


**Effectively
Navigating E.O.
2020-35**
Continuity of Learning,
Special Education, and
Labor Issues

Presented by:
Lusk Albertson and The Metro Bureau
Thursday, April 9, 2020
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Welcome

Melissa Baker
Executive Director, The Metro Bureau



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Overview of EO 2020-35

Kevin Sutton

Managing Partner, Lusk Albertson



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Overview of EO 2020-35

- Surprise? No Surprise.
 - Lessons from home
 - An impossible task
- Notable Items on First Reading
 - Days / Balanced Calendar
 - Plan - *The School Year is NOT Over!*
 - Assessments / Evaluations
 - Building Access
 - "Consistent with Collective Bargaining Agreement ..."

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Continuity of Learning ... and More!

Dr. Randy Liepa

Superintendent, Wayne RESA



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Questions for Dr. Liepa

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Special Education Considerations: *Compliance Meets Chaos*

Robert Lusk / Donna Tinberg

Lusk Albertson Special Education Services (SES)



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Overview

- Discuss Pre-COVID-19 Framework
- Discuss Immediate Reaction to COVID-19
- Discuss Impact of Executive Order 35

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Pre-COVID-19 Framework

- Methods for Changing an IEP to Address New Circumstances:
 - Develop a New IEP Meeting;
 - Reach an IEP Amendment; or
 - Obtain a decision in a contested case
- Stay-Put Rule - If the parent requested a due process hearing after a new IEP or IEP Amendment, the school district could not change the student's placement unless and until it prevailed

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Immediate Reaction to COVID-19

- Executive Order 2020-5, March 12, 2020
- Federal Guidance
 - US DOE Q & A, March 12, 2020
 - OCR Supplemental Fact Sheet, March 21, 2020
- Michigan Guidance
 - MDE Compliance Requirements, March 13, 2020
 - MDE OSE Concepts Document - April 2020

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Executive Orders 2020-5

- Effective March 16, 2020, all schools are temporarily closed
- IEPs and 504 plans are not being implemented
- Regular mechanism for changing IEPs and 504 plans (IEP and 504 meetings) are unavailable
- Two Possible Reactions:
 - No big deal, this is like summer vacation
 - This is the special education apocalypse

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US DOE Q & A, March 12, 2020

- If a school district is continuing to provide instruction to general education students, it must continue to provide FAPE (to the greatest extent possible) to IDEA and Section 504-eligible students
 - Eligible students must have equal access to educational materials
 - District may wish to prepare "contingency plans" if instruction is to be provided virtually
- If an eligible student does not receive required services, once school reopens the district must determine, on an individualized basis, whether compensatory education is warranted

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US DOE Q & A, March 12, 2020

- If a school district is not providing instruction to general education students, it is not required to provide FAPE to IDEA or Section 504-eligible students
- A wide-open invitation to apply "The Law of Unintended Consequences "

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OCR Supplemental Fact Sheet, March 21, 2020

- "Some educators, however, have been reluctant to provide any distance instruction because they believe that federal law presents insurmountable barriers to remote education. This is simply not true."
- No specific guidance on overcoming the real, though apparently not "insurmountable," barriers

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MDE Compliance Requirements, March 13, 2020

- March 13, 2020
 - One day after EO 2020-5 Announced, March 12, 2020
 - Three days before EO 2020-5 took effect, March 16, 2020
- Directives
 - IEP services must be provided on an individualized basis per IDEA and MARSE
 - Timelines
 - IEP Annual Review Timelines Cannot be Extended
 - Evaluation Timelines - May be extended by Agreement to Extend Evaluation Timelines
 - Noncompliance with required timelines - Will be noted, but no corrective action

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Reaction in the Field

- Initial Reactions - Complete Consternation
 - Conversation with Union President, Local 1 District
 - School Districts
- Upon Further Reflection: Let's do what we can under the circumstances and deal with the fallout when we can
 - Credit to Donna Tinberg
 - New Theme: Compassion over Compliance

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CARES Act

- Most provisions concern the economy
- Act also authorizes US Secretary of Education:
 - To grant waivers for non-civil rights statutes; and,
 - Recommend IDEA waivers for congressional consideration
- Thoughtful waivers have been suggested by CEC, MAASE, and in Executive Order 2020-35

