

September 12, 2022

*Submitted via [www.regulations.gov](http://www.regulations.gov)*

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

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

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

Dear Secretary Cardona and Assistant Secretary Lhamon:

The Pregnant Scholar Initiative at the Center for WorkLife Law, University of California Hastings Law, is a nationwide legal resource center dedicated to the rights of pregnant and parenting students. Since our founding in 2015, we have worked with dozens of educational institutions and thousands of administrators nationwide to provide technical assistance and training on educational equity for student parents and pregnant students. We have also directly assisted hundreds of pregnant and parenting students facing discrimination or uncertainty about their rights on college and university campuses. Based on this extensive experience working with the community most impacted by the proposed Title IX regulation changes on pregnancy and parenting, we congratulate the Department for strengthening protections of pregnant and parenting students.

Even as we applaud many of the changes proposed in this rulemaking, we urge the Department to do more to protect pregnant students, student parents, and students who may become pregnant or parenting during their education, as explained herein. We are proud to have co-authored other comments alongside partners in the Federal Advocacy Coalition for Pregnant and Parenting Students ([here](#)) and leading organizations in the lactation and maternal and infant health fields ([CTN: 17z-hd4e-el61](#)). We write today to build upon those more comprehensive comments to call your further attention to three critical areas of need for student parents and pregnant students:

**1. Pregnancy accommodations and leave**

We strongly support the Department’s clarification of the affirmative, standalone right to academic adjustments, when needed, for pregnancy-related conditions. The Pregnant Scholar regularly receives calls from students who have been denied even the most basic accommodations to protect their health. Students have been denied bathroom breaks and accessible seating. They’ve been denied access to remote instruction, including where classes are already recorded. And they’ve even been exposed to toxic chemicals, risking their pregnancy and the health of their child. The

changes in the proposed regulations directly address the need of pregnant students to be able to access modifications for pregnancy-related conditions. They also address the needs of college administrators, who often report uncertainty regarding what accommodations they can provide for pregnancy-related conditions and who is responsible for and accountable to the accommodation process. We also applaud the Department’s proposal to explicitly include lactation as a pregnancy-related condition for the first time, and to continue to treat termination of pregnancy as a related condition—as it has done for decades. This clarity and specificity will ensure that more pregnant and recently pregnant students will get the support they need to continue their education.

To further aid campuses in ensuring compliance, we encourage the Department to make clear that should a proposed academic modification be found to “fundamentally alter” the program or activity, the educational institution must engage in a good faith, interactive dialogue to identify other modifications that would meet the student’s needs. In addition, we strongly encourage the Department to explicitly state in the regulations that medical documentation is typically, or often, unnecessary. While we appreciate the Department’s proposal to allow more types of care providers to offer certification, requiring pregnant students to submit documentation from a care provider can be needlessly burdensome, particularly for routine or obvious changes such as bathroom or lactation breaks. Forcing a student to provide extensive documentation has been used as a tool to harass students and impede their ability to meet their health needs.

We also support the continued requirement for recipients to provide students who are pregnant or experiencing related conditions with leave for as long as medically necessary. However, **we are concerned that the language of the proposed regulations regarding absences will result in pregnant and recently pregnant students having less ability to meet their health needs while continuing their studies.** The Department, in its 2009 publication *Supporting the Academic Success of Pregnant and Parenting Students*, stated that, “Title IX requires a school to excuse a student’s absences due to pregnancy or related conditions, including recovery from childbirth, for as long as the student’s doctor deems the absences to be medically necessary.”<sup>1</sup> This guidance reflects the decades-old Title IX regulatory requirement to provide all medically-necessary leave and has been implemented by educational institutions nationwide. In contrast, the proposed Title IX regulations now treat a medically necessary leave of absence (which *must* be provided) as distinct from intermittent absences or breaks from class (which are subject to a process to determine reasonableness). (See proposed § 106.40(b)(4)).

The distinction between types of pregnancy-related absences is confusing at best, and detrimental to students at worst. The Pregnant Scholar regularly receives requests for assistance from students who have been denied minimal time off school, even while they face grave health complications. Students are frequently told missing more than two or three classes in a semester is unreasonable,

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<sup>1</sup> *Supporting the Academic Success of Pregnant and Parenting Students Under Title IX of the Education Amendments of 1972*, U.S. Department of Education, OCR-00069 (2009), citing 34 C.F.R. § 106.40(b)(5).

regardless of reason for missing class and efforts to remain up-to-date on coursework. Further, postpartum students often share that they're unable to get the lactation breaks and bathroom breaks they need without being penalized academically. Should intermittent absences for doctor's appointments or medically-necessary breaks for addressing pregnancy-related health needs be subject to the discretion of campus personnel, we anticipate encountering more pregnant students forced to choose between their health and their education.

The need for clearly protected medically necessary absences is even more compelling in light of the recent limitations on reproductive health access. Students often struggle to book medical appointments outside of class time, a problem expected to grow as reproductive health care providers report backlogs of patients seeking care. Similarly, students who need time off to seek abortion care or recover from abortion or pregnancy loss will be at risk for discrimination, retaliation and harassment due to being forced to engage in an accommodation process to receive the time off they need.

