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Submitted via www.regulations.gov

Dr. Miguel Cardona
Secretary of Education
U.S. Department of Education
400 Maryland Ave SW
Washington, DC 20202

Catherine E. Lhamon
Assistant Secretary, Office for Civil Rights
U.S. Department of Education
400 Maryland Ave SW
Washington, DC 20202

Re: Docket ID ED–2021–OCR–0166, RIN 1870–AA16, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

Dear Secretary Cardona and Assistant Secretary Lhamon:

We are a diverse group of advocates and experts dedicated to advancing civil rights protections and institutional resources for students and/or pregnant and parenting people. Many of the signatories are members of the Advocacy Coalition for Pregnant and Parenting Students, a recently formed national coalition aiming to advance policy changes for pregnant and parenting students in K-12 and Higher Education.

We appreciate that the U.S. Department of Education (“the Department”), for the first time since 1975, is proposing new regulations to effectuate the law’s broad and remedial purpose for pregnant and parenting students and workers in education programs and activities. At the same time, we note that the Department’s proposed changes do not reach far enough to protect against sex discrimination in education. To that end, we are pleased to submit this comment regarding the proposed Title IX regulations which detail recipients’ obligations to pregnant and parenting students, admissions’ applicants, and workers.

Section I provides a background on pregnant and parenting people’s access to equal educational opportunities. Sections II and III encompass our specific asks for pregnant students. Section IV outlines our recommendations for addressing sex-based harassment against pregnant and parenting students. Section V details our ask for broader protections for parenting students. Section VI suggests changes to the Department’s proposal regarding admissions. Section VII outlines recommendations to address the intersection of pregnancy and disability under Title IX and other relevant federal civil rights laws. Finally, section VIII outlines our recommendations for pregnant and parenting workers covered under Title IX.

I. BACKGROUND

Becoming pregnant or a parent should not derail a student’s education. Unfortunately, pregnant and parenting students are routinely stigmatized, discriminated against, and denied the resources and support they need to thrive in their educational institutions. As a result, only 51% of teenage mothers earn a high school diploma by age 22 compared to 89% of girls who do not have a child as a teen.¹ 33% of Black teen mothers and 54% of Latina teen mothers never obtain a diploma

¹ Kate Perper, Kristen Peterson, and Jennifer Manlove, *Diploma attainment among teen mothers*. Child Trends (Jan. 2010), https://www.childtrends.org/wp-content/uploads/2010/01/child_trends-2010_01_22_FS_diplomaattainment.pdf

or GED,² and fewer than 2% of all teen mothers graduate college by age 30,³ leading to decreased opportunities for continuing education and employment. Additionally, lesbian and bisexual teen girls are more likely than straight teens to become pregnant, and transgender youth are just as likely to become pregnant as cisgender youth.⁴ Despite this trend, LGBTQI+ pregnant and parenting students' experiences of intersectional discrimination and their unique needs are largely ignored by educational institutions.⁵

At the college level, almost one quarter of all undergraduate students are parents.⁶ 44% of student parents work full time while enrolled, and 23% of student parents are single parents working full time while enrolled. 40% of Black women in college are mothers, which means that Black women are more likely to be student parents than their White peers.⁷ Despite earning higher GPAs than non-parenting students,⁸ parenting college students are less likely to graduate.⁹ This is not due to personal failing, but rather a lack of institutional support and recognition of the unique barriers to college completion for parenting students.¹⁰ Parenting students often experience feeling disconnected from the larger education community and are not aware of who they can speak to when they experience discrimination because of their parenting status.¹¹

Despite these roadblocks, when educational institutions listen to pregnant and parenting students, support them, and prevent discrimination against them, these students thrive. While balancing their health, caregiving responsibilities, and educational goals is challenging, these added responsibilities often renew students' dedication to their studies.¹²

Likewise, it is critical that pregnant and parenting employees in educational programs and activities are protected from discrimination and have access to the support they need to stay employed. As the COVID-19 pandemic pushes women out of the workforce¹³ and teacher

² *Id.*

³ Cynthia Costello, *Pathways to postsecondary education for pregnant and parenting teens*. Institute for Women's Policy Research. (May 2014), <https://files.eric.ed.gov/fulltext/ED556724.pdf>

⁴ Nat'l Women's Law Ctr., *A Call to Action to Support LGBTQI Pregnant, Expectant, and Parenting Students* (March 2022), <https://nwlc.org/resource/a-call-to-action-to-support-lgbtqi-pregnant-expectant-and-parenting-students/>

⁵ *Id.*

⁶ Institute for Women's Policy and Research, *Parents in College by the Numbers*, (April 11, 2019), <https://iwpr.org/iwpr-issues/student-parent-success-initiative/parents-in-college-by-the-numbers>

⁷ *Id.*

⁸ *Id.*

⁹ Renee Ryberg, Rachel Rosenberg, Jessica Warren, *Higher Education Can Support Parenting Students and Their Children with Accessible and Equitable Services*, Child Trends (Jan. 2021), <https://www.childtrends.org/publications/higher-education-support-parenting-students-and-their-children-with-accessible-equitable-services>

¹⁰ See e.g. Barbara Gault and Lindsey Reichlin Cruse, *Access to Child Care Can Improve Student Parent Graduation Rates* (2017), Inst. for Women's Pol'y & Res. (May 2017), <https://iwpr.org/iwpr-general/access-to-child-care-can-improve-student-parent-graduation-rates>

¹¹ Generation Hope, *National Student Parent Survey Results and Recommendations* (May 2020), <https://www.generationhope.org/student-parents-report-2020>

¹² Nat'l Women's Law Ctr., *Let Her Learn: Stopping Pushout For Girls Who are Pregnant or Parenting*, 1,(2017) <https://nwlc.org/resources/stopping-school-pushout-for-girls-who-are-pregnant-or-parenting/>.

¹³ Nat'l Women's Law Ctr., *Resilient but not Recovered, After Two Years of the COVID-19 Pandemic, Women are Still Struggling*,(March 2022), <https://nwlc.org/resource/resilient-but-not-recovered-after-two-years-of-the-covid-19-crisis-women-are-still-struggling/>

shortages impact schools across the country,¹⁴ stronger protections for pregnant and parenting employees in educational settings are essential.¹⁵

The Supreme Court's recent decision in *Dobbs v. Jackson Women's Health*, 597 U.S. ___ (2022), highlights the importance and timeliness of the Department's proposed rule.¹⁶ As access to reproductive health care faces new attacks and criminalization, it is especially crucial that an individual's reproductive decisions do not dictate their educational outcomes. The U.S. Department of Education plays a critical role in advancing and enforcing the civil rights protections of pregnant and parenting students and workers.

II. SCOPE OF PROHIBITED DISCRIMINATION

A. The Final Rule Should Prohibit Discrimination Against those Perceived or Expected to be Pregnant and Expand the List of Examples of Pregnancy Related Medical Conditions.

