

September 12, 2022

Submitted via www.regulations.gov

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

Catherine E. Lhamon
Asst. 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, the undersigned organizations and community leaders, urge you to adopt the proposed Title IX Regulations [ED-2021-OCR-0166] without delay in order to protect lactating students and educators. As advocates and experts in the lactation, education, maternal and infant health, and public health fields, we find that stronger and clearer protections are necessary to protect health and gender equity in education. The proposed regulations, which would prohibit discrimination on the basis of lactation and require lactation break time and space, are a strong investment in healthy students, employees, and communities.

Over eighty percent of infants born in the U.S. are breastfed, and human milk feeding is a proven primary prevention strategy, building a foundation for life-long health and wellness. The scientific evidence for the value of breastfeeding to children's and women's health is long-held and continually being reaffirmed by new research. Breastfeeding is proven to prevent a wide range of illnesses and conditions. Compared with formula-fed children, those who are breastfed have a reduced risk of ear, skin, stomach, and respiratory infections; diarrhea; sudden infant death syndrome; and necrotizing enterocolitis.ⁱ In the longer term, breastfed children have a reduced risk of obesity, type 1 and 2 diabetes, asthma, and childhood leukemia. Women who breastfeed their children experience their own health benefits, and have a reduced long-term risk of diabetes, cardiovascular disease, and breast and ovarian cancers.ⁱⁱ Lactating parents must remove milk from the body; inability to express milk regularly often leads to pain, illness and reduced milk supply and can result in the eventual inability to continue nursing.ⁱⁱⁱ

Students and employees—and their families—should not have to forgo the benefits of human milk feeding due to a lack of support and accommodations in educational institutions. But sadly, that happens every day.

Students we support at both the K-12 and postsecondary levels of education report struggling to find safe spaces to pump milk or feed their baby. Without the support they need to continue providing milk for their child, many students delay their return to studies; and some never return.

“No student should be forced to choose between their education and providing optimal nutrition for their child like I was. Our Title IX office told us multiple times they’re uncertain whether Title IX covers lactation, leaving many students like myself vulnerable to discrimination...it significantly delayed my education.” Whitney, Colorado

“As a lactating student, finding a safe space to pump or feed my daughter was always a challenge. There was never a designated area so I would either find myself pumping in the car or a bathroom stall....Not having a designated space is a huge inconvenience. For an entire year I felt unseen as if lactating students didn’t exist.” Student parent, California

Educators and other employees of educational institutions also struggle to find a private space for milk expression, and the break time to use it. Teachers and many other education workers were unintentionally excluded from coverage under the Break Time for Nursing Mothers provision of the Fair Labor Standards Act when it became law over a decade ago. State laws are not filling the gap; education employees in 17 states do not have workplace lactation break time and space protections under state law.^{iv} The Center for WorkLife Law estimates 909,900 full-time public K-12 educators—roughly 1 in 4 teachers nationwide—are currently without state mandated workplace lactation accommodations.^v And additional federal protections, such as the proposed Title IX regulations, would be useful even for teachers with existing state law protections, which vary in their clarity and ability to be enforced.

At a time when many school districts are struggling with shortages of educators and other staff, we desperately need to retain as many as possible. According to the U.S. Department of Health and Human Services, employees who receive break time and space to express milk are more likely to be retained and are more loyal and productive in the workplace.^{vi} Without the workplace lactation accommodations they need, employees report facing illness and complications including breast infection and a loss of the ability to produce milk for their child. Given these high stakes, many employees chose to leave their job when not provided lactation accommodations.

“I would be mid-pump, shirt off, bottles up, and the locked door would fly open with an ‘I know you’re pumping but I’m not looking.’ I just felt violated and I’m not one for modesty. Finally I had my mommy-breakdown when one day I had no chance to leave and pump, as there was zero coverage to be had. By mid-day my boobs were so full that I just began leaking everywhere. Soaked through my shirt and sweater. I started thinking, I’m here teaching these babies basic life skills and I don’t even have the time to provide

my own baby with food for survival. I came home that day and told my husband I was not going back and we would figure it out. The stress and lack of availability to be able to pump sent me over the edge.” Catherine, Elementary school teacher

“Pumping four times a day as a teacher is the hardest, worst, most stressful thing I’ve ever had to do.” Elementary school teacher

The proposed Title IX regulations would make education feasible for lactating students

Proposed regulation §106.2

The proposed Title IX regulations, if implemented, would ensure equal access to education for lactating students and prohibit discrimination against them. While many advocates and administrators have already acknowledged that lactation is a pregnancy-related condition covered by Title IX, others struggle to do so. The new regulations would provide the unambiguous protections our students need.

Proposed regulation §106.4(b)(3)(iv)

We welcome the proposed requirement to provide a space “other than a bathroom, that is clean, shielded from view, free from intrusion from others, and may be used by a student for expressing breast milk or breastfeeding as needed.” As a result, students will be able to meet their health needs in privacy, should they wish to do so. A lack of privacy for those who want it can lead to sexual harassment and bullying, and can cause undue stress and difficulty, inhibiting the milk ejection reflex making it harder for parents to fully express milk. This proposed requirement would directly benefit the thousands of students who currently struggle to find a safe and clean place for milk expression, and who are forced to pump in closets, janitors’ store rooms, and cars.

