Questions for the Record from Senator Charles E. Grassley for
Karol Mason
U.S. Senate Committee on the Judiciary
Hearing on "Improving Accountability and Oversight of Juvenile Justice Grants"
Submitted on April 28, 2015

1. **Legality of "not out of compliance" notifications**

In an October 28, 2014 letter, the Justice Department stated that:

> Pending implementation of [an assessment] tool, OJJDP has notified states that they are not out of compliance with the DMC core requirement and has offered training and technical assistance to ensure each state continues to address DMC with the juvenile justice system.[1]

The Department also stated that "the 'not out of compliance' notifications began in 2013 and *will* continue each year until the tool is implemented" and that each state would be offered training and technical assistance during this period.[2] [3] [4] [5]

However, the statute requires OJJDP to base Title II Formula Grant funding decisions on annual, state-specific assessments of compliance.[3] Mere offers of training and technical assistance cannot satisfy this requirement. The Administrator has the duty and authority to find individual states either compliant or non-compliant -- but it is unclear what part of the statute authorizes him to declare all states "not out of compliance" even *before* conducting these annual, state-specific assessments, with regard to the DMC requirement.

At the April 21st hearing, I asked you whether the OJJDP Administrator has legal authority to suspend statutory requirements in this manner. Unfortunately, your response failed to answer the question because it did not cite any legal authority in support of these "not out of compliance" determinations. Instead, you stated as follows:

> We do not have an adequate tool that gives us the objectivity we need to determine compliance with the disproportionate minority contact core requirement . . . . We are . . . working . . . to develop a tool that will withstand scrutiny and will be more objective . . . . It is in our best interest to develop a tool that is fair

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[1] Letter from the Hon. Peter J. Kadzik, Assistant Attorney General, U.S. Department of Justice, to Sen. Charles E. Grassley, Ranking Member, Sen. Comm. On the Judiciary (Oct. 28, 2014).

[2] *Id.* (emphasis added).

[3] U.S.C. § 5633 (a), (c)(1), and (c)(2).

[4] *Id.* (emphasis added).

[5] U.S.C. § 5633 (a), (c)(1), and (c)(2).

and objective so that we can hold states fairly accountable for the compliance with that core requirement.[6]

Questions

a. According to the OJJDP website, there have been only three instances since Fiscal Year 2006 in which OJJDP reduced a state's funding by 20% based on a finding of noncompliance with the DMC requirement.[7]

i. Since FY 2006, has OJJDP's failure to develop an objective assessment tool led to over-enforcement or under-enforcement of the DMC requirement?

In April 2013, the Office of Juvenile Justice and Delinquency Prevention (OJJDP) Administrator learned that OJJDP's method for determining states' compliance with Disproportionate Minority Contact (DMC) was not based on a consistent objective standard. Instead, the determinations were based on the subjective judgment of the individual reviewing an individual state's DMC plan. In light of this information, the Office of Justice Programs' (OJP) Office of General Counsel (OGC) examined OJJDP's practices and found that, in the absence of clear and objective standards for collecting and measuring data, OJJDP's method for determining states' compliance with DMC may not have been legally defensible. Thus, beginning in September 2013, all participating states received funding determination notice letters that advised that states were not out of compliance with the DMC core requirement. States were strongly encouraged to prioritize and increase their efforts to eliminate systemic racial and ethnic disparities and to seek training and technical assistance from OJJDP to assist the state with fully implementing the OJJDP DMC Reduction Model. In sending this guidance, OJJDP sought to promote the goals of the DMC requirement without unfairly and arbitrarily penalizing states based on the individual standards of different reviewers—and depriving communities of much-needed funding to support juvenile justice—by applying an unworkable compliance standard. Notably, OJJDP staff continues to review states' DMC compliance plans with the goal of providing technical assistance to the states.

OJJDP is actively working to develop a legally sound and objective standard against which to judge all states' compliance with DMC on an equitable basis. It is speculative to assess whether the lack of an objective tool led to over-enforcement or under-enforcement of the DMC requirement. However, it is clear that, absent an objective tool, consistent determinations are unlikely. It is OJJDP's plan to develop an objective tool not to increase or decrease the amount of states found out of compliance but instead to ensure consistent and legally defensible standards aligned with the JJDPA. As we develop this tool, OJJDP is working closely with OJP's Bureau of Justice Statistics;

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[6] U.S. Senate Committee on the Judiciary, *Improving Accountability and Oversight of Juvenile Justice Grants*, (Apr. 21, 2015), http://www.judiciary.senate.gov/meetings/improving-accountability-and-oversight-of-juvenile-justicegrants/.

[7] American Samoa in FY 2009; Mississippi in FY 2007; and Northern Mariana Islands in FY 2007. *See* http://www.ojjdp.gov/compliance/compliancedata.html.

Office of Audit, Assessment and Management; Office of General Counsel; and three technical assistance grantees who are leading experts in the field of racial and ethnic disparities, specifically, the W. Haywood Burns Institute, Center for Children's Law and Policy, and Development Services Group. The objective tool will be part of a new policy and accompanying procedures establishing consistent compliance guidelines for states, streamlining the process for submitting compliance data, and establishing an objective and data-driven process to assess compliance.

ii. **Since FY 2006, which states in which years were unfairly denied JJDPA funds to which they were entitled – due to OJJDP's failure to develop an objective tool to assess compliance with the DMC requirement?**

As detailed above, the previous practice (under which assessments were made) was not based on a consistent objective standard. We are not, however, aware of any states that were unfairly denied JJDPA funds to which they were entitled.

iii. **Since FY 2006, which states in which years unfairly *obtained* JJDPA funds to which they were *not* entitled – due to OJJDP's failure to develop an objective tool to assess compliance with the DMC requirement?**

