

# AN OUNCE OF PREVENTION:

How a Little Legal Knowledge Can Help SAP  
Teams Increase Effectiveness, Protect  
Student Rights, and Prevent Liability



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## **ABOUT**

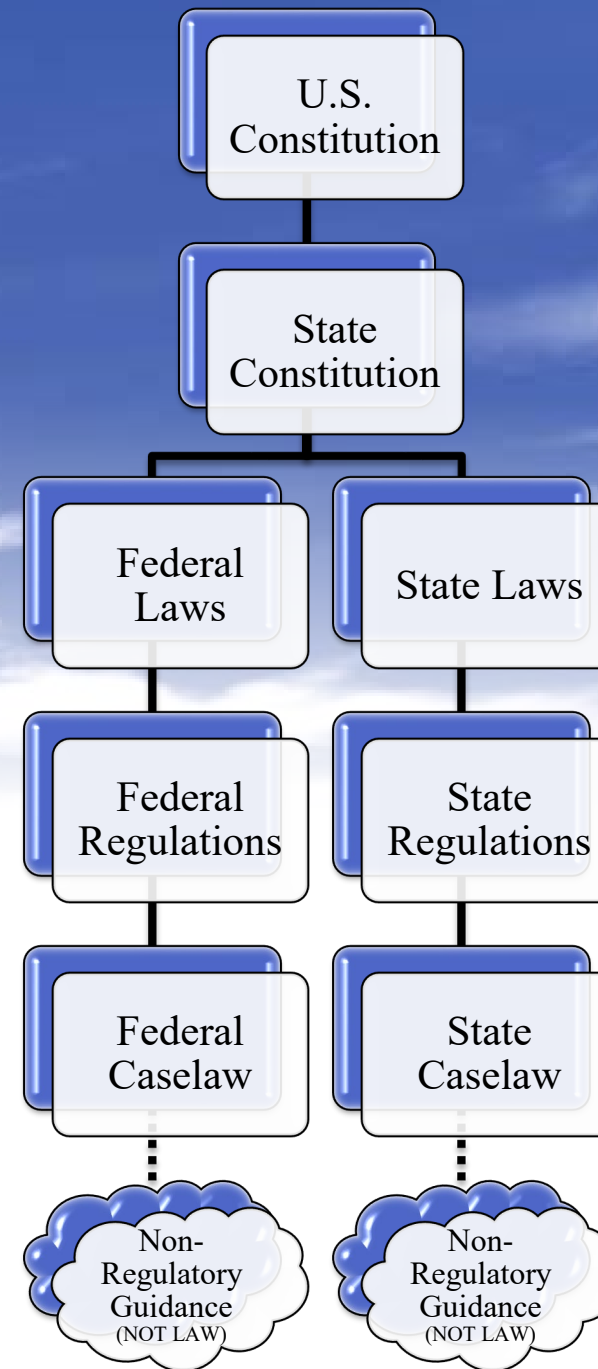
## **THE**

## **SPEAKER:**

**ERIN D. GILSBACH, ESQ., IS A PRACTICING ATTORNEY AND EXECUTIVE DIRECTOR OF EDLAW INTERACTIVE AND AN EXPERIENCED SPEAKER AT THE STATE AND NATIONAL LEVELS ON A WIDE VARIETY OF SCHOOL LAW ISSUES. SHE IS THE IMMEDIATE PAST-PRESIDENT OF THE PA SCHOOL BOARDS ASSOCIATION (PSBA) SOLICITOR'S ASSOCIATION, AND SHE IS A FREQUENT AUTHOR AND PRESENTER FOR AND MEMBER OF THE BOARD OF DIRECTORS OF THE NATIONAL SCHOOL BOARDS ASSOCIATION (NSBA) AND THE NSBA COUNCIL OF SCHOOL ATTORNEYS (COSA), THE EDUCATION LAW ASSOCIATION, THE NATIONAL BUSINESS INSTITUTE (NBI) AND LRP PUBLICATIONS. SHE PROVIDES LEGAL CONSULTING AND PROFESSIONAL DEVELOPMENT FOR MANY SCHOOLS AND IUS ACROSS THE STATE. SHE CURRENTLY LIVES IN EASTERN PA WITH HER HUSBAND AND THEIR THREE DAUGHTERS.**

