



A Review of Federal Law and NCAA Rules Impacting Treatment of Pregnant and Parenting Student-Athletes

The NCAA Model Pregnancy and Parenting Policy provides a set of guidelines to enhance the educational experience for college student-athletes who become pregnant or experience pregnancy-related conditions. It identifies the most common issues related to pregnancy and participation in athletics, and the appropriate way to provide effective support that is grounded in an ethic of care for these student-athletes. This section reviews the legal framework and applicable NCAA rules within which the Model Policy was developed.

Title IX and the NCAA Model Pregnancy and Parenting Policy

Title IX,¹ its regulations, and the policies of the Office for Civil Rights (“OCR”) provide the primary legal support for the Model Policy. The United States Constitution, state constitutions and state laws may provide additional protections for pregnant or parenting student-athletes.² Most athletics departments are familiar with the 1975 Title IX Regulations interpreting Title IX’s broad prohibition against sex discrimination in education to include athletics.³ The Title IX Regulations establish a framework for compliance in three areas: participation, scholarships, and treatment or benefits.⁴ They also prohibit institutions from discrimination based on parental status and pregnancy.⁵ While there is very little case law interpreting the latter provisions of the Title IX Regulations,⁶ on June 25, 2007, the Office for Civil Rights of the U.S. Department of Education (“OCR”) sent out a “Dear Colleague Letter” that affirms the application of the pregnancy-related portions of the Regulations to athletics departments, and summarizes a school’s obligations to pregnant student-athletes.⁷ (“OCR Letter”).

The sections of the 1975 Title IX Regulations relating to pregnancy are short and the relevant provisions are reproduced here:

Section 106.40 - Marital or parental status

- (a) Status generally. 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.
- (b) Pregnancy and related conditions.
 - (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.
 - (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 in the normal education program or activity so long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.
 - (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.

- (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.

Federal Protection Against Pregnancy Discrimination

The Title IX Regulations set forth a general ban on pregnancy discrimination, stating that schools must treat pregnancy and all related conditions in the same way as they treat any other temporary disability.⁸ In other words, pregnant student-athletes are to be treated the same as student-athletes with a knee injury or mononucleosis. In addition, the Regulations provide special protection for pregnant students by requiring an institution to provide them with necessary medical leave, and to reinstate them to the same status as they held when the leave began, even if the school does not have a leave policy or if the students do not qualify under its policy.⁹

The OCR Letter mirrors the Regulations, and discusses the regulatory requirement to treat pregnancy in the same way as other temporary medical conditions in the athletics context.¹⁰ It stresses that financial assistance to student-athletes cannot be terminated or reduced on the basis of pregnancy, and that institutions cannot require female student-athletes to sign athletic contracts listing pregnancy as an infraction.¹¹

Although student-athletes are not employees¹² and there is a separation between collegiate sports and professional sports, Title IX's protections for pregnancy are similar to those barring pregnancy

discrimination in the workplace.¹³ As a general matter, employees have an expectation that they will not be forced to stop working arbitrarily, they will not lose their jobs due to pregnancy, and they will be able to return to work when it is medically safe to do so.¹⁴ Students should have the same expectations regarding their educational pursuits, including athletics.

Taken together, the Title IX Regulations and OCR Letter protect a student-athlete who decides to carry her pregnancy to term, to parent a child, or to terminate her pregnancy. A university may not assume that pregnancy makes it unsafe for a student-athlete to continue to play. The pregnant student-athlete can both continue to participate in the athletics program as long as it is medically safe, and she can return to the team once it is medically safe to do so, as determined by the student-athlete and her healthcare provider. The law allows time for her rehabilitation and for her medical care in some circumstances. The Title IX Regulations also apply to a male student-athlete, protecting him from adverse treatment on the basis of his “actual or potential parental, family or marital status”.¹⁵

The Title IX Regulations and these guidelines should be considered a floor and not a ceiling, meaning that institutions can provide additional support to help pregnant and parenting student-athletes and their partners cope with their needs.

1. A Pregnant Student-Athlete’s Physician Should Make Medical Decisions Regarding Sports Participation.

The Model Policy supports decision-making by the student-athlete in conjunction with her professional healthcare provider. Medical decisions regarding the need for and the nature of

limitations on sports participation should rest with the student-athlete and her medical professionals. Where the opinions or recommendations of these professionals differ from those of team physicians or trainers, coaches should defer to the student-athlete’s health care providers who are obstetricians or other experts in pregnancy and related conditions. These providers have expertise in evaluating activity that will be safe for the student-athlete, and are less likely to be influenced by out-dated stereotypes about pregnancy.¹⁶

An institution cannot automatically exclude a pregnant student-athlete from sports participation, but it can require certification from her physician, if such certification is required from student-athletes with other medical conditions.¹⁷ Medically necessary absences from team activities due to pregnancy should be considered excused absences.¹⁸

2. A Student-Athlete with a Pregnancy-Related Condition Must Be Provided with the Same Types of Modifications Provided to Other Student-athletes to Allow Continued Team Participation.

