

# WHEN THE EEOC, MDCR OR OCR COME KNOCKING ON YOUR DOOR!

MSBO 79<sup>TH</sup> ANNUAL CONFERENCE

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By Kara T. Rozin

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# EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC)

**Enforces Federal Laws that prohibit workplace discrimination, harassment or retaliation based on:**

Age (40 or over)

Disability

Equal Pay/Compensation

Genetic Information

National Origin

Race/Color

Religion

Sex

Pregnancy

Sexual Harassment



# EEOC – EMPLOYMENT POLICIES OR PRACTICES

- **Job Advertisements**
- **Recruitment**
- **Application & Hiring**
- **Job Assignments & Promotions**
- **Training**
- **Pay & Benefits**
- **Dress Code**
- **Discipline & Discharge**
- **Reasonable Accommodation**



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# EEOC PROCEDURE

- **Typically, it's a “one and done” process.**
- **Employee files a Charge of Discrimination**
  - In general, within 180 calendar days of when discrimination took place.
- **Employer decides how to respond:**
  - Mediation
  - Position Statement
- **EEOC makes finding – (typical 10 months to investigate)**
  - Less than 10% of cases go to the EEOC attorneys/legal unit. If they do, they are typically “class” cases where a policy affects more than one person.
- **EEOC can either file a complaint against Employer, or issue a “Right to Sue” letter. Even if no evidence to support a finding of illegal discrimination, harassment or retaliation.**

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## EEOC RESOURCES

### Laws and Regulations:

<https://www.eeoc.gov/laws/index.cfm>

### Guidance (by subject area):

<https://www.eeoc.gov/laws/guidance/subject.cfm>

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## MICHIGAN DEPARTMENT OF CIVIL RIGHTS (MDCR)

- **Enforce State laws and investigate alleged discrimination against any person because of religion, race, color or national origin and to “secure the equal protection of such civil rights without such discrimination.”**
- **Expands beyond Employment to Education and Housing.**
- **Relevant Civil Rights Laws:**
  - Michigan Persons with Disabilities Civil Rights Act (equivalent to ADA)
  - Michigan Elliot Larsen Civil Rights Act (equivalent to Title VII, Title IX, ADEA)
- **Same timeframe to file a complaint with MDCR, 180 calendar days.**

## **MDCR (CONT'D)**

- **MDCR is a bit more involved than EEOC's "one and done."**
- **Typically, after a position statement is submitted by the respondent, the MDCR conducts interviews (via telephone) of those directly involved in the allegations.**
- **Decision is made. Similar "Right to Sue" is issued to Complainant.**



# EEOC/MDCR CLAIMS: ADVERSE EMPLOYMENT ACTIONS

- **The majority of EEOC/MDCR complaints are over “Adverse Employment Actions.”**
- **Take many forms:**
  - Termination
  - Discipline
  - Layoff
  - Failure to Promote
  - Transfer (if lesser pay/benefits/job title)
  - Failure to Hire
  - Denial of Accommodation
- **Initial Burden on Employee to allege adverse action was based on unlawful discrimination. Employer then has to show adverse action was based on a legitimate, business decision.**





# AVOIDING MDCR/EEOC CLAIMS

- **Conduct thorough investigations regarding discipline decisions for misconduct**
  - 7 part Just Cause test
  - Not arbitrary or capricious
- **Evaluate employees effectively!**
  - Do not “puff” performance evaluations
  - Utilize your tools (MYPR, PIP, etc.)
- **ADA – Engage in the interactive process!**
  - How can I help you?
  - Do not substitute your assumptions for that of the employee as to whether something is “reasonable” (religious accommodations, pregnancy accommodations)
  - FMLA ends, ADA does not!
- **Document, Document, Document!**
  - The EEOC and MDCR will be asking for your policies, procedures and protocol as well as your EVIDENCE to support the decision.
  - Don’t make it a he said/she said case!



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## **AVOIDING MDCR/EEOC CLAIMS (CONT'D)**

- **Enforce your policies, and enforce them equally**
  - Notice to employees of policies and procedures – annually
- **Take prompt action on Complaints**
- **Train your District**
  - Administrators, HR, Building Principals/Supervisors – your “decision makers” – policies, procedures, investigations and proper documentation
  - Train all staff/students on Anti-Harassment, Non-Discrimination policies and procedures

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## **KNOCK, KNOCK! IT'S THE OCR!**

- **OCR's Authority**
  - Title VI, Title IX, Section 504, Title II, ADEA
  
- **OCR Investigations are the epitome of a school investigation – costing a district a substantial amount of time and resources.**



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## OCR

- **Complaint Investigations**

- Low threshold to open Complaint against School District
- Case Processing Manual – Section 108(c)
  - Requires dismissal if allegations are so speculative, conclusory or incoherent that it is not sufficiently grounded in fact for OCR to infer discrimination or retaliation has occurred or is occurring.
  - Complaint “must provide more than conclusions of alleged violations of the laws enforced by the OCR.”

