



**Saginaw Valley State University  
Accommodations for Pregnant and Nursing  
Students and Employees  
September 18, 2023**



**Presenter Information**



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## Disclaimer #1



### *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.
- We have a variety of stakeholders here, so please keep that in mind.

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## Disclaimer #2



### *We can't help it – we're lawyers*

- We are discussing federal law today. Please check state law (and local ordinances) to determine whether additional restrictions may apply.
- Title IX is a major part of our discussion. We recognize that there are new regulations that have been proposed. Today, we are discussing only current regulations and guidance. For more information on proposed regulations, check out our recorded webinars at <https://www.bricker.com/titleix>.

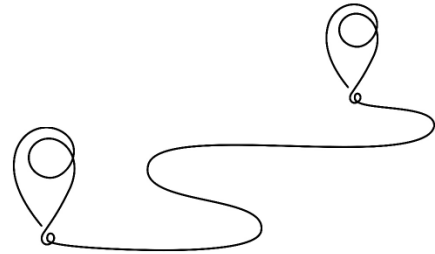
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## Today's Roadmap/Objectives



### Focusing on *Current* impacts to Higher Education

- Identify current Legal Landscape generally
  - Title IX
  - Your Policy
  - Various other laws (including employment laws)
  - Takeaways from Law/Guidance
- Short break (five minutes)
- Learn from colleagues
  - Recent OCR Resolution Agreements
  - Litigation Update
- Q&A



## Audience Poll



Please let me know who is participating today!

- A. Title IX Team
- B. Human Resources
- C. Student Affairs
- D. Faculty
- E. Other Staff

## Legal Landscape



### Many layers!

- Laws & Regulations
  - Title IX, ADA/504, PWFA, PUMP, FLSA, FMLA, PDA
  - Guidance/Guidelines
- Your Institution's Policy



## Federal Law Today (Mostly)



- Today's presentation covers mostly federal law, which provides the minimum level of protection. Michigan has an additional law, ELCRA, which we will discuss later.
- Students and employees are treated differently under current federal law
- As of this presentation (September 18, 2023), new Title IX regulations are said to be finalized in October 2023 (they probably won't be).
  - The proposed regulations would provide even more protections than what Title IX currently offers. Stay tuned on this topic.
  - In the meantime, the U.S. Department of Education appears to be stepping up enforcement of the current protections.

## A Quick Note on Terminology



- Not all pregnant individuals identify as women, and not all lactating individuals are mothers.
- In *Bostock v. Clayton County* (2020), the U.S. Supreme Court held that Title VII includes transgender status in its prohibition against employment discrimination because of sex.
- Consider using non-gendered terminology, such as “parent” instead of “mother” or “father,” to be more inclusive, when discussing these topics.

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## Title IX (1 of 2)



- 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.”

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## Title IX (2 of 2)



- 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)*

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## Other Relevant Laws



- Disability discrimination laws
  - Section 504 of the Rehabilitation Act
  - Americans with Disabilities Act
- Employee Protections
  - Pregnancy Discrimination Act
  - Family Medical Leave Act
  - Fair Labor Standards Act
  - **NEW:** Pregnant Workers Fairness Act
  - **NEW:** Providing Urgent Maternal Protections (“PUMP”) for Nursing Mothers ACT

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## General Principles



- Non-Discrimination
  - Are you requiring someone to do something different because they are pregnant or because they are a parent?
  - If you had a non-pregnant person or non-parent ask for the same accommodation or leave in any other circumstance, would you grant it to them?
- Remember: Parents and pregnant people generally maintain autonomy to choose how to navigate their education/employment.
  - Informed consent is key.

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## Title IX

- *Current regulations and guidance*

## 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.

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## 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.

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## Students - Health Certifications?



- 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.

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## 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.**

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## 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 disabilities” generally aren’t protected by Section 504/ADA.

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## Temporary Disabilities (ADA/504)



- These laws protect individuals with a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.
- According to the EEOC, “a minor, nonchronic condition of short duration, such as a sprain, infection, or broken limb, generally would not be covered.”
- Where do pregnancy-related conditions fit, if they resolve after having the baby?

