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July 26, 2011

William Damiano, Chief  
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Jody Green  
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Humboldt County Juvenile Probation Department  
2002 Harrison Street  
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Wendy B. Chaitin  
Humboldt County Counsel  
825 5th Street  
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Re: Juvenile Probation Department, "Undocumented Persons" Policy

Dear Chief Damiano, Ms. Green, and Ms. Chaitin:

Community leaders and attorneys for juveniles in Humboldt County along with statewide organizations, the Immigrant Legal Resource Center, Legal Services for Children, and ACLU of Northern California have ongoing concerns about the Humboldt County Juvenile Probation Department's adoption of a policy in 2010 that requires juvenile probation staff to refer juveniles to immigration authorities at the point of booking, before any adjudication of their underlying juvenile charges. The policy raises serious legal concerns and threatens public safety by undermining relationships between community members and law enforcement. We are particularly concerned that this policy was adopted without full consideration of the legal ramifications and without input from key community stakeholders.

### "Undocumented Persons" Policy

The County Juvenile Probation Department's "Undocumented Persons" Policy encourages probation officers to inquire into the immigration status of juveniles and requires probation officers to report youth to ICE at the point of booking—before any adjudication of juvenile charges. It encourages probation officers—who lack expertise in the extremely complex area of civil immigration law—to make a determination regarding a youth's status based on the following factors:

I.

“self-report of immigration status, inconsistent report of immigration status, report by parent, guardian, or other reliable person, location of parents or guardian, possession of documentation that establishes legal status, existence of verifiable local address, method of entry into the country, length of time in the country, and court or criminal history information showing prior ICE hold or proceedings. Staff may not rely solely in inability to speak English or on perceived or actual national origin.”

## II. Legal Analysis

### a. The Policy Violates State Law Protections for Juveniles

The County’s policy of reporting youth to immigration authorities undermines the fundamental goals of the juvenile justice system, including confidentiality, rehabilitation, permanency, stability, family reunification, and promotion of the minor’s best interests and violates well-established juvenile court law and procedure. Calif. Welfare & Institutions Code § 202 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.” By referring youth to immigration authorities, the County is punishing and not rehabilitating youth for something they have no control over, facilitating separation from their families, and facilitating the possibility of removal to a country where they often will become unaccompanied minors. These actions clearly are not in a youth’s best interest.

The County’s policy also violates Welfare & Institutions Code § 827 and California Rules of Court § 5.552(a)(4), which prohibit disclosure of information related to juvenile court proceedings. Although there is a limited exception providing for disclosure of information related to juvenile court cases to law enforcement agencies, the context and plain language of the exception make clear that the legislature did not contemplate including federal immigration officials within its scope. Immigration agents plainly cannot be “actively participating” in proceedings against minors who have not yet been identified as suspected violators of federal immigration statutes. Even in the rare event that immigration proceedings are being actively pursued at the time information is shared, these proceedings are civil, and therefore not “criminal or juvenile” in nature as the statute requires.

Further, the policy violates Welfare & Institutions Code § 828 which allows for information sharing between law enforcement agencies regarding the taking of a minor into custody or to any person or agency who has the “legitimate need for the information for purposes of official disposition of a case.” The legislative history of § 828 indicates that it was only intended to facilitate the sharing of juvenile court information between *local and state* law enforcement agencies.<sup>1</sup> Moreover, unless ICE has filed a notice to initiate removal proceedings (which is almost never the case), there is no active immigration case for which an official disposition is

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<sup>1</sup> In 1972, Senate Bill 910 was introduced by Senator Robert Lagomarsino at the request of the California Peace Officers’ and California State Juvenile Officers’ Associations. Letters included in the Governor’s Chaptered Bill File for SB 910 indicate that the intent of section 828 would be to “merely codif[y] normal police operating procedures prior to *T.N.G.*, and refer specifically to the need to create “*statewide* uniformity in record information dissemination,” and to assist “law enforcement agencies *throughout the state.*” No mention is made in these materials of an intent to enable information-sharing with federal agencies.

needed and therefore, this exception does not apply. Courts recognize a private right of action under the right to privacy for violations of § 827.<sup>2</sup>

