

SPECIAL NEEDS, SPECIAL SOLUTIONS: USING TITLE II OF THE ADA AND BEHAVIORAL SUPPORTS TO PROTECT STUDENTS WITH DISABILITIES FROM ARREST

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*“It is a shame that when a child shows up for school that they have to be fearful for their safety. . . . It’s even more disheartening that the school bully turns out to be the school resource officer.”*¹

–Emily and Robert Brown, Parents of Son with Autism²

ABSTRACT

Students with disabilities are frequently arrested in K–12 public schools for misbehavior that would be better addressed with reasonable accommodations and behavioral support. Title II of the Americans with Disabilities Act (“Title II”) prevents discrimination by requiring that public entities modify procedures to allow individuals with disabilities to benefit from and participate in the entity’s programs, services, and activities. Despite this sweeping protection, some courts have held that Title II does not apply during an arrest. This exception to the Americans with Disabilities Act (“ADA”) protection is particularly problematic when applied to arrests in schools because students with disabilities are at high risk of arrest: 26% of students arrested and 75% of students restrained have a disability. This Article takes the novel position that because arrests in a school setting do not

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¹ Diane Smith, *Parents: Autistic Child Injured by School Resource Officer*, FORT WORTH STAR-TELEGRAM (May 15, 2018, 4:23 PM) (quoting Emily and Robert Brown), <https://www.star-telegram.com/news/local/education/article211167159.html> [<https://perma.cc/7M8R-LHA4>].

² There is significant debate over whether identify-first or person-first language is more appropriate when discussing individuals with disabilities. Beth Haller, *Journalists Should Learn to Carefully Traverse a Variety of Disability Terminology*, NAT’L CTR. ON DISABILITY & JOURNALISM (Jan. 7, 2016), <https://ncdj.org/2016/01/journalists-should-learn-to-carefully-traverse-a-variety-of-disability-terminology/> [<https://perma.cc/6YVA-PDBY>]. The Americans with Disabilities Act encouraged the use of person-first language when referring to individuals with disabilities. *Id.* For that reason, this Article will use person-first language throughout.

pose the same risks as arrests in a community setting, Title II should apply to arrests in a school setting.

But applying Title II alone will not stop arrests. This Article goes beyond ADA protection and offers proactive solutions to curb misbehavior and prevent arrests. Schools are required by the Individuals with Disabilities Education Act (“IDEA”) to provide students with an Individualized Education Plan reasonably calculated to allow the student to make progress. A student is unable to progress when maladaptive behaviors interfere with learning and lead to arrests. Amendments to the IDEA requiring schools to implement policies and procedures for law enforcement involvement, and behavioral supports when a student’s behavior hinders learning, would reduce misbehavior, eliminate the need for law enforcement involvement, and reduce the number of arrests on school campuses.

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I.
INTRODUCTION

When Emily and Robert Brown sent their ten-year-old son with autism to school the morning of April 30, 2018, they did not expect to receive a call later that day that their son was in handcuffs.³ Though the Browns were aware their son had behavioral concerns, handcuffs were new.⁴ An Individualized Education Plan (“IEP”)⁵ was in place to address any maladaptive behaviors arising from their son’s autism—placing the boy in handcuffs was certainly not included in that plan.⁶

Incident reports from the school and police department describe the behaviors the boy displayed before restraint: swinging a computer mouse around the room, poking one student, and pinching another.⁷ The officer carried the child to a safe room per the child’s IEP, but what transpired after deviated significantly from the plan and left the boy traumatized.⁸ Disturbing bodycam video from the officer shows the officer carrying the boy from the classroom, dropping him onto the floor of an empty saferoom, and immediately forcing the child into handcuffs by holding the boy’s face to the ground, twisting his small arms behind him, and pressing his legs to his back.⁹ Once the boy calmed down several minutes later, the officer removed the handcuffs.¹⁰ When the boy ripped up a tissue and spit at the officer, the officer again pinned the boy to the ground and placed him in handcuffs.¹¹

Later that day, the Browns discovered severe bruising on their son’s head, neck, back, arms, and knees.¹² The Browns, rightfully upset, accused the officer of using excessive force in his attempt to prevent their child from harming himself or others.¹³ After reviewing the video, the school district and police department

³ Bradley Blackburn, *Student with Autism Injured by School Resource Officer in Denton, Parents Say*, WFAA (May 15, 2018, 5:39 AM), <https://www.wfaa.com/article/news/local/denton-county/student-with-autism-injured-by-school-resource-officer-in-denton-parents-say/287-552089048> [<https://perma.cc/L32G-GNYR>].

⁴ Smith, *supra* note 1.

⁵ An Individualized Education Plan is a unique program designed to meet the needs of a particular student. LEARNING ABOUT IEPs, <https://www.understood.org/en/school-learning/special-services/ieps/what-is-an-iep> [<https://perma.cc/PU4N-8M25>] (last visited Apr. 20, 2019).

⁶ Blackburn, *supra* note 3 (“We never agreed for him to be mechanically restrained”).

⁷ Smith, *supra* note 1.

⁸ *Id.*

⁹ See See PD, *Bodycam Video Shows Officer Handcuffing 10-Year-Old Boy with Autism*, YOUTUBE (Aug. 12, 2018), <https://youtu.be/qyFzkrLOGnc> (showing the bodycam video).

¹⁰ *Id.*

¹¹ *Id.*

¹² Smith, *supra* note 1.

¹³ Joyeeta Biswas, *Parents to Sue After 10-Year-Old Boy with Autism Repeatedly Pinned to Ground, Handcuffed by Officer*, ABC NEWS (Aug. 13, 2018, 11:13 AM), <https://abcnews.go.com/News/parents-sue-10-year-boy-autism-repeatedly-pinned/story?id=57144546> [<https://perma.cc/BG6W-WMLL>].

sided with the officer, stating that the officer followed appropriate policies and procedures to prevent immediate harm to the student or others.¹⁴ The Browns pulled their son from the school, stating: “It is a shame that when a child shows up for school that they have to be fearful for their safety. . . . It’s even more disheartening that the school bully turns out to be the school resource officer.”¹⁵

Unfortunately, the Browns’ story is familiar to parents of students with disabilities across the nation.¹⁶ According to the most recently published statistics, students with disabilities represent about twenty-six percent of school-related arrests,¹⁷ despite making up only thirteen percent of the K–12 public school population.¹⁸ This Article will address the disparity in school-related arrests of students with disabilities, but it is important to note that there are significant racial disparities at play as well—even within the narrowed category of school-related arrests of students with disabilities.¹⁹ For example, fifty-one percent of students enrolled under the Individuals with Disabilities Education Act (“IDEA”) are white,²⁰ but

¹⁴ Smith, *supra* note 1.

¹⁵ *Id.*

¹⁶ See, e.g., Lindsey Bever, ‘I Don’t Like To Be Touched’: Video Shows 10-Year-Old Autistic Boy Getting Arrested At School, WASH. POST (Apr. 21, 2017), https://www.washingtonpost.com/news/education/wp/2017/04/19/i-dont-like-to-be-touched-video-shows-10-year-old-autistic-boy-getting-arrested-at-school/?utm_term=.1a7f9cea7c51 [<https://perma.cc/NK54-TRYB>]; Maria Coder, *Video of Kentucky School Resource Officer Handcuffing Crying 8-Year-Old Boy Sparks ACLU Lawsuit*, PEOPLE (Aug. 4, 2015, 1:35 PM), <https://people.com/crime/kentucky-officer-handcuffs-a-crying-8-year-old-boy-with-disabilities-at-school/> [<https://perma.cc/2UAF-MAKK>]; John Rogers, *6-year-old Boy with Autism Handcuffed by School Resource Officer*, WFLA (Apr. 19, 2018, 6:51 PM), <https://www.wfla.com/news/local-news/6-year-old-boy-with-autism-handcuffed-by-school-resource-officer/1130370219> [<https://perma.cc/2QA3-JYWQ>].

¹⁷ *Percentage of Students Receiving Selected Disciplinary Actions in Public Elementary & Secondary Schools, by Type of Disciplinary Action, Disability Status, Sex, and Race/Ethnicity: 2013–14*, NAT’L CTR. FOR EDUC. STATISTICS, https://nces.ed.gov/programs/digest/d17/tables/dt17_233.28.asp [<https://perma.cc/2C48-G49X>] (last visited Apr. 21, 2019); see also U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, CIVIL RIGHTS DATA COLLECTION, DATA SNAPSHOT: SCHOOL DISCIPLINE 7 (2014) <https://ocrdata.ed.gov/downloads/crdc-school-discipline-snapshot.pdf> [<https://perma.cc/AP9G-WMF8>]. This article addresses the need for protection of students qualified as a student with a disability under the guidelines set out in the Individuals with Disabilities Education Act. See *infra* note 93.

¹⁸ *Fast Facts: Students with Disabilities*, NAT’L CTR. FOR EDUC. STATISTICS, <https://nces.ed.gov/fastfacts/display.asp?id=64> [<https://perma.cc/B9G7-SYG6>] (last visited Apr. 16, 2019).

¹⁹ *2013–14 Discipline Estimations by Discipline Type, School-Related Arrests*, U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS [hereinafter *School-Related Arrests*], https://ocrdata.ed.gov/StateNationalEstimations/Estimations_2013_14 [<https://perma.cc/7P3P-X295>] (last visited Aug. 28, 2019) (follow subsection titled “Discipline”; then follow “School-Related Arrests”) (on file with *N.Y.U. Review of Law and Social Change*). For more information on the racial disparities relevant to school-related arrests of students with disabilities, see, for example, Amanda Merkwae, *Schooling the Police: Race, Disability, and the Conduct of School Resource Officers*, 21 MICH. J. RACE & L. 147 (2015) (discussing the racial component of arrests of students with disabilities in more detail).