We are continuing our review of the matter. We are, however, aware that for FY 2013 funding, three states, South Carolina, Illinois, and Louisiana, received their entire FY 2013 Part B Formula Grant allocation, and for FY 2014, four states, Arkansas, Illinois, Louisiana, and South Carolina, received their entire FY 2014 Part B Formula Grant allocation, despite initial recommendations to reduce funding based on preliminary concerns about whether they had satisfied the DMC requirement. Full awards were made because OJJDP determined there was insufficient legal basis for a noncompliance determination, without being arbitrary.

b. **How is it fair to penalize American taxpayers for OJJDP's failure to develop an objective DMC assessment tool, by giving out federal grants to states for which OJJDP claims there is currently no objective way to determine compliance with statutory funding requirements?**

A critical purpose of the Title II, Part B, and Formula Grant Program is to encourage states to protect the nation's youth from certain harmful conditions in the justice system. The grant funds awarded to states were used to improve the juvenile justice system, a core purpose of the statute. As stated above, we are nevertheless developing policies and procedures to ensure that only those states in compliance with JJDPA and the core requirements receive their full grant allocation.

c. At the hearing, you stated that "I can assure you that going forward we are going to have a robust policy that is objective and transparent, *so that everyone going forward knows what the rules are.*"[8]

i. Has OJJDP notified all states that all states have received "not out of compliance" notifications since 2013 and will continue to do so for Fiscal Year 2016?

Beginning in September 2013, all states participating in the JJDPA received funding determination notice letters that advised that states were not out of compliance with the DMC core requirement. States were strongly encouraged to prioritize and increase their efforts to eliminate systemic racial and ethnic disparities and to seek training and technical assistance from OJJDP to assist the state with fully implementing the OJJDP DMC Reduction Model.

ii. What are the rules that govern DMC compliance assessments for states while the assessment tool is being developed?

Please see above response.

iii. What is the statutory basis for these rules?

In addition to the JJDPA, all OJJDP grant decisions must also follow general OMB grant regulations, as well as requirements of cross-cutting statutes, such as the Administrative Procedure Act. It is correct that the JJDPA requires OJJDP to assess compliance with all of the core requirements, including DMC. However, OJJDP must also ensure that their actions are legally defensible. In April 2013, the OJJDP Administrator learned that OJJDP's method for determining states' compliance with DMC was not based on a consistent objective standard. Instead, the determinations were based on the subjective judgment of the individual reviewing an individual state's DMC plan. In light of this information, OJP OGC examined OJJDP's practices and found that, in the absence of clear and objective standards for collecting and measuring data, OJJDP's method for determining states' compliance with DMC may not have been legally defensible.

d. According to Ms. Andrea Coleman, the DMC Coordinator at OJJDP, she developed in 2011 the Compliance Determination Assessment Instrument (CDAI) to assist with making annual determinations of compliance with the DMC requirement. Is there another tool that is currently in development at OJJDP?

i. If so, please describe this tool.

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[8] U.S. Senate Committee on the Judiciary, *Improving Accountability and Oversight of Juvenile Justice Grants*, (Apr. 21, 2015), http://www.judiciary.senate.gov/meetings/improving-accountability-and-oversight-of-juvenile-justicegrants/ (emphasis added).

OJJDP is actively working to develop a legally sound and objective standard against which to judge all states' compliance with DMC on an equitable basis. OJJDP is working closely with OJP's Bureau of Justice Statistics; Office of Audit, Assessment and Management; Office of General Counsel; and three technical assistance grantees who are leading experts in the field of racial and ethnic disparities, specifically, the W. Haywood Burns Institute, Center for Children's Law and Policy, and Development Services Group. The objective tool will be part of a new policy and accompanying procedures establishing consistent compliance guidelines for states, streamlining the process for submitting compliance data, and establishing an objective and data-driven process to assess compliance. Although draft policies have been distributed within OJJDP, there is no final policy that has been approved by all of the relevant stakeholders.

ii. If not, why has OJJDP not approved the CDAI?

Please see above response.

e. According to OJJDP: "If a state fails to demonstrate compliance with any of the [JJDPA'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 JJDPA."[9]

As we explained in our letter dated June 26, 2015, OJJDP's practice has been to reduce funding in the fiscal year subsequent to the year an actual finding of noncompliance was made by the Administrator – which generally occurred approximately 2-3 years after the year of the non-compliant activity.

i. How are the "not out of compliance" notifications compatible with 42 U.S.C. § 5633 (a), (c) (1), and (c) (2)?

Please see response 1 (c)(iii) above. In April 2013, the DMC Coordinator opined in writing that OJJDP's current method of determining states' compliance with DMC was not based on any consistent standard, nor on the JJDPA or OJJDP's regulations implementing the Formula Grant program. Instead, the determinations of whether a state was in or out of compliance (and consequently subject to a reduction in formula grant funding), were based upon the subjective judgment of the individual reviewing a particular state's DMC plan. Based on this determination and the fact that any finding of noncompliance based on these vague standards would be found to be arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. § 706(2), OJJDP was not prepared to defend DMC noncompliance determinations. As described above, OJJDP is developing a legally sound and statistically valid standard against which to judge all states' compliance with DMC on an equitable basis.

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[9] Letter from the Hon. Peter J. Kadzik, Assistant Attorney General, U.S. Department of Justice, to Sen. Charles E. Grassley, Ranking Member, Sen. Comm. On the Judiciary (Oct. 28, 2014).

ii. **How are the "not out of compliance" notifications compatible with CFR 31.303(j)?**

See above response. While we recognize that these notifications were not compatible with C.F.R. 31.303(j), compliance with the Administrative Procedure Act is equally important in light of the facts discussed above.

iii. **Is OJJDP staff required to review states' DMC compliance plans even though they are receiving these notifications?**

OJJDP staff continues to review states' DMC compliance plans even though states are receiving these notifications. As noted above, while states were notified that they were "not out of compliance" with the DMC core requirement, states were strongly encouraged to prioritize and increase their efforts to eliminate systemic racial and ethnic disparities and to seek training and technical assistance from OJJDP to assist the state with fully implementing the OJJDP DMC Reduction Model. In that regard, OJJDP has consistently offered training and technical assistance in this area, and a review of the DMC compliance plans has assisted in identification of states where assistance is needed.

iv. **Does OJJDP base its annual compliance determinations of the DMC requirement on whether a state received training and technical assistance, or on whether that state *actually complied* with the DMC requirement during the year in question**?

