TITLE IX AND EQUAL EDUCATIONAL ACCESS FOR PREGNANT AND PARENTING GIRLS

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I. INTRODUCTION

> I was speaking at a homeless shelter in Boston and a teen mom with a 2-year-old on her lap raised her hand and said, "If I am hearing you right, I think I have been discriminated against. When I got pregnant I was a sophomore at a prestigious boarding school on the fast track to Harvard. They asked me to leave and I did so, politely. Then I spent my pregnancy moving from homeless shelter to homeless shelter and, well, you see where I am now."[1]

The United States Supreme Court recognized the "supreme importance" of education in *Meyer v. Nebraska*[2] and has since repeatedly held that the Fourteenth Amendment protects the right to "equal educational opportunities" among students,[3] though it has refused thus far to identify a fundamental right to receive an education.[4] Most state constitutions are more expansive, guaranteeing each child the fundamental right to a free, public education.[5]

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1. Celina De Leon, *Katherine Arnoldi: Fighting for Teen Moms*, FEMINISTING, Oct. 28, 2006, http://feministing.com/archives/005950.html.

2. 262 U.S. 390, 400 (1923); *accord* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 30 (1973) ("'[T]he grave significance of education both to the individual and to our society' cannot be doubted" (quoting 337 F. Supp. 280, 283 (W.D. Tex. 1972))).

3. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954); *see*, *e.g.*, Grutter v. Bollinger, 539 U.S. 306, 331-32 (2003); *San Antonio*, 411 U.S. at 40; *cf. Meyer*, 262 U.S. at 400 (holding that the Fourteenth Amendment's due process clause protects parents' right to hire a teacher for their children).

4. 16A C.J.S. Constitutional Law § 736 (2007); see San Antonio, 411 U.S. at 35.

5. C.J.S., *supra* note 4; *see*, *e.g.*, TENN. CONST. art. XI, § 12.

Moreover, Title IX of the Education Amendments of 1972 provides that no student shall be discriminated against in schools on the basis of sex.[6] Federal regulations set forth seemingly bright-line rules extending this protection to "actual or potential parental, family, or marital status[,] . . . pregnancy, childbirth, false pregnancy, termination of a pregnancy or recovery therefrom."[7] Nevertheless, pregnant and parenting teens are frequently denied educational rights because some of the legal requirements are unclear and schools are often unwilling or unable to accommodate the girls.

This is not a trivial issue. About 750,000 to 800,000 teenage girls, or approximately 7-8%, become pregnant each year.[8] Nearly one-third of all teenage girls in the United States will become pregnant at least once before they turn twenty years old.[9] Many teen mothers are already demographically at a high risk of dropping out of school. For example, Hispanic and African-American students are significantly more likely to drop out[10] and to become pregnant[11] than are white students; teens from poor and low-income families are also significantly more likely both to drop out of school[12] and to become pregnant.[13] As a consequence, teen mothers make up about a quarter of the total number of dropouts.[14] Two-thirds of teenage mothers will never receive a high

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6. 20 U.S.C. §§ 1681-1688 (2000).

7. 34 C.F.R. § 106.40 (2006).

8. *See The Link Between Teen Childbearing and Employment in Georgia*, POLICY BRIEF (Fiscal Research Ctr. of Ga. State Univ., Atlanta, Ga.), Apr. 2005, at 1 (citing studies by the Centers for Disease Control and Prevention), *available at* http://frp.aysps.gsu.edu/frp/frpreports/brief106/brief106.pdf; *see also* GUTTMACHER INST., U.S. TEENAGE PREGNANCY STATISTICS: NATIONAL AND STATE TRENDS AND TRENDS BY RACE AND ETHNICITY 2 (2006), *available at* http://www.guttmacher.org/pubs/2006/09/12/USTPstats.pdf; Pat Burdell, *Teen Mothers in High School: Tracking Their Curriculum*, 21 REV. OF RES. IN EDUC. 163, 166 (1995).

9. NAT'L CAMPAIGN TO PREVENT TEEN & UNPLANNED PREGNANCY, NATIONAL TEEN PREGNANCY AND BIRTH DATA: GENERAL FACTS AND STATS [hereinafter NAT'L CAMPAIGN TO PREVENT TEEN & UNPLANNED PREGNANCY, FACTS AND STATS], http://www.teenpregnancy.org/resources/data/genlfact.asp.

10. JENNIFER LAIRD, MATTHEW DEBELL & CHRIS CHAPMAN, NAT'L CTR. FOR EDUC. STAT., DROPOUT RATES IN THE UNITED STATES: 2004, at 18 (2006), *available at* http://nces.ed.gov/pubs2007/2007024.pdf.

11. GUTTMACHER INST., *supra* note 8, at 4; NAT'L CAMPAIGN TO PREVENT TEEN & UNPLANNED PREGNANCY, SCIENCE SAYS: PREGNANCY AMONG SEXUALLY EXPERIENCED TEENS, 2002, at 3 (2006), *available at* http://www.teenpregnancy.org/press/pdf/ScienceSays23.pdf.

12. LAIRD ET AL., *supra* note 10, at 4.

13. GUTTMACHER INST., ISSUES IN BRIEF: TEENAGE PREGNANCY AND THE WELFARE REFORM DEBATE (1995), *available at* http://www.guttmacher.org/pubs/ib5.html.

14. Monica J. Stamm, Note, *A Skeleton in the Closet: Single-Sex Schools for Pregnant Girls*, 98 COLUM. L. REV. 1203, 1203 n.1 (1998) (citing DEBORAH BRAKE, NAT'L WOMEN'S L. CTR., GOALS 2000 AND PREGNANT AND PARENTING TEENS: MAKING EDUCATION REFORM ATTAINABLE FOR EVERYONE 3 (1995)).

school diploma and only 1.5% will earn a college degree before turning thirty.[15] Teen parenthood is the number one reason that girls drop out of school.[16]

When school administrators impede pregnant and parenting students' access to education, they contribute to these dropout rates and leave the girls—as well as the girls' children—at a disadvantage.[17] Teenage mothers, particularly unmarried teenage mothers, are less likely to be employed than are other women.[18] Those who are employed work fewer hours and earn less per hour.[19] Teenage mothers are also more likely than other women to live below the poverty line and to receive public assistance such as welfare;[20] more than 75% of unmarried teen mothers are on welfare within five years of childbirth.[21] High school dropouts as a whole earn about $8,000 less per year than people who have a high school education.[22] The children of teen mothers are more prone to underperforming in school[23] and their daughters are more likely to

15. NAT'L CAMPAIGN TO PREVENT TEEN & UNPLANNED PREGNANCY, FACTS AND STATS, *supra* note 9 (citing ROBIN HOOD FOUND., KIDS HAVING KIDS: A ROBIN HOOD FOUNDATION SPECIAL REPORT ON THE COSTS OF ADOLESCENT CHILDBEARING (R.A. Maynard ed., 1996)); *see also* STEPHEN P. COELEN, BEYOND 2000: DEMOGRAPHIC CHANGE, EDUCATION AND THE WORK FORCE: EXISTING RELATIONSHIPS AND THE PROGNOSIS IN NEW ENGLAND 21 (1993), *available at* http://www.umass.edu/miser/news/Beyond2k.pdf (describing pregnant teen graduation rates in Massachusetts).

16. ARIZ. COAL. ON ADOLESCENT PREGNANCY & PARENTING, NO CHILD LEFT BEHIND? SCHOOL LINKS TO TEEN PREGNANCY 4 (2003) (on file with author); *see* NAT'L COAL. FOR WOMEN & GIRLS IN EDUC., TITLE IX AT 30: REPORT CARD ON GENDER EQUITY 55 (2002), *available at* http://www.ncwge.org/PDF/title9at30-6-11.pdf.

