



## Pregnancy and Parenting in Higher Education September 29, 2022

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### Disclaimer #1



- We are not giving you legal advice. Consult with your legal counsel regarding how best to address a specific situation.
- Use chat function to ask general questions and hypotheticals.
- We have a variety of stakeholders here, so please keep that in mind.
- Watch for your "Thanks for Attending" email, which will include a link to the **slides** of this webinar.
- Yes, you may share the slides with your colleagues!

## Disclaimer #2



- We are discussing federal law today. Please check state law (and local ordinances) to determine whether additional restrictions may apply.
- Title IX is a major part of our discussion. We recognize that there are new regulations that have been proposed. Today we are discussing only current regulations and guidance. For more information on proposed regulations, check out our recorded webinars at <https://www.bricker.com/titleix>.

3

## Your Presenters



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4

## Agenda



- Legal Landscape generally
- OCR Resolution Agreements
- Hypotheticals



5



### Legal Landscape

*Not quite as well-groomed as the topiary of justice.*

## Title IX (1 of 2)



20 U.S.C. §1681 *et seq*

- “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.”

7

## Title IX (2 of 2)



34 C.F.R § 106.21(c)

- Marital or Parental Status - Admissions

**34 C.F.R § 106.40**

- Marital or Parental Status - Students

**34 C.F.R § 106.57**

- Marital or Parental Status – Employees

Non-Regulatory Guidance

- *Supporting the Academic Success of Pregnant and Parenting Students (July 1991, reprinted June 2013)*

8

## Other Relevant Laws



- Disability discrimination laws
  - Section 504 of the Rehabilitation Act
  - Americans with Disabilities Act
- Employee Protections
  - Pregnancy Discrimination Act
  - Family Medical Leave Act
  - Fair Labor Standards Act

9

## General Principles



- Non-Discrimination
  - Are you requiring someone to do something different because they are pregnant or because they are a parent?
  - If you had a non-pregnant person or non-parent ask for the same accommodation or leave in any other circumstance, would you grant it to them?
- Remember: Parents and pregnant people generally maintain autonomy to choose how to navigate their education/employment.
  - Informed consent is key.

10



## Title IX

*Current regulations and guidance*

### Marital or Parental Status



**34 C.F.R § 106.40 (a):** A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status **which treats students differently on the basis of sex.**

- Rivertown School of Beauty, September 2013
  - Facts: Beauty School had a policy that required, among other things, students to withdraw upon the seventh month of pregnancy.
  - Result: School was found in violation of Title IX.

## Non-Discrimination



34 C.F.R § 106.40(b)(1)

A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, **on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless** the student requests **voluntarily to participate in a separate portion** of the program or activity of the recipient.

13

## Health Certifications



34 C.F.R § 106.40(b)(2)

A recipient **may require** such a student to **obtain the certification of a physician** that the student is physically and emotionally able to continue participation **so long as** such a certification **is required of all students for other physical or emotional conditions** requiring the attention of a physician.

- Rivertown School of Beauty, September 2013
  - Required health certifications for absences and return from giving birth

14



## Separate Programs



34 C.F.R § 106.40(b)(3)

A recipient which operates a portion of its education program or activity separately for pregnant students, admittance to which is completely **voluntary** on the part of the student as provided in paragraph (b)(1) of this section shall ensure that the **separate portion is comparable to that offered to non-pregnant students.**

15

## Temporary Disabilities (Title IX)



34 C.F.R § 106.40(b)(4)

A recipient shall treat **pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom** in the same manner and under the same policies as any **other temporary disability\*\*** with respect to any medical or hospital benefit, service, plan or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.

16



## Temporary Disabilities (ADA/504)



These laws protect individuals with a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

According to the EEOC, “a minor, nonchronic condition of short duration, such as a sprain, infection, or broken limb, generally would not be covered.”

Where do pregnancy-related conditions fit, if they resolve after having the baby?

