



## Compliance in Focus

### Pregnancy Discrimination & Students: What You Need To Know

By Elizabeth D'Agostino

#### Introduction

The recent settlement of a discrimination complaint by a pregnant student against the City University of New York (CUNY) is instructive for institutions looking to appropriately work with pregnant students. In that case, Stephanie Stewart was attending Borough of Manhattan Community College on a scholarship when she was allegedly discriminated against based on her pregnancy<sup>1</sup>. Specifically, when she was not allowed to make up work in a particular course missed due to her pregnancy-related absences, she was told by school administration to drop the class<sup>2</sup>. It was not until incurring significant tuition-related expenses and emotional distress that Stephanie learned Title IX protected her.

Unfortunately there are many more stories like Stephanie's that have gone unnoticed or have yet to occur. The reality is that women in higher education are often in their prime childbearing years, yet

childbirth is one of the main reasons women drop out of college<sup>3</sup>. Whether the pregnancy is planned or unplanned, female students should know that they have the support of their campus community to complete their program of study because schools are under certain legal obligations when it comes to pregnant students due to Title IX of the Civil Rights Act.

The following guidance will discuss what protections exist for pregnant students and will suggest some policies advocated by the Department of Education's Office for Civil Rights (OCR).

#### I. Title IX

In general, Title IX of the Education Amendments of 1972 prohibits sex discrimination in educational programs and activities. Sex discrimination includes discrimination relating to a student's pregnancy. Specifically:

"A recipient [of federal funding] 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 separate portion of the program or activity of the recipient."<sup>4</sup>

Title IX and the corresponding regulations (collectively the "Title IX") apply to all colleges and universities that receive some kind of federal funding. Title IX prohibits schools from excluding a pregnant student in any aspect of her education, including the admissions process, attending classes and completing coursework. The term pregnancy is broadly defined and includes the following: (1) pregnancy, (2) childbirth, (3) false pregnancy, (4) termination of pregnancy or (5) medical conditions or recovery stemming from these conditions<sup>5</sup>.

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<sup>1</sup>Note that this case was resolved by way of an Early Complaint Resolution Agreement between CUNY and OCR. While a court never officially ruled on the discrimination issues, Ms. Stewart was reimbursed lost tuition expenses. Early Complaint Resolution Agreement, OCR Case No. 02-13-3065 available at <http://system.suny.edu/media/suny/content-assets/documents/compliance/Accommodating-Pregnant-Students-on-SUNY-Campuses.pdf>; Seth Gilbertson, *Accommodating Pregnant Students on SUNY Campuses*, SUNY OFFICE OF GENERAL COUNSEL (Aug. 2013) available at <http://system.suny.edu/media/suny/content-assets/documents/compliance/Accommodating-Pregnant-Students-on-SUNY-Campuses.pdf>.

<sup>2</sup>CUNY Settles Discrimination Claim, Inside Higher Ed (May 2, 2013) <https://www.insidehighered.com/quicktakes/2013/05/02/cuny-settles-discrimination-claim>.

<sup>3</sup>Mary Ann Mason & Jaclyn Younger, *Title IX and Pregnancy Discrimination in Higher Education: The New Frontier* available at [https://www.law.berkeley.edu/files/bccj/Title\\_IX\\_Law\\_Review\\_Article\\_Final\\_5.29-3-5.pdf](https://www.law.berkeley.edu/files/bccj/Title_IX_Law_Review_Article_Final_5.29-3-5.pdf); Office for Civil Rights, *Supporting the Academic Success of Pregnant and Parenting Students*, U.S. Dep't of Educ., June 25, 2013 available at <http://www2.ed.gov/about/offices/list/ocr/docs/pregnancy.pdf> [hereinafter OCR Guidance].

<sup>4</sup>4 C.F.R. § 106.40(b)(1) (2012).

<sup>5</sup>OCR Guidance, *supra* note 3. These conditions will collectively be referred to throughout the piece as pregnancy.



