

School Law Update



August 6, 2020

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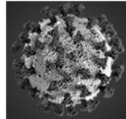


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Topics

- Return to School Face Coverings
 - Gathering Limits
 - Liability
 - Reporting
- Students
- Employees
 - Leaves
 - Bargaining
- Overview of New Title IX Regulations



Preparedness & Response Plan

"Every school district ... must develop and adopt a COVID-19 Preparedness and Response Plan that is informed by the Michigan Return to School Roadmap...."

- Due **August 15** (or 7 days before school starts, whichever is first)
- ISDs collect and transmit to State by **August 17**

EO 142 (June 30, 2020)

Implementation Tips

- Check for policies that conflict with Preparedness Plan or add requirements
- Review CBA for conflict or deviation
- Document specific staff implementation responsibilities
- Train staff



EO 153 (July 17, 2020)

"No business, government office, or operation that is open to the public may provide service to a customer or allow a customer to enter its premises, unless the customer is wearing a face covering as required by this order."



Phase 4: Required Face Covers

- Bus: all staff and preK-12 Ss
- Indoor halls, common areas: all staff and preK-12 Ss
- Classrooms: all staff
 - ✓ 6-12 Ss when in classrooms
 - ✓ K-5 Ss who do not remain with their classes and have “close contact” with someone (over 15 minutes with someone less than 6’ apart)

Note: EO 147 requires face covers in indoor “public spaces” (not classroom) for persons age 5+

Face Cover Exemptions

- During meals
- Roadmap: “Any student who is incapacitated, or unable to remove the facial covering without assistance, must not wear one.”
- If “cannot be medically tolerated”
 - Documentation may be required

Medical Exemption

- Review essential job functions and contact opportunities
- Use interactive process
- Look at reasonable accommodation(s)
- Consideration of others is part of interactive process and reasonable accommodation review



Face Shields

- Required for staff performing “all cleaning activities” in Phase 4
- Strongly recommended for:
 - All serving and cafeteria staff
 - Staff performing cleaning activities in Phase 5
- Shield ≠ face covering



Student Refusal

- Determine basis for refusal
- Determine response:
 - Accommodation if medical
 - Limit instruction to remote protocol
 - Discipline
- Caution: no unilateral placement in contradiction to IEP



Staff Refusal

- Determine basis for refusal
- Note: “There may be situations where it is not safe for the **bus driver** to wear a facial covering. Decisions about these situations should be made on a case-by-case basis with local public health officials.” (Roadmap, p 28)
- Determine response:
 - Accommodation (if medical)
 - Leave of absence
 - Discipline

Gathering Limits

- **EO 110:** Statewide
 - Indoor max 10
 - Outdoor max 100
- **EO 115:** Regions 6 & 8
 - Indoor max 50
 - Outdoor max 250
- **EO 142:** Limits in EO 110 or subsequent EOs do ***“not apply to students in a classroom setting.”***

CAUTION



Do Not Exceed

Visitors/Spectators

- Roadmap strongly recommends excluding visitors (including parents) in Phase 4 except extenuating situation
- For permitted visitors
 - Screen for symptoms
 - Require face covering
 - Wash/sanitize hands
 - Maintain log
- No indoor events; outdoor events max 100
 - Person not from same household must be 6 feet apart



Liability Waiver to Attend School

- Minor does not have legal capacity to sign and parent can't waive rights on behalf of minor child
- Optics: With limited exceptions, school is "compulsory" with criminal penalties for noncompliance
- But, if choice between remote or in-person, consider notice of risk assumption
- Require written authorization to participate in athletics

Governmental Immunity

- For district if engaged in gov't function
- For board, employee, volunteer if
 - District engaged in gov't function
 - Person reasonably believes acting within scope of authority
 - Conduct not "gross negligence" that is proximate cause of injury (i.e., reckless conduct demonstrating substantial lack of concern for whether injury results)

MCL 691.1407

Remote Learning & State Aid

- EO 142 extends pupil accounting rules through Sept. 30; count day is Oct 7
- Unless further legislation or EOs, pupil accounting rules will apply
 - 180 days, 1098 hours of instruction
 - Minimum attendance requirements
 - See PAM Section 5-O-D for virtual learning requirements

Student Temperature

- Can we take student's temperature
 - Upon entering school?
 - Suspicion of fever?
 - With parent permission?
- Note: *"This Act shall not be construed to authorize compulsory physical examination or compulsory medical treatment of pupils."* MCL 380.1504



Choir & Band

- Not specifically addressed by EO or Roadmap
- Remember gathering limits
 - Indoor limits do not apply to classrooms
 - Outdoor limits still apply
- Consult local health department



