COALITION FOR JUVENILE JUSTICE

September 29, 2016

U.S. Department of Justice
Office of Justice Programs

In re: 28 CFR Part 31, the Proposed Rulemaking to Update the Implementing Regulation for the Formula Grant Program Authorized by Title II, Part B of the Juvenile Justice and Delinquency Prevention Act of 1974 at 60 FR 21852 and Amended at 61 FR 65132.

To Whom It May Concern:

Since 1984, the Coalition for Juvenile Justice ("CJJ") has served as the 'trade association' for the State Advisory Groups, or "SAGs", the governor-appointed bodies that administer funds appropriated under the Juvenile Justice and Delinquency Prevention Act. SAGs are also charged with ensuring compliance with the four core protections prescribed by the Act to safeguard youth who come into contact with the juvenile justice system. In this role, CJJ has been afforded unique access to real-time feedback from states about how proposed federal actions—be they legislative or regulatory—may affect their ability to implement safe, fair and effective programming and approaches.

Through our relationship with the field, including a list of over 9,000 juvenile justice stakeholders, with relevant federal agencies, and with Congress, CJJ relays information about developments in juvenile justice at the state and local level to federal policymakers; and from federal policymakers to the field. We have also remained at the cutting edge of juvenile justice issues by partnering with private philanthropic initiatives to improve juvenile justice policy and practice, and through those partnerships, have developed a wide network of relationships with experts in evidence-based practice.

Further, the Coalition for Juvenile Justice maintains close connections with the Juvenile Justice Specialists, DMC Coordinators and Compliance Monitors, the frontline practitioners and state–level actors most knowledgeable about the practical impact of federal legislation and rulemaking. It is with their input that CJJ has prepared and is offering the following comments on the Proposed Rulemaking.

General Comments

The Proposed Regulatory Action is Impracticable, and Provides Disincentives to Participation in the JJDPA.

The original design of the Juvenile Justice and Delinquency Act provided states with an incentive to participate. In exchange for federal resources to implement prevention programs and to improve systems, states receive resources, and standards with which to comply. For over forty years, this approach has resulted in significant gains in juvenile justice practice and policy. The Proposed

Regulatory Action has turned that scheme on its head and now converts the Act to a punitive measure that would put forty-eight states immediately out of compliance with one or more of the core requirements of the JJDPA. Further, the Proposed Action would require them to expend 50 percent of their reduced award on remedial efforts achieve compliance with the core requirements, rather than on services and programming for youth. This immediate out-of-compliance determination sets the bar where it is impracticable for most states to meet, despite their best efforts. And it is certainly a standard that will leave a majority of states unable to fulfill the spirit and intent of the Act to "support juvenile delinquency prevention programs and to improve their juvenile justice systems" as their remaining resources will be dedicated to remediation rather than programs.

Currently, states are charged with implementing the mandates of the Act with appropriations that have been reduced by almost 50 percent since 2002. Already strapped for resources, and relying primarily on those appropriated by the state rather than the federal government, states would find it difficult under the Proposed Regulatory Action to reach compliance, and the Regulatory Action would in fact dis-incentivize participation in the Juvenile Justice and Delinquency Prevention Act. This would inevitably lead to wider variances between and within states in terms of the efficacy, equity and efficiency of juvenile justice systems; and would ultimately lead to poorer outcomes for youth.

The Proposed Regulatory Action May Conflict with Other Relevant Administrative Action.

In June of 2014, the Office of Juvenile Justice and Delinquency Prevention released new Guidance on Sight-and-Sound Separation and Jail Removal, informed by the U.S. Department of Justice's Office of Legal Counsel. Among other things, that Guidance broadens the application of the separation and jail; removal requirements to juveniles in non-secure custody, triggering a responsibility for states to monitor more facilities than they were previously responsible for. As of the time of this new proposed Rulemaking, states had still not received clear direction on the full scope of their monitoring universe that would enable them to understand their compliance responsibilities. States are left to assume—though it has not been confirmed—that the Proposed Rule would preempt any previous Guidance given by OJJDP.

The Proposed Regulatory Action Will Negatively Impact the Relationship between the Office of Juvenile Justice and Delinquency Prevention and the States.

The spirit of the JJDPA requires that states and the Office of Juvenile Justice and Delinquency Prevention work in a spirit of collaboration to ensure that youth who come into contact with the juvenile justice system are treated fairly and humanely, and that they receive services and programming they may need. States agree to use their best efforts to comply with the Act, but when they fall short, rely on OJJDP to provide training and technical assistance, or connect them to information and other resources. That collaborative relationship between the states and federal government depends on an understanding that OJJDP's role is to assist states in reaching compliance, not simply to penalize them when they do not. The Proposed Rulemaking tips that balance and will impede open, and frank communication between the states and OJJDP.

Comments Regarding the Proposed New Standards for Compliance with the DSO, Separation, and Jail Removal Requirements.

1. **The Elimination of the *De Minimis* Standard for a Numerical Threshold is Rigid and Does Not Adequately Account for Differences Between States.**

The Proposed Regulatory Action would eliminate the *de minimis* standard for determining compliance with the DSO, jail removal and separation core requirements despite pointing out that it has been largely successful, and resulted in a 99.9 percent decrease in non-compliance with the DSO requirement, a 99.9 percent decrease in jail removal non-compliance and a 99.8 decrease in sight-and-sound violations.

The proposal to use a statistical model for determining compliance standards developed from three states with the lowest non-compliance states from each of the four Census Bureau regions demonstrates a lack of understanding about the sometimes stark differences between states, even within the same Census Bureau regions.

