DEPARTMENT OF EDUCATION

34 CFR Part 370

RIN 1820–AB16

Client Assistance Program

AGENCY: Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary amends the regulations governing the Client Assistance Program (CAP) to implement changes to the Rehabilitation Act of 1973 (Act) made by the Rehabilitation Act Amendments of 1992 (1992 Amendments), enacted on October 29, 1992, and the Rehabilitation Act Amendments of 1993 (1993 Amendments), enacted on August 11, 1993.

EFFECTIVE DATE: These regulations take effect December 4, 1995.

FOR FURTHER INFORMATION CONTACT: David Ziskind, U.S. Department of Education, 600 Independence Avenue SW., Room 3211, Switzer Building, Washington, DC 20202–2735. Telephone: (202) 205–5474. Individuals who use a telecommunications device for the deaf (TDD) may call the TDD number at (202) 205–9362 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

SUPPLEMENTARY INFORMATION: The CAP is authorized by section 112 of the Act (29 U.S.C. 732). The CAP provides support to States for programs that assist clients and client applicants to secure the benefits and services available to them under the Act.

The final regulations implement changes to section 112 of the Act made by the 1992 and 1993 Amendments (Pub. L. 102–569 and Pub. L. 103–73, respectively), clarify certain program requirements, and make other changes that are needed to increase program effectiveness. More specifically, the final regulations describe the process a Governor is required to use to designate a public or private agency to conduct the CAP authorized by section 112 of the Act (i.e., the designated agency), identify the authorized activities a designated agency is required to carry out under the CAP, and specify the conditions that apply to a State and the designated agency in the operation of its CAP. The final regulations implement the requirement in the 1992 Amendments that CAPs expand the services they provide to include dissemination of information related to Title I of the Americans with Disabilities Act of 1990 (ADA), especially with regard to individuals with disabilities who have traditionally been unserved or underserved by vocational rehabilitation (VR) programs. The final regulations implement the due process requirements added by the 1992 Amendments that apply if a Governor of a State chooses to redesignate the agency designated to conduct the State's CAP. Finally, the final regulations incorporate certain provisions of the Education Department General Administrative Regulations (EDGAR).

This program supports the National Education Goal that, by the year 2000, every adult American, including individuals with disabilities, will possess the knowledge and skills necessary to compete in a global economy and exercise the rights and responsibilities of citizenship.

On October 8, 1993, the Secretary published a notice of proposed rulemaking (NPRM) for this program in the Federal Register (58 FR 52614). The major issues related to this program were discussed in the preamble to the NPRM. In general, the commenters agreed with the NPRM.

Analysis of Comments and Changes

In response to the Secretary's invitation in the NPRM, 90 parties submitted comments on the proposed regulations. An analysis follows of the comments and of the changes in the regulations since publication of the NPRM, including those changes made as a result of the Secretary's further consideration of certain issues for the purpose of reducing burden and increasing flexibility.

The comments have been grouped according to subject, with appropriate sections of the regulations referenced in parentheses. Technical and other minor changes—and suggested changes the Secretary is not legally authorized to make under the applicable statutory authority—are not addressed.

Purpose (§ 370.1(b))

Comments: One commenter recommended changing the term ''facilities'' in proposed § 370.1(b) to ''community rehabilitation programs'' to correspond to changes in the statutory language made by the 1993 Amendments. Several other commenters recommended that the same change be made in proposed § 370.4(a)(2).

Discussion: The Secretary agrees that the term ''facilities'' should be changed to correspond to the change in terminology made by the 1993 Amendments to section 112(a) of the Act.

Changes: The Secretary has changed the terms ''facility'' and ''facilities'' to ''community rehabilitation program'' and ''community rehabilitation programs,'' as appropriate, in §§ 370.1(b), 370.4(a)(3), 370.41(a)(1), and 370.42 in the final regulations.

Eligible Subgrantees (§ 370.2(e))

Comments: The Secretary received 77 comments objecting to proposed § 370.2(e), which prohibits a designated agency from contracting with an entity or individual to provide CAP services if that entity or individual provides services under the Act. Of these 77 commenters, 41 were letters from individuals who had received Client Assistance Program (CAP) services from centers for independent living (centers) in one State, 13 were from centers in that one State, and 14 were from other organizations and agencies in that one State. These commenters believed that centers should be allowed to contract with a designated agency, even though centers provide services under the Act, for a variety of reasons, including the following: housing CAP services in centers is convenient, cost-effective, and promotes maximum access to services for consumers; centers are different from other service providers because a major function of centers is to advocate and to teach individuals how to advocate for themselves; the Rehabilitation Services Administration (RSA) previously approved contracts between a designated agency and centers to provide CAP services in a State; and the prohibition on contracting with service providers in proposed § 370.2(e) has no statutory basis.

Discussion: The Secretary agrees that many clients and client applicants have been served well by centers under contract with a designated agency to provide CAP services. The Secretary also recognizes that one of the major functions of a center is to provide advocacy on behalf of individuals with severe disabilities and that this function distinguishes a center from other providers of services under the Act.

Furthermore, the Secretary acknowledges that, several years ago, RSA advised a designated agency that it was permissible to maintain its contracts with centers. RSA's decision was based on language in section 112(c)(1)(A) of the Act that provides an exemption from the requirement (in that same section of the Act) that a Governor of a State designate as the designated agency an agency that is independent of any agency that provides treatment, services, or rehabilitation to individuals under the Act. This statutory exemption from the ''independence'' requirement in section 112(c)(1)(A) of the Act permits a Governor of a State to designate, in the initial designation (i.e., the first designation by the Governor,

after February 22, 1984, of an agency to carry out the CAP), an agency that provides treatment, services, or rehabilitation to individuals with disabilities under the Act if, at any time prior to February 22, 1984, there had been an agency in the State that had both served as a designated agency and received Federal financial assistance under the Act. Because the centers in question were continuing to carry out the CAP after February 22, 1984, under contracts entered into prior to February 22, 1984, with an agency that had been designated as the State's CAP agency prior to February 22, 1984, RSA permitted the agency designated as the State's CAP agency after February 22, 1984, to continue contracting with centers to provide CAP services. Section 370.2(f) of the final regulations implements this very limited exemption to the independence requirement.

However, the Secretary also believes that, notwithstanding the limited exception for certain contracts with centers, retaining the general prohibition in § 370.2(e) against designated agencies contracting with service providers is in the best interest of the CAP and is consistent with the independence requirement of section 112(c)(1)(A) of the Act. Therefore, the Secretary is strictly limiting this exemption from the independence requirement to the circumstances that formed the basis for RSA's earlier decision to permit a designated agency to contract with centers to provide CAP services.

In addition, pursuant to new § 370.2(g)(1) of the final regulations, the designated agency remains legally responsible for the conduct of a CAP that meets all of the requirements of 34 CFR Part 370. Also, pursuant to new § 370.2(g)(2) of the final regulations, the designated agency remains legally responsible for the proper expenditure of CAP funds and shall exercise proper management of its contract to ensure that CAP funds are used in compliance with the regulations in this part and with the cost principles applicable to the designated agency. Furthermore, new § 370.2(g)(3) of the final regulations requires a designated agency that contracts to carry out the CAP to be directly involved in the day-to-day supervision of the CAP services being carried out by the contractor. This day-to-day supervision must include the direct supervision by designated agency staff of the contractor's employees who are responsible for providing CAP services.

Finally, the Secretary wishes to emphasize that the conflict of interest provisions in § 370.41 (b) and (c) apply if a designated agency contracts to carry out CAP services.

Changes: The Secretary has added a new paragraph § 370.2(f) that will allow a designated agency in a State to enter into a contract for CAP services with a center that provides treatment, services, or rehabilitation to individuals with disabilities under the Act if, on February 22, 1984, a designated agency in the State was contracting with one or more centers to provide CAP services. The Secretary also has added a new § 370.2(g) to the final regulations to reflect the conditions and responsibilities that relate to this limited contracting authority.

Eligibility for Services (§ 370.3)

Comments: One commenter recommended revising proposed § 370.3 to clarify that all individuals with disabilities seeking information about their employment rights under Title I of the ADA, 42 U.S.C. 12101–12213, may receive that information from the designated agency.

Discussion: The Secretary agrees § 370.3 should reflect the revisions to section 112 of the Act made by the 1992 Amendments that authorize the designated agency to provide information to individuals with disabilities, especially those who have traditionally been unserved or underserved by VR programs, about the services and benefits authorized under Title I of the ADA.

Changes: The Secretary has revised § 370.3 in the final regulations to clarify that all individuals with disabilities are eligible to receive information on the services and benefits available to them under Title I of the ADA. In addition, the Secretary has added a new § 370.3(b) to the final regulations to clarify that only clients and client applicants are eligible for CAP services.

Comments: One commenter asked why proposed § 370.3 excludes services under the Protection and Advocacy of Individual Rights (PAIR) program from the types of services provided under the Act that qualify an individual to receive CAP services.

Discussion: Receipt of services under the PAIR program authorized by section 509 of the Act does not entitle an individual to CAP services for several reasons. Both the PAIR program and CAP are programs that provide primarily advocacy services for individuals with disabilities. In addition, the PAIR program provides advocacy services with respect to other rights and benefits provided to individuals with disabilities under other Federal and State statutes.

The phrase ''services under the Act'' in section 112 of the Act was intended to include only direct VR, independent living, supported employment, and other similar rehabilitation services under the Act and was never intended to include the advocacy services provided under the PAIR program. Neither the CAP nor the PAIR program provides direct ''rehabilitation services,'' as that term is traditionally defined, to individuals with disabilities. Therefore, an individual with a disability who applies for or is receiving advocacy services under the PAIR program and is either denied PAIR services or is dissatisfied with PAIR services is not eligible to seek advocacy services under the CAP from the designated agency to address any grievance with the PAIR agency.

