

Thursday, June 9, 2016

VIA ELECTRONIC SUBMISSION

<http://www.regulations.gov>

ATTN: Luis C. deBaca, Director
SMART Office, Office of Justice Programs
United States Department of Justice
810 7th St. NW.
Washington, DC 20531

RE: Comments on the Proposed Supplemental Guidelines for Juvenile Registration Under the Sex Offender Registration and Notification Act; Docket no. OAG 151; AG Order No. 3659-2016

Dear Director deBaca:

We, the undersigned organizations, represent an alliance of legal experts, child advocates and juvenile justice policy experts, researchers and treatment providers concerned about the practice of including youth on sex offender registries. We appreciate your office for considering updated guidelines regarding SORNA's provision on the inclusion of youth on sex offender registries (OAG Docket Number 151) and also understand that you are working within the confines of SORNA to develop this approach. But the current proposal falls short of addressing the root of the problem: registering youth is harmful and undermines public safety goals. As written, these guidelines may also lead to grave unintended consequences, by incentivizing jurisdictions to strengthen harmful practices rather than pursue evidence-based approaches to public safety.

We urge you to: 1) Hold a full public hearing on the proposed guidelines to examine unintended consequences and alternative approaches that would better serve public safety before finalizing; 2) Convene a taskforce to study and recommend best practices for youth charged with sex offenses; 3) Revise the guidelines to incentivize evidence-based practices proven to prevent and intervene with sexual harm, and; 4) Move toward implementing a system that both reassures states they will not lose Byrne grant funding if they do not register youth and also discourages state policies that require youth registration.

Please note that we worked closely with a separate bi-partisan coalition of diverse stakeholders to develop our comments. While the two submissions are similar, our comments add specific concerns relating to the prosecution of youth in adult courts and the potential for these proposed guidelines to expand that detrimental practice.

Our comments follow:

I. Existing social science and nearly all relevant professional and research bodies disagree with the inclusion of youth in registration and notification policies.

We strongly support measures to keep children and communities safe from sexual harm. This requires effective public policies driven by fact, not fear. The empirical evidence is conclusive: registering children is harmful and counter to public safety goals. The research overwhelmingly condemns the practice of subjecting children to sex offender registration and notification restrictions. Consider the following statements by these organizations:

- **The Association for the Treatment of Sexual Abusers (ATSA):**

“Increasingly, research findings show that registration and public notification policies, especially when applied to youth, are not effective and may do more harm than good.”¹

- **International Association for the Treatment of Sexual Offenders (IATSO):**

“Sexual offender registries and community notification should not be applied to juveniles. Given the developmental needs of youth, their culpability being different from adults, and the labels and stigmas that adults can place on children through unproven avenues such as registration and notification IATSO is extremely skeptical of the long-term utility of such policies and is concerned by their potentially harmful effects on the very communities these policies seek to serve.”²

- **The Sex Offender Management Assessment and Planning Initiative (SOMAPI)**, a project of the SMART Office; and the **Center for Sex Offender Management (CSOM)**, a project of the

¹ Association for the Treatment of Sexual Abusers, “Adolescents Who Have Engaged in Sexually Abusive Behavior: Effective Policies And Practices,” October 30, 2012. <http://www.atsa.com/pdfs/Policy/AdolescentsEngagedSexuallyAbusiveBehavior.pdf>

² Michael Miner et. al., “Standards of Care for Juvenile Sexual Offenders of the International Association for the Treatment of Sexual Offenders,” *Sexual Offender Treatment*, 1:3 (2006).

Office of Justice Programs, the National Institute of Corrections, and the State Justice Institute are among the expert bodies that caution against the long-term labelling of youth as sex offenders.³ CSOM warns:

“...registration of juveniles has not been found to increase public safety, and it comes with potential unintended consequences, such as social and peer rejection, disruption in the development of a healthy identity, and other barriers to adjustment and stability.”⁴

- **The Illinois Juvenile Justice Commission (IJJC)**, the state’s federally mandated State Advisory Group, also recently completed a comprehensive study on effective responses to youth adjudicated of sexual offenses. IJJC recommends eliminating youth registration. The commission’s strongly worded 2014 report cautioned:

“Treating youth like adults and categorically applying registries and other barriers to stable housing, education, family relationships, and employment does not protect public safety. On the contrary, employing these strategies is much more likely to undermine youth rehabilitation, harm intrafamilial victims of sexual abuse, stigmatize families, and produce poor outcomes for communities.”⁵

We are not aware of a single peer reviewed study, government agency or professional association that has determined that continued registration of children benefits public safety or protects victims. In fact, evidence indicates the opposite.

