



Formula Grants

Consolidated Regulation
(28 CFR Part 31)

This document updates the Formula Grants Regulation as published in the *Federal Register*, May 31, 1995, by including revisions as published in the *Federal Register*, December 10, 1996.

OJJDP

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Questions regarding the Formula Grants Regulation
may be directed to OJJDP's State Relations and
Assistance Division, (202) 307-5924

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OJJDP FORMULA GRANTS REGULATION REVISION SUMMARY

The document that follows this summary provides a consolidated regulation, incorporating into the OJJDP Formula Grants Regulation changes published in the Federal Register on December 10, 1996. This summary highlights the changes made to the regulation.

Since early 1996, the Office of Juvenile Justice and Delinquency Prevention (OJJDP) has taken a comprehensive look at the regulation, 28 CFR Part 31, that guides the States' implementation of the Juvenile Justice and Delinquency Prevention (JJDP) Act of 1974, as amended. The Formula Grants program regulation has been modified periodically, usually following Congressional reauthorizations. The focus for the 1996 regulation review was to consider those changes which would be responsive to the expressed needs of States and localities while ensuring the safety of children in the justice system.

In April 1996, OJJDP held two listening conferences, one in Idaho and another in New Jersey. At these meetings, the Office sought input from a cross section of those affected by the JJDP Act: judges, public defenders, prosecutors, sheriffs, other juvenile justice practitioners, and private citizens. At the same time, the Office sought written suggestions from State agencies and State Advisory Groups charged with implementation of the Act. Recommendations were also received through meetings with public interest groups and youth advocacy organizations.

Based on the information received, OJJDP proposed a revised regulation for public comment in the *Federal Register* on July 3, 1996. Following the comment period, views from the field were considered and a Final Revised Regulation was published in the *Federal Register* on December 10, 1996. The final regulation, synopsisized below, provides enhanced flexibility to State and local governments and reduces red tape related to program administration.

Deinstitutionalization of Status Offenders

Section 223(a)(12)(A) of the JJDP Act provides that status offenders and nonoffenders not be detained or confined in secure detention or correctional facilities. OJJDP policy has, since 1975, provided an exception to allow a status or nonoffender to be detained for up to 24 hours, exclusive of weekends and legal holidays, in a juvenile detention facility. The revised regulation expressly provides that it is permissible to hold an accused status offender or nonoffender in a secure juvenile detention facility for up to 24 hours, exclusive of weekends and legal holidays, prior to an initial court appearance, and for an additional 24 hours, exclusive of weekends and legal holidays, immediately following an initial court appearance.

The JJDP Act provides that status offenders found to have violated a Valid Court Order may be securely detained in a juvenile detention or correctional facility under an exception to Section 223(a)(12)(A). The definition of a Valid Court Order, under Section 103(16) of the JJDP Act, provides that before a disposition of placement in a secure detention facility or a secure

correctional facility is entered, an appropriate public agency (other than a court or law enforcement agency) must review the case and submit a written report to the court. The implementing regulation provided an example of a multidisciplinary review team as an appropriate public agency.

The revised regulation eliminates the regulatory language suggesting that jurisdictions use multidisciplinary review teams to prepare and submit a written report to a judge who is considering an order that directs or authorizes the placement of a status offender in a secure facility for the violation of a Valid Court Order. Although a multidisciplinary team is still an appropriate option and is encouraged when practical, this suggestion led to some confusion and, therefore, the example is deleted.

Separation

Section 223(a)(13) provides that accused and adjudicated delinquent, status offender, and nonoffender juveniles shall not have contact with incarcerated adults. In order to meet this separation requirement, the prior regulation provided that while juveniles are in secure custody in an adult facility, sight and sound contact with adults is prohibited. When OJJDP began the process of reexamining the regulation, it became clear that some confusion existed with the definition of “sight and sound” contact. Therefore, *sight contact* is defined as clear visual contact between incarcerated adults who are in close proximity to juveniles alleged to be or found to be delinquent, status offenders, and nonoffenders in a secure institution. *Sound contact* is defined in the regulation as direct oral communication between incarcerated adults and juveniles in secure institutions. While separation must be provided through architectural or procedural means, the revised regulation provides that sight or sound contact that is both brief and inadvertent or accidental must be reported as a violation only if it occurs in secure areas of the facility that are dedicated to use by juvenile offenders, including any residential area. A residential area is an area used to confine individuals overnight, and may include sleeping, shower and toilet, and day room areas.

State laws are increasingly providing for the mandatory or permissible transfer of adjudicated delinquents to adult facilities once the delinquent has attained the age of full criminal responsibility established by State law. The revised regulation provides that the separation requirement of the Act no longer applies if the transfer or placement of an adjudicated delinquent who has reached the age of full criminal responsibility is required or authorized by State law.

The revised regulation modifies the prior compliance standard penalizing States that have not enacted laws, rules and regulations, or policies prohibiting the incarceration of all juvenile offenders under circumstances that would be in violation of Section 223(a)(13). These States were not eligible for a finding of compliance if any instances of noncompliance were sanctioned by State law, rule, regulation, or policy. The revised regulation establishes a single standard applicable to all States regardless of whether a law, rule, regulation, or policy exists, if compliance can be established under circumstances in which 1) the instances of noncompliance

do not indicate a pattern or practice; and either 2) adequate enforcement mechanisms exist; or 3) an acceptance plan has been developed to eliminate the noncompliant incidents.

Jail and Lockup Removal

Section 223(a)(14) provides that juveniles cannot be detained in any adult jail or lockup. Although not expressly provided in the prior regulation, OJJDP policy provided an exception to the jail and lockup removal requirement: an alleged delinquent could be detained, while separate from adults, for up to six hours for the purposes of identification, processing, and to arrange for release to parents or transfer to a juvenile facility. The regulation codifies this exception and extends it to include a six hour time period both immediately before and after a court appearance, provided that the juvenile has no sight or sound contact with incarcerated adults during the time the juvenile is in a secure custody status in the adult jail or lockup.

Sections 223(a)(14)(B) and (C) provide circumstances that extend the statutory 24-hour non-Metropolitan Statistical Area (MSA) exception to the jail removal requirement based on distance/ground transportation and weather. The revised regulation removes previous regulatory language requiring States to document and describe, in their annual monitoring report, each individual use of these exceptions.

Collocated Juvenile and Adult Facilities

The regulation makes three revisions to the criteria to establish the existence of a separate juvenile detention facility that is collocated with an adult jail or lockup:

First, the regulation is modified to permit program space in collocated adult and juvenile facilities to be shared through time-phased use. While OJJDP's objective is to encourage the development and use of separately located juvenile facilities whenever possible, it is recognized that expecting every jurisdiction to create wholly separate juvenile facilities, including the duplication of costly infrastructure elements like gymnasiums, cafeterias, and classrooms, may result in those jurisdictions being unable to provide any secure juvenile detention capacity. The revised regulation makes it possible for more jurisdictions to provide collocated juvenile and adult facilities by removing the requirement that collocated facilities not share program space between juvenile and adult populations. Utilization of time-phasing will allow both juveniles and adults access to educational, vocational, and recreational areas of collocated facilities. It is important to note that time-phased use is explicitly limited to nonresidential areas of collocated facilities and requires the use of written procedures to ensure that no contact occurs between detained juveniles and incarcerated adults.

Second, the requirement that a needs-based analysis precede a jurisdiction's request for State approval of a juvenile facility that is collocated with an adult jail or lockup has been removed. Technical assistance will remain available to States and localities that wish to conduct such an analysis.

Finally, OJJDP's concurrence with a State's decision to approve a collocated facility will no longer be required. Annual onsite reviews by the State, coupled with OJJDP's periodic review of the adequacy of State monitoring systems, will ensure that each collocated juvenile detention facility meets the criteria to establish a collocated juvenile detention facility.

Disproportionate Minority Confinement (DMC)

Section 223(a)(23) of the JJDP Act provides that States are to determine if minority juveniles are disproportionately confined in secure detention and correctional facilities and, if so, to address any features of its system that may account for the disproportionate confinement of minority juveniles. The regulation clearly states the position of OJJDP that the DMC core requirement neither requires nor establishes numerical standards or quotas in order for a State to achieve or maintain compliance.

Questions regarding the Formula Grants Regulation may be directed to OJJDP's State Relations and Assistance Division, 202-307-5924.

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Authority: 42 U.S.C. 5601 et seq.

Subpart A--General Provisions

§ 31.1 General.

This part defines eligibility and sets forth requirements for application for and administration of formula grants to State governments authorized by part B, subpart I, of the Juvenile Justice and Delinquency Prevention Act.

§ 31.2 Statutory authority.

The Statute establishing the Office of Juvenile Justice and Delinquency Prevention and giving authority to make grants for juvenile justice and delinquency prevention improvement programs is the Juvenile Justice and Delinquency Prevention Act of 1974, as amended (42 U.S.C. 5601 et seq.).

§ 31.3 Formula grant plan and applications.

Formula Grant Applications for each Fiscal Year should be submitted to OJJDP by August 1st (60 days prior to the beginning of the fiscal year) or within 60 days after the States are officially notified of the fiscal year formula grant allocations. Beginning with FY 1995 and each subsequent fiscal year, all Formula Grant Applications are due no later than March 31 of the fiscal year for which the funds are allocated.

Subpart B--Eligible Applicants

§ 31.100 Eligibility.

All States as defined by Section 103(7) of the JJDP Act.

§ 31.101 Designation of State agency.

The Chief Executive of each State which chooses to apply for a formula grant shall establish or designate a State agency as the sole agency for supervising the preparation and administration of the plan. The plan must demonstrate compliance with administrative and supervisory board membership requirements established by the OJJDP Administrator pursuant to Section 299(c) of the JJDP Act. States must have available for review a copy of the State law or executive order establishing the State agency and its authority.

§ 31.102 State agency structure.

The State agency may be a discrete unit of State government or a division or other component of an existing State crime commission, planning agency, or other appropriate unit of State government. Details of organization and structure are matters of State discretion, provided that the agency:

§ 31.102 continued.

- (a) Is a definable entity in the executive branch with the requisite authority to carry out the responsibilities imposed by the JJDP Act;
- (b) Has a supervisory board (i.e., a board of directors, commission, committee, council, or other policy board) which has responsibility for supervising the preparation and administration of the plan and its implementation; and
- (c) Has sufficient staff and staff capability to carry out the board's policies and the agency's duties and responsibilities to administer the program, develop the plan, process applications, administer grants awarded under the plan, monitor and evaluate programs and projects, provide administration/support services, and perform such accountability functions as are necessary to the administration of Federal funds, such as grant close-out and audit of subgrant and contract funds. At a minimum, one full-time Juvenile Justice Specialist must be assigned to the Formula Grants Program by the State agency. Where the State does not currently provide or maintain a full-time Juvenile Justice Specialist, the plan must clearly establish and document that the program and administrative support staff resources currently assigned to the program will temporarily meet the adequate staff requirement, and provide an assurance that at least one full-time Juvenile Justice Specialist will be assigned to the Formula Grants Program by the end of FY 1995 (September 30, 1995).

§ 31.103 Membership of supervisory board.

The State Advisory Group appointed under Section 223(a)(3) may operate as the supervisory board for the State agency, at the discretion of the Governor. Where, however, a State has continuously maintained a broad-based law enforcement and criminal justice supervisory board (council) meeting all the requirements of Section 402(b)(2) of the Justice System Improvement Act of 1979, and wishes to maintain such a board, such composition shall continue to be acceptable provided that the board's membership includes the chairman and at least two additional citizen members of the State Advisory Group. For purposes of this requirement a citizen member is defined as any person who is not a full-time government employee or elected official. Any executive committee of such a board must include the same proportion of juvenile justice advisory group members as are included in the total board membership. Any other proposed supervisory board membership is subject to case-by-case review and approval of the OJJDP Administrator and will require, at a minimum, "balanced representation" of juvenile justice interests.

Subpart C--General Requirements

§ 31.200 General.

This subpart sets forth general requirements applicable to formula grant recipients under the JJDP Act of 1974, as amended. Applicants must assure compliance or submit necessary information on these requirements.

§ 31.201 Audit.

[The State must assure that it adheres to the audit requirements enumerated in the Office of Justice Programs Financial Guide (formerly Guide Manual 7100.1). Chapter 19 of the Manual contains a comprehensive statement of audit policies and requirements relative to grantees and subgrantees.]

§ 31.202 Civil rights.

- (a) To carry out the State's Federal civil rights responsibilities the plan must:
 - (1) Designate a civil rights contact person who has lead responsibility in insuring that all applicable civil rights requirements, assurances, and conditions are met and who shall act as liaison in all civil rights matters with OJJDP and the OJP Office of Civil Rights Compliance (OCRC); and
 - (2) Provide the Council's Equal Employment Opportunity Program (EEOP), if required to maintain one under 28 CFR 42.301 et seq., where the application is for \$500,000 or more.
- (b) The application must provide assurance that the State will:
 - (1) Require that every applicant required to formulate an EEOP in accordance with 28 CFR 42.301 et seq., submit a certification to the State that it has a current EEOP on file, which meets the requirement therein;
 - (2) Require that every criminal or juvenile justice agency applying for a grant of \$500,000 or more submit a copy of its EEOP (if required to maintain one under 28 CFR 42.301 et seq.) to OCRC at the time it submits its application to the State;
 - (3) Inform the public and subgrantees of affected persons' rights to file a complaint of discrimination with OCRC for investigation;
 - (4) Cooperate with OCRC during compliance reviews of recipients located within the State; and
 - (5) Comply, and that its subgrantees and contractors will comply with the requirement that, in the event that a Federal or State court or administrative agency makes a finding of discrimination of the basis of race, color, religion, national origin, or sex (after a due process hearing) against a State or a subgrantee or contractor, the affected recipient or contractor will forward a copy of the finding to OCRC.

§ 31.203 Open meetings and public access to records.

The State must assure that the State agency, its supervisory board established pursuant to Section 299(c) and the State advisory group established pursuant to Section 223(a)(3) will follow applicable State open meeting and public access laws and regulations in the conduct of meetings and the maintenance of records relating to their functions.

Subpart D--Juvenile Justice Act Requirements

§ 31.300 General.

This subpart sets forth specific JJDP Act requirements for application and receipt of formula grants.

§ 31.301 Funding.