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If a pregnant student believes that her school is discriminating against her based on her pregnancy, she must prove four elements in order to win on her claim. First, she must prove that at the time of discrimination she had one of the five conditions listed above<sup>6</sup>. Second, she must demonstrate that she was otherwise performing her academic requirements according to her professor's legitimate expectations. Third, the student must prove that she suffered some adverse treatment. Such adverse treatment could consist of obvious behavior like harassment or something more discrete like receiving a low participation grade. Finally, the student must prove that the school, despite taking adverse academic actions against her, continued to "instruct and credit other students,"<sup>7</sup> such that she was singled out or denied an opportunity to be educated that was otherwise provided to other students. Such a claim could derail a campus' reputation. As such, it is important to be aware of the main areas where pregnancy discrimination may arise.

## II. Areas of Concern

Generally, schools can comply with Title IX by providing any special services that are normally provided to a student with a temporary medical condition to the pregnant student. There are several areas of discrimination concern that have played out through court cases and are specifically addressed by OCR guidance. These areas should be addressed in a comprehensive pregnancy discrimination policy or added to existing discrimination compliance information.

### A. Coursework and Exams

The first area for potential pregnancy discrimination is the classroom, including course work and exams. This area has proven to be problematic because of the freedom that faculty enjoy to create syllabi, set course work expectations and evaluate students<sup>8</sup>. To avoid discrimination, the instructor should offer a pregnant student "alternatives for making up missed work" including, in some circumstances, retaking exams missed because of pregnancy-related absences. For

**Compliance Tip:** Consider implementing a policy that is separate from, but mirrors, a temporary disability policy that addresses questions such as:

- How will the student be able to make up work upon returning from a pregnancy-related absence?
- For things that are impractical to make up, how will the campus "work with the student to devise an alternative path"?<sup>10</sup>

example, refusing to allow a student to submit an assignment late that was due when she could not turn it in on time due to her pregnancy may result in a strong discrimination claim<sup>9</sup>. Similarly, when final grades are based on a student's participation, a professor's actions may be considered discriminatory if he/she fails to provide a pregnant student who missed classes due to her pregnancy with an alternative assignment to make up for her absence.

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<sup>6</sup>Emily McNee, Pregnancy Discrimination in Higher Education: Accommodating Student Pregnancy, 20 Cardozo J. L. & Gender 63 (Nov. 26, 2013) available at [http://www.cardozolawandgender.com/uploads/2/7/7/6/2776881/mcnee\\_final.pdf](http://www.cardozolawandgender.com/uploads/2/7/7/6/2776881/mcnee_final.pdf); Hogan v. Ogden, No. CV-06-5078-EFS, 2008 EL 2954245, at \*9 (E.D. Wash. July 30, 2008).

<sup>7</sup>McNee, *supra* note 6, at 68.

<sup>8</sup>Id. at 67

<sup>9</sup>OCR Guidance, *supra* note 3, at 11.

<sup>10</sup>Gilbertson, *supra* note 1.



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#### B. Enrollment

The second area involves course enrollment. A school may not prohibit a student from enrolling in a course because of her pregnancy. Similarly, a school may not require the student to take a special course or program for pregnant students<sup>11</sup>. If a student wants to take a course or needs to take a course to satisfy academic requirements, the school cannot stop her from doing so, even if the school subjectively believes the course will be too rigorous or demanding on the student given anticipated absences relating to her pregnancy.

#### C. Attendance

A third area is attendance. Attendance is perhaps the trickiest area because the law, regulations and guidance require a school to grant a pregnant student leave “for so long a period of time as is deemed medically necessary by the student’s physician.”<sup>12</sup> Furthermore, “when the student returns to school, she must be reinstated to the status she held when the leave began.”<sup>13</sup> The exact time frame for what is “medically necessary” will

vary from person to person, so it is hard to predict from a policy standpoint how this may play out.

**Compliance Tip:** The student and the school should maintain an open and ongoing line of communication during the student’s pregnancy-related absence or leave, to the extent that the communication is not overly obtrusive of the student’s privacy. This will help manage expectations of both the student and the school.

#### D. General Considerations

Here are some additional important considerations and guidelines for working with pregnant students. First, the school cannot require a student to submit a doctor’s note evidencing her pregnancy or pregnancy-related conditions unless the school also requires a doctor’s note for students requiring special treatment for other medical conditions. For example, if a school requires a student to bring in a doctor’s note to prove an extended absence for a medically necessary surgery, the school may also require such substantiation of pregnant students<sup>14</sup>. This standard

applies to rules requiring students to submit doctor’s notes for absences or to submit medical certification for participation in certain school-related activities.

