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Teen Pregnancy in Charter Schools: Pregnancy Discrimination Challenges Under the Equal Protection Clause and Title IX

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TEEN PREGNANCY IN CHARTER SCHOOLS:
PREGNANCY DISCRIMINATION CHALLENGES
UNDER THE EQUAL PROTECTION CLAUSE
AND TITLE IX

*Kaylee Niemasik**

ABSTRACT

Until three years ago, a policy at Delhi Charter School in Louisiana required that any pregnant student be effectively expelled. A pregnant sixteen-year-old student's expulsion caught the attention of national media in 2012. The ACLU sued and the school quickly rescinded the policy. Although the policy was revoked, the un-adjudicated nature of the resolution leaves teen girls at the school and nationwide without any final court order to protect them against the (re)enactment of similar discriminatory policies.

*This Article analyzes the Delhi Charter School policy in order to make three related arguments. First, the Court should adopt a rebuttable presumption of state action when the plaintiff is a charter school student alleging the deprivation of a fundamental right. Second, any pregnancy expulsion policy enforced by a charter school violates both the Equal Protection doctrine and Title IX. The Equal Protection claim rests on the remedy left available under *Geduldig v. Aiello*, which otherwise crippled women's access to remedies against pregnancy discrimination: if a facially neutral policy evidences discrimination, that policy is unconstitutional under the Equal Protection Clause. Due to the complete lack of rational justification for these policies, this Article argues that all pregnancy expulsion policies *de facto* evidence invidious discrimination. Third, while Title IX provides another source of remedies, it will not provide meaningful remedies without reform to its implementation. This Article concludes with suggested Title IX reforms.*

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INTRODUCTION

“Thus the thing began. Had she perceived this meeting’s import she might have asked why she was doomed to be seen and coveted that day by the wrong man . . .”

—Thomas Hardy, *Tess of the d’Urbervilles*.¹

One-hundred-forty years after its publication, Thomas Hardy’s tale of temptation, predation, and ostracism played out for a crowd of practiced onlookers. This time, Tess was embodied in a sixteen-year-old charter school student in Delhi, Louisiana, impregnated by a classmate and subsequently expelled from the school pursuant to the charter’s policy, while the father of her child suffered no consequence.

Like Tess, teen girls in American high schools face imminent danger. Society and school authorities purport that the danger is internal—the uncontrolled sexual proclivities of the girls themselves. On the contrary, schools and their leaders unwittingly play key roles in orchestrating the downfalls of teen girls across the country. These institutions deftly bring the wry and predatory Alec, instigator of Tess’ downfall by way of highly coercive sex, to life through policies and practices designed to punish pregnant girls for the visible evidence of their surrender to society’s obsessive sexual predation. Students in charter schools, the wild west of the education system, are particularly vulnerable to attack on their constitutional freedoms.

In public schools, it is relatively well established that students have the right to be free from excessive disciplinary regulation. But in the charter school system, an educational framework created twenty-four short years ago, judges have not yet clearly defined the inalienable liberties of students. Teen girls in charter schools need more definite rights; this would create more accountability in their charter schools and thereby protect the girls against the unequal harms showcased in the Delhi Charter School case.

Delhi Charter School in Louisiana required female students suspected of being pregnant to take pregnancy tests.² The school reserved the right to refer the student to a doctor chosen by the school. If the student tested positive or refused to submit to the test, she was forced to drop out and be home-schooled.³ Though the school voluntarily rescinded the policy in response to a lawsuit by the ACLU, the rights of pregnant teens in charter schools remain at risk. The Delhi Charter School case highlights a new

1. THOMAS HARDY, *TESS OF THE D’URBERVILLES* 30 (1965).

2. Janet McConnaughey, *ACLU Targets Anti-Pregnancy Rule at La. School*, USA TODAY (last updated Aug. 8, 2012, 10:25 PM), <http://usatoday30.usatoday.com/news/nation/story/2012-08-07/aclu-anti-pregnancy-louisiana-school/56862780/1>.

3. *Id.*

frontier in the applications of the Equal Protection Clause of the Constitution and of Title IX of the Education Amendments of 1972.

The Supreme Court has roughly defined the freedom of expression that students in public schools possess through its First Amendment jurisprudence.⁴ In the charter school system, the barrier between the rights of students and the powers of administrators and teachers is even less clear. Delhi Charter School justified its policy as necessary to maintain a school environment “in which all students will learn and exhibit acceptable character traits.”⁵ However, the passage of Title IX, a federal statute that prohibits discrimination based on pregnancy status in federally funded schools,⁶ and the Pregnancy Discrimination Act, an Act that prohibits sex discrimination on the basis of pregnancy for employment-related purposes,⁷ firmly established the rights of students in publicly-funded schools to be free from discrimination based on pregnancy status.

The state action doctrine limits available remedies for the wrongs school officials perpetrate against students based on pregnancy status. Without a state’s action in a policy discriminating against pregnant students, a constitutional challenge to the policy (in this case Equal Protection) cannot be supported. Aside from the hurdle of demonstrating state action, an Equal Protection claimant must also show the existence of invidious discrimination in the challenged policy to overcome the standard established in *Geduldig v. Aiello*.⁸ If a student cannot overcome either of these two hurdles, federal statutory law—specifically Title IX—provides another available remedy. Title IX’s deficient regulatory scheme, however, makes the law a hollow promise for pregnant students.

This Article discusses the application of the state action doctrine to charter schools and then considers the likelihood of success for an Equal Protection Clause or Title IX challenge to a pregnancy expulsion policy. In Part I, I present a factual landscape of the charter school system. In Part II, I argue that the Delhi Charter School case shows why the pregnancy expulsion policies of charter schools are acts fairly attributable to the state. In addition, I argue that courts should use a rebuttable presumption of state action when students allege the deprivation of a fundamental right. In Part III, I argue that no rational basis exists that could justify the policy under

4. See, e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

5. McConnaughey, *supra* note 2.

6. 20 U.S.C. § 1681 (a) (Westlaw through P.L. 113–296).

7. See Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (Westlaw through P.L. 113–296).

8. 417 U.S. 484 (1974).

Equal Protection analysis. I first discuss the effect of *Geduldig v. Aiello* on the constitutional analysis of this expulsion policy and then argue that the remedy left available under *Geduldig* for invidious discrimination applies in this case. In Part IV, I briefly discuss the application of Title IX to the Delhi Charter School policy. In Part V, I summarize suggested remedies for the current state of relatively unchecked pregnancy discrimination in federally funded high schools.

I. CHARTER SCHOOLS: WHAT ARE THEY?

Charter schools all share two characteristics: “(1) a charter contract that establishes their authority to exist and binds them to accountability standards; and (2) some form of relief from the state statutory and regulatory requirements imposed on traditional public schools.”⁹ Beyond these two basic characteristics, state legislatures set the definitions and requirements of charter schools.¹⁰ Since the first charter school was established, the number of charter schools in America has grown to more than 6,500 schools, serving more than 2.5 million children across the country.¹¹

A. *The Purpose of Charter Schools*

Charter schools were designed to reform the education system in two ways. First, charter schools increase the accountability of school officials by placing control of educational programming in the hands of the same people who are responsible for student achievement (the individual school’s board members).¹² In public schools, the leaders of each individual school are responsible for the academic success of the students, but a centralized school board structures the educational program.¹³ Second, charter schools create competition in the educational system. Parents of economic means have always had the benefit of school choice. Wealthy families can afford to move to areas with high-quality public school systems or to enroll their kids in private schools. Charter schools provide that same school choice to parents of lower economic means. Under the No Child Left Behind Act of

9. Julie F. Mead, *Devilish Details: Exploring Features of Charter School Statutes That Blur the Public/Private Distinction*, 40 HARV. J. ON LEGIS. 349, 350 (2003).

10. *Id.*

11. *Choice & Charter Schools*, THE CENTER FOR EDUC. REFORM, <http://www.edreform.com/issues/choice-charter-schools/facts/> (last visited Apr. 9, 2015).

12. See Catherine LoTempio, *It’s Time To Try Something New: Why Old Precedent Does Not Suit Charter Schools in the Search for State Actor Status*, 47 WAKE FOREST L. REV. 435, 437 (2012).

13. *Id.*

2001, a charter school cannot charge tuition.¹⁴ Only charter schools that follow federal standards are eligible to receive federal money.¹⁵ So, most charter schools do not charge tuition, instead providing a free education to students, “the majority of [which] are minority (52 percent), at risk (50 percent), or low-income (54 percent).”¹⁶

The existence of charter schools encourages public schools to be more responsive to their students’ parents. Otherwise, public school parents may choose to enroll their kids in a nearby charter school.¹⁷ By adding this element of competition, charter schools raise the educational standards of local public schools, as well.

B. The Uniqueness of Charter Schools in the Realm of Education

Five characteristics distinguish charter schools from public schools: (1) founding legislation; (2) charter from (read: contract with) the state; (3) private control and ownership; (4) public funding; and (5) lighter regulation.¹⁸ First, state legislation creates charter schools, state statutes govern charter schools, and most states define charter schools as “public” in nature.¹⁹ Though charter schools might appear to be very similar to public schools with regard to founding legislation, the actions charter school administrators take after the point of legislative creation are not necessarily attributable to the state.²⁰ Second, charter schools operate within the confines of a contract between private individuals and the state, which is generally subject to reevaluation every five years.²¹ The contract sets the basic obligations of the charter school, which usually relate to filling a perceived

14. No Child Left Behind Act of 2001, 20 U.S.C. § 7221i (Westlaw through P.L. 113–296).

15. Mead, *supra* note 9, at 367 (“[I]n order for a charter school to be eligible for planning and implementation grants or participation in the credit enhancement program, a charter school must abide by the prohibition on charging tuition.”).

