Parenting and Pregnant Students: An Evaluation of the Implementation of the Other Title IX

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INTRODUCTION

Title IX of the Education Amendments of 1972 prohibits gender discrimination. Although pregnancy has been described as the "quintessential sex difference," Title IX's prohibition of gender discrimination in the context of parenting and pregnant students has often been left out

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of the discussion, and therefore the understanding, of the implementation of Title IX Regulations. The scholarship discussing the topic shows general agreement that the language and spirit of Title IX has not been given effect thus far by our schools or by some courts.

This Article begins by looking to the Title IX regulations themselves and then to the research indicating that this aspect of Title IX has yet to be fulfilled. With that understanding, it turns to the litigation landscape to identify trends in the case law, including strengths, weaknesses, and gaps. Next, this Article looks to societal impacts, specifically lack of awareness, discourses and legal mobilization, in order to garner an understanding of why the Title IX Regulations for pregnant and parenting teens have not been more strongly implemented in schools or litigated in courts.

A. Title IX and HEW Regulations

In 2006, the National Campaign to Prevent Teenage Pregnancy reported that approximately 850,000 teenage girls become pregnant and that these pregnancies result in over 500,000 births each year. Other studies have shown that becoming a mother during secondary school increases the chances of dropping out.


3. See infra Part II. A, Lack of Knowledge, for discussion of unawareness by students and school personnel.

4. See, e.g., Catherine Marshall & Gary L. Anderson, Rethinking the Public and Private Spheres: Feminist and Cultural Studies Perspectives on the Politics of Education, POLITICAL SCIENCE ASSOCIATION YEARBOOK 176 (1994) ("[W]ith little effort at monitoring, training, or enforcement, and with ample attention to protecting dominant interests from any ill effects of sex equity, gender equity is still problematic after 20 years of policy nonimplementation.").

5. Not since 1994 has any of the literature provided such an overview of the litigation, and the cases have more than tripled since Deborah Brake's Clearinghouse Review article. See infra note 14 and accompanying text.


7. See Ducker, supra note 6; Madeline E. McNeely, Title IX and Equal Educational Access for Pregnant and Parenting Girls, 22 Wis. WOMEN'S L.J. 267, 268 (2007); see also National Women's Law Center ("NWLC"), When Girls Don't Graduate, We all
Research indicates that teen pregnancy is the number one reason that girls drop out of high school. Indeed, the pamphlet created and distributed by the Office for Civil Rights in 1991 for school administrators, teachers, and staff, as well as students and parents, discussing U.S. Department of Education regulation of the requirements under Title IX states that “[p]regnancy is the leading reason for females to drop out of high school... The problem is not limited to racial or ethnic minorities; in fact, 58% of pregnant teens are white.”

At the same time, research done by Wanda S. Pillow, Professor of Education Policy at University of Illinois–Urbana Champagne, shows another relationship between teen pregnancy and high school reentry. Her work demonstrates that many teen mothers who dropped out before being pregnant returned to school after being pregnant: “[U]p to 25% of female dropouts return to school when they are pregnant.” Research by Amber Hausenfluck reinforced this point, describing a mother who reported returning to school after having dropped out in order to gain an education that would enable her to provide for her daughter.

In addition, research indicates that pregnancy disproportionately impacts female students' educational experience as compared to male students who father children. For example, research by the Gates Foundation shows that 33% of female students, but only 19% of male...
students, listed pregnancy as a reason for their decision to drop out. \footnote{13} Such statistics illustrate how school-aged pregnancy and parenting continue to raise gender equity issues. \footnote{14}

Accordingly, the implementation of the Title IX Regulations related to pregnant and parenting students is important because it addresses a significant population of students and presents high-stakes challenges for school organizations. \footnote{15}

In 1972, President Nixon signed Title IX of the Educational Amendments. In 1974, the cabinet-level Department of Health, Education, and Welfare ("HEW")\footnote{16} enacted Regulations ("Regulations") to effectuate Title IX, \footnote{17} which specifically address gender equity concerns in the context of pregnancy. \footnote{18} The Regulations provide that

(1)[A] recipient [of federal funding] shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program.

\footnote{13} NWLC, \textit{supra} note 7, at 12.
\footnote{14} For thorough discussions of the history of treatment of pregnant and parenting teens see Deborah Brake, \textit{Legal Challenges to the Educational Barriers Facing Pregnant and Parenting Adolescents}, 28 CLEARINGHOUSE REV. 141 (1994); Kendra Fershee, \textit{Hollow Promises for Pregnant Students: How the Regulations Governing Title IX Fail to Prevent Pregnancy Discrimination in School}, 43 IND. L. REV. 79 (2009); \textit{WENDY LUTTRELL, PREGNANT BODIES, FERTILE MINDS} (2003); \textit{Pillow, \textit{supra} note 10}.
\footnote{15} McNeeley, \textit{supra} note 7, at 269 (describing that 7–8% of teenage girls become pregnant each year and that nearly one-third of teenage girls will become pregnant by the age of 20).
\footnote{16} The Department was created under President Eisenhower in 1953. In 1979, a separate Education Department was created and HEW became the Department of Health and Human Services in 1980. \textit{See U.S. Dept. of Health & Human Serv., About Us: Historical Highlights, http://www.hhs.gov/about/hhs Hist.html}.
\footnote{17} 34 C.F.R. § 106.1 ("The purpose of this part is to effectuate Title IX of the Education Amendments of 1972, as amended by Pub. L. 93–568, 88 Stat. 1855 (except sections 904 and 906 of those Amendments) which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in this part. This part is also intended to effectuate section 844 of the Education Amendments of 1974, Pub. L. 93–380, 88 Stat. 484. The effective date of this part shall be July 21, 1975.").
\footnote{18} Fershee, \textit{supra} note 14, at 79; \textit{see also Pillow, \textit{supra} note 10, at 56}. 
(3) 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 as provided in paragraph (b)(1) of this section shall ensure that the instructional program in the separate program is comparable to that offered to non-pregnant students.

(4) A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.19

Title IX and the Regulations became effective in 1975, thirty-five years ago.20 Under the Title IX Regulations, public schools and private schools that receive federal funds must both accommodate pregnant and parenting students and also provide these students equal treatment.21 In a 2008 article, law professor Deborah Brake describes these potentially conflicting demands:22

By including both accommodation rights, independent of how other students are treated, and comparative rights, treating pregnant students as well as other temporarily disabled students, Title IX straddles the equal treatment/special treatment divide that has characterized so much of the discourse surrounding discrimination law's treatment. Feminists have often struggled with whether to analyze pregnancy under a special treatment model, requiring extra accommodation of pregnancy.

19. 34 C.F.R. § 106.40(b).
20. 34 C.F.R. § 106.1.
21. See 34 C.F.R. § 106.2(h)(3) for inclusion of private schools that receive federal monies. But see 34 C.F.R § 106.12 (“This part does not apply to an educational institution which is controlled by a religious organization to the extent application of this part would not be consistent with the religious tenets of such organization.”). See also infra notes 222-225 and accompanying text for discussion of how students with pregnancy-related disability may be able to use Section 504 to assert rights against private schools.
22. Brake, supra note 1, at 344–47.
or an equal treatment model, requiring pregnancy to be treated as well (or as badly) as some comparable condition.\textsuperscript{23}

Brake explains that Title IX's straddling of the two is beneficial because each has flaws and thus Title IX "mitigates the downsides of both."\textsuperscript{24}

In contrast, Kendra Fershee and Madeline McNeeley suggest that coupling equal treatment requirements with accommodation has presented schools with unclear and challenging legal requirements. However, as will be discussed in Part III, many schools are unfamiliar with the requirements at all, which suggests that failures to implement the regulations are less an issue of vagueness and/or complexities in the requirements and more an issue of lack of awareness.

\textbf{B. Enactment Alone Does Not Accomplish Social Reform}

In addition to the above issues arising from the inclusion of both equal treatment and accommodation requirements,\textsuperscript{26} Title IX's implementation has been far from clear. The literature discussing pregnant and parenting students covers an array of areas, including athletics, instruction, single-sex schools, and extracurricular activities. It also calls for additional regulations from the federal government and discussions of social discursive forces at play in the failures in implementation.\textsuperscript{27} Yet while the topics covered in the literature vary, the scholarship shows general agreement that Title IX has not been given its full range by schools and some courts. As will be discussed, research shows that

\begin{itemize}
  \item \textsuperscript{23} Id. at 344.
  \item \textsuperscript{24} Id. at 346--47 ("[T]he comparative model artificially reduces pregnancy to a narrow physical dimension so that it can be analogized to a temporary disability. This poses the risk that the nonphysical dimension of pregnancy will be ignored. . . . [T]he special treatment model invites greater attention to the ways in which pregnancy is unlike temporary disabilities. . . . Pregnancy implicates women's identities, life courses, and relationships to others in ways that knee injuries and ankle sprains do not, and there is value in having an approach to equality that recognizes the uniqueness to pregnancy.").
  \item \textsuperscript{25} McNeeley, supra note 7, at 268; see Fershee, supra note 14, at 110.
  \item \textsuperscript{26} See McNeeley, supra note 7, at 268 ("Federal regulations set forth seemingly bright-line rules extending this protection. . . . Nevertheless, pregnant and parenting teens are frequently denied educational rights because some of the legal requirements are unclear and schools are often unwilling or unable to accommodate the girls."); Brake, supra note 1, at 337 ("Like other major federal antidiscrimination statutes, the key language simply bans discrimination on the basis of sex, leaving to interpretation important questions about the meaning of discrimination and the scope of the protected class characteristic.").
  \item \textsuperscript{27} See, e.g., Brake, supra note 1; Pillow, supra note 10.
\end{itemize}
schools continue to practice informal push-out policies, operate less-than-comparable alternative schools, treat pregnant and parenting students with hostility, fail to accommodate pregnant and parenting students' health and emotional issues, prohibit or discourage pregnant and parenting students from participating in certain classes, and in general, continue to treat pregnant and parenting students differently than students with other health challenges and conditions.28

This Article argues that there are three central reasons for the failures in implementation: 1) the perception of little or no case law; 2) lack of knowledge of “front-line service providers to pregnant and mothering teens”29 and of students themselves;30 and 3) the social and legal marginalization of the affected students.31 Further, this Article emphasizes that the litigation landscape shows pregnant and parenting students often assert other rights. In some cases, litigants have asserted other legal claims alongside Title IX claims; in other cases litigants have asserted other legal protections exclusively—sometimes to their detriment. This review of the case law ultimately indicates that while Title IX is central in the litigation, other constitutional protections, particularly privacy, are often implicated.

This Article proposes three means for improving the fulfillment of the Title IX law: first, increase awareness of the existing case law and effective use of litigation as a strategy for improving enforcement; second, impose law and education requirements for teachers and administrators; and third, increase regulation by the Office for Civil


29. See Wanda S. Pillow, Teen Pregnancy and Education: Politics of Knowledge, Research, and Practice, 20 EDUC. POL’Y 59, 60 (2006) for term. For discussion of lack of knowledge by teachers and administrators, see infra Part III.

30. MARGARET A. NASH & MARGARET DUNKLE, THE NEED FOR A WARMING TREND: A SURVEY OF THE SCHOOL CLIMATE FOR PREGNANT AND PARENTING TEENS 5–11 (Equality Ctr. 1989); NWLC, supra note 7 ("According to the Gates Foundation report . . . those who left [were] . . . most likely to say that they would have worked harder if their schools would have demanded more of them and provided the necessary support . . . many pregnant students dropped out because they 'unable to juggle' the demands of school and parenthood and seemed unaware of any assistance at their schools that might have helped them ease their burden."); Pillow, supra note 10.

31. See infra notes 295–302 and accompanying text.
Rights. The article argues that increased regulation alongside increased awareness combined with, or as part of, such law and education requirements for educators will combat the marginalization of the students most impacted by developing their perception as “rights-bearing” individuals. This change in perception will begin to chip away at the rights-derogating discourses that have shaped the discussion of the education of pregnant and parenting students.

I. LACK OF CASE LAW?

The United States Supreme Court upheld Title IX as a private right of action in Jackson v. Birmingham Board of Education. Yet, the number of Title IX cases addressing the rights of pregnant and parenting students is disproportionately small to the number of students that research indicates are having their rights violated in schools. Indeed, the bulk of literature discussing Title IX Regulations and school-aged expectant and current mothers describes a lack of case law on point. In her 1994 article Brake said, “Because very little case law exists interpreting the rights of pregnant students under Title IX, courts evaluating these claims should be guided primarily by the language of the Title IX regulation.” Ten years later, Pillow says that “[t]here has been no case law under Title IX to determine what educational opportunities for school-age mothers looks like and why schools continue to be ambivalent.” McNeeley’s 2007 law review article states, “[T]here is an almost total absence of litigation in this area, except for several cases in which students have been excluded or dismissed from the National Honor Society.” The National Honor Society (“NHS”) cases are discussed in detail in Part II(A), but

32. Kendra Fershee makes the argument for increased regulations by the OCR in Hollow Promises for Pregnant Students: How the Regulations Governing Title IX Fail to Prevent Pregnancy Discrimination in School, supra note 14.

33. Nancy Lesko, Act Your Age! A Cultural Construction of Adolescence 144 (2001) (arguing that “reproductive rights must include health care, sex education, AIDS prevention, and so on (sic) will shift the present immoral status of teenage mothers.”).


35. Brake, supra note 14, at 144.


37. McNeeley, supra note 7.
for now it is sufficient to note that the four NHS cases represent less than a fourth of the cases addressing the rights of pregnant and parenting teens in school. McNeeley's description illustrates how the perception of a lack of case law persists despite the existence and growth of a body of cases, more than half of which were resolved in favor of the students. Numerous other law reviews and articles continue to describe and reinforce the perceived lack of case law addressing school-aged current and expectant mothers, either generally or under specific topics.38

Not since Brake's 1994 article has any of the literature provided a thorough, updated review of the case law on point. Such an updated review is called for, given that when Brake wrote Legal Challenges to the Educational Barriers Facing Pregnant and Parenting Adolescents in 1994, there were only six cases on point, five of which were addressed by Brake. There are now eighteen cases; the number has more than tripled. While the 2009 law review article by Fershee39 provides an excellent discussion of cases decided prior to the enactment of Title IX, the case law discussion is limited to pre-Title IX decisions.40 Further, while the purpose of Fershee's article is not to provide a review, the article, along with those discussed above, references the lack of case law,41 thus reinforcing the notion that little or no helpful precedent exists.

