

To: Sarah Prout Rennie/MCEDSV Membership  
From: Survivor Law Clinic  
Date: May 20, 2021  
RE: DV/SA Shelters and Service Providers and Michigan's Mask Mandate

**Question Presented:**

Whether Michigan state regulators plan to apply the new CDC and MDHHS COVID-19 guidelines to workplaces such as domestic violence and sexual assault shelters and service providers under 42 U.S.C. § 10401 so that employees, as well as survivors, are not required to wear masks.

**Brief Answer:**

Michigan Occupational Safety and Health Administration (MiOSHA) is working to bring its permanent rules and proposed permanent rules in line with the new orders. Prior to the Centers for Disease Control and Prevention (CDC) new guidance on mask wearing on May 13, 2021, MiOSHA extended the Emergency Rules for Coronavirus 2019 on April 10, 2021 to continue for businesses, including establishments such as domestic violence and sexual assault shelters and service providers, until October 14, 2021. Mich. Admin. Code R 408E-2.2020. These mask mandates are still applied to workers, and businesses may impose them on customers; however, they *are not* applicable to those receiving services offered by FVSPA-funded programs. *Id.*; 45 CFR § 1370.10 (b)(10).

A central FVSPA program goal is parity in services with no one being denied access or receiving less than others due to requirements set forth at an organization. Therefore, anyone receiving services from these programs cannot be refused services for not wearing a mask. Ultimately, employees can request survivors wear masks, but cannot refuse services for failing to comply. 42 U.S.C. § 10408.

**Statement of Facts:**

Domestic Violence and Sexual Assault (DV/SA) shelters cannot require survivors to wear masks while CDC guidelines, Michigan Department of Health and Human Services (MDHHS), and Victims of Crime Act Administrators (VOCA) require staff to wear masks and socially distance indoors and give other businesses discretionary power to require patrons to wear masks to receive services.

As of May 13, 2021, the CDC updated its guidelines so that “fully vaccinated people no longer need to wear a mask or physically distance in any setting, except where required by federal, state, local, tribal, or territorial laws, rules, and regulations, including local business and workplace guidance.” The CDC released guidance indicating the fully vaccinated persons need not wear a mask in most settings, regardless of whether indoors or outdoors. CDC also stated that fully vaccinated persons are at low risk of experiencing symptomatic or severe COVID-19 infection, and pose a reduced risk of transmitting COVID-19 to others.

The May 15, 2021 Gatherings and Face Mask Order, as a response by MDHHS to the new CDC mask guidelines, concluded that, pursuant to M.C.L.A. 333.2253(1), COVID-19 continues to constitute an epidemic in Michigan. If the director determines that control of an epidemic is necessary to protect the public health, the director by emergency order may prohibit the gathering of people for any purpose and may establish procedures to be followed during the epidemic to insure continuation of essential public health services and enforcement of health laws. Emergency procedures shall not be limited to this code. *Id.* MDHHS may “[e]xercise authority and promulgate rules to safeguard properly the public health; to prevent the spread of diseases and the existence of sources of contamination; and to implement and carry out the powers and duties vested by law in the department.” M.C.L.A. 333.2226(d).

Despite the new MDHHS Order, MiOSHA still requires employees to wear face masks when they cannot maintain 6 feet of distancing from others or in common areas under its authority granted by M.C.L.A. 333.2253 until October 14, 2021 because it believes that COVID-19 cases can be reduced by requiring medium- and high-risk employees to wear masks. Mich. Admin. Code R 408E-2.2020. This requires that:

- (1) The employer shall keep everyone on the worksite premises at least 6 feet from one another to the maximum extent possible and to reduce congestion, including using ground markings, signs, and physical barriers, as appropriate to the worksite.
- (2) The employer shall provide non-medical grade face coverings to their employees at no cost to the employee.
- (3) The employer shall require face coverings to be worn when employees cannot consistently maintain 6 feet of separation from other individuals in the workplace and consider face shields when employees cannot consistently maintain 3 feet of separation from other individuals in the workplace.
- (4) The employer shall require face coverings in shared spaces, including during in-person meetings and in restrooms and hallways.