17

## Leaves of Absence



34 C.F.R § 106.40(b)(5)

In the case of a recipient which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, **a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began.**

18

## Non-Discrimination on the Basis of Sex in Admissions (1 of 2)



34 C.F.R § 106.21(c): Recipients

1. **Shall not apply any rule** concerning the **actual or potential parental, family, or marital status of a student or applicant** which treats persons differently on the basis of sex. . .
2. **Shall not discriminate** against or exclude any person on the **basis of pregnancy, childbirth, termination of pregnancy, or recovery therefrom**. . .

19

## Non-Discrimination on the Basis of Sex in Admissions (2 of 2)



34 C.F.R § 106.21(c): Recipients

3. **Shall treat disabilities** related to **pregnancy, childbirth, termination of pregnancy, or recovery therefrom** in the **same manner** and under the same policies **as any other temporary disability or physical condition**
4. **Shall not make pre-admission inquiry** as to the marital status of an applicant for admission, including whether such applicant is “Miss or “Mrs.”

20

## Title IX/Employees (1 of 2)



34 C.F.R § 106.57:

- Don't use potential marital, potential, or family status of an employee or applicant as a reason for employment decisions
- Don't use whether an employee is the breadwinner as a reason for employment decisions
- Can't discriminate or exclude from employment on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom

21

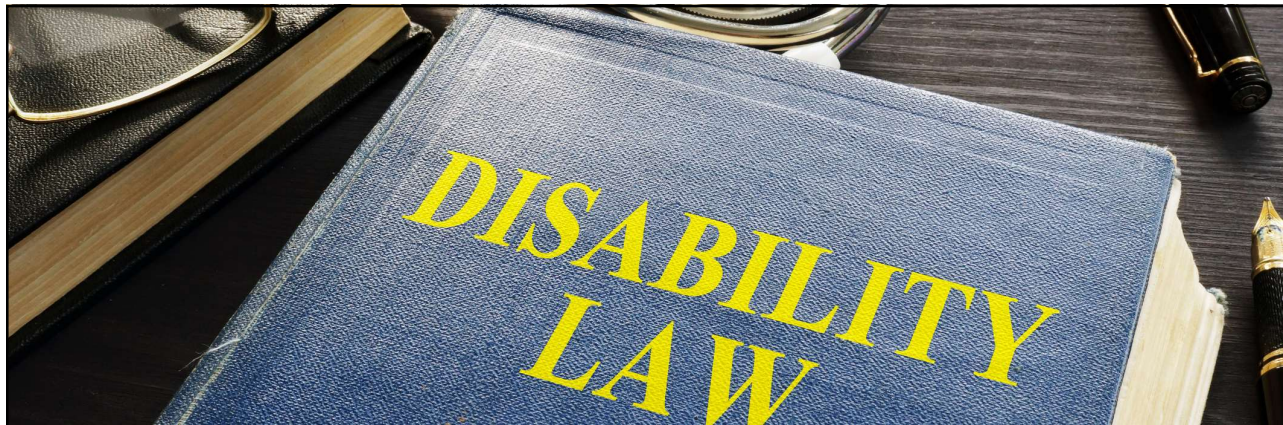
## Title IX/Employees (2 of 2)



34 C.F.R § 106.57:

- Temporary disabilities from pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom should be treated the same as the employer treats any other temporary disability
- If no leave with pay is available, these are reasons for leave without pay. The employee must be reinstated to a "comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment."

22



**What else applies? Lots more!**

*Current regulations and guidance*

## **Title VII – Married Women**



- “[A]n employer’s rule which forbids or restricts the employment of married women and which is not applicable to married men is a discrimination based on sex prohibited by [T]itle VII...” 29 C.F.R> 1604.4(a).

## Title VII – Pre-employment



- Employers may request an applicant's sex and/or whether they are "Mr. Mrs. Miss" on their application if "the inquiry is made in good faith for a nondiscriminatory purpose." 29 C.F.R. 1604.7.
- What is your nondiscriminatory purpose?