The significance of case law is highlighted by Katherine Hanson et al. in More than Title IX: How Equity in Education has Shaped the Nation. Ray Rose, former teacher and former staff member of Massachusetts Department of Education's Bureau of Equal Educational Opportunity, is quoted as aptly stating, "Legislation was important to help get people to change their behaviors, policies, and classroom content. We were able to use the laws to change the code. Without the national cases and the defining legal judgments, a lot of this wouldn't have happened. \textit{We need cases to get things moving.}"42 Rose's comment illustrates the importance of case law, explains why the myth of there

38. Ling, \textit{supra} note 28, at 2400 ("Unfortunately, the regulations do not explicitly set forth criteria for determining comparability and there has been no case law directly on point."); Hausenfluck, \textit{supra} note 11, at 173 ([there is no case law defining what constitutes “voluntary” under Title IX . . . “]; \textit{id.} at 176 ("It is difficult to compare the quality of alternative education programs to that of home campuses. . . and 3) there has yet to be case law on point.").
40. \textit{Id.; see also} Pillow, \textit{supra} note 10 (describing very few post-Title IX cases).
41. Fershee, \textit{supra} note 14, at 111 ("To date, there are no federal cases regarding the poor quality of education available to pregnant students. This dearth of cases certainly does not imply that no problem exists. . . . Because the regulations are silent as to what “comparable” means, schools can operate academically inferior schools without fear of reprisal.").
42. Hanson et al., \textit{supra} note 2, at 28 (emphasis added).
being no case law addressing pregnant and parenting students is problematic, and, as will be discussed in Part IB, emphasizes the importance of highlighting the case law that we do have. This Article now turns to examine the legal landscape for Title IX pregnant and parenting student claims.

A. The Cases

As of January 2010, there were a total of eighteen cases related to Title IX and pregnant and parenting students,\(^4\) thirteen of which alleged Title IX violations. Three cases present fact patterns that correspond to existing Title IX precedent and arguably could have but did not raise Title IX violations, and one case presented a unique fact pattern under which the plaintiffs could have alleged Title IX violations but did not. Keeping in mind the earlier discussion of how Title IX requires both accommodation and equal protection, the cases are organized under these broad categories in order to provide architecture to the discussion. Five cases fall under “accommodation” and thirteen fall under the category of “equal treatment.” Each will be treated distinctly under its respective category with enough of the fact pattern to give light to the situations for which claims have arisen and a sufficient description of the holding to illuminate how courts are and are not enforcing Title IX for pregnant and parenting students.

1. Accommodation Cases

There are five cases that address Title IX claims by pregnant and/or parenting students. These cases represent a disproportionately small number in comparison to the number of students shown by research to be affected by the failures in Title IX implementation. They represent, however, a varied and enlightening array of claims and holdings, including: one claim against a college for failure to provide childcare;\(^4\) one claim by a father seeking pregnancy relief under NCAA rules;\(^4\) two

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43. Starting in November 2009 and using Westlaw, I gathered 17 cases that specifically applied to this discussion. I re-ran the search in January 2010 and was able to gather one additional claim. I have also cross-checked this group of cases through multiple law reviews and articles on the topic.


claims for accommodations for coursework and/or class structure due to significant pregnancy complications; and one claim for which few facts are provided but which alleges discrimination on the basis of pregnancy and pregnancy-related disabilities.

a. De La Cruz v. Tormey—The Childcare Case

This 1978 case has not been distinguished or overturned. In fact, it was cited by a later Ninth Circuit opinion for its remarks on the role of the judiciary in school policy. Brake also references it in her 1994 article’s discussion of disparate impact claims. Here, the plaintiffs alleged that the community college had denied their equal opportunity to education and

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48. "In doing this our effort joins a growing number of cases in which the federal courts have been called upon to trace the bounds of equal educational opportunity" as required by the Constitution or statute. Decisions flowing from such an undertaking involve, inter alia, The question of “the proper role of the federal judiciary in overseeing the decisions of local administrative bodies in the field of public education.” De La Cruz v. Tormey, 582 F.2d 45, 47 (9th Cir. 1978). "Responding to this question also involves considering the interests of the children being educated, their parents, and the local school authorities, the respective roles of the state and federal governments, the competency of the federal courts to undertake the requested education oversight, and, at least in this case, the nature of the social compact that binds this Nation together.” Guadalupe Org., Inc. v. Tempe Elem. Sch. Dist. No. 3, 587 F.2d 1022, 1025 (9th Cir. 1978) disapproved of on other grounds by Yniguez v. Ariz. for Official English, 69 F.3d 920 (9th Cir. 1994) (citing Guadalupe for importance of common grounds but then stating for contrast, "Equally important, however, is the American tradition of tolerance, a tradition that recognizes a critical difference between encouraging the use of English and repressing the use of other languages. Arizona’s rejection of that tradition has severe consequences not only for its public officials and employees, but for the many thousands of Arizonans who would be precluded from receiving essential information from their state and local governments if the drastic prohibition contained in the provision were to be implemented.").

49. Brake, supra note 14, at 154. Disparate impact claims reference those claims in which a party claims that individuals sharing a particular characteristic are disproportionately treated or affected differently through application of a facially neutral policy. Because disparate impact theory does not consider intention, it is distinct from intentional discrimination. For additional discussion of disparate impact theory, see Brake, supra note 14; see also Deborah Brake, What Counts as “Discrimination” in Ledbetter and the Implications for Sex Equality Law, 58 S.C. L. REV. 657 (2008); Julia A. Davis & Lisa M. Bohon, Re-Imagining Public Enforcement of Title IX, B.Y.U. EDUC. & L.J. 25, 47 (2007).
violated Title IX by its failure to provide child care.\textsuperscript{50} The court held that the plaintiffs' claims should survive summary judgment.

Material facts discussed in the opinion included: plaintiffs' allegations that the college had failed to provide child care despite "an apparently severe shortage of child care facilities for low-income families in San Mateo County;"\textsuperscript{51} a presentation to the Board of Trustees by the Associated Students of the College of San Mateo (ASCSM) describing the result of a survey of over 3,500 students that showed a high need for child care; a report by a hired consultant that described a severe need and recommended a procedure to address it, including seeking state and federal grant money; a report by the District Advisory Committee for Early Childhood Education, composed of faculty and students of the Early Childhood Education Department and community member and public services agencies that recommended that a campus child care facility be developed; and two separate grant opportunities that were offered, one at the federal level and one at the state level, that required no financial obligation from the college but required approval, which the college refused.\textsuperscript{52}

The federal district court noted that the plaintiffs included mothers who would attend community college if child care facilities were provided but were not able to because of the lack of such facilities:

All of the plaintiffs in this case are being denied an opportunity for education or are threatened with a denial of educational opportunity solely on account of the lack of child care facilities. . . . Since the plaintiffs cannot find employment without more education, the denial of child care facilities forces the plaintiffs into low paying jobs or onto welfare . . . .

There can be little doubt that a discriminatory effect, as that term is properly understood and has been used by the Supreme Court, has been adequately alleged. The concrete human consequences flowing from the lack of sufficient child care facilities, very practical impediments to beneficial participation in the Districts' educational program, are asserted to fall overwhelmingly upon women students and would-be students.\textsuperscript{53}

\textsuperscript{50} De La Cruz v. Tormey, 582 F.2d 45, 47 (9th Cir. 1978).
\textsuperscript{51} De La Cruz, 582 F.2d at 48.
\textsuperscript{52} De La Cruz, 582 F.2d at 48-49.
\textsuperscript{53} De La Cruz, 582 F.2d at 53.
The court was also careful to address the issue of inaction and held that a school district's failure to establish provisions for child care for its students may constitute an act that is subject to challenge for having a discriminatory impact on women and, therefore, violates Title IX.\(^{54}\)

b. *Butler v. National Collegiate Athletic Association*—The Father-Athlete case

Toure Butler filed a claim alleging Title IX violation for the inequitable treatment of fathers in the National Collegiate Athletic Association ("NCAA")\(^{55}\) athletic regulation that allowed mothers, but not fathers, to receive a one-year waiver in athletic eligibility for the reason of pregnancy.\(^{56}\) Butler sought a temporary restraining order against the NCAA determination that his five-year athletic eligibility had expired. Butler argued that he lost a year of opportunity to play football because he changed plans to attend NMSU in order to work to provide and care for his daughter. The court emphasized that the NCAA provision allowed the one-year waiver for pregnancy and not motherhood or fatherhood and denied the injunction.\(^{57}\)

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54. *De La Cruz*, 582 F.2d at 53–58.
55. In *National Collegiate Athletic Association v. R.M. Smith*, the United States Supreme Court overturned the Third Circuit's conclusion that the NCAA is subject to a private action under Title IX because it received dues from universities that received funding from the federal government, but the Court left open the two alternative arguments advanced for application of Title IX to the NCAA for the lower courts to determine. Nat'l Collegiate Athletic Ass'n v. R.M. Smith, 525 U.S. 459, 469 (1999). On remand, the Third Circuit held that "Smith presented a viable theory for subjecting the NCAA to Title IX's requirements and thus her proposed amendment would not be futile." Nat'l Collegiate Athletic Ass'n v. R.M. Smith, 266 F.3d 152, 163 (3d Cir. 2001).
c. Hogan v. Ogden and Darian v. University of Massachusetts Boston—The Coursework Accommodation Cases

i. Hogan v. Ogden

In Hogan, the federal district court denied summary judgment to defendants regarding Hogan's claims of Title IX violations in discriminating against her based upon her pregnancy. Hogan was a student at Central Washington University and enrolled in a senior-level video production course that included lectures, exercises, and projects.

Until the end of October, Hogan had attended every class. On October 27, however, Hogan had contacted her instructor to miss class because she was eight months pregnant and experiencing complications. Hogan was then placed on bed rest and missed a test given two days later. Hogan requested to have the test given at her home and explained that she was prepared but unable to travel to the school. In response, the instructor encouraged her to withdraw from the course because she was causing hardship for her group and was at a risk of failing. Hogan replied and proposed two means for taking the exam: 1) that a student proctor give it at her home; or 2) that her mother could drive her to the school in 8 days. She also explained that her group "did not object to her absence. In fact, without Defendant Ogden's knowledge, her group helped her stay involved despite her absence. One group member took notes for Hogan during class. At another point, members from Hogan's group traveled to her home to work on the group project." The instructor rejected both of Hogan's proposed means for taking the exam and again encouraged Hogan to withdraw, noting that she was not going to be able to pass and that it was in "everyone's best interest." Hogan's group eventually contacted the instructor to get clarification about Hogan's status and indicated that they wanted her to participate if she could take and pass the equipment exam. The instructor directed them to move on without her. Hogan ultimately withdrew and filed a Title IX action for the lack of accommodation.

60. Hogan, 2008 WL 2954245, at *2.
64. Hogan, 2008 WL 2954245, at *2.
The court held that Hogan had made a prima facie case for a Title IX violation and a violation of the ADA. Regarding the latter, the court noted, "Courts have generally held that pregnancy, and pregnancy-related complications, do not qualify as 'disabilities' under the Acts. Circumstances do exist, however, where pregnancy-related complications form the basis for a 'disability' finding under the ADA." The court then held that whether the pregnancy-related complications constituted a disability was a fact issue for the jury. Last, the court noted a circuit split regarding whether Title IX supplanted 42 U.S.C. § 1983 ("Section 1983") claims against school officials. The First, Second, Third and Seventh Circuits had held that it did, while the Fifth, Sixth, Eighth and Tenth Circuits had held that the same set of facts could be used to allege both claims. The district courts in the Ninth Circuit had split, five holding that Title IX subsumed Section 1983 suits and two holding that it did not. Finally, the court agreed with the First, Second, Third and Seventh circuits and held that Title IX supplants other suits.

ii. Darian v. University of Massachusetts Boston

Darian was a senior nursing student and was pregnant.

[U]ntil October 24, 1994, she attended clinical sessions regularly, and she was a good student. She made patient visits, took good patient notes, successfully completed the first twelve clinical days, and received an 'A' on her mid-term examination. In fact, Darian was the class secretary, a member of the Golden

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68. See Gruenke v. Seip, 225 F.3d 290, 298 (3d. Cir. 2000) ("Section 1983 imposes civil liability upon any person who, acting under the color of state law, deprives another individual of any rights, privileges, or immunities secured by the Constitution or laws of the United States. This section does not create any new substantive rights but instead provides a remedy for the violation of a federal constitutional or statutory right.").
70. Hogan, 2008 WL 2954245, at *11.
71. Hogan, 2008 WL 2954245, at *11. In 2009, the United States Supreme Court held in Fitzgerald v. Barnstable School Committee, 555 U.S. 246, 797 (2009), that Title IX was not written to be an exclusive remedy and did not subsume § 1983 claims, thereby abrogating the various circuits' decisions that held otherwise.
Key National Honor Society, and had a 3.65 grade point average.  

Darian developed complications during her pregnancy and in October, Darian was placed on full bed rest for one week by her obstetrician. After the one week, she returned to her doctor who prescribed partial bed rest but also indicated that she could return to class so long as she avoided seeing patients. Darian missed two classes during the week of bed rest, and her professor, O'Malley, indicated that she could stay in the office upon her return until she could see patients, so as to comply with the doctor’s recommendation. In early November, Darian requested and was permitted to work from home with her feet elevated. One week later, Darian suffered two nights of severe pelvic bone pain, back and hip pain, general fatigue, and queasiness. The next day she requested to be sent home early. Professor O'Malley did not send Darian home but sent her to a home health aid department with no patient assignments and where her other assignments were light. However, Darian experienced difficulty sitting and left around 11 a.m. That day, O'Malley called Darian and told her that the modification “is not working out” and “this [Nursing 410] is a clinical, not a home study course.”

