



GOVERNOR'S JUVENILE JUSTICE COMMISSION

JIM DOYLE, GOVERNOR

DEIRDRE GARTON, CHAIR

December 28, 2007

The Honorable Patrick J. Leahy
Chairman, Judiciary Committee
United States Senate
433 Russell Senate Building
Washington, D.C. 20510

Dear Senator Leahy:

Thank you for inviting me to testify before the Senate Judiciary Committee earlier this month. I was very pleased and honored to testify at the December 5, 2007, hearing of your committee entitled, "Reauthorization of the Juvenile Justice and Delinquency Prevention Act: Protecting Our Children and Our Communities." I truly appreciate the time you took to say hello at the hearing, as well as your opening statement made at the hearing. I am pleased to see the committee's consideration of and attention to the issues related to the reauthorization of this important statute.

Today, I am writing in response to questions you have posed to me, received December 18, 2007, as follows:

1. There is growing concern from states that they are not getting sufficient assistance from the Office of Juvenile Justice and Delinquency Prevention to understand how to stay in compliance with, or get back into compliance with, the core requirements of the Juvenile Justice and Delinquency Prevention Act. If you agree with this premise, what, in your experience, is the biggest hurdle right now to keeping states in compliance with the core requirements of the JJDP Act?

I agree with this premise. From the perspective of Wisconsin, there are hurdles of great significance:

1. Repeated and ongoing changes in OJJDP "guidance" regarding compliance with the JJDP Act core requirements cause a lack consistency and clarity;
2. New compliance guidance manuals have been issued without a basis in regulations and because they are manuals for training purposes they are not subject to any Administrative Procedures Act processes—including review by the states;
3. Compliance functions, in all states and territories, are grossly under-resourced and stretched to the breaking point while compliance monitoring requirements are simultaneously broadened;

4. OJJDP itself has diminished resources to partner with and assist states. In addition, OJJDP is sorely lacking in a focus that would assist states to succeed in maintaining and ensuring compliance.

These issues have negatively affected our state's ability to maintain compliance with all of the core requirements of the JJDPA—despite our earnest efforts. In discussion, we have learned that at least some of the other states are struggling with some of the same issues, as reported by other SAG Chairs, FACJJ members and Juvenile Justice Specialists in collective discussions.

Since the 2002 Reauthorization of the JJDPA, OJJDP has issued new “guidelines” for compliance at least two times. Unlike regulations under the Administrative Procedures Act, OJJDP is not required to subject compliance manuals to timely public notice, public comment and standard review requirements. Therefore, State Advisory Groups and Juvenile Justice Specialists charged with implementation of the JJDPA have not been consulted. Since 2002, new rules and definitions for compliance guidance have been introduced at each, new training, with changed guidelines and definitions from one training to the next.

The problem of differing definitions and changing guidance for compliance has been compounded by the lack of regulations under this Administration. None have been issued pursuant to the 2002 Reauthorization despite new statutory mandates and purposes in the JJDPA. The last regulations related to JJDPA were issued by OJJDP in 1995-96. Therefore, there are many inconsistencies in new compliance guidance when viewed in light of historical definitions. Yet, the historical definitions are contained in governing regulations. In addition, OJJDP correspondence interpreting the guidelines differs from person to person and department to department.

Many concerns have to do with what may be considered to be an unreasonable scope or universe for compliance monitoring, given limited resources. It is the desire of our State Advisory Group and our state to strengthen compliance and to fulfill the mandates and purposes of the JJDPA as effectively as possible. Yet, like most states we cannot staff a full-time compliance monitoring function. Therefore, the most recent OJJDP guidance, which broadens definitions and increases the monitoring universe and the reporting requirements presents an unreasonable burden.

Re-Interpretation of Sight and Sound Separation based on OJJDP definition of co-mingling juvenile and adult inmates: In a memorandum of October 2003, then Deputy Administrator of OJJDP, William Woodruff, re-interpreted the requirements for Sight and Sound Separation by asserting that “once the juvenile who has been transferred, waived, or is otherwise under the jurisdiction of a criminal court reaches the state's age of majority, he or she must be separated from the juvenile population within six months. Separation may be accomplished architecturally, or through policies and procedures such as time phasing the use of an area to prohibit simultaneous use by juveniles and adult inmates, or by transfer to the adult system” (see attached Woodruff memo).

The basis of Mr. Woodruff's compliance memo was Section 103 Definitions (26) of the JJDPA which states that the term “adult inmate” means an individual who—(A) has reached the age of full criminal responsibility under applicable State law; and (B) has been arrested and is in custody for or awaiting trial on a criminal charge, or is convicted of a criminal charge offense.

Prior to the 2002 reauthorization of the Act, states were operating according to OJJDP Policy 89-1301, April 1989, Separation, that references Legal Opinion No. 77-9, December 1, 1976, and states, “...Juveniles waived or transferred to criminal court are members of neither group or category subject to the Section 223(a)(13) prohibition. Therefore, such juveniles may be detained or confined in institutions where they have regular contact with either group or category covered by the prohibition. They are a “swing group” of individuals who can be placed with whomever the legislature or courts deem appropriate.” This policy worked well in that it allowed judges/states the discretion to make decisions in the best interests of the individual youth involved. Recent research on adolescent brain development appears to affirm that this type of policy is in the best interests of youth.