**Compliance Tip:** A school should not require a doctor’s note for a pregnant student to participate in a school activity based on the presumption she is physically unable to attend or participate in such activity unless such a note is also required of students with temporary medical conditions.

Second, aside from excusing a student’s absence for as long as “medically necessary” and reinstating the student to the same status as before her medical leave, schools are not required to affirmatively provide any special treatment to pregnant students that they would not provide to other students with temporary disabilities. This point goes to the central purpose of Title IX, which is to put women on a level playing field as men in academics. From a pregnancy standpoint, it is anatomically impossible to treat a pregnant student the same

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<sup>11</sup>Note, however, that such courses may be offered but must be completely voluntary.

<sup>12</sup>Gilbertson, *supra* note 1.

<sup>13</sup>OCR Guidance, *supra* note 3, at 10.

<sup>14</sup>34 C.F.R. § 106.40(b)(2).



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as a male student, so the law has provided the work around in which pregnant women are to be given the same opportunities and accommodations as their peers suffering from temporary disabilities. For example, “if a school provides special services, such as homebound instruction or tutoring, for students who missed school because they have a temporary medical condition, it must do the same for a student who misses school because of pregnancy or childbirth.”<sup>15</sup> Similarly some accommodations may be necessary to “ensure a pregnant student’s access” to education including providing “a larger desk,

**Compliance Tip:** Review your policies regarding temporary disabilities and include pregnant women in the applicable coverage. Remember that pregnancy is not in and of itself a disability, but is covered by its own provisions and regulations under Title IX.

allow[ing] frequent trips to the bathroom, or permit[ing] temporary access to elevators.”<sup>16</sup> Note, however, that such accommodations must be no less but can be no more than what a student with a temporary disability is given.

### III. Employment Discrimination

Pregnancy discrimination in employment was a hot topic in 2015 given a recent Supreme Court case<sup>17</sup> and U.S. Equal Employment Opportunity Commission guidance<sup>18</sup>. Since many times employment and education overlap, being aware of the changes in employment may be useful. Specifically, the Pregnancy Discrimination Act (PDA) prohibits discrimination either by overt discriminatory treatment or by creating a policy that disproportionately negatively impacts women in the workplace based on pregnancy and pregnancy-related conditions. Also notable is the Americans with Disabilities Act Amendments Act, in which conditions relating to pregnancy may be considered a disability

warranting a reasonable accommodation in employment under the federal statute.

### Conclusion

Given the plethora of guidance pertaining to Title IX and pregnancy discrimination, it is fundamental that a campus has, at the least, a non-discrimination provision pertaining to pregnancy and students. Such a provision will likely reflect the protections and accommodations offered to temporarily disabled students. Implementing a plan to end pregnancy discrimination on your campus is the first step in overcoming the struggles pregnant students face every day. By removing academic hurdles and implementing and circulating a fair anti-discrimination policy, we can help pregnant students increasingly cross the finish line with their earned degrees.

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<sup>15</sup>OCR Guidance, *supra* note 3, at 6.

<sup>16</sup>OCR Guidance, *supra* note 3, at 9.

<sup>17</sup>In *Young v. United Parcel Service, Inc.*, a pregnant postal delivery woman sued UPS for violation of the Pregnancy Discrimination Act (PDA) for failing to provide her an alternative when, due to her pregnancy, she could no longer satisfy the 70-pound lifting requirement. The court overturned the lower court’s decision in favor of UPS, finding that UPS could have discriminated against the woman by accommodating non-pregnant employees with lifting restrictions while failing to provide pregnant woman the same accommodations. *Young v. U.S. Parcel Service, Inc.*, No. 12-1226 (Mar. 25, 2015); Brooke Leone & Erin Sylvester Torcello, *The Supreme Court Addresses Pregnancy Accommodations under Title VII*, N.Y. LABOR & EMPLOYMENT Apr. 6, 2015 <http://www.nylaborandemploymentlawreport.com/2015/04/articles/employment-discrimination/the-supreme-court-addresses-pregnancy-accommodations-under-title-vii/>.

<sup>18</sup>*Enforcement Guidance: Pregnancy Discrimination and Related Issues*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION June 25, 2015 available at [http://www.eeoc.gov/laws/guidance/pregnancy\\_guidance.cfm](http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm).