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TOPIC:

THE PREGNANT AND PARENTING STUDENT

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INTRODUCTION:

Pregnancy among students raises a host of issues that are unique to the college and university setting. While it is simple to acknowledge that “discrimination against students who are pregnant is prohibited,” it is far more complex to apply the law to the numerous scenarios that can arise when students are pregnant. Institutions must be prepared to address pregnancy-related issues that implicate an array of services, including institutional policies, housing and facilities, clinical placements, athletics, financial assistance, and many others. Additionally, institutions must consider how to address instances when pregnant students are ill; cannot complete physical aspects of course work; are subjected to harassment; or request accommodations related to hiring, admission into specific programs, or attendance.

This NACUANOTE will review recent federal guidance on the topic of pregnant and parenting students; discuss recent federal compliance and enforcement efforts; and provide practical guidance to help institutions comply with the law and afford appropriate, equitable treatment to pregnant and parenting students.^[2]

I. OVERVIEW OF THE LAW AND FEDERAL GUIDANCE

A. The Title IX Statute, Regulations, and Guidance on Pregnant and Parenting Students

Title IX of the Education Amendments of 1972 provides that no person, on the basis of sex,

shall 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.”^[3] The accompanying regulations, along with sub-regulatory guidance, make clear that Title IX’s prohibition of sex discrimination prohibits colleges and universities from discriminating against students based on pregnancy.^[4]

Title IX regulations set forth an array of compliance obligations with respect to admissions, financial assistance, employment, leaves of absence, athletics, course work, and healthcare that colleges and universities must address, both in policy and practice, as they endeavor to accommodate pregnant students. Broadly speaking, colleges and universities (1) cannot discriminate against applicants for admission, financial assistance, or employment “on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom;” (2) must afford reasonable academic accommodations to pregnant students, including leaves of absence and accommodations related to course work, if requested and deemed medically necessary as a result of pregnancy, childbirth, false pregnancy or termination of a pregnancy; (3) must treat student-athletes with pregnancy related conditions in the same way that the institution treats other ill or injured athletes; and (4) otherwise cannot adopt rules or regulations that treat students differently based on their actual or potential parental status.^[5]

In addition to the regulations, in June 2013, the United States Department of Education Office for Civil Rights (“OCR”) issued a “Dear Colleague” letter and an accompanying pamphlet interpreting Title IX as it applies to pregnant and parenting students.^[6] Though focused on secondary schools, the letter expressly states that it also applies to post-secondary institutions.^[7] It emphasizes the institution’s obligation to “treat pregnant students in the same way that [it] treat[s] similarly situated students” and thus provide to pregnant students “any special services provided to students who have temporary medical conditions.”^[8] It prohibits institutions from requiring that pregnant students submit medical certification to participate in activities, unless medical certification is required of all students as a condition for participating in the activity.^[9] Finally, it obliges colleges and universities to excuse absences deemed medically necessary as a result of pregnancy or childbirth, and requires institutions to return students to the same academic status following a pregnancy as when they departed.^[10]

The Title IX statute, regulations, and sub-regulatory guidance make clear that pregnancy itself is not a disability.^[11] However, since 2008, when the definition of disability was broadened with the ADA Amendments Act (ADAAA), the Equal Employment Opportunity Commission (EEOC) has stated that impairments related to pregnancy—even temporary impairments—are qualifying disabilities that trigger “reasonable accommodation.”^[12] By calling for reasonable accommodations even when a pregnant employee is not disabled under the ADAAA, the EEOC appears to make irrelevant the inquiry about whether impairment due to pregnancy is a disability. It gives the example of a pregnant woman with a lifting restriction due to normal pregnancy (i.e., one in which there are no complications), and compares her, for purposes of the reasonable accommodation analysis, to an employee with a back-related disability. Whether the lifting restriction of the pregnant woman is a disability is not relevant for reasonable accommodation purposes. In other words, the EEOC takes the position that discrimination can be proven when a pregnant woman is treated less favorably than an employee covered by the ADAAA. Additionally, the EEOC notes that employers must accommodate not only impairments like preeclampsia or gestational diabetes but also conditions present in most pregnancies—such as morning sickness, changes in body size and weight, and balance issues—if the employer provides accommodations to other employees with similar abilities or inabilities to work.^[13] While these examples are offered in the context of employment discrimination, one could argue that impairments related to pregnancy warrant reasonable

accommodations in other contexts as well, including under Title IX.

