

IMPROVING MEMORANDA OF UNDERSTANDING FOR SCHOOL RESOURCE OFFICER SERVICES

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As school-based policing has continued to grow, schools have become increasingly concerned about how to balance school safety needs with students' constitutional rights. Achieving an appropriate balance is critical to avoiding litigation and to achieving an environment focused on student learning. It can also help stem the troubling flow of young people into the criminal justice system as a result of relatively minor school discipline issues better left to school officials.ⁱ

One way to promote such an equilibrium is for school officials, local law enforcement agencies, and school attorneys to take a closer look at the memoranda of understanding (MOU) that formalize the relationship between the school district and the local law enforcement agency for the use of school resource officers (SROs). Most MOUs include the mission, organizational structure, goals and procedures of the SRO. Some also address such issues as location of SROs in school buildings, specific day-to-day duties like recordkeeping, funding sources, selecting the SRO, and training by the local law enforcement agency, along with chain of command issues.

But many MOUs often fail to address the roles of school officials and SROs with respect to student discipline and maintaining the educational environment, resulting in "at that moment" decisions that may ultimately upset the ideal balance between school safety and student rights. By discussing matters beforehand, all involved can carefully consider the local conditions necessitating the presence of SROs and take into account the applicable laws and relevant school policies on such issues as search and seizure, questioning of students, and requests for student records. Following are three recommendations and some useful resources to help stakeholders update and better-define school official and SRO roles that promote a positive and safe educational environment.ⁱⁱ

Align the SRO's roles and activities with specific, identified needs for maintaining the educational environment.

Because SROs are frequently trained by their agencies and associations to use the *Triad Model of SRO Responsibility*: educator, informal counselor, and law enforcer,ⁱⁱⁱ one important question to ask is in which area(s) of the *Triad Model* does the school district need assistance from the SRO to maintain the educational environment?

The answer will depend upon local conditions within the school district. Perhaps the answer may even depend upon the specific building where the SRO will be assigned. Because many issues that SROs manage involve components of preventing and managing school violence, stakeholders may want to begin answering this question by collecting data with a school climate measurement instrument. (See text box for school climate resources.)

School climate measurement instruments may help to prevent, identify, investigate and respond to school violence and student discipline issues. They are designed to collect data identifying: (a) a school district's or individual school building's conditions affecting student development and learning;^{iv} and (b) the specific needs within the school community. The data may help to align the SRO's role with the specific, identified needs. Many state boards of education provide great information and data collection options, which are usually listed in conjunction with their school violence prevention materials.

Results from a school climate measurement instrument can also provide a good starting place for stakeholders to discuss what to include in the MOU. Examples of possible MOU language include:

1. A section titled, *Alignment of SRO's activities to specific, identified needs for creating and maintaining [School District's] ideal conditions for development and learning in the educational environment.*
2. Establishment of a school leadership team that includes key personnel: principals, teachers, school-employed mental health professionals, instruction/curriculum professionals, school resource officer, and a staff member skilled in data collection and analysis.^v
3. A statement recognizing that alignment of the SRO's role to the school district's identified needs moves stakeholders away from using SROs as a substitute for effective student discipline policies (a practice that has been shown to increase the risk of litigation and is the subject of debate for perpetuating the school-to-prison pipeline).^{vi}
4. A statement that [School District] and [Local Law Enforcement Agency] seek to implement a partnership with the SRO to create effective, positive school discipline that: (a) functions in concert with efforts to address school safety and climate; (b) is not simply punitive (e.g., zero tolerance); (c) is clear, consistent, and equitable; and (d) reinforces positive behaviors.

Clarify school officials' authority under the law.

Most states have statutory provisions that grant school officials the authority to control their buildings and discipline students to maintain the educational environment. This authority is generally granted on the premise that school administrators, teachers, and other certified educational employees stand in the place of parents and guardians to students while they are in school, i.e., *in loco parentis*.^{vii} Generally, the *in loco parentis* status of school officials usually extends to non-disciplinary matters and to all activities connected with the school program, including athletic and extracurricular programs.

Although the term "school official" may statutorily include the SRO, if the school community has identified the need for a law enforcement presence in school buildings, the MOU should nonetheless set forth the roles and responsibilities of the SRO while on school grounds. It should clearly specify how SROs will assist and partner with school officials to manage disruptive student behavior and discipline issues. In matters where SROs are better trained, such as questioning and searching techniques, SROs may be given the authority to take the lead. Because students do maintain their constitutional protections while at school, the MOU should clearly state that school officials are empowered to draw

SCHOOL CLIMATE RESOURCES

Listed below are several data collection instruments for assessing conditions for development and learning.

