



Office of the Inspector General
U.S. Department of Justice



**A Review of Allegations Referred by
the Office of Special Counsel
Concerning the Office of Justice
Programs' Administration of the
Disproportionate Minority Contact
Requirement of the Title II Part B
Formula Grant Program**

EXECUTIVE SUMMARY

The Department of Justice (Department or DOJ), Office of the Inspector General (OIG), initiated this review following a January 13, 2015 referral from the Office of Special Counsel (OSC) of allegations regarding the administration of a formula grant program under the Juvenile Justice and Delinquency Prevention Act (JJDP Act or JJDPA) by the Office of Juvenile Justice and Delinquency Prevention (OJJDP) within the Office of Justice Programs (OJP). The allegations were that:

1. During fiscal years 2009-2014, agency managers approved full funding for numerous states that were out of compliance with regulations implementing the JJDP Act; and
2. In May 2014, agency managers advised compliance officials that every state would be approved for JJDP Act funding in 2015, regardless of compliance with statutory requirements.¹

The formula grant program authorized by the JJDP Act generally provides that states and territories may receive federal grants to improve their juvenile justice systems and to support juvenile delinquency prevention programs, provided they develop plans that meet certain statutory requirements. Four of these requirements are considered “core requirements” with which the states must comply or face funding reductions. The specific statutory and regulatory requirements at issue in the 2015 OSC referral are those that involve the Disproportionate Minority Contact (DMC) core requirement. The DMC core requirement provides that the state plans submitted pursuant to the JJDP Act formula grant program must address “efforts designed to reduce, without establishing numerical standards or quotas, the disproportionate number of juvenile members of minority groups, who come into contact with the juvenile justice system.” The JJDP Act regulations provide specific requirements to satisfy the DMC core requirement.

With respect to the first allegation, we did not substantiate that OJJDP managers approved full funding for numerous states that were out of compliance with regulations implementing the DMC core requirement between fiscal year (FY) 2009 and FY 2012. We considered FY 2013 and FY 2014 in connection with the second allegation, which employees within OJJDP have referred to as the “DMC pass.” We substantiated this allegation, concluding that the DMC pass effectively has been in place since FY 2013.

Specifically, we found that for each year between FY 2013 and FY 2016 OJJDP awarded all states the DMC portion of their JJDP Act formula grant allotment

¹ The January 13, 2015 OSC referral followed a September 16, 2014 OSC referral to the OIG including other allegations related to the same JJDP Act formula grant program. The OIG published two reports as a result of the 2014 referral. These reports may be found on the OIG’s website at the following locations: <https://oig.justice.gov/reports/2017/o1703.pdf#page=1>; <https://oig.justice.gov/reports/2017/a1731.pdf#page=1>.

regardless of compliance with regulatory requirements. We determined that the DMC pass resulted, in part, from guidance provided by OJP's Office of General Counsel (OGC) in FY 2013 regarding the perceived litigation risks posed by a single e-mail the DMC Coordinator wrote about her concerns with the DMC compliance review process. While we did not find that OGC's guidance was improperly motivated or beyond its authority, we determined that OGC based its guidance on an unduly restrictive assessment of the import and impact of the DMC Coordinator's e-mail, especially in light of other statements made by the DMC Coordinator around the same time. We also found that miscommunications among OJJDP management and staff (especially between former Administrator Robert Listenbee and lower level management) and between OJJDP and OGC contributed to this outcome, resulting in the perceived need for a DMC pass that was not, in fact, necessary or consistent with the applicable regulatory requirements.

We further concluded that with the passage of time the need to correct any perceived deficiencies in the DMC compliance review program grew more acute as additional funding was provided to states regardless of their compliance with key statutory and regulatory requirements. Although OJJDP has attempted to correct such deficiencies, it has failed to do so due to internal disagreements and delays in developing an acceptable solution. Overall, we determined that the DMC pass was unnecessary and inconsistent with OJJDP's responsibilities under the JJDP Act and its implementing regulations. While we could not conclude with certainty whether any specific states improperly received DMC funding and we defer to OJP as to whether recoupment of funds from any states based on our findings is appropriate, we questioned over \$1.1 million in DMC funding awarded to several states between FY 2013 and FY 2016.

We make several recommendations to improve OJP's processes. With respect to OJJDP, these include making DMC compliance determinations in accordance with statutory and regulatory requirements, ensuring the expeditious completion of a DMC compliance assessment tool to facilitate this, and improving recordkeeping procedures. We also recommend that OGC issue legal guidance to clarify the circumstances under which OJJDP appropriately may find states out of compliance with the DMC core requirement.

Table of Contents

EXECUTIVE SUMMARY	i
I. INTRODUCTION	1
II. BACKGROUND	3
A. Overview of the JJDP Act	3
B. Relevant Structure of OJP and the Compliance Monitoring Process	6
1. OJJDP.....	6
2. OGC.....	9
C. The Compliance Monitoring Review Timeline.....	9
D. The Appellate Process and Relevant Administrative Procedures Act Law.....	11
E. The DMC Core Requirement	12
1. Requirements set forth in the Statute, Regulations, and DMC Manual	12
2. Historical Treatment of DMC by OJJDP and the Development of the CDAI.....	15
III. CHRONOLOGY OF EVENTS	17
A. DMC Review From FY 2007 to FY 2011	17
B. FY 2012 DMC Determinations and Reversals.....	18
1. Initial FY 2012 DMC Compliance Determination Letters.....	18
2. FY 2013 Circumstances that Led to Reversal of FY 2012 Noncompliance Determinations.....	23
3. Administrator Listenbee’s Reversal of the FY 2012 Noncompliance Determinations.....	29
C. FY 2013 DMC Determinations and Related Events	30
1. Listenbee’s Directive to Find All States in Compliance with DMC in FY 2013.....	30
2. ACT’s Unsuccessful Attempt to Require Noncompliant States to be Subject to Quarterly Reporting	33
3. FY 2013 Compliance Determination Letters	35
4. Use of the CDAI in FY 2013 and States the ACT Team Might Have Recommended for a Noncompliance Determination if Not for Listenbee’s Directive.....	36
D. FY 2014 DMC Determinations and Related Events	38
1. The Directive to Give All States a DMC “Pass” in FY 2014: Associate Administrator’s and Deputy Associate’s Account	39
2. OGC Guidance Regarding the DMC Pass.....	40
3. Practical Effects of the FY 2014 DMC Pass	44

4.	FY 2014 Compliance Determination Letters and Reaction from the States.....	45
5.	Listenbee’s, Ayers’, and Cutlar’s Accounts of the 2014 DMC Pass.....	45
6.	Listenbee’s October 14, 2014 Conversation with Coleman.....	46
7.	Progress Made on the CDAI and the Establishment of the “RED Center”	47
E.	FY 2015 DMC Review and Related Events.....	48
1.	FY 2015 DMC Compliance Review Process.....	48
2.	FY 2015 Compliance Determination Letters	49
3.	Follow-up with Deficient States in FY 2015.....	50
4.	DMC Record Keeping.....	57
5.	Progress on the CDAI in FY 2015 and the Plan for FY 2016 DMC Compliance Review.....	57
F.	Parameters of the Multi-Year DMC Pass and Whether the CDAI Was Necessary to Hold States Accountable for DMC Deficiencies	60
G.	OGC’s and OJJDP’s Views on Whether OJJDP is Bound by the DMC Regulations.....	62
IV.	Conclusions and Recommendations	63
A.	Conclusions.....	65
1.	Management of DMC Compliance Monitoring in FYs 2009-2011	65
2.	FY 2012 Reversals	65
3.	FY 2013 Decision to Find All States In Compliance Regardless of Submissions	69
4.	FY 2014 and FY 2015 DMC Pass.....	71
B.	Recommendations	73

I. INTRODUCTION

On January 13, 2015, the Office of Special Counsel (OSC) referred to the Office of Inspector General (OIG) two allegations regarding the handling of a formula grant program under the Juvenile Justice and Delinquency Prevention Act (JJDP Act) by the Office of Juvenile Justice and Delinquency Prevention (OJJDP) within the Office of Justice Programs (OJP). According to the OSC referral and follow-up conversations with OSC, Andrea Coleman, an OJJDP employee, disclosed that:

- During fiscal years 2009-2014, agency managers approved full funding for numerous states that were out of compliance with regulations implementing the JJDP Act;
- In May 2014, agency managers advised compliance officials that every state would be approved for JJDP Act funding in 2015, regardless of compliance with statutory requirements.

The formula grant program authorized by the JJDP Act generally provides that states and territories may receive federal grants to support juvenile delinquency prevention programs provided they develop plans that meet certain statutory requirements. *See generally* 42 U.S.C. § 5601 *et seq.* Four of these requirements are considered “core requirements” with which the states must comply or face funding reductions. *Id.* The specific statutory and regulatory requirements at issue in the OSC referral are those that involve the Disproportionate Minority Contact (DMC) core requirement of the JJDP Act. Coleman has been the DMC Coordinator at OJJDP for the period covered by this review (referred to in this report as the “relevant time period”).²

Regarding the first allegation, Coleman specifically alleged that “states routinely submit DMC plans that do not meet program requirements established by agency regulations,” but Administrator Robert Listenbee often “overrules” recommendations by OJJDP compliance analysts to find such states out of compliance and reduce their funding.³

² The January 13, 2015 OSC referral followed a September 16, 2014 OSC referral to the OIG also including allegations against OJP and OJJDP officials. In 2014, the OSC referred allegations made by OIG Special Agent Jill Semmerling in connection with an investigation she conducted of alleged grant fraud by the Wisconsin Office of Justice Assistance. Among other things, Semmerling alleged that OJJDP employees failed to assure compliance with the JJDP Act core requirements. The OSC noted in the 2015 referral that “in the present case, the allegations suggest a dynamic widespread mismanagement of agency programs extending beyond the incidents Ms. Semmerling reported.”

The OIG published two reports as a result of the 2014 referral. These reports may be found on the OIG’s website at the following locations: oig.justice.gov/reports/2017/o1703.pdf#page=1; oig.justice.gov/reports/2017/a1731.pdf#page=1.

³ Notably, Listenbee was appointed Administrator in March 2013, toward the end of the period covered by this allegation.

Regarding the second allegation, Coleman provided the OSC with a May 7, 2014 e-mail from the Associate Administrator who oversaw the division of OJJDP handling JJDP Act compliance monitoring at the time. In the e-mail, the Associate Administrator wrote about explaining to states “why they will ‘get a pass’ (not the language we will use)” on the DMC core requirement. According to Coleman, the Associate Administrator told staff that she sent the May 7, 2014 e-mail at the direction of Administrator Listenbee.

In Section II, we provide background on the relevant provisions of the JJDP Act, its implementing regulations, and other relevant legal authority. We also describe the pertinent structure of OJJDP and OJP’s Office of General Counsel (OGC) and explain OJJDP’s procedures for monitoring states’ compliance with the DMC core requirement, during the relevant time period.

In Section III, we describe the timeline of events relevant to this review. Specifically, we discuss how OJJDP handled DMC reviews during each of the following five fiscal year (FY) time periods: FY 2007-FY 2011; FY 2012; FY 2013; FY 2014; and FY 2015. As part of this discussion, we describe guidance provided by OGC in April 2013 advising OJJDP leadership that OGC could not legally defend certain DMC noncompliance determinations as a result of an e-mail in which Coleman indicated that the DMC review process lacked objective criteria and consistency. We discuss the impact that this 2013 OGC guidance had on DMC noncompliance determinations that had been made in 2012, as well as the impact of the guidance on the compliance review process between 2013 and the present. We also discuss the viewpoints of OJJDP and OGC employees regarding the parameters of the DMC “pass” and the extent to which JJDP Act regulations are binding on the agency.

Finally, in Section IV we provide our analysis of the allegations contained in the OSC referral. With respect to the first allegation, we did not substantiate that OJJDP managers approved full funding for numerous states that were out of compliance with regulations implementing the DMC core requirement between FY 2009 and FY 2012. We considered FY 2013 and FY 2014 in connection with the second allegation. We substantiated this allegation, concluding that the DMC pass effectively has been in place since FY 2013. Specifically, we found that for each year between FY 2013 and FY 2016 OJJDP awarded all states the DMC portion of their JJDP Act formula grant allotment regardless of compliance. We determined that the latter outcome resulted, in part, from OGC guidance in FY 2013 regarding the impact of a single e-mail DMC Coordinator Coleman wrote about the DMC compliance review process. While we did not find that OGC’s guidance was improperly motivated or beyond its authority, we determined that OGC based its guidance on an unduly restrictive assessment of the import and impact of Coleman’s e-mail, especially in light of other statements made by Coleman around the same time. We also found that miscommunications among OJJDP management and staff (especially between former Administrator Robert Listenbee and lower level management) and between OJJDP and OGC resulted in the perceived need for a DMC pass that was not, in fact, necessary or consistent with the applicable regulatory requirements.

We further concluded that with the passage of time the need to correct any perceived deficiencies in the DMC compliance review program grew more acute as additional funding was provided regardless of compliance with key statutory and regulatory requirements. Although OJJDP has attempted to correct such deficiencies, it has failed to do so due to internal disagreements and delays in developing an acceptable solution. Overall, we determined that the DMC pass was unnecessary and inconsistent with OJJDP's responsibilities under the JJDP Act and its implementing regulations. While we could not conclude with certainty whether any specific states improperly received DMC funding and we defer to OJP as to whether recoupment of funds from any states based on our findings is appropriate, we questioned over \$1.1 million in DMC funding awarded to several states between FY 2013 and FY 2016. Thus, in Section IV, we make several recommendations to address our conclusions and to improve OJP's processes going forward.

II. BACKGROUND

In this section, we provide an overview of the JJDP Act; describe the structures of OJJDP and OGC in relation to JJDP Act compliance monitoring and how the structure of OJJDP has changed during the relevant time period; describe the compliance monitoring review process and timeline; provide an overview of the appellate process for disputed noncompliance determinations, including a brief discussion of the Administrative Procedures Act (APA); and summarize the elements of the DMC core requirement as set forth in the JJDP Act, the regulations, and the Disproportionate Minority Contact Technical Assistance Manual (DMC Manual). As part of the summary of the DMC core requirement, we discuss how OJJDP historically has treated DMC as compared to the other three core requirements, and we describe the development of the Compliance Determination Assessment Instrument (CDAI) as a tool to assist DMC compliance review.

A. Overview of the JJDP Act

Congress passed the JJDP Act in 1974 to improve the juvenile justice system and support state and local efforts to prevent juvenile delinquency. The original JJDP Act established formula grants to assist state and local governments with building and managing delinquency prevention programs; promulgated "core" requirements that states were required to follow to qualify for these grants; and created OJJDP and other government entities to coordinate and administer federal juvenile justice efforts.⁴ Since 1974, the JJDP Act has been amended several

⁴ Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. No. 93-415, 88 Stat. 1109 (1974). Formula grants are grants for which recipients do not compete, but rather that they receive as long as they satisfy the requirements set forth in the statutory scheme. The amount of funds allocated to each state is determined by statute. Formula grants are unlike discretionary grants, which are competitive, and they are unlike block grants, which are sums of money granted by the federal government to state and local governments with only general restrictions on how the money should be spent.

times.⁵ Congress last reauthorized the JJDP Act in November 2002, which took effect on October 1, 2003 (first day of FY 2004).⁶ Although the 2002 reauthorization expired on September 30, 2007 (final day of FY 2007), its substantive provisions remain in effect.⁷ While participation in the formula grant program is voluntary, only one state, Wyoming, has chosen not to participate.⁸

Title II of the JJDP Act governs the formula grant program.⁹ According to an October 2015 OJJDP policy statement, OJJDP has disbursed more than \$2 billion in formula grant funds to participating states over the past 40 years. The amount of funds disbursed to the states varies by year. For example, according to OJJDP's annual reports, OJJDP awarded approximately \$60 million in formula grants in FY 2008 and approximately \$28 million in FY 2013.

Title II funds are allocated annually among the states based on the relative population of people under age 18. See 42 U.S.C. § 5632(a). In order to qualify for the formula grant, each state must submit a 3-year plan for carrying out juvenile justice efforts, consistent with the JJDP Act. 42 U.S.C. § 5633(a). The plan must be updated and submitted to OJJDP annually for approval. 42 U.S.C. § 5633(a). In addition, the state must submit annual performance reports (also known as compliance monitoring reports) and DMC plans that "describe progress in implementing programs contained in the original plan" and "describe the status of compliance" with the statutory requirements. *Id.* The JJDP Act lists 28 items that must be included within each state plan for the state to be eligible for funding. 42 U.S.C. § 5633. If a state fails to submit a plan or submits a plan that "the Administrator, after reasonable notice and opportunity for hearing, . . . determines does not meet the requirements of" the JJDP Act, such state will become ineligible for funds under the formula grant program. 42 U.S.C. § 5633(d).

Among the statutory requirements for a state to be eligible for JJDP Act formula grants are four "core requirements." Separate from submitting an adequate plan, if the state fails to substantively comply with any of the core requirements, such state's funding "shall be reduced by not less than 20 percent" for each core requirement unfulfilled. 42 U.S.C. § 5633(c)(1). In addition, any

⁵ See Congressional Research Service, *Juvenile Justice: Legislative History and Current Legislative Issues* (Nov. 27, 2012).

⁶ Juvenile Justice and Delinquency Act of 2002, 42 U.S.C. § 5601 *et seq.* (2002).

⁷ On April 30, 2015, Senators Charles Grassley and Sheldon Whitehouse introduced S. 1169, the Juvenile Justice Reauthorization Act of 2015, a bipartisan bill to reauthorize the JJDP Act. See S. 1169, 114th Cong. (2015). On July 23, 2015, the Senate Judiciary Committee referred S. 1169 to the Senate as a whole for consideration. On September 8, 2016, Representative Carlos Curbelo introduced a similar bill in the House of Representatives. The House passed this bill on September 22, 2016, and referred it to the Senate on September 26, 2016. www.congress.gov/bill/114th-congress/house-bill/5963/text?resultIndex=6 (accessed August 3, 2017).

⁸ All five of the permanently inhabited U.S. territories and the District of Columbia also participate in the grant program. Unless otherwise indicated, this report hereinafter uses the term "states" to include both states and territories.

⁹ In addition to the JJDP Act Title II formula grant program, OJJDP administers other block and discretionary grant programs.

state that fails to satisfy a core requirement will be ineligible for any funds for the same fiscal year, unless either (1) the state agrees to expend 50 percent of the remaining funds allocated to the state to achieve compliance; or (2) the Administrator determines that the state has achieved substantial compliance and has made “an unequivocal commitment” through legislative or executive action to achieve full compliance within a reasonable time. 42 U.S.C. § 5633(c)(2). The core requirements are as follows:

- Deinstitutionalization of Status Offenders (DSO)

States may not place status offenders in secure detention facilities or secure correctional facilities. 42 U.S.C. § 5633(a)(11)(A). Status offenders are juveniles who “are charged with or who have committed an offense that would not be criminal if committed by an adult,” such as truancy, curfew violations, or running away. 42 U.S.C. § 5633(a)(11)(A); 28 C.F.R. § 31.304(h). The DSO requirement is subject to several exceptions, which are discussed in the OIG’s July 25, 2017 report entitled, “A Report of Investigation of Certain Allegations Referred by the Office of Special Counsel Concerning the Juvenile Justice and Delinquency Prevention Act Formula Grant Program.” (July 25, 2017 Report) See <https://oig.justice.gov/reports/2017/o1703.pdf#page=1>.

- Separation of Juveniles from Adults in Institutions (Separation)

States may not detain or confine juvenile delinquents, status offenders, or non-offenders in any institution in which they have contact with adult inmates. 42 U.S.C. § 5633(a)(12). To meet this requirement, states must maintain sight and sound separation between juveniles and adult inmates.

- Removal of Juveniles from Adult Jails and Lockups (Jail Removal)

States may not detain or confine juveniles in any jail or lockup for adults. The Jail Removal core requirement is subject to certain exceptions, which are discussed in the July 25, 2017 report. 42 U.S.C. § 5633(a)(12), (13); 42 U.S.C. § 5603(28); 28 C.F.R. § 31.303(e)(3).

- Reduction of Disproportionate Minority Contact (DMC)

States must “address juvenile delinquency prevention efforts and system improvement efforts designed to reduce, without establishing numerical standards or quotas, the disproportionate number of juvenile members of minority groups, who come into contact with the juvenile justice system. See 42 U.S.C. § 5633(a)(22). The JJDP Act regulations provide additional requirements to satisfy the DMC core requirement and the DMC manual provides guidelines for doing so, as explained in part E of this Section. See 28 C.F.R. § 31.303(j); Disproportionate Minority Contact Technical Assistance Manual (4th Ed.), www.ojjdp.gov/compliance/dmc_ta_manual.pdf.

B. Relevant Structure of OJP and the Compliance Monitoring Process

OJP is headed by an Assistant Attorney General (AAG) and contains six programmatic bureaus, including OJJDP, and several support offices, including OGC. Laurie O. Robinson was the AAG from November 2009 through February 2012, when Mary Lou Leary became Acting AAG for approximately 1 year. Karol Mason was the AAG from April 2013 until the end of January 2017, when Alan Hanson became the Acting AAG.

1. OJJDP

OJJDP is headed by a Presidentially-appointed Administrator, who reports to the AAG. See 28 C.F.R. § 0.94. Between 2002 and 2009, J. Robert Flores was the OJJDP Administrator. After Flores resigned in January 2009, OJJDP was headed by two successive Acting Administrators: Jeffrey Slowikowski from January 2009 to January 2012, and Melodee Hanes from January 2012 to March 2013. Robert Listenbee served as the Administrator of OJJDP from March 2013 to January 2017, when Eileen Garry became the Acting Administrator.

The OJJDP unit monitoring compliance with the formula grant program of the JJDP Act, including compliance with the DMC core requirement, underwent two major reorganizations during the period relevant to our review.

a. 2007-2012: The State Relations and Assistance Division

Until late 2012, the State Relations and Assistance Division (SRAD) was responsible for formula grant compliance monitoring. During that period, SRAD was led by Associate Administrator Gregory Thompson and Deputy Associate Administrator Chyrl Jones (formerly Chyrl Penn). Associate Administrator Thompson reported to the Deputy Administrator for Programs, at that time Marilyn Roberts, who reported to the Administrator. Thompson and Jones supervised the OJJDP state representatives who were responsible for reviewing formula grant plans and compliance monitoring reports submitted by states in connection with the JJDP Act, conducting audits and technical assistance visits to states, and otherwise managing grants to states. Witnesses told us that there were approximately nine OJJDP state representatives and each was assigned a handful of states to monitor.

During this period, OJJDP state representatives conducted the initial review of states' formula grant plans and compliance monitoring reports and drafted letters to advise states whether they were in or out of compliance with the JJDP Act requirements (determination letters). Thereafter, all determination letters were submitted for a second level review to both the Compliance Monitoring Coordinator, who reviewed the letters for compliance with the Jail Removal, Separation, and DSO core requirements, and the DMC Coordinator, who reviewed the letters for

compliance with the DMC core requirement.¹⁰ After review by the Compliance Monitoring Coordinator and DMC Coordinator, the determination letters were reviewed by Deputy Associate Administrator Jones, Associate Administrator Thompson, Deputy Roberts, and the Administrator, in that order.

b. Early 2013-April 2015: Audit and Compliance Team

According to OJJDP records and witness accounts, OJJDP was reorganized in early 2013 and the unit assessing and monitoring compliance with the JJDP Act formula grant program became the Audit and Compliance Team (ACT), within the Budget and Administration Division of OJJDP. Compliance monitoring was handled by ACT until approximately April 2015. The Budget and Administration Division was led by an Associate Administrator (the "Associate Administrator") and a Deputy Associate Administrator (the "Deputy Associate"). The Associate Administrator reported to the Deputy Administrator for Operations, Nancy Ayers, who in turn reported to the Administrator.¹¹ Under the Deputy Associate were Compliance Monitoring Coordinator Rumsey and DMC Coordinator Coleman (whom we also refer to as "compliance analysts"), and three additional compliance analysts.

Witnesses told us that during this period, Coleman, Rumsey, and the additional compliance analysts each were assigned an approximately equal number of states to monitor for compliance with the JJDP Act formula grant program, including DMC. While Coleman and Rumsey maintained their Coordinator titles and certain additional duties such as "policy and training type work," they no longer conducted a second level review of all the state submissions and proposed determination letters.¹² Instead, both the regular compliance analysts and the Coordinators submitted proposed determination letters directly to the Deputy Associate, who then transmitted them to the Associate Administrator, Deputy Administrator Ayers, and the Administrator for review in that order.

¹⁰ Elissa Rumsey is the current Compliance Monitoring Coordinator and held that position during the entire period relevant to our review. Andrea Coleman was a state representative within SRAD from July 2007 through October 2010, when she became the Disproportionate Minority Contact Coordinator.

¹¹ From 2007 to 2009, Nancy Ayers was OJJDP's Deputy Administrator for Policy. After a detail to another office, Ayers became the Deputy Administrator of Operations in February 2013.

¹² For Coleman, these additional duties included coordinating technical assistance for states, drafting portions of reports to Congress, developing a tool to help standardize the process of assessing and monitoring DMC compliance, and leading other DMC initiatives. The Deputy Associate told us that he and the Associate Administrator decided to eliminate Rumsey's and Coleman's review of all state submissions because they believed the additional level of review caused a "bottleneck." He further told us that he did not believe it was "necessarily appropriate for a non-supervisor to provide that level of review for their peers." After reviewing a draft of this report, Coleman told us that she disagreed with the Deputy Associate's assessment for several reasons. According to Coleman, the additional review conducted by Rumsey and Coleman was "for quality assurance" and was particularly important to ensure quality work from certain employees who were less knowledgeable on particular aspects of the formula grant program. Coleman also stated that any "bottleneck" actually resulted from the absence of a "formalized review process" and inadequate time for employees to review state plans.

