PREGNANT TEACHERS IN THE CLASSROOM

Women's Legal History Seminar
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Until 1974, almost no one ever saw a visibly pregnant school teacher in the classroom.¹ This situation started to change in the 1970-71 school year, when three teachers -- Susan Cohen, Jo Ann La Fleur, and Ann Elizabeth Nelson -- joined many other teachers in successfully challenging their respective school boards' mandatory maternity leave² policies.³ Although Cohen, La Fleur and Nelson, did not

¹ National Education Association (NEA) Research Div., Maternity Leave Provisions for Classroom Teachers in Larger School Systems, Educational Research Service (ERS) Circular No. 3 (March 1966). Of 129 school districts enrolling 25,000 or more pupils that responded to the survey, 66 provided for compulsory absence of four or more months prior to the anticipated date of birth. An additional 30 required a pregnant teacher's absence by the end of the sixth month and four permitted a teacher to continue until two months prior to the anticipated date of birth. One district, although not replying to this portion of the survey, did grant maternity leave and 14 districts had policies that were not specific as to when compulsory pregnancy leave commenced. There were no maternity leave provisions in 14 of the responding school districts. These school districts probably required a pregnant teacher to leave at some definite point in her pregnancy, but provided her with no reinstatement rights whatsoever.

² Maternity leave for the purposes of this discussion has two components, a specific period of time prior to delivery and a specific time period subsequent to childbirth, presumably for recovery and childrearing.

³ Numerous legal actions were initiated in the early 1970's by women who did not consider their pregnancies disabling conditions in need of protective treatment. These
regain their teaching positions prior to the birth of their children, their three-year legal battle to the Supreme Court against the Chesterfield County, Virginia (Cohen) and Cleveland, Ohio (LaFleur and Nelson) school boards established the right of pregnant women teachers to remain in their teaching posts as long as they were physically able and to return to their classrooms when they had recovered from childbirth, subject to reasonable medical and administrative conditions.  

The Cleveland School Board's pregnancy provisions were adopted in 1952. According to Cohen's attorney, the Chesterfield County provision had been adopted at about the same time. The mystery of why nineteenth century views of


The district court ruled in favor of Cohen after the birth of her baby; LaFleur and Nelson were unsuccessful in their pursuit of relief at the district court level.

Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 648-49. The Court found that the Chesterfield County provision "limiting eligibility to return to the semester following delivery . . . a precisely drawn means of serving the school board's interest in avoiding unnecessary changes in classroom personnel during any one school term."

Id. at 634.

women were incorporated into mid-twentieth century personnel rules can be explained by the fact that prior to World War II, married teachers were not hired by most school districts. ¹

This paper will describe the regulations that barred married women and then visibly pregnant married women from the classroom, their underlying rationales and the legal and social ferment that led to their elimination. Generally, it will show that local school board regulations and, in some instances, state laws, reflected widespread views of women's "place" in society, views that remained fairly constant, subject to some pragmatic considerations, until the advent of the civil rights and women's movements in the 1960's.

I. BARS AGAINST EMPLOYMENT OF MARRIED WOMEN TEACHERS

The stereotype, "old maid school teacher," was not without some basis in fact. By 1919, women constituted 86

¹ NEA Research Div., Teacher Personnel Practices, 1950-51: Appointment and Termination of Service, 30 Research Bull at 12-13 (February 1952). In 1941, only 93 (5%) of 1,782 school districts reported appointing married women as new teachers without giving preference to single women. Married women were absolutely barred as new teachers in 1,025 school districts (58%). NEA Research Div., Teacher Personnel Procedures: Selection and Appointment, 20 Research Bull. 60 (March 1942) (These two publications are hereinafter cited as 20 or 30 NEA Research Bulletin). By 1951, 634 (41%) of the 1,952 school districts reporting gave no preference to single women and only 132 (8%) of the school districts absolutely barred appointment of married women as new teachers.
percent of the nation's public school teachers. Some feared that this overwhelming proportion of female teachers would "warp the psychics [sic] of our boys and young men." As a reflection of this apprehension, rules were established barring initial employment of married women as teachers or the retention of women teachers after they married. In 1928, 61 percent of the local school districts serving towns and cities of 2,500 or more denied initial employment as teachers to married women. Approximately 51 percent terminated women teachers who married subsequent to their employment.

With the onset of the depression, these figures increased. "[B]y 1931, the percentages had risen to 76.6 and 62.9 percent, respectively." Census data for 1930 disclosed that 15 percent of school teachers were married women.

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9 NEA and Women's Equity Action League Educ. and Legal Defense Fund Brief Amicus Curiae (hereinafter cited as NEA Amicus Brief).


11 Id. But these rules had little or any effect on the proportion of women in public school teaching prior to World War II. See n.32 infra.

12 Id. at 10, n.22.

13 Id.

14 Id.

15 NEA Report of the Committee on Tenure, Married Women Gainfully Employed (1940) (hereinafter cited as Married Women) at 13. The report surmised that the percentage of married women in public school teaching was probably lower.
And, by 1941, the last year of the depression, 95 percent of school districts gave preference to single women in their initial hiring of classroom teachers.¹⁴ Seventy percent terminated or otherwise limited the employment of teachers who married.¹⁷

Such sex discrimination on the basis of marital status reflected societal pressures against employment of married women in teaching or in other occupations.¹⁰ Those pressures stemmed from a view that working interfered with a married woman's duty to home and family (or, conversely, her home and family responsibilities interfered with her performance as an employee) or from a view that married women, absent special circumstances in which they constituted the sole economic support for their families, should not compete for scarce jobs.¹⁹ A third fear was of "race suicide" because employment of married women was held at least partly responsible for lowering "the birth-rate among the better

because the census classification of school teacher included private school teachers and college and university faculty members.

¹⁴ See n.8, supra.

¹⁷ 20 NEA Research Bulletin at 107. Where married teachers were not dismissed, they were often refused permanent positions or tenure.

¹⁰ There were, of course, no bars against employment of married men.

educated classes."\(^{20}\)

The National Education Association (NEA) attempted to secure greater job security for teachers during the Depression. Partly through its efforts, 15 states had laws in 1938 which, because of their specification of dismissal procedures and their enumeration of causes for dismissal, tended to protect women teachers against dismissal on the grounds of marriage.\(^{21}\) A notable exception was the Kansas tenure law which enumerated as cause for dismissal or demotion, along with such reasons as immorality or incompetence, the "marriage of women instructors."\(^{22}\)

\(^{20}\) Id. at 22-23.

\(^{21}\) Id. at 8,10. Statewide permanent tenure laws were in effect in Louisiana, Maryland, Massachusetts, New Jersey, Pennsylvania and Wisconsin. Tenure provisions covering only certain large school districts were operative in California, Colorado, Florida, Indiana, Illinois, Kansas, Minnesota, New York and Oregon.

\(^{22}\) Tenure of Instructors in Cities Having a Population of More Than 120,000 Inhabitants, Chap. 311, 47-1937 Kansas Jan. Sess. 500-01.

Sec. 6. Causes for the discharge or demotion of an instructor either during or after the probationary period shall be immoral character, conduct unbecoming an instructor, insubordination, failure to obey reasonable rules promulgated by the board of education, marriage of women instructors, inefficiency, incompetency, physical unfitness or failure to comply with reasonable requirements of the board of education as may be prescribed to show normal improvement and evidence of professional training. Instructors also may be dismissed because of decrease in number of pupils or for other causes over which the board of education has no control . . . . (emphasis added)
The NEA officially opposed discrimination against married teachers in its publications. In reporting on its 1941 survey, its Research Division lamented that the principle stated in the NEA Platform that "[t]eachers should not be discriminated against because of . . . marital status . . . is violated in practice, to some degree . . . in the great majority of city school systems of the United States." 23 Its publication on the Status of the Married Woman Teacher posited that married women were more efficient and skilled as teachers than their single counterparts and were not responsible for the nation's decreasing birth rate. That report cited comments to the effect that "[t]he unmarried, the mainstay of the American public school system, cannot avoid, because of their external examples, becoming a sterilizing influence upon the species," and thus would contribute to "race suicide." 24

23 20 NEA Research Bull. 60.

