



Student Mental Health: The Public School's Legal Role

Sarah Schmanke and Betsey Helfrich, Mickes O'Toole, St. Louis, MO

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Student Mental Health: The Public School's Legal Role

By: Sarah A. Schmanke & Betsey A. Helfrich

Mickes O'Toole, LLC

What is a school district's legal obligation with regard to student mental health? This detailed outline will examine pertinent case law and best practices regarding school districts' legal obligations to assist students with their mental health needs and minimizing liability related to student mental health issues. This outline will focus on the following potential obligations or issues related to student mental health: awareness; identifying, assessing and providing a free appropriate public education to students with a mental disability; protecting students against discrimination, harassment and bullying; the duty to warn; crisis intervention; and referrals and/or collaboration with outside agencies or other health care professionals.

I. AWARENESS

A. "Mental Health," its rate of occurrence, and relationship to suicide

1. The U.S. Department of Mental Health and Human Services explains that mental health:
 - a) Includes emotional, psychological, and social well-being;
 - b) Affects the way we think, feel, and act;
 - c) Helps determine how we handle stress, relate to others, and make choices;
 - d) Is important at every stage of life, from childhood and adolescence to adulthood; and
 - e) Is variable -- responding to cultural, environmental, physical, and biological factors.

<https://www.mentalhealth.gov/basics/what-is-mental-health/index.html>

2. Nearly **fifty percent** of children will have a diagnosable mental illness at some point before they turn 18. *Child Mind Institute*. Suicide is the **third** leading cause of death in youth ages 10-24. **Ninety percent** of those who died by suicide had an underlying mental illness. Half of the individuals living with mental illness experience onset by the age 14 and 75% by the age of 24. *National Alliance on Mental Health*.

B. Legislative Initiatives -- Mandated Awareness Training for Schools

1. **State Legislation:** In the 2013-2014 fiscal year, 14 states enacted legislation or appropriations for Mental Health First Aid/training for

educators. Seven more states considered legislation. In 2015, at least 18 states considered legislation related to school mental health. For example, in 2015 North Dakota passed SB2048, requiring teachers to have mental health training as a component of licensure. The same year, other states, such as Georgia, focused on a particular mental health-related aspect, such as suicide prevention and awareness. The trend appears to be continuing in 2016; at least one state, Missouri, has passed legislation requiring training related to student suicide risk factors.

2. **Federal Legislation:** In 2015, multiple bills were introduced at the federal level to address student mental health, including:
 - a) **Mental Health in Schools Act 2015** (H.R. 1211/S. 1588): Provides federal funding to train school staff on mental health related issues, establish school-based mental health services, and create schools and community mental health partnerships.
 - b) **Mental Health First Aid Act of 2015** (S. 711/H.R. 1877): Provides funding for training of teacher/school administrators among others on recognizing symptoms of common mental illnesses/substance use disorders, de-escalating crisis situations, and referrals to community resources.

II. IDENTIFY, ASSESS AND PROVIDE FAPE

- A. **Child Find Obligation:** Both IDEA and 504 describe/anticipate an affirmative child find obligation. School districts should not ignore red flags that trigger the duty to identify, locate and evaluate students.

1. **IDEA:**
 - a) Child find is the affirmative, ongoing obligation of states and local districts to identify, locate, and evaluate all children with disabilities residing within the jurisdiction that either have, or are suspected of having, disabilities and need special education as a result of those disabilities. 34 CFR 300.111(a)(i).
 - b) The IDEA Regulations note that child find also must include children who are suspected of being a child with a disability and in need of special education, even though they are advancing from grade to grade. 34 CFR 300.111(c).
 - c) IDEA requires schools to assess a student's needs in all areas of suspected disabilities including but not limited to the student's emotional status. 34 CFR 300.304 (C)(4).
 - d) If the assessment shows that the student has an Emotional Disturbance, as defined by Federal Regulations, **and by reason**

thereof, needs special education and related services, then the student has an IDEA disability. 34 CFR 300.8.

