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LEGAL OPINIONS

OF THE

OFFICE OF GENERAL COUNSEL

OF THE

LAW ENFORCEMENT ASSISTANCE ADMINISTRATION
UNITED STATES DEPARTMENT OF JUSTICE

JULY 1 TO DECEMBER 31, 1975

WITH CUMULATIVE INDEX FROM JULY 1, 1973

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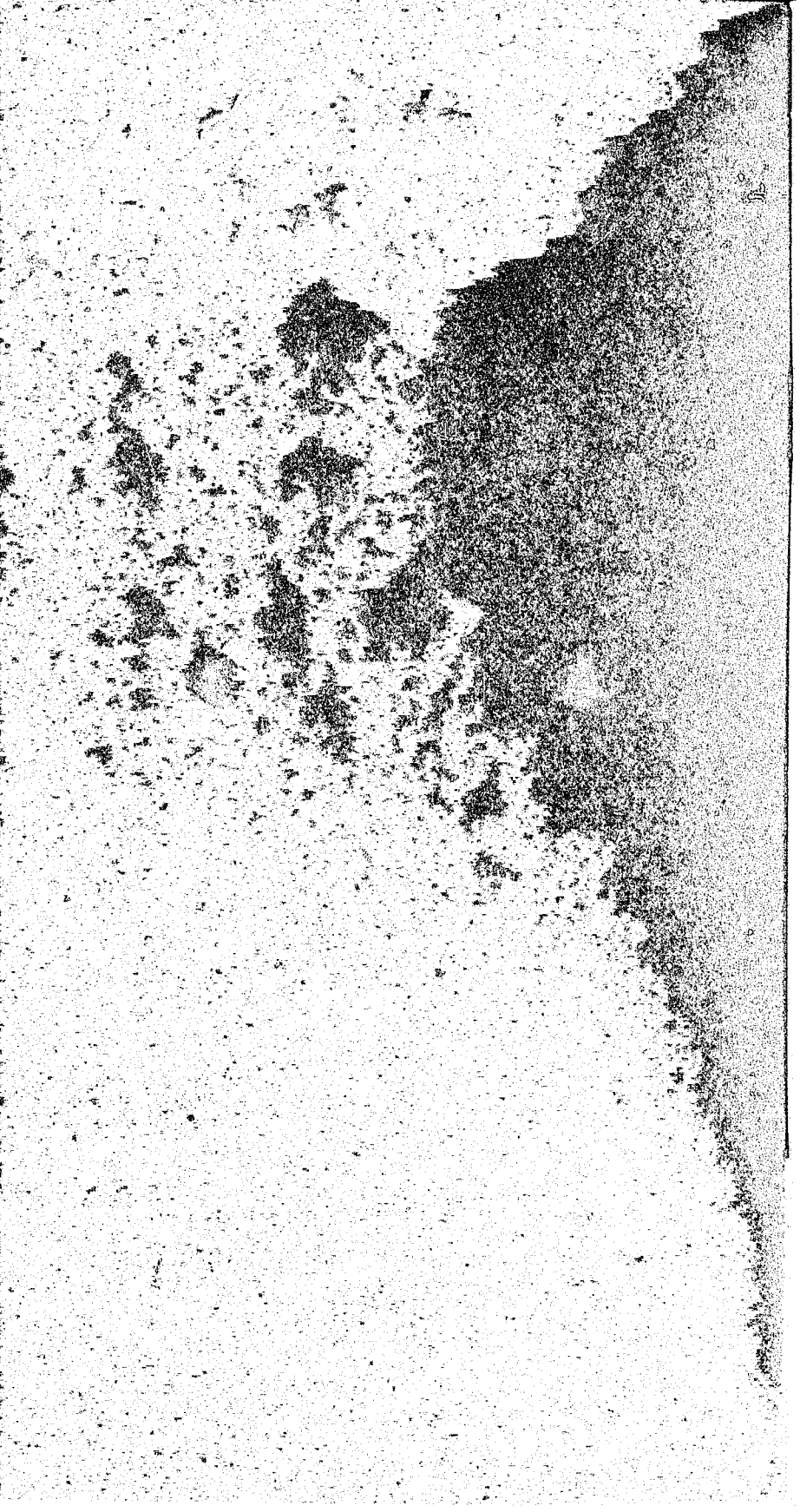
WASHINGTON: 1976



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Editor

Nina Graybill

NOTE TO READER

Each year the Office of General Counsel deals with hundreds of requests for advice and counsel. Only those opinions of general interest and applicability are printed in this volume. These opinions are printed for the benefit of the public and the criminal justice community. The printing of these opinions conforms not only with the letter of the Freedom of Information Act, which requires that in certain instances opinions affecting governmental agency actions be made available to the public, but also with the spirit of that law, which calls for a more open Government and greater access of the public to information affecting actions of Government agencies.

A Legal Opinion of the Office of General Counsel is generated by a request from within the Law Enforcement Assistance Administration (LEAA) central office, an LEAA Regional Office, a State Criminal Justice Planning Agency (SPA), or some other appropriate source. No Legal Opinions are generated by the Office of General Counsel itself, acting on its own initiative. Each of these Legal Opinions, therefore, responds to a request from a particular party and is based upon a particular and unique set of facts.

The principles and conclusions enunciated in these Legal Opinions, unless otherwise stated, are based on legislation in effect at the time that the Legal Opinion was released. All Legal Opinions issued after Sept. 7, 1974, are based on the Crime Control Act of 1973 (Public Law 93-83), as amended by the Juvenile Justice and Delinquency Prevention Act of 1974 (Public Law 93-415). The reader is advised to cross-check the date of a particular Legal Opinion with the language of the legislation that was effective on that date.

The Legal Opinions contained in this volume have been edited for format, for syntax, and for clarity, but otherwise appear in all respects as they did when promulgated by the Office of General Counsel.

Any person intending to rely in any way on a position adopted or an interpretation expressed in these Legal Opinions is advised to take into consideration the conditions and qualifications presented in this Note to Reader. If any such person has a question about a particular Legal Opinion or any other point, the person should communicate with the nearest LEAA Regional Office or with the Office of General Counsel, LEAA, Room 1268, 633 Indiana Avenue, N.W., Washington, D.C. 20531.

Legal Opinions in This Publication

Legislation Establishing LEAA Cited in This Volume

Note on Sectional Changes

1. The Omnibus Crime Control and Safe Streets Act of 1968 (Public Law 90-351) was the original legislation that established LEAA.
2. The 1970 amendments to that act were contained in the Omnibus Crime Control Act of 1970 (Public Law 91-644). The amendments redesignated Parts E and F of the 1968 act as Parts F and G and added a new Part E, entitled "Grants for Correctional Institutions and Facilities."
3. The 1973 amendments to the legislation were contained in the Crime Control Act of 1973 (Public Law 93-83). Those amendments redesignated Section 408 as Section 407 and incorporated the former Section 407 into Section 402(b)(6).
4. In 1974, Congress expanded LEAA authority to fund juvenile delinquency prevention programs by enacting the Juvenile Justice and Delinquency Prevention Act of 1974 (Public Law 93-415). This act made conforming amendments to the Crime Control Act of 1973.

Crime Control Act of 1973

Legal Opinion No. 76-1—Use of Part C Funds for Court Programs—November 13, 1975

TO: LEAA Regional Administrator
Region III - Philadelphia

This is in response to requests from Richard C. Wertz, Executive Director, Governor's Commission on Law Enforcement and Criminal Justice of Maryland (the State Criminal Justice Planning Agency or SPA) dated July 18, 1975, and August 4, 1975, for an opinion regarding four grant applications under consideration by the commission. The four grants, which are for court-related projects, raise the issue of whether, because of the civil court aspects of the grants, portions of the applications can be funded.

Each grant presents somewhat different aspects of that issue. The four grants are:

1. Training Circuit Court Clerks.
2. Court Reporters Training.
3. Maryland Trial Judges Benchbook.
4. Maryland Judicial Personnel Allocation System.

The following is a brief description of the grant purpose, personnel involved, and the question raised:

1. Training Circuit Court Clerks. The purpose of this project is to upgrade the professionalism of court-related personnel through preservice training and continuing legal and professional education. Eligible participants would be circuit court clerks and their deputies and assistants who are in key positions affecting the actual operations of the courts. Commission staff has concluded that clerks whose duties are exclusively civil in nature are not eligible t participate in the program under LEAA regulations and has therefore recommended that the grantee: (a) Submit a revised budget deleting expenses for the training of clerks whose duties are exclusively civil in nature; and (b) give priority to clerks with primary criminal court duties in the selection of participants.

2. Court Reporters Training. The purpose of the project is the same as above. Eligible participants would be official Maryland court reporters. Other members of the Maryland Shorthand Reporters Association would also be eligible to participate in the 2-day training seminar but would have to pay their own expenses for attending. Commission staff questions the legality of the use of funds to support the attendance of reporters who work exclusively on civil matters; the impact of their attendance on court efficiency; and the seminar's compatibility with the State law enforcement and criminal justice plan.

3. Maryland Trial Judges Benchbook. The purpose of the project is the same as above. Funds are requested for the development, compilation, printing, and distribution of the benchbook. It would be available as a reference text for trial judges to deal with certain problems arising in the course of trial. Topics to be covered include evidence, criminal law, civil and equity cases, and juvenile law. The commission questions the legality of funding those sections

of the benchbook not dealing with criminal matters, such as civil and equity cases.

4. Maryland Judicial Personnel Allocation System. The purpose of this project is to improve the administrative management and operational techniques of the Maryland court system in order to reduce the time period between arrest and final disposition in adult and juvenile cases. This would be accomplished through development of an information system that would enable the chief judge of the Court of Appeals to allocate judicial resources in the most effective manner possible. It would also permit more effective planning for the future requirements of the Maryland judicial system. The commission questions funding of the civil aspects of this grant.

Issue

What criteria are to be used in determining eligibility for funding of grants affecting court systems where the grant involves civil aspects?

Discussion

Under Section 301(a) of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644, by Public Law 93-83, and by Public Law 93-415), LEAA is authorized to make grants to States "to carry out programs and projects to improve and strengthen law enforcement and criminal justice." That term is defined in Section 601(a) of the Omnibus Crime Control Act of 1968, as amended, to mean:

> ...any activity pertaining to crime prevention, control or reduction or the enforcement of the criminal law, including, but not limited to police efforts to prevent, control, or reduce crime or to apprehend criminals, *activities of courts having criminal jurisdiction* and related agencies (including prosecutorial and defender services), activities of corrections, probation, or parole authorities, and programs relating to the prevention, control, or reduction of juvenile delinquency or narcotic addiction. (Emphasis supplied.)

In interpreting the above sections, LEAA has determined that agencies which are not primarily engaged in the general enforcement of criminal law, but rather have as their primary purpose and function the implementation and enforcement of specialized areas of the law such as civil, regulatory, or administrative law, are not "law enforcement and criminal justice" agencies for general funding eligibility purposes. Such agencies are not, however, totally precluded from participating in or receiving Federal grant fund assistance from LEAA. They are eligible to receive LEAA grant assistance for specific programs that will accomplish a clear "law enforcement and criminal justice" purpose in accordance with the funding provisions of Section 301(b) of the act.[1] This interpretation is equally applicable to both law enforcement and criminal justice agencies. The latter includes primarily the courts and corrections functions.

