



STATE OF KANSAS

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Curt T. Schneider
Attorney General

December 31, 1975

ATTORNEY GENERAL OPINION NO. 75- 476

Mr. Paul McNall
Superintendent
U.S.D. #241
Sharon Springs, Kansas 67748

Re: Schools--School Board Powers--Rules and Regulations--
Rules Affecting Unwed Parents, Pregnant Women and
Married High School Students

Synopsis: School board or district rules, regulations or policy guidelines which exclude, prohibit or limit the right or capability of students who are married, pregnant or unwed parents to participate in non-academic or extracurricular school sponsored or related activities are violative of the Equal Protection Clause of the U.S. Constitution, and are, therefore, void and without force or effect. In the case of those rules affecting only pregnant women, their promulgation is prohibited specifically by 45 CFR 86.40, more popularly termed Title IX.

* * *

Dear Mr. McNall:

You have requested my opinion concerning the legality of a school board policy or regulation which bars district high school students who are married, unwed parents or pregnant from participating in extracurricular school sponsored activities.

In prior years, courts were reluctant to intervene in disputes over regulations such as these. According to 68 Am.Jur.2d, *Schools*, page 245, regulations restricting the right of married

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students to participate in extracurricular activities were sustained in some state cases as within the power of the school authorities to maintain discipline and regulate school activities. See, e.g., *Board of Directors of Independent School District of Waterloo v. Green*, 147 N.W.2d 854 (Iowa, 1967). Those courts considering this issue apparently regarded these regulatory measures as based on a reasonable policy designed to discourage student marriages, curb dropping out and preserve existing marriages by limiting distractions. Thus, the court in *Estay v. Lafourche Parish School Board*, 230 So. 2d 443 (1st Cir. 1969) held that a school board has the authority to adopt a reasonable regulation barring married students from participating in extracurricular activities. The court based its decision on the belief that:

"The requirements of the equal protection clause . . . and the due process clause . . . are fulfilled when laws or regulations involved affect alike all persons similarly situated." 230 So. 2d at 447.

The older cases upholding these rules were based on a belief that participation in extracurricular activities is a privilege and not a right. This was demonstrated by the majority in *Estay, supra.*, at page 448 where they stated:

"We are of the view that the right to public school attendance is not an unqualified right. Rather it is a right involving concomitant privileges and obligations. Among these is the duty of submitting to reasonable regulations imposed by lawful authority in the interest of the individual student and the welfare of institutions of learning. A student cannot be deemed to possess the constitutional right to breach reasonable, uniformly applied disciplinary regulations of a school authority."

Likewise, various state courts had previously decided that regulations which prohibited married students from participating in extracurricular activities as a deterrent measure were not unconstitutional per se. Perle and Browning, *Student Classifications and Equal Protection*, 3 Journal of Law & Education 93 (1974). Thus, it was stated in *Starkey v. Board of Education*, 14 Utah 2d 227, 381 P.2d 718 (1963) that:

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"It is not for the courts to be concerned with the wisdom or propriety of the resolution as to its social desirability, nor whether it best serves the objectives of education, nor with the convenience or inconvenience of its application to the plaintiff in his particular circumstances. So long as the resolution is deemed by the Board of Education to serve the purpose of best promoting the objectives of the school and the standards for eligibility are based upon uniformly applied classifications which bear some reasonable relationship to the objectives, it cannot be said to be capricious, arbitrary or unjustly discriminatory." Pg. 720

See, Kissick v. Garland Independent School District, 330 S.W.2d 708 (Tex. Civ. App. 1959), overruled, 507 S.W.2d 636 (1974), which upheld the rule as a valid attempt to discourage early marriages.

Nevertheless, a dramatic reversal of this judicial trend began to take place in the 1970's. Illustrative of this reversal is *Holt v. Shelton*, 371 F. Supp. 821 (M.D. Tenn. 1972), where it was held that a regulation barring married students from extracurricular activities infringed upon married students' fundamental right to marry and in the absence of a compelling state interest, impermissibly infringed on the plaintiff's rights to due process and equal protection. A similar result obtained in *Davis v. Meek*, 344 F. Supp. 298 (N.D. Ohio 1972), where the court was unable to find a necessary compelling state interest sufficient to justify an otherwise patently unequal treatment of the married student. The court concluded that extracurricular activities were an important part of the educational process. In so holding, it stated:

"[E]xtra curricular activities are . . . an integral and complementary part of the total school program . . . "[h]igh school students are human beings . . . and they learn more in school than just the formal scholastic subjects." 334 F. Supp. at Pg. 301.