17. *See* NAT'L COAL. FOR WOMEN & GIRLS IN EDUC., *supra* note 16, at 55; Tamara S. Ling, Comment, *Lifting Voices: Towards Equal Education for Pregnant and Parenting Students in New York City*, 29 FORDHAM URB. L.J. 2387, 2389 (2002); NAT'L CAMPAIGN TO PREVENT TEEN & UNPLANNED PREGNANCY, FACTS AND STATS, *supra* note 9; *see also* Interview with Kimberly Smith, Florence Crittenton Agency, Inc., in Knoxville, Tenn. (Mar. 21, 2007) (noting that many pregnant Knox County students are second-generation teenage mothers from low-income families).

18. Emily Stier Adler, Mildred Bates & Joan M. Merdinger, *Educational Policies and Programs for Teenage Parents and Pregnant Teenagers*, 34 FAM. REL. 183, 183-84 (1985).

19. *Id.*

20. ARIZ. COAL. ON ADOLESCENT PREGNANCY & PARENTING, *supra* note 16, at 8; NAT'L COAL. FOR WOMEN & GIRLS IN EDUC., *supra* note 16, at 55; NAT'L CAMPAIGN TO PREVENT TEEN & UNPLANNED PREGNANCY, FACTS AND STATS, *supra* note 9 (citing data from the U.S. Department of Labor's National Longitudinal Survey of Youth).

21. Stamm, *supra* note 14, at 1203 n.1 (quoting Darci Elaine Burrell, *The Norplant Solution: Norplant and the Control of African-American Motherhood*, 5 UCLA WOMEN'S L.J. 401, 440 (1995)).

22. *See* LAIRD ET AL., *supra* note 10, at 1.

23. ARIZ. COAL. ON ADOLESCENT PREGNANCY & PARENTING, *supra* note 16, at 5.

become teenage mothers themselves.[24] Lower educational attainment has a noticeably negative effect on outcomes for these girls and their children.[25]

This Article examines the issues of pregnant and parenting students' access to academic and co-curricular programs in secondary education. Part II discusses the historical background of schools' and the courts' approaches to teen pregnancy and the rights that were subsequently guaranteed by Title IX and its enacting regulations. This Part also analyzes some persistent ambiguities in the law and suggests potential clarifications. Part III covers the continued problems of access to academic programs and facilities, including a comment on how the No Child Left Behind Act of 2001[26] affects schools' willingness to accommodate pregnant and parenting students. Finally, Part IV looks at exclusion from extracurricular activities, the various analytical approaches being used by the courts in the set of lawsuits brought by National Honor Society candidates, and the implications of applying these decisions to other activities and programs.

Though this Article's primary focus is on the rights of female students, the reader should remain aware that parenting boys have similar protections under Title IX. Furthermore, pregnancy and childbirth implicate many other areas of student rights, as well. However, discrimination against girls in access to educational programs is a threshold issue that must be addressed before related rights can be properly understood.

II. PREGNANCY IN SCHOOLS: HISTORY AND LEGISLATION

> After they have a baby to take care of, they just can't keep up at school, and then they drop out. It happened to my first daughter. She thought she could do it (finish school), but she started missin' too many days, and finally she quit. She started back at night school, but she couldn't get there 'cause the buses they cost too much. I think that (dropping out) is what will happen to [my other daughter], too.[27]

A. Legal and Administrative Treatment of Pregnant Students Prior to Title IX

Until the late 1960s and early 1970s, most school districts in the United States expelled pregnant and parenting students or excluded them from regular

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24. NAT'L CAMPAIGN TO PREVENT TEEN & UNPLANNED PREGNANCY, FACTS AND STATS, *supra* note 9.

25. Adler et al., *supra* note 18, at 184; Sarah Katz, *When the Child Is a Parent: Effective Advocacy for Teen Parents in the Child Welfare System*, 79 TEMP. L. REV. 535, 551-52 (2006).

26. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended in scattered sections of 20 U.S.C. (2007)).

27. Gail Hasselbach Henderson, *Consequences of School-Age Pregnancy and Motherhood*, 29 FAM. REL. 185, 188 (1980) (quoting the parent of two school-aged mothers).

classes.[28] A "known or shows" rule of excluding pregnant girls (when either the school officials learned of the pregnancy or it became visible) was often formally codified in local board of education regulations.[29] School administrators and state officials justified these policies by saying that the girls would be a distraction to their classmates, they would not be able to handle the stress of full course loads, and activities such as climbing stairs and carrying books posed excessive risks to the girls' health and safety.[30] For the most part, though, these rules were grounded in condemnation of the "licentious or immoral character"[31] the pregnancy represented and a fear that other girls would be tempted to become pregnant.[32] Even girls who, at first, remained in school would begin to feel isolated and guilty because of the administrators' attitudes and eventually "give up."[33]

Slowly, some school district administrators began to acknowledge that states owed the same duty to both pregnant and non-pregnant teens.[34] Simultaneously, three federal district court cases in Mississippi found that the expulsion of unwed mothers violates the Fourteenth Amendment absent a showing that the particular student has a disruptive or corruptive influence on the other students' educations.[35] Likewise, a federal court in Massachusetts offered some protection to pregnant girls, finding that, where a girl's doctors said she could safely attend school, the board's "reluctance to appear to condone premarital sex" was not sufficient by itself to justify segregating her or giving her an inferior educational experience.[36] Still, as of the early 1970s,

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28. KERN ALEXANDER & M. DAVID ALEXANDER, THE LAW OF SCHOOLS, STUDENTS AND TEACHERS IN A NUTSHELL § 4.8 (2d ed. 1995); MARK G. YUDOF, DAVID L. KIRP, BETSY LEVIN & RACHEL F. MORAN, EDUCATIONAL POLICY AND THE LAW 587 (4th ed. 2002) (citing Laurence W. Knowles, *High Schools, Marriage, and the Fourteenth Amendment*, 11 J. FAM. L. 711, 732 (1971)); Amber Hausenfluck, Comment, *A Pregnant Teenager's Right to Education in Texas*, 9 SCHOLAR 151, 154 (2006); Ling, *supra* note 17, at 2390-91.

29. *See*, *e.g.*, EDWARD C. BOLMEIER, SEX LITIGATION AND THE PUBLIC SCHOOLS §§ 6.4-6.6 (1975) (citing regulations adopted by the Trenton (Ohio) Board of Education, the North Middlesex (Mass.) Regional High School Committee, and the Decatur (Ga.) School System); Ling, *supra* note 17, at 2390-91 (noting the policy as applied in the New York City school system).

30. *See* BOLMEIER, *supra* note 29, at § 6.4 (discussing State v. Chamberlain, 175 N.E.2d 539 (Ohio 1961)); Hausenfluck, *supra* note 28; *see also* Ling, *supra* note 17, at 2391-92.

31. Grace Belsches-Simmons, Commentary, *Teenage Pregnancy and Schooling: Legal Considerations*, 24 EDUC. L. REP. 1, 2 (1985) (quoting Nutt v. Goodland, 278 P. 1065, 1066 (Kan. 1929)).

32. Hausenfluck, *supra* note 28, at 154; Ling, *supra* note 17, at 2391.

33. Hausenfluck, *supra* note 28, at 154 & n.22.

34. ALEXANDER & ALEXANDER, *supra* note 28, § 4.8; Ling, *supra* note 17, at 2398.

35. Shull v. Columbus Mun. Separate Sch. Dist., 338 F. Supp. 1376, 1377-78 (N.D. Miss. 1972) (citing Smith v. Columbus Mun. Separate Sch. Dist., No. EC 71-3-K (N.D. Miss. Jan. 15, 1971)); Perry v. Grenada Mun. Separate Sch. Dist., 300 F. Supp. 748, 750, 753 (N.D. Miss. 1969).

