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Title IX and "Menstruation or Related Conditions"

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TITLE IX AND “MENSTRUATION OR RELATED CONDITIONS”

*Marcy L. Karin, Naomi Cahn, Elizabeth B. Cooper, Bridget J. Crawford, Margaret E. Johnson & Emily Gold Waldman**

Title IX of the Education Amendments Act of 1972 (“Title IX”) prohibits sex discrimination in educational programs or activities receiving federal financial assistance. Neither the statute nor its implementing regulations explicitly define “sex” to include discrimination on the basis of menstruation or related conditions such as perimenopause and menopause. This textual absence has caused confusion over whether Title IX must be interpreted to protect students and other community members from all types of sex-based discrimination. It also calls into question the law’s ability to break down systemic sex-based barriers related to menstruation in educational spaces. Absent an interpretation that there is explicit Title IX coverage, menstruation will continue to cause some students to miss instruction. Other students may be denied access to a menstrual product or a restroom as needed and face health consequences. They also may be teased and bullied after menstrual blood visibly leaks onto their clothes. Employees, who are also covered by Title IX, may be fired for damaging school property as a result of such leaks.¹ People in perimenopause may be denied reasonable modifications like bathroom access, water, or temperature control. Collectively, this creates an educational system that prevents students, faculty, or employees from fully participating in educational institutions and causes harm.

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1. *Sex Discrimination: Frequently Asked Questions*, U.S. DEP’T OF EDUC. (Aug. 19, 2021), [<https://perma.cc/834L-J88D>].

On July 12, 2022, the U.S. Department of Education (“DOE”) issued a Notice of Proposed Rulemaking “to better align the Title IX regulatory requirements with Title IX’s nondiscrimination mandate, and to clarify the scope and application of Title IX and [schools’ obligations] to provide an educational environment free from discrimination on the basis of sex, including through responding to incidents of sex discrimination.”² On September 12, 2022, the Authors submitted the below Comment asking the DOE to modify existing regulations to cover menstruation-related discrimination in three ways. First, the regulations should include “menstruation or related conditions” from menarche through menopause in the scope of discrimination on the basis of sex. Second, the regulations should include reasonable modifications for “menstruation or related conditions.” Finally, the regulations should provide education on “menstruation or related conditions” to all students and employees, regardless of sex, to tackle barriers related to reporting and eliminating sex-based discrimination and to provide equal access. Only then will Title IX be able to fully live up to its nondiscrimination mandate.

This Article contains our Comment asking the DOE to make these changes and explicitly include menstruation or related conditions in Title IX’s protections. In addition to our Comment, over 150 of the publicly available rulemaking submissions referenced menstruation and over thirty-five mentioned menopause.³ Collectively, these comments—from other academics, public health scholars, medical practitioners, clinicians, advocates, and individuals—further demonstrate the need for Title IX to cover menstruation-related discrimination.

2. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390 (proposed July 12, 2022) (to be codified at 34 C.F.R. pt. 106).

3. *See, e.g.*, Marni Sommer, Molly Secor-Turner, Diana J. Mason, Bethany Caruso, Jhumka Gupta, Anne Sebert Kuhlmann, L. Lewis Wall, Robin Cogan, & Linda Mendonça, Comment on Proposed Rule to Require Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance (Sept. 7th, 2022), [<https://perma.cc/8CYY-LEP7>].

The text of our Comment in its original form follows.⁴

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
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Submitted via www.regulations.gov

Re: Comment in response to RIN 1870-AA16 (Docket ED-2021-OCR-0166) Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

Dear Secretary Cardona and Assistant Secretary Lhamon:

Thank you for the opportunity to comment on the regulations proposed by the United States Department of Education (“Department”) related to Title IX of the Education Amendments Act of 1972 (“Title IX”).¹ We commend the Department for engaging in this rulemaking to clarify the scope and improve implementation of Title IX’s protections against sex-based discrimination and harassment in covered education programs and activities. As law professors with expertise in law and menstruation,² we write to ask you to explicitly include, throughout the

4. The text of this Comment is substantially identical to what was submitted to the Department of Education, except that certain changes have been made to conform to the *Michigan Journal of Gender & Law*’s style rules, and any typographical errors have been corrected.

1. See Title IX, Education Amendments of 1972, 20 U.S.C. §§ 1681-88.

2. This comment draws heavily on the authors’ menstruation-related discrimination scholarship. See, e.g., BRIDGET J. CRAWFORD & EMILY GOLD WALDMAN, *MENSTRUATION MATTERS: CHALLENGING THE LAW’S SILENCE ON PERIODS* (2022); Marcy L. Karin, *Addressing Periods at Work*, 16 HARV. L. & POL’Y REV. 449 (2022); Naomi R. Cahn, Bridget J. Crawford & Emily Gold Waldman, *Managing and Monitoring the Menopausal Body*, U. CHI. LEGAL F. (2022); Emily Gold Waldman, Naomi R. Cahn, & Bridget J. Crawford, *Contextualizing Menopause in the Law*, 45 HARV. J. L. & GENDER 1 (2022); Bridget J. Crawford, Emily Gold Waldman & Naomi R. Cahn, *Working Through Menopause*, 99 WASH. U. L. REV. 1531 (2022); Marcy L. Karin, Margaret E. Johnson & Elizabeth B. Cooper, *Menstrual Dignity and the Bar Exam*, 55 U.C. DAVIS L. REV. 1 (2021) [hereinafter Karin et al.]; Bridget J. Crawford, *Menstruation and the Bar Exam: Unconstitutional Tampon Bans*, 41 COLUM. J. GENDER & L. 63 (2021); Margaret E. Johnson, Emily Gold Waldman & Bridget J. Crawford, *Title IX and Menstruation*, 43 HARV. J. L. & GENDER 225 (2020) [hereinafter Johnson et al.]; Bridget J. Crawford, Margaret E. Johnson, Marcy L. Karin, Laura Strausfeld &

regulations, references to *discrimination on the basis of menstruation or related conditions* as a form of discrimination on the basis of sex. Although the words “menstruation,” “perimenopause,” and “menopause” are not in the statute, these conditions—inherently linked to sex—should be incorporated into the Department’s regulations. Failing to do so means that students and educators who menstruate or experience related conditions (as defined below) will continue to face sex discrimination and other sex-based barriers in the educational environment.

Based on our scholarly and applied research, analysis, and work, as well as clear evidence from our public health colleagues,³ we recommend three main changes:

1. 34 C.F.R. § 106.10 should include “menstruation or related conditions” from menarche through menopause in the scope of discrimination on the basis of sex.

Emily Gold Waldman, *The Ground on Which We All Stand: A Conversation About Menstrual Equity Law and Activism*, 26 MICH. J. GENDER & L. 341 (2020); Margaret E. Johnson, *Menstrual Justice*, 53 U.C. DAVIS L. REV. 1 (2019); Symposium, *Are You There, Law? It’s Me, Menstruation*, 41 COLUM. J. GENDER & L. 1 (2021).

This comment also builds on the authors’ menstruation-related education and advocacy work. See, e.g., Margaret Johnson & Marcy Karin, *Now More Than Ever, It’s Time for Universal Menstrual Education for Gender Equality*, Ms. (June 10, 2022), [https://perma.cc/V7LM-YK9T]; MP AND THE BAR, MENSTRUATION AND THE BAR EXAM: MODEL POLICY AND OPERATING PROVISIONS (2021), [https://perma.cc/F7JV-7VG7]; *Expanding Student Access to Period Products Act of 2020: Hearing on D.C. B23-0887 Before the Comm. of the Whole and the Comm. on Educ.*, D.C. Council (2020), [https://perma.cc/8JQD-W3AQ] (statement of Marcy L. Karin and Galina M. Abdel Aziz); *Public School Students – Provision of Menstrual Hygiene Products: Hearing on HB 208 Before the House Ways and Means Comm.*, Md. Gen. Assemb. (2020), [https://perma.cc/8QNJ-2Z72] (statement of Eaujee Francisco, Hayden Shannon, Yao Yang, and Margaret E. Johnson); BRAWS & UNIV. OF D.C. DAVID A. CLARKE SCH. OF L. LEGIS. CLINIC, PERIODS, POVERTY, AND THE NEED FOR POLICY: A REPORT ON MENSTRUAL INEQUITY IN THE UNITED STATES (2018), [https://perma.cc/6AVB-24Z9] [hereinafter PERIODS, POVERTY, AND THE NEED FOR POLICY].

Many thanks to Beth Brodsky, Veronica Cihlar, and Eva Cox for their helpful work on this comment.

3. See Marni Sommer, Molly Secor-Turner, Diana J. Mason, Bethany Caruso, Jhumka Gupta, Anne Sebert Kuhlmann, L. Lewis Wall, Robin Cogan & Linda Mendonça, Comment on Proposed Rule to Require Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance (Sept. 7th, 2022), [https://perma.cc/8CYY-LEP7].

2. 34 C.F.R. §§ 106.40(b)(4) and 106.57(e) should include reasonable modifications for “menstruation or related conditions.”
3. 34 C.F.R. §§ 106.34 and 106.8(d) should provide education on “menstruation or related conditions” to all students and employees, regardless of sex, to tackle barriers related to reporting and eliminating sex-based discrimination and to provide equal access.

Section I of this comment discusses the experiences of persons who menstruate in school and provides important context for our Recommendations. Section II contains our Recommendations to the proposed regulations and the legal and policy justifications for them.

I. EXPERIENCES OF MENSTRUATORS IN SCHOOL

To understand the importance of including discrimination on the basis of menstruation or related conditions from menarche through menopause in the definition of “because of sex,” it is important to understand the experiences of menstruators in school.⁴ This section discusses first the menstrual cycle and then harassment and discrimination on the basis of menstruation, menopause, or related conditions that students and employees have faced in schools.

A. *The Menstrual Cycle: From Menarche to Menopause*

We begin by providing background about the menstrual cycle and related conditions such as menarche, menstruation, perimenopause, menopause, hormonal activity, and associated pain.⁵

4. We use the term “menstruator” intentionally. First, it recognizes that not all girls and women menstruate and that trans boys/men, non-binary/genderqueer individuals, intersex individuals of any gender, and other individuals may menstruate or experience menopause or related conditions. Second, at times, it serves as an umbrella term to cover people who are in any stage of the biological process of menstruation, from menarche through menopause. See *infra* Section II.A (containing proposed definition of “menstruation or related conditions”).

5. See generally *Menstruation through Menopause*, OUR BODIES OURSELVES TODAY (last visited Aug. 31, 2022), [<https://perma.cc/A6PR-5YLM>].

