

**United States Senate**  
COMMITTEE ON THE JUDICIARY  
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**VIA ELECTRONIC TRANSMISSION**

Karol Mason  
Assistant Attorney General  
Office of Justice Programs  
U.S. Department of Justice  
Washington, D.C. 20531

Dear Assistant Attorney General Mason:

On September 5, 2014, I wrote Administrator Listenbee of the Office of Juvenile Justice and Delinquency Prevention (OJJDP) within the Office of Justice Programs (OJP) regarding allegations that OJJDP knowingly granted millions of taxpayer dollars to states that incarcerated runaway youth, foster youth, and other vulnerable minors in violation of the Juvenile Justice and Delinquency Prevention Act (JJDP Act). OJJDP's responses to that letter have confirmed the existence of disturbing compliance monitoring failures at OJJDP. As noted in my September 5<sup>th</sup> letter:

[W]histleblowers allege that it is common knowledge among the states that OJJDP does not annually verify the information reported by states in their applications for [JJDP Act] grants. . . . [Allegedly, in Wisconsin,] there was underreporting of the number of youth who were incarcerated in violation of the Deinstitutionalization of Status Offenders (DSO) requirement [of the JJDP Act] . . . . [but] . . . full funding has been provided for years despite indications of fraud in the DSO Violation Rates reported since 2002.

According to OJJDP's October 28<sup>th</sup> reply:

In May 2008, the Department's Office of the Inspector General initiated an investigation into an allegation that [ ] Wisconsin . . . provided false information in its annual compliance monitoring reports. . . . The investigation found that from 2001 to 2004, a [Wisconsin] compliance monitor submitted annual reports that he admitted were "made up" so that [the state] would continue to receive . . . grant funds. [ ] OIG also found that from 2001 to 2006, [Wisconsin] submitted inaccurate reports about the number of facilities that were physically inspected.

OIG also found that from 2001 to 2008, Wisconsin underreported the total number of secure detention and correctional facilities in its monitoring universe as between 155 and 170 over that time span, failing to account for over 600 police departments that should have been included.

Yet, according to OIG: “[O]ther than reducing Wisconsin’s grant funding in 2007 [for non-compliant data reported for 2005], *no other actions were taken against Wisconsin* [by OJJDP]” as of January 2014.<sup>1</sup> According to OJJDP, in October 2014, it placed special conditions on Wisconsin’s 2013 and 2014 grant funds that prevent the expenditure of *additional* grant funds until those conditions are met, but OJJDP did not explain what has been done to account for the untold amounts of taxpayer dollars that Wisconsin *already* obtained unlawfully since 2001.

When my staff inquired about whether OJJDP ever reduced Wisconsin’s JJDP Act funding based on a clearly non-compliant DSO Violation Rate<sup>2</sup> that was reported for 2004, OJJDP explained in a November 21<sup>st</sup> email that “OJJDP was not able to find any record of such a reduction based on Wisconsin’s 2004 compliance monitoring data.” This failure alone warrants heightened scrutiny of OJJDP’s administration of JJDP Act grants. It clearly contradicts OJJDP’s own interpretation of what the law requires, as stated in its October 28<sup>th</sup> letter, which claimed that:

If a state fails to demonstrate compliance with any of the [JJDP Act’s] core requirements in a given year, OJJDP reduces its formula grant for the subsequent fiscal year by 20 percent for each requirement where the state is noncompliant, as required by the JJDP Act.

But, that did not actually happen in the case of Wisconsin’s 2004 non-compliance.

In addition, following similarly non-compliant data reported for 2005, OJJDP nevertheless awarded full funding to Wisconsin when it reported non-compliant data for the third consecutive year in 2006. According to OJJDP:

- Wisconsin [] initially submitted calendar year 2006 compliance data, which OJJDP used in making a funding determination for the state’s FY 2008 Title II, formula grant allocation. *While this data showed that Wisconsin was technically out of compliance with the DSO core requirement . . .* OJJDP issued a finding of compliant ‘contingent upon further information received’ and required receipt and approval of further supporting documentation. *It was only after receipt and review of six months of supplemental data that showed that [] Wisconsin [] was compliant with the DSO core requirement that OJJDP determined that Wisconsin was in compliance.*<sup>3</sup>

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<sup>1</sup> Emphasis added. At a September 29<sup>th</sup> briefing, OJJDP staff explained that OJJDP needs six months to process data reported by states and then another year to review it before making a funding determination. Thus, funding determinations for a given fiscal year (e.g. 2007) are actually determined based upon two-year-old data (e.g. 2005).

<sup>2</sup> For 2004, Wisconsin OJA reported a DSO Violation Rate of 96.22. At the September 29<sup>th</sup> briefing, OJJDP staff explained that a state is non-compliant when its DSO Violation rate exceeds 29.4. If a state reports a DSO Violation Rate above 5.8 but below 29.4, the state is allowed to demonstrate compliance by satisfying other criteria.

