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"A" Students Go To Court: Is Membership in the National Honor Society a Cognizable Legal Right?

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“A” STUDENTS GO TO COURT: IS MEMBERSHIP IN THE NATIONAL HONOR SOCIETY A COGNIZABLE LEGAL RIGHT?

Thomas A. Schweitzer[†]

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INTRODUCTION

In a widely reported case, a federal judge in Kentucky recently ordered a school district to admit two superior students who were unmarried mothers to the National Honor Society (“NHS”).¹ The girls, both seventeen when the case was filed, had excellent grades: Somer Chipman had a grade point average (“GPA”) of 3.9 on a scale of 4.0, and

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1. *Chipman v. Grant County Sch. Dist.*, 30 F. Supp. 2d 975 (E.D. Ky. 1998). Somer Chipman gave birth to a daughter, Cheyenne, on June 1, 1998. *Id.* at 977. On August 6, 1998, American Civil Liberties Union attorneys filed the complaint of Somer Chipman and Chasity Glass in federal court in Covington, Kentucky. Feminists for Life of America, *ACLU and FFL Win Case for Teen Moms* (visited Jan. 19, 2000) <<http://www.feministsforlife.org/hottopic/nhspr.htm>>. The next day, Somer Chipman married Cheyenne’s father, Shawn Hurston, and took his name. See Ethan Bronner, *Two Girls to Sue School They Say Denied Honors Because of Pregnancies*, PALM BEACH POST, Aug. 6, 1998, at A3.

Chasity Glass had a GPA of 3.7.² Nevertheless, although each of the other 31 students with GPA's of 3.5 or better was admitted to the NHS by the faculty committee of Grant County High School, Chipman and Glass were denied admission on character grounds.³ The girls, represented by the American Civil Liberties Union (ACLU), sued, alleging violation of their rights under the Equal Protection Clause and Title IX, and of their state and federal rights to privacy and personal autonomy.⁴ On December 29, 1998, District Judge William Bertelsman granted them a preliminary injunction on the grounds that they had a high likelihood of success in proving their claim of discrimination on the basis of pregnancy in violation of Title IX.⁵ The court ordered the Grant County School District to admit Somer Chipman and Chasity Glass to the Grant County High School NHS chapter

2. Bronner, *supra* note 1. Chipman and Glass also had exemplary records of extracurricular activities. According to the affidavit she filed in the case, Somer Chipman worked part-time as a nursing assistant and regularly traveled a long distance to help care for her 85-year-old disabled grandfather. Affidavit of Somer Chipman Hurston in Support of Plaintiffs' Motion for Summary Judgment ¶ 8, *Chipman* (No. 98-180) [hereinafter Affidavit of Somer Hurston]. She played first chair flute in the Grant County High School Concert Band and was Senior Class Representative on the Student Council. *Id.* ¶ 7. She was also active in fund-raising for the school's marching band, media class and school newspaper, as well as for Brothers and Sisters in Christ, which provided support for people in need. *Id.* ¶ 6. Chasity Glass's affidavit in the case stated that she was one of only eight Grant County High School students nominated for the prestigious Governor's Scholars Program. Affidavit of Chasity Glass in Support of Plaintiffs' Motion for Preliminary Injunction ¶ 5, *Chipman* (No. 98-180) [hereinafter Affidavit of Chasity Glass]. She had been captain of the marching band colorguard team since her junior year, was a dance soloist in the marching band, was an accomplished flutist and singer, and had been accepted by the Morehead State University Concert Choir, which was to perform in Carnegie Hall in New York City the next year. *Id.* ¶¶ 7-8. Both girls also testified that they had earned a large number of awards and commendations for their course work in school. Affidavit of Somer Hurston ¶ 5; Affidavit of Chasity Glass ¶ 5.

3. Susan Vela, *2 Graduate With Honors From Court*, CINCINNATI ENQUIRER, June 7, 1999, at B01. The district court found that "[t]here is strong evidence that the GCNHS selection committee considered the fact that each plaintiff had engaged in premarital sexual activity and had given birth to a child out of wedlock." *Chipman*, 30 F. Supp. 2d at 977. According to Grant County Board of Education counsel Donald J. Ruberg, "[g]iven the fact that character is one of the criteria, the admissions committee did not feel that someone who had engaged in premarital sex should be held up as a role model for the rest of the students to emulate, whether male or female." Ethan Bronner, *School Board Sued After Moms Denied Honor Society Entrance - 2 Kentucky Teens Say Chapter Excluded Them Because of Pregnancies*, DALLAS MORNING NEWS, Aug. 9, 1998, at 12A. Williamstown, some 30 miles south of Cincinnati, is a conservative, rural, tobacco-growing area where alcohol sales are banned. *Id.*

4. *Chipman*, 30 F. Supp. 2d at 976. The defendants were the Grant County School District, James Simpson, Superintendent of the Grant County School District, and five members of the Grant County School District Board of Education.

5. *Id.* at 978-80.

no later than January 31, 1999, pending trial of their action.⁶

The NHS, which has chapters in high schools throughout the United States,⁷ is sponsored by the National Association of Secondary School Principals (“NASSP”). High schools can establish local NHS chapters if they pay a chartering fee and annual initiation fee to the NHS and adopt the NHS constitution.⁸ Membership in the NHS is a coveted distinction, which is open only to students with cumulative GPA’s of at least 3.0 on a 4.0 scale.⁹ An outstanding academic record alone, however, does not guarantee admission to the NHS: applicants must also achieve satisfactory rankings in service, leadership, and character from the faculty committee at their school, which determines eligibility.¹⁰ But while superior grades, the

6. *Id.* at 980. Shortly afterward, Somer Chipman Hurston and Chasity Glass were honored in legislative citations sponsored by Kentucky State Representatives Kathy Stein and Mary Lou Marzian, which were adopted without objection. Michael Collins, *Two Kentucky Lawmakers Honor Student Mother*, CINCINNATI POST, January 12, 1999, at 12A. “Both lawmakers said the two young mothers showed tremendous courage and tenacity for standing up against discrimination and fighting for the right to be admitted into the honors organization.” *Id.* Somer Chipman Hurston and Chasity Glass were inducted as new members of the Grant County High School NHS chapter in May 1999, shortly before their graduation. Michael Pollak, *Honored, A Year Later*, N.Y. TIMES, May 19, 1999, at B10. The case was scheduled to go to trial on Monday, October 25. John C. K. Fisher, *Honor Society Trial Near*, CINCINNATI POST, October 21, 1999, at 13A. It was settled on Friday, October 22. Susa Vela, *Teens Barred From Honor Club Will Get \$999; School Vows to Uphold Law*, CINCINNATI ENQUIRER, Oct. 22, 1999, at 1. Both girls received \$999, and Grant County High School agreed that it would not violate Title IX. *Id.* The Grant County School District also agreed to report to the American Civil Liberties Union over a five-year period which otherwise eligible students were excluded from NHS membership by gender because of their record of sexual activity. *Id.* While the high school authorities were permitted by the agreement to take into account sexual activity in selecting NHS members, they promised to do this in a way that did not prejudice females or penalize girls who become pregnant. Telephone Interview with Suzanne Cassidy, Counsel for the Grant County School District (Nov. 2, 1999); Telephone Interview with Sara Mandelbaum, ACLU Counsel for Chasity Glass and Somer Hurston (Nov. 2, 1999).

7. The NHS has more than 15,000 members in U.S. high schools. Terry Kinney, 2 *Unwed Mothers Ask Court to Order Honor*, CHATTANOOGA FREE PRESS, Nov. 25, 1998, at A3.

8. NATIONAL HONOR SOC’Y CONST. art. IV (Local Chapters), §§ 1 – 3 [hereinafter NHS CONST.].

9. NHS CONST. art. IX (Selection of Members), § 2. Local NHS chapters are permitted to adopt additional admissions criteria so long as they are consistent with the NHS constitution. NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS, NATIONAL HONOR SOC’Y HANDBOOK 25 (15th ed. 1997) [hereinafter NASSP]. Thus, the Grant County NHS increased the required GPA from the 3.0 required by national NHS rules to 3.5. *Chipman*, 30 F. Supp. 2d at 977.