16. *Improving American Education with School Choice*, THE CENTER FOR EDUC. REFORM (Dec. 2012), <http://www.edreform.com/wp-content/uploads/2012/12/Improving-American-Education-With-School-Choice-DEC-2012.pdf>.

17. Mead, *supra* note 9, at 350.

18. See Jason Lance Wren, *Charter Schools: Public or Private? An Application of the Fourteenth Amendment’s State Action Doctrine to These Innovative Schools*, 19 REV. LITIG. 135, 160–64 (2000) (laying out elements of charter schools relevant to courts’ “state actor” analyses).

19. *Id.* at 160.

20. See *id.* (“Although legislation creates charter schools, it leaves most decisions to the private operators of the schools. Simple legislative approval of charter school initiatives is not sufficient to establish state action.”).

21. *Id.* at 139.

educational void.²² However, beyond the basic obligations stated at each school's founding, charter schools act independently of direct state control.²³ Third, the group that establishes the school, usually private individuals,²⁴ shapes the educational programming at the school and oversees day-to-day operations.²⁵ Fourth, charter schools receive public funding,²⁶ including in some instances federal funding.²⁷ Fifth, charter schools do not answer to local school boards or school districts; rather, the private individuals who establish the school also set the school's policies.²⁸ The Board of Education has limited power to review a charter school's performance, and the degree of power the Board exercises depends on the state. For example, in Louisiana, pursuant to a formal review, the Board can modify the charter and revoke or refuse to renew the charter.²⁹

C. *Delhi Charter School Facts*

The Louisiana Department of Education oversaw the creation of the Delhi Charter School.³⁰ The school receives 98% of its budget from state and federal funding, \$6,218,000 from the State of Louisiana, and \$508,000 from the federal government.³¹ These funds cover \$5,869,000 in yearly expenditures.³² A charter school is valid for an initial period of four years; the Board of Education reviews the charter on the third year, and contingent upon the results of the review, the charter is reauthorized for a maximum period of an additional five years. After the initial authorization period, the

22. *Id.* Though the author studied Texas charter schools specifically and the details of each charter school system vary state to state, the Texas statute and charter school system serve as "an adequate model of the charter school legislation throughout the nation." *Id.*

23. *Id.* at 142.

24. *See id.* "[P]rivate individuals, such as parents and teachers, have received the largest number of the charters issued by the state." *Id.* at 141.

25. *Id.* at 142.

26. *See id.* at 143 (noting that charter schools are "fully supported by the public funds they receive (including any federal funds)").

27. Only 8 states are ineligible for federal charter school funding because those states do not have the necessary prerequisite charter school laws. Office of Innovation and Improvement, *Finding Federal Funding for a New Charter School or for Dissemination of Best Practices*, U.S. DEP'T OF EDUC., <http://www2.ed.gov/about/offices/list/oii/csp/funding.html> (last modified Nov. 20, 2013).

28. *See* Wren, *supra* note 18, at 144.

29. LA. REV. STAT. ANN. § 17:3992(A)(1) (Westlaw through 2014 Reg. Sess.).

30. *2012 District Charter Application Process*, LA. DEP'T OF EDUC., http://www.louisianaschools.net/topics/district_charter_process.html (last visited Nov. 5, 2012).

31. *Delhi Charter School School District*, STARTCLASS, <http://school-districts.startclass.com/1/5174/Delhi-Charter-School> (last visited Mar. 25, 2014).

32. *Id.*

charter can be re-extended for three to ten years, pursuant to additional review.³³

The Board of Directors establishes the school's policies, including the expulsion policy, "consistent with the goals and objectives of the Delhi Charter School."³⁴ The Board of Directors consists of seven to nine individuals. "When possible," these members are preferred to have teaching, business or other professional experience, or be parents of students enrolled in the school (though those parents cannot make up a majority of the Board). The majority of Board members must hold a bachelor's degree from an accredited college or university.³⁵ The mission of Delhi Charter School, which it must fulfill per the terms of its contract with the state, is to provide an education for "at risk" students. In Louisiana, "at risk" students are defined as "those who are experiencing difficulty with learning, school achievement, progress through graduation from high school, and/or preparation for employment due to social, emotional, physical, and mental factors."³⁶ The school must maintain a student body of at least 50% "at risk" students.³⁷

II. IS A PREGNANCY EXPULSION POLICY A STATE ACTION?

Given the hybrid structure of charter schools, the boundary between state acts and non-state acts has been difficult to find. In order to state a constitutional claim, the student must first show that, per 42 U.S.C. § 1983, the conduct at issue is "fairly attributable to the State."³⁸ She must demonstrate that she was deprived of a right guaranteed under the Constitution and that the deprivation happened under the color of state law.³⁹ The state action doctrine, which emerged from civil rights case law, was originally created to distinguish private action from state action within the realm of the Fourteenth Amendment.⁴⁰ The Supreme Court has held that if an action satisfies the state action requirement of the Fourteenth Amend-

33. LA. REV. STAT. ANN. § 17:3992(A)(1) (Westlaw through 2014 Reg. Sess.).

34. *Delhi Charter School Policy Manual*, DELHI CHARTER SCHOOL § A(A03) 2 (Mar. 15, 2015), <http://www.delhicharterschool.org/> (follow "DCS Policy manual" link).

35. *Id.* § A(A03) 1.

36. *Evolution of the Concept 'At Risk'*, THE SOUTHWEST EDUC. DEV. LABORATORY, <http://www.sedl.org/rural/atrisk/concept.html> (last visited Jan. 8, 2015).

37. *Delhi Charter School Policy Manual*, *supra* note 34, § A(A01) 3.

38. *See* *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

39. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49–50 (1999).

40. *Wren*, *supra* note 18, at 152.

ment, it also satisfies the “color of state law” test for Section 1983 purposes.⁴¹

A. *The Law on State Action*

Courts have used five tests to determine whether an action is fairly attributable to the state: “(1) the symbiotic relationship test; (2) the close nexus test; (3) the joint action test; (4) the public function test; and (5) the pervasive entwinement test.”⁴² Because a private party might engage in state action with regard to certain actions but not others, courts do not make categorical judgments.⁴³ Instead, when applying any of these tests to a particular action, the court examines the conduct itself to determine whether it constitutes state action.⁴⁴ Of the five state action tests, the first three are not applicable to the Delhi Charter School policy. The last two tests are potentially applicable and thus deserve more attention.

The symbiotic relationship test, though never overruled, has fallen out of favor with the Supreme Court.⁴⁵ Under that test, the Court considers the level of interdependence between the state and the private actor.⁴⁶ When applying the close nexus test, the court will find state action if the state has coerced or significantly encouraged the specific action.⁴⁷ The Court will find state action under the joint action test when private parties act jointly with state officials.⁴⁸ The state and the private party must have conspired to violate the constitutional rights of the plaintiff.⁴⁹

The public function and pervasive entwinement tests are more relevant to the charter school context. Under the public function test, courts have found state action where the state has delegated one of its historic and traditional functions to a private institution and that delegated function is within the exclusive control of the state.⁵⁰ For example, the Court in *Rendell-Baker v. Kohn* applied the public function test to find that the dis-

41. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 296 n.2 (2001).

42. LoTempio, *supra* note 12, at 441.

43. *See id.* at 442.

44. *Id.*

45. *Id.* at 443.

46. *Id.* at 443. In *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961), the Supreme Court established the symbiotic relationship test in its holding that, by leasing part of its lot to a privately owned restaurant, the state municipal parking garage had placed itself in an interdependent relationship with that restaurant. *Id.*

47. *Id.* at 444.

48. LoTempio, *supra* note 12, at 444 (citing MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES § 5.16 (2011)).

49. LoTempio, *supra* note 12, at 444.

50. *Id.* at 442.

charge of teachers and a school counselor by a nonprofit, private school for maladjusted high school students was not state action.⁵¹ Three of the Court's holdings in *Rendell-Baker* are of particular significance here. First, the Court noted that the state actor determination is not made entirely on the basis of receipt of state or federal funds, as 90% of the school's budget in *Rendell-Baker* came from public funds.⁵² Second, the Court noted that the determination is not made based on the extent of state regulation of the private actor either; despite otherwise extensive state regulation, decisions related to personnel matters (such as discharge) remained with the school in *Rendell-Baker*.⁵³ Third, the Court also noted that the education of maladjusted students was not within the "exclusive province of the State."⁵⁴ This language has led to some confusion among the courts applying the public function test to charter schools, as was indicated by the First Circuit's broadening of this statement.⁵⁵ In applying the public function test, the First Circuit held that public education generally was not the exclusive function of the state and cited *Rendell-Baker* for this proposition.⁵⁶ However, a more thorough analysis of the *Rendell-Baker* holding indicates that the Court constrained the language of its exclusivity limitation to schools specifically for maladjusted students.⁵⁷ The Court did not intend for the limitation to be used in applying the public function test to all education providers.