Changes: None. However, in response to this comment on proposed § 370.3, the Secretary has added a definition to § 370.6(b) in the final regulations for the term ''services under the Act'' that excludes PAIR services.

Authorized Activities (§ 370.4)

Comments: One commenter suggested that proposed § 370.4(a)(1)(i) be revised to prohibit a designated agency from providing advocacy services to clients whose grievances involve services and benefits available under Title I of the ADA. Two commenters suggested that a designated agency should be permitted to advocate for the individual's rights under Title I of the ADA. Two other commenters stated that proposed § 370.4(b) is confusing and suggested that this provision be reworded.

Discussion: An individual who needs or is seeking assistance and advocacy services to assert his or her rights under Title I of the ADA and who is also a client or client applicant under the Act may receive advocacy services from the designated agency with respect to his or her claims under Title I of the ADA, if the assistance and advocacy under Title I of the ADA are directly related to services that the client or client applicant is seeking or receiving under the Act. Example: Under an individual written rehabilitation program developed pursuant to Title I of the Act, a State VR agency is assisting a client who must use a wheelchair to obtain employment with Employer Y. However, Employer Y refuses to make the company's entrance accessible to wheelchairs. A designated agency would be able to undertake advocacy under Title I of the ADA on behalf of that client to argue that Employer Y is required to make the company's entrance accessible to wheelchairs.

Nothing in the revisions made to section 112 of the Act or in the legislative history of those revisions indicates that a designated agency may advocate for an individual whose grievances involve only rights, services, and benefits available under Title I of the ADA, but whose grievances are not related to services under the Act. However, the Secretary does wish to point out that an individual whose grievances involve only rights, services, and benefits available under Title I of the ADA may be eligible to obtain advocacy services to pursue those rights, services, and benefits from an eligible agency under the PAIR program.

Changes: The Secretary has revised § 370.4 (a) and (b) in the final regulations to clarify that the designated agency may provide assistance and advocacy services to a client or client applicant with respect to the individual's claims under Title I of the ADA, if those claims under Title I of the ADA are directly related to services under the Act that the individual is receiving or seeking.

Comments: Several commenters suggested that proposed § 370.4(a)(2) be revised to give the designated agency discretion to deny an individual's request for advocacy services if the individual's case is without merit.

Discussion: Nothing in the Act or these regulations either requires the designated agency to accept frivolous cases on behalf of individuals or takes away a designated agency's discretion to deny an individual's request for advocacy services if the designated agency determines that an individual's complaint has no merit. Therefore, the Secretary does not believe a change is necessary. However, a designated agency must accept all meritorious requests for advocacy services to the extent that resources are available.

Changes: None.

Comments: Three commenters suggested changing the word ''exiting'' to ''transitioning'' in proposed § 370.4(a)(2)(ii) to reflect the Act's requirement that State VR and educational agencies work together to provide transitional services for students with disabilities leaving secondary school programs.

Discussion: The Secretary agrees that referring to an individual's ''transition'' from public school programs to services under the Act is more appropriate and more accurately reflects the requirements in sections 101(a)(24) and 103(a)(14) of the Act that State VR agencies work with education officials to plan for and provide ''transitional'' services to students with disabilities leaving public school programs.

Changes: The Secretary has replaced the word ''exiting'' with the phrase ''making the transition from'' in § 370.4(a)(3)(ii) in the final regulations.

[Note: Proposed § 370.4(a)(2)(ii) has been redesignated § 370.4(a)(3)(ii) in the final regulations.]

Definitions (§ 370.6(b))

Advocacy

Comments: One commenter felt that the proposed term ''systemic advocacy'' should be more clearly defined.

Discussion: The Secretary believes that the definition of ''systems (or systemic) advocacy'' in § 370.6(b) is adequate.

Changes: None.

Comments: One commenter recommended revising the proposed definition of advocacy because non-lawyer staff in the designated agency typically represent clients at formal administrative hearings conducted by State VR agencies.

Discussion: The Secretary acknowledges that some State agencies permit non-lawyers, as well as lawyers, to represent individuals in formal administrative proceedings, as well as in informal administrative proceedings. The definition of advocacy in § 370.6(b) in the final regulations is not intended to supersede applicable State law or State agency rules that may permit non-lawyers, as well as lawyers, to engage in advocacy on behalf of another individual. Because the definition of ''advocacy'' in the final regulations does not preclude non-lawyers from representing clients or client applicants if State law or State agency rules permit, the Secretary does not believe any revision is necessary to allow this practice.

Changes: None.

Class Action

Comments: One commenter stated that the proposed definition of ''class action'' was unnecessary because the term is defined in the Federal Rules of Civil Procedure (FRCP).

Discussion: The Secretary acknowledges that FRCP prescribes the requirements for class actions in the courts of the United States. These or similar rules establishing requirements for class actions have been adopted by many States. However, to help distinguish between the terms ''class action'' and ''systemic advocacy'' as used in these regulations, the Secretary believes the definition of ''class action'' should be clarified.

For purposes of the CAP, engaging in ''systems (or systemic) advocacy'' on behalf of a group or class of individuals is permissible, if the ''systems (or systemic) advocacy'' does not include filing a formal ''class action,'' which is specifically prohibited by section 112(d) of the Act, in a Federal or State court.

Changes: The Secretary has added language to the definition of ''class action'' in § 370.6(b) in the final regulations that excludes ''systemic advocacy,'' if the ''systems (or systemic) advocacy'' does not include filing a formal ''class action'' in a Federal or State court.

Client or Client Applicant

Comments: Eight commenters noted that it was unclear whether the proposed definition of the terms ''client'' and ''client applicant'' apply to the designated agency's clients and client applicants or to clients and client applicants under the Act. Several of these commenters also observed that excluding from the proposed definition of ''client or client applicant'' those individuals who receive only information and referral services adds to the confusion.

Discussion: The Secretary agrees that these regulations should clarify that the terms ''client'' and ''client applicant'' refer only to those individuals who are receiving or seeking services under the Act, respectively.

Changes: The Secretary has revised the definition of ''client or client applicant'' in § 370.6(b) in the final regulations to clarify that these terms refer only to individuals who are receiving or seeking services under the Act, respectively.

Mediation

Comments: Some commenters objected to the requirement, included in the proposed definition of mediation, that a designated agency shall obtain the services of an independent third party if the designated agency chooses to use mediation to resolve a dispute between a client or client applicant and a service provider. These commenters objected because the proposed requirement is contrary to the current practice at a number of CAPs and obtaining the services of third party mediators would be costly and burdensome.

Discussion: The Secretary recognizes that hiring independent third parties to act as mediators would be more expensive than using in-house staff who have been trained in the art of mediation, which is the current practice at many designated agencies and which was permitted by the former CAP regulations. Therefore, the Secretary believes that a designated agency should be allowed to continue using its employees as mediators in those cases

in which the designated agency relies on mediation to resolve a dispute between a client or client applicant and a service provider. However, if a designated agency uses any of its employees as mediators, an individual employee of the designated agency may not assume, at one point in time, the role of advocate for a client or client applicant and, at another point in time, the role of a mediator in the same or other dispute involving that client or client applicant.

In addition, if a designated agency does not use one of its own employees as a mediator, it shall use a professional mediator or other independent third party mutually agreed to by the parties to the dispute. As a practical matter, allowing a designated agency to assign one of its employees to act as a mediator in a dispute between a client or client applicant and a service provider means that the designated agency will have to assign another employee to act as an advocate for the client or client applicant in that dispute. Otherwise, the existence of the conflict of interest that will arise from the same employee acting as both an advocate and the mediator will prevent the designated agency from fulfilling its statutory mandate to provide advocacy services for the client or client applicant.

Although the definition of ''mediation'' in the final regulations does not include an exemption for an employee of a designated agency to act as a mediator, the Secretary believes that this exemption is better placed in § 370.43 of the final regulations. The Secretary also believes the definition of ''mediation'' for the CAP should be consistent with the definition of ''mediation'' found in the final PAIR regulations (34 CFR 381.5(b)).

Changes: The Secretary has revised the definition of ''mediation'' in § 370.6(b) in the final regulations to be consistent with the definition of ''mediation'' in the regulations published for the PAIR program. The Secretary also has added language to § 370.43 to permit an employee of a designated agency to serve as a mediator as long as that employee has not been and is not advocating on behalf of the client or client applicant who is a party to the mediation and is not involved in representing or assigned to represent that same client or client applicant.

Comments: Some commenters objected to the proposed definition of mediation because they do not believe it has a statutory basis. These commenters also argued that a designated agency should be allowed to listen to both sides of a dispute, conduct an investigation of the facts, and attempt mediation before ''taking the stance of a negotiator.'' Other commenters stated that a designated agency can provide mediation and negotiation to resolve a client's problem. One commenter argued that the proposed definition of mediation would force designated agencies to always assume the position of negotiator.

Discussion: Section 112(g)(3) of the Act states, in relevant part, as follows:

> The Secretary shall *prescribe regulations* applicable to the client assistance program which shall include the following requirements:
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> * * * * *
>
> (3) Each program shall contain provisions designed to assure that to the maximum extent possible *mediation* procedures are used prior to resorting to administrative or legal remedies.

29 U.S.C. 732(g)(3) (emphases added). Clearly, the Secretary has statutory authority to define mediation by regulations and to regulate on its use by designated agencies. In addition, the Secretary believes that the comments received on the proposed definition of ''mediation'' indicate a misunderstanding of the difference between ''mediation'' and ''advocacy'' and a designated agency's responsibilities to clients and client applicants.

