




HUSCH BLACKWELL




Pregnancy Discrimination


1



Presenters



Ellen Armentrout
512-703-5730
Ellen.Armentrout@huschblackwell.com



Kristine Zayko
312-526-1615
Kristine.Zayko@huschblackwell.com

HUSCH BLACKWELL

2



Education Team

HUSCH BLACKWELL

3



Agenda

- Overview of Legal Requirements
- Recent Case Law
- Hypothetical Scenarios
- Practice Pointers



HUSCH BLACKWELL

4

Overview of Legal Requirements

© 2021 Husch Blackwell LLP

5



Applicable Laws

- Title IX
- Pregnancy Discrimination Act
- ADA/Section 504
- State and local civil rights laws



HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

6

Pregnancy Discrimination Act

Title VII, as amended by the PDA, prohibits *employment* discrimination based on:

- Current pregnancy
- Past pregnancy
- Potential or intended pregnancy
- Medical conditions related to pregnancy or childbirth

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

7

ADA/Section 504

- Federal laws that prohibit disability discrimination and require institutions to make reasonable accommodations to qualified individuals with a disability.
- Disability = a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such an impairment, or a person who is perceived by others as having such an impairment.
- Pregnancy itself is not a disability, but complications from pregnancy or childbirth may qualify.

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

8

H-B

Title IX

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.



HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

9

H-B

Title IX Regulations: Gender-neutral rules



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.

34 CFR § 106.40(a)

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

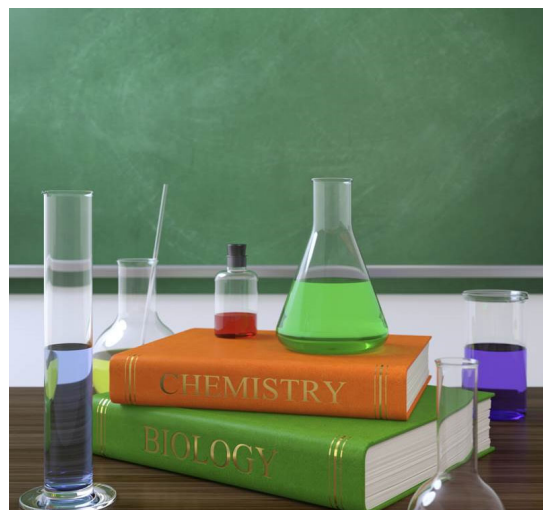
10

H-B

Title IX Regulations: Equal Participation

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.

34 CFR § 106.40(b)(1)

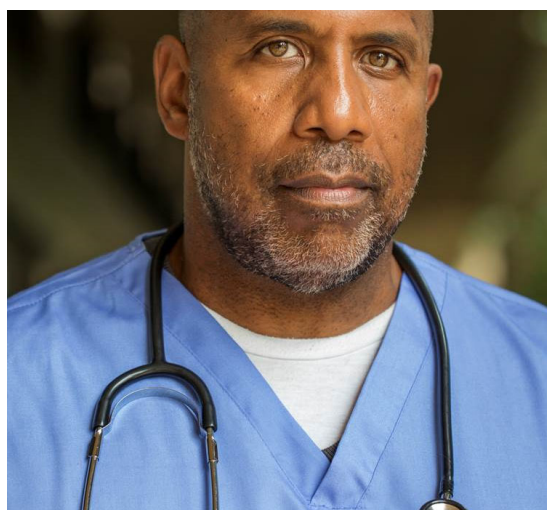


HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

H-B

Title IX Regulations: Medical Certification



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.

34 CFR § 106.40(b)(2)

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP



Title IX Regulations: Separate Programs

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.

34 CFR § 106.40(b)(3)

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

13



Title IX Regulations: Temporary Disability Policies

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.

34 CFR § 106.40(b)(4)

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

14

H-B

Title IX Regulations: Leaves of Absence

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.

34 CFR § 106.40(b)(5)



HUSCH BLACKWELL

H-B

OCR Guidance: Administrative Measures



Schools **MUST**

- Protect students from harassment based on pregnancy or related conditions.
- Possess and distribute a policy against sex discrimination. OCR recommends the policy make clear that sex discrimination covers discrimination against pregnant and parenting students too.

HUSCH BLACKWELL



OCR Guidance: Administrative Measures

Schools **MUST**

- Adopt and publish grievance procedures for students to file complaints of sex discrimination, including discrimination related to pregnancy or parenting.
- Identify at least one employee to carry out Title IX responsibilities.



