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Submitted via regulations.gov

September 12, 2022

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

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

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

Dear Secretary Cardona and Assistant Secretary Lhamon:

We are pleased to submit this comment in response to the U.S. Department of Education's (the "Department") proposed regulations under Title IX of the Education Amendments of 1972 ("Title IX").[1]

A Better Balance is a national, non-profit legal services and advocacy organization that uses the power of the law to advance justice for workers, so they can care for themselves and their loved ones without jeopardizing their economic security. Among our central organizational priorities is advancing the rights of pregnant and parenting people, at work and at school. For over a decade, we have led the national movement to guarantee reasonable accommodations for pregnant and postpartum workers—the same right guaranteed to those with disabilities—to ensure that no person is forced to choose between having a family and having a career. We also run a free and confidential national legal helpline where we hear daily from pregnant and parenting workers and students who need modest accommodations in order to protect their equal access to work and education.

[1] 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), available at https://www.federalregister.gov/documents/2022/07/12/2022-13734/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal.

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We thank the Department for proposing regulations to effectuate Title IX's broad mandate to remediate and eliminate sex discrimination against pregnant and parenting students and workers in federally-funded education programs. The proposed rule, if implemented, will go a long way toward ensuring that pregnant and parenting students and workers are able to meaningfully access both education and employment.

Still, we urge the Department to make several changes to the proposed rule, to better fulfill Title IX's promise of equality:

I. The Department should further clarify students' and workers' affirmative rights to pregnancy and pregnancy-related reasonable modifications.
   A. The Department should clarify that workers are affirmatively entitled to reasonable modifications for pregnancy and related conditions, in § 106.57.
   B. The Department should offer additional examples of reasonable modifications, in §§ 106.40(b)(4)(iii), 106.57.
   C. The Department should clarify that medical documentation, such as doctor's notes, is unnecessary for the consideration of most reasonable modifications, in §§ 106.40(b)(4), 106.57.
   D. The Department should state expressly that recipients shall not force students and workers to accept reasonable modifications, in §§ 106.40(b)(4)(i), 106.57.
   E. The Department should clarify that providing reasonable modification on an "individualized" basis requires a good-faith, interactive dialogue, in §§ 106.40(b)(4)(i), 106.57.
   F. The Department should make clear that the right to reasonable modification protects applicants, in §§ 106.40(b)(4), 106.57.

II. The Department should require that recipients provide students all medically necessary *time off*—not just leaves of absence—without regard to fundamental alteration to educational programs, in § 106.40(b)(3)(iii).

III. The Department should clarify that Title IX requires that recipients afford pregnant and postpartum workers, at minimum, all medically necessary time off, including leaves of absence, in § 106.57(d).

IV. The Department should bolster and clarify students' and workers' rights related to lactation, in §§ 106.40(b)(4)(iii), 106.57(e).

V. The Department should bolster its proposed definitions of "pregnancy or related conditions" and "parental status," in § 106.2.

VI. The Department should clarify the proposed rule's notice provisions, in §§ 106.8(b) – (c), and privacy protections, in § 106.40.

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VII. The Department should consider requiring schools to provide reasonable modifications related to parental status.

VIII. The Department should keep, and consider adding examples to, its definition of retaliation, in § 106.71.

IX. The Department should provide additional clarity around what constitutes a voluntary, separate education program, in §§ 106.40(b)(1), (b)(3)(i)(C).

We detail our recommendations below. We offer proposed text for use in the final rule, which we have underlined.

I. The Department should further clarify students' and workers' affirmative rights to pregnancy and pregnancy-related reasonable modifications.

We strongly commend the Department for clarifying that schools must provide "reasonable modifications to the recipient's policies, practices, or procedures for a student because of pregnancy or related conditions."[2] Pregnant and postpartum students often need modest accommodations or adjustments, such as a larger uniform, extensions on homework assignments, or break time to use the restroom; when schools refuse to make these modifications, students' educations (and health) suffer.[3] By codifying its longstanding position that schools must take proactive steps to accommodate students' pregnancies and pregnancy-related conditions,[4] the Department will more fully effectuate Title IX's nondiscrimination mandate, ensuring that pregnancy-based discrimination does not push students out of school or otherwise impede their equal access to education.

A. The Department should clarify that workers are affirmatively entitled to reasonable modifications for pregnancy and related conditions, in § 106.57.

