers to apply a financial needs test to determine the amount of a particular consumer's participation in the costs of IL services must be made in accordance with the State plan.

Part 365

Funds to Provide IL Core Services (§ 365.22) and Additional IL Services (§ 365.21)

Comments: One commenter suggested revising proposed § 365.21 to clarify that a State does not have to provide the IL core services with funds made available under Part B of Chapter 1 of Title VII of the Act, if the State is providing the IL core services with other resources. The same commenter suggested a similar revision to proposed § 364.22.

Discussion: The Secretary agrees with the commenters that proposed §§ 365.21(a) and 365.22 should be revised as they suggest.

Changes: The Secretary has amended §§ 365.21(a) and 365.22 of the final regulations to make it clear that a State may use either funds provided under Part B of Chapter 1 of Title VII of the Act or other funds to provide the IL core services and other additional IL services.

Comments: One commenter asked whether a State can award a grant or subgrant on a non-competitive basis.

Discussion: The requirements applicable to the awarding of subgrants by grantees pursuant to the regulations in 34 CFR Part 365 are addressed in 34 CFR 76.51, which gives a State wide latitude on how to award subgrants.

Changes: None.

Part 366

Eligibility for Assistance Under the CIL Program (§ 366.2)

Comments: None.

Discussion: Since publication of the NPRM, the Secretary has reviewed this section and wants to clarify that a center may serve a community within the State in which the center is located or a community in a bordering State. The Secretary also wants to clarify that a center that is not receiving funds under Part C of Chapter 1 of Title VII of the Act may apply as a new center, even if the center receives funds under Part B of Chapter 1 of Title VII of the Act. Finally, the Secretary feels that it is important to clarify that a center that proposes the expansion of an existing center through the establishment of a separate and complete center does not need to establish a separate governing board for the new center. The governing board of the existing center may serve as the governing board for the new center.

Changes: The Secretary has revised § 366.2(a)(1)(i), (b)(1), (b)(2), and (b)(3) of the final regulations to reflect these changes. The Secretary made similar corresponding changes to §§ 366.28(a) and 366.29(a) of the final regulations.

Activities the Secretary Funds (§ 366.3)

Comments: One commenter suggested that the word "such" be included in proposed § 366.3(b)(4) because its absence makes this provision unclear and may lead centers to believe that an IL plan is necessary before a consumer may receive IL services.

Discussion: The Secretary agrees that the omission of the word "such" from proposed § 366.3(b)(4) leaves the meaning of this provision unclear. An eligible agency is not required to facilitate the development and achievement of IL goals for an individual with a significant disability who does not seek assistance to develop and achieve IL goals. In addition, section 704(e) of the Act specifically allows a consumer to waive the development of an IL plan. However, the waiver of an IL plan does not preclude a consumer from developing and seeking to achieve IL goals with assistance from the center.

Changes: The Secretary has revised § 366.3(b)(4) of the final regulations to clarify that an eligible agency may use funds awarded under Subparts C and D of 34 CFR Part 366 to facilitate the development and achievement of IL goals selected by individuals with significant disabilities who seek assistance in the development and achievement of IL goals.

Order of Priorities (§ 366.22)

Comments: Commenters observed that, if any funds are left over after the Secretary awards grants to existing centers under Part C of Chapter 1 of Title VII of the Act, proposed § 366.22(b) allows the Secretary to use these excess funds to assist existing centers or to reallot these excess funds to another State. These commenters suggested that, under these circumstances, proposed § 366.22(b) should be amended to require the Secretary to consult with the DSU and the SILC before making this decision.

Discussion: The Secretary may use excess funds only to assist existing centers in the State or for reallotment if these funds are insufficient to fund a new center in the State. The Secretary will make any decision to use excess funds to assist existing centers in a State in a manner that is consistent with the State plan of the State in which the excess funds exist. The Secretary believes this will ensure that a State's concerns will be adequately addressed and that it is not necessary to include in these final regulations any requirement that the Secretary consult with the DSU or the SILC.

Changes: The Secretary has revised § 366.22(b)(1) of the final regulations to require that the use of excess funds to assist existing centers in a State will be consistent with the State plan.

Selection Criteria (§ 366.27)

Comments: One commenter suggested revising the selection criteria in proposed § 366.27 to require that the governing board be reflective of the localities to be served by the proposed center.

Discussion: Section 702(1)(A) of the Act requires that a center be "designed and operated within a local community." The Secretary believes that this requirement provides sufficient safeguard to ensure that a center's governing board will be reflective of the localities the center proposes to serve.

Changes: None.

Comments: One commenter suggested that the selection criteria in proposed § 366.27 should include a requirement that centers take affirmative action to hire and promote individuals with significant disabilities.

Discussion: Pursuant to section 725(c)(5) of the Act, the State plan required by section 704(a)(1) of the Act must include satisfactory assurances that all recipients of financial assistance under Parts B and C of Chapter 1 of Title VII of the Act will take affirmative action to employ and advance in employment qualified individuals with significant disabilities on the same terms and conditions required with respect to the employment of individuals with disabilities under section 503 of the Act. The Secretary does not believe it is necessary to include this requirement as a selection criterion, which a center could then choose whether or not to address in its application.

Changes: None.

Comments: One commenter believed that the selection criterion on need in proposed § 366.27(a)(2) is too vague and suggested that it be expanded to "not appear to be the traditional 'needs assessment' that creates more service providers." This commenter suggested that the criterion should be based on how supportive a center is of IL and of advocating for change.

Discussion: The Secretary believes that the criterion adequately explains how an applicant can be expected to identify the need for a new center in a community and how the applicant plans to address this identified need. The Secretary also believes that there is adequate emphasis on advocacy in the regulations.

Changes: None.

Comments: One commenter objected that the selection criteria, particularly § 366.27 (a) through (c), place too much emphasis on past performance.

Discussion: Only the selection criterion in § 366.27(b) of these regulations addresses an applicant's past performance. In addition, this selection criterion accounts for only 5 points out of a total of 100 points.

Changes: None.

Comments: Commenters suggested reducing the points allotted to "plan of operation" and increasing points for "involvement of individuals with significant disabilities" in the selection criteria in proposed § 366.27 (g) and (h), respectively. Commenters also felt that the proposed selection criteria should include the involvement of individuals with significant disabilities in the preparation of a center's application.

Discussion: The Secretary believes that the points assigned to the "plan of operation" selection criterion appropriately reflect its value. The Secretary also believes that § 366.27(h)(2) of these regulations sufficiently covers the involvement of individuals with significant disabilities in conducting center activities. However, the Secretary agrees that participation of individuals with significant disabilities in the preparation of applications is important and should be emphasized.

Changes: The Secretary has substituted the phrase "developing the center's application" for the phrase "conducting center activities" in § 366.27(h)(1) of the final regulations.

Order of Priorities (§ 366.34)

Comments: One commenter suggested that the order of priorities for funding in proposed § 366.34(a) be listed in the State plan to ensure that the expenditure of funds meets the requirements and purposes of Title VII of the Act.

Discussion: The Secretary agrees that requiring a State that administers the CIL program pursuant to section 723 of the Act to include in its State plan the order of priorities for allocating funds within the State is important.

Changes: Because the suggested change is to the State plan requirements, the Secretary has revised § 364.39 of the final regulations to require that, in States in which State funding for centers equals or exceeds the amount of funds allotted to the State under Part C of Title VII of the Act, as determined pursuant to 34 CFR 366.29 and 366.31, and in which the State elects to administer the CIL program as provided in section 723 of the Act, the State plan must include policies, practices, and procedures, including the order of priorities that the State may establish pursuant to 34 CFR 366.34(a)

Comments: Commenters suggested that the Director of the DSU should be required to consult with the SILC before determining how excess funds should be used.

Discussion: Whether a Director of the DSU consults with the SILC before determining, pursuant to § 366.34(b), how excess funds should be used is an issue that should be resolved at the State level, preferably during the joint development of the State plan by the DSU and the SILC that is mandated by section 705(c)(1) of the Act. To the extent that this situation is addressed by the State plan, the consultation will already have taken place. If the State plan does not address this issue, the Director of the DSU should ensure that the use of any excess funds is consistent with the State plan.

Changes: The Secretary has revised § 366.34(b)(1) of the final regulations to require the Director of the DSU, if the DSU plans to use excess funds to assist existing centers in a State, to use these funds in a manner consistent with the State plan.

Enforcement (§ 366.39)

Comments: One commenter recommended that a corrective action plan should require a center to comply with the standards and assurances within six months after a center receives approval of its plan.

Discussion: The Secretary believes that the length of a corrective action plan must be determined on a case-by-case basis. In some cases, immediate corrective action may be required. In other cases, six months may be unrealistically short. The Secretary believes it would be unwise to establish a rigid timeframe for corrective action plans.

Changes: None.

Assurances (§ 366.50)

Comments: None.

Discussion: Although no parties commented on proposed § 366.50(n), the Secretary believes it is important to establish a deadline for the submission of the annual performance report because it is necessary to enable the Secretary to make timely continuation grants. A 90-day period before the end of the fiscal year is consistent with other reporting requirements in the Education Department General Administrative Regulations.

Changes: The Secretary has revised § 366.50 in the final regulations to require that the annual performance report be submitted within 90 days of the end of the fiscal year.

Part 367

Definitions (§ 367.5)

Comments: One commenter recommended adding a definition of "capacity building" to proposed § 367.5.

Discussion: Section 725(b)(6) of the Act describes "activities to increase community capacity" as activities "to increase the capacity of communities . . . to meet the needs of individuals with [significant] disabilities." The Secretary believes that the term "capacity building" should be interpreted in a manner consistent with section 725(b)(6) of the Act and does not need to be further defined.

Changes: None.

Selection Criteria (§ 367.22)

Comments: One commenter suggested that the list of services under the selection criterion in proposed § 367.22(g) should be the same as that provided in proposed § 367.3(b).

Discussion: The Secretary agrees that the list of services in these referenced provisions should be consistent. The services listed in § 367.22(g) include the services listed in § 367.3(b).

Changes: The Secretary has changed §§ 367.3(b) and 367.22(g)(2) in the final regulations to clarify that the services listed in § 367.22 include the services listed in § 367.3(b).

Comments: One commenter suggested that proposed § 367.22(g) should be clarified to allow a designated State agency (DSA) to use funds received under Chapter 2 of Title VII of the Act in a way that will not duplicate services that the State may be providing with other funds.

Discussion: The Secretary agrees that Chapter 2 funds should be used in a way that will supplement, rather than duplicate, services that may already be available through other sources.

Changes: The Secretary has revised § 367.22(g)(2) of the final regulations to clarify that an application will be evaluated on the extent to which the DSA will use Chapter 2 funds to meet the unmet IL needs of individuals in the State.

Awarding Grants or Contracts (§ 367.41)

Comments: Two commenters recommended deleting proposed § 367.41(b), which restricts a DSA's flexibility to enter into procurement contracts with public and private nonprofit agencies.

Discussion: Although section 752(i)(2)(A) of the Act is a general provision that allows the DSA to operate or administer this program either directly or through grants or contracts, section 752(g) of the Act specifically requires that a State's awards to public and private nonprofit agencies and organizations under this program be made only through grants.

Changes: None.

Intergovernmental Review

These programs are subject to the requirements of Executive Order 12372 and the regulations in 34 CFR Part 79. The objective of the Executive order is to foster an intergovernmental partnership and a strengthened federalism by relying on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

In accordance with the order, this document is intended to provide early notification of the Department's specific plans and actions for this program.

Assessment of Educational Impact

In the notice of proposed rulemaking, the Secretary requested comments on whether the proposed regulations would require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

Based on the response to the proposed regulations and on its own review, the Department has determined that the regulations in this document do not require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

List of Subjects in 34 CFR Parts 364, 365, 366, and 367

Aged, Blind, Disabled, Grant programs—education, Independent living services, Reporting and recordkeeping requirements, Vocational rehabilitation.

(Catalog of Federal Domestic Assistance Numbers: 84.132 Centers for Independent Living; 84.169 State Independent Living Services; and 84.177 Independent Living Services for Older Individuals Who Are Blind.)

Dated: August 3, 1994.

Richard W. Riley,

Secretary of Education.

The Secretary amends Title 34 of the Code of Federal Regulations by adding a new Part 364 and by revising Parts 365, 366, and 367 to read as follows:

PART 364—STATE INDEPENDENT LIVING SERVICES PROGRAM AND CENTERS FOR INDEPENDENT LIVING PROGRAM: GENERAL PROVISIONS

Authority: 29 U.S.C. 796–796f-5, unless otherwise noted.

Subpart A—General

§ 364.1 What programs are covered?

(a) This part includes general requirements applicable to the conduct of the following programs authorized under Title VII of the Rehabilitation Act of 1973, as amended:

(1) The State Independent Living Services (SILS) program (34 CFR Part 365).

(2) The Centers for Independent Living (CIL) program (34 CFR Part 366).

(b) Some provisions in this part also are made specifically applicable to the Independent Living Services for Older Individuals Who Are Blind (OIB) program (34 CFR Part 367).

(Authority: 29 U.S.C. 711(c) and 796–796f-5)

§ 364.2 What is the purpose of the programs authorized by Chapter 1 of Title VII?

The purpose of the SILS and CIL programs authorized by Chapter 1 of Title VII of the Act is to promote a philosophy of independent living (IL), including a philosophy of consumer control, peer support, self-help, self-determination, equal access, and individual and system advocacy, to maximize the leadership, empowerment, independence, and productivity of individuals with significant disabilities, and to promote and maximize the integration and full inclusion of individuals with significant disabilities into the mainstream of American society by providing financial assistance to States—

(a) For providing, expanding, and improving the provision of IL services;

(b) To develop and support statewide networks of centers for independent living (centers); and

(c) For improving working relationships among—

(1) SILS programs;

(2) Centers;

(3) Statewide Independent Living Councils (SILCs) established under section 705 of the Act;

(4) State vocational rehabilitation (VR) programs receiving assistance under Title I and under Part C of Title VI of the Act;

(5) Client assistance programs (CAPs) receiving assistance under section 112 of the Act;

(6) Programs funded under other titles of the Act;

(7) Programs funded under other Federal laws; and

(8) Programs funded through non-Federal sources.

(Authority: 29 U.S.C. 796)

§ 364.3 What regulations apply?

The following regulations apply to the SILS and CIL programs:

(a) The Education Department General Administrative Regulations (EDGAR) as follows:

(1) 34 CFR Part 74 (Administration of Grants to Institutions of Higher Education, Hospitals, and Nonprofit Organizations), with respect to grants or subgrants to an eligible agency that is not a State or local government or Indian tribal organization.

(2) 34 CFR Part 75 (Direct Grant Programs), with respect to grants under Subparts B and C of 34 CFR Part 366.

(3) 34 CFR Part 76 (State-Administered Programs), with respect to grants under 34 CFR Part 365 and Subpart D of 34 CFR Part 366.

(4) 34 CFR Part 77 (Definitions that Apply to Department Regulations).

(5) 34 CFR Part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(6) 34 CFR Part 80 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments), with respect to grants to an eligible agency that is a State or local government or Indian tribal organization.

(7) 34 CFR Part 81 (General Education Provisions Act—Enforcement).

(8) 34 CFR Part 82 (New Restrictions on Lobbying).

(9) 34 CFR Part 85 (Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants)).

(10) 34 CFR Part 86 (Drug-Free Schools and Campuses).

(b) The regulations in this Part 364.

(c) The regulations in 34 CFR Parts 365 and 366 as applicable.

(Authority: 29 U.S.C. 711(c))

§ 364.4 What definitions apply?

(a) *Definitions in EDGAR.* The following terms used in this part and in 34 CFR Parts 365, 366, and 367 are defined in 34 CFR 77.1:

Applicant
Application
Award
Department
EDGAR
Fiscal year
Nonprofit
Private
Project
Public
Secretary

(b) *Other definitions.* The following definitions also apply to this part and to 34 CFR Parts 365, 366, and 367:

Act means the Rehabilitation Act of 1973, as amended.

Administrative support services mean assistance to support IL programs and the activities of centers and may include financial and technical assistance in planning, budget development, and evaluation of center activities, and support for financial management (including audits), personnel development, and recordkeeping activities.

(Authority: 29 U.S.C. 796c(c)(2))

Advocacy means pleading an individual's cause or speaking or writing in support of an individual. To the extent permitted by State law or the rules of the agency before which an individual is appearing, a non-lawyer may engage in advocacy on behalf of another individual. Advocacy may—

(1) Involve representing an individual—

(i) Before private entities or organizations, government agencies (whether State, local, or Federal), or in a court of law (whether State or Federal); or

(ii) In negotiations or mediation, in formal or informal administrative proceedings before government agencies (whether State, local, or Federal), or in legal proceedings in a court of law; and

(2) Be on behalf of—

(i) A single individual, in which case it is individual advocacy;

(ii) A group or class of individuals, in which case it is *systems* (or *systemic*) *advocacy;* or

(iii) Oneself, in which case it is *self advocacy.*

Attendant care means a personal assistance service provided to an individual with significant disabilities in performing a variety of tasks required to meet essential personal needs in areas such as bathing, communicating, cooking, dressing, eating, homemaking, toileting, and transportation.

(Authority: 20 U.S.C. 706(30)(B)(vi))

Center for independent living means a consumer-controlled, community-based, cross-disability, nonresidential, private nonprofit agency that—

(1) Is designed and operated within a local community by individuals with disabilities; and

(2) Provides an array of IL services.

(Authority: 29 U.S.C. 796a(1))

Consumer control means, with respect to a center or eligible agency, that the center or eligible agency vests power and authority in individuals with disabilities, including individuals who are or have been recipients of IL services.

(Authority: 29 U.S.C. 796a(2))

Cross-disability means, with respect to a center, that a center provides IL services to individuals representing a range of significant disabilities and does not require the presence of one or more specific significant disabilities before determining that an individual is eligible for IL services.

(Authority: 29 U.S.C. 796a(1))

Designated State agency or *State agency* means the sole State agency designated to administer (or supervise local administration of) the State plan for VR services. The term includes the State agency for individuals who are blind, if that agency has been designated as the sole State agency with respect to that part of the State VR plan relating to the vocational rehabilitation of individuals who are blind.

(Authority: 29 U.S.C.. 706(3) and 721(a)(1)(A))

Designated State unit means either—

(1) The State agency or the bureau, division, or other organizational unit within a State agency that is primarily concerned with the vocational rehabilitation, or vocational and other rehabilitation, of individuals with disabilities and that is responsible for the administration of the VR program of the State agency; or

(2) The independent State commission, board, or other agency that

has the vocational rehabilitation, or vocational and other rehabilitation, of individuals with disabilities as its primary function.

(Authority: 29 U.S.C. 706(3) and 721(a)(2)(A))

Eligible agency means a consumer-controlled, community-based, cross-disability, nonresidential, private, nonprofit agency.

(Authority: 29 U.S.C. 796f–5)

Independent living core services mean, for purposes of services that are supported under the SILS or CIL programs—

(1) Information and referral services;
(2) IL skills training;
(3) Peer counseling, including cross-disability peer counseling; and
(4) Individual and systems advocacy.

(Authority: 29 U.S.C. 706(29))

Independent living services includes the independent living core services and—

(1) Counseling services, including psychological, psychotherapeutic, and related services;
(2) Services related to securing housing or shelter, including services related to community group living, that are supportive of the purposes of the Act, and adaptive housing services, including appropriate accommodations to and modifications of any space used to serve, or to be occupied by, individuals with significant disabilities;
(3) Rehabilitation technology;
(4) Mobility training;
(5) Services and training for individuals with cognitive and sensory disabilities, including life skills training and interpreter and reader services;
(6) Personal assistance services, including attendant care and the training of personnel providing these services;
(7) Surveys, directories, and other activities to identify appropriate housing, recreation opportunities, and accessible transportation, and other support services;
(8) Consumer information programs on rehabilitation and IL services available under the Act, especially for minorities and other individuals with significant disabilities who have traditionally been unserved or underserved by programs under the Act;
(9) Education and training necessary for living in a community and participating in community activities;
(10) Supported living;
(11) Transportation, including referral and assistance for transportation;
(12) Physical rehabilitation;
(13) Therapeutic treatment;
(14) Provision of needed prostheses and other appliances and devices;
(15) Individual and group social and recreational services;
(16) Training to develop skills specifically designed for youths who are individuals with significant disabilities to promote self-awareness and esteem, develop advocacy and self-empowerment skills, and explore career options;
(17) Services for children;
(18) Services under other Federal, State, or local programs designed to provide resources, training, counseling, or other assistance of substantial benefit in enhancing the independence, productivity, and quality of life of individuals with significant disabilities;
(19) Appropriate preventive services to decrease the need of individuals with significant disabilities assisted under the Act for similar services in the future;
(20) Community awareness programs to enhance the understanding and integration into society of individuals with significant disabilities; and
(21) Any other services that may be necessary to improve the ability of an individual with a significant disability to function, continue functioning, or move toward functioning independently in the family or community or to continue in employment and that are not inconsistent with any other provisions of the Act.

(Authority: 29 U.S.C. 796e–2(1))

Individual with a disability means an individual who—

(1) Has a physical, mental, cognitive, or sensory impairment that substantially limits one or more of the individual's major life activities;
(2) Has a record of such an impairment; or
(3) Is regarded as having such an impairment.

(Authority: 29 U.S.C. 706(8)(B))

Individual with a significant disability means an individual with a severe physical, mental, cognitive, or sensory impairment whose ability to function independently in the family or community or whose ability to obtain, maintain, or advance in employment is substantially limited and for whom the delivery of IL services will improve the ability to function, continue functioning, or move toward functioning independently in the family or community or to continue in employment.

(Authority: 29 U.S.C. 706(15)(B))

Legally authorized advocate or representative means an individual who is authorized under State law to act or advocate on behalf of another individual. Under certain circumstances, State law permits only an attorney, legal guardian, or individual with a power of attorney to act or advocate on behalf of another individual. In other circumstances, State law may permit other individuals to act or advocate on behalf of another individual.

(Authority: 29 U.S.C. 711(c))

Minority group means Alaskan Natives, American Indians, Asian Americans, Blacks (African Americans), Hispanic Americans, Native Hawaiians, and Pacific Islanders.

Nonresidential means, with respect to a center, that the center, as of October 1, 1994, does not operate or manage housing or shelter for individuals as an IL service on either a temporary or long-term basis unless the housing or shelter is—

(1) Incidental to the overall operation of the center;
(2) Necessary so that the individual may receive an IL service; and
(3) Limited to a period not to exceed eight weeks during any six-month period.

(Authority: 29 U.S.C. 796a, 796f–1(f) and 706f–2(f))

Peer relationships mean relationships involving mutual support and assistance among individuals with significant disabilities who are actively pursuing IL goals.

Peer role models mean individuals with significant disabilities whose achievements can serve as a positive example for other individuals with significant disabilities.

Personal assistance services mean a range of IL services, provided by one or more persons, designed to assist an individual with a significant disability to perform daily living activities on or off the job that the individual would typically perform if the individual did not have a disability. These IL services must be designed to increase the individual's control in life and ability to perform everyday activities on or off the job.

(Authority: 29 U.S.C. 706(11))

Service provider means—

(1) A designated State unit (DSU) that directly provides IL services to individuals with significant disabilities,
(2) A center that receives financial assistance under Parts B or C of Chapter 1 of Title VII of the Act; or
(3) Any other entity or individual that meets the requirements of § 364.43(e) and provides IL services under a grant or contract from the DSU pursuant to § 364.43(b).

(Authority: 29 U.S.C. 711(c) and 796(e))

Significant disability means a severe physical, mental, cognitive, or sensory impairment that substantially limits an individual's ability to function independently in the family or community or to obtain, maintain, or advance in employment.

State means, except for sections 711(a)(2)(A) and 721(c)(2)(A) and where otherwise specified in the Act, in addition to each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the United States Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the Republic of Palau (until the Compact of Free Association with Palau takes effect).

(Authority: 29 U.S.C. 706(16))

State plan means the State IL plan required under section 704 of Title VII of the Act.

Transportation means travel and related expenses that are necessary to enable an individual with a significant disability to benefit from another IL service and travel and related expenses for an attendant or aide if the services of that attendant or aide are necessary to enable an individual with a significant disability to benefit from that IL service.

(Authority: 29 U.S.C. 706(30)(B)(xi) and 711(c))

Unserved and underserved groups or populations, with respect to groups or populations of individuals with significant disabilities in a State, include, but are not limited to, groups or populations of individuals with significant disabilities who—

(1) Have cognitive and sensory impairments;

(2) Are members of racial and ethnic minority groups;

(3) Live in rural areas; or

(4) Have been identified by the eligible agency as unserved or underserved within a center's project area.

(Authority: 29 U.S.C. 706, 711(c), and 796f–796f–5)

§ 364.5 What is program income and how may it be used?