The Model Policy and its guidelines contemplate continued participation during pregnancy. Sports participation typically is not an all-or-nothing endeavor. Workouts are commonly modified to accommodate athletic injuries. Swimmers with hurt shoulders can still kick through workouts; wrestlers avoid maneuvers that could inflame a teammate’s knee injury; baseball and softball players with foot injuries continue workouts in batting cages; student-athletes returning after an illness gradually return to full workouts; and student-athletes with running injuries are commonly sent to the pool for their workouts. Pregnancy-related conditions may also require modifications to workouts and team activities, particularly in the later stages of pregnancy. The types of

modifications to athletic activities made for ill or injured student-athletes must also be made for student-athletes with pregnancy-related conditions.¹⁹

3. Pregnant Student-Athlete Cannot Be Harassed Due to Pregnancy.

The actions and attitudes of athletics department personnel are critically important to a student-athlete's continued educational progress and to the school's compliance with the law. Medical clearance and a reduced workout schedule become irrelevant if a coach is hostile toward pregnancy; belittles, shuns or shames the student-athlete because she is pregnant; or allows others to do the same. Such conduct is also unlawful. Because pregnancy discrimination is sex discrimination, comments or behaviors creating a hostile environment on the basis of pregnancy are prohibited under Title IX.²⁰ In addition, athletics department personnel must act quickly to thwart harassment by peers or other third parties.²¹

4. A Student-Athlete Whose Athletic Career is Interrupted Due to a Pregnancy-Related Condition Will Typically Be Entitled to a Waiver to Extend Her Athletic Career.

NCAA bylaws offer student-athletes extensions that may apply during a student's athletic career, typically referred to as a "red-shirted" year. Under these rules, student-athletes may be granted an additional year of competition due to "hardship."²² These rules allow student-athletes to complete four seasons of competition during five consecutive calendar years after initial full time collegiate enrollment for Division I or four seasons of participation during the first 10 semesters or 15 quarters in which the student is enrolled in a collegiate institution in at least a minimum full-time program of studies for Divisions II and III.²³ In addition, NCAA bylaws specifically permit member

institutions to approve an extra one-year extension of the five-year period or 10- semester/15- quarter period of eligibility for a female student-athlete due to her pregnancy.²⁴ The bylaw allows pregnant student-athletes to complete four years of competition within six years or 12 semesters/18 quarters. A pregnant student-athlete who competed during, but did not complete the season, may be granted a hardship waiver and be awarded an additional season of competition, provided there is contemporaneous medical documentation that indicates the student-athlete was unable to compete for the remainder of the season.²⁵

Consistent with Federal laws, these NCAA bylaws prohibit institutions from failing to extend a student-athlete's eligibility due to pregnancy, childbirth, false pregnancy, and termination of pregnancy or recovery therefrom when that institution provides for extensions for student-athletes with temporary disabilities.²⁶ If, on the other hand, an institution does not take advantage of the NCAA's permissive rules permitting waivers to any of its student-athletes, it would not be required to grant a waiver to a student-athlete whose athletic career was interrupted due to a pregnancy-related condition.

5. Legal Prohibitions Against Discrimination Apply to Recruiting.

An institution's recruiting policies or practices may not discriminate against female student-athletes who are pregnant or parenting.²⁷ If coaches want to ask potential recruits about their pregnant or parenting status, they must ask the same questions of males and females. If an institution recruits student-athletes who are fathers or are about to become fathers,²⁸ they must utilize the same recruiting standards for their female recruits.²⁹ Therefore, a heavily recruited high school female student-athlete who becomes pregnant prior to signing her letter of intent must receive the same

treatment from the institution that a male student-athlete whose partner is expecting a child or who has fathered a child would receive.

6. Athletics Financial Aid Awards Cannot be Conditioned on not Becoming Pregnant.

Athletics awards cannot include a clause that would make pregnancy an infraction of the terms of the award.³⁰ In addition, any non-athletically related conditions included in the award must be gender-neutral.³¹ For example, if pre-marital sex is to be prohibited, the prohibition must apply to both male and female student-athletes equally.³² To enforce any such provisions, institutions must utilize methods other than pregnancy to detect whether pre-marital sex has occurred. Otherwise, because only women become pregnant, only women-athletes would suffer penalties from these conditions on their athletics awards. Institutions wishing to enforce rules against premarital sex must be willing and able to investigate charges of premarital sex in a gender-neutral fashion.

7. A Pregnant Student-Athlete's Athletics Financial Aid Award is Absolutely Protected during the Term of the Award.

Once an athletics award has been made (typically for one-year) it cannot be withdrawn due to pregnancy, suspected pregnancy, parenthood or termination of pregnancy. As long as a student-athlete remains in good standing academically and does not withdraw voluntarily, a pregnant student-athlete's scholarship is protected from being reduced or withdrawn in a number of ways.

First, NCAA bylaws offer student-athletes a number of protections. In general, athletics departments cannot reduce or cancel an athletics award once the letter of agreement has been signed nor during the term of the award without serious misconduct, withdrawal from the

university, academic ineligibility, or fraudulent misrepresentation of information on an application, letter of intent or financial aid agreement.³³ For example, financial aid cannot be terminated or reduced because a student-athlete arrives at school in poor physical condition,³⁴ is not as skilled as the department expected, performs poorly in athletics contests, or fails to contribute to the team's success.³⁵ In addition, NCAA bylaws protect a student-athlete's scholarship when he or she becomes ill, including an extended illness like mononucleosis, or is injured, including injuries sustained outside of athletics such as in a car accident.³⁶ These NCAA bylaws are consistent with those for other merit based scholarships awarded by a university, and are part of an ongoing commitment to fully integrate athletics into the educational institution as a whole.