10. NHS CONST. art. VIII (Membership), § 1 (“Membership in local chapters is an honor bestowed upon a student. Selection for membership is by a Faculty Council and is based on outstanding scholarship, character, leadership, and service. Once selected, members have the responsibility to continue to demonstrate these qualities.”). “While the

foremost criterion for eligibility, are precisely quantifiable, the latter three factors are not and, indeed, are inherently subjective. Applicants' character and records of service and leadership, moreover, are secretly evaluated by a faculty committee, which is not required to divulge the basis for its decisions.¹¹

academic criterion is important and should be considered first, membership should never be considered on the basis of grades alone, even though a Faculty Council may consider scholarship as the most important of the four criteria. Schools that select members solely on the basis of scholarship are violating the Constitution and placing their charters in jeopardy." NASSP, *supra* note 9, at 24. The NHS Constitution further states that "[t]he National Council and the NASSP shall not review the judgment of the Faculty Council regarding selection of individual members to local chapters." NHS CONST. art. IX (Selection of Members), § 5.

11. NHS CONST. art. IX (Selection of Members), § 3. "Chapters are not legally or constitutionally obligated to share with parents and students information concerning specific students not selected for membership in the Society." NASSP, *supra* note 9, at 34. After she was passed over for NHS membership, Somer Chipman's parents tried to find out the reason. In a letter to the editor of the Grant County News, the student's mother wrote:

When we first learned that Somer was not going to be admitted into the National Honor Society, naturally, we wanted to know why. After all, every other student who met the GPA standard was admitted. First, my husband and I spoke with the principal of Grant County High School. He told us that he didn't know why Somer was not admitted. Next, we asked to speak with the school's selection committee. This request was initially approved but then rescinded, with the principal informing us that we had no right to know why Somer was not admitted.

America Civil Liberties Union, *An Open Letter to the Editor of the Grant County News from Brenda Jones, Mother of Somer Chipman* (Aug. 6, 1998) <<http://www.aclu.org/news/n080698d.html>> [hereinafter *Open Letter from Brenda Jones*]. While it was universally assumed that Chipman and Glass had been denied NHS membership because they had children out of wedlock, counsel for the Grant County School District carefully refrained from acknowledging this or describing the faculty committee's selection process. Thus, the plaintiffs' complaint argued:

The NHS Constitution explicitly requires that '[t]he selection process must be public information, available to parents, students, and faculty upon request.' In violation of this explicit rule, defendants have to date steadfastly refused to provide this information, despite repeated oral and written requests made by plaintiffs and their representatives. In addition to refusing to make public their selection procedures, defendants have failed to date to provide any meaningful explanation for plaintiffs' exclusion beyond the vague statement of the Superintendent that plaintiffs 'did not meet the collective criteria.' It is only indirectly, through comments made to the press, that defendants have hinted that the basis for their decision was the sexual conduct resulting in plaintiffs' status as pregnant and parenting students.

Plaintiffs' Memorandum of Law in Support of Motion for Preliminary Injunction, *Chipman* (No. 98-180) (citations omitted). In another NHS case, the New York Commissioner of Education, the ultimate appellate authority in administrative appeals of New York education cases, rejected the contention that respondent school district should have required a teacher to give the reasons for his or her negative NHS recommendation. *In re Torre-Tasso*, 25 N.Y. Educ. Dep't Rep. 47, 49 (Comm'r of Educ. 1985). The Commissioner stated, "[m]y review of the National Honor Society Constitution does not reveal any such requirement."

Since superior academic achievement is the principal requirement for membership in the NHS, students with top grades are likely to feel that they have earned admission and to feel aggrieved if they are excluded on such inherently subjective grounds as inadequate service, leadership or character. It is widely believed that distinctions such as NHS membership enhance a student's chance of being admitted to a prestigious college,¹² and it can be argued that denial of admission to a student with top grades stigmatizes the student by raising the obvious question of what flaw caused such a superior student to be excluded.¹³ Not surprisingly, some of these students have gone to court to vindicate what they regard as a legal entitlement. Similar claims have been made by students dismissed from NHS chapters for failure to keep up with NHS standards.¹⁴

Chipman v. Grant County School District is only the latest in a series of cases alleging unequal application of admissions standards to boys and

Id.

12. Chasity Glass stated in her affidavit:

I plan to apply to several highly selective colleges during the fall semester, and I believe that National Honor Society membership is a tremendous advantage when applying to college. I hope to be a high school English or History teacher. It is my understanding that college admissions officers look favorably upon National Honor Society Membership. I am afraid that my current inability to list membership in the National Honor Society on my college applications may have a negative impact on my college admissions prospects.

Affidavit of Chasity Glass ¶ 12. Somer (Chipman) Hurston's affidavit contained an almost identical statement. Affidavit of Somer Hurston ¶ 10. Accordingly, the court found that plaintiffs would suffer irreparable injury in the absence of an injunction, and it based this in part on the fact that “the plaintiffs will be unable to list NHS membership on their college admission applications and on financial aid applications.” *Chipman*, 30 F. Supp. 2d at 980.

13. This was the reaction of Justin Dangler, a student at Yorktown High School in Westchester County, New York, after a federal jury rejected his claim that he had been denied NHS membership in retaliation for his and his father's exercise of their freedom of speech. *Dangler v. Yorktown Cent. Schs.*, 771 F. Supp. 625 (S.D.N.Y. 1991) [hereinafter *Dangler I*]. He told a reporter that exclusion from the NHS would hurt him when he applied to schools like Harvard, Yale, the University of Pennsylvania, Williams College and Amherst College: “When colleges take a look at my application, they're going to see an incredible record with a lot of strengths, and they're going to say, ‘Why isn't this kid in the National Honor Society - what's wrong with him?’” Lisa W. Foderaro, *Jury Denies Bid to Join Honor Society*, N.Y. TIMES, Oct. 2, 1991, at B2.

14. See, e.g., *Pfeiffer v. Marion Ctr. Area Sch. Dist.*, 700 F. Supp. 269 (W.D. Pa. 1988) [hereinafter *Pfeiffer I*], *aff'd*, *Pfeiffer v. Marion Ctr. Area Sch. Dist.*, 917 F.2d 779 (3d Cir. 1990) (dismissal for pregnancy) [hereinafter *Pfeiffer II*]; *Ector County Indep. Sch. Dist. v. Hopkins*, 518 S.W.2d 576 (Tex. App. 1975) (dismissal for drinking wine). As noted previously, the NHS Constitution requires that members continue to fulfill the scholarship, character, leadership and service requirements after they become NHS members. NHS CONST. art. VIII (Membership), § 1. The NHS Constitution also provides that NHS members can only be dismissed upon a majority vote of the faculty council following a hearing. NHS CONST. art. X (Dismissal), §§ 4-5.

girls.¹⁵ Other cases have resulted from students being excluded or dismissed from the NHS for getting married;¹⁶ for joining fraternities, sororities or other secret organizations;¹⁷ for consumption of beer, wine or alcohol;¹⁸ for refusal to recite the Pledge of Allegiance;¹⁹ for allegedly cheating on tests;²⁰ or for using profanity.²¹ In a handful of cases, students have alleged that they were excluded because of racial or religious prejudice,²² and in a large number of cases, the reasons for exclusion are

15. *Pfeiffer II*, 917 F.2d at 783-84; *Cazares v. Barber*, No. CIV-90-0128-TUC-ACM, slip op. (D. Ariz. May 31, 1990) [hereinafter *Cazares I*], *aff'd*, 959 F.2d 753 (9th Cir. 1992) [hereinafter *Cazares II*]; *Wort v. Vierling*, No. 82-3169, slip op. (C.D. Ill. Sept. 4, 1984) [hereinafter *Wort I*], *aff'd*, 778 F.2d 1233 (7th Cir. 1985) [hereinafter *Wort II*].

16. *Romans v. Crenshaw*, 354 F. Supp. 868 (S.D. Tex. 1971).

17. *Isgrig v. Srygley*, 197 S.W.2d 39 (Ark. 1946).

18. *See, e.g., Farver v. Board of Educ.*, 40 F. Supp. 2d 323 (D. Md. 1999); *Ector County*, 518 S.W.2d at 578.

