NOTE
WHO PROTECTS WHOM: FEDERAL LAW AS A FLOOR, NOT A CEILING, TO PROTECT STUDENTS FROM INAPPROPRIATE USE OF FORCE BY SCHOOL RESOURCE OFFICERS

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INTRODUCTION

Over the past forty years, students in the U.S. have experienced increasingly strict school discipline policies and increased police presence in schools. The proportion of U.S. schools patrolled by police increased from about 1 percent in 1975 to nearly 50 percent in 2017.[1] Legislators and policy makers have sent police, often called "school resource officers" (SROs), into schools to improve security in the wake of mass shootings. But research has repeatedly shown that this policy has not produced the desired effect: There is limited evidence that such programs increase school safety,[2] and the regular presence of law

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1. AM. C.L. UNION, *Cops and No Counselors: How the Lack of School Mental Health Staff Is Harming Students* 4, 8 (2019), https://www.aclu.org/sites/default/files/field_document/030419-acluschooldisciplinereport.pdf [hereinafter *Cops and No Counselors*].

2. *See* John Woodrow Cox & Steven Rich, *Scarred by School Shootings: More Than 187,000 Students Have Been Exposed to Gun Violence at School Since Columbine*, WASH. POST (Mar. 25, 2018), https://www.washingtonpost.com/graphics/2018/local/us-school-shootings-history/ (describing a study finding that, between 1999 and 2018, out of 197 gunfire incidents at school, there was one instance where a school resource officer stopped an active shooter by returning fire); Denise C. Gottfredson et al., *Effects of School Resource Officers on School Crime and Responses to School Crim*e, 19 CRIMINOLOGY PUB. POL'Y 905, 931 (2020) (finding that there is no empirical support for the popular belief that deployment of SROs "will prevent mass shootings from occurring"). *See also* CONG. RES. SERV. R45251, SCHOOL RESOURCE OFFICERS:

enforcement in schools negatively impacts students in a myriad of ways,[3] including by causing physical and emotional harm and worse educational outcomes (e.g., contributing to the "school-to-prison pipeline").[4] These injuries are borne disproportionately by students of color and disabled students.[5]

Proponents of SROs often emphasize SROs' additional roles as counselors, educators, and mentors. As the Executive Director of the National Association of School Resource Officers explained, "[w]ell-trained school resource officers operate more like counselors and educators, . . . working with students to defuse peer conflict and address issues such as drug and alcohol use."[6] In response to calls to reallocate SRO funding to programs that support students' mental, social, and emotional well-being, one police department emphasized that SROs serve as "an ear that will listen, a coach, a mentor, an educator, a trusted adult, a counselor, a service provider, a facilitator of resources. . . . The

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ISSUES FOR CONGRESS 1, 6–12 (2018), https://www.everycrsreport.com/files/20180705_R45251_db5492370a04c7e3b39f27ce52416d229a0ac17d.pdf (summarizing data from various studies on the efficacy and impact of SROs).

3. *See*, *e.g.*, Emily K. Weisburst, *Patrolling Public Schools: The Impact of Funding for School Police on Student Discipline and Long-Term Education Outcomes*, 38 J. POL'Y ANALYSIS & MGMT. 338, 362 (2019) ("On the whole, the results suggest that SROs have the potential to negatively affect students, through both increasing student discipline involvement and reducing student educational attainment.").

4. *See*, *e.g.*, Jennifer Counts et al., *School Resource Officers in Public Schools: A National Review*, 41 EDUC. & TREATMENT CHILD. 405, 426 (2018) (citation omitted) ("Greater numbers of school arrests for school behavior/conduct violations, rather than criminal activity, have exposed students to adjudication through the school-to-prison pipeline."); Gottfredson et al., *supra* note 2, at 909 (describing studies "support[ing] the conclusion that SROs, by increasing exclusionary responses to school discipline incidents, increase the criminalization of school discipline and in so doing contribute to a 'school to prison pipeline,' which disproportionately affects minority youth and students with disabilities and increases the likelihood that minority youth will end up in prison").

5. *See* Counts et al., *supra* note 4, at 426 (citation omitted) ("Particularly impacted by these practices are at-risk groups who are already disproportionately affected in exclusionary discipline (e.g. special education and minority students)."). There is disagreement over using "person-first" language, i.e., a person with a disability, or "identity-first" language, i.e., a disabled person. This note will primarily use identity-first language because it is the language that many disabled people prefer. *See, e.g.*, Emily Ladau, *Why Person-First Language Doesn't Always Put the Person First*, THINK INCLUSIVE (July 20, 2015) https://www.thinkinclusive.us/why-person-first-language-doesnt-always-put-the-person-first/ (describing the debate, its origins, and conventions around usage). In some instances, this note will alternate or use person-first language when, for example, that is the language used in a statute. In addition, a precise definition of disability is not needed for this note. However, the Note's use of the term will mostly align with statutory definitions of disability that are relevant in school settings.

6. Dana Goldstein, *Do Police Officers Make Schools Safer or More Dangerous?*, N.Y. TIMES (June 12, 2020), https://www.nytimes.com/2020/06/12/us/schools-police-resource-officers.html (quoted language from article paraphrasing original statement of the Executive Director of the National Association of School Resource Officers).

law enforcement aspect of being an SRO is very minimal."[7]

Ultimately, though, even if SROs assume the role of counselor and educator, they retain the immense power and privileges of sworn law enforcement officers. They are exempt from many restrictions that apply to teachers, school administrators, and counselors, but are equipped with handcuffs, tasers, and other methods of control. Meanwhile, most schools in the U.S. have far fewer school counselors, social workers, nurses, and psychologists than recommended,[8] and millions of students are educated in schools with police present but no counselor, nurse, psychologist, or social worker.[9] "Conflating the law enforcement purpose of school police with 'educators', 'counselors' and 'social workers' is both misleading and dangerous," in part because it "justifies the under-investment in funding, hiring and training of social and emotional supports for students to fulfill these roles."[10]

Despite years of work by advocates to prevent the physical, emotional, and social injuries caused by SROs, these harms continue to occur. And aside from the most extreme situations, the Constitution and federal law are inadequate both for preventing SROs from using inappropriate force and for providing relief when harm has already occurred. In any event, claims against SROs rely heavily on federal law.[11] While there is extensive research and legal scholarship about SROs and related issues, there is minimal legal scholarship on areas where state constitutions and state law may offer additional mechanisms for advocates working to protect students with disabilities

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7. Jimmy Bentley, *Ban Police Officers from MA Schools: Teachers Union*, PATCH (Jun 22, 2020), https://patch.com/massachusetts/barnstable-hyannis/ma-teachers-association-calls-end-police-presence-schools (reporting on statement saying, "Districts must change how they meet the emotional health and safety needs of students and identify and obtain the necessary resources to keep students, educators and communities safe").

8. *Cops and No Counselors*, *supra* note 1, at 4–5 (explaining that 90% of public schools fail to meet professional recommendations).

9. *Id.* at 4 ("14 million students are in schools with police but no counselor, nurse, psychologist, or social worker. 1.7 million students are in schools with police but no counselors; 3 million students are in schools with police but no nurses; 6 million students are in schools with police but no school psychologists; and 10 million students are in schools with police but no social workers.").

10. *Fail: School Policing in Massachusetts,* CITIZENS FOR JUV. JUST. & STRATEGIES FOR YOUTH 17 (2020), https://static1.squarespace.com/static/58ea378e414fb5fae5ba06c7/t/5f64b57d40e1a14ef6c1c468/1600435601167/SchoolSafetyPolicyReport.pdf [hereinafter *School Policing in Mass. Report*].

11. *See* Perry A. Zirkel, *An Empirical Analysis of Recent Case Law Arising from the Use of School Resource Officers*, 48 J.L. & EDUC. 305, 317 (2019) (finding that approximately 70% of student-specific claim rulings in SRO-related cases were based on federal constitutional or legislative claims).

from inappropriate actions by SROs.[12]

States often have the authority and latitude to impose more robust protections,[13] especially in the arenas of education and law enforcement, which are traditionally areas of state and local control.[14] Yet state constitutional provisions, laws, and regulations—and courts' interpretations of those requirements—tend to mirror federal analogs in a phenomenon called "lockstepping" or "judicial federalism."[15] This Note examines whether there are state law mechanisms that are more protective of disabled students than federal laws, and whether such laws provide an additional avenue either for relief after harm has occurred or to prevent such harms altogether. However, even where state provisions may provide relief, broader harm prevention will require comprehensive federal and state policy reform. States and localities can—and should—implement reforms and treat federal law as a floor rather than as a ceiling, and state courts should avoid reflexive lockstepping when interpreting state provisions.

This Note begins by describing the role of SROs and presenting research on their efficacy and impact. Part II describes litigation trends, limits on SRO actions under federal law, and the potential for broader use of state law for curtailing inappropriate SRO conduct. Part III canvasses SRO, school discipline, and disability discrimination laws in Massachusetts and analyzes potential claims under select provisions in comparison to federal law to provide a roadmap for such legal analysis. Part IV draws on perspectives from advocates at non-profit litigation and policy organizations to describe key areas for reform and conclusions regarding potential legal strategies that may be available

12. Prior research and scholarship have examined, among many other topics, the types of federal claims available to students after incidents with SROs and the impacts of SROs and zero-tolerance discipline on educational and other outcomes. Many organizations have also prepared compendiums of state laws and requirements related to use of corporal punishment, restraint and seclusion, and SRO training requirements.

13. *See, e.g.*, Goodwin Liu, *State Constitutions and the Protection of Individual Rights: A Reappraisal*, 92 N.Y.U. L. REV. 1307, 1313 (2017) ("Many state constitutions also have provisions that mandate government provision of social services, such as education and welfare, and state courts have held that these provisions confer positive rights that the Supreme Court has refused to recognize under the Federal Constitution.").

14. RICHARD BRIFFAULT & LAURIE REYNOLDS, STATE AND LOCAL GOVERNMENT LAW 2 (8th ed. 2016) ("[M]ost public services that affect people in their homes and families—public schools, policing . . ., public safety. . .—are provided by states and localities, not the federal government.").

15. Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 325 (2011). Lockstepping is typically used to describe constitutional law, but this Note will apply the concept to include statutes and regulations.

under state law.

I. THE RISE OF SROS AND PUNITIVE SCHOOL ENVIRONMENTS

School resource officers (SROs) are sworn law enforcement officers with arrest authority that are assigned to work in one or more schools.[16] They are usually employed by a local law enforcement agency, like a county or city police department.[17] SROs are distinct from security guards who lack arrest authority.[18] The purpose of SROs is usually to "ensure the safety and security of students, faculty, staff, and visitors."[19] The membership organization for SROs developed the "triad model," in which the SRO's role includes duties as a law enforcement officer, an informal counselor, and a teacher.[20] But in reality, studies show that SROs spend most of their time on law enforcement activities.[21]

This section will first describe the SRO role, drivers behind the increased prevalence of SROs, and the relationship between SRO presence and stricter discipline practices generally. Second, this section will summarize data on the impacts of SROs.

A. SROs and "zero tolerance" discipline policies

Use of SROs grew significantly beginning in the 1990s and early 2000s, coinciding with highly publicized school shootings and the passage of federal legislation funding SRO programs.[22] The growth was

16. CONG. RES. SERV. R45251, *supra* note 2, at 2.

17. *Id.* In some cities, the school district has its own school police department that is separate from the city police department or sheriff's office. *Id.* ("The difference between SROs and school police officers is that the latter are employed by a school police department (e.g., the Los Angeles School Police Department) and not a city police department or sheriff's office."). For the purposes of this Note, the term SRO will generally include school police officers.

18. *Id.*

19. *Id.*

20. Mo Canady et al., *To Protect and Educate: The School Resource Officer and the Prevention of Violence in Schools*, NAT'L ASS'N OF SCH. RES. OFFICERS 21 (2012), https://www.nasro.org/clientuploads/resources/NASRO-Protect-and-Educate.pdf. *See also* CONG. RES. SERV. R45251, *supra* note 2, at 1 ("[T]hese officers are more than armed sentries waiting to engage a shooter. . . [T]heir roles can be placed into three general categories: (1) safety expert and law enforcer, (2) problem solver and liaison to community resources, and (3) educator.").

21. Elizabeth A. Shaver & Janet R. Decker, *Handcuffing a Third Grader: Interactions Between School Resource Officers and Students with Disabilities*, 2017 UTAH L. REV. 229, 235–36 (2017) (collecting studies on SRO roles) ("[T]he law enforcement aspect of the triad model seems to be predominant in the everyday work of SROs.").

22. *See* Weisburst, *supra* note 3, at 341 ("Political interest in school police escalated after the high-profile Columbine school shooting in 1999."). *See also* Kerrin C. Wolf, *Assessing Students' Civil Rights Claims Against School Resource Officers*, 38 PACE L. REV. 215, 222 (2018)

largely driven by hopes that the presence of SROs would keep students safe. In 1999, the DOJ created the "COPS in Schools" grant program to support law enforcement in schools.[23] Political support and federal and state funding for SROs has fluctuated since the 1990s,[24] but on the whole, federal, state, and local governments tend to increase funding for SROs after mass school shootings.[25] For example, after the 2018 shooting at Marjory Stoneman Douglas High School in Parkland, Florida, states spent millions on security upgrades and SROs.[26] In conjunction with adding SROs, schools across the U.S. have adopted increasingly strict disciplinary policies.[27] Federal funding has incentivized schools to adopt "zero tolerance" policies for offenses related to weapons and drugs, and states and school districts have expanded the scope of zero tolerance policies to apply to an array of less serious conduct.[28]

Despite the federal incentives for states to use SROs, there are no federal training or supervision requirements, and training and qualification requirements vary widely across states.[29] As of 2016, fewer than half of all states had statutes or regulations that set minimum qualifications for SROs, and only a few states described the training

(describing legislation that promoted the use of SROs, including the Violent Crime and Law Enforcement Act of 1994, and the Safe and Drug-Free Schools and Communities Act).

23. Shaver & Decker, *supra* note 21, at 233.

24. *See* Weisburst, *supra* note 3, at 342 (describing fluctuating appropriations and attitudes from the Bush administration to present); Gottfredson et al., *supra* note 2, at 908 ("As federal funding for SROs has become less certain, state level funding has increased.").

25. *See, e.g.*, *Department of Justice Awards Hiring Grants for Law Enforcement and School Safety Officers*, U.S. DEP'T JUST. (Sept. 27, 2013), https://www.justice.gov/opa/pr/department-justice-awards-hiring-grants-law-enforcement-and-school-safety-officers (reporting an allocation of $45 million to the COPS program to fund 356 new SRO positions following the mass shooting at Sandy Hook Elementary School).

26. Carolyn Phenicie, *The State of School Security Spending: Here's How States Have Poured $900 Million into Student Safety Since the Parkland Shooting*, THE 74 (August 20, 2018), https://www.the74million.org/article/the-state-of-school-security-spending-heres-how-states-have-poured-900-million-into-student-safety-since-the-parkland-shooting/ ("The amounts ranged widely by state, from $300,000 in Missouri to $400 million in Florida. They include only what's being spent [in 2018], though some states allocated a larger amount over a few years.").

27. Wolf, *supra* note 22, at 222–23.

28. *Id.* at 223. *See also* Weisburst, *supra* note 3, at 341 n.6 (explaining that zero-tolerance policies are "laws or school policies that require predetermined consequences for specific student offenses, without considering mitigating circumstances or context").

29. Counts et al., *supra* note 4, at 412 ("Although SROs are one of the fastest growing branches of policing, there are no federal guidelines outlining the procedures for training SROs."); Shaver & Decker, *supra* note 21, at 236–42 (describing National Association of School Resource Officer training courses, state training statutes and regulations, and SRO training on mental health and issues affecting students with disabilities).

SROs should receive.[30] Some state statutes include precatory language or discretionary requirements for SRO training on youth mental and behavioral health issues and interacting with disabled students.[31] Increasingly, states and localities have imposed limits on SRO discretion[32] and have suggested or required that school districts create written memoranda of understanding (MOUs) with the local law enforcement agency supplying SROs to delineate SROs' duties and decision-making authority.[33]

B. The Impacts of SROs

There is minimal evidence to suggest that SROs improve school safety.[34] To the contrary, research shows that SROs have a largely negative impact on students, inflicting physical and emotional harm, increasing students' interactions with the criminal justice system for minor misbehavior, diminishing students' experience of a positive, safe school environment, and inhibiting educational attainment and outcomes.[35] Studies have found that increased reliance on surveillance and unreasonable searches and seizures may create, among other things, "an environment of fear and distrust, reduce perceived

30. *See* Shaver & Decker, *supra* note 21, at 238 ("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.").