Many states will find this mandate from Mr. Woodruff problematic because they provide judges with the discretion to retain youth adjudicated in adult court in youth facilities even though they have attained the state’s age of majority. In addition, more than 40 states more generally provide for extended juvenile jurisdiction for youth and young adults, adjudicated in criminal court, but who may be emotionally/psychologically fragile, vulnerable to attack, suffer disabilities or who are sentenced for nonviolent crimes and would be better served under juvenile jurisdiction.

Representing the concerns of others, the Juvenile Justice Specialists and State Advisory Group Chairs from Washington, Idaho and Oregon, have responded with concern, because Mr. Woodruff’s new standard for compliance with Sight and Sound Separation does not recognize the intent of state laws based on research and best practices that meet the needs of youthful offenders beyond the age of majority within allowable ages of placement in juvenile facilities pursuant to state laws (up to ages 21 and 25 in these respective states and others). The letter sent on October 17, 2008, by these states to Administrator Flores is attached and contains recommended language to amend the JJDPA.

Broadened definition of an adult lock-up. The definition of an adult lock-up required to be monitored has been broadened to include law enforcement departments that are unlocked facilities and do not have residential features. The rationale from OJJDP for the change is that upon some of OJJDP’s monitoring visits to unlocked, non-residential law enforcement facilities, staff encountered cuffing rails where youth could be or are secured. While, we would not wish to see excessive use of cuffing rails, the guidance creates such a broad mandate that it is impossible to be effective and successful. Moreover, this broader definition appears to differ with the historical definition of an adult lockup. Section 103 of the JJDPA, Definitions (22) states, “the term ‘jail or lockup for adults’ means a *locked* (emphasis added) facility that is used by a State, unit of local government, or any law enforcement authority to detain or confine adults—

- A. pending the filing of a charge of violating a criminal law;
- B. awaiting trial on a criminal charge; or
- C. convicted of violating a criminal law.”

Broadened definition of the monitoring and reporting universe: Similarly, there has been a confusing broadening of the “monitoring universe” without attendant support in the form of technical assistance to or funding to help states to be successful.

Effective with the FY 2007 Compliance Report, states are required to report “the total number of public and private secure and *non-secure* (emphasis added) detention and correctional facilities, the total number of facilities reporting data, and the number of facilities which received an on-

site inspection during the past twelve months by the following facility types: Juvenile Detention Centers, Juvenile Training Schools, Adult Jails, Adult Lockups, Collocated Facilities (Approved), and Collocated Facilities (Non-approved).” Here again, this differs with the last regulations published by OJJDP, the Consolidated Federal Regulations (CFR), published in the Federal Register, May 31, 1995, and revisions as published in the Federal Register, December 10, 1996 regarding minimum monitoring plans as set forth in CFR 31.303(f) (A): “Identification of the monitoring universe: This refers to the identification of all residential (emphasis added) facilities which might hold juveniles pursuant to public authority and thus must be classified to determine if it should be included in the monitoring effort. This includes those facilities owned or operated by public or private agencies.”

In addition, CFR 31.303(f)(5)(i)(A) as published in 1995-1996 set forth the minimum reporting requirements as, the “total number of public and private secure (emphasis added) detention and correctional facilities, the total number reporting, and the number inspected onsite....(D) Data collection and data verification: This is the actual collection and reporting of data to determine whether the facility is in compliance with the applicable requirement(s) of Section 223(a)(12), (13), and/or (14). The length of the reporting period should be 12 months of data, but in no case less than 6 months. If the data is self-reported by the facility or is collected and reported by an agency other than the State agency designated pursuant to Section 223(a)(1) of the JJDP Act, the plan must describe a statistically valid procedure used to verify the reported data.”

Additional examples of what may be overly-broad compliance requirements include:

- Requiring states to monitor adult prisons even if they have state laws that preclude the placement of juveniles (under age of majority) in such facilities. Yet, the reason given by OJJDP was that states needed to verify that youth are not being sent to prisons to participate in “Scared Straight” programs. See Historical Minimum Reporting Requirements in Section 3.
- Requiring that even those states with state laws that assign the responsibility for the licensing and monitoring of non-secure facilities to another agency, the statewide SPA must monitor and “spot check” those facilities as well or have a memorandum of understanding with the responsible state agency. This creates problems for states in over duplication of effort, increased expense, and HIPPA conflicts. See Historical Minimum Reporting Requirements in Section 3.
- Stepping up monitoring requirements dramatically from monitoring 10% of the defined monitoring universe annually to monitoring 10% of each type of facility in the monitoring universe annually, and 100% of most types of facilities every three years. This significant increase in monitoring workload and responsibilities coincided with a time of steadily decreasing funds and increasing travel expenses fueled by record gas price increases. Further, states were not allowed to give comment on the impact of this significant change.
- Requiring states to submit written documentation to OJJDP to approve each facility for use of the rural exception and that such documentation had to be submitted with the 2007 monitoring report. Having facilities (as opposed to states) approved for use of the rural exception is a real problem for larger rural/frontier states—the very states it was designed to assist. Under the previous interpretation, the state could approve holding youth in an adult jail or lockup if the facility could document that weather conditions prohibited transfer to an alternative placement and that adults were not being held during the time of the youth’s presence in the facility. With OJJDP having to pre-approve each facility, the

state is effectively prevented from using the rural (removal) exception as intended by the JJDP.

