U.S. Department of Justice
Office of the Inspector General
Evaluation and Inspections Division

Review of the Office of Justice Programs' Forensic Science Improvement Grant Program

December 2005

I-2006-002

EXECUTIVE SUMMARY

The Department of Justice Paul Coverdell Forensic Science Improvement Grant Program (Coverdell Grant Program) provides funds to state and local governments to improve the timeliness and quality of forensic science and medical examiner services and to eliminate backlogs in the analysis of forensic evidence. The National Institute of Justice (NIJ), under the legal and fiscal oversight of the Office of Justice Programs (OJP), plans to distribute almost $15 million in fiscal year (FY) 2005 Coverdell Grants.

The Office of the Inspector General (OIG) evaluated the FY 2005 Coverdell Grant Program Announcement and application review process. In particular, we focused on the new "external investigation certification" requirement, imposed by the Justice for All Act of 2004, which requires Coverdell Grant applicants to submit:

> A certification that a government entity exists and an appropriate process is in place to conduct independent external investigations into allegations of serious negligence or misconduct substantially affecting the integrity of the forensic results committed by employees or contractors of any forensic laboratory system, medical examiner's office, coroner's office, law enforcement storage facility, or medical facility in the State that will receive a portion of the grant amount.[1]

RESULTS IN BRIEF

NIJ did not enforce the external investigation certification requirement imposed by the Justice for All Act of 2004. We found that NIJ's FY 2005 Coverdell Grant Program Announcement did not give applicants necessary guidance. For example, in its announcement NIJ did not provide examples of the types of government entities and processes that could meet the certification requirement, did not direct applicants to provide the name of the government entity that would conduct investigations into allegations of serious negligence or misconduct, and did not require a letter from the named government

[1] "External investigation certification" is NIJ's term for the certification required by the Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Justice for All Act of 2004 (Pub. L. 108-405), codified at 42 U.S.C. § 3797k(4).

entity acknowledging its responsibility to conduct investigations. Without the name of the government entity responsible for conducting an independent external investigation, NIJ cannot evaluate the applicants' certifications or provide effective oversight of that portion of the Coverdell Grant Program.

NIJ did not provide necessary guidance to applicants in the FY 2005 Coverdell Grant Program Announcement.

NIJ did not provide applicants with guidance on what constitutes an independent external investigation in the FY 2005 Coverdell Grant Program Announcement. Prior to the publication of the announcement, NIJ received questions regarding the external investigation certification requirement from the OIG, potential grant applicants, and the Innocence Project but did not include necessary guidance in the announcement.[2] Those questions sought information regarding the types of government entities and processes that could satisfy the certification requirement imposed by the Justice for All Act of 2004. NIJ program managers and attorneys in OJP's Office of the General Counsel officials told us that they considered providing more guidance in the Coverdell Grant Program Announcement, but decided against it because the guidance would have to cover a wide variety of state and local government entities and investigation processes.

The principal shortcomings in the FY 2005 Coverdell Grant Program Announcement were NIJ's failure to provide examples of external investigation certifications and its failure to require applicants to name the government entity responsible for conducting the independent external investigation envisioned by the Justice for All Act of 2004. Further, when applicants sought clarification of the certification requirement in the announcement, NIJ still did not require them to name the government entity. In response to the announcement, 74 of the 223 applicants did not submit an external investigation certification, and 56 other applicants simply quoted the statutory language but did not provide the name of the government entity responsible for the investigations.

After NIJ's FY 2005 Coverdell Grant Program Announcement was published, the OIG reviewed the announcement and expressed concern

[2] The Innocence Project is a non-profit legal clinic and criminal justice reform organization that represents clients involved in cases in which DNA testing of evidence may yield conclusive proof of innocence.

to NIJ that the announcement did not provide applicants with sufficient guidance on what constitutes an independent external investigation for purposes of the certification. NIJ informed the OIG that it would not provide additional general guidance to all applicants but would respond to applicants' questions and request the information necessary to evaluate the certifications on a case-by-case basis.

NIJ did not request the information necessary to evaluate the applicants' external investigation certifications.

After the applications were received, however, NIJ decided *not* to respond to applicants' questions or request information on a case-by-case basis. Instead, in response to questions from applicants, NIJ provided eight examples of the types of government entities and processes that may or may not meet the external investigation certification requirement. NIJ directed all 223 applicants to review the 8 examples and to complete a re-certification form provided by NIJ. The form quoted the Justice for All Act of 2004 certification requirement and directed applicants to provide only the name of the applicant agency and the signature of a certifying official from the applicant agency. In response, 198 applicants submitted re-certification forms; 25 applicants did not re-certify and these applicants were not considered for Coverdell Grants.

Because NIJ still did not request the name of the government entity responsible for conducting external investigations, the 198 re-certification forms that the applicants submitted did not contain the information necessary for NIJ to evaluate the certifications. Of the 198 applicants who re-certified, 129 submitted the re-certification form as NIJ requested, and 69 submitted different information than that requested on the re-certification form. Nonetheless, NIJ approved all 198 grant applications.

After reviewing the external investigation certifications and re-certification forms submitted to NIJ, we concluded that, prior to approving the Coverdell Grant applications, NIJ should have required each applicant to name the government entity in its certification. Further, to address the confusion and clarify the requirements of the certifications and re-certifications, we believe that NIJ also should have considered requiring each applicant to provide a letter from the named government entity acknowledging its obligation to conduct the

independent external investigations envisioned by the Justice for All Act of 2004.[3] Yet, NIJ did not require any of that information.

CONCLUSION AND RECOMMENDATIONS

NIJ did not enforce the external investigation certification requirement imposed by the Justice for All Act of 2004 during the application process or exercise effective oversight of this aspect of the FY 2005 Coverdell Grant Program. The FY 2005 Coverdell Grant Program Announcement did not provide necessary guidance on how applicants could meet the external investigation certification requirement. The announcement also did not direct applicants to name the government entity with a process in place to conduct independent external investigations into allegations of serious negligence or misconduct under the grant.

We believe that Coverdell Grant Program Announcements must provide necessary guidance to applicants and request the information required for NIJ to evaluate the external investigation certifications and conduct effective oversight of the grants. To meet the requirements of the Justice for All Act of 2004, we recommend that OJP, as part of its oversight of NIJ:

1. Require that all Coverdell Grant Program Announcements contain guidance on what constitutes an independent external investigation and examples of government entities and processes that could satisfy the certification requirement.

2. Require that each Coverdell Grant applicant, prior to receiving funds, provide the name of the government entity with a process in place to conduct independent external investigations into allegations of serious negligence or misconduct.

3. Consider requiring each Coverdell Grant applicant, prior to receiving funds, to submit a letter from the government entity that will conduct independent external investigations acknowledging that the entity has the authority and process to investigate allegations of serious negligence or misconduct.

[3] *NIJ Guidelines: How to Submit Applications* includes a requirement for grant applicants to submit letters of cooperation and support or administrative agreements from organizations with a significant responsibility under the grant.

TABLE OF CONTENTS

BACKGROUND 1
PURPOSE, SCOPE, AND METHODOLOGY 6
RESULTS OF THE REVIEW 7
CONCLUSION AND RECOMMENDATIONS 15
APPENDIX I 16
APPENDIX II 17
APPENDIX III 24

BACKGROUND

The Office of Justice Programs (OJP) is responsible for developing programs to increase the nation's capacity to prevent and control crime, improve the criminal and juvenile justice systems, increase knowledge about crime and related issues, and assist victims of crime. Led by an Assistant Attorney General, OJP is divided into five bureaus that provide training, collect and disseminate crime statistics, support technology development and research, and administer Department grants.[4] In fiscal year (FY) 2004, OJP and its bureaus awarded 4,333 grants totaling more than $3.7 billion to state and local agencies to assist with criminal justice activities.[5] To ensure the legal and fiscal responsibility of the Department's grant programs, OJP's Office of the General Counsel, Office of the Comptroller, and the Office of Budget and Management Services provide legal and fiscal advice to all five of OJP's bureaus.