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Executive Order 2020-35

- No way to avoid providing FAPE for eligible students
- Discussion of virtual FAPE and Auxiliary Services
- Discussion of US DOE guidance
- Partial Penalty Waiver
- Encouragement for Applications for Waivers

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No Easy Out

- We are going to be providing instruction to general education students. See Section II. B. 1 of EO 35. So, per US DOE Q & A:
 - We provide FAPE to eligible students, on an individualized basis; and,
 - Once school resumes, we must conduct individualized determination to decide whether compensatory education is required

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FAPE and Auxiliary Services

- School districts must strive - to the extent practicable, based on existing resources, technology, training, and curriculum, as well as the circumstances presented by any state of emergency or state of disaster, to provide equal access to alternative modes of instruction to eligible students for the remainder of the school year
- This applies equally to auxiliary services provided to eligible private and home-schooled students

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Guidance from US DOE

- While the COVID-19 state of emergency or state of disaster continues, school districts must comply with guidance from the US DOE
- This includes the compensatory education guidance referenced earlier

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Partial Penalty Waiver

- School districts will not suffer financial penalties arising from the inability to deliver services in person
- By implication, financial penalties may be assessed for other failures to deliver services

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Application for Waivers

- MDE and Department of Civil Rights are “strongly encouraged” to submit requests to US DOE for interpretation, guidance, and waivers permitting school districts to:
 - Deliver instruction to eligible students without having to reconvene or amend IEPs or 504 plans;
 - Deliver related services without having to reconvene or amend IEPs or 504 plans;
 - Complete annual reviews by telephone or virtually while school is closed and consider them timely, as long as they are completed by the end of the school year (June 30);
 - Make necessary compensatory education decisions no later than the first annual IEP meeting of the 2020-2021 school year and, for those students who are more likely to qualify for compensatory education, permit virtual IEP amendments.

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Compassion over Compliance

- “How can we help?” versus “What are we required to do?”
- Acting in good faith
- What’s reasonable and appropriate
- In light of current circumstances
- Keeping in mind the health and safety of all
- With parents as partners

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Executive Order 2020-35

- Continuity of Learning Plan (district level)
 - Outlines services for all students
 - Assurance Statement:
 - Applicant assures that **to the extent practicable** the District/PSA will **in good faith** provide students with IEPs/Section 504 Plans the opportunity to **participate in learning consistent with existing plans.**

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MDE/OSE Concepts, April 3, 2020

- Contingency Plan for Students with Disabilities
 - District must consider the offer of a FAPE defined in the current IEP
 - District must determine what the district can or is able to provide given the Governor's Executive Order 2020-35
 - Includes best practices around FERPA

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MAISA/SEILN Work Group in Process

- Contingency Plan (student level)
 - Will it really be necessary for all students with IEPs?
 - What content minimally should be addressed in a student-level plan?
 - Leaning toward providing samples of tools districts might use for decision-making
 - More info to come

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GOOD FAITH PLAN FOR INSTRUCTIONAL ACCESS AND DELIVERY OF FAPE
During the School Closure related to the COVID-19 Emergency

| | |
|------------------|------------|
| Student Name: | Plan Date: |
| Date of Birth: | Grade: |
| School/District: | |

The following individuals provided input into the development of this plan:

| | |
|----------|----------------------------------------|
| Student: | District Representative: |
| Parent: | General Education Teacher: |
| Parent: | Special Education Teacher or Provider: |
| Other: | Other: |

NOTE: The parent is an integral team member when planning to address the needs of a student with a disability. If the parent did not contribute input when developing this plan, document multiple efforts to obtain parent participation.

The following items were reviewed to inform decision-making about the student's individual needs during the mandated COVID-19 school closure:

- The extent to which educational services are being provided to the general population in the school district, including the plan developed by the District pursuant to Section II of Executive Order 2020-35.
- The student's current IEP and progress, including goals/objectives, programs, related services, and supplementary aids/services.
- The unique circumstances of this student/family as a result of the mandated school closure related to the COVID-19 emergency.

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1. What learning opportunities is the school/district providing for the general population of student during the mandated school closure?

2. Do the learning opportunities provided for the general student population require the use of specific technology (phone, computer, internet, email, Skype, Google Hangout, Zoom, etc.)?

___ No.

___ Yes, and the parent has indicated that this student already has all the technology necessary to access the learning opportunities being provided for all students.

