

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.

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

Response: OJJDP's proposal to eliminate the requirement for its concurrence in State approval of a colocated facility, and the elimination of a needs-based analysis, should make it clear that the establishment of colocated facilities is not prohibited. States may approve colocated 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 colocated 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 commentor, 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 JJDP 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, lobby 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.

* * * * *

(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)(1) 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.

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Dated: December 5, 1996.

Shay Bilchik,

Administrator, Office of Juvenile Justice and Delinquency Prevention.

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