



## 2024 Joint Guidance on Federal Title IX Regulations

### Analysis on Section 106.40(b): Parental, family, or marital status; Pregnancy or related conditions, Pregnancy or related conditions

July 5, 2024

*Note:* This document focuses on a summary analysis of Section 106.40(b), specifically Parental, family, or marital status; Pregnancy or related conditions, Pregnancy or related conditions.<sup>1</sup> For a full overview of the changes from the 2020 Regulations and the 2024 Final Regulations, see *Title IX Text for Text 2020 and 2024 Regulation Final Comparison*, available at <https://system.suny.edu/sci/titleix/>.

#### **§ 106.40(b): Pregnancy or related conditions [students]**

Recipients are prohibited from discriminating against any student on the basis of the student's current, potential, or past pregnancy or related conditions.<sup>2</sup> When permitting a student to engage in a separate portion of its education program or activity, on a voluntary basis, the recipient is not engaging in unlawful discrimination, so long as the separate program is comparable to the portion of its program offered to students who are not pregnant and do not have related conditions.<sup>3</sup>

#### **Referral to Title IX Coordinator**

When any employee of the recipient learns about a student's pregnancy or related condition from either the student or a person with the legal right to act on behalf of the student, the employee must provide that individual with the contact information for the Title IX Coordinator and inform that person that the Title IX Coordinator can coordinate specific actions to ensure equal access to the Recipient's education program or activity.<sup>4</sup>

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<sup>1</sup> The effective date of these Regulations will be August 1, 2024 and will apply prospectively. The Department has stated it will provide technical assistance during the transition period and after the effective date.

<sup>2</sup> 34 C.F.R. § 106.40(b)(1).

<sup>3</sup> 34 C.F.R. § 106.40(b)(1) and (b)(3)(iii).

<sup>4</sup> 34 C.F.R. § 106.40(b)(2).

In the Preamble, the Department considered comments suggesting that website and syllabus notifications or referrals by student-facing employees were sufficient to meet the objectives of 106.40(b)(2).<sup>5</sup> In responding to these comments, the Department stated such an approach would be insufficient, and that referrals by *all* employees is necessary to ensure that students are provided the necessary information to ensure they have equal access to the recipient’s education program and activities and balances the interests of the students, provides students agency to determine when and how to disclose their pregnancy or related condition, and has minimal administrative burden.<sup>6</sup> Of concerns regarding records and privacy, the Department noted that records maintained by the institution are subject to § 106.44(j), which prohibits the disclosure of personally identifiable information obtained in compliance with the regulations.<sup>7</sup>

### **Actions to Prevent Discrimination and Ensure Equal Access**

A recipient must “promptly and effectively” prevent sex discrimination by taking specific actions such as providing information about obligations, providing reasonable modifications, making a separate but comparable program available on a voluntary basis, providing the opportunity for voluntary leaves of absence, providing access to lactation spaces, and limiting the requests for supporting documentation.<sup>8</sup>

### **Reasonable Modifications**

To ensure equal access and prevent discrimination, the recipient *must* make reasonable modifications to its policies, practices, or procedures.<sup>9</sup> Such reasonable modification must be “based on the student’s individualized needs” and should be determined in consultation with the student.<sup>10</sup> A modification is *not* reasonable if it “fundamentally alters” the nature of the program or activity.<sup>11</sup>

Students have discretion to accept or decline the reasonable modification, but, once a student accepts the modification, the modification *must be* implemented.<sup>12</sup>

As examples of possible reasonable modifications, the Department provided that modifications may include breaks during class to express breastmilk, breastfeed or to attend health related needs; breaks to eat, drink, or use the restroom, intermittent absences, access to online education, changes in schedule or sequencing of classes, etc.<sup>13</sup>

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<sup>5</sup> Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33474, 33767 (Apr. 29, 2024) (to be codified at 34 C.F.R. Pt. 106) (hereinafter “2024 Title IX Final Rule”).

<sup>6</sup> 2024 Title IX Final Rule, 89 Fed. Reg., at 33767, 33771.

