

42 C.F.R. PART 51—REQUIREMENTS APPLICABLE TO THE PROTECTION AND ADVOCACY FOR INDIVIDUALS WITH MENTAL ILLNESS PROGRAM

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PART 51—REQUIREMENTS APPLICABLE TO THE PROTECTION AND ADVOCACY FOR INDIVIDUALS WITH MENTAL ILLNESS PROGRAM

Section Contents

[§ 51.1 Scope.](#)

[§ 51.2 Definitions.](#)

Subpart A—Basic Requirements

[§ 51.3 Formula for determining allotments.](#)

[§ 51.4 Grants administration requirements.](#)

[§ 51.5 Eligibility for allotment.](#)

[§ 51.6 Use of allotments.](#)

[§ 51.7 Eligibility for protection and advocacy services.](#)

[§ 51.8 Annual reports.](#)

[§ 51.9 \[Reserved\]](#)

[§ 51.10 Remedial actions.](#)

[§§ 51.11-51.20 \[Reserved\]](#)

Subpart B—Program Administration and Priorities

[§ 51.21 Contracts for program operations.](#)

[§ 51.22 Governing authority.](#)

[§ 51.23 Advisory council.](#)

[§ 51.24 Program priorities.](#)

[§ 51.25 Grievance procedure.](#)

[§ 51.26 Conflicts of interest.](#)

[§ 51.27 Training.](#)

[§§ 51.28-51.30 \[Reserved\]](#)

Subpart C—Protection and Advocacy Services

[§ 51.31 Conduct of protection and advocacy activities.](#)

[§ 51.32 Resolving disputes.](#)

[§§ 51.33-51.40 \[Reserved\]](#)

Subpart D—Access to Records, Facilities and Individuals

[§ 51.41 Access to records.](#)

[§ 51.42 Access to facilities and residents.](#)

[§ 51.43 Denial or delay of access.](#)

[§ 51.44 \[Reserved\]](#)

[§ 51.45 Confidentiality of protection and advocacy system records.](#)

[§ 51.46 Disclosing information obtained from a provider of mental health services.](#)

Authority: 42 U.S.C. 10801, *et seq.*

Source: 63 FR 53564, Oct. 15, 1997, unless otherwise noted.

§ 51.1 Scope.

The provisions of this part apply to recipients of Federal assistance under the Protection and Advocacy for Mentally Ill Individuals Act of 1986, as amended.

§ 51.2 Definitions.

In addition to the definitions in section 102 of the Act, as amended, the following definitions apply:

Abuse means any act or failure to act by an employee of a facility rendering care or treatment which was performed, or which was failed to be performed, knowingly, recklessly, or intentionally, and which caused, or may have caused, injury or death to an individual with mental illness, and includes but is not limited to acts such as: rape or sexual assault; striking; the use of excessive force when placing an individual with mental illness in bodily restraints; the use of bodily or chemical restraints which is not in compliance with Federal and State laws and regulations; verbal, nonverbal, mental and emotional harassment; and any other practice which is likely to cause immediate physical or psychological harm or result in long-term harm if such practices continue.

Act means the Protection and Advocacy for Mentally Ill Individuals Act of 1986, as amended, also referred to as Protection and Advocacy for Individuals with Mental Illness Act.

ADD means the Administration on Developmental Disabilities within the Administration for Children and Families, Department of Health and Human Services.

Care or Treatment means services provided to prevent, identify, reduce or stabilize mental illness or emotional impairment such as mental health screening, evaluation, counseling, biomedical, behavioral and psychotherapies, supportive or other adjunctive therapies, medication

supervision, special education and rehabilitation, even if only “as needed” or under a contractual arrangement.

Center or *CMHS* means the Center for Mental Health Services, a component of the Substance Abuse and Mental Health Services Administration.

Complaint includes, but is not limited to any report or communication, whether formal or informal, written or oral, received by the P&A system, including media accounts, newspaper articles, telephone calls (including anonymous calls) from any source alleging abuse or neglect of an individual with mental illness.

Department or *HHS* means the U.S. Department of Health and Human Services.

Designated Official is the State official or public or private entity empowered by the Governor or State legislature to be accountable for the proper use of funds by the P&A system.

Director means the Director of the Center for Mental Health Services, Substance Abuse and Mental Health Services Administration, or his or her designee.

Facility includes any public or private residential setting that provides overnight care accompanied by treatment services. Facilities include, but are not limited to the following: general and psychiatric hospitals, nursing homes, board and care homes, community housing, juvenile detention facilities, homeless shelters, and jails and prisons, including all general areas as well as special mental health or forensic units.

Fiscal Year or *FY* means the Federal fiscal year (October 1–September 30) unless otherwise specified.

