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Cut the Baby Talk:
Negotiating Pregnancy Clauses in Women’s Athletic Contracts

Courtney Luis*

Many athletic departments, organizations, teams, and leagues have regulations that address the event of pregnancy in their athletes. As interest and participation in women’s sports continues to grow, along with the number and profitability of female athletes, pregnancy clauses are becoming increasingly common in athletic contracts for women.

Pregnancy clauses are an often overlooked section of athletic contracts and sports deals but can have far-reaching consequences for female athletes. Many athletic departments and organizations have attempted to create standardized regulations on how to deal with female athletes who become pregnant; however, these attempts are usually confusing, unclear, and regularly fail to address the individual needs of the athlete that are unique to pregnancy.

Although there are distinct differences between gender identity and biological sex, at this point in time, there has not been a situation where an athlete identifies as a man, competes in men’s athletics, and yet is still capable of becoming pregnant. For this reason, this Article shall treat gender issues as encompassing the sex-specific ability of pregnancy.

I. CONSTITUTIONALITY OF THE CLAUSE

It is undeniable that pregnancy is a uniquely sex-specific occurrence, thus making pregnancy clauses fundamentally discriminatory. Theoretically, one could include such a clause in contracts for male athletes, however unnecessary, but the effect of discrimination is the same.

On the surface, there are several federal laws that purport to protect pregnant women from discrimination in the workplace. The Equal Pay Act of 1963 prohibits discrimination on the basis of sex “for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.”1 Title VII of the Civil Rights Act of 1964 made sex-based employment discrimination illegal.2 Title IX of the Education Amendments of 1972 explicitly addresses pregnancy by including that institutions receiving federal funds “shall not . . . exclude any student from its education program or activity . . . on the basis of such student’s pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom . . . .”3 Finally, the Pregnancy Discrimination Act amended Title VII to ensure that “women affected by

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* J.D., South Texas College of Law, 2024.
3 34 C.F.R. § 106.40(b)(1) ((2024); see also 20 U.S.C. § 1681(a)(1).
pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . ”4

Unfortunately for female athletes, these legal protections have had very little influence on the sports industry, where the relationship between an athlete and an organization is often governed by industry customs and strict contractual interpretations, which do not always fit into the typical employer-employee framework. Such protections are further limited in the context of student athletes and amateurs, who are often not considered employees at all.

Pregnancy clauses are often disguised in the “failure to perform” language of an athletic contract, which is present in both men’s and women’s athletic contracts.5 In fact, most contracts do not use the word “pregnancy” at all.6 For most athletes, a failure to perform would constitute an injury that prevents the athlete from playing or competing.7 By framing the pregnancy clause as a “failure to perform,” it is difficult for athletes to prove sex discrimination without clear-cut evidence that the discrimination occurred solely due to the fact of pregnancy.8

II. ENFORCEMENT OF THE CLAUSE

While the exact form and wording of the pregnancy clause may vary, in general the result is that pregnancy is treated as an injury. That is, the athlete is considered physically incapable of competing, and thus, unable to uphold their end of the contract.9 The ability for an athlete to physically perform is therefore essential to discharge the duties demanded by the contract.

The enforcement of the clause varies widely from one organization to another as to when a female athlete is deemed unfit to continue performance. Some organizations might allow an athlete to continue training, while others will force the athlete to stop playing or severely limit her playability, which can negatively impact an athlete’s career by affecting her eligibility to compete and her ranking in the sport.10

6 Id. at 1039.
7 Id. at 1040.
8 See generally id.
9 Id. at 1047.
A “pregnancy pause” is when an athlete’s athletic contract is paused for the duration of her pregnancy—that is, her eligibility to play is suspended. The effect of this clause is similar to “redshirting,” or forcing an athlete to sit out for the season. Redshirting is commonly used in college teams, where a student athlete will sit out of gameplay for a season while remaining eligible to compete for another year. Traditionally, this is used to allow amateur recruits to acclimate to a new team or a more rigorous training regimen, while gaining competition experience. The practical effect for professional athletes, however, is that a pregnancy pause allows a sponsor to severely decrease payment or even terminate that athlete’s employment agreement for lack of performance. This is often justified in athletic contracts because courts have found that “in every contract of employment there is an implied condition that the employee will be physically capable of performing his duties at the time appointed.”

Ultimately, many claims never make it to a courtroom, as athletes are frequently at the mercy of the power, wealth, and influence wielded by athletic organizations. Potential plaintiffs are often discouraged from bringing suit due to a lack of resources and a lack of sufficient remedies. Moreover, many plaintiffs face potential blacklisting within the industry and retaliation by the organizations for harassment or defamation.

III. BODILY AUTONOMY AND PRIVACY RIGHTS

Pregnancy clauses relate to the much larger issue of women’s bodily autonomy, rights to privacy, and access to quality healthcare. The increasingly unpredictable landscape for women’s rights in the United States, particularly post-Dobbs, has blurred the line of what information should be publicly available regarding women’s reproductive health. If the government can investigate personal medical records to confirm a woman’s pregnancy while prosecuting an abortion case, what other medical information remains unprotected? Are athletic organizations allowed to bench athletes on the mere suspicion that they might be pregnant? Can such organizations investigate an athlete for pregnancy?

The case that best answers these questions comes from the Third Circuit in Gruenke v. Seip. Leah Gruenke was a high school swimmer who was repeatedly questioned about the possibility of her being pregnant by multiple members of her team, high school administrators, as well as the coaching staff. Her swim coach, Michael Seip, and other members of her swim team pressured Leah to take a

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11 Kanoy, supra note 5, at 1038.
12 Id.
13 See id.
16 225 F.3d 290 (3d Cir. 2000).
pregnancy test. There was conflicting testimony from Leah’s teammates on whether they pressured her to take a pregnancy test to “clear her name,” or because she would be kicked off the team if she refused. Nonetheless, Leah was eventually convinced to take a pregnancy test, with several members of her swim team present to witness it.