Menstruation consists of the shedding of uterine lining, which causes an average discharge of two to five tablespoons of blood and tissue and may include large clots.⁶ Menstruation usually begins around the age of twelve, though it may start as early as age eight or as late as fifteen—and typically continues through menopause.⁷ Periods—“the common term for the bleeding that occurs as a result of menstruation”⁸—usually last four to seven days, although lengths, especially of adolescent cycles, are variable, irregular, and often unpredictable.⁹ One’s menstrual cycle typically lasts from twenty-one to thirty-five days, though they may be less regular in the first two years.¹⁰ In addition to age, stress, diet, and other conditions can affect numerous aspects of the menstrual cycle, including its timing and the intensity of bleeding, cramps, and other related pain.¹¹

Generally, menstruators “use products or items to absorb the flow, [including] tampons, pads, liners, menstrual cups, period underwear, and cloth menstrual pads.”¹² Depending on one’s cycle, products may need to be changed frequently “to decrease the risk of disease and to avoid leaking blood onto one’s body, clothes, and other items[.]”¹³ Because the onset of menstruation may vary each month, as may the amount of menstrual discharge, “menstruators are often caught off guard by . . . their period.”¹⁴ One study reported that “sixty-one percent of menstruators reported having at least one unexpected period.”¹⁵

6. AM. COLL. OBSTETRICIANS & GYNECOLOGISTS, THE MENSTRUAL CYCLE: MENSTRUATION, OVULATION, AND HOW PREGNANCY OCCURS (2022), [<https://perma.cc/PLZ2-ZCCM>]; *Your Menstrual Cycle*, U.S. DEP’T OF HEALTH & HUM. SERVS., OFF. ON WOMEN’S HEALTH (last visited Jan. 31, 2021), [<https://perma.cc/UBS6-HZLQ>].

7. *Your Menstrual Cycle*, *supra* note 6. People often do not know when their first period will arrive. Johnson et al., *supra* note 2, at 232. Approximately 2% will get their first period at age sixteen or later. Lisa Fields, *Why No Period by Age 15?*, WEBMD (last visited Sept. 2, 2022), [<https://perma.cc/ACW2-P34E>] (reporting that “[b]y age 15, 98% of teens have started their periods”).

8. Johnson et al., *supra* note 2, at 232.

9. *Id.* (citation omitted).

10. *How Long Does a Period Last? What You Need to Know About Menstruation Length*, FLO (Sept. 16, 2021), [<https://perma.cc/XUL9-QKDG>]. Getting one’s period is considered to “mark the beginning of [a] new cycle.” *Id.*

11. Karin, *supra* note 2, at 512 (citations omitted).

12. Johnson et al., *supra* note 2, at 232 (citing *Your Menstrual Cycle*, *supra* note 6).

13. *Id.* (citing *Your Menstrual Cycle*, *supra* note 6).

14. *Id.*

15. *Id.* (citing ELISSA STEIN & SUSAN KIM, FLOW: THE CULTURAL STORY OF MENSTRUATION 189 (2009)).

Menstruation often is accompanied by menstrual cramps. During a period, uterine contractions “help the uterine lining leave the body,” causing pain.¹⁶ Dysmenorrhea (or period pain) often accompanies an adolescent’s first period and it “may (or may not) lessen gradually with age.”¹⁷ Extreme menstrual pain is a lifetime experience for some.¹⁸ Painful menstrual cramps, inflammation, irregular bleeding, and chronic lower back and pelvic pain also may be caused by endometriosis. Endometriosis is a condition where the body attempts to shed extra-uterine growth of tissue each cycle.¹⁹ In addition, menstruation “correlates to susceptibility to infection” including an increased risk of reproductive tract infections such as thrush and urinary tract infections.²⁰

By itself, menstruation is not a disability. However, debilitating menstruation-related conditions are not uncommon, including endometriosis, polycystic ovary syndrome (PCOS), and fibroids that may cause pain, unpredictable periods, heavy bleeding, or other symptoms.²¹ Some of these conditions are disproportionately found in menstruators of color.²² Linked to less access to medical information, research, and care, many such conditions remain un- or underdiagnosed.²³

16. *Id.* at 232-33 (citing *Period Problems*, U.S. DEP’T OF HEALTH & HUMAN SERVS., OFF. ON WOMEN’S HEALTH (last visited Sept. 8, 2022), [https://perma.cc/C4T5-VVRS]).

17. *Id.*

18. *Period Problems*, *supra* note 16.

19. *Id.*

20. Karin, *supra* note 2, at 458 (citing SARAH HOUSE, THÉRÈSE MAHON & SUE CAVILL, MENSTRUAL HYGIENE MATTERS: A RESOURCE FOR IMPROVING MENSTRUAL HYGIENE AROUND THE WORLD (2012), [https://perma.cc/44GS-WQH6]).

21. See generally *Menorrhagia (heavy menstrual bleeding)*, MAYO CLINIC (last visited Sept. 2, 2022), [https://perma.cc/MQX4-3T7L] (noting that menorrhagia “is typically due to uterine pathology, including fibroids, polyps and adenomyosis” among other conditions).

22. Karin, *supra* note 2, at 456-57 (citations omitted). For example, Black menstruators “are at higher risk of developing [menstruation-related] disorders” like endometriosis, ovarian cancer, and PCOS. Memorandum from Brian McClure, Director, Council of Racial Equity to Hon. Phil Mendelson, Chairman, D.C. Council (Dec. 6, 2021), [https://perma.cc/2VCC-4WVQ] (citations omitted) (concluding that the District’s menstrual education and product access proposal “will likely improve outcomes for Black and Hispanic residents”). Medical interventions related to these conditions such as hysterectomies also occur at higher rates in menstruators of certain races. See Elizabeth A. Stewart, Wanda K. Nicholson, Linda Bradley & Bijan J. Borah, *The Burden of Uterine Fibroids for African-American Women: Results of a National Survey*, 22 J. WOMEN’S HEALTH 807, 807 (2013) (noting that African American women are “2.4 times more likely to undergo hysterectomy and have an 6.8-fold increase of undergoing uterine-sparing myomectomy”); Heba M. Eltoukhi, Monica N. Modi.

Menopause represents the permanent end of menstruation; it is calculated retrospectively, by determining that a full year has lapsed since the last menstrual period.²⁴ The average age of menopause in the United States is fifty-one.²⁵ While menopause is typically associated with aging, it can occur at earlier ages, such as when both ovaries are removed as part of treatment for cancer, endometriosis, or fibroids.²⁶ Cancer treating chemotherapy or other chemicals also can cause menopause.²⁷ Essentially, at some point, anyone born with a uterus and at least one ovary will lose the ability to reproduce, and correspondingly, stop menstruating and be in menopause.²⁸

The stage of transition to menopause is called perimenopause. It typically begins in the mid-to-late forties, with an average duration of approximately seven years.²⁹ Perimenopause is caused by changes in

Meredith Weston, Alicia Y. Armstrong & Elizabeth A. Stewart, *The Health Disparities of Uterine Fibroid Tumors for African American Women: A Public Health Issue*, 210 AM. J. OBSTETRICS & GYNEC. 194, 197 (2014) (reporting that African Americans experience larger numbers of postoperative complications than other racial groups after fibroid-related surgeries).

23. See, e.g., Beata Mostafavi, *Understanding Racial Disparities for Women with Uterine Fibroids*, MICHIGAN MEDICINE (Aug. 12, 2020), [<https://perma.cc/TD89-XGVA>]; see McClure, *supra* note 22, at 4 (“Research attributes the disparities in diagnoses and treatment [of PCOS] to racial bias and how Black women are often perceived and treated by doctors in medical settings, the lack of available research, and because PCOS is misunderstood and often mismanaged by medical professionals.”).
24. Crawford et al., *supra* note 2, at 1539.
25. *Menopause*, MAYO CLINIC (last visited Sept. 5, 2022), [<https://perma.cc/HZ7D-EKNZ>] (menopause can happen in your forties or fifties, but the average age is fifty-one).
26. Valinda Riggins Nwadike, *Surgical Menopause*, HEALTHLINE, [<https://perma.cc/D7RA-N5HG>] (Feb. 27, 2020) (describing “surgical menopause” as occurring “after an oophorectomy, a surgery that removes the ovaries”). Periods also stop after a hysterectomy, the “surgical removal of the uterus,” but “having a hysterectomy doesn’t lead to menopause unless the ovaries are removed too.” *Id.*
27. See Devon Carter, *7 Things to Know About Menopause and Breast Cancer*, MD ANDERSON CANCER CENTER (Oct. 8, 2019), [<https://perma.cc/X7LM-BU8C>] (noting that chemotherapy to treat breast cancer “can speed up the [menopause] process and intensify the symptoms”). Certain intersex variations, including Turner Syndrome, are associated with primary ovarian insufficiency, causing menstruation to cease early or to not start. See Kutluk Oktay, Giuliano Bedeschi, Karen Berkowitz, Richard Bronson, Banafsheh Kashani, Peter McGovern, Lubna Pal, Gwendolyn Quinn & Karen Rubin, *Fertility Preservation in Women with Turner Syndrome: A Comprehensive Review and Practical Guidelines*, 29 J. PEDIATRIC & ADOLESCENT GYNEC. 409 (2016).
28. Crawford et al., *supra* note 2, at 1538.
29. *What is Menopause?*, NAT’L INST. ON AGING (2021), [<https://perma.cc/88U7-XUYE>].

ovarian function, as the ovaries begin to produce lower levels of key hormones for menstrual regulation (estrogen and progesterone).³⁰ During this stage, menstruation continues, but becomes increasingly unpredictable, with shorter or longer cycles and lighter or heavier bleeding. It is a complex and highly variable process.³¹

Experiences of menopause are different, and it can be a comparatively benign, even welcome, process for some, while others experience more severe symptoms over a long period.³² Hot flashes are the most ubiquitous symptom. Up to 75% of North American women experience hot flashes, and almost a quarter of them have such discomfort that they discuss their symptoms with a clinician.³³ Hot flashes can persist for six months to two years, but, for approximately 15% of U.S. women, hot flashes last much longer, and possibly indefinitely.³⁴ Perimenopause and menopause may also cause other physical and mental symptoms, such as night sweats, disturbed sleep, headaches, itchy skin, extreme fatigue, joint pain, panic attacks, dizziness, and brain fog.³⁵ Reported symptoms also may vary by race.³⁶

Historically, menstruation and related conditions have been hidden from public discourse.³⁷ When mentioned, they have been characterized

30. See *Perimenopause*, JOHNS HOPKINS MED. (last visited Sept. 5, 2022), [https://perma.cc/ST7K-WJY7]. Premenopause describes the timeframe between someone’s first period and first sign of perimenopause. See Menopause Now Editorial Team, *About Premenopause*, MENOPAUSE NOW (Sept. 30, 2019), [https://perma.cc/9TYT-BUPJ].

31. See *Perimenopause*, *supra* note 30.

32. Crawford et al., *supra* note 2, at 1541-45.

33. See *Menopause FAQs: Hot Flashes*, N. AM. MENOPAUSE SOC’Y (last visited Jan. 28, 2023), [https://perma.cc/9HF3-NPSH]; Crawford et al., *supra* note 2, at 1541.

34. See *Dealing with the Symptoms of Menopause*, HARV. HEALTH PUB. (Mar. 21, 2017), [https://perma.cc/2G46-CLNF].

35. See, e.g., *34 Symptoms of Menopause*, ALVA (last visited Sept. 9, 2022), [https://perma.cc/MU2A-DL7U]; Caroline Gurvich, Chen Zhu & Shalini Arunogiri, ‘Brain Fog’ During Menopause Is Real – It Can Disrupt Women’s Work and Spark Dementia Fears, THE CONVERSATION (Dec. 13, 2021, 9:12 PM), [https://perma.cc/4S6A-ZT54].

