

# HOLLOW PROMISES FOR PREGNANT STUDENTS: HOW THE REGULATIONS GOVERNING TITLE IX FAIL TO PREVENT PREGNANCY DISCRIMINATION IN SCHOOL

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## INTRODUCTION

Teen pregnancy has been long decried as a plague on America, and fighting teen pregnancy has received vast resources and intense attention since it began to be publicly acknowledged as a problem in the late 1960s.<sup>1</sup> Unfortunately, too often those who fight teen pregnancy fail to notice the difference between eradicating teen pregnancy and eradicating pregnant teens. Not long ago the driving policy implemented to rid society of teen pregnancy was to abolish the pregnant teen from school, where, the theory went, she would be seen and copied by other teens. In the 1970s, the unfairness of the practice of purging schools of pregnant teens appeared to have been recognized by Congress when it passed Title IX and authorized its implementing regulations (“Regulations”).<sup>2</sup> Unfortunately, the Regulations were and continue to be, weak and do little to stop schools that discriminate against pregnant teens.

In 1973, Congress passed Title IX with the intent to equalize educational opportunities for young women.<sup>3</sup> A few years later, the Department of Health, Education, and Welfare (HEW)<sup>4</sup> enacted Regulations to clarify the rights and responsibilities of the schools and students, including pregnant students, governed by Title IX.<sup>5</sup> The Regulations have weak provisions intended to protect pregnant students from discrimination in school. HEW must strengthen the Regulations to require that school administrators learn about how to treat pregnant students lawfully, to provide regulators the best opportunity to root out pregnancy discrimination when it happens, and to punish schools that violate the law.

Until the early 1970s, it was common for pregnant students to suffer terrible

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1. Helen Rauch-Elnekave, *Teenage Motherhood: Its Relationship to Undetected Learning Problems*, *ADOLESCENCE*, Spring 1994, at 91, 91 (stating that the problem of teenage parenthood, a significant social problem in the United States since the late 1960s, has been the subject of much study).

2. *See* 20 U.S.C. § 1681(a) (2006); 34 C.F.R. § 106.40 (2009).

3. 20 U.S.C. § 1681(a).

4. HEW was split and renamed the Department of Health and Human Services and the Department of Education in 1980. *See* Department of Education Organization Act, Pub. L. No. 96-88, § 509(e), 93 Stat. 695 (1973) (codified at 20 U.S.C. §§ 3508, 3411 (2006)).

5. *See* U.S. COMM’NON CIVIL RIGHTS, ENFORCING TITLE IX 2-10 (1980), [http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content\\_storage\\_01/0000019b/80/39/84/56.pdf](http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/39/84/56.pdf) [hereinafter 1980 COMMISSION R.].

treatment at the hands of their educators.<sup>6</sup> Pregnant students were expelled from school, sent to homes in distant towns or states when their pregnancies became visible, hidden from the public, and essentially scorned from society.<sup>7</sup> In 1980, after being forced by litigation to confront rampant school noncompliance with Title IX, HEW implemented the Regulations to, among other things, give force and effect to the protections in Title IX afforded to pregnant students.<sup>8</sup> HEW meant the Regulations to do several things, including protect pregnant students from school pressure to drop out or temporarily leave during their pregnancy.<sup>9</sup> The Regulations require federally funded schools to provide education to pregnant girls and to give them a choice regarding the location of their schooling.<sup>10</sup> Young women who are pregnant can continue at the school they attended when they became pregnant or at an alternative school for pregnant or parenting teenagers.<sup>11</sup>

Although well intended, the protections in the Regulations are not adequate to educate, identify, and punish school administrators who treat pregnant students unlawfully. This lack of accountability can result in flagrant violations of the Regulations and Title IX that negatively impact educational opportunities for pregnant students. In theory the Regulations do three things. First, they guarantee a pregnant student's right to public education. Second, they promise that the education she receives will be equal to the education she would receive if she were not pregnant. Third, they give her the option of staying in her mainstream school or going to an alternative school during her pregnancy that provides an equivalent education to her mainstream school. In reality, the weak and incomplete Regulations leave pregnant students at the mercy of their educators who may, through animus or ignorance, treat pregnant students unlawfully with few or no legal repercussions.

The Regulations have inadequate mechanisms to ensure that schools and administrators know of or heed their dictates, and courts do little, if anything, to enforce them. As a result, the three goals of the Regulations—access, choice, and parity—are not met. First, the weaknesses allow school administrators the opportunity to pressure a pregnant girl, who is likely in a heightened state of vulnerability and impressionability, into dropping out of school or attending an alternative school, despite her federally protected right to make those choices herself. Second, the weaknesses permit a school district to operate inferior schools for pregnant girls. Third, the weaknesses permit a combination of the preceding problems to result in a high dropout rate among pregnant teens,<sup>12</sup>

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6. See ANN FESSLER, *THE GIRLS WHO WENT AWAY: THE HIDDEN HISTORY OF WOMEN WHO SURRENDERED CHILDREN FOR ADOPTION IN THE DECADES BEFORE ROE V. WADE* 72 (2006).

7. *Id.* at 71-72.

8. 34 C.F.R. § 106.40 (2009).

9. *Id.* § 106.40(b)(1).

10. *Id.* § 106.40(b)(3).

11. *Id.*

12. NAT'L WOMEN'S LAW CTR., *HOW TO KEEP PREGNANT AND PARENTING STUDENTS FROM DROPPING OUT: A PRIMER FOR SCHOOLS* 1 (2007), <http://www.nwlc.org/pdf/FinalPregnancy>

effectively nullifying Title IX's ultimate goal of keeping pregnant girls in school.

Part I of this Article examines the history of education for girls in the United States, particularly with respect to how pregnant students were treated, and the goal of the Title IX Regulations to minimize the damage a school-aged girl can suffer when she finds herself pregnant. Part II of the Article examines the problems with and proposed solutions for the Title IX Regulations regarding pregnant students. The Article concludes with a list of the specific revisions suggested throughout the Article.

#### I. THE HISTORY OF EDUCATION FOR PREGNANT GIRLS IN PUBLIC SCHOOLS AND THE GOALS OF THE TITLE IX REGULATIONS TO RECTIFY THE HARMS

Public education in the United States did not exist until many years after the birth of the nation.<sup>13</sup> Early, the largely agrarian society in the United States did not lend itself to the idea of children spending time away from the farm learning about impractical things.<sup>14</sup> Over time, as the nation's financial foundation became industrial, education gained importance for more than just those families who could afford (both in a monetary and temporal sense) to send a child to school.<sup>15</sup> Still, educating girls was less of a priority than educating boys because girls were expected to marry, have children, and stay at home.<sup>16</sup>

Eventually the value of education for girls began to rise.<sup>17</sup> More young women attended school, and coeducation became the standard in public education.<sup>18</sup> At the same time, society began to experience a sexual revolution of sorts; young men and women were experimenting with premarital sex at dramatically higher rates than they did before World War II.<sup>19</sup> The combination of these two factors—more girls in public schools and more sex among young people—resulted in more pregnancies among girls attending

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FactSheet.pdf (noting that “one-quarter to one-third of female dropouts say that pregnancy . . . played a role in their decision to leave school”).

13. See Ian Bartrum, *The Political Origins of Secular Public Education: The New York School Controversy, 1840-1842*, 3 N.Y.U. J. L. & LIBERTY 267, 280-85 (2008) (discussing the beginning of the “common school” concept in the mid-1800s, which developed to provide education to all children, regardless of their ability to pay for school).

14. See Molly Townes O'Brien, *Private School Tuition Vouchers and the Realities of Racial Politics*, 64 TENN. L. REV. 359, 373 (1997) (explaining how the culture of America shifted between 1800 and 1900 from agrarian to industrial and resulted in more people attending school).

15. See *id.*

16. See Susan McGee Bailey & Patricia B. Campbell, *Gender Equity: The Unexamined Basic of School Reform*, 4 STAN. L. & POL'Y REV. 73, 75-76 (1993) (describing the policy of educating girls in early “common schools” before or after the school day, but only if their parents financed it).

17. See *id.* at 75.

18. See *id.*

19. See FESSLER, *supra* note 6, at 29-31.

school.<sup>20</sup>

Public schools, as many sectors of society from the 1940s to the 1970s, did not treat girls with the same regard boys enjoyed.<sup>21</sup> Pregnant girls were no exception to the general rule; they were singled out for particularly egregious treatment by society, public schools, and their parents.<sup>22</sup> The stigma pregnancy cast on an unmarried girl could reach far beyond her as an individual; it could also stain the reputation of the school she attended and her family name.<sup>23</sup> Image was such a part of survival in American society in the 1940s and 1950s that it is easy to imagine that a principal would go to great lengths to avoid being perceived as running a school where young girls got themselves into trouble.<sup>24</sup> Schools also feared that pregnancy was contagious and would result in even more pregnancies among girls who would want to get pregnant if the school exposed them to a pregnant peer.<sup>25</sup>

As a result of these fears as well as alleged concerns for a pregnant girl's health in a school environment, schools commonly dealt with the issue of teen

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20. The lack of access to birth control is another large factor that contributed to the rise in pregnancy rates for girls attending school, but the legal issues stemming from that debate have already filled many law review articles.

21. See Bailey & Campbell, *supra* note 16, at 76.

22. See FESSLER, *supra* note 6, at 67-74.

23. See *id.* at 72.

24. See *id.*

25. See *Perry v. Grenada Mun. Separate Sch. Dist.*, 300 F. Supp. 748, 752 (N.D. Miss. 1969). In this pre-Title IX case, the court ruled that permanent expulsion, without a hearing, of students who were expelled when their pregnancy was discovered violated their Due Process and Equal Protection rights. *Id.* at 753. Although the court ruled that schools must hold a hearing to determine whether a student should be readmitted after her pregnancy, it did not consider that barring students during their pregnancies could also be a violation of their constitutional rights. Admittedly, the plaintiffs were "unwed mothers" who did not bring the action until after their pregnancies, and it appears that they did not argue that their expulsions during their pregnancies were a violation of their rights. *Id.* at 749. But the court's opinion of the effect pregnant students would have on the student body was clear:

[T]he Court is aware of the defendants' fear that the presence of unwed mothers in the schools will be a bad influence on the other students vis-a-vis their presence indicating society's approval or acquiescence in the illegitimate births or vis-a-vis the association of the unwed mother with the other students.

The Court can understand and appreciate the effect which the presence of an unwed pregnant girl may have on other students in a school. Yet after the girl has the baby and has the opportunity to realize her wrong and rehabilitate herself, it seems patently unreasonable that she should not have the opportunity to go before some administrative body of the school and seek readmission on the basis of her changed moral and physical condition.

*Id.* at 752.

pregnancy by literally expelling the problem.<sup>26</sup> Although the expulsion was not always permanent, removing the pregnant student from school during her pregnancy was considered necessary to avoid “contaminating” the students with a pregnancy.<sup>27</sup> Whether any alternative programs would be available to a pregnant teen was dependent on the wishes and financial situation of her parents and had little to do with the wishes of the pregnant teen.<sup>28</sup> The alternatives, for many years, were homes set up for pregnant girls that would simply house them until they gave birth and served no educational purpose.<sup>29</sup> The homes were simply meant to hide pregnant girls from their home communities in an effort, if not to keep the pregnancy secret, at least to provide her family and local community with plausible deniability.<sup>30</sup>

In the early 1970s, Congress began to recognize rampant unequal treatment of girls educated in America and addressed the inequities by guaranteeing all girls a right to equal education.<sup>31</sup> The language of Title IX is straightforward: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>32</sup> The broad wording of Title IX went largely unheeded in the immediate years after its enactment, resulting in continued sex discrimination in schools.<sup>33</sup> Public pressure from several sources grew until the Regulations were enacted to clarify the rights and responsibilities of schools that receive federal funding and their students under Title IX.<sup>34</sup>

Like Rome, the Regulations implementing Title IX were not built in a day. Although the simplicity of the mandate in Title IX makes it broad in its scope and bars all school discrimination based on sex other than enumerated exclusions for certain activities (such as beauty pageants and choir), its imprecision left schools without guidelines about how to treat students lawfully.<sup>35</sup> Unlawful behavior continued virtually unabated in schools governed by Title IX.<sup>36</sup> Congress then passed the Education Amendments of 1974, which specifically directed the HEW to “prepare and publish . . . proposed regulations implementing the provisions of

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26. See FESSLER, *supra* note 6, at 72.