Leah’s parents were understandably upset when they found out. Because Leah was only seventeen at the time, Leah’s parents sued on behalf of their child under 42 U.S.C. § 1983, claiming that the pregnancy test, and the actions surrounding it, constituted an illegal search in violation of Leah’s Fourth Amendment rights, and had violated Leah’s right to privacy regarding family and personal matters. The court determined that Seip did indeed violate Leah’s constitutional right against illegal searches. Seip should have reasonably known that his conduct, which included talking to other students, faculty, and parents, but not Leah’s parents, about Leah’s suspected condition, and that forcing their daughter to take a pregnancy test would violate clearly established constitutional rights to privacy and to be free from illegal searches.

However, the court in Gruenke v. Seip did not draw a hard line regarding a woman’s right to privacy over her pregnancy. One would assume that forcing an athlete to undergo a pregnancy test is inherently unconstitutional, or at the very least, a tort for the invasion of privacy. But the court in Gruenke leaves a glaring loophole for athletic organizations to exploit:

Although student athletes have a very limited expectation of privacy, a school cannot compel a student to take a pregnancy test absent a legitimate health concern about a possible pregnancy and the exercise of some discretion. This is not to say that a student, athlete or not, cannot be required to take a pregnancy test. There may be unusual instances where a school nurse or another appropriate school official has legitimate concerns about the health of the student or her unborn child. An official cannot, however, require a student to submit to this intrusion merely to satisfy his curiosity. While it might be shown at trial that the facts are more favorable to Seip, we cannot say, as a matter of law, that his conduct as alleged by the Gruenkes did not violate a clearly established constitutional right.

So, although many athletic organizations do not mandate pregnancy tests for their athletes, courts have recognized that these organizations might have “legitimate health concerns” about possible pregnancy, and that it may be essential

17 *Id.* at 295–296.
18 *Id.* at 296.
19 *Id.* at 296–97.
20 *Id.* at 297.
21 *Id.* at 300.
22 *Id.*
23 *Id.* at 301.
for these organizations to determine whether an athlete has the ability to play or perform. However, the scope of the court’s language is unclear and most courts allow athletic organizations broad discretion in writing and interpreting the holding of Gruenke. As a result, mandatory pregnancy tests for female athletes might be considered morally wrong, but there is wiggle room for a school or athletic organization to enforce it under the right circumstances.

IV. ACCESS TO QUALITY HEALTHCARE

The unpredictability of women’s rights across states in America is further complicated by the degree of access to and adequacy of healthcare for pregnant women, which varies substantially across states and between institutions. When athletes are traded to different teams, or travel for competition, the quality of the medical care available to them may likewise vary substantially.

International tennis champion Serena Williams has been one of the leading advocates on the matter in recent years, due to her own experiences with pregnancy complications. One year after giving birth to her daughter, Olympia, Serena revealed in a Vogue cover story that she had suffered life-threatening complications during and after delivery. Olympia was delivered by emergency C-section after the baby’s heart rate dove dangerously low during Serena’s contractions. The surgery went well, Olympia was delivered safely and healthy, and Serena and her daughter appeared to have survived the worst of it. But the worst was yet to come. Serena, who has a history of blood clots, takes blood thinners every day to prevent clots from forming. She was forced to stop taking them, however, so that her body would be able to heal the surgical wound from her C-section. The day after giving birth, Serena began to experience shortness of breath and was immediately concerned that she was having another pulmonary embolism. Doctors found blood clots settling in her lungs, and they feared the clots would continue to form and travel to her lungs.

Serena and her doctors spent the next week trying to save her life. Serena’s recovery was further impeded when the surgical wound from her C-section reopened

24 Id.
27 Id.
28 Id.
29 Id.
30 See id.
31 Id.
32 Id.
due to coughing caused by the clots in her lungs.\textsuperscript{33} Her doctors immediately called for a surgery to correct the lung clots, and when administering the surgery, they found a large, deadly hematoma in her abdomen.\textsuperscript{34} This led to another surgery, where a surgeon had to insert a filter into a major vein to prevent more clots from dislodging and traveling to Williams’ lungs.\textsuperscript{35}

But Serena’s story is not just a cautionary tale about the dangers of childbirth. Even as an internationally acclaimed athlete, she struggled to receive quality care from her medical providers.\textsuperscript{36} When Serena began to experience shortness of breath, she left her room to find the nearest nurse and, “between gasps,” stated she needed “a CT scan with contrast and IV heparin (a blood thinner) right away.”\textsuperscript{37} Serena reported that her complaints about her pain and trouble breathing were initially dismissed by nurses, and her requests for further investigative treatment were ignored at first, but Serena kept insisting until the medical staff finally listened.\textsuperscript{38}

Unfortunately, Serena’s story is representative of a growing problem in the United States regarding insufficient care for pregnant women. The United States has the highest rate of maternal deaths across all developed nations.\textsuperscript{39} According to the Centers for Disease Control and Prevention, an estimated 50,000 women (a conservative estimate, as some researchers say that the numbers could be significantly higher) in America deal with dangerous or life-threatening complications related to pregnancy and childbirth each year.\textsuperscript{40} There is a widespread misconception that these complications are rare, when in fact, they are not. Rather, the number of maternal deaths due to childbirth complications is growing every year in the United States.\textsuperscript{41} A study of all women admitted for delivery at Cedars-Sinai Medical Center in Los Angeles between January 1, 2012, and June 30, 2014, found an “opportunity for improvement in care” in forty-four percent of life-threatening complications related to pregnancy and childbirth, with a majority of cases having contributing factors relating to improving provider care.\textsuperscript{42}

“The nature of [the American] system is to focus on these women while they’re pregnant,” states Dr. Eugene DeClercq, a professor of community health services at Boston University School of Public Health. “And then if there are