These changes—only partially detailed above—present a considerable “hurdle” to any state diligently attempting to maintain compliance. Very significantly, the increase in workload (based solely on new “guidance”) in a time of substantially decreasing resources to do the work is further exacerbated by the loss of a genuinely “helping” partnership with OJJDP. The combination has led to a distrustful and difficult relationship with OJJDP. In Wisconsin, the impact has also brought an extended delay in receiving funds causing potential breaks in funding of local programs, extensive and unnecessary staff time focused on repeated compliance “responses” to OJJDP, and an inability to focus on other critically important (but less enforceable) requirements like Disproportionate Minority Contact (DMC).

The lack of transparency of the process that OJJDP uses to make compliance determinations and decisions to withhold funds from some states and not others, the absence of Consolidated Regulations for the JJDP of 2002, and the unwillingness to recognize individual states’ needs and provide true assistance all play into the difficulties that Wisconsin has faced in regaining and maintaining compliance. All “hurdles” are exacerbated in a time when juvenile justice funds are at ten-year lows and are slated to be further reduced in FFY 2008.

I would, therefore, urge you and the Congress to consider the following ways to strengthen the federal partnership with the states in the upcoming Reauthorization. I would be interested in reviewing and commenting on specific language to accomplish these changes:

- Ensure that youth, adjudicated in juvenile or criminal court, who have reached the age of majority, but who the state has approved to remain in “extended juvenile jurisdiction” are not considered “adult inmates.” [103 (26)]
- Ensure adequate funding, incentives and resources for the states to comply with the core protections for children in the JJDP through authorized levels instead of ‘such sums’ and corresponding levels of appropriations. [299 (a) (1); 299 (a) (2) (A) (B) (C); 299 (c); 504]
- Require OJJDP to make reports public and timely, and increase accountability and transparency at the federal level regarding all aspects of JJDP implementation. [Throughout].
- Ensure that OJJDP adheres to the public notice, public comment, timeliness and review requirements of the Administrative Procedures Act. [Sec. 223 (a); Sec. 222 (11); Sec. 222 (28)(e); Sec. 243 (a)(A)(6); Sec. 299 (B)]
- Require that the OJJDP Administrator issue regulations and rules regarding compliance standards and measures and all other aspects of implementation of the JJDP within 6 months of the passage of the JJDP. [299 (A) (d)]
- Prioritize the Office of Juvenile Justice & Delinquency Prevention (OJJDP) office’s research and technical assistance functions to supporting states’ efforts to comply with the core protections in the JJDP. [251; 252]

2. In your testimony, you described a program to address issues of disproportionate representation of minority children in the juvenile justice system that was successfully implemented in Rock County, Wisconsin, which had some of the worst numbers in the country on this issue in 2000. You noted that since this program began, Rock County has reduced the number of youth of color held in secure detention by 44% and has reduced the use of detention for all youth by a third. Please explain what Wisconsin did to institute such a successful program and how the Juvenile Justice and Delinquency Prevention Act assisted you in doing this.

The Wisconsin State Advisory Group has been addressing DMC for more than a decade. Using Title II Formula Funds, we commissioned a study to help us understand which communities had troubling raw numbers. As a result, Wisconsin could focus the allocation of the federal dollars to the communities that most needed to address the issue of disproportionality. That effort along with the focus on evidence-based services, which we highlighted in *What Works Wisconsin*, gave us the road map for the data collection that we required of each of our counties and the programming that we supported to address DMC.¹ Our goal in encouraging evidence-based practices was not to impose from the top down, but for each community to bring together its stakeholders to look at their own data and then choose or fashion their own programs using the most cost effective models available.

The success of the Rock County DMC programming followed from being effective in five main areas:

- (1) using data to drive decisions;
- (2) incorporating research-based principles and evidence-based programs into our solutions;
- (3) making sure new programs were coordinated as part of a broader service continuum;
- (4) sustaining mechanisms for continuous monitoring and improvement; and
- (5) effective collaboration among system leaders and stakeholders.

The DMC Advisory Board has remained focused on points in the system that they could control. They did not allow themselves to become sidetracked by a discussion of larger socioeconomic and societal issues (i.e., racism, poverty). Also, the Advisory Board identified and focused on the decision point they felt they were in the strongest position to address: placement in secure detention. Once they addressed that decision point, they could build on their success to address others.

(1) Use of data

In 2002, they conducted a data analysis to better understand why more African American youth were in the detention center than Caucasian youth. African Americans represent the predominant minority population in Rock County. Rock County gathered data to determine:

- (1) Who was the primary detaining authority in detention admissions?
- (2) What offense types resulting in secure detainment had the highest disproportionality?
- (3) What time of day were incidents taking place that were leading to detainment?

¹ Small, Stephen, Reynolds, Arthur, O'Connor, Cailin, Cooney, Siobhan, *What Works Wisconsin*, <http://oja.state.wi.us/docview.asp?docid=6444&locid=97>

(4) Where were incidents occurring that led to detainment?