Consistent with non-discrimination principles, a pregnant student-athlete is entitled to keep her scholarship under the same NCAA bylaws that allow an injured or ill student-athlete to keep receiving his or her award.³⁷ A pregnant student-athlete's scholarship is thereby protected in the same way as that of a student-athlete who does not compete because of an injury, illness, or other reason such as poor performance.³⁸

Another section of the Title IX Regulations also protects athletics awards.³⁹ Section 106.37 of the Regulations prohibits an institution from applying any eligibility rule on financial assistance differently based on sex or parenting status. If an institution provides financial assistance for student-athletes with temporary disabilities, it must provide equivalent financial assistance to student-athletes with pregnancy related conditions. Finally, the pregnant student-athlete's athletics award is protected under the absolute approach set forth in the OCR Letter, "...terminating or reducing financial assistance on the basis of pregnancy or a related condition is prohibited under Title IX."⁴⁰

8. A Pregnant Student-Athlete's Athletics Award Renewal May Be Protected.

In many situations, the renewal of a student-athlete's athletics award will also be protected. Although NCAA bylaws prohibit athletics awards beyond a one-year time period,⁴¹ many institutions regularly renew athletics awards for injured and ill student-athletes, particularly when the student-athletes are working with their medical team and trainers to rehabilitate themselves. Even in cases of career-ending injuries, many institutions continue to renew the student-athlete's athletics award and find other ways to keep him or her engaged with the athletics department. Since the Title IX Regulations require institutions to treat student-athletes with pregnancy related conditions the same way they treat other ill or injured student-athletes,⁴² those institutions must renew the award of a pregnant student-athlete who likewise remains engaged with the athletics department.

The protection for renewal of an athletics award is not as strong as the protection during the term of the award. Athletics departments cannot fail to renew because of pregnancy or poor physical fitness due to pregnancy,⁴³ but they may do so for other reasons. For example, if the student-athlete were to cease communicating with the athletics department, if she does not comply with the rehabilitation plan outlined by her physician, or if she chooses to become disengaged with the program, and her pregnancy or complications from her pregnancy were not the reasons for her actions, the institution would not be required to renew her athletics award.

If a student-athlete's award is to be non-renewed, the athletics department must notify the student-athlete in writing with the reason for the non-renewal on or before July 1st prior to the academic year in which the non-renewal is to be effective.⁴⁴ The student-athlete then has the right to appeal the non-renewal to a non-athletic board on campus,

a. Case Study #1: Student-Athlete, Alice Aleesa, University of Alaskippi.

Alice Aleesa became pregnant in December 2007, the middle of the basketball season. Ms. Aleesa's physician, UA's Health Center physicians, medical staff and athletic trainers worked closely with Ms. Aleesa during her pregnancy and monitored her sports participation. She continued to participate until her physician and the UA team determined it was medically unwise to do so. She continued to attend team functions. UA kept Ms. Aleesa on scholarship for the remainder of the academic year, where she finished in good academic standing. On July 12, 2008 Ms. Aleesa gave birth to a healthy child, but with severe complications. She was released from the hospital days after the delivery. Ms. Aleesa was scheduled to report back to campus on August 4, 2007 for student-athlete orientation. However, due to the complications from her pregnancy and childbirth, Ms. Aleesa was unable to attend practices, and was not physically fit. Her physician had not cleared her for sports participation, she still could not perform a single sit-up, and she was 30 pounds above her normal competition weight. Because these conditions are the result of pregnancy, as long as she remains engaged with the athletics department, Ms. Aleesa's athletics award renewal would be protected.

b. Case Study #2: Student-Athlete, Bessie Begnini at the University of Bestenville.

Bessie Begnini confirmed she was pregnant in August, 2007, at the beginning of field hockey season. Ms. Begnini's physician, BU's Health Center physicians, medical staff and athletic trainers worked closely with Ms. Begnini during her pregnancy and monitored her sports participation. She continued to participate until her physician and the BU team determined it was medically unwise to continue. BU kept Ms. Begnini on scholarship for the remainder of the academic year, where she finished in good academic standing. On April 1, 2008 Ms. Begnini gave birth to a healthy child after a normal delivery. On May 15, 2008, Ms. Begnini's physician determined she was physically and mentally able to return to sports participation. The BU rehabilitation team created a plan for her to lose weight and return to the field hockey team. However, Ms. Begnini did not attend those scheduled sessions or communicate with the athletics department. Her actions were not due to her pregnancy or complications from her pregnancy. On July 1, 2008 the athletics department notified Ms. Begnini in writing that her scholarship would not be renewed for the next academic year due to her failure to comply with the BU rehabilitation team. Ms. Begnini's award renewal would not be protected.

