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COMPLAINTS OF BIASED POLICING IN NEW YORK CITY:

AN ASSESSMENT OF NYPD'S INVESTIGATIONS, POLICIES, AND TRAINING

NEW YORK CITY DEPARTMENT OF INVESTIGATION
OFFICE OF THE INSPECTOR GENERAL FOR THE NYPD (OIG-NYPD)



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I. EXECUTIVE SUMMARY

In New York City, “Bias-Based Profiling,” otherwise known as biased policing, is defined in Section 14-151 of the New York City Administrative Code as any discriminatory action by law enforcement that is motivated by a person’s actual or perceived status protected by law. In October 2014, the New York City Police Department (NYPD) began investigating complaints of biased policing, such as racial profiling, as a distinct complaint classification. Prior to that, NYPD did not track biased policing complaints. Accordingly, no separate records exist regarding investigations or discipline related to complaints of biased policing prior to the 2014 creation of the classification.

Biased policing, whether perceived or actual, is a matter of significant public concern. Communities affected by certain policing practices report high levels of distrust of the police, as the remedial process of *Floyd v. City of New York* has documented.¹ Concerns regarding bias (or the perception of bias) by officers are, among other factors, intricately tied to public trust in law enforcement.

NYPD’s implementation of a specific process for investigating complaints of biased policing in 2014 detailed important steps that investigators must take when

* This Report was prepared by DOI’s Office of the Inspector General for the NYPD, specifically, Justyn Richardson, Senior Policy Analyst; Matthew Polistina, Policy Analyst; Hassan Naveed, Director of Outreach; and Jaclyn Quiles, Investigative Attorney, under the supervision of First Deputy Inspector General Asim Rehman and Inspector General Philip K. Eure. Commissioner Garnett and Inspector General Eure extend thanks to the New York City Police Department, the NYC Civilian Complaint Review Board, and the NYC Commission on Human Rights for their cooperation during the investigation of this Report.

¹ See Belen, *New York City Joint Remedial Process: Final Report and Recommendations on NYPD’s Stop, Question, and Frisk and Trespass Enforcement Policies* (May 15, 2018), pursuant to Opinion and Order in *Floyd v. City of New York*, 959 F. Supp. 2d 540 (2013) (No. 08-CIV-1034-SAS-HBP, ECF No. 372 at p. 8 (Aug. 12, 2013)).

handling such allegations against its officers and other personnel. The new process reinforced the Department's commitment to its policy that race, color, ethnicity, national origin, and other actual or perceived protected statuses may not be used as a motivating factor to initiate police action (or to refrain from police action). This new policy was coupled with revisions to the Patrol Guide that acknowledged policing practices must be constitutionally sound and that prohibited the use of racial profiling and other types of biased policing in law enforcement.

The Department of Investigation's (DOI's) Office of the Inspector General for the NYPD (OIG-NYPD) examined NYPD's handling of 888 biased policing allegations filed between late 2014 and early 2017 and closed by mid-2017. These allegations were made against both uniformed (*i.e.*, police officers) and non-uniformed NYPD personnel. The investigation resulted in several findings regarding the policies and practices of both NYPD and the Civilian Complaint Review Board (CCRB). Some key findings include:

- Although members of the public have made at least 2,495 complaints of biased policing since the creation of the "Racial Profiling and Bias-Based Policing" complaint category in 2014, all of which have resulted in investigations, NYPD's investigators have not substantiated a single such claim out of the 1,918 complaints that were closed as of December 31, 2018. (*See* Figure 2 on page 19 for a complete breakdown of the dispositions of biased policing allegations). NYPD officials confirmed in June 2019 that the Department has never substantiated an allegation of biased policing. As discussed in this Report, such allegations can be difficult to prove.
- The majority of the biased policing complaints (68.0%) contained allegations of discriminatory policing based on race, ethnicity, color, or national origin. Other

complaints alleged biased policing on the basis of creed, disability, sexual orientation, gender identity, gender, age, citizenship status, alienage, housing status, and other non-physical characteristics.

- NYPD does not investigate as biased policing an officer's use of offensive or derogatory language related to a complainant's actual or perceived protected status, such as a racial slur, even though NYPD prohibits such conduct. By contrast, if a complainant alleges that an officer used a racial slur *and* took additional police action (*e.g.*, making an arrest), then NYPD *would* investigate the matter as biased policing.
- According to CCRB, the City's primary agency charged with investigating allegations of police officer misconduct involving Force, Abuse of Authority, Discourtesy, and Offensive Language, CCRB has substantiated numerous allegations of Offensive Language made against NYPD officers since 2014. CCRB, does *not*, however, investigate complaints of biased policing made against officers. This makes CCRB an outlier among the independent police review agencies that primarily handle complaints of police misconduct in the largest U.S. police departments.
- NYPD began administering implicit (*i.e.*, unconscious) bias training in February 2018 with the goal of training uniformed members to recognize unintentional bias.
- NYPD's early intervention and performance monitoring systems do not monitor biased policing allegations made against its uniformed and other employees with the same depth and diligence that NYPD brings to tracking excessive force claims involving NYPD personnel.
- Although NYPD and CCRB both receive allegations of biased policing, they do not formally share information about such allegations with the City's Commission on

Human Rights (CCHR) to aid that agency's investigative efforts into individualized or systemic discrimination against members of the public.

Based on these and other findings, OIG-NYPD's recommendations include the following:

- **NYPD should amend its policies so that complaints alleging the use of offensive or derogatory language associated with an individual's actual or perceived status, such as racial slurs, are classified and investigated as biased policing in addition to "Offensive Language." As with other biased policing allegations, proving that the uniformed member of NYPD had a discriminatory intent will be necessary to substantiate the allegation as biased policing.**
- **CCRB should adopt a policy to classify and investigate allegations of biased policing by uniformed members of NYPD under its "Abuse of Authority" jurisdiction instead of referring such allegations to IAB for investigation.**
- **NYPD should develop and implement a pilot mediation program for some biased policing complaints.**
- **City agencies that handle biased policing complaints (NYPD, CCRB, and CCHR) should convene within the next four months to address the findings and recommendations in OIG-NYPD's investigation. Consistent with all of the recommendations, these New York City government agencies should develop protocols and procedures to regularly share data and information on biased policing complaints.**
- **NYPD should publish statistics for the public as part of an annual report covering complaints of biased policing. These statistics should, at a minimum, include a breakdown of the following: (i) the subject officer's uniformed versus**

non-uniformed status, bureau or unit assignment, gender, race/ethnicity, age, and length of service to the Department; (ii) the self-reported demographics (race/ethnicity, sex, age, etc.) of complainants; (iii) the types of police encounters that resulted in complaints of biased policing; (iv) the number of biased policing complaints initiated by borough and precinct; (v) the discriminatory policing conduct alleged; (vi) the sub-classifications and outcomes of such complaints; and (vii) the status of the Department's efforts to prevent biased policing. This information should be conspicuously visible on NYPD's website and in other locations where such information would be readily available to the public.

II. INTRODUCTION AND BACKGROUND

New York City law and New York City Police Department (NYPD) procedures define biased policing (also referred to as bias-based policing or bias-based profiling) as any discriminatory action by law enforcement that is motivated by a person's actual or perceived status protected by law. Biased policing threatens the core value of equal treatment under the law, enshrined in the Fourteenth Amendment to the Constitution of the United States and in Sections 11 and 12 of Article I of the New York State Constitution. Discriminatory practices alienate the public, particularly communities of color, from law enforcement. Perceptions of biased policing have damaged community trust and public safety, as evidenced by public outcry in New York City and across the U.S. in recent years.²

² CAROL A. ARCHBOLD & SAMUEL WALKER, *THE NEW WORLD OF POLICE ACCOUNTABILITY*, 2-6 (3rd Ed. 2019).

In 2015, then-NYPD Commissioner William Bratton publicly stated that “the stories of police and [B]lack citizens have intertwined again and again. And the unequal nature of that relationship cannot and must not be denied.”³ Bratton’s remarks came amid NYPD’s efforts, during his tenure, to implement reforms addressing racial profiling and other forms of biased policing. Two years earlier, in 2013, the New York City Council had amended the NYC Administrative Code to prohibit biased policing because of:

“deep concern about the impact of NYPD practices on various communities in New York City ... In 2002, the NYPD made approximately 97,000 stops. By 2010, the number of stops had increased to more than 601,000. Black and Latino New Yorkers face the brunt of this practice and consistently represent more than 80 percent of people stopped despite representing just over 50 percent of the city’s population.”⁴

Also in 2013, a federal judge held in *Floyd v. City of New York* that NYPD’s policies and practices on “stop, question, and frisk” violated the Fourth and Fourteenth Amendments, primarily because the Court found that those policies and practices resulted in the disproportionate and discriminatory stopping of hundreds of thousands of Black and Latino people.⁵ The Court issued an order specifying remedies and appointed a federal monitor to oversee implementation of the Court orders and the parties’ agreements. The Court also required that NYPD “begin tracking and investigating civilian complaints related to racial profiling and other allegations of bias” committed by officers.⁶ Prior to this requirement, which took effect in 2014, NYPD did not separately track complaints of biased policing, and

³ William Bratton, Commissioner, New York Police Dep’t, Address at Queens Black History Month Discussion Panel, (Feb. 24, 2015), *available at* <http://nypdnews.com/2015/02/police-commissioner-brattons-remarks-at-queens-black-history-month-discussion-panel/> (last visited June 17, 2019).

⁴ N.Y.C. Local Law No. 71 § 1 (2013), *available at* https://www1.nyc.gov/assets/cchr/downloads/pdf/amendments/Int_1080_2013_bias_profiling.pdf.

⁵ *Floyd*, *supra* note 1, at 540.

⁶ Seventh Report of the Independent Monitor at 51, *Floyd v. City of New York*, No. 08-CIV-1034 (S.D.N.Y.), ECF No. 576 (Dec. 13, 2017), *available at* http://nypdmonitor.org/wp-content/uploads/2017/12/2017-12-13-FloydLigonDavis-Monitor-Seventh-Report_EAST_80301353_1.pdf.

thus there are no reliable records indicating whether such claims were investigated or if any discipline resulted.⁷ The federal monitor subsequently worked with NYPD on reforms in several areas, including revisions to NYPD's Patrol Guide Section 203-25 – "Department Policy Prohibiting Racial Profiling and Bias-Based Policing." That section now states:

"Race, color, ethnicity, or national origin may not be used as a motivating factor for initiating police enforcement action. When an officer's decision to initiate action against a person is motivated even in part by a person's actual or perceived race, color, ethnicity or national origin, that enforcement action violates Department policy unless the officer's decision is based on a specific and reliable suspect description that includes not just race, age, and gender, but other identifying characteristics or information."

The Court-appointed federal monitor also worked with NYPD to bring its investigative procedures into compliance. An October 2014 update—NYPD's Internal Affairs Bureau (IAB) Procedure Number 620-58 entitled "Processing and Investigating Complaints of Profiling and Bias-Based Policing"—outlined the new process for investigating public complaints related to racial profiling and other types of biased policing against NYPD personnel, whether uniformed or non-uniformed members.⁸ NYPD now has the following nine biased policing sub-classifications based on the protected statuses listed in § 14-151 of the New York City Administrative Code: "Race / Ethnicity / National Origin / Color," "Creed," "Age," "Alienage / Citizenship Status," "Gender / Gender Identity," "Sexual Orientation,"

⁷ First Report of the Independent Monitor at 55, *Floyd v. City of New York*, No. 08-CIV-1034 (S.D.N.Y.), ECF No. 513 (July 9, 2015), available at <http://nypdmonitor.org/wp-content/uploads/2015/08/MonitorsFirstReport-AsFiledInFloydDocket.pdf>.

⁸ NYPD refers to its non-uniformed members as "civilian" employees of the Department. This category is distinct from the much larger category of uniformed members of NYPD, sometimes referred to as "sworn" officers of the law (*i.e.*, police officers). In addition to clerical and support personnel, non-uniformed members are employed in various positions, including traffic enforcement agents and school safety agents, whose duties range from issuing traffic summonses to making arrests, thus bringing them into frequent contact with members of the public. NYPD employs approximately 36,000 uniformed members and 19,000 non-uniformed employees. *About NYPD*, New York Police Dep't, <https://www1.nyc.gov/site/nypd/about/about-nypd/about-nypd-landing.page> (last visited June 17, 2019).

“Disability,” “Housing Status,” and “Other.”⁹ Pursuant to the Court’s approval of the federal monitor’s recommendation, in January 2019 NYPD made further updates to IAB Procedure Number 620-58 and the Department’s investigative training.

III. METHODOLOGY

During this investigation, the Department of Investigation’s (DOI’s) Office of the Inspector General for the NYPD (OIG-NYPD) met with senior NYPD officials and other staff, including those responsible for implementing Court-ordered reforms related to preventing biased policing and investigating biased policing complaints. In addition, OIG-NYPD interviewed senior staff from the Civilian Complaint Review Board (CCRB) and the NYC Commission on Human Rights (CCHR) to understand how these agencies conduct investigations and exchange complaint information with NYPD. OIG-NYPD also met with representatives of government agencies and non-governmental organizations to learn about public perceptions of the current investigative process and recent reforms.