While Title IX has always prohibited recipients from discriminating against students based on their pregnancy or pregnancy related medical condition, this type of sex-based discrimination is still a frequent occurrence.¹⁷

We strongly support the Department's proposal to prohibit educational institutions from discriminating against any person (including students and workers, and in the admissions process) based on their "current, potential, or past" pregnancy or related condition¹⁸ and **urge the Department** to include "perceived" and "expected" pregnancy or related conditions to the list. This language will better capture the ways pregnancy stigma and bias prevent equal access to educational opportunities. For example, one signatory supported a high school student who had her academic honors designation revoked simply because false rumors spread that she was pregnant and had an abortion. Students rumored or otherwise perceived to be pregnant deserve equal educational opportunities. This language will also ensure that students seeking fertility care or otherwise planning to become pregnant are not discriminated against on that basis. It will also

¹⁴ Hannah Natanson, " 'Never Seen it This Bad': America Faces Catastrophic Teacher Shortage, Washington Post, (Aug.4 2022), <https://www.washingtonpost.com/education/2022/08/03/school-teacher-shortage/>

¹⁵ Hannah Natanson, " 'Never Seen it This Bad': America Faces Catastrophic Teacher Shortage, Washington Post, (Aug.4 2022), <https://www.washingtonpost.com/education/2022/08/03/school-teacher-shortage/>

¹⁶ *Dobbs v. Jackson Women's Health*, 597 U.S. ___ (2022).

¹⁷ See e.g., *Salt Lake Community College*, No. 08-22-2021, Office for Civ. Rts. Ltr. of Findings (U.S. Dep't. Education [June 14, 2022]), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/08222021-a.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term= (finding college violated pregnant student's rights under Title IX and Section 504 of the Rehabilitation Act); *Cal St. Univ. East Bay*, No. 09-18-2245, Office for Civ. Rts. Ltr. of Findings (U.S. Dep't. Education [Aug. 1, 2018]), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09182245-a.pdf> (pregnant student denied accommodations and excused absences); *Fresno City College*, No. 09-18-2013, Office for Civ. Rts. Ltr. of Findings (U.S. Dep't. Education [Apr. 10, 2018]), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09182013-a.pdf> (student denied pregnancy related absences); *Conley v. Northwest Florida State Coll.*, 145 F. Supp.3d 1073 (N.D. Fla. 2015)(denying recipient's motion to dismiss student's Title IX claim alleging pregnancy discrimination when professor urged pregnant student to not participate in paramedic program)

¹⁸ 87 Fed. Reg. at 41568 (proposed 34 C.F.R. § 106.2) ("pregnancy or related conditions"), 41571 (proposed 34 C.F.R. §§ 106.21(c)(2)(ii), 106.40(b)(1)), 41579 (proposed 34 C.F.R. § 106.57(b)).

ensure that women and girls and others assigned female at birth are not denied opportunities in programs because they might become pregnant.

We also support the proposed rule explicitly adding “lactation” as a related condition alongside childbirth and termination of pregnancy.¹⁹ As detailed in section III(C) below, this addition is crucial to ensure lactating students need not choose between their health, the health of their children and their education.

We urge the Department to clarify in the regulations that’s its enumeration of pregnancy-related conditions is non-exhaustive and that the term “pregnancy-related conditions” also includes mental and physical conditions including, but not limited to gestational diabetes, preeclampsia, mastitis, hyperemesis gravidarum, “morning sickness,” fatigue, dehydration, and postpartum depression. Additionally, the Department should clarify that a pregnancy related condition need not qualify as an ADA disability in order to fit this definition of a protected pregnancy related medical condition.

B. The Department Should Require Recipients to Publicize the Scope of their Obligations and Protect Students’ Privacy.

We support the Department’s proposal to explicitly require recipients to train employees, including Title IX Coordinators, on their obligations to pregnant and parenting students.²⁰

We urge the Department to require recipients to specifically state in their published notice of nondiscrimination²¹ that sex discrimination includes discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, gender identity, and parental, family, caregiver, or marital status. These additions should be required to be made in the notice because students may not know all that “sex discrimination” covers.²²

The proposed rules would also require employees who know of a student’s pregnancy or related condition to give them the Title IX coordinator’s contact information²³ and would require Title IX coordinators to then notify the student of their rights if the student or someone with the legal right to act on behalf of the student notifies the Title IX coordinator of the student’s pregnancy or related condition.²⁴ We appreciate the intent behind these requirements but **ask the Department** to instruct educational institutions in the final regulations and in supplemental guidance on how to protect student privacy to ensure that, in states where abortion is criminalized, school records, including school health records, are not used to support abortion-related prosecutions through

¹⁹ 87 Fed. Reg. at 41568 (proposed 34 C.F.R. § 106.2) (“pregnancy or related conditions”).

²⁰ 87 Fed. Reg. at 41570 (proposed 34 C.F.R. §106.8(d))

²¹ 87 Fed. Reg. at 41570 (proposed 34 C.F.R. §106.8(c))

²² See, Nat’l Coal. for Women & Girls in Educ., Title IX at 40: Working to Ensure Gender Equity in Education 55 (2012), <http://www.ncwge.org/TitleIX40/TitleIX-print.pdf> [<https://perma.cc/Q3MD-W56W>]; Mangel, *supra* note 7 (“[T]he pregnant and parenting students aren’t the only ones empowered by this information ... teachers, nurses, social service providers and others are always shocked to hear that the law actually is in place to protect the pregnant and parenting student.”). 20 Mary Ann Mason, Opinion, Title IX and Babies: The New Frontier?, *Chron. Higher Educ.* (Nov. 29, 2012), <https://www.chronicle.com/article/Title-IXBabies-The-New/135936> [<https://perma.cc/5REJ-HMTW>].

²³ 87 Fed. Reg. at 41571 (proposed 34 C.F.R § 106.40(b)(2)).

²⁴ 87 Fed. Reg. at 41571-72 (proposed 34 C.F.R. § 106.40(b)(3)(i)).

documentation that students have been pregnant in the past but are not currently pregnant.²⁵ Further, **we urge the Department** to instruct and remind recipients that it is a violation of Title IX to discipline or refer students to law enforcement based on termination of pregnancy, contraceptive use, or other reproductive health decisions.

III. STUDENT ACCESS TO EDUCATION PROGRAMS AND ACTIVITIES

A. The Department Should Protect Pregnant Students from Being Forced into Inferior Alternative Programs.

Despite the Department's long standing requirement that pregnant students can only be placed in separate educational programs or activities if their participation in such programs or activities is voluntary,²⁶ pregnant and parenting students, particularly those in high school, are routinely forced, coerced or pressured into inferior alternative education programs. Additionally, there is currently no repository of information on which districts or schools have separate programs or services for pregnant and parenting students or the quality of those offerings.²⁷ As such, **we urge the Department** to explicitly prohibit educational institutions from requiring pregnant or parenting²⁸ students to participate in separate programs and to specify that such programs must be substantially equal "in purpose, scope, and quality" to those offered to students who are not pregnant or parenting and don't have a pregnancy related condition.

We also support the proposed rule prohibiting educational institutions from requiring students who are pregnant or have a related condition to provide certification from their healthcare provider that they can physically participate in a program or activity, unless all students are required to provide such certification and such certification is not used as the basis for discrimination.²⁹ This is especially important for pregnant students who participate in physically intensive extracurricular activities, or are placed in laboratories or medical facilities as part of their curriculum. In these instances, recipients tend to make blanket assumptions about pregnant students' abilities and prohibit them from participating in such programs all together.³⁰ Finally, **we support** the proposed change allowing any healthcare provider (not just a physician) to provide certification,³¹ as this recognizes that not all students have easy access to a physician.