9. A Student-Athlete Who Has Taken Leave for Pregnancy Related Conditions Must Be Reinstated.

The Title IX regulations require athletics departments to reinstate the formerly pregnant student-athlete "to the status which she held when the leave began."⁴⁵ This would include her returning to be a full-fledged member of the team, including receiving an athletics award, if that was her status when the leave began. As a member of the team, she will have to compete like the others for a specific position and playing time. While she cannot be penalized for having taken pregnancy

leave, she need not necessarily be reinstated to the specific position she formerly held, such as being a starter.

10. Medical Care for the Pregnant Student-Athlete May Be Covered.

Pregnant student-athletes may have concerns about available medical care, both during pregnancy and after delivery.

a. Medical Care During Pregnancy

Since the Title IX Regulations require institutions to treat pregnancy as they treat other temporary illnesses or injuries, medical benefits and insurance must be equally available to pregnant student-athletes and student-athletes with other temporary disabilities.⁴⁶ If an institution covers medical expenses related to pregnancy for all students, pregnant student-athletes are eligible for those student benefits, regardless of the applicable NCAA bylaws.

All divisions allow institutions to provide student-athletes with counseling expenses and certain medical care that will enable the individual to participate in intercollegiate athletics, regardless of how the injury occurred.⁴⁷ Institutions often provide a heightened level of medical care for their student-athletes. NCAA bylaws allow Division I institutions to provide generous medical benefits to their student-athletes.⁴⁸ Division II bylaws do not permit athletics departments to pay for certain surgical expenses unless the injury or illness is a result of practice or competition.⁴⁹ But other hospital and medical expenses relate to pregnancy are permissively covered.⁵⁰

Regardless of the medical care an institution is permitted to provide by NCAA bylaws, any institution may choose to limit its medical care in other ways. However, a rule or practice that discriminates against pregnancy is prohibited.

b. Medical Care for the Baby.

After birth (typically after two weeks), the baby will need its own coverage for medical care. Institutions can help student-athletes find such coverage. In some institutions, student health insurance provides coverage for the infant for a limited period of time.

c. Medical Care for an Abortion.

Title IX does not require schools to pay for an abortion. However, it does not prohibit institutions from covering these services.⁵¹

Medical procedures or services necessary to save the life of a pregnant woman, including abortion, or to address complications related to an abortion, are not exempt from Title IX and are treated like other types of medical care.⁵² If, for example, an institution pays for medical care for complications resulting from other types of elective surgeries, the institution would need to provide medical care for complications resulting from an abortion.⁵³

11. Termination of Pregnancy is a Choice Protected by the 1975 Title IX Regulations.

Institutions may not impose a penalty on a student, withhold a benefit or retaliate against her, because she is seeking, has received, or is recovering from a legal abortion.⁵⁴

12. “Misconduct” Involving Pre-Marital Sex Cannot be used as a Justification for Limiting Pregnant Student-Athlete’s Participation.

Pregnancy discrimination cannot be carried out under the guise of enforcing rules against premarital sex. Under NCAA bylaws, an institution may cancel or reduce the financial aid of a student-athlete who is found to have engaged in misconduct by the university's regular student disciplinary authority.⁵⁵ The majority of institutions do not have prohibitions against pre-marital sex that are applicable to the entire student body and are enforced by the university's regular student disciplinary authority. In addition, specific team rules or conditions on athletics awards regarding pre-marital sex must be gender-neutral.⁵⁶ Coaches of women's teams cannot impose terms of the award that would discriminate against women.

Universities controlled by religious organizations may have an institution-wide policy proscribing pre-marital sex. If the institution's regular disciplining authority determined that serious misconduct occurred, the student-athlete could only be disciplined if the institution's policy is applied in a gender-neutral fashion, and if pregnancy is not the only method of determining whether pre-marital sex occurred.⁵⁷ In other words, men who engage in pre-marital sex and father children must be disciplined in the same way as pregnant women, and there must be other methods to determine whether there was pre-marital sex besides pregnancy. Otherwise, only women would be sanctioned for this behavior.⁵⁸

13. The 1975 Title IX Regulations Relating to Pregnancy May Apply to Religious Schools.

Schools that are controlled by a religious organization are exempted from the 1975 Title IX Regulations only to the extent that they conflict with the religious tenets of the organization,⁵⁹ and only after the institution provides advanced written notice to the OCR.⁶⁰

A. Abortion.

If an institution controlled by a religious organization objects to abortion, and the school has provided written notice to the OCR about its objection in advance of the decision to punish a particular student, the religious school would be able to terminate a student-athlete's athletics award and her participation on the team on this basis without violating the Regulations.

