



# Pregnancy and Parenting Compliance Strategies

August 27, 2024

**Bricker**   
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# Disclaimer

## *We can't help it – we're lawyers*

- We are not giving you legal advice. Consult with your legal counsel regarding how best to address a specific situation.
- Use the chat function to ask general questions and hypotheticals.
  - Questions and engagement with the hypotheticals are encouraged!
- We are discussing federal law today.

# *Injunctions: 2024 Title IX Regulations*

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- 26 States Enjoined – including Ohio!
- Hundreds of individual schools also enjoined.
- The United States Supreme Court declined to limit the injunctions to the at issue provisions of the regulations on August 16, 2024 - in applications brought from the Fifth and Sixth Circuit Courts of Appeal.
- Stay tuned!

# Aspirational Agenda

## Current Impacts to Higher Education

### Ensuring Equal Access for Students

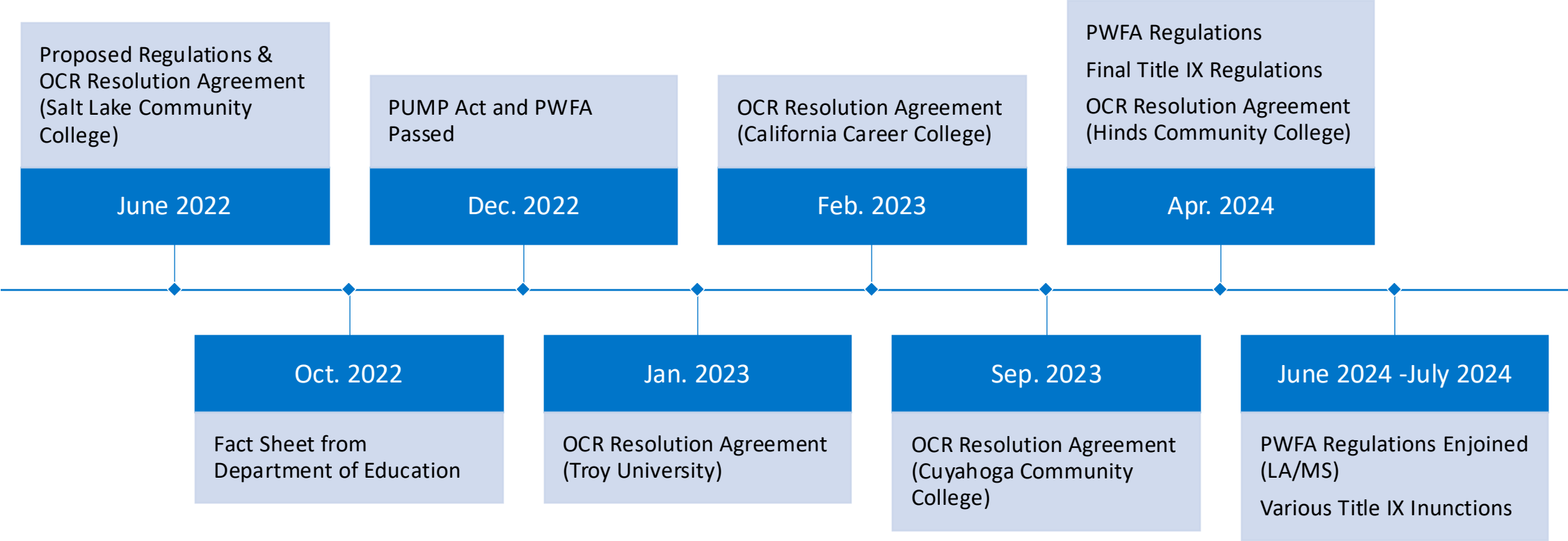
- What's Existing: 2020 Title IX Regulations
- OCR: Lessons Learned From Others
- 2024 Title IX Regulations
- Litigation Update



# Recent Developments



## June 2022-Present



## Accommodating Pregnant and Nursing Students

- Data & Trends
- 2020 Regulations
- 2024 Regulations
- Learn from Others
- Questions





# What applies to Students?

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- Title IX
- Section 504 of the Rehabilitation Act
- ADA
- Fair Housing Act
- State Laws
- University policies

# Student Parents on Campus

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- 42 % of parents attending college attend public 2-year institutions
  - 18% attend private for-profit institutions
  - 17% attend public four-year institutions
  - The remaining 23 % attend private 4-year non-profit institutions or other institutions.
- Source: Institute for Women's Policy Research analysis of data from the U.S. Department of Education, National Center for Education Statistics, 2015-16 National Postsecondary Student Aid Study (NPSAS:16).

