School-Related Issues: What can a defender do?

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ROADMAP

- Role of the Defender in Educational Advocacy
- Special Education Proceedings
- School Discipline Proceedings
- School Discipline for Special Education Students
- How Education Advocacy Can Help Your Delinquency Case
- School-Based Searches, Seizures and Interrogations

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Role of Juvenile Defender in Education Advocacy

- What is educational advocacy?
- What is the role of the juvenile defender in educational advocacy?

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SPECIAL EDUCATION ADVOCACY

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What is Special Education?

- A set of services and protections providing disabled students
  - Between the ages of 3 and 21
  - With a Free and Appropriate Public Education (FAPE)
  - In the Least Restrictive Environment (LRE)
  - Includes youth in juvenile facilities
- Specially designed instruction, at no cost to the parents, to meet the unique needs of a disabled child, including:
  - Instruction in the classroom, home, hospitals, institutions, and other settings
  - Instruction in physical education
  - Speech-language pathology and other related services
  - Vocational education

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What Special Education is Not

- A code word for mental retardation
- A particular class room
- Cookie-cutter "one size fits all" services
- Subject to availability or cost
- A privilege

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Sources of Special Education Law

- Federal Sources
  - IDEA 2004 (20 U.S.C. §1400 et seq.)
  - Federal Regulations (34 C.F.R. 300 et seq.)
- State Sources
  - State Statutes
    - (MS Code Ann §37-23-1 et. seq.))
- Local Sources
  - Local School District Student Handbooks and Codes of Conduct

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Entitlements Under the IDEA

- FAPE
  - Modifications and Accommodations
  - Related Services
  - Transition Services
- LRE
  - Education with children who are not disabled *to the maximum extent appropriate* through the use of supplemental aids and services
- IEP
  - An individualized education program developed yearly containing a student's services, placement and goals
- Disciplinary Protections
- Other Procedural Safeguards

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Parental Rights under the IDEA

- Right to Participate in IEP Meetings
- Right to have advocate present
- Right to access records
- Right to an Independent Educational Evaluation (IEE) at public expense
- Right to Written Prior Notice of Changes or Refusals
- Right to give or withhold consent for initial evaluation
- Dispute resolution: Mediation & Due Process Hearings
- Right to compensatory education
- Right to attorney's fees if prevailing party

*Note: Rights transfer to child at age of majority

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Helpful Resources

- State Parent Training and Information (PTI) Centers
  - https://wdcrobcolp01.ed.gov/Programs/EROD/org_list.cfm?category_cd=SPT
- State Protection & Advocacy Systems
  - http://www.acl.gov/programs/aidd/Programs/PA/Contacts.aspx
- Wrightslaw Website
  - http://wrightslaw.com
- State Department of Education Websites
  - http://www2.ed.gov/about/contacts/state/index.html
- US Department of Education Office of Special Education Programs
  - http://www2.ed.gov/about/offices/list/osers/osep/index.html

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Referral and Evaluation

- Quick Write: What are some of the red flags that your client may qualify for special education services?
- School System's Child Find Obligation

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Evaluation Procedures

- Parental Consent
- 60-Day Timeline
- Employs a variety of assessment tools and strategies
- Addresses all areas of suspected disability
- Use of Prior Evaluations
- 3-Year Reevaluation
- Right to IEE at public expense for any reason

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Eligibility Categories

- Mental retardation
  - (Also referred to as intellectual disability)
- Hearing impairment
  - Including deafness
- Speech or language impairment
- Visual impairment
  - Including blindness
- Specific learning disability
- Serious emotional disability
  - Also referred to as emotional disability
- Orthopedic impairment
- Autism
  - (Includes Asperger's Syndrome)
- Traumatic brain injury
- Other health impairment
- Deaf-blindness
- Multiple disabilities

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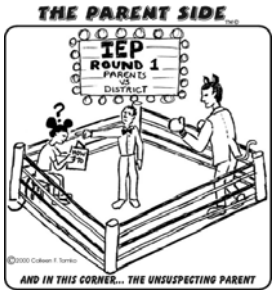
* Who, by reason thereof, needs special education and related services



DEVELOPMENT OF THE IEP

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IEP Meetings

- Timing
  - Must be held once a year but can be convened earlier
- Team members
  - Parent/Guardian
  - Special Educator (At Least 1)
  - General Educator (At Least 1 if child is in or considered for general ed classes)
  - LEA Representative
  - Anyone else with knowledge of child or special expertise
- Parental Consent
  - Can consent to all, part or none of the proposed IEP
  - Should note any lack of consent in writing on IEP and withhold approval signature