Please see above responses concerning compliance determinations and use of training and technical assistance.

f. **Since OJJDP began sending out these notifications in 2013, which states in which years have received training and technical assistance with respect to the DMC requirement?**

In 2013, no states received training and technical assistance for compliance with the DMC requirement. In June 2014, OJJDP provided Core Requirements training to all states. With the assistance of a recently awarded grant to experts in the field of racial and ethnic disparities, specifically, the W. Haywood Burns Institute, Center for Children's Law and Policy, and Development Services Group, we are now prepared to provide DMC technical assistance.

g. **Prior to 2013, did OJJDP ever send out "not out of compliance" notifications to any state, with respect to any core requirement of the JJDPA? If so, when, and to which states?**

OJJDP is unaware of any such notifications prior to 2013.

h. Which provision of the statute authorizes the Administrator to issue these "not out of compliance" notifications?

See response 1 (c)(iii) above. As noted above, the JJDPA requires OJJDP to assess compliance with all of the core requirements, including DMC. Additionally, OJJDP must also ensure that its actions are legally defensible. Since OJP OGC determined that OJJDP's method for determining states' compliance with DMC may not have been legally defensible, beginning in September 2013, all participating states received funding determination notice letters that advised that states were not clearly found by the Administrator to be out of compliance with the DMC core requirement. Until a legally defensible standard has been developed, which can be applied uniformly to all jurisdictions, we are not in the position to actually assess DMC monetary penalties.

2. Recovery of Funds Disbursed Under Unlawful DOJ Policy That Dates Back to 1997

In an April 14, 2015 letter, the Justice Department admitted that it had in place a policy since 1997 that was "not permitted by the statute" in that it allowed states to obtain JJDPA funds even after submitting non-compliant data.[10] At the April 21st hearing, I asked whether you could commit to providing a ball-park estimate of how many federal taxpayer dollars were wrongfully disbursed to states under this unlawful policy.

You did not commit to providing this figure by a date certain, stating as follows:

> Because of the subjectivity that is built into the current policies and practices, we are having a difficult time being able to determine on an objective basis and recreate the decisions. So . . . I could not give you a time limit as we dig into this to try to figure out what monies, if any, need to be returned as a result of earlier decisions.[11]

Questions

a. Why do decisions need to be recreated at all in order to obtain this ball-park estimate? Why is this not a straightforward matter of reviewing and tallying records?

As a result of our review, we have found that records dating back to 1997 are incomplete or not available, making it difficult, if not impossible, to validate compliance determinations made by OJJDP. Specific OJP record retention requirements, as approved

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[10] Letter from the Hon. Peter J. Kadzik, Assistant Attorney General, U.S. Department of Justice, to Sen. Charles E. Grassley, Ranking Member, Sen. Comm. On the Judiciary (Apr. 14, 2015).

[11] U.S. Senate Committee on the Judiciary, *Improving Accountability and Oversight of Juvenile Justice Grants*, (Apr. 21, 2015), http://www.judiciary.senate.gov/meetings/improving-accountability-and-oversight-of-juvenile-justicegrants/.

by the National Archives and Records Administration (NARA), generally require retention of all grant records, for a period of four years after the close of each grant. Additionally, the Grant Management System (GMS) (which is OJP's official system of records for grant information) contains all such records in an electronic format. Unfortunately, it is apparent that although OJJDP had been retaining all grant documents electronically in GMS consistent with this policy, apparently the documents used in part for determining compliance with the core requirements had been retained, if at all, in a paper format, by individual compliance program managers. OJJDP has physically moved to new office space five times since 1997 alone, and unfortunately, such moves have contributed to the loss of paper files from individuals in OJJDP. As a result of this review, OJJDP has modified its policy to include all compliance documents in the electronic systems, which should ensure that in the future it complies with all OJP record retention requirements as approved by NARA.

b. In which years, and for how many core requirements, were states allowed to submit supplemental data under the 1997 policy which the Department recently admitted was inconsistent with the statute?

While our review of past OJJDP Formula Grant practices is ongoing, it appears that states were allowed to submit supplemental data for each of the three core requirements that relied upon data. OJJDP did not consistently document instances in which supplementation was allowed, and as noted above, OJJDP records are incomplete. As a result, it is impossible to identify all the instances in which supplementation was allowed.

c. For each instance referenced in Question 2(b) above, what is 20% of the total amount of Title II formula grant funds the state received in that year?[12]

Unfortunately, due to incomplete records and poor documentation, we do not have access to this information.

d. What is the sum of all the 20% calculations referenced in Question 2(c), above?

Please see above response.

e. Other than your concerns about OJJDP's ability to assess states' compliance with the DMC requirement, do you have concerns about the objectivity of compliance determinations that OJJDP made under the 1997 policy with respect to any of the three other core requirements? If so:

i. Which other core requirements?

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[12] 42 U.S.C. § 5633 (a)(19) requires participating states to have procedures necessary for "accurate accounting of funds received" under the Act, so states should have these numbers available.

The new Core Protections Unit is developing policies and procedures to ensure consistent standards aligned with the JJDPA. In addition to concerns regarding DMC discussed below, we have determined that the regulations governing compliance with the three other core requirements are out of date. Moreover, both the regulations themselves, and the method by which they were implemented, allowed for significant subjectivity on the part of reviewers.

ii. What is subjective about these compliance determinations?

