

**§ 42.612 Interagency consultation.**

(a) Before investigating whether the employment practices of a recipient of Federal financial assistance constitute a pattern or practice of unlawful discrimination or initiating formal administrative enforcement procedures on that basis, an agency shall, to the extent practical, consult with the Chairman of the EEOC and the Assistant Attorney General to assure that duplication of effort will be minimized.

(b) Prior to the initiation of any legal action against a recipient of Federal financial assistance alleging unlawful employment practices, the Department of Justice and/or EEOC shall, to the extent practical, notify the appropriate agency or agencies of the proposed action and the substance of the allegations.

**§ 42.613 Definitions.**

As used in this regulation, the term:

(a) *Agency* means any Federal department or agency which extends Federal financial assistance subject to any civil rights provision(s) to which this regulation applies.

(b) *Assistant Attorney General* refers to the Assistant Attorney General, Civil Rights Division, United States Department of Justice, or his or her delegate.

(c) *Chairman of the EEOC* refers to the Chairman of the Equal Employment Opportunity Commission, or his or her delegate.

(d) *EEOC* means the Equal Employment Opportunity Commission and, where appropriate, any of its District Offices.

(e) *Federal financial assistance* includes:

- (1) Grants and loans of Federal funds,
- (2) The grant or donation of Federal property and interests in property,
- (3) The detail of Federal personnel,
- (4) The sale and lease of, and the permission to use (on other than a casual or transient basis), Federal property or any interest in such property without consideration or at a nominal consideration, or at a consideration which is reduced for the purpose of assisting the recipient, or in recognition of the public interest to be served by such sale or lease to the recipient, and
- (5) Any Federal agreement, arrangement, or other contract which has as

one of its purposes the provision of assistance.

For purposes of this regulation, the term *Federal financial assistance* also includes funds disbursed under the revenue sharing act.

(f) *Joint complaint* means a complaint of employment discrimination covered by title VII or the Equal Pay Act and by title VI, title IX, or the revenue sharing act.

(g) *Recipient* means any State, political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, organization, or other entity, or any individual, in any State, to whom Federal financial assistance is extended, directly or through another recipient, for any program, including any successor, assign, or transferee thereof, but such term does not include any ultimate beneficiary under such program.

(h) *Revenue sharing act* refers to the State and Local Fiscal Assistance Act of 1972, as amended, 31 U.S.C. 1221 *et seq.*

(i) *Title VI* refers to title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d to 2000d-4. Where appropriate, *title VI* also refers to the civil rights provisions of other Federal statutes or regulations to the extent that they prohibit employment discrimination on the ground or race, color, religion, sex or national origin in programs receiving Federal financial assistance of the type subject to title VI itself.

(j) *Title VII* refers to title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, *et seq.*

(k) *Title IX* refers to title IX of the Education Amendments of 1972, 20 U.S.C. 1681 to 1683.

### **Subpart I—Nondiscrimination on the Basis of Age in Federally Assisted Programs or Activities; Implementation of the Age Discrimination Act of 1975**

AUTHORITY: 42 U.S.C. 6103(a)(4); 45 CFR part 90.

SOURCE: Order No. 1843-94, 59 FR 6560, Feb. 11, 1994, unless otherwise noted.

GENERAL PROVISIONS

§ 42.700 Purpose.

(a) This subpart implements the Age Discrimination Act of 1975, as amended (42 U.S.C. 5101-6107) (Act). Subject to certain exceptions, the Act prohibits discrimination on the basis of age in programs or activities receiving federal financial assistance.

(b) The Secretary of Health and Human Services has issued a general regulation (45 CFR part 90) to guide other federal agencies regarding implementation of the Act. This subpart is generally based upon that general regulation.

§ 42.701 Application.

(a) This subpart applies to each program or activity that receives federal financial assistance from the Department of Justice.

(b) This subpart does not apply to employment practices, except to those occurring in programs or activities that receive federal financial assistance under the Job Training Partnership Act.

§ 42.702 Definitions.

As used in this subpart, the term:

*Act* means the Age Discrimination Act of 1975, as amended, 42 U.S.C. 6101-6107.

