Intersection of ADA/504 and Title IX
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Title IX Statute

“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.”

Why Title IX?

• Failure to admit women to undergraduate programs

• Higher/different admissions criteria for women

• Caps on admission of women

• Failure of certain academic programs to admit married women

• Some school sponsored activities (e.g., honor societies and athletics) for males only
Why Title IX (cont’d.)?

• Less financial aid to women

• Counseling or discouraging women from traditionally male vocations

• Lower salaries for female employment applicants at educational institutions; fewer women promoted to upper-level administration

• Few women allowed to coach or hold high school or college athletic positions
Title IX applies to...

- Admissions
- Recruitment
- Financial aid
- Academic programs
- Student treatment/services
- Counseling and guidance
- Discipline
- Classroom assignment
- Grading
- Vocational education
- Recreation
- Physical education
- Housing
- Employment
- Athletics
Brandy hits a bump in the road...

• In her junior year, Brandy discovers she is pregnant and due in May
• She is experiencing nausea and fatigue
• In March, she is put on bed rest
• She asks to take one course via Skype, withdraw from two other courses, and finish another through independent study
• ADA/504 implications?
• Title IX implications?
Pregnancy as a Disability

• Pregnancy generally not a disability under Section 504/ADA
  • Temporary
  • Not considered as substantially limiting a major life activity

• But, as to temporary impairments generally:
  • “Impairments that last only for a short period of time are typically not covered” as protected disabilities
  • But they may be if “substantially severe”
  • Summers v. Altarium Institute, Corp., 740 F.3d 325 (4th Cir. 2014)

• Some pregnant workers/students may have impairments related to their pregnancies that qualify as disabilities under ADA
  • Impairment's cause not relevant in determining whether impairment is disability
  • Moreover, likely that a number of pregnancy-related impairments that impose work (or education) related restrictions will be substantially limiting, even though are only temporary. http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm
Pregnancy under Title IX

• “A recipient shall not discriminate against any student, or exclude and student from its education program or activity, including any class or extra-curricular activity, on the basis of such student’s pregnancy, childbirth, ... termination of pregnancy or recovery therefrom...”
  • Accommodation requirement?

• “A recipient shall treat pregnancy, childbirth, ... 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...with respect to students admitted to the recipient’s educational program or activity.”
  • Health coverage
  • Accommodation requirement?
Pregnancy under Title IX

• “In the case of a recipient which does not maintain a leave policy for its students..., a recipient shall treat pregnancy, childbirth, ... 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.”
  • Accommodation requirement?
Pregnancy under Title IX

  • “Although this pamphlet focuses on secondary schools, the underlying legal principles apply to all recipients of federal financial assistance, including postsecondary institutions.”
Accommodations

From OCR’s guidance:

• Examples
  • Provide a larger desk
  • Allow frequent trips to the bathroom
  • Permit temporary access to elevators

• Excused Absences:
  • For doctor’s appointments, morning sickness, etc.
  • Limits?

• Leave
  • “A school must excuse a student’s absences because of pregnancy or childbirth for as long as the student’s doctor deems the absences medically necessary. When a student returns to school, she must be allowed to return to the same academic and extracurricular status as before her medical leave began.” June 2013 DCL
Accommodations

• From recent listserv posting:
  • "Our private institution has been asked to provide a pregnant student with an accommodation while she is on leave. She has asked that a note-taker be assigned to take notes in her absence while she is on leave. Note takers are generally assigned to assist the student in class (only). We are familiar with the OCR 2013 guidance but it does not cover this particular issue. I assume that the student is responsible to work out missed class notes with her fellow students and/or professor. Have any of my colleagues addressed this issue?"
Accommodations

• From recent listserv posting:
  • “I think I know the answer to this one, but would like confirmation if I am
correct in denying a student's request for extended time on a lab exam due to
‘As a new mother, my brain and hand-eye coordination are simply not up to
the same standard I am used to.’"
Accommodations

• Adapted from recent listserv posting:
  • “We have an online nursing programs. Students are required to come to campus for two "immersion" weekends each semester, to attend classes and take exams. Several pregnant students are due near an immersion weekend and cannot travel. When this happened in the past, we would record the class and take the close-out exam at a later date. Our Nursing department has now rearranged the curricula and states that participation in these weekends is a fundamental part of the program and they will no longer allow students to miss or make them up. They state the collaboration with other students in the class is too vital to learning how to be a nurse at the graduate/doctoral level."
Health and Safety

• From DCL pamphlet:
  • May a school require a pregnant student to obtain a doctor’s permission before allowing her to attend school late in her pregnancy if the school is worried about the student’s health or safety?
  • Labs? Internships? Practicums? Clinical settings?
  • Athletics?
Parental Leave