19. Nat Hentoff, *Allegiance to Constitution*, CHATTANOOGA TIMES, Aug. 25, 1997, at A8. Tisha Byars, a seventeen-year-old black student at Wilby High School in Waterbury, Connecticut, was the most successful student plaintiff to challenge in court the denial of her admission to the NHS. She remained seated while other students recited the Pledge of Allegiance because her father had instructed her not to stand, and she did not believe that there was "liberty and justice" for African-Americans in America. *Id.* As a result, she was banished from her homeroom while the pledge was being recited and was required to sit outside Principal Martin Galvin's office. *Id.* In addition, while she had a 3.75 grade point average, which would qualify her for membership, she was denied admission to the NHS. Susan D. Etkind, *Byars v. City of Waterbury*, CONN. LAW TRIB., Apr. 14, 1997, § Deals and Suits. Byars transferred to a different high school and then sued Galvin, the eight faculty selection committee members and the city of Waterbury in federal court in April 1997. Susan D. Etkind, *Byars Gets a \$60,000 Settlement, With Honor*, CONN. LAW TRIB., Feb. 16, 1998, at 4. An angry Judge Peter Dorsey chastised the school officials at a hearing for failing to heed the clear mandate of *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), which held that expelling from school Jehovah's Witness children who refused to salute the flag violated their freedom of speech under the First Amendment. Hentoff, *supra*. Rejecting as pretextual the defendants' contention that Byars's exclusion from the NHS was due to her ignoring a teacher's order to stop eating corn chips in class, Judge Dorsey issued a preliminary injunction in May 1997 ordering her admission to the NHS on a temporary basis. *Honor Society Must Admit Student Who Refused to Recite Pledge*, LEGAL INTELLIGENCER, May 9, 1997, at 4. Byars was inducted into the NHS at Wilby High School on June 10. Brigitte Greenberg, *Under Court Order, Student Joins National Honor Society*, LEGAL INTELLIGENCER, June 12, 1997, at 4. On January 26, 1998, Byars, who was now a student at the University of Connecticut, agreed to settle the suit for \$60,000 in damages, permanent induction into the NHS, and creation of a racially and socially diverse panel of educational professionals, civic leaders and parents to monitor NHS admission practices by the three Waterbury high schools for four years to ensure that minority applicants were not held to a higher standard than white applicants, as Byars had charged. Etkind, *supra*.

20. *Jacob v. School Bd.*, 519 So. 2d 1002 (Fla. Dist. Ct. App. 1987). In another case, thirteen top students at Sunny Hills School in Fullerton, California, were expelled from the NHS when they were found to have copied homework in a senior honors class in philosophy. *Honor Students Dis-Honored For Cheating*, NEWSDAY, Apr. 11, 1997, at A36.

21. *Dangler*, 771 F. Supp. at 627.

22. *In re Friedberg*, 34 N.Y. Educ. Dep't Rep. 284, 285 (Comm'r of Educ. 1994)

vague or obscure.²³

Because of the longstanding tradition of judicial deference to the academic assessments of educators,²⁴ students seeking the reversal of negative NHS decisions in court face an uphill battle. The most successful have been those, like *Chipman*, who have persuasively shown that different standards have been applied to male and female applicants. Those alleging a denial of due process have usually been unsuccessful, since courts have uniformly denied that NHS membership is a property interest,²⁵ and only one court has held that denial of NHS membership implicates a liberty interest.²⁶

This article summarizes the cases which the author has found challenging exclusion from NHS membership.²⁷ It describes and analyzes the arguments which plaintiffs have made in seeking to reverse such exclusions as well as the courts' decisions. Its conclusion seeks to articulate what the correct rules of law should be in this controversial area.

I. THE TITLE IX CASES

As noted above, judges have generally been reluctant to intervene in school matters on behalf of academically aggrieved students when intervention necessitates second-guessing the academic evaluations of ostensibly professional educators.²⁸ For similar reasons, courts have been hesitant to recognize students' liberty or property interests in higher education programs such as medical school,²⁹ as this would trigger the application of formal due process procedures whenever a student was about

(claim of discrimination against student because she was Jewish rejected); *In re Rezac*, 18 N.Y. Educ. Dep't Rep. 327, 327 (Comm'r of Educ. 1978) (claim of racial discrimination rejected).

23. See, e.g., *Price v. Young*, 580 F. Supp. 1 (E.D. Ark. 1983); *Karnstein v. Pewaukee Sch. Bd.*, 557 F. Supp. 565 (E.D. Wis. 1983).

24. See Thomas A. Schweitzer, 'Academic Challenge' Cases: Should Judicial Review Extend to Academic Evaluations of Students?, 41 AM. U. L. REV. 267 *passim* (1992).

25. *Price*, 580 F. Supp. at 2; *Karnstein*, 557 F. Supp. at 567.

26. *Warren v. National Assoc. of Secondary Sch. Principals*, 375 F. Supp. 1043, 1048 (N.D. Tex. 1974).

27. In many of these cases, student candidates were denied admission to the NHS. In other cases, they were admitted to their school's chapter and subsequently dismissed for misconduct. As noted previously, "[o]nce selected, members have the responsibility to continue to demonstrate" the qualities for which they were selected, i.e., "outstanding scholarship, character, leadership, and service." NHS CONST. art. VIII (Membership), § 1. Thus, the standards applied are the same when a student is denied admission and when a student already a member is dismissed.

28. Schweitzer, *supra* note 24, *passim*.

29. *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985); *Board of Curators v. Horowitz*, 435 U.S. 78 (1978).

to be dismissed for academic insufficiency. The principal instance in which the Supreme Court has intervened to recognize a liberty interest deserving of due process protections is *Goss v. Lopez*, in which junior high students accused of misconduct had been dismissed from school for up to ten days without any hearing.³⁰ This case involved the significant deprivation of a right to universal education³¹ which, while the Supreme Court has not deemed it fundamental,³² is very important indeed.³³ Finding a person guilty of misconduct without affording him or her any opportunity to present his or her side of the matter entails a palpable injustice which courts can recognize and redress without having to make any academic evaluation of the aggrieved party.

Similarly, no judicial academic assessments were required to adjudicate *Chipman* and the other NHS pregnancy cases.³⁴ The statistical evidence was stark: The record showed that pregnant students had uniformly been denied admission to or dismissed by the NHS,³⁵ whereas no

30. 419 U.S. 565, 567 (1975).

31. Every state makes education compulsory for certain age groups and guarantees free public education to virtually all young people within a broader age range. STEPHEN R. GOLDSTEIN, ET AL., *LAW AND PUBLIC EDUCATION – CASES AND MATERIALS* 15-16 (3d ed. 1995).

32. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

33. As Chief Justice Warren observed:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today, it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

34. *Pfeiffer v. Marion Ctr. Area Sch. Dist.*, 917 F.2d 779 (3d Cir. 1990) [hereinafter *Pfeiffer II*]; *Cazares v. Barber*, No. CIV-90-0128-TUC-ACM, slip op. (D. Ariz. May 31, 1990) [hereinafter *Cazares I*], *aff'd*, 959 F.2d 753 (9th Cir. 1992) [hereinafter *Cazares II*]; *Wort v. Vierling*, No. 82-3169, slip op. (C.D. Ill. Sept. 4, 1984) [hereinafter *Wort I*], *aff'd*, 778 F.2d 1233 (7th Cir. 1985) [hereinafter *Wort II*].

35. In another prominent case, eighteen-year-old Amanda Lemon of Xenia, Ohio, whose GPA was 3.8, had been selected for membership in the Xenia High School NHS chapter. American Civil Liberties Union, *ACLU Fact Sheet - Discrimination Against Pregnant and Parenting Students* (Aug. 6, 1998) <<http://www.aclu.org/news/n080698e.html>> [hereinafter *ACLU Fact Sheet*]. When she attended the rehearsal for her induction ceremony, however, she was notified that the decision to select her had been reversed because school officials had learned in the interim that she was unmarried and had a nine-month-old baby. *Id.* She formally complained to her

instance had been cited where a male student had been excluded or dismissed by the NHS for premarital sexual relations.³⁶ Indeed, in both *Pfeiffer v. Marion Center Area School District* and *Cazares v. Barber*, record evidence disclosed that male students who had fathered children while unmarried were admitted to the NHS.³⁷ As a result, plaintiffs were able to make a persuasive factual showing that defendants had violated

school and subsequently filed a complaint with the Ohio Human Rights Commission but evidently did not sue Xenia High School. *Id.* On April 28, 1998, Amanda Lemon and Xenia Superintendent of Schools James Smith appeared on the “Today” show on NBC television news with Katie Couric and later on the CNN television program “Talkback Live” with Miles O’Brien and four other commentators. *Today* (NBC television broadcast, Apr. 28, 1998); *CNN Talkback Live* (CNN television broadcast, Apr. 28, 1998). The court in *Pfeiffer* noted that at trial, “[t]estimony was presented that a pregnant female student had resigned from the NHS chapter after an admission of engaging in premarital sex 10 to 12 years earlier. She apparently had been given the choice of resignation or dismissal by the faculty council. No male member of the chapter has ever been dismissed for premarital sexual activity.” *Pfeiffer II*, 917 F.2d at 783.