# SCHOOL LAW IN A NUTSHELL:

A QUICK OVERVIEW FOR SAP PERSONNEL



## CHILD FIND AND SAP:

HOW THE SAP PROCESS CAN DRAMATICALLY REDUCE LIABILITY



*After a child find referral, six weeks of evaluations, and numerous meetings to determine whether the student's ADHD qualified him for Section 504 protections or an IEP, school officials were embarrassed to learn that Johnny did, in fact, simply have ants in his pants.*



# Section 504 and IDEA Child Find



- School's biggest (and most expensive) student-related liability issue
- SAP teams are frequently in the best position to spot issues
- What is Child Find?
  - School's obligation to identify students who do or may have a qualifying disability or meet the requirements under Chapter 16 for Giftedness

# ELIGIBILITY:

IMPORTANT NOTE: **NONE** of these categories requires a formal diagnosis!!

## IDEA

- Must have one of the specific disabilities listed in the IDEA
- Must be in need of specially designed instruction and/or related services

## Section 504

- Physical or Mental Impairment
- That substantially limits
- One or more major life activities

## Gifted

- IQ of 130 or higher OR
- Multiple Criteria (as defined in Ch. 16) indicate Gifted ability

# IDEA vs. Section 504: What's the Difference??



- Section 504 = accessibility accommodations
  - *Making sure a disabled student is able to access the curriculum and all programs offered to students*
- IDEA = Specially Designed Instruction
  - *Adapting the curriculum and/or providing specialized instruction to meet the student's individual needs*

# A Word About Compensatory Education...



- What is it?
  - Remedy available under IDEA/Section 504/Gifted
- Why does Child Find have the potential to be so expensive?
  - *The FULL DAYS problem!!!*
  - *Failure to identify results in full days from the date the school “should have known” to the date the student began receiving services!*
  - \$\$\$\$\$





# PRINCIPLES OF TRAUMA-INFORMED SCHOOLS

- 1** Childhood trauma can have a direct, immediate, and sometimes overwhelming impact on a child's ability to be successful in school.
- 2** All schools and educators encounter, on a daily basis, students impacted by trauma.
- 3** Schools and educators must learn to recognize the signs that a student has experienced or is experiencing trauma.
- 4** Trauma often manifests itself in behaviors that perpetuate a cycle of trauma.
- 5** Schools and educators need to establish practices that are sensitive to those students, even when such students are not readily identifiable.



# Sources of Childhood Trauma

**Physical or sexual abuse**

**Abandonment**

**Neglect**

**The death or loss of a loved one**

**Witnessed or was victim of significant crime** (home invasion, kidnapping, assault, etc.)

**Witnessed or was victim of domestic violence**

**Automobile accidents or other serious accidents** (self or loved one)

**Chronic or severe bullying or cyberbullying**

**Life-threatening health situations and/or painful medical procedures** (self or loved one)

**Witnessed or was victim of school or community violence**

**Witnessed the arrest of a loved one or having a close relative incarcerated**

**Life-threatening natural disasters**

**Parent/caregiver suffers from drug/alcohol addiction**

**Acts or threats of terrorism** (viewed in person or on television)

**Homelessness**

**Insecure living environments where food, heat, and/or basic resources are not consistently available**



# STUDENT CONFIDENTIALITY:

TO SHARE OR NOT TO SHARE...



# FERPA –

## Family Education Rights and Privacy Act



- Provides parents and students over age 18 with **3 rights**:
  - Inspect
  - Challenge
  - **PRIVACY**
- Who is a Parent?
  - Natural parent, guardian or person acting as a parent *in the absence of a parent*
- Rights transfer to student at age 18.
  - Info. may still be disclosed to parent if student is claimed by parent as dependent on taxes.



# How is FERPA enforced?



- No private cause of action – parents can't sue
- Family Policy Compliance Office (FPCO) receives complaints and investigates
- Can withhold federal funding

## What is an “Education Record”?



- Any record that:
  - Contains personally-identifiable information about a student and
  - Is *maintained* by the school
- Notable Exception: **Directory Information**
  - Narrow category that contains personally-identifiable information but may be disclosed
  - Requires “opt-out” (passive) consent rather than written (active) consent
  - Governed by Policy

# Sharing Information Within the School



*"This is highly confidential, so, yes, we built a little fort."*

# Sharing Information Within School



- May share educational records with “school officials” a “legitimate educational interest” in the document/information
- “School officials” generally interpreted very broadly – most, if not all, school staff would qualify
- Applies to school employees, contractors and volunteers
- Does not apply to outside entities (mental health agencies, TSS, etc.)
  - When in doubt, get a release
- **FAR greater potential for liability for NOT sharing important information with other school personnell than for over-sharing in good faith...**



