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HANDCUFFING A THIRD GRADER? INTERACTIONS BETWEEN SCHOOL RESOURCE OFFICERS AND STUDENTS WITH DISABILITIES

Elizabeth A. Shaver* and Janet R. Decker**

INTRODUCTION

In October 2015, national news organizations broadcasted a cell phone video of a school resource officer's violent treatment of a South Carolina high school student.¹ When the student refused to get up from her desk, the school resource officer (SRO) threw both the student and her desk to the ground, ripped the student from the chair attached to the desk, and dragged her along the ground.² When the video became public, the SRO was fired, and state and federal governmental authorities launched several investigations.³

The South Carolina video received far more national attention than another, equally startling video, of the actions of an SRO who worked in a Kentucky elementary school. In the fall of 2014, the Kentucky SRO handcuffed a third-grade student for fifteen minutes, placing the handcuffs above the child's elbows with both hands behind the child's back.⁴ While restrained, the child can be heard crying in

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¹ Dana Ford, Greg Botelho & Kevin Conlon, *Spring Valley High School Officer Suspended After Violent Classroom Arrest*, CNN (Oct. 27, 2015, 10:12 PM), <http://edition.cnn.com/2015/10/27/us/south-carolina-school-arrest-video/> [<https://perma.cc/7JQX-Q4ER>].

² *Id.*

³ Craig Melvin & Erik Ortiz, *South Carolina Deputy Ben Fields Fired After Body Slamming Student: Sheriff*, NBC NEWS (Oct. 28, 2015, 12:34 PM), <http://www.nbcnews.com/news/us-news/sheriff-announce-south-carolina-deputy-ben-fields-be-fired-sources-n452881> [<https://perma.cc/NSS8-YHPQ>].

⁴ The videotaping was done by school personnel in three separate segments of video. See Complaint at ¶ 27, *S.R. v. Kenton Cty. Sherriff's Office*, No. 2:15-cv-00143 (E.D. Ky. Aug. 3, 2015) [hereinafter *Kenton County Complaint*]. A segment lasting nearly seven and one-half minutes can be found at Police State USA, *Deputy Handcuffs 8-Year-Old and Watches as He Sobs in Agony*, YOUTUBE (Aug. 3, 2015), <https://www.youtube.com/watch?v=JRFaivKu7bg> [hereinafter *Kenton County Video*].

On March 15, 2016, the plaintiffs in the Kenton County Case filed an amended complaint. See Amended Complaint for Damages and Declaratory and Injunctive Relief, *S.R. v. Kenton Cty. Sherriff's Office*, No. 2-15-cv-00143 (E.D. Ky, filed Mar. 15, 2016). The Amended Complaint contains the same factual allegations as the original Complaint, although the allegations sometimes appear in a different paragraph. Given the availability of the original Complaint both via the Internet and Westlaw, citations here are to the original

pain and exclaiming, “Ow, that hurts.”⁵ Why did the SRO do this? The child, an eight-year-old boy with Attention Deficit Hyperactivity Disorder (ADHD), after having had a “severe temper tantrum”⁶ in the classroom, refused to sit down when told to do so by the SRO.⁷ In the video, the SRO tells the child: “you can either behave the way you know you’re supposed to or you suffer the consequences.”⁸

After the Kentucky video was made public, two children—one of whom is the boy shown in the video—filed suit alleging, among other things, that the SRO had violated their constitutional rights by handcuffing them in the manner seen in the video.⁹ The second plaintiff, a nine-year-old girl enrolled in fourth grade, alleged that the SRO had forced her to kneel on the floor for about thirty minutes while handcuffed, again with the handcuffs placed above the elbows and her arms behind her back.¹⁰ Both children are students with disabilities who are eligible for legal protections under the Individuals with Disabilities Education Act (IDEA).¹¹

In the case, *S.R. v. Kenton County Sheriff’s Office*, (Kenton County Case), the U.S. Department of Justice (DOJ) filed a statement of interest in which the federal government asserted that the SRO had applied excessive force, thus violating the children’s constitutional rights.¹² In December 2015, the federal court in the Kenton County Case denied the defendants’ motions to dismiss the complaint, finding that the plaintiffs had adequately stated several claims, including a violation of their Fourth Amendment rights.¹³ In particular, the court declined to dismiss the claims against the SRO, who had asserted a defense of qualified immunity.¹⁴ The case is proceeding to discovery.¹⁵

Complaint.

⁵ See Kenton County Video, *supra* note 4.

⁶ See *S.R. v. Kenton Cty. Sheriff’s Office*, No. 2:15-cv-00143, 2015 WL 9462973, at *4 (E.D. Ky. Dec. 28, 2015).

⁷ See Complaint at ¶ 26, *S.R. v. Kenton Cty. Sheriff’s Office*, No. 2:15-cv-00143 (E.D. Ky. Aug. 3, 2015). In an “Investigation Report” written months after the incident, the SRO asserted that the child, who was approximately three and a half feet tall and weighed fifty-two pounds, had “swung his arm and attempted to strike [the officer] with his elbow,” a move that the officer blocked with his hand. *Id.* at ¶¶ 12, 30.

⁸ See Kenton County Video, *supra* note 4.

⁹ See Amended Complaint for Damages and Declaratory and Injunctive Relief at ¶ 57, *S.R. v. Kenton Cty. Sheriff’s Office*, No. 2:15-cv-00143 (E.D. Ky. Mar. 15, 2016).

¹⁰ *Id.* at ¶ 50.

¹¹ *Id.* at ¶¶ 23–24 (alleging male student’s disability status). *Id.* at ¶¶ 40–41 (alleging female student’s disability status). The current provisions of the Individuals with Disabilities Education Act can be found at 20 U.S.C.A. § 1400 (West 2016).

¹² Statement of Interest of the U.S., *S.R. v. Kenton Cty. Sheriff’s Office* at 1–2, No. 2:15-cv-00143 (E.D. Ky. Oct. 2, 2015).

¹³ See *S.R. v. Kenton Cty. Sheriff’s Office*, No. 2:15-cv-00143, 2015 WL 9462973, at *4–5 (E.D. Ky. Dec. 28, 2015).

¹⁴ *Id.* at *6.

¹⁵ See *S.R. v. Kenton Cty. Sheriff’s Office*, No. 2:15-cv-00143, 2015 WL 9462973, at *8 (E.D. Ky. Dec. 28, 2015).

Statistically, students with disabilities are at a much higher risk of entering the juvenile justice system, particularly as a result of conduct that takes place at school.¹⁶ Indeed, several recent cases highlight the complex issues that can arise when a student with disabilities engages in undesired behavior at school and that behavior leads to the intervention of an SRO.¹⁷

In some cases, the child's behavior is not a new or unanticipated behavior, and the behavior may already be the subject of a Behavior Intervention Plan (BIP) designed to address the behavior.¹⁸ As discussed in more detail below, a BIP is a written plan that describes the particular behavioral interventions to be implemented when a child exhibits undesired behavior.¹⁹ The overall goal of a BIP is to reduce the frequency of undesired behavior and increase the frequency of appropriate behavior.²⁰

While BIPs have been used in clinical settings for decades, their use in school settings began more than fifteen years ago as a result of certain statutory amendments to IDEA.²¹ Over the years, the use of BIPs in school settings has steadily increased.²² Indeed, the increased use of BIPs to address the undesired behavior of students with disabilities has corresponded almost directly with the increased presence of SROs in the nation's schools.²³

¹⁶ *Students with Disabilities & the Juvenile Justice System: What Parents Need to Know*, PACER CTR., <http://www.pacer.org/jj/pdf/JJ-8.pdf> [<https://perma.cc/ZX6J-WVYT>].

¹⁷ See, e.g., *C.B. v. City. of Sonora*, 769 F.3d 1005, 1010 (9th Cir. 2014) (arising out of an incident where law enforcement handcuffed an elementary school student with ADHD); *Thomas v. Barze*, 57 F. Supp. 3d 1040, 1044 (D. Minn. 2014) (arising out of an incident between law enforcement and a high school student with a disability); *E.C. v. Cty. of Suffolk*, 882 F. Supp. 2d 323, 329, 333 (E.D.N.Y. 2012) (arising out of an incident between school security guards and a sixth grade student with a disability).

¹⁸ See *J.H. ex rel. J.P. v. Nation*, 61 F. Supp. 3d 1176, 1184 (D.N.M. 2015), *aff'd sub nom. J.H. ex rel. J.P. v. Bernalillo Cty.*, 806 F.3d 1255 (10th Cir. 2015).

¹⁹ See *infra*, Section II.C.

²⁰ See Perry A. Zirkel, *Case Law for Functional Behavior Assessments and Behavior Intervention Plans: An Empirical Analysis*, 35 SEATTLE U. L. REV. 175, 175 (2011).

²¹ Terrance M. Scott & Debra M. Kamps, *The Future of Functional Behavioral Assessment in School Settings*, 32 BEHAV. DISORDERS 146, 146 (2007).

²² *Id.*

²³ Michael A. Couvillon et al., *Tracking Behavior Assessment Methodology and Support Strategies: A National Survey of How Schools Utilize Functional Behavioral Assessments and Behavior Intervention Plans*, 14 J. EMOTIONAL & BEHAV. DIFFICULTIES 215, 215 (2009) (use of FBAs and BIPs increased after 1997 amendments to IDEA); Stephanie M. Poucher, Comment, *The Road to Prison Is Paved with Bad Evaluations: The Case for Functional Behavior Assessments and Behavior Intervention Plans*, 65 AM. U. L. REV. 471, 490–91 (2015) (noting that the 1997 amendments to IDEA were a “catalyst” to train teachers about the use of FBAs and BIPs); NATHAN JAMES & GAIL MCCALLION, CONG. RESEARCH SERV., R43126, SCHOOL RESOURCE OFFICERS: LAW ENFORCEMENT OFFICERS IN SCHOOLS 7 (2013) (describing federal funding for SROs in the wake of the 1999 shooting at Columbine High School and the corresponding growth of SROs).

The existence of a BIP to address behavior of a child with a disability does not foreclose the intervention of an SRO. However, as recent cases demonstrate, parents expect that school personnel will adhere to the contents of a child's BIP when undesired behavior arises. When parents instead discover that SROs have physically restrained and sometimes arrested their children, many parents become angry and sue.²⁴

In addition, as the Kenton County Case makes clear, even when the child's behavior is not the subject of a written BIP, interactions between SROs and students with disabilities can result in litigation. In denying the defendants' motion to dismiss the complaint, the court in the Kenton County Case posed some very significant questions regarding the interactions of SROs and students with disabilities, including the following: "In a school setting, what is the appropriate way to deal with children who are acting out because of disabilities?"²⁵ "What was the policy of the school district regarding use of SROs interacting with children with disabilities?"²⁶ "What training did [the SRO] receive in dealing with such children?"²⁷

This Article examines these important questions. Part I provides background about SROs, focusing on their training, definition of their roles and responsibilities, and available studies regarding their interactions with students, including students with disabilities. Part II reviews the provisions of IDEA that pertain to the use of behavioral interventions to address undesired behavior of students with disabilities. Part III examines recent cases involving claims brought by students against school districts, local law enforcement agencies, and SROs. In the words of one federal district court judge, the facts of some cases are "profoundly disturb[ing]."²⁸ Indeed, in cases filed by students with disabilities, the conduct of some SROs ranges from merely insensitive to downright cruel.²⁹

These cases reveal the need for a comprehensive training program for SROs, clear delineation of the scope of—and limitations on—the SROs' duties, and strict adherence by both school personnel and the SROs to their respective roles. It is in Part IV that we offer recommendations with regard to these items. The goal is that, with better training and clearer policies, no additional videos in which SROs mistreat students with disabilities will make the national news.

²⁴ See *C.B. v. City of Sonora*, 769 F.3d 1005, 1012 (9th Cir. 2014); *Thomas v. Barze*, 57 F. Supp. 3d 1040, 1044 (D. Minn. 2014); *E.C. v. Cty. of Suffolk*, 882 F. Supp. 2d 323, 340 (E.D.N.Y. 2012).

²⁵ *S.R. v. Kenton Cty. Sherriff's Office*, No. 2-15-cv-143, 2015 WL 9462973, at *8 (E.D. Ky. Dec. 28, 2015).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *J.W. v. Birmingham Bd. of Educ.*, 143 F. Supp. 3d 1118, 1126 (N.D. Ala. 2015).

²⁹ See *infra* Section III.B.

I. POLICE PRESENCE IN SCHOOLS

A. *The Growth of School Resource Officer Programs*

The regular presence of law enforcement officers at school, generally known as SROs, is a “relatively new phenomenon.”³⁰ Although the first SRO program apparently began as early as the 1950s, the presence of SROs increased rapidly in the 1990s, primarily in response to increased fear about school shootings.³¹ Various federal legislative initiatives spurred the hiring of SROs. Among those initiatives were The Gun-Free Schools Act of 1994, which required states to enact laws expelling for one year any student who brought a gun to school³² and the Violent Crime Control and Law Enforcement Act of 1994, which provided grants for state and local law enforcement to establish, among other things, programs of “proactive crime control and prevention” between officers and young persons in the community.³³ The 1998 Amendments to the Omnibus Crime Control and Safe Streets Act of 1968 also provided grant money for the use of SROs to deter crime, particularly gang or drug-related crimes at school.³⁴ Finally, the Safe and Drug-Free Schools and Communities Act, enacted as part of the No Child Left Behind Act of 2001, also provided grant money for SRO programs.³⁵

In 1994 the U.S. Department of Justice (DOJ) created the Office of Community Oriented Policing Services (COPS), which had the primary responsibility for implementing various federal grant programs available to state and local law enforcement agencies.³⁶ While the initial COPS program did not focus specifically on the use of law enforcement at school, in 1999 the DOJ began a “COPS in Schools” grant program that dramatically increased the hiring of SROs.³⁷ Between 1999 and 2005, the COPS in Schools program provided nearly \$724 million in grant

³⁰ Jason P. Nance, *Students, Police, and the School-to-Prison Pipeline*, 93 WASH. U. L. REV. 919, 946 (2016).

³¹ Spencer C. Weiler & Martha Cray, *Police at School: A Brief History and Current Status of School Resource Officers*, 84 CLEARING HOUSE 160, 161 (2011); *To Protect & Educate: The School Resource Officer and the Prevention of Violence in Schools*, NAT’L ASS’N SCH. RES. OFFICERS 9 (2012) [hereinafter *To Protect & Educate*], <https://nasro.org/cms/wp-content/uploads/2013/11/NASRO-To-Protect-and-Educate-nosecurity.pdf> [https://perma.cc/6367-ZVGJ].

³² Pub. L. NO. 103-227, § 1032, 108 Stat. 125, 270 (1994).

³³ Pub. L. NO. 103-322, § 1701(d)(7), 108 Stat. 1796, 1809 (1994).

³⁴ Act of Oct. 27, 1998, Pub. L. No. 105-302, §1, 112 Stat. 2841, 2841(codified as amended at 42 U.S.C. § 3796dd(b)(12) (1998)) (authorizing the use of federal grant money to fund the “school resource officers who operate in and around elementary and secondary schools to combat school-related crime and disorder problems, gangs, and drug activities.”).

³⁵ Pub. L. NO. 107-110, § 4115, 115 Stat. 1734, 1748 (2002).

³⁶ *The COPS Office: 20 Years of Community Oriented Policing*, U.S. DEP’T JUST. 1 (2014), <http://ric-zai-inc.com/Publications/cops-p301-pub.pdf> [https://perma.cc/X5A7-4VJW] [hereinafter *20 Years of Community Oriented Policing*].

³⁷ *Id.* at 4.

money to hire SROs.³⁸ Federal grant money led to the hiring of 6,500–7,200 SROs between 1999 and 2005.³⁹

Local law enforcement agencies typically were awarded a three-year grant to fund an SRO program.⁴⁰ At the end of three years, it was anticipated that the local law enforcement agency would be able to continue to fund the position using a variety of sources other than the federal grant money.⁴¹

Between 2005 and 2013, federal grant money for SRO programs became unavailable. In 2005, federal grants through the COPS in Schools program ended and in 2009 funding through the Safe and Drug-Free Schools and Communities Act ended.⁴² The lack of available grant money led to a slight decline in the reported number of SRO positions after 2005.⁴³ While the number of SROs nationwide had climbed to approximately 19,900 positions in 2003, by 2007, the last year for which there is available data, the number of positions had declined to approximately 19,088 full-time SROs.⁴⁴

After the December 2012 school shooting in Newtown, Connecticut, Congress did appropriate monies to fund SRO positions. In September 2013, the DOJ announced a \$45 million program to fund an additional 356 SRO positions in the nation's schools.⁴⁵

B. *The SRO's Role and Responsibilities*

SROs generally are defined as “certified peace officers employed by local or county law enforcement agencies and assigned to a particular school or schools.”⁴⁶ The SRO has been described as a “new type of public servant; a hybrid educational, correctional, and law enforcement officer.”⁴⁷ SROs are not school security guards—

³⁸ *Id.* at 5.

³⁹ Barbara Raymond, *Assigning Police Officers to Schools*, U.S. DEP'T JUST. 1 (2010); NATHAN JAMES & GAIL MCCALLION, CONG. RESEARCH SERV., R43126, SCHOOL RESOURCE OFFICERS: LAW ENFORCEMENT OFFICERS IN SCHOOLS 7 (2013) (placing the number at 7,200).

⁴⁰ Raymond, *supra* note 39, at 26.

⁴¹ David C. May et al., *School Resource Officers in Financial Crisis: Which Programs Get Cut and Why*, 11 J. POLICE CRISIS NEGOTS. 125, 127 (2011).

⁴² NATHAN JAMES & GAIL MCCALLION, CONG. RESEARCH SERV., R43126, SCHOOL RESOURCE OFFICERS: LAW ENFORCEMENT OFFICERS IN SCHOOLS 7 (2013).

⁴³ *Id.* at 5 (noting that the number of reported SRO positions in 2007 declined by 800 from the number reported in 2003).

⁴⁴ *Id.* at 19–20.

⁴⁵ *Obama Administration to Allocate \$45M for Cops in Schools*, FOX NEWS (Sept. 28, 2013), <http://www.foxnews.com/politics/2013/09/28/obama-administration-to-spend-45m-on-cops-in-schools/> [<https://perma.cc/G7X5-7YFY>].

⁴⁶ Weiler & Cray, *supra* note 31, at 160 (quoting Kenneth S. Trump & Curtis Lavarello, *Buyer Beware: What to Look for When You Hire A School Security Consultant*, 188 AM. SCH. BD. J. 30, 32 (2001)).