27. See WANDA S. PILLOW, UNFIT SUBJECTS: EDUCATIONAL POLICY AND THE TEEN MOTHER 64-68 (2004) (describing several cases, including *Perry*, 300 F. Supp. 798, where pregnant teens were expelled from school to keep the student body from being “contaminated” by a pregnancy in their midst).

28. See FESSLER, *supra* note 6, at 133-50.

29. See *id.* at 139 (stating that the schedule in maternity homes concentrated on chores and maybe some private tutoring).

30. See *id.* at 131-54.

31. See 20 U.S.C. § 1681(a) (2006).

32. *Id.*

33. See 1980 COMMISSION R., *supra* note 5.

34. 34 C.F.R. §§ 106.1-106.71 (2009).

35. See 1980 COMMISSION R., *supra* note 5.

36. See *id.* at 5.

the education amendments of 1972 . . . relating to the prohibition of sex discrimination in federally assisted education programs."<sup>37</sup> The Regulations went into effect on July 21, 1975.<sup>38</sup>

The Regulations feature three main goals that address the rights of pregnant girls to a public education. First is access. The Regulations forbid schools from expelling pregnant students.<sup>39</sup> Second is choice. The Regulations require that pregnant students be able to choose whether they want to attend an alternative school, if one is available, or stay in the school they attended when they became pregnant.<sup>40</sup> Third is quality. The Regulations require that school districts ensure that the alternative schools open to pregnant teenagers be comparable to mainstream schools.<sup>41</sup> The most important and pressing goal of the Regulations was to guarantee pregnant students access to education.

### A. Goal One: Access

Public schools in the post-World War II and pre-Title IX era were not shy about expelling unmarried pregnant girls once their pregnancies became known or apparent.<sup>42</sup> Many schools also had policies of expelling married girls when they became visibly pregnant.<sup>43</sup> Lee Burchinal's 1960 study of Iowa public and parochial schools focused on school policies with regard to married students' attendance of their schools, but he also surveyed how schools dealt with pregnant students.<sup>44</sup> His study showed that 90% of schools surveyed had policies that required or encouraged young women who were married before they became pregnant to leave school during their pregnancies; only 10% of the schools surveyed left the decision whether to stay in school to the young pregnant woman.<sup>45</sup> Girls who married after they became pregnant fared worse—92% were expelled or encouraged to leave before their delivery date.<sup>46</sup>

1. *Exclusion as a Rule.*—Although the statistics in Iowa are not conclusive evidence that every school in every state had policies requiring expulsion of pregnant girls, the startling pervasiveness of Iowa's practice is a good example

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37. H.R. Res. 69, 93d Cong. (1974) (enacted).

38. 34 C.F.R. § 106.1 (2009).

39. *Id.* § 106.40(b)(1).

40. *Id.* § 106.40(b)(3).

41. *Id.*

42. See FESSLER, *supra* note 6.

43. Lee B. Burchinal, *School Policies and School Age Marriages*, FAMILY LIFE COORDINATOR, Mar. 1960, at 43, 44.

44. *Id.* at 43.

45. *Id.* at 44 (noting that 29% of schools required immediate withdrawal of married pregnant students and 21% encouraged them to withdraw; another 20% required withdrawal by a certain date; and an additional 20% had policies requiring withdrawal under certain case-by-case circumstances).

46. *Id.* (noting that only 8% of schools left the decision to the pregnant student).

of general practices throughout the country at the time.<sup>47</sup> The scorched earth policies most schools employed in dealing with pregnant students are not surprising considering the similarly discriminatory policies requiring that pregnant teachers take maternity leave without pay around the time their pregnancies became obvious.<sup>48</sup> As recently as 1986, a school board fired a pregnant woman from her teaching job because she was unmarried.<sup>49</sup>

The philosophy behind expulsion often focused on a few common themes. First, school administrators feared that the mere presence of pregnant girls would influence other girls to become pregnant.<sup>50</sup> Second, the stigma attached to unwed pregnant teenagers was so prevalent in the 1940s, 50s, and 60s that families and schools resorted to nearly inhumane treatment of pregnant girls when they discovered their pregnancies to hide their state of “shame.”<sup>51</sup> Third, many school administrators claimed to be concerned that pregnant students would be exposed to health risks by attending school.<sup>52</sup> A fourth concern, centered on the lack of resources schools had to deal with the physical and emotional needs pregnant teens presented, like seating that could not accommodate a pregnant girl’s growing belly.<sup>53</sup> Each of these reasons standing alone may have allowed school administrators to justify discriminatory exclusion of particular pregnant girls from school, but the confluence of the many and varied reasons to exclude pregnant girls explains the prevalence of the practice.

*a. Contagious pregnancy.*—Without any proven basis for the belief, school administrators throughout the county believed, and to a large degree still believe, that a pregnant peer would be an advertisement to all of the young women in her school that they should follow her lead into pregnancy.<sup>54</sup> At least one study has shown that teen pregnancy rates are higher in communities where social norms do not negatively reinforce the concept of parenting during the teen years, but it is not clear that school attendance has anything to do with these norms.<sup>55</sup> In June

47. See KRISTEN LUKER, *DUBIOUS CONCEPTIONS: THE POLITICS OF TEENAGE PREGNANCY* 62 (1996) (citing a 1968 Children’s Bureau survey, which showed that more than two-thirds of public school districts in the country had explicit policies of expelling pregnant students in the late 1960s); DANIEL SCHREIBER & RUBY J. DAY, *SCHOOLS FOR PREGNANT GIRLS IN NEW YORK CITY* 4 (1971).

48. See, e.g., *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 646-47 (1974) (holding that school board policy of requiring pregnant teachers to take maternity leave four to five months before the birth of the baby was a violation of their due process rights); *Williams v. San Francisco Unified Sch. Dist.*, 340 F. Supp. 438, 442-43 (N.D. Cal. 1972) (holding that school policy of requiring certificated employees of the school district take maternity leave at least two months before the delivery of the child violated the Equal Protection Clause).

49. See *Ponton v. Newport News Sch. Bd.*, 632 F. Supp. 1056, 1059-60 (E.D. Va. 1986).

50. See PILLOW, *supra* note 27, at 64-71.

51. See FESSLER, *supra* note 6, at 101-19.

52. PILLOW, *supra* note 27, at 102-04 (noting that these reasons for exclusion remain today).

53. *Id.*

54. See *id.* at 64-71.

55. See SUZANNE RYAN ET AL., *CHILD TRENDS, HISPANIC TEEN PREGNANCY AND BIRTH RATES: LOOKING BEHIND THE NUMBERS* 6 (2005), <http://www.childtrends.org/Files/HispanicRB>.

2008, a media storm swirled around a story in Gloucester, Massachusetts about a group of teenagers who allegedly entered into a “pregnancy pact,” in which they agreed to get pregnant and raise their babies together.<sup>56</sup> The story lost momentum when students and administrators at the school cast doubt on its factual authenticity.<sup>57</sup> The idea that girls will find pregnancy desirable when their peers come to school pregnant and seek to mimic them likely springs from misinformation and unscientific conjecture (like that in the Gloucester story), and certainly should not be a justification for expelling pregnant students.

It is unclear why decisionmakers at schools where teen pregnancy was unusual believed that other students would perceive a pregnant teenager to be in an enviable state and further that her mere presence would encourage others to follow suit.<sup>58</sup> Certainly, administrators did not appear to consider that the inclusion of pregnant teens could serve as an effective deterrent to teen pregnancy. Because there are likely so many influences on the teen pregnancy rate, it is difficult to know what the determinative factors for a higher rate of teen pregnancy are in a particular school district. Even if the theory that pregnant teens encourage more teens to become pregnant holds true, it does not mandate expulsion as the singular solution to the problem of teen pregnancy. Allowing a pregnant or parenting teen to remain in school could teach valuable lessons about the difficulties that accompany parenthood, but schools instead routinely chose to address the problem with extreme vitriol—expulsion was the only option.

Often the removal from school was temporary, and the teen could come back to school after she gave birth.<sup>59</sup> This was during a time when the vast majority of babies born to unmarried teen mothers were given up for adoption; so there was no baby to alert the community as to why the teen left school and she could

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pdf (“[T]he tendency among *all* Hispanic teens to hold less negative views of teen pregnancy than teens in the overall population may be one factor contributing to Hispanic teens’ high pregnancy and birth risks; if some sexually active teens do not feel a strong aversion to becoming pregnant, they likely will not be as careful to avoid it.”).

56. See Kathleen Kingsbury, *Postcard: Gloucester*, TIME, June 30, 2008, at 8. The story was originally published June 18 on Time.com and created quite a stir almost immediately; so the response the story received from Gloucester students and administrators appears to have been published before the cover date of the print article. Kathleen Kingsbury, *Pregnancy Boom at Gloucester High*, TIME.COM, June 18, 2008, <http://www.time.com/time/world/article/0,8599,1815845,00.html>.

57. Patrick Anderson, *Gloucester Officials Question Pregnancy ‘Pact,’* GLOUCESTER DAILY TIMES ONLINE, June 20, 2008, [http://gloucestertimes.com/punews/local\\_story\\_172215712.html](http://gloucestertimes.com/punews/local_story_172215712.html).

58. See Wanda Pillow, *Teen Pregnancy and Education: Politics of Knowledge, Research, and Practice*, 20 EDUC. POL’Y 59, 67-70 (2006) (discussing the “contamination discourse” among educators).

59. See FESSLER, *supra* note 6, at 134-35. Anecdotally, many people in this generation tell stories of girls in their school going to help an ailing aunt in Rhode Island or some similar excuse that would explain, however lamely, her extended absence. See *id.*

reintegrate into the school community without much disruption.<sup>60</sup> The need felt by administrators to hide the fact that a teen attending a school in the district had become pregnant was closely tied to the fear they had that the school's reputation would suffer by allowing the pregnancy to become public. The reputation of the school as a place where teens were pure and innocent was of paramount importance to school administrators during the pre-Title IX years.<sup>61</sup>

*b. Reputation trumps educational quality.*—The decades before Title IX were a tumultuous time for Americans. After World War II, the vast majority of Americans shared the sentiment that being alike was the only way to succeed in society.<sup>62</sup> Being part of a larger community traditionally was desirable for most people, as is clear from the effectiveness of excommunication as a punishment in most major religions throughout the ages where the faithful were forbidden from engaging in any social, legal, or business contact with outcasts.<sup>63</sup> Growing numbers of immigrants and socioeconomic changes among those people who had been in the United States for more than a generation led to a strong desire for assimilation.<sup>64</sup> The problem was that true assimilation, the dictates of which varied depending on the region, was impossible for some and difficult for many to attain. This fact, however, did not change the reality that many people perceived nonconformance to be socially fatal.<sup>65</sup>

Although being different would not necessarily result in starvation or homelessness in mid-twentieth century America, it could result in severe social isolation.<sup>66</sup> Institutions as well as individuals certainly felt the pressures to be like others.<sup>67</sup> The better the reputation a school held, the more likely the administrators and teachers could feel assured that their jobs were safe and their communities would grow. Having a good reputation included not only academically preparing students for the world beyond high school, but also maintaining a student body that was morally pure.<sup>68</sup> Pregnant teenagers were a visible cue that students at a particular school were engaging in sexual behavior, which was well outside acceptable social norms at the time.<sup>69</sup> Expelling pregnant

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60. *See id.* at 143 (noting that the mission of maternity homes was to sequester pregnant young women until they could give birth and surrender their children).

61. *See id.* at 72.

62. *See id.* at 102.

