

Maryland Office of the Public Defender for Baltimore City
Comments on Stops, Searches, & Arrests Policy Revisions
October 2020

The Maryland Office of the Public Defender previously commented on the stops, searches and arrests policies, with many of our recommendations accepted. Our concerns underlying the recommendations that were not accepted after the first public comment period remain, but our comments here do not reiterate them. Rather we highlight additional issues arising in these drafts that require further attention.

Policy 1002, Securing and Interviewing Witnesses

Recommendation 1: For witnesses who are youth, require officers to ask whether the youth has an attorney and, if so, contact that lawyer prior to conducting the interview.

The heightened vulnerabilities of youth are well-known and established, which BPD recognizes through its youth-specific policies. As will be discussed further in our comments to draft Policy 1202 (to be submitted for the public comment period ending November 16), and were addressed in our comments to draft Policy 1207 last year, young people being subject to police questioning need legal counseling and support to counteract their lack of experience, perspective, developmental maturity, and judgment. For children who already have an attorney, that lawyer should always be consulted prior to any questioning and, while not applicable to this policy, a child suspect should be provided a lawyer regardless of whether they already have one.

Suggested action: Revise ¶4.3 NOTE as follows:

If the Witness is a youth, be sure to use simple, concrete, age-appropriate language to ensure the youth understands that their responses are voluntary and that they are free to leave. The member must receive consent of the youth's parent or guardian before proceeding with the Interview. **The member shall ask the youth if they are currently or have ever been represented by an attorney. A youth who responds affirmatively must be provided with the opportunity to consult with their lawyer prior to any questioning, unless there is an immediate risk of bodily harm or death.** The member shall also inform the youth that they can have a parent, guardian, or other supportive adult present during the Interview and must determine whether the youth wants such a person present and if so, shall not conduct the Interview until the parent, guardian, or other supportive adult is present. Whenever possible, a member who is trained in youth Interviewing should conduct the Interview. See Policy 1202, Interactions with Youth.

Revise ¶18 as follows:

If the person to be Interviewed is a youth, the member should inform the youth that they can have a parent, guardian, or other supportive adult present during the Interview. **The member shall also ask the youth if they are currently or have ever been represented by an attorney.**

...

18.5 A youth who responds affirmatively that they are or have been represented by an attorney, must be provided with the opportunity to consult with their lawyer prior to any questioning, unless there is an immediate risk of bodily harm or death.

Recommendation 2: Include reporting and review of any weapons pat-downs and warrantless searches of witness.

The policy notes the limited circumstances in which a member may conduct pat-down or warrantless search of a witness. However, it does not provide for any documentation or oversight of these intrusive actions.

Suggested action: Add the following to the Reporting Requirements Section

28. When a member conducts a weapons pat-down and/or warrantless search of a witness, Supplemental Report, Form 7, must be completed to include:

28.1 Who made the determination to conduct the pat-down and/or search,

28.2 The reason such a determination was made,

28.3 The date, time, location and manner of the search,

28.4 Whether the witness consented to the search, and if so, how their consent was secured,

28.4 Whether any contraband was identified,

28.5 A list of any items seized.

Recommendation 3: Consistently note that witnesses are not required to provide identification, even if they refuse to cooperate.

Witnesses can refuse to cooperate, even if they are material and this refusal can include providing their contact or other personal information. While the policy generally conforms to these principles, it suggests that contact information may be required if the witness is deemed material.

Suggested action: Amend the Note after ¶14.2 to include:

A witness is not required to provide contact information, and refusal to do so cannot be used as justification to further detain them.

Recommendation 4: Remove subpoena as justification to compel statement. ¶ 15.

Fundamental to constitutional principles is that a statement can never be compelled. A subpoena can compel an individual to attend a court proceeding or a deposition, but they can continue to refuse to answer questions at those proceedings. Moreover, because a subpoena can only be compelled to provide testimony at a proceeding, it is a prosecutorial power, not one that the BPD can exercise independently.

Suggested action: Remove the following references to compelling statements with a subpoena:

¶2.2. A Witness cannot be detained without an arrest warrant or Body Attachment and cannot be Compelled to give a statement ~~without a court order or a Grand Jury Subpoena.~~

¶15. At no time shall a Witness be Compelled to give a statement, ~~with the exception of when a Subpoena is obtained.~~ The statement must be obtained freely and without coercion.

Recommendation 4: Require that a body attachment be secured prior to its execution.

While as the policy notes, a body attachment is an exception that allows for the involuntary transport of a witness, the body attachment must be obtained prior to transport. The policy improperly authorizes transport for purpose of obtaining a body attachment or otherwise while it is being requested.

Suggested action: Remove the following references to transporting in advance of the body attachment order.

¶8: ... The member shall not transport the person off-site, unless the person requested, they consented to transport, ~~or there is a Body Attachment~~ **has been** issued for them, ~~or the member is bringing them before a judicial officer for the purpose of obtaining a Body Attachment.~~

Delete the note after ¶ 8.