36. FERNAND N. DUTILE, SEX, SCHOOLS AND THE LAW 175 (1986) (discussing Ordway v. Hargraves, 323 F. Supp. 1155, 1156-58 (D. Mass. 1971)).

pregnant students were almost always prevented from attending regular classes and only a small percentage of school systems made any provisions for them at all.[37]

B. Title IX and Pregnancy Discrimination: Legal Advancements and Interpretive Ambiguities

Finally, Congress passed Title IX of the Education Amendments of 1972 (Title IX).[38] Title IX states that "[n]o 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 . . . ."[39] The enacting federal regulations[40] fleshed out this statement and clarified that discrimination based on sex includes pregnancy and childbirth:

> a) *Status generally.* A recipient [of federal funding] shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex.
> (b) *Pregnancy and related conditions.* (1) A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.[41]

Federal law, then, expressly prohibits any federally-funded school from expelling pregnant teenagers, restricting them to certain academic "tracks" or special education classes, or excluding them from extracurricular activities. If parenting teens are restricted in such ways, the restrictions must not disparately impact either sex. A school system is permitted to maintain "a portion of its education program or activity separately for pregnant students,"[42] but it may do no more than suggest that the students consider joining.[43] Participation must be "completely voluntary" and the program must be "comparable" to the mainstream program.[44]

In addition, the Title IX regulations address girls' equal rights with respect to their medical needs during and post-pregnancy. School systems offering

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37. Anne-Marie Foltz, Lorraine V. Klerman & James F. Jekel, *Pregnancy and Special Education: Who Stays in School?*, 62 AM. J. PUB. HEALTH 1612, 1612 (1972).

38. 20 U.S.C. §§ 1681-1688 (2000).

39. 20 U.S.C. § 1681(a).

40. 34 C.F.R. pt. 106 (2006).

41. 34 C.F.R. § 106.40(a)-(b)(1).

42. 34 C.F.R. § 106.40(b)(3).

43. *See* YUDOF ET AL., *supra* note 28, at 587.

44. 34 C.F.R. § 106.40(b)(3).

homebound instruction to students who cannot attend class for health reasons must also make it available to pregnant students for part or all of their pregnancies and recovery periods.[45] Pregnancy, childbirth, and recovery are to be treated the same as "any other temporary disability" with respect to medical services and benefits offered by the school.[46] Likewise, a school cannot require a doctor's note that a pregnant or recovering student "is physically and emotionally able" to attend school and participate in extracurricular activities unless all other students under a doctor's care are also required to provide such certification.[47] Finally, schools must excuse individual absences and leaves of absence due to pregnancy, childbirth and recovery when the girl's doctor has deemed them medically necessary.[48] When the girl is ready to return to school, she must be allowed to pick up her studies where she left off; the school may not penalize her for her absences.[49]

The regulations do not provide a definition for voluntariness of participation in segregated programs. In the absence of any case law on point, some commentators suggest that constitutional and criminal procedure law provide guidance.[50] Criminal proceedings require that a voluntary confession be "given[] 'freely, with full knowledge of its nature and consequences' and . . . not . . . through[] 'overpersuasion, coercion, or compromise of benefit.'"[51] Similarly, waivers of constitutional rights must "be given freely, voluntarily, and unequivocally."[52] Such a waiver must be "knowing and intelligent";[53] the "person must be cognizant of [her] rights . . . [and] the consent must not be contaminated by any duress or coercion . . . ."[54] This suggests that in the context of separate pregnancy and parenthood programs, participation should only be considered voluntary if the students are fully informed of all of their options and they are allowed to make their decisions "without overpersuasion,

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45. *See* 34 C.F.R. § 106.40(b)(4); WENDY C. WOLF, CTR. FOR ASSESSMENT AND POL'Y DEV., USING TITLE IX TO PROTECT THE RIGHTS OF PREGNANT AND PARENTING TEENS 1 (1999), *available at* http://www.capd.org/pubfiles/pub-1999-10-01.pdf. "Recovery" includes not only postpartum recovery but also recuperation from false pregnancy, miscarriage, or abortion. *See* 34 C.F.R. § 106.40(b)(4).

46. 34 C.F.R. § 106.40(b)(4).

47. 34 C.F.R. § 106.40(b)(2).

48. 34 C.F.R. § 106.40(b)(5); NAT'L COAL. FOR WOMEN & GIRLS IN EDUC., *supra* note 16, at 56.

49. 34 C.F.R. § 106.40(b)(5); NAT'L COAL. FOR WOMEN & GIRLS IN EDUC., *supra* note 16, at 56.

50. Ling, *supra* note 17, at 2404-05 (citing Deborah Brake, *Legal Challenges to the Educational Barriers Facing Pregnant and Parenting Adolescents*, 28 CLEARINGHOUSE REV. 141, 147-48 (1994)); Stamm, *supra* note 14, at 1219-20 (citing same).

51. Ling, *supra* note 17, at 2405 (quoting Brake, *supra* note 50, at 147-48).

52. Madeline E. McNeeley, Case Note, *Georgia v. Randolph, 126 S. Ct. 1515 (2006)*, 74 TENN. L. REV. 259, 273 (2007) (discussing consent to warrantless search and seizure).

53. Ling, *supra* note 17, at 2405 (quoting Brake, *supra* note 50, at 148); Stamm, *supra* note 14, at 1219 (quoting same).

54. Wren v. United States, 352 F.2d 617, 618 (10th Cir. 1965) (discussing voluntary waiver of Fourth Amendment rights).

coercion, or compromise of their educational benefits."[55] Indeed, "even subtle counseling and encouragement" could constitute an impermissible attempt to influence the girls' choices.[56]

Likewise, there is no regulatory definition for comparability of educational programs and no court seems yet to have interpreted it. "Comparable" certainly could imply a lower standard than the strictly "equal educational opportunities" required under *Brown v. Board of Education*,[57] but the degree of allowable inequality is not clear. The Department of Education's Office for Civil Rights has evaluated segregated pregnancy programs using a remarkably limited set of criteria including the use of qualified instructors, whether the educational instruction is "parallel," and the number of credit hours awarded for successful coursework.[58] One commentator has suggested that a comparable segregated program must be "functionally equivalent" to the mainstream program.[59] Another has indicated that the comparability standard for school sports programs under Title IX provides guidance.[60] That standard requires that the "availability, quality, and kinds of benefits, opportunities, and treatment afforded" to female athletes be "generally equivalent" to programs for male athletes, provides guidance.[61]

Perhaps the dissent to the Fourth Circuit's opinion in *United States v. Virginia*[62] is the most useful guide for interpreting Title IX's ambiguities. Judge Phillips suggested criteria for assessing whether the proposed Virginia Women's Institute for Leadership was comparable to the all-male Virginia Military Institute.[63] He concluded that "separate-but-equal single-gender institutions" should only be permissible if they include "substantially comparable curricular and extra-curricular programs, funding, physical plant, administration and support services, and faculty and library resources."64 This seems to be an entirely reasonable articulation of a comparability standard, but because it was propounded under the Fourteenth Amendment's Equal Protection Clause,65 courts could potentially find it more rigorous than the Title IX regulations require. However, some have suggested that Title IX was actually designed to invoke a strict scrutiny standard, rather than the intermediate scrutiny that would later be developed in the courts for sex-based

55. Ling, *supra* note 17, at 2405.

56. Stamm, *supra* note 14, at 1219 (quoting Brake, *supra* note 50, at 148).

57. Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

58. Ling, *supra* note 17, at 2400-01 (citing Brake, *supra* note 50, at 149).

59. Stamm, *supra* note 14, at 1219.

60. Ling, *supra* note 17, at 2400 (quoting Brake, *supra* note 50, at 149).

61. *Id.*

62. 44 F.3d 1229, 1242 (4th Cir. 1995) (Phillips J., dissenting), rev'd 515 U.S. 518 (1996).

63. *Id.* at 1250.

64. *Id*., cited with approval in 518 U.S. 515, 547 n.17 (1996).

65. *Id*. at 1242-43.

Fourteenth Amendment claims.[66] If strict scrutiny applies to distinctions between segregated pregnancy and mainstream school programs or if comparability implies general equivalency, then Judge Phillips's formulation could be very useful in understanding how pregnancy programs should be assessed.