II. Applying lifelong consequences to youth contradicts the best evidence we have on what is best for young people and their communities.

Placing kids on sex offender registries labels them for life and impedes their chances to become successful, educated, employable adults. Teens who are raised on registries are denied housing, jobs and education. They are isolated and depressed – one in five will attempt suicide.⁶ They are also vulnerable to cycles of incarceration for technical violations like failing to update their addresses on time with local police if they become homeless, or forgetting to change their employment status if they get a new job.

³ See US Department of Justice, Office of Justice Programs, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking, *Sex Offender Management Assessment and Planning Initiative*, by Kevin Baldwin, Susan Faupel, Tom Leverage, Christopher Lobanov-Rostovsky, Roger Przybylski, Phil Rich, Michael Seto, Dominique A. Simons, and Jane Wiseman, October 2014; US Department of Justice, Office of Justice Programs, Center for Sex Offender Management, *Twenty Strategies for Advancing Sex Offender Management in Your Jurisdiction*, by Madeline M. Carter, December 2008.

⁴ US Department of Justice, Office of Justice Programs, Center for Sex Offender Management, *Twenty Strategies for Advancing Sex Offender Management in Your Jurisdiction*, by Madeline M. Carter, December 2008.

⁵ Illinois Juvenile Justice Commission, “Improving Illinois’ Responses to Sexual Offenses Committed by Youth,” March 2014.

⁶ Human Rights Watch, “Raised on the Registry: The Irreparable Harm of Placing Children on Sex Offender Registries in the US,” May 2013.

Additionally, registries harm registrants, their families, their communities, and in many cases their victims. Because child-on-child sexual harm is often intrafamilial, putting a teenager on the registry often tears apart a victim's family.⁷ Youth adjudicated of sexual offenses are also often victims of trauma themselves. Of the 500 people placed on the registry as youth who were interviewed for the 2013 Human Rights Watch Report *Raised on the Registry: The Irreparable Harm of Placing Children on Sex Offender Registries in the US*, **all had been identified by the child welfare system as victims of abuse or neglect in the year before the underlying offense** that placed them on the registry.⁸ Rather than addressing the underlying trauma, youth placed on registries are re-victimized by registration.

III. With appropriate intervention, youth grow up and do not cause further sexual harm.

The latest empirical findings show that **over 95 percent of youth adjudicated of sex offenses will never cause sexual harm again, with or without registration.**⁹ This is true across offense type and whether youth register or not. Research also suggests that youth adjudicated of sexual offenses categorized as particularly aggressive under SORNA are no more likely than their peers adjudicated of non-sex offenses or of lesser sex offenses to harm sexually again.¹⁰ Youth are most often acting opportunistically and experimentally, and their behavior cannot be treated as intractable character flaws.¹¹

Given recent research on adolescent development it should come as no surprise that a young person's actions are not a good indicator of how they will behave as adults. Youth are more likely to act impulsively but grow out of dangerous or harmful behavior. They are uniquely amenable to intervention and change.¹² The Supreme Court has relied on this research over the last decade to affirm the need to protect youth from the harshest adult consequences in its judgments in *Roper v. Simmons* (2005), *Graham v. Florida* (2010), *Miller v. Alabama* (2012), and most recently *Montgomery v. Alabama* (2016).

⁷ See Human Rights Watch, "Raised on the Registry"; Illinois Juvenile Justice Commission, "Improving Illinois' Responses to Sexual Offenses Committed by Youth"; US Department of Justice, Office of Juvenile Justice Delinquency and Prevention, *Juveniles Who Commit Sex Offenses Against Minors*, by David Finkelhor, Richard Omrod, and Mark Chaffin, December 2009.

⁸ Nicole Pittman, Reanalysis of *Raised on the Registry* interviews, Unpublished, 2015. Verified with court documents by Human Rights Watch.

⁹ Michael F. Caldwell, "Quantifying the decline in juvenile sexual recidivism rates," *Psychology, Public Policy, and Law* (forthcoming).

¹⁰ See Michael F. Caldwell, Mitchell H. Ziemke, and Michael J. Vitacco, "An examination of the sex offender registration and notification act as applied to juveniles: Evaluating the ability to predict sexual recidivism," *Psychology, Public Policy, and Law*, 14:2 (2008): 89-114; Ashley B. Batastini, Elizabeth Hunt, Julie Present-Koller, and David DeMatteo, "Federal standards for community registration of juvenile sex offenders: An evaluation of risk prediction and future implications," *Psychology, Public Policy, and Law*, 17:3 (2011): 451 – 474.

