

**DEPARTMENT OF EDUCATION****Vending Facility Program for the Blind on Federal and Other Property****AGENCY:** Department of Education.**ACTION:** Notice of final schedule of arbitration fees and expenses under the Randolph-Sheppard Act.

**SUMMARY:** The Secretary presents a schedule of fees and expenses associated with arbitration proceedings conducted under the Randolph-Sheppard Act (Act) that will be paid by the Department. The schedule lists the reasonable costs of arbitration and describes the standards by which the Secretary will support those costs.

**EFFECTIVE DATE:** This schedule takes effect on May 16, 1996.

**FOR FURTHER INFORMATION CONTACT:**

George Arsnow, U.S. Department of Education, 600 Independence Avenue, S.W., Room 3230, Mary E. Switzer Building, Washington, D.C. 20202-2531. Telephone: (202) 205-9317. Individuals who use a telecommunications device for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 8 a.m. and 8 p.m., Eastern time, Monday through Friday.

**SUPPLEMENTARY INFORMATION:** The Randolph-Sheppard Act, 20 U.S.C. 107 *et seq.*, gives blind persons who are trained and licensed by State vocational rehabilitation agencies (called "State licensing agencies" or SLAs) a priority to operate vending facilities on Federal property. The Act further provides for arbitration to resolve disputes that arise under the program between individual vendors and SLAs and between SLAs and Federal agencies. 20 U.S.C. 107d-1(a) and (b). For each of these two categories of arbitrations, the Secretary authorizes the convening of an arbitration panel upon receipt of a complaint filed by either a vendor against an SLA or by an SLA against a Federal agency. 20 U.S.C. 107d-2(a).

The Act directs each of the parties to an arbitration to appoint one arbitrator (or panel member) and directs the two party-appointed arbitrators to select a neutral chairperson. 20 U.S.C. 107d-2(b)(1) and (2). In order to facilitate this process, the Department sends to the parties names of potential chairpersons from the Roster of Arbitrators maintained by the Federal Mediation and Conciliation Service (FMCS). If the parties seek to appoint a chairperson who is not listed on the FMCS roster, a biographical sketch of that chairperson is to be sent to the Department. Once selected, the panel conducts a hearing and renders a decision, which is subject

to appeal and review as a "final agency action" for purposes of the Administrative Procedure Act. 20 U.S.C. 107d-2(a).

The Act, in 20 U.S.C. 107d-2(d), requires the Secretary to pay all reasonable costs of arbitration in accordance with a schedule of fees and expenses that the Secretary publishes in the Federal Register. Pursuant to this requirement, the Department has continued to pay certain costs associated with arbitration proceedings authorized by the Secretary in the absence of an established schedule, but has not published the schedule referred to in the statute.

On August 19, 1994 the Secretary published a notice of proposed schedule of arbitration fees and expenses under the Act in the Federal Register (59 FR 42824).

In accordance with 107d-2(d) of the Act, this final schedule outlines the types of costs that the Secretary considers reasonable costs of arbitration and the standards by which the Secretary will determine the rate of payment for these costs. Generally, the Secretary considers reasonable costs of arbitration to include the cost of preparing the official record of arbitration proceedings, professional fees for arbitration panel members, and food, travel, and lodging expenses of panel members and essential witnesses. The Secretary does not consider attorney's fees to be part of the reasonable costs of arbitration supported by the Secretary.

The Department has drawn guidance from information and data supplied by the FMCS in formulating these standards.

There are no substantive differences between the proposed schedule and this final schedule other than the authorization of postponement or cancellation fees for panel members if an arbitration proceeding is postponed or canceled within 72 hours of its scheduled date and time. The proposed schedule would have authorized these fees for panel members only if an arbitration proceeding is postponed or canceled within 48 hours of its scheduled date and time.

**Analysis of Comments and Changes**

In response to the Secretary's invitation in the notice of proposed schedule, two parties submitted comments on the proposed schedule. An analysis of the comments and of the changes in the schedule since publication of the notice of proposed schedule follows.