### **b. The County Has No Duty to Report Juveniles to ICE and No Authority or Expertise to Enforce Immigration Law**

Importantly, Humboldt County has no legal duty to expend limited County resources on immigration enforcement. In fact, the vast majority of California counties, including Alameda, Los Angeles, Sacramento, Santa Clara, Santa Cruz, and Ventura do not engage in the referral of juveniles to immigration authorities. Even the City and County of San Francisco, from which it appears that Humboldt County has replicated its policy, has rescinded the policy to refer accompanied youth booked on felony charges to ICE.<sup>3</sup> The Department of Justice has made it clear that “if state and local officials do not wish to assist us in arresting violators of federal immigration laws, they are free to choose not to.”<sup>4</sup> State and federal courts have also made clear that local officials who engage in immigration enforcement may themselves be violating the law.<sup>5</sup> The City Attorney of San Francisco has stated that “[f]ederal civil law does not require the city to give federal authorities information about juvenile detainees who appear to be in the country illegally.”<sup>6</sup> Nor does federal criminal law impose any such duty on local officials. Notably, there has *never* been a successful criminal prosecution under federal harboring laws of any municipal government entity, employee or officer acting pursuant to a policy of not reporting youth to immigration authorities. In order to be held criminally liable under federal harboring statutes, an individual must have the requisite criminal intent, which cannot be established against County officials under these types of circumstances. As a recent Court of Appeals case illustrates, even an immigration officer who counseled an individual how to avoid detection by staying out of trouble was not criminally liable for harboring.<sup>7</sup>

### **III. The Policy Undermines Public Safety and May Subject the County to Liability**

Policies like this one increase the level of fear and distrust in immigrant communities. In particular, the County’s collaboration with immigration agents in deporting immigrant youth sends the message that County officials are not to be trusted. Immigrant youth and their families

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<sup>2</sup> *Gonzalez v. Spencer*, 336 F.3d 832 (9th Cir. 2003) (reversing dismissal of claim seeking damages).

<sup>3</sup> See e.g., Sara Phelan, *Mayor Lee to partially implement Campos’ due process ordinance*, San Francisco Bay Guardian, May 10, 2011, <http://www.sfbg.com/politics/2011/05/10/mayor-lee-partially-implement-campos%E2%80%99-due-process-ordinance>.

<sup>4</sup> Attorney General John Ashcroft, “Prepared Remarks for the International Association of Chiefs of Police Conference” (Oct. 7, 2002). Available at <http://www.justice.gov/archive/ag/speeches/2002/100702chiefsofpolicemn1.htm>.

<sup>5</sup> See, e.g., *Gates v. Superior Court of Los Angeles County*, 193 Cal. App.3d 205, 218 (1987) (“[b]y allowing LAPD officers to arrest for civil violations of the [Immigration and Nationality Act], the [former LAPD] policy impermissibly intruded upon the federal preserve.”); *Gonzales v. Peoria*, 722 F.2d 468, 474-76 (9th Cir. 1983) (overruled on other grounds by *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037, 1041 (9th Cir. 1999); *League of United Latin American Citizens v. Wilson*, 908 F. Supp. 755, 771-72 (C.D. Cal. 1995) (holding portions of Proposition 187 impermissibly duplicative of federal immigration regulation and thus preempted); *United States v. Brignoni-Ponce*, 422 U.S. 873, 886-887 (1975) (inquiry into immigration status solely based on an individual’s appearance of Mexican ancestry is unlawful).

<sup>6</sup> City Attorney memo to Mayor Newsom, *Re: Undocumented Youth Detained in the Juvenile Justice System*, July 1, 2008, at 2, available at: <http://www.sfcityattorney.org/Modules/ShowDocument.aspx?documentid=114>.

<sup>7</sup> See *United States v. Ozcelik*, 527 F.3d 88, 100-101 (3d Cir. 2008), cert. denied, 129 S. Ct. 1037 (2009) (immigration officer not guilty of shielding an alien from detection when he told the alien, “. . . [d]isappear, don’t tell anyone what address you’re staying at,” and “[s]tay away. . . stay away from everything for 5-6 months. . .”).

have legitimate reason to fear providing information to the police about crimes committed against them or that they have witnessed, which in turn jeopardizes public safety.

