

**THE CASE FOR REFORM:
SAN FRANCISCO'S IMMIGRANT YOUTH POLICY**

Juvenile Probation's Policy of Referring Youth to I.C.E. Without Due Process

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EXECUTIVE SUMMARY

This memorandum summarizes our concerns about the San Francisco Juvenile Probation Department's ("JPD") policy, which requires minors to be reported to federal immigration agents for deportation based on a *suspicion* regarding a minor's immigration status and an *accusation* of wrongdoing, before there has been any finding of guilt or innocence.

We have repeatedly shared our concerns with the Mayor's Office, JPD, and the City Attorney's Office about JPD's current policy, which was crafted behind closed doors and hastily adopted in 2008 without a public hearing. Yet, the Mayor's Office and JPD have rejected our invitation to work collaboratively with community partners to ensure that the youth are not referred for deportation based on a mere accusation or an unfounded suspicion, and to protect the City from exposure to liability for erroneously referring a youth who is actually documented for deportation. We are therefore now urging the Board of Supervisors to take the necessary action to protect our youth and the values that govern our Juvenile Justice system.

There are several major concerns with JPD's current policy:

1. **Undermining Confidence in Police:** JPD's policy of referring immigrant youth for deportation exacerbates prevalent fears in immigrant communities that police cannot be trusted since the referrals are based only on police charges of felonies without regard to a youth's actual guilt or innocence. As stories spread of innocent youth and families being unfairly deported, immigrants will be further discouraged from reaching out to police.
2. **Subverting Our Core Values:** JPD's policy contravenes our commitment to due process and a fair judicial system by presuming youth to be guilty and deserving of deportation based on a mere accusation of wrongdoing, no matter how unfounded.
3. **Exposing the City to Lawsuits:** JPD's policy subjects the City to costly lawsuits by creating a perverse incentive for police to arrest immigrant youth on trumped-up charges (since youth will be deported regardless of whether charges are sustained), by violating state laws preserving youth confidentiality rights, and by forcing juvenile probation officers to make complex immigration determinations which are outside their expertise and will result in inevitable erroneous referrals.
4. **Ignoring Differences between Adults and Minors:** JPD's policy disregards the important distinctions between the adult and juvenile justice systems. Under the current policy, the juvenile court is prevented from resolving cases in a manner that best reflects the core principles of the juvenile justice system, such as rehabilitation and reunification of families. Instead, youth are automatically referred for deportation before there has even been a hearing, tearing many families apart in the process.
5. **Violating the Charter and City Law:** In its haste to respond to media stories, the Mayor's Office and JPD acted precipitously, usurping the role of the Juvenile

Probation Commission under the City Charter, and failed to abide by the measured approach embodied in the City of Refuge Ordinance.

A year has passed since JPD hastily adopted its policy. It is long overdue for the City to adopt a measured, thoughtful approach that is both in accordance with the law and consistent with our City's core values of inclusion, equality, and diversity. Based on the lessons we have learned this past year, at a minimum, youth should not be referred to Immigration and Customs Enforcement ("ICE") agents unless all of the following conditions are met:

1. **Felony Charge:** The youth has been charged with a felony and not a misdemeanor or status offense.
2. **Post-Adjudication:** The youth's felony delinquency petition has been sustained.
3. **Immigration Legal Screening:** The youth has undergone immigration legal screening by an immigration attorney.
4. **Comprehensive Language Access Protocol:** JPD has a comprehensive language access protocol to minimize the risk that youth will be erroneously referred to ICE because of language barriers.
5. **Individualized Determination:** The probation officer makes a recommendation to the court and the court agrees that ICE should be notified based upon an individualized determination, which takes into account the nature of the offense, availability of suitable caregivers, offense history, previous illegal entries, and other relevant factors.

Given the stakes, it is critical for the City to rebuild trust in immigrant communities and to restore our commitment to fairness and due process.

STATEMENT OF FACTS

San Francisco's City of Refuge Ordinance (also known as the Sanctuary Ordinance) originated from a 1985 City Resolution² entitled the "Resolution Urging Mayor to Declare San Francisco to be a City of Refuge." The resolution affirmed that immigration law enforcement is the exclusive jurisdiction of the federal government. San Francisco's official government website indicates:

The Ordinance is rooted in the Sanctuary Movement of the 1980's, when churches across the country provided refuge to Central Americans fleeing civil wars in their countries. In providing such assistance, faith communities were responding to the difficulties immigrants faced in obtaining refugee status from the U.S. government. Municipalities across the country followed suit by adopting sanctuary ordinances.³

In 1989, the City passed the City of Refuge Ordinance,⁴ which prohibits City employees from assisting in the enforcement of federal immigration law unless such assistance is required by federal or state law.

In 1993, the Board of Supervisors reluctantly voted six to four to amend the Ordinance to comply with the California Office of Criminal Justice Planning's 1992 directive and to prevent the loss of a particular source of federal funding. The amendment, Section 12H.2-1, incorporated an exception for individuals arrested and booked on felonies. As explained in Section V of this memo, the Ordinance's text and legislative history indicates that Section 12H.2-1 applies only to adults who are arrested and booked on felonies, not youth who are placed under the jurisdiction of the Juvenile Court.

San Francisco's official government website continues:

In recent years, the Sanctuary Movement has experienced a rebirth, as grassroots organizations, faith communities, and local government have stood firmly against repressive immigration proposals in Congress and immigration raids that separate families. In February 2007, Mayor Gavin Newsom reaffirmed San Francisco's commitment to immigrant communities by issuing an Executive Order that called on City departments to develop protocol and training on the Sanctuary Ordinance.⁵

However, in a sudden turnabout, JPD, in a memorandum dated August 26, 2008, decreed a new policy regarding undocumented youth without permission from the Juvenile Probation Commission.⁶ The policy provides:

² Resolution Urging Mayor to Declare San Francisco to be a City of Refuge, San Francisco City Res. 1087-85 (1985) (enacted).

