

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES
REHABILITATION SERVICES ADMINISTRATION
WASHINGTON, D.C. 20202

INFORMATION MEMORANDUM
RSA-IM-02-05
DATE: November 19, 2001

ADDRESSEES: STATE VOCATIONAL REHABILITATION AGENCIES (GENERAL)
STATE VOCATIONAL REHABILITATION AGENCIES (BLIND)
STATEWIDE INDEPENDENT LIVING COUNCILS
CENTERS FOR INDEPENDENT LIVING
CLIENT ASSISTANCE PROGRAMS
PROTECTION & ADVOCACY OF INDIVIDUAL RIGHTS
PROGRAMS
REGIONAL REHABILITATION CONTINUING EDUCATION
PROGRAMS
AMERICAN INDIAN VOCATIONAL REHABILITATION
PROGRAMS
RSA SENIOR MANAGEMENT TEAM

SUBJECT: Independent Living Questions and Answers No. 1

CONTENT: Title VII, chapter 1 of the Rehabilitation Act of 1973, as amended, (the Act) creates the Independent Living Services and Centers for Independent Living programs. Each year the Rehabilitation Services Administration (RSA) Independent Living (IL) Branch receives numerous requests from designated State units, Statewide Independent Living Councils, and Centers for Independent Living for interpretations of Title VII, chapter 1 of the Act and its implementing regulations, 34 CFR Parts 364 through 366, and the applicable Education Department General Administrative Regulations (EDGAR). In order to promote consistent application of the law and to encourage information sharing in the IL community, the IL Branch will be compiling these inquiries and RSA's responses into Questions and Answers. It is anticipated that these Questions and Answers will be released on a quarterly basis. Attached are Questions and Answers No. 1.

If you have any questions regarding this IM, please contact Dr. Thomas E. Finch at (202) 205-8292, or via email at tom.funch@ed.gov.

Joanne Wilson
Commissioner

Attachment

cc: NATIONAL COUNCIL ON INDEPENDENT LIVING
COUNCIL OF STATE ADMINISTRATORS OF VOCATIONAL REHABILITATION
NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS
NATIONAL REHABILITATION FACILITIES COALITION
NATIONAL ORGANIZATION OF REHABILITATION PARTNERS

REHABILITATION SERVICES ADMINISTRATION

Questions and Answers No. 1

1. ***Can Title VII, Chapter 1, Part B funds be used for a fundraiser or for fund raising activities?***

No - Section 713 of the Rehabilitation Act of 1973, as amended, (the Act), sets forth the authorized use of funds that each State receives under Title VII, Chapter 1, Part B of the Act. Section 713 contains no authorization for fund raising or "resource development activities" as there is in Section 725 of Chapter 1, Part C of Title VII. Furthermore, OMB Circular A-87, providing the cost principles for State, Local, and Tribal Governments, specifically prohibits the use of federal funds for fundraising activities. It states in Attachment B, No. 21(a), "Costs of organized fund raising, including financial campaigns, solicitation of gifts and bequests, and similar expenses incurred to raise or obtain contributions are unallowable, regardless of the purpose for which the funds will be used". The Attachment continues at No. 21(c) to say, "Fund raising and investment activities shall be allocated an appropriate share of indirect costs under the conditions described in subsection C.3.b of Attachment A [of Circular A-87]". Although the specific statutory authorization for "resource development activities," which can fairly be read as fund raising activities, in Chapter 1, Part C of Title VII, overrides the OMB cost principles, no such authorization can be read into Part B of Title VII when there is a clear OMB rule on point prohibiting such conduct.

2. ***On the Statewide Independent Living Council (SILC), does the member serving as the "representative from the designated State unit" have a term limit and, if so, for how long?***

Section 705(b) of the Act provides the requirements regarding the composition and the appointment of members of the SILC. Section 705(b)(2) provides that a representative from the designated State unit (DSU) shall be an ex officio nonvoting member of the SILC. The Act does not name a particular position within the DSU (such as the Director) that must be a member of the SILC. Instead, the representative from the DSU may be any person appointed by the Governor, in the same manner as the other members of the SILC. Section 705(b)(6)(A) defines the length of the term of office. No mention is made to exempt members who are ex officio from the term limit requirement, and because the ex officio member from the DSU is not required by the Act to be in a particular position, but rather may be any person chosen to represent the DSU, the term limits apply to all members, ex officio or otherwise. Sections 705(b)(6)(A) and (B) of the Act provide: "Each member of the Council shall serve for a term of 3 years [except for vacancy and certain initial appointments]. . . . No member of the Council may serve more than two consecutive full terms." Therefore, if a particular person has served on the SILC as the

representative of the DSU for two consecutive full terms, another person to serve as the DSU's representative must replace him or her for the next term.

