

A New Lawsuit by a Female Athlete Tests Title IX's Protection Against Pregnancy Discrimination

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While a student at Connecticut's Sacred Heart University, Tara Brady was notable for two things: her basketball promise and her pregnancy. As a sophomore on a full athletic scholarship, Brady became pregnant, and made known her intention to complete the pregnancy and raise the child (now a 14-month old boy).

According to a lawsuit Brady filed last month in federal court, the reaction of her coach, Edward Swanson, and the University to the news of her pregnancy was to discriminate against her. Brady claims that their discriminatory actions violated Title IX of the Education Amendments of 1972. (Title IX is a federal statute that prohibits schools that receive federal financial assistance from discriminating on the basis of sex.)

If Brady's allegations are proven true, her Title IX claims against the University - based both on its own actions, and her coach's - are promising. Brady has also sued her coach individually for emotional distress. (According to most courts, Title IX does not permit individuals to be held directly liable under Title IX.)

Brady's Allegations: Discrimination Once Her Pregnancy Was Public

According to Brady's complaint, she revealed her pregnancy at the end of her sophomore year, while working in a summer basketball camp, a job that was guaranteed under the terms of her scholarship. At first, she says, her coach took the news well. But

after consulting with university officials, he told her she would be a "distraction" and should leave Sacred Heart.

Brady alleges that she requested "medical redshirt" status--an NCAA term for granting an athlete an additional year of eligibility to make up for time spent not playing because of injury or disability--but that her coach never registered her for it. Her scholarship was also revoked.

The next fall, Brady says she noticed that she was listed as a "medical redshirt" - despite the fact that, to her knowledge, she had never been registered for that status - and she contacted the University again to request that her scholarship be reinstated. It was, and so was her status as a team member. However, she alleges, her coach still refused to speak to her, forcing her to communicate with him through an intermediary.

Eventually, Brady withdrew from Sacred Heart and enrolled at West Chester University, where she now plays basketball.

Title IX and Pregnancy Discrimination: Relevant Statutes and Regulations

Title IX is best known for its revolutionary, if sometimes controversial impact on women's athletic participation. But Title IX is broader: It prohibits any form of discrimination "on the basis of sex" by an institution covered by the statute. Thus far, it has been applied in four main areas--athletics, single-sex education, sexual harassment, and pregnancy. In each area, there is a unique set of implementing rules and principles.

In the area of pregnancy, parental status, and marital status, regulations promulgated by the Office for Civil Rights in the Department of Education and court interpretations have applied Title IX's broad ban on sex discrimination. They, along with interpretations of Title IX generally, impose three basic requirements on schools with regard to pregnant students.

The First Requirement: Do Not Treat a Student Worse Because of Her Pregnancy

First, a school receiving federal financial assistance may not discriminate against or exclude a student from any educational program or activity, including an extracurricular activity, on the basis of pregnancy or childbirth - regardless of whether or not that particular program receives any federal funding. (The concern about exclusion has mainly been tested in school districts that have tried overtly or covertly to force pregnant teenage girls to attend separate schools, a plain violation of Title IX.)

Nor can a school single out pregnant students for any sort of disadvantageous treatment - that is, any worse treatment than they would have received had they not become pregnant. Adverse educational actions taken against a student because of her pregnancy - such as revoking a scholarship - are likely to violate this principle. So are comments or behaviors creating a hostile environment on the basis of pregnancy.

The Second Requirement: Accommodate Pregnancy Like Temporary Disability

Second, schools must accommodate pregnancy to the same degree they accommodate students with other temporary disabilities. Medical benefits and insurance must be applied equally to pregnant and temporarily disabled students. Moreover, leave policies, modifications to course requirements or activities, and so on, must also be equally applied.

Schools may require pregnant students to submit a doctor's certificate as a condition of continued participation in a program or activity, as long as they would require a similar certification for all students with comparable disabilities or limitations.

The Third Requirement: Allow Pregnant Students to Take Temporary Leave

Third, the regulations require schools to permit a pregnant student to take a leave of absence for pregnancy, childbirth, and related medical conditions for as long as deemed medically necessary by her physician - whether or not they allow leave for other reasons. When the student returns, she must be reinstated to her prior status.

For its part, the NCAA also has guidelines governing pregnant student-athletes. It permits athletes a one-year extension of the five-year period of eligibility for "reasons of pregnancy." NCAA guidelines also contemplate continued participation during pregnancy with physician approval.

Previous Court Cases Involving Pregnancy Discrimination Under Title IX

There has been relatively little litigation about pregnancy discrimination under Title IX, meaning that Brady's case will likely pave new legal ground. There are no published decisions involving a pregnant athlete.

In a few cases, a pregnant female student has sued because she has been denied admission to, or dismissed from, the National Honor Society (NHS). NHS inducts students based on a combination of academic achievement and moral character. It imposes a uniform set of standards for selection and participation upon affiliated schools, but local chapters may also impose more stringent standards for selection.