We strongly urge the Department to clarify that workers[5] at recipient institutions are *affirmatively* entitled to reasonable modifications to the recipient's policies, practices, and procedures for

[2] 87 Fed. Reg. at 41572.

[3] *See, e.g.,* Nat'l Women's Law Ctr., *Let Her Learn: Stopping Pushout for Girls Who Are Pregnant or Parenting*, 7–8 (2017), https://nwlc.org/resource/stopping-school-pushout-for-girls-who-are-pregnant-or-parenting/.

[4] *See, e.g.,* U.S. Dep't of Educ., *Know Your Rights: Pregnant or Parenting? Title IX Protects You From Discrimination At School*, 1 (2013), https://www2.ed.gov/about/offices/list/ocr/docs/dcl-know-rights-201306-title-ix.html ("[Y]our school MUST . . . [p]rovide you with reasonable adjustments, like a larger desk, elevator access, or allowing you to make frequent trips to the restroom, when necessary because of your pregnancy."); U.S. Dep't of Educ., *Supporting the Acad. Success of Pregnant & Parenting Students* (June 2013), https://www2.ed.gov/about/offices/list/ocr/docs/pregnancy.html (same).

[5] Because Title IX protects any "person," the Department should make clear that the law protects not just traditional employees but also other workers, such as independent contractors, too. *See, e.g., Elwell v. Oklahoma ex rel. Bd. of Regents of Univ. of Oklahoma*, 693 F.3d 1303, 1311 (10th Cir. 2012) ("Title IX does not limit its coverage at all, outlawing

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pregnancy or related conditions (absent fundamental alteration to the recipient's education program or activity), just like students.[6]

Title IX's gender equality mandate is broad: "[N]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[7] Chief among the "three . . . different types of [sex] discrimination" that Title IX was passed to combat was "discrimination in *employment* within an institution."[8] Indeed, Congress designed Title IX to be "a strong and comprehensive measure . . . to provide women with solid legal protection as they . . . seek employment commensurate to their education."[9]

Just like for students, proactive, affirmative steps are required in order to prevent sex-based exclusion of, and discrimination against, workers at recipient institutions. The Department itself appears to recognize this reality, reasoning that "[t]o prevent . . . 'subtle discrimination that may be difficult to detect on a case-by-case basis' . . . and 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 that a recipients affords students and *employees* who are pregnant or experiencing pregnant related conditions full access through their pregnancy and recovery."[10]

Quite simply, when pregnant workers are unable to access the reasonable modifications they need to continue working—just like when pregnant students are unable to access the reasonable modifications they need to continue studying—they "may have no choice but to leave"[11] the federally-funded program or activity. That is precisely the outcome Title IX was enacted to prevent.

It is not solely the legislative purpose, history, and text of Title IX that justify the provision of reasonable modifications to workers. Synchronizing workers' rights with students' rights also will

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discrimination against any 'person'[.]"); *see also North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982) ("There is no doubt that 'if we are to give [Title IX] the scope that its origins dictate, we must accord it a sweep as broad as its language.") (internal quotation marks omitted).

[6] The Department's current proposed rule appears to require recipients to treat "pregnancy or related conditions" only as well (or as poorly) as they treat other temporary disabilities, and thus provide pregnant workers reasonable modifications only to the extent that they provide such modifications to other temporarily disabled workers. 87 Fed. Reg. at 41579. This comparative approach is out of step with the Department's affirmative approach to reasonable modifications for pregnant students, who are entitled to modifications regardless of how other non-pregnant students are treated. 87 Fed. Reg. at 41572.

[7] 20 U.S.C. § 1681(a).

[8] 118 Cong. Rec. 5812 (1972) (statement of lead sponsor, Sen. Birch Bayh) (emphasis added).

[9] *Id.* at 5806-07 (statement of Sen. Birch Bayh).

[10] 87 Fed. Reg. at 41513 (emphasis added).

[11] Fed. Reg. at 41527.