*Action* means any act, activity, policy, rule, standard, or method of administration; or the use of any policy, rule, standard, or method of administration.

*Age distinction* means any action using age or an age-related term.

*Age-related term* means a term that necessarily implies a particular age or range of ages (e.g., “youth,” “juvenile,” “adult,” “older persons,” but not “student”).

*Department* means the Department of Justice.

*Federal financial assistance* means any grant, entitlement, loan, cooperative agreement, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Department provides assistance in the form of:

- (1) Funds;
- (2) Services of federal personnel; or

(3) Real or personal property or any interest in or use of such property, including—

(i) Transfers or leases of property for less than fair market value or for reduced consideration; and

(ii) Proceeds from a subsequent transfer or lease of property if the federal share of its fair market value is not returned to the federal government.

*FMCS* means the Federal Mediation and Conciliation Service.

*OJP* means the Office of Justice Programs. OJP coordinates the work of the Bureau of Justice Assistance, the National Institute of Justice, the Bureau of Justice Statistics, and the Office of Juvenile Justice and Delinquency Prevention; OJP includes the Office for Victims of Crime.

*Program or activity* means all of the operations of any entity described in paragraphs (1) through (4) of this definition, any part of which is extended Federal financial assistance:

(1)(i) A department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(ii) The entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(i) A college, university, or other postsecondary institution, or a public system of higher education; or

(ii) A local educational agency (as defined in 20 U.S.C. 7801), system of vocational education, or other school system;

(3)(i) An entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(A) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(B) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

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(ii) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) Any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3) of this definition.

*Recipient* means any state or political subdivision, any instrumentality of a State or political subdivision, any public or private agency, institution, organization, or other entity, or any person to which federal financial assistance is extended, directly or through another recipient. "Recipient" includes any successor, assignee, or transferee, but does not include the ultimate beneficiary of the assistance.

*Secretary* means the Secretary of Health and Human Services or his or her designee.

*United States* means the fifty States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Trust Territory of the Pacific Islands, the Northern Marianas, and the territories and possessions of the United States.

[Order No. 1843-94, 59 FR 6560, Feb. 11, 1994, as amended by Order 2679-2003, 68 FR 51366, Aug. 26, 2003]

### §§ 42.703-42.709 [Reserved]

#### STANDARDS FOR DETERMINING AGE DISCRIMINATION

#### § 42.710 General prohibition.

(a) Subject to the exceptions discussed in §§ 42.711-42.713, no person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in any program or activity to which this subpart applies. This prohibition applies to actions taken by a recipient, directly or through contractual or other arrangements, that have the purpose or effect of discriminating on the basis of age.

(b) This prohibition encompasses treatment of elderly persons, children and any other age group. Unless one of the exception applies, the recipient may use neither a minimum age limit nor a maximum age limit in connec-

tion with receipt of benefits or services or other participation in a program or activity subject to this subpart.

#### § 42.711 Exception; authorized by law.

(a) This subpart does not apply to an age distinction contained in a portion of a federal or state statute or a local statute or ordinance adopted by an elected, general-purpose legislative body which portion:

(1) Provides any benefits or assistance to persons on the basis of age;

(2) Establishes criteria for participation in age-related terms; or

(3) Describes intended beneficiaries or target groups in age-related terms.

(b) The exception set forth in paragraph (a) of this section does not extend to regulations adopted by an administrative agency pursuant to a specific statutory provision or otherwise.

#### § 42.712 Exception; normal operation or statutory objective.

(a) A recipient may take an action that would otherwise be prohibited by § 42.710(a), if such action reasonably takes age into account as a factor necessary to the normal operation of or the achievement of any statutory objective of the program or activity.

(1) *Normal operation* refers to the operation of a program or activity without significant changes that would impair its ability to meet its objectives.

(2) A *statutory objective* of a program or activity is a purpose that is expressly stated in a federal or state statute or a local statute or ordinance adopted by an elected, general-purpose body.

