ANNOUNCEMENT

RESCISSION OF TRANSFER PROCEDURE, RESEARCH CAREER DEVELOPMENT AWARD

As a result of the phaseout of NIH research training programs (see GUIDE No. 1, Vol. 2, March 2, 1973), the procedure for change in grantee institution for a research career development awardee is no longer applicable. Page 7 of GUIDE No. 22, Vol. 1, dated December 15, 1972, is therefore rescinded.

The GUIDE is published at irregular intervals to provide policy, program, and administrative information to individuals and organizations who need to be kept informed of requirements and changes in grants and contracts programs administered by the National Institutes of Health.
MICROFILM RECORDS OF CHECKS

ANNOUNCEMENT

The U. S. General Accounting Office by decision No. B116550 dated March 28, 1973, has advised that there is no objection to a "program of microfilming checks [pertaining to contracts with and grants from NIH] when they are approximately one year old and retaining the microfilms rather than the original checks providing that such microfilms are clear and durable and that the retrieval system is such that copies of checks pertaining to Government grants and contracts may readily be located for audit if desired."
1. Part 16 of Title 45 of the Code of Federal Regulations establishes the criteria and procedures for appealing adverse decisions concerning the administration of grant awards made by the Department of Health, Education, and Welfare. The attached regulation, effective for all awards made on or after May 21, 1973, was published in the Federal Register dated April 20, 1973, pp. 9906-9910.

2. Grantees desiring to appeal an adverse decision by the National Institutes of Health may do so by requesting a review in writing. The request for review must be postmarked no later than 30 days after the postmarked date of the adverse decision and be addressed to the Executive Secretary, Grant Appeals Board, 330 Independence Avenue, SW, Washington, DC 20201. The request for review must clearly identify the question(s) in dispute and contain a full statement of the grantee's position with respect to such question(s) and the pertinent facts and reasons in support of the appeal.
Title 45—Public Welfare
SUBTITLE A—DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, GENERAL ADMINISTRATION
PART 16—DEPARTMENT GRANT APPEALS PROCESS
Charter for Departmental Grants Appeals Board
Notice of proposed rulemaking was published in the Federal Register on November 18, 1972, at 37 FR 24675, setting forth a charter for a Departmental Grant Appeals Board from which grant appeals panels would be selected for the purpose of reviewing and providing hearings on postaward disputes which may arise in the administration of certain grant programs by constituent agencies of the principal investigator, the institution rather than the grantee's request for permission to incur an expenditure during the term of a grant when the failure of the constituent agency to approve the grantee's request for permission to incur an expenditure during the term of a grant only when such expenditure is ordinarily permissible. As we understand it, the purpose of this amendment would be to limit the Board's caseload and thereby expedite its functions. However, it would seem that the suggested basis for excluding disputes—whether the expenditures are ordinarily permissible—goes to the ultimate issue in this class of cases. It is not clear how the Board Chairman is to determine which expenditures are ordinarily permissible and which are not. If appeals are made by grantees with respect to expenditures which are clearly not permissible, we think the existing number of Board members, and it makes clear that the Board may be on a regular or an intermittent basis.
3. Section 16.5(a)(1) has been amended to clarify the nature of terminations subject to the jurisdiction of the Board.
4. Section 16.5(a)(3) has been amended to provide that a grantee's request for permission to incur an expenditure during the term of a grant only when such expenditure is ordinarily permissible. As we understand it, the purpose of this amendment would be to limit the Board's caseload and thereby expedite its functions. However, it would seem that the suggested basis for excluding disputes—whether the expenditures are ordinarily permissible—goes to the ultimate issue in this class of cases. It is not clear how the Board Chairman is to determine which expenditures are ordinarily permissible and which are not. If appeals are made by grantees with respect to expenditures which are clearly not permissible, we think the existing

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A. SUMMARY OF CHANGES BASED ON COMMENTS RECEIVED

1. A definition of “Grantee” has been added to § 16.3 which is intended to make clear that in the case of grant awards which designate an institution as the grantee and which also designate a principal investigator, the institution rather than the principal investigator shall be regarded as the grantee for the purposes of the procedures under this part.