For example, the *de minimis* exception for the Deinstitutionalization of Status Offenders core requirement allows a state with a certain level of compliance to be found compliant if it "adequately meet[s]" two criteria: (a) noncompliant incidents violated state law, and (b) an "acceptable plan" has been developed that is designed to eliminate the noncompliant incidents. States with lower rates of compliance are eligible for the *de minimis* exception if they "fully satisfy" two criteria: (a) noncompliant incidents violated state law, and (b) an "acceptable plan" has been developed that is designed to eliminate the noncompliant incidents. However, OJJDP has never defined the terms "adequately meet[s]," "fully satisfy," or an "acceptable plan." Similarly vague and undefined terms are used in the Jail Removal requirements.

iii. Who has determined that these determinations are subjective?

In conducting our review, we identified various vague terms. OJJDP, in consultation with OJP's Office of General Counsel and the Office of the Assistant Attorney General, has found these terms are subjective. The Assistant Attorney General for OJP has directed that specific action be taken to ensure consistent and objective policies and procedures are developed, and that staff be adequately trained to ensure consistent application of discretionary factors.

iv. Do these concerns of subjectivity warrant "not out of compliance" notifications to be sent to all states with respect to the other core requirements as well?

Fortunately, the degree of subjectivity present in the three other core requirements is not as severe as with the DMC requirement, such that "not out of compliance" notifications were not deemed necessary.

v. In practice, are there any core requirements for which OJJDP is less likely to reduce a state's funding for noncompliance?

Because of problems with DMC compliance review discussed above, DMC is currently the core requirement for which OJJDP is less likely to reduce a state's funding.

3. Regulations

At the April 21st hearing, Senator Whitehouse correctly stated to you that "developing administrative regulations is something that is 100% within the purview of the executive branch of government. That is something that you control absolutely."[13]

Senator Whitehouse also stated to you his preference that OJJDP begin revising and updating regulations now to match the current statute, independent of the timing of the next reauthorization of the JJDPA.[14]

I agree.

Questions

a. Since April 21, 2015, what actions has OJJDP taken to update the JJDPA regulations?

Personnel across OJP have been actively working on draft regulations for several months. Since the April 21, 2015 hearing, OJP has redoubled its efforts and is working diligently to prepare the regulations for final review within the Department before they will be submitted to OMB and published in the Federal Register as a Notice of Proposed Rule-Making for public comment.

b. When were the JJDPA regulations – pursuant to the 2002 reauthorization – first drafted and by whom?

Drafting on revised JJDPA regulations began in 2003 and several versions have followed through the years, including drafts in 2006/2007, 2010/2011, and most recently in 2015. We are informed that numerous OJP staff members have been involved in the drafting efforts, including senior OJJDP management and staff and OGC.

c. According to one whistleblower, JJDPA regulations were drafted and have been ready to go since at least 2007 – with multiple iterations produced and multiple consultations occurring with national leaders. Reportedly, a viable draft of these regulations is currently "sitting on the OJP shared computer drive, waiting to be issued." Is this true?

As indicated above, for the last several years, personnel across OJP have worked on numerous drafts of the Formula Grant Program regulation, addressing a number of

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[13] U.S. Senate Committee on the Judiciary, *Improving Accountability and Oversight of Juvenile Justice Grants*, (Apr. 21, 2015), http://www.judiciary.senate.gov/meetings/improving-accountability-and-oversight-of-juvenilejustice-grants/.

[14] *Id.*

substantive legal and policy issues. As you know, this process has been complicated by the fact that the regulations have not been updated since 1996. Additionally, from 2008 to 2011, OJJDP paused the regulatory drafting process and instead focused its efforts on affecting statutory changes through either the JJDPA reauthorization or the annual appropriations process, which would allow OJJDP to continue to administer the Formula Grant Program as it had been previously run.

We understand the importance of clear and consistent regulations and we are now moving as quickly as possible to update the regulations. While this process is a priority for OJJDP and OJP leadership, any draft regulations will have to be cleared through Office of Information and Regulatory Affairs, and will go through the usual notice and comment process.

d. OJJDP's 24-hour exception is embodied in 28 C.F.R. 31.303(f)(2), promulgated in 1996. What is the legal authority for this exception to the Act's ban on secure detention for status offenders stated in Section 223(a)(12) of the JJDPA?

The Act's Deinstitutionalization of Status Offenders (DSO) requirement related to status offenders is found at 223(a)(11), so we assume that the reference to 223(a)(12) (the separation requirement) in the question was in error. For that reason, we note that Section 223(a)(11) is not technically a "ban" on secure detention of status offenders. Unlike sections 223(a)(12) and 223(a)(13), which provide that states shall not "detain or confine" juveniles under certain circumstances, the DSO requirement does not speak to detention. In sharp contrast, section 223(a)(11) provides that states shall not "place[]" status offenders in secure correctional or secure detention facilities. We presume that Congress used different words to mean different things in the JJDPA and that "place[ment]" in a secure facility reflects a formal arrangement or a more deliberate action as opposed to mere factual detention in such a facility. The 24-hour exception to the DSO requirement was created to prevent states from circumventing the DSO requirement by never taking a formal or deliberate action.

e. If the 24 hour exception is deemed to be valid, why is its use by courts not a detailed part of OJJDP's monitoring, like the Valid Court Order (VCO) exception?

Federal Regulations prior to, and since the issuance of, the OJJDP Policy Statement 89-1201, dated April 1989, have always contained language in the Reporting Requirement section, currently Section 31.303(f)(5)(i), which implies the allowable use of the 24-hour exception. Since the use of the 24-hour exception only applies to *accused* status offenders, those being held for less than 24 hours do not need to be reported to OJJDP. The VCO reporting requirement is necessary because it applies to *adjudicated* status offenders, who are not allowed to be placed in a detention or correction facility for any length of time, unless each of the requirements of the VCO are followed; and once documented and verified, the VCO exception would apply.