36. See Kacey Y. Eichelberger, Kemi Doll, Geraldine E. Ekpo & Matthew L. Zerden, *Black Lives Matter: Claiming a Space for Evidence-Based Outrage in Obstetrics and Gynecology*, 106 AM. J. PUB. HEALTH 1771, 1772 (2016) (noting that Black women are more likely to experience hot flashes); Nancy E. Avis, Sybil L. Crawford & Robin Green, *Vasomotor Symptoms Across the Menopause Transition: Differences Among Women*, 45 OBSTETRICS & GYNECOLOGY CLINICS N. AM. 629, 636 (2018) (“[B]lack and Hispanic women are more likely . . . to report . . . the primary menopausal symptoms.”); Karin, *supra* note 2, at n.28.

37. Karin, *supra* note 2, at 459-60; Johnson, *supra* note 2, at 15-22.

as dirty, shameful, or othered as an unknown.³⁸ Further, “the voices and experiences of some menstruators (including some in menopause)—such as those with disabilities who may experience menstruation differently—are often missing altogether.”³⁹ Collectively, this makes it hard for some to discuss related conditions or needs. Nonetheless, “bleeding is a bodily expression, [and] menstruators rarely are indifferent to the process,”⁴⁰ even when conditioned not to discuss menstruation or its absence, menopause.

B. *Harassment on the Basis of Menstruation or Related Conditions*⁴¹

Students who menstruate and those who work in educational institutions have experienced a variety of forms of sex discrimination based on menstruation or related conditions. For instance, students have documented that they have been subjected to belittling, shaming, and unnecessary restrictions by teachers, coaches, and other school officials who require students to keep their menstruation silent and invisible. For example, students in a Virginia middle school reported that they were instructed to refer to pads as “penguins” and tampons as “turtles.”⁴² Similarly, a thirteen-year-old student reported that Bronx Prep Middle School in New York required students “to go to the main office and . . . ask for a marshmallow” if they needed a pad.⁴³ This same school rein-

38. Maureen C. McHugh, *Menstrual Shame: Exploring the Role of ‘Menstrual Moaning,’* in THE PALGRAVE HANDBOOK OF CRITICAL MENSTRUATION STUDIES (Chris Bobel, Inga T. Winkler & Breanne Fahs, eds., 2020) (“Periods are perceived as a strictly negative process that is dirty, disgusting, and icky.”) (citation omitted); Johnson, *supra* note 6, at 15-22.

39. Karin, *supra* note 2, at 460 (citations omitted).

40. Karin et al., *supra* note 2, at n.128; see also Elizabeth B. Cooper, *What’s Law Got to Do with it? Dignity and Menstruation*, 41 COLUM. J. GENDER & L. 39, 41 (2021).

41. Importantly, the proposed 34 C.F.R. §§ 106.2 and 106.10 define sexual harassment to include harassment based on sex. We agree with this and note that if our proposed language clarifying the definition of sex to include “menstruation or related conditions” is accepted, then harassment that involves “menstruation or related conditions” appropriately would be included in the definition of sexual/sex harassment. See *Non-discrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 87 Fed. Reg. 41390, 41491, 41568-41569, 41571 (proposed July 12, 2022) (to be codified at 34 C.F.R. pt. 106).

42. PERIODS, POVERTY, AND THE NEED FOR POLICY, *supra* note 2, at 7.

43. Johnson et al., *supra* note 2, at 235 (quoting Elissa Nadworny & Clare Lombardo, *Periods! Why These 8th-Graders Aren’t Afraid to Talk About Them*, NPR (May 15,

forces menstrual stigma, quite literally via a sign taped to the inside of toilet stall doors providing “a guide on how to ‘properly dispose [of] feminine products,’” instructing menstruators to “[m]ake sure that no one views or handles product.”⁴⁴ A different thirteen-year-old student at this school stated that the sign sends the clear message to not “let anyone see that you are on your period.”⁴⁵

In *GIRLS IN POWER: GENDER, BODY, AND MENSTRUATION IN ADOLESCENCE*, sociologist Laura Fingerson details that teenage boys “talked about PMS and other menstrual symptoms in exaggerated terms, stressing how ‘bitchy’ girls get and blaming menstruation for any moodiness or unfeminine behavior[.]”⁴⁶ She further observed, “[m]any boys think menstruation is ‘gross’ and some boys engage in gross joking.”⁴⁷ According to Fingerson, this is because “menstruation is defined as secretive and shameful in cross-gender interactions,” where girls are a “ripe target for teasing and embarrassment.”⁴⁸ Not surprisingly, this behavior occurs in schools.⁴⁹

Students who menstruate, and especially those “who do not conform to expectations of secrecy and control[,] can become the targets of harassment.”⁵⁰ For example, one study found “[o]ne in five girls and young women in the UK are teased or bullied about their periods, with many suffering in silence.”⁵¹ In the study, “[o]nly half of those who were targeted spoke to anyone about the harassment.”⁵² Of those harassed, approximately “67% said abuse mainly happened at school, and 66% said they had missed classes because of their period.”⁵³ Research also shows that “male students are a notable source of menstruation-

2019, 5:02 AM), [<https://perma.cc/B4HQ-DGUF>] (transcript of conversation with the eighth-grade students and creators of the podcast “Shhh! Periods”).

44. *Id.* at 236 (quoting Nadworny & Lombardo, *supra* note 43).

45. *Id.*

46. LAURA FINGERSON, *GIRLS IN POWER: GENDER, BODY, AND MENSTRUATION IN ADOLESCENCE* 119-27 (2006); CRAWFORD & WALDMAN, *supra* note 2, at 80.

47. FINGERSON, *supra* note 46, at 119-27; CRAWFORD & WALDMAN, *supra* note 2, at 80 (further noting that girls reported being “teased and embarrassed by the boys, [but] the boys [did] not admit to this”).

48. FINGERSON, *supra* note 46, at 119-27; CRAWFORD & WALDMAN, *supra* note 2, at 80.

49. CRAWFORD & WALDMAN, *supra* note 2, at 80.

50. Johnson et al., *supra* note 2, at 236.

51. *Id.* (quoting *One in Five Girls and Young Women Bullied about Periods – Study*, *GUARDIAN* (May 28, 2019, 2:59 PM), [<https://perma.cc/P7DE-LKBB>]).

52. *Id.*

53. *Id.*

based harassment.”⁵⁴ Girls have self-reported boys labeling them as “‘moody’ and concluding that they must be ‘on [their] period.’”⁵⁵

To a certain extent, such harassment likely has its origins in a lack of education about menstruation. One study of adolescent experiences with menstruation in the United States found that “because boys rarely were educated about menstruation,” by the time they were in college, “many had internalized the taboo of menstruation and showed a lack of empathy around menstruation, as evidenced by their harassing menstruating girls and policing women’s bodies regarding menstrual hygiene.”⁵⁶ Reflecting on their early experiences, male participants in this study recalled “severe incidents of girls being teased, although no boy actually admitted to teasing a girl in this manner.”⁵⁷ Their recollections made clear that “for boys . . . being associated with menstruation or even being in the same room when it is being discussed is something shameful or dirty, and some boys hold onto these attitudes into adulthood.”⁵⁸

Another participant recounted that he and his peers did not receive early education that destigmatized periods.⁵⁹ He stated that “my peers jok[ed] about periods and blood often. It always seemed like something that guys could make jokes about to make girls embarrassed or to seem superior to them.”⁶⁰ Further, the researchers found that “girls who had the misfortune of being marked with blood or other evidence indicating their status as currently menstruating, were put at an extreme disad-

54. *Id.* at 236-37 (citing Nadworny & Lombardo, *supra* note 43; Qiru Su, Zhengyang Chen, Ruili Li, Frank J. Elgar, Zhihao Liu & Qiguo Lian, *Association Between Early Menarche and School Bullying*, 63 J. ADOLESCENT HEALTH 213, 213 (2018); Lisa Rapaport, *Early Puberty in Girls Tied to Bullying in Schools*, PHYSICIAN’S WEEKLY (May 17, 2018), [<https://perma.cc/77KC-Z927>] (reporting on the school bullying study). For example, in *Doe v. Fairfax County School Board*, 384 F. Supp. 3d 598, 603-04 (E.D. Va. 2019), a 16-year-old male student unsuccessfully challenged his reassignment to another school after he was found to have made offensive comments and engaged in “inappropriate touching.” The student alleged that he was only making “a joke” when he asked one female student, “how a girl doesn’t orgasm when she puts a tampon in” and was overheard by three others. *Id.*

55. Johnson et al., *supra* note 2, at 236-237 n.62.

56. *Id.* at 261 n.195 (citing Katherine R. Allen, Christine E. Kaestle & Abbie E. Goldberg, *More Than Just a Punctuation Mark: How Boys and Young Men Learn About Menstruation*, 32 J. FAM. ISSUES 129, 145 (2011) [hereinafter Allen et al.]).

57. *Id.* at 237 (quoting Allen et al., *supra* note 56, at 152).

58. *Id.*

59. Allen et al., *supra* note 56, at 141-42; CRAWFORD & WALDMAN, *supra* note 2, at 80-81.

60. CRAWFORD & WALDMAN, *supra* note 2, at 80 (quoting Allen et al., *supra* note 56, at 145 (citing male participant)).

vantage, and boys would use fear of the situation to empower themselves in social interactions.”⁶¹ Not surprisingly, the authors concluded that “[m]enstruation-related sexual harassment in schools is common.”⁶²

Faculty and staff also subject students to harassment on the basis of menstruation or related conditions. While sports are exempt from this NPRM, this type of abuse frequently is related to athletic activities and demonstrates the acceptance of this type of discrimination. For example, in *Moeck v. Pleasant Valley School District*, a wrestling coach asked a student if she was menstruating because her menstrual product was visible through her wrestling uniform. The coach was then observed laughing at the student with another coach.⁶³ A 2016 Title IX complaint alleged that the Director of Tennis and Head Coach at Hofstra University purportedly was “obsess[ed] with” and would comment on a female player’s menstrual cycle, which led to his termination.⁶⁴

Employees of educational institutions also have harassed co-workers about their menstruation or related conditions. For example, in *Warmington v. Board of Regents of University of Minnesota*, the head coach of the men’s cross-country and track-and-field teams insinuated that the head coach of the women’s teams “was menstruating if she [swore or made crude remarks even though it was] similar language” to what he used.⁶⁵

Further, courts have held that harassment based on menopause may constitute sex-based harassment. For example, a federal district court allowed a harassment claim to proceed in *Bailey v. Henderson*, where the worker alleged that her second-line supervisor told her direct supervisor not to step in when she was being harassed by coworkers, “because the

61. Allen et al., *supra* note 56, at 145.

62. *Id.* at 152.

63. *Moeck v. Pleasant Valley Sch. Dist.*, 179 F. Supp. 3d 442, 447 (M.D. Pa. 2016). The court ruled against the plaintiff stating that “the coaching staff were not discriminatory—they ‘harassed’ everyone on the team, male and female. They did not harass because of sex but rather, harassed everyone regardless of their sex.” *Id.* at 448.

64. *Menaker v. Hofstra Univ.*, 935 F.3d 20, 27-28 (2d Cir. 2019) (remanding case to the district court, which had dismissed plaintiff’s case challenging his firing).