<sup>7</sup> 2024 Title IX Final Rule, 89 Fed. Reg., at 33768.

<sup>8</sup> 34 C.F.R. § 106.40(b)(3)(i)-(vi).

<sup>9</sup> 34 C.F.R. § 106.40(b)(3)(ii)(A).

<sup>10</sup> 34 C.F.R. § 106.40(b)(3)(ii)(A).

<sup>11</sup> 34 C.F.R. § 106.40(b)(3)(ii)(A).

<sup>12</sup> 34 C.F.R. § 106.40(b)(3)(ii)(B).

<sup>13</sup> 34 C.F.R. § 106.40(b)(3)(ii)(C).

In the Preamble, the Department drew parallels between modifications under § 106.40(b)(3)(ii) and accommodations under the ADA. Specifically, the Department stated that, like under the ADA, recipients need not permit modifications that would “completely waive the requirements that demonstrate mastery of a particular field of study,” “that demonstrate academic competency, such as clinical components or examinations,” or that “reduc[e] or modif[y] a student’s duties in a required clinical course.”<sup>14</sup>

Importantly, if a recipient determines that a requested reasonable modification would “fundamentally alter” the education program or activity, a recipient is *not* relieved of its obligations. Rather, the recipient must still consult with the student to determine whether other reasonable modifications are available.<sup>15</sup>

As to the role of the Title IX Coordinator, the Preamble makes clear that the Title IX Coordinator has discretion to delegate its duties under this section to other offices, including offices that work with students with disabilities, so long as the Title IX Coordinator retains oversight.<sup>16</sup>

### **Voluntary Leaves of Absence**

The recipient must allow the student to take a voluntary leave of absence. The leave of absence must cover the time deemed medically necessary by the student’s licensed health care provider. If the student is qualified for a leave of absence under another policy maintained by a recipient that allows a greater period of time than the medically necessary period the student must be permitted to take a leave of absence under that policy instead, if the student so chooses. When the student returns, the student must be reinstated to the same academic status and, as practicable, the extracurricular status, that the student held before the leave of absence.<sup>17</sup> In the Preamble, the Department recognized that in some circumstances, reinstatement to the same status may not always be practicable, for example if an extracurricular activity ended prior to the return of the student, however, the presumption is that students should be reinstated at the same status they held before the leave began.<sup>18</sup>

### **Lactation Spaces**

The recipient must ensure that the student can access a lactation space. Lactation spaces must be spaces that are clean, other than a bathroom, shielded from view, and free from intrusion.<sup>19</sup> Recipients must ensure that the lactation space is accessible.<sup>20</sup> Recipients have discretion to determine the number of lactation spaces, where the lactation space is, and how it handles the

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<sup>14</sup> 2024 Title IX Final Rule, 89 Fed. Reg., at 33775.

<sup>15</sup> *Id.*, at 33776.

<sup>16</sup> *Id.*, at 33778.

<sup>17</sup> 34 C.F.R. § 106.40(b)(3)(iv).

<sup>18</sup> 2024 Title IX Final Rule, 89 Fed. Reg., at 33784.

<sup>19</sup> 34 C.F.R. § 106.40(b)(3)(v).

<sup>20</sup> 2024 Title IX Final Rule, 89 Fed. Reg., at 33788.

administration of the lactation space, so long as the space is accessible and available to students.<sup>21</sup> Recipients should also review their state laws regarding access to and the necessary requirements of lactation spaces.

