



Recommendation 74-2

Procedures for Discretionary Distribution of Federal Assistance

(Adopted May 30-31, 1974)

The provision of assistance by the Government has a major impact upon the general public, as well as upon those who seek aid and those who particularly benefit from it. As with other governmental activity of similar importance, in dispensing assistance agencies should not be free to act completely within their own discretion, *ad hoc*, unguided by standards and insulated from the complaints of those who dispute the propriety of agency decisions. Such unchannelled discretion not only creates the occasion for arbitrary action, but also prevents the agencies from giving their programs the effective policy direction essential for the achievement of statutory aims.

This Recommendation calls upon each agency which has discretion in the distribution of assistance under a domestic program to identify publicly the specific results it expects the assistance to achieve; to develop criteria based on that formulation for awarding aid; and to utilize public procedures for developing and enforcing the program's criteria and other requirements. The adoption of these measures has advantages for all concerned. For the agencies, it promotes the rationality of decision-making by creating a stimulus towards analysis and specification of program aims. Applicants and recipients benefit from more consistent and predictable assistance terms, and from the open opportunity to seek an award. The affected public can monitor compliance in a way that promotes program purposes. And agency actions become more comprehensible to all involved.

The Conference has previously adopted two recommendations directed to particular categories of assistance programs covered by the present Recommendation and urging with respect to those categories, some of the same measures here proposed. Moreover, those earlier recommendations, since they were more narrowly focused, set forth procedures in addition to those here proposed, useful for the particular types of assistance programs they covered. Recommendation 71-4, dealing only with discretionary grant programs, urges, as does the present Recommendation, the development of criteria by rulemaking and sets forth particularized public notice and applicant notification procedures appropriate for that type of Federal assistance. Similarly, Recommendation 71-9, directed only to grant-in-aid programs, describes in some detail complaint procedures and information systems particularly applicable



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

to that type of Federal assistance. The present Recommendation is not meant to supersede those earlier proposals; but where it suggests additional procedures not there described, it is intended to supplement them.

Recommendation

A. Scope of the Recommendation. In its broadest sense, Federal assistance includes any expenditure made by the Government to provide goods or services to the public, whatever the form of transfer; thus it includes money grants and benefits, in-kind aid, financing, insurance, and the permitted use of public goods. This Recommendation is directed to domestic programs for the provision of all forms of assistance except services (where personnel considerations must be given special account). Since, however, the purpose of the Recommendation is to regularize agency exercise of discretion in the distribution of assistance, its provisions do not apply to programs in which no such discretion exists (e.g., "benefit" and "formula" programs in which aid is distributed on the basis of statutory entitlement); nor do they apply to contractual agreements covered by the Government's procurement regulations and its system of award and dispute procedures.

B. Articulation of Objectives, Criteria and Requirements—1. Statement of Objectives and Criteria. Each agency that has discretionary authority to determine the recipients under an assistance program, and the terms, amounts and purposes of awards, should publicly state the specific results which it expects the assistance to achieve. The agency should also identify any major technical obstacles hindering the achievement of these objectives, describe its strategy for overcoming them and make this statement public where doing so would not frustrate accomplishment of the program's goals. On the basis of such formulation, the agency should articulate the criteria guiding its actions in making awards. Periodically, the agency should review the adequacy of its program objectives and assistance criteria in light of the results achieved and changes in the public need.

2. Nature of Assistance Criteria. To ensure performance-related, impartial choice in selection of recipients, whenever possible the agency's assistance criteria should provide for the award of aid either on an entitlement basis, to all who meet specified requirements, or on a competitive basis, to those who best satisfy stated selection factors. While considerable judgment may be left to the decision-maker in their application, the criteria should provide sufficient guidance to enable determinations to be made on a rational and justifiable basis.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

In research, demonstration, developmental and other experimental programs, however, an agency will not always be able to specify its assistance criteria fully because of uncertainty about the results to be sought and the means of their achievement. To a corresponding degree, the choice of a recipient will involve greater judgment and in many instances subjective choice. Nevertheless, at each stage of program development the agency should refine its selection basis and provide as equal an opportunity to compete as it can.