B. Carrying a Pregnancy to Term.

Few religious tenets object to pregnancy per se or carrying a pregnancy to term.⁶¹ For example, if the pregnancy occurred within a marriage or was the result of a rape, the pregnancy would probably not violate a religious tenant. Therefore, the rest of the Model Policy would be in effect. An institution controlled by a religious organization could not harass the student-athlete for being pregnant, preclude her from participating in sports, or withdraw her financial award, among other adverse treatment.⁶²

14. A Pregnant Student-Athlete Cannot Be Retaliated Against For Reporting or Complaining About Pregnancy Discrimination.

When student-athletes report pregnancy discrimination, institutions should take affirmative steps to prevent any retaliation. Likewise, members of the institutional community that advocate the rights of pregnant student-athletes are also protected from retaliation. For example, a coach or certified athletic trainer who advocates on behalf of a pregnant student-athlete's right to participate cannot be subject to an adverse employment action because of their advocacy. All those in the

institutional community who complain about discrimination are protected under Title IX, even if the conduct about which they complain is not actually unlawful.⁶³

Summary and Conclusion

Student-athletes with pregnancy-related conditions, and the choices they make as a result of their pregnancy, are legally protected in a number of ways. The student-athlete has a right to carry her pregnancy to term, the right to terminate her pregnancy and the right to parent. She has the right to continue participating in athletics for as long as is medically safe without harassment or animus. Her athletics award is protected, and its renewal may also be protected. She may have counseling and medical care provided, and she has the right to be free of retaliation if she complains about pregnancy discrimination. In addition to meeting the legal obligations outlined in this policy, a school should develop its policies around an ethic of care. Policies should enable pregnant student-athletes to make informed decisions based on the long-term consequences of those decisions, and aid them in continuing their education, including their athletic careers.

Additional Resources

Dear Colleague Letter from Stephanie Monroe, Office of the Assistant Secretary, Office for Civil Rights, Department of Education, June 25, 2007. Available at: <http://www.ed.gov/about/offices/list/ocr/letters/colleague-20070625.html>.

Deborah L. Brake, The Invisible Pregnant Athlete and the Promise of Title IX, 31 HARV. J. L. & GENDER 323 (Summer 2008). Available at: <http://www.law.harvard.edu/students/orgs/jlg/vol312/323-366.pdf>

Women's Sports Foundation, Issues Related to Pregnancy & Athletic Participation: The Foundation Position. Available at: <http://www.womenssportsfoundation.org/cgi-bin/iowa/issues/disc/article.html?record=1145>

"How to Keep Pregnant and Parenting Students in School," When Girls Drop Out, We all Fail. National Women's Law Center, October 2007. Available at: <http://www.nwlc.org/pdf/Final%20Pregnancy%20Fact%20Sheet.pdf>

Footnotes:

1. Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 – 1688.
2. See, e.g., David S. Cohen, Title IX: Beyond Equal Protection, 28 HARV. J. L. & GENDER 217 (2005).
3. 34 C.F.R. §106.41. For a more thorough discussion of the of the history behind the 1975 Regulations, see NANCY HOGSHEAD-MAKAR & ANDREW ZIMBALIST, EQUAL PLAY; TITLE IX AND SOCIAL CHANGE, 49-53 (Temple University Press 2007), and Deborah Brake & Elizabeth Catlin, The Path of Most Resistance: The Long Road Toward Gender Equity in Intercollegiate Athletics, 3 DUKE J. GENDER L. & POL'Y 51 (1996).
4. 34 C.F.R. §106.41.
5. 34 C.F.R. §106.40, Marital or Parental Status; §106.37, Financial assistance; § 106.21, Admission and Recruiting; § 106.57, Employment
6. Ben Gose, Sacred Heart U. Settles Pregnancy Suit, CHRONICLE OF HIGHER EDUC., November 7, 2003, at A43. There are no published decisions applying the Title IX regulations to pregnant student-athletes.
7. Dear Colleague Letter from Stephanie Monroe, Office of the Assistant Secretary, Office for Civil Rights, Department of Education, June 25, 2007. Available at: <http://www.ed.gov/about/offices/list/ocr/letters/colleague-20070625.html>.

8. 34 C.F.R. §106.40(b)(4). Throughout this memo, the term "pregnancy" encompasses "pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, as set forth in the regulations.
9. 34 C.F.R. §106.40(b)(5); see also, Deborah L. Brake, The Invisible Pregnant Athlete and the Promise of Title IX, 31 HARV. J. L. & GENDER 323 (Summer 2008). Available at: <http://www.law.harvard.edu/students/orgs/jlg/vol312/323-366.pdf>
10. "In fact, the Title IX regulation instructs recipients to treat pregnancy or childbirth in the same manner and under the same policies as any temporary physical disability." OCR Letter (citing 34 C.F.R. 106.40(b)(4)).
11. Id. ("I want to reiterate that terminating or reducing financial assistance on the basis of pregnancy or a related condition is prohibited under Title IX.").
12. Employees in federally funded educational institutions, including coaches and administrators, are also protected by the 1975 Regulations. See 34 C.F.R. § 106.57, which provides:

Marital or parental status.

(a) General. A recipient shall not apply any policy or take any employment action:

(1) Concerning the potential marital, parental, or family status of an employee or applicant for employment which treats persons differently on the basis of sex; or

(2) Which is based upon whether an employee or applicant for employment is the head of household or principal wage earner in such employee's or applicant's family unit.

(b) Pregnancy. A recipient shall not discriminate against or exclude from employment any employee or applicant for employment on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom.