\textsuperscript{33} Id.
\textsuperscript{34} See id.
\textsuperscript{35} See id.
\textsuperscript{36} Id.
\textsuperscript{37} Id.
\textsuperscript{38} See id.
\textsuperscript{40} Id.
\textsuperscript{41} Id.
\textsuperscript{42} John A. Ozimek, Rhonda M. Eddins, Naomi Greene, Daniela Karagyozyan, Sujane Pak, Melissa Wong, Mark Zakowski & Sarah J. Kilpatrick, \textit{Opportunities for Improvement in Care Among Women with Severe Maternal Morbidity}, 215 AM. J. OBSTETRICS & GYNECOLOGY 509.e1, 509.e3 (2016).
difficulties later, they get lost to the larger system that doesn’t particularly care about women’s health to a great degree unless they are pregnant.43 Each year in the United States, 700 to 900 women die during childbirth or from post-birth complications.44 Black women are disproportionately likely to face these complications, as they are less likely to receive attentive and quality care, making black women three to four times more likely than white women to die from pregnancy-related complications.45

More recently, Olympic track star Tori Bowie died from birthing complications in April of 2023.46 She was eight months pregnant at the time that she died, and her body was not found for several days.47 It sent shockwaves through the world of athletics, but more so in track and field, where her former teammates had just wrapped up a high-profile contract negotiation with the athletic brand Nike to amend its contractual pregnancy clauses for the female track stars that it sponsored, a negotiation that will be discussed later in this article.48

Serena’s and Tori’s stories serve to highlight the struggle that women in America face in finding quality reproductive healthcare, even for some of America’s top athletes. The loss of jobs and sponsorships not only deprives female athletes of a source of income during their pregnancy but can also have dramatic negative effects on their healthcare coverage, and many risk losing their access to medical services during their pregnancies.49

V. STUDENT ATHLETES

A. Employment Status

Employees receive protection from the government and federal regulation, but independent contractors do not.50 The distinction is found based on the amount of control that an employer has over an employee, and whether the employer can

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43 Ellison & Martin, supra note 39.
44 Id.
47 See id.
“control . . . the end result and the manner in achieving it.”

The NCAA claims that it is not required to compensate athletes and has the right to limit their sources of income as part of a concerted effort to retain the “amateurism” of college athletics. The NCAA has used this “amateurism” defense for decades, but with the recent decisions to allow college athletes to profit off of their name, image, and likeness (referred to as “NIL deals”), the employment status of student athletes is now being reconsidered.

In September of 2023, members of the Dartmouth College basketball team filed a petition to join the local chapter of the Service Employees International Union in New Hampshire. Unionizing would allow the players to negotiate not only over compensation, but also over working conditions and benefits, such as healthcare. Unsurprisingly, Dartmouth opposed the petition, using the NCAA’s age-old argument that the players were not employees because the college did not exercise sufficient control over them. Moreover, Dartmouth argued that the players did not receive compensation or scholarships for playing basketball and that the basketball program was unprofitable and a drain on the school’s finances.

However, on February 5, 2024, the regional director of the National Labor Relations Board (“the Board”) issued a decision finding that the student athletes on the men’s basketball team at Dartmouth College were “employees” under the National Labor Relations Act (NLRA) because they perform work under the direction of the college. Therefore, the players were eligible to vote on whether to unionize.

Applying the common law test for employment, the regional director reasoned that the basketball players were employees “because Dartmouth ha[d] the right to control the work performed by the men’s varsity basketball team and because the players perform that work in exchange for compensation.” It did not matter that the players were not given a salary or any athletic scholarships in exchange for their services because the players received other forms of compensation, such as

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54 Tr. of Dartmouth Coll. and Serv. Emp. Int’l, Local 560, No. 01-RC-325633 (Feb. 5, 2024).
55 Id.
56 Id.
57 Id. at 21–22.
58 Id. at 22.
59 Id. at 2.
“academic support, career development, sports and counseling psychology, sports nutrition, leadership and mental performance training, strength and conditioning training, sports medicine, and integrative health and wellness.” Furthermore, the unprofitability of the basketball program was irrelevant to the analysis of employee status. Dartmouth had exercised “significant control” over its student athletes, such as “when the players will practice and play, as well as when they will review film, engage with alumni, or take part in other team-related activities. When the basketball team participates in away games, Dartmouth determines when and where the players will travel, eat, and sleep.”

Dartmouth has appealed the decision to the full Board, and quite possibly will continue to appeal all the way up to the Supreme Court, given the relevancy of the topic. The Dartmouth basketball players’ unionization vote is only the latest in a string of legal developments related to whether college athletes may be considered employees or parties entitled to receive compensation under various legal standards, including under the NLRA and Fair Labor Standards Act (FLSA). The Dartmouth case and its effects on the future relationship between student athletes and educational institutions is still unclear. No doubt, however, it will raise questions about the rights of student athletes across all divisions and all sports within higher education.

B. Athletic Scholarships and the NCAA Policy

Historically, student athletes have not had to worry about losing sources of income. However, as college athletics continues to grow and become more lucrative, particularly with the introduction of NIL deals, pregnancy has become an inevitable issue for female athletes and their college athletic contracts. The growing number of female athletes across the nation, coupled with an increasing demand for women’s sports in entertainment, has led to widespread, often publicized conflict between athletic organizations and athletes regarding bodily autonomy.

Athletic contracts occur at both the collegiate and professional levels. Despite the NCAA’s role in governing college athletics, colleges and universities have broad power to construe pregnancy clauses however they like. Moreover, the NCAA’s rules are unclear and often contradictory. The current NCAA model policy states:

An institution cannot automatically exclude a pregnant student athlete from sports participation, but it can require certification from her physician, if such certification is required from student athletes with other medical conditions. Medically necessary absences from

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60 Id. at 20.
61 Id. at 12–13.
62 Id. at 19.
64 Kanoy, supra note 5, at 1038–40.
team activities due to pregnancy should be considered excused absences.\textsuperscript{65}

This model discourages schools from requiring athletes to disclose if they are pregnant and outlines federal protections for pregnant athletes, specifically that they cannot be excluded from the team or denied financial aid because of “pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom.”\textsuperscript{66}

Regarding playability, the NCAA states that “a pregnant student athlete’s physician should make medical decisions regarding sports participation . . . in conjunction with her professional healthcare provider.”\textsuperscript{67} The medical provider that the student athlete chooses to see should have an opinion with greater weight than that of the team’s trainers or doctors.\textsuperscript{68} If a doctor determines that it is no longer practical or safe (for either mother or fetus) for an athlete to continue to contribute, most leagues and teams reserve the right to remove the athlete from the active roster.\textsuperscript{69}

The issue, however, arises when the determination for the scholarship hinges upon a player’s ability to continue training or playing for the team. Although Title IX protects students from discrimination based on sex, Title VII, which specifically protects pregnant women from discrimination, fails to protect student athletes who become pregnant.\textsuperscript{70} This is because the law only applies to an employer-employee relationship, but does not encompass a contractual relationship, such as that between a student and a university.\textsuperscript{71} This issue is best presented by the case of Tara Brady, who faced discrimination by her college basketball coach based solely on her pregnancy.