<sup>3</sup> Letter from Hon. Peter J. Kadzik, Assistant Attorney General, U.S. Department of Justice, Office of Legislative Affairs, to Sen. Charles E. Grassley, Ranking Member, S. Comm. on the Judiciary (October 28, 2014).

- OJJDP has a long standing practice of allowing states to submit additional information in support of their applications for JJDP[] [Act] funding in certain circumstances.<sup>4</sup>
- This includes allowing a state to correct clerical errors and/or provide more recent data (data for the last six months) to demonstrate whether the state has come into compliance since the time of its initial submission to OJJDP.<sup>5</sup>

According to whistleblowers, however, this policy effectively allows non-compliant states to “cherry-pick” compliant data from certain months during which incarcerations of status offenders tend to be less frequent—during certain seasons when youth are less likely to commit the status offenses of skipping school or running away from home, for example. Similarly, under this policy, OJJDP allegedly allows states to substitute wholesale qualifying data from another year in place of disqualifying data for the year in question. OJJDP’s justification for this policy is as follows:

This step of reviewing updated data is important because it may reflect a recent change in state policy or practice, or a change in a reporting facility’s procedures *which ensures, moving forward, that the state will be in compliance.*<sup>6</sup>

However, this approach appears to be at odds with the law. As noted above, OJJDP itself explained that the JJDP Act requires OJJDP to base its annual compliance determinations not on whether states *will* comply with the JJDP Act’s requirements moving forward, but on whether states *actually complied* with those requirements during the year in question.

In addition, even if supplemental data is relied upon for the sole purpose of determining whether the state in question has come into compliance *since* the submission of non-compliant data, there is a question as to whether this policy allows such states to essentially “double-dip”—by obtaining two fiscal years’ worth of JJDP Act grants when it has demonstrated compliance for only one of the corresponding calendar years. In its October 28<sup>th</sup> letter, OJJDP attempted to defend its policy as follows:

[O]n February 7, 1990, the then-OJP Acting General Counsel opined that the OJJDP Administrator had the discretion to conditionally award formula grant funds for the express purpose of assuring the state’s *continuing* compliance with the requirements of the JJDP Act.<sup>7</sup>

However, it is unclear how the conditional award given to Wisconsin would have assured Wisconsin’s *continuing* compliance with the JJDP Act, given that the state was found non-compliant the year before, and had submitted non-compliant data for three consecutive years.

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<sup>4</sup> Email from U.S. Department of Justice, Office of Legislative Affairs, to Staff of Sen. Charles E. Grassley, Ranking Member, and Sen. Patrick J. Leahy, Chairman, S. Comm. on the Judiciary (November 21, 2014).

<sup>5</sup> See note 3, *supra*.

<sup>6</sup> Emphasis added.

<sup>7</sup> Emphasis added.

Moreover, OJJDP admitted that “this [policy] does not appear to have been reduced to writing” even though “it has been the common practice since at least 1986.”<sup>8</sup> In addition, OJJDP explained that “[it] has not historically maintained a comprehensive record of all communications with the 55 participating states and territories.”<sup>9</sup> This gives rise to a concern that this policy, questionable on its face, may be arbitrary as applied.

Most disturbingly, whistleblowers allege that OJJDP’s exercise of this policy is not limited to the correction of clerical errors or other innocent mistakes arising from states’ misunderstanding of reporting requirements. As evidenced by the Wisconsin example, the core allegation is that OJJDP knowingly allows states to obtain JJDP Act funds to which they are not entitled, as part of its institutional philosophy of “working with the states” at all costs.

In the case of Wisconsin, OJP’s Office of General Counsel (OGC) reportedly issued an unpublished legal memorandum in order to retroactively justify accommodations provided to Wisconsin under this policy. This memorandum reportedly overturned OGC’s decades-old interpretation of the Valid Court Order (VCO) exception to the DSO core requirement—with important consequences for Wisconsin and possibly other states that otherwise would have lost grant funds due to disqualifying DSO rates.

In addition to Wisconsin, my staff has also been contacted by whistleblowers who provided information and documentation suggesting that OJJDP similarly mismanaged and abused its grant authority with regard to at least four other participating states and territories. In light of this information, there is a growing concern as to just how much taxpayer money OJJDP has unlawfully granted under the JJDP Act, whether and to what extent OJJDP’s administration of that act contravenes the policy goals and procedural requirements that Congress set forth in that act, and what corrective actions need to be taken prior to that act’s reauthorization.

Accordingly, please provide written responses to the following by February 6, 2015:

1. According to OJJDP: “If a state fails to demonstrate compliance with any of the [JJDP Act’s] core requirements in a given year, OJJDP reduces its formula grant for the subsequent fiscal year by 20 percent for each requirement where the state is noncompliant, as required by the JJDP Act.”
  - a. How is OJJDP’s practice of issuing conditional awards to states that report non-compliant data in a given year compatible with this legal obligation?
  - b. Does OJJDP base its annual compliance determinations on whether a state *will* comply with the JJDP Act’s requirements moving forward, or on whether that state *actually complied* with those requirements during the year in question?
  - c. Has OJJDP ever used the same set of data, or overlapping data, to determine a state or territory’s funding under the JJDP Act for more than one fiscal year? If so, by what legal authority?
  - d. What portion of OJJDP’s annual compliance determinations under the JJDP Act has involved the use of supplemental data or conditional awards?

