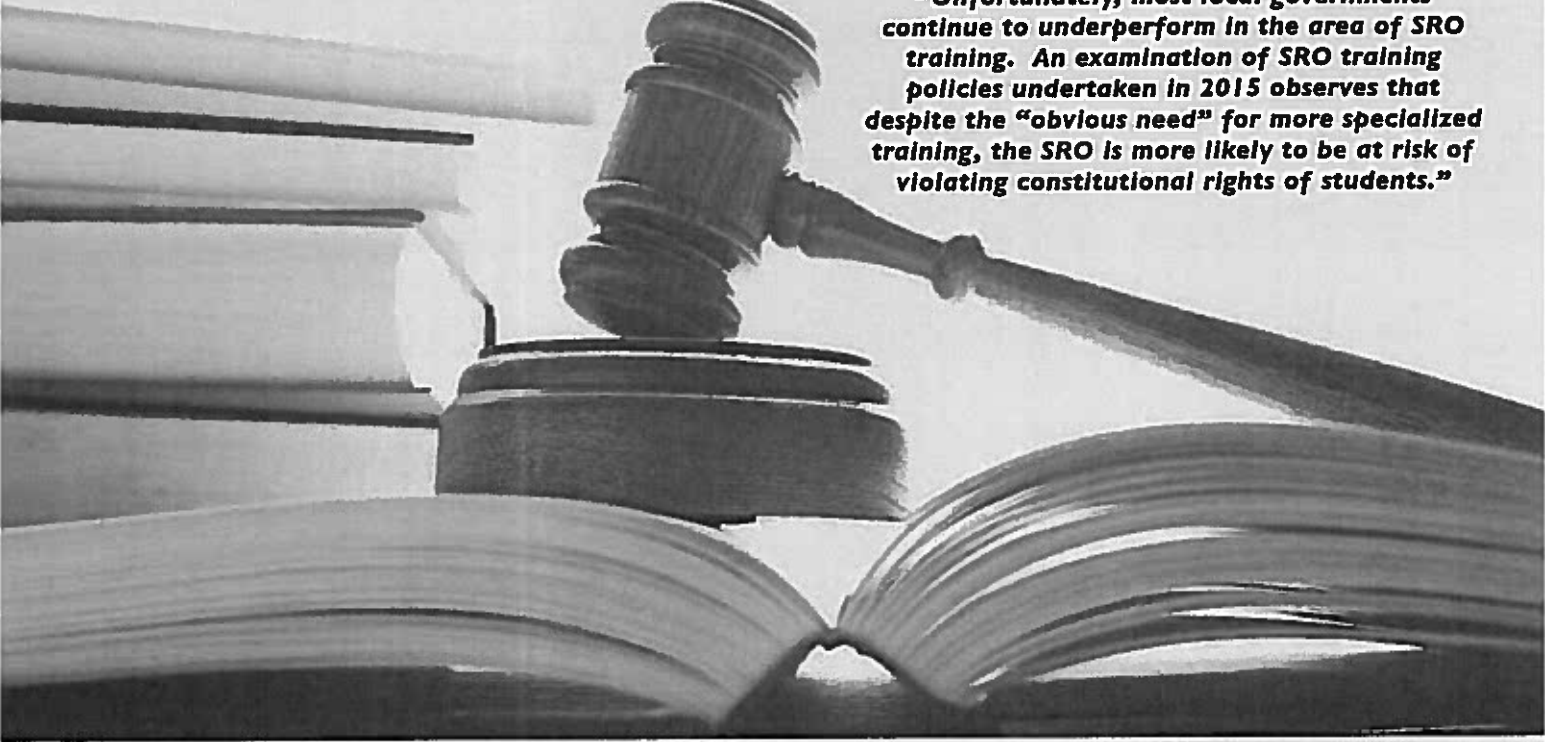


# GOVERNMENT LIABILITY & THE “FAILURE TO TRAIN” THE SCHOOL RESOURCE OFFICER

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*“Unfortunately, most local governments continue to underperform in the area of SRO training. An examination of SRO training policies undertaken in 2015 observes that despite the “obvious need” for more specialized training, the SRO is more likely to be at risk of violating constitutional rights of students.”*

**R**ecently, lawsuits for “failure to train,” have been on the rise in cases against school districts and police departments. The goal of these lawsuits is to impose liability on the jurisdiction for poor implementation of school safety programs. There are a conspicuous and growing number of incidents involving school resource officers.