Although at least one court has concluded that high school students do not have a fundamental right to participate in extracurricular activities, see *Haas v. South Bend Community School Corp.*

289 N.E.2d 495 (Ind. 1972), the present trend of judicial authority is represented by *Moran v. School District*, 350 F. Supp. 1180, 1184 (N.D. Montana 1972), where the court stated that the ". . . right to attend school includes the right to participate in extracurricular activities." Thus, Berwick and Oppenheimer concluded in their article, "Marriage, Pregnancy, and The Right to go to School", 50 Texas L.R. 1196, that this legal position is substantially supported by the weight of scholarly opinion. As stated by the court in *Moran v. School District*, 350 F. Supp. 1180 (D. Montana 1972), because they are fundamental to the educational process, the "right to attend school includes the right to participate in extracurricular activities." Pg. 1184.

Furthermore, other courts have held similar such regulations restricting married students to be an infringement of a student's right to marry. The court in *Bell v. Lone Oak Independent School District*, 507 S.W.2d 636 (Tex. Civ. App. 1974), held such a regulation was discriminatory in effect and punishes those who legally contract a valid marriage. It went on to state that "although there may not be a guaranteed right to an education, if the state undertakes to provide such an education, it must do so in a manner which is nondiscriminatory." 507 S.W.2d at Pg. 638. (The injunction in *Bell, supra*, was set aside in 515 S.W.2d 252 after the plaintiff graduated.)

Furthermore, it has been urged such rules infringe upon the legislature's matriculated right to establish laws concerning marriage.

"Once the legislature has defined the right to marriage within the state, other political subdivisions should not be allowed to substitute their own notions of marriageable age . . . No matter how strong a school district's desire to deter legal marriages, the legislature's determination of the state interest remains paramount." 50 Texas L.Rev. at Pg. 1206 and 1207."

According to Bartley, *School Board Regulation Barring Married Students From Extracurricular Activities is Unconstitutional*, 6 Texas Tech. L. R. 215 (1974), one of the principal arguments against such rules is that they clearly infringe upon the individual's right to marital privacy. Therefore, it must be concluded that any school board rule or regulation which prohibits or limits a student's right to participate in extracurricular activities must be deemed void and without effect.

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A similar line of reasoning has been extended to those school rules which discriminate on the basis of parental status. In *Andrews v. Drew Municipal Separate School District*, 371 F. Supp. 27 (N.D. Miss. 1973), a school board policy of barring unwed parents from employment in public schools was held to violate the Equal Protection Clause of the Fourteenth Amendment to U.S. Constitution. The court based its decision primarily on the fact that "'parental status' as a basis of classification is no less offensive to the Fourteenth Amendment than religion or racial status classification or other groupings arbitrarily and unreasonably made by . . . the state."

Generally, any classificatory scheme based on marital status is impermissible unless it can be shown that it bears a rational relationship to a valid state policy. *Eisenstadt v. Baird*, 405 U.S. 438, 447, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972), *Stanley v. Illinois*, 405 U.S. 551, (1972) 31 L. Ed. 2d 551, (1972). It is difficult to conclude that the exclusion of unwed mothers and fathers from non-academic school activities bears a rational relationship to any permissible state objective. This precise conclusion was echoed by the court in *Perry v. Grenada Municipal Separate School District*, 300 F. Supp. 748 (N.D. Miss. 1969), where it was stated that the ". . . fact that a girl has one child out of wedlock does not forever brand her as a scarlet woman underserving of any chance for rehabilitation or the opportunity for future education." 300 F. Supp. at Pg. 753.

According to Goldstein, 117 U.Pa. L.R. 373, the justification offered most commonly by school boards for promulgation of these rules is to discourage other students from emulating married students and to prevent the "moral pollution" of the other students. However, the author goes on to point out that such rules punish students for an act which took place outside the school premises and also punish a status. Unwed parents have the same continuing interest as any other student in receiving an education.

The denial to pregnant women of the right to participate in extracurricular activities clearly violates 45 CFR 36.1 *et seq.*, more popularly referred to as Title IX. As stated in 40 Fed. Reg. § 86.40:

"A recipient (sic) shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery

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therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient."

Likewise, § 86.31 forbids such discrimination:

". . . no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives or benefits from Federal financial assistance. . ."

More specifically, schools shall not, on the basis of sex:

"(4) Subject any person to separate or different rules of behavior, sanctions, or other treatment."

The applicability of these federal provisions to your school district's policy guidelines is established by the definition of the word "recipient" contained at § 86.2(h):

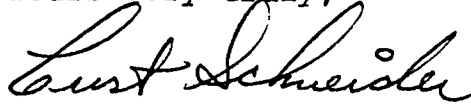
"'Recipient' means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof."

In summary, school board or district rules, regulations or policy guidelines which exclude, prohibit or limit the right of capability of students who are married, pregnant, or unwed

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parents to participate in non-academic or extracurricular school-sponsored or -related activities violates the Equal Protection Clause of the U.S. Constitution and is, therefore, void and without force and effect. In the case of those rules affecting only pregnant women, their promulgation is prohibited specifically by 45 CFR 86.40, more popularly termed Title IX.

Yours very truly,



CURT T. SCHNEIDER
Attorney General

CTS:HTW:MS:kj