63. *See* Richard H. Helmholz, *Excommunication in Twelfth Century England*, 11 J.L. & RELIGION 235, 235-36 (1995); Nathan B. Oman, *Preaching to the Court House and Judging in the Temple*, 2009 BYU L. REV. 157, 187-88 (discussing the practice of excommunication in the Mormon faith).

64. *See* Sylvia R. Lazos Vargas, *Deconstructing Homo[geneous] Americanus: The White Ethnic Immigrant Narrative and its Exclusionary Effect*, 72 TUL. L. REV. 1493, 1530-35, 1555 (1998).

65. *See id.*

66. *See* FESSLER, *supra* note 6, at 102.

67. *See id.*

68. *See id.* at 72.

69. *See id.*

teenagers, or at least banishing them from school for the duration of their pregnancies, became the "solution" to the "problem" of teen pregnancy.

*c. Health risks.*—Misconceptions about a pregnant woman's physical capabilities contributed to the practice of excluding pregnant students from school or at least from school activities and programming.<sup>70</sup> The schools justified the exclusion with the convenient belief that it would protect the student from potential physical harms lurking in the school halls.<sup>71</sup> Pregnancy, even today, is often perceived as a state of physical delicacy, and pre-Title IX school administrators justified their decision to remove a pregnant student from school by simply stating that her health might be at risk by jostling in the halls or participating in gym class.<sup>72</sup> School administrators claimed without merit that her physical safety was at risk if she stayed in school, which allowed administrators the opportunity to appear thoughtful and caring while denying the student access to education. Protecting pregnant women from the world was not unusual in the pre-Title IX days,<sup>73</sup> however, and school most certainly would have seemed to society an unsafe place for young pregnant women.

*d. Physical and emotional limitations.*—Another convenient excuse raised by schools to justify barring pregnant students was that expulsion was better than continued school attendance for the physical and emotional well-being of young pregnant women.<sup>74</sup> To a certain extent, school administrators in the pre-Title IX era and still today understood the trials pregnant students could suffer in school and may have believed that the best way to solve the problem would be to remove the student from the discomfort of being in school.<sup>75</sup> School desks, for example, were not designed to adjust to a pregnant girl's ever-changing shape. Physical education classes could not accommodate a pregnant student, and class schedules may have posed problems for sick or exhausted pregnant students. It was also difficult for schools to monitor and control the emotional toll pregnancy may cause a teenager. Combining all of the perceived negative effects surrounding student pregnancy, ill-founded as they often were, school administrators seemed to believe expulsion served as an attractive and reasonable response to the challenges.

The multitude of seemingly reasonable excuses for which a pregnant teen could be removed from school made it a simple and often fairly automatic process to remove pregnant teens from school, and there were no safeguards to allow them to continue their education if they did not have parents who were inclined to help them do so.<sup>76</sup> In the 1970s, however, society began to understand

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70. See PILLOW, *supra* note 27, at 102.

71. See *id.*

72. See *id.*

73. See *id.*

74. *But see* Ordway v. Hargraves, 323 F. Supp. 1155, 1156-58 (D. Mass. 1971) (holding that the mental and physical health of a young pregnant student did not put her at risk if she continued attending school).

75. See *id.*

76. See FESSLER, *supra* note 6, at 72.

that expelling pregnant students was a serious punishment imposed where no crime had been committed. Years after Title IX was passed to require equal treatment of girls in schools that receive federal funding, federal regulators realized that more instruction was needed for schools to properly implement Title IX. The Regulations were written, in part, to bar schools from falling back on their default practice of expelling pregnant teens.<sup>77</sup>

2. *The Intent of the Title IX Regulations to Guarantee Access.*—In light of the commonly held belief that pregnant girls should not be permitted to continue their education during their pregnancy, in 1975 HEW drafted provisions of the Regulations that prohibited expulsion.<sup>78</sup> The most fundamental of the Regulations prohibits the exclusion of pregnant teenagers from federally funded public schools' ("Recipient(s)") educational programs or activities, including extracurricular activities.<sup>79</sup> There are exceptions to this rule for situations in which pregnant girls may choose to engage in activity that may pose physical or emotional risks, but those exceptions are limited.<sup>80</sup> Recipients may require signoff from a pregnant student's physician that she is capable of participating in an activity that might raise health or emotional concerns, but only if other students who have physical or emotional conditions also require a physician's signoff to participate.<sup>81</sup> The prohibition on exclusion of pregnant girls is short and sweet, but not necessarily effective.

### B. Goal Two: Choice

Not every school in the pre-Title IX era permanently expelled pregnant students, but many schools essentially shunned them while their pregnancies were visible.<sup>82</sup> Pregnant young women were generally not consulted when their parents and school administrators decided it was best to hide them for the duration of their pregnancies. Some pregnant teens were sent to private homes for unwed mothers; some were kept in the confines of their parents' homes until after delivering the baby; and some were sent to work for families in distant locations who would, in turn, pay for their stay in an unwed mothers' home at the end of the pregnancy.<sup>83</sup> Regardless of the options, the choice was not the young pregnant woman's to make. If the pregnant student was given the rare chance to choose where she wanted to stay for the latter part of her pregnancy, her decision

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77. See 34 C.F.R. § 106.40(b)(1).

78. *Id.* § 106.40(b)(1)-(2).

79. *Id.* § 106.40(b)(1).

80. *Id.* § 106.40(b)(2) ("A recipient may require such a student to obtain the certification of a physician that the student is physically and emotionally able to continue participation so long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.").

81. *Id.*

82. See FESSLER, *supra* note 6, at 133-54.

83. See *id.*

generally did not include the school she attended when she became pregnant.<sup>84</sup>

1. *Alternative Schools/Homes as a Rule.*—If a pregnant student was lucky enough to be given an alternative to staying in the school she attended, her options were quite limited.<sup>85</sup> In the decades before Title IX, young people were beginning to explore sexually at much higher numbers than the preceding decades.<sup>86</sup> Not surprisingly, the number of pregnant teens rose steadily throughout those same years, and many schools, families, and communities found themselves with expanding numbers of teen pregnancies to address.<sup>87</sup> If they could afford it, many parents resolved the problem of their pregnant teen by removing her from the school she attended when she became pregnant and sending her to a distant community to stay at a home for unwed mothers.<sup>88</sup> Some parents simply forced their pregnant daughters to stay home, indoors, until they delivered.<sup>89</sup>

Before Title IX, most public schools did not have publicly funded alternatives to offer their pregnant students; so those whose parents could afford it were sent to private homes for unwed mothers.<sup>90</sup> The homes were mostly intended to give girls a place to hide during their pregnancies. Some did provide instruction through tutors or, on occasion, more formal classroom instruction in certain subjects.<sup>91</sup> Pregnancy homes were neither required to provide education to pregnant teens, nor were the parents and schools who sent them there particularly focused on providing these young women an education.<sup>92</sup> School districts often provided tutors so girls could continue their education while at a home, but that service was provided out of the goodness of the local school district's heart and was not the norm.<sup>93</sup>

2. *The Intent of the Title IX Regulations to Require Choice.*—The long history of excommunicating pregnant girls to far away homes during their pregnancies left an indelible scar on those girls who endured the practice.<sup>94</sup> Perhaps for this reason, the drafters of the Regulations recognized that pregnant students should have the right to stay in the schools they attended when they became pregnant.<sup>95</sup> If, however, the student does not feel comfortable continuing her education in her home-base school, the Regulations allow her to choose to

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84. *See id.*

85. *See id.*

86. *Id.* at 29-34. The percentage of sexually active girls increased steadily from the 1920s through the 1970s, with studies showing that 39% of girls admitted to having had engaged in sexual intercourse in the 1950s and by the early 1970s, that number rose to 68%. *Id.* at 29.

87. *Id.* at 29-30.

88. *Id.* at 101-32.

89. *Id.* at 72-74.

90. *See id.* at 134.

91. *Id.* at 139, 157, 273.

92. *See id.*; *see also* PILLOW, *supra* note 27, at 143-49.

93. *See* FESSLER, *supra* note 6, at 139.

94. *See id.* at 138-39.

95. 34 C.F.R. § 106.40(b)(3) (2009).

attend an alternative school that provides a comparable education to the one she would receive at her original school.<sup>96</sup> The Regulations leave the choice expressly to the student.<sup>97</sup>

### C. Goal Three: Quality Education for Pregnant Teens

Before the Regulations, pregnant teens tended to receive little or no education during their pregnancies.<sup>98</sup> The purpose of alternative institutions was to hide pregnant teens, not educate them.<sup>99</sup> If a teen did find a way to stay engaged in some sort of educational programming, there was no requirement that the education she received be quality or related to the one she would have received in school.<sup>100</sup> As a result, any education offered at alternative homes was often practical and directed toward an unmarried mother regardless of whether the pregnant young woman would be raising the baby. It frequently included training on budgeting and household management, child development, vocational skills, and discussions about how to become responsible adults.<sup>101</sup> This lack of a guarantee of a quality education was among the ills regulators sought to change when they implemented the Regulations.

1. *Alternatives to Mainstream Schools Were Academically Inadequate.*—In the years prior to the enactment of Title IX, the perception of young women's educational needs was changing. No longer were school-aged girls kept out of school to stay home and learn the basics of running a household.<sup>102</sup> Young women were expected to attend school and receive at least a basic pre-college education, and many young women were even prepared for and expected to attend college.<sup>103</sup> Yet despite these changing attitudes, educating young women often was considered somewhat of a luxury, because as adults they were expected to stay at home, get married, and raise children.<sup>104</sup> The purpose of having a young woman attend school was likely more focused on ensuring that she experience life outside of her parents' home long enough to meet someone who could provide for her when she was old enough to marry.<sup>105</sup>

96. *Id.*

97. *Id.*

98. *See supra* Part I.B.1.

99. *See* FESSLER, *supra* note 6, at 134, 142.

100. *See* PILLOW, *supra* note 27, at 143-49.

101. *Id.* at 146.

102. *See* John L. Rury, *Vocationalism for Home and Work: Women's Education in the United States, 1880-1930*, HIS. EDUC. Q., Spring 1984, at 21, 21.

103. *See id.* at 21-22.

104. *Id.* at 24 (homemaking classes, in the form of home economics courses in school, were "to prepare women for their roles in sustaining the central institution of modern industrial society: the family").

105. *Id.* at 25 ("Advocates of home economics pointed out that most women only worked four or five years before getting married. Hence the principal work of women's lives was housework, and the schools should assume responsibility for guaranteeing that they knew how to carry it out.").

As a result of these attitudes, the stakes were even higher for a young unmarried woman who became pregnant while in school. Such a scandal could only reduce her chances at traditional homemaking.<sup>106</sup> So the options for many families faced with a decision about what to do with their pregnant teen became even more limited. The family's goals became to avoid public scrutiny and to get her out of the environment where she became pregnant.<sup>107</sup> That priority essentially guaranteed that her formal education would stop during her pregnancy, because she was either hidden at home, or because, although alternative homes for pregnant young women may have provided some education to their residents,<sup>108</sup> there was no requirement that it would be a quality education.

As the passage of Title IX drew near, it appeared that school districts were taking note of the unfairness of the lack of education for pregnant girls and began to address the problem, albeit somewhat poorly.<sup>109</sup> Although education about mainstream subjects may have been included in the curriculum, it appeared that schools deemed homemaking and childcare a crucial complement to the substantive education the pregnant girls received.<sup>110</sup> Interestingly, pregnancy schools that taught homemaking and childcare likely considered themselves highly advanced in their treatment of students because not only did these schools educate pregnant girls, they did it without assuming that the student would give her baby up for adoption, as was the norm at the time.<sup>111</sup> Although it may have been somewhat innovative to educate pregnant students, the emphasis on skills instead of substance left pregnant students unprepared to provide for their babies or, if they surrendered their babies for adoption, for life after pregnancy.