### **Limitation on Supporting Documentation**

When implementing reasonable modifications, voluntary separate programs, leaves of absence, or providing access to lactation spaces (34 CFR § 106.40(b)(3)(ii)-(v)) the recipient must not require supporting documentation, *unless* the documentation is “necessary and reasonable” for the recipient to determine the reasonable modification.<sup>22</sup> The Department stated that supporting documentation is not to be requested when the student’s need is obvious (e.g. when the student is pregnant and requests a larger uniform or has previously provided documentation).<sup>23</sup> In the Preamble, the Department cautioned recipients to develop “clearly defined limits” on whether and what medical documentation is required from students so as not to overburden them, should the recipient determine that documentation is “necessary and reasonable” to determine reasonable modifications.<sup>24</sup>

### **Comparable Treatment to Other Temporary Medical Conditions**

To the extent consistent with § 106.40(b)(3), a recipient must treat pregnancy or related medical conditions in the same manner and under the same policies as any other temporary medical condition, with respect to any medical or hospital benefit, service, plan or policy the recipient administers, operates, offers or participates in with respect to students admitted to the recipient’s program or activity.<sup>25</sup> In comparing § 106.40(b)(4) with § 106.40(b)(3), the Department further clarified that § 106.40(b)(3) provides a “floor” under which a recipient cannot fall.<sup>26</sup> Building on this principle, the Department stated that after complying with 106.40(b)(3), the recipient must further apply 106.40(b)(4). Thus, if a recipient provides greater protections under 106.40(b)(4), those same greater protections must be provided to the student.<sup>27</sup>

In response to commenters’ concerns that the regulation might lead to the mistaken conclusion that a pregnancy is a “disability,” in the Preamble the Department clarified that under this section, the Department referred to “medical conditions” as opposed to “disabilities” as a pregnancy, alone, is not a disability.<sup>28</sup>

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<sup>21</sup> 2024 Title IX Final Rule, 89 Fed. Reg., at 33788.

<sup>22</sup> 34 C.F.R. § 106.40(b)(3)(vi).

<sup>23</sup> 34 C.F.R. § 106.40(b)(3)(vi).

<sup>24</sup> 2024 Title IX Final Rule, 89 Fed. Reg., at 33789.

<sup>25</sup> 34 C.F.R. § 106.40(b)(4).

<sup>26</sup> 2024 Title IX Final Rule, 89 Fed. Reg., at 33792.

<sup>27</sup> *Id.* at 33792.

<sup>28</sup> *Id.* at 33791.

## **Certification to Participate**

A recipient must not require a student who is pregnant or experiencing related conditions, to submit a certification that they are physically able to participate in the recipient's class, program, or extracurricular activity unless a certified level of health or ability is necessary for participation, the certification is required of all participants, and is not used as a basis for discrimination.<sup>29</sup>

### **Text of § 106.40(b)**

§ 106.40(b) states:

*(b) Pregnancy or related conditions.*

*(1) Nondiscrimination.* A recipient must not discriminate in its education program or activity against any student based on the student's current, potential, or past pregnancy or related conditions. A recipient does not engage in prohibited discrimination when it allows a student, based on pregnancy or related conditions, to voluntarily participate in a separate portion of its education program or activity provided the recipient ensures that the separate portion is comparable to that offered to students who are not pregnant and do not have related conditions.

*(2) Responsibility to provide Title IX Coordinator contact and other information.* A recipient must ensure that when a student, or a person who has a legal right to act on behalf of the student, informs any employee of the student's pregnancy or related conditions, unless the employee reasonably believes that the Title IX Coordinator has been notified, the employee promptly provides that person with the Title IX Coordinator's contact information and informs that person that the Title IX Coordinator can coordinate specific actions to prevent sex discrimination and ensure the student's equal access to the recipient's education program or activity.

*(3) Specific actions to prevent discrimination and ensure equal access.* A recipient must take specific actions under paragraphs (b)(3)(i) through (vi) of this section to promptly and effectively prevent sex discrimination and ensure equal access to the recipient's education program or activity once the student, or a person who has a legal right to act on behalf of the student, notifies the Title IX Coordinator of the student's pregnancy or related conditions. The Title IX Coordinator must coordinate these actions.

*(i) Responsibility to provide information about recipient obligations.* The recipient must inform the student, and if applicable, the person who notified the Title IX Coordinator of the student's pregnancy or related conditions and has a legal right to act on behalf of the student, of the recipient's obligations under paragraphs (b)(1) through (5) of this section and § 106.44(j) and provide the recipient's notice of nondiscrimination under § 106.8(c)(1).

