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ABSTRACT

School policy on teenage pregnancy must take into account a variety legal considerations. Up until recently, the favored way of dealing with pregnant pupils or pupils who are mothers was to exclude them from school. Several law cases involving instances of exclusion and segregation of pregnant pupils are cited. The 14th Amendment's guarantee of equal protection is described as well as four cases involving teenage pregnancy and education. Title IX to the Education Amendments is discussed with relation to unlawful discrimination. The statute prohibits sex discrimination in any program or activity receiving federal financial assistance. Several state laws are discussed: compulsory attendance (South Carolina), expulsion (Michigan), public accommodation (Colorado), and sex discrimination (Alaska). Finally, extracurricular activities and policy issues are focused upon with regard to segregating and excluding pregnant girls and mothers. (SI)

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Teenage pregnancy rates have risen phenomenally. Statistics show that forty percent of girls who are now 14 will become pregnant during their teenage years. Of these, twenty percent will have the child, and ninety percent of those will keep the child. Most of these young women are compelled, because of their age, to attend school. Despite evidence that indicates that teenage pregnancy and parentage is rampant — crossing geographical, socioeconomic, and racial lines — most states have no comprehensive policy for dealing with the pregnant student, or the student who is a parent. Where these policies do exist they can be divided into two general categories: rules excluding or segregating pregnant girls and mothers and rules restricting their participation in extracurricular activities. Construction of the fourteenth amendment, Title IX, and state law will determine if disparate treatment of these children is legal, and provide guidance on the best approach to these problems.

Excluding or Segregating Pregnant Pupils

Up until recently, the favored way of dealing with pregnant pupils or pupils who are mothers was to exclude them from school, or segregate them from the general student population. Several courts have considered cases where a child was excluded from school either during or after pregnancy, with varying results.

In 1929, the Kansas Supreme Court ordered a school district to allow a teenage mother to continue her education. Dorothy Nutt was denied the right to attend school after she became pregnant out of wedlock, married, and then separated from her husband. Construing the general education statutes, the court in Nutt v. Goodland,[1] noted that the state had vested in school boards the authority to "exclude from association with the school any one who may be or become undesirable from either physical malady or moral obloquy." The court noted:

> [t]he public schools are for the benefit of children within school age, and efficiency ought to be the sole object of those charged with the power and privilege of managing and conducting the same, and while greater care should be taken to preserve order and proper discipline, it is proper also to see that no one should be denied the privilege of attending school unless it is clear that the public interest demands the expulsion of such pupils or a denial of his right to attend.[2]

The court recognized that under this authority a child could be excluded from school because of a "licentious or immoral character," but concluded that conception of a child out of wedlock was not a good enough reason to classify the child as immoral.

The instances in which a school can legitimately exclude students for alleged licentious or immoral conduct are limited. In Tinker v. Des Moines Independent Community School District[3] the court held that school officials may not infringe on a fundamental right except where the exercise of the right would constitute a "substantial disruption of or material interference with school activities."[4] The Tinker court found that the

fundamental right to free speech as protected in the first amendment was violated when students were excluded from school because they wore armbands which symbolized their dissatisfaction with the Vietnam War. Unwed parentage is not "speech", so the Tinker rule cannot be applied unless a fundamental right can be identified. The Supreme Court has recognized that the right to privacy includes the fundamental right to procreate. In Eisenstadt v. Baird, Justice William Brennan noted "if the right to privacy means anything, it is the right of the individual, married or single, to be free from unwanted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[5]

Since a fundamental right is at stake, the Tinker rule, if applied to regulations governing the education of pregnant students, requires school officials to demonstrate that the continuing presence of these pupils in the schools creates a substantial disruption in the school.[6] Given the subjectivity of this test, determination must be made on a case-by-case basis. A general rule excluding all pregnant teens or teens who are parents would be an unconstitutional infringement on the right to privacy.