⁴⁷ See NATHAN JAMES & GAIL MCCALLION, CONG. RESEARCH SERV., R43126, SCHOOL

whose primary responsibility is monitoring school entry and exit points.⁴⁸ Nor should the SRO be confused with a law enforcement officer who is only sporadically in the school building. An SRO's primary assignment is to be at school and the SRO is a "constant" presence on school grounds.⁴⁹

The SRO's duties have been described as a "triad model" under which the SRO has three main roles: "law enforcement officer, law-related counselor, and law-related education teacher."⁵⁰ As a law enforcer, the SRO handles school-related matters that police traditionally would have handled, including off-campus activities that involve students, making arrests or issuing citations on campus for particular conduct, and taking action against unauthorized persons on school grounds.⁵¹

As a law-related counselor, the SRO will often assist in resolving issues that might not necessarily be law violations (e.g., bullying or other conflicts between students). The SRO also may connect at-risk students to needed services and organizations, such as guidance counselors or social workers.⁵² Finally, as an educator, the SRO can teach courses on policing and responsible citizenship, which may include presentations on topics of drug abuse or gang violence.⁵³

Federal law contains two definitions of an SRO, each of which incorporates the triad model to some degree.⁵⁴ In particular, both federal definitions define the SRO's role to include not just law enforcement activities, but also crime prevention efforts and education of students with regard to crime awareness and conflict resolution.⁵⁵

Although the triad model is the proposed model for SRO responsibilities, several studies have shown that SROs spend a majority of their time in law enforcement activities.⁵⁶ In a 2005 national assessment of SRO programs, SROs indicated that they spent approximately twenty hours per week engaged in law enforcement

RESOURCE OFFICERS: LAW ENFORCEMENT OFFICERS IN SCHOOLS 2 (2013).

⁴⁸ Martha Cray & Spencer C. Weiler, *Policy to Practice: A Look at National and State Implementation of School Resource Officer Programs*, 84 CLEARING HOUSE 164, 167 (2011); see also *School Resource Officer*, CTR. FOR PREVENTION SCH. VIOLENCE, http://test.ncdjjdp.org/cpsv/school_resource_officer.html [<https://perma.cc/DF6H-AJZP>] (defining "school resource officer").

⁴⁹ Cray & Weiler, *supra* note 48, at 167.

⁵⁰ Kerrin C. Wolf, *Arrest Decision Making by School Resource Officers*, 12 YOUTH VIOLENCE & JUV. JUST. 137, 138 (2014).

⁵¹ NATHAN JAMES & GAIL MCCALLION, CONG. RESEARCH SERV., R43126, SCHOOL RESOURCE OFFICERS: LAW ENFORCEMENT OFFICERS IN SCHOOLS 2 (2013).

⁵² Raymond, *supra* note 39, at 4.

⁵³ NATHAN JAMES & GAIL MCCALLION, CONG. RESEARCH SERV., R43126, SCHOOL RESOURCE OFFICERS: LAW ENFORCEMENT OFFICERS IN SCHOOLS 2 (2013).

⁵⁴ 20 U.S.C. § 7161(11) (2012) (repealed 2015); 42 U.S.C. § 3796dd-8(4) (2012).

⁵⁵ NATHAN JAMES & GAIL MCCALLION, CONG. RESEARCH SERV., R43126, SCHOOL RESOURCE OFFICERS: LAW ENFORCEMENT OFFICERS IN SCHOOLS 3 (2013).

⁵⁶ David C. May & George E. Higgins, *The Characteristics and Activities of School Resource Officers: Are Newbies Different than Veterans*, 11 J. POLICE CRISIS NEGOTS. 96, 98 (2011); Chongmin Na & Denise C. Gottfredson, *Police Officers in Schools: Effects on School Crime and the Processing of Offending Behaviors*, 30 JUST. Q. 619, 633 (2013).

activities, ten hours a week engaged in advising or mentoring students, and five hours a week engaged in teaching.⁵⁷ In a 2011 survey, SROs in Kentucky reported that they spent nearly 61% of their time in law enforcement activities, while counseling and teaching activities occupied just 23% and 15% of their time respectively.⁵⁸ Thus, the law enforcement aspect of the triad model seems to be predominant in the everyday work of SROs.

C. Training of SROs

A successful SRO program has at least two important requirements.⁵⁹ First, the officers chosen must be able to effectively work with children, particularly adolescents.⁶⁰ Second, the officer should receive appropriate training, which might include training about, among other things, special education law.⁶¹

In spite of many sources that identify the need for rigorous SRO training, it is difficult to obtain any hard information about the content of training courses or copies of any training materials.⁶²

1. The National Association of School Resource Officers

SROs may attend training courses that are operated by state or national organizations.⁶³ The National Association of School Resource Officers (NASRO), an organization that was founded in 1991, provides a great deal of training. NASRO

⁵⁷ PETER FINN & JACK MCDEVITT, NATIONAL ASSESSMENT OF SCHOOL RESOURCE OFFICER PROGRAMS FINAL PROJECT REPORT 4 (March 2005).

⁵⁸ May, *supra* note 56, at 103.

⁵⁹ See *Protecting Students and Teachers: A Discussion on School Safety: Hearing Before the H. Comm. on Educ. and the Workforce*, 113th Cong. 1 (2013) [hereinafter *Protecting Students and Teachers*] (statement of Mo Canady, Executive Director, National Association of School Resource Officers).

⁶⁰ NATHAN JAMES & GAIL MCCALLION, CONG. RESEARCH SERV., R43126, SCHOOL RESOURCE OFFICERS: LAW ENFORCEMENT OFFICERS IN SCHOOLS 12 (2013).

⁶¹ Weiler & Cray, *supra* note 31, at 161.

⁶² Professor Shaver contacted a number of organizations and agencies requesting information about training materials. She received some responses indicating that training programs are conducted by third-party presenters whose materials either are not available or cannot be shared with outside parties. Email from Kari Parsons, Ohio Sch. Res. Officers Ass'n, to Elizabeth Shaver, Associate Professor of Legal Writing, Univ. of Akron Sch. of Law (September 14, 2015) (on file with author); Email from Joe Munoz, Texas Sch. Safety Ctr., to Elizabeth Shaver, Associate Professor of Legal Writing, Univ. of Akron Sch. of Law (September 17, 2015) (on file with the author). Initial inquiries to the National Association of School Resource Officers went unanswered. Email from Elizabeth Shaver, Associate Professor of Legal Writing, Univ. of Akron Sch. of Law, to Mo Canady, Exec. Dir., Nat'l Ass'n Sch. Res. Officers (September 16, 2015) (on file with the author).

⁶³ *To Protect & Educate*, *supra* note 31, at 35.

provides both basic and advanced training of SROs.⁶⁴ The Basic Course is a five-day, forty-hour training course for SROs with less than two years' experience.⁶⁵ The Advanced Course is a three-day, twenty-four-hour course for SROs.⁶⁶ Indeed, the federal COPS program provides scholarships for grant-funded SROs to take the NASRO courses.⁶⁷

NASRO publicly states that its training materials provide SROs with information about the needs of students with disabilities and special education laws.⁶⁸ NASRO identifies the topic of special education as a "critical" training topic for SROs and states that its training courses include "extensive information on the topic."⁶⁹ NASRO also states that its training "helps SROs understand how special needs children and their behaviors are different from those who don't have special needs."⁷⁰ NASRO further states that its materials "provide[] SROs with information on special education laws, regulations and policies, including the Individualized Education Program (IEP) document that schools create for each special education student."⁷¹ "Typically, the IEP for a student known to have behavior issues clearly specifies how educators will respond to such issues."⁷²

⁶⁴ See *About NASRO*, NAT'L ASS'N OF SCH. RES. OFFICERS, <https://nasro.org/about/> [<https://perma.cc/NE9M-FZWT>]; *COPS Hiring Program School Resource Officer Scholarship Opportunity for NASRO Training*, OFF. COMMUNITY ORIENTED POLICING SERVS. (Sept. 2014), https://cops.usdoj.gov/pdf/2014_CHP-SRO-FactSheet3_092613.pdf [<https://perma.cc/G55D-KCFC>] [hereinafter *2014 Training Fact Sheet*].

⁶⁵ See *Basic SRO Course*, NAT'L ASS'N OF SCH. RES. OFFICERS, <https://nasro.org/basic-sro-course/> [<https://perma.cc/H4JL-ENLM>].

⁶⁶ See *Advanced SRO Course*, NAT'L ASS'N OF SCH. RES. OFFICERS, <https://nasro.org/advanced-sro-course/> [<https://perma.cc/D3VH-YMPM>].

⁶⁷ See *2014 Training Fact Sheet*, *supra* note 64; *FY2013 COPS Hiring Program School Resource Officer Scholarship Opportunity for NASRO Training*, OFF. COMMUNITY ORIENTED POLICING SERVS. (Sept. 2013), https://cops.usdoj.gov/pdf/2013_CHP-SRO-FactSheet3_092613.pdf [<https://perma.cc/S2FT-Z6T2>].

⁶⁸ See *NASRO Position Statement on Police Involvement in School Discipline*, NAT'L ASS'N OF SCH. RES. OFFICERS (Aug. 14, 2015), <https://nasro.org/news/nasro-updates/nasro-position-statement-police-involvement-student-discipline/> [<https://perma.cc/2H6K-GAH9>].

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

However, in spite of several requests from the authors, NASRO has refused to supply copies of any of its training materials.⁷³ Thus, it is difficult to evaluate the type and extent of training that SROs receive about students with disabilities and their behavioral needs.⁷⁴

2. State Statutes and Regulations

Twenty-three states and the District of Columbia have state statutes or regulations that require SROs to be trained or certified. However, most states do not specify curriculum or training guidelines, although some state administrative agencies or organizations may be responsible for developing training material or curricula.⁷⁵

⁷³ Initial emails from Elizabeth A. Shaver and her research assistant directed to Mo Canady, Exec. Dir., Nat'l Ass'n Sch. Res. Officers, went unanswered. *See supra*, note 62. In July 2016, Professor Shaver again contacted Mr. Canady, who indicated that he would provide assistance; however, to date, no NASRO training materials have been received. *See* Email from Mo Canady, Exec. Dir., Nat'l Ass'n Sch. Res. Officers to Elizabeth Shaver, Associate Professor of Legal Writing, Univ. of Akron Sch. of Law (July 18, 2016) (on file with the author).

⁷⁴ NASRO held its 26th Annual School Safety Conference in July 2016. *See Agenda*, <https://nasro.org/2014-conference-agenda/> [<https://perma.cc/J568-UNHE>]. Neither the Conference Agenda nor the Breakout Training Schedule clearly identified any topic relating to students with disabilities. *Id.*

⁷⁵ *See, e.g.*, ALA. CODE § 16-1-44.1 (West 2016) (requiring SROs to receive certification from Alabama Peace Officers' Standards and Training Commission); ARIZ. REV. STAT. ANN. § 15-155 (West 2016) (allowing the assignment of a peace officer trained and certified by the Arizona peace officer standards and training board); ARK. CODE ANN. § 6-10-128 (West 2016) (permitting a school to accept a certified law enforcement officer as a SRO); ARK. CODE ANN. § 12-9-501 (West 2016) (identifying training of SROs as one form of training to be developed by Arkansas Criminal Justice Institute); CAL. EDUC. CODE § 35021.5(a) (2015) (mandating that school police reserve officer shall complete prescribed training); CAL. EDUC. CODE § 38000(c) (West 2015) (requiring that school chief of police must have completed peace officer training program); CAL. EDUC. CODE § 38001.5(b) (West 2016) (providing that a school security officer shall complete training); COLO. REV. STAT. ANN. § 24-31-312 (West 2016) (describing what must be included in the training curriculum for SROs); CONN. GEN. STAT. ANN. § 7-294x (West 2016) (mandating that POST council shall provide training); CONN. GEN. STAT. ANN. § 10-244a(b) (West 2016) (requiring training for school security personnel in possession of a firearm); D.C. CODE ANN § 5-132.03 (West 2016) (requiring the School Safety Division to develop training program for school security personnel); GA. CODE ANN. § 20-8-5(b) (West 2017) (requiring certification by POST Council after completing basic training); IND. CODE ANN. § 20-26-18.2-2(b) (West 2016) (defining an SRO as one who has completed a minimum of forty hours of certified SRO training); KY. REV. STAT. ANN. § 158.441(2) (West 2016) (requiring that officers must receive specialized training); LA. STAT. ANN. § 17:416:19(b)(2) (West 2016) (requiring officer to be certified by national or state organization); MD. CODE ANN. EDUC. § 4-318 (West 2016) (outlining requirements for a training program for Baltimore City school police

Only a few state statutes or regulations describe the type of training an SRO should receive.⁷⁶ For example, a Missouri statute states that SROs should receive training regarding “legal operations within an education environment, intruder training and planning, juvenile law, and any other relevant topics relating to the job and functions of a school resource officer.”⁷⁷ A Texas statute describes an SRO training curriculum to include the following topics, among others: (a) child and adolescent development and psychology; (b) positive behavioral interventions and supports, conflict resolution techniques, and restorative justice techniques; (c) de-escalation techniques and techniques for limiting the use of force, including the use of physical, mechanical, and chemical restraint; (d) the mental and behavioral health needs of children with disabilities or special needs; and, (e) mental health crisis intervention.⁷⁸ A recently enacted Utah statute identifies the need for training with regard to: (a) child and adolescent development; (b) “working with disabled students;” and, (c) understanding the respective roles of the SRO and other school personnel who help keep school safe, among other topics.⁷⁹

officer); MISS. CODE ANN. § 37-7-321(2) (West 2016) (requiring school security personnel to have basic law enforcement training); MO. ANN. STAT. § 590.205(1) (West 2016) (authorizing the POST commission to establish minimum standards for training instructors and programs); N.J. STAT. ANN. § 18A:17-43.1 (West 2016) (mandating that SRO must be trained); N.J. STAT. ANN. § 52:17B-71.8 (West 2016) (requiring that police training commission must develop a training course); N.Y. EDUC. LAW § 2801-a (McKinney 2016) (requiring boards of education to ensure that school safety officers are adequately trained); N.C. GEN. STAT. ANN. § 162-26 (West 2016) (establishing volunteer SRO program with power of arrest, but requiring training); 24 PA. STAT. AND CONS. STAT. ANN. § 7-778 (West 2016) (mandating school police officer must successfully complete training); 16 R.I. GEN. LAWS ANN. § 21-24 (West 2016) (requiring school safety plans to ensure that school safety officers are adequately trained); S.C. CODE ANN. § 5-7-12 (2016) (mandating that SROs have completed national or state basic training); TENN. CODE ANN. § 49-6-4217 (West 2016) (establishing SRO training, specified to be forty hours within the first twelve months and a minimum of sixteen hours per year thereafter); TEX. OCC. CODE ANN. § 1701.263 (West 2016) (requiring districts to have more than thirty thousand students to employ officers); TEX. OCC. CODE ANN. §§ 1701.262, 1701.263 (West 2016) (setting standards for training); UTAH CODE ANN. §53A-11-1603 (West 2016) (requiring the State Board of Education to prepare and make available a training program); VA. CODE ANN. § 9.1-110 (West 2016) (mandating that officers must be certified).

Massachusetts does not require that SROs receive any training over and above their training as a law enforcement officer, but does not provide that, in selecting individuals to serve as law enforcement officers, the chief of police can consider whether the individual has received any specialized training regarding interactions with children and adolescents. *See* 71 MASS. GEN. LAWS ch. 71, § 37P(b) (West 2016).

⁷⁶ MO. ANN. STAT. § 168.450 (West 2016); TEX. OCC. CODE ANN. § 1701.262(c) (West 2016).

⁷⁷ MO. ANN. STAT. § 168.450 (West 2016).

⁷⁸ TEX. OCC. CODE ANN. § 1701.262(c) (West 2016).

⁷⁹ UTAH CODE ANN. §53A-11-1603(3) (West 2016).

In some states, state-funded “school safety centers” have been created to, among other duties, help develop curricula and training materials for SROs.⁸⁰ However, it appears that many state agencies, including the state-funded school safety centers, either contract with outside parties to provide training or send trainees to courses offered at police/juvenile justice academies or local colleges or universities.⁸¹

3. SRO Training on Mental Health or Regarding Particular Issues Affecting Students with Disabilities

With regard to disability issues, some state statutes do refer to the need to train SROs with regard to mental health or behavioral issues. Connecticut, for example, requires that SROs receive training in “nationally recognized best practices to prevent students with mental health issues from being victimized or disproportionately referred to the juvenile justice system,” but only if federal funds are available to pay for such training.⁸² Massachusetts notes, when selecting SROs, the employer may give special preference to candidates with specialized training, including training in “behavioral health disorders in children and adolescents.”⁸³

Yet it is unclear from available training materials whether SROs receive sufficient information about the behavioral issues of students with disabilities and the use of behavioral intervention techniques to address certain behavior. Indeed, a review of the available state materials indicates that SROs are not being given enough training regarding the behavioral issues that might affect students with disabilities.⁸⁴

For example, a guide published by the DOJ’s COPS program in 2005 did not mention special education or behavioral issues of students with disabilities.⁸⁵ The guide only obliquely referred to the need to train SROs in “child development and

⁸⁰ COLO. REV. STAT. ANN. § 24-33.5-1803 (West 2016); KY. REV. STAT. ANN. § 158.442 (West 2016); MD. CODE ANN. EDUC. § 7-1502 (West 2016); OR. REV. STAT. ANN. § 339.331 (West 2016).

⁸¹ See *SRO Training*, UNIV. TENN. L. ENFORCEMENT INNOVATION CTR., <http://leic.tennessee.edu/sro-training> [<https://perma.cc/B9JC-D58G>]; *School Resource Officer Training*, N.C. JUST. ACAD., <http://ncja.ncdoj.gov/5673.aspx> [<http://ncja.ncdoj.gov/5673.aspx>]; *School Resource Officer Practitioner Designation*, FLA. CRIME PREVENTION TRAINING INST., <http://www.fcpti.com/fcpti.nsf/pages/SROPD> [<https://perma.cc/VL6N-F3QR>]; *Basic School Resource Officer Training* <http://www.srotraining.com/docs/2016%20%20CA%20%20%20Basic.pdf> [<https://perma.cc/KLS2-6ED2>].

⁸² CONN. GEN. STAT. ANN. § 17a-22bb (West 2016).

⁸³ MASS. GEN. LAWS ANN. ch. 71, § 37P (West 2016).

⁸⁴ See *School Resource Officer (SRO) Basic Training 2016*, OHIO SCH. RES. OFFICERS ASS’N, <http://www.osroa.org/basic%20training/basic2.html> [<https://perma.cc/RX4V-Q4CG>].

⁸⁵ Peter Finn et. al., *A Guide to Developing, Maintaining, and Succeeding You’re your School Resource Officer Program*, OFFICE OF COMMUNITY ORIENTED POLICING SERVS. 10 (2005).

psychology” and “handling especially difficult students.”⁸⁶ A School Resource Officer Program Guide published in 2004 that is available on the website of the Virginia Department of Criminal Justice Services contains a multipage recitation of the various IDEA provisions, including disciplinary measures.⁸⁷ The document itself, however, does not make any attempt to link its description of IDEA’s legal requirements to the work of SROs or otherwise describe behavioral issues affecting students with disabilities.