(a) *Definition*. Program income means gross income received by a grantee under Title VII of the Act that is directly generated by an activity supported under 34 CFR Part 365, 366, or 367.

(b) *Sources*. Sources of program income include, but are not limited to, payments received from workers' compensation funds or fees for services to defray part or all of the costs of services provided to particular consumers.

(c) *Use of program income*. (1) Program income, whenever earned, must be used for the provision of IL services or the administration of the State plan, as appropriate.

(2) A service provider is authorized to treat program income as—

(i) A deduction from total allowable costs charged to a Federal grant, in accordance with 34 CFR 80.25(g)(1); or

(ii) An addition to the grant funds to be used for additional allowable program expenditures, in accordance with 34 CFR 80.25(g)(2).

(3) Program income may not be used to meet the non-Federal share requirement under 34 CFR 365.12(b).

(Authority: 29 U.S.C. 711(c); 34 CFR 80.25)

§ 364.6 What requirements apply to the obligation of Federal funds and program income?

(a) Except as provided in paragraph (b) of this section, any Federal funds, including reallotted funds, that are appropriated for a fiscal year to carry out a program under 34 CFR Part 365, 366, or 367 that are not obligated or expended by the DSU or center prior to the beginning of the succeeding fiscal year, and any program income received during a fiscal year that is not obligated or expended by the DSU or center prior to the beginning of the succeeding fiscal year in which the program income was received, remain available for obligation and expenditure by the DSU or center during that succeeding fiscal year.

(b) Federal funds appropriated for a fiscal year under Part B of Chapter 1 and under Chapter 2 of Title VII of the Act remain available for obligation in the succeeding fiscal year only to the extent that the DSU complied with any matching requirement by obligating, in accordance with 34 CFR 76.707, the non-Federal share in the fiscal year for which the funds were appropriated.

(Authority: 29 U.S.C. 718)

Subpart B—What Are the Application Requirements?

§ 364.10 What are the application requirements?

To receive a grant from a State's allotment of funds under Parts B and C of Chapter 1 of Title VII of the Act and 34 CFR Parts 365 and 366, a State shall submit to the Secretary, and obtain approval of, a three-year State plan meeting the requirements in Subpart C of this part.

(Approved by the Office of Management and Budget under control number 1820–0527)

(Authority: 29 U.S.C. 796c(a)(1))

§ 364.11 When must the State plan be submitted for approval?

The designated State unit (DSU) shall submit to the Secretary for approval the three-year State plan no later than July 1 of the year preceding the first fiscal year of the three-year period for which the State plan is submitted.

(Approved by the Office of Management and Budget under control number 1820–0527.)

(Authority: 29 U.S.C. 796c(a)(4))

§ 364.12 How does the Secretary approve State plans?

(a) *General*. The Secretary approves a State plan that the Secretary determines meets the requirements of section 704 of the Act and Subparts B through D of this part and disapproves a plan that does not meet these requirements.

(b) *Informal resolution*. If the Secretary intends to disapprove the State plan, the Secretary attempts to resolve disputed issues informally with State officials.

(c) *Notice of formal hearing*. If, after reasonable effort has been made to resolve the dispute informally, no resolution has been reached, the Secretary provides written notice to the DSU and the SILC of the intention to disapprove the State plan and of the opportunity for a hearing.

(d) *Hearing*. (1) If the DSU requests a hearing, the Secretary designates one or more individuals, either from the Department or elsewhere, not responsible for or connected with the Department's administration of the programs authorized by Title VII of the Act, to conduct a hearing.

(2) If more than one individual is designated, the Secretary designates one of those individuals as the Chief Hearing Official of the Hearing Panel. If one individual is designated, that individual is the Hearing Official.

(e) *Judicial review*. A State may appeal the Secretary's decision to disapprove its State plan by filing a petition for review with the U.S. Court of Appeals for the circuit in which the State is located, in accordance with section 107(d) of the Act.

(Approved by the Office of Management and Budget under control number 1820–0527)

(Authority: 29 U.S.C. 711(c) and 796d–1(a))

§ 364.13 Under what circumstances may funds be withheld, reduced, limited, or terminated?

(a) *When withheld, reduced, limited, or terminated*. Payments to a State under Chapter 1 of Title VII of the Act may be withheld, reduced, limited, or terminated as provided by section 107(c) of the Act if the Secretary finds that—

(1) The State plan has been so changed that it no longer conforms with the requirements of section 704 of the Act; or

(2) In the administration of the State plan, there is a failure to comply substantially with any provision of the plan.

(b) *Informal resolution.* If the Secretary intends to withhold, reduce, limit, or terminate payment of funds to a State under Title VII of the Act as provided by section 107(c) of the Act, the Secretary attempts to resolve disputed issues informally with State officials.

(c) *Notice of formal hearing.* If, after reasonable effort has been made to resolve the dispute informally, no resolution has been reached, the Secretary provides written notice to the DSU and SILC of the intention to withhold, reduce, limit, or terminate payment of funds under Title VII of the Act and of the opportunity for a hearing.

(d) *Hearing.* If the DSU requests a hearing, the Secretary designates an administrative law judge (ALJ) in the Office of Administrative Law Judges to conduct a hearing in accordance with the provisions of 34 CFR Part 81, Subpart A.

(e) *Initial decision.* The ALJ issues an initial decision in accordance with 34 CFR 81.41.

(f) *Petition for review of an initial decision.* The DSU may seek the Secretary's review of an ALJ's initial decision in accordance with 34 CFR 81.42.

(g) *Review by the Secretary.* The Secretary reviews an ALJ's initial decision in accordance with 34 CFR 81.43.

(h) *Final decision of the Department.* The ALJ's initial decision becomes the final decision of the Department in accordance with 34 CFR 81.44.

(i) *Judicial review.* A State may appeal the Secretary's final decision to withhold, reduce, limit, or terminate payment of funds to a State under Title VII of the Act by filing a petition for review with the U.S. Court of Appeals for the circuit in which the State is located, in accordance with section 107(d) of the Act.

(Approved by the Office of Management and Budget under control number 1820–0527)

(Authority: 29 U.S.C. 727(c)–(d) and 796d–1(a))

Subpart C—What Are the State Plan Requirements?

§ 364.20 What are the general requirements for a State plan?

(a) *Form and content.* The State plan must contain, in the form prescribed by the Secretary, the information required by this part and any other information requested by the Secretary.

(b) *Duration.* (1) The State plan must cover a three-year period and must be amended whenever necessary to reflect any material change in State law, organization, policy, or agency operations that affects the administration of the State plan.

(2) The Secretary may require a State to submit an interim State plan for a period of less than three years following a reauthorization of the Act and prior to the effective date of final regulations.

(c) *Joint development-single agency.* The State plan must be jointly—

(1) Developed by the DSU and the SILC; and

(2) Signed by the—

(i) Director of the DSU (Director); and

(ii) Chairperson of the SILC, acting on behalf of and at the direction of the SILC.

(d) *Joint development-separate agency for individuals who are blind.* If a separate State agency is authorized by State law as the sole State agency with authority to administer or supervise the administration of that part of the State plan relating to the vocational rehabilitation of individuals who are blind, the State plan must be jointly—

(1) Developed by the DSU, the SILC, and the separate State agency authorized to provide VR services for individuals who are blind; and

(2) Signed by the—

(i) Director;

(ii) Director of the separate State agency authorized to provide VR services for individuals who are blind; and

(iii) Chairperson of the SILC, acting on behalf of and at the direction of the SILC.

(3) (Cross-reference: See § 364.22(c).)

(e) The State plan must assure that, as appropriate, the DSU and SILC actively consult in the development of the State plan with the Director of the CAP authorized under section 112 of the Act.

(f) *Periodic review and revision.* The State plan must provide for the review and revision of the plan, at least once every three years, to ensure the existence of appropriate planning, financial support and coordination, and other assistance to appropriately address, on a statewide and comprehensive basis, the needs in the State for—

(1) Providing State IL services;

(2) Developing and supporting a statewide network of centers; and

(3) Working relationships between—

(i) Programs providing IL services and supporting or establishing centers; and

(ii) The VR program established under Title I of the Act, and other programs providing services for individuals with disabilities.

(g) *Public hearings.* (1) The State plan must assure that the DSU and SILC conduct public meetings to provide all segments of the public, including interested groups, organizations, and individuals, an opportunity to comment on the State plan prior to its submission to the Secretary and on any revisions to the approved State plan. The DSU and SILC may meet the public participation requirement by holding the public meetings before a preliminary draft State plan is prepared or by providing a preliminary draft State plan for comment at the public meetings.

(2) The State plan must assure that the DSU and SILC establish and maintain a written description of procedures for conducting public meetings in accordance with the following requirements:

(i) The DSU and SILC shall provide appropriate and sufficient notice of the public meetings. Appropriate and sufficient notice means notice provided at least 30 days prior to the public meeting through various media available to the general public, such as newspapers and public service announcements, and through specific contacts with appropriate constituency groups and organizations identified by the DSU and SILC.

(ii) The DSU and SILC shall make reasonable accommodation to individuals with disabilities who rely on alternative modes of communication in the conduct of the public meetings, including providing sign language interpreters and audio-loops.

(iii) The DSU and SILC shall provide the notices of the public meetings, any written material provided prior to or at the public meetings, and the approved State plan in accessible formats for individuals who rely on alternative modes of communication.

(h) The State plan must assure that, at the public meetings to develop the State plan, the DSU and SILC identify those provisions in the State plan that are State-imposed requirements. For purposes of this section, a State-imposed requirement includes any State law, regulation, rule, or policy relating to the DSU's administration or operation of IL programs under Title VII of the Act, including any rule or policy implementing any Federal law, regulation, or guideline, that is beyond what would be required to comply with the regulations in 34 CFR Parts 364, 365, 366, and 367.

(i) The State plan also must address how the specific requirements in §§ 364.21 through 364.43 and in §§ 364.56 and 364.59 will be met.

(Approved by the Office of Management and Budget under control number 1820–0527)

(Authority: 29 U.S.C. 711(c) and 796c (a) and (m)(6))

§ 364.21 What are the requirements for the Statewide Independent Living Council (SILC)?

(a) *Establishment.* (1) To be eligible to receive assistance under Chapter 1 of Title VII of the Act, each State shall establish a SILC that meets the requirements of section 705 of the Act.

(2) The SILC may not be established as an entity within a State agency, including the designated State agency or DSU. The SILC shall be independent of the DSU and all other State agencies.

(b) *Appointment and composition.* (1) *Appointment.* Members of the SILC must be appointed by the Governor or the appropriate entity within the State responsible, in accordance with State law, for making appointments.

(2) *Composition.* (i) The SILC must include—

(A) At least one director of a center chosen by the directors of centers within the State; and

(B) As ex officio, nonvoting members, a representative from the DSU and representatives from other State agencies that provide services to individuals with disabilities.

(ii) The SILC may include—

(A) Other representatives from centers;

(B) Parents and legal guardians of individuals with disabilities;

(C) Advocates of and for individuals with disabilities;

(D) Representatives from private businesses;

(E) Representatives from organizations that provide services for individuals with disabilities; and

(F) Other appropriate individuals.

(iii) A majority of the members of the SILC must be individuals with disabilities, as defined in § 364.4(b), and not employed by any State agency or center.

(c) *Qualifications.* The SILC must be composed of members—

(1) Who provide statewide representation;

(2) Who represent a broad range of individuals with disabilities; and

(3) Who are knowledgeable about centers and IL services.

(d) *Voting members.* A majority of the voting members of the SILC must be individuals with disabilities, as defined in § 364.4(b), and not employed by any State agency or center.

(e) *Chairperson.* (1) *In general.* Except as provided in paragraph (e)(2) of this section, the SILC shall select a chairperson from among the voting membership of the SILC.

(2) *Designation by Governor.* In States in which the Governor does not have veto power pursuant to State law, the Governor shall designate a voting member of the SILC to serve as the chairperson of the SILC or shall require the SILC to so designate a voting member.

(f) *Terms of appointment.* Each member of the SILC shall serve for term of three years, except that—

(1) A member appointed to fill a vacancy occurring prior to the expiration of the term for which a predecessor was appointed must be appointed for the remainder of that term;

(2) The terms of service of the members initially appointed must be (as specified by the appointing authority) for the fewer number of years as will provide for the expiration of terms on a staggered basis; and

(3) No member of the SILC may serve for more than two consecutive full terms.

(g) *Duties.* The SILC shall—

(1) Jointly develop and sign (in conjunction with the DSU) the State plan required by section 704 of the Act and § 364.20;

(2) Monitor, review, and evaluate the implementation of the State plan;

(3) Coordinate activities with the State Rehabilitation Advisory Council established under section 105 of the Act and councils that address the needs of specific disability populations and issues under other Federal law;

(4) Ensure that all regularly scheduled meetings of the SILC are open to the public and sufficient advance notice is provided; and

(5) Submit to the Secretary all periodic reports as the Secretary may reasonably request and keep all records, and afford access to all records, as the Secretary finds necessary to verify the periodic reports.

(h) *Hearings.* The SILC is authorized to hold any hearings and forums that the SILC determines to be necessary to carry out its duties.

(i) *Resource plan.* (1) The SILC shall prepare, in conjunction with the DSU, a resource plan for the provision of resources, including staff and personnel, made available under Parts B and C of Chapter 1 of Title VII of the Act, Part C of Title I of the Act, and from other public and private sources that may be necessary to carry out the functions of the SILC under this part.

(2) The SILC's resource plan must, to the maximum extent possible, rely on the use of resources in existence during the period of implementation of the State plan.

(3) No conditions or requirements may be included in the SILC's resource plan that may compromise the independence of the SILC.

(4) The SILC is responsible for the proper expenditure of funds and use of resources that it receives under the resource plan.

(5) A description of the SILC's resource plan required by paragraph (i)(1) of this section must be included in the State plan.

(j) *Staff.* (1) The SILC shall, consistent with State law, supervise and evaluate its staff and other personnel as may be necessary to carry out its functions under this section.

(2) While assisting the SILC in carrying out its duties, staff and other personnel made available to the SILC by the DSU may not be assigned duties by the designated State agency or DSU, or any other agency or office of the State, that would create a conflict of interest.

(k) *Reimbursement and compensation.* The SILC may use the resources described in paragraph (i) of this section to reimburse members of the SILC for reasonable and necessary expenses of attending SILC meetings and performing SILC duties (including child care and personal assistance services) and to pay compensation to a member of the SILC, if the member is not employed or must forfeit wages from other employment, for each day the member is engaged in performing SILC duties.

(l) *Conflict of interest.* The code of conduct provisions in 34 CFR 74.162 and the conflict of interest provisions in 34 CFR 75.524 and 75.525 apply to members of the SILC. For purposes of this paragraph and 34 CFR 74.162, 75.524, and 75.525, a SILC is not considered a government, governmental entity, or governmental recipient.

(Approved by the Office of Management and Budget under control number 1820–0527)

(Authority: 29 U.S.C. 796d)

§ 364.22 What is the State's responsibility for administration of the programs authorized by Chapter 1 of Title VII?

(a) *General.* The State plan must identify the DSU as the entity that, on behalf of the State, shall—

(1) Receive, account for, and disburse funds received by the State under Part B of Chapter 1 and section 723 of Title VII of the Act (and 34 CFR Parts 365 and 366, as applicable) based on the plan;

(2) Provide, as applicable, administrative support services for the SILS and CIL programs under Part B of Chapter 1 and section 723 of Title VII of the Act, respectively, and 34 CFR Parts 365 and 366, respectively;

(3) Keep records and afford access to these records as the Secretary finds to be necessary with respect to the SILS and CIL programs; and

(4) Submit additional information or provide assurances as the Secretary may require with respect to the SILS and CIL programs.

(b) *Provision of administrative support services.* The State plan must describe the administrative support services to be provided by the DSU under paragraph (a)(2) of this section.

(c) *Designation of State unit for individuals who are blind.* The State plan may designate a State agency or the organizational unit of a State agency that is authorized under State law to provide VR services to individuals who are blind under a State VR plan as the DSU to administer that part of the State IL plan under which IL services are provided to individuals who are blind. However, a State agency designated pursuant to this paragraph may not submit a separate State plan.

(Approved by the Office of Management and Budget under control number 1820–0527)

(Authority: 29 U.S.C. 796c(c))

§ 364.23 What are the staffing requirements?

(a) *General staffing requirement.* The State plan must assure that the staff of the service provider includes personnel who are specialists in the development and provision of IL services and in the development and support of centers.

(b) *Alternative communication needs staffing.* The State plan must also assure that, to the maximum extent feasible, the service provider makes available personnel able to communicate—

(1) With individuals with significant disabilities who rely on alternative modes of communication, such as manual communication, nonverbal communication devices, Braille, or audio tapes, and who apply for or receive IL services under Title VII of the Act; and

(2) In the native languages of individuals with significant disabilities whose English proficiency is limited and who apply for or receive IL services under Title VII of the Act.

(Approved by the Office of Management and Budget under control number 1820–0527)

(Authority: 29 U.S.C. 711(c) and 796c(a)(1))

§ 364.24 What assurances are required for staff development?

The State plan must assure that the service provider establishes and maintains a program of staff development for all classes of positions involved in providing IL services and, if appropriate, in administering the CIL program. The staff development program must emphasize improving the skills of staff directly responsible for the provision of IL services, including knowledge of and practice in the IL philosophy.

(Approved by the Office of Management and Budget under control number 1820–0527)

(Authority: 29 U.S.C. 711(c) and 796c(a)(1))

§ 364.25 What are the requirements for a statewide network of centers for independent living?

(a) The State plan must include a design for the establishment of a statewide network of centers that comply with the standards and assurances in section 725 (b) and (c) of the Act and Subparts F and G of 34 CFR Part 366.

(b) The design required by paragraph (a) of this section must identify unserved and underserved areas and must provide an order of priority for serving these areas.

(Approved by the Office of Management and Budget under control number 1820–0527)

(Authority: 29 U.S.C. 711(c) and 796c(g))

§ 364.26 What are the requirements for cooperation, coordination, and working relationships?

(a) The State plan must include steps that will be taken to maximize the cooperation, coordination, and working relationships among—

(1) The SILS program, the SILC, and centers; and

(2) The DSU, other State agencies represented on the SILC, other councils that address the needs of specific disability populations and issues, and other public and private entities determined to be appropriate by the SILC.

(b) The State plan must identify the entities to which the DSU and the SILC will relate in carrying out the requirements of paragraph (a) of this section.

(Approved by the Office of Management and Budget under control number 1820–0527)

(Authority: 29 U.S.C. 796c(i))

§ 364.27 What are the requirements for coordinating independent living (IL) services?

The State plan must describe how IL services funded under Chapter 1 of Title VII of the Act will be coordinated with, and complement, other services, to avoid unnecessary duplication with other Federal, State, and local programs, including the OIB program authorized by Chapter 2 of Title VII of the Act, that provide IL- or VR-related services. This description must include those services provided by State and local agencies administering the special education, vocational education, developmental disabilities services, public health, mental health, housing, transportation, and veterans' programs, and the programs authorized under Titles XVIII through XX of the Social Security Act within the State.

(Approved by the Office of Management and Budget under control number 1820–0527)

(Authority: 29 U.S.C. 796c(j) and 752(i)(2)(C))

§ 364.28 What requirements relate to IL services for older individuals who are blind?

The State plan must include an assurance that the DSU will seek to incorporate into and describe in the State plan any new methods or approaches for the provision to older individuals who are blind of IL services that are developed under a project funded under Chapter 2 of Title VII of the Act and that the DSU determines to be effective.

(Approved by the Office of Management and Budget under control number 1820–0527)

(Authority: 29 U.S.C. 711(c), 796c(j), and 796k(h))

§ 364.29 What are the requirements for coordinating Federal and State sources of funding?

(a) The State plan must describe efforts to coordinate Federal and State funding for centers and IL services.

(b) The State plan must identify the amounts, sources, and purposes of the funding to be coordinated under paragraph (a) of this section, including the amount of State funds earmarked for the general operation of centers.

(c) Cross-reference: See 34 CFR 366.30(a).

(Approved by the Office of Management and Budget under control number 1820–0527)

(Authority: 29 U.S.C. 796c(k))

§ 364.30 What notice must be given about the Client Assistance Program (CAP)?

The State plan must include satisfactory assurances that all service providers will use formats that are accessible to notify individuals seeking or receiving IL services under Chapter 1 of Title VII about—

(a) The availability of the CAP authorized by section 112 of the Act;

(b) The purposes of the services provided under the CAP; and

(c) How to contact the CAP.

(Approved by the Office of Management and Budget under control number 1820–0527)

(Authority: 29 U.S.C. 718a and 796c(m)(1))

§ 364.31 What are the affirmative action requirements?

The State plan must include satisfactory assurances that all recipients of financial assistance under Parts B and C of Chapter 1 of Title VII of the Act will take affirmative action to employ and advance in employment qualified individuals with significant disabilities on the same terms and conditions required with respect to the employment of individuals with disabilities under section 503 of the Act.

(Approved by the Office of Management and Budget under control number 1820–0527)

(Authority: 29 U.S.C. 796c(m)(2))

§ 364.32 What are the requirements for outreach?

(a) With respect to IL services and centers funded under Chapter 1 of Title VII of the Act, the State plan must include steps to be taken regarding outreach to populations in the State that are unserved or underserved by programs under Title VII, including minority groups and urban and rural populations.

(b) The State plan must identify the populations to be designated for targeted outreach efforts under paragraph (a) of this section and the geographic areas (i.e., communities) in which they reside.

(Approved by the Office of Management and Budget under control number 1820–0527)

(Authority: 29 U.S.C. 796c(l))

§ 364.33 What is required to meet minority needs?

The State plan must demonstrate how the State will address the needs of individuals with significant disabilities from minority group backgrounds.

(Approved by the Office of Management and Budget under control number 1820–0527)

(Authority: 29 U.S.C. 711(c), 718b(b), and 796c(l))

§ 364.34 What are the fiscal and accounting requirements?

In addition to complying with applicable EDGAR fiscal and accounting requirements, the State plan must include satisfactory assurances that all recipients of financial assistance under Parts B and C of Chapter 1 of Title VII of the Act will adopt those fiscal control and fund accounting procedures as may be necessary to ensure the proper disbursement of and accounting for those funds.

(Approved by the Office of Management and Budget under control number 1820–0527)

(Authority: 29 U.S.C. 796c(m)(3))

§ 364.35 What records must be maintained?

In addition to complying with applicable EDGAR recordkeeping requirements, the State plan must include satisfactory assurances that all recipients of financial assistance under Parts B and C of Chapter 1 of Title VII of the Act will maintain—

(a) Records that fully disclose and document—

(1) The amount and disposition by the recipient of that financial assistance;

(2) The total cost of the project or undertaking in connection with which the financial assistance is given or used;

(3) The amount of that portion of the cost of the project or undertaking supplied by other sources; and

(4) Compliance with the requirements of Chapter 1 of Title VII of the Act and this part; and

(b) Other records that the Secretary determines to be appropriate to facilitate an effective audit.

(Approved by the Office of Management and Budget under control number 1820–0527)

(Authority: 29 U.S.C. 796c(m)(4))

§ 364.36 What are the reporting requirements?

With respect to the records that are required by § 364.35, the State plan must include satisfactory assurances that all recipients of financial assistance under Parts B and C of Chapter 1 of Title VII of the Act will submit reports that the Secretary determines to be appropriate.

(Approved by the Office of Management and Budget under control number 1820–0527)

(Authority: 29 U.S.C. 796c(m)(4)(D))

§ 364.37 What access to records must be provided?

For the purpose of conducting audits, examinations, and compliance reviews, the State plan must include satisfactory assurances that all recipients of financial assistance under Parts B and C of Chapter 1 and Chapter 2 of Title VII of the Act will provide access to the Secretary and the Comptroller General, or any of their duly authorized representatives, to—

(a) The records maintained under § 364.35;

(b) Any other books, documents, papers, and records of the recipients that are pertinent to the financial assistance received under Chapter 1 of Title VII of the Act; and

(c) All individual case records or files or consumer service records of individuals served under 34 CFR Part 365, 366, or 367, including names, addresses, photographs, and records of evaluation included in those individual case records or files or consumer service records.

(Approved by the Office of Management and Budget under control number 1820–0527)

(Authority: 29 U.S.C. 711(c) and 796c(m)(4)(c) and (5))

§ 364.38 What methods of evaluation must the State plan include?

The State plan must establish a method for the periodic evaluation of the effectiveness of the plan in meeting the objectives established in § 364.42, including evaluation of satisfaction by individuals with significant disabilities who have participated in the program.

(Approved by the Office of Management and Budget under control number 1820–0527)

(Authority: 29 U.S.C. 796c(n))

§ 364.39 What requirements apply to the administration of grants under the Centers for Independent Living program?