Equal Protection

The fourteenth amendment's guarantee of equal protection was the basis for the 1969 decision in Perry v. Grenada Municipal School District.[7] In Perry, two unwed mothers alleged that the school board policy of excluding unwed mothers from school was a violation of the equal protection clause. The court agreed, finding that this policy was an invidious discrimination, and noted:

> [A]ny rule which fastens on one wrong, and never permits a person to change his position or condition is indeed on tenuous grounds.
>
> . . .
>
> It [the policy of exclusion] is arbitrary in that the individual is forever barred from seeking a high school education. Without a high school education, the individual is ill equipped for life, and is prevented from seeking higher education.
>
> . . .
>
> [T]he court holds that plaintiffs may not be excluded from the schools of the district for the sole reason that they are unwed mothers. . .[8]

In 1972 Della Jean Houston was expelled from regular classes after the birth of her child. It was the policy of the Decatur Board of Education that any person who was married or a parent was automatically excluded from day classes, but could attend adult education classes providing the student paid tuition. In Houston v. Prosser,[9] a Georgia federal district court found that, while Houston had a fundamental right to procreate, the exclusion policy did not infringe the exercise of her rights or violate her right to equal protection. The court applied the rational-basis test after finding that no suspect class or fundamental right was affected by the policy. Generally, when the rational-basis test is applied to a state policy, the policy is upheld as furthering some legitimate state purpose. Finding that the purpose of the policy was to maintain discipline in the schools, the court said:

> [t]here is no dispute that students who marry or who become parents are normally more precocious than other students. Because of their precociousness, it is conceivable that their presence in a regular daytime school could result in the disruption thereof. Defendants policy . . . is rationally related to the legitimate state purpose of maintaining discipline in

the school. Therefore, the court finds defendants' policy has a rational basis and does not deny plaintiff the equal protection of the law.[10]

Although the Houston court found that the exclusion policy did not violate equal protection, the court held that since children in regular school were not required to pay, Della Jean was denied equal protection to the extent that indigency precluded her attendance at night school. Equal protection required that she be allowed to attend night school free of charge.

In recent years, the U.S. Supreme Court has recognized an intermediate level of scrutiny in equal protection cases.[11] This middle tier acknowledges that some groups of people and some rights (though neither fundamental rights or suspect classes) deserve stricter scrutiny than the rational-basis test. Sex is one of these middle-tier classes and access to education is one of these middle-tier rights. Under this test, a classification will be upheld only if some substantial state interest is served by the classification. However, the Court has consistently held that classifications based on pregnancy are not sex discrimination.[12] Thus, it appears that distinctions based on pregnancy under the fourteenth amendment will continue to be judged by the more lenient rational-basis test.

The same is not true for education, however. The Supreme Court has held that education is not a fundamental right under the U.S. constitution and so cannot be judged under the strict-scrutiny test.[13] However, in 1982, the Court indicated that in at least some circumstances, education had to be measured by more than the rational-basis test. In Plyler v. Doe,[14] the Supreme Court considered a Texas statute that allowed school districts to refuse a free education to children who were, or whose parents were, illegal aliens. The court applied the middle-tier analysis, declaring that the statute could be upheld only if it furthered some substantial state interest. Finding no such state interest, the court overturned the statute. Though it is not entirely clear when the Court will apply intermediate scrutiny to a policy governing education, it is clear that a policy denying education must be justified by some substantial state interest. On the question of teenage pregnancy, outright denial of the right to attend school, as in Nutt, Ordway and Perry, would violate equal protection rights. On the other hand, providing separate classes, separate schools or adult education, as long as they are free of charge and substantially equivalent to "regular" school, will survive federal equal protection scrutiny.

Sixteen states have passed equal rights amendments (ERAs) to their state constitutions.[15] Equal rights amendments make sex a suspect classification in equal protection analysis. In these states, sex-based classifications would be analyzed more strictly than under the state equal protection clauses or the fourteenth amendment. These state courts will, of course, have to decide whether a classification based on pregnancy is a sex-based classification, but assuming they do, any state policy affecting girls who are pregnant would seemingly have to be justified by a compelling state interest.