(b) This exception applies when the following test is met—

(1) Age is used as a measure or approximation of one or more other characteristics;

(2) The other characteristic must be measured or approximated in order to continue the normal operation of the program or activity or to achieve any statutory objective of the program;

(3) The other characteristic can be reasonably measured or approximated by the use of age; and

(4) The other characteristic is impractical to measure directly on an individual basis.

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(c) The question whether an age distinction comes within this section depends upon the particular facts, including the nature and purpose of the program or activity, the basis for and the nature and purpose of the age distinction, and the manner in which the age distinction is used.

#### § 42.713 Exception; reasonable factors other than age.

(a) A recipient may take an action, otherwise prohibited by § 42.710(a), that affects age groups differently, if such differentiation is based upon reasonable factors other than age.

(b) This exception does not apply to the use of an explicit age distinction, but to conduct that has the effect of differentiating among age groups. This exception applies when the factor (other than age) upon which the recipient's action is based bears a direct and substantial relationship to the normal operation of or achievement of a statutory objective of the program or activity.

#### § 42.714 Special benefits.

If a recipient operating a program or activity provides special benefits to the elderly or to children, such use of age distinctions shall be presumed to be necessary to the normal operation of the program or activity, notwithstanding the provisions of § 42.712.

#### § 42.715 Burden of proof regarding exceptions.

The burden of proving that an age distinction or other action falls within the exceptions described in § 42.712 and § 42.713 is on the recipient. This allocation of the burden of proof applies in proceedings by the Department to enforce the Act.

#### §§ 42.716–42.719 [Reserved]

#### DUTIES OF RECIPIENTS

#### § 42.720 General responsibility.

Regarding any program or activity subject to this subpart, the recipient has primary responsibility to ensure compliance with the Act and this subpart. The recipient also has responsibility to maintain records, provide information, and to afford access to its

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records to the Department to the extent required to determine whether it is in compliance with the Act.

#### § 42.721 Notice to subrecipients.

Any recipient that receives federal financial assistance from the Department and extends such assistance to subrecipients shall give its subrecipients written notice of their obligations under this subpart.

#### § 42.722 Recipient assessment of age distinctions.

(a) As part of a compliance review under § 42.730 or complaint investigation under § 42.731, the Department may require a recipient employing the equivalent of 15 or more employees to complete a written self-evaluation, in a manner specified by the responsible Department official, of any age distinction imposed in its program or activity receiving federal financial assistance from the Department to assess the recipient's compliance with the Act.

(b) Whenever a recipient assessment indicates a violation of the Act and this subpart, the recipient shall take corrective action.

#### § 42.723 Compliance information.

(a) Upon request by the Department, a recipient shall make available to the Department information necessary to determine whether the recipient is complying with this subpart.

(b) Each recipient shall permit reasonable access by the Department to the recipient's facilities, books, records and other sources of information concerning the recipient's compliance with this subpart.

#### § 42.724 Remedial and affirmative action.

(a) If the Department finds that, in violation of this subpart, a recipient has discriminated on the basis of age, the recipient shall take remedial action that the Department considers necessary to overcome the effects of the discrimination.

(b) Even in the absence of a finding of discrimination, a recipient, in administering a program or activity, may take steps to overcome the effects of conditions that resulted in limited participation on the basis of age.

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### § 42.725 Assurance of compliance.

Each recipient of federal financial assistance from the Department shall sign a written assurance as specified by the Department that it will comply with this subpart in its federally assisted programs or activities.

### §§ 42.726–42.729 [Reserved]

#### COMPLIANCE PROCEDURES

### § 42.730 Compliance reviews.

The Department may conduct a pre-award or post-award compliance review of an applicant or a recipient to determine compliance with this subpart. When a compliance review indicates probably noncompliance, the Department shall inform the applicant or recipient and shall promptly begin enforcement as described in § 42.733.

### § 42.731 Complaints.

(a) *General.* This section provides for the filing, by aggrieved persons, of complaints alleging violation of this subpart. Although the complaint process is limited to aggrieved persons, any person who has information regarding a possible violation of this subpart may provide it to the Department.