If the Court were to interpret the exclusivity requirement to apply to education providers generally, the rationale of the public function test would be defeated. Using the public function test to analyze delegations of power prevents the state from delegating actions to private actors *for the purpose of* avoiding liability for those actions under the state action doctrine.⁵⁸ Charter schools are created when states assign private actors the responsibility to provide public education.⁵⁹ The contract between the state and the charter school provides the basis for the charter's existence, and if the provision of public education is per se beyond the exclusive control of the state, charter schools could never be held liable as state actors under this test.

51. See *Rendell-Baker v. Kohn*, 457 U.S. 830, 842 (1982).

52. *Rendell-Baker*, 457 U.S. at 840.

53. *Rendell-Baker*, 457 U.S. at 841.

54. *Rendell-Baker*, 457 U.S. at 842.

55. *Logiodice v. Trs. of Me. Cent. Inst.*, 296 F.3d 22, 27 (1st Cir. 2002).

56. *Logiodice*, 296 F.3d at 27.

57. LoTempio, *supra* note 12, at 455–56.

58. *Id.* at 456.

59. *Id.*

Under the entwinement test, when private conduct is “‘entwined with governmental policies’ or when the government is ‘entwined in [the conduct’s] management or control,’” the action becomes state action.⁶⁰ In *Brentwood Academy v. Tennessee Secondary School Athletic Association*, the Court established the entwinement test and held that an action taken by a statewide interscholastic athletic association⁶¹ was state action because the association was entwined with the state.⁶² The Court noted that “almost all of Tennessee’s public schools were members of the association, most of the association’s members were public school officials, the majority of the association’s funding came from the state, and the association governed intercollegiate athletics in lieu of the state’s Board of Education.”⁶³ Aggregating these factors, the Court held a reasonable person would conclude that the state was involved in the action.⁶⁴

B. *The State Action Analysis Applied to Charter School Policies*

The key factors courts consider in applying the state action test to charter schools are (1) the status of the plaintiff (student or teacher) and, relatedly, (2) whether the nature of the action pertains to the provision of equal educational opportunities for all students.⁶⁵ Significantly, in all the cases applying the state action doctrine in the charter school context, where the plaintiff was a student asserting a deprivation of the right to equal educational opportunities, the court found state action. Conversely, in the cases where the plaintiff was a teacher asserting a deprivation of a fundamental right, the court did not consistently find state action.

Milonas v. Williams and *Scaggs v. New York* illustrate how courts find state action when student-plaintiffs assert deprivations of equal education rights. In *Milonas v. Williams*, the state action doctrine was applied to a

60. *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 296 (2001) (citing *Evans v. Newton*, 382 U.S. 296, 299, 301 (1966)).

61. An interscholastic athletic association organizes and coordinates athletic competition and programs of high schools throughout the state.

62. *Brentwood Acad.*, 531 U.S. at 291.

63. LoTempio, *supra* note 12, at 445 (citing *Brentwood Acad.*, 531 U.S. at 291).

64. LoTempio, *supra* note 12, at 445.

65. In an increasingly outdated line of cases, when initially faced with constitutional violations in charter schools, lower courts had simply presumed that the charter schools were state actors, foregoing the state action analysis altogether. Eventually, federal courts began to realize the need to analyze each constitutionally challenged action under the state action analysis. Though lower courts in recent years have undertaken state action analyses in cases involving constitutional rights deprivations in charter schools, the resulting line of precedent is inconsistent. LoTempio, *supra* note 12, at 451–52.

pseudo-charter school⁶⁶ after the school subjected students, some involuntarily placed in the school by state officials, to a behavior modification program.⁶⁷ The Tenth Circuit held that the behavior modification program was state action pursuant to the close nexus test.⁶⁸ The court found that the primary distinction between this case and *Rendell-Baker* lay in the status of the plaintiffs—they were students, not teachers. The court also found significant the involuntary nature of some of the students' Provo Canyon School placement, which was done by juvenile courts and other state agencies, with or without parental consent.⁶⁹

In *Scaggs v. New York*, a district court judge in the Eastern District of New York found state action (and the violation of the Equal Protection Clause) in a charter school's lack of accommodations for disabled students.⁷⁰ The court held that the school defendants were state actors under a set of factors that most closely resembles the public function test.⁷¹ Like the Tenth Circuit in *Milonas*, the court held that the plaintiffs' statuses as students dispositively distinguished them from the teacher-plaintiffs of *Rendell-Baker*.⁷² The court also noted that the state was quite uninvolved in the termination of a single teacher in *Rendell-Baker*, whereas here, "the claims relate to the alleged total inadequacy of a school to provide free public education to its students while receiving state funding, being bound to state educational standards and purporting to offer the same educational services and facilities as any other public school."⁷³ The court went on to hold that

66. The school was established in 1973, before the advent of specifically-designated "charter schools," but it is unique from traditional private schools. Unlike other private schools, when this case was decided in 1982, Provo Canyon School received both state and federal funds. The school is privately owned and operated, and "many of the youths are placed at the Provo Canyon School by the boy's local school districts, with tuition funding coming from state and federal agencies pursuant to state special education laws and the federal Education for All Handicapped Children Act." *Milonas v. Williams*, 691 F.2d 931, 935-36 (10th Cir. 1982).

67. *Milonas*, 691 F.2d at 939-40. In *Milonas*, the Tenth Circuit held that an action taken by a private school for boys with behavioral problems was state action. The action at issue was a behavioral modification program. The court held that the primary distinction between this case and *Rendell-Baker* was that the plaintiffs in this case were students, where the plaintiffs in *Rendell-Baker* were teachers. The court held significant the fact that some of the students at issue were involuntarily placed into the school by state officials, and those officials had knowledge of and approved some of the behavior modification practices of the school. *Id.*

68. *Milonas*, 691 F.2d at 940.

69. *Milonas*, 691 F.2d at 940.

70. *Scaggs v. N.Y. Dep't of Educ.*, No. 06-CV-0799, 2007 WL 1456221, at *13 (E.D.N.Y. May 16, 2007).

71. *Scaggs*, 2007 WL 1456221, at *13.

72. *Scaggs*, 2007 WL 1456221, at *13.

73. *Scaggs*, 2007 WL 1456221, at *13.

Section 1983 claims against charter schools could properly be brought when they related to “the nature and quality of education received at charter schools.”⁷⁴

Of the cases that apply the state action test to charter schools, the Delhi Charter School case is most similar to *Scaggs v. New York*, which considered a school’s lack of accommodation for disabled students.⁷⁵ Pregnancy should be treated as a temporary disability, as is reflected in legislation on the rights of pregnant teens in schools.⁷⁶ The Delhi Charter School policy is dissimilar from the action at issue in *Rendell-Baker* and more similar to the action considered in *Scaggs* because the action taken here affected a student of the charter school, and the act of expelling pregnant students critically impacts the provision of equal educational opportunities to all students.

The ruling courts also found state action in one of the two cases involving a teacher-plaintiff. In *Riester v. Riverside Community School*, a district court judge in the Southern District of Ohio considered the application of the state action doctrine to a charter school’s termination of a teacher, as the United States Supreme Court had in *Rendell-Baker*.⁷⁷ This time, the court held that the school defendants were state actors because a state statute categorically held the actions of “community schools” to be state actions.⁷⁸ However, the court also noted that the actions taken were state actions under the public function and entwinement tests.⁷⁹ The court held that because a charter school and its administrators terminated the plaintiff, and because the State Board of Education had to approve the creation of that charter school, the court must consider the charter school’s actions analogous to those of the state.⁸⁰ The court determined the case was factually distinct enough from *Rendell-Baker*,⁸¹ noting that the charter status

74. *Scaggs*, 2007 WL 1456221, at *13.

75. *See Scaggs*, 2007 WL 1456221, at *13.

76. *See* 34 C.F.R. § 106.40(b)(2) (requiring that a physician’s note for excusal from activities may only be required of a pregnant student if it is also required of other students with physician-treated physical or emotional conditions). *See also* 34 C.F.R. § 106.40(b)(4) (“A recipient shall treat pregnancy . . . and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient’s educational program or activity.”).

77. *Riester v. Riverside Cmty. Sch.*, 257 F. Supp. 2d 968 (S.D. Ohio 2002).

78. *Riester*, 257 F. Supp. 2d at 972.

79. *Riester*, 257 F. Supp. 2d at 972.

80. *Riester*, 257 F. Supp. 2d at 972–73.

81. *Riester*, 257 F. Supp. 2d at 972–73.

of the school, as distinguished from the private school at issue in *Rendell-Baker*, was significant.⁸²

In the second case to address a charter school's termination of a teacher, the Ninth Circuit determined that the school's conduct was not state action.⁸³ Of the four cases applying the state action doctrine in the charter school context, this case, *Caviness v. Horizon Community Learning Center, Inc.*, is factually most similar to *Rendell-Baker*. The court noted that the plaintiff's attempt to distinguish from *Rendell-Baker*, on the grounds that the *Rendell-Baker* school was private and this school was statutorily characterized as public, was ineffective.⁸⁴ The court also held that, though the state in this case regulated the personnel matters of charter schools, state regulation alone was not enough to mandate a state action designation.⁸⁵ Citing *Rendell-Baker*, the court held that this action failed the close nexus test since there was no coercive action taken by the state to compel the employment decision.⁸⁶

C. Analysis of Delhi Charter School's Policy: Is this State Action?

Of the five tests, the public function test and the entwinement test are most applicable to pregnancy expulsion policies promulgated by charter schools such as Delhi Charter School.