65. 998 F.3d 789, 800 (8th Cir. 2021) (upholding the dismissal of plaintiff’s sex discrimination claims, stating that although her allegations “perhaps describe[d] vile or inappropriate behavior,” as a whole they “do not rise to the level of actionable hostile work environment as a matter of law”). See ROBYN STEIN DELUCA, *THE HORMONE MYTH: HOW JUNK SCIENCE, GENDER POLITICS, AND LIES ABOUT PMS KEEP WOMEN DOWN* (2017) (explaining how erratic behavior is often attributed to feminine hormones, such as the moody menstruating or menopausal person).

problems were attributable to ‘just some [B]lack women going through menopause.’”⁶⁶ In *Ward v. Nicholson*, the Office of Federal Operations of the Equal Employment Opportunity Commission (EEOC) “reversed an agency decision against a worker whose supervisor referred to her and a coworker as ‘post-menopausal bitches,’ among other things[,]” finding such statements sufficient to make out a harassment claim under Title VII.⁶⁷ Similarly, a supervisor’s asking an employee numerous times, “how’s the hot flash queen?” and “how’s the menopause today?,” among other offensive statements, could be considered harassment,⁶⁸ and, consequently, discriminatory under Title VII.⁶⁹

As three of the authors of this comment wrote previously:

Ideally, Title IX would not only cover menstruation-based harassment that demonstrably limits students’ ability to benefit from school, but also call upon schools to respond to all menstruation-based harassment. Indeed, schools should strive to be proactive in addressing *all* levels and variations of sexual harassment, menstruation-based and otherwise. Doing so fur-

66. Karin, *supra* note 2, at 501 (quoting *Bailey v. Henderson*, 94 F. Supp. 2d 68, 71 (D.D.C. 2000), which also denied the plaintiff’s disparate-treatment sex discrimination claim). Cases and guidance related to Title VII of the Civil Rights Act of 1964 are frequently used to interpret Title IX’s protections. *See, e.g.*, *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 636-37, 647 (1999).

67. Karin, *supra* note 2, at 500 (citing *Ward v. Nicholson*, No. 0120070147, 2007 WL 556805 (E.E.O.C. 2007) and exploring cases that allege discrimination at the intersection of sex and age). *But see id.* at 500-01 (citing *Mesias v. Cravath, Swaine & Moore LLP*, 106 F. Supp. 3d 431, 435, 438 (S.D.N.Y. 2015), finding that remarks related to the worker’s menopause were not enough to find liability).

68. *White v. Twin Falls Cnty.*, No. 14-CV-00102, 2016 WL 1275594, at *2, *9 (D. Idaho Mar. 31, 2016). The case settled. *See* Order of Dismissal, *White v. Twin Falls Cnty.*, No. 14-CV-00102 (D. Idaho June 27, 2016).

69. While there is less discussion about menopause harassment in the United States, there is an ongoing, robust conversation about it in the United Kingdom, which considers menopause discrimination to be sex-discrimination under the Equality Act of 2010. *See, e.g.*, *A v. Bonmarche Ltd.* [2019] E.T. Z4 (WR) 4107766/2019 (Scot.), (harassing an employee based on menopause could constitute sex-based discrimination); U.K. Dep’t of Health & Social Care, WOMEN’S HEALTH STRATEGY FOR ENGLAND (Aug. 30, 2022), [<https://perma.cc/7GK5-Q9SA>] (government actions in the next ten years include supporting workers in menopause with steps to break down stigma, create workplace adjustments, and increase education about menstrual health); *Menopause and the Law*, EQUITY (last visited Sept. 2, 2022), [<https://perma.cc/555M-NBPP>], (The British equity union has undertaken to educate its members that “unwanted comments, jokes, banter or ridicule about a woman’s menopause or perimenopause symptoms could amount to harassment.”).

thers the fundamental goal of Title IX: that no student is deprived of equal access to education because of sex.⁷⁰

C. Other Menstruation or Related Conditions Discrimination

Harassment is only one type of discrimination on the basis of sex that menstruators experience. This section will explore other ways in which menstruators have experienced discrimination related to menstruation.

People with disabilities who menstruate may face unique discrimination. Consider the experience of C.S., “a typical pre-teen” who also has Down Syndrome, and who attended an after-school program, Stepping Stone School.⁷¹ As a result of her disability, “C.S. needs extra help sometimes, including assistance with toileting,”⁷²—a type of support also provided to other students with disabilities who were comparable in age to C.S.⁷³ Specifically, the school aided C.S. with removing her diapering and cleaning herself. When she started menstruating, C.S. required no additional care from the school. Nonetheless, the principal expelled C.S. upon learning that she had started her period. The school alleged that aiding C.S. with her menstruation would not be possible.⁷⁴ The positive school environment that C.S. experienced ended when the school expelled her simply because she had begun menstruating.⁷⁵ The school alleged that aiding C.S. with her menstruation presented a “privacy need” without explaining what this meant.⁷⁶ Later, the school falsely asserted that it had expelled C.S. because her menstruation required

70. Johnson et al., *supra* note 2, at 241.

71. Am. Compl. at ¶ 1, *Spaw v. Stepping Stone Sch.*, No. 20-CV-00741 (W.D. Tex. July 10, 2020) (noting that C.S. “loves superheroes and the TV show ‘Supergirl.’ She enjoys dancing, singing, and doing gymnastics and adores her family, her teachers, and her classmates.”); see Jennifer Weiss-Wolf, *Education, Discrimination and Menstruation*, Ms. (Aug. 3, 2020), [<https://perma.cc/FT5P-HSBX>].

72. Am. Compl. at ¶ 2, *Spaw*, (No. 20-CV-00741).

73. Am. Compl. at ¶ 3, *Spaw*, (No. 20-CV-00741).

74. Am. Compl. at ¶ 3, *Spaw*, (No. 20-CV-00741).

75. Am. Compl. at ¶ 3, *Spaw*, (No. 20-CV-00741). Before expulsion, C.S. enjoyed the school because she could “dance, giggle, and socialize with peers without disabilities who were her same age.” *Id.*

76. See Am. Compl. at ¶ 24, *Spaw*, (No. 20-CV-00741).

additional diapering needs.⁷⁷ Following the filing of a complaint under Title IX by C.S. and her family, the parties agreed to dismiss the suit.⁷⁸

Students also have been subjected to inappropriate acts by faculty and staff related to menstruation or related conditions. For example, a twelve-year-old student was forced to undergo a physical examination to participate in school sports notwithstanding having already been cleared to do so by an outside physician.⁷⁹ She alleged that during the exam she was instructed to “remove portions of her clothing and expose her genitalia”; she was menstruating at the time and the nurse “examined [the student’s] genitalia with a flashlight.”⁸⁰ Although it dismissed the Title IX claim because the school did not receive federal funding, the federal court (S.D.N.Y.) allowed assault and battery claims against the school nurse to proceed.⁸¹

Disputes arising outside of the school setting also lend weight to the importance of explicitly defining menstruation and related conditions as sex-related within the proposed Title IX regulations. Consider the case of Joyce Flores, a dental hygienist working in a correctional facility.⁸² When she came to work one morning, she was wearing a tampon when she passed through the body scanner.⁸³ When she later left her office to go to the bathroom, she forgot to take a tampon with her, so returned to her office, passing through the body scanner, with toilet paper in her underwear to absorb her menstrual flow.⁸⁴ When she later “inserted another tampon and walked through the body scanners for a third time, the third image, again, looked different.”⁸⁵ The body scanner flagged Flores under “suspicion of contraband,” and she was suspended and later terminated from her employment, even though no contraband was found.⁸⁶ Ultimately, the “suspicion” arose merely because Flores had been wearing a tampon the first time but not the sec-

77. See Am. Compl. at ¶ 29, *Spaw*, (No. 20-cv-00741).

78. See Order of Dismissal, *Spaw*, No. 20-cv-00741 (Nov. 9, 2020).

79. TP *ex rel* Patterson v. Elmsford Union Free Sch. Dist., No. 11 CV 5133, 2012 WL 860367, at *4-5 (S.D.N.Y. 2012).

80. *Patterson*, 2012 WL 860367, at *2.

81. *Patterson*, 2012 WL 860367, at *3.

82. *Flores v. Virginia Dep’t of Corrs.*, No. 20-cv-00087, 2021 WL 668802, at *2 (W.D. Va. Feb. 22, 2021).

83. *Flores*, 2021 WL 668802, at *2.

84. *Flores*, 2021 WL 668802, at *2.

85. *Flores*, 2021 WL 668802, at *6.

86. *Flores*, 2021 WL 668802, at *2-3.

ond. The United States District Court of the Western District of Virginia allowed Flores’ claim alleging discrimination on the basis of sex to proceed, as “[b]ut for Flores’s menstruation and use of a tampon—conditions inextricable from her sex and her child-bearing capacity—she would not have been discharged.”⁸⁷

With respect to menopause, consider the experience of Alisha Coleman, a perimenopausal employee who was terminated after some of her menstrual blood twice leaked on company property.⁸⁸ Although she promptly cleaned the spot after each occurrence, the employee was fired because she “lacked high standards of cleanliness.”⁸⁹

As discussed above, the menstrual cycle from menarche through menopause may impact students and educators in ways that are often considered taboo in schools. Those experiencing any menstruation-related conditions may be subjected to harassment, suspension, termination, and other forms of discrimination. As discussed in the next Section, these acts of harassment and other forms of discrimination occur because of sex and should be recognized as such.

II. PROPOSALS AND JUSTIFICATIONS

To address the experiences of discrimination identified in section I, we strongly recommend that the Department modify the proposed regulations in three important, yet seamless, ways. First, the term “discrimination on the basis of sex” should be amended to explicitly include “menstruation or related conditions.” This phrase “menstruation or related conditions” should be defined to include “menstruation, menstrual cycle, menstrual hormone fluctuations or pain, menopause, premenopause, peri-

87. *Flores*, 2021 WL 668802, at *6 (emphasis in original).

88. *Coleman v. Bobby Dodd Inst., Inc.*, No. 17-CV-29, 2017 WL 2486080, at *1 (M.D. Ga. June 8, 2017).

89. Alisha Coleman, *I Was Fired from My Job as a 911 Call Taker for Getting My Period at Work*, ACLU (Aug. 25, 2017), [<https://perma.cc/LM39-UPVY>]. Unfortunately, the court held that Coleman did not “allege facts that if proven are direct evidence of sex discrimination,” holding that her firing was not based on being perimenopausal or menstruating, but rather because she was “unable to control the heavy menstruation and soiling herself and company property.” *Coleman*, 2017 WL 2486080, at *1-2. The court further held that “[t]here is no allegation that male employees who soiled themselves and company property . . . would have been treated more favorably.” *Id.* at *2. Coleman appealed and the case settled. *Coleman v. Bobby Dodd Inst., Inc.*, No. 17-13023, 2017 WL 6762403 (11th Cir. Nov. 6, 2017); see also Karin, *supra* note 2, at 492-93, 495 (describing why the decision does not preclude other menstruation-related discrimination claims).

menopause, and related conditions.” If, however, the Department of Education determines that these proposals are not acceptable, we ask it to amend the proposed regulations to clarify that “pregnancy or related conditions” includes “menstruation, menopause or related conditions.” Second, we ask the Department to clarify obligations related to making reasonable modifications that may be associated with menstruation or related conditions. Third, we recommend that the Department adopt explicit requirements regarding menstrual education and training. The remainder of this section explains these recommendations.