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## 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.**

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## 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. . .**

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## Non-Discrimination on the Basis of Sex in Admissions **Bricker Graydon**

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- 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)

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## Title IX/Employees **Bricker Graydon**

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- 34 C.F.R § 106.57:
- Don't use potential marital, parental, or family status of an employee or applicant as a reason for employment decisions
- Don't use whether an employee is the breadwinner as a reason for employment decisions
- Can't discriminate or exclude from employment on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom

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## Title IX/Employees (2 of 2)



- 34 C.F.R § 106.57:
- Temporary disabilities from pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom should be treated the same as the employer treats any other temporary disability
- If no leave with pay is available, these are reasons for leave without pay. The employee must be reinstated to a “comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.”

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## Your Policies

Sexual Misconduct Policy (Interim) 3.6-1, Faculty Contract, Staff Policies

## SVSU - Sexual Misconduct Policy



### What does this policy cover?

- “Consequently, SVSU strictly prohibits sex discrimination”
- Discrimination on the basis of pregnancy is a form of sex discrimination!
- This policy applies to all members of the community (staff, students, faculty, etc.)

Current Students Faculty Staff Alumni Giving Community Parents mySVSU Contact

**SV SU** SAGINAW VALLEY STATE UNIVERSITY  
OFFICE OF TITLE IX & DIVERSITY PROGRAMS

Exit this Site Quickly Getting Help- Reporting Policies- Meet Our Team

SVSU / Title IX / Getting Help / Support for Pregnant Students

**REPORT SEXUAL MISCONDUCT**

**Title IX: Support for Pregnant Students**

SVSU is committed to supporting pregnant students throughout the course of their studies. Information about your pregnancy will be treated confidentially and sensitive to-know basis with consent. Students are granted a leave of absence for as long as it is deemed medically necessary by a doctor. At the conclusion of the leave, the student is allowed to resume status held when the leave began. A memo will be created with you to ensure reasonable accommodations are made and your needs are met during pregnancy, following the birth and when you return to study.

Read: Know Your Rights: Pregnant or Parenting (426KB)

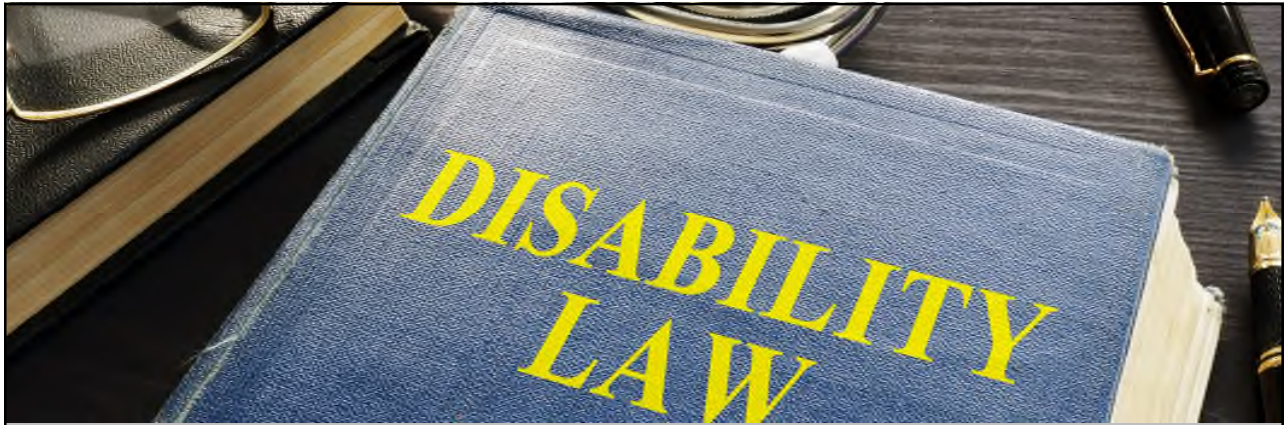
Visit the Office of Accessibility Resources & Accommodations to request reasonable accommodations.

