

Title IX and Tampons: How the Department of Education is Failing Menstruators Nationwide

By Brooke E. López

Bleeding isn't easy – more than 86% of young menstruators start their period unexpectedly in public, without the products they need.¹ The Department of Education must address educational menstrual equity, the movement to provide menstrual hygiene products like tampons and pads for free in educational environments. Student menstruators caught empty-handed face an uphill battle.² When lacking the necessary menstrual hygiene products, students are forced to leave instruction in search of a solution, losing valuable time in the classroom. Put simply, menstruators are being denied educational opportunity on the basis of sex because of educational institutions' lack of menstrual equity. This is a violation of Title IX protections guaranteed to students of all ages in federally-funded programs.³

Menstruators face distinct disadvantages in the classroom.

There are limited solutions when facing an unexpected period. Students can: (1) hope that the school maintains properly-stocked product dispensers in the restroom; (2) scramble to the nurse's office in pursuit of products; (3) wait in the restroom until someone brings a spare product, even though research indicates that's most menstruators are too embarrassed to seek products from a fellow restroom guest; (4) use a spare piece of clothing, like a sock, or gather a wad of toilet paper to "MacGyver" a homemade product, possibly creating a health risk like toxic shock syndrome or a urinary tract infection; or (5) leave campus.⁴ All of these options take a student's time away from the classroom.

What is Title IX and who does it protect?

Without available menstrual hygiene products, 62% of menstruators will leave the campus to purchase products, 34% of menstruators will go home in search of products, and 53% of menstruators will wait in the restroom to ask a passerby for products.⁵ In each of these scenarios, menstruators are more likely to spend time outside of the class when faced with their period, thus being at risk of missing class time disadvantaging them compared to their non-menstruating colleagues.

In addition to time missed in the classroom, menstruators also face other challenges such as lack of accessibility to necessary products, destruction of mutual property if menstruators free bleed, economic burden on low-income students, and risk of physical illness if trying to extend the use of or using makeshift products to address menstruation. Under Title IX policy, these distinct disadvantages placed on menstruators should constitute gender-based discrimination.⁶

Title IX states 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."⁷ Title IX policy protects students attending education institutions, ranging from elementary schools to universities, from the restraints of gender-based discrimination.⁸ When Title IX is referred to in the public sphere, the policy is generally associated with topics like athletic programs and protection against sexual assault.

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However, it is commonly forgotten that any conduct considered to be discrimination “on the basis of sex” falls within the purview of Title IX.⁹

Title IX guarantees equal opportunity students without regard to their sex.¹⁰ A menstrual cycle is a functional difference between biological males and females.¹¹ Therefore, school districts and universities who deprive students of menstrual hygiene products are discriminating against menstruators solely on the basis of sex—depriving them of the equal opportunity they are afforded. The Supreme Court has held that forcing students out of the classroom on the basis of sex diminishes equal educational access guaranteed by Title IX.¹² Students who lack equal opportunity to be present in the classroom, measured via absenteeism, tend to suffer significant performance gaps.¹³ Students who miss time in the classroom have lower testing performance, larger probability of dropping out, and increased chance of future unemployment.¹⁴ Additionally, regularly absent students suffer achievement gaps that worsen throughout their schooling even if their absenteeism is curbed.¹⁵

The negative effects of time spent out of the classroom disproportionately affects menstruators versus their non-menstruating counterparts.¹⁶ Menstruator's school absenteeism is notably attributed to lacking menstrual hygiene products. On average, 92% of menstruators indicate that they needed pads or tampons while at school.¹⁷ Over half of those identified menstruators indicated that lacking products has caused them to be late to school, leave school early, or miss school altogether.¹⁸ When there is a significant correlation between absenteeism and the lack of menstrual hygiene products, a school district or university must take notice. It is clear that menstruators do not receive equal access to education, solely because they have monthly periods. However, the federal courts have yet to rule specifically on the issue of whether time spent away from the classroom because of lacking menstrual hygiene products violates Title IX.

How do we cure Title IX deficits for menstruators?

What is the solution? State legislatures and school districts have tried taking measures to ensure equal access to education without limitation due to menstruation.

- New York City passed legislation mandating that menstrual hygiene products be provided in all public school systems, arguing that these products are a “necessity – not a luxury”.¹⁹
- Multiple colleges in the University of Texas System started providing free menstrual hygiene products in single-stall and women's restrooms.²⁰
- A group of high school students in Dallas Independent School District successfully advocated for free menstrual products to be dispensed in all high schools and middle schools.²¹
- School districts in Dublin City, Ohio provided free tampons and pads in elementary and middle schools, citing lack of time between classes for students to approach the nurse's office.²²
- Brown University provides free pads and tampons in all restrooms, claiming that menstrual hygiene products are as much of a necessity as toilet paper.²³

However, these small-scale projects took years to develop and implement. Even worse, some school districts have completely refused to provide products at all.²⁴ Some districts claim that

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product dispensers will be destroyed, are too expensive, and can be used to transport illicit drugs into schools although no evidence has been found to support these arguments.²⁵ Without intervention from the Department of Education, students may be left to rely on the ill-contrived decisions of others and a patchwork of local and state policies. The only *true* solution to cure Title IX violations on the basis of menstruation requires the Department of Education to take action.

