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## An Act for All Contexts: Incorporating the Pregnancy Discrimination Act Into Title IX to Help Pregnant Students Gain and Retain Access to Education

Kendra Fershee

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## AN ACT FOR ALL CONTEXTS: INCORPORATING THE PREGNANCY DISCRIMINATION ACT INTO TITLE IX TO HELP PREGNANT STUDENTS GAIN AND RETAIN ACCESS TO EDUCATION

*Kendra Fershee\**

*Few would agree that pregnancy discrimination is a tolerable by-product of a modern society. Yet there is at least one segment of society where pregnancy discrimination can thrive—federally funded schools. Even though Title IX was passed in 1972 to bar discrimination in schools based on sex, it is quite possible for schools to discriminate based on pregnancy with little impunity. Worse, those who suffer the discrimination cannot sue for the harms they suffered in federal court, nor can they seek monetary redress, even if they were financially harmed by the discrimination.*

*The status of U.S. Supreme Court precedent, coupled with the inadequacy of Title IX, makes it difficult for pregnant students to protect themselves from pregnancy discrimination or discourage schools from engaging in the practice. A proactive approach to stemming pregnancy discrimination is crucial for pregnant students, just as it was for working women when Congress passed the Pregnancy Discrimination Act in 1978. Congress should make ending pregnancy discrimination in schools a clearly defined goal that is efficient and effective by passing an amendment to Title IX that expressly includes pregnancy discrimination in its prohibition of discrimination based on sex. This Article discusses how Supreme Court precedent has coalesced to allow pregnancy discrimination in schools to slip through the cracks in Title IX and argues for an amendment similar to the Pregnancy Discrimination Act in Title VII to rectify the problem.*

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## I. INTRODUCTION

In 1978, Congress, in an uncharacteristically efficient process, passed a somewhat curt provision to amend Title VII to make clear to employers that pregnancy discrimination at work is unlawful.<sup>1</sup> Dubbed the Pregnancy Discrimination Act, it overruled *General Electric Co. v. Gilbert*<sup>2</sup>—U.S. Supreme Court precedent which held that an employer’s insurance plan that excluded pregnancy from short-term disability coverage was not discrimination “on the basis of sex.”<sup>3</sup> The Supreme Court’s decision in *Gilbert* was not the first of its kind. Only two years before, the Court decided that sex discrimination barred by the Equal Protection Clause did not bar discrimination based on pregnancy.<sup>4</sup> These auspicious cases created a backdrop, in a time that was ripe with political discourse about women’s rights, which made it possible for Congress to quickly reverse the Court’s ruling in *Gilbert* and clearly indicate that Title VII does protect women from pregnancy discrimination in the workplace. Apparently satisfied that women were now protected, the forces behind the pro-Pregnancy Discrimination Act political furor quieted and moved onto other pressing women’s issues.

Unfortunately, the job of protecting women from pregnancy discrimination is not done. An entire segment of society is still at risk for pregnancy discrimination and the individuals affected by it have no personal remedy when it happens. What is worse is that these individuals are the least likely able to protect themselves from discrimination and are the most likely to suffer as a result of it. Despite the provisions banning discrimination in schools on the basis of sex in Title IX,<sup>5</sup> and the Title IX regulations (“Regulations”) specifically prohibiting

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1. See 42 U.S.C. § 2000e(k) (2006) (“The terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions . . .”).

2. 429 U.S. 125 (1976).

3. See *id.* at 144-46.

4. See *Geduldig v. Aiello*, 417 U.S. 484, 497 (1974).

5. See 20 U.S.C. § 1681(a).

pregnancy discrimination,<sup>6</sup> pregnant students remain largely unprotected. These students are left to fall into a gap created by a series of Supreme Court cases that make it extremely difficult to argue that students can sue for discrimination in federal court, leaving them with inadequate remedies to redress the harms they might suffer.

While it is possible for schools that have discriminated against pregnant students to lose federal funding if they do not cease discriminating, the disincentives are limited.<sup>7</sup> Moreover, students who suffer discrimination are left with remedies that do not make them whole.<sup>8</sup> The societal ills that accompany teen pregnancy (high drop out, unemployment, and welfare rates), which, as an aside, are frequently cited to stop teens from engaging in risky sexual behavior, can be attributed in part to a lack of access to education for pregnant and parenting teens.<sup>9</sup> Unfortunately, a lack of access to education is not always a choice by a pregnant or parenting student; some schools still engage in discriminatory practices that force students out altogether, or into inferior alternative schools.<sup>10</sup> Congress must proactively seek to stamp out pregnancy discrimination in schools by amending Title IX to include a Pregnancy Discrimination Act of its own.

Part II of this Article discusses the Supreme Court precedent that makes a private right of action for monetary damages for pregnancy discrimination next to impossible under Title IX. Part III argues that Title IX should be amended with a version of the Title VII Pregnancy Discrimination Act to fill the gap created by the Supreme Court into which pregnant students fall. Part IV suggests specific recommended language for the amendment.

## II. THE PREGNANCY DISCRIMINATION GAP IN TITLE IX AND LESSONS LEARNED FROM TITLE VII

Discrimination against women based on their pregnancy status in America is not new.<sup>11</sup> The notion that it is improper for a woman to be visible in society while pregnant was pervasive until relatively

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6. *See infra* note 25 and accompanying text.

7. *See infra* p. 287-88.

8. *See infra* p. 287-88.

9. *See infra* p. 287-88.

10. *See, e.g.*, Cecilia G. v. Antelope Valley Union High Sch. Dist., No. CV 04-7275, slip op. at 2 (C.D. Cal. July 27, 2005); Kicklighter v. Evans Cnty. Sch. Dist., 968 F. Supp. 712, 715-16 (S.D. Ga. 1997); Hall v. Lee Coll., Inc., 932 F. Supp. 1027, 1028, 1030 (E.D. Tenn. 1996).

11. *See generally* DEBRAN ROWLAND, THE BOUNDARIES OF HER BODY: THE TROUBLING HISTORY OF WOMEN'S RIGHTS IN AMERICA (2004). Biological differences between women and men have been used by men in power to justify a patriarchal society that excludes women based on many factors, including pregnancy. *See id.* at XXIV.

recently.<sup>12</sup> The men who were the public figures of the birth of America, on the whole, believed that women's usefulness lay in their role as mothers, but not much more, and that the legal system should reflect that perception.<sup>13</sup> The combination of these beliefs, that pregnancy was a fragile condition and that women should be pregnant as much as possible, created a ripe environment to withhold rights and privileges from women during their pregnancies. Women were generally confined to the home when their pregnancies became obvious, essentially imprisoned "for their own good."<sup>14</sup>

The notion of imprisoning people, either literally or figuratively, to protect them from some undefined, perceived threat has been an effective tool in justifying discriminatory treatment in many contexts. A common theme of the propaganda issued by the United States while rounding up people of Japanese ancestry, U.S. citizens included, to send them to internment camps during World War II, was that it was necessary to protect them (from what was never really articulated).<sup>15</sup> Racial segregation in American prisons is a common practice, which is justified as necessary for the protection of the prisoners.<sup>16</sup> But it is hard to imagine a more long-lasting commitment to societal segregation to guard against perceived danger than the stalwart belief that pregnant women would suffer great harm if not protected from others, not to mention themselves.<sup>17</sup>

It is only in very recent history, within the last sixty years, in fact, that society has begun to realize the injustice of segregating people for their own protection.<sup>18</sup> In the span of less than one lifetime, the United States has made segregation based on race unlawful,<sup>19</sup> and has acknowledged the egregious error that was the Japanese internment camps.<sup>20</sup> Thus, in the last forty years, society has begun to acknowledge that negative assumptions of women's abilities during pregnancy are unfounded, harmful, and serve to segregate them from crucial segments

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12. *Id.* at 157-58.

13. *Id.* at 5, 15.

14. *See id.* at 13-15, 49-50, 209.

15. *See* WENDY NG, *JAPANESE AMERICAN INTERNMENT DURING WORLD WAR II*, at 13-14 (2002).

16. *See* CHAD R. TRULSON & JAMES W. MARQUART, *FIRST AVAILABLE CELL: DESEGREGATION OF THE TEXAS PRISON SYSTEM* 70 (2009).

17. *See* ROWLAND, *supra* note 11, at 208-10.

18. *See* *Brown v. Bd. of Educ.*, 347 U.S. 483, 493-95 (1954).

19. *See id.* at 495.

20. *See* 50 U.S.C. app. § 1989 (2006) (acknowledging "the fundamental injustice of the evacuation, relocation, and internment of United States citizens and permanent resident aliens of Japanese ancestry during World War II").

of most people's lives, such as work.<sup>21</sup> Pregnancy discrimination in the employment context was specifically prohibited by Congress through the Pregnancy Discrimination Act in 1978.<sup>22</sup> Despite Congress's recognition that pregnancy cannot be a reason to withhold rights and responsibilities from women in employment, Congress has not yet acknowledged directly that schools must also not discriminate based on pregnancy.

There are two pieces to the legal puzzle that help courts determine whether pregnancy discrimination has happened in an educational context. When an allegation of sex discrimination is made against a school, courts look to, among other places, Title IX for guidance on how to adjudicate that claim.<sup>23</sup> The language of Title IX, however, is very broad and does not include any mention of pregnancy in its mandate to treat the sexes equally in school.<sup>24</sup> For more specific guidance, courts can look to the Regulations, which do instruct schools about the parameters of how schools should treat pregnant students.<sup>25</sup> The problem for pregnant students who have suffered pregnancy discrimination is that statutory protection is always more comprehensive and beneficial than regulatory protection, and they are falling into a gap that makes filing a claim so unattractive and unlikely to succeed that it is nearly a legal fiction.<sup>26</sup>

*A. Title IX Regulations Offer Limited Protection to Pregnant Students Who Experience Pregnancy Discrimination*

Title IX was passed by Congress in 1972 to ban discrimination based on sex in educational settings.<sup>27</sup> Its language is simple: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."<sup>28</sup> So simple, in fact, that many questions about exactly what behavior Congress intended to ban and what sort of protection Congress intended to provide arose almost immediately after its passage.<sup>29</sup> In 1975, the confusion led the U.S.

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21. See ROWLAND, *supra* note 11, at 157, 159, 161-62, 164.

22. 42 U.S.C. § 2000e(k).

23. See 20 U.S.C. § 1683.

24. See *id.* § 1681(a).

25. See 34 C.F.R. §§ 106.1, 106.40 (2010).

26. See Robert D'Augustine, *A Loosely Laced Buskin? The Department of Education's Policy Interpretation for Applying Title IX to Intercollegiate Athletics*, 6 SETON HALL J. SPORT L. 469, 484 (1996).

27. 20 U.S.C. § 1681(a).

28. *Id.*

29. See U.S. COMM'N ON CIVIL RIGHTS, THE FEDERAL CIVIL RIGHTS ENFORCEMENT

Commission on Civil Rights to criticize the Department of Education (“DOE”), then called Department of Health, Education, and Welfare, for taking more than two years to enact regulations to implement Title IX.<sup>30</sup> The Regulations finally became effective on July 21, 1975.<sup>31</sup>

The Regulations cleared up some of the confusion about what Title IX actually was intended to outlaw, by barring discrimination based on sex in several specific contexts.<sup>32</sup> The most important provisions, for the purposes of this Article, are the sections of the Regulations that bar discrimination against students based on marital status or pregnancy.<sup>33</sup> Specifically, the Regulations prohibit schools from excluding students from school or school programs for being pregnant, from forcing pregnant students to attend alternative programs for pregnant or parenting students, and from providing alternative programs to pregnant or parenting students that are not equivalent to the mainstream programs available to all students.<sup>34</sup> The Regulations also incorporate the Title VI procedural provisions, which require, among other things: (1) self-reporting by schools to provide information about whether they are in compliance with the law and, (2) the DOE to conduct compliance reviews and investigations of complaints.<sup>35</sup>

Even with their specificity regarding pregnancy discrimination, the Regulations need revisions.<sup>36</sup> They are inadequate to reach their internal goals with respect to pregnancy discrimination in schools, in that they cannot guarantee pregnant students access to education, preserve their choice to stay in a mainstream school, or ensure that alternative programs are equivalent in quality to mainstream schools.<sup>37</sup> The lack of data collection requirements, enforcement provisions that fail to account for the fleeting nature of pregnancy, and silence about how school administrators should discuss a pregnant student’s educational options without bias are only a few of the failures of the Regulations.<sup>38</sup>

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EFFORT–1974: VOLUME 3: TO ENSURE EQUAL EDUCATIONAL OPPORTUNITY 39–41 (1975), available at <http://www.eric.ed.gov/PDFS/ED102071.pdf>.

30. See *id.* at 41.

31. 34 C.F.R. § 106.1 (2010).

32. See *id.* §§ 106.21–.61 (prohibiting sex discrimination by schools in admissions, recruitment, housing, financial assistance, athletics, and more).