The proposed methodology does not account for the myriad factors that have an impact on compliance such as: *population size, population density, rural versus urban nature of the population, number and location of facilities, number and location of juvenile courts, and racial and ethnic make-up of the population*, to name just a few. The proposed change wrongly assumes that there is a formula to reach compliance when many of the changes that will have to be made involve broader social and systems culture shifts rather than the application of a statistical model to achieve "substantial compliance." The application of a statistical model also negates the role of individual discretion and decision-making, at virtually all points of the juvenile justice continuum, as a factor that influences states' compliance, particularly with the DSO core requirement.

An alternative approach to the new proposed method for determining compliance would be for states to be categorized according to key characteristics and similarities that influence whether and how they reach compliance. Some of these characteristics could include those factors listed above as well as, for example: whether there is relevant state legislation that reinforces the DSO core requirement, a concentration of their juvenile population in rural, or hard-to-access communities, or whether a state has old facilities that make compliance with sight-and-sound separation more costly, or challenging.

2. The New Requirements Are Unclear Regarding Implementation and Enforcement.

Additionally, answers to the following questions are being sought:

- What is the timeline for this proposed change?
- Can states challenge or appeal a non-compliance determination, particularly if they are currently in compliance and would be deemed non-compliant under the new standard? If so, what will be the process for making an appeal?
- With what expertise is the new compliance model being developed? Were, or will states be consulted to ensure its validity or efficacy?
- Will OJJDP be given resources and a directive to train and provide technical assistance to implement the new standard?

<u>Comments Regarding the Proposed Requirement That States Annually Report Compliance Data for 100% of Facilities</u>

3. It Remains Unclear How the Proposed Reporting Requirement Will be Applied.

As mentioned above, in 2014, OJJDP's new Guidance on Sight-and-Sound Separation and Jail Removal expanded the scope of what might be considered secure detention, and as such, increased the number

of places where the core requirements might be triggered. The Guidance applies a subjective standard, so that the "facility" in which juveniles are held is one measure of detention or confinement, but another is whether the juvenile being held was not, or believed themselves to not be free to leave. The current proposal, on the other hand, expressly includes only "juvenile detention facilities, juvenile correctional facilities, adult jails, adult lockups and collocated facilities" while referring to the new expanded definition of "detain and confine." So, further clarification is necessary for states to understand whether the new proposal encompasses those places where juveniles are held, and are not free to leave (for instance in police substations in Malls, or in an open area in a police station), or whether it is limited to the enumerated places listed above.

4. The Proposed Requirement is Fiscally Unattainable for Most States with their Current Resources.

At current appropriation levels, states do not have the resources to comply with this new mandate to monitor 100 percent of facilities. While state juvenile justice systems may aspire to report on compliance of all facilities that hold juveniles, they have neither the human nor financial resources to do so. A vast majority of states do not have a full-time Compliance Monitor. Further, many states have facilities numbering in the hundreds, particularly after the expansion of the definitions of "secure" and "non-secure". The elimination of the Federal Wards Provision may only increase further the number of potential facilities that may have to be inspected in some states.

5. The Proposed Requirement Does Not Adequately Specify what Constitutes 'Good Cause' For States to Receive a Waiver of the 100 Percent Reporting Rule.

The Proposed Rule would give states the option of requesting a waiver from the Administrator from the 100 percent reporting requirement. Further clarification is needed about the following: 1) circumstances that would constitute "good cause" 2) the process for making the request for a waiver; and 3) what the state's compliance status will be while the request is under consideration.

Comments Regarding Proposed Changes to the DMC Requirement

6. Further Clarification is Needed Regarding the Statistical Tool for Assessing States' Progress.

States would benefit from receiving additional information on the development of the statistical tool, and the "technical assistance grantees" who are charged with developing it. To ensure the validity of the tool, it is being requested that states be consulted throughout the development process, and a timeline for the roll-out of the tool be announced. States could also benefit from additional information about the "assessment and comprehensive analysis" and "evaluation" requirements associated with the new standards for DMC reduction efforts, including some clarification on about how (and by whom) analyses and evaluations would be assessed for adequacy.

7. The Criteria for the Selection of Jurisdictions for DMC Reduction is Limiting.

The requirement that states obtain the Administrator's approval for the selection of three jurisdictions with the "highest minority concentration or with focused DMC-reduction efforts" is questionable. States currently recognize that DMC is among the more difficult of the core requirements to address, given the sensitive nature of the intersection of race, ethnicity and criminal (and juvenile) justice. As a result, meaningful DMC-reduction efforts are often initiated through a process of relationship-building,

stakeholder engagement and upon invitation by local authorities. After building a track record of success, or progress in those jurisdictions, it can become easier to initiate DMC reduction efforts elsewhere. States need the flexibility to field-test and build a foundation of success in jurisdictions other than those specified by the new Proposed Rule.

8. The New Timing for DMC Data Reporting Conflicts with Census Data Reporting and State Reporting

States continue to face significant administrative burdens associated with the required reporting periods for compliance monitoring data. The federal fiscal year reporting for DMC creates a conflict with state reporting timelines, and even with federal Census Data reporting which is on a calendar-year reporting schedule. In order for states to be responsive to reporting obligations, it is being proposed that the reporting deadlines be scheduled to coordinate rather than conflict with other federal, and state timelines.

In closing, the Coalition for Juvenile Justice, its member State Advisory Groups and juvenile justice stakeholders appreciate the opportunity to comment on these proposed changes to the federal regulations governing the implementation of the Juvenile Justice and Delinquency Prevention Act. As is the U.S. Department of Justice Office of Justice Programs, we are committed to ensuring that youth who come in conflict with the law have contact with a juvenile justice system that is effective, fair and safe. To that end, we remain available to work cooperatively with the Office of Juvenile Justice and Delinquency Prevention to make that outcome a reality for all youth, families and communities around the nation.

Regards,

The Executive Board and Membership of the Coalition for Juvenile Justice