In 2003, Tara Brady filed a complaint against her school, Sacred Heart University, for discrimination against her based solely on pregnancy, resulting in her involuntary dismissal from the team and forced withdrawal from the school. These actions were in direct conflict with Title IX of the Education Amendments of 1972.\textsuperscript{72} Tara was accepted to the university on a basketball scholarship in 1999 and her scholarship had just been extended for her second year based on her performance on the team.\textsuperscript{73} However, when the basketball coach, Edward Swanson,


\textsuperscript{66} Id. at 18–35.

\textsuperscript{67} Id. at 32.

\textsuperscript{68} Id. at 11.

\textsuperscript{69} See id. at 11–32.

\textsuperscript{70} Kanoy, supra note 5, at 1041–44.

\textsuperscript{71} See id. at 1045.


\textsuperscript{73} See id.
became aware of Tara’s pregnancy, the scholarship offer was abruptly rescinded.\textsuperscript{74} Tara was removed from the basketball team, and the school, Swanson in particular, pressured Tara to withdraw from the university entirely.\textsuperscript{75}

According to the complaint, Swanson had told Tara and her parents that allowing her to remain on the basketball team would be “an insurance liability to the university, a health risk for Ms. Brady, a distraction to the team, and a risk to Coach Swanson’s job.”\textsuperscript{76} He refused to allow Tara’s requests to be placed on “medical redshirt” status, which would have allowed her to keep her scholarship, remain listed as a team member, and continue to attend classes.\textsuperscript{77} Despite these apparent refusals, when Tara later attended her school’s basketball game as a spectator, she noticed that her player status was listed as “medical redshirt.”\textsuperscript{78} Further investigation led to Tara finding out that Swanson had not been required to remove her from the basketball team on account of being pregnant, nor had she been required to withdraw from the university,\textsuperscript{79} since the NCAA has no mandate that a pregnant athlete be redshirted, although the practice is common in the industry.\textsuperscript{80} Tara was further distressed to find out that she was at risk of losing her medical insurance if she did not continue as a full-time student, which would no doubt impose great hardship on her ability to give birth and care for her child post-birth.\textsuperscript{81}

Although the school reinstated Tara as a student when she spoke directly with the university’s director, Swanson continued to deny Tara any chance to resume her basketball career.\textsuperscript{82} Even after Tara gave birth to her child, and later approached Swanson about resuming her place on the basketball team, Swanson refused to speak to her and falsely claimed that it was on the school’s orders.\textsuperscript{83} When Tara appealed directly to the school, her scholarship was renewed, and she was reinstated on the basketball team.\textsuperscript{84} Despite her reinstatement, however, Swanson continuously created obstacles that prevented Tara from participating on the basketball team: he still refused to speak to her directly, communicating to her only through an intermediary, and repeatedly failed to communicate the time and place of team events to Tara.\textsuperscript{85}

It had become obvious that the source of the discrimination started and ended with Coach Swanson, who was ultimately in charge of determining whether

\begin{footnotes}
\item[74] Id. at 5.
\item[75] Id.
\item[76] Id. at 4.
\item[77] Id.
\item[78] Id. at 5.
\item[79] See id. at 6.
\item[80] See generally Hogshead-Makar & Sorensen, supra note 65, at 41.
\item[82] Id.
\item[83] Id. at 6–7.
\item[84] Id. at 8.
\item[85] Id.
\end{footnotes}
Tara received her basketball scholarship or not. Swanson was aware of the hardships imposed on Tara and her family at the loss of the scholarship, and yet intentionally and tortiously interfered with her contractual relationship with the university based on his own biases. As a result, Tara lost educational and professional opportunities that would have otherwise been afforded to her, had it not been for the deliberate discrimination and interference of her basketball coach.86

Multiple courts have now ruled that colleges and universities do, in fact, owe a duty of care to their students, particularly on campus.87 Schools owe this same duty toward their students both in the classroom and during extracurricular activities.88 In the words of the court in Regents:

Colleges provide academic courses in exchange for a fee, but a college is far more to its students than a business. Residential colleges provide living spaces, but they are more than mere landlords. Along with educational services, colleges provide students social, athletic, and cultural opportunities . . . [Students] are dependent on their college communities to provide structure, guidance, and a safe learning environment.89

Colleges and universities owe a duty to provide support and a safe environment for student athletes. For many students, their entire future hinges on their participation in school athletics in order to achieve their diploma. Policies that essentially punish a student athlete for becoming pregnant might have drastic and unintended consequences when an athlete feels that their future is on the line.