33. See *id.* § 106.40.

34. See *id.*

35. See *id.* §§ 100.6(b), 100.7(c).

36. See generally 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 (2009) (arguing that the Regulations cannot reverse entrenched policies of expulsion and/or temporary exclusion of pregnant students without major revisions).

37. See *id.* at 89, 111–12.

38. See *id.* at 94–115.



Tightening and improving the Regulations would primarily help protect schools from violating the law in the first place, but would not do much to make a pregnant student who has suffered discrimination whole. Ultimately, even perfect Regulations cannot fully redress the harms pregnant students suffer in the face of discrimination and cannot be the only legal authority that stands between discriminating school districts and the pregnant students in their schools. For these reasons, Title IX must be amended to include language similar to the Pregnancy Discrimination Act in Title VII.

1. Under Current Supreme Court Precedent, Title IX Does Not Clearly Permit a Private Right of Action for Violations of Discrimination Barred in the Regulations

As noted above, the language of Title IX does not include the word “pregnant,” or any derivation thereof.<sup>39</sup> The Supreme Court has grappled with, in many contexts, what rights and benefits lie for litigants who sue for discrimination that is barred in regulations to a statute, but not in the statute itself. The Court’s decisions regarding whether Title IX permits recovery of monetary damages from schools that discriminate based on sex do not address whether pregnant students could recover monetary damages for pregnancy discrimination.<sup>40</sup> The Supreme Court has never ruled that the Regulations permit compensatory damages for pregnant students.<sup>41</sup> A line of cases decided by the Court, starting in the 1970s, suggest that while Title IX itself does permit a private right of action and compensatory damages for violations of the statute, a damages award for violations of the Regulations is not among the remedies a plaintiff can seek. The first in this line of cases was the Court’s decision in *Cannon v. University of Chicago*.<sup>42</sup>

In *Cannon*, the Court was faced with determining whether a woman who applied to, and was rejected from, a medical school could bring a private right of action under Title IX for discrimination based on sex.<sup>43</sup> The Court analyzed whether Title IX provided her the opportunity to seek specific performance, or if her only recourse was to request that the

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39. 20 U.S.C. § 1681(a) (2006).

40. See *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) (holding that an action brought under the regulations to Title VI does not allow a private right of action); *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 76 (1992) (holding that Title IX (the statute, not the Regulations) does allow plaintiffs to sue for monetary compensation); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 717 (1979) (deciding that Title IX (the statute, not the Regulations) does have an implied private right of action).

41. See *Fershee*, *supra* note 36, at 106 n.187.

42. 441 U.S. 677 (1979).

43. *Id.* at 680.

DOE cut off federal funding to the University.<sup>44</sup> Because Title IX does not specifically state, on its face, that specific performance is an available remedy to plaintiffs, the Court needed to determine whether a private right of action was implied by the meaning of the statute.<sup>45</sup> The Court looked to four factors, applied in a case that it had recently decided, to determine if it would be appropriate for a court to order that the University admit the plaintiff to the medical school.<sup>46</sup> The four factors developed in *Cort v. Ash*<sup>47</sup> helped the Court in *Cannon* decide that an implied right of action existed in Title IX.<sup>48</sup>

First, the *Cannon* Court considered a threshold question developed in *Cort* that requires a court seeking to determine whether a statute contains an implied private right of action to ask whether the statute was enacted for the benefit of a class of people in which the plaintiff is a member.<sup>49</sup> So, in the Title IX context, because the plaintiff in *Cannon* was a woman who was claiming that she was denied admission to medical school because she was a woman, she fell squarely into the category of people Title IX was intended to protect and satisfied the threshold question raised in *Cort*.<sup>50</sup> The next step in determining whether a statute contains a private right of action is to look to the legislative history to see whether Congress clearly intended to deny a private right of action in the statute.<sup>51</sup> The *Cannon* Court referenced several sources to make this determination, but principally compared Title IX to its sister statute, Title VI, to see if Congress contemplated a private right of action when it wrote Title IX.<sup>52</sup> The Court dug a bit into the history of Title IX and Title VI to rule that Congress clearly intended Title IX to include a private right of action.<sup>53</sup>

Only six words separate Title IX and Title VI.<sup>54</sup> Where Title VI bars discrimination based on “race, color, or national origin[,]” Title IX substitutes the word “sex.”<sup>55</sup> The *Cannon* Court noted this slight difference in the statutes when determining whether Congress intended to allow a private right of action in Title IX, because the Court had

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44. *Id.* at 704-06.

45. *See id.* at 683, 688.

46. *Id.* at 688-89.

47. 422 U.S. 66, 78 (1975).

48. *Cannon*, 441 U.S. at 688-89 & n.9 (citing *Cort*, 422 U.S. at 78).

49. *Id.* at 689.

50. *Id.* at 680, 693-94.

51. *Id.* at 694.

52. *Id.* at 694-98.

53. *Id.* at 694-703.

54. *Id.* at 694-95.

55. *Id.*

already determined that Title VI carries an implied private right of action when Congress passed Title IX.<sup>56</sup> Operating under the presumption that lawmakers know the current law when passing new law, the Court decided that Congress intended the same implied private right of action in Title IX as that which exists in Title VI.<sup>57</sup>

Moving on to the third consideration to determine whether an implied private right of action exists in Title IX, the *Cannon* Court followed the *Cort* decision that a private right of action should not be read into a statute if doing so “would frustrate the underlying purpose of the legislative scheme.”<sup>58</sup> Again turning to Title VI, the Court looked to the objectives of Title IX and Title VI.<sup>59</sup> The Court reviewed what it considered to be related, but ultimately different, objectives in the statutes.<sup>60</sup> The first objective was to avoid funneling federal funds to schools that discriminated unlawfully, and the second was to provide individuals protection against discriminatory practices.<sup>61</sup> The Court reasoned that it would be more efficient, orderly, sensible, and consistent with the intent of the statute for courts to allow litigants to receive what they had initially been denied by the discriminatory practice (in *Cannon*, admittance to medical school), rather than require the DOE to rescind federal funding to the offending school.<sup>62</sup>

The Court quickly dispensed with the final *Cort* consideration, which prohibits federal courts from implying a private right of action if it would be inappropriate to do so because the subject matter of the statute is mostly of concern to the States.<sup>63</sup> Stating that no problem is raised in this context by barring sex discrimination, the Court skipped the next step of weighing the four factors because they all supported the same outcome.<sup>64</sup> With that, the Court ruled that Title IX contains an implied private right of action.<sup>65</sup>

Obviously, a determination that Title IX itself does contain a private right of action does not mean that the Regulations also do. Because administrative regulations are borne of a separate constitutional power from the legislative function, they do not contain the same force

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56. *Id.* at 696.

57. *Id.* at 696-98.

58. *Id.* at 703.

59. *Id.* at 704.

60. *Id.*

61. *Id.*

62. *Id.* at 705-06.

63. *Id.* at 708.

64. *Id.* at 709.

65. *Id.*; *id.* at 717 (Rehnquist, J., concurring).

and effect that the statutes they are meant to implement do.<sup>66</sup> This concept formed part of the Court's reasoning in *Alexander v. Sandoval*,<sup>67</sup> when it decided that the regulations to Title VI did not carry with them an implied private right of action.<sup>68</sup> In *Sandoval*, the Court considered whether the regulations to Title VI contained a private right of action for an individual person, not an agency, to file a disparate impact discrimination case against the Alabama Department of Public Safety.<sup>69</sup> Before reaching the question of whether the regulations themselves could contain a sort of self-executing private right of action, the Court looked to the language of Title VI to see if it had an implied private right of action to enforce the regulations.<sup>70</sup>

For help in deciding whether the language of Title VI creates an implied right of action to enforce the regulations, the Court looked to *Cannon*, which determined that the statutory language of Title IX contains an implied private right of action.<sup>71</sup> The *Sandoval* Court pointed out that the operative language in Title IX and the language in section 601 of Title VI, which are nearly identical, clearly show that Congress intended to create a private right of action for individuals to enforce those sections of the statutes.<sup>72</sup> At issue in *Sandoval*, however, was the language contained in section 602 of Title VI, which reads, in pertinent part: "Each Federal department and agency which is empowered to extend Federal financial assistance to any program . . . is authorized and directed to effectuate the provisions of . . . this title . . . by issuing rules [or] regulations . . ."<sup>73</sup> The Court looked closely at the language of section 602 to conclude that Congress did not include "rights-creating" language that conferred a private right of action to individuals to enforce the regulations to Title VI.<sup>74</sup>

The *Sandoval* Court also considered an argument raised by the government and respondents, which suggested that the regulations themselves contained "rights-creating" language that permits individuals to bring a private right of action when the regulations to Title VI have been violated.<sup>75</sup> Rejecting this reasoning, the Court stated:

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66. See *Alexander v. Sandoval*, 532 U.S. 275, 291 (2001).

67. 532 U.S. 275.

68. *Id.* at 291, 293.

69. See *id.* at 278.

70. See *id.* at 288-91.

71. See *id.* at 279-80, 282 & n.2, 288-90; *supra* note 54 and accompanying text.

72. *Sandoval*, 532 U.S. at 279-80.

73. 42 U.S.C. § 2000d-1 (2006); *Sandoval*, 532 U.S. at 288.

74. See *Sandoval*, 532 U.S. at 288-91.

75. *Id.* at 291.

Language in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not. Thus, when a statute has provided a general authorization for private enforcement of regulations, it may perhaps be correct that the intent displayed in each regulation can determine whether or not it is privately enforceable. But it is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress. Agencies may play the sorcerer's apprentice but not the sorcerer himself.<sup>76</sup>

The most crucial consideration in the Court's decision in *Sandoval*, in the context of trying to determine whether the regulations to Title VI can be enforced through a private right of action, however, hinges on whether the regulations "authoritatively construe" the statute itself, which the Court reasoned can only happen when the regulations bar intentional discrimination.<sup>77</sup>

In *Sandoval*, the Court was asked to consider whether a person can bring a cause of action to enforce regulations to Title VI, which forbid agencies from using uniform criteria that result in discrimination on the basis of color, race, or national origin, commonly known as disparate impact discrimination.<sup>78</sup> Relying on *Cannon*, the *Sandoval* Court stated that the *Cannon* decision only permitted a private right of action for intentional discrimination barred by the text of Title IX and not unintentional discrimination.<sup>79</sup> The *Sandoval* majority's interpretation of *Cannon* led it to decide that the disparate impact regulation, which bars unintentional discrimination, could only be supported by a private right of action if the text of Title VI permitted it.<sup>80</sup> As stated above, the Court held that section 602 of Title VI did not permit such an action.<sup>81</sup> Even though the Court held that section 602 did not create a private right of action to enforce violations of the regulatory bar on unintentional discrimination, it did discuss the clear intent of section 601 of Title VI to confer a private right of action for intentional discrimination barred in the regulations.<sup>82</sup>

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76. *Id.* (citation omitted).

77. *See id.* at 284-85.

78. *See id.* at 278.

79. *Id.* at 282. The dissent in *Sandoval* took extreme umbrage at the notion that the *Cannon* Court only permitted a private right of action for intentional discrimination, stating that the *Cannon* Court ruled that an implied right of action exists for not just "some of the prohibited [Title IX] discrimination, but all of it." *Id.* at 297 (Stevens, J., dissenting).

80. *See id.* at 286 (majority opinion).

81. *See supra* note 74 and accompanying text.

82. *Sandoval*, 532 U.S. at 284.

The *Sandoval* Court attempted to put fears to rest that its decision to block a private right of action for the disparate impact regulations would also bar a private right of action for violations of the Title VI regulations barring intentional discrimination.<sup>83</sup> The Court stated that it did “not doubt that regulations applying” the ban on intentional discrimination in the statutory text are enforceable by the direct, private right of action permitted in the section.<sup>84</sup> The regulations that bar intentional discrimination, reasoned the Court, “authoritatively construe” the statute and are enforceable through the language of the statute itself.<sup>85</sup> The Court then listed several other Supreme Court cases where the Court ruled that regulatory provisions in other federal statutes carried with them a private right of action, and suggested that those provisions were all meant to bar intentional discrimination.<sup>86</sup> Based on this reasoning, knowing whether the pregnancy Regulations would be enforceable hinges on whether the Court would consider them to authoritatively construe the text of Title IX itself.

It seems, based on the Court’s decision in *Sandoval*, that determining whether regulatory provisions can be enforced through a private right of action is a three step process. First, a court must analyze the text of the statute at issue and rule that it authorizes private enforcement of the statute, which the Court in *Cannon* ruled Title IX does, when someone suffers discrimination “on the basis of sex.”<sup>87</sup> If the statute authorizes individuals to bring an action to enforce any of the provisions of the statute or the regulations thereto, the analysis would stop there. But, as is true for Title IX (and Title VI), when the statute is silent regarding the private enforceability of the regulations, a court must move on to the next step.