¹¹ See Franklin E. Zimring, *An American Tragedy: Legal Responses to Adolescent Sexual Offending*, (Chicago: The University of Chicago Press, 2004); Mark Chaffin, "Our Minds Are Made Up – Don't Confuse Us with the Facts: Commentary on Policies Concerning Children with Sexual Behavior Problems and Juvenile Sex Offenders," *Child Maltreatment*, 13:2 (May 2008).

¹² See Laurence Steinberg & Elizabeth S. Scott, "Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty," *American Psychologist*, 58:12 (2003); Laurence Steinberg, "A Social Neuroscience Perspective on Adolescent Risk Taking," *Developmental Review*, 28:1 (2008).

Youth can cause real harm and need support to take responsibility for their actions when they do. But registering youth contradicts the best evidence we have about what works and goes far beyond the rehabilitative goals of a separate juvenile justice system. This is the only circumstance in which even youth who are adjudicated in juvenile court face lifelong adult consequences.

IV. Registries have no public safety benefits and are counterproductive.

The proposed guidelines inaccurately imply that registering youth can be an effective public safety tool, stating:

...the jurisdiction [that has discretionary registration for youth in juvenile court and prosecutes most youth in SORNA's juvenile registration category in adult court] protects the public through registration at least as effectively as a jurisdiction that proceeds against more offenders as juveniles and has mandatory registration based on delinquency adjudications, because all individuals convicted of qualifying sex offenses as adults are required to register.

But studies conclude that registering youth does not protect the public. It neither further lowers already very low recidivism rates, nor deters sexual harm.¹³ Instead, existing research compellingly documents the hazards of including youth on registries. Two studies that examined data in South Carolina found that sex offender registration and notification failed to influence sexual and nonsexual violent recidivism rates.¹⁴ A similar study looking at over 3,000 cases over 13 years found that SORN policy was not associated with deterrence of first-time charges for youth sex offenses.¹⁵ In a review of the existing literature on child development, child sexual behavior and registration, Chaffin (2008) concluded that registration and notification policies stigmatize and isolate children with no identifiable public benefits. He noted that registration and notification break social bonds that are important to healthy adolescent development.¹⁶

¹³ See Elizabeth J. Letourneau, Dipankar Bandyopadhyay, Debajyoti Sinha, and Kevin S. Armstrong, "The influence of sex offender registration on juvenile sexual recidivism," *Criminal Justice Policy Review* 20:2 (2009): 136-153; Elizabeth J. Letourneau, Dipankar Bandyopadhyay, Kevin S. Armstrong, and Debajyoti Sinha, "Do sex offender registration and notification requirements deter juvenile sex crimes?" *Criminal Justice & Behavior* 37:5 (2010): 553-569; Michael F. Caldwell and Casey Dickinson, "Sex Offender Registration and Recidivism Risk in Juvenile Sexual Offenders." *Behavioral Sciences & the Law* 27:6 (Nov/Dec 2009): 941-95.

¹⁴ See Elizabeth J. Letourneau et. al., "The influence of sex offender registration on juvenile sex offender recidivism.;" Elizabeth J. Letourneau and Kevin S. Armstrong, "Recidivism rates for registered and nonregistered juvenile sex offenders," *Sexual Abuse: A Journal of Research and Treatment*, 20 (2008).

¹⁵ Elizabeth J. Letourneau et. al., "Do sex offender registration and notification requirements deter juvenile sex crimes?"

¹⁶ Mark Chaffin, "Our Minds Are Made Up – Don't Confuse Us with the Facts: Commentary on Policies Concerning Children with Sexual Behavior Problems and Juvenile Sex Offenders."

Registering youth is also costly. A recent cost-benefit analysis found that registering youth adjudicated in juvenile courts comes with social and government costs of roughly \$3 billion a year.¹⁷ Jurisdictions could instead redirect some of these funds to evidence-based treatment, positive social supports, and intervention efforts that actually prevent sexual abuse and provide services to victims.¹⁸ Missing from the proposed guidelines are any incentives for such effective public safety practices.

V. The proposed supplemental guidelines may have unintended negative public safety consequences by incentivizing harmful policies and disincentivizing evidence-based practice.