# Student Parents on Campus

“Student parents face several hurdles to completion, including a nationwide shortage of affordable child-care options, a lack of lactation space and family housing on many campuses, and the daily struggle to juggle work, school, and family responsibilities. Though they have higher GPAs, on average, than their nonparenting peers and are often highly motivated, only a third earn a degree or certificate within six years.”

Field, K. (2022) Colleges brace for more pregnant and parenting students.  
<https://www.chronicle.com/article/colleges-brace-for-more-pregnant-and-parenting-students>

33% of student parents have a GPA of 3.5 or higher, which is higher than all other students without children.

Source: Institute for Women’s Policy Research analysis of data from the U.S. Department of Education, National Center for Education Statistics, 2015-16 National Postsecondary Student Aid Study (NPSAS:16).

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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.”

# Title IX is an Equity Statute



# What is your Ethic of Care?

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- What do you think are the top values of your institution's community?
- Do you think institutional values align between administration, faculty and staff?
- What about students?
- What about the town or city around your institution?
- How does support of pregnant and parenting students fit into this ethic?

# 2020 Title IX Regulations

- 34 C.F.R § 106.21(c)
  - No discrimination on the basis of Marital or Parental Status - Admissions
- 34 C.F.R § 106.40
  - No discrimination on the basis of Marital or Parental Status - Students
- 34 C.F.R § 106.57
  - No discrimination on the basis of Marital or Parental Status – Employees
- Non-Regulatory Guidance
  - *Supporting the Academic Success of Pregnant and Parenting Students (July 1991, reprinted June 2013)*
  - *Discrimination Based on Pregnancy and Related Conditions (October 2022)*

# 2020 Title IX Regulations: 106.40

- Non-discrimination on the basis of parental, family or marital status. 34 CFR 106.40 (a)
- Non-discrimination on the basis of "student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom...." 34 CFR 106.40 (b)(1)
- No physician certifications. 34 CFR 106.40 (b)(2)
- Voluntary separate but comparable programs. 34 CFR 106.40 (b)(3)
- Treat same as temporary disabilities. 34 CFR 106.40 (b)(4)
- Allow for leave of absence but return to same status. 34 CFR 106.40 (b)(5)



# Discriminatory Prohibition for Students

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.**

# Prohibition Against Exclusion of Students

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.

# Hypothetical

A student in a chemistry lab reports that they are three months pregnant. Concerned about the student's exposure to harmful chemicals and fumes, the instructor states that the student must obtain a letter from their doctor stating that they are able to attend lab. Is this permissible?

- A. Yes
- B. No
- C. I don't know

# Students - Health Certifications

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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.

# Students - 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.**

# Hypothetical

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A pregnant student is experiencing preeclampsia in the late weeks of pregnancy and requests to attend her biology lab class remotely to avoid walking to and from class. The instructor denies this request on the basis that he denied a similar request last year for a student who was hospitalized for a week. Does the college have to grant the request?

- A. Yes
- B. No
- C. I don't know

# 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.

\*\*We will discuss disability laws momentarily, but note that temporary conditions may not be protected by Section 504/ADA.

- A healthy pregnancy is generally not considered to be a *disability*.
  - However, pregnancy complications may or may not rise to the level of a disability that substantially limits one or more major life activities, so don't overlook these protections!
  - Also – practical overlap in concepts and decades of precedent
- Potential for related concepts in proposed Title IX regs
  - Inclusion of “fundamental alteration” language (proposed 106.40(b))



- Relevant provisions:
  - ADA Title II (public entities)
  - ADA Title III (public accommodations)
  - Section 504 (programs rec'ing federal financial assistance and contracts)
- The devil is in the ~~details~~ **definitions!**
  - “Qualified individual” (ADA)
  - “Essential to the instruction” (Section 504)
  - “Fundamentally alter” (ADA)
  - “Undue hardship” (ADA)

# Qualified Individual with a Disability (ADA)

42 USC 12131(2)

The term “qualified individual with a disability” means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

# Essential to the Instruction (Section 504)

## 34 CFR 104.44(a) Academic Requirements

A recipient to which this subpart applies shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate or have the effect of discriminating, on the basis of handicap, against a qualified handicapped applicant or student. **Academic requirements that the recipient can demonstrate are essential to the instruction being pursued by such student or to any directly related licensing requirement will not be regarded as discriminatory within the meaning of this section.** Modifications may include changes in the length of time permitted for the completion of degree requirements, substitution of specific courses required for the completion of degree requirements, and adaptation of the manner in which specific courses are conducted.

# Fundamentally Alter (ADA)

42 USC 12182(b)(2)(A)

Discrimination includes

...

