October 7, 2016

Mr. Gregory Thompson
Senior Advisor
Office of Juvenile Justice and Delinquency Prevention
Office of Justice Programs
U.S. Department of Justice
810 7th Street N.W.,
Washington, DC 20531

RE: OJP Docket No. 1719

Dear Mr. Thompson:

Thank you for this opportunity to comment on the Office of Justice Programs’ proposal to update the implementation regulation for the Formula Grant Program authorized by Title II, Part B, of the Juvenile Justice and Delinquency Prevention Act of 1974 (JJDPA). Members of the National Criminal Justice Association (NCJA) include the state, territorial and tribal chief executive officers of criminal justice agencies charged with strategic planning and the managing of federal, state, and tribal justice assistance resources. Half of these agencies administer the Title II Formula Grant program.

NCJA members appreciate the Office of Justice Programs and the Office of Juvenile Justice and Delinquency Prevention’s (OJJDP) commitment to protecting juveniles who come into contact with the criminal justice system. The promise of the JJDPA is federal support for innovative state approaches to reforming the juvenile justice system and improving the treatment of juveniles under the state’s care.

NCJA members welcome this update to the regulations, since they have not been refreshed since 1996, even after the last reauthorization by Congress in 2002. Clearly, new regulations are called for. However, the rule as proposed is ill-advised and will weaken the spirit of partnership between OJJDP and the states. This partnership, though diminished in recent years, has led to substantial and measurable improvements in juvenile justice systems nationwide. According to OJJDP data, instances of non-compliance with the core requirements of the Act decreased by 99 percent from the 1990s to 2013. This is a remarkable achievement that states, with OJP’s support, look forward to building upon in the coming years.

Our overriding concern about the proposed rule is that it will, by the OJP’s own admission, immediately push 48 states out of compliance on one or more of the core requirements. Any federal regulation that immediately threatens the compliance status of nearly every state in the nation is seriously flawed and requires substantial revision.

The proposed rule will cause a distortion in how states are able to spend their Title II funds and will shift resources away from grants that support incremental progress on all of the core requirements toward a more narrow effort on those core requirements that will be suddenly deemed out of compliance. This will happen even in states that have strong records of compliance with those core requirements. Furthermore, the new rule
will cause considerable confusion about what is required of states, slowing progress and, potentially, causing states to opt out of the JJDP.

Regulations are meant to clarify legislative intent; this proposed rule does the opposite. While states continually strive to improve their juvenile justice systems, the standards cannot be so unrealistic that it drives states out of the program, putting more children and youth at risk.

NCJA aligns itself with the comments and recommendations from the Act 4 JJ coalition as well as those of numerous state juvenile justice agencies. We offer a few points below.

**The shift from a “de minimis” to a “substantial compliance” standard for determining states’ compliance with the core requirements is flawed, lacks reasonable flexibility, and will immediately push 48 states out of compliance with the Act.**

- The proposed rule uses only one year of data to inform the revised compliance standard, which is too limiting to accurately reflect a baseline for states. This baseline data from 2013 is made even less relevant by a change in the definition of “to detain” the following year. The proposed rule also uses the states with the highest compliance rate to set the standard without allowing for adjustment for states with small populations or other unique circumstances. For instance, states with small populations, would be out of compliance for a violation involving just one youth.

- The proposed rule offers no ability for states to respond to, or correct, an initial determination of non-compliance. Under current rules, non-compliant states have an opportunity to respond with a detailed plan to improve compliance without losing funding. Given the proposed use of a strict numerical standard for compliance, coupled with the proposal that OJP will only review compliance determination standards at least every five years, states that can make improvements in a more timely way will have no recourse.

- Also, given the substantial changes envisioned by the rule, states will require immediate and concentrated training and technical assistance from OJJDP, which past history suggests is very unlikely.

**The proposed changes to the definition of “detained” and “confined” is inconsistent with the long-standing purpose of the Act, continues to lack clarity, will be costly, and is likely to result in more youth entering the system.**

- In 2014, OJJDP issued guidance that extended the definition of “detain or confine” to reflect an interpretation of case law. The goal of the proposed change appears sensible on its face. In practice, however, the new definition is counter to the underlying premise of the JJDP, which is to provide standards for those facilities in which juveniles are confined after they are accused or adjudicated delinquent. The JJDP was never intended to require monitoring and reporting of those locations where juveniles have brief contact with law enforcement personnel, such as a police station lobby. To extend the regulatory requirements of the Act to those ancillary locations will require an expansion of monitoring by the states and an expansion of recordkeeping by law enforcement agencies. The change is divorced from the reality in the field, particularly in smaller and rural communities, and may not be required by the case law in question.