*A. Explicitly Define Sex Discrimination Under Title IX to
Include Discrimination Relating to Menstruation,
Menopause, and Related Conditions*

We applaud the Department’s proposed 34 C.F.R. § 106.10, especially its broad inclusion of sex stereotypes, sex characteristics (including intersex traits), and gender identity. To meet the goal of prohibiting *all* forms of sex discrimination, however, the new regulations must clarify that discrimination on the basis of sex under Title IX includes discrimination on the basis of menstruation and related conditions. Accordingly, we propose the following changes, reflected in **bold and underlined**:

- Proposed 34 C.F.R. § 106.10: Scope.

Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, **menstruation or related conditions**, sexual orientation, and gender identity.

- 34 C.F.R. § 106.2: Definitions.

“menstruation or related conditions” is defined to include menstruation, menstrual cycle, menstrual hormone fluctuations or pain, premenopause, perimenopause, menopause, and related conditions.

The proposal to add “discrimination on the basis of . . . menstruation or related conditions” to the scope of “discrimination on the basis of sex” is wholly consistent with the Department’s understanding that sex discrimination includes discrimination based on pregnancy or related conditions⁹⁰ and that pregnancy-based harassment is sex-based har-

90. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390, 41410 (proposed July 12, 2022) (to be codified at 34 C.F.R. pt. 106).

assment.⁹¹ It also provides important support to the Department’s stance that sex discrimination includes discrimination on the basis of gender-identity and sex characteristics.⁹²

Discrimination because of menstruation from menarche through menopause is discrimination on the basis of sex; it is based on an individual’s reproductive sex organs, such as the uterus, which is the situs of the menses that is discharged during the menstrual cycle.⁹³ As described above, the menstrual cycle is a biological process that is related to hormonal changes (in all cases) and pain (in some cases) that typically occurs from puberty until menopause.⁹⁴ Perimenopause and menopause are related to cessation of menstruation. All are therefore sex-based.

Section I of this comment provides numerous examples of how individuals have experienced discrimination related to menstruation.⁹⁵ Yet, the Department’s failure to explicitly define discrimination “on the basis of sex” to include discrimination on the basis of menstruation from menarche to menopause—and the lack of case law interpreting Title IX’s application to this issue—leaves students and schools without clear guidance. Our proposal to include “menstruation or related conditions” in the description of discrimination “on the basis of sex” will provide clarity for schools, students, and employees alike as to permitted—and prohibited—conduct. For example, when C.S. (a teenager with Down Syndrome) was expelled from her after-school program, notwithstanding the program’s capacity to meet her menstruation-related needs, a Title IX action was filed against the school. The parties ultimately settled, but amending the regulation to include “menstruation or related

91. *Id.* at 41512-13.

92. *See, e.g., id.* at 41391, 41531.

93. *See* Johnson et al., *supra* note 2, at 225, 263 (identifying discrimination against menstruating students as sex-based discrimination under Title IX); Karin et al., *supra* note 2, at 58 (identifying sex-discrimination coverage for menstruating test takers under federal, state, and local laws); Karin, *supra* note 2, at 490-95 (explaining discrimination protections against current and former menstruators under Title VII and local equivalents); Deborah A. Widiss, *Menstruation Discrimination and the Problem of Shadow Precedents*, 41 COLUM. J. GENDER & L. 235, 243 (2021) (“Menstruation, like pregnancy, is a condition linked to female biology and associated with stereotypical assumptions about women’s proper role in society.”); Crawford et al., *supra* note 2, at 355-56 (menstruation is covered under existing employment discrimination laws); Johnson, *supra* note 2, at 28-37 (identifying discrimination against menstruating employees as discrimination under Title VII); CRAWFORD & WALDMAN, *supra* note 2, at 43-44.

94. *See supra* notes 6-8 and accompanying text.

95. *See supra* Section I.

conditions” and defining that phrase as we have suggested will help ensure a clearer and quicker resolution of such disputes.⁹⁶

Further, clarifying that the definition of sex includes “menstruation or related conditions” is consistent with court and EEOC decisions that have done the same under Title VII of the Civil Rights Act of 1964 for disparate treatment and harassment cases alike.⁹⁷ As noted above, in *Flores v. Virginia Department of Corrections*, the federal district court reasoned that menstruation-based discrimination *is* sex-based discrimination under Title VII.⁹⁸ Rejecting the Virginia Department of Corrections’ mo-

96. *See supra* notes 71-78 and accompanying text. This would be similar to how the Pregnancy Discrimination Act provided this type of clarification and authority for Title VII—e.g., the law prohibits discrimination on the basis of pregnancy because it prohibits discrimination on the basis of sex. *See* Widiss, *supra* note 93, at 242 (“Theorists and advocates addressing both employment-related and non-employment-related claims should therefore consistently argue that menstruation discrimination is sex discrimination, full-stop. [P]rior to *Gilbert*, the circuit courts and the EEOC unanimously stated that pregnancy discrimination was sex discrimination. The PDA simply clarified and restored that interpretation. Similarly, menstruation discrimination should be recognized as sex discrimination, whether or not statutes were amended with language similar to the PDA.”).

97. *See, e.g.*, *Petrosino v. Bell Atl.*, 385 F.3d 210, 215, 224, (2nd Cir. 2004) (“gender-hostile environment” was “sufficiently severe and pervasive” when male supervisors “routinely [connected] their perceptions of [a menstruating worker’s job performance] and her anatomy, especially [with] vulgar references to her breasts and menstrual cycle”); *Conner v. Schrader-Bridgeport Int’l, Inc.*, 227 F.3d 179 (4th Cir. 2000) (asking a faculty worker if she was “on the rag today” in front of colleagues multiple times a month was evidence of a hostile work environment); *Equal Emp. Opportunity Comm’n v. H. S. Camp & Sons, Inc.* 542 F. Supp. 411, 436, 449, 450 (M.D. Fla. 1982) (finding that an employer’s proffered non-discriminatory reason for firing a Black female worker who “experienced severe pain due to menstrual cramps” and left work to sleep was pretextual). *But see* *Jirak v. Fed. Express Corp.*, 805 F. Supp. 193 (S.D.N.Y. 1992) (dismissing a sex-discrimination claim brought by someone who was fired for missing work due to menstrual cramps); *supra* note 89 (explaining the district court’s decision in *Coleman*).

Notably, the New York City Human Rights Commission has issued guidance that unequivocally declares “discrimination based on menstruation is a form of gender discrimination.” NYC Comm’n on Hum. Rts., *NYC Commission on Human Rights Legal Enforcement Guidance on Discrimination on the Basis of Pregnancy, Childbirth, Related Medical Conditions, Lactation Accommodations, and Sexual or Reproductive Health Decisions* 3 (July 2021), [<https://perma.cc/6NEH-Q3SP>]. Similarly, some state courts also have found menstruation-related discrimination to constitute sex discrimination under state antidiscrimination laws. *See, e.g.*, *Taylor v. Giant of Md.*, 33 A.3d 445 (Md. 2011); *Giant of Md., LLC v. Taylor*, 981 A.2d 1, 12 (Md. Ct. Spec. App. 2009). *See generally* Karin, *supra* note 2, at 496-98 (reviewing theories to prove menstrual discrimination).

98. *See supra* notes 82-87 and accompanying text; *Flores v. Va. Dep’t of Corrs.*, No. 20-cv-00087, 2021 WL 668802, at *6 (W.D. Va. Feb. 22, 2021).

tion to dismiss, the court held that “*but for* Flores’s menstruation and use of a tampon—conditions inextricable from her sex and her child-bearing capacity—she would not have been discharged.”⁹⁹ The court made clear that its decision was based on Title VII’s “because of sex” or “on the basis of sex” language even without relying on the incorporated Pregnancy Discrimination Act’s language of “pregnancy . . . or related conditions.”¹⁰⁰ The court further reasoned that menstruation-related discrimination was sex discrimination because terminating an employee for using menstrual products “will always result in ‘treatment of a person in a manner which but for that person’s sex would be different.’”¹⁰¹

In another case, the EEOC supported an Administrative Law Judge’s finding that menstruation-related harassment is sex-based harassment under Title VII.¹⁰² In this case, the EEOC agreed that in “failing to act promptly, [the Department of Transportation] tolerated the use of sexist comments and jokes in the workplace, including . . . a coworker’s reference in writing to menstrual cycles[, as well as] a written joke about PMS and a joke called ‘The Gift,’ both of which were passed around the office.”¹⁰³ The EEOC found that the employee was harassed based on her sex when subjected to the unwelcome menstrual and other sexist comments and jokes,¹⁰⁴ awarded damages, expenses, fees and costs totaling over \$58,000, and urged the agency to discipline the employee’s supervisor.¹⁰⁵

In *Harper v. Thiokol Chemical Corporation*, Bertha Harper was prohibited from returning to work after her maternity leave until she had a “normal menstrual cycle,” which eventually resulted in her fir-

99. *Flores*, 2021 WL 668802, at *6.

100. *Flores*, 2021 WL 668802, at *4-6. *But see supra* note 89 (explaining the *Coleman* decision).

101. *Flores*, 2021 WL 668802, at *6 (citing *Hall v. Nalco Co.*, 534 F.3d 644, 649 (7th Cir. 2008)).

102. See Robyn M. Duponte, Arnold Rubin, Gerard Thomson & Aina Watkins, *Hostile Work Environment Based on Gender*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, XV DIGEST EQUAL EMP. OPPORTUNITY L. (Spring 2004), [<https://perma.cc/RF2F-WXLX>] [hereinafter Duponte et al.]; *Hiebert v. Minetta*, Appeal No. 01A05253, 2003 WL 21302525, at *1 (E.E.O.C. Office of Fed. Ops. May 30, 2003); see also Johnson, *supra* note 2, at 33-34.

103. *Hiebert*, 2003 WL 21302525, at *1; see also Johnson, *supra* note 2, at 33.

104. *Hiebert*, 2003 WL 21302525, at *2; see also Johnson, *supra* note 2, at 33-34.

105. See Duponte et al., *supra* note 102; *Hiebert*, 2003 WL 21302525, at *3; Johnson, *supra* note 2, at 34.

ing.¹⁰⁶ She sued claiming her employer discriminated against her on the basis of sex. Both the district court and the Fifth Circuit found that the employer had indeed discriminated against Harper on the basis of sex.¹⁰⁷ The Fifth Circuit stated that “[T]hiokol’s policy of requiring women who have been on pregnancy leave to have sustained a normal menstrual cycle before they can return to work clearly deprives female employees of employment opportunities and imposes on them a burden which male employees need not suffer.”¹⁰⁸ Here, the court found that conditioning an employee’s continued employment on her menstrual cycle without any business justification constitutes sex-based discrimination.¹⁰⁹

Finally, explicitly prohibiting discrimination based on “menstruation or related conditions” will help protect trans men, as well as intersex, nonbinary, and gender-queer persons who menstruate. We applaud the broad definition of sex proposed by the regulations (inclusive of different gender identities and sex characteristics).¹¹⁰ In keeping with that, full anti-discrimination protection should exist for those who menstruate or experience menopause who are not cisgender, endosex girls or women. For example, menstruation or menopause discrimination also may occur on the basis of gender identity or sex characteristics when the discriminator is motivated by expectations that a person should conform to stereotypes associated with their assumed sex or gender.¹¹¹

For instance, a person may harass a trans man for menstruating because he is not meeting the harasser’s gender expectations that men do not menstruate, or someone may harass an intersex woman who does not menstruate since her body does not conform to sex stereotypes.¹¹² *Bostock v. Clayton County* supports a finding that this is discrimination on the basis of sex.¹¹³ In that case, the Supreme Court ruled that “Title

106. *Harper v. Thiokol Chem. Corp.*, 619 F.2d 489, 490, 493 (5th Cir. 1980).