(ii) a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations;

(iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden;

# Undue Hardship (ADA)

42 USC 12111(10)

(A) In general

The term “undue hardship” means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered

In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include—

- (i) the nature and cost of the accommodation needed under this chapter;
- (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility;
- (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and
- (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

# ADA/504 Takeaways

- Holding students to academic requirements that are essential to the instruction ≠ discrimination
- Declining to provide modifications if they would fundamentally alter the nature of the public service provided ≠ discrimination
- Reasonable accommodations/adjustments may be requested
  - Institution must engage in an interactive process to determine what accommodations are reasonable
  - Medical documentation to support accommodations may be requested

# Working with Stakeholders

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- Coordination and consistency is key
- Identify stakeholders
  - ADA/504 Coordinator
  - TIXC
  - General Counsel
  - Human Resources
  - Academic leadership
- Consider referral to ADA/504 office + consult with TIXC

# Hypothetical

Student Smith is enrolled in a teacher education program and is scheduled to student teach during the Spring 2024 semester. She is due to give birth in March 2024, and has been directed to take bed rest beginning in mid-January 2024. The Dean of the Teacher Education program has informed Student Smith that her only option is to complete her student teaching requirement another semester. Is the Dean correct?

- A. Yes
- B. No
- C. I don't know



# Back to Title IX...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.**

# 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...**

# 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.” (unless asked of both sexes and results are not used for a discriminatory purpose)

- Fact specific – no bright line test. Must work closely with stakeholders (including faculty) to assess the following issues:
  - Fundamental Alteration (ADA)
  - Essential to the Instruction (Section 504)
  - Undue Burden (ADA)
- Consider accreditation
- Be flexible and INTERACTIVE
- Be consistent under similar circumstances
  - If the circumstances are different – and justify a different course of action – document the circumstances and course of action

# Hypothetical

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A student lives in the residence halls and reports that they will give birth to a child during the academic year. Does the university have to allow the child to live in the residence halls?

- A. Yes
- B. No
- C. Maybe?

- Highly fact specific – no easy answer or bright line test
- CONSULT WITH COUNSEL.
- Look to your housing contracts/policies.
  - What are the Fair Housing Act considerations?
    - Does the policy/contract discriminate against people based on sex/family status?
      - If families allowed on campus: be mindful not to adopt/apply a rule that treats folks differently (i.e. charging them more) as a result of sex/family status.
      - If students are required to live on campus, can you offer to release the student from their housing contract?
    - Think of some *legal (i.e. non-discriminatory)* limitations on who can live in the residence halls: numbers of folks per room, enrolled students only, guest policies.
- Look at your minors on campus policies.

## Hypothetical - Charlie

Charlie is an incoming freshman athlete on your institution's track and field team. Charlie has been offered a scholarship and is enrolled to start in the fall and aid has already been disbursed. Charlie informs the head coach that they can no longer participate in the fall season because they are pregnant and expecting to give birth during the season. Can your institution rescind the scholarship?

- A. Yes.
- B. No.
- C. Maybe?

# Hypothetical - Maria

Maria is a junior on volleyball team. Maria has a scholarship and recently became pregnant. Maria has missed some practices and appears fatigued. Can your institution require Maria to submit to a medical examination due to her pregnancy?

- A. Yes.
- B. No.
- C. Maybe?



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- |   |  |
|---|--|
| <ol style="list-style-type: none"><li>1. Can we require health certifications for participation?</li><li>2. Can you prevent the student athlete from participating in team activities?</li><li>3. What if the student misses team activities?</li><li>4. Can we terminate aid to the athlete?</li><li>5. Can the student take a leave of absence?</li></ol> | <ol style="list-style-type: none"><li>1. If you require them of everyone.</li><li>2. No. Not unless the student's medical provider says it is unsafe.</li><li>3. If missed for medically necessary reason, then excused.</li><li>4. Not because of pregnancy.</li><li>5. Yes, allow them to return at same status they had before the leave began. Can they seek a waiver from the conference?</li></ol> |
|---|--|

# Madeline

- Madeline is an x-ray tech student who is three months pregnant. She is due after the completion of a semester of clinicals.
- Can the institution require Madeline to submit to a medical examination to determine whether she can participate in the clinical?
- Can the institution require Madeline to submit a liability waiver regarding potential dangers to herself or the fetus?
- Can the institution require Madeline make up clinical hours missed due to prenatal appointments?
- If Madeline gives birth early, what are some things the institution could do to help Madeline finish her clinical and stay with the rest of her class?

# Chandler

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- Chandler is a first year student and has intense morning sickness.
- Chandler stated she cannot get out of bed before 10:00 AM due to the nausea; but Chandler is currently enrolled in an 8:00 am Psych Class.
- What types of modifications might the institution consider to support Chandler and make sure Chandler doesn't miss too many classes?
- What if Chandler misses an exam? Participation Points?