²⁰ *2013–14 Discipline Estimations by Discipline Type, IDEA Enrollment*, U.S. DEP’T OF EDUC.,

only 35% of such students who are arrested are white.²¹ In contrast, eighteen percent of students with disabilities are black,²² but black students with disabilities also represent thirty-five percent of students with disabilities who are arrested.²³ Many of these arrests are the result of behaviors directly related to a student's disability, as demonstrated by both the Browns' story above and resulting lawsuits.²⁴

The officers' actions in these situations are often justified under current law, demonstrating a serious problem.²⁵ Title II of the Americans with Disabilities Act ("Title II") requires public entities to make accommodations when interacting with individuals with disabilities,²⁶ but some courts have held that Title II does not

OFFICE FOR CIVIL RIGHTS [hereinafter *IDEA Enrollment*], https://ocrdata.ed.gov/StateNationalEstimations/Estimations_2013_14 [<https://perma.cc/7P3P-X295>] (last visited Aug. 28, 2019) (follow subsection titled "All Enrollment"; then follow "IDEA enrollment") (on file with *N.Y.U. Review of Law and Social Change*).

²¹ *School-Related Arrests*, *supra* note 19.

²² *IDEA Enrollment*, *supra* note 20.

²³ *School-Related Arrests*, *supra* note 19.

²⁴ *See, e.g.*, Appellant's Brief on the Merits at 7–11, *Wilson v. Southlake*, No. 18-10342, 2018 WL 3830643 (5th Cir. Aug. 10, 2018) [hereinafter Appellant's Brief on the Merits] (discussing a pending case where an officer arrested an eight-year-old student with autism in an empty hallway after holding a jump rope that he referred to as "home-made nun-chucks."); Deborah Fowler & Morgan Craven, *Collateral Consequences: The Increase in Texas Student Arrests Following the Parkland and Santa Fe Tragedies*, TEXAS APPLESEED, <http://stories.texasappleseed.org/collateral-consequences> [<https://perma.cc/6FUH-HFBX>] (last visited Apr. 16, 2019) (describing behavioral concerns that often lead to arrest); Greg Groogan, *Tasing of Disabled Student Triggers Lawsuit Against Katy ISD*, FOX26HOUSTON (June 5, 2018, 10:30 PM), <http://www.fox26houston.com/news/tasing-of-disabled-student-triggers-lawsuit-against-katy-isd> [<https://perma.cc/MGC6-MG7W>] (describing officer's use of a taser on a seventeen-year-old student with intellectual disabilities after the student tried to make his way past a faculty member to get outside the school building—an activity allowed by his Individualized Education Plan); Tena Lee, *Suit: Disabled Boy Arrested, Put in 'Straight Jacket Chair'*, TENNESSEAN (Feb. 13, 2015, 2:58 PM), <https://www.tennessean.com/story/news/local/sumner/2015/02/13/suit-disabled-boy-arrested-put-straight-jacket-chair/23369245/> [<https://perma.cc/AS6N-MFYG>] (describing the arrest of an eight-year-old student with developmental disabilities when teachers failed to follow his Individualized Education Plan, resulting in him swatting at a teacher's head out of frustration and anger); ACLU, *Third Grader Handcuffed in School*, YOUTUBE (Aug. 3, 2015), <https://youtu.be/72vu6nxZX58> (involving a third-grader placed in handcuffs for disrupting class when he displayed behaviors related to attention deficit disorder and a history of trauma); Smith, *supra* note 1.

²⁵ *See, e.g.*, *Scott v. City of Albuquerque*, 711 Fed. App'x 871, 872 (10th Cir. 2017); *Hayenga ex rel. Hayenga v. Nampa Sch. Dist.* No. 131, 123 Fed. App'x 783 (9th Cir. 2005); *J.H. ex rel. J.P. v. Bernalillo Cty.*, 61 F. Supp. 3d 1085, 1093 (D.N.M. 2014); *J.V. v. Sanchez*, 2013 WL12334144, at *11 (D.N.M. Mar. 29, 2013). *But see* Susan Mizner, *We Don't Think an 8-Year-Old Boy Should Be Put in Handcuffs. A Judge Finally Agreed with Us.*, ACLU (Oct. 12, 2017, 3:00 PM), <https://www.aclu.org/blog/juvenile-justice/school-prison-pipeline/we-dont-think-8-year-old-boy-should-be-put-handcuffs> [<https://perma.cc/NLP9-YPCU>] (discussing a finding of unconstitutional seizure and excessive force in light of other courts' opposing decisions).

²⁶ Americans with Disabilities Act, 42 U.S.C. § 12101 (2012); Title II Regulations 28 C.F.R. § 35.130(b)(7) (2016) ("A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter

apply to arrests.²⁷ Adding to the problem, schools are not required to actually provide behavioral supports for students with disabilities until placing the student in an alternative environment as a result of the problematic behavior.²⁸ Schools could prevent many of the behaviors leading to arrest by providing critical behavioral supports to students with disabilities before removal from the classroom is required.

This Article addresses the disproportionate rate at which students with disabilities are arrested and calls for the application of Title II to arrests on school campuses and amendments to key legislation to prevent students with disabilities from suffering improper arrests. Part II provides background information about the use of law enforcement in schools and the constitutional and statutory protections already in place to protect students with disabilities. Part III calls for the application of Title II to student arrests on school campuses and proposes amendments to the IDEA that would proactively address student misbehavior. Those proposed amendments include an earlier requirement for behavioral supports, enhanced school policies and procedures in the event of misbehavior, and the requirement of Memorandums of Understanding between law enforcement agencies and schools.

II. BACKGROUND

Law enforcement agencies and school districts have worked together for decades.²⁹ While some of the earliest accounts place law enforcement officers on school campuses as early as the 1950s,³⁰ full-time law enforcement officers on school campuses became prevalent after a series of school shootings in the 1990s.³¹ After the Columbine shooting in 1999, the federal Office of Community

the nature of the service, program, or activity.”).

²⁷ See Brief of Council of Parent Attorneys & Advocates, Inc.; Disability Rights Tex.; The Nat’l Ctr. for Youth Law & Tex. Appleeed as Amici Curiae in Support of Appellant & Urging Reversal at 4, *Wilson*, 2018 WL 3830643 (5th Cir. Aug. 22, 2018) (No. 18-10342) [hereinafter Council of Parent Attorneys & Advocates, Inc. Amicus Brief].

²⁸ Individuals with Disabilities Act, 20 U.S.C. § 1415(k)(1)(D)(ii) (2012). For information on behavioral supports, see *PBIS and the Law*, POSITIVE BEHAVIORAL INTERVENTIONS & SUPPORTS: OSEP TECH. ASSISTANCE CTR., <https://www.pbis.org/policy-and-pbis/pbis-and-the-law> [<https://perma.cc/L9MK-SLAK>] (last visited Apr. 21, 2019).

²⁹ See Nathan James & Gail McCallion, *School Resource Officers: Law Enforcement Officers in Schools*, CONG. RES. SERV. 2 (June 26, 2013), <https://fas.org/sgp/crs/misc/R43126.pdf> [<https://perma.cc/EN2Y-YMX7>].

³⁰ *A Brief History of School-Based Law Enforcement*, TEX. SCH. SAFETY CTR., <https://txssc.txstate.edu/topics/law-enforcement/articles/brief-history> [<https://perma.cc/AH6Y-X6XE>] (last visited Apr. 19, 2019).

³¹ James & McCallion, *supra* note 29.

Oriented Policing Services (“COPS”) created the Cops in Schools (“CIS”) program to provide schools with funding to have law enforcement officers on campus.³²

Law enforcement officers on campus are bound by the same constitutional and statutory guidelines as law enforcement officers in the community.³³ The Fourth Amendment requires that an officer have probable cause to make an arrest and the arrest cannot be made using excessive force.³⁴ Because claims under the Fourth Amendment can be difficult to prove (i.e., an officer can usually show probable cause and the use of reasonable force), claims are frequently brought under statutes designed to protect individuals with disabilities like the Americans with Disabilities Act (“ADA”) and the IDEA.³⁵

A. School Resource Officers & Student Arrests

The number of officers working on school campuses, called School Resource Officers (SRO), has significantly increased since implementation in the 1990s.³⁶ The National Center for Education Statistics reported forty-two percent of schools had an officer on campus during the 2015–2016 school year—ten percent higher than one decade earlier.³⁷ We are likely to see that number continue to rise in the wake of recent school shootings, such as those in Sandy Hook, Parkland, and Santa Fe, as communities take steps to protect their children.³⁸

³² *Id.* at 7.

³³ It is important to note that students in schools have even fewer protections under the Fourth Amendment because of the special characteristics of the school setting. See Kathryn Gardner, *The Fourth Amendment Rights of Students*, LAW WISE, https://cdn.ymaws.com/www.ksbar.org/resource/resmgr/LRE/FINAL_Materials_4th_Amend_Vi.pdf [<https://perma.cc/SL5J-V7AB>] (last visited Aug. 21, 2019).

³⁴ U.S. CONST. amend. IV.

³⁵ Americans with Disabilities Act, 42 U.S.C. § 12101(a) (2012); Individuals with Disabilities Education Act, 20 U.S.C. § 1400 (2012); see, e.g., *Scott v. City of Albuquerque*, 711 Fed. App’x 871 (10th Cir. 2017) (demonstrating a student’s failed claim under both the Fourth Amendment and the ADA); *J.V. v. Albuquerque Pub. Schs.*, 813 F.3d 1289 (10th Cir. 2016) (demonstrating a student’s failed claim under ADA); *Hayenga ex rel. Hayenga v. Nampa Sch. Dist. No. 131*, 123 Fed. App’x 783 (9th Cir. 2005) (demonstrating one student’s failure on a Fourth Amendment Claim).

³⁶ James & McCallion, *supra* note 29, at 2.

³⁷ David Sherfinski, *Percentage of Public Schools with Resource Officers on the Rise: Report*, WASH. TIMES (March 29, 2018), <https://www.washingtontimes.com/news/2018/mar/29/percentage-public-schools-resource-officers-rise-r/> [<https://perma.cc/P64E-S6YY>].

