ALESSANDRA SOLER
EXECUTIVE DIRECTOR

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PRESIDENT

Via Certified Mail

February 15, 2013

Manuel L. Isquierdo, Ed.D., Superintendent
Sunnyside Unified School District #12
2238 E. Ginter Rd.
Tucson, AZ 85706

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

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Superintendent Isquierdo,

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 school administrators at Sunnyside High School. [redacted] was referred to ICE while at school, after he was arrested for an alleged criminal infraction. The episode raises a number of troubling questions about the practices of Sunnyside High School and the Sunnyside Unified School District. The ACLU-AZ has grave concerns about the district's practice of referring students to federal immigration officials.

Any actions by Sunnyside High School or the Sunnyside 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 Sunnyside School District is attempting to serve. Supreme Court precedent makes clear, the denial of a public education to 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 adult residents negatively impacts the immigrant community, Arizona, and the nation.

We believe that Sunnyside School District exceeded its authority and violated [redacted] 4th Amendment rights when [redacted] was held for an extended period of time, transported from Sunnyside High School to a local convenience store, and given to a Border Patrol agent solely to enforce federal immigration law. Additionally, the referral of [redacted] to federal immigration officials appears to have been made solely on the basis of his ethnicity, another violation of [redacted] constitutional rights. We request Sunnyside School District amend its current policies to ensure that no school administrator may refer any student to federal immigration officials.

Background

[redacted] is a 15 year old student who attends Sunnyside High School. On November 15, 2012 [redacted] was pulled out of class by a staff member at Sunnyside High School and taken to the office of Assistant Principal Ricky Torres. [redacted] believed he had been called to the office in relation to a prior incident. However, Assistant Principal Torres wanted to speak with [redacted] about school property he believed was in [redacted] possession. Assistant Principal Torres questioned [redacted] for approximately an hour regarding the missing school property. After Mr. Torres had finished, he requested [redacted] call Mrs. [redacted] to come to the school.

When [redacted] mother arrived at the school, School Resource Officer Aurelio Galvan proceeded to question [redacted] about his immigration status. SRO Galvan stated he was required to inquire about Manuel's immigration status in accordance with SB 1070. [redacted] refused to disclose the information. SRO Galvan stated that Manuel was in police custody and thus entitled to know. Despite this, [redacted] continued to refuse to disclose his immigration status.

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Assistant Principal Torres informed SRO Galvan that he would have to speak with Principal Ybarra concerning whether or not the school could contact Immigration and Customs Enforcement concerning [redacted] Soon thereafter, SRO Galvan and Assistant Principal Torres left the room to speak. When they returned, Assistant Principal Torres stated that he believed [redacted] was not being truthful concerning the missing school property and that he was not going to drop the charges. Assistant Principal Torres then told SRO Galvan to take [redacted] to Circle K so that ICE may pick him up.

SRO Galvan handcuffed and transported [redacted] in his squad car to a Circle K approximately four blocks from Sunnyside High School. The sole purpose of transporting [redacted] to Circle K was to take [redacted] to an area where federal immigration officials could detain him; the school administration knew that federal immigration officials would not go to the Sunnyside High School campus to enforce immigration law. At the Circle K, SRO Galvan released [redacted] from his cuffs and instructed him to get into the border patrol agent's squad car. [redacted] was then transported to the local ICE office.

Once there, agents attempted to calm [redacted] who was upset and crying. ICE agents informed [redacted] that he qualified as a Dreamer, making him eligible for deferred action, and that he would be released in 3 to 4 hours. ICE agents requested that [redacted] provide them with school records to verify that he attends Sunnyside High School. Accordingly, [redacted] mother returned to Sunnyside High School seeking proof [redacted] was a current student.

When Mrs. [redacted] returned to Sunnyside High School she was shocked and saddened by the response she received from the school administration.

Principal Steve Ybarra initially pretended to not know who [redacted] was, stating to Mrs. [redacted] that her son did not attend Sunnyside High School. Mrs. [redacted] refused to leave until she received the information she requested. Principal Ybarra became annoyed, made a gesture to the ground, and began muttering profanities as he walked away. Mrs. [redacted] next asked Assistant Principal Ricky Torres for the necessary paperwork, which he agreed to provide. Once the information was given to ICE, they immediately released [redacted] from custody.

[redacted] was suspended from Sunnyside High School for 45 days, during which he attended S.T.A.R. Academic Center. Since being taken into custody by ICE, [redacted] has consulted with an immigration attorney who has confirmed that [redacted] qualifies as a dreamer, eligible for deferred action. All criminal charges against [redacted] have been dropped.