2. Sections 16.5(b) and 16.6(a) have been amended to clarify that in cases where a formal evidentiary hearing is held under § 16.8(b)(2), a record of the proceedings is not required unless requested by either party to the proceeding.

3. Section 16.10(c) has been amended to clarify the nature of terminations subject to the jurisdiction of the Board.

4. Other minor changes have been made, either to correct typographical errors or to effect solely technical matters, and appropriate additions and deletions of programs affected have been made in the appendices.

B. OTHER CHANGES

1. Section 16.3 has been amended to include the Office of the Assistant Secretary for Education, with respect to grants under section 404 of the General Education Provisions Act, and the National Institute of Education as constituent agencies and the Assistant Secretary for Education and the Director of the National Institute of Education as heads of constituent agencies. These agencies and positions were established by the Education Amendments of 1972.

2. Section 16.4(a) has been amended so as to permit greater flexibility in the composition of the Board. As amended, the section does not prescribe a certain

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procedures permit expeditious disposition of such appeals by the Board on an informal basis.

Several comments emphasized the importance of the last sentence of § 16.5(b), which provides that the failure of a constituent agency to approve a grantee's request to incur an expenditure during the term of a grant within a reasonable time shall be deemed by the Board a notification for purposes of invoking the jurisdiction of the Board. However, most of these comments expressed concern over the impression of the concept of "reasonable time." One comment pointed out that this would give grantees inadequate guidance as to when it would be appropriate to appeal. Another questioned whether grantees in this situation would be prejudiced under § 16.6(a) for not making a timely filing of an application for review. An attempt has been made to meet these objections through amendments to §§ 16.5(b) and 16.5(a).

9. A comment was received proposing that the Grant Appeals Board be required to act within specified time limits on applications for review, or alternatively, that the agency action on determinations should be stayed by the timely filing of the application. Section 16.6(b), which requires the Board Chairman promptly to refer cases to a panel, was viewed as too vague by the comment. Also, the comment regarded § 16.7, which provides for agency action pending disposition of the application, as recognizing exceptions which would prove too broad, related to the suspension of assistance or the withholding or deferring of payments under the grant. These comments are well taken. They raise considerations which we hope will help to shape the Board's activity. However, we deem it ill-advised to regulate further on these matters in the instant context for the following reasons:

(a) In the absence of any feel for the prospective size and complexity of the Board's caseload, it would be inappropriate to regulate specific time limits on the Board for disposal of petitions. Indeed, it is difficult to visualize how any sensible across-the-board time limits of this sort might be devised. The Board must obviously take whatever time is needed to dispose of cases on a rational and fair basis, and this will inevitably vary from case to case.

(b) Contrariwise, suspension of grant assistance and withholding of payments, to the extent that they are available to an agency, are remedies which by their nature cannot be stayed by the institution of an appeal. If they were stayed, they would render termination a hollow remedy. In the course of resorting to these remedies, agencies independently would, as a matter of good administrative practice, afford grantees some sort of proceedings, but these proceedings should be covered in administrative or program regulations of the agencies concerned.

10. One comment proposed that provision be made for appeals to the Secretary on decisions which are adverse to the grantee. However, it is felt that such an amendment would not add any significant protection and would be administratively undesirable. The Grant Appeals Board established by this part is the Secretary's Board. All Board members are appointed by the Secretary for such terms as he may designate (§ 16.4(a)). The Board renders an initial decision which is sent to all parties involved in the dispute. (Section 16.10 (a) and (b)). While such decision may be modified or reversed by the head of the constituent agency, he must accompany such action by a written statement of the grounds for such modification or reversal which shall be filed with the Secretary and the Board (§ 16.10(d)). Section 16.10(d) provides: "In order to afford the Secretary an opportunity to study such decision of the agency head, it shall be served upon the parties no earlier than 30 days after such filing. Such decision shall not become final until it is served upon the grantee involved or his attorney." These precautions are designed to make sure that the decision of the Board will be overturned by the head of the constituent agency, who is prohibited from delegating his review functions by § 16.10 (e), only for substantial reasons articulated on the record. They follow the decision and review of administrative adjudication set forth in the Administrative Procedure Act. In the face of these safeguards, a provision for review by the Secretary would create an additional administrative layer for review, without any corresponding benefit to grantees.