# Monica

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- Monica is 8 months pregnant
- Monica is struggling to walk long distances, but the commuter lot is across campus from Monica's academic building
- What might the institution do to support Monica?

# Sofia

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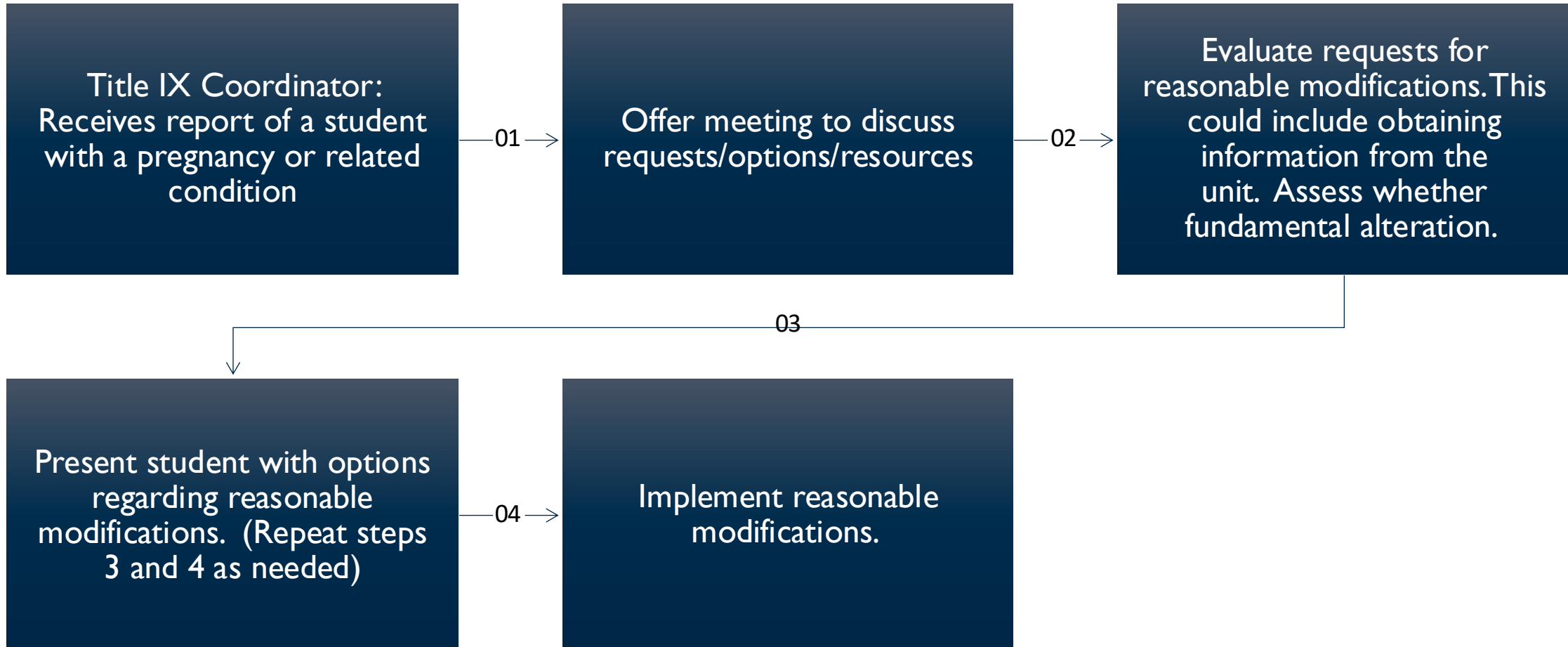
- Sofia recently had a child.
- The child has been ill and Sofia contacted the institution to request a leave of absence to care for her child.
- The institution does not have a policy for this type of leave.
- What might your institution consider?

# Takeaways: 2020 Regulations In Practice

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- Provide "reasonable and responsive" modifications to the policies/practices of the program to ensure equal access
  - Excuse absences
  - Make up missed work/give extensions
  - Access to elevators, breaks, etc.
- Engage in an interactive process
- TIXC should "coordinate" that process
- Show your work

# Evaluating Student Requests: Model Process





# OCR Findings and Resolution Agreements

- *Learn from Colleagues*



- Student alleged various instances of the college's failure to make academic adjustments during and after her pregnancy and failed to respond appropriately to the student's complaints of pregnancy discrimination and harassment.
- During the semester, the student asked for accommodations to leave class early to attend to medical appointments; or to remotely attend when she was hospitalized; or to take lactation breaks after the child was delivered (and the student pumped in the restroom at times).
- The student also developed complications due to a premature birth and the College did not provide adjustments under TIX or Section 504
- The College's staff "encouraged" the student to withdraw and finish the program later.
- The student filed a complaint with the TIX Office, and the TIX Office did not inform the student of the right to file a formal complaint.