24 Status of the Married Woman Teacher at 13-17, quoting Kempf in Bater, Why More Women Teachers Are Needed, 5 Educ. Law and Admin. 17 (1937) In this vein, the publication also quoted the popular family relations "expert," Paul Popenoe, as suggesting that "pedagogical celibacy" was 'biologically eugenic' by "lowering the biological fitness of members of the teaching profession." Id. at 18, citing Popenoe, Better Teachers, Biologically Speaking, 2 Educ. Dig. 4,5 (April 1937). Popenoe went on to say that "[t]he matter is almost axiomatic; if a woman is not inferior, she should not be teaching." He opined that teachers not only should marry, but should also have children, advocating "a half-year of leave with full pay, or a full year with half pay . . . for any woman making such a racial contribution."
In summing up the arguments for and against working wives, the NEA Committee on Tenure pointed to the agreement of economist Paul Douglas (later to become U.S. Senator) and sociologist James A. Stouffer "that married women should work if household duties can be maintained, if the male ego of their husbands is not seriously wounded, and if they will have children regardless of activities outside the home." 25

Whatever the merits of wives as teachers, the massive unemployment of the Depression undoubtedly fostered statutes and rulings that denied them rights to initial employment or to retention if they had not obtained tenure. Only three states and the District of Columbia statutorily prohibited the dismissal of teachers on the basis of marital status. 24

In Massachusetts in 1938, the people voted against employment

But Popeneoe was also cited in Married Women 22 as a proponent of the argument that the "home suffers" from employment of married women.

"Big Business spoils a woman for love and marriage. The more dominant she becomes the more she repels men. If financially possible a woman should never take a job, but should spend her spare time cultivating her talents. Homemaking and marriage should be her first goal." (citing 123 Lit. Dig. 25–26 (May 15, 1937)

What a difference a month (or an audience) makes!

25 Married Women at 24, citing at n. 10, V.H. Parker, Wedlock, Wages and Women, 18 Independent Woman 169, 188–89 (June 1939).

24 Id. at 7. The states were Kentucky, North Carolina and West Virginia. Later, West Virginia was to be one of the first states to bar compulsory maternity leave for teachers who were physically able to continue working.
of married women in public service. Executive orders were issued in Alabama, Idaho, Indiana, Pennsylvania and Rhode Island that limited employment of married women. In Iowa, married women had no right to unemployment insurance. A number of states barred by statute or resolution state employment of husbands and wives.

NEA surmised in 1942 that it was unlikely that the percentage of married women teachers would be much larger if all bars against marriage were removed. It based its presumption on data showing that only 20.1 percent of women professionals and technicians other than teachers were married, only slightly more than the figure for women teachers of 17.5 percent. In predicting that the effect of

27 Id. at 10.

28 Id.

29 Id.

30 Id. at 9. In Louisiana, a husband and wife could not be employed in a state office if either received a salary of $100.00 or more a month. This law did not extend, however, to parish school district employees. In Texas, husbands and wives were barred from state employment if their combined salaries totaled more than 175.00 monthly. In Utah, applicants for state positions were accorded preference who were without family members in such positions.

31 NEA Research Bull. 108. As with the 1930 data, the percentage of married public school teachers may have been lower because the data furnished by the research department of Time, Inc., on which the NEA presumption was based, may have also included teachers in private schools and colleges and universities. See n. 15, supra. Census data for 1940 showed married women as 22 percent of the women teachers in the country and 21.7 percent of female professional and semi-professional workers.
lifting marital bars would be slight, the forecasters may have mistakenly assumed that the low proportion of married women in the ranks of female professionals and technicians resulted from differences between married women's career interests and the career interests of men and single women, rather than from discrimination against married women in other sectors of public and private employment.

When World War II suddenly opened jobs for women in industry and created new demands for teachers in industrial areas and near military bases, school districts, out of necessity, suspended their prohibitions against employment or retention of married women teachers. 32 By 1950, 90 percent of school districts responding to an NEA survey indicated that marriage did not affect a female teacher's employment status. 33 Only four percent absolutely barred married women

32 England also dropped its bars against employment of married women as teachers at this time. See NEA Research Bull. at 109. A March 31, 1987 telephone interview of J.J. Booker, principal of Craddock High School, Portsmouth, Va., 1949-1966; Director of Instruction, Portsmouth City Schools, 1966-70, and a principal in rural schools from the 1930's until his appointment at Craddock High, confirmed that women weren't permitted to teach until the World War II scarcity made their employment necessary. The absence of married women, however, had had little effect on the proportion of women who weren't public school teachers. Mr. Booker noted there weren't many men teaching until after World War II, and that those who were usually held principalships or coaching positions.

33 30 NRA Research Bull. 27.
The great surge in the proportion of married women employed as public school teachers, and the increase in the number of married women working in general after the United States entered World War II suggest, contrary to NEA's presumption, that formal and informal barriers to employment of married women, rather than a desire of married women to stay at home, accounted for the low representation in the professional and technical ranks of the work force. By 1960, the proportion of women public school teachers who were married had more than doubled to 62 percent. This steep increase further demonstrates that the elimination of bars against the employment and retention of married women teachers dramatically affected their representation on

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34 Id. Two percent terminated a teacher's employment immediately upon her marriage; two percent permitted her to continue teaching until the end of the school year in which she married.

35 Of course, as a result of the government's propaganda campaign to convince the public that wives should work to support the war effort, there was greater social acceptance of employment of married women, at least for the duration of the war. Polls indicate considerably less objection to working wives in the 1940's than in the 1930's. See L.Y. Weiner, From Working Girl to Working Mother, The Female Labor Force in the United States, 1820-1980 (1985) at 110-12.

teaching staffs well beyond the wartime emergency.

II. BARS AGAINST PREGNANT WOMEN TEACHERS IN THE CLASSROOM

A. Maternity Leave Policies, 1948-66

The NEA noted in 1948 that because the teacher shortage had led school districts to drop their bars against employment of married women teachers, they were faced with the necessity of developing "policies with respect to maternity leave."37 Although the organization had obtained some information previously about maternity leave provisions,38 it therefore proceeded to conduct a more detailed survey of 364 school districts, 275 of which responded. Of those


38 See AASA and NEA Research Div., Employment Status and Leaves of Absence of Teachers, 1937-38, Educ. Research Serv. Circ. No. 1 (January 1938) at 7. Of 87 school systems serving cities above 100,000 in population, 51 reported leaves of absence for maternity, seven reported no leaves being granted for maternity, and two reported having no policy. Of the 204 respondent school systems serving cities with populations between 30,000 and 100,000, 98 replied to the question. Sixty-two reported that maternity leaves of absence were afforded; 36 stated they were not. The NEA surmised that those school systems that did not reply probably had a "negative" maternity leave policy. Eighty-two school districts serving cities over 100,000 in population responded to a similar survey for the 1940-41 school year. Fifty-four gave leaves of absence for maternity; 24 did not, including 11 cities who terminated teachers either upon their marriage or at the end of the school year. See AASA and NEA Research Div., Leaves of Absence Regulations for City School Teachers, Educ. Research Serv. Circ. No. 8 (June 1942) at 2-5.
responding, 118 (42.9%) had no established maternity leave policy. Over a fourth of those with no policies did not employ married women. The remaining 157 responded to several questions, one of which elicited the length of time before birth a pregnant teacher was required to withdraw from active classroom duties and another which requested the minimum length of time subsequent to childbirth before a teacher could return to the classroom. Copies were also requested of the respondents' official policies on maternity leaves. The substance of the responses prompted the NEA to refer to maternity leave as "compulsory" in its tabulation of the results.

