

## **EXHIBITS FOR WRITTEN TESTIMONY IN SUPPORT OF HB 208**

### **Exhibit A**

Margaret E. Johnson, Emily Gold Waldman, and Bridget J. Crawford, *Title IX & Menstruation*, HARV. J.L. & GENDER (forthcoming 2020).

### **Exhibit B**

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).

### **Exhibit C**

*Free Menstrual Hygiene Products Proposal* (January 28, 2019).

### **Exhibit D**

Photograph of Menstrual Hygiene Product Dispenser at the University of Baltimore School of Law.

## TITLE IX & MENSTRUATION

*Margaret E. Johnson,\* Bridget J. Crawford,† and Emily Gold Waldman<sup>∞</sup>*

### ABSTRACT

“Oh no. Could I borrow a tampon or pad?” These (or similar) words are familiar to almost everyone who has ever had a period. Even for adults, menstruation can at times be a challenge. For some schoolchildren, it can feel like an insurmountable obstacle to receiving an education. Students are subject to constant observation by classmates and teachers; they may not have autonomous access to a bathroom during the school day; or they may not be able to afford menstrual products. As a result, a menstruating student may find it difficult to concentrate in school or even attend school at all, depending on the circumstances. This Article explores the intersection of menstruation and education to uncover the impediments faced by girls and other students who menstruate. Students may experience menstruation-related peer harassment, restrictive school policies, a lack of access to menstrual products, and inadequate menstruation-related education. Because menstruation is uniquely associated with female biology, a school’s failure to address the needs of menstruating students amounts to a denial of educational opportunities on the basis of sex under Title IX.

In recent years, students themselves have played notable roles in successful efforts to cause schools to provide free pads or tampons to students. Currently most states do not require schools to do so. Even in states where schools have a legal obligation to provide menstrual products to students, availability is only one part of a larger problem. Unless students can access bathroom facilities in response to their biological needs, and do so without shame, stigma or restriction, students may risk bleeding during class, failing to change tampons or pads as medically recommended, or even leaving (or skipping) school. This Article

---

\* Professor of Law, Associate Dean of Experiential Education, Co-Director of Center on Applied Feminism, and Director, Bronfein Family Law Clinic, University of Baltimore School of Law.

† Professor of Law, Elisabeth Haub School of Law at Pace University.

<sup>∞</sup> Professor of Law and Associate Dean for Faculty Development and Operations, Elisabeth Haub School of Law at Pace University.

The authors thank Professor Nancy Cantalupo for her work in the area of Title IX and her feedback on this project.



argues that pursuant to Title IX, schools should provide students with an education free of unnecessary anxiety about the natural biological process of menstruation. This freedom from anxiety is a necessary precondition for having meaningful opportunities to fully participate in school and all aspects of public life. Theoretical frameworks further illuminate legal claims stemming from the intersection of menstruation and education.

#### TABLE OF CONTENTS

<i>Introduction</i> .....	3
<i>I. Menstruation: An Overview</i> .....	7
A. The Biology of Menstruation .....	8
B. Menstrual Stigma .....	9
C. Menstruation at School.....	10
<i>II. Menstruation’s Nexus With Educational Opportunities and Title IX</i> .....	11
A. Menstruation-Based Harassment in Schools.....	11
1. Impediments Resulting from Harassment.....	11
2. Title IX and Menstruation-Based Harassment.....	14
B. Insufficient Menstrual Accommodations .....	18
1. Impediments Resulting from Restrictive Policies.....	18
2. Title IX and Menstrual Accommodations.....	21
C. Menstrual Products in Schools .....	27
1. Impediments Resulting from Lack of Access to Products...27	
2. Action at the State and Federal Legislative Levels.....	32
3. Title IX and Menstrual Products in Schools .....	35
D. Menstrual Education in Schools.....	35
1. Impediments Resulting from Inadequate Menstrual Education.....	35
2. Title IX and Menstrual Education.....	39
<i>III. Theoretical Frameworks for Understanding Title IX and Menstruation</i> .....	41
A. Formal Equality.....	41
B. Anti-Essentialism .....	43

17-Jan-20]	<i>TITLE IX &amp; MENSTRUATION</i>	3
	C. Anti-Stereotyping .....	45
	D. Anti-Subordination.....	48
	E. Intersectionality .....	49
	F. Third-Wave Feminist Legal Theory .....	52
	<i>Conclusion</i> .....	56

## INTRODUCTION

In 2019, three seventh-grade girls staged a “cookie protest” with tampon-shaped cookies after a school principal denied their request to make free menstrual products available in school bathrooms.<sup>1</sup> Social media brought wide attention to the girls’ cause (and cookies).<sup>2</sup> The principal was forced to reconsider his argument that students would “abuse the privilege” of freely receiving such products.<sup>3</sup> *Cosmopolitan* magazine even reported the story as an example of young women who felt comfortable enough with their own bodies to advocate successfully for their menstruation-related needs.<sup>4</sup>

The *Cosmopolitan* story reflected a broader societal trend. In 2015, four years earlier, menstruation entered the public discourse in a new way: activists created an online petition in opposition to the tampon tax (i.e., the

---

<sup>1</sup> See Alexis Morillo, *Middle School Students Baked Tampon Cookies to Prove that Menstrual Products Should Be Free in Schools*, DELISH (Nov. 7, 2019), <https://www.delish.com/food-news/a29727313/tampons-shaped-cookies> (detailing cookie protest in light of decision of middle-school students to protest principal’s decision not to provide menstrual products in bathrooms and decision of students to remain anonymous but call themselves the Revolutionary Girls Baking Society, “Because really, we are Every Girl in Every Town across the U.S. and the world who is finding her way in a society that doesn’t want to hear us talk about our bodies and something that is perfectly healthy and perfectly normal.”).

In this article, we use “menstrual products” to refer primarily to pads and tampons. Although we recognize that “menstrual products” can also more generally include items like heating pads or aspirin that some people use to manage menstrual pain, or even newer items like menstrual underwear or menstrual cups, we prefer this terminology to the “menstrual hygiene products” label, which implies that menstruation itself is unclean.

<sup>2</sup> See Morillo, *supra* note 1 (displaying picture of the cookies and describing them as “some sort of sugar cookies sandwiched together with red frosting, dipped in white frosting, and baked with a “string” coming out.”).

<sup>3</sup> See Morillo, *supra* note 1 (reporting that principal changed his mind about the wisdom of providing free menstrual products in school bathrooms).

<sup>4</sup> Shannon Barbour, *Middle Schoolers Protest After Their Principal Said They’d “Abuse the Privilege” of Free Tampons*, COSMOPOLITAN, Oct. 30, 2019 (reporting on tampon-shaped cookies prepared as part of “cookie protest” by seventh grade girls whose school principal refused to make free menstrual products available in bathrooms because students would “abuse the privilege”). See also Morillo, *supra* 1.

state sales tax on menstrual products).<sup>5</sup> This petition garnered significant attention. It ultimately led to ongoing multiple legislative efforts around the country, along with a parallel litigation campaign, to repeal these state taxes so that menstrual products can receive the same sales tax exemptions afforded to other necessities.<sup>6</sup>

This increased awareness about the existence and unfairness of the tampon tax<sup>7</sup> helped inspire many people to discuss and advocate against other menstrual injustices, including lack of accommodations for menstrual needs and lack of access to affordable products.<sup>8</sup> It also amplified existing litigation and advocacy.<sup>9</sup> The dialogue raised awareness about the fact that transgender boys and men, as well as gender non-binary and intersex persons, menstruate as well.<sup>10</sup> Menstruation's new salience in public discourse increased the number of charitable organizations and community groups organizing menstrual product drives for those who could not afford them.<sup>11</sup> Plaintiffs brought new lawsuits seeking remedies for being fired from their jobs for

---

<sup>5</sup> See, e.g., Prachi Gupta, *Why the Hell Are Tampons Still Taxed?* COSMOPOLITAN.COM, Oct. 15, 2015, <https://www.cosmopolitan.com/politics/news/a47780/abolish-tampon-tax-america>; See Petition, *No Tax on Tampons: Stop Taxing Our Periods! Period.*, CHANGE.ORG (Oct. 10, 2015), <https://www.change.org/p/u-s-state-legislators-stop-taxing-our-periods-period> [<https://perma.cc/D38W-DR4G>]; see also Bridget Crawford, *Interview with Jennifer Weiss-Wolf, New York Attorney and Menstrual Equity Advocate*, FEMINIST L. PROFESSORS (Nov. 22, 2016), <https://www.feministlawprofessors.com/2016/11/interview-jennifer-weiss-wolf-new-york-attorney-menstrual-equity-advocate/> [<https://perma.cc/6PCA-6CMU>] (describing origins of Weiss-Wolf's menstrual equity activism).

<sup>6</sup> Currently only thirty-three states have the tampon tax. Natalie Gontcharova, *Does Your State Have a Period Tax?*, Refinery29 (Nov. 20, 2019, 11:00 AM) <https://www.refinery29.com/en-us/tampon-tax-us-states> (last visited Dec. 11, 2019). In 2015, forty-one states had the tampon tax. See Taryn Hillin, *These are the U.S. States that Tax Women for Having Periods*, Fusion (June 3, 2015, 12:33 PM), <https://splinternews.com/these-are-the-u-s-states-that-tax-women-for-having-per-1793848102>.

<sup>7</sup> See Bridget J. Crawford & Emily Gold Waldman, *The Unconstitutional Tampon Tax*, 53 U. RICH. L. REV. 439, 483-87 (2019) (describing how tax law brings discrimination and unfairness clearly into focus).

<sup>8</sup> See generally Margaret E. Johnson, *Menstrual Justice*, 53 U.C. DAVIS L. REV. 1 (2019) (explaining and analyzing the wide-range of menstrual injustices including exclusion and essentializing of menstruators, discrimination, harassment, and constitutional violation against menstruators, insults and indignities towards menstruators, health disadvantages face by menstruators, and economic disadvantages faced by menstruators).

<sup>9</sup> See e.g. PERIOD, which was founded in 2014 to provide products to those experiencing housing instability. [www.period.org](http://www.period.org); Johnson, *supra* note 8 at 28-45 (discussing constitutional and employment discrimination cases brought focused on menstruation since 1980).

<sup>10</sup> See Johnson, *supra* note 8, at 26-28.

<sup>11</sup> Johnson, *supra* note 8, at 54-55.

menstruating, or for being left isolated in a cell bleeding with no menstrual products, water, soap, or change of clothes.<sup>12</sup> These efforts, too, inspired change, with some states passing legislation that requires free products in settings like prisons, schools, and shelters.<sup>13</sup> All of these efforts toward menstrual accommodations and access to products fit under the broader umbrella of the movement for “menstrual equity,” a phrase coined by Period Equity, a non-profit organization “dedicated to ensuring accessible, affordable and safe menstrual products.”<sup>14</sup> In connection with these efforts, there is a broader goal of “menstrual justice,” namely addressing the stigma and taboo of menstruation, and the resultant discrimination toward and harassment of people who are menstruating.<sup>15</sup>

Students are on the forefront of efforts to address the menstrual stigma and make menstrual products available in their schools. Like the girls who staged the “cookie protest,” most students tend to be media-savvy and aware of national efforts to make such products more accessible.<sup>16</sup> Students (and their adult allies) have also become increasingly vocal about the ways that menstruation can limit access to educational opportunities. This Article attempts to identify the particular intersections of menstruation with K-12 education (as opposed to the university setting). The onset of menstruation typically ranges from ages eight to fifteen; thus, high schools, middle schools, and even some elementary schools will have menstruating students. These educational settings are particularly fraught: schools exercise tight authority and control over students; students are in close contact with each other; and many students are just beginning to menstruate and adjust to that process. This Article examines the legal recourse that Title IX does and should provide for menstruation-related “academic and social disturbances” in students’ school lives.<sup>17</sup>

This Article proceeds in three parts. Part I provides a brief overview of menstruation, discussing both the biology of menstruation and the long-held stigmas that surround it. Part II then frames the discussion of menstruation in the school context. It introduces four particular points of intersection: menstruation-related peer harassment; the failure of school

---

<sup>12</sup> Johnson, *supra* note 8, at 33-35, 47-48.

<sup>13</sup> Johnson, *supra* note 8, at 47-49.

<sup>14</sup> About Us, PERIOD EQUITY, <https://www.periodequity.org/>.

<sup>15</sup> See generally Johnson, *supra* note 8.

<sup>16</sup> See *infra* Part II.A.1 (citing menstruation-related podcast created by eighth grade students at middle school in the Bronx, New York).

<sup>17</sup> Jhumka Gupta et al., *How Do Adolescent Girls and Boys Perceive Symptoms Suggestive of Endometriosis Among Their Peers? Findings From Focus Group Discussions* In *New York City*, BMJOpen, <https://bmjopen.bmj.com/content/bmjopen/8/6/e020657.full.pdf> (June 4, 2018) (citing study of teenage menstrua disorders).

policies (particularly those surrounding bathroom access) to take into account that approximately half of the student population menstruates every month; the inaccessibility of menstrual products in schools; and the insufficient state of menstrual education. Each of these issues, as we show, can impede equal access to an education. Accordingly, Title IX—which prohibits discrimination on the basis of sex in federally-funded schools and programs, and which has the ultimate goal of ensuring equal access to education—should address them. Currently, Title IX provides a starting point for dealing with these sorts of educational barriers, but needs to go even further. Menstruation is based on female biology and hence is sex-specific, even if not gender- or gender-identity specific.<sup>18</sup> As a result, barriers due to menstruation are barriers due to sex. Thus, just as Title IX regulations (and related guidance) were promulgated to address pregnancy, so too should regulations and guidance be adopted to address menstruation.

Part III extends this analysis through the lens of multiple feminist legal theories to consider what those theories might contribute to framing legal claims based on menstruation-based disruptions in a student's education. Formal equality has a certain cognitive appeal, but it is an incomplete foundation for addressing all of the issues identified above. In particular, although formal equality arguments are relevant to situations involving menstruation-based harassment, they are less relevant to claims about accommodations and access to products. Similarly, anti-essentialist arguments are in tension with Title IX's embedded sex binarism. Anti-stereotyping, anti-subordination, and intersectional arguments, by contrast, are more helpful. They challenge the notion of menstruation as a "private" matter (a characterization that stems from menstruation's association with female bodies), invite consideration of the ways that privacy and stigma around menstruation operate as instruments of control over women and girls, and illuminate the ways in which sex overlaps with poverty and power in the context of schools' policies toward menstruation. This Part further locates activism around menstruation in the context of third-wave feminist legal theory and suggests that menstrual advocacy can be understood as a unique engagement with law and social media in the service of legal and cultural change.

The Article concludes by emphasizing Title IX's potential role as a tool for addressing educational barriers caused by schools' policies toward menstruation. Until all students can attend school with the confidence that

---

<sup>18</sup> "Female biology" refers to the reproductive health system, which is involved in menstruation. *See infra* note 19. By using this terminology, we do not mean to exclude those who do not identify as "female" and yet menstruate. *See infra* notes 203, 211-213 and accompanying text (discussing differences between and among "sex," "gender" and "gender-identity").

their biology is no obstacle to achievement, there will be continued need for advocacy around menstruation and education.

## I. MENSTRUATION: AN OVERVIEW

Menstruation is a fact of life for most girls, women, and other individuals who menstruate.<sup>19</sup> The menstrual cycle results from a biological process that is not optional, unless repressed by medications.<sup>20</sup> Unfortunately,

---

<sup>19</sup> Many ciswomen and girls menstruate. This is because their anatomy contains the reproductive system of ovaries, fallopian tubes, uterus, and vaginas that interact with the hormones of estrogen and progesterone that regulate ovulation and the menstrual cycle. If the released mature egg is not fertilized, the uterine lining of blood and tissue that was built up in expectation of nourishing a fertilized egg, is shed; this is menstruation, or a period. See Planned Parenthood, Menstruation [www.plannedparenthood.org/learn/health-and-wellness/menstruation](http://www.plannedparenthood.org/learn/health-and-wellness/menstruation) (last visited Nov. 30, 2019). Some cis women and girls do not menstruate, for multiple reasons. Called amenorrhea, this condition could be for a host of reasons, such as pregnancy, breastfeeding, or hormonal problems. See *Menstrual Cycle: Period Problems*, U.S. DEP'T OF HEALTH & HUMAN SERVS., OFF. ON WOMEN'S HEALTH, <https://www.womenshealth.gov/menstrual-cycle/period-problems> (explaining that amenorrhea is “[t]he absence of menstrual periods before menopause” for three months in a row or no first period by age fifteen and can be caused by pregnancy, breastfeeding, hormonal problems, eating disorders, weight loss or gain, stress, or other health problems). Mary Cain provides one athlete's narrative regarding amenorrhea. Mary Cain, *I Was the Fastest Girl in America, Until I Joined Nike*, N.Y. TIMES, Nov. 7, 2019, <https://www.nytimes.com/2019/11/07/opinion/nike-running-mary-cain.html> (description by elite runner of three years of exercise-related amenorrhea three years, including injury, risk of osteoporosis and infertility, and experiences suicidal thoughts as a result of the severe dieting and exercise regimens required by her elite training team).

Individuals other than women and girls may menstruate. Transgender men and boys, gender nonbinary persons, and intersex persons may also menstruate if they too have the reproductive system in their body and are not on consistent hormonal treatment to suppress their menstrual cycle. See Menstruation, Planned Parenthood, [www.plannedparenthood.org/learn/health-and-wellness/menstruation](http://www.plannedparenthood.org/learn/health-and-wellness/menstruation) (last visited Nov. 30, 2019). For one transgender man's personal narrative of menstruation, see Kenny Jones, *Getting My Period Made Me Feel Like Less of a Man – Even Though I Knew I Was*, SELF (May 24, 2018), <https://www.self.com/story/male-period-trans-model-kenny-jones>. (stating “my period pain and cramps came knocking on my door monthly like a bill collector, and I could not ignore it” unlike other aspects of his body, like breasts, that he could hide with chest binders).

Where possible, this Article endeavors to be gender-inclusive. To that end, this article uses the term “menstruating students” in multiple locations. Scientific research and media coverage of menstruation is largely focused on “women” and “girls,” however. To the extent that this Article relies on that work, references to those gender-specific or gender binary discussions do not intend to imply that harassment, lack of accommodations, lack of menstrual products, or menstrual education are the exclusive domain of “women” and “girls,” as opposed to all who menstruate.

<sup>20</sup> For a more extensive discussion of the menstrual cycle, see Johnson, *supra* note 8, at 9-16. See also *Your Menstrual Cycle and Your Health*, U.S. DEP'T OF HEALTH & HUMAN



a variety of obstacles can arise for students at the intersection of menstruation and education.<sup>21</sup> After providing a brief overview of both the biology of menstruation and the long-held stigma surrounding it, this Part identifies these obstacles and their potential to impede menstruating students' ability to attend school and fully access educational opportunities.

### A. The Biology of Menstruation

Typically, menstruation begins at age twelve, but it can begin as early as age eight and as late as age fifteen.<sup>22</sup> Menstruation continues until menopause.<sup>23</sup> Students do not typically know exactly when they will first get their "period" (the common term for the bleeding that occurs as a result of menstruation, typically lasting four to seven days), and menstrual cycles are not always predictable or regular. The lengths of adolescent menstrual cycles are especially variable, typically lasting anywhere between twenty and forty-five days.<sup>24</sup> As a result, adolescents' menstrual cycles are more irregular than adults'.<sup>25</sup>

During a menstrual cycle, the amount of discharge is typically two to five tablespoons of blood per cycle; the discharge can include large clots.<sup>26</sup> When menstruating, most individuals use products or items to absorb the flow. These products include tampons, pads, liners, menstrual cups, period underwear, and cloth menstrual pads.<sup>27</sup> These products must be changed often, sometimes as frequently as every two hours, depending on their flow.<sup>28</sup> This is necessary to decrease the risk of disease<sup>29</sup> and to avoid leaking blood

---

SERVS., OFF. ON WOMEN'S HEALTH, <https://www.womenshealth.gov/menstrual-cycle/your-menstrual-cycle-and-your-health> (last visited Dec. 12, 2019).

<sup>21</sup> This article focuses mostly on secondary schools, but depending on a school's grade divisions and age cut-offs, the issues can even arise in primary (elementary) schools as well.

<sup>22</sup> *What Happens During the Typical 28-Day Menstrual Cycle?*, U.S. DEP'T OF HEALTH & HUMAN SERVS., OFF. ON WOMEN'S HEALTH, <https://www.womenshealth.gov/menstrual-cycle/your-menstrual-cycle> (last visited Oct. 21, 2019) [<https://perma.cc/H2J3-JGM4>] [hereinafter *Menstrual Cycle*].

<sup>23</sup> *Id.*

<sup>24</sup> Paula J. Adams Hillard, *Menstruation in Adolescents: What's Normal?*, 10 MEDSCAPE J. MED. 295 (2008).

<sup>25</sup> *Id.*

<sup>26</sup> Abigail Durkin, *Profitable Menstruation: How the Cost of Feminine Hygiene Products is a Battle Against Reproductive Justice*, 18 GEO. J. GENDER & L. 131, 133 (2017); *Menstrual Cycle*, *supra* note 22.

<sup>27</sup> *Menstrual Cycle*, *supra* note 22.

<sup>28</sup> *Id.*

<sup>29</sup> Toxic shock syndrome (TSS) is a possibly fatal condition "caused by bacteria that make toxins or poisons." *Menstrual Cycle*, *supra* note 22. The risk of TSS can be decreased by using the correct tampon absorbency for one's bleeding and by changing one's tampon regularly, at least every four to eight hours. *Menstrual Cycle*, *supra* note 22.

onto one's body, clothes, and other items because the product is full and can no longer absorb the menses.<sup>30</sup> Because the onset of menstruation may vary every month, "menstruators are often caught off guard by the onset of their period. One study showed that 61% percent of menstruators reported having at least one unexpected period."<sup>31</sup>

In addition, pain from menstrual cramps often accompanies menstruation.<sup>32</sup> Cramps are "usually caused by contractions of the uterus (womb) ... to help the uterine lining leave the body" during one's period.<sup>33</sup> Adolescents often experience period pain, called dysmenorrhea, after their first period and the pain may (or may not) lessen gradually with age.<sup>34</sup> For some, extreme menstrual pain is life-long.<sup>35</sup> In particular, the intensity of pain is quite severe for those with endometriosis.<sup>36</sup> Endometriosis is an illness characterized by the extra-uterine growth of tissue that the body nevertheless attempts to shed monthly. With no pathway for exiting the body, this shedding causes inflammation, intensely severe menstrual cramps, and irregular bleeding.<sup>37</sup>

### B. Menstrual Stigma

Historically speaking and across many cultures, menstruation has been (and remains) a taboo topic.<sup>38</sup> Even in the United States, unconscious bias affects interactions with and opinions of menstruators. One recent study called the "Tampon Experiment" demonstrated that the average individual sees menstruating women as "lower in competency and less likable" than women who are not menstruating.<sup>39</sup> The study also found that people "avoid

---

<sup>30</sup> *Menstrual Cycle*, *supra* note 22.

<sup>31</sup> Johnson, *supra* note 8, at 10 (2019) (citing ELISSA STEIN & SUSAN KIM, *FLOW: THE CULTURAL STORY OF MENSTRUATION* 189 (2009)). Others believe the percentage of menstruators experiencing unexpected cycles is much higher. *Id.* at note 51.

<sup>32</sup> *Period Problems*, U.S. DEP'T OF HEALTH & HUMAN SERVS., OFF. ON WOMEN'S HEALTH, <https://www.womenshealth.gov/period-problems> (last visited Dec. 12, 2019).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Glossary*, U.S. DEP'T OF HEALTH & HUMAN SERVS., OFF. ON WOMEN'S HEALTH, <https://www.womenshealth.gov/glossary/> (last visited Dec. 5, 2019).

<sup>37</sup> *Id.*

<sup>38</sup> For a discussion of negative cultural attitudes toward menstruation, see Johnson, *Menstrual Justice*, *supra* note 10, at 16-24 (2019) and Bridget J. Crawford & Carla Spivack, *Tampon Taxes, Discrimination, and Human Rights*, 2017 WISC. L. REV. 491, 506-12 (exploring cultural roots of misunderstandings of and taboos around menstruation).

<sup>39</sup> See Tomi-Ann Roberts et al., "Feminine Protection": *The Effects of Menstruation on Attitudes Towards Women*, 26 PSYCHOL. WOMEN Q. 131, 131 (2002); Inga T. Winkler & Virginia Roaf, *Taking the Bloody Linen Out of the Closet: Menstrual Hygiene as a Priority*

sitting close to the woman [believed to be menstruating] and [are] more likely to objectify the woman [believed to be menstruating].”<sup>40</sup>

In a culture of discomfort with menstruation, it is not surprising that some girls, women and other menstruators internalize this bias and stigma. A study of 1,000 teenagers ages 13-19 reveals that 80% of respondents “feel there is a negative association with periods, that they are gross or unsanitary” and 69% “feel embarrassed when they have to bring period products to the bathroom.”<sup>41</sup> Fifty-seven percent of respondents report that they “have felt personally affected by the negative association surrounding periods.”<sup>42</sup>

### C. Menstruation at School

In the school context, menstruation can pose particular challenges for students. Anyone who has ever been a student at a primary or secondary school knows what an all-encompassing environment a school can be. Students are often told what they can and cannot wear, when they are allowed to go to the bathroom, which bathrooms they can use, and what items they can bring to school and/or borrow from one another. They are constantly subject to observation from their teachers and scrutiny from their peers. Students also receive various messages about menstruation from school officials, from formal health education to informal comments to signage in the bathroom about accessing and disposing of menstrual products. And students engage in constant intercommunication—some supportive, some hostile—with each other. These factors can combine to make school an especially fraught environment for menstruating students.