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reduce burden and complexity on recipients, creating a single standard applicable to all pregnant and postpartum people at recipient institutions. In addition, recipient institutions are already familiar with the "reasonable modification" framework from its use in the disability context under Title II of the ADA, as the Department recognizes, which will further ease compliance.[12]

Moreover, many students, particularly at institutions of higher education, hold paid employment on campus. It would be arbitrary and irrational to guarantee a pregnant student access to a stool to rest in her chemistry lab but not to a chair to sit on while she works as a receptionist for the admissions department. In both contexts, the modification is necessary to ensure that she can fully access the educational program like any other student.[13]

Such modifications are often low-cost and time-limited, as well as highly-effective at keeping pregnant and postpartum workers in the workplace, reducing absenteeism and turnover, and improving worker health.[14]

Accordingly, we urge the Department to clarify in the final regulation that Title IX requires recipients to provide *affirmative* "reasonable modifications to the recipient's policies, practices, or procedures for a worker because of pregnancy or related conditions, including but not limited to restroom, rest, food, and water breaks, time off for medical appointments,[15] changes in physical spaces or supplies, elevator access, adjustments to uniform requirements or dress codes, adjustment of shift start or end time, reduced or modified work schedule, help with manual labor or limits on lifting, desk duty or light duty, and temporary transfer to an alternate position."

The final rule also should state that, like for students (see below), "such modifications must be provided on an individualized and voluntary basis" and "medical documentation from a physician or other licensed healthcare provider is not necessary to support the need for most reasonable modifications and, accordingly, recipients may not require such documentation in the vast majority of cases."

[12] 87 Fed. Reg. at 41523.

[13] To be clear, the regulation should protect all workers, not only students who hold campus jobs.

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

[15] If the Department accepts our recommendation in (II), *infra*, to treat the need for intermittent time off like other medically necessary time off, and our recommendation in (III), *infra*, to guarantee workers, at minimum, a right to all medically necessary time off, then the Department should locate this provision in § 106.57(d) and change "Pregnancy Leave" to "Time off for Pregnancy-Related Needs and Leave."

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B. The Department should offer additional examples of reasonable modifications, in §§ 106.40(b)(4)(iii), 106.57.

We urge the Department to list additional non-exhaustive examples of reasonable modifications that schools must provide students and workers. While we appreciate—and support—that the Department's current list is not intended to be comprehensive, we know that students and workers benefit from additional clarity regarding their rights, in concrete terms and examples.

For instance, as to students:

- In addition to listing "changes in schedule or course sequence," we suggest the Department also include "changes in course load (reduction or increase)."
- The Department should include "modification or temporary elimination of a school or sport uniform policy."
- The Department should also add examples of modifications applicable to the athletics and extracurricular context, such as changing "breaks during class to attend to related health needs" to "breaks during class, athletics, and extracurricular activities to attend to related health needs."
- The Department should also include "tutoring, academic counseling, supplemental instruction, and other educational support services" as examples of reasonable modification to ensure that pregnant and postpartum students do not fall behind.
- The Department should absolutely retain the current proposed language of "reasonable modifications . . . [m]ay include but are not limited to" to ensure that the examples are not understood to be limiting.

Likewise, as to workers, the Department should incorporate the list of example reasonable modifications we proposed in (I)(A), *supra*.

C. The Department should clarify that medical documentation, such as doctor's notes, is unnecessary for the consideration of most reasonable modifications, in §§ 106.40(b)(4), 106.57.

We urge the Department to clarify in the final regulation that "medical documentation from a physician or other licensed healthcare provider is not necessary to support the need for most reasonable modifications and, accordingly, recipients may not require such documentation in the vast majority of cases."

On our national legal helpline, we hear regularly from pregnant students and workers—especially workers at recipient institutions, including those in food service, janitorial work, and security services—whose schools require them to obtain doctor's notes for run-of-the-mill accommodations, such as extra bathroom breaks, rest breaks, and uniform modifications. Obtaining such medical

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documentation frequently necessitates pregnant people scheduling appointments with a physician or other healthcare provider on short notice, at significant expense, and requires them to take time off from school or work—all to receive a modest, inexpensive, and usually obvious accommodation. Indeed, such documentation requirements tend to delay or outright block pregnant people from getting the accommodations they need to stay healthy at school or on the job. In recognition of this reality, other government agencies have prohibited employers (including schools) from requiring such documentation for most accommodations.[16]

In the Preamble, the Department appears to recognize the harm of allowing schools to require students to obtain medical documentation in order to receive commonplace modifications, when it states, "Although the Department anticipates that such [medical] documentation will be unnecessary in most cases, it could be appropriate in limited situations depending on the circumstances of a student's needs, the education program or activity, and the modification at issue."[17]

We urge the Department to say as much in the text of the final rule itself, by clearly stating, "Medical documentation from a physician or other licensed healthcare provider is not necessary to support the need for most reasonable modifications and, accordingly, recipients may not require such documentation in the vast majority of cases."