The National Institute of Justice (NIJ) is one of OJP's five bureaus. NIJ is the Department of Justice's (Department) primary research, development, and evaluation agency. NIJ also awards grants to educational institutions, public agencies, non-profit and faith-based organizations, individuals, and certain for-profit organizations to conduct independent research on crime control and justice issues. Some of NIJ's major programs include social science research and evaluation, technology development, forensic laboratory capacity development, technology assistance for state and local public safety agencies, and dissemination of information. In FY 2004, NIJ awarded 506 grants totaling approximately $300 million.

NIJ Grant Process

NIJ solicits grant applications by releasing grant announcements on its web site or publishing them in the *Federal Register*. Grant announcements contain the program and eligibility description, application deadline, instructions for applying, and list of required documents. Applicants are required to submit their applications through an automated, online system called the Grants Management System, operated by OJP. Applicants must provide certain information with

[4] The five OJP bureaus are the National Institute of Justice, the Bureau of Justice Assistance, the Bureau of Justice Statistics, the Office of Juvenile Justice and Delinquency Prevention, and the Office for Victims of Crime.

[5] See *Office of Justice Programs Resource Guide, Fiscal Year 2005 Edition.*

grant applications, including a detailed program narrative and abstract describing the purpose, goals, and objectives of the project to be funded; a budget detail worksheet and narrative; and several standard forms. In addition to these general documents, applicants must submit any information required by the particular grant for which they are applying.

NIJ's grant announcements may also require that applicants make certain assurances in their applications by certifying that they have taken or will take certain actions and will comply with all applicable federal statutes and regulations during the period covered by the grant. In its publication, *NIJ Guidelines: How to Submit Applications* (NIJ Guidelines), NIJ provides general instructions and a checklist for completing grant applications in response to grant announcements.

NIJ may also request that applicants provide additional information to ensure that the application is accurate and that all certifications are factually correct. If an applicant provides all requested information and qualifies, the NIJ grant program manager forwards the application to the NIJ Director for approval. If the NIJ Director approves an application, OJP's Office of the Comptroller and other OJP offices review the application. The Assistant Attorney General for the Office of Justice Programs' signature is required before grant funds are paid.

Coverdell Grants

The Paul Coverdell Forensic Science Improvement Grant Program (Coverdell Grant Program), administered by NIJ, provides funds to state and local governments to improve the timeliness and quality of forensic science and medical examiner services.[6] The Coverdell Grant Program is intended to assist state and local governments in eliminating backlogs in analyzing forensic evidence, including controlled substances, firearms examinations, forensic pathology, latent prints, questioned documents, toxicology, and trace evidence, and to improve the quality and reliability of forensic laboratory results.

Studies and investigations funded by the Department, state and local governments, and non-profit groups have identified backlogs in processing forensic evidence at state and local crime laboratories and have uncovered incidents of negligence and misconduct by laboratory

[6] NIJ defines "state" or "states" to include the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, American Samoa, Guam, and the Commonwealth of the Northern Mariana Islands. For certain purposes, American Samoa and the Northern Mariana Islands are treated as one state.

employees and contractors in several states. For example, a Bureau of Justice Statistics study of the 50 largest crime laboratories found that at the end of 2002, these laboratories had a backlog of approximately 270,000 requests for forensic services, which represented a 132-percent increase from the beginning of 2002.[7] In addition to these backlogs, several investigations have identified instances of negligence and misconduct in the processing of criminal evidence, such as DNA evidence, in at least four different forensic crime laboratories. In another example, a 2005 investigation of the Houston Police Department Crime Laboratory found that two laboratory analysts engaged in multiple incidents of scientific fraud for which they were not properly disciplined.[8]

Prior to October 30, 2004, the Omnibus Crime Control and Safe Streets Act of 1968 required Coverdell Grant applicants to certify that: (1) they have developed a consolidated state plan for forensic science laboratories and a description of how the grant will be used to carry out that plan; (2) any forensic science laboratory system, medical examiner's office, or coroner's office that will receive some of the grant money uses generally accepted laboratory practices and procedures established by accrediting organizations; and (3) the amount of the grant used to construct a new facility will not exceed the specified limitations.

FY 2005 Coverdell Grant Announcement and Application Review

On October 30, 2004, Coverdell Grants became subject to a new certification requirement. The Justice for All Act of 2004 amended the Omnibus Crime Control and Safe Streets Act of 1968 to require a fourth certification from all state or local government applicants for Coverdell Grants. In addition to the first three certifications described above, applicants must now provide:

> A certification that a government entity exists and an appropriate process is in place to conduct independent external investigations into allegations of serious negligence or misconduct substantially affecting the integrity of the forensic results committed by employees or contractors of any forensic laboratory system, medical examiner's office, coroner's office, law enforcement storage facility, or medical

[7] See *50 Largest Crime Labs, 2002 (Census of Publicly Funded Forensic Crime Laboratories)*, Bureau of Justice Statistics Fact Sheet, September 2004.

[8] See *Third Report of the Independent Investigator for the Houston Police Department Crime Laboratory and Property Room,* June 30, 2005.

> facility in the State that will receive a portion of the grant amount.[9]

During the Attorney General's confirmation hearing on January 6, 2005, Senate Judiciary Committee members asked two questions about the new Justice for All Act of 2004 certification requirement. The Attorney General was asked if he would "rigorously enforce" the new certification requirement. The Attorney General responded that if confirmed, under his direction the Department would "rigorously enforce the certification provision added by the Justice for All Act."

The Attorney General was then asked how the Department would require timely certification for states applying for FY 2005 Coverdell Grant funds. The Attorney General responded as follows:

> If confirmed, I will direct the NIJ to ensure that all applicants for [Coverdell] grant funds comply with this certification requirement. States that fail to provide this certification as part of the grant application process will be denied funding.[10]

In January 2005 representatives of the Innocence Project expressed concerns regarding the external investigation certification and Coverdell Grant applicants' ability to certify.[11] Based on these concerns, we asked NIJ how it planned to enforce the new certification requirement. After NIJ discussed the matter with OJP's Office of the General Counsel, NIJ provided us with a plan to enforce the certification requirement on April 13, 2005. NIJ planned to notify applicants of the requirement, direct applicants to submit a certification as an appendix to their applications, and deny funding to any applicant that failed to provide the certification. NIJ notified applicants of the certification requirement in the April 21, 2005, Coverdell Grant Program Announcement, which established an application due date of May 24, 2005.

---

[9] The Omnibus Crime Control and Safe Streets Act of 1968, as amended by the Justice for All Act of 2004 (Pub. L. 108-405), codified at 42 U.S.C. § 3797k(4).

[10] *Confirmation Hearing on the Nomination of Alberto R. Gonzales to be Attorney General of the United States*, United States Senate, January 6, 2005, p. 184 (Questions and Answers).

[11] The Innocence Project is a non-profit legal clinic and criminal justice reform organization that represents clients involved in cases in which DNA testing of evidence may yield conclusive proof of innocence.

On May 12, 2005, the OIG sent a memorandum to the NIJ Director expressing concerns about the announcement and the external investigation certification. On May 27, 2005, NIJ met with the OIG to discuss our concerns that the announcement may not have provided sufficient guidance to applicants on the required external investigation certification or requested sufficient information from applicants for NIJ to evaluate the certifications.

On June 30, 2005, NIJ notified all the FY 2005 Coverdell applicants via e-mail that the certifications they initially submitted would not be considered and that they were required to re-certify. The June 30, 2005, e-mail contained a re-certification package which included examples of external investigation certifications and a re-certification form prepared by NIJ. The re-certification form quoted the Justice for All Act of 2004 certification language and required the name of the applicant agency and the signature of a certifying official from the applicant agency (see Appendix I). NIJ instructed all applicants to submit the signed re-certification forms online, through the Grants Management System, by July 20, 2005. NIJ began reviewing the applications and re-certification forms on July 21, 2005, and approved or disapproved the grant applications, depending on the adequacy and completeness of the applications. NIJ forwarded the approved grant applications to OJP with a recommendation that they be considered for funding.