¶ 16. At no time shall a Witness be removed from the scene against their will for the purpose of giving an Off-Site Interview, unless ~~there is a Body Attachment~~ **has been** issued ~~or being sought for the person.~~

¶ 19. At no time shall a Witness be removed from the scene against their will for the purpose of giving an Off-Site Interview, unless ~~there is~~ a Body Attachment **has been** issued ~~or being sought for the person~~.

Policy 1013, Strip Searches and Body Cavity Searches

Recommendation: Reiterate the need for specific and articulable facts for Probable Cause to justify a search.

Throughout the policies developed or revised under the consent decree, BPD often, appropriately, restates key requirements, limitations, and concepts. This policy should utilize repetition as well to ensure that members understand and appreciate the limitations needed for these highly invasive searches. While the Justification section notes that specific articulable facts are required, members referring to the policy are more likely to expect these criteria to be included in the definition.

Suggested action: Amend the Probable Causes to Search definition as follows:

Where **specific and articulable** facts and circumstances, known to the member and taken as a whole, would lead a reasonable member to believe that, based on their training and experience, either contraband or evidence of a crime will be found in a particular location.

Policy 1105, Custodial Interrogations

Recommendation: Coordinate with the youth interrogation policy and provide an opportunity for further comment at that time.

The interrogation policy is intended to apply only to adults, with a separate policy providing additional protections needed to interrogate youth. This second draft still notes that the youth interrogation policy is under development. Members will need to understand and navigate both policies simultaneously and further understand how to address the edges of these policies, including how to interact with emerging adults on the cusp of the age criteria (i.e. an individual stopped on their 18th birthday) and what to do if they are unsure of someone's exact age.

Training, supervision and compliance measures need to include both policies together. Likewise, review of these policies should occur with a holistic approach that allows for review of the policies for all interrogations, regardless of age. When the BPD holds its second comment period on the Interrogation of Youth policy, we anticipate potentially having comments and recommendations for Policy 1105.

Policy 1106, Warrantless Arrest Procedures and Probable Cause Standard

Recommendation 1: Use mandatory, not permissive language when discussing the specific and objective facts required.

Suggested action: Revise, Probable Cause Standard ¶ 1 as follows:

Probable cause to arrest ~~should~~ **shall** be founded on...”

Recommendation 2: Use clearer language when discussing when a stop becomes an arrest.

The first sentence of Probable Cause ¶ 8 combines the determination of whether an interaction is a stop or an arrest with whether the basis for detention has been met. This provision should more clearly explain when a stop becomes an arrest and what their respective standards are. Moreover, an arrest may be effectuated whenever someone is not free to leave; and does not require a determination that it is indefinite.

Suggested action: Revise ¶ 8 as follows:

What begins as an investigative stop **can turn into** ~~likely becomes~~ an Arrest ~~when the scope of the detention goes beyond the basis for it. Actions that would indicate to~~ **if the actions and circumstances would cause** a reasonable person **to believe** that they are being arrested or **otherwise are not free to leave.** ~~indefinitely detained may convert an investigative stop into an arrest, which~~ **While a stop only requires a reasonable articulable suspicion, an arrest** ~~would requires~~ Probable Cause ~~to Arrest~~ or an arrest warrant.

The following actions may contribute to an investigative stop becoming an arrest. Unless justified by the original stop, members must have additional articulable justification for further limiting a person’s freedom ~~during an investigative stop by doing any of the following:~~

Policy 1109, Warrantless Searches

Recommendation 1: In Core Principles, Constitutional Searches, explain what compliance with 4th and 14th amendments means.

In most of the policies, the core principles section explains constitutional principles or best practice approaches that provide useful context for the policy’s requirements. This policy merely mentions that searches must be constitutional without explaining what that means. The core principle should explicitly acknowledge the privacy interests compromised by searches and the concepts applied under constitutional law to balance privacy rights and public safety needs.

Suggested action: Revise the Core Principle, Constitutional Searches as follows:

BPD members will conduct Searches in compliance with the 4th and 14th Amendments to the Constitution as well as Maryland law and Declaration of Rights. **Under the 4th Amendment, people have a right “to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” The Constitution generally requires law enforcement to obtain a Search Warrant prior to conducting a Search. There are, however, limited exceptions to the warrant requirement: Probable Cause Search of a Vehicle; Exigent Circumstances; Search Incident to Arrest; and Consent Search.**

Recommendation 2: Consistent with the strip search policy, ask person their gender identity.

While this policy incorporates the general requirement of same-gender searches, it does not indicate how gender identity should be determined. Consistent with the cross-referenced policies, the directive here should require that the gender identity be determined based on the stated gender identity of the person being searched.

Suggested action: Amend General Procedures ¶ 9 as follows:

As a general rule, a person shall only be Searched by a BPD member of the same gender, unless the person expresses health or safety reasons for a cross-gender search. **The gender identity of the person being searched should be determined by asking the person being searched their gender identity.** Absent exigent circumstances, the person’s preferences for health of safety reasons with respect to the gender of the member conducting a Search will be honored. ...

