

# CONTRACTING WITH MENTAL HEALTH PROFESSIONALS

Presented by:

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## Awareness



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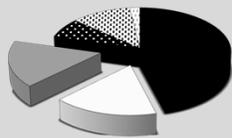
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### Leading Causes of Death in Youth Ages 10 - 24



- Unintentional Injury
- Homicide
- ▨ Suicide
- Malignant Neoplasms
- ▨ Heart Disease
- Congenital Anomalies

Nearly **50%** of children will have a diagnosable mental illness at some point before they turn 18.  
*(Child Mind Institute)*

Suicide is the **3rd** leading cause of death in youth ages 10 - 24.  
*(National Alliance on Mental Illness)*

**90%** of those who died by suicide had an underlying mental illness.  
*(National Alliance on Mental Illness)*



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## The Facts in Missouri

- Suicide is the third leading cause of death among teenagers (CDC, 2010).
- The Suicide rate in Missouri is higher than the national rate (Mo. Institute of Mental Health, 2015).
- Approximately 1 out of 6 high school students seriously consider attempting suicide (CDC, 2012).



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## Legislation

- In 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.



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## Missouri Legislation 2016

- House Bill 1583 – bullying & suicide awareness and prevention laws
- Effective August 28, 2016
- Codified at RSMo §§ 160.775 (bullying), 170.047 & 170.048 (suicide awareness)
- See also House Bill 2379 – Trauma Informed Schools Initiative



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**Section 170.048 RSMo**

•By July 1, 2018, each district shall adopt a policy for youth suicide awareness and prevention, including plans for how the district will provide for the training and education of its district employees.



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**Section 170.048 RSMo**

•Each district's policy shall address, but not be limited to, the following:

1. Strategies that can help identify students who are at possible risk of suicide;
2. Strategies and protocols for helping students at possible risk of suicide; and
3. Protocols for responding to a suicide death.

\*See DESE's Model Policy



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**Identify, Assess,  
and Provide FAPE**



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## Mental Health

The U.S. Department of Mental Health and Human Services explains that mental health:

- Includes emotional, psychological, and social well-being;
- Affects the way we think, feel, and act;
- Helps determine how we handle stress, relate to others, and make choices;
- Is important at every stage of life, from childhood and adolescence to adulthood; and
- Is variable -- responding to cultural, environmental, physical, and biological factors.

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



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## Child Find Obligation

IDEA:

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)



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## Child Find Obligation

Section 504:

- Requires districts to annually “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)
- 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)



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## Child Find Violations – Case Example

***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.

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## Obligations and Best Practices

- Screen students early
- Refer for special education consideration
- Don't make eligibility decisions solely on grades
- Determine appropriate related services
- Do not implement practices that result in exclusion of students with disabilities
- Implement the plan!

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## Providing FAPE

- Conduct a comprehensive evaluation
- Determine related aids and services
  - Determine what is required for student to receive educational benefit
  - Consider parent counseling
- Don't overlook bullying and mental health concerns raised at IEP meeting
  - *T.K. v. New York City Dept. of Ed*, 810 F. 3d 869 (2<sup>nd</sup> Cir. 2016)
  - Some state laws require review.  
See Mass. Senate No. 2404 (2010)

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***Beam v. Western Wayne Sch. Dist.,  
(2016)***

- Plaintiffs alleged school failed to develop and follow an appropriate Section 504 plan to accommodate student's needs, which allegedly caused student to commit suicide
- Evidence was sufficient to show that Defendants knew of student's suicidal ideation and his suicidal thoughts were linked to his academic deficiencies
- Plaintiffs sufficiently pled claim under Section 504 after alleging that school failed to implement student's 504 plan

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**Related Aids and Services**

- 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)

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**Related Aids and Services**

- Related services include:

... psychological services; recreation, including therapeutic recreation; counseling services, including rehabilitation counseling; medical services for diagnostic or evaluation purposes; school health services and school nurse services, social work services in schools, and parent counseling and training.

34 CFR 300.34(a)

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### Related Aids and Services

- Consider parent counseling as a related service
- 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 (2006)



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### Related Aids and Services

- 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)



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### Parental Change of Placement

- Placement in residential facility.
- Who pays?
- What is the primary purpose of the placement?
  - Special education or mental health treatment?
  - “Inextricably intertwined?”



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## Duty to Warn



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## Failure to Warn – Case Examples

- *Estate of Smith v. Western Brown Local Sch. Dist.*, 117 LRP 4355, 26 N.E.3d 890 (Ohio Ct. App. 2015).
- *Armijo v. Wagon Mound Pub. Sch.*, 29 IDELR 593, 159 F.3d 1253 (10th Cir. 1998).



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## Counselor's Duty to Warn

- *Eisel v. Board of Educ. of Montgomery County*, 18 IDELR 402, 597 A.2d 447 (Md. Ct. App. 1991):
  - Court held that school counselors have duty to use reasonable means to attempt to prevent suicide when they are on notice of child or adolescent student's suicidal intent.