C. The Social Stigma of Pregnancy in Student Athletes

The rate of pregnancies within student athletes can only be estimated from the rates of pregnancy across students in general. According to various polls and surveys, researchers estimate that between ten and fifteen percent of any Division 1 college athletic department will become a parent during their tenure as a student athlete (including both male and female athletes).90

Although the frequency of pregnancy among student athletes is unconfirmed, anecdotal accounts over the past decade strongly support that pregnancy presents many obstacles for young female athletes. Athletes have reported hiding their pregnancies from doctors and their teams in order to continue training and competing, feeling forced to choose between pregnancy and their financial aid (and

86 See id. at 7–8.
88 Id. at 897–898.
89 Regents of Univ. of Cal., 413 P.3d at 625.
being unable to stay enrolled without it), feeling pressured to have an abortion, and fearing expulsion from the school, being cut from the team, or facing other negative stereotypes.91

In extreme and tragic circumstances, it is rare but not unheard of for a student to attempt to deliver her baby in secret.92 Take, for example, the case of Teri Rhodes, who in 2007 was charged with voluntary manslaughter after leaving her infant to die in a plastic bag.93 Teri was an eighteen-year-old sophomore and member of the volleyball team at Mercyhurst College, a Catholic institution.94 At the beginning of the school year, Teri underwent a team physical, during which the team doctor noted that she had a swelling abdomen and had gained a substantial amount of weight.95 Despite this, Teri was cleared to continue practicing.96

Only a day later, Teri delivered her baby in her apartment’s bathtub and her roommate found her soon after.97 An investigation into Teri’s laptop computer revealed that sometime prior to giving birth, she had conducted internet searches on pregnancy and means to provoke a miscarriage or otherwise abort a pregnancy.98 In the subsequent police interrogation, Teri continued to deny that she had ever been pregnant or given birth even after being admitted to the hospital.99

The prosecution presented evidence that Rhodes and the circumstances of her crime fit the profile for neonaticide compiled by the Behavioral Science Unit of the FBI:

[T]he profile for individuals that commit this type of crime are almost identical. They’re almost solely within a particular age group that this defendant falls into. . . . All are full term pregnancies. . . . In this particular case, as in all neonaticide cases, it’s hard to judge what the motive would be. Additionally, lacking motive, in this particular case you had a denial following the crime, and a continued denial through the process for quite a period of time.100

In 2011, Judge Ernest J. DiSantis Jr., who presided over Teri’s re-sentencing hearing, stated that her case highlighted the pitfalls of how the United States deals with pregnancy and mental health in young women.101 Unfortunately, cases like

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91 Id. at 29–33.
93 Id. at 735–36.
94 Id. at 734.
95 Id. at 734–735.
96 Id.
97 Id. at 735.
98 Id.
99 Id.
100 Id. at 737.
Teri Rhodes’ are not isolated incidents, and she is not the first nor the last student athlete to resort to such extremely irrational actions in the face of an unplanned pregnancy, under the impression that her education and future career were on the line.

This is part of a broader issue of society blaming the woman for being “irresponsible” when they become pregnant and creating a social stigma surrounding pregnancy. There is intense scrutiny and negative repercussions when a student athlete becomes pregnant, particularly when that athlete is part of a team sport. Many student athletes fear losing their scholarships, being ostracized at school, and fear being accused of undermining the team if they get pregnant while in school. Such fears should never be a student’s first reaction to becoming pregnant. It is up to the school to provide a safe and healthy environment where a student who becomes pregnant can seek assistance without judgment or fear of retribution by the school or its staff.

D. Protections for Student Athletes (Or Lack Thereof)

The phrase “student athlete” was coined over half a century ago to ensure that a distinction would be made between the NCAA’s athletes and its employees. It is this loophole that universities and the NCAA rely upon to avoid taking responsibility for the treatment of student athletes that become pregnant and limiting the safeguards provided to students under scholarship.

In 2007, Clemson University came under fire for encouraging abortions because a section of its athletic agreement for female track athletes had stated, “Pregnancy resulting in the inability to compete and positively contribute to the program’s success will result in the modification of your grant-in-aid money.” An anonymous athlete had told an ESPN reporter that she had received an abortion after a school official told her she could lose her scholarship by being pregnant, and reportedly knew of at least seven current and former Clemson athletes who had abortions for fear of losing their scholarships.

During its investigation, ESPN also spoke to members of the women’s track team at the University of Memphis, who were required to sign a document acknowledging they could lose their scholarships if they became pregnant. The NCAA declined to comment specifically on the pregnancy policies for Clemson and Memphis during ESPN’s investigation but acknowledged that there are no national guidelines about pregnancy, granting member schools broad power over their


103 Sperber, supra note 102, at 445.


106 Id.
student athletes. Contracts between athletes and universities are highly individualized, independent agreements between the school and the athlete, over which the NCAA exercises very little control or oversight. Pregnancies can still be deemed as a “violation” of the athletic agreement, and result in the loss of scholarships, student aid, potential dismissal from the team, and even a breach of contract.

Yet without NCAA mandates on how schools should address pregnancy in student athletes, many schools would not have a pregnancy policy at all, neither for athletes nor even for regular students. There is a distinct scarcity of policies and discussion about pregnancy in college athletics. Data suggests that eighty-five percent of Division I schools lack policies for athletes who become pregnant. For Division II and III schools, and NAIA colleges, that number raises to ninety-four percent.

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107 Id.
108 See Sorenson et al., supra note 90, at 40.
109 Kanoy, supra note 5, at 1047.
110 Hogshead-Makar & Sorensen, supra note 65, at 35.
111 Sorenson et al., supra note 90 at 36.
112 Id.
Nor does the mere existence of a college’s pregnancy policy necessarily mean it is suitable to address the needs of student athletes. Many policies still offer little to no support for the student during pregnancy, cancel financial aid, ban student athletes from participating in training, actively counsel the student to withdraw from the athletic program or even from the school, and outright ignores the NCAA’s one-year extension for pregnant athletes.\(^{113}\) Many only mention pregnancy in passing, just enough to waive liability for the school and its athletic department, and go no further to provide students with guidance on what to do and who to go to for support and assistance in navigating college life and parenthood.\(^{114}\) Some athletic departments flat-out refuse to develop a policy under the illusion that it offers protection against liability; however, in a worst-case scenario, this only creates an opportunity for negligence due to the contractual nature of the relationship between student athletes and their schools.\(^{115}\)

School health professionals are supposed to advocate for the welfare of their students, and yet, based on anecdotal evidence, there is a significant lack of support from schools for student athletes in this area that creates obstacles for students to return to their regular studies and to competition.\(^{116}\) Colleges and universities need to remember that they are educational institutions first and foremost and athletic organizations second. The school’s main objective should always be to assist the students—athlete or not—in completing their degree.