We know what works. With age-appropriate treatment, intervention and social support, youth found guilty of serious sexual harm do not hurt others sexually again. The practices the proposed guidelines encourage jurisdictions to maintain — registration, weakening of juvenile court confidentiality, and transfer to adult court — do not improve safety. Instead, they upend young people’s chances at successful reintegration into society. These policies make it harder for youth to succeed, and make communities less safe.

While we appreciate that these supplemental guidelines open the door to greater discretion in juvenile court, we are concerned that they also incentivize states to hold onto youth registration, and to strengthen or expand policies that prosecute large numbers of youth in adult court. The proposed guidelines state that they will “enhance public safety by incentivizing a broader range of measures that may protect the public from serious juvenile sex offenders.” But the measures the guidelines appear to incentivize are not those proven to make the public safer. Instead, the proposed guidelines encourage jurisdictions to broadly prosecute youth in SORNA’s qualifying juvenile offense categories in adult court and to couple that with discretionary registration of youth in juvenile court and loosened confidentiality protections for those whom the juvenile court does not require to register. This is the opposite direction that your office and the nation are moving in juvenile justice and could have serious consequences for youth and communities.

Reports issued by the Centers for Disease Control and the Office of Juvenile Justice and Delinquency Prevention conclude that prosecuting youth in adult rather than juvenile court increases the likelihood of violent recidivism among transferred youth.¹⁹ The Attorney

¹⁷ Richard B. Belzer, “The Costs and Benefits of Including Juveniles on Sex Offender Registries,” *R-Street Institute Policy Study No. 41* (September 2015).

¹⁸ Chaffin, “Our Minds Are Made Up – Don’t Confuse Us with the Facts.”

¹⁹ See US Department of Justice, Office of Juvenile Justice and Delinquency Prevention, *Juvenile Transfer Laws: An Effective Deterrent to Delinquency?*; Centers for Disease Control and Prevention, Task Force on Community Preventive Services, “Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult System.”

General’s Taskforce on Children Exposed to Violence recommends that youth not be prosecuted in adult court:

“No juvenile offender should be viewed or treated as an adult. Laws and regulations prosecuting them as adults in adult courts, incarcerating them as adults, and sentencing them to harsh punishments that ignore or diminish their capacity to grow must be replaced or abandoned.”²⁰

Encouraging jurisdictions to transfer youth to adult court undermines the Attorney General’s Taskforce’s recommendations and the best evidence on what works. Youth prosecuted as adults are more likely to be confined in adult correctional facilities, where they are especially vulnerable to sexual victimization and suicide.²¹ In an attempt to protect children from sexual harm, guidelines which encourage prosecution in adult court may actually increase youth victimization. Youth transferred to the adult system or confined in adult facilities may also have less access to the age-appropriate and evidence-based treatments available in the juvenile justice system.

These guidelines may also unintentionally widen racial and ethnic disparities. Courts are more likely to transfer Black and Latino youth to adult court than White youth, due largely to implicit bias at key decision-making points.²² Recent research suggests that youth of color may also be more likely to be adjudicated of violent sexual offenses than White youth.²³ The supplemental guidelines incentivize registration and prosecution practices that could disparately impact Black and Latino youth. Jurisdictions should instead eliminate youth registration and direct resources to strengths-based, evidence-driven and culturally-competent practices that minimize disparities.

VI. This current trajectory contradicts the rehabilitative goals of the juvenile justice system and the current administration’s policies

Policies that mark kids as “sex offenders” contradict the administration’s recent bold steps to promote second chances and eliminate criminal justice practices that are harmful to youth.

²⁰ See US Department of Justice, Attorney General’s National Task Force on Children Exposed to Violence, “Defending Childhood: Report of the Attorney General’s National Task Force on Children Exposed to Violence,” (December 12, 2012).

²¹ See US Department of Justice, Bureau of Justice Statistics, *Suicide and Homicide in State Prisons and Local Jails*, by Christopher J. Mumola, (August 21, 2005); US Department of Justice, Bureau of Justice Statistics, *Sexual Victimization in Prisons and Jails Reported by Inmates, 2011-12*, by Allen J. Beck, Marcus Berzofsky, Rachel Caspar, and Christopher Krebs, (May 2013).

²² See Amanda Burgess-Proctor, Kendal Holtrop, and Francisco A. Villaruel, “Youth Transferred to Adult Court: Racial Disparities,” *Campaign for Youth Justice*, Adulthood Volume 2 (2008); Donna M. Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, (Chicago, IL: University of Chicago Press, 2000); Neelum Arya and Ian Augarten, “Critical Condition: African-American Youth in the Justice System,” *Campaign for Youth Justice*, Race and Ethnicity Volume 2 (2008).

²³ Rebecca L. Fix, Melissa A. Cyperski, and Barry R. Burkhart, “Disproportionate Minority Contact: Comparisons Across Juveniles Adjudicated for Sexual and Non-Sexual Offenses,” *Sexual Abuse: A Journal of Research and Treatment* 1-18 (2015).

When President Obama banned solitary confinement for youth in federal prisons, he spoke to the devastating mental health consequences of solitary and the insurmountable barriers it places in a young person's path to reentry:

*"The United States is a nation of second chances, but the experience of solitary confinement too often undercuts that second chance. Those who do make it out often have trouble holding down jobs, reuniting with family and becoming productive members of society."*²⁴

We need to bring the same sort of thinking to registration of youth. Registration, like solitary confinement, alienates and isolates. Youth on registries have alarming rates of suicide and depression. They are ostracized. They are required to register long after they serve sentences in juvenile prison and undergo treatment and can never shake the "sex offender" label. These young people deserve a second chance, too. Attorney General Lynch's words on second chances ring true here:

*"In order to truly make our communities safer, we must make sure that people who have served their time are able to fully and productively engage in our society — whether through education or employment or some other constructive means."*²⁵

Youth on registries face insurmountable barriers to living, working, and going to school. These barriers do not make us safer and deny youth the right to grow up to be more than their worst moments. *The SMART Office should consider following the administration's trajectory on youth justice and should hold hearings to consider an alternative means to allow full compliance with SORNA.*

VII. Recommendations:

While we understand that your office is working within the confines of SORNA, we ask that in the interest of achieving SORNA's goals **you consider the following steps:**

1. Hold a full public hearing on these proposed supplemental guidelines before finalizing.

This hearing would give the Department of Justice and the SMART Office an opportunity to review the evidence about placing youth on registries, explore the least restrictive and best solutions relating to the public safety goals of SORNA, and evaluate potential costs and unintended consequences of updating the approach to substantial compliance in this way.

2. Convene a task force to study and recommend best practices for youth charged with sexual offenses.

Such a taskforce would closely examine the latest research on the impact of youth registration and community notification. It would compile recent findings on what

²⁴ Barack Obama, "Why we must rethink solitary confinement," *The Washington Post*, January 25, 2016.

²⁵ Loretta Lynch, "Second Chances Vital to Justice Reform," *The Huffington Post*, July 30, 2015.

works best to prevent sexual harm and respond to youth who have committed sexual offenses, and it would examine the prevalence and impact of prosecuting youth charged with sexual offenses in adult court. Based on these findings, it would recommend effective practices for responding to youth sexual behavior and sexual harm.

- 3. Revise the guidelines to explicitly incentivize evidence-based rather than harmful practices.** For example, if a jurisdiction has a policy against placing any youth on sex offender registries but instead ensures that every young person adjudicated of a sexual offense undergoes a validated evaluation and is placed in risk and needs-based programming, that jurisdiction may actually better protect the public and serve SORNA's goals than one which applies discretionary or mandatory registration or that prosecutes most youth in SORNA's youth registration category in adult court.
- 4. Move towards implementing a system that both reassures states that they will not lose Byrne grant funding if they do not register youth and also discourages state policies that require youth registration.** A stronger approach would better align with the spirit of SORNA, the Department of Justice's initiatives, and what we know is best for youth, families and communities. Ultimately, we need a legislative fix to fully remove youth from registries. We the undersigned hope that the SMART office and the Department of Justice will support such Congressional action. In the meantime, we urge you to consider this slightly more authoritative approach.

Youth registration should end. There is simply no empirical evidence that registering children adjudicated in juvenile courts has any public safety value, and it comes at an enormous cost to youth, families, victims and communities. Governments allocate tremendous resources — roughly \$3 billion nationally each year — to tracking low-to-no risk children, taking away what otherwise could go to rehabilitative and victims' services. Incentivizing states to prosecute youth in adult court is not a solution — and only trades one harmful, costly and counterproductive practice for another. The SMART Office has the opportunity to encourage policies that work to prevent sexual abuse rather than cause more damage.

Sincerely,

Campaign for Youth Justice

Wisconsin Council on Children and Families

Citizens for Juvenile Justice

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