A 2001 curriculum guide published by the California Commission on Peace Officers Training and Standards states that SROs should understand “special education classifications and children with special needs and how this impacts the actions of the SRO.”⁸⁸ The California guide does identify specific federal statutes and specific terminology or acronyms applicable to the provision of special education services.⁸⁹ For example, the guide notes that students who are eligible for services under IDEA will have an IEP which, among other items, might identify behavior exhibited by the student as a result of his or her disability.⁹⁰

The California guide further states that the discipline of a student with disabilities must conform to IDEA and that the child’s disability “must be taken into consideration before any discipline is applied.”⁹¹ However, other than stating that the SRO should consider the child’s ability to distinguish right from wrong, the guide provides no further information about behavioral issues affecting students with disabilities.⁹²

Although there has been very little study on the specific topic of the interactions between SROs and students with disabilities, concerns have been expressed that SROs are not adequately trained with regard to disability/special education issues. A 2004 study of SROs in Kentucky found that 58.8% of SROs had not received any academic training on special education issues. Of those surveyed, 56.5% indicated that they had not received any in-service training on special education issues.⁹³ A 2008–2009 study of Massachusetts SROs also revealed that lack of training was problematic.⁹⁴ In that study, SROs indicated that they “rarely had any formal

⁸⁶ *Id.*

⁸⁷ *The Virginia School Resource Officer Program Guide*, VA. DEP’T CRIM. JUST. SERVS. 64–72 (2004), <https://www.dcjs.virginia.gov/forms/cple/sroguide.pdf> [<https://perma.cc/268P-89VF>].

⁸⁸ *School Resource Officer Standardized Core Course Curricula*, CAL. COMMISSION ON PEACE OFFICER STANDARDS & TRAINING 1 (May 2001), <http://lib.post.ca.gov/publications/60700295.pdf> [<https://perma.cc/K66Y-LTKY>].

⁸⁹ *Id.* at 22–23.

⁹⁰ *Id.* at 62.

⁹¹ *Id.* at 31.

⁹² *Id.* at 62.

⁹³ David C. May et. al., *An Examination of School Resource Officers’ Attitudes Regarding Behavioral Issues among Students Receiving Special Education Services*, CURRENT ISSUES EDUC., Sept. 7, 1012, at 6.

⁹⁴ Johanna Wald & Lisa Thurau, *First, Do No Harm: How Educators and Police Can*

knowledge of, or training in . . . the behavioral precautions and protections that need to be taken with youths on Individual Education Plans (IEPs),” among other topics.⁹⁵

Indeed, a March 2015 report released by the North Carolina Department of Public Safety indicates that SROs themselves would like more information about the needs of students with behavioral issues, including students with disabilities.⁹⁶ The report contained a survey of SROs employed in North Carolina schools during the 2014–2015 school year.⁹⁷ These SROs identified the need for additional training, particularly in the area of mental health and student behavior, including the behavior of students with disabilities.⁹⁸ Survey respondents specifically recommended increased training about “students with mental health issues”; “kids with Autism”; and “understand[ing] and encounter[ing] student behaviors (different personalities, health concerns, disabilities).”⁹⁹

Hopefully, the stated desire of SROs for additional information about students with disabilities is being heard. At least one recently advertised SRO training session included information specifically about children with disabilities, particularly autism.¹⁰⁰

Although there is no uniform curriculum for training SROs, in 2013 the COPS Office of the DOJ began to provide funding for an “Integrated School Resource Officer Safety Model and Training Curriculum project,” which has the stated goal of “expand[ing] the knowledge base for SROs”¹⁰¹ and those who hire and supervise them.¹⁰² This project is funded by grants to the VTV Family Foundation,¹⁰³ a nonprofit organization that was founded by families and survivors of the 2007 shooting on the campus of Virginia Tech University.¹⁰⁴ The VTV Family Foundation is in the process of developing a “Promoting Positive Practices (P3) SRO Model & Training Program” that it expects will be available for testing sometime in 2016.¹⁰⁵

Work Together More Effectively to Preserve School Safety and Protect Vulnerable Students, POLICY BRIEF (Inst. For Race & Just., Cambridge, M.A.), March 2010, at 7.

⁹⁵ *Id.*

⁹⁶ *2015 North Carolina School Resource Officer Census*, N.C. CTR. FOR SAFER SCHS., 15 (2015), <https://ncdps.s3.amazonaws.com/s3fs-public/div/JJ/final%20SRO%20CENSUS%202015%20final.pdf> [<https://perma.cc/P2NE-32EN>].

⁹⁷ *Id.* at 3.

⁹⁸ *Id.* at 32–52.

⁹⁹ *Id.* at 33, 35, 38.

¹⁰⁰ *See Training*, FLA. ASS’N OF SCH. RES. OFFICERS, <http://www.fasro.net/training.html> [<https://perma.cc/NF5P-GGT8>] (advertising that 2016 conference will include speaker addressing the topic of “Autism Spectrum Disorders & Behavioral Intervention Strategies for School Resource Officers”).

¹⁰¹ *20 Years of Community Oriented Policing*, *supra* note 36, at 5.

¹⁰² *Id.*

¹⁰³ *About Us*, VTV FAMILY OUTREACH FOUND., <http://www.vtvfamilyfoundation.org/about-us/> [<https://perma.cc/V3AR-72EB>].

¹⁰⁴ *Id.*

¹⁰⁵ Email from Elizabeth A. Shaver, Associate Professor of Legal Writing, Univ. of

D. Policies and Procedures to Delineate the SRO's Duties and Decision-Making Authority in the School Environment

Because SROs operate in a school environment with a well-defined organizational structure of its own, it is important to clearly define the scope of the SROs' duties and decision-making authority. The recommended practice is to have the school district and the particular law enforcement agency execute a written Memorandum of Understanding (MOU) that outlines the respective roles and responsibilities of the SRO and school administrators.¹⁰⁶ In fact, several state statutes refer to the need for an MOU between school and law enforcement agency and some statutes even describe in general terms the contents of such an agreement.¹⁰⁷ Yet, based on available data and studies, it seems that many school districts with SROs do not have any written materials that describe or define the SRO's responsibility at school.¹⁰⁸ A study of Colorado school districts published in 2011 indicated that 40% of school districts with an SRO (twelve out of thirty school districts) did not have any written agreement (MOU) or other document that delineated the role of the SRO.¹⁰⁹

Akron Sch. of Law, to Will Marling, VTV Family Foundation (January 14, 2016) (on file with the author). For a description of the P3 SRO Model, see *P3 SRO Model*, VTV FAMILY OUTREACH FOUND., <http://www.vtvfamilyfoundation.org/programs/p3-sro-model/> [<https://perma.cc/6UW7-5W8Q>]; see also *2013 Community Policing Development Awards*, COMMUNITY ORIENTED POLICING SERVS. 2 (2013), <https://cops.usdoj.gov/pdf/2013AwardDocs/CPD/CPD-List.pdf> [<https://perma.cc/N9YC-86M9>] (indicating that the VTV Family Foundation received a grant in the amount of \$496,340 in 2013).

¹⁰⁶ See *Memorandum of Understanding Fact Sheet*, OFF. COMMUNITY ORIENTED POLICING SERVS. 1 (May 2015), http://www.cops.usdoj.gov/pdf/2015AwardDocs/chp/CHP_MOU_Fact_Sheet.pdf [<https://perma.cc/ZNB6-PZC3>]; *Protecting Students & Teachers*, *supra* note 59, at 10 ("There should always be a formal memorandum of understanding between the law enforcement agency and the school district.").

¹⁰⁷ See CONN. GEN. STAT. ANN. § 10-233m (West 2016); IND. CODE ANN. § 20-26-18.2-2 (West 2016); MASS. GEN. LAWS ANN. ch. 71, § 37P (West 2016); MO. ANN. STAT. § 162.215 (West 2016); N.H. REV. STAT. ANN. § 186.11 (West 2016); 24 PA. STAT. AND CONS. STAT. ANN. § 13-1303-A (West 2016); TENN. CODE ANN. § 49-6-4202 (West 2016); TEX. OCC. CODE ANN. § 1701.262 (West 2016); UTAH CODE ANN. § 53A-11-1604 (West 2016); VT. STAT. ANN. tit. 16, § 1167(b) (West 2016).

There have been some recent developments at the state level in terms of statutorily requiring a district to have a written MOU with a local law enforcement that will supply SROs. See N.H. REV. STAT. ANN. § 186.11 (West 2016) (effective Jan. 1, 2017) (requiring the State Board of Education to determine that each school district has developed policies regarding SROs and has a signed MOU); UTAH CODE ANN. § 53A-11-1604 (West 2016) (specifying the required contents of an MOU between the district and local law enforcement).

¹⁰⁸ See Cray & Weiler, *supra* note 48, at 169.

¹⁰⁹ See *id.* at 168.

Even when an MOU exists, there is a question whether the document actually affects the parties' day-to-day interactions. A 2009 survey of sixteen school districts in Massachusetts indicated that the MOU is not a document upon which the parties rely.¹¹⁰ In interviews with SROs, the researchers learned that "most SROs were barely aware that MOUs existed, and rarely referred to them, much less used them as a guide."¹¹¹ The MOUs "appeared to be mostly pro forma documents that were filed away."¹¹² Thus, based on the available information, it appears that many school districts do not have clear policies or procedures that are either known to SROs or followed by them.

E. Statistics Regarding SROs at School

1. The Presence of SROs and Security Personnel at School

Although the numbers of SROs have fluctuated somewhat according to available data, SROs are now a regular presence in the nation's schools, particularly the nation's high schools. In a survey of the nation's public schools for the 2007–2008 school year, 40% of rural high schools and 68% of urban high schools reported that a full-time law enforcement officer was present in the building.¹¹³ Principals in 21.1% of all of the nation's schools, including all elementary and secondary schools, reported the presence of a full-time police officer at school.¹¹⁴ Over 93% of those officers wore uniforms or other identifiable clothing while at school.¹¹⁵ Over 81% of those officers carried a firearm at school.¹¹⁶

Other national statistics refer more generally to the use of SROs or security guards at school. For the 2009–2010 school year, 62% of public high schools and 45% of public middle schools reported that security guards, security personnel, SROs, or non-SRO law enforcement officers were assigned to the building on a full-time basis.¹¹⁷ For that same school year, 63.3% of public high schools reported that security guards, security personnel, or law enforcement officers "routinely" carried a firearm at school.¹¹⁸

¹¹⁰ See Lisa H. Thureau & Johanna Wald, *Controlling Partners: When Law Enforcement Meets Discipline in Public Schools*, 54 N.Y. L. SCH. L. REV. 977, 991 (2009–2010).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ See Na & Gottfredson, *supra* note 56, at 633.

¹¹⁴ See *id.* at 632.

¹¹⁵ See *id.* at 633.

¹¹⁶ See *id.*

¹¹⁷ See Table 233.70 of the *Digest of Education Statistics*, NAT'L CTR. FOR EDUC. STATS., http://nces.ed.gov/programs/digest/d14/tables/dt14_233.70.asp [<https://perma.cc/M8LY-5H3B>].

¹¹⁸ See *id.*

Similarly, in the 2011–2012 school year, 57.6% of the nation’s public secondary schools reported that police or “security personnel” were in school on a daily basis.¹¹⁹ Just over 70% of public schools with enrollment of between one thousand and fifteen hundred students reported having police or security personnel onsite as a daily presence.¹²⁰ In schools where enrollment exceeded fifteen hundred students, police or security personnel were present on a daily basis in 90% of the nation’s public schools.¹²¹

2. *The Correlation Between the Presence of SROs and Reduced Crime at School*

Although the main rationale for placing SROs at school is safety, some advocacy groups and commentators question whether SROs reduce school violence or whether SROs inappropriately criminalize the misbehavior of minors.¹²² On this issue, the data appears to be mixed.

One indicator of reduced criminal activity at school is the rate of juvenile arrests overall. Statistics from the DOJ’s Office of Juvenile Justice and Delinquency Prevention show an overall decline in the rate of juvenile arrests from 1994–2012.¹²³ The 2012 juvenile arrest rate for all crimes was 38% below the rate reported in 1980 and 63% below the peak year of 1994.¹²⁴ Juvenile arrests for the crime of simple (not aggravated) assault reported in 2012 were 28% below the rate for the years from 2003–2012 and 25% below the rate for the years 2008–2012.¹²⁵ Juvenile arrests for

¹¹⁹ See Table 233.50 of the *Digest of Education Statistics*, NAT’L CTR. FOR EDUC. STATS., http://nces.ed.gov/programs/digest/d14/tables/dt14_233.50.asp [<https://perma.cc/Z3DM-GHUQ>].

¹²⁰ See Table 233.60 of the *Digest of Education Statistics*, NAT’L CTR. FOR EDUC. STATS., http://nces.ed.gov/programs/digest/d14/tables/dt14_233.60.asp [<https://perma.cc/W3CC-8E9A>].

¹²¹ See *id.*

¹²² See *Hard Lessons: School Resource Officer Programs and School-Based Arrests in Three Connecticut Towns*, AM. C.L. UNION 5 (November 2008), https://www.aclu.org/sites/default/files/field_document/hardlessons_november2008.pdf [<https://perma.cc/3N6P-G56P>]; *Education on Lockdown: The School to Jailhouse Track*, ADVANCEMENT PROJECT 11 (March 2005), http://b3cdn.net/advancement/5351180e24cb166d02_mlbrqgxlh.pdf [<https://perma.cc/7S3U-C5AH>]; *Education Under Arrest: The Case Against Police in Schools*, JUST. POL’Y INST. 1 (November 2011), http://www.justicepolicy.org/uploads/justicepolicy/documents/educationunderarrest_fullreport.pdf [<https://perma.cc/KR6A-SRFY>] [hereinafter *Education Under Arrest*]; Catherine Y. Kim, *Policing School Discipline*, 77 BROOK. L. REV. 861, 886–87 (2011–2012).

¹²³ See *Juvenile Arrest Rate Trends*, OFF. JUV. JUST. & DELINQ. PREVENTION (DEC. 13, 2015), https://www.ojjdp.gov/ojstatbb/crime/JAR_Display.asp?ID=qa05201 [<https://perma.cc/YK6W-3P4N>].

¹²⁴ See *id.*

¹²⁵ See Charles Puzanchera, *Juvenile Arrests 2012*, OFF. JUV. JUST. & DELINQ. PREVENTION, 3 (Dec. 2014), <https://www.ojjdp.gov/pubs/248513.pdf> [<https://perma.cc/Q7ZQ-SGSR>].

the crime of disorderly conduct reported in 2012 were 38% below the rate for the years from 2003–2012 and 36% below the rate for the years 2008–2012.¹²⁶

Another indicator of reduced school crime or violence is data from surveys of students regarding their experiences at school. Overall, students have reported decreasing rates of criminal victimization at school. The percentage of students aged twelve to eighteen who reported being the victim of crime within the past six months has fallen steadily between 1995 and 2013.¹²⁷ The reported rate in 1995 was 9.5%.¹²⁸ In 2013, the reported rate was 3%.¹²⁹

However, some critics argue that these national statistics do not demonstrate a “clear correlation” between the presence of SROs in schools and declining rates of juvenile crime.¹³⁰ Indeed, some scholars and commentators have raised concerns that the presence of an SRO in school tends to criminalize adolescent misbehavior that should be handled by school personnel only.¹³¹ A study published in 2013, using data from the Department of Education’s School Survey on Crime and Safety, found that simple assault without a weapon is the most common crime reported by schools¹³² and that the presence of an SRO at school is associated with a more than double the rate of referrals to law enforcement for the crime of simple assault.¹³³ A regression analysis of the data demonstrated that schools that added SROs between the 2005–2006 and the 2007–2008 school years had a 12.3% higher rate of reporting nonserious violent crime to law enforcement than schools that did not add SROs.¹³⁴ Yet the data also showed that the reporting of crime overall or other crime types was not affected by the addition of SROs.¹³⁵

A different study that was published in 2009 examined data from comparable middle and high schools located within one county in the southeastern United States, some of which had SROs in schools and others that did not.¹³⁶ The data revealed that the presence of an SRO in school did not increase the overall rate of arrests (when

¹²⁶ *See id.*

¹²⁷ *See Table 228.30 of the Digest of Education Statistics*, NAT’L CTR. FOR EDUC. STATS., http://nces.ed.gov/programs/digest/d14/tables/dt14_228.30.asp [https://perma.cc/T5GW-72V3].

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Education Under Arrest*, *supra* note 122, at 10.

¹³¹ *See, e.g.,* Matthew T. Theriot, *School Resource Officers and the Criminalization of Student Behavior*, 37 J. CRIM. JUST. 280, 280 (2009) (describing concerns that increased SRO presence criminalizes student behavior).

¹³² *See* Na & Gottfredson, *supra* note 56, at 635 (summarizing the study); *see also* Kerrin C. Wolf, *Booking Students: An Analysis of School Arrests and Court Outcome*, 9 NW. J. L. & SOC. POL’Y 58, 70 (2013) (introducing a study of juvenile arrests in the state of Delaware indicated that crimes of disorderly conduct, third-degree assault, and offensive touching comprised three-quarters of all arrests).

¹³³ Na & Gottfredson, *supra* note 56, at 635.

¹³⁴ *Id.* at 640.

¹³⁵ *Id.*

¹³⁶ Theriot, *supra* note 131, at 282.

controlled for school-level poverty).¹³⁷ When an SRO was present, there were fewer arrests for more serious crimes like weapons possession and assault charges.¹³⁸ However, the presence of an SRO at school significantly increased the rate of arrests for the crime of disorderly conduct, a relatively minor criminal charge that has subjective and situational considerations, unlike a weapon or drug charge.¹³⁹ This data seems to support the contention that the presence of an SRO at school criminalizes minor misbehavior that, in years past, would have been addressed through in-school disciplinary measures.

3. *The Interaction Between SROs and Students with Disabilities*

Currently there is limited research or data on the interaction between SROs and students with disabilities. Independent of any interaction with SROs, it is clear that students with disabilities are disciplined more often than general education students, including being removed from school by way of suspension or expulsion.¹⁴⁰ Specifically, data collected by the Department of Education's Office of Civil Rights (OCR) for the 2011–2012 school year indicated that, while students receiving special education services represent 12% of all students nationwide, they make up 23% of the nation's students who received a school-related arrest.¹⁴¹ Students with disabilities are twice as likely to be suspended from school when compared to students without disabilities; the suspension rate for students with disabilities is 13%, as compared to a 6% rate for students without disabilities.¹⁴²

Students with disabilities are also disproportionately subject to in-school discipline, including the highly-criticized practices of restraint and seclusion. In 2014, the OCR released a report summarizing civil rights data from schools across the country.¹⁴³ While students with disabilities represent only 12% of the student

¹³⁷ *Id.* at 285.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ May et al., *supra*, note 93, at 4; Russell Skiba et al., *Are Zero-Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations*, 63 AM. PSYCHOL. ASS'N 852, 854–55 (Dec. 2008), <http://www.apa.org/pubs/info/reports/zero-tolerance-report.pdf> [<https://perma.cc/26M8-PBDH>] (“Although there are less data available, students with disabilities, especially those with emotional and behavioral disorders, appear to be suspended and expelled at rates disproportionate to their representation in the population.”).