Part II, to which this Article now turns, groups these challenges into four categories: (1) menstruation-based harassment; (2) insufficient menstrual accommodations; (3) insufficient access to menstrual products; and (4) insufficient menstrual education. For each category, the Article

---

*for Achieving Gender Equality*, 21 CARDOZO J. L. & GENDER 1, 4 (2014). In the “Tampon Experiment,” researchers studied participants’ evaluations of a woman who seemingly accidentally pulled out from her purse a tampon or a hairclip. Roberts et al., *supra* note 39 at 134-5.

<sup>40</sup> See Roberts et al., *supra* note 39, at 131. Chris Bobel, a scholar in the area of menstrual health and stigma, reports that “Stigma compromises healthy engagement with one’s body. It undermines self-care, critical thinking and informed decision-making. It also hurts self-esteem and social status.” See Malaka Gharib, *New Book Busts Myths about Menstruation Spread by Public Health Groups*, NPR (Jan. 30, 2019 3:27 PM), <https://www.npr.org/sections/goatsandsoda/2019/01/30/689943045/new-book-busts-myths-about-menstruation-spread-by-public-health-groups>.

<sup>41</sup> Thinx and Period, *State of the Period: The Widespread Impact of Period Poverty on U.S. Students*, [https://cdn.shopify.com/s/files/1/0795/1599/files/State-of-the-Period-white-paper\\_Thinx\\_PERIOD.pdf?455788](https://cdn.shopify.com/s/files/1/0795/1599/files/State-of-the-Period-white-paper_Thinx_PERIOD.pdf?455788) (last visited 12/12/19) [hereinafter *State of the Period*].

<sup>42</sup> *Id.*

sketches the scope of the problem and explores the extent to which Title IX currently serves—and ultimately *should* serve—as a vehicle for addressing it.

## II. MENSTRUATION’S NEXUS WITH EDUCATIONAL OPPORTUNITIES AND TITLE IX

Title IX of the Educational Amendments of 1972 is a federal law that provides that “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance,” subject to certain exceptions.<sup>43</sup> The statute’s underlying goal, as the United States Department of Justice puts it, is to ensure “equal access to education”—to “ensure that no educational opportunity is denied to women on the basis of sex and that women are granted ‘equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities.’”<sup>44</sup>

Because menstruation is a biological process linked to female sex, educational deprivations connected with schools’ treatment of menstruation should be understood as a violation of Title IX’s core proposition.<sup>45</sup> Below, we categorize those deprivations and explain how Title IX should be expanded (through interpretation, regulation, and guidance) to provide a more comprehensive and robust response.

### *A. Menstruation-Based Harassment in Schools*

#### 1. Impediments Resulting from Harassment

As one scholar puts it, school is “an environment where girls are constantly watched for signs that they are menstruating and have failed to keep their female bodies secret and under control.”<sup>46</sup> Teachers and schools may unintentionally play a role in perpetuating menstrual stigmas, and those stigmas help lay the groundwork for harassment.

---

<sup>43</sup> 20 U.S.C. §§ 1681-1688 (1994).

<sup>44</sup> See United States Department of Justice, *Equal Access to Education: Forty Years of Title IX* (June 23, 2012), available at <https://www.justice.gov/sites/default/files/crt/legacy/2012/06/20/titleixreport.pdf>

<sup>45</sup> 20 U.S.C. § 1681(a).

<sup>46</sup> See Katherine Allen et al., *More Than Just a Punctuation Mark: How Boys and Young Men Learn about Menstruation*, 32 J. FAM. ISSUES 129, 152 (2011), <https://doi.org/10.1177/0192513X10371609>; See also Crawford & Spivack, *supra* note 38, at 21-22 (discussing difference between valorized “voluntary bleeding” by soldiers and disparaged “involuntary bleeding” by menstruating women).

For example, at one school in Virginia, students were instructed to refer to pads as “penguins” and tampons as “turtles.”<sup>47</sup> Similarly, thirteen year-old student Caroline Abreu reported that at Bronx Prep Middle School, “If we want a pad and we don't have it, we have to go to the main office and we have to ask for a ‘marshmallow.’” That student aptly observed: “It shouldn't be like, oh - (whispering) I need a ‘marshmallow’ or ‘I need a pad.’ It should just be like, ‘I need a pad. I'm on my period.’”<sup>48</sup> In the same school, the messages literally on the bathroom walls reinforce menstrual stigmas. Kathaleen Restitullo, age 13, described the bathroom signage as follows:

In the second-floor girls' restroom at Bronx Prep Middle School in New York, there's a sign taped to the back of the toilet stall doors. It's a guide on how to "properly dispose feminine products." On the list? "Make sure that no one views or handles product.”<sup>49</sup>

As Kathaleen pointed out, even in the girls' restroom, the sign does not use the words “pad” or “tampon.” Kathaleen reflected, ““It's not even saying the word pad. It just says product ... Just, like, don't let anyone see that you are on your period.””<sup>50</sup>

By telling students to use code words for menstrual products—or not to mention them at all—school officials are contributing to a culture that treats menstruation as something shameful and something to be hidden.<sup>51</sup> These sorts of messages stigmatize menstruating students and normalize nonmenstruating students' and others' discomfort with menstruation. The stigma influences students' behaviors and perceptions.<sup>52</sup> And menstruating

---

<sup>47</sup> TOJANIQUE EVANS ET AL., BRINGING RESOURCES TO AID WOMEN'S SHELTERS, PERIODS, POVERTY, AND THE NEED FOR POLICY: A REPORT ON MENSTRUAL INEQUITY IN THE UNITED STATES (2018), [https://cdn.ymaws.com/www.law.udc.edu/resource/resmgr/LegClinic/2018\\_periods\\_policy\\_rep](https://cdn.ymaws.com/www.law.udc.edu/resource/resmgr/LegClinic/2018_periods_policy_rep).

<sup>48</sup> NPR MORNING EDITION, *Periods! Why These 8th-Graders Aren't Afraid To Talk About Them*, <https://www.npr.org/transcripts/721729850> (transcript of conversation with the 8th grade students and creators of the podcast creators of “Shhh! Periods”).

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*; EVANS ET AL., *supra* note 47, at 7.

<sup>52</sup> *Periods! Why These 8<sup>th</sup>-Graders Aren't Afraid to Talk about Them*, *supra* note 48. Discussing menstruation, another student at Bronx Prep Middle School in New York, Raizel Febles, age 14, states, “You kind of are ashamed for having it, which sucks because it's something so natural and so normal.” *Periods! Why These 8<sup>th</sup>-Graders Aren't Afraid to Talk about Them*, *supra* note 48. The Bronx Prep Middle School students discuss how their shame affects how they behave, such as “trying to hide a tampon in their tight jean pockets.” *Periods! Why These 8<sup>th</sup>-Graders Aren't Afraid to Talk about Them*, *supra* note 48. They

students who do not conform to expectations of secrecy and control can become the targets of harassment.

A recent United Kingdom study, for instance, found “[o]ne in five girls and young women in the UK are teased or bullied about their periods, with many suffering in silence.”<sup>53</sup> Only half of those who were targeted spoke to anyone about the harassment.<sup>54</sup> And “[a]bout 67% said abuse mainly happened at school, and 66% said they had missed classes because of their period.”<sup>55</sup>

In particular, male students are a notable source of menstruation-based harassment.<sup>56</sup> One current study features girls’ self-reports of boys labeling girls as “moody” and concluding that they must be “on [their] period.”<sup>57</sup> In a 2011 study that involved a survey of college-aged men, the men reflected on their earlier school experiences and recalled “severe incidents of girls being teased, although no boy actually admitted to teasing a girl in this manner.”<sup>58</sup> The men also recalled incidents in which it was clear that “for boys ... being associated with menstruation or even being in the

---

investigated how their peers felt about their periods. The students found that “Sixty-seven percent of female students polled at Bronx Prep Middle School said that they feel uncomfortable discussing their periods at school because it’s not anybody’s business.”<sup>52</sup> In the same poll, “[t]hirty-three percent of students said periods were a dirty topic.” *Periods! Why These 8<sup>th</sup>-Graders Aren’t Afraid to Talk about Them*, *supra* note 48. The found that it is no wonder that “[y]oung girls carry this stigma into adulthood.” *Periods! Why These 8<sup>th</sup>-Graders Aren’t Afraid to Talk about Them*, *supra* note 48.

<sup>53</sup> One in Five Girls and Young Women Bullied about Periods – Study (May 28, 2019 2:59 EDT), <https://www.theguardian.com/society/2019/may/28/one-in-five-girls-and-young-women-bullied-about-their-periods-study>.

<sup>54</sup> *Id.* Girls recount being upset that boys, who do not have much knowledge of menstruation, could make such a stereotyped comment about them. Informal communications with menstrual health researcher Margaret (Maggie) Schmitt, MPH, Associate Director, Gender, Adolescent Transitions & Environment (GATE) Program, Department of Sociomedical Sciences, Columbia University Mailman School of Public Health (Dec. 5, 2019) (notes on file with co-author Margaret E. Johnson) [hereinafter “Schmitt”]. Ms. Schmitt is conducting qualitative public health research regarding adolescent girls and menstruation. *Id.*

<sup>55</sup> One in Five Girls and Young Women Bullied about Periods – Study, *supra* note 53. In addition, a 2018 study found a link between early menarche and bullying at school. Qiru Su et al., *Association Between Early Menarche and School Bullying*, 63 J. ADOLESCENT HEALTH 213 (2018); Lisa Rapaport, *Early Puberty in Girls Tied to Bullying in Schools*, PHYSICIAN’S WEEKLY (May 17, 2018), (reporting on the school bullying study) <https://www.physiciansweekly.com/early-puberty-in-girls/>.

<sup>56</sup> Morning Edition, *Periods! Why These 8<sup>th</sup>-Graders Aren’t Afraid to Talk about Them*, *supra* note 48.

<sup>57</sup> Schmitt, *supra* note 54.

<sup>58</sup> Allen, *supra* note 46, at 152.

same room when it is being discussed is something shameful or dirty, and some boys hold onto these attitudes into adulthood.”<sup>59</sup>

## 2. Title IX and Menstruation-Based Harassment

Title IX’s treatment of menstruation-based harassment is relatively straightforward. For egregious menstruation-based harassment, Title IX clearly provides the basis for a legal claim for harassment on the basis of sex, whether the source of the harassment is fellow students, teachers or school administrators. It is true that neither Title IX’s text nor its regulations explicitly address sexual harassment. But both the Supreme Court and the Department of Education’s Office of Civil Rights (OCR)—which has primary responsibility for administrative enforcement of Title IX—have long recognized that sexual harassment, including peer-based sexual harassment, is a form of discrimination that can violate Title IX.

In the 1999 case of *Davis v. Monroe County School Board of Education*,<sup>60</sup> the Supreme Court first held that peer sexual harassment, “if sufficiently severe, can...rise to the level of discrimination actionable” under Title IX, giving rise to damages liability.<sup>61</sup> Even prior to 1999, OCR had already concluded that Title IX prohibited peer sexual harassment, issuing detailed guidance in 1997 about schools’ responsibility to address such harassment.<sup>62</sup> These conclusions drew on the Supreme Court’s earlier recognition that workplace sexual harassment violated Title VII’s prohibition on sex discrimination.

Moreover—and notably for menstruation-based harassment—that same 1997 OCR guidance explained that “for instance, if a young woman is taunted by one or more young men about her breasts or *genital area* or both, OCR may find that a hostile environment has been created, particularly if the conduct has gone on for some time, takes place throughout the school, or if the taunts are made by a number of students.”<sup>63</sup> Menstruation-based harassment certainly relates to students’ genital areas, and thus it is straightforward to argue that it counts as a form of sexual harassment.

That said, not all sexual harassment rises to the level of being actionable under Title IX. In *Davis*, the Supreme Court held that to recover damages against a school in a Title IX claim, a victim of sexual harassment must show that (1) the sexual harassment was “so severe, pervasive, and

---

<sup>59</sup> *Id.*

<sup>60</sup> 526 U.S. 629 (1999).

<sup>61</sup> *Id.* at 650.

<sup>62</sup> See Office of Civil Rights, Department of Education, *Sexual Harassment Guidance 1997*, available at <https://www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html>.

<sup>63</sup> *Id.* (emphasis added).

objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit,” (2) the school exercised “substantial control over both the harasser and the context in which the known harassment occur[red],” (3) the school had “actual notice” of the harassment, and (4) the school’s response reflected “deliberate indifference,” i.e., that the response was “clearly unreasonable.”<sup>64</sup> Thus, in a situation where a student is severely and pervasively harassed for menstruating—especially to the point where the student starts missing school as a result—and a school official is informed about the situation and chooses to do nothing, there would be a good case for holding the school liable for damages under *Davis*.

By contrast, OCR has set the threshold somewhat lower in its administrative enforcement of Title IX (which it accomplishes through reviews, investigations, informal dispute resolution, and, if necessary, suspension or termination of federal funding). In a 2001 guidance letter, OCR made clear that it was retaining the approach that it had outlined in 1997, rather than adopting the *Davis* Court’s stringent standard for damages liability in Title IX suits.<sup>65</sup> In particular, when defining harassment, OCR never adopted the “so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit” test that the *Davis* Court had articulated. Instead, OCR retained its own previous 1997 language: “conduct that is sufficiently serious to deny or *limit* a student’s ability to participate or benefit from the school’s program based on sex.”<sup>66</sup> Similarly, OCR made clear that notwithstanding *Davis*, it would continue to hold schools responsible for peer harassment even in the absence of actual notice. The OCR guidance explained:

If a student sexually harasses another student and the harassing conduct is sufficiently serious to deny or limit the student’s ability to participate in or benefit from the program, and if the school knows or *reasonably should know* about the harassment, the school is responsible for taking immediate effective action to eliminate the hostile environment and prevent its recurrence.<sup>67</sup>

Likewise, rather than requiring only that a school’s response to sexual harassment not be deliberately indifferent, OCR required the school’s

---

<sup>64</sup> *Davis*, 526 U.S. at 643-651.

<sup>65</sup> See *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (January 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

<sup>66</sup> *Id.* (emphasis added).

<sup>67</sup> *Id.*



response to be reasonable.<sup>68</sup> Thus, unlike the *Davis* standard for damages liability, OCR's administrative enforcement standard sweeps in cases where schools have been negligent but not deliberately indifferent, and where harassment has limited a student's ability to benefit from school even if it has not outright barred the student from benefiting.

The Department of Education has never issued actual regulations to codify the approach to harassment that was conveyed by the OCR guidance documents, and such guidance documents do not themselves carry the force of law.<sup>69</sup> But because OCR guidance is used for the administrative enforcement of Title IX, it remains important.

Thus, under the OCR guidance for administrative enforcement, and even the *Davis* standard for damages liability, there is a clear, albeit narrow, path to Title IX protection against menstruation-based harassment. In this sense, Title IX already protects against significant menstruation-based harassment, even providing for damages in extreme cases. But under the stringent *Davis* standard and even the broader administrative standard, Title IX does not provide a remedy for lower-grade forms of menstruation-based harassment (or other sexual harassment). This is problematic, because even subtle harassment can make menstruating students feel anxious and unwelcome in school, regardless of whether it tangibly and provably limits their opportunities there.

Worse, there is now a real possibility that OCR will be abandoning its broader standard for what constitutes actionable harassment under Title IX. On November 16, 2018, the Department of Education issued a notice of proposed rulemaking on various aspects of Title IX, including sexual harassment. The Department's proposed new regulations, which would supersede any previous conflicting OCR guidance, would ratchet up the administrative standard to the damages liability standard articulated in *Davis*, so that the new standards are aligned.<sup>70</sup> The proposed regulations adopt the "actual notice" and "deliberate indifference" requirements for liability, as well as the *Davis* definition of actionable peer sexual harassment ("unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the

---

<sup>68</sup> *Id.*

<sup>69</sup> *See, e.g.,* C.C. v. Paradise High School, 2019 WL 6130439, at \* 8 (E.D. Ca. Nov. 19, 2019).

<sup>70</sup> The new proposed regulations can be found at <https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-nprm.pdf>. A summary version is available at <https://www2.ed.gov/about/offices/list/ocr/docs/background-summary-proposed-ttle-ix-regulation.pdf>.

recipient's education program or activity").<sup>71</sup> These proposed regulations received over 100,000 comments, and generated much critical commentary.<sup>72</sup>

Although OCR's existing 2001 guidance on harassment currently remains in effect with respect to administrative enforcement of Title IX, it is unclear what form the final rulemaking from the Department of Education will take and how it will ultimately fare in court.<sup>73</sup> If the Department of Education's final regulations proceed with ratcheting the OCR standard up to the *Davis* level, then Title IX will provide less protection against menstruation-based harassment than it has for many years. Students who are victims of menstruation-based harassment will not have a valid Title IX claim unless they can show that the harassment is severe enough to effectively bar them from educational opportunities. The prospect of OCR's not being able to take administrative action in all but the most extreme cases is worrisome. But even if the OCR standard remains unchanged, it will still not provide comprehensive protection on this issue. Ideally, Title IX would not only cover menstruation-based harassment that demonstrably limits students' ability to benefit from school, but would 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 furthers the fundamental goal of Title IX: that no student is deprived of equal access to an education because of her sex.

---

<sup>71</sup> The Department explained that this definition of harassment "is imported directly from the Supreme Court's *Davis* decision and promotes protection of free speech and academic freedom in a way that the more expansive and subjective definition of harassment used in Department guidance has not." *Id.* It similarly explained that its "actual notice" and "deliberate indifference" requirements are drawn directly from Supreme Court precedent. *Id.*

<sup>72</sup> See, e.g., Joanna L. Grossman & Deborah L. Brake, *A Sharp Backward Turn: Department of Education Proposes to Undermine Protections for Students Against Sexual Harassment and Assault*, VERDICT: LEGAL ANALYSIS AND COMMENTARY (describing the change as "a complete game-changer for administrative enforcement of Title IX," and "effectively remov[ing] OCR from any meaningful enforcement role in guarding the rights of students who experience sexual harassment"); Jeannie Suk Gersen, *Assessing Betsy DeVos's Proposed Rules on Title IX and Sexual Assault*, THE NEW YORKER (Feb. 1, 2019) (noting that "more than a hundred thousand [comments] were submitted to the agency by the close of the comment period, and speculating that "perhaps the comments will result in some amendments to the final regulations...This process could take years—and it's all but guaranteed that the moment final rules are issued, the agency will be sued over them").

<sup>73</sup> See *Title IX and Sexual Harassment: Private Rights of Action, Administrative Enforcement, and Proposed Regulations*, Congressional Research Service (CRS) Report for Congress (April 12, 2019), <https://fas.org/sgp/crs/misc/R45685.pdf> (stating that although OCR has withdrawn certain previous guidance documents, it stated that "it would continue to rely on the 2001 guidance" during the process of new rulemaking).

*B. Insufficient Menstrual Accommodations*

## 1. Impediments Resulting from Restrictive Policies

Because of design and policy choices, schools can be places that are unintentionally inhospitable to students who menstruate. In particular, schools' bathroom break policies, toilet facilities, and dress codes can impose challenges for menstruating students.

## a. Bathroom Access

Schools understandably want to limit students' trips to the bathroom in order to minimize misconduct and dilatory trips from the classroom. Nevertheless, strict limitations on bathroom access may have the unintended consequence of keeping some students from coming to school at all, due to fear that they may not be able to access the bathroom while menstruating. This is particularly anxiety-producing because pre-adolescents and adolescents have more unpredictable periods than adults do, which means that they may need to quickly and unexpectedly access the bathroom.<sup>74</sup> Indeed, even students who already know that they have their periods, and have brought menstrual products to school, may bleed onto their clothes if they cannot access the bathroom in time.

An anecdote from student Josephine Kwan illustrates this point: Kwan recounted that in tenth grade during a volleyball game, her coach refused to let her run to the bathroom to attend to a sudden menstrual flow.<sup>75</sup> Knowing her underwear was blood-soaked and feeling confused, anxious, and fearful, Kwan found the entire experience traumatic.<sup>76</sup> She never played volleyball again.<sup>77</sup> Caroline Abreu, a Bronx Prep Middle School student, similarly recounted that she has repeatedly found herself "bleeding out" at school, explaining: "It's not usually my fault; it's because I can't go to the bathroom during class."<sup>78</sup>

In May of 2018, National Public Radio reported that a network of Chicago charter schools had such a strict bathroom break policy that menstruating girls were bleeding through their clothes.<sup>79</sup> Former teachers

---

<sup>74</sup> See *supra* text accompanying notes 24 and 25.

<sup>75</sup> Kristi Pahr, *Period Shaming: A Not-So New Type of Bullying Parents Need to Know About*, PARENTS (Nov. 4, 2019), <https://www.parents.com/kids/problems/bullying/period-shaming-is-a-kind-of-bullying-parents-need-to-be-aware-of/>.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> Morning Edition, *Periods! Why These 8<sup>th</sup>-Graders Aren't Afraid to Talk about Them* May 15, 2019, *supra* note 48.

<sup>79</sup> Dusty Rhodes, *Feedback: Noble Charter Schools Story Hit a Nerve*, NPR Illinois

found the bathroom access policy “dehumanizing.”<sup>80</sup> A similar story came out in July 2018 about KIPP DC Northeast Academy, a charter school in Washington, DC.<sup>81</sup> Not only may such policies cause menstruating students to worry about leaking or bleeding onto their clothes, but they even pose a health risk by leading students to change their tampons or pads later than recommended.<sup>82</sup> In addition to the problems caused by schools’ rigid policies about bathroom access, teachers’ informal rules about bathroom breaks during class can have similar effects.<sup>83</sup> For instance, one news account described a teacher’s policy of limiting her students’ access to the restroom during class to one visit every two months.<sup>84</sup> If a student already had used their one visit, a menstruating student might choose to skip school rather than bleed out in that teacher’s class.

#### b. Inadequate Toilet Facilities

---

(April 30, 2018), <https://wjla.com/features/7-on-your-side/kipp-dc-northeast-academy-bathroom-lunch-policy-investigationhttps://www.nprillinois.org/post/feedback-noble-charter-schools-story-hit-nerve#stream/0> (recounting text messages from teachers that described school policy of not letting students go the bathroom without a rarely-available escort, forcing students to choose between walking out of class and staining themselves, and quoting teachers as saying that the school had responded by allowing “girls to tie a Noble sweater around their waist, to hide the blood stains”).

<sup>80</sup> See Maiysha Kai, *Dressed for Success? This Charter School’s Policies Are Humiliating Its Female Students*, ROOT (May 1, 2018, 4:05 PM), <https://theglowup.theroot.com/dressed-for-success-one-charter-schools-policies-are-h-1825694277>.

<sup>81</sup> Nathan Baca, *What Some Kids Who Get One Bathroom Pass a Week Say They Face Daily at a DC Charter School*, wjla.com (July 19, 2018), <https://wjla.com/features/7-on-your-side/kipp-dc-northeast-academy-bathroom-lunch-policy-investigation> (quoting one parent as reporting that “Young ladies have started their menstrual cycle and there have been several girls [who] have had accidents in their pants”). It is important to note here that charter schools are subject to Title IX. See 20 U.S.C. § 1681(a) (Title IX applies to educational activities or programs receiving federal funds).

<sup>82</sup> Doha Madani, *Girls Reportedly Bleeding Through Pants Due to Charter School Bathroom Policy*, HUFFPOST (Apr. 30, 2018, 9:44 PM), [https://www.huffingtonpost.com/entry/charter-school-bathroom-policy-periods\\_us\\_5ae7a19be4b04aa23f26463c](https://www.huffingtonpost.com/entry/charter-school-bathroom-policy-periods_us_5ae7a19be4b04aa23f26463c). For instance, to avoid toxic shock syndrome, menstruators are advised to change their tampons at least every four to eight hours. *Menstrual Cycle*, *supra* note 22. Pads should be changed “every few hours.” *Id.*

<sup>83</sup> See, e.g., Alia Wong, *When Schools Tell Kids They Can’t Use the Bathroom*, THE ATLANTIC (Feb. 26, 2019), <https://www.theatlantic.com/education/archive/2019/02/the-tyranny-of-school-bathrooms/583660/> (“Absent official policies, parents and doctors tell me, many teachers come up with their own regulations, which anecdotes suggest can border on the absurd”).

<sup>84</sup> *Id.*

Even if a well-supplied student is able to leave class to go to the bathroom in time, once the student arrives there, immediate access to a toilet is not guaranteed. There may be fewer bathroom stalls than the number of students needing them.<sup>85</sup> For a transgender boy student or a gender nonbinary student, using the boys' restroom may provide less access to privacy for addressing menstrual needs (given that there are fewer stalls and more urinals).<sup>86</sup> Public health researchers working in low- and middle-income countries have identified "toilet insecurity" as an obstacle for girls' and women's health.<sup>87</sup> To assist policymakers, these researchers have created a list of the characteristics of what they call "female friendly" sanitation facilities, repurposed for this discussion as "menstruation-friendly" facilities. The key features include:

[a] safe and conveniently located toilet, [individual or] separated by gender (if communal or public), which provides privacy (doors, locks), a culturally appropriate menstrual waste disposal option (trash bins, chutes, pits), water and soap is available for washing blood off one's hands (water tap or bucket), suitable drainage and accessibility both during the day and night (area and internal lighting).<sup>88</sup>

Although access to water and soap is not usually a problem in most U.S. schools, students have indeed reported embarrassment when disposing of their used menstrual products in the public space of the bathroom, rather than in a private bin inside the stall.<sup>89</sup> Menstruation-friendly bathrooms would address these concerns.

c. Dress Codes

---

<sup>85</sup> Schmitt, *supra* note 54.