B. The Department Should Ensure Medically Necessary Leave Does Not Restrict Students' Access to Benefits and Ensure Reasonable Modifications Are Accessible.

²⁵ See e.g., *Bonamici Leads 60 Colleagues in Calling for Pregnant Students to be Protected Under Title IX*, Press Release, (July 2022), <https://bonamici.house.gov/media/press-releases/bonamici-leads-60-colleagues-calling-pregnant-students-be-protected-under-title>

²⁶ 87 Fed. Reg. at 41571 (proposed 34 C.F.R. § 106.40(b)(1)).

²⁷ Nat'l Women's Law Ctr. Mandatory Civil Rights Data Collection Public Comment, Docket No. ED-2021-SCC-0158, at 86 Fed. Reg. 70831, (Feb. 2022) at 32, <https://nwlrc.org/wp-content/uploads/2022/02/CRDC-comment-2.11.22-vF.pdf>

²⁸ The proposed rule only mentions pregnancy and related conditions despite the reality that parenting students are also pushed into inferior alternative programs.

²⁹ 87 Fed. Reg. at 41572 (proposed 34 C.F.R. § 106.40(b)(6)).

³⁰ See, e.g. *Conley v. Northwest Florida State Coll.*, 145 F. Supp.3d 1073 (N.D. Fla. 2015)

³¹ 87 Fed. Reg. at 41572 (proposed C.F.R. § 106.40(b)(6))

Punitive absence policies push pregnant and parenting students out of school by disciplining them for missing class for medical appointments, their own medical recovery and needs, when their children are ill, or if child care arrangements fall through. For example, in a 2017 survey, high school girls who are pregnant or parenting (54%) were more likely than girls overall (25%) to report they had missed 15 days or more of school in a year.³² When individual schools or instructors have the discretion to create their own attendance policies, it is likely that pregnant and parenting students' needs will not be considered. Pregnant and parenting students should not have to choose between their health and their education.

We support the Department providing new regulatory clarity regarding reasonable modifications, voluntary leave absence, and lactation spaces (as discussed further below), but we urge the Department to clarify that the obligation to provide reasonable modifications to address pregnancy or related conditions; to allow a student affected by pregnancy or related conditions to take a voluntary leave of absence; and to ensure the availability of a lactation space are obligations of the *recipient*, not just personal obligations of the Title IX coordinator. The proposed regulations specifically charge the Title IX coordinator with these obligations,³³ which may lead recipients to assert that no other agent or employee of the recipient has a responsibility to comply with these provisions or that the recipient is not responsible for any failure of the Title IX coordinator to meet these obligations.

We support the proposed rule requiring educational institutions to allow students who are pregnant or have a related condition to take a voluntary leave of absence for as long as deemed medically necessary by their healthcare provider or for as long as the school's policy allows—whichever is longer—and to reinstate students when they return to their prior academic status and, as practicable, extracurricular status.³⁴ In particular, we support the proposed change allowing any healthcare provider (not just a physician) to determine how much leave is medically necessary, as this recognizes that not all students have easy access to a physician or that they may receive healthcare from another type of provider. However, the proposed rule does not address the reality that many students in higher education who take a medically necessary “leave” are forced to withdraw or deregister during the leave, which in turn results in ineligibility for critical benefits like housing, financial aid or scholarships, and healthcare. For this reason, **we urge the Department** to require recipients to provide medically-necessary leave without jeopardizing a student's access to benefits. Recipients can achieve this by ensuring the continuation of the student's status and benefits coverage during medically necessary leave, and preserving their scholarships.

The proposed rules would also require educational institutions to “promptly” make “voluntary and reasonable modifications”³⁵ to their policies, practices, or procedures because of a student's pregnancy or related condition, unless a modification is “so significant” that it “alters the essential

³² Nat'l Women's Law Ctr., *Let Her Learn: Stopping Pushout For Girls Who are Pregnant or Parenting*, 7,(2017) <https://nwc.org/resources/stopping-school-pushout-for-girls-who-are-pregnant-or-parenting/>.

³³ 87 Fed. Reg. at 41571 (proposed 34 C.F.R. § 106.40(b)(3)(ii), (iii), and(iv))

³⁴ 87 Fed. Reg. at 41571 (proposed 34 C.F.R. § 106.40(b)(3)), 41572 (proposed 34 C.F.R. § 106.40(b)(3)(ii)).

³⁵ 87 Fed. Reg. at 41571 (proposed 34 C.F.R. § 106.40(b)(3)), 41572 (proposed 34 C.F.R. § 106.40(b)(3)(ii)).

nature” of the school’s program or activity.³⁶ We appreciate the requirement that the modifications must be voluntary, but we note that as written the language of the proposed rules is somewhat vague as to what is meant by the term and whether it refers to the voluntary acceptance of the modification by the student or the voluntary provision of the modification by the recipient; therefore, **we encourage the Department** to explain what is meant by “voluntary” by explicitly stating in the regulations that a recipient shall not force a student to accept a modification that the student does not want or need. The proposed rule also would create an arbitrary and harmful distinction between medically necessary “leave” (e.g., for recovery from pregnancy)—which would have to be granted if requested—and short “breaks during class” (e.g., for lactation breaks) or “intermittent absences” (e.g. for abortion or recovery therefrom)—which would be classified as “reasonable modifications” and could be approved or denied subject to a Title IX coordinator’s discretionary determination that providing such breaks amounts to a “fundamental alteration” of the educational program.

Therefore, **we urge the Department** to require educational institutions to presume that medically necessary absences (e.g., for prenatal care, lactation breaks, abortion care) are inherently “reasonable” modifications and must be granted. Additionally, the Department should clarify that if a modification turns out to be ineffective or “fundamentally alters” the program or activity, then the educational institution must engage in a good faith, interactive dialogue to identify other modifications that would meet the student’s needs.

The proposed rule does not clarify whether recipients are allowed to require medical documentation in order to grant requests for reasonable modifications.³⁷ **We urge the Department** to explicitly state in the regulations that medical documentation is very frequently—indeed, typically—unnecessary. Forcing students to get medical documentation for reasonable modifications, particularly very routine or obvious modifications such as bathroom breaks or a larger desk, is unnecessarily burdensome for students and is often used as a tool for harassment or retaliation.

We also ask the Department to add more specific examples of modifications, including access to accessible parking; educational support services such as tutoring, supplemental instruction, academic counseling, and homework assistance to address medically necessary absences; and the modifications listed in sections V(C) and VIII(A) pertaining to parenting and caregiving students and workers.

As detailed in VIII(A) below, **the Department should** extend the same affirmative rights to modifications to workers who are pregnant or have a related condition, or are parenting or caregiving, instead of making such workers’ rights dependent on what modifications are provided to workers with temporary disabilities. After all, discrimination based on pregnancy or a related condition is a form of sex discrimination under Title IX, and affected students and employees alike should have affirmative rights under Title IX that are independent of other civil rights laws. Finally, as mentioned in section V(C) below, the Department should make similar modifications available

³⁶ 87 Fed. Reg. at 41572 (proposed 34 C.F.R. § 106.40(b)(4)).