In States in which State funding for centers equals or exceeds the amount of funds allotted to the State under Part C of Title VII of the Act, as determined pursuant to 34 CFR 366.29 and 366.31, and in which the State elects to administer the CIL program as provided in section 723 of the Act, the State plan must include policies, practices, and procedures, including the order of priorities that the State may establish pursuant to 34 CFR 366.34(a), that are consistent with section 723 of the Act to govern the awarding of grants to centers and the oversight of these centers.

(Approved by the Office of Management and Budget under control number 1820–0527)

(Authority: 29 U.S.C. 796c (g) and (h), 796f–1(d), and 796f–2(d))

§ 364.40 Who is eligible to receive IL services?

The State plan must assure that—

(a) Any individual with a significant disability, as defined in § 364.4(b), is eligible for IL services under the SILS and CIL programs authorized under Chapter 1 of Title VII of the Act;

(b) Any individual may seek information about IL services under these programs and request referral to other services and programs for individuals with significant disabilities, as appropriate; and

(c) The determination of an individual's eligibility for IL services under the SILS and CIL programs meets the requirements of § 364.51.

(Approved by the Office of Management and Budget under control number 1820–0527)

(Authority: 29 U.S.C. 706(15)(B) and 796b)

§ 364.41 What assurances must be included regarding eligibility?

(a) The State plan must assure that the service provider applies eligibility requirements without regard to age, color, creed, gender, national origin, race, religion, or type of significant disability of the individual applying for IL services.

(b) The State plan must assure that the service provider does not impose any

State or local residence requirement that excludes under the plan any individual who is present in the State and who is otherwise eligible for IL services from receiving IL services.

(Approved by the Office of Management and Budget under control number 1820–0527)

(Authority: 29 U.S.C. 711(c) and 796c(a)(1))

§ 364.42 What objectives and information must be included in the State plan?

(a) The State plan must specifically describe—

(1) The objectives to be achieved;

(2) The financial plan for the use of Federal and non-Federal funds to meet these objectives. The financial plan must identify the source and amounts of other Federal and non-Federal funds to be used to meet these objectives; and

(3) How funds received under sections 711, 721, and 752 of the Act will further these objectives.

(b) The objectives required by paragraph (a) of this section must address—

(1) The overall goals and mission of the State's IL programs and services;

(2) The various priorities for the types of services and populations to be served; and

(3) The types of services to be provided.

(c) In developing the objectives required by paragraph (a) of this section, the DSU and the SILC shall consider, and incorporate if appropriate, the priorities and objectives established by centers pursuant to section 725(c)(4) of the Act.

(d) The State plan must establish timeframes for the achievement of the objectives required by paragraph (a) of this section.

(e) The State plan must explain how the objectives required by paragraph (a) of this section are consistent with and further the purpose of Chapter 1 of Title VII of the Act, as stated in section 701 of the Act and § 364.2.

(Approved by the Office of Management and Budget under control number 1820–0527)

(Authority: 29 U.S.C. 796c(d))

§ 364.43 What requirements apply to the provision of State IL services?

(a) The State plan must describe the extent and scope of IL services to be provided under Title VII of the Act to meet the objectives stated in § 364.42.

(b) The State plan must provide that the State directly, or through grants or contracts, will provide IL services with Federal, State, or other funds.

(c) Unless the individual signs a waiver stating that an IL plan is unnecessary, IL services provided to individuals with significant disabilities must be in accordance with an IL plan that meets the requirements of § 364.52 and that is mutually agreed upon by—

(1) An appropriate staff member of the service provider; and

(2) The individual.

(d) If the State provides the IL services that it is required to provide by paragraph (b) of this section through grants or contracts with third parties, the State plan must describe these arrangements.

(e) If the State contracts with or awards a grant to a center for the general operation of the center, the State shall delegate to the center the determination of an individual's eligibility for services from that center. If the State contracts with or awards a grant to a third party to provide specific IL services, the State may choose to delegate to the IL service provider the determination of eligibility for these services and the development of an IL plan for individuals who receive these services.

(Approved by the Office of Management and Budget under control number 1820–0527)

(Authority: 29 U.S.C. 711(c), 796c(e)–(f), and 796f–4(b)(2))

Subpart D—What Conditions Must Be Met After an Award?

§ 364.50 What requirements apply to the processing of referrals and applications?

The service provider shall apply the standards and procedures established by the DSU pursuant to 34 CFR 365.30 to ensure expeditious and equitable handling of referrals and applications for IL services from individuals with significant disabilities.

(Authority: 29 U.S.C. 711(c) and 796–796f–5)

§ 364.51 What requirements apply to determinations of eligibility or ineligibility?

(a) *Eligibility.* (1) Before or at the same time as an applicant for IL services may begin receiving IL services funded under this part, the service provider shall determine the applicant's eligibility and maintain documentation that the applicant has met the basic requirements specified in § 364.40.

(2) The documentation must be dated and signed by an appropriate staff member of the service provider.

(b) *Ineligibility.* (1) If a determination is made that an applicant for IL services is not an individual with a significant disability, the service provider shall provide documentation of the ineligibility determination that is dated and signed by an appropriate staff member.

(2)(i) The service provider may determine an applicant to be ineligible for IL services only after full consultation with the applicant or, if the applicant chooses, the applicant's parent, guardian, or other legally authorized advocate or representative, or after providing a clear opportunity for this consultation.

(ii) The service provider shall notify the applicant in writing of the action taken and inform the applicant or, if the applicant chooses, the applicant's parent, guardian, or other legally authorized advocate or representative, of the applicant's rights and the means by which the applicant may appeal the action taken. (Cross-reference: See § 364.58(a).)

(iii) The service provider shall provide a detailed explanation of the availability and purposes of the CAP established within the State under section 112 of the Act, including information on how to contact the program.

(iv) If appropriate, the service provider shall refer the applicant to other agencies and facilities, including the State's VR program under 34 CFR Part 361.

(c) *Review of ineligibility determination.* (1) If an applicant for IL services has been found ineligible, the service provider shall review the applicant's ineligibility at least once within 12 months after the ineligibility determination has been made and whenever the service provider determines that the applicant's status has materially changed.

(2) The review need not be conducted in situations where the applicant has refused the review, the applicant is no longer present in the State, or the applicant's whereabouts are unknown.

(Approved by the Office of Management and Budget under control number 1820–0527)

(Authority: 29 U.S.C. 711(c) and 796c(e))

§ 364.52 What are the requirements for an IL plan?

(a) *General.* (1) Unless the individual who is to be provided IL services under this part signs a waiver in accordance with paragraph (a)(2) of this section, the service provider, in collaboration with the individual with a significant disability, shall develop and periodically review an IL plan for the individual in accordance with the requirements in § 364.43(c) and paragraphs (b) through (e) of this section.

(2) The requirements of this section with respect to an IL plan do not apply if the individual knowingly and voluntarily signs a waiver stating that an IL plan is unnecessary.

(3) Subject to paragraph (a)(2) of this section, the service provider shall provide each IL service in accordance with the IL plan.

(b) *Initiation and development of an IL plan.* (1) Development of an individual's IL plan must be initiated after documentation of eligibility under § 364.51(a) and must indicate the goals or objectives established, the services to be provided, and the anticipated duration of the service program and each component service.

(2) The IL plan must be developed jointly and signed by the appropriate staff member of the service provider and the individual with a significant disability or, if consistent with State law and the individual chooses, the individual's guardian, parent, or other legally authorized advocate or representative.

(3) A copy of the IL plan, and any amendments, must be provided in an accessible format to the individual with a significant disability or, if consistent with State law and the individual chooses, the individual's guardian, parent, or other legally authorized advocate or representative.

(c) *Review.* (1) The IL plan must be reviewed as often as necessary but at least on an annual basis to determine whether services should be continued, modified, or discontinued, or whether the individual should be referred to a program of VR services under 34 CFR Part 361 or to any other program of assistance.

(2) Each individual with a significant disability or, if consistent with State law and the individual chooses, the individual's guardian, parent, or other legally authorized advocate or representative, must be given an opportunity to review the IL plan and, if necessary, jointly redevelop and agree by signature to its terms.

(d) *Coordination with vocational rehabilitation, developmental disabilities, and special education programs.* The development of the IL plan and the provision of IL services must be coordinated to the maximum extent possible with any individualized—

(1) Written rehabilitation program for VR services for that individual;

(2) Habilitation program for the individual prepared under the Developmental Disabilities Assistance and Bill of Rights Act; and

(3) Education program for the individual prepared under Part B of the Individuals with Disabilities Education Act.

(e) *Termination of services.* If the service provider intends to terminate services to an individual receiving IL services under an IL plan, the service provider shall follow the procedures in § 364.51(b)(2)(ii) through (iv) and (c).

(Approved by the Office of Management and Budget under control number 1820–0527)

(Authority: 29 U.S.C. 711(c) and 796c(e) and (j))

§ 364.53 What records must be maintained for the individual?

For each applicant for IL services (other than information and referral) and for each individual receiving IL services (other than information and referral), the service provider shall maintain a consumer service record that includes—

(a) Documentation concerning eligibility or ineligibility for services;

(b) The services requested by the consumer;

(c) Either the IL plan developed with the consumer or a waiver signed by the consumer stating that an IL plan is unnecessary;

(d) The services actually provided to the consumer; and

(e) The IL goals or objectives—

(1) Established with the consumer, whether or not in the consumer's IL plan; and

(2) Achieved by the consumer.

(f) A consumer service record may be maintained either electronically or in written form, except that the IL plan and waiver must be in writing.

(Approved by the Office of Management and Budget under control number 1820–0527)

(Authority: 29 U.S.C. 711(c), 712 and 796c(m)(4)(B))

§ 364.54 What are the durational limitations on IL services?

The service provider may not impose any uniform durational limitations on the provision of IL services, except as otherwise provided by Federal law or regulation.

(Authority: 29 U.S.C. 711(c) and 796–796f–5)

§ 364.55 What standards shall service providers meet?

In providing IL services to individuals with significant disabilities, service providers shall comply with—

(a) The written standards for IL service providers established by the DSU pursuant to 34 CFR 365.31; and

(b) All applicable State or Federal licensure or certification requirements.

(Authority: 29 U.S.C. 711(c) and 796–796f–5)

§ 364.56 What are the special requirements pertaining to the protection, use, and release of personal information?

(a) *General provisions.* The State plan must assure that each service provider will adopt and implement policies and procedures to safeguard the confidentiality of all personal information, including photographs and lists of names. These policies and procedures must assure that—

(1) Specific safeguards protect current and stored personal information;

(2) All applicants for, or recipients of, IL services and, as appropriate, those individuals' legally authorized representatives, service providers, cooperating agencies, and interested persons are informed of the confidentiality of personal information and the conditions for gaining access to and releasing this information;

(3) All applicants or their legally authorized representatives are informed about the service provider's need to collect personal information and the policies governing its use, including—

(i) Identification of the authority under which information is collected;

(ii) Explanation of the principal purposes for which the service provider intends to use or release the information;

(iii) Explanation of whether providing requested information to the service provider is mandatory or voluntary and the effects to the individual of not providing requested information;

(iv) Identification of those situations in which the service provider requires or does not require informed written consent of the individual or his or her legally authorized representative before information may be released; and

(v) Identification of other agencies to which information is routinely released;

(4) Persons who are unable to communicate in English or who rely on alternative modes of communication must be provided an explanation of service provider policies and procedures affecting personal information through methods that can be adequately understood by them;

(5) At least the same protections are provided to individuals with significant disabilities as provided by State laws and regulations; and

(6) Access to records is governed by rules established by the service provider and any fees charged for copies of records are reasonable and cover only extraordinary costs of duplication or making extensive searches.

(b) *Service provider use.* All personal information in the possession of the service provider may be used only for the purposes directly connected with the provision of IL services and the administration of the IL program under which IL services are provided. Information containing identifiable personal information may not be shared with advisory or other bodies that do not have official responsibility for the provision of IL services or the administration of the IL program under which IL services are provided. In the provision of IL services or the administration of the IL program under which IL services are provided, the service provider may obtain personal information from other service providers and cooperating agencies under assurances that the information may not be further divulged, except as provided under paragraphs (c), (d), and (e) of this section.

(c) *Release to recipients of IL services.* (1) Except as provided in paragraphs (c)(2) and (c)(3) of this section, if requested in writing by a recipient of IL services, the service provider shall release all information in that individual's record of services to the individual or the individual's legally authorized representative in a timely manner.

(2) Medical, psychological, or other information that the service provider determines may be harmful to the individual may not be released directly to the individual, but must be provided through a qualified medical or psychological professional or the individual's legally authorized representative.

(3) If personal information has been obtained from another agency or organization, it may be released only by, or under the conditions established by, the other agency or organization.

(d) *Release for audit, evaluation, and research.* Personal information may be released to an organization, agency, or individual engaged in audit, evaluation, or research activities only for purposes directly connected with the administration of an IL program, or for purposes that would significantly improve the quality of life for individuals with significant disabilities and only if the organization, agency, or individual assures that—

(1) The information will be used only for the purposes for which it is being provided;

(2) The information will be released only to persons officially connected with the audit, evaluation, or research;

(3) The information will not be released to the involved individual;

(4) The information will be managed in a manner to safeguard confidentiality; and

(5) The final product will not reveal any personally identifying information without the informed written consent of the involved individual or the individual's legally authorized representative.

(e) *Release to other programs or authorities.* (1) Upon receiving the informed written consent of the individual or, if appropriate, the individual's legally authorized representative, the service provider may release personal information to another agency or organization for the latter's program purposes only to the extent that the information may be released to the involved individual and only to the extent that the other agency or organization demonstrates that the information requested is necessary for the proper administration of its program.

(2) Medical or psychological information may be released pursuant to paragraph (e)(1) of this section if the other agency or organization assures the service provider that the information will be used only for the purpose for which it is being provided and will not be further released to the individual.

(3) The service provider shall release personal information if required by Federal laws or regulations.

(4) The service provider shall release personal information in response to investigations in connection with law enforcement, fraud, or abuse, unless expressly prohibited by Federal or State laws or regulations, and in response to judicial order.

(5) The service provider also may release personal information to protect the individual or others if the individual poses a threat to his or her safety or to the safety of others.

(Authority: 29 U.S.C. 711(c))

§ 364.57 What functions and responsibilities may the State delegate?

A DSU may carry out the functions and responsibilities described in §§ 364.50, 364.51 (subject to 364.43(d)), 364.52, 364.53, and 364.56 or, except as otherwise provided, may delegate these functions and responsibilities to the appropriate service provider with which the DSU subgrants or contracts to provide IL services.

(Authority: 29 U.S.C. 711(c), 796c(f) and 796e–2)

§ 364.58 What appeal procedures must be available to consumers?

Each service provider shall—

(a) Establish policies and procedures that an individual may use to obtain review of decisions made by the service provider concerning the individual's request for IL services or the provision of IL services to the individual; and

(b) Use formats that are accessible to inform each individual who seeks or is receiving IL services from the service provider about the procedures required by paragraph (a) of this section.

(Authority: 29 U.S.C. 711(c))

§ 364.59 May an individual's ability to pay be considered in determining his or her participation in the costs of IL services?

(a) *No Federal requirement or prohibition.* (1) A State is neither required to allow nor prohibited from allowing service providers to charge consumers for the cost of IL services.

(2) If a State allows service providers to charge consumers for the cost of IL services, a State is neither required to allow nor prohibited from allowing service providers to consider the ability of individual consumers to pay for the cost of IL services in determining how much a particular consumer must contribute to the costs of a particular IL service.

(b) *State plan requirements.* If a State chooses to allow service providers to charge consumers for the cost of IL services or if a State chooses to allow service providers to consider the ability of individual consumers to pay for the cost of IL services, the State plan must—

(1) Specify the types of IL services for which costs may be charged and for which a financial need test may be applied; and

(2) Assure that any consideration of financial need is applied uniformly so that all individuals who are eligible for IL services are treated equally.

(c) *Financial need.* Consistent with paragraph (b) of this section, a service provider may choose to charge consumers for the cost of IL services or may choose to consider the financial need of an individual who is eligible for IL services.

(d) *Written policies and documentation.* If the service provider chooses to consider financial need—

(1) It shall maintain written policies covering the specific types of IL services for which a financial need test will be applied; and

(2) It shall document the individual's participation in the cost of any IL services, including the individual's financial need.

(Approved by the Office of Management and Budget under control number 1820–0527)

(Authority: 29 U.S.C. 711(c))

PART 365—STATE INDEPENDENT LIVING SERVICES

Subpart A—General

Sec.

Subpart B—How Does the Secretary Make a Grant to a State?

Subpart C—For What Purpose Are Funds Authorized or Required To Be Used?

Subpart D—What Conditions Must Be Met After an Award?

Authority: 29 U.S.C. 796e–796e–2, unless otherwise noted.

Subpart A—General

§ 365.1 What is the State Independent Living Services (SILS) program?

The Secretary provides financial assistance to States under the SILS program authorized by Part B of Chapter 1 of Title VII of the Act to—

(a) Provide the resources described in the resource plan required by section 705(e) of the Act and 34 CFR 364.21(d) relating to the Statewide IL Council (SILC);

(b) Provide to individuals with significant disabilities the independent living (IL) services required by section 704(e) of the Act;

(c) Demonstrate ways to expand and improve IL services;

(d) Support the operation of centers for independent living (centers) that are in compliance with the standards and assurances in section 725 (b) and (c) of the Act and Subparts F and G of 34 CFR Part 366;

(e) Support activities to increase the capacities of public or nonprofit agencies and organizations and other entities to develop comprehensive approaches or systems for providing IL services;

(f) Conduct studies and analyses, gather information, develop model policies and procedures, and present information, approaches, strategies, findings, conclusions, and recommendations to Federal, State, and local policy makers in order to enhance IL services for individuals with significant disabilities;

(g) Train individuals with significant disabilities, individuals with disabilities, individuals providing services to individuals with significant disabilities, and other persons regarding the IL philosophy; and

(h) Provide outreach to populations that are unserved or underserved by programs under Title VII of the Act, including minority groups and urban and rural populations.

(Authority: 29 U.S.C. 796e)

§ 365.2 Who is eligible for an award?

Any designated State unit (DSU) identified by the State pursuant to 34 CFR 364.22 is eligible to apply for assistance under this part in accordance with 34 CFR 364.10 and 364.11.

(Approved by the Office of Management and Budget under control number 1820–0527)

(Authority: 29 U.S.C. 796c(a)(1) and (c) and 796e(a))

§ 365.3 What regulations apply?

The following regulations apply to this part:

(a) The regulations in 34 CFR Part 364.

(b) The regulations in this Part 365.

(Authority: 29 U.S.C. 711(c) and 796e)

Subpart B—How Does the Secretary Make a Grant to a State?

§ 365.10 How does a State apply for a grant?

To receive a grant under this part, a State shall submit to the Secretary and obtain approval of a State plan that meets the requirements of Part A of Title VII of the Act and Subparts B and C of 34 CFR Part 364.

(Approved by the Office of Management and Budget under control number 1820–0527.)

(Authority: 29 U.S.C. 796c(a)(1) and (c) and 796e(a))

§ 365.11 How is the allotment of Federal funds for State independent living (IL) services computed?

(a) The allotment of Federal funds for State IL services for each State is computed in accordance with the requirements of section 711(a)(1) of the Act.

(b) The allotment of Federal funds for Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Mariana Islands, and the Republic of Palau is computed in accordance with section 711(a)(2) of the Act.

(c) If the State plan designates, pursuant to § 364.22(c), a unit to administer the part of the plan under which State IL services are provided for individuals who are blind and a separate or different unit to administer the rest of the plan, the division of the State's allotment between these two units is a matter for State determination.

(Authority: 29 U.S.C. 711(c) and 796e(a))

§ 365.12 How are payments from allotments for IL services made?

(a) From the allotment of a State for a fiscal year under § 365.11, the Secretary pays to the State the Federal share of the expenditures incurred by the State during the year in accordance with the State plan approved under section 706 of the Act. After any necessary adjustments resulting from previously made overpayments or underpayments, the payments may be made in advance or by reimbursement, in installments, and on conditions that the Secretary may determine.

(b)(1) The Federal share with respect to any State for any fiscal year is 90 percent of the expenditures incurred by the State during that fiscal year under its State plan approved under section 706 of the Act.

(2) The non-Federal share of the cost of any project that receives assistance through an allotment under this part may be provided in cash or in kind, fairly evaluated, including plant, equipment, or services.

(Authority: U.S.C. 796e–1)

§ 365.13 What requirements apply if the State's non-Federal share is in cash?

(a) Except as further limited by paragraph (b) of this section, expenditures that meet the requirements of 34 CFR 80.24(a) through (b)(6) may be used to meet the non-Federal share matching requirement under section 712(b) of the Act if—

(1) The expenditures are made with funds made available by appropriation directly to the designated State agency or with funds made available by allotment or transfer from any other unit of State or local government;

(2) The expenditures are made with cash contributions from a donor that are deposited in the account of the designated State agency in accordance with State law for expenditure by, and at the sole discretion of, the DSU for activities identified or described in the State plan and authorized by § 365.20; or

(3) The expenditures are made with cash contributions from a donor that are earmarked for meeting the State's share for—

(i) Providing particular services (e.g., personal assistance services);

(ii) Serving individuals with certain types of disabilities (e.g., older individuals who are blind);

(iii) Providing services to specific groups that State or Federal law permits to be targeted for services (e.g., children of migrant laborers); or

(iv) Carrying out particular types of administrative activities permissible under State law.

(b) Cash contributions are permissible under paragraph (a)(3) of this section only if the cash contributions are not used for expenditures that benefit or will benefit in any way the donor, an individual to whom the donor is related by blood or marriage or with whom the donor has a close personal relationship, or an individual, entity, or organization with whom the donor shares a financial interest.

(c) The receipt of a grant, subgrant, or contract under section 713 of the Act or a grant, subgrant, or assistance contract under section 723 of the Act from the DSU is not considered a benefit to the donor of a cash contribution for purposes of paragraph (b) of this section if the grant, subgrant, or contract was awarded under the State's regular competitive procedures.

(d) For purposes of this section, a donor may be a private agency, a profit-making or nonprofit organization, or an individual.

(Authority: 29 U.S.C. 711(c) and 796e–1(b))

§ 365.14 What conditions relating to cash or in-kind contributions apply to awards to grantees, subgrantees, or contractors?

(a) A State may not condition the award of a grant, subgrant, or contract under section 713 of the Act or a grant, subgrant, or assistance contract under section 723 of the Act on the requirement that the applicant for the grant or subgrant make a cash or in-kind contribution of any particular amount or value to the State.

(b) An individual, entity, or organization that is a grantee or subgrantee of the State, or has a contract with the State, may not condition the award of a subgrant or subcontract under section 713 of the Act or section 723 of the Act on the requirement that the applicant for the subgrant or subcontract make a cash or in-kind contribution of any particular amount or value to the State or to the grantee or contractor of the State.

(Authority: 29 U.S.C. 711(c) and 796e–1(b))

§ 365.15 What requirements apply if the State's non-Federal share is in kind?

Subject to § 365.14, in-kind contributions may be—

(a) Used to meet the matching requirement under section 712(b) of the Act if the in-kind contributions meet the requirements of 34 CFR 80.24 (b)(7) through (g) and if the in-kind contributions would be considered allowable costs under this part, as determined by the cost principles made applicable by either Subpart Q of 34 CFR Part 74 or 34 CFR 80.22, as appropriate; and

(b) Made to the program or project by the State or by a third party (i.e., an individual, entity, or organization, whether local, public, private, for profit, or nonprofit), including a third party that is a grantee, subgrantee, or contractor that is receiving or will receive assistance under section 713 or 723 of the Act.

(Authority: 29 U.S.C. 711(c) and 796e–1(b))

§ 365.16 What requirements apply to refunds and rebates?

The following must be treated as a reduction of expenditures charged to the grant, subgrant, or contract awarded under this part and may not be used for meeting the State's matching requirement under section 712(b) of the Act:

(a) Rebates, deductions, refunds, discounts, or reductions to the price of goods, products, equipment, rental property, real property, or services.

(b) Premiums, bonuses, gifts, and any other payments related to the purchase of goods, products, equipment, rental property, real property, or services.

(Authority: 29 U.S.C. 711(c), 796e–1(b), and OMB Circulars A–87 and A–122)

Subpart C—For What Purpose Are Funds Authorized or Required To Be Used?

§ 365.20 What are the authorized uses of funds?

The State may use funds received under this part to support the activities listed in § 365.1 and to meet its obligation under section 704(e) of the Act and 34 CFR 364.43(b).

(Authority: 29 U.S.C. 796e–2)

§ 365.21 What funds may the State use to provide the IL core services?

(a) In providing IL services as required under section 704(e) of the Act and 34 CFR 364.43(b), a State may use funds provided under this part to provide directly, or through grants or contracts, the following IL core services:

(1) Information and referral services.

(2) IL skills training.

(3) Peer counseling, including cross-disability peer counseling.

(4) Individual and systems advocacy.

(b) Information and referral services may be provided independently of the other services described in paragraph (a) of this section and without regard to Subpart G of 34 CFR Part 366.

