

	Interstate Commission for Juveniles	Opinion Number 03-2010*	Page Number: 1
ICJ Advisory Opinion Issued by: Executive Director: Ashley H. Lippert Chief Legal Counsel: Richard L Masters			
Description: Rule 5-101: The sending state's ability to "override" a denial; who has decision making authority to "override" a denial; and, Adam Walsh Act implications		Dated: March 31, 2010	

Background:

Pursuant to Commission Rule 8-101.3, a request has been made by the ICJ Compliance Committee for an interpretation of Rule 5-101.5 to address the following issues:

Case Scenario:

In accordance with Rule 4-104.6 and 5-101.4, a juvenile sex offender is denied acceptance by the receiving state. However, the sending state 'overrides' the denial and sends the juvenile sex offender anyway according to Rule 5-101.5 which states in part: ". . . the sending state shall submit a Court order or written justification of an authorized official containing the reason(s) for the decision to proceed with the placement ***before supervision will be accepted in the receiving state.***" (emphasis added)

This part of the rule appears to require that the receiving state must accept the juvenile offender upon receipt of the written justification, negating Rules 4-104.6 and 5-101.4 and giving the sending state the ultimate authority despite the laws of the receiving state.

Issues:

Does Rule 5-101.5 allow the sending state to 'override' the denial of acceptance of supervision of a juvenile under Rules 4-104.6 and 5-101.4? Does ICJ Rule 5-101.5 require that a decision to override the receiving state's denial of a transfer of supervision must be made by a judge or a parole authority and would the sending state incur potential civil legal liability? Does a judge or parole authority in another state have the jurisdiction/authority to force a receiving state to supervise a juvenile in violation of state or federal laws? Do the provisions of the Adam Walsh Act apply to such transfers of supervision?

Analysis and Conclusions:

The civil liability, if any, resulting from harm to a victim by a juvenile sex offender transferred to a receiving state based upon a decision to 'override' the denial of such a placement could be attributed to the State which made such a determination. Whether or not such liability would result would depend upon such factors as whether the determination of the sending state to 'override' the receiving state's denial was a judicial function such as a Court order (in which case judicial immunity would apply) and if not ordered by a Court, whether the action can be classified as 'discretionary' or 'mandatory'

* *This advisory opinion was superseded by rule changes effective January 1, 2011*

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and whether the risk of harm to a potential victim resulting from such a decision was 'foreseeable.' See for example *Sterling v. Bloom*, 723 P.2d 755 (ID, 1986) (probation officer could be held personally liable for damages resulting from injuries to the plaintiff occurring while the probationer was under the control of the Department of Corrections; also *Hertog v. City of Seattle*, 979 P.2d 400 (WA, 1998) (probation officers have a duty to third persons, such as a rape victim, to control the conduct of probationers to protect them from "reasonably foreseeable harm.") Thus, the 'better practice' would be for a Judge or Parole authority to make the required determination under Rule 5-101.5.

However, the text of the new rule (5-101.5) **does not expressly limit the decision to 'override' the receiving state's denial to a Judge or Parole authority.** The literal text is: "If the judge or other appropriate authority in the sending state decides to proceed with the placement despite the concerns of the receiving state, the sending state shall submit a Court order or written justification of an authorized official containing the reason(s) for the decision to proceed with the placement before supervision will be accepted in the receiving state." The term "other appropriate authority" would seem to allow a compact office to provide such a justification. It is also important to remember that any such Court order or decision by 'other appropriate authority' must be submitted by the sending state "before supervision will be accepted in the receiving state" under this rule.

As to the question of whether a judge or parole authority in another state has the jurisdiction/authority to force a receiving state to supervise a juvenile in violation of state or federal laws, ICJ Rule 5-101.4 provides that "Supervision may be denied when the home evaluation reveals that the proposed placement is unsuitable or that the juvenile is not in substantial compliance with the terms and conditions of supervision required by the sending or receiving state." The clear intent of this rule is to prevent a transfer of supervision under the compact when in violation of terms and conditions of supervision including transfers in violation of state or federal law. The rules must be read consistently with one another so that 5-101.5 allows a sending state to 'override' a receiving state's denial under 5-101.4 or 4-104.6 unless such an order would violate state or federal law, the opinion would not leave a basis for any other conclusion.

With respect to the sex offender registration requirements of the Adam Walsh Child Protection and Safety Act of 2006, 18 U.S.C. §3509(m) - §3142(c), federal law requires that certain juveniles register as sex offenders if they have been convicted as an adult or

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adjudicated delinquent in juvenile court, so long as the juvenile is 14 years of age or older and is convicted of an offense similar to or more serious than federal aggravated sexual assault. (See 18 U.S.C. §2241. In addition to offenses such as forcible rape, this statute covers any offense involving a sex act with a victim under the age of twelve (12). As long as the registration requirements are met in both the sending and receiving states under the compact, the provisions of Rule 5.101.5 do not appear to directly conflict with the above referenced provisions.¹

¹ The Walsh Act organizes sex offenders into three tiers and mandates that Tier 3 offenders (the most serious tier) update their whereabouts every three months with lifetime registration requirements. Tier 2 offenders must update their whereabouts every six months with 25 years of registration, and Tier 1 offenders (which includes minors as young as 14 years of age) must update their whereabouts every year with 15 years of registration. Failure to register and update information is a felony under the law. It also creates a national sex offender registry and instructs each state and territory to apply identical criteria for posting offender data on the Internet (i.e., offender's name, address, date of birth, place of employment, photograph, etc.)

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