As noted above, Listenbee became Administrator of OJJDP in March 2013. Listenbee told us that prior to his appointment, he was a criminal defense attorney and served for approximately 16 years as the Chief of the Juvenile Unit of the Defender Association of Philadelphia. Listenbee told us that he came to OJJDP with “extensive background in terms of working on DMC issues.” Specifically, he stated that he had served on the DMC subcommittee of the Pennsylvania Commission on Crime and Delinquency, was “leader of the Philadelphia Working Group, which is a subgroup of the Pennsylvania DMC subcommittee,” and served on the “MacArthur Models for Change DMC action committee.” He further stated that it was his desire as a new administrator to “bring about change” in the area of DMC and that one of his “priorities was to address racial and ethnic disparities in the juvenile justice system.”

In the fall of 2013, Administrator Listenbee hired Shanetta Cutlar as his Chief of Staff and Counsel, and she joined the OJJDP staff full-time in April 2014. Cutlar told us that shortly thereafter she began reviewing all compliance determination letters for style, tone, and typographical errors before Listenbee’s final review. In addition, witnesses told us that Listenbee assigned Cutlar to be the lead on “Racial and Ethnic Disparities” (RED), which included oversight of DMC monitoring.

c. April 2015-The Date of this Report: Core Protections Division

In approximately July 2015, the unit monitoring compliance with the formula grant program became the Core Protections Division (CPD), which was led by an Acting Associate Administrator (the “Acting Associate Administrator”) on detail from OJP’s Front Office until September 2016.¹³ The Acting Associate Administrator told us that, although her rating manager remained within OJP’s Front Office, she reported to Deputy Administrator for Programs Chyrl Jones for matters related to the JJDP Act formula grant program. Jones, in turn, reported to Administrator Listenbee. As noted above, Jones was previously the Deputy Associate Administrator for SRAD.

Within the CPD as of the writing this report, there were four compliance analysts, two of whom were hired in 2016, in addition to the two coordinators, Rumsey and Coleman, who continued to conduct the same state compliance review as the compliance analysts.¹⁴ However, one compliance analyst told us that during portions of this period at least one of these employees was on extended medical

¹³ The Acting Associate Administrator told us that she was selected for the position of Acting Associate Administrator of the CPD because AAG Mason wanted to improve OJJDP’s compliance auditing procedures. While the Acting Associate Administrator did not have extensive experience with the JJDP Act or the core requirements before being assigned to the detail, she had a strong background as an auditor. In October 2016, the Acting Associate Administrator told us that she was replaced with a new Acting Associate Administrator in September 2016, but that she was still completing certain tasks with the CPD. She stated that at that time OJP was still searching for a permanent employee to fill the position of CPD Associate Administrator.

¹⁴ At times in this report, we refer to the coordinators and compliance analysts collectively as “compliance analysts” given their similar work duties.

leave and one was detailed to another office. As a result, other OJJDP employees with less compliance monitoring expertise were asked to assist in the CPD.

2. OGC

OGC is responsible for advising OJP components, including OJJDP, on all legal matters relating to OJP's functions, duties, and activities. OGC's legal advice is binding on OJP component agencies. Under OJP Order 1001.5A, "No OJP officer or employee may take any action in contravention of legal advice from the [General Counsel], without the approval and concurrence of the Assistant Attorney General (AAG)." The order further states, "No payment, appointment, finding, determination, affirmance, reversal, assignment, authorization, decision, judgment, waiver, or other substantive ruling, arising from or in connection with any programmatic claim against the United States under any program administered by OJP. . . may be made without the concurrence of the [General Counsel]."

Rafael Madan has been the OJP General Counsel since 2001. Under the General Counsel, there are Deputy General Counsels and Attorney Advisors. During our review period, Deputy General Counsel Charles Moses was in charge of juvenile justice matters and was OJP's designated ethics official. There have generally been two to three Attorney Advisors specifically assigned to handle juvenile justice matters (JJ attorneys) at all times.

In addition to providing guidance to OJJDP employees when questions arise, JJ attorneys review appeals from states contesting findings by OJJDP that they are out of compliance with one or more JJDP Act requirements. In connection with this appellate function, in approximately 2009 JJ attorneys began reviewing all JJDP Act proposed noncompliance determination letters before review by the Administrator to avoid unnecessary reversals on appeal. General Counsel Madan told us that when OGC exercises this function, it attempts to predict what a reviewing court would decide on appeal. The appellate process is discussed in part D of this Section.

C. The Compliance Monitoring Review Timeline

During our review period, OJJDP generally made compliance determinations by September 30 of a given fiscal year (FY), based upon data collected by the states from a prior fiscal year, to determine a state's funding for the following fiscal year.¹⁵ For example, on June 30, 2014, most states submitted to OJJDP data from FY 2012 and an updated state plan, including a plan to address DMC. On September 30, 2014, OJJDP made compliance determinations regarding the states' FY 2015 funding awards, to be awarded on September 30, 2015. Table 1 shows key dates and deadlines for the formula grant program.

Table 1

¹⁵ The fiscal year for the federal government begins on October 1 and ends on September 30, and reflects the calendar year in which it ends. Thus, for example, FY 2016 began on October 1, 2015 and ended on September 30, 2016.

Grant Program Key Dates

Date	Activity
March 30	OJJDP announces solicitation
June 30	Grant application due to OJJDP
June 30	Deadline for states to submit compliance information from the prior FY and state plans to OJJDP
July 1–September 29	OJJDP reviews prior FY compliance data and state plans
September 30	Determination letters are sent to states
September 30	Award issued from prior FY determination

In a recent policy document posted on OJJDP’s website, OJJDP announced that it intends to change its timeline as follows, beginning with funding determinations for FY 2017:

Table 2
Timeline for FY 2017 Funding Determinations

Date	Activity
February 28 (Administrator may grant a 1 month extension to March 31)	Deadline for states to submit compliance data from previous FY and state plans to OJJDP
March 30	OJJDP announces solicitation for following FY
April 30	Determination letters are sent to states
June 30	Grant Application Due for following FY
September 30	Awards Issued from April 30 determination

The anticipated FY 2017 timeline is more condensed than the previous timeline, because OJJDP will issue awards to the states in the same fiscal year in which the determinations are made.¹⁶

When discussing the compliance review process and determination letters in this report, we refer to the fiscal year in which the compliance review was performed and the determination letters were sent to the states. For example, we call determination letters sent to states on September 30, 2013, FY 2013 determination letters, even though such letters related to funding that was awarded to the states in FY 2014. Similarly, we refer to the review period leading to the FY 2013 determination letters as the FY 2013 compliance review period.

D. The Appellate Process and Relevant Administrative Procedures Act Law

During the course of our review, we learned that the decision to give states a “pass” on DMC for certain years related to an e-mail in which Coleman appeared to indicate that OJJDP did not have standards to consistently and objectively assess DMC compliance. This e-mail will be discussed in Section III below. Based upon Coleman’s e-mail, OGC determined that it would have difficulty defending an appeal of an OJJDP denial or reduction of a grant award against a state’s argument that OJJDP’s determination was “arbitrary and capricious” and thus unlawful under the Administrative Procedures Act (APA). Accordingly, in this part we provide background on the appellate process and relevant provisions of the APA.

States have a right to appeal agency determinations of noncompliance with the formula grant program pursuant to 28 C.F.R. § 18.5. The state appealing the determination must send its notice of appeal to OGC, which then reviews the appeal and makes a recommendation to the AAG as to whether to grant or deny the appeal. *Id.* The AAG may attempt to resolve the matter informally, with the appellant-state’s consent, or appoint a hearing officer to preside over a formal hearing. 28 C.F.R. §§ 18.5-18.6. The AAG makes a final determination, which in turn is appealable to a federal court. 28 C.F.R. § 18.9; 5 U.S.C. §§ 702, 704.

The APA governs the legality of agency actions, including determinations of noncompliance with the JJDP Act formula grant program. *Id.* The standard of review under the APA is “highly deferential,” and courts have held that they must not “substitute [their] judgment for that of the agency.” *Nat’l Oilseed Processors*

¹⁶ States received their most recent funding awards in September 2016 based on compliance determinations that had been made in September 2015. However, due to the recent timeline change, no compliance determinations were made in September 2016. Instead, the next set of compliance determinations will be made in April 2017, based upon materials the states will submit in January 2017, for funding awards that will be made in September 2017. This is consistent with AAG Mason’s April 21, 2015 testimony before the Senate Judiciary Committee that OJJDP was “working to shorten the gap between the submission of a state’s data and OJJDP’s compliance determination based on that data.” www.judiciary.senate.gov/imo/media/doc/04-21-15%20Mason%20Testimony%20Updated.pdf (accessed August 3, 2017). We did not find that OJJDP neglected its duties by not making compliance determinations in FY 2016; rather, we found that this was simply an unavoidable outcome of the newly condensed timeframe.

Ass'n v. Browner, 924 F.Supp. 1193, 1200 (D.C. Cir. 1996). A court will "set aside" an agency's action "only if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Id.* (quoting 5 U.S.C. § 706(2)(A)). Regarding whether an agency action is "not in accordance with law," an agency is not only bound by and required to obey statutes but also its own regulations, as long as such regulations do not conflict with or otherwise exceed the agency's statutory authority. *Leslie v. Attorney General*, 611 F.3d 171, 180 (3d Cir. 2010) (agency must obey own rules); *Am. Tel. & Tel. Co. v. Fed. Commc'n Comm'n*, 978 F.2d 727, 733 (D.C. Cir. 1992) (agency not bound by rule that is inconsistent with statute).

An agency action is "arbitrary and capricious" if the agency "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Ins. Co.*, 463 U.S. 29, 43 (1983). Agencies also act with arbitrariness and caprice when they treat similarly situated entities differently without reason. See, e.g., *Marco Sales Co. v. Fed. Trade Comm'n*, 453 F.2d 1, 7 (2d Cir. 1971). Moreover, the Supreme Court has held that "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (internal quotation marks omitted). When agencies change their policies, courts have required them to "provide a more detailed justification than what would suffice for a new policy created on a blank slate." *Fed. Commc'n Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

E. The DMC Core Requirement

1. Requirements set forth in the Statute, Regulations, and DMC Manual

The DMC provision was created in 1988 when Congress amended the JJDP Act to require states to address disproportionate minority confinement in their state formula grant plans. See *Disproportionate Minority Contact Technical Assistance Manual* Fourth Ed. (July 2009). In 1992, Congress elevated DMC to a core requirement, thus requiring OJJDP to reduce a state's funding by 25% (later amended to 20%) for failure to comply. *Id.* Originally, the DMC core requirement required states to "address efforts to reduce the proportion of juveniles detained or confined in secure detention facilities, secure correctional facilities, jails, and lockups who are members of minority groups if such proportion exceeds the proportion such groups represent in the general population." 42 U.S.C. § 5633(23) (Former Version). As part of the 2002 JJDP Act Reauthorization, Congress amended the DMC core requirement in two significant ways. First, Congress broadened the requirement by mandating that states address not only disproportionate minority detention and confinement but all disproportionate

minority “contact” with the juvenile justice system, such as arrest.¹⁷ Second, Congress made clear that states are prohibited from establishing “numerical standards or quotas” to reduce DMC. Thus, the current DMC provision provides that in order to qualify for JJDP Act formula grants:

[States must] address juvenile delinquency prevention efforts and system improvement efforts designed to reduce, without establishing or requiring numerical standards or quotas, the disproportionate number of juvenile members of minority groups, who come into contact with the juvenile justice system.

42 U.S.C. § 5633(a)(22).

DMC is the only core requirement that does not permit numerical standards to determine compliance.¹⁸ Thus, some witnesses told us that the evaluation of state compliance with DMC is inherently more subjective than the evaluation of compliance with the other core requirements. Nonetheless, the JJDP Act regulations provide specific criteria for the state’s DMC plan. 28 C.F.R. § 31.303(j). Specifically, the regulations provide that a state DMC plan must contain the following three components:

- Identification. “Identification” requires states to determine whether minorities are disproportionately represented in their juvenile justice systems and, if so, the extent to which such disproportionality exists. States must provide “quantifiable documentation . . . to determine whether minority juveniles are disproportionately detained or confined . . . in relation to their proportion of the State juvenile population.” A state that is unable to provide such documentation must submit a “time-limited plan of action, not to exceed six months, for developing and implementing a system for the ongoing collection, analysis and dissemination” of such information. 28 C.F.R. § 31.303(j)(1). The Identification provision indicates that “guidelines” for determining the existence and extent of disproportionality are provided by the DMC Manual. According to JJ Attorney 2, this language means that the DMC Manual is “incorporated by reference” into the regulations.
- Assessment. “Assessment” requires a state that has identified disproportionality to perform an analysis to identify the factors contributing to the existence of DMC and explain the disproportionality. The assessment must identify and explain DMC in the following seven areas: (1) arrest rates, (2) diversion rates; (3) adjudication rates, (4) rates of court dispositions other than

¹⁷ The other types of “contact” with the juvenile justice system are delineated in 28 C.F.R. § 31.303(j) and the DMC Manual, and are described in more detail later in this subsection.

¹⁸ A state will be penalized if it reports any violation of the Separation core requirement or if it reports violations of the DSO or Jail Removal core requirements that are in excess of the de minimis violation rates established by the JJDP Act regulations.

incarceration, (5) rates and periods of prehearing detention in secure facilities; (6) rates and periods of dispositional commitments to secure facilities, and (7) rates of transfers to adult court.¹⁹ A state that is unable to provide such an assessment must submit “a time-limited plan (not to exceed twelve months)” for doing so. 28 C.F.R. § 31.303(j).

- Intervention. “Intervention” requires states to “provide a time-limited plan of action for reducing” DMC where DMC has been “demonstrated.” Under the regulations, “The intervention plan shall be based on the results of the assessment, and must include, but not be limited to the following” five types of intervention: (i) diversion; (ii) prevention; (iii) reintegration; (iv) policies and procedures; and (v) staffing and training. The regulations further provide that each type of intervention be focused on “minority youth.” 28 C.F.R. § 31.303(j).

The DMC Manual is nearly 400 pages and provides additional guidance for DMC compliance. For example, the DMC Manual explains that for purposes of satisfying the Identification requirement, OJJDP has selected the “Relative Rate Index” (RRI) as the method for states to determine the rate at which minorities have contact with the juvenile justice system relative to the general population. States must use the “RRI Analysis and Tracking Sheet” for reporting this data. The DMC Manual also establishes that states must report RRIs both statewide and for three local jurisdictions. DMC Manual at 1-1 to 1-3, 1-28. As noted above, one JJ Attorney told us that the DMC Manual is incorporated by reference into the Identification provision of the DMC regulations, pursuant to 28 C.F.R. § 31.303(j)(1).

Regarding the Assessment regulatory requirement, the DMC Manual explains that an Assessment is an “in depth examination of how DMC occurs. An assessment is a search for the factors that contribute to DMC, with the goal that the results may lead to strategies or interventions to reduce DMC.” The DMC Manual calls the seven areas listed in the regulations for assessing DMC “contact points” and incorporates two additional contact points. Specifically, the DMC Manual divides the “Adjudication” contact point into “Petition/charges filed” and “Delinquency findings,” and adds a “Referral” contact point to capture the point at

¹⁹ As explained in the text that follows this footnote, the DMC Manual adds two contact points to the Assessment requirement. It is not clear whether reporting on these contact points is mandatory. After receiving a draft of this report, OJP submitted technical comments to us indicating that “[t]he only things States need to respond to in order to be in compliance with the DMC core requirement is what is contained in the statute and regulation.” However, Coleman told us that the additional requirements of the DMC Manual are incorporated into the regulations by 28 C.F.R. § 31.303(k) which provides that, “states shall agree to other terms and conditions as the Administrator may reasonably prescribe to assure the effectiveness of programs assisted under the Formula Grant.” In Part IV.B. of this report, we recommend that OGC provide guidance to OJJDP regarding the extent to which OJJDP may impose requirements that are contained within the DMC Manual or other sources, but not specifically incorporated into the regulations.

which a juvenile is “sent forward for legal processing and received by a juvenile or family court or juvenile intake agency.” DMC Manual at 1-7, 2-18.

In addition to the Identification, Assessment, and Intervention requirements established by the regulations, the DMC Manual requires that each state conduct and incorporate into its DMC plan an “Evaluation” and ongoing “Monitoring” of the effectiveness of the state’s intervention methods. DMC Manual, Chapter 5. Coleman told us that Identification, Assessment, Intervention, Evaluation, and Monitoring are the five phases of the “DMC reduction model,” which was developed after the current JJDP Act regulations were promulgated. Although Evaluation and Monitoring are not specifically included in the current DMC regulations, they were included in new proposed regulations that were posted by OJP for public notice and comment last year.²⁰ See www.regulations.gov/document?D=OJP-2016-0003-0001 (accessed August 3, 2017).

2. Historical Treatment of DMC by OJJDP and the Development of the CDAI

Several witnesses told us that OJJDP has prioritized the other three core requirements over the DMC core requirement. For example, Madan told us that DMC was considered the “red-headed stepchild” of the core requirements. We determined that several factors contributed to this phenomenon. First, Madan described DMC as an “afterthought,” because it was added to the JJDP Act after the other core requirements. Second, several witnesses stated that the DMC statutory language is vaguer and less objective than the other core requirements, because the statute does not permit numerical standards to be used for assessing whether states have adequately reduced DMC. Third, although the regulations provide specific criteria for the state DMC plan, witnesses told us that the DMC regulations are problematic because they have not been updated since the 2002 Reauthorization. As a result, the regulations use the terminology disproportionate minority *detention and confinement* rather than the broader terminology disproportionate minority *contact* of the amended statute.²¹ Finally, Coleman and one of the compliance analysts told us that many OJJDP staff and managers do not fully understand the complex DMC regulations and that OJJDP has not adequately trained staff and managers on how to evaluate DMC compliance. As a result, Coleman told us – and wrote in both an October 3, 2011 memorandum to OGC and an April 3, 2013 e-mail to both OGC and OJJDP employees – that historically the

²⁰ On January 17, 2017, OJP issued a partial final rule, effective February 16, 2017, that does not modify the DMC regulations. 82 Fed. Reg. 4783-4793. According to the posting in the Federal Register, OJP decided to issue only a partial final rule due to the number and complexity of comments received on the proposed rule. 82 Fed. Reg. 4783. The Federal Register posting further indicated that OJP would address other aspects of the proposed rule, including amendments to the DMC regulations, in a future final rule.

²¹ Although the regulations do not use the term “disproportionate minority contact,” the Assessment provision requires that state assessments address not only disproportionate minority confinement but also differential treatment at other stages in the criminal justice process, such as diversion and dispositions other than incarceration. In addition, the language of the regulations that were proposed last year is more consistent with the language of the amended statute. www.regulations.gov/document?D=OJP-2016-0003-0001 (accessed August 3, 2017).

evaluation of DMC by state representatives and compliance analysts was inconsistent and that OJJDP approved DMC funding for states regardless of the quality of their plans.

Coleman told us that her frustration with the absence of consistency in DMC monitoring and OJJDP's related resistance to finding states out of compliance with the DMC core requirement led her to begin developing the Compliance Determination Assessment Instrument (CDAI), a tool intended to objectively measure states' compliance with DMC. Coleman stated that she created the CDAI by combining the requirements of the statute, regulations, and DMC Manual into one instrument. She told us that she then incorporated weights for each of the requirements, so that the tool could generate a numerical score representing each state's level of DMC compliance.²² Coleman explained that she envisioned the CDAI as a way to better equip staff and supervisors to assess DMC compliance, even though they may not have been adequately trained on the regulatory requirements. Listenbee told us that he believed the CDAI was a necessary supplement to the JJDP Act and its implementing regulations.

The Associate Administrator and Coleman told us that after Coleman developed a draft CDAI, OJJDP sought input from various individuals and entities, including OGC, a statistician from OJP's Bureau of Justice Statistics (BJS statistician), a randomly selected group of states, and OJJDP contractors. According to a Memorandum written by Coleman on October 3, 2012, OJJDP introduced the CDAI to the states through a series of conference calls in July 2011 and held two webinars in 2012 for states to ask questions about the CDAI. In 2013, an OJP OGC attorney (JJ Attorney 4), who has a background as a statistician, was temporarily assigned to work on juvenile justice matters and provided input on the CDAI. In 2014, OJJDP sought input on the CDAI from two nonprofit organizations that OJJDP selected as grantees to operate a National Resource Center to Address Racial and Ethnic Disparities later called Technical Assistance to End Racial and Ethnic Disparities (RED Center). Based upon guidance from the different entities and individuals that reviewed the CDAI, the tool has been revised several times but has not yet been finalized.

Listenbee told us that when he became Administrator in March 2013, he made DMC a priority and endeavored to "move the dial" on DMC – in other words, to more aggressively enforce the DMC core requirement. In addition, Listenbee said he took several actions aimed at reducing DMC, such as soliciting the views of experts and establishing the RED Center.²³ However, no states have been found

²² As explained later in this report, OGC and a statistician from the Bureau of Justice Statistics (BJS) had concerns about the weighting proposed by Coleman in drafts of the CDAI.

²³ After reviewing a draft of this report, Listenbee described several other actions he took in an effort to reduce DMC across the country, including increasing and enhancing diversion programs for juvenile substance abuse, increasing funding for the development of juvenile "risk assessment instruments," funding research to "better understand the needs and issues facing Latino youth," seeking to "reduce the involvement of American Indian and Alaska native children in the juvenile justice system," and making efforts to reduce referrals from schools to juvenile courts. We have not sought to confirm the effectiveness of these efforts, as they are beyond the scope of this review.

out of compliance with the DMC core requirement since he became Administrator. As described in the pages that follow, we found that this gap between Listenbee's stated intentions, which we have no reason to doubt were sincere, and OJJDP's failure to find any state out of compliance during his tenure resulted from several factors. These factors include OGC guidance, various miscommunications, and Listenbee's own reluctance to break from OJJDP's longstanding practice of granting states their funding for DMC.

III. CHRONOLOGY OF EVENTS

A. DMC Review From FY 2007 to FY 2011

As described in Section II above, between FY 2007 and FY 2011, the division that handled compliance monitoring, including DMC compliance monitoring, was the State Relations and Assistance Division (SRAD), which was headed by Associate Administrator Thompson and then-Deputy Associate Administrator Jones. According to OJJDP's website, only three states were held out of DMC compliance during this time period – Mississippi and the Northern Mariana Islands in 2007 and American Samoa in 2009. See <https://www.ojjdp.gov/compliance/compliancedata.html> (accessed August 4, 2017). Coleman told us that OJJDP found Mississippi out of compliance for failure to submit a DMC plan, and that OJJDP found Northern Mariana Islands and American Samoa out of compliance for failure to submit sufficient data to identify its rate of DMC. Coleman also told us that during this period Arkansas, the District of Columbia, Illinois, Indiana, Louisiana, New Hampshire, and South Carolina submitted deficient DMC compliance plans but that Thompson and Jones rejected her recommendations to find these states out of compliance.

Coleman told us that whenever she recommended a state to be found out of compliance, Thompson directed her to go back to the state in an effort to gather additional information. She also told us that Thompson often directed her to go back to the same state multiple times and that "[a]fter the third time" she "would refuse to do it." Coleman stated that she was always willing to give a state one chance to resubmit its plan if the original plan was inadequate, but that she believed Thompson and others gave the states too many chances. According to Coleman, Thompson would say, "you know, this is the state's money," but she told us that she did not agree with this philosophy. Coleman stated that her supervisors ultimately changed her draft letters to find the states in compliance.

Based upon a review of OJJDP's past compliance determination letters, we confirmed that OJJDP did not find Arkansas, the District of Columbia, Illinois, Indiana, Louisiana, New Hampshire, and South Carolina out of compliance with the DMC core requirement between FY 2007 through 2011. We requested from Coleman any records showing that these states had nonetheless submitted deficient

Listenbee also noted, after reviewing a draft of this report, that OJJDP has made positive strides in connection with the other three core requirements since the early 1990s. This is similarly beyond the scope of this review.

plans and that compliance staff had thus recommended that they be found out of compliance during the same years. However, Coleman did not provide us with any such records. Therefore, we found no evidence to substantiate or refute the allegations that between FY 2007 through FY 2011, OJJDP managers approved full funding for states over her recommendations that they be found out of compliance with the DMC core requirement.

B. FY 2012 DMC Determinations and Reversals

Coleman told us that in FY 2012 she provided DMC noncompliance recommendations to her supervisors for Louisiana, Illinois, and South Carolina and that Jones, Thompson, then-Acting Administrator Hanes, and OGC approved the recommendations. However, Coleman told us that Listenbee, who became Administrator in March 2013, later reversed these recommendations. In this part, we describe the process that led to the three FY 2012 noncompliance determinations and the circumstances that culminated in Administrator Listenbee's reversal of those determinations in June 2013.

1. Initial FY 2012 DMC Compliance Determination Letters

a. SRAD's Proposed FY 2012 Noncompliance Determinations

In or about July 2012, OJJDP compliance staff in SRAD began reviewing the updated state plans and compliance monitoring reports that states had submitted to OJJDP by June 30, 2012. As explained in Section II, state representatives each reviewed a set of state plans and then submitted proposed DMC determination letters to Coleman. At this time, the DMC determinations were communicated to states through separate letters from the letters regarding compliance with the other three core requirements.

Coleman told us that based upon her second level review she recommended that OJJDP find Louisiana, South Carolina, and Illinois out of compliance. We obtained and reviewed OJJDP's grant records related to these states' DMC noncompliance recommendations, including documents that summarized each state's DMC deficiencies as identified by state representatives.