As defined in these regulations, advocacy means to plead an individual's cause or to speak or write in support of an individual. A designated agency is charged under section 112(a) of the Act with advocating the best interests of the client or client applicant, whether those interests are advocated during negotiations, mediation, administrative proceedings, litigation, or any other circumstances.

The role of a mediator, on the other hand, is to be an independent third party who listens objectively to both sides of a dispute between the client or client applicant and the service provider. A mediator is not supposed to take sides.

Therefore, the Secretary believes that the roles of advocate and mediator are mutually exclusive and that an individual employee of the designated agency may not assume both roles at the same time in any dispute involving the same client or client applicant, nor assume the role of advocate at one point in time and the role of mediator at another point in time in different disputes involving the same client.

The Secretary believes that allowing a designated agency to use one of its employees as an advocate for a particular client or client applicant and another of its employees as a mediator is consistent with a designated agency's statutory purpose and allows a designated agency maximum flexibility. In addition, the Secretary believes that restricting individual employees of the designated agency to only one of these two roles with respect to any one individual client or client applicant provides the necessary protection to ensure that a client or client applicant receives the advocacy to which he or she is entitled.

Changes: The same changes made in response to the previous comment on the definition of mediation apply to this comment.

Accessibility (§ 370.7) (New)

Comments: One commenter suggested that the designated agency be required to ensure that communications are provided in accessible formats.

Discussion: The Secretary agrees that the designated agency must provide the CAP services described in § 370.4 in formats that are accessible to clients or client applicants who seek or receive CAP services.

Changes: The Secretary has added to the final regulations a new § 370.7 that requires a designated agency to provide CAP services in accessible formats.

Applicability of Redesignation Requirements (§§ 370.10 Through 370.17) to Contracts

Comments: Four commenters objected to the language in proposed § 370.10(b), which applies the redesignation requirements in proposed §§ 370.10 through 370.17 to a designated agency's decision to cancel or not renew a contract between the designated agency and an entity actually carrying out the CAP. These commenters argued that only an actual redesignation of the agency designated by the Governor of the State to carry out the State's CAP is subject to the redesignation provision in section 112(c)(1)(B) of the Act.

Discussion: The Secretary does not agree with the commenters. The intent of section 112(c)(1)(B) of the Act is to protect a designated agency from retaliation for pursuing complaints against agencies that provide services under the Act, particularly those service providers that are State agencies. In several States, the designated agency contracts with other entities or individuals to carry out all or part of its responsibilities under the CAP. If section 112(c)(1)(B) of the Act is not made applicable to contracts between a designated agency and those entities or individuals with which it contracts, the designated agency (particularly if it is a State agency) may decide to terminate its CAP contract because the contractor

is pursuing too many complaints against State agencies that are service providers under the Act. Therefore, the Secretary believes that section 112(c)(1)(B) of the Act should be made applicable to contracts between a designated agency and those entities or individuals with which it contracts to carry out all or part of its responsibilities under the CAP.

However, the Secretary believes that a designated agency that fails to renew a contract simply because it is complying with State procurement laws requiring contracts to be awarded through a competitive bidding process meets the requirement to show good cause. In addition, the Secretary believes clients and client applicants, individuals with disabilities, and the public will be served best if a designated agency that plans to issue a request for proposal pursuant to State procurement laws holds a public hearing to allow interested parties to comment on the proposed contract.

Changes: The Secretary has revised § 370.10(b) in the final regulations to clarify its meaning. The Secretary also has deleted proposed § 370.10(c) because it is unnecessary and has added a new § 370.10(c). New § 370.10(c) establishes a rebuttable presumption of ''good cause for redesignation'' if a designated agency does not renew a contract for CAP services because it is following State procurement laws that require contracts to be awarded only through a competitive bidding process. Additionally, new § 370.10(d) requires a designated agency that follows State competitive procurement laws to hold public hearings on the request for proposal before awarding the new contract. Finally, the Secretary has added the State Rehabilitation Advisory Council (as established under section 105 of the Act) and the State Independent Living Council (as established under section 705 of the Act) to the parties that must receive notice pursuant to § 370.11 of the final regulations.

Comments: Two commenters recommended adding further requirements to the redesignation provisions in proposed §§ 370.10 through 370.17 so that equipment and case and fiscal records are transferred and the new CAP agency is operational within a designated timeframe. Another commenter suggested adding language to the redesignation requirements to ensure that consumers experience no delay in access to CAP services if a State's CAP agency is redesignated.

Discussion: The Secretary believes that the Governor of a State will take whatever steps are necessary to minimize the possibility of any delay in access to CAP services if a State's CAP agency is redesignated and to ensure that the interests of client and client applicants will be adequately protected during any redesignation.

Changes: None.

Comments: One commenter suggested revising the assurance required by proposed § 370.20(b)(1) concerning the designated agency's authority to pursue legal, administrative, and other remedies because the proposed assurance is applicable only to those individuals who are receiving services under the Act and not to those individuals seeking services under the Act.

Discussion: The Secretary did not intend to exclude those individuals who are seeking services under the Act but who have not yet begun receiving services under the Act from the protection provided by the assurance required by proposed § 370.20(b)(1).

Changes: The Secretary has revised the assurance required by § 370.20(b)(1) in the final regulations to include both clients and client applicants.

Allocation of Funds (§ 370.30)

Comments: Three commenters suggested that the minimum allotments described in proposed § 370.30 are incorrect and should reflect the amount of the current appropriation.

Discussion: The Secretary notes that proposed § 370.30 parallels the statutory language in section 112(e)(1) of the Act and provides that, if section 112(e)(1)(D) of the Act applies, the minimum allotment to each State will be increased. However, the Secretary recognizes that the effect of this provision can be clarified.

Changes: The Secretary has added language to § 370.30 in the final regulations to clarify that the minimum allotment to each State will be increased if Congress increases the appropriation for the CAP as provided under section 112(e)(1)(D) of the Act.

Allowable Costs (§ 370.40)

Comments: None.

Discussion: Upon further review of proposed § 370.40(e), 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 Department programs and that no rationale exists for treating the CAP differently.

Changes: The Secretary has deleted proposed § 370.40(e).

Conflict of Interest (§ 370.41)

Comments: Six commenters requested clarification of proposed § 370.41, which prohibits employees of State agencies (who also may be CAP employees) from serving in any capacity in any other project, program, or community rehabilitation program under the Act. Two of these commenters suggested revising this section to prohibit any employee of the State VR agency, a center, or any other program funded under the Act, from serving on a CAP board of directors or otherwise occupying a position with authority to make personnel or management decisions for the CAP. Another commenter stated that this section is confusing because the Act mandates CAP participation on ''Rehabilitation Agency Advisory Boards.''

Discussion: The Secretary believes that a conflict of interest exists if an employee of the designated agency serves in any capacity that could jeopardize or give the appearance of jeopardizing the independence of the designated agency. However, the Secretary recognizes that an employee of a designated agency who carries out CAP duties and responsibilities may be employed either by a State VR agency (or another agency that provides services under the Act) that has been ''grandfathered'' (i.e., not subject to the ''independence'' requirement) pursuant to section 112(c)(1)(A) of the Act, or by a center under contract with a designated agency pursuant to new § 370.2(f) of the final regulations. To avoid creating the conflict of interest that may arise under these and other circumstances, § 370.41(a) of the final regulations clarifies that employees of a State VR agency, or another agency that provides services under the Act, as well as all other employees of the designated agency, may not (1) serve concurrently in any position with a rehabilitation project, program, or community service program receiving assistance under the Act; or (2) provide any services under the Act other than CAP and PAIR services. This prohibition does not prevent employees of the designated agency from providing CAP services and (1) receiving a traineeship under section 302 of the Act; (2) representing the designated agency on a board or council, if designated agency participation on the board or council is specifically permitted or mandated by the Act; and (3) consulting with policymaking and administrative personnel in the State and with rehabilitation projects, programs, or community rehabilitation programs.

Changes: The Secretary has revised § 370.41 in the final regulations to clarify that employees of a designated agency, of a center, or of entities or individuals with which a designated agency contracts to carry out any duties

or responsibilities under the CAP, are limited in the roles they may undertake in addition to their CAP duties and responsibilities.

Access to Policymakers (§ 370.42)

Comments: Three commenters suggested changing the word ''may'' in the second sentence of proposed § 370.42 to ''shall'' or ''should'' to parallel statutory language in sections 101(a) (18) and (23) of the Act, which require that the designated State VR agency consult the director of the CAP on policy matters related to the provision of VR services under the State VR plan. Four commenters suggested adding the words ''or his or her designee'' after the phrase ''CAP director,'' or otherwise revising this section to clarify that, in those cases in which the director of the designated agency is not the person in charge of day-to-day operations of the CAP, the person who actually runs the CAP should be consulted.

Discussion: The Secretary notes that the first sentence of § 370.42 is nearly identical to section 112(g)(2) of the Act and includes the mandatory word ''must'' to require that the designated agency be afforded access to policymaking and administrative personnel in State and local rehabilitation programs, projects, or community rehabilitation programs. However, the permissive ''may'' is used in the second sentence of § 370.42 to suggest one of several ways that the designated agency could be provided access. Each State can decide how to implement § 370.42, and the Secretary expects that a variety of mechanisms may be established. The Secretary believes that States will comply fully with the spirit of section 112(g)(2) of the Act and that § 370.42 gives the States maximum flexibility in meeting this requirement. Therefore, the Secretary believes that the current wording is appropriate.

Changes: None.

Use of Mediation (§ 370.43)

Comments: Two commenters suggested changing the word ''and'' to ''or'' in proposed § 370.43(a) to clarify that the designated agency need not provide both good faith negotiations and mediation on behalf of clients or client applicants. One commenter suggested modifying the proposed definition to conform to the comparable provision for the PAIR program in 34 CFR 381.10(a)(9) to clarify that the designated agency need not use mediation if the designated agency determines that mediation is not appropriate in a particular case.