(b) *Receipt of complaints.* (1) Any aggrieved person, individually or as a member of a class, may file with the Department a written complaint alleging a violation of this subpart. A complaint may be filed by a representative of an aggrieved person. A complaint must be filed within 180 days of the date the complaint first knew of the alleged violation. However, this time limit may, for good cause shown, be extended by the Department.

(2) The Department shall promptly review each such complaint for sufficiency. A complaint will be deemed sufficient if it—

- (i) Describes an action that may constitute a violation of this subpart; and
- (ii) Contains information necessary for further processing (i.e., identifies the parties involved, states the date when the complainant first learned of the alleged violation, and is signed by the complainant).

(3) When a complaint is deemed sufficient, the Department shall promptly refer it to the FMCS for mediation.

(4) When a complaint is deemed insufficient, the Department shall advise the complainant of the reasons for that determination. A complainant shall be freely permitted to add information necessary for further processing.

(c) *Representation of parties.* During each stage of the complaint process, the complainant and the recipient may be represented by an attorney or other representative.

(d) *Assistance from the Department.* Any complainant or recipient may request from the Department information regarding the complaint process.

(e) *Mediation.* (1) When a complaint is referred for mediation, the complainant and the recipient shall participate in the mediation process to the extent necessary either to reach an agreement or to enable the mediator to determine that no agreement can be reached. No determination that an agreement is not possible shall be made until the mediator has conferred at least once, jointly or separately, with each of the parties.

(2) If the complainant and the recipient reach an agreement, they shall reduce the agreement to writing and sign it. The mediator shall send a copy of the agreement to the Department.

(3) If, after 60 days after the Department's receipt of a complaint, no agreement is reached or if, within that 60-day period, the mediator determines that no agreement can be reached, the mediator shall return the complaint to the Department.

(4) The mediator shall protect the confidentiality of information obtained during the mediation process. No mediator shall testify in any adjudicative proceeding, produce any document, or otherwise disclose any information obtained during the mediation process without prior approval of the Director of the FMCS.

(f) *Department investigations.* The Department shall promptly investigate any complaint that is unresolved after mediation or is reopened because of violation of a mediation agreement. An investigation should include a review of the pertinent actions or practices of the recipient and the circumstances under which the alleged discrimination occurred. During an investigation the Department shall take appropriate

steps to obtain informal resolution of the complaint.

(g) *Resolution of matters.* (1) Where, prior to any finding by the Department of probable noncompliance with this subpart, discussions between the Department and the parties result in settlement of a complaint, the Department shall prepare an agreement to be signed by the parties and an authorized official of the Department. A settlement shall not affect the operation of any other enforcement efforts of the Department, including compliance reviews or investigation of other complaints involving the recipient.

(2) If the Department determines that an investigation pursuant to paragraph (f) of this section indicates probable noncompliance with this subpart, the Department shall inform the recipient and shall promptly begin enforcement pursuant to § 42.733.

(3) If the Department determines that an investigation does not indicate probable noncompliance, the Department shall inform the recipient and the complainant. The Department shall also inform the complainant of his or her right to bring a civil action as described in § 42.736.

**§ 42.732 Prohibition against intimidation.**

A recipient may not intimidate or retaliate against any person who attempts to assert a right secured by the Act and this subpart or who cooperates in any mediation, investigation, hearing, or other aspect of the Department's compliance procedure.

**§ 42.733 Enforcement procedures.**

(a) *Voluntary compliance.* When a compliance review or complaint investigation results in a finding of probable noncompliance with this subpart, the Department shall attempt to obtain voluntary compliance. An agreement for voluntary compliance shall describe the corrective action to be taken and time limits for such action and shall be signed by the recipient and an authorized official of the Department.

(b) *Means of enforcement—(1) General.*

(i) The Department may seek to enforce this subpart—

(A) By administrative proceedings that may lead to termination or re-

fusal of federal financial assistance to the particular program or activity; or

(B) By any other means authorized by law. Such other means include lawsuits by the Department of enjoin violations of this subpart.

(ii) To the extent consistent with the Act, the Department, in enforcing this subpart, shall follow the procedures applicable to enforcement of title VI of the Civil Rights Act of 1964.