4. **OJJDP's Core Protections Division**

According to your written statement for the hearing:

> Last month, we created a new "Core Protections Division" within OJJDP, which will be responsible for ensuring adherence to the Act. We appointed an experienced auditor and one of my trusted advisors to serve as the Division's first Acting Associate Administrator. With the assistance of OJP leadership, the new Acting Associate Administrator will be working with OJJDP to develop consistent compliance guidelines for states, to streamline the process for submitting compliance data, and to establish an objective and data-driven process to assess compliance.

Questions

a. **How does the new Core Protections Division differ from the Audit and Compliance Team established in 2013 – the latter of which was explained in detail in the Department's October 28, 2014 letter?**

As detailed in our October 28, 2014 letter, OJJDP established the Audit and Compliance Team (ACT) to strengthen states' compliance with the JJDPA, to increase the level of objectivity and independence in compliance determinations, and to conduct audits of state compliance systems. While this was a positive step, OJJDP has made additional significant commitments to achieve these goals. The ACT consisted of only five analysts and was only one part of the Budget and Administration Division, a separate Division in OJJDP. The new Core Protections Division will replace ACT and will be a standalone Division within OJJDP dedicated to enforcement of the JJDPA core requirements, rather than a team within the Budget and Administration Division (which has other responsibilities). The new Core Protections Division will be staffed by the previous ACT staff, as well as by several additional analysts (estimated hires will be 4 to 6 full time employees), contract support data technicians, and support staff. This elevation to an OJJDP Division underscores the Department's commitment to the JJDPA core requirements. The Core Protections Division will be led by an Associate Administrator dedicated to oversight of the Division. These important structural changes will facilitate the necessary substantive changes to ensure consistent compliance guidelines for states, streamline the process for submitting compliance data, and establish an objective and data-driven process to assess compliance.

b. **Have any employees in the Audit and Compliance Team been assigned to the Core Protections Division? If so, who, and how many have not been so assigned?**

As detailed above, all of the former ACT employees are now part of the Core Protections Division.

c. What role will Ms. Andrea Coleman play in the Core Protections Division?

While we cannot provide personnel information regarding specific employees, as detailed above, all of the former ACT employees are now part of the Core Protections Division.

d. What role will Ms. Elissa Rumsey play in the Core Protections Division?

While we cannot provide personnel information regarding specific employees, as detailed above, all of the former ACT employees are now part of the Core Protections Division.

e. At a September 29, 2014 briefing provided to Committee staff, the Justice Department made available two subject matter experts from OJJDP – Ms. Janet Chiancone and Mr. Greg Thompson – to answer questions raised in my September 5, 2014 letter. Ms. Chiancone was the only one who spoke up when Committee staff asked questions that other briefers refused to answer. According to multiple whistleblowers, OJP and OJJDP leadership subsequently removed Ms. Janet Chiancone from leading OJJDP's compliance monitoring efforts, despite her eminent qualifications and experience in this area. What role will Ms. Janet Chiancone play in the Core Protections Division?

At the September 29, 2014 briefing, both Ms. Chiancone and Mr. Thompson provided detailed, extensive answers in response to the questions posed by the Committee staff. As explained at the briefing, because our review of specific practices is ongoing, we did not at that time have many of the details requested. Since that time we have provided the Committee with significant additional information regarding our efforts to ensure compliance with the core requirements of the JJDPA. Although we cannot provide personnel information regarding specific employees, we can tell you Ms. Chiancone remains an integral part of the inter-Divisional team that is working to strengthen core compliance controls and develop policies, procedures, and guidance. She routinely participates in a number of weekly team meetings, including those hosted by the Assistant Attorney General, and she has primary responsibility for various key tasks.

f. Will OJJDP be selecting a permanent Associate Administrator of the Core Protections Division? Will the Acting Associate Administrator be allowed to apply for this position on a permanent basis?

OJJPD plans to select a permanent Associate Administrator for the Core Protections Division. The position vacancy was open to interested applicants internal and external to the government. The hiring process is ongoing.

g. Why is this position Acting? Is the Core Protections Division temporary?

As Assistant Attorney General Mason testified, we are committed to institutionalizing the needed reform to ensure consistent, objective enforcement of the JJDPA core

requirements. Accordingly, the Core Protections Division is a permanent Division within OJJDP. In order to minimize delay in establishing the unit, Ms. LeToya Johnson was detailed from the Assistant Attorney General's staff in an Acting capacity as we seek to hire a permanent Associate Administrator.

h. Whistleblowers allege that the Acting Associate Administrator lacks background or experience in conducting audits and determining the adequacy of states' system for compliance monitoring pursuant to Section 204(b)(6) and Section 223(a)(14) or with addressing Disproportionate Minority Contact Section 223(a)(22) pursuant to the JJDPA. Whistleblowers also claim that the Acting Associate Administrator lacks experience monitoring facilities covered by the JJDPA, such as adult jails and lockups.

a. Please describe the Acting Associate Administrator's background or experience in these areas.

Acting Associate Administrator LeToya Johnson is a Senior Advisor in the Office of the Assistant Attorney General. Ms. Johnson has a distinguished career in government service and extensive audit and oversight expertise. She is a Certified Public Accountant with over 20 years of audit experience. Prior to joining OJP, Ms. Johnson was an auditor with the Department of Justice's Office of the Inspector General, where she conducted audits of DOJ components and DOJ grant recipients, including police departments. She was routinely called upon to quickly learn an organization's system and then assess its adequacy and compliance with complex statutory and regulatory requirements. Since joining OJP, Ms. Johnson has served in several key auditing and system oversight roles, including Deputy Director of the Audit and Review Division with the Office of Audit, Assessment, and Management (where she established audit and internal control functions for all of the Bureaus within OJP) and Director of the Office of the Chief Financial Officer's Financial Monitoring Division (where she led a staff of accountants responsible for overseeing the fidelity of grantees' activities to ensure that millions of dollars of federal grants were properly used). Ms. Johnson's auditing and system oversight expertise is well-suited to stand up the Core Protections Division.

b. Was the Acting Associate Administrator competitively selected for the position?