Discussion: Section 112(g)(3) of the Act requires a designated agency to use mediation to the maximum extent possible before resorting to administrative or legal remedies. In addition, section 2(a)(2) of the Executive Order on Civil Justice Reform, E.O. 12778 (January 21, 1991), requires that all Federal regulations ''be written to minimize needless litigation.'' Requiring a designated agency to engage in good faith negotiations and mediation, to the maximum extent possible, before the designated agency may resort to formal administrative or legal remedies is consistent with both section 112(g)(3) of the Act and E.O. 12778.

However, whether mediation is appropriate in a particular case depends on the circumstances of the case, including the issues raised and applicable legal deadlines and State administrative requirements. For example, mediation in a specific situation may not be required before the designated agency may resort to formal administrative or legal remedies if a statutory, regulatory, or other legal deadline precludes mediation as impractical, or if mediation is otherwise determined to be inappropriate under the circumstances of that particular case. The statutory mandate to use mediation to the maximum extent possible permits a case-by-case determination of the appropriateness of mediation and does not establish an inflexible requirement that mediation be used in all cases.

If a designated agency does not have sufficient resources both to advocate for its clients and to obtain an independent mediator to assist in resolving a dispute, it is not required to use mediation. Under those circumstances, a designated agency should make full use of the negotiations process.

Changes: The Secretary has added language to § 370.43 that permits a designated agency to take into account the extent of its resources in deciding whether or not to engage in mediation in a particular case. The Secretary also has added a new paragraph (b) to § 370.43 that clarifies when a designated agency may use its employees to conduct mediation. See the earlier discussion of this issue in the discussion of the definition of ''mediation.''

Comments: Five commenters recommended revising proposed § 370.43 to include consideration of client choice in the decision to engage in mediation.

Discussion: Although the 1992 Amendments introduced a new level of client choice to programs funded under the Act, the requirement in section 112(g)(3) that designated agencies use mediation to the maximum extent possible remained unchanged and is not subject to client choice.

Changes: None.

Comments: One commenter expressed concern that a designated agency will not have to account for the proper expenditure of CAP funds because proposed § 370.43 does not require a designated agency to maintain records that will support its decision to engage in formal administrative or legal remedies.

Discussion: A State must include in its application for assistance under the CAP the general assurance required by § 370.20(c)(2) that a designated agency will meet the requirements in these regulations. The specific assurance that a designated agency will implement procedures to ensure that mediation is used to the maximum extent possible before formal administrative or legal remedies are undertaken is implicit in the general assurance required by § 370.20(c)(2). Therefore, the Secretary is satisfied that designated agencies will maintain sufficient documentation to support their obligation to engage in mediation to the maximum extent possible before engaging in formal administrative or legal remedies on behalf of clients or client applicants.

Changes: None.

Annual Reports (§ 370.44)

Comments: Seven commenters suggested that the proposed definitions of ''requests for assistance'' and ''requests for assistance that the designated agency was unable to serve'' in § 370.44 be clarified and questioned whether this section applies to ''requests for information and referrals.'' Three of these commenters recommended changes that would require a designated agency to identify more specifically why it was unable to serve a particular request for assistance. One of these commenters suggested that this section be revised to require a designated agency to include in its annual report information on (1) how many individuals were denied the range of CAP services that those individuals felt they were entitled to receive from the designated agency, and (2) the reasons that these requests for CAP services were denied. Two of these commenters suggested that this section also be revised to require a designated agency to include in its annual report information about specific groups or classes of individuals with disabilities who were unserved or underserved by the designated agency and the reasons (e.g., lack of CAP resources, language barriers, factors related to disability, or

ineligibility) that these groups or classes were not served appropriately.

Discussion: The Secretary notes that section 112(g)(5) of the Act requires a designated agency to include in its annual report information on (1) the number of ''requests the [CAP] * * * receives annually'' and ''requests [the CAP] is unable to serve''; and (2) the reasons that the [CAP] is unable to serve all the requests.'' These requests include requests for information and referral. The Secretary also recognizes that a designated agency may be unable to provide advocacy services to some individuals who request assistance under the CAP. The Secretary believes Congress intended that a designated agency identify in its annual report only those requests for advocacy services that a designated agency is unable to serve. In providing the reasons why it was unable to serve requests for advocacy services, § 370.44 of the final regulations requires the designated agency to provide a summary of the reasons why the cases were closed before resolution. The Secretary also agrees with the commenters who suggested that the regulations should include more specific requirements for the types of cases that the designated agency should include in its annual report.

Changes: The Secretary has revised § 370.44 in the final regulations to clarify that ''requests for assistance'' include ''requests for information and referral'' and that ''requests for assistance that the designated agency was unable to serve'' means requests for advocacy services that the designated agency was unable to serve. Specifically, the Secretary has revised § 370.44 in the final regulations to clarify that designated agencies are required to report on (1) the number of requests received by the designated agency for information on services and benefits under the Act and Title I of the ADA; (2) the number of referrals to other agencies made by the designated agency and the reason or reasons for those referrals; (3) the number of requests for advocacy services received by the designated agency for assistance from clients or client applicants; (4) the number of the requests for advocacy services that the designated agency was unable to serve; and (5) the reasons that the designated agency was unable to serve all of the requests for advocacy services.

Comments: One commenter recommended deleting the requirement in proposed § 370.44(d) that the annual report contain ''any other information that the Secretary may require'' because it is too open-ended. Five commenters suggested modifying this proposed requirement to indicate that the Secretary must communicate any new reporting requirements prior to the beginning of the fiscal year for which that information is requested.

Discussion: The Secretary will make every effort to provide reasonable notice before new requirements take effect. Nonetheless, the Secretary must have the ability to respond to unforeseen circumstances and changes.

Changes: None.

Protection, Use, and Release of Personal Information (§ 370.48)

Comments: One commenter suggested deleting the phrase ''parent, or other legally authorized representative or advocate'' from proposed § 370.48(b) because the release of information by these individuals is not allowed under the Federal Fair Information Practices Act, 5 U.S.C. 552a, and other Federal and State statutes.

Discussion: Nothing in § 370.48 is intended to supersede any other Federal law that may restrict or expand an individual's right to control his or her personal information or that restricts another individual's ability to act on behalf of someone else. The statutory provision referred to by the commenter in 5 U.S.C. 552a applies to the disclosure of personal information by Federal agencies, not to the power given through a valid legal instrument to any individual (e.g., a parent, legal guardian, or attorney) to consent, on behalf of another person, to the release of personal information about that other person. Therefore, section 552a is not relevant to § 370.48(b).

Changes: The Secretary has added the word ''legal'' in front of the word ''guardian'' to § 370.48(b) in the final regulations to stress that only those individuals who have been given legal authority to act on behalf of an individual may do so.

Comments: One commenter suggested revising proposed § 370.48(c) to prevent State VR agency directors from obtaining client information from designated agencies that are not subject to the independence requirement in section 112(c)(1)(A) of the Act.

Discussion: The Secretary believes that the limitations on the unauthorized use of personal information described in § 370.48(b) will prevent the disclosure of personal information to unauthorized persons or for unauthorized purposes under § 370.48(c). Section 370.48(b) requires the designated agency to use personally identifiable information only for those purposes directly connected with the CAP. The files of a client or client applicant that are maintained by a designated agency are presumptively confidential and subject only to the exceptions listed in § 370.48(c) through (e). Therefore, the State VR agency director may not use his or her authority under § 370.48(c) to gain access to files containing personal information about requests for assistance under the CAP, unless it is for a purpose directly connected to the CAP or is otherwise subject to the exceptions in § 370.48(c) through (e).

Changes: None.

Comments: Two commenters recommended that ''substantial'' evidence should be required before the Secretary may obtain access to personal information pursuant to proposed § 370.48(e). Two other commenters suggested that the Secretary should be permitted to request only personal information that is reasonably likely to lead to relevant evidence of the designated agency's alleged wrongdoing.

Discussion: The Secretary fully appreciates a designated agency's desire to protect the confidentiality of personal information about clients and client applicants. However, in a similar program, Congress recognized the need for the Secretary to have access to personal information if there is probable cause to believe a recipient of Federal funds has violated its legislative mandate or misused Federal funds. See H. Rep. No. 102–822, 102d Cong., 2d Sess. 123 (1992). Therefore, if an audit, evaluation, monitoring review, State plan assurance review, or other investigation produces reliable evidence that there is probable cause to believe that the designated agency has violated its legislative mandate or misused Federal funds, or if the Secretary determines the personal information that is sought may reasonably lead to further evidence that is directly related to alleged misconduct of the designated agency, § 370.48(e) of the final regulations permits the Secretary to gain access to personal information of the designated agency's clients or client applicants. The Secretary believes the limited access to the identity of, or any other personally identifiable information related to, any individual requesting assistance under the CAP that is given to the Secretary by § 370.48(e) is fully consistent with section 112(g)(6) of the Act.

Changes: The Secretary has revised § 370.48(e) in the final regulations to clarify the Secretary's access to personal information. If an audit, evaluation, monitoring review, State plan assurance review, or other investigation produces reliable evidence that there is probable cause to believe that the designated agency has violated its legislative

mandate or misused Federal funds, or the Secretary determines that specific and limited personal information may reasonably lead to further evidence that is directly related to alleged misconduct of the designated agency, § 370.48(e) grants the Secretary access to that personal information of individuals who have received or sought services from the designated agency.

