

Arizona Autism Coalition presents

Bullying and Discipline of Students with ASD

Lori Kirsch-Goodwin, Esq.

Hope N. Kirsch, M.A.(Ed.), Esq.

Kirsch-Goodwin & Kirsch, PLLC

www.azspecialeducationlawyers.com

<http://kgklaw.blogspot.com/>

www.facebook.com/KGKLAW



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.



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.

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.

Bullying & Being Bullied: Legal and Emotional Aspects

Why the concern for bullying?

- Fear and disrespect
 - Physical and psychological
 - Negatively affect learning
- denial of FAPE



Effects and Impact

- Academics
- Alienation
- Anxiety
- Depression
- Absentism
- School phobia

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)

Bullying includes:

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



Remember the elements:

Aggression + Power Imbalance + Repetition

Types of Bullying

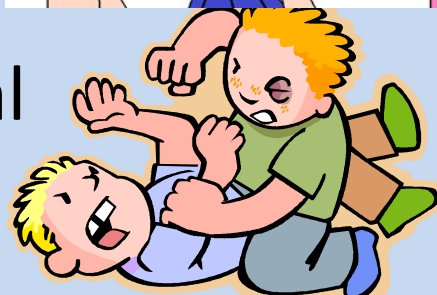
1. Verbal



2. Social



3. Physical



4. Cyber



Verbal Bullying

- Saying / writing mean things
- Teasing, taunting
- Name-calling
- Inappropriate sexual comments
- Threats
- Derogatory comments
- Spreading rumors about someone



Social (Relational) Bullying

- Intentionally excluding
- Telling others not be friends
- Spreading rumors about someone
- Embarrassing someone in public
- Exploitation

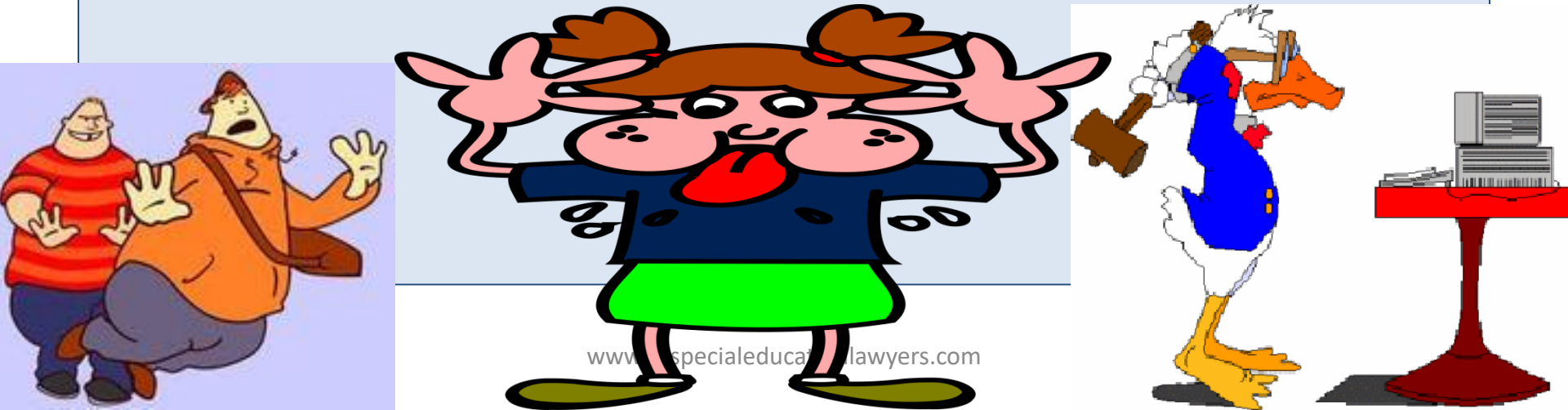


ialeducationlawyers.com



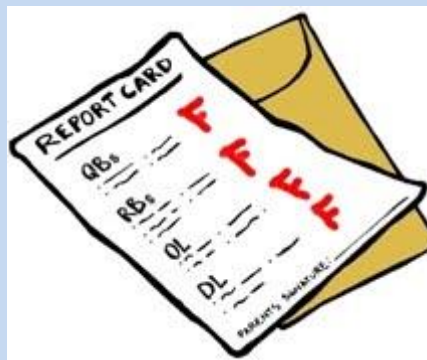
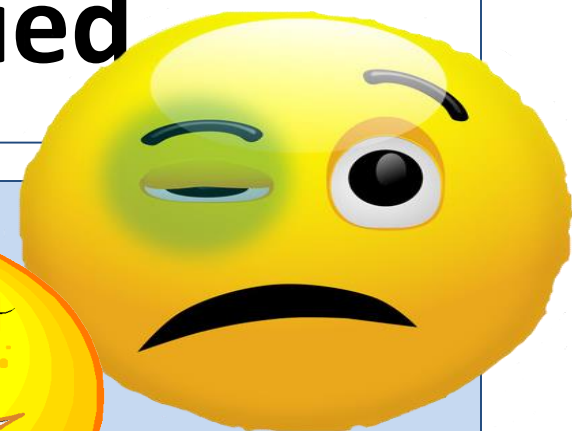
Physical Bullying