First, the public function test is especially applicable in the education context because of the historic role of the state as the primary provider of education. Though the Court in *Rendell-Baker* established that the education of maladjusted students is not within the exclusive province of the state, this narrow holding does not apply to the policy at issue here. The provision of education is unquestionably one of the traditional functions of the state. Furthermore, the public function test was designed to prevent state actors from delegating authority to evade liability. Delhi Charter

82. *Riester*, 257 F. Supp. 2d at 973. The Court also held that the charter school was a state actor under the entwinement test. *Id.* The Court noted that no entities other than charter schools and local school districts had been delegated the authority to provide free and nondiscriminatory public schooling to residents of the state. *Id.* Citing this lack of other schools delegated that same authority by the state, the Court held that the entwinement test had been met and thus the termination was a state action. *Id.*

83. *Caviness v. Horizon Cmty. Learning Ctr.*, 590 F.3d 806, 808 (9th Cir. 2010).

84. *Caviness*, 590 F.3d at 815. In *Riester*, the school relied on approval from the State Board of Education for its creation. *Riester*, 257 F. Supp. 2d at 972–73. Whereas in *Caviness* (as was the case in *Rendell-Baker*), the school was a private entity brought into existence by private individuals which subsequently contracted with the state to provide state-funded education services. *Caviness*, 590 F. 3d at 815.

85. *Caviness*, 590 F.3d at 816.

86. *Caviness*, 590 F.3d at 816.

School is a charter school and, as previously detailed, the creations of all charter schools in Louisiana are overseen by the Louisiana Department of Education or their local school board.⁸⁷ Additionally, the school receives 98% of its budget from state and federal funding.⁸⁸ Given the policy interest underlying the public function test and the unique nature of charter schools as overseen and funded by the state, the public function test is especially relevant to the analysis of charter school policies.

Second, with regard to the entwinement test, it is inherent that the state would be involved in the policies promulgated by a charter school. Charter schools are distinguished from private schools by virtue of state involvement (a contract with the state and continuous state supervision). The entwinement test asks whether a reasonable person would conclude that the state was involved in the Delhi Charter School policy.⁸⁹ The school's founding was overseen by the Louisiana Department of Education,⁹⁰ the Board of Education reviews the charter's progress toward its stated goals (primarily, of providing an education to "at risk" students),⁹¹ and 98% of the school's funding comes from the state and the federal government.⁹² The ideologies behind the public function and entwinement tests, particularly the former, support their use to review Delhi Charter School's policy, and thus the school's expulsion policy is state action.

D. Public Policy Justifications for Finding State Action

Numerous public policy reasons weigh in favor of holding that pregnancy expulsion policies, like the Delhi Charter School's policy, are state acts. These reasons include: (1) bridging the accountability gap between the state and the individual charter school, by assigning consequences to the party responsible for a failure; (2) the Congressional intent behind the passage of Title IX, a federal statute prohibiting pregnancy discrimination in schools; and (3) the state oversight needed in the new frontier of charter schools, especially to protect students' constitutional rights.⁹³

87. *Louisiana Charter Schools At-A-Glance*, LA. DEP'T OF EDUC., <https://www.louisianabelieves.com/schools/charter-schools> (last visited Mar. 15, 2015).

88. *Delhi Charter School School District*, *supra* note 31.

89. *See* LoTempio, *supra* note 12, at 445–46 (citing *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 291 (2001)).

90. *2012 District Charter Application Process*, LA. DEP'T OF EDUC., <http://www.louisianabelieves.com/schools/charter-schools/district-charter-school-application-process> (last visited Mar. 25, 2015).

91. LA. REV. STAT. ANN. § 17:3992(A)(1) (Westlaw through 2014 Reg. Sess.).

92. *Delhi Charter School School District*, *supra* note 31.

93. In Part IV of this Article, I will apply Title IX to the Delhi Charter School policy directly, but the Congressional intent expressed through Title IX also counsels for use of the state action doctrine to protect the rights of pregnant, school-aged teens.

First, the state should be held liable for its negligent charter oversight in a case like that of Delhi Charter School because it was responsible for holding the school accountable to its stated mission. The state charged Delhi Charter School with maintenance of the school's mission: to provide an education for "at risk" students.⁹⁴ Pregnant teens are considered an "at risk" minority of students. Teen mothers are less likely to be employed and more likely to live below the poverty line and receive public assistance than other women.⁹⁵ By expelling all pregnant teens from Delhi Charter School, the school was preventing a categorically "at risk" body of students from receiving an education at the school. This was in direct violation of the school's stated mission and thus a breach of the state's contract with the charter school. Given that the state was charged with overseeing the activities and actions of the school to ensure that the mission was upheld, the possibility of liability should encourage states to more closely monitor their contractual partners.

Second, Title IX was passed as a direct result of the Civil Rights Act of 1964⁹⁶ and was fueled by the women's rights movement in the 1960s and 70s.⁹⁷ The language of Title IX is almost identical to the language of Title VI of the Civil Rights Act, which provides that no person shall be discriminated against on the basis of race, color, or national origin under any program that receives federal assistance.⁹⁸ Title IX expanded Title VI to include sex as an impermissible basis for discrimination.⁹⁹ Lead Title IX proponent

94. See *Delhi Charter School Policy Manual*, *supra* note 34, at 2–3.

95. Madeline E. McNeely, *Title IX and Equal Educational Access for Pregnant and Parenting Girls*, 22 WIS. WOMEN'S L.J. 267, 269 (2007).

Teenage mothers, particularly unmarried teenage mothers, are less likely to be employed than other women. Those who are employed work fewer hours and earn less per hour. Teenage mothers are also more likely than other women to live below the poverty line and to receive public assistance such as welfare; more than 75% of unmarried teen mothers are on welfare within five years of childbirth. High school dropouts as a whole earn about \$8,000 less per year than people who have a high school education. The children of teen mothers are more prone to underperforming in school and their daughters are more likely to become teenage mothers themselves. Lower educational attainment has a noticeably negative effect on outcomes for these girls and their children.

Id. at 269–70.

96. See Paul M. Anderson, *Title IX at Forty: An Introduction and Historical Review of Forty Legal Developments that Shaped Gender Equity Law*, 22 MARQ. SPORTS L. REV. 325, 326 (2012) (discussing the origins of Title IX).

97. *Title IX Legal Manual*, U.S. DEP'T OF JUST., <http://www.justice.gov/crt/about/cor/coord/ixlegal.php#II> (last visited Mar. 25, 2015).

98. Anderson, *supra* note 96, at 326.

99. See 20 U.S.C. § 1681(a) (Westlaw through P.L. 113–296).

Senator Birch Bayh explained to Congress that the language of Title IX intentionally reflected the language of Title VI. He noted that Title IX was meant to prohibit sex discrimination just as discrimination based on race, color, or national origin was prohibited because “our national policy should prohibit sex discrimination at all levels of education.”¹⁰⁰ Specifically, the Senator was concerned about the link between discrimination in education and subsequent limitation in women’s access to jobs. The Senator expressed his concern with the resultant economic inequity on the floor of Congress:

The field of education is just one of many areas where differential treatment has been documented but because education provides access to jobs and financial security, discrimination here is doubly destructive for women. Therefore, a strong and comprehensive measure is needed to provide women with solid legal protection from the persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women.¹⁰¹

In the Education Amendments of 1974, Congress delegated to the Department of Health, Education, and Welfare the authority to promulgate regulations implementing Title IX.¹⁰² In describing the authority of federal agencies to implement Title IX in schools, Senator Bayh noted that Title IX provides those agencies with the power necessary to enforce the law.¹⁰³

Third, the combined goals of Title IX and the charter school system counsel that the discriminatory actions taken by charter schools against students should be regarded as state actions. Excluding charter schools from state actor classification would undermine the objectives of the charter system and Title IX, which was enacted to bridge the gender gap in income by ensuring equal educational opportunities for men and women.

E. Refining the State Action Test in the Charter School Context

The actions taken by charter schools to limit students’ constitutional rights should be unambiguously adopted into the fold of state action. The Supreme Court should develop a new presumption in determining the applicability of the state action doctrine to actions taken by charter schools. Though most of the cases dealing with the state action doctrine in charter

100. Anderson, *supra* note 96, at 326–27 (citing 118 CONG. REC. 5807 (1972) (statement of Sen. Birch Bayh)).

101. 118 CONG. REC. 5804 (1972) (statement of Sen. Birch Bayh).

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

103. 118 CONG. REC. 5807 (1972) (statement of Sen. Birch Bayh).

schools have touched on the *Rendell-Baker* holding, the standard developed in *Rendell-Baker* was created with a private school in mind. *Rendell-Baker* can also be distinguished from future charter school cases by the fact that it considered a private school's termination decision—a school action that did not affect the constitutional rights of students. The unique characteristics of charter schools differentiate charter schools from private schools, and the importance of protecting students' constitutional rights differentiate actions affecting teachers from actions affecting students.