As Table 3 below shows, the collective DMC funding for Louisiana, Illinois, and South Carolina for FY 2013 was \$309,812.

Table 3
States with DMC Non-Compliance Determinations for FY 2013 Funding

FY	State	Grant Award	DMC Allotment Portion
FY 2013	Louisiana	\$425,679	\$85,136
FY 2013	Illinois	\$871,698	\$174,340
FY 2013	South Carolina	\$251,680	\$50,336
	Total	\$1,549,057	\$309,812

Source: OJJDP (www.ojjdp.gov/funding/fy13awards.html (accessed August 3, 2017)).

Coleman told us that based upon the prevailing practice described in part III.A. above, she was surprised that her managers approved these three noncompliance recommendations and did not know what accounted for the change in approach. However, she also told us that FY 2012 was the first year that SRAD used a draft of the Compliance Determination Assessment Instrument (CDAI) as part of the review process for every state. Specifically, Coleman stated that while not all of the state representatives used the CDAI in their initial compliance review, she used the CDAI as part of her second-level review of every state DMC plan.²⁴ Coleman described the use of the draft CDAI in FY 2012 as a “pilot” project to test out the utility of the tool. Coleman told us that based upon her CDAI analysis, the submissions from Illinois, Louisiana, and South Carolina were the most “egregious.”

Coleman told us that Jones and Thompson approved her use of the CDAI in FY 2012, even though BJS and OGC were still reviewing the tool. In addition, an August 23, 2012 e-mail from Deputy General Counsel Moses to OJJDP management indicates that OGC was aware of and did not oppose the use of the CDAI in FY 2012 to find the most deficient states out of compliance. Coleman told us that she believed the use of the CDAI may have influenced Thompson to approve the FY 2012 noncompliance recommendations, because the CDAI was more effective than a former checklist at documenting the justifications for SRAD’s recommendations.

²⁴ One compliance analyst who was a state representative at the time told us that she used the CDAI in her FY 2012 review as a way to “keep a record” of her compliance analysis and to assess how the tool worked.

b. OGC Review of SRAD's Proposed FY 2012 Noncompliance Determinations

In an August 23, 2012 e-mail, Moses wrote to Hanes and Deputy Administrator Roberts, copying three JJ attorneys, that OGC had completed its legal review of the three FY 2012 DMC noncompliance recommendations and concluded that the recommendations "generally" had "adequate" support. In explaining OGC's reasoning, Moses wrote that he was aware that the CDAI had been used during the review process and that, although OGC still had concerns regarding the CDAI, he agreed that the states recommended for noncompliance determinations had submitted DMC plans that were "weak and scored well below the 60 point threshold [on the CDAI] for determining non-compliance." He further stated that "anticipating future, closer calls will require that we in OGC understand and be able to argue the merits of the CDAI evaluation instrument and the RRI analyses." However, Moses expressed concern regarding OGC's ability to provide a legal defense should any of the noncompliant states appeal. Moses advised OJJDP in the e-mail that each agency determination must be "consonant with [the agency's] prior administrative holdings (or otherwise free of arbitrariness and caprice)." Thus, in anticipation of possible appeals, Moses requested that OJJDP provide additional information. Among other things, he asked OJJDP to explain why OJJDP recommended the three states to be found noncompliant even though no state had been found noncompliant since FY 2008, whether all states had been notified that OJJDP planned to take a "different approach" in FY 2012, and whether the three proposed noncompliant states were given notice that they were "trending toward being found out" of compliance in FY 2012. He also wrote that, in anticipation of "future, closer calls," OGC and OJJDP should continue their discussions regarding the CDAI until OGC's "concerns are resolved."

In a September 14, 2012 reply to Moses' e-mail, Roberts wrote that all states had been put on notice that there would be greater DMC scrutiny in FY 2012 and that the three noncompliant states had been required to submit to "quarterly reporting" previously because of their recurring deficiencies.²⁵ Roberts also wrote that the three states had been given at least two opportunities to provide more data to OJJDP but had failed to do so. In response, JJ Attorney 3 e-mailed Roberts that same day to ask "whether the determinations of noncompliance with DMC were made independent of the CDAI instrument." Roberts replied that the CDAI was used as an "internal reference point" but that the determinations were made "based on the information provided by the states and their responses, or lack thereof, to requests for additional information."

On September 24, 2012, Moses e-mailed Roberts and Hanes, "This will confirm that, as we discussed earlier, we in OGC find that there exists adequate

²⁵ Coleman told us that in 2008 OJJDP instituted a procedure of requiring states that had deficiencies in their annual plans to report on their progress quarterly instead of yearly until the deficiencies were resolved. Coleman told us that quarterly reporting was a "compromise" – a way to hold states at least somewhat accountable for their DMC failures, even if management would not approve noncompliance findings. The quarterly reporting procedure is not codified in the JJDP Act or its implementing regulations.

information in the state plan narratives to support OJJDP's proposed findings of noncompliance for: IL, SC and LA." Moses copied the three JJ attorneys at the time (JJ Attorneys 1, 2, and 3) on the e-mail and typed his name and all three of their names at the bottom the message. In the event of an appeal, however, Moses asked for "documentation" in response to the questions he had posed on August 23. Hanes forwarded this e-mail to Coleman that same day and asked her to prepare a memorandum in response.

On October 3, 2012, Coleman submitted a memorandum to OGC to respond to the questions Moses posed in the August 23 e-mail. Coleman wrote that OJJDP generally had not made DMC funding denials before FY 2012, because the DMC provision does not allow for "numerical de minimis rates to assist with making annual determinations of compliance." As a result, she wrote that prior determinations had been "contingent upon who reviewed the plans, discussions with states that would potentially be out of compliance, and informal polices." She further wrote that in 2010 OJJDP began "consistently administering" the DMC regulations, including "requiring states to identify and explain DMC throughout their juvenile justice systems." Despite this, she wrote that "determinations of compliance with DMC were still being made based on the aforementioned criteria." To explain why DMC funding denials were being made in FY 2012 when denials had not been made previously, Coleman wrote that the CDAI, which is "primarily based on" the DMC regulations and the DMC manual, was created to "assist in making consistent determinations."

In response to Moses' questions about notice to the states, Coleman wrote that the states had been told about the CDAI through conference calls, webinars, and focus groups. She further wrote that the three noncompliant states had each previously been placed on quarterly reporting due to their deficiencies, provided with technical assistance, and given at least two opportunities to provide additional information to make their plans compliant.

c. FY 2012 Noncompliance Determination Letters and Appeals

On September 28, 2012, OJJDP sent letters to Illinois, South Carolina, and Louisiana finding each state "not in compliance" with the DMC core requirement. These letters were signed by former Acting Administrator Melodee Hanes. In the letters, OJJDP notified each state that its formula grant award would be reduced by 20% for FY 2013 and that it must spend 50% of its remaining FY 2013 award on efforts to achieve compliance with DMC. The letters further notified each state of its deficiencies: Illinois and Louisiana were told that they had not demonstrated how they planned to "implement the Identification Phase" of the regulations and South Carolina was told that it had not demonstrated "how it would fully implement the Identification, Assessment/Diagnosis, Intervention, and Monitoring phases of the DMC Reduction Model." The letters documented that the states had been given the opportunity to submit supplemental information to cure these deficiencies to no avail. In addition, each state was notified of its right to appeal. Coleman told us that Illinois, Louisiana, and South Carolina all failed to meet the minimum requirements of the JJDP Act regulations, and based on our review of the CDAs

and “Compliance Plan Reviews” completed for each state, this conclusion appeared to be supported by OJJDP’s records.²⁶

²⁶ For Illinois, according to OJJDP’s Compliance Plan Review and CDAI, the state was out of compliance with the Identification requirement because, among other things, it had not submitted statewide RRI data for all nine contact points and had not entered the correct data into OJJDP’s DMC “Web-Based Data Entry System.” The JJDP Act regulations require that states provide both statewide and local data to identify the extent of DMC and comply with the guidelines in the DMC Manual for doing so. 28 C.F.R. § 31.303(j)(1). The DMC manual identifies the RRI, the Analysis and Tracking Sheets, and the Web-Based Data Entry System as the methods for providing this information. DMC Manual at 1-1 to 1-3, 1-28. The Compliance Analyst who had reviewed Illinois’ plan in 2012 (Compliance Analyst 1) told us that Illinois’ submission was “so bad” that the numbers contained in the RRI did not match the numbers discussed in the plan and the state could not explain the discrepancy. Although the determination letter only indicated that Illinois was out of compliance with the Identification requirement, OJJDP’s Compliance Plan Review and the CDAI indicated that the state also was out of compliance with the Assessment and Intervention requirements. Specifically, Illinois had not completed an assessment study and its “time-limited plan” did not “discuss any current or future barriers to completing the assessment study or the anticipated outcomes and how it will assist with guiding the state’s DMC efforts,” as required by the regulations. See 28 C.F.R. § 31.303(j)(4). According to the same documents, the state was out of compliance with the Intervention requirement because the activities listed were general and not “directly related to DMC delinquency prevention and systems improvement strategies,” as required by the statute and regulations. See 42 U.S.C. § 5633(d); 28 C.F.R. § 31.303(j)(3). According to OJJDP’s Compliance Plan Review, Illinois also did not satisfy the Evaluation and Monitoring requirements set forth in the DMC Manual. Compliance Analyst 1 told us that she gave Illinois many opportunities to cure these deficiencies in FY 2012 and had even discussed the same issues with Illinois state representatives in FY 2011, but that Illinois never submitted an adequate FY 2012 DMC plan. Compliance Analyst 1 and Coleman both told us that Illinois’ deficiencies constituted a failure to meet the minimum requirements of the JJDP Act regulations.

For Louisiana, according to OJJDP’s Compliance Plan Review and CDAI, the state was out of compliance with the Identification requirement because, among other things, it had not submitted RRI data for all relevant contact points as required by the regulations and DMC Manual. Although the determination letter only indicated that Louisiana was out of compliance with the Identification requirement, the Compliance Plan Review and CDAI also indicated that Louisiana’s Assessment study did not “formally identify any contributing mechanisms.” As far as Intervention, the same documents stated that the state did not “indicate which agencies, organizations, or individuals will be responsible for determining which strategies will be implemented and why.” According to OJJDP’s Compliance Plan Review, Louisiana also did not satisfy the Evaluation and Monitoring requirements set forth in the DMC Manual. Coleman told us that Louisiana’s deficiencies constituted a failure to meet the minimum requirements of the JJDP Act regulations.

For South Carolina, according to OJJDP’s Compliance Plan Review and CDAI, the state was out of compliance with the Identification requirement because, among other things, it had not submitted RRI Analysis and Tracking Sheets statewide and for at least three local jurisdictions, as required by the DMC Manual and incorporated by reference into the JJDP Act regulations. 28 C.F.R. § 31.303(j)(1); DMC Manual at 1-1 to 1-3, 1-28. The same documents indicated that the state did not comply with the Intervention requirement because the intervention activities listed were related to the Jail Removal core requirement and thus not “directly related to DMC delinquency prevention and systems improvement strategies,” as required by the statute and regulations. See 42 U.S.C. § 5633(d); 28 C.F.R. § 31.303(j)(3). Moreover, the intervention strategies were not targeted toward reducing DMC at the arrest contact point, despite that the data indicated that the arrest contact point was where DMC rates were the highest. The documentation also indicated that South Carolina did not satisfy the Evaluation and Monitoring requirements set forth in the DMC Manual. According to the Deputy Associate and Coleman, South Carolina’s deficiencies constituted a failure to meet the minimum requirements of the JJDP Act regulations.

South Carolina and Illinois appealed the September 28, 2012 DMC noncompliance determinations on October 25 and October 26, 2012, respectively. In the letter supporting the South Carolina appeal, the Administrator of the South Carolina Department of Public Safety argued that OJJDP's explanation for the noncompliance determination was not sufficiently specific to allow for a response and, in any event, OJJDP had granted South Carolina an extension that had not yet expired to submit its assessment plan. In the letter supporting the Illinois appeal, the Chairman of the Illinois Juvenile Justice Commission acknowledged that Illinois had "failed to adequately demonstrate" DMC compliance in its submissions to OJJDP, but wrote that "it became clear to [state employees] that we were/are in fact in compliance with this core requirement" following discussions with OJJDP staff. The Chairman further wrote, "Without making excuses for this failure, we would like to take the opportunity to demonstrate our compliance through this appeal." On January 14, 2013, Louisiana submitted a "response" to the September 28, 2012 DMC noncompliance determination. However, on January 25, 2013, then-Administrator Hanes sent a letter to Louisiana advising state employees that the "response" could not be considered, because it was submitted beyond the 30-day deadline for appeal.

2. FY 2013 Circumstances that Led to Reversal of FY 2012 Noncompliance Determinations

a. Review of CDAI Following FY 2012 Determinations

According to documents we reviewed, OGC and the BJS statistician continued to review drafts of the CDAI and provide feedback to Coleman, after the FY 2012 compliance determinations. In August 2012, the BJS statistician returned to Coleman a redlined draft of the CDAI with several comments and suggestions. In addition, in early 2013, an OGC attorney who had a background in statistics and had previously focused on advising BJS (JJ Attorney 4) was temporarily assigned to provide guidance on DMC and the CDAI.²⁷ In the meantime, Listenbee became Administrator in March 2013.

On April 1, 2013, JJ Attorney 2 e-mailed Coleman, copying Moses, the other JJ attorneys, the Associate Administrator, and the other members of ACT, regarding OGC's review of the CDAI. She expressed concern that the BJS statistician's suggestions had not been addressed in the most recent version of the CDAI, and she requested a meeting. JJ Attorney 2 wrote:

It appears, based on our review of the revised instrument you provided, that the comments/suggested edits offered by BJS . . . in

²⁷ JJ Attorney 4 told us that he had several concerns based on his review of the CDAI. For example, he stated that he was concerned that the tool allotted disproportionate weight to the states' efforts to identify rates of DMC as compared with the weight allotted to the states' effectiveness in improving those rates over time. JJ Attorney 4 told us there were many "flaws" within the CDAI and that it was not a "reliable measure." However, he also told us that his review of the CDAI was mostly "statistical in nature" as opposed to legal. He stated that he did not "have enough of a firm grasp on the statutes to determine whether or not [the CDAI] measured up" in a legal sense or effectively implemented the JJDP Act regulations.

August of last year have not been addressed. Because many of the comments and suggestions echo those raised by OGC during our meetings on this topic, we'd like to discuss your thoughts as to the concerns raised and if, perhaps, they were addressed in ways not obvious to us.

JJ Attorney 3 told us that Coleman also repeatedly returned drafts without addressing OGC's suggested edits and comments. Coleman told us that she disagreed with JJ Attorney 2's assessment and that she believed she had incorporated the BJS statistician's suggestions. Similarly, the Associate Administrator and the Deputy Associate, who were both involved with the process of developing the CDAI and reviewing suggested edits, told us that Coleman incorporated both OGC's and the BJS Statistician's suggestions. We reviewed both the BJS statistician's marked-up version of the CDAI and the version Coleman completed after reviewing the BJS statistician's comments and suggested edits. Based on that review, we found that Coleman had made changes based upon most, but not all, of the BJS statistician's comments and edits. Coleman told us that she did not make at least one of the edits because she did not agree with it and that her failure to incorporate other edits was likely an oversight. During his OIG interview, JJ Attorney 4 reviewed one of the BJS statistician's substantive comments and Coleman's corresponding edit and agreed that – at least in that example – Coleman's edit adequately remedied the BJS statistician's concern. JJ Attorney 4 also told us that while Coleman appeared to be somewhat defensive about the tool, Coleman was generally receptive to OGC's suggestions.

b. Coleman's April 3, 2013 E-mail and OGC's Reaction

On April 3, 2013, Coleman responded to JJ Attorney 2's April 1, 2013 e-mail, copying all of the original recipients, with what became a critical e-mail that shaped OGC's guidance related to and OJJDP's future handling of DMC compliance. Coleman wrote:

As you know, prior to the CDAI the determinations of compliance were based on the individuals reviewing the DMC Plans so there were no criteria based on [the JJDP Act regulations], other applicable statutes/regulations, and the guidance from [the DMC Manual]. These reviews, in many instances, led to states being found in compliance, submitting the same data/information in the annual updates, not identifying and assessing contributing factors, etc.

According to several OGC witnesses, this e-mail generated great concern within OGC. Madan and JJ Attorneys 2 and 3 told us that they understood Coleman to be saying that OJJDP's past DMC determinations were not based upon any criteria, that the regulations and DMC Manual did not supply criteria for assessing DMC compliance, and that each determination of compliance and noncompliance was based only on the subjective judgment of the individual reviewing the state's plan. Based on this interpretation, the OGC attorneys told us that they believed Coleman's e-mail undermined the credibility of prior DMC determinations, including

the FY 2012 determinations.²⁸ JJ Attorney 2 told us that what Coleman wrote could have led to a conclusion that OJJDP treated states arbitrarily or capriciously in violation of the APA. She stated that OJJDP could have been required to release the e-mail pursuant to a Freedom of Information Act (FOIA) request or a discovery request on appeal.²⁹ Madan told us that when he first reviewed Coleman's e-mail he believed it was particularly likely to be detrimental on appeal, because Coleman was "responsible for the program" as DMC Coordinator. JJ Attorney 3 described the e-mail as "a disaster."

During her OIG interview, however, Coleman told us that OGC had not correctly understood her e-mail. She told us that she did not mean to say that criteria did not "exist," that the regulations did not supply criteria, or that the problem impacted the FY 2012 determination process. Rather, she told us that she meant to say that historically the OJJDP state representatives reviewing DMC plans did not always properly apply the regulations. According to Coleman, while some OJJDP state representatives understood and applied the DMC regulations, others did not understand the DMC regulations due to a lack of adequate training. However, Coleman told us that the use of the CDAI in FY 2012 to guide her review of every state's DMC plan enabled OJJDP to apply the standards set forth in the JJDP Act regulations "in a more uniform and consistent way." She further stated that she believed the CDAI aided supervisory review of the proposed determination letters in FY 2012.

In addition, Coleman told us that at the time she wrote the e-mail she was frustrated by her exchanges with OGC regarding the CDAI, including JJ Attorney 2's April 1 e-mail. Thus, she explained that her intent was not to say that there were no standards for assessing DMC, but rather to defend the CDAI as a tool that allowed the compliance analysts to apply the DMC regulations more consistently and effectively in FY 2012.

We found that Coleman's explanation of her e-mail was consistent with what she wrote in the October 3, 2012 memorandum to OGC shortly after OGC had approved the FY 2012 determinations with knowledge that the CDAI had been used. In that memorandum, Coleman wrote that before the development of the CDAI compliance determinations were "contingent upon who reviewed the plans."

²⁸ Although the evidence we reviewed showed that OJJDP used the CDAI in FY 2012 with OGC's knowledge, OGC attorneys explained to us that the CDAI was not a finalized tool, it was only used as a guide, and OGC continued to have concerns regarding its effectiveness and validity. In other words, in the view of the OGC attorneys, the use of the CDAI as a guide for following the regulations in FY 2012 did not cure what OGC perceived to be Coleman's assertion that the regulations themselves did not supply criteria.

²⁹ It is beyond the scope of this review to assess whether OJJDP in fact would have been required to release the e-mail pursuant to a FOIA request or whether the e-mail may have been subject to an exception from release.

We found no evidence that OGC employees expressed concern with Coleman's statement at that time.³⁰

Other witnesses told us that when they received Coleman's April 3, 2013 e-mail they did not believe it was problematic. For example, the Associate Administrator told us that she understood Coleman to be saying in the e-mail that the program was "getting stronger." Unlike the OGC attorneys, the Associate Administrator did not understand Coleman to be saying that the statute, regulations, and DMC manual provided no standards, but rather that the CDAI "routinized" and allowed OJJDP to better "document" the way employees applied the standards set forth in those other sources. Even JJ Attorney 4 told us that he was not as concerned by Coleman's e-mail as the other OGC attorneys. He stated that he understood Coleman to be saying something more akin to what she told us – that OJJDP had not been following its own regulations. He further told us that he believed Coleman's e-mail was unclear.

Madan told us, upon reviewing Coleman's April 3, 2013 e-mail again during his OIG interview, that he realized there was more than one "plausible reading" of the e-mail. According to Madan, the JJ Attorneys told him about the e-mail shortly after they received it and then forwarded him a copy. He stated that his initial assessment of the e-mail may have been influenced by conversations with his staff before he read it – what he termed "confirmation bias." He further stated that at the time he first read the e-mail he was distracted by disappointing news he had then-recently received regarding an unrelated OJP program and that this may have clouded his judgment about Coleman's e-mail. Madan told us that the e-mail was "problematic anyway, no matter how you read it," though its impact might not have been as bad as he originally had perceived. He further told us that he would have to conduct additional unspecified analysis to determine how the alternate interpretation of the e-mail would have impacted his subsequent guidance regarding the defensibility of the three FY 2012 noncompliance determinations, which we discuss in part III.B.2.d, below.³¹

³⁰ After reviewing the October 3, 2012 memorandum during her interview, JJ Attorney 3 stated that the language in the memorandum was similar to the language in the April 3 e-mail and that the memorandum "[s]hould have raised a larger question then." JJ Attorney 2, on the other hand, told us that while both the memorandum and the later e-mail stated that the determinations were "contingent upon who reviewed the plans," the e-mail was more concerning. She stated that she interpreted the e-mail to mean that the compliance analysts were not utilizing the regulations at all, while she interpreted the memorandum to indicate merely that "there might be a problem with how [the regulations were] being applied." As noted in the text preceding this footnote, however, Coleman told us that what she meant to say in her April 3 e-mail was that the OJJDP state representatives did not always properly apply the regulations. We found Coleman's explanation to be consistent with what she actually wrote on April 3, especially in light of a later April 10, 2013 e-mail described below.

³¹ OGC attorneys told us that the CDAI and the April e-mail exchange were not the only matters about which OGC experienced frustration in working with Coleman. For example, OGC attorneys told us that, prior to working with Coleman on the CDAI, OGC had provided guidance to Coleman regarding a DMC chapter in a textbook that she sought to publish in her personal capacity, but that Coleman published the chapter without following the OGC guidance. Coleman told us that she did not agree with OGC's assessment that she did not follow OGC guidance. We did not seek to

The Associate Administrator told us that shortly after reading the April 3, 2013 e-mail, she received a concerned call from one of the JJ attorneys. She stated that in response she called Coleman and suggested that Coleman clarify what she had intended to say in the e-mail.

c. Coleman's April 10, 2013 E-mail

On April 10, 2013, Coleman sent a second e-mail to the JJ Attorneys, copying the Associate Administrator, that she told us was intended to clarify the April 3 e-mail, as a result of concerns expressed by OGC to her management. Coleman and the Associate Administrator told us that they drafted the e-mail together. In the April 10 e-mail, Coleman wrote:

In reviewing my email again (below) I realize that I probably need to clarify what I meant. The standards we use for DMC compliance determinations have always been and continue to be the statute, regulations and guidance from OJJDP's *DMC Technical Assistance Manual*. I did not intend to say that there were no criteria prior to development of the CDAI, but rather that the CDAI enables a more consistent application of these criteria in making our annual determinations. Also, I want to clarify that while OJJDP was in the process of piloting the CDAI during FY 2012, we did not rely on CDAI scores in final DMC compliance determinations for FY 2013 funding. You may recall that we included a summary for each state that was found out of compliance for DMC purposes—that summary detailed the reasons for that finding (inadequate DMC plans, quarterly reports, etc.) I think I also included a copy of the CDAI pilot instrument with the materials I provided, but be assured that was for information purposes and guidance.

Coleman told us, consistent with her April 10 e-mail, "though the regs are outdated . . . I definitely agree with them, and I think that they do provide a very sound structure for DMC." She also told us that all of the FY 2012 compliance determinations were based upon the DMC regulations. The Associate Administrator told us that based upon her conversation with Coleman that preceded the April 10 e-mail, the April 10 e-mail was "consistent" with what Coleman had intended to say in the April 3 e-mail.

However, Madan and others told us that they did not believe Coleman's April 10 e-mail cured the problem they believed the April 3 e-mail had created. JJ Attorney 3 indicated that she did not believe Coleman's April 10 e-mail was credible, because she believed that it was, in essence, "the opposite" of the April 3 e-mail. Madan told us that he believed Coleman only wrote the April 10 e-mail because the JJ Attorneys had "landed like a ton of bricks on her." Similarly,

validate OGC's assertion that Coleman published the chapter without following OGC's guidance, because that topic was beyond the scope of this review. However, we mention it to place in context OGC's reaction to Coleman's April 3 e-mail, including OGC's failure at the time to consider alternative "plausible" interpretations of it.

Listenbee told us that he did not believe Coleman's April 10 e-mail was "genuine" and that he believed that the April 10 e-mail was "an attempt to cover up a decision and a mistake that she'd made."

Nonetheless, Madan also told us that applying the alternate interpretation of the April 3 e-mail that he had not previously considered, the April 3 and April 10 e-mails together made the FY 2012 noncompliance determinations "problematic but possibly defensible."

d. OGC's Guidance to OJJDP Regarding Coleman's April 3 E-mail and Its Impact on the FY 2012 DMC Noncompliance Determinations

Based on several witness interviews, we determined that OGC organized a meeting in the OJP law library on or about April 15, 2013, regarding Coleman's April 3, 2013 e-mail and its impact on the FY 2012 noncompliance determinations. Witnesses told us that Listenbee, the Deputy Associate, Madan, and JJ Attorney's 2 and 3 attended the meeting in person, and that Coleman attended by telephone. According to JJ Attorneys 2 and 3, Madan explained to Listenbee during the meeting that Coleman's April 3, 2013 e-mail would make it very difficult for OGC to defend the FY 2012 noncompliance determinations. While Madan said he could not remember the conversation with Listenbee or the precise guidance he provided, he told us that he "would have said something like . . . if . . . the head of the [DMC] program [Coleman] is saying that there are no standards, I can't defend it." JJ Attorneys 2 and 3 told us that Listenbee responded that he understood the concern because he had previously been a litigator, and that he agreed that the e-mail was problematic.