- (a) *Allocation to States.* Funds shall be allocated annually among the States on the basis of relative population of persons under age eighteen. If the amount allocated for Title II (other than parts D and E) of the JJDP Act is less than \$75 million, the amount allocated to each State will not be less than \$325,000, nor more than \$400,000, provided that no State receives less than its allocation for FY 1992. The Territories will receive not less than \$75,000 or more than \$100,000. If the amount appropriated for Title II (other than parts D and E) is \$75 million or more, the amount allocated for each State will be not less than \$400,000, nor more than \$600,000, provided that parts D and E have been funded in the full amounts authorized. For the Territories, the amount is fixed at \$100,000. For each of FYs 1994 and 1995, the minimum allocation is established at \$600,000 for States and \$100,000 for Territories.
- (b) *Funds for Local Use.* At least two-thirds of the formula grant allocation to the State (other than the Section 222(d) State Advisory Group set-aside) must be used for programs by local government, local private agencies, and eligible Indian tribes, unless the State applies for and is granted a waiver by the OJJDP [Administrator]. The proportion of pass-through funds to be made available to eligible Indian tribes shall be based upon that proportion of the State youth population under 18 years of age who reside in geographical areas where the tribes perform law enforcement functions. Pursuant to Section 223(a)(5)(C) of the JJDP Act, each of the standards set forth in paragraphs (b)(1)(i) through (iii) of this section must be met in order to establish the eligibility of Indian tribes to receive pass-through funds:
- (1) (i) The tribal entity must be recognized by the Secretary of the Interior as an Indian tribe that performs law enforcement functions as defined in paragraph (b)(2) of this section.
 - (ii) The tribal entity must agree to attempt to comply with the requirements of Section 223(a)(12)(A), (13), and (14) of the JJDP Act; and
 - (iii) The tribal entity must identify the juvenile justice needs to be served by these funds within the geographical area where the tribe performs law enforcement functions.
- (2) “Law enforcement functions” are deemed to include those activities pertaining to the custody of children, including, but not limited to, police efforts to prevent, control, or reduce crime and delinquency or to apprehend criminal and delinquent offenders, and/or activities of adult and juvenile corrections, probation, or parole authorities.
 - (3) To carry out this requirement, OJJDP will annually provide each State with the most recent Bureau of Census statistics on the number of persons under age 18 living within the State, and the number of persons under age 18 who reside in geographical areas where Indian tribes perform law enforcement functions.

§ 31.301(b) continued.

- (4) Pass-through funds available to tribal entities under Section 223(a)(5)(C) shall be made available within States to Indian tribes, combinations of Indian tribes, or to an organization or organizations designated by such tribe(s), that meet the standards set forth in paragraphs (b)(1)(i) through (iii) of this section. Where the relative number of persons under age 18 within a geographic area where an Indian tribe performs law enforcement functions is too small to warrant an individual subgrant or subgrants, the State may, after consultation with the eligible tribe(s), make pass-through funds available to a combination of eligible tribes within the State, or to an organization or organizations designated by and representing a group of qualifying tribes, or target the funds on the larger tribal jurisdictions within the State.
 - (5) Consistent with Section 223(a)(4) of the JJDP Act, the State must provide for consultation with Indian tribes or a combination of eligible tribes within the State, or an organization or organizations designated by qualifying tribes, in the development of a State plan which adequately takes into account the juvenile justice needs and requests of those Indian tribes within the State.
- (c) *Match.* Formula grants under the JJDP Act shall be 100% of approved costs, with the exception of planning and administration funds, which require a 100 percent cash match (dollar for dollar), and construction projects funded under Section 299C(a)(2) which also require a 100 percent cash match.
 - (d) *Funds for Administration.* Not more than ten percent of the total annual formula grant award may be utilized to develop the annual juvenile justice plan and pay for administrative expenses, including project monitoring. These funds are to be matched on a dollar-for-dollar basis. The State shall make available needed funds for planning and administration to units of local government on an equitable basis. Each annual application must identify uses of such funds.
 - (e) *Nonparticipating States.* Pursuant to Section 223(d), the OJJDP Administrator shall endeavor to make the fund allotment under Section 222(a), of a State which chooses not to participate or loses its eligibility to participate in the Formula Grant Program, directly available to local public and private nonprofit agencies within the nonparticipating State. The funds may be used only for the purpose(s) of achieving deinstitutionalization of status offenders and nonoffenders, separation of juveniles from incarcerated adults, removal of juveniles from adult jails and lockups, and reducing the disproportionate confinement of minority youth in secure facilities. Absent a request for extension which demonstrates compelling circumstances justifying the reallocation of formula grant funds back to the State to which the funds were initially allocated, or the proceedings under Section 223(d), formula grant funds allocated to a State which has failed to submit an application, plan, or monitoring data establishing its eligibility for the funds will, beginning with FY 1995, be reallocated to the nonparticipating State program on September 30 of the fiscal year for which the funds were appropriated. Reallocated funds will be competitively awarded to eligible recipients pursuant to program announcements published in the *Federal Register*.

§ 31.302 Applicant State agency.

- (a) Pursuant to Section 223(a)(1), Section 223(a)(2), and Section 299(c) of the JJDP Act, the State must assure that the State agency approved under Section 299(c) has been designated as the sole agency for supervising the preparation and administration of the plan and has the authority to implement the plan.
- (b) *Advisory Group.* Pursuant to Section 223(a)(3) of the JJDP Act, the Chief Executive:
 - (1) Shall establish an advisory group pursuant to Section 223(a)(3) of the JJDP Act. The State shall provide a list of all current advisory group members, indicating their respective dates of appointment and how each member meets the membership requirements specified in this section of the Act.
 - (2) Should consider, in meeting the statutory membership requirements of Section 223(a)(3)(A) through (E), appointing at least one member who represents each of the following: A locally elected official representing general purpose local government; a law enforcement officer; representatives of juvenile justice agencies, including a juvenile or family court judge, a probation officer, a prosecutor, and a person who routinely provides legal representation to youth in juvenile court; a public agency representative concerned with delinquency prevention and treatment; a representative from a private, nonprofit organization, such as a parents group, concerned with teenage drug and alcohol abuse; a high school principal; a recreation director; a volunteer who works with delinquent or at-risk youth; a person with a special focus on the family; a youth worker experienced with programs that offer alternatives to incarceration; persons with special competence in addressing programs of school violence and vandalism and alternatives to expulsion and suspension; and persons with knowledge concerning learning disabilities, child abuse, neglect, and youth violence.
- (c) The State shall assure that it complies with the State Advisory Group financial support requirement of Section 222(d) and the composition and function requirements of Section 223(a)(3) of the JJDP Act.

§ 31.303 Substantive requirements.

- (a) *Assurances.* The State must certify through the provision of assurances that it has complied and will comply (as appropriate) with Section 223(a)(1), (2), (3), (4), (5), (6), (7), (8), (9), (10), (11), (16), (17), (18), (19), (20), (21), (22), and (25), and Sections 229 and 261(d), in formulating and implementing the State plan. The Formula Grant Application Kit provides a form and guidance for the provision of assurances. OJJDP interprets the Section 223(a)(16) assurance as satisfied by an affirmation that State law and/or policy clearly require(s) equitable treatment on the required bases; or by providing in the State plan that the State agency will require an assurance of equitable treatment by all Formula Grant subgrant and contract recipients, and establish as a program goal, in conjunction with the State Advisory Group, the adoption and implementation of a statewide juvenile justice policy that all youth in the juvenile justice system will be treated equitably without regard to gender, race, family income, and mentally, emotionally, or physically handicapping conditions. OJJDP interprets the Section 223(a)(25) assurance as satisfied by a provision in the State plan for the State agency and the State Advisory Group to promulgate policies and budget priorities that

§ 31.303(a) continued.

require the funding of programs that are part of a comprehensive and coordinated community system of services as set forth in Section 103(19) of the JJDP Act. This requirement is applicable when a State's formula grant for any fiscal year exceeds 105 percent of the State's formula grant for FY 1992.

- (b) *Serious Juvenile Offender Emphasis.* Pursuant to Section 101(a)(10) and Section 223(a)(10) of the JJDP Act, OJJDP encourages States that have identified serious and violent juvenile offenders as a priority problem to allocate formula grant funds to programs designed for serious and violent juvenile offenders at a level consistent with the extent of the problem as identified through the State planning process. Particular attention should be given to improving prosecution, sentencing procedures, providing resources necessary for effective rehabilitation, and facilitating the coordination of services between the juvenile justice and criminal justice systems.
- (c) *Deinstitutionalization of Status Offenders and Nonoffenders.* Pursuant to Section 223(a)(12)(A) of the JJDP Act, the State shall:
- (1) Describe its plan, procedure, and timetable covering the three-year planning cycle, for assuring that the requirements of this section are met. Refer to § 31.303(f)(3) for the rules related to the valid court order exception to this Act requirement.
 - (2) Describe the barriers the State faces in achieving full compliance with the provisions of this requirement.
 - (3) *Federal wards.* Apply this requirement to alien juveniles under Federal jurisdiction who are held in State or local facilities.
 - (4) *DSO compliance.* Those States which, based upon the most recently submitted monitoring report, have been found to be in full compliance with Section 223(a)(12)(A) may, in lieu of addressing paragraphs (c)(1) and (2) of this section, provide an assurance that adequate plans and resources are available to maintain full compliance.
 - (5) Submit the report required under Section 223(a)(12)(B) of the Act as part of the annual monitoring report required by Section 223(a)(15) of the Act.
- (d) *Contact With Incarcerated Adults.*
- (1) Pursuant to Section 223(a)(13) of the JJDP Act the State shall:
 - (i) *Separation.* Describe its plan and procedure, covering the three-year planning cycle, for assuring that the requirements of this section are met. The term "contact" is defined to include any physical or sustained sight and sound contact between juvenile offenders in a secure custody status and incarcerated adults, including inmate trustees. A juvenile offender in a secure custody status is one who is physically detained or confined in a locked room or other area set aside or used for the specific purpose of securely detaining persons who are in law enforcement custody. Secure detention or confinement may result either from being placed in such a room or area and/or from being physically secured to a cuffing rail or other stationary object. Sight contact is defined as clear visual contact between incarcerated adults and juveniles within close proximity to each other. Sound contact is defined as direct oral communication between incarcerated adults and juvenile offenders. Separation must be accomplished architecturally or through policies and procedures in all secure areas of the facility which include, but are not

§ 31.303(d)(1)(i) continued.

limited to, such areas as admissions, sleeping, and shower and toilet areas. Brief and inadvertent or accidental contact between juvenile offenders in a secure custody status and incarcerated adults in secure areas of a facility that are not dedicated to use by juvenile offenders and which are nonresidential, which may include dining, recreational, educational, vocational, health care, sally ports or other entry areas, and passageways (hallways), would not require a facility or the State to document or report such contact as a violation. However, any contact in a dedicated juvenile area, including any residential area of a secure facility, between juveniles in a secure custody status and incarcerated adults would be a reportable violation.

- (ii) In those instances where accused juvenile criminal-type offenders are authorized to be temporarily detained in facilities where adults are confined, the State must set forth the procedures for assuring no sight or sound contact between such juveniles and confined adults.
 - (iii) Describe the barriers which may hinder the separation of alleged or adjudicated criminal-type offenders, status offenders and nonoffenders from incarcerated adults in any particular jail, lockup, detention or correctional facility.
 - (iv) Those States which, based upon the most recently submitted monitoring report, have been found to be in compliance with Section 223(a)(13) may, in lieu of addressing paragraphs (d)(1)(i), (ii), and (iii) of this section, provide an assurance that adequate plans and resources are available to maintain compliance.
 - (v) Assure that adjudicated offenders are not reclassified administratively and transferred to an adult (criminal) correctional authority to avoid the intent of separating juveniles from adult criminals in jails or correctional facilities. A State is not prohibited from placing or transferring an alleged or adjudicated delinquent who reaches the State's age of full criminal responsibility to an adult facility when required or authorized by State law. However, the administrative transfer, without statutory direction or authorization, of a juvenile offender to an adult correctional authority, or a transfer within a mixed juvenile and adult facility for placement with adult criminals, either before or after a juvenile reaches the age of full criminal responsibility, is prohibited. A State is also precluded from transferring adult offenders to a juvenile correctional authority for placement in a juvenile facility. This neither prohibits nor restricts the waiver or transfer of a juvenile to criminal court for prosecution, in accordance with State law, for a criminal felony violation, nor the detention or confinement of a waived or transferred criminal felony violator in an adult facility.
- (2) *Implementation.* The requirement of this provision is to be planned and implemented immediately by each State.
- (e) *Removal of Juveniles From Adult Jails and Lockups.* Pursuant to Section 223(a)(14) of the JJDP Act, the State shall:
- (1) Describe its plan, procedure, and timetable for assuring that requirements of this section will be met beginning after December 8, 1985. Refer to § 31.303(f)(4) to determine the regulatory exception to this requirement.

§ 31.303(e) continued.

- (2) Describe the barriers which the State faces in removing all juveniles from adult jails and lockups. This requirement excepts only those alleged or adjudicated juvenile delinquents placed in a jail or a lockup for up to six hours from the time they enter a secure custody status or immediately before or after a court appearance, those juveniles formally waived or transferred to criminal court and against whom criminal felony charges have been filed, or juveniles over whom a criminal court has original or concurrent jurisdiction and such court's jurisdiction has been invoked through the filing of criminal felony charges.
- (3) *Collocated facilities.*
 - (i) Determine whether or not a facility in which juveniles are detained or confined is an adult jail or lockup. The JJDP Act prohibits the secure custody of juveniles in adult jails and lockups, except as otherwise provided under the Act and implementing OJJDP regulations. Juvenile facilities collocated with adult facilities are considered adult jails or lockups absent compliance with criteria established in paragraph (e)(3)(i)(C)(1)–(4).
 - (A) A collocated facility is a juvenile facility located in the same building as an adult jail or lockup, or is part of a related complex of buildings located on the same grounds as an adult jail or lockup. A complex of buildings is considered “related” when it shares physical features such as walls and fences, or services beyond mechanical services (heating, air conditioning, water, and sewer), or the specialized services that are allowable under paragraph (e)(3)(i)(C)(3) of this section.
 - (B) The State must determine whether a collocated facility qualifies as a separate juvenile detention facility under the four criteria set forth in paragraph (e)(3)(i)(C)(1)–(4) of this section for the purpose of monitoring compliance with Section 223(a)(12)(A), (13), and (14) of the JJDP Act.
 - (C) Each of the following four criteria must be met in order to ensure the requisite separateness of a juvenile detention facility that is collocated with an adult jail or lockup:
 - (1) Separation between juveniles and adults such that there could be no sustained sight or sound contact between juveniles and incarcerated adults in the facility. Separation can be achieved architecturally or through time-phasing of common use nonresidential areas; and
 - (2) Separate juvenile and adult program areas, including recreation, education, vocation, counseling, dining, sleeping, and general living activities. There must be an independent and comprehensive operational plan for the juvenile detention facility which provides for a full range of separate program services. No program activities may be shared by juveniles and incarcerated adults. Time-phasing of common use nonresidential areas is permissible to conduct program activities. Equipment and other resources may be used by both populations subject to security concerns; and

§ 31.303(e)(3)(i)(C) continued.

