

Police Accountability Board
Fair and Impartial Policing Implementation Subcommittee
Assessment of BPD Implementation of Fair and Impartial Policing Directives

INTRODUCTION

On February 23, 2021, the Berkeley City Council (City Council or Council) unanimously passed the package of policy recommendations that the Mayor’s Working Group on Fair and Impartial Policing (FIP) forwarded to City Council after two years of meetings with experts and Berkeley Police Department (BPD) representatives (See Appendices 1 and 2). As part of that package, the Police Review Commission (PRC) and its successor the Police Accountability Board (PAB) were assigned responsibility for “monitoring and assessing” BPD implementation of the FIP directives. The directives included a requirement for quarterly updates from the BPD to City Council on implementation progress. Initially BPD updates were submitted solely to Council. More recently, updates have been sent to the PAB prior to Council submission; however, the PAB has not been given the opportunity to weigh in on or inform the contents of BPD’s quarterly updates. A summary of BPD updates covering the period June 2021 to October 2023 is provided in Appendix 3.

The goal of the Mayor’s FIP Working Group was to discuss ways to address racial disparities in BPD stops, arrests, and searches, as presented to the Berkeley community in the 2018 Center for Policing Equity (CPE) report¹ commissioned by the Council. That report found that, given the city’s population demographics, Black motorists were 6.5 times more likely to be stopped by Berkeley police than White motorists and that Black pedestrians were 4.5 times more likely to be stopped than White pedestrians.

The PAB recognizes the ongoing efforts taken by the BPD to implement the FIP mandates, as represented in the quarterly updates from Chief Louis. This PAB

¹ Center for Policing Equity. *The Science of Justice: Berkeley Police Department, National Justice Database City Report*. May 2018. www.policingequity.org.

report, submitted pursuant to the PAB's directive to monitor FIP implementation, is an independent assessment of progress to date. The focus of this assessment is not only on changes in written policy, but also on how much progress has been made towards addressing racial disparities in BPD stops, arrests, and searches.

This report begins with the most recent statistics on racial disparities in stops, arrests, and searches. It then includes a discussion of FIP recommendations and the status of BPD's implementation efforts, as well as questions that emerge from Chief Louis's quarterly updates². The report concludes with recommendations for the BPD, the PAB, and the Council.

FAIR AND IMPARTIAL POLICING STATISTICAL PROFILE

For the period April 1, 2021 to October 31, 2023, the total number of stops by BPD was 13,551. Of this total, 34.8% were White individuals, 32.5% were Black individuals, and 16.1% were Latino individuals. Based on population figures for Berkeley, this means that Black people were 6.2 times more likely to be stopped than Whites, and Latinos were 1.7 times more likely to be stopped. A simple comparison to the CPE report suggests that there has been a 4.6% decline in the disparity between White and Black stop rates pre- versus post FIP implementation.

During this same time period, 2,413 stops resulted in a search, and 2,188 resulted in an arrest. In absolute numbers, Black individuals were more likely to be searched and/or arrested than any other racial category (See Appendix 3). Based on Berkeley demographics, Black people had an 11% chance of being arrested while White people had a 1% likelihood and Latinos had a 2% likelihood of arrest. When looking only at Berkeley residents, the numbers are almost as disparate. Black Berkeley residents had a 29.4% chance of being stopped, while the likelihood of a stop was 5% for White residents and 6% for Latino residents. **The data we put here should include, for the pre- spring 2021 period and post spring 2021 to the present: 1)**

² In addition to direction to the Berkeley Police Department to implement reforms, the February 2021 City Council action included referral of some FIP recommendations to the public safety reimagining process, and others to be "taken up by the PAB". This report does not address those recommendations referred to the reimagining process. The report substantively addresses one of the three recommendations referred to the PAB (annual implicit bias training). The PAB-specific items and corresponding action steps are outlined in the Recommendations section of the report.

absolute numbers of stops, arrests, and searches by race; 2) % of same; 3) disparities by race given population statistics (i.e. likelihood of being stopped etc); 4) do the same for Berkeley residents and non-residents. And do the same for officer-initiated versus call-initiated. My preference would be to put this in narrative form in the text and add an Appendix with the detailed graphs.