Similarly, Listenbee stated that while the OGC attorneys did not tell him that he was legally required to reverse any noncompliance determinations, they told him that due to Coleman's e-mail they would rule against OJJDP in an appeal. Listenbee further stated that he did not have an "in-depth" discussion with staff regarding the reasons the three states had been determined out of compliance in the first place or whether those states had failed to include in their plans information that was required by the JJDP Act regulations. He told us that he was "concerned" that he would "make a decision that would be appealed and . . . lose the appeal" and that "just didn't seem like a good way to get started." He further told us that OGC recommended that he "not support" the noncompliance recommendations and he decided to follow that guidance.³² After reviewing a draft of this report, Listenbee added that he was "prohibited from taking any action that conflicted with the legal advice" of OGC without concurrence from the AAG. He further stated that despite several meetings with OGC, OJJDP staff, and OJJDP

³² Listenbee also told us that the meeting was about only one state that was being considered for a FY 2013 noncompliance recommendation and that the OGC attorneys advised him that they would rule against OJJDP if OJJDP were to find the state out of compliance and the state were to subsequently appeal. We believe that Listenbee's recollection was inaccurate in this regard because, based on all the other evidence we received, the meeting was about the impact of Coleman's April 3 e-mail on *prior* noncompliance determinations, including those made in FY 2012.

leadership after the April 15, 2013 meeting, “[n]o one ever recommended that [OGC’s recommendation] be appealed to the AAG.”

The Deputy Associate told us that he opposed OGC’s guidance during the meeting and that Coleman later thanked him for “trying to stand up” for her. Despite his efforts, the Deputy Associate told us that it was clear by the end of the meeting that the three FY 2012 noncompliance determinations would be reversed.

We asked Listenbee and Madan whether the three FY 2012 noncompliance determinations could have been redone with instructions to staff to apply the regulations. Listenbee responded that this “approach wasn’t brought to my attention.” He blamed the absence of a “rich” discussion about “alternative approaches” with OGC on how recently he had started as Administrator and his mistake of failing to bring sufficient staff with him to the meeting. Madan told us that he might have been able to tell OJJDP that Coleman was wrong, that the regulations do provide standards, and that OJJDP must follow them going forward, but he had not considered that option at the time.

Witnesses were unclear as to whether OGC’s guidance on April 15, 2013 impacted only the FY 2012 compliance determinations or future compliance determinations, as well. JJ Attorney 3 told us that she could not remember whether OGC provided guidance on the prospective impact of the April 3, 2013 e-mail during the meeting in the law library. As described in part C of this section, Listenbee, the Associate Administrator, and the Deputy Associate all told us that at first they did not believe that the guidance was intended to impact future compliance determinations. However, Listenbee and his Chief of Staff Cutlar both told us that later discussions revealed that OGC would not approve noncompliance determinations until OJJDP developed an objective standard for assessing DMC. Madan and Moses told us that they could not remember the precise guidance they provided to OJJDP. However, Madan told us that he “would have told” Listenbee that new DMC regulations were needed before OGC could successfully defend DMC noncompliance determinations, and Moses told us that OJJDP had to develop a consistent, articulable method of assessing DMC before finding states out of compliance.³³ Notably, witnesses told us that neither OJJDP leadership nor OGC provided any written guidance regarding the short term or long term consequences of Coleman’s e-mails.

3. Administrator Listenbee’s Reversal of the FY 2012 Noncompliance Determinations

On June 15, 2013, OJJDP sent letters to Illinois, Louisiana, and South Carolina reversing the FY 2012 noncompliance determinations and associated funding reductions for FY 2013. Each state was told, “Following receipt of your appeal and after additional review of the status of your compliance, OJJDP has determined that the state’s FY 2013 Title II B Formula Grant award allocation will not be reduced” for DMC. The letters went on to list recommendations to “avoid

³³ The witness’ differing perceptions of what was required to begin finding states out of compliance with DMC are discussed in Part III.F. below.

noncompliance findings in the future,” based upon each state’s particular deficiencies. Listenbee signed all three letters. We found no other written documentation explaining Listenbee’s reason for reversing the three FY 2012 noncompliance determinations.

Listenbee told us that his staff drafted the letters and brought them to him to sign, and OJJDP employees similarly told us that staff or lower level supervisors drafted the letters with guidance from OGC. Listenbee also told us that he did not understand at the time he signed the letters that they were reversals of the FY 2012 noncompliance determinations based on the April 2013 OGC guidance. He stated, “I didn’t see this as a determination letter. I just thought this was routine business that they were addressing and getting, you know, getting South Carolina and the other states to focus on specific aspects of DMC.” He stated that during that time he was focused on taking proactive steps to more broadly improve OJJDP’s DMC efforts or, in his words, “turn the dial on DMC.” After reviewing the letters during his OIG interview, however, Listenbee acknowledged that the letters amounted to reversals of the FY 2012 determinations.

C. FY 2013 DMC Determinations and Related Events

In FY 2013, OJJDP did not find any states out of compliance with the DMC core requirement and did not recommend any states for quarterly reporting. In this part, we discuss Listenbee’s decision to find all states in compliance with the DMC core requirement contrary to initial consideration within ACT of finding some states out of compliance, ACT’s unsuccessful attempt in FY 2013 to require certain states to submit to quarterly reporting, the FY 2013 compliance determination letters, and the use of the CDAI by compliance analysts to review states’ submissions in FY 2013. In discussing the use of the CDAI, we also provide information on four states that compliance analysts told us they would have recommended for FY 2013 noncompliance determinations if not for a directive from management that all states be found in compliance that year.

1. Listenbee’s Directive to Find All States in Compliance with DMC in FY 2013

The Associate Administrator, the Deputy Associate, and Coleman told us that they originally did not think that Coleman’s e-mail or the reversals of the FY 2012 noncompliance determinations would impact the FY 2013 review process. Similarly, Listenbee told us that in early 2013 he did not believe his authority to find states out of compliance was impacted by Coleman’s April 3, 2013 e-mail or the OGC guidance related to it.³⁴

On June 17, 2013, Coleman e-mailed the other members of the ACT team regarding the plan for reviewing DMC plans in FY 2013. She wrote that, based on advice provided by management, they should begin reviewing the FY 2013 plans for

³⁴ However, as discussed later in this report, he told us that at some point he received guidance from OGC that he should not find states out of compliance until OJJDP developed an objective way to assess DMC compliance.

their assigned states “while awaiting approval” of the CDAI. She provided a list of documents and information to assist them in this “preliminary review,” including the JJDP Act regulations, the DMC Manual, the former “SRAD Title II Formula Grant Checklist,” the FY 2012 DMC compliance plans and determination letters, and the “DMC Web-Based Data Entry System.” Regarding the regulations, Coleman wrote, “Although the Regs are dated, most are still relevant, particularly §[§] 31.303(j)(2), (3), and (4).” The Associate Administrator and Coleman told us that at around that time, ACT had identified four states – Arkansas, Illinois, Louisiana, and South Carolina –for possible noncompliance recommendations.

Despite the witnesses’ understanding of how the compliance determinations would proceed in early 2013, as described in Coleman’s June 17, 2013 e-mail, Administrator Listenbee ultimately did not find any states out of compliance with DMC in FY 2013. We received conflicting testimony as to when and why Listenbee made this decision.

According to the Associate Administrator and Deputy Associate, Administrator Listenbee advised them in the summer of 2013, during a meeting they attended along with Deputy Administrator Ayers, that he would not find any states out of compliance in FY 2013. The Associate Administrator and Deputy Associate told us that Listenbee stated that he did not want to begin his term as Administrator by finding states out of compliance with DMC when that had not been done in the past and in the absence of a DMC “policy.”³⁵ The Associate Administrator told us that she and the Deputy Associate protested Listenbee’s direction but were unsuccessful.³⁶

According to notes provided to us by one compliance analyst within ACT (Compliance Analyst 1), the Deputy Associate held a meeting on July 18, 2013, during which he provided guidance to the compliance analysts on the DMC review process. Compliance Analyst 1 wrote in the notes:

→ No states will be found out of compliance this year

³⁵ The Associate Administrator stated that she “struggled” with Listenbee’s statement that he needed a “policy,” because she believed that the policy was embodied in the statute, regulations, and DMC manual. She told us that she questioned Listenbee as to whether a policy was actually necessary, but that she sensed that her argument did not “really seem to be getting through.” The Deputy Associate later wrote in an April 2, 2014 e-mail to Chief of Staff Shanetta Cutlar that he similarly believed that the DMC policy was already established by the JJDP Act and its implementing regulations. Nonetheless, the Deputy Associate told us that he attempted to write a “policy” to address Listenbee’s concerns, and we identified several e-mails and documents to support that he made such an effort. For example, on April 11, 2014, the Deputy Associate e-mailed a Proposed Policy Statement to Listenbee, Ayers, Cutlar, Jones, the Associate Administrator, and the compliance analysts, among others. The Policy Statement was about a page and a half in length and relied heavily on the statute, regulations and DMC manual. However, the Deputy Associate told us that Listenbee never responded to his policy proposal.

³⁶ The Associate Administrator’s and Deputy Associate’s statements regarding the timing of this conversation were assisted by their review of e-mails they had written or received in 2013, because they had difficulty recalling the exact timeline of events during their OIG interviews.

- No confidence in consistency, over the last few years
- Would like to not find any states out of compliance for any of the 4 core requirements
- Bull doze the whole process

Compliance Analyst 1 wrote in an e-mail to the OIG on June 15, 2016, that, "These were words that [the Deputy Associate] said to the team about DMC." She stated during her OIG interview that she did not remember whether the Deputy Associate told staff who specifically had made the decision not to find states out of compliance or why the decision had been made. However, she also stated that she gathered from what the Deputy Associate told them that the first bullet in the notes was based upon a "leadership determination," and she defined "leadership" as Listenbee and Ayers. She told us that she understood the third and fourth bullets to represent what the Deputy Associate wanted to happen, based on his frustration with the overall compliance process at that time.

Coleman told us that she recalled the July meeting, as well, and similarly stated that she could not remember whether the Deputy Associate specifically said who had originally issued the directive that no state would be found out of compliance. However, she told us that the Associate Administrator and Deputy Associate told her that they opposed the decision not to find states out of compliance. Both Coleman and Compliance Analyst 1 told us that the July 18, 2013 meeting took place before the ACT team had submitted any FY 2013 DMC recommendations up the chain for review.³⁷

Listenbee, however, told us that he did not make the decision to find all states in compliance with DMC until September 2013. He told us that he made this decision at that time because the determination letters proposing to find several states out of compliance had been submitted to him only 1 day before they were due and without sufficient supporting documentation.

Because the accounts provided by the Associate Administrator, the Deputy Associate, Coleman, and Compliance Analyst 1 were consistent with one another in material respects and supported by both Compliance Analyst 1's handwritten notes and contemporaneous e-mails, we found that those accounts were likely more accurate than Listenbee's account. Specifically, both the handwritten notes from July 2013 (detailed above) and e-mails from August and September 2013 (described in the next part) indicate that the decision to find all states in compliance was made in or about July 2013, before any proposed determination letters had been submitted to Listenbee. Further undermining Listenbee's account, OGC witnesses told us that they were never asked to review proposed DMC noncompliance determination letters in FY 2013 – a step that witnesses told us

³⁷ The Associate Administrator and Deputy Associate told us that they could not specifically recall the July 18, 2013 meeting described by Coleman and Compliance Analyst 1, but told us that it was plausible that they held such a meeting with ACT around that time to convey the direction Listenbee had provided to them.

would have preceded Listenbee's review – and OJJDP officials confirmed to us that no such written requests were made of OGC that year.³⁸ Thus, we concluded, based on the weight of the testimony, that in the summer of 2013 Listenbee made the decision that no states would be found out of compliance that fiscal year and directed the Associate Administrator and Deputy Associate accordingly.

2. ACT's Unsuccessful Attempt to Require Noncompliant States to be Subject to Quarterly Reporting

According to documents we reviewed, in August 2013, ACT sought to formalize the quarterly reporting process that OJJDP had been informally using since 2008 to better monitor states that had difficulties with DMC compliance. Coleman told us that quarterly reporting was originally instituted by former Associate Administrator Thompson as a "compromise" – a way to hold states somewhat accountable for their DMC failures, even if management would not approve noncompliance findings. On August 1, 2013, Coleman e-mailed a draft "DMC Quarterly Reporting Policy and Protocol" (Quarterly Reporting Policy) to the JJ attorneys for their review. On September 19, 2013, after a series of e-mail exchanges, JJ Attorney 3 sent the Quarterly Reporting Policy back to OJJDP with proposed edits and comments. In the e-mail attaching this document, JJ Attorney 3 advised OJJDP, "To the extent that states weren't aware of these provisions prior to the most recent DMC Compliance Monitoring Reports, it would be inadvisable to apply this new policy until states have had the chance to address the new policy and requirements contained therein in their next Compliance Monitoring Reports." She further advised OJJDP to seek OMB approval for the "DMC Quarterly Progress Report template, pursuant to the Paperwork Reduction Act," but wrote that "[if] the form that you're proposing to use is significantly the same information collection as what you have used in the past, you might continue using it while you seek the necessary OMB clearance."

³⁸ We note that in a March 23, 2015 e-mail, the Associate Administrator wrote to an employee within OJP's front office that ACT had submitted to Listenbee proposed determination letters recommending four states to be found noncompliant in September 2013. The Associate Administrator told us that this e-mail was written to assist the Department with responding to "questions for the record" ("QFRs") arising from AAG Karol Mason's April 21, 2015 testimony before the Senate Committee on the Judiciary. Although this e-mail and the subsequent responses to the QFRs appear to support Listenbee's account, upon reviewing a series of 2013 e-mails both the Associate Administrator and the Deputy Associate told us that the March 23, 2015 e-mail was inaccurate. They stated that the ACT team had only internally discussed recommending the four states for noncompliance findings, but ultimately submitted recommendations for quarterly reporting as a result of Listenbee's directive. Based on the testimony of all the witnesses with knowledge on this subject, including the OGC attorneys, combined with the contemporaneous notes and e-mails, the much later March 2015 e-mail did not undermine our conclusion that the decision to find all states in compliance was made in or about July 2013, before any proposed determination letters had been submitted to Listenbee.

Ayers told us that she did not remember Listenbee providing any guidance regarding the FY 2013 DMC review process. However, we did not find this testimony to be significant because Ayers also told us that she did not remember Coleman's April 2013 e-mails, OGC's guidance surrounding Coleman's e-mails, Listenbee's reversal of the FY 2012 noncompliance determinations, or the fact that OJJDP did not find any states out of compliance in FY 2013.

Later that day, the Deputy Associate forwarded JJ Attorney 3's e-mail to Coleman and Compliance Analyst 1 and wrote, "I want to congratulate you both for your work on this! We actually got a formal protocol in place in a short period of time!" Compliance Analyst 1 wrote back the next day asking, "Are we going to move forward and use this this year?" and the Deputy Associate responded, "Yes." As explained in the subpart III.C.1. above, we determined that by this time Listenbee had already instructed the Associate Administrator and Deputy Associate not to find any states out of compliance in FY 2013. Accordingly, witnesses told us and contemporaneous e-mails show that the compliance analysts prepared proposed letters requiring quarterly reporting for states for which they otherwise would have recommended a noncompliance finding.

On September 24, 2013, the Deputy Associate wrote to Coleman and Compliance Analyst 1:

As I discussed with Andrea [Coleman], I need your help! We need to get all of the DMC letters done by Thursday, Friday at the latest . . . so Bob can sign on Friday. . . . I know what this means for you all and I am so grateful for your assistance in this. Please, give them all a cursory review . . . if folks are on the cusp, then put them thru. . . [I]f they are really in bad shape, go with quarterly.[³⁹]

Two days later, the Deputy Associate sent an e-mail to Ayers summarizing the results of the ACT team's DMC review. He wrote that, "All were found to be in some level of compliance with the DMC provision," but that 10 state plans were "found to be lacking in all of the required elements [and] will be required to submit quarterly reports that show the progress made in addressing the state's noted deficiencies." He then listed the states that were recommended for quarterly reporting and the reasons for the recommendations. Compliance Analyst 1 told us that all of the states that she had recommended for quarterly reporting were states that could have been deemed out of compliance based on the JJDP Act regulations and DMC Manual.⁴⁰

The next morning, on September 27, 2013, Ayers e-mailed the Associate Administrator and the Deputy Associate, "can you both come down to [Listenbee's] office at 11:15 for a quick discussion about the quarterly reporting issue?" According to the Associate Administrator and the Deputy Associate, at this meeting Listenbee refused to sign letters that required states to submit to quarterly reporting, telling them that he believed the ACT team had instituted a "new policy"

³⁹ The Deputy Associate told us that the letters were sent up the chain so close to the deadline because past Administrators had simply signed the letters "without a lot of back-and-forth" and he expected that to be the case again. He also told us that Coleman and Compliance Analyst 1 were asked to do extra work close to the deadline because another compliance analyst had not completed her work.

⁴⁰ After reviewing a draft of this report, OJP commented that a state's DMC compliance can only be based on what is required in the statute and regulations, not additional guidance found in the DMC Manual. This view does not appear to be shared by the Compliance Analysts. In Part IV.B. of this report, we recommend that OJP OGC provide guidance to OJJDP on this issue.

without first receiving his approval. The Associate Administrator told us that Listenbee expressed concerns about his own “relationships with the states.”⁴¹ The Associate Administrator and the Deputy Associate stated that they told Listenbee that there was no new policy, OJJDP had required states to report quarterly in previous years, and OGC had “signed-off.” Nonetheless, the Deputy Associate told us that Listenbee directed him to eliminate quarterly reporting and “make all the letters the same.” The Associate Administrator described the meeting as “very heated” and stated that she was frustrated that she was unable to convey to Listenbee that they were not changing policy. As a result of the meeting, the Associate Administrator and the Deputy Associate told us that the Deputy Associate changed the letters to eliminate quarterly reporting.

Listenbee’s recollection of the meeting was significantly different from that of the Associate Administrator and Deputy Associate. Listenbee described his concerns in September 2013 as related to his late receipt of the proposed determination letters, the absence of adequate supporting documentation, and the Associate Administrator’s and Deputy Associate’s *statements to him* that they had instituted a new policy without prior approval.⁴² Ayers told us that she did not remember the conversation and that she did not remember ever receiving or providing guidance that states could not be placed on quarterly reporting.

Members of the ACT team told us that they were frustrated that quarterly reporting had been eliminated. For example, Compliance Analyst 1 stated, “I don’t understand it. If . . . we can give a little extra help to states . . . as a remedy of us not being able to find anybody out, quarterly reporting would have satisfied me. . . . But it was taken away.”⁴³

3. FY 2013 Compliance Determination Letters

Based on a review of the final FY 2013 DMC determination letters, we found that (1) all states were told that they were “in compliance” with the DMC core requirement; (2) no states were placed on quarterly reporting or otherwise subject

⁴¹ According to the Associate Administrator, Listenbee even mentioned a particular Florida juvenile justice employee whom he knew before coming to OJJDP and felt uncomfortable telling that he was “going to be holding . . . accountable.” Florida was one of the states that the ACT team had recommended for quarterly reporting.

⁴² Listenbee also told us that the discussion at the meeting in September was about several states that the ACT team was proposing to find out of compliance based upon a new policy. However, as explained in the last subpart, we found Listenbee’s recollection that he received proposed noncompliance recommendations in September 2013 to be inconsistent with other testimony we received and unsupported by contemporaneous e-mails and handwritten notes.

Based on our review of all the evidence, most of which is described in the text above, we found that Listenbee was likely conflating three events – the 2012 reversals, the 2013 decision that no states would be found out of compliance, and the 2013 decision not to approve quarterly reporting for certain states – into one.

⁴³ The Associate Administrator told us that some states continued to report quarterly even though Listenbee eliminated the requirement, because those states were “on board and wanted to improve their systems.”

to a special condition on their DMC funding; and (3) all states were awarded their full allotment of DMC funding for FY 2014.⁴⁴ However, the “Status of Compliance” pages attached to the FY 2013 DMC determination letters contained state-specific information: in some cases, this included descriptions of deficiencies in the states’ plans; in other cases, this included descriptions of how states had been successful in addressing DMC.⁴⁵

4. Use of the CDAI in FY 2013 and States the ACT Team Might Have Recommended for a Noncompliance Determination if Not for Listenbee’s Directive

Witnesses told us that although the CDAI had not yet been finalized, compliance analysts used it to guide their DMC compliance review in FY 2013. In other words, witnesses told us that the CDAI was used as a “checklist” for determining whether states had complied with the JJDP Act, the regulations, and the DMC Manual; for documenting the compliance review process; and for training staff on how to use the tool. However, witnesses said that compliance analysts did not apply the scoring within the CDAI to make qualitative judgments regarding the different components of each state’s plan. Witnesses told us that the CDAI was a helpful tool in FY 2013 for identifying states that submitted deficient DMC plans. Indeed, compliance analysts stated that they would have recommended four states to be found out of compliance and several other states to undergo quarterly reporting if not for Listenbee’s directives.

Compliance Analyst 1 told us that she completed the compliance review for South Carolina in FY 2013. She stated that South Carolina did not submit an intervention plan as required by 28 C.F.R. § 31.303(j) and that this was a “big basis” to find the state out of compliance. In the CDAI, she also indicated, among other failures, that South Carolina did not submit RRI data for all nine contact points and did not comply with the Evaluation and Monitoring requirements of the DMC Manual. Coleman and Compliance Analyst 1 both told us that South Carolina’s DMC plan failed to meet the minimum requirements of the DMC regulations. We found that many of the problems identified by Compliance Analyst 1 for South Carolina in FY 2013 were similar to those that had been identified in FY 2012, when the state was deemed noncompliant but Listenbee later reversed the determination. See note 23 *supra*. Indeed, South Carolina’s performance in the Intervention category seemed to be worse in FY 2013 than in FY 2012 when the state at least submitted an Intervention plan, albeit a deficient one. See note 21 *supra*. However, Compliance Analyst 1 told us that she did not recommend South Carolina

⁴⁴ A special condition is a restriction on a grantee’s ability to draw-down funds on a grant until the grantee meets certain specified requirements, such as improving its compliance monitoring system or conforming its DMC plan to satisfy certain regulatory requirements.

⁴⁵ For example, although South Carolina was found to be “in compliance,” the Status of Compliance page indicated, among other things, that “the State will need to increase its efforts at data collection” and that the plan did not address how the state would “implement any recommendations for specific delinquency prevention, intervention, or systems improvement strategies.” The letter to Massachusetts, on the other hand, listed the various intervention programs the state had implemented the previous year.

to be found out of compliance because of the direction she had received from the Deputy Associate earlier that summer.

Louisiana and Illinois also continued to have similar problems in FY 2013 to those that had been identified in FY 2012. See note 21 *supra*. According to the CDAI for Louisiana, the state once again failed to supply statewide and local RRI data for all nine contact points, submit an adequate intervention plan based on strategies designed to reduce DMC, and comply with the Monitoring and Evaluation requirements. While the FY 2013 CDAI for Illinois indicated that its DMC compliance had improved, it too had some of the same failures that had been identified in FY 2012, including failing to provide RRI data in the correct format, analyze its RRI data, and comply with the Evaluation requirement. In addition, Rumsey, who completed Illinois' review that year, questioned in the CDAI whether the state's Intervention strategies were designed to reduce DMC.⁴⁶

Coleman told us that Arkansas' plan also had major deficiencies in FY 2013, as indicated by the CDAI she completed that year. According to the CDAI, Arkansas failed to, among other things, provide updated statewide and local RRI data for all nine contact points, list intervention strategies that were related to reducing DMC, and comply with the Evaluation requirement of the DMC Manual.

Coleman told us that Arkansas, Illinois, Louisiana, and South Carolina all failed to meet the minimum requirements of the DMC regulations in FY 2013, and that ACT would have recommended all four states to be found out of compliance in FY 2013, if not for Listenbee's directive. We cannot determine definitively whether each of these states ultimately would have been deemed out of compliance if not for Listenbee's directive, because noncompliance recommendations never went up the OJJDP chain and through OGC for review. Nonetheless, the below chart shows the amount of questionable FY 2014 DMC awards to each of these states – a total of nearly \$530,000:

⁴⁶ In the CDAI that Rumsey completed for Illinois, she wrote, "Potential overall improvement. Assessment completed, for example . . . [Quarterly reporting] may still be needed?" There was no indication in the CDAI that Rumsey recommended that Illinois be found out of compliance. However, at the time the Illinois CDAI was completed, staff had already been told that no states would be found out of compliance that year, and Coleman told us that absent this directive she would have recommended that Illinois be found out of compliance.

Table 4
States that Had Originally Been Contemplated for Noncompliance
Recommendations in FY 2013 for FY 2014 Funding

FY	State	Grant Award	DMC Allotment Portion
FY 2014	Arkansas	\$393,667	\$78,733
FY 2014	Louisiana	\$553,752	\$110,750
FY 2014	Illinois	\$1,387,187	\$277,437
FY 2014	South Carolina	\$312,434	\$62,487
	Total	\$2,647,040	\$529,407

Source: OJJDP (www.ojjdp.gov/funding/fy14awards.html (accessed August 3, 2017)).

