



August 2, 2017

Ty Alper, Board President  
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Dear Board President Alper,

Thank you for your invitation to compare Berkeley Unified School District ("District") Board Policy 5111.3 (Protection of Undocumented Students) with the Model Sanctuary School Board Policy ("Model Policy") developed by the American Civil Liberties of California ("ACLU") to identify ways that the District can better protect undocumented students. We deeply appreciate the opportunity to collaborate with the District to improve protections for its students. I intended to send this analysis in mid-July; but the ACLU updated the Model Policy in July to strengthen it in response to some questions and concerns we heard from other school districts in California, and so I waited to compare the District's policy to the ACLU's updated policy. The updated policy, attached here, replaces the previous model sanctuary school board policy we sent to the District in May.<sup>1</sup> It is framed to encompass a broader range of activity, thus presenting an even more robust foundation from which to better protect vulnerable public school students.

It is our understanding that Resolution 17-050 was written and passed to clarify and bolster Board Policy 5111.3. Therefore, below we compare the Policy and Resolution together as one "District policy" in relation to the ACLU Model Policy.

Areas where the District's policy and the ACLU Model Policy are similar or identical

Importantly, both the District and ACLU policies clarify that students in California have a right to equal educational opportunity regardless of immigration or citizenship status, and District personnel may not adopt enrollment or registration procedures that have a disparate impact on students based on their immigration status.<sup>2</sup> Relatedly, both policies state that District personnel may not require proof of a social security number from the student or the student's family members in order to access school services.<sup>3</sup>

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<sup>1</sup> The ACLU Model Policy is also available online at [https://www.aclunc.org/docs/July\\_2017\\_FINAL\\_ACLU\\_Model\\_Sanctuary\\_School\\_Board\\_Policy.pdf](https://www.aclunc.org/docs/July_2017_FINAL_ACLU_Model_Sanctuary_School_Board_Policy.pdf).

<sup>2</sup> Board Policy 5111.3 at 1; Board Resolution 17-050 at 1, 3; ACLU Model Policy at 1, 2, 5.

<sup>3</sup> Board Policy 5111.3 at 1; Board Resolution 17-050 at 3; ACLU Model Policy at 5.

The District and ACLU policies also prohibit the District from collecting information about a student's immigration or citizenship status, including by asking for a "green card," citizenship papers, or a Social Security number.<sup>4</sup>

Third, both policies restrict access to District schools by a law enforcement agency conducting immigration enforcement activities based on the determination that such activities cause significant disruption in schools; and require that any request for access (including access to records) by such law enforcement agency be forwarded to the Superintendent for review and consultation with legal counsel to determine whether facilitating such access will conflict with District compliance with the legal principles articulated in *Plyler v. Doe* and other applicable laws.<sup>5</sup> Here, the ACLU Model Policy is more expansive than the District's policy, because it applies the requirement to "law enforcement officers, including federal immigration enforcement, [who] request access...for a non-school-related purpose," thus encompassing all local, state and federal law enforcement agencies (including Customs and Border Patrol and other agencies under the U.S. Department of Homeland Security). The District's policy applies this requirement only to access requested by U.S. Immigration and Customs Enforcement ("ICE").

Fourth, the District and ACLU policies require the District to make resources accessible to students, parents, staff and other community members regarding their legal rights in relation to federal immigration enforcement.<sup>6</sup> Here, the District's policy is more expansive than the ACLU Model Policy because it mandates that the District develop a list of local non-profit immigration law organizations; refer members of the District community to those listed organizations if any member has questions about their immigration status; and encourages the Superintendent to "increase and enhance partnerships with community based organizations and legal service organizations who provide resources for families facing deportation and that a rapid and ready responsive network be created to assist children whose family members have been detained" by ICE. The ACLU Model Policy limits this requirement only to those situations where the law enforcement agency "requests or gains access to a District student or their records for a non-school-related purpose."

