federal register

Friday
January 9, 1981

Part VII

Department of Justice

Office of Juvenile Justice and Delinquency Prevention

Policy and Criteria for de Minimis Exceptions to Full Compliance With Deinstitutionalization Requirement of Juvenile Justice and Delinquency Prevention Act

DEPARTMENT OF JUSTICE

Office of Juvenile Justice and Delinquency Prevention

Policy and Criteria for de Minimis Exceptions to Full Compliance With Deinstitutionalization Requirement of the Juvenile Justice and Delinquency Prevention Act, 1974, as Amended

AGENCY: Office of Juvenile Justice and Delinquency Prevention (OJJDP).

ACTION: Issuance of final policy.

SUMMARY: Notice is hereby given that the Office of Juvenile Justice and Delinquency Prevention, U.S. Department of Justice, pursuant to the Juvenile Justice and Delinquency Prevention Act of 1974, as amended, 42 U.S.C. 5601, et seq., (JJDP Act), is issuing a policy and criteria for determining full compliance with de minimis exceptions to the deinstitutionalization requirement of Section 223(a)(12)(A) of the JJDP Act, as amended.

SUPPLEMENTARY INFORMATION: Section 223(a)(12)(A) of the JJDP Act requires that states participating in the Formula Grant Program (Part B, Subpart I), of the JJDP Act "provide within three years after submission of the initial plan that juveniles who are charged with or who have committed offenses that would not be criminal if committed by an adult or offenses which do not constitute violations of valid court orders, or such non-offenders as dependent or neglected children, shall not be placed in secure detention facilities or secure correctional facilities." Section 223(c) of the Act further provides that failure to achieve compliance with the Section 223(a)(12)(A) requirement within the three-year limitation shall terminate a State's eligibility for formula grant funding unless a determination is made that the State is in substantial compliance, through achievement of deinstitutionalization of not less than 75 percent of such juveniles or through removal of 100 percent of such juveniles from secure correctional facilities and has made an unequivocal commitment to achieving full compliance within two additional years. The Agency's Office of General Counsel, in Legal Opinion 76-7, October 7, 1975, indicated that a State's failure to meet the full compliance requirement within the statutorily designated time-frame would result in future ineligibility for Formula Grants unless such failure was de minimis. The opinion further stated that such determinations would be made on a case-by-case basis.

OJJDP published in the August 14, 1980, **Federal Register** a proposed policy and criteria for de minimis exceptions to full compliance. That publication provided interested persons the opportunity to submit comments and recommendations on the proposed criteria. A total of 15 comments were received and analyzed. The responses included comments from 15 of the 50 states participating in the JJDP Act Formula Grant program. Appendix A provides additional information regarding the review and analysis of these comments. OMB Circular No. A-95, regarding State and Local Clearinghouse review of Federal and Federally-assisted programs and projects, is not applicable to the issuance of this policy. This policy is specifically applicable to Program No. 16.540, Juvenile Justice and Delinquency Prevention Allocation to States, within the Catalog of Federal Domestic Assistance.

Policy and Criteria for de Minimis Exceptions to Full Compliance With Section 223(a)(12)(A) of the JJDP Act

The following provides the Office of Juvenile Justice and Delinquency Prevention policy for the determination of State compliance with Section 223(a)(12)(A) of the Juvenile Justice and Delinquency Prevention Act of 1974, as amended (42 U.S.C. 5601 *et seq.*). The criteria presented below will be applied in determining whether a State has achieved full compliance, with de minimis exceptions, with the above cited deinstitutionalization requirement of the Juvenile Justice Act. Also specified is the information which each state must provide in response to each criterion when seeking from OJJDP a finding of full compliance with de minimis exceptions.

States requesting a finding of full compliance with de minimis exceptions should submit the request at the time the annual monitoring report is submitted or as soon thereafter as all information required for a determination is available. For those States that have participated in the formula grant program continuously since 1975 such a request, if needed, would be due December 31, 1980, because that is the first monitoring report due after five years of participation. States that had extremely low rates of institutionalization when they began participation in the program are eligible to request a finding of full compliance with de minimis exceptions after three years of participation in lieu of demonstrating a 75% reduction from the number of status and non-offenders institutionalized in their base year.