Thirty-four of the school district replies did not specify an exact time prior to birth that leave was to begin. Three of these indicated that the beginning date was left to the discretion of the teacher or her doctor, while two reported that the beginning date was at the school superintendent's discretion. For the remaining


40 Id. at 6.

41 Id. at 6-13. In Birmingham, Ala., the onset of leave depended on the advice of the teacher's doctor, in Fort Wayne, Ind. and Seattle, Wash. on the request of the teacher, and in Nashville and Chattanooga, Tenn., on the superintendent's determination. In San Bernardino, Ca., maternity leaves were granted "on proof of illness." A teacher could "receive the difference between her salary and of a substitute" upon presentation of medical "testimony" of
respondents, the range for compulsory leave-taking was from
the date of the teacher’s knowledge of her pregnancy to three
months prior to the anticipated birth, with most mandating
leave four to six months prior to delivery.\textsuperscript{42}

In some instances, disciplinary action was threatened
against a teacher who failed to commence her maternity leave
by the date mandated by school board policy. If her
calculations were inaccurate, or her baby arrived
prematurely, she could be denied reinstatement.\textsuperscript{43}

Judging from the clustering of the dates at which
maternity leaves were mandated at the fourth to sixth month
of pregnancy, school board members apparently disfavored a
teacher’s remaining in the classroom once her pregnancy was
evident. Indeed a few policies explicitly stated this

\textsuperscript{42} Id. at 6-13. The following is a summary tabulation
of the number of respondents mandating leave at specific
times prior to confinement:

\begin{tabular}{|c|c|}
\hline
Upon teacher’s awareness of pregnancy & 9 \\
7 months prior to confinement & 3 \\
6 & 26 \\
5 & 42 \\
4 & 27 \\
3 & 16 \\
\hline
\end{tabular}

\textsuperscript{43} Id. at 20, 29. For example, the Washington, D.C.
schools provided that a teacher who had been on maternity
leave would "be eligible for reinstatement . . . if due
notice was given and leave of absence taken . . . not less
than 150 calendar days prior to the birth of . . . [her]
child." Evansville, Ind., which required a teacher to go on
leave "[a]s soon as . . . [she] shall become aware that she is
to become a mother," stated that [f]ailure to do so shall be
deemed neglect of duty, and an act of insubordination, and
shall automatically cancel the teacher’s contract.

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concern. One stated that "[i]f pregnancy becomes noticeable before the beginning of the fifth calendar month of pregnancy, the teacher may be requested to ask for leave."**

One possible reason for this concern is that visibility could be deemed constructive notice of a pregnant teacher's infirmity, thereby making the school administration liable for any work-related injury to her or her baby. To this end, one school district explicitly disclaimed liability, should a teacher continue working during her pregnancy, for "miscarriage, accident, or any injury to the mother or offspring."**

Later testimony by school officials and school board members in litigation challenging mandatory maternity leave policies suggest other fears were operative, namely that the sight of a pregnant teacher would influence her pupils unfavorably,** that a pregnant teacher's mind would not be on

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** Id. at 23.

** Id. at 28 (Norfolk, Va.).

** In People ex. rel. Peixotto v. Bd. of Educ., one of the few early cases successfully challenging the termination of a teacher because of her pregnancy, the court noted that the arguments for the school board's dismissal action included "that the presence of the teacher who is about to become a mother exerts an unfortunate influence upon the older girl pupils." 82 Misc. 684, 686, 144 N.Y.S. 89. This view was also expressed by a former school administrator in 1987, to wit, "[T]here is not a place in the school system for pregnant girls to teach ... [I]t is not good for young people; [i]t would encourage young girls to become pregnant outside marriage. They would think if the teacher is pregnant, they could be, too." Telephone interview of J. J. Booker. See also the testimony of the superintendent responsible for the introduction of Cleveland's mandatory

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her work, or that a pregnant teacher would be incompetent to meet the physical demands of the job, particularly standing on her feet for lengthy time periods. 47

Generally, maternity leave was without pay and a teacher was not guaranteed reinstatement to her former position, but only reinstatement to a comparable position. At least one respondent, however, provided no guarantee of reinstatement at all. 48 The teacher usually returned to the salary level she held before her leave, although a few school systems "advanced her on the salary schedule as tho [sic] there had been no absence." 49 Where reinstatement was available to a teacher on maternity leave, the vast majority of school districts required that a teacher remain absent after the birth of her child for an extended time period. 50

maternity leave policy, Brief for Respondents at 182a, Cleveland Bd. of Educ. v. LaFleur, n.5 supra.

47 See Brief for Petitioners at 5-6, Cleveland Bd. of Educ. v. La Fleur.


49 Id. at 3, 20-33.

50 Id. at 6-13. Two school districts (Norfolk, Va. and Beaumont, Tex. provided for reinstatement only at the discretion of the school board. Of the remaining 155, 25 did not specify an exact time period. The responses of the remainder ranged from seven weeks to three years, with 88 respondents requiring at least one year. Jane Picker, attorney for the plaintiffs in La Fleur reported in a telephone interview of June 2, 1987, (hereinafter referred to as telephone interview of Jane Picker) that a small school district in Minnesota barred a teacher's return until 21 years after the birth of her child.
In adopting provisions mandating lengthy leaves subsequent to childbirth, school boards demonstrated their belief that mothers should remain at home with their infants. The Chicago policy unequivocally stated that "no mother of a living child, born to or adopted by her, of less than one year of age, shall be employed as a teacher." Other school districts had similar language in their reinstatement provisions. It is not clear whether the lengthy time lapse prior to eligibility for reinstatement stemmed primarily from concern for the welfare of the infant or from concern that a mother of an infant would devote insufficient time and attention to her teaching duties.

A substantial number of respondents extended the minimum leave of absence required after childbirth to schedule a teacher's return to coincide with either the beginning of a school year or the start of a semester. These provisions demonstrated some concern for continuity and administrative convenience, a concern which was less obvious in determining the date maternity leaves were to begin.

\[\text{References}\]

\[51\] Id. at 20.

\[52\] See Id. at 29 (Joliet, Ill.), 30 (Battle Creek, Mich.) and 32 (Poughkeepsie, N.Y.).

\[53\] Id. at 21 (New York, N.Y.); 22 (Milwaukee, Wisc., Oakland, Ca.); 23 (Indianapolis, Ind.); 24 (Minneapolis, Minn., Kansas City, Mo., Newark, N.J.); 25 (Rochester, N.Y., Yonkers, N.Y., Charlotte, N.C.); 26 (Erie and Reading, Pa.); 27 (Chattanooga and Nashville, Tenn., Houston, Tex.); 28 (Berkeley and Inglewood, Ca.); 29 (Stamford, Conn., Moline, Ill.); 30 (Evansville, Ind., Owensboro, Ky.); 31 Perth Amboy, South Orange, and Maplewood, N.J., Jamestown, N.Y.., 32 (Mt.
Some school systems provided for abridgement of the time lapse subsequent to childbirth if they had a need for a teacher's earlier return. Some also permitted flexibility if the teacher were in dire economic straits. For example, the Passaic, N.J. policy stated that "[a] maternity leave may . . . be curtailed . . . [if] an employee . . . on maternity leave . . . is reduced to destitute circumstances." One school district, while mandating that a teacher remain off the rolls for three full semesters from the beginning of her leave, also attempted to limit the number of children she could have to two, ruling that "[i]f such absences, continuous or intermittent, exceed three years in the aggregated within any seven year period they shall constitute cause for dismissal . . . ."