Finally, under both policies, the District must distribute and train school and district staff on implementation of the policy, and District families must receive notification about the policy with required translation.<sup>7</sup> Relatedly, the Superintendent must prepare an implementation plan within 90 days.<sup>8</sup> The District and ACLU policies differ somewhat in the requirement to notify District families. Board Policy 5111.3 and Resolution 17-050, read together, require the District

<sup>4</sup> Board Policy 5111.3 at 1; ACLU Model Policy at 5.

<sup>5</sup> Board Policy 5111.3 at 2; ACLU Model Policy at 3, 4.

<sup>6</sup> Board Policy 5111.3 at 2; Board Resolution 17-050 at 3, 4; ACLU Model Policy at 7.

<sup>7</sup> Board Policy 5111.3 at 2; Board Resolution 17-050 at 3, 4; ACLU Model Policy at 7.

<sup>8</sup> Board Resolution 17-050 at 4; ACLU Model Policy at 7.



to circulate “notification” of Board Policy 5111.3 (translated into various languages) to District families, and require the District to post the entire non-discrimination policy on the District’s website. The ACLU Model Policy requires the District to circulate to District families the Superintendent’s plan for implementing the policy, translated into various languages.

Areas where the District’s policy is more expansive than the ACLU Model Policy

There are elements in the District’s policy that are not included in the ACLU Model Policy. First, as noted above, the District’s policy has broader requirements to develop and distribute resources to District families who may have immigration-related questions. Second, as noted above, the District’s policy requires it to notify families of the policy and to post the entire District non-discrimination policy on the District website. Third, Resolution 17-050 instructs the Superintendent to ensure that the District English Learner Advisory Committee, school-site English Learner Advisory Committees, Mayor’s Office, and immigrant community organizations “are consulted and involved in monitoring the successful implementation of this resolution.” The ACLU Model Policy does not include these requirements, but we believe these are very positive aspects and commend the District for taking these steps to promote inclusion and public awareness.

Areas where the ACLU Model Policy is more expansive than the District’s policy

There are also several elements in the ACLU Model Policy that are not included in the District’s policy. First, as described briefly above, the ACLU Model Policy limits “the District’s participation in non-school-related law enforcement activities, including enforcing immigration law, to the maximum extent permitted by law.”<sup>9</sup> In comparison, in key areas, the District’s policy is focused only on “ICE activities.” The District’s narrower approach does not restrict immigration enforcement activities that may be undertaken by local law enforcement agencies (e.g., pursuant to an agreement under 287(g) of the Immigration and Nationality Act)<sup>10</sup> or even other federal agencies (e.g., Customs and Border Control or other agencies within the Department of Homeland Security). Therefore, the ACLU Model Policy protects students from a wider range of potential immigration enforcement activities on District campuses. Moreover, the broader approach under the ACLU Model Policy better insulates the District from a possible challenge—as far-fetched as it may seem to us—based in the District’s decision not to cooperate

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<sup>9</sup> ACLU Model Policy at 1.

<sup>10</sup> This concern may seem theoretical given the low likelihood that the Berkeley Police Department (BPD) would enter into a 287(g) Agreement with ICE. Nevertheless, other local law enforcement agencies also operate in Berkeley, and cooperation with ICE can come in many different forms. Recently, for example, the Alameda County Sheriff’s Office came under heavy criticism for facilitating ICE detention of 339 people, some of whom had only been convicted of misdemeanor offenses or nonviolent drug crimes, within a 18-month span. Darwin BondGraham, *Advocates Criticize Alameda Sheriff’s Cooperation with Immigration Enforcement*, E. Bay Express, Feb. 21, 2017, available at <https://www.eastbayexpress.com/SevenDays/archives/2017/02/21/advocates-criticize-alameda-sheriffs-cooperation-with-immigration-enforcement>. Thus, the threat to District families of local law enforcement participation in immigration enforcement activities is concrete and specific.

with specific federal agencies. We firmly believe that the approach taken in the ACLU Model Policy will strengthen the District's position with respect to resisting unwanted intrusion into District schools.