Darian was offered the option of taking an incomplete in the clinical portion of the course but completing the classroom portion. This option would have required Darian to take the clinical in the spring and not graduate until June 1995 rather than December 1994. Darian protested and stated that she could complete the practicum with some modifications. Later the same day, Darian talked with O'Malley and expressed that she wanted to return to the clinical. O'Malley told Darian that she would have to see patients and that she needed a doctor's note detailing her exact restrictions. Darian and her husband then met with Dr. Winfrey, the undergraduate program director. Darian provided Dr. Winfrey with the requested note from her doctor that prescribed that she see only one patient a day and not climb stairs. The University agreed with the physician's restrictions. They also discussed Darian’s concerns that she was being discriminated against under the ADA and what O'Malley had

73. Darian, 980 F. Supp. at 80.
75. Darian, 980 F. Supp. at 81.
76. Darian, 980 F. Supp. at 81.
77. Darian, 980 F. Supp. at 81.
78. Darian, 980 F. Supp. at 81–82.
79. Darian, 980 F. Supp. at 82.
meant when commenting that Darian’s return might be unsafe. Following this meeting, Darian returned to the clinical at which O’Malley had found a home with two patients needing care that had only one step. Darian expressed her preference to see only one patient because of her doctor’s restrictions. At the same time, Darian agreed to make up lost clinical time at a flu clinic that day about which O’Malley had told her.

The nature of events darkened later that morning, when in a private meeting, O’Malley was alleged to have met with Darian, called her a “backstabber” for discussing concerns with O’Malley’s superior, and told her that she should take an incomplete. When Darian stated that she did not want to do this, “O’Malley criticized her by saying that she simply did not want to find a babysitter for two days a week.” Darian returned the patient file to O’Malley, told her to find someone else, and left in tears. Darian never returned to the clinical.

On November 21, Darian met with the dean of the school of nursing and described how she felt harassed by O’Malley’s statements. They discussed accommodations, but the dean indicated that O’Malley would have authority to make decisions about alternative learning experiences. The dean sent a follow-up letter to Darian stating that O’Malley was to contact her about alternative learning experiences and make-up time.

The next day, Darian requested to be administratively withdrawn from the course, but the dean rejected the request because of the timing.

During this period, Professor Dumas, the classroom portion professor, had recommended that Darian complete the classroom portion and take a grade of incomplete in the clinical part because of the 30 hours of missed clinical time that she would need to make up and her physical challenges to making up time. Darian received an F in the course and filed a complaint in federal court the following April alleging violations of the ADA, the Rehabilitation Act of 1973 ("Rehabilitation Act"), and Title IX.

The court held that the complications that arose from Darian’s pregnancy did constitute a disability under the ADA or a handicap under the Rehabilitation Act. However, the court held that "no reasonable fact-finder could find that the University, having offered an

80. Darian, 980 F. Supp. at 82.
81. Darian, 980 F. Supp. at 83.
82. Darian, 980 F. Supp. at 83.
83. Darian, 980 F. Supp. at 83.
84. Darian, 980 F. Supp. at 84, 91.
85. Darian, 980 F. Supp. at 87. In the analysis, the court noted the Garret holding, discussed infra notes 90–93 and accompanying text.
array of remedial measures, failed to make a reasonable accommodation merely because it did not offer Darian what she wanted.\textsuperscript{86}

For the Title IX claim the court described that there are four elements required for a plaintiff to make a prima facie case. A plaintiff must show by a preponderance of the evidence that: (1) she was a member of the protected class; (2) she was performing the academic requirements at a level well enough to meet her educator’s legitimate expectations; (3) she suffered adverse treatment; and (4) the educational program continued to instruct and credit other students.\textsuperscript{87} Once a prima facie case is shown the burden shifts to defendant, who must provide a legitimate and non-discriminatory reason for excluding the plaintiff. Finally, if the defendant meets this burden, the plaintiff must show that the defendant’s reason is pretext.\textsuperscript{88} The court held that Darian could not meet the “legitimate educational expectations of both her classroom and her clinical professor.”\textsuperscript{89} Further, the court stated that “Darian’s allegations of pretext are insufficient. When pretext is an issue in a discrimination case, the plaintiff must produce specific facts which, reasonably viewed, tend logically to undercut the defendant’s position. The plaintiff cannot rest upon conclusory allegations, improbable inferences, and unsupported speculation.”\textsuperscript{90}

d. \textit{Garrett v. Chicago School Reform Board of Trustees}—
The Case With No Details

The \textit{Garrett} opinion provides very few details about the fact pattern that led to the filing of the claim. Garrett filed a three-count complaint that alleged violations of Title IX, the ADA, the Rehabilitation Act, and the Illinois Constitution for the school’s discrimination of her based on her pregnancy and pregnancy-related complications.\textsuperscript{91} The defendants had filed a 12(b)(6) motion to dismiss for the ADA and Illinois Constitution claims and moved to dismiss the claim for punitive damages under the ADA and Section 504.

\textsuperscript{86} Darian, 980 F. Supp. at 91.
\textsuperscript{87} Darian, 980 F. Supp. at 91 (citing Lipsett v. Univ. of P. R., 864 F.2d 881, 897 (1st Cir. 1988) (holding claims under Title IX will be analyzed using the Title VII burden shifting analysis)).
\textsuperscript{88} Darian, 980 F. Supp. at 91.
\textsuperscript{89} Darian, 980 F. Supp. at 87.
The district court held that pregnancy-related complications could constitute a disability under the ADA$^{92}$ and a handicap under Section 504 of the Rehabilitation Act,$^{93}$ and that the full range of damages, including monetary, were available to the plaintiff.$^{94}$ However, the court agreed with the defendants regarding the Illinois Constitution claims because the section identified by Garrett did not apply to the City of Chicago or the Board of Education. The Title IX allegation was not challenged by the defendants' motion to dismiss and therefore not addressed in the opinion.

2. Equal Treatment Cases

There are eight Title IX cases involving parenting and/or pregnant teens that address equal treatment. Additionally, under the appropriate sections, I discuss five cases in which Title IX was not addressed but was implicated. Thus, there are thirteen equal treatment cases. Four cases involve pregnant and/or parenting students being rejected for admission to or dismissed from membership in National Honor Society ("NHS") chapters, two cases involve school staff administering pregnancy tests to students, two cases address schools' parental notification policies, one addresses admissions, two address hostile treatment claims, one addresses allegations of coerced abortion, and one addresses a pregnant student's expulsion from a private, nonsectarian school.

a. The Four NHS Cases

i. Wort v. Vierling

Wort is the first of the four National Honor Society cases.$^{95}$ Wort filed a civil rights action following her dismissal from the National Honor Society. She was selected for membership in March 1981, became pregnant in July of 1981, married in October of 1981, and was dismissed from NHS in February 1982 "for deficiency of leadership and character, allegedly because of her premarital pregnancy."$^{96}$ Wort won at

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$^{92}$ Garrett, 1996 WL 411319, at *3.
$^{93}$ Garrett, 1996 WL 411319, at *3 ("The term 'disabilities' under the ADA is equivalent to the term 'handicaps' under the Rehabilitation Act.") (citing Erickson v. Bd. of Governors of State Colls. and Univs. for Northeastern Ill. Univ., 911 F.Supp. 316, 322 (N.D. Ill. 1995)).
$^{94}$ Garrett, 1996 WL 411319, at *3.
$^{95}$ Wort v. Vierling, 778 F.2d 1233 (7th Cir. 1985).
$^{96}$ Wort, 778 F.2d at 1233.
the trial court level, where the judge held that the defendants had violated Title IX and ordered the defendants to reinstate her to the NHS.\textsuperscript{97}

ii. \textit{Cazares v. Barber}

\textit{Cazares} is the second of the four NHS cases. Here, the court found that the plaintiff was rejected from NHS, despite being academically qualified, due to the fact that "she was pregnant, unmarried and not living with the father of the child."\textsuperscript{98} The court noted that a male student who had fathered a child and who did not live with the child's mother was accepted into the NHS chapter. The court held that the rejection of the plaintiff violated Title IX and the Fifth Amendment.\textsuperscript{99} “The victory, however, proved to be hollow: the school responded by cancelling the ceremony and terminating its participation in the NHS.”\textsuperscript{100}

iii. \textit{Pfeiffer v. Marion Center Area School District}

\textit{Pfeiffer} was decided in October of 1990.\textsuperscript{101} It has also become a commonly cited case by scholars discussing Title IX failures in the treatment of pregnant and parenting students.\textsuperscript{102} Publicity might stem from media coverage because, as noted in the opinion, the plaintiff appeared on national and local television about the issues in this case.\textsuperscript{103}

In \textit{Pfeiffer}, a former student brought suit alleging violations of Title IX after she was dismissed from the National Honor Society because of her pregnancy. The trial court granted summary judgment for defendants, and she appealed. The Third Circuit upheld the district court finding “that she was dismissed because of premarital sexual activity and not because of gender discrimination.”\textsuperscript{104} However, the Third Circuit

\textsuperscript{97} Wort, 778 F.2d at 1234.
\textsuperscript{100} Brake, supra note 28, at 518.
\textsuperscript{101} Pfeiffer v. Marion Ctr. Area Sch. Dist., 917 F.2d 779 (3d Cir. 1990).
\textsuperscript{102} See Pillow, supra note 10; NELDA H. CAMBRON-MCCABE, MARTHA M. MCCARTHY & STEVEN B. THOMAS, PUBLIC SCHOOL LAW: TEACHERS' AND STUDENTS' RIGHTS 136, 143 (6th ed. 2009) [hereinafter PUBLIC SCHOOL LAW].
\textsuperscript{103} Pfeiffer, 917 F.2d at 786; see also Pillow supra at 69 (discussing publicity around this NHS case).
\textsuperscript{104} Pfeiffer, 917 F.2d at 780.
remanded the case to the district court for an evidentiary ruling, since
the district court had excluded testimony "by a former student who was
a male member of the chapter, that two years after Pfeiffer's dismissal,
while a senior at the high school he impregnated his girlfriend and that
he was not dismissed from the chapter." At the same time, despite the
nature of the excluded testimony, the court hinted that it did not expect
the case to be decided differently. "[W]e do not suggest that the admis-
sion of this evidence would, in and of itself, produce a result different
than that previously reached by the trial court." 

The Third Circuit described the Wort holding and distinguished it
by stating that "the court in Wort declined to distinguish the sexual con-
duct from the resulting pregnancy. But the district court here did make
this distinction. The court specifically found that Pfeiffer was dismissed
not because she was pregnant but because she had engaged in premarital
activity."

The opinion includes a tone of approval for the NHS's approach to
defining "character." After describing the district court's factual finding
as "bolstered" by the opinion's rationale that "[f]aced with the task of
educating hundreds of young people, and with constant demand by the
public that the schools instill attributes of good character as part of the
educational process, the Council and the Board can scarcely be criticized
for taking the action that was taken." The Third Circuit then went on
to state:

Indeed, the Supreme Court has given us express guidance in
matters relating to student conduct in public schools: The
process of educating our youth for citizenship in public
schools is not confined to books, the curriculum, and the civ-
ics class; schools must teach by example the shared values of a
civilized social order . . . .

The Third Circuit's citation to Fraser may be interpreted as indicative
of a misplaced characterization of Pfeiffer's situation. Fraser is a First
Amendment case involving a student's graduation speech, which was filled
with sexual innuendo. The Court held the speech to be outside the scope
of speech protected by the First Amendment. In Pfeiffer, by contrast,

105. Pfeiffer, 917 F.2d at 783.
106. Pfeiffer, 917 F.2d at 781.
107. Pfeiffer, 917 F.2d at 784.
108. Pfeiffer, 917 F.2d at 785 (citations omitted).
109. Pfeiffer, 917 F.2d at 785 (citing Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 683
(1986)).
110. Bethel Sch. Dist., 478 U.S. at 685.
the policies and legal requirements of Title IX are characteristically different from those raised in the context of the First Amendment. While the Third Circuit's citation to Fraser simply may reference the proposition that schools are often held to have the responsibility, desire, and legal authority to determine which behaviors shall be permitted in order to inculcate good values, it fails to acknowledge the gender issues applicable to pregnancy that were not raised by a sexually explicit student monologue delivered at a formal public ceremony. The case is of such a different character that the citation seems more peculiar than supportive, possibly indicating the court's flawed equation of one student's pregnancy arising from private behavior—the burden of which is peculiarly placed upon the female—to the poor taste exhibited by student's decision to infuse a speech at a formal graduation ceremony with sexual innuendoes.

Despite upholding the district court on these issues, the Third Circuit overruled the district court in holding that compensatory damages could be allowed for Title IX violations. The Third Circuit noted that the holding was in disagreement with the Eleventh and Seventh Circuit. The Third Circuit also held that Pfeiffer's constitutional claims were “subsumed” by Title IX but was subsequently overruled on this point by the United States Supreme Court.

iv. Chipman v. Grant County School District

Chipman is the most recent of the four NHS cases. In Chipman, the district court issued an injunction requiring NHS to invite two students who met requirements into the chapter after NHS discriminated against the students based upon their pregnancies in violation of Title IX.

The court explained that the relevant part of the Title IX Regulation has different language but a similar purpose to the Pregnancy Discrimination Act (“PDA”) amendments to Title VII and that the

111. Pfeiffer, 917 F.2d at 788–89 (overruled on other grounds).
112. Pfeiffer, 917 F.2d at 788–89.
113. Pfeiffer, 917 F.2d at 789 (citing Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clambers Ass'n, 453 U.S. 1 (1981)).
PDA precedent should apply to the claim. Further, the court held that disparate impact theory was "well-recognized in pregnancy cases" and that under disparate impact theory, intentional discrimination does need to be proven. The court applied the theory and described that "the balance tips decidedly in favor of plaintiffs." The court explained:

Although 100% of young women who are visibly pregnant or who have had a child out of wedlock are denied membership, as far as the record reflects, defendants' policy excludes 0% of young women who have had such relationship but have not become pregnant or have elected to have an early abortion.

