

**Comments on the Chicago Police Department's
Proposed Use of Force Guidelines
Prepared by Sheila A Bedi¹ & Craig Futterman²**

These comments respond to the March 2017 proposed revisions to the Chicago Police Department's Use of Force Guidelines. The CPD's draft policy is out of step with best practice in policing and conflicts with the National Consensus Policy on Use of Force, promulgated by the International Association of Chiefs of Police and eleven other organizations that represent the interests of law enforcement. Even more importantly, the CPD's draft policy conflicts with its own framework for reform that it released just two days ago.

Whereas CPD's draft policy permits officers to use force even when it is unnecessary (indeed it stripped the concept of necessity entirely from its previous draft of its policy on the use of force), the Chicago Police Department's Next Steps for Reform Framework ("Reform Framework"), released on March 14, 2017, states that its use of force policies must make clear that an officer may resort to physical force only when no effective alternative appears to exist, and, even then, must restrict his or her amount of force to that which is "*necessary* based on the totality of the circumstances." And contrary to CPD's retreat in its draft policy from any mandatory duty to attempt de-escalation, the CPD's Reform Framework states that CPD's force policy will require CPD members to "de-escalate situations as soon as practicable and resort to force only after all other reasonable alternatives have been exhausted or would clearly be ineffective under the circumstances." We agree that the CPD's quoted language trumpeted in its Reform Framework should be official policy. But it is not. With the Reform Framework, CPD is announcing that it wants officers to do one thing, but its draft force policy demonstrates that CPD policy would empower officers to do the exact opposite.

Our analysis of the new draft use of force policy and the Reform Framework underscores the need for the Chicago Police Department to be subject to a consent decree that is informed by the communities who have borne the brunt of CPD's brutality over the decades, monitored by an independent, credible third party and rigorously enforced. Even model use of force policies cannot by themselves address the years-long pattern of excessive force and civil rights violations in Chicago. The CPD has long maintained paper policies, such as those for the use of in-car cameras, which have never been enforced. The CPD and the Mayor have proved that they are incapable of putting an end to their pattern of ongoing civil rights violations on their own. The problems and culture that have facilitated police abuse are too entrenched and run too deep. It is critically important that we do not waste this historic opportunity for real and enduring change.

It is also long past time for half measures. Nothing short of the sustained external monitoring and oversight provided by a federal consent decree will bring the change that the people of Chicago and their officers need and deserve.

Our comments below have two important caveats. Use of force policies cannot be evaluated piecemeal. We analyzed the use of force policy without having the benefit of any revisions made to the complimentary policies—including policies regarding the use of tasers, OC

¹ Associate Clinical Professor of Law, Northwestern Pritzker School of Law, MacArthur Justice Center

² Clinical Professor of Law, University of Chicago Law School

spray and other less lethal weapons, and use of force reporting, supervision, and transparency. A full analysis requires examining all of these pieces together—our comments are restricted to the March 2017 draft of the use of force policy—so there are important components of a use of force policy we do not address. Second, we have not retreated from our October 2016 comments on the proposed policy from that date. We will not repeat that analysis here, but will instead attach those comments to this documents.

Our comments below track the sections of the proposed policy

I. PURPOSE

No comments

II. DEPARTMENT POLICY

Core principle. The core principle of the policy is written in such a way that suggests that mere non-compliance with a CPD member’s orders is a sufficient justification for use of force. This suggestion is both dangerous and unlawful. The core principle of the policy must make clear that absent a public safety emergency or probable cause to make an arrest, police officers should not—under any circumstances—physically engage with or use any sort of force against civilians. In the event that a physical interaction between an officer and a civilian is warranted, the policy must state clearly and unequivocally that the officer is obligated to use the least amount of force necessary to achieve a legitimate public safety-related goal.

Assessing uses of force. The section of the policy describing how force will be assessed focuses entirely on whether an officer with similar training and experience in the same or similar circumstances would use force. This is not the legal standard. The standard requires an analysis from the perspective of a reasonably prudent law enforcement officer. Hinging the reasonableness analysis to an officer with “similar training and experience” is problematic given the serious deficiencies with CPD’s training and supervisory practices. Moreover, it is contrary to accepted law enforcement practice and impractical to have individualized force standards for each officer, based on his or her training and experience. Additionally, every use of force must be assessed to determine if the use of force was 1) necessary—meaning was force required to meet a legitimate public safety aim; 2) reasonable—would a reasonably prudent law enforcement officer have used force in that situation; and 3) proportional—was the force used proportional to the threat posed by the subject and did the officer take efforts to de-escalate the situation prior to using force.