Second, the ACLU Model Policy has both more protective language and more specific guidance to district and school staff prohibiting cooperation with or support for non-school-related law enforcement activities, including immigration enforcement, on campus. The language from the ACLU Model Policy includes the following:

- When law enforcement officers, including federal immigration enforcement agents, request access to a school site or to interview a student for a non-school-related purpose, the District Superintendent and/or District General Counsel shall ask for the officers' credentials, ask why the officers are requesting access, and ask to see a warrant signed by a federal or state judge. The officers must provide to the Superintendent and/or General Counsel written authorization from their employing agency instructing them to enter District property and the purpose of such entry, as well as a warrant signed by a federal or state judge which specifies the name of the person under arrest or area to be searched. If the officers are not able to provide such written authority and warrant, the Superintendent and/or General Counsel shall deny their request for access to District property, unless otherwise required by law as determined by the General Counsel.<sup>11</sup> The District shall not use its resources to facilitate access to students, including any law enforcement interview, that does not have an education-related purpose and is therefore disruptive of the educational environment.<sup>12</sup>
- If the law enforcement officers satisfy the above criteria, the school site principal or his/her designee shall monitor the officers' investigation and ensure the officers are not given access to information, records, and areas beyond that specified in the warrant. For student interviews, a private location out of sight and hearing of other students should be arranged, where practicable, that will help avoid invading the student's privacy, jeopardizing the safety and welfare of other students, and further disrupting the school campus. The principal or designee shall discourage law enforcement officers from interviewing or escorting students through school hallways in view of students. The District expects that law enforcement officers will provide the principal or designee the opportunity to be present during any interview of a student.<sup>13</sup>
- The District shall not disclose student records to non-school officials for any purpose that is not education-related unless there is parental consent or a valid court order for the records. This prohibition includes requests from law enforcement to access student

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<sup>11</sup> ACLU Model Policy at 3.

<sup>12</sup> ACLU Model Policy at 4.

<sup>13</sup> ACLU Model Policy at 3.



directory information and information that may be disclosed to law enforcement under the Family Education Rights and Privacy Act ("FERPA").<sup>14</sup> If presented with any subpoena for student records, including an ICE Administrative Subpoena,<sup>15</sup> the District's General Counsel shall make a determination whether the request is education-related and, if not, refuse access to the records based on the District's general policy against sharing student records for any purpose that is not education-related and the District's need to ensure its resources are effectively allocated. In the event the law enforcement agency seeks to enforce the subpoena for the records in court, the District will oppose that motion and may appeal a court order enforcing the subpoena. The District will comply with any final court order enforcing a subpoena for access to records.<sup>16</sup>

- When required by judicial warrant<sup>17</sup> or other court order to provide access to a student's records for a non-school-related purpose, including immigration enforcement, the school site principal or his/her designee shall monitor the law enforcement investigation. Such monitoring shall include guaranteeing that the law enforcement officers access only the information specified in the warrant or judicial order.
- If any law enforcement agency, including any federal immigration enforcement agency, requests or gains access to a District student or their records for a non-school-related purpose, District staff shall immediately notify the student's parent or guardian that the law enforcement agency sought access to the student. The District shall remind the parent that they have the right to authorize and send a designee to pick up their child on the parent's behalf. The District shall allow the child to wait in the office until the parent or his or her designee pick up the student. District personnel who provide parental notice are prohibited from inquiring into the parent or guardian's immigration status. Efforts to contact parents by the principal or designee must include calling all numbers listed on the student's emergency card, including work numbers, cell phone numbers, and all numbers supplied by the student. The principal or designee shall record the time(s) of contact or attempted contact with the parent/guardian.<sup>18</sup>

Thus, the ACLU Model Policy specifies the considerations that the Superintendent and legal counsel must take into account when determining whether to allow the law enforcement officers access to a student or to records (including whether or not the officer has a judicial warrant or

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<sup>14</sup> "FERPA authorizes, but does not require, the District's voluntary disclosure of student directory information. The District will refuse any informal request for voluntary disclosure of student directory information."