31. *Id.* at 240.

32. Gottfredson et al., *supra* note 2, at 907 (describing concerns that have been raised about SROs and that "many school districts have recently begun to place limits on SRO discretion").

33. *See* Shaver & Decker, *supra* note 21, at 243 n.107 (collecting state MOU statutes). *See also* OFFICE OF CMTY. ORIENTED POLICING SERVS., MEMORANDUM OF UNDERSTANDING FACT SHEET 1, U.S. DEP'T JUST. (2017), https://cops.usdoj.gov/pdf/2017AwardDocs/chp/MOU_Fact_Sheet.pdf ("Every jurisdiction with a school and law enforcement partnership should have an MOU that clearly defines the roles and responsibilities of the individual partners involved, including school districts, boards or departments of education, school administration officials, law enforcement agencies (including SROs), students, and parents."). For an extensive collection and comparison of state SRO and discipline laws and regulations, *see Compendium of School Discipline Laws and Regulations for the 50 States, Washington, D.C. and the U.S. Territories*, NAT'L CTR. ON SAFE SUPPORTIVE LEARNING ENV'TS, https://safesupportivelearning.ed.gov/school-discipline-compendium (last visited Feb. 3, 2021).

34. *See, e.g.*, Gottfredson et al. *supra* note 2, at 908–13, 929–31 (providing a literature review of research on SROs, noting that there is no empirical support for the popular belief that deployment of SROs prevents mass shootings, and finding that increased SRO presence does not reduce school crime).

35. Weisburst, *supra* note 3, at 339–41 (providing a literature review of research on the impact of SROs and discipline measures and analyzing data from Texas schools). *See also School Policing in Mass. Report*, *supra* note 10, at 14 (noting a study which found that "being stopped at school by police officers was a 'potent' predictor of heightened emotional distress and posttraumatic stress symptoms in youth.").

legitimacy of police, weaken the school's sense of community, and diminish students' willingness to confide in school staff when they are experiencing problems."[36] As one judge noted, the use of handcuffs can disrupt a child's education "far beyond the time they actually spend in handcuffs" by causing children to have negative feelings about school, stigmatizing and alienating them, and making them not want to attend.[37] Other studies have identified similar findings and have linked federal grants for SROs to both an increase in discipline rates and a decrease in high school graduation rates.[38]

With more SROs in schools, there has also been a dramatic increase in escalating interactions between SROs and students. Arrests by SROs and other police officers called to schools are overwhelmingly for minor misbehavior[39] "once considered to be under the purview of school administrative discipline."[40] Common student behaviors can result in serious, disproportionate criminal charges: for instance, fake burping resulted in criminal charges for "disrupting school"; refusing to leave the lunchroom and cursing led to charges of disorderly conduct; throwing a paper airplane and a baby carrot led to assault charges; and the temper tantrum of a five year-old with ADHD was met with charges for battery of a police officer.[41]

As trained law enforcement officers, SROs tend to use "justice system responses" to address student misbehavior when the behavior could be addressed without escalating to such extremes.[42] In a case involving an SRO in the Fourth Circuit, Chief Judge Roger Gregory described the harms from this kind of school policing: "Unnecessarily handcuffing and criminally punishing young schoolchildren is undoubtedly humiliating, scarring, and emotionally damaging. We must be mindful of the long-lasting impact such actions have on these

36. Gottfredson et al. *supra* note 2, at 928.

37. E.W. *ex rel.* T.W. v. Dolgos, 884 F.3d 172, 183–84 (4th Cir. 2018).

38. *See* Weisburst, *supra* note 3, at 339–41 (providing an extensive literature review of research on the impacts of SROs and original quantitative research). *But see* Gottfredson et al., *supra* note 2, at 929 (noting that the increased school disciplinary offenses in their study are "probably due at least in part to increased surveillance").

39. Wolf, *supra* note 22, at 224–25.

40. Counts et al., *supra* note 4, at 426 ("Increases in the number of school arrests for behaviors that were once considered to be under the purview of school administrative discipline have amplified the likelihood that students will experience exclusionary discipline consequences.").

41. *Cops and No Counselors*, *supra* note 1, at app. D tbl.A7 (citing various news articles describing incidents).

42. Wolf, *supra* note 22, at 252.

children and their ability to flourish and lead prosperous lives . . . ."[43]

Students with disabilities and students of color experience the negative impacts of such responses most acutely. Many of the SRO and student interactions that escalate involve disabled students and often occur in connection with behavior related to the student's disability. Indeed, students with disabilities are nearly three times more likely to be arrested than their nondisabled counterparts, and in some states, arrest was ten times more likely.[44] While there is minimal data specifically on arrests of disabled students by SROs, "there are an increasing number of reported cases where students with disabilities have been handcuffed or arrested by SROs."[45] Disabled students account for 16 percent of the U.S. student population,[46] but nearly 80 percent of students subjected to restraint or seclusion (by SROs and other school personnel) were disabled students.[47] More broadly, disabled students are disciplined more than their non-disabled peers, including with restraints, suspensions, expulsions, arrests, and referrals to the criminal justice system.[48]

Cumulatively, the presence of SROs denies students the

43. E.W. *ex rel.* T.W. v. Dolgos, 884 F.3d 172, 188 (4th Cir. 2018) ("[O]fficers should not handcuff young students who may have committed minor offenses but do not pose an immediate threat to safety and will not evade arrest.").

44. *Cops and No Counselors*, *supra* note 1, at 5 (summarizing data collected by the Department of Education and other sources, and finding that "Black and Latino boys with disabilities were 3 percent of students but were 12 percent of school arrests").

45. Shaver & Decker, *supra* note 21, at 248 (citation omitted).

46. U.S. DEP'T EDUC. OFF. FOR C.R., 2017-2018 CIVIL RIGHTS DATA COLLECTION: THE USE OF RESTRAINT AND SECLUSION ON CHILDREN WITH DISABILITIES IN K-12 SCHOOLS, 2 (2020), https://www2.ed.gov/about/offices/list/ocr/docs/restraint-and-seclusion.pdf (including students served under the Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act (Section 504)).

47. *Id.* at 6–7. Students who are Black *and* disabled were subjected to particularly disproportionate rates of restraint and seclusion. *See id.* at 10–11 (reporting that students who are Black account for 18 percent of students served under the IDEA, yet account for 26 percent of disabled students subjected to physical restraint; 34 percent of disabled students subjected to mechanical restraint; and 22 percent of disabled students subjected to seclusion). *But see* U.S. GOV'T ACCOUNTABILITY OFF. GAO-20-345, K-12 EDUCATION NEEDS TO ADDRESS SIGNIFICANT QUALITY ISSUES WITH ITS RESTRAINT AND SECLUSION DATA 1, (April 2020) https://www.gao.gov/assets/710/706269.pdf (stating that restraint and seclusion data is almost certainly underinclusive).

48. Shaver & Decker, *supra* note 21, at 247. *See* Counts et al., *supra* note 4, at 426 (cleaned up) ("Greater numbers of school arrests for school behavior/conduct violations, rather than criminal activity, have exposed students to adjudication through the school-to-prison pipeline. This is despite the lack of research demonstrating the efficacy of exclusionary discipline practices, zero tolerance policies, and adjudication of student behaviors for improving school safety. Particularly impacted by these practices are at-risk groups who are already disproportionately affected in exclusionary discipline (e.g., special education and minority students).").

opportunity to learn.[49] These SRO interactions and negative outcomes fall disproportionately on students with disabilities and students of color, adding to the already staggering educational and societal barriers that these students face.

II. LEGAL STRATEGIES TO OBTAIN RELIEF FOR INJURIES FROM SROS HAVE FALLEN SHORT

With increasing presence of SROs in schools, students have sought relief in the courts, albeit with minimal success.[50] Lawsuits brought in response to SRO actions generally raise federal constitutional and statutory claims against school districts, police departments, and individual police officers. Students often sue under 42 U.S.C. § 1983,[51] claiming they have been subjected to an unreasonable search or seizure in violation of the Fourth Amendment or to a Fourteenth Amendment substantive due process violation.[52] Disabled students also bring suits under Title II of the Americans with Disabilities Act (ADA),[53] Section 504 of the Rehabilitation Act (Section 504),[54] and the Individuals with Disabilities Education Act (IDEA).[55] Students' claims typically fall into two categories—education-based claims related to the IDEA, and arrest-based claims related to the ADA and Section 504. In some cases, students raise violations of state tort laws, state anti-discrimination statutes, or state constitutional law as well.[56]

Federal law imposes some limits on SROs, but rulings on federal claims largely favor law enforcement, the school district, or other

49. *See generally We Came to Learn: A Call to Action for Police-Free Schools*, ADVANCEMENT PROJECT & ALL. FOR EDUC. JUST. (2018), https://advancementproject.org/wp-content/uploads/WCTLweb/index.html#page=1 (describing the impacts of exclusionary policies).

50. *See* Zirkel, *supra* note 11, at 314–22 (providing an overview of a study finding that most federal claim rulings in cases involving SROs were resolved in favor of the government authority); Wolf, *supra* note 22, at 219 (concluding that "students' potential civil rights remedies against abuses by SROs are quite limited because of the considerable leeway provided to SROs in their interactions with students by existing student rights jurisprudence").

51. 42 U.S.C. § 1983 (2018) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .").

52. Wolf, *supra* note 22, at 240.

53. 42 U.S.C. § 12132.

54. 29 U.S.C. § 794.

55. 20 U.S.C. §§ 1400 *et seq*.

56. Zirkel, *supra* note 11, at 317 tbl.2.

government authority.[57] A 2019 study found that just six percent of federal claim rulings came down in favor of the individual student, while the rest were in favor of the government authority (75 percent), or were inconclusive (19 percent).[58] Even so, litigants rely heavily on federal law: Among final decisions on the merits in cases involving students and SROs, nearly 70 percent of the claims ruled upon were based on a federal law, including the Fourth, Fifth, and Fourteenth Amendments, and the ADA, Section 504, and the IDEA.[59]

This section will describe limits on SROs under some of the most frequently litigated federal laws and highlight some of the reasons that outcomes for federal claims typically favor government authorities. In light of broad reliance on federal law claims in SRO-related litigation and the poor outcomes for individual students, this section will then consider the practice of states interpreting their constitutions in lockstep with the U.S. Constitution and the potential for broader protections under state law.

A. Federal limits on SRO actions under the Fourth Amendment and disability discrimination statutes

1. Section 1983 and the Fourth Amendment

Students in SRO-related cases often bring claims for wrongful seizure and excessive force in violation of the Fourth Amendment.[60] SRO-related Fourth Amendment claims are typically raised under 42

57. *Id.*

58. *See id.* (providing separate totals for claims under federal statutes and the Fourth, Fifth, and Fourteenth Amendments). Inconclusive rulings included denials of pretrial motions, e.g., dismissal or summary judgment; government authorities included school districts, the city or county employing an SRO, or the state. *Id.* at 314. The study identified 229 student-specific rulings: 157 were on federal claims. *Id.* at 317. Student-specific claim rulings included civil cases where a student was the plaintiff and criminal cases where the student was the defendant and excluded rulings where the SRO or another non-student was the plaintiff, e.g., another school employee or the parents separate from the student. *Id.* at 316.

59. *Id*. at 317 (finding that of student-specific claim rulings, approximately 40% were based on the Fourth Amendment; 13% on the Fifth Amendment; 11% on the Fourteenth Amendment; 7% on federal legislation; 15% on state torts; 18% on criminal codes; and only .9% (two claim rulings) on state constitutions).

60. *Id.* at 318. The presence of SROs in schools also frequently raises issues related to protection against unreasonable searches, in part because of blurred lines between the SRO's role as a member of law enforcement and as school personnel. Issues related to this blurring of roles are also relevant to seizure analysis. *See generally* Peter Price, *When is a Police Officer an Officer of the Law: The Status of Police Officers in Schools*, 99 J. CRIM. L. & CRIMINOLOGY 541 (2009) (evaluating the evidentiary standards that courts apply in cases involving SROs, considering challenges with and confusion on the role of police in schools, and advocating for a bright line rule that treats SROs as police officers at all times).

U.S.C. § 1983, which provides a private right of action to individuals when a public official "acting under color of state law" violates a codified legal right.[61] The case law in this area tends to favor law enforcement and other government authorities, making it difficult for students injured by SROs to succeed in court.[62]

These outcomes largely demonstrate the nearly impenetrable veil of qualified immunity.[63] Qualified immunity shields state and local governments and officials from the burdens of suit altogether, and, by extension, from paying civil damages.[64] Traditionally, courts have justified qualified immunity based on "the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably."[65] Qualified immunity has evolved into a potent defense for law enforcement in many settings, but it has proven a particularly powerful roadblock in SRO cases because of the relative newness of widespread use of SROs.

Qualified immunity applies unless a court concludes that the government or official violated "clearly established law." To succeed on a § 1983 claim, a plaintiff must establish that (1) a right was violated, and (2) that the right was "clearly established" at the time of the official's actions such that the official would have sufficient notice that their actions would violate the right.[66] Courts "define the 'clearly

61. Monroe v. Pape, 365 U.S. 167, 184 (1961) (The "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken under color of state law.") (quoting United States v. Classic, 313 U.S. 299, 326 (1941)). A state official acting under a "badge of authority" can be liable even if their actions violated restrictions on that authority. *Id.* at 171–72 (" . . . Congress has the power to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it."). Requirements for municipal liability differ from those for state liability. Municipalities are immune from liability unless the plaintiff can establish that the official was acting under an official policy or custom. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 694 (1978) ("[A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.").

62. *See* Wolf, *supra* note 22, at 219 (noting that students' federal civil rights remedies against SROs are "quite limited" because of the qualified immunity defense and "because applicable laws and school rules are particularly controlling of student behavior, SROs can more readily justify their more aggressive and antagonistic interactions with students").

63. *Id.*

64. *See* Pearson v. Callahan, 555 U.S. 223, 231 (2009) (noting that "qualified immunity protects government officials from liability for civil damages" and is "an immunity from suit rather than a mere defense to liability") (cleaned up).

65. *Id.*

66. *See* Saucier v. Katz, 533 U.S. 194, 200, 202 (2001) (establishing a two-part test for qualified immunity and holding that "[i]f the law did not put the officer on notice that his conduct

established' right at issue on the basis of the 'specific context of the case,'" and earlier precedents must closely resemble the fact patterns and claims of the current litigation.[67] If the right was clearly established at the time of the alleged violation, the official is likely not entitled to qualified immunity.[68] However, courts frequently decide § 1983 cases without addressing whether the conduct violated the law because they have discretion to determine the order for addressing each prong of the two-prong test.[69] This makes it nearly impossible for rights to become clearly established in the first place. In the SRO context, it is particularly difficult for law to *become* clearly established because "existing case law [about SROs] is inconsistent and favorable to SROs' ability to search students based on minimal information and use force against students even if they seemingly do not pose a real threat."[70]

The Fourth Amendment use of force standard also gives law enforcement significant latitude and deference: Courts have recognized a need for officers to make split-second decisions under exigent circumstances.[71] There are two different tests that courts apply in the school setting to evaluate the objective reasonableness of seizures and use of force: the test from *New Jersey v. T. L. O.*,[72] and the "*Graham* factors" from *Graham v. Connor*.[73] The *T. L. O.* test is two-fold: The

would be clearly unlawful, summary judgment based on qualified immunity is appropriate").

67. Tolan v. Cotton, 572 U.S. 650, 657 (2014) (per curiam) (citing *Saucier*, 533 U.S. at 201). *But see* Gray *ex rel.* Alexander v. Bostic, 458 F.3d 1295, 1306–07 (11th Cir. 2006) ("Even in the absence of factually similar case law, an official can have fair warning that his conduct is unconstitutional when the constitutional violation is obvious, sometimes referred to as 'obvious clarity' cases.").

68. *See, e.g.*, *Pearson*, 555 U.S. at 231 ("[Q]ualified immunity protects government officials . . . insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." (cleaned up)).