Full Investigation is based upon a complaint or a determination of probable cause and means the access to facilities, clients and records authorized under this part that is necessary for a P&A system to make a determination about whether an allegation of abuse or neglect is taking place or has taken place. Full investigations may be conducted independently or in cooperation with other agencies authorized to conduct similar investigations.

Governor means the chief executive officer of the State, Territory or the District of Columbia, or his or her designee, who has been formally designated to act for the Governor in carrying out the requirements of the Act and this part.

Individual with Mental Illness means an individual who has a significant mental illness or emotional impairment, as determined by a mental health professional qualified under the laws and regulations of the State and

(1) Who is an inpatient or resident in a facility rendering care or treatment, even if the whereabouts of such inpatient or resident is unknown;

(2) Who is in the process of being admitted to a facility rendering care or treatment, including persons being transported to such a facility, or

(3) Who is involuntarily confined in a detention facility, jail or prison.

Legal Guardian, Conservator, and Legal Representative all mean an individual whose appointment is made and regularly reviewed by a State court or agency empowered under State law to appoint and review such officers, and having authority to consent to health/mental health care or treatment of an individual with mental illness. It does not include persons acting only as a representative payee, persons acting only to handle financial payments, attorneys or persons acting on behalf of an individual with mental illness only in individual legal matters, or officials responsible for the provision of health or mental health services to an individual with mental illness, or their designees.

Neglect means a negligent act or omission by an individual responsible for providing services in a facility rendering care or treatment which caused or may have caused injury or death to an individual with mental illness or which placed an individual with mental illness at risk of injury or death, and includes, but is not limited to, acts or omissions such as failure to: establish or carry out an appropriate individual program or treatment plan (including a discharge plan); provide adequate nutrition, clothing, or health care; and the failure to provide a safe environment which also includes failure to maintain adequate numbers of appropriately trained staff.

Private Entity means a nonprofit or for-profit corporation, partnership or other nongovernmental organization.

Probable cause means reasonable grounds for belief that an individual with mental illness has been, or may be at significant risk of being subject to abuse or neglect. The individual making such determination may base the decision on reasonable inferences drawn from his or her experience or training regarding similar incidents, conditions or problems that are usually associated with abuse or neglect.

Program means activities carried out by the P&A system and operating as part of a P&A system to meet the requirements of the Act.

Public Entity means an organizational unit of a State or local government or a quasi-governmental entity with one or more governmental powers.

System means the organization or agency designated in a State to administer and operate a protection and advocacy program under Part C of the Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C. 6041, 6042) and thereby eligible to administer a program for individuals with mental illness.

Subpart A—Basic Requirements

§ 51.3 Formula for determining allotments.

The Secretary shall make allotments to eligible Systems from amounts apportioned each year under the Act on the basis of a formula prescribed by the Secretary in accordance with the requirements of sections 112 and 113 of the Act (42 U.S.C. 10822 and 10823).

§ 51.4 Grants administration requirements.

The following parts of titles 42 and 45 CFR apply to grants funded under this part.

42 CFR Part 50, Subpart D.

45 CFR Part 16—Procedures of the Departmental Grant Appeal Board.

45 CFR Part 74—Administration of Grants.

45 CFR Part 75—Informal Grant Appeals Procedures.

45 CFR Part 76—Government-wide Debarment and Suspension (Nonprocurement) and Government-wide Requirements for Drug-Free Workplace.

45 CFR Part 80—Nondiscrimination under Programs Receiving Federal Assistance through the Department of Health and Human Services—Effectuation of Title VI of the Civil Rights Act of 1964.

45 CFR Part 81—Practice and Procedure for Hearings under Part 80 of This Title.

45 CFR Part 84—Nondiscrimination on the Basis of Handicap in Programs and Activities Receiving or Benefiting from Federal Financial Assistance.

45 CFR Part 86—Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving Federal Financial Assistance.

45 CFR Part 91—Nondiscrimination on the Basis of Age in Education Programs and Activities Receiving Federal Financial Assistance from HHS.

45 CFR Part 92—Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments.

45 CFR Part 93—New Restrictions on Lobbying.

45 CFR Part 1386, subpart A.

§ 51.5 Eligibility for allotment.

(a) Federal financial assistance for protection and advocacy activities for individuals with mental illness will be given only to a System that has been established under Part C of the Developmental Disabilities Assistance and Bill of Rights Act (42 U.S.C. 6041, *et seq.*) and designated in accordance with 45 CFR part 1386, subpart B.

(b) The P&A system must meet the requirements of sections 105 and 111 of the Act (42 U.S.C. 10805 and 10821) and that P&A system must be operational. Each system shall submit an application at the beginning of each PAIMI authorization period. This application shall contain at

a minimum the program priorities and budget for the first year of the authorization period and the required assurances and certifications. Thereafter, the system shall submit yearly updates of the budget and program priorities for the upcoming fiscal year through its annual report.

(c) Written assurances of compliance with sections 105 and 111 of the Act (42 U.S.C. 10805 and 10821) and other requirements of the Act and this part shall be submitted by the P&A system in the format designated by the Director. These assurances will remain in effect for the period specified in the application for funds unless changes occur within the State which affect the functioning of the P&A system, in which case an amendment will be required 30 days prior to the effective date of the change. The P&A system shall also provide the Department the name of the designated official.

(d) The Governor's written assurance that the allotments made available under the Act will be used to supplement and not to supplant the level of non-Federal funds available in the State to protect and advocate the rights of individuals with mental illness shall be submitted by the P&A system. The Governor may provide this assurance along with the assurances provided to ADD under 45 CFR part 1386, as long as it can reasonably be construed as applying to the PAIMI program. Any future "supplement and not supplant" assurance shall explicitly refer to the PAIMI program.

§ 51.6 Use of allotments.

(a) Allotments must be used to supplement and not to supplant the level of non-Federal funds available in the State to protect and advocate the rights of individuals with mental illness.

(b) Allotments may not be used to support lobbying activities to influence proposed or pending Federal legislation or appropriations. This restriction does not affect the right of any P&A system, organization or individual to petition Congress or any other government body or official using other resources.

(c) Allotments may not be used to produce or distribute written, audio or visual materials or publicity intended or designed to support or defeat any candidate for public office.

(d) If an eligible P&A system is a public entity, that P&A system shall not be required by the State to obligate more than five percent of its annual allotment for State oversight administrative expenses under this grant such as costs of internal or external evaluations, monitoring or auditing. This restriction does not include:

(1) Salaries, wages and benefits of program staff;

(2) Costs associated with attending governing board or advisory council meetings; or

(3) Expenses associated with the provision of training or technical assistance for staff, contractors, members of the governing board or advisory council.

(e) No more than ten percent of each annual allotment may be used for providing technical assistance and training, including travel expenses for staff, contractors, or members of the governing board or advisory council as defined in §51.27.

(f) Allotments may be used to pay the otherwise allowable costs incurred by a P&A system in bringing lawsuits in its own right to redress incidents of abuse or neglect, discrimination, and other rights violations impacting on individuals with mental illness and when it appears on behalf of named plaintiffs or a class of plaintiffs for such purposes.

§ 51.7 Eligibility for protection and advocacy services.

In accordance with section 105(a)(1)(C) of the Act (42 U.S.C. 10805(a)(1)(C)) and the priorities established by the P&A system governing authority, together with the advisory council, pursuant to section 105(c)(2)(B) of the Act (42 U.S.C. 10805(c)(2)(B)), allotments may be used:

(a) To provide protection and advocacy services for:

(1) Individuals with mental illness as defined in 42 U.S.C. 10802(4) and 10805(a), including persons who report matters which occurred while they were individuals with mental illness;

(2) Persons who were individuals with mental illness who are residents of the State, but only with respect to matters which occur within 90 days after the date of the discharge of such individuals from a facility providing care or treatment; and

(3) Individuals with mental illness in Federal facilities rendering care or treatment who request representation by the eligible P&A system. Representation may be requested by an individual with mental illness, or by a legal guardian, conservator or legal representative.

(b) To provide representation of clients in civil commitment proceedings if the P&A system is acting on behalf of an eligible individual to obtain judicial review of his or her commitment in order to appeal or otherwise challenge acts or omissions which have subjected the individual to abuse or neglect or otherwise violated his or her rights. This restriction does not prevent a P&A system from representing clients in commitment or recommitment proceedings using other resources so long as this representation does not conflict with responsibilities under the Act.

§ 51.8 Annual reports.

By January 1 of each year, a report shall be submitted, pursuant to section 105(a)(7) of the Act (42 U.S.C. 10805(a)(7)), to the Secretary which is in the format designated by the Secretary.

Effective Date Note: At 62 FR 53564, Oct. 15, 1997, §51.8 was added. This section contains information collection and recordkeeping requirements and will not become effective until approval has been given by the Office of Management and Budget.

§ 51.9 [Reserved]

§ 51.10 Remedial actions.

Failure to submit an annual report in the designated format on time or to submit requested information and documentation, corrective action plans and ongoing implementation status reports in response to Federal review and monitoring activities or to satisfy any other requirement of the Act, this part, or other requirements, may be considered a breach of the terms and conditions of the grant award and may require remedial action, such as the suspension or termination of an active grant, withholding of payments or converting to a reimbursement method of payment. Any remedial actions shall be taken consistent with 45 CFR Part 74 and 42 CFR Part 50, as appropriate.