Background

Office of General Counsel Legal Opinion 76-7, October 7, 1975, establishes that a State's "good faith" effort to meet the (then) two year requirement for deinstitutionalization of status offenders would preclude the imposition of sanctions with regard to funds already granted to the State under the formula grant program. However, a State's "good faith" effort cannot be considered in determining whether the statutory minimum compliance level has been met. In terms of eligibility for funding the opinion concluded:

> A State's failure to met the Section 223(a)(12) requirement within a maximum of two years from the date of submission of the initial plan would result in future fund cut-off unless such failure was de minimis. These determinations would be made on a case-by-case basis.

Subsequent amendments to the Juvenile Justice Act in 1977 modified Section 223(a)(12) to require full compliance within three years. However, Section 223(c) was also amended to provide that if a State was in substantial compliance with the modified Section 223(a)(12)(A) provision at the end of three years, substantial compliance being defined as a 75 percent reduction in the number of status offenders held in juvenile detention or correctional facilities, then the State could be given up to two additional years to achieve full compliance.

Thus, this opinion provides the legal basis for the OJJDP to utilize the de minimis principle, i.e., by disregarding instances of non-compliance that are of slight consequence or insignificant, in making a dtermination regarding a state's full compliance with Section 223(a)(12)(A) of the Act.

Parameters

The legal concept of de minimus, meaning "the law cares not for small things," is generally applied where small, insignificant or infinitesimal matters are at issue. Whether a matter, such as the number of status offenders and non-offenders held in non-compliance with Section 223(a)(12)(A), can be characterized as de minimis cannot be determined by an inflexible formula. Therefore, OJJDP will consider each case on its merits based on criteria which take into consideration relative numbers, circumstances of non-compliance, and State law and policy. The establishment of these criteria is intended to achieve an equitable determination process. States reporting significant numbers of institutionalized status and non-offenders should not

expect a finding of full compliance with de minimus exceptions. In determining whether a State has achieved substantial compliance within three years, OJJDP must compare the number of status and non-offenders held in non-compliance with Section 223(a)(12)(A) at the conclusion of the three year period with the number of status and non-offenders held at the start of the three year period (the State's baseline figure). However, in determining whether a State is in full compliance with de minimis exceptions, OJJDP does not consider a comparison of the current situation to baseline to be relevant. Only data and information which accurately and completely portrays the current situation is relevant when demonstrating full compliance with de minimus exceptions.

Individual states must continue to show progress toward achieving 100 percent compliance in order to maintain eligibility for a finding of full compliance with de minimis exceptions.

Criteria and Required Information

The OJJDP has determined that the following criteria will be applied in making a determination of whether a State has demonstrated full compliance with Section 223(a)(12)(A) with de minimis exceptions. While States are not necessarily required to meet each criterion at a fully satisfactory level, OJJDP will consider the extent to which each criterion has been met in making its determination of whether the State is in full compliance with the minimis exceptions. The information following each criterion must be provided to enable OJJDP to make this determination.

Criterion A

The extent of non-compliance is insignificant or of slight consequence in terms of the total juvenile population in the State.

In applying this criterion OJJDP will compare the State's status offender and non-offender detention and correctional institutionalization rate per 100,000 population under age 18 to the average rate that has been calculated for eight states (e.g., two states from each of the four Bureau of Census regions). The eight states selected by OJJDP were those having the smallest institutionalization rate per 100,000 population *and* which also had an adequate system of monitoring for compliance. By applying this procedure and utilizing the information provided by the eight states' most recently submitted monitoring reports, OJJDP determined that eight states' average annual rate was 17.6 incidences of status offenders and non-offenders held per 100,000 population under age 18. In computing the standard deviation from the mean of 17.6, it was determined that a rate of 5.8 per 100,000 was one standard deviation below the mean and 29.4 per 100,000 was one standard deviation above the mean. Therefore, in applying Criterion A, states which have an institutionalization rate less than 5.8 per 100,000 population will be considered to be in full compliance with de minimis exceptions and will not be required to address Criteria B and C. Those states whose rate falls between 17.6 and 5.8 per 100,000 population will be eligible for a finding of full compliance with de minimis exceptions if they adequately meet Criteria B and C. Those states whose rate is above the average of 17.6 but does not exceed 29.4 per 100,000 will be eligible for a finding of full compliance with de minimis exceptions only if they full satisfy Criteria B and C. Finally, those states which have a placement rate in excess of 29.4 per 100,000 population are presumptively ineligible for a finding of full compliance with de minimis exceptions because any rate above that level is considered to represent an excessive and significant level of status offenders and non-offenders held in juvenile detention or correctional facilities.