III. ACCESS TO ACADEMICS

> I know I shouldn't have skipped school, but just because I did, I don't think that the school had the right to make me have the tests and turn over the results. I wasn't given any choice about turning over my test results—the school wouldn't let me go to my classes unless I gave them proof I wasn't pregnant and had no STDs. I needed to get back to my classes because we had an important math exam coming up and the school had already kept me out of classes for three days. Since I couldn't get the prep materials when the other kids did, I had to cram and study extra hard to pass the math exam. Afterwards, I was worried about what the teachers and other kids think of me; they all knew what happened and that we had to get tested for pregnancy and STDs and HIV. I'm so upset about what they did to me.[67]

A. Continued Discrimination in Access to Academics Following Title IX

The Title IX regulations clearly state that teenagers may not be discriminated against, expelled from school, or excluded from mainstream classes for being pregnant or parents.[68] Some schools and school districts have implemented policies consistent with Title IX regulations[69] and there has been

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66. Letter from Marcia D. Greenberger, Co-President & Jocelyn Samuels, Vice President for Educ. and Emp., Nat'l Women's Law Ctr., to Kenneth L. Marcus, U.S. Dept. of Educ., at 3 n.3 (Apr. 22, 2004), http://nwlc.org/pdf/FinalSingleSexComments_4-22-04.pdf.

67. Press Release, ACLU, Statements by Teenage Girls and Their Parents, Clients in NYCLU Lawsuit Against New York School Officials for Forcing Teenage Girls to Undergo Intrusive Medical Exams (July 8, 2003), http://www.aclu.org/studentsrights/gen/12778res20030708.html (statement of 14-year-old "Susan Roe").

68. 34 C.F.R. § 106.40 (2006).

69. *See*, *e.g.*, Anderson County Bd. of Educ. (Tenn.), Married and/or Pregnant Students (on file with author), *available at* http://www.acs.ac/Policies/BoardPolicy/6-501.pdf (stating that "[m]arried students, pregnant students, and student-parents shall have the same educational opportunities—curricular and extracurricular—as all other students" in accordance with Title IX and providing for any necessary health services on the same basis as "for any other health-impaired student"); Berkshire Arts & Tech. Charter Pub. Sch. (Adams, Mass.), Policy Regarding Pregnant Students (Mar. 1, 2006) (on file with author), *available at* http://www.bartcharter.org/downloads/policy_pregnant_students.pdf (using

some progress in ensuring equality of education for pregnant and parenting teens.[70] Nevertheless, school boards are still widely unaware of the many Title IX requirements.[71] As a result, many girls are still excluded from mainstream classes and programs, denied accommodations that are nevertheless offered to other children with temporary disabilities, and even coerced into leaving school entirely.

There is a conspicuous absence of nationwide data on schools' compliance with Title IX regulations regarding pregnant and parenting students,[72] partly due to lax monitoring and enforcement by the Department of Education's Office of Civil Rights.[73] Furthermore, there do not appear to have been any fully-litigated cases regarding a secondary educational institution's discrimination against pregnant and parenting teens since the enactment of the regulations in 1976.[74] Unfortunately, lack of litigation does not indicate an absence of violations. The more likely explanation is that most of these girls and their parents are unaware that Title IX protects pregnant and parenting students, so they do not pursue their potential claims. The few who do so probably settle before going to trial, preventing media coverage of the case from bringing public attention to the school's violations.[75]

Indeed, despite the lack of concrete statistics and court opinions, anecdotal evidence indicates that access to education remains a very real problem for teen parents. The tales being told are reminiscent of the pre-Title IX days, when

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language that substantially tracks the Title IX regulations); *see also* NAT'L COAL. FOR WOMEN & GIRLS IN EDUC., *supra* note 16, at 56 (describing efforts to develop relevant policies in a Pittsburgh school district and others).

70. *See* NAT'L COAL. FOR WOMEN & GIRLS IN EDUC., *supra* note 16, at 6-7 (giving schools a "C+" in treatment of pregnant and parenting students, where "C" is defined as "[s]ome progress: some barriers addressed, but more improvement necessary").

71. *Id.* at 56.

72. *Id.* at 55.

73. *Id.* at 56-57.

74. Public Welfare, 40 Fed. Reg. 24128, 24142 (June 4, 1975) (codified at 45 C.F.R. § 86.40 (1976)). The creation of the new Department of Education in 1979 led the Title IX regulations to be recodified, without substantive changes, at 34 C.F.R. pt. 106 (1981). *See* Department of Education Rules and Regulations, 45 Fed. Reg. 30802, 30955 (May 9, 1980). This author's search of federal and state case law yielded no judicially-rendered judgments or opinions on point. Other authors appear to have reached the same result, as they cite only pre-Title IX cases in similar discussions. *See* KERN ALEXANDER, SCHOOL LAW 420-41 (1980); ALEXANDER & ALEXANDER, *supra* note 28, § 4.8; BOLMEIER, *supra* note 29, §§ 6.4-6.6; DUTILE, *supra* note 36, at 175-77; YUDOF ET AL., *supra* note 28, at 587-92; Stamm, *supra* note 14, at 1218 (stating further that "few, if any" pregnancy discrimination claims have been litigated under Title IX); *see also* Ling, *supra* note 17, at 2399 n.102 (noting that Title IX litigation has focused almost exclusively on the athletics regulations). The only judicial opinions issued on the matter of pregnant students' access to secondary education under Title IX have stemmed from their exclusion from extracurricular activities, specifically the National Honor Society. *See infra* Part IV.

75 For example, Amber Hausenfluck, *supra* note 28, at 170-71, describes one Texas case in which two sisters sued the school district for denying them homebound instruction and other services and encouraging them to leave school. The parties reached a negotiated settlement in which one sister reenrolled and the school district modified "its policies regarding pregnant students." *Id.* at 170.

"moral obloquy"[76] and licentiousness were perfectly valid reasons for expulsion and having "one child out of wedlock [could] forever brand [the girl] as a scarlet woman undeserving of . . . the opportunity for future education."[77] An advocate for teen mothers says that the girls are being forced out of school because "the school 'does not have insurance'" and they "would 'be better off just to drop out and get a GED' . . . ."[78] One author, as well, recounts stories from students in Texas, each involving a pregnant girl whose school directed her to leave.[79] One was told "to attend night classes or transfer";[80] others were summarily expelled.[81] One school received several thousand dollars in grant monies to provide services for pregnant teens, yet told a girl that no such services existed and that she was "being a 'bad influence on the other students.'"[82] In a somewhat chilling example, one of these girls sought judicial bypass to abort her second pregnancy because she could not endure the "humiliation" she suffered at the hands of teachers and school officials during her first pregnancy.[83]

The Center for Assessment and Policy Development (CAPD) notes that in many school districts, pregnant and parenting teens are discriminated against "[o]n a daily basis."[84] For example, the National Coalition for Women and Girls in Education says that "unlawful leave and absence policies" are one of "the most common barriers to education faced by pregnant and parenting students."[85] Some girls, overwhelmed by parenthood or experiencing postpartum depression, have difficulty keeping up with schoolwork and are expelled for missing too many classes.[86] Schools are suspending, expelling, or failing the girls for excessive absences when they miss school due to childbirth.[87] In fact, the CAPD lists "failed due to excessive absences," whether because of maternity leave or their infants' illnesses, as one of the types of discrimination they see regularly and in many school systems.[88] In addition, girls are often placed in lower-achievement academic tracks and special education programs.[89] They might also be told that their teachers do not expect

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76. Nutt v. Bd. of Educ., 278 P. 1065, 1066 (Kan. 1929).

77. Perry v. Grenada Mun. Separate Sch. Dist., 300 F. Supp. 748, 753 (N.D. Miss. 1969) (finding lack of moral character a valid ground for expulsion but not permitting the fact of a single birth to serve as the only evidence).