D. FY 2014 DMC Determinations and Related Events

As explained in Part 1 above, one of the two allegations referred to us by OSC was that in FY 2014 “agency managers advised compliance officials that every state would be approved for [JJDP Act] funding in 2015, regardless of compliance with statutory requirements.” The witnesses we interviewed had conflicting accounts regarding who initially provided the directive in FY 2014 that all states would receive their FY 2015 DMC funding regardless of compliance. While the Associate Administrator and Deputy Associate told us that Ayers conveyed the directive to them based upon guidance Ayers had received from Listenbee, Listenbee told us that he did not issue the directive and that he only became aware that no states would be found out of compliance when he received the FY 2014 proposed determination letters. Regardless of who initially gave the directive, there was no dispute that Listenbee provided the final approval on the FY 2014 determination letters that gave all states a DMC “pass.”

In this part, we describe the different accounts of who provided the directive regarding the DMC pass, OGC’s guidance regarding the DMC pass, the practical effects of the DMC pass, the final determination letters that were issued to the states in FY 2014, progress made on the CDAI in FY 2014, and other related issues and events that occurred in FY 2014.

1. The Directive to Give All States a DMC “Pass” in FY 2014: Associate Administrator’s and Deputy Associate’s Account

The Associate Administrator, the Deputy Associate, and Coleman told us that the ACT team did not know how to handle DMC compliance monitoring in early 2014 because the CDAI had still not been approved and leadership had provided no new guidance regarding finding states out of compliance and quarterly reporting. Although Listenbee held a meeting on March 27, 2014 regarding DMC compliance and the CDAI, Coleman told us that during this meeting Listenbee requested documents and information that already had been provided to him and that he did not provide any additional guidance about these issues.

Thus, the Deputy Associate told us that he and the Associate Administrator approached Deputy Administrator Ayers to determine what the DMC compliance process would be that year. Both the Associate Administrator and the Deputy Associate told us that Listenbee was not present for the conversation. The Deputy Associate told us that he did not seek guidance from Listenbee directly because Ayers was the official above the Associate Administrator in his chain of command.⁴⁷ According to the Deputy Associate, Ayers told them to “use the same process we used last year.” Similarly, the Associate Administrator stated that while she could not remember Ayers’ precise language, she remembered Ayers telling them that all states would continue to be found in compliance in FY 2014.

While the Deputy Associate told us that he assumed but was not certain that Ayers had spoken with Listenbee about the directive to find all states in DMC compliance, the Associate Administrator told us that she was certain the directive originated from Listenbee. When we asked the Associate Administrator whether she could have been mistaken that the directive originated from Listenbee, she responded, “There’s no way.” She told us that she and the Deputy Associate would not have relied on Ayers’ instruction without confirming that it originally came from Listenbee, because the decision to find all states in compliance was not one that Ayers could have made “independently” due to her lack of authority and expertise.⁴⁸

The Deputy Associate told us that he respectfully pushed back on the guidance during the meeting with Ayers, but that he also was cautious in doing so based upon his experience the previous year. Specifically, he stated that he had been treated poorly the previous year, and that Listenbee and Ayers had even lowered his yearly performance evaluation due to Listenbee’s allegation that he had relied upon a new quarterly reporting policy without receiving proper approval.⁴⁹ As

⁴⁷ The Deputy Associate’s decision not to go up the chain may also have been influenced by negative interactions he had had with Listenbee and Ayers the year before, as described later in this subpart.

⁴⁸ After reviewing a draft of this report, Ayers told us that “despite her role in the supervisory chain in the office, Listenbee had appointed Cutlar as the point person on all DMC issues.”

⁴⁹ We did not seek to confirm the accuracy of the Deputy Associate’s statements that he had been treated poorly or that his performance evaluation had been lowered the previous year, because they are outside the scope of this review.

a result, the Deputy Associate told us that he did “whatever I needed to do so that those letters got out.”

The Associate Administrator similarly indicated that she did not oppose the directive as strongly as she had the previous year. She told us that the staff was already “overloaded” with work in FY 2014 and that she questioned whether they were “really going to have time to review all these states” anyway. She stated that she and the Deputy Associate decided, “if it’s going to happen, let’s just do it right.” Thus, they told us that they decided to consult OGC regarding the legality of finding every state in compliance and the proper language to use in the determination letters.⁵⁰

On May 7, 2014, the Associate Administrator wrote an e-mail summarizing a meeting with ACT that had taken place earlier that morning, which included a discussion of next steps in compliance review. One of the items she listed in her summary was the following:

Following up with [JJ Attorney 4] about the appropriate verbiage to use for our DMC determinations in 2015. Ideally, we want to issue a notice to the states (ahead of time) which explains why they will “get a pass” (not the language we will use).

The Associate Administrator and the Deputy Associate told us that “get a pass” was a phrase they and ACT used internally to describe the leadership’s directive that all states would receive their DMC funding regardless of compliance, an approach they said they opposed. According to the Associate Administrator, all of the compliance analysts within ACT also were unhappy that states would receive a pass on DMC that year.

2. OGC Guidance Regarding the DMC Pass

According to e-mails we reviewed and the testimony of several witnesses, JJ Attorney 4 was the primary OGC point person on DMC matters in FY 2014. The Deputy Associate told us that he approached JJ Attorney 4 in late spring or early summer 2014 to seek guidance regarding whether the DMC pass was legally permissible and what language to use in the FY 2014 determination letters. According to JJ Attorney 4, the Deputy Associate told him, “we have been instructed to not ding states for DMC anymore” and asked how the determination letters could be written such that they would be “legally accurate.”

On July 14, 2014, the Deputy Associate e-mailed JJ Attorney 4:

If you recall, we discussed crafting some language to put in the status of compliance notification letters on DMC this year. As you know, we have been given direction on how to approach the DMC determinations and I was hoping this language would be ok to use.

⁵⁰ As described in subpart III.D.7., ACT also continued to work on the development of the CDAI during this time.

The e-mail did not specify who provided “direction” or specifically what “direction” was provided. The e-mail went on to provide the Deputy Associate’s proposed language to be included in the DMC Status of Compliance page for each state that year. JJ Attorney 4 told us that he could not remember whether the Deputy Associate told him who had given him the direction on the DMC pass, but that “it certainly seemed that . . . he was carrying out a leadership decision.”⁵¹ JJ Attorney 4 stated that he believed that OJJDP was instituting the pass because the agency needed better “procedures” to gather “information” on which to “base denials” of DMC funding. He indicated that he agreed that it was prudent for OJJDP to get its “house in order” before starting “enforcement” of the DMC provision.⁵² He further stated that while he discussed the matter with the other JJ Attorneys, he did not remember having conversations about the “pass” with anyone at OJJDP other than the Deputy Associate.

On July 29, 2014, JJ Attorney 4 forwarded the Deputy Associate’s July 14 e-mail to JJ Attorneys 2 and 3 writing, “As we’ve discussed, they’re planning to rule states as in compliance w/ DMC this year based on last year’s information” and asking, “Is this approach being taken w/ the other core requirements?” The JJ Attorneys scheduled a meeting that day to discuss the e-mail and the proposed DMC pass.

The OGC witnesses’ recollections were hazy regarding what was discussed at the meeting and the guidance they provided to OJJDP on the legality of the DMC pass. JJ Attorney 4 told us that his conversation with the Deputy Associate focused on what language to use, rather than the legality of giving states a DMC pass in the first instance. He further told us that he discussed the matter at length with the other JJ Attorneys and that OGC “must have” made a determination that the pass was legally permissible based on the fact that OGC approved language for the compliance determination letters; however, he could not remember the rationale underlying that determination. JJ Attorney 3 told us that she could not recall whether the OGC attorneys discussed whether the pass was legally permissible. She told us that she remembered only that at some point they decided that OJJDP should tell the states that they are “not out of compliance” rather than “in compliance” to avoid giving states the impression that there were no concerns.

However, according to the Deputy Associate, JJ Attorney 4 advised him that there was precedent for making compliance determinations in one year based upon information from an earlier year and that OJJDP could therefore make its FY 2014 DMC determinations for FY 2015 funding based upon the information that OJJDP

⁵¹ The other JJ attorneys similarly told us that they were not certain who made the decision that all states would receive their DMC funding regardless of their submissions.

⁵² JJ Attorney 4 stated that there were other contexts in which OJP did not follow a statutory mandate because it did not have procedures in place to do so reliably. For example, he told us that the Death in Custody Reporting Act requires BJS to publish annual statistics regarding individuals who die while in law enforcement custody. According to JJ Attorney 4, BJS stopped publishing these statistics for a period of time because it did not have adequate procedures for gathering reliable data.

had received from the states in FY 2013.⁵³ The JJ Attorneys told us that they did not remember providing this guidance. Moreover, JJ Attorney 4 told us that he was not familiar with the “precedent” at the time because he was relatively new to DMC, and he believed that it was the Deputy Associate’s idea to rely on the previous year’s data. Nonetheless, the Deputy Associate told us that, relying on what he understood to be OGC’s guidance, he believed that all states could be found in compliance in FY 2014 because they had all been found in compliance in FY 2013. The Associate Administrator told us that she did not remember anyone justifying the pass in this way, but that she recalled JJ Attorney 4 indicating that there was more “wiggle room” with DMC than with the other three core requirements.

On July 30, 2014, the Deputy Associate e-mailed the Associate Administrator, Deputy Administrator Ayers, the compliance analysts within ACT, and the three JJ attorneys, writing, “I have received approval from OGC on the language below for use on the DMC sections of the determination letters.” The e-mail then went on to describe the content that should be included in each compliance determination letter that year. According to the e-mail, each letter would have four bullets, one for each core requirement.⁵⁴ While the DSO, Separation, and Jail Removal bullets each would indicate that the state was either “in compliance” or “out of compliance” depending on the state’s submissions, the DMC bullet would indicate that the state was “not out of compliance” regardless of the state’s submissions. The Deputy Associate told us that OGC drafted and advised OJJDP to use the term “not out of compliance.”

The e-mail went on to provide the “OGC approved language” for every state’s DMC Status of Compliance page, which the Deputy Associate told us that he drafted:

Pursuant to the requirements of Section 223(a)(22), OJJDP has determined that (insert State) will not be found out of compliance with the Disproportionate Minority Contact requirement of the JJDPA. The summary of programmatic activities undertaken in your state to address racial and ethnic disparities in the state’s juvenile justice system and the statewide Relative Rate Index (RRI) Spreadsheet data submitted indicates action in your state towards addressing minority overrepresentation at the various system contact points. OJJDP recognizes the efforts taken by (insert State) to address racial and ethnic disparities in the juvenile justice system, and the Office stands

⁵³ Records we reviewed indicate that all states received their full allotment of JJDP Act funding in 2004, regardless of compliance with any of the core requirements, due to the 2002 Reauthorization of the JJDP Act. However, we were unable to determine whether the action taken in 2004 was the precedent upon which OGC relied in approving the FY 2014 DMC pass. The Deputy Associate told us that he was unable to explain the precise precedent relied upon by JJ Attorney 4, because “that was all done in SRAD” before the Deputy Associate worked on core-requirement compliance at OJJDP. Moreover, JJ Attorney 4 said he could not remember his legal reasoning and told us that he was not aware of what had happened in FY 2004.

⁵⁴ For reasons unrelated to the DMC pass, this was the first year that OJJDP addressed compliance with all four core requirements in one determination letter to each state.

ready to continue to work collaboratively with (insert state) to achieve and maintain full compliance with this JJDP core requirement.

Although (insert state) has identified strategies aimed at DMC reduction, OJJDP strongly encourages (insert state) to prioritize and increase these efforts aimed at eliminating systemic racial and ethnic disparities. Historically, OJJDP has worked with states to implement the five phase OJJDP DMC Reduction Model with fidelity. To date, efforts have greatly focused on the initial identification and assessment phases of the DMC Reduction Model. As OJJDP continued to further DMC reduction efforts at the Federal, state, and local levels, the Office will place an increasing emphasis on assisting states to implement strategies aimed at moving through the full OJJDP DMC Reduction model, with specific emphasis being placed on the areas of assessment/diagnosis, intervention, evaluation, and monitoring.

Moving forward with this DMC reduction work, OJJDP will engage with states to increase efforts aimed at eliminating systemic racial and ethnic disparities in juvenile justice across the nation and more specifically DMC reduction efforts in your state of (insert state). To this end, the Office will continue to take steps to refine our approach to this work, and encourage each state to closely examine the activities and the impact of your DMC reduction efforts. DMC reduction strategies and objectives should have a demonstrable and measurable impact on reducing racial and ethnic disparities. Thus, OJJDP encourages (insert state) to submit a training and technical assistance request to assist the state with fully implementing the full OJJDP DMC Reduction Model with specific focus on assessment, intervention, evaluation, and monitoring.

The Deputy Associate told us that he drafted this language in an effort to implement the direction conveyed to him by Ayers and which he understood to have originated from Listenbee, while also endeavoring to encourage states to make improvements in how they addressed DMC.

JJ Attorney 4 confirmed that OGC approved the DMC language for the letters. Witnesses told us that General Counsel Madan and Deputy General Counsel Moses were not involved with approving the language. Madan and Moses both told us that they had never seen the language before and were not sure if anyone from OGC had approved it, but that they did not doubt that it had been approved. JJ Attorney 3 told us that this was "not necessarily the kind of thing we would elevate to them."

Although Madan and Moses told us that they were not involved with approving the DMC pass language, they both indicated that the pass was connected to OGC's 2013 guidance related to Coleman's April 2013 e-mails. Specifically, Madan told us that he believed and "would have told" Listenbee that after Coleman's e-mail, OJJDP could not begin finding states out of compliance until new DMC regulations were promulgated. Moses and JJ Attorney 3 told us that they

believed that, after Coleman's e-mail, OJJDP needed to develop a consistent method of assessing DMC before finding states out of compliance.⁵⁵

3. Practical Effects of the FY 2014 DMC Pass

The Associate Administrator, the Deputy Associate, and the compliance analysts we interviewed all told us that, based upon the July 30, 2014 e-mail containing the OGC-approved language for the DMC determinations, all states would receive identical language in their DMC Status of Compliance pages in FY 2014; all states would receive the full DMC portion of their formula grant allocations in FY 2015, regardless of the quality or content of each state's plan; and no states would be placed on quarterly reporting. They told us that they understood there to be no exceptions to the DMC language in the determination letters, and that a state would receive this precise language – including OJJDP's recognition of "efforts taken by" the state "to address racial and ethnic disparities in the juvenile justice system" and of the "strategies" that the state had "identified" to achieve DMC reduction – even if the state's plan did not comply with one or more regulatory requirements. Further, the Deputy Associate, Compliance Analyst 1, and Coleman told us that their understanding was that a state would receive this language and its DMC funding even if it did not submit a DMC plan at all and that OGC never advised them otherwise, though they indicated that all states in fact submitted a plan that year. Likewise, they told us that all states would receive the identical language – including the "strong" encouragement that the state "prioritize and increase" its "efforts aimed at eliminating systemic racial and ethnic disparities" and the suggestion that the state "submit a training and technical assistance request to assist the state with fully implementing the full OJJDP DMC Reduction Model" – even if the state's submission was exemplary and it had not received such guidance in the past.

The Associate Administrator and Deputy Associate told us that based upon the knowledge that every state would be found "not out of compliance on DMC" and receive identical letters, the ACT team conducted only a cursory review of the DMC plans submitted in FY 2014. The Associate Administrator told us that the primary purpose of the review in FY 2014 was to assess whether any states needed technical assistance. However, Compliance Analyst 1 told us that no one ever told her to review the plans even for that purpose and that she did not even review the submissions for completeness or basic compliance with the regulations, because "it would have been a waste of time." Coleman told us that the Deputy Associate advised compliance staff "not to even bother reviewing the [DMC] plans." We cannot determine whether any states would have been deemed out of compliance in FY 2014 if not for the DMC pass or how much funding might have been awarded to states in FY 2015 despite noncompliance.

Compliance Analyst 1 told us that the Deputy Associate spoke with the ACT team about the pass during weekly meetings. She stated that she repeatedly

⁵⁵ In addition, in the Department's April 28, 2015 Responses to Questions for the Record following AAG Karol Mason's April 21, 2015 testimony before the Senate Committee on the Judiciary, the Department connected the ongoing DMC pass to OGC's 2013 guidance.

voiced her opposition to it, stating that she felt that she was being asked to do something improper. According to Compliance Analyst 1, the Deputy Associate responded that “this is what we were told we had to do.” Compliance Analyst 1 and Coleman also told us that they never received any written guidance from management or from OGC regarding the pass or how to handle the compliance monitoring review process in FYs 2013 or 2014.

4. FY 2014 Compliance Determination Letters and Reaction from the States

Based on our review of the DMC determination letters that were sent to participating states and territories in FY 2014 for FY 2015 funding, we found that they were consistent with the testimony we received and that the FY 2014 letters were even more standardized than the letters that had been sent in FY 2013. As in FY 2013, all participating states and territories were told in FY 2014 that they would receive their full allotment of DMC funding (albeit using the term “not out of compliance” rather than “in compliance”), and no states were placed on quarterly reporting or otherwise subject to a special condition on their DMC funding. However, unlike the FY 2013 letters, the FY 2014 letters did not notify states of the specific strengths and deficiencies in their plans or provide a list of intervention activities expected to be addressed in the following year’s plans. Rather, the DMC language contained in the FY 2014 Status of Compliance Pages was identical for every state and the same as the “OGC approved language” contained in the Deputy Associate’s July 30, 2014 e-mail.

According to Coleman, employees from at least three states (Oklahoma, Texas, and Arizona) e-mailed her expressing concern about the language in the letters. She stated that the different state employees spoke to one another and realized that they had all received the same letter. Coleman further stated that she told Cutlar that she had received “pushback” from states that believed the letters did not “accurately reflect their DMC plans.” She told us that she suggested to Cutlar that OJJDP at least incorporate language regarding states’ deficiencies in the letters where appropriate. However, she stated that Cutlar refused because such language would indicate that OJJDP was making a compliance determination.

5. Listenbee’s, Ayers’, and Cutlar’s Accounts of the 2014 DMC Pass

Listenbee told us he never directed OJJDP to give all states a pass on the DMC core requirement in FY 2014. He said he was not aware that the “not out of compliance” DMC language would be used for every state until he received the proposed compliance determination letters in September 2014. Neither Listenbee nor his Chief of Staff, Shanetta Cutlar, was copied on the Deputy Associate’s July 30, 2014 e-mail, regarding the OGC-approved language to be used in the letters, and Listenbee told us that he had not seen the e-mail before his OIG interview.⁵⁶

⁵⁶ The Associate Administrator stated that Listenbee and Cutlar were not copied on the July 30, 2014 e-mail exchange because of “internal politics.” Specifically, she stated that Ayers did not get

Listenbee told us that when he first read the proposed FY 2014 determination letters, he asked Ayers about the DMC language and she told him "OGC said we had to include this language here." However, Ayers maintained that she did not remember any conversations with Listenbee, the Associate Administrator, or the Deputy Associate regarding the plan for DMC review in FY 2014 and that she did not recall that there was ever a decision to give all states a pass on DMC. Listenbee told us that he did not confirm with OGC that it had advised OJJDP to use the "not out of compliance" language because he assumed that the language was included as a result Coleman's April 2013 e-mails.

Cutlar, on the other hand, stated that she had been aware of the plan to give states a pass on DMC before receiving the proposed determination letters. She told us that Listenbee also "had to have been aware," because he had advised her when she started in April 2014 that he could not find states out of DMC compliance that fiscal year due to OGC's guidance in 2013. In addition, Cutlar told us that the plan to use the language "not out of compliance" regarding the DMC core requirement had been discussed during leadership meetings that Listenbee chaired and Ayers attended, before the draft determinations letters were submitted for Listenbee's review.

In any event, Listenbee told us – in seeming contradiction to his statements that he had been unaware of the DMC pass – that he believed, based on conversations with OGC in FYs 2013 and 2014, that OJJDP could not begin finding states out of DMC compliance until OJJDP finalized the CDAI or another objective tool for measuring DMC. He stated that he "assumed that would happen within a matter of months" of the FY 2014 determination letters. Similarly, Cutlar stated that Moses had told her that OJJDP could not find states out of compliance with DMC until the agency developed "some sort of objective way" of measuring DMC compliance that everyone assessing compliance is trained to use. Listenbee stated that he believed this guidance was "sound." He further stated that he did not question the DMC language used in the FY 2014 compliance determinations based upon his understanding that it had been drafted by OGC.

6. Listenbee's October 14, 2014 Conversation with Coleman

According to e-mails we reviewed, on October 14, 2014, Coleman had a telephone conference with Listenbee regarding her concerns about the FY 2014 DMC review process. Coleman told us that during this phone conference Listenbee denied providing the directive that led to the FY 2014 DMC pass. Coleman also told us that Listenbee "raised his voice" and told her to "look in the mirror," indicating that she should accept responsibility for states not being found out of compliance with DMC because she was the one who had been "coordinating" the program and had "caused its failure." Coleman stated that she found Listenbee's denial of responsibility during the telephone conference to be "odd."

along with Cutlar and that Ayers had told her subordinates not to communicate directly with Listenbee or Cutlar. Cutlar similarly told us that Ayers would not permit Cutlar to speak directly with Ayers' subordinates.

On October 22, 2014, in response to an e-mail that Coleman had sent on October 15 thanking Listenbee for the telephone conference, Listenbee wrote:

When we talked you indicated that there were several states that were out of compliance with the DMC core requirement during the last fiscal year which ended September 30th. You also indicated that you were told by your supervisors that you could not find them out of compliance because I had directed that no states could be found out of compliance. As I told you, there is no way I would issue such a directive.

Listenbee told us that what he wrote in this e-mail was accurate. However, Cutlar told us that Listenbee's statement that he did not issue "the directive that no states could be found out of compliance . . . strikes me as untrue." While Cutlar stated that she could not point to a specific conversation during which she heard Listenbee issue this directive, she told us that putting everything together – including that Listenbee told her at the outset of her tenure that he refused to sign the FY 2013 letters based on OGC guidance and that OGC's guidance had not changed in FY 2014 – she believed that Listenbee issued the directive.

On November 26, 2014, Coleman responded to Listenbee's October 22 e-mail, writing:

In 2013 the Audit and Compliance Division completed the determination letters and recommended thirteen states be placed on quarterly reporting. It is my understanding, based on your assessment, the quarterly reporting language was removed from these letters.

She went on to place responsibility on Listenbee for the ACT team's inability to use the CDAI to find states out of compliance, writing that the team "was advised the CDAI could not be used to assist with making determinations of compliance with DMC until you approved it which has not occurred." Finally, she described the DMC language contained in the FY 2014 compliance determination letters – language that found states "not out of compliance" on DMC without providing individualized information regarding states' performance or "what they anticipated addressing in FY 2015" – as an "unprecedented departure from previous letters."

7. Progress Made on the CDAI and the Establishment of the "RED Center"

In FY 2014, Listenbee assigned Chief of Staff Cutlar to be the lead on "Racial and Ethnic Disparities" (RED), which included overseeing the development of the CDAI. According to Compliance Analyst 1, Cutlar led weekly meetings with staff, including the Associate Administrator, the Deputy Associate, Coleman, and Compliance Analyst 1, regarding the CDAI.

In addition, as referenced above, Listenbee established a National Resource Center to Address Racial and Ethnic Disparities, later called Technical Assistance to

End Racial and Ethnic Disparities Center (RED Center). According to Listenbee, the purpose of the RED Center was to provide more effective training and technical assistance to state grantees on DMC issues. OJJDP awarded grants to two nonprofit organizations to facilitate the RED Center. As part of their duties, these nonprofit organizations not only provided resources, training, and technical assistance to states participating in the formula grant program, but also acted as consultants regarding the development of the CDAI. However, according to Coleman, many of the changes they suggested were inconsistent with the DMC regulations and DMC manual and, thus, she later recommended that such proposed changes be rejected.

E. FY 2015 DMC Review and Related Events

In this part, we discuss the FY 2015 review process and determination letters. While the DMC pass remained in effect in FY 2015 and all states received their allotted DMC funding in FY 2016, OJJDP made certain changes in an effort to increase state accountability and enhance technical assistance to states. Thus, we discuss how certain changes in the process were implemented and the effectiveness of those changes. Because FY 2015 was the most recent DMC compliance review process we examined, we devote considerable attention to addressing the compliance circumstances of particular states and what OJJDP did and did not do to hold states accountable. We also discuss recordkeeping issues and the current status of the CDAI.

1. FY 2015 DMC Compliance Review Process

As described in Part II.B.1. above, in FY 2015 the unit of OJJDP handling compliance monitoring changed from ACT within the Budget and Administration Division to the Core Protections Division (CPD), a stand-alone division within OJJDP. While the compliance analysts of ACT all retained their positions in the new CPD, they were no longer supervised by the Associate Administrator and Deputy Associate of Budget and Administration. Instead, a new Acting Associate Administrator became the head of the new CPD, as a detailee from OJP's Office of the Assistant Attorney General (OAAG).⁵⁷

The Acting Associate Administrator told us that she worked with the compliance analysts to develop an "Interim Compliance Determination Protocol" (FY 2015 Protocol) to govern the FY 2015 review process, as well as a "Compliance Determination Analysis Form" (CDAF) for each of the four core requirements to better document the process. According to the FY 2015 Protocol, the compliance analysts were required to review the DMC plans to determine if each state had "submitted a complete plan that address[ed] the requirements as described in the" FY 2015 formula grant program solicitation. The protocol stated that OJJDP could recommend technical assistance to address any "issues" that were identified during

⁵⁷ The Acting Associate Administrator told us that she did not have experience in juvenile justice or with the JJDP Act. However, she stated that she had significant experience as an auditor, including a prior position in OJP's Office of Audit, Assessment, and Management.

this review, but could not find a state out of compliance with DMC. Rather, the FY 2015 Protocol provided:

OJJDP anticipates completion of an objective and statistically valid tool for assessing compliance with the DMC requirements by the end of calendar year 2015. Until the objective tool is developed, States will not be found out of compliance with DMC requirements. OJJDP will include the following language in the determination letters impacting FY 2016 Title II formula grant funding.