HUSCH BLACKWELL



OCR Guidance: Day-to-Day

Schools **MUST**

- Allow pregnant students to continue participating in classes and extracurricular activities.
- Allow pregnant students to choose if they want to participate in special programs or classes for pregnant students. Schools may not pressure students to participate in these types of programs.
- Provide reasonable adjustments such as a larger desk or elevator access.



HUSCH BLACKWELL



OCR Guidance: Day-to-Day

Schools **MUST**

- Allow pregnant students to return to the same academic and extracurricular status as before medical leave, including the opportunity to make up missed work.
- Ensure that teachers understand the Title IX requirements. Teachers may not prohibit students from submitting work after a deadline missed due to pregnancy or childbirth. Students should be permitted to make up missed participation and attendance credits.

HUSCH BLACKWELL



OCR Guidance: Medical Accommodations

Schools **MUST**

- Excuse absences due to pregnancy or childbirth for as long as medically necessary.
- Provide pregnant students with the same special services they provides to individuals with temporary medical conditions, including remote instruction, tutoring, and/or independent study.



HUSCH BLACKWELL



OCR Guidance: Medical Accommodations

- Schools may only require pregnant students to submit a doctor's note if the school also requires a doctor's note from all students who have a physical or emotional condition requiring treatment by a doctor.



HUSCH BLACKWELL

Recent Cases

—
What do courts think about pregnancy discrimination in higher education?

© 2021 Husch Blackwell LLP



Overview

- These cases will provide examples of recent pregnancy discrimination decisions involving higher education
- Sample cases come from several federal jurisdictions
- Cases cover a range of factual scenarios



HUSCH BLACKWELL

23



Stanford v. Fox College, 2020 WL 814865 (N.D. Illinois 2020)



- Facts: Physical therapy assistant student alleged that the College discriminated against her because of her pregnancy by assigning her to a clinical location she found unacceptable and not allowing her to find her own clinical placement.
- Result: Court granted summary judgment to College.
- Key takeaway:
 - Student faced no adverse action. Her first clinical assignment was cancelled by the clinical location, and the College assigned her to another appropriate location.
 - There was no genuine dispute regarding whether the College's explanations were pretextual.

HUSCH BLACKWELL

24



Varlesi v. Wayne State University, 643 Fed. Appx. 507 (6th Cir. 2016)

- **Facts:** Student enrolled the Wayne State University's social work program. The social work program requires students to complete coursework and work placements. Student volunteered at the Salvation Army as part of her work placement. Student became pregnant while working at the SA. Her supervisor commented on her lack of wedding ring, repeatedly told student to stop wearing fitted clothing, and told student that individuals receiving treatment at the SA would be sexually attracted to her pregnancy. The supervisor then gave student failing marks, which the Department Chair relied upon to fail student for the clinical portion of her degree. Student sued for pregnancy discrimination under Title IX.
- **Result:** The Eastern District of Michigan affirmed decision to dismiss SA and denied new trial to Wayne State University on plaintiff's pregnancy discrimination claims.
- **Key takeaway:**
 - The Salvation Army was not considered an academic placement under Title IX (thus TIX did not apply to SA)
 - Court found the jury's award of \$848,690 against the University did not shock the conscience
 - Evidence showed that she was failed because of her pregnancy

HUSCH BLACKWELL

25



Kubik v. Central Michigan University, 717 Fed.Appx. 577 (6th Cir. 2017)

- **Facts:** Plaintiff worked as an Assistant Professor at CMU. Plaintiff was told by CMU superiors her scholarly output was lacking on multiple occasions. Plaintiff requested an extension in her tenure evaluations to accommodate her pregnancy. CMU originally denied this extension and held a hostile meeting discussing Plaintiff. After this meeting, however, Plaintiff's extension was granted. Plaintiff sued for pregnancy discrimination under Title VII.
- **Result:** The Sixth Circuit affirmed the lower court's decision granting summary judgment to CMU.
- **Key takeaways:**
 - Must show a nexus between pregnancy and adverse employment action (e.g., time, comments, comparison to a similarly-situated employee).
 - Adverse action must be material – not just inconvenient.

HUSCH BLACKWELL

26



Burnett v. University of Tennessee Knoxville, 2010 WL 1687062 (E.D. Tenn. 2010)



- Facts: Veterinary assistant worked for UT Knoxville’s Large Animal Clinic. Her job required her to clean the stalls of diseased animals. When she learned she was pregnant, she sought out medical advice. Her doctor instructed her to “have no contact with animals placed in isolation.” UT Knoxville subsequently terminated her. She sued for pregnancy discrimination under Title VII.
- Result: The Eastern District of Tennessee granted summary judgment to the University of Tennessee Knoxville.
- Key takeaway:
 - Plaintiff must show that defendant failed to make a reasonably informed decision. Defendant is not required to make the optimal decision or “leave no stone unturned.”

