

Comments on Proposed Revisions to the JJDPA DMC Core Requirement Regulations

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JOINTLY SUBMITTED BY
THE CENTER FOR CHILDREN'S LAW AND POLICY
AND
THE W. HAYWOOD BURNS INSTITUTE

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Dear Administrator Listenbee,

Thank you for the opportunity to comment on the proposed updates to the implementing regulation for the Formula Grant Program authorized by Title II, Part B, of the Juvenile Justice and Delinquency Prevention Act of 1974 (JJDPA). As the primary federal youth justice statute, the JJDPA has led to significant and measurable improvements to our country's youth justice systems. As a result of the JJDPA, states have moved away from the dangerous and counterproductive practice of housing youth in adult jails. States have also significantly reduced or ended their reliance on incarceration of youth charged with status offenses. Both practices were widely accepted prior to the passage of the JJDPA, despite evidence showing that they were counterproductive. The Office of Juvenile Justice and Delinquency Prevention's (OJJDP) leadership in enforcing those provisions of the JJDPA has unquestionably improved the lives of thousands of young people in this country.

Over the last 10 years, there has been significant and measurable progress in many areas of youth justice – significant increases in the use of evidence-based services and steep reductions in overall youth incarceration, for example. However, youth of color continue to be overrepresented at each stage of the justice system. Youth of color are treated more harshly than similarly situated White youth at various points in the system. And youth of color continue to enter and move through the youth justice system unnecessarily. Progress in this area of justice reform is slow, and states need better guidance to make measurable change.

We are pleased that the Department has proposed regulations for the Disproportionate Minority Contact (DMC) Core Requirement that aim to strengthen and clarify requirements under the JJDPA. However, we believe that OJJDP can and should do much more to incorporate what we know about effective efforts to reduce justice system involvement for youth of color and racial and ethnic disparities. In this submission, we recommend changes and additions to the agency's proposed regulations to move jurisdictions beyond identifying and studying the existence of disparities and toward adopting measurable and significant improvements for youth of color and their families.

Although we describe these recommendations and regulatory changes in detail below, we have also summarized them here:

1. **Prioritize investments in local-level jurisdictions with a significant potential to improve outcomes for youth of color.** We recommend that OJJDP require, at a minimum, that selected local jurisdictions (1) demonstrate a readiness to engage in intentional and focused DMC reduction efforts, (2) reflect the political buy-in and leadership necessary to support reform, and (3) identify racial and ethnic disparities at key decision points in the youth justice system that, when remedied, will yield measurable improvements in outcomes for youth of color.

- 2. Expand the definition of “racial and ethnic disparity” and broaden accepted methods for measuring progress in reducing racial and ethnic disparities to include reducing disparate treatment of similarly situated youth and unnecessary entry and movement deeper into the system of youth of color.** The Relative Rate Index (RRI) is one indicator of racial and ethnic disparities. However, the field has moved beyond looking at racial and ethnic disparities solely from the perspective of overrepresentation of youth of color relative to White youth. Moreover, the RRI can mask problems in the justice system for youth of color. While the disparities for youth of color may not be exacerbated at a decision making point, the rate of involvement for youth of color may be significantly greater than that of White youth. Disparities that occur at each stage of the system accumulate, resulting in greater disparities as youth move deeper into the system. We urge OJJDP to expand its definition of racial and ethnic disparities to encompass other widely accepted measures of racial and ethnic disparities.
- 3. Eliminate references to terms such as “statistically significant” and “formal methodological evaluative instruments,”** which will needlessly divert scarce resources to simply studying the existence of racial and ethnic disparities. In 2016, we have more than enough evidence of the existence of racial and ethnic disparities in the justice system. Limited funding would be better used supporting localities that are engaging in focused and intentional reform work.
- 4. Shorten the timeframes for reporting on the existence of racial and ethnic disparities and assessing progress in reducing racial and ethnic disparities.** As written, the proposed regulations require jurisdictions to evaluate the effectiveness of state and local interventions related to racial and ethnic disparities (R.E.D.) “within three to five years.” We urge the agency to shorten these time frames. In our experience, jurisdictions do not need several years to know whether their efforts have yielded a positive impact.
- 5. Strengthen the standard for data collection by requiring jurisdictions to disaggregate their data to learn more about why youth of color are involved in the justice system.** Although there is a limit to the data collection that agencies can reasonably engage in, counties and states that are serious about taking steps to reduce disparities must be able to answer basic questions about youth in their systems. This includes disaggregating data by race, ethnicity, gender, geography, and offense or reason for involvement with the youth justice system at a given decision point. We urge OJJDP to require local jurisdictions that have been identified as sites for R.E.D. reduction efforts to disaggregate data in this manner.
- 6. Change the term “disproportionate minority contact” to the more widely-accepted and accurate term “racial and ethnic disparities.” Similarly, change “minority youth” to “youth of color.”** The terms “disproportionate minority contact” and “minority youth” are outdated and no longer used by jurisdictions engaged in effective work to reduce racial and ethnic disparities. The terms also ignore the fact that in a number of

states and a large number of localities, youth of color are not the “minority.” We urge OJJDP to abandon these outdated and inaccurate terms.