PURPOSE, SCOPE, AND METHODOLOGY

Purpose

The Office of the Inspector General (OIG) evaluated NIJ's implementation of the requirement in the Justice for All Act of 2004 that Coverdell Grant applicants must certify that a government entity exists and an appropriate process is in place to conduct independent external investigations into allegations of serious negligence or misconduct. NIJ refers to this requirement as the "external investigation certification."

Scope

The scope of this report is the development of the FY 2005 Coverdell Grant Program Announcement and the application review process. The report focuses specifically on the external investigation certification requirement of the Justice for All Act of 2004.

Methodology

Interviews. We interviewed the former Principal Deputy Assistant Attorney General, the OJP General Counsel and two attorneys in the Office of the General Counsel who provided oversight and advice during the FY 2005 Coverdell Grant application process. We interviewed three representatives of the OJP's Office of the Comptroller who reviewed Coverdell Grant applications. We also interviewed the NIJ Director and the managers responsible for the announcement and application review process. We interviewed representatives from the Innocence Project regarding the announcement and application review process.

Document review. We reviewed NIJ and OJP documents, including various NIJ grant announcements; NIJ's *Guidelines: How to Submit Applications;* the *OJP Financial Guide 2005;* the *OJP Post-Award Instructions*; relevant statutes and regulations; congressional testimony; articles and reports on problems identified with forensic laboratories; and information contained on NIJ's web site. We also reviewed NIJ and OJP e-mails, letters, and memoranda documenting the development of the FY 2005 Coverdell Grant Program Announcement, including questions applicants asked NIJ about the external investigation certification requirement. To evaluate the certifications, we reviewed the FY 2005 Coverdell Grant Program Announcement and all 223 applications submitted in response to the announcement.

RESULTS OF THE REVIEW

In FY 2005, NIJ did not enforce the external investigation certification requirement of the Justice for All Act of 2004 or exercise effective oversight of the Coverdell Grant Program. Specifically, the FY 2005 Coverdell Grant Program Announcement did not provide applicants with necessary guidance for meeting the external investigation certification requirement. NIJ was aware of the shortcomings in the announcement but failed to correct them. The lack of guidance in the Coverdell Grant Program Announcement resulted in a variety of inadequate external investigation certifications.

NIJ did not provide necessary guidance to applicants in its FY 2005 Coverdell Grant Program Announcement.

The FY 2005 Coverdell Grant Program Announcement did not provide adequate guidance to potential applicants on how to meet the external investigation certification requirement. The announcement did not provide examples of the types of government entities and processes that could meet the certification, or specify a particular format for submitting the certification, such as a standard form, template letter, or narrative description. Rather, NIJ simply informed potential applicants that a certification was required by statute. The announcement also did not require applicants to provide a statement naming the government entity with a process in place to conduct the independent external investigation required by the Justice for All Act of 2004. Because the Department relies on applicants' statements in the grant application process, it is important that the applicants' certifications contain information necessary to evaluate the validity of the certification and to support sanctions if applicants' certifications are later determined to be false. We believe that with regard to the external investigation certification, the name of the government entity responsible for conducting the investigations is necessary to evaluate the certification and impose sanctions if the certification is later shown to be false.

We asked NIJ why the FY 2005 Coverdell Grant Program Announcement did not require applicants to provide the name of the government entity as part of the external investigation certification. NIJ responded that it is the applicants' responsibility to decide whether they can meet the certification requirement and that NIJ would accept the

applicants' certifications without requiring them to provide the name or other information identifying the government entity responsible for conducting independent external investigations. We asked OJP's General Counsel whether it would have been reasonable to require applicants to provide a statement naming the government entity. The General Counsel agreed that it would be reasonable to request that applicants provide the name of the government entity.

NIJ was aware of the shortcomings in the FY 2005 Coverdell Grant Program Announcement but failed to correct them.

Prior to the publication of the FY 2005 Coverdell Grant Program Announcement, NIJ received inquiries from potential applicants and representatives from the Innocence Project on the external investigation certification. In February 2005, representatives from the Innocence Project and NIJ attended a panel discussion at the annual meeting of the American Academy of Forensic Sciences. The panel discussion covered the requirements of the external investigation certification, the types of government entities that will oversee the investigations, the parameters of the investigations, and the effect on other quality assurance program obligations.

Innocence Project representatives also expressed concerns regarding the implementation of the certification requirement. Specifically, Innocence Project representatives expressed the need for Coverdell applicants to receive guidance on *what constitutes* an adequate external investigation certification. Beginning in February 2005, the OIG encouraged NIJ to provide guidance to potential applicants on the external investigation certification and to seek advice from other Department components and external organizations on how to administer the external investigation certification requirement effectively.

Rather than provide guidance on what constitutes an adequate certification, OJP's Office of the General Counsel and NIJ quoted the legislative language for the certification requirement in the announcement. NIJ stated it would respond to applicants' specific questions about the external investigation certification requirement (such as whether or not a particular process might be appropriate) on a case-by-case basis after consulting OJP's Office of the General Counsel. NIJ informed the OIG of this decision and its plan of action on April 13, 2005, and published the announcement on April 21, 2005.

After the publication of the announcement, representatives from some of the applicant agencies and other state and local government officials questioned NIJ about the form and content of the external

investigation certification. Representatives from at least five applicant agencies requested clarification from NIJ on whether their agencies' structure would permit them to certify that a government entity existed and a process was in place to conduct the required independent external investigation. NIJ staff forwarded these questions to OJP's Office of the General Counsel. According to attorneys in the Office of the General Counsel, they provided informal guidance to applicants, without dispensing legal advice, regarding the criteria to determine whether a government entity existed and whether an appropriate process was in place to conduct the required independent external investigations. OJP's Office of the General Counsel did not record the informal guidance it provided to Coverdell Grant applicants.

We asked the attorneys in OJP's Office of the General Counsel how they evaluated the information the applicants provided. They responded that they did not tell applicants whether they could legally make the external investigation certification because it is the applicant's responsibility to certify that a process is in place to conduct the required investigations, and OJP's Office of the General Counsel is not permitted to provide legal advice to applicants. According to attorneys in OJP's Office of the General Counsel, they told applicants that the certification does not require that the applicant agency be directly responsible for conducting the investigations itself; rather, applicants are only responsible for certifying that a government entity exists and an appropriate process is in place to conduct independent external investigations. Attorneys in OJP's Office of the General Counsel stated that if there were any doubts about the validity of a certification, it would be NIJ's responsibility to obtain additional information from the applicants.

On May 12, 2005, the OIG wrote to the NIJ Director, expressing concerns about the announcement and the external investigation certification. The OIG memorandum stated:

> We believe that the NIJ will not have the information necessary to evaluate the applications and to exercise effective oversight over the certification requirement. We also believe that grantees have not been given sufficient guidance as to what constitutes an independent external investigation.

However, NIJ did not provide additional guidance as to what constituted an appropriate process to conduct independent external investigations before the application period closed. Instead, NIJ directed the five applicants that asked specific questions to submit their

applications – in order to meet the May 24, 2005, application deadline – without the external investigation certifications. OJP's Office of the General Counsel recommended to NIJ that it flag these five applications and ensure that the applicants submitted the external investigation certifications before their applications were approved.