VI. Professional Athletic Contracts

A. When It Doesn’t Work

Much like college athletic contracts, contracts for professional athletes often impose financial penalties on athletes who become pregnant. Outside of mainstream sports, many athletes rely on checks from sponsors to provide funds for their training and livelihood.\(^{117}\) This is doubly true for female athletes in sports where the women’s league gets far less coverage and funding than their male counterparts.\(^{118}\) Many, if not all, female athletes face pressure not to conceive and discrimination for becoming pregnant during their careers, as sponsors have indicated that they will not get paid while taking time away from training to give birth and recover from pregnancy. In essence, these athletic contracts do not include paid maternity leave. Moreover, most sponsorship contracts also include

\(^{113}\) Id. at 37.

\(^{114}\) See id.

\(^{115}\) Id.

\(^{116}\) See id. at 33.

\(^{117}\) West, supra note 48.

\(^{118}\) See, e.g., A new NCAA report show the stark gap in funding for women’s sports, NPR (June 24, 2022, 3:33 AM), https://www.npr.org/2022/06/24/1107242271/the-ncaa-says-that-funding-for-women-in-college-sports-is-falling-behind.
nondisclosure agreements that prevent these athletes from raising public awareness on the issue.\textsuperscript{119}

The most recent high-profile controversy to scrutinize pregnancy clauses is a widely publicized dispute between the athletic apparel brand Nike and several notable female athletes on the United States track team.\textsuperscript{120}

Allyson Felix, a six-time Olympic gold medalist, made headlines in 2019 when she chose to speak out in a self-written opinion piece for the New York Times against the financial penalties and loss of sponsorship from Nike when she revealed her pregnancy. She was joined by her fellow American track stars, Olympic teammates, and former Nike-sponsored runners Alysia Montaño, Kara Goucher, and Phoebe Wright, all of whom were hit with the same penalty by Nike for becoming pregnant.\textsuperscript{121} When asked about her opinion on Nike’s dispute with her teammates, Phoebe Wright famously stated, “Getting pregnant is the kiss of death for a female athlete . . . . There’s no way I’d tell Nike if I were pregnant.”\textsuperscript{122}

Alysia Montaño, a middle-distance track and field runner and Olympic competitor, made headlines in 2014 when she ran the women’s 800 meters at the U.S.A. Track and Field Outdoor Championships while nearly eight months pregnant with her first child.\textsuperscript{123} When she told Nike that she wanted to have a baby, Nike threatened to pause her sponsorship deal and stop paying her.\textsuperscript{124} She left Nike to sign with Asics, but that footwear brand also threatened to stop paying her during her recovery after childbirth.\textsuperscript{125} In order to meet the demands of her contract, Alysia says that she would tape her abs together for races and even shipped breast milk home to the United States while competing at the 2017 IAAF World Championships in Beijing because she could not afford to take any more time off to care for her infant without losing funding.\textsuperscript{126}

Kara Goucher, an Olympic marathon runner, found out during her 2010 pregnancy that Nike was going to stop paying her until she started racing again.\textsuperscript{127} She planned to run a half-marathon just three months after giving birth in an effort to start getting paid again.\textsuperscript{128} In a recent memoir, released in March of 2023, Kara reports that Nike temporarily withheld a quarter of her annual salary, which was

\textsuperscript{119} West, \textit{supra} note 48.

\textsuperscript{120} \textit{Id.}


\textsuperscript{122} Montaño, \textit{supra} note 15.

\textsuperscript{123} West, \textit{supra} note 48.

\textsuperscript{124} \textit{Id.}

\textsuperscript{125} \textit{Id.}

\textsuperscript{126} \textit{See id.}

\textsuperscript{127} Montaño, \textit{supra} note 15.

\textsuperscript{128} \textit{Id.}
roughly $81,000. In her book, Kara wrote, “I had worked my butt off for the entirety of my pregnancy while they marketed me as a mother-athlete to consumers, yet they were effectively telling me that none of that work had any value.”

Allyson Felix was added to the mix while re-negotiating her contract with Nike in 2018. The six-time Olympic gold medalist revealed that Nike offered to pay her seventy percent less than it did before, and then negotiations came to a “standstill” after she asked the brand to guarantee she would not be punished for not performing her best in the months following childbirth. When the brand refused, Allyson Felix joined the growing list of female athletes speaking out about the lack of maternity protection in the athletic industry. “If I, one of Nike’s most widely marketed athletes, couldn’t secure these protections, who could?” Allyson stated when her split from Nike went public. In a published op-ed in the New York Times, Allyson continued:

> [P]regnancy is not messing up; for women it can and should be able to be part of a thriving professional athletic career, as my teammates have shown and I hope to show too. And I dream of a day when we don’t have to fight in order to try. Protection during maternity isn’t just limited to Olympians; working women all over the U.S. deserve protection when they have children. We shouldn’t have to rely on companies to do the right thing. Our families depend on it.

Nike, being the industry leader in athletic wear, has largely set the industry custom for how pregnancy clauses in athletic sponsorship contracts are enforced. It is only recently, due to negative press and pushback from sponsored athletes, that Nike has backpedaled on its strict enforcement of pregnancy clauses, with other athletic sponsors quickly following Nike’s lead to avoid similar public reproach.

The changes have come after a year of scandals for Nike relating to women’s issues. A year before Allyson’s letter was published by the New York Times, the Times also reported complaints from female Nike employees of being harassed, marginalized, and thwarted in their careers at the company, based on interviews with more than fifty current and former employees. Several male Nike executives

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130 Id. at 169.
132 Id.
133 Felix, supra note 121.
134 Id.
were ousted amid complaints of inappropriate behavior and the resulting investigation.\(^{137}\)

Thanks to the public outcry following Nike’s disputes with the female track stars, Nike has since implemented a string of corporate reforms, including changes to its maternity policies for athletes.\(^{138}\) But note that it took the combined efforts of nearly half a dozen of America’s best track athletes and a coinciding slew of harassment scandals to make a monolithic company like Nike capitulate. There is still no guarantee that other athletic sponsors will follow suit.