36. As Judge Bertelsman stated, “[a]lthough 100% of young women who are visibly pregnant or who have had a child out of wedlock are denied membership, as far as the record reflects, defendants’ policy excludes 0% of young men who have had premarital sexual relations and 0% of young women who have had such relations but have not become pregnant or have elected to have an early abortion.” *Chipman v. Grant County Sch. Dist.*, 30 F. Supp. 2d 975, 979 (E.D. Ky. 1998). Xenia, Ohio Superintendent of Schools James Smith claimed that boys in his district had been denied NHS membership in the past because they had fathered children but he mentioned no specific case. *CNN Talkback Live*, *supra* note 35. On the same program, Amanda Lemon claimed that a school official had told her “that they do know people in the National Honor Society that have had abortions . . .” but she furnished no further details. *Id.* Most of the people who spoke on CNN Talkback Live expressed the opinion that it was unfair and anomalous to penalize Amanda Lemon for bearing a child while admitting to the NHS other girls who had had abortions, which they regarded as a greater evil than unmarried motherhood. *Id.*

37. *Pfeiffer II*, 917 F.2d at 783 (“The appellant offered to introduce testimony by a former student who was a male member of the chapter, that two years after Pfeiffer’s dismissal, while a senior at the high school he impregnated his girlfriend and that he was not dismissed from the chapter. The district court excluded the evidence.”). The district court in *Cazares* found that “Plaintiff ELISA CAZARES was rejected by the National Honor Society Selection Committee of the Tohono O’odham High School because she was pregnant, unmarried, and not living with the father of the child.” *Cazares I*, slip op. at 2. It further found that “[a] male student who had fathered a child and was not living with the child’s mother was accepted as a candidate for the Tohono O’odham High School chapter of the National Honor Society with no discussion by the selection committee as to his status as a father or his relationship with the child’s mother.” *Id.* See also *Andrews v. Drew Municipal Separate School District*, in which the court held that automatic disqualification from employment in the school system of parents of illegitimate children violated the Equal Protection Clause, since from the beginning only unwed mothers and not unwed fathers were adversely affected by the rule, which by its nature could only be applied against females, and the rule therefore created “an inherently suspect classification based on sex, i.e., single women, which could not survive the scrutiny of the fourteenth amendment.” 507 F.2d 611, 613-14 (5th Cir. 1975).

Title IX,³⁸ the applicable regulations,³⁹ and the Equal Protection Clause,⁴⁰ not to mention the NHS's own regulations.⁴¹ In *Chipman*, Judge Bertelsman concluded that plaintiffs were likely to succeed in showing a violation of Title IX under either a "disparate impact" or a "disparate treatment" theory.⁴²

Thus, for plaintiffs to prevail, it was unnecessary to argue that the faculty selection committees had acted with malice towards female applicants or had intentionally discriminated against them. The plaintiffs' pregnancies undoubtedly came to the attention of the faculty selection committees because they were obvious and impossible to conceal, and not because applicants were questioned about their sexual histories.⁴³ The sexual past of male NHS applicants, of course, was not similarly vulnerable to exposure. As Judge Bertelsman observed in *Chipman*, while the evidence indicated that the Grant County High School Selection Committee would have considered any evidence of paternity in evaluating the character of male applicants, "it was unlikely that any such knowledge would come before the committee in any way but rumor or gossip."⁴⁴

38. Education Amendments of 1972 § 901(a), 20 U.S.C. § 1681(a) (1999).

39. 34 C.F.R. § 106.40(a) – (b) (1980).

40. U.S. CONST. amend. XIV.

41. According to the NASSP:

It should be noted that, under provisions of federal law, pregnancy - whether within or without wedlock - cannot be the basis for automatic denial of the right to participate in any public school activity. It may properly be considered, however, like any other circumstance, as a factor to be assessed in determining character as it applies to the National Honor Society. But pregnancy may be taken into account in determining character only if evidence of paternity is similarly regarded.

NASSP, *supra* note 9, at 29.

42. *Chipman*, 30 F. Supp. 2d at 978-80.

43. In *Chipman*, Judge Bertelsman found that "[t]here is . . . strong evidence that the selection committee did not ask those students offered admission to the NHS - male or female - if they had engaged in premarital sexual activity," *id.* at 977, but he hastened to add that "[t]he court certainly does not suggest that they should have done so." *Id.* at 977 n.2.

44. *Id.* at 977. Somer Chipman's mother and co-plaintiff, Brenda Jones, contended in an open letter dated August 6, 1998, the date their action was filed, that this policy of the NHS faculty selection committee at Grant County High School had an unfair impact on pregnant candidates:

Since the school selection committee and school board will not say it publicly, I will say it for them - Somer was not admitted into the National Honor Society because she engaged in premarital sex and is pregnant out of wedlock. If this is the standard, how, may I ask, can it be applied fairly to all students eligible for admission into the National Honor Society? Since boys cannot get pregnant, how do they screen them for premarital sex? Furthermore, How do they screen other girls who are not pregnant?

Open Letter from Brenda Jones, supra note 11. The press release noted, "[t]he following

A. The Title IX Statute and Regulations

The Supreme Court has held that there is an implied private right of action for violations of Title IX.⁴⁵ While plaintiffs in *Chipman* alleged a variety of civil rights claims in their pleadings,⁴⁶ the district court considered only Title IX in granting a preliminary injunction. Title IX provides in pertinent part:

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.⁴⁷

The Title IX regulations explicitly apply its prohibition against sex discrimination to parental status:

A recipient [of federal funds] shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex.⁴⁸

The regulations, moreover, also outlaw discrimination against pregnant persons:

(b) Pregnancy and related conditions. (1) A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.⁴⁹

Neither Title IX nor the regulations, of course, protect a right of

letter was published last month in its entirety in the Grant County News and in the Kentucky Post." *Id.*

45. *Cannon v. University of Chicago*, 441 U.S. 677, 709 (1979).

46. *Supra* notes 38-41 and accompanying text.

47. 20 U.S.C. §1681(a). In *Iron Arrow Honor Society v. Heckler*, the court reviewed the legislative history of Title IX, including a number of amendments which were proposed to limit its coverage, most of which were not adopted. 702 F.2d 549 (5th Cir. 1983). The court concluded, "[t]hese amendments reveal that Congress contemplated the problem of Title IX's coverage of outside organizations, including honor societies such as Iron Arrow, and that Congress did not act to prevent such an extension of HEW's authority under Title IX." *Id.* at 559. Through its decision, the court upheld a federal regulation which threatened the University of Miami with a total cutoff of federal funds because it gave "substantial assistance" to the Iron Arrow Honorary Society, the most prestigious honorary-recognition society at the university, since it excluded women from membership. *Id.* at 561.

48. 34 C.F.R. § 106.40(a).

49. 34 C.F.R. § 106.40(b).

unmarried students to engage in sexual intercourse.⁵⁰ Since pregnant unmarried students have by definition engaged in premarital sexual intercourse, it seems analytically artificial to try to separate illicit coitus from pregnancy. Nevertheless, such a distinction makes a critical difference for Title IX purposes, as the *Pfeiffer* case demonstrates.⁵¹

The facts in *Pfeiffer* closely resembled the facts of the *Chipman* case. Arlene Pfeiffer, a very good student who was active in extracurricular activities, was elected to the NHS chapter at the Marion Center Area High School in Pennsylvania in 1981.⁵² She informed the high school authorities that she was pregnant during the spring of 1983, and her baby was born in the fall.⁵³ After a meeting of the school's NHS faculty council at which Pfeiffer was present and answered questions, the five council members voted unanimously on November 9, 1983 to dismiss her from the NHS for "[f]ailure to uphold the high standards of leadership and character required for admission and maintenance of membership."⁵⁴ She appealed this decision in December to the school board, which voted unanimously to affirm the faculty council decision on January 16, 1984.⁵⁵ She graduated with honors in 1984 and took a job with Holiday Inn instead of going to college.⁵⁶ She also got married, but not to the father of her child.⁵⁷

Pfeiffer sued the school district, the school board, members of the NHS faculty selection committee, the NASSP, the NHS and various other individuals in 1984, alleging violations of Title IX, 42 U.S.C. §§ 1983 and 1985, and various claims based on Pennsylvania law.⁵⁸ She sought an injunction reinstating her and correcting the school district records to

50. The closest the Supreme Court has come to deciding this question is apparently *Carey v. Population Services International*, in which a divided Court struck down a New York statute prohibiting the sale or distribution of contraceptives to minors under 16. 431 U.S. 678 (1977). The Court stated in a footnote: "Appellees argue that . . . the right to privacy comprehends a right of minors as well as adults to engage in private consensual sexual behavior. We observe that the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating such behavior among adults" *Id.* at 694 n.17.

51. *Pfeiffer v. Marion Ctr. Area Sch. Dist.*, 700 F. Supp. 269 (W.D. Pa. 1988) [hereinafter *Pfeiffer I*], *aff'd*, *Pfeiffer v. Marion Ctr. Area Sch. Dist.*, 917 F.2d 779 (3d Cir. 1990) [hereinafter *Pfeiffer II*].