In assessing some aspects of the quality of NYPD’s investigations of biased policing complaints, OIG-NYPD analyzed the Department’s case closing reports for such investigations.¹⁰ Although OIG-NYPD obtained full investigative files containing notes and evidence for a small number of cases, OIG-NYPD primarily relied on the summary case closing reports. As a result, OIG-NYPD could not assess whether the lack of substantiation

⁹ NYPD had previously separated race, ethnicity, national origin, and color into four distinct sub-classifications, all of which were combined in January 2016. The same was done with gender and gender identity.

¹⁰ Case closing reports summarize the full IAB case file’s investigative findings and how dispositions were determined. A single complaint may sometimes contain several different allegations, including multiple categories of biased policing (*e.g.*, based on race, sex, etc.), and those allegations can also be directed towards multiple officers or other personnel.

determinations was supported by the investigative findings in every instance. The set of case closing reports that OIG-NYPD examined was defined by four parameters: (i) investigations of biased policing allegations, (ii) made against uniformed and non-uniformed NYPD members, (iii) that were opened between November 11, 2014 (when NYPD opened its first biased policing investigation) and January 12, 2017, and (iv) closed as of August 2, 2017.¹¹ To analyze these cases, OIG-NYPD examined over 400,000 data points from more than 5,000 pages of NYPD documents. These data points captured 596 cases containing 888 allegations of biased policing. Subsequently, OIG-NYPD interviewed a number of NYPD investigators who examined biased policing allegations in the same time frame as represented by the set of case closing reports. OIG-NYPD also reviewed the dates and relevant details of allegations of biased policing forwarded from CCRB to IAB.

On four occasions, OIG-NYPD also observed two different police officer recruit training courses at NYPD's Police Academy—"Policing Impartially" and "Policing in a Multicultural Society"—to assess how recruits are trained on conduct related to biased policing issues. OIG-NYPD also attended the IAB Training Unit's "Profiling and Bias-Based Policing" training course for IAB and Bureau/Borough investigators handling complaints of biased policing. OIG-NYPD reviewed course material including lesson plans, handouts, presentation slides, and evaluations from these three courses. In addition, OIG-NYPD attended a full-day session on "Fair and Impartial Policing," an implicit (*i.e.*, unconscious) bias training for NYPD's in-service personnel.¹²

¹¹ NYPD's case closing reports indicated that "subject officers" can be uniformed or non-uniformed employees, but did not always explicitly identify the employee's status as between these two groups.

¹² In-service personnel are active-duty uniformed officers who graduated from NYPD's recruit academy.

IV. PROCESSES AND POLICIES RELATED TO THE HANDLING OF BIASED POLICING COMPLAINTS

When a person makes a complaint alleging biased policing by NYPD employees—whether uniformed or non-uniformed—different City agencies may investigate the case depending on the allegation. An individual may file the same complaint with one or more of these City agencies.

A. Complaints Processed by NYPD

Complaints can be initiated with NYPD's Command Center, which is open for 24 hours every day of the week and receives complaints from members of the public and from NYPD personnel.¹³ Callers may request to remain anonymous and can withdraw their complaint at any time. The Command Center will direct a biased policing complaint to IAB, which then assigns it for investigation depending on the facts alleged. Usually, the complaint will be assigned to the appropriate Bureau/Borough Investigations Unit as a "Misconduct" (or "M") case.¹⁴ Subsequently, a Bureau/Borough Executive Officer of Administration (*i.e.*, a one-star Chief or higher) reviews and approves the cases for thoroughness and completion of

¹³ According to NYPD's website, complaints against NYPD members can be reported to the Command Center by phone (212) 741-8401, by mail at P.O. Box 10001, New York, NY 10014, or in-person at IAB headquarters at 315 Hudson Street, New York, NY 10014. There is no information about filing complaints at individual precincts. *See Internal Affairs*, N.Y. POLICE DEP'T, <https://www1.nyc.gov/site/nypd/bureaus/investigative/internal-affairs.page>, (last visited June 17, 2019).

¹⁴ Although biased policing allegations, standing alone, are classified as "M," if the complaint includes other allegations that IAB classifies as "Corruption" (represented by the "C" classification) (*i.e.*, acts of corruption, criminal activity, or serious misconduct), then the entire case is categorized as "C." NYPD categorizes all internal investigations according to the most serious allegation in the case. In these instances, IAB would investigate the biased policing allegation because IAB investigates all "C" cases. Prior to January 2015, biased policing allegations were classified as "Outside Guidelines" (OG) cases, which are considered less serious than either "M" or "C" classified allegations. OG cases go through the Investigative Review Section of the Office of the Chief of Department to determine where the allegations should be sent for investigation, but they usually are sent to the subject officer's precinct. *See* N.Y.C. DEP'T OF INVESTIGATION, OFFICE OF THE INSPECTOR GEN. FOR THE NYPD, *Addressing Inefficiencies in NYPD's Handling of Complaints: An Investigation of the "Outside Guidelines" Complaint Process* (2017), available at <http://www1.nyc.gov/assets/oignypd/downloads/pdf/Reports/OGReport.pdf>.

the required investigative steps. If NYPD substantiates the allegation, the matter will proceed and the officer could be subject to discipline.

As discussed below, IAB can also receive complaints of biased policing as referrals from CCRB.

1. Examples of Allegations

Examples of complaints of biased policing submitted to NYPD's Command Center, drawn from the case closing reports OIG-NYPD reviewed, include:

- A female complainant alleged that her Black husband was racially profiled when two NYPD officers blocked his parked Bentley vehicle so they could verify his disability placard. The two officers were unable to determine whether the placard was valid, but one of the officers wrote the husband a ticket for littering based on a discarded cigarette on the sidewalk. The complainant also alleged that one of the officers directed the slur "nigger" at her husband and that the officer assumed the placard was invalid because her husband "look[ed] fine."
- A complainant who was working as a store clerk alleged that he was falsely arrested after a confrontation outside his store during which a man pulled out a screwdriver. The clerk stated that he believed the man would attempt to rob the store, so the clerk went back inside. Shortly after, the police arrived and arrested the clerk on suspicion of wielding a knife. While no knife was found, the clerk was arrested for possession of a gram of marijuana. The clerk alleged that during the arrest, one of the officers said to him, "[a]ren't you supposed to be home today praying to your fucking God whoever he is, Allah?"

- A female complainant was informed by her 15-year-old son that while on his way to school, an officer “pulled up alongside him, threw him up against a car, handcuffed him,” and brought him to the police station. According to the complainant, the officer claimed that her son “was observed on camera stealing [55 dollars] from a [restaurant]” and that the officer “wanted to know a little more about [the boy’s] background... and a little more about Romanian Gypsies.” The complainant alleged that while at the police station, the officer said, “they are all Gypsies, and you know what I do with Gypsies? I put all Gypsies in jail.”
- A male complainant was awoken by two police officers after falling asleep inside a building. The man said that he apologized to the officers, who then “pushed him against a wall” and said to him, “[y]ou fucking Latino,” “[e]stupido Latino,” and called him a “Mexican piece of shit.”
- A complainant alleged that an officer “regularly harasses him and his friends” and occasionally places them under arrest “for no reason.” According to the complainant, the officer also told the complainant and his friends to “go back to Africa.”
- A White female complainant alleged that her Arab male friend was subjected to biased policing by two police officers who stopped the pair as they talked in the street after exiting a bar. After the complainant’s male friend ran over to her to say goodbye, the officers asked her “if she was ok, felt scared, or if [the Arab male friend] was harming her.” The complainant noted that she believed the officers’ treatment of her friend was “racist.”
- A Black male filed a complaint alleging that he was targeted for a vehicle stop because of his race. The complainant also alleged that the officer planted illegal drugs in the vehicle.

These examples illustrate the context of some claims of biased policing. Motor vehicle stops were a recurring theme among the biased policing complaints reviewed by OIG-NYPD, accounting for 44.2%.

2. Slur Allegations Related to Protected Status

Under NYPD's policy, if a complainant alleges only that an NYPD officer used offensive or derogatory language based on the complainant's actual or perceived protected status, such as using a racial slur, NYPD will not investigate the allegation as biased policing under IAB Procedure Number 620-58, but instead will refer the matter to CCRB to investigate as potential "Offensive Language." For example, during a previous investigation into NYPD's compliance with 2012 changes to the Patrol Guide, OIG-NYPD found that "an allegation that an officer used an [Lesbian, Gay, Bisexual, Transgender, and Queer] LGBTQ-related slur, without any accompanying action, would *not* be classified and tracked as 'profiling' because, under NYPD's interpretation of the profiling definition, words alone are not considered 'action.'"¹⁵ On the other hand, if the complainant alleges that an NYPD officer used a racial slur and also took some type of action (or refrained from taking an otherwise warranted police action) based on the complainant's protected status, NYPD will retain the action-based allegation, investigating it as potential biased policing, while referring the Offensive Language allegation to CCRB.¹⁶ Under these circumstances, a single interaction

¹⁵ See N.Y.C. DEPT OF INVESTIGATION, OFFICE OF THE INSPECTOR GENERAL FOR THE NYPD, *Review of NYPD's Implementation of Patrol Guide Procedures Concerning Transgender and Gender Nonconforming People* 23 (Nov. 2017), available at https://www1.nyc.gov/assets/doi/press-releases/2017/nov/31_LGBTQ_ReportRelease_112117.pdf.

¹⁶ While NYPD does not view a slur alone as evidence of biased policing, NYPD might still view the slur as evidence of biased intent when investigating other allegedly discriminatory actions or inactions by the subject officer.

would become two separate cases, with different agencies conducting two separate investigations arising from the same set of facts.

NYPD states that it will substantiate allegations of biased policing when a preponderance of evidence supports such findings. Intent is a necessary element, and given the challenge of determining the subject officer's state of mind and whether there was an intention to discriminate against the complainant, biased policing is often difficult to prove.

3. Duty to Report Allegations

A large number of allegations of biased policing involve events that occur in front of witness police officers. According to NYPD's policy in Patrol Guide § 207-21, "Allegations of Corruption and Other Misconduct Against Members of the Service," officers are required to report "[c]riminal activity or other misconduct of any kind including the use of excessive force or perjury" if they witness or become aware of such conduct. Although it can be inferred, NYPD's Patrol Guide does not explicitly state that biased policing qualifies as such conduct in § 207-21 or in § 203-25, "Department Policy Prohibiting Racial Profiling and Bias-Based Policing."¹⁷

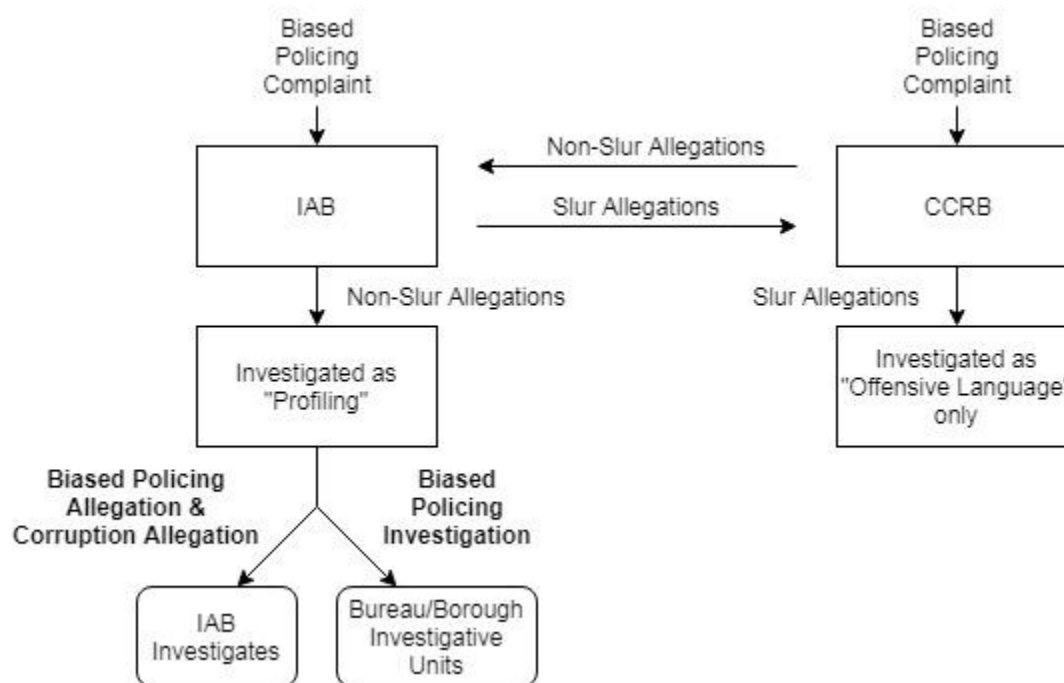
B. Complaints Processed by Civilian Complaint Review Board

A person who wants to make a biased policing complaint against a uniformed member of NYPD might alternatively choose to file the complaint with CCRB. In that situation, CCRB will determine whether the case falls within its jurisdiction to investigate, conduct the

¹⁷ In contrast, the Seattle Police Department's (SPD) biased policing policy explicitly states: "Employees who have observed or are aware of others who have engaged in bias-based policing shall specifically report such incidents to a supervisor, providing all information known to them before the end of the shift during which they make the observation or become aware of the incident." Carmen Best, SEATTLE POLICE DEPT Manual § 5.140 (2015), *available at* <https://www.seattle.gov/police-manual/title-5---employee-conduct/5140---bias-free-policing>.

investigation if it does, and then recommend discipline if the complaint is substantiated. CCRB has authority over complaints alleging “Force,” “Abuse of Authority,” “Discourtesy,” or “Offensive Language” (FADO). If an officer allegedly used derogatory language related to someone’s actual or perceived protected status—such as uttering a racial or Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ)-related slur—CCRB will investigate the matter as Offensive Language. In all cases, CCRB maintains that it will consider the context of the police encounter. In *some* cases involving Offensive Language allegations, CCRB will also consider the officer’s potentially discriminatory motive for making the derogatory statement. CCRB substantiates FADO allegations when there is a preponderance of evidence supporting the finding. If CCRB substantiates a FADO allegation, the matter will proceed to NYPD’s disciplinary process. Since CCRB does not investigate biased policing, as defined by NYPD, the agency refers those allegations to NYPD, even if CCRB retains for investigation FADO allegations arising from the same incident. For example, if a CCRB complainant alleged that they were subjected to a vehicle stop without any lawful basis and that they believed the true reason for the stop was their race, CCRB would investigate the lawfulness of the vehicle stop under its Abuse of Authority jurisdiction, but refer the allegation of a racial motivation for the stop to NYPD.

