

§ 1172.12 Exceptions to the rules against age discrimination.

(a) *Normal operation or statutory objective of any program or activity.* A recipient may take an action otherwise prohibited by § 1172.11 if the action reasonably takes into account age as a factor necessary to the normal operation or the achievement of any statutory objective of a program or activity, if:

- (1) Age is used as a measure or approximation of one or more other characteristics;
- (2) The other characteristic(s) must be measured or approximated in order for the normal operation of the program or activity to continue, or to achieve any statutory objective of the program or activity;
- (3) The other characteristic(s) can be reasonably measured or approximated by the use of age; and
- (4) The other characteristic(s) are impractical to measure directly on an individual basis.

(b) *Reasonable factors other than age.* A recipient may take an action otherwise prohibited by § 1172.11 which is based on a reasonable factor other than age, even though that action may have a disproportionate effect on persons of different ages. An action may be based on a reasonable factor other than age only if the factor bears a direct and substantial relationship to the normal operation of the program or activity or to the achievement of a statutory objective.

(c) *Affirmative action by recipient.* Even in the absence of a finding of discrimination, a recipient may take affirmative action to overcome the effects or conditions that resulted in limited participation in the recipient's program or activity on the basis of age.

(d) *Special benefits for children and the elderly.* If a recipient operating a program or activity provides special benefits to the elderly or to children, such use of age distinctions shall be presumed to be necessary to the normal operation of the program or activity, notwithstanding the provisions of § 1172.12(a).

(e) *Age distinctions in NEH regulations.* Any age distinction in a regulation issued by NEH is presumed to be necessary to the achievement of a statutory objective of the program or activity to which the regulation applies, notwithstanding the provisions of § 1172.12(a).