We encourage the Department to consider additional lactation space requirements to ensure the space is functional, such as by providing a seat, access to electricity to operate a pump, and/or a sink for cleaning pump parts. We also encourage the Department to adopt language making clear that educational institutions must allow the student a safe space in which to store expressed milk, for example by permitting the use of a cooler or providing access to a refrigerator. These lactation space components are simple and affordable to provide, yet when the requirement to provide them isn’t articulated, students suffer.

Proposed regulation §106.4(b)(4)

We welcome the regulations’ requirement to provide accommodations for lactation and other pregnancy-related conditions. However, the proposed language regarding lactation breaks raises concerns. The proposed regulations mention lactation break time as a potential reasonable modification to be provided unless doing so would fundamentally alter the educational program. In our experience, it is challenging for students to negotiate break time and convince faculty that

the break time they are requesting is reasonable. Few school staff or administrators understand how often and for how long lactating parents must pump and the consequences of delayed milk expression.

We suggest the department treat lactation breaks as the medically necessary absence they are, making clear that time off for milk expression or nursing must be provided *as needed*, and the student not penalized academically for time missed. At minimum, we encourage the Department to adopt a presumption that providing lactation breaks during classes and exams is a reasonable academic adjustment. Further, we request clarification in the regulations that lactating students should not be forced to provide medical documentation specifying exactly when or how long someone must express milk in order to access lactation breaks. While the Department's proposed language enabling non-physician healthcare providers to certify medical documentation is a positive step, it remains challenging for many student parents to access healthcare. It is overly burdensome to require lactating students to rigorously document their need to express milk when such needs are common and easily anticipated.

Finally, we also encourage the Department to make clear that time for milk expression or feeding should include the time required to reach the designated lactation space.

The proposed Title IX regulations would make work accessible for lactating employees

Proposed regulation §106.57(e)(i)

We welcome the proposed requirement to provide “reasonable break time for an employee to express breast milk or breastfeed as needed.” This standard mirrors the legal requirement in the FLSA Break Time for Nursing Mothers provision, which covers 3/4 workers in the U.S., including many employees of covered educational institutions. It is also in line with existing state protections, which typically mandate as-needed reasonable lactation breaks. Ensuring this protection is given to all employees of covered educational institutions will make it easier for schools and colleges to comply with the law and ensure equal treatment of employees of all genders. In our experience, securing break time is one of the biggest barriers met by lactating employees in education, and this requirement would break that barrier, creating equitable access to employment in education for lactating parents.

Proposed regulation §106.57(e)(ii)

We welcome the proposed requirement to provide, “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.” This proposed requirement would directly benefit the millions of education employees who currently are

unprotected by federal workplace lactation law and struggle to find a safe place for milk expression, or are forced to pump in closets, janitors' store rooms, and cars.

This standard again mirrors the requirements of the FLSA Break Time for Nursing Mothers provision and is similar to the legal requirements of states with existing protections. The only additional requirement added by these proposed rules is for the lactation space to be clean, a requirement that can already be inferred by the Department of Labor's finding that legally compliant lactation spaces be functional.^{vii} The proposed cleanliness requirement directly addresses the concerns of many lactating parents, who have been forced to express milk alongside roaches, mold, and hazardous chemicals.

Providing lactation break time and space is feasible and beneficial for educational institutions

Employers of all sorts have provided lactation break time and space—from farms to factories and transit agencies. Due to the rise in breastfeeding rates, the adoption of state laws and the federal Break Time for Nursing Mothers provision (FLSA), thousands of schools and universities nationwide are already providing their employees with lactation break time and space. Meeting the requirements of this proposed rule is readily achievable; we can learn from the many educational institutions already compliant. Educational institutions in a variety of settings, from [Philadelphia](#) to [Kansas](#) to [California](#), have shared models for lactation accommodation success.

Providing the lactation accommodations and prohibiting lactation discrimination, as required by the proposed regulations, would benefit educational institutions by increasing their retention of both students and staff, as discussed above. It also reduces absences, especially important in this pandemic era of increased health burdens. Per the U.S. Department of Health and Human Services “one-day absences to care for sick children occur more than twice as often for mothers of formula feeding infants.” Further, babies who are *not* breastfed, “visit the physician more often, spend more days in the hospital, and require more prescriptions than breastfed infants.” This is in addition to the impact on parents' health; research shows that women who breastfeed also have reduced rates of certain illnesses (e.g. cardiovascular diseases, diabetes, breast and ovarian cancer). Illness means increased employer healthcare costs and absenteeism, which can impair student learning.

Should the Department adopt these proposed regulations, thousands of breastfeeding coalitions and public health organizations stand at the ready to assist educational institutions in designing and implementing lactation-supportive policies. We strongly urge you to enact these regulations without delay.

Thank you for your consideration of our comments. For questions or more information contact Jessica Lee, Director of the Pregnant Scholar Initiative at the Center for WorkLife Law, at: policy@worklifelaw.org.