Separately, **we applaud** the Department for proposing to clarify the rare circumstances in which a recipient may require a student to provide a certification in order to participate in school activities. Currently, the old rule—which, among other harms, permits recipients to require a physician's certification as to whether a student is "emotionally able" to participate in school activities—is paternalistic and outdated, encourages sexist stereotyping about pregnant students' abilities, and fosters rather than eliminates sex-based discrimination.[18] We wholeheartedly support the Department's new proposed rule.[19]

D. The Department should state expressly that recipients shall not force students and workers to accept reasonable modifications, in §§ 106.40(b)(4)(i), 106.57.

We recommend the final rule state explicitly that "'[v]oluntary basis' means that recipients shall not require a student or worker to accept a reasonable modification they do not want or need."

[16] *See, e.g.,* 47 R.C.N.Y. § 2-09(g) ("Under no circumstances shall an employer request unnecessary medical documentation of the need for minor accommodations . . . "); *see also* Conn. Comm'n Human Rights & Opps., *Legal Enforcement Guidance: Pregnancy, Childbirth or Related Conditions at Work*, 2 (2019), https://portal.ct.gov/-/media/CHRO/20190412RevisedProposedPregnancyGuidancepdf.pdf ("In many instances a medical certification should not be needed before granting the [accommodation] request.").
[17] 87 Fed. Reg. at 41526.
[18] 87 Fed. Reg. at 41525.
[19] 87 Fed. Reg. at 41572.

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We appreciate that the proposed rule clearly states that reasonable modifications "[m]ust be provided on an individualized and voluntary basis depending on the student's needs."[20] We recommend the Department retain this language and also add the above proposed language, so as to make unmistakably clear that recipients may not act out of paternalism or "benevolent" sexism to force a student or worker to accept modifications the student or worker does not want or need. Incorporating this clarifying language is also necessary to make clear that "voluntary basis" refers to the student's or worker's right to refuse reasonable modifications, not to the recipient's obligation to offer them.

E. The Department should clarify that providing reasonable modification on an "individualized" basis requires a good-faith, interactive dialogue, in §§ 106.40(b)(4)(i), 106.57.

We support the proposed rule requiring reasonable modifications to be provided on an "individualized" basis "depending on the student's needs."[21]

We suggest the Department further clarify that, in order to provide reasonable modifications on an individualized basis, a recipient must work with a student or worker to engage in a good-faith, interactive dialogue to understand the student's or worker's specific needs and options that would best meet those needs, thus protecting the student's equal access to education or worker's equal access to employment within the federally-funded education program. (In the Preamble, the Department already appears to recognize the utility of such a process, when it states, "[A] recipient may engage in an interactive process with the student . . . to discuss the student's needs and options that would best ensure equal access.")[22] The Department should then elaborate in guidance what the components of this interactive dialogue should be, such as issuing a written determination at the conclusion of the dialogue about the reasonable modifications offered and/or accepted, and/or the assertion of fundamental alteration to the education program.

F. The Department should make clear that the right to reasonable modification protects applicants, in §§ 106.40(b)(4), 106.57.

We recommend the Department state that applicants for admission and employment—not just current students and workers—have a right to reasonable modification, absent fundamental alteration. Such a policy would further Title IX's purpose of deterring sex discrimination, ensuring that pregnancy is not a barrier to entering education programs and activities (whether as a student or

[20] 87 Fed. Reg. at 41572.
[21] 87 Fed. Reg. at 41572.
[22] 87 Fed. Reg. at 41524.

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worker); better align with other portions of the Department's proposed regulations, which prohibit discrimination against applicants for admission and employment;[23] and would harmonize with other civil rights laws, which protect applicants for employment on the same terms as current employees.[24]

II. The Department should require that recipients provide students all medically necessary *time off*—not just leaves of absence—without regard to fundamental alteration to education programs, in § 106.40(b)(3)(iii).

We support the Department requiring recipients to allow students "a voluntary leave of absence from the recipient's education program or activity to cover, at minimum, the period of time deemed medically necessary . . . [or] [t]o the extent that a recipient maintains a leave policy for students that allows a greater period of time than the medically necessary period, the recipient must permit the student to take leave under that policy instead if the student so chooses."[25] We also support the proposed rule's requirement that a student be fully reinstated to the same academic and extracurricular status upon return.[26]

We suggest, however, that the Department treat all medically necessary time away from the education program the same.

