

## insights

TYPES NOT MAPPED YET October 25, 2022 | TTR not mapped yet | Aaron D. Lacey, Stephanie C. Fredman, Scott Z. Goldschmidt

# Title IX update: Important new ED guidance concerning pregnancy

On October 4, 2022, the U.S. Department of Education (the “Department”) released new guidance for students and schools on Title IX’s prohibition of discrimination based on pregnancy and pregnancy-related conditions (the “Guidance”). As outlined in a [memorandum](#) from the White House’s Gender Policy Council Director, this Guidance was released in response to the Supreme Court’s recent decision in *Dobbs v. Jackson Women’s Health Organization* and the effect the *Dobbs* decision may have on students and college campuses.

Title IX’s regulations address pregnancy discrimination for students at [34 CFR §106.40\(b\)](#) and for employees at [34 CFR §106.57](#). The Guidance highlights the following main points for schools, students, and employees based on those regulations:

### 1. Discrimination and Exclusion

- Title IX’s prohibitions on discrimination extend to pregnancy, pregnancy-related conditions, and termination of pregnancy. A school must not discriminate or exclude **students** or **employees** based on pregnancy or pregnancy-related conditions, including: “pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom.” 34 C.F.R. § 106.40(b)(1); 34 C.F.R. § 106.57(b).

### 2. Medical and Other Benefits and Services

- Pregnancy and pregnancy-related conditions, including the termination of pregnancy, must be treated the same as any other temporary disability with respect to any benefit or policy for **students**. *See* 34 C.F.R. § 106.40(b)(4).
- Pregnancy and pregnancy-related conditions, including the termination of pregnancy, must be treated the same as any other temporary disability for all job-related purposes, including benefits and policies for **employees**. *See* 34 C.F.R. § 106.57(c).

### 3. Leave Policy

- In the absence of a school having a leave policy or if a student does not qualify for a leave policy, a school **must** provide leave to a **student** for pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery for as long as deemed necessary by a student’s doctor. Following leave, a student must be reinstated to the status the student had when their leave began. *See* 34 C.F.R. § 106.40(b)(5).
- For **employees**, a similar leave policy applies. In the absence of a leave policy, or if an employee does not qualify for leave under a school policy, pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery, is justification for a leave of absence from work **without pay** for a reasonable period of time. Notably, a reasonable period of time is not defined in the guidance. Employees may also be eligible for leave under a temporary disability policy. *See* 34 C.F.R. § 106.57(c).

The Department’s website provides additional resources on Title IX and its protections for pregnant students, including the Office for Civil Rights’ pamphlet: [Supporting the Academic Success of Pregnant and Parenting Students](#).

It is important to note that the above Guidance is based on current Title IX regulations. The Department’s [proposed changes](#) to the Title IX regulations, published on July 12, 2022, contain significant revisions to sections relating to



students and employees who are pregnant or experiencing pregnancy-related conditions. For more information on these proposed changes, please see Thompson Coburn's webinar: [ED's New Title IX Rule: A Careful Review and Suggestions for Public Comment](#).

Institutions should also be mindful that other federal and state laws impose obligations related to pregnancy discrimination. In particular, instructions should be mindful of obligations imposed by Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act, the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973, and state or local human rights laws.

*Postsecondary institutions with questions are welcome to contact [Scott Goldschmidt](#), [Stephanie Cohan](#), or [Aaron Lacey](#).*

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