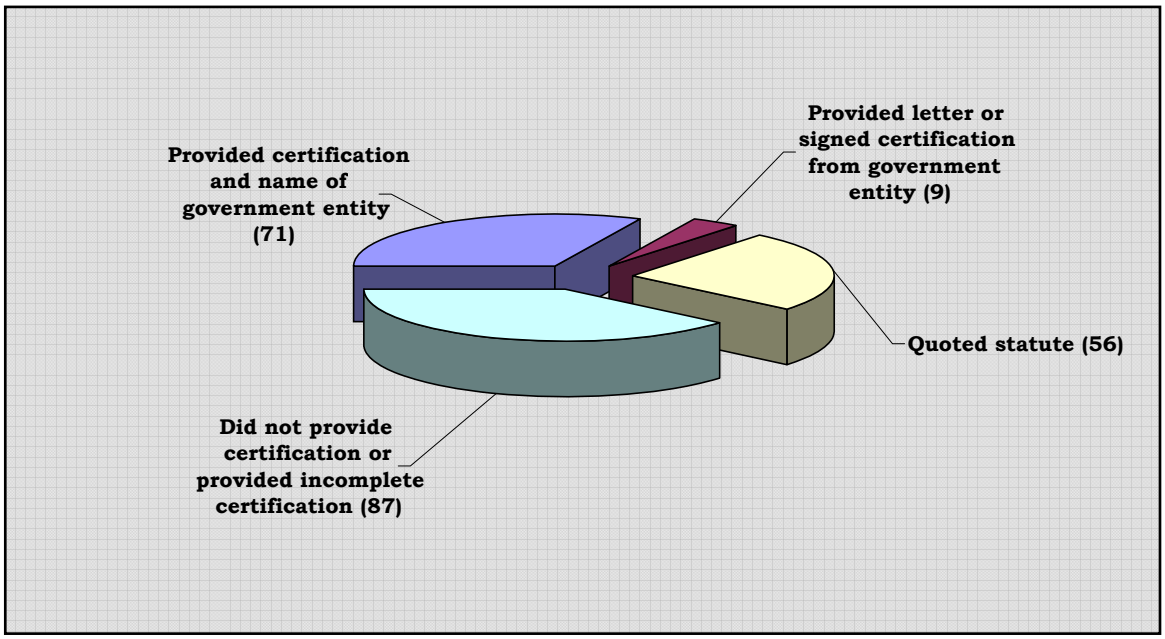
OIG representatives met with NIJ on May 27, 2005. The OIG expressed continued concern that NIJ would not have the information necessary to evaluate the external investigation certification requirement in the applications and to exercise effective oversight over that requirement. However, NIJ did not revise and reissue the FY 2005 Coverdell Grant Program Announcement to include guidance or collect additional information from individual applicants on a case-by-case basis.

The lack of guidance in the Coverdell Grant Program Announcement and NIJ's response to the applicants' questions resulted in inadequate certifications.

The OIG reviewed the external investigation certifications in all 223 FY 2005 Coverdell applications. We found that 87 applicants did not submit any external investigation certification or submitted incomplete certifications.[12] Another 56 applicants quoted the Justice for All Act of 2004 but did not provide the name of the government entity that would conduct the independent external investigations (Chart 1, next page). OJP's Office of the General Counsel told us that NIJ did not request that they review the 149 applications that contained external investigation certifications to determine the legal adequacy of the certification. Consequently, OJP's Office of the General Counsel told us it was unaware that some of the initial certifications did not contain the information required by statute.

[12] The 13 incomplete certifications were submitted by 8 applicants who certified that a process was in place but did not name entity other than themselves; 4 applicants who certified the existence of more than 1 government entity, but did not certify that any processes were in place; and 1 applicant who certified that it would collect certifications from grant recipients prior to distributing funds.

Chart 1: Types of External Investigation Certifications Submitted by the 223 FY 2005 Coverdell Applicants



Source: OIG analysis of FY 2005 Coverdell applications received by NIJ

We believe the inadequate certifications were caused by NIJ's failure to provide adequate guidance to applicants and to request, in the Coverdell Grant Program Announcement, a statement from the applicants containing the name of the government entity responsible for conducting the independent external investigation envisioned by the Justice for All Act of 2004. Providing the name of the government entity would not be an undue burden on applicants; more than half (80 of 149) of the applicants who submitted external investigation certifications named the government entity responsible for conducting independent external investigations or provided a letter from the government entity even though they were not required to do so.

After the FY 2005 Coverdell Grant applications were received, NIJ provided additional guidance but directed applicants to complete a re-certification form that did not request the information necessary for NIJ to evaluate the applicants' external investigation certifications.

NIJ's re-certification form did not provide specific guidance to applicants.

After receiving these applications, NIJ decided to provide general guidance and require all applicants to complete a re-certification form. NIJ disseminated the form as part of a re-certification package it provided to all 223 applicants via e-mail on June 30, 2005. In addition to the re-certification form, NIJ provided applicants with guidance to assist them in determining whether they could properly make the certification. The guidance contained eight factual examples of government entities and processes under which an external investigation certification might or might not be appropriate. NIJ instructed applicants to review the statutory requirements and the eight examples to determine whether they could properly make the external certification. If, after reviewing the information, an applicant determined that it could certify, an appropriate official for the applicant agency was to simply sign the re-certification form.

As shown in Appendix I, the re-certification form only required the name of the applicant agency and a signature from the applicant agency's certifying official. NIJ stated that the certifying official must be both familiar with the requirements of the certification and have the authority to make such a certification on behalf of the applicants. NIJ told applicants *not* to submit specific documentation on the government entity or process that they had in place for conducting investigations. Applicants were to submit the signed re-certification forms by July 20, 2005.

The re-certification forms did not require applicants to submit the information necessary to evaluate the applicants' certifications.

While NIJ's re-certification effort finally provided some guidance to applicants as to what constituted a government entity with an appropriate process in place to conduct independent external investigations, the re-certification process was still flawed. The re-certification form NIJ instructed applicants to submit did not require them to name the government entity that would conduct independent external investigations. It also did not provide any evidence that the

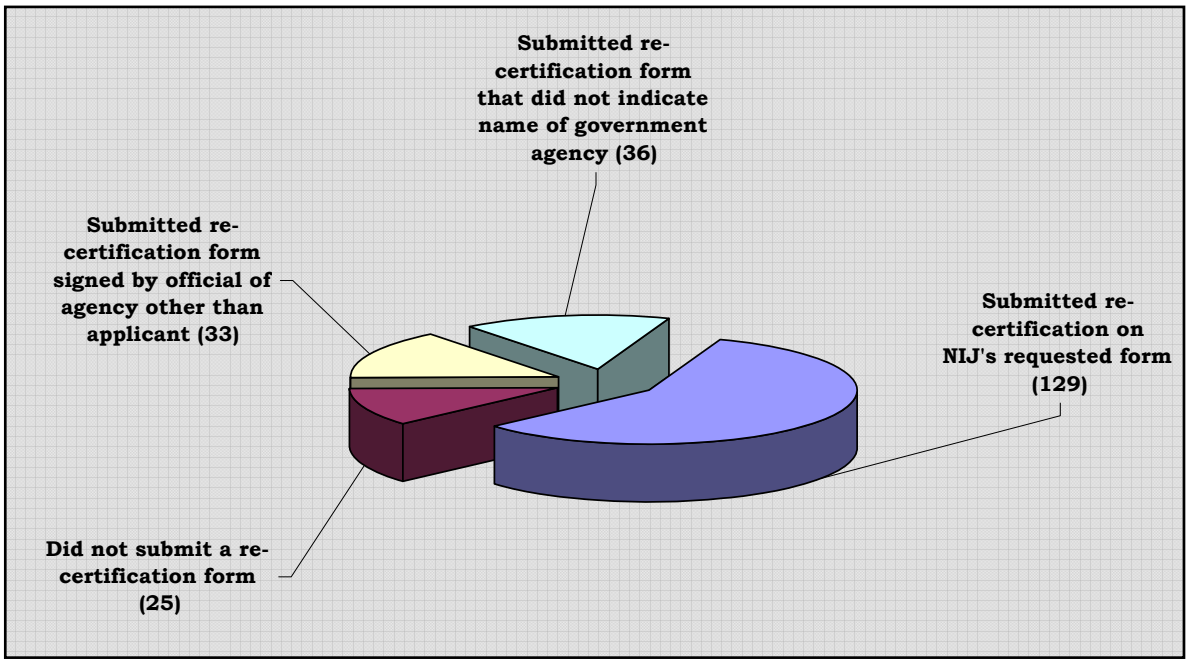
government entity acknowledged its responsibility, under the Justice for All Act of 2004, to investigate allegations of serious negligence or misconduct by the grant recipient.