[State] is not found out of compliance with Section 223(a)(22) of the JJDP Act (the "disproportionate minority contact" or "DMC" requirement).

(Emphasis in original). The Acting Associate Administrator told us that based on direction she received from AAG Mason and Administrator Listenbee, the primary purpose for the FY 2015 DMC compliance review was to determine whether any states should receive technical assistance to resolve deficiencies in their DMC plans.

The CDAF for each of the four core requirements was attached to the FY 2015 Protocol. The DMC CDAF was three and a half pages and contained six sections, each with one to five questions for the compliance analysts to answer based on a review of each state's DMC submissions. The Acting Associate Administrator and Coleman told us that the purpose of the CDAF was to determine whether each state submitted a complete plan consistent with the formula grant program solicitation, which was based on the requirements of the JJDP Act, its implementing regulations, and the DMC Manual. They stated that, unlike the CDAI, the CDAF did not provide a means to substantively assess the quality of each state's DMC plan.

Compliance Analyst 1 told us that she was on a detail to another office during the FY 2015 compliance review period. Thus, she told us that her assigned states were distributed to former SRAD employees who had experience conducting compliance reviews. She told us that upon returning to the office on or about September 28, 2015, she was assigned to do any remaining work on those states before the September 30 deadline, as well as any necessary follow-up after the September 30, 2015, determination letters were issued.

2. FY 2015 Compliance Determination Letters

We reviewed the final determination letters that were issued to all the states in FY 2015 for FY 2016 funding. Like the FY 2014 compliance determination letters, the FY 2015 letters informed each state that it was "not out of compliance" with the DMC core requirement. Each state also received standard DMC language in its Status of Compliance page. This standard language included a notification that OJJDP was in the process of developing an objective tool – referring to the CDAI without identifying it by name – to assist OJJDP with assessing DMC compliance, and that this tool would be shared with the states "for feedback and comment soon." The letters did not contain individualized information regarding each state's deficiencies or successes.

However, unlike the FY 2014 letters, 10 of the FY 2015 letters also contained additional identical language notifying the corresponding states that their plans were incomplete and instructing them to contact a particular compliance analyst regarding “what additional information is required.” The 10 states that received the alternate letter were Alabama, Arkansas, California, Georgia, Indiana, Kentucky, Louisiana, New Hampshire, Utah, and Wisconsin.⁵⁸ Each of these states was told that if it did not “provide all required information by October 14, 2015, OJJDP will issue a Grant Adjustment Notice (GAN) to withhold [the state’s] FY 2015 Title II Formula Grant award funds until a complete DMC plan has been submitted.” According to Compliance Analyst 1 and Coleman, this meant that OJJDP could “freeze” the state’s previously allocated FY 2015 funding if the state did not submit a complete DMC plan by the October 14 deadline. However, witnesses told us that the states’ FY 2016 DMC funding was not in jeopardy of being reduced, in accordance with the DMC pass. In addition, one territory, American Samoa, was told that OJJDP was unable to make a final determination regarding its DMC compliance because it had failed to submit a DMC plan. American Samoa was instructed to submit a DMC plan by December 31, 2015, or “OJJDP may initiate termination of the fiscal year 2015” award. Finally, Puerto Rico received a letter that was different from all the others, in that it contained no DMC language at all.⁵⁹

The Acting Associate Administrator stated that incorporating the language requiring follow-up in the letters to the deficient states was her idea. She told us that the compliance analysts were expected to work with the states to resolve any deficiencies in their DMC plans before the September 30 determination letters were issued. The Acting Associate Administrator stated that if, despite these efforts, a compliance analyst determined that a state did not submit a complete DMC plan, the state would receive a deficient-state letter and the assigned analyst would be the point person for follow-up communications with the state.

3. Follow-up with Deficient States in FY 2015

We found that OJJDP did not establish a clear process for following up with the deficient states and assessing and documenting whether they ultimately submitted complete DMC plans. The Acting Associate Administrator told us that although the deficient-state letters placed the burden on the deficient states to contact the assigned compliance analysts, she expected the compliance analysts to initiate follow-up with the states. However, she acknowledged that she might not have explicitly told them to do so. She also told us that she did not provide specific guidance to the compliance analysts regarding what they should do if any deficient states did not submit complete DMC plans by the October 14 deadline. Moreover, both Compliance Analyst 1 and Coleman told us that they were given little to no

⁵⁸ We refer to these states as the “deficient states” and the letters to them as “deficient-state letters.”

⁵⁹ Witnesses told us that OJJDP has awarded Puerto Rico its full allotment of JJDP Act funding without requiring it to comply with the DMC requirement since compliance monitoring was under SRAD. In Part III.E.3.e. below, we describe the information we received as to why Puerto Rico has been exempt from the DMC requirement and the opposition to the Puerto Rico exemption by many within OJP.

instruction regarding how or when to follow up with the deficient states or what to do if the states did not meet the October 14 deadline. Compliance Analyst 1 stated, "I made up my own process."

The Acting Associate Administrator also told us that she did not follow up with the compliance analysts on October 14, 2015 – or before an OIG document request on July 27, 2016, discussed immediately below – to determine whether the deficient states had ultimately submitted complete DMC plans, because she did not treat October 14 as a strict deadline.⁶⁰ In addition, the Acting Associate Administrator, Coleman, and Compliance Analyst 1 all told us that OJJDP did not notify deficient states when their plans were complete or their DMC issues were otherwise resolved.

Because of the language contained in the FY 2015 determination letters, on July 27, 2016, we requested that OJJDP provide documentation indicating that each of the 10 states listed above either "was issued a GAN to withhold its FY 2015 formula grant award funds" or "subsequently provided OJJDP all required DMC information for purposes of its FY 2016 award." We also sought any documentation of OJJDP communications with the ten deficient states following the September 30, 2015, determination letters, as well as information regarding the handling of American Samoa, which information provided by OJJDP showed had not even submitted a DMC plan.

The Acting Associate Administrator told us that to respond to the OIG document request, she asked the compliance analysts to search their own e-mails and notes to identify documents that were responsive to our request. The Acting Associate Administrator also told us that the compliance analysts had always been instructed to upload information regarding state compliance matters, including significant e-mail communications, into OJJDP's formula grant "SharePoint" site, which contained documents catalogued by fiscal year and state. However, she stated that she searched SharePoint in response to our document request and discovered that the compliance analysts had not uploaded any e-mails or documents regarding their follow-up communications with the deficient states. Both Compliance Analyst 1 and Coleman told us that they were never told to upload documentation regarding their follow-up communications with states into SharePoint or any other central location that could be accessed by other OJJDP staff or supervisors.

In response to our July 27 document request, we received several e-mails documenting communications between OJJDP compliance analysts and state

⁶⁰ Compliance Analyst 1 and Coleman both told us that in their view the October 14 deadline was unreasonable. According to Coleman, if the states could not submit adequate plans by the September 30 deadline, they were unlikely to be able to resolve their deficiencies within 2 weeks of the deadline. Compliance Analyst 1 told us, "Many dates that are given or were given through CPD were very flexible. So I can't even begin to tell you if that was, if they expected to really move forward with any GANs or not." She stated that OJJDP has often failed to adhere to its own deadlines and that she believed this has caused OJJDP to "lose credibility with the states." In addition, Coleman stated that she did not believe the process of sending deficient-state letters to certain states was an improvement from the FY 2014 process, because some states found the letters to be confusing.

employees, including attachments submitted by state employees to OJJDP. We also received an e-mail written by the Acting Associate Administrator on August 26, 2016 to our OJP point of contact stating, “[FY 2015] GANs to withhold funds were not issued for these awards [to the ten deficient states]. The states were given an opportunity to clarify and update plans. All states provided the necessary clarifications.” The Acting Associate Administrator told us that she came to the conclusion that all the deficient states had resolved their DMC deficiencies based upon the information she gathered from the compliance analysts in response to the July 2016 OIG document request.

However, after reviewing the e-mails and attachments we received and discussing them with the Acting Associate Administrator, Coleman, and Compliance Analyst 1, we found that the Acting Associate Administrator’s statements were not precise. Specifically, we found that while most of the states had submitted sufficient paperwork to resolve OJJDP’s concerns, some of the states still had unresolved DMC issues at the end of FY 2016, as discussed in the following subparts. Compliance Analyst 1 and Coleman both told us that, even after the follow-up, they likely would have recommended that Arkansas and Louisiana be found out of compliance with DMC, if not for the DMC pass. Coleman also stated that she would have recommended American Samoa for a noncompliance finding and that she recommended that New Hampshire receive a GAN to withhold its FY 2015 funds.⁶¹ In addition, both Coleman and Compliance Analyst 1 expressed concern that Puerto Rico has been exempt from the DMC core requirement for many years.

Below we discuss in more detail the follow-up communications with and circumstances surrounding the award of DMC grant funds to each of the 10 deficient states for FY 2016.⁶²

a. Georgia, Kentucky, Utah, Wisconsin, Alabama, New Hampshire, and California

According to the e-mails, 4 of the 10 states – Georgia, Kentucky, Utah, and Wisconsin – submitted additional data or revised DMC plans to the assigned CPD compliance analyst by October 14, 2015, and 2 of the states – Alabama and New Hampshire – submitted revised plans later in October 2015 (October 26 and October 22, respectively). Both Coleman and Compliance Analyst 1 told us that after receiving follow-up information from Alabama, Kentucky, and Utah, they did not believe that any remaining concerns warranted withholding FY 2015 or FY 2016 funding from those states. Compliance Analyst 1 made the same representation with respect to Georgia and Wisconsin, two states about which Coleman did not express an opinion because she had not reviewed their FY 2015 plans. In addition,

⁶¹ Compliance Analyst 1 did not review the plans for New Hampshire or American Samoa.

⁶² For some of these states, we note that a compliance analyst told us she would have found the state out of compliance but for the DMC pass. This should not be interpreted to mean that the states necessarily would have been found out of compliance, as such an outcome would have required approval by OJJDP management and OGC. However, this information is relevant to our assessment of questionable awards described in Part III.E.3.f. and Part IV.A.

Coleman told us that she had timely follow-up conversations with California that resolved OJJDP's concerns.

With regard to New Hampshire, Coleman told us that the revised plan continued to have deficiencies, including failing to sufficiently analyze the state's RRI data. She told us that while she did not recommend finding New Hampshire out of compliance on this basis, she did orally notify the Acting Associate Administrator that the state should receive a GAN placing a special condition on its FY 2015 award but the GAN was never issued.⁶³ However, as noted above, the Acting Associate Administrator told us that no GANs were issued because she came to the conclusion that all the deficient states had resolved their DMC deficiencies, based upon the information gathered from Coleman and the other compliance analysts. We were unable to resolve this discrepancy.

b. Arkansas and Indiana

At our request, OJJDP provided us with e-mail exchanges indicating that OJJDP recommended technical assistance and training for Arkansas and Indiana. However, based on documents we reviewed and witness accounts, neither state had submitted a revised FY 2015 DMC plan in response to the FY 2015 determination letter and both states were still in the process of receiving the recommended technical assistance as of late 2016. As explained below, Coleman and Compliance Analyst 1 were consistent in their views about Indiana's and Arkansas' compliance statuses.

With respect to Indiana, the documentation we received indicated that Coleman had granted an exception to Indiana allowing the state to use older data to support its DMC plan submission (discussed in Part III.E.4. below). Both Coleman and Compliance Analyst 1 indicated that Indiana was otherwise in compliance and was making strides to improve its data collection. Thus, Coleman stated that she did not recommend that Indiana be found out of compliance in FY 2015, but that she "would have liked to have . . . put a special condition on [Indiana's] funding restricting drawdown until they completed their data collection."

Coleman and Compliance Analyst 1 told us that Arkansas, by contrast, had failed to comply with the DMC regulations in numerous respects. For example, they told us that Arkansas had not submitted an Intervention strategy that was based on the recommendations in the state's DMC assessment.⁶⁴ Coleman stated that Arkansas' plan was "substantially deficient," and distinguished it from Indiana's plan by explaining that Indiana "was able to follow the regulatory requirements" and had submitted an Intervention plan that directly addressed the recommendations in the state's Assessment as required by 28 C.F.R. § 31.303(j). Thus, Coleman included the following notation related to Arkansas in the spreadsheet referenced above that

⁶³ In addition, according to a spreadsheet that Coleman told us she submitted to the Acting Associate Administrator before the FY 2015 determination letters were issued, Coleman recommended either a noncompliance finding or quarterly reporting for New Hampshire.

⁶⁴ As described in Part II.E.1. *supra*, a state must submit an Intervention plan that is "based on the results of the assessment." 28 C.F.R. § 31.303(j).

she told us she provided to the Acting Associate Administrator in late September 2015 before the FY 2015 determination letters were issued: “I also recommend non-compliance for DMC as the Compliance Plan needs to be rewritten and intensive training and technical assistance should be required.”

The Acting Associate Administrator told us and supplied records to support that OJJDP froze Arkansas’ entire FY 2015 and FY 2016 awards, subject to certain special conditions, for reasons unrelated to DMC noncompliance. However, OJJDP did not issue a GAN to withhold Arkansas’ FY 2015 funds for failure to comply with the DMC core requirement, as it indicated it would in the FY 2015 determination letter and as Coleman had recommended. Thus, Coleman told us that if Arkansas satisfies the FY 2015 and FY 2016 special conditions, the state may receive its entire FY 2015 and FY 2016 awards despite failing to submit a complete FY 2015 DMC plan meeting the minimum requirements of the DMC regulations. As discussed above, Arkansas had difficulties complying with the DMC core requirement since as long ago as FY 2013, when the ACT team reportedly would have found the state out of compliance but for a leadership determination that no states be found out of compliance with the DMC core requirement that year. See Part III.C. *supra*.

c. Louisiana

With respect to Louisiana, we requested and received some additional documentation that had been provided by the state to OJJDP in response to the September 30, 2015, determination letter. However, the documents did not indicate and Compliance Analyst 1 told us that she did not remember when this documentation had been submitted. Compliance Analyst 1 told us that Louisiana was working on its DMC issues and described its situation as “borderline,” but stated that she likely would have “put up a fight” to find the state out of compliance due to certain concerns if not for the DMC pass. For example, Compliance Analyst 1 stated that she had concerns regarding how the one Intervention strategy Louisiana listed in its DMC plan – a truancy court – was related to reducing DMC. As noted in Parts III.B. and C. *supra*, Louisiana had difficulties complying with the DMC core requirement, including failing to submit an adequate Intervention plan, since as long ago as FY 2012. See Part III.B. *supra*. Coleman told us that based on Louisiana’s failure to submit intervention strategies that were related to reducing DMC, she too would have recommended Louisiana to be found out of compliance but for the DMC pass.⁶⁵

d. American Samoa

With respect to American Samoa, OJJDP provided us with a letter dated August 15, 2016 – over 2 weeks after the OIG’s July 2016 document request – informing the territory that it was ineligible to receive its entire *FY 2016* formula

⁶⁵ According to the documentation we reviewed, the SRAD employee that initially reviewed Louisiana’s plan did not identify the deficiencies with Louisiana’s Intervention plan, but found that the state had other issues that required follow-up.

grant award due to its failure to submit a FY 2015 DMC plan.⁶⁶ However, despite the instruction in the FY 2015 determination letter that American Samoa submit a DMC plan by December 31 or face potential termination of its *FY 2015* award, the Acting Associate Administrator and Coleman told us that OJJDP did not contact American Samoa in December 2015 or take any action towards terminating American Samoa's FY 2015 award at that time.

The Acting Associate Administrator and Coleman told us that they later discovered that American Samoa had in fact timely submitted a FY 2015 DMC plan, but had submitted it directly to the Grant Management System rather than through the online compliance "tool" where the states had been directed to submit their plans. The Acting Associate Administrator told us that once she realized that American Samoa in fact submitted a plan, she asked Coleman whether the territory's plan was complete. She stated that Coleman responded that the plan was complete and was the same as what had been submitted in the past. However, Coleman told us that she found American Samoa's plan to be inadequate and recommended that the territory be found out of compliance, because the territory essentially claimed that it did not have DMC without submitting adequate data to support such a claim. We reviewed the CDAF that Coleman completed for American Samoa after OJJDP located its plan and found that it was consistent with what Coleman told us. Coleman checked off the box on the CDAF indicating that American Samoa's plan was "incomplete." Notwithstanding the discrepancies in their accounts about the completeness of American Samoa's DMC plan, both the Acting Associate Administrator and Coleman told us that, based upon the DMC pass, OJJDP awarded American Samoa its FY 2016 DMC funding once OJJDP determined that the territory in fact submitted a FY 2015 DMC plan. They further told us that OJJDP did not seek a GAN to withhold American Samoa's FY 2015 funding.

e. Puerto Rico

Coleman told us that Puerto Rico has not been required to comply with the DMC requirement for many years, despite receiving its full formula grant allocation for all four core requirements. Coleman stated that in the early 2000s Puerto Rico had asserted that based upon its 2000 census it was "not required to collect data based on race and ethnicity."⁶⁷ She further stated that SRAD supervisors Thompson and Jones agreed, resulting in Puerto Rico's exemption from the DMC core requirement. Both Compliance Analyst 1 and Coleman told us that they did not believe that Puerto Rico's DMC exemption was appropriate, and Coleman told us that she previously had recommended that the exemption be eliminated, but to no avail. Coleman stated that there are ways that Puerto Rico can collect data based on race and ethnicity outside of the census process.

⁶⁶ We were unable to determine why OJJDP delayed so long in providing this letter to American Samoa.

⁶⁷ We did not seek to verify whether Puerto Rico's 2000 census did not require Puerto Rico to collect data based on race and ethnicity or why. Instead, in Part IV we recommend that OGC provide guidance to OJJDP regarding the appropriateness of the Puerto Rico exemption.

Other OJP employees, including Deputy General Counsel Moses and the Associate Administrator of Budget and Administration, similarly told us that they did not understand the reason for Puerto Rico’s exemption. The Associate Administrator stated that when she oversaw ACT, she learned that Puerto Rico started to collect data regarding race and ethnicity but still received the exemption. She stated, “I think I brought it up to our leadership. But, you know, nobody responded.” The Acting Associate Administrator told us that she did not know the history behind Puerto Rico’s exemption, but she did not question it.

f. Total Questionable FY 2016 DMC Awards

In sum, although OJJDP made efforts to improve DMC accountability in FY 2015, as discussed in Section IV below we found that OJJDP did not ultimately follow through with these efforts. Moreover, compliance analysts identified three jurisdictions that they would have recommended for noncompliance findings if not for the DMC pass.⁶⁸ According to OJJDP’s records, these jurisdictions received the following funds in FY 2016:

**Table 5
States that Compliance Analysts Would Have Recommended for a Noncompliance Finding in FY 2015 if Not for the DMC Pass and Puerto Rico Exemption**

FY	State	Grant Award	DMC Allotment Portion
FY 2016	Arkansas	\$393,873	\$78,775
FY 2016	Louisiana	\$590,832	\$118,166
FY 2016	American Samoa	\$74,099	\$14,820
	Total	\$1,316,968	\$211,761

Source: OJJDP
(external.ojp.usdoj.gov/selector/title?solicitationTitle=OJJDP%20FY%2016%20Title%20II%20Formula%20Grants%20Program&po=OJJDP (accessed August 3, 2017)).

⁶⁸ We do not include Puerto Rico here, because it was not part of the DMC pass but was afforded an exemption for different reasons. However, we do address Puerto Rico’s DMC exemption in our recommendations in Part IV.B.

4. DMC Record Keeping

Based on the records we reviewed, we identified instances where the failure by OJJDP employees to centrally maintain records of communications with states impaired the ability of compliance analysts to properly review state compliance and to respond to requests for information, such as those submitted by the OIG.

For example, according to an October 9, 2015 e-mail from Compliance Analyst 1 to an Indiana employee, Indiana's FY 2015 DMC plan had been identified as deficient in large part due to the age of the data upon which the state had relied. However, Coleman wrote to Compliance Analyst 1 in an e-mail later that day that she had previously advised Indiana that it could use older data, because the state had "historically struggled with data collection and most recently staff turnover." Regarding the exception Coleman had provided to Indiana, Compliance Analyst 1 wrote:

This information is not known to other analysts to be able to give a good assessment of where they are with regard to DMC. If the CDAF requirements are followed without the background and history, it is not fair to the state.

Coleman responded, "I'm not sure who reviewed Indiana's Plan but as you correctly stated the reviewer was probably unaware of these issues." Compliance Analyst 1 told us that the OJJDP employee who reviewed Indiana's plan probably would not have recommended Indiana to receive a deficient-state letter if he had known about the exception. Witnesses told us that the only record of this and other exceptions was in Coleman's e-mails. Compliance Analyst 1, Coleman, and the Acting Associate Administrator told us they believed it would be helpful for all important documents related to compliance review, including exceptions and extensions, to be uploaded into SharePoint or another central location at OJJDP.

The Acting Associate Administrator and Coleman also said that they thought it would be helpful to include more detail in the determination letters, such as information regarding the states' specific deficiencies, the states' previously identified plans for reducing DMC, concerns identified during audits, and whether any of the states' obligated funds had been held subject to special conditions.⁶⁹ Coleman told us and OJJDP records showed that much of this information had been included in the years before the DMC pass.

5. Progress on the CDAI in FY 2015 and the Plan for FY 2016 DMC Compliance Review

The Acting Associate Administrator, who assumed oversight of the CDAI in FY 2015, stated that staffing issues and personality conflicts delayed progress on the

⁶⁹ The Acting Associate Administrator told us that she decided not to include such information in the FY 2015 letters, because doing so would have required more editing. However, she told us that the additional information could have been included. Coleman also told us that the compliance review process was more rushed than normal in FY 2015, due to changes in the process that we described earlier in this part.

development of the tool. Indeed, several witnesses, including the Acting Associate Administrator, the Deputy Associate, and Compliance Analyst 1, told us that there were deeply rooted personal and professional tensions among staff, including compliance analysts and supervisors, that have made consensus on many issues, including the content of the CDAI, very difficult to achieve.

The Acting Associate Administrator said that that as of June 2016, she and Coleman were still working on the content of the CDAI questions. She stated that once she and Coleman finalize the questions and all of the compliance analysts agree to the content of the questions, they would submit the CDAI for another review by OGC and the BJS statistician, and a first review by Deputy Administrator Jones, Administrator Listenbee, and DMC Coordinators in each of the states and territories receiving formula grant funding. According to the Acting Associate Administrator, OJJDP would then conduct a conference call with the state DMC Coordinators to receive their feedback. The Acting Associate Administrator stated that once OJJDP received comments on the content of the questions from those sources, OJJDP staff would still need to agree upon and finalize the weights to be assigned to each of the categories within the CDAI – an issue about which the BJS statistician and OGC had expressed concerns when reviewing prior versions of the CDAI.⁷⁰

In early June 2016, the Acting Associate Administrator told us that she hoped this process would be complete by the end of the summer of 2016. However, when we met with the Acting Associate Administrator again in mid-October 2016, we found that OJJDP had made little progress on the CDAI during the previous several months. The Acting Associate Administrator told us that in September 2016 her term as Acting Associate Administrator of CPD ended, but that she maintained the responsibility of overseeing the completion of the CDAI.⁷¹ She stated that the content of the questions of the CDAI had not been finalized because the compliance analysts still could not agree. She further stated that around the time of her transition she attempted to edit the content of the CDAI to accommodate everyone's concerns and "streamline" it, but that both Compliance Analyst 1 and Coleman objected to the new version. Coleman told us that the Acting Associate Administrator's effort to "streamline" the CDAI resulted in a document that was a "shell" of the CDAI Coleman had originally created and that the Acting Associate Administrator had stripped the CDAI of essential elements that she mistakenly assessed to be "duplicative."

On September 15, 2016, after receiving Coleman's and Compliance Analyst 1's feedback on the new "streamlined" version of the CDAI, the Acting Associate Administrator wrote to the compliance analysts, "[A]s usual, we have hit a wall.

⁷⁰ Coleman told us that the BJS statistician recommended not scoring the CDAI at all, but that she disagreed with this recommendation.

⁷¹ Coleman told us that the Acting Associate Administrator of CPD as of October 2016 told the compliance analysts that she has no background in juvenile justice, DMC, or compliance monitoring. According to the Acting Associate Administrator, OJP is still searching for a permanent employee to fill the Associate Administrator position.

However, we have to move forward because we owe it to the compliance stakeholders.” The next day Coleman responded:

The ongoing view that “we have hit a wall”, in my opinion, stems from a perception that we as a team always challenge your direction and, as a result, deliverables cannot be completed. Though you may be correct to some degree, when we raise issues it is not because we are challenging your direction [sic] it is due to our vast knowledge, experience, and expertise in juvenile justice.

We are told we are [sic] the Subject Matter Experts (SMEs) or Analysts should “use our professional judgment” however it often feels (again my opinion) that our subject matter expertise or professional judgment is not valued.