For more information regarding your rights as a pregnant or parenting student, please contact Dr. Mamie T. Thorns, special assistant to the president for diversity and equity coordinator, at 989-964-4068 or mtthorns@svsu.edu.

## SVSU - Faculty and Staff



- FMLA Policy 2.1-2
  - <https://www.svsu.edu/operationsmanual/humanresources/familymedicalleavepolicy21-2/>
- SVSU Faculty Contract (2020-2023)
  - <https://www.svsu.edu/media/hr/currentdocs/SVSU%20Faculty%20Contract%202020-2023.pdf>
- Both policies/contract address leave for the birth of a child and track FMLA, which we are going to discuss later.



## What else applies? Lots more!

- *Current regulations and guidance*

## Title VII – Married Women



- “[A]n employer’s rule which forbids or restricts the employment of married women and which is not applicable to married men is a discrimination based on sex prohibited by [T]itle VII...” 29 C.F.R. § 1604.4(a).
- Rules that apply to married women must also apply to married men.

## Title VII – Pre-employment



- Employers *may* request an applicant’s sex and/or whether they are “Mr. Mrs. Miss” on their application if “the inquiry is made in good faith for a nondiscriminatory purpose.” 29 C.F.R. § 1604.7.
  - What is your nondiscriminatory purpose?

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## Title VII – Pregnancy/Childbirth



- Employers cannot exclude applicants or employees because of pregnancy, childbirth, or related medical conditions
- “Disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions, for all job-related purposes, shall be treated the same as disabilities caused or contributed to by other medical conditions”
  - Consider leave/reinstatement, accrual of seniority, payments under insurance/sick leave, etc.
- See 29 C.F. R. § 1604.10.

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## Pregnancy Discrimination Act



- Already folded into the Title VII regulations, above
- Remember:
  - Employers must permit a pregnant employee to do the job for as long as the employee is capable
  - If you are providing temporary assistance to non-pregnant employees, plan on doing the same for pregnant employees
  - If a pregnant employee goes on leave, they are entitled to the return and accrual rights of other employees that go on leave

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## Back to ADA/504



- Applies to employees, students, and visitors
- Protect individuals with disabilities
- Qualified individuals with disabilities receive protection from discrimination
- Reasonable accommodations may be requested
  - Institution must engage in an interactive process to determine what accommodations are reasonable
  - Medical documentation to support accommodations may be requested
- Must be able to perform essential functions either with/without reasonable accommodations

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## Unreasonable accommodations?



- Employers do not have to provide reasonable accommodations that would cause an “undue hardship” to the employer
  - Requires an individualized assessment that the specific request would cause significant difficulty or expense
  - Consider the overall financial resources of the facility

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## NEW: Pregnant Workers Fairness Act



- Effective 6/27/23
- Applies to employers with 15 or more employees
- Requires employers to provide reasonable accommodations to employees and applicants for conditions related to pregnancy; prohibits retaliation
- The accommodations process is designed to mirror that under the ADA, except that the accommodations are likely to be temporary.
- EEOC fact sheet cites the following as potential reasonable accommodations: ability to sit or drink water; receive closer parking; have flexible hours; receive appropriately sized uniforms and safety apparel; receive additional break time to use the bathroom, eat, and rest; take leave or time off to recover from childbirth; be excused from strenuous activities and/or activities that would involve exposure to compounds not safe for pregnancy

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## Family Medical Leave Act



- This could be a whole hour webinar in itself
- To be eligible, employees must:
  - work for a covered employer,
  - have worked for the employer for at least 12 months and 1,250 in those 12 months, and
  - must work at a location where the employer has 50 employees within 75 miles
- See 29 U.S.C. § 825.100

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## FMLA Leave



- 12 workweeks in a 12-month period for
  - Birth/adoption
  - To care for a spouse, child, or parent with a serious health condition
  - For a serious health condition that makes the employee unable to perform the essential functions of his or her job
- (More leave is available in certain military-related situations not relevant to us today.)