B. Title VII and Title IX—Standards for Employment Discrimination Pertaining to Pregnant and Parenting Student Employees

All students who attend colleges and universities that receive federal financial assistance are entitled to the protections afforded under Title IX. In addition, many students who attend colleges and universities are also employees of those institutions, thus entitling them to protections both under Title IX and Title VII of the Civil Rights Act.^[14] Title VII prohibits covered employers – including institutions of higher education – from discriminating on the basis of sex.^[15] Since 1978, when the Pregnancy Discrimination Act was enacted to amend Title VII, Title VII has explicitly prohibited sex discrimination on the basis of pregnancy.^[16]

In July of 2014, the EEOC, which enforces Title VII, issued a comprehensive update to its guidance concerning discrimination against pregnant workers.^[17] The EEOC’s Enforcement Guidance covers an array of pregnancy issues that range from prohibited employment discrimination to accessing parental leave and health insurance. Since that time, the EEOC has updated its guidance on disparate treatment and light duty in response to the U.S. Supreme Court’s 2015 decision in *Young v. United Parcel Service, Inc.*^[18] to reflect the Court’s conclusion that women may be able to prove unlawful pregnancy discrimination if the employer previously provided accommodations to workers but refused to accommodate pregnant women.^[19] The guidance incorporates *Young’s* framework for making a claim under Title VII challenging an employer’s workplace accommodation policies and practices as applied to pregnant employees.

Institutions should be familiar with Title VII requirements related to pregnancy not only to ensure equitable treatment of pregnant student employees but also because court and agency interpretations of Title VII can sometimes provide guidance to institutions as they interpret and apply requirements under Title IX to students and employees alike.^[20]

II. COMPLIANCE AND ENFORCEMENT

Although the OCR has focused most of its recent Title IX compliance efforts on issues relating to sexual misconduct, it has, within the past few years, directly addressed pregnancy discrimination in the context of higher education. In May of 2014, the OCR settled a complaint against the Virginia Military Institute (VMI) regarding its policy prohibiting cadet parenthood.^[21] VMI’s policy required cadets who married or became parents to resign voluntarily or be deemed ineligible to enroll at the institution.^[22] While VMI believed its policy applied equally to male and female cadets (any cadet who became a parent was expected to resign), the OCR determined that it was in direct violation of Title IX because the policy rendered pregnant cadets ineligible to participate in VMI’s program.^[23] The VMI resolution evidenced OCR’s intent to investigate and remedy instances of pregnancy discrimination on college campuses.

In the resulting agreement, VMI agreed to treat pregnancy like any other temporary medical condition; permit cadets to remain enrolled as long as they arranged for the care, custody and support of their children; and (since maternity can be easily ascertained while paternity cannot) implement “strong and effective” measures for identifying when a male cadet becomes a parent.

III. PRACTICAL GUIDANCE

As a preliminary matter, institutions should review their policies and training programs related to

pregnant and parenting students to ensure that they are accommodating pregnant students as required by the law and to ensure that their policies and practices align with their mission. Assuring that institutional policies and procedures proactively address pregnant and parenting students can serve as both educational initiatives and preventative measures.

A. Institutional Policy: Revision & Creation

Institutional policies about a student's actual or potential parental status may not discriminate or exclude a student from equal access to educational programs on the basis of sex.^[24] In addition to reviewing existing policies, institutions should turn a critical eye to areas where they can improve existing policies or create new policies to ensure compliance.

Institutions should ensure that pregnant and parenting students are adequately informed of Title IX protections,^[25] as well as their right to access the grievance process for claimed violations.^[26] Notably, institutions must be prepared to adequately handle complaints of pregnancy-related discrimination or harassment. This includes establishing compliance and enforcement procedures to ensure that complaints are resolved in a timely fashion. Such policies are crucial for university compliance with Title IX. Furthermore, institutions should also engage in periodic self-evaluations that include the collection of data on pregnancies, withdrawals, complaints, and other pregnancy-related issues. These self-evaluations may inform future policy revisions, and will assist institutions in crafting policies that are tailored to address issues specific to their unique campus concerns.

Certain areas within the university are ripe for policy review or creation. One such area concerns leaves of absence. Pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery from pregnancy or child birth are justifications 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 must be reinstated to the status that she held when the leave began.^[27] Institutions should consider amending Title IX policies or developing other clear guidance to staff to excuse pregnancy-related absences for as long as is medically necessary.^[28]

Another area institutions should critically examine involves course work completion and accommodations. An institution must 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 from pregnancy or child birth, unless the student requests voluntarily to participate in a separate portion of the program or activity of the institution.^[29] In addition, any such separate portion must be "comparable" to that offered to non-pregnant students.