■ In Kentucky, a school resource officer was accused of a civil rights violation by handcuffing an 8-year-old boy’s biceps behind his back. In the video of the incident, the SRO tells the boy, “You don’t get to swing at me like that.” As he shackles the third-grader, the student starts to cry and says that the SRO is hurting him. It is later discovered that the same SRO had handcuffed a 9-year-old girl with special needs.<sup>1</sup>

■ In Alabama, a federal court ruled that the use of pepper spray by school resource

officers as the standard response for student misconduct constituted excessive and unconstitutional force. The court ordered the city to come up with a plan for improved training and procedures for the use of pepper spray.<sup>2</sup>

■ In South Carolina, a lawsuit is expected after a school resource officer was seen yanking a 16-year-old student out of her desk and slamming her to the floor. The student had refused orders from a teacher and an administrator to leave the classroom.<sup>3</sup>

■ In Texas, parents of a high school student plan to file a lawsuit after an officer was caught on camera putting his hands around their son’s throat. The SRO was asked to stop a fight in the cafeteria after educators were unable to de-escalate the incident. The SRO

was seen in a video talking to a student and then grabbing the student by the neck and taking him down to the floor. The parents contend that the SRO “should have been trained well enough to know that this is a 130 pound child and that the action that was taken was totally unnecessary.”<sup>4</sup>

Can a police department or school district be liable when an SRO has not been adequately trained and a civil rights violation has been caused by that failure to train? The answer is yes. This article explores the application of the duty to train cases on the police officer in the school environment. The cases suggest that although courts are reluctant to impose liability on a local government for the torts of their employees, the obvious consequences of poor SRO training represents an increasingly direct path to government liability for victimized students.

## TEST YOUR "FAILURE TO TRAIN" IQ ON THE FOLLOWING SCENARIOS:

① A lawsuit brought by parents of a student who was injured in an attack by other students during lunch. The attack occurred after a long verbal argument between the victim and a group of students in the presence of the school resource officer. Although fights regularly occur on campus, SROs do not receive training in conflict de-escalation and intervention techniques. Instead, they must use their discretion based on the general training that they do receive. The SRO had completed pre-service training, but because she had been working for the City for less than one year, she had not yet completed all Academy training on school safety.

**Can the Government be held liable?**  
YES \_\_\_\_\_ NO \_\_\_\_\_

② A lawsuit brought by parents of a special needs student who, while attending an alternative school, was physically assaulted by other students. The alternative school offered no training to educators or police on de-escalating conflicts or identifying children who could be victimized. The parents presented expert opinion evidence in court that the training program was not adequate and did not meet nationally recognized standards for school safety.

**Can the Government be held liable?**  
YES \_\_\_\_\_ NO \_\_\_\_\_

③ A lawsuit brought by parents of a special needs student who, while attending school, had the misfortune of suffering a diabetic emergency. The SRO mistook the student's confused and erratic behavior for symptoms of intoxication and wrestled him forcibly to the ground. Before the struggle ended the student was bleeding and in handcuffs. An emergency medical technician who arrived at the school verified that the student was in fact suffering from diabetic shock. The SRO made a mistake despite receiving prior training specifically related to diabetic emergencies as well as periodic first aid training that discussed care of citizens in diabetic shock.

**Can the Government be held liable?**  
YES \_\_\_\_\_ NO \_\_\_\_\_

④ A lawsuit brought by parents of a student who was seriously injured when the SRO mishandled his plea for help. The student had informed the SRO that the gangs on campus were threatening him. The specific errors alleged included (1) hesitating to share the information with his commanders or with

educators – waiting three days when it should have been done immediately; (2) instructing the student, to protect himself; (3) failing to perceive the urgency and danger of the situation; and (4) sending the student back to class with the attendant risk of further danger. The supervisors of the SRO actually knew that he had poor communication skills. Nonetheless, they failed to terminate, discipline, or provide him with additional training.