25

## Title VII – Pregnancy/Childbirth



- Employers cannot exclude applicants or employees because of pregnancy, childbirth, or related medical conditions
- "Disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions, for all job-related purposes, shall be treated the same as disabilities caused or contributed to by other medical conditions"
  - Consider leave/reinstatement, accrual of seniority, payments under insurance/sick leave, etc.

See 29 C.F. R. 1604.10.

26

## Pregnancy Discrimination Act



- Already folded into the Title VII regulations, above
- Remember:
  - Employers must permit a pregnant employee to do the job for as long as the employee is capable
  - If you are providing temporary assistance to non-pregnant employees, plan on doing the same for pregnant employees
  - If a pregnant employee goes on leave, they are entitled to the return and accrual rights of other employees that go on leave

27

## Back to ADA/504



- Applies to employees, students, and visitors
- Qualified individuals with disabilities receive protection from discrimination
- Reasonable accommodations may be requested
  - Institution must engage in an interactive process to determine what accommodations are reasonable
  - Medical documentation to support accommodations may be requested
- Must be able to perform essential functions either with/without reasonable accommodations

28

## Unreasonable accommodations?



- Employers do not have to provide reasonable accommodations that would cause an “undue hardship” to the employer
  - Requires an individualized assessment that the specific request would cause significant difficulty or expense
  - Consider the overall financial resources of the facility

29

## Family Medical Leave Act



- This could be a whole hour webinar in itself
- To be eligible, employees must:
  - work for a covered employer,
  - have worked for the employer for at least 12 months and 1,250 in those 12 months, and
  - must work at a location where the employer has 50 employees within 75 miles

30



## FMLA Leave



- 12 workweeks in a 12-month period for
  - Birth/adoption
  - To care for a spouse, child, or parent with a serious health condition
  - For a serious health condition that makes the employee unable to perform the essential functions of his or her job

(More leave is available in certain military-related situations not relevant to us today.)

31

## Serious Health Conditions



- Illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a health care provider.
- This includes “any period of incapacity due to pregnancy, or for prenatal care”
- Very specific regulations in this area. See 29 C.F.R. Part 825.