Rather than requiring re-certification forms, we believe that after NIJ received the applications containing inadequate certifications, NIJ should have required all applicants to name the government entity in the certification. We also believe that NIJ should have considered whether to require applicants to provide a letter from that entity acknowledging its responsibility to investigate allegations of serious negligence or misconduct. NIJ's Guidelines include a requirement for grant applicants to submit letters of cooperation and support or administrative agreements from organizations with a significant responsibility under the grant.[13] NIJ has required such letters in two other grant announcements: the Forensic Casework DNA Backlog Reduction Program (FY 2005) and the Convicted Offender DNA Backlog Reduction Program (FY 2005).

Because of NIJ's failure to require this information, none of the re-certification forms submitted by the applicants contained the information necessary for NIJ to evaluate the external investigation certifications. Of the 223 applicants, 25 did not re-certify. Of the 198 applicants that re-certified, 129 submitted the re-certification form that NIJ requested, 33 submitted certifications signed by an official of an agency other than the applicant, and 36 submitted forms that did not clearly indicate the name of the government agency submitting the certification (Chart 2, next page). However, NIJ approved all 198 grant applications.

[13] See *National Institute of Justice Guidelines: How to Submit Applications*, March 2005, p. 16.

Chart 2: Types of Re-certifications Submitted by the 223 FY 2005 Coverdell Applicants



Source: OIG analysis of FY 2005 Coverdell re-certification forms received by NIJ

In fact, in some cases, NIJ's re-certification form gathered less information than some applicants were willing to supply voluntarily. We found that 51 applicants that named the government entity on their original certifications did *not* do so on their re-certification forms. We also determined that NIJ did not ask OJP's Office of the General Counsel to review the applicants' re-certification forms; OJP's Office of the General Counsel was therefore unaware that some of the re-certification forms did not contain the name of the applicant agency that NIJ requested, or that some were not signed by an appropriate official of the applicant agency.

Rather than relying on a form, we believe that adopting the practice of requiring Coverdell Grant applicants to submit a letter from the government entity responsible for conducting the independent external investigations could: (1) reduce applicants' confusion over their ability to submit the certification, (2) produce a greater number of complete certifications, and (3) increase NIJ's and OJP's ability to evaluate the applicants' certifications.

CONCLUSION AND RECOMMENDATIONS

NIJ did not enforce the external investigation certification requirement imposed by the Justice for All Act of 2004 during the application process or exercise effective oversight of this aspect of the FY 2005 Coverdell Grant Program. The FY 2005 Coverdell Grant Program Announcement did not provide necessary guidance on how applicants could meet the external investigation certification requirement. The announcement also did not direct applicants to name the government entity with a process in place to conduct independent external investigations into allegations of serious negligence or misconduct under the grant.

We believe that Coverdell Grant Program Announcements must provide necessary guidance to applicants and request the information required for NIJ to evaluate the external investigation certifications and conduct effective oversight of the grants. To meet the requirements of the Justice for All Act of 2004, we recommend that OJP, as part of its oversight of NIJ:

1. Require that all Coverdell Grant Program Announcements contain guidance on what constitutes an independent external investigation and examples of government entities and processes that could satisfy the certification requirement.

2. Require that each Coverdell Grant applicant, prior to receiving funds, provide the name of the government entity with a process in place to conduct independent external investigations into allegations of serious negligence or misconduct.

3. Consider requiring each Coverdell Grant applicant, prior to receiving funds, to submit a letter from the government entity that will conduct independent external investigations acknowledging that the entity has the authority and process to investigate allegations of serious negligence or misconduct.

APPENDIX I: FY 2005 COVERDELL GRANT APPLICATION RE-CERTIFICATION FORM

Paul Coverdell Forensic Science Improvement Grant Program Certification

I, (certifying official name and title), certify that a government entity exists and an appropriate process is in place to conduct independent external investigations into allegations of serious negligence or misconduct substantially affecting the integrity of the forensic results committed by employees or contractors of any forensic laboratory system, medical examiner's office, coroner's office, law enforcement storage facility, or medical facility in the State that will receive a portion of the grant amount.

_____ _____

Signature of Certifying Official Date

_____ _____

Applicant Telephone Number

APPENDIX II: OFFICE OF JUSTICE PROGRAMS' RESPONSE

U.S. Department of Justice

Office of Justice Programs

Office of the Assistant Attorney General

Washington, D.C. 20531

NOV 04 2005

MEMORANDUM TO: Paul A. Price
Assistant Inspector General for Evaluation and Inspections

FROM: Bud McGarry for
Regina B. Schofield
Assistant Attorney General

SUBJECT: Draft Audit Report on Review of Office of Justice Programs' Forensic Science Improvement Grant Program, Assignment Number A-2005-010

This memorandum responds to the Office of the Inspector General's (OIG's) draft audit report issued on October 13, 2005, regarding the review of the Office of Justice Programs' (OJP) Paul Coverdell Forensic Science Improvement Grant Program. The OIG evaluated the Fiscal Year (FY) 2005 National Institute of Justice (NIJ) Coverdell Grant Program Announcement and application review process. In particular, the OIG focused on the new "external investigation certification" requirement established by section 311(b)(3) of the Justice for All Act of 2004, which amended section 2802 of the Omnibus Crime Control and Safe Streets Act of 1968 to add a requirement that States or units of local government requesting Coverdell grants submit a certification that:

> . . . a government entity exists and an appropriate process is in place to conduct independent external investigations into allegations of serious negligence or misconduct substantially affecting the integrity of the forensic results committed by employees or contractors of any forensic laboratory system, medical examiner's office, coroner's office, law enforcement storage facility, or medical facility in the State that will receive a portion of the grant amount.
> 42 U.S.C. § 3797k(4).

In the "Conclusions and Recommendations" section, the Draft Report asserts that *"NIJ did not enforce the external investigation certification requirement imposed by the Justice for All Act of 2004 during the application process or exercise effective oversight of this aspect of the FY 2005 Coverdell Grant Program."* The OJP does not agree with this assertion, which constitutes the basis for the Draft Report. As discussed below, the certification required by section

3797k(4) was the exact certification that NIJ (acting on the advice of OJP counsel) required its Coverdell applicants to submit.

In order to receive funding, NIJ required[1] applicants to submit a certification that:

> . . . a government entity exists and an appropriate process is in place to conduct independent external investigations into allegations of serious negligence or misconduct substantially affecting the integrity of the forensic results committed by employees or contractors of any forensic laboratory system, medical examiner's office, coroner's office, law enforcement storage facility, or medical facility in the State that will receive a portion of the grant amount.

In requiring this certification from applicants, NIJ required them to provide no more and no less than what section 3797k(4) requires. Although the Draft Report fails to mention it, NIJ did not fund seven applications for the competitive portion of the program and two State applications for the formula portion of the program because the applicants did not submit the certification required by section 3797k(4) and the Coverdell Grant Program Announcement.