Equal Access for Students with Disabilities

- Schools must “*strive in good faith and to the extent practicable*” to provide equal access to students with disabilities
- May temporarily exclude student who school knows or has reason to suspect has COVID-19
- IEP Team decides whether student with disability who doesn’t have a communicable disease can safely attend school

IEP/504 Plan Review

- Roadmap *strongly recommends* systematic review of IEPs, 504 plans, and health plans in Phases 4 and 5 to ensure students with health needs receive appropriate supports
- Schools should also consider alternative learning plans (with parent agreement) for students who are “high risk”

Distance Learning

- School remains responsible for FAPE consistent with IEP or 504 plan
 - May need to convene IEP Team or amend
 - Consider contingency learning plan
- Students may be entitled to compensatory education once in-person school resumes
- See, MDE’s July 7 “Recovery Services” guidance

“Recovery Services”

- Not *legally* required
- No guarantee that district will get “credit” for recovery services in a compensatory education dispute
- Address on case-by-case basis
- If provided, incorporate into IEP with full procedural safeguards



Inability to Provide Services?

- EO: State will not penalize school for inability to provide services due to COVID-19
- Neither Governor nor MDE has legal authority to waive IDEA or Section 504 requirements
- Proceed with caution



Reporting Requirement

- All schools must cooperate with local health department if confirmed case of COVID-19 is identified, *and*
- Collect contact information for any close contacts of affected person from 2 days before he/she showed symptoms to time when last present at school
- Follow guidance of local health department

Report to Local Health Dept.

- When EE identified with confirmed case of COVID-19:
- (1) Immediately notify to local health department, and
 - (2) Within 24 hours, notify any co-workers, contractors, or suppliers who may have come into contact with person with confirmed case of COVID-19

OSHA/MIOSHA

- Reportable if diagnosis results in in-patient hospitalization or fatality
- Contagious diseases, other than common cold and flu, are presumed work-related if EE infected at work, per 29 CFR § 1904.5
- <https://www.osha.gov/SLTC/covid-19/covid-19-faq.html#reporting>

Contractors

- Both EO 142 and Roadmap use the term “staff” and do not distinguish between contractors and employees
- Contractor is responsible to provide PPE
- Look at individual contracts and contractor responsibility to comply with state/federal law
- Be proactive – address issues and expectations **now**

Checking EE Temperature

- ADA prohibits medical exam, unless job-related and business necessity
- Checking body temp = med. exam
- **But ...** *“Because the CDC and state/local health authorities have acknowledged community spread of COVID-19 and issued attendant precautions, employers may measure employees’ body temperature.”*

EEOC Q&A (March 18, 2020)

ADA: Information Requests

- During a pandemic, ER may ask EEs if they are experiencing symptoms (per CDC) of the pandemic virus
- ER must maintain all information about employee illness as confidential medical record in compliance with ADA
- ER may require fitness for duty test upon return (be flexible due to limited physician availability)

EEOC Q&A (March 18, 2020)

Staff “Accommodation”

- What does EE assert?
- What documentation (including physician) supports assertion?
- “Disability” under ADA?
 - Substantial limitation
 - Major life activity
 - In “unmitigated state”
- Engage in “interactive process”



Staff Leave Considerations

- Emergency Paid Sick Leave Act
- Emergency Family Leave Act
- Family Medical Leave Act
- Americans with Disabilities Act
- Paid Medical Leave Act
- Collective Bargaining Agreement
- Individual Employment Contract
- Board Policy
- Employee Handbook

Employee Leave Analysis

- Reason for leave
 - Verification
- Start and end dates
- Coverage by
 - Statute
 - CBA, contract, policy
- Interactive process
- Accommodation
- On-site or remote



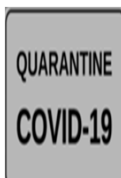
Emergency Paid Sick Leave Act

- Creates new paid sick leave for EEs who *cannot work or telework due to coronavirus*
- *In addition* to pre-existing leave
 - Full-time EEs: 80 hours
 - Part-time EEs: Average hours over 2-week period
- Enforced under FLSA
- Expires December 31, 2020



EPSLA Leave Qualifiers When Employee Is Sick

1. EE subject to government quarantine/isolation order
2. Health care provider advised EE to self-quarantine
3. EE experiencing COVID-19 symptoms and seeking medical diagnosis



Benefit: Up to \$511/day, \$5,100 aggregate

Qualifiers When Employee Is Caring for Someone

4. EE caring for person subject to quarantine/isolation order
5. EE caring for child if school or childcare facility has closed or if childcare provider unavailable
6. EE experiencing other substantially similar condition specified by Secretary of Health and Human Services

