



March 15, 2018

Via First Class and Electronic Mail

BPD Monitoring Team
c/o Kenneth Thompson
Venable LLP
760 East Pratt Street, Suite 900
Baltimore, MD 21202

**RE: *U.S. v. Police Department of Baltimore City*, case no. 1:17-cv-00099-JKB
Initial Comments on Baltimore Police Department's Use of Force Policies**

Dear Mr. Thompson:

On behalf of NAACP Legal Defense and Educational Fund, Inc. ("LDF"), we write to provide initial comments on the Baltimore Police Department's ("BPD") draft use of force policies. LDF has appreciated the opportunity to provide comments during consent decree negotiations, selection of the monitor, and the development of the monitoring plan in the case of *U.S. v. Police Department of Baltimore City*. We welcome the opportunity to now provide comments on the BPD's draft policies. In its investigative report, the U.S. Department of Justice ("DOJ") found, among other things, that the BPD: needlessly used overly aggressive tactics that escalated encounters and resulted in excessive force; and used unreasonable force against individuals who did not pose a threat or were members of vulnerable populations, such as youth and individuals with mental health disabilities.¹ With this track record, BPD officials are wise to prioritize revising its use of force policies during the first year of the federal consent decree's implementation.

LDF is encouraged that the draft policies have incorporated many of the promising practices adopted by law enforcement executives nationwide,² including an emphasis on valuing and preserving human life in all situations and an officer's duty to intervene to prevent the excessive use of force.³ We urge the BPD to continue to follow the lead of these executives by adopting common sense use of force policies and training that go beyond what is constitutionally required, and are necessary to ensure the safety of members of the public and police. In other

¹ U.S. Dep't of Justice Civil Rights Division, *Investigation of the Baltimore City Police Department*, 76-98 (Aug. 10, 2016), <https://www.justice.gov/opa/file/883366/download> [hereinafter *DOJ Report*].

² See generally Police Executive Research Forum, *Guiding Principles on Use of Force* (March 2016), <http://192.168.1.1:8181/http://www.policeforum.org/assets/30%20guiding%20principles.pdf> [hereinafter *PERF, Guiding Principles*].

³ See, e.g., Baltimore Police Department, *Draft Use of Force Policy 1115* (Feb. 3, 2018), <https://www.powerdms.com/public/BALTIMOREMD/documents/332427>.

words, constitutional requirements should be the floor, not the ceiling.⁴ Additionally, any use of force policies should extend to all sworn officers to whom the BPD has granted the authority to patrol city streets. Accordingly, we offer general comments on BPD’s draft use of force policies below.

1. De-escalation tactics should be a separate policy and include interactions with youth and people with mental and behavioral health disabilities

The consent decree states that the BPD must “require officers to use de-escalation techniques, including verbal persuasion and warnings and ... techniques such as slowing down the pace of an incident, waiting out subjects, creating distance ... whenever possible, before resorting to force...”⁵ While the draft use of force policies mention the de-escalation requirement, they do not detail the various techniques that could be used. To address this omission, we recommend that the BPD create a separate and distinct de-escalation policy.

The goal of de-escalation is for officers to prevent interactions from developing into dangerous situations that risk serious injury or death. The consent decree recognized that “tactics leading up to the use of force can influence whether the force used was necessary.”⁶ It also urges the use of de-escalation tactics during interactions with youth and people with mental and behavioral health disabilities.⁷ Therefore, a separate de-escalation policy should:

- Help officers identify opportunities for de-escalation and require critical reflection after an incident about missed opportunities to reduce force;
- Outline specific protocols for interacting with youth, including developmentally appropriate, gender-informed, and trauma-informed de-escalation tactics;
- Train officers to recognize residents with mental and behavioral health disabilities and outline protocols for responding safely;
- Encourage police to rely on resources outside of law enforcement (including behavioral health providers, crisis intervention teams, and negotiators); and
- Help officers to identify warning signs that another officer is on the verge of using force and impose an obligation to intervene.

⁴ See PERF, *Guiding Principles* at 35 (“Agencies should continue to develop best policies, practices, and training on use-of-force issues that go beyond the minimum requirements of *Graham v. Connor*.”).

⁵ Consent Decree, *United States v. Baltimore Police Dep’t.*, No. CV JKB-17-99, 2017 WL 1301500, 43 (D. Md. Apr. 7, 2017) (ECF No. 2–2), <https://www.justice.gov/opa/file/925056/download> [hereinafter Consent Decree].

⁶ *Id.* at 46.

⁷ *Id.* at 39 and 45.