In reality, the Draft Report faults NIJ for not requiring *more* than what section 3797k(4) requires. Such extra-statutory requirements (assuming them to be permissible as a matter of law in a formula program)[2] may or may not be desirable or advisable as a matter of policy, but OJP believes to be unfounded the suggestion that NIJ's failure to implement them constitutes a failure to enforce section 3797k(4).[3]

The OIG appears to suggest that section 3797k(4) requires NIJ to do much more than require that applicants make the certification prescribed in that section. The OIG suggests further that section 3797k(4) requires NIJ to guide applicants in crafting this certification and then to "evaluate" the substance of the certification made by applicants. There is no statutory basis, however, for these suggestions. Section 3797k(4) does not require NIJ to make awards only to those applicants with respect to which "a government entity exists and an appropriate process is in place to conduct independent external investigations . . . ." It requires, rather, NIJ to make awards only to applicants who submit "*a certification* that a government entity exists and an appropriate process is in place to conduct independent external investigations . . . ." The Draft Report takes no cognizance of the critical legal distinction between these two alternate

---

[1] The form NIJ required applicants to complete is reproduced in Appendix I of the Draft Report.

[2] The structure of the Coverdell program is complex. In general terms, it is a formula program with a competitive component. Certain funds are allocated to State applicants based on population; other funds are allocated to State and/or local government applicants competitively. There is also a minimum award for State applicants. The competitive allocations, the population-based allocations, and the minimum award together determine the size of an award to a State. For purposes of convenience, we use the terms "formula portion" and "competitive portion," though they are not entirely distinct as a legal matter.

[3] If the OIG disagrees with this legal conclusion, the disagreement should be referred for resolution to the Office of Legal Counsel pursuant to 28 C.F.R. § 0.25; 28 U.S.C. § 512.

schemes. The former scheme would make *NIJ* primarily responsible for determining if the required "entity" and "process" actually were "in place." The latter scheme, however (the one actually enacted into law), makes *the applicants themselves* primarily responsible.[4] Section 3797k(4) thus embodies a significant policy choice as to which party should bear the cost and burden of determining if the required "entity" and "process" is "in place"; from the Draft Report, it appears that the OIG seeks to reverse this statutory choice and faults NIJ for honoring it.[5]

The Executive Branch ordinarily may not impose novel substantive requirements on statutory formula grant programs; section 3797k declares how much or how little information Coverdell applicants must provide to NIJ to be eligible. And the statute here is clear: Once the required certifications have been made, formula program applicants are eligible to receive awards.[6] Thus, with respect to the formula portion of the program (about 75% of the total funding), NIJ is statutorily denied any substantive discretion in deciding which applicants are eligible. Simply put, the Draft Report does not appear to recognize the legal fact that the formula portion of the Coverdell program is in the nature of an entitlement.

Separately, the OIG appears to believe that NIJ was required to provide "guidance" to applicants as to what would constitute an independent external investigation. Also, the Draft Report faults NIJ for not providing "case by case" responses to questions by applicants concerning section 3797k(4).[7] The language of section 3797k(4), however, requires NIJ only to obtain certifications from each applicant, and imposes no obligation to review individual cases or provide "guidance" to applicants. All the Coverdell applicants – State and local governments – have access to their own legal counsel, and each applicant was free to consult with its own counsel to determine whether its particular situation permitted it to provide the necessary certification. As it happens, NIJ forwarded a number of specific applicant questions to OJP's Office of the General Counsel (OGC), and NIJ (after consultation with OGC)[8] did provide

---

[4] The certification regime established by section 3797k authorizes NIJ to accept applicants' certifications as *prima facie* evidence of what they certify. NIJ is of course prepared to take appropriate oversight action, for example, if it were to receive credible information that suggests that a particular certification is false.

[5] The Draft Report states that "[b]ecause the Department relies on applicants' statements in the grant application process, it is important that the applicants' certifications contain the information necessary to evaluate the validity of the certification and to support sanctions if applicant's [*sic*] certifications are later determined to be false." This position is inconsistent with the very notion of a certification requirement.

[6] NIJ follows the same *prima-facie*-evidence approach with respect to *all* the certifications required by 42 U.S.C. § 3797k.

[7] The Draft Report also indicates that NIJ informed the OIG that it would request the information necessary to "evaluate" certifications on a case-by-case basis, and that NIJ did not do so. This is misleading. NIJ indicated that guidance provided in response to questions from individual applicants might be heavily fact-dependent. It did not indicate that it would collect facts and then determine whether or not particular certifications were or would be appropriate.

[8] It should be noted that this instance of action pursuant to consultation with OGC was hardly unique; NIJ, throughout, sought and received OGC's advice regarding the section 3797k(4) requirement and the form certification.

written guidance, including a set of general examples, to applicants.

The Draft Report views the form certification that NIJ required as inadequate. OJP responds by simply noting that the form certification was what the statute itself prescribes by its express and unambiguous terms. The certification prescribed by NIJ was – word-for-word – the same as the certification prescribed by section 3797k(4). Thus, the OIG's position that the form certification was inadequate is tantamount to suggesting that section 3797k(4) itself is inadequate.

In addition to the foregoing, the following comments are offered to address and clarify certain statements in the Draft Report that appear to be mistaken or incomplete and therefore misleading:

On the first page of the Executive Summary, in the first paragraph, the Draft Report states that NIJ "*plans to distribute almost $15 million in fiscal year (FY) 2005 Coverdell Grants.*" Although the initial appropriation for the Coverdell program for FY 2005 was $15 million, only $13,773,089 were available for distribution after statutory rescissions and program management expenses were deducted. Of these funds, $13,607,811 were awarded. Some funds were not awarded due to the fact that two State applicants for the formula portion of the program did not provide the required certifications and therefore did not receive a Coverdell Grant Program formula award for FY 2005.

On pages 3 and 4 of the Executive Summary, the Draft Report states the OIG's belief that NIJ "should have considered requiring each applicant to provide a letter from the named government entity *acknowledging its obligation* to conduct the independent external investigations envisioned by the Justice for All Act of 2004." To the extent this suggests that section 3797k(4) requires that the "government entity" must be under an "obligation" to conduct an investigation, we note that section 3797k(4) does not impose any such requirement. Section 3797k(4) requires only that "an appropriate process [be] in place to conduct investigations . . . ."

On page 4 of the Executive Summary, in footnote 3, in connection with its assertion that NIJ should have considered requiring applicants to provide letters from named government entities, the Draft Report refers to *NIJ Guidelines: How to Submit Applications*, and states that the guidelines include "a requirement for grant applicants to submit letters of cooperation and support or administrative agreements from *organizations with a significant responsibility under the grant*." This is a mischaracterization. The statement in the *NIJ Guidelines* (in section III) is that "Appendixes . . . include . . . [l]etters of cooperation/support or administrative agreements from *organizations collaborating in the project, if any. (If applicable)*." [9]

[9] In this same connection, the Draft Report states that "NIJ has required such letters in two other grant announcements . . . ." This is inaccurate and misleading. First, neither of the two grant announcements identified by the OIG relates to a statutory formula program. Second, one of the announcements does not appear to refer to letters of cooperation. Third, the grant announcement that does refer to such letters tracks the *NIJ Guidelines* in that, through a checklist, it states "You provide *if applicable* . . . [l]etters of cooperation/support or administrative agreements *from organizations collaborating in the project* (*if applicable*) . . . if more than one agency from your State decides to collaborate in the project."

On numbered page 2 of the Draft Report, in footnote 6, the OIG indicates that "NIJ defines "state" or "states" to include the 50 states, the District of Columbia . . . ." NIJ does not define them; the statute does. *See* 42 U.S.C. § 3797*l*(b).

On numbered page 8 of the Draft Report, the OIG states that OJP's General Counsel was asked "whether it would have been reasonable to require applicants to provide a statement naming the government entity" and that "[t]he General Counsel agreed that it would be reasonable to request that applicants provide the name of the government entity." This statement is incomplete, in that it neglects to mention that the General Counsel then also expressed his opinion that the law did not require such a result.

With respect to the first full paragraph on numbered page 8 of the Draft Report, NIJ did not participate in the panel discussion. An NIJ staff member was in the audience but made no comments during the presentation.

