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# Part VI

# Department of Justice

## Office of Justice Programs

## Office of Juvenile Justice and Delinquency Prevention

28 CFR Part 31

**Criteria for de Minimis Exceptions to Full Compliance With the Jail Removal Requirement; Final Rule**

**DEPARTMENT OF JUSTICE**

**Office of Justice Programs**

**Office of Juvenile Justice and Delinquency Prevention**

**28 CFR Part 31**

## Criteria for De Minimis Exceptions to Full Compliance With the Jail Removal Requirement

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

**ACTION:** Final rule.

**SUMMARY:** The Office of Juvenile Justice and Delinquency Prevention (OJJDP), pursuant to section 262(d) (42 U.S.C. 5672(d)) of the Juvenile Justice and Delinquency Prevention Act of 1974, as amended, 42 U.S.C. 5601 *et seq.* (JJDP Act), revises its Formula Grants Regulation to include criteria for determining full compliance with de minimis exceptions to the jail removal requirement of section 223(a)(14) (42 U.S.C. 5633(a)(14)) of the JJDP Act, as amended.

**EFFECTIVE DATE:** This rule is effective November 2, 1988.

**FOR FURTHER INFORMATION CONTACT:** Emily C. Martin, Director, State Relations and Assistance Division. OJJDP, 633 Indiana Avenue NW., Room 768, Washington, DC 20531, (202) 724-5921.

**SUPPLEMENTARY INFORMATION:**

### I. Introduction and Background

Section 223(a)(14) of the JJDP Act requires that States participating in the Formula Grants Program "(14) provide that, beginning after the five-year period following December 8, 1980, no juvenile shall be detained or confined in any jail or lockup for adults, except that the Administrator shall through 1989, promulgate regulations which make exceptions with regard to the detention of juveniles accused of non-status offenses who are awaiting an initial court appearance pursuant to an enforceable State law requiring such appearance within twenty-four hours after being taken into custody (excluding weekends and holidays) * * *." Section 223(a)(14) limits this exception to areas that are outside a standard metropolitan statistical area.

Section 233(c) of the JJDP Act further provides that a State's "(c) * * * Failure to achieve compliance with the requirements of Subsection (a)(14) within the five-year time limitation shall terminate any State's eligibility for funding under this subpart, unless the Administrator determines that: (1) The State is in substantial compliance with such requirement through the achievement of not less than 75 percent removal of juveniles from jails and lockups for adults; and (2) the State has made through appropriate executive or legislative action, an unequivocal commitment to achieving full compliance within a reasonable time, not to exceed three additional years."

Section 31.303(f)(6)(iii) of the OJJDP Formula Grants Regulation, which was published in the June 20, 1985, **Federal Register**, at pages 25550–25561, 28 CFR Part 31, establishes three ways for a State to demonstrate full compliance with the section 223(a)(14) requirement. First, "Full compliance is achieved when a State demonstrates that the last submitted monitoring report, covering a full and actual 12 months of data, demonstrates that no juveniles were held in adult jails or lockups in circumstances that were in violation of section 223(a)(14)" (28 CFR 31.303(f)(6)(iii)).

The remaining two ways to demonstrate full compliance involve the legal concept of de minimis. First, a State may be found in full compliance with de minimis exceptions where all instances of noncompliance violated a State law, court rule, or other statewide executive or judicial policy; the instances of noncompliance do not indicate a pattern or practice; an enforcement mechanism exists; and, an acceptable plan has been developed to eliminate the noncompliant incidents (28 CFR l31.303(f)(6)(iii)(A)).

Second, a State may demonstrate full compliance by achieving a rate of noncompliant incidents, per 100,000 juvenile population in the State, that falls below the de minimis rate established by OJJDP. This de minimis rate, as set forth below, is being added to the OJJDP Formula Grants Regulation at § 31.303(f)(6)(iii)(B) which is currently designated "Reserved."

Office of Justice Programs Office of General Counsel Legal Opinion 76-7 provides the legal basis upon which OJJDP establishes this de minimis exception. Specifically, the legal opinion allows OJJDP to tolerate a limited number of instances of noncompliance (the legal opinion addressed the deinstitutionalization of status offenders requirement) that are of "slight consequence" or "insignificant" in making a determination regarding a State's achieving full compliance.

### II. Discussion of Comments

A proposed policy was published in the **Federal Register** on June 9, 1988, for public comment. One comment was received and has been considered by the OJJDP in the issuance of a final policy.

1. *Comment:* Each State should have the option of providing the juvenile population figure to be used in calculating the de minimis rate for the year in which this exception is requested. The U.S. Bureau of Census juvenile population figures used by the OJJDP may not accurately reflect rapid changes in a State's juvenile population.

*Response:* The OJJDP will continue to use the U.S. Bureau of Census juvenile population figures, which are annually updated by the Bureau, to calculate each State's rate of compliance with the jail removal provision of the JJDP Act. This is necessary in order to ensure a uniform basis for making de minimis calculations.