³⁸ See, e.g., Julia Rentsch, *After STEM Shooting, Loveland Charter Schools Explore Adding Resource Officers*, LOVELAND REPORTER-HERALD (May 18, 2019, 7:43 PM), <https://www.reporter-herald.com/2019/05/18/after-stem-shooting-loveland-charter-schools-explore-adding-school-resource-officers/> [<https://perma.cc/A9BC-HASG>] (discussing one school’s contemplation of additional SRO’s after school shooting); Isabel Rosales, *Florida Congressman Introduces Bill to Boost School Security Following School Shootings*, ABC ACTION NEWS WFTS TAMPA BAY (Jan. 14, 2019, 6:08 PM), <https://www.abcactionnews.com/news/state/florida-congressman-introduces-bill-to-boost-school-security-following-school-shootings> [<https://perma.cc/5H53-TGZH>] (discussing state action to introduce more SRO’s into the school districts as a result of school violence); Maranda

If the number of law enforcement officers on campuses continue to rise, it is critical to consider the role of law enforcement on campus and the protections in place to protect students with disabilities from unnecessary arrests. Federal guidelines do not require an officer to have specialized training before working in a school setting.³⁹ Some states and local school districts require additional training, but even the National Association of School Resource Officers, the “world’s leader in school policing,” requires only forty hours of broad disabilities training with minimal time spent on how to interact with students with disabilities.⁴⁰ A school resource officer’s primary responsibilities on campus are keeping the campus safe from outside intruders, responding to crimes on campus, and assisting students and staff with communications to local police.⁴¹ Importantly, an officer’s role is *not* to enforce school policy or handle school-based misbehavior that is not a threat to public safety and which could be ordinarily handled by school personnel if SRO’s were not present in the school.⁴²

The National Association of School Resource Officers, one of a handful of organizations that provide the trainings, describes some of the benefits of the SRO program: preventing student injuries, increasing the chance of a student receiving needed mental health care, and increasing safety.⁴³ Despite the impressive benefits of the SRO program, it often fails to protect students with disabilities. Students with disabilities make up thirteen percent of the public school K–12 population, but represent twenty-six percent of arrests and seventy-five percent of physical restraints made on campus.⁴⁴ The crimes these students are arrested for include assault, battery, terroristic threats, resisting arrest, vandalism, and more.⁴⁵ In many

Whittington, *Bossier Schools Add Five New SRO’s This Year*, KSLA NEWS (Aug. 26, 2018, 9:15 PM), <https://www.ksla.com/story/38878284/bossier-schools-add-five-new-sros-this-year/> [<https://perma.cc/5A9X-ZL93>] (discussing the addition of SRO’s in response to increased violence in schools).

³⁹ Erin R. Archerd, *Restoring Justice in Schools*, 85 U. CIN. L. REV. 761, 770 (2017).

⁴⁰ *Frequently Asked Questions*, NAT’L ASS’N OF SCH. RES. OFFICERS [hereinafter *Frequently Asked Questions*], <https://nasro.org/frequently-asked-questions/> [<https://perma.cc/J4W9-EZ4L>] (last visited Apr. 20, 2019).

⁴¹ See, e.g., *Defining the Role of School-Based Police Officers*, POLICE FOUND., http://www.policefoundation.org/wp-content/uploads/2016/10/PF_IssueBriefs_Defining-the-Role-of-School-Based-Police-Officers_FINAL.pdf [<https://perma.cc/K3XC-NG2V>] (last visited Apr. 20, 2019) (describing California’s policies for school-based policing).

⁴² *Frequently Asked Questions*, *supra* note 40.

⁴³ *Id.*

⁴⁴ See sources cited *supra* note 17.

⁴⁵ See Jackie Mader & Sarah Butrymowicz, *For Many With Disabilities, Special Education Leads to Jail*, DISABILITY SCOOP (Oct. 29, 2014), <https://www.disabilityscoop.com/2014/10/29/for-sped-leads-jail/19800/> (describing a student’s arrest for assault) [<https://perma.cc/2FMR-2XMT>]; Fowler & Craven, *supra* note 24 (explaining that students with disabilities are frequently charged with making terroristic threats); Lee, *supra* note 24 (describing the arrest of a student with autism who struck a teacher’s aide).

of these cases, the student's behavior is a manifestation of the student's disability.⁴⁶

An arrest is a highly stressful event for anyone. It is particularly traumatizing for a student with disabilities.⁴⁷ Some parents whose children with disabilities were arrested at school reported that their children were later diagnosed with post-traumatic stress disorder, suffered from nightmares, and were afraid of law enforcement.⁴⁸ Many students are afraid to return to school after an arrest because they face higher rates of stigma and victimization from other students aware of the arrest.⁴⁹ Students who get arrested at school begin to disengage from peers and teachers at school and may become isolated.⁵⁰ Research shows that students arrested at school are more likely to drop out of school—in fact, the likelihood of graduation decreases by seventy percent after punishments like arrests and court involvement.⁵¹

B. Fourth Amendment: Protecting Officers, Failing Students

The Fourth Amendment to the United States Constitution provides two layers of protection to all citizens, including those with disabilities, regarding arrests.⁵² First, an officer must have probable cause, meaning the officer must reasonably believe—based on the facts available at the time of the arrest—that the arrestee has committed or is committing a crime.⁵³ Second, when carrying out the arrest, an officer may only use “reasonable” force.⁵⁴ Reasonable force is determined in light of the circumstances at the time of the arrest.⁵⁵ Courts must balance the governmental interest in making the arrest against the individual's right to be free from seizure.⁵⁶ Some factors to be considered include the intensity of the situation,

⁴⁶ See Fowler & Craven, *supra* note 24 (“During a crisis, students with disabilities can sometimes exhibit behaviors that are a manifestation of their disability, but untrained school staff can mistake them as being threatening.”).

⁴⁷ See *id.* (describing reasons, such as social stigma, why students with disabilities may find an arrest more traumatic); see also Mizner, *supra* note 25 (demonstrating a student's reaction to arrest).

⁴⁸ See, e.g., Groogan *supra* note 24 (“[parent] says her son is haunted with persistent nightmares, remains terrified of police and has been diagnosed with PTSD.”).

⁴⁹ See Fowler & Craven, *supra* note 24 (“[S]tudents with disabilities experience higher rates of social stigma in schools compared to their [non-disabled] peers. . . . Returning to school following an arrest can add more peer victimization leading to isolation and create more mental health concerns for the student.”).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² U.S. CONST. amend. IV.

⁵³ Beck v. Ohio, 379 U.S. 89, 91 (1964).

⁵⁴ Graham v. Connor, 490 U.S. 386, 395 (1989).

⁵⁵ *Id.* at 396.

⁵⁶ United States v. Place, 462 U.S. 696, 703 (1983).

the severity of the crime, whether there is an immediate threat, and whether the arrestee is resisting arrest.⁵⁷

Under current Fourth Amendment precedent, an officer's actions in the course of an arrest of a student with disabilities can almost always be deemed reasonable in light of the circumstances.⁵⁸ Officers can usually show that a student's behavior was a criminal act, demonstrating a need for restraint, and the use of restraints alone is not usually enough to succeed on an excessive force claim.⁵⁹ To overcome an officer's qualified immunity from liability, a student must demonstrate that the officer violated a clearly established constitutional or statutory right at the time of the arrest.⁶⁰

C. Statutory Protection

Because courts rarely find that an officer violated a student's constitutional rights, students must rely on statutory protections. The Rehabilitation Act of 1973 was the first major legislative action taken to protect individuals with disabilities from discrimination.⁶¹ Section 504 of the Rehabilitation Act of 1973 ("Section 504") "prohibits discrimination against qualified individuals with disabilities by any program or activity receiving federal financial assistance or by any program or activity conducted by a federal executive agency. . . ."⁶² This landmark legislation set the groundwork for the ADA.⁶³ Just two years later, the Education for All Handicapped Children Act was passed, guaranteeing a free and appropriate public education for individuals with disabilities.⁶⁴ This would eventually lead to the enactment of the IDEA.⁶⁵

⁵⁷ *Graham*, 490 U.S. at 396.

⁵⁸ See cases cited *supra* note 25.

⁵⁹ See *Hayenga ex rel. Hayenga v. Nampa Sch. Dist. No. 131*, 123 Fed. App'x 783 (9th Cir. 2005).

⁶⁰ *Id.*

⁶¹ *The Rehabilitation Act of 1973 (Rehab Act)*, EMP'R ASSISTANCE & RES. NETWORK ON DISABILITY INCLUSION, <http://www.askearn.org/topics/laws-regulations/rehabilitation-act/> [<https://perma.cc/DC6T-35CT>] (last visited Apr. 20, 2019); *United States Laws: Overview of the Rehabilitation Act of 1973 (Sections 504 and 508)*, WEBAIM (Aug. 26, 2013), <https://webaim.org/articles/laws/usa/rehab> [<https://perma.cc/6XWR-ZNTE>].

⁶² *Id.*

⁶³ *Introduction to the ADA*, U.S. DEP'T OF JUSTICE CIVIL RIGHTS DIV., https://www.ada.gov/ada_intro.htm [<https://perma.cc/AXG4-Q2UF>] (last visited Aug. 21, 2019).

⁶⁴ *What U.S. Federal Legislation Protects the Rights of Students with Disabilities?*, DO-IT (Apr. 29, 2019), <https://www.washington.edu/doiit/what-us-federal-legislation-protects-rights-students-disabilities> [<https://perma.cc/6SU9-B83V>].

⁶⁵ *Id.*

1. *The Americans with Disabilities Act*

Recognizing that individuals with disabilities experienced discrimination preventing them from participating on an equal basis in society, Congress extended protections against discrimination by enacting the ADA in 1990.⁶⁶ Title II of the ADA states that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”⁶⁷ The statute expressly defines a public entity, in relevant part, as “any State or local government; [and] any department, agency, special purpose district, or other instrumentality of a State or States or local government.”⁶⁸ Congress went on to expressly define “qualified individual with a disability” to include persons who are eligible to receive services or participate in activities or programs of the public entity “with or without reasonable modifications”—putting the burden on public entities to modify rules, policies, and practices to include individuals with disabilities.⁶⁹

Courts are split on whether an arrest falls under the scope of Title II protection.⁷⁰ If Title II does apply during an arrest, law enforcement officers are required to provide reasonable modifications to the rules, policies, and procedures during an arrest.⁷¹ In *San Francisco v. Sheehan*, the United States Supreme Court recognized the need to determine whether Title II extends to arrests, but dismissed the question as improvidently granted when the petitioner’s brief failed to address the issue.⁷² The Court emphasized that a critical matter in determining whether Title II would apply would come down to whether “an arrest is an ‘activity’ in which the arrestee ‘participat[es]’ or from which the arrestee may ‘benefit.’”⁷³

At least the Fourth, Ninth, and Eleventh Circuit Courts have held that Title II applies during all arrests.⁷⁴ These courts have recognized two types of claims under Title II: wrongful arrest and reasonable accommodation.⁷⁵ A wrongful arrest claim arises when an officer arrests an individual with a disability after mistaking

⁶⁶ Americans with Disabilities Act, 42 U.S.C. § 12101(a) (2012).