69. *See id.* at 236 (modifying the two-part test from *Saucier* and holding that lower courts "should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand."). Put another way, by allowing courts to first determine if "the right that was allegedly violated was clearly established," courts can avoid determining "if a right was in fact violated in the case at hand." Wolf, *supra* note 22, at 239.

70. Wolf, *supra* note 22, at 254–55. *See also generally* Kevin P. Brady, *School Resource Officers and the Unsettled Legal Standard for Establishing Student Excessive Force Claims*, 359 EDUC. L. REP. 689 (2018) (describing why the law on SROs is unclear and providing an overview of key Supreme Court cases and varied state laws on SROs).

71. *See* Graham v. Connor, 490 U.S. 386, 396–97 (1989) ("The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.").

72. *See* 469 U.S. 325, 341–42 (1985) ("[T]he legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search.").

73. *Graham*, 490 U.S. at 395–96 (considering "the severity of the crime at issue, whether the

court considers whether the search was "justified at its inception" and "reasonably related in scope to the circumstances which justified the interference in the first place."[74] The *Graham* factors evaluate the severity of the crime, the immediacy of any safety threats to officers or others, and whether the individual is "actively resisting arrest or attempting to evade arrest."[75] Courts can also consider other factors,[76] and in SRO-related cases, those factors may include the school setting and the relative threat in light of the student's age.[77] But generally, "students' youth (and their diminished physical prowess) do not seem to restrict SRO's ability to use force when arresting students for even the most minor misbehavior."[78] As described above, establishing that an SRO violated a Fourth Amendment right is often not enough to prevail because the law governing SROs is so unsettled. Taken together, the strength of the qualified immunity defense and the unsettled state of law governing SROs mean that recovery is rare.[79]

2. Disability discrimination statutes: The ADA, Section 504, and the IDEA

Public school students with disabilities are protected primarily by three laws: Title II of the Americans with Disabilities Act (ADA),[80]

suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight"). Circuits are divided on which standard to apply, and some courts apply both. *See, e.g.*, K.W.P. v. Kan. City Pub. Sch., 931 F.3d 813, 822 (8th Cir. 2019) (collecting cases and summarizing the split "on whether to apply *T.L.O.'s* reasonableness standard or the objective reasonableness standard set forth in *Graham* . . . to law enforcement seizures of students" and noting that "[s]ome courts have opted to apply both . . . in analyzing a claim of unreasonable seizure and excessive force") (citations omitted).

74. *T.L.O.*, 469 U.S. at 341.

75. *Graham*, 490 U.S. at 395–96.

76. *See, e.g.*, Kingsley v. Hendrickson, 576 U.S. 389, 397 (2015) (noting that analysis of objective reasonableness is highly fact specific and providing non-exclusive examples illustrating the types of "objective circumstances potentially relevant to a determination of excessive force").

77. *See, e.g.*, E.W. *ex rel.* T.W. v. Dolgos, 884 F.3d 172, 179 (4th Cir. 2018) (noting, in a case where an SRO handcuffed a calm, compliant ten-year-old, that "we believe it prudent to consider also the suspect's age and the school context"); S.R. v. Kenton Cnty. Sheriff's Off., 302 F. Supp. 3d 821, 833 (E.D. Ky. 2017) (considering the nature of plaintiffs' conduct, which "[did] not call to mind the type of 'assault' which would warrant criminal prosecution," the lack of immediate threat posed by the children given their respective ages and statures, and the method of handcuffing).

78. Wolf, *supra* note 22, at 219, 254.

79. *See, e.g.*, *E.W.*, 884 F.3d at 186–87 (concluding that an SRO's seizure violated the Fourth Amendment under the *Graham* factors, but holding that the SRO was entitled to qualified immunity because it was not clearly established that handcuffing a non-threatening child could violate the Fourth Amendment); *S.R.*, 302 F. Supp. 3d at 834–35 (applying both *Graham* and *T.L.O.* and concluding that the SRO violated the Fourth Amendment, but dismissing the claim because the SRO was entitled to qualified immunity).

80. 42 U.S.C. § 12132.

Section 504 of the Rehabilitation Act (Section 504),[81] and the Individuals with Disabilities Education Act (IDEA).[82] With SROs' ubiquitous presence in schools, it is almost certain that they will interact with students who are eligible for protections under the ADA, Section 504, or the IDEA, making all three laws pertinent to the issues involving SROs. The ADA and Section 504 are broadly applicable civil rights laws intended to ensure that disabled individuals have equal access to and participation in society, and they include requirements that apply to law enforcement and to schools and education.[83] The IDEA is narrower, imposing requirements on states, local education agencies, and schools that relate specifically to the administration of schools and education services.[84]

Under their combined and overlapping requirements, the three laws impose obligations to ensure that disabled individuals have an equal opportunity to succeed, including by facilitating access and ensuring that disabled individuals are not denied benefits or services on the basis of their disability.[85] In some instances, the requirements under these laws entail affirmative obligations: such as providing reasonable accommodations, modifications, or supplemental aids or services.[86] The affirmative obligations imposed by the ADA, Section

81. 29 U.S.C. § 794.

82. 20 U.S.C. §§ 1400 *et seq.*; *see generally Disability Rights in Public Primary and Secondary Education: How Do They Relate?*, ADA NAT'L NETWORK (2018), https://adata.org/factsheet/disability-rights-laws-public-primary-and-secondary-education-how-do-they-relate [hereinafter *ADA, 504, and IDEA Comparison*] (summarizing and comparing the three laws) ("Under IDEA, the child must have a specific disability (as defined in law) and must need specially designed instruction and related services. A child can have a disability and be covered under 504 and ADA (non-discrimination), but not require specially designed instruction and thus not receive services under IDEA.").

83. *See ADA, 504, and IDEA Comparison*, *supra* note 82; *Commonly Asked Questions about the Americans with Disabilities Act and Law Enforcement*, U.S. DEP'T JUST. C.R. DIV., DISABILITY RTS. SECTION (Revised Feb. 25, 2020) [hereinafter *The ADA and Law Enforcement*], www.ada.gov/q&a_law.htm ("Title II of the ADA prohibits discrimination against people with disabilities in State and local governments services, programs, and employment. Law enforcement agencies are covered . . . The ADA affects virtually everything that officers and deputies do . . .").

84. *See ADA, 504, and IDEA Comparison*, *supra* note 82.

85. *See id.*; *The ADA and Law Enforcement*, *supra* note 83.

86. The IDEA does not explicitly require accommodations or modifications, but they may be required to fulfill the statutory requirement to provide a free appropriate public education (FAPE) in the least restrictive environment. 20 U.S.C. § 1412(a)(1)(A), (a)(4). The implementing regulations for Title II of the ADA require, *inter alia*, that public entities "make reasonable modifications in policies, practices, or procedures . . . to avoid discrimination on the basis of disability" unless the modification would be a fundamental alteration. 28 C.F.R. § 35.130(b)(7). The implementing regulations of Section 504 require, *inter alia*, that disabled individuals are provided with certain "supplementary aids and services." 34 C.F.R. § 104.34(a). The terms "accommodation" and "modification" will be used interchangeably in this Note.

504, and the IDEA are defining and unique features.

As law enforcement, SROs are generally held to different standards than school personnel under federal, state, and local requirements related to conduct, training, and supervision.[87] Thus, the applicability of these three laws to SRO interactions with students is unsettled. Disability-based claims can be broadly categorized as: (1) arrest- or force-based, often involving reasonable accommodation claims under the ADA and Section 504, and (2) education-based, often involving denial of a free appropriate public education (FAPE) in the least restrictive environment as required by the IDEA. Barriers to successful claims under these statutes include fulfilling the exhaustion provision of the IDEA,[88] demonstrating a link between the student's disability and the SRO's action, and meeting the standard for intent.[89]

a. The ADA and Section 504

Title II of the ADA prohibits disability discrimination by state and local government entities, including public schools.[90] Title II states that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[91] Section 504 similarly prohibits disability discrimination against individuals in programs that receive federal funding, which includes most public schools.[92] The ADA and Section 504 target discrimination that Congress had perceived "to be most often the product, not of invidious animus, but rather of thoughtlessness and indifference—of benign neglect."[93] Central to the

87. For example, law enforcement must typically have probable cause to conduct a search, while school personnel acting alone only need reasonable suspicion. *See generally* New Jersey v. T.L.O., 469 U.S. 325, 341 (1985) ("[T]he accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause. . .").

88. 20 U.S.C. § 1415(1). For a full discussion of the IDEA's exhaustion requirement, see generally Chris Ricigliano, Note, *Exhausted and Confused: How* Fry *Complicated Obtaining Relief for Disabled Students*, 16 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 34 (2021).

89. Zirkel, *supra* note 11, at 321–22.

90. 42 U.S.C. § 12132.

91. *Id.*

92. 29 U.S.C. § 794(a) (an individual with disabilities cannot, "solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency").

93. Alexander v. Choate, 469 U.S. 287, 295 (1985). The Supreme Court decided *Choate* before the enactment of the ADA. "When Congress enacted the ADA a few years after *Choate*,

ADA and Section 504, entities have an affirmative duty to prevent disability-based discrimination and to provide reasonable accommodations.[94]

To state a claim for discrimination under Title II of the ADA, a plaintiff must show that:

> (1) she is an individual with a disability; (2) she is otherwise qualified to participate in or receive the benefit of a public entity's services, programs or activities; (3) she was either excluded from participation in or denied the benefits of the public entity's services, programs or activities or was otherwise discriminated against by the public entity; and (4) such exclusion, denial of benefits, or discrimination was by reason of her disability.[95]

The ADA and Section 504 define disability as "a physical or mental impairment that substantially limits one or more major life activities."[96]

Arrest- or force-based claims involving law enforcement are typically brought for failure to provide reasonable accommodations, failure-to-train, or for wrongful arrest in violation of the ADA and Section 504.[97] While the Supreme Court has not addressed the issue,

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it incorporated the disparate-impact interpretation into Title II: 'It is . . . the Committee's intent that section 202 [ADA Title II] . . . be interpreted consistent with *Alexander v. Choate*.'" Mark C. Weber, *Accidentally on Purpose: Intent in Disability Discrimination Law*, 56 B.C.L. REV. 1417, 1442 (2015), http://lawdigitalcommons.bc.edu/bclr/vol56/iss4/4 (quoting H.R. REP. NO. 101-485, pt. 2, at 84 (1990), as reprinted in 1990 U.S.C.C.A.N. 267, 367).

94. *See, e.g.*, Delano-Pyle v. Victoria Cnty., 302 F.3d 567, 575 (5th Cir. 2002) ("A plain reading of the ADA evidences that Congress intended to impose an affirmative duty on public entities to create policies or procedures to prevent discrimination based on disability."); Pierce v. District of Columbia, 128 F. Supp. 3d 250, 269 (D.D.C. 2015) ("[N]othing in the disability discrimination statutes even remotely suggests that covered entities have the option of being passive in their approach to disabled individuals as far as the provision of accommodations is concerned. Quite to the contrary, . . . Section 504 and Title II mandate that entities act affirmatively to evaluate the programs and services they offer and to ensure that people with disabilities will have meaningful access to those services.").

95. *E.g.*, Sheehan v. City of San Francisco, 743 F.3d 1211, 1231 (9th Cir. 2014) *rev'd in part on other grounds, cert. dismissed as improvidently granted in part, and remanded*, 135 S. Ct. 1765 (2015). The standard to prove a *prima facie* case of discrimination is mostly the same under Section 504 and Title II.

96. 42 U.S.C. § 12102(1)(A); 29 U.S.C. § 705(20)(B).

97. *See Sheehan*, 743 F.3d at 1232 ("Courts have recognized at least two types of Title II claims applicable to arrests: (1) wrongful arrest, where police wrongly arrest someone with a disability because they misperceive the effects of that disability as criminal activity; and (2) reasonable accommodation, where . . . [police] fail to reasonably accommodate the person's disability in the course of investigation or arrest, causing the person to suffer greater injury or indignity in that process than other arrestees."); Haberle v. Troxell, 885 F.3d 171, 179 (3d Cir. 2018) *aff'g in part, vacating in part and remanding sub nom.* Haberle for Est. of Nixon v. Borough of Nazareth, 5:15-CV-02804, 2018 WL 4770682 (E.D. Pa. Oct. 2, 2018), *rev'd and remanded sub nom.* Haberle v. Borough of Nazareth, 936 F.3d 138 (3d Cir. 2019) (noting that a general failure to train police officers or institute policies does not violate Title II, but a failure to train that was

most circuits have held that Title II of the ADA applies to law enforcement during arrests and investigations, thus requiring that police provide, among other things, reasonable accommodations to disabled individuals.[98] DOJ guidance also interprets Title II to apply during arrests.[99] In the school setting, plaintiffs may allege that the municipality and SRO violated the ADA by, for example, failing to modify "policies, practices, or procedures," "failing to ensure policies, practices, procedures, training, or supervision that take the needs of children with disabilities into account," or by maintaining "methods of administration that have the effect of discriminating against persons with disabilities."[100]

A party can succeed on a Title II or Section 504 claim for injunctive or declaratory relief even in the absence of discriminatory intent.[101] To recover damages, courts require proof of intent,[102] although a party can generally establish intent by proving deliberate indifference.[103] For example, in a case in Flint, Michigan, an SRO handcuffed a disabled seven-year-old in response to non-threatening disability-related misbehavior,[104] the court found that the SRO did not need to have specific knowledge of the child's disability for a finding of discrimination under the ADA.[105] Inferring intentional discrimination

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at issue during the incident may).

98. *See, e.g.*, *Sheehan*, 743 F.3d at 1231 ("Exigent circumstances inform the reasonableness analysis under the ADA, just as they inform the distinct reasonableness analysis under the Fourth Amendment."). In circuits where the court has not explicitly addressed the question, lower courts tend to find that Title II does apply during arrests. *See, e.g.*, *Haberle*, 885 F.3d at 178 (concluding that "the answer is generally yes" on the question of whether Title II applies during arrests); *see also* Morais v. City of Philadelphia, No. CIV.A.06-582, 2007 WL 853811, at *10 (E.D. Pa. Mar. 19, 2007) ("The Court of Appeals for the Third Circuit has not yet addressed the application the ADA or [Rehabilitation Act] to police activities and procedures, but a majority of courts now hold that the ADA applies to arrests and similar police action in some circumstances.").

99. *See, e.g.*, *The ADA and Law Enforcement*, *supra* note 83 (stating that the ADA affects "arresting, booking, and holding suspects").

100. *E.g.*, McCadden v. City of Flint, No. 18-12377, 2019 U.S. Dist. LEXIS 63244, *15 (E.D. Mich. Apr. 12, 2019).

101. *See, e.g.*, McCullum v. Orlando Reg'l Healthcare Sys., 768 F.3d 1135, 1147 n.8 (11th Cir. 2014) ("Where a plaintiff is not seeking compensatory damages, discriminatory intent is not required.")

102. *See, e.g.*, Hamer v. City of Trinidad, 924 F.3d 1093, 1108 (10th Cir. 2019) ("Our circuit requires proof of intentional discrimination before a plaintiff can recover compensatory damages under section 504, and we have suggested that as much is required under Title II." (cleaned up)).

103. *See, e.g.*, *McCullum*, 768 F.3d at 1146–47 ("[A] plaintiff must show that a defendant violated his rights under the statutes and did so with discriminatory intent. A plaintiff may prove discriminatory intent by showing that a defendant was deliberately indifferent to his statutory rights." (cleaned up)).

104. *McCadden*, 2019 U.S. Dist. LEXIS 63244, at *2.

105. *Id.* at *20–21 ("[I]ntentional discrimination may be inferred from a defendant's

from the defendant-city's deliberate indifference, the court explained that "the City knew or should have known about the elevated likelihood that any Flint juveniles would suffer from a disability and should have taken action to address how officers interact with Flint juveniles."[106] In addition, facially neutral policies that have discriminatory impact may also violate the ADA.[107]

However, if there are exigent circumstances when an officer uses force, courts often find that accommodations were unreasonable.[108] Courts consider a variety of factors when evaluating exigent circumstances and the reasonableness of accommodations during arrest or investigations.[109] In *Wilson v. City of Southlake*, for example, the Fifth Circuit considered the school setting, the SRO's knowledge of the child's disability, and the relative threat.[110] The court concluded that the SRO *was* subject to the requirements of Title II because "[t]here was no potentially life-threatening situation or threat to human life."[111]

b. The IDEA

The IDEA requires that eligible students receive a free appropriate public education (FAPE) in the least restrictive environment appropriate to the individual's needs.[112] The IDEA includes a "child-

deliberate indifference to the strong likelihood that pursuit of its questioned policies will likely result in a violation of federally protected rights." (citing Velzen v. Grand Valley State Univ., 902 F. Supp. 2d 1038, 1046 (W.D. Mich. 2012)).

106. *Id.* at *20 (denying the defendant's motion to dismiss the ADA claim).

107. *See, e.g.*, McGary v. City of Portland, 386 F.3d 1259, 1265 (9th Cir. 2004) ("We have repeatedly recognized that facially neutral policies may violate the ADA when such policies unduly burden disabled persons, even when such policies are consistently enforced.").

108. *Compare* Hainze v. Richards, 207 F.3d 795, 801–02 (5th Cir. 2000) (finding that police are not subject to the requirements of Title II while there are exigent circumstances) *with* Gohier v. Enright, 186 F.3d 1216, 1221 (10th Cir. 1999) ("[A] broad rule categorically excluding arrests from the scope of Title II . . . is not the law.").

109. *See* Carly A. Myers, Note, *Police Violence against People with Mental Disabilities: The Immutable Duty under the ADA to Reasonable Accommodate during Arrest*, 70 VAND. L. REV. 1393, 1411 (2017) (explaining that, in incidents with people with mental illness, courts seem to consider the "nature and history of a person's mental illness; the officer's knowledge of the individual's disability; the physical setting and conditions giving rise to the incident; and the presence, degree, and immediacy of danger to the person with a disability, the officers, or the general public").

110. 936 F.3d 326, 331–32 (5th Cir. 2019).

111. *Id.* at 331.

112. 20 U.S.C. § 1412(a)(1)–(5) ("A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21. . ."). Children are eligible under the IDEA if they have a specific disability (as defined in the law) and require "special education and related services" because of that disability. 20 U.S.C. § 1401(3)(a). Schools must develop an Individualized Education Program (IEP) describing the needs of and services for each eligible child. 20 U.S.C. § 1412(a)(3) (defining requirements for IEPs). The IDEA also

find" provision that affirmatively requires schools to identify eligible students.[113] The IDEA also imposes requirements regarding suspensions, expulsions, and management of disability-related behavior with the overarching aim of reducing the systematic exclusion of students with disabilities from education, especially when it results from behaviors that are a manifestation of their disability.[114] If a student's disability causes a behavior, the student cannot be suspended, expelled or otherwise disciplined for that behavior.[115] Federal law does not explicitly prohibit the use of restraint and seclusion, but they may violate the IDEA, ADA, and Section 504 in some cases.[116]

Education-based claims are typically brought against schools for a denial of FAPE stemming from an SRO-related incident or an SRO's conduct.[117] Student-plaintiffs generally claim that the SROs' conduct violated the IDEA's requirements related to discipline or suspensions.[118] However, such claims generally fail, as courts typically do not hold SROs to the requirements of the IDEA in the same manner as other school personnel.[119]

Applied in the school setting, the ADA, Section 504, and the IDEA reflect policy aims and legislative presumptions that students "will be educated with children without disabilities and will be removed from the classroom or placed in special classes only when necessary to meet their individual needs," and that they will "receive educational services in the regular educational environment with the appropriate aids and services necessary to ensure they benefit from educational opportunities."[120] Existing federal law does not adequately address how

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requires school to consult with parents or guardians and follow due process procedures. 20 U.S.C. §§ 1414, 1415.

113. 20 U.S.C. §§ 1412(a)(3), (a)(10)(A)(ii) (West 2020).

114. *See generally ADA, 504, and IDEA Comparison*, *supra* note 82.

115. 20 U.S.C. § 1415(k)(1)(D)–(F); *see also* Shaver & Decker, *supra* note 21, at Section II (describing requirements under the IDEA and Department of Education guidance (issued in 2016) related to behavioral interventions that are intended to address disabled students' "undesired" disability-related behaviors); DEP'T OF EDUC., DEAR COLLEAGUE LETTER 1 (Aug. 1, 2016) https://sites.ed.gov/idea/files/dcl-on-pbis-in-ieps-08-01-2016.pdf (warning school districts that failure to provide adequate behavioral supports to students with disabilities could violate federal education law).

116. 2017-2018 CIVIL RIGHTS DATA COLLECTION: THE USE OF RESTRAINT AND SECLUSION ON CHILDREN WITH DISABILITIES IN K-12 SCHOOLS, *supra* note 46, at 4.

117. *See* Shaver & Decker, *supra* note 21, at 259–265 (describing cases where SRO conduct contravened requirements in students' IEP or behavior intervention plan).

118. *Id.*

119. *See id.* (explaining that SROs are typically not bound by students' IEPs and behavior intervention plans).

120. *ADA, 504, and IDEA Comparison*, *supra* note 82. *See* 28 C.F.R. § 35.130(d) (requiring

these aims can continue to be implemented and protected when SROs, not just school personnel, are regularly interacting with students in the school environment.

B. States have the power to guarantee positive rights and treat federal law as a "floor," but many fall into lockstep with federal law, treating it as a ceiling

Federal provisions have proven inadequate to protect disabled students from harm by SROs and to remedy that harm after it occurs. But states have the ability to implement additional protections that exceed the floor set by federal law. To limit the harm from SROs, states should adopt policies that exceed the floor set by federal law, and courts should avoid reflexive lockstepping when interpreting state provisions.

State courts often interpret state constitutional provisions in lockstep with federal courts' interpretations of the analog provision of the U.S. Constitution, even though such interpretations are not required.[121] A "highly generalized guarantee," such as a restriction on searches, need not mean the same thing to different sovereigns.[122] Nevertheless, "state courts have relied heavily—at times completely and explicitly—on federal constitutional doctrine when interpreting their own charters, even when the language, history, and intent of the latter are distinct."[123]

Among other names, scholars have referred to this concept as "judicial federalism," "new judicial federalism," and "lockstepping."[124] Judge Jeffrey Sutton defined lockstepping as "the tendency of some state courts to diminish their constitutions by interpreting them in

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that programs are administered "in the most integrated setting appropriate to the needs of qualified individuals with disabilities"); 34 C.F.R. § 104.34(a) (requiring programs to educate qualified "handicapped" people "with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person"); 20 U.S.C. § 1412(a)(5)(A) ("To the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and . . . removal of children with disabilities from the regular educational environment occurs only when . . . education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.").

121. *See* Blocher, *supra* note 15, at 325 ("[S]cholars, state courts, and even Supreme Court Justices have repeatedly noted that state constitutions need not be interpreted in line with the federal Constitution.") (citations omitted).

122. JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS 174 (2018) (ebook) ("Why the meaning of a federal guarantee in these areas (or any other) proves the meaning of an independent state guarantee is rarely explained and often seems inexplicable.").

123. Blocher, *supra* note 15, at 325.

124. This paper will primarily use the term "lockstepping" because it is the most intuitive and clear. Blocher notes that, while accurate, the term "is widely reviled by scholars of state constitutional law. *See id.* at 340.

reflexive imitation of the federal courts' interpretation of the Federal Constitution."[125] State courts typically consider federal constitutional claims first, and then "summarily announce that the state provision means the same thing."[126] Sutton argues against lockstepping and contends that there are immense benefits when states try out a "new" idea before the country "takes on the risks associated with implementing it."[127] In addition, Professor Joseph Blocher argues that courts should give more weight to state constitutional doctrine in *federal* constitutional cases.[128]

Multiple scholars cite the positive right to public education that many states confer as an example of an area of state constitutional law that is *not* in lockstep with the U.S. Constitution.[129] Indeed, "every state constitution currently contains at least one constitutional provision regarding public education."[130] These provisions have generally been applied to school funding and resource allocation[131] in conferring a positive right to education.[132] After the Supreme Court "definitively rejected the idea that the U.S. Constitution contained the right to an education" in 1972, plaintiffs increasingly turned to state constitutional

125. Sutton, *supra* note 122, at 174.

126. *Id.*

127. *Id.* at 177 ("There will never be a healthy 'discourse' between state and federal judges about the meaning of core guarantees in our American constitutions if the state judges merely take sides on the federal debates and federal authorities, as opposed to marshaling the distinct state texts and histories and drawing their own conclusions from them.").

128. Blocher, *supra* note 15, at 327–28 (noting that the Supreme Court has looked to state law for guidance in criminal procedure cases, due process cases, and Eighth Amendment cases).

129. *See generally* EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS ch. 5 (2013) (ebook) (describing state constitutional treatment of education as an example of a tradition of positive rights in the U.S.); SUTTON, *supra* note 122 (describing the state and federal "stories" of different illustrative rights, including public education); Blocher, *supra* note 15, at 333 ("Many [state constitutions] guarantee 'positive' rights—obligations on the government to provide public education, for example—which are unheard of in the federal system." (cleaned up)); Liu, *supra* note 13, at 1313 ("Many state constitutions also have provisions that mandate government provision of social services, such as education and welfare, and state courts have held that these provisions confer positive rights that the Supreme Court has refused to recognize under the Federal Constitution.").

130. Zackin, *supra* note 129, at 67.

131. *See generally id.* at ch. 5 (describing the historical context of state constitutional education provisions and the evolution of activism in response to state legislatures mismanaging school funds).

132. Blocher, *supra* note 15, at 332–33. *See generally* Emily Parker, *50-State Review: Constitutional Obligations for Public Education*, EDUC. COMM'N OF THE STATES (Mar. 2016), http://www.ecs.org/wp-content/uploads/2016-Constitutional-obligations-for-public-education-1.pdf (providing a 50-state overview of the constitutional foundation for public education in each state).

claims instead.[133] A lack of recourse under the U.S. Constitution prompted "a new wave of textual education rights."[134] By 2007, the state high courts in all but seven states had considered the constitutionality of state systems of public school financing: Courts in twenty-six of those states held that the ways in which the state funded its school system was unconstitutional.[135]

Litigants' use of dual federal and state constitutional claims became a "widespread option" in the 1960s and 1970s after the Supreme Court incorporated most of the Bill of Rights through the Fourteenth Amendment Due Process clause.[136] After incorporation and during the Warren Court era, "state constitutional law emerged as an independent legal force, but only where it exceeded the federal floor."[137] As the Supreme Court shifted right under the Burger Court, however, state constitutional law once again garnered more attention from advocates as "it was now possible that a state constitutional claim might succeed where its federal analogue would fail."[138] In a 1991 guide to Massachusetts civil rights laws, a civil rights attorney advocated for the use of state civil rights laws amid "federal judicial retrenchment," writing that "state civil rights law offers promising new approaches to

133. Zackin, *supra* note 129, at 98 (describing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973)). In response to *Rodriguez* and the "closure" of "the federal courts . . . to those who seek to overturn educational finance systems through the federal Equal Protection Clause," education activists "challeng[ed] education financing on state constitutional grounds and in state courts." *Id.* at 99.

134. *Id.*

135. *Id.* at 128 (citing Michael Paris, FRAMING EQUAL OPPORTUNITY: LAW AND THE POLITICS OF SCHOOL FINANCE REFORM 46 (2010)); *see also* Alia Wong, *The Students Suing for a Constitutional Right to Education*, THE ATLANTIC, https://www.theatlantic.com/education/archive/2018/11/lawsuit-constitutional-right-education/576901/ ("[E]ducational equity is the most active area of litigation regarding state constitutions in [state] courts . . . Such suits have been brought in pretty much every state, more than half of which—60 percent—have resulted in a finding that there is a right to a high-quality education under the respective state constitution . . .").

136. Sutton, *supra* note 122, at 175.

137. Blocher, *supra* note 15, at 336 ("[S]ince relatively few state courts were inclined to read rights more broadly than the Warren Court, the *Federal Reporter* effectively displaced state constitutions. . . [M]any state courts, knowing that federal rights were so expansive, tended to resolve cases on the basis of federal guarantees rather than state analogues. The result was an atrophying of state constitutional interpretation.")

138. *Id.* at 337. "[L]iberals urged state courts to 'step into the breach' left by the Burger Court's 'contraction of federal rights and remedies on grounds of federalism.'" *Id.* at 337 (quoting William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 548 (1986)). Justice Brennan's 1977 Harvard Law Review article, "State Constitutions and the Protection of Individual Rights," "in which he called on state courts to reclaim ground the Burger Court had allegedly given away" was the "Magna Carta" of the "movement." *Id.*

the stubborn problems of discrimination."[139]

With ongoing harm from inappropriate conduct by SROs and limits on remedies under federal law, state constitutions and civil rights laws could again offer additional approaches. As Justice Goodwin Liu of the California Supreme Court emphasized, "state courts, as the ultimate arbiters of state law, have the prerogative and duty to interpret their state constitutions *independently*."[140] Advocates and policy makers should look to state provisions as part of a broad strategy to limit the harms from SROs and raise the floor set by federal law.

III. THE IMPORTANCE OF STATE-LEVEL SOLUTIONS AS A POTENTIAL SOURCE FOR REMEDIES FOR INAPPROPRIATE SRO CONDUCT

SRO-related problems lend themselves to analysis under a lockstepping framework because, in the absence of adequate federal remedies, states have increasingly enacted legislation and regulations relating to SROs and school discipline. States have imposed limitations on the use of corporal punishment and restraint and seclusion and enacted requirements for SRO training and delineation of duties. States have also established best practices for school districts and law enforcement agencies, including requiring or recommending the use of MOUs.[141] To evaluate the potential of state law remedies in the context of SROs, I started by identifying state laws and regulations that either mirror or exceed protections under the federal provisions upon which litigants often rely, including civil rights and equal protection laws and regulations, and SRO and school discipline laws and regulations.[142] I then selected one state—Massachusetts—for in-depth research. Massachusetts has, at various points in time, been seen as providing more protections for people with disabilities than federal law,[143] and it

139. Marjorie Heins, *Massachusetts Civil Rights Law*, 76 MASS. L. REV. 77, 96 (1991) ("Massachusetts has the constitutional and statutory tools to redress the real economic and social harm, as well as the insult to human dignity, that results from invidious discrimination against any group.").

140. Liu, *supra* note 13, at 1315 (emphasis in original).

141. *See generally* Zeke Perez Jr. and Ben Erwin, *A Turning Point: School Resource Officers and State Policy*, EDUC. COMM'N OF THE STATES: EDNOTE (July 9, 2020), https://ednote.ecs.org/a-turning-point-school-resource-officers-and-state-policy/ (describing trends and collecting sources on different policies).

142. This Note did not include analysis of state tort laws and criminal laws, or administrative exhaustion requirements.

143. For example, Massachusetts was one of the first states to pass a law protecting the rights of disabled students in education, doing so before Congress enacted the IDEA. *See generally* Gary L. Monserud, *The Quest for a Meaningful Mandate for the Education of Children with Disabilities*, 18 ST. JOHN'S J. OF LEGAL COMMENT. 675 (2004) (providing a detailed account of

is one of nine states that has received a rating of "meets requirements and purposes of IDEA" every year since 2014.[144]

Nonetheless, while Massachusetts has instituted a number of reforms over the past decade, students in the state still experience a criminalized school environment: Massachusetts law *requires* at least one SRO per district, with some exceptions.[145] And disabled students are disproportionately disciplined. During the 2018–2019 school year, 36.4 percent of students disciplined for non-violent, non-drug, or non-criminal offenses were disabled students, though they represent just 19.2 percent of the student body.[146]

Massachusetts's constitution, laws, and regulations may offer viable avenues for challenging SROs' inappropriate use of force and restraints on students with disabilities. But there is effectively no federal or state court precedent applying these provisions to incidents with SROs, making it difficult to determine if remedies are indeed available. In addition, analysis of Massachusetts laws and regulations reveals that claims against SROs for use of force may face numerous barriers to success: Some regulations may not apply to or be enforceable against

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Massachusetts's special education mandate and the amendment to adopt the federal standard in 2002, and suggesting that, in actuality, the pre-2002 standard was applied as a less rigorous "maximum feasible" standard, not "maximum possible"). *Compare* Stock v. Mass. Hosp. Sch., 467 N.E.2d 448, 453 (Mass. 1984) (recognizing the more stringent state-law standard) *and* David D. v. Dartmouth Sch. Comm., 775 F.2d 411, 423 (1st Cir. 1985) (affirming the district court's finding that "since Massachusetts law mandated a level of substantive benefits superior to that of the federal Act, the state standard would be utilized as determinative of what was an 'appropriate' education for the child") *with* E.T. v. Bureau of Special Educ. Appeals of the Div. of Admin. L. Appeals, 91 F. Supp. 3d 38, 45 n.1 (D. Mass. 2015) ("Massachusetts had previously adhered to the higher standard of 'maximum possible development' before adopting the federal standard of 'free appropriate public education.'").