Finally, institutions should consider embedding "pregnancy disclosure" language into the policy. It is the student's obligation to voluntarily disclose and affirmatively seek any necessary accommodations. The policy should stress that pregnancy disclosure is voluntary, but it should also make clear that the institution will collaborate with students to develop an appropriate plan for continuation of the student's education.^[30]

B. Accommodations Process

Pregnant students may desire to avail themselves of various accommodations that have been made available through institutional policies. Once a student self-identifies as pregnant, she should have the option of meeting with the school's Title IX Coordinator or a designated representative to obtain information about how the school supports pregnant students in

continuing their education. Many institutions offer an accommodation-like process that allows a student to work with the Title IX Coordinator or other designated institutional representative to make a plan with the student. Accommodations provided to a student—and the policies that provide those accommodations—should be comparable to those that the institution offers to disabled or ill students in similar circumstances. Coordination between the institution and the student is preferable to allowing students to make plans with individual professors because coordination through the Title IX Coordinator allows for institutional oversight to ensure compliance with Title IX.

Institutional representatives should make clear that a student has several options regarding her educational future, including continuing in the educational program; requesting a leave of absence; or withdrawing from the institution.^[31] Withdrawal is left to the sole discretion of the student, but institutions should recognize that pregnant and parenting students are more likely to drop out of school than other students.^[32] Accordingly, the Department of Education places a burden on schools and requires that school officials “advise [pregnant students] of the importance of staying in school...[and] let them know of any school assistance that may be available to them.”^[33] The message from the Department of Education is clear: institutions should work with students to accommodate their needs and make a concerted effort to facilitate the completion of their program.

After educating a student about her options, school officials should take steps to assist the student through the creation of an individualized plan to assist the student’s continuing educational success. When crafting this educational plan with a self-identified pregnant student, institutions should work with pregnant and parenting students individually to “come up with a graduation plan tailored to each student’s needs.”^[34] If a student decides to continue in the school’s programs after disclosing her pregnancy, the plan should outline any adjustments, based on the student’s pregnancy, which are discussed and agreed upon by the student and the institution. The plan should also indicate how and when the adjustments will be implemented. The plan should cover academics, financial aid, and any additional matters relevant to the student’s situation. Students should be given an opportunity to make up missed work, to the extent possible, and be provided with flexibility in how the missed work will be made up. When appropriate, “the student should be allowed to choose how to make up the work.”^[35] Accommodations will depend on the nature of the student’s academic work. Certain academic work—papers, quizzes, tests—may be finished at a later time, and students should be given the option to complete the work at a later date. For degree programs that contain requirements of clinical rotations, group projects, or lab work, institutions should work with the student to provide alternate paths to degree completion. An educational plan may include an academic credit-recovery component or utilize extended deadlines, make-up assignments, and incomplete grade options. Other alternatives include allowing the student to retake a semester or “allowing the student additional time in a program to continue at the same pace and finish at a later date, especially after longer periods of leave.”^[36]

C. Training

Institutions should adopt proactive training and educational efforts for members of the campus community. In general, institutions should consider conducting annual training for employees that specifically addresses their responsibilities in accommodating and working with pregnant and parenting students.^[37] Such training will help fully educate employees and staff members about accommodating pregnant students, and may also include information about treating a pregnancy complication as they would in accommodating a student with a disability. Institutional training should also include information about preventing and responding to hostile environment

claims based on pregnancy.

In particular, educating faculty members about how to address class absences, coursework flexibility, and extended leaves of absences due to pregnancy or parenting is crucial. For example, some institutions leave excused absence and make-up work policies to the discretion of individual instructors. At those institutions, training is critical to ensure consistency and prevent situations where pregnant students who miss class for bed rest, recovery from childbirth, or other pregnancy-related reasons are penalized inappropriately.

D. Housing

When discussing housing policies and practices, it can be difficult to make generalizations. Institutions across the country have a variety of housing situations—ranging from coed dorms to separate male/female dorms; from a majority of students commuting to a majority living all four years on campus. Colleges and universities should consider their own unique campus housing dynamics and create guidelines for residence halls concerning pregnant and parenting students who live on campus.

When crafting those guidelines, institutions should take care not to exclude pregnant students from campus housing. Absent a religious exemption under Title IX, requiring a pregnant student to move out of a university dorm would likely constitute a violation of Title IX because the University would be preventing her from participating in a University program or activity based on her pregnancy. The Department of Education would likely analogize this situation to the university excluding a student from a dorm because of epilepsy or some other type of disability (i.e., treating someone differently based on a protected status).^[38] However, if an institution has a policy allowing a student to be released from a housing contract for a medical condition, a pregnant student would have the same right. In such cases, that decision must be the student's decision completely. If the student voluntarily decides to move out of the residence hall, there should be no liability for a Title IX violation.