Lower courts consistently find state action in suits against charter schools when student-plaintiffs allege the deprivation of equal educational opportunities. Given that consistent recognition, the Supreme Court should adopt those two factors as establishing a rebuttable presumption of state action under a new test: (1) is the plaintiff a student, and (2) does the plaintiff allege the deprivation of equal educational opportunities? Other authors arguing for a new state action test in the charter school context have proffered options such as a fact-based inquiry that reflects the analysis performed by the Court in *Brentwood*,¹⁰⁴ or a variant on the public function test currently performed in the private prison context.¹⁰⁵

Maren Hulden suggests the *Brentwood*-esque, fact-based inquiry, noting that federal precedent in the charter school arena has made clear that “charter schools are state actors for claims brought by students, but not for all claims brought by employees.”¹⁰⁶ No court has ever dismissed a state action claim lodged by a student in the charter school context. Though suggested tests like Hulden's acknowledge the significance of the two key factors the lower courts have drawn out in their collective jurisprudence, the proposed tests do not explicitly account for those factors.¹⁰⁷ Given the uni-

104. Maren Hulden argues that:

[C]ourts should consider the alleged state action under the guiding factors in *Brentwood*, considering the extent to which: (1) the alleged violation resulted from the state's coercion, (2) the entity participates in a joint activity with the state, (3) the entity is so closely tied to the state so as to be controlled by it, (4) the entity is performing a delegated public function, (5) the entity is entwined with government policies, and (6) the government is entwined with the entity's management or control. However, instead of treating each factor with “rigid simplicity,”—as in *Caviness*—courts should consider the facts comprehensively and find state action when significant factors point to a “close nexus between the State and the challenged action,” as described in *Brentwood*.

Maren Hulden, *Charting a Course to State Action: Charter Schools and § 1983*, 111 COLUM. L. REV. 1244, 1288 (2011).

105. See LoTempio, *supra* note 12, at 460–61.

106. Hulden, *supra* note 104, at 1293.

107. For example, Hulden acknowledges that her *Brentwood*-based test

versally acknowledged importance of the plaintiff's student status and the allegation of a fundamental right deprivation, a rebuttable presumption that state action will be found in cases that display both factors would best protect charter school students' constitutional rights. Certainly, a subsequent fact-based inquiry or a public function test similar to the private prison context might rebut an initial presumption of state action. However, given the courts' historic inconsistency in determining state action in the charter school context,¹⁰⁸ relying upon those courts to systematically find state action in the charter school context under a test that does not explicitly account for those two key factors is risky. This rebuttable presumption would provide the most protection to charter school students deprived of their constitutional rights while preserving charter schools' relative autonomy in employment decisions.

III. THE EQUAL PROTECTION CHALLENGE

Of course, overcoming the state action hurdle is only the beginning of stating an Equal Protection claim against a charter school. If a court finds state action in a school's pregnancy expulsion policy, it must then determine the applicability of *Geduldig v. Aiello* with regard to the Equal Protection analysis of the policy. If a court decides that the policy contains no evidence of invidious discrimination, the rational basis test must be applied to determine whether the policy is constitutionally permissible.¹⁰⁹ On the other hand, if a court finds that a school's justifications for the policy are mere pretexts concealing a true intent to discriminate against women, the policy is unconstitutional per the Equal Protection Clause. In Section A, I discuss the legacy of *Geduldig* in more detail, and in Section B, I discuss the exception for invidious discrimination. Within Section B, I discuss the historical reasoning for pregnancy discrimination in schools and the inadequacy of those stated justifications, and argue that Delhi Charter School's policy

should typically lead courts to find state action by charter schools in the context of claims brought by students and parents, such as those challenging enrollment, disciplinary actions, or access to education, but rarely in the context of claims brought by employees. [. . .] Courts applying this analysis should find that charter schools are state actors in the case of most claims brought by students and parents because the delegated public function the school performs and the degree of state regulation and entwinement will normally render the state's involvement close enough to the challenged action to meet the nexus requirement.

Id. at 1278, 1288–89.

108. See *id.* at 1266–67 (noting the various approaches used by courts).

109. See *Geduldig v. Aiello*, 417 U.S. 484, 496–97 (1974) (applying this approach).

(and, by extension, any pregnancy expulsion policy) is invidiously discriminatory.

*A. Equal Protection Claims Based on Pregnancy Status:
The Legacy of Geduldig*

In 1974, The Supreme Court in *Geduldig v. Aiello* held that facial distinctions on the basis of pregnancy are gender-neutral, and thus pregnancy discrimination does not necessarily constitute sex discrimination in the realm of the Equal Protection Clause of the 14th Amendment.¹¹⁰ The Court applied rational basis scrutiny to the denial of insurance benefits for work loss resulting from a normal pregnancy.¹¹¹ The Court stated that “[w]hile it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification.”¹¹² The Court held that, rather than a distinction based on gender, laws mandating differential treatment for pregnant women target pregnant, as opposed to non-pregnant, persons.¹¹³ Though many state legislatures and Congress have rejected this reasoning and enacted statutory prohibitions on pregnancy discrimination, *Geduldig*’s three main holdings must be considered when applying the constitutional equal protection analysis to pregnancy discrimination cases.¹¹⁴ First, *Geduldig* “deems pregnancy-based government classifications to be facially neutral with respect to gender.”¹¹⁵ Second, it allows governments to justify sex-based classifications on the basis of pregnancy or childbearing capability.¹¹⁶ Third, *Geduldig* reaffirms what rational basis review presumes—that courts should apply deference when considering the government’s reasoning behind possibly discriminatory action that arguably infringes on the constitutional rights of pregnant women.¹¹⁷

Though *Geduldig* allows courts to defer to the stated purposes of state and federal governments in legislation that targets pregnant women, there is an exception to the general holding of the case. While in most cases a distinction based on a woman’s pregnant status does not support an inference of sex-based discrimination, *Geduldig*’s general holding does not apply in

110. *Geduldig*, 417 U.S. at 495–96.

111. *Geduldig*, 417 U.S. at 484.

112. *Geduldig*, 417 U.S. at 484.

113. *Geduldig*, 417 U.S. at 484.

114. Kim Shayo Buchana, *Lawrence v. Geduldig: Regulating Women’s Sexuality*, 56 EMORY L.J. 1235, 1236 (2007) (discussing the application of the principles of *Lawrence* to *Geduldig*).

115. *Id.*

116. *Id.* at 1236–37.

117. *Id.* at 1237.

cases of invidious discrimination. The Court noted that “[if] distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other,” this would remove a case from the realm of pregnancy discrimination jurisprudence governed by *Geduldig* and would instead allow the court to find the policy a result of sex-based discrimination and as such unconstitutional.¹¹⁸

The Court reiterated this exception two years later in a case factually very similar to *Geduldig* that arose under Title VII: *General Electric Co. v. Gilbert*.¹¹⁹ In *Gilbert*, the Court held that an insurance plan that excluded disabilities arising from pregnancy did not constitute sex-based discrimination within the meaning of Title VII.¹²⁰ Quoting the language of *Geduldig*, the Court noted that:

There is no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program. There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.¹²¹

However, the Court acknowledged *Geduldig*'s exception: “[W]e recognized in *Geduldig*, of course, that the fact that there was no sex-based discrimination as such was not the end of the analysis, should it be shown that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other.”¹²² In 1978, Congress overruled the decision in *Gilbert* with the passage of the Pregnancy Discrimination Act¹²³—an amendment to Title VII, the sex discrimination provision of the Civil Rights Act of 1964.¹²⁴

The Pregnancy Discrimination Act amended Title VII by adding a prohibition on all forms of pregnancy discrimination,¹²⁵ applicable to em-

118. *Geduldig*, 417 U.S. at 496 n.20.

119. *Gilbert*, 429 U.S. 125 (1976).

120. *Gilbert*, 429 U.S. at 145–46.

121. *Gilbert*, 429 U.S. at 135 (quoting *Geduldig*, 417 U.S. at 496–97).

122. *Gilbert*, 429 U.S. at 135 (quoting *Geduldig*, 417 U.S. at 496–97) (quotation marks omitted).

123. This policy might also be challenged on the basis of the Pregnancy Discrimination Act, but that analysis is outside the realm of this paper.

124. Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (Westlaw through through P.L. 113–296)).

125. 42 U.S.C. § 2000e(k) (Westlaw through through P.L. 113–296) (“The terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on

ployers of fifteen or more employees.¹²⁶ Through the Pregnancy Discrimination Act, Congress not only overturned the holding of *Gilbert* (that the exclusion of disabilities caused by pregnancy did not constitute sex-based discrimination), but it also rejected the reasoning of *Gilbert*—that although only women can become pregnant, pregnancy discrimination is not sex-based discrimination.¹²⁷

In *Newport News Shipbuilding and Dry Dock Co. v. E.E.O.C.*, the Supreme Court abided by the provisions of the Pregnancy Discrimination Act. It held that a health insurance plan that provided less favorable insurance benefits for pregnant spouses of employees than for employees who themselves were pregnant constituted pregnancy discrimination.¹²⁸ The Court again noted that a showing of invidious discrimination against the members of one sex would bring the analysis outside of the bounds of the holding of *Geduldig* with regard to facially neutral pregnancy distinctions.¹²⁹

B. Invidious Discrimination in a Charter School's Pregnancy Expulsion Policy

Historically, and still today, school administrators have advanced many justifications for expelling pregnant teens from public schools or, alternatively, coercing them to voluntarily withdraw. The justifications have centered around four common themes: (1) the idea of “contagious pregnancy”; (2) an attempt by schools to hide visible indicators of “morally reprehensible” action, which was believed to reflect poorly on the school; (3) health concerns; and (4) lack of school resources to provide accommodations for pregnant teens.¹³⁰ However, these excuses lack rational bases, indicating that the true reason for attempts to force pregnant teens from schools is invidiously discriminatory.

the basis of pregnancy, childbirth, or related medical conditions”); *see also* *Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 675-76 (1983) (clarifying the meaning of the Act).