HUSCH BLACKWELL

27



Castro v. Yale University, 518 F.Supp.3d 593 (D. Conn. 2021)

- Facts: Many female residents at University hospital brought claims against University, hospital, and residency supervisor, including pregnancy discrimination claims under Title IX.
- Result: Court denied University’s motion to dismiss.
- Key takeaway:
 - University and hospital had a contractual arrangement formally integrating the hospital with the University
 - Hospital held itself out as the primary teaching hospital of the University’s medical school thereby affiliating itself with the University and holding itself out as an educational institution
 - Hospital receives federal funds
 - Therefore, hospital subject to Title IX

HUSCH BLACKWELL

28



Darian v. University of Massachusetts Boston, 980 F. Supp. 77 (D. Mass. 1997)

- Facts: Nursing student suffered a variety of unpleasant ailments as a result of her pregnancy. University offered accommodations for her clinical class (that had classroom and clinical components) that student ultimately found unacceptable, and student left the program. She sued the University for disability discrimination and under Title IX.
- Result: Court granted summary judgment to University, determining that University granted reasonable accommodations and did not violate Title IX.
- Key takeaways:
 - Pregnancy can lead to disability
 - Students may file cases under both discrimination statutes and Title IX
 - Accommodations are reasonable if they do not impose undue financial hardship or administrative burdens or fundamental alteration in the nature of the program
 - A student not meeting the academic requirements of a program does not have a legitimate claim under Title IX

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

29



Muro v. LSU, 2019 WL 5810308 (E.D. La. 2019)

- Facts: Dental student got pregnant and sought maternity leave. University did not have a maternity leave policy. Student returned to work but was suffering from postpartum depression. She was cleared for work but was terminated from the program six months later.
- Result: Court dismissed the claim that student was terminated from the program due to her post-partum depression but allowed her claim that the failure to allow her maternity leave was a violation of Title IX.
- Key takeaways:
 - Courts analyze Title VII and Title IX cases in the same way
 - If school does not have a leave policy, it shall treat pregnancy and recovery therefrom as a justification for a leave of absence for so long a period of time as is deemed medically necessary, and the student shall be reinstated to the status which the student held when the leave began

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

30

hb1 cD

HuschBlackwell, 11/15/2021



Khan v. Midwestern University, 879 F.3d 838 (7th Cir. 2018)

- Facts: Medical student who was struggling academically was given the chance to prove her ability to complete the program satisfactorily at the discretion of the University. She continued to struggle and was dismissed. After being expelled, she sued the University for failing to accommodate her pregnancy-related disabilities.
- Result: The Seventh Circuit affirmed the trial court's decision granting summary judgment to the University.
- Key takeaways:
 - Medical student was not "otherwise qualified" to meet all of the program's requirements in spite of her pregnancy-related disabilities.
 - This was not a Title IX claim; it was a disability discrimination claim under Section 504 of the Rehabilitation Act.

HUSCH BLACKWELL

31

Hypotheticals

What would you do?

© 2021 Husch Blackwell LLP

32



Hypothetical 1: Inez's Story

Inez enrolled in an 8-week certificate course through Blackwell University Nursing (BUN). At the end of the 8-weeks, students take the state examination to become a basic nursing assistant. The program has two components: 80 hours in a simulation lab, and 40 hours in a clinical setting where students perform tasks on residents in a nursing home. The 40-hour clinical program requires extensive physical maneuvering and lifting up to 80 pounds.

BUN's program handbook required pregnant students to notify their instructors as soon as they become aware of their pregnancies and provide written consent from their medical professional to continue participating in the program. BUN does not require students with other medical conditions to provide written medical consent.

During week 3 of the course, Inez learns she is pregnant.

HUSCH BLACKWELL

33

Problematic Policies

- Students were required to disclose pregnancy, even if not subject to medical restrictions.
- Pregnant students were required to provide medical documentation regarding their ability to participate in the program.
- Pregnant students were required to provide a medical release with no restrictions.
- Clinical placement sites were permitted to "take measures" to avoid potential hazards to the pregnant student and/or unborn fetus even if no medical restrictions.

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

34

Hypothetical 2: Amy's Story

Amy is enrolled in an accelerated program at Husch College of Nursing. Two months into the eight-month program, she notifies the nursing director that she is pregnant and is due in February. The nursing director reminds Amy that the college has a zero-absence policy and if she misses more than two consecutive days of class or clinical, she will be dismissed from the program. When Amy delivers her baby, she misses two days of class, including one pop quiz, and three days of clinical. She receives a zero for the absences in accordance with the college policy, which is applied consistently to all students regardless of the reason for the absence. Amy files a complaint alleging that she should have been allowed to make up the missed quiz and clinicals.