After consideration of the above comments, title 45 of the Code of Federal Regulations is amended by adding a new part 16 as set forth below.

Effective date.—This regulation shall be effective May 21, 1973.


CARMEN W. WEINBERGER, Secretary.

[Signature]

Sec. 16.1 Purpose.

16.2 Scope.

16.3 Definitions.

16.4 Grant appeals board; grant appeals panel.

16.5 Determinations subject to the jurisdiction of the Board.

16.6 Submission.

16.7 Effect of submission.

16.8 Substantive and procedural rules.

16.9 Hearing before panel or a hearing officer.

16.10 Initial decision; final decision.

16.11 Separate appeal procedures for certain agencies.

Appendix A—Education Programs.

Appendix B—Social and Rehabilitation Service and Health Development Programs.

Appendix C—Public Health Programs.

Appendix D—Food and Drug Programs.

Authority: Sec. 1, 5, 8, and 7 of Reorganization Plan No. 1 of 1950, 80 P.R. 2005, 67 Stat. 631 and the individual authorities cited in the Appendices.

§ 16.1 Purpose.

This part establishes a Departmental Grant Appeals Board, for the purpose of reviewing and providing hearings upon post-award disputes which may arise in the administration of or carrying out of grants under grant programs (as described in §16.2) and which are submitted to the Board as provided in §16.5.

(Authority cited in the Appendices.)

§ 16.2 Scope.

(a) This part applies to certain determinations (as set forth in §16.5), made after the effective date of this part, with respect to grants awarded by a constituent agency of the Department of Health, Education, and Welfare pursuant to: (1) Any program which authorizes the making of direct, discretionary project grants or (2) any other program (including any State plan, formula program) which the head of the constituent agency, with the approval of the Secretary, may designate in whole or in part.

(b) Notwithstanding paragraph (a) of this section, this part shall not be applicable to a determination: (1) If the grantee is entitled to an opportunity for hearing with respect to such determination pursuant to §5 U.S.C. sec. 554 or (2) if, in order to meet special needs applicable to a particular program, the constituent agency has established an appropriate alternative procedure (which is available to the grantee) for the review or resolution of such determination and the Secretary has approved such procedure as an alternative to the procedures under this part.

(c) Programs to which this part is applicable shall be listed in the Appendices to this part. With the approval of the Secretary, a program not so listed may be made subject to this part through an appropriate designation by the head of the constituent agency concerned. The Appendices referred to in the preceding sentence shall be promptly updated to reflect such designations.

(d) This part does not apply to any action taken pursuant to title VI of the Civil Rights Act of 1964, Part 80 of this title, and Executive Order No. 11246.

(Authority cited in the Appendices.)

§ 16.3 Definitions.

For purposes of this part:

(a) "Board" means the Departmental Grant Appeals Board, as described in paragraph (a) of § 16.4.

(b) "Chairman" means the Board member designated by the Secretary to serve as Chairman of the Board.

(c) "Panel" means a Grant Appeals Panel, as described in paragraph (b) of § 16.4.

(d) "Panel Chairman" means a member of a Grant Appeals Panel who has been designated as Chairman of such Panel by the Board Chairman.

(e) "Constituent agency" means the Office of the Assistant Secretary for Education (with respect to grants pursuant to section 404 of the General Education Provisions Act), the Office of Education, the National Institute of Education, the...
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§ 16.5 Determinations subject to the jurisdiction of the Board.

(a) Subject to § 16.2 and paragraph (b) of this section, the Board shall have jurisdiction over the following determinations of a constituent agency or employee of a constituent agency adverse to a grantee:

(1) "Termination," in whole or in part, of a grant for failure of the grantee to carry out its approved project proposal in accordance with applicable law, and the terms of such assistance or for failure of the grantee otherwise to comply with any law, regulation, assurance, term, or condition applicable to the grant.