The data showed:

- A significant number of African American youth who were being admitted to secure detention were already on probation and were being ordered to detention by their probation officers as a result of probation violations that, from a public safety standpoint, were relatively minor offenses.
- The offense types resulting in a detainment that had the highest degree of disproportionality of African American youth were: disorderly conduct, misbehavior at school, and minor drug offenses.
- The majority of incidents leading to detainment occurred during school hours, with a significant percent occurring at a school location.

From the analysis of the data, the DMC Advisory Board concluded that developing and utilizing non-detention sanction alternatives for appropriate probation violation cases could have a positive impact on the disproportionate number of African American youth securely detained. They also concluded that schools and law enforcement needed to coordinate more closely.

Thus, the data analysis drove the decision to create program modules for the sanctioned youth to complete in lieu of being sanctioned to the Detention Facility. The educational modules were directed to students who had engaged in disorderly conduct, school misbehavior and minor drug offenses to address those behaviors. A new youth worker was responsible for delivering those modules, coordinating with probation officers to make sure the modules were utilized in all appropriate cases and coordinating with schools and law enforcement.

(2) Research-based Principles and Evidence-based Programs

Using alternatives to secure detention is in itself a research based practice. Research indicates that placement in secure detention does not deter most juveniles from engaging in future criminal acts and carries a profound negative impact on young people's mental and physical well being, education and employment.

The educational diversion modules incorporated evidence-based programming, such as Prime for Life. As our DMC programming expanded, they added a mentoring component based on Michigan's Adolescent Diversion Project (ADP) and a first time offender program based on California's Repeat Offender Prevention Program (ROPP).

Because evidence indicates the most successful services are delivered either at home or in a home like environment, the location of service delivery was chosen based on its inviting and homelike qualities and accessibility to youth and their families (The Merrill Community Center, which is located in the heart of a challenged neighborhood in which many African American youth on probation reside).

Because evidence indicates that the most successful programs are individually tailored in type and intensity to each youth / family based on a risk and needs assessment, a multi-disciplinary assessment component was added to the programming.

(3) Part of a Broad Continuum

As the program progressed, the DMC Advisory Board and Rock County worked to provide links to community organizations for the youth wanting and needing continued structure after they completed program modules. They also referred youth to the mental health system to provide services to youth and families in the programs who needed and would accept in home family counseling services.

(4) Continuous Monitoring & Improvement Mechanisms

Rock County developed a commitment to data analysis and the use of data as a management tool to monitor the effectiveness of the program and identify areas for improvement. To do this, Rock County continues to collect and analyze data relating to the monthly percentage of minority admissions, Rock County Human Services Department (HSD) RockStat process. Based on the City of Baltimore's highly successful CitiStat program, HSD RockStat involves: monthly meetings with division managers and supervisors to review program and fiscal performance utilizing a series of outcome based data reports; meetings utilize multimedia aids and are administered in a highly structured format where follow-up assignments and corrective actions are meticulously tracked.

(5) Effective Collaboration Among System Leaders and Stakeholders

Because there are so many actors involved with the juvenile justice system (i.e., courts, probation, schools, police) and so many stakeholders that have unique insights into how improvements can be made (i.e., parents of youth who have had contact with the system, youth who have been through the system, nonprofit agencies who serve youth in the system and citizens in general), Rock County was committed to using its DMC Advisory Board fully. It gave and gives input to the analysis and program implementation.

JJDP Act emphasizes and has requirements regarding some of the areas discussed above. Most of these concepts, while not completely foreign to Rock County, were not institutionalized. Programming made possible through funds under the JJDP Act helped these concepts take root. They are now part of the philosophy and culture of the Rock County Human Services Department.

I would urge you to consider strengthening amendments to the DMC core requirement that would provide for a systemic approach based on data, more guidance regarding implementation of best practices and greater evaluation of innovative models.

- 3. You noted in your written testimony that cuts in federal funding forced your program to use money more efficiently, but you also emphasized the importance of having sufficient funding.**
 - a. Is the amount of funding that Wisconsin programs are receiving right now from JJDPA enough?**

The amount of funding that Wisconsin is receiving is not enough to accomplish what we hope to accomplish. As I noted in my oral testimony DMC is the most pressing issue that we face. Wisconsin has been working diligently on the issue with some success for more than a decade, not only because it is a core requirement of the JJDPA, but because it is the right thing to do.

Because Wisconsin has been found out of compliance with DSO by this Administration, Wisconsin will be required to use 50% of its modest Title II Formula Funds to address DSO until we are found in compliance. The programs that will suffer will be the award-winning programs that we have nurtured around DMC that I highlighted in my oral testimony (see also my answer to question #2 above). The other initiative that will suffer will be our effort to disseminate evidence-based practices down to the local level. Many Wisconsin counties and service providers are aware of the research around evidence-based practices and their cost effectiveness. They are anxious to implement them. In a survey conducted this fall, we found that our grantees, both public and private, are clamoring for more technical assistance to help them move to using evidence-based practices. We will not be able to effectively continue this initiative or our work with DMC using a scant 50% of Title II funds that will remain.

b. How can we best estimate how much funding needs to be allocated for states to be effective and efficient?