107. *Harper*, 619 F.2d at 494.

108. *Harper*, 619 F.2d at 491-92. The Fifth Circuit further stated that the policy was illegal discrimination because the employer offered no business justification for such a policy. *Id.* at 492.

109. *Harper*, 619 F.2d at 493. *See also* Johnson, *supra* note 2, at 29-30; Karin, *supra* note 2, at 452, 497.

110. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390, 41390, 41531 (proposed July 12, 2022) (to be codified at 34 C.F.R. pt. 106).

111. Karin et al., *supra* note 2, at 54; CRAWFORD & WALDMAN, *supra* note 2, at 132-45.

112. Karin et al., *supra* note 2, at 48.

113. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741-43 (2020).

VII’s prohibition of discrimination ‘on the basis of sex’ covered discrimination against individuals who are transgender, gay, or lesbian.”¹¹⁴ The Supreme Court reasoned that “it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex.”¹¹⁵ Furthering this point,

[t]he Court explained that in discriminating against an individual who is transgender, the actor is ‘intentionally penaliz[ing] a person identified as [one sex] at birth for traits or actions that it tolerates in an employee identified as [another sex] at birth. Again, the individual employee’s sex plays an unmistakable and impermissible role in the [action].’¹¹⁶

The Department’s proposed regulations recognize this line of reasoning by including “gender identity” and “sex characteristics” in the definition of “sex,”¹¹⁷ and we encourage the inclusion of “menstruation or related conditions” to reinforce protections for individuals whose experiences of menstruation or menopause may not conform to sex stereotypes.

People continue to experience discrimination based on “menstruation or related conditions,” as seen in the cases described in this comment. The Department of Education should remove any remaining ambiguity and explicitly state in its Title IX regulations that discrimination on the basis of sex includes discrimination on the basis of menstruation or related conditions.

114. Karin et al., *supra* note 2, at 58 (citing *Bostock*, 140 S. Ct. at 1741-43); CRAWFORD & WALDMAN, *supra* note 2, at 145.

115. *Bostock*, 140 S. Ct. at 1741.

116. Karin et al., *supra* note 2, at 59 (citing *Bostock*, 140 S. Ct. at 1741).

117. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390, 41391, 41531 (proposed July 12, 2022) (to be codified at 34 C.F.R. pt. 106). Recent updates to the Title IX Legal Manual clarify that the same reasoning applies with respect to discrimination against intersex people. See U.S. DEP’T OF JUST., TITLE IX LEGAL MANUAL (updated Aug. 12, 2021) (internal citations omitted) (last visited Sept. 12, 2022), [<https://perma.cc/F3US-MX6S>].

*B. In the Alternative, the Regulations Should Clarify
that “Pregnancy or Related Conditions” Includes
“Menstruation, Menopause, or Related Conditions”*

If the Department does not adopt our proposal to include “menstruation or related conditions” when describing discrimination “on the basis of sex” (34 C.F.R. § 106.10), we ask the Department instead to modify the definition of “pregnancy or related conditions” to include “menstruation, menopause, or related conditions.” As the Department recognizes,¹¹⁸ the current Title IX regulations use the term “pregnancy and related conditions,” but do not define that term.¹¹⁹ We fully support the Department’s proposal to define “pregnancy and related conditions” in the new regulations at proposed 34 C.F.R. § 106.2. We further endorse the Department’s use of “or,” in using the term “pregnancy *or* related conditions” (as opposed to “pregnancy *and* related conditions”) (emphasis added).¹²⁰ Using the disjunctive “or” helpfully makes clear the term goes beyond pregnancy itself. Therefore, if our first proposal is not accepted to include “menstruation or related conditions” in the description of “discrimination on the basis of sex,” it would be consistent with the Department’s approach to explicitly include in the broadened definition of “pregnancy or related conditions” menstruation, menopause, and related conditions. Such a definition would read as follows:

- (1) Pregnancy, childbirth, termination of pregnancy, ~~or~~ **menstruation, or menopause**;
- (2) Medical conditions related to pregnancy, childbirth, termination of pregnancy, ~~or~~ lactation, **menstruation, or menopause**;
or

118. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390, 41513, 41515, 41418.

119. See 34 C.F.R. § 106.40(b).

120. See, e.g., Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390, 41831, 41568 (proposed July 12, 2022) (to be codified at 34 C.F.R. pt. 106).

- (3) Recovery from pregnancy, childbirth, termination of pregnancy, lactation, **menstruation, menopause**, or their related medical conditions.

Including menstruation, menopause, and related conditions in the definition of “pregnancy or related conditions” makes sense from both a scientific and policy perspective. Pregnancy and menstruation are closely related biological processes connected to the same reproductive system; indeed, they represent the two possible outcomes once ovulation occurs. Pregnancy results from the fertilization of an ovulated egg and implantation in the uterine wall (or other bodily structure, like the fallopian tube, which results in a non-viable and life-threatening ectopic pregnancy),¹²¹ while menstruation results from the shedding of the uterine lining from the *non*-fertilization of that egg. (Indeed, pregnancies are dated from the first day of the menstrual period prior to fertilization and implantation, known as the “last menstrual period.”)¹²²

Particularly relevant here are the reasons underlying the Department’s longstanding recognition that pregnancy discrimination is a form of sex discrimination. As the Department explains, pregnancy-related discrimination often is “sex discrimination”; so too is the associated “failure to accommodate conditions associated with women as effectively as those associated with men.”¹²³ The Department adds that this discrimination can result “not only from animus, but also from sex-based indifference to the needs of this student and employee population.”¹²⁴ The Department also aptly notes that “to ensure that pregnancy and related conditions are not the vector through which sex becomes a barrier to a student’s or employee’s participation in a recipient’s education program or activity, proactive measures are necessary to ensure” full access.¹²⁵

All of these observations are equally applicable to menstruation from menarche through menopause. Like pregnancy, menstruation-related conditions typically are associated with cis women and are often

121. *About Pregnancy*, NATIONAL INSTITUTE OF CHILD HEALTH AND HUMAN DEVELOPMENT, [https://perma.cc/627A-W8QU].

122. *Id.*

123. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41531 (proposed July 12, 2022) (to be codified at 34 C.F.R. pt. 106).

124. *Id.*

125. *Id.*

viewed with sex-based indifference and animus. Indeed, the animus and stigma surrounding menstruation from menarche through menopause—which often are shrouded in silence and secrecy—are often even stronger than that surrounding pregnancy.¹²⁶ And just like pregnancy, menstruation-related conditions can become vectors through which sex becomes a barrier to a student’s or employee’s full participation in education programs. These barriers can include menstruation-related peer or employee harassment; restrictive school policies (e.g., limits on students’ bathroom access); and inaccessibility of menstrual products (e.g., policies whereby extra products are only kept in school nurse’s offices that are far from bathrooms or require someone to disclose menstruation to school personnel, or when more freely available, placed only in girls bathrooms, without regard to the needs of trans students).¹²⁷ Menopausal symptoms, too, can drive (primarily older) students out of school or related opportunities and women out of the workplace, particularly when discrimination on the basis of menopause is not recognized as a form of sex discrimination.¹²⁸

Notably, some courts, local governments, and scholars recognize that menstruation-based discrimination is generally viewed as a form of sex discrimination, and that it can specifically fall within legal prohibitions of discrimination based on pregnancy, such as the Pregnancy Discrimination Act.¹²⁹ However, by explicitly providing a definition of

126. See Waldman et al., *supra* note 2, at 46-53 (comparing social attitudes toward menopause, menstruation, pregnancy and breastfeeding).

127. See, e.g., Johnson et al., *supra* note 2, at 234-63; Christopher A. Cotropia, *Menstruation Management in United States Schools and Implications for Attendance, Academic Performance, and Health*, 6 WOMEN’S REPROD. HEALTH 289, 292 (2019); Karin et al., *supra* note 2, at 58, 64; Elizabeth B. Cooper, Margaret E. Johnson & Marcy L. Karin, *Menstrual Products and the Bar: Advocacy Seeks to Create Equal Bar Exam Testing Conditions for Menstruators*, BEST PRACS. FOR LEGAL EDUC. BLOG (Aug. 5, 2020), [<https://perma.cc/9FMC-MA64>].

128. See, e.g., *Coleman v. Bobby Dodd Inst.*, No. 17-CV-29, 2017 WL 2486080 (M.D. Ga. June 8, 2017) (rejecting claim that termination for unexpected perimenopausal bleeding amounted to a form of sex discrimination).

129. See, e.g., *Flores v. Va. Dep’t of Corrs.*, No. 20-cv-00087, 2021 WL 668802 (W.D. Va. Feb. 22, 2021); *Powers v. Chase Bankcard Servs., Inc.*, No. 10-cv-332, 2012 WL 1021704 (S.D. Ohio Mar. 26, 2012) (allowing a hostile work environment claim relying on multiple incidents of menstruation and lactation-related harassment to survive summary judgments); NYC Comm’n on Hum. Rts., *supra* note 97, at 3 (“Discrimination based on actual or perceived pregnancy . . . or related medical conditions is prohibited under the [New York City Human Rights Law] . . . Pregnancy discrimination is a form of gender discrimination. Similarly, discrimination based on menstruation is a form of gender discrimination. Treating an individual less well than

“pregnancy or related conditions” that does not mention menstruation for Title IX purposes, the Department may inadvertently reverse this progress, both in the Title IX context and beyond. By contrast, including menstruation-related conditions in the definitional examples of “pregnancy or related conditions” will help ensure that sex does not become a barrier to full participation in educational programs for either students or employees.

*C. Clarify Recipients’ Obligations to Provide
Menstruation-Related Modifications*

To facilitate compliance with the antidiscrimination requirements of Title IX, we recommend that the Department clarify obligations related to making reasonable modifications that may be associated with menstruation or related conditions. Accordingly, we propose the following changes:

- 34 C.F.R. § 106.40 (b)(4) Reasonable modifications for students because of pregnancy or related conditions.

Reasonable modifications to the recipient’s policies, practices, or procedures for a student because of pregnancy, **menstruation**, or related conditions, for purposes of this section:

....

(iii) May include but are not limited to breaks during class to attend to related health needs, expressing breast milk, ~~or~~ breastfeeding, **menstruating, or related conditions**; intermittent absences to attend medical appointments; access to online or other homebound education; changes in schedule or course sequence; extension of time for coursework and rescheduling of tests and examinations; counseling; changes in physical space or supplies (for example, access to a larger desk, **menstrual products and spaces that are clean, safe, private, and provide the ability to address menstruation**,¹³⁰ **a**

others because of their actual or perceived pregnancy or related medical condition is a violation[.]”); Karin, *supra* note 2, at 491, 494-95; Widiss, *supra* note 93, at 236; Karin et al., *supra* note 2, at 66-67.