The court found "that the defendants . . . have failed to articulate a legitimate credible non-discriminatory reason for their NHS pregnancy policy. The reasons articulated for the exclusion of the plaintiffs are vague, conclusory and undocumented." Finally, the court found that the plaintiffs had a high likelihood of success on the merits and granted the preliminary injunction.

b. Pregnancy Tests Administered to Students

i. Villanueva v. San Marcos Consolidated Independent School District

In Villanueva, the school nurse allegedly coerced a student whom she heard was pregnant to take a pregnancy test, which turned out to be negative. The father of the student sued alleging Section 1983 claims

117. Chipman, 30 F. Supp. 2d. at 978.
119. Chipman, 30 F. Supp. 2d. at 979.
120. Chipman, 30 F. Supp. 2d. at 979.
121. Chipman, 30 F. Supp. 2d. at 980.
122. For a thorough discussion of potential privacy rights raised by these cases, see Melissa Prober, Note, Please Don't Tell My Parents: The Validity of School Policies Mandating Parental Notification of a Student's Pregnancy, 71 BROOK. L. REV. 577 (2005).
and state law claims. The father was not able to meet the Monell standard, which is required to pierce the state actor’s qualified immunity for Section 1983 purposes.

The clear policy maker for the district was the Board, and the plaintiff did not dispute that the pregnancy testing policy did not take the form of an adopted policy of the Board. However, he alleged that the custom of using the tests was widespread enough that constructive knowledge could be imputed to the district. Specifically, he described that

the director of the PEP program, then SMHS Principal Toro, and a few other lower-level school officials (e.g. Vogel, the director of PEP, McGee, a social worker with PEP, Defendant Eastwood, a school nurse), each located in different schools throughout the district, were aware of the original implementation of the program and the concomitant purchase of the pregnancy tests.

However, the court explained that even if plaintiff’s evidence showed custom widespread enough to impute knowledge, he failed the third part of the Monell analysis, which requires that the “moving force” of the policy cause the constitutional infringement. The court explained:

Plaintiff does not contend (nor could he), that a program, which makes pregnancy tests available to students who desire them, violates the Constitution. The summary judgment evidence demonstrates that the PEP program made pregnancy tests available to students on a voluntary basis. There is no summary judgment evidence that the program identified or targeted students and tried to convince (or coerce) them to take tests. When the implicated custom in a § 1983 suit is

125. Villanueva, 2006 WL 2591082, at *3; see Monell v. Dept. of Soc. Services, 436 U.S. 658 (1978) (requiring that a plaintiff show a policy maker, a policy, and that the moving force of such policy is violation of constitutional rights).
127. Villanueva, 2006 WL 2591082, at *3-*4 (“[A]n act performed pursuant to a ‘custom’ that had not been formally approved by an appropriate decision maker may fairly subject a municipality to liability on the theory that the practice is so widespread to have the force of law, . . . . The policy-maker must have either actual or constructive knowledge of the alleged policy, due to its duration and frequency.”) (quoting Cox v. City of Dallas, 430 F.3d 734, 748 (5th Cir. 2005)).
constitutional on its face, it cannot support municipal liability unless the plaintiff can demonstrate that it was imposed with deliberate indifference to the "known or obvious consequences" that constitutional violations would result.\textsuperscript{130}

Accordingly, the plaintiff was held to not meet the third part of Monell because the program itself did not have a central aim of violating a constitutionally protected right. Summary judgment was granted on all the § 1983 claims against the district and the nurse in her official capacity.\textsuperscript{131}

However, the § 1983 claims asserted against the nurse in her individual capacity were allowed to proceed past summary judgment. For such individual capacity claims, the "court evaluating a claim of qualified immunity must first determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all, and if so, proceed to determine whether that right was clearly established at the time of the alleged violation."\textsuperscript{132} The court held that a school staff person's coercive administration of a pregnancy test to a student would violate clearly established Fourth Amendment rights for the first part of the test.\textsuperscript{133}

Turning to the second part of the test, whether the nurse's actions were objectively reasonable under the law at the time, the court explained that the facts were disputed: the nurse claimed that the student voluntarily took the test, while the plaintiff claimed that the nurse, "in a closed door meeting in a school office, insisted that she take a pregnancy test (the putative unreasonable seizure), and then caused Plaintiff's daughter's urine to be tested with a pregnancy test kit (the putative unreasonable search)."\textsuperscript{134} Since there was a material fact dispute about whether the nurse's actions were objectively reasonable, summary judgment was not granted on that claim.\textsuperscript{135}

\begin{itemize}
  \item \textsuperscript{130} Villanueva, 2006 WL 2591082, at *4 (quoting Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown, 520 U.S. 397, 407 (1997)).
  \item \textsuperscript{131} Villanueva, 2006 WL 2591082, at *5 (explaining that the claims against Nurse Eastwood in her official capacity duplicated the claims against the District).
  \item \textsuperscript{132} Villanueva, 2006 WL 2591082, at *6 (quoting Wilson v. Layne, 526 U.S. 603, 609 (1999)).
  \item \textsuperscript{133} Villanueva, 2006 WL 2591082, at *7 (citing Gruenke, 225 F.3d 290, 301 (3d. Cir. 2000)).
  \item \textsuperscript{134} Villanueva, 2006 WL 2591082, at *8.
  \item \textsuperscript{135} Villanueva, 2006 WL 2591082, at *8.
\end{itemize}
ii. *Gruenke v. Seip*

In *Gruenke*, a school swim coach was alleged to have required a student who he suspected to be pregnant to take a pregnancy test.\(^{136}\) The student filed a claim alleging violations of her First and Fourth Amendment rights but not Title IX. Within the alleged First Amendment claims, she asserted violations of her right to familial privacy and violations of her right to freedom of association because the coach allegedly instructed team members to not associate with her. The district court granted summary judgment to the coach and school on all counts.\(^{137}\) On appeal, the Third Circuit overturned the district court's grant of summary judgment to the defendant on the basis of immunity for the Fourth Amendment § 1983 claim. The court agreed with the district that a violation had been alleged. But it described the district court as having "[f]oundered" as to whether the right was clearly established at the time, and held that it was.\(^{138}\)

Regarding the allegation of violating the student's substantive due process right to privacy, the court applied the same test as with the Fourth Amendment claim: "whether the contours of current law put a reasonable defendant on notice that his conduct would infringe on the plaintiff's asserted right."\(^{139}\) The court held that the student's version of the facts not only falls squarely within the contours of the recognized right of one to be free from disclosure of personal matters, see *Whalen v. Roe*, 429 U.S. 589, 599–600, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977), but also concerns medical information, which we have previously held is entitled to this very protection.\(^ {140}\)

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137. *Gruenke*, 225 F.3d at 295.
138. *Gruenke*, 225 F.3d. at 300–01 ("Merely because the Supreme Court has not yet ruled on whether a school official's administration of a pregnancy test to a student violates her Fourth Amendment rights does not mean the right is not clearly established. Moreover, a review of current Fourth Amendment law in the public school context reveals not only that the right is clearly established, but also that Seip's conduct as alleged was objectively unreasonable. . . . We believe that the standard set forth in *Vernonia* clearly establishes that a school official's alleged administration to a student athlete of the pregnancy tests would constitute an unreasonable search under the Fourth Amendment.").
139. *Gruenke*, 225 F.3d. at 302.
140. *Gruenke*, 225 F.3d. at 302–03.
Thus the claim met the test, and the district court’s grant of summary judgment was reversed.141

However, the court upheld the district court’s grant of summary judgment for the alleged violation of a constitutional familial privacy right.142 The court explained that although the student’s parents had alleged a violation of their constitutional privacy rights of this family matter, it was appropriate to uphold the district court’s grant of summary judgment based on immunity because the right was not clearly established at the time.143 Regarding the claim that the coach “violated Leah’s First Amendment rights by forbidding members of his private swim team from associating with Leah,” the Third Circuit held that the coach’s alleged interference with Leah’s interaction with other swimmers did not violate a protected First Amendment right.144

c. Parental Notification Policies

i. Port Washington Teachers’ Association v. Board of Education of the Port Washington Union Free School District

Port Washington Teachers’ Association involved motions on behalf of teachers and third-party students for a preliminary injunction to enjoin implementation of the district’s pregnancy notification policy.145 The court denied the injunction for lack of a case or controversy because the plaintiffs were not able to describe a student who had been negatively affected by the policy, and the plaintiffs did not show that the policy implicated a likelihood of success on the merits for constitutional violations, state laws, or privilege rules.146 Addressing the Article III “case or controversy” requirement, the court found that the plaintiffs lacked third-party standing and that the claims lacked ripeness because “only about two (2) students per year report being pregnant at Schreiber High

141. Gruenke, 225 F.3d at 302.
143. Gruenke, 225 F.3d. at 307.
146. Port Wash. Teachers’ Ass’n, 361 F. Supp. 2d at 77.
School and of those teens 'nearly all' of them voluntarily report their pregnancies to their parents.\textsuperscript{147}

However, the court proceeded to address the merits of the case. In this discussion, the court held that the privacy rights of pregnant students did not require satisfaction of the \textit{Bellotti} test for mandatory parental consent to abortion\textsuperscript{148} and noted that there is "a distinction between notification of pregnancy and consent/notification to abortion."\textsuperscript{149} The court explained that "it is the school's unending obligation to inform parents of the conditions that affect the health, safety, and welfare of their child"\textsuperscript{150} and clarified that the phrase \textit{in loco parentis} is not meant to "displace parents."\textsuperscript{151} In the next to last paragraph the court comments, "Should the school fail to inform the parents of a student's pregnancy and the student in any way is physically injured (through pregnancy complications or otherwise), it is the school that will face civil and perhaps criminal liability."\textsuperscript{152}

In the second court opinion regarding the defendants' 12(b)(6) motions, the court applied generally the same rationale. But unlike the opinion addressed the preliminary injunction, this opinion addressed equal protection claims raised because the policy did not apply to male students.\textsuperscript{153} However, while the equal protection claims center on the discrimination of female students based upon pregnancy, at no point is Title IX raised. The court addressed and dismissed the equal protection claim in one paragraph stating,

Plaintiffs assert, without providing the Court with any authority in support, that the Policy is unconstitutional because it does not apply to male students who impregnate someone. The Court has previously held that the male counterpart to a pregnant female enjoys no constitutional protections with re-

\textsuperscript{147} Port Wash. Teachers' Ass'n, 361 F. Supp. 2d at 77.
\textsuperscript{148} Port Wash. Teachers' Ass'n, 361 F. Supp. 2d at 78 ("In \textit{Bellotti}, the Supreme Court found unconstitutional a Massachusetts statute requiring pregnant minors seeking an abortion to obtain the consent of their parents. . . . The Court held that if the State were to require a pregnant minor to obtain one or both parents' consent to an abortion, it must also provide a judicial bypass alternative." (citing \textit{Belotti} v. Baird, 443 U.S. 622, 643 (1979))).
\textsuperscript{149} Port Wash. Teachers' Ass'n, 361 F. Supp. 2d at 78.
\textsuperscript{150} Port Wash. Teachers' Ass'n, 361 F. Supp. 2d at 78.
\textsuperscript{151} Port Wash. Teachers' Ass'n, 361 F. Supp. 2d at 81 (quoting Gruenke v. Seip, 225 F.3d 290 (3d Cir. 2000))).
\textsuperscript{152} Port Wash. Teachers' Ass'n, 361 F. Supp. 2d at 81.
Accordingly, the court’s opinion does not squarely address the plaintiffs’ claim that the student mothers are discriminated against by the policy, but instead enigmatically dismisses the claim because of the lack of father’s rights. The plaintiffs arguably should have asserted a violation of Title IX claim alongside the equal protection claim.

ii. Holt v. Superior Court

Holt originated from the termination of a high school guidance counselor from her position. The alleged reason was that she had refused to obey her vice-principal’s order “to disclose the names of any and all students who had disclosed to [her] that they were pregnant . . . [and] to insist in her counseling sessions with any pregnant students that they transfer out of the regular high school and into Somerset, a program allegedly inferior to the one at Bellflower High School.”\(^{155}\) Holt further alleged that “the vice-principal told Holt the reason for the request was because the school board did not want pregnant girls on the school campus, and they had adopted a policy of transferring pregnant students out of the regular school program.”\(^{156}\) Following these actions, Holt alleged that she had contacted the California Department of Education out of concern that the request was illegal and that the Department confirmed that it was. After Holt expressed to the principal and vice-principal that she believed that the school’s program violated state and federal law, she was told that her employment would not continue the next school year.

Holt then sued arguing that her termination was illegal because it was in retaliation for her refusal to follow an illegal policy. She alleged, among other things, that the directive related to transferring pregnant students violated Title IX.\(^{157}\)

The state trial court granted the defendants’ demurrer based upon the district’s participation in the Cal-SAFE program and held that the defendants’ action did not violate public policy.\(^{158}\) Holt filed a petition challenging the trial court’s ruling, and the Second Circuit Court of Appeals for California held that by considering that the school district was

\(^{154}\) Port Wash. Teachers’ Ass’n, 2006 WL 47447, at *7 (citations omitted).


\(^{156}\) Holt, 2002 WL 1399106, at *1.

\(^{157}\) Holt, 2002 WL 1399106, at *1.

\(^{158}\) Holt, 2002 WL 1399106, at *2.
a participating member of Cal-SAFE program, the trial court considered facts outside the pleadings and improper at stage of demurrer. The California Second Circuit Court directed the trial court to overrule the demurrer and correct the error.\textsuperscript{159}

The state circuit court's opinion suggests that the school's participation in the Cal-SAFE program made the practice and policies legal, despite the plaintiff's allegations of Title IX violations and Title IX's language requiring that pregnant students should voluntarily choose to attend an alternative school. Specifically, the court quotes a section of the Education Code that "embodies the state's public policy concerning students."\textsuperscript{160} In footnote 2, the court describes that,

> Education Code section 54741 provides . . . . "The Legislature hereby finds and declares all of the following: . . . . School-based programs for pregnant and parenting teens and their children offering a wide range of educational and supportive services, including child care and transportation, which begin during pregnancy and continue after childbirth, have been successful in increasing school enrollment and high school graduation rates, and reducing the incidence of low birth weight babies and repeat pregnancies . . . ."