___ Yes, but the parent indicates that this student does not have access to all the necessary technology. Describe the technology/support or alternative means of delivery that the district will provide to ensure equal access to the learning opportunities being provided to all students:

3. Does this student require accommodations/modifications or supplementary aids/services to meaningfully access the types of learning opportunities that are being provided to the general student population during the mandated school closure? This may include significantly modified or alternative activities for students who participate very little in general education.

___ No.

___ Yes. Describe the accommodations/modifications or supplementary aids/services that are necessary to ensure equal access to the types of learning opportunities being provided during the closure:

| Accommodations/modification or supplementary aid/service to be provided: | Amount of time/frequency or circumstances | Location or Method of Delivery | Start date: |
|--------------------------------------------------------------------------|-------------------------------------------|--------------------------------|-------------|
| | | | |
| | | | |
| | | | |

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Practical Considerations for Provision of a FAPE

- CONTEXT: What's being provided for all students?
- Applying the principles behind IDEA:
 - Equal Access
 - Involvement/Progress in General Curriculum
 - Specially Designed Instruction related to IEP Goals/Objectives

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Equal Access

- What accommodations/modifications are **reasonable and appropriate** for this student to have meaningful access to what's being provided for all students?
 - Current IEP as a starting point: Supplementary Aids/Services
 - Other supports necessitated by the new delivery model
 - Technology needs
 - Implies communication/collaboration among staff

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Involvement/Progress in the General Curriculum

- How was the student involved in the general curriculum prior to closure?
- How can we **reasonably and appropriately** approximate that same level of involvement?
 - Supplementary aids
 - Other accommodations/modifications necessitated by the new delivery model
 - How might paraprofessionals help?
 - Implies communication/collaboration among staff

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Specially Designed Instruction

- Driven by annual goals/short term objectives
- What goals/objectives remain appropriate?
- What instruction is **reasonable and practicable** to address those goals/objectives **under these circumstances**?
 - Special ed programs (i.e., SE teacher support)
 - Related services (speech, SW, OT, PT, etc.)
- What supplementary aids are necessary to support progress on goals?
 - How can paraprofessionals help?
- Progress monitoring implications

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In the Background: Comp Ed Considerations

- Will be addressed after normal operations resume---
format/criteria still unknown
- Safety net for students and district
- We can prepare now:
 - Document decision-making
 - Document parent contacts/results
 - Document student contacts/progress

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Compassion over Compliance

- "How can we help?"
- Acting in good faith
- What's reasonable and appropriate
- In light of current circumstances
- Keeping in mind the health and safety of all
- With parents as partners

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Questions for
Bob Lusk &
Donna Tinberg



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Addressing the Myriad Labor Issues

Robert Schindler
Partner, Lusk Albertson



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Topics for Today

- Collective Bargaining
 - The Continuity of Learning Plan
 - Other modifications as a result of the EO
 - Upcoming contracts
- Other L&E Considerations
 - Student loan wage garnishment
 - Payment of employees and ICs
 - Redeployment of workers
 - Workers that won't/can't work and the FFCRA
 - Evaluations
 - Nonrenewals

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Collective Bargaining and EO 2020-35

- Q: Do School Districts need to bargain their continuity of learning plan (COL)?
 - A: No.
 - The EO specifically tasks school districts with "implementing" the COL
 - Requires only "collaboration" with teachers and others
 - Notes that districts should act "consistent" with applicable CBAs
- Q: Is there any aspects of plan that may need to be bargained?
 - A: Possibly, but any requirements would be severely limited
 - Plan and work according to the plan is subject to an Executive Order, which has the effect of law
 - Prohibited subjects of bargaining

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Collective Bargaining and EO 2020-35

- Prohibited Subjects of Bargaining:
 - Decisions . . . concerning use of technology to deliver educational programs and services and staffing to provide that technology, or the impact of those decisions on individual employees or the bargaining unit.
 - Teacher placement and evaluation also PSBs
- What does it mean to be prohibited?
 - No obligation to bargain
 - The continued demand to bargain by one side amounts to a ULP
 - A contractual provision relative to the topic is unenforceable

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Collective Bargaining and EO 2020-35

- What about “changes in working conditions”? Do those need to be bargained?
 - Perhaps, but this would have to be more than simply the redeployment or a modification of how the individuals’ jobs are being done
- This does not mean we should not be working with or discussing matters with our bargaining units
- We can sign an MOU on certain matters, but necessity would be limited