In each of the NHS cases, the school claimed the student's exclusion was not based on pregnancy in itself, but rather on the fact that the student has (demonstrably) engaged in premarital sex--a fact reflecting poorly on her moral character. But that raises the issue of whether male students who have also engaged in premarital sex are treated the same.

In one case, the local chapter rules specified that pregnancy could not be the basis for an automatic denial, but instead could be considered as a factor in determining character as long as evidence of paternity, on the part of a male student, was similarly regarded. Other chapters, however, took different approaches.

The NHS cases' outcomes have varied, based on varying chapter rules, varying treatment of similarly situated male students, and varying evidence as to the true motivation for excluding the pregnant student. But all agree that Title IX prohibits a school from excluding a pregnant student from a program like the NHS unless it imposes a similar exclusion on male students who father children or male students who have engaged in sexual activity.

If this sounds strange, it's important to remember that Title IX is a sex discrimination statute--it thus permits discrimination against student parents, but not mothers alone. In addition, it permits discrimination against sexually active students, but not pregnant girls alone.

But as applied, a ban on students who have engaged in premarital sexual activity turns out to be a ban on pregnant girls, since they are the only ones who cannot hide their past behavior. Across the board, even NHS selection committees that purported to consider evidence about sexual activity of both male and female applicants, did not actually try to find out about any such activity, either by asking students themselves or in any other way.

Instead, the committees denied admission only students who were obviously pregnant. Indeed, in one blatant case, proffered evidence indicated that after excluding a pregnant girl because of "premarital sexual activity," the NHS chapter admitted a male student, whose nickname was allegedly "Daddy" because he fathered a child while in high school and commented to friends that he would be able to celebrate his 15th high school reunion, wedding anniversary, and child's birth together. (The case, *Pfeiffer v. Marion Center Area School District*, was the subject of a 1990 decision by the U.S. Court of Appeals for the Third Circuit).

If true, such evidence - or any evidence that NHS has knowingly admitted unmarried, sexually active males - is proof of intentional discrimination. But plaintiffs can also prevail on a theory of "disparate impact."

To prove "disparate impact" discrimination, the plaintiff must show that a gender-neutral policy has a disadvantageous, disparate impact on one sex. As I discussed in [a prior column](#), the status of disparate impact claims under Title IX is in question. Still, the disparate impact on women and girls of policies penalizing students for sexual activity is obvious.

How Does Title IX Apply to Brady's Claim?

This all brings us back to Tara Brady's claim - which is relatively straightforward. Unlike in the NHS cases, Brady's school has not made any claim that it was acting pursuant to a policy against premarital sexual activity (even though it is a Roman Catholic institution). Indeed, its only public statement about the case has been a press release claiming it is "offended" by Brady's suggestion to the press that the school would have treated her more fairly had she terminated her pregnancy rather than completed it.

As discussed above, Title IX and its implementing regulations relating to pregnancy required the University, upon learning of Brady's pregnancy, both to give her medically necessary leave and allow her reinstatement following any leave to her former status - here, as a member of

the basketball team and a scholarship athlete with guaranteed summer employment. They also required the University to take no action motivated by hostility, animus, or disapproval toward Brady's pregnancy. Finally, they required the University to provide Brady with whatever accommodations they would have provided to other temporarily disabled athletes. In addition, the NCAA Guidelines clearly entitled Brady to medical red-shirt status.

The facts, as Brady has alleged them, thus seem to make out a case of discrimination in violation of Title IX. There appears to be no legitimate reason other than her pregnancy for her coach's refusal to register her for the medical red-shirt status to which the Guidelines entitled her. (Male athletes before her had invoked it after being benched because of injury and returned to play upon recovery.) Nor does there appear to be any legitimate reason for revocation of her scholarship. In addition, her coach's alleged refusal to speak with her, after she was reinstated, looks similarly suspicious.

Of course, evidence supporting a gender- and pregnancy-neutral explanation for all of these actions might arise during discovery or at trial. But if it does not, Brady's case looks like a winner.

Pregnant Students: The Forgotten Class

Cases like Brady's, involving pregnant scholarship athletes, tend to be few and far between. Yet there are scores of girls and women who get pregnant while attending educational institutions governed by Title IX. And many of them encounter problems in trying to seek the rights and accommodations that Title IX requires.

Sometimes the hurdle is intentional discrimination, but often it is just ignorance of the law's mandates. Brady's case should serve as a wake-up call to educational institutions with respect to Title IX's ban on pregnancy discrimination - which applies to athletes and other students alike. Few schools have written policies governing the treatment of pregnant students. Many have never even given the subject any thought. As a result, pregnancies often end up being dealt with on a case-by-case basis - and that often leads to arbitrary, ad hoc, and unfair treatment of pregnant students.

While some may think pregnancy and parenting are inconsistent with many educational pursuits, the law says otherwise. To comply with it, high schools and universities - particularly those providing graduate and professional education (and catering to a population smack in the middle of their childbearing years) need to enact policies designed to deal with pregnant students.