78. De Leon, *supra* note 1.

79. Hausenfluck, *supra* note 28, at 169-70.

80. *Id.* at 169.

81. *See id.* at 170-71, 170 n.126.

82. *Id.* at 170.

83. *Id.* at 169.

84. WOLF, *supra* note 45, at 1.

85. NAT'L COAL. FOR WOMEN & GIRLS IN EDUC., *supra* note 16, at 55-56.

86. *See*, *e.g.*, *In re* Shai F.-B., Nos. K09CP00007836A, K03CP00007837A, 2004 WL 3130540, at *3 (Conn. Super. Ct. Dec. 21, 2004).

87. *Id.*

88. WOLF, *supra* note 45, at 2.

89. *Id.*; De Leon, *supra* note 1.

them to be able to keep up with their schoolwork[90] or that they have no choice but to complete their studies at home.[91]

The No Child Left Behind (NCLB) legislation[92] complicates this problem. When pregnant and parenting teens—often already low achievers in danger of dropping out—have difficulty keeping up in their classes, their schools risk that the students will fail to perform at grade level on the NCLB-mandated assessments[93] and will bring down the schools' progress ratings.[94] Schools with poor progress ratings, in turn, could be required to undergo massive restructuring and funding reallocation.[95] Some schools actively encourage their low-achieving students to drop out for this reason.[96] On the other hand, NCLB now also requires school districts to reduce dropouts among "at-risk" students,[97] including pregnant and parenting teens,[98] so some schools feel great pressure not to report unacceptably high numbers of dropouts.[99] The bias against pregnant and parenting students—or at best, the bias against giving

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90. Hausenfluck, *supra* note 28, at 169.

91. *See id.* at 169; Ling, *supra* note 17, at 2406-07.

92. No Child Left Behind Act of 2001 (NCLB), Pub. L. No. 107-110, 115 Stat. 1425 (codified as amended in scattered sections of 20 U.S.C.). NCLB requires annual standardized testing in each public school in the United States as the measure of whether students are meeting federal standards of "adequate yearly progress" (AYP) in the key areas of science, reading, and mathematics. National Education Association (NEA): NCLB/Elementary & Secondary Education Act (ESEA), Adequate Yearly Progress, http://www.nea.org/esea/eseaayp.html (last visited Aug. 10, 2007); NEA: NCLB/ESEA, Testing and Assessments, http://www.nea.org/esea/eseatesting.html (last visited Aug. 10, 2007). Failure to meet AYP benchmarks may result in massive restructuring, mandated "school choice" programs, private tutoring, reallocation of federal education funding, and other major changes. NEA: NCLB/ESEA, School Improvement, http://www.nea.org/esea/eseaschools.html (last visited Aug. 10, 2007).

93. *See* OFFICE OF ELEMENTARY & SECONDARY EDUC., U.S. DEP'T EDUC., NO CHILD LEFT BEHIND: A DESKTOP REFERENCE 20 (2002).

94. *See* De Leon, *supra* note 1.

95. *See* discussion *supra* note 92.

96. *See* Julie Bosman, *Schools for Pregnant Girls, Relic of 1960s New York, Will Close*, N.Y. TIMES, May 24, 2007, at A1, *available at* http://www.nytimes.com/2007/05/24/education/24educ.html; *see* Ling, *supra* note 17, at 2407.

97. 20 U.S.C. § 6421 (Supp. IV 2004); *see* OFFICE OF ELEMENTARY & SECONDARY EDUC., *supra* note 93, at 53.

98. Norfolk, Va. Public Schools, *Glossary of Terms from the No Child Left Behind Act of 2001*, http://www.npsk12.com/nclb/glossary.htm (last visited May 3, 2007); *see also* OFFICE OF ELEMENTARY & SECONDARY EDUC., *supra* note 93, at 96.

99. *See* Michael Winerip, *The 'Zero Dropout' Miracle: Alas! Alack! A Texas Tall Tale*, N.Y. TIMES, Aug. 13, 2003, at B7, *reprinted in Houston's 'Zero Dropout'*, 18 RETHINKING SCHOOLS (FALL 2003), http://www.rethinkingschools.org/special_reports/bushplan/drop181.shtml. Houston, Texas made national news when its principals began massively underreporting dropouts, flatly falsifying data in order to "make their numbers" and allowing thousands of students to slip through the cracks. *Id.* (quoting Dr. Robert Kimball, an assistant principal in Houston who blew the whistle on the scandal).

them any extra assistance beyond what mainstream students receive[100]—means that schools are unlikely to take special measures to bring the girls' achievement scores up to grade level. When pregnant and parenting teens are at risk of dropping out, then, their schools might be even more motivated to move them to special education classes[101] or steer them toward other schools and school districts.[102]

Suspending, expelling, or failing students, encouraging them to drop out or transfer, and moving them to lower-track or special education classes are all clearly impermissible actions under Title IX. Section 106.40 of the regulations clearly states that girls may not be "exclude[d]

. . . from [the] education program . . . including any class" based on their pregnancies.[103] If the girls themselves feel that pregnancy or childcare is keeping them from staying caught up with their current classes and they wish to drop down to a less demanding academic track, the regulations certainly permit that, and the school may accommodate such a request so long as it is made "voluntarily."[104] However, the requests *must* come from the girls; the school is summarily forbidden from requiring or promoting such a move.[105] Regardless, it is certainly inappropriate to place a girl in special education classes unless she has a learning disability or other condition that would independently qualify her for such a program.[106] Ideally, the school would try to accommodate her and offer special programs like day care and flexible scheduling so that she

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100. *See*, *e.g.*, Anderson County Bd. of Educ., *supra* note 69 (stating that married, pregnant and parenting students "shall be expected to assume the same responsibilities . . . governing all students"); Interview with Kimberly Smith, *supra* note 17 (noting that school administrators in Knox County, Tennessee want to keep pregnant teens enrolled in school but are not comfortable giving them special treatment).

101. *See* De Leon, *supra* note 1. "[O]ften in the past, students with disabilities were excluded from assessments and accountability systems . . . ." U.S. DEP'T EDUC., MODIFIED ACADEMIC ACHIEVEMENT STANDARDS: NON-REGULATORY GUIDANCE 10-17 (2007), *available at* http://www.ed.gov/policy/speced/guid/nclb/twopercent.doc. Today, students in special education are able to take their NCLB-mandated tests with special accommodations and are held to a "modified" achievement standard. *Id.* at 11; Press Release, U.S. Dep't of Educ., New *No Child Left Behind* Provision Gives Schools Increased Flexibility While Ensuring All Children Count, Including Those With Disabilities (Dec. 9, 2003), *available at* http://www.ed.gov/news/pressreleases/2003/12/12092003.html; *see also* Individuals with Disabilities Education Act, 72 Fed. Reg. 17,748 (Apr. 9, 2007).

102. Bosman, *supra* note 96; De Leon, *supra* note 1; *see* NAT'L COAL. FOR WOMEN & GIRLS IN EDUC., *supra* note 16, at 2.

103. 34 C.F.R. § 106.40(b)(1).

104. *Id.*; *see* WOLF, *supra* note 45, at 1 ("Students must be able to choose voluntarily their educational option . . . .").

105. *See* 34 C.F.R. § 106.40(b)(1); WOLF, *supra* note 45, at 1.

106. *See* 34 C.F.R. § 104.3(j)(l) (defining "handicapped person" and "qualified handicapped person" for purposes of disability discrimination in education); 34 C.F.R. § 104.33(a), (b) (providing that all qualified handicapped persons shall receive special education as required to meet the students' individualized needs).

could receive the most rigorous education she was capable of achieving.[107] At a minimum, the school should do what it can to keep the girl enrolled in school and attending mainstream (or mainstream-comparable) academic classes.