<sup>86</sup> Joe Pinsker, *The Long Lines for Women's Bathrooms Could Be Eliminated. Why Haven't They Been?*, THE ATLANTIC, <https://www.theatlantic.com/family/archive/2019/01/women-men-bathroom-lines-wait/580993/> (Jan. 23, 1989) (explaining that since the late 1980s, states have required new buildings to have a greater number of toilets for women's versus men's restrooms due to the increased time it takes women to "enter a stall to pee" and "because they menstruate.").

<sup>87</sup> Margaret L. Schmitt et al., *Making the Case for a Female-Friendly Toilet*, 2018 WATER 10, 1193, <https://www.mdpi.com/journal/water>. While the authors use the term "female" in their work, we use the term "menstruator-friendly" in order to be inclusive of transgender male, gender nonbinary, and intersex menstruators.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

Finally, schools' dress code and uniform policies can impose impediments to menstruating students. In the United States, approximately 21.5% percent of all public schools and approximately 49.2% of all private schools require their students to wear uniforms.<sup>90</sup> One recent news account, for instance, described a charter school's policy of requiring all students to wear khaki trousers, disadvantaging students who risk leaking while menstruating.<sup>91</sup> Uniform policies and dress codes that permit all students to wear dark bottoms would help to alleviate this concern.

## 2. Title IX and Menstrual Accommodations

Compared to menstruation-based harassment, issues involving bathroom break policies, toilet facilities, and dress codes raise more complex legal questions under Title IX. As discussed above, menstruation-based harassment fits neatly into existing Title IX doctrine, since the Supreme Court has already recognized sexual harassment as a form of sex discrimination. By contrast, issues involving strict bathroom break policies or dress codes do not involve the same sort of blatantly disparate treatment that sexual harassment does. Rather, there are two other models of discrimination that are more applicable to these issues: (1) disparate impact and (2) the failure to provide reasonable accommodations. However, although these frameworks are well-developed and established in the employment discrimination arena, they are much murkier in the Title IX context.

First, it is helpful to review these two antidiscrimination models. Unlike disparate treatment, the disparate impact model covers situations where there is a facially neutral policy that has a disparate impact as to a statutorily protected characteristic.<sup>92</sup> This framework has been incorporated into the statutory text of Title VII,<sup>93</sup> the Age Discrimination in Employment

---

<sup>90</sup> See Table 233.50, Percentage of Public Schools With Various Safety and Security Measures: Selected years, 1999-2000 through 2015-16, Nat'l Ctr. for Educ. Stat. 2017, [https://nces.ed.gov/programs/digest/d17/tables/dt17\\_233.50.asp](https://nces.ed.gov/programs/digest/d17/tables/dt17_233.50.asp) (reporting that 21.5% of all public schools required students to wear uniforms and that 56.9% of all public schools enforced a strict dress code in 2015-2016 academic year) and Table 233.50, Percentage of Public and Private Schools With Various Safety and Security Measures, by School Level: 2003-04, 2007-08, and 2011-12, [https://nces.ed.gov/programs/digest/d13/tables/dt13\\_233.50.asp](https://nces.ed.gov/programs/digest/d13/tables/dt13_233.50.asp) (reporting that 56.9% of all private schools at the elementary and secondary level required students to wear uniforms and 76.3% of all private schools enforced a strict dress code in the 2011-2013 academic year).

<sup>91</sup> See Coshandra Dillard, *Equity, Period.*, 61 TEACHING TOLERANCE (Spring 2019), <https://www.tolerance.org/magazine/spring-2019/equity-period>.

<sup>92</sup> See, e.g., George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297, 1297 (1987).

<sup>93</sup> 42 U.S.C. § 2000e-2(k)(1)(A)(i)-(ii).

Act,<sup>94</sup> and the Americans with Disabilities Act;<sup>95</sup> it also appears in numerous federal regulations. The reasonable accommodations model, in turn, holds that in certain instances, the failure to provide reasonable accommodations for covered individuals counts as a form of discrimination. This framework is central to the Americans with Disabilities Act,<sup>96</sup> and also appears in Title VII's prohibition of religious discrimination.<sup>97</sup>

Both frameworks provide useful lenses for thinking through what is so problematic about, for example, a strict bathroom break policy that does not take menstruating students' needs into account. Given that menstruation is a process resulting from female biology, and that 98% of females are menstruating by age 15,<sup>98</sup> such policies clearly have a disproportionate effect on female students (in addition to the harms that they impose on all students). Moreover, refusals to exempt menstruating students from such policies amount to denials of reasonable accommodations. Indeed, the bathroom break situation exemplifies Professor Christine Jolls' argument about the overlapping nature of the disparate impact and reasonable accommodation frameworks.<sup>99</sup> Both frameworks would clearly counsel adjusting strict bathroom break policies so that menstruating students can visit the bathroom as required and still participate fully at school.

The wrinkle, however, is that neither of these frameworks is on entirely solid footing in the Title IX context. Title IX's statutory text says nothing about disparate impact or reasonable accommodations. Additionally, no Supreme Court case has interpreted Title IX's text to incorporate these frameworks—to the contrary, Supreme Court precedent implies that there is no private right of action under Title IX for a disparate impact claim.<sup>100</sup> That said, the Department of Education has promulgated numerous Title IX regulations related to both disparate impact and accommodations. These

---

<sup>94</sup> 29 U.S.C. § 623(f) (2012).

<sup>95</sup> 42 U.S.C. § 12112(b)(6) (2012).

<sup>96</sup> *Id.* § 12112(b)(5)(A) (2012).

<sup>97</sup> 42 U.S.C. § 2000e-2(a)(1) (2012); *id.* § 2000e(j) (2012).

<sup>98</sup> *Menstruation in Girls and Adolescents: Using the Menstrual Cycle as a Vital Sign*, Adolescent Health Care Committee Opinion 651, American College of Obstetricians and Gynecologists (2003) <https://m.acog.org/Clinical-Guidance-and-Publications/Committee-Opinions/Committee-on-Adolescent-Health-Care/Menstruation-in-Girls-and-Adolescents-Using-the-Menstrual-Cycle-as-a-Vital-Sign>.

<sup>99</sup> Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 643 (2015).

<sup>100</sup> In *Alexander v. Sandoval*, the Supreme Court held that disparate impact claims for damages were not available under Title VI. *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001). Given the Supreme Court's indication that Title IX and Title VI should be interpreted in the same manner, numerous courts have held that *Alexander* also applies to Title IX. See, e.g., *Yu v. Vassar College*, 97 F.Supp.3d 448, 461 n. 6 (citing numerous cases that have reached that conclusion).

regulations apply for administrative purposes, even if not for damages liability, and they are a useful starting point here.

Title IX's existing disparate impact regulations arise in contexts distinct from menstruation. Rather, they apply to admissions testing,<sup>101</sup> preferential admissions based on having attended single-sex schools,<sup>102</sup> preferential recruiting at single-sex schools,<sup>103</sup> sex-specific scholarships,<sup>104</sup> and various employment and contractual decisions.<sup>105</sup> In all of these arenas, the regulations counsel that covered entities cannot use practices that have a discriminatory *effect* based on sex.

---

<sup>101</sup> 34 C.F.R. § 106.21 (b)(2) (“A recipient shall not administer or operate any test or other criterion for admission which has a disproportionately adverse effect on persons on the basis of sex unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criteria which do not have such a disproportionately adverse effect are shown to be unavailable.”).

<sup>102</sup> 34 C.F.R. § 106.21 (b)(2) (“A recipient to which this subpart applies shall not give preference to applicants for admission, on the basis of attendance at any educational institution or other school or entity which admits as students only or predominantly members of one sex, if the giving of such preference has the effect of discriminating on the basis of sex in violation of this subpart”).

<sup>103</sup> 34 C.F.R. § 106.23(b) (“A recipient to which this subpart applies shall not recruit primarily or exclusively at educational institutions, schools or entities which admit as students only or predominantly members of one sex, if such actions have the effect of discriminating on the basis of sex in violation of this subpart.”).

<sup>104</sup> 34 C.F.R. § 106.37(b) (“A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established pursuant to domestic or foreign wills, trusts, bequests, or similar legal instruments or by acts of a foreign government which requires that awards be made to members of a particular sex specified therein; *Provided*, That the overall effect of the award of such sex-restricted scholarships, fellowships, and other forms of financial assistance does not discriminate on the basis of sex”).

<sup>105</sup> *See, e.g.*, 34 C.F.R. § 106.51(a)(2) (“A recipient shall make all employment decisions in any education program or activity operated by such recipient in a nondiscriminatory manner and shall not limit, segregate, or classify applicants or employees in any way which could adversely affect any applicant's or employee's employment opportunities or status because of sex.”); *id.* § 106.51(a)(3) (“A recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination prohibited by this subpart, including relationships with employment and referral agencies, with labor unions, and with organizations providing or administering fringe benefits to employees of the recipient.”); *id.* § 106.51(a)(4) (A recipient shall not grant preferences to applicants for employment on the basis of attendance at any educational institution or entity which admits as students only or predominantly members of one sex, if the giving of such preferences has the effect of discriminating on the basis of sex in violation of this part.”); 34 C.F.R. § 106.52 (A recipient shall not administer or operate any test or other criterion for any employment opportunity which has a disproportionately adverse effect on persons on the basis of sex unless: (a) Use of such test or other criterion is shown to predict validly successful performance in the position in question; and (b) Alternative tests or criteria for such purpose, which do not have such disproportionately adverse effect, are shown to be unavailable.)”



Title IX's accommodation-related regulations likewise arise in contexts distinct from menstruation. The only Title IX regulation that *explicitly* uses the word "accommodation" appears in the athletic context. This regulation states that in determining whether equal opportunities are available to both sexes, one factor is "whether the selection of sports and levels of competition *effectively accommodate* the interests and abilities of members of both sexes."<sup>106</sup> Here, the very word "accommodate" connotes something different than what it typically means in the antidiscrimination context; it is less about specific arrangements to facilitate individual access and more about overall programming. This approach has been further articulated in some of OCR's guidance documents about intercollegiate athletics—in particular, in its famous three-part test for intercollegiate athletic programs, which can be satisfied as long as "it can be demonstrated that the interests and abilities of the members of that sex have been *fully and effectively accommodated* by the present program."<sup>107</sup>

We move closer to the more conventional meaning of accommodations—and to the context of menstruation—by turning to Title IX's treatment of pregnancy. Like menstruation, pregnancy is a biological process linked to female sex. Title IX's pregnancy regulations do not explicitly use the word "accommodations." But they do state that "a recipient shall not discriminate against any student, or exclude any student from its education program or activity...on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom."<sup>108</sup> Moreover, one of the provisions states that schools "shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom *as a justification for a leave of absence* for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began."<sup>109</sup>

Thus, even without using the word "accommodation," Title IX's regulatory language does prescribe at least one accommodation for pregnant students: leaves of absence, with the opportunity to return to school without punishment or sanction, regardless of whether those leaves are available to other students. Moreover, in its guidance documents, OCR has gone even further. In 2013, OCR issued a guidance letter and accompanying pamphlet (entitled "Supporting the Academic Success of Pregnant and Parenting Students") that instructed schools about how to deal with pregnant

---

<sup>106</sup> 34 C.F.R. § 106.41(c).

<sup>107</sup> Russlyn Ali, Office for Civil Rights, U.S. Dep't of Educ., *Dear Colleague Letter: Intercollegiate Athletics Policy Clarification: The Three-Part Test—Part 3* (April 20, 2010).

<sup>108</sup> 34 C.F.R. § 106.40(b)(1).

<sup>109</sup> 34 C.F.R. § 106.40(b)(5).

students.<sup>110</sup> Significantly, the pamphlet included two accommodation-related passages in its “Frequently Asked Questions Pertaining to Title IX Requirements Regarding Pregnant and Parenting Students”:

Q. What types of assistance must a school provide to a pregnant student at school?

A. To ensure a pregnant student’s access to its educational program, when necessary, a school must make adjustments to the regular program that are reasonable and responsive to the student’s pregnancy status. For example, a school might be required to provide a larger desk, allow frequent trips to the bathroom, or permit temporary access to elevators.

\*

Q. What if some teachers at a school have their own policies about class attendance and make-up work?

A. Every school that receives federal financial assistance is bound by Title IX. Schools must ensure that the policies and practices of individual teachers do not discriminate against pregnant students. For example, a teacher may not refuse to allow a student to submit work after a deadline that she missed because of absences due to pregnancy or childbirth.<sup>111</sup>

These two passages suggest that OCR has started interpreting Title IX’s pregnancy regulations as requiring a broad array of accommodations, such as larger desks, bathroom breaks, access to elevators, and deadline extensions, even though the actual regulations themselves only mention medical leaves.

It is true that OCR’s guidance here is somewhat equivocal (in stating that a school “*might* be required” to provide the larger desk, bathroom break, or elevator access).<sup>112</sup> However, a subsequent section of the pamphlet (entitled “Strategies to Assist Educators in Supporting Pregnant and Parenting Students”) goes on to provide “examples of possible strategies

---

<sup>110</sup> Seth Galanter, Office for Civil Rights, U.S. Dep’t of Educ., *Dear Colleague Letter: Supporting the Academic Success of Pregnant and Parenting Students* (June 25, 2013), available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201306-title-ix.pdf>, with attached pamphlet available at <https://www2.ed.gov/about/offices/list/ocr/docs/pregnancy.pdf>.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

[that...] are not legally mandated by Title IX or its regulations,” such as “allowing excused absences for parenting students (both male and female) who need to take their children to doctors’ appointments” or “designat[ing] a private room for young mothers to breastfeed, pump milk, or address other needs related to breastfeeding during the school day.”<sup>113</sup> In suggesting that these additional accommodations are *not* legally mandated, OCR implies that the accommodations mentioned earlier in the pamphlet *are* legally mandated, at least for administrative purposes.

OCR’s growing recognition of accommodations as one aspect of Title IX compliance is relevant to the question of whether schools must accommodate students’ menstrual needs. Menstruation, unlike pregnancy, is not specifically mentioned in Title IX’s regulations. But it is certainly related to the regulatory heading of “pregnancy and related conditions.”<sup>114</sup> Both pregnancy and menstruation are biological processes connected to female sex; indeed, menstruation results from the shedding of the uterine lining when an ovulated egg is not fertilized, while pregnancy results when the ovulated egg has been fertilized. It is difficult to see why Title IX’s prohibition of sex discrimination would require schools to give pregnant students frequent bathroom breaks, but impose no comparable requirement to give menstruating students the very same sorts of breaks. The failure to do so means that some students, by reason of their sex, will not have equal access to an education, either because they feel they must stay home from school or because they cannot effectively learn and participate while there.

Title IX’s pregnancy-specific regulations are the most factually relevant analogue, but all of Title IX’s disparate impact and accommodation regulations point toward a larger underlying point: Title IX, as discussed further in Part III, is not just about formal equality. As Professor David Cohen has written, these different provisions suggest that Title IX “looks beyond formal equality and reaches into the realm of substantive equality.”<sup>115</sup> Title IX’s disparate impact regulations, Cohen writes, are in keeping with “more substantive conceptions of equality, [which] tend to accept that a showing of disparate impact is enough to prove discrimination.” Title IX’s approach toward athletic equity similarly “jettison[s] the simplistic theory of formal equality,” with the goal of “equaliz[ing] athletic opportunity.”<sup>116</sup> Title IX’s treatment of pregnancy likewise results from this broader view: as Cohen

---

<sup>113</sup> *Id.*

<sup>114</sup> *Cf. Coleman v. Bobby Dodd Institute*, 2017 WL 2486080 (M.D. Ga. June 8, 2017) (rejecting Title VII plaintiff’s argument that menstruation is itself a pregnancy-related condition).

<sup>115</sup> David Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J.L. & GENDER 217, 263 (2005).

<sup>116</sup> *Id.* at 263-65.

explains, “prohibiting discrimination based on pregnancy, a form of discrimination that subordinates women based on a unique biological difference [for which there is no male comparator], naturally follows from this more substantive version of equality.”<sup>117</sup>

In keeping with this underlying approach, and in order to fulfill Title IX’s promise of equal access to education, OCR should expand its pregnancy-related guidance to make clear that schools should accommodate menstruating students’ needs. Ideally, the Department of Education itself should amend the Title IX regulations about “pregnancy and related conditions” to explicitly cover menstruation (as well as breastfeeding, as other commentators have argued). In the meantime, schools themselves should take care to examine their practices, in terms of bathroom facilities, breaks, and dress codes, to ensure that they are not limiting menstruating students’ ability to fully participate in school.

### C. Menstrual Products in Schools

#### 1. Impediments Resulting from Lack of Access to Products

While schools routinely provide students with bathroom necessities like soap and toilet paper, most schools do not provide another necessity: menstrual products.<sup>118</sup> A 2019 study of almost seven hundred 18-25 year old females regarding their access to menstrual products while in high school shows that 92% required a new pad or tampon during the school day.<sup>119</sup> Ninety-one participants stated that they had “trouble affording” menstrual

---

<sup>117</sup> *Id.* at 275.

<sup>118</sup> Reports about access to menstrual products for transgender boys or gender nonbinary students in K-12 schools are difficult to find. Some colleges and universities, like Brown University and New York University, have taken steps to ensure that menstrual products are in all restrooms, men’s, women’s, and gender nonbinary. Chloe Atkins, *For Transgender Men, Pain of Menstruation is More than Just Physical*, NBC NEWS (Jan. 11, 2020) <https://www.nbcnews.com/feature/nbc-out/transgender-men-pain-menstruation-more-just-physical-n1113961>; and <https://www.washingtonpost.com/news/morning-mix/wp/2016/09/09/free-tampons-for-all-at-brown-university-this-school-year-even-in-the-mens-room/>. It is critical that menstrual products be provided for students who do not identify as girls in order to address their menstrual needs. As activist Kenny Ethan Jones states, having a period contributes to gender dysphoria and if access to menstrual products is only in identified female spaces (like the girl’s bathroom) the gender dysphoria is heightened. <https://www.nbcnews.com/feature/nbc-out/transgender-men-pain-menstruation-more-just-physical-n1113961>

<sup>119</sup> Christopher A. Cotropia, *Menstruation Management in United States Schools and Implications for Attendance, Academic Performance, and Health*, 6 WOMEN’S REPRODUCTIVE HEALTH 289, 292 (2019) [hereinafter called the “Cotropia study”].

products and only a quarter of their schools provided products for free.<sup>120</sup> Overall, only 42% of all respondents attended schools where menstrual products were provided.<sup>121</sup> When schools did provide products, the most common place was at the nurse's or front office, and some of those schools also provided menstrual products in the bathrooms, either for free or for purchase.<sup>122</sup> Students reported that a school's provision of menstrual products in the restroom, as opposed to the nurse's or front office, would reduce stigma.<sup>123</sup> The failure to provide menstruating students with free and easily accessible tampons and pads negatively affects their access to equal educational opportunities.

There are two factors undergirding any discussion of a school's decision to provide (or not) accessible and free menstrual products for students.<sup>124</sup> First, the inability to afford menstrual products will cause some students to feel they must stay home and thus miss school. Second, even for those who can afford products, school-provided products are crucial to assist students faced with the reality of an unpredictable period.

a. Educational Access Limited by Income

“Period poverty,” or the inability to afford menstrual products, is an obstacle to educational attainment by many secondary school students.<sup>125</sup>

---

<sup>120</sup> *Id.* at 294-95.

<sup>121</sup> *Id.* at 292.

<sup>122</sup> *Id.* (Eighty percent of respondents reported available products in the nurse's or front office. In addition, about 40% of the respondents whose schools did provide menstrual products reported that they were also available in bathrooms, with about half of them saying they were available for free and the other half saying they were available for purchase).

<sup>123</sup> *Id.* at 299

<sup>124</sup> According to the Simmons National Consumer Survey, over 58.29 million women in the U.S. used menstrual pads and approximately 40 million used tampons in 2019. *See* U.S. population: Usage of Sanitary Pads and Napkins From 2011 to 2023, Statista, <https://www.statista.com/statistics/287048/usage-of-sanitary-pads-and-napkins-in-the-us-trend/> and Statista, Do You Use Tampons? <https://www.statista.com/statistics/278085/us-households-usage-of-tampons/>. Pads represent a 55% share of the market for menstrual hygiene products. Breakdown of the Feminine Hygiene Market Worldwide in 2018, by Segment, Statista, <https://www.statista.com/statistics/1075218/market-share-of-feminine-hygiene-worldwide-by-type>. This in no way suggests that noncommercial items are inappropriate for use. *See* Gharib, *supra* note 40 (including explanation by menstrual health researcher and University of Massachusetts professor Chris Bobel that there is no research that causally links using an improperly washed or dried cloth to staunch menstrual blood to infections in the individual menstruating).

<sup>125</sup> *State of the Period*, *supra* note 41. *See also* Nadaya Okamoto & Maria Molland, *The Cost of Tampons is Hurting Low-Income Girls*, CNN (Oct. 21, 2019), <https://www.cnn.com/2019/10/21/perspectives/period-poverty-menstrual-products/index.html> (“Public awareness about period poverty, the inability to access

According to one recent study of 1,000 teenagers ages 13 to 19, approximately twenty percent reported that “they have struggled to afford period products or were not able to purchase them at all.”<sup>126</sup> The same number “have missed class time because of lack of access to period products.”<sup>127</sup> Two-thirds of the surveyed adolescents reported that they “have experienced the stress of inaccessible period products.”<sup>128</sup> Students relate that it is difficult to attend school or be productive in school if they do not have the necessary menstrual products.<sup>129</sup> The Cotropia study echoes those results finding that “the inability to afford [menstrual products] was ... significantly positively correlated with missing school, being late, and leaving early.”<sup>130</sup> Similarly, the Cotropia study demonstrates “statistically significant correlations between not providing [menstrual products] at school and missing school, leaving school early, and negative impacts on learning....”<sup>131</sup> Separate and apart from other disadvantages that low-income students may face once they are in school,<sup>132</sup> low-income menstruating students encounter the difficulty of not being able to afford the products they need to leave the house and go to school. When they do attend school, worries about access to menstrual products distract low-income menstruating students from their studies.

Poverty is pervasive in public schools. Nation-wide, approximately 51% of all public students qualify for free or low-cost lunches.<sup>133</sup> In New York City, that number is 74%.<sup>134</sup> Jennifer Weiss-Wolf, the co-founder of Period Equity, frames it this way:

---

menstrual hygiene products, has ignited a movement calling for free and accessible pads and tampons in restrooms and public spaces around the world. Period poverty impacts millions of people every day and is pervasive in US schools.”).

<sup>126</sup> *State of the Period*, *supra* note 41.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> JENNIFER WEISS-WOLF, PERIODS GONE PUBLIC: TAKING A STAND FOR MENSTRUAL EQUITY 85-86 (2017).

<sup>130</sup> Cotropia, *supra* note 119 at 296.

<sup>131</sup> Cotropia, *supra* note 119 at 296, 299.

<sup>132</sup> See, e.g., Lea Hubbard, *College Aspirations Among Low-Income African American High School Students: Gendered Strategies for Success*, 30 ANTHROPOLOGY & EDUC. Q 363 (1999) (discussing gender-specific strategies employed to encourage academic success among studied population).

<sup>133</sup> See Kelley Taylor, *Poverty's Long-Lasting Effects on Students' Education and Success*, INSIGHT INTO DIVERSITY (May 30, 2017), <https://www.insightintodiversity.com/povertys-long-lasting-effects-on-students-education-and-success/> (reporting poverty data based on U.S. Census Bureau Statistics).

<sup>134</sup> BTNY Students Excel Despite the Devastating Effects Poverty Can Have on Educational Outcomes, BREAKTHROUGH NEW YORK, Dec. 19, 2018, <http://www.btny.org/blog/2018/12/19/btny-students-excel-despite-the-devastating-effects-poverty-can-have-on-educational-out-comes> (reporting that 74% of public school student in

[A] majority of public school students – 51 percent – come from low-income families. Nearly one in five teenagers age twelve to seventeen live in poverty, which for a family of four, means getting by on \$24,600 each year. After rent, food, and other bills, even with the help of public benefits, that doesn't leave much room for anything else. Not all the things a student needs. Like books. Like shoes. Like maxi pads.<sup>135</sup>

As compared to adults, students are “more prone to be caught off guard with the arrival of their period (which is less likely to be regular), more embarrassed by it, and more likely to be without budgets of their own to buy what they need, when it is needed,”<sup>136</sup> giving rise to a greater need for them to be able to access menstrual products in schools.

b. Educational Access Limited by Biology

A menstruating pre-teen or teenager is uniquely vulnerable to needing products on unpredictable schedules,<sup>137</sup> further underscoring the importance of providing free menstrual products at school.<sup>138</sup> Placing the products where students are most likely to need them—in the bathrooms, as opposed to at a nurse's station—reduces students' barriers to access, whether the barrier is

---

New York qualify for free or low-cost lunches).

<sup>135</sup> WEISS-WOLF, *supra* note 129, at 85-86.

<sup>136</sup> *Id.* at 86.

<sup>137</sup> See *supra* note 24 and accompanying text (discussing wide variation in length of adolescent's menstrual cycles).