(Authority: 29 U.S.C. 711(c) and 796c(e))

§ 365.22 What additional IL services may the State provide?

In addition to the IL core services that the State may provide pursuant to § 365.21(a) with funds received under Part B of Chapter 1 of Title VII of the Act, the State also may use funds received under Part B of Chapter 1 of Title VII of the Act to provide other IL services defined in 34 CFR 364.4 (Independent living services).

(Authority: 29 U.S.C. 796e–2(1))

§ 365.23 How does a State make a subgrant or enter into a contract?

If a State makes a subgrant or enters into a contract to provide IL services to meet its obligation under section 704(e) of the Act—

(a) The provisions of this part apply to both the State and the entity or individual to whom it awards a subgrant or with whom it enters into a contract; and

(b) The provisions concerning the administration of subgrants and contracts in 34 CFR Parts 76 and 80 apply to the State.

(c) Cross-reference: See 34 CFR Parts 74, 76, and 80.

(Authority: 29 U.S.C. 711(c), 796c(f), and 796e–2)

Subpart D—What Conditions Must Be Met After an Award?

§ 365.30 What are the standards for processing referrals and applications?

The DSU shall develop, establish, and maintain written standards and procedures to be applied by service providers to assure expeditious and equitable handling of referrals and applications for IL services from individuals with significant disabilities.

(Approved by the Office of Management and Budget under control number 1820–0527.)

(Authority: 29 U.S.C. 711(c) and 796e)

§ 365.31 What are the standards for service providers?

(a) The DSU shall develop, establish, make available to the public, maintain, and implement written minimum standards for the provision of—

(1) IL services to be met by service providers that are not centers; and

(2) Specialized IL services to individuals with significant disabilities by centers under a contract with the DSU.

(b) The minimum standards developed pursuant to paragraph (a)(2) of this section may differ from the standards and assurances in section 725 of the Act and Subparts F and G of 34 CFR Part 366.

(c) The DSU shall assure that participating service providers meet all applicable State licensure or certification requirements.

(Approved by the Office of Management and Budget under control number 1820–0527.)

(Authority: 29 U.S.C. 711(c))

PART 366—CENTERS FOR INDEPENDENT LIVING

Authority: 29 U.S.C. 796f through 796f–5, unless otherwise noted.

Subpart A—General

§ 366.1 What is the Centers for Independent Living (CIL) program?

The CIL program provides financial assistance for planning, conducting, administering, and evaluating centers for independent living (centers) that comply with the standards and assurances in section 725(b) and (c) of the Act, consistent with the design included in the State plan pursuant to 34 CFR 364.25 for establishing a statewide network of centers.

(Authority: 29 U.S.C. 796f, 796f–1(a)(2), and 796f–2(a)(1)(A)(ii))

§ 366.2 What agencies are eligible for assistance under the CIL program?

(a) In any State in which the Secretary has approved the State plan required by section 704 of the Act, an applicant may receive a grant under Subpart C or D of this part, as applicable, if the applicant demonstrates in its application submitted pursuant to § 366.21, 366.24, 366.33, 366.35, or 366.36 that it—

(1) Has the power and authority to—

(i) Carry out the purpose of Part C of Title VII of the Act and perform the functions listed in section 725(b) and (c) of the Act and Subparts F and G of this part within a community located within that State or in a bordering State; and

(ii) Receive and administer—

(A) Funds under this part;

(B) Funds and contributions from private or public sources that may be used in support of a center; and

(C) Funds from other public and private programs; and

(2) Is able to plan, conduct, administer, and evaluate a center consistent with the standards and assurances in section 725(b) and (c) of the Act and Subparts F and G of this part.

(b) An applicant that meets the requirements of paragraph (a) of this section is eligible to apply as a new center under §§ 366.24 or 366.36 if it—

(1) Is not receiving funds under Part C of Chapter 1 of Title VII of the Act; or

(2) Proposes the expansion of an existing center through the establishment of a separate and complete center (except that the governing board of the existing center may serve as the governing board of the new center) at a different geographical location; and

(3) Meets the requirements of § 366.24;

(c) A State that received assistance in fiscal year (FY) 1993 to directly operate a center in accordance with section 724(a) of the Act is eligible to continue to receive assistance under this part to directly operate that center for FY 1994 or a succeeding fiscal year if, for the fiscal year for which assistance is sought—

(1) No nonprofit private agency submits and obtains approval of an acceptable application under section 722 or 723 of the Act or § 366.21 or § 366.24 to operate a center for that fiscal year before a date specified by the Secretary; or

(2) After funding all applications so submitted and approved, the Secretary determines that funds remain available to provide that assistance.

(d) Except for the requirement that the center be a private nonprofit agency, a center that is operated by a State that receives assistance under paragraph (a), (b), or (c) of this section shall comply with all of the requirements of Part C of Title VII of the Act and the requirements in Subpart C or D, as applicable, and F of this part.

(e) Eligibility requirements for assistance under Subpart B of this part are described in § 366.10.

(Approved by the Office of Management and Budget under control number 1820–0018.)

(Authority: 29 U.S.C. 711(c), 796f–1(b) and (d)(3), 796f–2(b), and 796f–3(a)(2) and (b))

§ 366.3 What activities may the Secretary fund?

(a) An eligible agency may use funds awarded under Subpart B of this part to carry out activities described in § 366.11(b).

(b) An eligible agency may use funds awarded under Subparts C and D of this part to—

(1) Plan, conduct, administer, and evaluate centers that comply with the standards and assurances in section 725(b) and (c) of the Act;

(2) Promote and practice the independent living (IL) philosophy in accordance with Evaluation Standard 1 ("Philosophy");

(3) Provide IL services (including IL core services and, as appropriate, a combination of any other IL services specified in section 7(30)(B) of the Act) to individuals with a range of significant disabilities in accordance with Evaluation Standards 2 and 5 ("Provision of services" and "Independent living core services," respectively);

(4) Facilitate the development and achievement of IL goals selected by individuals with significant disabilities who seek assistance in the development and achievement of IL goals from the center in accordance with Evaluation Standard 3 ("Independent living goals");

(5) Increase the availability and improve the quality of community options for independent living in order to facilitate the development and achievement of IL goals by individuals with significant disabilities in accordance with Evaluation Standard 4 ("Community options");

(6) Increase the capacity of communities within the service area of the center to meet the needs of individuals with significant disabilities in accordance with Evaluation Standard 6 ("Activities to increase community capacity");

(7) Conduct resource development activities to obtain funding from sources other than Chapter 1 of Title VII of the Act in accordance with Evaluation Standard 7 (Resource development activities); and

(8) Conduct activities necessary to comply with the assurances in section 725(c) of the Act, including, but not limited to the following:

(i) Aggressive outreach regarding services provided through the center in an effort to reach populations of individuals with significant disabilities that are unserved or underserved by programs under Title VII of the Act, especially minority groups and urban and rural populations.

(ii) Training for center staff on how to serve unserved and underserved populations, including minority groups and urban and rural populations.

(9) Cross-reference: See § 366.71 in Subpart G.

(Authority: 29 U.S.C. 796f through 796f–4)

§ 366.4 What regulations apply?

The following regulations apply to the CIL program:

(a) The regulations in 34 CFR Part 364.

(b) The regulations in this Part 366.

(Authority: 29 U.S.C. 711(c) and 796f–796f–5)

§ 366.5 How are program funds allotted?

(a) The Secretary allots Federal funds appropriated for FY 1994 and subsequent fiscal years for the CIL program to each State in accordance with the requirements of section 721 of the Act.

(b)(1) After the Secretary makes the reservation required by section 721(b) of the Act, the Secretary makes an allotment, from the remainder of the amount appropriated for a fiscal year to carry out Part C of Title VII of the Act, to each State whose State plan has been approved under section 706 of the Act and 34 CFR Part 364.

(2) The Secretary makes the allotment under paragraph (b)(1) of this section subject to sections 721(c)(1)(B) and (C), 721(c)(2) and (3), and 721(d) of the Act.

(Authority: 29 U.S.C. 796f)

Subpart B—Training and Technical Assistance

§ 366.10 What agencies are eligible for assistance to provide training and technical assistance?

Entities that have experience in the operation of centers are eligible to apply for grants to provide training and technical assistance under section 721(b) of the Act to eligible agencies, centers, and Statewide Independent Living Councils (SILCs).

(Authority: 29 U.S.C. 796f(b)(1))

§ 366.11 What financial assistance does the Secretary provide for training and technical assistance?

(a) From funds, if any, reserved under section 721(b)(1) of the Act to carry out the purposes of this subpart, the Secretary makes grants to, and enters into contracts, cooperative agreements, and other arrangements with, entities that have experience in the operation of centers.

(b) An entity receiving assistance in accordance with paragraph (a) of this section shall provide training and technical assistance to eligible agencies, centers, and SILCs to plan, develop, conduct, administer, and evaluate centers.

(Authority: 29 U.S.C. 796f(b)(1)–(3))

§ 366.12 How does the Secretary make an award?

(a) To be eligible to receive a grant or enter into a contract or other arrangement under section 721(b) of the Act and this subpart, an applicant shall submit an application to the Secretary containing a proposal to provide training and technical assistance to eligible agencies, centers, and SILCs and any additional information at the time and in the manner that the Secretary may require.

(b) The Secretary provides for peer review of grant applications by panels that include persons who are not Federal government employees and who have experience in the operation of centers.

(Approved by the Office of Management and Budget under control number 1820–0018.)

(Authority: 29 U.S.C. 711(c) and 796f(b))

§ 366.13 How does the Secretary determine funding priorities?

In making awards under this section, the Secretary determines funding priorities in accordance with the training and technical assistance needs identified by the survey of SILCs and centers required by section 721(b)(3) of the Act.

(Authority: 29 U.S.C. 796f(b)(3))

§ 366.14 How does the Secretary evaluate an application?

(a) The Secretary evaluates each application for a grant under this subpart on the basis of the criteria in § 366.15.

(b) The Secretary awards up to 100 points for these criteria.

(c) The maximum possible score for each criterion is indicated in parentheses.

(Authority: 29 U.S.C. 796f(b)(3))

§ 366.15 What selection criteria does the Secretary use?

The Secretary uses the following criteria to evaluate applications for new awards for training and technical assistance:

(a) *Meeting the purposes of the program* (30 points). The Secretary reviews each application to determine how well the project will be able to meet the purpose of the program of providing training and technical assistance to eligible agencies, centers, and SILCs with respect to planning, developing, conducting, administering, and evaluating centers, including consideration of—

(1) The objectives of the project; and

(2) How the objectives further training and technical assistance with respect to planning, developing, conducting, administering, and evaluating centers.

(b) *Extent of need for the project* (20 points). The Secretary reviews each application to determine the extent to which the project meets specific needs recognized in Title VII of the Act, including consideration of—

(1) The needs addressed by the project;

(2) How the applicant identified those needs;

(3) How those needs will be met by the project; and

(4) The benefits to be gained by meeting those needs.

(c) *Plan of operation* (15 points). The Secretary reviews each application for information that shows the quality of the plan of operation for the project, including—

(1) The quality of the design of the project;

(2) The extent to which the plan of management ensures proper and efficient administration of the project;

(3) How well the objectives of the project relate to the purpose of the program;

(4) The quality of the applicant's plan to use its resources and personnel to achieve each objective; and

(5) How the applicant will ensure that project participants who are otherwise eligible to participate are selected without regard to race, color, national origin, gender, age, or disability.

(d) *Quality of key personnel* (7 points).

(1) The Secretary reviews each application for information that shows the qualifications of the key personnel the applicant plans to use on the project, including—

(i) The qualifications of the project director, if one is to be used;

(ii) The qualifications of each of the other management and decision-making personnel to be used in the project;

(iii) The time that each person referred to in paragraphs (d)(1)(i) and (ii) of this section will commit to the project;

(iv) How the applicant, as part of its nondiscriminatory employment practices, will ensure that its personnel are selected for employment without regard to race, color, national origin, gender, age, or disability; and

(v) The extent to which the applicant, as part of its nondiscriminatory employment practices, encourages applications for employment from persons who are members of groups that have been traditionally under-represented, including members of racial or ethnic minority groups, women, persons with disabilities, and elderly individuals.

(2) To determine personnel qualifications under paragraphs (d)(1)(i) and (ii) of this section, the Secretary considers—

(i) Experience and training in fields related to the objectives of the project; and

(ii) Any other qualifications that pertain to the objectives of the project.

(e) *Budget and cost effectiveness* (5 points). The Secretary reviews each application for information that shows the extent to which—

(1) The budget is adequate to support the project; and

(2) Costs are reasonable in relation to the objectives of the project.

(f) *Evaluation plan* (5 points). The Secretary reviews each application to determine the quality of the evaluation plan for the project, including the extent to which the applicant's methods of evaluation—

(1) Are appropriate to the project;

(2) Will determine how successful the project is in meeting its goals and objectives; and

(3) Are objective and produce data that are quantifiable.

(4) Cross-reference: See 34 CFR 75.590.

(g) *Adequacy of resources* (3 points). The Secretary reviews each application to determine the adequacy of the resources that the applicant plans to devote to the project, including facilities, equipment, and supplies.

(h) *Extent of prior experience* (15 points). The Secretary reviews each application to determine the extent of experience the applicant has in the operation of centers and with providing training and technical assistance to centers, including—

(1) Training and technical assistance with planning, developing, and administering centers;

(2) The scope of training and technical assistance provided, including methods used to conduct training and technical assistance for centers;

(3) Knowledge of techniques and approaches for evaluating centers; and

(4) The capacity for providing training and technical assistance as demonstrated by previous experience in these areas.

(Approved by the Office of Management and Budget under control number 1820–0018.)

(Authority: 29 U.S.C. 711(c) and 796f(b))

Subpart C—Grants to Centers for Independent Living (Centers) in States in Which Federal Funding Exceeds State Funding

§ 366.20 When does the Secretary award grants to centers?

The Secretary awards grants to centers in a State in a fiscal year if—

(a) The amount of Federal funds allotted to the State under section 721(c) and (d) of the Act to support the general operation of centers is greater than the amount of State funds earmarked for the same purpose, as determined pursuant to §§ 366.29 and 366.31; or

(b) The Director of a designated State unit (DSU) does not submit to the Secretary and obtain approval of an application to award grants under section 723 of the Act and § 366.32(a) and (b).

(Authority: 29 U.S.C. 796f–1 and 796f–2(a)(2))

§ 366.21 What are the application requirements for existing eligible agencies?

To be eligible for assistance, an eligible agency shall submit—

(a) An application at the time, in the manner, and containing the information that is required;

(b) An assurance that the eligible agency meets the requirements of § 366.2; and

(c) The assurances required by section 725(c) of the Act and Subpart F of this part.

(Approved by the Office of Management and Budget under control number 1820–0018.)

(Authority: 29 U.S.C. 796f–1(b))

§ 366.22 What is the order of priorities?

(a) In accordance with a State's allotment and to the extent funds are available, the order of priorities for allocating funds among centers within a State is as follows:

(1) Existing centers, as described in § 366.23, that comply with the standards and assurances in section 725(b) and (c) of the Act and Subparts F and G of this part first receive the level of funding each center received in the previous year. However, any funds received by an existing center to establish a new center at a different geographical location pursuant to proposed § 366.2(b)(2) are not included in determining the level of funding to the existing center in any fiscal year that the new center applies for and receives funds as a separate center.

(2) Existing centers that meet the requirements of paragraph (a)(1) of this section then receive a cost-of-living increase in accordance with procedures consistent with section 721(c)(3) of the Act.

(3) New centers, as described in § 366.2(b), that comply with the standards and assurances in section 725(b) and (c) of the Act and Subparts F and G of this part.

(b) If, after meeting the priorities in paragraphs (a)(1) and (2) of this section, there are insufficient funds under the State's allotment under section 721(c) and (d) of the Act to fund a new center under paragraph (a)(3) of this section, the Secretary may—

(1) Use the excess funds in the State to assist existing centers consistent with the State plan; or

(2) Reallot these funds in accordance with section 721(d) of the Act.

(Approved by the Office of Management and Budget under control number 1820–0018.)

(Authority: 29 U.S.C. 711(c) and 796f–1(e))

§ 366.23 What grants must be made to existing eligible agencies?

(a) In accordance with the order of priorities established in § 366.22, an eligible agency may receive a grant if the eligible agency demonstrates in its application that it—

(1) Meets the requirements in § 366.21 or § 366.24;

(2) Is receiving funds under Part C of Title VII of the Act on September 30, 1993; and

(3) Is in compliance with the program and fiscal standards and assurances in section 725(b) and (c) of the Act and Subparts F and G of this part. (The indicators of minimum compliance in Subpart G of this part are used to determine compliance with the evaluation standards in section 725(b) of the Act.)

(b) For purposes of this section, an eligible agency is receiving funds under Part C of Title VII of the Act on September 30, 1993, if it was awarded a grant on or before that date, i.e., during FY 1993.

(Approved by the Office of Management and Budget under control number 1820–0018.)

(Authority: 29 U.S.C. 796f–1(c))

§ 366.24 How is an award made to a new center?

(a) To apply for a grant as a new center, an eligible agency shall—

(1) Meet the requirements of § 366.2(b);

(2) Submit an application that meets the requirements of § 366.21; and

(3) Meet the requirements of this section.

(b) Subject to the order of priorities established in § 366.22, a grant for a new center may be awarded to the most qualified eligible agency that applies for funds under this section, if—

(1)(i) No center serves a geographic area of a State; or

(ii) A geographic area of a State is underserved by centers serving other areas of the State;

(2) The eligible agency proposes to serve the geographic area that is unserved or underserved in the State; and

(3) The increase in the allotment of the State under section 721 of the Act for a fiscal year, as compared with the immediately preceding fiscal year, is sufficient to support an additional center in the State.

(c) The establishment of a new center under this subpart must be consistent with the design included in the State plan pursuant to 34 CFR 364.25 for establishing a statewide network of centers.

(d) An applicant may satisfy the requirements of paragraph (c) of this section by submitting appropriate documentation demonstrating that the establishment of a new center is consistent with the design in the State plan required by 34 CFR 364.25.

(Approved by the Office of Management and Budget under control number 1820–0018.)

(Authority: 29 U.S.C. 796f–1(d))

§ 366.25 What additional factor does the Secretary use in making a grant for a new center under § 366.24?

In selecting from among applicants for a grant under § 366.24 for a new center, the Secretary considers comments regarding the application, if any, by the SILC in the State in which the applicant is located.

(Approved by the Office of Management and Budget under control number 1820–0018.)

(Authority: 29 U.S.C. 796f–1(d)(1))

§ 366.26 How does the Secretary evaluate an application?

(a) The Secretary evaluates each application for a grant under this subpart on the basis of the criteria in § 366.27.

(b) The Secretary awards up to 100 points for these criteria.

(c) The maximum possible score for each criterion is indicated in parentheses.

(Authority: 29 U.S.C. 796f(b)(3))

§ 366.27 What selection criteria does the Secretary use?

In evaluating each application for a new center under this part, the Secretary uses the following selection criteria:

(a) *Extent of the need for the project* (20 points).

(1) The Secretary reviews each application for persuasive evidence that shows the extent to which the project meets the specific needs for the program, including considerations of—

(i) The needs addressed by the project;

(ii) How the applicant identified those needs (e.g., whether from the 1990 census data or other current sources);

(iii) How those needs will be met by the project; and

(iv) The benefits to be gained by meeting those needs.

(2) The Secretary looks for information that shows that the need for the center has been established based on an assessment of the ability of existing programs and facilities to meet the need for IL services of individuals with significant disabilities in the geographic area to be served.

(3) The Secretary looks for information that shows—

(i) That the applicant proposes to establish a new center to serve a priority service area that is identified in the current State plan; and

(ii) The priority that the State has placed on establishing a new center in this proposed service area.

(b) *Past performance* (5 points). The Secretary reviews each application for information that shows the past performance of the applicant in successfully providing services comparable to the IL core services and other IL services listed in section 7 (29) and (30) of the Act and 34 CFR 365.21 and 365.22 and other services that empower individuals with significant disabilities.

(c) *Meeting the standards and the assurances* (25 points). The Secretary reviews each application for information that shows—

(1) Evidence of demonstrated success in satisfying, or a clearly defined plan to satisfy, the standards in section 725(b) of the Act and Subpart G of this part; and

(2) Convincing evidence of demonstrated success in satisfying, or a clearly defined plan to satisfy, the assurances in section 725(c) of the Act and Subpart F of this part.

(d) *Quality of key personnel* (10 points).

(1) The Secretary reviews each application for information that shows the qualifications of the key personnel the applicant plans to use on the project, including—

(i) The qualifications of the project director, if one is to be used;

(ii) The qualifications of each of the other management and decision-making personnel to be used in the project;

(iii) The time that each person referred to in paragraphs (d)(1) (i) and (ii) of this section will commit to the project;

(iv) How the applicant, as part of its nondiscriminatory employment practices, will ensure that its personnel are selected for employment without regard to race, color, national origin, gender, age, or disability; and

(v) The extent to which the applicant, as part of its nondiscriminatory employment practices, encourages applications for employment from persons who are members of groups that have been traditionally under-represented, including—

(A) Members of racial or ethnic minority groups;

(B) Women;

(C) Persons with disabilities; and

(D) Elderly individuals.

(2) To determine personnel qualifications under paragraphs (d)(1) (i) and (ii) of this section, the Secretary considers—

(i) Experience and training in fields related to the objectives of the project; and

(ii) Any other qualifications that pertain to the objectives of the project.

(e) *Budget and cost effectiveness* (10 points). The Secretary reviews each application for information that shows the extent to which—

(1) The budget is adequate to support the project; and

(2) Costs are reasonable in relation to the objectives of the project.

(f) *Evaluation plan* (5 points). The Secretary reviews each application for information that shows the quality of the evaluation plan for the project, including the extent to which the applicant's methods of evaluation—

(1) Are appropriate for the project;

(2) Will determine how successful the project is in meeting its goals and objectives; and

(3) Are objective and produce data that are quantifiable.

(4) (Cross-reference: See 34 CFR 75.590.)

(g) *Plan of operation* (20 points). The Secretary reviews each application for information that shows the quality of the plan of operation for the project, including—

(1) The quality of the design of the project;

(2) The extent to which the plan of management ensures proper and efficient administration of the project;

(3) How well the objectives of the project relate to the purpose of the program;

(4) The quality and adequacy of the applicant's plan to use its resources (including funding, facilities, equipment, and supplies) and personnel to achieve each objective;

(5) How the applicant will ensure that project participants who are otherwise eligible to participate are selected without regard to race, color, national origin, gender, age, or disability; and

(6) A clear description of how the applicant will provide equal access to services for eligible project participants who are members of groups that have been traditionally under-represented, including—

(i) Members of racial or ethnic minority groups;

(ii) Women;

(iii) Elderly individuals; and

(iv) Children and youth.

(h) *Involvement of individuals with significant disabilities* (5 points).

(1) The Secretary reviews each application for information that shows that individuals with significant disabilities are appropriately involved in the development of the application.

(2) The Secretary looks for information that shows that individuals with significant disabilities or their parents, guardians, or other legally authorized advocates or representatives, as appropriate, will be substantially involved in planning, policy direction, and management of the center, and, to the greatest extent possible, that individuals with significant disabilities will be employed by the center.

(Approved by the Office of Management and Budget under control number 1820–0018.)

(Authority: 29 U.S.C. 796f–1(d)(2)(B))

§ 366.28 Under what circumstances may the Secretary award a grant to a center in one State to serve individuals in another State?

(a) The Secretary may use funds from the allotment of one State to award a grant to a center located in a bordering State if the Secretary determines that the proposal of the out-of-State center to serve individuals with significant disabilities who reside in the bordering State is consistent with the State plan of the State in which these individuals reside.

(b) An applicant shall submit documentation demonstrating that the arrangements described in paragraph (a) of this section are consistent with the State plan of the State in which the individuals reside.

(Approved by the Office of Management and Budget under control number 1820–0018.)

(Authority: 29 U.S.C. 711(c) and 796f (c) and (d))

Subpart D—Grants to Centers in States in Which State Funding Equals or Exceeds Federal Funding

Determining Whether State Funding Equals or Exceeds Federal Funding

§ 366.29 When may the Director of the designated State unit (DSU) award grants to centers?

(a) The Director of the DSU (Director) may award grants under section 723 of the Act and this subpart to centers located within the State or in a bordering State in a fiscal year if—

(1) The Director submits to the Secretary and obtains approval of an application to award grants for that fiscal year under section 723 of the Act and § 366.32 (a) and (b); and

(2) The Secretary determines that the amount of State funds that were earmarked by the State to support the general operation of centers meeting the requirements of Part C of Chapter 1 of Title VII of the Act in the second fiscal year preceding the fiscal year for which the application is submitted equaled or exceeded the amount of funds allotted to the State under section 721 (c) and (d) of the Act (or Part B of Title VII of the Act as in effect on October 28, 1992) for that preceding fiscal year.