³⁷ 87 Fed. Reg. at 41525-41526

to all parenting and caregiving students and workers (not just those who are pregnant or have a related condition) for as long as they are caring for a minor child or disabled adult who is sick.³⁸

C. The Final Rule Should Ensure Access to a Functional Lactation Space.

We support the proposed rules requiring educational institutions to give lactating students and workers reasonable breaks and a clean, private non-bathroom space for expressing breastmilk or feedings. Without adequate space and time to pump, lactating students are forced to choose between the health of themselves and their child, and their education. Pumping breastmilk can take 15 to 40 minutes and requires specialized equipment and supplies.³⁹ Without expressing breastmilk, lactating students may experience pain and be at risk of health complications such as clogged ducts and mastitis (inflammation of breast tissue that sometimes involves infection).⁴⁰ An inability to pump also leads to a reduction in milk supply, making it harder to continue breastfeeding.⁴¹ Because breastmilk can be used to feed a child, a public restroom is not an appropriate space for people to breastfeed, just as one would not expect an adult to eat in a public restroom. A lack of accommodations frustrates the ability of lactating persons to provide nutrition for children.

We urge the Department to clarify that lactation spaces must be equipped with a chair, flat surface, and access to an electrical outlet. There should also be nearby access to running water and a refrigerator to store expressed milk. The Department should also explicitly state that lactation spaces must be in reasonable proximity to the student's specific place of study or worker's specific place of work. These are the bare minimum features of a lactation space for it to be functional. What's more, nearly all recipients under Title IX are already required to provide a lactation space to certain employees under the Fair Labor Standards Act. As such, the cost of implementing these spaces is minimal.⁴²

The Department should also clarify in the regulations and in supplemental guidance that if multiple lactating students or workers need access to a lactation space at the same time, recipients should discuss various options with all parties to create a solution that meets everyone's needs. Such options can include using a signage or scheduling system, or creating a multi-person space by placing partitions or screens in the space.⁴³

Finally, **we urge the Department** to explicitly state in the regulations that students and workers still have a right to express milk or breastfeed in places other than designated lactation spaces, if they wish. For example, it may be easier for a professor to express milk in their office, or for a

³⁸ Under the proposed rules, the only parents entitled to modifications would be those who are pregnant, lactating, or recovering from childbirth. Our recommendation is consistent with the proposed rules' definition of "parental status," which applies to all parents of minor children and disabled adults. See 87 Fed. Reg. at 41568 (proposed 34 C.F.R. § 106.2).

³⁹ U.S. Dep't. of Agriculture, Learning to Pump and Hand Express Milk, <https://wicbreastfeeding.fns.usda.gov/learning-pump-and-hand-express-milk>

⁴⁰ Nat'l Women's Law Ctr., *Breastfeeding FAQ* (2016), <https://nwlc.org/resource/faq-breastfeeding-students/>.

⁴¹ *Id.*

⁴² 29 U.S.C. 207(r)(1).

⁴³ NYC FAQ: Lactation Accommodations and Model Policy NYC Admin. Code § 8-107(22) at #21, <https://www1.nyc.gov/site/cchr/law/lactation-faqs.page>

student to nurse at a child care facility. Additionally, fully portable breast pumps allow lactating persons to easily express milk in public spaces. Such a regulation would align with laws in all 50 states, the District of Columbia, Puerto Rico, and the Virgin Islands that allow lactating people to breastfeed in any public or private place they are otherwise allowed to be.⁴⁴ This language gives agency to the lactating person and challenges outdated messages that it is shameful or indecent to express breastmilk in public.⁴⁵ We also suggest the Department adopt more gender-neutral language, such as “lactating person,” “express milk,” and “nursing.”

IV. HARASSMENT OF PREGNANT AND PARENTING STUDENTS

Becoming pregnant or a parent can subject students, particularly girls and women, to sexual harassment and unwanted sexual attention, as well as other sex-based harassment based on their pregnancy or related conditions or on their status as parent. Girls who are pregnant or parenting report feeling stigmatized and treated like an outcast in both school and society at large. For example, one young girl in a 2017 focus group explained that her classmates think that “just because you [have] a baby that you are going to sleep with them.”⁴⁶ Not surprisingly, girls who are pregnant or parenting ranked protection from bullying and harassment among the most important things that schools could do to help them.⁴⁷

We support the proposed rules stating that recipients must address harassment based on pregnancy or related conditions as a form of sex-based harassment.⁴⁸ In addition, **we ask the Department** to instruct educational institutions in the final regulations and in supplemental guidance on how to protect student privacy to ensure that school records regarding harassment based on pregnancy or related conditions (including termination of pregnancy) are not used to support abortion-related prosecutions in states where abortion and other reproductive healthcare is criminalized. **The Department should** also clarify how the Supreme Court’s decision in *Dobbs* interacts with other privacy laws affecting students, like the Family Educational Rights and Privacy Act (FERPA) and the Health Insurance Portability and Accountability Act (HIPAA) and clarify that a student is protected by FERPA if they disclose an abortion to an academic counselor or mental health care provider. Given the growing number of state laws criminalizing and targeting abortion, the **Department should** clarify that Title IX’s preemption⁴⁹ extends to these state laws, and as such, even in states where abortion is criminalized, recipients must prohibit abortion related discrimination and cannot be subjected to criminalization for doing so. Furthermore, as explained in section V(A) below, **we urge the Department** to include harassment based on parental, family,

⁴⁴ National Conference of State Legislatures, *State Breastfeeding Laws*, <https://www.ncsl.org/research/health/breastfeeding-state-laws.aspx>

⁴⁵ The Department’s language in the preamble that lactating persons should not have to “risk exposing themselves” to their peers (See 87 Fed. Reg. at 41522 and 41527) unintentionally suggests lactating in public is indecent or shameful. Lactating persons deserve to express milk or nurse wherever they are comfortable and recipients should ensure they have access to a functional lactation space. See also, NYC FAQ #23 <https://www1.nyc.gov/site/cchr/law/lactation-faqs.page>

⁴⁶ Nat’l Women’s Law Ctr., *Let Her Learn: Stopping Pushout For Girls Who are Pregnant or Parenting*, at 11, (2017) <https://nwlc.org/resources/stopping-school-pushout-for-girls-who-are-pregnant-or-parenting/>.

⁴⁷ *Id.* at 4.

⁴⁸ 87 Fed. Reg. at 41572 (proposed 34 C.F.R. §§ 106.40(b)(3)(i)(F)).

⁴⁹ Proposed 34 C.F.R. § 106.6(b)

caregiver, or marital status as a type of sex-based harassment and to require recipients to address it as such.

