

**Policing in the Principal's Office:
Are DC Public Schools Becoming Part of the Justice System?**

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Education is the point at which we decide whether we love the world enough to assume responsibility for it and by the same token to save it from that ruin which, except for renewal, except for the coming of the new and the young, would be inevitable. And education, too, is where we decide whether we love our children enough not to expel them from our world and leave them to their own devices, nor to strike from their hands their choice of undertaking something new, something unforeseen by us, but to prepare them in advance for the task of renewing a common world.

~Hannah Arendt

Introduction

Waves of youth violence in the early 1990s precipitated the “super-predator” image of youthful offenders and led policymakers to toughen criminal procedures and sanctions for youth, making it easier to try youth as adults and punish them with adult sentences.¹ Despite the significant decrease in youth crime in recent years, many policymakers refuse to reexamine these tough youthful offender laws and align them with current crime statistics² and new research on adolescent development and behavior. Societal perceptions of youth crime have not aided a movement towards reform of the “tough on crime” laws, especially in light of resurgence of violent school shootings in the past year. For example, a fatal school shooting at Ballou High School in Washington D.C. led the mayor and police chief to implement the D.C. Metropolitan Police (MPD) takeover of D.C. public school security.³ Currently, 320 police officers, called School Resource Officers (SROs), and security officers under contract with MPD check, patrol and interact with students within the walls of 48 D.C. schools. While many students say they feel safer with the police presence⁴ and advocates of the takeover hail it as a new method to curb youth violence, one must question to what extent police in schools are necessary or whether their presence

¹ See, e.g., Thomas Grisso, *Law & Psychiatry: The Changing Face of Juvenile Justice*, Psychiatric Services 51, 425-438 (Apr. 2000).

² See e.g., Bureau of Justice Statistics, *Indicators of School Crime and Safety: 2004* (finding that victimization rates and other episodes of school violence for school-aged youth over the past decade have consistently been on the decline).

³ Testimony of Margaret Poethig, Metropolitan Police Department, Joint Public Roundtable on School Safety and Security (May 23, 2005) available at http://newsroom.DC.gov/file.aspx/release/5196/statement_050523.pdf (commenting that shooting deaths like at Ballou represent the spillover of crime between schools and neighborhoods that MPD is trying to prevent).

⁴ See Denise Barnes, *Students Want Police Inside D.C. Schools*, [The Washington Times](#), March 6, 2005.

serves to perpetuate a perception of an increase in violent youth crime and fuels the ease with which youth are sent to the justice system.

Because the MPD will remain in schools for the foreseeable future, it is important to take a critical look at this new intersection of the education system and justice system. It is also important to determine what precautions, if any, should be taken to ensure that schools retain their primary purpose of education independent of law enforcement and that police adhere to strict constitutional standards even in light of the general dilution of students' rights in the school environment. This paper will examine the potential legal consequences of the increased presence of police in schools, namely searches and interrogation in the school environment and disclosure of educational records, highlighting D.C. where relevant and possible. What this paper will not do, however, is evaluate the SRO program or the successes or the shortfalls of law enforcement in schools. The goal is not to pass judgment on policy, but rather to foster awareness and discussion about the potential entanglement between administration and law enforcement and raise realistic and practical legal issues.

I. Background: School Resource Officers

A. Functions and Duties of School Resource Officers in D.C.

The "School Resource Officer" had its inception in Title I of the Omnibus Crime Control and Safe Streets Act of 1968 as amended in 1998. "School Resource Officer" is defined as "a career law enforcement officer, with sworn authority, deployed in community-oriented policing, and assigned by the employing police department or agency to work in collaboration with school and community-based organizations."⁵

The D.C. MPD adopted the idea of "community policing" and implemented its own "Policing for Prevention" program that resulted in MPD's takeover of school security in all of the public schools.⁶ The takeover, largely implemented because of severe disruptions at schools coupled with teacher and school official burn-out, defeat and apathy, seeks to control and

⁵ 42 U.S.C. 3796dd-8 (2000).

⁶ See Poethig, *supra* note 3.

maintain immediate safety while building a community of trust, responsibility and accountability.⁷ The D.C. police protect students from immediate harms within the school walls, mediate when a problem does arise and serve as a deterrent to student misbehavior and also to those who might come into the school seeking to harm a student. Former assistant chief of MPD, Gerald Wilson, described his perspective on “community policing” as educators, police and communities coming together to serve as role models for those who have little to no guidance in the home environment. In essence, police and teachers would take on parental roles since, as Chief Wilson stated, a principal calling home about discipline problems hardly phases the students or the parents anymore.

Most of the SROs willingly admit that they wish their presence was not necessary in schools. But what Chief Wilson hoped is that school officials and teachers would “buy into [MPD’s] philosophy of community policing” where they take a more proactive role in students’ lives so that they can reduce the actual need for the officers in schools. According to him, the SROs in schools serve in part to teach teachers how to manage students effectively and engage them in empowering partnerships with the students to help control and maintain the school environment. Schools, however, currently do not function ideally, and SROs and the MPD hope that they can create a safe bridge between schools and communities and teach students skills to resolve conflicts in school that they may carry to the streets and into their homes.

B. Integration of SROs into the School Environment

While all SRO programs vary widely across the country, the main programs recognize that SROs play three primary roles: problem solvers and liaison to community resources, educator, and safety expert and law enforcer⁸ and alternatively, law enforcer, teacher and

⁷ Personal interview with now former D.C. MPD Assistant Chief of Police Gerald Wilson, November 27, 2006.

⁸ National Institute of Justice, U.S. Dept. of Justice, *Solicitation: National Assessment of School Resource Officers* (2000), available at <http://www.ncjrs.gov/pdffiles1/nij/sl000394.pdf>.

counselor.⁹ In one study, when asked to define their role as and SRO, the majority of SROs chose the “one-third law enforcement, one-third counseling with students and one-third law-related educator” option.¹⁰ When asked about their daily activities in the schools, most SROs said that they spend most of their time monitoring parking and the lunchroom, clearing hallways, and counseling students.¹¹ A national survey of SROs revealed that a majority had taken a weapon from a student.¹² This cursory look at these surveys serves only to reveal that while SROs serve a key safety function, such as confiscating weapons, they also serve functions outside the normal range of law enforcement duties. This makes it increasingly difficult to evaluate constitutional and legal standards within the schools because modern courts do not readily assume that SROs always act as state agents or agents of the law while fulfilling their SRO duties.

When questioned about how kids might be affected by police in schools, Chief Wilson seemed to acknowledge that perhaps kids in general might show concern or be bothered by the officers, but that “these kids” are accustomed to the presence of police in their lives. In his experience thusfar, Chief Wilson does not think that the students view the SROs or security officers as a threat, but rather, are grateful of their presence in the school. Most of the kids see these same officers in their neighborhood since MPD tries to place the neighborhood officers in the neighborhood school, and do not necessarily even notice their presence in school.

The manner in which students and administrators view SROs and the school-specific functions they serve will affect much of the following discussion. If SROs only serve a law enforcement function and students know that, SROs will more likely be viewed as the law enforcement agent where the Fourth and Fifth Amendments would be invoked in full force. If

⁹ National Association of School Resource Officers, available at http://www.nasro.org/about_nasro.asp; see also Center for the Prevention of School Violence, available at <http://www.ncdjjdp.org/cpsv/sro/candle.htm> (clarifying that SROs serve as *law-related* teachers and counselors).

¹⁰ David May, Gary Cordner, Stephen Fessel, *School Resource Officers as Community Police Officers: Fact or Fiction*, Law Enforcement Forum 173 (2004).

¹¹ *Id.*

¹² National Association of School Resource Officers, 2004 National School-Based Law Enforcement Survey (2004).

SROs are viewed, however, as friends, counselors or mediators, students and administrators may not be able to differentiate between situations when students' rights may be violated and situations that are non-interrogatory and non-custodial, leaving it up to the court's determination. From now on, lawyers and judges will have to carefully evaluate these relationships when a referral to the justice system comes from the school and administrators and SROs must take precaution not to interchange their roles and responsibilities.

II. Potential Legal Consequences of Increased Police Presence in Schools

What courts have yet to fully grapple with and what remain open for interpretation, however, are the boundaries of these legal standards in light of the working partnerships between police and school officials within the school. The degree to which principals act as agents of law enforcement or to which law enforcement act in a disciplinarian function arguably skews the former bounds of the Fourth and Fifth Amendment legal standards as applied to school administrators and to police.¹³ As a result of the heightened and consistent presence of police in schools, the traditional right that administrators had to conduct of students' bags or lockers and to question students in the principal's office supported by lower constitutional standards has the potential to supplant law enforcement functions and the heightened constitutional mandates that accompany them.

