COMMONWEALTH of VIRGINIA

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Mr. Gregory Thompson
Senior Advisor
Office of Juvenile Justice and Delinquency Prevention
Office of Justice Programs
U.S. Department of Justice
4810 7th Street, NW
Washington, DC 20531

RE: OJP Docket No. 1719, Virginia's Response to OJJDP Rule Changes

Dear Mr. Thompson:

We appreciate the opportunity to comment on the Office of Justice Programs' proposed rule changes. We will comment on several of the proposed changes.

§31.2. Definitions, specifically the proposed definition of "detain and confine"

1. Proposed Definition of Detain and Confine Not Consistent with Intent of JJDP Act
   - The proposed definition of "detain or confine" is too broad and is not consistent with the intent of the JJDP Act. Federal register comments in 1988 and 1996 repeatedly speak of "secure detention status" regarding adult jails and lockups. It seems clear that the intent is to protect children in secure custody. In a non-secure area, such as a law enforcement waiting area, there are officers or other staff who simply by their presence either directly with the juvenile, directly with the adult, or both, limit conversation or other interaction between the juvenile and any adult inmate, thus limiting potential for harm. The issue of whether a child believes he is free to leave has no bearing on the issue of protecting that juvenile from potential harm caused by exposure to an adult inmate. A child's acknowledgment that they understand that they are free to leave does not lessen the potential for harm caused to a juvenile by an adult offender.

   - Under the proposed definition, there could be two similarly situated juveniles, but only one would be afforded JJDP Act protection. Consider two juveniles picked up for truancy in neighboring jurisdictions, one whose police substation has a cuffing bar and one whose does not. Both juveniles were questioned in conference rooms, then sent home to parents. Neither juvenile felt free to leave, but no harm came to either one – an officer was present with each child during his time in the facility. Because the first substation has a cuffing bar, that would be reported as a violation of the JJDP Act's prohibition against the detention of status offenders.

- However, since the other substation is a non-secure facility, the JJDP Act protections do not extend to the juvenile, whether he is in secure custody status or not. Clearly this is not what Congress would have intended. Neither falls within the intent of the Act, which is to protect juveniles who are securely detained in adult jails, lockups, detention facilities or correctional facilities.

2. Potential Unintended Consequences

- The proposed definition may accelerate the charging process. Classifying a police waiting area as secure becomes problematic in the case of law enforcement agencies that may wish to handle some issues informally. For instance, if the police want to question a child about vandalism in their community and their practice has been to informally divert a first-time offender in such an instance, the classification of the entire facility as "secure" might encourage the officer to place the child under arrest so as not to violate the JJDP Act. What might have been handled through informal counseling would now result in a child entering the juvenile justice system. Similar concerns would arise when officers interview non-offenders like child victims, child witnesses, those present in the police department awaiting transfer for a temporary detention order for mental health services, etc.

- The proposed definition would be contrary to the best interest of the child and could leave a child that the Act intends to protect in a more vulnerable situation. For example, typical current practice is that an officer would take a child into a police station and have the child wait in an interview or conference room for the arrival of a parent or guardian. Under the new definition, this practice would violate the Act. However, this same officer could secure the child to a bench or flagpole in front of the station to await the arrival of their parent, and this would not constitute a violation of the JJDP Act, but it would be a less desirable option for the child and could add new vulnerabilities.

3. Circumstances Can Be Distinguished from Cited Caselaw

- It has been stated that the new definitions are required due to application of federal caselaw interpreting the fourth amendment's protections against seizure. We would suggest that these cases are not dispositive of this question.

- With regard to the cases[1] cited by OJJDP in their memorandum dated July 15, 2014, both examine whether an adult's interactions in an airport with DEA agents amounted to a consensual encounter or a brief seizure within the meaning of the Fourth Amendment. Both cases involve initial encounters with law enforcement. The issue that we are discussing regarding the definition of "detain and confine" for purposes of the JJDP Act, when a child has been brought to a facility, is an entirely different context. A more analogous context under these cases would be where an officer encounters a child on the street or in school. Thus, the discussion of the two cases cited is not controlling of the definition.