**B. When It Does Work**

Not all athletic organizations have failed to adequately account for pregnancy in their athletes. In fact, the Women’s National Basketball Association (WNBA) has, since its inception, offered the best maternity benefits to its athletes above all other sports organizations. Until 2020, WNBA players earned only about half their salaries while taking maternity leave—salaries that were about $75,000 on average to begin with.\(^{139}\) But even this, in the world of sports, was considered a progressive maternity policy.

The WNBA’s most recent collective bargaining agreement, which was ratified in 2020, has become the gold standard for how sport leagues deal with pregnancy in athletes.\(^{140}\) Under a Standard Player Contract, league members will receive their full base salary while on maternity leave, but shall not be eligible to receive any merit bonuses.\(^{141}\) However, it is up to each player to individually negotiate the length of her leave with her organization.\(^ {142}\) Players will also continue to receive the medical benefits “until the later of the end of the [s]eason in which such contract was terminated, or three months after the birth of her child.”\(^{143}\)

The WNBA has also agreed to include childcare assistance as part of its benefits package for players.\(^ {144}\) During the season, players with children under

\(^{137}\) *Id.*; Draper, *supra* note 135.

\(^{138}\) *See* Draper, *supra* note 135.


\(^{141}\) WOMEN’S NATIONAL BASKETBALL ASSOCIATION COLLECTIVE BARGAINING AGREEMENT, *supra* note 140, at 91–92 (Article X, Section 2(a)).


\(^{143}\) WOMEN’S NATIONAL BASKETBALL ASSOCIATION COLLECTIVE BARGAINING AGREEMENT, *supra* note 140, at 92 (Article X, Section 2(b)).

\(^{144}\) *Id.* at 96 (Article X, Section 7).
thirteen can receive up to $5,000 a year for childcare, and will have the option to choose between a housing stipend or living in housing arrangements provided by the team. Childcare stipends are available only upon request by the player, but are limited to necessities, and players will be required to submit itemized receipts to prove what the money is used for. A small number of elite, veteran athletes who have played eight or more seasons can be reimbursed up to $20,000 per year for costs directly related to adoption, surrogacy, egg freezing, or other fertility treatments, for which many have lauded as being inclusive of LGBTQ athletes. Per player, the amount is capped at a total of $60,000. Furthermore, the WNBA will now provide accommodations for nursing mothers upon player request. Compared to other industries, both in sports and beyond, this is a monumentally progressive maternity policy.

Of course, no contract comes without negotiation from both sides of the table. In the past, many WNBA players have had to supplement their income in the offseason by playing overseas, risking injuries and restraining their ability to play throughout the year. As a result, players would sometimes miss training camp or early games of the season due to overlapping schedules between the WNBA and foreign basketball leagues. By raising salaries and increasing player benefits, the WNBA aims to incentivize players to remain in the United States throughout the year and commit themselves to the full WNBA season. In return, however, the players have agreed to more stringent game attendance policies and harsher fines for missing training camp and season games.

This is all part of a larger effort by the WNBA to expand its organization and operations in the wake of recent and fast-growing popularity of women’s sports. Revenue from major women’s sports is projected to cross the $1 billion threshold in 2024, marking a threefold spike from just three years ago.

Providing maternity benefits to female athletes is no longer a luxury for sports organizations, but a necessity. Today, some of the most recognizable athletes in the world are parents, and an increasing number of players—both male and

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145 Id. at 96, 98 (Article X, Section 7 & Article XI Section 1(a)).
146 See Furman, supra note 142.
148 WOMEN’S NATIONAL BASKETBALL ASSOCIATION COLLECTIVE BARGAINING AGREEMENT, supra note 140, at 96 (Article X, Section 8).
149 Id. at 97 (Article X, Section 9).
151 Id.; WOMEN’S NATIONAL BASKETBALL ASSOCIATION COLLECTIVE BARGAINING AGREEMENT, supra note 140, at 96 (Article XIV, Section 7 and 8).
female—are demanding benefits in their athletic contracts that include maternal and paternal guarantees. A league that supports parenthood is, thus, a league that can retain and develop its top talent.

VII. ATHLETIC ABILITY IN PREGNANT WOMEN

The growing understanding that female athletes can still play at an elite level after pregnancy has helped shake the idea that motherhood comes at the cost of one’s career, sponsorships, and endorsements. Misinformation regarding pregnant women and pregnancy itself is rampant. Such rumors are particularly heightened for female athletes and the effect of exercise during pregnancy. One of the most common myths about exercising while pregnant is its effect on fertility and the likelihood of miscarriage. Proper research on the effects of pregnancy in elite female athletes is sorely lacking, and many athletic organizations have sparse guidelines, if any, for athletes that become pregnant.

The most recent and in-depth clinical study on the relationship between pregnancy and physical performance in elite female athletes was published in 2019, headed by Dr. Jorunn Sundgot-Borgen, a professor at the Norwegian School of Sport Sciences and former consultant for the International Olympic Committee (IOC). The study focused on elite female athletes who were competing at the international level, including Olympians.

The study found that there were no differences in fertility or miscarriage numbers between elite athletes and women of normal activity (“the control group”) Nor was there any increased risk of complications during pregnancy and giving birth, preterm birth, or low birth weight in infants as a result of their mothers being elite athletes. Most athletes were able to return to their regular training schedules within six weeks after giving birth.