144. Based on the U.S. Department of Education determination letters for 2014 to 2020 evaluating states' implementation of the IDEA Part B. For simplicity, only the determination year, date of publication or revision, and the hyperlink are provided for determinations prior to 2020. Off. of Special Educ. and Rehab. Servs., *2020 Determination Letters on State Implementation of IDEA*, U.S. DEP'T EDUC. (Revised Nov. 25, 2020), https://sites.ed.gov/idea/idea-files/2020-determination-letters-on-state-implementation-of-idea/#IDEA-Part-B-Determinations-Meets-Requirements (Part B); *2019*, (Modified July 11, 2019), https://sites.ed.gov/idea/idea-files/2019-determination-letters-on-state-implementation-of-idea/#IDEA-Part-B-Determinations-Meets-Requirements; *2018*, (July 24, 2018), https://sites.ed.gov/idea/idea-files/2018-determination-letters-on-state-implementation-of-idea/#IDEA-Part-B-Determinations-Meets-Requirements; *2017*, (Revised July 12, 2017), https://sites.ed.gov/idea/files/ideafactsheet-determinations-2017.pdf; *2016*, (Revised July 10, 2016), https://www2.ed.gov/fund/data/report/idea/ideafactsheet-determinations-2016.pdf; *2015*, (June 2015), https://www2.ed.gov/fund/data/report/idea/2015-ideafactsheet-determinations.pdf; *2014*, (revised April 2015) https://www2.ed.gov/fund/data/report/idea/finalrev0413152014ideafactsheet-determinations.pdf.

145. MASS. GEN. LAWS ANN. ch. 71, § 37P (West 2020).

146. *2019–20 Student Discipline Data Report*, MASS. DEP'T OF ELEMENTARY AND SECONDARY EDUC., https://profiles.doe.mass.edu/statereport/ssdr.aspx (last visited Feb. 3, 2021).

SROs, or the standard for enforcement may impose too high a bar to hold SROs accountable for most instances of use of force. This section will first summarize several Massachusetts provisions, including (1) an SRO law and laws and regulations about discipline in schools,[147] (2) constitutional and statutory civil rights provisions,[148] and (3) the constitutional provision protecting against unreasonable search and seizure.[149] Then, this section will evaluate whether the provisions are in lockstep with federal analogs or could provide additional remedies,[150] and consider limitations in raising claims under Massachusetts provisions.

A. Overview of Massachusetts Provisions

1. State limits on corporal punishment, physical restraints, and SROs in schools.

Massachusetts General Laws ch. 71, § 37P ("the SRO Law") requires at least one SRO per district, with limited exceptions.[151] The SRO Law defines the SRO role[152] and imposes some requirements and recommendations for SRO hiring and operations.[153] Under this law, school superintendents and the police department providing the SRO(s) are required to enter into a memorandum of understanding (MOU) that "clearly defin[es] the role and duties of the school resource officer."[154] The SRO Law requires that SRO hiring not be

147. MASS. GEN. LAWS ANN. ch. 71, § 37P (West 2020); MASS. GEN. LAWS ANN. ch. 76, § 37G (West 2020); 603 MASS. CODE REGS. 46.00 (2016).

148. MASS. CONST. amend. art. CXIV (barring disability discrimination); MASS. GEN. LAWS ANN. ch. 93 § 103 (West 2020) (same); MASS. GEN. LAWS ANN. ch. 12, §§ 11H, 11I (West 2020) (Massachusetts Civil Rights Act).

149. MASS. CONST. amend. art. XIV.

150. This Note has not examined issues of claim preclusion and exhaustion under various Massachusetts frameworks. The analysis that follows is intended as an illustration of how a lockstepping framework may be useful, not as a complete canvassing of potential claims.

151. The requirement was included in the Massachusetts Gun Violence Reduction Act, 2014 Mass. Acts 284, which was passed in the aftermath of the 2012 shooting at Sandy Hook Elementary School. The act states, "[e]very chief of police, in consultation with the superintendent and subject to appropriation, shall assign at least 1 school resource officer to serve the city, town, commonwealth charter school, regional school district or county agricultural school." MASS. GEN. LAWS ANN. ch. 71, § 37P(b).

152. Massachusetts defines SRO as "a duly sworn municipal police officer with all necessary training, up-to-date certificates or a special officer appointed by the chief of police charged with providing law enforcement and security services to elementary and secondary public schools." MASS. GEN. LAWS ANN. ch. 71, § 37P(a) (West 2020).

153. *See generally Rights Regarding School Resource Officers in Massachusetts*, MENTAL HEALTH LEGAL ADVISORS COMM. (February 2015), https://mhlac.org/wp-content/uploads/2018/10/ed_school_resource_officers.pdf (describing the SRO law).

154. MASS. GEN. LAWS ANN. ch. 71, §§ 37P(b), (e) (West 2020). The Massachusetts Attorney

based solely on seniority and requires the police chief to consider certain criteria such as personality, character, and specialized training.[155] However, the SRO Law leaves police chiefs with considerable discretion in assigning SROs, stating that "the chief of police shall assign an officer that the chief *believes* would *strive* to foster an optimal learning environment and educational community."[156]

Under the SRO Law, MOUs must state that SROs cannot "serve as school disciplinarians, as enforcers of school regulations or in place of licensed school psychologists, psychiatrists or counselors and that SROs shall not use police powers to address traditional school discipline issues, including non-violent disruptive behavior."[157] The SRO Law also limits liability, stating that no public employer will be liable for actions or omissions "in the scope of the public employee's employment and arising out of the implementation of" the SRO Law and that the SRO Law does not "creat[e] or impos[e] a specific duty of care."[158]

In the school setting, Massachusetts's laws and regulations restrict use of force in the forms of corporal punishment,[159] mechanical restraint, and physical restraint to "ensure that every student participating in a Massachusetts public education program is free from the use of physical restraint."[160] Use of restraints is regulated under Title 603, sections 46.00 through 46.06 of the Code of Massachusetts Regulations ("the Restraint Regulation"). The Restraint Regulation states that mechanical restraints and seclusion are "prohibited in public

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General's office released a model MOU in 2018. Office of Attorney General Maura Healey, *State Agencies Release Model Memorandum of Understanding for Massachusetts School Resource Officers*, MASS.GOV (Sept. 5, 2018), https://www.mass.gov/news/state-agencies-release-model-memorandum-of-understanding-for-massachusetts-school-resource; Office of Attorney General Maura Healey, *SRO MOU Final*, MASS.GOV (Sept. 5, 2018), https://www.mass.gov/doc/sro-mou-final-9-5-18 [hereinafter *Model MOU*].

155. MASS. GEN. LAWS ANN. ch. 71, § 37P(e) (West 2020)

156. *See id.* at § 37P(b) (emphasis added). The law continues, "The chief of police shall give preference to candidates who demonstrate the requisite personality and character to work with children and educators in a school environment and who have received specialized training relating to working with adolescents and children, including cognitive development, de-escalation techniques, and alternatives to arrest and diversion strategies." *Id.*

157. *Id.* The SRO Law requires that MOUs state the requirement in the accompanying text. The model MOU states, "Under state law, the SRO shall not serve as a school disciplinarian . . . ." *Model MOU*, *supra* note 154, at 6. The SRO law could be interpreted to imply that SROs are, in actuality, prohibited from such actions, or it could be read as simply requiring the statement in the MOU as an expression of policy preference.

158. MASS. GEN. LAWS ANN. ch. 71, § 37P(f) (West 2020).

159. MASS. GEN. LAWS ANN. ch. 76, § 37G (West 2020).

160. 603 MASS. CODE REGS. 46.01(2) (2016).

education programs."[161] School committees, teachers, employees, and agents of "the school committee," are also restricted from using corporal punishment,[162] and from using physical restraints unless performed by trained, qualifying personnel in "emergency situations, after . . . less intrusive alternatives have failed or been deemed inappropriate."[163] The Restraint Regulation requires program staff to review and consider disability-related factors specific to an individual student before employing physical restraints.[164] Restraint is not to be used "[a]s a response to property destruction, disruption of school order, a student's refusal to comply with a . . . rule or staff directive, or verbal threats when those actions that do not constitute a threat of assault, or imminent, serious, physical harm."[165]

The limits on corporal punishment do not, however, prohibit school personnel and their agents from "using such reasonable force as is necessary to protect pupils, other persons, and themselves from an assault by a pupil."[166] In addition, the Restraint Regulation does not

161. *Id.* at 46.03(1)(a). Mechanical restraint is "the use of any physical device or equipment to restrict a student's freedom of movement." *Id.* at 46.02. Seclusion is "involuntary confinement of a student alone in a room or area from which the student is physically prevented from leaving." *Id.*

162. MASS. GEN. LAWS ANN. ch. 71, § 37G(a) (West 2020) ("The power of the school committee or of any teacher or any other employee or agent of the school committee to maintain discipline upon school property shall not include the right to inflict corporal punishment upon any pupil.").

163. 603 MASS. CODE REGS. 46.01(3) (2016). Physical restraints are defined as "direct physical contact that prevents or significantly restricts a student's freedom of movement." *Id.* at 46.02. The use of "prone" physical restraint is barred except under a few exceptions that all require advance documentation. *Id.* at 46.03(1)(b). Prone restraint is "a physical restraint in which a student is placed face down on the floor or another surface, and physical pressure is applied to the student's body to keep the student in the face-down position." *Id.* at 46.02. *See generally Rights Regarding the Use of Restraint in Massachusetts Public Schools*, MENTAL HEALTH LEGAL ADVISORS COMM. (January 2016), https://mhlac.org/wp-content/uploads/2018/10/restraint_in_Mass_public_schools.pdf (summarizing Massachusetts Department of Elementary and Secondary Education restraint regulations).

164. *See* 603 MASS. CODE REGS. 46.05(5)(d) (2016) (requiring program staff to make certain safety considerations, including to "review and consider any known medical or psychological limitations . . . and/or behavioral intervention plans regarding the use of physical restraint on an individual student" and noting that "[n]othing in 603 CMR 46.00 shall be construed to limit the protection afforded publicly funded students under other state or federal laws, including those laws that provide for the rights of students who have been found eligible to receive special education services").

165. *Id.* at 46.03(2)(c). Further, the regulation provides that school personnel using physical restraints should have "two goals in mind:" to only use when necessary to protect "a student and/or a member of the school community from . . . imminent, serious, physical harm; and . . . to prevent or minimize any harm to the student as a result of the use of physical restraint." *Id.* at 46.01(3)(a–b).

166. MASS. GEN. LAWS ANN. ch. 71, § 37G(b) (West 2020).

prohibit law enforcement or school security personnel "from exercising their responsibilities, including the physical detainment of a student or other person alleged to have committed a crime or posing a security risk."[167] It is unclear whether SROs are subject to the restrictions in the Restraint Regulation. However, a Massachusetts Department of Education guidance document states that "anyone employed by the school district and working in a school security role (e.g., school resource officer) should receive the in-depth training."[168]

2. State limits on disability-based discrimination and the state Civil Rights Act.

Article 114 of the Massachusetts Constitution, Section 103 of the Massachusetts Equal Rights Act (MERA), and the Massachusetts Civil Rights Act (MCRA) are the primary state provisions that protect people from discrimination on the basis of disability. Article 114 and MERA § 103 both "exist to address the 'pervasive unequal treatment of individuals with disabilities,' who 'have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society.'"[169] Unlike the U.S. Bill of Rights, Article 114 explicitly prohibits disability discrimination.[170] It states that "[n]o otherwise qualified handicapped individual shall, solely by reason of his handicap, be excluded from the participation in, denied the benefits of, or be subject to discrimination under any program or activity within the commonwealth."[171] The language of Article 114 is broad, and although it was modeled after Section 504, it applies to public and private entities and parties, even if they do not receive state or federal funds.[172] Thus, Article 114 has a

167. 603 MASS. CODE REGS. 46.03(4)(b) (2016).

168. *Questions & Answer Guide Related to Implementation of 603 CMR 46.00*, MASS. DEP'T OF ELEMENTARY AND SECONDARY EDUC. (last updated September 3, 2020), https://www.doe.mass.edu/sfs/safety/restraint.html [hereinafter *Mass. Questions & Answer Guide*]. Similarly, it states elsewhere that "Any employee whose duties are primarily related to maintaining school safety (e.g., school resource officers) should be included in the in-depth training." The guidance document also reiterates that "Nothing in 603 CMR 46.00 prohibits law enforcement, judicial authorities or school security personnel from exercising their responsibilities." *Id.*

169. Adjartey v. Cent. Div. of the Hous. Ct. Dep't, 120 N.E.3d 297, 314 (Mass. 2019) (quoting *In re McDonough*, 930 N.E.2d 1279, 1283 (2010)).

170. MASS. CONST. amend. art. CXIV.

171. *Id.*

172. Guckenberger v. Bos. Univ., 957 F. Supp. 306, 324 (D. Mass. 1997) (citing Grubba v. Bay State Abrasives, Div. of Dresser Indus., Inc., 803 F.2d 746, 747–48 (1st Cir. 1986)) ("By its plain language, the amendment does not limit the pool of potential defendants to public actors. . . ."); Heins, *supra* note 139, at 88 (Article 114 "reaches beyond the various handicap discrimination

broader scope than Section 504.

A decade after ratifying Article 114, Massachusetts amended MERA[173] to provide expressly for equal rights and reasonable accommodations for people with disabilities.[174] MERA § 103 states in relevant part:

> Any person within the commonwealth, regardless of handicap or age . . . shall, with reasonable accommodation, have the same rights as other persons . . . to the full and equal benefit of all laws and proceedings for the security of persons and property, including, but not limited to, the rights secured under Article CXIV of the Amendments to the Constitution.[175]

Section 103(c) specifies that courts should evaluate claims under the statute based on the "totality of the circumstances," and provides a civil cause of action in Superior Court for injunctive and equitable relief, including compensatory and exemplary damages, and for attorney's fees.[176]

MCRA is the state's equivalent to 42 U.S.C. § 1983.[177] It provides a right of action when "any person or persons, whether or not acting under color of law, interfere by threats, intimidation or coercion, or attempt to interfere by threats, intimidation or coercion, with the exercise or enjoyment" of another person's rights.[178] Liability "may be predicated upon violations of either the federal or state constitutions,"[179] or upon violations of federal or state laws.[180] The limited application of MCRA to interferences based on "threats, intimidation or coercion" is a higher standard for liability than what is required under § 1983.[181] The Supreme Judicial Court of Massachusetts

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prohibitions in employment, housing and public accommodations that are now found in c. 151B and c.272."); *see also Disability Rights Laws in Massachusetts*, MASS. OFF. ON DISABILITY, https://www.mass.gov/doc/disability-rights-laws-in-massachusetts/download (describing Massachusetts laws as of June 1, 2015) (last visited Feb. 8, 2021).

173. *See generally* Heins, *supra* note 139, at 85–86 (describing the history of MERA).

174. MASS. GEN. LAWS ANN. ch. 93, § 103 (West 2020).

175. *Id*. Handicap is defined by reference to Title XXI Labor And Industries, Chapter 151B, § 1. MASS. GEN. LAWS ch. 151B, § 1 (2020) ("The term 'handicap' means (a) a physical or mental impairment which substantially limits one or more major life activities of a person; (b) a record of having such impairment; or (c) being regarded as having such impairment. . .").

176. MASS. GEN. LAWS ANN. ch. 93, § 103(c–d) (West 2020).

177. MASS. GEN. LAWS ANN. ch. 12, §§ 11H, 11I (West 2020).

178. *Id.* at § 11H (providing a right of action to the state Attorney General). Section 11I creates an individual right of action for the violations described in § 11H, and provides for injunctive and equitable relief, including compensatory damages, and attorneys' fees. *Id.* at § 11I.