These rules were promulgated by the Director of the Michigan Department of Labor and Economic Opportunity (LEO) to establish requirements for employers to control, prevent, and mitigate the spread of COVID-19 among employees. *Id.*

The gathering restrictions for an establishment, which includes any business, store, office, organized event, or other organization, remain limited. M.C.L.A. § 333.2253(1)(e). Gatherings in waiting rooms at outpatient health care facilities and other businesses are prohibited unless the facility implements a system to ensure that persons not of the same group maintain 6 feet of distance. *Id.*

After the CDC guidelines changed on May 13, 2021, MDHHS allowed that the indoor face mask requirements may be loosened by a “good faith effort” which may include requiring all patrons and employees to wear a face mask. M.C.L.A. § 333.2253(6). However, MDHHS also stated that the requirement does not apply to those who are fully vaccinated. M.C.L.A. § 333.2253(7)(a). *Despite businesses being able to enforce and condition patrons to wear masks, voluntary services such as DV/SA shelters and other services under FVSPA may not require survivors to wear masks as a condition for services. 42 U.S.C. §10408 (d)(2).*

Notwithstanding the lightened restrictions by the CDC and MDHHS, MiOSHA still requires employees to wear face coverings when they cannot maintain 6 feet of distancing from others or in common areas, and permits requiring patrons to wear masks. Mich. Admin. Code R 408E-2.2020. Unlike the new CDC and MDHHS rules, there is no exception to the mask requirement for employees. *Id.* However, the discretionary power held by businesses to refuse services for customers who refuse to wear masks on premises **does not** apply to voluntary services such as programs and projects “designed to prevent incidents of family violence, domestic violence, and dating violence by providing immediate shelter and supportive services for adult and youth victims of family violence, domestic violence, or dating violence (and their dependents), and that may provide prevention services to prevent future incidents of family violence, domestic violence, and dating violence.” 42 U.S.C. §10408.

On May 17, 2021, the LEO posted an update on its COVID-19 Workplace Safety Guidelines indicating that MiOSHA will also post an update on its workplace rules. However, until it has “reviewed the new CDC and MDHHS guidelines” in accordance with its own, it maintains that workers must wear masks while responding to employee complaints and investigations related to COVID-19. Despite Michigan businesses’ discretion to require masks by the new CDC and

MDHHS guidelines, DV/SA and other FVSPA-funded services programs cannot refuse services to survivors for failure to comply because the goal of the implementation of FVSPA-programs is to better prevent and protect survivors of family violence, domestic violence, and dating violence, in accordance with the Act. 42 U.S.C. § 10404(a)(4).

### **Discussion:**

Under Family Violence Prevention and Services Act (FVSPA) statute and regulation mandates, no one can be forced or required to do, or not do, something in order to receive services. No conditions can be applied for the receipt of emergency services. 42 U.S.C. § 10408(d)(2). Furthermore, FVSPA provides that a coalition that receives a grant shall collaborate with “entities in such fields as housing, health care, mental health, social welfare, or business to support the development and implementation of effective policies, protocols, and programs that address the safety and support needs of adult and youth victims of family violence, domestic violence, or dating violence.” *Id.*; 42 U.S.C. §104011(d)(4).

Under Occupational Safety and Health Administration Act of 1970, (1) employers have a duty to furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees, (2) comply with occupational safety and health standards, and (3) employees have a duty to comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to his own actions and conduct. 29 U.S.C.A. § 654. This does not permit employees of FVSPA-funded programs to condition the receipt of services on the survivors’ willingness to wear masks, despite employees’ safety concerns. 42 U.S.C. §10408(d)(2). MiOSHA has maintained that the safety protocols are necessary to maintain safety and reduce the spread of COVID-19. Mich. Admin. Code R 408E-2.2020. Medium- and

high-exposure risk include workers whose tasks require frequent or close contact with people who may be infected with COVID-19, but who are not a known or suspected COVID-19 patients. In areas with ongoing community transmission, workers that have contact with the public are required wear masks and businesses may require patrons to wear masks, however the same is not true for those seeking FVSPA services. *Id.*; 42 U.S.C. §10408(d)(2).