2. *The Intent of Title IX Regulations to Mandate Quality.*—Regulators understood that guaranteeing an education to pregnant students carries little or no value if that education is not comparable to that which she received before she became pregnant.<sup>112</sup> As a result, the Regulations contain language that mandates alternative schools for pregnant students be of comparable quality to the mainstream schools.<sup>113</sup> Comparable education for pregnant teens helps ensure that they can realize their post-school goals without interruption. The Regulations requiring a quality education for pregnant students are short, but presumably they stand for the much larger proposition that schools must review their educational goals and plans for non-pregnant students and make efforts to ensure that those goals and plans are duplicated in alternative schools for

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106. See PILLOW, *supra* note 27, at 144.

107. See FESSLER, *supra* note 6, at 67-99.

108. See PILLOW, *supra* note 27, at 58-61.

109. See, e.g., SCHREIBER & DAY, *supra* note 47, at 5 (describing a goal of the New York City program for alternative schools for pregnant students that was “[t]o increase the skills of the participating girls in infant care and allied homemaking areas”).

110. See *id.*

111. See FESSLER, *supra* note 6, at 176-205.

112. See 34 C.F.R. § 106.40(b)(3) (2009).

113. See *id.*

pregnant students. Unfortunately, the Regulations offer only thin protections that do little to protect students from the reality that little has changed since the Regulations were implemented.

## II. THE REGULATIONS MUST BE STRENGTHENED TO BETTER ENFORCE TITLE IX AND PROTECT PREGNANT STUDENTS

The Regulations are incomplete, vague, and give schools too little guidance about how to behave lawfully with respect to their pregnant students. Further, the Regulations give federal agencies little power to ensure compliance. Although the Regulations, as a whole, provide guidance on a wide variety of areas governed by Title IX, including military educational institutions, admissions, recruitment, athletics, and employment, the specifics about how schools should address the education of pregnant students are sparse.<sup>114</sup> The provisions that regulate access, choice, and quality in education for pregnant students are almost as short and broad as the language of Title IX itself. The broad language of Title IX did little to protect girls before the Regulations were enacted.<sup>115</sup> Unfortunately, it appears that the weak and vague language of the Regulations with respect to pregnant students has also failed to protect them from discrimination.

Growing frustration with the impotence of federal agencies in enforcing civil rights statutes, including Title IX, spurred civil rights advocates to file lawsuits demanding that the government hold violators accountable for their unlawful behavior.<sup>116</sup> In the early 1970s, Title VI, also known as the Civil Rights Act of 1964, and its attendant regulations were at the center of several lawsuits brought to force the government to enforce the legislative mandates therein.<sup>117</sup> The instigators of the lawsuits sought to require communities to provide people of color equal opportunity to exercise their right to vote, to an equal education, and to equal access to services.<sup>118</sup> At the same time, Title IX was passed with no regulations clearly delineating what behavior was prohibited or required to comply with the new law.<sup>119</sup> As a result of this statutory and regulatory silence, schools operated in much the same fashion they had before Title IX was passed.<sup>120</sup>

Unfortunately, after a three-year delay in passing regulations to clarify the requirements of Title IX, educational opportunities for pregnant students

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114. *See id.* §§ 106.1-106.71.

115. *See* discussion *supra* Part I.B.1.

116. *See generally* *Women's Equity Action League v. Cavazos*, 879 F.2d 880, 881 (D.C. Cir. 1989) (discussing the nearly twenty years of civil rights litigation that attempted to improve Title IX enforcement).

117. *See id.* at 882-84.

118. *See, e.g., Adams v. Richardson*, 480 F.2d 1159, 1165-66 (D.C. Cir. 1973) (enforcing school desegregation).

119. 20 U.S.C. § 1681(a) (2006).

120. *See* 1980 COMMISSION R., *supra* note 5, at 2-4.

remained elusive at best. Little to no effort was made to determine what schools were out of compliance. Little to no enforcement commenced, and the complaints that trickled in were not taken seriously by HEW, which was tasked with implementing and enforcing the Regulations.<sup>121</sup> Lengthy and complex litigation was commenced to force the government to properly enforce the Regulations, but it failed to bear fruit for the plaintiffs.<sup>122</sup> The Regulations ultimately, even if fully and properly implemented and enforced, are still too weak to force compliance, which results in a system that remains extremely ineffective at requiring schools to provide a quality education to pregnant teenagers. Further, weak guidelines regarding how to lawfully advise a pregnant teen about her options leave open the real possibility that schools can discriminate against pregnant teens.

There are several reasons the Regulations are weak. First, they have no specific mandates requiring schools to report the numbers of pregnant students who drop out of school, choose to attend alternative schools, or what academic requirements are in place for pregnant students at alternative schools. Second, they do not provide adequate enforcement mechanisms to catch violations of the Regulations and Title IX when they occur. Third, they do not require routine reviews of Recipients. Fourth, the provision requiring that any alternative education available to pregnant students must be comparable to that available to non-pregnant students fails to include specific strictures to ensure that pregnant students are not receiving inferior opportunities. Fifth, the Regulations lack directives for school administrators in the role of advising pregnant students about their options and rights under Title IX.

### A. Reporting Requirements

Reporting requirements in federal statutes are effective and common tools to help the government evaluate the effectiveness of the statutes themselves and their attendant regulations.<sup>123</sup> It is difficult for regulators to enforce, amend, or properly implement federal laws and regulations if there is no empirical evidence that they do or do not operate and protect as intended. Mandatory reporting could provide such empirical evidence. Regulators may believe that reporting is not necessary, and the best way to determine whether regulations are effective is to look at how many enforcement actions are filed in a given year, for what purpose they are filed, and how often the claimant wins the challenge. But that would be at best an incomplete picture of the legal landscape for pregnant teens

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121. *Id.* at 3-6.

122. *See infra* Part II.B.1.

123. *See, e.g.*, 34 C.F.R. § 100.6 (2009). The Title VI civil rights regulations are incorporated by reference into the Regulations, *see id.* § 106.71, but they are more effective because they contain specific language offering an example of the kind of data Recipient schools should collect: “For example, recipients should have available for the Department racial and ethnic data showing the extent to which members of minority groups are beneficiaries of and participants in federally-assisted programs.” *Id.* § 100.6(b).

in school.

There are several reasons why a pregnant teen might not want to sue her school for Title IX violations during her pregnancy. Pregnancy is a temporary state, and because those who are meant to be protected by the Regulations are young and likely going through a dramatic and potentially traumatic life change, it is probable that many choose to forego their legal options (or are unaware of their legal options) in favor of the path of least resistance. As a result, many teens may choose to drop out of school or attend an inferior alternative school in order to avoid engaging in a legal battle that they may not win. Also, bringing a legal challenge can be expensive and time consuming. Mandatory reporting is one tool that regulators could use to discern whether a problem exists in a particular school, without relying on scared pregnant teenagers to act as private attorneys general.

1. *Problem—The Regulations Do Not Have Reporting Requirements Isolating Pregnant Students.*—From their inception, the Regulations have not required the Department of Education (the “Department”) (or its predecessor, HEW) to collect any information related to teen pregnancy in schools.<sup>124</sup> The Department’s Office of Civil Rights (OCR) is required to keep Title IX compliance data.<sup>125</sup> The Regulations require, however, only that Recipients conduct self-evaluations to determine whether they are in compliance with federal law.<sup>126</sup> The Regulations adopted and incorporated the procedure provisions in Title VI of the Civil Rights Act,<sup>127</sup> which are more comprehensive but do not specifically require data to be kept regarding pregnancy in secondary schools.<sup>128</sup> No federal or state entity regularly collects or keeps data on dropout rates of pregnant students, the transfer rates to alternative schools, or the graduation requirements at alternative schools.<sup>129</sup>

At least two government studies have conceded that the Regulations lack reporting requirements.<sup>130</sup> In 1985, the U.S. House of Representatives Select Committee on Children, Youth, and Families released a report that conceded the problem with the lack of reporting requirements: “Beyond collecting information on the number of births to teens, States are unable to answer the most basic questions related to teenagers at risk, pregnant, or parenting teens, including: where they are being served, what benefits they are receiving, who finishes high

124. See 1980 COMMISSION R., *supra* note 5, at 16-17 (stating that no data collected by the National Center for Educational Statistics could indicate possible discrimination).

125. See 34 C.F.R. § 106.71 (incorporating by reference “procedural provisions applicable to Title VI of the Civil Rights Act of 1964”).

126. *Id.* § 106.3(c).

127. See *id.* § 106.71.

128. See *id.* § 100.6.

129. See PILLOW, *supra* note 27, at 80-81, 92-97.

130. SELECT H. COMM. ON CHILDREN, YOUTH, AND FAMILIES, 99TH CONG., TEEN PREGNANCY: WHAT IS BEING DONE? A STATE-BY-STATE LOOK 47 (Comm. Print 1985) [hereinafter SELECT H. COMM.]; 1980 COMMISSION R., *supra* note 5, at 13.

school and who finds employment.”<sup>131</sup> A study conducted by the U.S. Commission on Civil Rights in 1980 deemed data collection regarding general inequities in schools and the compliance reviews required of OCR to be inadequate.<sup>132</sup> Even if the federal or state governments did regularly collect such data, they would not be required to analyze it, use it to improve regulations, or continue collecting it, because the Regulations lack those requirements.<sup>133</sup>

A scan of the Department website confirms that the Department regards Title IX primarily as an athletics-equalizer.<sup>134</sup> The Department’s “Fast Facts” highlight “participation in athletics,” but hardly mention pregnancy.<sup>135</sup> The CRDC webpage describes data about public school students collected by OCR, which includes enrollment, education services, and academic proficiency results information.<sup>136</sup> The information is disaggregated on a few demographic categories: race/ethnicity, sex, limited English proficiency, and disability.<sup>137</sup> Upon further inspection, the sex and disability categories (the only two that could or should contain information about pregnant public school students) have no breakout of information for pregnant students.<sup>138</sup> It is possible that the CRDC does not collect pregnancy statistics for students because it does not consider it to be a civil rights issue,<sup>139</sup> in which case it would be appropriate for the Department to direct another of its agencies to collect the data, but it does not.

In addition to the CRDC data collection, the National Center for Education Statistics (NCES) collects data about educational attainment for various demographic groups, none of which regularly include pregnant students.<sup>140</sup> Race, ethnicity, and sex are analyzed with respect to dropout rates, college attendance, college graduation rates, and other basic educational attainment information frequently because of a congressional mandate that dates back to the mid-1800s.<sup>141</sup> Although some information regarding pregnant students is available,

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131. SELECT H. COMM., *supra* note 130, at xiii.

132. *See* 1980 COMMISSION R., *supra* note 5, at 12-17.

133. *See* C.F.R. §§ 106.1-106.71.

134. National Center for Education Statistics, Fast Facts, <http://nces.edu.gov/fastfacts/display.asp?id=93> (last visited Nov. 3, 2009).

135. *See id.*

136. *See, e.g.*, Civil Rights Data Collection 2006, <http://ocrdata.ed.gov/ocr2006rv30>.

137. *Id.*

138. *Id.*

139. Congress has in other statutes considered pregnancy a civil rights issue. *See Newport News Shipbuilding & Drydock Co. v. EEOC*, 462 U.S. 669, 684 (1983) (noting that “for all Title VII purposes, discrimination based on women’s pregnancy is, on its face, discrimination because of her sex”). Unlike Title IX, however, Title VII has been amended to expressly prohibit pregnancy discrimination. *See* 42 U.S.C. § 2000e(k) (2006).

140. *See* National Center for Education Statistics, <http://nces.ed.gov> (last visited Apr. 6, 2009).

141. *See, e.g.*, SNYDER ET AL., DIGEST OF EDUCATION STATISTICS 2007 (2008), <http://nces.ed.gov/pubs2008/2008022.pdf> (collecting information regarding particular classes of people, but not pregnant students).

it is not regularly collected or analyzed and is often out of date.<sup>142</sup> The existence of some data is the exception that proves the rule; the data can be, but is not regularly, collected.<sup>143</sup> Unless Congress, or the executive branch, through its regulatory function, requires that NCES implement specific, regular data collection efforts about pregnant teens, history indicates no such collection will be done.