Second, a court must determine what kind of discrimination the regulation bars that a plaintiff is seeking to enforce. As stated above, the Court decided in *Sandoval* that the text of Title VI only authorizes a private right of action for regulations that bar intentional discrimination.<sup>88</sup> The Court relied heavily on *Cannon*, which construed Title IX, stating that the *Cannon* decision only allows a private right of action to redress intentional discrimination under Title IX (even though, as stated in the dissent to *Sandoval*, the *Cannon* Court never expressly ruled that only intentional discrimination would be subject to a private

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83. *See id.*

84. *Id.*

85. *Id.*

86. *Id.* at 284-85.

87. *See Cannon v. Univ. of Chi.*, 441 U.S. 677, 693-94 (1979).

88. *See supra* text accompanying notes 74, 80-81.

right of action).<sup>89</sup> So the Supreme Court is likely to rule that Title IX, like Title VI, only authorizes a private right of action to enforce intentional acts of discrimination that are barred in the statute or the Regulations. A court would next have to review the regulation at issue to determine what kind of discrimination it bars.

Third, a court would have to decide if the regulation at issue in the case bars intentional or unintentional discrimination. The Supreme Court has ruled, in various cases over the years, that certain federal regulations carry a private right of action, a list of which Justice Scalia in *Sandoval* includes as cases he says involved regulations that barred intentional discrimination.<sup>90</sup> Unfortunately, those cases have been decided on their facts and offer little guidance about what regulations the Court might review in the future would be considered to target intentional discrimination and which might target unintentional discrimination. This uncertainty makes it hard to predict if the pregnancy Regulations might be considered aimed at intentional or unintentional discrimination.

So, in order to determine whether a private right of action arises in the Title IX Regulations, a court must find that they “authoritatively construe” the text of the statute, which requires a court to take two steps.<sup>91</sup> First, a court must determine that the text of Title IX contemplates pregnancy discrimination as discrimination “because of sex.”<sup>92</sup> Second, if a court agrees with the *Sandoval* Court’s understanding of *Cannon*, that a private right of action is only available for intentional discrimination, it must then determine whether the pregnancy Regulations bar intentional discrimination. Both of these considerations make it, at best, unclear if the Regulations contain a private right of action, and at worst, likely that they do not.<sup>93</sup>

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89. See *supra* note 79 and accompanying text.

90. *Sandoval*, 532 U.S. at 284-85. Those cases included rulings that regulations defining what a “recipient” is under Title IX, defining “physical impairment” and “major life activities” under section 504 of the Rehabilitation Act of 1973, and interpreting Title VI to require recipients to use affirmative action to remedy past intentional discrimination, all carried with them a private right of action. *Id.*

91. See *supra* notes 80, 88-89 and accompanying text.

92. See *infra* Part II.B for a longer discussion analyzing the Supreme Court’s precedent on whether pregnancy discrimination is defined as discrimination “because of sex.”

93. *But see* David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J.L. & GENDER 217, 275 (2005). Professor Cohen argues that Title IX creates more substantive equality rights than does the Equal Protection Clause, and that the Regulations were enacted pursuant to protecting those rights, so the pregnancy provisions in the Regulations should be interpreted as “authoritative interpretations of the statute.” *Id.* (internal quotation marks omitted). Unfortunately, it is not at all clear that the federal courts, or even a federal court, would come to the same conclusion Professor Cohen did, leaving the question of whether pregnant students can sue for pregnancy discrimination dangerously unresolved.

## 2. The Elusive Private Right of Action Would Not Necessarily Provide Monetary Damages for Plaintiffs

After the *Cannon* Court determined that the text of Title IX does allow a plaintiff to bring a private right of action, the Court expanded the reach and power of Title IX one step further in *Franklin v. Gwinnet County Public Schools*,<sup>94</sup> when it awarded compensatory damages to a plaintiff who sued a school district for intentional sex discrimination.<sup>95</sup> In *Franklin*, the plaintiff brought an action against her school district for allowing a high school coach and teacher to sexually abuse her (including three occasions when he signed her out of class and coerced her into engaging in sexual intercourse).<sup>96</sup> The Court analyzed whether the implied right of action in Title IX afforded redress through monetary damages for intentional violations of Title IX, and ruled that it did.<sup>97</sup> The Court relied on two legal principles to rule as it did, based on longstanding precedent and more recent legislative action.<sup>98</sup> While careful not to conflate the separate legal considerations, a legal right to bring an action as an individual seeking redress under a statute, and the legal right to recover money for a violation, the Court decided that intentional violations of Title IX do permit plaintiffs to recover damages for the harm they suffered.<sup>99</sup>

The Court grounded in two legal principles its determination to allow successful plaintiffs suing under Title IX to recover damages for intentional discrimination.<sup>100</sup> The first principle was based on longstanding precedent permitting courts broad discretion to redress legal rights that have been protected by federal law.<sup>101</sup> The Supreme Court has relied on this concept since *Marbury v. Madison*,<sup>102</sup> where Justice Marshall relied on Blackstone's principles of remedies to justify his determination that the high esteem the judiciary enjoyed would cease "if the laws furnish no remedy for the violation of a vested legal right."<sup>103</sup> The Court restated the concept in more modern times in a 1946 case, stating, "[w]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal

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94. 503 U.S. 60 (1992).

95. *See id.* at 63-64, 76.

96. *Id.* at 63-64.

97. *Id.* at 62-63, 76.

98. *Id.* at 67-72.

99. *Id.* at 65-66, 76.

100. *See id.* at 66-73.

101. *Id.* at 66-68 (citing *Bell v. Hood*, 327 U.S. 678, 684 (1946)).

102. 5 U.S. (1 Cranch) 137 (1803).

103. *Franklin*, 503 U.S. at 66 (quoting *Marbury*, 5 U.S. (1 Cranch) at 163).



courts may use any available remedy to make good the wrong done.”<sup>104</sup> In addition to the broad remedial power vested in the federal courts, the Court in *Franklin* also relied on a legislative mandate from Congress in 1986 to support its determination that damages are available under Title IX for intentional discrimination.<sup>105</sup>

The *Franklin* Court looked beyond the common law for support that Congress intended Title IX to permit claimants to receive monetary damages for intentional discrimination.<sup>106</sup> After the Supreme Court decided that plaintiffs are entitled to bring a private right of action under Title IX in *Cannon*, Congress passed two amendments to Title IX that led the *Franklin* Court to “conclude that Congress did not intend to limit the remedies available in a suit brought under Title IX.”<sup>107</sup> The first abrogated the states’ Eleventh Amendment protection from lawsuits for actions against a state for Title IX discrimination.<sup>108</sup> The next allowed claimants to seek the same remedies from a state defendant as they might have received from any other public or private entity.<sup>109</sup> The combination of the two legislative acts gave the *Franklin* Court assurance that Congress intended to apply the traditional common law rule of providing a broad list of remedies to those whose federal rights have been violated.<sup>110</sup>

The Court was later confronted with a case similar to *Franklin*, in *Gebser v. Lago Vista Independent School District*,<sup>111</sup> when a student sued a school district under Title IX for damages for sexual harassment after it was discovered that she was having a sexual relationship with a teacher.<sup>112</sup> The Court was able to distinguish *Gebser* from *Franklin* and affirmed the lower court’s decision not to award damages.<sup>113</sup> The most significant difference between the two cases was that the plaintiffs in *Gebser* attempted to recover against the school district for the teacher’s actions via respondeat superior.<sup>114</sup> A crucial subsidiary consideration to the respondeat superior claim in *Gebser* was that the student did not report the sexual relationship, causing the Court to determine that the defendant school district did not have notice of the harassment and could

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104. *Id.* (alteration in original) (quoting *Bell*, 327 U.S. at 684).

105. *Id.* at 72-73.

106. *See id.*

107. *Id.* at 72.

108. *Id.*

109. *Id.* at 72-73.

110. *Id.* at 73.

111. 524 U.S. 274 (1998).

112. *See id.* at 277-78.

113. *See id.* at 279-80.

114. *See id.* at 282-83.

not be held liable for the teacher's actions.<sup>115</sup> The plaintiffs attempted to rely on the availability of respondeat superior liability in the Title VII employment context to make the argument that Title IX should be read similarly, but the Court rejected that argument.<sup>116</sup> The Court laid out reasoning for that rejection, which can be instructive when trying to predict what courts might do when asked to decide whether the Regulations contain a private right of action for compensatory damages.

First, the *Gebser* Court reasoned that Title VII contains specific statutory provisions to allow a private right of action, and provide plaintiffs with compensatory and/or punitive damages to redress violations of the statute.<sup>117</sup> The damages provision, according to the *Gebser* Court, clearly defines the availability of and limitations to the scope of damages recoverable under Title VII.<sup>118</sup> Title IX, on the other hand, has no express private right of action and, the *Gebser* Court stated, the judicially implied private right of action in Title IX cannot indicate what the legislative intent regarding damages would have been.<sup>119</sup> According to the Court, the lack of an express legislative language in Title IX regarding damages awards leaves unclear when damages should be awarded at all for Title IX violations.<sup>120</sup> This silence was interpreted by the Court as granting it flexibility to create remedies that comport with the statute.<sup>121</sup>

The Court then looked to the text of the statute to try to determine the scope of the potential remedies that flow from it, considering its statutory structure and purpose.<sup>122</sup> The Court stated that an implied remedial scheme cannot “frustrate the purposes” of the statute.<sup>123</sup> The Court concluded that it would frustrate the purposes of Title IX to allow damages to be recovered from a defendant employer that did not have actual notice of the discrimination.<sup>124</sup> Reasoning that, because Congress did not create a private right of action under Title IX, the text of the statute does not “shed light” on what remedies under an implied right of action would be appropriate, the Court looked to the amendment to Title VII allowing compensatory and punitive damages for guidance.<sup>125</sup> The

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115. *See id.* at 278, 282-83.

116. *See id.* at 283.

117. *See id.*

118. *Id.*

119. *Id.* at 283-84.

120. *See id.* at 284.

121. *Id.*

122. *Id.*

123. *Id.* at 285.

124. *Id.*

125. *See id.* at 285-86.

express limits imposed upon the amount of recovery in the Title VII amendment permitting monetary recovery implied to the Court that the silence in Title IX regarding damages could not support the notion that “unlimited recovery” would be appropriate to redress Title IX violations.<sup>126</sup>

Second, the *Gebser* Court emphasized the dissimilarity between the framework of Title IX and the framework of Title VII to infer a reticence on the part of Congress to allow monetary damages awards for Title IX discrimination in some circumstances.<sup>127</sup> The *Gebser* Court relied on its description of the Title VI framework from *Guardians Ass’n v. Civil Service Commission of the City of New York*,<sup>128</sup> which it characterized as a “contractual” relationship between recipients of federal funds and the government and contrasted it with the prohibitory nature of Title VII.<sup>129</sup> Title IX conditions the receipt and retention of federal funding by educational institutions on compliance with the statute, whereas Title VII prohibits all employers, regardless of whether they receive federal funding, from discriminating.<sup>130</sup> The Court in *Gebser* was concerned about holding employers liable for the discriminatory acts of an employee when the employer did not know of the discrimination, because the contractual nature of Title IX was meant to protect individuals from discrimination, not compensate them for it, as is the aim of Title VII.<sup>131</sup> The relationship of the Government and the recipient of federal funds under Title IX seems to be a pivotal concern in the Court’s analysis in deciding who can recover for Title IX discrimination, not the individual who experienced the discrimination.<sup>132</sup>

Setting aside the concern that the *Sandoval* decision precludes federal courts from hearing pregnancy discrimination cases brought under the Regulations by individuals, the Court’s decisions in *Franklin* and *Gebser* paint a grim picture for the possibility that successful claimants could be awarded compensatory damages. Although the *Franklin* Court does not limit compensatory damages to cases involving intentional discrimination in its holding, the decision distinguishes an earlier decision that limited remedies for unintentional discrimination.<sup>133</sup> In *Franklin*, the Court reasoned that the *Pennhurst State School &*

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126. *Id.* at 286.

127. *Id.* at 286-87.

128. 463 U.S. 582 (1983).

129. *Gebser*, 524 U.S. at 286.

130. *Id.* at 286-87.

131. *Id.* at 287-88.

132. *Id.* at 288-90.

133. *See Franklin v. Gwinnett Cnty. Sch. Dist.*, 503 U.S. 60, 74-75 (1992).

*Hospital v. Halderman*<sup>134</sup> decision stood for the proposition that statutes passed pursuant to the Spending Clause in the Constitution could not be the source of compensatory damages in lawsuits alleging unintentional discrimination.<sup>135</sup> The *Franklin* Court's reliance on the distinction between unintentional and intentional discrimination when deciding whether compensatory damages are available to claimants suing for discrimination under Title IX further indicates the uncertainty of monetary remedies for violations of the Regulations. The Court further limited the possibility of compensatory damages under Title IX in *Gebser*, using reasoning that further indicates a probable reluctance by the Court to extend a compensatory damage remedy to the Regulations.