⁶⁷ *Id.* § 12132.

⁶⁸ *Id.* § 12131(1).

⁶⁹ *Id.* § 12131(2).

⁷⁰ Compare *Sheehan v. City of San Francisco*, 743 F.3d 1211, 1231–1232 (9th Cir. 2014), *dismissed in part, rev’d on other grounds*, 135 S. Ct. 1765 (2015) (collecting cases and finding that Title II applies to arrests), with *Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000) (finding that Title II does not apply to arrests).

⁷¹ See Americans with Disabilities Act §§ 12131–12132.

⁷² *City of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1773 (2015).

⁷³ *Id.* (citing Americans with Disabilities Act § 12132).

⁷⁴ Furthermore, the Fourth and Tenth Circuit Courts have indicated that, in at least some cases, Title II should be applied to arrests. *Sheehan*, 743 F.3d at 1231–1232 (collecting cases).

⁷⁵ *Id.* at 1232.

effects of that disability for criminal activity.⁷⁶ A reasonable accommodation claim arises when an officer fails to reasonably accommodate a person's disabilities during an arrest.⁷⁷ In order to bring a claim under Title II four factors are generally required:

“(1) [The plaintiff] is an individual with a disability; (2) [the plaintiff] is otherwise qualified to participate in or receive the benefit of a public entity's services, programs, or activities; (3) [the plaintiff] was either excluded from participation in or denied the benefits of the public entity's services, programs or activities or was otherwise discriminated against by the public entity; and (4) such exclusion, denial of benefits or discrimination was by reason of [the plaintiff's] disability.”⁷⁸

The plaintiff in this situation would bear the burden of proving that a reasonable accommodation existed.⁷⁹

Unlike the Fourth, Ninth, and Eleventh Circuit Courts, the Fifth Circuit Court of Appeals held in *Hainze v. Richards* that Title II does not apply to at least some arrests, specifically “an officer's on-the-street responses to reported disturbances or other similar incidents . . . prior to the officer's securing scene and ensuring that there is no threat to human life.”⁸⁰ Through this holding, the Fifth Circuit created an exception at least for officers acting under exigent circumstances—if exigent circumstances exist, officers do not need to consider accommodations at all.⁸¹

A recently decided Fifth Circuit case, however, left open the door for significant expansion to this exception.⁸² In *Wilson v. Southlake*, an eight-year-old student with autism became the subject of law enforcement involvement when a teacher requested help in response to the student hitting her and throwing a coffee mug.⁸³ When the SRO arrived, the student was standing in an empty hallway holding a jump rope which he referred to as “home built nun-chuck.”⁸⁴ The officer put the student on the ground, placed him in handcuffs, then forced the student into a chair.⁸⁵ The officer proceeded to sit directly in front of the student and yell at the student to behave until the student's parents arrived.⁸⁶ The student's parents sued

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 1233.

⁸⁰ *Hainze v. Richards*, 207 F.3d 795, 797, 801 (5th Cir. 2000) (addressing officers responded to a call regarding an adult with mental illness holding a knife and threatening to kill himself or let police kill him). *But see Sheehan*, 743 F.3d at 1232 (rejecting *Hainze* in the Ninth Circuit); *Seremeth v. Bd. of Cty. Comm'rs Frederick Cty.*, 673 F.3d 333, 339 (4th Cir. 2012); *Bircoll v. Miami-Dade County*, 480 F.3d 1072, 1085 (11th Cir. 2007) (rejecting *Hainze* in the Eleventh Circuit).

⁸¹ *See Hainze*, 207 F.3d at 801.

⁸² *Wilson v. Southlake*, No. 18-10342, 2019 WL 4051863 (5th Cir. Aug. 28, 2019).

⁸³ Appellant's Brief on the Merits, *supra* note 24, at 9.

⁸⁴ *Id.*

⁸⁵ Council of Parent Attorneys & Advocates, Inc. Amicus Brief, *supra* note 27, at 11–12.

⁸⁶ Appellant's Brief on the Merits, *supra* note 24, at 10–11.

the police department under Title II alleging the officer failed to provide reasonable accommodations.⁸⁷ The district court, relying on the *Hainze v. Richards*'s exigent circumstances exception, held as a matter of law that Title II did not apply during the student's arrest because the student was a threat.⁸⁸ As such, the officer was not required to consider accommodations before arresting the student.⁸⁹ The student's parents appealed to the Fifth Circuit Court of Appeals. The Fifth Circuit held that *Hainze* did not apply because the student's actions did not create exigent circumstances; however, the court remanded the case to determine whether the officer's actions were reasonable under the circumstances.⁹⁰ The decision leaves open the possibility of further restrictions on the instances in which officers will be required to provide reasonable accommodations.⁹¹

2. *The Individuals with Disabilities Education Act*

The Rehabilitation Act of 1973 sparked advocacy for the education of individuals with disabilities, leading to The Education for All Handicapped Children Act in 1975 which required public schools to provide an education to children with disabilities.⁹² Amended numerous times over the years, the Act is now known as the Individuals with Disabilities Education Act ("IDEA").⁹³ The IDEA provides various guidelines for the teaching and discipline of students with intellectual disabilities, hearing impairments, speech or language impairments, visual impairments, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, health impairments, and specific learning disabilities.⁹⁴

The primary purpose behind the IDEA is to ensure all students with disabilities have access to "a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent learning."⁹⁵ Included in the IDEA is a definition of related services: "such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability

⁸⁷ *Id.* at 4.

⁸⁸ *Id.* at 21.

⁸⁹ *Id.*

⁹⁰ *Wilson v. Southlake*, No. 18-10342, 2019 WL 4051863 (5th Cir. Aug. 28, 2019).

⁹¹ *Id.* (stating that "the City of Southlake may fare better arguing that it is not 'reasonable' to require school employees and police officers to risk pain or injury to themselves or others under the circumstances presented here").

⁹² Ernest L. Boyer, *Public Law 94-142: A Promising Start?*, 36 EDUC. LEADERSHIP 298, 298-99 (1979), http://www.ascd.org/ASCD/pdf/journals/ed_lead/el_197902_boyer.pdf [<https://perma.cc/5S4A-UASN>].

⁹³ Individuals with Disabilities Education Act, 20 U.S.C. § 1400 (2012).

⁹⁴ *Id.* § 1401(3)(a).

⁹⁵ *Id.* § 1400(d)(1)(A).

to benefit from special education. . . .”⁹⁶ Included in the definition of related services are speech-language pathology services, physical and occupational therapy, and psychological services.⁹⁷

In order to provide students with disabilities an education that satisfies these requirements, public schools are required to work with parents, regular education teachers, special education teachers, and others familiar with the child to create and implement Individualized Education Plans (“IEPs”).⁹⁸ An IEP is a written document that must contain the student’s present academic achievement and functional performance levels and describe how the disability affects the student’s progress in the educational setting.⁹⁹ Schools are required to craft an IEP that is reasonably calculated to provide the student with an opportunity to make progress toward their academic and functional goals.¹⁰⁰

The Supreme Court of the United States has indicated that an IEP team must design the plan to include specialized instruction and services with “an eye toward ‘progress in the general education curriculum.’”¹⁰¹ Though the Court indicated that specialized instruction and services are required, the Court was reluctant to take discretion away from an IEP team, holding only that a school must reasonably determine the services a student receives in light of the student’s circumstances.¹⁰²

The IEP team has great discretion, for example, in the use of behavioral supports for a particular student. The team is required to consider the use of positive behavioral supports or other strategies if a student’s behaviors impede learning.¹⁰³ Despite the directive to consider behavioral supports, the team is not required to implement any behavioral supports until a student becomes the subject of disciplinary action.¹⁰⁴ Once the student is the subject of disciplinary action resulting in the student’s placement in an alternate setting for greater than ten days, the IEP team must make a manifestation determination to determine whether the behavior has a “direct and substantial relationship to the child’s disability,” or if the behavior resulted from the failure to implement the student’s IEP. Only then are the local

⁹⁶ *Id.* § 1401(26)(A).

⁹⁷ *Id.*

⁹⁸ *Id.* §§ 1414(d)(1)(B)–(d)(2)(A).

⁹⁹ *Id.* § 1414(d)(1)(A)(i)(I)(aa).

¹⁰⁰ *Endrew F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 1001 (2017).

¹⁰¹ *Id.* at 1000 (quoting 20 U.S.C. § 1414(d)(1)(A)(i)(IV)(bb)).

¹⁰² *See id.* at 1002.

¹⁰³ Individuals with Disabilities Education Act § 1414(d)(3)(B)(i). For more information on positive behavioral supports, see *School*, POSITIVE BEHAVIORAL INTERVENTION & SUPPORTS: OSEP TECH. ASSISTANCE CTR., <https://www.pbis.org/school> [<https://perma.cc/92W8-RGFJ>] (last visited June 2, 2019).

¹⁰⁴ *See generally* Individuals with Disabilities Education Act § 1414 (defining the requirements of an IEP team).

educational agency and the student's IEP team required to conduct a functional behavior assessment and implement a behavior intervention plan.¹⁰⁵

A Functional Behavior Assessment is a process in which a student's behavior is monitored in order to determine the purpose of particular behaviors.¹⁰⁶ The purpose (or function) of a behavior is determined by taking data and analyzing the events happening right before a behavior occurs (antecedent), the behavior itself, and the events happening right after a behavior occurs (consequence).¹⁰⁷ The data collected on the antecedent, behavior, and consequence are commonly referred to as "ABC" data.¹⁰⁸ After determining the function of a behavior, the data is used to create a behavior intervention plan. The behavior intervention plan describes strategies to prevent the behavior from occurring, strategies for how to address the behavior when it does occur, and how to replace the problematic behavior with a more productive behavior.¹⁰⁹

Consider the following hypothetical of a Functional Behavior Assessment and Behavior Intervention Plan. If a student throws a tantrum every day on the playground and does not stop until the teacher puts the student in a swing, a Functional Behavior Assessment could be performed to determine the antecedent, behavior, and consequence. The antecedent of the behavior is standing on the playground. The behavior is throwing a tantrum. The consequence of the behavior is getting into the swing. The Functional Behavior Assessment would then inform the behavior analyst that the function of the student's tantrum is to get in the swing. At this point, a behavior intervention plan would be put into place to encourage the student to communicate the desire to be placed in the swing verbally. The antecedent and consequence remain the same, but the behavior changes.