Without tracking data to determine how many pregnant students are dropping out of school, transferring to alternative schools, or missing so many school days that they must be held back, it is nearly impossible to proactively identify discrimination against pregnant teens. Gathering data about pregnant students' schooling will not only show if problems persist, but it will also indicate if successes have been achieved. Data showing which schools have programs that allow pregnant teens to succeed would also help regulators pinpoint schools for study that have excelled in educating pregnant students. Observing the successful programs can help regulators build models for schools whose data indicates a problem with how pregnant teens are treated. Understanding the problems and studying the successes are the only ways regulators can begin to understand the current state of education for pregnant teenagers and improve it in the future. But, in part due to the lack of reporting requirements in the Regulations, the Department is not focused on teen pregnancy.<sup>144</sup>

Without data, there is no way to consistently and specifically track information about the Regulation's three pregnancy-related goals.<sup>145</sup> Data must be collected to monitor dropout rates among pregnant teens that will help regulators pinpoint trouble spots. Also, information about how many students attend alternative schools would be instructive when regulators need to diagnose where schools might be pushing pregnant students out of mainstream education. And last, data about the quality of education available at the alternative schools must be collected and analyzed to help regulators ensure that the separate educational opportunities offered there indeed are equal. The Regulations must reflect the importance of this information to those who are governed by them, starting with dropout rates.

*a. Dropout rates.*—As stated above, NCES regularly collects and publishes data regarding the percentage of young people who drop out of school.<sup>146</sup> The data is disaggregated by a number of demographic characteristics, including

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142. See, e.g., U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, STUDENT EFFORT AND EDUCATIONAL PROGRESS, HIGH SCHOOL SOPHOMORES WHO LEFT WITHOUT GRADUATING WITHIN 2 YEARS, EDUCATION LONGITUDINAL STUDY OF 2002, tbl. 27-3 (Jan. 2006) (previously unpublished tabulation), <http://nces.ed.gov/programs/coe/2006/section3/table.asp?tableID=485>.

143. See *id.*

144. See, e.g., 34 C.F.R. § 106.71 (2009).

145. *Id.* § 106.40 (explaining the goals of access, choice, and equality).

146. JENNIFER LAIRD ET AL., NAT'L CTR. FOR EDUC. STATISTICS, PUBL'N NO. NCES 2008-053, DROPOUT AND COMPLETION RATES IN THE UNITED STATES: 2006, at 1-2 (2008), <http://nces.ed.gov/pubs2008/2008053.pdf>.

race/ethnicity, sex, and socioeconomic class status.<sup>147</sup> Whether a student was pregnant when she dropped out of school is not a statistic in that regular data collection, or in any other regularly kept statistical analysis conducted by NCES, the National Center for Health Statistics, or any other federal agency charged with collecting similar data.<sup>148</sup> In fact, little information is available about the educational attainment of pregnant teens at the federal, private, or state level, despite the histrionics public officials engage in when discussing the problem of teen pregnancy.<sup>149</sup> Although the lack of regular data is clear, occasionally data is collected regarding pregnant students.

Two NCES studies help illustrate the problem with the paucity of federal requirements on Recipients to collect data regarding pregnant teens in the Regulations. First, in 2004, NCES published a report about gender equity in U.S. education institutions (“NCES Report”) that included some data regarding the educational attainment of childbearing teens, such as the graduation rates of girls who bore at least one child in high school between 1988 and 2000.<sup>150</sup> Even though the NCES Report has useful dropout rate information about girls who bore children during high school, it does not segregate information about pregnant students. This may seem a subtle distinction, but it is an important one. Pregnancy is a fleeting characteristic that is hard to track and does not necessarily result in parenthood; therefore, discriminatory action taken by schools to force out pregnant students can slip past regulators if parenting female students are lumped together with pregnant students in the data.

Although it may be heartening that some official statistics do exist regarding high school girls’ dropout rates when they bear children before graduation, the information is not particularly instructive when used to evaluate whether Title IX is actually protecting pregnant students. The statistics in the NCES Report show that 29.4% of girls who were in eighth grade in 1988 and had a child either during eighth grade or in high school did not complete high school.<sup>151</sup> This statistic is telling in two ways. First, its existence proves that information relating to a young woman’s parental status is collectable, which might, or at least should, have been a concern of those who wrote the regulations governing Title IX. Certainly, a mandate that the federal government should gather information about a girls’ pregnancy status may raise privacy concerns. However, the fact that the government has developed a system to gather information about parental status shows that collecting information about pregnancy status and educational achievement on a regular basis is not impossible.

The second reason the childbearing statistic is significant lies in the

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147. *Id.* at vi-viii, 2-6.

148. *See* PILLOW, *supra* note 27, at 80, 94-97.

149. *See id.*

150. CATHERINE E. FREEMAN, NAT’L CTR. FOR EDUC. STATISTICS, PUBL’N NO. NCES 2005-016, TRENDS IN EDUCATIONAL EQUITY OF GIRLS & WOMEN: 2004, at 58-59 (2004), <http://nces.ed.gov/pubs2005/2005016.pdf>.

151. *Id.*

information itself. Nearly one-third of female students who had a child during high school dropped out of high school, and that number only includes those young women whose parenting status was known and divulged on the survey. Isolating dropout information about pregnant high school students would shed light on the question of whether Title IX is living up to its promise of protecting pregnant girls from discrimination that bars them from realizing their educational goals.

Another telling study conducted by NCES regarding pregnancy was released in 2006, when the NCES published a data table showing what caused high school sophomores to drop out of school.<sup>152</sup> The table shows the top reasons why students left school.<sup>153</sup> The availability of this table is instructive for two reasons. First, it was the only one of its kind (i.e., including information about pregnant students) that appeared in a search for the word “pregnant” on the NCES website. Second, the percentage of female sophomores dropping out of school because of pregnancy (27.8%) was startlingly high.<sup>154</sup>

The fact that teenage mothers have a high dropout rate is not helpful to determine whether educational institutions are violating Title IX by encouraging or requiring pregnant students to drop out of high school. Dropout information when disaggregated to include pregnant students as a specific group could be extremely helpful to regulators in their enforcement and education efforts with respect to Title IX. The more specific the information, the more regulators can do to diagnose problems and intervene. Further, information about the number of alternative schools that exist, the graduation rate of pregnant students from alternative schools, and other crucial details about alternative education options could contribute greatly to determining the efficacy of the schools.

*b. Information about pregnant students who attend alternative schools or programs.*—The only information available about alternative programs for pregnant students is anecdotal and indicates an inability to assess where such programs exist and if they are effective. The NCES, in an effort to determine the feasibility of surveying schools via automatic systems, asked schools to report how they kept data on various subjects, including information regarding the “instructional setting for pregnant students.”<sup>155</sup> Ironically, there is no indication that the NCES ever actually collected information on the topic.<sup>156</sup> It is clear that

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152. See NAT’L CTR. FOR EDUC. STATISTICS, *supra* note 142.

153. *Id.*

154. *Id.*

155. See WENDY MANSFIELD & ELIZABETH FARRIS, NAT’L CTR. FOR EDUC. STATISTICS, PUBL’N NO. NCES 92-130, OFFICE FOR CIVIL RIGHTS SURVEY REDESIGN: A FEASIBILITY SURVEY 23 (1992), <http://nces.ed.gov/pubs92/92130.pdf>.

156. See National Center for Education Statistics, Publications & Products Search, <http://nces.ed.gov/pubsearch/index.asp> (last visited Apr. 8, 2009). A search for “pregnant” in all publications and survey and program areas, from January 2000 to present, yielded no results. A search specifically geared to determine if the Fast Response Survey System, which was the system that resulted from the feasibility study that included the “instructional setting for pregnant students” survey item, collected data about the topic also yielded no results. For the feasibility study, see

the NCES has the capability of collecting data about alternative programs in school districts that operate them, as evidenced by the feasibility survey, which indicated that the schools surveyed collected data automatically and in paper form about alternative schools for pregnant students.<sup>157</sup> The mere ability to do so, however, cannot be trusted to yield enough consistency to help regulators monitor schools that are required to follow federal mandates.

After the Supreme Court decision in *Brown v. Board of Education*,<sup>158</sup> the phrase and concept of “separate but equal” has been much maligned, for good reason, by courts and scholars alike.<sup>159</sup> There are circumstances, however, when the concept of separating the educational setting for certain students from other students might be lawful and just. Separating pregnant students from mainstream students, when pregnant students so choose, may be one of those circumstances. Even though that mandated choice allows students to choose which school they would like to attend, the risk remains that some schools may force their pregnant students into an alternative school, thus subjecting them to inferior education. Knowing the rate at which pregnant students attend or drop out of alternative schools, and whether the academic rigor at alternative schools is on par with mainstream schools would help regulators determine whether the “separate but equal” concept in the pregnancy context runs afoul of federal law.

It would obviously be instructive to regulators interested in evaluating the efficacy of alternative schools to know how many of these schools exist. Even more helpful, though, would be information about the number of pregnant teens who attend alternative programs in a particular district. Knowing the raw information about how many students attend alternative programs would be useful, as would knowing whether pregnant teens made the decision to attend those schools without pressure or influence from school administrators or teachers. A survey tailored to catching the potential harms intended to be rectified through the federal regulations would allow regulators the opportunity to focus their enforcement efforts in the right places.

*c. Academic requirements of pregnant students.*—The Regulations require that a pregnant student’s education in an alternative school be comparable to that which she would have received were she not pregnant, but they are not clear about what “comparable” means.<sup>160</sup> The ambiguity leaves open important questions: Do pregnant teens have to be in school for a certain number of days? Do they have to take the same courses non-pregnant teens have to take to graduate? Do they have to make up coursework that they have missed or inadequately completed? Additionally, it leaves open questions about alternative

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MANSFIELD & FARRIS, *supra* note 155.

157. See MANSFIELD & FARRIS, *supra* note 155.

158. 347 U.S. 483 (1954).

159. See, e.g., *Missouri v. Jenkins*, 515 U.S. 70, 120 (1995) (“In the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.” (quoting *Brown*, 347 U.S. at 495) (alterations omitted)); Erwin Chemerinsky, *Separate and Unequal: American Public Education Today*, 52 AM. U. L. REV. 1461 (2003).

160. See 34 C.F.R. §§ 106.34(c), 106.40(b)(3) (2009).

and mainstream educational programming: What courses are required of pregnant students? What courses are available? What optional courses do most students take? Just having to answer questions about their curricular options for pregnant students might help schools think about how better to comply with the Regulations, but the information is crucial to regulators to identify schools that put pregnant students on the “mommy track.”<sup>161</sup>

The rigors of schooling should not change when educating pregnant students, but the methods of how those students receive that education may need to. Requiring that alternative schools be comparable to mainstream schools should mean that pregnant students can expect to learn the same subjects they were learning in their pre-pregnancy school. It should also mean that the instructional quality of the alternative school should be comparable to the quality of instruction they received in their mainstream school. The Regulations do not require that schools gather and report any information from students attending alternative schools to see if they perceive their education to be comparable to that which they were receiving before transferring. This lack of information makes it difficult to determine whether they are receiving a comparable education and is evidence that stricter, clearer regulations should be implemented.

2. *Solution—Reporting Requirements About Pregnant Students.*—The lack of reporting requirements in the Regulations severely limits regulators’ ability to track and assess how schools treat pregnant students. Currently, the compliance provisions for Title IX are incorporated by reference to the compliance provisions in the regulations for Title VI.<sup>162</sup> The Title VI regulations have specific language that gives regulators a benchmark to judge the quality of the information schools file to comply with their federal mandate.<sup>163</sup> The added specificity to help schools and regulators track compliance with respect to race issues in the Title VI compliance regulations, however, is still somewhat vague: “For example, recipients should have available for the Department racial and ethnic data showing the extent to which members of minority groups are beneficiaries of and participants in federally-assisted programs.”<sup>164</sup> The Regulations need to include their own compliance provisions, and those provisions must be clear and explicit about the type of information schools must report.