¹⁴¹ *Guiding Principles: A Resource for Improving School Climate and Discipline*, U.S. DEP'T EDUC. i (Jan. 2014), <http://www2.ed.gov/policy/gen/guid/school-discipline/guiding-principles.pdf> [<https://perma.cc/4ZM6-YZ7S>].

¹⁴² *Id.*

¹⁴³ *Data Snapshot: School Discipline*, U.S. DEP'T EDUC. (March 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/crdc-discipline-snapshot.pdf> [<https://perma.cc/VN8V-FW7X>] [hereinafter *Data Snapshot*].

population, nearly 60% of students placed in seclusion and 75% percent of students who are physically restrained at school are students with disabilities.¹⁴⁴

There is little data regarding the arrests of students with disabilities by SROs specifically, although there are an increasing number of reported cases where students with disabilities have been handcuffed or arrested by SROs.¹⁴⁵ A 2013 study using data collected by the Department of Education did not reveal a disproportionate arrest rate on students receiving special education services specifically as a result of the presence of an SRO at school.¹⁴⁶ However, in response to the OCR's report on disproportionate discipline of students with disabilities, in July 2014, the DOJ's COPS program issued a "BOLO" ("Be On the Lookout") bulletin indicating that, among other items, SROs need training on "disability issues."¹⁴⁷

There is only one reported survey of SROs that elicited information about SROs' perceptions of students with disabilities. The data collected for that survey came from 130 SROs working with students with disabilities in Kentucky.¹⁴⁸ The survey revealed that SROs might harbor negative stereotypes of students with disabilities.¹⁴⁹ A majority of the survey respondents (55%) agreed that students receiving special education were "responsible for a disproportionate amount of problem behaviors at school."¹⁵⁰ Nearly the same amount (54.3%) agreed that placing students receiving special education services in the general education classroom "is detrimental because of [the students'] problem behaviors."¹⁵¹ The vast majority of survey respondents (84.8%) agreed that some students receiving special education services "used the special education status as an excuse for their problem behavior to avoid accountability for their actions."¹⁵² While limited in scope to a single state, these survey findings indicate that SROs may lack "understanding and knowledge of the unique characteristics and needs" of students with disabilities who receive special education services.¹⁵³

These survey results raise serious concerns, particularly in light of the fact that students with disabilities spend a large amount of time in the general education environment. In the 2011 school year, nearly 95% of students with disabilities spent

¹⁴⁴ *Id.*

¹⁴⁵ *See id.* at Part III.

¹⁴⁶ *See* Na & Gottfredson, *supra* note 56, at 641.

¹⁴⁷ *Potential Effects of the U.S. Departments of Education and Justice Recently Released School Guidance Package on Law Enforcement*, OFF. COMMUNITY ORIENTED POLICING SERVS. (July 2014), <https://ric-zai-inc.com/Publications/cops-w0736-pub.pdf> [<https://perma.cc/6QQY-4YNN>].

¹⁴⁸ *See* May et al., *supra* note 93, at 1.

¹⁴⁹ *Id.* at 7–8.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.* at 8.

some part of their school day in the general education classroom.¹⁵⁴ Over 61% of students with disabilities spent the vast majority of their time (80% or more of the school day) in the general education classroom, while nearly 20% of students with disabilities spent between 40%–79% of their school day in the general education classroom.¹⁵⁵ If SROs believe that inclusion of students with disabilities in the general education classroom is “detrimental”¹⁵⁶ due to those students’ behavioral issues, then SROs may feel that it is appropriate for them to exercise their authority and remove those students from the classroom.

II. BEHAVIORAL INTERVENTIONS TO ADDRESS UNDESIRE BEHAVIORS OF STUDENTS WITH DISABILITIES

A. Background on IDEA

A student’s right to special education services is governed by IDEA, which contains a comprehensive array of substantive and procedural provisions.¹⁵⁷ A child is eligible for special education services under IDEA if the child fits into at least one of thirteen disability categories.¹⁵⁸ In addition, the child’s disability must “adversely affect” the child’s educational performance such that the child needs special education services in order to access the curriculum.¹⁵⁹

Every child with a disability who is deemed eligible under IDEA is entitled to a “free appropriate public education,” also known as a FAPE.¹⁶⁰ Although IDEA does not define with any precision what level of services constitutes a FAPE, in *Board of Education of Hendrick Hudson Central School District v. Rowley*,¹⁶¹ the U.S. Supreme Court developed a two-part test that has become the rule for determining whether a child with a disability has received a FAPE.¹⁶² The first part of the *Rowley* test addresses the substantive issue of the “appropriate[ness]” of a child’s educational programming. It provides that a child with a disability has received a FAPE when the educational programming provides the child with

¹⁵⁴ See Table 204.60 of the *Digest of Education Statistics*, NAT’L CTR. FOR EDUC. STATS., https://nces.ed.gov/programs/digest/d13/tables/dt13_204.60.asp [<https://perma.cc/YE7K-2QG7>].

¹⁵⁵ *Id.*

¹⁵⁶ May et al., *supra* note 93, at 8.

¹⁵⁷ See 20 U.S.C.A. § 1400 (West 2016).

¹⁵⁸ See 20 U.S.C.A. § 1401(3)(A) (West 2016). The thirteen disability categories are: autism, deaf-blindness, deafness, emotional disturbance, hearing impairment, intellectual disability, multiple disabilities, orthopedic impairments, other health impairment, specific learning disability, speech or language impairment, traumatic brain injury, and visual impairment, including blindness.

¹⁵⁹ 34 C.F.R. § 300.8 (2007) (defining a “child with a disability”).

¹⁶⁰ 20 U.S.C.A. § 1412(a)(1)(A) (West 2016).

¹⁶¹ 458 U.S. 176 (1982).

¹⁶² *Id.* at 206–07.

“educational benefit.”¹⁶³ The Court recognized that the phrase “educational benefit” was a flexible concept that would depend in large part on the nature and severity of each child’s disability.¹⁶⁴ The Court explicitly declined to establish a single test by which the adequacy of the educational benefit would be measured.¹⁶⁵

The second part of the *Rowley* test examines the procedural requirements of IDEA and inquires whether the child and his parents were afforded all of IDEA’s procedural protections regarding notice and an opportunity to participate in developing the child’s educational plan.¹⁶⁶ If there are no violations of the procedural requirements of IDEA and the child has received educational benefit, then a FAPE has been provided.¹⁶⁷

The educational plan of a child with a disability must be documented in a written IEP. The IEP contains very detailed provisions about the child’s current educational performance, projected goals for the child’s progress in the coming year, the level and type of services to be provided, and the educational setting, among other details.¹⁶⁸ The IEP is drafted and approved by the child’s IEP team, a group that includes both educators and the child’s parents.¹⁶⁹ Parents can refuse to consent to the initial provision of special education services if they do not agree with the contents of a proposed IEP.¹⁷⁰ Parents also can revoke their consent to the continued provision of special education services.¹⁷¹ This revocation of consent can take place at any time, including the circumstance where the parents disagree with the contents of a proposed IEP. Parents also can refuse to consent to the provision of a particular “service or activity” offered by the school district without losing the benefits of other services or activities offered by the district.¹⁷²

IDEA provides various mechanisms for the parties to resolve disputes involving the provision of special education services.¹⁷³ These processes, which include alternative dispute resolution mechanisms like mediation, are generally referred to as “due process.”¹⁷⁴ If the parties are unable to resolve the dispute using alternative

¹⁶³ *Id.* at 201. In so holding, the Court rejected a more stringent definition of an “appropriate” education, one that would have required a school district to provide an education that was designed to maximize the educational potential of a child with a disability. *Id.* at 199–200.

¹⁶⁴ *Id.* at 202.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 206–07.

¹⁶⁷ *Id.*

¹⁶⁸ See 20 U.S.C.A. § 1414(d)(1)–(4) (West 2016); 20 U.S.C.A. § 1414(d)(1)(A)(i)(V)–(VI) (West 2016).

¹⁶⁹ See 20 U.S.C.A. § 1414(1)(B) (West 2016) (describing the members of the IEP team).

¹⁷⁰ See 34 C.F.R. §300.300(b) (2007).

¹⁷¹ See 34 C.F.R. §300.300(b)(4) (2007).

¹⁷² 34 C.F.R. §300.300(d)(2) (2007).

¹⁷³ See 20 U.S.C.A. §1415 (West 2016).

¹⁷⁴ For a detailed discussion of IDEA’s due process provisions, see Elizabeth A. Shaver,

dispute resolution processes, the parties may request a hearing before an impartial hearing officer and, after a decision has been rendered, file certain appeals.¹⁷⁵ Although the due process procedures can vary somewhat by state, in every special education dispute, an aggrieved party has the right to appeal a hearing officer's decision by filing suit in state or federal court.¹⁷⁶

B. IDEA's Provisions to Address Undesired Behavior

In 1997, Congress amended IDEA to incorporate behavioral intervention techniques, including the use of BIPs to address undesired behavior.¹⁷⁷ Various provisions of IDEA set forth procedures to be followed when a child with a disability exhibits undesired behavior, including behavior that is physically aggressive towards others. The impetus of these changes was to prevent to the widespread exclusion of students with disabilities at schools—because these students are often more challenging to teach, many schools were suspending and expelling students with disabilities too often.

One provision of IDEA directs a child's IEP team to “consider the use of positive behavioral interventions and supports” (PBIS) and other strategies to address behavior that may impede a child's learning.¹⁷⁸ Although IDEA and its corresponding regulations do not explicitly define what PBIS entails, the Department of Education's Office of Special Education Programs defines PBIS as “a framework or approach for assisting school personnel in adopting and organizing evidence-based behavioral interventions into an integrated continuum that enhances academic and social behavior outcomes for all students.”¹⁷⁹

Indeed, IDEA includes specific provisions requiring schools to implement two specific behavioral interventions, “functional behavioral assessment[s]” (FBAs) and “behavioral intervention plan[s]” (BIPs) when students with disabilities engage in behavior that could lead to suspension or expulsion from school.¹⁸⁰ Congress first added these behavioral intervention techniques when it amended IDEA in 1997.¹⁸¹

Every Day Counts: Proposals to Reform the IDEA's Due Process Structure, 66 CASE WESTERN RES. L. REV. 143, 146–48 (2015).

¹⁷⁵ See 20 U.S.C.A. § 1415(f) (West 2016).

¹⁷⁶ See Shaver, *supra* note 174, at 158.

¹⁷⁷ See Individuals with Disabilities Education Act of 1997, PUB. L. NO. 105–17, § 614, 111 Stat. 37, 86 (codified as amended at 20 U.S.C. §§ 1414(d)(3)(B)(i), 1415(k)(F) (2012)).

¹⁷⁸ 20 U.S.C.A. § 1414(d)(3)(B)(i) (West 2016).

¹⁷⁹ *PBIS FAQs*, POSITIVE BEHAV. INTERVENTIONS & SUPPORTS, <https://www.pbis.org/school/swpbis-for-beginners/pbis-faqs> [<https://perma.cc/8L9T-7ZUV>]. In recently enacted legislation, Congress encouraged schools to implement PBIS in all school settings to address the behavior of students. See Every Student Succeeds Act, Pub. L. No. 114–95, 129 Stat. 1802, 1864 (2015).

¹⁸⁰ 20 U.S.C.A. § 1415(k)(1)(F) (West 2016).

¹⁸¹ Individuals with Disabilities Education Act of 1997, Pub. L. NO. 105–17, 111 Stat. 37, 94 (1997) (codified as amended at 20 U.S.C. §§ 1414(d)(3)(B)(i), 1415(k)(F) (2012)).

In doing so, Congress incorporated principles from the field of applied behavior analysis (ABA).¹⁸²

IDEA requires that a child's IEP team consider these behavioral interventions when a child's behavior could result in suspension or expulsion from school.¹⁸³ Specifically, if the child will be removed from his placement for more than ten consecutive or cumulative days, or if the child will be placed in an Interim Alternative Educational Setting (IAES), a manifestation determination review must occur.¹⁸⁴ A manifestation determination review (MDR) is a meeting where the IEP team must determine: (1) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or, (2) if the conduct in question was the direct result of district's failure to implement the IEP.¹⁸⁵ In that circumstance, IDEA requires that the child's IEP team consider whether to conduct an FBA and implement a BIP to address the undesired behavior.¹⁸⁶

C. FBAs and BIPs

An FBA is the process by which a trained professional like a behavior analyst examines the function of a particular behavior exhibited by an individual.¹⁸⁷ The FBA defines the behavior, identifies any antecedent (preexisting) events that give rise to the behavior, and reviews any consequences that are imposed when the individual exhibits the behavior.¹⁸⁸ An FBA could reveal, for example, that a child with a disability who is presented with an overly complex task (the antecedent) may

¹⁸² Scott & Kamps, *supra* note 21, at 146. ABA is a science that is devoted to understanding and improving human behavior through rigorous analysis of the conditions under which behavior occurs and the consequences that result from such behavior. JOHN O. COOPER ET AL., *APPLIED BEHAVIOR ANALYSIS* 3, 499–503 (2d ed. 2014).

¹⁸³ 20 U.S.C.A. § 1415(k)(1)(F) (West 2016). Further, any time a student is placed at an Interim Alternative Educational Setting, the child shall “receive, as appropriate, a functional behavioral assessment, behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.” 20 U.S.C.A. § 1415(k)(1)(D)(ii) (West 2016).

¹⁸⁴ 20 U.S.C.A. § 1415(k)(1)(E) (West 2016); see *Questions and Answers on Discipline Procedures*, U.S. DEP'T. EDUC. 11 (2009) <https://www2.ed.gov/about/offices/list/osep/osep-idea.html> [<https://perma.cc/9ACG-H5S3>] (describing what constitutes an IAES).

¹⁸⁵ 20 U.S.C.A. § 1415(k)(1)(E) (West 2016).

¹⁸⁶ 20 U.S.C.A. § 1415(k)(1)(F) (West 2016). Suspension from school, whether a single suspension or a series of lesser suspensions that form a pattern, must exceed ten days. 34 C.F.R. § 300.536 (2016).

¹⁸⁷ Elizabeth A. Shaver, *Should States Ban the Use of Non-Positive Interventions in Special Education? Reexamining Positive Behavior Supports Under IDEA*, 44 STETSON L. REV. 147, 152 (2014); *Questions and Answers on Discipline Procedures*, U.S. DEP'T. EDUC. 14 (2009) <https://www2.ed.gov/about/offices/list/osep/osep-idea.html> [<https://perma.cc/46ME-MAUV>].

¹⁸⁸ COOPER ET AL., *supra* note 182, at 500; H. Rutherford Turnbull, III et al., *IDEA, Positive Behavioral Supports, and School Safety*, 30 J.L. & EDUC. 445, 456 (2001).

engage in undesired behavior (aggression), resulting in removal from the classroom—a consequence that actually can reinforce the behavior’s function, namely task avoidance.¹⁸⁹

The results of an FBA allow a trained professional to write a BIP. The BIP will specify behavioral interventions that may be used to either alter the antecedent to the behavior (change the task) or the consequences resulting from the behavior. A BIP might also introduce rewards or reinforcements when the child exhibits appropriate behavior. The overall goal of the BIP is to reduce the frequency of undesired behavior and increase the frequency of appropriate behavior.¹⁹⁰ When conducting an FBA, it is very important that the behavior be examined in the environment or context in which it occurs, since interventions that may be implemented to reduce or modify the behavior could include changes to the environment or the context (antecedent conditions) and not simply the consequences that flow from the behavior.¹⁹¹

FBAs and BIPs have been used in clinical settings for decades; however, their use in school settings was limited before the 1997 amendments to IDEA went into effect.¹⁹² While Congress explicitly referred to FBAs and BIPs when it amended IDEA in 1997, the amendments themselves raised several questions about how best to implement these behavioral techniques in the school setting. For example, neither the IDEA nor its implementing regulations defined an FBA or a BIP, or provided any guidance as to their design or implementation in the school setting.¹⁹³

In addition, by incorporating those terms only in provisions that addressed disciplinary procedures against a student with disabilities who exhibited undesired behavior—and not in the statutory provisions that address the IEP team’s responsibility to consider undesired behavior when drafting a child’s IEP—the 1997 amendments raised the question about when to conduct an FBA.¹⁹⁴ A “proactive approach” would call for the initiation of the FBA-BIP process “when earl[ier] behavioral warning signs occur,”¹⁹⁵ while a narrower approach would await disciplinary action.

Although the narrower approach may be the prevailing view in practice simply because IDEA explicitly does not require either an FBA or a BIP unless school personnel are conducting an MDR,¹⁹⁶ school officials may be at some risk if they

¹⁸⁹ Zirkel, *supra* note 20, at 178–79.

¹⁹⁰ *Id.* at 175; Trumbull et al., *supra* note 188, at 453–54.

¹⁹¹ Terrance M. Scott et al., *Strategies for Developing and Carrying Out Functional Assessment and Behavior Intervention Planning*, 52 PREVENTING SCH. FAILURE 39, 40 (2008).

¹⁹² Scott & Kamps, *supra* note 21, at 146. In 1999, the Department of Education issued the implementing regulations for the 1997 amendments to IDEA.

¹⁹³ Scott et al., *supra* note 191, at 40; Poucher, *supra* note 23, at 489–90.

¹⁹⁴ Maureen A. Conroy et al., *Building Competence in FBA: Are We Headed in the Right Direction?*, 44 PREVENTING SCH. FAILURE 169, 170 (2000).

¹⁹⁵ *Id.*

¹⁹⁶ 20 U.S.C.A. § 1415(k)(1)(D)(ii) (West 2016).

either do not use the FBA-BIP process to address behavioral concerns. The failure to conduct an FBA and implement a BIP could form the basis of a reasonable accommodation claim under Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act, if there is sufficient evidence that a student required those behavioral supports in order to have meaningful access to her education.¹⁹⁷ School personnel also could be individually liable if it is determined that there were deliberately indifferent to a student's education needs by, among other things, ensuring that a BIP is implemented consistently.¹⁹⁸ Thus, school districts who fail to conduct FBAs and implement BIPs when it is clear that a student requires behavioral supports may be at risk in subsequent litigation.