E. Facilities

Institutions may have pregnant students, faculty, or staff members who interact in scientific lab situations that may pose hazards to a developing fetus. Unsurprisingly, institutions have questions about what warnings they may issue and what requirements they may impose on pregnant members of the campus community who interact with potential health hazards.

Although a student can elect whether to disclose a pregnancy, a college or university may issue general warnings or craft policies concerning the health risks a student may encounter as a result of her participation in course work, clinical assignments, or other components of an education program.^[39] In particular, a college or university is free to issue general warnings concerning the possible risks in the lab setting, such as exposure to noxious fumes to all students, including pregnant students.^[40] It may also notify all students of the possible precautionary measures they may wish to take prior to engaging in such labs.^[41]

Institutions should require a disclosure to all clinical lab students that discusses the potential health risks associated with a particular lab or clinical placement (e.g. bacterial diseases, viral diseases, radioactivity, etc.). These warnings can go a long way towards ensuring that students are informed and that pregnant students are aware of any risks. Additionally, such warnings may encourage students who may be pregnant to self-identify so accommodations can be made.

Programs that create legitimate health concerns for pregnant students should provide appropriate education and offer comparable alternatives. A student who is seeking accommodations in order to complete her course work without causing herself or her fetus harm ought be given multiple options, such a taking a leave of absence, withdrawing entirely from the program to be reinstated after her pregnancy ends, or withdrawing solely from the clinical courses while completing her didactic courses. Title IX regulations do permit colleges and universities to require students who are pregnant, or have a related condition, to obtain certification from a physician to confirm that the student is physically and emotionally able to continue participation in a recipient's program *if* such certification is required of all students for other physical or emotional conditions that require a physician's attention.[42]

F. Clinical Placements

As discussed above, members of the campus community may be informed of precautionary measures available in situations involving potential health hazards. Such precautionary measures may include warnings about clinical settings where health hazards include the effects of strenuous activity. And, as stated above, if all students with physical conditions that require a physician's attention are required to obtain certification from a physician, then such certification may also be required of pregnant students.

In general, institutions should give all students in clinical situations appropriate precautionary instruction that includes education about protective devices and makes students aware of problems which could be encountered and special problems for pregnant students. Without a student request for accommodations, the institution is generally in the position of making all students understand that neither the college nor its clinical affiliates assume responsibility for any harm that might occur to a fetus or pregnant student. To offset this, institutions often request self-identification which, in effect, waives the student's right to medical privacy, which may or may not be necessary.

However, institutions should avoid disclosure requirements because of the choices a pregnant student has with regard to the pregnancy. The pregnancy may not interfere (depending on timing) with any educational work. It also could result in a spontaneous miscarriage; and pushing self-identification often causes women for whom the pregnancy is unplanned to rush into a decision-making process about whether to carry the pregnancy through to term or not.[43] Accordingly, institutions should review clinical program policies to ensure that any policies addressing pregnancy do not create barriers that are inconsistent with Title IX.

Nevertheless, pregnancy may also give rise to questions concerning degree progression or readmission to clinical programs when pregnant or parenting students decide to take a leave of absence. Because many clinical programs require rotations or courses offered only at limited times, institutions should consider drafting specific degree progression or readmission policies to address situations when students may take a leave of absence for pregnancy-related reasons. For students who continue their course work but do seek accommodations, institutions should offer specific, reasonable accommodations for the unique circumstances of the clinical program. For example, where radiation is involved, faculty or staff can accommodate by limiting the student's exposure to radiation to the extent possible or allowing the student to delay completion of a particular component of the program. Many colleges and universities provide fetal radiation exposure monitoring with a low dose limit that remains in effect until the student provides written notice that she is no longer pregnant.

Institutions may also consider requiring any student enrolling in a clinical program to read and sign the institution's disclosures about the health risks of clinical settings, including any specific health risks for pregnant students. This "informed consent" is different than requesting a waiver of liability. Express assumptions of risk through a well-written waiver may be unenforceable, depending upon state case law. While neither informed consent nor a waiver will protect an institution from a lawsuit, these documents can help in litigation to show that the institution took reasonable steps to educate students about risks and possible consequences of participation. Nonetheless, the best risk-management approach entails advising on the inherent risks, training on safety, and providing adequate supervision of all students.