POLICY AND PRACTICES DIRECTIVES AND REFORMS

Focusing on safety in traffic stops. The FIP recommendation on traffic stops was to “focus traffic stops on safety” and “eliminate stops for low-level offenses”; the motion that passed City Council was to “Implement a new evidence-based traffic enforcement model focusing the basis for traffic stops on safety and not just low-level offenses.” Neither the Mayor’s Working Group nor the Council defined “low-level offenses.” The PAB recommends that the BPD adopt the definition used in SB50, as detailed below in Footnote 3.³

BPD is using a 3-pronged approach to traffic safety (“Primary Collision Factors”; “Community Reports”; and “Community Caretaking”) to effectuate Council direction (Policies #1107 and #500). BPD updates report that implementation of this recommendation is complete.

The first prong of BPD’s 3-pronged approach (“Primary Collision Factors” or PCF) is generally excellent and data-driven at the local level. This prong consists of those factors that most commonly result in fatal or severe collisions in Berkeley (unsafe speed; ignoring pedestrian right of way at crosswalks; failure to yield for turns; red light violations; and stop sign violations). One important update to this prong would be to specify not only the violation but also the mode of the party at fault

³ In 2023, a Bill was introduced in the California Legislature, SB50 (“An Act to Amend Sections 21 and 21100 of, and add Section 2804.5, to the Vehicle Code”), that stipulated that “notwithstanding any other law, a peace officer shall not stop or detain the operator of a motor vehicle or bicycle for a low-level infraction...”. The Bill, which was tabled after a third reading, defined a “low-level infraction” as “a violation related to the registration of a vehicle or vehicle equipment,” as specified; “a violation related to the positioning or number of license plates when the rear license plate is clearly displayed...”; “a violation related to vehicle lighting equipment not illuminating, if the violation is limited to a single brake light, headlight, rear license plate, or running light or a single bulb in a larger light of the same,” as specified; “a violation related to vehicle bumper equipment,” as specified; “a violation related to bicycle equipment or operation,” as specified.

(e.g., stop sign violations by drivers are a common cause of fatal and severe collisions in Berkeley, but stop sign violations by bicyclists are not, and the PCF categories should reflect this). It is expected that most, if not all, stops should occur in response to these well-documented safety issues, following the Council's directive.

The second prong ("Community Reports") consists of "responding to calls from community members" and includes such things as "possible DUI driver (i.e. car reportedly swerving)"; "driver fallen asleep at red light"; "a variety of unsafe driving incidents"; "crime with get-away vehicle description." While some of these community calls no doubt require an immediate response, the category is broad and opens the door to potential profiling by proxy. At a minimum, under the category of "a variety of unsafe driving incidents", policies should be put in place that specify which calls for service will result in law enforcement action. Data analyzed by the City Auditor found⁴ that only 13% of calls from community members resulted in a citation or arrest, compared to 42% of officer-initiated stops. To maximize impact and reduce the potential for profiling by proxy, this 13% should be analyzed to determine what types of community calls are most likely to yield a law-enforcement response relating to public safety. The PAB recommends that this prong should then be substantially reformulated based on the data analysis of which types of calls for service result in enforcement action and which are more likely to open the door to profiling by proxy.

The third prong, "Community Caretaking," is the least specific and consists of three examples: "seatbelt violations"; "distracted driving (hands free law)"; and "DUI". As described by the BPD, these are not primary collision factors according to the California Highway Patrol because they are not the proximate cause of a collision (even if they interact with primary collision factors and may be the ultimate cause of the collision). Because this prong is open-ended and consists only of several

⁴ Data Analysis of the City of Berkeley's Police Response, 07/02/2021
<https://berkeleyca.gov/sites/default/files/2022-01/Data-Analysis-Berkeley-Police-Response.pdf>

examples, it allows for maximum discretion with no real parameters. The PAB recommends more specificity in this prong and basing its components on Berkeley data rather than national statistics, as is done for Prong 1 (Primary Collision Factors). Specifically, the analysis should examine which other factors (non-PCFs) are highly associated with severe and fatal collisions in Berkeley. The open-ended quality of this prong may contribute to more non-safety related stops than is called for in the Council directive. If more specificity is not possible or feasible, this prong should be eliminated.

In addition to further clarification and specification of factors and policies as related to prongs two and three, future BPD updates to Council should include statistical information enabling an analysis of the impact of the three-prong approach on reducing or eliminating stops for low-level offenses in a manner that supports an overall assessment as well as an understanding of the impact of the approach on reducing racial disparities.