- When draft guidance was issued in 2014, states were united and vocal in expressing their concerns to OJJDP. NCJA members appreciated that OJJDP Administrator Bob Listenbee spoke by telephone with nearly every state’s juvenile justice agency staff to better understand each states’ concerns. It is disheartening and perplexing, then, to see that this proposed rule provides no greater clarity or flexibility in how states will be required to monitor secure custody status in non-secure areas and report that data to the Department. Further, despite the outcry from the states, there has been little to no technical assistance from OJJDP since
the release of the draft guidance to assist states in understanding or meeting this requirement.

- NCJA continues to assert that the revised definitions are inappropriate and not within the letter or spirit of the JJDPA. To extend the requirements of the Act to a police substation lobby lacks common sense and could have unintended consequences. Local law enforcement agencies have an obligation to keep juveniles free from harm. If a law enforcement officer believes a child is at risk or in danger, they may take the child to a police station or sheriff’s office until a parent, guardian or social service agency can take custody of the child. The proposed rule requires that a law enforcement officer assess the child’s state of mind and their understanding of their legal right to leave the station. It is not unreasonable to assume that, given the choice between charging the child or releasing them back to potential harm on the street, the law enforcement officer will charge the juvenile simply in an effort to keep them safe. This would cause the unintended consequence of moving more children into the system. This proposed provision must not be finalized without further extended conversation with the states, law enforcement, and those who advocate on behalf of juveniles in the justice system.

*The proposed rule is unclear about which facilities states are required to monitor.*

- The proposed rule is unclear as to what is meant by “100% of facilities” to determine compliance. As noted above, the proposed rule could substantially increase the number of facilities states are required to monitor, increasing their costs and stretching their capacity. Furthermore, states, tribes or localities may lack jurisdiction over some of the identified facilities required for reporting under the proposed rule, thereby making it difficult, if not impossible, for states to achieve or remain in compliance.

- OJJDP should reconcile this proposal in concert with the guidance on the meaning of “detained or confined” to clearly articulate the expectation of the expanded monitoring required and on what schedule states are required to report.

*The proposed rule needs to provide greater clarity to states on the Disproportionate Minority Contact requirement.*

- Under current statute, states must collect and analyze data on the existence of disparities in the juvenile justice system for youth of color. The proposed rule seeks to move states beyond identifying and studying the existence of disparities and toward adopting measurable and significant improvements for youth of color and their families. However, given the complexities of implementation necessary to successfully reduce disparities, states will need more detailed guidance than what is provided in the proposed rule. The comments provided by individual states offer possible solutions to this problem.

*The proposed rule would shift resources away from programs that benefit youth in the justice system and exceed OJJDP’s ability to provide training and technical assistance.*

- As noted above, the proposed rule declares that the implementation of these new regulations would push 48 states out of compliance with one or more core requirements. As a result, those states would be penalized 20 percent of their formula grant for each core requirement, and would have to target half of the remaining grant funds to activities that will restore the state to compliance. For the 70 percent of states that will fall out of compliance with at least two core requirements, this penalty will be 40 percent. The proposed rule assumes that OJJDP will be able to provide training and technical support to help these states come back into compliance with the Act’s core requirements. However, as noted above, that seems highly unlikely given the absence of technical support provided by OJJDP in the past and, particularly, on the issue of secure custody status.

The Juvenile Justice and Delinquency Prevention Act is a partnership between the federal government and states by which all states may reach a common standard of protection and service for children in the juvenile
justice system. Success is possible only when OJJDP and the states work in common purpose to find solutions and break through the barriers to compliance with the core protections of the Act. Unfortunately, many states have experienced a diminished partnership and a lack of flexibility in recent years, most recently in the issuance of draft guidance on the definition of “detained” and “confined”. This proposed rule seems to be an extension of that more punitive approach.

As stated by OJJDP, 49 states and 6 jurisdictions currently participate in the JJDPA. Together, these jurisdictions have reduced their non-compliance by more than 99 percent on every core requirement. In FY14, more than 173,000 children were served by federal funds that allow states to partner with providers to implement evidenced-based or promising practices. With these new regulations that will increase penalties and require that remaining funding be used to come back into compliance, the strong partnerships between states and local providers will be threatened and will likely undermine the great progress we have seen to date. Ultimately, these proposed standards undermine OJJDP’s goals of improving compliance.

NCJA urges OJJDP to address the concerns outlined above and modify the rule accordingly. Further, as a practical matter, it appears the JJDPA may be reauthorized in the 114th Congress. H.R. 5963 passed the House on September 22nd and is moving to the Senate. If the JJDPA is reauthorized this year, the only appropriate course of action would be to suspend this proposed rule and reissue a new rule that aligns with the reauthorized Act.

Thank you for your consideration of these recommendations.

Sincerely,

[Signature]

Cabell Cropper
Executive Director