7. **Provide states with guidance and examples of best practices that successfully reduce R.E.D. and require that effective strategies be incorporated into the submitted plans.** The requirement that states address disproportionate minority contact currently includes a process for identifying and measuring the extent of disparities in the youth justice system, but current provisions lack substantive guidance on strategies that work. We urge OJJDP to provide examples and include best practices that have been shown to reduce R.E.D. in jurisdictions that have effectively addressed this problem and to require all states to incorporate these strategies in their state plans.

Our experience working with stakeholders across the nation has helped us identify what is needed to help jurisdictions achieve significant and measurable reductions in racial and ethnic disparities. We urge you to consider and accept our recommended changes to the proposed regulations. Thank you for your consideration, and please do not hesitate to contact us if you have any questions.

Sincerely,

James Bell, Executive Director
W. Haywood Burns Institute

Laura Ridolfi, Director of Policy
W. Haywood Burns Institute

Khalid Samarrai, Policy Associate
W. Haywood Burns Institute

Mark Soler, Executive Director
Center for Children’s Law and Policy

Jason Szanyi, Deputy Director
Center for Children’s Law and Policy

Tiana Davis, Policy Director for Equity and Justice
Center for Children’s Law and Policy

Recommendation #1: Prioritize investments in local-level jurisdictions with a significant potential to improve outcomes for youth of color.

We are pleased that OJJDP will require states to identify racial and ethnic disparities for at least three local jurisdictions, in addition to conducting a statewide assessment. State-level assessments contribute to our knowledge of the extent of racial and ethnic disparities, but the vast majority of successful efforts to actually *reduce* racial and ethnic disparities are grounded in local-level work.

To this end, we recommend that OJJDP elaborate on the criteria for identifying local jurisdictions that have “focused-DMC-reduction efforts” as identified in the regulations. First, we recommend that OJJDP require that selected local jurisdictions (1) demonstrate readiness to engage in intentional and focused R.E.D. reduction efforts, (2) reflect the political buy-in and leadership necessary to support reform, and (3) identify key decision points where R.E.D exists that, when remedied, will yield measurable improvements for youth of color.

We propose incorporating the following language to §31.9(d)(1)(i):

- (i) *Identification analysis must be completed both statewide and for at least three local jurisdictions that the state will prioritize for R.E.D. reduction. States must select the target jurisdictions based on at least two of the following criteria:*
 - (a) *The jurisdiction has one of the largest populations of youth of color, relative to other jurisdictions in the state,*
 - (b) *The jurisdiction has one the highest rates of system involvement for youth of color at one or more of the following contact points: arrest, diversion, referral to juvenile court, charges filed, secure detention, adjudication as delinquent, community supervision, placement in secure correctional facilities, or transfer to adult court, or*
 - (c) *The jurisdiction demonstrates the existence of buy-in among key stakeholders and leadership necessary to support reform, and exhibits readiness to engage in intentional and focused R.E.D. reduction efforts.*

Second, we recommend that OJJDP clarify the criteria for identifying local jurisdictions as having “the highest minority concentration.” Local jurisdictions can benefit from efforts to reduce racial and ethnic disparities where the highest numbers of youth of color live, as well as where youth of color are involved in the justice system at the highest rates. We recommend avoiding the use of the term “highest minority concentration” and including language that requires states to prioritize selecting jurisdictions where the highest numbers of youth of color live or where youth of color have the highest rates of justice system involvement.

Recommendation #2: Expand the definition of “racial and ethnic disparity” and broaden accepted methods for measuring progress in reducing racial and ethnic disparities to include reducing disparate treatment of similarly situated youth and unnecessary entry and movement deeper into the system of youth of color.

The proposed regulations are consistent with OJJDP’s previous guidance on identification of DMC, directing jurisdictions to focus on areas where the RRI suggests an overrepresentation of youth of color relative to White youth. The RRI is one indicator of racial and ethnic disparities. However, the field has moved beyond looking at racial and ethnic disparities solely from the perspective of overrepresentation of youth of color relative to White youth. Moreover, the RRI can mask problems in the justice system for youth of color. While the disparities for youth of color may not be exacerbated at a decision making point, the rate of involvement for youth of color may be significantly greater than that of White youth. Disparities that occur at each stage of the system accumulate, resulting in greater disparities as youth penetrate deeper into the system.