Currently, the proposed regulation requires recipients to allow students a "voluntary leave of absence from the recipient's education program" for, at minimum, the amount of time medically necessary—*not* subject to a fundamental alteration defense.[27] Yet the proposed regulation subjects all other medically necessary time off (such as time to attend medical appointments) to the fundamental alteration defense applicable to reasonable modifications.[28]

There is no principled reason one form of medically necessary time away from the educational program should be treated differently than another. Accordingly, to eliminate this arbitrary and confusing distinction, synchronize the regulation, and reduce complexity for recipients, the Department should strike "intermittent absences to attend medical appointments" from § 106.40(b)(4). In § 106.40(b)(3)(iii), the Department should change "[a]llow the student a voluntary leave of absence from the recipient's education program or activity to cover, at minimum, the period of time deemed medically necessary by the student's physician or other licensed healthcare

[23] 87 Fed. Reg. at 41391.
[24] *See, e.g.,* U.S. Eq. Empl. Opp. Comm'n, *Job Applicants & the ADA* (Oct. 7, 2003), https://www.eeoc.gov/laws/guidance/job-applicants-and-ada#application ("Employers are required to provide 'reasonable accommodation' — appropriate changes and adjustments to be considered for a job opening.").
[25] 87 Fed. Reg. at 41572.
[26] 87 Fed. Reg. at 41572.
[27] 87 Fed. Reg. at 41572.
[28] 87 Fed. Reg. at 41572.

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provider" to "[a]llow the student voluntary absences from the recipient's education program or activity to cover, at minimum, the periods of time deemed medically necessary by the student's physician or other licensed healthcare provider, including but not limited to, intermittent absences to attend medical appointments, such as pre- and postnatal appointments, and leave to recover from childbirth, bedrest, or to recover from related conditions such as mastitis."

In the alternative, if the Department rejects our recommendation, **we urge** the Department to amend § 106.40(b)(4) to read, "intermittent absences to attend medical appointments, such as but not limited to prenatal and postnatal appointments"—to make clear that rights to intermittent absences apply after a pregnancy ends, too.

III. The Department should clarify that Title IX requires that recipients afford pregnant and postpartum workers, at minimum, all medically necessary time off, including leaves of absence, in § 106.57(d).

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

Currently, the Department's proposed rule guarantees students but not workers all medically necessary leaves of absence (or additional time if provided to other non-pregnant students).[29] For the reasons articulated above, there is no principled justification, in the text, legislative history, or purpose of Title IX, to treat workers within educational institutions any differently than students. As the Department itself acknowledges, "[e]nsuring equal access to employment in the education sector regardless of sex was a central purpose of Title IX at the time of passage."[30] Allowing employers to deny pregnant and postpartum workers job-protected time off to recover from childbirth, attend medical appointments, and seek other pregnancy-related care would further enshrine the stereotype that motherhood and work are incompatible, perpetuating the sex-based exclusions Title IX was meant to eradicate.

Accordingly, we urge the Department to clarify that Title IX entitles workers, *at minimum*, to voluntary absences while medically necessary, including but not limited to, intermittent time off to attend medical appointments, such as pre- and postnatal appointments, and leave to recover from childbirth, bedrest, or to recover from related conditions such as mastitis. To the extent a recipient

[29] 87 Fed. Reg. at 41572.
[30] 87 Fed. Reg. at 41527 (citing testimony by Dr. Bernice Sandler—the "godmother of Title IX"—that education-employers' assumptions about women's inability to balance work and family were primary drivers of the sex discrimination Title IX was passed to combat).

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maintains a leave policy for employees that is more generous, the recipient should be required to permit the worker to take leave under that policy instead if the employee so chooses.

IV. The Department should bolster and clarify students' and workers' rights related to lactation, in §§ 106.40(b)(4)(iii), 106.57(e).

We applaud the Department for recognizing the rights of students and workers to clean, private, non-bathroom lactation space and reasonable break time.

We recommend the final rule clarify several additional requisites, so as to ensure that a lactation space is actually functional to meet an individual's needs, and thereby ensure equal access in education programs under Title IX:
"The lactation space must:

- Be in reasonable proximity to the student's place of study or worker's workplace;
- Be equipped with a chair, flat surface to place a pump, and access to electricity;
- Have nearby access to running water and a refrigerator or other location in which the individual may store milk."

