

Autism Society of Greater Phoenix Conference presents

Bullying, Discipline & Placement vs. Location

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The law firm of Kirsch-Goodwin & Kirsch is dedicated to advising and representing students in all school related matters including at IEPs, Due Process, MDRs and disciplinary matters including suspensions and expulsions, bullying, and restraint and seclusion issues.

Lori Kirsch-Goodwin has been a litigation/trial attorney for over 25 years and has had over 30 jury trials. She obtained her B.A. at Syracuse University and her law degree at the University of Bridgeport (now Quinnipiac University). She is admitted to the state and federal district courts in New York, New Jersey, Arizona and the 9th Circuit Court of Appeals. Lori entered the special education arena over 12 years ago when one of her twin boys was evaluated for special education and related services, and has been advocating for and representing other families since. Her son with special needs is now entering his second year at a local community college. Lori brings her litigation skills to the table as well as her sensitivity for the families she represents. Lori is AV® Preeminent rated by her peers and judges, representing the highest rating in legal ability and ethical standards. Lori recently won a case before the 9th Circuit Court of Appeals that involved appropriateness of a school's selection of location of a school for a student on the spectrum.

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Hope Kirsch is a licensed special education teacher and special education attorney. She advises and represents students and their families throughout Arizona in all school related matters and disputes. Prior to her law career, Hope was a special education teacher and school administrator for nearly 20 years in NYC in settings ranging from self-contained classes to special education day schools and hospital programs. She supervised and trained special education teachers in teaching strategies, curriculum development, IEPs and behavior management. Hope earned a B.S. in special education from Boston University, an M.A.(Ed.) in special education from New York University, 30+ post-graduate credits in educational supervision and administration, and her J.D. from Brooklyn Law School. She is admitted before the state and Federal District courts in NY, NJ, AZ and the 9th Circuit. She is AV-rated. Most importantly, she is the proud aunt to young man on the spectrum.

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Bullying & Being Bullied: Legal and Emotional Aspects

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Why the concern for bullying?

- Bullying fosters a climate of fear and disrespect
- Bullying can seriously impair physical and psychological health of its victims
- Bullying can negatively affect learning

→ denial of FAPE



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Effects and Impact

- Lower academic achievement
- Feelings of alienation
- Anxiety
- Depression
- Absentism
- School phobia

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Bullying defined

- Behavior
- Unwanted
- Aggressive
- Imbalance of power – real or perceived
- Repeated, or potential to be repeated, over time

www.stopbullying.gov (US Dept. H&HS)

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Bullying includes:






- ❖ Making threats
- ❖ Spreading rumors
- ❖ Attacking physically or verbally
- ❖ Purposely excluding someone from a group

Remember the elements:
Aggression, Power Imbalance, Repetition

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3 Types of Bullying

1. Verbal 
2. Social 
3. Physical 

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Examples

VERBAL:

- Saying / writing mean things
- Teasing
- Name-calling
- Inappropriate sexual comments
- Taunting
- Threatening to cause harm
- Derogatory comments
- Rumor spreading

SOCIAL:

- Relational bullying
- Hurting one's reputation or relationships
- Leaving someone out on purpose
- Telling child not to be friends w/ someone
- Spreading rumors about someone
- Embarrassing someone in public
- Extortion
- Exploitation
- Social exclusion
- Ostracism

PHYSICAL:

- Hurting person's body or possessions
- Hitting/kicking/pinching
- Spitting
- Tripping/pushing
- Taking or breaking someone's things
- Making mean or rude hand gestures

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Signs of being bullied


- Unexplained injuries
- Lost or destroyed belonging
- Frequent complaints about being ill
- Social activity avoidance
- Declining grades
- Changes in eating habits

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Bullying vs.:

- Hazing (A.R.S. § 15-2301[C][2])
- Teasing
- Assault (A.R.S. § 15-2303[A])
- Cyberbullying

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Who?

Bully	Victim
<ul style="list-style-type: none"> • Popular, have social power, like being in charge • Lack empathy, low self-esteem, less engaged • Easily frustrated, more aggressive, less parental involvement at home, family tolerates bullying • Difficulty following rules, impulsive, tolerance for violence 	<ul style="list-style-type: none"> • Fear – of bully, of isolation, of punishment, of rejection from peers • Different • Weaker • Fewer friends • Do not get along with others

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Arizona’s Anti-Bullying Law: A.R.S. § 15-341 (A)(37)

- **What:** SDs must prescribe & enforce policies to prohibit harassing, intimidating & bullying
- **Where:**
 - school grounds
 - school property
 - school buses
 - school bus stops
 - school sponsored events and activities
 - cyberbullying (internet)

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A.R.S. § 15-341 (A)(37), cont’d

- Procedure for confidential reporting
- Forms
- Reporting obligation of “suspected incidents”
- To “appropriate school official”
- Disciplinary procedures for failing to report
- Written copy of rights →
 - All students
 - Alleged victim

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A.R.S. § 15-341 (A)(37), cont’d

- Formal process of:
 - Documenting reported incidents
 - Maintaining documentation
 - Confidentiality of documentation
 - Disposition of documentation

6 years
Redact personally identifiable information

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A.R.S. § 15-341 (A)(37), cont’d

- Formal process for investigation
- Procedure for notifying alleged victim
- Disciplinary procedures for perpetrators
- Consequences for false reporting
- Procedures for protecting health & safety of those harmed, incl. contacting EMS or law enforcement.
- Definitions of “harassment, intimidation & bullying”

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JICK STUDENT VIOLENCE / HARASSMENT / INTIMIDATION / BULLYING

Defines bullying:

- Physically harms
- Damages property
- Places student in reasonable fear of harm
- Real or perceived imbalance of power or strength
- Sufficiently severe, persistent or pervasive
- As to create intimidating, threatening or abusive environment

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*****Quiz*****

What is NOT bullying?

- a. Pushing a child down stairs
- b. Calling a child names
- c. Threatening to beat up a child
- d. Emailing obscene photos
- e. Fighting



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WHAT IF YOUR CHILD IS THE BULLY?



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What should parents do?

- District and school handbook
- Ask
- Be vigilant and proactive
- Give notice 
- Ask to meet w/ school administration 
- Speak at Governing Board meeting
- Request surveillance tapes
- Meet with the 504 or IEP Team
- Seek help from OCR

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Remedies

- OCR – disability-based harassment 
<http://www2.ed.gov/about/offices/list/ocr/docs/howto.html>
- Mediation 
<http://www.azed.gov/special-education/dispute-resolution-mediation/>
- State Complaint 
<http://www.azed.gov/special-education/dispute/complaints/>
- Due Process – denial of FAPE 
<http://www.azed.gov/special-education/dispute/due-process/>
- Personal injury 

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Discipline Rights of Students with Special Needs

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Laws Governing Discipline of Students with Disabilities


- Arizona defers to federal law: discipline of students with IEPs must be in accordance w/ IDEA:
- "...the suspension or expulsion of children with disabilities, as defined in section 15-761, shall be in accordance with the [IDEA] and the federal regulations [34 C.F.R. §§ 300.1 *et seq.*]" A.R.S. § 15-844
- 20 U.S.C. 1415(k) (Procedural Safeguards)
- 34 C.F.R. 300.530 - .537 (Discipline Procedures)

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Suspensions and the 10-Day Rule

- 10 FAPE-free days
- 10 consecutive days
- > 10 non-consecutive for separate incidents of misconduct

Disciplinary change in placement = Removal from current educational placement



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Disciplinary "Change of Placement"

Removal >10 consecutive school days
OR
Series of removals ~ a **pattern** b/c:

- Series of removals total >10 days in SY;
- Substantially similar B; **AND**
- Additional factors:
 - Length of each removal
 - Total amount of time student has been removed
 - Proximity of removals to one another

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Who decides whether pattern of removals ~ change of placement?

- School
- Case-by-case basis
- "May consider any unique circumstances"
- Key: Appropriateness
- Notice to parents & PSN
- How is this reviewed (appealed)?
- Determination subject to review via DP and judicial proceedings

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Removals beyond 10 days

If not >10 consecutive days AND not COP:

- School personnel + at least one of child's teachers
- Determine FAPE, although in another setting
- Remember: provide services to enable child to progress toward meeting IEP goals


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Disciplining Students with 504 Plans

- Similar protections to students with IEPs, except:
 - Provision of educational services not required during LT suspension or expulsion to student w/ a 504 absent manifestation;
 - No stay-put.

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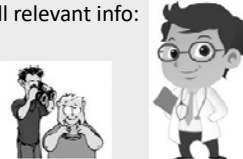
MDRs



Determine whether B manifestation of disability
Who attends? PEA rep, parents & relevant members of IEP Team (deter'd by parents and PEA)

What must be considered? All relevant info:

- Student's file
- IEP
- Teacher observations
- Any other relevant info parents provide



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Determination to be made at MDR

1. Was the conduct caused by or had a direct & substantial relationship to the student's disability, **OR**
2. Was the conduct direct result of the school's failure to implement IEP?

If YES to 1, → conduct was manifestation of disability:

- FBA;
- BIP;
- student returns to placement – unless
- parents & PEA agree to COP as part of BIP or mod to BIP

If YES to 2, school must take immediate steps to remedy failures.

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If conduct is determined to be manifestation of disability?

- Conduct FBA & develop and implement a BIP
- If already a BIP, review and modify as necessary to address the behavior

AND

- Return child to placement from which child was removed, **UNLESS** parent & school agree to a COP as part of modification of BIP

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If conduct not manifestation & not due to failure to implement?

- Student disciplined as student w/o disability, **but** must be provided services
- LT suspended
- IAES – determined by IAES
- On-line
- What if parents disagree?
- Stay-put @ IAES during DP or until expiration of placement, unless PEA & parents agree otherwise

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Recap of MDR

When?

- Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct

Who?

- The school, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA)

What must they do? Determine—

- (i) If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; **OR**
- (ii) If the conduct in question was the direct result of the LEA's failure to implement the IEP.

How do they do that?

- Review all relevant information in the student's file, including :
 - the child's IEP;
 - any teacher observations; and
 - any relevant information provided by the parents. *

*What information should parents provide????

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How would you decide?

- Student, ASD, smoked marijuana
- Student, ASD, selling marijuana
- Student, ASD, threatening others

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Appeal

- File DP Complaint (ALJ in OAH)
- Expedited DP hearing:
 - Reso meeting – 7 days unless waived
 - Hearing – 20 school days
 - Decision - 10 school days after hearing

Appeal of ALJ Dec – 35 days in AZ

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Placement during appeals

Child remains in IAES the earlier of:
the decision of the ALJ

OR

45 days

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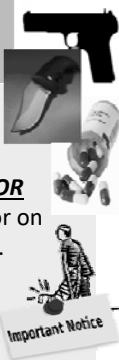
Special Circumstances - Exceptions to MDR: 45 Day Removals

IAES up to 45 school days w/o MDR:

- Weapon – carry or possess;
- Illegal drugs - knowingly possess;
- Controlled substance – sell or solicit; **OR**
- Inflict serious bodily injury @ school or on school premises or @ school function.

34 C.F.R. § 300.530 (f) and (g).


Notification to parents same day plus PSN



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Providing Services During “Disciplinary Removal”

- Services to enable student to *continue to participate in gen ed curriculum* -- although in another setting -- and to *progress toward meeting IEP goals*.
- Determining appropriate services for FAPE in alternative setting is made by the IEP Team.
- As appropriate, FBA & BIP to address B violations so they do not recur.
- IDEA, not 504



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FBA & BIP

- Functional Behavior Assessment
- Behavior Intervention Plan
- Parent consent required
- Parents may request
- 60 days to complete
- Parent right to IEE
- Attach BIP to IEP
- Data

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Protections for children not determined eligible for special education and related services

Children not determined eligible for SPED & RS who may assert procedural protections:

Children who engaged in behavior that violated a code of student conduct if the public agency had **knowledge** that the child was a **child with a disability before the behavior that precipitated the disciplinary action occurred.**

34 C.F.R. 300.534(a)

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300.534 Bases of knowledge

PEA **must** be **deemed to have knowledge** that child is child w/ a disability **if, before the behavior that precipitated the disciplinary action occurred—**

- (1) **parent expressed concern in writing** to supervisory or admin personnel or teacher **that child needs** SPED & related services;
- (2) **parent requested an evaluation**; OR
- (3) **teacher / personnel expressed specific concerns directly to SPED director** or other **supervisory personnel** about **pattern of behavior** demonstrated by the child.