[1] See Office of General Counsel Legal Opinion Nos. 74-4, 74-39, 74-74, 75-35, and 75-37 for application of the rule to particular agencies and/or programs and projects.

In Maryland, circuit courts are trial courts of general jurisdiction and handle all cases of a civil, criminal, or juvenile nature which are not within the exclusive jurisdiction of district courts. Of those cases within the exclusive jurisdiction of the district courts, appeals– whether *de novo* or on the record– are heard in the circuit courts. In Baltimore City, there are six separate courts which exercise the same types of jurisdiction held by the circuit courts for the counties. One of these courts is exclusively criminal, three are civil (which includes habeas corpus, postconviction, defective delinquency, and civil commitment of drug abusers), and two have equity jurisdiction (which includes juvenile delinquency and nonsupport).

Judges, circuit court clerks, and court reporters, with the exception of Baltimore City, have overlapping responsibilities in the area of civil, criminal, and juvenile law. Even in Baltimore City, where assignments are specialized, judges, clerks, and reporters are subject to reassignment or rotation from one court to another. A civil-criminal dichotomy is not possible because of the unified nature of the judicial system in Maryland. The court system, having a balance of criminal and civil jurisdiction, may be said to be *equally* engaged in criminal justice and civil activity and in this regard differs from the usual application of the funding criteria.

Without addressing the question of whether the Maryland court system is eligible for general purpose funding, these issues may be resolved by determining whether each specific program or project will accomplish a clear "law enforcement and criminal justice" purpose in accordance with the funding provisions of Section 301(b) of the Omnibus Crime Control Act of 1968, as amended.

Section 301(b) authorizes LEAA grants to States for 10 specific purposes which encompass programs and projects to improve and strengthen law enforcement and criminal justice. The first two purposes, relevant to the Maryland grant applications, are as follows:

> (1) Public protection, including the development, demonstration, evaluation, implementation, and purchase of methods, devices, facilities, and equipment designed to improve and strengthen law enforcement and criminal justice and reduce crime in public and private places.
>
> (2) The recruiting of law enforcement and criminal justice personnel and the training of personnel in law enforcement and criminal justice.

It is clear that the four grant applications under consideration fall within one or the other of these program areas. In addition, the court system, which will benefit from these projects, has criminal jurisdiction as required by the Section 601(a) definition of law enforcement and criminal justice.

A clear "law enforcement and criminal justice" purpose requires, in the first instance, that a particular program or project directly and substantially further the improvement of the criminal justice system. Once this is established, elements of the program or project must also be examined to determine whether non-criminal-justice costs will facilitate or further the criminal justice purpose (i.e., provide an indirect benefit). In Legal Opinion No. 74-40, this Office

considered the funding of a court-related traffic citation system. It found that the system was eligible for funding under the following rationale:

> . . . general court improvement projects that improve both the criminal and civil court may be funded in their entirety because the improvement of the court system will facilitate criminal court activities and release court personnel and resources to improve the criminal courts.

Applying these principles to the four Maryland court projects, it is the opinion of this Office that each is eligible for funding, even though there is also a concurrent benefit to the civil function of the court system. Only those project costs which would not benefit the criminal justice function, directly or indirectly, are ineligible for LEAA funding.

The grants for training of circuit court clerks and court reporters, as proposed, are permissible with one caveat. The current assignment of a clerk or reporter to a civil court or to report civil cases is not in itself determinative of eligibility to participate in training. If a clerk or reporter could be routinely assigned or rotated to a criminal justice assignment, then he or she would be eligible to participate in training. However, a specialized reporter (e.g., workmen's compensation reporter) who would not normally be reassigned or rotated to report criminal cases would not be eligible to receive grant funds for travel and other expenses related to training. Also, where funds or training slots are limited, it is proper for State planning agencies to set priorities for participant selection. Finally, the matters of impact on court efficiency and compatibility with the State plan should also be considered by the State planning agency in its decision to make a grant.

The Maryland trial judges benchbook should be considered as eligible for LEAA funding in its entirety. While it has sections devoted to civil and equity law, as well as criminal law, it is clear that maximum value can only be achieved by a comprehensive product. If a general trial judge becomes more proficient in all areas of the law, there would be a substantial benefit to his overall performance in the criminal area. For example, the elimination of trial error in a civil or equity case could have an indirect effect on reducing not only the appellate caseload, which involves both civil and criminal cases, but also the necessity for new trials, thus permitting the court to eliminate much case processing delay.

This affords a substantial benefit to criminal case handling. This factor, in combination with the fact that the project confers a direct and substantial benefit to the criminal justice function, permits the funding of the entire benchbook project.

Finally, the grant for development of a judicial personnel allocation system is a general court improvement project of benefit to both the civil and criminal functions of the court system. It is apparent that this innovation, like the benchbook, must include both civil and criminal aspects in order to "facilitate criminal court activities and release court personnel and resources to improve the criminal courts." Such a general court improvement project may also be funded in its entirety.

In conclusion, the Maryland court proposals are an integral part of the State judiciary's effort to provide a unified and centrally administered judicial system. A true systems approach to court improvement represents an important step forward in the solution of criminal justice problems. Thus, the Omnibus Crime Control Act of 1968, as amended, permits the funding of projects which, although a benefit to the civil function of the court system, also confer a direct and substantial benefit to the criminal justice function, as is the case in this instance. All project costs that will facilitate or further the criminal justice purpose of the grant are fundable.

Legal Opinion No. 76-2—Jurisdiction of LEAA to Deal with Complaints of Employment Discrimination in Agencies Not Directly Funded by LEAA—August 4, 1975

TO: Office of Civil Rights Compliance, LEAA

This is in response to your memorandum of May 7, 1975. The question presented is whether LEAA has jurisdiction to deal with complaints of employment discrimination in agencies that are not directly funded by LEAA but that participate in regional programs funded by LEAA. In particular, does the San Carlos, Calif., Police Department fall within the scope of 28 C.F.R. §42.201(b) if it stores and shares data in a centralized filing of police records system and utilizes a training facility, both of which are programs funded by LEAA.

The relevant sections of the Justice Department regulations concerning Equal Employment Opportunity are:

> 28 C.F. §42.102-(c) The term "Federal financial assistance" includes (1) grants and loans of Federal funds . . . .
>
> 28 C.F.R. §42.102-(d) The term "program" includes any program, project, or activity for the provision of services, financial aid, or other benefits to individuals (including education or training . . .), or for the provision of facilities for furnishing services, financial aid, or other benefits to individuals . . . .
>
> 28 C.F.R. §42.201-(b) The regulations in this subpart apply to the employment practices of planning agencies, law enforcement agencies, and other agencies or offices of States or units of general local government administering, conducting, or *participating* in any program or activity receiving Federal financial assistance extended under Title I of the Omnibus Crime Control and Safe Streets Act of 1968 (the Act) . . . . (Emphasis added.)
>
> 28 C.F.R. §42.202-(a) The definitions set forth in §42.102 of Subpart C, Part 42, Title 28, Code of Federal Regulations are, to the extent not inconsistent with this subpart, hereby made applicable to and incorporated in this subpart.

According to Section 201(b), the regulations of Subpart D, 28 C.F.R. §42.201-206, apply to the employment practices of any law enforcement agency ". . . participating in any program or activity receiving Federal financial assistance extended under Title I of the Omnibus Crime Control and Safe Streets Act of 1968 (the Act)." The term "program" is defined at 28 C.F.R. §42.102(d). The term "Federal financial assistance" is defined at 28 C.F.R. §42.102(c). These definitions are made applicable to Subpart D by 28 C.F.R. §42.202(a). The phrase "participating in" is not defined in the regulations. Since the word is not defined in the regulation, and there is no

evidence of any special meaning intended in the regulations, the common meaning of the word is to be used. (*Treat* v. *White*, 181 U.S. 264 (1901); see also, 2A C. Sands, *Sutherland Statutory Construction* Section 47.28, at 141 (4th Ed. 1973).) As defined in Black's Law Dictionary 1275 (Revised 4th Ed. 1968), "participate" means ". . . To partake of, experience in common with others . . . to take part in . . . ."

In the instant case, it is clear that the two programs involved--the first being the central filing of police records and the second being the funding for training equipment--are "programs or activities receiving Federal financial assistance extended under Title I of the Omnibus Crime Control and Safe Streets Act of 1968 (the Act)," since both programs are funded by LEAA and are set up either to provide services or other benefits to individuals or to provide facilities for furnishing services or benefits to individuals.

The San Carlos Police Department is "taking part in" or "partaking of" these two programs. It is, therefore, the opinion of this office that the San Carlos Police Department is subject to LEAA and Justice Department regulations concerning Equal Employment Opportunity, Subpart D, 28 C.F.R. §42.201 through §42.206.

Legal Opinion No. 76-3—Applicability of the Juvenile Justice Act to the Trust Territory of the Pacific Islands and the Proposed Commonwealth of the Northern Mariana Islands—July 25, 1975

TO: Office of Juvenile Justice and Delinquency Prevention,
LEAA

This is in response to your inquiry concerning the applicability of the Juvenile Justice and Delinquency Prevention Act of 1974, Public Law 93-415, September 7, 1974, to the Trust Territory of the Pacific Islands.

The relevant sections of the Juvenile Justice Act are:

> Section 103(7)—The term "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Trust Territory of the Pacific Islands, and any territory or possession of the United States;
>
> Section 222(a)—In accordance with regulations promulgated under this part, funds shall be allocated annually among the States on the basis of relative population of people under age eighteen. No such allotment to any State shall be less than $200,000, except that for the Virgin Islands, Guam, American Samoa, and the Trust Territory of the Pacific Islands no allotment shall be less than $50,000.

The Trust Territory of the Pacific Islands is composed of numerous small islands in the Western Pacific in the general area of Guam. Approximately one-sixth of the territory is composed of the Northern Mariana Islands, which may become a Commonwealth of the United States as early as 1980. The Trust Territory is under the administering authority of the United States pursuant to the trusteeship agreement approved by the Security Council of the United Nations on April 2, 1947, and by the United States Government on July 18, 1947. The sections of the United States Code applicable to the Trust Territory are 48 U.S.C. §1435 and 48 U.S.C. §§1681-1693.

The Trust Territory of the Pacific Islands is specifically included in the definition of the term "State" in the Juvenile Justice Act (Section 103(7)). Thus, the Trust Territory has the same rights under the Juvenile Justice Act as any State. However, States must be allocated funds at a level which cannot be less than $200,000 annually while the Virgin Islands, Guam, American Samoa, and the Trust Territory of the Pacific Islands must be allocated funds which cannot be less than $50,000 annually (Section 222(a)). In order to receive these funds, the Trust Territory must comply with the relevant sections of the Juvenile Justice Act including Section 223—State Plans.

On July 1, 1975, the President presented to Congress a proposed joint resolution which would provide congressional approval of the "Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America." If the Congress approves this covenant, there will be five more steps before the Northern Mariana Islands become a commonwealth.[1] These steps are:

1. The Marianas Constitutional Convention.
2. A referendum on the constitution.
3. Approval of the constitution by the United States Government.
4. Election and installation of a new government for the Northern Marianas.
5. Termination of the trusteeship and a proclamation by the President of the United States that the commonwealth has been established.

