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ACLU
AMERICAN CIVIL LIBERTIES UNION of ARIZONA
FOUNDATION

Via Certified Mail

January 23, 2013

Dr. Jacob A. Chavez, Superintendent
Cartwright School District No. 83
3401 N. 67th Ave.
Phoenix, AZ 85033-4599

Re: School Resource Officer's Referral of Student to Immigration and Customs Enforcement

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Dr. Chavez,

The American Civil Liberties Union of Arizona ("ACLU-AZ") writes on behalf of student [redacted] concerning the referral of [redacted] to Immigration and Customs Enforcement (ICE) by a school resource officer working at Raul H. Castro Middle School. [redacted] who is a United States citizen, was referred to ICE during the school day, while at school, after he was arrested for an off-campus incident. The episode raises a number of troubling questions about the practices of Castro Middle School and the Cartwright School District. The ACLU-AZ has grave concerns about the district's practice of referring students to federal immigration officials.

Any actions by Castro Middle School or the Cartwright School District that chills the right of immigrant or undocumented students to enroll or attend school is unconstitutional, contradicts the stated goals of federal immigration policy, and negatively impacts the community Cartwright School District is attempting to serve. As Supreme Court precedent makes clear, the denial of a public education to the children of undocumented immigrants violates the Equal Protection clause of the 14th Amendment. *Plyler v. Doe*, 457 U.S. 202 (U.S. 1982). Depriving undocumented students' of the educational opportunities they will need to thrive and participate fully as adults residents negatively impacts the immigrant community, Arizona, and the nation.

Additionally we are concerned that [redacted] was held an extended period of time to verify his immigration status, and referred to ICE on the basis of his ethnicity, both violations of his constitutional rights. We ask that Cartwright School District amend its current policies to ensure that no school resource officer or school official may refer any student to federal immigration officials.

Background

[redacted] is a 13 year old student at Raul H. Castro Middle School. [redacted] has attended Castro Middle School for 2 years, where he has received special instruction to combat his learning disability. On Oct. 19, 2012, [redacted] was involved in an altercation after school with another student near a school bus stop. On October 20th, the other student's mother contacted Raul H. Castro Middle School concerning the fight. Later that same day, [redacted] was arrested at school by the School Resource Officer (SRO) Gary Lashewich.

Principal Sarah Hernandez called [redacted] mother [redacted] to inform her that [redacted] had been arrested and that she needed to come to the school. When [redacted] arrived, Principal Hernandez and SRO Lashewich interviewed [redacted] regarding the alleged fight. After a brief interview, SRO Lashewich asked [redacted] for identification, explaining that unless she produced identification, he could not release [redacted] to her custody and would be forced to take [redacted] to juvenile detention. [redacted] did not have relevant I.D. with her. SRO Lashewich then stated to [redacted] that due to the new Arizona law, he must notify ICE after he makes an arrest.

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SRO Lashewich proceeded to call ICE regarding [redacted] and Principal Hernandez present. On the phone, SRO Lashewich provided ICE officials with [redacted] name, date of birth, and information about the alleged altercation outside of school. ICE informed SRO Lashewich that [redacted] was a U.S. citizen. The entire call took approximately 20 minutes. After the call, SRO Lashewich stated that ICE refused to take the case and told [redacted] not to worry about ICE, because they could not come to churches or schools. He then told [redacted] he would allow her to take custody of [redacted] at that time and that [redacted] would be expelled from school for 10 days. [redacted] felt scared and intimidated throughout the ordeal. [redacted] was relieved when she was finally able to exit the school with custody of her son, but concerned about the implications for other students and parents who may receive similar treatment.

The use of school resource officers to refer students to ICE custody violates federal law; runs counter to the current goals and policies of the federal government; and, undermines the educational mission of the Cartwright School District. Using school resource officer's to enforce federal immigration laws decreases the the likelihood that students will attend school or seek the aid of school resource officers. The practice of referring students to ICE should be abolished because it is unconstitutional, immoral, and a waste of school resources.

Legal Analysis

I. The Use of School Resource Officers to Enforce S.B. 1070 Interferes with the Ability of Undocumented and Immigrant Students to Receive an Education, in Violation of the Equal Protection Clause of the 14th Amendment.

Any Cartwright School District policy that chills the right of undocumented students to obtain or access public education violates the Equal Protection Clause of the 14th Amendment. *Plyler v. Doe*, 457 U.S. 202, 216 (U.S. 1982). In *Plyler*, the Texas legislature sought to deny undocumented students the opportunity to enroll in public schools. *Plyler* at 205. The Supreme Court held that "if the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest. No such showing was made." *Plyler* at 230. The Court treats as

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> presumptively invidious those classifications that disadvantage a "suspect class," or that impinge upon the exercise of a "fundamental right." With respect to such classifications, it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest. *Plyler* at 216-217.