- (3) Separate staff for the juvenile and adult populations, including management, security, and direct care staff. Staff providing specialized services (medical care, food service, laundry, maintenance and engineering, etc.) who are not normally in contact with detainees, or whose infrequent contacts occur under conditions of separation of juveniles and adults, can serve both populations (subject to State standards or licensing requirements). The day-to-day management, security, and direct care functions of the juvenile detention center must be vested in a totally separate staff, dedicated solely to the juvenile population within the collocated facilities; and
- (4) In States that have established standards or licensing requirements for juvenile detention facilities, the juvenile facility must meet the standards (on the same basis as a free-standing juvenile detention center) and be licensed as appropriate. If there are no State standards or licensing requirements, OJJDP encourages States to establish administrative requirements that authorize the State to review the facility's physical plant, staffing patterns, and programs in order to approve the collocated facility based on prevailing national juvenile detention standards.
 - (ii) The State must determine that the four criteria are fully met. It is incumbent upon the State to make the determination through an onsite facility (or full construction and operations plan) review and, through the exercise of its oversight responsibility, to ensure that the separate character of the juvenile detention facility is maintained by continuing to fully meet the four criteria set forth above in paragraphs (e)(3)(i)(C)(1)–(4) of this section.
 - (iii) Collocated juvenile detention facilities approved by the State and concurred with by OJJDP before December 10, 1996, may be reviewed against the regulatory criteria and OJJDP policies in effect at the time of the initial approval and concurrence or against the regulatory criteria set forth herein, as the State determines. Facilities approved on or after the effective date of this regulation shall be reviewed against the regulatory criteria set forth herein. All collocated facilities are subject to the separate staff requirement established by the 1992 Amendments to the JJDP Act, and set forth in paragraph (e)(3)(i)(C)(3) of this section.
 - (iv) An annual onsite review of the facility must be conducted by the compliance monitoring staff person(s) representing or employed by the State agency administering the JJDP Act Formula Grants Program. The purpose of the annual review is to determine if compliance with the criteria set forth in paragraphs (e)(3)(i)(C)(1)–(4) of this section is being maintained.
- (4) Those States which, based upon the most recently submitted monitoring report, have been found to be in full compliance with Section 223(a)(14) may, in lieu of addressing paragraphs (e)(1) and (2) of this section, provide an assurance that adequate plans and resources are available to maintain full compliance.

§ 31.303 continued.

(f) Monitoring of Jails, Detention Facilities, and Correctional Facilities.

- (1) Pursuant to Section 223(a)(15) of the JJDP Act, and except as provided by paragraph (f)(7) of this section, the State shall:
 - (i) Describe its plan, procedure, and timetable for annually monitoring jails, lockups, detention facilities, correctional facilities, and nonsecure facilities. The plan must at a minimum describe in detail each of the following tasks including the identification of the specific agency(s) responsible for each task.
 - (A) *Identification of the monitoring universe:* This refers to the identification of all residential facilities which might hold juveniles pursuant to public authority and thus must be classified to determine if it should be included in the monitoring effort. This includes those facilities owned or operated by public and private agencies.
 - (B) *Classification of the monitoring universe:* This is the classification of all facilities to determine which ones should be considered as a secure detention or correctional facility, adult correctional institution, jail, lockup, or other type of secure or nonsecure facility.
 - (C) *Inspection of facilities:* Inspection of facilities is necessary to ensure an accurate assessment of each facility's classification and recordkeeping. The inspection must include:
 - (1) A review of the physical accommodations to determine whether it is a secure or nonsecure facility or whether adequate sight and sound separation between juvenile and adult offenders exists and
 - (2) A review of the recordkeeping system to determine whether sufficient data are maintained to determine compliance with Section 223(a)(12), (13), and/or (14).
 - (D) *Data collection and data verification:* This is the actual collection and reporting of data to determine whether the facility is in compliance with the applicable requirement(s) of Section 223(a)(12), (13), and/or (14). The length of the reporting period should be 12 months of data, but in no case less than 6 months. If the data is self-reported by the facility or is collected and reported by an agency other than the State agency designated pursuant to Section 223(a)(1) of the JJDP Act, the plan must describe a statistically valid procedure used to verify the reported data.
 - (ii) Provide a description of the barriers which the State faces in implementing and maintaining a monitoring system to report the level of compliance with Section 223(a)(12), (13), and (14) and how it plans to overcome such barriers.
 - (iii) Describe procedures established for receiving, investigating, and reporting complaints of violation of Section 223(a)(12), (13), and (14). This should include both legislative and administrative procedures and sanctions.
- (2) For the purpose of monitoring for compliance with Section 223(a)(12)(A) of the Act, a secure detention or correctional facility is any secure public or private facility used for the lawful custody of accused or adjudicated juvenile offenders or nonoffenders, or used for the lawful custody of accused or convicted adult criminal offenders. Accused status

§ 31.303(f)(2) continued.

offenders or nonoffenders in lawful custody can be held in a secure juvenile detention facility for up to twenty-four hours, exclusive of weekends and holidays, prior to an initial court appearance and for an additional twenty-four hours, exclusive of weekends and holidays, following an initial court appearance.

- (3) *Valid Court Order.* For the purpose of determining whether a Valid Court Order exists and a juvenile has been found to be in violation of that valid order all of the following conditions must be present prior to secure incarceration:
- (i) The juvenile must have been brought into a court of competent jurisdiction and made subject to an order issued pursuant to proper authority. The order must be one which regulates future conduct of the juvenile. Prior to issuance of the order, the juvenile must have received the full due process rights guaranteed by the Constitution of the United States.
 - (ii) The court must have entered a judgment and/or remedy in accord with established legal principles based on the facts after a hearing which observes proper procedures.
 - (iii) The juvenile in question must have received adequate and fair warning of the consequences of violation of the order at the time it was issued and such warning must be provided to the juvenile and to the juvenile's attorney and/or legal guardian in writing and be reflected in the court record and proceedings.
 - (iv) All judicial proceedings related to an alleged violation of a Valid Court Order must be held before a court of competent jurisdiction. A juvenile accused of violating a Valid Court Order may be held in secure detention beyond the 24-hour grace period permitted for a noncriminal juvenile offender under OJJDP monitoring policy, for protective purposes as prescribed by State law, or to assure the juvenile's appearance at the violation hearing, as provided by State law, if there has been a judicial determination based on a hearing during the 24-hour grace period that there is probable cause to believe the juvenile violated the court order. In such case the juvenile may be held pending a violation hearing for such period of time as is provided by State law, but in no event should detention prior to a violation hearing exceed 72 hours exclusive of nonjudicial days. A juvenile alleged or found in a violation hearing to have violated a Valid Court Order may be held only in a secure juvenile detention or correctional facility, and not in an adult jail or lockup.
 - (v) Prior to and during the violation hearing the following full due process rights must be provided:
 - (A) The right to have the charges against the juvenile in writing served upon him a reasonable time before the hearing;
 - (B) The right to a hearing before a court;
 - (C) The right to an explanation of the nature and consequences of the proceeding;
 - (D) The right to legal counsel, and the right to have such counsel appointed by the court if indigent;
 - (E) The right to confront witnesses;
 - (F) The right to present witnesses;

§ 31.303(f)(3)(v) continued.

- (G) The right to have a transcript or record of the proceedings; and
- (H) The right of appeal to an appropriate court.
- (vi) In entering any order that directs or authorizes the placement of a status offender in a secure facility, the judge presiding over an initial probable cause hearing or violation hearing must determine that all the elements of a Valid Court Order (paragraphs (f)(3)(i), (ii), and (iii) of this section) and the applicable due process rights (paragraph (f)(3)(v) of this section) were afforded the juvenile and, in the case of a violation hearing, the judge must obtain and review a written report that reviews the behavior of the juvenile and the circumstances under which the juvenile was brought before the court and made subject to such order; determines the reasons for the juvenile's behavior; and determines whether all dispositions other than secure confinement have been exhausted or are clearly inappropriate. This report must be prepared and submitted by an appropriate public agency (other than a court or law enforcement agency).
- (vii) A nonoffender such as a dependent or neglected child cannot be placed in secure detention or correctional facilities for violating a valid court order.
- (4) *Removal exception* (Section 223(a)(14)). The following conditions must be met in order for an accused juvenile criminal-type offender, awaiting an initial court appearance, to be detained up to 24 hours (excluding weekends and holidays) in an adult jail or lockup:
 - (i) The State must have an enforceable State law requiring an initial court appearance within 24 hours after being taken into custody (excluding weekends and holidays);
 - (ii) The geographic area having jurisdiction over the juvenile is outside a metropolitan statistical area pursuant to the Bureau of Census's current designation;
 - (iii) A determination must be made that there is no existing acceptable alternative placement for the juvenile pursuant to criteria developed by the State and approved by OJJDP;
 - (iv) The adult jail or lockup must have been certified by the State to provide for the sight and sound separation of juveniles and incarcerated adults; and
 - (v) The State must provide documentation that the conditions in paragraphs (f)(4)(i) through (iv) of this section have been met and received prior approval from OJJDP. OJJDP strongly recommends that jails and lockups that incarcerate juveniles be required to provide youth-specific admissions screening and continuous visual supervision of juveniles incarcerated pursuant to this exception.
- (vi) Pursuant to Section 223(a)(14) of the JJDP Act, the non-MSA (low population density) exception to the jail and lockup removal requirement as described in paragraphs (f)(4)(i) through (v) of this section shall remain in effect through 1997, and shall allow for secure custody beyond the 24 hour period described in paragraph (f)(4)(i) of this section when the facility is located where conditions of distance to be traveled or the lack of highway, road, or other ground transportation do not allow for court appearances within 24 hours, so that a brief (not to exceed an additional 48 hours) delay is excusable; or the facility is located where conditions of safety exist (such as severely adverse, life-threatening weather

§ 31.303(f)(4)(vi) continued.

conditions that do not allow for reasonably safe travel), in which case the time for an appearance may be delayed until 24 hours after the time that such conditions allow for reasonably safe travel. States may use these additional statutory allowances only where the precedent requirements set forth in paragraphs (f)(4)(i) through (v) of this section have been complied with. This may necessitate statutory or judicial (court rule or opinion) relief within the State from the 24-hour initial court appearance standard required by paragraph (f)(4)(i) of this section.

- (5) *Reporting requirement.* The State shall report annually to the Administrator of OJJDP on the results of monitoring for Section 223(a)(12), (13), and (14) of the JJDP Act. The reporting period should provide 12 months of data, but shall not be less than six months. The report shall be submitted to the Administrator of OJJDP by December 31 of each year.
- (i) To demonstrate the extent of compliance with Section 223(a)(12)(A) of the JJDP Act, the report must include, at a minimum, the following information for the current reporting period:
 - (A) Dates covered by the current reporting period;
 - (B) Total number of public and private secure detention and correctional facilities, the total number reporting, and the number inspected onsite;
 - (C) The total number of accused status offenders and nonoffenders, including out-of-State runaways and Federal wards, held in any secure detention or correctional facility for longer than 24 hours (not including weekends or holidays), excluding those held pursuant to the valid court order provision as set forth in paragraph (f)(3) of this section or pursuant to Section 922(x) of Title 18, United States Code (which prohibits the possession of a handgun by a juvenile), or a similar State law. A juvenile who violates this statute, or a similar State law, is excepted from the deinstitutionalization of status offenders requirement;
 - (D) The total number of accused status offenders (including Valid Court Order violators, out-of-State runaways, and Federal wards, but excluding Title 18 U.S.C. 922(x) violators) and nonoffenders securely detained in any adult jail, lockup, or nonapproved collocated facility for any length of time;
 - (E) The total number of adjudicated status offenders and nonoffenders, including out-of-State runaways and Federal wards, held for any length of time in a secure detention or correctional facility, excluding those held pursuant to the Valid Court Order provision or pursuant to Title 18 U.S.C. 922(x);
 - (F) The total number of status offenders held in any secure detention or correctional facility pursuant to the Valid Court Order provision set forth in paragraph (f)(3) of this section; and
 - (G) The total number of juvenile offenders held pursuant to Title 18 U.S.C. 922(x).

§ 31.303(f)(5) continued.

- (ii) To demonstrate the extent to which the provisions of Section 223(a)(12)(B) of the JJDP Act are being met, the report must include the total number of accused and adjudicated status offenders and nonoffenders placed in facilities that are:
 - (A) Not near their home community;
 - (B) Not the least restrictive appropriate alternative; and
 - (C) Not community-based.
- (iii) To demonstrate the extent of compliance with Section 223(a)(13) of the JJDP Act, the report must include, at a minimum, the following information for the current reporting period:
 - (A) Dates covered by the current reporting period;
 - (B) The total number of facilities used to detain or confine both juvenile offenders and adult criminal offenders during the past 12 months and the number inspected onsite;
 - (C) The total number of facilities used for secure detention and confinement of both juvenile offenders and adult criminal offenders which did not provide sight and sound separation;
 - (D) The total number of juvenile offenders and nonoffenders not separated from adult criminal offenders in facilities used for the secure detention and confinement of both juveniles and adults;
 - (E) The total number of State-approved juvenile detention centers located within the same building or on the same grounds as an adult jail or lockup, including a list of such facilities;
 - (F) The total number of juveniles detained in State-approved collocated facilities that were not separated from the management, security, or direct care staff of the adult jail or lockup;
 - (G) The total number of juvenile detention centers located within the same building or on the same grounds as an adult jail or lockup that have not been approved by the State, including a list of such facilities; and
 - (H) The total number of juveniles detained in collocated facilities not approved by the State that were not sight and sound separated from adult criminal offenders.
- (iv) To demonstrate the extent of compliance with Section 223(a)(14) of the JJDP Act, the report must include, at a minimum, the following information for the current reporting period:
 - (A) Dates covered by the current reporting period;
 - (B) The total number of adult jails in the State AND the number inspected onsite;
 - (C) The total number of adult lockups in the State AND the number inspected onsite;
 - (D) The total number of adult jails holding juveniles during the past 12 months;
 - (E) The total number of adult lockups holding juveniles during the past 12 months;

§ 31.303(f)(5)(iv) continued.