(2) *Termination of federal financial assistance.* With regard to enforcement of this subpart through the termination or refusal of federal financial assistance, the Department shall follow the provisions of its title VI regulation concerning notice (28 CFR 42.180(c)), hearings (28 CFR 42.109), and decisions (28 CFR 42.110). However, with respect to programs or activities receiving federal financial assistance from a component of the Department's Office of Justice Programs (OJP), the requirement of 28 CFR 42.110(e) that a sanction be approved by the Attorney General shall not apply; that function may be performed by the Assistant Attorney General, OJP.

(3) *Other means of enforcement.* With regard to enforcement of this subpart through other means, the Department shall follow the procedures of 28 CFR 42.108(d). In addition, at least 30 days before commencing a lawsuit or taking other action pursuant to paragraph (b)(1)(i)(A) of this section, the Department shall send an appropriate report to the committees of the House of Representatives and the Senate having legislative jurisdiction over the program or activity involved.

(c) *Deferral.* When a proceeding for the termination or refusal of federal financial assistance is initiated pursuant to paragraph (b)(1)(i)(A) of this section, the Department may defer granting new federal financial assistance to the recipient.

(1) New federal financial assistance includes any assistance for which, during the deferral period, the Department requires an application or approval, including renewal or continuation of existing activities or authorization of new activities. New federal financial assistance does not include assistance approved prior to initiation of the administrative proceeding or increases in

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funding as a result of a change in the manner of computing formula awards.

(2) A deferral may not begin until the recipient has received a notice of opportunity for a hearing. A deferral may not continue for more than 60 days unless a hearing has begun within that time or the time for beginning the hearing has been extended by mutual consent of the recipient and the Department. A deferral may not continue for more than 30 days after the close of the hearing, unless the hearing results in a finding against the recipient.

**§ 42.734 Alternative funding.**

When assistance to a recipient is terminated or refused pursuant to § 42.733(b)(1)(i)(A), the Department may disburse the withheld funds directly to an alternate recipient serving the same area (i.e., a public or nonprofit private organization or agency or state or political subdivision of the state). Any such alternate recipient must demonstrate the ability to comply with the requirements of this subpart and to achieve the goals of the federal statute authorizing the assistance.

**§ 42.735 Judicial review.**

A final decision of the Department in an administrative proceeding pursuant to § 42.733(b)(1)(i)(A) is subject to judicial review as provided in section 306 of the Act, 42 U.S.C. 6105.

**§ 42.736 Private lawsuits.**

(a) Upon exhausting administrative remedies under the Act, a complainant may file a civil action to enjoin a violation of the Act. Administrative remedies are exhausted if—

(1) 180 days have elapsed since the complainant filed the complaint and the Department has made no finding with regard to the complaint; or

(2) The Department issues a finding, pursuant to § 42.731(g)(3), in favor of the recipient.

(b) Whenever administrative remedies are exhausted in accord with paragraph (a) of this section, the Department shall promptly inform the complainant that

(1) The complainant may bring a civil action in a United States district court for the district in which the recipient is located or transacts business;

(2) A complainant who prevails in such an action has the right to be awarded reasonable attorney's fees, if the complainant demands such an award in the complaint initiating the lawsuit;

(3) Before commencing the action, the complainant must give 30 days' notice by registered mail to the Secretary, the Attorney General, and the recipient;

(4) The notice must state the nature of the alleged violation, the relief requested, the court in which the action will be brought, and whether attorney's fees will be demanded; and

(5) The complainant may not bring an action if the same alleged violation by the recipient is the subject of a pending action in any court of the United States.

**§§ 42.737–42.799 [Reserved]**

**APPENDIX A TO SUBPART I OF PART 42—  
FEDERAL FINANCIAL ASSISTANCE  
ADMINISTERED BY THE DEPARTMENT  
OF JUSTICE TO WHICH THIS SUBPART  
APPLIES**

NOTE: Failure to list a type of federal assistance in appendix A shall not mean, if the Age Discrimination Act is otherwise applicable, that a program or activity is not covered. For the text of appendix A to subpart I, see appendix A to subpart C of this part.