The systems that are in place to collect data on the various demographic categories are already adequate to capture most of the information needed to determine whether public schools are addressing pregnant students’ academic needs. The CRDC has an established process that the government implements yearly to collect invaluable data about selected public schools. This data can be relied upon to reassess academic programming where deficiencies exist. Right

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161. Jane Gross, 2005: *In a Word; Daughter Track*, N.Y. TIMES, Dec. 25, 2005 (describing the “mommy track” as “the exodus of many young professional women from the workplace . . . with the expectation that when their children needed them less they would find a way to return”).

162. 34 C.F.R. § 106.71; *see id.* § 100.6.

163. *Id.* § 100.6.

164. *Id.* § 100.6(b).

now, the systems are not being utilized in a way that helps regulators or schools assess their success at educating pregnant students. The Regulations should be amended to make explicit the type of information schools should report. Specifically, the Regulations should require data collection about dropout rates for pregnant students, the number of students who attend alternative schools, and the academic rigor, or lack thereof, required of pregnant students.

*a. Dropout rates.*—Because the Regulations do not require that dropout rates among pregnant students be tracked, any data collection done by the NCES is not mandated or systematic.<sup>165</sup> Regular, yearly analysis of pregnant students' dropout rates would be a starting place for remediation, should it be necessary, at the local level. At the very least, requiring school administrators to report the academic setbacks suffered by pregnant students could raise awareness among those who can address the issues where they arise. Perhaps a reporting requirement would spark positive change for pregnant students in some areas and would help the federal government avoid getting involved at all. Schools may be unaware or willfully ignorant of a pregnancy-dropout correlation, and forcing them to report the numbers may encourage them to address problems that may be illuminated by the numbers.

The Regulations should include specific reporting requirements, mandating that schools provide regulators with regularly collected data about how many, and for what reasons, pregnant students drop out of school each year. For example, were the students asked or encouraged to leave, pushed to an alternative school they did want to attend, not accommodated if they experienced pregnancy complications that made it difficult to attend school, or did they drop out for reasons unrelated to the school's treatment of them during their pregnancy? The Regulations should require the Department to design a mandatory reporting form that schools must use to collect the required information and not leave it to schools to design their own data collection process. The new compliance provisions in the Regulations should begin: "Recipients must isolate information about pregnant students, including dropout rates and reasons for dropping out. The information must be reported regularly, but no less than every three years, to the Secretary." Recipients must use the form issued by the Secretary to collect the required information. This level of specificity should carry through to other new reporting provisions in the Regulations, including information about alternative schools.

*b. Information about pregnant students who attend alternative programs.*—The Regulations also should be revised to add a provision that requires school districts to report the number of pregnant teens who attend alternative programs each year. The Regulations do not require schools to provide alternative programs to pregnant teens, but to the extent that they are offered, regulators should know how many pregnant teens are in the programs. After the proposed compliance provision stated in the previous section, the Regulations should go on to state:

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165. See SELECT H. COMM., *supra* note 130.

Recipients who offer alternative schools to pregnant students must also report to the Secretary on a regular basis, but no less than every three years, how many pregnant students attend those alternative schools in a given year and how many students, who are known to the Recipient to be pregnant, remain in the school they attended before becoming pregnant.

Although the suggested language would not capture every piece of helpful information, it may help notify regulators when schools run afoul of the mandate that pregnant students be allowed to choose where to attend school if an alternative is available.

Assumptions based on statistics can be deceiving. If, for example, a school district shows that 100% of pregnant teenagers attend an alternative school during their pregnancy, it may signal that the school administration is shuttling the teens out of their rightful mainstream educational opportunities into an inferior program. On the other hand, it could mean the exact opposite. Perhaps the alternative school is so good that pregnant teens see the opportunity as the best option to meet their educational goals.<sup>166</sup> The numbers alone cannot complete the picture, but when analyzed in conjunction with other information, such as where compliance “hot spots” have arisen in the past, the numbers can raise a flag signaling ongoing or future problems in particular schools.

Knowing the number of students who attend alternative schools would also give regulators valuable information about alternative schools in general. For example, information about where alternative schools exist that provide education to pregnant students in higher numbers could provide a context to study the effectiveness of the alternative programs. The data could also be used by scholars seeking to determine whether alternative programs can or should be improved. Schools could also use the data to track trends in alternative education for pregnant students, which may aid their decisions to start or close an alternative school, for example. Regardless of how the data showing how many students attend alternative schools is analyzed by itself, it could be even more helpful for regulators and educators to see how the information merges with dropout rates.

The convergence of these two pieces of crucial data—dropout rates and the rate pregnant teens choose alternative programs—can help inform regulators and school districts how to better to serve pregnant students. It would be valuable to know if, for example, a school district that does not have an alternative program has a higher pregnant student dropout rate than school districts with alternative programs. Conversely, it would also be helpful to know how many pregnant students drop out of school in school districts that have alternative programs. A breakdown of how many students dropped out before

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166. Priscilla Pardini, *A Supportive Place for Teen Parents*, RETHINKING SCHOOLS ONLINE, Summer 2003, <http://www.rethinkingschools.org/sex/teen174.shtml> (discussing Lady Pitts High School in Milwaukee, which caters to pregnant and parenting students and boasts a 93% graduation rate).

entering an alternative program and how many dropped out after starting an alternative program might also be indicative of the efficacy of the alternative program. The data would not be conclusive evidence of problems in alternative programs (or the lack thereof), but it could be instructive and help regulators and educators start asking the right questions to discover where change is needed.

*c. Academic requirements of pregnant teens.*—The Regulations should also require that schools report their academic requirements for pregnant teens, regardless of what school they attend while pregnant. Schools should accommodate pregnant teens' physical and emotional needs during pregnancy; they should not be permitted to offer an inferior education that fails to prepare them the way they would have been prepared were they not pregnant. The Regulations should allow regulators to keep tabs on how schools are addressing academic requirements in mainstream schools, where pregnant students might need accommodation, and in alternative schools. The Regulations do not need to be so rigid as to specify what academic rigors a school should require, but they should require that schools report any deviations pregnant students encounter from the normal academic requirements. Such a mandate can point regulators to programs that are successfully addressing the challenges that accompany educating pregnant students and can warn regulators when schools impermissibly lower their standards for educating pregnant students.

Revised Regulations requiring self-reporting with regard to academic rigor should be simple and clear. The final sentence in the new reporting requirements in the Regulations should read: "Recipients must also report to the Secretary on a regular basis, but no less than every three years, any difference in graduation or promotion requirements (such as permissible number of missed days, academic requirements, or physical education options and alternatives) between pregnant and non-pregnant students." The flexibility permitted in the suggested language remains. For example, administrators can choose how to determine the number of absences to allow pregnant students before they are held back. All of the proposed reporting requirements give those charged with enforcing the Regulations the opportunity to evaluate, compare, and analyze the way schools in the United States treat pregnant students, and could be a starting point for change.

## *B. Enforcement*

*1. Problem—Title IX Does Not Have Adequate Enforcement Provisions to Protect Pregnant Students who are Expelled, Forced to Withdraw, Mistreated, or Forced into Alternative Schools.*—In the 1980 Commission Report, the U.S. Commission on Civil Rights determined that federal agencies were not doing enough to adequately enforce Title IX.<sup>167</sup> The Report was written after years of Recipient non-compliance and government inaction, which initially was the

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167. See 1980 COMMISSION R., *supra* note 5, at 2-6.

result of the HEW's failure to draft the Regulations.<sup>168</sup> Before the Regulations were implemented in 1975, but after Title IX was passed in 1972, victims of sex-based discrimination in schools throughout the country began an effort to hold HEW accountable for enforcing Title IX (and other federal civil rights statutes).<sup>169</sup> The battle lasted long after the Regulations were implemented, culminating in a decision that essentially relieved regulators of proactive enforcement requirements,<sup>170</sup> even though it was clear from the many court opinions issued throughout the fight that regulators were not engaged in adequate enforcement efforts.<sup>171</sup> As a result, the Regulations must pick up where the litigation failed.

Title VI of the Civil Rights Act of 1964 guaranteed African-American students educational opportunities equal to white students.<sup>172</sup> In 1970, a group of African-American students filed an action against HEW for failing to enforce that right and permitting school districts in seventeen southern and border states to continue receiving federal funding, despite their discriminatory practices.<sup>173</sup> The plaintiffs alleged that HEW's Office of Civil Rights, the Secretary of HEW, and the Attorney General deliberately failed to enforce Title VI and essentially extracted "the teeth" from the law.<sup>174</sup> The district court hearing the case granted the plaintiffs' prayer for injunctive relief, requiring HEW to commence proceedings against school districts out of compliance with Title VI.<sup>175</sup> The litigation was far from complete, however, because the federal government continued to lag in its enforcement obligations, and by 1976, other classes of complainants had been given permission by the U.S. Court of Appeals for the District of Columbia Circuit to intervene.<sup>176</sup>

On behalf of female students seeking to enforce the provisions of Title IX, which were also receiving little attention from HEW, the Women's Equity Action League (WEAL) intervened in the *Adams* litigation.<sup>177</sup> WEAL argued that HEW was permitting school districts to engage in sex-discriminatory practices in violation of Title IX.<sup>178</sup> WEAL was added into the schedule set in the earlier proceedings that required HEW to pursue all legitimate complaints in a timely manner and initiate compliance reviews of schools in the seventeen

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168. *See id.* at 3-5.

169. *See Women's Equity Action League v. Cavazos*, 879 F.2d 880, 882 (D.C. Cir. 1989), *supplemented*, 906 F.2d 742 (D.C. Cir. 1990).

170. *See Women's Equity Action League v. Cavazos*, 906 F.2d 742, 752 (D.C. Cir. 1990); *see also infra* text accompanying note 184.

171. *See Women's Equity Action League*, 906 F.2d at 744-46.

172. *See* 42 U.S.C. § 2000d (2006).

173. *See Adams v. Richardson*, 356 F. Supp. 92 (D.D.C. 1973).

174. *See Women's Equity Action League*, 879 F.2d at 881.

175. *See id.* at 881-82.

176. *See id.* at 882.

177. *See id.*

178. *Id.*

states included in the original *Adams* litigation.<sup>179</sup>

In 1977, the U.S. District Court for the District of Columbia approved a consent decree that settled several of the cases regarding HEW's lagging enforcement and issued an order, commonly known as the "*Adams Order*."<sup>180</sup> The *Adams Order* required federal authorities to enforce nationally Title VI, Title IX, and other federal directives regarding race, sex, national origin, and disability discrimination in a proactive and timely manner.<sup>181</sup> The *Adams Order* only operated effectively, according to the *Adams* plaintiffs, for a short period of time before the government again faltered in its enforcement efforts.<sup>182</sup> Upon a court directive to negotiate a revised order, the parties reached an impasse, and in 1982, federal officials sought to vacate the original *Adams Order*.<sup>183</sup> The parties continued to litigate their dispute until 1990, twenty years after the commencement of the lawsuit, when the U.S. Circuit Court for the District of Columbia ruled that the broad remedies sought by the plaintiffs were not legally cognizable.<sup>184</sup>

During the twenty years in which the dispute waged between federal officials and plaintiffs seeking enforcement of federal statutes and executive orders, the focus of the plaintiffs' arguments changed.<sup>185</sup> The D.C. Circuit, in the final court case held that by seeking broad judicial oversight of executive agencies, plaintiffs were requesting relief on grounds that the courts could no longer grant.<sup>186</sup> As such, even though it may have been true that federal agencies were not timely addressing female or minority students' complaints or initiating compliance reviews frequently or quickly enough, the federal courts were not (and are not) the right place to seek redress for those wrongs. The courts simply do not have the logistical capability to enforce such a broad directive.

As a result of the drawn-out, complex, and ultimately ineffectual litigation to require agencies to act on behalf of female, minority, disabled, or foreign students, there are only a couple of ways to improve the state of education for non-majority students. First, students may bring legal action directly against the school district for violations of federal law.<sup>187</sup> The only remedy available to

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179. *Id.* at 882-83.