Signed,

The Pregnant Scholar Initiative at the Center for WorkLife Law, UC Hastings Law
U.S. Breastfeeding Committee
1,000 Days, an Initiative of FHI Solutions
A Better Balance
Alimentación Segura Infantil
American Academy of Family Physicians
American Academy of Pediatrics
American Association of Birth Centers
Association of Maternal & Child Health Programs
Association of State Public Health Nutritionists
Baby Café Bakersfield
Better Beginnings
Breastfeed Durham
Breastfeed Orange NC
Breastfeeding Blues & Bliss
Breastfeeding Family Friendly Communities
BreastfeedLA
California WIC Association
Centro Pediátrico de Lactancia y Crianza
Center for Advancement of Public Policy
Colorado Breastfeeding Coalition
Education Law Center
Elmhurst University
Every Mother, Inc.
Family Values @ Work
First 1000 Days Florida
Florida Breastfeeding Coalition
Futures Without Violence
Gender Justice
HealthConnect One
Healthy Mothers Healthy Babies Coalition of Georgia
Indigenous Breastfeeding Counselor
Kansas Breastfeeding Coalition

La Leche League of the United States of America, Inc
Lactation Improvement Coalition of Kentucky (LINK)
Lamaze International
Mamava
March of Dimes
Maternity Care Coalition
Michigan Breastfeeding Network
Missouri Breastfeeding Coalition
MomsRising
Montana State Breastfeeding Coalition
Mothering Justice
National Birth Equity Collaborative
National Council of Jewish Women
National Nurse-Led Care Consortium
National Women's Health Network
Nevada Coalition to End Domestic and Sexual Violence
New Hampshire Breastfeeding Task Force
New Jersey Breastfeeding Coalition
New York Statewide Breastfeeding Coalition
Nurse Practitioner Services: Milky Moms
Nursing Mothers Counsel, Inc.
Nurture
Ohio Chapter, American Academy of Pediatrics
Philadelphia Department of Public Health
Philadelphia Mabel Morris Family Home Visit Program
Philadelphia Nurse-Family Partnership
Project Self-Sufficiency
Public Health Management Corporation
pumpspotting
San Diego County Breastfeeding Coalition
Shining Star Community Services
The Healthy Children Project
The Macomb County Breastfeeding Coalition
United States Lactation Consultant Association
University of Kentucky College of Nursing
US Lactation Consultant Association
Wabash County Health Department
Women's Law Project

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Jackie Clark, Postdoc, Arizona State University
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Gina Rose, IBCLC, RN
Vanessa Safie, Birth doula and lactation peer support
Laura Salvatierra, RN, Childbirth Educator
Angie Sanchez, Indigenous Lactation Counselor
Hope Savaria, Masters of Social Work Student
Katie Sharma, Fourth Year Medical Student
Morgan Rose Shelor, Graduate student and teaching assistant
Thea Simpson, Lactation specialist and doula
Meghan Smith, Librarian
Jennie Smith-Pariola, Graduate student
Theresa Solis, IBCLC
Denys Symonette Mitchell, MSW
Ellen Taraskiewicz, Graduate Student
Rachel Taylor
Walter D. Terrell
Heather Tilley
Kathryn Van Winkle, Lecturer, The University of Texas at Austin
Emilia Welsh, Student
JoAnne Whitehouse, Student Nurse
Grace Yoo

ⁱ *Systematic Review of Breastfeeding Programs and Policies, Breastfeeding Uptake, and Maternal Health Outcomes in Developed Countries*, Effective Health Care Program (2020). Available at:

<https://effectivehealthcare.ahrq.gov/products/breastfeeding/research-protocol>.

ⁱⁱ *Making the decision to breastfeed*, Office on Women's Health (2020). Available at:

<https://www.womenshealth.gov/breastfeeding/making-decision-breastfeed/#1>.

ⁱⁱⁱ *Reasonable Break Time for Nursing Mothers*, Wage and Hour Division 75 FR 80073 (RIN 1235-ZA00), 2020.

Available at: <https://www.federalregister.gov/d/2010-31959/p-48>.

^{iv} Alabama, Alaska, Arizona, Florida, Idaho, Kansas, Michigan, Mississippi, Missouri, New Hampshire, North Carolina, North Dakota, Ohio, Pennsylvania, South Dakota, Wisconsin, and Wyoming. For more information on state lactation and reasonable accommodation laws, see: <https://pregnantatwork.org/workplace-lactation-laws/>

^v Center for WorkLife Law at the University of California Hastings School of Law analysis of U.S. Department of Education, National Center for Education Statistics, Schools and Staffing Survey (SASS), “Public School Teacher Data File” 2011-12. (*Florida data from 2007-08 edition)

^{vi} *The Business Case for Breastfeeding*, U.S. Dep’t of Health and Human Serv., Maternal Childcare Bureau (2008). Available at: https://owh-wh-d9-dev.s3.amazonaws.com/s3fs-public/documents/bcfb_business-case-for-breastfeeding-for-business-managers.pdf

^{vii} Wage and Hour Division, *supra* note 3.