Responses to Questions about New Guidance on "Detain or Confine"
Set #2

How does one know when a juvenile enters the universe of monitoring for jail removal purposes, under this revised guidance? Currently, states are monitoring facilities to ensure that youth are not in *secure custody*. How does the state's monitoring activity need to change?

For the jail removal core requirement, states must monitor facilities to ensure that youth are not *detained or confined* in any jail or lockup for adults [with certain exceptions]. Therefore, the universe of facilities that states must monitor for jail removal remains the same (e.g., jails and lockups for adults). However, the state must also monitor these facilities to determine whether and when youth are *detained or confined* within the facility*,* rather than only when they are in *secure custody*. The monitoring must account for all juveniles that are in the jail or lockup for adults **and** are in the status of being *detained or confined*—i.e., not free to leave.

This means that if a juvenile is *detained* during processing in the facility, it may constitute a violation of the jail removal requirement. If, for example, a juvenile who is accused of a delinquent offense is being processed at an adult jail or lockup, the 6-hour clock would start as soon as the juvenile was first *detained* – i.e., not free to leave – and would continue to run, regardless of whether processing had been completed.

This requirement does not apply if a juvenile is *detained or confined* in a vehicle or in a location other than an adult jail or lockup (for example, a school or a juvenile-only residential facility).

We have seen a stronger push for evidence for the work we do. In that light, what is the data supporting the need for the change?

The new guidance reflects the plain language of the jail removal and separation core requirements, and the meaning of "detain" under Supreme Court case law and in common law enforcement parlance.

If you read Congressional comments from the 1980s, this does not appear to be their intent. It is also not supported in the 1996 Formula Grant regulations.

The U.S. Supreme Court has made clear that in determining the meaning of a statute, one must first look to the plain language of the statute. "The starting point in discerning congressional intent… is the existing statutory text." *Lamie v. U.S. Trustee*, 540 U.S. 526, 527, 124 S. Ct. 1023 (2004), citing *Hughes Aircraft Co. v. Jacobson,* 525 U.S. 432, 119 S .Ct. 755 (1999). When the language of a statute is plain and unambiguous, reference to legislative intent is unwarranted. *Dellmuth v. Muth*, 491 U.S. 229, 109 S. Ct. 2397, 2401 (1989).

Do regulations carry the same weight as "positions"?

Regulations promulgated pursuant to the requirements of the Administrative Procedures Act (APA) are generally afforded greater deference by courts than agency policies that have not been published for notice and comment in the Federal Register. Where regulations and/or policy are inconsistent with the underlying authorizing statute (such as the JJDPA), however, the statute must be followed.

You have mentioned that this new direction is supported by case law, yet no citations are provided to support this.

Generally speaking, a person is detained, or seized within the meaning of the Fourth Amendment if, by means of physical force or show of authority, in view of all the circumstances surrounding the incident, a reasonable person would believe that he was not free to leave. *United States v. Mendenhall*, 446 U.S. 544, 554 (1980). Conversely, if, in view of all the circumstances surrounding the incident, a reasonable person would believe that he *is* free to leave, he has not been detained. *United States v. Bradley*, 923 F.2d 362 (5th Cir. 1991)

Have there been any changes in the interpretation of the Detained vs. Processing? In some situations a jail/facility must bring a youth into the facility to process them. How does that pertain to being detained?

If a juvenile is detained during processing, it may constitute a violation of the jail removal requirement. If, for example, a juvenile who is accused of a delinquent offense is processed at an adult jail or lockup, the 6-hour clock would start as soon as the juvenile was first detained – i.e., not free to leave – and would continue to run, regardless of whether processing had been completed. Any instance in which a status offender is detained in an adult jail or lockup – including while being processed -- would represent a violation of jail removal.

How should we monitor "time-out" rooms in residential facilities? Time-out rooms are locked rooms in an otherwise completely non-secure facility that services non-offenders and status offenders.

The answer to this question turns on whether the residential facility is (1) a jail or lockup for adults; (2) a secure correctional facility or secure detention facility; or 3) an institution in which juveniles are detained and in which they might have contact with adult inmates. If the facility is not in one of the three foregoing statutory categories, violations of Sections 223(a)(11), (12), or (13) cannot occur therein. Therefore, that facility (including any "time out" room) should only be monitored to the extent that by practice it may begin to be used as one of the three types of facilities described above.

On a 30-second delayed egress door, does the activation device need to be posted?

The concept of delayed egress doors and related activation devices is not relevant any longer because the distinction between non-secure and secure custody is no longer relevant to determine violations.