- (F) The total number of accused juvenile criminal-type offenders held securely in adult jails, lockups, and unapproved collocated facilities in excess of six hours (including those held pursuant to the “removal exception” as set forth in paragraph (f)(4) of this section);
 - (G) The total number of accused juvenile criminal-type offenders held securely in adult jails, lockups, and unapproved collocated facilities for less than six hours for purposes other than identification, investigations, processing, release to parent(s), transfer to court, or transfer to a juvenile facility following initial custody;
 - (H) The total number of adjudicated juvenile criminal-type offenders held securely in adult jails or lockups and unapproved collocated facilities in excess of six hours prior to or following a court appearance or for any length of time not related to a court appearance;
 - (I) The total number of accused and adjudicated status offenders (including Valid Court Order violators) and nonoffenders held securely in adult jails, lockups, and unapproved collocated facilities for any length of time;
 - (J) The total number of adult jails, lockups, and unapproved collocated facilities in areas meeting the “removal exception” as noted in paragraph (f)(4) of this section, including a list of such facilities and the county or jurisdiction in which each is located;
 - (K) The total number of juveniles accused of a criminal-type offense who were held in excess of 6 hours but less than 24 hours in adult jails, lockups, and unapproved collocated facilities pursuant to the “removal exception” as set forth in paragraph (f)(4) of this section;
 - (L) The total number of juveniles accused of a criminal-type offense who were held in excess of 24 hours but not more than an additional 48 hours in adult jails, lockups, and unapproved collocated facilities pursuant to the “removal exception” as noted in paragraph (f)(4) of this section, due to conditions of distance or lack of ground transportation; and
 - (M) The total number of juveniles accused of a criminal-type offense who were held in excess of 24 hours, but not more than an additional 24 hours after the time such conditions as adverse weather allow for reasonably safe travel, in adult jails, lockups, and unapproved collocated facilities in areas meeting the “removal exception” as noted in paragraph (f)(4) of this section.
- (6) *Compliance.* The State must demonstrate the extent to which the requirements of Section 223(a)(12)(A), (13), (14), and (23) of the Act are met. If the State fails to demonstrate full compliance with Section 223(a)(12)(A) and (14), and compliance with Section 223(a)(13) and (23) by the end of the fiscal year for any fiscal year beginning with fiscal year 1994, the State’s allotment under Section 222 will be reduced by 25 percent for each such failure, provided that the State will lose its eligibility for any allotment unless the State agrees to expend all remaining funds (except planning and administration, State advisory group set-aside funds, and Indian tribe pass-through funds) for the purpose of achieving compliance with the mandate(s) for

§ 31.303(f)(6) continued.

which the State is in noncompliance; or the Administrator makes discretionary determination that the State has substantially complied with the mandate(s) for which there is noncompliance and that the State has made through appropriate executive or legislative action an unequivocal commitment to achieving full compliance within a reasonable time. In order for a determination to be made that a State has substantially complied with the mandate(s), the State must demonstrate that it has diligently carried out the plan approved by OJJDP; demonstrated significant progress toward full compliance; submitted a plan based on an assessment of current barriers to DMC; and provided an assurance that added resources will be expended, be it formula grants or other funds, to achieve compliance. Where a State's allocation is reduced, the amount available for planning and administration and the required pass-through allocation, other than State Advisory Group set-aside, will be reduced because they are based on the reduced allocation.

- (i) Full compliance with Section 223(a)(12)(A) is achieved when a State has removed 100 percent of status offenders and nonoffenders from secure detention and correctional facilities or can demonstrate full compliance with de minimis exceptions pursuant to the policy criteria contained in the *Federal Register* of January 9, 1981 (copies are available from the Office of General Counsel, Office of Justice Programs, 633 Indiana Ave., NW, Washington, DC 20531).
- (ii) Compliance with Section 223(a)(13) has been achieved when a State can demonstrate that:
 - (A) The last submitted monitoring report, covering a full 12 months of data, demonstrates that no juveniles were incarcerated in circumstances that were in violation of Section 223(a)(13); or
 - (B) (1) The instances of noncompliance reported in the last submitted monitoring report do not indicate a pattern or practice but rather constitute isolated instances; and
 - (2) (i) Where all instances of noncompliance reported were in violation of or departure from State law, rule, or policy that clearly prohibits the incarceration of all juvenile offenders in circumstances that would be in violation of Section 223(a)(13), existing enforcement mechanisms are such that the instances of noncompliance are unlikely to recur in the future; or
 - (ii) An acceptable plan has been developed to eliminate the noncompliant incidents.
- (iii) (A) Full compliance is achieved when a State demonstrates that the last submitted monitoring report, covering 12 months of actual data, demonstrates that no juveniles were held in adult jails or lockups in circumstances that were in violation of Section 223(a)(14).
- (B) Full compliance with de minimis exceptions is achieved when a State demonstrates that it has met the standard set forth in either of paragraphs (f)(6)(iii)(B)(1) or (2) of this section:

§ 31.303(f)(6)(iii)(B) continued.

- (1) *Substantive de minimis standard.* To comply with this standard the State must demonstrate that each of the following requirements have been met:
 - (i) State law, court rule, or other statewide executive or judicial policy clearly prohibits the detention or confinement of all juveniles in circumstances that would be in violation of Section 223(a)(14);
 - (ii) All instances of noncompliance reported in the last submitted monitoring report were in violation of or departures from the State law, rule, or policy referred to in paragraph (f)(6)(iii)(B)(1)(i) of this section;
 - (iii) The instances of noncompliance do not indicate a pattern or practice but rather constitute isolated instances;
 - (iv) Existing mechanisms for the enforcement of the State law, rule, or policy referred to in paragraph (f)(6)(iii)(B)(1)(i) of this section are such that the instances of noncompliance are unlikely to recur in the future; and
 - (v) An acceptable plan has been developed to eliminate the noncompliant incidents and to monitor the existing mechanism referred to in paragraph (f)(6)(iii)(B)(1)(iv) of this section.
- (2) *Numerical de minimis standard.* To comply with this standard the State must demonstrate that each of the following requirements under paragraphs (f)(6)(iii)(B)(2)(i) and (ii) of this section have been met:
 - (i) The incidents of noncompliance reported in the State's last submitted monitoring report do not exceed an annual rate of 9 per 100,000 juvenile population of the State; and
 - (ii) An acceptable plan has been developed to eliminate the noncompliant incidents through the enactment or enforcement of State law, rule, or statewide executive or judicial policy, education, the provision of alternatives, or other effective means.
 - (iii) *Exception.* When the annual rate for a State exceeds 9 incidents of noncompliance per 100,000 juvenile population, the State will be considered ineligible for a finding of full compliance with de minimis exceptions under the numerical de minimis standard unless the State has recently enacted changes in State law which have gone into effect and which the State demonstrates can reasonably be expected to have a substantial, significant, and positive impact on the State's achieving full (100 percent) compliance or full compliance with de minimis exceptions by the end of the monitoring period immediately following the monitoring period under consideration.

§ 31.303(f)(6)(iii)(B) continued.

- (iv) *Progress.* Beginning with the monitoring report due by December 31, 1990, any State whose prior full compliance status is based on having met the numerical de minimis standard set forth in paragraph (f)(6)(iii)(B)(2)(i) of this section, must annually demonstrate, in its request for a finding of full compliance with de minimis exceptions, continued and meaningful progress toward achieving full (100 percent) compliance in order to maintain eligibility for a continued finding of full compliance with de minimis exceptions.
 - (v) *Request Submission.* Determinations of full compliance and full compliance with de minimis exceptions are made annually by OJJDP following submission of the monitoring report due by December 31 of each calendar year. Any State reporting less than full (100 percent) compliance in any annual monitoring report may request a finding of full compliance with de minimis exceptions under paragraph (f)(6)(iii)(B)(1) or (2) of this section. The request may be submitted in conjunction with the monitoring report, as soon thereafter as all information required for a determination is available, or be included in the annual State plan and application for the State's formula grant award.
- (C) *Waiver:* Failure to achieve full compliance as defined in this section shall terminate any State's eligibility for FY 1993 and prior year formula grant funds unless the Administrator of OJJDP waives termination of the State's eligibility. In order to be eligible for this waiver of termination, a State must request a waiver and demonstrate that it meets the standards set forth in paragraphs (f)(6)(iii)(C)(1) through (7) of this section:
- (1) Agrees to expend all of its formula grant award except planning and administration, advisory group set-aside, and Indian tribe pass-through funds to achieve compliance with Section 223(a)(14); and
 - (2) Removed all status and nonoffender juveniles from adult jails and lockups. Compliance with this standard requires that the last submitted monitoring report demonstrate that no status offender (including those accused of or adjudicated for violating a Valid Court Order) or nonoffender juveniles were securely detained in adult jails or lockups for any length of time; or that all status offenders and nonoffenders securely detained in adult jails and lockups for any length of time were held in violation of an enforceable State law and did not constitute a pattern or practice within the State; and
 - (3) Made meaningful progress in removing juvenile criminal-type offenders from adult jails and lockups. Compliance with this standard requires the State to document a significant reduction in the number of jurisdictions securely detaining juvenile criminal-type offenders in violation of

§ 31.303(f)(6)(iii)(C)(3) continued.

Section 223(a)(14) of the JJDP Act; or a significant reduction in the number of facilities securely detaining such juveniles; or a significant reduction in the average length of time each juvenile criminal-type offender is securely detained in an adult jail or lockup; or State legislation has recently been enacted and taken effect and which the State demonstrates will significantly impact the secure detention of juvenile criminal-type offenders in adult jails and lockups; and

- (4) Diligently carried out the State's jail and lockup removal plan approved by OJJDP. Compliance with this standard requires that actions have been undertaken to achieve the State's jail and lockup removal goals and objectives within approved timelines, and that the State Advisory Group, required by Section 223(a)(3) of the JJDP Act, has maintained an appropriate involvement in developing and/or implementing the State's plan; and
- (5) Submitted an acceptable plan, based on an assessment of current jail and lockup removal barriers within the State, to eliminate noncompliant incidents; and
- (6) Achieved compliance with Section 223(a)(15) of the JJDP Act; and
- (7) Demonstrates an unequivocal commitment, through appropriate executive or legislative action, to achieving full compliance.

(D) *Waiver maximum:* A State may receive a waiver of termination of eligibility from the Administrator under paragraph (f)(6)(iii)(C) of this section for a combined maximum of four formula grant awards through FY 1993. No additional waivers will be granted.

(7) *Monitoring report exemption.* States which have been determined by the OJJDP Administrator to have achieved full compliance with Section 223(a)(12)(A) and (a)(14) and compliance with Section 223(a)(13) of the JJDP Act and wish to be exempted from the annual monitoring report requirements must submit a written request to the OJJDP Administrator which demonstrates that:

- (i) The State provides for an adequate system of monitoring jails, law enforcement lockups, and detention facilities, to enable an annual determination of State compliance with Section 223(a)(12)(A), (13), and (14) of the JJDP Act;
- (ii) State legislation has been enacted which conforms to the requirements of Section 223(a)(12)(A), (13), and (14) of the JJDP Act; and
- (iii) The enforcement of the legislation is statutorily or administratively prescribed, specifically providing that:
 - (A) Authority for enforcement of the statute is assigned;
 - (B) Timeframes for monitoring compliance with the statute are specified; and
 - (C) Adequate procedures are set forth for enforcement of the statute and the imposition of sanctions for violations.

§ 31.303 continued.

- (g) *Juvenile crime analysis.* Pursuant to Section 223(a)(8), the State must conduct an analysis of juvenile crime problems, including juvenile gangs that commit crimes, and juvenile justice and delinquency prevention needs within the State, including those geographical areas in which an Indian tribe performs law enforcement functions. The analysis and needs assessment must include educational needs, gender specific services, delinquency prevention and treatment services in rural areas, and mental health services available to juveniles in the juvenile justice system. The analysis should discuss barriers to accessing services and provide a plan to provide such services where needed.
- (1) *Analysis.* The analysis must be provided in the multiyear application. A suggested format for the analysis is provided in the Formula Grant Application Kit.
 - (2) *Product.* The product of the analysis is a series of brief written problem statements set forth in the application that define and describe the priority problems.
 - (3) *Programs.* Applications are to include descriptions of programs to be supported with JJDP Act formula grant funds. A suggested format for these programs is included in the application kit.
 - (4) *Performance indicators.* A list of performance indicators must be developed and set forth for each program. These indicators show what data will be collected at the program level to measure whether objectives and performance goals have been achieved and should relate to the measures used in the problem statement and statement of program objectives.
- (h) *Annual Performance Report.* Pursuant to Section 223(a) and Section 223(a)(22), the State plan shall provide for submission of an annual performance report. The State shall report on its progress in the implementation of the approved programs, described in the three-year plan. The performance indicators will serve as the objective criteria for a meaningful assessment of progress toward achievement of measurable goals. The annual performance report shall describe progress made in addressing the problem of serious juvenile crime, as documented in the juvenile crime analysis pursuant to Section 223(a)(8)(A). The annual performance report must be submitted to OJJDP no later than June 30 and address all formula grant activities carried out during the previous complete calendar year, federal fiscal year, or State fiscal year for which information is available, regardless of which year's formula grant funds were used to support the activities being reported on, e.g., during a reporting period, activities may have been funded from two or more formula grant awards.
- (i) *Technical Assistance.* States shall include, within their plan, a description of technical assistance needs. Specific direction regarding the development and inclusion of all technical assistance needs and priorities will be provided in the "Application Kit for Formula Grants Under the JJDP Act."
 - (j) *Minority Detention and Confinement.* Pursuant to Section 223(a)(23) of the JJDP Act, States must demonstrate specific efforts to reduce the proportion of juveniles detained or confined in secure detention facilities, secure correctional facilities, jails, and lockups who are members of minority groups if such proportion exceeds the proportion such groups represent in the general population, viz., in most States, youth ages 10-17 are subject to secure custody. It is essential that States approach this statutory mandate in a comprehensive manner. The purpose of the statute and regulation is to encourage States to

§ 31.303(j) continued.

address, programmatically, any features of its justice system, and related laws and policies, that may account for the disproportionate detention or confinement of minority juveniles in secure detention facilities, secure correctional facilities, jails, and lockups. The disproportionate minority confinement core requirement neither establishes nor requires numerical standards or quotas in order for a State to achieve or maintain compliance. Compliance with this provision is achieved when a State meets the requirements set forth in paragraphs (j)(1) through (3) of this section:

- (1) *Identification.* Provide quantifiable documentation (State, county, and local level) in the State's FY 1994 Formula Grant Plan (and all subsequent Multi-Year Plans) Juvenile Crime Analysis and Needs Assessment to determine whether minority juveniles are disproportionately detained or confined in secure detention and correctional facilities, jails, and lockups in relation to their proportion of the State juvenile population. Guidelines are provided in the OJJDP Disproportionate Minority Confinement Technical Assistance Manual (see Phase I Matrix). Where quantifiable documentation is not available to determine if disproportionate minority confinement exists in secure detention and correctional facilities, jails, and lockups, the State must provide a time-limited plan of action, not to exceed six months, for developing and implementing a system for the ongoing collection, analysis, and dissemination of information regarding minorities for those facilities where documentation does not exist.
- (2) *Assessment.* Each State's FY 1994 Formula Grant Plan must provide a completed assessment of disproportionate minority confinement. Assessments must, at minimum, identify and explain differences in arrest, diversion, and adjudication rates, court dispositions other than incarceration, the rates and periods of prehearing detention in and dispositional commitments to secure facilities of minority youth in the juvenile justice system, and transfers to adult court (see Phase II Matrix). If a completed assessment is not available, the State must submit a time-limited plan (not to exceed 12 months from submission of the Formula Grant Application) for completing the assessment.
- (3) *Intervention.* Each State's FY 1995 Formula Grant Plan must, where disproportionate confinement has been demonstrated, provide a time-limited plan of action for reducing the disproportionate confinement of minority juveniles in secure facilities. The intervention plan shall be based on the results of the assessment, and must include, but not be limited to, the following:
 - (i) *Diversion.* Increasing the availability and improving the quality of diversion programs for minorities who come in contact with the juvenile justice system, such as police diversion programs;
 - (ii) *Prevention.* Providing developmental, operational, and assessment assistance (financial and/or technical) for prevention programs in communities with a high percentage of minority residents with emphasis upon support for community-based organizations (including nontraditional organizations) that serve minority youth;

§ 31.303(j)(3) continued.