**Can the Government be held liable?**  
YES \_\_\_\_\_ NO \_\_\_\_\_

## LIABILITY BASED ON FAILURE TO TRAIN – BASICS

Obviously, if the school campus is not being overseen by skilled police officers, chaos is the likely outcome. And so just as it is necessary to train an administrator to implement the education mission on campus, it is necessary to provide training regarding the operation of several laws that will be in play during the school resource officer's day-to-day interaction with students, including:

- Constitutional standards on searches, seizures, and interrogation of students;
- State and Federal laws relating to student records privacy;
- School District Policy regarding students with special needs;

In American tort law a government may be held liable for negligence in hiring, training, or supervising employees. This liability is different from the more well-known respondeat superior – which states that an employer is responsible for the actions of employees performed within the course of their employment. In fact, school districts and police departments are exempt from respondeat superior liability for nearly all constitutional claims a citizen might assert. Instead, local governments are being singled out for shortcomings in connection with hiring, training, and supervision.

The U.S. Supreme Court has issued important rulings in connection with government liability for failure to train. In the landmark case of *City of Canton v. Harris*, the U.S. Supreme Court put it this way.<sup>5</sup>

Only where a municipality's failure to train its employees in a relevant respect evidences a "deliberate indifference" to the rights of its inhabitants can such a shortcoming be ...actionable under federal law...[m]unicipal liability ...attaches where — and only where — a failure to train reflects a "deliberate" or "conscious" choice.<sup>6</sup>

In other words, inadequate training will become a link in the chain of liability when that poor training is the custom of government. "Custom" in civil rights lawsuits is code for a conclusion by the courts that inadequate train-

ing represents the policy when a government does not take steps to train its employees even when the need for training is so obvious and the failure to do so is likely to result in the violation of constitutional rights. In most cases, liability through custom can only be established after a pattern of incidents is uncovered. In the case of *Connick v. Thompson* the Court identifies this as the main path to liability.<sup>7</sup>

"A pattern of similar constitutional violations by untrained employees is ordinarily necessary to demonstrate deliberate indifference for purposes of failure to train. [Without] notice that a course of training is deficient in a particular respect, decisionmakers can hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights."<sup>8</sup>

Even so, courts are reluctant to impose liability on a local government for the failure to train and the standard is a high one for a victimized citizen to establish. The reason for the reluctance is two-fold. First, there is the difficulty of a jury determining how training of any kind plays a role in the constitutional violation. The Court in *Canton* puts it this way:

"Predicting how a hypothetically well-trained officer would have acted under the circumstances may not be an easy task for the factfinder, particularly since matters of judgment may be involved, and since officers who are well trained are not free from error and perhaps might react very much like the untrained officer in similar circumstances."<sup>9</sup>

The second reason for making government liability harder to prove when it is based on an allegation of failure to train is the belief by the Court that an easy legal standard could lead to respondeat superior liability in nearly every case of misconduct by a civil servant. Again, the Court in *Canton* provides the reasoning.

"To adopt lesser standards of fault and causation would open municipalities to unprecedented liability... In virtually every instance where a person has had his or her constitutional rights violated by a city employee, a ... plaintiff will be able to point to something the city "could have done" to prevent the unfortunate incident. Thus, permitting cases against cities for their "failure to train" employees to go forward ... on a lesser standard of fault would result in de facto respondeat superior liability on municipalities — a result we rejected. It would also engage the federal courts in an endless exercise of second-guessing municipal employee-training programs."<sup>10</sup>

## LIABILITY BASED ON FAILURE TO TRAIN – THE LAW ENFORCEMENT EXCEPTION

However, the courts have made an exception to the higher, more difficult standard of

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proof when the constitutional violation involves a law enforcement officer. Failure to train allegations become easier to prove. Police misconduct cases are treated differently by the courts because of the obvious need for police training and the high consequences of unconstitutional behavior on the job. In such cases a pattern of misconduct is not required to establish liability based on the failure to train. A single act by the SRO can lead to government liability without the student victim establishing a pattern of any kind. The Court in *Connick* affirmed the so-called “obvious need” exception, first applied in the *Canton* case.

“[I]n a narrow range of circumstances, a pattern of similar violations might not be necessary to show deliberate indifference [in a case where] the unconstitutional consequences of failing to train could be so patently obvious that a city could be liable ...without proof of a pre-existing pattern of violations.”<sup>11</sup>

The Court thus lowers the bar in failure to train cases as it pertains to law enforcement. In stating the reasons for this, the Court notes that adequate training in the area of law enforcement is an affirmative duty for local governments.