One reason for the dramatic drop in the juvenile crime rate over the last decade was the dramatic infusion of federal funds into the juvenile justice systems of various states during the late 1990s through the JJDP funds and the Juvenile Accountability Block Grant (JABG) program. That infusion helped states to implement more community based efforts to address effectively issues of accountability for juvenile offenders. As illustrated by the Milwaukee First-time Firearm Offenders program, "Running Rebels," that I highlighted in my oral testimony on December 5, such programs can have an impact on the degree and seriousness of juvenile crime. Along with the Mendota Juvenile Treatment Center Program that deals with the most serious juvenile offenders in Wisconsin, we know that we can implement models that can modify juvenile behavior in ways that were not possible before. Our programming is slowly beginning to reflect the science that has been taking place over the last ten years.²

We are at a unique point in the history of juvenile programming. The juvenile crime rate is low. We know what works with offending youth. We know that a significant infusion of federal funds to help states build infrastructure to do the right kind of programming has an impact.

It is critical that Congress provide leadership to restore and strengthen federal juvenile justice funding dedicated to supporting the JJDP goals. In his testimony on December 5, 2007, OJJDP Administrator, J. Robert Flores suggested that OJJDP funds to states are merely meant to "serve as a magnet" for attracting state and private funding to fulfill the mandates and purposes of the JJDP. This underscores apparent lack of concern and, at times, reinforcement of the dramatic diminution of federal juvenile justice appropriations on the part of the current OJJDP Administrator.

Every year, the juvenile justice community, both in the states and in the nation's capitol, has to put forward a major effort to raise awareness about the effectiveness of state and local programs funded by Title II and Title V of the JJDP, as well as other very useful streams of funding, such as the Juvenile Accountability Block Grant (JABG). Pleas for adequate levels of funding are made more difficult by various misdirected efforts to assess the effectiveness of the programs using irrelevant measures. For instance, in 2004, a controversial report issued by the Office of Management and Budget (OMB) (see ExpectMore.gov) was used by the Administration to

² MacArthur Foundation Research Network on Adolescent Development and Juvenile Justice, http://www.adjj.org/content/resource_page.php?filter=download

justify the elimination of the JABG Program. The OMB report found that JABG was “ineffective” even though OMB conducted no field visits or meetings with state or local officials. OMB also ignored the findings of a major study commissioned by the National Institute of Justice that had favorably reviewed the program. Since that time, OJJDP has taken steps to collect data that have begun to clearly demonstrate the program’s effectiveness. Nevertheless, JABG funds have been cut by more than 75% since 2002. Overall, juvenile justice appropriations to the states have fallen by more than 57% since 2002 and those that remain are substantially earmarked.

Now is the time to make an investment in prevention. With an infusion of Title V funds in the amounts similar to the amounts invested in accountability in the late 1990s, states could build the prevention infrastructure to stave off any increase in juvenile delinquency and crime. All the studies and meta-analyses highlight that prevention is the most economically reasonable response to juvenile delinquency.³ States and communities want to do prevention work, but they need the seed money and investment in infrastructure to be able to do so. Evidence-based programs are expensive to implement and creating infrastructure within counties to fully monitor the effectiveness of programs is also an expensive undertaking. The return on that investment however as illustrated by the Rock County experience of using data analysis to drive targeting of program can yield significant results. I would submit that it is the role of the Federal Government to provide the seed and infrastructure development money for delinquency prevention.

4. What steps would you recommend to improve the relationship between the states and the Office of Juvenile Justice and Delinquency Prevention?

Thank you so much for this very important question. The federal-state partnership on juvenile justice is neither an afterthought nor an accident of history or administrative practice. Rather, the partnership is an elaborate one, and central to achieving the goals of the JJDP. OJJDP is, by statute, authorized and/or mandated to carry out a number of functions intended to reduce delinquency and improve the administration of juvenile justice at the state level, including but not limited to (1) making grants to States to improve their juvenile justice systems, (2) monitoring a state’s compliance with the JJDP, (3) prescribing regulations to implement the JJDP and (4) providing technical and financial assistance to the states directly and via an eligible organization composed of member representatives of the State Advisory Groups.

OJJDP’s relationship with the states, however, is not effective when it is simply top-down. Section 223(f)(2)(C) of the Juvenile Justice and Delinquency Prevention (JJDP) mandates a mechanism for states to review federal juvenile justice and delinquency prevention policies, including those proposed and implemented by OJJDP. Sec. 223(f)(2)(D) provides that States shall “advise the [OJJDP] Administrator with respect to particular functions or aspects of the work of the Office.”

Finally, Sec. 299A(d) directs the Administrator to seek consultation from the states when establishing rules, regulations and procedures that affect OJJDP and implicate compliance with the requirements of the JJDP. **These various JJDP provisions clearly demonstrate that Congress intended for the relationship between OJJDP and the states to be a mutually beneficial partnership whereby the federal government and the states are each putting demands on the other, and influencing and improving the functions of the other.**

³ Small, Stephen, Reynolds, Arthur, O’Connor, Cailin, Cooney, Siobhan, *What Works Wisconsin*, <http://oja.state.wi.us/docview.aspx?docid=6444&lcid=97>

Recent actions taken by OJJDP, however, are damaging the federal-state partnership. For example, as mentioned in my answer to question #1 above, in 2003 OJJDP issued a memorandum to the states “clarifying its guidance on the separation issue” and mandating that all states are required to transfer youth convicted as adults to an adult correctional facility despite a decades’ long practice among many states of treating certain youthful offenders within juvenile facilities. As a result, more than 40 states, the overwhelming majority of whom are otherwise in full compliance with the JJDP, now find themselves risking sanctions if they fail to evict youthful offenders from their juvenile facilities, despite the risk these youth will face if placed in an adult correctional facility. This strict reading of the “separation” core requirement was developed internally by OJJDP without benefit of a notice-and-comment process and without seeking consultation from the states. As of the writing of this letter, the “clarification” of the rule has not been published in the Federal Register.