³ *What is the Sanctuary Ordinance?*, http://www.sfgov.org/site/sanctuary_index.asp (last visited Aug. 2, 2008).

⁴ The legislation was introduced by Supervisor Jim Gonzales, approved by a nine to zero vote, and signed into law by Mayor Art Agnos.

⁵ *What is the Sanctuary Ordinance?*, http://www.sfgov.org/site/sanctuary_index.asp (last visited Aug. 2, 2008).

⁶ Although this memorandum is dated August 26, 2008, it is undisputed that juvenile probation officers were trained on this new policy in or around July 2008.

The Juvenile Probation Department shall inform the U.S. Department of Homeland Security, Immigrant and Customs Enforcement (ICE) in every case where a person is in custody after being booked for the alleged commission of a felony and is suspected of violating the civil provisions of the immigration laws.⁷

Under this new policy, the on-duty probation officer is required to notify ICE agents by fax at the booking stage, before there has been any judicial disposition in the case and regardless of whether any of the charged offenses are sustained against a youth. Because the referral occurs at the beginning of the juvenile process before the youth even appears in court, the youth is given little or no access to legal counseling. In addition, because juvenile probation officers do not have expertise in immigration law and JPD does not have a comprehensive language access protocol, youth are at risk of being mistakenly referred by JPD officials for deportation because of erroneous assessments of immigration status and language barriers.

Once in ICE custody, these youth are often taken to remote federal facilities far removed from their families, while deportation proceedings are initiated. Thus far, at least 130⁸ youth have been referred by JPD to ICE to facilities as far away as Washington, Indiana, and Florida.

KEY CONCERNS

I. JPD'S CURRENT POLICY UNDERMINES CONFIDENCE IN POLICE AND ENDANGERS PUBLIC SAFETY.

For nearly two decades, the Sanctuary Ordinance has been a cornerstone of efforts to build bridges between City officials and immigrant communities. The Sanctuary Ordinance has made it safe for immigrant communities to report crimes and work with the police to solve crimes, thereby protecting the entire community. Yet, JPD's 2008 policy sends a very different message to immigrant communities. JPD officials have made clear that they will report youth to immigration agents for deportation based on a mere accusation, even if a youth has done nothing wrong. In so doing, JPD has exacerbated longstanding fears of police and discouraged immigrants from reaching out to the police to seek help or provide information about crime in our community.

More than fifty cities and states⁹ and 17,945 law enforcement agencies nationwide¹⁰ have endorsed sanctuary ordinance policies as being crucial to effective community policing

⁷ See S.F. Juv. Prob. Dept. Policies & Procedures re: Intake, Processing, and Release of Undocumented Persons Sec. I (Aug. 26, 2008).

⁸ Jessie McKinley, *San Francisco at Crossroads Over Immigration*, NY Times, Jun. 13, 2006, at A12 ("the new policy has resulted in more than 100 referrals"), available at <http://www.nytimes.com/2009/06/13/us/13sanctuary.html>. At the time this story was being written, the NY Times was informed by ICE that 130 referrals of youth from JPD to ICE had occurred from July 2008 to February 2009. At a conservative estimate of 10 referrals by JPD to ICE per month, the total number of referrals to ICE as a result of JPD's policy may now be up to or more than 190 youth.

⁹ Lynn Tramonte, *Debunking the Myth of "Sanctuary Cities:" Community Policing Policies Protect American Communities 3* (Immigration Policy Center Mar. 2009), available at <http://www.immigrationpolicy.org/images/File/specialreport/CommunityPolicingPaper3-09.pdf>.

¹⁰ Benjamin Wachs, *Sanctuary City: Now Endorsed by 17,945 Law Enforcement Agencies Nationwide*, SF Weekly (Aug. 26, 2008), http://blogs.sfweekly.com/thesnitch/2008/08/sanctuary_city_now_endorsed_by.php.

efforts. “Although [local officials] face public and political pressure to crack down on illegal immigrants, officials say such efforts can backfire by making immigrants reluctant to report crimes, exposing departments to lawsuits, and putting local police officers in confusing and dangerous situations that can lead to mistakes and abuse.”¹¹

The International Association of Chiefs of Police (IACP), the leading law enforcement association in the U.S., indicated in its 2004 report:

Local police agencies depend on the cooperation of immigrants, legal and illegal, in solving all sorts of crimes and in the maintenance of public order. Without assurances that they will not be subject to an immigration investigation and possible deportation, many immigrants with critical information would not come forward, even when heinous crimes are committed against them or their families.¹²

Crime experts agree that community policing policies are essential to encouraging immigrants to access police protection, thereby protecting the entire community.¹³ Sanctuary ordinance policies make it safe for immigrant crime victims and witnesses to report criminals and work with the police to solve crimes.¹⁴ By contrast, those cities and states that reject a community policing approach are quickly becoming “sanctuaries” for *criminals*, not undocumented immigrants, because a vulnerable segment of the community that experiences crime has become alienated and fearful to report crime.¹⁵

In San Francisco, immigrant victims and witnesses have come forward to report crimes and cooperate with law enforcement officials because of the ordinance. Although immigrant victims and witnesses who work with police and prosecutors to solve crimes are largely invisible to the public, we should never forget that we are all safer as a result.