In August 2016, the Department of Education issued a "Dear Colleague Letter" warning school districts that the failure to provide adequate behavioral supports to students with disabilities could constitute a denial of FAPE.¹⁹⁹ The purpose of the Department's letter was to respond to a perceived practice among some school districts that disciplinary removals from school of less than ten days were "free days" because cumulative suspensions of less than ten days do not trigger a student's special protections under IDEA in the form of an MDR.²⁰⁰ The Department heavily emphasized IDEA's requirement that an IEP team consider implementing behavioral supports and interventions whenever a student's behavior impedes learning, even if the student's behavior has not triggered an MDR.²⁰¹ The Department specifically noted that "instances of child misbehavior and classroom disruptions" that may fall short of a violation of the student code of conduct can require the implementation of behavioral supports and interventions.²⁰²

Perhaps most tellingly, the Department noted that removing a student with disabilities from the general education environment into a more restrictive environment due to behavior could violate IDEA if behavioral supports that might allow the student to remain in the regular education setting are not provided.²⁰³ Thus, the Department has forcefully warned school districts that they may not simply segregate students with disabilities who exhibit undesired behavior into self-contained classrooms or other restrictive environments without first considering and implementing behavioral supports and interventions in the regular education setting.²⁰⁴ This Dear Colleague Letter should result in increased use of FBAs and

¹⁹⁷ *A.G. v. Paradise Valley Unified Sch. Dist. No. 69*, 815 F.3d 1195, 1206 (9th Cir. 2016).

¹⁹⁸ *J.S. v. East End Sch. Dist.*, No. 4:05-CV-01599, 2007 WL 1029559, at *10 (E.D. Ark. Apr. 3, 2007).

¹⁹⁹ U.S. Dep't of Educ., *Dear Colleague Letter 1* (Aug. 1, 2016) <https://www2.ed.gov/policy/gen/guid/school-discipline/files/dcl-on-pbis-in-ieps--08-01-2016.pdf> [<https://perma.cc/XK8L-TDTX>].

²⁰⁰ *Id.* at 12.

²⁰¹ *Id.* at 1, 4.

²⁰² *Id.* at 4.

²⁰³ *See id.* at 7.

²⁰⁴ *Id.*

BIPs for students whose behavior impedes learning, but who may have been overlooked in the past because they had not violated the student code of conduct.

Although the Department is sending a clear message to increase the use of behavioral supports, some school districts may not have significant experience in conducting FBAs or implementing BIPs. The relative lack of experience using FBAs and BIPs in the school setting before 1997 meant there were no established protocols or practices for the use of FBAs in the education setting. Most schools were not prepared to implement the new mandates with regard to behavioral interventions.²⁰⁵ As a result, school districts “implemented a variety of inexact practices and procedures that [were] loosely labeled as FBA.”²⁰⁶ Several articles published in the early 2000s detailed the need to build competence in educators’ use of FBAs and BIPs to address undesired behavior.²⁰⁷

While the transfer of these behavioral intervention techniques from a clinical setting to the school environment has been somewhat uneven, over the years the use of FBAs and BIPs in school settings has steadily increased.²⁰⁸ Under IDEA, it is the responsibility of the child’s IEP team, of which the parents are a part, to develop or modify any BIP for the child that will address undesired behavior.²⁰⁹ Thus, the parents are part of an IEP team that determines whether to implement or modify a BIP for the child. In addition, the parents may withhold consent to the implementation of a BIP if they do not agree with even one component of its contents.²¹⁰ In that circumstance, however, the district may be relieved of its obligation to implement a BIP.²¹¹

D. Concerns Regarding Restraint and Seclusion

Although IDEA does not regulate schools’ use of restraint and seclusion when addressing undesired behavior, policymakers, parents, scholars, and others have recommended that federal legislation is needed to protect students with disabilities from improper restraint and seclusion in school settings.²¹² In 2009, the Government

²⁰⁵ Richard Van Acker et al., *Are We on the Right Course? Lessons Learned About Current FBA/BIP Practices in Schools*, J. BEHAV. EDUC. 35, 37 (2005).

²⁰⁶ See Scott et al., *supra* note 191, at 40.

²⁰⁷ See Couvillon et al., *supra* note 23; Echo M. Cunningham & Robert E. O’Neill, *Agreement of Functional Behavioral Assessment and Analysis Methods with Students with EBD*, 32 BEHAV. DISORDERS 211, 211 (2007).

²⁰⁸ See Scott & Kamps, *supra* note 21, at 146.

²⁰⁹ 34 C.F.R. § 300.520 (2007).

²¹⁰ See, e.g., *L. ex rel. Mr. F. v. North Haven Bd. of Educ.*, 624 F. Supp. 2d 163, 181–82 (D. Conn. 2009) (describing parents refusing to grant consent for use of time-out room).

²¹¹ *Id.* at 182.

²¹² See Mareesa Nicosia, *The Future of Restraint and Seclusion in Schools*, THE ATLANTIC (Jan. 24, 2016), <https://www.theatlantic.com/education/archive/2016/01/the-future-of-restraint-and-seclusion-in-schools/426735/> [<https://perma.cc/ZDM4-PMHK>]; John Fensterwald, *Federal Officials Urged Not to Step on State’s School Reforms*,

Accountability Office (GAO) released a report detailing numerous instances of use and abuse of restraints and seclusion by school personnel against students—some of which resulted in serious injury or death of students with disabilities.²¹³ The report explained that no federal law existed that governed the use of such methods and that state law governing the topic “vari[ed] widely” at that time.²¹⁴ It also identified the lack of a national tracking system to record instances of inappropriate restraint or seclusion in public schools.²¹⁵ In response, the Department of Education released a “Dear Colleague Letter” to school officials nationwide calling attention to the GAO’s report and to growing concerns about the use of seclusion and restraint techniques in schools.²¹⁶ Additionally, Congress has annually attempted to enact legislation to address restraint and seclusion through a bill entitled the Keeping All Students Safe Act (KASSA) during the 2009 through 2015 terms.²¹⁷ Yet, such attempts to pass federal legislation have been unsuccessful.

At the state level, numerous states have taken steps to develop or revise their state statutes and regulations. Several states have clarified the rare circumstances under which certain behavioral interventions, such as physical restraint, may be used to address aggressive behavior of students with disabilities.²¹⁸ However, state efforts have varied widely²¹⁹ and do not solve some of the issues raised in the GAO report such as the need for a national tracking system.²²⁰

EDSOURCE (Jan. 19, 2016), <https://edsources.org/2016/federal-officials-urged-not-to-intrude-on-states-school-reform-essa-nclb-lcff/93632> [<https://perma.cc/RU6U-5DW7>].

²¹³ U.S. GOV’T ACCOUNTABILITY OFF., GAO-09-719T, SECLUSIONS AND RESTRAINTS, SELECTED CASES OF DEATH AND ABUSE AT PUBLIC AND PRIVATE SCHOOLS AND TREATMENT CENTERS 7–8 (2009).

²¹⁴ *Id.* at 3–4.

²¹⁵ *Id.*

²¹⁶ *Key Policy Letters Signed by the Education Secretary or Deputy Secretary*, U.S. DEP’T EDUC. (July 31, 2009), <https://www2.ed.gov/policy/elsec/guid/secletter/090731.html> [<https://perma.cc/264B-M7SU>].

²¹⁷ Keeping All Students Safe Act, H.R. 927, 114th Cong. (2015); Keeping All Students Safe Act, S. 2036, 113th Cong. (2014); Keeping All Students Safe Act, H.R. 1893, 113th Cong. (2013); Keeping All Students Safe Act, S. 2020, 112th Cong. (2012); Keeping All Students Safe Act, H.R. 1381, 112th Cong. (2011); Keeping All Students Safe Act, H.R. 4247, 111th Cong. (2010).

²¹⁸ *See, e.g.*, N.H. CODE ADMIN. R. ANN. Bd. Educ. 1113.04, 1114.07 (2016) (allowing “[p]hysical restraint” to be included in a child’s IEP); N.Y. COMP. CODES R. & REGS. tit. 8, § 200.22(e)(1) (2016) (providing that aversive interventions may be included in child’s IEP); WASH. ADMIN. CODE §§ 392-172A-03130, 392-172A-03135 (2016) (allowing the use of “bodily contact,” “isolation,” and “physical restraint” as part of a child’s BIP).

²¹⁹ *See* Jessica Butler, *How Safe Is the Schoolhouse? An Analysis of State Seclusion and Restraint Laws and Policies*, AUTCOM 1 (July 25, 2015), <http://www.autcom.org/pdf/HowSafeSchoolhouse.pdf> [<https://perma.cc/59V9-R6LB>].

²²⁰ For a discussion of the use of restraint and seclusion in schools, see Daniel Stewart, *How Do States Regulate Restraint and Seclusion in Public Schools? A Survey of the Strengths and Weaknesses in State Laws*, 34 HAMLINE L. REV. 531, 533–37 (2011).

As of 2015, twenty-five states have laws that provide meaningful protections against restraint and seclusion of all students, while thirty-five states provide protections specifically for students with disabilities.²²¹ Yet serious concerns about restraint and seclusion specific to students with disabilities still exist given the statistics regarding the high percentage of students with disabilities who are subject to restraint and seclusion at school.²²² The national conversation has clarified that school personnel should only resort to restraint and seclusion in extreme situations and they should never use it as a form of punishment.²²³ Instead, school personnel should only restrain or seclude students with disabilities if safety is in jeopardy and after personnel have attempted less intrusive measures to de-escalate the situation.²²⁴

III. LITIGATION INVOLVING CLAIMS AGAINST SROs

Perhaps due to the increased awareness about disciplinary measures used at school, including restraint and seclusion, there have been a growing number of lawsuits filed against SROs alleging the improper use of law enforcement tactics. While the body of caselaw is not large, some recent cases reveal facts that, in the words of one federal judge, are “profoundly disturb[ing]”²²⁵ regardless of whether the student has a disability or not.²²⁶ In particular, some cases involving students

²²¹ Butler, *supra* note 219.

²²² *Data Snapshot*, *supra* note 143, at 1.

²²³ *Restraint and Seclusion: Resource Document*, U.S. DEP’T EDUC. 12 (2012), <https://www2.ed.gov/policy/seclusion/restraints-and-seclusion-resources.pdf> [<https://perma.cc/P2RB-6XJ3>] [hereinafter *Restraint and Seclusion*]. In July 2015, the Department of Education launched a campaign to have a national conversation about school discipline that it entitled “#Rethink Discipline.” See *Educators Gather at the White House to Rethink School Discipline*, U.S. DEP’T EDUC. (July 22, 2015), <https://www.ed.gov/news/press-releases/educators-gather-white-house-rethink-school-discipline> [<https://perma.cc/5BVC-Y6HS>]. In December 2015, as part of that #Rethink Discipline campaign, the Department of Education’s Office of Special Education and Rehabilitative Services held a webinar. U.S. Dep’t of Educ., *#RethinkDiscipline: What Communities Should Know About School Resource Officers*, YOUTUBE (Dec. 17, 2015), <https://www.youtube.com/watch?v=X97flaNt8T8&feature=youtu.be>.

²²⁴ *Restraint and Seclusion*, *supra* note 223, at 12.

²²⁵ *J.W. v. Birmingham Bd. of Educ.*, 143 F. Supp. 3d 1118, 1126 (N.D. Ala. 2015).

²²⁶ In *J.W.*, eight former high school students who attended various high schools within the Birmingham City Schools brought suit against, among others, several SROs who had sprayed the plaintiffs with a chemical spray known as “Freeze +P” as part of law enforcement activities. *Id.* at 1125. After a twelve-day bench trial, the court found in favor of two plaintiffs on claims of excessive force against, among other defendants, the individual SROs. *Id.* at 1125–26.

One of the plaintiffs, a female high school student, was first handcuffed then sprayed in the face with the chemical spray because she was crying and upset due to the verbal taunting of another student. *Id.* at 1131. The court found both that the SRO had acted with excessive force and that the SRO was not entitled to qualified immunity because his conduct

with disabilities reveal conduct by SROs that is a disproportionate response to the child's behavior or is simply cruel.²²⁷

There are reported cases in which students with disabilities engaged in undesired behavior that was physically aggressive and could have caused, or did cause, harm to others.²²⁸ In those circumstances, SROs have concluded that the appropriate course of action is to handcuff and arrest the child, even when the student has a BIP that describes behavioral interventions to be implemented when undesired behavior arises. In those cases, where the "tension" between the contents of a BIP and traditional law enforcement tactics has been addressed, the courts have held that an SRO is not bound by the contents of a child's BIP and may act in accordance with his or her authority as a law enforcement officer.²²⁹

As discussed below, that conclusion appears to be correct when one considers the four corners of the law.²³⁰ However, one must also consider the remaining cases, in which the conduct of SROs towards students with disabilities is quite startling and problematic. In a growing body of cases, including the more recently filed cases, the courts have declined to dismiss claims against SROs or have ruled in favor of students.

Many cases involve circumstances where the SRO's conduct is shocking. One might discount the facts of these cases as isolated situations involving anomalous actions by rogue SROs. However, considering the time and effort necessary to litigate a case in federal court, it is prudent to view these cases as a snapshot of not infrequent interactions between SROs and students with disabilities.²³¹ When

violated clearly established standards. *Id.* at 1147–50. In particular, the court stated that it was "especially taken back that a police officer charged with protecting the community's children considered it appropriate and necessary to spray a girl with Freeze +P simply because she was crying about her mistreatment at the hands of one of her male peers." *Id.* at 1147.

The court also found in favor of another student, who was sprayed with the chemical spray because he tried to retrieve a cell phone from an SRO who had pulled the phone out of the student's pocket. *Id.* at 1133. At the time that this student was sprayed by one SRO, he already had been pinned to wall lockers by an assistant principal and another SRO. *Id.* With regard to this student, the court noted that the SRO had sprayed "a 135-pound boy who two adult men had pinned against a set of lockers." *Id.* at 1147. The court further noted that, although SRO had testified that it would be inappropriate for her to spray a student who did not consent to a search of his pockets, "that is essentially what she did." *Id.* at 1148.

²²⁷ See *infra* Section III.B.

²²⁸ See *infra* Section III.B.1.

²²⁹ See *infra* Section III.B.1.

²³⁰ See *infra* Section III.A.

²³¹ Indeed, several news stories and videos confirm that inappropriate conduct by SROs against students, including students with disabilities, is not rare. Several videos show SROs punching, choking, or throwing students to the ground. See, e.g., Hilary Golston, *Mentor HS Parent: Teen Son Victim of 'Police Brutality,'* WKYC (Apr. 15, 2015, 6:29 AM), <http://legacy.wkyc.com/story/news/local/lake-county/2015/04/14/mentor-police-video/25800245/> [<https://perma.cc/V4MJ-T3UU>] (showing video of an Ohio SRO throwing a high

viewed from that perspective, the cases reveal an urgent need to address the proper role and training of the SRO.

A. The SRO Is Not Bound to Follow a Child's BIP

There are two main cases involving claims against SROs in which the plaintiffs alleged that, as a result of a district-implemented BIP, the SRO's conduct was unlawful. In both cases, the plaintiffs did not prevail.

In *E.C. v. County of Suffolk*,²³² the student was an eleven-year-old boy with cognitive and developmental delays, a speech and language impairment, and a condition requiring a feeding tube.²³³ Due to certain undesired behaviors, the student's IEP team had designed and implemented a BIP to address the student's behavior.²³⁴

school student to the ground); David Lohr, *Ixel Perez, Student, Accuses School Resources Officer of Excessive Force by Tackling Her (VIDEO)*, HUFFINGTON POST (Sept. 4, 2014, 12:52 PM), http://www.huffingtonpost.com/2014/09/04/ixel-perez-student-tackled_n_5766324.html [<https://perma.cc/Z8GL-GVPX>]; Candice Naranjo, *VIDEO: Security Guard Fired for Handcuffing, Punching Special Needs Students*, KRON (May 30, 2014, 1:53 PM), <http://kron4.com/2014/05/30/security-guard-fired-for-handcuffing-punching-special-needs-student/> [<https://perma.cc/6B7G-33JV>] (showing video of a school security guard punching a wheelchair-bound high school student); *School Resource Officer Charged with Misdemeanor Assault*, CNN (Oct. 30, 2015), <http://www.cnn.com/videos/us/2015/10/30/oklahoma-school-resource-officer-charged-pkg.kfor> [<https://perma.cc/2H37-PYA6>] (reporting that an Oklahoma SRO who punched a student twice in the face was charged with misdemeanor assault); *Surveillance Video Appears to Show School Resource Officer Hitting Student*, WLKY, <http://www.wlky.com/news/surveillance-video-appears-to-show-school-resource-officer-hitting-student/33338270> [<https://perma.cc/UH3X-N5PF>] (reporting that a Kentucky SRO was charged with assault and official misconduct after two incidents of force against two students, including placing a student into a choke hold, causing the student to lose consciousness); *Video Shows School Resource Officer Attacking Student, Officials Say*, WESH, <http://www.wesh.com/news/video-shows-school-resource-officer-attacking-student-officials-say/36376354> [<https://perma.cc/X6JV-QJDY>] (presenting video of an Orlando-area SRO shoving and throwing a student to the ground while the student's mother stands by); *Video Shows High School Resource Officer in Confrontation with Students*, NBC4 (Dec. 18, 2015, 4:14 PM), <http://nbc4i.com/2015/12/18/video-shows-high-school-resource-officer-in-confrontation-with-students/> [<https://perma.cc/SKY3-44E9>] (reporting that a Nebraska SRO repeatedly punched a student watching a fight).

In addition to those news stories, various lawsuits have been filed across the country alleging the inappropriate use of handcuffs against either particular groups of children or children located in particular schools. See Laura Knittle, *From Crayons to Handcuffs: An Investigation of Elementary School Discipline*, 17 PUB. INT. L. REP. 1, 2 (2011) (describing lawsuits alleging illegal use of handcuffs filed in Washington and Mississippi).

²³² 882 F. Supp. 2d 323 (E.D.N.Y. 2012).

²³³ *Id.* at 329.

²³⁴ *Id.* at 330. The court described the BIP as designed to “target certain behaviors of a student that the District wishes to change, improve or reduce the frequency of and to provide

While on the playground outside of school one day, the student engaged in undesired behavior, which first began when the student threw pebbles and rocks.²³⁵ When told by school employees that he could not throw rocks, the students began to scream, tried to punch one adult, and started to run away.²³⁶ To prevent the child from either running away or hitting anyone, school employees, including school security guards, restrained the child by holding his arms.²³⁷ Yet the student continued to engage in aggressive behavior, including attempting to kick, bite, and head-butt various adults.²³⁸ Efforts by multiple school employees, including the student's special education teacher, to calm the student were unsuccessful.²³⁹ At one point, due to the student's behavior, two school security guards held the student by his wrists for approximately thirty minutes.²⁴⁰

Eventually, an SRO arrived, and after attempting for between five and seven minutes to calm the student, decided to handcuff the boy.²⁴¹ The student was handcuffed on the playground for about five minutes until his mother arrived.²⁴² When the student's mother arrived at school, she spoke to her son in Spanish and the boy calmed down.²⁴³ The mother then asked the SRO to remove the handcuffs, which he did.²⁴⁴ The student was neither arrested nor charged with any criminal offense; he was allowed to leave school with this mother.²⁴⁵

The plaintiffs brought multiple claims against the school district, its employees, the county, and the SRO who had handcuffed the student.²⁴⁶ Among other claims, the plaintiffs alleged that the defendant SRO had violated the student's constitutional rights by improperly seizing him and using excessive force.²⁴⁷ The plaintiffs also alleged that the county police department who had employed the SRO had negligently supervised and trained the SRO with regard to interactions with students with disabilities.²⁴⁸

positive reinforcement.” *Id.*

²³⁵ *Id.* at 331–32.

