Learning for Two: Pregnancy & Parenting Rules Under Title IX and Related Laws

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Introduction

- Discrimination based on pregnancy and parenting are discrimination based on sex
- This presentation cover the current state of the law under the 2024 Title IX rule and other employment laws
- Do not ask (definitely don't assume!) that a student or employee is pregnant
- Additional care may be warranted regarding questions about how to handle accommodations for abortion and post-abortion conditions
- Remember to carefully manage privacy concerns related to students and employees who are pregnant or have pregnancy-related conditions, including abortion and post-abortion conditions
- Don't forget that complaints of discrimination (e.g., different treatment, disparate impact) and failure to accommodate should be addressed using the Title IX process

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Notification Requirements

- Schools must communicate their nondiscrimination policies and grievance procedures to students and families, ensuring students understand their rights and how to report discrimination or request accommodations (34 C.F.R. § 106.8(b))

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Types of Discrimination - Students

- Different Treatment/Exclusion
- Harassment
- Equal Access
- Reasonable Modifications
- Leave Policies & Absences

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Different Treatment/Exclusion

- Schools must not discriminate against students based on pregnancy, childbirth, related conditions, or parenting status. (2024 Version: 34 C.F.R. § 106.40(b))
- That includes forced exclusion from an education program or activity, including any class or extracurricular activity, based on a student's pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom
- A school must ensure that its policies and practices—and those of its employees—do not discriminate against students because of pregnancy and related conditions

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Harassment

- Title IX protects students against harassment by school employees or other students because of their pregnancy and related conditions
- Use the "hostile environment" standards to evaluate, investigate, and decide complaints involving harassment based on pregnancy or parenting status

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Equal Access

- Schools must provide pregnant students with equal access to educational programs and activities as their peers, including reasonable adjustments similar to those provided for other temporary medical conditions (2024 Version: 34 C.F.R. § 106.40(b))
- If a school provides special services, such as homebound instruction, tutoring, or independent studies, to students with temporary medical conditions, it must also provide such services to pregnant students

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Reasonable Modifications

- The Title IX Regulations require educational institutions to provide students who are pregnant/postpartum with "reasonable modifications." That term refers to changes that allow students to have equal access to the educational program or activity. Colloquially, many people also refer to these changes as adjustments or accommodations. "Reasonable accommodations" (a workplace right) is a similar concept to "reasonable modifications."
- Examples include providing a larger desk, allowing frequent trips to the restroom, or permitting temporary breaks during class or access to elevators as needed

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Fundamental Alteration

- An adjustment is not reasonable if it would fundamentally alter the educational program or activity
- Examples of potential fundamental alterations include lowering of academic standards or fundamentally altering essential requirements of a course, safety concerns, excessive financial or administrative burden, and dramatic changes in program structure (e.g., in-person vs. online learning)
- Even where a requested accommodation would be a fundamental alteration, the school should explore alternative accommodations and document the decision-making process to ensure compliance with Title IX regulations

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Lactation

- One type of adjustment/modification required for students is reasonable break times to express breast milk (2024 Version: 34 C.F.R. § 106.40(b))
- Educational institutions are required to ensure that students and employees have access to clean, private, non-bathroom lactation spaces that may be used as needed
- These spaces must be available and accessible so that students' inability to access a lactation space does not negatively impact their ability to participate in the educational program
- To ensure access, lactation spaces have to match the size of the population and be situated in locations convenient to users; the National Institutes of Health estimates that for every 1,000 females, six lactation spaces will be needed.
- Educational institutions should enact measures to ensure that their lactation spaces are accessible when and where needed. Many institutions regularly survey lactation room users, have sign-in sheets that ask whether the space is sufficient, and/or monitor data from door access logs
- At a minimum, lactation space users should be informed of a point of contact to address any concerns about space access

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Leave Policies & Absences

- Leave under Title IX for pregnancy and related conditions must be provided, at minimum, for as long as medically necessary (§ 106.40(b)(3)(iv))
- Schools must treat pregnancy-related absences as justified and allow students to make up missed work, ensuring they return to their prior academic and extracurricular status
- The length of time for leave is determined by the student's own licensed healthcare provider based on their circumstances
- While there is no pre-established timeframe for leave, the common presumption in the employment context is 6 weeks of recovery for an uncomplicated vaginal birth and 8 weeks for an uncomplicated cesarean birth
- Leave must be entirely voluntary
- Any limits on excused absences should be equal to those provided for other temporary conditions or situations

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Types of Discrimination - Employees

- The 2024 Title IX regulations protect employees (including student employees) from discrimination on the basis of pregnancy and related conditions and ensure that employees' pregnancy-related conditions are treated like temporary medical conditions for job-related purposes
- As a result, in many circumstances, a failure to accommodate an employee would violate Title IX.