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[1] *United States v. Mendenhall, 446 U.S. 544, 554 (1980); United States v. Bradley, 923 F.2d 362, 365 (5th Cir. 1991)*

- A third case[2] has been raised that has been suggested is controlling as well. As Miranda warnings must be given to a child before custodial interrogation, the Court held that age is a relevant factor in determining whether a child is in "custody." Thus, this case recognizes that children will often feel bound to submit to police interrogation when an adult in the same circumstances would feel free to leave. This is not applicable to our situation and would, thus, not be controlling of the definition.

4. Resource Implications of New Definition

- There would be resource implications on states and on local law enforcement agencies if the definition were to change. At the local level, law enforcement agencies would need to be trained in and institute new practices with regard to recordkeeping when juveniles are brought in, immediately upon entry to the facility. Without any incentive, we would be relying on law enforcement agencies to carry out an exercise which would arguably provide little if any benefit for children. Indeed, as mentioned earlier, it could provide harm.

5. Proposed Alternative Definition

- Instead of the definition proposed, we would suggest that the definition match common understanding: "detained and confined, as used in the Act, means placed, held, or physically secured in a locked room, set of rooms, cell, or to a cuffing rail or other stationary object."

§31.2. Definitions, specifically proposal to define "institution"

- It would be helpful to include a definition of "institution," as used in 42 U.S.C. 5633(a)(12). We would suggest that the definition match common understanding: "Institution means any secure detention or secure correctional facility."

§31.8 Core requirement reporting, namely the shortened timeframe to submit report

- Virginia has two part-time compliance monitors comprising one full-time equivalent position. Virginia is already diverting funds that could be used for juvenile justice programming in order to pay for our compliance monitors. The proposed time frame in which we would be required to complete and submit the report to OJJDP is 60 days shorter than we have had in the past. This shortened time frame will create difficulties. The amount of work in gathering and verifying data is significant. Additionally, given the new time frame, site visits to verify data will be conducted in late fall and winter months, presenting a real possibility of some of the site visits needing to be rescheduled due to weather.

- The shortened timeframe reduces the capacity for us to achieve this deadline without additional resources, the Office of Justice Programs (OJP) is putting states in a position of diverting even more resources from youth.

- We would propose that states be given until March 31 to submit the annual compliance report.

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[2] *J.D.B. v. North Carolina, 564 U.S. 261 (2011)*

§31.9 Core requirement compliance determinations, namely new standards for determinations

1. Impact on Virginia of Proposed Standards

   - The standards proposed for determining compliance with the DSO, Separation and Jail Removal requirements of the JJDP Act would result in Virginia being found out of compliance with both the DSO and the Jail Removal requirements. Under the proposed standards, we would only be allowed approximately four violations of the DSO core requirement or two violations of the Jail Removal requirement before being found out of compliance. Although Virginia has historically been in full compliance with the *de minimis* standard for each of these core requirements, we would be out of compliance under the proposed rules.

2. Methodology Proposed is Too Rigid

   - While the methodology initially used – taking the rates of states with the fewest violations in each of the census bureau regions – was reasonable at the time that the initial standard was developed, that is no longer the case today. At the time, states had much room for improvement in their compliance with the core requirements. Today, however, as indicated by OJP in these proposed Rules, there has been significant progress in compliance since the enactment of the core requirements, and to expect the same level of reduction at this point is not a reasonable expectation.

   - Minimal violations would lead to significant funding reductions. With regard to the jail removal requirement, Virginia has had times when minors lie about their age when being taken into custody, and state that they are adults when, in fact, they are under the age of majority. Thus, they are processed as if they are adults and are detained in adult jails. When these incidents occur, jail staff promptly make arrangements for transfer to an appropriate juvenile facility, but the violation has already occurred. The issue of minors being truthful about their age is outside of the control of the states; states should not be penalized.

   - There are times when, due to local law enforcement staff turnover, the specific requirements of the JJDP Act are not immediately communicated to incoming staff. If one officer makes a mistake out of lack of knowledge, as happened in one jurisdiction in Virginia when several juveniles were held in an adult lockup beyond the six hour limit, it could interfere with compliance for the state as a whole with such a tight standard.