34 C.F.R. § 300.534(b)

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Referral to and action by law enforcement and judicial authorities

- Nothing prohibits schools from reporting crimes committed by a child with a disability
- School reporting a crime must transmit copies of SPED and disciplinary records to law enforcement agency, but only to extent the transmission is permitted under FERPA

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Available Remedies

For students: other school programs, additional services, supports, counseling

For parents: mediation, State Complaints, DP, OCR

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Seclusion in AZ (prior law)

A.R.S. § 15-843. Pupil disciplinary proceedings (April 3, 2013)
Beginning school year 2013-2014, disciplinary policies for **confinement** of pupils **left alone** in an **enclosed space**. These policies shall include:

- (a) A process for **prior written parental notification** that confinement may be used for disciplinary purposes that is included in the pupil's **enrollment packet or admission form**.
- (b) A process for **prior written parental consent before confinement** is allowed for any pupil in the school district. The policies shall provide for an **exemption to prior written parental consent** if a school principal or teacher determines that the pupil poses **imminent physical harm to self or others**. The school principal or teacher shall make **reasonable attempts to notify** the pupil's parent or guardian **in writing by the end of the same day** that confinement was used.

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Restraint & Seclusion in AZ (current law)

A.R.S. § 15-105. Use of R&S techniques; requirements; definitions (April 10, 2015)

R&S if BOTH:

- B presents “imminent danger of bodily harm” &
- Less restrictive interventions insufficient to mitigate.

Must maintain continuous visual observ & monitoring
Ends when no longer danger
Training
Notice 24 hrs., detailed (trigger, R&S technique, duration)


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Placement vs. Location

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- Educational **PLACEMENT** = LOS (type of program)
- **LOCATION** = bricks and mortar
- IEP Team → Placement
- Administration → Location
- Caveat: *Appropriateness*

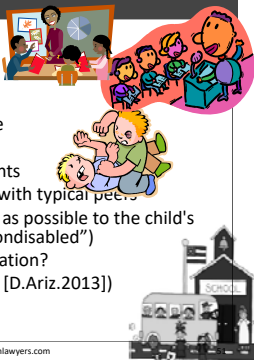


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Factors in Location – is it appropriate?

- Student-staff ratio
- Functioning levels of peers
- Transitions
- Physical features of setting
- Services and supports available
- Ages
- Behavior issues of other students
- Opportunities for interactions with typical peers
- Distance from home (“as close as possible to the child’s home” and “would attend if nondisabled”)
- Can IEP be implemented at location?

(*DVUSD v. L.P.*, 942 F.Supp.2d 880 [D.Ariz.2013])
(Pointe Educational Services)

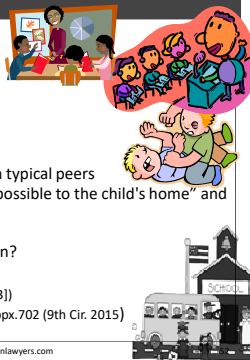


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Factors in Location – is it appropriate?

- The educational program
- Student-staff ratio
- Transitions
- Physical features of setting
- Services and supports available
- Ages
- Behavior issues of other students
- Opportunities for interactions with typical peers
- Distance from home (“as close as possible to the child’s home” and “would attend if nondisabled”)
- Functioning levels of peers
- Can IEP be implemented at location?

(*DVUSD v. L.P.*, 942 F.Supp.2d 880 [D.Ariz.2013])
(*Pointe Educational Services v A.T.*, 610 Fed.Appx.702 (9th Cir. 2015))



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Predetermining Placement

- Procedural violation
- IDEA mandates parent involvement in D-M about educational placement
- IEP meetings
- Open-mind
- Consider parents’ input
- Meaningful participation

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QUIZ: Predetermination???

“This is where your child will be next year.”

“These are some examples of possible placements.”

“We can’t place students there.”

“This is what we’re offering.”

“We think our program is better.”

“Option A is the best option.”

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Remedies & Stay-Put

- Parent consent not required
- File Due Process
- Invoke stay-put
- Child remains in *"then-current educational placement"*
- Last agreed-upon placement OR placement H.O./ A.L.J. determines is appropriate
- Functions as automatic preliminary injunction
- Why? heightened risk of irreparable harm to prematurely remove child

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The End
but only the
beginning 

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