However, OJJDP will consider requests from such States where the State demonstrates exceptional circumstances which account for the excessive rate. Exceptional circumstances are limited to situations where, but for the exceptional circumstance, the State's institutionalization rate would be within the 29.4 rate established above.

The following will be recognized for consideration as exceptional circumstances:

(1) Out of State runaways held beyond 24 hours in response to a want, warrant, or request from a jurisdiction in another State or pursuant to a court order, solely for the purpose of being returned to proper custody in the other State;

(2) Federal wards held under Federal statutory authority in a secure State or local detention facility for the sole purpose of affecting a jurisdictional transfer, appearance as a material witness, or for return to their lawful residence or country of citizenship; and

(3) A State has recently enacted changes in State law which have gone into effect and which the State demonstrates can be expected to have a substantial, significant, and positive impact on the State's achieving full compliance with the deinstitutionalization requirement within a reasonable time.

In order to make a determination that a State has demonstrated exceptional circumstances under (1) and (2) above, OJJDP will require that the State has developed a separate and specific plan under Criterion C which addresses the problem in a manner that will eliminate the non-compliant instances within a reasonable time.

OJJDP deems it to be of critical importance that all states seeking a finding of full compliance with de minimis exceptions demonstrate progress toward 100 percent compliance and continue to demonstrate progress annually in order to be eligible for a finding of full compliance with de minimis exceptions.

The following information must be provided in response to criterion A and must cover the most recent and available 12 months of data (calendar, fiscal, or other period) or available data for less than 12 months, projected to 12 months in a statistically valid manner. If data projection is used the state must provide the statistical method used, the actual reporting period by dates and the specific data used. States are encouraged to use and expand upon currently available monitoring data gathered for purposes of the annual monitoring report required by Section 223(a)(15).

1. Total number of *accused* status offenders and non-offenders held in secure detention facilities or secure correctional facilities in excess of 24 hours (per OJJDP monitoring policy).

2. Total number of *adjudicated* status offenders and non-offenders held in secure detention facilities or secure correctional facilities.

3. Total number of status offenders and non-offenders held in secure detention facilities or secure correctional facilities (i.e., sum of items 1 and 2).

4. Total juvenile population (under 18) of the State according to the most recent available U.S. Bureau of the Census data or census projections.

States may provide additional pertinent statistics that they deem relevant in determining the extent to which the number of non-compliant incidences is insignificant or of slight consequence. However, factors such as local practice, available resources, or organizational structure of local government will not be considered relevant by OJJDP in making this determination.

Criterion B

The extent to which the instances of non-compliance were in apparent

violation of State law or established executive or judicial policy.

The following information must be provided in response to criterion B and must be sufficient to make a determination as to whether the instances of non-compliance with Section 223(a)(12)(A) as reported in the State's monitoring report were in apparent violation of, or departures from, state law or established executive or judicial policy. OJJDP will consider this criterion to be satisfied by those States that demonstrate that all or substantially all of the instances of non-compliance were in apparent violation of, or departures from, state law or established executive or judicial policy. This is because such instances of non-compliance can more readily be eliminated by legal or other enforcement processes. The existence of such law or policy is also an indicator of the commitment of the State to the deinstitutionalization requirement and to future 100% compliance. Therefore, information should also be included on any newly established law or policy which can reasonably be expected to reduce the State's rate of institutionalization in the future.

1. A brief description of the non-compliant incidents must be provided with includes a statement of the circumstances surrounding the instances of non-compliance. (For example: Of 15 status offenders/non-offenders held in juvenile detention or correctional facilities during the 12 month period for State X, 3 were accused status offenders held in jail in excess of 24 hours, 6 were accused status offenders held in detention facilities in excess of 24 hours, 2 were adjudicated status offenders held in a juvenile correctional facility, 3 were accused status offenders held in excess of 24 hours in a diagnostic and evaluation facility, and 1 was an adjudicated status offender placed in a mental health facility pursuant to the court's status offenders jurisdiction.) Do not use actual names of juveniles.