In sum, school districts' mandatory maternity leave policies treated women teachers as incompetent to make their own decisions about their careers, their physical well-being or the well-being of their children.

Over the next 17 years, more school systems adopted


Id. at 25. For example, Cincinnati provided that "[a]ny teacher . . . , whose baby is at least three months old, may be returned to active teaching whenever the list of qualified teachers in her field of teaching is exhausted."

Id. at 31.

Id. at 22 (Milwaukee, Wisc.).
formal maternity leave policies that set a specific date before the expected date of birth when leave was required. A 1966 NEA survey showed a growth in the proportion of school districts with formal maternity leave policies from 57.1 percent (1948) to 89.1 percent (1965-66).57 Instead of requiring leave to commence four to six months prior to delivery,58 a majority of the school districts by 1965-66 required leave to commence three to five months prior to the expected date of birth.59 The length of time after delivery that a teacher was required to remain on leave changed more


58 See text accompanying n.42, supra.

59 1966 ERS Circular at 2. The 114 responses to the question, "at what point in her pregnancy must a teacher begin leave?" are summarized as follows:

<table>
<thead>
<tr>
<th>REQUIRED PERIOD OF ABSENCE PRIOR TO ANTICIPATED DATE OF BIRTH</th>
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<tbody>
<tr>
<td>Upon confirmation of pregnancy</td>
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<tr>
<td>6 months</td>
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<tr>
<td>5 months</td>
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<tr>
<td>4 months</td>
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<tr>
<td>3 months</td>
</tr>
<tr>
<td>2 months</td>
</tr>
<tr>
<td>Unspecified</td>
</tr>
</tbody>
</table>

Of those with no specified date, one school system, Ft. Worth, Tex., required that leave begin "when the pregnancy becomes evident." Id. at 14. Most of the remainder required leave to begin at the discretion of the school district superintendent or director of personnel.
dramatically. Only four of the responding school districts reported that a teacher was required to be on leave more than a year subsequent to the birth of her child.\textsuperscript{40} Almost half the responding districts had policies that were not specific, including a number that stated that a teacher could return when she secured medical approval. In others, a teacher's return depended on school officials' discretion or on the availability of a suitable position prior to the expiration of her maximum leave time.

The 1966 survey also commented on provisions in a few school districts that were harbingers of events to come. Two school districts permitted teachers to apply their accumulated sick leave to their maternity leaves. In addition, the NEA reported that a "number of leaves of absence policies" provided for paternity leave.\textsuperscript{41} On the other hand, the Cleveland Board of Education had modified its reinstatement provision from a mandated 12-months after birth to a more discretionary policy where the discretion rested in part on the judgment of a teacher's husband whose agreement

\textsuperscript{40} Id. at 4 and 6-22. One school district, Evansville, Ind., mandated a two-year leave of absence, but permitted a teacher "within a reasonable length of time following the birth of her child, . . . to do casual substitute teaching . . . that did not . . . total [more than] 30 days . . . in any one school year." The other school districts mandating more than a year's leave were Pittsburgh, Pa. (one year plus 100 days), Richmond, Va. (two years), and South Bend, Ind. (semester following baby's first birthday).

\textsuperscript{41} Id. at 24.
to her return had to "accompany the recommendations of the Physician and the Bureau of Personnel."\textsuperscript{42}

The liberalization of maternity leave policies with respect to the period of absence required after the birth of a teacher's child may have resulted from the teacher shortage that prevailed as the baby boom children enrolled in the schools and the offspring of the depression, when the nation's birth rate reached its nadir, constituted the potential teacher supply.\textsuperscript{43} That the shortage of teachers, rather than any influence of the civil rights/women's movement, was probably primarily responsible for the liberalization of school districts' reinstatement policies is supported by data from a less detailed 1961-62 NEA survey of maternity leave policies. That survey showed that 37 (18.5%) of the 199 school districts reported as granting maternity leave indicated that the date of return was at the discretion of the teacher and her physician, and another 49 (24.5%) gave ambiguous responses that may have included discretionary

\textsuperscript{42} Id. and 1962 ERS Circular No. 5, infra at n.61. Cleveland's policy respecting return to service apparently changed frequently. When the first mandatory leave policy was adopted a teacher was required to be absent for a six month period after delivery according to the former superintendent's testimony in LaFleur; when the policy was challenged in 1971, a three-month period was required, and there were at least two variations in between, a one year rule and the discretionary provision discussed here.

provisions. Only seven of the respondents mandated that a leave extend beyond 12 months after delivery.

Several other facts lend credence to the theory that liberalization of reinstatement policies resulted to a large degree from the teacher shortage. First, in 1961-62, the women's movement was, at most, in its infancy. Second, the prevalence of married teachers suggests that less stringent maternity leave policies were necessary. In 1960-61, more than two-thirds (68.6 percent) of public school teachers were women and of those women, almost two-thirds (62.4 percent) were married.

B. Challenges to Mandatory Maternity Leave Policies

Before 1971

With or without the ferment of the women's movement, however, there is some evidence that women teachers objected to provisions compelling their dismissal or placement in leave status because of their pregnancies. As early as 1913,

See NEA Research Div., Local Provisions for Sick Leave and Maternity Leave (Educ. Research Serv. Circ. No. 5, April 1962) at 2, 4-17. The ambiguous replies included, "Must return within 12 months after birth," "[m]ay have a total of 2 years leave, plus extension," "[m]ay return within 12 to 24 months after birth," and "[p]rovisions not reported."

Id. at 4-22.

a teacher defied her school board's maternity policy by absence herself from her teaching position because she was "ill with some affection of her ears and nose" and giving birth some two months later. Sue successfully challenged her dismissal in state court. 47 Mark C. Schinnerer, the school superintendent who recommended Cleveland's mandatory policy in 1952, did so in response to teachers' refusal to abide by an unwritten rule that they absent themselves from the classroom when they developed "the sign of pregnancy." 48 A former principal reported that "several thought they were discriminated against when he told them they had to leave." 49 In 1943, a teacher requested a sabbatical leave "for health reasons," giving birth to a 'seven months baby' . . . eight months and thirteen days after she applied for sabbatical leave . . . ." 50 The school board's regulations mandated a "minimum period of two years" for maternity, without pay, but permitted sabbatical leave "for a maximum period of one year, [during which] the teacher continues to receive his or her salary, less the amounts paid to a temporary substitute,"

47 See supra, n.6. 82 Misc. 684, 685, 144 N.Y.S. 87, 88 (Sup. Ct. 1913).

48 Cleveland Bd. of Educ. v LaFleur, Brief for Respondents at 173a-187a.

49 Telephone interview of J.J.Booker.

and, for the purpose of salary increments, treated the 
teacher on a sabbatical the same as if he or she had been "in 
regular full-time daily attendance in the position from which 
the sabbatical was taken."\(^{71}\) A divided court (4-3) upheld 
her dismissal. The dissent argued there was "no basis for 
holding that . . . a teacher who has been granted sabbatical 
leave must divulge to a group of school directors such a 
strictly personal matter as approaching motherhood." It 
questioned the logic of requiring an individual already on 
leave to apply for a concurrent leave.\(^{72}\)

Marian Sievers Schlueter, a Nebraska school teacher, 
refused to hand over the keys to the schoolhouse when the 
school board terminated her contract in 1956 because of her 
"present condition which makes it impossible for you to 
complete this year of teaching."\(^{73}\) When a school board 
member went to Schlueter's house on a Friday to get the keys 
to the schoolhouse, Schlueter "refused to give" them to him 
"and told him she would be back to teach on Monday."\(^{74}\)

The following Monday, when she arrived at the 
schoolhouse, she found that the door was padlocked preventing

\(^{71}\) Id., at 346 Pa. 105, n.3, 29 A.2d 36, n.3.