<sup>138</sup> To be sure, the link between access to products and school attendance is not limited to K-12 students alone. For instance, a student at the University of Baltimore School of Law reported, “On more than one occasion, I've either unexpectedly gotten my period or bled through the stash of tampons in my purse. If none of my friends have any products, and because there is nowhere to get any within the school, I will often skip the rest of my classes and head home to get a tampon.” University of Baltimore School of Law Students and Faculty Free Menstrual Hygiene Products Proposal (Jan. 28, 2019), [http://law.ubalt.edu/centers/caf/pdf/Universal\\_Menstrual\\_Hygiene\\_Product\\_Access\\_Proposal.pdf](http://law.ubalt.edu/centers/caf/pdf/Universal_Menstrual_Hygiene_Product_Access_Proposal.pdf). In the fall of 2019, responding to student need, the University of Baltimore School of Law installed dispensers and began providing free menstrual products in restrooms, regardless of gender. Correspondence to co-author Margaret E. Johnson (on file with Johnson). In addition, Harvard Law began providing products for female students in 2008 and now provides them to students regardless of gender as well. See [http://archive.boston.com/news/politics/2008/articles/2009/01/04/shes\\_thawed\\_harvard\\_law/](http://archive.boston.com/news/politics/2008/articles/2009/01/04/shes_thawed_harvard_law/) (Former Harvard Law School Dean Elena Kagan required the provision of free tampons to women at Harvard Law School over a decade ago). College campuses throughout the United States are providing access to menstrual products to support and assist their menstruating students and hopefully, more law schools will as well. Johnson, *supra* note 8, text accompanying notes 424 - 425.

the physical location of a nurse's station or a school administrator's office,<sup>139</sup> the authority of a school administrator, a culture of stigma surrounding menstruation, or the student's own shyness.<sup>140</sup> As the Cotropia study shows, 73% of those who needed menstrual products were embarrassed to ask a school administrator for them.<sup>141</sup>

Having access to menstrual products makes students of *all* income levels less likely to miss school. Twelfth-grader Natalie Baimester, a student at a public school in Fairfax County, Virginia, one of the wealthiest counties in the country,<sup>142</sup> observed the positive impact the availability of free products had in her school:

Students need free and easy access to feminine hygiene products...Before providing pads in school bathrooms, girls would roll toilet paper in their underwear, tie sweaters around their waists, or go home early because they did not have feminine hygiene products. Some girls used to miss entire school days because they did not have a sufficient way to manage their periods. Now that pads are available in the bathrooms, girls are using them more. Not only is this a healthier solution, but it also allows girls to stay in school. Without easy access to menstrual products, girls miss critical

---

<sup>139</sup> Traveling to a nurse's station or a school administrator's office is not always practical in the event of sudden flow. Schmitt, *supra* note 54. In Colorado, students advocated for a bill to provide menstrual products in schools arguing that “[w]hile students have access to feminine hygiene products in nurses’ offices, they’re not easily accessible and sometimes students are too embarrassed to ask for them. Some schools ... have dispensers in bathrooms for the products, but many don’t....” Saja Hindi, *Student-advocated Bill Would Help Colorado Public Schools Provide Free Tampons And Other Feminine Hygiene Products*, THE DENVER POST (Nov 27, 2019, 6:13 PM), <https://www.denverpost.com/2019/11/27/colorado-schools-tampons-feminine-hygiene-products/>.

<sup>140</sup> Schmitt, *supra* note 54. See also WEISS-WOLF, *supra* note 129, at 88. See also Cotropia, *supra* note 119 at 293-294, 299 (for instance, one respondent stated “‘Periods are a stigmatized topic – asking for assistance made other’s aware of the situation. Then, if you acted ‘off’ or ‘moody’, others could blame that.’”).

<sup>141</sup> Cotropia, *supra* note 119 at 293-294, 299 (for instance, one respondent stated “‘the nurse made it seem like it was bad that I had to ask for a pad’”).

<sup>142</sup> See Carol Morello & Dan Keating, *D.C. Region is Nation’s Richest, Most Educated*, WASH. POST (Dec. 15, 2010), <https://www.washingtonpost.com/wp-dyn/content/article/2010/12/14/AR2010121407680.html> (reporting that Fairfax County, Virginia and neighboring Loudon County, Virginia, “were the only two U.S. counties with median household incomes surpassing \$100,000” in a recent five-year period).



instruction time, which can be detrimental to their academic performance.<sup>143</sup>

As Baimester’s description suggests, access to free menstrual products benefits all who menstruate and who might otherwise skip school if they are caught unaware by their period. By providing accessible products in schools, the school facilitates the education of both those who cannot afford the products at all and those who “may not be prepared for their period to start at school,” as one school nurse explained.<sup>144</sup>

A school’s decision to provide menstrual products (or not) also has expressive value. Approximately 51% of surveyed teens “feel like their school does not care about them if they do not provide free period products in their bathrooms.”<sup>145</sup> By contrast, when a school places products in the bathrooms, it signals that it supports all students, and cares about their having what they need to thrive at school.<sup>146</sup>

## 2. Action at the State and Federal Legislative Levels

---

<sup>143</sup> Ms. Baimester, a senior at Justice High School, expressed her support for a federal bill that would require free menstrual products in schools. *See Meng Unveils Bold Proposal to Provide Menstrual Equity to All*, Press Release (Mar. 26, 2019), <https://meng.house.gov/media-center/press-releases/meng-unveils-bold-proposal-to-provide-menstrual-equity-to-all>. The argument that menstrual product availability was tied to school attendance was echoed by Holly Seibold, Founder and Executive Director of Bringing Resources to Aid Women’s Shelters (BRAWS) in the same Press Release. *Id.*

<sup>144</sup> Society for Women’s Health Research, *Survey of School Nurses Reveals Lack of Bathroom Policies and Bladder Health Education* (Nov. 26, 2018), <https://swhr.org/survey-of-school-nurses-reveals-lack-of-bathroom-policies-and-bladder-health-education/> [hereinafter *Survey of School Nurses*].

<sup>145</sup> *State of the Period*, *supra* note 41.

<sup>146</sup> The podcasting Bronx Prep Middle School girls suggested that their middle school could be made better if schools would “supply girls’ restrooms with free pads and tampons.” *See NPR, Periods! Why These 8th-Graders Aren’t Afraid To Talk About Them*, <https://www.npr.org/transcripts/721729850>.

In recent years, state and local governments have begun addressing this issue: New York,<sup>147</sup> New Hampshire,<sup>148</sup> Illinois,<sup>149</sup> California,<sup>150</sup> and Georgia<sup>151</sup> have all taken government action requiring school districts to provide free menstrual products in their restrooms. The Boston Public Schools announced in June of 2019 that they would similarly provide free menstrual products to its students in grades six to twelve<sup>152</sup> (an action also taken by New York City prior to the enactment of legislation by New York State<sup>153</sup>).

Notably, the rhetoric surrounding these developments has specifically emphasized the importance of equal access to education, and linked provision of menstrual products to the achievement of that goal. New York Governor Andrew Cuomo, for example, described the legislation as a “critical step forward in ensuring every girl in New York has the same opportunities to grow into a confident, successful woman,” emphasizing the importance of

---

<sup>147</sup> See N.Y. PUB. HEALTH L. § 267 (McKinney 2019) Effective July 1, 2018 (providing, “All elementary and secondary public schools in the state serving students in any grade from grade six through grade twelve shall provide feminine hygiene products in the restrooms of such school building or buildings. Such products shall be provided at no charge to students.”). See also Meghan Finnerty, *Free Tampons Available in Schools (Period)*, ROCHESTER DEM. & CHRON., Sept. 10, 2018), <https://www.democratandchronicle.com/story/news/local/communities/2018/09/10/free-feminine-hygiene-products-schools-districts-spend-thousands/990572002> (reporting on cost to local school districts of New York State law requiring free menstrual hygiene products in girls’ bathrooms in public schools).

<sup>148</sup> N.H. Rev. Stat. Ann. § 189:16-a (2019). Under the New Hampshire law, the law is inclusive of all menstruating students by requiring schools to provide free “menstrual hygiene products” in gender-neutral bathrooms and bathrooms designated for females in all public schools. *Id.* See [https://www.huffpost.com/entry/new-hampshire-passes-bill-requiring-free-menstrual-products-in-all-public-schools\\_n\\_5d31bd0de4b0419fd32bd119](https://www.huffpost.com/entry/new-hampshire-passes-bill-requiring-free-menstrual-products-in-all-public-schools_n_5d31bd0de4b0419fd32bd119).

<sup>149</sup> See, e.g., 105 Ill. Comp. Stat. Ann. 5/34-18.56 (West 2019). Effective August 14, 2018; 105 Ill. Comp. Stat. 5/10-20.63 (West 2019). Effective August 14, 2018 (“A school district shall make feminine hygiene products available, at no cost to students, in the bathrooms of school buildings.”).

<sup>150</sup> CAL. EDUC. CODE § 35292.6 (West 2019). Effective January 1, 2018.

<sup>151</sup> Maya T. Prabhu, *Georgia OKs Providing Menstrual Products to Low-Income Girls, Women*, ATLANTA JOURNAL-CONSTITUTION (April 9, 2019), <https://www.ajc.com/news/state--regional-govt--politics/georgia-oks-providing-menstrual-products-low-income-girls-women/8wRDKwffieuHFslCsg0TML/> (explaining that through the budgeting process, the legislature allocated monies to the Department of Education for schools’ menstrual product supplies).

<sup>152</sup> City of Boston, *Pilot Program Launched To Provide Free Menstrual Supplies To BPS Students*, (June 17, 2019), <https://www.boston.gov/news/pilot-program-launched-provide-free-menstrual-supplies-bps-students> (The Boston City Mayor announced a pilot program providing free menstrual products to seventy-seven city schools beginning Fall 2019 with funding from the FY2020 budget).

<sup>153</sup> N.Y.C., N.Y., ADMIN. CODE § 21-968 (LEXIS though August 21, 2019).

“providing all students with equal access to these products.”<sup>154</sup> New Hampshire Governor Chris Sununu likewise explained that its legislation “will help ensure young women in New Hampshire public schools will have the freedom to learn without disruption—and free of shame, free of stigma,”<sup>155</sup> echoing the statement of Representative Polly Campion, a co-sponsor of the bill, who described it as a “basic, essential measure for equality.”<sup>156</sup> Illinois’s legislation similarly included the statement that “when students do not have access to affordable feminine hygiene products, they may miss multiple days of school every month,”<sup>157</sup> and that access to such products enables them “to continue with their daily lives.”<sup>158</sup> This rhetoric also dovetails with other state and federal rules that emphasize the importance of school attendance.<sup>159</sup>

Advocacy surrounding free menstrual products also falls under the umbrella of the larger “menstrual equity” movement which—as discussed above—has also taken aim at the tampon tax.<sup>160</sup> The focus on menstrual equity has even recently been picked up at the federal legislative level, with Representative Grace Meng of New York having introduced, on March 26, 2019, a proposed bill—the “Menstrual Equity for All Act of 2019”—that would, among other things, give states the option of using federal grant funds to provide students with free menstrual products in schools, require large employers to provide free menstrual products for their employees in the workplace, and require all public federal buildings to provide free menstrual products in their restrooms.<sup>161</sup>

---

<sup>154</sup> *Id.*

<sup>155</sup> See Nancy West, *Sununu Signs Bill Requiring that Menstrual Care Products Be Available in Schools* (July 17, 2019), <http://indepthnh.org/2019/07/17/sununu-signs-bill-requiring-menstrual-care-products-be-available-in-schools/>.

<sup>156</sup> *Id.*

<sup>157</sup> See Illinois Public Act 100-0163 (the “Learn with Dignity Act”), Sec. 10-20.60(3)-(4).

<sup>158</sup> See Statement of Governor Andrew Cuomo, Sept. 10, 2018, <https://www.governor.ny.gov/news/governor-cuomo-reminds-schools-new-law-requiring-school-districts-provide-free-feminine-hygiene>.

<sup>159</sup> See Evie Blad, *Give Students Free Tampons, Pads, Advocates Say. Here's Why Some Schools Already Do*, EDUC. WK. (Jan. 28, 2019), [http://blogs.edweek.org/edweek/rulesforengagement/2019/01/give\\_students\\_free\\_tampons\\_pads\\_advocates\\_say\\_heres\\_why\\_some\\_schools\\_already\\_do.html?override=web](http://blogs.edweek.org/edweek/rulesforengagement/2019/01/give_students_free_tampons_pads_advocates_say_heres_why_some_schools_already_do.html?override=web) (“[A]s state and federal education laws put a growing emphasis on school attendance, more schools may consider providing such products in an effort to address every obstacle that may keep students out of the classroom.”).

<sup>160</sup> See *supra* note 6 and accompanying text.

<sup>161</sup> See H.R. 1882: Menstrual Equity for All Act of 2019, <https://www.govtrack.us/congress/bills/116/hr1882>.

### 3. Title IX and Menstrual Products in Schools

The rhetoric surrounding period poverty and government action to provide free menstrual products resonates with Title IX's emphasis on ensuring equal access to education, regardless of sex. The statute's underlying purpose—to ensure that students' sex does not deprive them of equal access to education—would suggest that schools *should* be so required. Students who menstruate and cannot afford to bring menstrual products to school—or who are unable to do so for other reasons (such as an unexpected period)—face a significant roadblock to their education that male students do not experience.

And yet, nothing in Title IX's statutory text or regulations, nor in OCR guidance, addresses this issue. Although it is straightforward to extrapolate OCR's guidance about bathroom breaks for pregnant students to bathroom breaks for menstruating students, the link between any of its pregnancy guidance provisions and the widespread provision of menstrual products in schools is far more attenuated.

This is a significant omission in the current Title IX regulatory framework. States and individual school districts have begun to close the gap in the past few years, as discussed above. But this piecemeal approach would be much more effective and comprehensive if developed at the federal level. That is particularly true because not all school districts can afford to provide such products on their own, and thus federal financial support (as Representative Meng's proposed bill calls for) may be necessary. As with menstrual accommodations, this is an area where further Title IX regulations and OCR guidance, and perhaps even additional legislation, are needed.

#### *D. Menstrual Education in Schools*

##### 1. Impediments Resulting from Inadequate Menstrual Education

Menstrual education in the United States is lacking in several respects. First, numerous states do not require schools to offer any instruction in the topic (or, indeed, any sex education at all).<sup>162</sup> Furthermore, even in states that mandate sex education, teachers are not necessarily required to provide accurate information to students.<sup>163</sup> It is not surprising, then, that seventy-nine percent of teens report that they “feel that they need more in-

---

<sup>162</sup> Guttmacher Institute, *State Laws and Policies: Sex and HIV Education* (Dec. 1 2019), <https://www.guttmacher.org/state-policy/explore/sex-and-hiv-education>.

<sup>163</sup> In the thirty-nine states that do require some sex education, only seventeen of those states require that the education be medically accurate. *Id.*

depth education about menstrual health.”<sup>164</sup> Girls in particular report that there is not sufficient discussion time in their menstrual education classes, that the content is not taught in a memorable way, and that the courses do not sufficiently take into consideration students’ embarrassment about asking questions.<sup>165</sup>

Another key deficiency in existing menstrual education instruction is that it may come too late. Typically, states that provide puberty education do so for students in the fifth or sixth grade;<sup>166</sup> this is after the point at which some students have begun menstruating.<sup>167</sup> During the past twenty-five years, the age of menarche “has declined steadily,” and although the average onset of menstruation for girls is twelve years old (approximately sixth or seventh grade), a not-insubstantial portion menstruate earlier.<sup>168</sup> Specifically, one study of 17,077 girls ages three to twelve found that 48.3% of the African-American girls<sup>169</sup> and 14.7% of the Caucasian girls showed physical development of puberty as early as eight years of age, or in third grade.<sup>170</sup>

Timely school-based education may be especially important for those students who are not learning about menstruation at home or elsewhere.<sup>171</sup> As one former student explained, “[s]ome girls find out about their periods when they actually get them. It’s just never talked about in schooling.”<sup>172</sup> Some advocates such as Jennifer Weiss-Wolf argue that menstrual education should begin in kindergarten.<sup>173</sup> In line with the research on the early onset

---

<sup>164</sup> *State of the Period*, *supra* note 41.

<sup>165</sup> Ann C. Herbert et al., *Puberty Experiences of Low-Income Girls in the United States: A Systematic Review of Qualitative Literature From 2000 to 2014*, 60 J. OF ADOLESCENT HEALTH 363, 376 (2017).

<sup>166</sup> In 1999, the Guttmacher Institute reported that “seventy-two percent of fifth- and sixth-grade teachers report that sexuality education is taught in their schools at one or both grades. Fifty-six percent of teachers say that the subject is taught in grade five and 64% in grade six.” David J. Landry et al., *Sexuality Education in Fifth and Sixth Grades in U.S. Public Schools*, 32 PERSPECTIVES ON SEXUAL AND REPRODUCTIVE HEALTH 212, 212 (1999), <https://www.guttmacher.org/journals/psrh/2000/09/sexuality-education-fifth-and-sixth-grades-us-public-schools-1999>.

<sup>167</sup> *Menstrual Cycle*, *supra* note 22; National Center for Education Statistics, [https://nces.ed.gov/programs/statereform/tab5\\_3.asp](https://nces.ed.gov/programs/statereform/tab5_3.asp) (last visited Dec. 12, 2019) (showing kindergarten begins at age five).

<sup>168</sup> National Center for Education Statistics, [https://nces.ed.gov/programs/statereform/tab5\\_3.asp](https://nces.ed.gov/programs/statereform/tab5_3.asp) (last visited Dec. 12, 2019) (showing twelve-year-olds attend sixth or seventh grade). *See also* Herbert, *supra* note 165, at 364.

<sup>169</sup> *See* Ashley Reese, *Black Blood*, in PERIOD: TWELVE VOICES TELL THE BLOODY TRUTH, 103, 109-111 (Kate Farrell ed., 2018) (explaining that black American girls start their periods earlier than other girls).

<sup>170</sup> Herbert et al., *supra* note 165, at 364.

<sup>171</sup> Herbert et al., *supra* note 165, at 376.

<sup>172</sup> Gupta et al., *supra* note 17.

<sup>173</sup> WEISS-WOLF, *supra* note 129, at 225 (2017).

of menarche, at a minimum, third-grade would be the appropriate point to introduce the topic. Regardless, what is certain is that girls and other menstruators need to receive information before they get their first period.

Students of all ages benefit from knowing the facts of the reproductive system and puberty, and also about the practicalities and management of menstruation.<sup>174</sup> School-based education that is medically accurate provides information (and therefore some comfort and confidence) to menstruating individuals. One study reported that low-income girls “who felt unknowledgeable or unprepared for menstruation were more likely to report having worse experiences of menarche, negative attitudes about menarche, and more menstrual distress.”<sup>175</sup> The study further reported that, unfortunately, those girls viewed the education they received was “inaccurate, negative, and late.”<sup>176</sup>

Research suggests that inadequate menstrual education disproportionately affects lower-income students, who otherwise may not be learning about menarche and menstruation at home or from other sources. In a 2013 study, low-income girls had significantly lower scores on “knowledge, menarche preparedness, and positive attitudes about menstruation”<sup>177</sup> compared to high-income girls, regardless of race. This suggests that in the United States, there may be “disparities by socioeconomic status in relation to preparation for puberty.”<sup>178</sup> Schools can help even the information gap between students. Empowering students with knowledge may diminish negative thoughts about menstruation and help students as they go through this transition.<sup>179</sup>

Insufficient sexual education not only may affect a student’s developing self-identity, but also may perpetuate stigmas around menstruation. Participants in one research study “linked lack of menstrual

---

<sup>174</sup> For instance, during a focus group on menstruation, one student asked into “which hole” a menstrual cup should be inserted because she had never learned this. Schmitt, *supra* note 54. Students need to know more than basic facts, too. As one student explained, “Your period is not really, it’s so scientifically talked about in our health classes . . . and some people have questions, but they’re too ashamed or scared to ask them, which is terrible.” Gupta et al., *supra* note 17.

<sup>175</sup> Herbert et al., *supra* note 165, at 364. Specifically, the lower-income girls in the survey population described their experiences with menstruation and menarche as “embarrassing, traumatic, scary, and confusing and associated with feeling gross, dirty, smelly, and disgusting.” *Id.* The students also reported having “felt unprepared and ill equipped for this transition.” *Id.*

<sup>176</sup> *Id.* at 377. Making this point clearly, one lower-income African American girl stated, “First I had my period, and then they started talking about it. It wasn’t helpful; it was a little late.” *Id.* at 377, 366-67, 378.

<sup>177</sup> *Id.* at 364.

<sup>178</sup> *Id.* at 364.

<sup>179</sup> *Id.* at 379.

health education with girls' fear of discussing such issues."<sup>180</sup> As one of the adolescent research subjects reported:

It's the fact that women don't like to talk about having their period because, alright, because it's gross to men. And men don't like to hear it and men are the more dominant people in society, and if a man doesn't like it being talked about then women are not going to talk about it in front of people in general. And so it's kind of seen as taboo to talk about your period. Something that has to do with your vagina, that's taboo you can't talk about that you know?<sup>181</sup>

The failure of schools to provide accurate information about menstruation thus contributes to a culture of silence and stigma. Such a culture is an incubator for harassment.<sup>182</sup>

Another concern is that when schools do offer puberty-related classes, the classes are often divided into two separate groups based on sex, with different content for each class. Female students learn about menstruation, but boys often do not.<sup>183</sup> Such differential instruction is problematic for two reasons. First, it is based on the premise that there are no transgender boys.<sup>184</sup> (By the same token, there may well be transgender girls in the girls' class, underscoring the need for both classes to cover male and female reproductive biology.) Second, if boys do not gain an understanding of this basic process of human biology, they not only miss out academically, but also miss the opportunity to develop understanding and empathy. By contrast, providing boys with menstrual education decreases the likelihood of negative attitudes toward those who are menstruating.<sup>185</sup> Bronx Prep Middle School student

---

<sup>180</sup> Gupta et al., *supra* note 17.

<sup>181</sup> *Id.*

<sup>182</sup> Appropriate education offered to all students can address the taboo of menstruation and "help reframe the idea that menstruation is a punishment or a deviant function that makes bodies that menstruate inferior to bodies that don't. Instead, schools can treat menstruation as an important process for everyone to understand—for the sake of body literacy and reproductive and sexual health." Dillard, *supra* note 91

<sup>183</sup> Allen, *supra* note 46, at 140-42.

<sup>184</sup> See Wiley Reading, *My Period and Me: A Trans Guy's Guide to Menstruation*, in PERIOD: TWELVE VOICES TELL THE BLOODY TRUTH 91-101 (Feiwei and Friends, 1st ed. 2018); see also Dillard, *supra* note 91

<sup>185</sup> Allen, *supra* note 46, at 130, 149. One 2011 study stated that "[t]he exemption or omission of boys from sexuality education in general and menstruation education in particular is problematic and may have implications for their attitudes and treatment of women, intimate relationships, and reproductive decision making." *Id.* at 130. This study showed that without school-based puberty classes, there was no consistent source of knowledge for boys on menstruation. *Id.* at 138-142. The study also "found that because boys

Litzy Encarnacion frames it simply: “If the boys learned about periods, too, it would be way less awkward.”<sup>186</sup>

Finally, to the extent that school personnel are themselves uninformed or untrained on menstruation-related matters, they may be ineffective as educators and support personnel. For example, participants in an endometriosis research study reported their perceptions that school nurses do not have enough knowledge to address endometriosis and tend to be suspicious of a menstruating student who presents with the pain and irregular bleeding symptoms caused by endometriosis.<sup>187</sup> If students fear that they will not be treated with respect, they will be reluctant to seek help with managing endometriosis.<sup>188</sup> Meaningful and scientifically accurate education delivered by trained personnel will make menstruating students more likely to seek any help they need.

## 2. Title IX and Menstrual Education

Menstrual education is another issue where Title IX has relatively little to say. The Title IX regulations regarding access to classes 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.”<sup>189</sup> Outside of that narrow context (and other similarly narrow contexts, such as contact sports and choruses),<sup>190</sup> single-sex classes can be offered only within strict parameters. Specifically, Title IX’s regulations state that a school may provide “single classes or extracurricular activities,” under these conditions:

---

rarely were educated about menstruation, when they grew to be college-aged men, 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.” Johnson, *supra* note 8, at 56 (citing Allen, *supra* note 46). Because they gathered bits and pieces of through a random process, boys had many misunderstandings that precluded comprehension of menstruation until they gathered more information later in life. Allen, *supra* note 46, at 151-152. Some misunderstanding led to a distancing by the boys and men from menstruating women because they menstruated. As boys, the study participants admitted they had been ignorant about menstruation in their youth. *Id.* at 138. That ignorance makes boys unlikely to be effective bystander intervenors against menstruation-based harassment. For effective bystander intervention training to gender-based harassment in the workplace, see Chai R. Feldblum & Victoria A. Lipnic, EEOC REPORT, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (June 2016) [https://www.eeoc.gov/eeoc/task\\_force/harassment/report.cfm#\\_Toc453686311](https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm#_Toc453686311).

<sup>186</sup> *Periods! Why These 8<sup>th</sup>-Graders Aren’t Afraid to Talk about Them*, *supra* note 48.

<sup>187</sup> Gupta et al., *supra* note 17.

<sup>188</sup> *Id.*

<sup>189</sup> 34 C.F.R. § 104.34(a)(3).

<sup>190</sup> *Id.* at § 104.34(a)(1), (4).



(i) Each single-sex class or extracurricular activity is based on the recipient's important objective—

(A) To improve educational achievement of its students, through a recipient's overall established policy to provide diverse educational opportunities...; or

(B) To meet the particular, identified educational needs of its students, provided that the single-sex nature of the class or extracurricular activity is substantially related to achieving that objective.<sup>191</sup>

In such situations, the school must ensure that “student enrollment in a single-sex class...is completely voluntary” and that the school “provides to all other students, including students of the excluded sex, a substantially equal coeducational class.”<sup>192</sup>

Thus, Title IX leaves some space for schools—if they so choose—to provide menstrual education in a single-sex setting. In particular, when menstrual education is provided in the context of a human sexuality class, this can occur in a single-sex setting. That said, there is no *requirement* that human sexuality classes be “conducted in separate sessions for boys and girls.” Title IX simply *allows* schools to take this approach. Moreover, Title IX says nothing about whether, for schools that do take that approach, the substantive content in the boys’ and girls’ human sexuality classes can entirely diverge. Given Title IX’s focus on equal access to educational opportunities regardless of sex, it is much more consistent for such classes to provide a basic understanding of both male and female reproductive biology, even if the precise emphases of the classes differ. Doing so means that all students gain the same scientific knowledge, and has the added benefit of creating a climate where menstruation-based harassment is less common. This is an area where more regulation and guidance under Title IX may be helpful.