3. **Background Scenario: The SILC has been incorporated as a private, non-profit organization. As allowed under Section 705(b)(7)(B) of the Act, the Governor has delegated the authority to fill Council vacancies to the remaining voting SILC members. *If the SILC wants to increase membership and appoint additional (new) members (i.e. not just fill vacancies that are left by departing members), can this appointment authority be delegated by the Governor or does the power to appoint these members still reside with the Governor because they are considered initial appointments?***

The Act provides that the Governor must make all appointments of members to the SILC. The only exception is that the Governor may delegate his authority to make appointments to fill vacancies. While not defined specifically in the Act, the common definition of a “vacancy” is “a position, office, or accommodation that is unfilled or unoccupied.” See American Heritage Dictionary 1334 (1991 Ed.). In order to have a vacancy, a position or office must already be in existence. If new positions are created, filling the positions for the first time is not considered filling a vacancy. The Governor must make the initial appointments of members of any newly created positions on the SILC. Any vacancies to those positions may then be filled by the SILC members in accordance with the Governor’s delegation.

4. ***What is the interpretation of the phrase “operated...by individuals with disabilities” and what is the meaning of “consumer controlled” with respect to the definition of a center for independent living (CIL) in Section 702(1)(A) and 702(2), respectively, of the Act?***

Section 702 of the Act provides:

As used in this chapter:

- "(1) Center for independent living. -- The term 'center for independent living' means a consumer-controlled, community-based, cross-disability, nonresidential private nonprofit agency that --
- "(A) Is designed and operated within a local community by individuals with disabilities; and
- "(B) Provides an array of independent living services.
- "(2) Consumer control. -- The term 'consumer control; means, with respect to a center for independent living, that the center vests power and authority in individuals with disabilities.

CILs must comply with the standards and assurances outlined in Section 725 of the Act. One of those standards is the philosophy of independent living: "The center shall promote and practice the independent living philosophy of -- (A) consumer control of the

center regarding decision-making, service delivery, management, and establishment of the policy and direction of the center. . . ." See Section 725(b)(1)(A) of the Act. In addition, the center must provide the assurance at section 725(c)(2) that it "will have a Board that is the principal governing body of the center and a majority of which shall be composed of individuals with significant disabilities." And the assurance at section 725(c)(6) that it will "ensure that the majority of the staff, and individuals in decision-making positions . . . are individuals with disabilities."

As evidence of compliance with the standards and assurances set forth in the Act, the regulations implementing Chapter 1, Part C of Title VII of the Act have established compliance indicators. For evidence of compliance with the philosophy of consumer control, 34 CFR §§ 366.63(a)(1)(A) and (B)(1)(2) provide:

- (a) Compliance indicator 1 -- Philosophy -- (1) Consumer control.
 - (i) The center shall provide evidence in its most recent annual performance report that --
 - (A) Individuals with significant disabilities constitute more than 50 percent of the center's governing board; and
 - (B) Individuals with disabilities constitute more than 50 percent of the center's --
 - (1) Employees in decision-making positions; and
 - (2) Employees in staff positions.

A decision-making position is defined at 34 CFR § 366.5 as "the executive director, any supervisory position, and any other policy-making position within the center." A staff position is defined also at 34 CFR § 366.5 as "a paid non-contract position within the center that is not included within the definition of a "decision-making position." Compliance with this independent living indicator serves to demonstrate that a center is "consumer-controlled" and "operated by individuals with disabilities."

5. *Who will resolve disputes between or among the various entities in the State, such as CILs, the SILC, and the DSU, concerned with independent living?*

In contrast to Title I, which in Section 105(d)(2) stipulates that disagreements between the State Rehabilitation Council (SRC) and the DSU are to be resolved by the Governor, Title VII, Chapter 1 of the Act is silent regarding who is to resolve disputes if disagreements occur between or among entities within the independent living community of the State. However, the State plan for independent living provides an opportunity to address cooperation, coordination and working relationships among the various independent living entities within a State. See Section 704(i) of the Act. This section of the state plan would be a prudent place to address the resolution of disputes between or among the SILC, DSU, and the CILs within a State, whether it be by dispute resolution procedures in State law, arbitration, or some other means. RSA will defer to the State plan to determine how disagreements between or among Title VII, Chapter 1 entities are to be resolved.

6. ***When reporting the total hours of “Community Services” on the annual performance report, known as the 704 Report, should a CIL count the number of hours of community education programs presented -OR- count the number of hours of community education programs presented multiplied by the number of participants in each program?***

The 704 Report instructs CILs to “report *the number of hours* of community services provided.” If a CIL presents a two-hour presentation on disability issues, this should be reported as two hours of community education, regardless of the number of participants attending the presentation.