# Other Notable FERPA Exceptions to Written Consent Requirement:



- School in which Student enrolls or seeks to enroll
- Health/Safety Emergencies
- State and local authorities within the juvenile justice system.
- Individuals who have obtained court orders or subpoenas.
  - *Proceed with caution with subpoenas!! Check with legal counsel!*

# HIPAA / FERPA



- Simple Rule Regarding Privacy / Confidentiality:
  - HIPAA specifically states:

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**If FERPA can apply, then FERPA does apply.**

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Thus, **schools, including school nurses, follow FERPA privacy requirements, not HIPAA.**

# Confidential Communications to School Personnel (42 PaCS §5945)



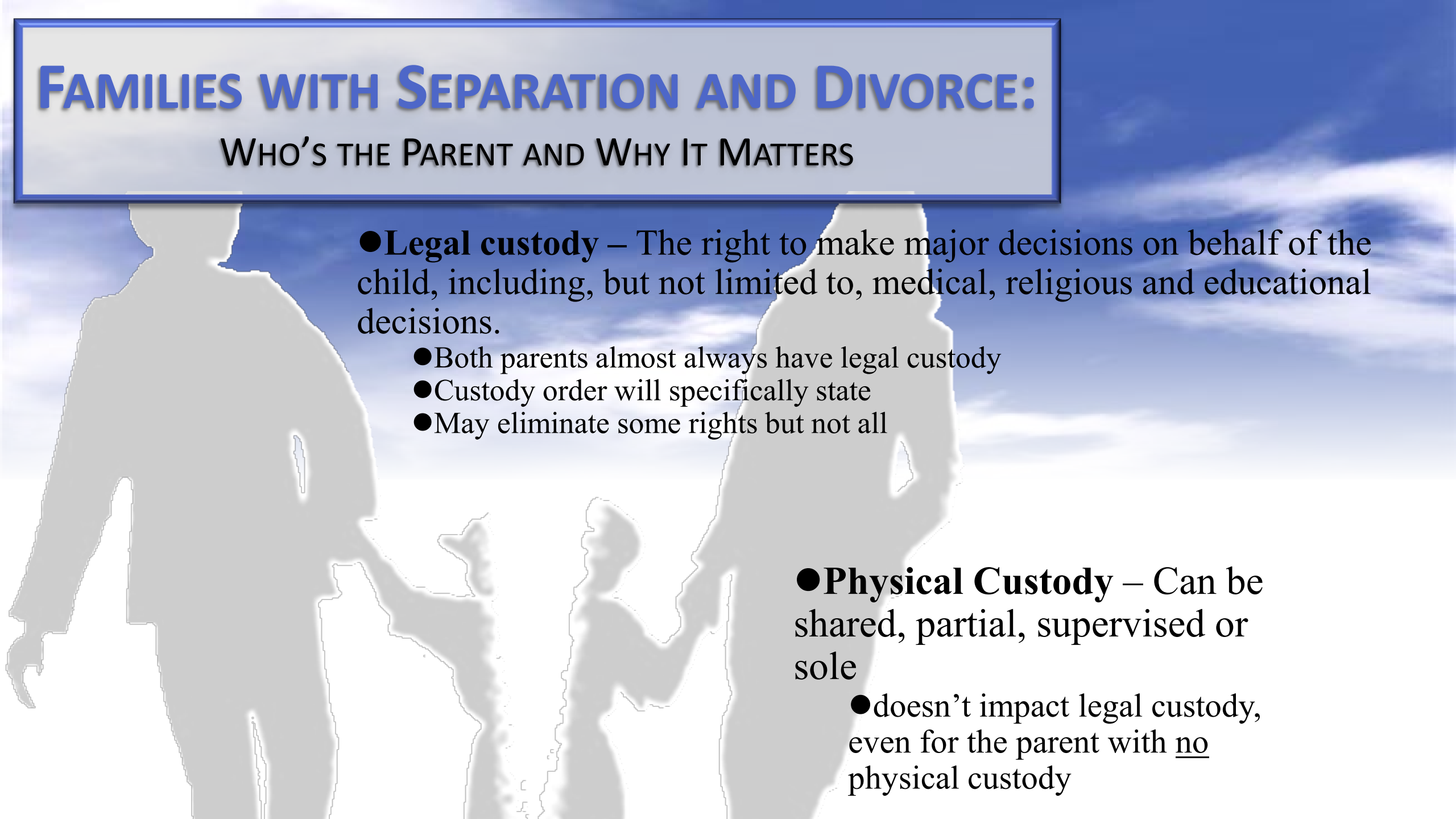
(a) General rule.--**No guidance counselor, school nurse, school psychologist, or home and school visitor** in the public schools or in private or parochial schools or other educational institutions providing elementary or secondary education, including any clerical worker of such schools and institutions, **who**, while in the course of his professional or clerical duties for a guidance counselor, home and school visitor, school nurse or school psychologist, **has acquired information from a student in confidence shall be compelled or allowed:**