"Education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests." *Plyler* at 221. "In addition to the pivotal role of education in sustaining our political and cultural heritage, denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit." *Plyler* at 221-22. To comply with the mandates of the 14th Amendment, Cartwright School District's infringement upon the right of undocumented students to obtain an education must serve a compelling government interest.

In practice, Cartwright School District's referral of suspected undocumented students to ICE furthers no government interest, compelling or otherwise, and cannot meet the standard laid out in *Plyler*. The Court in *Plyler* states,

> It is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime. It is thus clear that whatever savings might be achieved by denying these children an

> education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation. *Plyler* at 230.

Given current federal immigration policy, the reality that undocumented persons are part of the Arizona community and will be for the foreseeable future, and the importance that all residents have access to a quality education, we see no legitimate reason to chill the right of undocumented students to access public education by attempting to enforce S.B. 1070 in local schools.

The holding in *Plyler* is reinforced by the policies of the federal government, which has placed a low priority on the detention and deportation of undocumented students, while simultaneously encouraging undocumented students to obtain authorized presence in the United States. In 2011, U.S. Immigration and Custom's Enforcement Director John Morton issued two memos discouraging ICE employees from targeting students and schools. Director Morton's March 2011 memo to ICE employees outlined three areas of priority enforcement; (1) aliens who pose a threat to national security or to public safety; (2) recent illegal entrants; and, (3) aliens who are fugitives or otherwise obstruct immigration controls. ICE Memoranda, March 2, 2011; Director John Morton. Director Morton wrote that,

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> absent extraordinary circumstances or the requirements of mandatory detention, field office directors should not expend detention resources on aliens who are known to be suffering from serious physical or mental illness, or who are disabled, elderly, pregnant, or nursing, or demonstrate that they are primary caretakers of children or an infirm person, or **whose detention is otherwise not in the public interest**. *Id.*

In October 2011, Director Morton issued a second memo, indicating that ICE employees should not arrest, interview, search or conduct surveillance around sensitive locations, which includes "pre-schools, primary schools, secondary schools, post-secondary schools, up to and including colleges and universities, and other institutions of learning such as vocational or trade schools." ICE Memoranda, October 24, 2011; Director John Morton. Director Morton advised supervisors to "take extra care when assessing whether a planned enforcement action could reasonably be viewed as causing significant disruption to the normal operations of the sensitive location… particular care should be exercised with any organization assisting children." *Id.* Under current federal government policy, ICE officers will not even set foot on a school campus without special authorization or extraordinary circumstances. *Id.* Indeed, SRO Lashewich acknowledged that ICE will not come to schools in his meeting with [redacted] leaving one to wonder what exactly was accomplished by calling ICE.

The federal government has demonstrated a sustained commitment to protecting the right of undocumented immigrants to receive an education. In June

2012, the Obama Administration announced the implementation of the Deferred Action of Childhood Arrivals Program, DACA, to pave a path for undocumented students to obtain an authorized presence within the United States. It is likely that a great percentage of the undocumented students in the Cartwright School District are either eligible or current DACA applicants. To be eligible under DACA, a person must: (1) be under 31 years of age; (2) have come to the United States before their 16th birthday; (3) have continuously resided in the US for at least 5 years preceding June 15, 2012; (4) not have a felony conviction or a serious misdemeanor; and (5) be presently attending school, have graduated, earned a GED or be an honorably discharged veteran of the US armed forces. Cartwright School District does not have the duty or ability to determine which students are U.S. citizens, subject to deportation, or possible beneficiaries of deferred action. Therefore, it should leave immigration enforcement to more qualified parties.

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Given that present federal government immigration policy supports creating a path for undocumented students to obtain authorized presence within the United States, it is unconscionable that a local school district would create a barrier by seeking to enforce immigration laws on campus. Any attempt to enforce section 2(B) of S.B. 1070 on school campuses chills the rights of undocumented students to receive a public education. The Supreme Court has made clear that "state laws are preempted when they conflict with federal law. This includes cases where 'compliance with both federal and state regulations is a physical impossibility,' and those instances where the challenged state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of'" the federal government. *Arizona v. United States*, 132 S. Ct. 2492, 2501 (U.S. 2012). Cartwright School District's actions run counter to federal immigration policy. The only thing accomplished by Cartwright School District's policy of referring students to ICE custody is to discourage students from attending school and interacting with school resource officers.

II. Cartwright School District May Not Detain Students to Verify Their Immigration Status

Neither law enforcement nor school officials may detain a student for the sole purpose of ascertaining the student's federal immigration status. *de Jesus Ortega Melendres v. Arpaio*, 695 F.3d 990, 1000 (9th Cir. Ariz. 2012). Nor may law enforcement or school officials extend the time of a legitimate police inquiry, solely to ascertain a student's immigration status. *Melendres* at 1001.