B. Homebound Education and Special Programs

Some states' laws provide for homebound instruction for students with illnesses and disabilities;[108] under the Title IX regulations, these programs must be made available to pregnant and recuperating students, as well.[109] Homebound programs can be either permissive or mandatory[110] and they vary widely in terms of scope and requirements. When permissive, states might make grant money available to school districts to help offset the cost of such programs.[111] In a few instances, states have made special accommodations for pregnant students, school age parents, or both. For example, Tennessee's statutes are seemingly unique in that they include a separate chapter specifically providing "Homebound Instruction for Pregnant Students."[112] Wisconsin, meanwhile, has a "school age parent program" that requires school districts "to provide educational services for school age parents to enable them to continue and complete their education," though schools retain discretion to grant or deny requests for homebound instruction of student-parents.[113]

States may vary in whether they require homebound services to be provided by licensed educators. The homebound education program in Virginia requires its homebound teachers to be licensed in Virginia and to "be employed

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107. *See* NAT'L COAL. FOR WOMEN & GIRLS IN EDUC., *supra* note 16, at 56; Interview with Kimberly Smith, *supra* note 17.

108. *See*, *e.g.*, OFFICE OF SPECIAL EDUC. & STUDENT SERV., VA. DEP'T EDUC., HANDBOOK FOR HOMEBOUND SERVICES 2 (2007), *available at* http://141.104.22.210/VDOE/sess/Homebound.pdf; Hausenfluck, *supra* note 28, at 166-68, 167 n.101 (describing a Texas law permitting education services for pregnant and parenting students and two grant programs available to school districts); Wis. Dep't of Pub. Instruction, Homebound Instruction: A Question and Answer Document for School Districts 1 (October 1993) (on file with author), *available at* http://dpi.state.wi.us/sspw/pdf/homeboundqaforsd.pdf (interpreting WIS. STAT. § 118.15(1)(d)(5) (2005-06) to permit schools to grant parents' requests for homebound instruction to temporarily disabled students).

109. *See* 34 C.F.R. § 106.40(b)(4); WOLF, *supra* note 45, at 1.

110. *Compare*, *e.g.*, Wis. Dep't of Pub. Instruction, *supra* note 108, at 1 (stating that school districts are under no obligation to make such instruction available or, if they do so, to grant every parent's request) *with*, *e.g.*, TENN. CODE ANN. §§ 49-10-1101 to 1104 (2002) (mandating that all school districts provide homebound instruction upon request) *and* OFFICE OF SPECIAL EDUC. & STUDENT SERV., *supra* note 108, at 2 (stating that "[h]omebound services *are available* to all students enrolled in a public school in Virginia" (emphasis added)).

111. *See*, *e.g.*, Hausenfluck, *supra* note 28, at 166-68, 167 n.101.

112. TENN. CODE ANN. §§ 49-10-1101 to 1104 (2002).

113. Wis. Dep't of Pub. Instruction, *supra* note 108, at 2; *accord* WIS. DEP'T PUB. INSTRUCTION, INSTRUCTION AND SERVICES FOR SCHOOL AGE PARENTS 1 (2005), *available at* http://dpi.wi.gov/sspw/pdf/sapinstructs.pdf.

and supervised by school district officials."[114] Tennessee specifically requires the "[p]ersonnel providing the homebound instruction" to be licensed to teach in the state.[115] Wisconsin, too, requires that "teachers . . . in the school age parent program shall hold a Wisconsin license."[116] Michigan, on the other hand, permits homebound instruction to be provided in a variety of ways, from the student's own teacher to a substitute teacher to non-interactive devices like talking books and video recordings.[117]

Likewise, states vary in how much instruction they choose to offer their homebound students. For example, the amount of instruction provided to Virginia students varies according to individual needs, but high school students are to receive a minimum of five hours of instruction per week for two credit-bearing subjects, or a minimum of ten hours for three to four subjects.[118] Tennessee mandates that such instruction last exactly three hours per week for six weeks, extendable upon provision of a doctor's note stating that the girl is experiencing complications with the pregnancy.[119] Michigan states that school districts must provide homebound instruction but requires a minimum of only two forty-five minute periods per week.[120] Michigan also sets forth a policy seemingly in contradiction with Title IX, as it explicitly states that pregnant students do not normally qualify for homebound instruction; even if a doctor certifies that a girl is experiencing "complications with the pregnancy which may endanger the mother or the fetus," the policy states only that the school district *may* consider her for homebound services.[121] Wisconsin, on the other hand, has "no requirements as to the amount of time, time of day, or subjects covered" in a homebound instruction program.[122]

Some school districts also provide programs specifically targeting pregnant and parenting students. For example, Wisconsin "requires public schools to make program modifications and services available to any . . . school age parent that will enable the student to continue her or his education," though the particular modifications are left up to the discretion of the school district.[123] Michigan[124] and Texas[125] permit school districts to create special programs for pregnant and parenting students. In some other areas across the country,

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114. OFFICE OF SPECIAL EDUC. & STUDENT SERV., *supra* note 108, at 6.

115. TENN. COMP. R. & REGS. 0520-1-2-.10 (2006).

116. WIS. DEP'T PUB. INSTRUCTION, *supra* note 113, at 9.

117. MICH. DEP'T OF EDUC., PUPIL ACCOUNTING MANUAL: 5D–HOMEBOUND/HOSPITALIZED 1-2 (2005) (policy and procedure manual, on file with author), *available at* http://www.michigan.gov/documents/5D-HomeboundHosp_41433_7.pdf.

118. OFFICE OF SPECIAL EDUC. & STUDENT SERV., *supra* note 108, at 8.

119. TENN. COMP. R. & REGS. 0520-1-2-.10 (2006).

120. MICH. DEP'T EDUC., *supra* note 117, at 3.

121. *Id.* at 2 (emphasis added).

122. Wis. Dep't Pub. Instruction, *supra* note 108, at 2.

123. WIS. DEP'T PUB. INSTRUCTION, *supra* note 113, at 1.

124. MICH. COMP. LAWS ANN. § 380.1301(3) (West 2005).

125. Hausenfluck, *supra* note 28, at 166-68.

nonprofit organizations will provide these services.[126] The content of the programs, again, will vary widely, including anything from tutoring, career counseling, and job training to parenting skills classes, support groups, and child care services.[127]

Homebound instruction and special programs seem to be positive ways of helping pregnant and parenting teenagers stay caught up with their schoolwork and learn to manage their new responsibilities. While existing programs for pregnant and parenting teens are encouraging, states would do well to develop them more zealously and to follow the lead of those states with more expansive or academically rigorous services. At the same time, school districts must be careful to remember that students' participation must always be voluntary[128] and that any special program made available to teenage mothers must be equally available to teenage fathers.[129] Finally, school districts offering homebound instruction for students with temporary disabilities must offer it to pregnant and recovering girls on the same terms.[130]

C. Segregated Pregnancy Schools and Programs

Pregnant girls are often "steered towards separate and less academically rigorous schools,"[131] such as the pregnancy schools in Chicago,[132] Los Angeles,[133] and Madison, Wisconsin,[134] and, previously, the recently-closed pregnancy school program in New York City.[135] These schools, many of which came about in the 1960s and early 1970s, were intended to be a "compassionate" alternative for pregnant girls.[136] The schools were designed to give the girls a support network away from the judgmental environment of mainstream schools, teach job and parenting skills, and provide basic academic instruction, all with a focus on "individualized instruction and flexibility."[137]

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126. *See*, *e.g.*, Child & Parenting Skills Program (CAPS): The Florence Crittenton Agency, Inc., http://www.fcaknox.org/caps.html (last visited Apr. 27, 2007) (describing a program conducted in schools in Knoxville, Tennessee).

127. *See*, *e.g.*, *id.*; WIS. DEP'T PUB. INSTRUCTION, *supra* note 113, at 2.

128. *See* 34 C.F.R. § 106.40(b)(1).

129. *Id.* § 106.40(a).

130. *Id.* § 106.40(b)(4).

131. NAT'L COAL. FOR WOMEN & GIRLS IN EDUC., *supra* note 16, at 2; *see also* Bosman, *supra* note 96.

132. *See* Bosman, *supra* note 96.