\(^{72}\) Id. at 346 Pa. 111, 29 A.2d 39.

\(^{73}\) Schlueter v. School Dist. No. 42, 168 Neb. 443, 445, 
96 N.W.2d 203, 205 (1059). The Nebraska Supreme Court found 
that Schlueter was entitled to damages as a result of the 
school district's breach of contract.

\(^{74}\) Id.
her entry. Somewhat later, three school board members appeared with the teacher they had hired to replace Schlueter. The board members then "dismissed school for the day, locked the door to the school and left." Subsequently, on the same day they gave written notice to Schlueter of "additional reasons for terminating . . . [her] contract."

Apparently undaunted, Schlueter returned to the school the following morning where she was soon approached by the county sheriff who "served her with a 'Notice to Quit School Premises" and told her he would put her in jail if she didn't leave . . . . She left shortly thereafter."74

Generally, plaintiffs in court challenges reported prior to 1971 based their claims on contract theory and obtained inconsistent results. The climate established by the Supreme Court in Goesaert v. Cleary 77 and in Hoyt v. Florida 78 discouraged litigation based on claims of denial of equal protection. In Goesaert, plaintiffs challenged a Michigan statute that forbade any female, other than "the wife or daughter of the male owner of a licensed liquor establishment" to be licensed as a bartender.79 The Court

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75 168 Neb. 446, 93 N.W.2d 203.
74 Id. at 451, 96 N.W.2d 208.
77 335 U.S. 464 (1948)
79 368 U.S. 465
ruled that "[t]he Constitution does not require legislatures to reflect sociological insight or shifting social standards, any more than it requires them to keep abreast of the latest scientific standards." 80

Although admitting that the 14th Amendment precluded states from irrationally discriminating between persons, Justice Frankfurter, in writing for the six-member majority, concluded:

Michigan evidently believes that the oversight assured through ownership of a bar by a barmaid's husband or father minimizes hazards that may confront a barmaid without such protecting oversight. This Court is certainly not in a position to gainsay such belief by the Michigan legislature. If it is entertainable, as we think it is, Michigan has not violated its duty to afford equal protection of its laws. We cannot cross-examine ... the mind of the Michigan legislators nor question their motives. Since the line they have drawn is not without a basis in reason, we cannot give ear to the suggestion that the real impulse behind this legislation was an unchivalrous desire of male bartenders to monopolize the calling.81

In Hoyt, the appellant challenged her conviction by an all-male jury for second-degree murder of her husband.82 At issue was a Florida statute which accorded "women an absolute exemption from jury service unless they waive[d] that privilege."83 The Court noted that "despite the enlightened

80 Id. at 466.
81 Id. at 466.
82 368 U.S. 58.
83 Id. at 60.
emancipation of women from the restrictions and protections of bygone years, . . . woman is still regarded as the center of home and family life."  

Although recognizing that the state could have limited its exemption to "women who have family responsibilities," Justice Harlan opined that it was not "irrational for a state legislature to consider preferable a broad exemption . . ." arising from the "State's historic public policy" or from considerations of administrative convenience.  

The Court in determining whether there was a rational basis for blatant sex-based classifications expanded the definition of "rational" to embrace any legislative reason, however weak. Consequently, the absence of equal protection challenges to mandatory maternity leave provisions prior to the 1970's is not surprising.  

There were, however, nonlitigious efforts to change school districts' maternity leave regulations. Joni Carr, outraged, in November 1969, at being "pushed out" of her West Virginia school district six weeks before the birth of her baby, began a letter writing campaign to state and education association officials about the "pregnant teacher's plight."  

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Id. at 62.

Id. at 63.

Letter of February 7, 1972 from Joni Carr (hereinafter cited as Joni Carr letter) to Susan Paxman who was the plaintiff in a suit challenging the mandatory
In the fall of 1970, she appeared uninvited at an education association meeting, where, she believes, that in order to silence her, the groups appointed her "chairman of a committee to investigate pregnancy policies." Because she was certain that the association would do nothing with any report she prepared, she instead, with her new title of committee chairman, expanded her letter writing campaign to a "list of important people [she had] selected to 'hound'"

As a result of her efforts, Mrs. Carr was invited in the summer of 1971 to serve on a nine-person committee to consider changing the state's 1942 resolution on maternity leave. Although she was unable to attend the first meeting of the committee because it was scheduled at the same time her second child was due, she did attend its second and last meeting two weeks after his birth. At that meeting, she wrote, she became

maternity leave policy of the Albemarle County, Va. school board.

Id. Confirmed in a telephone interview of May 31, 1977, in which Mrs. Carr, who is about to complete her twenty-third year of teaching, explained that the State School Board's mandatory maternity leave policy (see n. 89) was being applied inconsistently and that pregnant pupils in her school could stay up until delivery and return immediately afterwards.

Id.

"a one-man spokesman for the young female teachers and their feelings . . . . I kept pounding away on the fact we are given no choice in the matter. [1]If we wanted to work we were denied that on no real grounds. It took raw nerve to be a nobody with eight 'big-wigs' for three hours of frank complaints, discussion, arguments and even insults (challenging everything from my being a good mother to pregnancy's vulgarity.) (emphasis in original)"^o

In November 1971, the State School Board adopted a new maternity leave policy for school employees which required leave to commence when the teacher's doctor determined she was unable to continue her duties or when the school district superintendent, with the concurrence of the school board, determined that a pregnant teacher was not performing her duties satisfactorily. A teacher could return after the birth of her child when her doctor certified she was able to resume duty."^1

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^o Joni Carr letter.

^1 The full text of the 1971 Resolution follows:

Maternity Leave Policy for School Employees

I. Voluntary Maternity Leave

Voluntary maternity leave for pregnancy and for convalescence after childbirth may be granted to a school employee upon request for a period of one year. The foregoing leave privilege shall extend equally to a school employee who becomes an adoptive parent.

II. Required Maternity Leave

A school employee who does not request voluntary maternity leave as provided above will be required to take maternity leave as follows:

(1) As soon as pregnancy has been con-
C. The Women’s Movement

By the late 1960’s, the women’s movement had become a strong force on the American political scene, arising in part as an adjunct to the civil rights movement. Esther Peterson, the Assistant Secretary of Labor in 1963, noted "there was a parallel between the current civil rights movement and the efforts of women to achieve 'full partnership in the affairs of the nation." She stated further that "[t]houghtful persons are beginning to see that discrimination against minority groups is wasteful of human resources and is a check upon the full realization of our nations potential. Similar recognition is being given to the

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firmed, the employee shall furnish the county superintendent's office with a statement of expected date of delivery.

(2) Required maternity leave must begin when, in the opinion of the employee's attending physician, she is unable to continue her duties.

(3) Maternity leave may also begin when an employee is no longer carrying out her regular duties in a satisfactory manner. Such leave shall be effective upon the recommendation of the superintendent and the approval of the county board of education.