A. Searches in School

i. Fourth Amendment Limitations on Searches Conducted by School Administrators

School officials are bound by the Constitution as applied to searches and seizures taking place in school or on school grounds.¹⁴ Though considered state agents under the Fourth Amendment, school officials need not adhere to the strict constitutional standard of probable

¹³ See, e.g., Meg Penrose, *Miranda, Please Report to the Principal's Office*, 33 Fordham Urb. L.J. 775, 779-781 (2006) ("Schools now routinely collaborate with police officers when a student is found to have drugs, drug paraphernalia, or weapons which clearly violate both school regulations and criminal law. Schools also assist the police in investigating allegations relating to assaults (fighting) and sexual assaults (incest or rape).").

¹⁴ *New Jersey v. T.L.O.*, 469 U.S. 325, 334 (1985).

cause before conducting a search in school because of the unique environment and the impediment to administrators' ability to swiftly maintain order and discipline created by the warrant requirement.¹⁵ Instead, school administrators can conduct searches through the relaxed standard of reasonableness. First, administrators must have reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either a school rule or the law, and second, the search must be reasonably related in scope to the circumstances which justified it in the first place.¹⁶ In cases when particularized suspicion of criminal activity, particularly drug use, would also be inefficient, schools have authority under the Fourth Amendment to condition certain activities at school on suspicionless and random searches, namely drug testing.¹⁷ Suspicionless searches of students can be justified by balancing the nature of the students' privacy interest and the character of the intrusion with the governmental concern and the efficacy of method of the search. Importantly, courts that have upheld such suspicionless searches emphasized that the character of the intrusion was minimal only where school administrators did not turn over evidence of a drug violation to law enforcement.¹⁸

ii. Fourth Amendment Limitations on Searches Conducted by SROs and the Potential for Foul Play

Generally, law enforcement can conduct searches only when they have probable cause to believe that a crime has occurred or is about to occur. The inherent tension with the probable cause standard required of SROs in schools is that the Supreme Court premised the lower search standards for school officials on the basis that the school is a unique environment where officials cannot be constrained by warrants because of their ultimate responsibility to maintain a safe environment conducive to learning.¹⁹ This tension can be resolved by considering the

¹⁵ *Id.* at 340.

¹⁶ *Id.* at 340, 342.

¹⁷ See *Vernonia School District v. Acton*, 515 U.S. 646 (1995); *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002).

¹⁸ *Vernonia*, 515 U.S. at 658; *Earls*, 536 U.S. at 833.

¹⁹ See *T.L.O.*, 469 U.S. at 341-42.

purpose of the search.²⁰ The Supreme Court allowed school officials as part of their administrative duties to search students under this lower standard so that they could quickly implement disciplinary procedures for those students in violation of school rules and laws. As police officers, SROs' main function in the schools is to investigate and prevent criminal activity, an authority that has the potential to jeopardize students' liberty interests protected by the Fourth Amendment. As such, that police conduct a search within the school house walls should not alter the constitutional standards to which they must adhere in all other circumstances, particularly when the *T.L.O.* court never intended to extend the lower search standards to law enforcement. To find otherwise would appear to encourage entanglement of school administrators' rights and duties with those of law enforcement within schools.²¹

Regardless of such entanglement issues, many courts subsequent to *T.L.O.* have allowed SROs to search students under the reasonableness standard and not that of probable cause.²² Many of these decisions, however, are premised on the elusive notion that the degree to which the school police officer participates in the search and from whom he or she derives authority (either the school district or the police department) should define the applicable constitutional standard.²³ For example, one court distinguished between searches in schools

²⁰ See *id.* at 341 n.7 (defining the reasonableness standard for school officials conducting searches of students while noting that “[w]e here consider only searches carried out by school authorities acting alone and on their own authority. This case does not present the question of the appropriate standard for assessing the legality of searches conducted by school officials in conjunction with or at the behest of law enforcement agencies, and we express no opinion on that question”); see also *Indianapolis v. Edmond*, 531 U.S. 32, 54 (2000) (Blackmun, J., dissenting) (“The ‘special needs’ doctrine, which has been used to uphold certain suspicionless searches performed for reasons unrelated to law enforcement, is an exception to the general rule that a search must be based on individualized suspicion of wrongdoing.”).

²¹ See Josh Kagan, *Reappraising T.L.O.’s “Special Needs” Doctrine in an Era of School-Law Enforcement Entanglement*, available at <http://www.jlc.org/EZT/publications/JoshKagan-ReappraisingT.L.O.pdf>.

²² See discussion *infra*; see, e.g., *T.S. v. State*, 863 N.E.2d 362, 369, 371 (Ind. App. 2007) (finding that *T.L.O.’s* “reasonableness” standard applies to school resource officers who “act on their own initiative” to “further educationally related goals,” distinguishing between “outside officers” and officers who act in their “capacity as security officers for the Indianapolis Public Schools”).

²³ See Michael Pinard, *From the Classroom to the Courtroom, Reassessing Fourth Amendment Standards in Public School Searches Involving Law Enforcement Authorities*, 45 *Ariz. L. Rev.* 1067, 1083-1090 (2002) (explaining how courts often allow SROs to search under a reasonable suspicion standard based on several enumerated factors such as whether the officer acted with a school official, if the purpose of the search was to uncover evidence that violates a school rule, whether the officer initiated the search and if he or she played a marginal role, and safety concerns); see also *State v. D.S.*, 685 So.2d 41, 43 (Fla. Dist. Ct. App. 1996) (holding that school police officers can search students under a “reasonableness” standard because school police officers constitute school officials employed by the district school board).

where school officials initiate a search or where police involvement is minimal, where school police or liaison officers act on their own authority, and where outside police officers initiate a search, finding that the first two situations invoke only the reasonableness standard, whereas the latter invokes probable cause.²⁴ Some courts justify this delineation by equating SROs to school officials because “the growing incidence[s] of violence and dangerous weapons in schools” has led school liaison officers to “enforce[e] rules and maintain[] order in public schools.”²⁵ The manner in which courts delineate actions of police officers in schools is somewhat of a misnomer in that regardless of the extent of the search, SROs should technically always be considered “outside officers” because of their affiliation with and duty to the local law enforcement agency and not the school. Though they owe concurrent duties to the school to maintain safety, SROs derive their authority from the state and perform searches at least in part for purposes of criminal investigation and prosecution.²⁶ Courts across the country have not established any hard and fast rule for which constitutional standards apply to searches conducted by SROs employed by the state, but many agree that probable cause should guide searches in schools where SROs (not privately employed school security officers or other officers employed by the school districts) conduct searches on their own initiative and pursuant to the regular duties of law enforcement.²⁷ Thus, probable cause should be the constitutional standard by which SROs and security officers under MPD control in D.C. conduct any search in the D.C. public schools.

²⁴ See *People v. Dilworth*, 661 N.E.2d 310, 317 (Ill. 1996), *cert. denied*, 116 S.Ct. 1692 (1996). In his dissent in *Dilworth*, Justice Nickels argued that an officer’s assignment in a school provides no justification for allowing him to conduct a search at a lower constitutional level because his primary duty is to investigate and prevent criminal activity, and that allowing officers to search without probable cause “opens the door to widespread abuse and erosion of students’ rights” *Id.* at 321-22.

²⁵ *Ex rel. Angelia D.B.*, 564 N.W.2d 682, 689-90 (Wis. 1997).

²⁶ See, e.g., *State v. Tywayne H.*, 933 P.2d 251, 255 (N.M. Ct. App. 1997) (comparing searches by police officers to the kinds of searches by school officials intended under *T.L.O.*). *But see Cason v. Cook*, 810 F.2d 188, 190 (8th Cir. 1987) (finding that the “reasonableness” search standard applied to school liaison officers where the police liaison program that assigned trained police officers to schools was funded jointly by the police department and the school district).

²⁷ See Pinard, *supra* note 23 at 1083-84.

For those SROs bound by probable cause, however, their relationship with school administrators provides an open door to search under a lower standard.²⁸ It is not altogether unlikely that SROs who know their constitutional limitations will simply tell school officials enough to create a reasonable suspicion for the administrators to conduct the search and subsequently reap the fruits of those searches.²⁹ Likewise, because of SRO's presence in schools, many school officials may not consider the presence of an SRO during a search of a student or his belongings to infringe upon students' constitutional rights and willingly conduct searches at the behest of SROs.³⁰ One particularly egregious case illustrates the inherent dangers in these kinds of circumventive searches. An SRO assigned to investigate criminal activity in a New Hampshire school had an agreement with school officials where the latter would investigate less serious potential criminal matters and the SRO would investigate more serious matters.³¹ If the SRO concluded based on his information that he did not have probable cause, he would transmit the information to school officials who would then call him if their search yielded any contraband. This officer admitted that the agreement was his technique to gather evidence "otherwise inaccessible to him due to constitutional restraints."³² The court ultimately held that because the school officials conducted a functionally equivalent criminal investigation, they should be held to the higher standard of probable cause. The suggestion in this decision that school administrators adhere to higher Fourth Amendment standards than delineated in *T.L.O.* appears to be an anomaly and is highlighted only to suggest that the risk that SROs will use school administrators

²⁸ See e.g., *In re Patrick Y.*, 749 A.2d 405 (Md. 2000) (upholding a search conducted by the school principal where the SRO provided the tip, was present at but did not participate in the search, and who filed delinquent charges against the student once the principal found the knife.)

²⁹ See Pinard, *supra* note 23 at 1093-94 (speculating that although the outcome of a school search case turned on the school official's actions, had the court needed to address the police officer's role in the search, it could have concluded that the officer intended to benefit from a search where no probable cause existed, but where he informed school officials of a possible drug deal at school and where he remained on school grounds until school officials had completed the search). Anecdotally, one D.C. SRO admitted that because they are bound by the probable cause standard, school officials conduct the actual search of a locker while the SROs stand to the side and watch.

³⁰ See Lawrence F. Rossow & Jacqueline F. Stefkovich, *Search and Seizure in the Public Schools* 47 (2d ed. 1995) (suggesting that the constitutionally mandated probable cause standard for police may encourage officers to "merely convince a school principal that a search is needed").

³¹ *State v. Heirtzler*, 789 A.2d 634, 636 (N.H. 2001)

³² *Id.* at 637.

to procure their own evidence for use in a criminal investigation or prosecution is not completely misguided.

In light of the working partnerships between SROs and school administrators in public schools in D.C. and across the country, courts will have to scrutinize carefully who conducted the search and for what purpose. With two parties both vested in school safety but with diverging constitutional limitations, it can no longer be assumed that a search by principal is constitutional merely because administrators are afforded easier access to students' belongings. The more the search appears at the behest of officers or conducted in tandem with SROs, the more the search smacks of law enforcement where probable cause should be required.

B. Custodial Interrogations and *Miranda* at School

The relationship between school officials and local law enforcement also poses questions about agency and functionally equivalent capacities of police and administrators for Fifth Amendment purposes. As agents of the state, SROs should provide *Miranda* warnings when questioning students about criminal behavior. Less clear, however, is the degree to which school administrators, who by default of their responsibility to question students for school disciplinary purposes may also elicit criminal information, should be considered agents of the state, or agents of law enforcement under the ambit of the Fifth Amendment. The inherent problem with *Miranda* at school is threefold. First, if SROs question students regarding both in-school and off-campus behavior, they may argue that they did not intend to elicit a criminal confession at all by questioning the student, but rather acted on behalf of school officials for school safety reasons. Second, courts have not consistently determined whether students are in custody for *Miranda* purposes when police officers question them in empty rooms or principals' offices at school, where the principal or other school official may or may not even be present. Finally, since school administrators are allowed to question students about potential criminal activity in the name of "school discipline" and absent police presence without invoking constitutional protections, they might choose to question students on behalf of the police or at police request and then turn the information over to police. Arguably, though, school administrators who question students on

behalf of law enforcement transcend their roles from administrator to law enforcement agent for purposes of criminal interrogation where *Miranda* should be required. Ultimately, if the SRO or other school officials do give *Miranda* warnings, a significant risk exists that the youth will not comprehend and will ultimately waive his or her rights anyway.

i. The Line Between State Actor and School Administrator for *Miranda* Purposes

The increased cooperation between the school police who have a responsibility to keep schools safe and the school officials normally in charge of student discipline has created a murky line between student behaviors subject to criminal sanctions and those subject to mere disciplinary action. Thus, equally murky are the legal standards that bind police and school administrators when questioning students about behavior that may violate both a school rule and also the law. Whether or not school administrators should be considered agents of police when questioning students and vice versa are issues few courts have addressed.

Generally, a principal or school official can question students about any behavior in violation of a school rule that may compromise the learning environment or safety of the other students in school without implicating the Fifth Amendment.³³ Schools have a substantial interest in maintaining order and discipline, and so long as the questioning was conducted pursuant to school disciplinary rules, courts have generally found no violation of a student's rights.³⁴

Likewise, when a police officer is the only person conducting the questioning, many courts find this to implicate the Fifth Amendment because of law enforcement's authority to arrest and determine criminal activity. For example, the Supreme Court of Kansas distinguished the authorities of school security officers and school police, commenting that school security officers

³³ See generally, D.C. Municipal Regulations, Chapter 25, Student Discipline (outlining the infractions that warrant disciplinary action in the D.C. schools); see also *Commonwealth v. Ira I.*, 791 N.E.2d 894, 900-01 (2003) (finding that a school official acted within the scope of his employment, rather than an instrument or agent of the police, when he questioned students about an assault on the school bus and was not required to give *Miranda* warnings prior to questioning a student in conjunction with the school investigation).

³⁴ See *T.L.O.*, 469 U.S. at 339; *Commonwealth v. Snyder*, 597 N.E.2d 1363, 1369 (1992) (noting that school administrators who have every intention of turning over evidence to the police did not become agents of the police when they questioned a student for possession of marijuana on school grounds). School security officer in D.C.P.S, however, operate under the auspices of MPD and should be considered law enforcement agents.

can question students without risking a violation of students' rights because they have the duty to maintain school discipline, just as a school official or teacher does.³⁵ The school police officer, on the other hand, owes a duty to the State and derives its authority from law enforcement function of the State, not the school. In accordance these duties delineated by the state, SROs and security officials under contract with local law enforcement should not take on administrative disciplinary duties, such as enforcing basic school rules, where no likelihood of criminal activity exists.³⁶ The risk in doing so is that officers may use "school discipline" as a pretext to illicit otherwise purely criminal information, especially when, according to Chief Wilson, school officers are concerned with student activity *outside* of the school environment as well. Even if the officer issues no criminal sanctions for the information he uncovers through questioning, schools officials must still be mindful of where the boundaries of their respective duties and authorities lie. SROs should be wary of taking on too many of the original roles of principals and school officials when it is likely that their true role as law enforcement might actually implicate constitutional rights. As the court in *State v. Wolfer* stated, "It does not matter that a particular employee's duties may be confined to the protection of persons on his employer's premises or that his employer may be the state...What does matter is whether he is employed by an agency of government whose primary mission is to enforce the law."³⁷

The risk, however, inherent in creating any bright line between school officials and school police for purposes of *Miranda's* custodial requirement, and one that courts generally have not considered to date, is that the more school administrators work in tandem with SROs, the more their "disciplinary" questioning seems like a safe method to effectuate a criminal prosecution without implicating students' rights in the way that an officer's questioning might.³⁸ In light of

³⁵ *In re L.A.*, 21 P.3d 952, 960 (Kan. 2001).

³⁶ *Cf. Brian A. v. Stroudsburg Area Sch. Dist.*, 141 F.Supp.2d 502, 505-06 (Penn. 2001) (finding that an SRO was not required to give *Miranda* warnings where he and the school principal questioned a student about a bomb threat and where the student was suspended and not charged with a crime).

³⁷ 693 P.2d 154 (1985).

³⁸ *See In re V.P.*, 55 S.W.3d 25, 27 (Tex. App. 2001) (describing how an SRO suspected a student of weapons possession on schools grounds, escorted the student to the principal's office, waited outside while

partnerships between schools and law enforcement, like in D.C., courts might have to consider whether school officials took on a law enforcement role when they elicited criminal information through questioning students that subsequently led to a charge in the justice system. The school's substantial interest in maintaining order and discipline in the classroom and on school grounds generally constitutes sufficient grounds for invading students' privacy in the role of a state actor in the Fourth Amendment search context,³⁹ and while those same interests are presumably at hand for Fifth Amendment purposes, courts have been much less clear as to when school officials cross the constitutional line between teacher and state actor when questioning is involved. Court decisions regarding Fourth Amendment searches at schools were premised on the notion that "a school official's primary mission is not to ferret out crime, but is instead to teach students in a safe and secure learning environment."⁴⁰ It follows, then, that if school officials can constitutionally search students only when considered "state actors," then they can constitutionally question students only as state actors when the focus of the inquiry is criminally-related and when the conditions for *Miranda* are met.

Unfortunately, questioning by a school official for purposes of discipline and that intended to procure criminal information is almost impossible to distinguish since most crimes committed by juveniles have concurrent disciplinary consequences in the school environment.⁴¹ In light of the increased presence of police in schools and the cooperation between schools and law enforcement, including statutory requirements that schools report students to police for certain conduct in school, questioning of students by school officials can just as easily become pretext for eliciting specific confessions from youth as it is to conduct a search in order to quickly refer them to law enforcement for criminal prosecution.

the principal questioned the student without *Miranda* warnings, and went into the principal's office to handcuff and arrest the student after he confessed).

³⁹ *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985).

⁴⁰ *Schall by Kross v. Tippecanoe County School Corp.*, 864 F.2d 1309, 1314-15 (1988) (citing *T.L.O.*)

⁴¹ See *In re G.S.P.*, 610 N.W.2d 651 (Minn. Ct. App. 2000) (many school officials have the right to discipline students for conduct both on and off schools grounds and if the behavior poses a direct and immediate effect on the discipline or general welfare of the school); see also *In re V.P.*, 55 S.W.3d at 33 (holding that a principal did not need to provide *Miranda* warnings to a student before questioning him about a weapon even though the principal only questioned him after the SRO suggested it and where the SRO waited outside of the office and arrested the student immediately thereafter).

The notion that school officials act on behalf of, or as agents of, law enforcement is most pronounced in questioning that concerns students' off-campus conduct. In situations where this off-campus conduct affects the school environment in addition to holding criminal penalties, school officials are able to question students and illicit criminal information only in order to maintain the school environment. But if school officials begin to follow MPD's mantra of "community policing," then principals and other administrators might find themselves simultaneously playing the role of teacher and cop if they actively question students regarding behavior outside of the school walls. This is especially troublesome if there is no indication that this behavior has affected or is about to affect the school environment. For example, Chief Wilson provided a scenario⁴² where two gangs had an altercation the previous night and the neighborhood officer informed the SRO who then informed the principal. They then took all of the kids aside at school the next day and discussed what had happened. Though this situation did not result in any criminal prosecutions, the likelihood of that a similar situation might require arrest is quite high. At this time, though, it is unclear if these SROs are relying on school administrators to conduct questioning regarding this off-campus behavior in order to avoid legal consequences. Likewise, school officials who question students for off-campus conduct that would have little to no effect on the school environment seems indicative of school officials' usurping police functions. If a school cannot punish a student for off campus behavior because it does not effect the health or safety of the school,⁴³ a school official should not have the authority to question a student. If he does, then he must be questioning for the sole purpose of turning his confession over to police. This school official's actions transform him into an agent of the state for Fifth Amendment purposes and *not* a school disciplinarian.

⁴² Personal interview with now former D.C. MPD Assistant Chief of Police, Gerald Wilson, November 27, 2006.

⁴³ See, e.g., Montgomery Co. Public School Rules and Regulations, Regulation JFA-RA(O)(7)(g) (explicating that off-campus conduct will not be subject to discipline by school authorities unless there is a reasonable belief that the health and safety of others will be compromised in the school setting); see also Maryland Code Education § 7-303(a)(6) (enumerating offenses for which law enforcement must notify schools when students are arrested). Statutes in D.C. are less clear. D.C. Municipal Regulations, Title V §2503, 2511 indicate that schools cannot take disciplinary action for most off-campus behavior where it does not affect the school environment.

ii. When Questioning at School Becomes a Custodial Interrogation Under the Fifth Amendment.

The second issue with regards to the Fifth Amendment is whether a student is in “custody” and “interrogated” by an SRO or security officer employed by MPD, the school official, or both. Several courts have ruled on such situations, but have not provided consistent answers across jurisdictions. The privilege against self-incrimination is jeopardized when an individual is taken into custody or otherwise deprived of his freedom in any significant way and is subjected to questioning.⁴⁴ For the Fifth Amendment’s protections to trigger, a person must be in custody to the point where a reasonable person would not feel free to leave⁴⁵ and must be subjected to an interrogation where the government agent should have known his statement, actions, or words would reasonably evoke an incriminating response.⁴⁶

To determine whether or not questioning of a student at school constituted a “custodial interrogation” for purposes of *Miranda* courts generally apply the standard totality of circumstances test rather than consider how inherently coercive and custodial being called into the principal’s office is when a potential criminal investigation is at hand.⁴⁷ Just two years ago, the Supreme Court reviewed custody as it pertains to juveniles and reiterated that “custody for *Miranda* purposes is an objective test determined by: (1) inquiring into circumstances surrounding interrogation, and (2) given those circumstances, determining whether a reasonable person would have felt he was not at liberty to terminate interrogation and leave.”⁴⁸ The Court made clear that the age and experience of the juvenile should not factor into the determination of custody since such considerations would require officers to apply a more subjective test that consists of psychological factors in determining whether *Miranda* rights should be given to a youth. This reasoning, however, as Justice O’Connor stated in her concurrence, is flawed since

⁴⁴ *Miranda v. Arizona*, 384 U.S. 436, 478 (1966).

⁴⁵ *Yarborough v. Alvarez*, 541 U.S. 652, 633 (2004).

⁴⁶ *Rhode Island v. Innis*, 446 U.S. 221, 301-02 (1980).

⁴⁷ See Penrose, *supra* note 13 (summarizing recent school interrogation cases that determined custodial issues by looking at which party initiated the questioning, the location of questioning, how long the interview lasted, and to what extent the student was being implicated in a crime).

⁴⁸ *Yarborough*, 541 U.S. at 633.

the juvenile's age may very well play into how he or she views the interrogation and his or her freedom to leave.⁴⁹

When a school official conducts an investigation in the principal's or school administrator's office, regardless of whether the principal turns over information to law enforcement, courts consistently hold that students are not considered in "custody" because the assumption is that the questioning was not for criminal investigatory purposes, but to gather information for disciplinary purposes.⁵⁰ Because of school officials' obligations to maintain order, protect the health and safety of students and maintain an effective learning environment, they are vested with administrative powers that most courts refuse to equate with a criminal interrogation within the purview of *Miranda*.⁵¹ This view, however, fails to consider the increased partnerships between school officials and law enforcement, such that principals who question students pursuant to a larger investigation involving the SROs and who actually intend to elicit and subsequently reveal a student's criminal confession to SROs for criminal investigatory and prosecutorial purposes may ultimately invoke the Fifth Amendment.

Alternatively, a student generally *is* considered in "custody" when an SRO conducts the investigation in a principal's office or other similarly enclosed space without the presence of any school administrators.⁵² In determining that an interview conducted solely by the SRO constituted "custody" for purposes of *Miranda*, one court determined that a principal's office could hardly be considered familiar or comfortable for a student, that the student knew the person questioning him was a police officer, and that the student would have been subject to disciplinary actions if he had refused to speak with the officer or tried to leave.⁵³ Additionally, because SROs work as agents of law enforcement, one can hardly argue that a police officer who interrogates a student

⁴⁹ *Id.* at 669.

⁵⁰ *See, e.g.,* *People v. Shipp*, 239 N.E.2d 296, 298 (1968) (finding that a student called into the principal's office for questioning by the principal is not "in custody" and *Miranda* warnings are not required); *see also* *Penrose*, *supra* note 13 at 785 (opining that the Fifth Amendment poses no obstacle to school officials when the questioning deals strictly with disciplinary issues).

⁵¹ *See, e.g.,* *People v. Corey L.*, 203 Cal.App.3d 1020 (1988).

⁵² *See, e.g.,* *State v. Doe*, 948 P.2d 166 (Idaho Ct. App. 1997) (finding that a student was in custody when the school resource officer questioned him alone in the principal's office).

⁵³ *Id.*

alone is not doing so with the intent to elicit criminal information or an actual confession. To find otherwise would tend to blur the bounds between school administration and the criminal system into oblivion. No evidence indicates that SROs were placed in schools to take on administrative functions in lieu of the principals and other administrators.

What many courts struggle with, though, and where the lines between duties of police and duties of school officials become murky, is when both a school official and the SRO or other officer is present during questioning. Most courts continue to look at the totality of the circumstances when ruling on whether questioning by both a school administrator and police officer is custodial for *Miranda* purposes. For example, where a principal, assistant principal and the SRO questioned a fourteen-year old over the course of thirty minutes in the assistant principal's office, the court held that the student was effectively in custody and should have been given *Miranda* warnings.⁵⁴ The court considered the record wherein nothing indicated that the youth was free to leave and that a juvenile in this circumstance would have believed he was restrained in his movement to the degree associated with formal arrest.⁵⁵ Similarly, a situation where the principal told a student that he had no choice but to answer the questions and then stated he was going to ask a few questions and then "turn it over to Officer Johnson," who had a tape recorder, constituted "custody."⁵⁶

Other courts view situations with both parties present differently. For example, a student was not considered "in custody" when the SRO and principal required a student to walk with them to his car where they suspected he had drugs. The questioning by both parties did not require *Miranda* since the court held that the student was not confined to any space and should have felt that his movement was not restrained to the degree of a formal arrest.⁵⁷ Where both a school official and SRO question a student, but inform the student that the questioning is only for disciplinary purposes, courts have found that the students' Fifth Amendment rights are not

⁵⁴ *In re W.R.*, 634 S.E.2d 923 (N.C. App. 2006).

⁵⁵ *Id.* at 926.

⁵⁶ *See In re G.S.P.*, 610 N.W.2d 651 (Minn. Ct. App. 2000).

⁵⁷ *See State v. R.D.S.*, 2006 WL 3350699 (Tenn. Ct. App.).

evoked.⁵⁸ Thus, for purposes of *Miranda*, courts generally consider whether the student was in an office or confined space and to what extent the officer conducted the interview as opposed to the principal.