180. *Id.* at 883.

181. *Id.*

182. *Id.* at 884.

183. *Id.*

184. *See Women's Equity Action League v. Cavazos*, 906 F.2d 742, 744 (D.C. Cir. 1990).

185. *See, e.g., Adams v. Bennett*, 675 F. Supp. 668, 680 (D.D.C. 1987) ("[P]laintiffs do not claim that defendants have abrogated their statutory responsibilities, but rather that, in carrying them out, they do not always process complaints, conduct investigations, issue letters of findings, or conduct compliance reviews as promptly or expeditiously as plaintiffs would like."), *rev'd*, 879 F.2d 880 (D.C. Cir. 1989), *supplemented*, 906 F.2d 742 (D.C. Cir. 1990).

186. *See Women's Equity Action League*, 906 F.2d at 752 (holding that two doctrinal changes in the law required a "green light" from Congress for courts to permit litigation against federal agencies for a failure to enforce federal civil rights under Titles VI and IX).

187. *See David S. Cohen, Title IX: Beyond Equal Protection*, 28 HARV. J.L. & GENDER 217,

students who have suffered discrimination in violation of Title IX is a non-discriminatory education.<sup>188</sup> Second, regulators can act proactively to evaluate school districts' compliance with federal regulations governing federal education civil rights statutes and can take action against schools not in compliance.<sup>189</sup> The first option leaves many gaps in the enforcement framework to adequately protect pregnant students, and the second option is not effective to combat pregnancy discrimination because proactive enforcement provisions are absent from the Regulations.

There are several problems with the first option as an adequate enforcement tool to deter pregnancy discrimination. Pregnancy is a temporary state, and the judicial process moves slowly.<sup>190</sup> By the time a teenager is able to secure even a preliminary injunction requiring her school administration to treat her equally, for example, she may be near, at, or past the end of her pregnancy.<sup>191</sup> Because the only reward for a successful pregnancy discrimination cause of action is an education comparable to that which non-pregnant students receive,<sup>192</sup> there is not much incentive for students to pursue it. Although adults in the same position may see the advantages to a solid education, many young pregnant women, perhaps failing to recognize the economic realities of their soon-to-be parent status, may not perceive its importance.<sup>193</sup>

The time, money, effort, and sophistication it takes to engage in civil rights litigation is likely far beyond a pregnant student, but the alternative, which requires proactive intervention by regulators, is not a viable option either. The Regulations incorporate by reference the Title VI enforcement procedures for violations of the regulations.<sup>194</sup> The "Procedures" section of the Title IX Regulations are actually entitled "Procedures [Interim]."<sup>195</sup> Those interim procedures, which appear to have been in place since their implementation in 1980, and have never been updated, simply refer the reader to the procedures for Title VI, which address enforcement in a few ways.<sup>196</sup> The procedures are nevertheless inadequate to timely intervene on behalf of pregnant students.

The Title VI regulatory procedures are vague and too broad to address compliance problems when schools discriminate against pregnant students. First, the Title IX Regulations lack their own procedures and incorporate instead

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218-19 (2005) (explaining that monetary damages are likely not available for pregnancy discrimination in school because the word "pregnancy" does not appear in the language of Title IX itself, only the Regulations thereto, and the Supreme Court has held that private rights of action cannot arise from violations of federal regulations, only violations of federal law).

188. *Id.*

189. *See* 34 C.F.R. § 100.7 (2009) (allowing periodic compliance reviews of Recipients).

190. *See* PILLOW, *supra* note 27, at 62.

191. *See id.*

192. *See* Cohen, *supra* note 187, at 218-19.

193. *See* PILLOW, *supra* note 27, at 62.

194. *See* 34 C.F.R. § 106.71 (2009).

195. *Id.*

196. *See id.* §§ 100.7-100.8.

regulations aimed at race discrimination, which are inadequate to isolate sex discrimination in schools.<sup>197</sup> Second, there is no expedited procedure for addressing complaints that are filed in time-sensitive situations, such as pregnancy discrimination.<sup>198</sup> The unique challenges presented in pregnancy discrimination situations are not addressed by the incorporated procedures in the Title VI regulations and require a stronger, clearer set of procedures aimed at stopping pregnancy discrimination.

2. *Solution—Regulations Mandating Swift Action to Investigate and Address Alleged Violations.*—The Regulations should include their own procedures for stopping pregnancy discrimination. Although procedures are generally transferable, especially in a similar legal context, such as with race discrimination and sex discrimination in schools, simply incorporating the regulations attached to Title VI is inadequate to address the unique problems that arise in pregnancy discrimination cases. During pregnancy, a student holds a unique legal status with unique legal problems that are quite different from the legal problems a minority student might encounter. Procedures governing Title IX must appear in the Regulations to, at the least, indicate that regulators understand that pregnancy discrimination raises special enforcement challenges. Moving the procedures from the Title VI regulations into the Regulations governing Title IX would be a good start, but would not solve problems raised by the fleeting status a pregnant student holds.

Once procedures are incorporated directly into the Regulations, they should be altered to specifically deal with the special issues presented by pregnancy discrimination and, at a minimum, require immediate investigation of complaints of pregnancy discrimination and immediate enforcement action. Because a student will be pregnant for a relatively limited time during her education, any violations of her right to an education should be rectified as quickly as possible. The Regulations should provide for an expedited investigation and hearing that allow a pregnant student to maintain her desired educational track until the hearing can commence. The language should read:

Upon receiving a complaint regarding pregnancy discrimination, the responsible Department official, or his or her designee, shall commence an emergency proceeding to determine whether the complaint has merit. The proceeding shall culminate in a preliminary injunction or temporary restraining order, where appropriate, to ensure that relief can be achieved as quickly as possible.

In addition to swift action, regulators should also engage in regular reviews to ensure compliance.

### C. Routine Reviews

The Department should be required to review schools' policies and attitudes

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197. See *id.* § 106.71.

198. See *id.* § 100.7.

about teen pregnancy to ensure that they are complying with the Regulations. A proactive approach to enforcement will help schools understand their obligations to pregnant teens and will protect pregnant students from discrimination based on ignorance or purposeful discrimination. The reviews can take many forms but should be conducted in such a way that schools with the highest likelihood of non-compliance receive higher scrutiny than other schools. That does not mean that schools that appear to have perfect track records (i.e., no formal complaints about pregnancy discrimination, low dropout rates, or few socioeconomic factors that indicate a high teen pregnancy rate) should not also receive review. It simply means that the Department should be thorough and review schools in every category. Currently, the Regulations lack specificity and thus, the regulators and Recipients cannot be on notice of the frequency and thoroughness of the reviews.

*1. Problem—Title IX Regulations Do Not Require Routine Reviews of Public Schools' Treatment of Pregnant Students or Alternative Programs Offered.*—The Regulations are not written specifically to require routine reviews of how schools treat pregnant students, and they do not require routine reviews of alternative programs that pregnant students attend.<sup>199</sup> The Title VI procedures, incorporated by reference into the Regulations, do require compliance reports to be filed with appropriate Department officials and require Recipients to allow Department officials who seek to launch an inquiry open access to their records.<sup>200</sup> The procedures in Title VI do not, however, include specific mandates for regular reviews; they do not address the unique challenges pregnancy discrimination raises for reviews; and they fail to mention alternative pregnancy programs altogether. The Regulations must make clear to regulators that reviews must be frequent, must address the time sensitivity of pregnancy discrimination, and must specifically require reviews of alternative programs.

The Title VI regulations require that Recipients of federal funds file compliance reports that show that they are following the directives of the federal law and the regulations implementing the law.<sup>201</sup> Those regulations, however, are geared toward detecting compliance problems with a federal statute prohibiting discrimination based on race and ethnicity.<sup>202</sup> The Title VI regulations require that Recipients keep and submit records to the designated Department official that can show that the Recipient “has complied or is complying” with the regulations.<sup>203</sup> The Department official responsible for reviewing the records has the power to specify what documents he or she would like submitted. The regulation provides: “For example, recipients should have available for the Department racial and ethnic data showing the extent to which members of minority groups are beneficiaries of and participants in federally-assisted

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199. *See id.* § 100.7(a) (“The responsible Department official or his designee shall from time to time review the practices of recipients to determine whether they are complying with this part.”).

200. *Id.* § 100.6(b)-(c).

201. *Id.* § 100.6(b).

202. *See id.*

203. *Id.*

programs.”<sup>204</sup> However, this example is too broad to effectively guide administrators to stay alert for pregnancy discrimination. For this reason, the procedures aimed at requiring compliance in racial discrimination cases are inadequate to address pregnancy discrimination.

Although it does not take a particularly creative mind to extend the obvious implications of the Title VI regulations to enforce Title IX regulations, the vagueness of the language leaves such large gaps that more specific language requiring more proactive enforcement is necessary. There are many reasons for this. First, because Title IX and its attendant regulations have become so widely recognized as athletics-equalizers,<sup>205</sup> the need to inquire into schools’ treatment of pregnant girls is likely not the main focus of Department officials tasked with enforcing Title IX. More specific enforcement provisions would force Department officials to be more proactive about rooting out pregnancy discrimination. Second, for a multitude of reasons, pregnant teenagers do not often seek to enforce their rights when they have faced pregnancy discrimination,<sup>206</sup> and this leaves a void that must be filled by those with the resources, time, and ability to enforce the Regulations. Third, the Title VI regulations leave significant discretion to the agency official to require compliance, which makes enforcement of the Title IX Regulations susceptible to the whims of each Presidential administration’s political ideology. Fourth, courts would be better able and more likely to require the Department to enforce the Regulations if they were clear and unambiguous. Regulatory compliance procedures must include specific examples of how to address pregnancy discrimination to help regulators pinpoint how schools discriminate against pregnant students.

2. *Solution—Clear Regulations Requiring the Department to Review Schools’ Handling of Pregnant Students’ Alternative School and Program Options.*—The Regulations should incorporate specific compliance procedures that require regulators frequently to investigate mainstream and alternative schools for potential pregnancy discrimination. The Regulations should have language specifically calling for reviews of schools for pregnancy discrimination, including a suggested timetable and method for those reviews. First, schools that have had a history of mistreating pregnant teens should receive heightened review and be categorized as higher-risk schools in need of closer scrutiny. Those schools should be made aware that they are in the higher-risk category and should be given the reasons for that determination. The heightened review should be transparent on one hand, to allow those schools that are ignorant of their legal obligations to pregnant students to get into compliance; however, those schools should also receive more frequent random, surprise reviews.

Second, the procedures should explicitly mandate careful review of alternative programs for pregnant students. The risk that alternative programs fly

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204. *Id.*

205. William C. Rhoden, *She’s Turning Pro, But Is It Progress?*, N.Y. TIMES, June 18, 2009, at B20 (recognizing Title IX as a “federal gender-equality law” in the context of athletics).

206. *See supra* Part II.B.1.

under the regulatory radar is real when pregnant students are so unlikely to report unlawful treatment, and they are the only students exposed to the programs. The Regulations should require an even higher level and frequency of review for alternative programs than they do for mainstream schools. The Department should be clear in the Regulations that all schools that receive federal funding will be subject to routine reviews of their policies and programs relating to pregnant teens.

#### *D. Voluntary Attendance of “Comparable” Programs*

The Regulations state that schools may offer alternative educational programs to pregnant teens as long as the programs are “comparable” to the mainstream education the students received before becoming pregnant and the choice to attend an alternative school is left to the pregnant student.<sup>207</sup> The Regulations make no other mention of the concept of alternative programs; there are no specific requirements to ensure the quality or quantity of education pregnant students must receive in the alternative programs. To date, there are no federal cases regarding the poor quality of education available to pregnant students.<sup>208</sup> This dearth of cases certainly does not imply that no problem exists, in light of compelling anecdotal evidence to the contrary and especially considering the weak procedural regulations governing enforcement and compliance.<sup>209</sup> Because the Regulations are silent as to what “comparable” means, schools can operate academically inferior schools without fear of reprisal.