179. Nuon v. City of Lowell, 768 F. Supp. 2d 323, 330 n.3 (D. Mass. 2011).

180. MASS. GEN. LAWS ANN. ch. 12, §§ 11H, 11I (West 2020).

181. Deptula v. City of Worcester, No. 17-40055-TSH, 2020 WL 1677633, at *7 (D. Mass.

has defined each term: A "threat" is the "intentional exertion of pressure to make another fearful or apprehensive of injury or harm"; "[i]ntimidation involves putting in fear for the purpose of compelling or deterring conduct;"[182] and coercion involves "physical or moral" force applied to another to get them to act against their will and do something they "would not otherwise have done."[183] MCRA "affords the same standards of qualified immunity for public officials as that applicable under § 1983."[184] But unlike § 1983, MCRA applies to both public and private actors.[185]

3. State limits on unreasonable search and seizure.

Article 14, Massachusetts's correlate of the Fourth Amendment, protects the right for "[e]very subject . . . to be secure from all unreasonable searches, and seizures, of his person, his houses, his papers, and all his possessions."[186] The Supreme Judicial Court of Massachusetts has held that Article 14 provides more substantive protection than the Fourth Amendment in some areas, including a broader definition of "seizure."[187] In other areas, however, such as probable cause for arrest, Article 14 is in lockstep with the Fourth Amendment.[188] There is little case law on Article 14 and seizures in the

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Apr. 6, 2020) (quoting Bally v. Northeastern Univ., 532 N.E.2d 49, 52 (Mass. 1989)).

182. Planned Parenthood League of Mass., Inc. v. Blake, 631 N.E.2d 985, 990 (Mass. 1994) (cleaned up).

183. *Id.* (quoting *Coercion*, WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1959)).

184. Brown v. Butler, Civil Action No. 3:17-cv-30030-MAP, 2017 U.S. Dist. LEXIS 219572, at *42–43 (D. Mass. Dec. 22, 2017). *See also, e.g.*, Raiche v. Pietroski, 623 F.3d 30, 40 (1st Cir. 2010) ("Most importantly here, the Supreme Judicial Court of Massachusetts has held that MCRA claims are subject to the same standard of immunity for police officers that is used for claims asserted under § 1983.").

185. *See, e.g.*, Batchelder v. Allied Stores Corp., 473 N.E.2d 1128, 1131 (Mass. 1985) ("[MCRA] extended beyond the limits of its Federal counterpart by incorporating private action within its bounds. . . . [T]he Legislature intended to provide a remedy under G.L. c. 12, § 11I, coextensive with 42 U.S.C. § 1983, except that the Federal statute requires State action whereas its State counterpart does not.").

186. MASS. CONST. amend. art. XIV. Ratified in 1780, Article 14 was a model for the crafting of the Fourth Amendment. *See, e.g.*, Harris v. United States, 331 U.S. 145, 161 (1947) ("The Fourth Amendment . . . derives from the similar provision in the first Massachusetts Constitution.").

187. *See, e.g.*, Commonwealth v. Lyles, 905 N.E.2d 1106, 1107 n.1 (Mass. 2009) ("We have held that art. 14 provides more substantive protection than does the Fourth Amendment in defining the moment when an individual's personal liberty has been significantly restrained by police such that the individual may be said to have been 'seized' within the meaning of art. 14.").

188. *See, e.g.*, *Brown*, 2017 U.S. Dist. LEXIS 219572, at *38 n.10 (quoting Nuon v. City of Lowell, 768 F. Supp. 2d 323, 330 (D. Mass. 2011) ("The standard for probable cause for arrest under Article 14 of the Massachusetts Declaration of Rights mirrors that of the Fourth Amendment to the United States Constitution."); Commonwealth v. Snyder, 597 N.E.2d 1363, 1367 (Mass. 1992) (citing Commonwealth v. Upton, 476 N.E.2d 548, 554 (Mass. 1985))

school setting,[189] so it is difficult to determine the extent to which the more protective standard would extend to schools. The Supreme Court has held that the Fourth Amendment right to privacy is more limited in the school setting,[190] but the standard for SROs—as opposed to non-law-enforcement school officials—is far less clear.

In *Commonwealth v. Evelyn*, the Supreme Judicial Court of Massachusetts stated that "[Article] 14 provides more substantive protection than does the Fourth Amendment in defining the moment of seizure."[191] Comparing seizure under the Fourth Amendment to seizure under Article 14, the court explained that the former occurs when a reasonable person believes they are not free to leave.[192] Under the latter, "a seizure occurs when an officer, 'through words or conduct, objectively communicate[s] that the officer would use his or her police power to coerce [an individual] to stay.'"[193] Like the Fourth Amendment standard, the court applies an objective reasonableness standard under Article 14.[194] And, as with the Fourth Amendment, age may be a relevant factor in the court's Article 14 analysis of whether a seizure occurred and whether it was objectively reasonable.[195] In *Evelyn*, the court held that

> [A] child's age, when known to the officer or objectively apparent to a reasonable officer, is relevant to the question of seizure under

("Certainly, art. 14 imposes no higher standard than probable cause.").

189. This note will not analyze the application of Article 14 to searches. For a (dated) summary of case law on searches and seizures in schools, *see* Wendy Wolf & Perry Moriearty, *School Search And Seizure: An Overview Of The Law*, JUV. DEF. NETWORK, YOUTH ADVOC. DEP'T - COMM. FOR PUBLIC COUNSEL SERVS. (2010), https://www.publiccounsel.net/ya/wp-content/uploads/sites/6/2014/08/school-search-and-seizure.pdf.

190. New Jersey v. T.L.O., 469 U.S. 325, 341–43 (1985); *see also* Commonwealth v. Snyder, 597 N.E.2d 1363, 1367 (Mass. 1992) ("It is consistent with the requirements of art. 14, except where a school employee is explicitly acting on behalf of law enforcement officials, for a school employee to conduct a search and seize drugs (guns and other contraband) in a school without first obtaining a search warrant.").

191. 152 N.E.3d 108, 117 (Mass. 2020) (internal quotations omitted) (quoting *Lyles*, 905 N.E.2d at 1107 n.1).

192. *Id.* at 116 (quoting Michigan v. Chesternut, 486 U.S. 567, 573 (1988)) (also citing California v. Hodari D., 499 U.S. 621, 626 (1991)).

193. *Id.* (alteration in original) (quoting Commonwealth v. Matta, 133 N.E.3d 258, 266 (Mass. 2019)); *but see* Commonwealth v. Fraser, 573 N.E.2d 979, 981 (1991) ("[T]he police do not effect a seizure merely by asking questions unless the circumstances of the encounter are sufficiently intimidating that a reasonable person would believe he was not free to turn his back on his interrogator and walk away.").

194. *Evelyn*, 152 N.E.3d. at 120. ("We maintain an objective standard so that officers can 'determine in advance whether the conduct contemplated will implicate the Fourth Amendment' or art. 14.").

195. *Id.* at 118. (comparing the custody and arrest contexts and finding that age is relevant in each).

> art. 14. The question will be whether the officer objectively communicated to a person of the juvenile's apparent age that the officer would use his or her police power to coerce the juvenile to stay.[196]

Article 14 claims generally arise under MCRA and, as described above, are subject to the same standard for qualified immunity as claims under § 1983.[197]

B. Application and comparison of Massachusetts laws

While Massachusetts's laws on discipline and corporal punishment are more protective that federal laws, the state's disability discrimination provisions are largely in lockstep with federal laws. If an SRO in Massachusetts used excessive force against a disabled student, that student may be able to claim violations of her state constitutional right to be free from disability discrimination guaranteed by Article 114 and MERA § 103. Protections under Article 14 may also offer additional protection beyond those of the Fourth Amendment, but there is little case law for evaluating the viability of an Article 14 claim raised under MCRA.

Massachusetts law does exceed federal protections in its prohibition of mechanical restraints in schools, corporal punishment, and, except in limited circumstances, use of physical restraints.[198] Massachusetts's SRO Law also exceeds federal protections by explicitly prohibiting SROs from using their police powers to address school discipline issues and non-violent disruptive behavior.[199] But it is not clear that there is a sufficient state remedy when SROs violate these laws—in particular, the SRO Law or the Restraint Regulation—or if SROs will be held to the same standard as other school personnel.

1. Application of Massachusetts's limits on corporal punishment, physical restraints, and SROs in schools as compared to federal limits.

The SRO Law and the Restraints Regulation are more protective of students than federal law. While unlikely, it is possible they might support a plaintiff's Fourth Amendment claim for unreasonable seizure or excessive force raised under § 1983. The state provisions could be

196. *Id.*
197. *See supra* note 184 and accompanying text.
198. *See* discussion *supra* Section III.A.1, note 161 (defining mechanical restraint), and note 163 (defining physical restraint).
199. MASS. GEN. LAWS ANN. ch. 71, § 37P (West 2020).

relevant to the qualified immunity analysis in a claim against an SRO for arrest without probable cause.[200] However, there are limitations to these approaches.

When evaluating use of force under the Fourth Amendment objective reasonableness standard, courts consider the totality of the circumstances, including factors like the school setting and the child's age.[201] In one case, for example, the school setting implied that "officers should exercise more restraint when dealing with student misbehavior in the school context."[202] Further, the court explained, the school setting "weighs against the reasonableness of using handcuffs."[203] Courts should consider the SRO Law, the Restraint Regulation, and the MOU between the school and the local law enforcement agency as key factors in analyzing the reasonableness of a seizure. In addition to generally considering the school setting, courts should consider Massachusetts's specific limits on SROs and protections for students. Failure to train SROs to understand Massachusetts's restrictions arguably amounts to deliberate indifference given the high likelihood that the SRO would encounter situations where the provisions apply.[204]

However, Massachusetts's SRO Law and Restraint Regulation have limited application in Fourth Amendment claims under § 1983 except where a plaintiff is raising a wrongful arrest or arrest without probable cause claim. This is because courts generally do not consider *state laws* when determining if the defendant's conduct violated "clearly established law" for purposes of qualified immunity—courts' analysis of whether law is clearly established relies on *federal*

200. *See, e.g.*, Nuon v. City of Lowell, 768 F. Supp. 2d 323, 333–34 (D. Mass. 2011) (noting that "unreasonable noise does not provide probable cause for the offense of disorderly conduct. Moreover, federal and Massachusetts case law clearly established that neither speech nor expressive conduct can properly form the basis of an arrest for disorderly conduct").

201. *See supra* notes 71–79 and accompanying text (discussing objective reasonableness in the school setting).

202. E.W. *ex rel.* T.W. v. Dolgos, 884 F.3d 172, 183 (4th Cir. 2018) (finding that it was unreasonable for an SRO to handcuff a "calm, compliant ten-year-old" who was on school grounds and sitting "in a closed office surrounded by three adults," but concluding that the SRO was entitled to qualified immunity).

203. *Id.* at 183–84 ("Society expects that children will make mistakes in school—and, yes, even occasionally fight. That teachers handle student misbehavior and unruliness 'on a routine basis without the use of any force' suggests that force is generally unnecessary in the school context.").

204. *See, e.g.*, McCadden v. City of Flint, No. 18-12377, 2019 U.S. Dist. LEXIS 63244, *14 (E.D. Mich. Apr. 12, 2019) ("Plaintiff has sufficiently alleged that the City has failed to train its police officers on appropriately interacting with juveniles who statistically, based on existing data and studies, may have a disability that would dictate how an officer — particularly a School Resource Officer — should interact with such a juvenile.").

constitutional precedents. State provisions may be relevant in some cases, however, such as claims of wrongful arrest and arrest without probable cause where the claim depends on the validity of the arrest, i.e., whether the officer reasonably believed the arrestee violated or was about to violate state or federal law.[205] In *Wilber v. Curtis*, for example, the plaintiff brought a Fourth Amendment claim under § 1983 for arrest without probable cause.[206] The court evaluated probable cause in relation to the offenses that the officer believed the plaintiff was committing, explaining that the plaintiff "must show that it was clear *under state law* that there was not probable cause to arrest him for this crime."[207]

Take also a case involving an SRO in Kentucky. At the time, the state's regulations on corporal punishment, restraint, and discipline by SROs were similar to Massachusetts's.[208] Two elementary school children, S.R. and L.G., sued the county sheriff and the SRO after the SRO handcuffed them each behind their backs at the biceps.[209] The SRO handcuffed S.R., an eight-year-old child who weighed 54-pounds, because he swung his arm at the SRO.[210] The SRO handcuffed L.G. on multiple occasions, including after the 56-pound nine-year old hit and blew snot at the SRO, and after she hit, kicked, and scratched a staff member.[211] The court described, but did not resolve, the question of whether the SRO's actions were done while in the role of school personnel or in the role of law enforcement. If he were deemed to be school personnel, his repeated handcuffing of students would violate a

205. *See, e.g.*, Cox v. Hainey, 391 F.3d 25, 31 (1st Cir. 2004) ("Probable cause exists when the arresting officer, acting upon apparently trustworthy information, reasonably concludes that a crime has been (or is about to be) committed and that the putative arrestee likely is one of the perpetrators."); Wilber v. Curtis, 872 F.3d 15, 22 (1st Cir. 2017) (affirming the magistrate's finding that the officers were entitled to qualified immunity because state law did not clearly establish that the officers did not have probable cause).

206. 872 F.3d at 19.

207. *Id.* at 22 (emphasis added) ("[F]or purposes of qualified immunity, it is not enough to show that the officers may have made a mistaken determination about whether Wilber's conduct provided probable cause to conclude that he had committed the offense for which he was arrested.").

208. S.R. v. Kenton Cnty. Sheriff's Off., 302 F. Supp. 3d 821, 825–26 (E.D. Ky. 2017) (describing that the contract between the county board of education and the sheriff's department prohibited SROs from disciplining students; a state regulation prohibited use of restraints (including handcuffs) in most situations, including as punishment or discipline, but provided that the regulation "does not prohibit the lawful exercise of law enforcement duties by sworn law enforcement officers").

209. *Id.* at 829–30.

210. *Id.* at 827.

211. *Id.* at 828–30. The SRO did not bring criminal charges against S.R. or L.G., testifying that "none of what they did was worthy of trying to file a criminal charge." *Id.* at 830.

state regulatory bar on use of mechanical restraints, but if he were deemed law enforcement, it might be permitted under the exception for "lawful exercise of law enforcement duties."[212] The court denied the defendant's motion for summary judgment, determining that the seizures and use of force were unreasonable as a matter of law and that the municipality was liable—regardless of the applicability of the Kentucky regulation.[213] In short, the court avoided determining the applicability of the state's regulation to the SRO to reach a liability determination.[214]

In a case where an SRO's actions were particularly severe, a court might be able to avoid the question of the applicability of Massachusetts's regulations, as in *S.R.* But if a court did reach the issue, it might conclude that the SRO was not acting in a school personnel capacity and that the Restraint Regulation only applies to school personnel, that the SRO Law or Restraint Regulation do not apply to the behavior the SRO was responding to, or that the SRO Law is non-binding because it explicitly limits liability for public employers and does not impose a specific duty of care.

2. Application of Massachusetts's Civil Rights Act and Article 14 as compared to § 1983.

On the one hand, MCRA imposes a high threshold for illegal conduct by requiring threats, intimidation, or coercion,[215] making it unlikely that a plaintiff could successfully use MCRA to pursue a claim against an SRO. On the other hand, Massachusetts's broader definition of seizure under Article 14 may bar more conduct than the Fourth Amendment alone. Massachusetts also follows a lockstep application of qualified immunity under § 1983.[216] Use of force or seizure by law enforcement "is not, in itself, coercive under the MCRA unless the

212. *Id.* at 832–33 ("Because SROs wear two hats while serving in Kentucky schools, it can be difficult to discern when their actions constitute those of school personnel or those of law enforcement. Moreover, the existence of a regulation prohibiting allegedly unconstitutional conduct is but one factor in the *Graham* analysis.").

213. *Id.* at 833.

214. *Id.* ("[T]he Court need not determine the applicability of 704 KAR 7:160 § 3(2)(a) because [the SRO's] seizure and use of force, under the facts of this case, were unreasonable, even in the absence of the above regulation.").

215. *See* MASS. GEN. LAWS ANN. ch. 12, §§ 11H, 11I (West 2020) (providing a right of action when "any person or persons, whether or not acting under color of law, interfere by threats, intimidation or coercion, or attempt to interfere by threats, intimidation or coercion, with the exercise or enjoyment" of another person's rights). For an overview of MCRA, *see* notes 177–185 and accompanying text *supra*.