Recommendation 3: Require consultation with an attorney before a youth can consent to a search.

As discussed in our comments submitted last year regarding the Draft Policy 1207 (Youth Interrogations), and will be detailed further in our upcoming comments on Draft Policy 1202 (Interactions with Youth), young people are not able to independently provide consent and must be provided with an attorney for any police action requiring their consent.

Children and adolescents lack the experience, perspective, developmental maturity, and judgment to recognize and avoid choices that could be detrimental to them. They are especially prone to intimidation and likely to acquiesce to a point that belies voluntariness. An attorney is needed to explain the potential consequences of a search and to ensure that the young person’s consent is knowing and voluntary.

Our office has previously confirmed that we are committed to provide counsel for youth being subject to interrogation, and we will be available to counsel for potential consent searches as well.

Suggested action: Add the following provision to the Consent Searches section:

¶28A. Youth are not able to independently provide consent. In order to rely on the consent justification to search a youth or their belongings, the youth must be provided with an attorney to consult, as detailed in Policy 1202.

Policy 1112, Field Interviews, Investigative Stops, Weapons Pat-Downs, & Searches

Recommendation 1: Use clearer language when discussing when a stop becomes an arrest.

As discussed above in our comments to the Warrantless Arrest policy, the discussion of whether an interaction is a stop or an arrest and whether the basis for detention has been met should more clearly track the legal requirements.

Suggested action: Revise ¶ 4 as follows:

The scope of the stop must be tied to the basis for it. A stop **can turn into likely becomes** an Arrest ~~when the scope of the detention goes beyond the basis for it. Actions that would indicate to~~ **if the actions and circumstances would cause** a reasonable person **to believe** that they are being arrested or **otherwise are not free to leave, indefinitely detained may convert an investigative stop into an arrest, which** **While a stop only requires a reasonable articulable suspicion, an arrest would** requires Probable Cause ~~to Arrest~~ or an arrest warrant.

The following actions may contribute to an investigative stop becoming an arrest. Unless justified by the original stop, members must have additional articulable justification for further limiting a person's freedom ~~during an investigative stop by doing any of the following:~~

Recommendation 2: Limit the exigency justifying transport during an investigative stop to an immediate threat to safety.

Transporting an individual without their consent will typically result in a stop escalating to an arrest, requiring the higher probable cause standard to be met. To the extent that exigent circumstances may authorize transport during a stop, it must be limited to immediate safety concerns. A "hostile crowd," as provided as an example in ¶7, is vague and subjective, and may not have safety implications. In particular, a member may not use mistrust or expressed dissatisfaction with the police as justification to involuntarily remove someone from their chosen location.

Suggested action: Revise Investigative Stops, Required Actions ¶ 7 as follows:

Members shall not transport or otherwise move the person from the location where they are stopped unless they voluntarily consent or there is an exigency necessitating relocation (~~e.g., hostile crowd, i.e.,~~ immediate threat to safety, ~~etc.~~).

Recommendation 2: Reiterate the limitation on using a weapons pat-down to search for other evidence.

As we note above, the BPD's occasional reiteration of concepts or limitations is a useful device to ensure it is understood and applied throughout a policy's implementation. Particularly in this policy, which discusses different levels of interaction, repetition is needed to remind members of limitations that apply to that interaction. The limitations of a weapons pat-downs, vis a vis identification and seizure of other evidence is a particular concern that warrants such consideration.

Suggested action: Amend the Note after ¶ 5 of Weapons Pat-Downs, Required Actions as follows:

If, during the process of removing the suspected weapon, the member discovers other items which are contraband or evidence of a crime, the member may lawfully seize those items, and the items may be considered when establishing Probable Cause to make an Arrest or to conduct a Search of the person. **A weapons pat-down cannot be used to justify the seizure of items located in a different place on the individual than a suspected weapon or if the item is otherwise not discovered while removing the suspected weapon.**

Recommendation 3: In the Performance Standard Section, require audit reviews to assess for racial bias and other trends that may require further attention.

The policy rightfully includes oversight through audits. Beyond just reviewing whether the policy is followed, these audits should look for trends in noncompliance, with particular attention toward racial disparities that suggest either implicit bias or over animus at play.

Suggested action: Revise Performance Standards Section ¶ 1 as follows:

Audits of documentation in support of Field Interviews, Vehicle Stops, Investigative Stops, Weapons Pat-Downs, Searches and Arrests will be included in the yearly audit plan. Documents to review may include, but are not limited to, Incident Reports, Form 8, Supplemental Reports, Form 7, Citizen/Police Contact Receipts, and Body-Worn Camera footage. **In addition to ensure ensuring general compliance with this policy, these audits should review racial and other demographic data to assess for biases and other trends that may require additional training or other attention.**