- The College agreed to the following:
  - Revising its nondiscrimination notice, Title IX policies and grievance procedures to comply with Title IX;
  - Publishing information on its website for pregnant students about their Title IX rights and how to seek academic adjustments, special services, or excused absences;
  - Training its Title IX coordinator and other school employees involved in addressing Title IX requests from pregnant students regarding Title IX's and Section 504's protections for pregnant students and the academic adjustments and special services available to pregnant students;
  - Tracking and documenting requests by pregnant students to ensure pregnancy-related adjustments are being provided; and
  - Taking other measures to directly remedy the discrimination against the student.

- Allegations:
  - Student in nursing was told by two administrators that if she was pregnant, she would need to take a leave of absence and would not be able to complete her clinicals
  - Student withdrew from the program due to pregnancy
  - When Student was ready to come back, she was told she would have to complete the entire semester over again
- Resolution Agreement (no factual findings):
  - College must offer the student the option to return to the Program at the same time and status in the semester as when she began her leave of absence, and will not require her to redo assignments, exams, or coursework that she had previously completed.
  - If the student requires additional support to make up missed work, the College will offer the option of allowing the Student to retake the semester if she chooses.

- Student struggled with attendance and meeting deadlines due to pregnancy-related complications, early labor, and childbirth.
- Student's request for assistance were not promptly responded to by the Title IX Coordinator.
- Professor's request for guidance was not responded to by the Title IX Coordinator.
- Pregnancy adjustments from professors were "ad hoc and uncoordinated and dependent on each professor's individual interpretation" of the Title IX Coordinator's limited guidance.
- University updated its website to include protections for pregnant students, but it was unclear whether it had provided any training for faculty and staff regarding pregnant students who request adjustments

- Resolved via Resolution Agreement:
  - Required training for faculty and staff who may assist pregnant students with adjustments.
  - Post-training survey to determine the effectiveness of the training.
  - Tracking system for pregnancy-related adjustments for students: request, responses, reasons for denial (if any)
  - Removed student's grades for the semester in question and required the University to "work to limit the negative impact on the Complainant's future applications for financial aid that any disbursement of financial aid for the Courses may have had and reimburse the Complainant for Fall 2020 documented expenses related to any of the Courses the Complainant has since retaken."

- 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.

- 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.

# Salt Lake Community College

## June 2022 (3 of 3)

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- OCR Found:
  - The College failed to **respond promptly and equitably** to the Complainant's complaint of pregnancy discrimination, in violation of Title IX.
  - 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.



- Allegations:
  - School **POLICY** said:
    - No pregnant students in the esthetician program
    - Students dismissed at seven (7) months pregnant
    - Pregnancy-related appointments must be scheduled outside the school day (other appointments not restricted)
- Findings:
  - The policies were in violation of Title IX and were rescinded.
  - Student was provided a full refund.

# Lessons from OCR

Update website

**Interactive** process for  
reasonable modifications

Clearly defined  
procedures/processes

Centralization/coordination  
of process via TIXC

Documentation

Implementation of  
modifications must be  
effective

# 2024 Regulations



# 2024 Title IX Regulations

- Adopted non-regulatory guidance into the regulations.
- Revitalized the regulations for first time since 1975.
- Added two definitions (Pregnancy or Related Condition; Parental Status).
- Imposed new obligations on employees and clarified the role of the TIXC.

**106.2 – Definitions**

**106.10 – Scope**  
includes “pregnancy or related conditions”

**106.21(c) – Admissions**

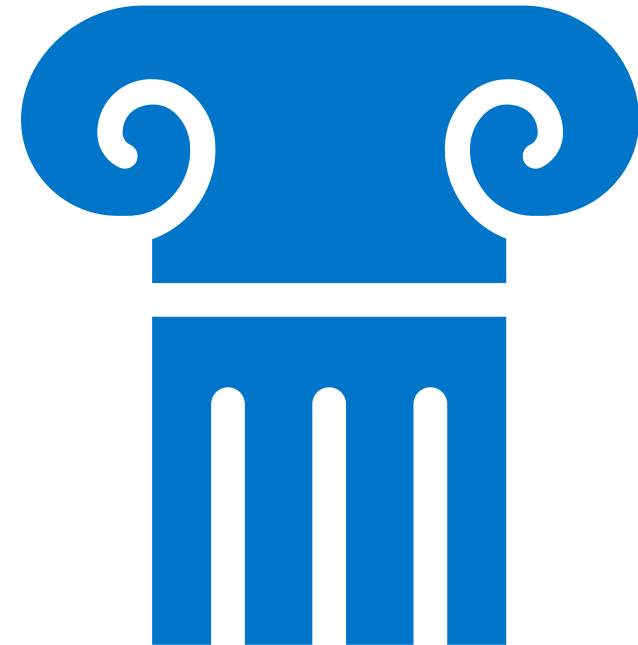
**106.40 – This**  
provides the bulk of the requirements for students

**106.51(b)(6) – Leaves**

**106.57 – This**  
provides the bulk of the requirements for employees

## Scope 106.10

Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, **pregnancy or related conditions**, sexual orientation, and gender identity.