- (c) Pregnancy as a temporary disability. A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom and any temporary disability resulting therefrom as any other temporary disability for all job related purposes, including commencement, duration and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.
- (d) Pregnancy leave. In the case of a recipient which does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to 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 without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to the status which she held when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.
13. The Pregnancy Discrimination Act of 1978, (“PDA”) (P.L. 95-555, 92 Stat. 2076) amended Title VII of the Civil Rights Act of 1964, which bars employment discrimination, to make it clear that discrimination on the basis of sex includes discrimination on the basis of pregnancy. The PDA was passed to reverse the Supreme Court’s decision in *General Electric Company v. Gilbert*, 429 U.S. 125 (1976), which had reached the opposite conclusion. Title IX actually created stronger protections for students than Title VII does for employees because of its absolute guarantee of a medical leave and reinstatement right to the same status. 34 C.F.R. §106.40(b)(5).
 14. *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974) (school district policies that forced pregnant teachers to leave work early in their pregnancies, regardless of whether or not they were able to work, and permitted them to return only three months after childbirth, were unconstitutional.) [The Title IX regulations are actually stronger than the PDA because of their absolute guarantee of a medical leave and right to reinstatement to the same status. 34 C.F.R. §106.40(b)(5).
 15. 34 C.F.R. §104.40(a). In other words, male and females cannot be discriminated because they are parents. However, the regulations may not protect either sex from adverse treatment due to extended leave or absences for child care needs. *Butler v. NCAA*, 2006 U.S. Dist. LEXIS 61632 (D. Kan. Aug. 15, 2006) (Male student-athlete’s claim of sex discrimination under Title IX rejected because NCAA regulations were based on the physical difference of pregnancy, and not gender stereotypes about parenting.)

16. *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974) (often-inaccurate assumptions regarding pregnant women’s limitations in employment were sufficiently arbitrary to fail constitutional scrutiny).
17. 34 C.F.R. §106.40(b) (1-2).
18. 34 C.F.R. §106.40(b)(5).
19. 34 C.F.R. §106.40(b)(5).
20. *Gebser v. Lago Vista*, 524 U.S. 274, 292-93 (1998) (educational institutions may be liable for damages for employee-student harassment if the institution has actual notice of the harassment and responds with deliberate indifference.); see also *Tara Brady v. Sacred Heart settlement* (requiring the University to take no action motivated by hostility, animus, or disapproval toward Brady’s pregnancy).
21. *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999) (educational institutions may be liable for damages for student-to-student sexual harassment if the institution has actual notice of the harassment and responds with deliberate indifference, and if the harassment is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect.) See also, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, issued by the Department of Education, Office for Civil Rights, January 2001. Available at: <http://www.ed.gov/about/offices/list/ocr/docs/shguide.pdf>
22. Division I – 14.2.4 Hardship Waiver; Division II and III – 14.2.5

Division I – 30.6.1 Waiver Criteria.

A waiver of the five-year period of eligibility is designed to provide a student-athlete with the opportunity to participate in four seasons of intercollegiate competition within a five-year period. This waiver may be granted, based on objective evidence, for reasons that are beyond the control of the student-athlete or the institution, which deprive the student-athlete of the opportunity to participate for more than one season in his/her sport within the five-year period.

While the waiver criteria for all three NCAA Divisions include the language “for reasons that are beyond the control of the student-athletes or the institution”, denial of a waiver for reasons of pregnancy would likely run afoul of the law because of the unequal effect between men and women. Only pregnant women would be denied waivers for engaging in sexual relations, not men. See e.g., Deborah Brake & Verna Williams, *The Heart of the Game: Putting Race and Educational Equity at the Center of Title IX*, 7 VIRGINIA SPORTS & ENT. L. J. 199 (Spring 2008).

23. Division I, II and III – 14.2 and 14.2.1.

24. Division I – 14.2.1.3 Pregnancy Exception.

A member institution may approve a one-year extension of the five-year period of eligibility for a female student-athlete for reasons of pregnancy.

Division II and Division III – 14.2.2.2 Pregnancy Exception.

A member institution may approve a two-semester or three-quarter extension of this 10-semester/15-quarter period of eligibility for a female student-athlete for reasons of pregnancy.

25. Division I – 30.6.1 Waiver Criteria.

Division II and Division III – 30.6.1 Waiver Criteria.

26. 34 C.F.R. §106.40(b)(4).

27. Subpart C—Discrimination on the Basis of Sex in Admission and Recruitment Prohibited. 34 C.F.R. § 106.21 Admission.

(c) Prohibitions relating to marital or parental status. In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this subpart applies:

(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, or establish or follow any rule or practice which so discriminates or excludes;

(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...

28. Michael Sokolove, *Football is a Sucker's Game*, N.Y. TIMES MAG., Dec. 22, 2002, (“Of the 105 players on U.S.F.'s football team—most of them between eighteen and twenty-three years old—about thirty are fathers and many have produced multiple children. ‘I would say there's a total of sixty children from this team, and that's a conservative estimate,’ said [Phyllis LeBaw, associate athletic director for academic support]. “It's amazing how quickly it occurs, usually in the first year. Or they come to school already fathers.”)

29. 34 C.F.R. § 106.21.

30. OCR Letter.

31. Division I – 15.3.4.2.2 Nonathletically Related Conditions.

An institutional financial aid agreement may include nonathletically related conditions (e.g., compliance with academics policies or standards, compliance with athletics department rules or policies) by which the aid may be reduced or canceled during the period of the award.

