

HIGHER EDUCATION INFORMATION MEMO

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Accommodations for Pregnant and Parenting Students: New Rules, New Challenges

New Title IX regulations became effective on August 1, 2024, and contain extensive requirements for colleges and universities that receive federal Title IV funds to provide accommodations for students who are pregnant or who have recently given birth. Although the new regulations have been enjoined in twenty-six states and at certain colleges and universities¹, the legal challenges have focused on the regulations' protections for students on the basis of sexual orientation and gender identity and have not addressed the sections related to pregnancy. It is not unreasonable to suggest that, even if the challenges to the 2024 Title IX regulations prevail, the provisions related to pregnancy and childbirth could very well survive.

For that reason, colleges and universities should review their policies and processes for responding to requests for academic accommodations related to pregnancy and childbirth. Fashioning such academic accommodations can be challenging, particularly for programs that require clinical experiences, time limitations, exposure to possible fetal toxins or specific requirements for licensure. For example, students enrolled in healthcare-related programs, teacher-candidates who must complete student teaching prior to graduation, and students in programs leading to licensure that require internships or other practice-based experiences may request accommodations related to the timing, activities or sequencing of these requirements.

This article will summarize the 2024 Title IX regulations related to pregnancy and childbirth. It will then provide suggestions for preparing for, and then responding to, student requests for accommodations in programs whose academic requirements pose challenges to accommodating these students. Finally, the article will discuss approaches to the accommodation process that comply with the 2024 regulations while maintaining the integrity of the academic program.

I. Summary of the 2024 Regulations Relating to Pregnancy and Childbirth²

Title IX prohibits and protects students from sex discrimination based on pregnancy, childbirth,

¹ "As of September 13, 2024, pursuant to Federal court orders, the Department is currently enjoined from enforcing the 2024 Final Rule in the states of Alabama, Alaska, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming; the Department is also currently enjoined from enforcing the 2024 Final Rule at the schools on the list located <https://ed.gov/sites/ed/files/about/offices/list/ocr/docs/list-of-schools-enjoined-from-2024-t9-rule>. Per Court order, this list of schools may be supplemented in the future. The Final Rule and these resources do not currently apply in those states and schools. Pending further court orders, the Department's Title IX Regulations, as amended in 2020 (2020 Title IX Final Rule) remain in effect in those states and schools." <https://www.ed.gov/about/ed-offices/ocr/regulations-enforced-by-the-office-for-civil-rights>.

² See 34 C.F.R. §§106.2, 106.10, 106.21, 106.40. and 106.57.

recovery from pregnancy, termination of pregnancy, lactation or related medical conditions. Related medical conditions may include morning sickness, fatigue, nausea, dehydration, gestational diabetes, preeclampsia, prenatal or postpartum depression, infertility, recovery from childbirth, miscarriage or abortion and lactation conditions or complications, among other conditions.

Notice

Any employee who is informed of a student's pregnancy must provide that person with the Title IX Coordinator's contact information and must inform the person that the Title IX Coordinator can coordinate specific actions to prevent sex discrimination and ensure the student's equal access to the institution's education program or activity. Furthermore, the institution must inform the student of its obligations and provide a notice of nondiscrimination to the student. Institutions must respect the privacy of information about a student's pregnancy.

Modifications

The institution must make reasonable modifications to its policies, practices or procedures as necessary to prevent sex discrimination and ensure equal access to its education program or activity. Each reasonable modification must be based on the student's individualized needs. The institution must consult with the student to determine what modifications are required. However, a modification that the institution can demonstrate would fundamentally alter the nature of its education program or activity is not a reasonable modification.

The student has discretion to accept or decline each reasonable modification offered by the institution. If a student accepts an institution's offered reasonable modification, the institution must implement it. Reasonable modifications may include (but are not limited to):

- Breaks during class to express breast milk, breastfeed, or attend to health needs associated with pregnancy or related conditions, including eating, drinking or using the restroom;
- Intermittent absences to attend medical appointments;
- Access to online or homebound education;
- Changes in schedule or course sequence;
- Extensions of time for coursework and rescheduling of tests and examinations;
- Allowing a student to sit or stand, or carry or keep water nearby;
- Counseling;
- Changes in physical space or supplies (for example, access to a larger desk or a footrest);
- Elevator access; and
- Other changes to policies, practices or procedures.