2. Policies should state unequivocally prohibited use of force

The consent decree provides that the BPD must explicitly prohibit several activities related to the use of force. For example, officers are prohibited from using force to punish individuals for fleeing, resisting arrest, or assaulting an officer.⁸ Additionally, BPD must prohibit: 1) the use of chokeholds or neck holds; 2) the use of a baton or other impact weapons on restrained persons; 3) the use of Oleoresin Capsicum Spray to disperse crowds; 4) the firing of warning shots; and 6) firing at moving vehicles.⁹ BPD should consistently and explicitly state in its policies that these activities are prohibited and then offer any exceptions to the general rule.

For example, the draft policy for the use of conducted electrical weapons (CEW), such as Tasers, has a section titled “prohibited uses of CEW.” But, that section begins, “[e]xcept where lethal force would be permitted, the member shall not use a CEW...”¹⁰ We recommend that the section and similar sections in other policies state at the outset, the use of X weapon is prohibited in the following circumstances, and at the end of the section list exceptions to the rule. Doing so, would emphasize the BPD’s stated commitment to the “sanctity of human life,” and the “peaceful resolutions” of conflicts without resorting to the use of force.¹¹

3. Less-Lethal Force

The consent decree requires that the use of force policy should “guide officers on all force techniques, technologies, and weapons that are available to BPD officers and clearly define and describe each force option and the circumstances under which use of such force is appropriate and consistent with potential types of resistance.”¹² This should be reinforced through trainings in which officers demonstrate mastery of appropriate less-lethal options based upon scenarios where the offense at issue and the threat to physical harm vary.

While the draft policies consistently state the consent decree requirement that the BPD will equip members with less-lethal alternatives, such as a CEW, the department’s draft Less-Lethal Munitions and Chemical Agents Policy 414 should describe circumstances that may lead to the appropriate use of less-lethal alternatives after de-escalation tactics have failed. Also, the policy should repeat the BPD’s commitment to resolving conflicts without resorting to the use of force.

⁸ *Id.* at 46.

⁹ *Id.* at 44-46 and 51-53.

¹⁰ Baltimore Police Department, *Draft Conducted Electrical Weapon Policy 719*, 7 (Feb. 3, 2018), <https://www.powerdms.com/public/BALTIMOREMD/documents/331748>.

¹¹ Baltimore Police Department, *Draft Use of Force Policy 1115*, 1 (Feb. 3, 2018), <https://www.powerdms.com/public/BALTIMOREMD/documents/332427>.

¹² Consent Decree, *supra* note 5 at 44.

4. Document use-of-force incidents and review data for racial and other disparities

The DOJ's investigative report determined BPD's lack of oversight of officers' use of force had contributed to a pattern of excessive force.¹³ Additionally, DOJ found that BPD disproportionately used force, particularly non-deadly force, against African Americans.¹⁴ Consequently, the consent decree requires BPD to develop a protocol for accurately analyzing use of force data to determine trends, identify and correct deficiencies uncovered in the analysis, and publicly report its findings.¹⁵ The protocol, including any forms completed by officers, should require use of force data to be disaggregated by age, race, gender, and disability of the victim. In addition, the policy should require BPD to:

- Document all use-of-force training as well as information on whether officers mastered the objectives of the training. Officers who do not, should be given corrective instruction and placed on assignments that do not require interacting with members of the public until they have mastered the training objective.
- Document consequences for use of force that is not objectively reasonable, including corrective action, discipline, and civil or criminal liability.

Conclusion

Use of force policies must be more than a statement of principles; they must be enforced through well-defined guidance, training, and systems of accountability to ensure that the ideals and values of the BPD are carried out. The importance of clear instruction, reinforced by regular training and accountability is particularly urgent given recent news reports that BPD officials graduated 17 police academy recruits who failed initial scenario-based tests on laws governing constitutional policing.¹⁶ It is essential that policies and trainings are further developed to ensure that all BPD officers understand what it means to treat the Baltimore residents with dignity and respect in practical terms under the difficult circumstances that arise on the job. Additionally, these policies should apply to any police departments that are granted authority by the BPD to serve as auxiliary police, including the Baltimore School Police Force.

¹³ DOJ Report, *supra* note 1 at 102.

¹⁴ *Id.* at 61.

¹⁵ Consent Decree, *supra* note 5 at 74.

¹⁶ See Kevin Rector & Justin Fenton, *Baltimore police recruits set to hit the streets with poor understanding of law, academy's legal instructor says*, The Baltimore Sun, Feb. 2, 2017, <http://www.baltimoresun.com/news/maryland/crime/bs-md-ci-recruits-law-understanding-20180202-story.html>. See also, Letter from LDF to Steven Rosenbaum, Chief, U.S. Department of Justice, Civil Rights Division, Special Litigation Section, et. al., (Feb. 5, 2018), <http://www.naacpldf.org/files/about-us/NAACP%20LDF%20Letter%20to%20Parties%20and%20Monitor%20re%20Baltimore%20Police%20Academy%20Graduates.pdf>.



Thank you for considering these recommendations. If you have any questions, please contact us at 202-682-1300.

Sincerely yours,

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