(2) A determination that an expenditure not allowable under the grant has been charged to the grant or that the grantee has otherwise failed to discharge its obligation to account for grant funds.

(3) The disapproval of a grantee's written request for permission to incur an expenditure during the term of a grant.

(4) A determination that a grant is void.

(5) Establishment of indirect cost or research patient hospital care rates (except for cases involving a constituent agency as a contractor to the Armed Services Board of Contract Appeals with respect to such determination under a contract with the Department).

(b) A determination described in paragraph (a) of this section may not be reviewed by the Board unless:

(1) An officer or employee of a constituent agency has notified the grantee in writing of such determination and (2) such informal procedures as the agency has established by regulation for the resolution (prior to submission to the Board) of issues related to such determination have been exhausted. A notification described in subparagraph (1) of this paragraph shall set forth the reasons for the determination in sufficient detail to enable the grantee to respond and shall inform the grantee of his opportunity for review under this part. In the case of a determination described in paragraph (a) of this section, the failure of a constituent agency to approve a grantee's request within a reasonable time, which shall not be longer than 30 days after the postmark date of the grantee's request unless the constituent agency demonstrates to the Board Chairman good cause for not acting upon the request within such time period and has so notified the grantee within 30 days after the postmark date of the grantee's request, shall be deemed by the Board a notification for purposes of this paragraph.

(Authority cited in the Appendices.)

§ 16.6 Submission.

(a) Application for review. (1) A grantee with respect to whom a determination described in § 16.5 has been made and who desires review may file with the Board an application for review of such determination. The grantee's application for review must be postmarked no later than 30 days after the postmark date of notification provided pursuant to § 16.5(b)(1) except when (i) the head of the constituent agency, by regulation, establishes a different period of time for any class of cases; (ii) the Board Chairman grants an extension of time for good cause shown; or (iii) the determination is one described in the last sentence of § 16.5(b), in which case subject to subdivision (a) and (b) of § 16.5(b)(ii), the grantee's application for review must be postmarked no later than 90 days after the postmark date of the grantee's request for permission to incur an expenditure.

(2) Although the application for review need not follow any prescribed form, it shall clearly identify the question or questions in dispute and contain a full statement of the grantee's position with respect to such question or questions, and the pertinent facts and reasons in support of such position. In the case of a determination described in the last sentence of § 16.5(b), the grantee shall attach to his submission a copy of the agency notification described in § 16.5(b)(1).

(b) Action by Board on application for review. (1) The Board Chairman shall promptly send a copy of the grantee's application to the appropriate constituent agency.

(2) If the Board Chairman determines, after receipt of an application for review, that the requirements of § 16.5 and paragraph (a) of this section have been satisfied, he shall promptly refer the application to a Grant Appeals Panel designated pursuant to § 16.4(b) for further proceedings under this part. If he determines that such requirements have not been met, the Board Chairman shall advise the grantee of the reasons for the rejection of the application.

(Authority cited in the Appendices.)

§ 16.7 Effect of submission.

When an application has been filed with the Board with respect to a determination, no action may be taken by the constituent agency pursuant to such determination until such application has been disposed of, except that the filing of the application shall not affect the authority which the constituent agency may have to suspend assistance under a grant during proceedings under this part or otherwise to withhold or defer payments under the grant.

(Authority cited in the Appendices.)

§ 16.8 Substantive and procedural rules.

(a) Substantive rules. The Panel shall be bound by all applicable laws and regulations.

(b) Procedural rules. (1) With respect to cases involving, in the opinion of the Panel, no dispute as to a material fact.
RELATING TO PROCEEDINGS UNDER THIS PART.

UNLESS, WITHIN

FOUR-ATTACHMENT

INTERVENTION BY INTERESTED THIRD PARTIES, THE BOARD SHALL, WITH A NOTICE AFFORDING SUCH PARTY AN OPPORTUNITY TO STUDY SUCH DECISION, AND WRITTEN STATEMENTS OR ORAL ARGUMENTS BY THE PARTIES, OR BY THEIR COUNSEL, TO THE PROCEEDING.