Section 54742 provides, in relevant part: "(a) It is the intent of the Legislature to establish a comprehensive, continuous, and community linked school-based program that focuses on youth development and dropout prevention for pregnant and parenting pupils and on child care and development services for their children . . . ."\textsuperscript{161}

Thus, the opinion discusses the parental notification program only in the context of the state's Cal-SAFE program and fails to address the potential Title IX violations due to the notification policy's application to mothering, and not fathering, students.

d. \textit{Tingley-Kelley v. Trustees of the University of Pennsylvania}

In \textit{Tingley-Kelley}, the court denied summary judgment to the University defendants for plaintiff's claims that the veterinary school's

\textsuperscript{159} Holt, 2002 WL 1399106, at *3.
\textsuperscript{160} Holt, 2002 WL 1399106, at *3.
\textsuperscript{161} Holt, 2002 WL 1399106, at *4 n.2 (CAL. EDUC. CODE §§ 54741-42).
admissions procedures discriminated against her based upon her status as a mother and thereby violated Title IX. The court began the opinion by acknowledging that in the highly competitive process of applying to veterinary school at the University of Pennsylvania, "[i]t would seem that an applicant alleging that she was denied admission because of her gender would face a daunting task inasmuch as there are almost always . . . legitimate reasons for favoring one well-qualified applicant over another. But when a plaintiff presents direct evidence sufficient to support allegations of discriminations, the case must be left to a jury to decide." 

Specifically, Tingley-Kelley alleged that the university had committed gender discrimination by "stereotyping her as a busy mother of young children who would have a difficult time handling both graduate school and her childcare responsibilities." Questions during her application review process supported the allegation as did notations on the review forms. Such comments included, "'concerns about how she'll do in school esp. w/family, etc' and it 'will be a tough row to hoe' . . . [and] that Ms. Tingley-Kelley had 'a lot on her plate.'" The court surveyed other courts and observed that such comments had been sufficient to overcome summary judgment even without evidence of similarly situated males. Citing language from Buck v. Hastings On the Hudson Union Free School District, the court noted that "stereotyping of women as caregivers can by itself and without more be evidence of an impermissible, sex based motive." The court held that comparative evidence was relevant but not necessary and that the issue was whether the plaintiff individually suffered discriminatory treatment. Finding that Tingley-Kelley had provided direct evidence of discrimination, the veterinary school's proffered evidence of her supposed inferior qualifications was insufficient to shift the burden to her to show pretext, and she survived summary judgment.

162. Tingley-Kelley v. Trs. of the Univ. of Pa., 677 F. Supp. 2d 764 (E.D. Pa. 2010).
163. Tingley-Kelley, 677 F. Supp. 2d at 768.
164. Tingley-Kelley, 677 F. Supp. 2d at 777.
165. Tingley-Kelley, 677 F. Supp. 2d.
166. Tingley-Kelley, 677 F. Supp. 2d at 772–78.
169. Tingley-Kelley, 677 F. Supp.2d at 780.
e. The Vindictive/Hostile Treatment cases

i. Ivan v. Kent State University

In *Ivan*, Ivan was a full scholarship student in a M.A./Ph.D. program. She informed her clinical practicum supervisor in summer of 1991 that she was pregnant and expecting a child in December. She asked for relief from the practicum for the fall 1991 semester only. After giving birth in December, she returned to her studies for the spring 1992 semester but did not receive a practicum assignment. She asked her practicum supervisor, Akamatsu, about the lack of assignment, and he was alleged to have expressed his concern that she would do a “half-assed job” with her clients because of her childcare responsibilities. Nonetheless, Akamatsu then assigned Ivan to a clinical practicum supervised by a psychology professor, Neal, but assigned [Ivan] cases on a gradual basis so that [h]e could monitor the impact, if any, of her newborn on her ability to perform in practicum. Ivan was also required to meet with her supervisor weekly so that he could monitor any impact that her motherhood was having on her performance. Ivan’s experience of receiving practicum responsibilities on a gradual basis was distinct from the experience of a male colleague whose wife had a baby at a similar time.

In April 1992, Ivan received an evaluation indicating the faculty’s belief that she needed an additional year of practicum experience before community placement. Ivan received an IP (in progress) for the spring semester practicum grade but received a letter advising her that she could receive a grade of satisfactory if she showed continued improvement in the summer and fall practicum. The letter noted that faculty described her performance as “very marginal” and indicated concern

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about the progress of her master’s thesis, the topic for which she had
been approved over a year before the letter was drafted.\footnote{Ivan, 863 F. Supp. at 584.}

Ivan filed a claim alleging that the defendants had discriminated
against her in assigning the IP grade and that as a result of the grade she
lost her employment as a graduate assistant at the University. The court
applied the \textit{McDonnell} burden shifting test\footnote{Ivan, 863 F. Supp. at 586 ("[T]he Sixth Circuit has not addressed burdens of proof
in a Title IX claim. Two Circuits have found the \textit{McDonnell Douglas Corp. v. Green
standard applies in Title IX cases similar to Ivan’s."
(citing Andriakos v. Univ. of S. Ind., 19 F.3d 21 (7th Cir. 1994); Lipsett v. Univ. of P.R., 864 F.2d 881 (1st Cir. 1988)).
\textit{McDonnell}"
standard applies in Title IX cases similar to Ivan’s." (citing Andriakos v. Univ. of S. Ind., 19 F.3d 21 (7th Cir. 1994); Lipsett v. Univ. of P.R., 864 F.2d 881 (1st Cir. 1988)).} for the Title IX claim and
found that although Ivan had pled a prima facie claim, she had failed to respond to the “Defendant’s proffered legitimate reasons for adverse
treatment.”\footnote{Ivan, 863 F. Supp. at 586.}

The Sixth Circuit upheld the decision. The court, like the district
court, applied the \textit{McDonnell} burden-shifting approach to the Title IX
claim and stated, “[T]he evidence of the university’s disparate, and alleg-
edly more favorable treatment, treatment of a male colleague with a
newborn is legally insufficient to support her contention that she was dis-
criminated against because of her female sex.”\footnote{Ivan, 1996 U.S. App. LEXIS 22269, at *10 (emphasis added).}

\textbf{ii. Olojo v. Kennedy-King College}

\textit{Olojo} involved claims that Badejoko Olojo was treated poorly and
discriminated against based upon her pregnancy.\footnote{Olojo v. Kennedy-King Coll., No. 05 C 6234, 2006 WL 1648441 (N.D. Ill. June 7,
2006). Olojo, 2006 WL 1648441, at *2.} Olojo did not origi-
nally file Title IX claims but requested leave to amend the complaint
and include a Title IX claim. Despite pleading failures, the court dis-
cussed the likelihood of success of a Title IX claim.

Olojo was enrolled as a full-time nursing student at Kennedy-King
nursing school. She alleged that the discriminatory treatment began af-
after she was late to class due to a flat tire, which led to a conversation
with her instructor, Ms. Montgomery, during which Ms. Montgomery
asked Olojo why her palms were white and Olojo explained that she was
pregnant.\footnote{Olojo v. Kennedy-King Coll., No. 05 C 6234, 2006 WL 1648441 (N.D. Ill. June 7,
2006). Olojo, 2006 WL 1648441, at *2.} Ms. Montgomery allegedly then asked Olojo if she “liked
her husband and whether she would like to use contraception to termi-
nate the pregnancy” and when Olojo replied that she could not
terminate her pregnancy, Ms. Montgomery “then ‘ordered’ Olojo to sign
a non-exemption form, consenting to participate in and be exposed to the same demands as her non-pregnant peers." 182

Olojo needed a 78% on a final exam in the course to meet the graduation requirements, but she only scored a 76.6%. As a result, Ms. Montgomery proposed that Olojo, along with two other students whose scores did not meet the minimum, teach nursing 101 students in exchange for extra credit. All three classmates did so, but Ms. Montgomery allegedly gave the other students the extra credit promised and denied it to Olojo. Olojo alleged that she reported Ms. Montgomery's behavior to the college and that the college did not take action. 183

Because she did not pass, Olojo had to repeat Advanced Nursing Surgery and did not graduate with her class.

Olojo filed claims alleging violations under the First Amendment and pregnancy discrimination under the Equal Protection Clause, the Pregnancy Discrimination Act, Title VII, the ADA, and the Illinois Human Rights Act, along with tort claims for Intentional Infliction of Emotional Distress due to religious and pregnancy discrimination, and retaliation claims. The defendants filed a motion to dismiss under Rule 12(b)(6).

The court held that Olojo's pregnancy was not a disability for purposes of the ADA, citing Olojo's admission in her response that her pregnancy "did not impair or substantially limit a major life activity, nor did it impair her ability to do her class work . . ." 184

When the court granted Olojo leave to amend her complaint to include Title IX claims, the court characterized the claims as unlikely to be successful, stating "Although it appears unlikely, we could not say with certainty that Olojo cannot state a claim under Title IX, thus she is entitled to an opportunity to amend the complaint." 185

The court granted the defendants' motion to dismiss on the Equal Protection claims. First, the court explained that "[i]n sum, Olojo alleges that Ms. Montgomery intentionally and vindictively treated her differently than similarly situated classmates for irrational, malicious, and discriminatory reasons. Plaintiff does not allege that the other similarly situated students were outside of her protected class (either male, non-pregnant . . .)." 186 In addition to this fatal flaw, 187 the court ex-

plained that the college could not be held vicariously liable for Ms. Montgomery's actions under § 1983 for failure to meet the *Monell* standards. In the discussion of the requirements to defeat the defendants' claims for immunity, the court stated that even if the court found that the college's alleged failure to take action after Olojo informed them of Ms. Montgomery's behavior to be ratification, Olojo failed to show that the person with whom she spoke had final policymaking authority for *Monell* standards.

f. The Coerced Abortion Case

i. *Arnold v. Board of Education of Escambia County*

*Arnold* involved claims by a high-school-aged mother and father that school officials had coerced the mother into having an abortion.

The plaintiffs asserted § 1983 claims for violations of their First, Thirteenth, and Fourteenth amendment rights, as well as civil conspiracy claims, but they did not allege Title IX violations. On review of the district court's grant of the defendants' 12(b)(6) motions to dismiss, the Eleventh Circuit considered the facts as alleged by the complaint. Therein, the students, Jane and John Doe, alleged that they had learned that Jane was pregnant and soon after, the school guidance counselor had called Jane to her office and then John, who admitted paternity. The counselor then provided a school-purchased pregnancy test for Jane, which returned positive. The counselor then notified another counselor, and the two were alleged to have then coerced the students to abort the child. The students also alleged that the school paid them to perform tasks so that they could earn the money necessary to obtain an abortion.

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188. Under § 1983, in order to state a claim for municipal liability, a plaintiff must "allege that '(1) the [municipality] had an express policy that, when enforced, causes a constitutional deprivation; (2) the [municipality had a widespread practice that . . . is so permanent and well settled as to constitute a custom or usage within the force of law; or (3) plaintiff's constitutional injury was caused by a person with final policy making authority.'" *Olojo*, 2006 WL 1648441, at *5 (citing *Alcala v. Toatro*, No. 05 C 3683, 2005 WL 3470293 (N.D. Ill Dec. 16, 2005)).

189. *Olojo*, 2006 WL 1648441, at *4 (quoting *Monell v. Dep't of Social Serv. of City of New York*, 436 U.S. 658, 694 (1978) ("We conclude, therefore, that a local government may not be sued under 1983 for an injury inflicted solely by its employees or agents.").


191. *Arnold*, 880 F.2d at 308.

and that the school paid $20 to the person who drove the students to the abortion clinic.\(^{193}\)

The Eleventh Circuit reversed in part, holding that Jane stated a § 1983 claim for violation of her rights under the Equal Protection Clause of the Fourteenth Amendment\(^ {194}\) — the asserted privacy rights regarding her decision whether to bear a child, and the parents’ rights to direct the upbringing of their children\(^ {195}\) and free exercise rights.\(^ {196}\) The court held that John Doe had sufficiently stated a claim of violation of his free exercise rights\(^ {197}\) and his Fourteenth Amendment Equal Protection rights.\(^ {198}\)

On remand, the district court granted the defendants’ motions for summary judgment after the plaintiffs failed to respond to the defendants’ motion for summary judgment, despite the court’s letter sent in advance reminding the plaintiffs of their need to respond.\(^ {199}\) The plaintiffs’ failure to respond was interpreted, per the rules, to be an admission that no material factual dispute existed.\(^ {200}\) Accordingly, the district court’s fact findings were based upon the defendant’s assertions, which the plaintiffs were interpreted as having admitted as true, and summary judgment was granted to the defendants on all counts.

g. The Private Religious School Case

i. *Hall v. Lee College, Inc.*\(^ {201}\)

Melissa Hall was suspended from the private and religious institution of Lee College after becoming pregnant in violation of the school’s policy that prohibits premarital sex. This was Hall’s second baby while a student at Lee College, and the college had taken no action against her for the first pregnancy.\(^ {202}\) After Hall received a letter requiring suspension or offering options of withdrawal, she filed a claim alleging Title IX violations.