²³⁶ *Id.* at 333.

²³⁷ *Id.* at 333–34.

²³⁸ *Id.*

²³⁹ *Id.* at 334–35.

²⁴⁰ *Id.* at 335.

²⁴¹ *Id.* at 336.

²⁴² *Id.* at 337.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 340–43 (describing the allegations of Plaintiffs' Second Amended Complaint).

²⁴⁷ *Id.* at 342.

²⁴⁸ *Id.* at 341–42.

The federal district court granted the defendants' motions for summary judgment.²⁴⁹ As to the claims against the SRO based on his action in handcuffing the student, the court noted the plaintiffs' argument that the SRO had acted "in disregard of [the student's] Protocol for Intervention."²⁵⁰ However, the court concluded that the SRO had acted reasonably under the circumstances by handcuffing the student for a limited period of time after the student's "violent attempts to harm school personnel"²⁵¹ and "their inability to control [the student] despite a prolonged effort."²⁵²

The court also found that the county police department that had supervised and trained the SRO was not liable for any alleged failure to train the SRO with regard to special education students, although the court did not address that argument in any detail.²⁵³ Rather, the court granted the county's motion for summary judgment based on the court's separate finding that the SRO's conduct had been reasonable and did not amount to an unconstitutional seizure or excessive force.²⁵⁴ The court made this finding even though the SRO had admitted in his deposition that he had not received any training pertinent to students with disabilities.²⁵⁵

The court in *E.C.* did not directly address the plaintiffs' argument that the SRO acted improperly by handcuffing the student rather than following the contents of the student's BIP. However, the court implicitly rejected this argument, as noted in several statements in the opinion. For example, when describing a BIP generally, the court stated that "a BIP does not address whether a student should be restrained in response to various behaviors."²⁵⁶ In that same paragraph describing the purpose of a BIP, the court noted that "[w]hen necessary . . . a student might be restrained to keep the student safe."²⁵⁷ In another part of the opinion, the court noted the SRO's testimony that he had not been supplied with a copy of the student's BIP.²⁵⁸ The

²⁴⁹ *Id.* at 329.

²⁵⁰ *Id.* at 356. Presumably the court's reference to a "Protocol for Intervention" refers to a BIP.

²⁵¹ *Id.*

²⁵² *Id.* The court noted two additional reasons, that the student posed a threat to other students and had attempted to cause injury to himself. In examining plaintiffs' claim that the SRO had violated his Fourth Amendment rights against unreasonable searches and seizures, the court applied the Supreme Court's decision in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), in which the Court ruled that searches conducted by school officials at school are subject to a more relaxed standard than searches conducted by law enforcement agencies in general. *Id.* at 357 (quoting *Shuman ex rel. Shertzer v. Penn Manor Sch. Dist.*, 422 F.3d 141, 148 (3d Cir. 2005)).

²⁵³ *Id.* at 356–57.

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 340. The court also granted summary judgment to the school district and its employees. *Id.* at 344–55 (discussing various claims against the school district and individual district employees).

²⁵⁶ *Id.* at 330.

²⁵⁷ *Id.*

²⁵⁸ *Id.* at 339.

court also noted plaintiffs' argument that the SRO had acted "in disregard of" the student's BIP.²⁵⁹ Yet the court found that the SRO had acted reasonably in handcuffing the student for a "limited amount of time."²⁶⁰

In a more recent decision from another federal district court, the court directly addressed the plaintiffs' allegation that the existence of a BIP prohibited the handcuffing and arrest of the student.²⁶¹ In *J.H. ex rel. J.P. v. Bernalillo County*,²⁶² the student was a child with a disability receiving special education services when, at age eleven, she was handcuffed and arrested by an SRO following an incident at school.²⁶³ The student had been diagnosed as a child with an emotional disturbance and, as a consequence of her disability, she received special education services under IDEA.²⁶⁴ Because the student "exhibited frequent verbal and physical aggression towards fellow students and staff," her IEP team had prepared a BIP for the student.²⁶⁵ The written BIP stated that, when the student exhibited the targeted physically aggressive behavior, the school's "crisis [management] team [would] be called," that "appropriate physical management" would be employed to protect the safety of the student and others, and that the student's mother would be called.²⁶⁶ Importantly, the BIP also explicitly stated that the school "[a]dministration [would] determine if the need for APS Police or other law enforcement [was] necessary."²⁶⁷

In September 2011, the student engaged in physically aggressive behavior. She first threw an object across the classroom, and then punched another student in the head.²⁶⁸ When school employees attempted to intervene, the student tried to hit, bite, and head-butt the adults.²⁶⁹ The student scratched one adult, drawing blood, then broke free and attacked the other student again.²⁷⁰ The special education teacher asked an assistant to call the office for the crisis management team, and the office staff asked the SRO to report to the classroom.²⁷¹

When the SRO arrived in the area, the altercation had moved into the hallway, where two school employees were attempting to restrain the student by each holding one of the student's arms.²⁷² After observing the student kick one of the teachers, the

²⁵⁹ *Id.* at 356.

²⁶⁰ *Id.*

²⁶¹ *J.H. ex rel. J.P. v. Nation*, 61 F. Supp. 3d 1176, 1184 (D.N.M. 2015), *aff'd sub nom. J.H. ex rel. J.P. v. Bernalillo Cty.*, 806 F.3d 1255 (10th Cir. 2015) (granting SRO's motion to dismiss substantive due process claim).

²⁶² 61 F. Supp. 3d 1085 (D.N.M. 2014), *aff'd*, 806 F.3d 1255 (10th Cir. 2015).

²⁶³ *Id.* at 1093.

²⁶⁴ *Id.* at 1094–96.

²⁶⁵ *Id.* at 1096.

²⁶⁶ *Id.* at 1097.

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 1110.

²⁶⁹ *Id.* at 1111.

²⁷⁰ *Id.* at 1111–12.

²⁷¹ *Id.* at 1110.

²⁷² *Id.* at 1112.

SRO verbally directed the student to stop and removed his handcuffs from his duty belt.²⁷³ Upon seeing the SRO, the student immediately stopped her aggressive behavior, ran back into the classroom, and went into a small area within the classroom, where she sat on the floor and locked her hands together to resist being handcuffed.²⁷⁴ The student remained in that position for approximately fifteen minutes until the SRO informed her that she would be placed under arrest and that she should “stand up and do this calmly.”²⁷⁵ The student complied and, according to the court, the SRO then “gently handcuffed” the student behind her back.²⁷⁶ The SRO transported the student to the juvenile detention center where she was charged with battery upon a school employee in violation of New Mexico law.²⁷⁷ The criminal charge was later dismissed by the juvenile court because the child was deemed incompetent to stand trial.²⁷⁸

The student’s mother, on behalf of the student, filed suit against both the school district, its employees, the local law enforcement agency, and the SRO.²⁷⁹ As to the claims against the SRO specifically, the plaintiff alleged that, in handcuffing and arresting the student, the SRO had violated the terms of the student’s BIP.²⁸⁰ Indeed, the plaintiffs’ complaint indicated that the student’s mother had on at least one prior occasion told the SRO that “either restraining her daughter in handcuffs or arresting her daughter would violate her daughter’s BIP.”²⁸¹ The student’s mother had taken the position with school officials and the SRO that “a BIP takes precedence over state law when a student or teacher is assaulted or battered.”²⁸²

In two separate opinions issued in late 2014 and early 2015, the court rejected the plaintiffs’ argument that the existence of the BIP prohibited the SRO from handcuffing or arresting the student.²⁸³ In November 2014, the court granted the SRO’s motion for partial summary judgment on a claim of unlawful seizure in violation of the Fourth Amendment.²⁸⁴ The court ruled that the SRO had probable

²⁷³ *Id.* at 1112–13.

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 1115 (internal quotation marks omitted).

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 1118.

²⁷⁸ *Id.* at 1123.

²⁷⁹ *Id.* at 1125.

²⁸⁰ *J.H. ex rel. J.P. v. Nation*, 61 F. Supp. 3d 1176, 1184 (D.N.M. 2015), *aff’d sub nom. J.H. ex rel. J.P. v. Bernalillo Cty.*, 806 F.3d 1255 (10th Cir. 2015).

²⁸¹ *Id.*

²⁸² *Bernalillo Cty.*, 61 F. Supp. 3d at 1117.

²⁸³ *Id.* at 1160; *Nation*, 61 F. Supp. 3d at 1209–10. In addition to the two opinions referenced previously, the court has issued other, very lengthy opinions in the case addressing various claims made against various defendants. *See, e.g., J.H. ex rel. J.P. v. Bernalillo Cty.*, 2014 WL 3421037 (D.N.M. Jul. 8, 2014), *aff’d* 806 F.3d 1255 (10th Cir. 2015) (granting motions for partial summary judgment of the SRO and Bernalillo County); *J.H. ex rel. J.P. v. Nation*, No. 12-0128, 2015 WL 403596 (D.N.M. Jan. 19, 2015) (granting defendants’ motion for partial summary judgment on municipal liability claims).

²⁸⁴ *Bernalillo Cty.*, 61 F. Supp. 3d at 1176.

cause to arrest the student and was justified in handcuffing her because she had attacked both a student and school employee.²⁸⁵

In so holding, the court rejected the argument that the BIP somehow altered the SRO's rights and responsibilities, stating that "the BIP does not change the Fourth Amendment standards that govern [the SRO's] conduct in arresting [the student]."²⁸⁶ The court noted that IDEA is a federal statute that "governs the conduct of state educational officials," not law enforcement officials.²⁸⁷ The court also noted that IDEA specifically authorizes state and local educational agencies to report crimes committed by students with disabilities, and otherwise allows law enforcement officials to "exercis[e] their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability."²⁸⁸ Thus, the court concluded:

In short, the BIP has little or nothing to say about whether [the SRO] violated the Fourth Amendment when he arrested [the student]—or about what he is generally expected to do when he arrives upon a violent event. That analysis depends on objective reasonableness in light of the facts known to him at the time and not on provisions in a BIP created under a statute that expressly preserves law enforcement officers' rights to enforce the law.²⁸⁹

Indeed, the court deemed the mother's position that the BIP took precedence over law enforcement authority to be a "mistaken belief."²⁹⁰

In a subsequent opinion issued in January 2015, the court granted the SRO's motion to dismiss claims that he had violated the student's substantive due process rights under the Fourteenth Amendment, holding that plaintiffs could not simultaneously bring claims under the Fourth and Fourteenth Amendments and, even if they could, the SRO was entitled to qualified immunity.²⁹¹ In that opinion, the court again addressed the plaintiffs' argument that the student's IEP and BIP prohibited the SRO from acting in a manner contrary to the BIP.²⁹² The court rejected the argument that the student's BIP created a "fundamental right" necessary to state a substantive due process claim.²⁹³ The

²⁸⁵ *Id.* at 1159–60. In examining the plaintiffs' Fourth Amendment claims, the court did not apply the Supreme Court's standard for searches of seizures by school officials as articulated in *New Jersey v. T.L.O.*, 429 U.S. 325 (1985), but instead applied the prevailing constitutional and Tenth Circuit law regarding the constitutionality of searches and seizures initiated by law enforcement officials. *Id.* at 1143–53.

²⁸⁶ *Id.* at 1107 n.33.

²⁸⁷ *Id.*

²⁸⁸ *Id.* at 1161–62 (citing 20 U.S.C. § 1415(k)(6)(A) (2012)).

²⁸⁹ *Id.* at 1107 n.33.

²⁹⁰ *Id.* at 1117 (internal quotation marks omitted).

²⁹¹ *J.H. ex rel. J.P. v. Nation*, 61 F. Supp. 3d 1176, 1205–10 (D.N.M. 2015), *aff'd sub nom. J.H. ex rel. J.P. v. Bernalillo Cty.*, 806 F.3d 1255 (10th Cir. 2015).

²⁹² *Id.* at 1209–10.

²⁹³ *Id.* at 1209.

court also noted that IDEA specifically provides that law enforcement agencies may act when a child with a disability commits a crime.²⁹⁴ Finally, the court found that it would be “impractical” to hold that a student’s IEP or BIP limited the conduct of an SRO.²⁹⁵

The court stated:

If a school officer encountered a child committing a crime with whom they were not familiar, that officer would have to ask that child for his or her name, go to the school office, review that child’s records, come back, and then levy the appropriate punishment. In a worst-case scenario, an officer faced with a child whose BIP or IEP prevents that child from being arrested would have to stand idly by as a child attacks another student or teacher in the hopes that the child will eventually get him or herself under control. The Court is unwilling to hold that the Due Process Clause imposes such a dangerous policy.²⁹⁶

Thus, the court held that the student’s BIP did not affect its analysis of the conduct of the SRO.²⁹⁷

In November 2015, the Tenth Circuit Court of Appeals affirmed the district court’s rulings *J.H.*, although without addressing plaintiff’s argument that the existence of a BIP somehow altered analysis of plaintiff’s claims.²⁹⁸ Applying traditional Fourth Amendment jurisprudence, the Tenth Circuit found that the SRO had probable cause to arrest the student after seeing the student kick a teacher, and that the SRO had not used excessive force by placing the student in handcuffs to transport her to the juvenile detention center.²⁹⁹

These cases are consistent with rulings in other cases where plaintiffs asserted that a student’s constitutional rights had been violated because the SRO had not been informed about a child’s disability,³⁰⁰ or where plaintiffs asserted that local law enforcement officials, not SROs, violated a special education student’s rights by handcuffing the student after he engaged in unspecified behavior.³⁰¹

²⁹⁴ *Id.* at 1210 (citing 20 U.S.C. § 1415(k)(6)(A) (2012))

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ *J.H. ex rel. J.P. v. Bernalillo Cty.*, 806 F.3d 1255, 1262 (10th Cir. 2015).

²⁹⁹ *Id.* at 1258.

³⁰⁰ *Chigano v. City of Knoxville*, 529 F.Appx. 753, 758 (6th Cir. 2013) (holding that school officials were not required to inform city police officers that student had autism); *see also J.G. ex rel. Koss v. Lingle*, No. 13-cf-414-slc, 2014 WL 4273269, at *1–3 (W.D. Wis. Aug. 28, 2014) (describing how because an SRO is not responsible to implement the contents of a child’s IEP, information about the student’s IEP was provided for background purposes only; the court denied a defendant SRO’s motion for summary judgment on excessive force claim, finding disputed issues of material fact as to whether the officer had used reasonable force in restraining a special education high school student).

³⁰¹ *See e.g., Thomas v. City of New Orleans*, 883 F. Supp. 2d 669, 688–89 (E.D. La. 2012) (describing how a student was held down and handcuffed by responding police

B. Other Recent Cases Reveal a Disturbing Trend About the Interactions Between SROs and Students with Disabilities

1. Disproportionate Responses to Minor Misbehavior of High-School-Age Students

Two recent cases involving interactions between SROs and high school students with disabilities demonstrate facts under which the SRO's conduct was out of proportion to the student's behavior. In *Avery v. City of Hoover*,³⁰² the plaintiff was a high school student who had been diagnosed with dyslexia, asthma, Type II Diabetes, and sleep apnea.³⁰³ The student's IEP called for instructional support, including access to books on tape and a computer.³⁰⁴ In May 2011, the student was sent to in-school suspension (ISS) for allegedly skipping class.³⁰⁵ While in ISS, she was told to read a book, but neither a book on tape nor access to a computer was provided to her.³⁰⁶ According to the allegations of plaintiff's amended complaint, after the student fell asleep due to her medical condition, the ISS supervisor struck the student's cubicle with his hand, causing the cubicle to hit the student in the head.³⁰⁷ When she again fell asleep, the ISS supervisor screamed and slammed a book on the student's desk, causing the book to bounce up and hit the student in the chest.³⁰⁸ The student then became hysterical and was told to go to the principal's office.³⁰⁹

As the student walked toward the principal's office, she began to call her mother on her cell phone.³¹⁰ An SRO saw the student in the hallway and approached her from behind, then inexplicably slapped the student's backpack.³¹¹ When the student said "leave me alone," the SRO shoved the student "face first into a file cabinet and handcuffed her."³¹² On the way to the police station, the student vomited in the police car and sustained injuries to her arm and wrist.³¹³

officers).

³⁰² No. 2:13-CV-00826-MHH, 2015 WL 4411765 (N.D. Ala. July 17, 2015).

³⁰³ *Id.* at *1.

³⁰⁴ *Id.* at *2.

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.* at *2.

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.* (quoting the complaint's allegations).

³¹³ *Id.*

The student filed a lawsuit against the school district, the school employees, the local law enforcement agency, and the SRO alleging a variety of claims, including a claim for excessive force in violation of the Fourth Amendment.³¹⁴

In July 2015, the court denied the SRO's motion to dismiss the claims against him.³¹⁵ The court viewed the complaint's allegations in the light most favorable to the plaintiff and stated that, on the basis of the allegations, "[n]o reasonable officer in [the SRO's] shoes would have thought the level of force [the SRO] used was necessary to subdue an upset high school student walking down a school hallway and talking on the phone, even if the student's conduct was 'disorderly.'"³¹⁶

The court also refused to dismiss plaintiff's claims against the local municipality based on allegations that its law enforcement agency had inadequately trained SROs.³¹⁷ The court held that the student had sufficiently alleged that the school officials had a policy of using police officers to "respond to instances of behavioral disruptions of disabled children" without providing sufficient training to those officers.³¹⁸ The plaintiff had alleged that, while teachers receive extensive training on students' IEPs, SROs are unfamiliar with students' IEPs, even as those officers are "encourage[d] and allow[ed]"³¹⁹ to intervene into "behavioral issues"³²⁰ of students with disabilities.³²¹ The court thus concluded that the plaintiff could proceed on her claim that the defendant municipality had "fail[ed] to provide adequate training to officers who interact with students with IEPs."³²²

In the second case involving a high school student, *Thomas v. Barze*,³²³ the student was a nineteen-year-old boy in a special education program for students with behavioral needs.³²⁴ While in the cafeteria at lunch one day, the student and some friends apparently "mutter[ed] comments at [two SROs]"³²⁵ who were standing close by; although the exact content of their comments was disputed, a video of the cafeteria during lunch revealed no fighting or other disturbances.³²⁶ After lunch, the two SROs asked to meet with the plaintiff and another student, each separately, in a

³¹⁴ *Id.* at *2–3.

³¹⁵ *Id.* at *4. In denying the SRO's motion to dismiss, the court applied Supreme Court Fourth Amendment precedent governing the conduct of law enforcement officials generally. *Id.* at *3–4 (quoting *Graham v. Connor*, 490 U.S. 386, 396 (1989)).

³¹⁶ *Id.* at *5.

³¹⁷ *Id.*

³¹⁸ *Id.* (quoting the complaint's allegations).