The Court's decision in *Gebser* relies on reasoning that makes it more difficult for a future court to decide that compensatory damages are recoverable for a violation of the Regulations. First, much of the Court's analysis in deciding that compensatory damages were not available was grounded in the fact that Title IX has no express private right of action and is silent on damages.<sup>136</sup> This concern, despite the fact that the Court had already found an implied private right of action under Title IX and permitted damages for intentional discrimination under the Act, shows a hesitation on the Court's part to extend those holdings to the Regulations as well. Second, the Court's reliance on the idea that Title IX is contractual in nature creates precedent that encourages courts interpreting the Regulations to focus not on the individuals who have been wronged but the parties to the contract: recipients of federal funding and the Government. Both of these conditions, limiting the possibility of receiving monetary damages for Title IX discrimination, could also be used to justify a court's refusal to extend monetary damages to the Regulations.

The Supreme Court has examined Title IX from a multitude of angles since it was passed in 1972. After each decision, even in those where the Court has expanded the anti-discrimination reach of Title IX, hope that a cause of action for individuals seeking monetary damages for pregnancy discrimination in schools has dimmed. The Court's reticence to effectively redress pregnancy discrimination is not new. The history of the Court's decisions regarding pregnancy discrimination, in a constitutional and Title VII context, can be instructive here. The bleak picture of the Court's precedent, painted by the cases discussed above regarding the likelihood that the Court will determine the Regulations

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134. 451 U.S. 1 (1981).

135. See *Franklin*, 503 U.S. at 74.

136. *Gebser*, 524 U.S. at 283-84.

afford a private right to sue for money, which interpret Title IX and Title VI, gets even bleaker when considering how the Court has handled pregnancy discrimination in the past.

*B. Is Pregnancy Discrimination “On the Basis of Sex” Under Title IX?*

The Supreme Court has built a precedential framework that makes it virtually impossible for a court to determine that a litigant who has suffered pregnancy discrimination in school has a right to bring an action against the school for monetary damages. To recap, in order to hear such a case, a court must first determine that the Regulations barring pregnancy discrimination in schools “authoritatively construe” the text of Title IX itself.<sup>137</sup> In order to authoritatively construe the text of the statute, the Regulations must ban discrimination that is barred by the text of the statute.<sup>138</sup> In other words, any discrimination by a school against pregnant students, which is barred by the Regulations, must have been “on the basis of” their sex, not just because of their pregnancy status. Second, the plaintiff would have to prove that the discrimination was intentional.<sup>139</sup> Once both of those hurdles were cleared, a court would then move on to consider whether damages were appropriate, which has its own challenges, as stated in Part II.A.2, *supra*.

The first roadblock set up by the Court for Title IX litigants seeking redress for pregnancy discrimination from a school that has discriminated is the determination of whether pregnancy discrimination is “on the basis of sex.” Longstanding and controversial Supreme Court precedent makes it entirely possible, even likely, that courts faced with this question would determine that the Title IX pregnancy Regulations do not prohibit discrimination “on the basis of sex.” The Court’s take on whether pregnancy discrimination is “because of” sex has been illuminated in three cases. The first, *Geduldig v. Aiello*,<sup>140</sup> was in the context of the Equal Protection Clause, where the Court held that pregnancy could be excluded from benefits provided under a state disability plan.<sup>141</sup> In the next case, *General Electric Co. v. Gilbert*,<sup>142</sup> a Title VII case, the Court ruled that excluding pregnancy from an employer’s disability plan was not “because of” sex.<sup>143</sup> More recently, in

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137. See *supra* note 77 and accompanying text.

138. See *supra* notes 85-87 and accompanying text.

139. See *supra* note 89 and accompanying text.

140. 417 U.S. 484 (1974).

141. See *id.* at 486, 497.

142. 429 U.S. 125 (1976).

143. See *id.* at 136.

*Nevada Department of Human Resources v. Hibbs*,<sup>144</sup> the Supreme Court discussed issues of gender stereotyping, particularly regarding ideas of women's and men's roles within the family structure and society, in the context of whether Section 5 of the Fourteenth Amendment contemplated the Family Medical Leave Act ("FMLA").<sup>145</sup> The Court's first ruling on whether pregnancy can be the basis for a discrimination claim came in the form of an equal protection case.<sup>146</sup>

### 1. The Equal Protection Clause

In *Geduldig*, the first of two controversial Supreme Court decisions regarding pregnancy discrimination, the Court was asked to decide whether an exclusion of pregnancy from disability coverage provided by the State of California violated the Equal Protection Clause of the Fourteenth Amendment.<sup>147</sup> A pregnant woman who had paid into the benefit system was denied coverage when she applied for benefits for the time she was unable to work as a result of her normal pregnancy and childbirth.<sup>148</sup> After discussing at some length the expense of the disability program to the State of California and the cost of removing pregnancy from the list of exclusions, the Court held that the Equal Protection Clause was not violated by the State when it excluded pregnancy from coverage.<sup>149</sup> The Court stated that it did not agree that excluding pregnancy from disability coverage amounted to invidious discrimination barred by the Equal Protection Clause.<sup>150</sup> The Equal Protection Clause bars sex discrimination, so the Court had to separate sex from pregnancy in order to reach its conclusion, which it did, stating: "The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities."<sup>151</sup>

The distinction the Court used to determine that the policy did not violate the Equal Protection Clause was between pregnant women and non-pregnant persons, not women and men.<sup>152</sup> The Court stated: "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."<sup>153</sup> By

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144. 538 U.S. 721 (2003).

145. *See id.* at 727-35.

146. *See Geduldig*, 417 U.S. at 486-87.

147. *Id.*

148. *Id.* at 489-92.

149. *Id.* at 493-97.

150. *Id.* at 494.

151. *Id.* at 496 n.20.

152. *Id.*

153. *Id.* at 496-97.

identifying the reason for the exclusion as pregnancy and not sex, the Court was able to apply a rational basis standard analysis to the policy and determined that the State's reasons for excluding pregnancy, to keep costs down, were legitimate.<sup>154</sup> The Court responded to the dissent's concern that the decision permitted sex discrimination by stating that, absent a showing that the pregnancy exclusion was mere pretext for discriminating against women, "lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis."<sup>155</sup>

After *Geduldig*, it appeared that future courts analyzing the Equal Protection implications of policies that address pregnancy concentrated not on *who* is being excluded (pregnant women), but *what* is being excluded (pregnancy). This distinction is extremely crucial when looking at whether pregnancy discrimination can be defined as "on the basis of sex" under the Equal Protection Clause for two reasons. First, if pregnancy discrimination does not automatically equal sex discrimination that is barred by the Equal Protection Clause, a plaintiff trying to seek redress for pregnancy discrimination must prove that the motivation for the discrimination was actually the fact that she is female, not that she is pregnant. Second, it appears that any policy targeted at pregnancy, as long as it is rationally related to a legitimate purpose, would be upheld. Obviously, absent a specific federal law barring state actors from basing employment, educational, or housing decisions on pregnancy, those actors could find rational reasons to exclude pregnant women from any number of contexts.

## 2. Title VII

The Supreme Court has relied heavily on comparisons between Title IX and Title VI to decide close statutory interpretation calls since Title IX was enacted, but Title VII can also serve a similar purpose for Title IX in a different context. Title VII bans discrimination against individuals in several employment areas, including hiring, firing, and promotions "because of such individual's race, color, religion, sex, or national origin."<sup>156</sup> The text of Title VII includes a private right of action for violations of the prohibitions in the statute.<sup>157</sup> The text of the statute was amended in 1991 to allow for plaintiffs to receive compensatory and punitive damages to redress intentional discrimination by employers.<sup>158</sup>

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154. *Id.* at 496.

155. *Id.* at 496 n.20.

156. 42 U.S.C. § 2000e-2(a)(1) (2006).

157. *See id.* § 2000e-5(f)(1).

158. *See id.* § 1981a(a)-(b).

If not for Congress's intervention after the Supreme Court decided *Gilbert*, however, Title VII would not have afforded a private right of action for compensatory or punitive damages to women who suffered pregnancy discrimination at work.

Two years after the Court decided that pregnancy discrimination was not barred by the Equal Protection Clause, the Court was asked to decide a similar case brought under Title VII.<sup>159</sup> In *Gilbert*, the Court was asked to consider whether a disability policy provided to employees of General Electric, which, like California's policy in *Geduldig*, excluded from coverage disabilities arising from pregnancy, violated Title VII.<sup>160</sup> The district and appellate courts held, like most lower courts post-*Geduldig*,<sup>161</sup> that Title VII barred employers from discriminating based on pregnancy, and the Supreme Court disagreed.<sup>162</sup> Because, the Court reasoned, recovery under Title VII, like the Equal Protection Clause, requires a court to make a finding of sex-based discrimination, the Court stated that excluding pregnancy from a disability plan was not "gender-based discrimination at all."<sup>163</sup> The Court overturned the lower courts, holding that the failure of the disability plan to cover pregnancy-related disabilities did not violate Title VII.<sup>164</sup>

Applying essentially the same reasoning the *Geduldig* Court did in the Equal Protection context, the *Gilbert* Court stated that pregnancy discrimination was not discrimination "because of" sex, as was barred by Title VII.<sup>165</sup> The *Gilbert* Court, stating that pregnancy discrimination could serve as a pretext for discrimination based on sex, then went on to say that there was no such showing.<sup>166</sup> The Court stated that there was no gender-based discriminatory effect to the policy excluding pregnancy from coverage, because, among other reasons, the disability plan is not worth more to men than women.<sup>167</sup> The Court simply categorized the exclusion of pregnancy as the exclusion of one risk among many they

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159. Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 127-28 (1976).

160. *Id.*

161. Most lower courts, after *Geduldig*, construed Title VII to bar pregnancy discrimination, thus allowing litigants to recover for pregnancy discrimination in the workplace. See Nicholas Pedriana, *Discrimination By Definition: The Historical and Legal Paths to the Pregnancy Discrimination Act of 1978*, 21 YALE J.L. & FEMINISM 1, 8-11 (2009).

162. *Gilbert*, 429 U.S. at 128.

163. *Id.* at 136.

164. *Id.* at 145-46.

165. *Id.* at 134-36.

166. *See id.* at 136.

167. *Id.* at 138.



could have excluded from coverage, which did not result in any discrimination aimed at one sex over the other.<sup>168</sup>

The last analysis the *Gilbert* Court conducted to determine if the pregnancy exclusion violated Title VII was to review the regulations promulgated by the U.S. Equal Employment Opportunity Commission, which explicitly required employers to count pregnancy as any other disability for the purposes of insurance coverage or sick leave.<sup>169</sup> The Court noted that the regulations to Title VII deserved consideration in its analysis, but declined to give them any weight for a few reasons.<sup>170</sup> The Court expressed reservations about how much weight should be given to the regulations requiring employers to treat pregnancy the same as any other disability, because they were not implemented until eight years after Title VII was passed.<sup>171</sup> In fact, the Court noted, the regulations at issue contravened the regulations about how to treat pregnancy when considering disability at the time Title VII was passed.<sup>172</sup> Most importantly, though, the Court relied heavily on the fact that Congress did not expressly mandate the implementation of the regulations in the text of Title VII to determine that they should receive no deference from the Court when interpreting the meaning of Title VII.<sup>173</sup>

Congress immediately set to work after the *Gilbert* decision was released to overturn it through legislation.<sup>174</sup> The Pregnancy Discrimination Act made clear that Title VII bans pregnancy discrimination in the workplace.<sup>175</sup> While the *Gilbert* opinion cannot stand in the way of women seeking to redress pregnancy discrimination in the workplace any more, it is instructive when trying to determine whether Title IX bars pregnancy discrimination. First, it shows that federal statutes that bar discrimination based on sex must explicitly prohibit pregnancy discrimination to provide women a cause of action for negative treatment based on their pregnancy status. Next, it shows that regulatory schemes attendant to federal statutes that are not explicitly called for in the text of the statute receive little consideration or deference from the Court when it is asked to determine what the statute was intended to prohibit.

The Court's decision in *Gilbert* appeared to have closed any debate about whether pregnancy discrimination would be defined as

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168. *See id.* at 139-40.

169. *Id.* at 140-41.

170. *Id.* at 141-42.

171. *Id.* at 142.

172. *Id.*

173. *See id.* at 141.

174. *See infra* Part II.C.