Additionally, to the extent that menstrual education is provided outside of “human sexuality” classes—for example, in biology courses—the regulations make clear that both male and female students should receive comparable information. For example, even if a school were to offer a girls-only biology class, the school would also need to offer a “substantially equal coeducational class” in biology. As such, it would directly contravene

---

<sup>191</sup> *Id.* at § 104.34(b)(1)(i).

<sup>192</sup> *Id.* at § 104.34(b)(1)(iii)-(iv).

existing Title IX regulations for a girls-only biology class to cover menstruation, while the counterpart co-ed biology class did not.

### III. THEORETICAL FRAMEWORKS FOR UNDERSTANDING TITLE IX AND MENSTRUATION

This Part highlights theoretical frameworks that illuminate legal claims for the rights to be free from menstruation-based harassment, to have access to menstrual accommodations and menstrual products, and to receive adequate and accurate menstrual education in schools. Understanding these theoretical frameworks assists in understanding and constructing legal claims under Title IX, and in advocating for state-specific legislation that could help remove educational obstacles faced by menstruating students.

#### A. Formal Equality

The belief that the law should provide for equal treatment of men and women fueled the early women's rights movement in the United States.<sup>193</sup> Elizabeth Cady Stanton and others who had been active in the abolitionist movement convened the first large public gathering for women's rights in Seneca Falls, New York in 1848.<sup>194</sup> One hundred of the estimated three hundred attendees—including Frederick Douglass—signed a Declaration of Sentiments that began, “We hold these truths to be self-evident: that all men and women are created equal.”<sup>195</sup> The Declaration proclaimed, “That woman is man's equal...she should be recognized as such,” “[t]hat it is the duty of the women of this country to secure to themselves their sacred right to the elective franchise,” and “[t]hat the equality of human rights results necessarily from the fact of the identity of the race in capabilities and responsibilities.”<sup>196</sup> Stanton and others sought to remove legal restrictions on women's right to vote, serve as jurors, own property, and receive an education.<sup>197</sup>

---

<sup>193</sup> See generally ELEANOR FLEXNER, *CENTURY OF STRUGGLE: THE WOMAN'S RIGHTS MOVEMENT IN THE UNITED STATES* 71 (rev. ed. 1979).

<sup>194</sup> See, e.g., TRACY A. THOMAS, *ELIZABETH CADY STANTON AND THE FEMINIST FOUNDATIONS OF FAMILY LAW* 7 (2016) (describing planning for Seneca Falls gathering).

<sup>195</sup> MODERN HISTORY SOURCEBOOK: THE DECLARATION OF SENTIMENTS SENECA FALLS CONFERENCE, 1848, <https://sourcebooks.fordham.edu/mod/senecafalls.asp> (reprinting text of Declaration of Sentiments).

<sup>196</sup> *Id.*

<sup>197</sup> See *id.* See also, e.g., Elizabeth B. Clark, *Matrimonial Bonds: Slavery and Divorce in Nineteenth-Century America*, 8 L. & HIST. REV. 25, 49 (Spring 1990) (describing Stanton's autonomy-based approach to rights); (Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J.

In the 1970s, lawyers with the same conception of women and men as equally capable autonomous actors brought challenges to laws that discriminated on the basis of sex.<sup>198</sup> In 1971 in *Reed v. Reed*, the Supreme Court found unconstitutional an Idaho intestacy statute that gave men a preference over women for appointment as the administrator of an intestate decedent's estate, when two people had the same degree of relatedness to the decedent.<sup>199</sup> Writing for a unanimous court (but without stating what standard of review it applied), Chief Justice Burger held that "[t]o give a mandatory preference to members of either sex over members of the other . . . is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment."<sup>200</sup> Two years later, in *Frontiero v. Richardson*, the Court found unconstitutional a military policy of providing automatic spousal benefits to married male personnel, but requiring married female personnel to provide proof that she provided over half of her spouse's support.<sup>201</sup> Many other cases followed, and slowly the intermediate scrutiny emerged for evaluating sex-based classifications drawn by the government.<sup>202</sup>

The Supreme Court's classic liberal construction of equality has two important ramifications for discussion of students' rights in connection with the menstrual equity issues explored above. First, the Court's jurisprudence is organized around a gender binary: male and female. This is true not only for equal protection purposes, but also for Title IX purposes (given Title IX's focus on ensuring that students are not discriminated against because of "sex"). Thus, in its current state, the doctrine fits less easily with claims that do not line up with that binary.<sup>203</sup> In this sense, menstrual advocates' gender-

---

1073, 1157-58 (1994) (discussing nineteenth-century rights discourse around married women's property rights)

<sup>198</sup> See generally SUPREME COURT DECISIONS AND WOMEN'S RIGHTS: MILESTONES TO EQUALITY (Claire Cushman ed., 2001).

<sup>199</sup> *Reed v. Reed*, 404 U.S. 71 (1971).

<sup>200</sup> 401 U.S. at 76-77.

<sup>201</sup> *Frontiero v. Richardson*, 411 U.S. 677 (1973). Although eight of the nine justices agreed that the military violated the Constitution, only four justices joined Justice Brennan's opinion that applied strict scrutiny. *Id.* at 684. The other justices applied *Reed* without elaborating on the precise standard that should be applied. *Id.* at 691-92.

<sup>202</sup> See, e.g., *Craig v. Boren*, 429 U.S. 190, 197-98 (1976) (invalidating state law that set sex-based age minimums for the purchase of certain beer, reasoning that "classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives"); *United States v. Virginia*, 518 U.S. 515 (1996) (invalidating male-only admission policy at the Virginia Military Institute on the grounds that the state did not show an "exceedingly persuasive" rationale for the policy).

<sup>203</sup> See, e.g., Kathryn M. Stanchi, Bridget J. Crawford & Linda L. Berger, *Why Women? Judging Transnational Courts and Tribunals*, CT. J. INT'L L. (forthcoming 2019), <https://papers.ssrn.com/abstract=3337965> (discussing difficulties of classifying people on the basis of sex or gender identity).

inclusive language (i.e., referring to “menstruators” rather than to girls or women) must be used carefully in the context of legal claims, to avoid delinking menstruation from biological sex. To be sure, not all menstruators are girls or women, but emphasizing the connection between menstruation and female biology (as opposed to gender) is an important thread of Title IX argumentation.

Second, although formal equality theory is helpful in framing sexual harassment (including menstruation-based harassment) as a form of sex discrimination, given that only one sex is being subjected to such treatment, it is of limited utility for analyzing some of the other issues raised by sex-specific biological processes. Recall that in *Geduldig v. Aiello*, for example, the Court upheld a state disability insurance program that excluded pregnancy from coverage, saying that the program’s distinction between pregnant women and non-pregnant persons was not based on sex, just pregnancy.<sup>204</sup> Similarly, an approach solely grounded in formal equality risks the argument that school refusals to exempt menstruating students from strict bathroom break policies or to provide free menstrual products do not reflect sex discrimination, since both sexes are being treated equally.

Indeed, just as David Cohen has noted in the context of athletics, formal equality does not always ensure the *equality of opportunity* that is Title IX’s ultimate goal.<sup>205</sup>

### B. Anti-Essentialism

Some similar tensions about the connections between menstruation and sex are raised by the anti-essentialism strain of feminist legal theory. The formal equality emphasis of the early feminist movement led legal scholars such as Tina Grillo and Angela Harris to question the emphasis on “women’s” experiences. Grillo decried what she called “essentialism” of the women’s movement:

Essentialism is the notion that there is a single woman's, or Black person's, or any other group's, experience that can be described independently from other aspects of the person -- that there is an “essence” to that experience. An essentialist outlook assumes that the experience of being a member of the

---

<sup>204</sup> *Geduldig v. Aiello*, 417 U.S. 484, 496 n. 20 (1974) (“The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes.”).

<sup>205</sup> See Cohen, *supra* note 115, at 265.

group under discussion is a stable one, one with a clear meaning, a meaning constant through time, space, and different historical, social, political, and personal contexts.<sup>206</sup>

To Grillo, any emphasis on “women’s” experiences effectively ignored the difference that race made (and continues to make) in women’s lives. An African-American woman’s experience of rape, for example, is historically different than a white woman’s experience, as the law treated enslaved African-American women as the chattel property of their owners.<sup>207</sup> So to talk about “women’s” experience requires attention to the way that experience is impacted by multiple factors.

Informed by the anti-essentialist vein of feminist legal theory, any discussion of access to menstrual products in schools, the right to be free from menstruation-based harassment, or even reproductive education, needs to be aware of the risks of generalization. It is possible to talk about the needs of girls and women to access menstrual products, for example. But as noted above, not all girls and women menstruate,<sup>208</sup> and not all who menstruate are girls or women.<sup>209</sup> Yet anyone who does menstruate has female biology.<sup>210</sup>

Understanding these distinctions requires appreciation of the differences between and among sex, gender, and gender identity. “Sex,” in the broadest sense, refers to biology—having male or female chromosome and biology, although humans can present with a range of chromosomal combinations and intersex individuals represent approximately 0.05% to 1.7% of the population.<sup>211</sup> “Gender” refers to the social or cultural

<sup>206</sup> Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master’s House*, 10 BERKELEY WOMEN’S L.J. 16, 19 (1995). See also Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 587 (1990) (critiquing feminists’ failure to listen to what women say about their own experiences).

<sup>207</sup> See Harris, *supra* note 206, at 598-99 (“[A]s a legal matter, the experience of rape did not even exist for black women. During slavery, the rape of a black woman by any man, white or black, was simply not a crime.”).

<sup>208</sup> Reasons that girls and women might not menstruate include age (i.e., being pre-pubescent or menopausal), pregnancy, breastfeeding, and hormone imbalance, among other factors. See, e.g., *supra* note 19.

<sup>209</sup> See, e.g., Nat’l Inst. on Aging, *Menopause* 2 (Dec. 2013), [https://www.nia.nih.gov/sites/default/files/menopause\\_2.pdf](https://www.nia.nih.gov/sites/default/files/menopause_2.pdf) (giving average age of menopause as fifty-one) and JOAN RYAN, *LITTLE GIRLS IN PRETTY BOXES: THE MAKING AND BREAKING OF ELITE GYMNASTS AND FIGURE SKATERS* 23 (1995) (providing data about delayed onset of menses in competitive gymnasts).

<sup>210</sup> See, e.g., Reading, *supra* note 184 and Johnson, *supra* note 8, at 5, 26 (explaining use of term “menstruators” to include transgender women and girls).

<sup>211</sup> See Fact Sheet, *Intersex*, UN Hum. Rts. Office of the High Comm’r, [https://unfe.org/system/unfe-65-Intersex\\_Factsheet\\_ENGLISH.pdf](https://unfe.org/system/unfe-65-Intersex_Factsheet_ENGLISH.pdf) (defining “intersex” as those “born with sex characteristics (including genitals, gonads and chromosome patterns)

expectations associated with people of a certain sex.<sup>212</sup> “Gender identity” is one’s self-perception as having a particular sex or gender, which may or may not match the sex one is assigned at birth.<sup>213</sup>

Given the fact that not all girls and women menstruate, but not all who menstruate are girls or women,<sup>214</sup> what type of essentialization of menstruation is appropriate? On the one hand, an inclusive movement must recognize that although menstruation may be biologically-based, it is not necessarily gender-based or gender-identity based. On the other hand, as noted above, the scientific fact that menstruation is an involuntary biological process unique to most girls and women (as well as those who have female biology) is an important part of Title IX argumentation. For that reason, anti-essentialism should certainly inform social activism, but there is no consensus among feminists (including even the three of us as authors) as to whether legal arguments under Title IX are enhanced or weakened by an anti-essentialist approach to sex and gender.<sup>215</sup>

### C. Anti-Stereotyping

The anti-stereotyping strand of feminist legal theory provides a stronger theoretical foundation for Title IX claims that address the issues identified by this Article. Legal scholar Cary Franklin has argued that the equal protection litigation of the 1970s is best understood as grounded in a view that “the state could not act in ways that reflected or reinforced traditional conceptions of men's and women's roles....The anti-stereotyping approach was designed to provide such guidance; its aim was to direct courts' attention to the particular institutions and social practices that perpetuate

---

that do not fit typical binary notions of male or female bodies”). *See also* How Common is Intersex? INTERSEX SOCIETY OF NORTH AMERICA, <http://www.isna.org/faq/frequency>.

<sup>212</sup> *See* Stanchi et al., *supra* note 203, at 4 (differentiating sex and gender).

<sup>213</sup> *Id.* *See also* Sexual Orientation and Gender Identity Definitions, HUM. RTS CAMPAIGN, <https://tinyurl.com/yd43z59j> (defining gender identity as a person’s “innermost concept of self as male, female, a blend of both or neither –how individuals perceive themselves and what they call themselves. One's gender identity can be the same or different from their sex assigned at birth.”).

<sup>214</sup> *See supra* notes 208-210 and accompanying text.

<sup>215</sup> Other forms of anti-essentialism arguments are outside the scope of Title IX but should be considered in advocacy for any legislation relating to menstruation and schools. For instance, recognizing the greater need for products for low-income students, Colorado’s proposed legislation for free menstrual products prioritizes schools with large numbers of low-income students. Saja Hindi, *Student-advocated bill would help Colorado public schools provide free tampons and other feminine hygiene products*, THE DENVER POST, Nov 27, 2019, 6:13 PM. <https://www.denverpost.com/2019/11/27/colorado-schools-tampons-feminine-hygiene-products/>.

inequality in the context of sex.”<sup>216</sup> Franklin’s argument helps explain cases like *Moritz v. Commissioner*, in which Ruth Bader Ginsburg, on behalf of the ACLU, challenged the denial of an unmarried man’s eligibility for a tax deduction for caretakers.<sup>217</sup> Ginsburg argued that denial of the deduction to Mr. Moritz because of his sex was rooted in the stereotype that only women (or men who had been married) occupy the caregiving role in families.<sup>218</sup>

In the context of menstrual equity issues, anti-stereotyping theories may not immediately be an obvious fit. After all, decisions to provide (or more often, to decline to provide) menstrual products are not typically grounded in socially-based views about proper roles for males and females. That said, one connective thread linking the various issues identified in this Article is the long-standing social convention that menstruation is a private, “taboo” bodily function inappropriate for public mention or attention.<sup>219</sup> This itself is a sex-based stereotype, resulting in the relegation of girls’ and women’s sex-specific bodily functions and needs to the private sphere.<sup>220</sup>

To be sure, the traditional distinction between what is public and what is private, at least with respect to menstruation, has begun to crumble in the wake of increased public awareness.<sup>221</sup> Activists, including young students,

---

<sup>216</sup> Cary Franklin, *The Anti-Stereotyping Principle in Constitutional Sex Discrimination Law*, 85 N.Y.U. L. REV. 83, 88 (2010).

<sup>217</sup> *Moritz v. Commissioner*, 469 F.2d 466 (10th Cir. 1972).

<sup>218</sup> See Br. for Pet.-Appellant, *Moritz v. Commissioner*, 469 F.2d 466 (10th Cir. 1972) (Ruth Bader Ginsburg, Martin Ginsburg and Melvin Wulf on brief arguing that “the constitutional sword necessarily has two edges. Fair and equal treatment for women means fair and equal treatment for members of both sexes.”).

<sup>219</sup> See Crawford & Spivack, *supra* note 38, at 506-12 (exploring cultural roots of misunderstandings of and taboos around menstruation). See also Crawford & Waldman, *supra* note 7, at 477 (explaining failure of many states’ legislatures to accord non-taxable status to menstrual hygiene products not as discriminatory intent, but rather as “the result of a combination of indifference, lack of understanding, and discomfort with discussions about or consideration of women’s biological processes”).

<sup>220</sup> Indeed, before states like Illinois and New York began requiring free menstrual hygiene products in bathrooms in middle schools and high schools in 2018, it was not clear that many school boards made an active decision to *not* provide menstrual hygiene products in schools. Rather, school boards may have simply let languish (and not refilled) existing “pay” machines in bathrooms. As society has moved away from a cash economy, it is possible to buy a soda from a vending machine by swiping a credit card, but menstrual hygiene product machines lie empty. This inattention is consistent with long-standing social conventions that menstruation is a private bodily function inappropriate for public mention or attention.<sup>220</sup> The failure to consider students’ needs for menstrual hygiene products is based on a general stereotype of what is (and is not) a legitimately “public” concern, and a specific relegation of girls’ and women’s sex-specific bodily functions to the private sphere.

<sup>221</sup> See, e.g., Shruti Sathish, *Menstrual Products Must Be Available in School Restrooms. Period*, WOMENSENEWS.ORG (Jan. 29, 2019), <https://womensenews.org/2019/01/menstrual-products-must-be-available-in-school-restrooms-period/> (high-school student’s description of efforts to increase access to menstrual hygiene products in her public school because,

are becoming more willing to openly talk about the normal bodily function of menstruation.<sup>222</sup> But that long-held stereotype still has force.

Relatedly, stereotypes or misunderstandings about the basic facts of female biology may be underlying the failure of schools to provide menstrual products and menstrual accommodations. Menstruation is an involuntary bodily function that most girls and women experience every month for years—and menstrual cycles vary widely, in terms of predictability, discomfort, and heaviness of flow.<sup>223</sup> If decision-makers better understood the biological facts of menstruation, there might be greater understanding of why students cannot always wait for bathroom breaks, and why it is so important to make menstrual products freely and easily accessible.<sup>224</sup> Unless boys and girls, as well as all teachers and administrators, understand these basic facts, policies may unintentionally disadvantage girls and women. Better school-based education for both girls and boys will help combat misinformation and stereotypes about female biology, ultimately reducing the potential for harassment as well.<sup>225</sup> To be sure, uninformed views of female biology are not the traditional target of “anti-stereotyping” theories.<sup>226</sup>

---

“[i]t’s time for everyone to realize that menstrual products are necessities, not luxuries, and that periods should be embraced, not feared.”).

<sup>222</sup> See *supra* notes 1-4 and accompanying text.

<sup>223</sup> See *supra* Part I.A.

<sup>224</sup> See, e.g., Daniel A. Epstein et al., *Examining Menstrual Tracking to Inform the Design of Personal Informatics Tools*, CHI ’17, Proceedings of the 2017 CHI Conf. on Hum. Factors in Comp. Systems 6876, 6876, <https://dl.acm.org/citation.cfm?id=3025635> (“For example, women often track their menstrual cycles without an explicit goal of action, but instead for awareness of their place in their menstrual cycle. Understanding the differences and commonalities between menstrual cycle tracking and other domains of personal informatics extends how we as a field consider personal informatics and design our personal informatics tools. See also Martha Hickey & Adam Balen, *Menstrual Disorders in Adolescence: Investigation and Management*, 9 HUMAN REPRODUCTION UPDATE 493, 494 (2003) (explaining that in adolescent girls, menstrual cycles are “initially be variable” but that they tend to become more regular “over the first 2-3 years following menarche”). See also *supra* note 24 and accompanying text (discussing variability in length of adolescents’ menstrual cycles).

<sup>225</sup> See, e.g., Bonnie J. Rough, *Why We Shouldn’t Be Separating Boys and Girls for Sex Ed*, WASHINGTON POST (Oct. 19, 2018), <https://www.washingtonpost.com/lifestyle/2018/10/19/why-we-shouldnt-be-separating-boys-girls-sex-ed> (describing daughter’s experience with single-sex “puberty workshop” and daughter’s curiosity about, “How do male teachers talk with fathers and sons about female bodies when girls are not in the room?”) and Elizabeth Jeglic, *Should Boys and Girls Get Sexual Education Separately?*, PSYCHOLOGY TODAY, Feb. 24, 2018, <https://www.psychologytoday.com/us/blog/protecting-children-sexual-abuse/201802/should-boys-and-girls-get-sexual-education-separately> (reporting that fourth grade daughter’s health class was sex-segregated for unit on “Family Life Education, aka sex ed”).

<sup>226</sup> See, e.g., Franklin, *supra* note 216. See also Neil S. Siegel & Reva B. Siegel, Struck



But debunking misinformation or misconceptions about girls' and women's bodies is just as important as challenging socially constructed norms about women as caretakers or as dependents of their spouses.<sup>227</sup>

#### D. Anti-Subordination

As described above, a rigid formal equality approach tolerates the law's failure to give women a particular benefit, as long as men do not receive it—even if men have no need for that benefit by virtue of their biology.<sup>228</sup> Such an emphasis on formal equality leads to near-absurd results, as in *Geduldig's* acceptance of a classification of “pregnant women” and “non-pregnant persons.”<sup>229</sup> The failure of schools to provide menstrual accommodations and access to menstrual products presents a similar challenge.

Catharine MacKinnon's approach, commonly referred to as anti-subordination theory,<sup>230</sup> provides a helpful lens through which to view these issues. MacKinnon invites attention to power differentials between women and men:

[A]n equality question is a question of the distribution of power. Gender is also a question of power, specifically of

---

by *Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 DUKE L.J. 771, 792096 (2010).

<sup>227</sup> See generally Moritz, *supra* note 217 (holding that a tax benefit for caregivers must be made available to an unmarried man on an equal basis to other taxpayers) and Frontiero, *supra* note 201 (holding that same rules for awarding dependent spouse benefits must apply to female service member and male service member).

<sup>228</sup> *Id.* (“Difference doctrine says it is sex discrimination to give women what we need, because only women need it. It is not sex discrimination not to give women what we need because then only women will not get what we need...”). One of the main shortcomings of the formal equality approach, as Patricia Williams has explained, is that it is largely mechanical. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 104-110 (1991) (comparing the Supreme Court's approach to equal protection to a machine that produces sausage links regardless of what is fed through the machine).

<sup>229</sup> See *supra* note 204 and accompanying text. *But see* 42 U.S.C. § 2000(e) et seq. (the Pregnancy Discrimination Act of 1978 mandating that employers treat pregnant women the same as other employees with similar work abilities). “Despite sustained criticism, the *Geduldig* decision has never been explicitly overruled and continues to constrain women's access to substantive equality and reproductive liberty.” Maya Manian, *Commentary on Geduldig v. Aiello*, in *FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT 185-90*, 185 (Katharine M. Stanchi, Linda L. Berger & Bridget J. Crawford eds. 2016).

<sup>230</sup> See, e.g., Joan C. Williams, *Jumpstarting the Stalled Gender Revolution: Justice Ginsburg and Reconstructive Feminism*, 63 HASTINGS L.J. 1267 (2012) (calling Professor MacKinnon “legal feminism's foremost antisubordination theorist”).

male supremacy and female subordination. The question of equality is at the root a question of hierarchy, which--as power succeeds in constructing social perception and social reality--derivatively becomes a categorical distinction, a difference.<sup>231</sup>

Applying this theory to the menstruation context, the failure to provide girls and women with the accommodations and products that they need in order to be fully functioning members of society ultimately serves to subordinate them and perpetuate male power. If girls cannot attend class without fear of bleeding through their clothes, they literally will not be in the room to compete with the boys. If girls are in class, but are concerned about managing their menstruation, they will not be mentally fully present in the classroom. By contrast, if girls can go to the restroom when they need to and access products in privacy—and have the peace of mind of knowing that they will be able to do so—they are more likely to be able to compete on an even footing with boys. Indeed, when schools take affirmative steps to ensure that menstruation does not hinder girls' educational experiences, they are not giving girls "special treatment." They are simply leveling the proverbial playing field.

### *E. Intersectionality*

Intersectionality, too, provides a useful lens for viewing menstrual equity issues.<sup>232</sup> Kimberlé Crenshaw has drawn on the metaphor of a traffic intersection to explain the interlocking forms of oppression that Black women experience.<sup>233</sup> "Discrimination, like traffic through an intersection, may flow in one direction, and it may flow in another," Crenshaw explains.<sup>234</sup> "If an accident happens in an intersection, it can be caused by cars traveling from any number of directions and, sometimes, from all of them. Similarly, if a Black woman is harmed because she is in the intersection, her injury could

---

<sup>231</sup> Catharine A. MacKinnon, *Difference and Dominance*, in FEMINISM UNMODIFIED 40 (1987). In her early writings, Professor MacKinnon called this the "dominance approach," but she has explained that "it's as much about subordination as dominance." Emily Bazelon, *The Return of the Sex Wars*, N.Y. TIMES MAG. 56 (Sept. 10, 2015), <https://www.nytimes.com/2015/09/13/magazine/the-return-of-the-sex-wars.html>.

<sup>232</sup> See Johnson, *supra* note 8 (discussing the universe of "menstrual injustice" issues as structural intersectionality).

<sup>233</sup> See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Anti-Discrimination Doctrine, Feminist Theory and Anti-Racist Politics*, 1989 U. CHI. LEGAL F. 139, 148-50 (1989) and Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1249 (1991).