Effective Date Note: At 62 FR 53564, Oct. 15, 1997, §51.10 was added. This section contains information collection and recordkeeping requirements and will not become effective until approval has been given by the Office of Management and Budget.

§§ 51.11-51.20 [Reserved]

Subpart B—Program Administration and Priorities

§ 51.21 Contracts for program operations.

(a) An eligible P&A system should work cooperatively with existing advocacy agencies and groups and, where appropriate, consider entering into contracts for protection and advocacy services with organizations already working on behalf of individuals with mental illness. Special consideration should be given to contracting for the services of groups run by individuals who have received or are receiving mental health services or by family members of such individuals.

(b) An eligible P&A system may contract for the operation of all or part of its program with another public or private nonprofit organization with demonstrated experience in working with individuals with mental illness provided that:

(1) Any organization that will operate the full program meets the requirements of section 104(a)(1), 105 and 111 of the Act (42 U.S.C. 10804(a)(1), 10805 and 10821) and has the capacity to perform protection and advocacy activities throughout the State;

(2) The eligible P&A system institutes oversight and monitoring procedures which ensure that this system will be able to meet all applicable terms, conditions and obligations of the Federal grant;

(3) The eligible P&A system and the contractor organization enter into a written agreement that includes at least the following:

(i) A description of the protection and advocacy services to be provided;

(ii) The type of personnel, their qualifications and training;

(iii) The methods to be used;

(iv) A timetable for performance;

(v) A budget;

(vi) Assurances that the contractor will meet all applicable terms and conditions of the grant;

(vii) Assurances that the contractor has adequate management and fiscal systems in place, including insurance coverage, if appropriate:

(viii) Assurances that the contractor's staff is trained to provide advocacy services to and conduct full investigations on behalf of individuals with mental illness; and

(ix) Assurances that the contractor staff is trained to work with family members of clients served by the P&A system where the clients are:

(A) Minors;

(B) Legally competent and choose to involve the family member; or,

(C) Legally incompetent and the legal guardians, conservators or other legal representatives are family members.

§ 51.22 Governing authority.

(a) Each P&A system shall have a governing authority responsible for its planning, designing, implementing and functioning. It shall, jointly with the advisory council, annually establish program priorities and policies.

(b) If the P&A system is organized with a multi-member governing board:

(1) Each P&A system shall establish policies and procedures for the selection of its governing board members and for the board evaluation of the P&A system director. The terms of board members shall be staggered and for 4 years except that any member appointed to fill a vacancy for an unexpired term shall serve for the remainder of such term. A member who has been appointed for a term of 4 years may not be reappointed to the governing board during the 2-year period beginning on the date on which such 4-year term expired.

(2) The board shall be composed of members who broadly represent or are knowledgeable about the needs of the clients served by the P&A system and shall include a significant representation of individuals with mental illness who are, or have been eligible for services, or have received or are receiving mental health services, and family members, guardians, advocates, or authorized representatives of such individuals.

(3) If the governing authority is organized as a private nonprofit entity, the chairperson of the advisory council shall be a member of the governing board.

(c) Continuing efforts shall be made to include members of racial and ethnic minority groups as board members.

(d) Any member of the advisory council may also serve on the governing board.

§ 51.23 Advisory council.

(a) Each P&A system shall establish an advisory council to:

(1) Provide independent advice and recommendations to the system.

(2) Work jointly with the governing authority in the development of policies and priorities.

(3) Submit a section of the system's annual report as required under §51.8.

(b) Members of the council shall include attorneys, mental health professionals, individuals from the public who are knowledgeable about mental illness, the advocacy needs of persons with mental illness and have demonstrated a substantial commitment to improving mental health services, a provider of mental health services, individuals who have received or are receiving mental health services and family members of such individuals. Continuing efforts shall be made to include members of racial and ethnic minority groups on the advisory council.

(1) At least 60 percent of the membership of the advisory council shall be comprised of individuals who have received or are receiving mental health services or who are family members of such individuals. At least one family member shall be a primary care giver for an individual who is currently a minor child or youth who is receiving or has received mental health services;

(2) The council shall be chaired by an individual who has received or is receiving mental health services or who is a family member of such an individual;

(3) The advisory council shall meet no less than three times annually. The terms of council members shall be staggered and for 4 years except that any member appointed to fill a vacancy for an unexpired term shall serve for the remainder of such term. A member who has been appointed for a term of 4 years may not be reappointed to the council during the 2-year period beginning on the date on which such 4-year term expired.