The following sections of the covenant are applicable:

> Section 502(a)—The following laws of the United States in existence on the effective date of this Section and subsequent amendments to such laws will apply to the Northern Mariana Islands, except as otherwise provided in this Covenant:
>
> (1) Those laws which provide Federal services and *Financial Assistance Programs* and the Federal Banking Laws as they apply to Guam; (Emphasis supplied.)
>
> Section 1003—The provisions of this Covenant will become effective as follows, unless otherwise specifically provided:
>
> (b) . . . Sections 501, *502* . . . will become effective on a date to be determined and proclaimed by the President of the United States which will be not more than 180 days after this Covenant and the Constitution of the Northern Mariana Islands have been approved. . . . (Emphasis supplied.)

According to these sections, the Northern Mariana Islands will become eligible for funds under the Juvenile Justice Act separate and apart from those funds allocated to the Trust Territory of the Pacific Islands, on a date proclaimed by the President, not more than 180 days after the approval of the Northern Mariana Islands Constitution and the covenant. Estimates are that this step will occur sometime in the summer or fall of 1976.

[1] On March 24, 1976, President Gerald R. Ford signed H.J. Res. 549, the Joint Resolution of the Congress approving the Northern Mariana Islands Commonwealth Covenant. As enacted, the bill (H.J. Res. 549) is Public Law 94-241, approved March 25, 1976.

Legal Opinion No. 76-4—Interpretation of Variable Pass-Through Requirement—August 7, 1975

TO: LEAA Regional Administrator
Region III - Philadelphia

Each State receiving LEAA funds is required to "pass through" to units of local government a percentage of Part C funds determined by applying the formula set out in Section 303(a)(2) of the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. §3701 *et seq.*, as amended (Public Law 90-351, as amended by Public Law 93-83 and Public Law 93-415). You have asked if LEAA can adjust the pass-through requirements for West Virginia in 1975 and 1976 to reflect the State referendum ballot conversion of the local court system to a State level system under the jurisdiction of the State supreme court.

Applicable Statutory Provisions

In order to receive an action or block grant under the act, each State must submit "an approved comprehensive State plan . . . which conforms with the purposes and requirements of this title." (Section 303(a).) The term "comprehensive" is defined in Section 601(m) as follows:

> The term "comprehensive" means that the plan must be a total and integrated analysis of the problems regarding the law enforcement and criminal justice system within the State; goals, priorities, and standards must be established in the plan and the plan must address methods, organization, and operation performance, physical and human resources necesssay to accomplish crime prevention identification detection, and apprehension of suspects; adjudication; custodial treatment of suspects and offenders, and institutional and noninstitutional rehabilitative measures.

Requirements for the comprehensive plan are set forth in Section 303(a), which states that the comprehensive plan shall:

> (3) adequately take into account the needs and requests of the units of general local government in the State and encourage local initiative in the development of programs and projects for improvement in law enforcement and criminal justice, and provide for an appropriately balanced allocation of funds between the State and the units of general local government in the State and among such units.

Section 303(a)(2) sets forth the variable pass-through requirement to units of local government as follows:

> (2) provide that at least the per centum of Federal assistance granted to the State planning agency under this part for any fiscal year which corresponds to the per centum of the State and local law enforcement expenditures funded and expended in the immediately preceding fiscal year by units of general local government will be made available to such units or combinations of such units in the immediately following fiscal year for the development and implementation of programs and projects for the improvement of law enforcement and criminal justice, and that with respect to such programs or projects the State will provide in the aggregate not less than one-half of the non-Federal funding. Per centum determinations under this paragraph for law enforcement funding and expenditures for such immediately preceding fiscal year shall be based upon the most accurate and complete data available for such fiscal year or for the last fiscal year for which such data are available. The Administration sh ll have the authority to approve such determinations and to review the accuracy and completeness of such data . . . .

Discussion

Data for computing the variable pass-through formula for each State is gathered by the United States Bureau of the Census. During fiscal year 1973, the court system in West Virginia was composed of county (local) and State level courts. The Bureau of the Census, therefore, classified the expenditures of county courts as local law enforcement expenditures when compiling the local pass-through percentages. In November 1974, the voters of West Virginia approved, by referendum ballot, a change in the court system. Under the new court system, all county courts were converted to State level courts under the jurisdiction of the State supreme court. Because there are no longer county courts, all grant funds in the court area must now be awarded to the State courts. As a result, the variable pass-through computation by the Bureau of the Census for fiscal year 1975, which is based upon fiscal year 1973 expenditures, does not adequately reflect current State/local participation in total law enforcement and criminal justice expenditures in the State.

When the facts of this situation are read in the context of the act, there is an apparent conflict of statutory provisions. Under Section 303(a)(2), the variable pass-through percentage computed by the Bureau of the Census based upon fiscal year 1973 expenditures must be used in fiscal year 1975. Under Section 303(a)(3), however, there must be "an appropriately balanced allocation of funds between the State and the units of general local government in the State and among such units." A pass-through percentage based on fiscal year 1973 expenditures would not appear to constitute an appropriately balanced allocation of funds in view of the recent legislative change in West Virginia's court system. In addition, Section 601(m), as well as LEAA Guidelines and review procedures, requires adequate planning and funding to the "adjudication"-related functions.

The applicable rule of statutory construction for resolving the apparent conflicts in statutory provisions caused by the current situation in West Virginia is as follows:

> A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error. 2A C. Sands, *Sutherland Statutory Construction*. §46.06, at 63, (4th Ed. 1973).

The Senate report on the 1971 amendments which added Section 303(a)(2) to the act states that Section 303(a)(2) is necessary to achieve the "appropriately balanced allocation" required by Section 303(a)(3). (S. Rep. No. 1253, 91st Cong., 2d Sess. 35 (1970).) It is clear that Section 303(a)(2) should

be read in a manner consistent with Section 303(a)(3). This is further supported by the following remarks by Senator John L. McClellan:

> The purpose of the committee in providing the flexible pass-through is to assure that there is an "appropriately balanced allocation" of action funds between the States and their local government units, as required by Section 303(3) of the act. (Cong. Rec. S. 17536 (daily ed., October 8, 1970).)

A similar explanation was made by Senator Roman L. Hruska at Cong. Rec. S. 20474 (daily ed., December 17, 1970). Senator Hugh Scott added the following:

> If the local units in one State bear the burden of 90 percent of the law enforcement activity in that State, their assistance should not be limited to an arbitrary 75 percent. At the same time if a State bears a larger portion of the law enforcement activity within its borders than do its cities, it should not be required to pass on 75 percent of the Federal funds. This provision will see that the money gets to the areas that need it - - and that is a major step on the road to stopping crime. (Cong. Rec. S. 17547 (daily ed., October 8, 1970).)

Congress rejected the fixed 75 percent pass-through requirement in favor of a variable percentage that would reflect the real needs of the State and its local governmental units and thus assure an "appropriately balanced allocation" as required by Section 303(a)(3) of the act. It is clear that the pass-through provision of Section 303(a)(2) is meant to effect Section 303(a)(3) and Section 601(m) and should not be applied so as to conflict with the latter.

In the present case, use of the outdated fiscal year 1973 pass-through percentages in West Virginia in fiscal year 1975 would create an unbalanced appropriation. It is clear from the legislative history that just the opposite effect is desired. In the rare instance, therefore, when a substantial change has occurred and the application of Section 303(a)(2) precludes the result demanded by Section 303(a)(3), the former must give way.

Conclusion

It is the opinion of this Office that the pass-through provisions of Section 303(a)(2) of the act must be read in a manner consistent with the provisions of Section 303(a)(3). Modification of the base data is justified here because West Virginia by law has modified the structure of the State and local court systems and the "appropriately balanced allocation" of funds between State and local government can best be achieved by this modification.

It will be necessary to adjust the pass-through percentages used in West Virginia for at least 2 years. Funds for fiscal year 1975, which were delayed pending determination of this issue, may be adjusted since the base data available is inaccurate. Since data reflecting the current situation will not be available before the comprehensive plan for fiscal year 1976 is due on September 30, 1975, adjustment may also be made regarding fiscal year 1976 funds. The comprehensive plan for fiscal year 1977 will be due on June 30, 1976. At that time, one year's statistics representing the current situation will be available but not yet incorporated into the percentages supplied by the Bureau of the Census. LEAA has the authority "to approve such determinations [of percentages] and to review the accuracy and completeness of such data." (Section 303(a)(2).) Under this authority LEAA may reject the incorrect figures supplied by the Bureau of the Census and recognize the correct situation by ordering a special audit of expenditures during the first year the new court system was operative. If such an audit cannot be made, the principles of this opinion will apply and proper adjustment should be made.

Legal Opinion No. 76-5—Representation of Indian Officials on RPU's—September 15, 1975

TO: LEAA Regional Administrator
Region V - Chicago

This is in response to your inquiry as to whether elected Indian tribal officials serving on a regional planning unit (RPU) are considered local elected officials.

Section 203(a) of the Crime Control Act of 1973 (Public Law 93-83, as amended by Public Law 93-415) requires that RPU's within the State must be comprised of a majority of local elected officials. In Office of General Counsel Legal Opinion Nos. 74-14, 75-10, and 75-42, this office has interpreted the "local elected officials" language as requiring that officials be elected representatives of local law enforcement and criminal justice agencies, units of general local government, or local public agencies maintaining programs to reduce and control crime. The term "unit of general local government" is defined at Section 601(d) to include, *inter alia*., ". . . an Indian tribe which performs law enforcement functions as determined by the Secretary of the Interior. . . ." Hence, where Indian tribal officials are elected at a general election held by an Indian tribe performing law enforcement functions as determined by the Secretary of the Interior, such Indian tribal officials are considered as local elected officials.

Legal Opinion No. 76-6—Implementation of Juvenile Justice and Delinquency Prevention Act of 1974—October 7, 1975

TO: California Department of Youth Authority

This is in response to your letter of July 21, 1975, to Mr. Fred Nader, Acting Assistant Administrator, Office of Juvenile Justice and Delinquency Prevention, requesting legal interpretation of questions related to California's planning efforts under the Juvenile Justice and Delinquency Prevention Act of 1974 (Public Law 93-415). Because of the significance of these questions, both on the State and national level, Mr. Nader has requested that this office respond formally to the issues raised.

1. Can the State Criminal Justice Planning Agency (SPA) contract with a

private or public agency to do the necessary staff work in developing a "State Plan"; to execute the plan; to provide technical assistance and consultation?

Sections 223(a)(1) and (2) of the Juvenile Justice Act provide that the State plan must:

> (1) designate the State planning agency established by the State under Section 203 of such title I as the sole agency for supervising the preparation and administration of the plan;
>
> (2) contain satisfactory evidence that the State agency designated in accordance with paragraph (1) (hereinafter referred to in this part as the 'State planning agency') has or will have authority, by legislation if necessary, to implement such plan in conformity with this part . . . .

These sections define the basic authority which the State planning agency must possess in order to receive a formula grant under the Juvenile Justice Act.