126. *Facts About Pregnancy Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <http://www.eeoc.gov/facts/fs-preg.html> (last modified Sept. 8, 2008).

127. *See Newport News*, 462 U.S. at 678-81 (discussing the legislative history demonstrating a Congressional intent to overrule *Gilbert*).

128. *See Newport News*, 462 U.S. at 685.

129. *Newport News*, 462 U.S. at 677 n.13.

130. Kendra Fershee, *Hollow Promises for Pregnant Students: How the Regulations Governing Title IX Fail to Prevent Pregnancy Discrimination in School*, 43 *IND. L. REV.* 79, 85 (2009).

1. Historic Reasoning Provided for the Expulsion of Pregnant Teens

First, without any evidence to support this belief, many school officials believe that the presence of a pregnant student in school will encourage other students to become pregnant.¹³¹ The media attention given to the alleged “pregnancy pact” in Gloucester, Massachusetts in 2008 indicates the extent of this mistaken belief.¹³² Although it is equally likely that the presence of a pregnant teen in school might actually serve as an effective deterrent for other potential teen mothers, many school officials still cling to the idea of contagious pregnancy.

Second, pregnant teens serve as a visible sign that teenaged students are sexually active, which is still considered outside the realm of moral and acceptable behavior. Expelling these students removes from the school a symbol of teenage sexuality and promiscuity—a symbol that reflects poorly on the school and its administrators.¹³³

Third, mistaken beliefs about the health risks for pregnant teens posed by the school environment provide another justification for schools to remove these students from the “hazardous” school environment.¹³⁴ School administrators commonly provide hallway jostling and gym class participation as examples of school activities and environments not suitably safe, given the “delicate” states of pregnant teens.¹³⁵

And fourth, relatedly, schools often cite concern for the physical and emotional comfort of pregnant teens to justify expulsion.¹³⁶ Administrators note the emotional difficulties faced by pregnant teens in schools combined with the potential for physical discomfort found in the school environment.¹³⁷ Examples of aspects of the school environment deemed to contribute to the discomfort and exhaustion of pregnant students include desks ill-suited for pregnant teens, physical education classes, and the “rigor” of class schedules.¹³⁸

131. *Id.* (citing WANDA S. PILLOW, UNFIT SUBJECTS: EDUCATIONAL POLICY AND THE TEEN MOTHER 64–71 (2004) (describing several cases where pregnant teens were expelled from school to keep the student body from being “contaminated” by a pregnancy in their midst)).

132. Fershee, *supra* note 130, at 85–86 (stating in 2008, national media attention was collected by an alleged “pregnancy pact” in Gloucester, Massachusetts, where a group of teenagers supposedly entered into a pact to all become pregnant and raise their children together. However, the credulity of this story was soon challenged when students and administrators were questioned).

133. *Id.* at 87.

134. *Id.* at 88.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

2. The Weaknesses of Schools' Stated Rationales

Pregnancy expulsion policies cannot be justified by the rationale of protecting the interests and health of teen mothers. The four primary excuses articulated by schools to justify their pregnancy expulsion policies have no support, scientifically or otherwise.

First, “contagious pregnancy,” an unsubstantiated belief regarding the effects of pregnant teens on the psyches of their peers, does not provide a rational justification for the expulsion of pregnant teens. In fact, a study released by the National Bureau of Economic Research indicates that, eighteen months after its premiere, the television show “*16 and Pregnant*” led to a 5.7% drop in teen births.¹³⁹ Melissa Kearney, a researcher who has studied teen pregnancy interventions for over a decade, examined the effect of this particular show on teen pregnancy rates.¹⁴⁰ She believes that shows like “*16 and Pregnant*” deter teen pregnancy because they “make it clear how hard it can be [to be a teen mom]” and “affect girls who might not care otherwise.”¹⁴¹ The same logic counsels that teens who witness the realities of their classmates’ pregnancies would be less, not more, likely to become pregnant themselves. This research clearly indicates that the concept of “contagious pregnancy” is meritless.

Second, schools’ interests in hiding visible indicators that their students are engaging in “morally reprehensible” behaviors is self-interested and in no way serves the students affected by the policy. As Kendra Fershee discusses in her article, “Hollow Promises for Pregnant Students,” pregnancy expulsion policies arose in the post-WWII era when assimilation to ensure social and economic stability was key, well before Title IX.¹⁴² During that time, antipathy for immigrants, among other social forces, drove individuals and institutions alike to strive to meet a standard of excellence based in sameness.¹⁴³ To guarantee their own job security, school authorities needed to ensure that the product they manufactured—the school—met society’s standards.¹⁴⁴ Thus, school authorities felt the same assimilationist pressure to present a homogenous student body, marked by both academic excellence and moral purity.¹⁴⁵ Pregnant teenagers were a visible blight to the reputation of institutions that attempted to meet society’s standard of

139. Jacque Wilson, *Study: MTV's '16 and Pregnant' led to fewer teen births*, CNN, Jan. 13, 2014, <http://www.cnn.com/2014/01/13/health/16-pregnant-teens-childbirth/>.

140. *Id.*

141. *Id.*

142. See Fershee, *supra* note 130, at 87–88.

143. See *id.* at 87.

144. See *id.*

145. See *id.*

excellence.¹⁴⁶ Students engaging in sexual behavior were well outside social norms of the time, and by expelling the pregnant teens, school authorities quickly solved the problem of obvious non-assimilation.¹⁴⁷

Third, the physical vulnerabilities of pregnant teens are egregiously overstated by schools. While schools purport that subjecting teens to certain aspects of the school environment, such as gym class, might seriously endanger the mother and her child, according to the CDC the real risks inherent in exercise during pregnancy are minimal and the benefits great.¹⁴⁸ According to scientific evidence, moderate-intensity aerobic activity carries very little risk for pregnant women.¹⁴⁹ Physical activity does not increase the risk factors for low birth weight, early delivery, or early miscarriage.¹⁵⁰ In fact, regular exercise during pregnancy ensures heart and lung health and improves mood, among other benefits.¹⁵¹

Fourth, and relatedly, schools overstate the degree of accommodation needed to meet the physical and emotional needs of pregnant teens. For example, to prevent jostling in the hallways, schools might allow pregnant teens to leave class five minutes before the bell sounds—an accommodation many high schools already afford to less mobile students, such as those on crutches.

A high school education is paramount to an individual's potential for success, and teen pregnancy is the number one reason girls drop out of high school.¹⁵² Predictably, studies indicate that parenthood disproportionately affects the educational experiences of female students. Research by the Gates Foundation shows that 33% of female dropouts listed pregnancy as the reason for their unfinished high school education, while only 19% of male dropouts listed parenthood.¹⁵³

Teen mothers have significantly less promising job prospects than other women of similar ages, and high school dropouts in general earn \$8,000 less per year than graduates.¹⁵⁴ Working teen mothers work fewer hours for less pay than other women and are more likely to require public

146. *See id.*

147. *See id.* at 87–88.

148. *Healthy Pregnant or Postpartum Women*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/physicalactivity/everyone/guidelines/pregnancy.html> (last updated Mar. 30, 2011).

149. *Id.*

150. *Id.*

151. *Id.*

152. McNeely, *supra* note 95, at 269.

153. Michelle Gough, *Parenting and Pregnant Students: An Evaluation of the Implementation of the "Other" Title IX*, 17 MICH. J. GENDER & L. 211, 213–14 (2011).

154. McNeely, *supra* note 95, at 269. These jobs are both inferior in quality and also fewer in quantity. *Id.*

assistance and live below the poverty line.¹⁵⁵ More than 75% of unmarried teen mothers are receiving government welfare by the time their children reach age five.¹⁵⁶ The children of teen mothers are less likely to succeed in school and more likely to become teen mothers themselves than children not raised by teen mothers.¹⁵⁷ If schools are truly striving to help teen moms, there is no public interest justification for pregnancy expulsion policies.

3. The Sources of Invidious Discrimination

Given the unpersuasive quality of the expulsion justifications proffered by schools, invidious sex-based discrimination appears to be the true impetus behind the coerced or direct expulsion policies. In *Loving v. Virginia*, where the Court found no other rational explanation for a state's anti-miscegenation statute, racial discrimination was presumed the true impetus.¹⁵⁸ *Loving* was decided three years after the passage of the Civil Rights Act of 1964. Racism was rampant across the country,¹⁵⁹ which contributed to the Court's suspicion of the facially neutral anti-miscegenation statute.¹⁶⁰ Presently, gender discrimination remains a problem in this country and the world. Women face inequities that are often attributable to inferior educational opportunities, as is especially apparent in countries outside of the United States. Title IX was enacted to level the educational playing field for women in an attempt to improve women's job prospects and salary potential.¹⁶¹ As was true with regard to race when *Loving* was decided, courts today should be highly suspicious of expulsion policies that unduly burden women's access to education and serve no legitimate purpose.

Two psychosocial phenomena illuminate the gender discrimination apparent in pregnancy expulsion policies: (1) the historic idealization of fe-

155. *Id.*

156. *Id.*

157. *Id.* at 269–70.

