



American Friends Service Committee
San Diego Area Office
US/Mexico Border Program

December 10, 2009

Michael J. Fisher
Chief Patrol Agent
U.S. Border Patrol, San Diego Sector
2411 Boswell Road
Chula Vista, CA 91914-3519

Dear Chief Patrol Agent Fisher:

We are writing regarding the May 20 arrest and deportation of three local high school students, arising out of the “VIPR operation” at the Old Town Transit Center. The ACLU of San Diego and Imperial Counties and the American Friends Service Committee have significant concerns about the way in which these students were arrested and deported. We also note the fear and distrust of law enforcement that these arrests and deportations generated within San Diego’s immigrant communities, and the broad range of local leaders who condemned the arrest of unaccompanied children on their way to school, including the editorial board of the *San Diego Union-Tribune*.

We are pleased that the Border Patrol has responded to these significant concerns by readmitting the students on humanitarian parole. However, we urge Border Patrol to take concrete steps to ensure that future operations do not result in the arrest and unlawful removal of unaccompanied minors.

Border Patrol has significant discretion, within constitutional and legal limits, as to how to enforce immigration laws at the U.S. border. In the past, Border Patrol exercised this discretion by deemphasizing “random” or “reactive” arrests of undocumented immigrants.¹ We urge Border Patrol to recommit itself to this approach, and to recognize the special legal and ethical issues created by arresting children, by instituting the following operational policy changes:

¹ See Memorandum from William T. Veal, Chief Border Patrol Agent, to Sector Staff, Patrol Agents in Charge, Enforcement Department Heads, and All Agents, San Diego Sector (August 8, 2003) (reviewing operational priorities and stating that as a matter of policy “Border Patrol Agents are not authorized to initiate questioning in a ‘city patrol’, ‘interior patrol’, or ‘area control’ mode”, even though “consensual encounters with pedestrians at these public locations may be entirely legal.”).

When conducting or participating in operations away from points of entry, like the VIPR operation of May 20, Border Patrol should refrain from stopping unaccompanied children and questioning them regarding their immigration status. According to the Border Patrol's own statements, the students were arrested on May 20 solely based on suspicion that they were unauthorized immigrants, and not because they were suspected of any violations of criminal law. We believe that arresting unaccompanied children in this fashion, particularly when they are on their way to school, is provocative, dangerous, and a poor use of resources, and that Border Patrol can best avoid the problems it creates by simply refraining from this practice.

Public transit is the only means of getting to and from school for many children, particularly those from lower-income families (local school districts do not provide transportation except in limited circumstances). If Border Patrol continues to arrest unaccompanied children traveling on public transit, there is a significant risk that they will be traveling to and from school, as all three of the students arrested on May 20 were. Arresting undocumented children aboard public transit is likely to deter some families from sending their children to school.² Laws or policies that exclude undocumented children from public education, whether explicitly or in fact, are unconstitutional and have long been prohibited by the courts and by law enforcement agency policies.³

This policy would not prevent apprehension of juveniles engaged in transporting drugs, gang activity or other crimes. If there is reasonable suspicion or probable cause to believe an individual is committing a crime, law enforcement officers may take appropriate action against that individual. It will not enhance public safety for Border Patrol to randomly apprehend minors riding public transportation who are not reasonably suspected of engaging in any criminal activity.

When unaccompanied children of Mexican nationality are taken into Border Patrol custody, and there is any evidence that these children live in the United States, Border Patrol must ensure that they complete a telephone call before presenting them with a voluntary departure form. The law requires the Border Patrol to ensure that any juvenile it arrests who does not reside in Mexico "in fact communicates" with either a parent, adult relative, friend, or a free legal service provider, and prohibits Border Patrol from presenting a child with a voluntary departure form before this communication has taken place.⁴ It does not appear that

² In the wake of the May 20 arrests, a number of San Diego Latino service agencies received inquiries from parents whose children take public transit, asking if they should keep their children out of school.

³ See, e.g., *Plyler v. Doe*, 457 U.S. 202 (1982) (finding that denying education to undocumented children would violate their constitutional rights, and that punishing the children of undocumented parents for their parents' conduct does not comport with fundamental conceptions of justice); *Murillo v. Musegades*, 809 F. Supp. 487, 498 (W.D. Tex. 1992) (applying *Plyler* to a case in which Border Patrol targeted students and teachers at a public school, and finding that the public interest is best served when students and their teachers are free from undue interference from law enforcement officers); Veal memorandum, *supra* note 2, at 1 n.1 (noting that Border Patrol policy restricts law enforcement contacts at schools).

⁴ 8 C.F.R. 236.3(g) (2008); *Perez-Funez v. Dist. Dir., Immigration & Naturalization Serv.*, 619 F. Supp. 656, 670 (C.D. Cal. 1985).