We further recommend that the Department state explicitly in § 106.40(b)(4)(iii) that lactation/breastfeeding breaks be available to students "during extracurriculars and athletics" (where doing so would not fundamentally alter the recipient's education program or activity), not just in "breaks during class" as the current proposed rule states.[31]

Next, **we recommend** the Department clarify recipients' obligations when multiple students and/or workers need access to a lactation space at the same time. The Department should require the recipient to discuss options with the affected individuals to meet their needs, such as use of a scheduling system, use of partitions, provision of additional lactation spaces, etc.[32]

Finally, **we recommend** the final rule state expressly that students and workers may pump in public if they so desire. The Preamble's commentary that, without a private space to pump, "employees may have little choice but to attend to their lactation needs in a space that is open and, in doing so, risk exposing themselves to colleagues and students,"[33] stigmatizes breastfeeding and lactation—bodily functions that more than four in five birthing parents experience.[34] Of course, students and

[31] 87 Fed. Reg. at 106.40(b)(4)(iii).
[32] For examples of potential options, *see* NYC Comm'n on Human Rights, *NYC FAQ: Lactation Accommodations and Model Policy NYC Admin. Code § 8-107(22)*, https://www1.nyc.gov/site/cchr/law/lactation-faqs.page.
[33] 87 Fed. Reg. at 41527.
[34] N.Y.C. Comm'n on Human Rights, *Lactation Accommodations: What NYC Employers Need to Know*, at 1 (Mar. 2019), https://www1.nyc.gov/assets/cchr/downloads/pdf/Lactation%20Accommodation_WhatNYCEmployersNeedToKnow%20FINAL.pdf.

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employees who *wish* to pump in private should and must be provided a clean, private space in which to do so.

V. The Department should bolster its proposed definitions of "pregnancy or related conditions" and "parental status," in § 106.2.

We support the proposed rule's definition of "pregnancy or related conditions."[35] **We recommend** the Department consider several changes and additions, however, so as to better aid students and recipients in understanding the breadth of covered related conditions:

- Change "medical conditions" to "health conditions" or "medical needs," so as to avoid recipients mistakenly believing that a student or worker must have an Americans with Disabilities Act ("ADA")-qualifying "disability" in order to be entitled to reasonable modifications under Title IX (a common problem we hear on our national legal helpline).
- Include an explicit statement to the effect that "'Related conditions' do not need to rise to the level of an ADA-qualifying disability in order to qualify for reasonable modification."
- State expressly that pregnancy-related *mental health* conditions, such as pre- or postpartum depression or anxiety, qualify as "related conditions."
- Include in the text of the rule itself a non-exhaustive list ("includes but is not limited to…") of health conditions for which students can receive reasonable modifications. The Department could include some of the examples listed in the Preamble (such as gestational diabetes, preeclampsia, hyperemesis gravidarum, and mastitis),[36] but **we urge** the Department to also include other more common or routine health needs that would not necessarily rise to the level of an ADA disability, such as "pregnancy-related fatigue, dehydration (or the need for increased water intake), and nausea (or morning sickness)."

Making the above changes will provide students, workers, and recipients greater clarity regarding their rights and responsibilities, better effectuating Title IX's nondiscrimination mandate.

We likewise support the proposed rule's definition of "parental status."[37] **We suggest** adding "(8) the domestic partner of a child's parent," however, so as to better reflect the range of family relationships.

[35] 87 Fed. Reg. at 41568.
[36] 87 Fed. Reg. at 41515.
[37] 87 Fed. Reg. at 41568.

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VI. The Department should clarify the proposed rule's notice provisions, in §§ 106.8(b), (c), and privacy protections, in § 106.40.

We recommend the Department specify that recipients' nondiscrimination policy and notice of nondiscrimination must:

- State explicitly that recipient does not discriminate on the basis of pregnancy or related conditions, or parental status (noting that parental status applies to all genders), not merely "sex"; and
- State expressly that students and workers may have additional rights under other laws, such as the Individuals with Disabilities Act ("IDEA"), Section 504 of the Rehabilitation Act, the Americans with Disabilities Act ("ADA"), and other federal, state, and local laws.