(b) For purposes of section 723(a)(1)(A)(iii) of the Act and this subpart, the second fiscal year preceding the fiscal year for which the State submits an application to administer the CIL program is considered the "preceding fiscal year." *Example:* If FY 1995 is the fiscal year for which the State submits an application to administer the CIL program under this subpart, FY 1993 is the "preceding fiscal year." In determining the "preceding fiscal year" under this subpart, the Secretary makes any adjustments necessary to accommodate a State's multi-year funding cycle or fiscal year that does not coincide with the Federal fiscal year.

(Approved by the Office of Management and Budget under control number 1820–0018.)

(Authority: 29 U.S.C. 796f–2(a)(3))

§ 366.30 What are earmarked funds?

(a) For purposes of this subpart, the amount of State funds that were earmarked by a State to support the general operation of centers does not include—

(1) Federal funds used for the general operation of centers;

(2) State funds used to purchase specific services from a center, including State funds used for grants or contracts to procure or purchase personal assistance services or particular types of skills training;

(3) State attendant care funds; or

(4) Social Security Administration reimbursement funds.

(b) For purposes of this subpart, "earmarked funds" means funds appropriated by the State and expressly or clearly identified as State expenditures in the relevant fiscal year for the sole purpose of funding the general operation of centers.

(Authority: 29 U.S.C. 711(c) and 796f–2(a)(1)(A))

§ 366.31 What happens if the amount of earmarked funds does not equal or exceed the amount of Federal funds for a preceding fiscal year?

If the State submits an application to administer the CIL program under section 723 of the Act and this subpart for a fiscal year, but did not earmark the amount of State funds required by § 366.29(a)(2) in the preceding fiscal year, the State shall be ineligible to make grants under section 723 of the Act and this subpart after the end of the fiscal year succeeding the preceding fiscal year and for each succeeding fiscal year.

Example: A State meets the earmarking requirement in FY 1994. It also meets this requirement in FY 1995. However, in reviewing the State's application to administer the CIL program in FY 1998, the Secretary determines that the State failed to meet the earmarking requirement in FY 1996. The State may continue to award grants in FY 1997 but may not do so in FY 1998 and succeeding fiscal years.

(Authority: 29 U.S.C. 796f–2(a)(1)(B))

Awarding Grants

§ 366.32 Under what circumstances may the DSU make grants?

(a) To be eligible to award grants under this subpart and to carry out section 723 of the Act for a fiscal year, the Director must submit to the Secretary for approval an application at the time and in the manner that the Secretary may require and that includes, at a minimum—

(1) Information demonstrating that the amount of funds earmarked by the State for the general operation of centers meets the requirements in § 366.29(a)(1); and

(2) A summary of the annual performance reports submitted to the Director from centers in accordance with § 366.50(n).

(b) If the amount of funds earmarked by the State for the general operation of centers meets the requirements in § 366.29(a)(1), the Secretary approves the application and designates the Director to award the grants and carry out section 723 of the Act.

(c) If the Secretary designates the Director to award grants and carry out section 723 of the Act under paragraph (b) of this section, the Director makes grants to eligible agencies in a State, as described in § 366.2, for a fiscal year from the amount of funds allotted to the State under section 721(c) and (d) of the Act.

(d) (1) In the case of a State in which there is both a DSU responsible for providing IL services to the general population and a DSU responsible for providing IL services for individuals who are blind, for purposes of Subparts D and E of this part, the "Director" shall be the Director of the general DSU.

(2) The State units described in paragraph (d)(1) of this section shall periodically consult with each other with respect to the provision of services for individuals who are blind.

(e) The Director may enter into assistance contracts with centers to carry out section 723 of the Act. For purposes of this paragraph, an assistance contract is an instrument whose principal purpose is to transfer funds allotted to the State under section 721 (c) and (d) of the Act and this part to an eligible agency to carry out section 723 of the Act. Under an assistance contract, the DSU shall assume a role consistent with that of the Secretary under section 722 of the Act. If the DSU uses an assistance contract to award funds under section 723 of the Act, the DSU may not add any requirements, terms, or conditions to the assistance contract other than those that would be permitted if the assistance contract were a grant rather than an assistance contract. Under an assistance contract, as defined in this paragraph, the role of the DSU is to ensure that the terms of the assistance contract, which are established by Chapter 1 of Title VII of the Act and the implementing regulations in this part and 34 CFR Part 364, are satisfied.

(f) The Director may not enter into procurement contracts with centers to carry out section 723 of the Act. For purposes of this paragraph, a procurement contract is an instrument whose principal purpose is to acquire (by purchase, lease, or barter) property or services for the direct benefit or use of the DSU. Under a procurement contract, the DSU prescribes the specific services it intends to procure and the terms and conditions of the procurement.

(g) In the enforcement of any breach of the terms and conditions of an assistance contract, the DSU shall follow the procedures established in §§ 366.40 through 366.45.

(Approved by the Office of Management and Budget under control number 1820–0018.)
(Authority: 29 U.S.C. 711(c) and 796f–2(a)(2))

§ 366.33 What are the application requirements for existing eligible agencies?

To be eligible for assistance under this subpart, an eligible agency shall comply with the requirements in § 366.21.

(Approved by the Office of Management and Budget under control number 1820–0018.)
(Authority: 29 U.S.C. 796f–2(b))

§ 366.34 What is the order of priorities?

(a) Unless the Director and the chairperson of the SILC, or other individual designated by the SILC to act on behalf of and at the direction of the SILC, jointly agree on another order of priorities, the Director shall follow the order of priorities in § 366.22 for allocating funds among centers within a State, to the extent funds are available.

(b) If the order of priorities in § 366.22 is followed and, after meeting the priorities in § 366.22(a) (1) and (2), there are insufficient funds under the State's allotment under section 721(c) and (d) of the Act to fund a new center under § 366.22(a)(3), the Director may—

(1) Use the excess funds in the State to assist existing centers consistent with the State plan; or

(2) Return these funds to the Secretary for reallotment in accordance with section 721(d) of the Act.

(Authority: 29 U.S.C. 711(c) and 796f–2(e))

§ 366.35 What grants must be made to existing eligible agencies?

In accordance with the order of priorities established in § 366.34(a), an eligible agency may receive a grant under this subpart if the eligible agency meets the applicable requirements in §§ 366.2, 366.21, and 366.23.

(Authority: 29 U.S.C. 796f–2(c))

§ 366.36 How is an award made to a new center?

To be eligible for a grant as a new center under this subpart, an eligible agency shall meet the requirements for a new center in §§ 366.2(b) and 366.24, except that the award of a grant to a new center under this section is subject to the order of priorities in § 366.34(a).

(Authority: 29 U.S.C. 796f–2(d))

§ 366.37 What procedures does the Director of the DSU (Director) use in making a grant for a new center?

(a) In selecting from among applicants for a grant for a new center under § 366.24 of this subpart—

(1) The Director and the chairperson of the SILC, or other individual designated by the SILC to act on behalf of and at the direction of the SILC, shall jointly appoint a peer review committee that shall rank applications in accordance with the standards and assurances in section 725 (b) and (c) of the Act and Subparts F and G of this part and any criteria jointly established by the Director and the chairperson or other designated individual;

(2) The peer review committee shall consider the ability of each applicant to operate a center and shall recommend an applicant to receive a grant under this subpart, based on either the

selection criteria in § 366.27 or the following:

(i) Evidence of the need for a center, consistent with the State plan.

(ii) Any past performance of the applicant in providing services comparable to IL services.

(iii) The plan for complying with, or demonstrated success in complying with, the standards and the assurances in section 725 (b) and (c) of the Act and Subparts F and G of this part.

(iv) The quality of key personnel of the applicant and the involvement of individuals with significant disabilities by the applicant.

(v) The budget and cost-effectiveness of the applicant.

(vi) The evaluation plan of the applicant.

(vii) The ability of the applicant to carry out the plans identified in paragraphs (a)(2) (iii) and (vi) of this section.

(b) The Director shall award the grant on the basis of the recommendations of the peer review committee if the actions of the committee are consistent with Federal and State law.

(Approved by the Office of Management and Budget under control number 1820–0018.)

(Authority: 29 U.S.C. 796f–2(d)(2))

§ 366.38 What are the procedures for review of centers?

(a) The Director shall, in accordance with section 723(g)(1) and (h) of the Act, periodically review each center receiving funds under section 723 of the Act to determine whether the center is in compliance with the standards and assurances in section 725 (b) and (c) of the Act and Subparts F and G of this part.

(b) The periodic reviews of centers required by paragraph (a) of this section must include annual on-site compliance reviews of at least 15 percent of the centers assisted under section 723 of the Act in that State in each year.

(c) Each team that conducts an on-site compliance review of a center shall include at least one person who is not an employee of the designated State agency, who has experience in the operation of centers, and who is jointly selected by the Director and the chairperson of the SILC, or other individual designated by the SILC to act on behalf of and at the direction of the SILC.

(d) A copy of each review under this section shall be provided to the Secretary and the SILC.

(Approved by the Office of Management and Budget under control number 1820–0018.)

(Authority: 29 U.S.C. 711(c) and 796f–2(g)(1) and (h))

Subpart E—Enforcement and Appeals Procedures

§ 366.39 What procedures does the Secretary use for enforcement?

(a) If the Secretary determines that any center receiving funds under this part is not in compliance with the standards and assurances in section 725 (b) and (c) of the Act and Subparts F and G of this part, the Secretary immediately notifies the center, by certified mail, return receipt requested, or other means that provide proof of receipt, that the center is out of compliance. The Secretary also offers technical assistance to the center to develop a corrective action plan to comply with the standards and assurances.

(b) The Secretary terminates all funds under section 721 of the Act to that center 90 days after the date of the notification required by paragraph (a) of this section unless—

(1) The center submits, within 90 days after receiving the notification required by paragraph (a) of this section, a corrective action plan to achieve compliance that is approved by the Secretary; or

(2) The center requests a hearing pursuant to paragraph (c) or (d) of this section.

(c) If the Secretary does not approve a center's corrective action plan submitted pursuant to paragraph (b)(1) of this section, the center has 30 days from receipt of the Secretary's written notice of disapproval of the center's corrective action plan to request a hearing by submitting a formal written request that gives the reasons why the center believes that the Secretary should have approved the center's corrective action plan.

(d) If the center does not submit a corrective action plan to the Secretary, the center has 90 days after receiving the notification required by paragraph (a) of this section to request a hearing by submitting a formal written request that gives the reasons why the center believes that the Secretary should have found the center in compliance with the standards and assurances in section 725 (b) and (c) of the Act and Subparts F and G of this part.

(e) The date of filing a formal written request for a hearing to the Secretary under paragraph (c) or (d) of this section is determined in a manner consistent with the requirements of 34 CFR 81.12.

(f) The Secretary issues a written decision to terminate funds to the center if, after providing reasonable notice and an opportunity for a hearing, the Secretary finds that—

(1) The center receiving funds under this part is not in compliance with the standards and assurances in section 725 (b) and (c) of the Act and Subparts F and G of this part; or

(2) The center's corrective action plan submitted under paragraph (b)(1) of this section cannot be approved.

(g) The Secretary's decision to terminate funds to a center pursuant to paragraph (f) of this section takes effect upon issuance.

(Approved by the Office of Management and Budget under control number 1820–0018.)

(Authority: 29 U.S.C. 711(c) and 796f–1(g))

§ 366.40 How does the Director initiate enforcement procedures?

(a) If the Director determines that any center receiving funds under this part is not in compliance with the standards and assurances in section 725 (b) and (c) of the Act and Subparts F and G of this part, the Director shall immediately provide the center, by certified mail, return receipt requested, or other means that provide proof of receipt, with an initial written notice that the center is out of compliance with the standards and assurances and that the Director will terminate the center's funds or take other proposed significant adverse action against the center 90 days after the center's receipt of this initial written notice. The Director shall provide technical assistance to the center to develop a corrective action plan to comply with the standards and assurances.

(b) Unless the center submits, within 90 days after receiving the notification required by paragraph (a) of this section, a corrective action plan to achieve compliance that is approved by the Director or, if appealed, by the Secretary, the Director shall terminate all funds under section 723 of the Act to a center 90 days after the later of—

(1) The date that the center receives the initial written notice required by paragraph (a) of this section; or

(2) The date that the center receives the Secretary's final decision issued pursuant to § 366.46(c) if—

(i) The center files a formal written appeal of the Director's final written decision pursuant to § 366.44(a); or

(ii) The center files a formal written appeal of the decision described in the Director's initial written notice pursuant to § 366.44(b).

(Approved by the Office of Management and Budget under control number 1820–0018.)

(Authority: 29 U.S.C. 711(c) and 796f–2(g) and (i))

§ 366.41 What must be included in an initial written notice from the Director?

The initial written notice required by § 366.40(a) must—

(a) Include, at a minimum, the following:

(1) The name of the center.

(2) The reason or reasons for proposing the termination of funds or other significant adverse action against the center, including any evidence that the center has failed to comply with any of the evaluation standards or assurances in section 725(b) and (c) of the Act and Subparts F and G of this part.

(3) The effective date of the proposed termination of funds or other significant adverse action against the center;

(b) Be given 90 days in advance of the date the Director intends to terminate a center's funds or take any other significant adverse action against the center;

(c) Inform the center that it has 90 days from the date the center receives the notice to submit a corrective action plan;

(d) Inform the center that it may seek mediation and conciliation in accordance with § 366.40(a) to resolve any dispute with the Director within the 90 days before the proposed termination of funds or other significant adverse action against the center; and

(e) Inform the center that, if mediation and conciliation are not successful and the Director does not issue a final written decision pursuant to § 366.42, the center may appeal to the Secretary the decision described in the Director's initial written notice on or after the 90th day, but not later than the 120th day, after the center receives the Director's initial decision.

(Approved by the Office of Management and Budget under control number 1820–0018.)

(Authority: 29 U.S.C. 711(c) and 796f–2 (g) and (i))

§ 366.42 When does a Director issue a final written decision?

(a) If the center submits a corrective action plan in accordance with § 366.40(b), the Director shall provide to the center, not later than the 120th day after the center receives the Director's initial written notice, a final written decision approving or disapproving the center's corrective action plan and informing the center, if appropriate, of the termination of the center's funds or any other proposed significant adverse action against the center.

(b) The Director shall send the final written decision to the center by registered or certified mail, return receipt requested, or other means that provide a record that the center received the Director's final written decision.

(c) A Director's final written decision to terminate funds or take any other adverse action against a center may not take effect until 30 days after the date that the center receives it.

(d) If a center appeals pursuant to § 366.44(a), the Director's final written decision to terminate funds or take any other adverse action against a center does not take effect until the Secretary issues a final decision.

(Approved by the Office of Management and Budget under control number 1820–0018.)

(Authority: 29 U.S.C. 711(c) and 796f–2 (g) and (i))

§ 366.43 What must be included in the Director's final written decision?

The Director's final written decision to disapprove a center's corrective action plan required by § 366.42 must—

(a) Address any response from the center to the Director's initial written notice to terminate funds or take other significant adverse action against the center;

(b) Include a statement of the reasons why the Director could not approve the corrective action plan; and

(c) Inform the center of its right to appeal to the Secretary the Director's final written decision to terminate funds or take any other significant adverse action against the center.

(Approved by the Office of Management and Budget under control number 1820–0018.)

(Authority: 29 U.S.C. 711(c) and 796f–2 (g) and (i))

§ 366.44 How does a center appeal a decision included in a Director's initial written notice or a Director's final written decision?

(a) To obtain the Secretary's review of a Director's final written decision to disapprove a center's corrective action plan submitted pursuant to § 366.40(b), the center shall file, within 30 days from receipt of the Director's final written decision, a formal written appeal with the Secretary giving the reasons why the center believes that the Director should have approved the center's corrective action plan. (Cross-reference: See § 366.42.)

(b) To obtain the Secretary's review of a decision described in a Director's initial written notice, a center that does not submit a corrective action plan to a Director shall file, in accordance with paragraph (c)(1)(i) of this section, a formal written appeal with the Secretary giving the reasons why the center believes that the Director should have found the center in compliance with the standards and assurances in section 725 (b) and (c) of the Act and Subparts F and G of this part.

(c) To appeal to the Secretary a decision described in a Director's initial written notice or a Director's final written decision to disapprove a center's corrective action plan and to terminate or take other significant adverse action, a center shall file with the Secretary—

(1) A formal written appeal—

(i) On or after the 90th day but not later than the 120th day following a center's receipt of a Director's initial written notice; or

(ii) On or before the 30th day after a center's receipt of the Director's final written decision to disapprove a center's corrective action plan and to terminate or take other significant adverse action;

(2) A copy of the corrective action plan, if any, submitted to the Director; and

(3) One copy each of any other written submissions sent to the Director in response to the Director's initial written notice to terminate funds or take other significant adverse action against the center.

(d) The date of filing a formal written appeal to the Secretary under paragraph (c) of this section is determined in a manner consistent with the requirements of 34 CFR 81.12.

(e) If the center files a formal written appeal with the Secretary, the center shall send a separate copy of this appeal to the Director by registered or certified mail, return receipt requested, or other means that provide a record that the Director received a separate copy of the center's written appeal.

(f) The center's formal written appeal to the Secretary must state why—

(1) The Director has not met the burden of showing that the center is not in compliance with the standards and assurances in section 725 (b) and (c) of the Act and in Subparts F and G of this part;

(2) The corrective action plan, if any, should have been approved; or

(3) The Director has not met the procedural requirements of §§ 366.40 through 366.45.

(g) As part of its submissions under this section, the center may request an informal meeting with the Secretary at which representatives of both parties will have an opportunity to present their views on the issues raised in the appeal.

(h) A Director's decision to terminate funds that is described in an initial written notice or final written decision is stayed as of the date (determined pursuant to paragraph (d) of this section) that the center files a formal written appeal with the Secretary.

(Approved by the Office of Management and Budget under control number 1820–0018.)

(Authority: 29 U.S.C. 711(c) and 796f–2(g)(2) and (i))

§ 366.45 What must a Director do upon receipt of a copy of a center's formal written appeal to the Secretary?

(a) If the center files a formal written appeal in accordance with § 366.44(c), the Director shall, within 15 days of receipt of the center's appeal, submit to the Secretary one copy each of the following:

(1) The Director's initial written notice to terminate funds or take any other significant adverse action against the center sent to the center.

(2) The Director's final written decision, if any, to disapprove the center's corrective action plan and to terminate the center's funds or take any other significant adverse action against the center.

(3) Any other written documentation or submissions the Director wishes the Secretary to consider.

(4) Any other information requested by the Secretary.

(b) As part of its submissions under this section, the Director may request an informal meeting with the Secretary at which representatives of both parties will have an opportunity to present their views on the issues raised in the appeal.

(Approved by the Office of Management and Budget under control number 1820–0018.)

(Authority: 29 U.S.C. 711(c) and 796f–2(g)(2) and (i))

§ 366.46 How does the Secretary review a center's appeal of a decision included in a Director's initial written notice or a Director's final written decision?

(a) If either party requests a meeting under §§ 366.44(g) or 366.45(b), the meeting is to be held within 30 days of the date of the Secretary's receipt of the submissions from the Director that are required by § 366.45(a). The Secretary promptly notifies the parties of the date and place of the meeting.

(b) Within 30 days of the informal meeting permitted under paragraph (a) of this section or, if neither party has requested an informal meeting, within 60 days of the date of receipt of the submissions required from the Director by § 366.45(a), the Secretary issues to the parties the Secretary's decision.

(c) The Secretary reviews a decision included in a Director's initial written notice or a Director's final written decision to disapprove the center's corrective action plan and to terminate the center's funds or take any other significant adverse action against the center based on the record submitted under §§ 366.44 and 366.45 and may affirm or, if the Secretary finds that the decision included in a Director's initial written notice or a Director's final written decision is not supported by the evidence or is not in accordance with the law, may—

(1) Remand the appeal for further findings; or

(2) Reverse the decision described in the Director's initial written notice or the Director's final written decision to disapprove the center's corrective action plan and to terminate funds or take any other significant adverse action against the center.

(d) The Secretary sends copies of his or her decision to the parties by registered or certified mail, return receipt requested, or other means that provide a record of receipt by both parties.

(e) If the Secretary affirms the decision described in a Director's initial written notice or the Director's final written decision, the Director's decision takes effect on the date of the Secretary's final decision to affirm.

(Authority: 29 U.S.C. 711(c) and 796f–2(g)(2) and (i))

Subpart F—Assurances for Centers

§ 366.50 What assurances shall a center provide and comply with?

To be eligible for assistance under this part, an eligible agency shall provide satisfactory assurances that—

(a) The applicant is an eligible agency;

(b) The center will be designed and operated within local communities by individuals with disabilities, including an assurance that the center will have a board that is the principal governing body of the center and a majority of which must be composed of individuals with significant disabilities;

(c) The applicant will comply with the standards in Subpart G;

(d) The applicant will establish clear priorities through—

(1) Annual and three-year program and financial planning objectives for the center, including overall goals or a mission for the center;

(2) A work plan for achieving the goals or mission, specific objectives, service priorities, and types of services to be provided; and

(3) A description that demonstrates how the proposed activities of the applicant are consistent with the most recent three-year State plan under section 704 of the Act;

(e) The applicant will use sound organizational and personnel assignment practices, including taking affirmative action to employ and advance in employment qualified individuals with significant disabilities on the same terms and conditions required with respect to the employment of individuals with disabilities under section 503 of the Act;

(f) The applicant will ensure that the majority of the staff, and individuals in decision-making positions, of the applicant are individuals with disabilities;

(g) The applicant will practice sound fiscal management, including making arrangements for an annual independent fiscal audit;

(h) The applicant will conduct an annual self-evaluation, prepare an annual performance report, and maintain records adequate to measure performance with respect to the standards in Subpart G;

(i) The annual performance report and the records of the center's performance required by paragraph (h) of this section must each contain information regarding, at a minimum—

(1) The extent to which the center is in compliance with the standards in section 725(b) of the Act and Subpart G of this part (Cross-reference: See §§ 366.70(a)(2) and 366.73);

(2) The number and types of individuals with significant disabilities receiving services through the center;

(3) The types of services provided through the center and the number of individuals with significant disabilities receiving each type of service;

(4) The sources and amounts of funding for the operation of the center;

(5) The number of individuals with significant disabilities who are employed by, and the number who are in management and decision-making positions in, the center;

(6) The number of individuals from minority populations who are employed by, and the number who are in management and decision-making positions in, the center; and

(7) A comparison, if appropriate, of the activities of the center in prior years with the activities of the center in most recent years;

(j) Individuals with significant disabilities who are seeking or receiving services at the center will be notified by the center of the existence of, the availability of, and how to contact the client assistance program;

(k) Aggressive outreach regarding services provided through the center will be conducted in an effort to reach populations of individuals with significant disabilities that are unserved or underserved by programs under Title VII of the Act, especially minority groups and urban and rural populations;

(l) Staff at centers will receive training on how to serve unserved and underserved populations, including minority groups and urban and rural populations;

(m) The center will submit to the SILC a copy of its approved grant application and the annual performance report required under paragraph (h) of this section;

(n) The center will prepare and submit to the DSU, if the center received a grant from the Director, or to the Secretary, if the center received a grant from the Secretary, within 90 days of the end of each fiscal year, the annual performance report that is required to be prepared pursuant to paragraph (h) of this section and that contains the information described in paragraph (i) of this section; and

(o) An IL plan as described in section 704(e) of the Act will be developed for each individual who will receive services under this part unless the individual signs a waiver stating that an IL plan is unnecessary.

(Approved by the Office of Management and Budget under control number 1820–0018.)

(Authority: 29 U.S.C. 796f–4)

PART 367—INDEPENDENT LIVING SERVICES FOR OLDER INDIVIDUALS WHO ARE BLIND

Authority: 29 U.S.C. 796k, unless otherwise noted.

Subpart A—General

§ 367.1 What is the Independent Living Services for Older Individuals Who Are Blind program?

This program supports projects that—

(a) Provide any of the independent living (IL) services to older individuals who are blind that are described in § 367.3(b);

(b) Conduct activities that will improve or expand services for these individuals; and

(c) Conduct activities to help improve public understanding of the problems of these individuals.

(Authority: 29 U.S.C. 796k(a) and (b))

§ 367.2 Who is eligible for an award?

Any designated State agency (DSA) is eligible for an award under this program if the DSA—

(a) Is authorized to provide rehabilitation services to individuals who are blind; and

(b) Submits to and obtains approval from the Secretary of an application that meets the requirements of section 752(i) of the Act and §§ 367.10 and 367.11.

(Authority: 29 U.S.C. 796k(a)(2))

§ 367.3 What activities may the Secretary fund?

(a) The DSA may use funds awarded under this part for the activities described in § 367.1 and paragraph (b) of this section.