III. USE OF FORCE—WHEN AUTHORIZED

Objectively reasonable. While objective reasonableness is the standard for imposing civil liability, we believe that it is critical to teach officers not simply to use force whenever it is reasonable to do so, but to restrict their uses of force only to situations where it is necessary under the circumstances. This core principle, which is at the center of the CPD’s Framework for

Reform, is entirely absent from its proposed use of force policy. This is particularly important in light of the Department's years-long pattern of using excessive and unlawful force.

Necessary. The provision describing when force is necessary should state that force can only be used when no effective alternative appears to exist and only for a lawful purpose. Whenever possible, CPD members must exhaust all other means available prior to using force.

Proportional. This section must make clear that as the threat decreases—so must the use of force and that the officer must use the least amount of force necessary under the circumstances.

De-escalation. The CPD's proposed de-escalation policy not only waters down language from its previous draft issued in the fall, but it also contradicts the National Consensus Policy on the Use of Force and its own Reform Framework issued on March 14. The de-escalation provisions of the policy should track the National Consensus Policy and the CPD's own language highlighted in its Reform Framework as follows: "An officer shall use de-escalation techniques and other alternatives before resorting to force and to reduce the need for force. Officers are required to use the principles of force mitigation to de-escalate potential use of force incidents wherever and whenever possible, including through the use of time as a tactic, continual communication, tactical positioning, and requesting assistance from other officers, mental health personnel, or specialized units as necessary and appropriate. Officers may resort to force only after all other reasonable alternatives have been exhausted or would clearly be ineffective under the circumstances."

The policy should also include language requiring that, when feasible, the CPD members evaluate the vulnerabilities of an individual prior to engaging in force and identify alternatives to force (or modify the force response) for people who are clearly vulnerable including children, the elderly, pregnant women and people who live with physical or mental disabilities.

Prohibitions. The prohibitions are an improvement from the prior draft, with the following exceptions. The October 2016 draft had strong language regarding racial and ethnic bias and the use of force. That language should be incorporated and expanded to include preventing bias based on gender, disability, and immigration status. The language should read "CPD members will ensure that race, ethnicity, gender, disability, gender expression, sexual orientation, and/or immigration status do not influence any decision to use force."

Given the specific history of the CPD, the policy must explicitly state that officers cannot escalate a situation or seek to instigate a physical encounter through verbal provocation.

Deadly Force. This section is generally improved from the October 2016 draft, but there are a few additions and clarifications that are needed. A minor point, but for the sake of consistency throughout the policy and consistency with Illinois law, the policy should substitute the words "great bodily harm" for the more ambiguous language, "serious physical injury." Consistent with the National Consensus Policy on Use of Force, CPD's policy should require that an officer shall identify himself as law enforcement and warn of intent to use deadly force (whenever possible). The policy should also explicitly prohibit the use of deadly force (all deadly force—not just the use of firearms) when a person is a threat only to themselves or to property. Additionally, the use of choke holds should be prohibited.

Deadly force against animals should occur only when an animal poses an immediate threat to the safety of an officer, another person or another animal and no effective alternatives appear to exist.

V. DUTY TO INTERVENE AND REPORT

The October 2016 draft policy made clear that CPD members had a duty to verbally and physically intervene to stop fellow officers from engaging in excessive force. The current draft does not require physical intervention. This is a problematic edit that in essence absolves CPD members of the meaningful duty to intervene. Officers physically intervene when community members unlawfully harm each other—similarly they should have a duty to intervene physically if possible—when officers unlawfully harm community members.

Additionally, this policy should affirmatively state that CPD members may not take any action to retaliate against other officers or members of the public for reporting the excessive use of force by a police officer. Retaliation should be expressly prohibited, and any member who engages in such retaliation should be fired and referred for criminal prosecution.