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## Serious Health Conditions



- Illness, injury, impairment, or physical or mental condition that involves inpatient care or continuing treatment by a health care provider.
- This includes “any period of incapacity due to pregnancy, or for prenatal care”
- Very specific regulations in this area. See 29 C.F.R. Part 825 *et seq.*

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## Fair Labor Standards Act/PUMP ACT



- Employers must provide reasonable breaks for employees to express breast milk for a nursing child for one year after the child’s birth, each time the employee must express milk
- Employers must provide a private space other than a bathroom – shielded from view, and free from intrusions
- Breaks do not have to be paid (unless employees are provided paid breaks generally)
- Breaks must be provided “as frequently as needed” for the purpose
- This applies to both exempt and non-exempt employees

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## Michigan Specific - ELCRA



- Elliot Larsen Civil Rights Act
  - Prohibits Discrimination on the Basis of Sex, including pregnancy, childbirth, or a medical condition related to pregnancy and childbirth.
- In 2023, Gov. Whitmer signed SB 147, which amended ELCRA to prohibit employers from engaging in discrimination against employees based on a decision to terminate pregnancy. This amendment will go into effect in approximately March 2024.

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## Takeaways from Law/Guidance

- *What does all of that actually mean?*

## General Principles:



- Treat pregnant people the same way you treat non-pregnant people who have similar needs.
- Let pregnant people decide if/when they can no longer work.
- When it comes to risks to pregnant people, informed consent is key. You are not their parent.

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## Best Practices:



- Does the person have a disability? If so, provide reasonable accommodations as determined through the interactive process.
- Is the person a pregnant employee? If so, provide reasonable accommodations as determined through the interactive process.
- Does the concern qualify as a serious health condition? If so, an employee may be entitled to FMLA leave.
- Does the concern require leave? If FMLA does not apply, look to your institution's policies for employees and students.
- Do we accommodate similar temporary needs for non-pregnant people? If so, do what you have done previously.
- If none of these things apply, does your institution have other policies that may provide some assistance?
- If absolutely nothing else applies, what action would be consistent with your institutional ethic of care?

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## Absences as Modifications/Accommodations (for students)



- 2013 Guidance from OCR:
  - Institutions are required to excuse student absences due to pregnancy or related conditions, for as long as the student's doctor deems the absences to be medically necessary.
  - When the student returns to school, they must be reinstated to the same status held when the leave began, including the opportunity to make up any work missed.
  - As an alternative to making up missed work, the school may offer retaking a semester, taking part in an online course credit recovery program, or allowing the student additional time in a program to continue at the same pace and finish at a later date. The student should be allowed to choose how to make up the work.
  - Schools must ensure that the policies and practices of individual faculty members do not discriminate on the basis of pregnancy.
- Fresno City College OCR case, April 2018 – Student was literally giving birth on the days the final exam was offered. Professor said she could retake the class or take an incomplete and make up the exam, but ultimately did not allow her to retake the exam. OCR noted that the College needed to provide the student the opportunity to make up the exam.

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## Madeline – Student



- 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 the clinical?

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## Chandler - Student

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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?

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## Monica – Student

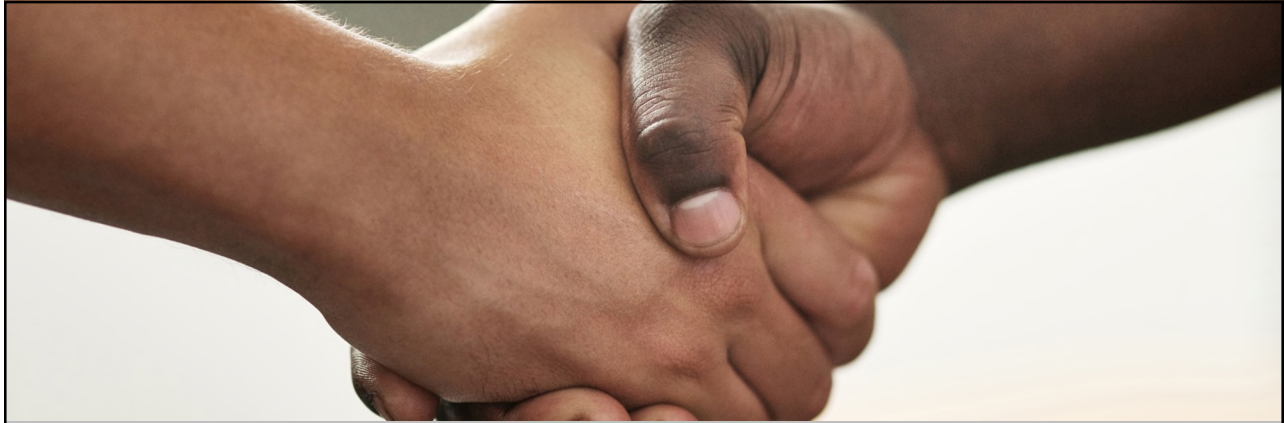
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- Monica is 8 months pregnant
- Monica is struggling to walk long distances, but the commuter lot is across campus from Monica's academic building
- What might the institution do to support Monica?