On numbered page 9 of the Draft Report, the OIG states that "[a]ttorneys in OJP's Office of the General Counsel stated that if there were any doubts about the validity of a certification, it would be NIJ's responsibility to obtain additional information from the applicants." This is a mischaracterization. OGC indicated that, if there were a credible allegation or credible evidence that a particular certification was false or faulty, NIJ would have a duty to inquire. In so indicating, OGC did not intend to suggest that section 3797k requires NIJ to verify the validity of a certification in the absence of such a credible allegation or credible evidence.

On numbered page 13 of the Draft Report, the OIG states that "33 [applicants] submitted certifications signed by an official of an agency other than the applicant, and 36 submitted forms that did not clearly indicate the name of the government agency submitting the certification . . . . However, NIJ approved all 198 grant applications." This is inaccurate. Of the 69 certifications that the Draft Report indicates vary from the form NIJ prescribed, only 37 pertain to applications that were in fact funded by NIJ.

In any event, it is difficult to understand the basis of the OIG's particular objection to certain "certifications signed by an official of an agency other than the applicant," if only because the blanket objection encompasses myriad situations, many of which would raise few, if any, legitimate questions about the sufficiency of a certification. For example, the blanket objection would cover cases where the applicant (or award recipient) is a component of a unit of local government or agency, and the head of the unit of local government or agency signs the certification.[10] It also would include cases where the applicant is a unit of local government or agency and the head of a component of a unit of local government or agency is the signatory,[11] or where one component of a unit of local government or agency is identified as the applicant

[10] An analogy would be the Attorney General's signing a certification for an application submitted by OJP.

[11] An analogy here would be to the AAG for the Civil Division signing a settlement agreement on behalf of the Department of Justice.

and another component is the signatory, or where the relationship between the signatory and the applicant entity, while not specifically set forth in the certification, is nevertheless adequately described in other documents included in the application package. The OIG's objection that certain certifications "did not clearly indicate the name of the government agency submitting the certification . . ." is subject to similar criticisms.

The Draft Report contains three recommendations. For ease of review, each of the three recommendations included in the Draft Report is restated in bold, followed by our response to the recommendation.

1. **We recommend that OJP, as part of its oversight of NIJ, require that all Coverdell Grant Program Announcements contain guidance on what constitutes an independent external investigation and examples of government entities and processes that could satisfy the certification requirement.**

   As a policy matter, OJP agrees with the essential premise of the recommendation. For the reasons discussed above, OJP does not agree that the recommendation is required by the statute. NIJ provided guidance (including examples) to applicants in FY 2005 that was designed to illustrate elements of the certification that an applicant must take into account in determining whether it can make the certification required by section 3797k(4). Future Coverdell Grant Program Announcements will contain similar guidance.

2. **We recommend that OJP, as part of its oversight of NIJ, require that each Coverdell Grant applicant, prior to receiving funds, provide the name of the government entity with a process in place to conduct independent external investigations into allegations of serious negligence or misconduct.**

   OJP does not agree to the imposition of such a requirement. As discussed earlier, section 3797k(4) includes no such requirement. Moreover, as the Coverdell program is in large part a formula program, it is not clear that such an extra-statutory requirement would be legally defensible. The burden on applicants and/or NIJ well might be significantly heavier than the OIG may believe. For example, where a State applicant wishes to provide Coverdell funds to both State and local subrecipients, and to include as subrecipients not only forensic laboratories, but also medical examiner's offices, coroner's offices, medical facilities, and law enforcement storage facilities, there may be no single government entity that has authority to conduct investigations; imposing the requirement recommended by the OIG might limit a State's ability to distribute funds effectively among otherwise-eligible subrecipients, should circumstances change between the time an application is submitted to or funded by the Department of Justice and funds are distributed within the State.

   OJP and NIJ will, however, consider requesting, as an optional matter, in future Coverdell Grant Program Announcements that applicants provide the information that the OIG suggests we require as a mandatory matter.

3. **We recommend that OJP, as part of its oversight of NIJ, consider requiring each Coverdell Grant applicant, prior to receiving funds, to submit a letter from the government entity that will conduct independent external investigations acknowledging that the entity has the authority and process to investigate allegations of serious negligence or misconduct.**

OJP has considered the matter and does not intend to require Coverdell applicants to submit such letters. Section 3797k(4) includes no such requirement. Because the Coverdell program is in large part a formula program, it is not clear that such an extra-statutory requirement would be legally defensible. Moreover, the burden on applicants and NIJ could be considerable, most of all when an applicant would (in order to address the varied circumstances of prospective subrecipients) need to provide letters from more than one such "government entity."

We appreciate the opportunity to comment on the draft report. If you have any questions, please feel free to contact me on 202-307-5933, or LeToya A. Johnson, OJP Audit Liaison, on 202-514-0692.

cc: Beth McGarry
Acting Deputy Assistant Attorney General for Operations

Glenn R. Schmitt
Acting Director, National Institute of Justice

Rafael Madan
General Counsel, Office of Justice Programs

Richard P. Theis,
Assistant Director, Audit Liaison Group
Justice Management Division

LeToya A. Johnson
OJP Audit Liaison

OJP Executive Secretariat
Control No. 20051599

APPENDIX III: OIG'S ANALYSIS OF OJP'S RESPONSE

On October 13, 2005, the Office of the Inspector General (OIG) sent copies of the draft report to the Office of Justice Programs (OJP) with a request for written comments. OJP responded to us in a memorandum dated November 4, 2005. The actions taken and planned by OJP to enforce the external investigation certification requirement imposed by the Justice for All Act of 2004 are responsive in part to our recommendations.

OJP's Response

OJP did not agree with our finding that the National Institute of Justice (NIJ) "did not enforce the external investigation certification requirement imposed by the Justice for All Act of 2004 [42 U.S.C. § 3797k(4)] during the application process or exercise effective oversight of this aspect of the FY 2005 Coverdell Grant Program."

In explaining its disagreement, OJP suggested – although it did not explicitly state – that it does not have the legal authority to implement the external investigation certification requirement in the manner that we suggest. OJP stated it was acting on advice of OJP counsel when it concluded that § 3797k(4) does not require that an independent external investigation process is in place before NIJ makes an award. Rather, according to OJP, the statute restricts NIJ to merely ensuring that a certification is in place before NIJ issues an award. OJP submitted that its interpretation of § 3797k(4) "makes the applicants themselves primarily responsible" for determining that a government entity exists and a process is in place to conduct independent external investigations rather than placing the responsibility on OJP. OJP concluded that once formula program applicants (which receive about 75 percent of the total funding) have made the required certifications, "NIJ is statutorily denied any substantive discretion in deciding which applicants are eligible."

In support of the validity of the existing NIJ process, OJP's response also noted that NIJ provided additional guidance to the FY 2005 applicants and that "NIJ did not fund seven applications for the competitive portion of the program and two State applications for the formula portion of the program because the applicants did not submit the certification required by § 3797k(4) and the [FY 2005] Coverdell Grant Program Announcement." OJP's response also reported, "Of the 69 certifications that the Draft Report indicates vary from the form NIJ

prescribed, only 37 pertain to applications that were in fact funded by NIJ."

In response to our recommendations that each Coverdell Grant applicant be required to provide the name of the government entity that will conduct any external investigation and that OJP consider requiring a letter from the government entity, OJP stated, "Because the Coverdell [Grant] [P]rogram is in large part a formula program, it is not clear that such an extra-statutory requirement would be legally defensible." OJP's response also suggested that the burden of providing the name of the government entity and a letter from the government entity "on applicants and/or NIJ well might be significantly heavier than the OIG may believe."

OIG Analysis of OJP's Response

The OIG disagrees with OJP's suggestion that NIJ lacks the legal authority to execute our recommendations. First, the plain language of the statute itself grants this authority to NIJ. Second, NIJ's actions in similar contexts demonstrate that it has the authority to implement our recommendations.