Benefit: Up to \$200/day, \$2,000 aggregate

Emergency Family Medical Leave Expansion Act

- Applies to all public employers (with limited exceptions)
- EE eligible after just 30 calendar days
- Applies to EE unable to work (or telework) because child's school/daycare unavailable due to public health emergency
- Expires December 31, 2020

EFMLEA Leave Benefit

- Total of 12 weeks of leave
- First 10 days *unpaid*
 - May use accrued paid leave or EPSLA leave during those days
- Remaining 10 weeks at 2/3 of regular pay rate, capped at
 - \$200/day
 - \$10,000 aggregate

Required Documentation

EE must provide documentation *before* taking leave under EPSLA or EFMLEA

- Employee's name
- Date(s) for which requested leave
- Qualifying reason for leave; *and*
- Oral or written statement that EE unable to work due to qualified reason

29 CFR 826.100(a)

Additional Documentation

- Name of child being cared for
- Name of School, Place of Care, or Child Care Provider that has closed or become unavailable; and
- Representation that no other suitable person will be caring for child during time which EE takes Paid Sick Leave or Expanded Family and Medical Leave

29 CFR 826.100(e)

EO 2020-36

- ER shall not discharge, discipline, or retaliate against EE for staying home when at "*particular risk of infecting others with COVID-19*"
- Must treat hourly EE as taking paid leave under PMLA
 - If EE has no paid leave, can be unpaid
 - Leave length not limited by time accrued, must adhere to EO time periods
- ER *may* discipline EE who is allowed to return to work but declines, or for other lawful reason

Employee Leave Abuse

- Falsification is dischargeable offense
- FMLA leave fraud and dishonesty are legitimate, nondiscriminatory reasons to discharge EE
- ER must establish it reasonably relied on particularized facts when leave decision was made

Collective Bargaining

EO 142 states that the Plan must be implemented consistent with applicable CBAs

- **First** check CBA!
- Do not bargain prohibited subjects
- Work with union leadership
- Consider LOA as needed



Title IX of the Education Amendments of 1972

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance"



20 USC §1681(a)

Title IX Has Broad Application

*"Title IX protects students in connection with **all the academic, educational, extracurricular, athletic, and other programs of the school**, whether those programs take place in a school's facilities, on a school bus, at a class or training program sponsored by the school at another location, or elsewhere."*

Archived OCR Dear Colleague Letter (April 4, 2011)

Gebser v Lago Vista Indep SD 524 US 274 (1998)

Title IX damages for teacher-student sexual harassment available *only* when school official

- Had **actual notice** of harassment, and
- Was **deliberately indifferent** to teacher's misconduct



Davis v Monroe Co Bd of Ed 526 US 629 (1999)

1. Is student member of statutorily protected class?
2. Was student harassed due to protected status?
3. Was conduct severe, pervasive, **and** objectively offensive?
4. Did school know of harassment?
5. Was school "**deliberately indifferent**"?



Damages for student-student sexual harassment

Recent Title IX Settlements K-12

- **\$1.5 million** sexual assault/civil rights violations of 7 students
- **\$575,000** for sexual assault of 4 students by Michigan teacher
- **\$400,000** for 2 students claiming harassment and assault based on perceived sexual orientation
- **\$190,000** to student sexually assaulted at school
- **\$170,000** for student claiming emotional distress and sexual harassment
- **\$97,500** for student claiming harassment and assault by Michigan student

Effects of #MeToo

- EEOC: 50% increase in sexual harassment suits in 2018
- EEOC recovered \$70 million for sexual harassment victims in 2018, up from \$47.5 million in 2017
- *Education Week* Survey (October 2018)
 - 25% of female educators have been sexually harassed or assaulted at work
 - 60% of all teachers/admins did *not* report harassment due to feared retaliation and no action

2020 Title IX Regulations

- Issued May 6, 2020
- Effective/enforceable **August 14, 2020**
 - Amends Code of Federal Regulations
 - Has force and effect of law
 - Enforceable by OCR
- Regulations are legalistic and go well beyond what courts have required under 14th Amendment due process case law
- Effect on courts to be determined
- Litigation filed to stop implementation

New Terminology

Previous

- Educ. Institution
- Alleged Victim
- Alleged Harasser
- Resolution
- Interim Measures

New

- Recipient
- Complainant
- Respondent
- Grievance Process
- Supportive Measures

Types of Sexual Harassment

- Employee *quid pro quo*
- Sexual assault, dating violence (definitions from Violence Against Women Act)
- Hostile environment (stricter definition)