Currently, the proposed rule states that a recipient "must adopt and publish a policy stating that the recipient does not discriminate on the basis of sex and prohibits sex discrimination" and must provide a notice of nondiscrimination stating that "the recipient does not discriminate on the basis of sex and prohibits sex discrimination."[38] In our experience, students and workers often do not realize that protections against "sex" discrimination include protections against pregnancy and/or parental status discrimination. Thus, to ensure that individuals are fully aware of the range of rights and protections they have, the final rule should require schools to articulate the breadth of the term "sex discrimination."

In addition, **we recommend** the Department instruct schools on requirements for protecting students' privacy, to ensure that a student's pregnancy (or termination of pregnancy) is not used to support abortion-related prosecutions.[39]

VII. The Department should consider requiring schools to provide reasonable modifications related to parental status.

We suggest the final rule require schools to provide reasonable modifications related to parental status, where the modification would not fundamentally alter the recipient's education program or activity.

Parental status discrimination is often a proxy for sex discrimination, rooted in gendered assumptions and stereotypes about the "correct" or assumed spheres for women and men. For example, denying a father a leave of absence to bond with a new baby, based on the belief that men should not be

[38] 87 Fed. Reg. at 41570.

[39] *See generally Bonamici Leads 60 Colleagues in Calling for Pregnant Students to be Protected Under Title IX,* Press Release, (July 21, 2022), https://bonamici.house.gov/media/press-releases/bonamici-leads-60-colleagues-calling-pregnant-students-be-protected-under-title.

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caregivers or that childcare is women's domain, is sex-based stereotyping and sex discrimination, regardless of how the institution treats persons of another gender.[40]

In individual cases, however, the sex-based reasoning underlying such discrimination can be subtle and difficult to detect.[41] Thus, to prevent such discrimination and ensure that parental status, like pregnancy, is "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,"[42] the final rule should require recipients to take proactive steps to support parents and other caregivers.

For example, the final rule should require recipients to:

- Adopt attendance policies excusing absences related to parental status, including but not limited to, taking children to medical appointments, attending parent-teacher conferences, and handling family and childcare emergencies;
- Make other reasonable modifications (absent fundamental alteration) related to parental status, such as course schedule, course load, and course sequence changes;
- Provide, either directly or by referral, assistance in accessing affordable, accessible childcare.

VIII. The Department should keep, and consider adding examples to, its definition of retaliation, in § 106.71.

We support the proposed rule's prohibition on retaliation and its clarification that retaliation includes "initiating a disciplinary process against a person for a code of conduct violation that does not involve sex discrimination but arises out of the same facts and circumstances as a complaint or information reported about possible sex discrimination, for the purpose of interfering with the exercise of any right or privilege secured by Title IX or this part[.]"[43] A pregnant student seeking reasonable modifications or otherwise asserting her rights under Title IX should not be disciplined for having premarital sex or sex as a minor, and we read this provision to classify discipline in such circumstances as impermissible retaliation. The Department may wish to further clarify and illustrate the provision's protections by way of non-exhaustive examples.

[40] *See* Cynthia Thomas Calvert, CAREGIVERS IN THE WORKPLACE: FAMILY RESPONSIBILITIES DISCRIMINATION LITIGATION UPDATE, WorkLife Law (2016), https://worklifelaw.org/publications/Caregivers-in-the-Workplace-FRD-update-2016.pdf.
[41] *See, e.g., Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003).
[42] 87 Fed. Reg. at 41513.
[43] 87 Fed. Reg. at 41579.

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IX. The Department should provide additional clarity around what constitutes a voluntary, separate education program, in §§ 106.40(b)(1), (b)(3)(i)(C).

Finally, **we recommend** the final rule provide greater clarity and specificity as to what constitutes a voluntary, separate, and comparable education program or activity.

Currently, the proposed regulation states that a recipient must "[a]llow access, on a voluntary basis, to any separate and comparable portion of the recipient's education program or activity."[44] These terms are overly vague and could be abused by recipients seeking to push pregnant students toward inferior education programs. We urge the Department to define terms and offer examples, to set guardrails preventing schools from pushing out pregnant and parenting students.

* * *

We thank you for your consideration of our concerns and recommendations, and for your commitment to ensuring the full effectuation of Title IX's promise of sex equality. Please do not hesitate to contact us with any questions.

Sincerely,

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[44] 87 Fed. Reg. at 41572.