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## **ANALYZING AN OCR COMPLAINT: BEST PRACTICE**

- **Consider taking steps to have Complaint closed at outset, or the issues/allegations significantly narrowed from the outset by challenging the underlying Complaint**
  - Gather basic background facts to determine if there is any basis in fact for the underlying Complaint.
  - Don't expect the OCR to do a preliminary review of evidence to determine if there is merit to open a Complaint.
- **If Complaint is not closed, it may help narrow investigation/data requests.**
- **Consider ECR/Early Resolution of Complaint (especially with Section 504 Complaints).**
- **Resolve with Complainant in exchange for withdrawal of Complaint.**

## OCR INVESTIGATION: DATA REQUESTS

- Often beyond the scope of the individual Complaint – “Audit” of District
- **HUGE BURDEN**
  - Numerous requests
  - 1000s of pages
  - Multiple building requests
  - Multiple years
  - Multiple students/staff
- **ALL IN 15 CALENDAR DAYS?!**



## DATA REQUESTS: BEST PRACTICE

- **Data production should be focused on Complaint allegations**
  - CPM states: “OCR will ensure that investigations are legally sufficient and that they are dispositive of the allegations raised in the Complaint.”
- **Consider on-site visit vs. production of documents**
- **Object to requests that require District to create new data or requests data that does not exist**
- **Limit requests to scope of Complaint**
  - Example: Title IX (student/student allegations)
- **Don't forget the Attorney/Client privilege!**
  - FERPA does not apply to OCR



## OCR INVESTIGATIONS: ON-SITE VISITS

- **Administration/Staff Interviews, Student Interviews, Viewing location of “Incident”, Classrooms, Athletic Facilities, etc.**
- **ANOTHER HUGE BURDEN**
  - Multiple witnesses, multiple days, multiple OCR attorneys
  - Disruptive to educational environment





## ON-SITE VISITS: BEST PRACTICE

- **Interviews should only be conducted when necessary**
  - Suggest interviews of “key players” first; may eliminate duplicative/unnecessary interviews
  - Attempt to not disrupt educational environment – schedule interviews far in advance around staff availability and instructional calendar
    - Schedule viewings outside of school day
  - Parental consent for student interviews
  - Review documents with witnesses to refresh recollection
  - Disclosure of interview questions/topics to subsequent witnesses
  - Insist district legal counsel present during interviews



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# OCR INVESTIGATIONS: RESOLUTION

- **Resolution Agreement – Frequently Used**
  - This is a NEGOTIABLE document – do not just “rubber stamp”
  - 30 days to negotiate terms and conditions – only signed by District, so make sure you are comfortable with terms/timeframes
  - If a Resolution will not be effective, or does not relate to original Complaint allegations, point it out for discussion
    - Ex: Training for certain staff when student no longer in building
  - Remedies may be duplicative
    - Ex: Task Force, Trainings, Policies
- **Resolution Agreements posted in OCR “Reading Room”**
  - Search by statute or state
  - <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/readingroom.html>

# WEBSITE ACCESSIBILITY 101

- **What is Website Accessibility?**
  - Simply put: “People with Disabilities can access the web.”  
Navigate, perceive, understand and interact with the website to the same extent as persons without disabilities can.
- **Who is impacted?**
  - Blind users, low vision users, deaf or hard of hearing.
- **Why does it matter?**
  - Section 504 and Title II of the ADA.
  - OCR!!!
    - As of July 2016, 227 investigations open.
    - “Special Education Wall of Shame!”



# WEBSITE ACCESSIBILITY 101 (CONT'D)

- **Standards for Website Compliance:**

- Web Content Accessibility Guidelines 2.0 (WCAG), Level AA – most common

- (1) Understandable**

- Text is readable and understandable (contrast issues)
- PDF vs. RTF files

- (2) Robust**

- Compatible with current and future user tools

- (3) Perceivability**

- Captioning, Alternative Text

- (4) Operable**

- Disabled users (screen readers, keyboard users)
- Alternative Access



## WEBSITE ACCESSIBILITY 101 – 3 STEP QUICK FIX

- **Get ahead of the OCR!! “3 Step Quick-Fix”**
  - (1) **Non-Discrimination Policies and Administrative Guidelines – how do you find them?**
    - Title IX Coordinators/Section 504 Coordinator – readily accessible!