*1. Problem—Title IX Regulations Are too Weak to Address Schools’ Efforts to Push Students to Alternative Programs and to Ensure that Alternative Schools Are Comparable.*—The Regulations are too weak to protect pregnant students from being coerced into attending academically inferior alternative schools. Two problems with alternative education must be addressed with stronger Regulations. First, schools must understand that they may not coerce, or even encourage, girls to attend alternative schools, even if the schools are academically superior to mainstream schools.<sup>210</sup> Although the Regulations require that schools allow pregnant students to make the choice to attend pregnancy schools, they are apparently not clear enough to stop schools from

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207. 34 C.F.R. § 106.40(b)(3).

208. See PILLOW, *supra* note 27, at 62-63. The Author performed a Westlaw search for: “34 C.F.R. 106.40,” which yielded no results post-2004, the year Pillow made the assertion that no cases regarding education quality issues arising under Title IX had been decided by the federal courts.

209. See *id.*; see also *supra* Part II.B.1. Pillow asserts that anecdotal evidence exists to indicate that some complaints of pregnancy discrimination are resolved at the school level, but that “complaints to the Office of Civil Rights remain low.” PILLOW, *supra* note 27, at 62-63.

210. See Tamara S. Ling, Comment, *Lifting Voices: Towards Equal Education for Pregnant and Parenting Students in New York City*, 29 FORDHAM URB. L.J. 2387, 2405-07 (2002) (discussing the persistence of the practice in New York City of pushing pregnant students out of their original school to a pregnancy school).

shuttling pregnant girls out to alternative schools.<sup>211</sup> Second, the Regulations must clarify what “comparable” means in order to stop schools from ignoring pregnant students’ academic needs and goals.<sup>212</sup> Clarifying the Regulations’ meaning regarding the statement that pregnant students should be left to choose whether to attend alternative schools should help schools avoid unlawfully pushing students out of their mainstream school.

The Regulations state that a pregnant student’s choice to attend an alternative school, should one exist, must be completely her own.<sup>213</sup> Despite that, anecdotal evidence shows that some schools still practice “push-out” with unabashed persistence.<sup>214</sup> The Regulations provide, in part, “A recipient which operates a portion of its education program or activity separately for pregnant students, admittance to which is *completely voluntary on the part of the student*. . . .”<sup>215</sup> Although the simple language in the Regulations seems completely clear, it is apparently not enough.<sup>216</sup> The attitudes the Regulations were meant to combat, namely that pregnant students are a bad influence and must be banished, remain.<sup>217</sup> The Regulations must also be improved to combat another hold-over from pre-Title IX days—the academically inferior alternative school.

Although there are no federal cases to confirm the inadequacy of some pregnancy schools, there is anecdotal evidence of their inferiority.<sup>218</sup> In one alternative school, girls were learning to quilt as a means of learning geometry (they had to cut shapes out of fabric), and in another, fewer than fifty percent of the students attended every day.<sup>219</sup> Some alternative school facilities are old and inadequate, curricula are lacking, and expectations are too low to ensure that pregnant students in these schools continue to move forward with their studies.<sup>220</sup> Even though the Regulations require that alternative education is “comparable to that offered to non-pregnant students,”<sup>221</sup> the persistence of inferior alternative schools indicates a need for stronger Regulations to address the problem.

2. *Solution—Regulatory Guidelines for Educators on How to Avoid Coercion and Clear Educational Standards for Alternative Schools.*—The Regulations regarding alternative schools must clearly indicate that schools may not coerce pregnant students to attend alternative schools, and those alternative

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211. *See id.*

212. *See* Amber Hausenfluck, Comment, *A Pregnant Teenager’s Right to Education in Texas*, 9 SCHOLAR 151, 175-79 (2006) (discussing the inadequacy of alternative schools in Texas); Ling, *supra* note 210, at 2400-04 (discussing the inadequacy of alternative schools in New York City).

213. *See* 34 C.F.R. § 106.40(b)(3) (2009).

214. *See* PILLOW, *supra* note 27, at 90-92.

215. 34 C.F.R. § 106.40(b)(3) (emphasis added).

216. *See id.*

217. *See* PILLOW, *supra* note 27, at 90-92.

218. *See* Hausenfluck, *supra* note 212, at 175-79; Ling, *supra* note 210, at 2400-04.

219. *See* Julie Bosman, *Schools for Pregnant Girls, Relic of 1960s New York, Will Close*, N.Y. TIMES, May 24, 2007, at A1.

220. *See id.*

221. 34 C.F.R. § 106.40(b)(3).

schools must meet certain academic standards. Regulators cannot trust that schools will allow pregnant students the choice to attend alternative programs because the decision-making process is so easy to influence. The Regulations should, therefore, include explicit language about the role schools can play in informing a pregnant student of her options. Also, the Regulations should include minimum educational requirements for alternative programs to ensure that pregnant students are actually receiving comparable educations to their non-pregnant peers. The rocky waters of advising students about what programs exist for pregnant students present the first area of improvement.

To further restrict any unlawful coercion of a pregnant student in her decision-making process, the Regulations should be changed in two ways. First, the Regulations should clarify that “completely voluntary on the part of the student”<sup>222</sup> means that schools should take no position on whether a pregnant student chooses to attend an alternative school. Second, the Regulations should include a new procedural provision that directs the Department to devise a set of guidelines for school administrators. The guidelines should help them understand the legal requirements associated with Title IX and its Regulations with respect to pregnancy, and how to approach discussions with pregnant students who are struggling with their educational choices. Both sets of provisions are necessary to protect pregnant students and to close the gap for schools that try to comply with the Regulations but do not know how to do so.

First, the Regulations, although seemingly clear, should be clarified further to remove any ambiguity about the appropriate level of input a school can have in a pregnant student’s decision to attend an alternative school. The Regulations should state:

A recipient may not, in any way, interfere with a student’s decision to attend an alternative school. Interference includes, but is not limited to, encouragement to attend an alternative program by suggesting it would be superior to her current education, suggestion that her mainstream school might not be able to meet her needs during pregnancy, and telling her how many other students attend alternative programs (unless specifically asked).

Such specificity seems necessary in light of the continuing problems with pushing out pregnant students, but further clarification on how to speak to pregnant students is necessary and must be included in the Regulations.

Even in schools where administrators are not engaging in explicit “push out” efforts, there may be an implied message from the administration to the student that she should not plan on continuing with her education at the school she attended when she became pregnant during the pendency of her pregnancy. Just making information available about alternative programs, if not done carefully, can suggest to a pregnant student that she should not continue in her mainstream school. When a school district has an alternative educational environment available for pregnant students, it makes sense for the school district and its

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222. *Id.*

administrators to assume the alternative is a superior educational choice for the student. It really is not fair to leave administrators the difficult task of discussing alternative educational options without some guidance to help them avoid running afoul of Title IX. As such, the proposed procedures in the Regulations should direct the Department to draft guidelines to clearly explain how schools can discuss alternative schools with pregnant students without running afoul of the Regulations.

The procedures governing the Regulations should require the Department to write, distribute, and update as necessary, a set of guidelines for school administrators who discuss with students their academic options during pregnancy. The procedural Regulations should read:

The responsible Department official, or his or her designee, should issue specific guidelines for distribution to all recipient schools with instruction about how to discuss with pregnant students their academic options during pregnancy. School districts that operate alternative schools should be specifically guided in how to avoid coercing pregnant students to attend those programs. The guidelines must be updated as necessary to apprise recipients of any changes in the law that would affect how they approach these discussions.

Not only should schools be clearly instructed about their responsibility to leave pregnant students to make their own decision regarding what school to attend, they must also be clear about what it means to offer a comparable education to that which is available in their mainstream school.

Although flexibility is crucial in the Title IX regulations for pregnant students, the requirement that they receive a “comparable” education is too vague to ensure that their education is actually comparable to what they would have received had they stayed in their mainstream school. Minimum graduation standards, with respect to math, science, English, and any other subjects required in the mainstream school system should also be required at alternative schools. School districts should operate under the assumption that pregnant students will continue to seek the same goals they would have sought if they were not pregnant. The value of extra-curricular options should not be discounted either. The one word in the Regulations addressing the quality of alternative schools—“comparable”<sup>223</sup>—is not enough to put schools on notice of their obligations to maintain academic standards in alternative schools.

It would not be difficult to elaborate on the current requirement in the Regulations with regard to alternative school quality. A simple requirement that schools be “comparable” leaves schools to interpret what academic and programmatic rigor is required of them, to the detriment of pregnant students. The Regulations should read:

A recipient that operates an alternative school or program for pregnant students must adhere to the academic and programmatic requirements in

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223. *See id.*

the school district's mainstream schools. While alternative schools may accommodate the particular physical and emotional needs presented during pregnancy, they may not vary from the educational quality or programmatic options available to students in mainstream schools.

Such a requirement should leave open the probability that schools will have to accommodate pregnant students' unique needs from time to time while clarifying schools' obligation to educate equally pregnant students.

### CONCLUSION

The Regulations implementing and governing Title IX were intended to protect pregnant students from sex discrimination in school, but they are inadequate to address all of the unique challenges raised by pregnant students. The regulatory provisions governing pregnancy discrimination in schools have faded into the background, partially because their noisy neighbor, the provisions governing female participation in school athletics, have taken so much of the attention given to the Regulations. Despite numerous attempts by commentators to raise concerns about the continuing discrimination suffered by pregnant students, little has changed since the Regulations were enacted. In order to truly guarantee access, choice, and quality education to pregnant students, the Regulations must change. Stronger Regulations are the most likely vehicle to positive changes for pregnant students, which have been a long time coming and much needed to fulfill the promise of equality in Title IX.

In summary, the Regulations should be revised to include:

1) Language regarding reporting dropout rates:

Recipients must isolate information about pregnant students, including dropout rates and reasons for dropping out. The information must be reported regularly, but no less than every three years, to the Secretary. Recipients must use the form issued by the Secretary to collect the required information.

2) Language regarding reporting of academic requirements:

Recipients must also report to the Secretary on a regular basis, but no less than every three years, any difference in graduation or promotion requirements (such as permissible number of missed days, academic requirements, or physical education options and alternatives) between pregnant and non-pregnant students.

3) Language regarding reporting about alternative schools:

Recipients who offer alternative schools to pregnant students must also report to the Secretary on a regular basis, but no less than every three years, how many pregnant students attend those alternative schools in a given year and how many students, who are known to the Recipient to be pregnant, remain in the school they attended before becoming pregnant.

4) Language regarding swift action in response to complaints of

discrimination:

Upon receiving a complaint regarding pregnancy discrimination, the responsible Department official, or his or her designee, shall commence an emergency proceeding to determine whether the complaint has merit. The proceeding shall culminate in a preliminary injunction or temporary restraining order, where appropriate, to ensure that relief can be achieved as quickly as possible.

5) Language regarding how educators must leave the choice of attendance of an alternative school to the pregnant student:

A recipient may not, in any way, interfere with a student's decision to attend an alternative school. Interference includes, but is not limited to, encouragement to attend an alternative program by suggesting it would be superior to her current education, suggestion that her mainstream school might not be able to meet her needs during pregnancy, and telling her how many other students attend alternative programs (unless specifically asked).

6) Language regarding procedural changes to require regulators to publish guidelines for school administrators:

The responsible Department official, or his or her designee, should issue specific guidelines for distribution to all recipient schools with instruction about how to discuss with pregnant students their academic options during pregnancy. School districts that operate alternative schools should be specifically guided in how to avoid coercing pregnant students to attend those programs. The guidelines must be updated as necessary to apprise recipients of any changes in the law that would affect how they approach these discussions.

7) Language regarding a school's obligation to provide a comparable education to that which a non-pregnant student receives:

A recipient that operates an alternative school or program for pregnant students must adhere to the academic and programmatic requirements in the school district's mainstream schools. While alternative schools may accommodate the particular physical and emotional needs presented during pregnancy, they may not vary from the educational quality or programmatic options available to students in mainstream schools.