Some states have recognized, under the state constitution's education clause, that education is a fundamental right.[16] Therefore, in these states, policies infringing the right to be educated will require strict-scrutiny analysis. Although there is little precedent construing the parameters of the right to education, a recent California case overturned a policy requiring payment of fees for extracurricular activities as an infringement of the fundamental right to a free public education.[17] On the other hand, a New Jersey court applying the same analysis concluded that despite the fundamental right to an education, school districts could require parents (who were able) to pay for some cost associated with the education of a profoundly retarded child.[18] As applied to

teenage pregnancy, where a fundamental right to an education is recognized by the state, policies prescribing exclusion or mandatory alternative schooling will probably not survive equal protection scrutiny.

Due Process

The fourteenth amendment's due process clause requires, at minimum, that a person be given notice and an opportunity for a hearing before being denied a right or privilege. The Perry court found that unwed mothers could not be barred forever from obtaining an education, unless "on a fair hearing they were found to be so lacking in moral character that their presence in the schools will taint the education of other students."[19]

In Houston v. Prosser, the court held that the policy of requiring teenage parents or married students to attend night school did not deny due process because the student was not "penalized by the policy or deprived of any entitlement".[20] Again, the result depends on whether there is effective denial of an education. If expulsion is total and irreversible, the due process clause requires a hearing prior to denial of the right. If the expulsion is temporary or if alternative instruction is given, the due process clause is satisfied.

Title IX

In 1972, Congress passed Title IX to the Education Amendments.[21] The statute prohibits sex discrimination in any program or activity receiving federal financial assistance. The United States Department of Education has promulgated regulations under the statute, which are binding on "any State or political subdivision thereof, or any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended."[22] The regulations prohibit discrimination in admissions based on marital or parental status:

> In determining whether a person satisfies any criterion for admission, or in making any offer of admission, a recipient . . .
>
> (2) Shall not discriminate against or exclude any person on the basis of pregnancy, childbirth, termination of pregnancy, or recovery therefrom, or establish or follow any rule or practice which so discriminates or excludes;
>
> (3) Shall treat disabilities related to pregnancy, childbirth, termination of pregnancy, or recovery therefrom in the same manner and under the same policies as any other temporary disability or physical condition.[23]

Although some have maintained that the admissions requirements under Title IX are applicable only to institutions of higher education, this is not supported by the language of the statute. Sex discrimination in admissions may be more prevalent on the university and college level, but Title IX applies equally to elementary and secondary education. Thus, any decision to exclude or otherwise discriminate against pregnant girls, mothers, or married students must take Title IX into consideration, if the program or activity is supported in whole or in part by federal funds.

The Supreme Court has held that Title IX is program specific.[24] This limits the regulation and enforcement powers of federal agencies to a specific program receiving federal funds. Although the definition of a program is not entirely clear, funds

earmarked for a specific activity and indirect funds that may be shown to benefit a particular program will invoke Title IX coverage.[25] In the case of pregnant teens, who could conceivably be excluded from many programs, which may be supported by federal funds, school officials should be careful not to jeopardize these funds by unlawfully discriminating against this group of students.

State Law

Most states have nothing in their state codes dealing with teenage pregnancy. Those that do typically excuse the pregnant student from compulsory attendance requirements. Excusing the child from compulsory attendance will not, however, excuse school officials from the duty of providing the child with free public education.

In South Carolina, for example, the compulsory attendance law will not apply to; "Any child who is married or has been married, any unmarried child who is pregnant or any child who has had a child outside of wedlock."[26] The pregnant, married or child who is a parent may, under this statute, decide not to attend school without being truant. However, South Carolina law otherwise obligates the state to educate all persons between the ages of 5 and 21.[27]

Michigan law prohibits expulsion of students because they are pregnant or have had children, and allows school districts to choose alternative programs to meet the educational needs of these students. That law provides:

> (1) A person who has not completed high school may not be expelled or excluded from a public school because of being pregnant.
>
> (2) A pregnant person who is under the compulsory school age may withdraw from a regular public school program in accordance with rules promulgated by the state board.
>
> (3) The board of a local or intermediate school district may provide an accredited alternative educational program for school age expectant parents and school age parents and their children, or provide a program of special services within the conventional school setting, or contract with another school district offering the educational program.[28]

State civil rights laws, though not explicitly considering teenage pregnancy, may also provide protection for these girls. A District of Columbia law provides:

> [i] t is an unlawful discriminatory practice . . . for an educational institution . . to deny, restrict or to abridge or condition the use of, or access to, any of its facilities and services to any person otherwise qualified, wholly or partially, for a discriminatory reason, based upon the . . . sex, . . . marital status, [or] . . . family responsibilities . . . of any individual.[29]

This statute obviously prohibits discrimination because of pregnancy or parental status. Although most state civil rights laws are not as broad in terms of groups covered or acts prohibited, courts have traditionally given very broad construction to these statutes.Thus, in Colorado, where a place of public accommodation is defined to include educational institutions, the following statute will probably give some protection to pregnant girls and unwed parents:

> [i]t is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or group, because of race, handicap, creed, color, sex, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation . . . .[30]

Finally, several states have passed civil rights laws that resemble Title IX in form and effect. These laws prohibit discrimination based on sex in any program or activity receiving state financial assistance. In Alaska:

> [r]ecognizing the benefit to our state and nation of equal educational opportunities for all students, . . . discrimination on the basis of sex against [a] . . .student in public education in Alaska violates [the Alaska Constitution] and is prohibited. No person in Alaska may on the basis of sex be excluded from participation in or denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal or state financial assistance.[31]

Where these statutes do not explicitly consider discrimination on the basis of pregnancy unlawful sex discrimination, courts, when confronted with such a case, will have to determine whether these civil rights provisions can be construed to grant this protection. Although case law construing state civil rights statutes have not considered the specific issue of state policies on teenage pregnancy, it is likely that some of these statutes will be construed to grant civil rights protection.

Extracurricular Activities

School districts often prohibit girls who are pregnant or who have had children from participating in athletics, clubs and other extracurricular activities. As well, married male students are often excluded from athletic programs and other extracurricular activities. Equal protection and due process analysis in these cases is different from denial of education because participation in extracurricular activities is not considered an entitlement or a right.[32] Thus, in these areas, students have less protection than where access to an education is limited.

Due process clauses require notice and a hearing where a right or entitlement is denied. In a non-pregnancy case, Karnstein v. Pewaukee School Board,[33] failure to select a qualified student for National Honor Society membership was held not to be a denial of due process. The court held "an applicant for membership in the National Honor Society has no constitutionally protected liberty or property interest in election to the society. The procedures governing the selection process, therefore, need not guarantee to an applicant the requirements of due process of law."[34] A similar analysis would apply where denial of an honor to a child was based on pregnancy or parenthood.

However, the result would be different if the school ruled that regardless of merit, no child who is pregnant or a parent, could be granted membership. Such a rule creates a classification (of pregnant students or teenage parents) and the equal protection clause will apply. The result, once the equal protection clause is applied, is that the fundamental right to privacy would be infringed, and the state then must establish a compelling state interest to justify the exclusion. In ERA states, the exclusion would have to be justified by a compelling state interest.

The cases where married boys are excluded from extracurricular activities provide an interesting parallel to the teenage pregnancy cases. The law in these cases is likely to provide very reliable precedent to the teenage pregnancy issue.