³¹⁹ *Id.* (quoting the complaint's allegations).

³²⁰ *Id.* (quoting the complaint's allegations).

³²¹ *Id.* (providing that the City did "not familiarize school resource officers with students' IEPs. Consequently, those officers are unfamiliar with the needs of students who have IEPs.").

³²² *Id.*

³²³ 57 F. Supp. 3d 1040 (D. Minn. 2014).

³²⁴ *Id.* at 1045.

³²⁵ *Id.* at 1046.

³²⁶ *Id.* at 1046–48, 1054.

private office with the door closed.³²⁷ Although there were varying accounts of what exactly happened in the office,³²⁸ the parties agree that this private meeting escalated into a situation where one SRO placed the student in a choke hold, causing the student to lose consciousness for a short period of time.³²⁹ After the student regained consciousness, he was allowed to leave school.³³⁰ When seen by his physician a short time later, the student had pin-point red dots on his face and neck known as petechiae that, in the opinion of his doctor, were injuries consistent with strangulation.³³¹

The student sued both SROs and their employer, the local municipality, for unreasonable seizure, false arrest, and excessive force.³³² At the close of discovery, the defendants filed motions for summary judgment, which the court denied.³³³ The court concluded that disputed issues existed as to: (1) whether the student had been seized within the meaning of the Fourth Amendment; and (2) whether the SRO who had been present, but had not applied the chokehold, nonetheless could be liable on an excessive force claim for failing to intervene to stop the other officer's use of excessive force.³³⁴ The court reasoned that, when the seizure of a student is entirely directed by SROs rather than by school officials, students are entitled to traditional Fourth Amendment protections instead of the more relaxed "reasonable suspicion" standards for school personnel.³³⁵ Thus, the court denied the defendants' motion for summary judgment.³³⁶

The facts of these two cases are quite similar to the recently publicized video of a South Carolina SRO's treatment of a female high school student who refused to leave her seat.³³⁷ In each case, the SROs appear to have greatly overreacted to relatively minor misbehavior of the students at issue.

³²⁷ *Id.* at 1046.

³²⁸ *Id.* at 1049–51 (according to one witness, the meeting was a "mentoring turned negative," and there was also testimony that the student refused to stand up and consent to a search).

³²⁹ *Id.* at 1044.

³³⁰ *Id.* at 1049–50.

³³¹ *Id.* at 1053.

³³² *Id.* at 1044. The student also had alleged a claim under *Monell v. Dep't of Soc. Serv.*, 436 U.S. 658 (1978), but, at the summary judgment stage, he voluntarily dismissed that claim. *Id.* at 1056.

³³³ *Id.* at 1057. The one claim as to which the defendants did not seek summary judgment was the excessive force claim against the SRO who had placed the student in a choke hold. *Id.* at 1044.

³³⁴ *Id.* at 1073–74.

³³⁵ *Id.* at 1065–68. The court thus declined to examine the SRO's conduct under the more relaxed standard of *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

³³⁶ *Id.* at 1071.

³³⁷ Ford et al., *supra* note 1.

2. Handcuffing Young Students with Disabilities

Two additional cases demonstrate the most troubling circumstances involving interactions between SROs and much younger children whose disabilities cause them to engage in undesired behavior. Although there are few reported judicial decisions, news stories about handcuffing of very young children, including students with disabilities, are plentiful.³³⁸

In *Hoskins v. Cumberland County Board of Education*,³³⁹ for example, the parents of an eight-year-old second-grade student filed suit after the school's SRO handcuffed the child for forty-five minutes in a school principal's office.³⁴⁰ While in kindergarten, the student had demonstrated symptoms of severe separation anxiety,³⁴¹ and, during first grade, the student's primary care physician diagnosed

³³⁸ See, e.g., Sasha Armstrong, *Officer Loses Key After Handcuffing Seven-Year-Old Student*, NEWSFIX (Nov. 3, 2015), <http://cw39.com/2015/11/03/officer-loses-key-after-handcuffing-seven-year-old-student/> [<https://perma.cc/77W3-39JP>] (discussing a 7-year-old in Michigan who was handcuffed by SRO until mother arrived at school); Associated Press, *7-Year-Old Handcuffed After Easter Egg Tantrum*, THEGRIO (Apr. 22, 2011, 1:21 PM), <http://thegrio.com/2011/04/22/7-year-old-handcuffed-after-easter-egg-tantrum/> [<https://perma.cc/VA2M-7BKB>] (discussing a 7-year-old child with special needs who was handcuffed after becoming upset about art project); Jessica Bliss, *Kids' Arrest Outrages Murfreesboro Community*, THE TENNESSEAN (Apr. 20, 2016), <http://www.tennessean.com/story/news/2016/04/18/kids-arrest-outrages-murfreesboro-community/83181068/> [<https://perma.cc/3N8X-KJS7>] (describing public outrage over several students who had been arrested for fighting at school); Gaby Fleischman, *Miami Cop Handcuffed 5-Year-Old Boy to Teach Him a "Lesson,"* CBSMIAMI (Sept. 17, 2015), <http://miami.cbslocal.com/2015/09/17/miami-cop-handcuffed-5-year-old-boy-to-teach-him-a-lesson/> [<https://perma.cc/4WRH-265T>] (discussing a 5-year-old in Florida who is handcuffed to "teach him a lesson"); KXLY, *Autistic Child Taken from School in Handcuffs*, YOUTUBE (Jan. 14, 2009), https://www.youtube.com/watch?v=gyE_8XZRgMk (discussing an 8-year-old girl with autism who was handcuffed and charged with battery, with charges later dropped); Suzanne Sirett, *Mom Says Daughter Put in Handcuffs at School*, YOUTUBE (March 18, 2016), <https://www.youtube.com/watch?v=qvRnUsmHgOI> (describing an incident of a six-year-old child being handcuffed at school for disciplinary reasons); Southside Tokyo, *6th Grade Autistic Student Handcuffed*, YOUTUBE (Feb. 1, 2008), <https://www.youtube.com/watch?v=bted32ku-uM> (discussing an 11-year-old who is handcuffed after refusing to leave gym class after inappropriate vocalizations); TheBrandNewWorld, *Eight-Year-Old Special Needs Student HANDCUFFED at School*, YOUTUBE (Mar. 7, 2013), <https://www.youtube.com/watch?v=Hl2thh0HAeI> (discussing an 8-year-old handcuffed, including placed in foot shackles, and placed into custody because she had a temper tantrum at school); UrbanWarfareChannel, *POLICE STATE – Cops Handcuff & Shackle 5 Year Old Special Needs Boy for Throwing a Temper Tantrum*, YOUTUBE (May 6, 2015), https://www.youtube.com/watch?v=GW_MOcx2BvA (focusing on a 5-year-old student with disabilities who was placed in handcuffs and foot shackles).

³³⁹ No. 2:13-cv-15, 2014 WL 7238621 (M.D. Tenn. Dec. 17, 2014).

³⁴⁰ *Id.* at *1.

³⁴¹ *Id.* at *2.

the student as suffering from anxiety.³⁴² In first grade, the student's school district had approved a plan for the student under Section 504 of the Rehabilitation Act of 1973,³⁴³ which provided home instruction to the student.³⁴⁴

The student then returned to the regular education classroom for second grade.³⁴⁵ Although the student did have difficulty separating from his parents, he had no unusual behavioral incidents for several months.³⁴⁶ However, in February 2012, the student apparently threatened to hit his teacher and swung his fist in her direction, an incident to which school officials responded by sending the student to an alternative school for a period of three days.³⁴⁷ While attending the alternative school, the student again made a fist and threatened to hit a teacher, prompting a trip to the principal's office.³⁴⁸ The sequence of events is somewhat unclear, although the parties apparently agreed that both the school principal and the SRO were present while the student was being brought to the principal's office; it is also undisputed that the student was "verbally or physically aggressive" on the way to the principal's office.³⁴⁹

Once in the principal's office, the SRO handcuffed the child.³⁵⁰ The SRO testified that he had intended to arrest the child but, realizing that he knew the student's parents, called them and asked them to come to school.³⁵¹ The student remained in handcuffs for forty-five minutes, apparently the time that it took for the student's parents to arrive at school and speak with the SRO.³⁵² At the end of that conversation, the SRO released the student to his parents.³⁵³

The student's parents then brought suit against several defendants, including the SRO, asserting claims under both state and federal law.³⁵⁴ After discovery, the SRO filed a motion for summary judgment seeking dismissal of plaintiffs' claims that he had violated the student's Fourth Amendment rights to be free from unreasonable searches and seizures.³⁵⁵ The court denied the SRO's motion for summary judgment, finding that the SRO had indeed violated the student's Fourth

³⁴² *Id.*

³⁴³ Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. §794 (2012)).

³⁴⁴ *Hoskins*, 2014 WL 7238621, at *2.

³⁴⁵ *Id.*

³⁴⁶ *See id.* at *3.

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ *Id.*

³⁵⁰ *Id.* at *4.

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ *Id.*

³⁵⁴ *Id.*

³⁵⁵ *Id.* *6 The court applied a "traditional Fourth Amendment analysis" to plaintiffs' claims rather than an analysis under the Supreme Court's decision in *New Jersey v. T.L.O.*, 429 U.S. 325 (1985). *See id.* at *8-10.

Amendment rights.³⁵⁶ The court concluded both that the “initial handcuffing”³⁵⁷ of the student was not objectively reasonable, and that the act of “leaving the child handcuffed for forty-five minutes was even less reasonable.”³⁵⁸

One reason that the SRO’s conduct was unreasonable was that the student’s conduct at most constituted a minor misdemeanor under Tennessee law.³⁵⁹ In that regard, the court stated:

Even in our society where the criminalization of children is lamentably becoming increasingly common, it remains relatively uncommon for law enforcement officers to arrest a child as young as [this student] at all, much less for this type of conduct. That is to say, not only was [the student’s] conduct not a “severe” crime, but also, given his extremely young age, arguably should not be treated as a crime at all. Although the Court has been unable to identify any limitation on the age of child that can be detained and arrested under Tennessee law, simple common sense dictates that it is not reasonable or appropriate to bring criminal charges against young children for relatively minor school misbehavior.³⁶⁰

The court also found that the prolonged duration of the handcuffing was unreasonable.³⁶¹ However, the court did conclude that the SRO was entitled to qualified immunity, primarily because the plaintiffs had failed to satisfy their burden to prove that the SRO was not entitled to qualified immunity.³⁶²

³⁵⁶ *Id.* at *8.

³⁵⁷ *Id.*

³⁵⁸ *Id.*

³⁵⁹ *Id.*

³⁶⁰ *Id.* Here the court cited a separately published concurring opinion written by Judge Carlos F. Lucero of the United States Court of Appeals for the Tenth Circuit in yet another case where a young child was handcuffed and arrested at school. *See Hawker v. Sandy City Corporation*, 774 F.3d 1243, 1245 (10th Cir. 2014) (Lucero, J., concurring). Judge Lucero had concurred in the majority’s ruling that a police officer called to school to investigate theft of an iPad had not acted with excessive force in handcuffing and arresting a nine-year-old. *Id.* at 1243. Judge Lucero noted that the majority’s ruling technically complied with the law, but lamented the growing criminalization of the behavior of young children, noting that the current environment leads to circumstances where “elementary schoolchildren of a tender age need to be manhandled into a criminal law system in which they are treated as if they were hardened criminals and with a lack of finesse.” *Id.* at 1245.

³⁶¹ *Hoskins*, 2014 WL 7238621, at *11.

³⁶² *Id.* at *13. In another section of the opinion, the court notes that the students’ parents, in opposing the defendants’ motions for summary judgment, had not submitted necessary evidence. *Id.* at *5.

In addressing the question of qualified immunity, the court did cite to the Eleventh Circuit’s decision in *Grey ex rel. Alexander v. Bostic*, 458 F.3d 1295 (11th Cir. 2006), where the Eleventh Circuit held that an SRO was not entitled to qualified immunity for handcuffing a nine-year-old fourth grader who, although she had physically threatened her gym teacher,

The final case is the Kenton County Case, in which the SRO was videotaped while handcuffing a third-grade student with the handcuffs placed behind his back, having placed the handcuffs on the student's biceps above the elbows.³⁶³ The Kenton County Case was filed on behalf of two students. The first student, the boy who appeared in the video, has been diagnosed with post-traumatic stress disorder and ADHD and, due to his disabilities, sometime has behavioral issues at school.³⁶⁴ The second student is a nine-year-old girl who has been diagnosed with ADHD and other mental health problems that cause her behavioral difficulties.³⁶⁵ Due to these behavior difficulties, the female student's IEP included strategies for assisting her with her behavior.³⁶⁶

According to the complaint, the defendant SRO handcuffed the male student once in the fall of 2014, and handcuffed the female student twice in that same time period.³⁶⁷

In November 2014, the boy had been sent to the vice principal's office after having "disability-related difficulties complying" with his teacher's directives in the classroom.³⁶⁸ The student had tried to leave the vice principal's office several times, but was restrained by school officials twice for approximately five minutes each time.³⁶⁹ The special education teacher then called the student's mother and, after the student had spoken with her for several minutes, he calmed down.³⁷⁰ The boy then said he needed to use the restroom, and the school personnel sent him to the restroom with the SRO.³⁷¹

was sitting quietly and compliantly when the SRO applied the handcuffs for the stated purpose of showing the student "how it feels to be in jail." *Hoskins*, 2014 WL 7238621, at *12.

³⁶³ *S.R. v. Kenton Cty. Sherriff's Office*, No. 2:15-cv-143, 2015 WL 9462973, at *1 (E.D. Ky. Dec. 28, 2015).

³⁶⁴ *Id.* According to the complaint filed in the Kenton County Case, over one year before the handcuffing incident, school officials had agreed that the student required a BIP to help him manage his disability-related behaviors. *See Kenton County Complaint*, *supra* note 4, at ¶ 24.

³⁶⁵ *S.R.*, 2015 WL 9462973, at *1.

³⁶⁶ *Id.* It is possible that the behavioral strategies in her IEP were a BIP, but the opinion does not use that terminology. Also, it is not clear when the student first received an IEP, as the complaint in the case alleges that, approximately one year prior to the handcuffing incidents, she had a Section 504 plan. *See Kenton County Complaint*, *supra* note 4, at ¶ 41.

³⁶⁷ *S.R.*, 2015 WL 9462973, at *1–2.

³⁶⁸ *Id.* at *1.

³⁶⁹ *Id.*

³⁷⁰ *Id.*

³⁷¹ *Id.*

When the SRO and the boy returned to the vice principal's office, the boy failed to follow the SRO's directive to sit down.³⁷² The SRO then handcuffed the boy.³⁷³ In the video, the child, who remained handcuffed in that position for approximately fifteen minutes, can be heard saying, "Oh, God. Ow, that hurts."³⁷⁴ The SRO can be heard saying, "If you want the handcuffs off, you're going to have to behave and ask me nicely."³⁷⁵

At the time the video was made, the student was eight years old, weighed fifty-two pounds, and stood three and a half feet tall.³⁷⁶ Perhaps most surprising, the video was made by school officials and it appears from the video footage that several adults were in the room while the video was being shot.³⁷⁷

The SRO apparently removed the handcuffs after approximately fifteen minutes.³⁷⁸ When the boy's mother arrived at school, the SRO told her that her son would be handcuffed again if he did not behave.³⁷⁹

As to the female fourth-grade student, the handcuffing incidents as alleged are even more disturbing. In October 2014, the student was sent first to a "suspension" room and then to an "isolation room" after not following her teacher's directives.³⁸⁰ She was restrained by the principal and vice principal when she attempted to leave the isolation room.³⁸¹ The school staff then contacted the SRO, who entered the isolation room and handcuffed the student behind the back by placing the handcuffs around her biceps and above her elbows.³⁸² The girl remained handcuffed for twenty minutes, during which time she experienced a "severe mental health crisis," requiring that she be transported by ambulance from school to the hospital.³⁸³

Less than a month later, the SRO once again handcuffed the girl.³⁸⁴ The school principal had directed the student to go to the cafeteria, and she walked in that direction, but did not enter.³⁸⁵ The SRO then approached the student and instructed

³⁷² *Id.* According to the complaint's allegations, in an Investigation Report written months after the incident, the SRO stated that the boy had attempted to strike him with an elbow, but that the SRO blocked the child's elbow. *See* Kenton County Complaint, *supra* note 4, at ¶ 30.

³⁷³ Kenton County Complaint, *supra* note 4, at ¶¶ 30–31.

³⁷⁴ Kenton County Video, *supra* note 4.

³⁷⁵ Kenton County Complaint, *supra* note 4, at ¶ 34. Just before the video ends, a school official can be heard saying, "Stop the video." *Id.* at ¶ 35.

³⁷⁶ *Id.* at ¶ 21.

³⁷⁷ *See* Kenton County Video, *supra* note 4.

³⁷⁸ Kenton County Complaint, *supra* note 4, at ¶ 31.

³⁷⁹ *Id.* at ¶ 36.

³⁸⁰ *Id.* at ¶ 43.

³⁸¹ *Id.*

³⁸² *Id.* at ¶ 44.

³⁸³ *Id.* at ¶ 45 (discussing that it was the SRO himself who called the medical crisis team after the student experienced her mental health crisis).

³⁸⁴ *S.R. v. Kenton Cty. Sheriff's Office*, No. 2:15-cv-143, 2015 WL 9462973, at *2 (E.D. Ky. Dec. 28, 2015).

³⁸⁵ *Id.*

her to enter the cafeteria, but the girl panicked and ran away.³⁸⁶ After the SRO and principal restrained the student for some period of time, the SRO again handcuffed her behind her back as before.³⁸⁷ She remained handcuffed and kneeling on the floor for thirty minutes until her mother arrived.³⁸⁸ When her mother arrived, she witnessed the SRO holding the student's hands "over her head in a shoulder 'hyperextension' position."³⁸⁹ At the time of these incidents, the student was nine years old and weighed about fifty-six pounds.³⁹⁰

The plaintiffs in the Kenton County Case alleged two causes of actions. First, plaintiffs alleged that both the SRO and his employer violated the students' Fourth and Fourteenth Amendment rights by subjecting them to unreasonable seizures and excessive force.³⁹¹ Plaintiffs also alleged that the SRO's employer has violated the Americans with Disabilities Act (ADA).³⁹²

The defendant SRO and Sheriff's Office filed motions to dismiss the complaint.³⁹³ In October 2015, the DOJ filed a statement of interest on behalf of the United States in which the DOJ urged the court to deny the defendants' motion to dismiss the complaint.³⁹⁴ The DOJ contended that, under the facts as alleged and demonstrated by the video of the handcuffing of one student, the SRO had violated the students' Fourth Amendment rights and that the plaintiffs should be able to proceed on a theory that the Sheriff's Office violated the ADA by instituting a policy or practice that, in effect, discriminated against students with disabilities.³⁹⁵

In December 2015, the court denied the defendants' motion to dismiss the complaint.³⁹⁶ The court found that the plaintiffs had adequately stated a claim for unlawful seizure.³⁹⁷ The court characterized the male student's conduct in the classroom as a "severe temper tantrum" that should not have required handcuffing.³⁹⁸ In addition, plaintiffs had adequately alleged that the SRO was not present during that temper tantrum and had handcuffed the student simply because the child refused to sit down in the vice principal's office.³⁹⁹ The court characterized

³⁸⁶ *Id.*

³⁸⁷ *Id.* The SRO asserted in a written report prepared sometime later that he had handcuffed the female student because she was attempting to injure school staff while being restrained. *Id.*

³⁸⁸ *Id.*

³⁸⁹ *Id.*

³⁹⁰ *Id.* at *1.