2. Describe whether the instances of non-compliance were in apparent violation of State law or established executive or judicial policy.

A statement should be made for each circumstance discussed in item 1 above. A copy of the pertinent/applicable law or established policy should be attached. (for example: The 3 accused status offenders held in jail in excess of 24 hours were held in apparent violation of a State law which does not permit the placement of status offenders in jail under any circumstances. Attachment "X" is a copy of this law. The 6 status offenders held in juvenile detention were placed there pursuant to a disruptive behavior clause in our statute which allows status offenders to be placed in juvenile detention facilities for a period of up to 72 hours if their behavior in a shelter care facility warrants secure placement. Attachment "X" is a copy of this statute. A similar statement must be provided for each circumstance.)

Criterion C

The extent to which an acceptable plan has been developed which is designed to eliminate the non-compliant incidents within a reasonable time, where the instances of non-compliance either (1) indicate a pattern or practice, or (2) appear to be consistent with State law or established executive or judicial policy, or both.

If the State determines that instances of non-compliance (1) do not indicate a pattern or practice, *and* (2) are inconsistent with an in apparent violation of State law or established executive or judicial policy, then the State must explain the basis for this determination. In such case no plan would be required as a part of the request for a finding of full compliance under this policy.

The following must be addressed as elements of an acceptable plan for the elimination of non-compliance incidents that will result in the modification or enforcement of state law or executive or judicial policy to ensure consistency between the state's practices and the JJDP Act deinstitutionalization requirements.

1. If the instances of non-compliance are sanctioned by or consistent with State law or executive or judicial policy, then the plan must detail a strategy to modify the law or policy to prohibit non-compliant placement so that it is consistent with the Federal deinstitutionalization requirement.

2. If the instances of non-compliance were in apparent violation of State law or executive or judicial policy, but amount to or constitute a pattern or practice rather than isolated instances of non-compliance, the plan must detail a strategy which will be employed to rapidly identify violations and ensure the prompt enforcment of applicable State law or executive or judicial policy.

3. In addition, the plan must be targeted specifically to the agencies, courts, or facilities responsible for the placement of status offenders and non-offenders in non-compliance with Section 223(a)(12)(A). It must include a specific strategy to eliminate instances of non-compliance through statutory reform, changes in facility policy and procedure, modification of court policy and practice, or other appropriate means.

Implementation of Plan and Maintenance of Full Compliance

If OJJDP makes a finding that a State is in full compliance with de minimis exceptions based, in part, upon the submission of an acceptable plan under Criteria C above, the State will be required to include the plan as a part of its current or next submitted formula grant plan as appropirate. OJJDP will measure the State's success in implementing the plan by comparison of the data in the next monitoring report indicating the extent to which non-compliant incidences have been eliminated.

Determinations of full compliance status will be made annually by OJJDP following the submission of the monitoring report due by December 31st of each year. Any State reporting less than 100% compliance in any annual monitoring report would, therefore, be required to follow the above procedures in requesting a finding of full compliance with de minimis exceptions. An annual monitoring report will continue to be due by December 31st of each year.

FOR FURTHER INFORMATION CONTACT: Mr. Doyle A. Wood, Office of Juvenile Justice and Delinquency Prevention, 633 Indiana Avenue, NW, Washington, DC 20531. (202) 724-8491.

Ira M. Schwartz,

Acting Administrator, Office of Juvenile Justice and Delinquency Prevention.

Appendix A—Supplemental Information: Review and Analysis of Comments in Response to Proposed Policy and Criteria

A total of 15 comments were received and included in the analysis. The response included comments from 15 of the 50 states participating in the formula grant program. All comments and recommendations were logged, reviewed and analyzed. The review and analysis consisted of recording each response as to whether or not a specific recommendation was presented. This recording effort was established to determine whether the respondent recommended each component of the policy and criteria to be: (1) retained, (2) eliminated, or (3) modified, or if no specific recommendation was made. The analysis also identified and recorded substantive responses for consideration during the revision process.

The results are presented according to each component of the proposed criteria.