(4) Employees on required maternity leave may return to duty when the attending physician certifies in writing that the employee is able to resume regular duties.

potential of our woman power." 93

One of the first signs of the advent of the women's movement was President Kennedy's establishment of the President's Commission on the Status of Women (PCSW) in 1961. Partly in response to the recommendations of that body, the Equal Pay Act was enacted in 1963. 94 In response to another recommendation of the PCSW, President Kennedy established the Citizen's Advisory Council on the Status of Women (CACSW) in the same year. 95 In 1963 also, Betty Friedan, in her book, The Feminine Mystique, advocated the liberation of women "from the ideology of domesticity." 96

The movement was particularly bolstered by enactment of Title VII of the Civil Rights Act of 1964 which barred discrimination in employment on the basis of sex as well as on the basis of race, color, national origin and religion. 97

93 Id.


97 53 U.S.C. 2000e et. seq. The inclusion of sex as a prohibited basis for discrimination was the result of an amendment by Rep. Howard Smith of Virginia in an unsuccessful attempt to defeat the 1964 Civil Rights Act. Rep. Smith indicated that the bill was so "imperfect ... what harm will this do to the condition of the bill?" 110 Cong. Rec. 2577. For the tenor of the debate, see 110 Cong. Rec. 2577 (1964).
Another action that fostered equal employment for women was the issuance of Executive Order 11,375 by President Johnson which amended by Executive Order 11,246 to bar discrimination on the basis of sex as well as on the basis of race, color or national origin, in federal government employment and by federal government contractors or subcontractors and in employment on federally-assisted construction contracts.**

The Office of Federal Contract Compliance (OFCC) in the Department of Labor administered the Executive Order 11,246, as amended. It issued guidelines which, although permitting compulsory maternity leave policies, at least stated the principle that women "not be penalized in their conditions of employment because they require time away from work on account of childbearing."***

The Equal Employment Opportunity Commission (EEOC), the agency responsible for enforcement of Title VII, issued a number of opinions to the effect that "to provide substantial equality of employment opportunity, there must be special recognition for absence due to pregnancy, and for this reason [we] have stated that, generally speaking, a leave of absence should be granted for pregnancy whether or not it is granted

Title VII did not become effective until 1954 and until 1972, did not apply to public employment. Thus public school teachers were initially excluded from coverage.

** See 17 N.Y.L. Forum (1972) at 488, n.486.

*** Id., citing at n. 49 the OFCC Guidelines, 41 C.F.R. sec. 60-20.3(g)(1) (1971).
for illness."\textsuperscript{100}

The enactment of Title VII gave rise to unexpected numbers of complaints of sex discrimination filed with EEOC, state human relations commissions, and other agencies. The Secretary of Education in Pennsylvania, although deciding that a school board regulation which required a teacher's resignation at the "end of the fifth month of pregnancy was reasonable," nevertheless qualified his determination by suggesting change should be considered in view of the number of appeals he had received about discharges resulting from violations of school districts' maternity leave regulations.\textsuperscript{101} (Pennsylvania's Supreme Court reversed the Secretary of Education's decision in 1973.)\textsuperscript{102}

\textsuperscript{100} November 15, 1966 letter of Charles T. Duncan, General Counsel, EEOC, quoted in Brief Amicus Curiae at 11-12, U.S. Chamber of Commerce, 414 U.S. 632. As this writer recalls, staff at the EEOC focused their attention on racial discrimination issues at this time and were neither prepared nor very willing to deal with sex discrimination matters.


We have heard argument presented on the concept of the equality of the sexes, the policies of the Human Relations Commission relevant thereto, and the new Women's Liberation Movement. These are worthy of consideration in the deliberations of school boards . . . . Our comments are not to be considered as a criticism of existing regulations, but merely a desire . . . for some degree of uniformity, with due consideration for present day concepts.

\textsuperscript{102} 299 A.2d 277
According to a report by the New York City Commission on Human Rights in 1972, the number of sex discrimination complaints it received had increased 700 percent for the period between January 1971 and June 1972 over the previous 18-month period. The head of the Commission, Eleanor Holmes Norton, attributed the increase partly to "the rapid development of the women's rights movement." In 1971, the Labor Department reported that the number of complaints alleging violations of the Equal Pay Act had increased 91 percent over the number received the previous fiscal year.

Additional evidence of the vigor of the women's movement was the hullabaloo that arose when Dr. Edgar Berman, a member of the Democratic Party's Committee on National Priorities, opined in 1970 that "physiological factors, particularly the menstrual cycle and menopause, disqualified women for key ... jobs." The New York Times characterized Berman's statement as "offering an unexpected political dividend to the

103 N.Y. Times, Nov. 19, 1972, at 80, col. 4.

104 Id., Jan. 31, 1971 at page 50, col. 1. It is unlikely that the rise in complaints resulted from worsening employment conditions for women. Instead, as the laws and court decisions were publicized which gave women new remedies for discriminatory employment practices, and as Title VII was extended to cover public, as well as private employment, an increasing number of women sought to strike down a variety of employment barriers that had adversely affected women.

Republicans.  

Five days after his remarks on women were publicized, he "resigned" from the Committee.  

As statutory avenues for redress of sex discrimination opened up to women, the CACSW focused on how those statutes should be applied. It stated, in 1970, that incapacity due to childbirth and pregnancy should "be treated by employers and health insurers as any other temporary disability."  

The enunciation of this principle served as a basis for EEOC to re-examine its position on the application of Title VII to employment practices relating to pregnancy and childbirth.  

As a result, the agency in 1972 discarded its earlier stance.

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107 Id., August 1, 1970 at 5, col. 4.

108 17 N.Y.L. Forum 482, n. 11 citing the following CACSW statement:

Childbirth and complications of pregnancy are, for all job-related purposes, temporary disabilities and should be treated as such under any health insurance, temporary disability insurance, or sick leave plan of an employer . . . . Any policies or practices of an employer . . . . applied to instances of temporary disability other than pregnancy or childbirth, including policies or practices relating to leave of absence, restoration or recall to duty, and seniority.

No additional or different benefits should be applied to disability because of pregnancy or childbirth, and no pregnant woman employee should be in a better position in relation to job-related practices or benefits than an employee similarly situated suffering from other disability.

that special treatment of pregnancy was advisable, \(^{110}\) and promulgated guidelines that pregnancy, childbirth, and related conditions should be treated under the same provisions employers applied to other temporary disabilities of employees. \(^{111}\)

D. Legal Challenges Since 1971

Although the EEOC Guidelines pertaining to leave for pregnancy and childbirth were not promulgated until 1972 and Title VII was not extended to cover public employees until the same year, it was within the general ferment that led to those developments that Cohen, LaFleur and Nelson sued under 42 U.S.C. 1983, alleging that the compulsory maternity leave policies that had been imposed on them by their school districts denied them equal protection of the law on the basis of sex. \(^{112}\)

\(^{110}\) EEOC's earlier position may have been based on a disparate impact theory that lack of a leave policy would have a disproportionately adverse effect on women. On the other hand, it could have been based on the theory that because pregnancy and childbirth were not sicknesses, they merited special treatment in order to prevent an adverse impact on members of one sex.

\(^{111}\) Interview of Susan Deller Ross.

\(^{112}\) Sec. 1983 establishes a private right of action to secure rights granted by the 14th Amendment and reads as follows:

**Civil action for deprivation of rights**

Every person who, under color of any statute, ordinance regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person
Cohen, whose baby was due April 28, 1971, wished to remain in her position as a teacher in the Chesterfield County, Virginia school system until April 1;\textsuperscript{113} LaFleur and Nelson, whose babies were due in mid-summer, wished to remain in their teaching positions in Cleveland until the end of the school year and until the spring vacation, respectively.\textsuperscript{114} Each therefore requested that her leave begin later than the mandatory date for commencement of maternity leave in her school district.\textsuperscript{115}

\textsuperscript{113} Cohen subsequently suggested that she be permitted to teach until the end of the semester, January 21, 1981. See 414 U.S. 638.