<sup>15</sup> "'ICE Administrative Subpoena' is a subpoena to require the testimony of witnesses or production of records."

<sup>16</sup> ACLU Model Policy at 3.

<sup>17</sup> "'Judicial warrant' means a warrant based on probable cause and issued by a state or federal judge or a federal magistrate judge that authorizes federal immigration authorities to take into custody the person who is the subject of the warrant."

<sup>18</sup> ACLU Model Policy at 6.

other court order); clarifies that the district will oppose a subpoena for access to records in court and will comply with any final court order; and lays out in concrete terms the procedures the Superintendent, district counsel, and other school and district staff must adhere to if access is granted. Additionally, the ACLU Model Policy has much more detailed language about the district's obligations a) not to share student confidential information with law enforcement agencies for a non-school-related purpose; b) not to employ or enter into security services with law enforcement agencies that do not adequately protect student confidential information; and c) the procedures for identifying and reviewing information-sharing agreements or practices.<sup>19</sup> The District's policy does not have comparable language. Absent these specific protections, school staff may easily be coerced by the authoritative language used by immigration authorities and found in administrative subpoenas, and we urge the District to adopt language to clarify and strengthen privacy protections for student records.

Third, the ACLU Model Policy articulates the procedure that district and school staff must follow if a student's parent is detained by federal immigration enforcement authorities,<sup>20</sup> which is not addressed in the District's policy. This is an area of acute anxiety for many parents, and should be explicitly addressed in District guidance to staff. It also presents an opportunity for the District to have a discussion with its staff about the avenues open to release the child to the custody of a third party (e.g., via the Caregiver's Affidavit, which has been promoted by several immigrants' rights organizations).

Fourth, the ACLU Model Policy states that students may not be discriminated against by district personnel on the basis of several protected categories delineated by state and federal civil rights law. The District policy focuses only on prohibiting discrimination against students on the basis of immigration or citizenship status. We fully support the District's clear and explicit statement in this regard, and understand that the District has a separate policy prohibiting discrimination on the basis of at least 17 categories, as listed on the District's website. Our concern is that having different categories listed in different policies could be confusing to district and school staff. To be sure, the District lists many more categories in its general non-discrimination policy than are listed in the ACLU Model Policy. Our suggestion is merely conform the two District policies to be all-encompassing. Relatedly, the ACLU Model Policy deems several categories of student personal information as "sensitive and confidential," and limits the sharing of that information; whereas the District's policy focuses only on prohibiting the collection of information about a student's immigration or citizenship status. Given the existence of federal laws that limit local agencies from prohibiting release of information related to citizenship and immigration status in particular, we recommend the District adopt a more expansive list of student information that should be accorded special care by district staff, treating immigration status and citizenship as two of many particularly sensitive areas of personal information.

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<sup>19</sup> ACLU Model Policy at 5, 6.

<sup>20</sup> ACLU Model Policy at 4.



Finally, the District's policy does not create any mechanism to document law enforcement contact with the school, district, or student for a non-school-related purpose. The ACLU Model Policy has a section requiring school staff to collect this data, details the exact information that must be recorded, and clarifies that student personal identifying information shall not be recorded.<sup>21</sup> Having sufficient information about a problem is necessary to truly define it, and collecting data about these interactions would be very helpful to advocating on behalf of vulnerable students, including those who have irregular immigration status.

Thank you again for the District's continuing leadership and commitment to providing equal educational opportunity to immigrant students, and for the opportunity to collaborate on this important project. Please do not hesitate to contact me at [lnelson@aclunc.org](mailto:lnelson@aclunc.org) or by telephone at 415-621-2493 x383 if you have any questions or need additional guidance on the points raised in this letter or the attached ACLU Model Policy. We look forward to continuing to work with the District to better protect immigrant students and their families in service of an equal and equitable educational opportunity for all.

Sincerely,



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<sup>21</sup> ACLU Model Policy at 7.