Border Patrol allowed the students to make the telephone calls to which they were entitled before presenting them with voluntary departure forms. It should have been evident to Border Patrol that the students reside in the United States: they stated that they were San Diego residents, they informed the officers that they attended San Diego schools, they showed student identification cards, they were carrying bags filled with schoolbooks from San Diego schools, and they spoke English fluently.⁵ The ACLU and AFSC are concerned that the rights of other juveniles are being violated in this fashion.

Border Patrol should not subject children who are not “entering” the country to an expedited form of removal that prevents them from exercising their rights to judicial review. The students were removed and repatriated in a very short period of time and never received the opportunity for judicial review of their claims for relief to which they were entitled.⁶ While we have not seen the students’ removal documents, we are concerned that they may have been processed in an expedited manner that appears to be applied along our southern border only to Mexican nationals.⁷ A recent report stated that this practice “involves the return of unaccompanied children from neighboring countries to their country of origin, en lieu of official entrance into the immigration system” and “results in the child’s *immediate* removal to the nearest port of entry, typically occurring within hours of apprehension.”⁸ It is especially disturbing that this procedure may have been applied to children who were not only not “arriving,” but who had developed substantial ties to the United States during their long residence here.⁹

It appears that Border Patrol’s rapid deportation of the students may have been motivated, in part, by a desire to avoid holding the children for longer than twenty-four hours,¹⁰ which

⁵ *Perez-Funez* makes clear that it is concerned with a juvenile’s country of *actual* residence, rather than that of *legal* residence. See, 619 F. Supp. at 662.

⁶ See, e.g., *Japanese Immigrant Case*, 189 U.S. 86, 99-100 (1903) (holding that deporting an alien, without providing that alien notice and an opportunity to be heard, is inconsistent with due process of law); *Orantes-Hernandez v. Smith*, 541 F. Supp. 351, 373-374 (C.D. Cal. 1982) (finding that coercion of plaintiffs into signing voluntary departure forms denied them their statutory and constitutional right to a deportation hearing and thus their right to due process); *Perez-Funez*, 619 F. Supp. at 660 (noting that the child who is entitled to relief but gives up the right to a deportation hearing by signing for voluntary departure “makes a grave mistake indeed.”).

⁷ See 8 USCS § 1225(b)(1)(A)(i) (2009) (permitting an immigration officer who determines that an alien *who is arriving in the United States* is inadmissible to remove the alien without further hearing or review, unless the alien indicates either an intention to apply for asylum or a fear of persecution); Chad C. Haddal, Congressional Research Services, UNACCOMPANIED ALIEN CHILDREN: POLICIES AND ISSUES 5 (2009), available at <http://wikileaks.org/wiki/CRS-RL33896> (charting the typical process for juvenile aliens involved with the immigration and juvenile justice system, including the mandatory “voluntary return” of juveniles at the border).

⁸ Amy Thompson, Center for Public Policy Priorities, A CHILD ALONE AND WITHOUT PAPERS: A REPORT ON THE RETURN AND REPATRIATION OF UNACCOMPANIED UNDOCUMENTED CHILDREN BY THE UNITED STATES 26 (2008) (emphasis added) (footnote omitted).

⁹ See Detention Operations Branch, Immigration & Naturalization Serv., JUVENILE ALIENS: A SPECIAL POPULATION (Juvenile Protocol Manual) 2.2.3 (2003) (discussing the limited circumstances under which an unaccompanied juvenile may be placed in expedited removal proceedings).

¹⁰ At least one of the children reports being told by Border Patrol agents that Border Patrol could not hold a minor in excess of twenty-four hours, and therefore the child would be removed in fewer than twenty-four hours.

would have required further protections under the *Reno v. Flores* class-action litigation.¹¹ It is unacceptable for Border Patrol to guard against a violation of the *Flores* settlement by depriving juveniles of their constitutional and statutory right to a deportation hearing.

We are interested in meeting with you to discuss these issues. In any event, we ask for a response addressing these concerns and proposals.

Sincerely,



Kevin Keenan
Executive Director
ACLU of San Diego & Imperial Counties



Pedro Rios
San Diego Area Program Director
American Friends Service Committee

cc: Alan Bersin, Assistant Secretary for International Affairs and Special Representative for
Border Affairs, Department of Homeland Security
Esther Olavarria, Deputy Assistant Secretary for Policy, Department of Homeland
Security
Marco Lopez, Customs and Border Protection Chief of Staff
Paul M. Morris, Field Operations Director, Customs and Border Protection, San Diego
Sector
Peggy Debeliso, Assistant Chief Counsel, Customs and Border Protection, San Diego
Sector

¹¹ Detention Operations Branch, *supra* note 10, at Attachment 1, § 12.A (agreeing that INS will segregate unaccompanied minors from unrelated adults and, where such segregation is not immediately possible, INS will not detain an unaccompanied minor with an unrelated adult for more than twenty-four hours); *Flores*, 507 U.S. 292.