(b) For purposes of § 367.1(a), IL services for older individuals who are blind include—

(1) Services to help correct blindness, such as—

(i) Outreach services;

(ii) Visual screening;

(iii) Surgical or therapeutic treatment to prevent, correct, or modify disabling eye conditions; and

(iv) Hospitalization related to these services;

(2) The provision of eyeglasses and other visual aids;

(3) The provision of services and equipment to assist an older individual who is blind to become more mobile and more self-sufficient;

(4) Mobility training, Braille instruction, and other services and equipment to help an older individual who is blind adjust to blindness;

(5) Guide services, reader services, and transportation;

(6) Any other appropriate service designed to assist an older individual who is blind in coping with daily living activities, including supportive services and rehabilitation teaching services;

(7) IL skills training, information and referral services, peer counseling, and individual advocacy training; and

(8) Other IL services, as defined in section 7(30) of the Act and as listed in 34 CFR 365.22.

(Authority: 29 U.S.C. 796k (d) and (e))

§ 367.4 What regulations apply?

The following regulations apply to the Independent Living Services for Older Individuals Who Are Blind program:

(a) The Education Department General Administrative Regulations (EDGAR) as follows:

(1) 34 CFR Part 74 (Administration of Grants to Institutions of Higher Education, Hospitals, and Nonprofit Organizations), with respect to subgrants to an entity that is not a State or local government or Indian tribal organization.

(2) 34 CFR Part 75 (Direct Grant Programs), with respect to grants under Subpart C.

(3) 34 CFR Part 76 (State-Administered Programs), with respect to grants under Subpart D.

(4) 34 CFR Part 77 (Definitions That Apply to Department Regulations).

(5) 34 CFR Part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(6) 34 CFR Part 80 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments).

(7) 34 CFR Part 81 (General Education Provisions Act—Enforcement).

(8) 34 CFR Part 82 (New Restrictions on Lobbying).

(9) 34 CFR Part 85 (Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants)).

(10) 34 CFR Part 86 (Drug-Free Schools and Campuses).

(b) The regulations in this Part 367.

(c) The following provisions in 34 CFR Part 364:

(1) Section 364.4 (What definitions apply?).

(2) Section 364.5 (What is program income and how may it be used?)

(3) Section 364.6 (What requirements apply to the obligation of Federal funds and program income?)

(4) Section 364.30 (What notice must be given about the Client Assistance Program (CAP)?).

(5) Section 364.37 (What access to records must be provided?).

(6) Section 364.56 (What are the special requirements pertaining to the protection, use, and release of personal information?).

(d) The following provisions in 34 CFR Part 365:

(1) Section 365.13 (What requirements apply if the State's non-Federal share is in cash?).

(2) Section 365.14 (What conditions relating to cash or in-kind contributions apply to awards to grantees, subgrantees, or contractors?).

(3) Section 365.15 (What requirements apply if the State's non-Federal share is in kind?).

(4) Section 365.16 (What requirements apply to refunds and rebates?).

(Authority: 29 U.S.C. 711(c) and 796k)

§ 367.5 What definitions apply?

In addition to the definitions in 34 CFR 364.4, the following definitions also apply to this part:

Independent living services for older individuals who are blind means those services listed in § 367.3(b).

Older individual who is blind means an individual age fifty-five or older whose severe visual impairment makes competitive employment extremely difficult to obtain but for whom IL goals are feasible.

(Authority: 29 U.S.C. 711(c) and 796j)

Subpart B—What Are the Application Requirements?

§ 367.10 How does a designated State agency (DSA) apply for an award?

To receive a grant under section 752(i) or a reallotment grant under section 752(j)(4) of the Act, a DSA must submit to and obtain approval from the Secretary of an application for assistance under this program at the time, in the form and manner, and containing the agreements, assurances, and information, that the Secretary determines to be necessary to carry out this program.

(Approved by the Office of Management and Budget under control number 1820–0018.)

(Authority: 29 U.S.C. 796k(c)(2) and (i)(1))

§ 367.11 What assurances must a DSA include in its application?

An application for a grant under section 752(i) or a reallotment grant under section 752(j)(4) of the Act must contain an assurance that—

(a) Grant funds will be expended only for the purposes described in § 367.1;

(b) With respect to the costs of the program to be carried out by the State pursuant to this part, the State will make available, directly or through donations from public or private entities, non-Federal contributions toward these costs in an amount that is not less than $1 for each $9 of Federal funds provided in the grant;

(c) In carrying out § 367.1(a) and (b), and consistent with 34 CFR 364.28, the DSA will seek to incorporate into and describe in the State plan under section 704 of the Act any new methods and approaches relating to IL services for older individuals who are blind that are developed by projects funded under this part and that the DSA determines to be effective;

(d) At the end of each fiscal year, the DSA will prepare and submit to the Secretary a report, with respect to each project or program the DSA operates or administers under this part, whether directly or through a grant or contract, that contains, information that the Secretary determines necessary for the proper and efficient administration of this program, including—

(1) The number and types of older individuals who are blind, including older individuals who are blind from minority backgrounds, and are receiving services;

(2) The types of services provided and the number of older individuals who are blind and are receiving each type of service;

(3) The sources and amounts of funding for the operation of each project or program;

(4) The amounts and percentages of resources committed to each type of service provided;

(5) Data on actions taken to employ, and advance in employment, qualified—

(i) Individuals with significant disabilities;

(ii) Older individuals with significant disabilities who are blind;

(iii) Individuals who are members of racial or ethnic minority groups;

(iv) Women; and

(v) Elderly individuals;

(6) A comparison, if appropriate, of prior year activities with the activities of the most recent year; and

(7) Any new methods and approaches relating to IL services for older individuals who are blind that are developed by projects funded under this part;

(e) The DSA will—

(1) Provide services that contribute to the maintenance of, or the increased independence of, older individuals who are blind; and

(2) Engage in—

(i) Capacity-building activities, including collaboration with other agencies and organizations;

(ii) Activities to promote community awareness, involvement, and assistance; and

(iii) Outreach efforts;

(f) The application is consistent with the State plan for providing IL services required by section 704 of the Act and Subpart C of 34 CFR Part 364; and

(g) The applicant has been designated by the State as the sole State agency authorized to provide rehabilitation services to individuals who are blind.

(Approved by the Office of Management and Budget under control number 1820–0018.)

(Authority: 29 U.S.C. 711(c) and 796k(d), (f), (h), and (i))

Subpart C—How Does the Secretary Award Discretionary Grants on a Competitive Basis?

§ 367.20 Under what circumstances does the Secretary award discretionary grants on a competitive basis to States?

(a) In the case of a fiscal year for which the amount appropriated under section 753 of the Act is less than $13,000,000, the Secretary awards discretionary grants under this part on a competitive basis to States.

(b) Subparts A, B, C, and E of this part govern the award of competitive grants under this part.

(Authority: 29 U.S.C. 796k(b)(1))

§ 367.21 How does the Secretary evaluate an application for a discretionary grant?

(a) The Secretary evaluates an application for a discretionary grant on the basis of the criteria in § 367.22.

(b) The Secretary awards up to 100 points for these criteria.

(c) The maximum possible score for each criterion is indicated in parentheses.

(Authority: 29 U.S.C. 711(c) and 796k(b)(1) and (i)(1))

§ 367.22 What selection criteria does the Secretary use?

The Secretary uses the following criteria to evaluate an application for a discretionary grant:

(a) *Extent of need for the project* (20 points).

(1) The Secretary reviews each application to determine the extent to which the project meets the specific needs of the program, including consideration of—

(i) The needs addressed by the project;

(ii) How the applicant identified those needs;

(iii) How those needs will be met by the project; and

(iv) The benefits to be gained by meeting those needs.

(2) The Secretary reviews each application to determine-(i) The extent that the need for IL services for older individuals who are blind is justified, in terms of complementing or expanding existing IL and aging programs and facilities; and

(ii) The potential of the project to support the overall mission of the IL program, as stated in section 701 of the Act.

(b) *Plan of operation* (25 points). The Secretary reviews each application to determine the quality of the plan of operation for the project, including—

(1) The quality of the design of the project;

(2) The extent to which the plan of management ensures proper and efficient administration of the project;

(3) How well the objectives of the project relate to the purpose of the program;

(4) The quality and adequacy of the applicant's plan to use its resources (including funding, facilities, equipment, and supplies) and personnel to achieve each objective;

(5) How the applicant will ensure that project participants who are otherwise eligible to participate are selected without regard to race, color, national origin, gender, age, or disability;

(6) A clear description of how the applicant will provide equal access to services for eligible project participants who are members of groups that have been traditionally under-represented, including members of racial or ethnic minority groups; and

(7) The extent to which the plan of operation and management includes involvement by older individuals who are blind in planning and conducting program activities.

(c) *Quality of key personnel* (10 points).

(1) The Secretary reviews each application to determine the qualifications of the key personnel the applicant plans to use on the project, including—

(i) The qualifications of the project director;

(ii) The qualifications of each of the other management and decision-making personnel to be used in the project;

(iii) The time that each person referred to in paragraphs (c)(1)(i) and (ii) of this section will commit to the project;

(iv) How the applicant, as part of its nondiscriminatory employment practices, will ensure that its personnel are selected for employment without regard to race, color, national origin, gender, age, or disability; and

(v) The extent to which the applicant, as part of its nondiscriminatory employment practices, encourages applications for employment from persons who are members of groups that have been traditionally under-represented, including—

(A) Members of racial or ethnic minority groups;

(B) Women;

(C) Persons with disabilities; and

(D) Elderly individuals.

(2) To determine personnel qualifications under paragraphs (c)(1)(i) and (ii) of this section, the Secretary considers—

(i) Experience and training in fields related to the scope of the project; and

(ii) Any other qualifications that pertain to the objectives of the project.

(d) *Budget and cost effectiveness* (5 points). The Secretary reviews each application to determine the extent to which—

(1) The budget is adequate to support the project;

(2) Costs are reasonable in relation to the objectives of the project; and

(3) The applicant demonstrates the cost-effectiveness of project services in comparison with alternative services and programs available to older individuals who are blind.

(e) *Evaluation plan* (5 points). The Secretary reviews each application to determine the quality of the evaluation plan for the project, including the extent to which the applicant's methods of evaluation—

(1) Accurately evaluate the success and cost-effectiveness of the project;

(2) Are objective and produce data that are quantifiable; and

(3) Will determine how successful the project is in meeting its goals and objectives.

(4) (Cross-reference: See 34 CFR 75.590.)

(f) *Adequacy of resources* (5 points). The Secretary reviews each application to determine the adequacy of the resources that the applicant plans to devote to the project, including accessibility of facilities, equipment, and supplies.

(g) *Service comprehensiveness* (20 points).

(1) The Secretary reviews each application to determine the extent to which the proposed outreach activities promote maximum participation of the target population within the geographic area served by the project.

(2) The Secretary reviews each application to determine the extent to which the DSA addresses the unmet IL needs in the State of older individuals with varying degrees of significant visual impairment. In making this determination, the Secretary reviews the extent to which the DSA makes available appropriate services listed in § 367.3(b), which may include any or all of the following services:

(i) Orientation and mobility skills training that will enable older individuals who are blind to travel independently, safely, and confidently in familiar and unfamiliar environments.

(ii) Skills training in Braille, handwriting, typewriting, or other means of communication.

(iii) Communication aids, such as large print, cassette tape recorders, and readers.

(iv) Training to perform daily living activities, such as meal preparation, identifying coins and currency, selection of clothing, telling time, and maintaining a household.

(v) Provision of low-vision services and aids, such as magnifiers to perform reading and mobility tasks.

(vi) Family and peer counseling services to assist older individuals who are blind adjust emotionally to the loss of vision as well as to assist in their integration into the community and its resources.

(h) *Likelihood of sustaining the program* (10 points). The Secretary reviews each application to determine—

(1) The likelihood that the service program will be sustained after the completion of Federal project grant assistance;

(2) The extent to which the applicant intends to continue to operate the service program through cooperative agreements and other formal arrangements; and

(3) The extent to which the applicant will identify and, to the extent possible, use comparable services and benefits that are available under other programs for which project participants may be eligible.

(Approved by the Office of Management and Budget under control number 1820–0018.)

(Authority: 29 U.S.C. 711(c) and 796k(b)(1) and (i)(1))

§ 367.23 What additional factor does the Secretary consider?

In addition to the criteria in § 367.22, the Secretary considers the geographic distribution of projects in making an award.

(Authority: 29 U.S.C. 711(c) and 796k(b)(1) and (i)(1))

Subpart D—How Does the Secretary Award Contingent Formula Grants?

§ 367.30 Under what circumstances does the Secretary award contingent formula grants to States?

(a) In the case of a fiscal year for which the amount appropriated under section 753 of the Act is equal to or greater than $13,000,000, grants under this part are made to States from allotments under section 752(c)(2) of the Act.

(b) Subparts A, B, D, and E of this part govern the award of formula grants under this part.

(Authority: 29 U.S.C. 796k(c))

§ 367.31 How are allotments made?

(a) For purposes of making grants under section 752(c) of the Act and this subpart, the Secretary makes an allotment to each State in an amount determined in accordance with section 752(j) of the Act.

(b) The Secretary makes a grant to a DSA in the amount of the allotment to the State under section 752(j) of the Act if the DSA submits to and obtains approval from the Secretary of an application for assistance under this program that meets the requirements of section 752(i) of the Act and §§ 367.10 and 367.11.

(Approved by the Office of Management and Budget under control number 1820–0018.)

(Authority: 29 U.S.C. 796k(c)(2))

§ 367.32 How does the Secretary reallot funds under section 752(j)(4) of the Act?

(a) From the amounts specified in paragraph (b) of this section, the Secretary may make reallotment grants to States, as determined by the Secretary, whose population of older individuals who are blind has a substantial need for the services specified in section 752(d) of the Act and § 367.3(b), relative to the populations in other States of older individuals who are blind.

(b) The amounts referred to in paragraph (a) of this section are any amounts that are not paid to States under section 752(c)(2) of the Act and § 367.31 as a result of—

(1) The failure of a DSA to prepare, submit, and receive approval of an application under section 752(i) of the Act and in accordance with §§ 367.10 and 367.11; or

(2) Information received by the Secretary from the DSA that the DSA does not intend to expend the full amount of the State's allotment under section 752(c) of the Act and this subpart.

(c) A reallotment grant to a State under paragraph (a) of this section is subject to the same conditions as grants made under section 752(a) of the Act and this part.

(d) Any funds made available to a State for any fiscal year pursuant to this section are regarded as an increase in the allotment of the State under § 367.31 for that fiscal year only.

(Approved by the Office of Management and Budget under control number 1820–0018.)

(Authority: 29 U.S.C. 796k(j)(4))

Subpart E—What Conditions Must Be Met After an Award?

§ 367.40 What matching requirements apply?

(a) Non-Federal contributions required by § 367.11(b) may be in cash or in kind, fairly evaluated, including plant, equipment, or services.

(b) For purposes of non-Federal contributions required by § 367.11(b), amounts provided by the Federal Government, or services assisted or subsidized to any significant extent by the Federal Government, may not be included in determining the amount of non-Federal contributions.

(Authority: 29 U.S.C. 796k(f))

§ 367.41 When may a DSA award grants or contracts?

(a) A DSA may operate or administer the program or projects under this part to carry out the purposes specified in § 367.1, either directly or through—

(1) Grants to public or private nonprofit agencies or organizations; or

(2) Contracts with individuals, entities, or organizations that are not public or private nonprofit agencies or organizations.

(b) Notwithstanding paragraph (a) of this section, a DSA may enter into assistance contracts, but not procurement contracts, with public or private nonprofit agencies or organizations in a manner consistent with 34 CFR 366.32(e).

(Authority: 29 U.S.C. 796k(g) and (i)(2)(A))

§ 367.42 When does the Secretary award noncompetitive continuation grants?

(a) In the case of a fiscal year for which the amount appropriated under section 753 of the Act is less than $13,000,000, the Secretary awards noncompetitive continuation grants for a multi-year project to pay for the costs of activities for which a grant was awarded—

(1) Under Chapter 2 of Title VII of the Act; or

(2) Under Part C of Title VII of the Act, as in effect on October 28, 1992.

(b) To be eligible to receive a noncompetitive continuation grant under this part, a grantee must satisfy the applicable requirements in this part and in 34 CFR 75.253.

(Approved by the Office of Management and Budget under control number 1820–0018.)

(Authority: 29 U.S.C. 796k(b)(2))

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Part VI

Department of Education

34 CFR Part 607

Strengthening Institutions Program; Final Rule

DEPARTMENT OF EDUCATION

34 CFR Part 607

RIN 1840–AB78

Strengthening Institutions Program

AGENCY: Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary revises the regulations governing the Strengthening Institutions Program. These final regulations are needed to improve the functioning of the program and to implement changes made to the program's authorizing statute, Title III, Part A, of the Higher Education Act of 1965 (HEA), by the Higher Education Amendments of 1992, Pub. L. 102–325 (1992 Amendments) and the Higher Education Technical Amendments of 1993, Pub. L. 103–208.

EFFECTIVE DATE: These regulations take effect either 45 days after publication in the **Federal Register** or later if the Congress takes certain adjournments. If you want to know the effective date of these regulations, call or write the Department of Education contact person. A document announcing the effective date will be published in the **Federal Register.**

FOR FURTHER INFORMATION CONTACT: Louis J. Venuto. Telephone: (202) 708–8839. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1–800–877–8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The Strengthening Institutions Program provides grants to institutions of higher education to improve their academic programs, institutional management, and fiscal stability. The purpose of the program is to increase the self-sufficiency of participating institutions and to strengthen their capacity to make a substantial contribution to the higher education resources of the nation.

The Strengthening Institutions Program is an important part of implementing the National Educational Goals. Specifically, the program addresses Goal 5, that every adult American will possess the knowledge and skills necessary to compete in a global economy and exercise the rights and responsibilities of citizenship, by expanding educational opportunities for students who attend the institutions that receive assistance under this program.

On September 16, 1993, the Secretary published a notice of proposed rulemaking (NPRM) in the **Federal Register** (58 FR 48478) to implement changes made to the program by the 1992 Amendments, to more sharply define institutional eligibility requirements, and to improve the functioning of the program.

Analysis of Comments and Changes

In response to the Secretary's invitation in the NPRM, 212 parties submitted comments on the proposed regulations. An analysis of the comments and of the changes in the regulations since publication of the NPRM follows.

The issues are grouped according to sections of the proposed regulations. Technical and other minor changes—and suggested changes the Secretary is not legally authorized to make under the applicable statutory authority—are not generally addressed.

Section 607.3(b) What is the enrollment of needy students?

—Sections 607.3(b) (3) and (4)

Comments: Under section 312(b)(1)(A) of the HEA, an institution must have "an enrollment of needy students" to qualify as an eligible institution under the Strengthening Institutions Program. Under section 312(c) of the HEA, an institution has an enrollment of needy students if (1) at least 50 percent of its degree students receive need-based student financial assistance; or (2) a substantial percentage of its students receive Pell Grants. However, an institution that does not satisfy this requirement can nevertheless qualify as an eligible institution if the Secretary waives this requirement under section 352() of the HEA.

Prior to the Higher Education Amendments of 1992, section 352(a) of the HEA required the Secretary to waive the "needy student requirement" if the institution satisfied any one of the six criteria established in section 352(a)(1) through (6). As a result of the 1992 Amendments, the Secretary now has discretion to waive the needy student requirement if the institution satisfies any one of the six criteria listed in that section. These six criteria are listed in § 607.3(b) of the program regulations.

In the NPRM, the Secretary proposed making the waiver criteria in § 607.3(b) (3) and (4) more explicit. Section 607.3(b)(3) of the current regulations permits the Secretary to waive the needy student enrollment requirement if an institution can demonstrate that it substantially increases higher education opportunities for low-income students who are also educationally disadvantaged, underrepresented in higher education, or minorities. The Secretary considered quantifying this requirement by requiring that an applicant demonstrate that its enrollment of these students has increased by 200 or at least 20 percent, whichever is greater, at the end of three years in order to get this waiver. The Secretary requested public comment on this proposal. The Secretary also solicited comment on whether an institution could automatically satisfy this requirement if these students constitute at least 50 percent of an institution's total enrollment.

Section 607.3(b)(4) of the current regulations permits the Secretary to waive the needy student enrollment requirement if an institution can demonstrate that it substantially increases the higher education opportunities for individuals who reside in an area that is not included in a "metropolitan statistical area" and who are unserved by postsecondary institutions. The Secretary considered quantifying this requirement by requiring that an applicant demonstrate that its enrollment of these students has increased by 200 or at least 20 percent, whichever is greater, at the end of three years. The Secretary requested public comment on this proposal. The Secretary also solicited comment on whether an institution could automatically satisfy this requirement if these students constitute at least 50 percent of an institution's total enrollment.

Several commenters oppose the proposed changes to §§ 607.3(b) (3) and (4) and believe that an institution should continue to provide whatever evidence it believes is appropriate to satisfy these waiver criteria.

Commenters believe that institutions may be unable to achieve the proposed increases in enrollment. First, commenters believe demographics may prohibit many institutions from increasing their enrollments of disadvantaged and unserved students by the numbers and percentages in the proposed regulations. Second, one commenter fears that nationwide decreases in enrollment of disadvantaged students may prevent institutions from achieving the proposed increases in enrollment. Third, commenters believe that small community colleges may be unable to achieve the proposed increases in enrollment because the students who attend these institutions often are not counted for purposes of eligibility due to the fact that they often attend less than half-time. Finally, commenters believe that large urban institutions may be unable to achieve the proposed increases in enrollment because of budgetary restraints that have forced many of these institutions to freeze enrollments.

Several commenters believe that it may be difficult for small institutions to document increases in enrollment. These commenters believe that it is impossible for many small institutions, for example, to provide counts by ethnicity of students currently being served and to reconstruct counts from the base year.

Commenters oppose the emphasis on the quantity of students served, rather than on the quality of services and benefits provided to these students. Commenters fear that placing the emphasis in the number of students enrolled will cause institutions to provide lower quality services to a greater number of students.

One commenter believes that the proposed changes unfairly penalize institutions that have already increased enrollment of disadvantaged and unserved students and rewards those institutions with low enrollments of these students.

One commenter opposes the proposed changes because they penalize institutions that have decreasing numbers of students taking more credit hours. The commenter believes that these institutions should not be penalized because educational programs that encourage students to take fewer credit hours have proven successful in promoting greater student retention and success.

One commenter opposes the proposed change because it appears to indicate a change in the program from one that was intended to provide support to increase educational opportunities for needy students to one that is intended to target a specific population. These commenters believe this change is contrary to statutory intent.

Several commenters representing tribal institutions oppose the proposed changes to § 607.3(b)(3), which would require an institution to show an increase in enrollment of disadvantaged students by 200 or by at least 20 percent, since this would adversely affect tribal institutions which do not focus on low-income enrollment. These commenters, however, favor the other proposed change which would afford automatic eligibility to institutions that enroll at least 50 percent low-income minorities. Another commenter favors the proposed change in its entirety. The Commenters believes that the proposed change would encourage many state institutions to form a bridge with two-year tribal colleges for the purpose of increasing their enrollment, and thus, ensure educational opportunities for reservation tribal members.

Several commenters asked for certain clarifications of proposed § 607.3(b)(3). Several commenters inquire how "low-income," "educational disadvantaged," "underrepresented in higher education," and "minorities" will be defined. Commenters representing community colleges oppose any definition of "low-income" that is based on Pell eligibility since many students attending community colleges are employed full-time and thus are not eligible for Pell Grants. These commenters also state that many students are reluctant to fill out federal financial assistance forms. Several commenters also inquire how the 20 percent increase in enrollment of disadvantaged students would be measured. One commenter asked if California institutions could count a 20 percent increase in its Educational Opportunity Program & Services enrollment as meeting that standard.

Commenters also request certain clarifications of both § 607.3(b) (3) and (4). Several commenters ask what is the basis for requiring institutions to show increases of 200 or at least 20 percent, rather than some other number or percent. Another commenter inquires whether the "end of three years" has already occurred or whether it is to occur in the future. One commenter also inquires about the sanctions for failing to comply with a promise if the waiver provisions are prospective. Several commenters inquire what type of student could be counted as being included in the population identified in § 607.3(b) (3) and (4). These commenters ask whether the population would include only full-time, degree-seeking students, or whether part-time students would also be included.

One commenter requested that the Secretary remove "whichever is greater" from proposed § 607.3(b) (3) and (4). This commenter suggests this change to allow a small college to be eligible under the proposed regulations. Another commenter requests substituting "whichever is less" for "whichever is greater" in § 607.3(b)(4) for the same reason. Finally, another commenter suggests that the Secretary change "an area that is not included in a metropolitan statistical area" to "rural area" in proposed § 607.3(b)(4).