130. Adequate menstrual space includes “safe and conveniently located’ facilities that: offer privacy; are accessible; contain toilets, soap, water, and disposal options; and contain an adequate and varied supply of menstrual products.” Karin, *supra* note 2, at n.89-91 and accompanying text (citations omitted); *see also* Karin et al., *supra* note 2, at 68; Johnson et al., *supra* note 2, at 241-50 (defining “menstruation-friendly’ facilities”). “Menstrual product” is defined to include “materials that absorb menstrual

fan or location with improved ventilation, or a footrest); modifications to dress codes; elevator access; or other appropriate changes to policies, practices, or procedures.

- 34 C.F.R. § 106.57(e) Lactation and menstruation time and space modifications.

- (1) A recipient must provide reasonable break time for an employee to express breast milk, breastfeed, or manage menstruation or related conditions 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.

(3) A recipient must ensure the availability of reasonable modifications, including a clean, safe, and private space to address menstruation or related conditions as needed.

This proposal recognizes that students and employees may need certain modifications to address menstruation or related conditions to succeed in educational settings.¹³¹ We identify four such categories to ensure equal opportunity to education on the basis of sex, including access to (1) menstruation-friendly restrooms, (2) menstrual products, (3) break time, and (4) other reasonable modifications.

The first two categories of potential modifications involve access to clean, safe, and private restroom facilities (with adequate flowing water, soap, and paper towels or dryers to clean and with waste receptacles to

discharge such as tampons, maxi-pads, diapers, menstrual cups, and underwear; cleaning products such as wet wipes, tissues, and water; and pain-relief products such as pills, patches, and heating pads.” Karin et al., *supra* note 2, at 73.

131. This builds on existing obligations to provide accommodations for some menstruation-related reasons contained in the Americans with Disabilities Act, the Rehabilitation Act, the Individuals with Disabilities Education Act, and the Family Medical Leave Act. *See, e.g., Schmidt v. Solis*, No. 17-cv-194, 2019 WL 958370, at *5 (D. Me. Feb. 27, 2019) (an employee with endometriosis should have been accommodated); *Chipman v. Cook*, No. 15-cv-143, 2017 WL 1160585 (E.D. Ark. Mar. 28, 2017) (menopause may meet the definition of disability); *see* Karin, *supra* note 2, at 462-66, 474-90 (categorizing workers’ menstruation-related needs and exploring existing laws that offer some workers accommodation rights related to these needs). *But see supra* notes 20-22 and accompanying text (acknowledging that menstruation-related conditions may be—but are not universally—considered disabilities).

dispose of products) and a range of menstrual products.¹³² While all menstruating students and employees may have this need, it “is disproportionately true for the large numbers of menstruators living in poverty.”¹³³ Twenty percent of teenagers in a recent study of 1,000 thirteen to nineteen year-olds shared that they struggled or could not afford menstrual products.¹³⁴ Further, as noted above, young menstruators, as well as those experiencing perimenopause, often have unpredictable periods.¹³⁵

Relatedly, a range of modifications may be needed to “address students whose body and/or cycle may require different sized or non-allergenic products.”¹³⁶ Further, there may be students or employees “with physical and/or intellectual disabilities who are not able to operate a dispenser and/or for whom menstruation may need to be a topic for consideration in individualized education plans.”¹³⁷

The third category reflects that these modifications may not be effective if menstruators are not provided the time to use them. As with pregnant, parenting, and/or disabled students and employees, inflexible attendance and other school policies may not allow menstruators the break time they need to address menstruation without undermining the educational task at hand.¹³⁸

Finally, schools should be required to make other appropriate modifications to ensure non-discrimination and equal access to educational opportunities. For example, changes to dress codes may be need-

132. Localities are increasingly requiring that menstrual products be available to students and employees; additional jurisdictions are considering following suit. *See, e.g.*, Galina M. Abdel Aziz & Marcy Karin, *Menstrual Equity in Schools: Existing State Laws* (Dec. 8, 2020), [https://perma.cc/UGM9-2BLM] (comparing requirements of state laws that required schools to provide products in schools at the time); ACLU & Period Equity, *The Unequal Price of Periods*, Tbl 1 at 7, App. at 10-12 (2019), [https://perma.cc/UG3R-FT73] (identifying state laws advancing menstrual equity in schools and other locations); PERIODS, POVERTY, AND THE NEED FOR POLICY, *supra* note 2, at 11 (contextualizing student and staff experiences with access to menstrual products in schools and noting that 14 states proposed related legislation in 2018).

133. Karin & Abdel Aziz, *supra* note 2, at 2; Johnson et al., *supra* note 2, at 252-53.

134. Thinx & PERIOD, *State of the Period 2021*, [https://perma.cc/N4TX-XDKL]; Johnson et al., *supra* note 2, at 252.

135. *See supra* notes 9, 31 and accompanying text.

136. Karin & Abdel Aziz, *supra* note 2, at 3 (citing Elisabeth H. Quint & Rebecca F. O'Brien, *Menstrual Management for Adolescents with Disabilities*, 138 PEDIATRICS 1 (July 2016)).

137. Karin & Abdel Aziz, *supra* note 2, at 3 (citations omitted); PERIODS, POVERTY, AND THE NEED FOR POLICY, *supra* note 2, at 10 (describing the experiences of a teacher who provides menstruation-related support to students with intellectual disabilities).

138. Karin et al., *supra* note 2, at 44; Karin, *supra* note 2, at 462-65.

ed to minimize a public display of leaking.¹³⁹ Just under a quarter of public schools and over half of private schools in the United States require students to wear uniforms, including some that involve khaki-colored clothing.¹⁴⁰ Other schools may regulate student dress in other ways that also make menstruating students vulnerable to exposing period-related leaks.¹⁴¹ Some menstruators may need permission to carry or access a change of clothes or tie something around their waist. Others may request a classroom or seat that is located closer to available restrooms or in a part of the room that minimizes travel time to the restroom and avoids public displays of leaking or product possession. Some individuals may, at times, need a room to lie down or rest in for a few minutes, require access to a heating pad, or be given permission to carry a fan or open a window for increased ventilation during perimenopause or menopause.¹⁴²

Without access to these modifications when needed, students and employees will likely experience a range of dignitary and other harms.¹⁴³ First, students will miss opportunities to be present or engaged in class. Studies demonstrate that without access to menstruation-friendly spaces and products, menstruating students may “miss school entirely, arrive late, leave early, or be distracted when they are present.”¹⁴⁴ Missing this time may impact academic success or cause presenteeism problems.¹⁴⁵ While we recognize that funding recipients may have valid interests in attendance and related policies, preventing break time to address menstruation or related conditions—or requiring students to disclose the reason for a restroom pass in front of others—has led some students to

139. Johnson et al., *supra* note 2, at 242-43; Karin & Abdel Aziz, *supra* note 2, at 4; see NATIONAL WOMEN’S LAW CENTER, DRESS CODED: BLACK GIRLS, BODIES, AND BIAS IN DC SCHOOLS (2018), [<https://perma.cc/TUR6-SX8K>].

140. Johnson et al., *supra* note 2, at 244 n.97.

141. *Id.* at 244 (citing Coshandra Dillard, *Equity, Period.*, 61 TEACHING TOLERANCE (2019), [<https://perma.cc/L5SR-8NC8>]).

142. See Karin, *supra* note 2, at 465-66 (describing the reported needs of temperature control for teachers experiencing menopause and other menstruation-friendly facility needs like wellness rooms and heating pad access).

143. See generally Karin et al., *supra* note 2, at 70.

144. Karin & Abdel Aziz, *supra* note 2, at 2; Johnson et al., *supra* note 2, at 252; see, e.g., Cotropia, *supra* note 127, at 296; Barbara Goldberg, *U.S. Women Push Back Against Stigma, Cost of Menstruation*, REUTERS (Mar. 8, 2016, 9:07 AM), [<https://perma.cc/KAF7-Z7AD>]; UNESCO, PUBERTY EDUCATION & MENSTRUAL HYGIENE MANAGEMENT (2014); House et al., *supra* note 20, at 31; PERIODS, POVERTY, AND THE NEED FOR POLICY, *supra* note 2, at 8-9.

145. Johnson et al., *supra* note 2, at 254; Karin, *supra* note 2, at 463-64.

stay home or to feel an increased fear of teasing.¹⁴⁶ The lack of access to menstrual products may be particularly acute for lower-income students, students of color, and those living in rural communities with constrained financial resources.¹⁴⁷

When offered by schools, menstrual products are most commonly available in a nurse’s office or front office.¹⁴⁸ But requiring students to travel to a nurse, the front office, or any one location that could be a significant distance from the student’s classroom imposes an additional “time tax” that requires further absence from instruction or activity that is longer than necessary.¹⁴⁹ Respondents to Professor Christopher Cotropia’s study of eighteen to twenty-five year-olds believed that providing menstrual products in restrooms would reduce stigma.¹⁵⁰ Similarly, Oregon’s Department of Health recommends access to products in multiple locations for “[s]tudents who are experiencing gender dysphoria [and] may be comfortable and safe only when products can be accessed within a single stall.”¹⁵¹

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146. Johnson et al., *supra* note 2, at 241-42 (citing Kristi Pahr, *Period Shaming: A Not-So New Type of Bullying Parents Need to Know About*, PARENTS (Nov. 4, 2019), [https://perma.cc/E8YJ-ZTRB] (sharing the story of a tenth grader who shared her trauma, including feelings of confusion, anxiety and fear, resulting from a coach’s decision not to let her go to the bathroom to address her blood-soaked underwear and another student’s experience “bleeding out” numerous times during the school day “because [she] can’t go to the bathroom during class”).
147. Thinx & PERIOD, *supra* note 134, at 1-2 (further noting that “[a]lmost half of Black and Latinx students feel they are not able to do their best school work because of lack of access to period products”); DC CORE, *supra* note 22; Johnson & Karin, *supra* note 2.
148. Cotropia, *supra* note 127, at 292; Johnson et al., *supra* note 2, at 250-51.
149. Wilson High School students testified about the “challenges of having to wait to access those products while other students may be being seen by a nurse, issues if the nurse is out, and even spoke to the shame associated with having to hide products after having received them from the nurse’s office.” D.C. COUNCIL COMM. WHOLE REP. ON BILL 24-158 (Dec. 7, 2021), [https://perma.cc/6BXR-KXB5]; *see also* Karin et al., *supra* note 2, at 33 (explaining the indignity of the choice posed to some test takers to either “bleed out” or use valuable test time that will not be replenished to attend to menstruation in a bathroom); Elizabeth Cooper, Margaret Johnson & Marcy Karin, *Punishing Bar Exam Policies On Menstrual Products Must Go*, LAW360 (Feb. 25, 2021), [https://perma.cc/7QKK-VNVR] (describing the time away from an exam that is used to address menstruation as a tax that is not imposed on non-menstruating test takers) [hereinafter Cooper et al.]; Aunt Flow, *9 Spaces to Promote Period Equity for Title IX*, [https://perma.cc/2TF3-22SJ] (mentioning nine places where products should be made available under Title IX from school bathrooms to transportation services).
150. Cotropia, *supra* note 127, at 299; Johnson et al., *supra* note 2, at 250-51.
151. Or. Dep’t of Educ., *Menstrual Dignity for Students Toolkit*, 1, 9 (Mar. 2022), [https://perma.cc/K9V2-CQ97].