G. Athletics & Extracurricular Activities

The pregnancy-related portions of the regulations also apply to athletics departments.^[44] Institutions must treat student-athletes with pregnancy-related conditions the same way as other ill or injured student-athletes.^[45] A financial award to a pregnant student-athlete who remains engaged with the athletics department must be renewed.^[46] A formerly pregnant student-athlete must be returned "to the status which she held when the leave began."^[47] This requirement includes her return as a full-fledged member of the team (including eligibility for athletics awards) if that was her status when the leave began.

Institutions should increase educational efforts and training for athletics staff who may be dealing with pregnant student-athletes.^[48] Generally, trainings should convey information to coaches and athletics department staff about how institutional athletic programs handle pregnancy. It is fundamental to an institution's compliance efforts to ensure that athletics staff and coaches receive appropriate training on accommodating pregnant student-athletes.

Also, institutions should review institutionally-supported extracurricular and non-academic programs to ensure they are not excluding pregnant and parenting students.^[49] Intramural and club sports are governed by the same Title IX gender equity and compliance standards as institutionally-supported sports teams.^[50]

H. Financial Assistance

Generally, an institution may not, on the basis of sex, provide different amounts or types of financial assistance, limit eligibility for assistance of any particular type or source, apply different criteria, or otherwise discriminate based on sex or pregnancy in awarding aid. It also may not apply any rule or assist in application of any rule concerning eligibility for financial assistance that treats persons of one sex differently from persons of the other sex with regard to marital or parental status.^[51]

Clearly, pregnancy is a change in circumstances that implicates how the student will file her FAFSA. She may qualify for more aid if she was considered a dependent student prior to the pregnancy. She may qualify for different sources of financial support, such as the parent PLUS loans. She may be eligible to defer a portion of her financial aid. Financial aid administrators must be cognizant of the various changes that occur for new student-mothers and mothers-to-be. Presuming the student has been offered options and has chosen to add an additional semester, the financial assistance rules state that institutions may not treat her differently than they would treat any other student who followed this same course of action and who was not pregnant.

I. Lactation Spaces

The Department of Education suggests that institutions “designate a private room for young mothers to breastfeed, pump milk, or address other needs related to breastfeeding.”^[52] Many colleges and universities provide lactation spaces for faculty and staff, given that it is also required of employers under Title VII.^[53] But student and employee complaints about a lack of lactation spaces have made this issue a topic of media discussion in recent years.^[54] Institutions should evaluate the number of spaces available, their placement on campus, and the setup of the stations on their campuses to ensure that lactation spaces are appropriately available for students who are breastfeeding. Lactation spaces should be located in a designated area where students and employees are shielded from view and free from intrusion.^[55]

J. Male Students as Parents

Colleges and universities should be mindful that Title IX’s prohibition on pregnancy discrimination also applies to parenting male students who are parents.^[56] Institutions may also take note of the Department’s assertion that institutions should be “mindful of issues facing *male students* who are parenting” when developing policies.^[57] In particular, the Department noted that, if an institution created a policy allowing excused absences for parenting students who need to take their children to doctors’ appointments or to take care of their sick children, the policy should cover both male and female students.^[58]

In order to achieve compliance, institutions should draft gender-neutral pregnant and parenting student policies. Schools should then apply those policies in cases where male students require accommodations for parenting responsibilities, as many academic policies may apply with equal force to male students who are parenting.

CONCLUSION:

In the last few years, federal agencies have made a point of showing how differential treatment with respect to pregnant and parenting students may constitute discrimination on the basis of sex. Given the recent guidance on this subject and the increased frequency of enforcement actions, it is fair to say that these agencies have re-emphasized the government’s stance that pregnancy discrimination will not be tolerated. Thus, the duty of counsel and Title IX coordinators lies in sorting through possible risks and proactively providing guidance throughout the entire institution, both to avoid liability and to ensure the equitable treatment of pregnant and parenting students.

ENDNOTES:

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[2] The Department of Education's guidance covers both pregnant and parenting students. Accordingly, this Note provides guidance addressing both. Although the bulk of this Note addresses pregnant students, application of this guidance to parenting students is clearly indicated by the presence of "parenting student" language.