- Measuring Bullying Victimization, Perpetration, and Bystander Experiences: A Compendium of Assessment Tools, available at www.cdc.gov/violenceprevention/pdf/bullyCompendiumbk-a.pdf;
- Safe Supportive Learning's School Climate Measurement Compendium, available at <http://safesupportiveschools.ed.gov/index.php?id=133>;
- Positive Behavior Intervention & Supports (PBIS), available at www.pbis.org/school/default.aspx;
- Youth Violence: Measuring Violence-Related Attitudes, Behaviors, and Influences Among Youths: A Compendium of Assessment Tools – (2d ed.), available at www.cdc.gov/ViolencePrevention/pub/measuring_violence.html;
- Intimate Partner Violence and Sexual Violence Victimization Assessment Instruments for Use in Healthcare Settings, available at www.cdc.gov/ncipc/pub-res/images/ipvandsvscreening.pdf;
- World Health Organization (WHO) Information Series on School Health's Document 10, Creating an Environment for Emotional and Social Well-Being, available at www.who.int/school_youth_health/media/en/sch_childfriendly_03_v2.pdf

the line so that their school buildings and the activities do not become an unwarranted extension of the local law enforcement agency.

Although many lower courts have considered the issue, the Supreme Court of the United States has not yet ruled on what standard should be used when school officials act in concert with or at the request of law enforcement agencies.^{viii} A well crafted MOU can give school officials the confidence to assert their authority over an SRO to control their own school buildings and programs and the discipline of students. This is essential given school officials' potential liability for violations of students' established constitutional rights. *In loco parentis* status does not automatically confer authority for school officials to consent in place of parents for the purpose of furthering local law enforcement interests.

The appropriate roles and responsibilities based upon relevant law may be set forth in the MOU under the rubric of collaboration. Examples of possible MOU language to include:

1. A statement that the school community, through its school officials, directs and commands the resources that it needs from the SRO and local law enforcement agencies to maintain the educational environment. See text box for a sample statement.^{ix}

SAMPLE STATEMENT OF COLLABORATION

Collaboration between the [School District] and [Local Law Enforcement Agency] and respect for the important role each plays in connection with our youth are essential to the success of the mission of both institutions. Where it is necessary for local law enforcement to be present on school property, they will conduct themselves according to accepted legal practices, recognizing the responsibility and authority of school officials to manage the school environment and work with school officials to minimize any impact their actions might have on that environment.

2. A clear description based on legal authority of the tasks that require the SRO to engage in the execution of his or her legal duty as a law enforcement officer and those situations that require the SRO to act or perform the duties as a school official. It should delineate between the circumstances when the SRO will be acting at the direction of educators attempting to enforce school policy and those under which the SRO should immediately intervene in school incidents without first waiting for direction by either the police or school officials.^x

RECORD SHARING

Because FERPA and many state records laws mandate non-disclosure of student records as a default position, the MOU should make clear that school officials may appropriately refuse disclosure without a warrant or subpoena. See *Commonwealth of Virginia, Letter to The Honorable Kenneth Alger, II, May 2, 1013.*

While it cites some specific state laws, general guidance about addressing requests from law enforcement agencies is available in *Answers to FAQs Responding to a Subpoena* (Illinois Council of School Attorneys, March 2011), available at <http://www.iasb.com/law/FAQsubpoena.pdf>.

3. An ongoing training calendar to ensure school officials and SROs receive updates from the school board attorney so they understand the current law on difficult issues such as search and seizure, questioning, and requests for student records. Many

MOUs also require training of their SROs through the local law enforcement agency and/or state or district attorney. Training is critical to reducing future litigation.

4. Discussion of landmark U.S. Supreme Court cases, such as *New Jersey v. T.L.O.* (search and seizure)^{xi} and *J.D.B. v. N.C.* (questioning)^{xii} and the case law specific to the jurisdiction.^{xiii} Cite and explain the federal and state statutes, along with any applicable interpreting opinions regarding student records.^{xiv} Embed measures for a school official to prevent SROs from recommending prosecution of students in a court of law for discipline issues better left for school officials to manage.
5. Criteria based on state and federal law for communication and record sharing between schools and law enforcement agencies. (See text box on record sharing.)