The Acting Associate Administrator told us that after these exchanges she decided to remove herself from the CDAI discussions because she believed that her involvement might be stifling progress toward completion. Thus, as of October 2016, OJJDP still had to finalize the content of the CDAI questions; submit the questions to OGC, the BJS statistician, Deputy Administrator Jones, Administrator Listenbee, and the states for feedback; and determine the weighting.⁷²

The Acting Associate Administrator told us that she remained confident that the compliance analysts would resolve their differences and that the CDAI would be finalized before the next set of DMC plans were to be submitted in January 2017, despite her earlier testimony that the compliance analysts have historically struggled to agree. She further told us that she expected OJJDP to use the CDAI to qualitatively review DMC plans for the FY 2017 funding determinations. According to the new timeline set forth in OJJDP’s October 2015 Policy Statement, the compliance determinations for FY 2017 funding are due to the states no later than May 31, 2017.⁷³ See OJJDP Policy: Monitoring of State Compliance with the Juvenile Justice and Delinquency Prevention Act www.ojjdp.gov/compliance/monitoring-state-compliance-JJDPA-policy.pdf (accessed August 3, 2017).

The Acting Associate Administrator also proposed that each of the more experienced compliance analysts lead a working group on one of the four core requirements. She stated that each working group lead could be assigned the roles of training other OJJDP employees and addressing policy issues with management on the assigned core requirement, which might be more efficient than the current model of seeking consensus from all of the compliance analysts on every issue.

⁷² In addition, witnesses told us that once new DMC regulations are finalized, OJJDP may have to make corresponding adjustments to the CDAI.

⁷³ The Acting Associate Administrator, Coleman, and Compliance Analyst 1 told us that even once the CDAI is finalized, several compliance analysts still need additional training to be able to properly conduct DMC compliance review. They stated that the CPD had two new employees that had not been fully or formally trained on compliance review, including DMC compliance review. In addition, they told us that at least two of the more experienced compliance analysts would benefit from and also be amenable to additional DMC training.

Compliance Analyst 1 also stated that it might be helpful for new employees to shadow more seasoned employees.

F. Parameters of the Multi-Year DMC Pass and Whether the CDAI Was Necessary to Hold States Accountable for DMC Deficiencies

We asked several witnesses about their understanding of the parameters of the DMC pass and whether they believed using the CDAI was necessary for OJJDP to find states out of compliance with the DMC core requirement and make related funding reductions. We received widely varying responses to these questions.

First, witnesses had starkly different views about whether, following OGC's guidance in relation to Coleman's April 3, 2013 e-mail, OJJDP could have made a noncompliance determination for a state that failed to submit a DMC plan at all or submitted a DMC plan that failed to respond at all to an entire subsection of the DMC regulations. Madan and Moses told us that if a state did not submit a DMC plan at all, the state should not have been eligible for any JJDP Act formula grant funding and, according to Madan, "should have gotten zero money." However, Madan stated that he had never provided this specific guidance to OJJDP. Madan added that a state that failed to do anything to comply with an entire subsection of the regulations, such as a state that failed to complete an Assessment or a time-limited plan for completing an Assessment as required by 28 C.F.R. § 31.303(j)(2), similarly should have been completely ineligible for formula grant funding.⁷⁴ JJ Attorneys 2 and 3, however, told us that they were unsure if, after Coleman's e-mail, a state's funding for DMC could be reduced for failing to submit a DMC plan or submitting a DMC plan that was missing something required by the regulations. JJ Attorney 3 stated that she did not recall those possible scenarios being discussed. Moreover, several OJJDP witnesses told us that, under the pass, they believed they could not find a state out of compliance even if the state did not submit a DMC plan at all.

Witnesses also disagreed about what OJJDP had to do to begin finding states out of compliance short of the two extremes described immediately above. Madan told us that, given that Coleman's e-mail connected the absence of DMC standards to the regulations, he "would have told" Listenbee that new DMC regulations were needed before OGC could successfully defend DMC noncompliance determinations based on a determination that a plan that was submitted was insufficient. However, the OJJDP witnesses we interviewed, including Listenbee, told us that OGC never told them that new regulations were required to begin finding states out of compliance and that they believed a finalized CDAI was all that was required. Moses and JJ Attorney 3 told us that neither finalization of the CDAI nor new regulations were needed to begin finding states out of compliance with the DMC requirement. Rather, they told us that all that was required was for OJJDP to

⁷⁴ Madan relied on the JJDP Act itself for this proposition. He noted that the JJDP Act lists 28 items that must be included within each state plan for the state to be eligible for funding. 42 U.S.C. § 5633. If a state fails to submit a plan or submits a plan that "the Administrator, after reasonable notice and opportunity for hearing, . . . determines does not meet the requirements of" the JJDP Act, such state will become ineligible for funds under the formula grant program. 42 U.S.C. § 5633(d).

develop a consistent method of assessing DMC, so that OJJDP could articulate its bases for finding states out of compliance.

Moses stated that the method to consistently assess DMC could have been as simple as a checklist based upon the regulations. Similarly, JJ Attorney 3 told us that OJJDP could have used a form like the CDAI or the CDAF as a checklist to determine whether states had included within their plans the minimum information required under the regulations. Compliance Analyst 1 and Coleman both told us they believed that the draft CDAI or the CDAF should have sufficed as a checklist to determine whether states met the minimum requirements of the JJDP Act, the regulations, and the DMC manual, at least until the CDAI or another formal tool to qualitatively assess DMC compliance was finalized. However, Compliance Analyst 1 stated that management and OGC never advised staff that this was an option. Listenbee told us that he did not believe a simple checklist to determine minimal compliance with the regulations was an option that would have been taken seriously in "the field." He further told us that OGC never suggested that a simple checklist would have been sufficient. Moses acknowledged that OGC never suggested the use of a checklist to OJJDP. He stated that he believed AAG Mason and Administrator Listenbee wanted to "fix the system" not just "have a patch."

We showed JJ Attorney 3 documentation related to OJJDP's review of state DMC compliance in FY 2013 and FY 2015. Upon reviewing this documentation, JJ Attorney 3 told us that it appeared that OJJDP could have articulated adequate bases for finding states out of compliance based upon failures to comply with the minimum requirements of the DMC regulations. For example, we showed JJ Attorney 3 completed CDAIs for Louisiana and South Carolina from FY 2013. According to these forms, Louisiana had not submitted completed RRI's - or statistical data on rates of DMC - for all relevant contact points, and South Carolina had not submitted an Intervention plan. JJ Attorney 3 told us that both of these states submitted plans that were missing elements required by the regulations, and thus, OGC likely would have approved noncompliance determinations for these states had OJJDP shown that it consistently applied the regulations to all states. JJ Attorney 3 even noted that it was "striking" seeing South Carolina not submitting a DMC Intervention plan at all, given that "the money they get for their funding is about reducing DMC." We also showed JJ Attorney 3 the completed FY 2015 CDAF for New Hampshire, which indicated that the state had not inputted its data into the data tracking system and had not analyzed its data statewide and for three local jurisdictions. She told us that "it doesn't seem unreasonable that [OJJDP] could have found [New Hampshire] out [of compliance]."

However, JJ Attorney 3 stated that that OJJDP never told OGC that it was applying consistent criteria based upon the DMC regulations and never presented OGC with any DMC noncompliance recommendations after FY 2012. She told us that it appeared that OJJDP did not understand that all that was required to find states out of compliance was a consistent, articulable standard for assessing DMC. JJ Attorney 3 blamed this failure in communication on the poor relationship between OGC and OJJDP. She told us that she believed that, under the circumstances, a conversation between the General Counsel and the Administrator to clarify the guidance was warranted.

Significantly, witnesses told us that neither OJJDP leadership nor OGC provided any written guidance regarding the consequences of Coleman's e-mails or what had to happen to lift the DMC pass.

G. OGC's and OJJDP's Views on Whether OJJDP is Bound by the DMC Regulations

We asked several witnesses whether the DMC regulations had the force of law and, if so, whether OJJDP had an obligation to find states out of compliance for violating them, despite Coleman's e-mail. Madan and Moses both indicated that although OJJDP is bound by the DMC regulations, it is also bound by the APA, which requires that OJJDP make fair, consistent assessments of DMC compliance. Madan stated that the APA at a minimum requires that OJJDP show a "certain amount of consistency" in how it handles compliance and articulate a rational basis for finding a state noncompliant "so that a person seeking to challenge it may understand." Thus, they justified the DMC pass on their belief that OJJDP did not have a method to assess DMC compliance that met the requirements of the APA.⁷⁵ JJ Attorney 4 told us, however, that in other contexts OJP simply applies the regulations when OJJDP does not have an established instrument to assess compliance, because "the regs are the law."

Listenbee stated that the existing regulations were outdated because they were drafted before the JJDP Act had been reauthorized, that OJP was developing new regulations, and that his preference was to wait for the new regulations to be finalized before relying upon the DMC regulations to find states out of compliance. However, he conceded that the JJDP Act regulations have the force of law and that OJJDP is obligated to deny funding to states that violate them. Despite this concession, Listenbee told us that nobody "recommended" to him that he could rely solely on the statute and regulations to find states out of compliance with the DMC requirement. He specified that he received no such recommendation from BJS, experts in the field, OGC, or OJJDP managers or staff. At the same time, however, he acknowledged that he has a duty to administer the JJDP Act and its implementing regulations, and recommendations from others are not necessary to enable him to do so.

Listenbee stated that in order to begin applying the regulations to find states out of compliance, he would have to issue a new policy statement. The policy statement, in his view, would have to notify the states that, while awaiting completion of the CDAI, OJJDP would hold states accountable for failure to meet the minimum requirements of the regulations. He stated that once OGC approved such a policy, the policy was distributed to the states, and he had sufficient properly trained staff, OJJDP could begin enforcing the minimum requirements of the JJDP

⁷⁵ As we explain in Part IV, however, we found that OGC's assessment that OJJDP did not have a method to assess DMC compliance that met the requirements of the APA in FY 2012 was based on a restrictive reading of Coleman's April 3, 2013 e-mail. We further found that in subsequent years OGC did not seek to determine whether OJJDP in fact was able to assess DMC compliance in a way that was consistent with the requirements of the APA. Indeed, several witnesses we interviewed indicated that OJJDP was able to do so.

Act regulations. After reviewing a draft of this report, Coleman told us that she disagreed with Listenbee's view that a new policy statement would be necessary in order to apply the regulations to find states out of compliance. She explained that the JJDP Act formula grant solicitations since at least FY 2012 have notified states that compliance with the DMC core requirement is achieved when states "meet the requirements set forth in [the] Formula Grants Consolidated Regulation[s]."

IV. Conclusions and Recommendations

In this section we provide our analysis of Coleman's allegations that:

- During fiscal years 2009-2014, agency managers approved full funding for numerous states that were out of compliance with regulations implementing the [JJDP Act];
- In May 2014, agency managers advised compliance officials that every state would be approved for [JJDP Act] funding in 2015, regardless of compliance with statutory requirements.

With respect to the first allegation, we did not substantiate that OJJDP managers approved full funding for numerous states that were out of compliance with regulations implementing the DMC core requirement between FY 2009 and FY 2012. We considered FY 2013 and FY 2014 in connection with the second allegation, which employees within OJJDP have referred to as the "DMC pass." We substantiated this allegation, concluding that the DMC pass effectively has been in place since FY 2013.

We divided our analysis by year rather than by allegation:⁷⁶

- For FYs 2009-2011, we could not substantiate Coleman's allegation due to the inadequacy of OJJDP's records.
- For FY 2012, we found that Listenbee relied on OGC's advice in reversing three DMC noncompliance determinations, and we did not find that advice to be improperly motivated or beyond OGC's authority. However, we determined that OGC based this guidance on a restrictive reading of Coleman's April 2013 e-mail and did not consider less extreme alternatives to reversing the compliance determinations. Thus, we questioned OJJDP's awards of DMC funding to three states – Illinois, Louisiana, and South Carolina – in FY 2013.
- For FY 2013, we found that Listenbee approved full DMC funding for every state despite the belief of at least two compliance analysts that at least four states should have been found out of compliance. We

⁷⁶ We found that grouping our findings by fiscal year was truer to the narrative of events for at least two reasons. First, the individuals occupying management positions and the specific reasons for management's alleged inaction differed over the course of the FY 2009 through FY 2014 time period. Second, the FY 2014 DMC pass is connected to events going as far back as FY 2012 and extending as far forward as FY 2016; thus, we addressed the second allegation as part of our analyses of each of the time periods from FY 2012 forward.

found that the compliance analysts did not recommend these states for noncompliance findings due to a management directive that such recommendations would not be accepted by Listenbee. However, we determined that this management directive resulted from communication failures and other flaws in OJJDP's processes and, thus, was unnecessary and inconsistent with OJJDP's obligation to implement the JJDP Act and follow its own regulations. As a result, we questioned OJJDP's awards of DMC funding to four states – Arkansas, Illinois, Louisiana, and South Carolina – in FY 2014.

- For FYs 2014 and 2015, we substantiated that agency managers advised OJJDP employees that every state would be approved for JJDP Act funding in FYs 2015 and 2016, regardless of compliance with the DMC core requirement. As with our conclusions regarding FY 2013, we determined that the FY 2014 to FY 2015 DMC “pass” was unnecessary, inconsistent with OJJDP's obligation to implement the JJDP Act and follow its own regulations, and primarily caused by failures in communication and other flaws in OJJDP's processes. While OJJDP did not conduct sufficient DMC compliance review in FY 2014 for us to be able to question particular FY 2015 DMC funding awards, we questioned OJJDP's awards of DMC funding to three jurisdictions – American Samoa, Arkansas, and Louisiana– in FY 2016 that might not have occurred but for the DMC pass.

Overall, we found that from FY 2013 through FY 2016, all states were awarded the DMC portion of their JJDP Act formula grant allotments regardless of compliance with the DMC core requirement. We determined that the review processes for each of these years ultimately were shaped by OGC's restrictive guidance based on a single e-mail exchange with DMC Coordinator Andrea Coleman about the DMC compliance review process in April 2013, whether or not OGC actually intended its guidance to be used in this way. Although there was disagreement as to the adequacy of OJJDP's DMC compliance review process, we found that at a minimum OJJDP should have endeavored to make compliance determinations consistent with the regulations and consulted with OGC to determine the defensibility of any proposed noncompliance determinations on a yearly basis.⁷⁷ Moreover, we believe that with the passage of time, the need to correct any perceived deficiencies in the DMC compliance review program grew more acute as additional funding was provided regardless of compliance with key statutory and regulatory requirements. Although OJJDP has attempted to correct

⁷⁷ After reviewing a draft of this report, Moses told us that the regulations are inconsistent with the statute, because the regulations have not been amended since the statutory language of “disproportionate minority confinement” was expanded to “disproportionate minority contact.” However, this failure to update the regulations would make the requirements of the regulations less, not more, burdensome than the requirements of the statute. Thus, we do not believe that this inconsistency warrants OJJDP ignoring the current regulations. We do, however, agree that OJP should expeditiously effectuate any amendments to the regulations that it deems necessary to meet the more expansive language of the statute.

such deficiencies, it has failed to do so due to internal disagreements and delays in developing an acceptable solution.

Based on these findings, we make several recommendations regarding how OJJDP may improve its processes. These include making DMC compliance determinations in accordance with statutory and regulatory requirements; promptly clarifying OGC's guidance regarding the circumstances that would permit OJJDP to find states out of compliance with the DMC core requirement consistent with statutory and regulatory requirements; considering possible measures that may be put in place to aid the compliance review process short of a completed CDAI; ensuring the expeditious completion of the CDAI or other compliance assessment tool; considering reinstating "quarterly reporting" requirements, with guidance from OGC; obtaining guidance from OGC regarding whether to eliminate or revise the DMC exemption for Puerto Rico; improving recordkeeping procedures; and considering measures to enhance communication within and among OJP components.

A. Conclusions

We divide our Conclusions into four parts. We first examine the allegation that OJJDP managers approved full funding for several states that were out of compliance with the DMC core requirement between FY 2009 and FY 2011. We then examine the appropriateness of OJJDP's reversal of the FY 2012 DMC noncompliance determinations for Illinois, Louisiana, and South Carolina. Next, we examine the appropriateness of OJJDP finding all states in compliance with the DMC core requirement in FY 2013, regardless of their submissions. Finally, we examine the appropriateness of finding all states "not out of compliance" with the DMC core requirement in FYs 2014 and 2015, regardless of their submissions.

1. Management of DMC Compliance Monitoring in FYs 2009-2011

For FY 2009 through FY 2012, we found no evidence that OJJDP managers approved full funding for states with non-compliance recommendations or that any states were recommended out of DMC compliance for those years. We reached this determination because OJJDP, including Coleman, could not provide any records that showed that states were non-compliant with the DMC requirement for those years.

2. FY 2012 Reversals

OJJDP found Illinois, Louisiana, and South Carolina out of compliance with the DMC core requirement in September 2012, but reversed all three determinations in June 2013. We determined that Administrator Listenbee reversed the FY 2012 determinations based on OGC's guidance that the determinations would not be legally defensible after Coleman's April 3, 2013 e-mail to OJJDP and OGC personnel. However, we found that OGC's guidance was based upon a restrictive reading of Coleman's e-mail, coupled with a lack of consideration as to whether there were other bases to uphold the noncompliance determinations

notwithstanding the e-mail. As a result, we identified a total of \$337,973 in questionable DMC expenditures to three states in FY 2013.

OGC attorneys told us that they understood Coleman's April 3, 2013 e-mail to convey that OJJDP had no criteria to assess DMC, the regulations did not supply criteria for assessing DMC, and past compliance determinations, including those made in FY 2012, were based only on the subjective judgments of the OJJDP employees reviewing the states' plans. Based on this interpretation of the e-mail, we did not find implausible OGC's conclusion that the FY 2012 determinations could not be defended against claims of arbitrariness and caprice under the APA. As explained in Part II.D. *supra*, while the standard of review under the APA is highly deferential to agency action, a court will set aside agency action that is arbitrary or capricious, including action for which the agency cannot articulate a rational explanation. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. Moreover, agencies must not treat similarly situated entities differently without reason. *Marco Sales*, 453 F.2d at 7.

Had Coleman, in her capacity as the OJJDP DMC Coordinator, actually written that the FY 2012 DMC determinations were based purely on the subjective judgments of the reviewing employees without regard for regulatory or other standards, we would not question OGC's view that the e-mail undermined the credibility of the FY 2012 determinations. However, she did not say this in the April 3 e-mail, and we found that it was susceptible to at least two plausible interpretations. The first was OGC's interpretation. The second was what Coleman told us she meant to say.

Specifically, Coleman told us that she did not mean her e-mail to say that criteria did not "exist," that the regulations did not supply criteria, or that the problem impacted the FY 2012 determination process. According to Coleman, what she meant to say was that that *prior to* the development of the CDAI *and* the FY 2012 review process in which it was used, the OJJDP employees reviewing DMC plans did not always properly *apply* the regulations and that the use of the CDAI in FY 2012 allowed for better and more consistent application of the DMC regulations. While Coleman's e-mail was not written as precisely as it could have been, we found that what she meant to say was entirely consistent with what she actually wrote, with both the larger history of events as detailed above, and with what she told OGC and other OJJDP employees she meant to say in communications very shortly after she sent the April 3 e-mail itself.

We believe that any fair assessment of Coleman's April 3 e-mail message must include consideration of other statements she made about the CDAI in connection with the FY 2012 review process. This is so because OGC's concern about defending the FY 2012 compliance determinations based on the April 3 e-mail should have taken into account Coleman's other statements on the determination process, all of which would have been relevant to an arbitrary or capricious determination under the APA. When viewed in this larger context, we found that what Coleman described as her intended meaning in the April 3 e-mail was credible and should have been considered in assessing any litigation risk associated with the

e-mail. Specifically, in responding to JJ Attorney 2's criticism related to the CDAI, Coleman defended the CDAI to OGC in the April 3 message by writing:

[P]rior to the CDAI the determinations of compliance were based on the individuals reviewing the DMC Plans so there were no criteria based on [the statute, regulations, and manual]. These reviews, in many instances, led to states being found in compliance, submitting the same data/information in the annual updates, not identifying and assessing contributing factors, etc.

(Emphasis added). In other words, according to Coleman the CDAI supplied something that helped improve the compliance review process in FY 2012 – a tool setting forth “criteria based upon” the statute, regulations, and manual – and thereby permitted OJJDP to make legally appropriate noncompliance determinations. Coleman's clarifying e-mail to OGC only 7 days later further corroborated this point:

The standards we use for DMC compliance determinations have always been and continue to be the statute, regulations and guidance from OJJDP's DMC Technical Assistance Manual. I did not intend to say that there were no criteria prior to development of the CDAI, but rather that the CDAI enables a more consistent application of these criteria in making our annual determinations.

(Emphasis added).

Moreover, approximately 6 months earlier and within just 3 days of the issuance of the FY 2012 determinations, Coleman wrote a memorandum at OGC's request that used similar language to the April 2013 e-mails. Specifically, Coleman wrote that OJJDP generally had not made DMC funding denials before FY 2012, because prior determinations had been “contingent upon who reviewed the plans, discussions with states that would potentially be out of compliance, and informal policies.” To explain why DMC funding denials were being made in FY 2012 when denials had not been made previously, Coleman wrote that the CDAI, which was “primarily based on” the DMC regulations and manual, was created to “assist in making consistent determinations.” We found no evidence that OGC expressed concerns at that time that the determinations could not be defended.

Perhaps most significantly, General Counsel Madan acknowledged that the April 3, 2013 e-mail was susceptible to more than one interpretation and that the alternative, more benign interpretation might not have required reversal of the FY 2012 determinations. He stated that his initial assessment of Coleman's April 3 e-mail could have been influenced by conversations with his staff – staff that had previously experienced frustrations with Coleman in working on the CDAI and other matters – before he read it. Madan told us that he would have to conduct additional analysis to determine whether OGC would have provided the same guidance based on the alternate interpretation of Coleman's e-mail.

Madan told us that he had not considered alternatives to reversing the three FY 2012 noncompliance determinations, such as instructing compliance monitoring staff that the regulations do provide standards and to redo the compliance determinations accordingly. We believe OGC may have reacted too superficially in its assessment of the litigation risks posed by Coleman's April 3 e-mail message and could have done more to determine whether there was, in fact, a rational basis based on the entire record for the initial compliance determinations that OGC had agreed with before receiving the April 3 e-mail.

We determined that OJJDP awarded a total of \$309,812 in FY 2013 DMC funds based upon guidance it received from OGC after OGC's assessment of the risk posed by Coleman's April 3 e-mail. Moreover, we believe that there is a substantial question as to whether OGC would have provided the same guidance based on a fuller assessment of Coleman's statements about the CDAI and the FY 2012 DMC compliance review process, if considered in the aggregate. The import of Coleman's e-mail was essentially a reiteration of what OGC knew before it approved the noncompliance determinations in the first instance – that OJJDP had rarely made noncompliance determinations in the past and that OJJDP made the FY 2012 noncompliance determinations relying, at least in part, on application of the criteria contained in the CDAI. Courts are deferential to agency action, especially when the agency can articulate reasonable grounds to support its action and, in the case of a formula grant denial, demonstrate that it allowed the applicant prior opportunities to cure its deficiencies. See *County of Westchester v. Dept. of Hous. and Urban Dev.*, 802 F.3d 413, 432-433 (2d Cir. 2015) (affirming HUD denial of formula grant award based on applicant's failure to submit adequate supporting documentation because HUD provided adequate, written explanation to applicant and had allowed applicant prior opportunities to correct deficiencies). OJJDP provided each of the FY 2012 noncompliant states letters explaining their deficiencies under the DMC regulations and noting that they had been given prior opportunities to cure their deficiencies, but to no avail.

Nonetheless, we found that Listenbee did not act unreasonably in relying on advice of counsel as to their ability to defend the initial FY 2012 noncompliance determinations. In addition, given that Illinois, Louisiana, and South Carolina have likely financially relied upon the funds they were awarded in FY 2013, we defer to OJP to determine whether recoupment of any FY 2013 funds is appropriate based on our findings at this point.⁷⁸ As explained below, however, we found that OGC's guidance led not only to the FY 2012 reversals, but also to the decision to not find any states out of compliance with the DMC core requirement until finalization of the CDAI – which has essentially morphed into an indefinite DMC pass. As explained in the next two subparts, we found the DMC pass to be unnecessary and inconsistent with OJJDP's statutory and regulatory obligations. Accordingly, we incorporate recommendations in Part IV.B. below that OGC provide updated, written guidance to OJJDP regarding the circumstances that would permit a finding of noncompliance

⁷⁸ It is, of course, possible that OGC would have reversed the FY 2012 compliance determinations irrespective of Coleman's e-mail. For example, OJJDP might not have been able to produce adequate documentation to defend against an appeal.

with the DMC core requirement going forward, and that OJJDP consider other measures to improve its compliance monitoring processes. We also recommend that OJP consider measures to improve communication between OJJDP and OGC, in the hope of preventing future communications issues like those surrounding Coleman's 2013 e-mails.

3. FY 2013 Decision to Find All States In Compliance Regardless of Submissions

In FY 2013, Listenbee found every state and territory "in compliance" with the DMC core requirement even though compliance analysts believed at least four states should have been found out of compliance for failure to meet the minimum requirements of the DMC regulations. In addition, Listenbee eliminated the longstanding practice of requiring states that struggled with DMC compliance to report quarterly regarding their DMC progress, despite staff recommendations that 10 states submit to quarterly reporting. We found that these outcomes resulted in large part from communications failures and were both unnecessary and incompatible with OJJDP's mission to responsibly administer the JJDP Act formula grant program.