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Components of an IEP

- Child strengths, parental concerns, educational needs
- Current level of academic and functional performance
- Measurable academic and functional annual goals
- Description of how progress towards goals will be measured
- A description of special education, related services, program modifications and supports to be provided
- Placement: Extent of participation with non-disabled peers in regular education classes and reason why
- Accommodations for state and district assessments
- The frequency, duration and location of services and modifications
- Transition planning and services once child turns 16 years old

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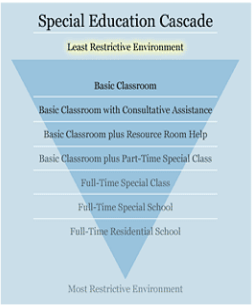
Continuum of Placement

- Mainstreaming/Full Inclusion
- Resource Class/Pull-Out
- Self Contained/Separate Class
- Special School
- Residential Placement
- Homebound / Hospital Services



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Dispute Resolution Mechanisms

Mediation

- Can be requested independently or after filing of due process complaint
- Voluntary on the part of both parties
- Cannot be used to deny or delay a parent's right to a due process hearing
- State shall bear cost of mediation
- Must provide qualified and impartial mediator

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Due Process Hearing

- Parent can be represented by self, lay advocate or attorney
- Must request within 2 years of violation
  - Unless LEA misrepresents or withholds information
- Must schedule resolution session within 15 days of receiving notice of complaint
- All evidence and evaluations must be exchanged 5 business days prior to a hearing
- Impartial hearing officer must rule on complaints within 45 days of request
  - Stay Put in effect while proceedings are pending

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Due Process

- Full adversarial hearing
  - Right to confront evidence
  - Right to exclude evidence
  - Right to a written record
  - Right to appeal (federal civil action)
- Burden of proof generally on party seeking relief
- Parents can recover attorney's fees if prevailing party

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SECTION 504

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SECTION 504

- Non-discrimination: "No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." (29 U.S.C. § 794)
- "Handicapped person means any person who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such impairment, or is regarded as having such an impairment." (34 C.F.R. Part 104.3)
- "Major life activities means functions such as . . . learning. . . ." (34 C.F.R. Part 104.3)

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Distinguishing Between Section 504 and the IDEA

- Section 504 applies to a broader group of students
  - No requirement that the disability adversely impact upon educational performance
  - Often used for students with ADHD and asthma to administer meds
- IDEA is more commonly used
  - Funding associated with IDEA
- 504 accommodation plan vs. IEP

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Advocacy at Suspension, Expulsion and Other Disciplinary Hearings

SCHOOL DISCIPLINE PROCEEDINGS

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Short Term Suspensions

- Requires only informal conference
  - Oral or written notice of the charges
  - Brief description of the evidence supporting the charges
  - An opportunity to present his or her side of the story
- No right to counsel or to call or confront witnesses
- Should be held as soon as practicable

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Long Term Suspensions & Expulsions

- More formal hearings with significant procedural protections
- What does "significant" mean? How do you determine the level of process due?
- *Mathews v. Eldrige*, 424 U.S. 319 (1976) – Balance:
  - Private interest at stake
  - Risk of erroneous deprivation of that interest through the procedures being used and the value of procedural safeguards
  - Government's fiscal interest and administrative burdens

Note: Much stronger protections for Special Education students

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Discipline Hearings

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Due Process in School Discipline

- *Goss* establishes the floor
- State statutes outline additional substantive or procedural rights
  - https://safesupportivelearning.ed.gov/sites/default/files/discipline-compendium/Mississippi%20School%20Discipline%20Laws%20and%20Regulations.pdf
- Some procedures vary from district to district

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MS Statute

§ 37-9-71. Suspension of pupils.

- The superintendent of schools and the principal of a school shall have the power to suspend a pupil for good cause, including misconduct in the school or on school property, as defined in Section 37-11-29, on the road to and from school, or at any school-related activity or event, or for conduct occurring on property other than school property or other than at a school-related activity or event when such conduct by a pupil, in the determination of the superintendent or principal, renders that pupil's presence in the classroom a disruption to the educational environment of the school or a detriment to the best interest and welfare of the pupils and teacher of such class as a whole, or for any reason for which such pupil might be suspended, dismissed or expelled by the school board under state or federal law or any rule, regulation or policy of the local school district. However, such action of the superintendent or principal Mississippi shall be subject to review by and the approval or disapproval of the school board. If the parent, guardian or other person having custody of any child shall feel aggrieved by the suspension or dismissal of that child, then such parent, guardian or other person shall have the right to a due process hearing. The parent or guardian of the child shall be advised of this right to a hearing by the appropriate superintendent or principal and the proper form shall be provided for requesting such a hearing.