2. **SECTION 504:**

- a) Requires districts annually to “undertake to identify and locate every qualified [individual with a disability] residing in [the district's] jurisdiction who is not receiving a public education.” 34 CFR 104.32(a).
- b) Requires districts to evaluate students “who, because of handicap, need or are believed to need special education or related services.” 34 CFR 104.35(a).
- c) Although not an exhaustive list, the regulations that define "mental impairment" for purposes of eligibility under Section 504 include mental illness as an example. *See* 34 CFR 104.3.

3. **Child Find Violations – Case Examples:**

- a) ***In re Student with a Disability***, 112 LRP 5256 (NM 2012): District violated its child find obligation by assessing student after suicidal threat but failing to evaluate student despite long history of behavior and attendance issues.
- b) ***Moore v. Hamilton Southeastern Sch. Dist.***, No. 1:11-cv-01548, 2013 WL 4607228 (S.D. Ind. Aug. 29, 2013): After student committed suicide, parents sued school district claiming that the district violated IDEA when it improperly relied on student’s average grades in denying eligibility. Court granted the school district’s motion for summary judgment on the child find claim. Evidence failed to show a violation of the district's specific procedural duty under the “child find” mandate.
- c) ***Elida (OH) Local School District***, Office for Civil Rights, Midwestern Division, Cleveland (2014), available at <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/15141143-b.pdf>: A school district violated Section 504’s child find requirement when it failed to assess a student with a hearing disability.
- d) **Dear Colleague Letter**, Office for Civil Rights (Jan. 19, 2012), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201109.html>: If a student has a mental health issue that substantially limits a major life activity, the student may need

services to have an equal opportunity to participate in a public school's activities, that student has a 504 disability.

B. Providing FAPE

1. Conduct a comprehensive evaluation

a) IDEA -- Districts must assess a student in all areas related to the suspected disability including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. 34 CFR 300.304 (c)(4).

b) IDEA -- Two categories for mental health challenges 34 CFR 300.8.

(1) Emotional Disturbance (ED)

Explicitly includes some mental health disorders, and excludes children who are socially maladjusted

(2) Other Health Impairment (OHI)

Implicitly includes a much broader range of mental health disorders "limited strength, vitality, or alertness" "due to" "health problem" and "adversely affects educational performance"

A large majority of mental health issues are categorized under ED.

2. Determine related aids and services

a) Determine what is required for the student to receive educational benefit.

b) IDEA: "Related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education. 34 CFR 300.34 (a).

c) Related services include speech-language pathology and audiology services; interpreting services; psychological services; physical and occupational therapy; recreation, including therapeutic recreation; early identification and assessment of disabilities in children; counseling services, including rehabilitation counseling; orientation and mobility services; medical services for diagnostic or evaluation purposes; related services also include school health services and school nurse services, social work services in schools, and parent counseling and training. 34 CFR 300.34 (a).

- d) Section 504: related aids and services are part of an appropriate education and must be provided to the extent that they enable the school district to meet the individual educational needs of students with disabilities as adequately as it meets the needs of nondisabled students. 34 CFR 104.33 (b). Whether a student with a disability is entitled to a related service is a decision that must be made by a group of knowledgeable persons as per 34 CFR 104.35 (c).
 - e) Consider parent counseling as a related service 34 CFR 300.34 (c)(8).
 - (1) The purpose of parent counseling and training is to provide support and information to the parents in order to better equip them to participate in their child's educational program. 71 Fed. Reg. 46,573.
 - (2) The related service of "parent counseling and training" means:
 - (a) Assisting parents in understanding the special needs of their child;
 - (b) Providing parents with information about child development; and
 - (c) Helping parents acquire the necessary skills that will allow them to support the implementation of their child's IEP. 34 CFR 300.34 (c)(8).
3. School districts should not overlook bullying and mental health concerns raised at an IEP meeting.
- a) *T.K. v. New York City Dept. of Ed.*, 810 F. 3d 869 (2nd Cir. 2016): refusal to discuss bullying in an IEP meeting “significantly impeded the parents’ meaningful participation in the IEP process.” District had to pay for a year of student’s private schooling.
 - b) *Long v. Murray County School District*, 522 Fed.Appx. 576 (11th Cir. 2013, unpublished). A student with Asperger syndrome committed suicide after being harassed. Prior to the suicide, the school responded by disciplining the perpetrators, developing a safety plan for the student, and increasing supervision. The school took a variety of types of action to end the harassment, “which showed it was not deliberately indifferent.” The question isn't whether the actions were fully effective.
 - c) Keep in mind OCR’s position on victims of sexual violence, **OCR Questions and Answers on Title IX and Sexual Violence (April**