175. *See* 42 U.S.C. § 2000e(k) (2006).

discrimination.<sup>176</sup> After the Pregnancy Discrimination Act superseded the holding in *Gilbert*, it is clear that *Gilbert* cannot be relied upon to justify pregnancy discrimination in the Title VII employment context any longer. But the fact that *Gilbert* was decided at all, especially in the wake of the Court's holding that the Equal Protection Clause does not bar pregnancy discrimination in *Geduldig*, indicates that any federal statute or constitutional provision that bars sex discrimination will not be interpreted to bar pregnancy discrimination. After *Gilbert*, the simple language of Title IX, barring discrimination "on the basis of sex," could almost certainly not be held to prohibit pregnancy discrimination, thus precluding a private right of action under *Sandoval*.<sup>177</sup> Fortunately, in the context of Title VII, Congress was willing to step in and undo the harm wrought by the *Gilbert* opinion's exclusion of pregnancy discrimination from the protections of Title VII by passing the Pregnancy Discrimination Act.<sup>178</sup>

*C. Congress Responds to the Court's Decision in Gilbert with the  
Pregnancy Discrimination Act*

The hue and cry after the *Gilbert* decision was immediate and furious.<sup>179</sup> Congress acted quickly and introduced the Pregnancy Discrimination Act as an amendment to Title VII within four months of the announcement of the *Gilbert* decision.<sup>180</sup> The Pregnancy Discrimination Act is straightforward:

The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . .<sup>181</sup>

The Pregnancy Discrimination Act applied directly to *Gilbert* and Title VII, giving women a direct cause of action to sue for pregnancy discrimination. Its coverage has helped protect pregnant women from discrimination in the employment context, which is likely where most

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176. See *Gilbert*, 429 U.S. at 136.

177. See *supra* text accompanying notes 78-93.

178. See 42 U.S.C. § 2000e(k).

179. See Pedriana, *supra* note 161, at 11.

180. See Pregnancy Discrimination Act, Pub. L. No. 95-555 (1978).

181. 42 U.S.C. § 2000e(k).

women suffer pregnancy discrimination, but another crucial societal context remains unprotected—education.

*D. Almost Twenty Years Later, Is There Cause for Hope that the Court Will Resolve this Issue Favorably?*

Although *Geduldig* remains as a barrier, in certain contexts, to plaintiffs who have been treated differently because of their pregnancy status,<sup>182</sup> it is possible that a court could hold that Title IX does afford a private right of action for pregnancy discrimination. The first theory is based on the idea that the Court, in 2003, laid out a scenario that would allow some plaintiffs to rely upon the *Geduldig* carve-out that acknowledges that pregnancy discrimination can be a pretext for sex discrimination, if the pregnancy discrimination is based on sex stereotypes.<sup>183</sup> The second theory is based on a textual, jurisprudential, and theoretical comparison of Title IX and the Equal Protection Clause, which points out their differences and allows for the possibility that Title IX affords more protection than the Equal Protection Clause.<sup>184</sup> While there is hope that courts could get there, ultimately, the safest path to barring pregnancy discrimination in schools is via an amendment to Title IX similar to the Pregnancy Discrimination Act.

1. The Court's Decision in *Hibbs*

More recently, in *Hibbs*, the Supreme Court discussed issues of gender stereotyping, particularly regarding ideas of women's and men's roles within the family structure and society in the context of whether Section 5 of the Fourteenth Amendment contemplated the FMLA.<sup>185</sup> The Court held that an employee of the State of Nevada was entitled to money damages when the State failed to comply with the family-care provision of the FMLA after he requested leave to care for his ailing wife.<sup>186</sup> The Court granted certiorari in the case in order to settle a circuit split regarding whether the FMLA permitted litigants to win monetary damages.<sup>187</sup> The Court upheld the constitutionality of the statute because it found that the FMLA was passed pursuant to

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182. See Shannon E. Liss, *The Constitutionality of Pregnancy Discrimination: The Lingering Effects of Geduldig and Suggestions for Forcing Its Reversal*, 23 N.Y.U. REV. L. & SOC. CHANGE 59, 94-103 (1997).

183. See Reva B. Siegel, *You've Come a Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in Hibbs*, 58 STAN. L. REV. 1871, 1891-94 (2006).

184. See Cohen, *supra* note 93, at 275.

185. See *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 727-37 (2003).

186. *Id.* at 725.

187. *Id.*

Congress's power granted in Section 5 of the Fourteenth Amendment.<sup>188</sup> The ruling is helpful to try and understand whether the Court might hold in the future that Title IX allows a private right of action for pregnancy discrimination, because in *Hibbs*, Chief Justice Rehnquist discussed how the Court views "gender-based discrimination."<sup>189</sup>

In order for a federal statute to be constitutional pursuant to Section 5 of the Fourteenth Amendment, it must be remedial.<sup>190</sup> In order to uphold the constitutionality of the FMLA, the Court needed to determine that constitutionally impermissible discriminatory conduct, based on assumptions of persons' abilities based on sex, was enough of a problem in the states that the federal government needed to step in and mandate compliance with the Constitution.<sup>191</sup> To show that the FMLA was indeed necessary to stem discrimination based on sex in the states, Chief Justice Rehnquist undertook a somewhat detailed analysis of gender stereotypes and how they have shaped the legal landscape for women and men in the employment context for years.<sup>192</sup> Many laws were based on the premise that women were "the center of [the] home" and in need of protection from the vagaries of the working world.<sup>193</sup> The Court reasoned that the FMLA was necessary to remedy such discriminatory decision making and upheld it as a proportional and congruent response to the discrimination.<sup>194</sup>

The *Hibbs* decision, with its emphasis on the dangers of gender stereotyping in the workplace and somewhat surprising author (Chief Justice Rehnquist), gave an indication to some that the Court's position on pregnancy discrimination may be changing.<sup>195</sup> In the decision, Chief Justice Rehnquist pays special attention to the differences between maternity and paternity leave policies that were considered by Congress when contemplating the FMLA.<sup>196</sup> There are sex stereotypes at the core of common employment policies, for example, that allow women significantly more leave after childbirth than men, which, if unconstitutional, could be remedied through legislation such as the FMLA.<sup>197</sup> While this may seem incongruent with the Court's decision in *Geduldig*, which allowed pregnancy to be excluded from an insurance

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188. *Id.* at 726-27, 735.

189. *See id.* at 728-31.

190. *See id.* at 727-28, 734.

191. *Id.* at 730.

192. *Id.* at 729-33.

193. *Id.* at 729 (internal quotation marks omitted).

194. *Id.* at 734-35, 740.

195. *See Siegel, supra* note 183, at 1891-92.

196. *Hibbs*, 538 U.S. at 730.

197. *See id.* at 731.

policy because the exclusion was not based on sex, at least one commentator has pointed out that *Geduldig* left open the possibility that some pregnancy-based classifications are based on sex.<sup>198</sup> Those classifications could serve as the basis for equal protection claims, and as is suggested by the language of *Hibbs*, would provide evidence that legislation banning pregnancy discrimination is necessary and constitutional under Section 5 of the Fourteenth Amendment.<sup>199</sup>

What does this all mean with regard to the Regulations and whether a private right of action exists for pregnancy discrimination? As was previously stated, *Sandoval* requires that claimants seeking to enforce regulations in a private action must show that the regulation upon which they rely “authoritatively construes” the text of the statute itself.<sup>200</sup> That requires two steps: First, the regulation must clearly fall within the meaning of the statute’s language that gives rise to a private right of action to enforce that regulation.<sup>201</sup> Second, the discrimination at issue must have been intentional.<sup>202</sup> For the purposes of determining whether the Court’s reasoning in *Hibbs* (which gives hope that federal courts may allow a plaintiff to bring a private right of action for pregnancy discrimination)<sup>203</sup> will have an effect on future courts, the first step is the most important.

The *Cannon* Court determined that an implied private right of action is supported by Title IX for discrimination that is barred by the language of the statute itself.<sup>204</sup> The language of Title IX simply bars federally funded institutions from discriminating on the basis of sex.<sup>205</sup> As stated above, a close reading of *Geduldig* does leave the door open to an argument that some policies negatively singling out pregnancy may be considered discrimination on the basis of sex.<sup>206</sup> Based on the *Hibbs* Court’s reasoning regarding sex stereotypes that allow for shorter paternity than maternity leave policies as unconstitutional discrimination that warrant a federal remedy, it is possible that a plaintiff could prove to a court that pregnancy discrimination by a school was based on sex

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198. See Siegel, *supra* note 183, at 1891. The Court in *Geduldig* states that if pregnancy discrimination is merely a pretext for sex discrimination, it is barred by the Equal Protection Clause. See *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974).

199. See Siegel, *supra* note 183, at 1892-94.

200. See *supra* note 77 and accompanying text.

201. See *supra* notes 85, 87 and accompanying text.

202. See *supra* text accompanying note 88.

203. See *supra* text accompanying notes 195-99.

204. See *Cannon v. Univ. of Chi.*, 441 U.S. 677, 717 (1979).

205. 20 U.S.C. § 1681(a) (2006).

206. See Siegel, *supra* note 183, at 1891.

stereotypes and is therefore “on the basis of sex.”<sup>207</sup> And, according to *Sandoval* and *Cannon*, if pregnancy discrimination is “on the basis of sex,” a plaintiff can pursue a private right of action against a school under Title IX and its Regulations.

It is certainly possible that a court, after a careful reading of *Hibbs* and *Geduldig* together, might come to the conclusion that negative treatment of pregnant women based on sex stereotypes is equivalent to sex discrimination and therefore barred by the Equal Protection Clause. It is also possible that a court could then apply that reading to *Sandoval* and *Cannon* to determine that a student can sue her school for pregnancy discrimination. It is also possible, however, that a defendant school could argue that its exclusion of a pregnant student was not because of her sex, but because of the limitations her pregnancy puts on her in an educational environment. As long as the school manages to avoid sex stereotypes when making the argument, it would fall squarely within the *Geduldig* loophole and require a court to deny a private right of action to the plaintiff. The somewhat unusual and unorthodox nature of pregnancy in school could give schools a way of justifying discriminatory treatment of a student—a forced transfer to a pregnancy school, for example—as necessary to accommodate her physical needs during pregnancy and not based on sex stereotypes.

## 2. Title IX Could Afford More Protection than the Equal Protection Clause, Ameliorating the Possibility that *Geduldig* Will Rise Again

There is a second alternative that might allow a private right of action under the Regulations to plaintiffs seeking redress for pregnancy discrimination in schools. Under *Geduldig*, which, as stated in Part II.B.1, *supra*, is a case determining that pregnancy discrimination does not violate the Equal Protection Clause, unless the exclusions of pregnant women are mere a pretext for sex discrimination, they are permitted.<sup>208</sup> If the Title IX language, barring discrimination “on the basis of sex” is read to be identical to the Equal Protection Clause, then it, too, would permit pregnancy discrimination.<sup>209</sup> But if a court were to construe the protections in Title IX as different, and more broad, than the Equal Protection Clause, it is possible that the pregnancy discrimination Regulations could be enforced through a private right of action.<sup>210</sup> In his article detailing the differences between Title IX and the Equal

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207. See *id.* at 1892-93.

208. See *Geduldig v. Aiello*, 417 U.S. 484, 496 n.20 (1974).

209. See *Cohen*, *supra* note 93, at 219.

210. See *id.* at 275.

Protection Clause, Professor David S. Cohen relies on the different textual, jurisprudential, and theoretical underpinnings of the two laws to argue that Title IX affords more rights to pregnant students than does the Equal Protection Clause.<sup>211</sup>

Professor Cohen examines three contexts in which differences between Title IX and the Equal Protection Clause can be distinguished from one another.<sup>212</sup> The differences in the text of the two laws, the jurisprudence flowing from them, and the theories under which they were created and interpreted are different in many ways, leading Professor Cohen to conclude that Title IX offers more protection from sex discrimination than the Equal Protection Clause in several contexts.<sup>213</sup> In the realms of disparate impact discrimination, retaliation, sovereign immunity, and others, Professor Cohen argues that Title IX is stronger and superior for plaintiffs who sue for sex discrimination.<sup>214</sup> It is in the context of pregnancy discrimination, however, where Professor Cohen makes, for the purposes of this Article, his most compelling argument. And while his conclusion that pregnancy discrimination is barred by Title IX and that it provides a private right of action is a welcome one to those pushing for more protections for pregnant students, unfortunately, there is no guarantee that most, if any, courts will agree with Professor Cohen's conclusion.

### 3. Three Illustrative Federal Cases Regarding Pregnancy Discrimination

Before some of the cases Professors Reva B. Siegel and Cohen relied upon in their analyses were decided, three federal district courts considered, in three separate cases, whether a plaintiff could seek redress for alleged discrimination based on pregnancy.<sup>215</sup> Since the passage of Title IX, there have been fewer than fifteen reported cases where a federal court has heard a claim of pregnancy discrimination under Title IX, and fewer than five where a student brought an action for pregnancy discrimination against her school.<sup>216</sup> Three of those cases are particularly illustrative of how courts have decided a pregnancy discrimination

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211. *See id.* at 240.

212. *See id.*

213. *See id.* at 275.

214. *See id.* at 276-82.