(c) Each P&A system shall provide its advisory council with reports, materials and fiscal data to enable review of existing program policies, priorities and performance outcomes. Such submissions shall be made at least annually and shall report expenditures for the past two fiscal years, as well as projected expenses for the next fiscal year, identified by budget category (e.g., salary and wages, contract for services, administrative expenses) including the amount allotted for training of each the advisory council, governing board and staff.

(d) Reimbursement of expenses. (1) Allotments may be used to pay for all or a part of the expenses incurred by members of the advisory council in order to participate in its activities. Expenses may include transportation costs, parking, meals, hotel costs, per diem expenses, stipends or subsistence allowances, and the cost of day care or child care (or its equivalent for the

child's travel and subsistence expenses) for their dependents with mental illness or developmental disabilities.

(2) Each P&A system shall establish its own policies and procedures for reimbursement of expenses of council members, taking into account the needs of individual council members, available resources, and applicable restrictions on use of grant funds, including the restrictions in §§51.31(e) and 51.6(e).

Effective Date Note: At 62 FR 53564, Oct. 15, 1997, §51.23 was added. This section contains information collection and recordkeeping requirements and will not become effective until approval has been given by the Office of Management and Budget.

§ 51.24 Program priorities.

(a) Program priorities and policies shall be established annually by the governing authority, jointly with the advisory council. Priorities shall specify short-term program goals and objectives, with measurable outcomes, to implement the established priorities. In developing priorities, consideration shall be given to, at a minimum, case selection criteria, the availability of staff and monetary resources, and special problems and cultural barriers faced by individuals with mental illness who are multiply handicapped or who are members of racial or ethnic minorities in obtaining protection of their rights. Systemic and legislative activities shall also be addressed in the development and implementation of program priorities.

(b) Members of the public shall be given an opportunity, on an annual basis, to comment on the priorities established by, and the activities of, the P&A system. Procedures for public comment must provide for notice in a format accessible to individuals with mental illness, including such individuals who are in residential facilities, to family members and representatives of such individuals and to other individuals with disabilities. Procedures for public comment must provide for receipt of comments in writing or in person.

§ 51.25 Grievance procedure.

(a) The P&A system shall establish procedures to address grievances from:

(1) Clients or prospective clients of the P&A system to assure that individuals with mental illness have full access to the services of the program; and

(2) Individuals who have received or are receiving mental health services in the State, family members of such individuals, or representatives of such individuals or family members to assure that the eligible P&A system is operating in compliance with the Act.

(b) At a minimum, the grievance procedures shall provide for:

(1) An appeal to the governing authority from any final staff review and/or determination; in cases where the governing authority is the director of the P&A system, the final review and/or determination shall be made by a superior of the governing authority, e.g., a supervisor, or by an independent entity, e.g., an appointed board or committee.

- (2) Reports, at least annually, to the governing authority and the advisory council describing the grievances received and processed and their resolution;
- (3) Identification of individuals responsible for review;
- (4) A timetable to ensure prompt notification concerning the grievance procedure to clients, prospective clients or persons denied representation, and to ensure prompt resolution;
- (5) A written response to the grievant; and
- (6) Protection of client confidentiality.

Effective Date Note: At 62 FR 53564, Oct. 15, 1997, §51.25 was added. This section contains information collection and recordkeeping requirements and will not become effective until approval has been given by the Office of Management and Budget.

§ 51.26 Conflicts of interest.

The P&A system must develop appropriate policies and procedures to avoid actual or apparent conflict of interest involving clients, employees, contractors and subcontractors, and members of the governing authority and advisory council, particularly with respect to matters affecting client services, particular contracts and subcontracts, grievance review procedures, reimbursements and expenses, and the employment or termination of staff.

§ 51.27 Training.

A P&A system shall provide training for program staff, and may also provide training for contractors, governing board and advisory council members to enhance the development and implementation of effective protection and advocacy services for individuals with mental illness, including at a minimum:

(a)(1) Training of program staff to work with family members of clients served by the program where the individual with mental illness is:

(i) A minor,

(ii) Legally competent and chooses to involve the family member; or

(iii) Legally incompetent and the legal guardian, conservator or other legal representative is a family member.

(2) This training may be provided by individuals who have received or are receiving mental health services and family members of such individuals.

(b) Training to enhance sensitivity to and understanding of individuals with mental illness who are members of racial or ethnic minorities and to develop strategies for outreach to those populations.

(c) Training to conduct full investigations of abuse or neglect.

§§ 51.28-51.30 [Reserved]

Subpart C—Protection and Advocacy Services

§ 51.31 Conduct of protection and advocacy activities.

(a) Consistent with State and Federal law and the canons of professional ethics, a P&A system may use any appropriate technique and pursue administrative, legal or other appropriate remedies to protect and advocate on behalf of individuals with mental illness to address abuse, neglect or other violations of rights.