As another example, Sec. 223(f)(1) of the JJDP mandates that OJJDP provide technical and financial assistance to “an eligible organization of member representatives of the [SAGs]” to perform five enumerated functions. Two of these functions can be characterized as technical assistance, and three of these functions can be characterized as advisory. Between 1984 and 2005, the Coalition for Juvenile Justice (CJJ), a national, non-partisan 501(c)(3) tax-exempt nonprofit founded by SAG members to be the representative organization for the SAGs, was universally recognized as this one “eligible organization.”

In 2003, however, the OJJDP Administrator made the unilateral decision to assign the advisory functions to a newly created advisory body (the FACJJ or Federal Advisory Committee on Juvenile Justice) established by and managed by OJJDP with a for-profit logistics contractor. Moreover, states are required to designate members to serve on the FACJJ in order to receive their Title II Formula Funds. This action by OJJDP is in clear violation of Section 223(f)(1). As with the aforementioned “clarification,” OJJDP did not seek input from the states before making its decision.

In FY 2007, all remaining OJJDP financial and technical assistance was stripped from the national association of the State Advisory Groups, the Coalition for Juvenile Justice. Despite repeated requests since 2003 from State Advisory Group Chairs who serve as the officers of the Coalition to explain this breach of the JJDP, the OJJDP Administrator, J. Robert Flores, has refused to respond in writing to provide any rationale for these changes.

Granted, the significant decrease in the amount of juvenile justice-related funding over the past six years makes it difficult for OJJDP to fulfill its obligations under the JJDP and provide states with the guidance and assistance they need to fulfill their obligations as well. OJJDP, however, is not helping its cause by mishandling matters that are within its direct control. Rather, such actions only work to weaken its position and isolate it from the very people it needs to maintain and fulfill its purpose, duties and goals under the JJDP.

In its reauthorization of the JJDP, Congress can ensure responses to juvenile crime and delinquency that promote and preserve the federal-state partnership. The Coalition for Juvenile Justice and more than 250 other national, state-based and local organizations recommend that the Reauthorization seek to fulfill Congress' intent and restore the federal-state partnership.

Specifically, by consensus, this group of organizations recommends the following changes in the statute, with which I concur in principle. I would be interested in reviewing and commenting on specific language to accomplish these changes:

- Amend Secs. 223(a), 222(11), 222(28)(e), 243(a)(A)(6) and 299B to ensure that OJJDP, when promulgating rules and regulations that impact that states, adheres to the public notice and review requirements of the Administrative Procedures Act.
- Amend Sec. 299A(d) to strengthen the requirement for the OJJDP Administrator to issue regulations on the implementation of the JJDPA within 6 months of the passage of the JJDPA to ensure clear guidance to and promote consistent enforcement of guidelines across the states.
- Amend Sec. 223(f) to ensure federal support for and partnership with a strong national body of the State Advisory Groups.

Many thanks for the opportunity to respond to your questions. Please feel free to call upon me if any additional information can be beneficial to your efforts to improve the federal response in support of state and local efforts and improvements in juvenile justice. I may be reached at 608-266-3323. You may also call upon Tara Andrews, Deputy Executive Director for Policy, at the Coalition for Juvenile Justice, a national leadership association of State Advisory Groups based in Washington, DC: 202-467-0864, ext. 109.

Sincerely,



Deirdre Wilson Garton
Chair, The Wisconsin Governor's Juvenile Justice Commission



U.S. Department of Justice

Office of Justice Programs

Office of Juvenile Justice and Delinquency Prevention

Washington, D.C. 20531

OCT 30 2003

MEMORANDUM

FROM: William Woodruff
Deputy Administrator

TO: State Agency Directors
State Juvenile Justice Specialists
State Advisory Group Chairs

SUBJECT: Compliance with Section 223(a)(12) of the Juvenile Justice and Delinquency Prevention Act of 2002

In January 2001, with the publication of the *Guidance Manual for Monitoring Facilities Under the Juvenile Justice and Delinquency Prevention Act of 1974, as Amended (Guidance Manual)*, the Office of Juvenile Justice and Delinquency Prevention (OJJDP) provided initial clarification on its policy regarding the separation of juvenile delinquent offenders from young adult offenders in secure juvenile detention and correctional facilities. Following review and analysis, OJJDP clarified its guidance on this issue with the publication of this guidance document. The policy presented in the *Guidance Manual* stipulated that:

X "A juvenile who has been transferred or waived or is otherwise under the jurisdiction of a criminal court may be detained or confined in a juvenile correctional facility or a juvenile detention facility with other juveniles who are under the jurisdiction of the juvenile court. Once the transferred, waived, or certified youth becomes an adult, however, he or she must be transferred to an adult facility within six months."

