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This factsheet summarizes the key legal principles relating to protections for students who are lactating.<sup>1</sup> Anti-discrimination laws prohibit discrimination against students because they are lactating, and typically require accommodation to meet these students' health needs. For more information, contact the Pregnant Scholar team.

### **Lactation is a sex-linked condition covered by Title IX**

Title IX of the Education Amendments of 1972 ("Title IX") prohibits discrimination on the basis of sex in educational programs or activities receiving financial assistance from the U.S. federal government.<sup>2</sup> The prohibition on discrimination based on sex necessarily includes pregnancy-related conditions, such as lactation, which only affect people with female reproductive systems.

While this question has not yet been addressed in the courts relating to Title IX, in recent years federal courts enforcing employment laws have stated that lactation is a pregnancy-related condition covered under laws banning sex discrimination.<sup>3</sup> As the Equal Employment Opportunity Commission (EEOC), the federal agency tasked with enforcing federal anti-discrimination laws in employment, makes clear "Because lactation is a pregnancy-related medical condition, less favorable treatment of a lactating employee may raise an inference of unlawful discrimination."<sup>4</sup> And, "a practice that singles out lactation or breastfeeding for less favorable treatment affects only women and therefore is facially sex-based."<sup>5</sup>

Using Title VII to help us interpret Title IX is proper as courts regularly look to Title VII employment cases to fill in gaps in our understanding of Title IX, including the Supreme Court.<sup>6</sup> As the 10<sup>th</sup> Circuit explained, "because Title VII prohibits the identical conduct prohibited by Title IX, i.e., sex discrimination," it would regard Title VII "as the most appropriate analogue when defining Title IX's substantive standards. . . ."<sup>7</sup> The Department of Justice's Title IX Enforcement Manual affirms the relation between Title IX and Title VII, stating, "courts

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<sup>1</sup> This term includes any person whose body produces milk for a child. Other common terms breastfeeding, bodyfeeding, chestfeeding, and nursing. Many of these parents remove milk from the body, or "express" the milk using a breast pump or "pumping."

<sup>2</sup> 20 U.S. Code § 1681.

<sup>3</sup> See, e.g., *E.E.O.C. v. Houston Funding II, Ltd.*, 717 F.3d 425, 428 (5th Cir. 2013) ("...lactation is a related medical condition of pregnancy..."); [Hicks v. City of Tuscaloosa](#), 870 F.3d 1253, 1260 (11th Cir. 2017) ("Breastfeeding is a gender-specific condition...").

<sup>4</sup> EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues (June 25, 2015).

<sup>5</sup> *Id.*

<sup>6</sup> *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992).

<sup>7</sup> *Mabry v. State Bd. of Cmty. Colls. & Occupational Educ.* 813 F.2d 311, 316 n.6 (10th Cir.), *cert. denied*, 484 U.S. 849 (1987).



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generally apply standards established under Title VII regarding what constitutes discrimination to guide their interpretation in Title IX cases.”<sup>8</sup>

### **Title IX and Lactation Discrimination, Generally**

Because lactation is a condition tied to sex and gender, Title IX protects people from discrimination on the basis of lactation. No student should face harassment or other discrimination as a result of their lactation status. And, to avoid treating lactating students less favorably than others in violation of the law, educational institutions must meet the needs of lactating students at least to the extent they meet the health needs of other students. For example, if professors permit students to take breaks when necessary to check blood sugar, use the restroom, or address another health condition, they should do the same for lactating students.

### **Title IX and Milk Expression Breaks**

Title IX prohibits excluding students from participation in educational programs on the basis of sex. To that end, accommodations may be necessary to ensure that lactating students are not denied an equal educational opportunity merely because of their sex-linked health condition. As mentioned above, Title IX principles require lactating students be given at least the same freedoms to address their health needs as other students. Next, institutions should consider whether attendance policies which do not allow students to meet their lactation-related health needs have a disparate impact on female students. These policies have the effect of excluding female students each time they need to express breast milk during the school day, harming their grades and, in some instances, resulting in the students leaving their degree program altogether.