V. PARENTAL, FAMILY, OR MARITAL STATUS

Parenting and caregiving students⁵⁰ face unique barriers to accessing and completing their education. Becoming a parent is a primary reason young girls do not complete high school⁵¹ and women account for 72% of students who are parents living with their children.⁵² 86.4% of young Black women ages 18 to 24 who are parents are caring for the children on their own⁵³ and only 11.3% of young women ages 18 to 24 who are parents are in school, compared to 48.9% of young women ages 18 to 24 who are not parents.⁵⁴

Students are caught in a double bind: on the one hand, in a growing number of states, lawmakers are determined to deny them access to reproductive healthcare. On the other hand, if they become pregnant and decide to parent, they are ostracized and pushed out of the classroom by an unsupportive school community. Students deserve an education system that supports them instead of punishing them for their reproductive decisions.

Further, student parents are doubly impacted by the high cost of child care and a lack of accessible options. According to a 2017 survey, 52% of pregnant or parenting students said that not having access to child care was a barrier to going to school and 76% said that schools would be better for them if they provided child care.⁵⁵ College campuses often lack on-campus child care, child-friendly on-campus housing, parenting student support groups, and other indicators of a family-friendly campus.⁵⁶ Studies have shown that high-quality child care access can triple the chance of on-time graduation for a student parent.⁵⁷

⁵⁰ See, e.g., Alisha Haridasani, *No Time to be a Child*, New York Times (Sept. 25, 2021), <https://www.nytimes.com/2021/09/25/us/young-girls-caregiving-covid.html>

⁵¹ Nat'l Women's Law Ctr., *Let Her Learn: Stopping Pushout For Girls Who are Pregnant or Parenting*, at 1,(2017) <https://nwlc.org/resources/stopping-school-pushout-for-girls-who-are-pregnant-or-parenting/>.

⁵²Parents" are those with their own kids living in their household. Data is specific to women ages 18 and older. National Women's Law Center calculations based on August 2021-May 2022 monthly Current Population Survey (CPS) microdata samples, accessed through Sarah Flood, Miriam King, Renae Rodgers, Steven Ruggles, J. Robert Warren, and Michael Westberry, Integrated Public Use Microdata Series Current Population Survey (IPUMS CPS): Version 9.0 (Minneapolis: University of Minnesota, 2021) <https://doi.org/10.18128/D030.V8.0>.

⁵³ NWLC calculations using February 2020-April 2022 monthly Current Population Survey (CPS) microdata samples, accessed through Sarah Flood, Miriam King, Renae Rodgers, Steven Ruggles, J. Robert Warren, and Michael Westberry, Integrated Public Use Microdata Series Current Population Survey (IPUMS CPS): Version 9.0 (Minneapolis: University of Minnesota, 2021) <https://doi.org/10.18128/D030.V8.0>. <https://doi.org/10.18128/D030.V8.0>;Caring for children on their own means Black women who indicated the age of their own youngest child in the household is under 18 and indicated they are married but their spouse is not present, separated, divorced, widowed, or never married/single.

⁵⁴ *Id.* "In school" means they are in high school or college either part time or full time. "Parents" are those with their own kids living in their household.

⁵⁵ Nat'l Women's Law Ctr., *Let Her Learn: Stopping Pushout For Girls Who are Pregnant or Parenting*, at 8,(2017) <https://nwlc.org/resources/stopping-school-pushout-for-girls-who-are-pregnant-or-parenting/>.

⁵⁶ Generation Hope, *National Student Parent Survey Results and Recommendations* (May 2020), <https://www.generationhope.org/student-parents-report-2020>

⁵⁷ Barbara Gault and Lindsey Reichlin Cruse, *Access to Child Care Can Improve Student Parent Graduation Rates*, Inst. for Women's Pol'y & Res. (2017), <https://iwpr.org/iwpr-general/access-to-child-care-can-improve-student-parent-graduation-rates>

For these reasons, we urge the Department to implement the following changes to the Title IX rule as they pertain to parenting students.

A. The Final Rule Should Recognize That Discrimination on the Basis of Parental, Familial, and Caregiver Status Will Often Constitute Discrimination on the Basis of Sex.

Both the current and proposed rules do not view discrimination based *solely* on parental, family, or marital status as a type of sex discrimination.⁵⁸ Rather, under the existing regulations it is only unlawful to adopt a policy disadvantaging students, workers or applicants based on their parental, family or marital status if the policy “treats persons differently on the basis of sex.”⁵⁹ This narrow prohibition is incomplete and means that, for example, school administrators believe that they can discriminate against parenting students (versus non-parenting students) or non-birthing parents (versus birthing parents), as long as they do so equally across genders, despite the fact that such discrimination is likely to have a disparate impact on the basis of sex and are often based on sex stereotypes (such as a stereotypes that women or girls who are mothers are likely to neglect their education or that men or boys should not be responsible for providing care to children). As written, the proposed rule would also exclude from protection other students who may be harmed by gender norms related to caregiving, including expectant non-birthing parents, students who are perceived to be parents, and caregivers who are not parents.

The proposed rules prohibition on sex discrimination does not need not be this narrow. In *Tingley-Kelley v. Trustees of Univ. of Pennsylvania*, 677 F. Supp. 2d 764 (E.D. Pa. 2010), the District Court clarified that it is unlawful sex discrimination to use sex-based stereotypes to deny equal education opportunities because of a student’s marital or parental status, regardless of how the recipient treats parenting students of a different sex.⁶⁰ It is also well established that parenting students experience discrimination that relies on outdated sex stereotypes about caregiving, such as the idea that women must be responsible for home and child care. Additionally, the EEOC has long found that harmful gender stereotypes relating to family responsibilities violate Title VII.⁶¹ Thus, since the Department proposes to include reliance on “sex stereotypes” as unlawful sex-based discrimination under Title IX, the regulations should explicitly include discrimination based on parenting and caregiving as prohibited sex discrimination.

In addition, some signatories have witnessed school staff *already* deterred from supporting young mothers because they fear that accommodating birthing mothers without similarly accommodating fathers and other non-birthing parents violates Title IX and, consequently, decide to not accommodate any student parents at all. Therefore, **we urge the Department** to make clear that providing reasonable modifications and supports to students affected by pregnancy and

⁵⁸ 87 Fed. Reg. at 41571 (proposed 34 C.F.R. § 106.10).

⁵⁹ 87 Fed. Reg. at 41571 (proposed 34 C.F.R. §§ 106.21(c)(2)(i), 106.40(a), 41579 (proposed 34 C.F.R. § 106.57(a)(1))).

⁶⁰ *Tingley-Kelley v. Trustees of Univ. of Pennsylvania*, 677 F. Supp. 2d 764 (E.D. Pa. 2010)

⁶¹ See, e.g. U.S. Equal Employment Opportunity Commission, Unlawful Disparate Treatment of Workers with Caregiving Responsibilities, (May 23, 2007), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-unlawful-disparate-treatment-workers-caregiving-responsibilities#sexbased>; U.S. Equal Employment Opportunity Commission, The Covid-19 Pandemic and Caregiver Discrimination under Federal Employment Discrimination Laws, (March 14, 2022), <https://www.eeoc.gov/laws/guidance/covid-19-pandemic-and-caregiver-discrimination-under-federal-employment>

related conditions or students with caregiving responsibilities does not constitute discrimination against those not so affected or without such responsibilities.