<sup>234</sup> Crenshaw, *Demarginalizing the Intersection of Race and Sex*, *supra* note 233, at 149.

result from sex discrimination or race discrimination.”<sup>235</sup> Anti-discrimination law fails, Crenshaw explain, when it lacks the capacity to address discrimination that is not sex-based alone or race-based alone, but the result of both sex *and* race.<sup>236</sup>

Legal scholars and cultural commentators have expanded Crenshaw’s theory of “intersectionality” to embrace consideration of a broad range of identity categories and the multiple oppressions that may be at work with respect to any particular individual or groups of individuals.<sup>237</sup> Indeed, in the context of menstruation at school, particularly relevant structures and systems

---

<sup>235</sup> *Id.*

<sup>236</sup> It is not uncommon for people to use the term out of context and to convey ideas that are not consistent with Crenshaw’s own conception of the theory. See Jane Coaston, *The Intersectionality Wars*, VOX.COM, May 28, 2019, <https://www.vox.com/the-highlight/2019/5/20/18542843/intersectionality-conservatism-law-race-gender-discrimination> (quoting Professor Crenshaw as saying, “Sometimes I’ve read things that say, ‘Intersectionality, blah, blah, blah,’ and then I’d wonder, ‘Oh, I wonder whose intersectionality that is,’ and then I’d see me cited, and I was like, ‘I’ve never written that. I’ve never said that. That is just not how I think about intersectionality.’ What was puzzling is that usually with ideas that people take seriously...Often, that doesn’t happen with intersectionality, and there are any number of theories as to why that’s the case, but what many people have heard or know about intersectionality comes more from what people say than what they’ve actually encountered themselves.”) On the left, “intersectionality” is often used to mean “multi-cultural” or “pertaining to racial minorities.” *Id.* On the right, conservatives have used it to describe rights claims that they perceive are based on claims of victimhood. *Id.* (quoting political commentator Ben Shapiro saying, “I would define intersectionality as, at least the way that I’ve seen it manifest on college campuses, and in a lot of the political left, as a hierarchy of victimhood in which people are considered members of a victim class by virtue of membership in a particular group, and at the intersection of various groups lies the ascent on the hierarchy.”). As Crenshaw herself has explained, intersectionality is not a concrete plan for change, but rather a mode of inquiry, one that requires individuals and movements to understand multiple forms of oppression. *Id.* (“Indeed, intersectionality is intended to ask a lot of individuals and movements alike, requiring that efforts to address one form of oppression take others into account. Efforts to fight racism would require examining other forms of prejudice (like anti-Semitism, for example); efforts to eliminate gender disparities would require examining how women of color experience gender bias differently from white women (and how nonwhite men do too, compared to white men.”).

<sup>237</sup> See, e.g., Nicole Delaney & Joanna N. Lahey, *The ADEA at the Intersection of Age and Race*, 40 BERKELEY J. EMP. & LAB. L. 61, 69 (2019) (“The idea that discrimination affects people with multiple disadvantages in a unique way is useful in understanding differential outcomes for older black and older white workers.”), Vicki Lens, *Judging the Other: The Intersection of Race, Gender, and Class in Family Court*, 57 FAM. CT. REV. 72 (2019) (The concept of intersectionality ...is particularly relevant to child maltreatment proceedings where many of the respondents are not only women and mothers, but also women of color and women experiencing poverty.”), and Caroline Mala Corbin, *Essay: Terrorists Are Always Muslim But Never White: At the Intersection of Critical Race Theory and Propaganda*, 86 FORDHAM L. REV. 455 (2017) (“[T]his Essay applies ‘critical race theory’s] insights to the brown Muslim/white Christian [hierarchy]”).

include class, poverty, gender identity, a school board's authority over students, and the control of a teacher over the classroom.<sup>238</sup>

In particular, it is important to recognize the ways that poverty and class overlap with sex in the context of access to menstrual products at school. If a menstruating student cannot afford menstrual products, and such products are not available through local food banks, pantries, or at school, that student may need to miss some or all of a school day.<sup>239</sup> School districts with fewer financial resources may similarly be constrained in their ability to make products available for free to students, underscoring the importance of broader governmental involvement with this issue.<sup>240</sup> Relatedly, if a family is homeless or does not have running water at home, using a menstrual cup may not be a viable option (especially if a girl does not want to clean a device in a school restroom), rendering tampons and pads the only options.<sup>241</sup> In these ways, the lack of access to such products in schools must be understood as a class-related issue as well.

In addition to class, there is an overarching power imbalance that exists between those who have power in schools (typically principals and teachers) and students who are subject to school-wide or teacher-specific policies. As discussed above, schools and individual teachers sometimes limit students' bathroom breaks by requiring them to procure passes, wait for an escort, invoke procedures for special permission, or even carefully ration a limited number of "chits" for the entire year.<sup>242</sup> These policies impose

---

<sup>238</sup> See Johnson, *supra* note 8.

<sup>239</sup> See Nearly 1 in 5 American Girls Have Missed School Due to Lack of Period Protection, Aug. 7, 2018, <https://www.marketwatch.com/press-release/nearly-1-in-5-american-girls-have-missed-school-due-to-lack-of-period-protection-1-always-joins-forces-with-gina-rodriguez-feeding-america-to-help-end-period-poverty-and-keep-girls-in-school-2018-08-07> (reporting results of survey finding that "nearly one in five American girls have either left school early or missed school entirely because they did not have access to period products").

<sup>240</sup> See Bridget Crawford, *How Much Do "Free" Tampons Cost? #MenstrualCapitalism and Examples from New York State* (Sept. 14, 2018), <https://www.thefacultylounge.org/2018/09/how-much-do-free-tampons-cost-menstrualcapitalism-and-examples-from-new-york-state.html>.

<sup>241</sup> See, e.g., Aneri Pattani, *Woman Gets Free Pads and Tampons to Teens in Need*, PHILA. INQUIRER (Aug. 3, 2019), <https://apnews.com/414de3619eca4b3fb62539252f4dd017> (describing experience of sexual-health counselor who advised the use of a menstrual cup by a teen who could not afford menstrual products: "When Medley suggested one girl try a menstrual cup — a reusable container that has been shown to safely collect blood inside the vagina — the girl explained she doesn't consistently have running water at home to clean the cup.").

<sup>242</sup> See, e.g., Alia Wong, *When Schools Tell Kids They Can't Use the Bathroom*, THE ATLANTIC (Feb. 26, 2019), <https://www.theatlantic.com/education/archive/2019/02/the-tyranny-of-school-bathrooms/583660/> (reporting on a variety of formal and informal bathroom policies adopted by teacher including "a teacher who allegedly stipulated that her

physical and psychological pressure on menstruating students. If a student knows that she is menstruating and may not be able to attend to her needs during the school day, she may leave school early or not go to school at all. Therefore, it is important to understand the way in which the school personnel, through their bathroom-related policies, very much control and exercise authority over the bodies of menstruating students.

### F. *Third-Wave Feminist Legal Theory*

One important development in feminist thought and discourse in the last twenty-five years is the rise of third-wave feminism, typically defined as a movement led by activists and writers who came of age in the 1980s and 1990s.<sup>243</sup> Methodologically third-wave feminists emphasize the power of media and technology to effect cultural change.<sup>244</sup> In the context of activism

---

students could only go to the restroom during class time once every two months”). *See also Survey of School Nurses, supra* note 144 (reporting that half of school nurses reported that their schools had restrictions on students’ ability to visit the bathroom).

<sup>243</sup> *See, e.g.,* Sally Ann Drucker, *Betty Friedan: The Three Waves of Feminism*, OHIO HUMANITIES, Apr. 27, <http://www.ohiohumanities.org/betty-friedan-the-three-waves-of-feminism> (providing brief overview of three principal “waves” of feminism in U.S. history). Feminism’s first wave in the nineteenth century culminated in the passage of the Nineteenth Amendment, and feminism’s second wave in the 1970s removed many formal legal (and other) barriers to women’s participation in political, social and economic life. *Id.* *See also* Cathryn Bailey, *Making Waves and Drawing Lines: The Politics of Defining the Vicissitudes of Feminism*, 12 HYPATIA 17 (1997) (distinguishing feminism’s first and second waves, but critiquing the declaration of a “third wave” as a political act that does not advance feminist interests). Maggie Humm, *Introduction in FEMINISMS: A READER* 1-8 (Maggie Humm ed. 1992 2d ed. 2013) For the precise beginning and end points for the generationally-based third-wave feminism *compare, e.g.,* Leslie Heywood & Jennifer Drake, *Introduction in THIRD WAVE AGENDA: BEING FEMINIST, DOING FEMINISM* 4 (Leslie Heywood & Jennifer Drake eds., 1997) (defining third-wave feminists as those “whose birthdates fall between 1963 and 1973”), *with* Lisa Jervis, *The End of Feminism’s Third Wave*, Ms., Winter 2004/2005, 57 (“I was born in 1972, right smack in the demographic that people think about when they think about the third wave.”) *and, with* DIFFERENT WAVELENGTHS: STUDIES OF THE CONTEMPORARY WOMEN’S MOVEMENT vii (Jo Reger ed. 2005) (“I feel feminist but do not fit into a second (i.e., starting in the 1960s and 1970s and continuing into the backlash 1980s) or third-wave (i.e., argued by some as beginning in the 1990s) description. I am barely a baby boomer and too young for the second wave, and not quite a member of Generation X, making me too old for the third wave.”).

<sup>244</sup> *Id.* Some scholars recently have identified what they believe is the emergence of a “fourth wave” of feminism, but that wave’s allegedly distinguishing characteristics—an emphasis on social media—bears a striking resemblance to third-wave feminism. *See, e.g.,* Kira Cochrane, *The Fourth Wave of Feminism: Meet the Rebel Women*, THE GUARDIAN (Dec. 10, 2013), <https://www.theguardian.com/world/2013/dec/10/fourth-wave-feminism-rebel-women> (“[T]he fourth wave of feminism .... [is] defined by technology: tools that are allowing women to build a strong, popular, reactive movement online.”).

around access to menstrual products, one can discern a distinctly third-wave feminist engagement with the law.<sup>245</sup>

In 2015, Jennifer Weiss-Wolf took inspiration from international activists and joined forces with *Cosmopolitan* magazine to sponsor the first online petition in the U.S. to draw attention to the state sales tax on menstrual products.<sup>246</sup> The petition, called *Stop Taxing Our Periods. Period*, sparked interest and awareness of a financial injustice that women had experienced (and mostly overlooked) their entire lives. Weiss-Wolf joined with attorney Laura Strausfeld to begin Period Equity, which, as described above, is the nation's first law and public policy organization devoted to the various aspects of menstrual equity.<sup>247</sup> Period Equity coordinated the class-action litigation that spurred New York's 2016 repeal of its state sales tax on menstrual products.<sup>248</sup> Together with the menstrual products company Lola, Period Equity has launched a national campaign to end the sales tax on menstrual products in the thirty-five states that retain it.<sup>249</sup> The campaign makes heavy use of social media, attention-getting facts and an interactive website to keep focus on the issue.<sup>250</sup>

Generationally, both Weiss-Wolf and Strausfeld, to give just two examples, are squarely within the demographic typically associated with third-wave feminism.<sup>251</sup> Even separate and apart from any generational-

---

<sup>245</sup> See Bridget J. Crawford, *Toward a Third-Wave Feminist Legal Theory: Young Women, Pornography and the Praxis of Pleasure*, 14 MICH. J. GENDER & LAW 99 (2007) (describing general themes of third-wave feminist writings and preferred methods for addressing gender inequality).

<sup>246</sup> See, e.g., Prachi Gupta, *supra* note 5, and Crawford, *Interview with Jennifer Weiss-Wolf, New York Attorney and Menstrual Equity Advocate*, *supra* note 5 (describing origins of Weiss-Wolf's menstrual equity activism).

<sup>247</sup> See *supra* note 14 and accompanying text (providing details about the mission of Period Equity)

<sup>248</sup> See Complaint, *Seibert v. New York State Dept of Taxation and Finance*, Index No. 151800/2016, at 12 (stating claim for a refund of all sales taxes paid on menstrual hygiene products). See also Crawford & Waldman, *supra* note 7, at 460-63 (discussing New York class action litigation to repeal sales tax on menstrual hygiene products).

<sup>249</sup> See TAXFREEPERIOD.COM, <https://www.taxfreeperiod.com> ("In June, thousands joined us in warning their states: Eliminate the discriminatory tampon tax, or Tax Free. Period. will mobilize legal action to remove it as a matter of equality under the law. Now we have assembled a coalition of lawyers to fight to eliminate the tampon tax in every state.").

<sup>250</sup> See, e.g., EXPLORE OUR INTERACTIVE MAP, TAXFREEPERIOD.COM, *supra* note 249 ("Oklahoma has a tax on tampons, but sun lamps are untaxed"). See also WEISS-WOLF, *supra* note 129; Jennifer Weiss-Wolf & Brigid Kelly, *Your Taxes Shouldn't Be Higher Because of Your Period*, NBCNews.com (Nov. 9, 2019), <https://www.nbcnews.com/think/opinion/your-taxes-shouldn-t-be-higher-because-your-period-let-ncna1076221>; Jennifer Weiss-Wolf, *Abolish the "Pink Tax": There Will be No Women's Equality Without Menstrual Equity*, REWIRE.COM (Oct. 31, 2018), <https://rewire.news/article/2018/08/31/abolish-the-pink-tax-menstrual-equity>.

<sup>251</sup> Weiss-Wolf is a 1989 graduate of Lafayette College and a 1992 graduate of Cardozo

based touchstones, what makes the work on menstrual equity issues—eliminating the sales tax on menstrual products, increasing access to menstrual products, ensuring product safety, and making workplaces, schools and public places hospitable to girls, women and others who menstruate—distinctly third-wave is the movement’s leadership and recognition of individual identities. In the past, prominent third-wave feminist writers have critiqued second-wave feminists for jealously holding leadership positions and for narrowly focusing on issues that are relevant only to some women.<sup>252</sup> By contrast, the current menstrual activism movement has national leadership through Period Equity, but also relies on people of all ages to increase awareness of the issues in a decentralized way.<sup>253</sup> There is no age minimum or status requirement for becoming a local, national or even international leader.<sup>254</sup> And because menstruation is a basic biological fact, issues of access, safety and structural or institutional recognition of the need to be able to manage menstruation (through break times at school or work, for example) cut across all other identity factors. As Weiss-Wolf has explained, “Our issues aren't all the same, but whether you're dissecting it by poverty or gender or any issues that affect things like access, participation, equality, justice, democracy [menstrual equity touches] all those things. This is why we can't leave it out.”<sup>255</sup> The issues of girls and women who are poor,<sup>256</sup>

---

Law School. Strausfeld is a 1986 graduate of Yale College and a 1991 graduate of Columbia Law School.

<sup>252</sup> See, e.g., JENNIFER BAUMGARDNER & AMY RICHARDS, *MANIFESTA: YOUNG WOMEN, FEMINISM, AND THE FUTURE* 219 (2000) (critiquing earlier feminist programming such as “Take Our Daughters to Work” day) and Lillian S. Robinson, *Subject/Postion, in “BAD” GIRLS/“GOOD” GIRLS: WOMEN, SEX, AND POWER IN THE NINETIES* 182 (Nan Bauer Maglin & Donna Marie Perry eds., 1996) (“The problem is that the feminism that went public in the late 1960s and early 1970s . . . broke silence about the systemic oppression of women, however we named the system, whereas the newer ‘third-wave’ seems inclined to break silence chiefly about oppressions perceived or experienced within feminism itself.”).

<sup>253</sup> See e.g., Debbie Truong, *Her School's Restrooms Didn't Have Pads or Tampons. So She Took Matters Into Her Own Hands*, WASH. POST (Dec. 29, 2018), [https://www.washingtonpost.com/local/education/her-schools-restrooms-didnt-have-pads-or-tampons-so-she-took-matters-into-her-own-hands/2018/12/29/c0c73bca-ffdc-11e8-862a-b6a6f3ce8199\\_story.html](https://www.washingtonpost.com/local/education/her-schools-restrooms-didnt-have-pads-or-tampons-so-she-took-matters-into-her-own-hands/2018/12/29/c0c73bca-ffdc-11e8-862a-b6a6f3ce8199_story.html); Chelsey Sanchez, *Brooklyn Girl Scouts Find City Isn't Fully Implementing Menstrual Equity Law*, Gotham Gazette (Dec. 28, 2018), <https://www.gothamgazette.com/city/8163-brooklyn-girl-scouts-find-city-isn-t-implementing-menstrual-equity-law-see-redress>; Emily Benson, *Meet the Girl Scout Fighting Period Poverty*, AUSTIN WOMAN (Nov. 21, 2018), <https://atxwoman.com/meet-girl-scout-fighting-period-poverty/>.

<sup>254</sup> See *supra* note 253.

<sup>255</sup> Anna Druet, *Menstrual Equity is the Ground We All Need to Stand On*, HELLOCLUE.COM, Sept. 19, 2018, <https://helloclue.com/articles/culture/menstrual-equity-is-the-ground-we-all-need-to-stand-on> (quoting Jennifer Weiss-Wolf).

<sup>256</sup> EVANS et al., *supra* note (highlighting voices of school children, shelter administrators, teachers and formerly incarcerated women speaking about their experiences

homeless,<sup>257</sup> detained<sup>258</sup> and incarcerated<sup>259</sup> are distinct and important fronts of the menstrual equity movement.

The commitment of menstrual activists to inclusivity reveals both the strength of the movement and potential fault lines. As described above, menstruation is a product of female biology, but not all who menstruate are girls or women.<sup>260</sup> Transgender boys and men need access to menstrual products in a safe, clean and private facilities. They need to be free from harassment and bullying, too. Thus, a truly inclusive menstrual equity movement must include all who menstruate, while still being attentive to the sex binarism currently embedded in our legal system.<sup>261</sup>

---

of menstrual inequity).

<sup>257</sup> See, e.g., Julie Kosin, *Getting Your Period Is Still Oppressive in the United States*, HARPARSBAZAAR.COM (Oct. 9, 2017), <https://www.harpersbazaar.com/culture/features/a10235656/menstrual-period-united-states/> (conveying Weiss-Wolf's recommendation that advocacy efforts include making menstrual products available in public restrooms and shelters).

<sup>258</sup> See, e.g., Jennifer Weiss-Wolf, *Forcing Immigrant Girls to Bleed Through Their Underwear is Cruel, Degrading and Dangerous*, NEWSWEEK (Aug. 30, 2019), <https://www.newsweek.com/forcing-immigrant-girls-bleed-through-their-underwear-cruel-degrading-dangerous-opinion-1457040> (decrying treatment of detained immigrant girls who do not have access to adequate menstrual hygiene products while in the custody of the U.S. government).

<sup>259</sup> See, e.g., Bridget J. Crawford, Margaret E. Johnson, Marcy L. Karin, Laura Strausfeld & Emily Gold Waldman, *The Ground on Which We All Stand: A Conversation About Menstrual Equity Law and Activism*, 37 LAW & INEQ. (forthcoming 2019), <https://ssrn.com/abstract=3352857> (Margaret Johnson's describing advocacy of students and faculty affiliated with the Bronfein Family Law Clinic at the University of Baltimore School of Law on behalf of women incarcerated in Maryland prisons and jails to increase their access to menstrual hygiene products).

<sup>260</sup> See *supra* notes 208-210 and accompanying text.

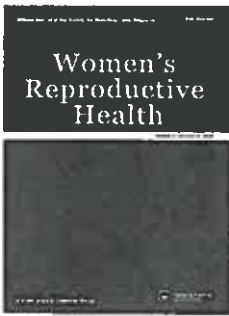
<sup>261</sup> See, e.g., *supra* notes 212-215 and accompanying text (discussing embedded sex binarism).



## CONCLUSION

Theoretical frameworks demonstrate that public schools need to take menstruation into account in order to provide true freedom of educational opportunity for menstruating students. As described above, menstruating students face many obstacles at school, including menstruation-based harassment, lack of menstrual accommodations, lack of provision of menstrual and other products, and lack of timely and meaningful menstrual education. At the local, state and national levels, organizers should advocate that schools voluntarily remove these barriers to equal access to education that arise at the multiple intersections of menstruation and education. To the extent that public schools do not take remedial steps on their own, Title IX provides a legal framework for arguments that any educational barriers related to menstruation are impermissible barriers based on sex. Moreover, additional regulations and guidance are needed to ensure that Title IX accomplishes this goal.

Title IX's promise of non-discrimination, complemented by feminist theoretical frameworks, is merely one starting point in menstruation-related justice efforts, albeit an important one. Other efforts include state and federal legislative and other advocacy to include menstrual products in K-12 schools. The efforts to ensure that menstruation does not prevent students from full and equal access to all educational opportunities should be understood as one of many fronts in the larger project of increasing justice for all people.



## Menstruation Management in United States Schools and Implications for Attendance, Academic Performance, and Health

Christopher A. Cotropia

To cite this article: Christopher A. Cotropia (2019) Menstruation Management in United States Schools and Implications for Attendance, Academic Performance, and Health, Women's Reproductive Health, 6:4, 289-305, DOI: [10.1080/23293691.2019.1653575](https://doi.org/10.1080/23293691.2019.1653575)

To link to this article: <https://doi.org/10.1080/23293691.2019.1653575>



Published online: 18 Oct 2019.



Submit your article to this journal [↗](#)



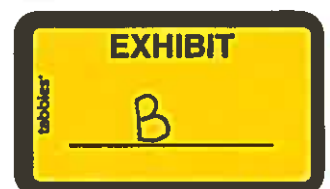
Article views: 37



View related articles [↗](#)



View Crossmark data [↗](#)





# Menstruation Management in United States Schools and Implications for Attendance, Academic Performance, and Health

Christopher A. Cotropia

School of Law, University of Richmond, Richmond, VA, USA

## ABSTRACT

Six hundred and ninety-three young women, 18–25 years old, all of whom had attended United States high schools, were surveyed to ask about their need for and the availability of menstrual hygiene products (MHPs) in high school and the impact, if any, that lack of access to MHPs in school had for their attendance, academic performance, and health. Most (640, 92.35%) needed MHPs while at school, but only 292 (42.13%) attended schools that provided MHPs (and those that did often required students to pay for them). Lack of access to MHPs resulted in 88 (12.7%) having missed school, 104 (15.01%) having been late to school, and 165 (23.91%) having left school early for the day. Lack of access was also identified by 122 (17.6%) respondents as having impacted their ability to learn and having resulted in health issues for 53 (7.65%) of them. There are statistically significant correlations between a school's failure to provide MHPs and a student having missed school, having left school early, and negative impacts on their ability to learn.

## ARTICLE HISTORY

Received 11 February 2019  
Revised 16 March 2019  
Accepted 16 May 2019

## KEYWORDS

Menstruation; menstrual hygiene products; feminine hygiene products; school; adolescents; USA

Menstrual management, particularly for school-aged girls, is recognized globally as an important public health issue (Hennegan, 2017; Sevil, Kevser, Aleattin, Dilek, & Tijen, 2013; Sommer, Hirsch, Nathanson, & Parker, 2015; Winkler, 2019). The general consensus is that better menstrual management improves school-aged girls' lives (Hennegan & Montgomery, 2016; House, Mahon, & Cavill, 2013; Vashisht, Pathak, Agarwalla, Patavegar, & Panda, 2018). Such interventions, either through education or through provision of “hardware” (i.e., sanitary napkins, tampons, or menstrual cups—collectively referred to as menstrual hygiene products [MHPs]), may address the psychosocial impact of menstruation, improve attendance and performance in schools, and support health in general (Sumpter & Torondel, 2013).

Accordingly, some states in the U.S. are considering, or have recently passed, legislation that requires public high schools and middle schools to provide MHPs to students at no charge. For example, California (Feminine Hygiene Products: Public School Restrooms, 2018), Illinois (School Code, 2018), and New York (Feminine Hygiene Products in Schools, 2018) recently passed legislation to require free MHPs in public schools. A few other states, such as Virginia (Menstrual Supplies, 2018), have considered or are currently

considering such legislation. The stated purpose behind this legislation is to increase female students' attendance, support their academic performance, and improve their health (Menstrual Supplies, 2018). The legislation is also born from both the recent menstrual equity movement to make MHPs more accessible and affordable and current discussions and concerns about "period poverty" (Cotropia & Rozema, 2018; Weiss-Wolf, 2017).

However, most of the available literature is focused on school-aged, menstruating girls in developing countries in South Asia and Africa, rather than in developed countries such as the United States (e.g., Chebii, 2018; Kuhlmann, Henry, & Wall, 2017; Lahme & Stern, 2017). Many of these non-U.S. studies are qualitative and use participatory approaches, focus groups, and interviews both to determine the level of menstrual management and to determine outcomes of this management (Crofts & Fisher, 2012; Sommer, 2010). Most of the quantitative studies concerned whether educational interventions improve menstrual management and thus increase factors such as school attendance (Aniebue, Aniebue, & Nwankwo, 2009; Houston et al., 2006). For example, one study in Nepal implemented a hardware intervention (provision of menstrual cups) and evaluated its impact (Oster & Thornton, 2011). Many of these studies have shown that menstrual management interventions do improve school-aged girls' lives (Sommer et al., 2015). The literature's current quandary is the magnitude of the improvement (Oster & Thornton, 2011; Sumpter & Torondel, 2013). For example, the specific impact of access on attendance is not entirely clear or conclusive (Benshaul-Tolonen et al., 2019; Grant, Lloyd, & Mensch, 2013; Hennegan & Montgomery, 2016; Oster & Thornton, 2011).

Most U.S.-focused discussions of this topic are found in popular media stories that assert a link between missing school and not having access to MHPs at school (Knisely, 2018). However, there is a recent study that showed a significant MHP need among low-income women in the U.S. (Kuhlmann et al., 2017), but the study did not examine schools or include adolescents. Furthermore, much of this publicly available information regarding menstruation contains "inaccuracies that appear in web sites ... especially those targeting adolescents" (Hillard, 2014, p. 309). There is also sociological and psychological literature that has shown that female students in the U.S. have difficulty managing menstruation while at school due to embarrassment and stigma (Morse & Doan 1987; Stubbs, 2008; Sveinsdóttir, 2018); thus legislation and other policy interventions must take these factors into account to craft effective solutions. Many researchers in this area have noted the general need for more evidence to "understand the problem and in developing and evaluating interventions" when it comes to menstrual management (Hennegan, 2017, p. 212).