Comments: One commenter suggested deleting proposed § 370.48(f), which provides that the right of a person or designated agency not to produce documents or disclose information is governed by the common law of privileges, as interpreted by the courts of the United States. This commenter believes proposed § 370.48(f) creates, without any statutory authority, a two-tier system in which clients of a designated agency would not receive the same protection of confidentiality when asserting their attorney-client privilege as individuals who retain private counsel. Two other commenters suggested deleting proposed § 370.48(f) because they believe there is no body of Federal common law applicable to the law of privileges and the current wording appears to exclude consideration of other Federal or State protections that may apply. These two commenters also stated that the common law of privileges in the Federal courts was replaced years ago by the Federal Rules of Evidence.

Discussion: Section 370.48(f) of the final regulations provides that the Secretary's access to the identity of, or any other personally identifying information (i.e., name, address, telephone number, social security number, or any other official code or number by which an individual may be readily identified) related to, any individual requesting assistance under the CAP is governed by the common law of privileges, as interpreted by the courts of the United States. Section 370.48(f) is consistent with Rule 501 of the Federal Rules of Evidence (FRE), which govern proceedings in the courts of the United States that raise a Federal question and is, in effect, identical to § 81.17 of 34 CFR Part 81, which governs proceedings before the Office of Administrative Law Judges of the Department of Education concerning the enforcement of legal requirements under applicable Department programs.

Rule 501 of the FRE reads, in relevant part, as follows:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State or political subdivision thereof shall be governed by the *principles of the common law as they may be interpreted by the courts of the United States* in the light of reason and experience.

28 U.S.C. Appendix–FRE 501 (emphasis added). In a case that raises a Federal question, the language of Rule 501 clearly provides that questions of evidentiary privileges are governed by Federal common law. *U.S.* v. *Zolin*, 491 U.S. 554, 562, 109 S.Ct. 2619, 2625 (1989); *Tornay* v. *U.S.*, 840 F.2d 1424, 1426 (9th Cir. 1988). More specifically, if a case raises a Federal question, Rule 501 applies to cases that raise the attorney-client privilege as a bar to disclosure of information. *U.S.* v. *Goldberger and Dubin, P.C., et al.*, 935 F.2d 501, 505 (2d Cir. 1991). State laws governing the protection of attorney-client confidences and secrets when a Federal agency seeks disclosure of those confidences pursuant to the Federal agency's statutory or regulatory authority would not be relevant. *U.S.* v. *Goldberger*, supra; *Dole* v. *Milonas*, 889 F.2d 885, 889 (9th Cir. 1989); *U.S.* v. *Hodge and Zweig*, 548 F.2d 1347, 1352 (9th Cir. 1977). Nor does Rule 501 distinguish between a party or witness who is represented by private counsel or by counsel provided under a Federal program such as the CAP.

A dispute between the Secretary and a designated agency concerning the designated agency's proper expenditure of CAP funds raises a ''Federal question'' (i.e., a case in which a question of law arises under the Constitution of the United States, a Federal statute, or Federal regulations) because the dispute would involve a question under the Act and the CAP regulations. In addition, the issue of the Secretary's access to personal information that is relevant to the designated agency's proper expenditure of CAP funds would be part of that Federal question. Therefore, pursuant to § 370.48(f), which applies the principle of Rule 501 to these circumstances, the Secretary's access to personal information is governed by the Federal common law of privileges.

The Secretary understands a designated agency's legitimate concern of maintaining the sanctity of the attorney-client privilege created by the relationship between a designated agency's attorneys and individuals who come to the designated agency seeking CAP services. The Secretary also understands a designated agency's legitimate concern that individuals who come to the designated agency seeking CAP services should enjoy the same privileges as those individuals who seek private counsel. However, in any Federal question case in which the Federal government is a party, a party or witness who is represented by private counsel is subject to Rule 501. Nothing in § 370.48(f) of the final regulations changes this or limits or expands the applicability of the common law of privileges, as interpreted by the courts of the United States, to the Secretary's access to the identity of, or any other personally identifiable information related to, any individual requesting assistance under the CAP. Therefore, clients of a designated agency will receive the same protection of confidentiality when asserting their attorney-client privilege as individuals who retain private counsel.

As a final note, the FRE became effective for cases in Federal courts on July 1, 1975.

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 these programs 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. A further discussion of the potential costs and benefits of these proposed regulations is contained in the summary at the end of this section of the preamble.

The Secretary also has determined that this regulatory action does not unduly interfere with State, local, and tribal governments in the exercise of their governmental functions.

Summary of Potential Costs and Benefits of Regulatory Provisions Discussed Earlier in This Preamble

The following are the provisions of these regulations that may add significant cost or impose significant burden on the States under this program:

Eligible Subgrantees (§ 370.2(e))

This provision in the final regulations allows designated agencies to contract to carry out part or all of the State's CAP, but does not permit a designated agency to contract with or subgrant with entities or individuals that provide services under the Act, other than centers. This provision could result in

some disruption for those designated agencies that have contracted with service providers other than centers. However, the need to prevent the conflict of interest that results if an entity attempts to advocate for an individual who feels aggrieved by that same entity outweighs the disruption that will occur for those designated agencies engaged in this practice.

Definitions (§ 370.6(b))—Mediation

The definition of ''mediation'' in § 370.6(b) and the requirements in § 370.43 of the final regulations clarify the relationship between advocacy and mediation and are designed to ensure compliance with section 112(g)(3) of the Act. Paragraph (b) of § 370.43 allows designated agencies to use their employees as mediators under limited circumstances.

Public comment on the NPRM demonstrated great confusion and misunderstanding about the meaning of ''mediation,'' which section 112(g)(3) of the Act requires designated agencies to engage in to the maximum extent possible before resorting to administrative or legal remedies. The interpretation of the term ''mediation'' by many designated agencies is inconsistent with any lay or legal definition of ''mediation.'' Part of the confusion and misunderstanding has resulted from the lack of understanding of the difference between ''advocacy'' and ''mediation.'' This confusion and misunderstanding has been aggravated by ambiguities in the current regulatory definition of ''mediation.'' See 34 CFR 370.43(b). Public comment also indicated that the confusion and misunderstanding about the meaning of ''mediation'' has frequently resulted in clients and client applicants receiving less than the full ''advocacy'' to which they are entitled from designated agencies.

Because of the flexibility given in § 370.43(b) to designated agencies to use their employees as mediators under certain conditions and because § 370.43(a) allows designated agencies to consider their resources in determining whether to engage in mediation, the definition of ''mediation'' and the requirements in these provisions should add little, if any, cost to the operation of a State's CAP. The benefit to clients and client applicants of having advocates who will advocate only for them and who will not also attempt to be neutral third parties in their disputes with service providers far outweighs the minimal cost to the designated agencies.

Applicability of Redesignation Requirements (§§ 370.10 Through 370.17) to Contracts

These provisions in the final regulations extend the protections of section 112(c)(1)(B) of the Act (concerning the redesignation of a designated agency by the Governor of a State) to a designated agency's decision to cancel or not renew a contract with another entity or individual to carry out or operate part or all of a State's CAP. As discussed earlier, designated agencies in several States contract with centers, individuals, and other entities to carry out or operate part or all of a State's CAP.

These provisions have been written with the minimum prescription necessary. For example, a designated agency is presumed to have good cause if it follows State procurement laws that require competitive bidding to renew a contract.

The costs of requiring designated agencies to comply with the redesignation requirements if they decide to cancel or not renew a contract are outweighed by the need to extend to contractors the same protection that section 112(c)(1)(B) provides to a designated agency from improper redesignation by the Governor of the State. This protection of a contractor's independence will help to ensure that clients and client applicants receive effective advocacy.

Conflict of Interest (§ 370.41)

The effect of the conflict of interest provision is similar to that of the provisions concerning ''mediation'' in the final regulations. The exception on contracting with service providers in § 370.2(e) of the final regulations and the ''grandfather'' clause in section 112(c)(1)(A) of the Act (permitting an agency of the State that provides services under the Act to operate a State's CAP under certain conditions) create a potential conflict of interest for those employees of centers and State agencies that operate a State's CAP who are assigned to work on the CAP.

In the same manner that the Secretary does not believe the same individual may act both as a mediator and an advocate, the Secretary does not believe an employee may serve two employers at the same time, especially if the two employers have conflicting interests. An employee who is paid by a service provider and whose job security is determined by the service provider has an inherent conflict of interest in advocating on behalf of a client or client applicant against the service provider. The cost of prohibiting this conflict of interest is far outweighed by the need to provide effective advocacy for clients and client applicants who are dissatisfied with the actions of a service provider.

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 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 Part 370

Administrative practice and procedure, Education, Client assistance, Grant program—education, Grant program—social programs, Reporting and recordkeeping requirements, vocational rehabilitation.

(Catalog of Federal Domestic Assistance Number 84.161, Client Assistance Program)

Dated: August 4,1995.

Howard R. Moses,

Acting Assistant Secretary for Special Education and Rehabilitative Services.

The Secretary amends Title 34 of the Code of Federal Regulations by revising Part 370 to read as follows:

PART 370—CLIENT ASSISTANCE PROGRAM

Subpart A—General

Sec.

370.1 What is the Client Assistance Program (CAP)?
370.2 Who is eligible for an award?
370.3 Who is eligible for services and information under the CAP?
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Subpart B—What Requirements Apply to Redesignation?

370.10 When do the requirements for redesignation apply?
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Subpart C—How Does a State Apply For a Grant?

370.20 What must be included in a request for a grant?

Subpart D—How Does the Secretary Allocate and Reallocate Funds to a State?

370.30 How does the Secretary allocate funds?
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Subpart E—What Post-Award Conditions Must Be Met by a Designated Agency?

370.40 What are allowable costs?
370.41 What conflict of interest provision applies to employees of a designated agency?
370.42 What access must the CAP be afforded to policymaking and administrative personnel?
370.43 What requirement applies to the use of mediation procedures?
370.44 What reporting requirement applies to each designated agency?
370.45 What limitation applies to the pursuit of legal remedies?
370.46 What consultation requirement applies to a Governor of a State?
370.47 When must grant funds be obligated?
370.48 What are the special requirements pertaining to the protection, use, and release of personal information?