For all of these reasons, **we also urge the Department** to

- expressly state that educational institutions may not discriminate based on a person's (including students, trainees⁶², workers, and applicants) "current, potential, *perceived*, *expected*, or past parental, family, marital, or *caregiver* status" (full stop);
- add "the domestic partner of a child's parent" to the definition of parental status;
- raise the age of the person receiving care from 18 to 21 in defining "parental status";
- define "family status," as existing regulations and guidelines do not provide any details and ensure such definition is inclusive of non-traditional families including LGBTQI+ families;⁶³
- explicitly state that discrimination based on parental or caregiving status is prohibited throughout the student's participation in the recipient's educational program or activity and not just immediately following the birth or adoption of their child; and
- affirmatively acknowledge that supportive services for pregnant, parenting, and caregiving students are lawful and encouraged.

B. Upon Notice of a Student's Parental, Family, Marital, or Caregiving Status, the Department Should Require Recipients to Inform Such Students of Their Title IX Rights.

We urge the Department to add that upon notice of a student's parental, family, marital or caregiving status, recipients must promptly take steps to inform such students of their rights and provide these students with the Title IX Coordinator's contact information.

C. The Final Rule Should Grant Parenting and Caregiving Students Affirmative Access to Leaves of Absence and Reasonable Modifications.

Again, punitive absence policies push pregnant and parenting students out of school by disciplining them for missing class for medical appointments, their own medical recovery and needs, when their children are ill, or if child care arrangements fall through.

We urge the Department to explicitly state that parenting students also have an affirmative right to reasonable modifications and medical leave. Medical leave should be granted as long as medically necessary for birthing parents or to care for dependents. Parenting and caregiving students should also have access to reasonable modifications including time off, without financial or academic penalty, for parent/teacher conferences, and family and child care emergencies. Such leave is essential to ensuring that attendance policies do not have a disparate impact on

⁶² Jessica Lee, Joan C. Williams, and Su Li, *Parents in the Pipeline: Retaining Postdoctoral Researchers with Families*, The Pregnant Scholar (2017), <https://thepregnantscholar.org/wp-content/uploads/Parents-in-the-Pipeline-Postdoc-Report.pdf>

⁶³ For e.g., "family member" can be defined as "either (i) an individual related to the student by blood, marriage, adoption, foster care or legal custody, including an individual related to the student's spouse; (ii) an individual whose close association with the student is equivalent of a family relationship; or (iii) an individual who relies on the student for care." See also, Cynthia Thomas Calvert and Jessica Lee, *Caring Locally for Caregivers: How State and Local Laws Protect Family Caregivers from Discrimination at Work*, AARP Public Policy Institute (Feb.2021), at 8, https://worklifeflaw.org/wp-content/uploads/2021/02/Caring_Locally_for_Caregivers.pdf

student parents who are playing an active caregiving role—typically women and girls, as well as other parents who give care outside of outdated gender stereotypes.

Additionally, **we urge the Department** to clarify that reasonable modifications for parenting and caregiving students should include, provided directly or by active referral, whichever is reasonable, the following supports:

- Case management;
- Accessible parking and transportation;
- Preventive and primary health services including prenatal and postnatal care, maternal and child health, family planning, substance use services, mental health services, and pediatric care;
- Maternity and baby clothing, baby food and related items (including formula and breast pumps), baby furniture, diapers, wipes, strollers, car seats, and similar items to assist students in meeting the material needs of their children;
- Assistance in accessing affordable, quality, and accessible child care; and
- Assistance in enrolling in public and private health insurance, income security, disability assistance, nutrition assistance, housing, legal aid, and other programs for which students or their children may be eligible.

This is a non-exhaustive list. Without these substantive additions, the protections and supports for parenting students are unnecessarily narrow under Title IX.

VI. ADMISSIONS

We support the Department’s proposal to explicitly prohibit recipients from adopting a policy, practice or procedure that discriminates against a person based on their current, potential, or past pregnancy or related conditions in the admissions process.⁶⁴ For the reasons outlined in section II(A) above, **we urge the Department** to add “perceived” and “expected” to the list of protected identities.

We understand the proposed rule prohibiting recipients from making pre-admission inquiries as to the marital status of applicants is designed to prevent gender biases from impacting the admissions’ process. However, more than 900 colleges across the country use the Common Application, which includes the question “if you have children, how many?”⁶⁵ Because family and marital status are not defined in the proposed rules and recipients may view parental, marital and familial status as one of the same, **we urge the Department** to clarify that pre-admission inquiries as to the *parental* status of an applicant are permitted under Title IX, so long as they do not impact the applicant’s chance of admission. This will ensure that advocates do not lose access to critical data about this population.

⁶⁴ 87 Fed. Reg. 41571 (proposed 34 C.F.R. §106.21(c)(2)(ii))

⁶⁵ See, Common App First-Year Application,

<https://commonapp.my.salesforce.com/sfc/p/#d0000000eEna/a/1L000000quQb/ji3AscLUhVXDq8uY.14Opi.3G.8IQqAUP5Oeijly10M>

For the reasons mentioned in section V(A) above, **we urge the Department** to explicitly prohibit discrimination based on a person’s “current, potential, *perceived*, *expected*, or past parental, family, marital, or *caregiver* status” in the admissions process. It unnecessarily narrow to only prohibit discrimination that treats parenting applicants differently based on sex.

Finally, because discrimination based on pregnancy or a related condition is a form of sex discrimination under Title IX, admissions applicants should have affirmative protections under Title IX that are independent of other civil rights laws. Additionally, in many signatories’ experiences, recipients often falsely believe they are not required to accommodate applicants with temporary disabilities. Therefore, consistent with our requests for pregnant and parenting workers, **we urge the Department** to grant admissions’ applicants affirmative rights to reasonable modifications instead of making such rights dependent on what modifications are provided to those with temporary disabilities. These changes will ensure pregnant and parenting persons in the admissions process are afforded the same protections as others under Title IX.

VII. PREGNANCY AND DISABILITY

It is a common occurrence that a pregnant person has or develops a disability as the result of their pregnancy or related condition and some of these disabilities endure post-partum. In fact, several complaints filed to the Department’s Office for Civil Rights involve pregnant students who alleged violations under Title IX *and* federal disability laws including the IDEA or Section 504.⁶⁶

We urge the Department to require recipients to note in their notice of nondiscrimination⁶⁷ that in addition to Title IX protections, students may have overlapping protections under other federal, state, or local civil rights laws including, but not limited to, those that protect students on the basis of race, disability, and housing status.

We support the Department’s proposal to require Title IX Coordinators in elementary and secondary schools to consult with a complainant or respondents’ Individualized Education Program (IEP) team or persons responsible for the student’s placement decision under 34 CFR 104.35(c) (section 504).⁶⁸ If a complainant or respondent is a postsecondary student with a disability, **we urge the Department to require**, rather than suggest,⁶⁹ that Title IX Coordinators consult the individual or office that the recipient has designated to provide support to students with disabilities.