Include supervision plans that measure the alignment of the SRO's performance with the needs of the school environment

The U.S. Department of Justice's Office of Community Oriented Policing Service (COPS) publication, *A Guide to Developing, Maintaining, and Succeeding with Your SRO Program (Guide)*,^{xv} discusses supervision of SROs. Three themes emerge that may be included in MOUs to help improve the effectiveness of SROs in schools.

1. Decide how school officials will supervise SROs. The type and degree of supervision should take into account the individual SRO's needs, school policy, available resources, specific local or building needs, and geographical realities.
2. Set an expectation of excellence. When this expectation is not met, provide constructive feedback to the SRO and report unresolved concerns to the SRO's direct law enforcement supervisor sooner rather than later. Addressing issues promptly will help increase understanding and minimize any potential negative impact on the school environment.^{xvi}
3. Commit to regular and frequent communication between the SRO and school officials. Many concerns can be addressed quickly and informally by keeping the lines of communication open at all times.^{xvii}

The COPS guide suggests incorporating school officials' supervisory roles for their assigned SROs into the MOU. Highlights include:^{xviii}

1. Methods of supervision. Many law enforcement agency supervisors and SROs report that the most effective supervision occurs when programs implement multiple supervision approaches. Approaches range from logs to maintaining telephone and radio communication to involving school officials in the SRO's evaluation.
2. SRO performance evaluations. Assess whether stakeholders are ready to agree upon an instrument to measure SRO performance in the school setting,^{xix} which incorporates the data results from the school climate assessment. In *SRO Performance Evaluation: A Guide to Getting Results*,^{xx} DOJ provides a step-by-step strategy for implementing outcome-oriented performance evaluations. Using data and implementing outcome-based performance evaluation processes can help provide clear guidance to stakeholders about whether the SRO's performance is

aligned to the specific needs that assist school officials in maintaining an educational environment conducive to learning.

Conclusion

The following excerpt from a court decision sets forth the importance of the MOU:

SROs perform a unique mission. They are certified law enforcement officers who are assigned to work at schools under [MOUs] between their law enforcement agencies and school boards. They [may be] bound to abide by district school board policies and consult with and coordinate activities through the school principal. In this capacity, SROs are called upon to perform many duties not traditional to the law enforcement function, such as instructing students, serving as mentors and assisting administrators in maintaining decorum and enforcing school board policy and rules.^{xxi}

A well-written MOU will focus on duties with specific locally-based outcomes as the controlling theme. The intervention that results when implementing its language will make the SRO and school officials more effective in educating their students and reducing litigation. The resources show evidence that opening these discussions often improves the learning environment, school safety, and when necessary, the administration of justice in a court of law.

ⁱ See, e.g., *The School-to-Prison Pipeline*, N.Y. TIMES, May 29, 2013, available at http://www.nytimes.com/2013/05/30/opinion/new-york-citys-school-to-prison-pipeline.html?_r=0; Erik Eckholm, *With Police in Schools, More Children in Court*, N.Y. TIMES, April 12, 2013, available at: <http://www.nytimes.com/2013/04/12/education/with-police-in-schools-more-children-in-court.html?pagewanted=all>. Senator Dick Durbin (D-IL) Chairman of the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights, recently held the first-ever Congressional hearing on the school-to-prison-pipeline (webcast of hearing available at <http://www.judiciary.senate.gov/hearings/hearing.cfm?id=b61e5f08eadf22b2ec4ab964fc64ae9f>). Recommendations included increasing collection of data on discipline incidents and school-based arrests; support for improved discipline practices like Positive Behavior Interventions and Supports (PBIS) and Restorative Justice (non-punitive discipline); ending corporal punishment; abolishing zero tolerance policies; increasing funding for poverty reduction programs; and improving investigations where there are alleged violations of special education laws.

ⁱⁱ For a comprehensive discussion about drafting an MOU, see *So you want an SRO? Ten Tips for Contracting for a Successful School Resource Officer*, INQUIRY & ANALYSIS (NSBA Council of School Attorneys, March/April 2013).