32. See the materials on Misconduct, Section 12.

33. Division I – 15.3.4.2 and Division II – 15.3.4.1.

Institutional financial aid based in any degree on athletics ability may be reduced or canceled during the period of the award if the recipient:

(a) Renders himself or herself ineligible for intercollegiate competition;

(b) Fraudulently misrepresents any information on an application, letter of intent or financial aid agreement (see Bylaw 15.3.4.1.1);

- (c) Engages in serious misconduct warranting substantial disciplinary penalty (see Bylaw 15.3.4.1.2); or
- (d) Voluntarily withdraws from a sport at any time for personal reasons; however, the recipient's financial aid may not be awarded to another student-athlete in the academic term in which the aid was reduced or canceled. A student-athlete's request for written permission to contact another four-year collegiate institution regarding a possible transfer does not constitute a voluntary withdrawal.
34. Division I and II – 15.3.2.2 Physical Condition of Student-Athlete.
- Financial aid awarded to a prospective student-athlete may not be conditioned on the recipient reporting in satisfactory physical condition. If a student-athlete has been accepted for admission and awarded financial aid, the institution shall be committed for the term of the original award, even if the student-athlete's physical condition prevents him or her from participating in intercollegiate athletics.
35. Division I and II – 15.3.4.3.2 Decrease Not Permitted.
- An institution may not decrease a prospective student-athlete's or a student-athlete's financial aid from the time the prospective student-athlete or student-athlete signs the financial aid award letter until the conclusion of the period set forth in the financial aid agreement, except under the conditions set forth in Bylaw 15.3.4.1.
36. Division I and II – 15.3.4.3 Reduction or Cancellation Not Permitted.
- Institutional financial aid based in any degree on athletics ability may not be increased, decreased or canceled during the period of its award: (a) On the basis of a student-athlete's athletics ability, performance or contribution to a team's success;
37. Division I and II – 15.3.2.2
38. 34 C.F.R. §106.40(b)(4)
39. 34 C.F.R. § 106.37 – Financial assistance.
- (a) General. [] in providing financial assistance to any of its students, a recipient shall not:

- (1) On the basis of sex, provide different amount or types of such assistance, limit eligibility for such assistance which is of any particular type or source, apply different criteria, or otherwise discriminate;
- (3) apply any rule or assist in application of any rule concerning eligibility for such assistance which treats persons of one sex differently from persons of the other sex with regard to marital or parental status.

40. OCR Letter.

Division I – 15.3.3.1 One-Year Period.

If a student's athletics ability is considered in any degree in awarding financial aid, such aid shall neither be awarded for a period in excess of one academic year nor for a period less than one academic year.

Division II – 15.3.3.1 One-Year Limit.

Where a student's athletics ability is taken into consideration in any degree in awarding financial aid, such aid shall not be awarded in excess of one academic year.

42. 34 C.F.R. §106.40(b)(4).

43. 34 C.F.R. §106.40(b)(5).

44. Division I – 15.3.2.4 Hearing Opportunity.

The institution's regular financial aid authority shall notify the student-athlete in writing of the opportunity for a hearing when institutional financial aid based in any degree on athletics ability is to be reduced or canceled during the period of the award, or is reduced or not renewed for the following academic year. Any reduction or cancellation of aid during the period of the award may occur only after the student-athlete has had an opportunity for a hearing. The institution shall have established reasonable procedures for promptly hearing such a request and shall not delegate the responsibility for conducting the hearing to the university's athletics department or its faculty athletics committee. The written notification of the opportunity for a hearing shall include a copy of the institution's established policies and procedures for conducting the required hearing, including the deadline by which a student-athlete must request such a hearing.

Division II – 15.3.2.4 Hearing Opportunity.

The institution's regular financial aid authority shall notify the student-athlete in writing of the opportunity for a hearing when institutional financial aid based in any degree on athletics ability is reduced or canceled during the period of the award, or not renewed. The notification of the hearing opportunity shall include a copy of the institution's established policies and procedures for conducting the required hearing, including the deadline by which a student-athlete must request the hearing. The institution shall conduct the hearing within 30 consecutive calendar days of receiving a student-athlete's request for the hearing and shall not delegate the responsibility for conducting the hearing to the university's athletics department or its faculty athletics committee.

45. 34 C.F.R. §106.40(b)(5).
46. 34 C.F.R. 106.40(b)(4).
47. Division I – 16.4.1 Permissible (Medical Expenses).

Identified medical expense benefits incidental to a student-athlete's participation in intercollegiate athletics that may be financed by the institution are: (g) Medical examinations at any time; (h) Expenses for medical treatment (including transportation and other related costs). Such expenses may include the cost of traveling to the location of medical treatment or the provision of actual and necessary living expenses for the student-athlete to be treated at a site on or off the campus during the summer months while the student-athlete is not actually attending classes. Medical documentation shall be available to support the necessity of the treatment at the location in question; and (i) Medical expenses (including surgical expenses, medication, rehabilitation and physical therapy expenses and dental expenses).

