



September 28, 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: ***United States v. Police Department of Baltimore City, et al***, case no. 1:17-cv-00099-JKB, Comments on Baltimore Police Department's Revised Policies

Dear Mr. Thompson:

On behalf of the NAACP Legal Defense and Educational Fund, Inc. (LDF), we write to provide comments on the following Baltimore Police Department (BPD) revised policies: Rape and Sexual Assault, Policy 708; Search and Seizure Warrants, Policy 1007; Strip Searches and Body Cavity Searches, Policy 1013; Warrantless Arrest Procedures and Probable Cause Standards, Policy 1106; and Field Interviews, Investigative Stops/Detentions, Weapons Pat-Downs, and Searches, Policy 1112. LDF offers the recommendations below for consideration by the parties and monitoring team.

1. BPD policies relating to its practices and procedures must underscore the agency's commitment to fair and impartial policing

The U.S. Department of Justice's (DOJ) report, *Investigation of the Baltimore City Police Department* (DOJ Investigative Report), found that the BPD engaged in a pattern or practice of biased stops, arrests, searches and investigations based on race, gender, and disability in violation of the U.S. Constitution or federal law.¹ Yet, none of the revised policies references the BPD's Fair and Impartial Policing Policy 317, which requires BPD officers to treat the communities they serve in "a fair, respectful, impartial, and nondiscriminatory manner."² BPD must underscore the need for officers to engage in unbiased policing practices at every opportunity. Therefore, we recommend that the BPD list Policy 317 as an associated guiding principle in each of the above-mentioned revised policies.

2. Strengthen the provisions of Policy 708, Rape and Sexual Assault, to ensure the elimination of gender bias in investigations of these crimes

The DOJ Investigative Report raised instances of gender bias against women and transgender individuals who were victims of rape or sexual assault. For example, the report

¹ U.S. DEPT. OF JUSTICE, CIVIL RIGHTS DIVISION, INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 3-11 (2016), <https://www.justice.gov/crt/file/883296/download> [hereinafter DOJ Investigative Report].

² Baltimore Police Department, *Fair and Impartial Policing, Policy 317*, 1, Draft August 24, 2018, <https://www.baltimorepolice.org/317-draft-fair-and-impartial-policing> [hereinafter BPD Fair and Impartial Policing].

described an email between a BPD officer and a prosecutor in which they expressed their hesitation to charge a man with sexual assault because they believed the woman reporting the crime was “a conniving little whore.”³ The DOJ also found that BPD allowed its rape cases to remain open for years and often misclassified the complaints as unfounded, i.e. false or baseless.⁴ Against this backdrop, any BPD policy must clearly state at the outset that BPD officers must thoroughly investigate rape and sexual assault cases in a bias-free manner. We recommend that the first sentence of the policy should be revised as follows:

It is the policy of the Baltimore Police Department (BPD) to fully investigate all reported rapes and other sexual offenses *in a manner that is unbiased and in compliance with federal, state and local nondiscrimination laws* (proposed revisions are *italicized*).

While Policy 708 contains a comprehensive set of protocols regarding how BPD must train for, respond to, investigate, and follow up on reports of rape and sexual assault, it is missing several valuable provisions that are included in the consent decree. First, regarding data collection, analysis, and reporting, we recommend that the data BPD must collect and analyze be listed in the policy, as it is in paragraph 264 of the consent decree.⁵ Second, the policy’s requirement that the BPD training academy curriculum include “[g]uidance on working with vulnerable populations,”⁶ should be expanded by identifying the populations. For example, BPD could incorporate the language of the consent decree, which states, “[g]uidance on working with vulnerable populations,

³ DOJ Investigative Report, *supra note 1*, at 122.

⁴ *Id.* at 124.

⁵ Consent Decree, *United States v. Police Dept. of Baltimore, et al.*, ¶ 264, Case No. 1:17-cv-00099-JKB (D. Md. Jan. 12, 2017), <https://www.justice.gov/opa/file/925056/download> [hereinafter Baltimore Consent Decree].

BPD will continue to enhance its data collection, analysis, and reporting. The data to be collected and analyzed should include the following:

- a. The numbers of sex offenses, broken down by crime category, that are reported to BPD, identifying, where applicable, incidents involving co-occurring crimes (i.e., sexual assaults involving domestic violence or stalking);
- b. The number of offenders, both the totals and broken down by gender (i.e., male, female, transgender, queer or non-binary) and the relationship of the offender to the victim (i.e., stranger or non-stranger);
- c. The number of victims/complainants, both the totals and broken down by gender, race, and age (i.e., under 18 and 18 and older);
- d. The total number of sex offense reports categorized as founded and unfounded, broken down by the BPD unit categorizing the report;
- e. The total numbers of sex offense reports, broken down by the BPD unit handling the report, that (1) were cleared by arrest, (2) were cleared by exceptional clearance, including by clearance category, (3) remain open and inactive, and (4) were referred to the Baltimore City State’s Attorney’s Office for the filing of charges; and
- f. Data about the processing of forensic medical exams (often referred to as “rape kits”), including: (1) date of reported incident; (2) date of SAFE exam; (3) date detectives request lab analysis of SAFE exam; (4) date detectives receive lab analysis results.

⁶ Baltimore Police Department, *Rape and Sexual Assault, Policy 708*, 18, Draft August 15, 2018, <https://www.baltimorepolice.org/708-draft-rape-and-sexual-assault>.

including homeless people, sex workers, people with Behavioral Health Disabilities, and LGBT individuals.”⁷

Third, we recommend adding two additional provisions from the consent decree that do not appear in Policy 708. Specifically, the agreement states that BPD will “[e]nsure that investigators of sexual assaults do not have a history of complaints of bias relating to gender or complaints of sexual misconduct that could impair their ability to investigate sexual assault in accordance with BPD policy and training[.]”⁸ Additionally, the consent decree requires the development of “a system of automated alerts to trigger supervisory review of open sexual assault investigations, and a protocol governing the supervisory review.”⁹ While Policy 708 provides for a system of supervisory review and associated protocols, it does not contain any references to something that would be considered a “system of automated alerts to trigger supervisory review.”

3. Clarify further when search and seizure warrants are appropriate and lawful

Policy 1007 concerns standards and procedures relevant to securing and executing search and seizure warrants. It states that applications for warrants “[m]ust contain an accurate, detailed description of the person or things intended to be seized *or possible evidence that are the purpose of the search*” (emphasis added).¹⁰ We recommend omitting the language “or possible evidence that are the purpose of the search” because it is vague and overbroad.

Also, the policy awkwardly states “[t]he affiant shall not omit from the Affidavit in Support of Search and Seizure Warrant any information or material evidence – known at the time the affidavit was presented – that would negate the finding of Probable Cause.”¹¹ To ensure that officers understand that they must include in the affidavit all information known to them at the time, that sentence should be revised to read as follows: “[t]he affiant shall include in the Affidavit in Support of Search and Seizure Warrant any information or material evidence – known at the time the affidavit was presented – *including any information or evidence that would contradict a finding of probable cause*” (proposed revisions are italicized).

Additionally, with respect to the affidavit supporting the search and seizure warrant, we recommend a provision that reflects the full language in paragraph 58 of the consent decree as detailed below:

BPD will require that any affidavit or sworn declaration supporting an application for a search and seizure warrant will provide an accurate, complete, and clear description of the offense, the place or thing to be searched, the scope and the time of the Search,

⁷ *Id.* ¶ 259g.

⁸ Baltimore Consent Decree, *supra note 5*, at ¶ 260d.

⁹ *Id.* at 262a.

¹⁰ Baltimore Police Department, *Search and Seizure Warrants, Policy 1007*, 4, Draft July 31, 2018, <https://www.baltimorepolice.org/1007-draft-search-and-seizure-warrants>. [hereinafter BPD Policy 1007]

¹¹ *Id.*

and state whether the warrant authorizes a Knock and Announce or No Knock warrant.¹²

Also, we recommend revisions to the exigent circumstances allowing officers to enter a premise to conduct a search without first knocking-and-announcing. According to the policy, officers must knock and announce in conformity with specific procedures, with the following exception: “[i]mmediate entry may be initiated if sounds, conversations or other activity coming from within the premises leads you to believe: (A) There is a potential threat of physical harm to members or occupants, (B) Evidence is being destroyed, or (C) A suspect is escaping.”¹³ Exigent circumstances exist if the officer had a particularized basis for a reasonable suspicion that knocking would be dangerous, futile, or result in the destruction of evidence.¹⁴ Accordingly, we recommend omitting the words “leads you to believe” and amending the language to read, “[i]mmediate entry may be initiated if sounds, conversations or other activity coming from within the premises *create a reasonable suspicion that: . . .*” (proposed revisions are italicized).

4. Include special considerations for vulnerable communities in the strip and body cavity searches policy

The DOJ Investigative Report provided detailed accounts of highly invasive, humiliating and unconstitutional public strip searches of Baltimore residents, including teenagers.¹⁵ While revised Policy 1013 acknowledges the humiliating and degrading nature of such searches, and therefore requires officers to balance public safety with the privacy interest of the person being searched, we recommend including additional language to the core principles section. Specifically, a principle of “less intrusive means” should be expressed at the outset, not only in the “Required Actions” section of the policy, so that it conforms with the consent decree language requiring the use of pat downs, metal detectors or clothing searches instead of strip and body cavity searches whenever possible.¹⁶

Additionally, due to the high level of intrusion on personal liberty interests, individual privacy, and dignity, we recommend the policy include special procedures for vulnerable groups, such as youths and individuals with mental or behavioral disabilities. For example, the policy should require officers to consider certain personalized factors before performing a strip or body cavity search on a youth, like those identified in BPD’s draft Use of Force Policy 1115, which directs officers

¹² Baltimore Consent Decree, *supra* note 8, at ¶ 58.

¹³ BPD Policy 1007, *supra* note 8, at 8.

¹⁴ See *United States v. Dunnock*, 295 F.3d 431, 434 (4th Cir. 2002) (“The knock and announce requirement may be excused, however, by exigent circumstances, but officers “must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence...Whether sufficient exigent circumstances existed at the time of the entry requires a court to analyze the facts of each case to determine that the officers had some particularized basis for their suspicion.”)

¹⁵ DOJ Investigative Report, *supra* note 1, at 32-34.

¹⁶ Baltimore Consent Decree, *supra* note 8, at ¶ 50.

to consider a young person's age and size and employ developmentally-appropriate and trauma-informed tactics.

5. Ensure Policy 1106, Warrantless Arrest Procedures and Probable Cause Standards, includes all offenses requiring supervisor approval before arrest

BPD's Policy 1106 sets forth standards and directives on when warrantless arrests should be made, what constitutes probable cause, and the procedures related to arrests and citations made without a warrant. Significantly, it emphasizes that officers are to use the least intrusive response appropriate to resolve a situation, such as a verbal warning instead of a citation, or a citation instead of an arrest, where doing so will serve the interests of public safety. This is a significant principle in the consent decree.

To better reflect provisions of the consent decree, the policy should include a full list of violations that will require an officer to seek permission from a permanent-rank supervisor before making an arrest, if practicable. Currently, the policy enumerates seven offenses, including obstructing or resisting an officer and disorderly conduct. The consent decree, however, also refers to arrests for quality of life offenses when categorizing the class of offenses for which an officer must seek a supervisor's approval before effecting the arrest.¹⁷ The consent decree defines these offenses as certain infractions of Baltimore or Maryland code including public urination and littering,¹⁸ which are not included in the list of offenses requiring approval in Policy 1106. Accordingly, we recommend adding quality of life offenses to the policy.

Additionally, Policy 1106 states that supervisors shall review reports and forms for deficiencies, including arrests that are not supported by probable cause or that violate the law or BPD policy. We recommend the policy refer to the consent decree explicitly; for example, the sentence could read "[a]rrests that . . . or are otherwise in violation of the law, BPD policy, *or the consent decree.*" (proposed revised language is italicized). This would track the language in the consent decree, which lists as one of the deficiencies, "Arrests that are unsupported by probable cause, or are otherwise in violation of the law, BPD policy, or this Agreement."¹⁹

The subsection on "Statements of Probable Cause" (SPC) in Policy 1106 provides that "[a] member may not leave material information out of an SPC if that information would defeat a finding of Probable Cause to Arrest."²⁰ An SPC should contain sufficient information to allow a Court Commissioner to understand the facts and circumstances that would be relevant to a probable cause determination. Officers should include all relevant facts and circumstances. Therefore, we recommend amending this language to affirmatively state something to the effect of, "A member must include all material information in the SPC even if it would contradict a finding of probable cause to arrest."

¹⁷ Baltimore Consent Decree, *supra* note 8, at ¶ 63.

¹⁸ *Id.* at ¶ 511sss.

¹⁹ *Id.* at ¶ 72e.

²⁰ Baltimore Police Department, *Warrantless Arrest Procedures and Probable Cause Standard, Policy 1106*, 8, Draft July 31, 2018. <https://www.baltimorepolice.org/1106-draft-warrantless-arrest-and-probable-cause>.

Further, while Policy 1106's section regarding audits requires data to be kept on all arrests resulting in arrestees being released without charge, released because of lack of probable cause, released based on identity issue, and declined to charge, we recommend that these data be disaggregated by race and ethnicity to monitor any patterns of biased policing.

6. Strengthen procedural protections in Policy 1112, Field Interviews, Investigative Stops/Detentions, Weapons Pat-Downs, and Searches

Policy 1112 governs core processes on stops, searches, and arrests and aims to ensure these procedures are executed in a manner that conforms with the rights secured by the U.S. Constitution and federal and state laws. We submit several recommendations to strengthen the obligations, directives, and procedures in the policy.

a. Provide a clearer definition of “procedural justice”

One of the core principles listed in Policy 1112 is procedural justice, which is defined as a *perception* of fairness in an encounter (emphasis added). In fact, experts have stated that the key component of procedural justice is the *actual* fairness and impartiality of a resident-police encounter.²¹ Accordingly, we recommend a revision to the definition of procedural justice as detailed below.

Procedural justice refers to the fairness and impartiality of an encounter, so that officers act in a manner that is honest, unbiased, benevolent, and lawful.²² Accordingly, members shall “(i) treat[] people with dignity and respect, (ii) giv[e] individuals a chance to be heard during encounters, (iii) mak[e] decisions fairly and transparently, based on the facts, and (iv) convey[] goodwill and trustworthiness.”²³ Conduct that conforms to these four principles has the potential of building community trust and confidence in the police and the community's willingness to cooperate with police to advance shared public safety goals.

b. Adopt a more precise legal standard governing “Weapons Pat Down”

The DOJ Investigative Report found that BPD frequently conducts weapons frisks despite lacking reasonable suspicion that the subject of the search is armed and dangerous.²⁴ The report details at length how suspicionless frisks have been a common feature of BPD street enforcement practices and has resulted in a pattern and practice of Fourth Amendment violations that is widespread.²⁵ The report also describes how these unconstitutional searches resulted in needless escalation of encounters with residents.²⁶

²¹ U.S. DEPT. OF JUSTICE, OFFICE OF COMMUNITY ORIENTED POLICING SERVICES, PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT OF THE PRESIDENT'S TASK FORCE ON 21ST CENTURY POLICING 10 (2015), <https://ric-zai-inc.com/Publications/cops-p311-pub.pdf>.

²² *Id.*

²³ Baltimore Consent Decree, *supra* note 8, at ¶ 511000.

²⁴ DOJ Investigative Report, *supra* note 1, at 24, 30.

²⁵ *Id.* at 31.