Section 3797k(4) provides that a state shall submit "a certification that a government entity exists and an appropriate process is in place to conduct independent external investigations" into allegations of serious negligence or misconduct. Clearly, in enacting § 3797k(4), Congress intended to do more than merely extract a promise from the applicants that an external investigation process was in place. Rather, Congress intended for the applicants to actually put such a process into place prior to receiving grant funds.

As the agency charged by Congress with implementing the Coverdell Grant Program, NIJ has inherent authority to regulate the grant application process to ensure that an external investigation process is in place. The statute expressly gives the Attorney General the authority to promulgate "procedures relating to the submission and review of applications for grants" under § 3797k.[14] A reading of the plain language of § 3797k(4), coupled with § 3797n, demonstrates that NIJ may require that the external investigation certification submitted by applicants contain both the name of the investigative government entity and a letter of support from that entity.

[14] 42 U.S.C. § 3797n; see also 28 C.F.R. Part 66, *Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments.*

Moreover, even if the statute were to be considered ambiguous on this point, NIJ, as the agency charged with its implementation, may reasonably interpret the statute in the course of implementation. We believe that an interpretation that the statute would allow OJP to require applicants to submit both the name of the government entity and a letter of support is a reasonable interpretation that would be entitled to deference and would withstand challenge under the Administrative Procedures Act.[15]

We also disagree with OJP's conclusion that requiring the certification process to include the identity of the government entity and requiring a letter of support from that government entity shifts the responsibility for setting up such a process from the grant applicant to NIJ. Requiring grant applicants to submit the government entity's identity and a letter of support will provide a strong disincentive for any grant applicant to make the requisite certification without first communicating with a government entity and establishing a process for conducting external investigations. The reason for this requirement is clear – by identifying the government entity, the certification becomes readily verifiable. Thus, rather than shifting the burden to OJP, our recommendation will make it more likely that the applicant will meet its burden of establishing an external investigation process and will make it easier for OJP to exercise its oversight function.

OJP acknowledged this oversight function in its response when it stated that "if there were a credible allegation or credible evidence that a particular certification was false or faulty, NIJ would have a duty to inquire." Surely, if the statute authorizes OJP to investigate allegations of false certifications, the statute also authorizes OJP to implement procedures to prevent false certifications in the first place.

NIJ's argument that it has no discretion in awarding the formula portion of the program is similarly unpersuasive. Even with funds specifically directed to be allocated to particular states, Congress required that these funds only be awarded to a state that "meets the requirements of § 3797k."[16] NIJ, by requiring that applicants provide the name of the government entity and a letter of support from that entity, can ensure that states receiving formula-funded grants are meeting the requirements of § 3797k as directed by Congress.

---

[15] *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[16] 42 U.S.C. § 3797l.

Significantly, OJP's position that NIJ lacks substantive discretion and may request and accept only the information specifically prescribed by § 3797k(4) from Coverdell Grant applicants is inconsistent with NIJ's own actions with regard to the FY 2005 Coverdell Grant external investigation certifications. The 223 applications we reviewed showed that NIJ exercised its substantive discretion in both rejecting certifications that followed the prescribed format and accepting certifications that did not follow the prescribed format:

- NIJ rejected 149 external investigation certifications presented with the original Coverdell Grant Applications and required applicants to re-certify;

- NIJ directed five applicants to submit their applications – in order to meet the May 24, 2005, application deadline – without an external investigation certification; and

- NIJ funded 37 applications containing an external investigation certification that the OIG found was not in the form prescribed by NIJ.

NIJ's actions in the context of other grant applications also demonstrate that NIJ has exercised similar authority in the past. As stated in the draft report, NIJ's Guidelines include a requirement for grant applicants to submit letters of cooperation and support or administrative agreements from organizations with a significant responsibility under the grant. NIJ has required such letters in two other grant announcements. There is no obvious reason why NIJ is permitted to prescribe procedures for grant applicants in these other contexts, but not for the Coverdell Grant Program. Indeed, NIJ's own actions in administering the FY 2005 Coverdell Grant Program suggest that NIJ understands it does have discretion to interpret § 3797k(4). If NIJ has the authority to reject certifications in their entirety and to consider applications with no certifications, it must also have the authority to request the information reasonably necessary to evaluate the certifications that applicants do submit.

Finally, to the extent that OJP rejected our legal analysis and recommendations because OJP believed that it lacks the legal authority to implement the recommendations, then we recommend that OJP seek an opinion on this issue from the Office of Legal Counsel (OLC) pursuant

to 28 C.F.R. § 0.25; 28 U.S.C. § 512. Once the legal issue is resolved, then OJP can reevaluate our recommendations as a matter of policy.

RECOMMENDATIONS

Recommendation 1: Require that all Coverdell Grant Program Announcements contain guidance on what constitutes an independent external investigation and examples of government entities and processes that could satisfy the certification requirement.

Status: Recommendation 1 is Resolved – Open.

Summary of OJP's Response. As a matter of policy, OJP concurred with our recommendation and stated that NIJ will provide guidance (including examples) in future Coverdell Grant Program Announcements. NIJ's guidance will be designed to illustrate elements of the external investigation certification that an applicant must take into account in determining whether it can make the external investigation certification. OJP stated that the guidance it plans to provide is not required by statute.

OIG Analysis. The actions taken and planned by OJP to provide guidance to Coverdell Grant Program applicants are responsive to our recommendation. Our recommendation was not based on a statutory requirement; it was based on NIJ's program management responsibility to provide guidance to applicants whether or not a specific statute requires that NIJ provide guidance for a specific certification.

So that we may evaluate the implementation of this recommendation, please provide a copy of the draft of the FY 2006 Coverdell Grant Program Announcement before it is published.

Recommendation 2: Require that each Coverdell Grant applicant, prior to receiving funds, provide the name of the government entity with a process in place to conduct independent external investigations into allegations of serious negligence or misconduct.

Status: Recommendation 2 is Unresolved – Open.

Summary of OJP's Response. OJP did not agree to require Coverdell Grant applicants to provide the name of the government entity because § 3797k(4) "includes no such requirement." Further, OJP stated, "It is not clear that such an extra-statutory requirement would be legally defensible. . . . OJP and NIJ will, however, consider requesting, as an optional matter, in future Coverdell Grant Program

Announcements that applicants provide the information that the OIG suggests we require as a mandatory matter."

OIG Analysis. To properly administer Coverdell Grants, NIJ should prescribe the form and content of certifications, review applicants' certifications to decide if the specific information is adequate, and determine if each application is acceptable. If OJP disagrees with our legal analysis and concludes that NIJ does not have the statutory authority to implement this recommendation, we recommend that this issue be referred to OLC for resolution. If OLC determines that NIJ has the authority to implement this recommendation, OJP should reconsider its decision not to require applicants to submit the names of the government entities. Please provide us with a description of OJP's decision by January 31, 2006.

Recommendation 3: Consider requiring each Coverdell Grant applicant, prior to receiving funds, to submit a letter from the government entity that will conduct independent external investigations acknowledging that the entity has the authority and process to investigate allegations of serious negligence or misconduct.

Status: Recommendation 3 is Unresolved – Open.

Summary of OJP's Response. OJP considered requiring each Coverdell Grant applicant to submit a letter from the government entity, but elected not to do so at least in part because, "It is not clear that such an extra-statutory requirement would be legally defensible."

OIG Analysis. Based on OJP's response, it appears that OJP and NIJ are rejecting this recommendation because they believe they lack the requisite authority to implement it, despite the OIG's conclusion to the contrary. To resolve this legal disagreement, OJP should refer the question to OLC for resolution. Should OLC determine that OJP has the requisite authority, OJP should reconsider its decision not to require each Coverdell Grant applicant to submit a letter from the government entity that will conduct independent external investigations. Please provide us with your decision by January 31, 2006.