However, when juvenile population figures available within the State demonstrate a rate below the allowable de minimis rate, while use of U.S. Bureau of Census figures indicate a rate above the allowable de minimis rate, the State may request the OJJDP to accept the State's figures. Such requests will be reviewed on a case by case basis, and must be submitted each year the State wishes to be exempted from the requirement to use U.S. Bureau of Census figures. The OJJDP may accept the State's juvenile population figures when they are the product of an established annual information collection system. The information collection system and its primary usage must be described in the State's annual request for a finding of full compliance with de minimis exceptions, and must be approved by the Administrator as valid and reliable.

### III. Policy and Criteria for De Minimis Exceptions to Full Compliance with the Jail Removal Requirement

The criteria presented below and set forth in the final regulation will be applied by OJJDP in determining whether a State has achieved, and subsequently maintained, a numerical finding of full compliance with de minimis exceptions with the jail and lockup removal requirement of section 223(a)(14). Also specified is the time frame for submitting information which each State must provide when requesting an initial or subsequent finding of full compliance with a de minimis exceptions under 28 CFR 31.303(f)(6)(iii)(B).

### Discussion of Criteria

The criteria for finding full compliance with de minimis exceptions is that the incidents of noncompliance are insignificant, or of slight consequence, in

terms of the total juvenile population in the State.

In applying this criteria, OJJDP will compare each State's noncompliance rate per 100,000 population under age 18 to the average rate that has been calculated for 12 States (three States from each of the four Bureau of Census regions). The 12 States selected by OJJDP were those having the lowest rates of noncompliance per 100,000 juvenile population and which had an adequate system of monitoring for compliance. Those States using the non-MSA exception, provided for in section 223(a)(14), were not included in calculating the average. Inclusion of these States would have created an artifically low average because the exception expires in 1989.

The information provided by the 12 States' 1986 Monitoring Reports indicated an average annual rate of nine (9) incidents of noncompliance per 100,000 juvenile population. Consequently, those States which have a noncompliance rate in excess of nine (9) per 100,000 juvenile population will be considered presumptively ineligible for a finding of full compliance with de minimis exceptions, pursuant to § 31.303(f)(6)(iii)(B) of the Formula Grants Regulation.

When a State can demonstrate, however, that recently enacted changes in State law which have gone into effect can reasonably be expected to have a substantial, significant and positive impact on the State's level of compliance, OJJDP will consider this exceptional circumstance in making its determination of full compliance with de minimis exceptions. This exceptional circumstance will only be applied where the legislation is expected to produce full (100%) compliance or full compliance with de minimis exceptions by the end of the monitoring period immediately following the monitoring period under consideration.

OJJDP deems it to be a requirement of critical importance that all States annually demonstrate continued and meaningful progress toward 100 percent compliance in order to remain eligible for a finding of full compliance with de minimis exceptions pursuant to § 31.303(f)(6)(iii)(B) of the Formula Grants Regulation.

**Executive Order 12291**

This regulation does not constitute a "major" rule as defined by Executive Order 12291 because it does not result in: (a) An effect on the economy of $100 million or more, (b) major increase in any costs or prices, or (c) adverse effects on competition, employment, investment, productivity, or innovation among American enterprises.

**Regulatory Flexibility Act**

This regulation does not have "significant" economic impact on a substantial number of small "entities," as defined by the Regulatory Flexibility Act (Pub. L. 96–354).

**Paperwork Reduction Act**

No new collection of information requirements are contained in this regulation (See the Paperwork Reduction Act, 44 U.S.C. 3504(h)).

**List of Subjects in 28 CFR Part 31**

Grant programs-law, Juvenile delinquency, Reporting and recordkeeping requirement.

**Final Regulation**

## PART 31—[AMENDED]

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

**Authority:** Juvenile Justice and Delinquency Prevention Act of 1974, as amended (42 U.S.C. 5601 *et seq.*).

2. A new paragraph (f)(6)(iii)(B), currently designated as "Reserved" in 28 CFR 31.303, is added to read as follows:

**§ 31.303 Substantive requirements.**

* * * * *

(f) * * *

(6) * * *

(iii) * * *

(B)(*1*) *Standard.* The State must demonstrate that each of the following requirements 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.

(*2*) *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%) compliance or full compliance with de minimis exceptions by the end of the monitoring period immediately following the monitoring period under consideration.

(*3*) *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)(*1*) (*i*) and (*ii*) of § 31.303, must annually demonstrate, in its request for a finding of full compliance with de minimis exceptions, continued and meaningful progress toward achieving full (100%) compliance in order to maintain eligibility for a continued finding of full compliance with de minimis exceptions.

(*4*) *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%) compliance in any annual monitoring report may request a finding of full compliance with de minimis exceptions under paragraph (f)(6)(iii) (A) or (B) of § 31.303. 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.

Date: October 28, 1988.

**Verne L. Speirs,**

*Administrator, Office of Juvenile Justice and Delinquency Prevention.*

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