Division II – 16.4.1 Permissible (Medical Expenses).

Identified medical expense benefits incidental to a student-athlete's participation in intercollegiate athletics that may be financed by the institution are: (c) Counseling expenses of any type, including, but not limited to, those related to drug rehabilitation and the treatment of eating disorders; (f) Medical examinations at any time for enrolled student-athletes; (i) Medication and physical therapy used by a student-athlete during the academic year to enable the individual to participate in intercollegiate athletics, regardless of whether the injury or illness is the result of intercollegiate competition or practice; (j) Medication and physical therapy used by a student-athlete (even if the

student-athlete is not a full-time student) during the academic year to enable the individual to participate in intercollegiate athletics, only if the student-athlete resides on campus (or in the local community of the institution) and appropriate medical documentation is available to establish that the student-athlete is unable to attend the institution as a full-time student as a result of the student-athlete's injury or illness;

Division III – 16.4 Medical Expenses

An institution may finance medical-expense benefits incidental to a student-athlete's participation in intercollegiate athletics. However, it is not permissible for an institution to finance nutritional supplements (e.g., weight-gain, muscle/strength-building, weight-loss supplements) as medical expense benefits incidental to a student-athlete's participation in intercollegiate athletics.

48. Division I – 16.4.1 Permissible (Medical Expenses). Supra, footnote 47.
49. Division II – 16.4.2 Nonpermissible (Medical Expenses).

Student-athlete medical expense benefits that may not be financed by the institution are:

- (a) Student health insurance, if the insurance is provided or offered to the general student body only on an optional basis, except that if such insurance is required for a particular group of students (e.g., foreign students), such expenses may be paid for student-athletes who are members of such a group. Only such required fees may be paid as a part of an institutional grant-in-aid for student-athletes;
- (b) Surgical expenses to treat a student-athlete's illness or injury that was not a result of practice for or participation in intercollegiate athletics at the institution and did not occur during voluntary physical activities that will prepare the student-athlete for competition; (c) Medical or hospital expenses incurred as the result of an injury while going to or from class, or while participating in classroom requirements (e.g., physical education), unless similar services are provided by the institution to all students or by the terms and conditions of the institution's overall insurance program...

50. Id.

51. 20 U.S.C. §1688 (“Nothing in this chapter shall be construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion...’.”)
52. 65 Fed. Reg. 52869 (2000); see also, Title IX Legal Manual, U.S. Department of Justice, Civil Rights Division. (2001). Available at: <http://www.usdoj.gov/crt/cor/coord/ixlegal.htm#Introduction>
53. Accord, 29 C.F.R. § 1604.10(b), Employment policies relating to pregnancy and childbirth.
54. 20 U.S.C. § 1688 (“...Nothing in this section shall be construed to permit a penalty to be imposed on any person or individual because such person or individual is seeking or has received any benefit or service related to a legal abortion.’”).
55. Division I and Division II – 15.3.4.1.2 Misconduct.

An institution may cancel or reduce the financial aid of a student-athlete who is found to have engaged in misconduct by the university's regular student disciplinary authority, even if the loss-of-aid requirement does not apply to the student body in general.

In other words, Title IX permits discipline against students, as long as both sexes are punished equally. While the ultimate outcomes of cases involving adverse treatment based on premarital sex have differed, the courts all agree that Title IX prohibits a school from excluding a pregnant student unless it imposes a similar exclusion on male students who have engaged in premarital sex. A contrary ruling would discriminate against females because only they become pregnant as the result of the prohibited conduct. *Cazares v. Barber*, 959 F.2d 753 (9th Cir. 1992); *Pfeiffer v. Marion Central Area School District*, 917 F.2d 779 (3d Cir. 1990) *Wort v. Vierling*, 778 F.2d 1233 (7th Cir. 1985); *Chipman v. Grant County School District*, 30 F.Supp. 2d 975 (D. Ky. 1998). Institutions wishing to enforce rules against premarital sex must be willing to investigate charges of premarital sex in a gender-neutral fashion.

57. *Id.*
58. *Id.*
59. Title IX of the Education Amendments of 1972, 20 U.S.C. 1681(a)(3);

34 C.F.R. § 106.12 Educational institutions controlled by religious organizations. (a) Application.

This part does not apply to an educational institution which is controlled by a religious organization to the extent application of this part would not be consistent with the religious tenets of such organization.

60. 34 C.F.R. § 106.12 (b) Exemption.

An educational institution which wishes to claim the exemption set forth in paragraph (a) of this section, shall do so by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization. This exemption is limited to those entities that can be identified as “religious.” A religious affiliation does not necessarily mean that the institution is entitled to this exemption.

61. If the objection relates to pre-marital sex, see Section 12 on Misconduct.
62. Beyond these legal requirements, the NCAA Model Pregnancy and Parenting Policy makes clear that negative treatment by the athletics department may have the unintended consequence of encouraging abortion.
63. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005). (Roderick Jackson, a male coach, was fired after he complained that the girls’ basketball team received inferior treatment. The Supreme Court held that retaliation is prohibited under Title IX and that an indirect victim of sex discrimination could bring a Title IX case against a school that retaliates against him because he complained of sex discrimination.)