Program Changes

The institution must allow the student to voluntarily access any separate and comparable portion of the institution's education program or activity, provided that the separate portion is comparable to that offered to students who are not pregnant and do not have any related conditions. The institution may not force or pressure the student to participate in the alternate comparable program, and students have the right to stay in their same classes and extracurricular activities.

Leaves

With respect to leaves of absence, the institution must allow the student to voluntarily take a leave of absence from the institution's education program or activity to cover, at minimum, the period of time deemed medically necessary by the student's licensed healthcare provider. To the extent that a student qualifies for leave under a leave policy maintained by the institution that allows a greater period of time than the medically necessary period, the institution must permit the student to take voluntary leave under that policy instead if the student so chooses. When the student returns to the institution's education program or activity, the student must be reinstated to the academic status and, as practicable, to the extracurricular status that the student held when the voluntary leave began.

Lactation

The institution must ensure that the student can access a lactation space, which must be a space other than a bathroom, that is clean, shielded from view, free from intrusion from others and may be used by a student for expressing breast milk or breastfeeding as needed.

Documentation

The regulations are quite specific about an institution's right to request documentation of the student's medical needs. The institution may require supporting documentation of 1) the need for reasonable modifications, 2) voluntary access to separate portions of programs or activities, 3) voluntary leaves of absence or 4) requirements of lactation space if the documentation is necessary and reasonable for the institution to determine the reasonable modifications to make or whether to take additional specific actions under the above requirements. But the regulations include examples of "unnecessary documentation," such as when the need is obvious, such as the need for a larger size uniform; when the student has previously provided sufficient supporting documentation; when the reasonable modification is allowing the student to carry or keep water nearby and drink, use a bigger desk, sit or stand, or take breaks to eat, drink, or use the restroom; when the student has lactation needs; or when the specific action listed in 1–4 above is available to students for reasons other than pregnancy or related conditions without submitting supporting documentation.

Equal Treatment

The regulations provide that the institution must treat pregnancy or related conditions in the same manner and under the same policies as any other temporary medical conditions with respect to any medical or

hospital benefit, service, plan or policy the institution administers, operates, offers or participates in with respect to students admitted to the institution's education program or activity. And finally, the institution may require a student who is pregnant or who has related conditions to provide certification from a healthcare provider or any other person that the student is physically able to participate in the institution's class, program or extracurricular activity only if: (i) the certified level of physical ability or health is *necessary* for participation in the class, program or extracurricular activity; (ii) the institution 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 the regulations.

II. Suggested Best Practices in Responding to Accommodation Requests from Pregnant Students

1. Consolidate all institutional pregnancy and lactation policies into a standalone pregnancy and lactation policy, if possible.
2. Consider a team approach to discuss academic accommodations (and convene the team).
3. We suggest that the final decisionmaker for academic accommodations should be a dean or provost, rather than an individual faculty member.
4. For programs leading to licensure, check on time restrictions to see if flexibility is possible in extraordinary circumstances.
5. Never say never!
6. Determine whether the requested modification or accommodation has ever been provided to a student (even if it was provided many years ago).
7. If leave is the best (or only) reasonable modification and a student requests a tuition refund, consider offering a tuition credit for future semesters.
8. Although the ultimate decision on reasonable academic modifications belongs to the institution, a student's requests should be seriously considered.

III. Considerations in Developing and Evaluating Academic Program Requirements

Institutions have been required to provide reasonable accommodations for students with disabilities under both the Americans With Disabilities Act (ADA) and Section 504 of the Rehabilitation Act for decades³. If an institution can demonstrate that the accommodation requested by the student with a disability would require a fundamental alteration to an academic program⁴, the law does not require the institution to modify the program's requirement(s). However, the standard for demonstrating that a requested accommodation would

³ Americans With Disabilities Act, 42 U.S.C. § 12101 et seq. (1990) and Section 504 of the Rehabilitation Act, 29 U.S.C. §794 (1973).