- The status of a person who, with respect to another person who is under the age of 18 or who is 18 or older but is incapable of self-care because of a physical or mental disability, is:
  - A biological parent;
  - An adoptive parent;
  - A foster parent;
  - A stepparent;
  - A legal custodian or guardian;
  - In loco parentis with respect to such a person; or
  - Actively seeking legal custody, guardianship, visitation, or adoption of such a person.

# Pregnancy or Related Condition 2024 Regulations 34 CFR 106.2

- (1) Pregnancy, childbirth, termination of pregnancy, or lactation;
- (2) Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation; or
- (3) Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or related medical conditions.

**Note:** A pregnancy related medical condition "does not have to be a disability" in order to fall within this definition. 89 FR 33756.

**Note:** "The Department interprets 'termination of pregnancy' to mean the end of pregnancy in any manner, including, miscarriage, stillbirth or abortion."

89 FR 33757.

# 2024 Regulations - Non-Discrimination

## 2024 34 C.F.R. 106.40(a)

- Recipients "must not adopt or implement any policy, practice, or procedure concerning a student's current, potential, or past parental, family, or marital status that treats students differently on the basis of sex."

## 2024 34 C.F.R. 106.40(b)(1)

- No discrimination based upon "pregnancy or related conditions"



# Referrals to TIXC

- 106.40(b)(2)
  - When a student/person with legal right to act on behalf of the student informs "ANY EMPLOYEE" of pregnancy or related condition, the employee **MUST**
    1. provide the student with the Title IX Coordinator's information and
    2. inform the student that the Title IX Coordinator can coordinate measures to preserve equal access to the education program or activity.
  - **Exception:** if the employee reasonably believes that the Title IX Coordinator has already been notified.
- This **does not** impose a requirement to affirmatively ask students if they have a pregnancy or related condition! 89 FR 33767.
- **Records:** "the provision **does not require documentation of compliance**...Any records maintained voluntarily by a recipient would be subject to the disclosure restriction of 106.44(j) of the final regulations, which prohibits the disclosure of personally identifiable information obtained in the course of complying with this part, with some exceptions." 89 FR 33768.

# Referral to TIXC - Takeaways

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Who does this apply to?

- ANY Employee
- Does not have to be student facing or someone.

Considerations for implementation:

- Have resources handy for employees to provide to students.
  - Can be creative: QR Codes with link to website; standard template letters or emails to send students so they have that information readily available and can refer back to it.
- Incorporate this information into any required training:
  - Onboarding Training
  - Annual training
  - Employee handbook or other resources
  - Title IX Website
- What, if anything, are you documenting?

# Role of Title IX Coordinator (1 of 3)

Title IX Coordinator must take "specific actions" to ensure equal access 106.40(b)(3)(i)-(vi):

- Provide information about obligations. 106.40(b)(3)(i)
- Provide reasonable modifications. 106.40(b)(3)(ii)
- Provide voluntary access to separate and comparable program. 106.40(b)(3)(iii)
- Voluntary leave of absence. 106.40(b)(3)(iv)
- Access to lactation spaces. 106.40(b)(3)(v)
- Limitation on requests for supporting documentation under 106.40(b)(3)(ii) to (v). 106.40(b)(3)(vi)

## Role of Title IX Coordinator (2 of 3)

Once a TIXC has been informed of a pregnancy or related condition:

- "A recipient must **promptly** take the steps specified in 106.40(b)(3), including implementing reasonable modifications." 89 FR 33769.
- "**No matter when** a student notifies the Title IX Coordinator of Pregnancy or related conditions...a recipient **must respond promptly and effectively** to ensure equal access to the recipient's education program or activity consistent with the requirements of Title IX." 89 FR 33769-70.

# Role of Title IX Coordinator (3 of 3)

A Title IX Coordinator can delegate duties:

- "The Title IX Coordinator must be responsible for coordinating the actions" but "a recipient may delegate...specific duties...provided that the Title IX Coordinator retains ultimate oversight." 89 FR 33770.

Consider:

- Bandwidth of current Title IX personnel
- Expertise of others
  - Consider partnerships with those in accessibility offices?
    - Pros: could have experience with the interactive process
    - Cons: use to requesting a lot of supporting documentation
- Training

- § 106.40(b)(3)(ii)(A)
  - "A recipient must make reasonable modifications to its policies, practices, or procedures as necessary to prevent sex discrimination and ensure equal access to the recipient's education program or activity; that each modification must be based on a student's individualized needs; that the recipient **must consult with the student** when determining what modifications are required; **and that a modification that a recipient can demonstrate would fundamentally alter the nature of its education program or activity is not a reasonable modification.**"
- If a student accepts the offered modification, it must be implemented. (§ 106.40)(b)(3)(ii)(B))

# Comparable processes to disability modifications

- "When recipients can use the same or similar processes for pregnancy and disability in a manner that is consistent with the requirements of these Final Title IX Regulations and applicable disability laws, recipients may do so." 89 FR 33772.

# Fundamental Alterations & "Reasonable Modifications" under Title IX (1 of 2)

- "Jurisprudence outlining modifications that would be unreasonable or rise to the level of a fundamental alteration to the nature of the program in the educational and disability context is illustrative." 89 FR 33775.
- The Department noted that fundamental alterations could include:
  - Modifications that "completely waive requirements that demonstrate mastery"
  - That "jeopardize an institution's accreditation"
  - That "completely waive requirements that demonstrate academic competency" like clinicals.
  - Waive entire senior year and graduate without the credits

89 FR 33775-76



# Fundamental Alterations & "Reasonable Modifications" under Title IX (1 of 2)

- Not Fundamental Alterations:
  - Make up exams at a later date
  - Repeat one or more classes
  - Tutoring
  - Taped lectures
  - Untimed [or extended time] exams
  - Changing seating arrangements
  - Modifying or reducing duties in a clinical course
  - Deferring to another semester to complete clinical requirements
  - Intermittent absences
  - Make up lost class time
  - Switching to a comparable course at a different time
  - Take credits at a slower pace
  - Bathroom breaks

89 FR 33775-76

# Other Reasonable Modifications

## 106.40(b)(3)(ii)(C)

- Breaks
  - To express breast milk/breastfeed
  - To attend health needs
  - Drink/snacks/keep water by them
  - Use restroom
- Online courses/homebound education
- Intermittent absences
- Changes to schedules or course sequences
- Extensions of time to complete coursework/reschedule exams
- Allow student to sit/stand
- Counseling
- Changes in physical space
- Etc.

# Working with Stakeholders

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- Coordination and consistency is key
- Identify stakeholders
  - ADA/504 Coordinator
  - TIXC
  - General Counsel
  - Human Resources
  - Academic leadership
- Consider delegation to ADA/504 office + consult with TIXC
  - New regs = be aware of training requirements, limitations on documentation, etc.

# Limitation on Supporting Documentation

- A recipient **must not** require supporting documentation under § 106.40(b)(3) unless the documentation is **necessary and reasonable** to determine the reasonable modifications. (89 FR 33789-90)
- Examples:
  - Not necessary when the need for action is obvious (i.e. student is pregnant and requests a bigger uniform) or when medical documentation has previously been provided or when the request is to keep water, sit, stand, use a bigger desk, go to the bathroom, or has lactation needs. 106.40(b)(3)(vi).

- "The Department has also removed the proposed requirement for the Title IX Coordinator to “document” reasonable modifications to decrease administrative burdens on the Title IX Coordinator and address privacy concerns related to such **documentation**. The Department emphasizes that while a recipient must comply with the final regulations regarding reasonable modifications, the reasonable modification provision does not require a recipient to maintain documentation of compliance with § 106.40(b)(3)(ii). **While a recipient may choose to voluntarily maintain such records, those records would be subject to § 106.44(j) of the final regulations, which prohibits the disclosure of personally identifiable information obtained in the course of complying with this part with some exceptions.** "

89 FR 33778

# Records & Documentation Considerations

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- Request only the information necessary to make the ultimate determination re: the modifications.
- What information is the TIXC sharing in the course of the assessment of the modification and to whom?
- What records are you keeping to "show your work"?

# Separate Programs

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- The recipient must allow the student to voluntarily access any separate and comparable portion of the recipient's education program or activity under paragraph (b)(1) of this section.

# Leave of Absence

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- Allow for a leave of absence
- For either 1) the time period determined to be medically necessary by the student's licensed healthcare provider or 2) the time under an appropriate leave policy—whichever is greater
- Allow the student to return to the program to the same academic status they had when the leave began



# Lactation Spaces

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- The space must be clean, not a bathroom, shielded from view, free from intrusion
- It must be accessible and available.
- Considerations (not requirements) for that space:
  - Is it functional?
  - Does it have: outlets, seating, a sink, refrigeration?