Therefore, **we urge the Department to require recipient institutions to presume that all medically necessary absences (e.g., for prenatal care, lactation breaks, abortion care) are inherently "reasonable" modifications and must be granted.**

## **2. Protecting pregnant students from harassment**

Students who are or were pregnant are often subjected to sexual harassment and other forms of discriminatory behavior based on their pregnancy. As one recent college student mom explained, "I decided to drop out because I was embarrassed and ashamed, and felt as though I would face judgement at every turn." In the wake of the *Dobbs* decision, pregnant students report fear of making their pregnancy known, should they risk criminalization or harassment following abortion or pregnancy loss.

The Pregnant Scholar applauds the Department's requirements to refer pregnant students to the Title IX coordinator and to provide notice to pregnant students of their rights (proposed 34 C.F.R. § 106.40(b)(2)). The regulation will ensure that students have full access to the supports available to them, and that faculty and staff are properly trained. However, we are concerned that this requirement can also result in more widespread awareness of students' pregnancy status, including in written records. We **urge the Department to instruct educational institutions in the final regulations and in supplemental guidance on how to protect student privacy** to ensure that, in states where abortion is criminalized, school records, including school health records, are not used to support abortion-related prosecutions through documentation that students have been pregnant in

the past but are not currently pregnant.<sup>2</sup> Further, we urge the Department to instruct and remind recipients that it is a violation of Title IX to discipline or refer students to law enforcement based on termination of pregnancy, contraceptive use, or other reproductive health decisions.

### 3. Protecting Parenting Students

The Title IX implementing regulations have long prohibited discrimination on the basis of sex relating to one’s parental status. However, without additional clarity, those regulations have not translated into equitable educational access for student parents. The existing regulations fail to address the significant needs of parenting students, including the need for attendance policies that are responsive to family caregiving obligations. As one student parent said to Pregnant Scholar staff, the pregnancy accommodations guaranteed by Title IX made a huge difference, but “after I gave birth, I felt like the rug was pulled out from under me.”

Students continue to need academic adjustments and protection from discrimination after their child is welcomed into their home, yet often find no support available. One student mother reached out to her Dean for help when her son was hospitalized in critical condition, but “instead of offering support, I was told to withdraw.” Women are commonly advised to drop out of their programs when their caregiving obligations are salient, because of sex-based stereotypes that “good mothers” prioritize their children over their own advancement. Likewise, a student father was told it didn’t matter that his wife and children were hospitalized, he needed to take his exams on time or fail. Men are commonly advised to put their own academic and professional advancement before the health and wellbeing of their children, because of sex-based stereotypes that “real men” take care of their families by providing an income and should leave family caregiving responsibilities to their wives, sisters, and mothers. Sex-linked stereotypes impact people of all genders – the stereotypes differ, but the impact is the same when parents are forced to choose between their children and their educations. **Title IX’s prohibition on sex discrimination should be explicitly interpreted to prohibit discrimination against parents and other caregivers, including requiring academic adjustments when necessary to ensure equal access to the recipient’s education program or activity, because such discrimination is grounded in sex-linked stereotypes.**

The Pregnant Scholar helpline hears regularly from student parents – mostly women – who desperately need additional support if they are to stay in their programs. The existing and proposed rules prohibit distinguishing between the sexes in policies pertaining to student parents, but this is not enough to ensure academic institutions do not discriminate against student parents because of their sex. This is because policies and practices that harm student parents necessarily

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<sup>2</sup> See e.g., *Bonamici Leads 60 Colleagues in Calling for Pregnant Students to be Protected Under Title IX*, Press Release, (July 2022), <https://bonamici.house.gov/media/press-releases/bonamici-leads-60-colleagues-calling-pregnant-students-be-protected-under-title>

disproportionately harm women, who are both more likely to be student parents and to be the primary caregivers for their children. And as discussed above, decisions to not accommodate the needs of student parents are typically based on stereotypes linked to sex and gender roles. Without additional guidance that informs educational institutions how discrimination against parents will normally constitute discrimination on the basis of sex, student parents will continue to be pushed out of their academic programs because of sex.

**We urge the Department to include reliance on “sex stereotypes” as unlawful sex-based discrimination under Title IX in relation to family caregiving status, and to explicitly include discrimination based on parenting as prohibited sex discrimination, due to the disparate impact such discrimination has on women.**

Further, **we urge the Department to require that parenting students be provided reasonable accommodations and leave related to their children’s health,** or to make clear that failure to do may constitute sex discrimination because of the disproportionate burden on women. At a minimum, the regulations should state that providing reasonable modifications, leave or other supports to pregnant and parenting students does not constitute discrimination against those not so affected or without such responsibilities.

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Thank you for your consideration of our recommendations. We are hopeful that with these changes, pregnant and parenting students will no longer be asked to choose between their families and their education.

Sincerely,

Jessica Lee

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