216. *See supra* note 184 and accompanying text.

force is inflicted to achieve 'some further purpose.'"[217] Though there is some disagreement on whether a Fourth Amendment violation alone can give rise to a MCRA claim, most courts have found that it does not.[218] Similarly, a violation of Article 14 alone may be insufficient to state a claim under MCRA absent threats, intimidation, or coercion. But if an SRO made statements suggesting a purpose of punishing or disciplining a student for behavior that stemmed from a disability, a plaintiff may be able to bring a claim under MCRA for violating any of the state or federal constitutional and statutory rights described above.[219]

Cases with SROs in other jurisdictions have involved motives suggestive of threats, intimidation, or coercion as defined by MCRA. For example, in *Gray v. Bostic,* a case against an SRO in Georgia, *the Eleventh* Circuit found that "[e]very reasonable officer would have known that handcuffing a compliant nine-year-old child for *purely punitive purposes* is unreasonable."[220] T*he court found that* the seizure "was justified at its inception" because the nine-year-old committed a misdemeanor by threatening her teacher.[221] However, the court held that the SRO's actions were not responding to an exigent threat, and instead were intended to teach the student a lesson.[222] Therefore, the seizure was not "reasonably related in scope to the circumstances which justified interference in the first place."[223] The court in *Gray* then concluded that the SRO was not entitled to qualified immunity.[224]

Likewise, Massachusetts's broader definition of what constitutes an unreasonable seizure under Article 14 may allow students to challenge a greater range of SRO conduct than under the Fourth Amendment alone.[225] Age can be a relevant factor when a court considers whether

217. Walker v. Jackson, 56 F. Supp. 3d 89, 95 (D. Mass. 2014) (quoting Gallagher v. Commonwealth of Massachusetts, 2002 WL 924243, at *3 (D. Mass. Mar. 11, 2002)).

218. Brown v. Butler, Civil Action No. 3:17-cv-30030-MAP, 2017 U.S. Dist. LEXIS 219572, at *41, n. 12 (D. Mass. Dec. 22, 2017).

219. MASS. GEN. LAWS ANN. ch. 12, § 11H (West 2020) (providing a right of action for violations of "rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth").

220. *Gray v. Bostic,* 458 F.3d 1295, 1307 (11th Cir. 2006) (emphasis added) (applying the standard from *New Jersey v. T.L.O.*, 469 U.S. 325, 341–42, (1985)).

221. *Id.* at 1304 (quoting *T.L.O.*, 469 U.S. at 341).

222. *Id.* at 1304–05 ("[T]he handcuffing was excessively intrusive given Gray's young age and the fact that it was not done to protect anyone's safety.").

223. *Id.*

224. *Id.* 1306–07 (applying the "obvious clarity" standard, described *supra* note 67).

225. *See generally* Section III.A.3, *supra* (describing Article 14, Massachusetts's search and seizure provision).

a seizure occurred and whether it was objectively reasonable under the totality of the circumstances.[226] The Supreme Judicial Court of Massachusetts explained that "the naiveté, immaturity, and vulnerability of a child will imbue the objective communications of a police officer with greater coercive power."[227] Indeed, a student's age is likely to impact *her own* perception of when an SRO has committed a seizure and "'engaged in some show of authority' that a reasonable person would consider coercive."[228] So if the standard for establishing that a seizure *occurred* is lower, it may thus be easier to establish that an SRO's seizure of a student violated Article 14. But proving that an unconstitutional seizure alone occurred is insufficient to establish liability under MCRA—the student would also have to demonstrate that the seizure involved threats, intimidation, or coercion.[229]

In addition, courts should consider the SRO Law and Restraint Regulation in evaluating a MCRA claim for excessive force or arrest without probable cause in violation of Article 14.[230] First, these state laws show that the school setting and the attendant policy decisions are relevant to the totality of circumstances inquiry. The legislature and the Massachusetts Department of Education, respectively, made policy judgments to restrict SRO authority and conduct under the SRO Law and to broadly limit the use of restraints under the Restraint Regulation. The state also recommended that SROs receive the same training that school personnel authorized to administer restraints are required to attend, albeit in a non-binding policy document.[231] In any event, these binding and non-binding policies evince the legislature's judgment that more should be done to keep students safe.

Second, a court should conclude that the state provisions limit the scope of qualified immunity. Qualified immunity under MCRA mirrors the standard under § 1983, so any MCRA analysis should look to state statutes and precedents for identifying clearly established law.[232] The

226. Commonwealth v. Evelyn, 152 N.E.3d 108, 118 (Mass. 2020) (finding that age can be a relevant factor when determining whether a seizure occurred).

227. *Id.* (citing J.D.B. v. North Carolina, 564 U.S. 261, 271–72 (2011)).

228. Commonwealth v. Matta, 133 N.E.3d 258, 266 (Mass. 2019) (quoting Commonwealth v. Sanchez, 531 N.E.2d 1256, 1259 (Mass. 1988)).

229. *See* notes 217–219 and accompanying text *supra*.

230. MASS. CONST. amend. art. XIV. *See* Section III.A, *supra* (describing the SRO Law and Restraint Regulation).

231. *Mass. Questions & Answer Guide*, *supra* note 168.

232. *See, e.g.*, Duarte v. Healy, 537 N.E.2d 1230, 1233 (Mass. 1989) (finding that "the law of this State was not clearly established" such that it would indicate that the policy in question violated Article 14).

Restraint Regulation explicitly prohibits mechanical restraint in public education programs,[233] and the SRO Law[234] prohibits SROs from using police powers for traditional school discipline.[235] The SRO Law also requires training for SROs, and the Massachusetts Department of Education recommends that SROs receive training on the Restraint Regulation as well.[236] Taken together, these policies should qualify as "clearly established law," and seizures employing banned methods would clearly contravene such laws. But as with a Fourth Amendment claim, a court may find that the Restraint Regulation does not apply because the SRO was not acting in a school personnel capacity; that the student's behavior exempted the SRO from the SRO Law or Restraint Regulation; or that the restrictions are non-binding.

3. Application of Massachusetts's disability discrimination provisions as compared to federal provisions.

Massachusetts's state disability discrimination provisions do not clearly provide significant additional remedies or recourse beyond what the ADA and Section 504 provide. Both Article 114[237] and MERA § 103,[238] which bar disability discrimination, have mostly been interpreted in lockstep with the ADA and Section 504.[239] In particular, Article 114 mirrors the language of Section 504, and bars exclusion, denial of benefits, or discrimination "solely by reason of" disability.[240]

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233. 603 MASS. CODE REGS. 46.00 (2016).

234. MASS. GEN. LAWS ANN. ch. 71, § 37P (West 2020).

235. *See supra* Section III.A.1 (describing the Restraint Regulation and the SRO Law).

236. *Mass. Questions & Answer Guide*, *supra* note 168.

237. MASS. CONST. amend. art. CXIV.

238. MASS. GEN. LAWS ANN. ch. 93, § 103 (West 2020).

239. For example, as with the ADA and Section 504, exclusion from benefits does not need to be "complete" to qualify as discrimination under Art. 114. *See, e.g.*, Shedlock v. Dep't Of Correction, 818 N.E.2d 1022, 1033 (Mass. 2004) ("The fact that Shedlock was not totally excluded from his cell or from prison programs does not make it impossible for him to prove his claim under the ADA, [Section 504], and art. 114. . ."). In *Shedlock*, the Supreme Judicial Court of Massachusetts held that it was overly narrow to require that "a violation could only be premised on conduct that resulted in a complete exclusion from programs or total denial of benefits." *Id.* Similarly, the court held that, "[a]lthough art. 114 contains no definition of the term 'qualified handicapped individual,' the language of the amendment closely tracks the language of the [Rehabilitation Act]." *Id.* at 1031 (citing Layne v. Superintendent, Mass. Corr. Inst., 546 N.E.2d 166, 168 n.4 (Mass. 1989)).

240. *Compare* MASS. CONST. amend. art. CXIV ("No otherwise qualified handicapped individual shall, *solely by reason of his handicap*, be excluded from the participation in, denied the benefits of, or be subject to discrimination under any program or activity within the commonwealth." (emphasis added)) *with* 29 U.S.C. § 794(a) (stating that an individual with disabilities cannot, "*solely by reason of her or his disability*, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or . . . conducted by any Executive agency." (emphasis

It is possible that, under Article 114, a plaintiff is not required to prove that the defendant subjectively intended to discriminate.[241] There is little case law arising under Article 114 and MERA § 103 outside the employment setting, so it is unclear how a court would treat Article 114 and MERA claims against an SRO. But this also means that a court could interpret the Massachusetts provisions—and especially Article 114—as imposing requirements above the floor required by the ADA and Section 504 in the school context.

Massachusetts's disability provisions do not significantly augment the protections from federal law, but a plaintiff could use state law to raise claims that mirror common federal claims. A plaintiff could claim that the SRO, the school district, and the law enforcement agency failed to accommodate the plaintiff's disability in the use of force, failed to adequately train SROs on interacting with students with disabilities, and discriminated against disabled students in the methods of administering the SRO program.[242] As described in Section II.A.2, most circuits require police to provide reasonable accommodations during arrest absent exigent circumstances. In *Wilson v. City of Southlake*, for example, the court found that the SRO was not exempt from accommodating an eight-year-old in the course of arrest.[243] In determining that the circumstances were not so exigent as to make accommodations unreasonable, the court considered: (1) the school setting and the actions of bystanders, (2) the relative threat in light of the child's age, (3) the officer's knowledge of the child's disability, and (4) the presence and type of weapon.[244]

The claim would likely need to be brought under MERA § 103, not Article 114. Courts have held that Article 114 does not provide an independent cause of action where a claim is available under an

added)).

241. Layne v. Superintendent, Mass. Correctional Inst., 546 N.E.2d 166, 169 (Mass. 1989) (stating in dicta that "[t]here is no requirement in art. 114 that a defendant be shown to have subjectively intended to deny the constitutional rights of a handicapped individual").

242. *See generally* Section II.A.2, *supra*, describing the federal disability law claims in McCadden v. City of Flint, No. 18-12377, 2019 U.S. Dist. LEXIS 63244 (E.D. Mich. Apr. 12, 2019).

243. 936 F.3d 326, 331 (5th Cir. 2019).

244. *See id.* at 331–32. In *Wilson*, a school staff member had instructed the officer to remain where he was and not speak to the child while the staff member tried to diffuse the situation, indicating a lack of exigence. The child's age reflected that the relative threat was low, and the officer knew of the child's disability. The court concluded that the child did not have an actual weapon capable of inflicting harm, stating that "[a] jump rope in the hands of an eight-year-old child is not a weapon." *Id.*

existing statute such as MCRA[245] or MERA.[246] In *Brodsky v. New England School of Law*, the District of Massachusetts held that an expelled law student could not proceed directly against the law school under Article 114 on allegations of disability discrimination.[247] The court explained that the constitutional claim was indistinguishable from the claim brought under MERA § 103, and MERA provided a "well-worn procedural path to relief."[248]

There are at least two more potential obstacles to bringing a claim under Art. 114 or MERA § 103. First, a government authority could have qualified immunity, but in *Shedlock v. Department of Corrections*, the court noted that the Department of Corrections did not argue that it was immune from suit for violations of Article 114.[249] Second, some courts have interpreted Section 504 to require a different causation standard than the ADA:[250] Section 504 prohibits discrimination "*solely* by reason of" disability,[251] whereas the ADA does not require that the discrimination is "solely" based on disability status.[252] Other courts

245. MASS. GEN. LAWS ANN. ch. 12, § 11I (West 2020); *see, e.g.*, Kilburn v. Dep't of Corr. State Transp. Unit, No. 07-P-812, 2008 Mass. App. Unpub. LEXIS 396 (App. Ct. July 25, 2008) ("There is no individual right of action under art. 114 of the Massachusetts Declaration of Rights where, as here, a plaintiff may seek redress under an existing statute such as G.L. c. 12, § 11I, of the State Civil Rights Act."); *Layne*, 546 N.E.2d at 168 ("If a violation of art. 114 rights can be redressed within the ambit of an existing statute, such as the State Civil Rights Act, there is a well-worn procedural path to relief for such a violation.").

246. *See, e.g.*, Marlon v. W. New Eng. Coll., No. CIV.A. 01-12199DPW, 2003 WL 22914304, at *10 n.19 (D. Mass. Dec. 9, 2003), *aff'd*, 124 F. App'x 15 (1st Cir. 2005) (finding that student-plaintiff could not "separately bring both an Article 114 claim and a § 103 claim" against the college for failure to accommodate her disabilities); Brodsky v. New Eng. Sch. of Law, 617 F. Supp. 2d 1, 6 (D. Mass. 2009) (same). The federal district court in *Marlon* explained of Massachusetts' state precedent: "The Supreme Judicial Court of Massachusetts has held that '[i]f a violation of art. 114 rights can be redressed within the ambit of an existing statute, such as the State Civil Rights Act, there is a well-worn procedural path to relief for such a violation.'" *Marlon*, 2003 WL 22914304 at *10 n.19 (first quoting *Layne*, 546 N.E.2d at 168; then citing Tate v. Dep't of Mental Health, 645 N.E.2d 1159 (Mass. 1995) (Article 114 claim barred because a claim under MASS. GEN. LAWS ch. 151B provided adequate relief to redress handicap discrimination in employment).

247. *Brodsky*, 617 F. Supp. 2d at 6.

248. *Id.* at 6.

249. Shedlock v. Dep't of Corr., 818 N.E.2d 1022, 1038 n.14 (Mass. 2004) ("While the immunity theories might extend to the entirety of Shedlock's ADA claims (a point we need not decide), any such immunity would be of no practical consequence in light of Shedlock's companion claims under [Section 504] and art. 114. . . . [T]he department [has not] contended that it is immune from suit for violations of art. 114.").

250. *See, e.g.*, Wilson v. City of Southlake, 936 F.3d 326, 330 (5th Cir. 2019) (cleaned up) ("Under Section 504, the plaintiff must establish that disability discrimination was the sole reason for the exclusion or denial of benefits. While under Title II of the ADA, 'discrimination need not be the sole reason.'").

251. 29 U.S.C. § 794(a).

252. 42 U.S.C. § 12132 ("[N]o qualified individual with a disability shall, by reason of such

have made no such distinction. For example, in *Shedlock*, the court stated that, "[t]he ADA, the [Rehabilitation Act], and art. 114 all prohibit the same conduct."[253] The court's statement in *Shedlock* suggests that Massachusetts courts may be hesitant to apply "solely" as a more demanding standard.

IV. LOCKSTEPPING AND EVOLVING ADVOCACY, LITIGATION, AND POLICY STRATEGIES

In the current landscape, plaintiffs face daunting odds if they look to the courts for recourse for SRO misconduct, but litigation against SROs has continued nonetheless.[254] The trend can likely be attributed to SROs' "entrenched behavioral patterns."[255] Though some states have implemented policies intended to restrict SRO conduct, it is not clear that such policies offer more *actionable* protection than federal law. Despite Massachusetts's efforts—including the SRO Law and its MOU requirement, and the Restraint Regulation and its associated training recommendations—it is not clear there are remedies for noncompliance. Similarly, even if state provisions like Article 14 of the Massachusetts Constitution prove to be more protective than federal law, qualified immunity and confused law stemming from SROs' blurred roles may limit students' recourse.

Thus, federal law and some state law appear to be insufficient to deter inappropriate use of force by SROs. Absent meaningful remedies and prevention, eliminating SROs from schools altogether seems like the only option. This section will briefly consider future directions and priorities for protecting students from SROs through litigation and policy reform, and the potential for state and local governments to break out of lockstep to adopt standards that are more protective than federal law.

Many advocates are pushing for state and local policy reform to eliminate SROs from schools altogether.[256] Some are lobbying to

disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.").

253. *Shedlock*, 818 N.E.2d at 1032.

254. Zirkel, *supra* note 11, at 323

255. *Id.* ("[T]he primary contributing factor [to unabated SRO litigation] appears to be the seemingly entrenched behavioral pattern of the SROs reflected in these cases," not an increase in the number of SROs because the number of SROs has not significantly increased in recent years).