As detailed above, to minimize delay in establishing the Core Protections Division (and to underscore the importance of this issue to Assistant Attorney General Mason), Ms. Johnson (a member of the current staff in the AAG's office) was designated as the Acting Associate Administrator. A competitive process was not required for this temporary position pursuant to OJP Merit Promotion policy. *See* OJP I 1552.1 - OJP Instruction: Merit Promotion Policy, dated 12/20/2004. The permanent Associate

Administrator will be selected in accordance with federal personnel regulations and requirements.

5. **OJJDP's Failure to Hold Wisconsin Accountable**

According to your testimony, OJJDP has frozen all of Wisconsin's unspent formula grant funds and notified the State of its plan to conduct an audit within the next 60 days. The Justice Department's October 28, 2014 letter indicates that OJJDP froze these funds in October 2014. However, according to the Inspector General, the Report of Investigation detailing Wisconsin's violations referenced above was provided to OJJDP in January 2014.

Question

a. **Why did OJJDP wait until October 2014 to place a special condition on Wisconsin's FY 2013 and 2014 funds?**

When the Office of Inspector General's (OIG) January 2014 report was provided to OJP, it was reviewed by OGC for the sole purpose of checking to see whether either criminal action or civil enforcement action (with which OJP would cooperate) would be pursued as a result of the findings in the report. The report indicated that the U.S. Attorney for the Northern District of Iowa had declined criminal prosecution on the matter, and the U.S. Attorney for the Northern District of Iowa, in coordination with the Civil Division, had declined civil enforcement under the False Claims Act. Once those determinations were made, the report was filed with other similar OIG reports concerning closed grant awards where no enforcement or collection action had already been undertaken by the DOJ or OIG. In a subsequent periodic review of those files, it was determined that further agency administrative action may nevertheless be warranted. OJJDP did not receive the Inspector General's Report of Investigation for agency follow-up until September 2014. Since that time, OJP's internal document filing and review process has been modified to ensure that all such reports will be reviewed and discussed with the OAAG at least monthly. Although the OIG report did not specifically address any open OJJDP grants to Wisconsin, the allegations of the state's ongoing failure to have an adequate system of monitoring were of such importance that OJJDP froze Wisconsin's remaining FY 2013 and FY 2014 funds (an amount exceeding $1M) shortly after receiving and assessing the report, in consultation with the OJP's Office of the General Counsel.

6. **Whistleblower Allegations of Misconduct by OJP Office of General Counsel**

As I noted at the hearing, whistleblowers allege that officials within your Office of General Counsel engaged in various forms of misconduct.

Multiple whistleblowers have named Rafael Madan and Charlie Moses as officials in your General Counsel's office who allegedly engaged in misconduct and whistleblower retaliation.

In my January 14, 2015 letter, I asked several questions concerning this misconduct, but those questions remain unanswered, to date.

Questions

a. **According to the OIG Special Agent who notified Deputy General Counsel Charlie Moses about the OIG investigation of Wisconsin, Mr. Moses responded by asking "Who is the whistleblower?" In your view, is this an acceptable method of responding to a DOJ employee's effort to report concerns of mismanagement internally?**

OJP has consistently cooperated with the OIG in the conduct of its investigations. OJP's Office of General Counsel frequently serves as the liaison between the OIG and the particular OJP Bureau under investigation. Deputy General Counsel Charlie Moses, who is one of the Department's ethics attorneys, routinely interacts with the OIG and whistleblowers in the agency. We are unaware of the full context for the reported question attributed to Mr. Moses, but in either his capacity as Deputy General Counsel on the ethics team, or in his current role as the Department Designated Deputy Agency Ethics Official for OJP, it would be entirely appropriate for him to have knowledge of and to interact with whistleblowers.

b. **Do you believe OJP's General Counsel Rafael Madan is able to be objective in his dealings with OJJDP Compliance Staff? Multiple present and past employees of OJJDP have answered this question in the negative in communications with my staff.**

OJP's General Counsel, Rafael Madan, has a duty to provide legal advice and counsel to OJP on what the law requires, permits, or forbids, to the best of his ability. He has served as General Counsel for nearly 14 years. He has executed, and remains fully able to execute, his duties with objectivity, professionalism and integrity with OJJDP Compliance Staff and all other OJP staff. We are unaware of information indicating anything to the contrary.

c. **Has OGC ever issued a legal opinion or memorandum relating to the JJDPA 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?**

By order of the Assistant Attorney General for OJP, the OJP Office of the General Counsel is charged with providing legal advice to OJP and each of its component parts. OJP Order 1001.5D. The Office of the General Counsel does not provide legal advice to entities (including state and local governments) outside of OJP. For that reason, all opinions of the General Counsel, including those regarding OJJDP matters, are provided

to OGC's client offices within OJP, but are not made publicly available unless done so by the client office in accordance with Department policy.

d. 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 JJDPA?

Advice that the Office of the General Counsel has provided to OJP or any of its components, including OJJDP, has been understood, in general, to apply prospectively and not retroactively, unless that opinion specifies otherwise. OJJDP issues compliance determinations based upon its review and analysis of the materials provided by the states and is informed by any relevant OGC advice and guidance.

e. What is OGC's current interpretation of the VCO exception?