Despite the clear public safety benefits of the Sanctuary Ordinance, the City’s commitment to the ordinance and community policing has not always been consistent. In one high-profile incident that occurred in September 2004,¹⁶ a stabbing victim reached out to San Francisco police officers for help. She was shocked when police turned her over to ICE agents; meanwhile, her assailant went unpunished. The Office of Citizen Complaints launched an investigation, concluded that the police had violated the Sanctuary Ordinance, and forwarded the case to the Police Department for discipline. But, the officer was not meaningfully disciplined. Instead, he was given “retraining.” Since that incident, and particularly over the last year because of the adoption of the current JPD policy at issue, tensions with law enforcement have only grown. In February 2009, the *San Francisco Chronicle* reported that City residents had

¹¹ Pamela Constable, *Many Officials Reluctant to Help Arrest Immigrants*, Washington Post, Aug. 23, 2008, at B01v, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/08/22/AR2008082202857.html>.

¹² Gene Voegtlin, *Enforcing Immigration Law: the Role of State, Tribal and Local Law Enforcement* 5 (International Association of Chiefs of Police 2004), available at <http://www.theiacp.org/Portals/0/pdfs/Publications/ImmigrationEnforcementconf.pdf>.

¹³ *Debunking the Myth of “Sanctuary Cities”* at 3.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Call the cops, get deported*, San Francisco Bay Guardian, Feb. 8-14, 2006, at 7.

experienced increasing incidents of police abuse and racial profiling, resulting in widespread distrust of police in the Latino and other immigrant and racial minority communities.¹⁷

JPD's policy of reporting youth to ICE agents for deportation, without regard to the fact that these youth may be innocent or have been wrongly charged with a felony, has further exacerbated fears in the community and heightened distrust of police. Through its actions over the past year, the City has sent the message that police should be feared, not trusted, because individual police officers have the power to cause immigrant youth to be deported, regardless of whether a youth has done anything wrong, just by arresting youth and accusing him/her of committing a felony. The message has been particularly harsh and devastating for immigrant communities because children – sons and daughters, grandchildren, and classmates – are the ones being targeted.

JPD's policy has had dire consequences not just for these youth, but also their entire families and the community at large. When ICE agents take a minor into custody, they often seek more information about the youth's family in the U.S. Once ICE agents become involved, family members without status – including parents, grandparents, brothers, sisters, and extended family members who reside in the same household – are at greater risk of deportation. Already since the implementation of the policy, there have been a number of incidents in which juvenile probation officers threatened not just youth, but also the youth's family with deportation. These incidents have hastened the spread of fear and panic in immigrant communities.

The City's past efforts to build community trust in police have been quickly undermined by JPD's new policy, which sends the ominous message to immigrant communities that police and local law enforcement are to be feared, not trusted. There is an urgent need for the City to build accountability into the system and ensure that a mere accusation of wrongdoing is not enough to upend the lives of youths, their families, and their communities in San Francisco. Otherwise, a handful of mistaken judgments or bad decisions by individual police officers can undo decades of efforts at building trust between law enforcement and immigrant residents. If this is allowed to happen, the safety of our entire community will suffer because more crimes will go unreported and unsolved.

II. JPD'S CURRENT POLICY VIOLATES BASIC NOTIONS OF FAIRNESS AND DUE PROCESS.

JPD's policy, as it is currently conceived, violates basic concepts of fairness and due process because it presumes youth to be guilty and deserving of deportation based on a mere accusation of wrongdoing, no matter how unfounded, and before youth have had the opportunity to access legal services, contest the charges against them, and confront their accusers in court. Consequently, automatic referrals of youth to ICE at the booking stage are often premature and erroneous because the youth could be innocent of any charges, could have been overcharged by law enforcement, or could actually be documented.

¹⁷ Marisa Lagos, *Residents claim racial targeting [&] police abuse*, San Francisco Chronicle, Feb. 10, 2009, at B-1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/02/10/BAO715QDEC.DTL>.

A. To protect due process, the point of referral to ICE should be moved from the booking stage to after a felony charge has been sustained by a juvenile court.

Many of us take for granted that if we are ever accused of a crime, we are entitled to our day in court, where we have the right to contest the charges against us and have our case heard by an impartial judge. Yet, JPD's policy turns these basic notions of fairness and justice on their heads. Under JPD's policy, an individual police officer has the power to decide the fate of a youth simply by alleging that a youth has committed a felony. Based on this arrest, the youth will be automatically referred by JPD to immigration agents for deportation, even if the charges are later proven in court to be without any merit.

As automatic referral of youth at the booking stage will result in premature and erroneous referrals, it will effectively dismantle crucial protections against racial profiling and pre-textual arrests by giving individual officers the unchecked power to determine a youth's fate. For example, Legal Services for Children ("LSC") is pursuing several complaints with the Office of Citizen Complaints on behalf of immigrant youth who have clearly been overcharged by police officers in order to trigger an ICE referral, including a minor charged with a felony that would typically have been referred to traffic court, and a minor charged with a felony where the evidence did not support the charge and the arresting officer was actually a friend of the alleged victim.

The City must ensure that all of our youth are afforded the fundamental right to contest charges against them and that immigration agents should never be notified based solely on an accusation of wrongdoing. Otherwise, the City will be inviting rogue police officers to make pre-textual arrests. Even if the charges are thrown out by the District Attorney or the court later on, it will be too late for youth arrested on false charges who were torn from their families and handed over to immigration agents.

Statistics in San Francisco confirm that JPD's policy has resulted in unwarranted referral of youth to ICE in cases where charges have not been sustained against youth. According to data from JPD, in 2008, 68% or 1100 of the 3446 referrals to Juvenile Probation did not result in a sustained petition (*i.e.*, the juvenile system counterpart to a guilty finding in adult criminal court).¹⁸ Even though the majority of charges for all youth across different racial groups did not result in a sustained petition, it was too late for youth who "appeared to be undocumented" and therefore were automatically referred for deportation under JPD's policy *before* ever being appointed an attorney or appearing before a juvenile court judge.