Figure 1 below demonstrates the flow of the complaint process as it relates to allegations of biased policing made in New York City to either IAB or CCRB.

Figure 1: Biased Policing Complaint Process between IAB and CCRB

C. Complaints Processed by NYC Commission on Human Rights

The NYC Commission on Human Rights is the City agency tasked with enforcing NYC’s Human Rights Law—Title 8 of the NYC Administrative Code—through its Law Enforcement Bureau which receives, investigates, and prosecutes complaints that allege violations of the law. CCHR has had the legal authority to investigate complaints of biased policing since the 2013 amendment to Section 14-151 of the NYC Administrative Code, which states that “[a]n individual subject to bias-based profiling ... may file a complaint with the New York City Commission on Human Rights.”¹⁸ CCHR’s authority extends not only to every member of the Department who is the subject of a complaint of biased policing, but also to

¹⁸ N.Y.C. Human Rights Law § 14-151(d)(1) (2016), *available at* <https://www1.nyc.gov/site/cchr/law/biased-based-profiling.page>.

NYPD itself, if “it has engaged, is engaging, or continues to engage in bias-based profiling or policies or practices that have the effect of bias-based profiling.”¹⁹

According to CCHR, if there is a finding that law enforcement has engaged in biased-based profiling, CCHR can direct the officer to cease the discriminatory conduct and, if necessary, undergo training on the NYC Human Rights Law. CCHR can also require NYPD to take additional steps to ensure that the discriminatory conduct does not continue and to make policy changes that ensure compliance.²⁰

Although NYPD and CCRB receive complaints of biased policing, they do not formally share information with CCHR to aid that agency’s investigative efforts into individualized or systemic discrimination against members of the public.

V. FINDINGS AND ANALYSIS

A. NYPD Has Never Substantiated an Allegation of Biased Policing Related to Any of the Protected Statuses Outlined in § 14-151 of the NYC Administrative Code and § 203-25 of NYPD’s Patrol Guide

NYPD received 2,495 complaints resulting in investigations into potential biased policing between November 11, 2014, when it began investigating such complaints, and December 31, 2018.²¹ During that time, NYPD closed 1,918 of those investigations without substantiating any of them. OIG-NYPD obtained and analyzed copies of every case closing report from investigations into biased policing that NYPD opened by January 12, 2017 and

¹⁹ *Id.*

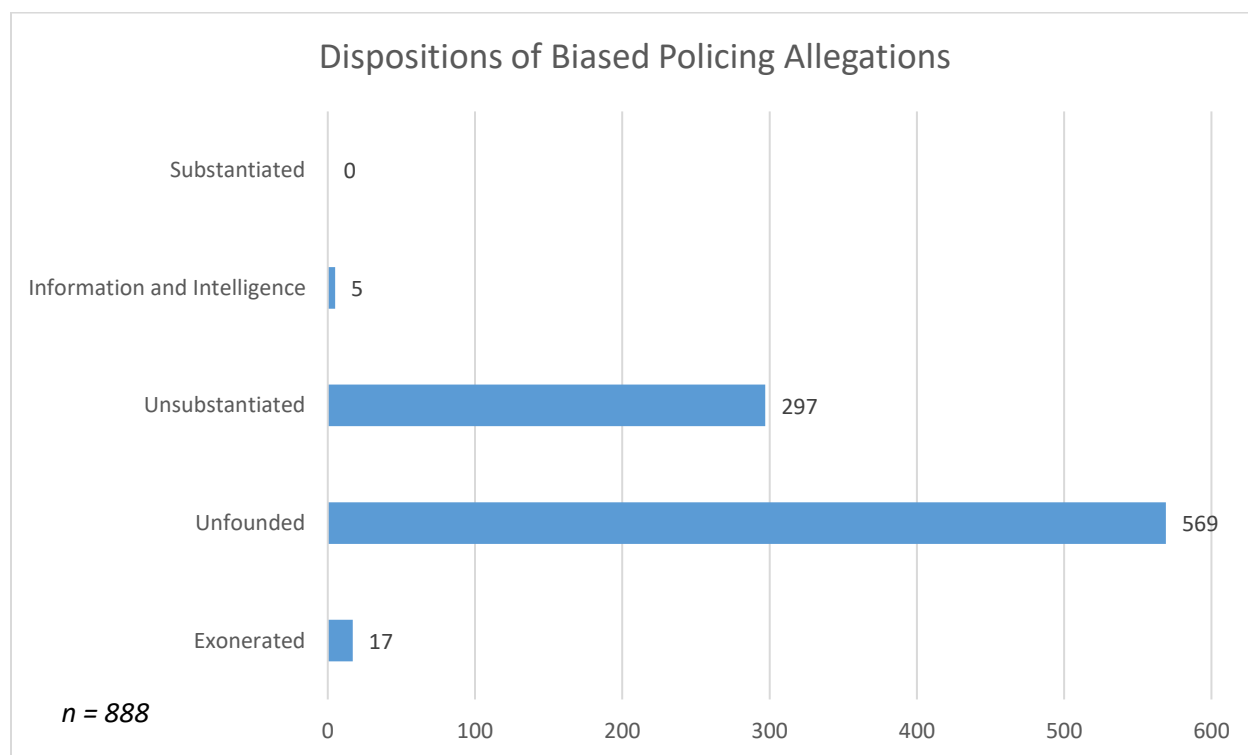
²⁰ See NYC COMM’N ON HUMAN RIGHTS, BIAS-BASED PROFILING BY LAW ENFORCEMENT, *available at* https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/BiasBasedHarassment_Brochure%20Final.pdf; *see also* N.Y.C. Human Rights Law § 14-151(d)(2) (2016).

²¹ According to NYPD, uniformed personnel have approximately 10 million police interactions with members of the public each year.

closed as of August 2, 2017, totaling 596 cases (containing 888 allegations of biased policing). NYPD officials confirmed in June 2019 that the Department has never substantiated an allegation of biased policing since it began using this complaint category in 2014.

Figure 2 below provides a breakdown of the dispositions of the investigations into biased policing allegations reviewed by OIG-NYPD. The disposition categories used by NYPD are (i) substantiated, (ii) information and intelligence, (iii) unsubstantiated, (iv) unfounded, and (v) exonerated.²² OIG-NYPD found that most allegations were resolved as either “unfounded” (indicating that NYPD’s investigation determined such conduct did not occur) or “unsubstantiated” (indicating that NYPD’s investigation did not have enough evidence to prove or disprove the claims).

²² The definitions of the range of dispositions are explained in Figure 2 and found at NYC COMM’N TO COMBAT POLICE CORRUPTION, *18th Annual Report*, 18-19 (Nov. 27, 2017), *available at* <http://www1.nyc.gov/assets/ccpc/downloads/pdf/18th-Annual-Report.pdf> [hereinafter NYC CCPC, *18th Annual Report*].

Figure 2: Dispositions of Biased Policing Allegations

Substantiated: The investigation determined that the accused member of service committed the alleged act of misconduct. As applied to the overall case, the accused member of service committed all of the alleged acts of misconduct.

Information and Intelligence: The investigation closed with insufficient evidence to clearly prove or disprove that the alleged misconduct occurred, but a record will be kept of this disposition for investigators to refer back to if a subsequent allegation is lodged against the same subject officer.

Unsubstantiated: The investigation was unable to clearly prove or disprove that the alleged misconduct occurred.

Unfounded: The investigation found that the alleged misconduct did not occur or was not committed by members of NYPD.

Exonerated: The investigation clearly proved that the accused member of service was involved in the incident, but their conduct was lawful and proper.

Although low substantiation rates for biased policing complaints exist in other large U.S. cities, NYPD's zero substantiation rate stands out.²³ NYPD has proven its ability to investigate and substantiate allegations of misconduct in other areas, according to the Commission to Combat Police Corruption's (CCPC) most recent annual report. Specifically, NYPD's IAB had a 29% substantiation rate across all categories of misconduct in the first eight months of 2016.²⁴

Some police departments regularly report this type of information to the public. By contrast, NYPD does not publicly report data on the outcomes of biased policing investigations, nor does NYPD proactively educate the public on what constitutes biased

²³ OIG-NYPD reviewed publicly available information for the police departments in many of the largest U.S. cities. Among those that *publicly* report information, the law enforcement agencies in the following cities have substantiated biased policing complaints against their officers: San Diego, Seattle, and San Jose. In addition, the independent police review agency for the District of Columbia (Office of Police Complaints) has substantiated biased policing complaints. See Charlie Beck, LOS ANGELES POLICE DEP'T, *Report of the Los Angeles Police Department on the Prevention and Limitation of Biased Policing*, 51 (Nov. 15, 2016), available at http://www.lapdpolicecom.lacity.org/111516/BPC_16-0391.pdf. SEATTLE POLICE DEP'T, OFFICE OF PROFESSIONAL ACCOUNTABILITY, *Report on Seattle's Response to Concerns About Racially Biased Policing*, 9 (2003), available at <https://www.seattle.gov/Documents/Departments/OPA/historicaldocuments/BiasedPolicing.pdf>.

²⁴ NYC CCPC, *18th Annual Report*, *supra* note 22, at 20.

policing.²⁵ NYPD does, however, report use-of-force data, including officer racial demographics, in its annual Use of Force report.²⁶

With respect to transparency, the January 2019 report by an NYPD-appointed panel reviewing the Department's disciplinary system concluded:

“[l]ack of transparency was one of the most frequent complaints that the Panel heard about the Department's disciplinary process. Although certain oversight entities issue regular reports, the Department itself releases minimal data to the public on the disciplinary outcomes or decision making. The absence of such information has engendered mistrust in the community, which questions whether the Department is sufficiently policing its own.”²⁷

NYPD should consider reporting complaint-related biased policing information in a fashion similar to other police departments and to how the Department itself reports use-of-force data. This would further the goal of transparency.

²⁵ LAPD previously published statistics on a quarterly basis regarding biased policing complaints. Such statistics included a breakdown of the accused officers by assignment, gender, ethnicity, age, and length of service to the Department, a breakdown of complainants by gender and ethnicity, the types of police encounters that resulted in biased policing, etc.; the Seattle PD describes and analyzes biased policing complaints on an annual basis along with the status of its efforts to prevent biased policing. LOS ANGELES POLICE DEPT', *Biased Policing and Mediation Update – 3rd Quarter 2017* (Nov. 27, 2017), *available at* http://assets.lapdonline.org/assets/pdf/Biased%20Policing%20Rpt%20and%20Tables_Q3.pdf; LOS ANGELES POLICE COMM'N, *Review of National Best Practices*, 32 (May 2, 2017), *available at* http://www.lapdpolicecom.lacity.org/050217/BPC_17-0169.pdf; SEATTLE POLICE DEPT', *Bias-Free Policing Policy Recommendations*, 5 (Nov. 15, 2013), *available at* http://www.seattle.gov/Documents/Departments/CommunityPoliceCommission/Bias-Free_Policing_Policy_Recommendation111513.pdf.

²⁶ N.Y.C. POLICE DEPT', *Use of Force*, 20 (2017), *available at* <https://www1.nyc.gov/assets/nypd/downloads/pdf/use-of-force/use-of-force-2017.pdf>.

²⁷ ROBERT L. CAPERS, BARBARA S. JONES, & MARY JO WHITE, THE REPORT OF THE INDEPENDENT PANEL ON THE DISCIPLINARY SYSTEM OF THE NEW YORK CITY POLICE DEPARTMENT, 5 (Jan. 25, 2019), *available at* <https://www.independentpanelreportnypd.net/>.