In 1969, a Louisiana state court upheld a school board regulation that prohibited married students from participating in extracurricular activities.[35] In the face of a claim that equal protection was denied, the court found no violation because all students who were married were treated similarly by the regulation. Further, the court found that the school board had authority to impose the limitation because "any rule or regulation reasonably calculated to insure that each student complete his high school education is within the scope of the authority granted by the statute."[36]

This rationale is no longer tenable. The Supreme Court has recognized that the right to marry is a fundamental right, and as such any classification that discriminates against people because of their marital status must be justified by a compelling state interest.[37] Thus, in Bell v. Lone Oak Independent School District,[38] the court held that a school board regulation that excluded married students from participation in extracurricular activities violated the equal protection clause. The court found that even though the school board was not required to provide extracurricular activities, once the decision to provide them had been made, the programs must be administered "in a manner not calculated to discriminate against a class of individuals who will be treated differently from the remainder of the students, unless the school district can show that such rule is a necessary restraint to promote a compelling state interest."[39]

A Question of Policy

Several policy issues come to mind on the question of segregating or excluding pregnant girls and mothers. These issues are not necessarily embodied in law, but raise questions of what constitutes "good" public policy.

First, teenage pregnancy is a growing national problem affecting huge numbers of students directly and indirectly. Legislatures should consider whether denial of equal education opportunity is an appropriate response to the problems of the child who is a parent. Is the problem of teenage promiscuity handled by dealing only with those children who are "caught" by reason of their pregnancy or parenthood? Legislation prescribing sex education, planned parenthood, parenting classes and counseling might better serve the legislative concern.Second, a policy that segregates pregnant girls or mothers inherently perpetuates the myth that boys who are fathers bear no responsibility for their actions in siring children. Surely, this is not the lesson that the legislature wishes to teach. Consequently, if a policy segregating children who are parents or about to become parents seems necessary, it should logically include the boys who father these children.

Finally, a high school education has become essential for obtaining even the most menial jobs. Denying a quality education to children who have already demonstrated a need to earn a living by virtue of their status as parents, while arguably protecting the state interest in a "moral" environment in the schools, creates and perpetuates ignorance and poverty. Certainly the state's interest in eradicating illiteracy, and preparing children for the world of work through quality education far outweighs any unproven allegations that children who are parents taint the morals and interfere with the education of children who are not parents.

Conclusion

Until the last twenty years or so, the phenomenon of teenage pregnancy was handled with relative ease. The girl either shouldered the entire burden by voluntarily leaving school for the duration of her pregnancy and beyond, or enrolled in special schools for unwed mothers, sometimes provided by the school district. However, young mothers and mothers-to-be no longer wish to be segregated from other students or forego the opportunity to receive an education. The challenge for school officials and state policy makers is to fashion policy which addresses the changing morality, yet ensures that quality education for both pregnant and non-pregnant students is not sacrificed.

FOOTNOTES

1. Nutt v. Goodland, 278 P. 1065 (Kan. 1929).

2. Id. at 1106.

3. 393 U.S. 503 (1969).

4. Id. at 514.

5. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (invalidating a statute which limited the availability of contraceptives to unmarried persons).

6. This reasoning was adopted in 1971 by the United States District Court in Massachusetts. In Ordway v. Hargraves, 323 F. Supp 1155 (D. Mass 1971) a preliminary injunction was issued ordering a high school principal to readmit a student to regular classes despite her pregnancy. The Ordway decision was issued prior to Eisenstadt so does not rely on the fundamental right to privacy as a basis for application of the Tinker rule, but apparently relied on the now disputed belief that there was a federal fundamental right to an education. While not clearly relying on equal protection, or due process the court nevertheless, found that excluding Fay Ordway from classes, even though she was allowed to continue her education by receiving assignments and after-school tutoring at no cost, was unjustified. The court citing Tinker found that since the school could not show that there was a "likelihood that her presence will cause any disruption of or interference with school activities or pose a threat of harm to others," Id. at 1158, she should be readmitted.

7. 300 F. Supp. 748 (N.D. Miss. 1969).

8. Id. at 753.

9. 361 F. Supp. 295 (N.D. Ga. 1973).

10. Id. at 299.

11. Mississippi University for Women v. Hogan, 102 S. Ct. 3331 (1982).

12. See, Geduldig v. Aiello, 417 U.S. 484 (1974) (held failure to provide disability benefits for pregnant employees is not sex discrimination unless it is shown that the distinction based on pregnancy is a "mere pretext" to invidious discrimination based on sex).

13. San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) (held there is no federally recognized "fundamental" right to an education).