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## OCR Findings and Resolution Agreements

- *Learn from Colleagues*

### California Career College (February 2023)



- 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.

## Rivertown School of Beauty (September 2019)

- 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.

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## Troy University – January 2023 (1 of 2)

- OCR's Concerns:
  - 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.

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## Troy University – January 2023 (2 of 2)



- 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."

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## Salt Lake Community College June 2022 (1 of 3)



- 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.

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## Salt Lake Community College June 2022 (2 of 3)



- 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.

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## Salt Lake Community College June 2022 (3 of 3)



- 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.
  - 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.

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## Litigation Updates

### Quick Reminder



- The information considered by the Court will depend on how far along the case is at the time of the decision.
  - Motion to Dismiss
  - Motion for Summary Judgment
  - Jury Verdict
  - Appeal
- Also, some of these cases are from Jurisdictions outside of Michigan and have state law-elements (which do not apply to Michigan). Cases outside of Michigan *may* not be binding on Michigan, though they are in the 6<sup>th</sup> Circuit (same as Michigan) and could be persuasive

## Taylor v. Univ. of Kentucky - 2023 WL 4289711 (E.D.Ky.) June 28, 2023



- **The Facts:**
  - Plaintiff Christine Dolin Taylor was a post-doctoral fellow.
  - Concerned with COVID, and its possible effects on her pregnancy, she sought an accommodation to avoid coming to campus and her laboratory.
  - The University said it could not accommodate her request for full-time remote status so Plaintiff's fellowship was extended three months to ensure Plaintiff's completion of the fellowship.
- **The Complaint:** Plaintiff alleged the University violated Title IX and the Kentucky Civil Rights Act.
- **The Outcome:**
  - On a motion for summary judgment
  - Some of her Title IX claims fail because they were brought outside the one-year statute of limitations and others because the University offered her a reasonable accommodation (which she rejected). Additionally, the Court said she did not suffer an adverse action, and there was no causal connection between her pregnancy and the alleged adverse action of forced leave.
  - Finally, the Court said Plaintiff was never an employee of the University and her employment-related discrimination claims fail for the same substantive reasons. (Plaintiff's offer letter designated her a student)

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## Carter v. Union College - 2023 WL 4605032 (E.D.Ky.) (Slip Copy) July 18, 2023



- **The Facts:**
  - Plaintiff was employed as a Wellness Coordinator at Union College
  - Plaintiff Requested pregnancy-related accommodations during COVID in 2020
- **The Complaint:**
  - Plaintiff alleged (1) sex and pregnancy discrimination in violation of the Kentucky Civil Rights Act (the "KCRA"); (2) retaliation in violation of the KCRA; and (3) interference and retaliation in violation of the Family and Medical Leave Act ("FMLA"). (No Title IX Claims alleged)
- **The Outcome:** Defendant Union College's motion for summary judgment was granted in its entirety.

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## 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, despite being told two weeks before that she was “doing great.”
- **The Complaint:** Varlesi alleged 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

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## Final Thoughts



- The law sets the floor, not the ceiling.
- How you treat your students and employees figures not just into legal compliance, but also:
  - Retention
  - Recruiting
  - Public Relations
  - Donations
- What is both compliant and consistent with your institution’s ethic of care?

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**Thank You**

**Bricker**   
**Graydon**