III.

PROVIDING STATUTORY PROTECTION TO STUDENTS WITH DISABILITIES

As the number of law enforcement officers on school campuses increases, it is critical that statutory protections are in place to prevent the unreasonable arrest of students with disabilities. The behaviors students with disabilities frequently display—tantrums, yelling, hitting, pushing, kicking, biting—coincide with the charges seen most often: assault, battery, resisting arrest, disorderly conduct, and disrupting public schools.¹¹⁰ Because our criminal justice system considers these

¹⁰⁵ *Id.*

¹⁰⁶ Frances Mueller, William R. Jenson, Kenton Reavis & Deb Andrews, *Functional Assessment of Behavior Can Be as Easy as A-B-C*, BEYOND BEHAVIOR, Spring 2002, at 23.

¹⁰⁷ *Id.* at 25.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 24.

¹¹⁰ See *supra* note 46 and accompanying text; see also Hannah Rappleye, Brenda Breslauer, Stephanie Gosk & Kenzi Abou-Sabe, *Kids in Cuffs: Why Handcuff a Student with a Disability*, NBC

behaviors to be “criminal,” an officer can easily find probable cause.¹¹¹ These same behaviors also provide officers with a justification for the use of force: to prevent students from injuring themselves or others.¹¹² Because most arrests do not rise to the level of violating constitutional rights, and because no statutes clearly call for reasonable modifications to be made before or during an arrest,¹¹³ students have no remedy, and law enforcement agencies are not held accountable. Title II should apply to arrests of a student on a school campus so that law enforcement officers are required to consider reasonable modifications, and the IDEA should be amended to further protect students from unnecessary encounters with law enforcement.

A. Title II of the ADA Should Apply to School Arrests

Title II should apply to arrests of a student on a school campus so that officers are required to consider reasonable modifications during an encounter with a student with disabilities.¹¹⁴ The ADA was intended to be sweeping legislation eliminating discrimination against individuals with disabilities from both public and private entities.¹¹⁵ If courts refuse to recognize that Title II applies during all arrests, they should, at the very least, require Title II accommodations during a student’s arrest on a school campus.

1. Legislative History Supports Title II’s Application to Arrests

Title II should apply to arrests on a school campus because legislators intended for Title II to apply to all law enforcement activities, including arrests. The congressional report accompanying the Act discusses disabilities training for public employees so that the public entity is compliant with the non-discrimination requirement of the ADA.¹¹⁶ The report gives the following as an example: “[P]ersons who have epilepsy, and a variety of other disabilities, are frequently inappro-

NEWS (Feb. 20, 2017, 4:55 PM), <https://www.nbcnews.com/news/us-news/kids-cuffs-why-hand-cuff-8-year-old-student-disability-n722451> [<https://perma.cc/R5T4-LWED>]; *Science for Students with Disabilities: Behavioral Disorders*, NAT’L SCI. TEACHING ASS’N, <https://www.nsta.org/disabilities/behavioral.aspx> [<https://perma.cc/PEF5-5Q4G>] (last visited Aug. 22, 2019).

¹¹¹ See *supra* Part II, Section B: Fourth Amendment: Protecting Officers, Failing Students (discussing probable cause).

¹¹² See *id.*; see also Smith, *supra* note 1 (discussing the reason officers felt the amount of force was necessary to protect the student).

¹¹³ See *City of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1771–72 (2015) (discussing courts’ disagreements on whether the Americans with Disabilities Act requires accommodations during an arrest and thus showing it is not a clearly established right).

¹¹⁴ See Americans with Disabilities Act 42 U.S.C. § 12132 (2012); Title II Regulations, 28 C.F.R. § 35.130(b)(7)(i) (2016).

¹¹⁵ 42 U.S.C. § 12101(b).

¹¹⁶ H.R. REP. NO. 101-485, at 490 (1990).

priately arrested and jailed because police officers have not received proper training in the recognition of and aid for seizures.”¹¹⁷ This statement is strong evidence that legislators drafted Title II with law enforcement activities and arrests in mind. Further, nothing in the legislative history indicates that Title II should not apply to law enforcement agencies. If legislators wanted to exclude law enforcement activities, it seems that would have been included in reports to counter this example. Instead, the reports and the statute itself read as broadly applicable to public entities.

2. *The Plain Language of the Statute Supports Title II’s Application During Arrests*

Even if the legislative history fails to prove that Title II applies during arrests, the express language and context of the rule itself call for such an interpretation.¹¹⁸ A claim under Title II is found when a petitioner is denied the “benefit” of or “participation in” a public entity’s “activity”.¹¹⁹ The Court in *Sheehan v. San Francisco*¹²⁰ explained that whether Title II applies during an arrest depends on whether “an arrest is an ‘activity’ in which the arrestee ‘participat[es]’ or from which the arrestee may ‘benefi[t].’”¹²¹ The Court did not rule on the issue;¹²² however, this Article argues the Court would have found Title II applicable for the following reasons.

First, an arrest fits into the definition of “activity” (for purposes of Title II application) because Section 504 of the Rehabilitation Act of 1973¹²³ specifically includes “instrumentalit[ies] of a State or of a local government” in its definition of activities of public entities.¹²⁴ The Rehabilitation Act’s definition is essential because “nothing in [the ADA] shall be construed to apply a lesser standard than the standard applied under Title V of the Rehabilitation Act of 1973. . . .”¹²⁵ Defining an activity according to the Rehabilitation Act of 1973 would mean that an activity includes instrumentalities of law enforcement—arrests—and thus would require officers to provide reasonable accommodations to an individual during an arrest.¹²⁶ Because the definition of activity under the Rehabilitation Act of 1973

¹¹⁷ *Id.*

¹¹⁸ Americans with Disabilities Act § 12132.

¹¹⁶ *Id.*

¹²⁰ *City of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1773 (2015).

¹²¹ *Id.* (citing Americans with Disabilities Act § 12132).

¹²² *Id.*

¹²³ Section 504 of the Rehabilitation Act of 1973 laid the groundwork for the ADA, and the current version contains a similar prohibition on discrimination. *See supra* text accompanying notes 61–63 (giving a brief background on Section 504 of the Rehabilitation Act of 1973).

¹²⁴ Rehabilitation Act of 1973, 29 U.S.C. § 794(b)(1)(A) (2012).

¹²⁵ Americans with Disabilities Act § 12201.

¹²⁶ *See* Rehabilitation Act of 1973 § 794.

would provide more protection to individuals with disabilities, this definition controls.¹²⁷

Additionally, the plain meaning of the word “activity” in Title II leads to the logical conclusion that an arrest is an activity. The plain meaning of the word is “a natural or normal function or operation.”¹²⁸ The function of law enforcement is summed up in the Department of Justice’s mission statement: “To enforce the law, . . . to provide federal leadership in preventing and controlling crime, . . . [and] to seek just punishment for those guilty of unlawful behavior. . . .”¹²⁹ In order to carry out this mission, law enforcement officers must make arrests as a normal function of their mission. In fact, the Bureau of Justice Statistics reported 13,122,000 arrests in 2010 alone.¹³⁰ Thus, arrests are a normal function of law enforcement in the community and that is no different in a school setting. An officer’s role on a school campus is to provide safety to the campus and to respond to criminal activity.¹³¹ An arrest is a natural and normal response to criminal activity, so much so that in the 2013-2014 school year almost 70,000 students were arrested in roughly 8,000 schools in the United States.¹³²

Second, the plain meaning of the word “participat[es]” in Title II leads to the logical conclusion that a student participates in an arrest.¹³³ Title II requires reasonable modifications be made to allow an individual with a disability to participate in an activity.¹³⁴ Though an arrestee may not be a willing participant, a student placed under arrest certainly participates in the arrest. The plain meaning of

¹²⁷ *Id.*

¹²⁸ *Activity*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/activity> [<https://perma.cc/UCZ5-ER6W>] (last visited May 25, 2019); see also *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dept. of Health & Human Res.*, 19 F. Supp. 2d 567, 574 (N.D. W. Va. 1998) (an example of a court applying the Merriam-Webster definition).

¹²⁹ *About DOJ*, U.S. DEP’T OF JUSTICE, <https://www.justice.gov/about> [<https://perma.cc/RG4V-UTNQ>] (last visited Apr. 20, 2019).

¹³⁰ Howard N. Snyder, *Arrest in the United States, 1990–2010*, U.S. DEP’T OF JUSTICE (Oct. 31, 2012), <https://www.bjs.gov/content/pub/pdf/aus/9010.pdf> [<https://perma.cc/LNV9-2BM9>]; see also *2014 Texas Arrest Data*, TEX. DEP’T OF JUSTICE, 73, <https://www.dps.texas.gov/crimereports/14/citCh9.pdf> [<https://perma.cc/MBC5-G48A>] (last visited Apr. 20, 2019) (showing the Texas Department of Public Safety made almost 900,000 arrests in 2014); *Adult Arrests: 2009–2018*, DIV. OF CRIMINAL JUSTICE SERVS. (Feb. 22, 2019), <http://www.criminaljustice.ny.gov/crimnet/ojsa/arrests/Allcounties.pdf> [<https://perma.cc/N2SQ-HF6L>] (reporting 400,000 arrests in 2018 in New York); *Total Arrests, 1952–2005*, CRIME IN CAL., tbl.16, <http://ag.ca.gov/cjsc/publications/candd/cd05/tabs/2005Table16.pdf>? [<https://perma.cc/4H44-HHFS>] (reporting that the California Department of Justice made over 1.5 million arrests in 2005).

¹³¹ *Frequently Asked Questions*, *supra* note 40.

¹³² *Which Students Are Arrested the Most?*, EDUC. WEEK, <https://www.edweek.org/ew/projects/2017/policing-americas-schools/student-arrests.html#/overview> [<https://perma.cc/M2KQ-BP9C>] (last visited Apr. 21, 2019).

¹³³ See, e.g., *City of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1773 (2015) (whether Title II of the ADA applies during an arrest depends on whether “an arrest is an ‘activity’ in which the arrestee ‘participat[es]’ or from which the arrestee may ‘benefit[.]’”).