When Hall entered the college, she was provided a handbook that stated that “students who engage in sexual immorality whether premari-

\(^{193}\) *Arnold*, 880 F.2d at 309.
\(^{194}\) *Arnold*, 880 F.2d at 317.
\(^{195}\) *Arnold*, 880 F.2d at 310–13.
\(^{196}\) *Arnold*, 880 F.2d at 314.
\(^{197}\) *Arnold*, 880 F.2d at 314–15.
\(^{198}\) *Arnold*, 880 F.2d at 317.
\(^{199}\) *Arnold*, 754 F. Supp at 854.
\(^{200}\) *Arnold*, 754 F. Supp at 854.
\(^{202}\) *Hall*, 932 F. Supp. at 1030.
tal, or homosexual, will be expelled from the college.\textsuperscript{203} The court found that the handbook did not discriminate on its face as it applied on its face to both sexes. Additionally, the court held that no similarly situated students that were treated differently had been brought to the court's attention.\textsuperscript{204} The court disagreed with Hall regarding a male student, John Doe, who Hall alleged was similarly situated, for three reasons:

\begin{quote}
[O]ne, Brian Conn married his then pregnant girlfriend, so he was allowed to reenter school the next semester; two, because of the familial relationship with the college president, there is a possibility of considerations other than sex playing a role; and three, Brian Conn's girlfriend, also a Lee College student, received identical letters of suspension and readmission upon their marriage.\textsuperscript{205}
\end{quote}

The court did not address the fact that Hall did not receive a letter offering a marriage option. Her letter only offered two options: she could voluntarily withdraw and receive all W's, or she could withdraw from all coursework except one required class, which she could complete on an independent basis, but she should not visit the campus until after her baby was born.\textsuperscript{206} The court held that Hall did not meet her burden under Title IX to show that a violation of discrimination had occurred.\textsuperscript{207} The Court never addressed whether the school met the requirement under § 106.12 that religious institutions must provide written paperwork to claim an exemption to Title IX.\textsuperscript{208}

\textbf{B. Case Law Evaluation}

The cases that have asserted the rights of pregnant and parenting students illuminate how the courts are interpreting the rights of these students, including what accommodation means and what equal treatment means to pregnant and parenting students under Title IX. It should be noted generally that more than half of the cases were decided in favor of students, including three out of the five accommodation

\textsuperscript{203} Hall, 932 F. Supp. at 1029.  
\textsuperscript{204} Hall, 932 F. Supp. at 1031.  
\textsuperscript{205} Hall, 932 F. Supp. at 1032.  
\textsuperscript{206} Hall, 932 F. Supp. at 1030.  
\textsuperscript{207} Hall, 932 F. Supp. at 1033.  
\textsuperscript{208} See supra note 21.
cases and seven of the thirteen equal treatment cases. Additional key points and trends are discussed under categories below.

1. Trends

a. Failure to Assert Title IX

As discussed, five of the eighteen cases did not even allege Title IX violations despite fact patterns that supported such claims. Of those five, only Olojo requested leave to amend the complaint to include a Title IX claim. The failure to assert Title IX claims illustrates a failure in awareness of Title IX despite the clear rights-granting language. The failure to allege Title IX violations has a significant impact on the viability of pregnant and parenting students' claims because Title IX grants protections specific to students in these situations and identifies impermissible conduct. For example, the Olojo court, while granting defendants' motions to dismiss the Equal Protection claims, allowed leave to amend the complaint to attach a Title IX claim. At the same time, the Holt court's failure to acknowledge the clear import of the Title IX prohibitions is problematic and illustrates unawareness similar to that illustrated by the attorneys who fail to assert the claims.

b. Pregnancy and Character

While three out of the four NHS cases held the prohibition of students due to their status as a pregnant or parenting student violated Title IX, the one that did not, Pfeiffer, is still good law in the Third Circuit (excepting the portion that held Title IX subsumed § 1983 claims). Furthermore, the Pfeiffer opinion explicitly acknowledged and disagreed with the Seventh Circuit's in Worz.

211. See supra notes 186–189 and accompanying text.
212. See infra note 219 and accompanying text.
213. See supra note 114 and accompanying text.
c. Hostile/Vindictive Treatment

In *Ivan* and *Olojo*, the Sixth Circuit and federal district court in Illinois found that plaintiffs had made prima facie cases for discrimination, but in both, the plaintiffs were unable to meet the burden of showing that the schools' proffered reasons for their actions were pretext. It should be noted that *Ivan* was litigated alleging Title IX violations and *Olojo* alleged Equal Protection violations. However, when the court in *Olojo* granted the plaintiff's request for leave to add a Title IX claim, it doubted the likelihood of success. Thus, while *Olojo* technically represents a victory for the student because the claim was allowed to continue for amendment, the *Olojo* opinion is largely unsympathetic and unreceptive towards the student's claims of discriminatory treatment on the basis of pregnancy. Given that both *Ivan* and *Olojo* included allegations of language of university actors that explicitly referenced the students' pregnancies combined with the different treatment of fathering students, these opinions call into question the feasibility of surviving the burden-shifting approach in these claims. In comparison, *Tingley-Kelley* considered such statements, albeit with written evidence, to be direct evidence and that evidence of pretext was no longer necessary to avoid summary judgment under the burden-shifting analysis.

d. Parental Notification Policies

Under the language of the Title IX Regulations, parental notification policies that apply only to mothers should be held to violate Title IX. The two cases addressing such policies, however, have not acknowledged the gender discrimination implicit in mother-only notification policies. Although *Port Washington Teachers' Association* was dismissed for lack of standing, the court proceeded to address the merits of the legal claims and noted the low probability of success for equal protection claims on the rationale that fathers do not have constitutional rights in such cases. *Holt* was remanded to the district court due to the district court's consideration of the school's participation in a state
program at an improper stage in the proceedings, but neither court addressed the irrelevance of the state program in the context of whether such a policy, state approved or not, violated Title IX. 219

e. Pregnancy Test Policies

Pregnancy tests that are administered to students have been held to violate Title IX and/or the Fourth Amendment. 220

f. Recovery

Following a circuit split, the United States Supreme Court clarified that Title IX is not the sole means of recovery, and Title IX claims may be made alongside § 1983 claims. 221 Further expanding the opportunities for legal redress, Garrett (N.D. Illinois), Hogan (9th Circuit), and Darian (D. Mass), held that discrimination against pregnancy-related complications experienced by students may comprise violations of the ADA and Section 504 of the Rehabilitation Act. 222 These holdings are significant not only because students have multiple claims that may be asserted, but also because, when pregnancy-related complications constitute disabilities, they invoke the panoply of associated rights and requirements under Section 504. 223 Also, the Rehabilitation Act of 1973 applies to both private and public schools, 224 which indicates that those students who have pregnancy-related complications that meet the definition of disability have a means of enforcing rights against secondary private schools that receive federal funds but have been exempted from Title IX through the filing of appropriate papers. 225 Finally, the Third Circuit has upheld compensatory and punitive damages in Title IX cases.

220. See supra text accompanying notes 145–154 for discussion of Port Washington.
222. For Garrett, see supra notes 92–93 and accompanying text; or Hogan, see supra note 66 and accompanying text; or Darian, see supra note 85 and accompanying text.
223. See PUBLIC SCHOOL LAW, supra note 102, at 188–92 (describing the Rehabilitation Act of 1973, Section 504, and explaining schools' responsibilities).
224. PUBLIC SCHOOL LAW, supra note 102 at 188.
225. See supra note 21 and accompanying text.
addressing rights of pregnant and parenting students despite contrary holdings in other circuits.\textsuperscript{226}

g. Deference

As with courts' general\textsuperscript{227} stance in other areas,\textsuperscript{228} courts continue to try to show deference to school administrators. In \textit{Hogan}, the court notes, "Deference to a university's judgment is generally appropriate because courts are "ill-equipped," as compared with experienced educators, to determine whether a student meets a university's "reasonable standards for academic and professional achievement."\textsuperscript{229} Similarly, \textit{De la Cruz} describes the significant issue of the proper role of the judiciary in overseeing the decisions of school administrators,\textsuperscript{230} and \textit{Arnold} emphasizes the First Amendment rights of counselors and states "we do not seek to curtail the beneficial use of counseling."\textsuperscript{231}

h. Burden Shifting Analysis

Unless plaintiffs are able to provide direct evidence,\textsuperscript{232} the burden shifting analysis has proven to be lethal to claims. Brake said in her 1994 Clearinghouse Review article, "Evidence is more likely to be successful it

\begin{itemize}
\item \textsuperscript{226} See supra note 111 and accompanying text. For argument that punitive damages should be allowed in Title IX claims, see Pohlman, Note, \textit{Have We Forgotten K-12? The Need for Punitive Damages to Improve Title IX Enforcement}, 71 U. Pitt. L. Rev. 167 (2009).
\item \textsuperscript{228} See Safford Unified Sch. Dist. v. Redding, 129 S. Ct. 2633, 2643 (2009) ("The difference is that the Fourth Amendment places limits on the official, even with the high degree of deference that courts must pay to the educator's professional judgment."); see also Morse v. Frederick, 551 U.S. 393, 428 (2007) (Breyer, J., concurring in part, dissenting in part) ("[N]o one wishes to substitute courts for school boards, or to turn the judge's chambers into the principal's office.").
\item \textsuperscript{229} Hogan v. Ogden, No. Cu-06-5078-EFS, 2008 WL 2954245, at *5 (E.D. Wash. July 30, 2008) (citing Wong v. Regents of the Univ. of Cal., 192 F.3d 807, 817 (9th Cir. 1999)) (citing Zukle v. Regents of the Univ. of Cal., 166 F.3d 1041, 1047 (9th Cir.1999)).
\item \textsuperscript{230} De La Cruz v. Tormey, 582 F.2d 45, 47 (9th Cir. 1978).
\item \textsuperscript{231} Arnold v. Bd. of Educ. of Escambia County, 880 F.2d 305, 314 (11th Cir. 1989).
\item \textsuperscript{232} See Tingley-Kelley v. Trs. of the Univ. of Pa., 677 F.Supp.2d 764, 776 (E.D. Pa. 2010); see also supra notes 87–88 and accompanying text.
\end{itemize}
if includes ‘smoking guns,’ such as negative comments made by teachers and school administrators directed toward teen mothers or a history of discrimination against mothers in the school district. However, Holt, Darian, Ivan, and Olojo included allegations of “smoking gun” language by instructors that proved to be insufficient to show that the schools’ proffered reasons were pretext. Only in Tingley-Kelley was such alleged smoking-gun language helpful to survive summary judgment. There, it was suggested that evidence beyond mere “say-so” would be required for such evidence to be probative.

i. Comparability

None of the eighteen cases address the issue of the comparability requirement. Holt tangentially raises the issue of alternative schools for pregnant students offering a lesser quality education, but the plaintiff lost at the summary judgment stage. As discussed under Section II, “comparability” is an area in which the scholars agree that there is little to no case law. Those who characterize the case law as little are correct; however, students seeking to assert claims are not without guidance. Brake notes that in the context of athletics, Title IX “involve[s] a comparison of the availability, quality, and kinds of benefits, opportunities, and treatment afforded members of both sexes. The benefits and opportunities . . . need not be identical but must be equivalent overall.”

Brake also notes that, although not in the specific context of pregnant and parenting students, the court in Newberg v. Board of Public Education, addresses the issue of single-sex schools under the Fourteenth Amendment and found the schools to be unequal. The Newberg court looked at “court offerings, type of degrees available, class size, teaching qualifications, academic and recreational facilities, library resources, availability of computers and other equipment, extracurricular activities, student performance, average per student expenditures, and the reputations of the two schools.” Additionally, McNeeley argues that the

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233. Brake, supra note 14, at 151.
234. See supra notes 155–161 and accompanying text.
235. See supra notes 72–90 and accompanying text.
236. See supra notes 170–179 and accompanying text.
237. See supra notes 180–185 and accompanying text.
238. See supra notes 164–169 and accompanying text.
239. See supra note 155 and accompanying text.
240. Brake, supra note 14, at 149.
dissent in the Fourth Circuit opinion in United States v. Virginia ("VMI") may provide some criteria for assessing whether schools are comparable. In the dissent, Judge Phillips stated that “separate-but-equal single-gender institutions” should only be permissible if they include “substantially comparable curricular and extra-curricular programs, funding, physical plant, administration and support services, and faculty and library resources.”243 McNeeley notes that while VMI was decided under heightened scrutiny under the Fourteenth Amendment, some courts have hinted that Title IX claims should receive such scrutiny.244

ii. Role of the First, Fourth, and Fourteenth Amendments

The case law illustrates that while Title IX serves as a centerpiece in protecting the rights of pregnant and parenting students, other areas of law also play a necessary role in protecting their rights. First Amendment right-to-not-speak concerns and constitutional privacy concerns are raised by school notification policies.245 Schools’ imposition of pregnancy tests raises Fourteenth Amendment due process as well as Fourth Amendment search and seizure concerns.246 While the above-discussed cases indicate that Fourteenth Amendment equal protection claims are more successful when alleged alongside Title IX claims, the role of the Equal Protection Clause in protecting against treatment according to gender should not be overlooked.

2. Importance of Recognizing the Body of Case Law and Its Contours

The presence of a coherent, consistent, and predictable body of case law goes a long way toward aligning action by otherwise recalcitrant groups and persons. Filing or threatening to file a case in which a district can reasonably expect to be found to have violated a rights law, or the filing of a case, has the potential to shift behavior without lengthy and costly litigation. Such has been demonstrated with Title IX. For example, the New York “P Schools” were closed by the threat of litigation. There, in 2002, the New York Civil Liberties Union Executive Director, Donna Lieberman, sent a letter to New York Schools Chancellor,

244. McNeeley, supra note 37, at 274.
245. See infra Part I.B.2.C.
246. See infra Part I.B.2.B.
Harold Levy, outlining three specific complaints and calling for action before a suit was filed. The three specific complaints included:

1. A seventh grade student in Brooklyn was told by a school counselor that she should stay at home because she was pregnant and that her pregnancy was distracting to other students. Making matters worse, an attendance officer told the girl that she should permanently transfer out of her school.

2. Takenya Tucker, a 17-year-old eleventh grader at the Lillian Rashkis School of Telecommunications in Brooklyn, has been barred from taking her baby on the school bus with her, preventing the baby from attending the school-based day care program ... mak[ing] it harder for Takenya to stay in school.

3. Tiffany Flores, a 16-year-old student at John Jay High School in Brooklyn enrolled her two-month-old son in the school's LYFE day care program. Then an Assistant Principal ordered the baby removed unless Tiffany ... sign[ed] a contract stipulating her termination from the LYFE program if she failed a single course ...