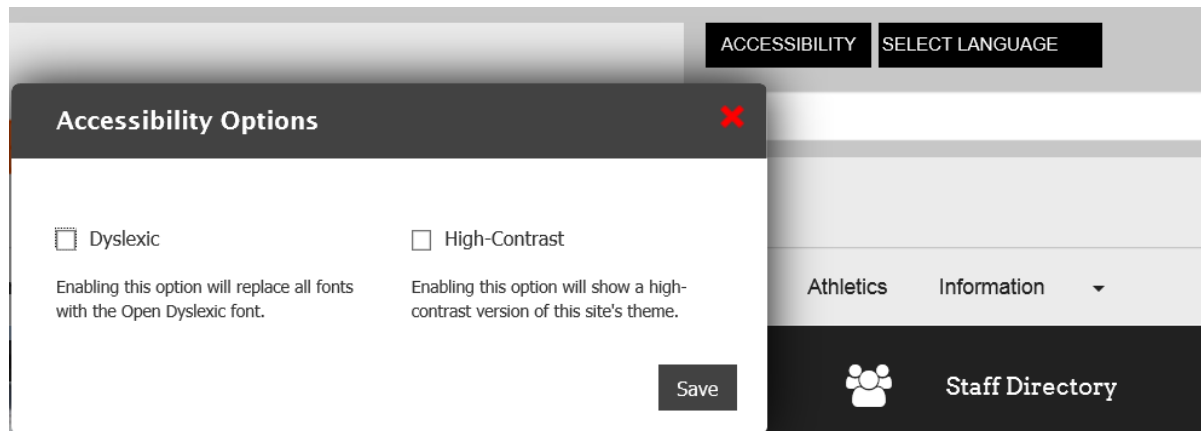
# WEBSITE ACCESSIBILITY 101 – 3 STEP QUICK FIX

## (2) Website Accessibility Issues

- Website Accessibility Coordinator: Who is it? How can I contact them?

### ACCESSIBILITY

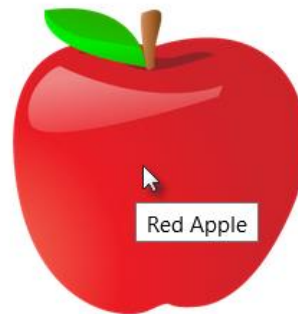
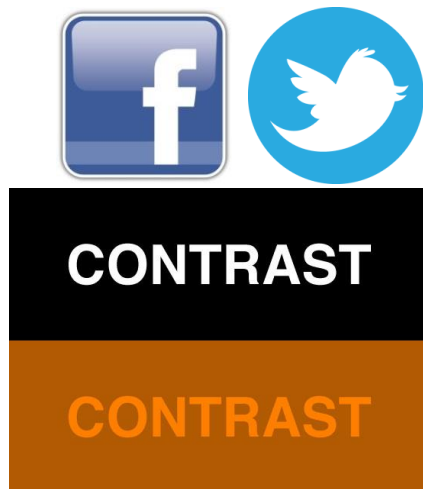
Any student, prospective student, employee or guest of the District who is unable to access information contained on this website or any online content about the District's programs, services, or activities may contact a member of the District Communications Department for assistance.



# WEBSITE ACCESSIBILITY 101 – 3 STEP QUICK FIX

## (3) Web Checker – Do it Yourself!

- WAVE: Identify the “Red Flags”
  - 3 most common: Alternate Text Images, Contrast Issues and Audio Only Content



# WEBSITE ACCESSIBILITY 101 – RESOLUTION AGREEMENTS

## • Resolution Agreement vs. Investigation

- Most OCR Resolution Agreements contain the same general requirements:
  - Development of Policies (WAP) and Procedures
    - No model policy yet from NEOLA or MDE
  - Development of Corrective Action Plan (Audit)
  - Notice of Policies – Reporting of Issues
  - Training
    - At least annually; can specify terms
    - Website Accessibility Coordinator and all other employees responsible for creating or distributing Online Content
      - Applies to all! (School secretary? History teacher?)





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## WEBSITE ACCESSIBILITY 101 - RESOURCES

<http://www2.ed.gov/about/offices/list/ocr/frontpage/faq/readingroom.html>

(OCR Reading Room – other sample Resolution Agreements/Website Accessibility Materials)

<http://siteimprove.com> (Web Checker Service)

<http://wave.webaim.org> (Free webpage checker)

<https://www.w3.org/WAI/intro/wcag> (WCAG standards)

<http://webaim.org/standards/508/checklist> (Section 508 standards checklist)

OCR Case Processing Manual:

<https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.html>



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- School law issues are complex and fact specific; when in doubt, consult with your legal counsel!

# THANK YOU!



Kara T. Rozin

[krozin@clarkhill.com](mailto:krozin@clarkhill.com)

616-608-1110

CLARK HILL