# Comparable Treatment to Temporary Medical Conditions

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- "A recipient must treat pregnancy or related conditions in the same manner and under the same policies as any other temporary medical conditions"
- Changed "temporary disabilities" to "temporary medical condition" to limit confusion. 89 FR 33791
- "§ 106.40(b)(3) provides a floor beneath which a recipient's treatment of pregnancy and pregnancy-related conditions may not fall, even if the recipient provides lesser protections for students with non-pregnancy related temporary medical conditions." 89 FR 33792

# Certifications to Participate

- recipient must not require a student who is pregnant or has related conditions to provide certification from a healthcare provider or any other person that the student is physically able to participate in the recipient's class, program, or extracurricular activity unless:
  - (i) The certified level of physical ability or health is necessary for participation in the class, program, or extracurricular activity;
  - (ii) The recipient requires such certification of all students participating in the class, program, or extracurricular activity; and
  - (iii) The information obtained is not used as a basis for discrimination prohibited by this part.

- Under 106.44(a)(1): "A recipient with knowledge of conduct that reasonably may constitute sex discrimination in its education program or activity must respond promptly and effectively"
- Under 106.45(a)(1): "A recipient's grievance procedures for the prompt and equitable resolution of complaints of sex discrimination must be in writing and include provisions that incorporate the requirements of this section."
- If it is sexual harassment in post-secondary school involving a student...106.46.

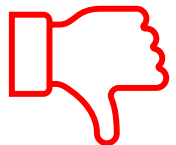
# We're enjoined...now what?

## Still required:



- Recipients have an obligation under the 2020 regulations to prevent sex discrimination.
- Those obligations include providing "reasonable and responsive" modifications to students for "pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom" under the 2020 regulations 106.40(b) and non-regulatory guidance.
- Treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom the same way you would treat a temporary disability.
- Provide leaves of absence, allow access to separate but comparable voluntary program, restrict use of certifications to participate.

## Do not have to:



- Have mandatory referral to TIXC from all employees
- Update definitions
- Update "scope" - but, recall, discrimination based on sex includes discrimination based on pregnancy



# Litigation Updates

# Varlesi v. Wayne State Univ.

## 643 Fed. Appx. 506 (6th Cir. 2016)

- **The Facts:** Varlesi was a graduate student assigned to an internship placement. She excelled in her first year of her program, but became pregnant before her second year. She continued to excel in the classroom, but reported issues with her field placement—including that one individual there complained that Varlesi rubbed her belly, wore tight clothing, and “stimulat[ed]” men with her pregnancy. That same individual gave Varlesi a failing evaluation, after Varlesi had been told two weeks before that she was “doing great.”
- **The Complaint:** Varlesi alleged Title IX pregnancy discrimination & retaliation
- **The Outcome:** Jury awarded the student \$849,000
- **The Appeal:** the 6<sup>th</sup> Circuit affirmed the District Court and the Jury Award

# Khan v. Midwestern University

## 879 F.3d 838 (7<sup>th</sup> Cir. 2018)

- **The Facts:** Pregnant medical school student was expelled after failing more courses than permitted to remain in the program. Most of the class failures occurred prior to the onset her pregnancy-related disability and her request for accommodations. Institution gave a second chance to take first year classes and remain, however she continued to fail courses, including those for she was given accommodations and was ultimately expelled.
- **The Complaint:** Failure to accommodate and discrimination under the Rehab Act
- **The Outcome:** University MSJ granted on the grounds that the student was not qualified

“Khan argues that she was not given the full panoply of accommodations she requested, but we need not reach the issue as to whether the accommodations provided were reasonable and sufficient. Khan was not qualified for the program long before the question of accommodations even arose.”



# Stanford v. Fox College

## 2020 WL 814865 (N.D. Ill.) (unreported)

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- **The Facts:** Pregnant Physical Therapy Assistant student was unable to complete her clinical training at her preferred location, and objected to the distance required to travel to the second location. The student ultimately withdrew from the program for one term, but returned and completed her degree after the birth of her child.
- **The Complaint:** Title IX Pregnancy Discrimination, ADA Title III, Rehab Act
- **The Outcome:** University MSJ granted: lack of adverse action under Title IX and the Rehab Act; no request for injunctive relief under ADA Title III (only relief available);

# Takeaways

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- Respond promptly
- Be open minded
- Treat students equitably.
- Don't be afraid to loop in counsel.
- Review your current processes and procedures.
- Consider updating your website to identify the Title IX Coordinator as a resource for pregnant individuals on campus.

Thank You

Bricker   
Graydon