Under this system, City authorities, including the Public Defender, the District Attorney, and JPD, are *not* working together with the judge and other court officials during court proceedings in order to ensure that the process is fair and the findings are accurate. Rather, JPD's policy assumes that youth are guilty and deserving of deportation, despite what a court ultimately decides in the case. This policy and practice, which was developed and implemented by the Mayor's Office and JPD, is a plain and simple violation of due process because these

¹⁸ William P. Sifferman, Chief Probation Officer, *San Francisco Juvenile Probation Department 2008 Statistical Report 2* (Apr. 17, 2009), p. 2, *available at* http://www.sfgov.org/site/uploadedfiles/juvprobation/Documents/2008AnnualReport_Statistics.pdf.

youth do not get an opportunity to contest the charges against them before they are reported to ICE for deportation.

Preserving the youth's access to a hearing before a juvenile court would protect against this and eliminate the incentive for officers to engage in racial profiling and racially-based overcharging of offenses. Thus, the point of referral to ICE should be moved from the booking stage to after a felony charge has been sustained by a juvenile court.

B. Access to legal services should be preserved.

The City should also take steps to ensure that youth who are entitled to remain in the U.S. by law, including victims of serious crimes, abused children, and refugees fleeing persecution, are not erroneously deported. Congress has created several means by which undocumented youth may apply to adjust their immigration status, including but not limited to, Special Immigrant Juvenile Status for children who have been abused, abandoned or neglected; asylum for children who have been persecuted in their countries of origin; "T" visas for children who are the victims of trafficking; and "U" visas for children who are the victims of enumerated crimes, such as domestic violence and sexual assault. Youth may be eligible for one or more of these forms of relief under federal immigration laws.

Notifying ICE at the booking stage will effectively cut off these avenues of federal immigration relief for a majority of eligible youth. ICE does not screen youth for potential forms of relief. Once these youth are in ICE custody as a result of referral or notification from the probation officer, youth are then transported to secure federal detention facilities, which are often out of state in remote areas, far away from their families, and where there is little to no access to immigration attorneys. For instance, San Francisco youth have been transported by ICE to facilities in Washington, Indiana, and most recently, Florida, while ICE initiates removal proceedings against these minors.

As the Congressional Research Service's 2007 Report for Congress indicated, most youth in deportation proceedings do not have legal counsel and are therefore "frequently unable to comprehend the proceedings."¹⁹ This makes it virtually impossible for the youth to assert a viable claim for relief. Faced with possible indeterminate detention in a federal facility, many youth waive court proceedings and are deported back to a country where they do not have any family who can take care of them or where their lives may be in danger.

To avoid deporting youth who have been victimized or could be tortured or killed if deported, youth should be given an opportunity to be screened by a competent immigration attorney. If the youth qualifies for immigration relief, the attorney can affirmatively file for relief for the youth, which increases the chances the youth will receive relief as opposed to defensively asserting that the youth qualifies for relief after deportation proceedings have been implemented by ICE. A number of local legal services organizations in San Francisco can facilitate this process; they can screen and represent youth with viable immigration claims. Moving the point of referral from the booking to the disposition stage would provide more

¹⁹ Chad C. Haddal, Congressional Research Services (CRS), CRS Report for Congress, Unaccompanied Alien Children: Policies and Issues 15 (Mar. 1, 2007).

opportunity for an immigration legal screening to occur and avoid deporting youth to a country where they are without any family or could suffer grave harm.²⁰

C. Juvenile Probation Officers are not qualified to determine a youth's immigration status, increasing the likelihood of erroneous referrals to ICE.

JPD's current policy encourages probation officers to question youth about their immigration status, in direct conflict with San Francisco's Sanctuary Ordinance.²¹ Compounding the problem, the factors enumerated as criteria for determining a youth's status are both under- and over-inclusive, encourage racial profiling, and create too great a risk of costly mistakes.

Under the policy, juvenile probation officers who lack expertise in immigration law are required to determine a youth's immigration status based on eleven enumerated factors. Several of the factors in JPD's policy require direct inquiry into immigration status in violation of the Sanctuary Ordinance, such as "self report of immigration status," "inconsistent report of immigration status," and "method of entry into the country."

Other factors simply provide very little to no information about a youth's immigration status, but instead are based on inquiries that rely heavily on racial profiling. For example, JPD's policy encourages probation officers to make assumptions about the immigration status of youth based on the demographic characteristics of their neighborhoods – *e.g.*, one of the factors a JPD officer is asked to look for is "presence of undocumented persons in the same area where arrested," which, in JPD's view, suggests that a youth must also be undocumented.²² It is unclear how JPD would even know that there were persons who appeared to be undocumented in the areas where the youth is arrested without relying on brute racial profiling, *e.g.*, if there were other people who "appeared" to be immigrants in the area then the youth also must be an immigrant. Even if probation officers could make such determinations without engaging in ethnic or racial stereotyping, which seems unlikely, "reasonable suspicion" about the youth's own status cannot be inferred from characteristics shared by people in the neighborhood as a matter of constitutional law.²³ Similarly, it is simply wrong for JPD officials to assume that "length of time in the country" is somehow determinative of an individual's immigration status. JPD's reliance on such factors betrays its ignorance of how our immigration laws actually operate and only heightens concerns that JPD officials will erroneously refer youth for deportation based on misconceptions or uniformed hunches.

²⁰ The form, "Notification Right to Consult with an Immigration Advocate," attached to JPD's 2008 policy simply recites the right of access to immigration legal services. Yet, two out of three of the organizations it lists (*i.e.*, Pacific Juvenile Defenders Center and Immigrant Legal Resource Center) do not even provide immigration legal screening services. Moreover, requiring detained youth to contact an immigration attorney is not realistic in most circumstances. Delaying the point of referral to ICE will give the public defender and other juvenile justice stakeholders more time to get the youth screened by an immigration attorney.