Witnesses provided conflicting statements about why all states were found in compliance in FY 2013. Listenbee told us that he refused to find states out of compliance because he received noncompliance recommendations too close to the deadline to assess whether they were well founded. However, the Associate Administrator, Deputy Associate, Coleman, and Compliance Analyst 1 all told us, and contemporaneous e-mails corroborated, that there had been a directive that no states be found out of compliance well before the deadline and before any noncompliance recommendations even went up the chain for review. Moreover, the Associate Administrator and Deputy Associate told us that Listenbee was the one who issued that directive. Further complicating matters, the Department's Responses to the questions for the record (QFR) arising from Mason's April 21, 2015 Senate testimony justified both the absence of FY 2013 noncompliance determinations and the later DMC pass on OGC's earlier guidance in connection with Coleman's e-mail. In any event, even assuming Listenbee's statements to the OIG were accurate and the conflicting evidence flawed, Listenbee signed the determination letters and was ultimately responsible for their content in FY 2013.

Based on our review of the evidence, we determined that finding all states in DMC compliance in FY 2013 regardless of the completeness of their submissions was unnecessary and resulted, at least in part, from communication failures within and among OJP components. For example, Listenbee stated that he believed that he could not defend noncompliance determinations and quarterly reporting requirements because ACT was relying on a new "policy" that had not been approved. However, the evidence we reviewed showed that ACT was simply applying the requirements of the DMC statute, regulations, and Manual, and that quarterly reporting was a longstanding OJJDP practice. In addition, OGC employees appeared to believe, consistent with the responses to the QFRs described above, that the decision to find all states in compliance emanated from their earlier guidance related to Coleman's April 2013 e-mail. However, Listenbee and the

OJJDP employees within ACT told us that they believed, at least at the outset of the FY 2013 review period, that they could find states out of compliance that year irrespective of OGC's earlier guidance.

As explained in Part II.D. above, OJJDP is bound by and must follow the JJDP Act and its implementing regulations. See, e.g., *Leslie*, 611 F.3d at 180. The JJDP Act provides that in order to receive JJDP Act formula grants each state "shall submit a plan" that incorporates the 28 items listed in the statute, one of which is addressing efforts to reduce DMC. 42 U.S.C. § 5633 (a). Madan and Moses told us that a state is ineligible for any JJDP Act funding if it does not do so. The JJDP Act further provides that a state's formula grant funding "shall be" reduced by 20% if the state does not comply with the DMC core requirement. 42 U.S.C. § 5633(c). The regulations provide that compliance with the DMC core requirement "is achieved when a State meets" certain listed requirements. 28 C.F.R. § 31.303(j). Listenbee, Madan, and Moses all agreed that OJJDP is bound by the regulations, provided that its actions are not otherwise arbitrary and capricious.

OJJDP compliance analysts told us that Arkansas, Illinois, Louisiana, and South Carolina all failed to comply with the DMC regulations and that they would have recommended such states to be found out of compliance if not for the directive that no states be found out of compliance in FY 2013. Based on our review of the CDAIs for these states combined with witness testimony, we believe that recommendations to find these four states out of compliance would have been well supported by the DMC regulations and could not reasonably have been seen to be arbitrary and capricious based on the available and undisputed evidence. For example, according to Compliance Analyst 1 and the CDAI she completed in FY 2013 for South Carolina, the state failed to submit an Intervention Plan as required by 28 C.F.R. § 31.303(j). Both Coleman and Compliance Analyst 1 told us that for this and other reasons South Carolina failed to meet the minimum requirements of the DMC regulations, and JJ Attorney 3 told us that she believed OGC likely would have approved a recommendation to find South Carolina out of compliance in FY 2013. However, due to Listenbee's alleged directive, neither OJJDP management nor OGC even considered whether the analysts' recommendations were consistent with the regulations and otherwise free of arbitrariness and caprice.

Based on our findings, we identified a total of \$530,000 in questionable FY 2014 DMC expenditures to four states. However, we cannot determine whether OJJDP actually would have found each of these states out of compliance and made associated funding reductions if not for Listenbee's alleged directive, because noncompliance recommendations never formally went up the chain and through OGC for review. In addition, given that the states have likely financially relied on their FY 2014 awards, we defer to OJP to determine whether recoupment of any FY 2014 funds based on our findings is appropriate. However, our conclusions in this part inform many of our recommendations in Part IV.B. below regarding improving OJJDP's DMC compliance monitoring processes and improving communications within and among OJP components to ensure more reliable DMC determinations in the future.

4. FY 2014 and FY 2015 DMC Pass

In FY 2014 and FY 2015, OJJDP found all states “not out of compliance” with the DMC core requirement without considering potential noncompliance recommendations from OJJDP compliance analysts and without assessing each year whether OJJDP employees in fact had the ability to make compliance assessments that were free of arbitrariness and caprice. We found that this DMC “pass” was an outgrowth of OGC’s 2013 guidance that led to the reversal of the FY 2012 noncompliance determinations and, thus, had effectively been in place for 4 years. We also determined that OJP intended to continue the DMC pass until employees could agree upon the content of the CDAI or another compliance assessment tool, whenever that might be. Based on our review of the evidence, we concluded that the ongoing DMC pass primarily resulted from failures of communication, was unnecessary, and was inconsistent with OJJDP’s statutory and regulatory obligations. Moreover, with the passage of time, we believe that the need to correct any perceived deficiencies in the DMC compliance review program grew more acute as additional funding was provided regardless of compliance with key statutory and regulatory requirements.

The Associate Administrator and Deputy Associate told us that before the compliance review process began in FY 2014, Ayers informed them that, based on direction from Listenbee, once again no states would be found out of compliance with the DMC core requirement. While Listenbee denied that he issued or even was aware of such a directive, he acknowledged that based on OGC guidance he believed he could not deny states their DMC funding until the CDAI was finalized. Moreover, Listenbee’s Chief of Staff told us that the DMC pass was discussed during leadership meetings that Listenbee chaired.

Although we did not identify any explicit guidance from OGC recommending a DMC pass, Madan, Moses, and other OGC attorneys appeared to assume that the ongoing DMC pass emanated from their guidance in 2013 related to Coleman’s e-mail. Indeed, the Department’s Responses to QFRs arising from Mason’s April 21, 2015 Senate testimony justified the “not out of compliance” determinations based on Coleman’s April 2013 e-mail. However, as explained above, we found that the 2013 guidance did not take into account an alternative interpretation of Coleman’s e-mail and other relevant information that could have led to a different assessment of the situation. Moreover, regardless of whether the FY 2012 reversals were necessary, we found that OGC’s guidance regarding the ongoing DMC pass was incomplete, unclear, and provided without a full understanding of the review process that OJJDP in fact had in place.

First, while OGC attorneys approved the language in the FY 2014 determination letters, they told us that they could not remember whether they had considered or provided any guidance to OJJDP as to whether or why the pass was legally permissible. They also provided guidance on the DMC pass language without confirming who had made the determination that no states would be found out of compliance or why.

Second, we were unable to find any written guidance from OGC between FY 2013 and FY 2016 regarding what circumstances would permit OJJDP to find a state out of compliance with DMC, and we found that the oral guidance provided during that time period was inconsistent and unclear. For example, while Madan told us that he believed after Coleman's April 2013 e-mail that new regulations were needed to find states out of compliance, Moses and JJ Attorney 3 told us that all OJJDP needed was a consistent, articulable method of assessing DMC. Neither of these views was understood by OJJDP employees, who told us that they believed an approved CDAI was what was needed. Moreover, Madan told us that a state that failed to submit a DMC plan at all or failed to submit anything in response to an entire subsection of the regulations would be ineligible for any formula grant funding. However, we found that OJJDP employees were not aware of OGC's view in this regard, and that it was not carried out in instances such as that of South Carolina in FY 2013 as discussed above.

Third, we found that OGC did not have a complete understanding of the procedures OJJDP in fact had in place to conduct compliance review between FY 2013 and FY 2015 and, thus, never assessed whether those procedures were sufficient to withstand attack as arbitrary or capricious. Once JJ Attorney 3 reviewed FY 2013 CDAs and FY 2015 CDAs for some states, she told us that she realized OJJDP was able to articulate reasons for finding states out of compliance and that OGC likely would have approved recommendations to find certain states out of compliance assuming OJJDP could demonstrate that it applied the regulations to all states. JJ Attorney 3 suggested that OJJDP did not understand OGC's guidance and that a conversation between the General Counsel and the Administrator to clarify the guidance was warranted.

Based on this evidence, we determined that the blanket DMC pass largely resulted from failures of communication and was unnecessary. While witnesses told us that the CDAI is needed to allow for better qualitative assessments of states' efforts to address DMC, we have identified no reason that, until the CDAI is finalized, OJJDP cannot hold states accountable for failure to submit what is minimally required by the DMC regulations. Indeed, based on our review of the evidence – including numerous CDAs and CDAs from 2012, 2013, and 2015, the testimony of two compliance analysts who had consistent views regarding which states failed to meet the minimum regulatory requirements each year, and the testimony of an OGC attorney that OGC likely would have approved noncompliance determinations had it seen certain CDAs and CDAs – there were several states that likely should have been found out of compliance between FY 2012 and FY 2015.

More fundamentally, we have found that an indefinite DMC pass due to OJJDP's own failure to agree upon the content of a compliance assessment tool is inconsistent with OJJDP's statutory and regulatory obligations. While the Acting Associate Administrator told us that OJJDP expects to begin using the CDAI to make compliance determinations based on the statute and regulations beginning in FY 2017, given the history and current status of the CDAI as described in Part III.E.5. above, we are not confident that this will happen. As explained above, OJJDP is bound by its own regulations, which require states to submit DMC plans that meet

certain requirements in order to receive DMC funding. Madan and Moses did not dispute that OJJDP is bound by the JJDP Act regulations, but told us that OJJDP must also ensure that its review process does not result in outcomes that are arbitrary or capricious under the APA. However, the evidence showed that neither OJJDP leadership nor OGC assessed each year whether OJJDP in fact was able to make determinations that were free of arbitrariness and caprice. We believe that, at a minimum, this was required and could have avoided finding all states “not out of compliance” due to a perceived inability to comply with the APA. In addition, we are concerned by the impact of the indefinite DMC pass on states’ incentive to comply with statutory and regulatory requirements.

Because OJJDP employees did not conduct a full review of the DMC submissions in FY 2014, we were unable to identify questionable awards to particular states in FY 2015. However, we found that OJJDP employees likely would have recommended three jurisdictions – American Samoa, Arkansas, and Louisiana – for noncompliance findings in FY 2015 if not for the DMC pass. Based on these findings, we identified a total of \$211,761 in questionable DMC expenditures in FY 2016.

Once again, given that the states have likely financially relied on their FY 2015 and FY 2016 awards, we defer to OJP to determine whether recoupment of those funds based on our findings is appropriate. However, in Part IV.B. we recommend that OJJDP enforce the requirements of the DMC regulations, based on clear, articulated standards derived from the regulations even if the CDAI is not completed by that time. In addition, we recommend that OGC promptly issue written guidance regarding the circumstances that permit OJJDP to find states out of compliance with DMC consistent with the statutory and regulatory requirements. We also recommend that OGC provide guidance as to whether to eliminate or revise the DMC exemption for Puerto Rico, and that OJJDP consider instituting certain measures to improve the DMC compliance review process, consistent with the DMC statute, regulations, and manual.

B. Recommendations

In this part we set forth eight recommendations to address the conclusions above and other concerns we identified with OJP’s processes.

Recommendation 1: OJJDP should make DMC compliance determinations in accordance with statutory and regulatory requirements.

As explained in our conclusions, we found that OJJDP is bound by the JJDP Act and its implementing regulations, including the DMC regulations, as well as the APA’s requirement that agency action not be arbitrary or capricious. Witnesses told us that a tool like the CDAI is important for conducting qualitative assessments of DMC plans. We do not doubt this. However, as of the writing of this report the CDAI has not been finalized after many years of efforts. Short of an approved CDAI, we believe that OJJDP is obligated and able to assess whether states have submitted DMC plans that meet the minimum requirements of the DMC statutory provision and regulations, without violating the arbitrary and capricious standard of

the APA. This is not to say that OJJDP has no authority to make exceptions where appropriate. However, we have determined that an indefinite DMC pass due to OJJDP's own failure to agree upon the content of a compliance assessment tool is inconsistent with OJJDP's obligations.

To assist with preventing arbitrariness and caprice in OJJDP's decision making, in Recommendation 2 below we suggest that OGC issue written guidance regarding the circumstances that would permit DMC noncompliance findings and in Recommendation 3 below we suggest measures to improve the compliance review process.

Recommendation 2: OGC should promptly issue written guidance clarifying the circumstances under which OJJDP appropriately may find states out of compliance with the DMC core requirement consistent with the statutory and regulatory requirements, and OJJDP managers and staff should work closely with OGC to implement such guidance.

As explained in our Conclusions above, we found that OGC's guidance since at least FY 2013 regarding the circumstances that would permit DMC noncompliance findings has been inconsistent and unclear. Moreover, one OGC attorney acknowledged that OJJDP did not seem to understand OGC's guidance. We found that the absence of written guidance from OGC has contributed to this problem.

Accordingly, we recommend that OGC promptly issue *written* guidance clarifying what circumstances would permit OJJDP to find states out of compliance with the DMC core requirement. Based on the information that we gathered during the course of our review, OGC should consider incorporating within this guidance explanations of or recommendations regarding:

- The baseline requirements of the DMC regulations (both the existing regulations and any that are pending final promulgation);
- The extent to which OJJDP may impose requirements that are contained within the DMC Manual or other sources, but not specifically incorporated into the regulations;
- The circumstances that would make a state ineligible for JJDP Act funding entirely versus the circumstances that would warrant a 20% reduction in funding;
- The circumstances that would warrant freezing or otherwise placing a special condition on a state's funding;
- The circumstances that might lead to a finding that a particular compliance determination is arbitrary or capricious, and practical steps that might enable OJJDP to avoid such a finding (OGC may wish to consider the bullets in Recommendation 3 in this regard);
- The circumstances that might warrant an exception from one or more regulatory requirements or an extension of time to submit a required item for a particular state; and

- Effective documentation and recordkeeping strategies (which are also discussed in Recommendation 7 below).

In a report issued earlier this year, the OIG found that in the past OJJDP has in certain circumstances refused to follow OGC's guidance. We strongly recommend that OJJDP work collaboratively with OGC to resolve the problems identified in this report.

Recommendation 3: OJJDP should consider possible measures that may be put in place to aid the compliance review process short of a completed CDAI.

In connection with or in addition to OGC's guidance in accordance with Recommendation 2 above, we recommend that OJJDP consider putting in place measures that could aid the compliance review process short of a completed CDAI or other compliance assessment tool. Based upon the input of OJP employees we interviewed as described in Section III and Part IV.A. above, such measures that could be considered include, but are not limited to the following:

- Using the most recent CDAI draft or the CDAF as a checklist to determine whether states have met the minimum DMC regulatory requirements, until the CDAI is finalized to enable more qualitative reviews;
- Affording states adequate opportunity to correct deficiencies before compliance determinations are issued;
- Requiring advance approval from either a supervisor or the DMC Coordinator before exceptions or extensions of time are issued to states;
- Developing a DMC training program for all OJJDP employees reviewing DMC compliance, including seasoned compliance analysts (the former Acting Associate Administrator suggested that Coleman develop and facilitate such a program);
- Identifying one person (possibly a supervisor or the DMC Coordinator) or a panel of OJJDP employees to review all compliance determinations to ensure basic adherence to regulatory requirements and that states are not treated inconsistently without reason;
- Hiring a permanent Associate Administrator of the Core Protections Division (or whichever division contains OJJDP employees handling JJDP Act compliance review) as expeditiously as possible, and filling that position with an individual who has experience in JJDP Act compliance monitoring;
- Setting and adhering to realistic deadlines for proposed compliance determination letters to reach each individual or entity in the chain of review, including OGC, such that proposed determination letters may be received by the Administrator with adequate time to review and address any issues;

- Arranging for OJJDP leadership and OGC to meet in person with compliance analysts regarding any recommendations to find states out of compliance with the DMC core requirement;
- Improving documentation and recordkeeping procedures (discussed in detail in Recommendation 7 below); and
- Establishing working groups for each of the core requirements, each led by an experienced compliance analyst tasked with coordinating training for other employees and communicating with management regarding policy and other matters.⁷⁹

Recommendation 4: OJJDP should ensure the expeditious completion of the CDAI or other compliance assessment tool.

Assuming OJJDP and OGC continue to believe that the CDAI or other compliance assessment tool is necessary and appropriate, we recommend that the Administrator ensure the expeditious completion of the tool.⁸⁰ We also recommend that the Administrator identify who within OJJDP is the appropriate person to resolve disputes regarding the content of the compliance assessment tool.

Recommendation 5: OJJDP should consider whether to reinstitute “quarterly reporting” requirements, with guidance from OGC.

Before Listenbee became Administrator, OJJDP had instituted a practice of requiring certain states to report quarterly on their compliance with the DMC core requirement. In addition, OGC provided guidance on a proposed “Quarterly Reporting Policy and Protocol” in FY 2013. However, Listenbee eliminated the practice later in FY 2013, despite the protests of several OJJDP employees who believed that the practice was beneficial. OJJDP witnesses even told us that some states were disappointed by the elimination of quarterly reporting requirements.

Accordingly, we recommend that OJJDP consider whether to reinstitute its “Quarterly Reporting Policy and Protocol” or develop a new one, with guidance from OGC.

Recommendation 6: OGC should provide guidance regarding the DMC exemption for Puerto Rico.

At least three OJJDP employees and Deputy General Counsel Moses expressed concerns to us about the appropriateness of the DMC exemption for Puerto Rico. We have been unable to determine why Puerto Rico is afforded an indefinite DMC exemption while it enjoys the benefit of receiving DMC funds, without even being required to submit statistics regarding its ethnic make-up or

⁷⁹ This bullet point is based on a recommendation from the former Acting Associate Administrator.

⁸⁰ We note that OGC may wish to consider whether it is legally permissible to find states out of compliance with the DMC core requirement based on a failure to achieve a certain score on a compliance assessment tool like the CDAI, given the JJDP Act’s prohibition against “establishing or requiring numerical standards or quotas” for reducing DMC.

changes thereto. We have found that no other states or territories receive such an exemption. Accordingly, we recommend that OGC provide guidance to OJJDP on the legality of the DMC exemption for Puerto Rico and that OJJDP consider whether to eliminate or revise the exemption, consistent with such guidance.

Recommendation 7: OJJDP should take measures to improve its recordkeeping procedures.

As described in Part III.E.4. above, we identified several flaws in OJJDP's recordkeeping practices that have impacted DMC compliance assessments. We believe that OJJDP's processes would be both fairer to states and more efficient if OJJDP improved its recordkeeping. Thus, we recommend that OJJDP considering instituting the following measures:

- Require OJJDP employees to upload all state DMC plans, OJJDP forms completed during compliance review, compliance analyst notes, documentation regarding extensions and exceptions, compliance recommendations, draft determination letters, final determination letters, significant e-mails, and other important documents related to compliance review to a standard location, such as a SharePoint site.
- Incorporate into each state's compliance determination letter more detailed information regarding DMC compliance regardless of whether the state is found in or out of compliance, which may include the state's DMC strengths and deficiencies, the state's progress over the years on reducing DMC, whether the state has received a particular exception or extension, and whether any of the state's past or present awards are frozen subject to special conditions; and
- Maintain yearly master spreadsheets detailing important information regarding each state's compliance status.

Recommendation 8: OJP should develop a plan to improve communications within and among OJP components.

We found significant communication failures within and among OJP components that resulted in or contributed to many of the problems we identified in this report. First, as explained in Part IV.A.2. above, we found that the OGC guidance in FY 2013 that led to the reversal of the FY 2012 compliance determinations was based in part upon a failure of communications between Coleman and OGC employees. Second, as explained in Part IV.A.3., we determined that the decision by Listenbee in FY 2013 to find all states in compliance with the DMC core requirement was based on several more miscommunications. Third, as explained in Part IV.A.4., we found that the ongoing blanket DMC pass might well have been avoided with better communication among OJJDP management, OJJDP staff, and OGC. Finally, we observed that OJJDP employees had difficulties communicating among themselves and with OGC employees regarding the development of the CDAI.

With this background in mind, we believe OJP should develop a plan to improve communications within and among its components, and should consider including the following suggestions as a part of that effort:

- OGC staff and OJJDP personnel have regular meetings during which OGC explains updates in the law and significant recent legal interpretations and during which OJJDP staff describe to OGC recent developments in the juvenile justice field and issues and dilemmas they have encountered in compliance monitoring;
- OGC provides written legal opinions providing practical guidance on compliance matters when issues arise; and
- OJJDP identifies “lead employees” to oversee particular important policy and other matters, and these “lead employees” communicate directly with OJJDP leadership regarding proposals and concerns.⁸¹

⁸¹ We found similar communication failures and made similar recommendations to resolve them in a report entitled “A Report of Investigation of Certain Allegations Referred by the Office of Special Counsel Concerning the Juvenile Justice and Delinquency Prevention Act Formula Grant Program,” which addresses certain allegations contained in the 2014 OSC referral referenced in note 1 of this report. See oig.justice.gov/reports/2017/o1703.pdf#page=1 (accessed August 3, 2017).

ATTACHMENT

A



U.S. Department of Justice

Office of Justice Programs


Office of the Assistant Attorney General

Washington, D.C. 20531

SEP 15 2017

MEMORANDUM TO: Michael E. Horowitz
Inspector General
United States Department of Justice

THROUGH: Daniel C. Beckhard
Assistant Inspector General, Oversight and Review Division
Office of the Inspector General
United States Department of Justice

FROM: Alan R. Hanson 
Acting Assistant Attorney General

SUBJECT: Response to the Office of the Inspector General's Draft Report,
A Review of Allegations Referred by the Office of Special Counsel Concerning the Office of Justice Programs' Administration of the Disproportionate Minority Contact Requirement of the Title II Part B Formula Grant Program

This memorandum responds to the Office of the Inspector General's (OIG's) August 10, 2017, draft report entitled, *A Review of Allegations Referred by the Office of Special Counsel Concerning the Office of Justice Programs' Administration of the Disproportionate Minority Contact Requirement of the Title II Part B Formula Grant Program*. The draft report notes longstanding issues with the Office of Juvenile Justice and Delinquency Prevention's (OJJDP) monitoring of state compliance with the four core requirements¹ of the Juvenile Justice and Delinquency Prevention Act (JJDP), and specifically the process for determining compliance with the Disproportionate Minority Contact (DMC) core requirement.

Over the past several years, OJJDP has worked diligently to ensure that states² that receive funds under the Title II Part B Formula Grant Program comply with the four core requirements by revising outdated guidance, developing sound controls to ensure consistent application of compliance policies, and improving communication and transparency with the states. In 2015, to ensure adequate oversight of the compliance monitoring responsibilities, as part of a reorganization, OJJDP established the Core Protections Division to oversee and monitor each state's compliance with the JJDP. In September 2017, a new permanent Associate Administrator was hired for the Core Protections Division.

¹ 1) Deinstitutionalization of Status Offenders; 2) Separation of Juveniles from Adults in Institutions; 3) Removal of Juveniles from Adult Jails and Lockups; and 4) Reduction of Disproportionate Minority Contact.

² "States" includes U.S. Territories and the District of Columbia.

To address some of the longstanding concerns related to the DMC compliance determination review process, in coordination with OJP's Office of the General Counsel (OGC), OJJDP developed a standardized template to consistently document and guide its review of DMC data and compliance reports submitted by the states. Beginning with Fiscal Year (FY) 2016 funding eligibility determinations, Core Protections Division staff documented compliance determination reviews and assessments on the standardized form. All determinations and assessments were reviewed and approved by OJJDP management to ensure a consistent approach was utilized to review the compliance submissions.

To further strengthen guidance related to the DMC core requirement, OJJDP increased training and technical assistance to states on implementing DMC reduction programs (e.g., OJJDP's DMC Reduction Model). Specifically, in FY 2014, OJJDP awarded two cooperative agreements to assist state, local, and tribal governments in implementing DMC reduction programs; provide guidance in the areas of Identification, Assessment, Intervention, Evaluation, and Monitoring of the DMC Reduction Model; and deliver training to professionals in state and local juvenile justice systems. Since FY 2014, OJJDP's training and technical assistance providers have responded to more than 30 requests for assistance from State Administering Agencies, state and county probation and corrections agencies, juvenile courts, and community organizations, on topics such as DMC data collection and evaluation, training for juvenile justice professionals, and strategic planning for State Advisory Group members.

While OJJDP has made progress in improving its oversight of compliance with the JJDPA, we recognize that additional improvements are needed. We agree with the eight recommendations included in the draft report. OJJDP and OGC will implement appropriate corrective actions to address the recommendations and continue collaborating to ensure that OJJDP is able to disseminate clear and consistent guidance to the states.

We appreciate the opportunity to respond to the draft report. If you have any questions regarding this response, please contact Ralph E. Martin, Director, Office of Audit, Assessment, and Management, at (202) 305-1802.

cc: Maureen A. Henneberg
Deputy Assistant Attorney General

Eileen M. Garry
Acting Administrator
Office of Juvenile Justice and Delinquency Prevention

cc: Rafael A. Madan
General Counsel

Ralph E. Martin
Director
Office of Audit, Assessment, and Management

Leigh Benda
Chief Financial Officer

Silas V. Darden
Director
Office of Communications

Richard P. Theis
Director, Audit Liaison Group
Internal Review and Evaluation Office
Justice Management Division

Jorge L. Sosa
Director, Office of Operations – Audit Division
Office of the Inspector General

OJP Executive Secretariat
Control Title IT20170816144605

The Department of Justice Office of the Inspector General (DOJ OIG) is a statutorily created independent entity whose mission is to detect and deter waste, fraud, abuse, and misconduct in the Department of Justice, and to promote economy and efficiency in the Department's operations. Information may be reported to the DOJ OIG's hotline at www.justice.gov/oig/hotline or (800) 869-4499.



Office of the Inspector General
U.S. Department of Justice
www.justice.gov/oig