About twelve percent of the athletes suffered from stress fractures post-partum, although the study notes that these fractures were not conclusively attributable to pregnancy. Most athletes reported that their performance level was the same or better post-partum, compared to a six-month period prior to their

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156 Sundgot-Borgen et al., supra note 154, at 1–2.
157 Id. at 8.
158 Id.
159 Id. at 5–6.
160 See id. at 5.
pregnancy, although a quarter of the athletic group reported a decrease in performance.\(^{161}\)

There is also a prevailing idea that after female athletes give birth and become parents, they may lose interest in the sport, or their level of performance will suffer.\(^{162}\) The idea that parenthood translates to a dip in playing ability disproportionately affects female athletes compared to male athletes, with new mothers often being grilled by reporters on how they balance their careers and parenthood.\(^{163}\) Any subsequent mistakes or lackluster performance is then blamed on the athlete having a child, while male athletes rarely face the same scrutiny when they enter fatherhood.\(^{164}\)

Training methods for female athletes during pregnancy and after giving birth are also sorely lacking, and largely based on guesswork. In the aforementioned clinical study by Dr. Sundgot-Borgen, the athletes reported being dissatisfied with the quality of advice given to them by their coaches, trainers, and medical providers in regard to breastfeeding, nutrient intake, and plans for training and recovery.\(^{165}\)

Both the athletic group and the control group continued their regular levels of exercise throughout most or all of their pregnancy, although the volume of their exercise was gradually scaled back as their pregnancy progressed.\(^{166}\) The athletes reported little to no high-intensity exercise in the second and third trimesters.\(^{167}\) After giving birth, most athletes returned to their previous level of fitness and training by gradually increasing the volume of exercise over a course of weeks.\(^{168}\) In fact, some data suggests that mothers are “often better athletes because they learn how to manage their time better, and they understand their bodies better.”\(^{169}\)

The premise that female athletes give up their careers after giving birth is a fallacy. Serena Williams famously won a grand slam title when she was eight weeks pregnant.\(^{170}\) Kerri Walsh Jennings won medals in beach volleyball during the London Olympic Games early in her pregnancy.\(^{171}\) Alysia Montaño ran the women’s 800 meters at nearly eight months pregnant at a national track competition.\(^{172}\)

\(^{161}\) \textit{Id.} at 6.

\(^{162}\) See, e.g., Furman, \textit{supra} note 142.


\(^{164}\) See, e.g., Furman, \textit{supra} note 142.

\(^{165}\) See Sundgot-Borgen et al., \textit{supra} note 154, at 6–7.

\(^{166}\) \textit{Id.} at 4.

\(^{167}\) \textit{Id.}

\(^{168}\) See \textit{id.} at 5.


\(^{170}\) Furman, \textit{supra} note 142.

\(^{171}\) \textit{Id.}

\(^{172}\) West, \textit{supra} note 48.
Women have proven time and time again that they can remain active and competitive at the highest levels of their sport while also being pregnant.

Female athletes should not have to defend their pregnancies against their teams or sponsors. Women should not be forced to give up motherhood because they want to be an athlete. Likewise, no woman should be forced to give up her athletic career because she started a family.

**VIII. FINAL CONSIDERATIONS – PLANNING FOR PREGNANCY IN ATHLETIC CONTRACTS**

As previously mentioned, pregnancy clauses are often disguised in the “failure to perform” language of a contract, making it difficult to prove discrimination based on sex or pregnancy. For this reason, it is important for female athletes to specifically address the possibility of pregnancy during their negotiations with teams and sponsors, and in more than one paragraph.

Pregnancy should be addressed as a possibility regardless of sexual orientation, relationship status, or use of birth control. The effect of pregnancy on an athlete’s career can vary greatly depending on whether it occurs before, during, or after the sport’s season and this should be specifically addressed in the contract in conjunction with a right to continued pay, continued employment or sponsorship, and guarantees for continued insurance coverage and medical treatment.

Both at the student level and professional level, athletic institutions should be able to answer these questions: What should the athlete do if they become pregnant? Who do they turn to for assistance? What happens to their scholarships, salaries, sponsorships, and endorsements? Can the athlete continue playing and for how far through the pregnancy? Will the organization provide health insurance, and if so, what is the coverage?

Every school needs to have a pregnancy policy, and ideally, a separate pregnancy policy for its athletic program. Schools need to be held accountable for providing support and protection for student athletes, since students generally lack the ability to negotiate their athletic agreements to the same degree that professional athletes do. Athletic directors, coaches, and trainers need to be included in this accountability. Schools should implement strategies that will improve or at least maintain the retention and graduation rates of student athletes who are also parents.

Pregnancy policies should create a safe environment that encourages student athletes to reveal rather than conceal their pregnancy. It should provide guidance to both students and athletic staff on what actions to take and comply with federal laws such as Title IX and the Pregnancy Discrimination Act. The policy should also identify neutral institutional resources outside the school’s network, such as independent health consultants, care providers, women’s centers, and psychological services. Athletes should be counseled against withdrawing from school. Ideally, the policy should be gender-inclusive, that is, provide guidance for both expecting
mothers and fathers, and be readily available to students, staff, and the campus community.

Every athletic organization should provide parental benefits to its athletes. Women’s sports organizations should have blanket pregnancy policies that act as a guideline for team organizations to follow; however, each team should also implement its own pregnancy policy that addresses more nuanced instruction between the team and its players. Professional athletes are encouraged to join player unions and participate in collective bargaining agreements with their respective leagues; however, athletes should also ensure that their individual contracts specifically address issues of pregnancy and parenthood with the organization that they play for.

Pregnancy clauses differ in every contract and need to be negotiated on a case-by-case basis between the athlete and the organization to address individual needs and concerns. Such considerations should include the athlete’s continued ability to train, play, and participate in the sport, as well as their ability to return to the sport. The contract should also address any stipulations for medical consultation and observation that the organization might require. A pregnancy clause should not be penal in nature, treating pregnancy as an injury, disability, or count as an infraction against the athlete’s character. Nor should the clause grant undue power to any coach, organization, or league over the female athlete’s body disproportionate to what a male athlete would experience, particularly over how or when the athlete may become pregnant.

Women should not fear becoming pregnant. They should not fear losing their scholarships, jobs, salaries, endorsements, or sponsorship merely for becoming pregnant. The current attitude towards pregnancy in female athletes only increases the health risks for the mother and the child, as seen in cases where the mother tries to conceal her pregnancy or continues to train without addressing the pregnancy. Athletic departments and institutions should aim to provide its athletes with a safe and supportive environment where its athletes can feel free to discuss their options in the event of a pregnancy without fearing for their futures.