[3] 20 U.S.C. §§1681, *et seq.*

[4] 34 C.F.R. §§ 106.1 *et seq.* See also U.S. Dep't. of Educ., Office for Civil Rights, SEX DISCRIMINATION (2016), available at <http://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/sex.html> (website access to Title IX guidance on sex discrimination, including two pieces of guidance specifically addressing pregnancy discrimination). Note, however, that religious institutions may request an exemption from Title IX requirements to the extent that those requirements conflict with an institution's deeply-held religious beliefs. For example, Bethel College requested a Title IX exemption from several Title IX requirements—including those related to pregnancy—because the "College's Christian religious beliefs...prohibit elective abortions, pre-marital sex, extra-marital sex...[and the application] of OCR's interpretation of Title IX...would result in such situations as the College being required to" accommodate students in a manner that is "inconsistent with the religious beliefs, policies, and values of the College." Letter from Gregg Chenoweth, President Bethel College, to Catherine Lhamon, Asst. Secretary, U.S. Dep.'t of Educ. Office for Civil Rights, at 7 (May 1, 2015), <http://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/bethel-college-request-05012015.pdf>. Other institutions have also filed for similar exemptions from Title IX.

[5] 34 C.F.R. §106.21(c) (1979) (admissions); 34 C.F.R. § 106.37 (financial assistance); 34 C.F.R. § 106.57 (employment); 34 C.F.R. § 106.40(b)(a) (leaves, of absence); 34 C.F.R. § 106.41 (athletics); 34 C.F.R. § 106.40(b)(1) (course work); and 34 C.F.R. § 106.40(b)(4) (healthcare).

[6] U.S. Dep.'t of Educ. Office for Civil Rights, "Dear Colleague" Letter on Pregnant and Parenting Students (June 25, 2013), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201306-title-ix.pdf> . The letter specifically states that "[a]lthough this pamphlet focuses on secondary schools, the legal principles apply to all recipients of federal financial assistance, including postsecondary institutions." *Id.*

[7] *Id.* at 1.

[8] *Id.* at 2.

[9] *Id.*

[10] *Id.* See also U.S. Dep't. of Educ. Office for Civil Rights, Know Your Rights: Pregnant or Parenting? Title IX Protects You From Discrimination At School, at 1, <http://www2.ed.gov/about/offices/list/ocr/docs/dcl-know-rights-201306-title-ix.pdf> ("Your school must...[a]llow you to return to the same academic and extracurricular status as before your medical leave began...") (emphasis omitted).

[11] See, e.g., U.S. Dep't. of Educ. Office for Civil Rights, Supporting the Academic Success of Pregnant and Parenting Students at 25, n.21 (June 2013), <http://www2.ed.gov/about/offices/list/ocr/docs/pregnancy.pdf>, which states:

An uncomplicated pregnancy, by itself, does not constitute a physical impairment and therefore is not considered a disability under *Title II* or Section 504. Complications resulting from pregnancy may be impairments. Whether a student with a complication resulting from pregnancy is protected under Section 504 and *Title II* depends on whether the complication is an impairment that substantially limits a major life activity, or alternatively, whether the student has a record of or is regarded as having such impairment. See also 34 C.F.R. § 104.3(j); 28 C.F.R. § 35.104.; 29 C.F.R. Part 1630, App. § 1630.2(h).

[12] See U.S. Equal Employment Opportunity Commission ("EEOC"), Enforcement Guidance: Pregnancy Discrimination and Related Issues, http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm (last visited January 24, 2017).

[13] This EEOC interpretation runs contrary to certain federal circuit court cases in which courts have

distinguished between “non-discrimination laws” and “reasonable accommodation” laws. The EEOC’s view does, however, appear to align with the Title IX regulations and pamphlet and is part of the discussion concerning a post-secondary institution’s obligations to pregnant student employees.

[14] See *Cuddeback v. Florida Bd. of Ed.*, 381 F.3d 1230, 1235 (11th Cir. 2004) (discussing Title VII’s application to student employees). Some students may not fall under Title VII (contingent student employees, part-time student employees, or trainees, for example), while others may (certain interns).

[15] See 42 U.S.C. § 2000e *et seq.* (1964).

[16] See Pregnancy Discrimination Act of 1978, Pub. L. 95–555, 92 Stat 2076 (amended Oct. 31, 1978)(“An Act to amend title VII of the Civil Rights Act of 1964 to prohibit sex discrimination on the basis of pregnancy.”).

[17] See EEOC, Enforcement Guidance: Pregnancy Discrimination and Related Issues (June 25, 2015), http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm.

[18] 135 S.Ct. 1338 (2015).

[19] See EEOC, Enforcement Guidance: Pregnancy Discrimination and Related Issues (June 25, 2015), http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm.