Quid Pro Quo (This for That)

- Recipient's employee conditions an aid, service, or benefit of the recipient on an individual's participation in unwelcome sexual conduct
- **New:** only applies to employee, *not* to volunteer, student, agent



Hostile Environment

Unwelcome Conduct Determined By a Reasonable Person to Be:

Old Definition

"...severe, pervasive, or persistent, and to interfere with or limit a student's ability to participate in or benefit from school services, activities, or opportunities"

New Definition

"... **so** severe, pervasive, **and objectively offensive** that it **effectively denies a person's equal access** to the recipient's education program or activity"

Conduct Factors

- “So severe, pervasive, **and** objectively offensive”
- Consider ...
 - Frequency
 - Location
 - Severity
 - Context
 - Effective denial of equal access to recipient’s program or service



“Education Program”

- Any location, event, or circumstance over which the recipient exhibits substantial control over both the respondent and the context in which the harassment occurred
- Keep jurisdictional issues in mind

Deliberate Indifference

*“Where a school district has **actual knowledge** that its efforts to remediate are ineffective, and it continues to use those same methods to no avail, such district has failed to act **reasonably** in light of the known circumstances.”*



*Patterson v Hudson Area Schs
(CA 6, 2009)*

New Regulation Definition of Deliberate Indifference

Failure to respond reasonably in light of known circumstances



When Does School Have Notice?

An “appropriate school official” must have “actual knowledge” of a sexual harassment complaint to trigger Title IX investigation obligation

- Applies to all K-12 employees
- No longer “should have known”



“Appropriate School Official”

- New definition
 - T9 Coordinator
 - Any employee of elementary or secondary school
 - Any school official with authority to institute corrective measures
- Train *all* employees to *always* notify T9 Coordinator of all reports

Notice and Response

- *Actual knowledge* triggers obligation to offer supportive measures and explain grievance process
- *Formal complaint* triggers obligation to investigate
- Parent/guardian has “right” to make report/complaint for K-12 student

Neutrality and Objectivity

- Grievance process must treat parties “equitably” and must
 - Be designed to restore access to education programs
 - Include enhanced due process protections before discipline
- Prohibits conflict-of-interest or bias with T9 coordinators, investigators, or decision-makers
- All relevant evidence must be *objectively* evaluated

New “Grievance” Procedures

- Presumption that respondent not responsible until determination reached
- “Reasonably prompt” timeframes
- Range of possible sanctions/remedies
- Description of evidentiary standard
- Appeal procedures
- Range of supportive measures

Promptness

- Reasonably prompt to conclude grievance process and resolve appeals
- Concurrent law enforcement investigation does *not* relieve investigation burden
- Temporary delays for “good cause” with written notice to parties, but *not* for administrative needs

Formal Complaint

Document filed by complainant or signed by T9 Coordinator:

- Alleging sexual harassment by a respondent, *and*
- Requesting recipient to investigate sexual harassment allegation



Initial Response to Report

Upon report receipt, T9 Coordinator must:

- Contact complainant to discuss “supportive measures”
- Inform complainant of available supportive measure regardless of whether formal complaint is filed
- Explain process for filing formal complaint

Supportive Measures (Previously Interim Measures)

- Available before, during, and after investigation, and in lieu of formal complaint
- Non-disciplinary, non-punitive, individualized
- Designed to restore or preserve equal access to education program or activity without “unreasonably” burdening other party



Emergency Removal

May remove student from educational program or activity *only* on an emergency basis, *if*

- Risk/safety assessment
- Immediate threat to *physical* health/safety justifies removal
- Provides notice and challenge opportunity *after* removal
- Comply with IDEA, 504, ADA



Notice to Parties

- Relevant grievance procedures
- Allegations (parties, policies, date)
- Statement that respondent not presumed responsible
- Parties may request to inspect relevant evidence
- Sufficient time to prepare response

Advisor of Choice

- All parties entitled to have advisor of *their choice* to assist throughout process
- Advisor may be anyone
- Must allow advisor to be present at all meetings, interviews, and hearing
 - May not restrict who is advisor
 - May restrict participation if restriction applied equally to all parties

Burden of Proof

- Burden of proof and gathering evidence rests *with the school*, not the parties
- Each party has equal opportunity to present witnesses and evidence



Grievance Process “Hand-Offs”

- Title IX Coordinator
- Investigator
- Decision-maker
- Appeals Officer



Investigation Process

- Investigator drafts preliminary report summarizing all relevant evidence
- At least 10 days before preliminary report is finalized: parties/advisors must be permitted to review and respond to all evidence directly related to allegations
- At least 10 days before hearing or responsibility determination: Final report (incorporating feedback as necessary) must be provided to parties