Finally, Title IX’s implementing regulations may require additional steps because lactation is a *pregnancy*-linked condition. The Pregnant Scholar recommends treating lactation as a pregnancy-related condition for the purposes of satisfying the Title IX implementing regulations section titled “Pregnancy and related conditions.”<sup>9</sup> These regulations require medically-necessary absences for pregnancy-related conditions be excused, and the student returned to the status they held prior to the absence.

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<sup>8</sup> Note, this document is currently under revision due to recent changes to other portions of the regulations. An archived version of the guidance is available at: <https://www.justia.com/education/docs/title-ix-legal-manual/discriminatory-conduct/>

<sup>9</sup> 34 CFR 106.40(b).



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### **Title IX and Milk Expression Space**

While Title IX regulations do not explicitly mandate the provision of lactation spaces, a failure to provide suitable lactation spaces may result in a situation in which students are denied equal access to their education due to their female sex. Students who do not have access to a suitable lactation space have limited choices available to them, all of which sacrifice either their health or education. These students may travel to distant lactation spaces (missing more class than is necessary to express breast milk in the process); pump in class (thereby making them the target of sexual harassment or complaints); or skip or delay milk expression, risking painful and often severe health complications as a result.<sup>10</sup>

Failure to accommodate lactating students by providing functional spaces for milk expression has a disparate impact on female students and students who have experienced pregnancy in particular. To avoid discrimination and ensure students aren't forced to choose between their health and education, the Pregnant Scholar encourages institutions to provide students with readily-accessible lactation spaces that are sanitary (not a bathroom) and private.

### **State Protections for Lactating Students**

Federal protections against discrimination apply to students in every U.S. state, but some states have additional protections. For example, California law explicitly requires accommodations be provided to lactating students.<sup>11</sup> Most states prohibit sex discrimination in their constitution. And at least 27 states and Washington, D.C. have laws making clear that discrimination on the basis of lactation and/or pregnancy-related conditions is a form of sex discrimination, with others bound by judicial decisions finding the same.

Because lactation discrimination is a form of sex discrimination, institutions prohibited from discriminating on the basis of sex under state law must take care to protect lactating students. As described above, this typically means providing basic accommodations for students' lactation-related health needs and avoiding harassment or otherwise penalizing students due to their condition.

For detailed information on the laws that apply in your state, [contact us](#).

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<sup>10</sup> Failure to adequately express breast milk on schedule results in painful engorgement, clogged ducts, and mastitis—which can require hospitalization. Skipping pumping sessions also commonly results in reduced milk supply, increasing the chances of early weaning and the attendant health consequences for parent and child.

<sup>11</sup> Cal. Educ. Code §66271.9. Note, other states have specific requirements for K-12 schools, but not for post-secondary institutions.



### Student Employee Protections

Student employees are typically protected by the same employment anti-discrimination laws that apply to other employees in the workplace. Student employees often have rights to lactation accommodations and non-discrimination under the federal Break Time for Nursing Mothers law (part of the Fair Labor Standards Act), the federal Pregnancy Discrimination Act (part of Title VII), and state/local breastfeeding or pregnancy accommodation laws.

For more information, consult the [state-by-state guide to workplace lactation protections](#) from our sister site Pregnant@Work.

### Direct Breastfeeding on Campus

Many students wish to breastfeed or bodyfeed while on campus. Most states have laws establishing that breastfeeding is not indecent exposure and is permitted in any location the parent and child are otherwise authorized to be. Students should not be prohibited from nursing their child when the child is otherwise permitted to be present, and revocation of permission to have the child in class/ on campus should not hinge on how the child is fed. Employees may also have rights to directly feed their child under state and local laws (see above).

For more information on rights to nurse in public, consult the National Conference of State Legislatures' [list of state breastfeeding laws](#).

**Need help?** *The Pregnant Scholar's team regularly provides technical assistance to higher education administrators, training on Title IX's pregnancy-related protections, and assistance implementing best practice policies to support pregnant and parenting students. We also operate a helpline for pregnant and parenting students nationwide who want to learn more about their rights. Most of our services are provided free of charge. [Contact us!](#)*