PAB analysis of BPD raw data on traffic stops⁵ reveals that the total number of traffic violation stops increased from 3,956 in 2020-2021 (at the height of the pandemic) to 6,280 in 2022-2023 when the 3-pronged approach took effect. While the absolute number of stops increased significantly during this period, the number of stops for low-level infractions remained approximately the same—at 1,256 and 1,219, respectively. Because the number of stops overall increased dramatically, the *percentage* of stops for low-level infractions declined from 32% in 2020-2021 to 19% in 2022-2023.

Clear, evidence-based definition of stops of criminal suspects. The FIP Working Group recommended “us[ing] a clear, evidence-based definition for stops of criminal suspects.” This was not meant to be primarily about traffic stops but all stops of criminal suspects, including motorists, cyclists and pedestrians. Following

⁵ The BPD data set on traffic violations included a few categories—such as those relating to improper parking, trespassing, and vehicle theft—which did not seem to us appropriate to include in these counts of traffic violations. We deleted those few categories, which accounted for 126 cases, from our calculations.

this recommendation, Council directed the BPD to amend policies “reaffirming and clarifying that the Berkeley Police Department will use a clear, evidence-based definition for stops of criminal suspects.” The Department’s quarterly updates state that the BPD “is establishing a precision based policing model that considers data and public safety. This model aims to reduce the number of stops that studies have shown had minimal impact on public safety.”

The PAB appreciates the BPD June 2023 and October 2023 statement that “ensuring that we implement approaches that identify and work to reduce racial disparities will be a cornerstone to our evidence-based approaches.” However, without more specifics about the department’s “precision-based policing model” and “a feedback loop with information flowing both ways”, it is difficult to assess whether these additions have the potential to reduce racial disparities. **More specificity in this context is particularly critical as the data presented in this report indicate that racial disparities remain high.** The BPD June and October 2023 updates also state that this “feedback loop ... creates an accountability measure.” Does this mean there is accountability for racial disparities? If so, what does it consist of? **The next BPD update should include greater specificity regarding precision-based policing, feedback loops, and accountability measures. Further, and significantly, none of the BPD updates have actually included a definition of what constitutes legitimate stops for criminal suspects, evidence-based or otherwise. Although the BPD indicated that this recommendation was implemented as of September 2022, a definition is still outstanding.**

Only use race and ethnicity as determining factors together with other clear criteria. BPD updates indicate that this recommendation has been implemented because formal policies, state law, and the Constitution, prohibit using race as the defining factor in making stops, arrests, and searches. The PAB is concerned that the BPD suggests that no change in this area is needed; the question is not whether BPD policies or state or federal law allow the use of race as a defining factor—clearly they do not. The question is how to prevent discretionary actions *in the field* from inadvertently introducing race as the determining factor. Most important, how are race and ethnicity used as determining factors “together with other clear

criteria”? Future updates should include more specificity on this important question of how race and ethnicity may be used with other factors. Examples may be useful here.

Enhanced Implicit Bias Training. The FIP directives passed by Council on 2/23/21 “require enhanced annual implicit bias training for police.” The BPD updates state that there has been “ongoing training in topics such as implicit bias, racial profiling...”. The PAB has been informed by the BPD that “The topic of bias is covered as a subtopic throughout various trainings” such as de-escalation and tactical communication. This likely falls short of the enhanced annual training focused on implicit bias that was called for in the Council directive. Full compliance with the Council directive requires that the BPD install annual intense implicit bias training, not the more scattered approach to implicit bias as a subtopic to other materials as currently practiced.

Early Intervention (EIS). An effective EIS was a central component of the FIP recommendations, and the focus—as with the FIP program as a whole-- was on racial disparities. As the Working Group stated in its recommendation presentation to Council in February 2021, an effective Early Intervention System would “involve identifying officer outliers in stops, searches, and use of force and their outcomes and examining the reasons for racial disparities.” Racial disparities take a back seat in the BPD quarterly updates, including in its description of an amended EIS program.

Beyond this important omission, BPD updates have been inconsistent across quarterly reports with regard to how this directive has been implemented (See Appendix 3). After relative minor tweaking, the BPD reported that the EIS directive had been completed.

Additionally, recent updates report that periodic audits of several randomly chosen officers have been added to the EIS process. While audits of a few randomly chosen officers may occasionally be useful, the intent of the FIP was to focus on “outliers”, a neutral term of art that refers to those whose performance on certain indicators is outside the BPD average. As the focus of the FIP was on racial disparities, in the case of EIS it is important to focus on those units or officers for whom stops are disproportionately numerous and/or racial disparities most pronounced. The allegations of racism, disdain for the unhoused, and implicit arrest quotas in the Downtown Bike Force have drawn attention to the importance of such a directed focus when doing EIS audits.