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

35

Reinstatement from Leave: Considerations

- Length of the leave
- Timing of the leave
- Course objectives
- Content missed
- Alternate ways to demonstrate competencies and skills

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

36

Hypothetical 3: Patricia's Story

Patricia attends HB University as an undergraduate student. One of her classes for the 2021-2022 academic year is a yearlong class, the content of which builds on itself.

During the fall semester, she gave birth the Saturday after the first week of class, and she missed the following 10 weeks of all her classes of the 12-week semester. She returned to class a week before finals week.

HB University told Patricia that she would receive an incomplete for the first semester of the course and thus would not be able to proceed to the second semester of the course for this academic year.

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

37

Reinstatement from Leave: Considerations

- Length of the leave
- Timing of the leave
- Course objectives
- Content missed
- Alternate ways to demonstrate competencies and skills

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

38



Hypothetical 4: Betty's Story

Betty, a student at Husch College, learned she was pregnant at the beginning of fall semester. She reached out to Professor Swift to explain her situation and to ask if she could re-schedule an in-class presentation that overlapped with a doctor's appointment. Professor Swift told Betty she could submit a written reflection in place of the in-class presentation. However, as the semester went on, Betty missed several more days of class. She did not communicate with Professor Swift to explain the reason for these absences. At the end of the semester, Professor Swift gave Betty a failing grade because her class participation and attendance were below the requirement. Betty felt she was being punished for missing classes due to her parenting obligations and emailed the Title IX coordinator at her university. The Title IX Coordinator did not respond.

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

39



OCR Resolution Agreement

Problems

- Title IX Coordinator failed to provide a timely response to the student's complaint.

Positives

- Student's absences were excused due to pregnancy, childbirth, or recovery notwithstanding lack of any documentation from a physician regarding medical necessity.
- Student was offered an academic adjustment to work from home for a period of time during her pregnancy.
- Student did not notify professor additional absences were due to pregnancy, childbirth, etc.

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

40



Hypothetical 5: James' Story

James enrolled in HB Community College (HBCC) classes in the fall. In October, James' partner gave birth. James missed a week of classes to support his partner while she gave birth and spend time with his newborn child. When James returned to school, Professor Taylor informed him that his absences would not be excused. Professor Taylor only allows students two unexcused absences over the course of the semester, and James had reached four. Professor Taylor told James he should drop the class or he would receive a failing grade. James dropped the class.



HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

41

Policy Considerations

- Rules or policies that relate to parental, family, or marital status must be applied equally to all genders.
- Leave for pregnancy, childbirth, false pregnancy, termination or pregnancy, or recovery therefrom = medically necessary.

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

42

Practical Guidance

—
Implementing What You've Learned

© 2021 Husch Blackwell LLP

43

H-B

Inclusive Language and Policies



- Much of the statutory language surrounding pregnancy is not gendered.
- Students of many genders, including cisgender women, non-binary people, and transgender men, might be pregnant.
- Regardless of a student's gender-identity, they are protected through their status as a pregnant person.

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

44



Faculty and Staff Training

- Many pregnancy discrimination investigations share a common theme: students reach out to faculty and staff members who are not familiar with the rights of pregnant students.
- **Solution: Inform all faculty and staff of the rights of pregnant students under Title IX.**

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

45



Review Institutional Policies

- Another common problem OCR identifies is school Title IX policies which do not specifically address pregnancy.
- Clear, written guidelines will allow faculty and staff to understand their obligations towards pregnant students, as well as provide pregnant students with clear expectations for available support.
- **Solution: Review institutional policies to ensure pregnancy discrimination is explicitly addressed.**

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

46



Common Policy & Practice Problems

- Zero absence attendance policies.
- Targeted medical documentation requirements.
- Requirements to restart programs from the beginning rather than status at the time a leave began.
- Deference to discriminatory clinical site policies.

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

47



Review Institutional Procedures

- A common challenge OCR often finds in pregnancy discrimination cases is a lack of prompt responses to student Title IX grievances.
- Individuals who express concerns about any type of discrimination, including pregnancy discrimination, should receive prompt responses to those concerns.
- **Solution: Evaluate your school's grievance procedures. Does every student receive a response to a report of discrimination? Is that response timely?**

HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

48



Questions?



HUSCH BLACKWELL

© 2021 Husch Blackwell LLP

HUSCH
BLACKWELL

© 2021 Husch Blackwell LLP