²¹ San Francisco Admin. Code § 12.H.2(c).

²² See S.F. Juv. Prob. Dept. Policies & Procedures re: Intake, Processing, and Release of Undocumented Persons Sec. I, page 3 (Aug. 26, 2008).

²³ See *U.S. v. Montero-Camargo*, 208 F.3d 1122, 1134 (9th Cir. 2000) ("[r]easonable suspicion requires *particularized* suspicion, and in an area in which a large number of people share a specific characteristic, that characteristic casts too wide a net to play any part in a particularized reasonable suspicion determination").

Also alarming is JPD's insistence that youth can be referred for deportation based in part on factors such as a youth's "perceived or actual national origin" or "inability to speak English."²⁴ JPD's refusal to exclude such considerations, which reek of racial profiling, underscores the likelihood that juvenile probation officers will engage in unlawful race and national origin discrimination in carrying out their duties under the policy.

In short, juvenile probation officers who are not experts in immigration law should not be attempting to enforce it. Lacking the necessary expertise, local officers are too likely to rely on improper factors such as racial or ethnic appearance, perceived or actual national origin, and English language proficiency, undermining San Francisco's commitment to equal treatment of all residents. Moreover, requiring juvenile probation officers to make decisions about matters beyond their expertise has led, and will continue to lead, to mistaken referrals of youth to ICE.

D. JPD's lack of comprehensive language access protocol increases the risk of miscommunication and erroneous referrals to ICE.

JPD has yet to adopt or implement a comprehensive language access protocol, refusing to follow the lead of other City Departments such as the Police Department, which adopted a comprehensive language access protocol in 2007 in recognition of the need for clear procedures to serve San Francisco's diverse and growing Limited English Proficient population.²⁵ In refusing to adopt a language access policy, JPD also is likely not in compliance with the City's Equal Access to Services Ordinance, which applies to JPD and requires "written policies on providing services to Limited English Speaking Persons" and that many written notices and materials be translated into at number of languages.²⁶ Currently, probation officers are assigned to cases without consideration of the youth's language needs, and there is little to no monitoring of whether proper language interpretation and translated materials are provided in interviews of youth by probation officers.

The lack of a language access protocol and monitoring by JPD increases the likelihood that there will be inaccuracies in the interviews that probation officers conduct with youth to determine whether they are undocumented, therefore increasing the risk of inappropriate referrals to ICE. JPD should, at a minimum, adopt the language access protocol that was developed and proposed to JPD in 2007 by a Juvenile Detention Alternatives Initiative (JDAI) working group, which is a collaborative effort between JPD and community groups.

III. JPD'S CURRENT POLICY EXPOSES THE CITY TO LAWSUITS.

JPD's policy opens the City to costly lawsuits by creating a perverse incentive for police to arrest immigrant youth on trumped-up charges (since youth will be deported regardless of

²⁴ See S.F. Juv. Prob. Dept. Policies & Procedures re: Intake, Processing, and Release of Undocumented Persons Sec. III, page 3 (Aug. 26, 2008) ("An On-Duty officer may not rely *solely* on inability to speak English or on perceived or actual national origin.")

²⁵ See San Francisco Police Department General Order 5.20 (adopted on Oct. 17, 2007), available at http://web1.sfgov.org/site/uploadedfiles/occ/OCC_DGO520_ENG.pdf.

²⁶ See San Francisco Admin. Code § 91 (adopted June 15, 2001). Available at <http://www.municode.com/library/HTML/14131/ch091.html>.

whether charges are sustained), and by forcing juvenile probation officers to make complex immigration determinations that are outside their expertise, resulting in inevitable errors.

JPD's policy incentivizes rogue police officers to engage in racial profiling and make pretextual arrests. As mentioned earlier, there have already been cases in which minors were improperly charged with felonies in order to trigger a referral to ICE. If the City continues on this path, it will be opening itself to a lawsuit, given the glaring racial disparities in the arrest, charging, and detention of youth that will become even more evident each passing month according to JPD's own statistics.

Moreover, the City is subject to liability for the wrongful detention of youth resulting from probation officers' mistaken judgments regarding the deportability of youth. For instance, San Joaquin County and federal officials paid \$100,000 to settle a lawsuit brought by the Lawyers' Committee for Civil Rights after a County probation officer made an erroneous determination regarding the plaintiff's deportability, which resulted in the wrongful arrest and detention of plaintiff by immigration agents.²⁷

Determination of immigration status is complex, and youth themselves are often unaware of their own status. There is a real danger that probation officers, who are not immigration law experts, will erroneously conclude that a youth does not have lawful status or is deportable and refer the youth to ICE for deportation. As recent news articles make clear, even immigration officials, who undergo extensive training in immigration law, have made costly errors, unlawfully detaining and deporting lawful immigrants and U.S. citizens.²⁸ For instance, a recent article in the *San Francisco Chronicle* reported that "hundreds of U.S. citizens . . . have landed in the custody of U.S. Immigration and Customs Enforcement and struggled to prove they don't belong there, according to advocacy groups and legal scholars, who have tracked such cases around the country. Some citizens have been deported."²⁹

In particular, all too often, birthplace outside the U.S. is mistakenly used as a proxy for immigration status, even though demographic data indicates otherwise.³⁰ Many youth have acquired U.S. citizenship or legal status through family members, yet may be unaware of their legal status because of a breakdown in communication with family members. In addition, JPD officials may wrongly detain youth who they believe look like he/she is undocumented, refusing to believe that a youth is in the country lawfully. In a recent case, a twelve-year old U.S. citizen was kept overnight at YGC for an offense for which he was never even charged. He was only released the next day when his father came in with his U.S. birth certificate. The mistakes made

²⁷ *Soto-Torres v. Johnson*, CIV S-99-1695 WBS/DAD (E.D. Cal. filed Aug. 30, 1999); Reynolds Holding, *Heavy-Handed INS Agents*, San Francisco Chronicle, Sep. 19, 1999, at SC-2, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/1999/09/19/SC80136.DTL>.