“Armed police must sometimes make split-second decisions with life-or-death consequences. There is no reason to assume that police academy applicants are familiar with the constitutional constraints... [a]nd, in the absence of training, there is no way for novice officers to obtain the legal knowledge they require. Under those circumstances there is an obvious need for some form of training.”<sup>12</sup>

### AREAS OF “OBVIOUS NEED” TRAINING INVOLVING THE SRO

The dispositive question is a practical one and can be stated simply. Government liability based on the failure to train depends on whether the training is adequate in light of the tasks the SRO must perform.<sup>13</sup> Courts will impose liability on local government agencies when the lack of training is “so reckless or grossly negligent that deprivations of persons’ constitutional rights are substantially certain to result.”<sup>14</sup> A federal lower court recently said of this standard.

“A Plaintiff must also demonstrate that the [government] was on notice of the need to train its employees by showing ... the government’s employees face clear constitutional duties in recurrent situations.”<sup>15</sup>

Recent scholarship and case law are useful to help identify the branches of SRO training that should be considered mandatory when implementing a school resource officer program.<sup>16</sup> In addition to frequent training on student rights arising out the

First, Fourth, and Fifth Amendments to the U.S. Constitution, the following training topics are emerging.

(1) Policies and practices on collaboration during intervention – including mandated reporting;

(2) Protocols in critical areas such as de-escalating conflicts between youths, crisis responses, and active shooters on campus.

(3) Policies and practices on the management of at-risk youth, including the identification and protection of children at risk of both misconduct and victimization; and

(4) Protocols to address the mental health needs of students.

One scholar makes these training elements the single most important component to a successful school resource officer program.

“Setting forth the duties and responsibilities of school resource officers ensures a minimum level of competency for the position that is not easily changed. ... a school resource officer is not just a law enforcement officer that happens to be walking through the halls of a school. The school resource officer plays a unique role and, accordingly, should be held to standards that reflect that unique role.”<sup>17</sup>

Unfortunately, most local governments continue to underperform in the area of SRO training. An examination of SRO training policies undertaken in 2015 observes that despite the “obvious need” for more specialized training, the SRO is more likely to be at risk of violating constitutional rights of students.

“Given the dearth of conclusive research about SRO program outcomes, it may be useful to assess the quality of SRO training programs in order to determine whether SROs are equipped to meet established program goals. One study identified three key components of successful SRO programs: extensive training, clearly defined roles within the school structure, and systems for evaluating officers. Yet, the study noted problems in relation to each of these objectives: (1) many SROs do not receive specialized training in adolescent development, counseling, or teaching youth; (2) the specific responsibilities of an SRO and their decisions to make arrests can vary based on the individual relationship between an SRO and school administrators; and (3) schools use inconsistent methods for assessing the effectiveness of SRO programs. In addition, few studies identify that comprehensive training was provided by schools or law enforcement departments to assist SROs with shifting between their roles in the triad model. While no state laws require SROs to undergo any specific training program prior to working in schools, many departments

take advantage of week-long trainings offered by the National Association of School Resource Officers (NASRO) if funding is available. None of the SROs interviewed in a 2009 study “receive[d] training in mediation, basic de-escalation techniques, or in detecting symptoms and behaviors of youths who have been exposed to violence, trauma, or abuse” and “rarely had any formal knowledge of, or training in, adolescent psychology or development, how to secure the respect and cooperation of youths, or on the behavioral precautions and protections that need to be taken with youths [who have] Individual Education Plans (IEPs).” As a result, SROs may not be properly equipped for their varied responsibilities.<sup>18</sup>

Finally, it must be said that government liability is evitable in the case of an SRO who is asked to implement the school safety plan without training of any kind. In this instance, the only remaining barrier to government liability will be the failure of the student to prove causation between the lack of training and the constitutional violation.

### THE IMPORTANT ROLE OF CAUSATION IN FAILURE TO TRAIN LIABILITY

The single biggest error in thinking about liability for failure to train is to suppose that liability is triggered by the improper training itself. Poor training, standing alone, will not result in government liability for failure to train. The victim must establish an additional element. A direct causal link must exist between the failure to train and the deprivation of a student’s rights. Courts apply the causation element with extraordinary rigor when a government liability claim is founded upon inadequate training. A federal court case says that “in a failure to train case, ‘the identified deficiency in a city’s training program must be closely related to the ultimate injury,’ so that it ‘actually caused’ the constitutional violation.” *Brown v. Gray*, 227 F.3d 1278, 1290 (10th Cir. 2000).