B. Deficiencies in NYPD's Biased Policing Investigations

1. Sub-classification of Complaints

When NYPD receives an allegation that an officer took action (or inaction) based on an individual's actual or perceived protected status, investigators are instructed to identify and sub-classify the one or more protected statuses at issue. IAB Training Unit's "Profiling and Bias-Based Policing" training course for IAB and Bureau/Borough investigators (who handle complaints of biased policing) provides the following presentation slide explaining NYPD's nine sub-classifications:

PROFILING AND BIAS-BASED POLICING

Protected categories include a person's actual or perceived:

- **Race/Color/Ethnicity/National Origin** – Skin appearance, cultural heritage, and ancestry.
- **Alienage/Citizenship Status** – citizenship of any person or the immigration status of a person who is not a citizen of the USA.
- **Gender/Gender Identity** – Male or Female (born as such); Transgender; identifying oneself as opposite sex
- **Sexual Orientation** – Homosexual, heterosexual, or bisexual
- **Age** - Specific range (e.g., 18 to 21) OR ageism ("too old")
- **Religion** – Christian, Jewish, Muslim, Hindu, Buddhist, Atheist, etc.
- **Disability** – Law enforcement actions based upon any disability as defined in PG 207-10 Bias Motivated Incidents
- **Housing Status** – Homeless status and/or location of residence; use of public housing; use of a shelter system
- **Other** – Used when profiling concerned does not fit into the above categories, however, a citizen is singled out due to a non-physical characteristic such as type of vehicle driven, type of music playing, out of state license plate, etc.

4

OIG-NYPD reviewed all of NYPD's case closing reports for the relevant time period and found that NYPD incorrectly or inadequately sub-classified complaints in 56 out of 596 cases (9.4%) in ways that were inconsistent with IAB Procedure Number 620-58. The procedure states that "[a]llegations may include more than express statements of Profiling (*e.g.*, 'I was profiled based on my race'). You should be mindful to categorize as Profiling those allegations that less directly indicate race." Yet, there were biased policing cases in which NYPD investigators either did not sub-classify an allegation that was clearly made, sub-classified an allegation that was not applicable to the case, or did not sub-classify any specific allegation in the case whatsoever.

For example, an investigating officer correctly classified as "profiling" an allegation made by a student against an NYPD school safety agent, but did not sub-classify the allegation as "Race" in the case closing report. This was despite the investigating officer having noted the student's claim that the school safety agent asked him not to "blow up the school" while he was walking through a metal detector, a comment supposedly made "because of [the complainant's] race." In another case, involving an officer's failure to take a complaint concerning harassment by members of the public, the investigator sub-classified a biased policing allegation as "Gender/Gender Identity" and not "Sexual Orientation." The sub-classification was made even though the complainant explicitly told the NYPD investigator that the officer questioned whether the alleged harassers were making comments regarding the complainant's "sexual preference" (and not his gender or gender identity). When the NYPD investigator asked the complainant why he believed that the officer did not take the report, the complainant responded, "[t]hey perceived me as being a faggot." With such information, the NYPD investigator should have sub-classified this case as "Sexual Orientation." In another case, an NYPD investigator sub-classified the case as "Color" due to

an allegation that the complainant's skin color affected the interaction, but the investigator failed to include an additional "Gender/Gender Identity" allegation, even though the complainant claimed that the officer "harassed her [and] was sexist towards her by making reference to her shoe heels."

Improperly sub-classifying a complaint makes it more difficult from the outset for NYPD to investigate allegations of biased policing thoroughly and to track such complaints systemically for the purpose of identifying patterns and trends. In other biased policing cases, NYPD investigators did not sub-classify the allegation at all, but simply listed "Profiling" without identifying the discriminatory basis, even when the facts contained in case closing reports clearly indicated that basis.

NYPD's Bureau/Borough investigators, however, now use a new Internal Case Management and Tracking (ICMT) system, implemented in January 2018, which requires investigators to include a sub-classification before the case can be closed. While the system ensures the *inclusion* of the sub-classification, and is thus an improvement over prior practice, it does not protect against *incorrect* sub-classifications.

2. Interviews of Complainants and Subject Officers

IAB Procedure Number 620-58 instructs investigators to interview both the subject officers and complainants. The IAB procedure states:

- "Interview the complainant(s), subject officer(s) and witness(es) as soon as possible. Whenever feasible, the complainant(s) and witness(es) should be interviewed in person."

- “All appropriate investigative steps must be conducted to thoroughly and expeditiously investigate all of the allegations, including ... interviews of complainant(s), subject officer(s) and witness(es).”
- “While conducting interviews of the subject officer related to an allegation of Profiling, the case investigator must pose questions to the officer to obtain the officer’s perspective of the encounter.”

As IAB Procedure Number 620-58 recognizes, in-person interviews are critical to investigating complaints of biased policing. Often, there is no other source of information about a subject officer’s state of mind during the potentially discriminatory police encounter than the interview. The IAB Training Unit’s “Profiling and Bias-Based Policing” training for IAB and Bureau/Borough investigators uses a presentation slide describing “Investigative Procedures,” which includes the following:

- “Interviewing the Subject Officer”
- “You **must** ask the Subject Officer ‘the complainant says you stopped him/her because of their...’, ‘what is your response to that?’” (emphasis original)
- “Interview the Complainant in person”
- “Ask complainant to identify any witnesses, documents, video and audio recordings with information relevant to the incident”

OIG-NYPD’s review of case closing reports found that NYPD usually followed procedure when subject officers and complainants were identified and available for questioning, though there were instances in which its investigators did not. OIG-NYPD identified at least 20 cases (including 33 allegations of biased policing) in which NYPD investigators did not conduct the requisite interviews of subject officers, despite knowing their identities. In at least four of these cases, NYPD investigators used similar boilerplate

language in their paperwork to explain the absence of an interview, stating words to the effect: “[i]t was determined not to conduct formal interviews because it would only elicit denials of the allegations....” Such speculation is clearly not a valid basis to disregard procedure and forego questioning a subject officer about the alleged incident.

More numerous were cases in which NYPD did not interview complainants in person. OIG-NYPD identified 123 out of 596 (20.6%) cases in which the investigator did not conduct the required in-person interview of a complainant because the investigator maintained that the complainant had either withdrawn the complaint, became uncooperative, or could not be reached. NYPD considered several complainants “unavailable” due to incarceration, even when the complainant was being held at a jail within New York City. Another example included a case in which the NYPD investigator noted the “[complainant] did not speak English and therefore his interview was conducted via [NYPD’s foreign language interpretation service].” In that case, the interpreter had difficulty understanding the complainant, who eventually got frustrated and disengaged from the call. The investigating officer subsequently attempted to contact “[the complainant] to conduct an interview, but all attempts were met with negative results.”

In other cases, investigators deemed complainants uncooperative because of a lack of responsiveness, such as refusing to open the door when the investigator made an unscheduled visit to the person’s residence. This suggests that certain investigative approaches that may be standard in other police investigations may not always be well suited when investigating allegations of biased policing. Indeed, an unscheduled home visit by a police investigator could intimidate a biased policing complainant who had previously reported an unpleasant interaction with the Department.

While there are legitimate explanations why investigators, in some cases, might be unable to interview complainants, it would be helpful to understand more fully the reasons why NYPD investigators are not successfully interviewing many biased policing complainants. As previously noted, among the cases reviewed by OIG-NYPD, the non-interview rate was 20.6%. Given the importance of addressing biased policing, the Department should consider studying why a substantial number of complainants who came forward to allege acts of biased policing either subsequently chose not to engage sufficiently with, or were deemed unreachable by, NYPD investigators.

OIG-NYPD's review determined that while NYPD investigators occasionally documented attempts to contact the complainant, they generally did not note the number of attempts in the case closing reports. As a result, OIG-NYPD could not verify the number of attempts investigators made to interview the complainants. In June 2018, OIG-NYPD asked senior NYPD officials how many complainant contact attempts are required by investigators. NYPD informed OIG-NYPD that investigators are trained to make at least three attempts to interview the complainants before closing the case, but there are no written guidelines on the matter. Subsequently, in January 2019, NYPD amended its IAB Procedure Number 620-58 to require investigators to document successful and unsuccessful attempts to contact complainants. In addition, NYPD's Bureau/Borough investigators now use ICMT to address this issue. ICMT requires either a single positive contact with a complainant or three documented contact attempts before the investigator can close the case. This is an encouraging development, although there are still no *written* guidelines on how many attempts should be made before the case is closed. However, although Bureau/Borough investigators have access to this system, IAB investigators still use the Internal Case Management System (ICMS), which does not require a single positive contact with a

complainant or three documented contact attempts before the case can be closed.

3. Some Investigators Lack the Relevant Training Before They Start Investigating Allegations of Biased Policing

The IAB Training Unit’s “Profiling and Bias-Based Policing” course for IAB and Bureau/Borough investigators is given a few times per year for two hours. The training commenced after the October 2014 update to IAB’s protocols on investigating complaints of biased policing. OIG-NYPD found that some investigators were assigned cases before receiving the training on how to investigate them. When asked about this, an NYPD official expressed doubt that the frequency of such instances was high, pointing out that the untrained investigator would likely be paired with and/or supervised by an investigator who had received the specialized training for biased policing complaints. Although the value of on-the-job training should not be discounted, 74 out of 596 (12.4%) closed cases reviewed by OIG-NYPD contained procedural errors—such as incorrectly sub-classifying the allegation—despite being ultimately approved by a supervisor.²⁸ Ensuring that biased policing allegations are investigated only by trained investigators may help bring this percentage down. Indeed, in June 2019, in response to OIG-NYPD’s identification of this issue, NYPD immediately distributed instructions to Commanding Officers of Bureau/Borough Investigations Units stating that only investigators who have attended the IAB Profiling and Bias-Based Policing training will be assigned such cases.

²⁸ In addition to supervisor approval, IAB’s Steering Committee conducts case reviews several times a year. During the Steering Committee’s review, a commanding officer presents the group’s caseload to IAB executive staff. The IAB groups investigating “C” cases present three times a year while the other Bureau/Borough units investigating “M” cases present twice a year. A majority of biased policing complaints are “M” cases. According to NYPD, the Steering Committee provides recommendations to encourage thorough investigations.

Research has shown that checklists are useful in a number of professions to ensure that procedures are being followed. According to Professor Samuel Walker, a police accountability expert, “[t]he Portland Police Bureau (PPB) uses checklists for a variety of police practices,” and research has shown that “[c]hecklists could be used by internal affairs divisions when they investigate citizen complaints filed against officers....”²⁹ Some agencies, such as the Los Angeles Police Department (LAPD), incorporate this safeguard to make sure that biased policing protocols are followed. LAPD’s checklist includes all required protocols for investigating biased policing allegations, and investigators are required to submit the checklist and protocols in the completed investigative file for supervisory review.³⁰

In addition, LAPD created a Constitutional Policing Unit (CPU) that reviews every complaint alleging biased policing. CPU selects for investigation those complaints that have the greatest potential for violations.³¹ All biased policing complainants whose intake was conducted by another investigative unit must be re-interviewed by CPU.³² NYPD should study what LAPD has done to address the handling of biased policing investigations.

4. Other Deficiencies

In several case closing reports reviewed by OIG-NYPD, investigators included statements suggesting that the decision not to substantiate allegations may have been influenced by observations that the complainant and the subject officer were of the same race. For example, an investigator stated in a case closing report: “It should be noted that [the subject officer] is a male [B]lack as is the summons respondent.” In January 2019, during the

²⁹ CAROL A. ARCHBOLD & SAMUEL WALKER, *THE NEW WORLD OF POLICE ACCOUNTABILITY*, 259-60 (3rd Ed. 2019).

³⁰ LOS ANGELES POLICE COMM’N, *Review of Biased Policing Complaints*, 4 (Dec. 15, 2015), available at http://www.lapdpolicecom.lacity.org/121515/BPC_15-0055A.pdf.

³¹ *Id.* at 7-8.

³² *Id.* at 22-23.

course of OIG-NYPD's investigation, NYPD updated the instructor's guide for IAB's training of investigators to ensure that investigators are now verbally instructed that "[t]he fact the subject officer is of the same race, gender, etc. as the complainant may be relevant but is not controlling."³³ While this is an improvement, NYPD's *written* investigative procedures should explicitly prohibit officers from making such assumptions.

OIG-NYPD also identified some case closing reports suggesting that if a complainant had pled guilty in the criminal case from which the allegation of biased policing arose, the investigator would not substantiate the biased policing allegation. For example, as previously referenced in the last example of the "Examples of Allegations" section, the complainant alleged that he was pulled over while driving because he was Black. The officers subsequently found drugs in his car, but the complainant asserted that the "officers planted the drugs in his car because he doesn't do crack." The occupants in the complainant's car pled guilty to disorderly conduct in the criminal case before the biased policing investigation concluded. An NYPD investigator wrote in the case closing report that "[n]o racial or derogatory statements were uttered by the [subject officer]. The three occupants in [the complainant's car] all plead [sic] guilty. Therefore the allegation of Profiling-color is to be closed as Unfounded." OIG-NYPD followed up on this statement by interviewing the assigned investigator, who reaffirmed that if there is a guilty plea in a case, it will be used as evidence to not substantiate the biased policing allegation because "if you plead guilty, obviously you did it." Because pleading guilty to disorderly conduct does not resolve whether the complainant was pulled

³³ Experts have likewise noted that "in the policing context, implicit biases can cause officers to unintentionally judge Black civilians as more suspicious than White civilians, even when these officers are consciously egalitarian, reject racial profiling, and are Black themselves." L. Song Richardson, *Implicit Racial Bias and Racial Anxiety: Implications for Stops and Frisks*, 15 Ohio St. J. Crim. L. 73, 3 (2017).

over because he is Black, this example represents a flawed approach to resolving actual biased policing claims.