215. *See Cecilia G. v. Antelope Valley Union High Sch. Dist.*, No. CV 04-7275, slip op. at 2 (C.D. Cal. July 27, 2005); *Kicklighter v. Evans Cnty. Sch. Dist.*, 968 F. Supp. 712, 715-16 (S.D. Ga. 1997); *Hall v. Lee Coll., Inc.*, 932 F. Supp. 1027, 1028, 1030 (E.D. Tenn. 1996).

216. *See Michelle Gough, Parenting and Pregnant Students: An Evaluation of the Implementation of the "Other" Title IX*, 17 MICH. J. GENDER & L. 211, 220-47 (2011).

issue.<sup>217</sup> This dearth of case law could imply that pregnancy discrimination is not happening in federally funded schools, or, as is more likely, it could mean that when it happens, bringing a case is simply not a possible or desirable remedy.

Looking more closely at three post-Title IX cases brought against schools for pregnancy discrimination could illuminate the challenges facing students who allege that they have been expelled for being pregnant. The challenges in these cases illustrate the need for a Pregnancy Discrimination Act amendment to Title IX. In the first case, *Hall v. Lee College, Inc.*,<sup>218</sup> a pregnant student, Ms. Hall, sued her federally funded college after she was suspended for a semester for engaging in premarital sex, which violated school policy.<sup>219</sup> The school admitted that it discovered that she had engaged in premarital sex when her pregnancy became visible, but the court ruled that the suspension did not violate Title IX because her suspension was not based on sex.<sup>220</sup> Instead, the court stated that because the policy barring premarital sex was gender-neutral, there was no violation of Title IX.<sup>221</sup>

Ultimately, *Hall* was not a case that adjudicated a pregnancy discrimination claim under Title IX. The court did consider the Regulations barring pregnancy discrimination, but determined that the school's policy prohibiting premarital sex was the nexus of the complaint, sidestepping the pregnancy discrimination issue.<sup>222</sup> It is unclear from the text of the decision if the court converted the case from a claim of pregnancy discrimination under the Regulations to a claim of discrimination on the basis of sex under Title IX, or if the plaintiff worded her complaint to avoid the pregnancy issue altogether. Technically, based on the discussion set out in Parts II.D.1 & 2, *supra*, a court would have had to engage in some complex analysis to allow the plaintiff to bring a cause of action for pregnancy discrimination under the Regulations, and likely would have concluded that she could not bring such an action. By considering only whether the policy prohibiting premarital sex was a violation of Title IX, the court avoided the thorny issue of whether Title IX also bars pregnancy discrimination.

While not explicitly stating so, the court in *Hall* implied that bringing an action for pregnancy discrimination under Title IX is either

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217. See *Cecilia G.*, No. CV 04-7275, slip op. at 2; *Kicklighter*, 968 F. Supp. at 714-16; *Hall*, 932 F. Supp. at 1028-30.

218. 932 F. Supp. 1027.

219. *Id.* at 1028-30.

220. See *id.* at 1030, 1032-33.

221. See *id.* at 1031-33.

222. See *id.* at 1032-33.



impossible or, at best, very difficult, to win. Only a year later, in 1997, another federal district court heard *Kicklighter v. Evans County School District*,<sup>223</sup> which centered on a claim of pregnancy discrimination against a school.<sup>224</sup> In *Kicklighter*, the plaintiff did not make a Title IX claim, focusing instead on Section 1983, the First Amendment, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment.<sup>225</sup> Ms. Kicklighter alleged that she had been suspended from school because she had been impregnated by a young man of a different race and not, as the school stated, because she refused to apologize to a teacher for disrupting class.<sup>226</sup> The facts of the case indicate that the court was far more concerned with Ms. Kicklighter's behavior than the potential pregnancy discrimination in which the school engaged.

The court included in its rendition of the undisputed facts two comments by school administrators, where they suggested that the plaintiff attend an alternative school for “chronically disruptive” students because of her pregnancy status.<sup>227</sup> The court ignored those facts and focused on a disciplinary issue that arose after the school's first attempt to encourage the plaintiff to attend the alternative school to grant summary judgment to the defendants and hold that there was no constitutional or Section 1983 violation.<sup>228</sup> When considering whether the school had violated her right to Equal Protection under the Fourteenth Amendment, the court quoted the U.S. Court of Appeals for the Eighth Circuit and stated that “the first step in an equal protection case is determining whether the plaintiff has demonstrated that she was treated differently than those who were similarly situated to her.”<sup>229</sup> The *Kicklighter* Court found that:

Failing to direct this Court's attention to any factual support for such a finding, *Kicklighter* cannot surmount the primary hurdle. Because she has neglected to show, for instance, that Defendants treated her differently than other pregnant students who misbehaved and then refused to accept full responsibility for their actions, or differently than other pregnant students carrying “mixed-race fetuses,” Plaintiff is unable to withstand summary judgment.<sup>230</sup>

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223. 968 F. Supp. 712 (S.D. Ga. 1997).

224. *See id.* at 715-16.

225. *Id.*

226. *See id.* at 714, 720.

227. *Id.* at 714-15 & n.1.

228. *See id.* at 720.

229. *Id.* (quoting *Klinger v. Dep't of Corr.*, 31 F.3d 727, 731 (8th Cir. 1994)).

230. *Id.* (citations omitted) (internal quotation marks omitted).

The court's narrow construction of who is similarly situated essentially makes it impossible that a pregnant student could win a claim for pregnancy discrimination, unless there were other pregnant students in the school who also had discipline problems and/or were impregnated by a person of a different race and were not treated the same way.

In the most recent case, *Cecilia G. v. Antelope Valley Union High School District*,<sup>231</sup> the U.S. District Court for the Central District of California denied summary judgment to the school district, which was sued by a group of students who alleged that they were involuntarily sent to an inferior alternative high school program for pregnant students after they revealed their pregnancies.<sup>232</sup> The court did do a fairly thorough and reasoned analysis of Supreme Court precedent on point, including *Cannon*, *Gebser*, *Franklin*, and, in a footnote, *Sandoval*.<sup>233</sup> The court's analysis determined that Title IX does contain a private right of action for monetary damages, based on *Cannon*, *Gebser*, and *Franklin*.<sup>234</sup> The court also flagged, however, a serious problem for the plaintiffs as a result of the prohibition in *Sandoval* on actions that are not based on regulations that authoritatively construe Title IX.<sup>235</sup> The court, noting that neither party mentioned this "significant threshold issue" in their motions for and against summary judgment, stated that this is "no small issue."<sup>236</sup>

Even though the *Cecilia G.* Court went on to deny the school district's motion for summary judgment, the footnote makes it clear that it should include an argument highlighting that "threshold issue" in future motions.<sup>237</sup> The case settled privately, but the concern that the plaintiffs would have been barred from pursuing the matter further likely had an effect on the parties' settlement negotiations. The order seems to confirm that federal judges might have difficulty determining that a federal private right of action for pregnancy discrimination exists under Title IX. The case shows that while the legal theory that supports the idea that Title IX affords protection to pregnant students may be correct, the reality for litigants seeking pregnancy discrimination remuneration after the Supreme Court's decisions regarding Title VI and Title IX is bleak.

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231. No. CV 04-7275 (C.D. Cal. July 27, 2005).

232. *See id.* at 2-3 (order denying summary judgment to defendants).

233. *See id.* at 10-12 & n.9.

234. *See id.* at 10-11.

235. *See id.* at 12 n.9.

236. *Id.*

237. *See id.* at 12 n.9, 30-31.

Both *Hall* and *Kicklighter* highlight the practical realities of trying to bring an action for pregnancy discrimination against a federally funded school under the current legal scheme. They are old enough that they are not particularly instructive when trying to predict what federal courts, especially the Supreme Court, might do if confronted with a school pregnancy discrimination case today. But they do illustrate how few school pregnancy discrimination cases are successfully making it into federal court. And they also show how difficult it can be to win a pregnancy discrimination case in federal court under the current legal scheme, even when the court is aware of evidence that the school did attempt to violate the Regulations. These cases make clear that leaving it to federal judges to determine whether a private right of action to sue for monetary damages for pregnancy discrimination under Title IX exists would leave many potential plaintiffs without a remedy.

In order to avoid the risk that courts will not agree with the analyses of Professors Siegel and Cohen and allow plaintiffs who have experienced pregnancy discrimination in schools to sue for damages, it is time that Congress revisit its lust for justice in the face of pregnancy discrimination and amend Title IX to include a Pregnancy Discrimination Act. The cues from the Court have strongly indicated that: (1) it does not automatically equate pregnancy discrimination with sex discrimination, and (2) it does not automatically perceive the same rights as flowing from regulations that flow from statutes. And while it is possible, with careful reading and an understanding of the complex history of Supreme Court civil rights jurisprudence, for a court to decide that Title IX does indeed contemplate a private right of action for damages, there are too many drawbacks to relying on that hope to evoke meaningful and positive changes for individuals suffering pregnancy discrimination in schools. The more efficient, effective, and safe approach would be to add language similar to that which Congress added to Title VII after the *Gilbert* decision to Title IX. This proactive approach would be a far superior path to education equality in the face of potential pregnancy discrimination in schools and would help stem some of the social ills that accompany teen pregnancy.

### III. IN ORDER TO AVOID RELIVING *GILBERT*, CONGRESS SHOULD AMEND TITLE IX TO INCLUDE A PREGNANCY DISCRIMINATION ACT

While it is unclear if the courts could or would determine that Title IX bars pregnancy discrimination, most people would agree that guaranteeing pregnant students access to a quality education is important to help them successfully transition into independent living. The debate

is not over whether schools should be allowed to discriminate, rather how discrimination, when it happens, should be negatively reinforced. The current scheme it seems, based on court precedent, only permits administrative action to cut funding to offending schools, and does not allow more direct action by those who suffer the discrimination. As a result, pregnant students who are kicked out of school, shuttled off to an alternative school against their wishes, or who end up in an alternative school that is inferior to their mainstream school, do not have any personal incentive to sue for those harms. Without willing litigants to send up the signal flare that discrimination is happening in a particular school, it is extremely difficult to root and snuff out pregnancy discrimination in schools.

*A. Where Is the Hue and Cry for Education Access for Pregnant Students?*

It may seem strange that Congress has not yet felt the need, or been encouraged, to look into whether Title IX should be amended with a Pregnancy Discrimination Act, nearly thirty years after its first foray into the issue. Women have been protected from pregnancy discrimination in employment since the Pregnancy Discrimination Act.<sup>238</sup> But, even though it has been the norm for girls to attend school for at least as long as it has been the norm for women to work outside the home, there is still no clear protection against pregnancy discrimination in schools. The unique nature of the issue of early pregnancy has been the topic of much debate, consternation, and frustration in society for many years.<sup>239</sup> Despite this concern, access to education is rarely, if ever, the driving force behind solving the problem. Instead the debate is firmly centered on the same idea—prevention.

It is difficult to quantify the time, energy, and effort that has gone into the issue of teen pregnancy prevention. Congress and the states have appropriated millions of dollars, started countless initiatives, and commissioned numerous studies to try and stop teen pregnancy.<sup>240</sup> The powers that be have tried to stop teen pregnancy through campaigns about safe sex or abstinence; they have tried to scare teens with posters and television ads portraying the horrors of early parenthood; they have done everything short of assigning personal chaperones to every

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238. See 42 U.S.C. § 2000e(k) (2006).

239. See ROWLAND, *supra* note 11, at 35-36.

240. Bill Albert, *New Federal Investment in Preventing Teen Pregnancy Applauded*, NAT'L CAMPAIGN TO PREVENT TEEN & UNPLANNED PREGNANCY (Sept. 30, 2010), <http://www.thenationalcampaign.org/media/press-release.aspx?releaseID=198>.

individual teenager in the United States to keep kids from having sex and getting pregnant. Unfortunately, the level of dedication, financial resources, and passion reserved for stopping the social ill of teen pregnancy dies a sudden death when a teen actually gets pregnant. Once she becomes pregnant, it appears that society wants nothing to do with her.

There is a dearth of attention paid to pregnant teens generally, and particularly there is little information about what it is like for pregnant teens to pursue their education after they become pregnant. Until July 2010, there had never been a bill introduced in Congress that addressed retaining pregnant students in school.<sup>241</sup> The most prominent national organizations that deal with the issue of teen pregnancy focus almost solely on prevention.<sup>242</sup> Few resources are dedicated to ensuring that the pregnant or parenting student herself is successful, and once she becomes pregnant, resources are focused on her fetus or child, as though the young parent is already a lost cause.<sup>243</sup>

The most common tool employed by organizations that are dedicated to preventing teen pregnancy is to quote statistics about the terrible things that are more likely to happen to pregnant teens.<sup>244</sup> High dropout rates, high rates of unemployment, a higher demand for welfare benefits, high multiple birth rate—and the list goes on—show teens how terrible it would be if they became pregnant.<sup>245</sup> Ironically, despite the sobering impact of those numbers, there is little, if any, effort by those organizations or any others on a national level to address the problem

241. Pregnant and Parenting Students Access to Education Act of 2010, H.R. 5893, 111th Cong. (2010). Representative Jared Polis introduced this act on July 28, 2010, which incentivizes, with federal grant money, schools to retain pregnant and parenting students. *Id.*

242. The National Campaign to Prevent Teen and Unplanned Pregnancy (the “Campaign”) and Stay Teen are two of the more prominent organizations that show up in a Google search for “teen pregnancy.” See NAT’L CAMPAIGN TO PREVENT TEEN & UNPLANNED PREGNANCY, <http://www.thenationalcampaign.org> (last visited Feb. 18, 2011); STAYTEEN.ORG, <http://www.stayteen.org> (last visited Feb. 18, 2011). Since 2002, the Campaign has organized a National Day to Prevent Teen Pregnancy. On May 5, 2010, they linked with StayTeen.org to deliver messages to teens about the negative consequences of teen pregnancy. See *The National Day to Prevent Teen Pregnancy*, NAT’L CAMPAIGN TO PREVENT TEEN & UNPLANNED PREGNANCY, <http://www.thenationalcampaign.org/national/> (last visited Feb. 18, 2011).