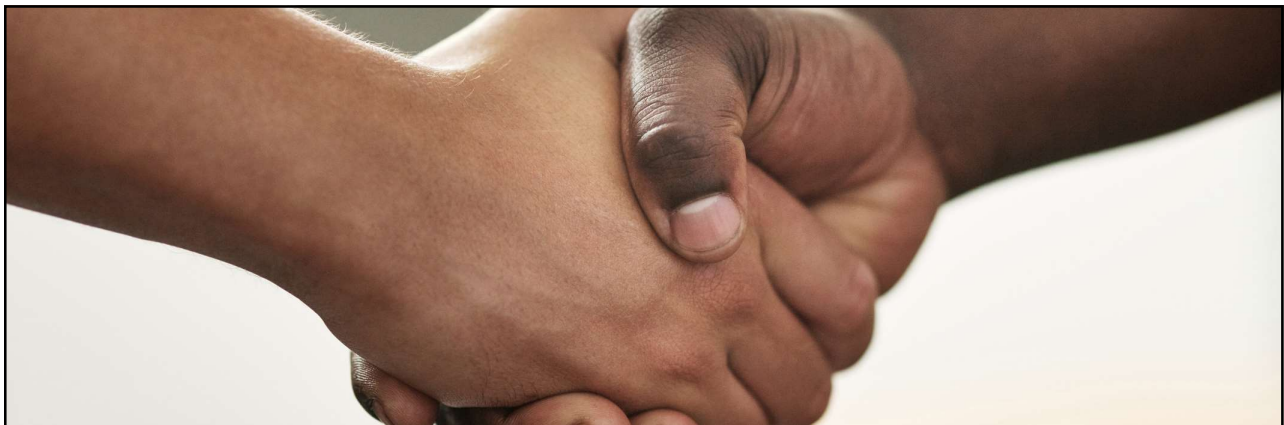
32

## Fair Labor Standards Act



- Employers must provide reasonable breaks for employees to express breast milk for a nursing child for one year after the child's birth, each time the employer must express milk
- Employers must provide a private space other than a bathroom – shielded from view, and free from intrusions
- Breaks do not have to be paid (unless employees are provided paid breaks generally)
- Breaks must be provided “as frequently as needed” for the purpose

33



## OCR Findings and Resolution Agreements

*Learn from Colleagues*

## Salt Lake Community College

### June 2022 (1 of 4)



- Complainant learned she was pregnant and informed her professor that she had missed or had been tardy to class as a result of morning sickness.
- Professor had an attendance policy → three late arrivals was one absence, a student that misses 20% of the class is not eligible to pass the class.
- Student requested the ability to turn in assignments late and to excuse her absences.
- Professor agreed to allow Student to miss some (but not all) of the classes, and would apply a penalty to late assignments.

35

## Salt Lake Community College

### June 2022 (2 of 4)



- Student continued to struggle with morning sickness, and the Professor then advised the student to drop the class because her “health is more important than a class” and she “needed to take some responsibility for the things that were going on.”
- The Title IX Coordinator was contacted and then denied the student’s requests for academic adjustments because they would constitute “fundamental alterations” to the course. Title IX Coordinator said they corresponded with the instructor and dean but did not document those discussions.

36

## Salt Lake Community College

### June 2022 (3 of 4)



- Result:
  - OCR found that the College failed to respond promptly and equitably to the Complainant's complaint of pregnancy discrimination, in violation of Title IX.
  - OCR found that the College failed to engage in an interactive process with the Complainant to determine the appropriate special services and/or academic adjustments to provide in light of her pregnancy, in violation of Title IX.

37

## Salt Lake Community College

### June 2022 (4 of 4)



- Result:
  - OCR found that the College failed to engage in an interactive process with the Complainant and failed to consider whether the Complainant's pregnancy caused a temporary disability requiring academic adjustments, in violation of Section 504.
  - Finally, OCR found that the College failed to excuse the Complainant's absences related to pregnancy, provide her the opportunity to make up work missed due to absences related to pregnancy, or provide alternatives to making up missed work at a later date, in violation of Title IX.

38

## **Fresno City College, April 2018 (1 of 2)**



### Facts:

- College student was hospitalized and gave birth on the days her final was offered. The final had both a written and lab component.
- The student emailed the professor before her final and informed the professor she was going to the hospital and would miss the examination.
- Professor gave the student two options: retake the class or take an incomplete and make up the examination later.
- The student was ultimately not allowed to make up the final examination.

39

## **Fresno City College, April 2018 (2 of 2)**



### Result:

- Prior to the completion of the investigation, Fresno City College entered into a resolution agreement with OCR.
- However, OCR highlighted compliance concerns and noted the College had a requirement to excuse any absences and allow the student to return to the same status they had when their leave began.
- In the context of this matter, that would have included providing the student with the opportunity to make up the final examination.

40

## Chicago State University, March 2018 (1 of 2)



### Facts

- Basic Nursing Assistant (BNA) Training Program had policy in the Program Handbook relating to “pregnancy”
- Among the guidelines included the following obligations:
  - Pregnant students were required to notify the BNA coordinator when they became aware of their pregnancy and provide a health certification that they are physically able to participate in the program
  - Any changes in health status were required to be reported to the clinical instructor