In the present instance, after questioning [redacted] regarding the fight, SRO Lashewich informed [redacted] that he was calling ICE in accordance with his duties under Section 2(B) of S.B. 1070. Immediately following ICE's verification that [redacted] was a U.S. citizen, SRO Lashewich released [redacted] into [redacted] custody. [redacted] estimates that after the completion of the investigation into the fight, SRO Lashewich and Principal Hernandez held [redacted] outside of class and in law enforcement custody for at least twenty additional

minutes while the school contacted ICE officials to ascertain [redacted] immigration status.

The additional time [redacted] was held in custody to determine his immigration status constitutes an illegal seizure under the 4th Amendment. As the Court explained in *Arizona v. United States*, "detaining individuals solely to verify their immigration status" raises the specter of an improper seizure by state officials under the 4th Amendment. *Arizona v. United States*, 132 S. Ct. 2492, 2509 (U.S. 2012). Any detention by law enforcement to determine [redacted] immigration status, beyond that needed to deal with the original criminal complaint, must be supported by a separate, reasonable suspicion that [redacted] committed another crime. *de Jesus Ortega Melendres v. Arpaio*, 695 F.3d 990, 1000 (9th Cir. Ariz. 2012).

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Detaining a student to determine the student's immigration status "disrupt(s) the federal framework" by putting "state officers in the position of holding aliens in custody for possible unlawful presence without federal direction and supervision." *Arizona v. United States*, 132 S. Ct. 2492, 2509 (U.S. 2012). As the Supreme Court made clear, "the program put in place by Congress does not allow state or local officers to adopt this enforcement mechanism." *Id.* By detaining [redacted] solely to identify his immigration status, Cartwright Middle School violated [redacted] 4th Amendment rights.

III. Cartwright School District May Not Refer Students to Federal Immigration Authorities Based on a Student's Race or Ethnicity.

S.B. 1070 restricts state officials from using race, color or national origin as a determining factor in assessing a person's unlawful presence, "except to the extent permitted by the United States and Arizona Constitution." *Arizona v. United States*, 132 S. Ct. 2492, 2507-2508 (U.S. 2012). The 4th Amendment does not permit a finding of reasonable suspicion a person is an unauthorized resident, solely based on the person's ethnicity. *United States v. Brignoni-Ponce*, 422 U.S. 873, 885-887 (U.S. 1975).

"Reasonable suspicion requires particularized suspicion. (citations omitted). Where… the majority (or any substantial number) of people share a specific characteristic, that characteristic is of little or no probative value in such a particularized and context-specific analysis." *United States v. Montero-Camargo*, 208 F.3d 1122, 1131 (9th Cir. Cal. 2000). "The likelihood that in an area in which the majority - or even a substantial part - of the population is Hispanic, any given person of Hispanic ancestry is in fact an alien, let alone an illegal alien, is not high enough to make Hispanic appearance a relevant factor in the reasonable suspicion calculus." *United States v. Montero-Camargo* at 1132. Given that nearly 90% of the students in the Cartwright School District are Hispanic, ethnicity cannot be used as a factor to determine if reasonable suspicion exists to detain a student as an unauthorized resident.

S.B. 1070 does not compel school officials or law enforcement officers to contact federal immigration officials each time they detain someone; only when there is reasonable suspicion the person does not have an authorized presence. Law enforcement and school authorities must be able to articulate a set of factors that give rise to reasonable suspicion, not including ethnicity, before they initiate contact with federal immigration officials. When enforcing S.B. 1070, the provisions must be "implemented in a manner consistent with federal law regulating immigration, protecting the civil rights of all persons and respecting the privileges and immunities of United States citizens." *Arizona v. United States*, 132 S. Ct. 2492, 2507-2508 (U.S. 2012).

It is not clear what factors gave SRO Lashewich and Principal Hernandez suspicion that [redacted] was unlawfully present in the United States, besides [redacted] ethnicity. [redacted] speaks fluent English. He has attended Castro Middle School for 2 consecutive school years. [redacted] mother has previously met with Principal Hernandez and is a U.S. citizen. Indeed, when called, ICE verified that [redacted] is a U.S. citizen. If not for [redacted] Hispanic ethnicity, it is hard to believe ICE would have been alerted to his presence. The use of [redacted] ethnicity as a determining factor in the decision to refer [redacted] to federal immigration authorities violated his 4th Amendment rights.

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For the foregoing reasons, we ask that Cartwright School District No. 83 amend its policies to prevent school officials and school resource officers from contacting federal immigration authorities in regards to any student. The continued use of school resource officers to enforce federal immigration laws chills undocumented students right to a public education, fosters fear and distrust between the district and the community, and violates the constitutional rights of undocumented, immigrant, and Hispanic students. Our hope is to resolve these matters before they reach the point where litigation is necessary. Should you have any questions or concerns, I can be reached at 602-773-6003 or by email at dpochoda@acluaz.org. I look forward to your response and working with you to resolve these matters.

Sincerely,

Dan Pochoda
Legal Director
ACLU of Arizona

Cc: Principal Sarah Hernandez