Several of the components of the first question have been addressed by this office in Legal Opinion No. 75-40, "Administration of Juvenile Related Programs within the State of Nevada," May 20, 1975. That opinion expressly considered the issue of the State planning agency's contracting with other public agencies to develop the State juvenile justice plan and the permissible role of such agencies in the administration of the plan. This Office concluded that, while the State planning agency must retain primary responsibility for planning and program development, it is permissible for it to contract with a public agency for staff work necessary to develop the State plan, where such contracting is provided for in an approved planning grant or State plan. Similarly, the State planning agency must retain control over the funds it administers. This does not, however, preclude delegation of limited administrative and management responsibilities to other agencies of State government.

The role of private agencies in the development and administration of the State plan has been statutorily mandated in Section 223(a)(9) of the Juvenile Justice Act:

> (9) provide for the active consultation with and participation of private agencies in the development and execution of the State plan . . . .

This role is described in State Planning Agency Guideline M 4100.1D, Chg. 1, July 10, 1975. The guideline defines the private agency role in terms of "consultation" and limits the scope of the term "private agency" by definition. The guideline does not reach the issue of contracted services. Therefore, the general provision of State Planning Agency Guideline M 4100.1D, March 21, 1975, Chapter 1, par. 17c(3), is determinative on the issue of contractual services provided by private agencies:

> (3) *Contracted Services Ceiling.* To assure that adequate funds are available to finance the level of planning agency staff capability necessary for the proper discharge of statutory responsibilities, not more than 20 percent of a State's total Federal planning grant should be used for contracting with non-governmental agencies or organizations to provide planning services or assistance. In exceptional cases, States may request prior written approval of the cognizant LEAA Regional Office for a higher "contracted services" ceiling.

While this subsection applies explicitly to a State's Crime Control Act (Public Law 93-83) planning grant, this Office finds the provision to be equally applicable to funds received by a State planning agency for planning and administration under the Juvenile Justice Act.

A State has authority under Sections 221 and 223(a) of the Juvenile Justice Act to provide technical assistance or services for programs and projects contemplated by the Juvenile Justice Act component of the State plan. Due to the interrelated nature of the Crime Control Act juvenile justice program component and the Juvenile Justice Act plan, it would be appropriate for a State to provide technical assistance and consultation for juvenile programing entirely under the authority of Section 303(a)(10) of the Crime Control Act. Alternatively, a State could utilize juvenile justice formula grant funds to augment technical assistance activity in the area of juvenile programing. Such a program could utilize "action" funds rather than funds for planning and administration. The limitations on use of planning and administration funds for developing and implementing the State plan would not be applicable. In addition, such use of action funds could not be counted toward the pass-through requirement of Section 223(a)(5) in the absence of local government waiver.

In sum, the State planning agency may contract with public agencies to do staff work in developing the State plan, may contract with private agencies to the extent permitted by applicable LEAA Guidelines, may delegate limited responsibility for plan execution consistent with the statute and guidelines, and may contract with public and private agencies for the provision of technical assistance in carrying out the Juvenile Justice Act plan. However, the Juvenile Justice Act clearly requires that final authority and responsibility for plan formulation and implementation, including the methods to be utilized, must rest with the State planning agency and its supervisory board.

2. In accordance with Section 223(a)(2) of the Juvenile Justice and Delinquency Prevention Act, what power or control does the State planning agency have to possess to carry out the "implementing of the plan"? There are several references in the guidelines to the term "authority." What is the legal interpretation of the word "authority" as it relates to the control that the State planning agency must possess over the operating agencies of State government to be in conformity with the act?

3. The guidelines (M 4100.1D, July 10, 1975, Chap. 1, para. 21c(3)) state under the paragraph on "Coordination of Services" that there is a mandate that "the State Planning Agency be able to cause coordination of human services to youth and their families in order to insure effective delinquency prevention and treatment programs. This would include all offices within the state responsible for the delivery of human services, etc." What does the phrase "cause coordination" require in the way of control or authority over the operations of other departments of State government? Is this function subject to contract if another State agency already has this responsibility?

All existing State planning agencies have a supervisory board, existing under State authority, which is responsible for reviewing, approving, and maintaining general oversight of the State plan and its administration (see State Planning Agency Guideline M 4100.1D, March 21, 1975). While the Juvenile Justice Act

requires that the existing State planning agency be designated in the State plan as the sole agency for supervising the preparation and administration of the State plan (Section 223(a)(1)), this in itself does not give the requisite authority to implement the Juvenile Justice Act plan. Therefore, the Section 223(a)(2) requirement, quoted above, simply requires that the plan indicate the source of the State planning agency supervisory board's authority to implement the Juvenile Justice Act component of the State plan. This requirement may be satisfied through the attachment of documentary evidence such as an executive order of the Governor or State legislation granting such authority. This requirement is fully set forth in Guideline M 4100.1D, Chg. 1, par. 21c, July 10, 1975.

The authority of the State planning agency to implement the plan does not require that the State planning agency be given direct power or control over the operating functions of other agencies of State government. As pointed out in the State Planning Agency Guideline, *supra,* par. 21c(3), "Coordination of Services," the authority to cause coordination of services, statewide, is the basic requirement. This does not mean, for example, that the State planning agency is required to step in and coordinate programs for which the Department of Youth Services (DYS) has direct operational responsibility. However, it would require that DYS operations be coordinated with other State youth-related human services agencies by the State planning agency. To the extent that DYS has legal authority and responsibility for coordination of youth services beyond its operational responsibility, its role would necessarily be subservient to the State planning agency role in orde for the State planning agency to qualify for Juvenile Justice Act funding. This principle is firmly established in Legal Opinion No. 75-40, *supra.* This would not, of course, prevent the State planning agency from entering into cooperative arrangements which utilize the experience and expertise of other State agencies in the coordination of youth services within the State.

4. Will the requirements for the State plan pursuant to Section 223 extend throughout the State or do they only apply to those individual entities which actually receive Federal funds? For instance, if a particular county does not wish to utilize Federal funds, will its decision to continue to place juveniles who are charged with or who have committed offenses that would not be criminal if committed by an adult (a decision contrary to Section 223(a)(12)) jeopardize Federal funds for the rest of the State?

5. Will the State be eligible to receive formula grants under Section 223 of the act if not every county or agency within a State chooses or is able to comply with Section 223(a)(12) or (13)?

The requirements of Section 223 extend throughout the State. In submitting its application for funds under the Juvenile Justice Act, a State is committing itself to meet the statutory provisions of Section 223(a)(12) and (13) statewide. This conclusion is based upon the statutory language and the explicit requirements of the State Planning Agency Guideline, *supra,* par. 82 h-j. A State accepting Juvenile Justice Act funds is expressing its intent to provide for statewide accomplishment of the goal of deinstitutionalization of status offenders and the separation of adult and juvenile offenders through the accomplishment of the State plan objectives established by the State planning

agency, the State agency that, as mentioned earlier, must have the authority to implement the State plan. The State planning agency, although not an operational agency, has a variety of options, means, and methods by which to effectuate these provisions. These options, means, and methods include agreements with operating agencies, legislative reform efforts, public education and information, funding to establish alternative facilities, and other plans to achieve those goals. It is implicit in the Juvenile Justice Act that failure to achieve the goals of Section 223(a)(12) and (13) within applicable time constraints will terminate a State's eligibility for future Juvenile Justice Act funding. Certainly, this would be the case if any county or agency "chose" not to comply.

Legal Opinion No. 76-7—State Plan Requirements of Section 223(a)(12)-(14) of the Juvenile Justice Act—October 7, 1975

TO: LEAA Regional Administrator
Region III - Philadelphia

This opinion is in response to a number of recent inquiries, including a request from the Virginia State Criminal Justice Planning Agency (SPA) dated August 11, 1975, regarding Section 223(a)(12)-(14) of the Juvenile Justice and Delinquency Prevention Act of 1974 (Public Law 93-415, 42 U.S.C. §5601 *et seq.*—hereinafter Juvenile Justice Act).

Issues

The basic issues which have been raised are broken down, for discussion purposes, into the following questions:

1. Does Section 223(a)(12) require that States which submit a Juvenile Justice Act plan must deinstitutionalize status offenders within 2 years of that date?
2. Does Section 223(a)(13) require the immediate separation of alleged or adjudicated delinquents and incarcerated adults?
3. What impact does Section 223(a)(2) have on a State planning agency's authority to implement these provisions of the State plan?
4. Without legislative authority, what measures can the SPA take with regard to achieving compliance with the Section 223(a)(12) and (13) requirements?
5. What are the consequences of a State's failure to conform with the requirements of Section 223(a)(12) and (13)?
6. How does an SPA develop the authority and/or responsibility for monitoring jails and detention and correctional facilities pursuant to Section 223(a)(14) in order to insure that the requirements of Section 223(a)(12) and (13) are met?

Discussion

Section 223(a)(12)-(14) sets forth the State plan requirements related to deinstitutionalization of status offenders, separation of adult and juvenile offenders, and monitoring as follows:

> SEC. 223.(a) In order to receive formula grants under this part, a State shall submit a plan for carrying out its purposes consistent with the provisions of section 303(a)(1), (3), (5), (6), (8), (10), (11), (12), and (15) of title I of the Omnibus Crime Control and Safe Streets Act of 1968. In accordance with regulations established under this title, such plan must–
>
> (12) provide within two years after submission of the plan that juveniles who are charged with or who have committed offenses that would not be criminal if committed by an adult, shall not be placed in juvenile detention or correctional facilities, but must be placed in shelter facilities;
>
> (13) provide that juveniles alleged to be or found to be delinquent shall not be detained or confined in any institution in which they have regular contact with adult persons incarcerated because they have been convicted of a crime or are awaiting trial on criminal charges;
>
> (14) provide for an adequate system of monitoring jails, detention facilities, and correctional facilities to insure that the requirements of section 223(12) and (13) are met, and for annual reporting of the results of such monitoring to the Administrator. . . .

Guidance on implementing these requirements is provided in LEAA Guideline Manual M 4100.1D, CHG 1, State Planning Agency Grants, Chapter 3, Par. 82 h-j.

When the Senate and House went to conference on S. 821 (the Juvenile Justice Act), the House bill provided only that the State plan "encourage" deinstitutionalization of status offenders and separation of adult and juvenile offenders. The Senate bill language was adopted by the conferees as quoted above with the following comment in the conference report:

> The Senate bill "requires" that within two years of enactment, juvenile status offenders be placed in shelter facilities, that delinquents not be detained or incarcerated with adults; and that a monitoring system be developed to ensure compliance with these provisions. The House amendment "encourages" such activities. The Conference substitute adopts the Senate provision. (Senate Report No. 93-1103, August 16, 1974, p. 42.)

This comment supports the clear meaning of the statutory language. Since the State plan must provide for the accomplishment of the objectives of Section 223(a)(12) and (13), it follows that Congress intended these provisions to be requirements that a State must plan for and implement as a condition for the receipt of funds.

The Section 223(a)(12) requirement must be met within 2 years after the submission date of the initial plan. At a minimum, a State submitting its initial plan is committing itself, through its State planning agency, to a good faith effort to meet the statutory 2-year mandate.