In April 2023, City Council referred \$100,000 to the June 2023 budget to hire a consultant for the design and help with implementing a new Early Intervention and Risk Management System. It will take some time before that project is complete. In the interim, EIS audits should be focused on officers who are outliers on the variables stipulated in the Department’s EIS, with a particular focus on racial disparities in stops, arrests, and searches. Further, the audits as currently published are of little value from an accountability perspective; information provided in BPD audit reports is so high-level and sanitized that neither the PAB, nor the Council, nor the public can exercise any oversight using the included data. (see Appendix X, sample audit report).

Written consent search forms. The PAB is pleased to see that this has been implemented (Policy 311.3). An understanding of the implementation process and its effect would be improved by the inclusion of data in the quarterly BPD reports. Dr. Frank Baumgartner and his team (2018) found that in North Carolina, consent searches declined by 75% in cities that required written permission. PAB analysis of BPD data reveals that the number of consent searches decreased from 188 in 2021, to 123 in 2022, and 69 through the first three quarters of 2023. While the number of consent searches has gone down since the introduction of written consent forms, racial disparities in these discretionary searches remain high. In 2021, 44% of consent searches were of Black individuals, 32% were of White individuals, and 16% were of Latinos. Two years later, the respective percentages were 43%, 30%,

and 19%. In other words, while the absolute number of people of color undergoing consent searches has decreased with the implementation of written consent forms, the racial disparities in these discretionary searches have not.⁶

Warrantless searches of people on supervised release status. BPD Policy 311.6, as adopted with agreement between the PRC and the BPD and incorporated into the FIP directives, limited warrantless searches of people on supervised release status unless there was reasonable suspicion that they had committed, were committing, or were about to commit a crime. This policy was modified by City Council on July 26, 2022, to make a distinction between people on supervised release for violent crimes (who would be subject to warrantless searches) as opposed to non-violent crimes (for whom reasonable suspicion would be required for a search). The Department under Chief Greenwood had considered the violent/non-violent distinction a challenging one to make in practice and recommended the “reasonable suspicion” standard for all searches of people on supervised release. Have officers found it difficult to implement the “violent”/“non-violent” distinction as Chief Greenwood had suggested? What is the impact of this policy revision on numbers of, and racial disparities in, arrests and searches of people on probation and parole? Future BPD updates should continue to address what, if any, impact this 2022 change in policy has had on racial disparities. Since introduction of the 311.6 policy change in 2020, BPD data no longer included “probation or parole search” as a category. This made sense since those searches were no longer permissible (absent reasonable suspicion). However, since the modification in 2022, probation and parole searches (and other supervised release searches) were allowed if the individual was on probation or parole for a violent offense. Therefore, BPD data should once again include these searches in their data.

Profiling by proxy. According to Chief Louis’s June 2023 update, the Communications Manual “has been amended to address handling cases involving profiling by proxy.” Further, dispatchers “are instructed to be cognizant and screen

⁶ These racial disparities in consent searches are comparable to the disparities in all searches. For the period 2020-2023, there were a total of 3244 searches, with 47% of them of Black people, 31% of White people and 17% of Latinos.

for profiling by proxy calls.” More specifics need to be provided. Exactly what does the “instruction” consist of? What has the effect been on racial disparities in departmental response to calls for service? As detailed in Section 1 above, racial disparities in stops are higher in police actions initiated by the public than in officer-initiated responses. This suggests that more targeted dispatcher instructions and call-screening for profiling by proxy are necessary.

Resources on police-civilian encounters. The PAB is pleased that the business card directive has been fulfilled.

Fire racist officers identified through social media and other media screens. Policy #1029 (“Employee Speech, Expression, and Social Networking”) stipulates that employees of the BPD whose speech or expression “tends to compromise or damage the mission, function, or reputation...of the Berkeley Police Department” will be held accountable. Two issues arise here: 1) The FIP recommendation included media scans to ensure consistency with this policy, yet this proactive approach does not seem to have been implemented; 2) The FIP recommendation was that “racist officers identified through social media...” shall be fired. The current Policy 1029 is not specific and requires only “accountability”. Thus, it is not clear if this FIP directive has been implemented. One way to move forward on this directive would be to be more specific on what exactly “accountability” means in this context and what preliminary steps would be taken prior to an officer’s termination.