Due to the new CDC and MDHHS guidelines, MiOSHA has responded to complaints from employees who are required to wear masks while survivors are not. The concern of employees who do not want to meet in person with survivors who do not wear masks due to COVID-19 concerns can be mitigated by asking a survivor to wear a mask, get vaccinated, or take other CDC recommendations. However, it is important to note that the failure of a survivor to comply does not permit an advocate or member program to refuse a voluntary service. 42 U.S.C. §10408(d)(2). Survivors deserve respect and the dignity of conversations that help them make choices and work through their safety needs, including the new CDC and MDHHS guidelines.

A state that receives a grant under 42 U.S.C. §10406(a) for programs and projects “designed to prevent incidents of family violence, domestic violence, and dating violence by providing immediate shelter and supportive services for adult and youth victims of family violence, domestic violence, or dating violence (and their dependents), and that may provide prevention services to prevent future incidents of family violence, domestic violence, and dating violence” cannot condition services on the requiring survivors to wear masks. 42 U.S.C. §10408 (d)(2). Providing shelter, supportive services, or preventions services includes no contingencies on survivors to receive voluntary services. *Id.* Program employees should first seek to accommodate survivors in an alternative way (i.e. requesting they wear a mask, meet outside, or off-site housing in a hotel from shelters), but may not refuse the survivor services by refusing to

wear a mask. *Id.* Furthermore, as trauma-informed employees of these programs, advocates should work individually with survivors about any concerns regarding masks. 45 CFR § 1370.10 (b)(10).

The statutory voluntary services and no conditions on the receipt of emergency shelter requirements in FVSPA hold that a mask condition cannot be imposed on the receipt of emergency shelter or other services. 42 U.S.C. §10408(d)(2). DV/SA shelters and services are subject to the regulation's specification that there is a prohibition on imposing "conditions" to prohibit shelters from refusing services to survivors. Similarly, the receipt of shelter cannot be conditioned on participation in wearing a mask because it impedes on basic human needs or lifesaving rights to shelter and services. By doing so, it would have the opposite effect on the best practices for trauma-informed services. 45 CFR § 1370.10(b)(10). Only extreme cases of disregard to public safety could give rise to requesting a DV/SA survivor being asked to leave a shelter (i.e. putting others in clear danger of contamination), but this should be a last resort. However, with the new CDC and MDHHS guidelines, this will likely be extremely rare as more survivors become fully vaccinated and COVID-19 dangers decrease. *Id.*

To have more consistent guidelines for employees who provide services to DV/SA victims, MiOSHA is going to release updated workplace-mask guidelines after it finishes its investigation to determine the best response to the new CDC and MDHHS mask mandate guidelines for employees who are fully vaccinated. Currently employees are still required to wear masks in offices and when working in a professional setting, however, these restrictions may lift due to the current response by the LEO. Regardless of employee mask requirements required by MiOSHA, CDC, and MDHHS, DV/SA programs and services cannot refuse services to survivors because they are not within the scope of "establishment" under M.C.L.A. § 333.2253(1)(e) and FVSPA prohibits conditions for such services, despite COVID-19 concerns.

### **Conclusion:**

Survivors receiving services from DV/SA programs cannot be refused services for not wearing a mask despite employees' COVID-19 concerns. Ultimately, employees can request survivors wear masks, but cannot refuse services for failing to comply. 42 U.S.C. § 10408.

Although the CDC and MDHHS permit businesses to refuse services by requiring patrons to wear masks under a “good faith effort” determination and additionally permits fully vaccinated people to not comply with the previous mask mandate, MiOSHA still requires employees to wear masks at work regardless of their vaccination status. Despite those state guidelines, DV/SA shelters and service providers funded under FVSPA are not permitted to refuse services to survivors who do not comply with mask requests. Employees of FVSPA-funded programs, despite their concerns about COVID-19 safety and non-compliance with office practices, are not the same as employees of private businesses that may refuse services to patrons. Survivors are entitled to the receipt of supported services under the Act and no conditions may be applied for the receipt of emergency shelter. 42 U.S.C. §10408(d)(2).