133. *See id.*; Stamm, *supra* note 14, at 1203 n.1.

134. *See* Bosman, *supra* note 96.

135. *Id.*; Alisa Roth, *NYC to Close Schools for Pregnant Teens*, MARKETPLACE, June 22, 2007, *available at* http://marketplace.publicradio.org/shows/2007/06/22/PM200706224.html; *see* Ling, *supra* note 17, at 2387-89; Stamm, *supra* note 14, at 1203 n.1. The New York pregnancy schools closed at the end of the 2006-2007 school year. Bosman, *supra* note 96; Roth, *supra*.

136. BOLMEIER, *supra* note 29, § 6.5.

137. Ling, *supra* note 17, at 2397; *accord* BOLMEIER, *supra* note 29, § 6.5.

While there were advantages to this approach at the time the schools were first developed[138] and some of their students do still appreciate a few aspects like smaller class sizes and childcare workshops,[139] there is serious doubt that the schools continue to serve a useful purpose. Today, placing girls in pregnancy schools often increases, rather than decreases, the stigma attached to the girls; they become defined only by their pregnancy, rather than as well-rounded teenagers.[140] Moreover, the instruction offered in pregnancy schools is often not equivalent to the education provided by the girls' original schools;[141] indeed, descriptions of some of these programs indicate that they come nowhere near the "comparable" standard set forth in the Title IX regulations.[142] One New York school stopped offering math and English classes for an entire school year because there were no such teachers on staff.[143] Girls in another New York school's math class spent the afternoons sewing quilts; the principal said that this "tie[d] into geometry" because they were "cutting shapes."[144]

Pregnancy school students often become disillusioned with the quality of the schools and drop out in frustration or they earn so few credits that they are unable to "successfully ma[k]e a transition back to high school."[145] Title IX's "voluntary" requirement is also routinely ignored, as girls are often instructed to leave their home schools or coerced to do so through discriminatory treatment.[146] In the words of one advocate, "they are being *diverted* to pregnant-teen high schools, which often are *separate and not equal*."[147]

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138. BOLMEIER, *supra* note 29, § 6.5; Ling, *supra* note 17, at 2402.

139. Roth, *supra* note 135.

140. *See* Ling, *supra* note 17, at 2409-10.

141. WOLF, *supra* note 45, at 1.

142. *See* Bosman, *supra* note 96; Roth, *supra* note 135. *See generally* Ling, *supra* note 17, for an excellent description of the New York pregnancy schools ("P-schools"). For example, Ling describes one P-school as offering only a core curriculum of basic-level academic classes, a parenting skills class, and one hour a week of "Mommy and Me" as the school's sole extracurricular activity. *Id.* at 2403-04. The New York City Department of Education's directory of "alternative schools" indicated that the programs might have been expanding somewhat through the addition of special education classes and the option for 12th grade students to take community college classes, but the list of offered extracurricular activities still included only "college visitation" and a vague reference to "student activities." TIM LISANTE, N.Y.C. DEP'T OF EDUC., ALTERNATIVE SCHOOLS AND PROGRAMS DIRECTORY 10 (2005) (on file with author). Nevertheless, Summer 2007 news stories discussing the schools' closing indicated that the scope of the programs remained largely unchanged. *See* Bosman, *supra* note 96; Roth, *supra* note 135.

143. Roth, *supra* note 135.

144. Bosman, *supra* note 96.

145. *See id.*

146. *Id.*; *see* Ling, *supra* note 17, at 2406-08. In 2004, the New York Civil Liberties Union and the N.Y.C. Department of Education (DOE) settled a case involving forced pregnancy tests and gynecological exams by requiring, in part, that the DOE would "revise its school policy to make clear that . . . school officials cannot exclude students for being pregnant" and would train school principals and guidance counselors on the new policy. Press Release, N.Y. Civil Liberties Union, NYCLU Hails Victory for Students' Privacy Rights—Department of Education Settles Federal Lawsuit by Agreeing to Changes to

A more positive way to incorporate special services into pregnant girls' education would be to integrate services into the mainstream schools. School-based programs providing physical and mental health services, support groups, career counseling, child care, and social services would allow pregnant and parenting girls to receive the individualized assistance they need to continue their education. These services could also be made available to teenage fathers more easily[148] and the comparability issue would be resolved because mainstream students would be able to take advantage of them as well. Still, schools would have to be careful to ensure that pregnant and parenting teens' participation in specialized programs was entirely voluntary.

IV. EXTRACURRICULAR ACTIVITIES

> A pregnant student [Cosby] who was banned from graduation at her . . . high school announced her own name and walked across the stage anyway at the close of the program. . . . [H]er mother and aunt were escorted out . . . by police after Cosby headed back to her seat. . . . The school's guidance counselor delivered Cosby's degree to her house earlier Tuesday, but she still wanted to participate. "I worked hard throughout high school, and I wanted to walk with my class," she said. Cosby was told in March that she could no longer attend school because of safety concerns, and her name was not listed in the graduation program. The father of Cosby's child, also a senior at the school, was allowed to participate in graduation.[149]

The Title IX regulations are clear that schools may not exclude pregnant and recovering girls from extracurricular activities[150] and that any rule based on "actual or potential parental, family, or marital status" may not "treat[] students differently on the basis of sex."[151] Still, pregnant and parenting girls are often excluded from participating in extracurricular activities.[152] Again, there is an almost total absence of litigation in this area, except for several cases in which students have been excluded or dismissed from the National Honor Society

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Protect Students' Reproductive Health Privacy (Jan. 31, 2004), http://www.nyclu.org/thi/current_events/currentevents_archive.html#victory.

147. De Leon, *supra* note 1 (emphasis added); *accord* Bosman, *supra* note 96 (quoting the New York program's superintendent as saying that the programs are "separate but unequal" and that students "get pushed out of their original high schools").

148. Like teenage mothers, teenage fathers' equal access is also protected by the Title IX regulations. *See supra* Part III-B.

149. *Pregnant Grad Told to Skip Ceremony Takes the Stage*, CHI. SUN-TIMES, May 19, 2005, § News, at 6, *available at* 2005 WLNR 8243176 (reporting an incident at a school in Montgomery, Ala.). Cosby attended a parochial school, not a public school. *Id.* It is not clear from published news reports whether her school would have been bound by the Title IX regulations.

150. 34 C.F.R. § 106.40(b)(1).

151. 34 C.F.R. § 106.40(a).

152. WOLF, *supra* note 45, at 1; Belsches-Simmons, *supra* note 31, at 9.

(NHS). Courts are split as to whether pregnant girls may be barred from NHS.[153] Two of the main cases showing this divide[154] are *Pfeiffer v. Marion Center Area School District*[155] and *Wort v. Vierling*.[156]

Each school's NHS chapter is run by a faculty council which is responsible for making membership decisions.[157] The NHS handbook "requires that students be selected for membership on the basis of scholarship, service, leadership and character."[158] NHS defined "leadership," until recently, as "whether the student exerted the type of leadership which directly influences others for good conduct,"[159] and it still defines "character" as "whether the student upholds principles of morality and ethics."[160] These nebulous, subjective categories are an easy justification for schools looking to deny entry to pregnant students.

Both *Wort* and *Pfeiffer* involved NHS members dismissed on character grounds. In *Wort*,[161] an NHS member was dismissed from the school's chapter due to "deficiency of leadership and character."[162] However, the district court concluded that she had been "dismissed from the NHS because of her pregnancy or the acts leading up to her pregnancy,"[163] constituting sex discrimination in violation of Title IX and the Fourteenth Amendment.[164] *Pfeiffer*, too, involved a pregnant girl being dismissed from NHS on leadership and character grounds,[165] but here the district court distinguished premarital sexual activity from the resulting pregnancy and found that the premarital sex was the reason for Pfeiffer's dismissal.[166] Furthermore, the court found that the school's policy was not based on the sex of the student, meaning that the Title IX claim failed.[167] However, the Third Circuit Court of Appeals found that the district court had abused its discretion in excluding the testimony of a male student who was also in NHS.[168] This student would have testified that he told

153. YUDOF ET AL., *supra* note 28, at 587.

154. *See* ALEXANDER & ALEXANDER, *supra* note 28, at § 4.7.