The Section 223(a)(13) requirement does not have a specific time limitation for its accomplishment. Therefore, as stated in LEAA Guidelines, this requirement must ". . . be planned and implemented immediately by each State in light of the constraints on immediate implementation described below." (State Planning Agency Grants, Guideline, *Supra,* par. 82i(3).) This means that it is the constraints on implementation which determine the length of time permitted. Each State must identify the constraints and establish a specific plan, procedure, and timetable to achieve statutory compliance. The State is, in effect, establishing its own deadline (with LEAA approval). Only if a State identifies no legitimate constraints would immediate separation of juvenile and adult offenders be required. It is possible that more than 2 years could be required in a State where the constraints are substantial.

Section 223(a)(2) does not require that the State planning agency be given any more authority to implement the Juvenile Justice Act plan than it has to implement the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644, Public Law 93-83 and by Public Law 93-415–hereinafter Crime Control Act). The Section 223(a)(2) provision must be read together with Section 223(a)(1). They provide that the State plan must:

> (1) designate the State planning agency established by the State under section 203 of such title I as the sole agency for supervising the preparation and administration of the plan;
>
> (2) contain satisfactory evidence that the State agency designated in accordance with paragraph (1) (hereinafter referred to in this part as the "State planning agency") has or will have authority, by legislation if necessary, to implement such plan in conformity with this part . . . .

These sections define the authority which a State planning agency must have in order to qualify for Juvenile Justice Act funds. This Office addressed the meaning of the "authority" requirement in Legal Opinion No. 76-6, October 7, 1975. In that opinion, the office concluded:

> All existing State planning agencies have a supervisory board, existing under State authority, which is responsible for reviewing, approving, and maintaining general oversight of the State plan and its administration . . . . While the Juvenile Justice Act requires that the existant State planning agency be designated in the State plan as the sole agency for supervising the preparation and administration of the State plan (223(a)(1)), this in and of itself does not give the requisite authority to implement the Juvenile Justice Act plan. Therefore, the Section 223(a)(2) requirement, quoted above, simply requires that the plan indicate the source of the State planning agency supervisory board's authority to implement the Juvenile Justice Act component of the State plan. This requirement may be satisfied through the attachment of documentary evidence such as an executive order of the governor or State legislation granting such authority.

While a State planning agency may be granted direct authority over operational agencies insofar as plan compliance is concerned, this is likely to be the exception. Therefore, compliance statewide will require careful planning, coordination, and execution. As to the means, this is a matter for the State planning agency to determine. However, as stated in Legal Opinion No. 76-6, *supra:*

> The State planning agency, although not an operational agency, has a variety of options, means and methods with which to effectuate these provisions. They include agreements with operating agencies, legislative reform efforts, public education and

information, funding to establish alternative facilities, and other methods planned to achieve those goals.

A State may fail to comply with the requirements of Section 223(a)(12) and (13) either in the planning stage or in executing its plan. Failure at any point in the planning stage to meet the statute and guideline requirements will result in rejection of the State plan. Failure to execute the plan may result in fund cut-off under Section 509 of the Crime Control Act. A State's implementation of Section 223(a)(12) and (13) requires specific plans, procedures, and timetables. The latter establishes milestones which should be carefully monitored. If these milestones are not met, fund cut-off would be appropriate, at any point in time, since failure to adhere to the timetable would indicate the lack of a "good faith" effort. In such a case, funds expended under the grant could be reclaimed by LEAA.

The fiscal year 1976 Juvenile Justice Act plan, due December 31, 1975, should not be approved unless specific plans, procedures, and timetables for implementation of Section 223(a)(12) and (13) are set forth therein; adequate resources are allocated to meet these objectives of the plan; and the implementation thereof would result in fully meeting the requirements. For example, if Section 223(a)(12) and (13) requirements could not be met without enabling legislation, appropriation of State funds, or agreements with State, county, and local government units, then the plan would have to set forth exactly what the State planning agency has done to date to achieve these basic needs and what future efforts it will make to obtain them.

However, an approved plan with appropriate assurances and a "good faith" effort to meet the requirements coupled with a later determination by the State that the requirements could not be met would only result in future fund ineligibility and not require repayment of funds previously expended in accordance with the act and in pursuance of its objectives. Thus, if a State receiving Juvenile Justice Act formula funds were to ascertain later that it could not meet the act's requirements because of unforeseeable circumstances or because it no longer wished to participate, no sanction would attach unless a finding of lack of "good faith" was made. A State's failure to meet the 223(a)(12) requirement within a maximum of 2 years from the date of submission of the initial plan would result in future fund cut-off unless such failure was *de minimus*. These determinations would be made on a case-by-case basis.

Each SPA has responsibility for monitoring "jails, detention facilities, and correctional facilities" under Section 223(a)(14). A State planning agency may attempt to obtain direct authority to monitor from the Governor or State legislature, may contract with a public or private agency to carry out the monitoring under its authority, or may contract with a State agency that has such authority to perform the monitoring function. Formula grant "action" program funds would be available to the SPA for this purpose since monitoring services (or funds for those services) are of a "program" or "project" nature related to functions contemplated by the State plan.

Conclusions

1. Section 223(a)(12) requires that States deinstitutionalize status offenders within 2 years after submission of their initial plan under the Juvenile Justice Act.

2. Section 223(a)(13) requires immediate separation of alleged or adjudicated delinquents and incarcerated adults only if no constraints to implementation are identified. Otherwise, identified constraints and the State's approved plan, procedure, and timetable for implementation will determine the time limitation.

3. Section 223(a)(2) requires that the State planning agency have the same authority to implement the Juvenile Justice Act plan that it must have to implement the Crime Control Act plan. While this does require that the State planning agency have authority to cause coordination of services to juveniles statewide, it does not require that the State planning agency have direct operational authority over State agencies providing services to juveniles.

4. Compliance with Section 223(a)(12) and (13) can be achieved through a grant of direct authority to the SPA from State government or through a wide variety of programmatic efforts.

5. A failure to conform with the Section 223(a)(12) and (13) requirements may result in plan rejection or fund cut-off at any point in the planning process or implementation of the plan. Only if there is a definite showing of a lack of "good faith" on the part of the State planning agency in the application process or in meeting the milestones established in the State's timetable would LEAA consider action to recover Juvenile Justice Act funds granted to a State. Failure to meet the 223(a)(12) requirement within 2 years will result in fund cut-off, irrespective of "good faith" planning and implementation, unless the failure is *de minimus*.

6. An SPA may be granted direct authority to perform the Section 223(a)(14) monitoring function or may contract with a public or private agency, under appropriate authority, for the performance of the monitoring function.

Legal Opinion No. 76-8—Elected School Board Member as a "Local Elected Official" on Regional Supervisory Board—September 15, 1975

TO: LEAA Regional Administrator
Region II - New York

Issue

This is in response to your request of July 31, 1975, in which you ask whether an elected local school board official could be appointed as a "local elected official" for purposes of compliance with Section 203(a) of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law

90-351, as amended by Public Law 91-644, by Public Law 93-83, and by Public Law 93-415—hereinafter Crime Control Act).

Discussion

Section 203(a) requires that "[t]he regional planning units within the State shall be comprised of a majority of local elected officials."

LEAA Guideline M 4100.1D, March 21, 1975, provides in Chapter 1, para. 24c(2), for the required composition of regional supervisory boards. There, the local elected officials requirement is stated as follows:

> (2) *Composition.* The composition of the supervisory board shall incorporate the representative character elements prescribed for supervisory boards of State Planning Agencies (see paragraph 16) with the following modifications:
>
> (a) Regional planning unit supervisory boards within the State shall be comprised of a majority of local elected officials. Where possible preference should be given to executive and legislative officials of general purpose government as defined by State law or pursuant to an opinion by the State Attorney General. However, elected sheriffs, district attorneys and judges may also be considered local elected officials.

The test for determining whether an individual qualifies as a "local elected official" has been stated by this Office in Legal Opinion Nos. 75-10 and 75-14 issued September 10, 1974, to be as follows:

> It is the opinion of this office that in determining whether a particular officer qualifies as a "local elected official," the language of this requirement must be read in conjunction with the immediately preceding sentence of Section 203(a). This sentence provides in part that:
>
> The State planning agency and any regional planning units within the State shall, within their respective jurisdictions, be representative of the law enforcement and criminal justice agencies, units of general local government, and public agencies maintaining programs to reduce and control crime. . . .
>
> Under this interpretation, a "local elected official" is defined as an elected officer of any one of the types of organizations set out in the preceding sentence, provided that the particular organization of which the official in question is a member is an element within a general purpose political subdivision of a State. Thus, any elected official of a local law enforcement or criminal justice agency, unit of general local government, or local public agency maintaining programs to reduce and control crime will qualify as a "local elected official."

This definition permits sheriffs, judges, and district attorneys to be considered "local elected officials" so long as they are elected and serve within a local law enforcement and criminal justice agency. Congressmen and State legislators do not qualify under the definition and "State officers" such as circuit judges, sheriffs, and State's attorneys may or may not qualify depending on the extent to which they serve and are under State control (see Legal Opinion Nos. 75-10 and 75-14, *supra*).

The statutory representation requirement quoted from the legal opinion above was amended by the Juvenile Justice and Delinquency Prevention Act of

1974 (Public Law 93-415—hereinafter Juvenile Justice Act). This sentence of Section 203(a) now reads as follows:

> The State planning agency and any regional planning units within the State shall, within their respective jurisdictions, be representative of the law enforcement and criminal justice agencies including agencies directly related to the prevention and control of juvenile delinquency, units of general local government, and public agencies maintaining programs to reduce and control crime, and shall include representatives of citizens, professional and community organizations including organizations directly related to delinquency prevention.

Although this amendment does not bear directly on this issue, it illustrates the increased concern of Congress for representation of entities which are concerned with delinquency prevention and control. The Juvenile Justice Act also requires that the advisory group mandated by Section 223(a)(3) include representation of ". . . public agencies concerned with delinquency prevention or treatment such as . . . education . . . departments. . . ."

While it is clear that an elected local school board official is not an executive or legislative official of a general purpose government, such an official may qualify as a "local elected official" on the basis of being a ". . . representative of . . . public agencies maintaining programs to reduce and control crime." A local school board is a "public agency" under the definition of the term in Section 601(i) of the Crime Control Act.

In New York State, where this issue originated, members of the board of education are mandated by law to maintain special schools, training, and transportation for delinquent children (New York State Education Law, Section 2554, subdivisions 9 and 18). Assuming that this mandate is being carried out by local school board officials, the local board would be an agency maintaining programs specifically directed to reducing and controlling juvenile crime. Therefore, a member of such a locally elected school board could qualify under the established criterion as a "local elected official" as well as a representative of "public agencies maintaining programs to reduce and control crime."

Conclusion

An elected local school board official may be considered a "local elected official" on a Regional Supervisory Board for purposes of meeting the Section 203(a) requirement. However, the local school board must be an element within a general purpose political subdivision of the State and must maintain programs to reduce and control crime and delinquency in order for a member thereof to qualify as a "local elected official." Where a school board is not an element within a general purpose political subdivision of the State, the member cannot be considered a "local elected official." This would be the case where local school boards are not elected to serve within a general purpose political subdivision of the State or where the individual is a member of the State, rather than a local, board of education.

Legal Opinion No. 76-9—Minnesota Bill H. F. 1118—November 19, 1975

TO: LEAA Regional Administrator
Region V - Chicago

This is in response to a request for a formal opinion as to whether Minnesota Bill H. F. 1118 is consistent with the provisions of the Crime Control Act of 1973 (Public Law 93-83, 87 Stat. 197, Aug. 6, 1973, as amended by Public Law 93-415, 88 Stat. 1109, Sept. 7, 1974).