¹³⁴ Americans with Disabilities Act, 42 U.S.C. § 12131 (2012); Title II Regulations, 28 C.F.R.

the word “participat[es]” is to partake in an activity along with others.¹³⁵ An unwilling participant participates no less than a willing participant—either way, the arrestee succumbs to handcuffs. An arrestor cannot participate in an arrest alone—there must be an arrestee.

Third, the plain meaning of the word “benefits” in Title II leads to the logical conclusion that a student benefits from a safe and proper arrest. “Benefit” is defined as an advantage or profit gained.¹³⁶ Title II requires public entities to make reasonable modifications to allow an individual with disabilities to benefit from a particular activity conducted by the public entity.¹³⁷ Ideally, students would not be subject to arrest on a regular basis. However, there are situations in which the arrest of students may be justified. In those situations, students will necessarily benefit from a proper and safe arrest. In fact, one of the most common explanations officers give for placing students in handcuffs is to protect students from injuring themselves.¹³⁸ But even in situations where the officer is not arresting the student for the immediate purpose of preventing physical harm to the student, if an officer makes an arrest that adheres to due process, the arrest is made to prevent the student from injuring anyone else and to maintain the safety of the student and the school community. Because the arrest prevents more severe consequences from occurring, a proper and safe arrest can be beneficial to the student. However, this benefit only exists if the arrest is conducted safely, appropriately, and in accordance the child’s rights. A relatively safe arrest that respects due process is impossible without reasonable modifications.

3. Title II of the ADA Should Apply Because Arrests in Schools Differ From Arrests in the Community

Title II should apply to arrests on a school campus, even if courts decide it does not apply to arrests in the community, because arrests in a school are fundamentally different. First, law enforcement officers who work in a school are more likely to be aware they are working with a student with disabilities. When an officer receives a call for assistance in a community setting, the officer arrives with little information about the individual causing the disturbance.¹³⁹ Because schools are required to identify students who have disabilities,¹⁴⁰ it is more likely that the

§ 35.130(b)(7)(i) (2016).

¹³⁵ *Participate*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/participate> [<https://perma.cc/G9R4-EYA7>] (last visited Apr. 16, 2019).

¹³⁶ *Benefit*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/benefit> [<https://perma.cc/V5FZ-RXC6>] (last visited Apr. 23, 2019).

¹³⁷ Americans with Disabilities Act § 12132.

¹³⁸ *See, e.g., Smith, supra* note 1 (explaining the student was put into handcuffs to prevent him from harming himself).

¹³⁹ *See Hainze v. Richards*, 207 F.3d 795, 801–02 (5th Cir. 2000) (describing the split-second decisions officers in the community must make).

¹⁴⁰ Individuals with Disabilities Education Act, 20 U.S.C. § 1412(a)(3)(A) (2012).

person calling for assistance in a school is aware of the student's disability and needs. Assuming the caller shares that knowledge with school officers, officers should not be surprised or unsure of whom they will encounter when they respond to the call for assistance.

The second way arrests in a school differ from arrests in the community is that law enforcement officers working in a school have an awareness of and access to the reasonable accommodations each student needs. An officer in the community may not be able to determine whether or what accommodations need to be made, and officers cannot be trained on how to accommodate the broad needs of every individual with a disability.¹⁴¹ An officer in a school, however, has immediate access to school personnel familiar with the student. Schools are required to have an IEP detailing the nature of the student's disability for every student on the campus with a disability.¹⁴² The student may also have a Behavior Intervention Plan in place to address inappropriate behaviors related to the disability.¹⁴³

School personnel can consult these plans and relay the information regarding accommodations to the officer. The officer is then able to quickly determine which accommodations may be necessary and easily access those accommodations.¹⁴⁴ In the community, an officer might be made aware of appropriate accommodations that would be helpful to an individual—like being able to speak with a counselor—but the officer might be unable to provide a counselor in the particular scenario. If a school has appropriately addressed the student's needs in the IEP, the school will already have the appropriate accommodations in place such as safe rooms, access to therapists, areas for the student to walk to settle down, or access to counselors. Officers in a school do not have to seek out appropriate accommodations—they need only take advantage of the accommodations already available.

The third reason arrests in a school differ from arrests in the community is that law enforcement officers in a school setting address fewer violent or dangerous circumstances than officers responding to calls in the community.¹⁴⁵ When an officer responds to a call for assistance in the community, the officer has little

¹⁴¹ See *Hainze*, 207 F.3d at 801–02.

¹⁴² Individuals with Disabilities Education Act § 1414(d)(2); see *A Guide to the Individualized Education Program*, U.S. DEP'T OF EDUC., <https://www2.ed.gov/parents/needs/speced/iepguide/index.html#team> [<https://perma.cc/7Y5S-LUFW>] (last modified Mar. 23, 2007) (explaining the role of an Individualized Education Planning team and describing the team members as faculty and staff familiar with the student).

¹⁴³ See Individuals with Disabilities Education Act § 1414(d)(3)(B)(i).

¹⁴⁴ See *id.* (describing the brief information included in an Individualized Education Plan).

¹⁴⁵ Compare *Fast Facts: School Crime*, NAT'L CTR. FOR EDUC. STATISTICS, <https://nces.ed.gov/fastfacts/display.asp?id=49> [<https://perma.cc/8VCR-MQQQ>] (last visited Aug. 22, 2019) (reporting 0.8 serious violent crimes out of 1000 students, or 0.08%), with *Violent Crime*, FBI: UNIFORM CRIME REPORTING, <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/offenses-known-to-law-enforcement/violent-crime> [<https://perma.cc/8X6X-K8EH>] (last visited Apr. 16, 2019) (reporting 372.6 serious violent crimes per 100,000 inhabitants in the United States, or 0.37%).

information available.¹⁴⁶ The officer must arrive on the scene and evaluate for all possible risks and determine the precise nature of the call¹⁴⁷—the individual could have a weapon or be in a state of psychosis. In schools, however, officers are very unlikely to encounter these types of serious threats.¹⁴⁸

It certainly cannot be said that an officer in a school setting will never face a situation involving exigent circumstances; however, Title II accounts for those circumstances by requiring only reasonable accommodations.¹⁴⁹ An officer facing a situation where a student poses a serious and immediate threat to the safety of himself or others will not be expected or required to provide the same accommodations as an officer responding to a call about a student who poses little risk to anyone. The failure to require an officer, in any scenario involving an arrest, to provide reasonable accommodations sets a dangerous precedent. At the extreme, an officer may be encouraged to escalate a situation to an arrest in order to avoid liability for not providing necessary accommodations. More likely, however, will be situations in which the officer fails even to consider accommodations or alternatives to arrest, irreparably harming the student placed under arrest. Students with disabilities have enough difficulty in school settings without having to worry about an arrest for misbehavior directly related to their disability.

B. Bringing a Claim Under Title II of the ADA

If Title II does apply during an arrest on a school campus, the student must then show they are a person with a disability, that they are qualified to participate in or benefit from the public entity's services (i.e., an arrest), that they were excluded from those services, programs or activities, and that such exclusion or discrimination was by reason of their disability.¹⁵⁰ Actions brought under Title II generally fall into two categories: (1) wrongful arrest or (2) failure to accommodate.¹⁵¹

¹⁴⁶ See Hainze v. Richards, 207 F.3d 795, 801–02 (5th Cir. 2000) (describing the split-second decisions officers in the community must make).

¹⁴⁷ *Id.*

¹⁴⁸ Nat'l Inst. of Justice, *School Safety: By the Numbers*, U.S. DEP'T OF JUSTICE (Nov. 2017), <https://www.ncjrs.gov/pdffiles1/nij/251173.pdf> [<https://perma.cc/VQ6P-YKXA>] (showing less than 7% of students between the ages of 12 and 18 were threatened or injured with a weapon at school). Officers in schools are more likely to encounter minor misbehavior such as disrupting school, which is interestingly a criminal act in some states. See, e.g., TEX. EDUC. CODE ANN. § 37.124 (West 2018) (“A person other than a primary or secondary grade student enrolled in the school commits an offense if the person, on school property or on public property within 500 feet of school property, alone or in concert with others, intentionally disrupts the conduct of classes or other school activities.”).

¹⁴⁹ See Americans with Disabilities Act, 42 U.S.C. § 12132 (2012).

¹⁵⁰ Sheehan v. City of San Francisco, 743 F.3d 1211, 1232 (9th Cir. 2014).

¹⁵¹ Robyn Levin, *Responsiveness to Difference: ADA Accommodations in the Course of an Arrest*, 69 STAN. L. REV. 269, 282 (2017).

Wrongful arrests occur when an officer arrests a student displaying a behavior that is mistaken for criminal activity.¹⁵² Consider the Browns' ten-year-old son with autism discussed in the introduction of this Article. Their son displayed behaviors at school that could be perceived as criminal acts—hitting and kicking the police officer, throwing items at the police officer, and failing to follow the officer's directions.¹⁵³ But these actions would be more appropriately categorized as behaviors manifesting from the boy's disability, not criminal acts.

The second claim under Title II arises when a law enforcement officer fails to provide reasonable accommodations.¹⁵⁴ A law enforcement agency can fail to make appropriate accommodations before, during, or after an arrest. In the situation described in the introduction of this Article, the officer put the Browns' son in handcuffs as a result of a failure to accommodate. First, given the federal guidelines on officer training discussed earlier, it is likely that the officer did not receive adequate training in how to respond to the boy's outbursts.¹⁵⁵ A failure to train is a failure to accommodate.¹⁵⁶ Second, the officer failed to provide reasonable accommodations before and during the arrest.¹⁵⁷ A reasonable accommodation before the arrest in the Brown case could have been to leave the boy in the safe room by himself where he could not injure himself or anyone else. Placing the boy in the safe room would have served the officer's stated purpose of preventing injury, but it also would have accounted for the boy's difficulty in controlling his outbursts. The officer's inadequate training to identify and respond to the student's behavior resulted in an arrest that will have a lasting impact on the boy.

Given the high likelihood that an officer will encounter a student with disabilities, it is critical that law enforcement agencies train officers to respond to students with disabilities.¹⁵⁸ An officer working in a school district can expect that a high percentage of calls for assistance will be about a student with disabilities given that, as stated previously, students with disabilities make up thirteen percent of the student population in the United States and account for twenty-six percent

¹⁵² *Id.* at 282–83.

¹⁵³ Smith, *supra* note 1; *see supra* Part I: I. Introduction (discussing behaviors of Browns' son).