Courts inconsistently apply a totality of circumstances test with regard to restraint of movement inherent at school and under the authority of school officials. Questioning by school officials, especially in the presence of police or school resource officers, appears inherently custodial.⁵⁹ Where school officials pull a student out of class or request his or her presence in an administrator's office, little possibility exists that this student would feel free to refuse the principal. Students who refuse to obey school administrators or teachers are inherently subject to disciplinary actions, and because the freedom of students' movements while at school is largely controlled by school officials, being forced to face questioning in the principal's office for purposes of eliciting criminally-related information seems to reflect the nature of a custodial interrogation that *Miranda* sought to protect against.

The problem inherent in an objective test that focuses on the mindset of a "reasonable person" when school interrogations are in question is that, in general, youth can hardly be considered "reasonable" or able to make judgments like an adult would in the context of reviewing whether or not a "reasonable person" would have felt free to leave questioning by a school official or school resource officer.⁶⁰ An adult likely would free to end this kind of questioning in the school environment, even in the presence of police officers, but most youth, once called into the principal's office, would not feel that they were free to leave the office at any time in light of

⁵⁸ See, e.g., *State ex rel. Juvenile Dept. of Multnomah County v. Loreda*, 865 P.2d 1312, 1313-14 (Or. App. 1993).

⁵⁹ See *State v. Doe*, 948 P.2d 166, 173 (Idaho Ct. App. 1997) ("Given that the school setting is more constraining than other environments, it is especially important that police interviews with children, when carried out in that setting, are conducted with due appreciation of the age and sophistication of the particular child.").

⁶⁰ See *id.* ("An interview that would not be "compelling" for an adult might nonetheless frighten a child into believing that he or she was required to answer an officer's questions. Accordingly, special precautions should be taken to ensure that children understand that they are not required to stay or answer questions asked of them by a police officer.").

possible fear of being disciplined for disobeying a school official.⁶¹ The standard totality of the circumstances test would seem to imply that one, students should be able to understand whether questioning is for disciplinary or criminal purposes and then allow that perception to influence whether or not to answer the questions and two, should feel free to stop a principal's questioning. The test, however, should be applied in light of the uniqueness of the school environment and young people's vulnerability and perceptions about discipline and authority.⁶²

Whether or not a school official and SRO working in tandem subject a student to a custodial interrogation turns largely on the purpose of the questioning and who is doing the questioning. The school official's presence could indicate that school disciplinary reasons require an interview with a student, whereby school officials do not evoke the Fifth Amendment because they are generally not considered agents of the state as previously discussed. But the presence of the SRO also indicates that the questioning is criminal in nature and could lead to a criminal prosecution, and that regardless of the presence of school officials, any questioning by police officers where a person has been implicated is generally always conducted to illicit a criminal confession or information.⁶³ As mentioned previously, though, because most crimes are also infractions of school rules, no clear authority exists to distinguish between an actual "interrogation" and questioning for disciplinary purposes until after a criminal charge has been brought based on information elicited from the questioning. From the perspective of a student who is answering questions from both principal and SRO, it may seem reasonable to him or her

⁶¹ See *In re Killitz*, 651 P.2d 1382 (Or. Ct. App. 1982) (finding that the student was in custody because he "was in school during regular hours, where his movements were controlled to a great extent by school personnel" and that the student "cannot be said to have come voluntarily to the place of questioning" because he would have likely been subject to disciplinary actions had he refused the principal's command). *But see State v. D.J.*, 2006 WL 1217215 (Wash. App. Div 1) ("Contrary to D.J.'s assertion, the test is not whether reasonable person would believe he or she was "free to leave." The test is whether a reasonable person would believe that his or her freedom was curtailed to the degree associated with a *formal arrest*.").

⁶² See *Doe*, 948 P.2d at 173 (emphasizing that a student who receives a mandatory directive from a police officer to leave class and report to a faculty room where he had been disciplined before would, "from a child's perspective," feel restrained to the degree of formal arrest.

⁶³ Cf. *Brian A. v. Stroudsburg Area Sch. Dist.*, 141 F.Supp.2d 502, 505-06 (Penn. 2001) (explaining that the SRO and principal questioned a student for a bomb threat, which is a crime, but issued a suspension and not a criminal charge).

that the officer is gathering information for criminal purposes, unless specifically told otherwise.⁶⁴ If the latter, then the situation begs the question of what purpose the SRO even serves by helping question a student for suspension or expulsion purposes. The presence of the school official may encourage the student to believe that the school official is helping gather incriminating statements, thereby creating a custodial interrogation.

Likewise, courts have failed to distinguish between questioning by a school official for student conduct off campus and that of conduct on campus. While school officials can discipline students for enumerated behavior off schools grounds, questioning a student for something like a burglary or vandalism off campus appears to be inherently for criminal purposes since the direct effect of this behavior on school safety or discipline is tenuous. In such an instance, then, the circumstances surrounding the interrogation indicate that the sole function of questioning is to elicit a criminal confession because the student is only subject to criminal sanction for his behavior.⁶⁵

The application of totality of the circumstances specifically to school interrogation is misplaced given the dual nature of school officials as leaders of the school and as liaisons of law enforcement and also because of how youth view their role as students subject to the control of teachers and principals and their relationship to uniformed officers. The problem is that any questions designed to find out if the student is violating a school rule are also by default going to elicit an incriminating statement if the school infraction is also a crime, so the constitutional standards for interrogation seem to fall apart unless courts carefully scrutinize the role that the school administrator plays in the questioning and his or her relationship to the SROs.

To preempt potential constitutional violations committed by school officials who elicit criminal confessions guised under “disciplinary purposes,” administrators, police and courts must consider whether the administrator acted *on behalf of* or in *direct partnership* with police. Either

⁶⁴ See Paul Holland, *Schooling Miranda: Policing Interrogation in the Twenty-First Century Schoolhouse*, 52 Loy. L. Rev. 39, 79 (2006) (opining it would be unreasonable to think that students will ignore that uniformed officer with a badge generally represents law enforcement, not school discipline).

⁶⁵ See Penrose, *supra* note 13 at 785 (observing that school officials are often asked to assist SROs in questioning students who may be potential criminal suspects).

situation tends to tip the agency scale more on the side of law enforcement and state agent and under these circumstances, school officials should constitutionally be required to provide students with the *Miranda* warnings before questioning.⁶⁶ Realistically, however, requiring school administrators to adhere to constitutional standards historically reserved to law enforcement confounds the actual administrative rights and responsibilities of school officials to efficiently run their schools and discipline students. As such, rather than impose Fifth Amendment requirements upon school officials who may act under the guise of law enforcement, school administrators must be mindful of the purpose of the questioning and should never question students as a result of an SRO or police request or tip unless the only consequence of such questioning is a prescribed disciplinary action.⁶⁷ School administrators should conduct all questioning for school disciplinary purposes in the absence of SROs, and law enforcement should conduct questioning for criminal purposes without the presence of school officials and only after providing the student with his or her *Miranda* warnings.⁶⁸ Because the purpose of SROs in schools is to encourage open communication about student behavior between law enforcement and school officials, it is obviously unreasonable to argue that information gathered from questioning a student should not be passed between parties, but by keeping the questioning separate, students, SROs and administrators will better understand their roles within the schools and purposes in relationship to each other. Likewise, an interrogation of a student by an SRO will be less suspect when premised on probable cause obtained through a students' admission during an interview with school administrators, and SROs should be required to provide *Miranda* warnings to a student and obtain their own confession given under the protection of the Constitution.⁶⁹ Exceptions lie in the form of mediation or conflict resolution where law

⁶⁶ See generally, *id.* at 787-89

⁶⁷ See Holland, *supra* note 64 at 89 (opining that school officials and SROs can interview students in tandem, but that the SRO must provide *Miranda* warnings only when the interview is informed and guided by law enforcement).

⁶⁸ See Lee Remington, *The Ghost of Columbine and the Miranda Doctrine: Student Interrogations in a School Setting*, 41 Brandeis L. J. 373, 392 (2002). *But see supra*, note 65 and accompanying text.

⁶⁹ See *id.*

enforcement explicate that no criminal charges, citations or record will result from any statement made in such a non-custodial setting.

iii. Discovery of Statements Made to Government Agents

All court rules include provisions for discovery and governmental disclosure of evidence. Of particular moment are rules that provide for disclosure of statements made to government agents. For example, in D.C., Superior Court Rule 16(a)(1)(A) provides, "Upon request . . . Corporation Counsel shall disclose . . . the substance of any relevant oral statement made by the respondent whether before or after arrest in response to interrogation by any person then known to the respondent to be a government agent" Thus the same question for disclosure purposes arises as it did for Fifth Amendment purposes-whether a school official should be considered a government agent. The concern inherent in disclosure of statements made by the defendant is the undue surprise to defense and the opportunity for the government to impeach the student through inconsistent statements.⁷⁰ Unfortunately, the answer remains just as clouded. As stated in the preceding sections, most courts currently do not recognize school administrators as government agents because of their duty to respond to student behavior that violates a school rule, even though this behavior often constitutes some form of criminal infraction as well. As described, one could argue that a school official who questions a student at the behest of the SRO or for behavior that holds no disciplinary consequences is actually a state agent for the purposes of the Fifth Amendment.⁷¹ In these instances, defense counsel could reasonably argue that disclosure of those statements made by the student to the school official

⁷⁰ See, e.g., *Smith v. U.S.*, 491 A.2d 1144, 1147 (D.C. 1985); see also *Davis v. U.S.*, 623 A.2d 601, 605 (D.C. 1993) noting that Rule 16(a)(1)(A) "is designed to enable defense counsel to prepare adequately for government efforts to incriminate the defendant through his own words, often a particularly damning form of evidence, and to permit defense counsel to make informed judgments regarding the strength of the prosecution's case").