The JJDPA was enacted in 1974. Over the course of various administrations, OJP has sought and received – and continues to seek and receive – opinions from the Office of the General Counsel in response to particular questions as they arise. Thus, rather than provide an overall interpretation of section 223(a)(11)(A)(ii) of the JJDPA (the VCO exception), the Office of the General Counsel has opined on the exception only in connection with specific questions posed by OJJDP as far back as 1981. Consistent with advice from the Office of the General Counsel, OJP's understanding of the Valid Court Order (VCO) exception has been as follows:

1) A juvenile described in what is now codified in section 223(a)(11)(B) of the JJDPA may not be placed in a secure detention or secure correctional facility without violating section 223(a)(11).

2) A juvenile described in what is now codified in section 223(a)(11)(B) of the JJDPA who violates the terms of his supervision may, when appropriate, be placed in a secure detention or secure correctional facility without a resulting DSO violation.

3) A juvenile who has been charged with violating a VCO that relates to his status as a juvenile may be placed in a secure detention or secure correctional facility, pursuant to the VCO exception.

4) Finally, because contempt of court is not itself a status offense, a juvenile who has committed such an offense may be securely detained without violating the DSO requirement. It is important to note, however, that, for a court order to be a "valid court order," under section 223(a)(11) of the JJDPA, various statutory prerequisites must be established, including a showing that the order was issued to a juvenile who received the full due process rights guaranteed to the juvenile by the U.S. Constitution.

f. What was OGC's previous interpretation of the VCO exception?

We are unaware of any change in OGC's legal interpretation of the VCO exception. Our understanding is that any interpretation different from the interpretation in response 6 (e) was never based on an opinion of the OJP General Counsel.

g. How long did OJJDP operate under the previous interpretation?

Please see above response.

h. When and why did OGC change its interpretation of the VCO exception?

OGC is unaware of any change in the legal interpretation of the applicability of the VCO exception. It should be noted, however, that OJJDP's current regulation implementing the Formula Grant Program (28 C.F.R. Part 31), is not consistent with OGC's opinions in that the regulation provides that "[a] non-offender such as a dependent or neglected child cannot be placed in secure detention or correctional facilities for violating a valid court order." 28 C.F.R. § 31.303(f)(3)(vii). As was noted above, (see question 3(c)) we are working to update OJJDP's current regulations to ensure that they are consistent with the JJDPA.

i. Did OGC seek public comment in making this change? If not, why not?

As indicated above, OGC is unaware of any change in OGC's legal interpretation of the VCO exception. However, it should also be noted that this is a legal interpretation of the language in a statute, not a policy decision based on the statutory language. While public comment may be appropriate in making policy choices, such public comment is neither necessary nor appropriate in provision of legal advice by an agency General Counsel to his client concerning the meaning of an existing statute.

j. Did OGC notify all participating states and territories of this change in interpretation? If so, when and how? If not, why not?

As indicated above, OGC is unaware of any change in OGC's legal interpretation of the VCO exception. Further, as noted above, the General Counsel provides direct advice to OJP, and not to states and territories that participate in OJP grant programs. See above response 6 (c).

k. Did OGC's change in interpretation affect the compliance determination for Wisconsin for data reported for calendar years 2001-2010? If so, how?

As indicated above, OGC is unaware of any change in OGC's legal interpretation of the VCO exception.

l. Who drafted this legal opinion in 2007?

See response 6 (e) above. OGC is unaware of any "legal opinion in 2007" related to the VCO exception within the DSO requirement. However, all legal opinions from the Office of the General Counsel reflect advice from the General Counsel.

m. Is the 2007 opinion still in effect? Does OJP OGC still allow states like Wisconsin to be in compliance with the DSO requirement despite detaining non-offenders?

OGC's legal opinions described above regarding the VCO exception to the DSO remain in effect. OGC did provide an opinion in 2008, not in 2007, that offered guidance regarding the VCO exception and that guidance was consistent with prior opinions. See response 6 (e) above. However, OGC is not responsible for, nor has the authority to make, compliance determinations. That authority rests solely with the Administrator of OJJDP. Pursuant to the JJDPA, and applicable regulations, states are required to report any violations of Section 223(a)(11), which includes any non-offenders placed in secure detention facilities or secure correctional facilities.

7. Andrea Coleman

At the hearing, Ms. Coleman testified that many of her job duties as DMC Coordinator at OJJDP were reassigned to other staff after she made recommendations of DMC noncompliance in 2013 and after she voiced similar concerns in 2014 and 2015. According to Ms. Coleman, prior to Administrator Listenbee's tenure, she was allowed to voice such concerns and recommend non-compliance when necessary, without having her job duties subsequently reassigned for doing so.

a. What were Ms. Coleman's job duties prior to Administrator Listenbee's tenure?

As explained above, we cannot provide personnel information regarding specific OJJDP employees. That being said, Ms. Coleman, like other members of the ACT team, provides valuable input to both the Administrator and the Assistant Attorney General regarding our efforts to ensure compliance with the JJDPA's core requirements. Thus, as OJJDP works to develop new policies and procedures to ensure consistent and objective enforcement of the JJDPA, Ms. Coleman (along with other staff members) is continually asked for her input, concerns and recommendations.

b. What were Ms. Coleman's job duties at the start of Administrator Listenbee's tenure?

Please see above response.

c. What are Ms. Coleman's current job duties?

Please see above response.

d. If Ms. Coleman's allegations are true, will you consider reinstating her previous job duties as DMC Coordinator? Why or why not?

Please see above response.

8. OJJDP's Compliance Monitoring of Tennessee

At the hearing, Professor Dean Rivkin testified that OJJDP refused to meet with him before or during OJJDP's 2013 Audit of Tennessee.

Questions

a. Why did OJJDP refuse to meet with Professor Rivkin before or during the Audit?