52. *Pfeiffer II*, 917 F.2d at 782.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 783.

57. *Id.*

58. *Id.* The state law claims were brought under 43 PA. CONS. STAT. ANN. §955 (i)(1) (1991) and PA. CONST. art. I, § 28. *Id.*

reflect this, as well as compensatory and punitive damages.⁵⁹ After initially rejecting her Title IX claim on the authority of *Grove City College v. Bell*,⁶⁰ the district court reinstated her Title IX claim after Congress nullified the *Grove City* decision by enacting the Civil Rights Restoration Act of 1989.⁶¹

Plaintiff Pfeiffer contended throughout that she was dismissed from the NHS because she was an unwed mother and that she was discriminated against on the basis of sex, while defendants maintained that she was dismissed because she admitted that she had voluntarily engaged in premarital sex, conduct inconsistent with the NHS's requirements of leadership and character.⁶² At a bench trial, each of the five faculty council members “specifically denied that his or her dismissal vote was based anywhere on Pfeiffer’s sex, on her pregnancy, or on her failure to marry after she engaged in premarital sexual activity.”⁶³ The district court accordingly concluded that “[t]he plaintiff was not dismissed for her pregnancy but because the council thought she failed to uphold the [NHS] standards [of leadership and character]” because the faculty council considered that the example set by premarital sex was inconsistent with those standards.⁶⁴

During the trial, plaintiff’s counsel made an offer of proof involving testimony by a male student who had been a sophomore member of the high school’s NHS chapter during Pfeiffer’s senior year.⁶⁵ He was ready to testify that two years later, when he was a senior, he had impregnated his girlfriend and had married her shortly after she became pregnant.⁶⁶ He had informed his teacher and other members of the Marion Center community that he had married because his fiancée had gotten pregnant and he was the

59. *Id.*

60. 465 U.S. 555 (1984).

61. *Pfeiffer II*, 917 F.2d at 783. The question in *Grove City* was what scope to give to the term “program” in Title IX. *Grove City*, 465 U.S. at 558-59. *Grove City* held that the grant of federal assistance to one program within a larger entity would not generally subject the entire entity to Title IX coverage. *Id.* at 604. Plaintiff Pfeiffer noted that the school district and high school received federal funding for school lunches, milk, library materials, and career guidance counseling; the district court pointed out that none of these programs bore any relation to the school’s NHS chapter and concluded on this basis that Title IX was inapplicable to Pfeiffer’s claim. *Pfeiffer I*, 700 F. Supp. at 271. The Civil Rights Restoration Act of 1987 was plainly intended to overrule *Grove City*, and the district court concluded in an Opinion and Order of August 17, 1989 that the Act made the school district subject to Title IX. *Pfeiffer II*, 917 F.2d at 783.

62. *Pfeiffer I*, 700 F. Supp. at 270.

63. *Pfeiffer II*, 917 F.2d at 785.

64. *Id.* at 783-84.

65. *Id.* at 785.

66. *Id.*

father.⁶⁷ Although the same five faculty members who had reviewed the Pfeiffer case were still on the school's NHS faculty council, they never approached him concerning his admitted premarital sexual activity.⁶⁸ This evidence was excluded by the district court on the grounds that it postdated the faculty council's November 1983 actions by several years.⁶⁹

On appeal, the Third Circuit was troubled by the exclusion of the male student's testimony, which it believed "ha[d] the potential of being relevant to whether the council members followed a double standard in evaluating premarital sexual activities of NHS chapter members."⁷⁰ Accordingly, it vacated and remanded this part of the district court's decision and directed that the evidence be admitted and considered upon remand. Nevertheless, in keeping with the dictates of Rule 52(a) of the Federal Rules of Civil Procedure,⁷¹ the appellate court did not reverse the lower court's finding of no discriminatory intent on the part of the faculty council.⁷² It held that the lower court's finding that Pfeiffer was dismissed because of premarital sexual activity and not because of gender discrimination was not clearly erroneous and accordingly affirmed it.⁷³

With its almost "hair-splitting" distinction between pregnancy and engaging in premarital sex as the reason for dismissing Pfeiffer's case, the *Pfeiffer* decision stands in sharp contrast to the two other earlier Title IX cases.

The plaintiff in *Wort v. Vierling* was selected for membership in the NHS in March 1981, became pregnant in July, was married in October and was dismissed from the NHS the following February for deficiency of leadership and character.⁷⁴ She sued her school district in May 1982, alleging a violation of Title IX and seeking immediate reinstatement.⁷⁵ After a bench trial, the court concluded that the plaintiff had been dismissed from the NHS on the basis of her pregnancy rather than the premarital sex that resulted in the pregnancy.⁷⁶ It accordingly concluded

67. *Id.*

68. *Id.*

69. *Id.* at 786.

70. *Id.*

71. "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given the opportunity of the trial court to judge the credibility of the witnesses." FED. R. CIV. P. 52(a).

72. *Pfeiffer II*, 917 F.2d at 789-90.

73. *Id.* at 780.

74. *Wort v. Vierling*, 778 F.2d 1233, 1233 (7th Cir. 1985) [hereinafter *Wort II*].

75. *Id.*

76. *Wort v. Vierling*, No. 82-3169, slip op. at 4 (C.D. Ill. Sept. 4, 1984) [hereinafter *Wort I*]. In evidently uncontradicted testimony at trial, the high school social worker stated that she had been told by Wort's guidance counselor and by the high school principal that

that the defendants had discriminated against Wort in violation of Title IX and the Fourteenth Amendment Equal Protection Clause and ordered them to reinstate Wort in the NHS.⁷⁷

In *Cazares v. Barber*, the pregnant plaintiff who was otherwise qualified was denied admission to the NHS while a male student who was an unmarried father was admitted.⁷⁸ The court found that the only reason plaintiff was denied admission was that she was pregnant, unmarried and not living with the child's father.⁷⁹ It concluded that the denial of membership to plaintiff violated both Title IX and the Fifth Amendment to the Constitution.⁸⁰ Accordingly, the court issued a permanent injunction, ordering that the NHS initiation ceremony at her high school not take place without plaintiff Cazares.⁸¹ The school authorities reacted by canceling the entire induction ceremony rather than include Cazares.⁸² As a result, the court found that the school authorities had acted in bad faith⁸³ and awarded plaintiff attorneys' fees in excess of the statutory cap of \$75 per hour under the Equal Access to Justice Act.⁸⁴

The progression in these cases from *Pfeiffer* through *Wort* and *Cazares* to *Chipman* mirrors, in part, society's effort to come to grips with

Wort would be asked to resign from the NHS or would be dismissed because she was pregnant. *Id.* at 2-3. An equal employment specialist with the United States Department of Education testified that “the school district representatives and teachers said [that Wort] was dismissed from the NHS because of her fornication.” *Id.* at 3. While the defendants later asserted that Wort's dismissal was also caused by absenteeism, a lack of interest in the NHS, a lack of participation in classroom activities, a personality change in plaintiff and poor interaction with students and teachers, the court discounted these alleged reasons since they were based on evaluations which only became available three months after plaintiff had been asked to resign from the NHS. *Id.* at 3-4. Furthermore, “[d]efendants offered Plaintiff's pregnancy as the sole reason for her dismissal until they were presented with a legal opinion that states pregnancy cannot be used as grounds for dismissal Thereafter, Defendants found other reasons to support Plaintiff's dismissal.” *Id.* at 4.

77. *Id.* at 8.

78. 959 F.2d 753, 755 (9th Cir. 1992) [hereinafter *Cazares II*].

79. *Cazares v. Barber*, No. CIV-90-0128-TUC-ACM, slip op. at 2 (D. Ariz. May 31, 1990) [hereinafter *Cazares I*].

80. *Id.* at 4. The Fifth Amendment rather than the Fourteenth Amendment was implicated because the school was on an Indian reservation. While the Fifth Amendment of course contains no equal protection clause, the Supreme Court held in *Bolling v. Sharpe*, the companion case to *Brown v. Board of Education*, 347 U.S. 483 (1954), which attacked racial segregation in the District of Columbia public schools, that the Fifth Amendment Due Process Clause was violated by the same conditions which violated the Fourteenth Amendment Equal Protection Clause when caused by state governments. 347 U.S. 497, 499 (1954).

81. *Cazares I*, slip. op. at 4-5.

82. *Cazares II*, 929 F.2d at 755.