243. Telephone Interview with Benita Miller, Founder and Exec. Dir., The Brooklyn Young Mother’s Collective (July 15, 2010). Ms. Miller highlighted the problem by sharing an anecdote about a city-run program that was conducting an outreach session for young mothers and mothers-to-be about their babies’ nutritional needs, which was scheduled on a weekday, during school hours. *Id.*; see also Interview with Benita Miller: Attorney and Executive Director at The Brooklyn Young Mother’s Collective, THE DAILY FEMME! (June 21, 2010), <http://media.causes.com/ribbon/840089>.

244. See *Preventing Unplanned and Teen Pregnancy: Why It Matters*, THE NAT’L CAMPAIGN TO PREVENT TEEN & UNPLANNED PREGNANCY, <http://www.thenationalcampaign.org/about-us/wim.aspx> (last visited Feb. 18, 2011).

245. See *id.*

once it has happened. Once a teen actually becomes pregnant, she is left to herself to confront and navigate the rocky waters of teen pregnancy. One reason for this about-face might be rooted in a fear that providing help to pregnant students might positively reinforce their “bad behavior” of getting pregnant in the first place.

Teen pregnancy in American society has been treated as a source of extreme shame for families and individuals affected by it.<sup>246</sup> Despite the many possible explanations for a teen becoming pregnant, including rape, incest, and sexual coercion, the common assumption was and is that the pregnancy is the result of a character flaw in the pregnant girl and should be negatively reinforced.<sup>247</sup> The fear appears to have manifested itself into a belief that providing support, or even acknowledgment, of the pregnancy might be viewed as an invitation to other teens to follow suit.<sup>248</sup> But even if this is not a reason that many people and institutions in American society ignore pregnant teens, the resulting disconnect between the understanding that teen pregnancy causes many, sometimes lifelong, problems and the resounding silence in the face of the problem once it has happened is a travesty that must be addressed. Unfortunately, these negative attitudes about the pregnant individuals themselves keep the teen pregnancy conversation focused almost exclusively on prevention and have stood in the way of opening a conversation about how to stop pregnancy discrimination in schools.

### B. *Why a Pregnancy Discrimination Act to Title IX Is Necessary*

When the Pregnancy Discrimination Act was passed, it opened the door for women to sue employers or potential employers for discrimination based on their pregnancy status. Before *Geduldig* clearly signaled that federal courts would not hear Equal Protection pregnancy discrimination cases in 1974, a Westlaw search for pregnancy discrimination yielded thirty-six results.<sup>249</sup> After *Geduldig*, but before the Supreme Court decided *Gilbert*, which barred claims for pregnancy discrimination under Title VII, there were sixty cases reported.<sup>250</sup> After

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246. WENDY LUTTRELL, PREGNANT BODIES, FERTILE MINDS: GENDER, RACE, AND THE SCHOOLING OF PREGNANT TEENS 26-35 (2003).

247. See KRISTIN LUKER, DUBIOUS CONCEPTIONS: THE POLITICS OF TEENAGE PREGNANCY 4, 17-24 (1996); LUTTRELL, *supra* note 246, at 27-28, 32-33.

248. LUKER, *supra* note 247, at 2; LUTTRELL, *supra* note 246, at 27, 32.

249. A Westlaw search performed on February 18, 2011 in the “ALLFEDS” database for pregnancy discrimination cases before June 17, 1974 yielded thirty-six results. The search language used was “pregnancy /s discrimination & da(bef 6/17/1974).”

250. This Westlaw search performed on February 18, 2011 was also in “ALLFEDS,” and was narrowed to the dates between June 17, 1974 (the date *Geduldig* was decided), and December 7, 1976 (the date *Gilbert* was decided). The search language used was “pregnancy /s discrimination &

*Gilbert* barred such cases from being brought under Title VII, but before the Pregnancy Discrimination Act was passed, there were sixty-nine cases reported on Westlaw.<sup>251</sup> After the Pregnancy Discrimination Act was added to Title VII, there have been 2545 lawsuits reported on Westlaw for pregnancy discrimination.<sup>252</sup> Because thirty-two years have passed since the Pregnancy Discrimination Act became law, the raw numbers are not particularly telling. On average however, before the Pregnancy Discrimination Act, there were eleven pregnancy discrimination cases reported per year, and after the Pregnancy Discrimination Act (which only allows Title VII cases, not Equal Protection cases), there have been an average of 79.5 pregnancy discrimination cases reported per year. These numbers indicate that until Congress showed its clear intent to allow women to sue for pregnancy discrimination under Title VII, women were not likely to seek to enforce their rights in federal court.

In the Title IX context, the lawsuit can act as an effective stick to encourage schools to comply with the law more readily, and an equally effective carrot to encourage students to become their own rights watchdogs. Both are necessary to protect students from pregnancy discrimination in schools. Schools have little incentive to comply with the Regulations at present, because unlawful behavior that might be properly sanctioned will likely not result in sanctions if schools correct their behavior quickly enough.<sup>253</sup> This leaves students vulnerable to discrimination until somebody takes a proactive role in seeking enforcement. Unfortunately, being a proactive student in the face of pregnancy discrimination is not a desirable position to take unless Congress provides a carrot in the form of a clear private right of action for monetary damages.

#### 1. Litigation Makes Compliance with Federal Law More Likely

As stated in Part II.A.1, *supra*, a pregnant student who is subjected to discrimination in schools probably does not have a private right to sue for that discrimination, and if, for some reason, a court did hear the case, as stated in Part II.A.2, *supra*, she also would not be able to recover

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da(aft 6/17/1974 & bef 12/7/1976).”

251. Another “ALLFEDS” search was performed on February 18, 2011 for cases reported between December 7, 1974 (the date *Gilbert* was decided) and October 31, 1978 (the date the Pregnancy Discrimination Act was passed). The search language used was “pregnancy /s discrimination & da(aft 12/7/1976 & bef 10/31/1978).”

252. This “ALLFEDS” search was performed on February 18, 2011 for cases reported after October 31, 1978. The search language used was “pregnancy /s discrimination & da(aft 10/31/1978).”

253. See *infra* note 256 and accompanying text.

monetary damages for the harm she suffered. The Regulations require that schools governed by Title IX take whatever remedial action deemed necessary by the Assistant Secretary for Civil Rights of the DOE when there has been a determination that the school discriminated against an individual on the basis of sex.<sup>254</sup> The remedy must be designed to “overcome the effects of such discrimination.”<sup>255</sup> If, for example, a school wrongfully discharges a student because she is pregnant, it likely will just readmit her and avoid monetary sanctions for the discrimination. It is possible that the school would never lose any funding for its behavior, but the student who was wrongfully expelled from school could not recover for whatever damages she suffered as a result of the delay in her education.

While there are obvious reasons that an individual would like to receive monetary compensation for discrimination she suffered and the financial harms that stemmed from it, there are also excellent reasons to allow lawsuits as a disincentive to schools that discriminate. The potential loss of federal funding is probably highly motivating to most school administrators to comply with the law, but it does not have the direct and efficient outcome that a lawsuit would have. First, it is possible that longtime school discrimination could go unnoticed. Second, the regulatory system allows schools to correct discriminatory behavior without being sanctioned, creating little downside to behaving unlawfully.<sup>256</sup> Turning to the first concern, the current compliance system under the Regulations is reactive and unable to catch all of the discrimination that could be happening.

There are basically three ways discrimination can come to light under the current Regulations. First, a student can file an administrative action with the DOE for discrimination, which could take years to resolve.<sup>257</sup> Second, if no student brings an action, the DOE can catch the discrimination in an official review of the school’s policies and

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254. 34 C.F.R. § 106.3(a) (2010).

255. *Id.*

256. *See id.* § 100.8(a). The procedural provisions in Title VI are incorporated by reference into the Regulations. *Id.* § 106.71. The Title VI “procedure for effecting compliance” provides that noncompliance with the law can result in a loss of federal funding, but only after other informal means to correct the discrimination have failed. *Id.* § 100.8(a). Furthermore, an order to terminate federal funds (or the denial of future federal funding applications) cannot be effective until three things have happened: (1) the discriminating school has been notified of its transgression and given an opportunity to voluntarily comply; (2) there has been an express finding, on the record and after an opportunity for a hearing, that the school is out of compliance; and (3) the congressional committees responsible for the oversight of the program involved have received a full written report about the circumstances and grounds for the termination of funds. *Id.* § 100.8(c).

257. *Id.* § 100.7(b).



procedures, which might rarely, if ever, happen.<sup>258</sup> Third, the DOE could catch wind of discrimination in the school's own self-reporting materials, which likely will not reveal any nefarious activity.<sup>259</sup> The indirect and inefficient nature of the processes through which a school's discrimination can be caught create an atmosphere that allows continued discrimination.

If discrimination is discovered, however, the procedural provisions require that the offending program be permitted to voluntarily correct the discrimination by "informal means."<sup>260</sup> If a school agrees to remedy the discrimination, there will be no funding sanction at all.<sup>261</sup> This is likely true regardless of the number of times the school has been determined to be out of compliance.<sup>262</sup> While that outcome might seem fair to school administrators and other students who might feel the pinch of attending a school that has lost some or all of its federal funding, it creates little incentive for schools to avoid discriminating in the first place, or even to find out what discriminatory behavior they should avoid. A private right of action that allows a student against whom a school has discriminated to sue for monetary damages would not only make the student whole for the harm she suffered, but would also be the stick that schools need to discourage discrimination in the first place.

If Congress passed a Pregnancy Discrimination Act for Title IX, it is possible that schools would seek to review their practices and curtail any discriminatory behavior before the first lawsuit was filed. Anecdotal evidence indicates that many schools operate in ignorance of the laws that prohibit pregnancy discrimination.<sup>263</sup> As a result, they may expel students for being pregnant, send them to alternative schools against their wishes, or neglect to provide them with the equal education to which they are legally entitled. If schools had individuals inside their walls every day who were empowered to enforce the law, they might take the opportunity to get into, and stay in, compliance before the law takes effect. Until then, schools are capable of discriminating without having to worry much about any negative consequences, unless and until they have been notified by the DOE that there might be a problem.

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258. *Id.* § 100.7(a).

259. *Id.* §§ 100.6(b), 100.7(c).

260. *Id.* § 100.8(a).

261. *Id.* § 100.8(d).

262. *See id.*

263. Jeremy P. Meyer, *Birth Leave Sought for Girls*, DENV. POST, Jan. 7, 2008, [http://www.denverpost.com/news/ci\\_7899096](http://www.denverpost.com/news/ci_7899096). The article discussed a request by students to the school board that the current policy in some Denver-area schools to count all absences after the birth of a student's baby as unexcused be changed. *Id.*

The Regulations prohibit schools from expelling students for being pregnant.<sup>264</sup> Before the Regulations took effect, it was not uncommon for schools to expel pregnant students, despite their marital status, when their pregnancy became known.<sup>265</sup> Since the Regulations took effect, it has been difficult to say if, or how many, schools are expelling students because they are pregnant. This lack of data is compounded by a lack of evidence regarding school compliance in this area. As discussed in Part II.D.3, *supra*, there are three federal cases (two reported) where an individual has brought a pregnancy discrimination action against a school. In addition, the outcome of an enforcement action by the Office of Civil Rights of the DOE, the government entity responsible for enforcing the Regulations, is not publicly available without a Freedom of Information Act request.<sup>266</sup>

But the harm of being expelled because of pregnancy, even without empirical data proving that the practice is rampant, outweighs the risk of legislating a fix to a non-problem. The more likely problem, however, in today's culture, is that school districts may, perhaps even inadvertently, encourage or force pregnant students into alternative schools despite the prohibition on that practice in the Regulations.<sup>267</sup> In the face of a Pregnancy Discrimination Act that makes it clear that Title IX itself also prohibits forced, coerced, or even encouraged segregation of pregnant students, schools might hesitate before engaging in any of those practices. And if Congress clearly approved a private right of action for violations of this Regulation, even school administrators who are ignorant of the prohibition now might be alerted, through litigation in other school districts or via media attention, to the change. Educating school administrators on the requirements of a newly enacted Pregnancy Discrimination Act amendment to Title IX might also encourage them to review the comparability of alternative programs as well.