## Present Study

Accordingly, in order to better evaluate the need for MHP supply legislation, the present study was designed to fill the current knowledge gap on the impact of menstrual management practices and MHP access in U.S. high schools. A survey, whose questions were shaped by the foci of the academic literature and recent legislation, asked recent U.S. high school graduates whether menstruation management issues during the school year had impacted their school attendance, ability to learn, and/or health and whether such impact was driven by lack of access to MHPs at school. The survey was also an attempt to document how female students manage menstruation while at school and the extent to which MHPs are provided at their schools.

## Method

### Participants

The survey, partially reproduced in the [Appendix](#), was posted on Amazon Mechanical Turk (MTurk), an online platform, and advertised an open call for women in the United States ages 18–25 to take a survey regarding attendance during high school. Respondents were paid \$1 for their time.

Six hundred and ninety-three women responded to the survey. The respondents ranged in age from 18 to 25 years; their mean age was 20.5 years. Most respondents had graduated high school (679; 97.98%) and had attended a public high school (614; 88.6%). Most respondents' primary language was English (688; 99.28%), and most identified themselves as White (509; 73.45%). Almost one half (332; 47.91%) of the respondents had a family income less than \$50,000 while in high school; 122 (17.6%) had a family income less than \$25,000. Ninety-one respondents (13.13%) indicated that they had had trouble affording MHPs while in high school. The respondents went to high school throughout the United States: 130 (18.76%) in the Northeast, 281 (40.45%) in the South, 154 (22.22%) in the Midwest, and 128 (18.47%) in the West.

### Instrument

The survey, which consisted of 59 questions, did not exclusively focus on menstruation in order to avoid any selection effects by respondents that could skew the results by either attracting individuals who had extreme experiences with menstruation in high school or implicitly suggesting to individuals that menstruation should impact attendance (or other aspects of high school). The survey asked, in addition to questions about menstruation, about the attendance impact of sleeping habits, transportation access, and family obligations, and these sets of questions, including those regarding menstruation management, were presented in a random order for each participant. The survey both began and ended with a series of non-personally identifiable demographic questions.

The survey's questions regarding menstruation management at school and the availability of MHPs, which are reproduced in the [Appendix](#), were based on the areas of investigation in prior research outside the U.S. and by the text of relevant legislation (Menstrual Supplies, 2018; Sumpter & Torondel, 2013). The survey also inquired about any embarrassment and shame associated with obtaining MHPs at school, as generally found in other studies (e.g., Bello et al., 2017; Tang, Yeung, & Lee, 2003; Tyack & Hansot, 1988). Legislation in this area focuses on providing MHPs at no cost and in restrooms in public schools; thus the survey asked questions shaped by these proposals (Feminine Hygiene Products: Public School Restrooms, 2018; School Code, 2018). In-depth conversations with two public school nurses in Virginia also informed the types of questions to ask regarding menstrual management in school.

School health personnel, school administrators, and recent female high school graduates from different public schools in Virginia and Texas completed initial versions of the survey. They were then asked for input as to whether the questions asked were clear and inquired about all relevant aspects of menstrual management they had encountered while attending school and, where applicable, helping students with management issues.

## **Procedure**

The survey, posted and completed on MTurk, was left open over a 2-week period. Disclosure and consent were obtained from each survey participant and in accordance with the University of Richmond's institutional review board, which approved the study. In addition, all survey takers were informed that any personally identifiable information would not be disclosed and that their identity would be kept anonymous.

The use of MTurk was driven by the net advantages of asking public health questions via this online service as previously recognized in the literature. Prior public health researchers have concluded that MTurk can prove advantageous, particularly in initial research (Brabham, Ribisl, Kirchner, & Bernhardt, 2014; Goodman, Cryder, & Cheema, 2013; Shapiro, Chandler, & Mueller, 2013). The MTurk online survey environment is open to everyone, Amazon confirms requested survey-takers' characteristics (e.g., age and sex in this survey), and it is seen as a "cost-effective first step in generating causal hypotheses" (Schleider & Weisz, 2015, p. 3235). Others have found that MTurk can "improve the quality, cost, and speed of a research project while engaging large segments of the public and creating novel science" (Ranard et al., 2014, p. 187). In the present study, MTurk could potentially target parts of the relevant population (women who had attended a U.S. high school) who are not on college campuses or likely to see advertisements for in-person interviews typically held on college campuses (Berinsky, Huber, & Lenz, 2012).

## **Data Analysis**

First, descriptive statistics were calculated. Then logistic regressions were used to determine correlations between MHP access at school and attendance, academic performance, and health impacts.

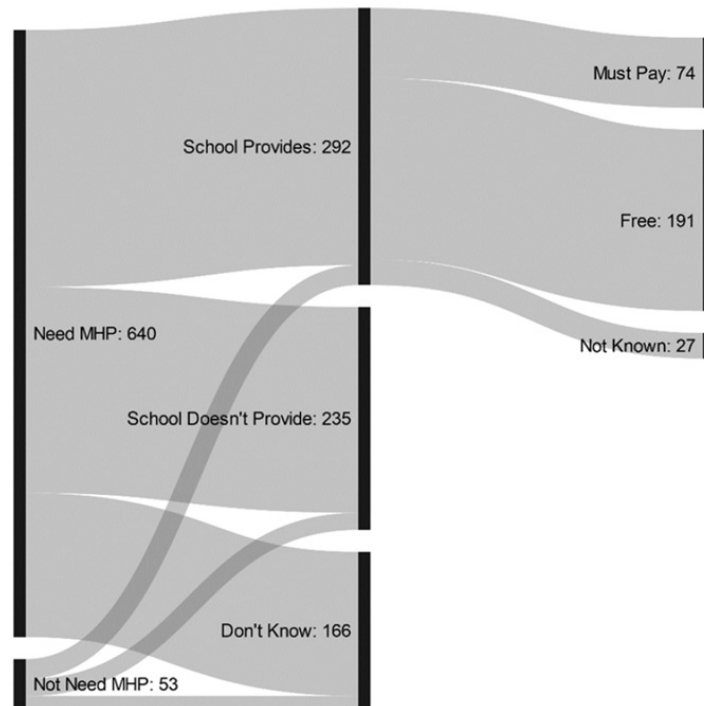
## **Results**

### **Access to MHPs at School**

The survey results indicate that the need for MHPs at school is high. Of the 693 respondents, 640 (92.35%) "need[ed] a new pad or tampon while at school to manage [their] period." Of these 640 who needed MHPs, only 292 of the respondents indicated that their schools provided MHPs, and 74 of them said they were required to pay for their MHPs (see [Figure 1](#)).

Overall, 292 (42.13%) participants responded that their schools provided MHPs, and many of them identified more than one source. The most common people who provided MHPs were the school nurse, a teacher, or front office staff (260 or 89.04% of those whose schools provided MHPs). For 117 (40.06%) respondents whose schools provided them, MHPs were available in the restroom, and just over one half (60 of 117) of those who could access MHPs in the restroom had to pay for them.

When asked what students do when they need a new MHP at school, 506 (79.01%) said they sometimes used one they brought with them to school, and 415 (64.84%) said they sometimes used toilet paper or paper towels. The use of toilet paper or paper



**Figure 1.** Need for MHPs at school; whether the school provides MHPs; and whether students must pay for MHPs.

towels was higher when menstruation started at school; 512 (80%) said that they sometimes used toilet paper or paper towels in this situation.

Many (471; 73.6%) of those who needed MHPs at school indicated that they were embarrassed to ask a school administrator for access to MHPs or for help in general. Notably, 275 (42.97%) respondents indicated that they interacted with a teacher or nurse to get MHPs when their menstruation began at school, and 253 (39.53%) said that they did so when they were already menstruating before they went to school and needed a new MHP while at school. When asked to explain why they found such requests and interactions embarrassing, respondents indicated that menstruation was “taboo,” seen as “gross,” and “not talked about,” particularly with male teachers. Many respondents were “ashamed” and felt that they would be negatively judged for being unprepared if they did not have their own MHPs. This was particularly the case because many of the respondents indicated that most administrators and teachers were male, which made them perceive the situation as even more embarrassing and awkward. Many survey takers noted that this embarrassment was amplified given their young age and the unique social setting of high school.

Over one half of the respondents (475; 68.54%) took the time to write a response to the open question “Please explain why you were embarrassed.” Some specific comments that captured these perceptions regarding asking for assistance with menstruation included:

- “Our culture treats menstruation as dirty or shameful and doesn’t talk about women bleeding even though it’s completely healthy.”

- “It’s something that is always talked about in hushed voices, even the adults at the time.”
- “It’s socially taboo to talk about periods.”
- “No one really talks about periods where I am from. They made it [sic] seem really gross so it was embarrassing.”
- “I went to a small school when I got my period and they did not have a nurse, many of the teachers were also male.”
- “I don’t [sic] know, it was always something I was embarrassed to ask, even though it’s normal. I think there should be dispensers in the school. I get embarrassed to even grab one from my locker and bring it to bathroom without concealing it.”
- “It is a really personal and embarrassing thing, especially in high school where you’re already being judged. It just felt strange having to ask someone that was teaching me something for a product.”
- “I was embarrassed to let my teacher know that I had my period. I also didn’t want to cause a scene or have anyone else know I was having my period.”
- “Because you had to get a hall pass to go to the nurse, and if you didn’t look sick then everyone would guess why.”
- “It’s personal and I don’t want others especially administrators to know I am on my period. So when they see me again the first thing that comes to mind is period girl.”
- “Now that I’m an adult I realize how ridiculous it sounds but I was worried if I didn’t bring my own it made me low class. Like we couldn’t afford them is why I need to ask for one. Being low class is apparently embarrassing to a 13-year-old.”
- “Historically, teachers or administrators will not always be kind or understand these situations. I wanted to present myself as prepared/capable of handling myself.”
- “The school district shared one nurse among several of the schools. At the time all the office staff were male. It was very degrading because I needed to ask the vice principal who was female. But she was not immediately available.”
- “Periods are a stigmatized topic—asking for assistance made others aware of the situation. Then, if you acted ‘off’ or ‘moody’ others could blame that.”
- “Because when I was younger, periods still felt like something to be embarrassed about even though it is a natural thing that women go through. Letting anyone know that I was on my period and that I needed something for it wasn’t fun.”
- “The nurse made it seem like it was bad that I had to ask for a pad.”
- “There is a stigma against women and their natural cycles, something I didn’t get over until I [sic] was a bit older.”
- “We’re taught as females that periods are gross and private.”
- “Most people acted like something like that was gross or not normal. I was ashamed.”

Some respondents (91; 13.13%) had trouble affording MHPs. Of these individuals, only 23 (25.27% of 91) noted that their schools provided MHPs and did not require



**Table 1.** Attendance impact of lack of access to MHPs.

	Missed school?	Days missed per year	Late to school?	Days late per year	Leave school early?	Days leave early per year
Yes	88 (12.7%)		104 (15.01%)		165 (23.91%)	
1–2		34 (38.64%)		62 (59.62%)		91 (55.15%)
3–5		33 (37.50%)		25 (24.04%)		55 (33.33%)
6–10		13 (14.77%)		12 (11.54%)		13 (7.88%)
11–14		6 (6.82%)		3 (2.88%)		4 (2.42%)
15 or more		2 (2.27%)		2 (1.92%)		2 (1.21%)
No	605 (87.3%)		589 (84.99%)		529 (76.19%)	

students to pay for them. Fifteen (2.16%) of those who had affordability problems indicated that they had obtained MHPs from their schools on a monthly basis. For these individuals, schools provided MHPs not only for school use, but their use at home as well.

### **Attendance**

Respondents also answered whether they missed school, were late to school, or had to leave school early because they “did not have access to” a MHP. If they answered yes, they were then asked to estimate the number of days per year that such an event occurred in high school. The results are reported in [Table 1](#): 12.7% missed school, 15.01% were late to school, and 23.91% left school early because they needed access to a MHP to manage their menstruation. Most who were late or who had to leave early were affected 1–2 days a year. Roughly 80% of those who missed school reported that they either missed 1–2 or 3–5 days a year; the distribution was split evenly between the two.

### **Health and Learning**

A series of questions asked if lack of access to MHPs at school ever impacted the respondents’ ability to learn or affected their health. Of the 693 respondents, 122 (17.6%) indicated that lack of access impacted their ability to learn, 481 (69.41%) said it did not, and 90 (12.99%) said they did not know. A smaller number (53; 7.65%) of the respondents indicated that lack of access to MHPs impacted their health; 582 (83.98%) said it did not, and 58 (8.37%) did not know.

For those who indicated that their ability to learn was impacted, the impact reported was negative, such as being “unable to focus” in class. The most common (101; 87.7%) cause of this lack of focus was that they were “[t]oo concerned about leakage to concentrate on instruction and/or material.” The most common reported health impact from lack of access to MHPs was being “[g]enerally sick.”

### **Correlation with Access**

A logistic regression was performed to see which factors, either of the students or the school environment, were related to the attendance, academic, and health impacts reported. [Table 2](#) shows the results of three models, each with the attendance result as

**Table 2.** Logit regression regarding attendance impact.

	Missed	Late	Leave Early
School Not Provide MHP	2.48*	1.24	1.68*
	(0.879)	(0.389)	(0.435)
Must Pay for MHP at School	1.14	1.11	1.25
	(0.580)	(0.493)	(0.466)
Cannot Afford MHP	5.89**	5.82**	4.14**
	(2.11)	(1.99)	(1.24)
Controls			
Public HS	No	No	No
Location of HS	Yes	Yes	Yes
Age	Yes	No	Yes
Race	No	No	No
Hispanic	No	No	Yes
Income	No	No	No
English Primary Lang.	No	No	No
R <sup>2</sup>	0.240	0.158	0.148

Odds ratios are reported, \*is for  $p < 0.05$  and \*\*for  $p < 0.01$ , and the standard errors are reported in parentheses. Statistical significance is reported for controls.

the dependent variable and the demographic and MHP access information as independent variables.

A school that did not provide MHPs was statistically significant and positively correlated with respondents both missing school and leaving school early. For example, a respondent in a school that did not provide MHPs was 2.48 times more likely to miss school and 1.68 times more likely to leave school early than a respondent in a school that did provide MHPs. These results hold when other demographic factors are controlled. Further analysis showed that not providing MHPs at the school was also significantly positively correlated with missing more days and leaving school earlier on more days.

The inability to afford MHPs was also significantly positively correlated with missing school, being late, and leaving early. Such students were 5.89 times more likely to miss school, 5.82 times more likely to be late to school, and 4.14 times more likely to leave school early than were those who could afford MHPs. Such a finding makes sense because lack of affordability not only impacts a student's ability to have MHPs at school, but to have MHPs at all (Kuhlmann et al., 2017). This circumstance would be expected to magnify the attendance impact of menstruation, and the survey results support such a conclusion.

Table 3 reports the results of two models, one for ability to learn and one for health impact as the dependent variable, and the demographic and MHP access information as independent variables.

There was a significant positive correlation between not providing MHPs at school and a student's "ability to learn in high school," such as impeding a student's ability to understand the material being taught in class, perform well on a test or assignment, or focus on the material being taught. Respondents whose schools did not provide MHPs were 2.70 times more likely to have their ability to learn impacted. And those who could not afford MHPs were 3.75 times more likely to have their ability to learn impacted. There was no statistically significant relationship between not providing MHPs at school and health. Those who could not afford MHPs were, however, 7.91 times more likely to experience self-reported health issues.

**Table 3.** Logit regression regarding learning and health impact.

	Learning	Health
School Not Provide MHP	2.70** (0.830)	0.866 (0.351)
Must Pay for MHP at School	1.99 (0.841)	0.959 (0.541)
Cannot Afford MHP	3.75** (1.23)	7.91** (3.70)
Controls		
Public HS	No	No
Location of HS	Yes	Yes
Age	Yes	No
Race	No	No
Hispanic	No	No
Income	No	No
English Primary Lang.	No	No
R <sup>2</sup>	0.133	0.144

Odds ratios are reported, \*is for  $p < 0.05$  and \*\*for  $p < 0.01$ , and the standard errors are reported in parentheses. Statistical significance is reported for controls.

## Discussion

The descriptive statistics indicate that students in the United States need MHPs at school and that some experience negative effects of trying to manage menstruation while at school when they lack access to MHPs. Female students who lack access to MHPs at school also miss school or leave school early and experience negative academic impacts.

The testing for statistically significant correlations between the reported level of access to MHPs at school and other variables can identify target areas for policy interventions and future research. One commonly proposed policy intervention, seen in the legislation discussed above and being considered by some states (Feminine Hygiene Products: Public School Restrooms, 2018; Menstrual Supplies, 2018), is to provide MHPs in the public schools, typically for free and in ways that do not require potentially embarrassing school administration or teacher interactions. Correlations between survey responses provide insights into whether these policy interventions may prove beneficial. Such analyses also isolate the association between access and certain negative effects from other, potentially influential, factors, such as the age of the respondent, whether the respondent went to a public school, the respondent's household income, and the ethnicity of the respondent.

The results conform with the expectation that without access to MHPs, many female students are unable to properly manage menstruation at school (Knisely, 2018) and, in turn, suffer negative consequences. These students either do not come to school when they are menstruating or leave school early because they need a new MHP and cannot readily get one.

The statistical significance and direction of effect of not providing MHPs in school stayed the same when I took into account those respondents who were also late or missed school because of oversleeping, transportation issues, or family obligations. The analyses show that respondents who had attendance issues correlated with schools not providing MHPs were not simply students who commonly had attendance issues in general, regardless of the cause. That is, the negative impact of not providing MHPs at

school stays significant even when the same respondent missed school for other reasons as well. The linkage between providing MHPs at school and attendance issues thus appears to be unique.

The results are also in line with literature that identifies proper menstrual management as important to prevent interruptions in “a girl’s ability to participate in school and progress academically” (Sommer & Sahin, 2013, p. 1556). A statistically significant correlation with lack of MHP access and the ability to learn was observed, and it supports the academic-related purpose of legislation that mandates providing MHPs at school (Menstrual Supplies, 2018).

## Limitations

These descriptive statistics cannot support any causal inferences. And the regression models cannot show definitively that providing MHPs or making them more affordable will increase attendance and improve academic performance. The availability of MHPs at school is unlikely to be random; other, unobserved factors that also negatively influence attendance and performance could also be correlated with no MHP access. The random selection of survey participants and the introduction of various controls in the models might minimize the selection effect but cannot eliminate it. Other scholars in this area have noted these problems in studies of the impact of menstrual management interventions (e.g., Oster & Thornton, 2011). Many previous studies have suffered from selection effect problems due to little randomization (Sumpter & Torondel, 2013).

In addition, although the reported incomes and ethnicities of the survey participants varied, their demographics were not completely representative of the overall United States high school population. The participants were overwhelmingly White (509, 73.45%), and only 122 (17.6%) reported household incomes during high school that were below the poverty line. However, given that the inability to afford MHPs only amplifies the negative impacts at school, if the underrepresented population had been included in the study, particularly the lower-income population, there is reason to believe that their inclusion would only magnify the reported negative impact from lack of access to MHPs.

The survey also asked most respondents about events in the past—their time in high school—and thus the results could suffer from respondents’ misremembering, a particular concern when it comes to school attendance (Fuhs, Nesbitt, & Jackson, 2018). MTurk, the mechanism for implementing the survey, does not provide access to potential participants younger than 18, which prevented the survey from reaching most girls who are currently in high school. Future researchers should include school-age girls, while they are still in school, to fill this gap in the literature.

Statistical analysis of the results, however, indicates that difference in age of the respondents does not change overall results. The logit regressions above controlled for age and yielded a statistically significant correlation between lack of access to MHPs at school and attendance and ability to learn. Further analysis of the data showed that the younger respondents experienced higher rates of missing school due to lack of access to MHPs. For example, the 18-year-old respondents, potentially still in high school when they took the survey or perhaps 1 year out, were twice as likely to miss school due to lack of MHP access than were the 25-year-old respondents. The data

cannot provide the exact reason for this difference, but this result suggests that either (1) the passage of time caused respondents to underreport the impact of lacking access to MHPs; or (2) the problem has gotten worse for more recent high school students.

The fact that the survey population includes those who are out of school, approximately 50% of whom graduated at least 5 years ago, may also limit the applicability of the results to the current state of menstrual management in U.S. high schools. There is currently greater awareness of the lack of access to MHPs in schools, and, as mentioned above, three states have recently passed legislation to increase access. A survey of current high school students would provide a better sense of the current state of menstrual management in U.S. schools.

The data do not, however, show a variation in the lack of access to MHPs at schools among the ages surveyed or the states where they reside, which suggests that things have not changed much over the past 6–7 years, nor among the various states. The distribution of those who reported that their schools did not provide MHPs is essentially random among the various age groups, with no statistical significance between respondents' particular age and the likelihood that their school actually provides MHPs. Such a result is not surprising given that, although awareness has increased over the last 2 years as a result of the menstrual equity movement and the recognition of period poverty, only three states have passed legislation to rectify the problem, and such legislation passed only recently. Furthermore, the usage of MTurk distributed the survey to women throughout the United States, not just in one local area or a few specific schools. This helps to take into account school-specific effects and provides the added benefit of taking a nationwide snapshot rather than a local or school-specific one.

## Conclusion and Future Directions

The results conform to many findings from research conducted outside the United States—that menstrual management at school is difficult, that lack of access can negatively affect attendance and academic performance, and that providing MHPs at school may help (Aniebue et al., 2009; Sommer, 2010). The results also align with the intuitions of those who propose MHP supply legislation—that providing MHPs at school is beneficial for female students. The results provide a foundation for evaluating pending legislation and future research in this area in the United States (Hennegan, 2017).

The statistically significant correlations between not providing MHPs at school and missing school, leaving school early, and negative impacts on learning all suggest that proposals to provide MHPs to students could prove beneficial. The findings also suggest, in line with the sociological and psychological literature in this area (e.g., Johnston-Robledo & Chrisler, 2013; Patterson & Hale, 1985), that reducing the stigma of menstruation and of asking for assistance by placing the MHPs in restrooms could also prove to be beneficial. Follow-up research to quantify the net-effectiveness of the recently passed legislation in New York, Illinois, or California, and studies of current high school students could provide a more complete picture and analysis of MHP supply legislation—legislation that will likely continue to be proposed and considered throughout the United States.

Future researchers should also investigate other ways to minimize or avoid the stigma associated with menstruation. The policy interventions discussed in this article and in pending legislation, such as providing MHPs for free at school in bathrooms, cannot fully address the embarrassment and shame detailed by respondents in the present study. Some of the embarrassment and social stigma respondents detailed, and already identified in the literature, is associated with menstruation. Providing students with a tampon or pad is not enough to remove this stigma, and further research is needed into the pervasiveness of this stigma in U.S. schools and comprehensive ways to address it (Bobel, 2018).

## Acknowledgments

Thanks to Kellie E. Carlyle, PhD, MPH (VCU School of Medicine), Jesse Senechal, PhD (VCU School of Education), Jim Gibson, JD (University of Richmond School of Law), and Julia Gibson (William and Mary University) for comments and suggestions in the early stages of this project.

## Disclosure Statement

The author has no conflicts to declare.