Major issues are grouped according to subject. Technical and other minor

changes—and suggested changes the Secretary is not legally authorized to make under the applicable statutory authority—are not addressed.

**Postponement or Cancellation Fees**

*Comments:* None.

*Discussion:* The proposed schedule would have authorized payment of postponement or cancellation fees for arbitrators if arbitration proceedings are postponed or canceled within 48 hours of their scheduled date and time. During the Department's review of the proposed schedule, it was determined that basing these fees on a two-day standard is unduly restrictive. The Secretary believes that authorization of fees for postponements or cancellations made within three days of a proceeding's scheduled date and time is a fairer basis for compensating arbitrators if schedule changes arise. Arbitrators also may receive a portion of their per diem fee that is proportional to the actual time that they expended in preparing for a postponed or canceled proceeding regardless of whether the panel member is entitled to a postponement or cancellation fee.

*Changes:* The Secretary has revised paragraph (b) of the proposed schedule to authorize payment of a predetermined, customary, and reasonable postponement or cancellation fee to panel members if a scheduled arbitration proceeding is postponed or canceled within 72 hours of its scheduled date and time.

**Attorney's Fees**

*Comments:* One commenter opposed the exclusion of attorney's fees from the reasonable costs of arbitration that are paid by the Department. This commenter asserted that the Department should pay the attorney's fees incurred by the parties to an arbitration proceeding so as not to put blind vendors, who have limited financial resources and cannot afford to retain an attorney, at a competitive disadvantage with SLAs, which typically do not have to expend additional resources to retain legal representation. In addition, this commenter stated that the refusal of the Department to pay the attorney's fees incurred by blind vendors during arbitration is inconsistent with the purposes of the Act and contrary to other statutory authorities such as the Equal Access to Justice Act, which requires the Department to pay the fees and other expenses of a prevailing party to certain adjudicative proceedings held before the Department. This commenter asserted that Congress intended that the Department pay "all" costs incurred during arbitration proceedings

conducted under the Act and questions the basis for excluding attorney's fees from the reasonable costs of arbitration supported by the Department.

*Discussion:* Pursuant to the requirements of the Act, the Department pays the reasonable costs of arbitration from its salaries and expenses account. Because the Department's financial resources are limited and because neither the Act nor its legislative history specifies the scope of the term "all reasonable costs of arbitration," it has been the Department's longstanding policy to support only the types of costs identified in this final schedule even though the schedule has not been published previously in the Federal Register. The Secretary believes that a Department policy to pay arbitration costs not identified in the schedule, such as attorney's fees, would significantly hinder the Department's ability to meet its statutory responsibility to support the reasonable costs associated with each arbitration that arises under the Act. Accordingly, the schedule is limited to the general costs necessary to ensure access to the arbitration process (i.e., the costs of convening the arbitration panel, developing the written record, and assembling essential witnesses).

The Secretary emphasizes that the Department plays a very limited role in arbitration proceedings under the Act, regardless of whether the arbitration is initiated by a blind vendor against an SLA or an SLA against another Federal agency. A requirement that the Department pay the attorney's fees of any party to an arbitration, therefore, would be inconsistent with the general understanding that only parties to the litigation can be held liable for damages or attorney's fees. This same view was advanced recently by the 8th Circuit Court of Appeals in *McNabb v. U.S. Department of Education*, 29 F.3d 1303 (8th Cir. 1994), when it held that the Secretary is not responsible for paying attorney's fees as part of the reasonable costs of arbitration under section 107d-2(d) of the Act. Finally, the Secretary notes that the Equal Access to Justice Act referred to by the commenter is unrelated to the Randolph-Sheppard program and authorizes Department support of fees and expenses only in certain adjudicative proceedings to which the Department is a party (See 34 CFR Part 21).

*Changes:* None.

#### Additional costs

*Comments:* One commenter suggested that the schedule be expanded to include additional expenses incurred by parties to an arbitration, such as the

costs of conducting depositions or other forms of discovery.