¹⁵⁴ *Sheehan*, 743 F.3d at 1232.

¹⁵⁵ *See supra* Part I: I. Introduction (discussing the Browns' experience); *see, e.g., supra* notes 39–41 (concerning standards of training for SROs).

¹⁵⁶ *See generally* *Saylor v. Regal Cinemas, Inc.*, 54 F. Supp. 3d 409, 424 (D. Md. 2014) (stating that failure to train is a failure to accommodate); Levin, *supra* note 151, at 294–98; Shanna Rifkin, *Safeguarding the ADA's Antidiscrimination Mandate: Subjecting Arrests to Title II Coverage*, 66 DUKE L.J. 913, 936–938 (2017).

¹⁵⁷ Smith, *supra* note 1; *see supra* Part I: I. Introduction (discussing the Browns' experience).

¹⁵⁸ *See, e.g., Saylor*, 54 F. Supp. 3d at 427–28 (stating that failure to train is a failure to accommodate).

of arrests on school campuses.¹⁵⁹ The National Association of School Resource Officers currently recommends that officers who work on a school campus undergo a forty-hour training.¹⁶⁰ Out of those forty hours, the training devotes only two hours to training officers on “Understanding Special Needs Students.”¹⁶¹ Furthermore, this unit includes four learning objectives, suggesting that as little as half an hour of the training time may be spent covering how to “communicate proactively with students with disabilities.”¹⁶² The remainder of the training is spent providing an overview of the IDEA, the disciplinary process allowed under the IDEA, and diagnostic categories for disabilities.¹⁶³

The amount of training officers receive is wholly inadequate. If students with disabilities make up thirteen percent of the student population, then at least thirteen percent of training for school-based officers should be devoted to techniques for working with that population. Under the current training scheme, thirty-eight hours, or ninety-five percent, of the training covers interactions with non-disabled students.¹⁶⁴ While much of the training arguably applies to both students with and without disabilities, techniques that may work in interactions with non-disabled students may not work in interactions with students with disabilities. A forty-hour general training is inadequate to teach officers (1) how to respond to students with disabilities, (2) how to work in collaboration with school personnel to address inappropriate behaviors, and (3) how to implement a student’s IEP or Behavior Intervention Plan. Proper training will prevent the need for many arrests.

First, law enforcement officers working in a school setting need extensive training on how to interact with students with disabilities. The officer involved with the Browns’ ten-year-old son with autism might have avoided the need to put the boy in handcuffs if the officer had utilized calming techniques and had not escalated the boy’s behaviors.¹⁶⁵ The most important training for officers in a school setting is an overview of the most common types of disabilities and associated behaviors. An officer unfamiliar with behaviors associated with common

¹⁵⁹ See sources cited *supra* note 17.

¹⁶⁰ *Frequently Asked Questions*, *supra* note 40; see *supra* Part II, Section A: School Resource Officers & Student Arrests (stating that there are no federal mandates, and minimal state and local mandates, for additional training).

¹⁶¹ *Basic 40-Hour School Resource Officer Course Outline and Objectives*, NAT’L ASS’N OF SCH. RES. OFFICERS, <https://nasro.org/cms/wp-content/uploads/2014/04/NASRO-Basic-Course-Description-and-Outline.pdf> [<https://perma.cc/5GGF-KBDJ>] (last visited Apr. 20, 2019).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ See Smith, *supra* note 1; see *supra* Part I: I. Introduction (introducing the Browns’ story of their son’s arrest).

disabilities can easily mistake behaviors such as kicking and screaming for criminal activity, resulting in wrongful arrests.¹⁶⁶ Officers can learn to identify common disabilities and associated behaviors through various training programs offered by disability advocacy organizations throughout the United States.¹⁶⁷

Second, law enforcement officers working in a school setting need training on how and when to collaborate with school personnel to address student behaviors. A teacher's aide accompanied the officer in the Browns' situation, but the officer took responsibility for the boys' discipline, eventually escalating the situation to the point of using handcuffs.¹⁶⁸ With clearer protocols in place for the interaction between law enforcement and school personnel, the situation could have been handled in a more appropriate manner. The Arc, a leading disability rights organization, created a program called Pathways to Justice Training.¹⁶⁹ The training focuses on creating interdisciplinary groups referred to as Disability Response Teams.¹⁷⁰ The Disability Response Teams are designed to open lines of communication between professionals in the criminal justice fields and disability advocacy fields.¹⁷¹ Open lines of communication allow for learning on both sides to better address the needs of individuals with disabilities in the community.¹⁷²

The Disability Response Team model should be used to train law enforcement officers in a school setting.¹⁷³ The team should consist of special education teachers, behavior analysts, parents, and disability rights advocates. The team would train law enforcement officers about the various disabilities students commonly experience, common behaviors associated with those disabilities, methods for de-escalation, and how to address maladaptive behaviors.¹⁷⁴ The most practical way to implement these Disability Response Teams would be by requiring law enforcement officers to participate in students' IEP team meetings.¹⁷⁵ Currently, these meetings do not usually involve law enforcement participation,¹⁷⁶ but this team

¹⁶⁶ See Fowler & Craven, *supra* note 24.

¹⁶⁷ See, e.g., David V. Whalen, Chief John Askey & Captain Patrick Mann, *Disability Awareness Training: A Train the Trainer Program for First Responders*, THE ARC, <https://www.thearc.org/document.doc?id=4801> [<https://perma.cc/8ZEG-GH6Z>] (last visited Apr. 16, 2019).

¹⁶⁸ See Smith, *supra* note 1.

¹⁶⁹ *National Center on Criminal Justice & Disability*, THE ARC, <https://www.thearc.org/NCCJD#> [<https://perma.cc/P8U3-W5PJ>] (last visited June 8, 2019).

¹⁷⁰ *Pathways to Justice: Disability Response Teams*, THE ARC [hereinafter *Pathways to Justice*], <https://www.thearc.org/document.doc?id=5114> [<https://perma.cc/539K-6RH9>] (last visited Apr. 20, 2019). The ARC is an advocacy organization representing individuals with intellectual and developmental disabilities. *Who We Are*, THE ARC, <https://www.thearc.org/who-we-are> [<https://perma.cc/BH8D-N4TV>] (last visited Apr. 19, 2019).

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ For more information on the current model for Disability Response Teams, see *id.*

¹⁷⁴ See *id.*

¹⁷⁵ See Individuals with Disabilities Education Act, 20 U.S.C. § 1414 (2012).

¹⁷⁶ See *id.* § 1414(d)(1)(B).

could serve the same purpose as Disability Response Teams by including officers in the meetings.

Third, officers need to be trained to consult and implement a student's IEP and Behavior Intervention Plan before making an arrest. The Browns indicated that carrying their son to the safe room was part of his IEP; however, the officer could have allowed him to de-escalate rather than staying in the room and continuing to lecture him.¹⁷⁷ A school officer's first instinct should be to ask school personnel if the student has an IEP or Behavior Intervention Plan.¹⁷⁸ Only after attempts to manage the student's behavior following the IEP and Behavior Intervention Plan have failed should an officer resort to law enforcement tactics. The officer involved with the Browns' son immediately used law enforcement tactics such as pinning the boy to the ground, escalating the situation immediately.¹⁷⁹ Deviation from the plans in place should be considered evidence of acting unreasonably for purposes of applying Title II accommodations.

C. Amendments to the IDEA

Law enforcement involvement most often occurs when the student exhibits behaviors that the teacher is unable to address. In the case of the Browns' son, the teacher requested the officer's presence in hopes that their son would calm down.¹⁸⁰ As a result, the officer stepped in to assist, and the situation eventually escalated to the point that the child was handcuffed.¹⁸¹ The best way to decrease the number of students with disabilities who are arrested at school is to prevent law enforcement involvement in the first place.

Preventing law enforcement involvement requires amendments to the IDEA. Because law enforcement officers are entitled to qualified immunity, a student bringing a cause of action against the officer must show a violation of a clearly recognized constitutional or statutory right.¹⁸² Constitutional claims are often unsuccessful in the school setting for the reasons discussed above,¹⁸³ so students

¹⁷⁷ See Smith, *supra* note 1.

¹⁷⁸ See *infra* Part III, Section C, Subsection 2: 2. Guidance for Law Enforcement Involvement (discussing designing of Individualized Education Plans with law enforcement in mind).

¹⁷⁹ See Smith, *supra* note 1.

¹⁸⁰ Press Release, City of Denton, Disorderly Conduct (Abuse/Threaten a Public Servant) (May 11, 2018), <https://bloximages.newyork1.vip.townnews.com/dentonrc.com/content/tncms/assets/v3/editorial/a/4a/a4a7e3c3-054b-59de-a197-a7276316b2f4/5afb865619ee4.pdf.pdf> [<https://perma.cc/XCM2-QZM3>].

¹⁸¹ *Id.*

¹⁸² *City of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 (2015); see, e.g., *Hayenga ex rel. Hayenga v. Nampa Sch. Dist. No. 131*, 123 Fed. App'x. 783 (9th Cir. 2005); see also *supra* Part II, Section B: Fourth Amendment: Protecting Officers, Failing Students (discussing qualified immunity).

¹⁸³ See *supra* Part II, Section B: Fourth Amendment: Protecting Officers, Failing Students (discussing the difficulty for a student bringing a constitutional claim).

must resort to bringing claims that arise from statutory rights violations.¹⁸⁴ If Title does not apply to arrests on a school campus, the IDEA needs to be amended in such a way that it prevents law enforcement involvement with students with disabilities. When law enforcement involvement is required, clear protocol needs to be in place so that the student suffers minimal to no harm.

1. Preventing Law Enforcement Involvement

In order to prevent student arrests, schools need to address student misbehavior before the behavior escalates to the point of requiring law enforcement involvement. One way to accomplish this goal is to expressly include positive behavioral supports in the statutory definition of “related services” that are required for a student to benefit from special education.¹⁸⁵ Currently, the IDEA expressly requires a student with disabilities to receive speech-language pathology, physical and occupational therapy, and counseling as examples of the type of developmental, corrective, and support services.¹⁸⁶

There is no mention of behavioral therapy or behavioral supports in the current definition of related services. But behavioral supports provide the same supportive service as speech, occupational, and physical therapy—the primary purpose is to support the student in a way that allows the student to make progress toward the goals in their IEP.¹⁸⁷ A student whose behavior impedes his or her learning should be given appropriate support services to ensure the student progresses toward their educational and functional goals, including behavior skills. IEP teams are already required to consider the use of behavioral supports when behaviors impede learning.¹⁸⁸ Adding behavioral supports to the non-exhaustive list included in the definition of related services would simply eliminate any question of whether schools must provide such services for students to progress toward the goals in their IEP.