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<sup>29</sup> 34 C.F.R. § 106.40(b)(5).

(ii) *Reasonable modifications.* (A) The recipient must make reasonable modifications to the recipient's policies, practices, or procedures as necessary to prevent sex discrimination and ensure equal access to the recipient's education program or activity. Each reasonable modification must be based on the student's individualized needs. In determining what modifications are required under this paragraph, the recipient must consult with the student. A modification that a recipient can demonstrate would fundamentally alter the nature of its education program or activity is not a reasonable modification.

(B) The student has discretion to accept or decline each reasonable modification offered by the recipient. If a student accepts a recipient's offered reasonable modification, the recipient must implement it.

(C) Reasonable modifications may include, but are not limited to, breaks during class to express breast milk, breastfeed, or attend to health needs associated with pregnancy or related conditions, including eating, drinking, or using the restroom; intermittent absences to attend medical appointments; access to online or homebound education; changes in schedule or course sequence; extensions of time for coursework and rescheduling of tests and examinations; allowing a student to sit or stand, or carry or keep water nearby; counseling; changes in physical space or supplies (for example, access to a larger desk or a footrest); elevator access; or other changes to policies, practices, or procedures.

(iii) *Voluntary access to separate and comparable portion of program or activity.* The recipient must allow the student to voluntarily access any separate and comparable portion of the recipient's education program or activity under paragraph (b)(1) of this section.

(iv) *Voluntary leaves of absence.* The recipient must allow the student to voluntarily take a leave of absence from the recipient's education program or activity to cover, at minimum, the period of time deemed medically necessary by the student's licensed healthcare provider. To the extent that a student qualifies for leave under a leave policy maintained by a recipient that allows a greater period of time than the medically necessary period, the recipient must permit the student to take voluntary leave under that policy instead if the student so chooses. When the student returns to the recipient's education program or activity, the student must be reinstated to the academic status and, as practicable, to the extracurricular status that the student held when the voluntary leave began.

(v) *Lactation space.* The recipient must ensure that the student can access a lactation space, which must be a space other than a bathroom, that is clean, shielded from view, free from intrusion from others, and may be used by a student for expressing breast milk or breastfeeding as needed.

(vi) *Limitation on supporting documentation.* A recipient must not require supporting documentation under paragraphs (b)(3)(ii) through (v) unless the documentation is necessary and reasonable for the recipient to determine the reasonable modifications to make or whether to take additional specific actions under paragraphs (b)(3)(ii) through (v). Examples of situations when requiring supporting documentation is not necessary and reasonable include, but are not limited to, when the student's need for a specific action under paragraphs (b)(3)(ii) through (v) is obvious, such as when a student who is pregnant needs a bigger uniform; when the student has previously provided the recipient with sufficient supporting documentation; when the reasonable modification because of pregnancy or related conditions at issue is allowing a student to carry or keep water nearby and drink, use a bigger desk, sit or stand, or take breaks to eat, drink, or use the restroom; when the student has lactation needs; or when the specific action under paragraphs (b)(3)(ii) through (v) is available to students for reasons other than pregnancy or related conditions without submitting supporting documentation.

(4) *Comparable treatment to other temporary medical conditions.* To the extent consistent with paragraph (b)(3) of this section, a recipient must treat pregnancy or related conditions in the same manner and under the same policies as any other temporary medical conditions with respect to any medical or hospital benefit, service, plan, or policy the recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's education program or activity.

(5) *Certification to participate.* A recipient must not require a student who is pregnant or has related conditions to provide certification from a healthcare provider or any other person that the student is physically able to participate in the recipient's class, program, or extracurricular activity unless:

- (i) The certified level of physical ability or health is necessary for participation in the class, program, or extracurricular activity;
- (ii) The recipient requires such certification of all students participating in the class, program, or extracurricular activity; and
- (iii) The information obtained is not used as a basis for discrimination prohibited by this part.

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