Finally, when the Title IX coordinator is administering reasonable modifications to pregnant students,⁷⁰ if that student also has a documented disability, **we urge the Department** to require

⁶⁶ See e.g., *Salt Lake Community College*, No. 08-22-2021, Office for Civ. Rts. Ltr. of Findings (U.S. Dep’t. Education [June 14, 2022]), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/08222021-a.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=; *Cal St. Univ. East Bay*, No. 09-18-2245, Office for Civ. Rts. Ltr. of Findings (U.S. Dep’t. Education [Aug. 1, 2018]), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09182245-a.pdf>

⁶⁷ 87 Fed. Reg. at 41570 (proposed 34 C.F.R. §106.8(c))

⁶⁸ 87 Fed. Reg. 41570 (proposed 34 C.F.R. §106.8(e))

⁶⁹ *Id.*

⁷⁰ 87 Fed. Reg. at 41571 (proposed 34 C.F.R. § 106.40(b)(3)), 41572 (proposed 34 C.F.R. § 106.40(b)(3)(ii)).

recipients to consult with the persons responsible for the student's placement under CFR 104.35(c) (Section 504 team) or their Individual Education Program (IEP) team, and/or the persons designated to provide support to students with disabilities to help comply with the requirements of the Individuals with Disabilities Education Act, 20 U.S.C. 1400 et seq., and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794.

VIII. PREGNANT AND PARENTING WORKERS

Chief among the “three . . . different types of [sex] discrimination” that Title IX was passed to combat was “discrimination in *employment* within an institution.”⁷¹ Indeed, Congress designed Title IX to be “a strong and comprehensive measure . . . to provide women with solid legal protection as they . . . seek employment commensurate to their education.”⁷²

To further Title IX's nondiscrimination mandate, **we urge** the Department to issue a final regulation clarifying that:

- (A) Workers⁷³ (like students) have an affirmative right to reasonable modifications for pregnancy and related conditions;
- (B) Workers (like students) have, at minimum, a right to all medically necessary time off for pregnancy and related conditions;
- (C) Workers (like students) have a right to a lactation space in reasonable proximity to their workstation, with a chair, surface, and access to an electrical outlet, running water, and refrigerator.

Doing so is necessary to fulfill Title IX's promise of equality. As the Department itself recognizes,

“ [A] policy that presents obstacles to the ability of a student or employee who is pregnant, lactating, or experiencing other pregnancy-related conditions to access a recipient's educational program or activity may constitute such discrimination under Title IX. Moreover, precisely because it is difficult to specify the counterfactual—how accommodating would the school have been if the person requesting an accommodation had done so for a condition associated with men rather than women—sex-based discrimination regarding pregnancy and related conditions will often take the form of “subtle discrimination that may be difficult to detect on a case-by-case basis.”⁷⁴ To prevent such discrimination . . . proactive measures are necessary to ensure that a

⁷¹ 118 Cong. Rec. 5812 (1972) (statement of lead sponsor, Sen. Birch Bayh) (emphasis added)

⁷² *Id.* at 5806-07 (statement of Sen. Birch Bayh).

⁷³ The comment intentionally uses the term ‘worker’ instead of ‘employee’ to mean both non-student and student workers. Because Title IX protects any “person,” the Department should clarify that its protections extend beyond traditional employees to other workers, such as independent contractors, as well. See, e.g., *Elwell v. Oklahoma ex rel. Bd. of Regents of Univ. of Oklahoma*, 693 F.3d 1303, 1311 (10th Cir. 2012) (“Title IX does not limit its coverage at all, outlawing discrimination against any ‘person[.]’”); see also *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982) (“There is no doubt that ‘if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language.’”) (internal quotation marks omitted).

⁷⁴ *Hibbs*, 538 U.S. at 736.

recipient affords students *and employees* who are pregnant or experiencing pregnancy related conditions full access throughout their pregnancy and recovery.⁷⁵

In addition, as the Department recognizes repeatedly, harmonizing recipients' obligations to workers with their obligations to students will allow recipients to standardize policies and practices, thereby reducing complexity and lowering compliance costs.

A. The Department's Final Rule Should Clarify That Workers Have a Right to Reasonable Modifications for Pregnancy and Related Conditions.

First, **we urge the Department** to clarify that workers in educational institutions have the same *affirmative* rights to reasonable modifications for pregnancy and related conditions guaranteed to students.

The section of the Department's proposed regulations applicable to employees takes a comparative rather than an affirmative approach, requiring recipients to treat employees with pregnancy-related conditions only as well (or as poorly) as employees with temporary disabilities. The proposed regulation states:

(b) *Pregnancy or related conditions.* A recipient shall not discriminate against or exclude from employment any employee or applicant for employment on the basis of current, potential, or past pregnancy or related conditions.

(c) *Comparable treatment to temporary disabilities or conditions.* A recipient shall treat pregnancy or related conditions or any temporary disability resulting therefrom as any other temporary disability for all job-related purposes[.]⁷⁶

By contrast, the portion of the Department's proposed rule applicable to students provides far more robust protections, requiring *affirmative* support of students with pregnancy-related conditions, regardless of how well or how poorly other non-pregnant students are treated. Specifically, the proposed rule requires that recipients promptly provide students "[r]easonable modifications to the recipient's policies, practices, or procedures" on an "individualized and voluntary basis[.]" so long as such modifications would not "fundamentally alter the recipient's education program or activity."⁷⁷ The examples of reasonable modifications provided for pregnant students include "changes in physical space or supplies," "elevator access," "breaks . . . to attend to related health needs," "intermittent absences to attend medical appointments," and "other appropriate changes to policies, practices, or procedures,"⁷⁸—all examples of modifications that pregnant and postpartum *workers* may likewise need.

⁷⁵ 87 Fed. Reg. 41390, 41513 (proposed July 12, 2022) (to be codified at 34 C.F.R. § 106) (emphases added).

⁷⁶ 87 Fed. Reg. 41390, 41579 (proposed July 12, 2022) (to be codified at 34 C.F.R. § 106). We also note that (c) should refer to "equal" rather than "comparable" treatment in regard to the treatment of pregnancy or related conditions and should refer to "limitations arising from pregnancy and related conditions" rather than assuming that pregnancy is per se disabling.

⁷⁷ 87 Fed. Reg. at 41522.

⁷⁸ *Id.*

Accordingly, **we strongly urge** the Department to issue a final rule clarifying that workers at educational institutions, like students, have an affirmative right to reasonable modifications to the recipient's policies, practices, and procedures, including but not limited to: changes in physical space or supplies; elevator access; adjustments to uniform requirements or dress codes; adjustment of shift start or end time; reduced or modified work schedule; assistance with manual labor or limits on lifting; desk duty or light duty; option for remote work; and temporary transfer to an alternate position. Like for students, such modifications must be provided on an individualized and voluntary basis, and medical documentation should be unnecessary in most cases.⁷⁹ Recipients may not require a worker to accept an accommodation that is not requested or desired by the worker. Recipients must offer such modifications unless the modification would fundamentally alter the recipient's education program or activity.