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### Counselor's Duty to Warn

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



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### Legal Considerations in Working with Mental Health Professionals



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### Using District Employees to Provide Mental Health Services

**Benefits:**

- The ability to supervise and direct employees.
- Increased availability for students.
- Increased likelihood of cooperation and communication between the mental health professional and other school members of the team if all are co-workers located in proximity to each other.



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### **Using District Employees to Provide Mental Health Services**

Careful consideration should be given to:

- How District will ensure that its employees are appropriately qualified to perform the services
- How it will provide appropriate supervision and direction
- Ensuring adequate insurance to cover the activities of the mental health professionals



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### **Using Independent Contractors for Mental Health Services**

Potential benefits include:

- Possible cost benefit to the District
- The ability to limit district liability by requiring the independent contractor to purchase and maintain professional liability insurance
- The ability to increase and reduce the contract according to student needs



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### **Employee vs. Independent Contractor**

- Whether an individual is an employee or an independent contractor is a matter of law.
- Court's focus in making determination is the employer's "right to control the manner and means of performance."
- Missouri courts rely on test that considers 20 factors to determine amount of control district has over worker



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## Employee vs. Independent Contractor

Potential issues if worker is misclassified:

- If the worker is an employee, the District is responsible for all legally required withholding including state and federal income taxes, social security and retirement.
- Employers who fail to withhold taxes when required to do so may be required to pay interest and penalties in addition to back taxes.
- Liability and other insurance provided by the district do not usually cover independent contractors.



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## Considerations for Contracts with Outside Mental Health Providers

- Review carefully & revise as needed
- Ensure proper certification & background checks
- Termination provision?
  - Automatically continues or date certain
- Indemnification/Liability Provision
- Include term prohibiting discrimination



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## Considerations for Contracts with Outside Mental Health Providers

Include FERPA provision

- Include provisions recognizing that records of related services are educational records and specifying that all records of related services provided to students pursuant to the contract will be made available to the school and will be the school's property upon termination of the contract; and
- Provisions relating to the privacy of student records/compliance with FERPA



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## FERPA School Official Exception

- Schools may disclose PII without consent to school officials if those officials have “legitimate educational interests”
- 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.”
- Best practice is to have a contract with agency and specifically state the duty not to re-disclose.

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## Considerations for Contracts with Outside Mental Health Providers

Who can sign contracts?

Section 432.070 RSMo:

No county, city, town...school district or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law... shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing.

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## Considerations for Contracts with Outside Mental Health Providers

What does your Board Policy say?

Board Policy DGA:

- The superintendent or designee is directed to create internal controls to ensure that contracts, checks and other official documents are accurate, authorized and signed by the appropriate persons and that necessary actions are taken to prevent mistakes, fraud, embezzlement and district liability.

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## Considerations for Contracts with Outside Mental Health Providers

• In general, the superintendent or designee may sign documents on behalf of the district or the Board as long as the document is accurate, has been adequately approved by the Board when necessary and is in the best interest of the district. However, when the law or Board policy requires others to sign documents on behalf of the Board or the district, those persons are the only persons who may sign the document.

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## Board Policy (Cont.)

### Contracts

• A contract is a binding, written agreement between the district and an individual or entity. In accordance with law, a contract with the district must be approved by a majority of the whole Board. After the Board has approved the contract, the Board president, Board secretary and superintendent or superintendent's designee have the authority to sign the contract on behalf of the district unless state or federal law requires a specific person to do so.

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## Board Policy (Cont.)

### Contracts

See also DJF -1:

No contract will be entered into or bill paid without the proper documentation and without an affirmative vote from a majority of the whole Board.

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## Referrals and Collaborations for Wraparound Services with Outside Providers



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## Mandated Referrals/Notifications

- McKinney-Vento Homeless Education Assistance Improvements Act
  - Requires LEAs to provide referrals to mental health services for homeless students
- State Referral or Hotline Laws
  - Example: Hotlines for neglect of medical/mental health treatment



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## Student Records/Confidentiality

- District may disclose education records to child welfare agency representatives when reporting child abuse and neglect.
  - FPCO guidance 2004
- FERPA exception for health and safety emergency may also apply.
  - Is knowledge of information necessary to protect the health or safety of student or other individuals?  
34 C.F.R. 99.31(a)(1)



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## Data Sharing

March 2016, U.S. Department of Education published a *Data-Sharing Tool Kit for Communities: How to Leverage Community Relationships While Protecting Student Privacy*

Generally, three categories of data that may be shared without outside agencies:

- 1) De-identified data
- 2) Data shared with written consent
- 3) Data shared under a FERPA exception



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## Sharing Student Information with Outside Providers or Agencies

•The U.S. Department of Education recommends that there be a written agreement that outlines the confidentiality and use of student information.



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## Questions?

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