⁷¹ See *U.S. v. Safavian*, 233 F.R.D. 12, 14 (D.D.C. 2005) ("This provision of Rule 16 is not limited to questions asked only by Justice Department prosecutors or law enforcement agents. At a minimum, it includes statements made, in response to interrogation, to any officers of the federal government 'with criminal law enforcement responsibilities or their agents'--that is, 'law enforcement agents or persons acting on their behalf' . . . so long as that person 'interrogates' the defendant."); see also *Smith*, 491 A.2d at 1147 (interpreting Rule 16(a)(1)(A) as requiring that the government disclose the substance of oral statements by an accused made in response to police interrogation).

come within the purview of 16(a)(1)(A) and are sufficiently testimonial to warrant a *Miranda* objection.

The language of this disclosure rule, however, may ultimately determine what statements made to school officials by the student defendant the government must disclose. The rule states that only statements made to agents “known to the respondent to be a government agent” shall be disclosed. Thus if a student was being formally interrogated by the school official, then one could reasonably argue that the school was indeed a government agent for disclosure purposes. The student, however, would have to believe that the questioning was intended to elicit information for criminal investigatory purposes and that the statement would be used against him in subsequent criminal proceedings.⁷² Since school officials are generally not assumed to be “government agents” for Fifth Amendment purposes, the merit of this rule could turn on a student’s subjective belief about his situation. For example, if a student knows that the principal and SRO closely work together, or if the principal makes a comment during the questioning that he or she will call down the SRO if the student does not cooperate, then a student could reasonably presume that his is being investigated for criminal purposes and that his statement will be later used against him.

In the interests of efficiency and fairness, if a student’s statement made to school official was the basis for either the referral or for further questioning by the SRO that led to the student’s arrest and the student has reason to think that his statement would land him in the justice system, then the government should disclose the statement to opposing counsel. Since the standard is whether the defendant student knew the interrogator was a government agent, a fuller discussion of the implications of the SRO-principal relationship on disclosure rules is contingent upon more specific facts or case studies on how students view their school administrators in the unique disciplinary setting.

⁷² See, e.g., Holland, *supra* note 64 at 47-48 (explaining that the definition of interrogation “focuses primarily upon the perceptions of the suspect, rather than the intent of the police”).

iv. Voluntary Waivers and Youths' Diminished Capacity to Understand
Miranda

Though *Miranda* warnings are an arguably necessary prerequisite to school officials' legal questioning of youth when they ultimately turn that information over to law enforcement, youths' inability to even comprehend *Miranda* in order to make an effective waiver required by *Miranda* is an ever-present risk inherent in juvenile confessions. Thus, even if officers provide *Miranda* warnings to students for the purposes of eliciting a confession, the likelihood that the student will waive his or her rights as a result of miscomprehension, and not voluntariness as *Miranda* assumed, is quite high. This risk is only exacerbated by the number of students with learning disabilities. In D.C., for example, 10,343 students out of the total DCPS population of 56,787⁷³ have some form of a disability for which they have an Individualized Education Program.⁷⁴ Of these IEPs, 5,601 are for generalized learning disabilities and mental retardation.

The law currently provides that voluntariness and a "knowing and intelligent" awareness suffice to waive *Miranda* rights, determined by a totality of the circumstances. In *Fare v. Michael C.* the Court applied a totality approach to determine voluntariness of a juvenile's waiver, but attempted to remain flexible so as to protect more readily coerced juveniles while still allowing officers authority to question more sophisticated juveniles.⁷⁵ The Court clarified that the totality approach in regards to juveniles includes evaluation of the "juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of those rights."⁷⁶ This Court, and many other lower courts, have consistently argued that older juveniles by default of their age understand *Miranda* and have the capacity to make a knowing and voluntary waiver. This argument naively assumes that older juveniles are wiser or are better equipped to

⁷³ Statistics personally communicated from Alan Patterson, Office of Information Technology, DCPS (May, 2007).

⁷⁴ An Individualized Education Program (IEP) is a curricular program specifically tailored for students who qualify under the Individual with Disabilities Education Act. 20 U.S.C. 1414(d).

⁷⁵ 404 U.S. 707, 725-26 (1979).

⁷⁶ *Id.*

understand legalese and the circumstances surrounding confession and demeans the rest of the totality test requiring a showing of capacity to understand the rights and consequences.

Juveniles, regardless of actual age, should not be presumed to understand such complex and important concepts. To be sure, the Court has conceded that “admissions and confessions of juveniles require special caution,” noting that “[i]f counsel was not present for some permissible reason when an admission was obtained [from a child], the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.”⁷⁷

Even under a totality of the circumstances test, psychologists question whether a typical juvenile’s waiver of *Miranda* rights can ever be knowing, intelligent or voluntary. Dr. Thomas Grisso performed the most thorough study done on this issue to date and the results indicate that most juveniles who receive a *Miranda* warning may not understand it well enough to knowingly and intelligently waive it. Dr. Grisso conducted tests to determine whether juveniles could paraphrase the words in the *Miranda* warning, whether they could define six critical words in the *Miranda* warning (attorney, consult, appoint, etc) and whether they could give correct true-false answers to twelve rewordings of the *Miranda* warnings. Only 20.9 percent of the juvenile, compared to 42.3 percent of the adults in the study, demonstrated adequate understanding of the four components of the *Miranda* warning, while 55.3 percent of juveniles compared to 23.1 percent of the adults exhibited no comprehension of at least one of the four warnings. Juveniles most frequently misunderstood the *Miranda* warning that they had a right to consult with an attorney and to have one present during interrogation. Juveniles younger than fifteen failed to meet both the absolute and relative (adult norm) standards for comprehension and, compared with the adults, exhibited significantly poorer comprehension of the nature and significance of *Miranda* rights.

Likewise, Dr. Grisso argues that youths’ social status relative to adult authority figures such as police also render them more susceptible than adults to the coercive pressures of

⁷⁷ *In re Gault*, 387 U.S. 1, 45, 55 (1967).

interrogation. Inexperienced youth may agree to speak to the police in hopes that their interrogation will end more quickly and secure their release. He notes that *Miranda* warnings are intended to inform and educate defendants, to enable them to assert their rights, and to ensure that they made waivers “knowingly and intelligently.” “If most juveniles lack the cognitive capacity to understand the warning or the psychosocial ability to invoke or exercise rights, then, ritualistic recitation of a *Miranda* litany hardly accomplishes those purposes.”⁷⁸ Indeed, recent scientific breakthroughs in adolescent brain development indicate that the areas of the brain that control cognitive capabilities, long-term planning, ability to foresee consequence and act on impulse mature as late as the early-twenties, making it even less likely that any school-aged child would fully comprehend the meaning of *Miranda* or the very real consequences of confessing.⁷⁹

The role that *Miranda* might play in schools now that law enforcement exhibits and increased presence and partnership with school administrators, as in D.C., really has yet to be fully explored by courts. Thus, courts in D.C. and in other districts where law enforcement and school officials work in tandem should carefully consider in what capacity a school administrator acted when questioning a student about his or her actions that would be subject to both school disciplinary actions and criminal sanction. While the law consistently supports school administrators in fulfilling their duties to keep schools safe, the reality is that these school administrators are taking on increasingly police-like functions due to the presence of police in school and law enforcements’ interest in linking students’ actions in the community with their behavior in school. As it stands, the law must take a harder look at the roles of schools and how they increasingly assist police in the efforts to maintain safety in the larger community.

III. The Justice System and the Disclosure of Educational Records in the District: The Family Educational Rights and Privacy Act

⁷⁸ All information regarding Dr. Grisso’s tests and findings are taken from Barry Feld, *Juveniles’ Waiver of Legal Rights: Confessions, Miranda and the Right to Counsel* 105-138, *Youth on Trial* (ed. Thomas Grisso and Robert Schwarz), 2000.