²⁶ *Id.* at 24.

BPD should revise the definition of “Weapons Pat Down” to protect individuals from unconstitutional searches and ensure conformance with the legal standard articulated in *Terry v. Ohio*. The current definition suggests that an officer may conduct a weapons pat down based on a belief that a person may be armed; but, it does not specify clearly the requirement of reasonable articulable suspicion or that such searches may only be justified to protect the safety of officers and others near the scene.²⁷ Accordingly, we suggest the following *italicized* revisions to the definition:

A brief, non-probing running of the hands over the outside of a person's clothing feeling for a weapon. A Weapons Pat-Down is authorized when the member *has a reasonable articulable suspicion* the person is armed *and dangerous, and the pat-down is designed to ensure the safety of police officers and others while an officer is conducting a legitimate criminal investigation.* This can include situations in which the member reasonably suspects that the person has committed, is committing, or is about to commit a violent crime ~~or and when~~ the member observes something on the person that they reasonably suspect is a weapon. A Weapons Pat-Down may not be conducted to discover evidence or the proceeds or instrumentalities of a crime. A member cannot “pat-down” a bag or item of personal property unless the member has a reasonable suspicion that the person is armed and the bag or item could contain a weapon and is within the person's reach.

The proposed revisions are consistent with the definition of a “frisk” or “pat down” in the consent decree.²⁸ We recommend conforming revisions in the section on Weapons Pat-Down, beginning on page 9 of the policy. For example, the subsection on “Justification” should be revised as follows: “[f]or a Weapons Pat-Down, a member must possess specific and articulable facts, combined with rational assumptions from these facts, that the person is armed *and dangerous, and the pat-down must be designed to ensure the safety of police officers and others while an officer is conducting a legitimate criminal investigation...*” (proposed revisions are *italicized*).

c. The policy should include further guidance on nondiscriminatory policing

Aside from a statement about nondiscriminatory policing and a prohibition relating to pretextual stops in the Core Principles section of Policy 1112, it does not contain specific guidance or directives incorporating fair and impartial policing practices. As mentioned above, the BPD has developed a separate policy on Fair and Impartial Policing, and it is crucial that this policy address bias-free policing in the specific context of field interviews, investigative stops, weapons pat-downs, and searches.

For example, the Policy 1112 should provide greater specificity that officers are prohibited from relying, to any extent or degree, on a person’s race or ethnicity to determine whether reasonable articulable suspicion exists. It should additionally specify that a permissible exception may exist only when the personal characteristic of race or ethnicity “is physically observable, and part of a reliable and trustworthy description of a specific suspect in an ongoing investigation, where that

²⁷ *Terry v. Ohio*, 392 U.S. 1, 29, 30 (1968) (stating that the sole justification of a protective search is the protection of the police officer and others nearby, and the search must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer); *see also Arizona v. Johnson*, 555 U.S. 323, 327-329 (2009).

²⁸ Baltimore Consent Decree, *supra note 8*, at ¶ 511nn.

description also includes other appropriate non-demographic identifying factors.”²⁹ Similar prohibitions against using race or ethnicity in choosing whom to target should extend to other law enforcement actions, such as non-custodial interviews and searches.

d. Strengthen procedural protections during field interviews

In conformance with the consent decree, the policy’s section on “Field Interviews” prohibits officers from using a person’s refusal to stop, answer questions, or end an encounter as the basis to extend an encounter or further intrude on the person’s liberty through a stop, pat-down, search, or arrest of a person. The section also requires officers asking a person to identify themselves to inform the person that providing identification is voluntary and clarifies that individuals are not required to carry any means of identification, identify themselves, or account for their presence in a public place.