256. Zoom Interview with Sabrina Bernadel, Attorney, Equal Justice Works Fellow, Nat'l Women's L. Ctr., (Dec. 18, 2020) [hereinafter Bernadel Interview] (interview notes on file with

reallocate SRO funds in state and local budgets to school counseling and mental health resources.[257] Others are working to increase SRO accountability by limiting the reach of qualified immunity as a defense.[258] And some organizations are strategizing to avoid "failure to train" claims that ultimately require greater allocation of resources to law enforcement, which would be counterproductive to the ultimate goal of reducing the presence of SROs.[259] Indeed, data shows that providing additional resources and training to law enforcement has not reduced negative interactions between law enforcement and either people of color or disabled people.[260]

Because state and local governments have primary authority over education, education funding,[261] and law enforcement, it is both possible and appropriate for them to break *out* of lockstep—especially

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the Author). *See, e.g.*, Perez Jr. & Erwin, *supra* note 141 ("In response to national protests against racism and police brutality sparked by the murder of George Floyd in Minneapolis, several school districts across the country have ended their relationships with local police departments.").

257. *See, e.g.*, Cheryl Corley, *Do Police Officers in Schools Really Make Them Safer?*, NPR (Mar. 8, 2018), https://www.npr.org/2018/03/08/591753884/do-police-officers-in-schools-really-make-them-safer ("[Activists] with Voices of Youth in Chicago Education . . . are lobbying for changes that would allow school districts to use some money designated for school resource officers for school psychologists, social workers and other strategies.").

258. *See, e.g.*, Dorwart v. Caraway, P.3d 128, 140 (Mont. 2002) (rejecting qualified immunity as a defense for state constitutional claims). *See also* Nick Sibilla, *Colorado Passes Landmark Law Against Qualified Immunity, Creates New Way to Protect Civil Rights*, FORBES (Jun 21, 2020), https://www.forbes.com/sites/nicksibilla/2020/06/21/colorado-passes-landmark-law-against-qualified-immunity-creates-new-way-to-protect-civil-rights/?sh=2982df23378a (describing a movement to change immunity doctrines across the U.S., including Colorado enacting legislation in June 2020 to eliminate qualified immunity for local law enforcement officers, sheriff's deputies, and Colorado State Patrol officers in actions under state law in state court).

259. *Cf.* Alex S. Vitale, *The Answer to Police Violence Is Not 'Reform'. It's Defunding. Here's Why*, THE GUARDIAN (May 31, 2020), https://www.theguardian.com/commentisfree/2020/may/31/the-answer-to-police-violence-is-not-reform-its-defunding-heres-why ("The alternative is not more money for police training programs, hardware or oversight. It is to dramatically shrink their function."); Caroline Preston, *Police Education Is Broken. Can It Be Fixed?*, HECHINGER REP. (June 28, 2020), https://hechingerreport.org/police-education-is-broken-can-it-be-fixed/ ("You can have the best training in the world but at the end of the day it comes down to morals, it comes down to the culture of an organization, it comes down to what's tolerated," said Erik Misselt, the interim executive director of the Minnesota Board of Peace Officer Standards and Training (cleaned up)).

260. *See generally* Martin Kaste, *NYPD Study: Implicit Bias Training Changes Minds, Not Necessarily Behavior*, NPR (Sept. 10, 2020), https://www.npr.org/2020/09/10/909380525/nypd-study-implicit-bias-training-changes-minds-not-necessarily-behavior (describing a study with a "null result" that "doesn't prove implicit bias training changes cops' behavior, but it doesn't disprove it either").

261. To varying degrees over the years, schooling has primarily been the domain of states. Wong, *supra* note 135 ("Schooling in America is not the domain of the federal government, but rather the domain of states, all 50 of which mandate in their individual constitutions the provision of public education."); *see also* Zackin, *supra* note 129, at 67.

in the absence of comprehensive federal action. Attorney Peggy Nicholson's experience in North Carolina need not be the norm: She explained that "lax" state laws usually did not offer viable options for claims related to use of force in schools by SROs or by other personnel, leaving her to rely on federal law.[262] Crystal Grant, an education law attorney who practiced in Michigan, explained that she has had success filing administrative complaints against congregate living centers based on violations of the state's policy prohibiting the use of restraints as punishment.[263] Grant would usually use the state's administrative complaint process or mediation because "going to court does not end well."[264]

Breaking out of lockstep could potentially be effective in a litigation strategy that capitalizes on state public education provisions. As described in Section II.B, many state constitutions guarantee a "positive right" to a free, public education and impose equitable funding and resource allocation obligations. Positive rights "require government to do or provide something, while negative rights require only that government refrain from doing something."[265] Suits alleging violations of the positive right to education generally claim that a state has failed to provide equal access to education or an education that meets a qualitative minimum standard—both of which are obligations under the state constitution.[266]

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262. Zoom Interview with Crystal Grant and Peggy Nicholson, Attorneys, Duke University School of Law Children's Law Clinic (Dec. 16, 2020) (interview notes on file with the Author). For clarity, Grant's statements will be reference hereinafter as "Grant Interview," and Nicholson's statements as "Nicholson Interview." Grant is a Senior Lecturing Fellow & Interim Director of the Children's Law Clinic and was previously a clinical fellow in the Pediatric Advocacy Clinic at the University of Michigan Law School and practiced education and disability law in Michigan. Nicholson is a Lecturing Fellow & Supervising Attorney at the Children's Law Clinic and was previously the director of the Youth Justice Project of the Southern Coalition for Social Justice and an education-law attorney at Legal Aid of North Carolina.

263. Grant Interview, *supra* note 262 (describing a general strategy not specific to SROs). Congregate living centers can include group homes for disabled individuals and long-term care facilities.

264. *Id.*

265. Zackin, *supra* note 129, at 27 ("Negative rights are the bases of demands for restraint by the government, while positive rights are the bases of demands for intervention. . . . [I]t is useful to think about the difference between a right to housing and a right to free speech. A right that requires government to intervene by providing the homeless with shelter is a positive right, while a right that requires government to refrain from silencing speech is a negative right.").

266. *See, e.g.*, Doe v. Sec'y of Educ., 95 N.E.3d 241, 252 (Mass. 2018) (denying a challenge to the state's caps on charter school enrollment by students arguing that they were denied a constitutionally adequate education and dismissing the plaintiffs' equal protection claim under the state constitution, but noting that the state constitution's education clause imposes "an affirmative duty on the Commonwealth to provide . . . constitutionally 'adequate'" education in public schools).

Such suits have not yet been used in the SRO context. Arguably, "unreasonable, forceful, or life-threatening interactions with SROs" may interfere with the fundamental right to education under the state constitution because it deprives the child of valuable learning time and inhibits positive development at school.[267] A plaintiff would need to show a connection between the allocation of resources and the failure to provide an education that meets the state's constitutional floor.[268] Plaintiffs might demonstrate, for example, that SROs are not in fact making schools and students safer and that resources are being allocated to SROs and security personnel instead of to other critical areas.[269] Other critical areas where resources may be necessary for students to achieve a qualitative minimum of education might include funding for teachers, mental health personnel, or books or facilities.[270] SROs impose severe costs for school districts and states, including for funding of positions and the "fiscal and public relations costs of using . . . districts' limited education budgets to defend [SRO] court actions."[271] The fiscal costs are difficult to estimate, but in 2018, 26 states allocated at least $960 million for school safety programs.[272] One report found that police officers "assigned to the Chicago Public Schools accumulated over $2 million in misconduct settlements" from 2012-

267. *See generally* Sabrina Bernadel, *Simply Put, Education is Different, Analyzing the* Gary B. v Whitmer *Right to A Basic Minimum Education as a Constitutional Claim Against School Resource Officers*, at 43, (May 12, 2020) (working paper) (on file with the Author) (considering "the viability of and strategies for bringing claims against states for violation of students' constitutional right to a basic minimum education to limit, if not eliminate, the presence of SROs").

268. Right to education claims are focused on the allocation of resources. Zackin, *supra* note 129, and Sutton, *supra* note 122, provide thorough accounts of the evolution of right to education claims. Many state constitutional provisions arose out of severe inequities in education funding, and activists pushing for reform used litigation to advance a movement for education equity. *See supra* notes 129–135 and accompanying text (describing right to education claims). In connecting SRO presence to state education resources, advocates would need to examine the types of data that courts in that jurisdiction consider. *See, e.g.*, M. Patrick Moore Jr., *The Constitutional Right to Education in the Commonwealth*, 101 MASS. L. REV. 19, 27 (2020) ("Following *Doe*, students from a diverse and economically disadvantaged district may use the state's own data to allege that the education they are being provided is inadequate.").

269. Bernadel Interview, *supra* note 256.

270. *Id.*

271. Zirkel, *supra* note 11, at 326. "For the public relations cost, consider the impact of media reports of SROs 'body slamming a 12-year-old girl,' carrying 'powerful rifles,' 'handcuffing a crying 7-year-old,' 'repeatedly pinn[ing] to ground, [and] handcuff[ing]' a 10-year-old boy with autism, and arresting students for 'such minor infractions as . . . trying to get to the bathroom.'" *Id.* at 326–27 (quoting various news articles) (citations omitted). "[G]iven the budgetary constraints of school districts and other SRO employers, the priority in resource allocation must extend beyond the prevailing prescription for training." *Id.* at 331.

272. Phenicie, *supra* note 26 ("Colorado lawmakers, for instance, poured $35 million into school resource officers and security upgrades.").

2016.[273]

But litigation is not currently the primary focus for at least some advocacy organizations. T.W., a former attorney who worked on issues related to the school-to-prison pipeline at a national litigation and advocacy non-profit organization, explained that advocates have thought about new and different claims to bring, but ultimately, the larger focus has shifted to policy-based arguments.[274] He explained that "everybody wants to litigate, but it just isn't feasible because the case law is so bad."[275] Without broader change, T.W. explained, students obtain relief from abusive SRO conduct only when there is attention from the media and shocking videos—not from the range of cumulative harm that happens off-camera.[276] The status quo is the systematic criminalization of the innocuous behavior of older students—especially students of color—which does not usually make the news or get addressed in court.[277]

Training for SROs[278] and clarifying and limiting SROs' roles through the use of MOUs are frequently recommended areas for reform and are recurring issues in SRO-related litigation.[279] But some advocates are changing tack: Particularly in the wake of nationwide racial justice protests in 2020, many advocacy organizations are reevaluating how best to address these issues.[280] Some advocates are

273. Michelle Mbekeani-Wiley, *Handcuffs in Hallways: The State of Policing in Chicago Public Schools*, SHRIVER CTR. ON POVERTY L. at 4, (Feb. 1, 2017) https://www.povertylaw.org/wp-content/uploads/2020/07/handcuffs-in-hallways-amended-rev1.pdf (updated in part June 30, 2020).

274. Zoom Interview with T.W., former attorney at a national litigation and advocacy non-profit organization, (Dec. 15, 2020) [hereinafter T.W. Interview] (interview notes on file with the Author).

275. *Id.*

276. *Id.*

277. *Id.*

278. Grant described one of her cases where a student was tased by an SRO, and the SRO was unfamiliar with Behavioral Intervention Plans (BIPs), which are positive behavioral supports for disabled students that the school district must consider under the IDEA. Implementing a BIP is best practice to regulate responses to undesirable disability-related behaviors. Grant negotiated a settlement that required that SROs be included in trainings about interacting with disabled students. Grant Interview, *supra* note 262.

279. *See, e.g.*, Shaver & Decker, *supra* note 21, at 282 ("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."); OFFICE OF CMTY. ORIENTED POLICING SERVS., *supra* note 33, at 1 (requiring MOUs that "clearly define[] the roles and responsibilities of the individual partners involved").

280. Bernadel Interview, *supra* note 256. For example, on June 30, 2020, the Shriver Center on Poverty Law published a cover letter on its February 2017 report on police in schools, stating, "While we know that many groups have relied on the data in our report to make the case for #policefreeschools we also know that the data and our recommendations resulted in solutions,

finding that requiring MOUs between law enforcement and schools and requiring better training for SROs have not had as much positive impact as hoped: Students are still experiencing broad, negative effects from SRO presence in schools.[281] T.W. criticized the effectiveness of relying on MOUs and merely categorizing SROs as school personnel to limit SRO misconduct.[282] The former, he explained, are mere non-binding policy documents and consequently do not provide a right of action. The latter will usually not matter much because SROs still have police power from the state "at the end of the day" and courts are unlikely to use the more restrictive standards that apply to school personnel.[283]

State and local independence are also essential to achieving current policy aims. Many activists and advocacy organizations are working to shift resources from programs that "invest in criminalization" to programs that improve school climates and student well-being.[284] In Chicago, for example, "students, the city's teachers union and community groups are now circulating a petition and calling for the $33 million the school system spends placing police in schools to be used instead to hire additional nurses and counselors."[285] Local legislative and budgetary control are essential to building on local activism and community support.[286] Grant and T.W. emphasized the importance of using narratives—which must include the voices of students with disabilities[287]—to shift public attitudes and build community support.[288] Achieving narrative shifts is a marathon and takes time, but it is important to be ready for impactful "advocacy windows" that will arise during the marathon.[289] In addition, Nicholson explained that broader change to address the presence of law enforcement in schools requires the use of cross-cutting strategies that take advantage of the combined

which we advocated for, that historically have not always produced desirable outcomes. Going forward, we are committed to always listening to the voices of people directly impacted by laws and policies." *See* Mbekeani-Wiley, *supra* note 273.

281. Bernadel Interview, *supra* note 256.

282. T.W. Interview, *supra* note 274.

283. *Id.*

284. *Id.*

285. Lauren Camera, *The End of Police in Schools*, U.S. NEWS (June 12, 2020), https://www.usnews.com/news/the-report/articles/2020-06-12/schools-districts-end-contracts-with-police-amid-ongoing-protests.

286. T.W. Interview, *supra* note 274.

287. Grant Interview, *supra* note 262.

288. T.W. Interview, *supra* note 274.

289. Zoom Interview with S.S., policy analyst at a regional litigation and advocacy non-profit organization, (Dec. 15, 2020) (interview notes on file with the Author).

expertise of education law practitioners (who usually bring suits against schools) and civil rights practitioners (who usually bring suits against law enforcement).[290]

SROs impose great individual and societal costs,[291] and there is a paucity of evidence that SROs are effective in preventing mass shootings or provide other significant benefits. "Established to prevent violence, primarily from outside the school, SROs have produced violence inside the schools."[292] The presence of SROs results in students achieving less and experiencing more physical and emotional harm, with long-term implications for individuals and communities.[293]

CONCLUSION

With more emphasis by many advocates on state and local solutions to the problems associated with SROs, future litigation will likely involve more claims related to state and local laws. Arguments around the benefits of breaking *out of* lockstep can be raised in support of "liberal" or "conservative" policies, as Judge Sutton points out.[294] In any event, advocates, state and local legislators, and courts should avoid reflexive lockstepping and take advantage of the broader latitude offered by state constitutions and state and local law to address the quintessentially local issues of education and law enforcement. Increasing recognition of the harms that stem from having SROs in schools and invigorated movements to shift resources from SROs to other resources provide an opportunity for state and local legislators to promote school safety in ways that are more protective of all students. Advocates, including those who generally litigate exclusively in federal

290. Nicholson Interview, *supra* note 262. Nicholson explained that the best options in her practice were usually to file a grievance at the school level or a complaint with the U.S. Department of Education, or to raise issues through the processes outlined in the IDEA based on a denial of FAPE.

291. Weisburst describes a conservative estimate of the aggregate policy cost that results from the impact of SROs on educational attainment generally, and on graduation rates specifically. Weisburst, *supra* note 3, at 362. "The resulting loss in earnings is $105 million dollars for affected students, leading to an aggregate policy cost of $162 million including the value of grant transfers. This calculation is illustrative: It does not include emotional or psychological costs of school discipline, the value of increased safety or perceptions of safety, benefits for subgroups of students who may be positively affected, costs of more than a single year decrease in schooling, or costs related to reductions in college enrollment. Despite these limitations, this exercise highlights the fact that the results in this study raise serious questions about the value of future investments in school police."

292. Zirkel, *supra* note 11, at 332.

293. *See* Section I.B, *supra*.

294. *See* Sutton, *supra* note 122, at 176–77 ("[S]tate constitutions provid[ing] a second avenue for invalidating a local law *says nothing* about what kind of law should be, or will be, challenged.").

courts, must be prepared to make the case for broader protections in state courts.