(Authority cited in the Appendices.)

16.11 Separation of functions. No person who participated in prior administrative consideration, or in the preparation or presentation of, a case submitted to the Board shall advise or consult with, and no person having an interest in such case shall make or cause to be made an ex parte communication to, the Board, or head of the constituent agency with respect to such case, unless all parties to the case are given timely and adequate notice of such advice, consultation, or communication, and reasonable opportunity to respond is given all parties.

(Authority cited in the Appendices.)

APPENDIX A—EDUCATION PROGRAMS


(2) Section 305 of Title V of the Elementary and Secondary Education Act (except as to matters governed by part E of such title) (20 U.S.C. 965, 997, 999a).


(4) Title VIII of the Elementary and Secondary Education Act (20 U.S.C. 897, 897a, 897b).


(9) Sections 131(a), 142(c), and 191 of the Vocational Education Act (20 U.S.C. 1281(a), 1302(f), 1301).


(14) Section 804 and parts B–1, C, D, E, and F of the Higher Education Professionals Development Act (20 U.S.C. 1101, 1111, 1119, 111b).


(24) Emergency School Aid Act, except for determinations described under § 16.0(a) (1) and (4) (20 U.S.C. 1601 et seq.).

(25) The follow through program under section 222(a) (2) of the Economic Opportunity Act of 1964, except for determinations described under § 16.0(a) (1) and (4) (20 U.S.C. 2000a (a) (2)).

(26) Section 222 (a) and (b) of the Social Security Amendments of 1972 (Public Law 92-603).

(27) Section 428 of the Social Security Act (42 U.S.C. 228).

(28) Sections 102, 201, 301, and 302 of the Juvenile Delinquency Prevention Act (42 U.S.C. 3812, 3816, 3871, 3872).

(29) Sections 4(a), 12, 15(a), 15(b), and 17 of the Vocational Rehabilitation Act (20 U.S.C. 34, 41a, 41b, 41b, and 42b).


(31) Section 1110 of the Social Security Act (42 U.S.C. 1110).


APPENDIX B—SOCIAL AND REHABILITATION SERVICES AND CHILD DEVELOPMENT PROGRAMS

(1) The Head Start program under section 222(a) (1) of the Economic Opportunity Act except for determinations described under § 16.0(a) (1) and (4) (20 U.S.C. 2000a (a) (1)).

(2) Section 222 (a) and (b) of the Social Security Amendments of 1972 (Public Law 92-603).

(3) Section 428 of the Social Security Act (42 U.S.C. 228).

(4) Sections 102, 201, 301, and 302 of the Juvenile Delinquency Prevention Act (42 U.S.C. 3812, 3816, 3871, 3872).

(5) Sections 4(a), 12, 15(a), 15(b), and 17 of the Vocational Rehabilitation Act (20 U.S.C. 34, 41a, 41b, 41b, and 42b).


(31) Section 1110 of the Social Security Act (42 U.S.C. 1110).


APPENDIX C—PUBLIC HEALTH PROGRAMS

(1) Section 225 of the Public Health Service Act (42 U.S.C. 264).

(2) Section 301 of the Public Health Service Act (42 U.S.C. 241).

(3) Section 309 of the Public Health Service Act (42 U.S.C. 242a).

(4) Section 304 of the Public Health Service Act (42 U.S.C. 242b).

(5) Section 308 of the Public Health Service Act (42 U.S.C. 242d).

(6) Section 308 of the Public Health Service Act (42 U.S.C. 242f).

(7) Section 309 of the Public Health Service Act (42 U.S.C. 242g).

(8) Section 310 of the Public Health Service Act (42 U.S.C. 242h).

(9) Section 314 (b), (c), and (e) of the Public Health Service Act (42 U.S.C. 246 (b), (c), and (e)).

(10) Section 717 of the Public Health Service Act (42 U.S.C. 247b).

(11) Section 818 of the Public Health Service Act (42 U.S.C. 267e).