A review by this Office of the proposed legislation yields the following conclusions:

1. H. F. 1118 makes no provision for the placement on the State Criminal Justice Planning Agency (SPA) or the regional planning units (RPU's) of representatives of agencies related to the prevention and control of juvenile delinquency and community organizations directly related to delinquency prevention. Such representation is explicitly required by Section 203(a) of the act:

> The State planning agency and any regional planning units within the State shall, within their respective jurisdictions, be representative of the law enforcement and criminal justice agencies including agencies directly related to the prevention and control of juvenile delinquency, units of general local government, and public agencies maintaining programs to reduce and control crime, and shall include representatives of citizens, professional, and community organizations including organizations directly related to delinquency prevention.

2. There is possible noncompliance of Section 2, Subd. 2 of H. F. 1118, with the act. Section 203(a) of the act provides for gubernatorial control of the State planning agency:

> Sec. 203(a). A grant made under this part to a State shall be utilized by the State to establish and maintain a State planning agency. Such agency shall be created or designated by the chief executive of the State and shall be subject to his jurisdiction.

Section 2, Subd. 2 reads as follows:

> Subd. 2. (MEMBERSHIP). The commission shall be composed of the following members: *17* members appointed by the governor; *six* members appointed by the Senate committee on committees; *six* members appointed by the Speaker of the House of Representatives; and a member of *each* region and coordinating council to be appointed by the respective region or coordinating council. (Emphasis added.)

It is clear that if five or more regions or coordinating councils are created, the Governor would not have control of the State planning agency as required by the statute because he could not appoint a majority of the voting members of the board and the Governor's will could be overridden by a majority of nongubernatorial appointees. As such, H. F. 1118 is in direct violation of Section 203(a) of the act.

3. Section 2, Subd. 1 of H. F. 1118 requires that:

> The governor shall create in the executive branch of State government a commission on crime prevention and control. *The commission shall operate,* insofar as practicable and consistent *with state law, in accordance with the provisions of the Crime Control Act of 1973,* P.L. 93-83, 87 Stat. 197, and acts amendatory thereof in effect on March 31, 1975. (Emphasis added.)

However, it must be pointed out that the supremacy clause would require that *all* provisions of the act, as amended, be adhered to as a condition to funding eligibility, even if provisions are inconsistent with State law. Under the supremacy clause of the U.S. Constitution, State law must yield to the Federal statute where the Federal statute concerns conditions relevant to distribution or expenditure of Federal funds. (*King* v. *Smith,* 392 U.S. 309 (1968).)

4. Section 6, Subd. 2(d) of H. F. 1118 requires allocation of block action grants to the regions and coordinating councils. It also provides a computation formula to be used in such allocation.

> . . . regions and coordinating councils shall be allocated block action grants to implement action programs and projects. These action funds shall be computed equally on the basis of crime and population.

Both of those functions are, however, delegated by the act to the Minnesota State planning agency and to the Governor. The act clearly states in Sec. 303(a) that each comprehensive plan shall:

> (1) provide for the administration of such grants by the State planning agency;
> (2) provide that at least the per centum of Federal assistance granted to the State planning agency under this part for any fiscal year which corresponds to the per centum of the State and local law enforcement expenditures funded and expended in the immediately preceding fiscal year by units of general local government will be made available to such units or combinations of such units in the immediately following fiscal year for the development and implementation of programs and projects for the improvement of law enforcement and criminal justice, and that with respect to such programs or projects the State will provide in the aggregate not less than one-half of the non-Federal funding. Per centum determinations under this paragraph for law enforcement funding and expenditures for such immediately preceding fiscal year shall be based upon the most accurate and complete data available for such fiscal year or for the last fiscal year for which such data are available. The Administration shall have the authority to approve such determinations and to review the accuracy and completeness of such data . . . .

It is not possible, therefore, for the State legislature to preempt these functions and still remain consistent with the act. The act must govern the distribution method for LEAA funds as a condition for continued State eligibility. (*King* v. *Smith,* 392 U.S. 309 (1968).)

For the above reasons, it is the opinion of this Office that the proposed bill does not conform with the act.

Legal Opinion No. 76-10—(Number Not Used.)

Legal Opinion No. 76-11—Availability of Part B Funds to Georgia Large Cities and Counties—December 1, 1975

TO: LEAA Regional Administrator
Region IV - Atlanta

This is in response to your inquiry as to whether the Georgia State Criminal Justice Planning Agency (SPA) is able to make Part B planning funds available to the City of Atlanta, Fulton County, and De Kalb County, which are within the planning area covered by the Atlanta Regional Commission. This Office assumes that the City of Atlanta is a major city and Fulton County and De Kalb County are major counties as defined by LEAA guidelines.

It is the understanding of this Office that the Georgia Attorney General has taken the position, in a letter dated August 18, 1975, to the Georgia SPA, that:

> . . . Georgia law requires that the state planning agency grant LEAA planning grants directly to the metropolitan area planning commissions and does not permit the state planning agency to grant LEAA planning grants *directly* to local governments which lie within the standard metropolitan statistical area as defined by Ga. Laws 1971, p. 17.

Section 203(c) of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644, Public Law 93-83, and Public Law 93-415) provides in part that: "In allocating funds under this subsection, the State planning agency shall assure that major cities and counties within the State receive planning funds to develop comprehensive plans and coordinate functions at the local level." This provision was a Senate amendment to the Omnibus Crime Control and Safe Streets Act and was enacted in 1971. The legislative purpose of this provision was explained by Senator Roman L. Hruska on the floor of the Senate as follows:

> In addition the Senate amendments require that in allocating funds under this subsection, the State planning agency in each State shall assure that major cities and counties within the State receive planning funds to develop comprehensive plans and coordinate action programs at the local level. The purpose of this provision is to require that planning funds pass through beyond the regional planning level to major local population centers.
>
> This requirement may be modified where LEAA authorizes the waiver of the 40 percent pass through requirement. What constitutes a major city or county under the amendment is open for administrative determination by LEAA, but I anticipate that it would consist at a minimum of the cities and counties within the Standard Metropolitan Statistical Areas-SMSA. (116 Cong. Rec. S. 17535 (Oct. 8, 1970).)

In implementing the above provision of Section 203(c), LEAA has defined SPA responsibilities in LEAA Guideline Manual M 4100.1D, Appendix 2-4, Section 1, paragraph 1f, as follows:

> The State Planning Agency must make eligible governments directly aware of their eligibility and assure that planning funds are actually allocated to such governments.

> Award to or receipt of planning funds by a regional planning unit in which the eligible county or city is a member, or even the dominant member, will not satisfy the statutory requirement. *There must be an allocation of funds for direct utilization by the city or county, either from the State Planning Agency or through an appropriate Regional planning unit.* (Emphasis added.)

Consistent with Section 203(c), the SPA must assure that major cities and counties receive some Part B planning funds. Hence, the City of Atlanta, Fulton County, and De Kalb County must be given the opportunity to receive a portion of available Part B planning funds to develop local component plans which will be incorporated into the Atlanta Regional Commission plan. (116 Cong. Rec. S. 17547 (Oct. 8, 1970).) However, the Georgia SPA has two methods available, pursuant to Appendix 2-4 of LEAA Guideline Manual M 4100.1D, to provide planning funds to major cities and counties. The SPA may make an award directly to major cities and counties, or the SPA may make an award through a regional planning unit (RPU) to major cities and counties. In the latter method, the SPA should attach a special condition reflecting this requirement to the Part B planning fund award to the regional planning unit.

Georgia State law appears to have limited the Georgia SPA's choice of methods. According to the Georgia Attorney General, the Georgia SPA may not make *direct* awards to the City of Atlanta, Fulton County, and De Kalb County. The Georgia SPA may not be precluded from making *indirect* awards through the Atlanta Regional Commission. The use of this method would be consistent with Section 203(c) and may be consistent with Georgia State law. However, this Office will not attempt to interpret Georgia State law and recommends that the Georgia Attorney General be asked by the Georgia SPA whether this method of award is consistent with Georgia State law.

Legal Opinion No. 76-12—(Number Not Used.)

Legal Opinion No. 76-13—Fund Control and Title to Property Purchased with Part E Funds—January 15, 1976

TO: LEAA Regional Administrator
Region I - Boston

This is in response to your request for clarification of procedures that a State Criminal Justice Planning Agency (SPA) must establish in order to be in compliance with Section 453(2) of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644, by Public Law 93-83, and by Public Law 93-415, hereinafter the Crime Control Act).

Section 453 of Part E of the Crime Control Act requires that a State, to receive a block grant of Part E funds, meet certain plan requirements. Section 453(2) requires the following assurances:

> Sec. 453. The Administration is authorized to make a grant under this part to a State planning agency if the application incorporated in the comprehensive State plan–
>
> * * * * *
>
> (2) provides satisfactory assurances that the control of the funds and title to property derived therefrom shall be in a public agency for the uses and purposes provided in this part and that a public agency will administer those funds and that property . . . .

Congress did not address the specific procedures required to implement the assurances nor does LEAA Guideline M 4100.1D, March 21, 1975, Chap. 3, Par. 84c, p. 134, provide for specific procedures. The guideline explains the assurances as follows:

> (a) Title and control of funds may not be transferred to private agencies, profit-making or otherwise, even though these agencies may be utilized in the implementation of Part E efforts including the purchase of service.
> (b) Part E funds and property are not diverted to other than correctional uses.

Neither the guideline nor the Part E statutory provisions restrict private agency involvement in Part E program efforts to purchase of service contracts. This Office has determined, in Legal Opinion No. 75-38, April 9, 1975, that Part E funds may be subgranted by State planning agencies to private, nonprofit organizations. In such a case, however, the State planning agency must comply with the Section 453(2) assurances.

Control and Administration of Funds

LEAA Financial Guideline M 7100.1A–Chg. 1 requires State planning agencies to be responsible for all funds granted to the State. These guidelines establish sufficiently stringent standards to assure public agency control and administration of funds. State planning agency supervision and monitoring responsibility (M 7100.1A, Chap. 2) should not, however, be delegated by the State planning agency to other than another public agency.

In the ordinary situation, the SPA or local government will contract with the private agency and thereby purchase its services for purposes of the grant. The contracting governmental unit, and not the contract recipient, maintains fund control in this situation. In addition, the State planning agency may provide for prior approval of expenditures by private, nonprofit subgrantees; may fund by reimbursement rather than by advance funding; or may provide another form of financial control to assure proper control over subgrant funds in the possession of private, nonprofit agency grantees and to assure itself of proper usage in order to protect its financial liability.

Title to and Administration of Property

The State planning agency must provide assurances that title to real or personal property purchased with subgrant funds or acquired by a private agency in the performance of a contract remains in a public agency.

This will normally be accomplished through a grant condition or contract clause requiring that title to property purchased with Federal funds will be in the name of a public agency grantor or some other public agency designated or to be designated by the grantor.

If a private agency recipient of Part E funds wishes to obtain existing facilities or construct new facilities (real property), full title must be taken in the name of a public agency and ultimately revert to the public benefit. Office of General Counsel Legal Opinion No. 75-5, September 11, 1974, addresses the question of renovation of privately owned facilities with Part E funds. Use of Part E funds for that purpose is restricted to minor alterations or renovations.