In January 2019, during the course of OIG-NYPD's investigation, NYPD updated the instructor's guide for IAB training to ensure that investigators are verbally instructed on this issue during their training. Specifically, investigators are now told that even if a criminal case and a complaint of biased policing arise from the same set of underlying facts, a guilty plea or even a conviction does not resolve the issue of whether the officer engaged in the alleged discriminatory conduct. While a positive development, this change has not yet been incorporated into NYPD's *written* investigative procedures.

OIG-NYPD also found that investigators regularly conduct background checks on alleged victims, complainants, and witnesses in biased policing matters, sometimes revealing criminal histories and the existence of sealed records. For example, one investigator noted "[t]he Investigating Supervisor conducted a DAS (LITE) Inquiry which revealed that [the alleged victim] has five (5) prior arrests. Four out of the five arrests are sealed and one prior arrest for Criminal Possession of a weapon 2nd Degree. The inquiry further revealed that [the witnessing complainant] has seven prior arrests all of which are sealed...." Although it is unclear whether such information is factored into NYPD's biased policing (and other misconduct) investigations, a complainant's criminal history should not be dispositive of the merits of a biased policing allegation.

C. NYPD Does Not Classify Allegations of Offensive Language Related to a Complainant's Protected Status as Biased Policing

The Patrol Guide prohibits "racial profiling and biased-based policing" in law enforcement "actions." As noted, IAB and Bureau/Borough investigators who examine allegations of biased policing are instructed that slurs, or other derogatory terms, are not

actionable instances of biased policing because “the use of language, standing alone, does not amount to action or inaction by the officer.”³⁴ While slurs may be evidence of an officer’s biased intent when engaged in other police conduct (*e.g.*, using a slur while making an arrest), NYPD does not investigate slurs alone—without any additional police action—as incidents of potential biased policing. Instead, when presented with a complaint about an officer making a slur or using other derogatory language, NYPD will forward the allegation to CCRB to be investigated as Offensive Language. CCRB, in turn, will investigate whether the slur was made and consider the context in which the officer used the language to determine whether it was offensive. If CCRB’s investigation substantiates the Offensive Language complaint, the matter will be referred to NYPD for discipline. Importantly, however, neither CCRB nor NYPD will regard the claim as a biased policing complaint, whether substantiated or not.

Because discriminatory intent can be difficult to prove, investigating Offensive Language complaints can still further the goals of holding officers accountable and identifying appropriate training and intervention, even though substantiating such complaints does not require proving that the officer had a biased motive.³⁵ Nevertheless, when a complainant alleges that an officer used a racial slur or other derogatory language based on the complainant’s actual or perceived protected status, neither NYPD nor CCRB will address the most critical issue: whether the slur was uttered intentionally by the officer because of the complainant’s actual or perceived protected status and, if so, whether the

³⁴ N.Y.C. POLICE DEP’T, *NYPD Response to “Review of NYPD’s Implementation of Patrol Guide Procedures Concerning Transgender and Gender Nonconforming People”*, 21 (Feb. 2018), available at https://www1.nyc.gov/assets/doi/reports/pdf/2018/feb/NYPD_Response_020918.pdf.

³⁵ According to NYPD and CCRB, since 2014 CCRB has substantiated numerous complaints of Offensive Language related to the complainant’s protected status. Because substantiated complaints of Offensive Language do not, however, require proof of discriminatory intent as an element, and because no police action was taken, NYPD does not classify such complaints as biased policing.

incident amounts to biased policing. The inability of the NYPD/CCRB investigative processes to categorize and treat the issue as biased policing may have negative implications for explicitly holding officers accountable for *intentional* discriminatory conduct, as well as for the City's ability to track the full range of patterns and trends related to biased policing. For these reasons, OIG-NYPD recommends that NYPD change its practices to include, as potential biased policing, complaints alleging an officer's use of offensive language made in connection with a complainant's protected status.

Patrol Guide § 203-05 relies on the NYC Administrative Code, which defines biased-based profiling as "an act of a member of the force." NYPD can and should change its approach and investigate language-based allegations as potential acts of biased policing since slurs by active-duty officers directed towards members of the public because of their protected status are indeed acts by officers. If discriminatory intent can be established based on the preponderance of evidence, then the use of a slur should be substantiated as biased policing.

NYPD has suggested that permitting slurs to be investigated as biased policing would result in duplicative investigations whereby CCRB would investigate the complaint under its "Offensive Language" jurisdiction (while *not* necessitating proof of biased intent for substantiation), and NYPD would investigate the same facts (but *would* ascertain biased intent to substantiate). This system of concurrent investigations, however, already exists. For example, if a complainant alleges that an officer used excessive force *because* of the complainant's race, CCRB will investigate the excessive force while NYPD will investigate the intent behind the excessive force to determine whether it was a biased policing incident. The same process can be applied to slurs and the use of other discriminatory language.

Moreover, NYPD's policy concerning offensive language related to a complainant's actual or perceived protected status is at odds with the practices of other law enforcement

agencies such as the Seattle Police Department (SPD), the Baltimore Police Department (BPD), and the Grand Rapids Police Department (GRPD), which regard offensive language related to a complainant's protected status as actionable instances of biased policing. For example, SPD's and BPD's policies directing their officers not to "engage in bias-based policing" state identically that personnel "shall not express—verbally, in writing, or by other gesture—any prejudice or derogatory comments concerning discernible personal characteristics."³⁶ Furthermore, GRPD updated its Impartial Policing policy in 2017 to state, "[e]mployees shall refrain from participating in or encouraging any actions or statements that could be reasonably perceived as racial/bias-related profiling, including, but not limited to, racial slurs or derogatory references about a specified characteristic," because "[b]iased policing undermines legitimate law enforcement efforts."³⁷ SPD's Office of Professional Accountability (OPA) has substantiated at least one allegation of biased policing when an officer made a derogatory comment about the arrestee's sexual orientation.³⁸

D. The Majority of Biased Policing Allegations are Based on Race, Color, Ethnicity, or National Origin, and a Plurality are made by Black Complainants

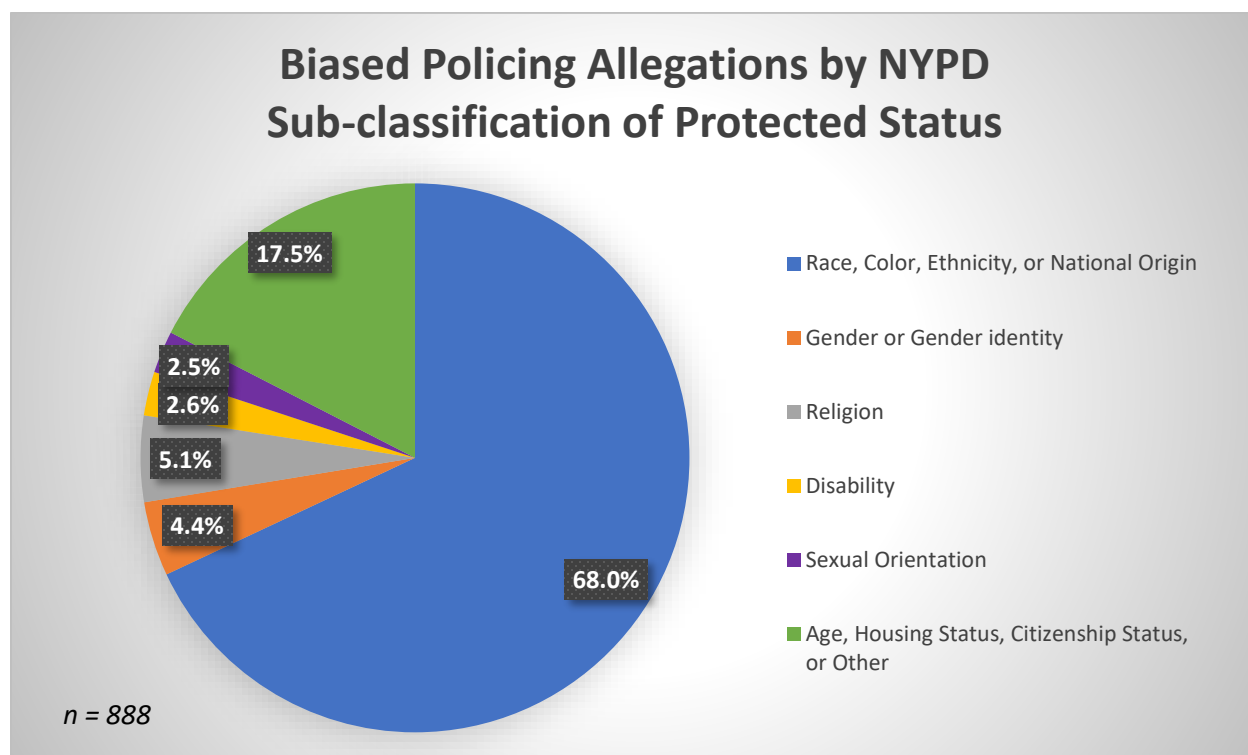
Of the 888 biased policing allegations examined in the study period, a majority—604 (68.0%)—were based on the race, ethnicity, color, or national origin of the complainant.

³⁶ Carmen Best, *supra* note 17; BALTIMORE POLICE DEP'T, POLICY 317 (July 1, 2016), *available at* https://www.baltimorepolice.org/sites/default/files/Policies/317_Fair_And_Impartial_Policing.pdf.

³⁷ CITY OF GRAND RAPIDS POLICE DEP'T, POLICY 8-15.1 "Impartial Policing," (July 21, 2017), *available at* <https://www.powerdms.com/public/GRANDRAPIDS/documents/269438> (last visited June 17, 2019).

³⁸ SEATTLE, *supra* note 23, at 9.

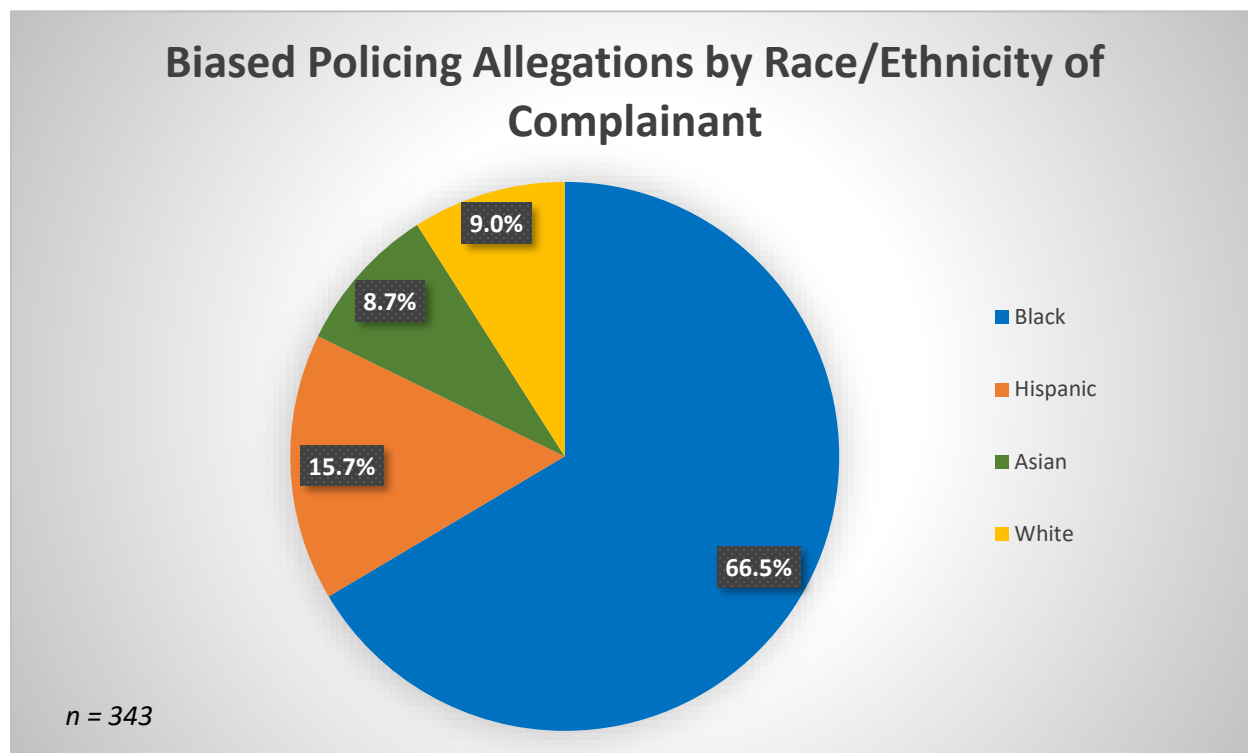
Figure 3: Biased Policing Allegations by NYPD Sub-classification of Protected Status