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Different Treatment/Exclusion

- Schools must not discriminate against any employee or exclude them from employment opportunities on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom

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Benefits

- For employees, schools must treat pregnancy and the same related conditions, including termination of pregnancy, as well as any temporary disability resulting therefrom, as any other temporary disability for all job-related purposes, including employment-based medical, hospital, and other benefits
- If a school provides health insurance, it must cover pregnancy-related conditions on the same basis as other medical conditions, including with respect to the provision of benefits for childbirth and related medical conditions

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Reasonable Accommodations

- Schools must provide reasonable accommodations for pregnant employees if they are requested and are reasonable under the circumstances
- This can include adjustments to job duties or work schedules, similar to accommodations provided for other temporary disabilities

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Leave Policies

- Schools must treat pregnancy-related conditions as any other temporary disability for all job-related purposes, including leave policies
- If a school has a leave policy for temporary disabilities, it must apply the same policy to pregnancy-related conditions
- If a school does not have a leave policy, or if an employee has insufficient leave or accrued employment time to qualify for leave under the school's policy, the school must treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom as a justification for a leave of absence without pay for a reasonable period of time
- After that time, the employee must be reinstated to the employee's pre-leave status or to a comparable position without reduction of compensation or loss of promotional opportunities or any other employment rights or privileges
- In addition, schools must treat pregnancy and the same related conditions and any temporary disability resulting therefrom as any other temporary disability for commencement, duration, and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, along with other employment-based benefits

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Infertility

- The new regulations offer protection for all pregnancy-related conditions, including infertility
- Protection under Title IX includes those who are planning a pregnancy or seeking/undergoing fertility care
- It is a violation of Title IX to discriminate against students undergoing fertility treatment, and institutions must provide related reasonable modifications, when needed

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Pregnancy Loss

- Since the first Title IX regulations were enacted in 1975 they have included protection for "termination of pregnancy," a technical term that includes abortion, miscarriage, and other pregnancy loss
- It is a violation of Title IX to discriminate against students for seeking or obtaining an abortion, and educational institutions must provide pregnancy-related modifications for students regardless of whether they carry their pregnancy to term

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Notice of Student's Pregnancy or Related Condition

- All K-12 employees must inform students (and parents/guardians) that the Title IX Coordinator can facilitate modifications and leave and provide the Coordinator's contact information
- School employees should not attempt to address requests for modifications or request any medical documentation from students regarding their pregnancy or related conditions

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Documentation

- The Title IX Coordinator or their designee may request documentation under certain circumstances
- Once a modification or leave plan has been established, the Title IX Coordinator should only share with other employees the information necessary for them to enact the modification or leave plan
- The educational institution must protect personally identifiable information

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2024 Rule – Title IX Coordinator Responsibility

- Title IX Coordinators are responsible for ensuring that individualized reasonable modifications for pregnancy-related conditions are provided to students who need them
- Coordinators may delegate some duties as needed but must oversee the efforts and are ultimately responsible for ensuring the obligations under the law are met
- While disability accommodation standards are similar, they are not identical; specialized training and materials are needed to ensure compliance with the law

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Parenting

- Title IX only mandates educational institutions provide modifications and leave to students who have pregnancy-related conditions, not all parents
- Recall that any parental leave or accommodation policies for the purposes of caregiving (rather than the student's own health condition) must be administered without distinction on the basis of sex or gender; for example, time off to care for sick children cannot be given to moms but not dads and time off cannot be given to care for an elderly parent but not to a parent of a sick child

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Other Pregnancy Related Laws

Title VII of the Civil Rights Act of 1964

Pregnancy Workers Fairness Act (PWFA)

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Other Pregnancy Related Laws

Fair Labor Standards Act (FLSA) as amended by the Affordable Care Act of 2010 & the Providing Urgent Maternal Protections (PUMP) Act

- Affordable Care Act 2010 amended FLSA to require break times for nonexempt employees who are nursing (but did not cover exempt employees)
- PUMP Act extends protections to exempt employees
- One year after child's birth, an employer must provide all nursing employees with:
  - Reasonable break times to lactate
  - A private place to express milk free from intrusion
  - Full regular salaries regardless of breaks (exempt), nonexempt breaks can be unpaid

Exception: less than 50 employees

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