Since this guidance was published, it has come to OJJDP's attention that several States currently do not adhere to Section 223(a)(12) of the Juvenile Justice and Delinquency Prevention (JJDP) Act of 2002. Based upon this information, OJJDP wishes to further clarify its guidance regarding the separation issue.

Section 223(a)(12) of the JJDP Act of 2002, states that juveniles alleged to be or found to be delinquents, status offenders, or nonoffenders will not be detained or confined in any institution

in which they have contact with adult inmates. Adult inmates, according to the JJDP Act of 2002, are those individuals who have reached the age of full criminal responsibility under applicable State law, have been arrested, are in custody awaiting trial on a criminal charge, or are convicted of a criminal offense. The State must monitor all jails, lockups, juvenile detention facilities, and juvenile training schools for separation between juvenile and adult offenders.

Presently, 47 States waive jurisdiction over serious cases involving juveniles so they can be transferred to criminal court. Furthermore, several States permit juveniles tried as adults to be sanctioned in the juvenile rather than the criminal justice system. Judges faced with the task of sanctioning serious juvenile offenders can choose between juvenile and adult correctional sanctions - or may sometimes impose both. To clarify OJJDP's guidance on this issue, a juvenile who has been transferred, waived, or is otherwise under the jurisdiction of a criminal court may be detained or confined in a juvenile correctional facility or juvenile detention center with other juveniles who are under the jurisdiction of the juvenile court. This is not a violation of the separation requirement because the youth is not a juvenile "alleged to be or found to be delinquent" (he or she has been charged with a criminal, not a delinquent act) and the youth is not an "adult inmate." However, **once the juvenile who has been transferred, waived, or is otherwise under the jurisdiction of a criminal court reaches the state's age of majority, he or she must be separated from the juvenile population within 6 months.** Separation may be accomplished architecturally, or through policies and procedures such as time phasing the use of an area to prohibit simultaneous use by juveniles and adult inmates, or by transfer to the adult system.

The implementation of this policy clarification will require immediate action within those States that allow for commingling of juveniles and adult inmates in their juvenile correctional facilities and training schools. OJJDP looks forward to working with these States to ensure that their secure custody policies and practices comply with the requirements of the JJDP Act of 2002.

GOVERNOR'S
JUVENILE JUSTICE
ADVISORY COMMITTEE

October 18, 2007

J. Robert Flores, Administrator
Office of Juvenile Justice and Delinquency Prevention
U.S. Department of Justice
810 7th Street NW
Washington, DC 20531

SUBJECT: Recommendations and comments regarding juveniles who have been transferred to adult court jurisdiction.

Dear Mr. Flores:

I am writing on behalf of the State Advisory Groups in Washington, Idaho, and Oregon to express our sincere concerns, comments and recommendations with regard to the JJDP Act separation requirement and the housing of juveniles who have been transferred or waived to adult court jurisdiction (including recommending that language be incorporated in the regulations and amended in the Reauthorized Act).

With the addition of the definition for "adult inmate" per the JJDP Act of 2002, and the subsequent interpretation by OJJDP which was published in the OJJDP Compliance *Guidance Manual for Monitoring Facilities* (and further clarified in the October 30, 2003, memorandum to the states from William Woodruff), states were informed their laws and/or practice must conform to these new policy guidelines regarding the separation of juvenile delinquent offenders from young adult offenders who are confined in secure juvenile detention and correctional facilities. Historically, federal policies (#89-1301) defined juveniles who were waived or transferred to criminal court as "a swing group of individuals who can be placed with whomever the legislature or courts deem appropriate."

In the October 30, 2003, memorandum it was stated: "Furthermore, several states permit juveniles tried as adults to be sanctioned in the juvenile rather than the criminal justice system." The number of states potentially impacted by this policy guideline and revision to the JJDP Act is significantly greater than referenced in the memo—in a recent (April 2007) communication from the OJJDP Compliance Monitoring Specialist to the states, there were 40 states listed "*who have laws that allowed for kids convicted as adults to be sentenced back to a juvenile facility or who have facilities that reported they did hold such kids (kids with adult convictions).*"

Our states have made every effort to diligently follow the OJJDP *Guidance Manual for Monitoring Facilities* under the JJDP Act, which was recently revised, and interpretation and guidance

regarding the 2002 revisions, even though the regulations per the reauthorized JJDP Act of 2002 have not yet been published or posted for public comment. We are asking for consideration of the following recommendation which we believe is supported by recent research findings on adolescent brain development and effective approaches to criminal behavior by adolescents. The proposed change would give youthful offenders the greatest opportunity for rehabilitation while maintaining public safety, and not jeopardizing the safety of other juveniles in these facilities.

It is our proposal that the following language be incorporated through OJJDP regulations and recommended as an amendment to the JJDP Act. The JJDP Act of 2002 (section 42 USC 5603(26)) defines an adult inmate as an individual who "has reached the age of full criminal responsibility under applicable state law; and ... is convicted of a criminal charge offense." The suggested language, below, would recognize the individual needs of youthful offenders and the strides made in assessment, programming (evidence-based practices), and other re-entry and rehabilitative services available in the juvenile system that have been recognized and, hence, taken into account within current state laws.

The proposed recommendation would re-define an adult inmate through the following language:

"For purposes of 42 USC 5633(12)(A), the term "adult inmate" does not include any individual who:

(1) is younger than the maximum age for juvenile jurisdiction and placement under state law; and

(2) has been determined by the state to be appropriate for continued placement in a facility/program for juveniles."