\textsuperscript{114} Nelson, after her request was denied, attempted to withdraw her resignation and testified she was ready to return to teaching to finish the semester. Brief for Respondent, 414 U.S. 632.

\textsuperscript{115} 414 U.S. 636, 638. Cleveland required that maternity leave begin five months before the anticipated date of birth. Id. at 635. Chesterfield County required that maternity leave begin "four months prior to birth." Id. at 637.

The Cleveland regulation provided:

"Any married teacher who becomes pregnant and who desires to return to the employ of the Board at a future date may be granted a maternity leave of absence without pay.

"APPLICATION A maternity leave of absence shall be effective not less than five (5) months before the expected date of the normal birth of the child. Application for such
leave shall be forwarded to the Superintendent at least two (2) weeks before the effective date of the leave of absence. A leave of absence without pay shall be granted by the Superintendent for a period not to exceed two (2) years.

"REASSIGNMENT A teacher may return to service from maternity leaves not earlier than the beginning of the regular school semester which follows the child's age of three (3) months. In unusual circumstances, exceptions to the requirement may be made by the Superintendent with the approval of the Board. Written request for return to service from maternity leave must reach the Superintendent at least six (6) weeks prior to the beginning of the semester when the teacher expects to resume teaching and shall be accompanied by a doctor's certificate stating the health and physical condition of the teacher. The Superintendent may require an additional physical examination.

"When a teacher qualifies to return from maternity leave, she shall have priority in reassignment to a vacancy for which she is qualified under her certificate, but she shall not have prior claim to the exact position she held before the leave of absence became effective.

"A teacher's failure to follow the above rules for maternity leave of absence shall be construed as termination of contract or as grounds for dismissal." (Emphasis in original.) 414 U.S. 635, n.1.

The Chesterfield County regulation provided:

"MATERNITY PROVISIONS

"a. Notice in writing must be given to the school Board at least six (6) months prior to the date of expected birth.

"b. Termination of employment of an expectant mother shall become effective at least four (4) months prior to the expected birth of the child. Termination of employment may be extended if the superintendent receives written recommendations from the expectant mother's physician and her principal, and if the superintendent feels that an extension will be in the best interest of the pupils and school involved.

"c. Maternity Leave

"(1) Maternity leave must be requested in writing at the time of termination of employment.

"(2) Maternity leave will be granted only to those persons who have a record of satisfactory performance.

"(3) An individual will be declared eligible for re-employment when she submits written notice from her physician that she is physically fit for full-time employment and when she can give full assurance that care of the child will cause minimal interference with job responsibilities.

"(4) Re-employment will be guaranteed no later than the first
The defendant school districts attempted to demonstrate that their maternity leave provisions had a reasonable basis. In doing so, they raised themes imbedded in the maternity leave policies and court ruling discussed earlier.

Cleveland argued that its rule was necessary in order to have "able-bodied" teachers; that a pregnant school teacher, after four months, was not "able-bodied" because "[h]er weight increases; her center of gravity shifts, she must urinate more frequently, [and] she experiences the three classic fears of pregnancy -- miscarriage, agony in labor, and a deformed child.\textsuperscript{114}

Both school districts brought out in their arguments that the rule protected the teacher from injury.\textsuperscript{117} Both pointed to the long periods of time teachers must be on their day of the school year following the date that the individual was declared eligible for re-employment.

\textsuperscript{114} Brief for Petitioner at 5, 414 U.S. 632.

\textsuperscript{117} Cleveland raised the spectre of assaults and violence, \textit{Id}. at 6; in suburban Chesterfield County, the concern was with possible "exposure to pushing and shoving by students in the halls and classrooms." Brief for Respondents at 26 in Cohen.
feet.\textsuperscript{118} Both alluded to pregnancy as a voluntary condition,\textsuperscript{119} and both claimed that the compulsory maternity leave provisions were necessary for the "continuity of education."\textsuperscript{120} In addition, both school districts contended that students would be distracted by the physical appearance of a pregnant teacher.\textsuperscript{121}

The plaintiff school teachers attempted to demonstrate that the compulsory maternity leave provisions of their school districts were arbitrary, irrational and served no legitimate purpose, thereby discriminating on the basis of sex in violation of the equal protection clause of the 14th Amendment. In doing so, they provided considerable medical testimony to the effect that there is no reason for expectant mothers experiencing normal pregnancies to stop working prior to when they go into labor.\textsuperscript{122} They also strove to show that

\textsuperscript{118} Id. at 7.

\textsuperscript{119} LaFleur v. Cleveland Bd. of Educ., 326 F. Supp. 1208, 1211 (N.D. Ohio 1971); Brief for Respondents in Cohen at 4, 6.

\textsuperscript{120} Brief for Respondents in Cohen at 4-5; Brief for Petitioners in La Fleur at 11.

\textsuperscript{121} Brief for Petitioner in Cohen at 26. See also the district court’s finding that the Cleveland rule was justified because students ‘were taking bets on whether the [teacher’s] baby could be born in the classroom or in the hall, 326 F. Supp. 1210.

\textsuperscript{122} Brief for Petitioner in Cohen at 25a, 77a. Cohen’s obstetrician had also delivered the district court judge’s baby. See 68a.
the cut-off dates for the onset of maternity leaves were related to irrational notions that visible pregnancy was disruptive, citing, for example, a school board member's statement that pregnant teachers should begin leave "when they become very conspicuous ... because some of the kids say, my teacher swallowed a watermelon, things like that."123 They also demonstrated that mandatory rules in actuality interfered with, rather than promoted, educational continuity and fostered unnecessary disruption. LaFleur was replaced by a student intern; Nelson, a French teacher, was replaced by a teacher trained in Spanish. By requiring LaFleur to leave, her special "(t)ransition" class of underachievers was assigned its third teacher that school year.124

To demonstrate further that advanced pregnancy did not prevent a teacher from performing her duties satisfactorily, the plaintiffs in LaFleur introduced testimony of a former teacher who had taught English as a Second Language in the Cleveland system. When she had been required to resign, because of her pregnancy, from teaching her class of six students in which she was assisted by an aide, she was permitted to teach a class of 30, without the assistance of

123 Cohen brief at 53a-54a. See also 43a where another school board member admitted that "appearance" was a factor, and 121a in which the school district superintendent conceded that appearance of pregnancy was not a valid reason for the beginning of leave.

124 Brief for Respondents, Cleveland Bd. of Educ. v. LaFleur, hereinafter cited as LaFleur brief, at 14-15.
The district court in La Fleur, applying an equal protection analysis similar to Goesaert, upheld Cleveland's mandatory maternity leave policy, finding its regulation was "entirely reasonable" and that there was "a reasonable basis for the rule which distinguishes pregnant teachers from all other teachers." The district court in Cohen struck down the similar, although somewhat more lenient maternity leave provisions in Chesterfield County. The Cohen court found "[b]ecause pregnancy, though unique to women, is like other medical conditions, the failure to treat it as such, amounts to discrimination . . . without rational basis . . . therefore violative of the Fourteenth Amendment." The two courts thus reached diametrically opposite conclusions from a group of facts and arguments that were essentially the same.

Both cases were appealed and again opposite results

125 LaFleur brief at 81a-84a. The teacher turned volunteer performed her twice weekly instruction until the end of her eighth month, missing only one day during the three months she was there due to a transportation problem.

126 326 F. Supp. 1214.