Because there is no simple method or procedure to determine an individual's immigration status, the decision by local officials to divert limited resources to immigration matters outside of their expertise or training can be very costly. Determining an individual's immigration status can be exceedingly complex, even for trained immigration agents and experienced immigration attorneys. This is particularly true in the case of youth, who themselves are often unaware of their own status. For those who lack any such training, these determinations are all too often based on uninformed hunches or ethnic and racial stereotyping. This in turn risks inappropriate apprehension of youth with legal immigration status, and subjects the city to potential liability.<sup>8</sup>

This problem is highlighted by the Policy's guidance to probation officers in part III (B) for establishing reasonable suspicion that a youth is undocumented. Reasonable suspicion must be based on specific, articulable facts that are individualized to each particular case.<sup>9</sup> Reasonable suspicion analysis is not "readily, or even usefully, reduced to a neat set of legal rules."<sup>10</sup> The policy allows officers to rely on inappropriate and inflexible factors, incorrectly oversimplifying the reasonable suspicion calculation.

Furthermore, many of the listed factors are not necessarily probative at all in the reasonable suspicion determination. The Ninth Circuit has made clear that "[r]easonable suspicion requires *particularized* suspicion, and in an area in which a large number of people share a particular characteristic, that characteristic casts too wide a net to play any part in a particularized reasonable suspicion determination."<sup>11</sup> Characteristics that are "common to both legal and illegal immigrants do little to arouse reasonable suspicion."<sup>12</sup> For example, many immigrants may not have been in the country for a long time and may not have a "verifiable local address." Looking at this factor disproportionately impacts all immigrants. Self-report of immigration status, as well as inconsistent reports, are also minimally probative. Youth are not always aware of their own status, and under the pressure of arrest and detention are even more likely to give inaccurate or conflicting information. It is also important to note that inquiries about immigration status may violate federal confidentiality protections for youth legally in the country under a grant of asylum.<sup>13</sup>

The inappropriate listed factors in Part III (B) of the Policy are particularly problematic because application of them can easily lead to improper racial profiling. Although the policy states "[p]robation staff may not rely solely on inability to speak English or on perceived or actual national origin," the wording suggests that these factors should be part of the reasonable suspicion determination. Importantly, in regions heavily populated by Latinos, such as Northern California, Latino appearance has such little probative value that it may not be given *any* weight at all. The policy's inappropriate inclusion of this factor underscores the likelihood that

<sup>8</sup> See, e.g., *Soto-Torres v. Johnson*, CIV S-99-1695 WBS/DAD (E.D. Cal. filed Aug. 30, 1999) (County and federal officials paid \$100,000 to settle case brought by the Lawyers' Committee for Civil Rights after County probation officer made erroneous determination regarding plaintiff's deportability which resulted in wrongful arrest and detention of plaintiff by immigration authorities).

<sup>9</sup> See *U.S. v. Montero-Camargo*, 208 F.3d 1122, 1129-30 (9th Cir. 2000).

<sup>10</sup> *Id.* at 1129 (internal quotations omitted).

<sup>11</sup> *Id.* at 1134 (emphasis in original).

<sup>12</sup> *United States v. Manzo-Jurado*, 457 F.3d 928, 937 (9th Cir. 2006).

<sup>13</sup> See, e.g., 8 CFR § 1208.6.

application of this policy by local probation officers will be infected by racial discrimination in violation of the equal protection guaranteed by U.S. and California Constitutions.

These are just some of the legal and policy concerns that our organizations have regarding the County's adoption of an immigration enforcement policy against juveniles. Ultimately, this issue is much more complicated than implied by news articles. We believe that the County's community policing efforts will be undermined and its relationship to immigrant communities will be damaged if the County does not listen to the concerns of community members. The County will also open itself up, unnecessarily, to the risk of litigation due to the potential errors it may make in an area that is not within its expertise.

We would appreciate the opportunity to meet with you to discuss in greater detail our concerns with the policy. If you have any questions, please do not hesitate to contact Angie Junck at (415) 255-9499 x 586.

Thank you for consideration of this request.

Sincerely,

Angie Junck  
Immigrant Legal Resource Center

Julia Harumi Mass  
ACLU of Northern California

Joanne Carter  
Humboldt County Public Defender's Office

Abigail Trillin  
Legal Services for Children

PARA

Redwood Curtain Cop-watch

Peoples' Action for Rights and Community