## References

- Aniebue, U. U., Aniebue, P. N., & Nwankwo, T. O. (2009). The impact of pre-menarcheal training on menstrual practices and hygiene of Nigerian school girls. *Pan African Medical Journal*, 2(1), 1–9. doi:10.4314/pamj.v2i1.51708
- Bello, B. M., Fatusi, A. O., Adepoju, O. E., Maina, B. W., Kabiru, C. W., Sommer, M., & Mmari, K. (2017). Adolescent and parental reactions to puberty in Nigeria and Kenya: A cross-cultural and intergenerational comparison. *Journal of Adolescent Health*, 61(4), S35–S41. doi:10.1016/j.jadohealth.2017.03.014
- Benshaul-Tolonen, A., Zulaika, G., Nyothach, E., Oduor, C., Mason, L., Obor, D., ... Phillips-Howard, P.-A. (2019). Pupil absenteeism, measurement, and menstruation: Evidence from western Kenya. *Center for Development Economics & Policy-Center on Global Economic Governance Working Paper No. 74*. Retrieved from [https://cgeg.sipa.columbia.edu/sites/default/files/cgeg/WP74\\_%20Tolonen%20et%20al.pdf](https://cgeg.sipa.columbia.edu/sites/default/files/cgeg/WP74_%20Tolonen%20et%20al.pdf).
- Berinsky, A. J., Huber, G. A., & Lenz, G. S. (2012). Evaluating online labor markets for experimental research: Amazon.com's Mechanical Turk. *Political Analysis*, 20(3), 351–368. doi:10.1093/pan/mpr057
- Bobel, C. (2018, March 31). Menstrual pads cannot fix prejudice. *New York Times*. Retrieved from <https://www.nytimes.com/2018/03/31/opinion/sunday/menstrual-periods-prejudice.html>.
- Brabham, D. C., Ribisl, K. M., Kirchner, T. R., & Bernhardt, J. M. (2014). Crowdsourcing applications for public health. *American Journal of Preventive Medicine*, 46(2), 179–187. doi:10.1016/j.amepre.2013.10.016
- Chebbi, S. J. (2018). Menstrual issues: How adolescent schoolgirls in the Kibera slums of Kenya negotiate their experiences with menstruation. *Women's Reproductive Health*, 5(3), 204–215. doi:10.1080/23293691.2018.1490534
- Cotropia, C., & Rozema, K. (2018). Who benefits from repealing tampon taxes? Empirical evidence from New Jersey. *Journal of Empirical Legal Studies*, 15(3), 620–647. doi:10.1111/jels.12188

- Crofts, T., & Fisher, J. (2012). Menstrual hygiene in Ugandan schools: An investigation of low-cost sanitary pads. *Journal of Water, Sanitation and Hygiene for Development*, 2(1), 50–58. doi: [10.2166/washdev.2012.067](https://doi.org/10.2166/washdev.2012.067)
- Feminine Hygiene Products in Schools. (2018). N.Y. Pub. Health § 267.
- Feminine Hygiene Products: Public School Restrooms. (2018). Cal. Code § 35292.6.
- Fuhs, M. W., Nesbitt, K. T., & Jackson, H. (2018). Chronic absenteeism and preschool children's executive functioning skills development. *Journal of Education for Students Placed at Risk*, 23(1–2), 39–52.
- Goodman, J. K., Cryder, C. E., & Cheema, A. (2013). Data collection in a flat world: The strengths and weaknesses of Mechanical Turk samples. *Journal of Behavioral Decision Making*, 26(3), 213–224. doi:[10.1002/bdm.1753](https://doi.org/10.1002/bdm.1753)
- Grant, M., Lloyd, C., & Mensch, B. (2013). Menstruation and school absenteeism: Evidence from rural Malawi. *Comparative Education Review*, 57(2), 260–284. doi:[10.1086/669121](https://doi.org/10.1086/669121)
- Hennegan, J. (2017). Menstrual hygiene management and human rights: The case for an evidence-based approach. *Women's Reproductive Health*, 4(3), 212–231. doi:[10.1080/23293691.2017.1388720](https://doi.org/10.1080/23293691.2017.1388720)
- Hennegan, J., & Montgomery, P. (2016). Do menstrual hygiene management interventions improve education and psychosocial outcomes for women and girls in low- and middle-income countries? A systematic review. *PLoS One*, 11(2), e0146985. doi:[10.1371/journal.pone.0146985](https://doi.org/10.1371/journal.pone.0146985)
- Hillard, P. J. (2014). Menstruation in adolescents: What do we know? And what do we do with the information? *Journal of Pediatric and Adolescent Gynecology*, 27(6), 309–319. doi:[10.1016/j.jpjg.2013.12.001](https://doi.org/10.1016/j.jpjg.2013.12.001)
- House, S., Mahon, T., & Cavill, S. (2013). Menstrual hygiene matters: A resource for improving menstrual hygiene around the world. *Reproductive Health Matters*, 21(41), 257–259.
- Houston, A. M., Abraham, A., Huang, Z., & D'Angelo, L. J. (2006). Knowledge, attitudes, and consequences of menstrual health in urban adolescent females. *Journal of Pediatric and Adolescent Gynecology*, 19(4), 271–275. doi:[10.1016/j.jpjg.2006.05.002](https://doi.org/10.1016/j.jpjg.2006.05.002)
- Johnston-Robledo, I., & Chrisler, J. C. (2013). The menstrual mark: Menstruation as social stigma. *Sex Roles*, 68(1–2), 9–18. doi:[10.1007/s11199-011-0052-z](https://doi.org/10.1007/s11199-011-0052-z)
- Knisely, A. F. (2018, Aug. 14). Teen girls are missing school because they don't have access to feminine hygiene products. *Nashville Tennessean*. Retrieved from <https://www.tennessean.com/story/news/education/2018/08/14/lack-feminine-hygiene-products-keeps-girls-out-school/948313002/>.
- Kuhlmann, A. S., Henry, K., & Wall, L. L. (2017). Menstrual hygiene management in resource-poor countries. *Obstetrical & Gynecological Survey*, 72(6), 356–376. doi:[10.1097/OGX.0000000000000443](https://doi.org/10.1097/OGX.0000000000000443)
- Lahme, A. M., & Stern, R. (2017). Factors that affect menstrual hygiene among adolescent school-girls: A case study from Mongu District, Zambia. *Women's Reproductive Health*, 4(3), 198–211. doi:[10.1080/23293691.2017.1388718](https://doi.org/10.1080/23293691.2017.1388718)
- Menstrual Supplies. (2018). H.B. 1432, Va.
- Morse, J. M., & Doan, H. M. (1987). Adolescents' response to menarche. *The Journal of School Health*, 57(9), 385–389.
- Oster, E., & Thornton, R. (2011). Menstruation, sanitary products, and school attendance: Evidence from a randomized evaluation. *American Economic Journal: Applied Economics*, 3(1), 91–100. doi:[10.1257/app.3.1.91](https://doi.org/10.1257/app.3.1.91)
- Patterson, E. T., & Hale, E. S. (1985). Making sure: Integrating menstrual care Practices into activities of daily living. *Advances in Nursing Science*, 7(3), 18–31. doi:[10.1097/00012272-198504000-00004](https://doi.org/10.1097/00012272-198504000-00004)
- Ranard, B. L., Ha, Y. P., Meisel, Z. F., Asch, D. A., Hill, S. S., Becker, L. B., ... Merchant, R. M. (2014). Crowdsourcing—Harnessing the masses to advance health and medicine: A systematic review. *Journal of General Internal Medicine*, 29(1), 187–203. doi:[10.1007/s11606-013-2536-8](https://doi.org/10.1007/s11606-013-2536-8)
- Schleider, J. L., & Weisz, J. R. (2015). Using Mechanical Turk to study family processes and youth mental health: A test of feasibility. *Journal of Child and Family Studies*, 24(11), 3235–3246. doi:[10.1007/s10826-015-0126-6](https://doi.org/10.1007/s10826-015-0126-6)
- School Code. (2018). Ill. Code § 10-20.60.

- Sevil, S., Kevser, O., Aleattin, U., Dilek, A., & Tijen, N. (2013). An evaluation of the relationship between genital hygiene practices, genital infection. *Gynecology Obstetrics*, 3(6), 1–5.
- Shapiro, D. N., Chandler, J., & Mueller, P. A. (2013). Using Mechanical Turk to study clinical populations. *Clinical Psychological Science*, 1(2), 213–220.
- Sommer, M. (2010). Where the education system and women's bodies collide: The social and health impact of girls' experiences of menstruation and schooling in Tanzania. *Journal of Adolescence*, 33(4), 521–529. doi:10.1016/j.adolescence.2009.03.008
- Sommer, M., & Sahin, M. (2013). Overcoming the taboo: Advancing the global agenda for menstrual hygiene management for schoolgirls. *American Journal of Public Health*, 103(9), 1556–1559. doi:10.2105/AJPH.2013.301374
- Sommer, M., Hirsch, J. S., Nathanson, C., & Parker, R. G. (2015). Comfortably, safely, and without shame: Defining menstrual hygiene management as a public health issue. *American Journal of Public Health*, 105(7), 1302–1311. doi:10.2105/AJPH.2014.302525
- Stubbs, M. L. (2008). Cultural perceptions and practices around menarche and adolescent menstruation in the United States. *Annals of the New York Academy of Sciences*, 1135(1), 58–66. doi:10.1196/annals.1429.008
- Sumpter, C., & Torondel, B. (2013). A systematic review of the health and social effects of menstrual hygiene management. *PloS One*, 8(4), e62004. doi:10.1371/journal.pone.0062004
- Sveinsdóttir, H. (2018). Menstruation, objectification, and health-related quality of life: A questionnaire study. *Journal of Clinical Nursing*, 27(3–4), e503–e513. doi:10.1111/jocn.14049
- Tang, C. S. K., Yeung, D. Y. L., & Lee, A. M. (2003). Psychosocial correlates of emotional responses to menarche among Chinese adolescent girls. *Journal of Adolescent Health*, 33(3), 193–201. doi:10.1016/S1054-139X(03)00049-1
- Tyack, D., & Hansot, E. (1988). Silence and policy talk: Historical puzzles about gender and education. *Educational Researcher*, 17(3), 33–41. doi:10.2307/1174831
- Vashisht, A., Pathak, R., Agarwalla, R., Patavegar, B. N., & Panda, M. (2018). School absenteeism during menstruation amongst adolescent girls in Delhi, India. *Journal of Family & Community Medicine*, 25(3), 163–168.
- Weiss-Wolf, J. (2017). *Periods gone public: Taking a stand for menstrual equity*. New York, NY: Simon and Schuster.
- Winkler, I. (2019). Human rights shine a light on unmet menstrual health needs and menstruation at the margins. *Obstetrics & Gynecology*, 133(2), 235–237. doi:10.1097/AOG.0000000000003098

## Appendix

Did you begin menstruating (getting your period) before or during high school?

- Yes
- No

Did you ever miss a day of high school because you did not have access to pads or tampons (menstrual hygiene products)?

- Yes
- No

Please estimate the number of days, **per year**, you missed school because you did not have access to pads or tampons:

- 1–2 days
- 3–5 days
- 6–10 days



- 11–14 days
- 15 days or more

Did your period ever start while at school?

- Yes
- No

When your period started while at school, what did you do in response? (check all that apply)

- Ask to go to the nurses office to get a pad or tampon
- Ask to go to the front office to call someone to bring you a pad or tampon
- Ask a teacher for a pad or tampon
- Ask a friend for a pad or tampon
- Used a pad or tampon you brought to school with you
- Used a pad or tampon provided to you by a dispenser in the bathroom
- Used toilet paper or paper towels
- Attempted to hide the situation
- Made up an alternative excuse to go to the nurse and/or home
- Other \_\_\_\_\_

Did you ever need a new pad or tampon while at school to manage your period?

- Yes
- No

What did you do when you needed a new pad or tampon? (check all that apply)

- Ask to go to the nurses office to get a pad or tampon
- Ask to go to the front office to call someone to bring you a pad or tampon
- Ask a teacher for a pad or tampon
- Ask a friend for a pad or tampon
- Used a pad or tampon you brought to school with you
- Used a pad or tampon provided to you by a dispenser in the bathroom
- Used toilet paper or paper towels
- Attempted to hide the situation
- Made up an alternative excuse to go to the nurse and/or home
- Other \_\_\_\_\_

Were you ever embarrassed to ask a school administrator (teacher, nurse, etc.) for a pad or tampon or other help to manage your period?

- Yes
- No

Please explain why you were embarrassed.

---



---



---



---

Did you ever have to leave high school early because you needed a pad or tampon to manage your period?

- Yes
- No

Please estimate the number of days, per year, you had to leave school early because you needed a pad or tampon to manage your period:

- 1–2 days
- 3–5 days
- 6–10 days
- 11–14 days
- 15 days or more

Were you ever late to high school because you needed a pad or tampon to manage your period?

- Yes
- No

Please estimate the number of days, per year, you were late to school because you needed a pad or tampon to manage your period:

- 1–2 days
- 3–5 days
- 6–10 days
- 11–14 days
- 15 days or more

Did the lack of access to a pad or tampon at school ever affect your ability to learn in high school?

- Yes
- No
- I don't know

What was the impact to lacking access to a pad or tampon at school? (select all that apply)

- Lack of understanding material being taught in class
- Underperform on a test (i.e., poor grade)
- Underperform on assignment/homework (i.e., poor grade or didn't complete)
- Unable to focus in class
- Other: \_\_\_\_\_

And why did it impact your ability to learn? (select all that apply)

- Too uncomfortable to concentrate on instruction and/or material
- Too embarrassed to concentrate on instruction and/or material
- Too concerned about leakage to concentrate on instruction and/or material
- Other: \_\_\_\_\_

Did the lack of access to a pad or tampon at school ever affect your health?

- Yes
- No
- I don't know

What was the impact on your health? (select all that apply)

- Toxic shock
- Reproductive tract infection
- Fever
- Infection
- Generally sick
- Other: \_\_\_\_\_

Did your school provide pads or tampons to students?

- Yes
- No
- I don't know

Where were the pads and/or tampons provided? (check all that apply)

- All restrooms
- Gym locker room
- Nurses office
- Front office
- Particular teachers
- Other \_\_\_\_\_

Did students have to pay for them?

- Yes
- No
- I don't know

Was it difficult for your family to afford pads and tampons during high school?

- Yes
- No

How do you obtain pads and tampons on a monthly basis? (Please check all that apply)

- Borrow from friends
- At the school market
- The school clinic gives me them
- I work and use my money to buy them myself
- Other: \_\_\_\_\_

# Free Menstrual Hygiene Product Proposal

January 28, 2019

## Proposal

Menstrual hygiene products should be provided for all menstruating individuals in the gender-neutral bathrooms on 1 and the women's bathrooms on 0, 2, 5, 8, 10, and 12 in the University of Baltimore School of Law Building. Because menstruation is a natural bodily process affecting over half the population, we believe that menstrual hygiene products should be regarded as fundamental necessities to the hygiene of our academic and social environment, as ubiquitous as toilet paper and soap dispensers.

## History

Across the county (and the world), initiatives to provide free menstrual products at schools have been met with great success.<sup>1</sup> The products are placed in both women and men's bathrooms to ensure access for everyone who menstruates, not only women but also persons who self-identify as transgender, non-binary, and/or intersex.<sup>2</sup> Many school administrations have begun to provide free menstrual products, while other students have initiated pilot programs providing free menstrual products.<sup>3</sup> Schools providing menstrual hygiene products in academic, residential, or student center buildings, include, but are not limited to, the following:

- University of Minnesota<sup>4</sup>
- University of Nebraska at Lincoln<sup>5</sup>
- Bucknell University<sup>6</sup>
- University of Washington<sup>7</sup>
- Brown University<sup>8</sup>
- University of Pennsylvania<sup>9</sup>
- Cornell University<sup>10</sup>

<sup>1</sup> <https://www.thecrimson.com/article/2018/9/12/college-installs-menstrual-hygiene-dispensers-houses/> (Harvard provides free products to students); <https://www.theguardian.com/uk-news/2018/aug/24/scotland-to-offer-free-sanitary-products-to-all-students-in-world-first> (Scotland provides free products to all college and university students).

<sup>2</sup> <https://dailycaller.com/2017/04/17/university-now-stocking-mens-bathrooms-with-free-tampons/>.

<sup>3</sup> <http://www.bu.edu/today/2018/free-tampons-on-campus/> (Boston University);

<https://thetab.com/us/emory/2016/02/09/emory-college-council-petition-free-tampon-dispensers-goes-viral-744>

(Emory); <https://www.sacbee.com/news/local/education/article223567575.html> (UC Davis);

<https://yaledailynews.com/blog/2018/04/02/ycc-to-pilot-free-menstrual-hygiene-product-program/> (Yale University).

<sup>4</sup> <https://www.washingtontimes.com/news/2016/oct/22/university-of-minnesota-to-provide-more-menstrual-/>.

<sup>5</sup> [http://www.dailynebraskan.com/news/unl-now-offers-free-tampons-campus-wide/article\\_e53fd76-510c-11e5-b489-3bea9466b521.html](http://www.dailynebraskan.com/news/unl-now-offers-free-tampons-campus-wide/article_e53fd76-510c-11e5-b489-3bea9466b521.html).

<sup>6</sup> <https://bucknellian.net/71446/news/free-tampon-movement-takes-university-storm/>.

<sup>7</sup> <https://facilities.uw.edu/blog/posts/2018/11/08/pilot-program-becomes-permanent>.

<sup>8</sup> [https://www.washingtonpost.com/news/morning-mix/wp/2016/09/09/free-tampons-for-all-at-brown-university-this-school-year-even-in-the-mens-room/?noredirect=on&utm\\_term=.0be5d944f683](https://www.washingtonpost.com/news/morning-mix/wp/2016/09/09/free-tampons-for-all-at-brown-university-this-school-year-even-in-the-mens-room/?noredirect=on&utm_term=.0be5d944f683).

<sup>9</sup> <https://www.thedp.com/article/2019/01/female-hygiene-products-penn-tampons-pads-upenn>.

<sup>10</sup> <https://cornellsun.com/2016/09/27/s-a-free-tampon-referendum-passes-with-overwhelming-support/>.



## Reasons

In speaking to fellow University of Baltimore School of Law students about this initiative, many were excited about the possibility and several were willing to share their stories regarding menstruation:

*“On more than one occasion, I’ve either unexpectedly gotten my period or bleed through the stash of tampons in my purse. If none of my friends have any products, and because there is nowhere to get any within the school, I will often skip the rest of my classes and head home to get a tampon.”*

*“I’ve bled through my pads and tampons onto my pants. I’ve had to choose between skipping class to go get tampons/change clothes or bleeding on chairs, which I’ve done before and had to tie a sweatshirt around my waist and come back with paper towels to clean the chair.”*

Poor access to menstrual products reduces menstruating individuals’ productivity and educational attainment.<sup>11</sup> Sometimes periods come on unexpectedly or are heavier than expected, and individuals are unprepared. A study of menstruators showed that 61% reported having at least one unexpected period.<sup>12</sup> Also, if one is suffering from endometriosis,<sup>13</sup> menorrhagia,<sup>14</sup> or premenopausal,<sup>15</sup> the flow and length of one’s menses can be heavier and longer.

Currently, there are no machines within the University of Baltimore School of Law building that provide menstrual hygiene products. One of the closest places to obtain menstrual hygiene products is the University Market & Deli. As of January 16, 2019, in the University Market & Deli, the price ranges from \$3.99 for a pack of 10 regular pads to \$6.99 for a pack of 14 overnight pads; additionally, the market charges \$6.99 for a box of 18 lite tampons and \$6.99 for a box of 16 super tampons. Going to the University Market & Deli is not only expensive but can also affect the student negatively mentally and emotionally – the thought of walking several blocks while bleeding to obtain products can be daunting and humiliating. And as one student noted above, if she is going to leave campus to get a tampon, she is more likely to skip class and just head home where she can access her preferred, previously purchased at a much-reduced cost tampons. And while the UB Pantry offers menstrual hygiene products, their hours are very limited, their limited supplies are for “critical food assistance and resources”<sup>16</sup> so no one in the community experiences hunger, and they are not located in the UB Law School.

We believe this proposal provides an exciting opportunity to broaden the law school’s commitment to diversity, inclusion, and equity. University of Baltimore School of Law has the unique opportunity to serve as a leader in menstrual hygiene access by becoming one of the first

---

<sup>11</sup> <https://www.worldbank.org/en/news/feature/2018/05/25/menstrual-hygiene-management>.

<sup>12</sup> ELISSA STEIN AND SUSAN KIM, FLOW: THE CULTURAL STORY OF MENSTRUATION 189 (2009). Commentators surmise the percentage is actually much higher. ELISSA STEIN AND SUSAN KIM, FLOW: THE CULTURAL STORY OF MENSTRUATION 189 (2009).

<sup>13</sup> <https://www.womenshealth.gov/a-z-topics/endometriosis>.

<sup>14</sup> <https://www.cdc.gov/ncbddd/blooddisorders/women/menorrhagia.html>.

<sup>15</sup> <https://www.womenshealth.gov/menstrual-cycle>.

<sup>16</sup> <http://www.ubalt.edu/campus-life/transitions/be-more/pantry.cfm>.

U.S. law schools to permanently provide free universal menstrual hygiene product access.<sup>17</sup> This initiative will continue to demonstrate, as your administration has already done through the implementation of gender-neutral bathrooms, UB's commitment to public health as well as gender and class equity.

Since our law school is open to the public, it is true that the products would be available for any person who enters the building. We believe, however, that this provides further incentive for this initiative because those persons, such as potential employers for our law students, clinic clients, and law library patrons, would certainly appreciate the good will of the law school in providing these products.

The goal of providing these free products is to make sure our students, staff, and faculty of limited income or experiencing a sudden, unexpected menstrual flow are not precluded from being fully engaged in the community.

### **Cost**

We have done some research into the potential costs for the products and believe the cost would approximately \$58 a month, for less than \$700 a year, with an upfront cost of approximately \$327. *See* UB School of Law Budget Worksheet (attached). We think these funds are probably negligible compared to the cost of toilet paper and also, if appropriate, could be a good use of our student activity funds.

From research on the UB Law School's website, it appears that our community consists of only approximately 662 students,<sup>18</sup> 88 faculty,<sup>19</sup> and 34 staff.<sup>20</sup> And of course, not all of these persons are menstruators. However, we estimated that half of the total students, faculty, and staff are menstruators. We estimated a total of 8 bathrooms (6 of the most heavily-trafficked female restrooms and the two gender-neutral bathrooms on 1). The upfront cost of approximately \$327 is for the purchase of (1) products dispenser per bathroom. All estimates are based on prices available online from wholesalers, so the price through the school's building services department may vary. *See* photo of Sample Dispenser (attached).

And because we see this program serving our community when a period is unexpected or bleeding is stronger than anticipated, we made the assumption (suggested by HOSPECO, the leader in personal care products for public restrooms<sup>21</sup>) that each individual would use one menstrual hygiene product per month.

---

<sup>17</sup> [http://archive.boston.com/news/politics/2008/articles/2009/01/04/shes\\_thawed\\_harvard\\_law/](http://archive.boston.com/news/politics/2008/articles/2009/01/04/shes_thawed_harvard_law/) (United States Supreme Court Justice Elena Kagan ensured that free tampons were offered to women at Harvard Law School when she was dean more than a decade ago, and we are unable to identify any other law school that provides free menstrual hygiene products to its students).

<sup>18</sup> [http://law.ubalt.edu/about/pdfs/Standard\\_509\\_2017.pdf](http://law.ubalt.edu/about/pdfs/Standard_509_2017.pdf) (as of October 5, 2017).

<sup>19</sup> [http://law.ubalt.edu/about/pdfs/Standard\\_509\\_2017.pdf](http://law.ubalt.edu/about/pdfs/Standard_509_2017.pdf) (as of October 5, 2017).

<sup>20</sup> <http://law.ubalt.edu/about/administration/index.cfm>; <http://law.ubalt.edu/library/information/staff/index.cfm>; <http://law.ubalt.edu/faculty/profiles/anderson.cfm>;

<sup>21</sup> <https://www.hospeco.com/>.

Since our law school is open to the public, it is true that the products would be available for any person who enters the building. We believe, however, that this provides further incentive for this initiative because those persons, such as potential employers for our law students, clinic clients, and law library patrons, would certainly appreciate the good will of the law school in providing these products.

We understand that providing products free of charge would not be free to the law school. While there is a cost for provision of such products, the cost is marginal given the increased access and dignity it provides to law students, staff, faculty, and other members of our community. Moreover, by providing tampons and pads free of charge, the law school provides equity to menstruators because non-menstruators already have their full sanitary needs met with the school's provision of free toilet paper, paper towels, and soap.

### **Education**

If the law school agrees to fund this initiative, this group would welcome the opportunity to hold a panel to educate our community about menstrual health and issues of menstrual justice. Additionally, we would be willing to create flyers for the bathrooms to explain the presence of the products and provide useful information on menstrual health and issues of menstrual justice. *See Sample Sign (attached).*

Additionally, as you know, the Campus Pantry provides critical food assistance resources to our UB Community. We would conduct periodic product drives to donate menstrual hygiene products to the UB Campus Pantry located in the UB Student Center.<sup>22</sup>

### **Proposed by:**

Professor Margaret E. Johnson, Esq.  
majohnson@ubalt.edu

Alana Glover, E-Board, If/When/How  
Alana.Glover@ubalt.edu

Kathleen Godwin, President, Women's Bar Association  
Kathleen.Godwin@ubalt.edu

Katherine Haladay, Student Associate, Center on Applied Feminism  
Katherine.Haladay@ubalt.edu

Jennifer Mahan, E-Board, If/When/How  
Jennifer.Mahan@ubalt.edu

### **Student Organization Support:**

Family Law Association  
If/When/How  
OUTLaw

---

<sup>22</sup> If this proposal is successful, we would certainly support this initiative across the rest of the UB campus.

Parents in Law School  
Students Supporting the Women's Law Center  
UBSPI  
Women's Bar Association

**Faculty Support:**

Student Life Committee  
Professor Jessica Emerson  
Professor Brianna Ford  
Professor Michele Gilman  
Professor Dan Hatcher  
Professor Cassandra Havard  
Professor Dave Jaros  
Professor Elizabeth Keyes  
Professor Jaime Lee  
Professor Hugh McClean  
Professor Lila Meadows  
Professor Michael Meyerson  
Professor Jane Murphy  
Professor Odeana Neal  
Professor Robert Rubinson  
Professor Shanta Trivedi  
Professor Kim Wehle



## UB School of Law Budget Worksheet

Total Restrooms	8
Total Individuals	392

Initial Investment					
	Selling				
	Unit Qty	Quote (ea)	Total Qty		Budget
<b>DISPENSERS</b>					
			(Restrooms)		
Necessities Courtesy Dispenser	1	\$ 40.80	8		\$ 326.40
<b>Total Initial Investment</b>					<b>\$ 326.40</b>
Monthly Supplies					Estimate
	Monthly Qty	# cases (Monthly Case Qty)			
Sanitary Napkins, 250/cs	250	196	0.784	\$	34.50
Tampons, 500/cs	500	196	0.392	\$	23.52
<b>Monthly Supply Estimate</b>					<b>\$ 58.02</b>

Estimate is good for 30 days.

### Assumptions for Monthly Supply Calculations:

- (8) restrooms (female bathroom on floors 0, 2, 5, 8, 10, 12 and the two gender-neutral bathrooms on 1) and half of the total number of students, faculty, and staff.
- All prices listed under "Quote (ea)" are based on prices available online from wholesalers. Price through school's building services department may vary.
- (1) menstrual hygiene productt per month per individual, 50% pads/50% tampons.

## Sample Dispenser



## Sample Sign

BUILDING SERVICES DEPARTMENT

UNIVERSITY *of* WASHINGTON

Custodial Services and UW Recycling



These **free** menstrual products are provided by UW Building Services Dept.

Please only take what is needed in order to sustain this service. Thank you!

### **HAVE FEEDBACK OR QUESTIONS?**

Contact the Facilities Services Customer Care Team:  
[careteam@uw.edu](mailto:careteam@uw.edu) or 206-685-1900



These free products are provided by the University of Baltimore.  
So that we can continue to offer this service, please take only what is needed. Thank you!



Please Use This Bag For Disposal



A Biodegradable Recyclable Paper Product

tabbles

**EXHIBIT**

    D