Authority: 29 U.S.C. 732, unless otherwise noted.

Subpart A—General

§ 370.1 What is the Client Assistance Program (CAP)?

The purpose of this program is to establish and carry out CAPs that—

(a) Advise and inform clients and client applicants of all services and benefits available to them through programs authorized under the Rehabilitation Act of 1973 (Act), as amended;

(b) Assist and advocate for clients and client applicants in their relationships with projects, programs, and community rehabilitation programs providing services under the Act; and

(c) Inform individuals with disabilities in the State, especially individuals with disabilities who have traditionally been unserved or underserved by vocational rehabilitation programs, of the services and benefits available to them under the Act and under Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101–12213.

(Authority: 29 U.S.C. 732(a))

§ 370.2 Who is eligible for an award?

(a) Any State, through its Governor, is eligible for an award under this part if the State submits, and receives approval of, an application in accordance with § 370.20.

(b) The Governor of each State shall designate a public or private agency to conduct the State's CAP under this part.

(c) Except as provided in paragraph (d) of this section, the Governor shall designate an agency that is independent of any agency that provides treatment, services, or rehabilitation to individuals under the Act.

(d) The Governor may, in the initial designation, designate an agency that provides treatment, services, or rehabilitation to individuals with disabilities under the Act if, at any time before February 22, 1984, there was an agency in the State that both—

(1) Was a grantee under section 112 of the Act by serving as a client assistance agency and directly carrying out a CAP; and

(2) Was, at the same time, a grantee under any other provision of the Act.

(e) Except as permitted in paragraph (f) of this section, an agency designated by the Governor of a State to conduct the State's CAP under this part may not award a subgrant to or enter into a contract with an agency that provides services under this Act either to carry out the CAP or to provide services under the CAP.

(f) An agency designated by the Governor of a State to conduct the State's CAP under this part may enter into a contract with a center for independent living (center) that provides services under the Act if—

(1) On February 22, 1984, the designated agency was contracting with one or more centers to provide CAP services; and

(2) The designated agency meets the requirements of paragraph (g) of this section.

(g) A designated agency that contracts to provide CAP services with a center (pursuant to paragraph (f) of this section) or with an entity or individual that does not provide services under the Act remains responsible for—

(1) The conduct of a CAP that meets all of the requirements of this part;

(2) Ensuring that the center, entity, or individual expends CAP funds in accordance with—

(i) The regulations in this part; and

(ii) The cost principles applicable to the designated agency; and

(3) The direct day-to-day supervision of the CAP services being carried out by the contractor. This day-to-day supervision must include the direct supervision of the individuals who are employed or used by the contractor to provide CAP services.

(Authority: 29 U.S.C. 711(c) and 732(a) and (c)(1)(A))

§ 370.3 Who is eligible for services and information under the CAP?

(a) Any client or client applicant is eligible for the services described in § 370.4.

(b) Any individual with a disability is eligible to receive information on the services and benefits available to individuals with disabilities under the Act and Title I of the ADA.

(Authority: 29 U.S.C. 732(a))

§ 370.4 What kinds of activities may the Secretary fund?

(a) Funds made available under this part must be used for activities consistent with the purposes of this program, including—

(1) Advising and informing clients, client applicants, and individuals with disabilities in the State, especially individuals with disabilities who have traditionally been unserved or underserved by vocational rehabilitation programs, of—

(i) All services and benefits available to them through programs authorized under the Act; and

(ii) Their rights in connection with those services and benefits;

(2) Informing individuals with disabilities in the State, especially individuals with disabilities who have traditionally been unserved or underserved by vocational rehabilitation programs, of the services and benefits available to them under Title I of the ADA;

(3) Upon the request of a client or client applicant, assisting and advocating on behalf of a client and client applicant in his or her relationship with projects, programs, and community rehabilitation programs that provide services under the Act by engaging in individual or systemic advocacy and pursuing, or assisting and

advocating on behalf of a client and client applicant to pursue, legal, administrative, and other available remedies, if necessary—

(i) To ensure the protection of the rights of a client or client applicant under the Act; and

(ii) To facilitate access by individuals with disabilities and individuals with disabilities who are making the transition from public school programs to services funded under the Act; and

(4) Providing information to the public concerning the CAP.

(b) In providing assistance and advocacy services under this part with respect to services under Title I of the Act, a designated agency may provide assistance and advocacy services to a client or client applicant to facilitate the individual's employment, including assistance and advocacy services with respect to the individual's claims under Title I of the ADA, if those claims under Title I of the ADA are directly related to services under the Act that the individual is receiving or seeking.

(Authority: 29 U.S.C. 732(a))

§ 370.5 What regulations apply?

The following regulations apply to the expenditure of funds under the CAP:

(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) applies to the designated agency if the designated agency is not a State agency, local government agency, or Indian tribal organization. As the entity that eventually, if not directly, receives the CAP grant funds, the designated agency is considered a recipient for purposes of part 74.

(2) 34 CFR Part 76 (State-Administered Programs) applies to the State and, if the designated agency is a State or local government agency, to the designated agency, except for—

(i) § 76.103;

(ii) §§ 76.125 through 76.137;

(iii) §§ 76.300 through 76.401;

(iv) § 76.708;

(v) § 76.734; and

(vi) § 76.740.

(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 80 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments) applies to the State and, if the designated agency is a State or local government agency, to the designated agency.

(6) 34 CFR Part 81 (General Education Provisions Act-Enforcement) applies to both the State and the designated agency, whether or not the designated agency is the actual recipient of the CAP grant. As the entity that eventually, if not directly, receives the CAP grant funds, the designated agency is considered a recipient for purposes of Part 81.

(7) 34 CFR Part 82 (New Restrictions on Lobbying).

(8) 34 CFR Part 85 (Governmentwide Debarment and Suspension (Nonprocurement) and Governmentwide Requirements for Drug-Free Workplace (Grants)).

(b) The regulations in this Part 370.

(c) The regulations in 34 CFR 369.43, 369.46 and 369.48, relating to various conditions to be met by grantees. (NOTE: Any funds made available to a State under this program that are transferred by a State to a designated agency do not comprise a subgrant as that term is defined in 34 CFR 77.1. The designated agency is not, therefore, in these circumstances a subgrantee, as that term is defined in that section or in 34 CFR Parts 74, 76, or 80.)

(Authority: 29 U.S.C. 711(c) and 732)

§ 370.6 What definitions apply?

(a) *Definitions in EDGAR.* The following terms used in this part are defined in 34 CFR 77.1:

Award
EDGAR
Fiscal year
Nonprofit
Private
Public
Secretary

(b) *Other definitions.* The following definitions also apply to this part:

Act means the Rehabilitation Act of 1973, as amended.

Advocacy means pleading an individual's cause or speaking or writing in support of an individual. Advocacy may be formal, as in the case of a lawyer representing an individual in a court of law or in formal administrative proceedings before government agencies (whether State, local or Federal). Advocacy also may be informal, as in the case of a lawyer or non-lawyer representing an individual in negotiations, mediation, or informal administrative proceedings before government agencies (whether State, local or Federal), or as in the case of a lawyer or non-lawyer representing an individual's cause before private entities or organizations, or government agencies (whether State, local or Federal). Advocacy may be on behalf of—

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

(2) More than one individual or a group or class of individuals, in which case it is *systems* (or *systemic*) *advocacy;* or

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

Class action means a formal legal suit on behalf of a group or class of individuals filed in a Federal or State court that meets the requirements for a ''class action'' under Federal or State law. ''Systems (or systemic) advocacy'' that does not include filing a formal class action in a Federal or State court is not considered a class action for purposes of this part.

Client or client applicant means an individual receiving or seeking services under the Act, respectively.

Designated agency means the agency designated by the Governor under § 370.2 to conduct a client assistance program under this part.

Mediation means the act or process of using an independent third party to act as a mediator, intermediary, or conciliator to settle differences or disputes between persons or parties. The third party who acts as a mediator, intermediary, or conciliator may not be any entity or individual who is connected in any way with the eligible system or the agency, entity, or individual with whom the individual with a disability has a dispute. Mediation may involve the use of professional mediators or any other independent third party mutually agreed to by the parties to the dispute.

Services under the Act means vocational rehabilitation, independent living, supported employment, and other similar rehabilitation services provided under the Act. For purposes of the CAP, the term ''services under the Act'' does not include activities carried out under the protection and advocacy program authorized by section 509 of the Act (i.e., the Protection and Advocacy of Individual Rights (PAIR) program, 34 CFR Part 381).

State means, 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 (but only until September 30, 1998), except for purposes of the allotments under section 112 of the Act, in which case ''State'' does not mean or include Guam, American Samoa, the United States Virgin Islands, the Commonwealth of the Northern Mariana Islands, and the Republic of Palau.

(Authority: 29 U.S.C. 711(c) and 732; P.L. 101–219 (Dec. 12, 1989); P.L. 99–658 (Nov. 14, 1986); and P.L. 99–239 (Jan. 14, 1986))

§ 370.7 What shall the designated agency do to make its services accessible?

The designated agency shall provide, as appropriate, the CAP services described in § 370.4 in formats that are accessible to clients or client applicants who seek or receive CAP services.

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

Subpart B—What Requirements Apply to Redesignation?

§ 370.10 When do the requirements for redesignation apply?

(a) The Governor may not redesignate the agency designated pursuant to section 112(c) of the Act and § 370.2(b) without good cause and without complying with the requirements of §§ 370.10 through 370.17.