Under this interpretation, juveniles who have been transferred to adult criminal court would not qualify as adult inmates when they have reached six months beyond the state's age of majority under federal law, and thus their presence would not violate the separation requirement of the JJDP Act. Juveniles meeting the terms of this definition would not be transferred to an adult jail while awaiting trial nor would they be transferred to an adult correctional facility to serve their sentence unless such transfer was deemed necessary for safety and security reasons. The federal compliance Guidance Manual states: *"Note that waiver or transfer and the filing of criminal felony charges does not transform a juvenile into an adult; ..."*

The above exception would continue the intent of federal laws and Formula Grant funding to the states in recognizing systems improvement, research and evaluation, evidence-based practices and programming, and in addressing disproportionate minority contact. It would require that the states appropriately assess each individual youthful offender for continued placement in a juvenile facility, which would be consistent with the original intent of the separation requirement – to protect the other younger residents at the juvenile facility – while recognizing the intent of state laws based on research and best practice in meeting the needs of youthful offenders and providing rehabilitation,

within the allowable ages of placement for these youthful offenders in juvenile facilities per state laws (up to ages 21 and 25 in our respective states).

The National Council on Crime and Delinquency summarized in a recent (June 06) Fact Sheet: youth convicted in the adult system receive little or no rehabilitative programming; they are at greater risk of victimization and death in adult jails and prisons than in juvenile facilities; they are more likely to recidivate than similar offenders remaining in the juvenile system; and the practice of sentencing youth as adults most seriously impacts African-American, Latino and Native American youth.¹ In Washington State, data on race/ethnicity for juveniles sentenced to the adult system who were transferred to juvenile institutions per the Youthful Offender Program, showed a range of 62 to 76 percent minority youth from one-day snapshots of the population. In Oregon, 329 (29 percent) of youth in Oregon Youth Authority close custody facilities on July 1 2007 were under the legal jurisdiction of the adult Department of Corrections. Of those, 144 (44 percent) were minority youth between the ages of 15 and 24. In Idaho, 16 (4 percent) of youth in Idaho Department of Juvenile Corrections' custody on August 15, 2007 were blended sentences or District Court commitments; 6 of the 16 were over 18.5 years of age. The 2005 report from the Coalition for Juvenile Justice, *Childhood on Trial*, reports "three out of four youth admitted to state prisons are racial/ethnic minority youth."

Additionally, other considerations for these youthful offenders include needed age-appropriate services (including special education) that are available in the juvenile system; further, from the CJJ *Childhood on Trial* report, one state study found "more than half of the youth sent into the adult system had no prior offenses and, therefore, had never received any juvenile court services. Many had serious abuse and neglect in their backgrounds." Also, it was noted/summarized by the Director of the Juvenile Law Center in the report: "Strong rehabilitative programs will bear more fruit during adolescence than later in life. Thus, the way corrections supervises teens—the way they counsel, educate, and teach skills—will have a long term effect on their behavior."²

Further, one must take into account that federal law does not require juveniles who were sentenced on juvenile charges be transferred from a juvenile facility when they have reached the state's age of majority; i.e., it could not be assumed that a remanded 18-1/2 year-old is more dangerous to the other residents than a 20 year old also in the juvenile training school/institution, but who was sentenced on juvenile charges (particularly if the remanded juvenile has been assessed and has been determined to be appropriate for continued placement). Additionally, in states that do not have transfer or waiver laws, youth convicted of more serious offenses would remain in the juvenile system, and be housed with other juveniles.

¹ "Youth Under Age 18 in the Adult Criminal Justice System," Views from the National Council on Crime and Delinquency, June 2006.

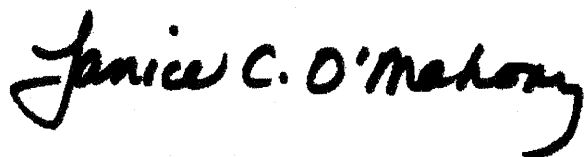
² "Childhood on Trial – The Failure of Trying & Sentencing Youth in Adult Criminal Court," Coalition for Juvenile Justice, 2005, quote from Marsha Levick, Legal Director, Juvenile Law Center.

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In conclusion, a recent research publication from the John D. and Catherine T. MacArthur Foundation summarizes: "Far from being "scared straight," some studies have found that youths transferred to the criminal system are *more* likely to commit new offenses, especially if they've spent time in jail or prison. They also re-offend more quickly and more often." The report also notes the need for policies "to address issues such as diminished responsibility and reduced levels of punishment, as well as the development of age-appropriate institutions, programs, and protections."

We respectfully submit these recommendations to you in the best interests of youth in our states, and are hopeful of their adoption.

Sincerely,

A handwritten signature in black ink that reads "Janice C. O'Mahony". The signature is written in a cursive, flowing style.

Janice C. O'Mahony, Chairman
Washington State Governor's Juvenile Justice Advisory Committee

cc: Mary E. Williams, Washington State Juvenile Justice Specialist
Alan Miller, Idaho Juvenile Justice Specialist
Lana Holman, Oregon Juvenile Justice Specialist
Billy Wasson, Oregon SAG Chair
John F. Varin, Idaho SAG Chair