127 Id. The trial court judge, James C. Connel, had the reputation of being the most oft-reversed district court judge in the Sixth Circuit. At the conclusion of the trial, the attorney for the school district apologized to the plaintiffs for the behavior of the judge. Telephone interview of Jane Picker.

128 326 F. Supp. 1159, 1161 (E.D. Va. 1971)

obtained; the Sixth Circuit struck down the school board's maternity leave regulations, the Fourth Circuit upheld them. 130 The Fourth Circuit, en banc in a 4-3 decision, concluded that the mandatory leave provision was "not an invidious discrimination based on sex . . . [because it did] not apply to women in an area in which they may compete with men." 131 The court further ruled that "pregnancy and maternity are sui generis, and a governmental employer's notice of them . . . not an invidious classification by sex." 132 Acknowledging that the provision need serve some ultimate objective, the court found, using the administrative convenience standard of Hoyt, that it could "reasonably be regarded as contributing to the better education of . . . pupils by enabling school officials to arrange a larger degree of continuity in . . . instruction." 133

130 465 F.2d 1184 and 474 F.2d 395. The Fourth Circuit's holding en banc reversed the decision of the three-judge panel.

131 474 F.2d at 397. Judge Haynesworth, for the majority, likened the maternity leave requirement to "regulations requiring . . . women . . . on a public beach to keep their breasts covered[.] Is that an invidious discrimination based upon sex, a denial of equal protection because the flat and hairy chest of a male lawfully may be exposed?"

132 Id. at 398.

133 Id. at 398-99. In reaching its decision, the court found that one of Cohen's new arguments -- that the school district's maternity leave provision violated Title VII -- was inapplicable because extension of the statute's coverage to public employment was not effected until after oral argument. At the appellate level, Cohen also challenged the
The Sixth Circuit, in finding that Cleveland's regulation violated the Equal Protection clause noted that it was "inherently based upon a classification by sex," and upheld plaintiffs' assertions that it was "arbitrary and unreasonable in its overbreadth." "To resolve the conflict between the Courts of Appeals over the constitutionality of" the compulsory maternity leave provisions of the two school boards, the Supreme Court granted certiorari.

When they argued before the Supreme Court, plaintiffs' attorneys' primary thesis continued to be two-pronged -- that maternity leave requirement constituted sex discrimination because only women could become pregnant and that sex-based classifications were "invidious" and therefore "suspect,"

school district's provision on due process grounds, but the court ignored this claim. Id. at 395-96.

Id. In reaching its conclusion, the 6th Circuit relied considerably on Stanley v. Illinois, 405 U.S. 645 (1972) and Reed v. Reed, 404 U.S. 71 (1971) which ruled that administrative convenience was an insufficient basis to presume unwed fathers unsuitable parents or to give preference to males in the selection of executors, respectively.

Id. In reaching its conclusion, the 6th Circuit relied considerably on Stanley v. Illinois, 405 U.S. 645 (1972) and Reed v. Reed, 404 U.S. 71 (1971) which ruled that administrative convenience was an insufficient basis to presume unwed fathers unsuitable parents or to give preference to males in the selection of executors, respectively.

414 U.S. 638. See also 411 U.S. 947.
warranting strict judicial scrutiny.\textsuperscript{137} As a secondary argument, plaintiffs' attorneys asserted that the school districts' maternity leave requirements impermissibly interfered with plaintiffs' fundamental rights, including the right to bear and raise children.\textsuperscript{138} The Supreme Court, in its decision, adopted the secondary argument, basing its analysis on the Due Process Clause in concluding that the school districts' maternity leave policies impermissibly interfered with its protection of "freedom of personal choice in matters of marriage and family life." \textsuperscript{139} Thus the Court avoided the question of whether discrimination on the basis of pregnancy and childbirth was sex discrimination and, although sounding the death knell for mandatory maternity leave requirements, left open whether it was necessary to treat pregnancy as any temporary disability. Indeed, the same year, it was to rule otherwise in \textit{Geduldig v. Aiello},\textsuperscript{140} a determination it reaffirmed in \textit{General Electric Co. v. Gilbert} which invalidated the 1972 EEOC guidelines.\textsuperscript{141} It

\textsuperscript{137} See \textit{Cohen} and \textit{La Fleur} briefs for petitioner and respondents, respectively.

\textsuperscript{138} \textit{Id.}

\textsuperscript{139} 414 U.S. 639. Justice Powell, in his concurrence, applied an equal protection analysis, finding the leave provisions "invalid under rational-basis standards of equal protection review." \textit{Id.} at 653.

\textsuperscript{140} 417 U.S. 484 (1974)

\textsuperscript{141} 429 U.S. 125 (1976).
was not until Congress enacted the Pregnancy Discrimination Act (PDA) in 1978 that discrimination on the basis of pregnancy and childbirth was included within the ambit of sex discrimination.\(^{142}\)

III. Conclusion

Despite Justice Frankfurter's assertion in *Goesaert* that legislatures (and by implication, courts) need not "reflect ... shifting social standards,"\(^{143}\) the reality of the matter is, in a democratic society, that is exactly what both those arms of government do.

The history of personnel provisions barring first married women, and then, when married women were out of necessity accorded employment rights, visibly pregnant women from teaching merely mirrors society's changing view of women. That history demonstrates that even in a field in which women numerically predominated, women teachers for most of this century had little influence on administrative decisions that directly affected their careers, livelihoods, and their personal choices regarding procreation and child-rearing.


\(^{143}\) See text accompanying n.80, *supra*. 

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The Court's decision in LaFleur embraced a trend toward liberalization of maternity leave policies that was well under way. But the Court, perhaps more removed from the changed social climate than other government actors, handed down a very limited decision that neither mandated that pregnancy be treated as any other temporary disability nor recognized discrimination on the basis of pregnancy as sex discrimination. Indeed, the decision expressly upheld the Chesterfield County reinstatement rule which permitted the school district to delay a teacher's return after childbirth until the beginning of the school year following the date her physician found her able to resume full-time employment.

As the dual wage-earner family becomes increasingly the

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144 See Richmond Times-Dispatch, December 17, 1971 at A-7, reporting that the Richmond School District, which adjoins Chesterfield County, had "no arbitrary deadline" for commencement of maternity leave, that "some nurses have worked right up to the hour of delivery," and that Sears had revised its policy to permit women to work as long as their physicians found them able to. Other employers with substantial proportions of women in their workforce were reported as having similar policies. In addition to the West Va. resolution set forth at n. 91, supra, several attorneys general had issued opinions that mandatory maternity leave requirements in their states were illegal. See Brief for Respondents in LaFleur at 23 (Mass.); see also Wilmington Morning News, August 22, 1972 (page number not on reprint) (Del.).

145 414 U.S. 650. See c(6) of Chesterfield County's Maternity Provisions, reported a n. 115, supra. The Cleveland rule on reinstatement, however, was struck down because it did not permit the teacher to return until the beginning of the semester after her child was three months old. Id. at 648. There is no record that either school district imposed such restrictions on the return of teachers on leave for other temporary disabilities.
norm in families in which the wife is of child-bearing age, as single-parent families continue to increase, as the teacher shortage grows because of increased opportunities for women elsewhere, and as concern rises about the nation's declining birth rate, appropriate accommodation of pregnancy, childbirth and childrearing in an employment context could become a major concern. Care must be taken that any such special provisions do not have the discriminatory effects on women that were apparent in the marriage and pregnancy provisions that once abounded. Their history provides ample evidence that whatever leave and child care policies are adopted in the future, there must be requirements that they be applied equally to expectant and actual parents of both sexes in order to preclude sexually discriminatory results. Expectant and actual parents of both sexes in order to preclude sexually discriminatory results.