Two of the most influential national youth justice reform initiatives – the Annie E. Casey Foundation’s Juvenile Detention Alternatives Initiative and the John D. and Catherine T. MacArthur Foundation’s Models for Change Initiative – recognize that racial and ethnic disparities also include (1) the harsher treatment of youth of color relative to similarly situated White youth and (2) the unnecessary entry and movement of youth of color deeper into the youth justice system. Together these initiatives have touched hundreds of counties and nearly every state, and jurisdictions have a broader understanding of what contributes to racial and ethnic disparities. We urge OJJDP to expand its definition of racial and ethnic disparities to encompass these widely accepted measures, and we have provided proposed language that better reflects the understanding of racial and ethnic disparities in the field.

We also urge the agency to provide additional guidance on what will constitute acceptable “measurable objectives” and “performance measures.” We propose language to this effect below:

Measurable Objective Defined. A measurable objective must include two components:

- (a) *A specific goal that aims to reduce one or more of the following:*
 - (i) *Overrepresentation of youth of color at a decision point in the youth justice system, which can be measured by:*
 1. *Relative Rate per capita: Rate of justice system involvement for youth of color compared to the rate for White youth at key decision making point (the rate for each racial and ethnic group is calculated using the general youth population);*
 2. *Relative Rate per prior decision making point: Rate of justice system involvement for youth of color compared to the rate for White youth at key decision making point (the rate for each racial and ethnic group is calculated using the previous decision making point); or*

3. *State rate comparison: Rate of justice system involvement for youth of color at the county level compared to the state rate for youth of color at key decision making point (the rate for each racial and ethnic group is calculated using the general youth population),*
 - (ii) *Disparate and harsher treatment of youth of color than similarly situated White youth, and/or*
 - (iii) *Unnecessary entry or progression of youth of color through the youth justice system.*
- (b) *A quantifiable measure or measures to indicate whether a jurisdiction is achieving that goal.*

Recommendation #3: Eliminate references to terms such as “statistically significant” and “formal methodological evaluative instruments,” which will needlessly divert scarce resources to simply studying the existence of racial and ethnic disparities.

In 2016, we have more than enough evidence of the existence of racial and ethnic disparities in the justice system. What we lack are examples of jurisdictions that can translate knowledge of disparities into reforms that achieve a measurable and positive impact for youth of color and their families. The proposed regulations frequently reference “comprehensive analysis,” “statistically significant,” “formal methodological evaluative instruments” and other terms that appear to prioritize conducting sophisticated statistical analyses to determine the nature or extent of racial and ethnic disparities, or where and when to invest in local-level racial and ethnic disparities reduction work.

While we certainly value using data to inform reform efforts, there are many jurisdictions that engage in intentional and successful racial and ethnic disparities reduction work without devoting significant and scarce resources to expensive outside evaluations. Today, jurisdictions have access to many free and publicly available tools to help them “peel the onion” and identify policies and practices that have a disparate impact on youth of color. The Burns Institute, the Center for Children’s Law and Policy, the Annie E. Casey Foundation’s Juvenile Detention Alternatives Initiative, and the John D. and Catherine D. MacArthur Foundation have manuals, reports, articles and other materials on their websites that enable and support jurisdictions to use system data to pursue reforms effectively.

We do not need more studies to tell us that youth of color are overrepresented in the youth justice system. Instead, states and localities should focus on existing sources of youth justice system data to identify disparities, understand policies and practices that contribute to disparities, and plan reforms. This process will also allow stakeholders to identify gaps and limitations in the system data and to plan corrective action. Limited funding would be better used supporting localities that are ready to make use of the tools available to them and to the replication and expansion of successful strategies.

Recommendation #4: Shorten the timeframes for reporting on the existence of racial and ethnic disparities and assessing progress in reducing racial and ethnic disparities.

As written, the proposed regulations require jurisdictions to evaluate the effectiveness of state and local R.E.D.-related interventions “within three to five years.” Similarly, the regulations require states to re-evaluate the significant factors contributing to R.E.D. at each decision point “not less than once in every five years” after identifying the existence of R.E.D. at a given decision point.

We urge the agency to shorten these time frames. Jurisdictions do not need several years to know whether their efforts yield a positive impact. For example, a jurisdiction such as Philadelphia that implements an intervention to reduce disparities in school-based arrests can implement a program at the beginning of the school year and know at the end of that school year whether the program has been successful. Indeed, the effectiveness of the program may be apparent after one semester.