⁷⁹ See e.g., Interview by Frontline with Jay Giedd, M.D., PBS Frontline: Inside the Teenage Brain (2002) at <http://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/interviews/giedd.html>

The presence of law enforcement in schools necessarily raises the question of what records and statements should be readily available to them for purposes of maintaining order in school and also for investigating and charging criminal activity. As discussed in previous sections, the role that law enforcement and school administrators play during questioning of a student and for what purposes each party maintains his or her respective records should dictate the disclosure of educational records and statements made by students in the course of either an actual criminal investigation or for disciplinary purposes. SROs' increasing disciplinary function in schools and school administrators' close investigatory cooperation with law enforcement provokes the very same entanglement problems under statutes as it does under the Constitution. While statutory safeguards exist to prevent complete disclosure of confidential educational information to law enforcement, lawmakers, police and school officials must be mindful that both intentional and unintentional disclosure could lead to an abuse of the already-precarious relationship between law enforcement and school administration.

The Family Educational Rights and Privacy Act (FERPA) is a federal law that gives parents the right to access their children's educational records, the right to have the records amended and the right to some control over the disclosure of information contained in educational records. In recognition of the need for all agencies serving children and families to coordinate and maximize services, particularly for at-risk youth, lawmakers amended FERPA in 1994 to include provisions that allow for information-sharing with law enforcement and juvenile justice agencies.⁸⁰ With SROs and school administrators alike questioning students for behavior that violates both school rules and the law, schools may question which records are protected under FERPA and which can be disclosed under the law enforcement provisions.

FERPA defines "educational record" as records, files, documents and other materials that contain information directly related to a student and are maintained by an educational agency or

⁸⁰ Office of Juvenile Justice and Delinquency Prevention & Family Policy Compliance Office, *Sharing Information: A Guide to the Family Educational Rights and Privacy Act and Participation in Juvenile Justice Programs* 8 (1997).

institution by a person acting for such agency or institution.⁸¹ This provision only protects confidential information within the record and not information derived from personal knowledge or observation even if that information may simultaneously exist in an educational record. Alternatively, FERPA exempts from the definition of educational record those records maintained by a law enforcement unit⁸² of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement.⁸³ This provision allows disclosure of any record made by law enforcement in the course of law enforcement duties to any third party, including other law enforcement agencies, social services, the media and the state attorney's office. In D.C. for example, SROs and school security guards should be considered "law enforcement" since they operate under the auspices of MPD and serve law enforcement purposes within the schools. Less clear in light of efforts to maintain student discipline, however, is which kind of records the statute considers to be "created for law enforcement" purposes. Commentators noted that "where a law enforcement unit also performs non-law enforcement functions, the records created and maintained by that unit are considered law enforcement unit records, even where those records were created for dual purposes (e.g. for both law enforcement and disciplinary purposes). Only records that were created and maintained by the unit exclusively for a non-law enforcement purpose will not be considered records of a law enforcement unit."⁸⁴ Therefore, if SROs investigate student behavior solely for disciplinary purposes, those records become educational records, not law enforcement records, subject to protection under FERPA. This caveat is a complete misnomer, however, since SROs are hired to maintain safety and security in schools and should question students only when their behavior has some criminal element to it. The practical consequence of this provision lies in the

⁸¹ 20 U.S.C. § 1232g(a)(4)(i)-(ii)

⁸² "Law enforcement unit" is defined as an individual, office, department, division, or other component of a school or school district-such as a unit of commissioned police officers or noncommissioned security guards-that is officially authorized or designated by the school district to i) enforce any Federal, State, or local law, or ii) maintain the physical security and safety of schools in the district. 34 CFR § 99.8(a)(1). "Law enforcement record" is defined as records, files, documents and other materials of law enforcement unit that are i) created by a law enforcement unit, ii) created for a law enforcement purpose and iii) maintained by the law enforcement unit. §99.8(b)(1).

⁸³ 20 U.S.C. § 1232g(a)(4)(ii)

⁸⁴ 60 FR 3464-01, Rules and Regulations, Department of Education (1995).

juxtaposition of law enforcement records and educational records. If student behavior is subject to both disciplinary action and potential criminal consequences, two records will presumably exist—one created by the SRO for law enforcement purposes and one created by school administrators for educational (i.e. disciplinary) purposes. The record created and maintained by the SRO can legally be shared with any third party, yet the record created and maintained by school officials cannot. Thus, the presence of SROs and school police during disciplinary proceedings or during questioning for the dual purposes of school discipline and law enforcement essentially undermines FERPA's intentions to keep disciplinary records confidential and opens the door to a host of information for law enforcement and prosecutors.

Conversely, SROs do not have access to educational records unless schools officials specifically designate the SROs as "school officials" with "legitimate educational interests."⁸⁵ Each school has the responsibility to send an annual notification letter to parents stipulating who can be considered a school official and what constitutes a legitimate educational interest. For example, D.C.PS stipulates that, "The law allows schools to disclose records, without consent, to the following parties: (a) To D.C.PS personnel with legitimate educational interests to fulfill professional responsibilities, including administrators, supervisors, instructors, support staff (including health or medical staff and law enforcement unit personnel) or school board members."⁸⁶ FERPA nor its commentaries define what constitutes a legitimate interest, but allows school administrators full discretion to define it as they see fit.⁸⁷ Therefore, if school officials believe that SROs must have access to educational records in order to carry out their *law enforcement* responsibilities, D.C.PS could designate SROs as "school officials" and open students' educational records to the requesting SRO.

⁸⁵ 34 CFR § 99.7

⁸⁶ DCPS, Confidentiality and Records Management (2001) located at http://www.k12.DC.us/DCPS/specialed/specialed_documents/CHAPTER_III.pdf

⁸⁷ See 20 U.S.C. § 1232g(b)(4)(A) ("Each educational agency or institution shall maintain a record, kept with the education records of each student, which will indicate all individuals (other than those specified in paragraph (1)(A) of this subsection), agencies, or organizations which have requested or obtained access to a student's education records maintained by such educational agency or institution, and which will indicate specifically the legitimate interest that each such person, agency, or organization has in obtaining this information.").

Because SROs are a constant presence in schools, this provision has both its advantages and disadvantages. First, if SROs can access educational records, they may be better able to gauge which students may seriously jeopardize safety and security and which may only have been having a bad day where no further law enforcement action should be taken at that time. Without knowing a brief disciplinary history, SROs may feel compelled to charge a wide range of students for a wide range of behavior because they cannot distinguish between the true threats they were hired to protect against and what could be considered typical adolescent behavior. Likewise, if SROs have knowledge of the mental and emotional challenges of the students whom they question or come in contact with, they may be better able to communicate with students. This is particularly beneficial if a *Miranda* situation arises at school. Before questioning a student and providing *Miranda* warnings to a student, an SRO can evaluate the educational record to determine whether or not the student would understand *Miranda* and how to most effectively communicate with the student. Arguably, SROs could not then claim that they had no indication that a student was mentally deficient when assessing whether or not the student voluntarily waived his rights.⁸⁸ This would not require SROs to evaluate records as a mental professional or educator might, but would rather allow them to gather a cursory profile of the cognitive abilities of the student.

Alternatively, designating SROs as school officials with legitimate educational interests may allow SROs to purposefully target certain students known to have disciplinary problems. Because a host of variables control what kinds of misbehavior is actually indicative of crime or poses a legitimate safety risk to the school, SROs should not purposefully target known troublemakers unless other evidence indicates that a particular student has or will engage in potentially violent and dangerous criminal behavior at school. Opening records to school police

⁸⁸ See Russell Skiba & Gale Morrison, *Predicting Violence from School Misbehavior: Promises and Perils, Psychology in the Schools*, Vol. 32(2) 175-79 (2001) (explaining that student misbehavior may not accurately predict future misbehavior or violence because of changing variables in student characteristics, tolerance levels of the people creating the report, and changes in the environment). “In parallel, predicting extreme acts of violence from patterns of rule breaking at school is difficult as well. Realistically, involvement in school discipline processes is just one of a cluster of student characteristics that may play a part in a developmental process that leads to violence on school campuses.” *Id.* at 177.

has the potential to encourage them to usurp traditional administrative disciplinary duties by inappropriately allowing them to red-flag non-criminal, typical adolescent misbehavior, thereby creating a potentially threatening or hostile learning environment for those particular students.⁸⁹

Significantly, if school officials designate SROs as school officials who require educational records to perform their duties for the school, SROs can only use information in the educational records for the purposes for which the disclosure was made and cannot redisclose the information to any third parties, including other law enforcement agents or the state attorney's office.⁹⁰ State juvenile justice information sharing statutes, however, provide one exception to the general presumption that all educational remain private unless parents consent to release.⁹¹ These statutes allow educators to share information with juvenile justice system agencies prior to adjudication about students at risk of involvement or who have already become involved in the juvenile justice system.⁹² It appears that D.C. has not adopted this kind of statute, yet Maryland, for example, has one that states that the school system may disclose student educational records if disclosure "concerns the juvenile justice system and the system's ability to effectively serve the student whose records are released."⁹³ The practical effect of these statutes seems to lie in the justice agency's ability to bypass the subpoena requirement or other lawfully issued court order for requesting educational records. Ultimately, while FERPA protects the general disclosure of educational records, it fails to fully address that law enforcement and school administrators currently serve overlapping functions in the name of maintaining a safe and orderly school environment. The daily presence of SROs in the schools proliferates the opportunities for police to create "law enforcement records" on students by virtue of serving disciplinarian functions and having constant access to youth.