[20] In particular, courts may look to Title VII standards to determine what constitutes Title IX discrimination. See, e.g., *Jennings v. Univ. of North Carolina*, 482 F.3d 686, 695 (4th Cir. 2007) (“We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX.” (citing *Davis v. Monroe Cnty. Sch. Bd.*, 526 U.S. 629, 651(1999))). See also U.S. Dept. of Education, Office for Civil Rights, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, at vi (Jan. 2001), <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> (noting that the Supreme Court in *Davis v. Monroe County Board of Education* indicated, “through its specific references to Title VII case law, that Title VII remains relevant in determining what constitutes hostile environment sexual harassment under Title IX”).

[21] Virginia Military Institute Resolution Agreement, Complaint No. 11-08-2079 (April 30, 2014),

https://www.insidehighered.com/sites/default/server_files/files/VMI%20resolution%20agreement.pdf

[22] OCR Letter to Virginia Military Institute, Complaint No. 11-08-2079 (May 9, 2014). See also Kent Talbert, “Behind the Scenes: A Closer Look at the Title IX Resolution Letters and Agreements of 2014,” NACUANOTES, Vol. 14, No. 2 (Dec. 2, 2015).

[23] See Virginia Military Institute Letter of Findings, Complaint No.11-08-2079 (May 9, 2014), available at http://www.insidehighered.com/sites/default/server_files/files/VMI%20letter.pdf .

[24] 34 C.F.R. § 106.40(b)

[25] This is certainly beneficial with respect to compliance with OCR guidance. From a practical standpoint, institutions may be better-equipped to navigate pregnant and parenting student issues if pregnant and parenting students are informed and aware of the appropriate institutional channels and policies that apply because students may be more likely to proactively seek institutional guidance—giving the institution time to work with a student to craft individualized accommodations. For example, one option would be to include a provision in the institution’s Title IX policy about pregnancy discrimination, making clear that the Title IX Coordinator will handle any pregnancy-related inquiries and will coordinate with the student and the appropriate institutional personnel to develop and implement an educational plan. The provision should also make clear that the Title IX Coordinator will serve as a resource for parenting students, and may assist those students in creating an educational plan and/or providing accommodations.

[26] While not required by law, the Department’s June 2013 pamphlet recommends that institutions specifically address pregnant or parenting students in their discrimination policies.

[27] 34 C.F.R. § 106.40(b)(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.”).

[28] See, e.g., U.S. Department of Education Office for Civil Rights, Supporting the Academic Success of Pregnant and Parenting Students, at 15 (June 2013), available at

<http://www2.ed.gov/about/offices/list/ocr/docs/pregnancy.pdf> (urging administrators to “[d]evelop policies and procedures to address the needs of pregnant and parenting students.”); see also *id.* at 11 (“Schools must ensure that the policies and practices of individual teachers do not discriminate pregnant students.”)

[29] 34 C.F.R. § 106.40(b)(1).

[30] See, e.g. Indiana University-Purdue University Fort Wayne, *Pregnancy Policy* (June 2015), <https://www.ipfw.edu/departments/chhs/depts/radiography/pregnancy.html>; Methodist College, *Pregnancy*

Disclosure (August 2015),

<http://www.methodistcol.edu/filesimages/Policies/Student/Pregnancy%20Disclosure%20Policy.pdf>;

University of Illinois, *Declaration of Pregnancy* (March 15, 2011), <https://www.drillinois.edu/site-documents/DeclarationOfPregnancyForm.pdf>.

[31] U.S. Dep't of Educ. Office for Civil Rights, "Dear Colleague" Letter on Pregnant and Parenting Students, at 10 (June 25, 2013), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201306-title-ix.pdf>.

[32] U.S. Dep't of Educ. Office for Civil Rights, Supporting the Academic Success of Pregnant and Parenting Students, at 17 (June 2013), <http://www2.ed.gov/about/offices/list/ocr/docs/pregnancy.pdf>

[33] *Id.*

[34] *Id.* at 18.

[35] *Id.* at 10.

[36] U.S. Dep't. of Educ. Office for Civil Rights, "Dear Colleague" Letter on Pregnant and Parenting Students at 18 (June 25, 2013), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201306-title-ix.pdf>.

[37] We suggest an annual training, as this particular subject matter can easily be addressed in conjunction with annual Title IX training.

[38] For example, a religious university without a religious exemption that maintains a strong morality code that prohibits pre-marital sex and learns that an unwed student is pregnant may not force a student to move out of campus housing.

[39] See Darton State College, *Pregnancy Policy for Radiologic Science* (February 1, 2016), <http://www.darton.edu/programs/AlliedHealth/rads/pregnancy.php> (program policy found within program handbook for the Health Sciences Radiologic Science program).