³⁹¹ *Id.* at *2–3.

³⁹² *Id.*

³⁹³ *Id.* at *1.

³⁹⁴ See Statement of Interest of the U.S., *S.R. v. Kenton Cty. Sherriff's Office* at 1–2, No. 2:15-cv-00143 (E.D. Ky. Oct. 2, 2015).

³⁹⁵ *Id.*

³⁹⁶ *S.R.*, 2015 WL 9462973, at *8.

³⁹⁷ *Id.* at *4.

³⁹⁸ *Id.*

³⁹⁹ *Id.*

the SRO's conduct as "a disciplinary measure employed to force [the student] to change his behavior" that, under the facts alleged, could constitute a Fourth Amendment violation.⁴⁰⁰ Finally, the court concluded that the SRO was not entitled to qualified immunity because, on the facts alleged, "it is highly questionable whether a reasonable officer would arrest an eight- or nine-year old for relatively minor misconduct at school."⁴⁰¹

The court also refused to dismiss the ADA claim asserted against the local law enforcement agency, holding that plaintiffs had adequately alleged a "practice of handcuffing disabled students [that] impermissib[ly] . . . bypasses less severe measures such as crisis intervention, de-escalation, etc. to address their behavioral problems."⁴⁰² The plaintiffs also had adequately alleged that the law enforcement agency had failed to modify its practices to accommodate students with disabilities, instead "demanding unnecessary compliance without allowing for the nature of the children's disabilities[,] which make such compliance difficult or impossible."⁴⁰³

The court concluded by identifying several issues that would be addressed as the case proceeded through discovery.⁴⁰⁴

1. What is the exact nature of the children's disabilities and what behavior can be expected to result therefrom?
2. In a school setting, what is the appropriate way to deal with children who are acting out because of disabilities?
3. What was the policy of the school district regarding use of SROs interacting with children with disabilities?
4. What training did [the SRO] receive in dealing with such children?
5. Was this training given by the Sheriff's Office or by the school district?
6. Did the officials of the school district or its governing body order or approve of the actions complained of?⁴⁰⁵

If these issues indeed are fully addressed during discovery, the Kenton County Case has the potential to provide valuable insight regarding the interactions between SROs and students with disabilities.⁴⁰⁶

⁴⁰⁰ *Id.* (citing *Gray ex rel. Alexander v. Bostic*, 458 F.3d 1295, 1306 (11th Cir. 2006)).

⁴⁰¹ *Id.* at *6.

⁴⁰² *Id.* at *8.

⁴⁰³ *Id.*

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.*

⁴⁰⁶ The Kenton County case may have influenced the Kentucky Department of Education to scrutinize the use of restraint and seclusion in schools. See Christina Samuels, *Ky. Education Chief to Review Restraint, Seclusion in State's Largest District*, EDUC. WEEK

IV. RECOMMENDATIONS

As the cases and news stories⁴⁰⁷ reveal, there is an urgent need to improve interactions between SROs and all students, particularly students with disabilities who might engage in undesired behavior more frequently. Improvements will require a multi-pronged approach that involves a variety of stakeholders, including school administrators, teachers, SROs, and parents of students with disabilities. The issue is not solely a “problem” with SROs or their current training, although we do make certain recommendations regarding SRO training. Optimal outcomes will occur only when all stakeholders improve their understanding of the behavioral needs of particular students with disabilities and the appropriate division of responsibility between school personnel and SROs.

A. For Students with a History of Aggressive or Self-Injurious Behavior, the SRO May Intervene Even If the Child Has a BIP

As the *E.C.* and *J.H.* cases make clear,⁴⁰⁸ some students with disabilities have a demonstrated history of engaging in undesired behavior, including aggressive behavior that could harm the student or others. Repeated demonstrations of that undesired behavior should lead to the implementation of a BIP as a means to reduce the frequency of the undesired behavior and increase the frequency of appropriate behavior.⁴⁰⁹ While the use of BIPs in school to address undesired behavior is an important tool that should be implemented whenever behavior impedes learning,⁴¹⁰ the existence of the BIP should not limit or constrain the authority of an SRO to act when it is necessary to ensure the safety of the student or others.⁴¹¹

Indeed, under the facts of both the *E.C.* and *J.H.* cases, the conduct of the SROs was reasonable. In the *E.C.* case, the SRO determined that the student, who had been engaged in undesired behavior for an extended period of time, should be handcuffed for his own safety and the safety of others.⁴¹² When the student’s mother arrived at school, after the student had been handcuffed for approximately five minutes, the SRO immediately removed the handcuffs and released the student to his mother.⁴¹³ In the *J.H.* case, the SRO personally observed the student’s aggressive behavior and

(July 22, 2016, 5:40 PM), http://blogs.edweek.org/edweek/speced/2016/07/kentucky_education_chief_investigates_restraint_seclusion.html?utm_source=feedblitz&utm_medium=FeedBlitzRss&utm_campaign=onspecialeducation [https://perma.cc/9MX8-5RZQ] (describing how the decision to send staff to investigate in Louisville district is related to the Kenton County case).

⁴⁰⁷ See *supra* Part III.

⁴⁰⁸ See *supra* Section III.A.

⁴⁰⁹ *E.C. ex rel. R.C. v. Cty. of Suffolk*, 882 F. Supp. 2d 323, 330 (E.D.N.Y. 2012).

⁴¹⁰ Scott & Kamps, *supra* note 21, at 153.

⁴¹¹ *J.H. ex rel. J.P. v. Bernalillo Cty.*, 61 F. Supp. 3d 1085, 1107, n.33 (D.N.M. 2014).

⁴¹² *E.C. ex rel. R.C.*, 882 F. Supp. 2d at 336.

⁴¹³ *Id.* at 337.

determined that an arrest should be made.⁴¹⁴ However, the SRO waited until the student calmed down enough to be placed into handcuffs without incident and then simply transported the student to the juvenile detention center.⁴¹⁵ In neither case does it appear that the SROs' conduct was out of proportion to the students' acts or that the SROs behaved with excessive force in handcuffing the students.

The rulings in *E.C.* and *J.H.* indicate that, even if a student with disabilities has a written BIP that recommends behavioral interventions to address volatile situations or modify the student's behavior, the existence of the BIP will not prohibit an SRO from exercising his law enforcement authority.⁴¹⁶ That position seems reasonable both under the law and as a practical matter. If a student has the capacity to cause harm—capacity as determined by a combination of factors, including the student's age, size, and demonstrated behavior—then the intervention of an SRO in a particular circumstance may be warranted.

Thus, we recommend that, for students with such behavior and a BIP in place, the child's BIP explicitly state that law enforcement may be called if the child engages in undesired behavior that is either physically aggressive or self-injurious. The BIP also should state that law enforcement may determine, given the facts of the situation, that the student should be handcuffed or arrested.⁴¹⁷ This recommendation places the primary onus on school officials who are responsible for developing BIPs to think in advance about the possibility of law enforcement involvement and to include information about possible SRO involvement in the BIP itself.

We recognize that it may be difficult for school officials to present parents with a proposed BIP that includes the possibility of having their child handcuffed or arrested, but those difficult conversations should not be avoided simply because they may be uncomfortable. One option is for school personnel to ensure that, as part of the BIP, parents are called immediately whenever undesired behavior occurs and, if they wish, are given the opportunity to come to school immediately to assist school personnel in handling a particular situation.⁴¹⁸ Indeed, in some instances, an effective de-escalation strategy is the calming presence of a parent.⁴¹⁹

In addition, although the SRO technically has the authority to determine whether to arrest a student in any given situation, when confronted with aggressive behavior that may be caused by a student's disability, the SRO should carefully consider whether arresting the student is appropriate under the circumstances. SROs have a great deal of discretion in determining whether to arrest a student at school, particularly for behavior that would fall into the categories of simple assault or

⁴¹⁴ *J.H. ex rel. J.P.*, 61 F. Supp. 3d at 1112.

⁴¹⁵ *Id.* at 1115.

⁴¹⁶ *Id.* at 1107, n.33.

⁴¹⁷ The student's BIP in the *J.H.* case included a very similar statement. *Id.* at 1097.

⁴¹⁸ *See id.*

⁴¹⁹ *E.C. ex rel. R.C. v. Cty. of Suffolk*, 882 F. Supp. 2d 323, 332 (E.D.N.Y. 2012) (providing that the child became calm after his mother arrived).

disorderly conduct.⁴²⁰ A study of SROs in public schools in the state of Delaware for the 2010–2011 school year confirmed that SROs often do not arrest a student even when confronted with strong evidence that the student has committed a crime.⁴²¹ Rather, many SROs will seek the input of administrators and teachers in certain situations, including guidance about whether to make an arrest.⁴²² Although arrest technically may be an appropriate action, it also could damage the important cooperative relationship between school officials, the SRO, and parents. Such damage to those relationships may be avoided if students are not arrested except in instances where a particularly severe injury has been caused and/or a victim wants to press charges.

Finally, even though the SRO is not constrained by the contents of a student’s BIP, best practices would be for school personnel to implement the BIP as much as possible before seeking the SRO’s intervention, absent any extraordinary circumstances. The student’s teachers and other school personnel have superior knowledge about the student’s disability, the student’s pattern of behavior, the contents of any BIP, the length of time that the BIP has been in place, and other similar factors. School personnel should view the intervention of the SRO as a last resort when all other means to de-escalate the situation have failed. Correspondingly, the SRO must be cognizant that, in a situation involving a student with disabilities, the SRO should follow the lead of the student’s special education teacher or other responsible school personnel in determining when to abandon the recommendations of the BIP in favor of SRO intervention. And, of course, if the BIP proves ineffective to address the student’s behavior, the student’s IEP team should reconvene to discuss modifying the BIP in an effort to reduce the frequency of the undesired behavior.

B. SROs Are Not Intervention Specialists or Behavior Analysts

The facts of some cases give the impression that some stakeholders believe that SROs should assist teachers and school officials in meting out punishment or changing behavior of students. In both *Hoskins* and the Kenton County Case, for example, the SROs handcuffed young children with disabilities for extended periods of time, yet never arrested them or otherwise took any law enforcement action.⁴²³ Seemingly, their conduct in handcuffing these children was simply to inflict punishment or, in the words of the SRO shown on the Kenton County video, to cause children to “behave nicely.”⁴²⁴ It strains credulity to think that school officials were unaware of the SROs’ conduct in these two elementary schools. Indeed, as seen in the Kenton County Video, there were several school personnel present when the

⁴²⁰ Wolf, *supra* note 50, at 146–47.

⁴²¹ *Id.* at 144–45.

⁴²² *Id.* at 147.

⁴²³ See *supra* Section III.B.2.

⁴²⁴ See Kenton County Video, *supra* note 4.

SRO handcuffed the male student.⁴²⁵ Although there is no video of the other handcuffing incidents described in the Kenton County Case, it is difficult to believe that a fourth-grade girl remained handcuffed and kneeling on the floor of the school cafeteria for thirty minutes during the school day without the knowledge of school personnel.⁴²⁶

We therefore recommend that all adults working in the school environment—school administrators, teachers, and SROs—have a clear understanding that the SRO’s duties do not include implementing school discipline, dealing with “difficult” students, meting out punishment or otherwise using his or her law enforcement authority to change students’ behavior. The SRO is not a behavior analyst or an intervention specialist. It is not the SRO’s job to make students “behave nicely.”⁴²⁷

It is possible that some school personnel prefer to have the SRO handle a more difficult situation for a variety of reasons, one of which may be a desire to avoid the necessity of following state-specific procedures for the use of restraint or seclusion. Indeed, state statutes and regulations are inconsistent in applying restraint and seclusion procedures to SROs.⁴²⁸ Another reason simply may be the belief that the intimidating presence of an SRO somehow will bring about a change in a student’s behavior.⁴²⁹ However, these reasons are not sufficient to have school personnel rely on an SRO’s use of law enforcement authority in the hope that, as a result of the SRO’s actions, a student with a disability will change his or her behavior.

⁴²⁵ *Id.*; see also Kenton County Complaint, *supra* note 4, at ¶ 27.

⁴²⁶ Kenton County Complaint, *supra* note 4, at ¶ 50.

⁴²⁷ Kenton County Video, *supra* note 4.

⁴²⁸ See, e.g., ARIZ. REV. STAT. ANN. § 15-105(E) (West 2016) (providing that a school resource officer may respond to situations involving imminent bodily harm according to protocols established by the law enforcement agency); 19 TEX. ADMIN. CODE § 89.1053(l) (2016) (describing provisions regarding restraint and time-out apply to SROs); VT. STAT. ANN. tit. 16, § 1667(a) (West 2016) (noting that the State Board of Education may not regulate the use of restraint or seclusion by school resource officers).

⁴²⁹ See Gray *ex rel.* Alexander v. Bostic, 485 F.3d 1295, 1301 (describing how the SRO handcuffed the nine-year-old girl, telling her “this is how it feels when you break the law” and “this is how it feels to be in jail”).

Indeed, the Department of Education's August 2016 "Dear Colleague Letter" emphasizes that a student's IEP team must consider behavioral interventions and supports whenever a student's behavior impedes learning.⁴³⁰ This obligation extends to behavior that includes "[i]ncidents of child misbehavior and classroom disruptions."⁴³¹ Thus, when a student experiences "disability-related difficulties complying with directives from [a] teacher,"⁴³² as did the male plaintiff in the Kenton County Case, school personnel should convene the student's IEP team to consider behavioral supports in the classroom, not permit an SRO to handcuff the student and lecture him about good behavior.

A written MOU should clearly outline the appropriate division of responsibility between school discipline and behavior interventions, to be conducted by school personnel, and law enforcement activities, to be conducted by SROs. The MOU must make clear that school discipline or behavior modification is not part of the SRO's responsibilities. Importantly, the MOU must be a "living document" that the parties use to govern the everyday activities at school, not a pro forma document that gets filed away and forgotten.⁴³³ Indeed, an August 2015 report authored by the National Association of State Boards of Education noted that best practice is to have a clear definition of the respective roles of the SRO and other school personnel such that the SRO acts in matters that affect school safety, not ordinary school discipline.⁴³⁴

In addition to documenting the appropriate division of responsibility, it may be helpful for SROs to be better informed about the behavioral needs of students with disabilities. SROs need to receive training about behavioral issues of students with disabilities and the special legal protections they are afforded. SROs should recognize that students with disabilities often engage in undesirable behavior not because they are "bad kids," but simply because they have behavioral challenges *due to* their disabilities. Thus, we recommend that SROs be trained with regard to the behavioral issues of students with disabilities, including information about the use of behavioral interventions, including BIPs, to address undesired behavior.

This training need not be so in depth that the SRO becomes an expert in behavioral interventions, FBAs, or BIPs. Rather, the SROs essentially need to know that school personnel can examine behavior of students with disabilities and devise a written plan to modify the behavior. SROs should receive enough training to be aware that they need to defer to educators about the individual needs of students with disabilities.

⁴³⁰ Swenson & Ryder, *supra* note 199, at 14.

⁴³¹ *Id.* at 4.

⁴³² S.R. v. Kenton Cty. Sherriff's Office, No. 2:15-cv-143, 2015 WL 9462973, at *1 (E.D. Ky. Dec. 28, 2015).

⁴³³ See Thureau & Wald, *supra* note 110, at 991.

⁴³⁴ See Gretta Colombi & David Osher, *Advancing School Discipline Reform*, EDUC. LEADERS REP. 10, http://www.nasbe.org/wp-content/uploads/ELR_Advancing-School-Discipline-Reform.pdf [<https://perma.cc/82W4-D75D>].

We do not recommend that SROs be required to read or review students' BIPs. First, the task of developing detailed and highly structured behavioral interventions to decrease the frequency of undesired behavior and increase the frequency of desired behavior is not within the SROs' "wheelhouse." Second, privacy concerns could make it unwieldy to include SROs in the process of developing BIPs.⁴³⁵ We also do not recommend that SROs become involved in implementing BIPs. Given funding constraints and the availability of other school personnel with specific education and expertise regarding the behavioral needs of students with disabilities, there simply is no need to involve SROs in that process. Rather, the focus should be on a clear understanding of the division of responsibility between school personnel and SROs in those situations where a student with disabilities exhibits undesired behavior.

That said, school personnel should notify SROs if a particular situation involves a student with disabilities whenever it is possible to do so. It is not fair either to the SRO or to the student if the SRO is unaware of special behavioral challenges that the child may be facing at the time of the incident. Again, the SRO does not need in depth or detailed information to understand that the student may be experiencing behavioral challenges and that school personnel are implementing a behavior plan.

V. CONCLUSION

The expansion of police involvement at schools has had serious implications for students with disabilities. By enacting IDEA, Congress recognized that these students deserve special protections and entitlements. In the most recent amendments to this federal law, Congress included important guidelines regarding functional behavioral assessments (FBAs) and behavior intervention plans (BIPs) to outline how school personnel must respond to undesired behavior of students with disabilities. Recognizing the special behavioral needs of students with disabilities is one way to reduce the current reality where students with disabilities are suspended, expelled, restrained, and secluded at much higher rates than their peers.

Although SROs can play a valuable role in the school environment, SROs also must recognize the unique needs and legal protections of students with disabilities. The existing case law reveals two important points. First, SROs can act reasonably towards students with disabilities where safety concerns exist. Second, SROs also can overreact and respond in punitive ways when responding to behavioral incidents involving students with disabilities. Of concern, a few of these recent cases have involved SROs mistreating young children with disabilities.

⁴³⁵ Lynn M. Daggett, *Book 'em?: Navigating Student Privacy, Disability, and Civil Rights and School Safety in the Context of School-Police Cooperation*, 45 URB. LAW. 203, 233 (2013) (discussing privacy concerns in sharing information with SROs and the uncertain legal landscape); *J.H. ex rel. J.P. v. Bernalillo County*, 806 F.3d 1255, 1261 (10th Cir. 2015) (noting privacy concerns that prevent school employees from disclosing information about a student's disability to an SRO).

These cases reveal the need for a comprehensive training program for SROs, clear delineation of the scope of—and limitations on—the SROs' duties, and strict adherence by both school personnel and the SROs to their respective roles. Ultimately, we hope that this article will increase the awareness of this significant issue and result in a multi-prong approach that involves a variety of stakeholders, including school administrators, teachers, SROs, and parents of students with disabilities.