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Preparing for the Hearing

- Be familiar with state regulations, education code and case law
- Know the district handbook and discipline policies
- Consult with an experienced advocate
- Review the suspension/expulsion packet
- Get all school records
- Investigate
- Client testimony and preparation
- Procedural variations

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How to Handle a Hearing

- Notify the school of your representation
- Attempt to negotiate with the school
- Be aggressive- make the school prove its case
- Did school follow policy procedurally
- Make objections for the record
- Give closing statement
- Have adult supporting witnesses to give positive character testimony during punishment phase
- Does punishment fall under progressive discipline policy?

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Appeals

Go ahead and "appeal to a higher authority". But you know Mommy rarely overrules me.

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Tips for Appeals

- Request a copy of the hearing transcript
- Submit a written statement to the local board and offer character letters
- Review the transcript and cite to it in your brief
- Research past decisions
- Always request an oral argument
- Bring exhibits to show hearing officer

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Issues to look for on appeal

Denial of Due Process
- Notice of disciplinary action
- Improper conduct of the hearing by hearing officers
- Opportunity to be heard, to be present at the hearing, to respond to evidence and to cross-examine witnesses
- Recording of hearing; availability of record to all parties

Abuse of Discretion
- Punishment is arbitrary and capricious
- Punishment to harsh / progressive discipline

Record Evidence
- Hearsay - decision cannot be based on hearsay
- Conflicting evidence
- Lack of sufficient evidence
  - Ex. need more than charging sheet & must have proof of disruption or danger to school when students charged with off campus conduct

Unconstitutionality of the policy
- Overly broad

Self-defense

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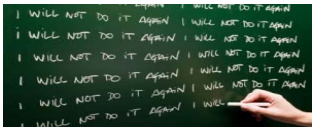
Discipline of a Student with a Disability



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IDEA Disciplinary Protections

10-Day Rule

- If removal is for less than 10 consecutive school days, only general disciplinary protections apply
- Manifestation Determination Review (MDR) is required if removal constitutes a change of placement
  - Removal is for more than 10 consecutive school days
  - Removal is part of a series of shorter suspensions totaling more than 10 days that constitute a pattern of removals

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Manifestation Determination Review

- Required within 10 school days of any decision to effect a disciplinary change of placement
- Must be ruled a manifestation if the conduct was:
  - Caused by or had a direct and substantial relationship to the child's disability
  - The direct result of a failure to implement the IEP

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Behavior is a Manifestation

- If conduct is ruled a manifestation, LEA must:
  - Return child to original placement unless parent consents
  - Conduct a Functional Behavioral Assessment (FBA) if none
  - Create or Review a Behavior Intervention Plan (BIP)

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Behavior is Not a Manifestation

- If behavior is not a manifestation, general disciplinary rules apply, except:
  - Must still provide FAPE, but can be provided in alternative educational setting
- Can appeal decision through a due process hearing
  - Expedited hearing must occur within 20 school days, with a determination 10 school days later

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Student Not Yet Identified

- If the school acknowledges the student may have a disability, the child is entitled to an MDR process
- A school will be "deemed to have knowledge" if:
  - The parent expressed concern in writing to a teacher or administrative personnel;
  - If the parent requested in writing or orally that the child be evaluated; or
  - If the teacher or other school personnel express concerns to the director of special education or other supervisory personnel.
- A school is *not* deemed to have knowledge if:
  - The child has a disability but the parent has not given consent.
  - If the child has been evaluated and determined not to have a disability.

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Exception to MDR Rule

- Student may be removed to an interim alternative educational setting for up to 45 days regardless of whether the behavior was a manifestation if the student:
  - Carries or possess a weapon
  - Knowingly possess, uses, sells or purchases illegal substances
  - Inflicts serious bodily injury upon another on school premises
- Requirement to provide FAPE still applies in IAES

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IMPLICATIONS FOR DELINQUENCY CASE

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How can discipline advocacy benefit your delinquency case?