[40] These warnings should be provided to all students as a part of student handbooks, student policies, etc.

[41] In particular, schools should ensure that equity and accommodation have been addressed for pregnant graduate and postdoctoral students who are teaching or working in laboratories.

[42] 34 C.F.R. 106.40(b)(2).

[43] Hogshead-Makar, N., and Sorensen, E., NCAA, *Pregnant and Parenting Student-Athletes Resources and Model Policies*, (2008), <http://www.ncaa.org/sites/default/files/PregnancyToolkit.pdf>.

[44] 34 C.F.R. § 106.41 (athletics).

[45] 34 C.F.R. §106.40(b)(4).

[46] Hogshead-Makar, N., and Sorensen, E., NCAA, *Pregnant and Parenting Student-Athletes Resources and Model Policies* at 38 (2008), <http://www.ncaa.org/sites/default/files/PregnancyToolkit.pdf>. ("Even in cases of career-ending injuries, many institutions continue to renew the student-athlete's athletics award and find other ways to keep him or her engaged with the athletics department. Since the Title IX Regulations require institutions to treat student-athletes with pregnancy related conditions the same way they treat other ill or injured student-athletes, those institutions must renew the award of a pregnant student-athlete who likewise remains engaged with the athletics department."). This could include participating in workouts until a physician determines it is no longer safe, continuing to attend team functions, or working with the institutional rehabilitation team to get back into competition shape. *Id.* at 38-39.

[47] 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.")

[48] The NCAA has a variety of free compliance resources that address pregnant student-athletes. See, e.g., NCAA, *Pregnant & Parenting Student-athletes*, <http://www.ncaa.org/about/resources/inclusion/pregnant-parenting-student-athletes>. Hogshead-Makar, N., and Sorensen, E., NCAA, *Pregnant and Parenting Student-Athletes Resources and Model Policies* (2008), <http://www.ncaa.org/sites/default/files/PregnancyToolkit.pdf>;

[49] See, e.g. *Chipman v. Grant Cty. Sch. Dist.*, 30 F. Supp. 2d 975 (E.D. Ky. 1998). In *Chipman*, several female high school students who were excluded from national honor society organization after becoming pregnant and having children outside of wedlock brought a Title IX pregnancy discrimination action

against school administration officials. The court determined that “plaintiffs’ probability of successfully proving pregnancy discrimination is very high using either a disparate impact or disparate treatment method of proof and granted plaintiffs’ motion for preliminary injunction and enjoined the defendants to admit the plaintiffs to NHS. *Id.* at 978-980.

[50] U.S. Dep. ’t of Educ. Office for Civil Rights, Requirements Under Title IX of the Education Amendments of 1972 (Oct. 15, 2015), <http://www2.ed.gov/about/offices/list/ocr/docs/interath.html> (“While designed specifically for intercollegiate athletics, the general principles and compliance standards set forth in the Policy Interpretation will often apply to...club and intramural athletic programs.”).

[51] 34 C.F.R. § 106.37.

[52] U.S. Dep. ’t of Educ. Office for Civil Rights, “Dear Colleague” Letter on Pregnant and Parenting Students (June 25, 2013), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201306-title-ix.pdf> .

[53] 29 U.S.C. § 207(r)(1) (requiring “a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.”).

[54] See, e.g. Robin Hoecker, “Let’s Make Universities Accessible to Nursing Mothers,” The Huffington Post (February 13, 2013), http://www.huffingtonpost.com/robin-hoecker/lets-make-universities-accessible-to-nursing-mothers_b_6656302.html. This article followed a 2013 *Inside Higher Ed* article chronicling a debate at the University of Chicago about graduate student breastfeeding mothers who complained after the list of “campus lactation stations” turned out to be handicapped bathroom stalls and open lounges. See Colleen Flaherty, “A Room of One’s Own: U. Chicago Grad Students Who Are Breastfeeding Want A Place to Pump,” *Inside Higher Ed* (November 5, 2013), <https://www.insidehighered.com/news/2013/11/05/u-chicago-grad-students-who-are-breast-feeding-want-place-pump>.

[55] See EEOC, Enforcement Guidance: Pregnancy Discrimination and Related Issues (June 25, 2015), http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm.

[56] U.S. Dep. ’t of Educ. Office for Civil Rights, “Dear Colleague” Letter on Pregnant and Parenting Students (June 25, 2013), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201306-title-ix.pdf> .

[57] *Id.*

[58] *Id.*

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