²⁸ See Tyche Hendricks, *U.S. Citizens Wrongly Detained, Deported by ICE*, San Francisco Chronicle, Jul. 27, 2009, at A-1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/07/27/MNGQ17C8GC.DTL>.; Tyche Hendricks, *Suits for Wrongful Deportation by ICE Rise*, San Francisco Chronicle, Jul. 28, 2009, at A-1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/07/28/MNH618NPM6.DTL>.

²⁹ See Tyche Hendricks, *U.S. Citizens Wrongly Detained, Deported by ICE*, San Francisco Chronicle, Jul. 27, 2009, at A-1, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2009/07/27/MNGQ17C8GC.DTL>.

³⁰ See U.S. Census Bureau, 2006 American Community Survey (60% of San Francisco's foreign-born residents are U.S. citizens).

by ill-prepared City officials will be costly in the long-term, resulting in protracted litigation against the City.

IV. JPD'S CURRENT POLICY DISREGARDS IMPORTANT DIFFERENCES BETWEEN THE ADULT CRIMINAL SYSTEM AND THE JUVENILE JUSTICE SYSTEM.

JPD's policy fails to recognize that under state law, youth are not to be treated in the same manner as adults. The State of California has created a separate justice system for youth in recognition of their unique needs, and has developed carefully-calibrated procedures to protect the rights of youth. In contrast to the adult criminal justice system, in which punishment is a primary goal, California's juvenile justice system seeks to treat and rehabilitate youth. As such, the State's juvenile court system has rules and procedures tailored towards these goals, including well-established privacy protections.

A. The Juvenile Court has been prevented from resolving the cases of immigrant youth in a manner that best reflects the core principles of the juvenile justice system, including rehabilitation of youth and reunification of families.

The principles of rehabilitation, permanency, stability, family reunification, and promotion of the minor's best interests guide juvenile court law and procedures for all juvenile cases, regardless of the youth's immigration status. State law specifically provides that the purpose of the juvenile court is "to provide for the protection and safety of the public and each minor," and requires the court to provide minors with "care, treatment and guidance consistent with their best interest" and "to preserve and strengthen the minor's family ties whenever possible."³¹ No exception is made for undocumented youth. Indeed, state law expressly applies the goal of family reunification to unaccompanied immigrant youth by providing that where the residence of a minor placed on probation is in a foreign country, the court may order the minor sent to his parents, guardians, or relatives in the foreign country, and may order transportation or accommodation furnished, with or without an attendant, as the court deems necessary.³²

These principles are also reflected in JPD's stated mission:

To serve the needs of youth and families who are brought to our attention with care and compassion; to identify and respond to the individual risks and needs presented by each youth, to engage fiscally sound and culturally competent strategies that promote the best interests of the youth; to provide victims with opportunities for restoration; to identify and utilize the least restrictive interventions and placements that do not compromise public safety; to hold youth accountable for their actions while providing them with opportunities and assisting them to develop new skills and competencies; and contribute to the

³¹ CA Welf. & Inst. Code § 220.

³² See CA Welf. & Inst. Code § 738; see also *In re Manuel P.*, 215 Cal.App.3d 48 (1989) (CA Welf. & Inst. Code Sec. 738 does not infringe on federal government's exclusive power over immigration matters).

overall quality of life for the citizens of San Francisco within the sound framework of public safety as outlined in the Welfare & Institutions Code.

Under state law and JPD's mission statement, all youth involved with the juvenile justice system should be treated equally regardless of immigration status. Furthermore, all policies with regards to juveniles in the justice system should be consistent with the strong principles of equality and human rights, which are at the core of our city's values. However, JPD's current undocumented youth policy violates these principles by singling out youth who are suspected of being undocumented for the presumption that they are guilty before proven innocent.

JPD's policy, as it now stands, is draconian and overly broad, requiring JPD to automatically refer immigrant youth for deportation before there has been a hearing in a youth's case, which has torn apart families in the process. JPD's policy has eliminated the ability of the probation officer or court to "identify and respond to the individual risks and needs presented by each youth," much less any other principles called for by state law and JPD's mission statement.

B. JPD's policy violates state confidentiality provisions for juveniles.

State law also prohibits juvenile probation departments from disclosing information regarding alleged juvenile criminal offenders to federal immigration official except when specifically authorized by court order.³³ Confidentiality protections in juvenile cases were developed to give youth the opportunity to rehabilitate and become contributing members of society. JPD's new policy plainly violates state confidentiality provisions, opening the City to a lawsuit and exposing probation officers to potential criminal charges.

In sum, the policy must be changed in accordance with state law to ensure that no confidential information is shared, unless there is an individualized determination based on all the evidence presented and a petition has been sustained against a youth.

V. JPD HAS ACTED IN VIOLATION OF THE CITY CHARTER AND CITY LAW.

Neither the San Francisco Charter nor the Sanctuary Ordinance provides authority to JPD's 2008 undocumented youth policy. This issue is of dire importance because since July 2008, JPD has referred over 130³⁴ youth to immigration authorities in violation of the Commission's longstanding policy.

A. JPD's 2008 policy was adopted and implemented without the approval of the Juvenile Probation Commission in violation of the San Francisco Charter.

JPD continues to refer youth to immigration agents pursuant to a policy that has not been adopted by the Juvenile Probation Commission ("The Commission"). The San Francisco

³³ CA Welf. & Inst. Code §§ 827 & 828.