Criterion (a)

"The extent of non-compliance is insignificant or of slight consequence in terms of the total juvenile population in the State"

In applying this criterion, a state's status offender and non-offender institutionalization rate per 100,000 population under age 18 will be compared to the average rate calculated for eight states. The eight states represent

two states from each of the four Bureau of Census regions having the smallest institutionalization rate *and* which also had an adequate monitoring system. The institutionalization rate is based on the data contained in the 1979 monitoring reports. The proposed criteria were initially developed before all 1979 reports were finalized and approved. Thus a recalculation, based upon all final 1979 reports, is reflected in the final policy. This recalculation resulted in a change of the eight state average annual rate from 15.8 to 17.6 incidences of status offenders and non-offenders held per 100,000 population under age 18. Also, the standard deviation below and above the mean is changed to 5.8 and 29.4 respectively. The eight states used in calculating the average rate include Massachusetts, Pennsylvania, Iowa, Wisconsin, Virginia, West Virginia, New Mexico and Washington. These states include both urban and rural states, states having an out-of-state runaway population, and states having an illegal alien and native American population.

Several comments were received which recommended exceptional circumstances which would justify a finding of full compliance with de minimis exceptions for any state which exceeded the rate of one standard deviation above the mean. Generally, the situations which states indicated should be exceptional circumstances include (1) states having recent changes in State law which will have substantial, significant, and positive impact on achieving full compliance (2) states which can document they did not achieve full compliance with de minimis exception because juveniles were held in State/local facilities who were Federal wards being held pursuant to Federal Codes, and (3) states which can document they did not achieve full compliance with de minimis exceptions because out-of-state runaways were being held pending return to their state of residence. As a result of these comments, criterion A was modified to delineate the acceptable exceptional circumstances and the conditions which must exist to enable a finding of full compliance.

The comment that a comparison should be made between the number of status offenders held and the number of youth charged with status offenders was not considered as an appropriate change because such comparison would reward states for charging an excessive number of youth with status offenses. The comment that states which can document a consistent decline in the rate of institutionalization should be eligible for a finding of full compliance, regardless of the absolute number held, is inconsistent with the intent of Congress to totally remove status offenders and non-offenders from inappropriate facilities within 5 years.

Five of the fifteen responses indicated the criteria go too far in giving an advantage to states which hold status offenders in secure facilities by allowing an excessive number to be held and still maintaining eligibility for a finding of full compliance. Several responders felt it was critically important that OJJDP not establish a policy which creates the impression that less than 100% compliance will satisfy the statutory requirement. The OJJDP is committed to the Congressional mandate to remove all status offenders and non-offenders from secure detention facilities and secure correctional facilities and under no circumstances should the de minimis policy and criteria be construed as a lessening of OJJDP's commitment to complete deinstitutionalization of youth under Section 223(a)(12)(A) of the JJDP Act.

Criterion (b)

"The extent to which the instances of non-compliance were in apparent violation of State law or established executive or judicial policy."

The information to be provided in response to this criterion is to demonstrate whether the instances of non-compliance with Section 223(a)(12)(A) were in apparent violation of state law or established executive or judicial policy or constitutes a pattern or practice. There were no substantial comments or recommendations on this criterion, thus the criterion is unchanged.

Criterion (c)

"The extent to which an acceptable plan has been developed which is designed to eliminate the non-compliant incidents within a reasonable time, where the instances of non-compliance either (1) indicate a pattern or practice, *or* (2) appear to be consistent with state law or established executive or judicial policy, or both."

The few comments on this criterion generally stated that plan elements one and three should be combined into a single element. The criterion has been modified to reflect these comments by combining these two plan components. Other comments which were received but did not result in a modification were that "the criterion should require the development of a plan even when there is no pattern or practice and when violations are inconsistent with state law and (2) the state can always develop a plan but implementation may be difficult thus some agreement as to what is practicable must be reached between the state and OJJDP." The review of the plan developed in response to this criteria and the negotiation, if necessary, between the state and OJJDP as to the viability and practicability of the plan will result in a mutual agreement as to what is expected from both parties. OJJDP technical assistance resources and capability will be available to assist states in the implementation of the states plan for 100% compliance.

[FR Doc. 81-822 Filed 1-8-81; 8:45 am]

BILLING CODE 4410-18-M