Out of these 604 allegations, the case closing reports associated with 496 of them noted the complainant's race, ethnicity, or national origin (*e.g.*, Black, Latino, etc.) in the complainant's narrative, while the remaining 108 either did not identify the complainant's specific race/ethnicity or were unclear about the complainant's identity. Of the 496 allegations in which OIG-NYPD could determine the complainant's race/ethnicity based on complainant narratives in the case closing reports, 343 complainants (69.2%) self-identified as either Black/African American, Hispanic/Latino, White, or Asian. The complainants who self-identified as Black made up the largest category. Figure 4 shows the breakdown of those complainants who self-identified as being Black/African American, Hispanic/Latino, White,

or Asian.³⁹

Figure 4: Biased Policing Allegations by Race/Ethnicity of Complainant



As illustrated in Figure 4, a disproportionate number of identifiable biased policing complainants are Black, a disparity that may reflect problems concerning NYPD's relationship with segments of the Black community. To provide some context, while 66.5% of the identifiable complainants are Black, 22.6% of New York City residents are Black and 48%

³⁹ NYPD investigators did not consistently indicate the race/ethnicity of the complainant in NYPD's designated complainant "Race" box in their case closing reports, even when the allegation related to biased policing was based on race, color, ethnicity, or national origin. In addition, NYPD does not have a "Hispanic" category. Instead, NYPD has a "Black," "Black Hispanic," "White," "White Hispanic," and "Asian/Pac ISL" categories (two or more categories cannot be simultaneously selected). However, while the race/ethnicity of complainants was not uniformly captured in the case closing reports, some complainants self-identified. These 343 do not include additional cases where complainants self-identified with national origins that closely correlate to Black/African American, Hispanic/Latino, Asian, or White. For example, the fifth largest category, behind these four, is "Indian," which makes up only seven cases, or 1.4% of the 496, after which the data become too granular to report in a meaningful way.

of arrestees in 2017 were Black.⁴⁰

E. CCRB's Procedures for Referrals or Sub-classification of Allegations

1. CCRB Does Not Investigate Biased Policing Allegations

CCRB's mandate is to investigate public complaints alleging Force, Abuse of Authority, Discourtesy, and Offensive Language (FADO) by uniformed members of NYPD.⁴¹ CCRB does not interpret biased policing allegations as falling under this jurisdiction.⁴²

According to the federal monitor's February 2016 report, "[a]lthough the CCRB has captured information about racial profiling as a reason for initial contact since 2004, it has not referred these allegations to NYPD for investigation. At a meeting with the federal monitor, the CCRB chair and staff, and IAB personnel, [NYPD] and the CCRB agreed that the CCRB would now notify IAB when the complainant/victim states that he or she was profiled."⁴³

NYPD investigates nine different sub-classifications of biased policing. Until early-2018, however, CCRB only sub-classified biased policing allegations that it received (and forwarded to IAB) as "Race" or "Religion." As a result, there are no reliable data on whether complaints of other types of discriminatory policing conduct reported to CCRB were

⁴⁰ Black population data was obtained from the NYPD's crime and enforcement data. See N.Y. POLICE DEPT, *Crime and Enforcement Activity in New York City (Jan 1 – Dec 31, 2017)* (2018), available at https://www1.nyc.gov/assets/nypd/downloads/pdf/analysis_and_planning/year-end-2017-enforcement-report.pdf (last visited June 17, 2019). The demographic data was based on the 2013 American Community Survey administered by the U.S. Census Bureau. Arrest data is based on N.Y. POLICE DEPT, *Annual Use-of-Force Report 2017* (2017) available at <https://www1.nyc.gov/assets/nypd/downloads/pdf/use-of-force/use-of-force-2017.pdf>.

⁴¹ CCRB complaints can be filed online, by telephone or by leaving a voicemail on CCRB's hotline at 1-800-341-2272, Monday through Friday from 8:00 am to 5:00 pm, and by mail or in-person at 100 Church Street, 10th Floor, New York, N.Y. 10007, between 8:00 am and 5:00 pm.

⁴² Second Report of the Independent Monitor, *Floyd v. City of New York*, No. 08-CIV-1034 (S.D.N.Y.), ECF No. 523, 60 (Feb. 16, 2016), available at <http://nypdmonitor.org/wp-content/uploads/2016/02/2016-02-16FloydvCityofNY-MonitorsSecondStatusReport.pdf>.

⁴³ *Id.*

transmitted to NYPD for investigation before 2018. For example, if a complainant alleged that an officer had engaged in racial profiling, CCRB would track and send that information to NYPD for investigation. However, if a complainant alleged an instance of biased policing based on a different protected status (e.g., sexual orientation or gender), CCRB would not sub-classify that allegation, but states that it may have classified it as “Other” and transmitted it to NYPD.

In the course of OIG-NYPD’s investigation, OIG-NYPD informed CCRB of the potential drawbacks of limiting the sub-classification of referrals. Subsequently, early in 2018, CCRB updated its tracking of biased policing allegations to include (and refer to IAB) cases involving *all* nine protected statuses based on New York City law. CCRB informed OIG-NYPD that it referred 84 biased policing allegations to NYPD in 2018. OIG-NYPD commends CCRB for this improvement in how it sub-classifies and tracks allegations of biased policing.

Although CCRB now tracks and forwards complaints of biased policing to IAB, CCRB’s drop-down menu in its complaint-tracking system states that investigators may track these biased policing allegations only if complainants volunteer that the claims involve discrimination. CCRB investigators are explicitly prohibited from asking complainants leading questions as to their belief that they may have been subject to discrimination because, according to CCRB, this may produce unwarranted claims of biased policing.⁴⁴ According to CCRB, the agency does, however, train its investigators to ask probing and open-ended questions about the allegations. These inquiries may elicit details concerning potentially discriminatory conduct.

⁴⁴ According to the federal monitor’s Second Annual Report, a drop-down menu states “C/V [complainant/victim] believes racially profiled (Do not ask C/V this question. Check only if C/V volunteers this info).” *Id.* at 60.

Although CCRB does not currently investigate allegations of biased policing, the legislative history leading to the agency's creation reveals that concerns over discrimination, particularly allegations regarding the use of excessive force by NYPD officers against Black and Latino community members, greatly influenced the creation of CCRB.⁴⁵ By not currently investigating complaints alleging biased policing, CCRB stands in stark contrast to other independent police review agencies in large U.S. cities that primarily investigate police misconduct complaints. Not every police department is in a jurisdiction that has an external entity performing this function. However, all such independent police review agencies associated with the 20 largest U.S. police departments investigate biased policing allegations, with the notable exception of the nation's largest police oversight agency, New York City's CCRB.⁴⁶ Those oversight agencies that do investigate biased policing complaints include Chicago's Civilian Office of Police Accountability (COPA), the District of Columbia's Office of Police Complaints (OPC), San Francisco's Department of Police Accountability (DPA), and Memphis's Civilian Law Enforcement Review Board (CLERB).⁴⁷ Police review agencies that investigate misconduct in smaller police departments (*i.e.*, outside of the 20 largest), such as

⁴⁵ *N.Y.C. Civilian Complaint Review Board: Hearing on Intro. No. 549 Before the Comm. On Public Safety*, N.Y. City Council 52-53, 435 (1992) (Hearings cited an article *The Latino Press* titled "Charges of Police Brutality Against Latinos—A Chronology," and a letter from the National Association of Colored People stating that it had received multiple complaints of police officers motivated by racial animus in their interactions with members of the public).

⁴⁶ The 20 largest police departments are based on the number of officers in each department according to 2016 FBI data. 2016 CRIME IN THE U.S., FED. BUREAU OF INVESTIGATION, <https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/police-employees> (last visited June 17, 2019).

⁴⁷ See *Jurisdiction*, CIVILIAN OFFICE OF POLICE ACCOUNTABILITY, <http://www.chicagocopa.org/wp-content/uploads/2018/03/1088318-redacted-by-JS.pdf> (last visited June 17, 2019); *About Office of Police Complaints*, D.C. OFFICE OF POLICE COMPLAINTS, <https://policecomplaints.dc.gov/page/about-office-police-complaints> (last visited June 17, 2019) (OPC's authority to receive complaints involving six types of police officer misconduct: harassment, inappropriate language or conduct, retaliation, unnecessary or excessive force, discrimination, and failure to identify). DEP'T OF POLICE ACCOUNTABILITY, *Complaint Summary Report*, CITY & CNTY. OF S.F. (2018), available at https://sfgov.org/dpa/sites/default/files/DPA_08_18_openness.pdf; *File a Complaint*, CIVILIAN LAW ENFORCEMENT REVIEW BD., <http://clerbmemphis.org/file-a-complaint/> (last visited June 17, 2019).

the Atlanta Citizen Review Board (ACRB), also investigate allegations of biased policing.⁴⁸ Notably, police accountability agencies such as the District of Columbia's OPC have substantiated biased policing allegations.⁴⁹

In pursuing its authority to investigate biased policing complaints, OPC in Washington, D.C., has found discriminatory conduct. For example, in OPC Complaint No. 09-0169 (2012), the agency substantiated allegations of discrimination by a Black male complainant against an officer who detained and searched the complainant and ran his name through criminal justice databases. The investigation determined that the officer was acting on a vague tip about a publicly intoxicated male of an unspecified race and had stopped six Black men within 30 minutes.⁵⁰ Absent an articulable justification for why the officer stopped the six men, OPC ruled that this amounted to racial discrimination.⁵¹ Similarly, in OPC Complaint No. 13-0331 (2015), the agency substantiated an allegation of national origin discrimination against an officer who repeatedly asked a Jamaican complainant about her country of origin, despite the question having no law enforcement or investigative value.⁵² The repeated questioning made the complainant feel singled out because of her national origin and created an environment of hostility in the encounter.⁵³

Although CCRB's FADO authority does not explicitly cover discrimination, the agency's existing Abuse of Authority jurisdiction can be interpreted to include biased policing. Historically, CCRB's definition of Abuse of Authority has expanded to include particular

⁴⁸ See also *File a Complaint*, ATLANTA CITIZEN REVIEW BD, <https://acrbgov.org/file-a-complaint/> (last visited June 17, 2019).

⁴⁹ Compl. No. 09-0169, 2012 DC POLICE LEXIS 11 (Aug. 27, 2012).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² Compl. No. 13-0331, 2015 DC POLICE LEXIS 9 (Oct. 20, 2015).

⁵³ *Id.*

subject matters, such as sexual misconduct, in response to increased public attention and concern. In February 2018, the agency's board unanimously voted that, as part of CCRB's phase one process, the agency would begin investigating sexual harassment (*e.g.*, verbal sexual harassment, sexual, or romantic propositions) complaints against NYPD officers under CCRB's Abuse of Authority jurisdiction.⁵⁴ All current investigators at CCRB are now required to receive basic competency training on processing and investigating sexual harassment allegations, which are no longer referred to IAB. OIG-NYPD understands, however, that nothing would prevent NYPD from investigating such claims if the complainant files separately with both CCRB and NYPD, or if NYPD becomes aware of the conduct through other means and chooses to conduct an investigation.

As part of phase two, the board further instructed CCRB to develop a plan to train and equip staff to investigate sexual assault (*e.g.*, groping, rape, coercive sexual activity on-duty) allegations against NYPD officers.⁵⁵ Until CCRB develops and implements its plan to investigate sexual assault, the agency will continue to refer those complaints to IAB. According to CCRB, once phase two is implemented, both CCRB and IAB will theoretically be able to conduct parallel investigations of the same sexual assault allegation, similar to how CCRB and IAB presently handle sexual harassment allegations. A New York court recently found that CCRB's interpretation of its Abuse of Authority jurisdiction was not only within its authority, but was crucial for its mission.⁵⁶ In the future, CCRB could similarly

⁵⁴ Press Release, N.Y.C. Civilian Complaint Review Bd., NYC Civilian Complaint Review Board Unanimously Votes to Investigate Allegations of NYPD Sexual Misconduct (Feb. 15, 2018), *available at* https://www1.nyc.gov/assets/ccrb/downloads/pdf/about_pdf/news/press-releases/2018/20181502_boardmtg_sexualmisconduct_release.pdf.

⁵⁵ *Id.*

⁵⁶ *Lynch v. N.Y.C. Civilian Complaint Review Bd.*, 2019 N.Y. Misc. LEXIS 830, 835 (2019) (The Court found that "[t]he CCRB's interpretation of its 'abuse of authority' jurisdiction is entitled to great weight and judicial deference..." and that the CCRB's interpretation had a rational basis that was supported by substantial evidence).

interpret its Abuse of Authority jurisdiction to include biased policing. For example, if a complainant alleges that an officer used a slur related to the complainant's protected status, CCRB could investigate both the potentially discriminatory intent under its Abuse of Authority jurisdiction (to cover the biased policing component) and whether the slur was used under CCRB's Offensive Language jurisdiction.

In recommending that CCRB investigate biased policing allegations under its Abuse of Authority jurisdiction, OIG-NYPD recognizes the practical and operational challenges that CCRB may face. First, as noted, biased policing complaints are often difficult to substantiate because of the need to prove discriminatory intent. Second, CCRB may need additional data and records from NYPD—and on an expedited basis—to complete such investigations in the required time frame. Lastly, CCRB presently has approximately 90 investigators, and may need more resources to adequately conduct such investigations.