83. *Id.*

84. *Id.* at 754 n.2.

the significant increase in unwed motherhood in recent decades.⁸⁵ Sociological changes during this time have challenged traditional moral views. Society's traditional condemnation of premarital sexual relations and pregnancy was visited principally upon the single mother, whose pregnancy and baby were palpable evidence of her transgressions, rather than the biological father, who was often not publicly identified. In an earlier era, it was widely believed that even marriage and pregnancy within marriage provided unsuitable examples to pupils. Thus, in some districts, married students were required to withdraw from school and were deemed in effect to have forfeited their right to free public education.⁸⁶ In other districts, married students did not forfeit their right to attend school but did lose their eligibility to participate in sports and other extracurricular activities, which were deemed "privileges" rather than rights.⁸⁷

85. Many social ills have been blamed on unwed parenthood, which is particularly prevalent among blacks and other minorities in the United States. Thirty-five years ago, economist Daniel Patrick Moynihan identified the breakdown of the black family and the concomitant increase in illegitimacy as fundamental causes of the weakness of black society. DANIEL PATRICK MOYNIHAN, U.S. DEP'T OF LABOR, *THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION* (1965). He stated, "[a]t the heart of the deterioration of the fabric of Negro society is the deterioration of the Negro family. It is the fundamental source of the weakness of the Negro community at the present time." *Id.* at 5. At the time, the black illegitimacy rate in the U.S. was 23.6% and the white rate was 3.07%. *Id.* at 8. In 1995, 25.3% of white babies were born to unwed mothers, as were 69.9% of black babies. U.S. DEP'T OF COMMERCE, *STATISTICAL ABSTRACT OF THE UNITED STATES* 1998, at 81 (1998). According to one observer, "[n]ationwide, the out-of-wedlock birthrate stands at over 32%; in some areas, especially in the inner city, the rate is more than double that." Kay S. Hymowitz, *There's No Honor in Unwed Motherhood*, WALL ST. J., Aug. 12, 1998, at A14 (commenting on the *Chipman* case).

86. See, e.g., *Alvin Indep. Sch. Dist. v. Cooper*, 404 S.W.2d 76 (Tex. App. 1966) (holding that a school district rule excluding married 16-year-old mother from public school violated Texas statute entitling children between the ages of six and eighteen to free public education); *Board of Educ. v. Bentley*, 383 S.W.2d 677 (Ky. Ct. App. 1964) (holding that a school district rule requiring students who marry to withdraw from school for at least one year was "arbitrary and unreasonable" and therefore invalid, and permanently enjoining the school district from applying it to female plaintiff whose marriage at age sixteen was legal and sanctioned by Kentucky law). *Cooper* and *Bentley* typify the virtually unanimous position taken by courts that complete exclusion of married students from school is illegal. See Stephen R. Goldstein, *The Scope of Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis*, 117 U. PENN. L. REV. 373, 396 (1969). Similarly, some school districts required pregnant teachers to leave the classroom. See *Cleveland Bd. of Educ. v. La Fleur*, 414 U.S. 632 (1974) (holding that a rule requiring pregnant public school teachers to leave work four or five months prior to the expected birth of their child was unconstitutional).

87. See, e.g., *School Dist. v. Green*, 147 N.W.2d 854 (Iowa 1967) (holding that a school district regulation barring basketball team member who had married from continuing on team and participating in other extracurricular activities was neither arbitrary nor unreasonable nor a violation of the Equal Protection Clause). Among the policy reasons which defendant school board in *Green* gave for excluding married students from

A student who had been married successfully challenged such a regulation in *Romans v. Crenshaw*.⁸⁸ Soni Romans had married at the age of fifteen; ten months later, she had a baby and got divorced.⁸⁹ She later gave up her baby for adoption.⁹⁰ All these events occurred before she entered Channelview High School at the age of sixteen and was confronted with the school district's rule that "[a]ny student who is married, or has been married, shall be prohibited from participating in any extracurricular activities," including the NHS.⁹¹ While the court's opinion does not reveal whether Romans was academically eligible for the NHS, it found that "[i]t [was] undisputed that her performance in both conduct and curricular activities this semester has been exceptionally good."⁹²

Romans brought a civil rights action under 42 U.S.C. § 1983 attacking the constitutionality of the regulation under the Equal Protection Clause and seeking to have it enjoined.⁹³ In defense of the regulation, the defendant school district argued that it was intended to discourage juvenile

extracurricular activities were the following:

3. Teenage marriages are on the increase. Marriage prior to the age set by the law should be discouraged. Excluding married students from extracurricular activities may tend to discourage early marriages 6. Married students are more likely to have undesirable influences on other students during the informal extracurricular activities 8. Married students may create school moral and disciplinary problems, particularly in the informal extra-curricular activities where supervision is more difficult.

Id. at 858-59. *Green*, however, plainly represents the minority view in sanctioning exclusion of married students from school sports teams. Most courts which have considered the issue in recent decades have held that exclusion of married students from eligibility for school athletic teams is unconstitutional under the Equal Protection Clause. *See* Brian E. Berwick & Carol Oppenheimer, Comment, *Marriage, Pregnancy, and the Right to Go to School*, 50 TEX. L. REV. 1196, 1197-211 (1972); *see also* *Hollon v. Mathis Indep. Sch. Dist.*, 358 F. Supp. 1269 (S.D. Tex. 1973); *Moran v. School Dist. No. 7*, 350 F. Supp. 1180 (D. Mont. 1972) (finding that excluding a married senior from the football team was unconstitutional); *Holt v. Shelton*, 341 F. Supp. 821 (M.D. Tenn. 1972) (finding that prohibiting a married female from participating in extracurricular activities was unconstitutional); *Beeson v. Kiowa County Sch. Dist.*, RE-1, 567 P.2d 801 (Colo. Ct. App. 1977); *Indiana High Sch. Athletic Ass'n v. Raike*, 329 N.E.2d 66 (Ind. Ct. App. 1976); *Bell v. Lone Oak Indep. Sch. Dist.*, 507 S.W.2d 636 (Tex. App. 1974). The Supreme Court, of course, has largely rejected the rights-privilege distinction as far as constitutional protection of the right to government employment and benefits is concerned. *See, e.g., Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

88. 354 F. Supp. 868 (S.D. Tex. 1971).

89. *Id.* at 869.

90. *Id.* The court specified that "the Petitioner herein had been legally married for a period of ten (10) months prior to the birth of her child" *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

marriages, since they led *inter alia* to undue interest in and discussion of sex by unmarried students, they tended to encourage other students to get married, they caused fraternization by married students which was disruptive to the school, and they tended to cause school drop-outs.⁹⁴ The court found that each of the reasons advanced by the district either did not apply to Romans's situation or was not factually supported by the record.⁹⁵ Accordingly, it concluded that the regulation violated the Equal Protection Clause and permanently enjoined defendants from enforcing it against Romans.⁹⁶

Whether teenage marriage is wise or ought to be encouraged as a matter of public policy, of course, it was legal and could not be deemed immoral in the above cases. At about the same time, however, other cases challenged the exclusion from school of unwed mothers, whose very status reflected a violation of prevailing societal moral standards. The right to expel immoral students had been affirmed by Massachusetts' highest court at the dawn of American free public education,⁹⁷ and courts for more than a century thereafter tended to uphold school districts which took such action.

The problem of unwed mother students came to a head in *Perry v. Grenada Municipal Separate School District*, in which two unwed mothers challenged their exclusion from school in federal court.⁹⁸ The court denied them a preliminary injunction to prevent their exclusion and justified the

94. *Id.* at 869, 871.

95. *Id.* at 868.

96. *Id.* at 871-72.

97. *Sherman v. Inhabitants of Charlestown*, 62 Mass. (8 Cush.) 160, 167 (1851). Miss Sherman was not pregnant, nor was there any allegation of misconduct by her in school. But the school board charged that she had engaged with a certain man in "a continued course of open and notorious familiarities, and actual illicit intercourse, and that for hire and reward," and it argued that this justified her expulsion. *Id.* at 162. The Supreme Judicial Court agreed and stated that it was equally proper for school administrators "to preserve the pure-minded, ingenuous and unsuspecting children of both sexes, from the contaminating influence of those of depraved sentiments and vicious propensities and habits, as from those infected with contagious diseases." *Id.* at 167. Compare *Street v. Cobb County School District*, 520 F. Supp. 1170, 1171 (N.D. Ga. 1981), in which a seventeen-year-old girl who had gone to live with her boyfriend and his parents was told she could no longer attend her high school, in part because of her unconventional living arrangements, and that her presence in the school population might be a bad influence on impressionable students. . Since the school district permitted pregnant students to attend the day school program, the federal district court rejected defendant school district's argument that she would set an undesirable example for impressionable students: "Thus, assuming the School District may legally enforce policies calculated to foster morality in personal living arrangements, the Court can see no rational basis for excluding someone in Plaintiff's situation, but not excluding a pregnant student. In other words, the School District's stated alternate reason fails equal protection analysis too." *Id.* at 1173.