Several commenters offer alternatives to proposed § 607.3(b) (3) and (4). Commenters suggest that the Secretary require institutions to demonstrate that the enrollment of disadvantaged and unserved students has increased at a rate that exceeds the national average enrollment rate for that type of institution for the last three years for which the Department has available statistics. These commenters believe that this alternative would enable institutions to demonstrate that they are exceeding the growth rate for needy students that is experienced by similar institutions, *i.e.*, two-year public, two-year private, four-year public, and four-year private institutions. In addition, these commenters believe that the comparison with like institutions is consistent with the means used by the Department to measure whether institutions meet the two eligibility criteria for the program. Another commenter questions whether the Department's statistics are valid. This commenter suggests that this alternative qualitative criterion also evaluate or measure an institution's effectiveness in providing improved or expanded services to students.

Another commenter suggests that the Secretary ask for documentation of the institution's past and current efforts to increase enrollments, rather than specify a numerical goal to be demonstrated. This commenter feels it is unfair for the Secretary to initiate changes in services and programs without also providing funds to support the implementation of these changes.

Discussion: The Strengthening Institutions Program has only two specific institutional eligibility requirements. One requires that an eligible institution have an "enrollment of needy students." An institution may satisfy this requirement if it serves a "substantial" percentage of Pell Grant recipients.

To determine whether an institution serves a substantial percentage of Pell Grant recipients, an institution must first determine the percentage of Pell Grant recipients at the institution. The institution calculates this rate by dividing the number of enrolled Pell Grant recipients by the number of enrolled potential Pell Grant recipients, *i.e.*, degree students enrolled on at least a half-time basis.

For the last application cycle, the Secretary determined that an institution served a substantial percentage of Pell Grant recipients if the institution's percentage of potential Pell Grant recipients who received Pell Grants was at least 28.18 percent for two-year public institutions, 35.25 percent for two-year private institutions, 28.98 percent for four-year public institutions, and 29.07 percent for four-year private institutions.

One of the waiver criteria requires an applicant to demonstrate that it contributes substantially to increasing higher educational opportunities for educating low-income students who are also minority students, educationally disadvantaged, or underrepresented in higher education. Another requires an applicant to substantially increase higher education opportunities for individuals in rural or other isolated areas which are unserved by postsecondary education. In the preamble to the proposed regulations, the Secretary proposed quantifying these increases. However, based upon public comments, the Secretary will not require these quantifications in the final regulations. Instead, the Secretary will develop a set of more specific questions relating to these waiver provisions in the eligibility application. The Secretary anticipates proposing standards for these waiver provisions after undertaking a careful review of the information received from these questions.

The definition of "low-income student" is included in § 607.3(c). The Secretary includes definitions of the terms "minority student," a student who is "educationally disadvantaged," and a student who is "underrepresented in higher education." The definition of "educationally disadvantaged" is adapted from the definition of "disadvantaged" under the Vocational and Applied Technology Education Programs—General Provisions (34 CFR 400.4(b)). The definitions of "minority student" and "underrepresented in higher education" mirror the definitions of these terms used in other higher education program regulations. The definitions are intended to clarify the meaning of these terms. The Secretary does not believe that these definitions will impose any additional administrative burden on parties affected by the regulations.

The Secretary has also reviewed the proposed alternative to require institutions to demonstrate that the enrollment of the disadvantaged and unserved students has increased at a rate that exceeds the national average enrollment rate for that type of institution for the last three years for which the Department has available statistics. This review found that the data to establish these thresholds are not available, and it would not be feasible to collect this data.

Changes: The Secretary revises § 607.7(b) to add definitions of "educationally disadvantaged," "minority student," and "underrepresented in higher education." The Secretary withdraws the proposed numerical standards.

—Section 607.3(b)(5) and (6)

Comments: Section 607.3(b)(5) provides a waiver of the needy student eligibility requirement if (1) An institution can demonstrate that the institution is located on or within 50 miles of an Indian reservation or a substantial population of Indians and (2) the institution will, if granted the waiver, substantially increase higher education opportunities for American Indians. Section 607.3(b)(6) provides a waiver of the needy student eligibility requirement if an institution can demonstrate that the institution will, if granted the waiver, substantially increase the higher education opportunities for Black Americans, Hispanic Americans, Native Americans, Asian Americans or Pacific Islanders, including Native Hawaiians.

The Secretary proposed changing these two waiver provisions by requiring an institution to provide a plan for increasing, during the next three years, its enrollment of subject students by some number or percent that would be the same for all institutions, and either maintain or put in place special programs and services designed to support these students. If an applicant for a waiver has applied for and received a waiver under these criteria in a previous year, the Secretary would base his decision to grant another waiver, in part, on whether the institution did what it said it was going to do to get the previous waiver. The Secretary requested comment on these proposals.

Several commenters believe that the proposed changes are non-specific, complex, and bureaucratic. These commenters believe that the plan "to increase by some number or percent that would be the same for all institutions" is not sufficiently defined to provide guidance.

Several commenters believe the requirement that institutions "put in place special programs and services designed to support these students" is unnecessary since most institutions serving low-income educationally disadvantaged students already have these programs in place. One commenter opposes this proposed requirement on the grounds that small community colleges do not have sufficient resources to provide these services.

One commenter is concerned with the phrase "that would be the same for all institutions." This commenter believes that the Secretary should not apply the same number of students to institutions of varying sizes, and that it would be unjust to apply the same percentage to institutions currently serving few needy students to institutions currently serving a high percentage of these students.

One commenter supports a change that requires a plan to increase by some number or percent that is based on the demographic setting of an institution. Another commenter believes that the number or percentage selected should be the same as that established for §§ 607.3(b)(3) and (4). Finally, several commenters suggest that an institution be required to demonstrate that enrollment of the target group of students has increased at a rate that exceeds the national average enrollment for that type of institution for the last three years for which the Department has available statistics.

Discussion: The Secretary believes that some commenters may have misunderstood the proposed changes to § 607.3(b)(5) and (6). The Secretary did not intend to offer any specific regulatory language change in the preamble. In particular, the Secretary did not intend to propose regulatory language that would require a institution to provide a plan for increasing, during the next three years, its enrollment of subject students by "some number or percent that would be the same for all institutions." Rather, the Secretary was soliciting public comment on this concept, specifically on what percentages and numbers may be appropriate for these waiver provisions.

Nevertheless, as in § 607.3(b)(3) and (4), the Secretary has determined, based upon the thoughtful public comment received, not to require these quantifications in the final regulations. Instead, the Secretary will develop a set of more specific questions relating to these waiver provisions in the eligibility application. The Secretary anticipates proposing standards for these waiver provisions after undertaking a careful review of the information received from these questions.

Changes: None.

Section 607.4(c) What are low educational and general expenditures?

Comments: Several commenters oppose the proposal that would limit a waiver of the educational and general expenditure eligibility (E&G) requirement to institutions that do not obtain waivers of the enrollment of needy students requirement. Commenters believe that the two waiver provisions are independent, and waivers should be allowed for both. One commenter is concerned that institutions with high cost, high technology programs will be prevented from participating if they do not receive a waiver of the E&G eligibility requirement even if they receive a waiver of the needy student requirement. This commenter states that institutions with a large number of continuing education students or college preparatory students may have higher costs per student since these students are not eligible to be counted as full-time equivalent students. Another commenter is concerned that the proposed change would mean that institutions located in metropolitan areas with high costs of living would be eliminated because their expenditures per student generally reflect the economic conditions of their geographic area. This commenter also fears that small rural institutions that provide a wide range of costly services to economically disadvantaged students would also be denied access to the program.

Several commenters request that the Secretary consider requiring better documentation from institutions using the waiver provisions rather than precluding an institution from receiving both types of waivers. One commenter suggests requiring an institution to (1) Provide a longitudinal enrollment history to explain why there is currently a reduction in enrollment to demonstrate low enrollment; (2) provide comparable data of similar institutions on size and mission with regards to salaries, energy costs, and facilities management to demonstrate the high cost of the living area; and (3) to fully explain the reasoning behind its low students to faculty ratio where an institution is operating a high cost program (*e.g.*, technology or medical program).

One commenter requests clarification of what is "persuasive evidence" by the institution that (1) It has low student enrollment; and (2) the institution is located in a high cost-of-living area. The commenter also requests a definition of "a high cost-of-living area" which would pay up to 33 percent higher costs to bring goods and services to isolated, rural areas. The commenter believes this definition provides a more equitable and less arbitrary means of measuring this requirement.

Discussion: The Secretary agrees that applicants should continue to be allowed to request waivers of both the needy student and educational and general expenditures requirements. The Secretary believes that both waivers are necessary to account for the different conditions (*e.g.*, urban versus rural areas) that may exist among institutions. Therefore, a change is not necessary in the current regulations.

The Secretary notes that both types of waivers have their own separate set of waiver options. If applicants are unable to meet both the needy student and educational and general expenditures requirements, then they must develop two separate waiver narratives addressing the specific criteria for each waiver.

The Secretary agrees with the comments and suggestions recommending that applicants provide appropriate waiver documentation. Because institutional demographics differ due to size, control, location, and structure and function, the regulations have not been written to detail the correct or acceptable narrative response. Rather, the Secretary believes that applicants should retain the flexibility, within the broad terms of the waiver options, to develop narratives containing specific evidence that meets the requirement but is developed according to the institution's unique circumstances. In fact, many of the commenters' suggestions are some of the elements used by applicants to justify their waiver narratives.

Changes: None.

Section 607.8 What is a comprehensive development plan and what must it contain?

Comments: Several commenters believe that the Secretary should further clarify how a comprehensive development plan (CDP) differs from activity required under a project plan. These commenters also suggest eliminating the points awarded to the CDP, require that it not exceed 10 pages, and establish a page limit for the number of pages for each activity narrative.

One commenter believes that the present nine elements of the CDP should not be revised. The commenter believes that the present nine areas keep the proposal within bounds in planning and carrying out an activity.

One commenter inquires whether additional information will be required under the CDP or requested in the application package. For example, the commenter inquires whether an applicant would be required to provide background information regarding the student population served by the institution, the mission of the institution, and other information needed to give the reader a context in which to read the remainder of the plan, activity narratives, and its request for funds.

One commenter suggests that the application further stipulate that the CDP address the strengthens and weaknesses of the institution as a result of an analysis of the external and internal trends and assumptions identified within the institutional environment. This commenter also suggests that the guidelines reinforce participation in the planning process by developing a guideline requiring the description of the planning process and an evaluative criterion worth three points assessing the extent to which the process is sound, systematic, participatory, and likely to return in a viable institutional plan.

Discussion: Although there is a correlation between the CDP and the description of activities in the project plan, they are not in any way identical. Section 351(b)(1) of the HEA requires the applicant to set forth a CDP to strengthen the institution's academic quality, institutional management, financial stability, and otherwise provide for institutional self-sufficiency and growth. The CDP provides a full description of the applicant's overall plan for achieving growth and self-sufficiency. This description is centered on a discussion of the institution's current analysis of its strengths and weaknesses as well as its long-range goals and objectives. The activity narratives, meanwhile, explain the rationale for each strategy designed to address the problems and weaknesses described in the CDP.

In the NPRM, the Secretary reduced the factors to be specifically addressed in the CDP. The elimination of several factors, including the assumptions statement, timeframes, resource requirements, and the separate evaluation of the CDP, is designed to focus the narrative on only the most important issues related to institutional planning. The assumptions statement, which is based on an analysis of external and internal trends projected to affect the institution's future, was eliminated in the NPRM as an element of the CDP because evaluators found it difficult to assign quality points to future estimates. Applicants, however, may find it useful to continue this exercise as part of their overall planning.

The reduction of CDP factors will have the effect of streamlining the plan, and, thereby, reduce the number of pages needed to respond. Further, the weighted points assigned to the four required factors represent the importance the Secretary places on each factor. Moreover, the Secretary does not agree that the CDP should not be scored. The Secretary believes that the quality of an institution's plan is essential to determining funding decisions and must, therefore, be evaluated.

The Secretary encourages applicants to describe briefly their student populations, their institutional mission, and generally provide helpful background information about their institution as a way of introducing their institutions to evaluators. This additional information is not evaluated and can be provided in a few pages. Although the Secretary has always strongly encouraged applicants to provide only the information needed to respond to the selection criteria, the Secretary does not believe it is necessary or useful to enforce a limit on the number of CDP and activity narrative pages.

Chages: None.

Section 607.10 What activities may and may not be carried out under a grant?

—Section 607.10(b) Development grants; allowable activities

Comments: One commenter suggests that the Secretary add a provision to proposed § 607.10(b) that the listed activities are examples only and do not represent priorities of the Secretary. Second, this commenter believes that the list of suggested activities should be updated at least every five years.

One commenter believes that the list of eligible activities should include activities that support regional accreditation or reaccreditation.

Finally, one commenter opposes proposed § 607.10(b)(1)(iii), which includes as an allowable activity faculty development that provides faculty the skills and knowledge needed to acquire terminal degrees that are required to obtain or retain accreditation of an academic program or department. The commenter believes that providing funding to finance terminal degrees for faculty members will chiefly benefit a few select individuals rather than assist a college in achieving long-range institutional goals.

Discussion: The listed examples are illustrative—not exhaustive. However, the list of examples reflect section 311(b)(3) of the HEA, which provides that special consideration shall be given to applications from institutions that propose to engage in these activities. The Secretary believes that the intent to list these activities as examples is clear under § 607.10(b) since that section states that the allowable activities "include, but are not limited" to those listed. Therefore, the Secretary does not believe any change is necessary.

The listed activities are normally updated when the HEA is authorized, or about every five years.

The Secretary believes that the allowable activities under section 311(b)(3) of the HEA include efforts to maintain institutional accreditation. The Secretary believes that these efforts are supportable by Title III funding because efforts to achieve self-sufficiency would be severely hampered by an institution's loss of accreditation.

In a few instances, institutions apply for faculty development funds to enable faculty to obtain advanced or terminal degrees to maintain institutional accreditation. In these cases, the Secretary believes that the greater benefit accrues to the institution by maintaining its accreditation.

Changes: None.

—Section 607.10(c) Development grants; unallowable activities

Comments: One commenter opposes proposed § 607.10(c)(5), which prohibits the use of grant funds for developing and improving non-degree or non-credit courses other than basic skills development courses. The commenter is concerned that vocational certificate courses will be unallowable. The commenter believes that these courses provide many students attending community colleges with the flexibility to shift majors if needed, and to better match ability to educational targets.

The same commenter also opposes proposed § 607.10(c)(7) which prohibits the use of grant funds to purchase standard office equipment, such as furniture, file cabinets, bookcases, typewriters, or word processors. The commenter suggests adding the phrase "other than limited typewriters or word processors for the Project Director's office." The commenter states that in many developing institutions capital equipment is not available, even though they can find furniture on campus to set up the director's office.

Several commenters oppose proposed § 607.10(c)(8). These commenters believe that deans should be permitted to fill the position of project coordinator or activity director for Title III programs and to receive program funding as part of their salaries. These commenters believe that college deans do not serve as top-level administrators, but rather as first-line supervisors in the areas of instruction and student services. Commenters believe deans have the greatest expertise to handle the duties of Title III management or direction of an activity most effectively. Another commenter believes that this restriction constitutes an unwarranted intrusion into the autonomy of the institution and that the decision regarding who should be the project director should be made by the institution and the Secretary during grant negotiations, rather than be the subject of regulation.

One commenter opposes proposed § 607.10(c)(9) which prohibits grant funds from being used for costs of organized fund-raising. The commenter believes that fund-raising is necessary to broaden an institution's funding base.

Discussion: The Secretary includes courses leading to a certificate or another recognized educational credential as a "degree" course; thus, the development of courses leading to a certificate or other recognized educational credential offered by the institution is an allowable program cost. The prohibition on the use of grant funds to support non-degree or non-credit courses (*e.g.*, courses offered in the evening or on weekends that are designed to provide instruction in self-improvement or constructive use of leisure time) is intended to focus grant funds upon developmental activities most central to the college's mission. The Secretary notes, however, that grant funds may be used to support basic skills developmental courses that are intended to provide the requisite skills in reading, math, and writing to students who are marginal in their ability to persist in college.

The Secretary believes that the prohibition in § 607.10(c)(7) on the use of grant funds to purchase standard office equipment, such as furniture, file cabinets, bookcases, typewriters, or word processors, is necessary. The Secretary believes that grant funds may be used to purchase necessary equipment support on developmental activities, rather than on the purchase of this kind of operational equipment.

The Secretary views the position of Dean as one that has college-wide administrative authority and responsibilities. The Secretary continues to believe that payment of Strengthening Institutions Program funds to support that position supplants institutional funds. However, the Secretary understands that certain institutional officials are called "Dean" but do not have college-wide administrative authority and responsibilities. The Secretary does not object to these officials serving as key officials in a Strengthening Institutions Program and being paid with grant funds for their work on the federally funded project. Therefore, the Secretary has revised the regulation to include among the allowable activities the "payment of any portion of the salary of a dean, with proper justification, to fill a position under the project such as project coordinator or activity director." Proper justification includes evidence that the position entitled "Dean" is not considered to be one that has college-wide administrative authority and responsibilities.

The Secretary prohibits the use of grant funds for operational purposes such as fund raising. The Secretary believes this restriction is necessary to focus program funding on developmental activities.

Changes: The Secretary revises the regulations by adding § 607.10(b)(7) to include among the allowable activities the payment of any portion of the salary of a dean, with proper justification, to fill a position under the project such as project coordinator or activity director. For purposes of this paragraph, proper justification includes evidence that the position entitled "Dean" is not one that has college-wide administrative authority and responsibility. The Secretary revises § 607.10(c)(8) by removing the word "dean."

Section 607.11 What must be included in individual development grant applications?

Comments: If grant funds are requested to continue or complete the activities, the Secretary proposed that an applicant for a development grant include a description of the activities funded under a prior grant. The Secretary also proposed that, if grant funds are requested for these purposes, the institution provide a justification for not completing the activities under the previous grant. One commenter suggests deleting the phrase "if grant funds are requested to complete the activities." This commenter believes that institutions should justify not having completed prior activities regardless of whether they are requesting funds to complete or continue the activities. The commenter believes that this is necessary to ensure accountability for past short-falls.

One commenter believes that the proposed change is unnecessary and would only require additional paperwork. The commenter believes that this information could be adequately contained in a former grantee's final performance report. Several commenters believe that the wording of the proposed change needs to be clarified to reflect that the only institutions required to report Part A grants that expired during the past five years are those that failed to complete any activities under those grants. Commenters state that, unless there are incomplete activities, there is no need for applicants to have the additional burden of reporting on past grants. Commenters suggest adding "uncompleted activities" for "activities" in proposed § 607.11(c) to clarify this point.

One commenter suggests that, if the Secretary opts to require all institutions to report any grants that expired within the past five years, applicants also be required to report whether an external consultant assisted in writing the applications and whether an external consultant has been paid to assist in writing the application being submitted to the current competition. The commenter believes that this would allow a reader to make a more fully informed judgment about institutional capabilities.

One commenter believes the meaning of uncompleted activities needs to be clarified. This commenter also believes that new proposals should include a brief abstract of all completed activities of the previous five years.

Discussion: The Secretary agrees with the first commenter that institutions applying for new funds should justify not having completed prior activities regardless of whether they are requesting funds to complete or continue those activities.

To determine the impact of grant funds under the program goal of assisting institutions progress towards growth and self-sufficiency, the Secretary believes that grantees and former grantees must provide evaluation and assessment information to allow the Secretary to make more informed funding decisions. Some of this information can be obtained from continuation application status reports as well as final performance reports. However, as many as five years may have passed from the end of an institution's last grant in which time, changed circumstances and events may influence the next application. Hence, this updating in the new application is necessary. The Secretary also believes that this information is needed for all previously funded activities, regardless of whether they are completed or uncompleted, under § 607.11(c).

The use of external consultants to assist institutions in the preparation of applications or during the implementation of a funded project is a known practice. The Secretary does not believe, however, that requiring applicants to report the use of a consultant who has been paid to assist with the preparation of an application will allow a reviewer to make more fully informed judgment about institutional capabilities.

The Secretary defines uncompleted activities as those that had unmet objectives during the period of program funding, and are subsequently not completed by the institution after funding ended.

Changes: The Secretary revises § 607.11(c) to require institutions to justify not having completed activities regardless of whether they are requesting funds to complete or continue the activities. The Secretary deletes "if grant funds are requested to complete or continue the activities" in § 607.11(c).

Section 607.13 How many applications for a development grant may an institution submit?

Comments: The Secretary proposed to prevent an institution from submitting an individual development grant application and a cooperative grant application in the same year. Several commenters oppose this proposed change, stating that, although cooperative arrangements grants may be funded with funds under Part A of Title III of the HEA, they are described under Part D of Title III of the HEA, and institutions should not be prohibited from participating in both types of grants simultaneously. Commenters also believe that individual development grants and cooperative arrangement grants serve different purposes. Many commenters request that, if the Secretary implements the proposed change, institutions currently receiving funds under the program be grandfathered so that the new requirement is phased in only for new grant applications.

Several commenters request that proposed § 607.13 be revised to allow an institution with an approved multi-year development grant from prior year's competition to be part of a cooperative arrangement application in a subsequent fiscal year.

One commenter requests that the definition of "grantee" be clearly defined. The commenter believes it is unclear whether individual institutions participating under cooperative arrangement grant would become eligible to apply for an individual development grant after they are phased out of the cooperative arrangement grant or whether the units participating in the cooperative arrangement are deemed "grantees" during the full term of the grant. The commenter believes that the term "grantee" should be clearly defined so that individual academic units participating in a cooperative arrangement grant of a university system may be eligible for an individual development grant (after a one-year wait-out period) after being phased out of the cooperative arrangement.

Discussion: Prior to its amendment by the Higher Education Technical Amendments of 1993, section 313(b) of the HEA provided that, "In awarding grants under this part, the Secretary shall give priority to applicants who are not already receiving a grant under this part." The Higher Education Technical Amendments of 1993 added the following exception to that section: "except that a grant made under section

354(a)(1) shall not be considered a grant under this part." Section 354(a)(1) authorizes the Secretary to fund "cooperative arrangement" grants.

Given the funding history of the Strengthening Institutions Program, and the funding priority contained in section 313(b) of the HEA before its amendment, it was exceedingly unlikely that an applicant would have been able to receive both a cooperative arrangement grant and an individual development grant in the same year. Therefore, the Secretary proposed in § 607.13 that an institution could apply for only one type of grant. However, as a result of the amendment to section 313(b) of the HEA, the Secretary has eliminated that limitation in § 607.13.

Changes: The Secretary revises § 607.13 to provide that in any fiscal year, an institution of higher education may submit both an application for an individual development grant and be part of a cooperative arrangement application.

Section 607.20 How does the Secretary choose applications for funding?

Comments: Several commenters believe that institutions receiving a cooperative arrangement grant should have priority for funding. These commenters believe that it is unfair to apply the requirements in section 313(b) of the 1992 Amendments retroactively.

Several commenters believe that a recipient of a Title III planning grant be allowed to apply for a development grant.

Discussion: As discussed in the preceding section regarding § 607.13, as a result of the amendment to section 313(b) of the HEA, an institution that is a recipient of a cooperative arrangement grant is not a "grantee under this part," and thus does not fall into a lower priority under that section. As a result, a recipient of a cooperative arrangement grant may apply for and receive an individual development grant. The Secretary has amended § 607.20(b) to clarify this change. On the other hand, a recipient of a planning grant under the program is a grantee under this part, and the limitation of section 313(b) will continue to apply to such a grantee.

Changes: The Secretary revises proposed § 607.20(b) by redesignating § 607.20(b) as § 607.20(b)(1) and by adding a new § 607.20(b)(2) that provides, for purposes of determining priority for funding under § 607.20(b)(1), that an institution that is a recipient of a cooperative arrangement grant is not a grantee under his part.

Section 607.22 What are the selection criteria for development grants?

Comments: One commenter recommends moving proposed § 607.8(b)(4), which requires an institution to include in its CDP its methods and resources that will be used to institutionalize practices and improvements developed under the proposed project, to the selection criteria in § 607.22.

One commenter suggests that the Secretary retain the present selection criteria for development grants.

One commenter believes that proposed § 607.22(c)(2) needs to be clarified.The commenter is unsure whether "relevant studies or projects" are those the applicant institution must carry out prior to the application or are carried out by other institutions or individuals whose results have been made available in the professional literature to the field of the proposed activity.

One commenter requests that the Secretary reinforce in proposed § 607.22(a) participation by faculty and staff in the planning process in the development of the CDP. The commenter suggests that the description of the planning process and evaluative criteria be worth three points, assessing the extent to which the process is sound, systematic, participatory, and likely to result in a viable institutional plan. The commenter suggests that the points for the planning process be reallocated from the criteria in proposed § 607.22(a)(4).