(b) For purposes of §§ 370.10 through 370.17, a ''redesignation of'' or ''to redesignate'' a designated agency means any change in or transfer of the designation of an agency previously designated by the Governor to conduct the State's CAP to a new or different agency, unit, or organization, including—

(1) A decision by a designated agency to cancel its existing contract with another entity with which it has previously contracted to carry out and operate all or part of its responsibilities under the CAP (including providing advisory, assistance, or advocacy services to eligible clients and client applicants); or

(2) A decision by a designated agency not to renew its existing contract with another entity with which it has previously contracted. Therefore, an agency that is carrying out a State's CAP under a contract with a designated agency is considered a designated agency for purposes of §§ 370.10 through 370.17.

(c) For purposes of paragraph (a) of this section, a designated agency that does not renew a contract for CAP services because it is following State procurement laws that require contracts to be awarded through a competitive bidding process is presumed to have good cause for not renewing an existing contract. However, this presumption may be rebutted.

(d) If State procurement laws require a designated agency to award a contract through a competitive bidding process, the designated agency must hold public hearings on the request for proposal before awarding the new contract.

(Authority: 29 U.S.C. 711(c) and 732(c)(1)(B))

§ 370.11 What requirements apply to a notice of proposed redesignation?

(a) Prior to any redesignation of the agency that conducts the CAP, the Governor shall give written notice of the proposed redesignation to the designated agency, the State Rehabilitation Advisory Council (SRAC), and the State Independent Living Council (SILC) and publish a public notice of the Governor's intention to redesignate. Both the notice to the designated agency, the SRAC, and the SILC and the public notice must include, at a minimum, the following:

(1) The Federal requirements for the CAP (section 112 of the Act).

(2) The goals and function of the CAP.

(3) The name of the current designated agency.

(4) A description of the current CAP and how it is administered.

(5) The reason or reasons for proposing the redesignation, including why the Governor believes good cause exists for the proposed redesignation.

(6) The effective date of the proposed redesignation.

(7) The name of the agency the Governor proposes to administer the CAP.

(8) A description of the system that the redesignated (i.e., new) agency would administer.

(b) The notice to the designated agency must—

(1) Be given at least 30 days in advance of the Governor's written decision to redesignate; and

(2) Advise the designated agency that it has at least 30 days from receipt of the notice of proposed redesignation to respond to the Governor and that the response must be in writing.

(c) The notice of proposed redesignation must be published in a place and manner that provides the SRAC, the SILC, individuals with disabilities or their representatives, and the public with at least 30 days to submit oral or written comments to the Governor.

(d) Following public notice, public hearings concerning the proposed redesignation must be conducted in an accessible format that provides individuals with disabilities or their representatives an opportunity for comment. The Governor shall maintain a written public record of these hearings.

(e) The Governor shall fully consider any public comments before issuing a written decision to redesignate.

(Approved by the Office of Management and Budget under control number 1820–0520)

(Authority: 29 U.S.C. 711(c) and 732(c)(1)(B))

§ 370.12 How does a designated agency preserve its right to appeal a redesignation?

(a) To preserve its right to appeal a Governor's written decision to redesignate (see § 370.13), a designated agency must respond in writing to the Governor within 30 days after it receives the Governor's notice of proposed redesignation.

(b) The designated agency shall send its response to the Governor by registered or certified mail, return receipt requested, or other means that provides a record that the Governor received the designated agency's response.

(Approved by the Office of Management and Budget under control number 1820–0520)

(Authority: 29 U.S.C. 711(c) and 732(c)(1)(B))

§ 370.13 What are the requirements for a decision to redesignate?

(a) If, after complying with the requirements of § 370.11, the Governor decides to redesignate the designated agency, the Governor shall provide to the designated agency a written decision to redesignate that includes the rationale for the redesignation. The Governor shall send the written decision to redesignate to the designated agency by registered or certified mail, return receipt requested, or other means that provides a record that the designated agency received the Governor's written decision to redesignate.

(b) If the designated agency submitted to the Governor a timely response to the Governor's notice of proposed redesignation, the Governor shall inform the designated agency that it has at least 15 days from receipt of the Governor's written decision to redesignate to file a formal written appeal with the Secretary.

(Approved by the Office of Management and Budget under control number 1820–0520)

(Authority: 29 U.S.C. 711(c) and 732(c)(1)(A))

§ 370.14 How does a designated agency appeal a written decision to redesignate?

(a) A designated agency may appeal to the Secretary a Governor's written decision to redesignate only if the designated agency submitted to the Governor a timely written response to the Governor's notice of proposed redesignation in accordance with § 370.12.

(b) To appeal to the Secretary a Governor's written decision to redesignate, a designated agency shall file a formal written appeal with the Secretary within 15 days after the designated agency's receipt of the Governor's written decision to redesignate. The date of filing of the

designated agency's written appeal with the Secretary will be determined in a manner consistent with the requirements of 34 CFR 81.12.

(c) If the designated agency files a written appeal with the Secretary, the designated agency shall send a separate copy of this appeal to the Governor by registered or certified mail, return receipt requested, or other means that provides a record that the Governor received a copy of the designated agency's appeal to the Secretary.

(d) The designated agency's written appeal to the Secretary must state why the Governor has not met the burden of showing that good cause for the redesignation exists or has not met the procedural requirements under §§ 370.11 and 370.13.

(e) The designated agency's written appeal must be accompanied by the designated agency's written response to the Governor's notice of proposed redesignation and may be accompanied by any other written submissions or documentation the designated agency wishes the Secretary to consider.

(f) As part of its submissions under this section, the designated agency 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 1820–0520)

(Authority: 29 U.S.C. 711(c) and 732(c)(1)(B))

§ 370.15 What must the Governor of a State do upon receipt of a copy of a designated agency's written appeal to the Secretary?

(a) If the designated agency files a formal written appeal in accordance with § 370.14, the Governor shall, within 15 days of receipt of the designated agency's appeal, submit to the Secretary copies of the following:

(1) The written notice of proposed redesignation sent to the designated agency.

(2) The public notice of proposed redesignation.

(3) Transcripts of all public hearings held on the proposed redesignation.

(4) Written comments received by the Governor in response to the public notice of proposed redesignation.

(5) The Governor's written decision to redesignate, including the rationale for the decision.

(6) Any other written documentation or submissions the Governor wishes the Secretary to consider.

(7) Any other information requested by the Secretary.

(b) As part of the submissions under this section, the Governor 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 1820–0520)

(Authority: 29 U.S.C. 711(c) and 732(c)(1)(B))

§ 370.16 How does the Secretary review an appeal of a redesignation?

(a) If either party requests a meeting under § 370.14(f) or § 370.15(b), the meeting is to be held within 30 days of the submissions by the Governor under § 370.15, unless both parties agree to waive this requirement. 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 submissions required from the Governor under § 370.15, the Secretary issues to the parties a final written decision on whether the redesignation was for good cause.

(c) The Secretary reviews a Governor's decision based on the record submitted under §§ 370.14 and 370.15 and any other relevant submissions of other interested parties. The Secretary may affirm or, if the Secretary finds that the redesignation is not for good cause, remand for further findings or reverse a Governor's redesignation.

(d) The Secretary sends copies of the decision to the parties by registered or certified mail, return receipt requested, or other means that provide a record of receipt by both parties.

(Approved by the Office of Management and Budget under control number 1820–0520)

(Authority: 29 U.S.C. 711(c) and 732(c)(1)(B))

§ 370.17 When does a redesignation become effective?

A redesignation does not take effect for at least 15 days following the designated agency's receipt of the Governor's written decision to redesignate or, if the designated agency appeals, for at least 5 days after the Secretary has affirmed the Governor's written decision to redesignate.

(Authority: 29 U.S.C. 711(c) and 732(c)(1)(B))

Subpart C—How Does a State Apply for a Grant?

§ 370.20 What must be included in a request for a grant?

(a) Each State seeking assistance under this part shall submit to the Secretary, in writing, each fiscal year, an application that includes, at a minimum—

(1) The name of the designated agency; and

(2) An assurance that the designated agency meets the independence requirement of section 112(c)(1)(A) of the Act and § 370.2(c), or that the State is exempted from that requirement under section 112(c)(1)(A) of the Act and § 370.2(d).

(b)(1) Each State also shall submit to the Secretary an assurance that the designated agency has the authority to pursue legal, administrative, and other appropriate remedies to ensure the protection of the rights of clients or client applicants within the State.

(2) The authority to pursue remedies described in paragraph (b)(1) of this section must include the authority to pursue those remedies against the State vocational rehabilitation agency and other appropriate State agencies. The designated agency meets this requirement if it has the authority to pursue those remedies either on its own behalf or by obtaining necessary services, such as legal representation, from outside sources.

(c) Each State also shall submit to the Secretary assurances that—

(1) All entities conducting, administering, operating, or carrying out programs within the State that provide services under the Act to individuals with disabilities in the State will advise all clients and client applicants of the existence of the CAP, the services provided under the program, and how to contact the designated agency;

(2) The designated agency will meet each of the requirements in this part; and

(3) The designated agency will provide the Secretary with the annual report required by section 112(g)(4) of the Act and § 370.44.

(d) To allow a designated agency to receive direct payment of funds under this part, a State must provide to the Secretary, as part of its application for assistance, an assurance that direct payment to the designated agency is not prohibited by or inconsistent with State law, regulation, or policy.

(Approved by the Office of Management and Budget under control number 1820–0520)

(Authority: 29 U.S.C. 732 (b) and (f))

Subpart D—How Does the Secretary Allocate and Reallocate Funds to a State?

§ 370.30 How does the Secretary allocate funds?