158. See *Loving v. Virginia*, 388 U.S. 1, 11–12 (1967).

159. In ways only slightly more blatant than what we see across our country today.

160. See *Loving*, 388 U.S. at 6.

161.

The field of education is just one of many areas where differential treatment [between men and women] has been documented but because education provides access to jobs and financial security, discrimination here is doubly destructive for women. Therefore, a strong and comprehensive measure is needed to provide women with solid legal protection from the persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women.

118 CONG. REC. 5806–07 (1972) (statement of Sen. Birch Bayh).

male, and especially teen, virginity; and (2) society's obsession with teen sexuality.

a. Idealization of female virginity

The history of idealizing female, and especially teen, virginity dates back to the Middle Ages, and it is exemplified in the writings and practices of the Renaissance. Through the Renaissance, individuals were bound and defined by their *fama*, a Roman conception of reputational honor that, for women, was defined by chastity and safeguarded by the men in their lives.¹⁶² A woman's value consisted of her marriageable qualities: chastity, virtue, and virginity were among the most important.¹⁶³ The penalty for "presumed defloration" (raping a virgin) in some instances could be five years slavery, to be spent rowing in a ship's galley, or five years banishment from the city.¹⁶⁴ Notably, rape was defined as the forced taking of a victim's virginity.¹⁶⁵ Highlighting the importance of female virginity, rape of non-virgins was infrequently prosecuted.¹⁶⁶ It was not the violent crime itself that merited harsh punishment, but rather the marring of a chaste woman's honor through defloration. "[A]ccording to the canons of moral codes, both Christian and honor centered, virginity was the essence of a young female's virtue."¹⁶⁷ Without her virtue, synonymous with her virginity, the law did not recognize a woman as a person with full legal rights served by the criminal justice system.

If society's pseudo-criminalization of teen pregnancy is the result of an antiquated view of female (and especially teen) sexuality as a sacred possession, the (potentially subconscious) motive for policies such as the one at

162. See Thomas Kuehn, *Fama as a Legal Status in Renaissance Florence*, in *FAMA: THE POLITICS OF TALK & REPUTATION IN MEDIEVAL EUROPE* 27, 27 (Thelma Fenster and Daniel Lord Smail eds., 2003).

163. See MARGARET F. ROSENTHAL, *THE HONEST COURTESAN: VERONICA FRANCO, CITIZEN AND WRITER IN SIXTEENTH-CENTURY VENICE* 68 (1993). The virginity of teen girls was especially valued and protected by the particularly patriarchal society of the Renaissance. One of the most prolific female writers of the time, Veronica Franco, wrote to an acquaintance who worked as a courtesan and who was considering allowing her daughter to work in the sex industry, "You know how many times I have begged and warned you to protect her virginity." VERONICA FRANCO, *POEMS AND SELECTED LETTERS* 38 (Ann Rosalind Jones & Margaret F. Rosenthal eds. & trans., 1998).

164. ALEXANDRA LAPIERRE, *ARTEMISIA* 186 (2001).

165. Elizabeth S. Cohen, *The Trials of Artemisia Gentileschi: A Rape as History*, 31 *SIXTEENTH CENTURY J.* 47, 59 (2000) (citation omitted).

166. Elizabeth S. Cohen, *No Longer Virgins: Self-Presentation by Young Women in Late Renaissance Rome*, in *REFIGURING WOMAN: PERSPECTIVES ON GENDER AND THE ITALIAN RENAISSANCE* 169, 172 (Marilyn Migiel & Juliana Schiesari eds., 1991).

167. *Id.*

Delhi Charter School is based on gender discrimination and not altruism, as purported by the schools. The gendered nature of society's condemnation of teen sex is reflected by punishment rates. As indicated in a number of cases involving the denial of pregnant teens' admissions to the National Honor Society, the teen boys fathering these children are not punished for their engagement in premarital sex.¹⁶⁸ Only the girls are expelled, coerced into dropping out, or excluded from school organizations. The disproportionate and gendered effect of society's attempts to discourage premarital sex is an indication that the intent of such attempts and related school policies is only to circumscribe the sexual behaviors of women.

b. Society's obsession with the sex lives of teens

Society's obsession with the sex lives of teens is simultaneously unabashed and covert. The popularity of television shows such as *Teen Mom*,¹⁶⁹ *16 and Pregnant*,¹⁷⁰ and *Skins*¹⁷¹ highlight this voyeuristic interest. The paradox of society's obvious interest and yet feigned disinterest is captured in the psychoanalytic concept of reaction formation. The concept holds that any extreme, emotional trend in one direction (like hate or love) is an indicator that the individual may actually be defending against awareness of the opposite emotion.¹⁷² Fascination with teen sex is not acceptable to the individual's conscious mind and thus the individual reacts against that forbidden fascination with an exaggerated denouncement of teen pregnancy. In her book, *Romantic Outlaws, Beloved Prisons: The Unconscious Meanings of Crime and Punishment*, Martha Grace Duncan writes that the exaggerated, and often illogical, punishment of criminals in our society indicates that we as a society are obsessed with and actually attracted to criminality.¹⁷³

Invidious discrimination is at work in pregnancy expulsion policies—all other possible rationales are decidedly unpersuasive. Rather than altruistic concern for the well-being of pregnant students in the school environment, these policies reflect well-documented psychosocial phenomena. The

168. See, e.g., *Wort v. Vierling*, 778 F.2d 1233 (7th Cir. 1985); *Cazares v. Barber*, 959 F.2d 753 (9th Cir. 1992); *Pfeiffer v. Marion Ctr. Area Sch. Dist.*, 917 F.2d 779 (3rd Cir. 1990); *Chapman v. Grant Cnty. Sch. Dist.*, 30 F. Supp. 2d 975 (E.D. Ky. 1998). Each of these cases dealt with gender discrimination claims by pregnant teens who were denied membership in their respective school's chapter of the National Honor Society.

169. A reality show airing on MTV that follows the lives of teenage mothers.

170. A reality show airing on MTV that follows the pregnancies of teenage girls.

171. A British teen drama that follows the lives of teenagers. Storylines include an emphasis on adolescent sexuality.

172. MARTHA GRACE DUNCAN, *ROMANTIC OUTLAWS, BELOVED PRISONS: THE UNCONSCIOUS MEANINGS OF CRIME AND PUNISHMENT* 105 (1996).

173. *Id.* at 107–08.

exception left available under *Geduldig* provides opportunity for redress when such invidious discrimination is apparent, and it should be utilized to the benefit of pregnant teens denied of their fundamental rights.

IV. TITLE IX IMPLICATIONS OF PREGNANCY EXPULSION POLICIES

Delhi Charter School's pregnancy policy violates the Equal Protection Clause, but remedy through a constitutional challenge is not these plaintiffs' only option—this policy could also be challenged under Title IX.

Title IX of the Education Amendments of 1972 provides that, in schools that receive federal funds, no student shall be discriminated against on the basis of sex.¹⁷⁴ In 1975, the Department of Health, Education, and Welfare enacted regulations detailing how Title IX would be enforced.¹⁷⁵ Specifically, a public school that receives federal funds may not discriminate against any student on the basis of the student's "pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient."¹⁷⁶ Because of the sparseness of relevant case law, any analysis of a Title IX pregnancy discrimination claim in a federally funded school must focus on the language of the statute and the regulations implementing the statute.

The language of Title IX explicitly prohibits any discrimination based on a student's pregnancy status. Title IX states that this prohibition applies to any school that receives "federal financial assistance." But one might interpret that language to be limited to public schools, as charter schools did not exist when Title IX was written. Because of the gap between the instatement of Title IX in 1972 and the creation of the first charter school in 1991, it is helpful to look to the Department of Health, Education, and Welfare's regulatory guidelines implementing Title IX, which directly address charter schools.¹⁷⁷

In Section 106.34, the Regulations address the requirement that any school that receives federal funds and excludes students on the basis of gender must provide those excluded students a "substantially equal" school to attend.¹⁷⁸ The Regulation goes on to make an exception for nonvocational public charter schools.¹⁷⁹ In Section 106.40, pregnancy discrimination is

174. 20 U.S.C. § 1681(a) (Westlaw through P.L. 113–296).

175. See 34 C.F.R. § 106.40.

176. 34 C.F.R. § 106.40(b)(1).

177. 34 C.F.R. § 106.34.

178. 34 C.F.R. § 106.34(c)(1).

179. 34 C.F.R. § 106.34(c)(2).

directly referenced: it is prohibited in schools that receive federal funding.¹⁸⁰ However, in this Section, there is no exception for charter schools.¹⁸¹ Because the sections are otherwise similarly structured, and because the Section that provides an exception for charter schools with regard to one form of gender discrimination appears in the Regulation before the Section without the exception, the exclusion of the exception in Section 106.40 presumably was intentional.

Though case law is sparse, courts have ruled on the applicability of Title IX to pregnancy discrimination in schools in thirteen cases with mixed results.¹⁸² Regardless of the inconsistent nature of these rulings, awareness that students can bring these cases would encourage educators, administrators, students, and the public at large to respect the educational rights of pregnant teens. As stated by Michelle Gough in her article on the implementation of Title IX with regard to parenting and pregnant students, “[f]iling 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.”¹⁸³ Unfortunately, the public has only a limited awareness of the federal remedies available to pregnant teens experiencing educational discrimination.