The Department of Education holds the authoritative power to issue Title IX regulations that interpret Title IX. Congress affirmatively granted deference to the Department of Education's interpretation of what constitutes discrimination "on the basis of sex," including equal opportunity to education.²⁶ If the Department were to formally interpret a lack of menstrual hygiene products to violate Title IX compliance, a sweeping new standard could be enforced on campuses nationwide. Such an interpretation could eliminate the pain-staking process of implementing individual menstrual equity policies. It would also remove authority from campuses to deny these rights to menstruating students, requiring them to provide menstrual hygiene products.

Conclusion

The Department of Education is currently failing menstruators. It is critical to the educational success of menstruating pupils across the country that they receive protection from gender-based discrimination under Title IX. Menstruation in the modern-day should not be a barrier to opportunity in an educational environment. Policy movements affecting women in education across the nation have faced uphill obstacles for over a hundred years. The modern-day policy approaches in the United States must continue to be inclusive of women's equity in education, starting with menstrual equity.

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¹ Hospeco, *The Murphy's Law of Menstruation*, https://www.hospeco.com/assets/user/documents/L-OL-H115-S_Murphy's%20Law%20of%20Menstruation.pdf.

² Menstruators—individuals who identify as regularly having a menstrual cycle—inherently tend to be women. However, since some menstruators are transgender males, I will use the term "menstruators" rather than women throughout this article.

³ 20 U.S.C. § 1681 (2021).

⁴ Hospeco, *The Murphy's Law of Menstruation*, *supra* note 1.

⁵ *Id.*

⁶ 20 U.S.C. § 1681 (2021).

⁷ *Id.*

⁸ 20 U.S.C. § 1681 (2021); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998).

⁹ 20 U.S.C. § 1681 (2021).

¹⁰ *Kelley v. Bd. of Trs.*, 832 F. Supp. 237 (C.D. Ill. 1993) (discussing that preventing discrimination on the basis of sex also means providing equal opportunities to members of "both" sexes).

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¹¹ Though menstrual cycles are a biological functional difference between males and females, this does not exclude individuals who are transgender or gender non-conforming. Menstrual cycles have no reference to gender identity. The menstrual equity movement is intended to be inclusive of all menstruators.

¹² *Davis*, 526 U.S. at 631 (1999) (a student was sexually harassed by a teacher which prevented that student from having equal access to the classroom).

¹³ Gottfried, Michael A. "The Detrimental Effects of Missing School: Evidence from Urban Siblings." *American Journal of Education*, vol. 117, no. 2, 2011, pp. 147–182. JSTOR, www.jstor.org/stable/10.1086/657886. Accessed 3 Apr. 2020.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Christopher A. Cotropia, *Menstruation Management in United States Schools and Implications for Attendance, Academic Performance, and Health* (March 25, 2019). *Women's Reproductive Health*, Vol. 9 (Forthcoming).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ N.Y.C., N.Y., N.Y.C. Admin. Code, title 21-A, ch.8, § 21-968 (2019).

²⁰ UT Dallas Student Government, Facebook (Mar. 18, 2018), <https://www.facebook.com/utdsg/posts/10156107607844547>; Nadia Hamdan, *UT Austin Pilot Program Offers Free Period Products in Women's Restrooms*, KUT 90.5 (Nov. 26, 2018), <https://www.kut.org/post/ut-austin-pilot-program-offers-free-period-products-womens-restrooms>.

²¹ Ignite National, Facebook (Nov. 19, 2019), <https://www.facebook.com/IGNITEnational/posts/2633701160043730>.

²² Abigail Jones, *Free Tampons and Pads are Making Their Way to U.S. Colleges, High Schools and Middle Schools*, *Newsweek* (Sep. 6, 2016), <https://www.newsweek.com/free-tampons-pads-us-schools-496083>.

²³ Ryan Lasker, *At Brown University, it's free tampons and pads for all*, *USA Today* (Sep. 10, 2016), <https://www.usatoday.com/story/news/college/2016/09/10/brown-university-free-tampons/90128406/>.

²⁴ Madeleine Schmidt, *Free Tampons 'Too Extreme': Republicans Blast Bill to Put Menstrual Hygiene Products in Schools*, *Colorado Times Recorder* (Nov. 25, 2019), <https://coloradotimesrecorder.com/2019/11/free-tampons-too-extreme-republicans-blast-bill-to-put-menstrual-hygiene-products-in-schools/19708/>; Email from Barry Lanford, Exec. Dir. of Facility Maint. and Operations, North East ISD, to Brooke López (May 23, 2018, 07:36 CST) (a North East ISD district representative—located in San Antonio, Texas—stated “our departments have neither the funds nor personnel to implement the program...”).

²⁵ Email from Amy Hillin, Coordinator of Health Servs., Wylie ISD, to Brooke López (Sept. 11, 2017, 11:40 CST) (on file with author) (a Wylie ISD district representative—located in North Texas—stated “[i]n addition, our administrators have felt that not having dispensers [is] in the best interest of student safety (they are a target for hiding illicit substances),” yet failed to cite to any supporting research or qualification for this statement).

²⁶ *Conley v. Nw. Fla. State Coll.*, 145 F. Supp. 3d 1073 (N.D. Fla. 2015) (noting that courts may give “considerable weight” to an administrative agency’s interpretation of statutory schemes it administers—such as the Department of Education’s interpretation of sex pursuant to Title IX).