• Brandy asks to take the fall semester off so that she can care for baby Brody.
  • “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.”
Lactation and Breastfeeding

Pregnancy-related medical condition, so:

1. Less favorable treatment of lactating employee may raise an inference of unlawful discrimination (e.g., demoting an employee because breastfeeding schedule interfered with work)

2. To continue producing adequate milk supply and to avoid painful complications associated with delays in expressing milk, nursing mother will typically need to breastfeed/express breast milk using pump 2-3 times over 8 hour workday.
   1. Employee must have the same freedom to address such lactation-related needs as other employees would have to address other similarly limiting medical conditions.
   2. E.g., if employer allows employees to change schedules or use sick leave for routine doctor appointments and to address non-incapacitating medical conditions, then must allow female employees to change schedules or use sick leave for lactation-related needs under similar circumstances.

3. Female employees (but not students) who are breastfeeding also have rights under other laws, including the Patient Protection and Affordable Care Act that requires employers to provide reasonable break time and private place for hourly employees who are breastfeeding to express milk
Sexual Harassment

• Remember Brandy?
• What if her pregnancy was a result of a sexual assault:
  • By another student?
  • By a faculty member?
  • By a visiting athlete?
Sexual harassment

• Unwelcome conduct of a sexual nature that denies or limits a student’s ability to participate in or receive benefits, services, or opportunities from the program

• Applies to
  • employee-on-student
  • student-on-student (peer)
  • Student-on-employee
  • third party
Sexual Harassment/Discrimination/Pregnancy

• Court of Appeals upholds $850,000 award to former student. The student was participating in social work internship when her supervisor ordered her to wear loose-fitting clothing and to stop rubbing her pregnant belly because her male clients were “turned on by her pregnancy.” The student received a failing grade for the internship and could not meet graduation requirements.

• Varlesi v. Wayne State University, 6th Circuit, 2016

http://www.leagle.com/decision/In%20FCO%2020160307088/VARLESI%20v.%20WAYNE%20STATE%20UNIVERSITY
Sexual Harassment/Disability

• Can result in/cause/exacerbate disabilities
  • PTSD
  • Anxiety Disorder
  • Other

• Indeed, individuals with disabilities are sexually assaulted at higher rates than general population – perhaps even targeted because of their disabilities

• Might need help from CAPS, Women’s Center, and DSS.
  • Work with them as you would with other students with disabilities, but with an added sensitivity due to the circumstances
Disability Accommodations for Sexual Assault?

Shank v. Carleton College, 16-CV-1154 (D. Minn. 1/9/17)

• Student alleged sexual assault by 2 other students & developed PTSD as a result.

• She alleged that college breached duty to accommodate her disability by
  • Refusing to suspend or expel the two students (whose continued presence on campus exacerbated her PTSD)
  • Refusing to remove notations from transcript that she had dropped several classes
  • Failing to offer her other accommodations like attending class remotely or allowing her to only take classes in locations where other students were unlikely to appear.

• College moved to dismiss claim because plaintiff never requested the accommodations
  • While characterizing claim as “slender,” court allows it to proceed based on student’s claim that she did request them (although apparently not through college’s disability accommodations procedure)
Sexual Harassment/Disability

• Complainant has preexisting emotional/psychiatric problems
  • Consider in evaluating impact on complainant in determining existence of hostile environment? In determining services and supports needed?

• Both parties have preexisting emotional/psychiatric problems
  • Complications for investigation?
Sexual Harassment/Disability

• Disability as a defense
  • Focus on the conduct, not the disability

• University of Michigan, OCR Complaint No. 15-99-2142
  • Student with bipolar pretended to have cancer to get women to sleep with him
  • Claimed misconduct was caused by his disability, but school suspended him
  • OCR found no discrimination:
    • “a college or university may discipline a student with a disability, who has
      violated the student code of conduct, the same as another student
      without a...disability. ... [A] university is permitted to discipline a student
      for misconduct, even if that conduct stemmed from the student’s
      disability, if the conduct violates an essential conduct code.”
Disability: Transgender/Gender Dysphoria

  • Transgender individual sued former employer under Title I based on *gender dysphoria* as a disability
  • Many courts (and OCR/EEOC?) consider discrimination based on gender identity/trans status as sex discrimination prohibited by Title VII and Title IX
  • Here, though, plaintiff alleged that condition substantially limited her MLAs of interacting with others, reproducing, and social and occupational functioning; and that she was harassed; denied her request to use a female nametag, uniform and the female restroom as accommodations; and eventually fired.
  • Even though ADA specifically excludes *gender identity disorders* as disabilities, court allows the claim to go forward.