- Discovery
- Investigative Leads
- Impeachment Materials
- Preventing Incriminating Statements
- Reducing Pretrial Detention/ Improving Disposition Options

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Implications of IDEA for a Delinquency Case

- Arrest and Intake
- Detention
- Pretrial Considerations
  - Motions to Dismiss
  - Competence
  - Miranda and Other Waiver Issues
  - Transfer Hearings
- Trial
  - NGRI
  - Mens Rea Defenses
  - Trial Accommodations

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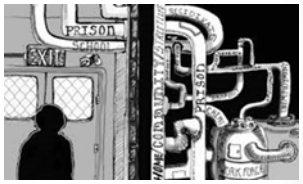
Implications

- Disposition
  - Dispositional Orders
  - Placement and Probation Conditions
- Post-Disposition
- Aftercare



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Arrest and Intake

- Disability may be relevant to child's behavior at arrest.
- If child not getting appropriate services at school to address disability, argument might be that fixing the IEP would be more effective than court intervention.

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Rights of Detained Youth

- Youth are entitled to special education services while in juvenile detention facilities.
- Identified youth under the age of 22 incarcerated in adult facilities are still entitled to FAPE.

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Pre-trial Considerations

- Motion to Dismiss if behavior is result of manifestation of disability and school failed to identify the child's special needs.
  - "[T]he bill also authorizes proper referrals to police and appropriate authorities when disabled children commit crimes, so long as the referrals **do not circumvent the school's responsibilities under IDEA**." 143 Cong. Rec. 54403 (1997)
- Be proactive with the family to ensure IEP is developed and refined to meet the child's needs.
- Ask for a GAL with educational law experience to assist with navigating the process.

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Competency Issues

- Is your client competent to stand trial?
  - Low intellectual functioning, communication problems, emotional disturbances and memory problems are all factors that could raise the need for a competency evaluation.
- Miranda
  - Was the waiver knowing, voluntary, and intelligent?
  - Age, reading abilities, education level, and processing issues all are relevant to determining the validity of the Miranda warnings.

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Trial

- You may need to ask for accommodations in the courtroom for a disabled client.
  - Simplified colloquies
  - Slower pace
  - Breaks
- A youth's educational disability may be relevant to lack of capacity to form intent.

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Disposition

- Dispositional Orders
  - Getting language in the order about the child's disabilities may help spur the school to act.
  - The Order should require that the child receive IDEA services while in a placement outside of the home.

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Placement & Probation Conditions

- The conditions of probation must take into account the youth's disability to be certain he receives SPED services.
- Ensure the child can realistically comply with probation conditions and can still participate in services to address his disability.
- In determining out of home placements, advocate for those that take into account and address disability related needs.

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Post-Disposition

- Follow-up to make sure child is receiving appropriate educational services under IDEA after disposition.
  - Could help child be successful on probation
  - Could help with success in placements and other programs
  - Could help with reentry

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School Chronologies

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Chronology of Schools & Services

- List all of the schools and years attended in chronological order
- List all special education services the client received each year
- Look for patterns of behavior and performance
- Compare annual goals and objectives to determine progress
- Show the judge or prosecutor where the problems should have been identified by the school system and that they were not addressed through appropriate evaluation and special education services.

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Other Uses for the Chronology

- Help identify potential witnesses that can speak on the child's behalf
  - Teacher and counselor comments
  - Classes client did well in
  - Evaluators
- Identifying the student's strengths and weaknesses
- Identifying relevant services and/or placement

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Concluding Tips

- Help the judge and the prosecutor understand that children often suffer severe collateral consequences at school for their delinquent behavior.
- Be creative about using educational record to assist your client.
- Understand and advocate for appropriate educational services for your client or ask for GAL.

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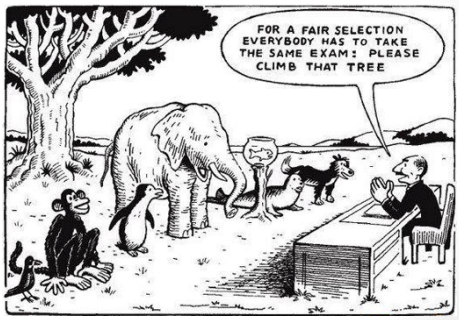

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SCHOOL-BASED SEARCHES, SEIZURES AND INTERROGATIONS

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Searches at School

- Fourth Amendment applies (New Jersey v. T.L.O.)
- Standard varies depending on
  - Who initiated search?
  - Who performed search?
- If student consents to search:
  - probable cause/reasonable suspicion not required
  - consent cannot be established by merely showing "acquiescence to a claim of lawful authority."
  - consent must be voluntary (totality of circumstances)

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Searches By School Officials

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

- Fourth Amendment (through 14th amendment) applies to searches conducted by public school officials
- Warrant and Probable Cause not required
- Reasonable Suspicion Standard

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Searches By School Officials

The Test for Reasonable Suspicion:

- justified at inception, *and*
- reasonable in scope

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Justified at Inception

- "Reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school" (*T.L.O.*)

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Justified at Inception

What is reasonable?