- (1) without the consent of the student, if the student is 18 years of age or over; or
- (2) without the consent of his parent or guardian, if the student is under the age of 18 years;

**to disclose such information in any legal proceeding, trial, or investigation before any government unit.**

# FAMILIES WITH SEPARATION AND DIVORCE:

## WHO'S THE PARENT AND WHY IT MATTERS

The background of the slide features a blue sky with white clouds. In the foreground, there are white silhouettes of a family: a man on the left, a woman on the right, and a child in the center holding hands with both adults.

● **Legal custody** – The right to make major decisions on behalf of the child, including, but not limited to, medical, religious and educational decisions.

- Both parents almost always have legal custody
- Custody order will specifically state
- May eliminate some rights but not all

● **Physical Custody** – Can be shared, partial, supervised or sole

- doesn't impact legal custody, even for the parent with no physical custody



# The BIG Question: Are Schools Legally Bound by Custody Agreements/Orders?



- No. PA law is clear on this point.
- PA law states that child custody determinations made by a PA court binds only those individuals who have been served proper notice as parties to the legal action or those who have *“submitted to the jurisdiction of the court and who have been given an opportunity to be heard.”* 23 Pa. CS 5406.
- In other words, only the individuals who are parties to the case (parents and/or guardians) are legally bound by the custody order.

# Who is a “Parent” for the purposes of signing regular ed. documents?

- No specific governing statute or regulation
- To determine this, ask:
  - What is being signed?
  - Are the student’s rights being waived or enforced through this signature?
- For day-to-day documents that do not involve a waiver of liability or waiver or assertion of rights, no legal implications/requirement.

# Documents Asserting or Waiving Rights and Liabilities:

- These should have permission by a person with the legal authority to assert or waive the right/liability:
- If someone other than a natural parent, seek proof of legal guardianship.
- Having someone other than a natural parent or legal guardian sign these types of documents runs the risk of nullifying the signature.
  - Parent or student could later challenge the signature and render the assertion or waiver of rights / waiver of liability void.

# THE SUICIDE PREVENTION LAW:

NEW RULES AND ROLES FOR SAP TEAMS



# Suicide Awareness and Prevention Law



- 24 P.S. §15-1526, requires that public schools (districts and charters) adopt a policy within this school year that addresses the following information:

Prevention

early  
identification  
and  
referral

of students at risk of suicide.

Intervention

Procedures that address an  
**emotional or mental  
health safety plan**  
for students identified as being  
at increased risk of suicide

Response

Procedures / Plan for  
addressing a  
**suicide or suicide  
attempt**



# Proceed with Caution



- Do NOT promise more than the school is professionally capable of doing
- Disclaimer, Disclaimer, Disclaimer!!
  - Make sure parents understand what we can and cannot do and/or assure
  - Good idea to put this crucial information in writing

# The Role of the School and the Limitations of its Expertise

## A School CAN:

- Identify **warning signs**
- Put in place a safety **plan** for suicide prevention at school (note: don't forget the "on school grounds, at school functions, etc.)
- Provide **notification** to parents and recommend that they seek outside help for the student.
- Obtain, where necessary, **emergency help** for the student (police, crisis, 302 process, etc.)

## A School SHOULD NOT STATE OR SUGGEST THAT THE SCHOOL IS ABLE TO:

- "Evaluate" for suicidal risk
- Ensure a "*mental health safety plan*" that extends past the school day or into the home
- Make specific referrals for specific medical providers, types of treatment, etc.
- Provide mental health treatment

# Questions?



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