14. Plyler v. Doe, 102 S. Ct. 2382 (1982).

15. Alaska, California, Colorado, Connecticut, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Mississippi, Montana, New Hampshire, New Mexico, Pennsylvania, Texas, Utah, Virginia, Washington and Wyoming have equal rights amendments to the state constitution.

16. Shofstall v. Hollins, 515 P.2d 590 (Ariz, 1983); Serrano v. Priest, 487 P.2d 1241 (Cal. 1971) (Serrano I); Horton v. Meskill, 172 Conn. 615 (Conn. 1976); Knowles v. State Board

of Educ., 547 P.2d 699 (Kan. 1976); Robinson v. Cahill, 62 N.J. 473 (N.J. 1973) (Robinson I); In Re G.H., 218 N.W.2d 44, (N.D. 1974); Seattle Sch. Dist. Nal v. State, 247 N.W.2d 71 (Wash. 1979); Buse v. Smith, 247 N.W.2d 141 (Wis. 1976); Washakie County Sch. Dist. No. 1 v. Herschler, 606 P.2d 310 (Wyo. 1980), cert. denied, 449 U.S. 824 (1980).

17. Hartzell v. Connell, 201 Cal. Rptr. 601 (Cal. 1984) (held, citing Serrano I, supra, note 16, requiring a fee for participation in extracurricular activities violates the free school provision).

18. Levine v. Institution and Agencies Department, 84 W.J. 234, 418 A.2d 229 (W.J. 1980) (held, despite Robinson I, supra note 16, state constitution did not require completely free institutionalized case of a profoundly handicapped child).

19. 300 F. Supp. at 753.

20. 361 F. Supp at 298-299.

21. 42 U.S.C.A. secs. 1681 through 1986 (1978).

22. 45 C.F.R. sec. 86.2(h) (1981) (definition of a "recipient.").

23. 45 C.F.R. sec. 86.21 (c)(2),(3) (1981).

24. North Haven Board of Education v. U.S., 102 S. Ct. 1912 (1982).

25. Grove City College v. Bell, 104 S. Ct. 1211 (1984) interpreting 20 U.S.C. sec. 1691(a) (1978). However, the "program specific" application in this case may be eliminated by passage of the Civil Rights Act of 1984 which makes it clear that Title IX and several other federal civil rights statutes do not require program specificity as threshold to federal enforcement.

26. S.C. Code sec. 59-65-30 (a) (1976).

27. S.C. Code sec. 59-63-20 (1976).

28. Mich. Comp. Laws Ann. sec. 380.1301 (West Supp. 1983).

29. D.C. Code Ann. sec. 1-2520 (a) (1981).

30. Colo. Rev. Stat. sec. 24-34-601 (2) (1981). Thirty-five states have statutes guaranteeing access to places of public accommodation; seven states expressly include schools in the definition of a place of public accommodation; five states include recipients of state subsidies; in recent years only New Mexico has held that schools are not included in the definition of a place of public accommodation, and this was limited to administrative decisions, the court reserving the question of whether issues of access to schools would be included. See Human Rights Commission v. Board of Regents, 624 P.2d. 518 (N.M. 1981).

31. Alaska Stat. sec. 14.18.010 (1982). Arizona, Arkansas, California, Louisiana, Maryland, New York, North Dakota, Oregon and Texas have similar statutes. See, Belsches-Simmons, G. State Civil Rights Laws, LEC 83-16 (1983), Table Four for citations and language.

32. But see. Hartzell v. Connell, supra, note 17.

33. 557 F. Supp. 565-567 (1983).

34. Id. at 565-567.

35. Estay v. LaFourche Parish School Board, 230 So. 2d 443 (La App. 1969).

36. 230 So. 2d at 446.

37. Loving v. Virginia, 388 U.S. 1 12 (1976) (held marriage is "one of the vital personal rights essential to the orderly pursuit of happiness.")

38. 507 S.W. 2d. 636 (Tex. App. 1974).

39. Id. at 638.