7. ***As stated in Section 705(b)(2)(C) of the Act, the composition of the SILC shall include: “in a State in which one or more projects are carried out under section 121, at least one representative of the directors of the projects.” How do we ensure that all Section 121 Projects have representation on the SILC?***

Once appointed by the Governor, the representative of the Section 121 Projects in the State is responsible for communicating issues from all the Section 121 Projects in the state to the SILC and for disbursing information from the SILC to the Section 121 Projects. The Section 121 Project representative is obligated to represent the interests of each Section 121 Project in the State to the SILC, not just the Section 121 Project of which the representative is a member. One promising practice that would involve all Section 121 Projects in the selection of the representative would entail having the Section 121 Projects in a State come together and elect a representative as their nominee to the Governor to serve on the SILC. If the Section 121 Projects cannot agree on one representative, the SILC may want to ask the Governor to appoint a representative from each Section 121 Project to its membership. The Act does not limit the number of Section 121 Projects representatives that can be included in the SILC membership

8. ***What is the order of priorities for allocating Part C funds among CILs within a State? Can a State or SILC create alternative priorities?***

The Act, in Sections 722(e) and 723(e), establishes the order of priorities for allocating funds to CILs within a State. These sections establish the same priorities for allocation of funds, except that in States where State funding equals or exceeds Federal funding, and the director of the DSU in the State makes the grant awards for centers, the director and the chairperson of the SILC, or other individual designated by the SILC acting on behalf of and at the direction of the SILC, may jointly agree on another order of priority. Otherwise, the order of priorities, in accordance with a State’s allotment and to the extent funds are available, are as follows:

- (1) Existing centers, as described in §366.23, that comply with the standards and assurances in Section 725(b) and (c) of the Act and subparts F and G of [Part 366] first receive the level of funding each center received in the previous year. However, any funds received by an existing center to establish a new center at a different geographical location pursuant to §366.2(b)(2) are not included in determining the level of funding to the existing center in any fiscal year that the new center applies for and receives funds as a separate center.
- (2) Existing centers that meet the requirement of paragraph (a)(1) of this section then receive a cost-of-living increase in accordance with procedures consistent section 721(c)(3) of the Act.
- (3) New centers, as described in §366.2(b), that comply with the standards and assurances in section 725(b) and (c) of the Act and subparts F and G of [Part 366]

See 34 CFR §§ 366.22(a) and 366.34(a). If, after meeting the priorities for existing centers in section 366.22(a)(1) and (2), there are insufficient funds under the State's allotment to fund a new center under paragraph (a)(3) of section 366.22, the Secretary [or the Director of the DSU] may (1) use the excess funds in the State to assist existing centers consistent with the State plan; or (2) reallocate [or in the Director's case, return to the Secretary for reallocation] excess funds in accordance with section 721(d) of the Act." See 34 CFR §§ 366.22(b) and 366.34(b).

Accordingly, a State must follow the order of priorities established in the Act and the implementing regulations in funding existing and then new centers with the State's allocation of funds. States may not create their own "alternative" funding priorities, except in cases where State funding equals or exceeds Federal funding, the director of the DSU in the State makes the grant awards for centers, and the director and the chairperson of the SILC agree on another order of priority.

9. *What information needs to be included by a Center for Independent Living in the 704 Report?*

The Act, in section 725(c)(4), requires centers to report annually their goals and objectives with a work plan describing how the center will fulfill its mission consistent with its State plan submitted under Section 704 of the Act. Section 725(c)(8) requires annual self-evaluations and performance reports concerning services the centers have provided during the year.

Specifically, 34 CFR § 366.50(d) requires each center to establish clear priorities through:

- (1) Annual and three-year program and financial planning objectives for the center, including overall goals or a mission for the center *[Subpart IIF and IIG of the 704 report]*;
- (2) A work plan for achieving the goals or mission, specific objectives, services priorities, and types of services to be provided; *[Subpart IIF of 704 report]*; and
- (3) A description that demonstrates how the proposed activities of the applicant are consistent with the most recent three-year State plan under section 704 of the Act. *[Subpart IIF(I) of 704 report]*.

In addition, 34 CFR § 366.50(h) requires each center to conduct an annual self-evaluation, prepare an annual performance report, and maintain records adequate to measure performance with respect to the standards in subpart G;

34 CFR § 366.50(i) requires the annual performance report and the records of the center's performance required by paragraph (h) of this section must each contain information regarding, at a minimum -

- (1) The extent to which the center is in compliance with the standards in section 725(b) of the Act and subpart G of this part *[Subpart IID of 704 Report]*;
- (2) The numbers and types of individuals with significant disabilities receiving services through the center *[Subpart IIB of 704 report]*;
- (3) The types of services provided through the center and the number of individuals with significant disabilities receiving each type of service *[Subpart IIC of 704 report]*;
- (4) The sources and amounts of funding for the operation of the center *[Subpart IIA of 704 report]*;
- (5) The number of individuals with significant disabilities who are employed by, and the number who are in management and decision-making positions in, the center *[Subpart IID of 704 report]*;
- (6) The number of individuals from minority populations who are employed by, and the number who are in management and decision-making positions in, the center *[Subpart IID of 704 report]*; and
- (7) A comparison, if appropriate, of the activities of the center in prior years with the activities of the center in most recent years *[Subpart IIE of 704 report]*.