Practically speaking, the addition of behavioral supports to the definition of related services would function in a manner similar to other therapies—schools could contract with therapy services in the community, hire their own behavior analyst for each district, or use the therapy services available to each school region.¹⁸⁹ While there would be some additional costs incurred, the return would be

¹⁸⁴ *Sheehan*, 135 S. Ct. at 1774.

¹⁸⁵ See Individuals with Disabilities Education Act, 20 U.S.C. §§ 1401(26)(A), 1414(d)(1)(A)(i)(IV) (2012). For more information on positive behavioral supports, see *What is Positive Behavior Support?*, ASS’N FOR POSITIVE BEHAVIOR SUPPORT, http://www.apbs.org/new_apbs/genintro.aspx [<https://perma.cc/2LCE-PA57>] (last visited June 8, 2019).

¹⁸⁶ Individuals with Disabilities Act § 1401(26)(A).

¹⁸⁷ See *id.*; see also ASS’N FOR POSITIVE BEHAVIOR SUPPORT, *supra* note 185.

¹⁸⁸ Individuals with Disabilities Education Act § 1414(d)(3)(B)(i).

¹⁸⁹ See, e.g., Invo HealthCare—Progressus Therapy, *Speech-Language Pathologist*, LINKEDIN JOBS, <https://www.linkedin.com/jobs/view/> (last visited Dec. 13, 2018) (posting an available speech-language pathologist position in a private clinic that contracts with a local school district) (on file

high. If students are not displaying as many inappropriate behaviors, students will achieve more academically, schools will ultimately spend less time addressing inappropriate behaviors, law enforcement officers will be summoned less frequently, and the school district will avoid litigation for unreasonable arrests.

In addition to adding behavioral supports to the list of related services, the IDEA also needs to be amended to expressly require functional behavior assessments and behavior intervention plans when a student's behaviors impede learning, evidenced by poor classroom performance coupled with an inability to follow basic classroom rules or being disruptive. Currently, the IDEA does not require a functional behavior assessment to be performed until a behavior has already led to an alternative placement (i.e., suspension or expulsion for greater than ten days).¹⁹⁰ Before placement in an alternate setting, a student's IEP team must only "consider the use of positive behavioral interventions and supports, and other strategies" if the student displays behaviors that impede his or her learning.¹⁹¹

This reactive approach is wholly inadequate to reduce the number of inappropriate behaviors. Without addressing the inappropriate behaviors through behavioral supports, a school cannot expect the student's behaviors to decrease. If the behaviors increase, it is more likely that the student will become involved with campus law enforcement officers. The IDEA needs to be amended to require a functional behavior assessment and behavior intervention plan when the behavior is interfering with learning. Early intervention will significantly reduce the problematic behaviors leading to law enforcement involvement in the first place.

Reducing the number of inappropriate behaviors displayed by students with disabilities is good for the student, good for the school, and good for society. The student will be able to spend more time in the classroom setting, therefore improving achievement in school, interacting better with peers, and learning to avoid conflicts. A reduction in inappropriate behaviors means the school ultimately avoids liability for arrests, the environment is less hostile, and academic achievement scores go up as a whole. Society benefits from a reduction in problematic behaviors because those students are better equipped to cope in the community both during and after their public-school education.

2. *Guidance for Law Enforcement Involvement*

Preventing problematic behaviors from occurring in the first place is the best way to help students with disabilities avoid arrest, but it will not always be ade-

with author); Jeffco Public Schools—Colorado, *Speech Language Pathologist*, LINKEDIN JOBS, <https://www.linkedin.com/jobs/view/> (last visited Dec. 13, 2018) (posting an available speech language pathologist position in a school district) (on file with author).

¹⁹⁰ Individuals with Disabilities Education Act § 1415(k)(1)(F)(i).

¹⁹¹ *Id.* § 1414(d)(3)(B)(i) (emphasis added).

quate. Additional amendments need to be made to the IDEA to guide school personnel and law enforcement officers through situations involving students with disabilities. These amendments include requiring that an IEP describes specific protocol for law enforcement involvement with a particular student and requiring schools and law enforcement agencies to have Memorandums of Understanding in place to better describe the expected law enforcement involvement with students who have disabilities.

First, the IDEA should be amended to require each student's IEP team to address how inappropriate behaviors will be handled if law enforcement involvement is required.¹⁹² While a law enforcement officer would not necessarily be bound to the IEP or Behavior Intervention Plan, defining the reasonable accommodations ahead of time would eliminate the concern that applying Title II to an arrest in the school setting would impede an officer's ability to quickly "identify, assess, and react."¹⁹³ If a student's IEP or Behavior Intervention Plan includes steps for de-escalation or preventing specific behaviors from occurring, it will be more reasonable to expect an officer to provide those accommodations before an arrest.

Second, in addition to having individualized protections in place for students, the IDEA should be amended to require that schools have Memorandums of Understanding in place to define the general role of officers on campus, the expectation of school personnel for involving law enforcement, and how law enforcement officers should interact with students with disabilities.¹⁹⁴ A Memorandum of Understanding provides contractual liability, and it also serves as an additional tool courts can use to determine whether an officer acted reasonably during an arrest. If a student can demonstrate that an officer failed to abide by the terms of a Memorandum of Understanding between the agency and the school district, the court may be more likely to find that the officer acted unreasonably in the course of an arrest.

Memorandums of Understanding should outline the policies and procedures in place and clearly describe the role law enforcement officers are expected to play in the discipline of students with disabilities. Among United States primary schools with law enforcement officers present at least once per week on campus,

¹⁹² *Id.* § 1414(d)(1)(A) (listing the current required information for an Individualized Education Plan, which does not include any discussion of actions to be taken should law enforcement be involved).

¹⁹³ *See Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000) ("Law enforcement personnel . . . already face the onerous task of frequently having to instantaneously identify, assess, and react to potentially life-threatening situations."). The IDEA currently does not impose any specific limitations on law enforcement officers. Individuals with Disabilities Education Act § 1415(k)(6)(A).

¹⁹⁴ *See Cmty. Oriented Policing Servs., Fact Sheet: Memorandum of Understanding for School-Based Partnerships*, U.S. DEP'T OF JUSTICE (Sept. 2014), https://cops.usdoj.gov/pdf/2014_MOU-FactSheet_v3_092513.pdf [<https://perma.cc/5JPY-U3FA>].

only fifty-one percent have policies defining an officer's role in the school.¹⁹⁵ Of those schools with policies in place, only forty-eight percent have formalized policies regarding arrests, and less than forty percent have policies for the use of restraints by law enforcement on campus.¹⁹⁶ School policies and procedures will be unique to every school district; however, it is important that schools have formalized policies to distribute to staff, parents, and law enforcement officers alike to eliminate any confusion about the role law enforcement plays in the school setting.

Memorandums of Understanding should also clearly define when school personnel should involve law enforcement officers and what must be communicated to law enforcement. Schools cannot prevent teachers or other personnel from summoning police when they feel threatened; however, schools should provide behavioral support training to teachers so that behaviors manifesting from a disability do not require law enforcement involvement. The federal government provides grant money for training on behavioral supports for school personnel.¹⁹⁷ While this grant money can be used for various trainings, one of the specifically mentioned trainings is behavioral supports training.¹⁹⁸ Schools have this option available to them and should take advantage of the funding. These types of trainings would teach school personnel how to address inappropriate behaviors themselves without needing to summon law enforcement officers.

Memorandums of Understanding will differ between school districts dependent upon the resources available to the school and law enforcement agency. That being said, schools should be required under IDEA to have a procedure in place to address behaviors. Not only does that provide a stable and safe environment for the student to achieve academic success, but it also decreases the likelihood of educators overreacting to misbehavior by summoning law enforcement for a situation better addressed through behavioral interventions.

¹⁹⁵ *Among Public Schools with Any Sworn Law Enforcement Officers Present at School at Least Once a Week, Percentage with Formalized Policies or Written Documents Defining the Roles of Officers at School, by School Level, Specific Areas for Which Officers' Role is Defined, and Selected School Characteristics: 2015–16*, NAT'L CTR. FOR EDUC. STATISTICS, https://nces.ed.gov/programs/digest/d17/tables/dt17_233.74c.asp?current=yes [<https://perma.cc/P2QL-78J6>] (last visited June 9, 2019).

¹⁹⁶ *Id.* Among secondary schools, 70% have formalized policies defining an officer's role in the school. Of that 70%, 63% have formalized policies regarding arrests made on school grounds and less than 50% have formalized policies regarding the use of restraints by law enforcement on campus. *Id.*

¹⁹⁷ See, e.g., Individuals with Disabilities Education Act, § 1411(e)(2)(C)(3).

¹⁹⁸ *Id.*

IV. CONCLUSION

Students with disabilities face many physical, emotional, and intellectual challenges each day—fear of the school resource officer should not be one of those challenges. Parents should be able to send their child to school without fear that their ten-year-old son with autism will be put in handcuffs, and kids should not be afraid of law enforcement officers who are in the school to keep them safe.¹⁹⁹ Application of Title II of the ADA, thus requiring reasonable accommodations to law enforcement activity on a school campus, would significantly reduce the number of inappropriate arrests. Further, amendments to the IDEA requiring schools to take proactive steps to limit the number of interactions students with disabilities have with law enforcement are critical to protect students with disabilities from suffering improper arrests at the hands of the very people responsible for protecting them. Finally, schools and law enforcement officers need to be required to work together to draft Memorandums of Understanding that clearly outline the roles of staff and law enforcement when a student with disabilities is misbehaving and law enforcement involvement cannot be avoided.

By applying Title II of the ADA to arrests in schools, by amending IDEA to take proactive steps, and by requiring contractual obligations between law enforcement and school districts, practitioners will finally be able to zealously advocate for students with disabilities against school resource officers, police departments, and school districts when reasonable modifications have not been provided to ensure a safe and proper arrest respecting due process.

¹⁹⁹ See Smith, *supra* note 1.