Congress recorded in the Pregnant and Parenting Students Access to Education Act of 2011 that many pregnant students have their rights violated.¹⁸⁴ In its findings of fact, Congress noted that in the United States, there are roughly 750,000 teen pregnancies and 400,000 teen births annually, though these numbers include women up to age nineteen (and so do not accurately reflect the number of teen pregnancies in middle or high schools).¹⁸⁵ Three in ten U.S. adolescents will become pregnant before age twenty, the highest rate of all Western industrialized countries.¹⁸⁶ Congress also found that “pregnant and parenting students face significant barriers in enrolling, attending, and succeeding in school, including . . . discrimination in violation of Title IX of the Education Amendments of 1972, including stigmatization at school by administrators, teachers, and peer students.”¹⁸⁷ Despite the prevalence of Title IX violations, few students bring Title IX cases to address pregnancy discrimination. There are now nineteen relevant

180. 34 C.F.R. § 106.40.

181. 34 C.F.R. § 106.40.

182. Gough, *supra* note 153, at 220.

183. *Id.* at 253. “For example, the New York ‘P Schools’ were closed by the threat of litigation.” *Id.*

184. Pregnant and Parenting Students Access to Education Act, H.R. 2617, 112th Cong. § 2(a) (2011).

185. H.R. 2617, 112th Cong. § 2(a)(2)– (3).

186. H.R. 2617, 112th Cong. § 2(a)(2)– (3).

187. H.R. 2617, 112th Cong. § 2(a)(5)(A).

cases, though only thirteen alleged Title IX violations.¹⁸⁸ Additionally, the legal community perceives an absence of Title IX case law that is greatly exaggerated.¹⁸⁹ This leads to even less effective implementation, as parties affected by rulings on discriminatory behaviors (and their lawyers) are less likely to seek guidance from the case law if they believe it to be nonexistent.

A. The Application of Title IX to the Delhi Charter School Policy

Delhi Charter School receives approximately \$400,000 in federal funds per year¹⁹⁰ and should thus be subject to Title IX.¹⁹¹ The Delhi Charter School policy mandated homeschooling for any student suspected of being pregnant who tested positive for pregnancy or refused to submit to the pregnancy test. This policy stands in direct contradiction to the language of Title IX, which bans discrimination based on pregnancy,¹⁹² including forced expulsion. Unless the student, without coercion, independently decides to attend an alternative school, drop out, or begin home-schooling as the result of pregnancy, Title IX strictly forbids any actions a school might take to encourage those choices.¹⁹³ Though the application of Title IX to charter schools could be debated due to the nonexistence of charter schools when Title IX was written, the regulations implementing Title IX indicate that charter schools are subject to it.

188. See Gough, *supra* note 153, at 220; Dawson v. Pine Bluff Sch. Dist., No. 5:10CV00213, 2011 WL 5508885 (E.D. Ark. Nov. 10, 2011) (bringing the total number of cases to nineteen).

189. See Gough, *supra* note 153, at 218–19.

In her 1994 article Brake said, “[b]ecause 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.” McNeely’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.” [. . .] 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.

190. *Delhi Charter School School District*, *supra* note 31.

191. “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U.S.C. § 1681(a) (Westlaw through P.L. 113–296).

192. See 34 C.F.R. § 106.40(b)(1).

193. See 34 C.F.R. § 106.40(b)(1).

B. *Tightening up Title IX*

Though the Delhi Charter School policy presents a clear-cut example of pregnancy discrimination in violation of Title IX, much more subversive means of discrimination threaten students around the country. Under the Title IX regulations promulgated by the Department of Health, Education, and Welfare, schools may not expel nor encourage the voluntary dropout of pregnant teens.¹⁹⁴ Though statistics tell us that the number one reason for high school dropouts is teen pregnancy,¹⁹⁵ we have no statistics indicating whether coercion or mistreatment from teachers or administrators led to those dropouts. Also, we have no systematically collected statistics reporting the dropout rates among pregnant teens, which would be helpful in assessing the level and quality of support provided by schools to pregnant teens.¹⁹⁶

Addressing both blatant and more subversive pregnancy discrimination alike, in 2012 the National Women's Law Center ("NWLC") published "A Pregnancy Test for Schools: The Impact of Education Laws on Pregnant and Parenting Students."¹⁹⁷ This comprehensive report evaluates the current state of the law vis-à-vis pregnant and parenting students, and, *inter alia*, recommends Title IX reforms. As indicated in the NWLC's report, the Department of Education's Office for Civil Rights ("OCR") has failed the pregnant teens it is tasked with protecting. OCR oversees school compliance with Title IX, which includes "reminding school districts of their civil rights obligations, assisting them with compliance, conducting investigations, and resolving complaints of discrimination."¹⁹⁸ From 1997

194. See 34 C.F.R. § 106.40.

195. McNeely, *supra* note 95, at 269.

196. Fershee, *supra* note 130, at 102.

197.

A Pregnancy Test for Schools outlines the ways that federal, state, and local laws, policies, and programs can change the landscape for pregnant and parenting students and ranks how well the state laws and policies address the needs of these students. The report describes the particular challenges faced by pregnant and parenting students, highlights the requirements of federal laws, reviews relevant state laws and policies (some promising and others sorely lacking), and concludes with recommendations for both policymakers and for schools. The report also serves as a guide to advocates and service providers who work with these youth; it includes a toolkit designed to help them push for legal reform, implementation, and enforcement in their own communities.

A Pregnancy Test for Schools: The Impact of Education Laws on Pregnant and Parenting Students, NAT'L WOMEN'S LAW CTR. 2 (2012), http://www.nwlc.org/sites/default/files/final_nwlc_pregnantparenting_report.pdf.

198. *Id.* at 9.

to 2012, only nine complaints were filed with OCR relating to pregnancy discrimination at the secondary education level.¹⁹⁹ This dearth of filings suggests that potential complainants are not aware of their rights or have not been given the tools to act on those rights. As of 2012, OCR had also not proactively undertaken any Title IX compliance assessments absent individual complaint filings.²⁰⁰

To remedy obvious failings by OCR, the NWLC report suggests a number of Title IX reforms, any and all of which would significantly improve the prognosis of pregnant teens in secondary schools. These recommendations are directed toward both the federal and state governments: (1) OCR should remind schools of their obligations under Title IX, instruct them to review their procedural compliance with Title IX, and require them to train their staff under Title IX; (2) OCR should conduct regular, proactive compliance reviews of the schools that receive federal funds; (3) states should write laws that uniformly include pregnancy and parenting-related absences under the definition of “excused” absence; (4) states should require all schools to anonymously track and record data on their pregnant and parenting students;²⁰¹ (5) states should require schools to provide state-funded programs to pregnant and parenting students, such as individualized graduation plans; and (6) states should require each school to designate a Title IX coordinator tasked with monitoring compliance with Title IX, as Title IX requires at the school district level.²⁰² As indicated by a number of these suggested reforms, it would not be cost-prohibitive for schools to achieve a higher level of Title IX compliance; for instance, it would be relatively cheap for OCR to remind schools of their pre-existing Title IX obligations. But regardless of the specifics, the future well-being of this underserved and vulnerable population demands effective Title IX reform.

V. CONCLUSION

“She knew that they were waiting like wolves just outside the circumscribing light, but she had long spells of power to keep them in hungry subjection there.”

—Thomas Hardy, *Tess of the d’Urbervilles*²⁰³

Pregnant teens are in danger and the law must step in to empower the powerless. It must keep in hungry subjection the societal forces that endan-

199. *Id.*

200. *Id.*

201. Such as, for example, dropout rates and reasons for dropouts.

202. *A Pregnancy Test for Schools*, *supra* note 197, at 20–21.

203. HARDY, *supra* note 1.

ger the futures of women like Tess and the students of Delhi Charter School. The rights of pregnant teens in charter schools are regularly violated due to a combination of: (1) the inconsistency of the state action doctrine in the charter school arena; (2) the lack of regard for the Equal Protection right of pregnant teens to be free from sex-based discrimination; (3) ineffective implementation of Title IX; and (4) a lack of knowledge on the parts of administrators, teachers, and students about the constitutional and federal statutory rights of pregnant teens in federally-funded schools. Though the Delhi Charter School policy was a clear violation of teen students' rights to be free from pregnancy discrimination, not all schools are as explicit in their discriminatory practices. Title IX prohibits coercive tactics by teachers and administrators, but neither the statute nor the regulations implementing the statute provide an effective means of ferreting out and penalizing this subversion.

Specifically, three jurisprudential reforms are necessary to provide full redress to future plaintiffs alleging pregnancy discrimination in the charter school context. First, we must create a presumption in favor of the plaintiff when a student alleges a civil rights deprivation by a charter school. Second, we must recognize that pregnancy expulsion policies lack a rational basis and reflect deeply rooted psychosocial sources of invidious discrimination. Third, we must flesh out the regulations implementing Title IX with much more specific guidelines, limitations, and requirements in the school context. Until we take these actions, the constitutional rights of charter school students will remain in jeopardy. Moreover, as long as pregnant teens are denied the same educational services as all other students, the cycle of condemning and penalizing pregnant teens will continue. Hardy's tale must be laid to rest, and only through educational equality for pregnant teens will the fates of girls like Tess be confined to the pages of history—at least in this context. ❀