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The use of school administrators and school resource officers to refer students to federal immigration authorities violates federal law; runs counter to the current goals and policies of the federal government; and undermines the educational mission of the Sunnyside School District. The actions taken by the staff at Sunnyside High School violated the law and fell far below the standards of professional conduct the community expects from public officials. Using school resource officers and administrators to enforce federal immigration laws decreases the the likelihood that students will attend school or seek the aid of school resource officers. [redacted] and all undocumented students, have a right to be treated in a manner consistent with our Constitution, regardless of their immigration status. We request that Sunnyside School District's abolish the practice of referring students to federal immigration officials 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 Sunnyside 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

> 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, Sunnyside School District's infringement upon the right of undocumented students to obtain an education must serve a compelling government interest.

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In practice, Sunnyside 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. *Memoranda from John Morton, Director, Immigration and Custom Enforcement* (March 2, 2011). Director Morton wrote that,

> 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." *Memoranda from John Morton, Director, Immigration and Custom Enforcement* (Oct. 24, 2011).. 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 set foot on a school campus without special authorization or extraordinary circumstances. *Id.* Indeed, ICE officers told [redacted] that he should never have been detained for immigration purposes because he was a current student in a school setting.

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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 Sunnyside School District are either eligible or current DACA applicants. Indeed [redacted] is an eligible and participating DACA applicant. The federal government policy was specifically designed to protect students such as [redacted] from excessive detention and entanglement with our immigration system. Sunnyside 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.

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). Sunnyside School District's actions run counter to federal immigration policy. Referring students to federal immigration officials will only discourage students from attending school and interacting with school resource officers.

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

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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. Detaining a student to determine their 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.*

In the present instance, after Assistant Principal Torres questioning of [redacted] regarding the school property had concluded, SRO Galvan opened a separate line of questioning concerning [redacted] immigration status. For more than an hour, Principal Ybarra, Assistant Principal Torres, and SRO Galvan detained [redacted] at the school specifically to address [redacted] immigration status. Eventually, Principal Ybarra had SRO Galvan transport [redacted] to a Circle K because he knew federal immigration officials would not come to the school to detain a current student. A state government official may not arrest and transport a person solely for the purpose of enforcing immigration laws. *Arizona v. United States*, 132 S. Ct. 2492, 2509 (U.S. 2012).

Once in ICE custody, ICE agents verified that [redacted] was a dreamer, verified that he attended Sunnyside High School, released him and let him know that he should have not been detained in the first place. Due to the actions of Sunnyside High School, [redacted] spent approximately 7 total hours in custody to ascertain his immigration status.

The additional time [redacted] was held in custody by Principal Ybarra, Assistant Principal Torres, and SRO Galvin to determine his immigration status constitutes an illegal seizure under the 4th Amendment. As the Court explained, "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).

III. Sunnyside 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).

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"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 Sunnyside 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 as SRO Galvan told [redacted] but only when there is reasonable suspicion the person does not have an authorized presence. *Ariz. Rev. Stat. § 11-1051 (B)*. Law enforcement and school authorities must be able to articulate a set of factors that give rise to reasonable suspicion, which does not include ethnicity, before they initiate questioning regarding a suspect's immigration status. *United States v. Montero-Camargo*, 208 F.3d at 1131-32. Reasonable suspicion must be based upon particular, individualized, and objectively observable factors. *Id.* at 1132.

It is not clear what factors gave SRO Galvan and Assistant Principal Torres suspicion that [redacted] was unlawfully present in the United States, besides [redacted] ethnicity. [redacted] speaks fluent English. He attended Sunnyside High School for 2 consecutive school years. If not for [redacted] Hispanic ethnicity, it is hard to believe school officials would have questioned [redacted] immigration status. The use of ethnicity as a determining factor in the decision to refer [redacted] to federal immigration authorities violated his 4th Amendment rights.

For the foregoing reasons, the ACLU of Arizona requests Sunnyside School District No. 12 amend its policies and practices to prevent school officials and resource officers from contacting federal immigration authorities regarding any student. Using school resource officers to enforce federal immigration law 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.

Additionally we requests, pursuant to Arizona's Public Records Law, A.R.S.§ 39-121 *et seq.,* the right to examine and copy, or to be furnished with copies, any and all documents relating to agreements or contracts between Sunnyside School District (or any of its subdivisions or members) and any law enforcement entity or department, including, but not limited to, Memoranda of Understanding for the deployment of School Resource Officers. Please comply with this request on or before March 7, 2013, otherwise, we may deem the request denied. Our hope is to resolve these matters before they reach the point where litigation is necessary. Should you have any questions, 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.

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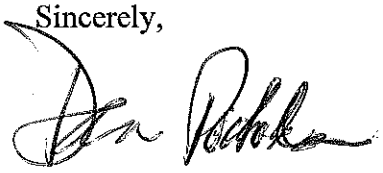
Sincerely,



Dan Pochoda
Legal Director
ACLU of Arizona

cc: Principal Steve Ybarra, Sunnyside High School
Zoe Savitsky, Department of Justice, Civil Rights Division
Jean Ajamie, Director, School Safety & Prevention, Arizona Department of Education