Discussion: The Secretary believes that the institutionalization plan element is appropriately placed in § 607.8. The applicant's capacity to assume and maintain the costs of strengthening the academic, management, and fiscal conditions at the institution after program funds are terminated is a key indicator of achieving growth and self-sufficiency. Therefore, the description of the institutionalization plan is an important and necessary element of § 607.8. Accordingly, the quality of the institutionalization plan is included in § 607.22(a)(4) as a factor in determining the overall quality of development grant applications.

In the NPRM, the Secretary has refocused the emphasis and point value for the CDP, implementation strategy, evaluation, and budget, because these four factors embody the purpose of the program. The revised selection criteria retained in these final regulations will hopefully enable applicants to develop cohesive applications that respond to the program purpose. The Secretary also believes that the revised selection criteria will have a positive impact on the review process, because readers will better understand these four areas in the overall context of the program, and how they should evaluate them.

Applicants are not required to participate in the relevant studies or projects cited in § 607.22(c)(2). However, applicants are required to "defend" their implementation strategy for each activity by citing the results of relevant studies and projects and the potential for success in using the results to address the problems and weaknesses identified in development grant applications.

The applicant's institutionalization plan in § 607.22(a)(4) differs significantly from an institution's planning process that results in a viable institutional plan. What is being evaluated in § 607.22(a)(4) is the applicant's plan to assume and maintain the costs of the activities developed under the proposed project when Title III funds are terminated, not its institutional planning process. To incorporate language to require applicants to describe their institutional planning initiatives would run counter to the purpose of development grant applications.

The Secretary does not view the description of the institutionalization plan as a function of the project management section in § 607.22(e). Project management involves the routine procedures and lines of authority to ensure that the project is conducted effectively. Since the issue of institutionalization correlates with institutional growth and self-sufficiency, it is appropriately contained in § 607.22(a)(4).

Changes: None.

Section 607.24 How does the Secretary use an applicant's performance under a previous development grant when awarding a development grant?

Comments: Several commenters believe that an institution should not be allowed to informally demonstrate that it failed to meet the goals and objectives listed in its CDP. Commenters believe that every proceeding should be formally administered to maintain the credibility of the process.

One commenter requests that institutions receiving multi-year grants be able to request modifications of their objectives or equipment specifications for cause during the funding period. The commenter believes that this would encourage institutions to establish innovative goals rather than conservative goals for its program.

One commenter suggests deleting proposed § 607.24. The commenter does not believe this requirement can be properly administered given the Department's inability to collect meaningful data relating to grant projects.

Discussion: The Secretary did not intend to imply that a grantee may not formally demonstrate that it met the goals and objectives listed in its CDP. A grantee may make this showing formally under 34 CFR 75.720(b).

The Secretary is aware that every effort at institutional change may not be successful. In this regard, the Secretary allows minor modifications to a project to improve measurability of objectives and provide for more realistic outcomes if a change would improve the chances for success. The Secretary, however, would not permit modifications that propose to add new activities or that change the project's scope.

The Secretary determines whether an applicant successfully achieved the goals and objectives of its previous development grant based on performance reports, and any other similar reports such as audit or monitoring reports.

Changes: None.

Section 607.25 What priority does the Secretary use in awarding cooperative arrangement grants?

Comments: One commenter opposes § 607.25 if the priority given by the Secretary to cooperative arrangement applications means that additional points would be awarded to these applications.

Discussion: The Secretary does not intend to award additional points to cooperative arrangement applications. Rather, the Secretary intends to give priority among cooperative arrangement grant applications only if applications are of comparable merit. In these circumstances, priority would be afforded to those applications that meet the statutory conditions in section 354(b) of the Act. These statutory conditions require that the cooperative arrangement be geographically and economically sound or that it will benefit the applicant institutions.

In determining whether the cooperative arrangement is geographically sound, the Secretary considers the proximity of the institutions, and how their locations would impact on the potential success of the proposed project. To determine the economic soundness of the cooperative arrangement, the Secretary considers whether the institutions avoid costly duplicative efforts by sharing their resources for developing and managing the proposed project. Finally, the Secretary determines how the cooperative arrangement will benefit the applicant institutions by looking for evidence that demonstrates how the proposed project will enable all the participating institutions to alleviate the significant problems affecting their academic programs, institutional management, and fiscal stability.

Changes: None.

Other Comments

Comments: Several commenters urge the Secretary to hold Strengthening Institutions Program competitions every other year rather than every year, with high scoring applications that are not funded in the first year to be funded by rank order in the second year. These commenters believe that this change would reduce the paperwork burden of grantees, allow for increased attention of program managers, and provide for considerable cost savings in the administration of the program. Commenters differed on what would define a high scoring application. Some commenters suggest a high ranking application would be one that received a score of at least 90 points. Others believe that this cut-off is arbitrary.

Discussion: While these comments are not directed to any of the proposed regulations, the Secretary is pleased to receive suggestions that relate to potential improvements in the administration of the program. The Secretary, therefore, will consider these comments under the overall Federal government-wide effort to create a government that works better and costs less.

Changes: None.

Executive Order 12866

These final regulations have been reviewed in accordance with Executive Order 12866. Under the terms of the order the Secretary has assessed the potential costs and benefits of this regulatory action.

The potential costs associated with the final regulations are those resulting from statutory requirements and those determined by the Secretary to be necessary for administering this program effectively and efficiently. In assessing the potential costs and benefits—both quantitative and qualitative—of these regulations, the Secretary has determined that the benefits of the regulations justify the costs.

Intergovernmental Review

This program is subject to the requirements of Executive Order 12372 and the regulations in 34 CFR Part 79. The objective of the Executive order is to foster an intergovernmental partnership and a strengthened federalism by relying on processes developed by State and local governments for coordination and review of proposed Federal financial assistance.

In accordance with the order, this document is intended to provide early notification of the Secretary's specific plans and actions for this program.

Assessment of Educational Impact

In the notice of proposed rulemaking, the Secretary requested comments on whether the proposed regulations would require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

Based on the response to the proposed rules and on its own review, the Department has determined that the regulations in this document do not require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

List of Subjects in 34 CFR Part 607

College and universities, Grant program-education, Reporting and recordkeeping requirements.

Dated: April 12, 1994.

(Catalog of Federal Domestic Assistance Number 84.031A—Strengthening Institutions Program)

Richard W. Riley,

Secretary of Education.

The Secretary amends Part 607 of Title 34 of the Code of Federal Regulations as follows:

PART 607—STRENGTHENING INSTITUTIONS PROGRAM

1. The authority citation for Part 607 is revised to read as follows:

Authority: 20 U.S.C. 1057–1059c, 1066–1069f, unless otherwise noted.

2. Section 607.1 is revised to read as follows:

§ 607.1 What is the strengthening institutions program?

The purpose of the Strengthening Institutions Program is to provide grants to eligible institutions of higher education to improve their academic programs, institutional management, and fiscal stability in order to increase their self-sufficiency and strengthen their capacity to make a substantial contribution to the higher education resources of the Nation.

(Authority: 20 U.S.C. 1057)

3. Section 607.2 is revised to read as follows:

§ 607.2 What institutions are eligible to receive a grant under the strengthening institutions program?

(a) Except as provided in paragraphs (b) and (c) of this section, an institution of higher education is eligible to receive a grant under the Strengthening Institutions Program if—

(1) It has an enrollment of needy students as described in § 607.3(a), unless the Secretary waives this requirement under § 607.3(b);

(2) It has low average educational and general expenditures per full-time equivalent undergraduate student as described in § 607.4(a), unless the Secretary waives this requirement under § 607.4(c).

(3) It is legally authorized by the State in which it is located to be a junior college or to provide an educational program for which it awards a bachelor's degree; and

(4) It is accredited or preaccredited by a nationally recognized accrediting agency or association that the Secretary has determined to be a reliable authority as to the quality of education or training offered.

(b) A branch campus of an institution of higher education, if the institution as a whole meets the requirements of paragraphs (a)(1) through (4) of this section, is eligible to receive a grant under the Strengthening Institutions Program even if, by itself, it does not satisfy the requirements of paragraphs (a)(3) and (a)(4) of this section, although the branch must meet the requirements of paragraphs (a)(1) and (a)(2) of this section.

(c) For the purpose of paragraphs (b) and (c) of this section, an institution's enrollment consists of a head count of its entire student body.

(d) An institution that qualifies for a grant under the Strengthening Historically Black Colleges and Universities Program (34 CFR Part 608) or the Hispanic-Serving Institution Program (20 U.S.C. 1059c) and receives a grant under either of these programs for a particular fiscal year is not eligible to receive a grant under the Strengthening Institutions Program for that same fiscal year.

(Authority: 20 U.S.C. 1058, 1059c)

4. Section 607.4 is revised to read as follows:

§ 607.4 What are low educational and general expenditures

(a)(1) Except as provided in paragraph (b) of this section, for the purpose of § 6072(a)(2), an applicant institution's average educational and general expenditures per full-time equivalent undergraduate student in the base year must be less than the average educational and general expenditures per full-time equivalent undergraduate student of comparable institutions that offer similar institution in that year.

(2) For the purpose of paragraph (a)(1) of this section, the Secretary determines the average educational and general expenditure per FTE undergraduate student for institutions with graduate students that do not differentiate between graduate and undergraduate E&G expenditures by discounting the graduate enrollment using a factor of 2.5 times the number of graduate students.

(b) Each year, the Secretary notifies prospective applicants through a notice in the **Federal Register** of the average educational and general expenditures per full-time equivalent undergraduate student at comparable institutions that offer similar instruction.

(c) The Secretary may waive the requirement contained in paragraph (a) of this section, if the Secretary determines, based upon persuasive evidence provided by the institution, that—

(1) The institution's failure to satisfy the criteria in paragraph (a) of this section was due to factors which, if used in determining compliance with those criteria, distorted that determination; and

(2) The institution's designation as an eligible institution under this part is otherwise consistent with the purposes of this part.

(d) For the purpose of paragraph (c)(1) of this section, the Secretary considers that the following factors may distort an institution's educational and general expenditures per full-time equivalent undergraduate student—

(1) Low student enrollment;

(2) Location of the institution in an unusually high cost-of-living area;

(3) High energy costs;

(4) An increase in State funding that was part of a desegregation plan for higher education; or

(5) Operation of high cost professional schools such as medical or dental schools.

(Authority: 20 U.S.C. 1058 and 1067)

5. Section 607.6 is revised to read as follows:

§ 607.6 What regulations apply?

The following regulations apply to the Strengthening Institutions Program:

(a) The Education Department General Administrative Regulations (EDGAR) as follows:

(1) 34 CFR Part 74 (Administration of Grants to Institutions of Higher Education, Hospitals, and Nonprofit Organizations).

(2) 34 CFR Part 75 (Direct Grant Programs), except 34 CFR 75.128(a)(2) and 75.129(a) in the case of applications for cooperative arrangements.

(3) 34 CFR Part 77 (Definitions that Apply to Department Regulations).

(4) 34 CFR Part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(5) 34 CFR Part 82 (New Restrictions on Lobbying).

(6) 34 CFR Part 85 (Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants)).

(7) 34 CFR Part 86 (Drug-Free Schools and Campuses).

(b) The regulations in this Part 607.

(Authority: 20 U.S.C. 1057)

6. Section 607.7 is amended by removing the word "Project" from the list in paragraph (a) and by removing the definition of "Strengthening Program," adding new definitions of "Educationally disadvantaged," "Minority student," and "Underrepresented" in alphabetical order, and revising the definition of "Activity" in paragraph (b) to read as follows:

§ 607.7 What definitions apply?

* * * * *

(b) * * *

Activity means an action that is incorporated into an implementation plan designed to meet one or more objectives. An activity is a part of a project and has its own budget that is approved to carry out the objectives of that subpart.

* * * * *

Educationally disadvantaged means a college student who requires special services and assistance to enable them to succeed in higher education. The phrase includes, but is not limited to, students who come from—

(1) Economically disadvantaged families;

(2) Limited English proficiency families;

(3) Migrant worker families; or

(4) Families in which one or both of their parents have dropped out of secondary school.

* * * * *

Minority student means a student who is Alaskan Native, American Indian, Asian-American, Black (African-American), Hispanic American, Native Hawaiian, or Pacific Islander.

* * * * *

Underrepresented means proportionate representation as measured by degree recipients, that is less than the proportionate representation in the general population—

(1) As indicated by—

(i) The most current edition of the Department's *Digest of Educational Statistics;*

(ii) The National Research Council's *Doctorate Recipients from United States Universities;* or

(iii) Other standard statistical references, as announced annually in the **Federal Register** notice inviting applications for new awards under this program; or

(2) As documented by national survey data submitted to and accepted by the Secretary on a case-by-case basis.

* * * * *

7. Section 607.8 is revised to read as follows:

§ 607.8 What is a comprehensive development plan and what must it contain?

(a) A comprehensive development plan is an institution's strategy for achieving growth and self-sufficiency by strengthening its—

(1) Academic programs;

(2) Institutional management; and

(3) Fiscal stability.

(b) The comprehensive development plan must include the following:

(1) An analysis of the strengths, weaknesses, and significant problems of the institution's academic programs, institutional management, and fiscal stability.

(2) A delineation of the institution's goals for its academic programs, institutional management, and fiscal stability, based on the outcomes of the analysis described in paragraph (b)(1) of this section.

(3) Measurable objectives related to reaching each goal and timeframes for achieving the objectives.

(4) Methods and resources that will be used to institutionalize practices and improvements developed under the proposed project.

(Authority: 20 U.S.C. 1066)

8. Section 607.9 is amended by revising paragraph (a)(3) to read as follows:

§ 607.9 What are the type, duration, and limitations in the awarding of grants under this part?

* * * * *

(a) * * *

(3) Either type of development grant may be awarded for a period of five years.

* * * * *

9. Section 607.10 is amended by revising paragraphs (b) and (c) to read as follows:

§ 607.10 What activities may and may not be carried out under a grant?

* * * * *

(b) *Development grants—allowable activities.* Under a development grant, except as provided in paragraph (c) of this section, a grantee shall carry out activities that implement its comprehensive development plan and hold promise for strengthening the institution. Activities that may be carried out include, but are not limited to—

(1) Faculty development that provides faculty with the skills and knowledge needed to—

(i) Develop academic support services, including advising and mentoring students;

(ii) Develop academic programs or methodology, including computer-assisted instruction, that strengthen the academic quality of the institution; or

(iii) Acquire terminal degrees that are required to obtain or retain accreditation of an academic program or department;

(2) Funds and administrative management that will improve the institution's ability to—

(i) Manage financial resources in an efficient and effective manner; and

(ii) Collect, access, and use information about the institution's operations for improved decisionmaking;

(3) Developing and improving academic programs that enable the institution to—

(i) Develop new academic programs or new program options that show promise for increased student enrollment;

(ii) Provide new technology or methodology to increase student success and retention or to retain accreditation; or

(iii) Improve curriculum or methodology for existing academic programs to stabilize or increase student enrollment;

(4) Acquiring equipment for use in strengthening management and academic programs to achieve objectives such as those described in paragraphs (b)(2) and (b)(3) of this section;

(5) Establishing or increasing the joint use of facilities such as libraries and laboratories to—

(i) Eliminate the distance and high cost associated with providing academic programs and academic support; or

(ii) Provide clinical experience that is part of an approved academic program at off-campus locations; or

(6) Developing or improving student services to provide—

(i) New or improved methods to deliver student services, including counseling, tutoring, and instruction in basic skills; or

(ii) Improved strategies to train student services personnel.

(7) Payment of any portion of the salary of a dean, with proper justification, to fill a position under the project such as project coordinator or activity director. For purposes of this paragraph, proper justification includes evidence that the position entitled "Dean" is not one that has college-wide administrative authority and responsibility.

(c) *Development grants—unallowable activities.* A grantee may not carry out the following activities or pay the following costs under a development grant:

(1) Activities that are not included in the grantee's approved application.

(2) Activities that are inconsistent with any State plan for higher education that is applicable to the institution, including, but not limited to, a State plan for desegregation of higher education.

(3) Activities or services that relate to sectarian instruction or religious worship.

(4) Activities provided by a school or department of divinity. For the purpose of this provision, a "school or department of divinity" means an institution, or a department of an institution, whose program is specifically for the education of students to prepare them to become ministers of religion or to enter into some other religious vocation or to prepare them to teach theological subjects.

(5) Developing or improving non-degree or non-credit courses other than basic skills development courses.

(6) Developing or improving community-based or community services programs, unless the program provides academic-related experiences or academic credit toward a degree for degree students.

(7) Purchase of standard office equipment, such as furniture, file cabinets, bookcases, typewriters, or word processors.

(8) Payment of any portion of the salary of a president, vice president, or equivalent officer who has college-wide administrative authority and responsibility at an institution to fill a position under the grant such as project coordinator or activity director.

(9) Costs of organized fund-raising, including financial campaigns, endowment drives, solicitation of gifts and bequests, and similar expenses incurred solely to raise capital or obtain contributions.

(10) Costs of student recruitment such as advertisements, literature, and college fairs.

(11) Services to high school students.

(12) Instruction in the institution's standard courses as indicated in the institution's catalog.

(13) Costs for health and fitness programs, transportation, and day care services.

(14) Student activities such as entertainment, cultural, or social enrichment programs, publications, social clubs, or associations.

(15) Activities that are operational in nature rather than developmental in nature.

(Authority: 20 U.S.C. 1057, 1069c)

10. Section 607.11 is amended by revising paragraph (c) to read as follows:

§ 607.11 What must be included in individual development grant applications?

* * * * *

(c) A description of any activities that were funded under previous development grants awarded under the Strengthening Institutions of Special Needs Program that expired within five years of when the development grant will begin and the institution's justification for not completing the activities under the previous grant;

* * * * *

11. Section 607.12 is amended by adding a new paragraph (b)(4) to read as follows:

§ 607.12 What must be included in cooperative arrangement grant applications?

* * * * *

(b) * * *

(4) The name of the applicant for the group that is legally responsible for—

(i) The use of all grant funds; and

(ii) Ensuring that the project is carried out by the group in accordance with Federal requirements.

* * * * *

12. Section 607.13 is revised to read as follows:

§ 607.13 How many applications for a development grant may an institution submit?

In any fiscal year, an institution of higher education may—

(a) Submit an application for an individual development grant; and

(b) Be part of a cooperative arrangement application.

(Authority: 20 U.S.C. 1057, 1069)

13. Section 607.20 is revised to read as follows:

§ 607.20 How does the Secretary choose applications for funding?

(a) The Secretary evaluates an application on the basis of the criteria in—

(1) Sections 607.21 and 607.23 for a planning grant; and

(2) Sections 607.22, 607.23, and 607.25 for a development grant.

(b) (1) With regard to applicants that satisfy the requirements of paragraph (d) of this section, for each fiscal year, the Secretary awards development grants to applicants that are not, or were not, grantees under this part during the fiscal year, before the Secretary awards a development grant to any applicant that is or was a grantee under this part during the fiscal year.

(2) For purposes of paragraph (b)(1) of this section, an institution that is a recipient of a cooperative arrangement grant is not a grantee under this part.

(c) (1) The Secretary awards up to 100 points for the criteria in § 607.21 and up to 100 points for the criteria in § 607.22.

(2) The maximum possible score for each complete criterion is in parentheses.

(d) (1) The Secretary considers funding an application for a planning grant that scores at least 50 points under § 607.21.

(2) The Secretary considers funding an application for a development grant that—

(i) Scores at least 50 points under § 607.22;

(ii) Is submitted with a comprehensive development plan that satisfies all the elements required of such a plan under § 607.8; and

(iii) In the case of an application for a cooperative arrangement grant, demonstrates that the grant will enable each eligible participant to meet the goals and objectives of its comprehensive development plan better and at a lower cost than if each eligible participant were funded individually.

(Authority: 20 U.S.C. 1057–1059, 1066–1069f)

14. Section 607.22 is revised to read as follows:

§ 607.22 What are the selection criteria for development grants?

The Secretary uses the following criteria to evaluate applications for development grants:

(a) *Quality of the applicant's comprehensive development plan.* (Total: 30 points) The extent to which—

(1) The strengths, weaknesses, and significant problems of the institution's academic programs, institutional management, and fiscal stability are clearly and comprehensively analyzed and result from a process that involved major constituencies of the institution. (12 points);

(2) The goals for the institution's academic programs, institutional management, and fiscal stability are realistic and based on comprehensive analysis. (5 points);

(3) The objectives stated in the plan are measurable, related to institutional goals, and, if achieved, will contribute to the growth and self-sufficiency of the institution (5 points);

(4) The plan clearly and comprehensively describes the methods and resources the institution will use to institutionalize practice and improvements developed under the proposed project, including, in particular, how operational costs for personnel, maintenance, and upgrades of equipment will be paid with institutional resources (8 points).

(b) *Quality of activity objectives.* (Total: 10 points) The extent to which the objectives for each activity are—

(1) Realistic and defined in terms of measurable results (5 points); and

(2) Directly related to the problems to be solved and to the goals of the comprehensive development plan (5 points).

(c) *Quality of implementation strategy.* (Total: 25 points) The extent to which—

(1) The implementation strategy for each activity is comprehensive (10 points);

(2) The rationale for the implementation strategy for each activity is clearly described and is supported by the results of relevant studies or projects (10 points); and

(3) The timetable for each activity is realistic and likely to be attained (5 points).

(d) *Quality of key personnel.* (Total: 10 points) The extent to which—

(1) The past experience and training of key professional personnel are directly related to the stated activity objectives (7 points); and

(2) The time commitment of key personnel is realistic (3 points).

(e) *Quality of project management plan.* (Total: 10 points) The extent to which—

(1) Procedures for managing the project are likely to ensure efficient and effective project implementation (5 points); and

(2) The project coordinator and activity directors have sufficient authority to conduct the project effectively, including access to the president or chief executive officer (5 points).

(f) *Quality of evaluation plan.* (Total: 10 points) The extent to which—

(1) The data elements and the data collection procedures are clearly described and appropriate to measure the attainment of activity objectives and to measure the success of the project in

achieving the goals of the comprehensive development plan (5 points); and

(2) The data analysis procedures are clearly described and are likely to produce formative and summative results on attaining activity objectives and measuring the success of the project on achieving the goals of the comprehensive development plan (5 points).

(g) *Budget.* (Total: 5 points) The extent to which the proposed costs are necessary and reasonable in relation to the project's objectives and scope.

(Approved by the Office of Management and Budget under control number 1840–0114)

(Authority: 20 U.S.C. 1057–1059, 1066–1069f)

15. Section 607.23 is amended by removing paragraph (c), and redesignating paragraphs (d) and (e) as paragraphs (c) and (d), respectively.

16. A new § 607.24 is added to Subpart C to read as follows:

§ 607.24 How does the Secretary use an applicant's performance under a previous development grant when awarding a development grant?

(a) (1) In addition to evaluating an application under the selection criteria in § 607.22, the Secretary evaluates an applicant's performance under any previous development grant awarded under Strengthening Institutions and Special Needs Programs that expired within five years of the year when the development grant will begin.

(2) The Secretary evaluates whether the applicant fulfilled, or is making substantial progress toward fulfilling, the goals and objectives of the previous grant, including, but not limited to, the applicant's success in institutionalizing practices developed and improvements made under the grant.

(3) The Secretary bases the evaluation of the applicant's performance on information contained in—

(i) Performance and evaluation reports submitted by the applicant;

(ii) Audit reports submitted on behalf of the applicant; and

(iii) Other information obtained by the Secretary, including reports prepared by the Department.

(b) If the Secretary initially determines that the applicant did not fulfill the goals and objectives of a previous grant or is not making substantial progress towards fulfilling those goals and objectives, the Secretary affords the applicant the opportunity to respond to that initial determination.

(c) If the Secretary determines that the applicant did not fulfill the goals and objectives of a previous grant or is not making substantial progress towards fulfilling those goals and objectives, the Secretary may—

(1) Decide not to fund the applicant; or

(2) Fund the applicant but impose special grant terms and conditions, such as specific reporting and monitoring requirements.

(Authority: 20 U.S.C. 1066)

17. A new § 607.25 is added to Subpart C to read as follows:

§ 607.25 What priority does the Secretary use in awarding cooperative arrangement grants?

Among applications for cooperative arrangement grants, the Secretary gives priority to proposed cooperative arrangements that are geographically and economically sound, or will benefit the institutions applying for the grant.

(Authority: 20 U.S.C. 1057, 1069)

18. Section 607.31 is revised to read as follows:

§ 607.31 How does a grantee maintain its eligibility?

(a) A grantee shall maintain its eligibility under the requirements in § 607.2, except for § 607.2(a) (1) and (2), for the duration of the grant period.

(b) The Secretary reviews an institution's application for a continuation award to ensure that—

(1) The institution continues to meet the eligibility requirements described in paragraph (a) of this section; and

(2) The institution is making substantial progress toward achieving the objectives set forth in its grant application including, if applicable, the institution's success in institutionalizing practices and improvements developed under the grant.

(Authority: 20 U.S.C. 1057–1059b, 1066–1069f)

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