- (iii) *Reintegration*. Providing developmental, operational, and assessment assistance (financial and/or technical) for programs designed to reduce recidivism by facilitating the reintegration of minority youth in the community following release from dispositional commitments to reduce recidivism;
 - (iv) *Policies and Procedures*. Providing financial and/or technical assistance that addresses necessary changes in statewide and local, executive, judicial, and legal representation policies and procedures; and
 - (v) *Staffing and Training*. Providing financial and/or technical assistance that addresses staffing and training needs that will positively impact the disproportionate confinement of minority youth in secure facilities.
- (4) The time-limited plans of action set forth in paragraphs (j)(1), (2), and (3) of this section must include a clear indication of current and future barriers; which agencies, organizations, or individual(s) will be responsible for taking what specific actions; when; and what the anticipated outcomes are. The interim and final outcomes from implementation of the time-limited plan of action must be reported in each State's Multi-Year Plans and Annual Plan Updates. Final outcomes for individual project awards are to be included with each State's annual performance report (see paragraph (h) of this section).
- (5) Technical assistance is available through the OJJDP Technical Assistance Contract to help guide States with the data collection and analysis, and with programmatic elements of this requirement. Information from the OJJDP Special Emphasis Initiative on Disproportionate Minority Confinement pilot sites will be disseminated as it becomes available.
- (6) For purposes of this statutory mandate, minority populations are defined as African-Americans, American Indians, Asians, Pacific Islanders, and Hispanics.
- (k) Pursuant to Section 223(a)(24) of the JJDP Act, States shall agree to other terms and conditions as the Administrator may reasonably prescribe to assure the effectiveness of programs assisted under the Formula Grant.

§ 31.304 Definitions.

- (a) *Private agency*. A private nonprofit agency, organization, or institution is:
- (1) Any corporation, foundation, trust, association, cooperative, or accredited institution of higher education not under public supervision or control; and
 - (2) Any other agency, organization, or institution which operates primarily for scientific, education, service, charitable, or similar public purposes, but which is not under public supervision or control, and no part of the net earnings of which inures or may lawfully inure to the benefit of any private shareholder or individual, and which has been held by IRS to be tax-exempt under the provisions of Section 501(c)(3) of the 1954 Internal Revenue Code.

§ 31.304 continued.

- (b) *Secure*. As used to define a detention or correctional facility this term includes residential facilities which include construction features designed to physically restrict the movements and activities of persons in custody such as locked rooms and buildings, fences, or other physical structures. It does not include facilities where physical restriction of movement or activity is provided solely through facility staff.
- (c) *Facility*. A place, an institution, a building or part thereof, set of buildings, or an area whether or not enclosing a building or set of buildings which is used for the lawful custody and treatment of juveniles and may be owned and/or operated by public and private agencies.
- (d) *Juvenile who is accused of having committed an offense*. A juvenile with respect to whom a petition has been filed in the juvenile court or other action has occurred alleging that such juvenile is a juvenile offender, i.e., a criminal-type offender or a status offender, and no final adjudication has been made by the juvenile court.
- (e) *Juvenile who has been adjudicated as having committed an offense*. A juvenile with respect to whom the juvenile court has determined that such juvenile is a juvenile offender, i.e., a criminal-type offender or a status offender.
- (f) *Juvenile offender*. An individual subject to the exercise of juvenile court jurisdiction for purposes of adjudication and treatment based on age and offense limitations as defined by State law, i.e., a criminal-type offender or a status offender.
- (g) *Criminal-type offender*. A juvenile offender who has been charged with or adjudicated for conduct which would, under the law of the jurisdiction in which the offense was committed, be a crime if committed by an adult.
- (h) *Status offender*. A juvenile offender who has been charged with or adjudicated for conduct which would not, under the law of the jurisdiction in which the offense was committed, be a crime if committed by an adult.
- (i) *Nonoffender*. A juvenile who is subject to the jurisdiction of the juvenile court, usually under abuse, dependency, or neglect statutes for reasons other than legally prohibited conduct of the juvenile.
- (j) *Lawful custody*. The exercise of care, supervision, and control over a juvenile offender or nonoffender pursuant to the provisions of the law or of a judicial order or decree.
- (k) *Other individual accused of having committed a criminal offense*. An individual, adult or juvenile, who has been charged with committing a criminal offense in a court exercising criminal jurisdiction.
- (l) *Other individual convicted of a criminal offense*. An individual, adult or juvenile, who has been convicted of a criminal offense in court exercising criminal jurisdiction.
- (m) *Adult jail*. A locked facility, administered by State, county, or local law enforcement and correctional agencies, the purpose of which is to detain adults charged with violating criminal law, pending trial. Also considered as adult jails are those facilities used to hold convicted adult criminal offenders sentenced for less than one year.
- (n) *Adult lockup*. Similar to an adult jail except that an adult lockup is generally a municipal or police facility of a temporary nature which does not hold persons after they have been formally charged.

§ 31.304 continued.

- (o) *Valid Court Order*. The term means a court order given by a juvenile court judge to a juvenile who has been brought before the court and made subject to a court order. The use of the word “valid” permits the incarceration of juveniles for violation of a valid court order only if they received their full due process rights as guaranteed by the Constitution of the United States.
- (p) *Local private agency*. For the purposes of the pass-through requirement of Section 223(a)(5), a local private agency is defined as a private nonprofit agency or organization that provides program services within an identifiable unit or a combination of units of general local government.

Subpart E--General Conditions and Assurances

§ 31.400 Compliance with statute.

The applicant State must assure and certify that the State and its subgrantees and contractors will comply with applicable provisions of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, of 1974, Pub. L. 93-415, as amended, and the provisions of the current edition of OJP’s Financial Guide.

§ 31.401 Compliance with other Federal laws, orders, circulars.

The applicant State must further assure and certify that the State and its subgrantees and contractors will adhere to other applicable Federal laws, orders, and OMB circulars. These general Federal laws and regulations are described in greater detail in OJP’s Financial Guide and the Formula Grant Application Kit.

§ 31.402 Application on file.

Any Federal funds awarded pursuant to an application must be distributed and expended pursuant to and in accordance with the programs contained in the applicant State’s current approved application. Any departures therefrom, other than to the extent permitted by current program and fiscal regulations and guidelines, must be submitted for advance approval by the Administrator of OJJDP.

§ 31.403 Civil rights requirements.

The State assures that it will comply, and that subgrantees and contractors will comply, with all applicable Federal nondiscrimination requirements, including:

- (a) Section 809(c) of the Omnibus Crime Control and Safe Streets Act as 1968, as amended, and made applicable by Section 299(A) of the Juvenile Justice and Delinquency Prevention Act of 1974, as amended;
- (b) Title VI of the Civil Rights Act of 1964, as amended;
- (c) Section 504 of the Rehabilitation Act of 1973, as amended;

§ 31.403 continued.

- (d) Title IX of the Education Amendments of 1972;
- (e) The Age Discrimination Act of 1975;
- (f) The Department of Justice Nondiscrimination regulations, 28 CFR part 42, subparts C, D, E, and G;
- (g) The Department of Justice regulations on disability discrimination, 28 CFR parts 35 and 39; and
- (h) Subtitle A, title II, of the Americans with Disabilities Act (ADA) of 1990.

federal register

Tuesday
December 10, 1996

Part IV

**Department of
Justice**

Office of Justice Programs

28 CFR Part 31
Formula Grants; Final Rule

DEPARTMENT OF JUSTICE**Office of Justice Programs****28 CFR Part 31**

[OJP (OJJDP) No. 1106]

RIN 1121-AA43

Formula Grants

AGENCY: Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, Department of Justice.

ACTION: Final rule.

SUMMARY: The Office of Juvenile Justice and Delinquency Prevention (OJJDP) of the U.S. Department of Justice is publishing the final revision of the existing Formula Grants Regulation, which implements part B of Title II of the Juvenile Justice and Delinquency Prevention (JJDP) Act of 1974, as amended by the Juvenile Justice and Delinquency Prevention Amendments of 1992.

This final regulation is a further clarification and modification of the regulations issued in March and April of 1995. It offers greater flexibility to States and local units of government in carrying out the Formula Grants Program requirements of the JJDP Act, while reinforcing the importance of complying with those underlying legal requirements and the policy objectives from which they stem.

The Department of Justice remains firmly committed to the core requirements of the JJDP Act, such as the obligation to maintain sight and sound separation between juveniles and adults. With that in mind, this regulation is expected to assist jurisdictions that are working diligently to comply with statutory and regulatory obligations by expressly providing such flexibility as State authorized transfers of delinquents who have reached the age of full criminal responsibility to the criminal justice system and by recognizing certain real-world factors which can make "perfect" compliance unrealistic. These regulatory changes are in no way intended to evidence any lessening of the Department's commitment to the core requirements.

EFFECTIVE DATE: This regulation is effective December 10, 1996.

FOR FURTHER INFORMATION CONTACT: Roberta Dorn, Director, State Relations and Assistance Division, Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, 633 Indiana Avenue, NW., Room 543, Washington, DC 20531; (202) 307-5924.

SUPPLEMENTARY INFORMATION:*Description of Major Changes**Contact With Incarcerated Adults*

The revised regulation provides definitions of sight and sound contact to assist in understanding the level of separation that is required under section 223(a)(13) of the JJDP Act (section 223(a)(13)). Sight contact is defined as clear visual contact between incarcerated adults who are in close proximity to juveniles alleged to be or found to be delinquent, status offenders, and nonoffenders in a secure institution. Sound contact is defined in the regulation as direct oral communication between incarcerated adults and juveniles in secure institutions. While separation must be provided through architectural or procedural means, the revised regulation provides that sight or sound contact that is both brief and inadvertent or accidental must be reported as a violation only if it occurs in secure areas of the facility that are dedicated to use by juvenile offenders, including any residential area. A residential area is an area used to confine individuals overnight, and may include sleeping, shower and toilet, and day room areas.

Placement of Delinquents in Adult Facilities

State laws are increasingly providing for the mandatory or permissible transfer (or placement) of adjudicated delinquents to adult facilities once the delinquent has attained the age of full criminal responsibility under State law. The revised regulation expressly provides that the section 223(a)(13) separation requirement is not violated as a result of contact between an adjudicated delinquent and adult criminal offenders in a secure institution once the adjudicated delinquent has reached the age of full criminal responsibility established by State law, provided that the transfer (or placement) of the adjudicated delinquent is required or authorized under State law.

Expansion of 6-Hour Hold Exception to Pre and Post Court Appearances

The revised regulation builds upon the existing authority to place an alleged or adjudicated delinquent juvenile in an adult jail or lockup for up to 6 hours by providing a 6 hour time period immediately before and/or after a court appearance, subject to the section 223(a)(13) separation requirement, during the time the delinquent juvenile is in a secure custody status in the adult jail or lockup.

Collocated Facilities

The revised regulation removes the requirement that a needs-based analysis precede a jurisdiction's request for State approval of a juvenile holding facility that is collocated with an adult jail or lockup to qualify as a separate juvenile detention facility. OJJDP concurrence with a State agency's decision to approve a collocated facility will no longer be required. On-site reviews by the State to determine compliance, coupled with OJJDP's statutorily required review of the adequacy of state monitoring systems, will be used to insure that each collocated juvenile detention facility meets and continues to meet the collocated juvenile detention facility criteria.

The revised regulation permits the sharing of common use nonresidential areas of collocated adult and juvenile facilities on a time-phased basis that prevents contact between juveniles and adults. Secure juvenile detention facilities around the country are routinely overcrowded. OJJDP's objective is to encourage the development and use of separately located juvenile facilities whenever possible. Still, it is recognized that expecting every jurisdiction to create wholly separate juvenile facilities, including the duplication of costly infrastructure elements like gymnasiums, cafeterias, and classrooms, may result in those jurisdictions being unable to provide any secure juvenile detention capacity. The revised regulation makes it possible for more jurisdictions to provide juvenile facilities by removing the requirement that collocated facilities not share program space between juvenile and adult populations. Utilization of time-phasing will allow both juveniles and adults access to available educational, vocational, and recreational areas of collocated facilities. Time-phased use is explicitly limited to nonresidential areas of collocated facilities and requires the use of written procedures to ensure that no contact occurs between detained juveniles and incarcerated adults.

Deinstitutionalization of Status Offenders

The revised regulation expressly provides, formalizing existing OJJDP policy, that it is permissible to hold an accused status offender or nonoffender in a secure juvenile detention facility for up to 24 hours, exclusive of weekends and legal holidays, prior to an initial court appearance and up to 24 hours, exclusive of weekends and legal

holidays, immediately following an initial court appearance.