(b) A P&A system shall establish policies and procedures to guide and coordinate advocacy activities. The P&A system shall not implement a policy or practice restricting the remedies which may be sought on behalf of individuals with mental illness or compromising the authority of the P&A system to pursue such remedies through litigation, legal action or other forms of advocacy. However, this requirement does not prevent the P&A system from placing limitations on case or client acceptance criteria developed as part of the annual priorities. Prospective clients must be informed of any such limitations at the time they request service.

(c) Wherever possible, the program should establish an ongoing presence in residential mental health care or treatment facilities, and relevant hospital units.

(d) Program activities should be carried out in a manner which allows program staff to:

(1) Interact regularly with those individuals who are current or potential recipients of protection and advocacy services;

(2) Interact regularly with staff providing care or treatment;

(3) Obtain information and review records; and

(4) Communicate with family members, social and community service workers and others involved in providing care or treatment.

(e) A P&A system may support or provide training, including related travel expenses, for individuals with mental illness, family members of such individuals, and other persons who are not program staff, contractors, or board or council members, to increase knowledge about protection and advocacy issues, to enhance leadership capabilities, or to promote Federal-State and intra-State cooperation on matter related to mental health system improvement. Decisions concerning the selection of individuals to receive such training shall be made in accordance with established policies, procedures and priorities of the P&A system.

(f) A P&A system may monitor, evaluate and comment on the development and implementation of Federal, State and local laws, regulations, plans, budgets, levies, projects, policies and hearings affecting individuals with mental illness as a part of federally funded advocacy

activities. A P&A system shall carry out systemic advocacy—those efforts to implement changes in policies and practices of systems that impact persons with mental illness.

(g) Determination of “probable cause” may result from P&A system monitoring or other activities, including observation by P&A system personnel, and reviews of monitoring and other reports prepared by others whether pertaining to individuals with mental illness or to general conditions affecting their health or safety.

(h) A P&A which is a public P&A system shall be free from hiring freezes, reductions in force, prohibitions on staff travel, or other policies imposed by the State to the extent that such policies would impact program staff or activities funded with Federal dollars and would prevent the P&A system from carrying out its mandates under the Act.

(i) A P&A system may exercise its authority under State law where the authority exceeds the authority required by the Act. However, State law must not diminish the required authority of the Act.

§ 51.32 Resolving disputes.

(a) Each P&A system is encouraged to develop and employ techniques such as those involving negotiation, conciliation and mediation to resolve disputes early in the protection and advocacy process.

(b) Disputes should be resolved whenever possible through nonadversarial process involving negotiation, mediation and conciliation. Consistent with State and Federal laws and canons of professional responsibility, family members should be involved in this process, as appropriate, where the individual with mental illness is:

(1) A minor,

(2) Legally competent and chooses to involve the family member, or

(3) Legally incompetent and the legal guardian, conservator or other legal representative is a family member or the legal guardian, conservator or other legal representative chose to involve the family member.

(c) A P&A system must exhaust in a timely manner all administrative remedies, where appropriate, prior to initiating legal action in a Federal or State court.

(d) Paragraph (c) of this section does not apply to any legal action instituted to prevent or eliminate imminent serious harm to an individual with mental illness nor does it apply in circumstances where administrative procedures do not exist. If in pursuing administrative remedies, the P&A system determines that any matter with respect to an individual with mental illness with mental illness with not be resolved within a reasonable time, the P&A system may pursue alternative remedies, including initiating legal action.

(e) A P&A system shall be held to the standard of exhaustion of remedies provided under State and Federal law. The Act imposes no additional burden respecting exhaustion of remedies.

§§ 51.33-51.40 [Reserved]

Subpart D—Access to Records, Facilities and Individuals

§ 51.41 Access to records.

- (a) Access to records shall be extended promptly to all authorized agents of a P&A system.
- (b) A P&A system shall have access to the records of any of the following individuals with mental illness:
- (1) An individual who is a client of the P&A system if authorized by that individual or the legal guardian, conservator or other legal representative.
 - (2) An individual, including an individual who has died or whose whereabouts is unknown to whom all of the following conditions apply:
 - (i) The individual, due to his or her mental or physical condition, is unable to authorize the P&A system to have access.
 - (ii) The individual does not have a legal guardian, conservator or other legal representative, or the individual's guardian is the State or one of its political subdivisions; and
 - (iii) A complaint or report has been received and the P&A system has determined that there is probable cause to believe that the individual has been or may be subject to abuse or neglect.
 - (3) An individual who has a legal guardian, conservator, or other legal representative, with respect to whom a complaint or report has been received by the P&A system and with respect to whom the P&A system has determined that there is probable cause to believe that the health or safety of the individual is in serious and immediate jeopardy, whenever all of the following conditions exists:
 - (i) The P&A system has made a good faith effort to contact the representative upon prompt receipt of the representative's name and address;
 - (ii) The P&A system has made a good faith effort to offer assistance to the representative to resolve the situation; and
 - (iii) The representative has failed or refused to act on behalf of the individual.
- (c) Information and individual records, whether written or in another medium, draft or final, including handwritten notes, electronic files, photographs or video or audio tape records, which shall be available to the P&A system under the Act shall include, but not be limited to:

(1) Information and individual records, obtained in the course of providing intake, assessment, evaluation, supportive and other services, including medical records, financial records, and reports prepared or received by a member of the staff of a facility or program rendering care or treatment. This includes records stored or maintained in locations other than the facility or program as long as the system has obtained appropriate consent consistent with section 105(a)(4) of the Act. The system shall request of facilities that in requesting records from service providers or other facilities on residents that they indicate in the release form the records may be subject to review by a system.

(2) Reports prepared by an agency charged with investigating abuse neglect, or injury occurring at a facility rendering care or treatment, or by or for the facility itself, that describe any or all of the following:

(i) Abuse, neglect, or injury occurring at the facility;

(ii) The steps taken to investigate the incidents;

(iii) Reports and records, including personnel records, prepared or maintained by the facility, in connection with such reports of incidents; or

(iv) Supporting information that was relied upon in creating a report, including all information and records used or reviewed in preparing reports of abuse, neglect or injury such as records which describe persons who were interviewed, physical and documentary evidence that was reviewed, and the related investigative findings.

(3) Discharge planning records.

(4) Reports prepared by individuals and entities performing certification or licensure reviews, or by professional accreditation organizations, as well as related assessments prepared for the facility by its staff, contractors or related entities, except that nothing in this section is intended to preempt State law protecting records produced by medical care evaluation or peer review committees.

(5) Professional, performance, building or other safety standards, demographic and statistical information relating to the facility.

(d) A P&A system shall have reasonable access and authority to interview and examine all relevant records of any facility service recipient (consistent with the provisions of section 105(a)(4) of the Act) or employee.

(e) A P&A system shall be permitted to inspect and copy records, subject to a reasonable charge to offset duplicating costs.

§ 51.42 Access to facilities and residents.

(a) Access to facilities and residents shall be extended to all authorized agents of a P&A system.

(b) A P&A system shall have reasonable unaccompanied access to public and private facilities and programs in the State which render care or treatment for individuals with mental illness, and to all areas of the facility which are used by residents or are accessible to residents. The P&A system shall have reasonable unaccompanied access to residents at all times necessary to conduct a full investigation of an incident of abuse or neglect. This authority shall include the opportunity to interview any facility service recipient, employee, or other persons, including the person thought to be the victim of such abuse, who might be reasonably believed by the system to have knowledge of the incident under investigation. Such access shall be afforded, upon request, by the P&A system when:

(1) An incident is reported or a complaint is made to the P&A system;

(2) The P&A system determines there is probable cause to believe that an incident has or may have occurred; or

(3) The P&A system determines that there is or may be imminent danger of serious abuse or neglect of an individual with mental illness.

(c) In addition to access as prescribed in paragraph (b) of this section, a P&A system shall have reasonable unaccompanied access to facilities including all area which are used by residents, are accessible to residents, and to programs and their residents at reasonable times, which at a minimum shall include normal working hours and visiting hours. Residents include adults or minors who have legal guardians or conservators. P&A activities shall be conducted so as to minimize interference with facility programs, respect residents' privacy interests, and honor a resident's request to terminate an interview. This access is for the purpose of:

(1) Providing information and training on, and referral to programs addressing the needs of individuals with mental illness, and information and training about individual rights and the protection and advocacy services available from the P&A system, including the name, address, and telephone number of the P&A system.

(2) Monitoring compliance with respect to the rights and safety of residents; and

(3) Inspecting, viewing and photographing all areas of the facility which are used by residents or are accessible to residents.

(d) Unaccompanied access to residents shall include the opportunity to meet and communicate privately with individuals regularly, both formally and informally, by telephone, mail and in person. Residents include minors or adults who have legal guardians or conservators.

(e) The right of access specified in paragraph (c) of this section shall apply despite the existence of any State or local laws or regulations which restrict informal access to minors and adults with legal guardians or conservators. The system shall make very effort to ensure that the parents of minors or guardians of individuals in the care of a facility are informed that the system will be monitoring activities at the facility and may in the course of such monitoring have access to the minor or adult with a legal guardian. The system shall take no formal action on behalf of

individuals with legal guardians or conservators, or initiate a formal attorney/client or advocate/client relationship without appropriate consent, except in emergency situations as described in §51.41(b)(3).