- Reliable tips (including anonymous tips with specifics)
- Direct observations
- Prior history (needs to be related; varies by juris.)
- Common sense conclusions about individual behavior, when more than a hunch

What is not reasonable?

- Student's status as rule breaker
- Hunches or rumors
- Association with wrongdoers
- Furtive gestures or non-cooperation

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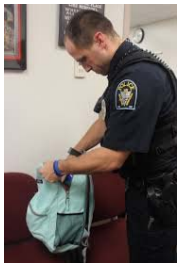
Reasonable in Scope

- Means of search must be reasonably related to objectives, and
- Not excessively intrusive
  - In light of age and sex of student, and
  - Nature of infraction



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Reasonable in Scope

Nature of the Infraction

- Courts weigh *intrusiveness of search* against the *school's interest*
- Nature of the offense implicates the importance of the school's interest
  - Drugs and weapons – legitimate interest
  - Stolen money – low interest

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Mississippi: Searches by School Officials

- School Officials: Reasonable Suspicion Standard

Covington Cnty. v. G.W., 767 So.2d 187 (Miss. 2000)

- After a student reported that defendant was drinking in school parking lot before class, the search of defendant's vehicle by school officials was justified because there was reasonable suspicion to believe that the student had been in the school parking lot drinking before class.

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Searches By Police at School

- Exclusively By Police = Probable Cause
  - Not requested or authorized by school officials
  - Clearest example: detective comes to school to investigate a crime that occurred off-campus

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School Officials and Police

- Standard depends on level of police involvement
- Factors include:
  - Who initiated or requested the search?
  - Did school officials authorize the search?
  - Who conducted the search?
- Always argue probable cause when officers are involved

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School Resource/Liaison Officers

- Depending on district, may be employed by:
  - Local law enforcement
  - School system
- TRIAD Model
  - Teacher
  - Counselor
  - Law enforcement officer
- Look to MOUs for specific duties

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School Resource/Liaison Officers

- Nationally, more often than not, SROs are considered school officials for purposes of search and seizure
- Factors courts consider include:
  - Nature of employment
    - Are they employed by the school or members of the police force?
    - Look to Memos of Understanding and/or other school policies
  - Nature of job responsibilities within the school
    - Is the SRO furthering educationally-related goals?

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School Interrogations: Miranda?

Objective Analysis

- Whether a reasonable person feels that he or she was not at liberty to terminate the interrogation and leave. Thompson v. Keohane 516 U.S. 99, 112 (1995).
- Whether there is a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest. CA v. Beheler 463 U.S. 1121, 1125 (1983).

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J.D.B.

- Child's age has a bearing on the Miranda analysis if the child's age was known to the officer, or was objectively apparent to a reasonable officer.

- "A child's age is far 'more than a chronological fact.' It is a fact that 'generates commonsense conclusions about behavior and perception.' Such conclusions apply broadly to children as a class. And, they are self-evident to anyone who was a child once himself, including any police officer or judge."

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Custody Factors

- Number of adults present
- Size of the adults
- Number of uniformed officers
- Presence of weapons
- Presence of handcuffs or other restraints
- Location of the interrogation (*e.g.,* no windows, small office)
- Length of interrogation
- Brought to location by compulsion or force
- Ability or perception of ability to leave
- Tone of voice
- Persistent interviewing or interrogation after repeated denials
- Positioning of adults in the interview (*e.g.*, adults standing, child seated)

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School Interrogations

Factors to consider:

- Who conducted the interrogation?
  - School official = almost never custodial
    - In what capacity is the school official acting? For an educational purpose?
  - SROs treated more like law enforcement in this analysis
- Who was present for the interrogation?
  - Police / SRO presence increases likelihood of custodial finding
- Circumstances of questioning
  - Was the student mandated to report to the office?

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Questions?

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