Valid Court Order

The revised regulation eliminates the regulatory language suggesting that jurisdictions use multi-disciplinary review teams to prepare and submit a written report to a judge who is considering an order that directs or authorizes the placement of a status offender in a secure facility for the violation of a valid court order pursuant to the valid court order exception to section 223(a)(12)(A). Although a multi-disciplinary team is still an appropriate option, and is encouraged when practical, this suggestion led to some confusion and, therefore, the example was unnecessary.

Removal Exception

The revised regulation eliminates the requirement for States to document and describe, in their annual monitoring report to OJJDP, the specific circumstances surrounding each individual use of the distance/ground transportation and weather exceptions to the section 223(a)(14) jail and lockup removal requirement.

Compliance With Separation Requirement

The revised regulation modifies the compliance standard that penalized States that have not enacted laws, rules, and regulations, or policies prohibiting the incarceration of all juvenile offenders under circumstances that would be in violation of the section 223(a)(13) separation requirement. These States were not eligible for a finding of compliance if any instances of noncompliance were sanctioned by state law, rule or regulation, or policy. Instead, the revised regulation establishes a single standard applicable to all States regardless of whether a law, rule or regulation, or policy exists that prohibits the detention or confinement of juveniles with incarcerated adults in circumstances that would be in violation of section 223(a)(13), providing that compliance can be established under circumstances in which:

(1) the instances of noncompliance do not indicate a pattern or practice; and either (2) adequate enforcement mechanisms exist; or (3) an acceptable plan has been developed to eliminate the noncompliant incidents.

Minority Detention and Confinement

The revised regulation specifically provides that the purpose of the section 223(a)(23) Disproportionate Minority Confinement core requirement is to

encourage States to programmatically address any features of its justice system that may account for the disproportionate detention or confinement of minority juveniles. The regulation is revised to clearly state that the Disproportionate Minority Confinement core requirement neither requires nor establishes numerical standards or quotas in order for a State to achieve or maintain compliance.

Discussion of Comments

The proposed revisions to the existing Formula Grants Regulation were published in the Federal Register on July 3, 1996 (61 FR 34770), for public comment. Written comments were received from thirty-six respondents on ten issues addressed by the proposed regulation. The respondents represent a diverse group including child advocacy organizations, state agencies responsible for carrying out the JJDP Act, and public interest groups. All comments have been considered by OJJDP in the issuance of this final regulation.

The following is a summary of the comments and the responses from OJJDP:

1. Comment: Several respondents raised concern over the proposed clarification of the Section 223(a)(13) prohibition against contact between incarcerated adults and juveniles who are in close proximity but not at such distances as "several hundred feet." These respondents contended that this statement in the commentary section of the proposed regulation appears to conflict with the later statement in the commentary section concerning the prohibition against systematic contact. These respondents suggested that the "several hundred feet" standard would create monitoring difficulties and, consequently, it should be clarified that "several hundred feet" was intended only as an example and that the ability for a juvenile and adult to communicate is the key. These respondents felt that it should be made clear that "systematic, procedural, and condoned contact is always prohibited."

Response: The Section 223(a)(13) separation requirement is designed to protect juveniles who are at risk from contact with adult offenders while under the delinquency jurisdiction of the juvenile justice system. OJJDP agrees with the comment that "systematic, procedural, and condoned contact is always prohibited." The "several hundred feet" example was intended to illustrate a common sense approach to determining if visual "contact" or oral "communication" is possible. This is not an issue of systematic, procedural, or condoned contact, but one of the

potential for harm to juveniles. OJJDP does not believe that a juvenile who is able to see an adult from a significant distance is in danger of being harmed. Simultaneous use of secure areas of adult facilities continues to be prohibited and, under the revised regulation, time-phased use of common use areas to achieve separation is permitted in both collocated facilities and adult jails, lockups, or other adult institutions. For collocated facilities, this revision is designed to allow both juveniles and adults access to available educational, vocational, and recreational areas common to the two facilities.

2. Comment: A number of respondents opined that the "brief and inadvertent" contact language of the proposed regulation essentially changes the Section 223(a)(13) prohibition from "no contact" back to "no regular contact" for nonresidential areas of institutions. Relaxing the no contact standard, it is argued, would permit more violations because violations are already occurring under current regulations. Several respondents believe this proposed regulation would "muddy the waters" and may "expose children to needless risks" by lowering the standards to which states must adhere. They assert that national policy should set the separation standard at the highest possible level.

Response: The revised regulation seeks to clarify with particularity the prohibition of systematic, procedural, or condoned contact between incarcerated adults and juveniles. It is not the intent of OJJDP, through the revised regulation, to in any way encourage or tolerate increased contact between incarcerated juveniles and adults, or to expose juveniles to greater risk. However, common sense and practicality suggested that the regulatory definitions of both sight and sound contact needed to be clarified, so that appropriate and reasonable parameters would guide State and local policy and practice.

In considering the respondent comments concerning this proposed regulatory clarification, it is important to note that the obligation of local jurisdictions housing juveniles to maintain sight and sound separation by architectural means or by established policies and procedures remains firmly in place. This obligation, coupled with the maintenance of policies, practices and facilities designed to maximize separation, is designed to maintain strict adherence to the "no contact" statutory prohibition between juveniles and adults in secure custody.

OJJDP also believes, however, that strict adherence to the "no contact"

prohibition is not inconsistent, in view of the lack of a statutory definition of the word "contact", with a recognition that brief and inadvertent or accidental sight or sound contact may occur, upon occasion, in nonresidential areas of a secure institution, without being considered a reportable violation of the separation requirement. OJJDP believes it would be unfair to penalize jurisdictions working consistently and genuinely to maintain sight and sound separation through policies, practices, and facilities architecture if brief and inadvertent or accidental contact between a juvenile and adult occurs in common use areas. This recognition should in no way be interpreted to indicate acceptance or tolerance of such impermissible contacts, but only as a recognition that in such environments, even the very best intentioned facility administrators may not prevent all short-term, accidental contact between juveniles and adults in a portion of the facility used at different times by both juveniles and adults.

Nonetheless, based on the concern expressed in the comment, OJJDP has expanded the regulatory language to prohibit contact in any secure areas of an institution that are dedicated to use by juvenile offenders, including any residential area. A residential area is an area used to confine individuals overnight, and may include sleeping, shower and toilet, and day room areas. OJJDP recognizes that in many jurisdictions, especially jurisdictions in rural areas, there may be periods of time when no juveniles are detained in an adult jail or lockup facility. During these periods, jurisdictions use all areas of the facility, including those areas dedicated to use by juveniles when juveniles are present, for incarcerated adults because no contact between incarcerated adults and juveniles is possible when juveniles are not present in the facility.

This revision, coupled with the requirement that facilities establish separation by architectural means or by establishing policies and procedures for time-phased use of common use areas within the secure perimeter of an adult jail, lockup, or penal facility, or within a juvenile detention facility that is collocated with any adult jail or lockup, helps to insure the safety of detained and confined juveniles.

OJJDP hopes that this explanation will assist those concerned with the proposed regulation to see that it is in no way intended to evidence a change in view or policy regarding the importance of maintaining the sight and sound separation of juveniles from adults in secure facilities at all times.

3(a). Comment: Several respondents asserted that an adjudicated delinquent should only be subject to transfer to an adult facility, such as a prison, once he (or she) reaches the age of full criminal responsibility, as provided by State law, in circumstances where the delinquent has been afforded the full due process rights available to a criminal offender in a criminal court proceeding (e.g. bail, trial by jury, etc.).

Response: The JJDP Act separation requirement expressly applies to juveniles who are alleged to be or found to be delinquent. An individual who has reached the age of full criminal responsibility is no longer considered a juvenile under the law of a State unless expressly so provided and would not, therefore, fall under the protection of the JJDP Act separation requirement. States have a compelling interest in striking a balance between the goal of achieving an adjudicated delinquent's well-being through treatment and physical security and the goals of punishment and protection of the public by lengthening the period of confinement in appropriate circumstances. The State of Texas, for example, has instituted a determinate sentencing system for certain violent offenders which initially places a juvenile adjudicated delinquent under the jurisdiction of the Texas Youth Commission and requires the committing court to re-evaluate the delinquent's placement status when he/she reaches the age of 18. At that time, the court can transfer the individual, who is now an adult, to an adult penal institution if warranted. Alternatively, the delinquent can be retained under the custody of the Texas Youth Commission to age 21, at which time transfer is mandatory if he/she is not released. Our review indicates that the caselaw is not definitive on the issue of whether a failure to provide a juvenile with all the due process rights of a criminal defendant in a delinquency proceeding would prohibit such a transfer, on due process or other grounds, to an adult jail or prison. The regulation continues to prohibit the pro forma administrative transfer of an adjudicated delinquent who has reached the age of full criminal responsibility to an adult jail or prison. However, we believe it is consistent with the JJDP Act and principles of federalism to allow States to authorize or require the transfer of such delinquents under State law. While the due process issue is appropriately a matter of State law and practice, those jurisdictions contemplating passage of a law to authorize such transfers should consider

whether delinquents subject to incarceration in the criminal justice system upon reaching the age of full criminal responsibility should be afforded the same due process rights in the original delinquency adjudication to which an adult in a criminal court proceeding is entitled.

3(b). Comment: One respondent opined that where an adjudicated delinquent is subject to transfer to an adult institution on or after reaching the age of full criminal responsibility pursuant to State law, assurances should be required that age-appropriate needs, such as health, mental health, recreation, and education services will be made available.

Response: Meeting the basic needs of transferred adjudicated delinquents should be a priority for any jurisdiction's correctional system. It is the responsibility of the State to provide for basic needs and services for all prisoners, including juveniles and young adults.

3(c). Comment: Several respondents felt that the transfer of adjudicated delinquents to adult facilities once they reach the age of full criminal responsibility defeats the purpose of a delinquency adjudication.

Response: It is important to note that persons eligible for such a transfer are limited to those who are no longer considered juveniles under State law. With States increasingly focusing on the transfer of serious and violent juvenile offenders to criminal court for prosecution, this type of transfer scheme may result in fewer transfers of juveniles to the criminal justice system through judicial waiver, prosecutorial direct-file, and statutory exclusion of certain offenses from the jurisdiction of the juvenile court. This will help to assure that appropriate treatment services are provided by the juvenile justice system while the individual is a juvenile and may serve to protect juvenile offenders from older delinquents who pose a threat or whose treatment needs cannot be met by the juvenile correctional system.

3(d). Comment: Several respondents stated that the transfer of adjudicated delinquents to adult facilities is not sound policy because the influences of adult facilities are extremely negative and harmful to young adults. These respondents further asserted that the risk of assaults and violence in juvenile facilities increase when wards know that they are going to be transferred to adult correctional facilities. This "split" disposition has a destabilizing influence on juvenile programs, according to one respondent. Several respondents stated that any advances made by juveniles in

the juvenile justice system through available educational, vocational, and therapeutic programs will be destroyed as a result of the transfer to an adult facility.

Response: OJJDP strongly recommends that States enacting a transfer law provide the transferred adjudicated delinquent with age appropriate programs. However, this Office is neither aware of any studies supporting the alleged harm from such transfers nor believes that a juvenile who is able to remain in a juvenile correctional setting at least until the age of full criminal responsibility is worse off than the juvenile who is transferred to the criminal justice system for felony prosecution and, upon conviction, is incarcerated in the criminal justice system.

3(e). Comment: One respondent suggested that OJJDP recommend that States provide separate facilities for delinquent offenders who have reached the age of full criminal responsibility.

Response: OJJDP agrees that this option merits State consideration. Such a system has been adopted in Colorado, where older serious and violent delinquent offenders who have reached the age of full criminal responsibility and juveniles transferred to criminal court pursuant to State transfer laws, are placed in secure treatment facilities designed and operated for youthful offenders.

3(f). Comment: One respondent suggested that the proposed regulatory change is of great assistance to individual States looking for appropriate methods to deal with the rising levels of violent juvenile crime.

Response: The intent of this regulatory change is to provide States with appropriate flexibility in dealing with serious and violent delinquent offenders who require sentences that extend into adulthood.

4(a). Comment: Three questions were asked by one respondent concerning the "6 hour rule" that allows an alleged delinquent to be held in a secure custody status in an adult jail or lockup for up to 6 hours for purposes of processing (while maintaining sight and sound separation from adult offenders). The proposed regulation would apply the six hour hold exception to include a six hour period before and/or after a court appearance (both pre and post adjudication).

(a) Is the 6 hour rule cumulative (i.e. before and after inclusive of the 6 hours) or is it a separate 6 hours for before and after a court appearance?

(b) Is the time limit affected by the status of the jail site, i.e. MSA or nonMSA?

(c) Would the 24 hour rural exception continue to be permitted?

Response: (a) The 6 hour rule is not cumulative. A juvenile may be held up to 6 hours before a court appearance and up to 6 hours after a court appearance in an adult jail or lockup.

(b) The time limit is not affected by the status of the jail site;

(c) The 24-hour rural exception is not changed by the regulation. The 24-hour rural (MSA) exception is a statutory exception that applies to initial law enforcement custody, which may or may not result in an initial court appearance. The new six-hour hold exception would apply in either an MSA or nonMSA jurisdiction both before and/or after a court appearance.

4(b). Comment: Several respondents suggested that the 6-hour rule following a court appearance be expanded to 24 hours for rural jurisdictions because of the expense of identifying and traveling to an appropriate facility or of constructing a separate detention facility in a small rural county or group of counties.

Response: The nonMSA, or rural exception, provides a 24-hour period, exclusive of nonjudicial days (Saturdays, Sundays and holidays), to detain an alleged delinquent, pending an initial court appearance, if State law requires such an appearance within the 24-hour period. Long distance and weather may extend this exception. The 6-hour hold exception has historically applied when police are holding a juvenile for investigation or processing a juvenile for purposes of notifying parents, arranging release, or transporting to a juvenile facility. Expansion of the 6-hour hold for pre- and post-court appearances is designed to facilitate court appearances of juveniles that require transportation. The statutory 24-hour nonMSA exception for initial court appearances is premised on the need for time to plan the placement/release of the juvenile. Subsequent court appearances can be planned in advance, negating the need for an extended placement of the juvenile in an adult jail or lockup.

4(c). Comment: One respondent found that the 6-hour exception was too inflexible where no reasonable alternative juvenile placement was available following arrest. The respondent suggested that a workable "good faith" rule be established.

