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A common issue raised by university administrators implementing new parental leave or accommodation policies is how to ensure the policy complies with Title IX's non-discrimination requirements. **In summary, all parents, regardless of sex, should be provided with the same leave or accommodations for caretaking or "baby-bonding."**

Parental leave and sex; general standard

Title IX of the Educational Amendments of 1972 ("Title IX") prohibits federally-funded institutions from discriminating on the basis of sex in their educational programs. The federal government's regulations on Title IX clarify that, "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."¹ A near replicate provision covers employees.² Mother-only caretaking leave policies treat students differently on the basis of sex, and are therefore prohibited.

Disability leave or caretaking leave?

Courts have found that limiting caretaking leave to birth mothers constitutes sex discrimination. But how does an institution differentiate between disability/medical leave that only new birthmothers require and leave that must also be provided to other parents? In short, **any leave provided beyond the period of disability resulting from childbirth (typically 4 weeks prior to birth and 6-8 weeks after birth) should be considered caretaking/parental leave, and should be provided equally to parents of all genders.**

A case from Pittsburgh serves as a clear example. In *Schafer v. Board*,³ the Third Circuit Court of Appeals reviewed a Pittsburgh school board policy that granted up to one year of maternity leave for mothers, without providing any leave to fathers. The court found that the policy discriminated on the basis of sex in violation of Title IX because it provided a benefit to parents of only one gender by granting leave beyond the period of medical need to women but not to men.

Disability can be determined on an individual basis, but more frequently institutions draft blanket policies that provide a minimum presumed period of disability for the last 4 weeks of pregnancy through 6 weeks after birth for a vaginal delivery and 8 weeks for a cesarean.⁴ Any leave provided beyond medical leave should be considered caretaking or parental leave, and should be made equally available to all parents, regardless of sex or gender. For example, an institution that provides a standard year to birth mothers would be expected to provide at least ten months to other

¹ 34 CFR 106.40(b) Dept of Ed. Title IX Rule; Section .445(a) Federal Title IX Common Rule, available at <http://www.justice.gov/crt/federal-coordination-and-compliance-section-156>

² Id. at 34 CFR 106.57(a); Section .530 (a).

³ *Schafer v. Bd. of Pub. Educ. of the Sch. Dist. of Pittsburgh, Pa.*, 903 F.2d 243, 248 (3d Cir. 1990).

⁴ In cases where a woman is disabled due to pregnancy or childbirth for a longer period, she may receive additional time off for disability leave.



Fact Sheet: Parental Leave and Title IX

parents as well (assuming two months of the birth mother's one year leave period is for her medical condition).

Structuring a leave policy

Providing parental leave is a critical component of ensuring that student parents (and employees) continue to succeed at your institution. Although disability associated with childbirth is often resolved within 6-8 weeks, the demands of having a newborn or newly adopted child do not end so soon.

Providing non-birth parents with parental leave ensures that both parents can be more fully engaged in childrearing and bonding, something that is especially valuable to the birthmother during her recovery, and will have positive life-long impacts for the child and family.⁵ Providing fathers equal leave also advances opportunities for women more broadly because institutions that provide leave only to women risk creating a culture where women are seen as “leave liabilities.” Departments may be less likely to hire women in their childbearing years due to the concern that they may take lengthy leave. When fathers also take significant leave, this perception is diminished. Note that policies that provide leave only to “primary caretakers” or those providing over half of the childcare do not adequately address bias against women, because women are typically assumed to be the primary caretaker and men are assumed to be the secondary.

It is equally important to include adoptive parents in any parental leave policy, to provide the same opportunities for bonding and adjusting to having a new child in the home. Providing lesser benefits for adoptive parents and other non-birth parents may give rise to claims of discrimination on the basis of sexual orientation or infertility (a disability under the law).

Finally, the best leave policies provide leave for student caretakers other than new parents. For example, students may need leave to care for an older child, spouse, parent, or other family member. Providing leave for student caretakers—similar to leave provided to employees under federal and state laws—reduces the potential for backlash against student parents, particularly mothers. Inclusive leave policies send the message that the institution supports all families, and in turn are more likely to receive the support of a large cross-section of the university community. Finally, inclusive caretaker policies reduce the risk of claims of discrimination under the ADA association clause.

⁵ For example, according to the US Department of Labor, “longer paternity leaves are associated with increased father engagement and bonding” and this engagement “leads to improved health and development outcomes for children.” DOL Policy Brief, Paternity Leave (2015) at <http://www.dol.gov/asp/policy-development/PaternityBrief.pdf>

Example: policy with no sex difference

The following example is excerpted from the Columbia University Graduate School of Arts and Sciences' policy for the Accommodation for Parental Responsibilities:

“The Accommodation...provides a twelve-week period of accommodation to Arts and Sciences Ph.D. and D.M.A. students who become parents. Students in years 1 through 7 who give birth, adopt, or become legal guardians or foster parents, as well as students whose spouse or partner gives birth, can have responsibilities associated with their doctoral program suspended for twelve calendar weeks. Parental accommodation typically begins after the date of birth, adoption, or guardianship, but must begin no later than six months after this date. Students may be granted additional time in the event of illness or disability relating to childbirth under other GSAS policies, such as leaves of absence.”⁶

This policy does not differentiate between birth-mothers, birth-fathers, adoptive or other parents.

Example: policy with permissible sex difference

The following example is excerpted from the University of California's collective bargaining agreement for academic student employees' section on paid long-term leave:

“1. Paid Leave for Pregnancy Disability, Childbirth and Related Medical Conditions

A salaried ASE shall be eligible to receive up to six (6) weeks of paid leave for pregnancy, childbirth or related medical conditions for the period prior to, during, and after childbirth. Any paid leave taken under this Section shall run concurrently with any leave taken under Section B. pursuant to California's Pregnancy Disability Leave Laws....

2. Other Paid Leave

A salaried ASE shall be eligible to receive up to four (4) weeks of paid leave due to the ASE's serious health condition, as defined under the Family Medical Leave Act (FMLA), or to care for a family member of the ASE, as defined in Section H, who has a serious health condition.

Additionally, this leave may be used to care for and bond with the ASE's newborn child or a child placed with the ASE for adoption or foster care, provided that the leave is taken within twelve months of the birth or placement of the child with the ASE....”⁷

*Under this paid leave policy:*⁸

Birthmother: 4 weeks caretaking/bonding leave + 6 weeks medical = 10 weeks paid leave

Other parent: 4 weeks caretaking/bonding leave + no medical leave = 4 weeks paid leave

⁶ Available at <http://gsas.columbia.edu/content/suspension-responsibilities-childbirth-policy>.

⁷ The Agreement Between The Regents of the University of California and the UAW AFL-CIO Academic Student Employees Unit, (2014 – 2018), available at <http://www.uaw2865.org/resources/current-uaw-contract/>

⁸ Note, in addition to this paid leave, a birthmother also remains eligible for up to four months of unpaid, benefitted, job-protected disability leave. Either parent is entitled to two weeks of unpaid bonding leave, with additional unpaid leave at the discretion of their employer.