To strengthen these provisions, we recommend two revisions to ensure officers do not use a person’s refusal to engage in a field interview as a basis to escalate an encounter or violate individuals’ rights. First, the policy should expressly prohibit officers from using a person’s refusal to participate in a field interview as a basis for establishing reasonable suspicion. Though this may be implicit in the policy’s current prohibition against using a person’s refusal as the basis for conducting a *Terry* stop or pat-down, it is important to state explicitly that refusal to participate in a field interview cannot be used as a contributing factor for reasonable suspicion. We recommend the *italicized* revisions to the policy as follows:

If a person refuses to answer questions during a Field Interview, they must be permitted to leave. A person’s failure to stop, refusal to answer questions, decision to end the encounter, or decision to walk away, cannot be used as the basis *for establishing reasonable articulable suspicion* or to extend the encounter or further intrude on the person through an Investigative Stop, Weapons Pat-Down, Search, or Arrest of the person.³⁰

Second, the policy should extend the prohibitions to a person’s refusal to provide identification; in other words, refusal to provide identification or otherwise identify oneself in the context of a field interview should be expressly prohibited as a basis for establishing reasonable suspicion, to extend or escalate an encounter, or intrude on a person’s liberty through a stop, pat-down, search, or arrest of a person. A similar revision should likewise be reflected in paragraph 1 of “Prohibited Actions.” This is an important limitation, given the DOJ Investigative Report’s finding of BPD’s practice of demanding identification from people who are lawfully present in an area to check for outstanding warrants.³¹ The risk of escalation based on demands by BPD officers for

²⁹ BPD Fair and Impartial Policing, *supra* note 2, at 5.

³⁰ Baltimore Police Department, *Field Interviews, Investigative Stops, Weapons Pat-Downs & Searches, Policy 1112*, 4, Draft July 31, 2018.

³¹ DOJ Investigative Report, *supra* note 1, at 28.

identification is underscored by the recent police beating of DaShawn McGrier, who was violently attacked by an officer after he refused to provide identification.³²

e. Strengthen procedural protections for investigative stops

BPD policies should reiterate, at every opportunity, relevant laws that apply to a police practice. Accordingly, BPD should further revise the “Investigative Stops” section of the policy with a leading paragraph that states Fourth Amendment protections. We propose a new paragraph 1 as follows:

“1. The Fourth Amendment of the U.S. Constitution protects individuals from unreasonable seizure when they are lawfully present in a place.³³ It permits officers to briefly detain an individual for investigation where an officer has reasonable suspicion that a person is involved in criminal activity.³⁴”

We further recommend paragraph 3 under the subsection on “Required Actions” mandate officers to inform a person of the reason for the stop. Requiring officers to explain the reason for the stop to a pedestrian (or motorist) as soon as practicable helps ensure the officer can articulate reasonable suspicion of a traffic or other violation, reduce the potential influence of improper bias, and legitimize the stop in the eyes of the person stopped.

Finally, in conformance with the consent decree, under the subsection on “Prohibited Actions” on page 8 of the policy, the lead paragraph should prohibit officers from conducting investigatory stops when they lack reasonable suspicion, based on specific and articulable facts, that a person has committed, is committing or is about to commit a crime.³⁵

Conclusion

We appreciate the opportunity to provide comments on BPD’s policies relating to stops, searches, arrests and the investigation of rapes and assaults. As we have stated in previous comment letters, policies alone will not lead to lawful policing practices. Rather, initial and continued training on these policies and mechanism to enforce officer compliance are vital to ensuring officers are well-educated and prepared to meet their obligations under the new policies.

Thank you for considering these recommendations. Please do not hesitate to contact us at 202-682-1300.

Sincerely yours,



Monique L. Dixon

³² Kevin Rector et al., *Baltimore police officer suspended with pay after viral video shows him punching, tackling man*, BALTIMORE SUN, Aug. 11, 2018, <http://www.baltimoresun.com/news/maryland/crime/bs-md-ci-police-incident-20180811-story.html>.

³³ U.S. CONST. amend. IV; *Delaware v. Prouse*, 440 U.S. 648, 663 (1979); *Terry*, 392 U.S. at 8-9.

³⁴ *Terry*, 392 U.S. at 30-31.

³⁵ Baltimore Consent Decree, *supra* note 8, at ¶ 38.

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