   - When you get to the heart of the matter regarding violations, states can do everything they can to make it right through policies, procedures, laws, and definitions, but we still cannot remove the human element, which accounts for most if not all of the violations.

   - Elimination of the *de minimis* compliance standards whereby states are able to explain why violations occurred and justify that they are not consistent with a pattern or practice would punish states and decrease interest in participation in the JJDP Act. As it stands, the *de minimis* allows states to fix relatively minor issues so that they will not recur. They allow for teaching opportunities. They do not allow for flagrant violations, but recognize human error.

- With fewer allowed violations, states may be found out of compliance based on one particular event (for example, if police gather a number of juveniles as a result of an incident and hold them for longer than six hours, the state would report a violation for each of the juveniles held.) If it was a bad decision of one uninformed officer, and not a pattern or practice that caused the violations, the state would be out of compliance, causing it to lose funding intended to go to benefit the youth in the state. In addition, 50% of the remaining funds would go toward compliance.

- Under Title II of the JJDP Act, Virginia's FY16 is $945,441, down from a high of $2,060,000 in FY98. After deducting planning and administration funds and funds for the state advisory group, we are left with $830,897. Assuming we are found out of compliance in one core requirement, twenty percent, or $166,179, would be withheld, leaving $664,718. Of that figure, we would be required to use one half, or $332,359, to get back into compliance, leaving only $332,359 to fund our compliance monitors and then, with the remaining balance, provide services and programs for vulnerable youth. In the scenario above, the problem would likely be addressed and resolved by a skilled compliance monitor who provides technical assistance to the facility or a corrective action plan would be established. Funds would not facilitate compliance in either circumstance. The withholding, then, would simply serve as a punishment to the state, and would in turn punish the vulnerable juveniles that these funds are intended to protect.

3. Alternative Methodology for Consideration

- We recommend that OJJDP do a comprehensive analysis that is data driven and evidence-based and determine a standard that rewards continued improvement by states and does not punish states for occasional violations. The JJDP Act is not about monitoring, it is about serving and protecting kids.

- In addition, and more critically, we recommend retaining the *de minimis* concept, allowing states to demonstrate criteria that suggest why they should not be found out of compliance, most particularly, allowing a look at whether violations constitute an isolated incident rather than demonstrate a pattern or practice. If a violation happens because of mistake, and not due to a practice or policy, the issue can be immediately remediated, thus permitting full compliance again. In those instances where immediate remediation is possible, providing funds to get back into compliance is often not fruitful, because as soon as the violations were noted, technical assistance was provided, so that the issue would not likely occur again. In the cases described above, where a juvenile lied about his age, no funds would address this issue; to hold the state out of compliance and withhold 20% of funds, and then require that 50% of the remaining allocation be used to get into compliance, would simply serve as punishment to the state, at the expense of the juveniles across the state who could benefit were full funding to be awarded. Similarly, if the violations occurred as a result of lack of knowledge by a new officer which was corrected upon uncovering the issue, withholding funds would serve as a punishment to the state and ultimately, to the very juveniles that the Act was created to protect.

Summary

Virginia has a long history of partnership with OJJDP and with compliance with the JJDP Act and its intended purposes. It is disappointing to see the direction move away from the protection and service of children who come to the attention of the juvenile justice system in favor of a more administrative stance. We understand the need for increased accountability, and believe that the proposals contained in this response would permit enhanced accountability without placing unreasonable burdens on states.

To implement the changes as proposed in one compliance monitoring period is neither fair nor practical. Harm will be done to children if this were to be implemented as proposed.

If the definitions are not modified but, rather, remain as in the proposed rules, states will need time to educate facilities about the new definitions, to provide assistance to help them institute data collection methods, and to collect data consistent with the new rules. Only after the new definitions have been implemented and data is consistently collected pursuant to the final definitions should OJJDP analyze those data and determine appropriate new compliance standards.

Thank you for the opportunity to comment on the proposed rules. We look forward to continuing our partnership with OJJDP as we work toward our common goal: improving the lives of the children that the Act is intended to protect.

Sincerely,

Francine C. Ecker
Director

c: Laurel Marks