(f) A P&A system providing representation to individuals with mental illness in Federal facilities shall have all the rights and authority accorded other representatives of residents of such facilities pursuant to State and Federal laws.

§ 51.43 Denial or delay of access.

If a P&A system's access to facilities, programs, residents or records covered by the Act or this part is delayed or denied, the P&A system shall be provided promptly with a written statement of reasons, including, in the case of a denial for alleged lack of authorization, the name, address and telephone number of the legal guardian, conservator, or other legal representative of an individual with mental illness. Access to facilities, records or residents shall not be delayed or denied without the prompt provision of written statements of the reasons for the denial.

§ 51.44 [Reserved]

§ 51.45 Confidentiality of protection and advocacy system records.

(a) Records maintained by the P&A system are the property of the P&A system which must protect them from loss, damage, tampering or use by unauthorized individuals. The P&A system must:

(1) Except as provided elsewhere in this section, keep confidential all records and information, including information contained in any automated electronic database pertaining to:

(i) Clients to the same extent as is required under Federal or State laws for a provider of mental health services;

(ii) Individuals who have been provided general information or technical assistance on a particular matter;

(iii) Identity of individuals who report incidents of abuse or neglect or furnish information that forms the basis for a determination that probable cause exists; and

(iv) Names of individuals who are residents and provide information for the record.

(2) Have written policies governing access to, storage of, duplication and release of information from client records; and

(3) Obtain written consent from the client, if competent, or from his or her legal representative, from individuals who have been provided general information or technical assistance on a particular matter and from individuals who furnish reports or information that forms the basis for a determination of probable cause, before releasing information to individuals not otherwise authorized to receive it.

(b) Nothing in this subpart shall prevent the P&A system from. (1) Issuing a public report of the results of an investigation which maintains the confidentiality of the individuals listed in paragraph (a)(1) of this section or,

(2) Reporting the results of an investigation which maintains the confidentiality of individual service recipients to responsible investigative or enforcement agencies should an investigation reveal information concerning the facility, its staff, or employees warranting possible sanctions or corrective action. this information may be reported to agencies responsible for facility licensing or accreditation, employee discipline, employee licensing or certification, or criminal prosecution.

(c) For purposes of any periodic audit, report, or evaluation of the performance of the P&A system, the Secretary shall not require the P&A system to disclose the identity, or any other personally identifiable information, of any individual requesting assistance under a program. This requirement does not restrict access by the Department or other authorized Federal or State officials to client records or other records of the P&A system when deemed necessary for audit purposes and for monitoring P&A system compliance with applicable Federal or State laws and regulations. The purpose of obtaining such information is solely to determine that P&A systems are spending their grant funds awarded under the Act on serving individuals with mental illness. Officials that have access to such information must keep it confidential to the maximum extent permitted by law and regulations. If photostatic copies of materials are provided, then the destruction of such evidence is required once such reviews have been completed.

(d) Subject to the restrictions and procedures set out in this section, implementing section 106 (a) and (b) of the Act (42 U.S.C. 10806 (a) and (b)), this part does not limit access by a legal guardian, conservator, or other legal representative of an individual with mental illness, unless prohibited by State or Federal law, court order or the attorney-client privilege.

§ 51.46 Disclosing information obtained from a provider of mental health services.

(a) Except as provided in paragraph (b) of this section, if a P&A system has access to records pursuant to section 105(a)(4) of the Act (42 U.S.C. 10805(a)(4)) which, under Federal or State law, are required to be maintained in a confidential manner by a provider of mental health services, it may not disclose information from such records to the individual who is the subject of the information if the mental health professional responsible for supervising the provision of mental health services to that individual has given the P&A system a written determination that disclosure of such information to the individual would be detrimental to the individual's health. The provider shall be responsible for giving any such written determination to the P&A system at the same time as access to the records containing the information is granted.

(b)(1) If the disclosure of information has been denied under paragraph (a) of this section to an individual, the following individuals or the P&A system may select another mental health professional to review the information and to determine if disclosure of the information would be detrimental to the individual's health:

(i) Such individual;

(ii) The legal guardian, conservator or other legal representative of the individual; or

(iii) An eligible P&A system, acting on behalf of an individual:

(A) Whose legal guardian is the State; or

(B) Whose legal guardian, conservator, or other legal representative has not, within a reasonable time after the denial of access to information under paragraph (a), selected a mental health professional to review the information.

(2) If such mental health professional determines, based on professional judgment, that disclosure of the information would not be detrimental to the health of the individual, the P&A system may disclose such information to the individual.

(c) The restriction in paragraph (b) of this section does not affect the P&A system's access to the records.