(a) The Secretary allocates the funds available under this part for any fiscal year to the States on the basis of the relative population of each State. The Secretary allocates at least $50,000 to each State, unless the provisions of section 112(e)(1)(D) of the Act (which

provides for increasing the minimum allotment if the appropriation for the CAP exceeds $7,500,000 or the appropriation is increased by a certain percentage described in section 112(e)(1)(D)(ii) of the Act) are applicable.

(b) The Secretary allocates $30,000 each, unless the provisions of section 112(e)(1)(D) of the Act are applicable, to American Samoa, Guam, the Virgin Islands, the Northern Mariana Islands, and the Republic of Palau, except that the Secretary allocates to the Republic of Palau only 75 percent of this allotment in fiscal year 1996, only 50 percent of this allotment in fiscal year 1997, only 25 percent of this allotment in fiscal year 1998, and none of this allotment in fiscal year 1999 and thereafter.

(c) Unless prohibited or otherwise provided by State law, regulation, or policy, the Secretary pays to the designated agency, from the State allotment under paragraph (a) or (b) of this section, the amount specified in the State's approved request. Because the designated agency is the eventual, if not the direct, recipient of the CAP funds, 34 CFR Parts 74 and 81 apply to the designated agency, whether or not the designated agency is the actual recipient of the CAP grant. However, because it is the State that submits an application for and receives the CAP grant, the State remains the grantee for purposes of 34 CFR Parts 76 and 80. In addition, both the State and the designated agency are considered recipients for purposes of 34 CFR Part 81.

(Authority: 29 U.S.C. 732 (b) and (e); P.L. 101–219 (Dec. 12, 1989); P.L. 99–658 (Nov. 14, 1986); and P.L. 99–239 (Jan. 14, 1986))

§ 370.31 How does the Secretary reallocate funds?

(a) The Secretary reallocates funds in accordance with section 112(e)(2) of the Act.

(b) A designated agency shall inform the Secretary at least 90 days before the end of the fiscal year for which CAP funds were received whether the designated agency is making available for reallotment any of those CAP funds that it will be unable to obligate in that fiscal year.

(Approved by the Office of Management and Budget under control number 1820–0520)

(Authority: 29 U.S.C. 711(c) and 732(e)(2))

Subpart E—What Post-Award Conditions Must Be Met by a Designated Agency?

§ 370.40 What are allowable costs?

(a) If the designated agency is a State or local government agency, the designated agency shall apply the cost principles in accordance with 34 CFR 80.22(b).

(b) If the designated agency is a private nonprofit organization, the designated agency shall apply the cost principles in accordance with Subpart Q of 34 CFR Part 74.

(c) In addition to those allowable costs established in EDGAR, and consistent with the program activities listed in § 370.4, the cost of travel in connection with the provision to a client or client applicant of assistance under this program is allowable. The cost of travel includes the cost of travel for an attendant if the attendant must accompany the client or client applicant.

(d) The State and the designated agency are accountable, both jointly and severally, to the Secretary for the proper use of funds made available under this part. However, the Secretary may choose to recover funds under the procedures in 34 CFR Part 81 from either the State or the designated agency, or both, depending on the circumstances of each case.

(Authority: 29 U.S.C. 711(c) and 732(c)(3))

§ 370.41 What conflict of interest provision applies to employees of a designated agency?

(a) Except as permitted by paragraph (b) of this section, an employee of a designated agency, of a center under contract with a designated agency (as permitted by § 370.2(f)), or of an entity or individual under contract with a designated agency, who carries out any CAP duties or responsibilities, while so employed, may not—

(1) Serve concurrently as a staff member of, consultant to, or in any other capacity within, any other rehabilitation project, program, or community rehabilitation program receiving assistance under the Act in the State; or

(2) Provide any services under the Act, other than CAP and PAIR services.

(b) An employee of a designated agency or of a center under contract with a designated agency, as permitted by § 370.2(f), may—

(1) Receive a traineeship under section 302 of the Act;

(2) Provide services under the PAIR program;

(3) Represent the CAP on any board or council (such as the SRAC) if CAP representation on the board or council is specifically permitted or mandated by the Act; and

(4) Consult with policymaking and administrative personnel in State and local rehabilitation programs, projects, and community rehabilitation programs, if consultation with the designated agency is specifically permitted or mandated by the Act.

(Authority: 29 U.S.C. 732(g)(1))

§ 370.42 What access must the CAP be afforded to policymaking and administrative personnel?

The CAP must be afforded reasonable access to policymaking and administrative personnel in State and local rehabilitation programs, projects, and community rehabilitation programs. One way in which the CAP may be provided that access would be to include the director of the designated agency among the individuals to be consulted on matters of general policy development and implementation, as required by sections 101(a) (18) and (23) of the Act.

(Authority: 29 U.S.C. 721(a) (18) and (23) and 732(g)(2))

§ 370.43 What requirement applies to the use of mediation procedures?

(a) Each designated agency shall implement procedures designed to ensure that, to the maximum extent possible, good faith negotiations and mediation procedures are used before resorting to formal administrative or legal remedies. In designing these procedures, the designated agency may take into account its level of resources.

(b) For purposes of this section, mediation may involve the use of professional mediators, other independent third parties mutually agreed to by the parties to the dispute, or an employee of the designated agency who—

(1) Is not assigned to advocate for or otherwise represent or is not involved with advocating for or otherwise representing the client or client applicant who is a party to the mediation; and

(2) Has not previously advocated for or otherwise represented or been involved with advocating for or otherwise representing that same client or client applicant.

(Authority: 29 U.S.C. 732(g)(3))

§ 370.44 What reporting requirement applies to each designated agency?

In addition to the program and fiscal reporting requirements in EDGAR that are applicable to this program, each designated agency shall submit to the Secretary, no later than 90 days after the end of each fiscal year, an annual report on the operation of its CAP during the previous year, including a summary of the work done and the uniform statistical tabulation of all cases handled by the program. The annual report must contain information on—

(a) The number of requests received by the designated agency for information on services and benefits under the Act and Title I of the ADA;

(b) The number of referrals to other agencies made by the designated agency and the reason or reasons for those referrals;

(c) The number of requests for advocacy services received by the designated agency from clients or client applicants;

(d) The number of the requests for advocacy services from clients or client applicants that the designated agency was unable to serve;

(e) The reasons that the designated agency was unable to serve all of the requests for advocacy services from clients or client applicants; and

(f) Any other information that the Secretary may require.

(Approved by the Office of Management and Budget under control number 1820–0520)

(Authority: 29 U.S.C. 732(g) (4) and (5))

§ 370.45 What limitation applies to the pursuit of legal remedies?

A designated agency may not bring any class action in carrying out its responsibilities under this part.

(Authority: 29 U.S.C. 732(d))

§ 370.46 What consultation requirement applies to a Governor of a State?

In designating a client assistance agency under § 370.2, redesignating a client assistance agency under § 370.10(a), and carrying out the other provisions of this part, the Governor shall consult with the director of the State vocational rehabilitation agency (or, in States with both a general agency and an agency for the blind, the directors of both agencies), the head of the developmental disability protection and advocacy agency, and representatives of professional and consumer organizations serving individuals with disabilities in the State.

(Authority: 29 U.S.C. 732(c)(2))

§ 370.47 When must grant funds be obligated?

(a) Any funds appropriated for a fiscal year to carry out the CAP that are not expended or obligated by the designated agency prior to the beginning of the succeeding fiscal year remain available for obligation by the designated agency during the succeeding fiscal year in accordance with 34 CFR 76.705 through 76.707.

(b) A designated agency shall inform the Secretary within 90 days after the end of the fiscal year for which the CAP funds were made available whether the designated agency carried over to the succeeding fiscal year any CAP funds that it was unable to obligate by the end of the fiscal year.

(Approved by the Office of Management and Budget under control number 1820–0520)

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

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

(a) All personal information about individuals served by any designated agency under this part, including lists of names, addresses, photographs, and records of evaluation, must be held strictly confidential.

(b) The designated agency's use of information and records concerning individuals must be limited only to purposes directly connected with the CAP, including program evaluation activities. Except as provided in paragraphs (c) and (e) of this section, this information may not be disclosed, directly or indirectly, other than in the administration of the CAP, unless the consent of the individual to whom the information applies, or his or her parent, legal guardian, or other legally authorized representative or advocate (including the individual's advocate from the designated agency), has been obtained in writing. A designated agency may not produce any report, evaluation, or study that reveals any personally identifying information without the written consent of the individual or his or her representative.

(c) Except as limited in paragraphs (d) and (e) of this section, the Secretary or other Federal or State officials responsible for enforcing legal requirements are to have complete access to all—

(1) Records of the designated agency that receives funds under this program; and

(2) All individual case records of clients served under this part without the consent of the client.

(d) For purposes of conducting any periodic audit, preparing or producing any report, or conducting any evaluation of the performance of the CAP established or assisted under this part, the Secretary does not require the designated agency to disclose the identity of, or any other personally identifiable information related to, any individual requesting assistance under the CAP.

(e) Notwithstanding paragraph (d) of this section and consistent with paragraph (f) of this section, a designated agency shall disclose to the Secretary, if the Secretary so requests, the identity of, or any other personally identifiable information (i.e., name, address, telephone number, social security number, or any other official code or number by which an individual may be readily identified) related to, any individual requesting assistance under the CAP if—

(1) An audit, evaluation, monitoring review, State plan assurance review, or other investigation produces reliable evidence that there is probable cause to believe that the designated agency has violated its legislative mandate or misused Federal funds; or

(2) The Secretary determines that this information may reasonably lead to further evidence that is directly related to alleged misconduct of the designated agency.

(f) In addition to the protection afforded by paragraph (d) of this section, the right of a person or designated agency not to produce documents or disclose information to the Secretary is governed by the common law of privileges, as interpreted by the courts of the United States.

(Authority: 29 U.S.C. 711(c) and 732(g)(6))

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