2. CCRB Does Not Sub-classify Offensive Language Allegations According to All Sub-classifications Tied to the Protected Statuses Under NYC Law

As noted earlier, when CCRB receives biased policing allegations (which the agency then refers to IAB), CCRB sub-classifies the complaint according to the nine protected status sub-classifications found in § 203-25 of NYPD's Patrol Guide and based on § 14-151 of the NYC Administrative Code: "Race / Ethnicity / National Origin / Color," "Creed," "Age," "Alienage / Citizenship Status," "Gender / Gender Identity," "Sexual Orientation," "Disability," "Housing Status," and "Other." When investigating Offensive Language allegations related to a complainant's protected status, however, CCRB's current practice is to sub-classify those allegations into eight categories: "Race," "Gender," "Gender Identity," "Ethnicity," "Sexual Orientation," "Religion," "Physical Disability," and "Other." Unlike NYPD, CCRB does not combine categories, such as "Gender" and "Gender identity," into a

single sub-classification. Furthermore, CCRB does not sub-classify allegations into the other six categories recognized in the NYC Administrative Code: “National Origin,” “Color,” “Age,” “Alienage,” “Citizenship Status,” and “Housing Status.” Allegations based on these six categories, or other non-physical characteristics that do not already have a category (*e.g.*, genre of music playing), are sub-classified as “Other” because CCRB states that either it does not receive large numbers of these types of complaints or they are subsumed into another sub-category. Although CCRB is not required to sub-classify Offensive Language allegations into all the protected statuses in the NYC Administrative Code, having more granular information will aid the agency’s work, furnish more precise data for CCRB’s reports, and inform other agencies, such as the City’s Commission on Human Rights, of the extent of possible biased policing involving NYPD. If CCRB uses the same sub-classifications as NYPD and CCHR, all three agencies can more easily share and track information related to discriminatory policing allegations, thereby strengthening the City’s combined response to potential bias in policing.

F. NYPD’s Training Related to Biased Policing

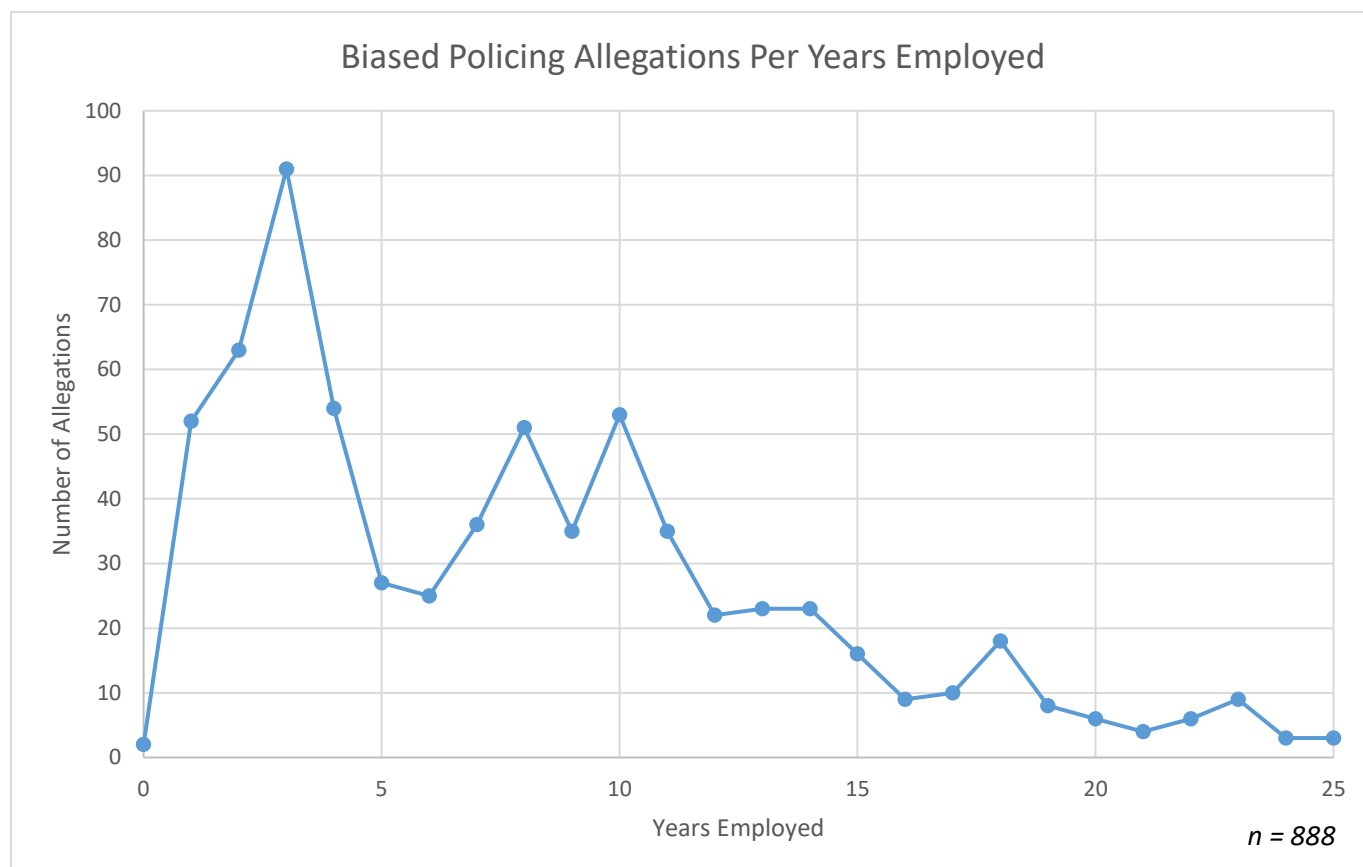
1. Recruits

As part of NYPD’s biased policing reforms, the federal monitor assisted in creating new presentation slides and lesson plans for recruit training on the Department’s protocols to combat and prevent biased policing. OIG-NYPD observed this recruit training for entry-level officers to understand the newly implemented steps that NYPD is taking to address, handle, and prevent allegations of biased policing.

According to NYPD’s case closing reports, complaints of biased policing are disproportionately directed at NYPD officers and other personnel who have less time on the job. Using the case closing reports provided by NYPD, OIG-NYPD examined the job tenures

of NYPD personnel who were the subjects of biased policing allegations. Figure 5 presents the results of this review.

Figure 5: Biased Policing Allegations per Years Employed



In the case of officers, those with less tenure tend to have more interactions with members of the public, which may partly account for the higher numbers of complaints in the early years of officers' careers. NYPD must therefore ensure that recruit training for entry-level police officers sufficiently covers the different types of community interactions that may implicate biased policing concerns.

In 2015, after consultation with the federal monitor, NYPD updated the curriculum and lesson plans for the two recruit-level courses that primarily relate to biased policing and cultural competency: "Policing in a Multicultural Society" and "Policing Impartially." The

federal monitor in the *Floyd* case provides consultation and approval on lesson plans and materials, while NYPD uses instructors from the Department to teach the materials. The first course is intended to provide background knowledge of different cultures and to build cultural competency, and the second is intended to explain the effects of biased policing and prejudice in the development of policing as a profession.⁵⁷ These two three-hour courses, taught in the NYPD Police Academy, along with NYPD's newly implemented eight-hour "Fair and Impartial Policing" course for recruits, account for significantly less time devoted to biased policing issues than in the police training academies of other large cities. For example, all LAPD recruits undergo training related to biased policing and cultural competency for a total of 33.5 hours.⁵⁸ Included in this program is a three-hour discussion on community and cultural diversity, a three-hour course on cultural diversity and discrimination, and a three-and-a-half-hour course on racial profiling and other biased policing.⁵⁹ LAPD's entire biased policing training module consists of 13 courses that are all at least one hour long. NYPD has other courses that may touch on relevant issues, such as the "Stop, Question, and Frisk" course; however, biased policing and/or cultural competency are peripheral to other issues addressed in these courses.

In 2016 and 2017, OIG-NYPD sent staff to observe full sessions of two NYPD recruit-level courses on four occasions after reviewing course material, including lesson plans and presentation slides. OIG-NYPD had a generally positive assessment of the instructional materials, which attempted to provide historical context for the relevant issues. For instance,

⁵⁷ N.Y. POLICE DEP'T, HUMANITIES: POLICING IMPARTIALLY 1 (Aug.17, 2015), *available at* <http://nypdmonitor.org/wp-content/uploads/2016/02/PolicingImpartiallySGRevised817-15finaln.pdf>.

⁵⁸ Charlie Beck, LOS ANGELES POLICE DEP'T, *Report of the Los Angeles Police Department on the Prevention and Limitation of Biased Policing*, 139-40 (Nov. 15, 2016), *available at* http://www.lapdpolicecom.lacity.org/111516/BPC_16-0391.pdf.

⁵⁹ *Id.*

the course noted that laws enforced by the police, such as immigration codes, “have favored European immigrants and limited the numbers of Asians, Africans, and Latin Americans,” citing specific examples such as The Chinese Exclusion Act of 1882 which prohibited the immigration of Chinese laborers into the U.S. for ten years and was enforced by the local police.

There was variation between NYPD instructors in tone, style, and grasp of the material. While not representative of every training session or every instructor, OIG-NYPD witnessed some problematic statements. Instructors, when attempting to explain certain generalized behaviors associated with particular ethnic groups and communities, engaged in role-playing scenarios that may have unintentionally reinforced negative stereotypes.⁶⁰ For example, one instructor was asked by a recruit whether it is permissible to call for back-up before approaching a group of Black people to issue a parking ticket if the recruit’s past experiences with Black people were hostile. The instructor responded: “I hate to say it, [but] biases can help us sometimes to keep us safe.” A supervising sergeant, who was present due to the attendance of OIG-NYPD observers, intervened: “Why is it that [the recruit] thinks, ‘[what] if I ticket a group of Blacks?’” The sergeant concluded by asking the students to question their own biases, stating that they may perceive White people to be “peaceful” and Black people to be “violent.”

2. In-Service

The *Floyd* decision, which held NYPD’s stop and frisk policies unconstitutional, stated that, “[i]t may also be appropriate to conduct training for officers on the effect of unconscious

⁶⁰ For example, one instructor said, “Pretend I’m Asian,” and then engaged the trainee in a role-play to illustrate supposed “Asian” norms regarding eye-contact.

racial bias.”⁶¹ This determination accords with other findings and best practices in modern policing. For instance, according to the 2015 *President’s Task Force on 21st Century Policing*, legitimacy in policing can only be achieved by reducing implicit (*i.e.*, unconscious) bias at all levels of law enforcement.⁶² In February 2016, the NYC Mayor announced that NYPD’s in-service implicit bias training would begin in Spring 2016,⁶³ after the federal monitor had reported in July 2015 that NYPD “recognized that police officers will be much more effective and safer if they are aware of their own unconscious biases as well as those of others with whom they interact—*e.g.*, community residents, witnesses and complainants, prosecutors, lawyers and judges.”⁶⁴ NYPD, however, did not commence training in-service personnel on implicit bias until February 6, 2018. In May 2018, OIG-NYPD previewed a full-day session of the “Fair and Impartial Policing” training, which NYPD now uses as its in-service implicit bias training. While OIG-NYPD commends NYPD for its goal to provide implicit bias training for every current uniformed member, it is too soon to assess the effectiveness of this training module. In June 2019, NYPD informed OIG-NYPD that approximately 25,000 uniformed members have received this implicit bias training to date, and all uniformed members (approximately 36,000) will by early 2020.⁶⁵

⁶¹ Opinion and Order, *supra* note 1, at 17.

⁶² CHARLES H. RAMSEY & LAURIE O. ROBINSON, PRESIDENT’S TASK FORCE ON 21ST CENTURY POLICING, FINAL REPORT 11 (May 2015), *available at* https://cops.usdoj.gov/pdf/taskforce/taskforce_finalreport.pdf.

⁶³ See Mayor Bill de Blasio, State of the City, (Feb. 6, 2016), *available at* <http://www1.nyc.gov/office-of-the-mayor/news/133-16/state-the-city-remarks-mayor-de-blasio-prepared-delivery>.

⁶⁴ First Report of the Independent Monitor, *supra* note 1, at 38.

⁶⁵ In addition, according to NYPD, the Department incorporates some bias training elements into its Sergeants Development Course, Lieutenants Development Course, and Captains Development Course.

G. NYPD Does Not Mediate Biased Policing Complaints

In New York City, CCRB offers mediation as an option to complainants in some cases. Mediation provides an opportunity for complainants and subject officers to speak face-to-face about the incident that led the member of the public to file a complaint, without invoking the full disciplinary process.⁶⁶ Because CCRB does not investigate biased policing complaints, however, mediation is not available through the agency for these types of allegations. NYPD likewise does not have a mediation program for complainants and police officers to discuss each other's perspectives on allegations of biased policing or, for that matter, any other types of police misconduct complaints handled by NYPD.

Other cities have instituted mediation to allow complainants and police officers to work through perceptions or allegations of biased policing that may arise from their encounters. For example, LAPD implemented a Biased Policing Complaint Mediation Program in 2014 as an “innovation to reduce conflict between citizens and law enforcement, promote improved community relations, educate officers about concerns and experiences of citizens, and increase satisfaction among citizens with disposition of complaints involving bias.”⁶⁷ Complaints that undergo this process are mediated by volunteers provided by the Los Angeles City Attorney's Office. LAPD's Mediation Exit Questionnaire showed that 90.2% of officers and 71.9% of complainants were satisfied with the process. Furthermore, 80% of both

⁶⁶ Mediation is commonly employed by other police oversight organizations. *See, e.g.,* CITY OF NEW ORLEANS OFFICE OF THE INDEPENDENT POLICE MONITOR, *Community-Police Mediation Program 2015 Annual Report* (2015), available at <http://nolaipm.gov/wp-content/uploads/2016/12/2015-Mediation-Annual-Report.pdf> (last visited June 17, 2019).