⁴ A fundamental alteration is a change that is so significant that it alters the essential nature of the goods, services, facilities, privileges, advantages, or accommodations offered. ADA.gov.

pose a fundamental alteration is not easy to meet. For example, the opinion of a single faculty member that the requested accommodation is a fundamental alteration may not satisfy the law's requirements. Nor would the decision of a disability services staff member that the requested accommodation would require a fundamental alteration in the academic program necessarily be a sufficient defense to a discrimination claim.

The Education Department's Office of Civil Rights (OCR), which enforces Title IX, Title II of the ADA (prohibiting disability discrimination by public entities, whether or not they receive federal financial assistance), Section 504 and other laws relevant to recipients of Title IV funds (Federal Student Aid), has provided some guidance concerning its expectations for the establishment of academic requirements as well as an institution's process for determining how or whether an academic requirement must be modified for a student with a disability (and now, for a student requesting a pregnancy accommodation). The OCR has stated:

Section 504 and Title II do not require a university to modify academic requirements that are essential to the instruction being pursued by the student or to any directly related licensing requirement. In reviewing an institution's determination that a specific standard or requirement is an essential program requirement that cannot be modified, OCR considers whether that requirement is educationally justifiable. The requirement should be essential to the educational purpose or objective of a program or class. OCR policy requires, among other factors, that decisions regarding essential requirements be made by a group of people who are trained, knowledgeable and experienced in the area; through a careful, thoughtful and rational review of the academic program and its requirements; and that the decision-makers consider a series of alternatives for the essential requirements, as well as whether the essential requirement in question can be modified for a specific student with a disability. OCR affords considerable deference to academic decisions made by post-secondary institutions, including what is or is not an essential program requirement.⁵

This guidance suggests that, prior to receiving a request to modify or eliminate a program requirement, an academic program should ensure that its requirements have been developed through a collaborative process as indicated in the above quotation, and preferably with the assistance of an individual who is experienced in developing accommodations for students. And when the accommodation request is made, the OCR advice suggests that a group of individuals with expertise in the particular academic area be convened to evaluate the request and recommend the institution's response.

Using a group of informed individuals with expertise, as noted above, rather than allowing the decision to be made by a single faculty member who is being asked to modify a particular academic requirement, is preferred by OCR for the following reasons:

Professors may be an integral part of the interactive process, e.g. input into what constitutes a fundamental alteration or essential requirements for a course. However, professors are not qualified to solely determine what the requesting student may be entitled to under Section 504 and Title II.

⁵ Letter to University of Massachusetts, Boston, Complaint No. 01-16-2120, February 23, 2018, p. 4 available at <https://ocrcas.ed.gov/sites/default/files/ocr-letters-and-agreements/01162120-a.pdf>.

Professors do not necessarily have specialized training in the law or disability issues to make informed decisions about what is legally required by Section 504 or Title II. Thus, leaving students to negotiate with their professors to obtain accommodations compromises the interactive process, which is further compromised because of the disparity in power and authority between a student and a professor who ultimately assigns the student a grade.⁶

Given this observation by OCR in the letter cited above, institutions may wish to consider involving not only academic subject-matter experts, but disability services staff in their recommendation regarding the accommodation request, which may also benefit from review by a higher-level academic administrator such as a dean or provost, and perhaps in certain cases, involving legal review.

Although pregnancy has generally not been considered a disability under the ADA or Section 504, pregnancy-related physical or mental impairments may be considered disabilities that are subject to reasonable accommodation under those laws⁷, and the new Title IX regulations make it clear that institutions are expected to accommodate pregnant students, as discussed above.

A webinar on this subject sponsored by Bond, Schoeneck and King was held on September 18, 2024. The webinar included PowerPoint slides that addressed the information provided in sections I and II of this article, as well as hypotheticals. The recorded version of the webinar and the related slides may be found [here](#).

If you have any questions about the information presented in this memo, please contact [Barbara A. Lee](#), [Alison K. Roach](#), [Jane M. Sovern](#), or any attorney in Bond's [higher education practice](#) or the attorney at Bond with whom you are regularly in contact.

⁶ Id. at p. 5.

⁷ EEOC, Pregnancy Discrimination and Pregnancy-Related Disability Discrimination, <https://www.eeoc.gov/pregnancy-discrimination#:~:text=While%20pregnancy%20itself%20is%20not,for%20the%20pregnancy%2Drelated%20disability> (ADA and Title VII) and 34 C.F.R. Part 106 (Title IX).