2014), available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

(1) Students who have never been identified as being disabled under IDEA or 504 may, as a result of being the victim of sexual harassment or sexual violence, “develop” a qualifying disability.

(2) IDEA or 504 students who are victims of sexual harassment or sexual violence may require additional services including, but not limited to, psychological or counseling services

OCR has not provided much in the way of specific guidance on what it means by “counseling” or, when required, who is to pay for needed psychological services.

d) And check state law, e.g.:

See Mass. Gen. Laws ch. 71, § 370 (2016) “Whenever the evaluation of the [IEP] team indicates that the child has a disability that affects social skills development or that child is vulnerable to bullying, harassment or teasing because of the child’s disability, the [IEP] shall address the skills and proficiencies needed to avoid and respond to bullying, harassment or teasing.”

III. PROTECT AGAINST DISCRIMINATION, HARASSMENT AND BULLYING

A. Potential Federal Law Claims

1. IDEA

- a) Generally no money damages, only educational relief for educational injuries.
- b) Strong administrative exhaustion requirement.

2. Section 1983

- a) Premised on violation of constitutional rights, usually the 14th Amendment
- b) Difficult to establish due to high pleading standards.

3. Section 504/ADA

- a) Generally requires either deliberate indifference or, bad faith or gross misjudgment. *See B.M. v. South Callaway R-II School Dist.*, 732 F.3d 882 (8th Cir. 2013) (Petitioner failed to present

evidence of bad faith or gross misjudgment by the school district – an essential element of his Section 504 claim).

B. Potential State Law Claims

1. **State Anti-Discrimination and Harassment Laws** – May apply to claims of disability discrimination/harassment by students against school districts.
2. **State Law Torts** – Immunities for school districts and public employees may apply.

C. Disability Harassment/Bullying –Case Example

1. *Estate of Lance, et al., v. Lewisville Indep. Sch. Dist.*, 743 F.3d 982 (5th Cir. 2014): Fourth grade student committed suicide in nurse’s bathroom. Student was emotionally disturbed and had made suicidal statements in second grade. Parents sued the school district, alleging claims under Section 1983, Section 504, and Texas law. Court affirmed summary judgment in District’s favor on Section 1983 and Section 504 claims. “Section 504 does not require that schools eradicate each instance of bullying from their hallways to avoid liability.”

D. Contrast Between Two “Bullycide” Cases Filed in the Same Court

1. *Myers, et al., v. Blue Springs Sch. Dist. R-IV, et al.*, No. 10-00081 (W.D. Mo. filed 2010), **Order Denying Motion for Judgment on the Pleadings (Aug. 17, 2012)**, available at <http://www.clearinghouse.net/chDocs/public/ED-MO-0002-0004.pdf>
 - a) Parents filed state and federal claims against school district, employees, classmate and parents alleging son committed suicide as a result of **disability** harassment and bullying.
 - b) School District’s **motion for judgment on the pleadings on the Section 1983 claims was denied**. Individual employees were dismissed from Section 504 claim and granted qualified immunity on Section 1983 claim but denied immunity on tort claims.
2. *Nugent, et al., v. Carl Junction R-1 Sch. Dist., et al.*, No. 13-05089 (W.D. Mo. filed 2013), **Order Granting in part and Denying in Part Motion for Judgment on the Pleadings (Sept. 30, 2014)**.
 - a) Parents filed state and federal claims against school district and employees alleging son committed suicide allegedly as a result of **gender** harassment/bullying.

- b) School district and individual employees' **motion for judgment on the pleadings on the Section 1983 claims was granted.**

E. OCR Disability Harassment Administrative Standard

1. **2000 Dear Colleague Letter**, available at <http://www2.ed.gov/about/offices/list/ocr/docs/disabharassltr.html>:

- a) Addressed problem of disability harassment
- b) Can lead to denial of FAPE under 504, ADA or IDEA
- c) "Harassment of a student based on disability may decrease the student's ability to benefit from his or her education and amount to a denial of FAPE."

2. **2010 Dear Colleague Letter**, available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html>:

- a) Addressed problem of bullying
- b) If based on disability, schools must treat bullying as more serious than simple inconsiderate student-to-student conduct.
- c) Some bullying violates 504 and ADA

3. **2013 Dear Colleague Letter**, available at <http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/bullyingdcl-8-20-13.pdf>:

- a) Bullying, even if not disability-related, can result in a denial of FAPE under IDEA.
- b) IEP team should meet to address possible changes to IEP that may be needed in light of the bullying.
- c) Bullying may also trigger a school's child find obligations under the IDEA.
- d) If the bully is a special education student, IEP team should review the student's IEP to determine if additional supports and services are needed to address the inappropriate behavior.
- e) Once school district is on notice of possible disability-based harassment, it must investigate and respond.
 - (1) Response: ending the conduct, eliminating hostile environment and its effects, and preventing any recurrence.

4. **OCR Dear Colleague Letter, 10/21/14**, available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-bullying-201410.pdf>

- a) OCR considers several factors, including:
 - (1) Was a student with a disability bullied by one or more students based on the student's disability?
 - (2) Was the bullying conduct sufficiently serious to create a hostile environment?
 - (3) Did the school know or should it have known of the conduct?
 - (4) Did the school fail to take prompt and effective steps reasonably calculated to end the conduct, eliminate the hostile environment, prevent it from recurring, and, as appropriate, remedy its effects?
 - (a) If the answer to each of these questions is "yes," then OCR would find a disability-based harassment violation under Section 504 and, if the student was receiving IDEA FAPE or Section 504 FAPE services, OCR would have a basis for investigating whether there was also a denial of FAPE under Section 504.
 - (b) Even if the answers to one or more of these questions is "no," for a student who was receiving IDEA FAPE or Section 504 FAPE services, OCR may still consider whether the bullying resulted in a denial of FAPE under Section 504 that must be remedied.

F. Practical Tips for Minimizing Liability

- 1. Carefully review student surveys and results.
- 2. Consider use of climate/anti-harassment/anti-bullying committees in district and buildings.
- 3. Training for employees can be critical.
 - a) Make sure trainings are in line with district practices.
 - b) Tailor training to buildings and positions.

- c) Document training and keep documentation of training materials as well as those who received the training.

G. Defense Strategies

1. Serve notice to preserve electronic information including social media on Plaintiff immediately.
2. Aggressively seek discovery of electronic/online information.
3. Scrutinize causal link between alleged wrongful act and injury.
4. Utilize expert witnesses.

IV. DUTY TO WARN AND CRISIS INTERVENTION

A. Failure to Warn or Protect From Self-Injury - Case Examples

1. *Estate of Smith v. W. Brown Local Sch. Dist.*, 26 N.E.3d 890 (Ohio App., 2015): Parents of high school student who committed suicide sued school district and administrators for negligence. Court found that school officials were entitled to tort immunity because the officials did not act in a wonton or reckless manner in allegedly failing to inform student's parent of his alleged threat to kill another student and then kill himself.
2. *Armijo By & Through Chavez v. Wagon Mound Pub. Sch.*, 159 F.3d 1253 (10th Cir. 1998): After being suspended and driven home without parental notification, student committed suicide. Parents then brought action against school district and various school officials under IDEA and § 1983. Tenth Circuit affirmed the district court's dismissal of the IDEA claim. It declined to exercise its pendent appellate jurisdiction to consider parents' cross-appeal.
3. *S.D. v. Moreland Sch. District*, No. 14-cv-00813, 2014 WL 3772606 (N.D. Cal. 2014): Student alleged that district was deliberately indifferent to her self-injurious behaviors, notably head banging. The Court refused to dismiss her Section 504 claim and held that there were sufficient pleadings to allege that: 1) Plaintiff had a federal right to "be educated in the absence of continuous injury, abuse or discrimination;" and 2) the district had knowledge of this and failed to act to minimize or prevent self-injurious behaviors.

B. Counselor's Duty to Warn

1. *Eisel v. Bd. of Ed. of Montgomery County*, 376 A.2d 447 (Md. 1991): School counselors have a duty to use reasonable means to attempt to prevent suicide when they are on notice of a child or adolescent student's suicidal intent. Court recognized that school counselors hear a lot of

suicidal ideation and not all threats are substantial, yet, “the consequence of the risk is so great that even a relatively remote possibility of a suicide may be enough to establish a duty.”

2. ASCA Ethical Standards for School Counselors: when school counselors work with a potentially suicidal student, the counselor must notify the parent/guardian.

C. Crisis Intervention

1. Formulate and implement a crisis intervention plan for each building in conjunction with mental health experts.
2. Publicize in all school buildings ways for students to seek help, such as confidential help telephone numbers.
 - a) National Suicide Prevention Lifeline: 1-800-273-TALK (8255)
3. Do annual training on crisis intervention including the warning signs/risks of suicidal behavior and how to respond to concerns or threats of self-harm.
 - a) Trainings should include at a minimum:
 - (1) Directive to report immediately to administration and school district’s mental health professionals
 - (2) Directive not to leave student alone
 - (3) Child find obligations
4. **Non-Exhaustive List of Considerations for Responding to Specific Crisis Situations:**
 - a) Analyze whether a search of the student for any potential method of harm (knife, pills, etc.) is reasonable and appropriate
 - b) Determine whether notification to a state child welfare agency is required
 - c) Consider contacting law enforcement or other emergency responders
 - (1) *M.C. and R.C. ex rel. v. Arlington Cent. Sch. Dist.*, No. 11-CV-1835, 2012 WL 3020087 (S.D.N.Y. 2012): School district did not discriminate against IEP student whom they believed to be suicidal when the district sent the student to

the hospital for evaluation in ambulance over the parent's objection.

- d) Carefully consider how the notification to the parent/guardian will be handled and document the notification
- e) If the school district is considering removing a student from school the following should be analyzed:
 - (1) Is this a threat against others?
 - (2) Is discipline appropriate?
 - (3) Provide due process
 - (4) Is this a special education student?
 - (a) Has the student's placement been changed?
 - (i) ***Boston (MA) Public Schools***, 53 IDELR 199 (OCR 2009):
 - (a) School told parent to pick up son who expressed suicidal ideation and to have him psychologically evaluated before he could return to school.
 - (b) District had a policy that students returning from "emergency treatment for suicide intervention must bring a letter from an appropriate medical/mental health provider."
 - (c) Student was denied re-entry to school until he could provide such a letter and missed a total of 17 school days without any educational services.
 - (d) OCR Concluded: Student was excluded from school based on his failure to obtain a medical clearance with regard to a suicide risk that reasonably could have been related to his disability. Student's exclusion from school for 17 days constituted a significant change in placement.

When a school takes action with respect to a significant change in placement, the district must conduct an evaluation of the student. 34 CFR 104.35

- (e) OCR mandated that for students with disabilities who will be absent for more than 10 days, the team will consider whether the student can return to school and if not, whether any services or accommodations are necessary to provide FAPE while student is out.
- (f) OCR also stated that students who are not already determined eligible under Section 504 will be referred to the student support team for consideration of whether as a consequence of the suicide threat, the student is believed to need additional support, accommodations or services.
- (g) District agreed to remove the policy that required a note from a mental health expert before a student could return to school.
- (h) Per OCR, District should have convened team to consider data relating to student's needs. Information considered by the team could include:
 - whether further evaluations were necessary
 - whether any modifications to the student's program and placement were required
 - if the student was determined unable to return to school, whether any services or accommodations were necessary

to provide FAPE while the student remained out of school.

- f) Refer for evaluation for special education/504 or reconvene IEP/504 or crisis team:
 - (1) Look at data from suicide intervention
 - (2) Consider social-emotional-behavioral needs not currently addressed
 - (3) Consider safety plan and/or increased supervision, monitoring, counseling/mental health services
- g) After the immediate crisis is over, hold a conference with the student and parent/guardian to discuss:
 - (1) How the students and parents want to address the issue with other students if the crisis situation is well known by the student body
 - (2) Steps to help make the student comfortable at school
 - (3) Possible safety plan
- h) Monitor student closely and keep in contact with parents

V. REFERRALS TO AND/OR COLLABORATION WITH AGENCIES OR OTHER MENTAL HEALTH PROFESSIONALS

A. Mandated Referrals/Notifications

1. McKinney-Vento Homeless Education Assistance Improvements Act

- a) Requires LEAs to provide referrals to mental health services for homeless students. 42 U.S.C. § 11432(f)(4) (2016).
- b) State laws may require referrals to an agency or health care professional.
 - (1) Example: Hotlines for neglect of medical/mental health treatment

B. Wraparound Services

- 1. Consider forming community partnerships with local agencies and mental health professionals that would allow students with mental health illnesses the opportunity to receive wraparound services.

- a) Wraparound services are “individualized community-based services that focus on the strengths and needs of the child and family. Wraparound services are developed through a team-planning process, where a team of individuals who are relevant to the well-being of the child (such as family members, service providers, teachers, and representatives from any involved agency) collaboratively develop and implement an individualized plan of care, known as a wraparound plan.” *Bazelon Center for Mental Health Law*, (<http://www.bazelon.org/where-we-stand/success-for-all-children/mental-health-services-for-children/wraparound-services-.aspx>)

C. **Sharing Student Records and Data**

1. A school district may disclose education records to child welfare agency representatives when reporting child abuse and neglect. FPCO guidance 2004, *Letter to University of New Mexico re: Applicability of FERPA to Health and Other State Reporting Requirements* (<http://www2.ed.gov/policy/gen/guid/fpc/ferpa/library/baiseunmslc.html>)
2. A Family Educational Rights and Privacy Act exception for health and safety emergency may also apply if disclosure of the information is necessary to protect the health or safety of the student or other individuals.

3. **Data Sharing**

- a) March 2016, U.S. Department of Education published *Data-Sharing Toolkit for Communities: How to Leverage Community Relationships While Protecting Student Privacy* which provides guidance for data sharing with outside agencies with complying with FERPA.
<http://www2.ed.gov/programs/promiseneighborhoods/datasharingtool.pdf>
- b) Generally, there are three categories of data that may be shared with outside agencies:
 - (1) De-identified data
 - (2) Data shared with written parental consent
 - (a) Identified as the “recommended and often most effective way of sharing education records”
 - (b) Consider incorporating consent request into registration process
 - (3) Data shared under a FERPA exception

- (a) School officials exception: allows the disclosure of personally identifiable information without consent to school employees and volunteers if the employee/volunteer has a “legitimate educational interests” 20 U.S.C. § 1232g(h)(2) (2016).
- (b) Schools may “outsource institutional services or functions to third parties so long as the outside party is performing a service or function the school would ordinarily use employees to compete and certain conditions are met.” *Toolkit* at p. 7.
- (c) It is best practice to have a contract with agency and specifically state the duty not to re-disclose.

VI. FINAL COMMENTS AND REMINDERS

- A.** Review and revise, as appropriate, school district plan(s) and training related to suicide prevention and crisis intervention.
- B.** Consider special education identification, services, and non-discriminatory practices and policies.
- C.** Educate school administrators and counselors on the duty to warn.
- D.** Collaborate with mental health professionals and develop best practices for sharing data responsibly.
- E.** In litigation, consider electronic discovery requests, experts and strong motion practice.