Require regular analysis of BPD stop, search, and use of force data. As noted in the BPD quarterly reports, a Transparency Hub was developed which provides raw data through an Open Data Portal. While this allows members of the public who have the time and ability to analyze the data, the BPD’s Data Analyst should provide more detailed analysis of these data with a focus on racial disparities, as we have done in this report.

Make resources on police-civilian encounters publicly available such as through RAHEEM.org. This Council directive is mentioned in the BPD quarterly updates, but no information is provided regarding its implementation status.

In conclusion, while some policy changes have been implemented, modification of these changes is needed in some areas. Other FIP recommendations have not been implemented at all. Racial disparities in stops, arrest, and searches remain high, and there is little public accountability for the overall results of the FIP effort due to a lack of statistical reporting in quarterly updates. The PAB offers the following recommendations to BPD and City Council with the goals of improving upon action steps that have already been taken, ensuring that no recommendations “fall through the cracks”, and establishing an expectation for future outcome reporting to enable the Council and the public to hold the BPD accountable for FIP results.

RECOMMENDATIONS

Recommendations for BPD

1. Three-prong approach.

- A. Primary Collision Factors. This prong should specify the mode of the party at fault.
- B. Community Reports. Under the category of “a variety of unsafe driving incidents”, policies should be put in place that specify which calls for service will result in law enforcement action. That specification should be derived from an analysis of the 13% of calls from community members that resulted in a citation or arrest per the City Auditor’s July 2021 report.
- C. Community Caretaking. The PAB recommends more specificity in this prong and basing its components on Berkeley data rather than national statistics, as is done for Prong 1 (Primary Collision Factors).

Specifically, the analysis should examine which other factors (non-PCFs) are highly associated with severe and fatal collisions in Berkeley.

- D. Reporting. Future BPD updates on FIP implementation should include statistical information enabling an analysis of the impact of the three-prong approach on reducing or eliminating stops for low-level offenses—a primary focus of the Council directive-- in a manner that supports an overall assessment as well as an understanding of the impact of the approach on reducing racial disparities in traffic stops.

2. Evidence-based definition for stops of criminal suspects.

- A. Establish an evidence-based definition for stops of criminal suspects.
- B. Explain how the precision-based policing, feedback loops, and accountability measures, referenced in BPD FIP implementation updates in relation to this recommendation address the directive to establish an evidence-based definition for stops of criminal suspects.

3. Enhanced implicit bias training. Ensure that annual training dedicated to the topic of implicit bias is delivered to BPD personnel per Council's directive.

- 4. **EIS.** Pending the deployment of a new EWS, EIS audits should be focused on officers who are outliers on the variables stipulated in the Department's EIS, with a particular focus on racial disparities in stops, arrests, and searches. Future audit reports should include the scope of what was reviewed and a clear and specific statement of findings.

- 5. **Written consent searches.** Future reporting to council should include the numbers of consent searches conducted per reporting period, and their effect on racial disparities in searches, with a comparison to consent search numbers before implementation.

- 6. **Make resources on police-civilian encounters publicly available** such as through RAHEEM.org

Recommendations for the PAB

1. Scenario-based training. The 2021 Council item refers the recommendation to include a scenario-based training component in the existing officer training required by the California Penal Code to the PAB. The PAB will address this matter in the first quarter of 2024.
2. Crisis Intervention Team (CIT). The 2021 Council item refers the recommendation to accelerate CIT activity to the PAB. The PAB will address this matter in the first quarter of 2024.

Recommendations for Council

1. Eliminate reporting requirements on fully implemented FIP recommendations
2. Require BPD to report biannually on:
 - a. Traffic stops by prong and race.
 - b. Stop, search, arrest, and use of force by probation/parole status and race.
 - c. Calls for service by race of reporter and reportee.
 - d. Consent searches.

REFERENCES

Baumgartner, Frank R., Derek A. Epp, and Kelsey Shoub. 2018. *Suspect Citizens: What 20 Million Traffic Stops Tell Us about Policing and Race*. Cambridge: Cambridge University Press.

Berkeley City Auditor (full citation)

Center for Policing Equity *The Science of Justice: Berkeley Police Department, National Justice Database City Report*. May 2018. www.policingequity.org

DRAFT