Decision-Maker Questioning

- Live hearing and cross-examination *not* required for K-12
- Questioning may be done through decision-maker
- If no hearing, after receiving final report, both parties may:
 - Submit written, relevant questions for the other party or any witness
 - Review answers to the questions
 - Provide limited follow-up questions
- Update report as necessary

Standard of Proof

- May use either preponderance or clear/convincing standard
- Must be consistent for all sexual harassment complaints, as well as
 - Student to student complaint
 - Student to employee complaint

Final Written Determination Must Address

- Allegations
- Procedural process
- Findings of fact
- Determination for each allegation
- Appeal rights
- Document no deliberate indifference

Note: decision-maker cannot be investigator or T9 Coordinator

Mandatory Complaint Dismissal

Complaint *must* be dismissed if allegations (even if proven):

- Do not constitute sexual harassment under new definition,
 - Did not occur in recipient's program or activity, or
 - Did not occur against a person in U.S.
- *Note: Even if complaint is dismissed under Title IX, it can still be addressed by policy or Code of Conduct*

Appeal

- Now required
- Must be available to both parties for:
 - Procedural irregularity
 - New evidence not reasonably available during investigation
 - Conflict of interest
- Must be handled by different person than decision maker (yet another hand off)

Record-Keeping

- Documented rationale for each conclusion
- Documented measures to restore access to education program/activity
- Certain records must be retained for at least 7 years, including
 - Investigation, responsibility determination, sanctions, remedies
 - Appeal and related results
 - Any informal resolution
 - Any supportive measures

Disciplinary Consequences

Title IX does not require administrators to

- Expel every student accused of misconduct
- Impose a particular disciplinary consequence, except as required by
 - State law
 - Student code of conduct



Vance v Spencer Co Sch Dist (CA 6, 2006)

M.D. v Bowling Green Indep SD (CA 6, 2017)

- CSC incident on bus; victim told friend, who told cheer coaches; investigation began *next day*
- Perp sent to alternative school (Feb-June)
- September: perp returned to same school as victim with conditions
 - No contact w/ victim, monitored by staff
 - No shared classes or lunch
 - No extra-curricular interaction
- Victim sued, alleging deliberate indifference

Sixth Circuit Decision

Court: Remedial measures were reasonable; expulsion not required

“While we wish we lived in a world where schools could prevent the kind of discomfort M.D. suffered, we do not. Often, school administrators face the unenviable task of balancing victims’ understandable anxiety with their attackers’ rehabilitation. They have to make judgment calls about how best to balance those competing interests with the limited resources they have.”

No Training = Deliberate Indifference

“Just like failing to train a police officer on when to use his or her gun, failing to train a school principal on how to investigate sexual assault allegations constitutes deliberate indifference.”



Doe v Forest Hills (WD Mich, 2015)

School Liability for “Failure to Train” Claim

These claims “arise frequently in the public high school context” so “it is certainly foreseeable that the **failure to train** school staff on how to handle such claims would **cause disastrous results.**”

Doe v Forest Hills (WD Mich, 2015)

Training and Different Outcome

- “[I]f school administrators **had been trained** properly, it is **probable** that they would **not have waited** for the criminal process to be complete before disciplining MM or relied so heavily on information from law enforcement....”
- “Training **may also** have mitigated Plaintiff’s emotional distress and social ostracization.”

Doe v Forest Hills (WD Mich, 2015)

Failure to Train

*“Failure to offer sexual harassment training could **clearly** increase the likelihood that a teacher might place a student with a history of peer aggression alone in a separate room with a student with a history of vulnerability, whom she had previously seen touching one another inappropriately.”*

C.R. and J.R. vs Novi Cmty SD
(ED Mich, 2017)

2020 Regs. Mandate Training

- All employees: reporting requirements
- Investigators, T9 coordinators, decision-makers, appeal officers, facilitators
 - Investigation, credibility, evidence
 - Report and rationale-writing
 - Managing interview process, appeals, informal resolution

Thrun Policy Package / Training

- Updated Thrun Title IX package (policy and template documents) available – see order form
- Training begins in August
 - All-staff training module
 - Comprehensive training for investigators, T9 coordinators, and decision-makers



Next Steps

- Designate T9 Coordinator and staff who will serve as advisor, investigator, decision-maker, appeal officer
- Require identified staff to attend comprehensive training
- Conduct awareness training for *all staff*
- Update policies, handbooks, forms
- Disseminate new policy and handbook language to students, parents, staff
- Post T9 Coordinator information and training materials on website