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EO 2020-35 and Payment of Workers

- Q: Does the EO require the payment of third-party contractors?
 - A: No.
 - The EO is silent on third-party contractors, thus no requirement to pay
 - There may be contractors that you need and should continue to pay the company for the service of those workers
 - Remember, we should never be paying "the employees of third-party contractors"
 - BUT: CARES Act provides that for federal grants schools should continue to pay employees and contractors to the greatest extent practicable

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EO 2020-35 and Payment of Workers

- Q: Does the EO require the payment of school employees that are funded through non-general fund dollars like tuition or grant money?
 - A: Yes. The EO states that schools should continue to pay "employees" without distinction as to the source of how they are paid
 - It is important to remember that these employees may be redeployed just as any other employee could

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EO 2020-35 and Payment of Workers

- Q: Does the requirement to pay employees include the payment of extra pay noted in contract or policy?
 - A: The EO is not clear on this point, but the intent seems to be that normal wages are included. Specific examples of this would include:
 - Schedule B stipends: There would seem to be no requirement to pay for extra duty pay where service has not/is not rendered, but check your contract on this as well
 - Longevity: Payment for longevity is generally based on a year of service. As that requirement would be met, longevity should generally be paid
 - Attendance bonuses or merit pay: It would depend on your policy or contract, but nothing in the EO would require payment of these items.

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Garnishment of Student Loan Payments

- Q: Should we continue to garnish student loan payments?
 - A: Nothing in the EO would prevent this, but the CARES Act prevents in certain circumstances
 - CARES Act suspends wage garnishments for **Department-owned** federal loans through Sept. 30, 2020
 - Erroneous garnishments will be refunded to employee by Department
 - Action plan:
 - If loan owner is known and owner is Department, suspend garnishments
 - If loan owner is not known, wait for Department to send letter to HR directing garnishments to cease
 - Employees may elect to continue garnishments during this period

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The Redeployment of Employees

- Q: Can we have employees do the work of other bargaining units or work normally done by third-parties?
 - A: Yes. The EO states, as part of the continuing of pay, that workers be redeployed to do meaningful work

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The Redeployment of Employees

- Q: What if the employees refuse?
 - A: They cannot without good reason.
 - Focus should be on those items that excused under either contract or state or federal leave law
 - FFCRA included EPSLA, which includes the following reasons:
 - The employee is subject to a Federal, State, or local quarantine or isolation order related to COVID-19
 - The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19
 - The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis
 - The employee is caring for an individual who is subject to an order as described in subparagraph (1) or has been advised as described in paragraph (2)
 - The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the child care provider of such son or daughter is unavailable, due to COVID-19 precautions- ALSO expanded FMLA
 - The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor

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The Redeployment of Employees

- Unable to work because of closed schools or daycares
 - May require employee to certify:
 - Unable to work or telework as a result; and
 - No other suitable individual to care for the children

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Evaluations

- Q: Are we required to provide evaluations for staff?
 - A: The EO says that strict compliance is not required for the evaluations of teachers and administrators for 2019-20 SY
 - Remember, the evaluation of teachers is a PSB
- Q: *May we do evaluations on teachers?*
 - A: Yes. Because strict compliance is not required does not mean that the District cannot do so - in some cases, meaningful feedback will be a necessity!

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Nonrenewal of Administrators and Teachers

- Q: Has the EO affected the timeline for the nonrenewal of administrators or probationary teachers?
 - A: No.
 - That means for an administrator, a board of education must vote for nonrenewal and notification of the nonrenewal no later than April 30. Notice of contemplated nonrenewal should have already went out last month. There is no reason that this nonrenewal cannot be done at a virtual meeting pursuant to EO 2020-15 (at least until April 15 or until extended)
 - Probationary teacher nonrenewal must still occur no later than June 15. May be done sooner.

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Questions for Bob Schindler

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Additional Questions?

Submit Your Questions Using the Questions/Chat function!

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Resources

- PowerPoint Slides and Recording of Webinar* →
www.LuskAlbertson.com/COVID19
- Twitter → **@LuskAlbertson / @metrobureaudet**
- SCECHs →
 - Click [HERE](#), or
 - Click on Link at www.LuskAlbertson.com/COVID19, or
 - Link will be emailed as well to all attendees

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Thank You!!



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