In the 2002 letter, Lieberman outlined that the schools' policies violated the girls' legal rights and that developing policies to help the students stay in school would not only uphold their legal rights but would be fiscally sound. The 2002 letter followed earlier action by NYCLU in 2000 in which Liebermann had contacted Chancellor Levy and explained that "after conducting interviews with dozens of pregnant and parenting girls[,] many of these students said that school officials sabotaged their efforts to stay in school, or pushed them out ... [and] results of a telephone survey that found some schools unlawfully refused to allow pregnant students to enroll." Lieberman stressed that "P' schools may offer emotionally supportive environments for pregnant students but too often lack the coursework and resources to meet their educational needs." In May of 2001, NYCLU representatives met with representatives from the Board of Education to provide recom-

248. Id.
249. Id.
250. Id.
251. Id.
recommendations. However, in 2002, the NYCLU reported their lack of awareness of any progress and gave Chancellor Levy an “F” for failing to address the discrimination. Finally in 2007, it was announced that the “P Schools,” which at that point had 323 students enrolled, were closing for reorganization. 252 Following the announcement, district Superintendent Cami Anderson said, “It’s a separate but unequal program... The girls get pushed out of their original high schools, they don’t come to class and they don’t gain ground in terms of credits.” 255

Similarly, three Texas cheerleaders who were dismissed after becoming pregnant were returned their status on the team after a letter from the ACLU. 254 Also, in 2004 in Southern California, the ACLU filed suit against Antelope Valley Union High School District and the Los Angeles County Office of Education arguing that the schools’ policies for pregnant and parenting teens amounted to coercion. 255 Students had to choose between the traditional high school or alternative school. The traditional high school offered college preparatory courses but did not have childcare services. In contrast, the alternative school had childcare but did not offer any college preparatory services. For students who needed childcare, the offerings did not really allow any choice at all. 256 The case settled before trial and no precedent was created. This and the two previous situations illustrate that the awareness of enforceable rights facilitates improved practices without costly and time-consuming full-length litigation.

II. Analyzing the Implementation

The above situations indicate that while the case law on the topic of pregnant and parenting teens is severely disproportionate to the number of parenting and pregnant teens affected by the failures in implementation, there is a body of case law that provides guidance, albeit limited in many ways, and can be relied upon by those asserting rights.

253. Id.
256. Id.
At the same time, schools that seek to comply with Title IX may encounter hardships when seeking information for compliance. For example, the earlier-mentioned pamphlet created and distributed by the Office for Civil Rights in 1991 for “elementary and secondary administrators, teachers, counselors, parents, and students” discussing Title IX requirements in this context fails to provide clarity for the legal requirement of Title IX, instead stating twice that “[t]hese approaches and programs, however, are not legal requirements under Title IX.” Additionally, although a Women’s Educational Equity Act Program (“WEEA”) 2002 report gave the OCR a C+ for its enforcement of Title IX regulations for pregnant and parenting students, the OCR has not updated the pamphlet, despite WEEA’s call for improvement and its own acknowledgment that the pamphlet is out of date. 2

A. Lack of Knowledge

Research has indicated that school administrators are commonly unaware of the legal requirements that apply to the education of these students. Yet, such knowledge is crucial for securing affected students’ rights. “The ability of pregnant athletes to realize Title IX’s promised protection from discrimination will depend on these students’ knowledge of their rights and their willingness to assert them.” Pillow describes a lack of knowledge by all parties: “In my research, I have found that few education students and personnel, as well as the teen mothers I have interviewed, know that under Title IX pregnant and mothering students have the right to equal education opportunity. (Pillow, 2006, p. 62).” Brittany Ducker and Madeline McNeeley also describe a lack of Title IX knowledge by school districts and students.

257. See supra note 9 and accompanying text.
258. Office for Civil Rights, supra note 9, at 2; see also id. at 8.
259. Luttrell, supra note 14, at 21.
260. E-mail from David A. Campbell, Customer Serv. and Tech. Team, Office for Civil Rights, to author (Apr. 26, 2010, 14:37 EST) (on file with author).
261. Margaret A. Nash & Margaret Dunkle, The Need for a Warming Trend: A Survey of the School Climate for Pregnant and Parenting Teens (Equality Ctr. 1989) (describing how school administrators were unaware of Title IX requirements for pregnant and parenting students and describing violations); Brake, supra note 14 (describing research indicating continued violations of Title IX for pregnant and parenting students); Brake, supra note 1 at 361 (stating that realization of rights for pregnant and parenting students often depends on school administrators and that administrators’ knowledge “often leaves much to be desired”).
262. Brake, supra note 1 at 362.
263. See Ducker, supra note 6; McNeeley, supra note 37.
Katrina Pohlman describes a lack of knowledge coupled with disinterest: “What was perhaps even more troubling than the study's depiction of inequality was the clear disinterest in reform. Only 49 of the 129 schools were able to name their Title IX coordinators, which schools are required to have by federal law.” Additionally, my own research has shown that the Indiana Department of Education was unable to provide any contact information about the state’s district Title IX coordinators. Yet, awareness of the relevant actors of the policy being implemented is germane to a policy’s implementation.

Teachers’ and principals’ lack of awareness of education-related laws can be connected to the fact that “separate courses in education law at the undergraduate level are the exception rather than the rule.” Most teacher and administrator preparation programs do not require School Law or Legal Perspectives courses. A study published in the Harvard Educational Review that surveyed over 1,300 teachers in several states showed that 75% of the participating teachers had not taken a school law course. In striking contrast, research indicates that throughout the nation, teachers and administrators want to develop legal knowledge. In 2004, a national survey showed that 82% of public school teachers and 77% of public school principals practiced “defensive teaching,” which meant teaching designed “to avoid legal challenges.” This information, taken together, indicates that teachers and administrators are not informed of whether their actions that aim to avoid legal violations actually align with legal requirements. These acts of defensive teaching that are made without a knowledge basis are likely to frustrate rather than facilitate educational processes, and unlikely to prevent the very legal challenges that they are designed to avoid.

265. E-mail from Risa Regnier, Ind. Dept. of Educ., to author (Nov. 30, 2009, 14:14 EST) (on file with author).
266. For discussion of the crucial component of understanding in the change process, see MICHAEL FULLAN, THE NEW MEANING OF EDUCATIONAL CHANGE 34–37 (4th ed. 2007).
269. Martin R. West & Joshua M. Dunn, The Supreme Court as School Board Revisited, in FROM SCHOOLHOUSE TO COURTHOUSE: THE JUDICIARY’S ROLE IN AMERICAN EDUCATION 3 (Joshua M. Dunn & Martin R. West eds., 2009).
Additionally, students themselves and their parents are frequently unaware of their rights. As reported by the National Women's Law Center ("NWLC"),

[A]vailable research suggests that schools make a difference in whether pregnant and parenting students remain in school. According to the Gates Foundation report . . . those who left . . . [were] “most likely to say that they would have worked harder if their schools would have demanded more of them and provided the necessary support. . . . [M]any pregnant students dropped out because they were “unable to juggle” the demands of school and parenthood and seemed unaware of any assistance at their schools that might have helped them ease their burden.

If the adults around them do not know of the existence of these rights, it seems almost axiomatic that the students themselves do not. Further, as discussed in the next section, the discourse surrounding pregnant and parenting students deemphasize these rights.

B. Marginalization

Several discourses shape society's understanding of school-aged mothers. Discourses are relevant to the discussion of the implementation of Title IX Regulations because they impact the politics and power of a law or policy.

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270. Pillow, supra note 10, at 62; see also McNeely, supra note 37, at 276 ("[M]ost of these girls and their parents are unaware that Title IX protects pregnant and parenting students, so they do not pursue their potential claims"); NWLC, supra note 7.
271. NWLC, supra note 7, at 14.
272. Brake supra note 1 at 364. For a thorough discussion of the history and context of teen pregnancy and education, see Pillow, supra note 10; see also Fershee, supra note 14. For a discussion of the history and context of New York Public School policy and pregnant students, see Ling, supra note 28. For a discussion of the history and context specific to Texas, see Hausenfluck, supra note 11.
273. Lisa Rosen, Rhetoric and Symbolic Action in the Policy Process, in HANDBOOK OF EDUCATIONAL POLICY RESEARCH 267, 283 (2009) ("The process of problem construction is also intrinsically political. This is not only because individuals hold different views of the same condition and compete to have their own views prevail, but also because how a problem is defined shapes understandings of its causes."); see also Bradley A. U. Levinson et al., Education Policy as a Practice of Power: Theoretical Tools, Ethnographic Methods, Democratic Options, 23 EDUC. POL’Y 767, 771 ("In every instance, policy formation is best conceived as a practice of wielding power."); Betty Malen, Revisiting Policy Implementation as a Political Phenomenon: The Case of Reconstitution Policies, in
Pillow explains how the teen mother was once portrayed as the “Girl Next Door” in order to drum up support for policy initiative for her benefit. However, in the eighties, that discourse was replaced by “The Teen Mother as the ‘Other Girl’ through which the teen mother was connected to the welfare mother” and as “immoral, irresponsible, and a drain on society.” Linda McClain describes the “single-mother,” the “welfare-mother,” and the “teen mother,” and “Further Costs of Irresponsible Reproduction” as four parts of the discourse of irresponsible reproduction.

These discourses have prevailed such that school-aged mothers are viewed as irresponsible and deficient, and descriptions of them include words such as “immorality, unaccountability, and incapacity.” The federal push for abstinence-only sex education is a result, an illustration, and a furtherance of these discourses.

Thus, we see the legal requirements of Title IX as contrasting with and derogated by public sentiment that views current and expectant mothers as irresponsible, detrimental, contaminating society, an
epidemic,\textsuperscript{282} deserving of shame and blame,\textsuperscript{283} and resists enabling mothering students.\textsuperscript{284} As McClain aptly explains:

\begin{quote}
[T]he current rhetoric of irresponsible reproduction cannot serve as an adequate basis for serious public debate about reproduction and responsibility or for changing law and public policy. Its models are flawed, reflect a problematic gender ideology and troublesome stereotypes about people in poverty, and rely upon reductive accounts of human motivation in the area of reproductive behavior. Even on its own terms, the rhetoric contains significant internal tensions which complicate its translation into law and public policy. Moreover, the focus upon personal responsibility in the diagnosis of social ills ignores issues of collective responsibility. \textsuperscript{285}
\end{quote}

The discourses explain why much policy for pregnant and parenting teens focuses on demographics of pregnant and parenting students and the risks that accompany not offering equal educational opportunities to the students, risks not only for the students and their child(ren) but for society at large.\textsuperscript{286}

The “cycles” that commonly come to mind when people speak of teen mothers are “cycle of poverty,” “cycle of welfare dependency,” and “cycle of child abuse.” Perhaps it would be fruitful to bear in mind, instead, a “cycle of stigma”—a cycle helped along by experts and advocates who enforce negative stereotypes to attract funding and support; a cycle given a spin

\begin{itemize}
\item \textsuperscript{282} Id.
\item \textsuperscript{283} Luttrell, supra note 14, at 25; see also Deirdre M. Kelly, Stigma Stories: Four Discourses About Teen Mothers, Welfare, and Poverty, 27 YOUTH & SOC'Y 421, 434 (1996) (describing the alternative media theme of “don’t blame the poor for poverty and its consequences”).
\item \textsuperscript{284} McClain, supra note 276, at 340 (“Many voices now urge that law and public policy should encourage, or require, personal responsibility and should no longer tolerate, much less reward, irresponsibility. A prime target in the campaign for personal responsibility is procreative irresponsibility . . . . The cluster of behaviors and choices that have been labeled ‘irresponsible’ includes, but is not limited to, ‘illegitimacy,’ single-parent families, divorce, abortion, and adolescent sexual activity.”); see also Pillow, supra note 10, at 40–41 (describing welfare policies built upon idea of “tough love”).
\item \textsuperscript{285} McClain, supra note 276, at 342.
\item \textsuperscript{286} See NWLC, supra note 7, at 10 (describing savings to society when students graduate). This Article by no means suggests that economic stability is not a meritorious goal but seeks to illustrate that the literature often frames discussions of educational programs for pregnant and parenting students in terms of costs and savings and not as a rights-centered discussion.
\end{itemize}
by politicians who ignore their own studies in seeking scape-
goats; a cycle reinforced by a mainstream media that relays the
stigmatized images it finds . . . and largely ignores the discourses of opposition and of teen mothers themselves.  

The discourses of shame and blame also explain why such policies have not been more popular and why the funding for such programs has continued to deteriorate. Policies and programs appeal to the cultural construction of teen pregnancy as burdens and risks. However, education for these students, like all, has not only an aim of qualifying them for positions but also the core aim of educating for education’s sake. Consider this quote from Superintendent Cami Anderson, whose New York school district included the controversial “P” Schools: “The most powerful thing we can do for parenting teens is help them get their diplomas . . . . Your brain does not die when you become pregnant.” Notice how Anderson says nothing about educating these girls to improve their ability to get good jobs so that they can take care of their families without any government assistance. Rather, her comment is about the intrinsic value of education for these young mothers—something that far too often is left out of the discussion surrounding teen pregnancy, an illustration of how society talks about educating these mothering students.  