Funds used to match Part E funds are not subject to the Section 453(2) assurances. If, because of termination or change of character of the private agency's operations, it is necessary for personal property purchased by a private agency recipient of Part E funds to be returned for public agency use, the proceeds must be divided at least in proportion to the Federal funds/non-Federal funds utilized in the project. State planning agencies should apply the total cost concept in making a division of such property with a private agency recipient of Part E funds.

Legal Opinion No. 76-14—Use of Juvenile Justice Act Funds to Support Projects Previously Funded with Crime Control Act Funds—January 5, 1976

TO: LEAA Regional Administrator
Region III - Philadelphia

This is in response to your request of October 9, 1975, for an opinion regarding the legality of a State's continuing to support a project originally funded with block grant funds under the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644, by Public Law 93-83, and by Public Law 93-415–hereinafter Crime Control Act), with formula grant funds under the Juvenile Justice and Delinquency Prevention Act of 1974 (Public Law 93-415–hereinafter Juvenile Justice Act).

The specific questions raised by the Virginia Division of Justice and Crime Prevention are as follows:

1. Is it permissible to fund a project with Juvenile Justice Act funds if that project has previously been funded with Crime Control Act funds, and is losing that funding because of a State's assumption-of-cost policy? (Assume that the project meets the criteria of the Juvenile Justice Act and the State plan.)

2. If the answer to question 1 is yes, does the State have the authority to make its own policy with regard to the above situation? (Assume that the supervisory board approves of the policy.)

The answer to the first question involves consideration of the assumption-of-cost provision of the Crime Control Act, the nonsupplantation provision of

the Juvenile Justice Act, and the juvenile-delinquency-related maintenance of effort provisions contained in both acts.

Section 303(a)(9) of the Crime Control Act states:

> Each such (comprehensive) plan shall –
> (9) demonstrate the willingness of the State and units of general local government to assume the costs of improvements funded under this part after a reasonable period of Federal assistance.

This requirement is discussed in detail in Office of General Counsel Legal Opinion No. 74-58, January 30, 1974. As that opinion makes clear, the assumption of cost provision requires "a good faith intent or attempt to obtain partial or full support of continuation projects" after a "reasonable time" (three or four years). Once a project has been funded with Part C funds, it is subject to this requirement. The same is true for Part E-funded projects through Section 453(10). Therefore, to satisfy this requirement, a State or unit of general local government grantee must attempt to obtain support for successful projects (after a reasonable time), whether continuation funding in the interim utilizes Crime Control Act funds, or whether Juvenile Justice Act funds have been substituted following initial Crime Control Act funding.

LEAA Guideline M 4100.1D, Par. 19j(3), March 21, 1975, requires that the State planning agency "Indicate the period of time the State generally will provide continuation support for specific classes of projects and provide separate justification in any cases where project support is provided for longer than four years." State assumption-of-cost "policy" is the result of this process. To continue to provide Federal funds to a project which is losing its eligibility for continuation funding would violate assurances set forth in the approved comprehensive plan, the guideline requirement, and the assumption-of-cost provision of the Crime Control Act.

Where a project remains eligible for continuation funding, there is no absolute statutory prohibition which would prohibit the substitution of Juvenile Justice Act funds. However, the assumption-of-cost provision would require that: (1) A "good faith" attempt be made to obtain partial or full support after a reasonable time; (2) any grant conditions that limit the Federal funding to a reasonable number of years be continued; and (3) any provisions for funding that provide the Federal share will decline by fixed amounts in future years be continued.

Another constraint on the substitution of Juvenile Justice Act funds for Crime Control Act funds is the Section 223(a)(19) State plan requirement of the Juvenile Justice Act. This "nonsupplantation" clause reads as follows:

> (The Juvenile Justice Act) plan must –
> (19) provide reasonable assurance that Federal funds made available under this part for any period will be so used as to supplement and increase (but not supplant), to the extent feasible and practical, the level of the State, local, and other non-Federal funds that would in the absence of such Federal funds be made available for the programs described in this part, and will in no event replace such State, local, and other non-Federal funds . . . .

This plan requirement strengthens the Crime Control Act assumption-of-cost provision. Unless a "good faith" attempt to obtain partial or full support for the project at the State or local level is demonstrated, the State will have failed to show that Juvenile Justice Act funds did not supplant State or local funds which would have otherwise been made available to support the continuation of the project. This result flows from the fact that the project was formerly funded from Crime Control Act funds and remains subject to the assumption-of-cost requirement. Further, the nonsupplantation requirement would necessitate that any project formerly funded with Crime Control Act funds utilize at least the same level of non-Federal funding (match). Otherwise, Juvenile Justice Act funds would be replacing available State, local, and other non-Federal funds. Therefore, the aggregate match from State, local, and other non-Federal funds for the particular project may in no event be less than that which was provided during the last year of Crime Control Act funding.

Both the Juvenile Justice Act (Section 261(b)) and the Crime Control Act (Section 520(b)) require that LEAA assure the maintenance of the 1972 level of expenditure for juvenile justice programs from Crime Control Act funds. The LEAA guideline implementing this requirement (M 4100.1D, Chg. 2, September 24, 1975) utilizes an "aggregate" basis to assure compliance with the maintenance requirement. This basis permits continuing State flexibility in planning for program priorities by not tying them to a mandatory level of juvenile program expenditures. However, to permit a wholesale transfer of programs or projects to funding under the Juvenile Justice Act would defeat one of the primary objectives of the maintenance requirement. The following statement by Senator Birch Bayh, made during floor debate on the Juvenile Justice Act, is illustrative:

> It is not merely a question of the total expenditure for delinquency programs. It is also vital that all States become involved in the effort so that there ceases to be such a tremendous disparity among the States on their approach to delinquency. (120 Cong. Rec., S. 13493, Daily Ed. July 25, 1974.)

In order to assure that this important congressional objective is met, both at the national level and at the State level, no State plan should be approved as comprehensive where:

- Juvenile-related programs or projects are transferred from funding under the Crime Control Act to funding under the Juvenile Justice Act; *and*
- The transfer of juvenile-related programs or projects will result in a decreased allocation of Crime Control Act funds for juvenile-related programs from the prior year's plan.

Finally, in answer to the second question, States are free to establish their own policy with regard to assumption of cost so long as such policy is consistent with the Crime Control Act, LEAA guidelines, and the opinions of this Office.

Conclusions

It is not permissible for a State to fund a project with Juvenile Justice Act funds when that project has lost eligibility for Crime Control Act funding

because of a State's assumption-of-cost policy formulated pursuant to the Crime Control Act and LEAA Guideline M 4100.1D, Par. 19j(3), March 21, 1975.

Crime Control Act projects which have not yet been funded for a "reasonable time" may be funded with Juvenile Justice Act funds but remain subject to "in place" assumption-of-cost commitments. Further, such projects, if funded with Juvenile Justice Act funds, are subject to the Juvenile Justice Act nonsupplantation requirement (Section 223(a) (19)).

A State which transfers programs or projects from Crime Control Act funding to Juvenile Justice Act funding must maintain at least its prior year's level of allocation of Crime Control Act funds for juvenile-related programs.

Legal Opinion No. 76-15—(Number Not Used.)

Legal Opinion No. 76-16—Eligibility of the Executive Security Division of the Maryland State Police to Receive LEAA Funds—December 29, 1975

TO: LEAA Regional Administrator
Region III - Philadelphia

Reference is made to your request for an opinion on the eligibility of the Executive Security Division of the Maryland State Police to receive LEAA funds in order to upgrade its communications system.

The issue to be resolved is whether the Executive Security Division, which is primarily responsible for providing security protection for the Governor and State legislature and is headquartered in the Governor's mansion, would be precluded from receiving Federal funds under the provisions of FMC Circular 74-4, Attachment B (34 C.F.R. Part 255, App. B (1975)) which state:

> 6. *Governor's expenses.* The salaries and expenses of the Office of the Governor of a State or the chief executive of a political subdivision are considered a cost of general State or local government and are unallowable.
>
> * * * * *
>
> 8. *Legislative expenses.* Salaries and other expenses of the State legislature or similar local governmental bodies such as county supervisors, city councils, school boards, etc., whether incurred for purposes of legislation or executive direction, are unallowable.

It is the understanding of this Office that the Executive Security Division is budgeted within the Maryland State Police. The protective functions of the division extend to the orderly operation of the General Assembly, to visiting Governors and other dignitaries, and to the security of elected State officials. When the Maryland General Assembly is in session, 14 members of the Maryland State Police are transferred from their field assignments to Annapolis to make up the legislative security detail and are under the responsibility of the Executive Security Division. The purpose of upgrading the communications system is to provide the necessary "on the street" coverage during any security and protection situation.

Since the functions of the Executive Security Division extend beyond the office of the Governor and are not budgeted by that office, nor by the State legislature, it is the opinion of this office that the Executive Security Division of the Maryland State Police is eligible to receive LEAA funds. GSA has responsibility for establishing principles and standards for determining costs applicable to grants and contracts with State and local governments. That agency has been contacted and concurs in this interpretation.

Legal Opinion No. 76-17—Power of National Institute of Juvenile Justice and Delinquency Prevention to Make Grants to Carry Out Statutory Functions—January 5, 1976

TO: Office of Juvenile Justice and Delinquency Prevention, LEAA

On December 1, 1975, this Office received an oral request from John Greacen for an opinion with regard to the statutory authority of the National Institute of Juvenile Justice and Delinquency Prevention (NIJJDP) to make grants to carry out its statutory functions.

The NIJJDP was established by Section 241(a) of the Juvenile Justice and Delinquency Prevention Act of 1974 (Public Law 93-415—hereinafter Juvenile Justice Act). Section 241(g) (4) provides the basic statutory authority to be utilized by the NIJJDP in carrying out its functions:

> (g) In addition to the other powers, express and implied, the Institute may—
>
> * * * * *
>
> (4) enter into contracts with public or private agencies, organizations, or individuals, for the partial performance of any functions of the Institute . . . .

There is no express reference in Section 241(g) to any power to make grants. While the responsibilities of the institute are extremely broad, no power to make grants may be implied based on administrative convenience to the Federal agency.

However, based on accepted rules of statutory construction, an absence of express statutory authority need not preclude a Federal agency from the power to make grants where an intent to grant such power can be demonstrated on examination of the legislative history of the authorizing legislation. The plain language of Section 241(g) would appear to authorize the NIJJDP to utilize only the contract mechanism. If the so-called "rule of literalness" were followed, it would end the inquiry. However, Sands, in the fourth edition of *Sutherland on Statutory Construction* states the following as a limitation on this rule:

> . . . it is clear that if the literal import of the text of an act is not consistent with the legislative intent . . . the words of the statute will be modified by the intention of the legislature. (Sutherland, *supra*, §46.07.)

Further, a number of judicial decisions support the proposition that, in proper circumstances, a departure from a literal reading of statutory language

may be necessary to effect the legislative purpose (see *Salt River Project Agricultural Improvement Power District* v. *Federal Power Commission,* 391 F. 2d 470 (D.C. Cir. 1968); *U.S.* v. *Alpers,* 338 U.S. 680 (1950); *U.S.* v. *Public Utilities Commission of California,* 345 U.S. 295 (1953)).