Second, limiting access to reasonable menstruation-related modifications further stigmatizes menstruation by causing students to internalize bias and develop feelings of embarrassment or guilt related to menstruation.¹⁵² By contrast, supporting menstruation by providing menstrual products “signals that [the school] supports all students, and cares about them having what they need to thrive at school.”¹⁵³

Third, limiting access to reasonable menstruation-related modifications also may increase indignity, stigma, harassment, and other forms of discrimination, including both student-on-student and employee-on-student harassment, which may be further exacerbated when leakage occurs as a result of being denied access or appropriate modifications.¹⁵⁴ For example, teachers described a “dehumanizing” restroom access policy in charter schools in Chicago and Washington, D.C.¹⁵⁵ It also may out some menstruators if products and facilities are only available in “girls” restrooms and locker rooms.¹⁵⁶ Providing these modifications helps afford dignity—“a counterweight to stigma” and a sense of belonging.¹⁵⁷

Adopting this proposal also will help ensure that the adoption of menstruation-supportive policies is not limited based on gender identity or sex characteristics. For instance, if schools provide products in all restrooms and locker rooms, they will be made available in the facilities that a non-binary or intersex menstruator (for example) may use.

Fourth, the failure to access these menstrual modifications may result in the use of makeshift products or cause or exacerbate health conditions.¹⁵⁸ One student has described how, without access to products, students “would roll toilet paper in their underwear, tie sweaters around

152. Karin & Abdel Aziz, *supra* note 2, at 3; PERIODS, POVERTY, AND THE NEED FOR POLICY, *supra* note 2, at 7; Johnson et al., *supra* note 2, at 254; *see also* Cotropia, *supra* note 127, at 293-94, 299 (approximately three quarters of students who need products are too shy or afraid to ask an employee for them).

153. Johnson et al., *supra* note 2, at 255 (citing Nadworny & Lombardo, *supra* note 43) (further observing that it also eliminates any employee confusion about the ability to provide products to students).

154. Karin & Abdel Aziz, *supra* note 2, at 3.

155. Dusty Rhodes, *Feedback: Noble Charter Schools Story Hit a Nerve*, NPR ILLINOIS (April 30, 2018), [<https://perma.cc/9YYZ-LU44>]; Maiysha Kai, *Dressed for Success? This Charter School's Policies Are Humiliating Its Female Students*, ROOT (May 1, 2018, 4:05 PM), [<https://perma.cc/T9S9-LD29>]; Nathan Baca, *What Some Kids Who Get One Bathroom Pass a Week Say They Face Daily at a DC Charter School*, ABC7 (July 19, 2018), [<https://perma.cc/L45V-MZFX>].

156. Johnson et al., *supra* note 2, at 243-44 (discussing the ways that educational facilities may not provide menstruation-friendly spaces).

157. Karin et al., *supra* note 2, at 28; Cooper, *supra* note 40, at 42.

158. PERIODS, POVERTY, AND THE NEED FOR POLICY, *supra* note 2, at 9, 15.

their waists, or go home early.”¹⁵⁹ Indeed, two-thirds of teenagers report experiencing stress related to inadequate access to menstrual products in schools.¹⁶⁰

We recognize that students and employees may need to notify the Title IX Coordinator to discuss a need to obtain some of these reasonable modifications. For example, an adult student in perimenopause may need to inform the Title IX Coordinator that they need to sit closer to the restroom or take a break during an exam to attend to menstruation-related needs. Given that, we also encourage the Department to make privacy rights related to menstruation or related conditions clear in the regulations (or to subsequently issue guidance that addresses them). Notifying the Title IX Coordinator of this type of need should not then be used for record-keeping that could function as a menstrual tracking system of students’ or employees’ menstrual cycle. Such tracking would raise grave privacy concerns.¹⁶¹ Given the biological connection between menstruation and pregnancy (or more accurately, the absence of pregnancy), we also encourage the Department to clarify that Title IX Coordinators may not share individualized menstruation-related information with law enforcement or keep it in disclosable student record.¹⁶²

Finally, the Department should not require medical certification for reasonable modifications for menstruation or related conditions. Should a menstruation-related condition rise to the level of disability, recipients already have requirements in place related to certification.

We urge the Department to adopt our proposed clarification of the obligations held by recipients of federal funding to provide menstruation-related modifications. These clarifications will ensure greater compliance with the gender equality goal of Title IX.

D. Combat Sex Discrimination Under Title IX Through Better Education About Menstruation

To realize Title IX’s promise, and specifically to make sure that menstruation does not limit any student’s participation in school, all

159. Press Release, Grace Meng, Representative, House of Representatives, Meng Unveils Bold Proposal to Provide Menstrual Equity to All (Mar. 26, 2019), [<https://perma.cc/LWW3-E5UF>] (quoting Natalie Baumeister, student, Justice High School in Fairfax County, Virginia).

160. Thinx & PERIOD, *State of the Period: The Widespread Impact of Period Poverty on US Students*, 2, [<https://perma.cc/JN9J-DA9P>].

161. Michele E. Gilman, *Periods for Profits and the Rise of Menstrual Surveillance*, 41 COLUM. J. GENDER & L. 100 (2021).

162. See Cynthia Conti-Cook, *Surveilling the Digital Abortion Diary*, 50 U. BALT. L. REV. 1 (2020).

students need to receive timely and accurate information about menstruation. Under existing regulations, there is no requirement that students receive instruction about reproductive biology, although the regulations do provide that “classes or portions of classes in elementary and secondary schools that deal primarily with human sexuality may be conducted in separate sessions for boys and girls.”¹⁶³

To prevent sex discrimination and harassment, employees of recipients also need to have a basic understanding of the relevant biology and experiences with related conditions, stigma, and harm. It is possible that many teachers, coaches, or other employees of educational institutions have not themselves received adequate menstruation-related education. Indeed, there is no obligation for employees to have had that education before being eligible to work for federally funded recipients. Accordingly, we applaud the Department’s proposal to expand training for employees about recipients’ obligations under Title IX to prevent discrimination, the proposed directive that any such training “not rely on sex stereotypes,” and its requirements that the Title IX Coordinator consult with 504 teams.¹⁶⁴ We also support the proposed requirement that the Title IX Coordinator examine and address barriers to reporting discrimination and harassment in school.¹⁶⁵ As part of this work, Title IX Coordinators should be required to include menstrual education in the trainings related to a recipient’s duties to address sex discrimination and in evaluating reporting barriers.

Thus, we propose the following changes:

- 34 C.F.R. § 106.34(a):
- (3) **Human sexuality classes.** Classes or portions of classes in elementary or secondary schools that primarily deal with human sexuality **must have a curriculum that is medically accurate, and may be conducted in separate sessions ~~for boys and girls, on the basis of students’ sex, gender, gender identity, or sex characteristics, provided, however, that the curriculum delivered shall be substantially the same for all students.~~**
- 34 C.F.R. § 106.8(d):
- (1) All employees. All employees must be trained on: (i) The recipient’s obligation to address sex discrimination in its education

163. 34 C.F.R. § 106.34(a)(3) (2006).

164. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41570, 41575-76 (proposed July 12, 2022) (to be codified at 34 C.F.R. pt. 106).

165. *Id.*

program or activity, **including on the basis of menstruation or related conditions;**

1. Rationale for Menstrual Education for Students

While schools should continue to have the choice to provide menstruation-related education in single-sex settings, it is important that the regulations explicitly require that all students receive the same instructional content. This should be true whether schools choose to provide menstrual education in single-sex or mixed-sex settings. All students need to acquire a basic understanding of human reproductive biology, and so the content of any curriculum delivered in “female” single-sex classes should be substantially similar to that delivered in “male” single-sex classes, and vice versa.

All students must have information, support, and a positive school environment that will allow them both to manage their own menstruation or related condition (if relevant), and to understand the menstruation-related needs of others. According to a recent Harris Poll of over 1,000 teenagers, approximately 79% say that they “need more in-depth information about menstrual health.”¹⁶⁶ Indeed, some receive only outdated, unrelatable, or even no information about menstrual health before experiencing their first period.¹⁶⁷ For that reason, all curricula should be medically accurate. Such comprehensive education will increase students’ confidence, equip them to better understand changes to their own and other bodies, make them more informed citizens, and hopefully reduce instances of menstruation-based harassment or discrimination.¹⁶⁸

We recommend that the Department issue an instructive document explaining that any curriculum concerning human sexuality or human reproductive biology include information on the menstrual cycle, premenstrual syndrome and pain management, menstrual hygiene management, menstrual disorders, menstrual irregularities, menopause, and other relevant topics relating to the menstrual cycle.¹⁶⁹

166. Thinx & PERIOD, *supra* note 160, at 2.

167. See Marni Sommer, *The US Lacks Adequate Education Around Puberty and Menstruation for Young People—An Expert on Mental Health Explains*, THE CONVERSATION (Aug. 26, 2022, 8:21 AM), [<https://perma.cc/4XLL-KVLD>].

168. See, e.g., Marni Sommer & Ann Herbert, *Low-Income Girls Often Feel Unprepared for Puberty*, THE CONVERSATION (Mar. 6, 2017, 10:15 PM), [<https://perma.cc/G7NE-6LSC>].

169. See D.C. CODE § 38–531.03 (a)(3) (2022).

2. Rationale for Title IX Coordinator Training

Menstrual education for students and staff is consistent with proposed 34 C.F.R. § 106.44(b), which requires Title IX Coordinators to identify and address reasons that sex discrimination goes unreported.¹⁷⁰ The current lack of knowledge of the menstrual cycle, its impact on education, and related discrimination is likely one reason this type of discrimination goes unreported. For example, employee training on the impact of menstruation-related language should decrease the prevalent use of code words that reflect discomfort when discussing menstruation.¹⁷¹ Accordingly, we support the proposed changes that require Coordinators to study and educate the community about barriers to reporting discrimination. We further encourage the Department to offer guidance to Coordinators that includes menstruation-related discrimination examples that can be used in their Title IX public awareness-raising work and specific questions about menstruation for inclusion in anonymous surveys of students and the community they may conduct. As noted above, we also recommend that the training requirements for all staff include information about menstruation and related conditions and menstruation-related discrimination to ensure that staff understands their and the school's obligations to address it.

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Our recommendations are designed to help Title IX meet its stated nondiscrimination and equal opportunity goals in a way that recognizes that menstruation and related conditions should not be the situs for sex-based discrimination or create barriers to a welcoming, equal educational opportunity on the basis of sex. Thank you again for soliciting comments and considering these recommendations. Please contact Professor Marcy Karin at marcy.karin@udc.edu with any questions or if meeting would be helpful to the Department.

170. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41572 (proposed July 12, 2022) (to be codified at 34 C.F.R. pt. 106).

171. Karin & Abdel Aziz, *supra* note 2, at 4; *see also* Thinx & PERIOD, *supra* note 134, at 3 (reporting that an increasing number of students believe that their health teachers seem “uncomfortable discussing menstruation”).