ⁱⁱⁱ NATIONAL ASSOCIATION OF SCHOOL RESOURCE OFFICERS, TO PROTECT & EDUCATE, THE SCHOOL RESOURCE OFFICER AND THE PREVENTION OF VIOLENCE IN SCHOOLS: 2012 (2012), available at <https://nasro.org/cms/wp-content/uploads/2013/11/NASRO-To-Protect-and-Educate-nosecurity.pdf>.

^{iv} The National Association of School Psychologists partnered with several other organizations to create *A Framework for Safe and Successful Schools*. Published in April 2013, it provides a framework supported by educators for improving school safety and increasing access to mental health supports for children and youth, stating that efforts to improve school climate, safety, and learning are not separate endeavors. K.C. COWAN, K. VAILLANCOURT, E. ROSSEN, & K. POLLITT, *A FRAMEWORK FOR SAFE AND SUCCESSFUL SCHOOLS* (2013), available at http://www.nasponline.org/resources/handouts/Framework_for_Safe_and_Successful_School_Environments.pdf.

^v *Id.*

^{vi} *Id.*

^{vii} For example, Illinois law states that school employees shall maintain discipline and “stand in the relationship of parents and guardians to the pupils.” 105 ILL. COMP. STAT. 5/24-24. Citing this common law doctrine that originated

in *William Blackstone's Commentaries on the Laws of England 441* (1769), courts have reasoned that even in schools with few or no disciplinary problems, a State still has a substantial interest in maintaining a proper educational environment for the school children entrusted to its custody and tutelage, through close supervision of students.

^{viii} For a comprehensive listing that identifies specific case law that applies to your jurisdiction, see webinar materials for *Working with Law Enforcement: Tips for School Attorneys and School Boards* (NSBA Council of School Attorneys, Aug. 21, 2013)

^{ix} Adapted from MOU between Newtown Public Schools and the Newtown Police Department, available at <http://www3.newton.k12.ma.us/sites/default/files/Mem%20of%20Understanding.pdf>.

^x NATIONAL ASSOCIATION OF SCHOOL RESOURCE OFFICERS, TO PROTECT & EDUCATE, THE SCHOOL RESOURCE OFFICER AND THE PREVENTION OF VIOLENCE IN SCHOOLS: 2012 (2012), available at <https://nasro.org/cms/wp-content/uploads/2013/11/NASRO-To-Protect-and-Educate-nosecurity.pdf>

^{xi} 469 U.S. 325 (1985) (holding that school officials do not need a warrant and are held to a reasonableness standard when searching students, but local law enforcement agencies are held to a probable cause standard). Thus, the relevant question is whether the SRO is acting at the direction of a school official (reasonableness) or the local law enforcement agency (probable cause).

^{xii} 131 S.Ct. 2394 (2011) (holding that the child-suspect's age is relevant (although not dispositive) in a *Miranda* custody analysis when the child's age is known to the law enforcement agent at the time of questioning, or would have been objectively apparent to a reasonable law enforcement agent, and a reasonable child of that age would perceive that he or she was not free to leave).

^{xiii} *See, e.g., Guidelines for Interviews of Students at School by Law Enforcement Authorities* (Committee of the Illinois Council of School Attorneys (ICSA), September 2011), available at <http://www.iasb.com/law/ICSAGuidelinesInterviews.pdf>.

^{xiv} Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g; 34 CFR Part 99.

^{xv} Peter Finn, Meg Townsend, Michael Shively, and Tom Rich. (U.S. Department of Justice, Office of Community Oriented Policing Services, 2005), available at: http://www.cops.usdoj.gov/files/ric/CDROMs/SchoolSafety/Law_Enforcement/AGuidetoDevelopingMaintainingSuceeding.pdf.

^{xvi} *Id.* at 149.

^{xvii} *Id.*

^{xviii} *Id.* at 150, 159.

^{xix} *See id.* at 160 for a sample SRO performance measure document. For more information on designing SRO performance measure instruments that reflect local conditions, see note xx, *infra*.

^{xx} TAMMY RINEHART KOCHER, ANNA T. LASZLO, & LAURA B. NICKLES, SRO PERFORMANCE EVALUATION: A GUIDE TO GETTING RESULTS (U.S. Dep't of Justice, Office of Community Oriented Policing Services, 2005), available at <http://www.cops.usdoj.gov/files/ric/Publications/sroperformanceevalguide.pdf>.

^{xxi} *C.M.M. v. State*, 983 So. 2d 704, 705 (Fla. Dist. Ct. App. 5th Dist. 2008).