In other words, students who assert rights violations by SROs must show that the failure to properly train actually caused the violation. To do otherwise would impose respondeat superior liability on municipalities. Nevertheless, the link between poor training and unconstitutional SRO conduct is easier to establish than some may think. Courts have noted that the high degree of predictability in a single-incident case of police misconduct will support an inference of causation – that the government’s indifference to training led directly to the very consequence that was so predictable.<sup>19</sup>

## “FAILURE TO TRAIN” IQ ANSWERS:

In Question One, the court found that a triable issue remained as to whether the government was deliberately indifferent to the need for training in conflict de-escalation and intervention and whether the lack of such training caused citizen's injuries. The jury was entitled to find the failure to provide training on de-escalation, intervention, and when to call for back-up to be a careless and dangerous practice, and one which reflects a deliberate indifference. See the closely related case of *Thomas v. Cumberland County*, 749 F.3d 217 (3rd Cir 2014).

In Question Two, the court held that there was sufficient evidence on the issue of whether the government acted with deliberate indifference to survive summary judgment and proceed to a jury. “[T]he potential for conflict was high and there was a complete lack of training on de-escalation and intervention... the evidence concerning the [government's] failure to train its ... workers in areas that would reduce the risk of a resident being deprived of his constitutional right to security and well-being was sufficient.” See the closely related case of *A.M. ex rel. J.M.K. v. Luzerne County Juvenile Detention Center*, 372 F.3d 572 (3rd Cir 2004).

In Question Three, the court held that the government was not indifferent to the need to train its officers to handle diabetic emergencies, and thus could not be subject to liability. Although the government lacked any written policies or guidelines on handling diabetic emergencies, officers received training specifically related to diabetic emergencies. An officer who performs poorly despite his training does not supply a basis for government liability. See the closely related case of *Burns v. City of Redwood City*, 737 F.Supp.2d 1047 (N.D. California 2010).

In Question Four, the court held that there was not sufficient causation between the training received by the employee and the misconduct. Absent any facts suggesting that the City's training policy itself was deficient or inadequate, the fact that the SRO may have required more or different training simply is insufficient to impose liability on the government. Even adequately trained officers occasionally underperform. The fact that they do says little about the training program or the legal basis for holding the city liable. See the closely related case of *Estate of Reat v. Rodriguez*, 2014 Westlaw 4358333 (D. Colorado 2014).



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2. See, “Judge: Police can no longer pepper-spray students for minor misbehavior at school.” On-line at: <https://www.washingtonpost.com/news/education/wp/2015/10/01/judge-police-can-no-longer-pepper-spray-students-for-minor-misbehavior-at-school/>
3. See, “South Carolina students protest firing of school resource officer.” On-line at: <http://www.cnn.com/2015/10/30/us/south-carolina-school-resource-officer/>
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5. 489 U.S. 378 (1989)
6. 489 U.S. at 389.
7. 563 U.S. 51 (2011)
8. 563 U.S. at 62.
9. Canton, 489 U.S. at 391.
10. *Id.*, at 392.
11. 563 U.S. at 63-64.
12. 563 U.S. at 64.
13. See the definition of “School Resource Officer” in Colorado law: “School resource officer” means a peace officer who has specialized training pursuant to a training curriculum approved by the Peace Officers Standards and Training Board, to work with school staff and students and who is assigned to a public school or charter school for the purpose of creating a safe learning environment and responding to all-hazard threats that may impact the school.” Colorado Jury Instructions, F:329. For other statutory standards for SRO training, see Alabama Code § 13A-11-72(e); Arkansas Code 6-10-128(b); Colorado Revised Statutes 22-32-109 and 24-31-312; Connecticut General Statutes 15-168, § 1; Florida Statutes 1006.12; Indiana Code 20-26-18.2-1; Louisiana Statutes 469.19; 40:2404 and 40:2404.1; Massachusetts General Laws 71§37P; Mississippi Code 37-3-32; Missouri Statutes 168.450; Code of Laws of South Carolina 5-7-12; Tennessee Code 49-6-4217; Texas Statutes and Codes § 1701.262, 1701.263 and 37.0812; Vermont Statutes 20 V.S.A. § 2358 (b).
14. Canton, 489 U.S. at 383.
15. *D.H. ex rel. Dawson v. Clayton County School District*, 904 F.Supp.2d 1301, 1305 (N.D. Georgia 2012).
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18. See, Amanda Merkwae, *Schooling The Police: Race, Disability, And The Conduct Of School Resource Officers*, 21 Mich. J. Race & L. 147, 162-163 (2015).
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