- Hurting person's body or possessions:
- Hitting /kicking
- Pinching / spitting / tripping / pushing
- Taking or breaking someone's things
- Hand gestures



Signs of being bullied

- Unexplained injuries
- Complaints re ill
- Social activity avoidance
- Declining grades
- Eating habits

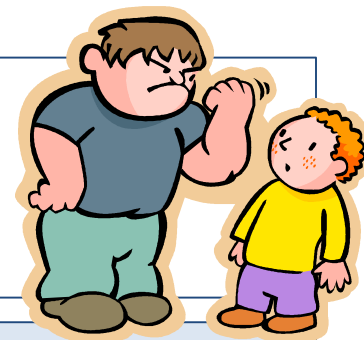


Bullying vs.:

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



Who?



Bully

- Popular, 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

Victim

- Fear – of bully, of isolation, of punishment, of rejection from peers
- Different
- Weaker
- Fewer friends
- Do not get along with others

*****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

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)

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

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

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”

Harassment

Under federal civil rights laws, harassment is:

- unwelcome conduct
- based on a protected class (race, national origin, color, sex, age, disability, religion)
- severe, pervasive, or persistent - and –
- creates a hostile environment.

Harassment can be a form of disability discrimination under Section 504 and Title II of the ADA.

“Hostile environment”

Harassment based on race, color, national origin,
sex or **DISABILITY**

++++
++++

conduct sufficiently severe, pervasive, or persistent
interferes w/ limits student's ability to participate
in or benefit from services/activities/opportunities
offered by school



hostile environment that can violate a
student's rights under Section 504 and Title II regs.

Harassment, cont'd

- Violation of student rights under 504 or Title II triggers civil rights laws
- OCR enforces 504 and Title II
- Need not include intent to harm.
- Need not be directed at specific target or involve repeated incidents.

Dear Colleague Letter, 10/26/2010.

JICK STUDENT VIOLENCE / HARASSMENT / INTIMIDATION / BULLYING


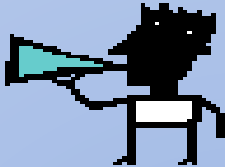
Defines bullying:

- 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

WHAT IF YOUR CHILD IS THE BULLY?



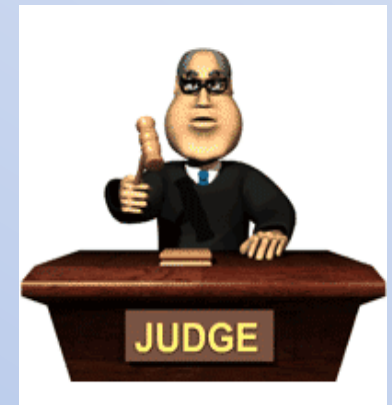
What should parents do?

- District and school handbook
- Ask for investigation report
- 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
- OCR

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



shutterstock - 65916643



Discipline Rights of Students with Special Needs

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)

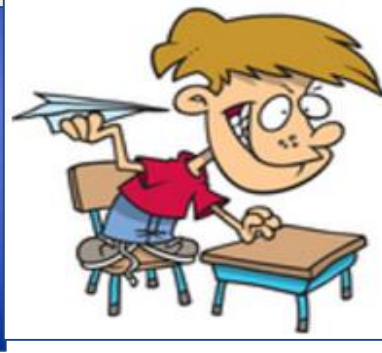
Suspensions and the 10-Day Rule

10 FAPE-free days =

- 10 consecutive days

OR

- > 10 non-consecutive for separate incidents of misconduct



Exception to 10 free FAPE days

- If school provides services to students without disabilities who have been short-term suspended, then you must also provide services to students with disabilities who are being short-term suspended.

Let's recap

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

What happens after 10 days????

- Change of placement

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

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

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.

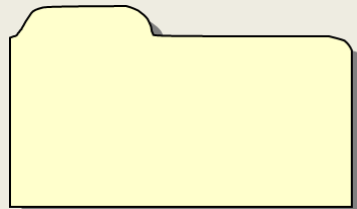
MDRs



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



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.

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

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

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???

How would you decide?

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

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

Placement during appeals

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

OR

45 days

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



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



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

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)

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)

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

Available Remedies

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

For parents: mediation, State Complaints, DP, OCR

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.

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)





Lori Kirsch-Goodwin, Esq.

Hope N. Kirsch, M.A.(Ed.), Esq.

Kirsch-Goodwin & Kirsch, PLLC

8900 East Pinnacle Peak Rd., Suite 250

Scottsdale, Arizona 85255

(480) 585-0600

www.azspecialeducationlawyers.com

<http://kgklaw.blogspot.com/>

www.facebook.com/KGKLAW