Research of the opinions of the Comptroller General has not revealed any decision which would prevent application in this case of the recognized exception to the "rule of literalness." In addition, the Comptroller General in 46 Comp. Gen. 556, 562 (Dec. 12, 1966) expresses support for the exception:

> Moreover, it has been judicially recognized that, in proper cases, it is permissible to supply omitted words in legislation if to do so would avoid absurd or *unintended results.* (Citations omitted; emphasis supplied.)

An examination of the legislative history of the Juvenile Justice Act clearly indicates that Congress intended the NIJJDP to possess the power to make grants. The omission of an express power to make grants was an unintended result of the legislative process. Consequently, this Office construes Section 241(g)(4) to give the institute the power to make grants to, as well as enter into contracts with, public or private agencies, organizations, or individuals.[1]

The additional powers set forth in Section 241(g)(1)-(5) of the Juvenile Justice Act were adopted, with minor changes, from Section 303(a)(1)-(5) of the House amendment (H.R. 15276). In the House committee report on H.R. 15276, the summary section of the report commented as follows on Section 303:

> Section 303. Powers–This section provides for the authority of the Institute not being transferred elsewhere without the specific consent of the Congress. This section also provides for interagency cooperation and collaboration, *contractual and grant authority,* and compensation of consultants. (Emphasis supplied.) (H.R. Rep. No. 1135, 93d Cong., 2d Sess. 16 (1974).)

This report language strongly indicates an intent by the committee to convey grant-making authority. There is no other legislative history in the House proceedings which sheds further light on the language used in Section 303(a) of the House amendment.

The Senate bill (S. 821) would have established an Office of Juvenile Justice and Delinquency Prevention (OJJDP) in LEAA through the addition of a new Part F to the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644, by Public Law 93-83, and by Public Law 93-415–hereinafter Crime Control Act). The NIJJDP, a part of the OJJDP, would have had the power to utilize both grants and contracts under the provisions of S. 821.

Section 471(b) of S. 821 provided as follows:

> The programs authorized in Part F (hereinafter referred to as "this part") . . . .

[1] In selecting the grant or contract mechanism, careful consideration should be given by the program office to the use of the more appropriate mechanism (see LEAA Handbook 1700.5, January 9, 1973).

Part F is thus referenced throughout the bill as "this part." Section 474(g) then authorizes the LEAA Administrator to utilize both grants and contracts in carrying out the purposes of Part F:

> (g) The Administrator is authorized to make grants to, or enter into contracts with, any public or private agency, institution, or individual to carry out the purposes of this Act.

S. 821 established the National Institute for Juvenile Justice in Title V of the bill through the addition of Sections 490-497 to Part F.

S. 821 set out functions of the institute that are similar to those in the House amendment. However, it did not go into as much detail or set forth explicit powers vis-a-vis other Federal agencies and State, municipal, or other public or private local agencies, as did the House amendment in Section 303(a)(1)-(3).

At conference, the conferees agreed to establish an independent bill rather than to add a new Part F to the Crime Control Act. This was done so that the House Committee on Education and Labor would retain oversight jurisdiction following enactment of the legislation. This agreement required that the House amendment's structure be retained. The conference report, however, indicates that the structural changes in the conference bill were not intended to change substantively provisions of S. 821:

> The Senate bill amended Title I of the Omnibus Crime Control and Safe Streets Act as amended while the House amendment established an independent bill. The conference substitute is an independent Act. It is not part of the Omnibus Crime Control and Safe Streets Act. It changes such Act to bring it into conformity with the Juvenile Justice and Delinquency Prevention Act. These conforming amendments represent no substantive changes from the Senate bill. (S. Rep. No. 1103, 93d Cong., 2d Sess. 39 (1974).)

The only House amendment provisions which had no "comparable" Senate provisions were those specific powers, mentioned earlier, which were granted in Section 303(a)(1)-(3) of the House amendment. It was apparently these powers that the conferees intended to carry forward in the conference bill.

It would be illogical to conclude that a power to make grants, which the legislative history indicates was intended by the House amendment and was clearly provided for in the Senate bill, would be removed at the conference level without comment. The conference report did make structural changes in the bill to make it independent, but it did not intend to make substantive changes from the Senate bill except where contrary House amendment provisions were adopted. Since no contrary House amendment provision was adopted which would otherwise have negated the reference in the Senate bill to the LEAA Administrator's power to utilize both grants and contracts, and since the House amendment provision subsequently adopted was intended to encompass both grants and contracts, this Office must conclude that the power to make grants and enter into contracts is within the scope of the Section 241(g) grant of powers to the NIJJDP.[2]

[2] It should be noted that the Grant Act, 42 U.S.C. §1891-93 (1958), provides supplemental authority for the use of the grant mechanism in support of basic scientific research conducted by the NIJJDP.

Legal Opinion No. 76-18—Eligibility of the American Association of Community and Junior Colleges to Receive Part D Section 406(e) Funds—January 7, 1976

TO: Director
LEAA Task Force on Criminal Justice Education and Training

This is in response to your request of November 11, 1975, for an opinion concerning the eligibility of American Association of Community and Junior Colleges (AACJC) to receive Section 406(e) funds to support a criminal justice workshop series to be held throughout the country during the summer of 1976. The target population is the directors and instructors of criminal justice courses at AACJC-member junior colleges. The AACJC is a nonprofit association of junior colleges with a membership of 1,100 schools.

Section 406(e) of Part D of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644, by Public Law 93-83, and by Public Law 93-415) provides statutory authority for the funding of certain educational activities in the criminal justice field:

> (e) The Administration is authorized to make grants to or enter into contracts with institutions of higher education, or combinations of such institutions, to assist them in planning, developing, strengthening, improving, or carrying out programs or projects for the development or demonstration of improved methods of law enforcement and criminal justice education, including—
>
> (1) planning for the development or expansion of undergraduate or graduate programs in law enforcement and criminal justice;
>
> (2) education and training of faculty members;
>
> (3) strengthening the law enforcement and criminal justice aspects of courses leading to an undergraduate, graduate, or professional degree; and
>
> (4) research into, and development of, methods of educating students or faculty, including the preparation of teaching materials and the planning of curriculums.

Thus, the criteria for applicant eligibility established by Section 406(e) are two-fold:

1. Applicants must be institutions of higher education or combinations of such institutions. Junior colleges are "institutions of higher education" as this term is defined in Section 601(j) of the act.

2. The purpose for which the funds are to be spent must be consistent with those included in Section 406(e)(1)-(4).

It is the opinion of this Office that the American Association of Community and Junior Colleges meets the first of the above criteria. The act does not define "combinations" of institutions of higher education. However, Section 601(e) defines a "combination" of States or units of general local government as ". . . any grouping or joining together to such States or units for the purpose of . . . (law enforcement planning)." Congress thus utilized the common meaning of a combination as a grouping or joining together to accomplish a particular purpose. Applying this definition to Section 406(e), it is apparent that the AACJC is an organization through which junior colleges join together (combine) to accomplish mutual goals and objectives. Educational programs and projects are one such objective of the association. Further, an organization

such as the AACJC is a most appropriate grantee to accomplish the planning and coordination needed to insure a maximum impact upon the target population.

The project is within the purposes of Section 406(e) in that it will provide criminal justice education and training to faculty members of institutions of higher education (Section 406(e)(2)).

For the foregoing reasons, it is the opinion of this Office that the AACJC is eligible to receive a Section 406(e) grant for the project outlined in your memorandum.

Legal Opinion No. 76-19—Pennsylvania Appropriation Bill for Part B Matching Funds—December 8, 1975

TO: LEAA Regional Administrator
Region III - Philadelphia

This is in response to your inquiry concerning a pending bill in the Pennsylvania legislature. It is the understanding of this Office that this bill would delete all funds for the administration and operation of the Pennsylvania Governor's Justice Commission. The Governor's Justice Commission is designated as the State Criminal Justice Planning Agency (SPA) under Section 203(a) of the Omnibus Crime Control and Safe Streets Act of 1968, as amended (Public Law 90-351, as amended by Public Law 91-644, by Public Law 93-83, and by Public Law 93-415) to administer funds received under that act on behalf of the State of Pennsylvania.

The report of the committee of conference on Pennsylvania House Bill No. 1333, starting on page 11, line 18, introductory paragraph, reads as follows:

> To the Department of Justice for salaries, wages, and all necessary expenses for the proper administration of the Department of Justice to be appropriated as follows:
>
> * * * * *
>
> Line 7, on page 12 [Governor's Justice Commission $495,000].

The effect of this supplemental appropriation bill, if enacted into law, would be to delete all Part B matching funds for the operation of the State planning agency. Section 204 of the act provides that:

> A Federal grant authorized under this part shall not exceed 90 per centum of the expenses incurred . . . . The non-Federal funding of such expenses, shall be of money appropriated in the aggregate by the State or units of general local government . . . .

Without statutorily mandated matching funds, the state of Pennsylvania would lose its eligibility for all Part B planning funds and would be in substantial noncompliance with the act. Under Section 509 of the act, LEAA would be forced to terminate all funding for Pennsylvania and Pennsylvania would be ineligible to participate in the LEAA program.

A number of consequences flow from this lack of eligibility. First, since the supplemental appropriation bill of Pennsylvania purports to discontinue the

entire fiscal year 1976 State appropriation, it is clear that funds previously awarded, based on the availability of the appropriated match, must now be viewed as unallowable costs against the grant. LEAA would, of necessity, be forced to initiate recovery action for all fiscal year 1976 planning funds expended from the 1976 planning grant which began on July 1975.

Second, without a State planning agency to administer and plan for Crime Control Act programs, the State would lose its eligibility for all Part C and Part E action grants. Section 302 of the act provides "Any State desiring to participate in the grant program under this part shall establish a State planning agency . . . ." Furthermore, LEAA guidelines implementing Part E of the act, issued pursuant to Section 452 and the specific wording of Section 453, providing authority for the administration "to make a grant under this part to the State planning agency if the application incorporated in the comprehensive State plan" meets certain requirements, could not be met.

In each instance, LEAA could not award statutory or guideline allocated funds to Pennsylvania. Part B funds which could not be awarded to Pennsylvania would have to be reallocated under Section 205 of the act "among the States." Part C funds would be available for reallocation under Section 305 for purposes of Section 306(a) which provides LEAA's discretionary grant-making authority. Part E funds would be reallocated in similar fashion.

Finally, should the bill be enacted into the law, LEAA would be forced to make a determination on all existing Part C and Part E action grants currently administered by the State planning agency. While speculative and subject to further consideration by the Administrator of LEAA, a number of options may be available for consideration on implementation of an orderly phase-out of preexisting LEAA funding in Pennsylvania. Among these options could be included a partial operation at the regional level based upon available regional matching funds. Such activity would require the concurrence and a minimal amount of participation by the State of Pennsylvania. Additional possibilities would include withdrawal of LEAA action funds from all ongoing activities or the execution of novation agreements with all current active subgrantees of the State of Pennsylvania and direct administration, through to termination, of all such grants by LEAA.

These options are not all inclusive and have been provided at your request, since the withdrawal possibility currently exists and consideration should be given to all potential effects of the proposed legislation.

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