⁸⁹ See e.g., Lisa Spinelli, *Band-aids on School Violence: Do Police in Schools Help or Hurt?*, Youth Matters, May 2004 (highlighting one student's story about his encounter with the SRO at his school who told him to stop singing in the hallway and then escorted him to an in-school suspension. The student related, "Now, every time I see that officer, he tell me, 'I'm watching you.'").

⁹⁰ 34 C.F.R. § 99.33(a)

⁹¹ § 99.38

⁹² *Sharing Information*, *supra* note 80, at 8.

⁹³ COMAR § 13A.08.02.26

IV. The Criminal Side Effects of School Discipline

The dirty underbelly of SRO presence in schools that generally remains concealed under the veil of school safety is the increasing number of students that will be, or already are, referred to the juvenile justice system by virtue of opportunity.⁹⁴ While those in positions of authority over SRO programs and policy are reticent to broach the issue, the effects of SROs in schools and the criminalization of misbehavior have not gone unnoticed. Adolescent behavior once left for the schools to address through discipline is now subject to criminal charges and punishments,⁹⁵ attributable to both the increased presence of law enforcement in schools and mandatory reporting of certain incidents in schools.⁹⁶

A 2005 study on school discipline and criminal referrals in Florida is the most recent and telling representation of the effect of reliance on the justice system to handle disciplinary problems. In one year, there were 26,990 referrals from the schools to the Florida Department of Juvenile Justice, over three-quarters of which were for misdemeanor offenses such as disorderly conduct, trespassing and assault and battery in the form of a schoolyard or hallway scuffle.⁹⁷ In one county, SROs made 444 in-school arrests at high schools and 244 arrest at middle schools, twenty-five percent of which were cited as “school disruption” or “disorderly conduct.”⁹⁸ School police in another district reported 946 youth arrests in school for simple assault (fights) without

⁹⁴ See, e.g., Pinard, *supra* note 23 at 1107-08 (opining that SROs in schools are the “gatekeepers” to the juvenile justice system because their primary role is to minimize disruption and maintain safety and utilize the mechanisms of the criminal justice system if necessary).

⁹⁵ See Marsha Levick & Robert Schwarz, Changing the Narrative: Convincing Courts to Distinguish Between Misbehavior and Criminal Conduct in School Referral Cases, 9 U.D.C. L. Rev. 53 (2007).

⁹⁶ 20 U.S.C. 7112(c)(3)(B)(i)-(ii) (2000) (conditioning federal funds on the reporting of truancy rates and the frequency, seriousness, and incidence of violence and drug- related offenses resulting in suspensions and expulsions in elementary schools and secondary schools in the State); 20 U.S.C. 8921(d) (2000) (requiring as part of the Gun Free Schools Act that educational agencies report expulsions for weapons-violations in school to the State). Some states have adopted reporting statutes that require school officials to report any threatening behavior or violence in addition to federal reporting schemes. See U.S. Dept. of Justice, Reporting School Violence, 2 Legal Series Bulletin (Jan. 2002), available at <http://ojp.usdoj.gov/ovc/publications/bulletins/legalseries/bulletin2/ncj189191.pdf>. D.C. has apparently only codified federal weapons reporting requirements. See D.C. St. § 38-232 (mandating that the Superintendent of Schools shall refer to the criminal justice or juvenile delinquency system, simultaneous with expulsion, any student who is expelled for bringing a weapon into a District of Columbia Public School).

⁹⁷ Florida State Conference NAACP, Advancement Project & NAACP Legal Defense and Educational Fund, *Arresting Development: Addressing the School Discipline Crisis in Florida* 6 (2006).

⁹⁸ *Id.* at 7.

injury and “miscellaneous offenses.”⁹⁹ These alarming statistics are indicative of school officials abdicating disciplinarian roles to SROs who are left to deal with the school’s more unruly students. While SROs should not allow criminal behavior in schools to go unnoticed, they must be sensitive to what kinds of adolescent behavior is better served by school administrators and counselors.

Particularly troublesome and an issue that warrants community discussion is the realistic risk that minority youth and youth with disabilities will be filtered into the justice system from schools at disproportionate rates. This effect is due in large part to SRO saturation in lower socio-economic areas where threats of safety are considered higher and thus a greater opportunity that minority youth will disproportionately constitute the majority of school to criminal system referrals by SROs.¹⁰⁰ The same study above also revealed that black students bore the brunt of disciplinary policies. In the district with 444 arrests, black students constituted nineteen percent of the student population, but accounted for fifty-one percent of the arrests.¹⁰¹ Black students likewise comprise the majority of students who receive the out of school suspensions and are thus subjected to increased disciplinary action.¹⁰² In Miami-Dade county, school police arrests 2,566 youth in 2004, over fifty-percent more than in the previous two years. Of those arrests, black students accounted for fifty-four percent while accounting for only twenty-seven percent of the student population.

Statistics such as these may only be too commonplace in other school districts across the country, particular those in urban cities with high minority populations. Unfortunately, arrest statistics like those in Florida do not exist in D.C., but the risk of similar arrest rates of minority

⁹⁹ *Id.* at 9.

¹⁰⁰ See Pinard, *supra* note 23 at 1108, n. 199 (citing the U.S. Department of Education’s *Indicators of School Crime and Safety* report that statistically correlates the percentage of minority youth in a school to the hours that SROs work); see also Poethig, *supra* note 3 (commenting that each D.C. public school has at least one SRO and schools deemed at “higher risk” have several SROs). Chief Wilson would not comment on which schools in the District are considered at higher risk and therefore have more SROs. Those familiar with location and demographics of D.C. public schools can easily assume where the majority of SROs are placed.

¹⁰¹ *Arresting Development*, *supra* note 97, at 7.

¹⁰² See *id.* at 10 (reporting that in one county, black students received sixty-three percent of out-of-school suspensions, but represented thirty-six percent of the total student population).

youth in D.C. public schools should thus not be underestimated. Minority students comprise about ninety-two percent of the total public student population in the District,¹⁰³ so it would follow that an increase in school referrals to the juvenile justice system or arrests at school would disproportionately affect minority students, though no statistics or tracking devices in D.C. currently exist to support this. Likewise, researchers have observed a correlation between students with disabilities and misbehavior in schools.¹⁰⁴ Therefore, the rate that IEP students end up in the principal's office for serious behavior may influence likelihood that these students will face concurrent criminal consequences. These are serious and realistic risks that can no longer go unnoticed and unstudied.

Conclusion

The increasing cross-section between school discipline and law enforcement and the fluctuating boundaries between each requires school administrators, SROs, prosecutors, defense attorneys, judges, policymakers and the like to recognize and scrutinize the roles and responsibilities of those who deal with students in the school environment. While bright lines will be difficult to draw in light of the theories of "community policing" and information sharing amongst school officials and SROs, students' right can more properly be protected if school officials and SROs minimize the degree to which they consider their roles in the school interchangeable. In situations where a student violates both a school rule and the law, school administrators and SROs must parse out which actions they take for disciplinary purposes and which actions are taken for law enforcement and prosecutorial purposes. Though SROs have discretion to criminally charge students, nonviolent troublemakers or first-time offenders may be better left to school resources than the justice system. In keeping with the educational and

¹⁰³ Statistics personally communicated from D.C.PS Office of Educational Accountability and Assessment (May, 2007) (reporting that 81.97% of D.C.PS students are black, 10.38% are Hispanic, 5.8% are white, 1.78% are Asian or Pacific Islander, and .07% are Native American).

¹⁰⁴ See Joseph B. Tulman, *Disability and Delinquency: How Failures to Identify, Accommodate, and Serve Youth With Education-Related Disabilities Leads to Their Disproportionate Representation In the Delinquency System*, 3 Whittier J. Child & Fam. Advoc. 3 (2003).

development missions of schools, automatic referral to the justice system should not be the immediate “fix” to rid schools of troublemakers.

More information about school referrals and arrests is required in D.C. to gauge whether SROs are responsible for an influx of students to the justice system and to determine the degree to which SROs are searching and interrogating students in the schools. A serious discussion about constitutional rights and the changing border thereof cannot be had without more information regarding these kinds of circumstances in the District. To what extent students view their SROs as friends or foe will also help guide the discussion about the role that SROs in D.C. should play and how that may affect students’ rights. Lastly, a discussion must be had about the role that SROs and school officials can play in diverting students from the justice system. Schools are the ideal forum for students to receive behavioral counseling and intervention before resorting to the justice system.

This paper has served to point out evolving legal standards and consequences of school policing. The real question, however, is the extent to which we wish to see these standards upheld in a way that does not compromise students’ rights and ability to function in the academic environment. We must choose the degree to which we allow educational institutions to criminalize students or the degree to which we encourage those institutions to address misbehavior and violence and its roots on a community-based and remedial level to foster reform and growth of America’s young people.

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