41

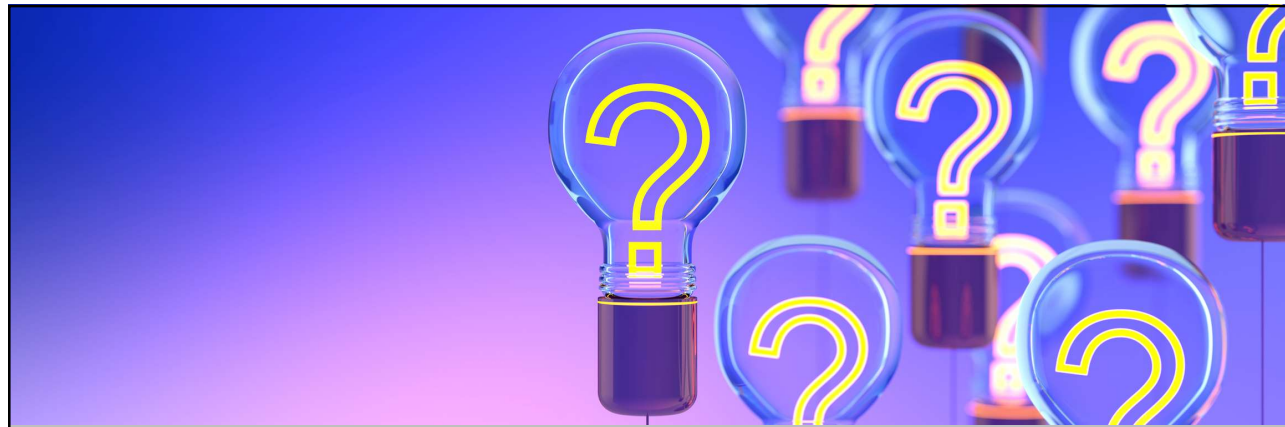
## Chicago State University, March 2018 (2 of 2)



### Result:

- OCR found the Program Handbook policy regarding Pregnancy violated Title IX in that it imposed requirements on Pregnant students that it did not impose on others.

42



## Hypotheticals

*Students and Employees*

### Olivia – Pregnant Student



Olivia is four months pregnant and approaches Professor Pearson to make up an in-class assignment she missed due to a medical appointment. Pearson also assigns five points per class attended for participation.

Professor Pearson tells Olivia she will have to take a zero for that assignment and will not receive the five participation points for the class she missed.

Olivia approaches your Title IX Coordinator and asks if there is anything the Title IX Coordinator can do to help. Olivia is about to graduate and needs to pass this class for her major.

44



## Olivia – On Bed Rest



Olivia is now 7 months pregnant and has developed a medical condition requiring her to remain on bedrest for the last two months of her pregnancy.

Having successfully helped Olivia navigate the situation with Professor Pearson, Olivia now approaches the Title IX Coordinator and asks if there is anything the Title IX Coordinator can do to help her finish her courses.

45

## Olivia – Now a Mom



Olivia gave birth to a healthy baby and took a voluntary leave to stay home for a semester. She is now back and ready to go to class, but her classes are out of sequence.

- What help can she get to graduate on time?
- If her childcare falls through, can she bring her baby to class?
- Can Olivia live in the residence hall with her baby?
- Can Olivia demand a space to express milk?

46

## Professor Polly



Professor Polly is due to give birth in October. She is entitled to FMLA leave and the pregnancy has been healthy so far.

- Can Polly demand that she be released from classes for Fall semester?
- Can the institution reassign Polly's classes for Fall semester?
- When Polly returns from leave, how does the time count for purposes of tenure eligibility?

47

## Blanche



Blanche is an employee. She will be going to the doctor to have an abortion next week.

- Can Blanche use sick leave?
- Can Blanche use FMLA leave?
- When Blanche returns, can she be fired for having an abortion?

(Do you know your state's stance on abortion?)

48

## Final Thoughts

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- The law sets the floor, not the ceiling.
- How you treat your students and employees figures not just into legal compliance, but also:
  - Retention
  - Recruiting
  - Public Relations
  - Donations
- What is both compliant and consistent with your institution's ethic of care?

49

50