155. 917 F.2d 779 (3d Cir. 1990).

156. No. 82-3169 (C.D. Ill. Sept. 4, 1984), *appeal dismissed*, 778 F.2d 1233 (7th Cir. 1985).

157. *See Pfeiffer*, 917 F.2d at 782.

158. *Id.*

159. *Id.* The current standard set by the organization suggests that students should be "resourceful" and "dependable" and should "exemplify positive attitudes about life," among other traits. Nat'l Honor Soc'y & Nat'l Junior Honor Soc'y, Membership, http://www.nhs.us/s_nhs/sec.asp?CID=125&DID=5269 (last visited Apr. 27, 2007).

160. *Pfeiffer*, 917 F.2d at 782.

161. 778 F.2d 1233.

162. *Id.*

163. *Pfeiffer*, 917 F.2d at 784 (quoting *Wort*, No. 82-3169, slip op. at 4).

164. *Wort*, 778 F.2d at 1234.

165. *Pfeiffer*, 917 F.2d at 782.

166. *Id.* at 784.

167. *See id.* at 784-85.

168. *Id.* at 785.

his teacher and other faculty that he had engaged in premarital sex and fathered a child, yet he was not dismissed from NHS.[169] In light of this potential testimony, the Third Circuit remanded the case to the district court to determine whether the council "followed a double standard" in deciding whether to dismiss students on the basis of sexual activity.[170]

In addition to this line of cases, a federal judge in Kentucky has used a disparate impact analysis to evaluate NHS dismissals. In *Chipman v. Grant County School District*,[171] Judge Bertelsman found the NHS chapter's criteria had a "significant adverse effect" on young, pregnant women.[172] Fully one hundred percent of pregnant girls and unwed mothers at the plaintiffs' school were barred from the society while none of the boys and childless girls who had engaged in premarital sex were dismissed.[173] Unlike the district judge in *Pfeiffer*, Judge Bertelsman was not persuaded that a proclaimed lack of discriminatory intent was sufficient to uphold the policy, because "proof of intentional discrimination is not required under a disparate impact theory."[174] He found that the burden had shifted to the defendants to show a "legitimate credible non-discriminatory reason" for using premarital sex—and therefore pregnancy—as an indicator of character.[175] He then concluded that they had been unable to meet that burden.[176] Judge Bertelsman issued a preliminary injunction against the policy and indicated that the plaintiffs were likely to succeed at trial in obtaining a permanent injunction.[177]

These cases suggest that, generally, courts will not uphold an exclusionary NHS membership policy that is clearly based on pregnancy per se or on premarital sex as a pretextual cover for pregnancy discrimination. On the other hand, a court will likely uphold a premarital sex policy as long as it is genuine and apparently would be applied even-handedly to both boys and girls regardless of pregnancy or parenthood. If, however, the disparate impact analysis advanced in *Chipman* takes hold, plaintiffs will not have to prove discriminatory intent to succeed on a Title IX claim. If courts continue to insist on entertaining the use of premarital sex as an indicator of character or leadership ability, the *Chipman* analysis will be much more successful in uncovering discriminatory policies than will the *Pfeiffer* approach, which essentially lets educators promise they have not learned of any sexually active teenage boys. Still, a bright-line rule against these exclusionary policies, regardless of whether they are based on pregnancy or "the acts leading up to

169. *Id.*
170. *Id.* at 786.
171. 30 F. Supp. 2d 975 (E.D.Ky. 1998).
172. *Id.* at 979.
173. *Id.*
174. *Id.*
175. *Id.* at 980.
176. *Id.*
177. *Id.*

her pregnancy,"[178] seems to be the simplest and most forceful way to protect teen mothers' rights.

From the NHS litigation, we may begin to extrapolate how the courts might view exclusion from other extracurricular activities, such as clubs, bands and choirs, student government, school-sponsored social activities, and ceremonies. The use of pregnancy and premarital sexual activity as indicators of character were key to the NHS cases, so other organizations with similar mission statements or membership criteria, such as student government or perhaps faith-based clubs, would presumably be subject to the same analytical frameworks. On the other hand, those whose only membership criteria relate to, for example, singing ability or enrollment in French classes would not have the cover provided by NHS-type rules and should have greater difficulty justifying an exclusionary policy based on either premarital sex or pregnancy. In those cases, the plain language of the regulations—stating that a school "shall not . . . exclude any student from . . . any class or extracurricular activity[] on the basis of such student's pregnancy"[179]—ought to control the outcome. The regulations do not clearly identify ceremonies such as awards banquets and commencement exercises as "extracurricular activities," so the applicability of Title IX's protections are unclear in that regard. Since the Supreme Court has previously commented in the First Amendment context on the importance of graduation ceremonies as a teenage right of passage,[180] judges who do not recognize such ceremonies as full-fledged extracurricular activities might nevertheless be persuaded that they should come within the scope of Title IX's protections.

V. CONCLUSION

> "By my junior year . . . I was planning to drop out and get my GED. . . ."
> This spring [L.R.] graduated from South-Doyle High School. ". . . Without CAPS [the Child and Parenting Skills program] . . . I wouldn't have had the energy to keep fighting all these problems and graduate. CAPS gave me people to talk to and let me know that I wasn't the only one."
> "It was the best thing I did for myself. . . . [The] CAPS program coordinator . . . just kept asking me, 'What are you going to do after high school, [L.R.] . . . ?'"
> This very together young lady . . . has her high school diploma and a very definite plan. "I want to work to be a registered nurse. I am

178. *Pfeiffer*, 917 F.2d at 784 (quoting *Wort*, No. 82-3169, slip op. at 4).
179. 34 C.F.R. § 106.40(b)(1).
180. Lee v. Weisman, 505 U.S. 577, 595 (1992).

> going to try to get a job in a nursing home to start with and then I am going to take CNA classes and I want to be a nurse eventually."[181]

Title IX provides strong protection against discrimination for pregnant and parenting teenagers in public schools. However, unfocused enforcement by the federal government, the pressure to marginalize underperforming students, and widespread lack of awareness of these Title IX regulations means that schools are making insufficient progress toward protecting their students from expulsion and exclusion. Students are being steered far too often into inadequate alternative classes and programs and being denied participation in extracurricular activities.

Pregnancy and childbirth implicate many other areas of student rights, as well. The Fourteenth Amendment might be relevant to students' equal access claims along with Title IX. Constitutional rights, as well as the protections of HIPAA,[182] FERPA,[183] and the PPRA,[184] arise when girls are required by their schools to have gynecological exams and pregnancy tests and to reveal those test results to the school administration. These rights might also be infringed when school officials reveal girls' pregnancies to other students, teachers, and the girls' parents. The emerging area of accommodations looks beyond these "negative rights" to such matters as flexible scheduling, day care, and special programs designed to teach wellness and parenting skills to pregnant girls while helping them stay in mainstream schools. Nevertheless, the most basic rights to access as granted by Title IX remain vitally important.

Fortunately, some positive advances in access to education, such as homebound education, supplemental programs, and school-based services, are beginning to take hold. The National Honor Society litigation also offers a glimpse of how the courts may be used to improve teen mothers' circumstances. Still, much work remains to be done. Only with concrete support and diligent advocacy, will Title IX live up to the promise it makes to pregnant and parenting girls.

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181. Success Stories at the Florence Crittenton Agency, Inc., http://www.fcaknox.org/success1.html (last visited Apr. 27, 2007).

182. Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of 18, 29, & 42 U.S.C.).

183. Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g (2000).

184. Protection of Pupil Rights Amendment, 20 U.S.C. § 1232h (2000).