³⁴ Jessie McKinley, *San Francisco at Crossroads Over Immigration*, NY Times, Jun. 13, 2006, at A12 ("the new policy has resulted in more than 100 referrals"), available at <http://www.nytimes.com/2009/06/13/us/13sanctuary.html>. At the time this story was being written, the NY Times was informed by ICE that 130 referrals of youth from JPD to ICE had occurred from July 2008 to February 2009. At a conservative estimate of 10 referrals by JPD to ICE per month, the total number of referrals to ICE as a result of JPD's policy may now be up to or more than 190 youth.

Charter sets forth the respective powers of the Commission and Chief Juvenile Probation Officer. The Commission is responsible for “set[ting] policies.”³⁵ By contrast, the Chief Juvenile Probation Officer is responsible for the “administration and management” of the Department.³⁶ The public must have the opportunity to comment on proposed policy changes before any such changes occur.³⁷

Other Commissions, such as the San Francisco Police Commission, have exercised their authority to adopt Departmental policies that are in Compliance with the Sanctuary Ordinance. For example, in 1995, the Police Commission adopted a General Order setting forth the Department’s policy on enforcement of immigration laws, after receiving public comment and input.³⁸

Under the Charter, the Juvenile Probation Commission, alone, has the authority to set policy. In fact, the Commission exercised that authority in 1996 by adopting a policy and protocol regarding the treatment of undocumented youth.³⁹ The Commission’s 1996 policy was adopted after considering public comment and remains legally in effect, until the Commission or the Board of Supervisors takes action to revise the policy.

Ultimately, JPD’s assumption that it can unilaterally reverse course and instruct its employees to disregard the Commission’s longstanding policy toward undocumented youth is untenable. As the City Attorney has advised the Commission in the past, JPD’s failure to act in accordance with official Commission policy can have serious legal consequences.⁴⁰

The City faces legal exposure if it continues to allow Juvenile Probation officers to act in a manner that plainly violates the Commission’s 1996 policy, in flagrant disregard of the Charter. Nor should the City condone JPD’s attempt to evade our open government laws, which ensures that members of the public have the opportunity to comment on proposed policy changes *before* any such changes occur.

³⁵ S.F. Charter § 4.102(1).

³⁶ S.F. Charter § 4.126. *See also* S.F. Admin. Code § 2A.30 (“Each department head shall be immediately responsible for the *administration* of his or her department . . .”) (emphasis added). *See also* S.F. City Atty. Op. 2004-01 at 8 (Mar. 31, 2004) (“A City commission is authorized to establish plans, policies and goals for the department, while the department head is responsible for the day-to-day management and administration of the department.”); S.F. Juvenile Probation Commission Authority & Rules of Order § 2.03 (“Ultimate responsibility for the governance of the department rests with the Commission.”).

³⁷ Cal. Gov’t Code §§ 54953(a) & 54954.3; S.F. Admin. Code § 67.5; S.F. Juvenile Probation Commission Authority & Rules of Order §§ 7.01 (“The Commission and its committees shall conduct all of its business in a public forum, in keeping with requirements of the Brown Act and San Francisco Sunshine Ordinance.”); 10.12 (“Members of the public are encouraged to attend the meetings and to address the Commission on items under consideration.”).

³⁸ *See* S.F. Dept. General Order 5.15 (Dec. 13, 1995). *See Zimmerman v. City and County of San Francisco*, 2000 WL 1071830 at *6 (N.D. Cal. Jul. 27, 2000) (acknowledging that the San Francisco Police Commission, not the Chief of Police, has final policy-making authority under the City’s Charter).

³⁹ *See* Juvenile Probation Commission’s 1996 Policy and Protocol for Undocumented Minors (“When there is no INS hold on the minor, there is no purpose for the probation officer to contact INS within the scope of Welfare and Institutions Code section 828. If a probation officer believes that it is necessary to contact INS when there is no hold, the probation officer shall file a motion before the presiding judge of the San Francisco Superior Court, Juvenile Division, pursuant to Welfare and Institutions Code section 827 and the Standing Order Number 303, Release of Records, for authorization to contact INS.”).

⁴⁰ *See* Minutes of July 9, 2005 Special Meeting of the Juvenile Probation Committee at ¶ 3 (“[Deputy City Attorney] Carillo commented on the authority of the commission to set policy vs. being able to direct and undertake actions of the Dept. He mentioned the question of the City’s liability if actions of the Dept.’s staff were or were not directly the result of policy decisions made by the Commission.”).

B. JPD’s policy is premised on a flawed interpretation of the Sanctuary Ordinance, which was never intended to authorize the reporting of youth or juvenile dispositions to federal immigration authorities.

JPD has operated under the false assumption that its policy is consistent with the Sanctuary Ordinance. In support of this position, the Juvenile Probation Department has cited an August 1993 amendment to the City of Refuge Ordinance, which provides:

Nothing in this Chapter shall prohibit, or be construed as prohibiting, a law enforcement officer from identifying and reporting any person pursuant to state or federal law or regulation who is in custody after being booked for the alleged commission of a felony and is suspected of violating the civil provisions of the immigration laws. S.F. Admin. Code § 12H.2-1.

Yet, the Sanctuary Ordinance’s text and legislative history indicates that Section 12H.2-1 should be construed narrowly to apply only to adults who are arrested and booked on felonies, not youth who are placed under the jurisdiction of the Juvenile Court.