⁶⁷ HOWARD P. GREENWALD, IMPLEMENTATION STUDY OF THE LAPD BIASED POLICING COMPLAINT MEDIATION PROGRAM: REPORT TO THE HAYNES FOUNDATION 3 (2015).

officers and complainants would recommend mediation to others.⁶⁸ LAPD's program became a full program when the pilot ended on December 31, 2017.

LAPD's biased policing mediation program is voluntary for both complainants and officers because, even after the case is deemed eligible, the subject officer or the complainant can decline mediation, which would then prompt the normal investigative process. LAPD had 363 complaints eligible for mediation during its three-year pilot program, with 73 resulting in mediation.⁶⁹

Other mediation programs, such as the one administered by the police accountability agency in Washington, D.C., are mandatory to the extent that "both parties are required to participate in good faith in the mediation."⁷⁰ However, "all agreements [resulting from the mediation process] are totally voluntary and must be agreed to by both parties."⁷¹ As a result, if no mediation outcome is achieved, the case proceeds to the regular investigative phase.⁷²

As part of the consent decree process, the U.S. Department of Justice required the Ferguson Police Department to work with Community Mediation Services of St. Louis, a private entity, to develop a "community-centered mediation program to act as an alternative to the misconduct investigation process."⁷³ Community Mediation Services offers mediation to members of the public who have complaints about police conduct such as biased policing.

⁶⁸ *Id.*

⁶⁹ LOS ANGELES POLICE DEP'T, *Community-Employee Mediation Pilot Program Implementation Plan* (July 26, 2013), available at <https://www.scmmediation.org/wp-content/uploads/2013/10/LAPD-Biased-Policing-Complaint-Mediation-Program2.pdf>.

⁷⁰ D.C. Office of Police Complaints, *Mediation*, <https://policecomplaints.dc.gov/service/mediation-service> (last visited June 17, 2019).

⁷¹ *Id.*

⁷² *Id.*

⁷³ Consent Decree at ¶ 399, *U.S. v. City of Ferguson*, No. 4:16-CV-00180-CDP, (E.D. Mo. Apr. 19, 2016), available at <https://www.justice.gov/crt/file/883846/download> [hereinafter "FPD Consent Decree"].

NYPD should follow suit and develop a pilot mediation program covering some biased policing allegations against both uniformed and non-uniformed members. Focus groups and community surveys conducted under the auspices of the *Floyd* monitorship expressed support for the concept of mediation, noting that it is an opportunity to work collaboratively with police to repair trust.⁷⁴ While NYPD would need to develop thoughtful and careful criteria for referring cases to mediation, the approaches in other cities can serve as models. In addition, NYPD can learn valuable lessons from New York City's own CCRB on how to develop and manage a successful mediation program.

H. NYPD Does Not Have an Effective Early Intervention Approach to Handle Biased Policing Complaints

NYPD has two principal early intervention programs to assess the behavior of officers (as well as non-uniformed employees) and intervene if necessary: the Performance Monitoring Program and the Risk Assessment Information Liability System (RAILS).⁷⁵ The Performance Monitoring Program is a Department-wide intervention system whereas RAILS provides real-time information to supervisors about individual officers. NYPD emphasizes that early intervention is not discipline; rather, it is an opportunity for the Department to identify certain behavior at an early stage and to correct such behavior if necessary.

NYPD's Performance Monitoring Program is designed to allow the Department to intervene when a specific officer's performance or behavior appears substandard. The

⁷⁴ Belen, *supra* note 1.

⁷⁵ An Early Intervention System (EIS) is a data-based management tool designed to identify officers whose performance exhibits problems or potential problems. In such situations, some type of intervention may be warranted, usually counseling or training, to correct the behavior. EIS's have emerged as an important mechanism for ensuring police accountability. Samuel Walker, OFFICE OF COMMUNITY ORIENTED POLICING SERV., U.S. DEP'T OF JUSTICE, *COPS Early Intervention Systems for Law Enforcement Agencies: A Planning and Management Guide* (2003), <https://www.hsdl.org/?view&did=470860> (last visited June 17, 2019); *see also* N.Y.C. DEP'T OF INVESTIGATION, OFFICE OF THE INSPECTOR GENERAL FOR THE NYPD, *2019 Investigation of Litigation Data Involving NYPD* (April 30, 2019) available at https://www1.nyc.gov/assets/doi/reports/pdf/2019/Apr/13LitData_pressrelease_report_43019.pdf.

Performance Monitoring Program has developed a three-level scale of officer monitoring. Each level groups together complaints made against an officer using criteria for complaint type, number of complaints, and complaint severity and assigns a degree of monitoring commensurate with the overall level of seriousness. Higher levels of monitoring allow more scrutiny and greater supervision of performance. For example, if an officer has four or more complaints alleging the use of excessive force within two years (or five or more within four years), “level one” (*i.e.*, heightened) monitoring of the officer’s performance begins, regardless of whether such complaints have been substantiated. If an officer has one substantiated force complaint within a five year period, then “level two” monitoring begins. OIG-NYPD commends NYPD’s aggressive tracking of force complaints, which could serve as a model for tracking biased policing complaints.

The Performance Monitoring Program is complemented by RAILS, which provides Department supervisors with real-time alerts of relevant data concerning NYPD employee performance. For example, four or more CCRB complaints for excessive force in two years, or five or more such CCRB complaints in a four-year period, automatically leads to supervisor notification. Although RAILS informs an employee’s supervisor when a biased policing complaint is substantiated, allegations of this type that are not substantiated are not included in RAILS.

If NYPD considers biased policing complaints, regardless of substantiation, to be potentially important indicators of employee performance, such complaints should be included in both the Performance Monitoring Program and the RAILS system. OIG-NYPD’s analysis of NYPD’s case closing reports shows that 20 out of 488 (4.1%) officers received at least two biased policing complaints during the study period. A pattern of biased policing complaints made against an officer over time may warrant early intervention, even if

allegations have not been substantiated. Early intervention could take the form of increased performance monitoring or additional training. By way of example, Seattle police officers who have had two or more biased policing complaints in a 12-month period are referred for a formal Administrative Review, which is similar to NYPD's Performance Monitoring Program.⁷⁶

VI. RECOMMENDATIONS

Based on the findings of this Report, DOI's OIG-NYPD makes the following recommendations:

A. NYPD Policies

1. NYPD should amend its Patrol Guide policies to explicitly require NYPD officers and non-uniformed employees to report instances of biased policing upon observing or becoming aware of such conduct.
2. NYPD should amend its Patrol Guide policies so that complaints alleging the use of offensive or derogatory language associated with an individual's actual or perceived protected status, such as racial slurs, are classified as biased policing if there is a discriminatory intent.

B. NYPD Investigative Procedures

3. NYPD should amend its *written* investigative procedures related to biased policing so that offensive or derogatory language associated with an individual's actual or perceived

⁷⁶ SEATTLE, *supra* note 23, at 8.

protected status, such as an officer's use of racial slurs, is classified, investigated, and adjudicated as a biased policing matter.⁷⁷

4. Consistent with NYPD's investigative training, NYPD should amend its *written* investigative procedures to document the number of attempts that investigators must make to contact complainants for interviews when investigating biased policing complaints before the case is closed.

5. NYPD should amend its *written* investigative procedures to require investigators to attempt to interview incarcerated complainants when such complainants are being held at a jail located within the five boroughs of New York City (regardless of whether the jail is managed by NYC Department of Correction, NYS Department of Corrections and Community Supervision, or the federal Bureau of Prisons).

6. Consistent with NYPD's investigative training, NYPD should amend its *written* investigative procedures to state that a guilty status, plea, or conviction does not resolve the issue of whether an officer or a non-uniformed employee engaged in discriminatory conduct, even if the criminal matter and the complaint of biased policing arise from the same set of underlying facts.

7. NYPD should amend its *written* investigative procedures to state that a complainant's previous criminal history should not be dispositive of whether a biased policing allegation is substantiated. Where NYPD does regard the complainant's previous criminal history as a factor in a non-substantiation decision, the investigator should articulate how the criminal

⁷⁷ This recommendation is not intended to alter the ability of CCRB to investigate and substantiate Offensive Language complaints under its current protocols. As noted above, investigating Offensive Language complaints can still further the goals of holding officers accountable and identifying appropriate training and intervention, even though substantiating such complaints does not require proving that the officer had a biased motive.

history impacted the decision and the investigator must still complete a full investigation of the allegation.

8. Consistent with NYPD's investigative training, the Department should amend its *written* investigative procedures to state that a subject officer's race/ethnicity or other protected status should not be determinative in deciding whether to substantiate a biased policing allegation, even when the officer (or non-uniformed employee) and complainant identify as members of the same race/ethnicity or other protected group.

9. NYPD should make records of complaints and investigations of biased policing allegations available to CCHR for analysis and review.⁷⁸

C. NYPD Investigative Integrity

10. NYPD investigators should not be assigned investigations of biased policing allegations until they complete the formal "Profiling and Bias-Based Policing" training for investigating such complaints.

11. NYPD should develop a checklist of all the required protocols for investigating allegations of biased policing, such as interviewing complainants and sub-classifying all applicable protected statuses.

12. Investigators should be required to complete and submit to their supervisors the checklist with their case closing reports.

13. Deputy Chiefs should receive training and reminders emphasizing that biased policing investigations can only be closed when proper investigative protocols have been

⁷⁸ This exchange of information is permissible under New York Civil Rights Law § 50-a(4).

followed, unless such protocols were impossible to implement or inapplicable to the particular case.

14. With respect to complaints of biased policing, NYPD should ensure that IAB's case management system contains the same controls found in the ICMT system used by NYPD's Bureau/Borough investigators, including controls regarding the requisite number of attempts to contact complainants. This will ensure that the necessary requirements of an investigation are completed prior to the closure of all biased policing cases.

D. NYPD Mediation

15. NYPD should develop and implement a pilot mediation program for some biased policing complaints. As part of that program, NYPD should develop criteria for referring to mediation cases involving both uniformed and non-uniformed members.

E. NYPD Early Intervention

16. NYPD's RAILS should be expanded to capture unsubstantiated biased policing allegations involving both uniformed and non-uniformed members.

17. NYPD's Performance Monitoring Program should develop monitoring criteria to include officers and non-uniformed employees who are the subject of biased policing complaints, regardless of substantiation, modeled on the metrics currently in use for excessive force complaints.

F. NYPD Transparency

18. NYPD should develop written materials to educate the public about what biased policing is and how members of the public can file biased policing complaints. This

information should be conspicuously visible on NYPD's website and in other locations where such information would be readily available to the public.

19. NYPD should publish statistics for the public as part of an annual report covering biased policing. These statistics should, at a minimum, include a breakdown of the following: (i) the subject officer's uniformed versus non-uniformed status, bureau or unit assignment, gender, race/ethnicity, age, and length of service to the Department; (ii) the self-reported demographics (race/ethnicity, sex, age, etc.) of complainants; (iii) the types of police encounters that resulted in complaints of biased policing; (iv) the number of biased policing complaints initiated by borough and precinct; (v) the discriminatory policing conduct alleged; (vi) the sub-classifications and outcomes of such complaints; and (vii) the status of the Department's efforts to prevent biased policing. This information should be conspicuously visible on NYPD's website and in other locations where such information would be readily available to the public.

G. Other Agencies

20. CCRB should add all the protected statuses, such as "National Origin," "Color," "Age," "Alienage," "Citizenship Status," and "Housing Status" as outlined in § 14-151 of the NYC Administrative Code and § 203-25 of NYPD's Patrol Guide, to the sub-classifications of its Offensive Language category.

21. CCRB should adopt a policy to classify and investigate allegations of biased policing by uniformed members of NYPD under its Abuse of Authority jurisdiction instead of referring such allegations to IAB for investigation. Consistent with this new authority, CCRB should request additional resources from the City to take on this new responsibility if the agency can demonstrate that more resources are necessary.

22. City agencies that handle biased policing complaints (NYPD, CCRB, CCHR) should convene within the next four months to address the findings and recommendations in OIG-NYPD's investigation. This would, for example, include developing standard categories and definitions for how these complaints are grouped and sub-classified.

23. NYPD, CCRB, and CCHR should develop protocols and procedures to share data and information on biased policing complaints on a regular basis. To the extent that implementing this Report's recommendations would require CCRB or CCHR to have prompt access to NYPD records (*e.g.*, case files, data, body-worn camera video, etc.), protocols should be established so that NYPD will commit itself to providing such access to these agencies.⁷⁹

⁷⁹ During most of OIG-NYPD's review period, NYPD made limited use of body-worn cameras for uniformed officers. Currently, according to NYPD, the Department has over 22,000 body-worn cameras deployed among uniformed officers. It is possible that widespread use of evidence from these cameras could affect the ability of investigators to substantiate claims of biased policing.