98. 300 F. Supp. 748 (N.D. Miss. 1969).

district’s rule as follows:

Obviously, the policy not to admit unwed mothers as students to this school system [and the related policy to expel pregnant students] is based upon what this court judicially knows to be a belief held by a large segment of the people in this area (perhaps, by a majority) that it is sinful, or immoral for unwed people to engage in sexual intercourse and that an unwed mother is not a fit associate for teenage children in a public school or elsewhere. The fact of such motherhood demonstrates such sinful, or immoral conduct.

...

By analogy, plaintiff’s situation could well be likened to that of a typhoid carrier who otherwise is an acceptable student in every way. The only real difference is that the carrier is one who acquired that status without fault, while plaintiff’s status is the result of her own wrongdoing Public opinion, enlightened or not, in the Grenada School territory, identified an unwed mother of school age as a threat to the moral health, particularly of all other teenage school girls.⁹⁹

After a trial, however, the federal district judge relented. While he recognized defendants’ fear that the presence of unwed mothers in the schools might be a bad influence on other students and might indicate society’s acquiescence in the illegitimate births, the court concluded that permanent exclusion, with no opportunity for the student to acknowledge her mistake and to seek readmission on the basis of her changed moral condition, was harsh and unreasonable.¹⁰⁰ It held that unwed mothers could not be excluded from the district’s schools solely on the basis of their unwed motherhood but that they were entitled to readmission “unless on a fair hearing before the school authorities they are found to be so lacking in moral character that their presence in the schools will taint the education of other students.”¹⁰¹

In a similar case, a federal district judge in Massachusetts ordered an 18 year-old pregnant unmarried senior readmitted to school after she had been automatically dismissed pursuant to a rule of the local school committee.¹⁰² High School Principal Robert Hargraves, who was questioned at a hearing before the school committee, could not give any

99. *Perry v. Grenada Mun. Separate Sch. Dist.*, Civ. No. W.C. 6736 (N.D. Miss. Dec. 27, 1967), *quoted in* STEPHEN R. GOLDSTEIN & E. GORDON GEE, *LAW AND PUBLIC EDUCATION—CASES AND MATERIALS* 183 (2d ed. 1980).

100. *Perry*, 300 F. Supp. at 752.

101. *Id.* at 753.

102. *Ordway v. Hargraves*, 323 F. Supp. 1155 (D. Mass. 1971).

educational purpose that would be served by excluding the plaintiff from school during regular class hours.¹⁰³ Plaintiff had earned good grades, and medical experts testified that her exclusion from school would cause her depression and mental anguish.¹⁰⁴

In addition, there was no evidence that her presence in school would be disruptive or would interfere with school activities. The concern that the presence of unwed mother students might influence other impressionable students aged twelve to fourteen was undercut by the fact that the school rule permitted plaintiff to attend school after hours and also to attend school games, dances and plays.¹⁰⁵ In conclusion, the court held that "the right to receive a public school education is a basic personal right or liberty" and the school authorities bore a heavy burden in justifying the termination of that right.¹⁰⁶ Since they had failed to carry the burden, the court ordered defendants to readmit the plaintiff to regular attendance at the North Middlesex Regional High School.¹⁰⁷

The decisions reversing the exclusion of married or pregnant students from public schools probably reflect a growing societal consensus that it is unfair to punish such students by depriving them of their right to an education. Most Americans probably regard teenage parenthood as unwise,¹⁰⁸ and single motherhood has in recent years been linked by

103. *Id.* at 1157.

104. *Id.*

105. *Id.* at 1158.

106. *Id.*

107. *Id.* See also *Nutt v. Board of Education*, 279 P. 1065 (Kan. 1929), which held on state law grounds that a school board lacked the power to exclude from school a girl who got pregnant, later married before her child was born, and separated from her husband shortly thereafter, and *State v. Chamberlain*, 12 Ohio Misc. 44, 175 N.E.2d. 539 (Ct. Com. Pleas 1961), which upheld a school board regulation prohibiting school attendance by pregnant students on the grounds that this was to protect their physical well-being and was not intended as a punitive measure.

108. A recent study provided support for such a view:

Teenage families with children are disproportionately fatherless, and most are poor. Teenage marriages, when they occur, are characterized by a high degree of instability. In addition, teenage parents, both male and female, suffer the negative impact that untimely parenting has on their education and the related limitation of career opportunities. Teenage parents are more likely than those who delay childbearing to experience chronic unemployment and inadequate income. Because these young people often fare poorly in the workplace, they and their children are highly likely to become dependent longer than those who delay childbearing until their twenties. Society's economic burden in sustaining these families is substantial.

NATIONAL RESEARCH COUNCIL, RISKING THE FUTURE - ADOLESCENT SEXUALITY, PREGNANCY, AND CHILDBEARING 1-2 (1987).

sociologists to a wide variety of social ills.¹⁰⁹ But when society's cultural and moral norms against premarital sexual relations and pregnancy have failed to deter such behavior, the added sanction of depriving young student mothers of education as a punishment perversely targets those who need education the most if they are to overcome the bleak prospects for single motherhood. Illegitimacy is a growing social problem with complex causes, which is unlikely to be ameliorated through the enforcement of academic penalties.

The question of whether unwed motherhood should disqualify a student from NHS membership is a more difficult one. As the NHS Constitution itself provides, admission is not to be automatically conferred upon those who attain a high GPA unless their character is also "outstanding."¹¹⁰ The critical question is what traits are deemed by the community to constitute "good character" in the modern day. Presumably, few would object if NHS candidates are disqualified for character flaws like dishonesty: anyone who plagiarizes or cheats on tests does not belong in the organization.¹¹¹ Thus, stigmatizing single motherhood by excluding

109. According to one authority who is a social worker:

Persons in female-headed households, usually children, comprise the highest percentage of persons living below the poverty level in the United States. Moreover, they are twice as likely as other households in the United States to have a housing problem. Single mothers are the most problem-ridden group among those living in substandard shelter in the United States A national 29-city survey conducted by the U.S. Conference of Mayors in 1987 found that two-thirds of all homeless families in America were headed by single parents.

ELIZABETH A. MULROY, *Introduction to WOMEN AS SINGLE PARENTS - CONFRONTING INSTITUTIONAL BARRIERS IN THE COURTS, THE WORKPLACE, AND THE HOUSING MARKET* 3-4 (Auburn House 1988). See also DAVID BLANKENHORN, *FATHERLESS AMERICA: CONFRONTING OUR MOST URGENT SOCIAL PROBLEM* 5 (1995) (deploring fatherlessness for causing or aggravating most social problems and calling for a cultural valuation of the man who "puts his family first"). Similarly, an editorial in the Roanoke Times & World News observed:

For many at the lower end of the economic order, single parenthood - most often single motherhood - remains a tether to poverty. More than a fourth of all children in the United States, and about 40 percent of blacks, are born out of wedlock. A sizable portion of the U.S. population bears little resemblance to the beloved "norm" of the presumed traditional structure of the family. The breakdown of that structure has been cited as the cause of a multitude of social ills, from welfare dependency to anomie to callous, anti-social attitudes and to crime.

Editorial, *Framing the Future Through the Family Series: Approaching a New Century*, ROANOKE TIMES & WORLD NEWS, Apr. 25, 1999, at 2.

110. "Membership in local chapters is an honor bestowed upon a student. Selection for membership is by a faculty council and is based on outstanding *scholarship, character, leadership, and service*. Once selected, members have the responsibility to continue to demonstrate these qualities." NHS CONST. art. VIII (Membership), § 1 (emphasis added).