*Discussion:* The Secretary emphasizes that the schedule limits Department support to those costs that are incident to arbitrations conducted under the Act and are necessary to ensure that each grievant has access to the arbitration process. Thus, the Secretary believes that expenses incurred by exchanging information between parties (i.e., discovery costs), which often are considered part of attorney's fees, fall outside the scope of the reasonable costs of arbitration for which the Department is responsible. In addition, the Secretary notes that Department support of the expenses of witnesses whose testimony is deemed by the arbitration panel chairperson to be essential to the proper resolution of the dispute may lessen the need for parties to conduct certain depositions.

*Changes:* None.

Dated: April 10, 1996.

(Catalog of Federal Domestic Assistance Number does not apply.)

Richard W. Riley,

Secretary of Education.

#### Reasonable Costs of Arbitration Under the Randolph-Sheppard Act

The Secretary states that the reasonable costs of arbitration under 20 U.S.C. 107d-2(d) are the following:

(a) *Stenographic Record*—(1) *General Provisions.* The Department will pay the costs of the services of the official reporter assigned to the arbitration, including preparation of the official transcript of the hearing and six copies thereof. The official transcript and one copy thereof must be submitted to the Department. The remaining five copies of the transcript must be distributed among the parties as determined by the arbitration panel chairperson. Costs of the services of the official reporter may not exceed the reasonable and customary costs for those services in the locality in which the services are furnished.

(2) *Cancellation.* The official reporter may charge the Department its customary fee for cancellation of an arbitration proceeding in situations in which a proceeding is canceled within 24 hours of its scheduled date and time.

(b) *Fees of Arbitrators*—(1) *Per Diem.* The Department will pay a per diem fee to arbitration panel members who are not otherwise employed by the Federal or State Government for their services during the course of the arbitration. The per diem fee to be paid by the Department must be the lesser of—

(i) The customary fee charged by the individual panel member; or

(ii) The reasonable and customary fee charged by arbitrators in the locality where the arbitration will be held.

(2) *Postponement or Cancellation within 72 hours.* If a scheduled arbitration proceeding is postponed or canceled within 72 hours of its scheduled date and time, panel members may charge the Department—

(i) A predetermined, customary, and reasonable postponement or cancellation fee; and

(ii) That portion of the arbitrator's per diem fee proportional to the actual time the panel member expended in preparing for the proceeding.

(3) *Other Postponements or Cancellations.* If a scheduled arbitration proceeding is postponed or canceled more than 72 hours prior to its scheduled date, panel members may charge the Department only that portion of the per diem fee proportional to the actual time expended in preparing for the proceeding.

(4) *Notice.* The customary per diem and predetermined fees charged by a panel member must be included in a biographical sketch that is to be sent to the Department following his or her appointment to the panel.

(c) *Travel, Lodging, and Meal Expenses of Arbitrators and Witnesses*—

(1) *Arbitrators.* Notwithstanding that the Secretary urges the parties to appoint panel representatives from the locality in which the dispute arose and the hearing is to be held, the Department will reimburse the travel, lodging, and food expenses of the arbitration panel members incurred for the purpose of attending hearings and for the purpose of attending any pre- or post-hearing conferences that cannot be conducted by telephone. These expenses will be reimbursed at the rate applicable to Federal Government employees traveling on government business to the hearing location. The Secretary urges the two panel representatives appointed by the parties to select a neutral chairperson from the locality in which the dispute arose and the hearing is to be held.

(2) *Witnesses.* The Department will reimburse the travel, lodging, and food expenses of witnesses for the purpose of testifying at hearings, if the witness does not reside at the locality of the arbitration proceeding and the testimony of the witness is deemed by the arbitration panel chairperson to be essential to the proper resolution of the dispute. These expenses will be reimbursed at the rate applicable to Federal Government employees traveling on government business to the hearing location.

(d) *Unsupported Costs.* Attorney's fees are not considered the responsibility of the Department and are not included in the reasonable costs of arbitration supported by the Department.

(Authority: 20 U.S.C. 107d-2(d))

[FR Doc. 96-9335 Filed 4-15-96; 8:45 am]

**BILLING CODE 4000-01-P**