In August 1993, the City of Refuge Ordinance was amended to incorporate the above exception concerning individuals arrested and booked on felonies. The events precipitating the 1993 amendment shed light on its intended purpose and limited scope. In particular, in 1990, Congress passed a law that required states receiving federal block grants for crime and drug control, such as California, to provide certified copies of state criminal conviction records to the INS within thirty days of a conviction.⁴¹ Notably, this federal law narrowly targeted state *conviction* records, not records of *juvenile dispositions*. The following year, Congress amended the law to require notice of a conviction within thirty days, in lieu of the certified records, unless INS requested the certified records.⁴² Again, Congress did not require states to provide notice of juvenile dispositions or records of such dispositions.

In 1992, the California Office of Criminal Justice Planning (OCJP), which was responsible for administering the federal block grant, determined that it would require grant recipients, such as San Francisco, to report individuals to the INS upon arrest. To comply with OCJP’s new directive and to prevent the loss of federal funding, the Board of Supervisors reluctantly voted by a vote of six to four in 1993 to amend the Sanctuary Ordinance and incorporate an exception for individuals arrested and booked on felonies.⁴³

⁴¹ Immigration Act of 1990, Pub. L. 101-649, § 507, 104 Stat. 4978.

⁴² Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. 102-232, § 306(a)(6), 105 Stat. 1751.

⁴³ Letter from San Francisco Mayor’s Criminal Justice Council dated Sep. 1, 1993 at 1 (“I worked closely with Mike Carrington [at OCJP] in determining what changes would bring San Francisco into compliance with OCJP . . . Mr. Carrington assured me verbally that San Francisco’s funding would no longer be in jeopardy if the changes were enacted.”); Letter from California Office of Criminal Justice Planning dated Sep. 29, 1993 at 1 (“The purpose of this letter is to advise you and the San Francisco County Board of Supervisors that we appreciate the efforts you have put forth to bring the City and County of San Francisco into compliance with federal law regarding the receipt of federal anti-drug abuse funds from the Edward M. Byrne Memorial Fund. As a result of the corrective action taken concerning the sanctuary ordinance, our office has been able to certify that San Francisco is now in compliance and we have been able to continue funding the vitally needed anti-drug activities which will be of great benefit to the San Francisco Bay Area.”).

The 1993 amendment to the Sanctuary Ordinance only allowed City officials to report such individuals to INS when required by law (*i.e.*, “pursuant to state or federal law or regulation”). In addition, the Title of Section 12H.2-1 continued to read, “Chapter Provisions Inapplicable to Persons Convicted of Certain Crimes,” indicating that the Ordinance’s exception remained focused on convicted felons. The 1993 amendment to the Sanctuary Ordinance was never intended to authorize the reporting of youth or juvenile dispositions to federal immigration authorities. Rather, it was intended only to facilitate the City’s compliance with a 1991 federal law requiring notification to INS of adult convictions in a timely manner.

Moreover, the 1991 federal requirement, which had been codified at 42 U.S.C. § 3753, was repealed by the Violence Against Women and Department of Justice Reauthorization Act of 2005 (enacted on January 5, 2006).⁴⁴ The requirement that funding recipients provide notice of adult criminal conviction records to INS was eliminated.

In sum, the Sanctuary Ordinance was amended to address a specific problem: the potential loss of federal funding based on a then-existing federal requirement that INS be notified of adult convictions. It was never intended to authorize the referral of youth to immigration authorities based on criminal charges that could never result in a conviction. The language of the Ordinance, as amended, clarified that such referrals could only occur “pursuant to” federal or state law, and federal law never required the reporting of juvenile dispositions and no longer even requires the reporting of adult convictions.

As this memorandum makes clear, JPD acted precipitously in adopting its current policy, in violation of the City Charter and City law. If the City does not take action to bring JPD’s current policy into compliance with the law, the City faces serious legal exposure.

CONCLUSION

The current JPD policy undermines public safety, violates due process, encourages racial profiling, undermines the basic principles of the Juvenile Court system, and exposes the City to civil liability. For the foregoing reasons, the City’s successful community policing efforts will be undermined and its relationship to immigrant communities will be damaged if the City does not amend the City of Refuge Ordinance to restore fairness and accountability and to ensure that youth are not unjustly reported to ICE for deportation.

This past year has taught us that we need to adopt a more thoughtful and balanced approach. We have seen the consequences of the current misguided policy, including the referrals of youth who are innocent of any charges to ICE, the referrals of youth who were overcharged by police to ICE, the separation of many families who have resided in and contributed to San Francisco for years, and an increased climate of mistrust of the police by immigrant residents.

We have expressed the concerns summarized in this memo to the Mayor's office, the Juvenile Probation Department, and the City Attorney's office in a number of meetings and

⁴⁴ Pub. L. 109-162, § 1111, 119 Stat. 2960.

letters, but there has been no action. We are therefore now urging the Board of Supervisors to take the necessary action to restore due process rights to our youth and to begin to repair the trust that has been lost between the City and our diverse immigrant communities.

Based on the experiences of this past year, at a minimum, youth should not be referred to Immigration and Customs Enforcement (“ICE”) agents unless all of the following conditions are met:

1. The youth has been charged with a felony and not a misdemeanor or status offense.
2. The youth’s felony delinquency petition has been sustained.
3. The youth has undergone immigration legal screening by an immigration attorney.
4. JPD has a comprehensive language access protocol to minimize the risk that youth will be erroneously referred to ICE because of language barriers.
5. The probation officer makes a recommendation to the court and the court agrees that ICE should be notified based upon an individualized determination, which takes into account the nature of the offense, availability of suitable caregivers, offense history, previous illegal entries, and other relevant factors.

It is our hope that the City will adopt a measured approach that preserves our commitment to due process and a fair judicial system.

Respectfully submitted,

ACLU of Northern California
Asian Law Caucus
Immigrant Legal Resource Center
Lawyers’ Committee for Civil Rights
Legal Services for Children
San Francisco Immigrant Rights Defense Committee