We urge the agency to adopt shorter timeframes for assessment of effectiveness of interventions, particularly local-level interventions. At the very least, the agency should adopt a two-year maximum timeline for analyses of effectiveness.

Finally, we urge OJJDP to require states to post the portion of their state plan that discusses the state’s efforts to reduce racial and ethnic disparities on a publicly available website in a timely manner. While some states do post this information, many do not. Moreover, some states that have posted reports in the past have not updated reports from many years ago. Requiring the public posting of their state plans will increase transparency and enable the public to hold their own elected and appointed officials accountable for making progress in this area.

Recommendation #5: Strengthen the standard for data collection by requiring jurisdictions to disaggregate their data to learn more about why youth of color are involved in the justice system.

To resolve the problem of disparities, stakeholders must have a better understanding of why youth are involved at each decision making point, as well as possible next steps to change policy, practice, and procedure to improve outcomes. Although there is a limit to the data collection that agencies can reasonably engage in, counties and states that are serious about taking steps to reduce disparities must be able to answer basic questions about youth in their systems. This includes, at a minimum, disaggregating data by race, ethnicity, gender, geography, and offense or other reason for involvement with the youth justice system at a given decision point (e.g., violation of probation order). We urge OJJDP to require local jurisdictions that have been identified as sites for R.E.D. reduction efforts to disaggregate data in this manner.

Recommendation #6: Change the term “disproportionate minority contact” to the more widely accepted and accurate term “racial and ethnic disparities.” Similarly, change the term “minority youth” to “youth of color.”

The terms “disproportionate minority contact” and “minority youth” are outdated and no longer used by jurisdictions engaged in effective work to reduce racial and ethnic disparities. There are currently four states (Hawaii, New Mexico, California, and Texas) in the United States that have a majority non-White population. More states will join them in the coming years.

Moreover, the proposed regulations focus on identifying local jurisdictions with “the highest minority concentration.” In many of these jurisdictions, youth who would be considered “minority youth” under the regulations in fact represent the majority of the youth population. Continuing to use an outdated term is not just at odds with the nation’s demographics, it is also at odds with the proposed goals of the revised regulations.

We urge OJJDP to replace these outdated and inaccurate terms.

Recommendation #7: Provide states with guidance and examples of best practices that successfully reduce R.E.D. and require that effective strategies be incorporated into the submitted plans.

We urge OJJDP to provide examples and include best practices that have been shown to reduce R.E.D. in jurisdictions that have effectively addressed this problem and to require all states to incorporate these strategies in their state plans. The requirement that states address disproportionate minority contact currently includes a process for identifying and measuring the extent of disparities in the youth justice system and the creation of a plan to address the issue, but current provisions lack substantive guidance on strategies that work and on what should be included in these plans. States would benefit from examples of current best practices that have been shown to reduce R.E.D.

We urge OJJDP to include examples of effective reform strategies in the regulation itself to help jurisdictions understand the types of interventions that OJJDP will require as part of local and state-level reform work. Although the particular system improvement strategies that a jurisdiction implements will depend on the nature of the disparities in that jurisdiction, the types of interventions that have proven to be effective at particular decision points – e.g., introducing objective criteria for diversion decisions at arrest or intake – are similar.

We propose incorporating the following language to §31.9(d)(2)(ii):

- a) *States and localities must include the following system improvement strategies:*
 - (i) *Cross-System Collaboration - Enhanced collaboration among a broad base of youth justice stakeholders, representatives from other child-serving systems such as education and child welfare, and active partnership with youth, family members and other representatives from communities of color most deeply affected by the justice system;*
 - (ii) *Data Strategies - Enhanced collection and analysis of the system data that are necessary to drive effective R.E.D. policy and practice reforms;*
 - (iii) *Policy and Practice Strategies - Structured tools and protocols to facilitate objective decision-making and decrease opportunities for disparate and more punitive responses for youth of color;*
 - (iv) *System Responsiveness Strategies - Improved cultural and linguistic responsiveness of youth justice programs and services to meet the needs of youth, families and communities of color most deeply affected by the youth justice system; and*
 - (v) *Program Strategies - Increased capacity and improved access to programs and services that prevent deeper involvement in, or enhance diversionary pathways out of, the justice system for youth of color.*
- b) *Sample Strategies. These provisions provide examples of best practices.*
 - (i) *Adopting and validating a detention risk assessment instrument or similar screening tool.*

- (ii) Modifying individual items on a risk assessment instrument or similar screening tool that are determined to contribute to DMC.*
- (iii) Establishing community-based alternatives to detention such as evening reporting centers or electronic monitoring systems.*
- (iv) Adopting a system of graduated responses (rewards and sanctions) for youth on probation.*