The last Regulation that should be incorporated into a Title IX Pregnancy Discrimination Act is the requirement that alternative schools available to students must be comparable to their mainstream counterparts. In one of the rare cases where plaintiffs accessed a federal court for a violation of the Regulations, the court denied a motion for summary judgment from the defendant school district on this issue.<sup>268</sup>

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264. 34 C.F.R. § 106.40(b)(1).

265. See LUKER, *supra* note 247, at 62.

266. See Freedom of Information Act, 5 U.S.C. § 552 (2006).

267. See *Kicklighter v. Evans Cnty. Sch. Dist.*, 968 F. Supp. 712, 714 & n.1 (S.D. Ga. 1997) (stating facts regarding a school secretary's encouragement of a pregnant student to consider, given her "condition," attending an alternative school for "disruptive" students).

268. *Cecilia G. v. Antelope Valley Union High Sch. Dist.*, No. CV 04-7275, slip op. at 26 (C.D. Cal. July 27, 2005).

## 2. A Private Right of Action for Monetary Damages Might Be an Incentive for Victims of Discrimination to Seek Enforcement, Even when DOE Cannot or Will Not Intervene

Even if some courts determined that Title IX does prohibit pregnancy discrimination and decided to allow students to sue, because it is clear that courts are not required to hear such cases, there would likely continue to be little to no school pregnancy discrimination litigation. There are many reasons a pregnant student might refrain from suing for pregnancy discrimination in schools. First, the likelihood of resolution of the lawsuit before she is scheduled to graduate is slim. Second, she probably has a lot of other things to worry about, and fighting for her right to an education might not top the list. Third, and most importantly here, she probably recognizes that there is little upside for her if she sues.

While it may be a moral victory for students to successfully enforce the Regulations and force a school into compliance, the victory could be hollow if there are no monetary incentives for her to sue. Right now, a student making a complaint may be able to get injunctive relief, allowing her back into school for wrongful expulsion, permitting her to attend her mainstream school if she so chooses, or requiring a school district to equalize an alternative school with the mainstream school.<sup>269</sup> But enforcement actions seeking this relief take time, which would often likely stretch beyond the length of her pregnancy.<sup>270</sup> The loss of the months that she was forced out of school or into an inferior program cannot be regained, even if she wins her action. In the alternative, if she wins and the school does not comply with the order in her favor, the school loses its federal funding and she gains nothing.

This system, as stated in Part III.B.1, *supra*, might scare some schools into compliance, but in order for it to work, someone must take the initiative to file a complaint. The Office of Civil Rights of the DOE can take this initiative after an unfavorable compliance review, but that

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269. See 34 C.F.R. § 106.40(b)(1)–(3).

270. See Anthony R. Pileggi, *An Attorney's Guide to Courthouse Practice and Procedure: Civil Division District of Columbia Superior Court 1983*, 32 CATH. U. L. REV. 1063, 1079 (1983) (“The average time between reaching issue and trial [in the civil division of the District of Columbia Superior Court] is fourteen months for jury trials and nonjury trials over \$10,000, and six months for non-jury trials under \$10,000.”); see also Michael H. Schill, *Local Enforcement of Laws Prohibiting Discrimination in Housing: The New York City Human Rights Commission*, 23 FORDHAM URB. L.J. 991, 1023-24 (1996) (stating that, “[o]n average, it took the [New York City Human Rights] Commission seventeen months to close housing discrimination cases filed in 1992 and 1993” and “when a remedy is not provided within weeks, it is likely that the complainant will no longer be interested in injunctive relief several months or, in some cases, years later” and thus “justice delayed may very well be justice denied”).

assumes that discriminatory behavior is open and notorious enough to be caught. The most efficient form of enforcement is to encourage young women who have suffered discrimination to become “civilian compliance officers,” by allowing them to sue for monetary damages. This more direct approach could fill gaps in ensuring compliance that may exist under the current scheme that relies on the Office of Civil Rights to take the initiative of enforcement. It would also be a step closer to making students who have been unlawfully treated by their schools whole.

*C. A Private Right of Action for Monetary Damages Deals More Effectively with the Reality of the Social Problems that Often Accompany Teen Pregnancy*

Plenty of data is available about what terrible things happen to many young women when they become pregnant early in life.<sup>271</sup> Popular statistics about the social problems that accompany teen pregnancy include high dropout rates among teen parents, poor or nonexistent prenatal care, and high rates of multiple unplanned early pregnancies are frequently cited.<sup>272</sup> There are also alarming statistics about the babies born to teen parents—they struggle more in school, are more likely to become pregnant as teens or end up in jail, and are more likely to live in impoverished homes.<sup>273</sup> A simple Google search for “preventing teen pregnancy” brings many sources that list the scary statistics and social ills that are likely to befall someone who becomes pregnant in her teens. Ironically, however, once a teen becomes pregnant, the reality of those statistics seems to have done nothing to encourage society to be more proactive about protecting a teen’s right to education during her pregnancy.<sup>274</sup>

The possibility that an ignorant or discriminatory school administration could eject a pregnant student from school with minimal or no repercussions should be offensive to an advanced society. School is probably the best and most efficient place for teens to get help when

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271. See *Stay Informed: Teen Pregnancy*, STAYTEEN.ORG, <http://www.stayteen.org/teen-pregnancy> (last visited Feb. 18, 2011).

272. See *Options for Pregnant Teens*, LIVESTRONG.COM, <http://www.livestrong.com/article/125702-options-pregnant-teens/> (last updated May 18, 2010); *Stay Informed: Teen Pregnancy*, *supra* note 271.

273. See *Preventing Unplanned and Teen Pregnancy: Why It Matters*, *supra* note 244; *Stay Informed: Teen Pregnancy*, *supra* note 271.

274. See Priscilla Pardini, *A Supportive Place for Teen Parents*, RETHINKING SCH. (Summer 2003), <http://www.rethinkingschools.org/sex/teen174.shtml> (“[T]here is still a stigma to being a pregnant teen. . . . The prevailing opinion is, ‘You’ve made your bed, and you ought to lie in it.’”).

they find themselves facing the challenges an early pregnancy brings.<sup>275</sup> Instead of treating her as a taint on the school population, schools should embrace pregnant students as among those who need them the most. Schools, instead of pushing the “problem” pregnant student out, could minimize the chances that she will struggle with poverty, poor prenatal care, and multiple pregnancies. Educating and treating the current generation of pregnant students effectively could also set the stage for dropping future teen pregnancy rates by helping create contributing members of society who raise contributing members of society. Those babies born to students who did not drop out of school, who got their college degrees, who achieved careers may be less likely to become pregnant as teens or land in jail.<sup>276</sup>

The law should make it easier for pregnant students who have suffered discrimination to hold schools accountable when they are unlawfully expelled. The law should also make it clear that inferior education at alternative schools will not be tolerated. Schools that accept the challenge of educating pregnant and parenting students boast much better graduation rates than even the mainstream schools in the same school district.<sup>277</sup> But all too often, alternative schools for pregnant students are inadequate to properly educate them.<sup>278</sup> The risk that pregnant students could be funneled, sometimes against their wishes, into inferior schools is another illustration of why Title IX should include language creating a private right of action to sue for monetary damages for violations of the Regulations.

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275. *See id.*

276. *See Options for Pregnant Teens, supra note 272; Stay Informed: Teen Pregnancy, supra note 271.*

277. *See Pardini, supra note 274.* At Lady Pitts High School, an alternative school for pregnant and parenting teens in Milwaukee, Wisconsin, the graduation rate is fifty-six out of sixty students, which significantly outpaces the Milwaukee graduation rate. *Id.* And only ten percent of the young women who have attended Lady Pitts have had become pregnant again, which is much lower than the national average. *Id.*

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

A dozen girls, some perched awkwardly with their pregnant bellies flush against the desks, were struggling over a high school geometry assignment on a recent afternoon.

No pencils, no textbooks, no Pythagorean theorem. Instead, they sewed quilts. . . .

. . . “It ties into geometry,” said Patricia Martin, the principal. “They’re cutting shapes.”

*Id.* New York City has since closed the Program for Pregnant Students schools, citing poor test scores, attendance, and facilities. *Id.*

#### IV. WHAT THE TITLE IX PREGNANCY DISCRIMINATION ACT SHOULD SAY

The language that should be added to Title IX cannot be identical to the language of the Pregnancy Discrimination Act in Title VII. The Pregnancy Discrimination Act was passed specifically to address the Supreme Court's decision in *Gilbert*, which stated that provisions excluding pregnancy from insurance coverage offered by a company to its employees were not considered discrimination based on sex.<sup>279</sup> The Pregnancy Discrimination Act did not mince words when clarifying that pregnancy discrimination is unlawful under Title VII: "The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions . . . ."<sup>280</sup> The language that should be amended to Title IX should similarly take into account Supreme Court precedent that excludes pregnancy from forms of discrimination barred by Title IX. As such, the language should be aimed at closing the gap allowing pregnancy discrimination under the Equal Protection Clause in *Geduldig* and addressing the denial in *Sandoval* of private rights of action for regulations that do not "authoritatively construe" the statutory text.

As stated in Part II.B.1, *supra*, the Supreme Court has ruled that discrimination based on pregnancy status is not discrimination based on sex, which is generally barred under the Equal Protection Clause. The Supreme Court has also ruled that regulations to statutes do not carry with them a private right of action to sue for discrimination barred by those regulations, unless they "authoritatively construe" the statute, meaning that the regulations are simply giving force and effect to the statutory text itself.<sup>281</sup> Because of the *Geduldig* decision excluding pregnancy discrimination from Equal Protection Clause scrutiny against discrimination based on sex, it is entirely likely that a court would interpret *Sandoval* to mean that the Regulations, which bar pregnancy discrimination, do not authoritatively construe the language of Title IX that bars federally funded education providers from discrimination "on the basis of sex."<sup>282</sup> It would be easy for a court to say that the Regulations are in no way authoritatively construing the statutory text of Title IX because *Geduldig* makes clear that pregnancy discrimination is not "on the basis of sex."<sup>283</sup> The best way for Congress to combat such a

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279. See 42 U.S.C. § 2000e(k) (2006); *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 136 (1976).

280. 42 U.S.C. § 2000e(k).

281. See, e.g., *supra* notes 77-79, 84-85 and accompanying text.

282. 20 U.S.C. § 1681(a).

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

result is through an amendment to Title IX to address specifically the language in Supreme Court precedent that creates the gap that leaves pregnant students vulnerable.

The language of an amendment to Title IX clearly barring pregnancy discrimination should also include a provision allowing plaintiffs to seek and receive monetary damages. As stated in Part III.B.2, *supra*, monetary damages are an efficient and effective tool to discourage discrimination. Allowing pregnant students to sue for declaratory or injunctive relief may not rectify the harms suffered when a student is denied access to an adequate education, even if the relief is granted as quickly as possible. The possibility of losing monetary damages will not only discourage schools from discriminating in the first place, but the possibility of receiving monetary damages should rectify the harm that the pregnant student suffered as a result of the discrimination. The most effective tool to help pregnant students fight for equal access to education would be an amendment to Title IX that negates the precedent that stands in the way of a pregnant student's ability to advocate for herself and prevents monetary damages from being available to her.

Congress does not need to reinvent the wheel when drafting anti-pregnancy discrimination language for Title IX, and should borrow from Title VII to start. The language should address the negative Supreme Court precedent and address the availability of monetary damages as a remedy. Title IX should be amended to add, in the appropriate location, the following language:

The term "on the basis of sex" includes, but is not limited to, on the basis of pregnancy, childbirth, or related medical conditions. The regulations to this section regarding pregnancy and parenting status [34 C.F.R. § 106.40] should be read to authoritatively construe the statute. As such, a private right of action for discrimination based on pregnancy or parenting status is contemplated by the statute. Plaintiffs are eligible to receive monetary damages for discrimination barred under this Title.

## V. CONCLUSION

Congress recognized, almost forty years ago, when it passed Title IX, that providing equal access to education for girls is crucial to a functioning, just, and advancing society. What impact that understanding would have on schools, students, administrators, and teachers, became clearer when the Regulations were passed a few years later. Unfortunately, because the processes through which legislation and

regulations are passed are dependent on separate constitutionally-granted powers, and because the Supreme Court has further muddied the waters, it is unclear whether education access is a right pregnant students can fight for. It is time that Congress officially grant pregnant students the most effective and efficient weapon available to those seeking to vindicate their rights—the lawsuit. Congress should amend Title IX to clearly bar pregnancy discrimination and allow students who have suffered discrimination the right to sue for damages to rectify their harms.



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