3. *Requirements imposed on recipients.* The agency should state clearly any specific results it expects the recipient to achieve. Where possible it should promulgate these and any other requirements it imposes on the operation or fiscal administration of assisted programs in the form of generally applicable rules, in preference to attaching such requirements as special conditions to particular assistance agreements.

4. *Degree of Specificity.* Agencies should state their objectives, criteria and requirements with as much specificity as practicable, and with clear indication of their purpose. Since, however, flexibility in the actual operation of assistance programs is useful, and diversity of approach often necessary, requirements relating to the manner of operation of recipients should be only as detailed and specific as is necessary to realize the program objective.

5. *Procedures for Development.* Agencies should develop their assistance criteria and generally applicable requirements through a procedure involving public participation, by following the notice and comment provisions of the Administrative Procedure Act, 5 U.S.C. §553.

C. *Complaint Procedures—1. Establishment of Complaint Procedures.* Agencies benefit by encouraging affected persons to report instances in which, in their belief, Federal standards (including the criteria for distribution of aid and any statutory or regulatory requirements) are not being observed in program administration. Such reports provide a source of information concerning operational problems and successes, supplementing whatever audits and field inspections the agency may conduct. Assertions that standards are being disregarded are indicative of program problems that the Federal agency must solve, by revising its own operations, by invoking sanctions for non-compliance or by re-examining the adequacy and appropriateness of the requirements themselves. Consequently, assistance agencies should make procedures available by which persons may formally report that Federal standards intended to benefit or protect them are being violated.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

2. *Nature of Procedures.* Agencies should permit dissatisfied persons a suitable opportunity to submit information and argument in support of their assertions. The agency should specify the complaint procedure or procedures applicable to each of the programs it administers.

D. *Application to Delegated Programs.* In some programs, assistance recipients have been delegated an administrative role like that of Federal agencies in discretionary programs: the delegate-recipient agency dispenses assistance and exercises some discretionary power to decide who will receive aid, in what amounts, on what terms, and for what purposes. An example is the role of community action agencies under the Economic Opportunity Act, 42 U.S.C. 2701, et seq. In such programs, if it has the power to do so, the Federal agency should direct such recipients to observe Part B of this Recommendation, and to adopt procedures in accordance with Part C for receiving reports alleging violation by the recipient of its own established objectives, criteria and requirements. Reports alleging that the recipient's objectives, criteria and requirements do not accord with Federal standards should be entertained at the Federal agency level.

Citations:

39 FR 23041 (June 26, 1974)

__ FR ____ (2012)

3 ACUS 38

Separate Statement of Malcolm S. Mason

Although this is an important Recommendation which takes a broad and sound view of the need for structured administration and discretion in an area where structure is largely absent, it is not sound in its present form as applied to new and creative programs.

If this Recommendation in its present form had been adopted ten years ago and had been honored, there would have been no Head Start. Programs that require decisive action and the unleashing of enthusiasms that have been suppressed, of courage hidden in unexpected places, would be talked to death, analyzed to death, bureaucratized to death.



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

As applied to that kind of program, this Recommendation, instead of promoting rationality of decisionmaking, would promote rationalization and jargonization of decisionmaking. By creating painful consequences for those who may have the right goals and the right approach but have articulated them less self-defensively than others, they would not counteract, they would encourage, the tendency to avoid risks inherent in making decisions.

In the case of Head Start, which I take only as an example sufficiently familiar to be recognized, those who thought they were improving cognitive achievement as a primary objective and those who recognized that as a spurious goal but felt they were achieving family solidarity and dignity, through participation in the children's education, as a primary objective, and several other factions, would have debated endlessly and the program would never have started. Because, under this Recommendation, a stated objective carries consequences, they would have been forced to fight on the statement of objectives or to compromise and water down the program.

The Recommendation should have been adopted only after excluding expressly the Head Start kind of program and only after deleting the gratuitously inappropriate reference under Part D to the Community Action Program as one that should specifically be subject to this Recommendation. The Conference should have explicitly undertaken, and I hope it will now undertake, separate fresh thought to the kind and extent of structural discretion that is appropriate for the sort of program typified by Head Start.