Failing to view education in this more holistic manner for this group of students, while recognizing it for others,

288. Pillow, supra note 10, at 86 (“A lack of federal funding initiatives to implement Title IX particularly explains the lack of program development. Without authorization funds to support the development of school-based teen pregnancy programs for pregnant/mothering students, school district had little incentive to proactively develop programs for such students.”); Hanson et al., supra, note 2, at 43 (describing that funding used to exist but has deteriorated); but see Luttrell, supra note 14, at 15–16 (describing that funding used to exist but has deteriorated).
289. See Kelly, supra note 283, at 445 (“Negative stereotypes, so often publicly voiced, have permeated the institutions that control teen mothers’ fates. For example, in many districts of British Columbia, the Ministry of Social Services now subsidizes day care for young mothers, regardless of whether they are on welfare. Although this is a valuable service for the mothers, the Ministry justifies this policy based on the assumption that any child of a young mother is ‘at risk of neglect or abuse.’ Many teen mothers are poor and in need of material support, yet to receive it they get constructed as inadequate mothers. This occurs despite research that a mother’s age is far less important than other factors in determining her parenting behavior . . . .”).
291. See Pillow, supra note 10, at 46 (“Clinton clearly linked ‘illegitimate births’ with poverty, and situated the problem of teen pregnancy with welfare reform and the economic stability of the United States.”); id. (“[E]ven amidst this heightened discussion of education for all, school-age mothers did not become education subjects.”).
illustrates the discrimination and discursive structures to which they have become subjected.\footnote{292}

\textit{C. Impact of the Perception of Weak Case Law, Lack of Knowledge, and Marginalization}

Research by Professors Pillow and Kelly supports that the teens most likely to carry their child to term are those who are poorer.\footnote{293} Luttrell reinforces this by describing the mothers that participated in the program that she studied in contrast with those who were able to “opt out”\footnote{294} and how Title IX seemed to mark the end of “de jure but not de facto discrimination against pregnant students—discrimination by way of subtle forms of discipline, punishment, and racial segregation.”\footnote{295}

The literature addressing school-aged current and expectant mothers supports that more affluent teen mothers are more likely to have abortions, give up the baby for adoption, or use family resources to help tackle the obstacles brought by pregnancy and motherhood so that they are able to keep it private and “out of school.” Pillow describes the different perceptions and experiences of the quiet teens as compared to those unquiet mothers: “[O]ne pregnant girl said to me ‘they just handle it better . . . like they were never pregnant and teachers and other kids just forget they ever were pregnant or had a baby.’ Handling ‘it better’ in

\footnote{292. An example of viewing women’s education for education’s sake is discussed in “Knowledge as the Necessary Food of the Mind”: Charlotte Mason’s Philosophy of Education. Stephanie Spencer, “Knowledge as the Necessary Food of the Mind”: Charlotte Mason’s Philosophy of Education, in Women, Education, and Agency 1600–2000 105, 109 (J. Spence, S.J. Aiston & M. Meikle eds., 2009) (“We say ‘what is the good of knowledge?’ Give a boy professional instruction, whether he is to be a barrister or a bricklayer, and strike out from his curriculum Greek or geography or whatever is not of utilitarian value. . . . Now here, is a most mischievous fallacy, an assertion that a child is to be brought up for the uses of society only and not for his own uses.”) (emphasis added).

293. Pillow, supra note 10, at 117 (“Teens most impacted by teen pregnancy are young women who are already living in impoverished conditions prior to becoming pregnant.”); see also Kelly, supra note 283, at 442 (“[P]oorer teenagers are more likely to carry their pregnancies to term. Also, fertility rates are higher within certain ethnic and racial groups. Therefore, as Luker . . . has observed, the risk of teen pregnancy does not occur with ‘equal frequency,’ and when people falsely universalize the issue, they mask and confuse disadvantages by class, race, and gender.”).

294. LUTTRELL, supra note 14, at 20 (“. . . [F]amilies with resources are likely to seek (and are often encouraged to do so) less stigmatized educational options for their daughters.”); see also McNeeley, supra note 37, at 268 (“. . . [T]eens from low-income families are also significantly more likely to drop out of school.”).

295. LUTTRELL, supra note 14, at 20.
this case refers to keeping the pregnancy invisible—keeping your pregnant-self and/or mothering-self separate from school." For example, during her research, Pillow

...[o]bserved or heard stories about the pregnant/mothering teen who stayed in school until her last trimester at which point she stayed at home and received home tutoring. After the birth . . . she returned to school, stepping back into her original classes—she remained invisible to her school during the height of her pregnancy and returned to school without any need of special support, thus minimizing her new role as Mother. Most girls who . . . followed this pattern . . . were college-track Caucasian students—some who decided to give their child up for adoption or had a mother at home to take on primary caretaking of the child.297

That keeping the pregnancy "quiet" is the "right" way of handling a pregnancy is a product of discourse. Further, that the "right" way is unavailable to students from low SES backgrounds feeds the discursive mechanisms and furthers the marginalization of the students affected.

The discourse affects teachers' and administrators' perceptions and treatment of pregnant and parenting students. Research by Nash and Dunkle showed, among other things, that of twelve surveyed schools:

42% did not always excuse absences due to pregnancy related problems such as nausea, morning sickness, and fatigue . . .

42% reported that teachers did not always allow pregnant teens flexibility to leave the classroom to go to the bathroom or to the health room for pregnancy related problems . . .

67% do not always make arrangements for pregnant students who need to urinate frequently to leave the classroom quickly and with minimal disruptions, such as providing a reusable hall pass . . .

25% usually or sometimes tracked pregnant and parenting students into a specific area, such as home economics and 8% required the students to go into such specific areas . . .

296. Pillow, supra note 10, at 115.
297. Id. at 131.
25% did grant sufficient medical leave for childbirth, and only half of schools reinstated students to their previous status after pregnancy leave . . .

25% of schools do not allow caring for a sick child as an excused absence . . .

And, as described, more recent research indicates that such violations continue. Brake found,

For the most part, the outright exclusion of pregnant students from regular classrooms no longer occurs. Instead however, pregnant students are likely to face more subtle forms of discrimination, such as coercive counseling . . . . Teachers may also consider pregnant students to be hopeless and not worth the additional effort it would take to enable them to continue in school.

For example, research by McLaughlin describes how teachers' attitudes are shaped by the context of their students and how teachers specified pregnancy as one of the reasons “students [are] burdened and distracted,” which impacted teachers' attitudes.

Additionally, research by Richard Arum and Doreet Preiss indicates that students from low socioeconomic backgrounds are unlikely to enforce their legal rights. Thus, those who are likely to experience the most harm from Title IX violations are the least likely to seek legal redress. The result of these practices is a continued marginalization that affects not only the mothering student but also her child. Hence,

[the reader will find that the pregnant/mothering teen most likely to stay in school or to utilize school-based teen parent programs contrasts with the teen for whom Title IX was

299. Brake, supra note 14, at 142; see also note 214 and accompanying text.
300. Milbrey Wallin McLaughlin, What Matters Most in Teachers' Workplace Context?, in IN TEACHERS' WORK: INDIVIDUALS, COLLEAGUES, AND CONTEXTS 79, 82 (Judith Warren Little & Milbrey Wallin McLaughlin eds., 1993) (“Teachers' comments about the aspects of their students that had the greatest impact on their classroom practices focused on the cultural diversity of students in their classes and on the demands, difficulties, and pressures associated with today's students . . . . Teachers see today's students burdened and distracted as never before by . . . . pregnancies.”).
III. Resolution: Increased Knowledge Building Alongside Increased Regulation

Fershee argues for increased regulation to improve the deficiencies in the implementation of Title IX for pregnant and parenting students. This Article agrees that increased regulation by the Office for Civil Rights will improve implementation, but proposes that increased regulation alone, without increased awareness and knowledge building of relevant actors, is insufficient. Scholars in the field agree that knowledge building will improve implementation of Title IX, as well as of other laws. Accordingly, this Article now shifts focus to discuss knowledge building for the students and those who influence them.

A. Students and Parents

The lack of knowledge leads professors Nancy Lesko and Wendy Luttrell to call for an increase in student knowledge of their reproductive rights. Kelly reiterates the importance of the reproductive rights, emphasizing that such rights extend beyond “choice” and describes that “young women ‘need solid information and safe contraception that serves their needs.’ . . . Feminists argue that young people need access to ‘sexuality education.’” To these calls more for more rights education, this Article seeks to emphasize the importance the role of education of such reproductive rights, including the Title IX rights. However, given the discursive powers already discussed, student and/or parent awareness will not ensure the assertion of these rights, and those who do assert such rights may encounter school personnel reacting with disbelief or

303. See Fershee, supra note 14.
304. For discussion of how neither top-down nor bottom-up change works alone, see Fullan, The New Meaning of Educational Change (4th ed. 2007).
305. See infra notes 307, 309–310 and accompanying text.
306. Lesko, supra note 33, at 145; Luttrell, supra note 14.
disapproval. Thus, as taken up in the next paragraphs, awareness and knowledge by school faculty are the most likely means of improving the observation of Title IX for pregnant and parenting students. At the same time, student and parent awareness will increase educators' awareness, as each time such rights are asserted, school personnel will be confronted with realities and enforceability of the legal requirements.

B. Teachers and Administrators

Ducker specifically calls for increased knowledge on the part of school district officials about Title IX requirements for pregnant and parenting teens, and school law scholars continue to call for more general knowledge building in the area of law and education for educators and lawyers. This chorus emphasizes that understanding simple legal principles and knowing when to seek additional advice can save schools money, time, energy, as well as provide peace of mind. These saved resources "can be better devoted to education." School law scholars agree that knowledge of education law enables the development of policies and practices that provide equal educational opportunities to all and respect core constitutional rights, and such scholars question whether equity in education will be achieved without the development of knowledge of relevant law. Indeed, a 2009 study indicated that while a majority of principals were uninformed or misinformed about school law issues, 85% indicated that they would change their behavior if they were better informed. Thus, legal education would counteract perceptions like that of one principal who stated, "We don't want to

307. See LUTTRELL, supra note 14, at 18 (describing teachers' reaction to "showing" and students' refusal to seem apologetic).
308. Ducker, supra note 6.
310. Redfield, supra note 309.
311. Id. at 639.
make it too easy for teen mothers; otherwise we'll reinforce the problems of teen pregnancy.”

In addition to the money and time saved by avoiding or enabling quick resolution of court proceedings, limiting litigation will also remedy the positioning of schools and parents as adversaries and enable collaboration between schools, parents, and lawyers. Such collaboration, in the place of litigation, promises overall improvements to the development of education policy and educational attainment of minority groups. “[T]he best intended and conceived litigation strategies have yet to produce equity and diversity along with the educational pipeline. . . . We have . . . not worked consistently or collaboratively with other educators along the continuum to understand and address the real problems or to improve student achievement along the pipeline.”

Ultimately, legal education holds promise for challenging teachers’ perceptions of pregnant students as well as teachers’ practices of clinging to traditional approaches despite students’ new and/or unique needs. The resulting perception has the potential to reverse the belief that pregnant students are social burdens and lead teachers to recognize pregnant and parenting students as rights-bearing individuals. This potential refers back to the earlier claim that legal education for teachers and administrators has promise to improve equity in schools.

An approach of knowledge building alongside regulation respects the professionalism of teachers and utilizes their context-specific knowledge, rather than undermining it through an approach of increased top-down regulation alone. Further, institutionalizing the legal education requirements for school personnel would result in more colleges, universities, and continuing education service providers increasing the offerings of legal education courses and programs. Formal education through such courses as a means of developing knowledge will be more

314. Pillow, supra note 10, at 79.
315. Redfield, supra note 309.
316. Parker & Redfield, supra note 312, at 16–17.
317. McLaughlin, supra note 300, at 85 (describing finding that nontraditional students often failed when teachers maintained traditional approaches and standards, as well as trend by some teachers to continue such traditional approaches).
318. See supra note 309 and accompanying text.
319. Fershee proposes increased oversight by the federal government, including increased reporting requirements. For discussion of weaknesses in top-down implementation and regulation and the case for backwards mapping, see Richard Elmore, Backwards Mapping: Implementation Research and Policy Decisions, 94 Pol. Sci. Q. 601 (1979); Levinson et al., supra note 273; Malen, supra note 273.
feasible than expecting such individuals to teach themselves or seek out courses that may or may not be offered at a university.

Conclusion

This Article analyzed the multifaceted situation surrounding pregnant and parenting school-aged parents and Title IX. The Article compared research indicating ongoing widespread Title IX violations in this context to the relatively meager litigation landscape and concluded that the number of cases and judicial opinions directed to this issue is disproportionately low. Finally, this Article proposed a means of directly addressing the first two of the three reasons proposed for the weakly developed case law: a) the widely shared view that there is no or very little helpful case law; b) lack of knowledge; and c) marginalization. Finally, this Article argues that while Title IX is a centerpiece for providing legal protections of these students, Title IX does not and cannot by itself provide a means of addressing all rights violations. Other areas of law, including privacy, the First Amendment, the Fourth Amendment, and the Fourteenth Amendment may be utilized in protecting the rights of these students.

This last point highlights one of several areas for future research. Legal and/or social science research focused on how various educational policies implicate privacy, First Amendment, and Fourth Amendment rights of these pregnant and parenting students would provide new architecture to the implications of weak implementation of this aspect of Title IX and offer useful information for addressing inequitable treatment. Further, research about knowledge and awareness of these students' legal rights by both educational and legal professionals would be a useful next step for determining where to focus knowledge building programs. In connection to the research about awareness, research regarding the effectiveness of coursework and continuing professional education programs would provide information necessary to understanding where and why knowledge gaps exist. Similarly, additional research about what it means to fulfill the Title IX Regulations' requirements that separate programs be completely voluntarily chosen by affected students and what it means for separate programs to be comparable to those offered to non-pregnant students would provide

320. Ducker, supra note 6, at 450 (proposing that district personnel become aware of Title IX requirements but providing no proposed method for ascertaining education law knowledge).

321. See supra notes 267–268 and accompanying text.
pragmatic guidance for these areas that remain unaddressed by case law. Finally, applying the lenses offered by feminist legal theory, specifically Martha Albertson Fineman’s\textsuperscript{322} vulnerability approach and Nancy Dowd’s\textsuperscript{323} approach to asking “the man question,” would provide explanatory power for the situation of pregnant and parenting students. §


\textsuperscript{323} Nancy E. Dowd, \textit{The Man Question: Male Subordination and Privilege} 14 (New York, N.Y.U. Press. 2010) (“The potential that ‘asking the man question’ in feminist theory suggests, particularly by exploring masculinities scholarship, is to enrich feminist theory by clarifying, reorienting, and further contextualizing how and why inequalities exist . . . it would include those places where men are disadvantaged, where women may have privilege as part of their subordinated status, and it would connect the interactions of men and women in the gender system rather than presuming that their interests are oppositional in all situations”).