Response: The six-hour exception gives law enforcement officials in nonMSA jurisdictions the opportunity to make decisions about investigating, processing, and/or transporting juveniles. States and local units of government have found the 6-hour

exception to be sufficient where mechanisms are put in place to expedite the handling of alleged delinquents who need to be detained for investigation or processing in secure custody in an adult jail or lockup.

4(d). Comment: One respondent organization cited the Institute for Judicial Administration/American Bar Association (IIA/ABA) Standards which state that "The interim detention of accused juveniles in any facility or part thereof also used to detain adults is prohibited." In support of its opposition to the proposed regulation, this respondent noted that under conditions where juveniles are held with adults prior to adjudication, ABA standards recommend a blanket prohibition against the detention of juveniles with adult inmates prior to adjudication under any circumstances.

Response: Congress considered the secure confinement of accused delinquent juveniles for up to 6 hours in an urban jail or lockup to be a reasonable outside time limit for processing purposes. This period of time was considered to reflect a "rule of reason", as stated in the House Committee report on the 1980 JJDP Act reauthorization. OJJDP is not establishing any new policy by this regulation, but rather is codifying in the regulation what has been the Office's monitoring policy for 16 years, and extending it to pre- and post-court appearance holds.

5(a). Comment: One respondent, while supporting the time-phasing of common use areas of collocated facilities, requested clarification on whether "professional treatment staff" can be "shared" between juvenile and adult populations.

Response: In collocated facilities, professional care staff such as medical, counseling, or education services continue to be permitted to serve both adult and juvenile residents, although not at the same time.

5(b). Comment: One respondent asserted that elimination of the requirement for OJJDP's concurrence in State-approved collocated facilities weakens the Office's enforcement capabilities.

Response: States will continue to have the responsibility to approve and monitor these facilities. OJJDP will continue to review the monitoring practices of States, as well as provide training and technical assistance. Further, the criteria for the establishment of such facilities are clearly set forth in § 31.303(e)(3) of the regulation.

5(c). Comment: Another respondent felt that the regulation should more

clearly reflect that collocated facilities are not prohibited and that these facilities are permissible if established in accordance with the regulatory criteria set forth to establish that a collocated facility is a separate and distinct facility from the adult jail or lockup with which it is collocated.

Response: OJJDP's proposal to eliminate the requirement for its concurrence in State approval of a collocated facility, and the elimination of a needs-based analysis, should make it clear that the establishment of collocated facilities is not prohibited. States may approve collocated facilities in accordance with State law and policy as long as each such facility meets the criteria set forth in § 31.303(e)(3) of the regulation.

5(d). Comment: Another respondent opined that the needs-based analysis and prohibition of time-phased use should not be eliminated.

Response: A properly constructed and operated collocated facility that meets the criteria set forth in § 31.303(e)(3) does not create conditions where the health and safety of juveniles would be jeopardized. Time-phased use of nonresidential areas allows for efficient use of these resources which, otherwise, might not be available to the juvenile population. Time-phased use, if properly implemented, would not result in any contact between juveniles and adults. Further, States are encouraged to conduct their own needs-based analysis. OJJDP technical assistance will remain available, upon State request, for this purpose.

6(a). Comment: One commentator, in response to the 24 hour detention exception for status and nonoffenders, stated that nonoffenders should not be placed in detention facilities. Limited exceptions should be permitted in the event of a well documented need. In this way, detention of nonoffenders will not become a pattern or practice.

Response: OJJDP agrees that the detention of nonoffenders, such as dependent, neglected, or abused children, should not become a pattern or practice. This authority should be used to meet emergency needs only. States are encouraged to provide for the return of nonoffenders to their families or to appropriate shelter care as soon as possible.

6(b). Comment: Another respondent considers the placement of nonoffenders in secure detention to be a retrenchment of longstanding national policy in opposition to such a placement.

Response: OJJDP Formula Grants program policy and regulation have authorized the limited and temporary placement of nonoffenders in secure

detention facilities since 1975. When either status offenders or nonoffenders are placed in such facilities, Section 223(a)(12)(B) encourages States to place the status offender or nonoffender in facilities which are the least restrictive alternative appropriate to the needs of the child and the community. The provision does not change established policy and is intended to provide adequate time to arrange for appropriate placement prior to or following an initial court appearance. Because the current statutory definition of "secure detention facility" includes dedicated facilities for nonoffenders, removal of the 24 hour hold exception's applicability to nonoffenders would also prohibit the secure holding of nonoffender juveniles in dedicated facilities. This issue needs to be addressed statutorily before OJJDP can propose a change to the 24 hour hold exception's applicability to nonoffenders.

6(c). Comment: One respondent believes that placement of status offenders with children accused of delinquency can stigmatize them as delinquent and that the proposed regulation dilutes OJJDP's strong regulatory support for the deinstitutionalization of status offender and nonoffender juveniles. This respondent supports the placement of status offenders in secure residential facilities for up to six hours and only when law enforcement is unable to contact a parent, custodian, or relative, unreasonable distance exists, the juvenile refuses to be taken home, or law enforcement is otherwise unable to make arrangements for the safe release of the juvenile.

Response: OJJDP has, since 1975, authorized the secure short-term detention of status offenders and nonoffenders in juvenile detention facilities. While blanket use of this authority without regard to the facts and circumstances of each juvenile taken into custody would be a poor policy, State and local governments should determine the specific law and policy that will govern the use of this authority.

7(a). Comment: Two respondents commented regarding revision of § 31.303(f)(3)(vi), authorizing the use of multi-disciplinary teams to make recommendations on the use of secure confinement for a valid court order violator, contending that such teams are an important tool for the valid court order process and that the language should not be deleted. Another commented that language should be added to clarify that multi-disciplinary teams are only a suggested way of

meeting the requirement for an independent review team and that court or law enforcement personnel can still serve on such a team.

Response: Multi-disciplinary teams may still be utilized for the purpose of preparing and submitting a written report to a judge considering an order to place a status offender in a secure facility for violation of a valid court order.

The suggestion of multi-disciplinary teams in the existing regulation was meant to be an example of one mechanism that would fulfill the statutory requirement. However, this apparently created the impression that only multi-disciplinary teams could be utilized. In fact, the review could be conducted by an individual, agency, or team representing a noncourt or law enforcement agency.

7(b). Comment: One comment opposed the deletion of language requiring that secure confinement represent the least restrictive alternative "appropriate to the needs of the juvenile and the community." This respondent felt that removal of this language lessens the judge's overall responsibility to ensure the appropriateness of the disposition in light of other available placement.

Response: Section 103(16)(C)(iii) of the JJD Act and § 31.303(f)(3)(vi) of the regulation require that a disposition of secure confinement must consider all alternative dispositions (including treatment) to placement in a secure detention or secure correctional facility. Removal of the referenced language does not diminish the responsibility of the court to consider alternatives to secure confinement. However, the referenced nonstatutory language is vague and does not provide meaningful guidance.

7(c). Comment: Another comment requested clarification of why the words "of a status offender" were added to the language "In entering any order that directs or authorizes the placement of a status offender in a secure facility, the judge presiding over an initial probable cause hearing or violation hearing must. * * *" in Section 31.303(f)(3)(vi).

Response: The change was intended to underscore that the valid court order (VCO) provision applies solely to status offenders. A nonoffender may not be placed in secure confinement for any length of time for violation of a court order.

7(d). Comment: One respondent recommended the deletion of the VCO requirement for an independent review and determination of the reasons for the juvenile's behavior. This respondent

insisted that the first was difficult to monitor and the latter impossible to determine, asking "How can the court ascertain the reasons for the juvenile's behavior?". Another respondent commented that the VCO provision should be a recommendation rather than a requirement.

Response: The use of the independent review standard under the valid court order exception is statutorily established in Section 223(a)(12)(A) and the term "valid court order" is defined in Section 103(16) of the JJDP Act. Therefore, they cannot be deleted or modified by regulation.

8. Comment: Comments were received both in favor of and opposed to the proposal to eliminate the reporting requirement for each use of the ground/distance and weather exceptions to the jail and lockup removal exception. Those opposed to the change are concerned that it will encourage abuses of the rule and lead to more youth in adult jails and lockups, in violation of the statute.

Response: Enforcement of this provision will continue to be a State responsibility that is subject to on-site monitoring and verification by OJJDP during compliance monitoring visits to States utilizing this jail and lockup removal exception. The changes streamline the process and remove an unnecessary administrative burden.

9(a). Comment: Several respondents felt that the "relaxation" of State reporting and monitoring requirements related to the separation requirement is "dangerous" and could cause States to slide into noncompliance. States might view this as an opportunity to relax their oversight responsibility.

Response: It is not OJJDP's intent to encourage States to weaken their commitment to the core requirements of the JJDP Act. However, OJJDP believes that isolated violations of the separation requirement that do not represent a pattern or practice should not jeopardize a State's ability to access federal funds. OJJDP remains fully committed to the enforcement of Section 223(a)(13) of the JJDP Act requiring the separation of juvenile delinquents from adult offenders.

9(b). Comment: One respondent commented that the existence of state laws, regulations, or court rules is the only mechanism that provides any true assurance that future violations of the separation requirement will not occur in a given jurisdiction. Another felt that eliminating this requirement will mean that States will abandon their efforts to obtain conforming laws, regulations, and court rules in order to enforce the separation core requirement. A third

respondent felt that all States should have a policy that mirrors the JJDP Act separation requirement.

Response: OJJDP encourages States to retain existing laws, regulations, and court rules mirroring the separation requirement. OJJDP also encourages States to utilize other effective enforcement tools including: training and technical assistance workshops; on-site training for law enforcement and adult jail and lockup personnel; and development of alternatives to incarceration.

9(c). Comment: One commentor suggested that until such time as OJJDP has unlimited resources, there is no way that the existence of a "pattern or practice" of noncompliance can be monitored.

Response: Section 223(a)(15) requires States to "provide for an adequate system of monitoring jails, detention facilities, and nonsecure facilities to ensure that the requirements of paragraph (12)(A), paragraph (13) and paragraph (14) are met, and for annual reporting of the results of such monitoring to the Administrator; * * *". It is OJJDP's position that State monitoring systems successfully identify the vast majority of violations and State monitoring reports can be used to identify whether reported violations establish a pattern or practice of separation violations in the State.

9(d). Comment: A single separation standard applicable to all States for measuring compliance based on *de minimis* violations that do not indicate a pattern or practice is a fair standard, according to one respondent. Moreover, it is less cumbersome than the present compliance requirement. Another respondent felt that it is clearly appropriate to find overall compliance within the separation requirement even if individual violations have occurred, as long as no pattern or practice exists.

Response: It is OJJDP's intent to treat all States in a fair and equitable manner. In addressing violations of Section 223(a)(13) of the JJDP Act in terms of a pattern or practice, OJJDP's across the board approach is equitable to the States, providing a substantive *de minimis* standard for the separation requirement.

10(a). Comment: A commentor noted that the addition of the word "programmatically" in Section 31.303(j) to clarify that "the purpose of the statute and regulation is to encourage States to address programmatically.* * *" the disproportionate minority confinement (DMC) core requirement (Section 223(a)(23)) will limit the focus of the States and move them away from alternative ways to address the over-

representation of minorities in secure facilities.

Response: OJJDP notes that the addition of the word "programmatically" does not restrict a State's options for addressing DMC. States are encouraged to examine all aspects of DMC and address any features of its juvenile or criminal justice systems that may contribute to DMC as identified by the State.

10(b). Comment: Another respondent stated that the regulation needs to reflect a broader examination of minority over-representation. Since 1992, States have spent considerable time and dollars reviewing their juvenile justice systems in their entirety. The clarification to the DMC core requirement provides that States should address "programmatically" any feature of its justice system that accounts for the disproportionate detention or confinement of minority juveniles. However, the entire system should be analyzed, not just juvenile detention or confinement.

Response: The regulation provides for a broad examination of the DMC issue, including all decision points in the juvenile justice system, and encourages States to address "any feature of its justice system" that accounts for DMC and not just those that "may account for the disproportionate detention or confinement." The latter language is taken verbatim from the statutory language of Section 223(a)(23) of the JJDP Act.

Executive Order 12866

This final rule is not a "significant regulatory action" for purposes of Executive Order 12866 because it does not result in: (1) an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with action taken or planned by another agency; (3) materially alter the budgetary impact of entitlement, grants, user fees, or loan programs or the rights and obligations of recipients thereof; and (4) does not raise novel legal or policy issues arising out of legal mandates, the President's priorities or the principles of Executive Order No. 12866, and accordingly this rule has not been reviewed by the Office of Management of Budget. This regulation has been drafted and reviewed in accordance with Executive Order 12866, Section 1(b), Principles of Regulation.

Regulatory Flexibility Act

This final rule, if promulgated, will not have a "significant" economic impact on a substantial number of small "entities" as defined by the Regulatory Flexibility Act. This action is intended to relieve existing requirements in the Formula Grants program and to clarify other provisions so as to promote compliance with its provisions by States participating in the program.

Paperwork Reduction Act

No collections of information requirements are contained in or affected by this regulation pursuant to the Paperwork Reduction Act, codified at 44 U.S.C. 3504(H).

Intergovernmental Review of Federal Programs

In accordance with Executive Order 12372 and the Department of Justice's implementing regulation 28 CFR Part 30, States must submit Formula Grant Program applications to the State "Single Point of Contact," if one exists. The State may take up to 60 days from the application date to comment on the application.

Lists of Subjects in 28 CFR Part 31

Grant programs—law, Juvenile delinquency, Reporting and recordkeeping requirements.

For the reasons set forth in the preamble 28 CFR Part 31 is amended as follows:

PART 31—[AMENDED]

1. The authority citation for Part 31 continues to read as follows:

Authority: 42 U.S.C. 5601 *et seq.*

2. Section 31.303 is amended to read as follows:

a. Paragraphs (d)(1)(i) and (d)(1)(v) are revised;

b. Paragraphs (e)(2) and (e)(3) are revised;

c. Paragraphs (f)(2), (f)(3)(vi), (f)(4)(vi), (f)(5)(i)(C), (f)(5)(iii), (f)(5)(iv), (f)(6)(i), and (f)(6)(ii) are revised;

d. Paragraph (f)(4)(iv) is amended by removing "and" at the end of the paragraph and paragraph (f)(4)(v) is amended by removing the period at the end of the paragraph and adding "; and" in its place; and

e. Paragraph (j) introductory text is amended by adding two sentences following the second sentence.

The additions and revisions read as follows:

§ 31.303 Substantive requirements.