Requiring recipients to offer workers reasonable modifications to school policies, practices, and procedures is necessary to effectuate Title IX's broad nondiscrimination mandate and ensure that no worker is excluded from employment on the basis of sex. As the Department recognized in the context of lactation accommodations, "clearly defined rights" to affirmative accommodation "are essential to prevent different treatment on the basis of sex and exclusion from recipient workplaces,"⁸⁰ so too are accommodations for pregnancy and related conditions essential to achieving Title IX's goals. Indeed, when a worker is unable to access the reasonable modifications they need to continue working, they "may have no choice but to leave their employment."⁸¹ Providing workers an affirmative, proactive right to reasonable modification of working conditions will ensure that discrimination against pregnant workers does not enshrine sex-based barriers to participation in federally-funded educational programs and activities.

Further, harmonizing workers' rights with students' rights will reduce the burden and complexity of compliance on recipients. Recipients are already familiar with the "reasonable modification" framework and structure from its use in the disability context under Title II of the ADA, as the Department recognizes.⁸²

Moreover, many students, particularly at institutions of higher education, hold paid employment on campus. For example, it would defy logic to guarantee a pregnant student access to a stool to rest while studying in their science lab, but not to provide them the same modification while they perform wage labor as a receptionist for the science department at their university. In both contexts, the modification is necessary to ensure that they can fully access the educational environment like any other student. Of course, the regulation should protect all workers at educational institutions, not only students who hold campus jobs.

Finally, because pregnancy itself is temporary, such workplace accommodations are temporary and often no-cost or low-cost. At the same time, these simple modifications help keep pregnant

⁷⁹ See Section III(B) above.

⁸⁰ Fed. Reg. at 41527.

⁸¹ Fed. Reg. at 41527.

⁸² 87 Fed. Reg. at 41523.

and postpartum people working safely throughout their pregnancies, reducing absenteeism and turnover, and improving worker health.⁸³

B. The Department Should Clarify That Workers Have a Right to All Medically Necessary Time Off.

Second, the Department should clarify that, at minimum, workers have a right to all medically necessary time off, including breaks to attend to pregnancy-related health conditions (including lactation), time off to attend medical appointments, and leaves of absence.

While the portion of the proposed regulation applicable to *students* requires recipients to provide affirmative leaves of absence related to pregnancy for as long as medically necessary,⁸⁴ the proposal does not offer the same protections to employees. Further, it is unclear whether leave for a “reasonable period of time” would include the time off work necessary for pregnancy-related medical appointments.

We urge the Department to clarify that workers be entitled, at minimum, to: a voluntary leave of absence while medically necessary, including but not limited to, leave to recover from childbirth; and any other medically necessary time off, such as for pre- and post-natal appointments, and bedrest. To the extent a recipient maintains a leave policy for employees similar in their ability or inability to work that is more generous, the recipient must permit the employee to take leave under that policy instead if the employee so chooses. The Department should clarify that recipients may not require doctors’ notes or other medical documentation for breaks to attend to basic health needs, such as bathroom breaks.

The Department should not deprive pregnant and postpartum workers at educational institutions of the protections afforded to students. Allowing employers to deny pregnant and postpartum workers job-protected time off would further enshrine the stereotype that motherhood and work are incompatible, enacting the very sex-based exclusion Title IX was meant to eradicate.

C. The Department Should Clarify That Workers, Like Students, Have Access to a Functional Lactation Space.

Finally, we commend the Department for recognizing the rights of employees, like students, to lactation space and time. To better effectuate Title IX’s nondiscrimination mandate—ensuring that a lactation space is functional to meet a worker’s needs—we urge the Department to adopt the same additional parameters for workers’ lactation space as those we recommend for students in Section III(C) above.

⁸³ See, e.g., Am. Coll. Obst. & Gyn., *Cmte. Op. No. 733: Employment Considerations During Pregnancy and the Postpartum Period*, 131 OBST. & GYN. e115 (Apr. 2018), <https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2018/04/employment-considerations-during-pregnancy-and-the-postpartum-period>; Ky. Dep’t Pub. Health & Wellness, PREGNANT WORKERS HEALTH IMPACT ASSESSMENT (2019), <https://louisvilleky.gov/center-health-equity/document/pregnant-workers-hia-final-02182019pdf>; JOB ACCOMMODATION NETWORK, WORKPLACE ACCOMMODATIONS: LOW COST, HIGH IMPACT (Oct. 21, 2020), <https://askjan.org/publications/Topic-Downloads.cfm?pubid=962628>.

⁸⁴ 87 Fed. Reg. at 41572.

The Department's proposed regulation states:

(e) *Lactation time and space.* (1) A recipient must provide reasonable break time for an employee to express breast milk or breastfeed as needed. (2) A recipient must ensure the availability of a lactation space, which must be a space other than a bathroom, that is clean, shielded from view, free from intrusion from others, and may be used by an employee for expressing breast milk or breastfeeding as needed.⁸⁵

We urge the Department to additionally specify that the lactation space must:

- Be in reasonable proximity to the worker's place of work;
- Equipped with a chair, flat surface, and access to electricity;
- With nearby access to running water and a refrigerator, or other location in which the worker may store expressed milk.⁸⁶

In addition, as with our recommendation with respect to students above,⁸⁷ **the Department should** make clear that workers have a right to express milk or feed in locations other than a designated lactation space, if they so choose. **We also suggest** the Department adopt more gender-neutral language, such as “express milk,” “nursing,” and “human milk feeding.”

As the Department acknowledges, adopting the same standards for students and workers would allow a recipient to “choose to offer a common space for both students and employees”—with the same functional requirements, e.g., nearby access to running water and refrigerator—“thereby minimizing cost while ensuring civil rights compliance.”⁸⁸

Thank you for your consideration of our recommendations. If you have any questions, please contact Cassandra Mensah (cmensah@nwlc.org), Lisette Orellana Engel (lisette@nationalcrittenton.org), Dana Bolger (dbolger@abetterbalance.org), and Jessica Lee (leejessica@uchastings.edu)

Thank you,

The Federal Advocacy Coalition for Pregnant and Parenting Students Members:

A Better Balance: The Work & Family Legal Center
Advocates for Youth
Center for WorkLife Law, Pregnant Scholar Initiative
Girls Inc.
Healthy Teen Network
Know Your IX
National Crittenton
National Women's Law Center

⁸⁵ 87 Fed. Reg. at 41579.

⁸⁶ See, e.g., <https://www1.nyc.gov/assets/cchr/downloads/pdf/amendments/Local%20Law%20185.pdf>; <https://www1.nyc.gov/site/cchr/law/lactation-faqs.page>.

⁸⁷ See, Section III(C) above

⁸⁸ 87 Fed. Reg. at 41528.

Joined By:

American Association of University Women
Clearinghouse on Women's Issues
Colorado Teen Parent Collaborative
Day One
Family Equality
Feminist Majority Foundation
Florence Crittenton Programs of SC
GLSEN
Higher Learning Advocates
Imaginable Futures
My Life My Choice
National Coalition for Women and Girls in Education⁸⁹
National Education Association
NoTeenShame
Oregonizers
School Social Work Association of America
SIECUS: Sex Ed for Social Change
Student Parent HELP Center
Women's Law Project

⁸⁹ NCWGE joins these comments based on a majority vote of its membership. Many member organizations have submitted their own comments in response to the July 12, 2022 Federal Register notice. Their individual submissions may take different positions regarding items discussed herein, and thus these comments should not be attributed to each of NCWGE's members.