OJJDP has consistently taken seriously the allegations raised by Professor Dean Hill Rivkin and made considerable efforts to investigate his concerns about the detention of status offenders in Knox County. In July and August 2013, senior members of OJJDP, at the instruction of OJJDP Administrator Robert Listenbee, spoke to Professor Rivkin. In response to Professor Rivkin's allegations, OJJDP arranged for a September 2013 on-site compliance audit. Administrator Listenbee also met with Professor Rivkin in October 2013, after which Professor Rivkin in a November 6, 2013 letter, thanked Mr. Listenbee. On February 28, 2014, OJJDP provided a written response to Professor Rivkin explaining the results of the audit. In particular, OJJDP told Professor Rivkin that while there were findings related to the compliance audit, none supported his allegations in Knox County. OJJDP also informed Professor Rivkin that his concerns about status offenders' right to counsel had been referred to the Civil Rights Division of the Department of Justice.

b. Is DOJ willing to meet with Professor Rivkin now?

OJJDP welcomes further meetings with Professor Rivkin to discuss any additional information he may wish to offer.

c. Will DOJ now review Professor Rivkin's raw detention data concerning Knox County and reconcile this data with the information reported by TCCY?

As discussed above, OJJDP is currently developing a new policy and procedures to ensure objective enforcement of the JJDPA core requirements. The new procedures will delineate the process to be followed in assessing data from sources external to the state. OJJDP must balance information from outside sources against the information provided by states, and must determine which information is verifiable. Importantly, as detailed

above, we previously considered the information provided by Professor Rivkin and attempted to verify the information he provided.

d. Will DOJ now reconcile the under-reporting and monitoring of VCO violation hearings in Tennessee? According to Professor Rivkin, OJJDP's 2013 Audit reported 227 VCO violation hearings in Tennessee in 2012, but his state court statistics show that there were in fact 889 such hearings in 2012.

As part of the audit conducted in September 2013, OJJDP examined compliance information and juvenile detention data from around the state, including Knox County, the source of Professor Rivkin's concerns. OJJDP identified nine audit findings that required a formal response from the state, but did not identify any data omissions or inconsistencies that would support Professor Rivkin's Knox County allegations.

In addition, Tennessee has submitted data indicating compliance with the JJDPA since 2006. Moreover, data has shown that Tennessee has reduced the use of the VCO by more than 50% since 2007, going from 487 instances in FY 2007 to 242 instances in FY 2013.

e. Why was there an eight year period between the 2005 Audit and the 2013 Audit?

While OJJDP endeavored to conduct onsite audits in each state at least every five years, OJJDP was unable to meet this goal due to resource constraints. Subject to the availability of funds, the new Core Protections Division will ensure that both routine as well as risk-based audits are consistently conducted.

f. Why was it necessary for Professor Rivkin to file a FOIA request to obtain a copy of the 2013 Audit?

The audit report is considered an agency document maintained by OJP. The FOIA process ensures transparency of government activities, while also ensuring that any sensitive, private, or proprietary information can be protected, as appropriate.

g. Why the 2013 Audit was not publicly posted on the OJJDP website?

Audit reports contain sensitive, private, financial, or proprietary information that is not appropriate for public dissemination. While it is possible to redact that information, OJJDP current resources only enable such redaction in response to FOIA requests.

h. Will you provide this Committee with a non-redacted copy of this 2013 Audit?

Yes. We will follow up with the Committee separately to provide this document.

9. **Enforcement of 42 U.S.C. § 5633 (c)(2)(A)**

a. **If a state is out of compliance with one or more core requirement, and the state has received a funding reduction for this noncompliance, how does OJJDP ensure that a state is truly spending 50% of its formula grant funding to come back into compliance with a given core requirement?**

OJJDP staff reviews budgets submitted by the states in conjunction with formula grant applications, grant adjustment and extension requests, and review of financial and progress reports. When states have been found out of compliance for one or more of the core requirements, OJJDP staff reviews the budget submissions specifically for compliance with the 50% requirement. Additionally, through fiscal and programmatic monitoring, OJJDP staff examines states' efforts to come into compliance and obtains information from the technical assistance providers designated to assist states found out of compliance.

10. **Definition of Juveniles**

The federal government considers individuals under age eighteen to be juveniles. Similarly, 41 states make a similar delineation where the "maximum age of juvenile court jurisdiction is age 17."[13] Nine states, however, draw the line between adults and juveniles at either age 16 or 15. For purposes of receiving formula grant funding under the JJDPA, the act specifies that "funds shall be allocated annually among the States on the basis of relative population of people under age eighteen."[14]

a. **If nine states set the maximum age of juvenile court jurisdiction below seventeen—and as such, are not necessarily treating all individuals under age eighteen as juveniles for court purposes—may these states be using their formula grant funding to serve a lower number of "juveniles" than might be assumed by the formula as laid out by the JJDPA?**

Yes. For states that have a criminal age of full responsibility lower than age 18, it can be presumed that formula grant funds are being targeted toward fewer individuals than the number upon which the states' formula grant allocations are based. Therefore these states could receive a larger proportion of money per juvenile based on the formula grant allocation required by the JJDPA, as dictated by the provisions of the JJDPA (Section 222(a)(1)).

b. **As such, might these states be receiving a larger proportion of money per juvenile (as defined by the state justice systems) through the formula grant program?**

Yes, as noted above, these states could receive a larger proportion of money per juvenile based on the formula grant allocation required by the JJDPA.

c. Does OJJDP expect that states are serving *all* eligible individuals under age 18 with formula grant funding, or does OJJDP leave the age of individuals served with juvenile justice funding up to the discretion of the states?

Each state may use formula grant funding for programs designed to address juvenile delinquency and to improve the juvenile justice system, using the definition of "juvenile" within the state.

[13] National Conference of State Legislatures, *Juvenile Age of Jurisdiction and Transfer to Adult Court Laws*, October 1, 2014. Seven states draw the line between juveniles and adults at age 16, and two states draw the line at 15.

[14] 42 U.S.C. § 5632.