* * * * *

(d) * * *

(1) * * *

(i) *Separation.* Describe its plan and procedure, covering the three-year planning cycle, for assuring that the requirements of this section are met. The term "contact" includes any physical or sustained sight or sound contact between juvenile offenders in a secure custody status and incarcerated adults, including inmate trustees. A juvenile offender in a secure custody status is one who is physically detained or confined in a locked room or other area set aside or used for the specific purpose of securely detaining persons who are in law enforcement custody. Secure detention or confinement may result either from being placed in such a room or area and/or from being physically secured to a cuffing rail or other stationary object. Sight contact is defined as clear visual contact between incarcerated adults and juveniles within close proximity to each other. Sound contact is defined as direct oral communication between incarcerated adults and juvenile offenders. Separation must be accomplished architecturally or through policies and procedures in all secure areas of the facility which include, but are not limited to, such areas as admissions, sleeping, and shower and toilet areas. Brief and inadvertent or accidental contact between juvenile offenders in a secure custody status and incarcerated adults in secure areas of a facility that are not dedicated to use by juvenile offenders and which are nonresidential, which may include dining, recreational, educational, vocational, health care, sally ports or other entry areas, and passageways (hallways), would not require a facility or the State to document or report such contact as a violation. However, any contact in a dedicated juvenile area, including any residential area of a secure facility, between juveniles in a secure custody status and incarcerated adults would be a reportable violation.

* * * * *

(v) Assure that adjudicated delinquents are not reclassified administratively and transferred to an adult (criminal) correctional authority to avoid the intent of separating juveniles from adult criminals in jails or correctional facilities. A State is not prohibited from placing or transferring an alleged or adjudicated delinquent who reaches the State's age of full criminal responsibility to an adult facility when required or authorized by State law. However, the administrative transfer, without statutory direction or authorization, of a juvenile offender to an adult correctional authority, or a transfer within a mixed juvenile and

adult facility for placement with adult criminals, either before or after a juvenile reaches the age of full criminal responsibility, is prohibited. A State is also precluded from transferring adult offenders to a juvenile correctional authority for placement in a juvenile facility. This neither prohibits nor restricts the waiver or transfer of a juvenile to criminal court for prosecution, in accordance with State law, for a criminal felony violation, nor the detention or confinement of a waived or transferred criminal felony violator in an adult facility.

* * * * *

(e) * * *

(2) Describe the barriers that a State faces in removing all juveniles from adult jails and lockups. This requirement excepts only those alleged or adjudicated juvenile delinquents placed in a jail or a lockup for up to six hours from the time they enter a secure custody status or immediately before or after a court appearance, those juveniles formally waived or transferred to criminal court and against whom criminal felony charges have been filed, or juveniles over whom a criminal court has original or concurrent jurisdiction and such court's jurisdiction has been invoked through the filing of criminal felony charges.

(3) *Collocated facilities.* (i) Determine whether or not a facility in which juveniles are detained or confined is an adult jail or lockup. The JJDP Act prohibits the secure custody of juveniles in adult jails and lockups, except as otherwise provided under the Act and implementing OJJDP regulations. Juvenile facilities collocated with adult facilities are considered adult jails or lockups absent compliance with criteria established in paragraphs (e)(3)(i)(C)(1) through (4) of this section.

(A) A collocated facility is a juvenile facility located in the same building as an adult jail or lockup, or is part of a related complex of buildings located on the same grounds as an adult jail or lockup. A complex of buildings is considered "related" when it shares physical features such as walls and fences, or services beyond mechanical services (heating, air conditioning, water and sewer), or the specialized services that are allowable under paragraph (e)(3)(i)(C)(3) of this section.

(B) The State must determine whether a collocated facility qualifies as a separate juvenile detention facility under the four criteria set forth in paragraphs (e)(3)(i)(C) (1) through (4) of this section for the purpose of monitoring compliance with section 223(a) (12)(A), (13) and (14) of the JJDP Act.

(C) Each of the following four criteria must be met in order to ensure the requisite separateness of a juvenile detention facility that is collocated with an adult jail or lockup:

(1) Separation between juveniles and adults such that there could be no sustained sight or sound contact between juveniles and incarcerated adults in the facility. Separation can be achieved architecturally or through time-phasing of common use nonresidential areas; and

(2) Separate juvenile and adult programs, including recreation, education, vocation, counseling, dining, sleeping, and general living activities. There must be an independent and comprehensive operational plan for the juvenile detention facility which provides for a full range of separate program services. No program activities may be shared by juveniles and incarcerated adults. Time-phasing of common use nonresidential areas is permissible to conduct program activities. Equipment and other resources may be used by both populations subject to security concerns; and

(3) Separate staff for the juvenile and adult populations, including management, security, and direct care staff. Staff providing specialized services (medical care, food service, laundry, maintenance and engineering, etc.) who are not normally in contact with detainees, or whose infrequent contacts occur under conditions of separation of juveniles and adults, can serve both populations (subject to State standards or licensing requirements). The day to day management, security and direct care functions of the juvenile detention center must be vested in a totally separate staff, dedicated solely to the juvenile population within the collocated facilities; and

(4) In States that have established standards or licensing requirements for juvenile detention facilities, the juvenile facility must meet the standards (on the same basis as a free-standing juvenile detention center) and be licensed as appropriate. If there are no State standards or licensing requirements, OJJDP encourages States to establish administrative requirements that authorize the State to review the facility's physical plant, staffing patterns, and programs in order to approve the collocated facility based on prevailing national juvenile detention standards.

(ii) The State must determine that the four criteria are fully met. It is incumbent upon the State to make the determination through an on-site facility (or full construction and operations

plan) review and, through the exercise of its oversight responsibility, to ensure that the separate character of the juvenile detention facility is maintained by continuing to fully meet the four criteria set forth in paragraphs (e)(3)(i)(C) (1) through (4) of this section.

(iii) Collocated juvenile detention facilities approved by the State and concurred with by OJJDP before December 10, 1996 may be reviewed by the State against the regulatory criteria and OJJDP policies in effect at the time of the initial approval and concurrence or against the regulatory criteria set forth herein, as the State determines. Facilities approved on or after the effective date of this regulation shall be reviewed against the regulatory criteria set forth herein. All collocated facilities are subject to the separate staff requirement established by the 1992 Amendments to the JJDP Act, and set forth in paragraph (e)(3)(i)(C)(3) of this section.

(iv) An annual on-site review of the facility must be conducted by the compliance monitoring staff person(s) representing or employed by the State agency administering the JJDP Act Formula Grants Program. The purpose of the annual review is to determine if compliance with the criteria set forth in paragraphs (e)(3)(i)(C) (1) through (4) of this section is being maintained.

* * * * *
(f) * * *
* * * * *

(2) For the purpose of monitoring for compliance with section 223(a)(12)(A) of the Act, a secure detention or correctional facility is any secure public or private facility used for the lawful custody of accused or adjudicated juvenile offenders or nonoffenders, or used for the lawful custody of accused or convicted adult criminal offenders. Accused status offenders or nonoffenders in lawful custody can be held in a secure juvenile detention facility for up to twenty-four hours, exclusive of weekends and holidays, prior to an initial court appearance and for an additional twenty-four hours, exclusive of weekends and holidays, following an initial court appearance.

(3) * * *

(vi) In entering any order that directs or authorizes the placement of a status offender in a secure facility, the judge presiding over an initial probable cause hearing or violation hearing must determine that all the elements of a valid court order (paragraphs (f)(3) (i), (ii) and (iii) of this section) and the applicable due process rights (paragraph (f)(3)(v) of this section) were afforded the juvenile and, in the case of a

violation hearing, the judge must obtain and review a written report that: reviews the behavior of the juvenile and the circumstances under which the juvenile was brought before the court and made subject to such order; determines the reasons for the juvenile's behavior; and determines whether all dispositions other than secure confinement have been exhausted or are clearly inappropriate. This report must be prepared and submitted by an appropriate public agency (other than a court or law enforcement agency).

* * * * *
(4) * * *

(vi) Pursuant to section 223(a)(14) of the JJDP Act, the nonMSA (low population density) exception to the jail and lockup removal requirement as described in paragraphs (f)(4) (i) through (v) of this section shall remain in effect through 1997, and shall allow for secure custody beyond the twenty-four hour period described in paragraph (f)(4)(i) of this section when the facility is located where conditions of distance to be traveled or the lack of highway, road, or other ground transportation do not allow for court appearances within twenty-four hours, so that a brief (not to exceed an additional forty-eight hours) delay is excusable; or the facility is located where conditions of safety exist (such as severely adverse, life-threatening weather conditions that do not allow for reasonably safe travel), in which case the time for an appearance may be delayed until twenty-four hours after the time that such conditions allow for reasonably safe travel. States may use these additional statutory allowances only where the precedent requirements set forth in paragraphs (f)(4) (i) through (v) of this section have been complied with. This may necessitate statutory or judicial (court rule or opinion) relief within the State from the twenty-four hour initial court appearance standard required by paragraph (f)(4)(i) of this section.

(5) * * *
(i) * * *

(C) The total number of accused status offenders and nonoffenders, including out-of-State runaways and Federal wards, held in any secure detention or correctional facility for longer than twenty-four hours (not including weekends or holidays), excluding those held pursuant to the valid court order provision as set forth in paragraph (f)(3) of this section or pursuant to section 922(x) of Title 18, United States Code (which prohibits the possession of a handgun by a juvenile), or a similar State law. A juvenile who violates this statute, or a similar state law, is

excepted from the deinstitutionalization of status offenders requirement;

* * * * *

(iii) To demonstrate the extent of compliance with section 223(a)(13) of the JJDP Act, the report must include, at a minimum, the following information for the current reporting period:

(A) Dates covered by the current reporting period;

(B) The total number of facilities used to detain or confine both juvenile offenders and adult criminal offenders during the past 12 months and the number inspected on-site;

(C) The total number of facilities used for secure detention and confinement of both juvenile offenders and adult criminal offenders which did not provide sight and sound separation;

(D) The total number of juvenile offenders and nonoffenders not separated from adult criminal offenders in facilities used for the secure detention and confinement of both juveniles and adults;

(E) The total number of State approved juvenile detention centers located within the same building or on the same grounds as an adult jail or lockup, including a list of such facilities;

(F) The total number of juveniles detained in State approved collocated facilities that were not separated from the management, security or direct care staff of the adult jail or lockup;

(G) The total number of juvenile detention centers located within the same building or on the same grounds as an adult jail or lockup that have not been approved by the State, including a list of such facilities; and

(H) The total number of juveniles detained in collocated facilities not approved by the State that were not sight and sound separated from adult criminal offenders.

(iv) To demonstrate the extent of compliance with section 223(a)(14) of the JJDP Act, the report must include, at a minimum, the following information for the current reporting period:

(A) Dates covered by the current reporting period;

(B) The total number of adult jails in the State AND the number inspected on-site;

(C) The total number of adult lockups in the State AND the number inspected on-site;

(D) The total number of adult jails holding juveniles during the past twelve months;

(E) The total number of adult lockups holding juveniles during the past twelve months;

(F) The total number of accused juvenile criminal-type offenders held securely in adult jails, lockups, and unapproved collocated facilities in excess of six hours, including those held pursuant to the "removal exception" as set forth in paragraph (f)(4) of this section;

(G) The total number of accused juvenile criminal-type offenders held securely in adult jails, lockups and unapproved collocated facilities for less than six hours for purposes other than identification, investigations, processing, release to parent(s), transfer to court, or transfer to a juvenile facility following initial custody;

(H) The total number of adjudicated juvenile criminal-type offenders held securely in adult jails or lockups and unapproved collocated facilities in excess of six hours prior to or following a court appearance or for any length of time not related to a court appearance;

(I) The total number of accused and adjudicated status offenders (including valid court order violators) and nonoffenders held securely in adult jails, lockups and unapproved collocated facilities for any length of time;

(J) The total number of adult jails, lockups, and unapproved collocated facilities in areas meeting the "removal exception" as noted in paragraph (f)(4) of this section, including a list of such facilities and the county or jurisdiction in which each is located;

(K) The total number of juveniles accused of a criminal-type offense who were held in excess of six hours but less than 24 hours in adult jails, lockups and unapproved collocated facilities pursuant to the "removal exception" as set forth in paragraph (f)(4) of this section;

(L) The total number of juveniles accused of a criminal-type offense who were held in excess of 24 hours, but not more than an additional 48 hours, in adult jails, lockups and unapproved collocated facilities pursuant to the "removal exception" as noted in paragraph (f)(4) of this section, due to conditions of distance or lack of ground transportation; and

(M) The total number of juveniles accused of a criminal-type offense who were held in excess of 24 hours, but not more than an additional 24 hours after the time such conditions as adverse weather allow for reasonably safe travel, in adult jails, lockups and unapproved collocated facilities, in areas meeting the "removal exception" as noted in paragraph (f)(4) of this section.

(6) * * *

(i) Full compliance with section 223(a)(12)(A) is achieved when a State has removed 100 percent of status offenders and nonoffenders from secure detention and correctional facilities or can demonstrate full compliance with de minimis exceptions pursuant to the policy criteria contained in the Federal Register of January 9, 1981 (copies are available from the Office of General Counsel, Office of Justice Programs, 633 Indiana Ave., N.W., Washington, D.C. 20531).

(ii) Compliance with section 223(a)(13) has been achieved when a State can demonstrate that:

(A) The last submitted monitoring report, covering a full 12 months of data, demonstrates that no juveniles were incarcerated in circumstances that were in violation of section 223(a)(13); or

(B)(I) The instances of noncompliance reported in the last submitted monthly report do not indicate a pattern or practice but rather constitute isolated instances; and

(2)(i) Where all instances of noncompliance reported were in violation of or departure from State law, rule, or policy that clearly prohibits the incarceration of all juvenile offenders in circumstances that would be in violation of Section 223(a)(13), existing enforcement mechanisms are such that the instances of noncompliance are unlikely to recur in the future; or

(ii) An acceptable plan has been developed to eliminate the noncompliant incidents.

* * * * *

(j) * * * The purpose of the statute and the regulation in this part is to encourage States to address, programmatically, any features of its justice system, and related laws and policies, that may account for the disproportionate detention or confinement of minority juveniles in secure detention facilities, secure correctional facilities, jails, and lockups. The disproportionate minority confinement core requirement neither establishes nor requires numerical standards or quotas in order for a State to achieve or maintain compliance.

* * *

Dated: December 5, 1996.

Shay Bilchik,
Administrator, Office of Juvenile Justice and Delinquency Prevention.

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