**APPENDIX B TO SUBPART I OF PART 42—  
AGE DISTINCTIONS IN FEDERAL  
STATUTES OR REGULATIONS AFFECT-  
ING FINANCIAL ASSISTANCE ADMINIS-  
TERED BY THE DEPARTMENT OF JUSTICE**

Section 90.31(f) of HHS' the general regulations (45 CFR part 90) requires each federal agency to publish an appendix to its final regulation containing a list of age distinctions in federal statutes and regulations affecting financial assistance administered by the agency. This appendix is the Department's list of federal statutes and Department regulations that contain age distinctions that:

(1) Provide benefits or assistance to persons based upon age; or

(2) Establish criteria for participation in age-related terms; or

(3) Describe intended beneficiaries or target groups in age-related terms.

The Department administers financial assistance under the Juvenile Justice and Delinquency Prevention Act of 1974, as amended (42 U.S.C. 5601–5672). This statute reflects

the basic distinction between criminal justice systems for adults and juvenile justice systems, and the entire statute is predicated upon making distinctions on the basis of age between juveniles and adults. Such age distinctions are set forth throughout this statute, including provisions establishing programs of financial assistance to juvenile justice systems and for purposes related to the prevention of juvenile delinquency. The Department's current regulations pertaining to formula grants under this statute are set forth at 28 CFR part 31 (CFDA No. 16.540). In order to implement the statutory purposes, these regulations reflect the same age distinctions between juveniles and adults as are contained in the statute. The same statute also provides for discretionary special emphasis grants for which there are program announcements issued (CFDA No. 16.541), and this program also necessarily reflects the basic statutory distinction based on age.

The Department is authorized to extend financial assistance under the Missing Children's Assistance Act, as amended (42 U.S.C. 5771–5777). This law is concerned with problems related to missing children, and, thus, it contains many age-related references to children, including references in connection with the provision of financial assistance. Program announcements are issued in connection with this program (CFDA No. 16.543).

The Department is authorized to extend financial assistance pursuant to the Omnibus Crime Control and Safe Streets Act of 1968, as amended (42 U.S.C. 3701–3797). Among the statutory purposes of this law is the provision of grants addressing problems related to juvenile delinquency and problems related to crimes committed against elderly persons. Accordingly, this law also reflects the basic distinction between criminal justice systems for adults and juvenile justice systems. This law also singles out elderly persons as a special target group to benefit from its pro-

grams. The Department's regulations concerning block grants authorized under this statute are set forth at 28 CFR part 33. These regulations reflect the statutory authorizations for such block grants, which specifically authorize funds for, among other things, programs addressing problems related to juvenile delinquency and programs addressing the problem of crimes committed against elderly persons (CFDA No. 16.573). Similarly, the statute provides for discretionary grants to enhance and complement the block grants (CFDA No. 16.574) and has been amended to provide a focus on narcotics control (CFDA No. 16.580).

The Department is authorized to extend financial assistance under the Victims of Crime Act of 1984, as amended (42 U.S.C. 10601–10604). Among other things, in order to qualify for funds under one grant program, a state must certify that priority will be given to eligible crime victim assistance programs that help victims of certain crimes, including child abuse. In addition, among the services to victims of crime for which funding is available is "short term child care services" (CFDA Nos. 16.575 and 16.576).

The Department is authorized to make grants to Native American Indian tribes with funds reserved to the Office of Victims of Crime under the Victims of Crime act of 1984, as amended (42 U.S.C. 10601(g)). The primary purpose of the funding is to assist Native American Indian tribes with handling child abuse cases, particularly child sexual abuse (CFDA No. 16.583).

The Department is authorized to extend financial assistance to state and local authorities for narcotics control under the Anti-Drug Abuse Act of 1988 (Pub. L. 100–690, 102 Stat. 4181), which extends and/or modifies each of the previously noted laws. The statute reflects the basic distinction between criminal justice systems for adults and juveniles (CFDA Nos. 16.579 and 16.582).