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<sup>8</sup> See note 4, *supra*.

<sup>9</sup> *Id.*

2. Regarding OJJDP's longstanding policy of allowing states that initially report non-compliant data to submit additional information to support a finding of compliance:
  - a. How many of these instances resulted in a finding of non-compliance?
  - b. If not in all cases, what portion of these instances involved a finding of compliant 'contingent upon further information received'?
  - c. Is there a limit on the number of times or years that a state or territory can submit additional information to support a finding of compliance?
  - d. Has this policy been exercised with regard to any one state or territory more than once, or in consecutive years? If so, which state or territory, and which years?
3. OJJDP justified this policy on grounds that it "affords states a full opportunity to comply with the requirements of the JJDP Act and, most importantly, furthers the goal of bringing about the needed reforms in each state's juvenile justice system."
  - a. Why has this policy not been reduced to writing?
  - b. Has OJJDP notified all participating states and territories of this policy? If so, how, when, and were all states and territories notified?
  - c. How does OJJDP ensure that this policy is administered in a manner that is predictable, equitable, and accessible to all participating states and territories?
  - d. OJJDP noted that "between fiscal years 2006 and 2014, OJJDP reduced funding to states by over \$12 million due to noncompliance with [the JJDP Act]." In how many of these instances did OJJDP give states "a full opportunity to comply with the requirements of the JJDP Act" through supplemental data, conditional awards, or other iteration of the policy?
  - e. How are OJJDP employees apprised of this policy and its relevant standards?
  - f. Has this policy ever been revised, updated, or corrected? If so, how?
4. Regarding the supplemental data that Wisconsin was allowed to submit for 2006:
  - a. Which six months of which year(s) did this cover?
  - b. Was this data used to determine Wisconsin's funding for multiple fiscal years?
5. Given that Wisconsin submitted a non-compliant DSO Violation Rate for calendar year 2004, why did OJJDP not reduce Wisconsin's funding by 20% in the subsequent year as required? In how many other instances has OJJDP failed to reduce a state or territory's subsequent funding despite a state or territory's violation of a core requirement of the JJDP Act, excluding cases involving conditional awards?
6. According to OIG, the Report of Investigation detailing Wisconsin's violations referenced above was provided to OJJDP in January 2014.
  - a. Why did OJJDP wait until October 2014 to place a special condition on Wisconsin's FY 2013 and 2014 funds?
  - b. To date, has OJJDP taken any other action to hold Wisconsin accountable for the violations outlined in the OIG Report? If so, when? If not, why not?
  - c. How many dollars in JJDP Act grants did Wisconsin unlawfully obtain as a result of the violations outlined in the OIG Report?

7. According to OJJDP: “When it is determined that grantees must return funds . . . OJP issues a maximum of three letters to the grant[ee] [before referral to Treasury.]”
  - a. How many of these letters has OJP sent to JJDP Act grantees?
  - b. Has OJP sent any letters to Wisconsin? If so, how many, and when?
  
8. Regarding OJP’s Office of General Counsel (OGC):
  - a. Has OGC ever issued a legal opinion or memorandum relating to the JJDP Act or Title II, Formula B grants that was not published? If so, why does OGC not make all of its guidance public so that this process is uniform and transparent?
  - b. Has OGC ever issued a legal opinion or memorandum that applied either contemporaneously or retroactively to the compliance determination of Wisconsin or any other state or territory for funding under the JJDP Act?
  - c. What is OGC’s current interpretation of the VCO exception?
  - d. What was OGC’s previous interpretation of the VCO exception?
  - e. How long did OJJDP operate under the previous interpretation?
  - f. When and why did OGC change its interpretation of the VCO exception?
  - g. Did OGC seek public comment in making this change? If not, why not?
  - h. Did OGC notify all participating states and territories of this change in interpretation? If so, when and how? If not, why not?
  - i. Did OGC’s change in interpretation affect the compliance determination for Wisconsin for data reported for calendar years 2001-2010? If so, how?
  
9. Will you notify all OJP staff by email of their right to communicate with Congress as part of this investigation and the prohibition on retaliation for such communication?
  - a. If so, please provide documentation that such an email has been distributed.
  - b. If not, please explain what other action you will take to ensure that all OJP employees are reminded of this protection and corresponding prohibition.

Please number your responses according to their corresponding questions. Should you have any questions, please contact Jay Lim of my Committee staff at (202) 224-5225. Thank you.

Sincerely,



Charles E. Grassley  
Chairman  
Senate Committee on the Judiciary

cc: Michael E. Horowitz, Inspector General  
U.S. Department of Justice

Sheldon Whitehouse, U.S. Senator  
Senate Committee on the Judiciary