111. In *Jacob v. School Board*, 519 So. 2d 1002, 1003 (Fla. Dist. Ct. App. 1987), the

students from NHS membership on "character" grounds is only illegitimate if it is assumed that traditional moral and societal norms have either changed or become inapplicable. While one could argue that the great increase in premarital sex and unwed motherhood in recent decades is evidence that society as a whole has changed its attitude towards such behavior from disapproval to tolerance, a large segment of society is steadfastly opposed to such change and is battling to preserve traditional moral norms.¹¹²

appellate court affirmed the trial court's decision upholding the Lee County School Board's order which affirmed the decision of the Faculty Council revoking Donald Jacob's and Thomas McLean's memberships in the NHS for cheating on a calculus examination. The boys were enrolled in an Advanced Placement Calculus class in which they had to memorize complicated formulas that they were forbidden to bring in to the examination room. *Id.* at 1004. They were found to have violated the spirit and intent of the examination rules and received grades of zero when both of them etched or placed certain calculus formulas on the backs of their calculators. *Id.* at 1004-05. In another case of cheating, three officers and ten other members of the NHS chapter at prestigious Sunny Hills High School in Fullerton, California were dismissed from the NHS after they copied homework from each other in a senior honors class in philosophy. *Honor Students Dishonored for Cheating*, *NEWSDAY*, Apr. 11, 1997, at A36. The students also received grades of zero on the assignment. *Id.*

112. In discouraging or penalizing extramarital pregnancy, of course, the defenders of traditional morality should take care not to give a pregnant unmarried student an incentive to get an abortion, which many of them undoubtedly regard as a greater evil. A Texas school evidently favored abortion as the appropriate way to deal with student pregnancies:

In a 1993 case that also received national coverage, the Women's Rights Project intervened on behalf of three pregnant cheerleaders in Texas who were kicked off the squad, while a fourth who had an abortion was allowed to remain. Under the school's policy, boys with children were not similarly censured. The Women's Rights Project together with the ACLU's Reproductive Rights Project and the ACLU of Texas, wrote a letter to the school board explaining that the policy was illegal. Shortly thereafter, the board reversed its policy.

ACLU Fact Sheet, *supra* note 35. An organization called Feminists for Life supported the American Civil Liberties Union in bringing the Chipman case because of the same concern. Its Executive Director, Serrin M. Foster, filed an affidavit in Chipman in which she stated:

4. I understand Somer Chipman and Chasity Glass were denied admission to the National Honor Society by the Grant County School District solely because, at the time the decision to exclude them was made, Ms. Chipman was an expectant mother and Ms. Glass was a mother. As Executive Director of FFL, I strongly believe granting preliminary relief in this case is in the public interest for the reasons set forth below.

5. According to the Alan Guttmacher Institute, Planned Parenthood's research organization, 1 million adolescent girls – 12 % of all girls aged 15-19 and 21% of those who have had sexual intercourse – become pregnant each year.

6. Defendants may argue their decision was necessary to send the message unwed motherhood is undesirable. However, in reality, Defendants' actions send student unwed mothers a different far more dangerous message: choose between education and career plans, on the one hand, and your children on the other hand. Actions such as those of the Grant County School District encourage students to

Given the plain language of Title IX, the decisions in *Wort* and *Cazares*, and the grant of a preliminary injunction in *Chipman*, were probably correct. Growing support for women's rights and a growing awareness of gender inequities have made society less willing to tolerate the familiar pattern that the unwed mother bore all of the obloquy and adverse consequences of her condition while the unwed father often escaped unscathed. The fact that no one has cited a specific instance in which an unwed father was denied NHS membership, whereas unwed mothers were excluded every time in the known cases, entails an obvious unfairness and denial of equal protection. The unfairness and denial of equal protection become all the more palpable and indefensible when, as in *Pfeiffer* and *Cazares*, boys who had fathered children out of wedlock were admitted into the NHS.

It would be wrong, however, to fault the faculty selection committees in these cases for following what amounted to a "Don't ask – don't tell" policy¹¹³ regarding student applicants' histories of sexual activity. One can well imagine the furor which would have resulted if the committees had pried into such matters when scrutinizing NHS candidates. On the other hand, a student's pregnancy and childbirth become physically obvious to a community in time, and a faculty selection committee would look foolish if it ignored them.

Implicit in the label "honor society" is the notion that those admitted to membership are role models for other students. Teenagers are

hide their pregnancies and not seek prenatal care (thereby putting them and their babies at medical risk) and instead obtain an abortion or, worst of all, commit neonatal infanticide. Many of such students are teens who are otherwise highly likely to attend and complete high school and college, but fear their academic success is threatened by their own children.

7. If Ms. Chipman and Ms. Glass had had abortions, their sexual activity would not have become known to school officials. Actions such as those of the Grant County School District thus send a message that a decision to carry a pregnancy to term will be punished. According to the Center for Disease Control and Prevention, nearly 4 in 10 teen pregnancies (excluding miscarriages) end in abortion. There were 308,000 abortions among teens in 1992.

8. Finally, the fear of punishment by powerful adults such as school officials could well play a role in inducing or encouraging teens to commit neonatal infanticide. Although we do not know the real number of newborns killed each year by their parents (usually the mother), approximately 250 cases of neonatal infanticide are reported annually to the Department of Justice.

Affidavit of Serrin M. Foster in Support of Plaintiffs' Motion for Preliminary Injunction, *Chipman v. Grant County Sch. Dist.*, 30 F. Supp. 2d 975 (E.D. Ky. 1998) (No. 98-180).

113. This, of course, is the popular name given by the media to the new policy regarding homosexual members of the military, which the Clinton Administration instituted in 1993.

impressionable and conformist, and they tend to derive their values from the group and community to which they belong. When a school singles out unwed parents for recognition as model students, it inevitably conveys the message that it condones or at least tolerates their behavior, and this can influence students' attitudes and values. Certainly, those who fall publicly short of general moral norms should not be punished by being deprived of important rights like an education. However, when a court orders their admission to an organization comprised by definition of exemplary individuals, it appears to minimize the importance of their deviation from the norm and perhaps to pressure the larger society to alter its norms. Title IX was enacted to protect individuals' rights: It is perhaps unfortunate if it has been applied to further such broader ends.¹¹⁴

II. THE BEER AND WINE CASES

In a number of cases, students have challenged in court their

114. The New York Times did not have such reservations; in an editorial it called the Grant County High School decision not to admit Somer Chipman and Chasity Glass to the NHS "misguided." Editorial, *Sex, Honor and Grade Point Averages*, N.Y. TIMES, Aug. 7, 1998, at A20. Noting that Title IX regulations specifically prohibited discrimination against students who are pregnant or teenage parents, married or not, the editorial commented: "Ms. Chipman's and Ms. Glass's achievements - doing well in school in spite of their parental responsibilities - prove that an unplanned pregnancy does not have to derail a student's academic career and aspirations. Any honor society chapter should be proud to count them as members." *Id.* Reacting to the New York Times editorial a few days later, a Wall Street Journal Columnist took a more jaundiced view of the Chipman case. Hymowitz, *supra* note 85. In her view, the case was part of a societal trend to legitimize unwed motherhood, which she regarded as a major social problem:

In 1990 the National Office of Education Statistics produced some astounding poll results. When 10th-graders were asked whether they would consider having a child without being married, only 53% said no. The remaining 47% said either they would or they weren't sure.

These results should be emblazoned in everyone's mind now that two Kentucky high school juniors are suing their school board for denying them entrance into the National Honor Society apparently because they are unwed mothers. The two 17-year-olds, Somer Chipman and (yes, really) Chasity Glass, merely reflect the shrugging attitude toward marriage shared by almost half of their peers.

It's hardly the kids' fault. Adults have taught them that rearing children within marriage is merely one of life's varied options. Nationwide, the out-of-wedlock birthrate stands at over 32%; in some areas, especially in the inner city, the rate is more than double that. Almost every week we read about a celebrity who has chosen to go dadless, with Jodie Foster the most recent example.

In many places, high schools provide day care centers for students' babies. Unmarried teen mothers have been honored as cheerleaders, homecoming queens and class presidents. Such efforts may seem compassionate, but they send an unmistakable message that unwed teen child bearing is normal.

Id.

dismissals from the NHS after they were caught drinking alcoholic beverages off campus. In each such case, imbibing by the student NHS member evidently violated both school policy and state law.¹¹⁵ Since drinking alcoholic beverages has always been regarded as wrong for American high school students,¹¹⁶ it is not surprising that no student who sued after being dismissed from the NHS for drinking wine or beer won permanent reinstatement in court,¹¹⁷ although one such student won an injunction reinstating her NHS membership from the trial court which was reversed on appeal.¹¹⁸

While the relief which the court granted fell short of ordering him reinstated in the NHS, the most successful plaintiff in a drinking case was the first to challenge in court his dismissal from the NHS for drinking.¹¹⁹ Robert Weldon Warren was an outstanding student at Tahoka High School

115. Students who graduate in the normal course, as would be expected of those with superior grades who qualify for NHS membership, are eighteen when they graduate from high school, and the vast majority of states have minimum drinking ages of 21.

116. In an old case, for example, the Arkansas Supreme Court upheld the suspension of a boy for being "drunk and disorderly" on Christmas day on the streets of a town in violation of a town ordinance. *Douglas v. Campbell*, 116 S.W. 211, 213 (Ark. 1909)

117. While it has not addressed the issues treated in this article, the United States Supreme Court has decided two cases in which high school students were disciplined for offenses involving alcohol. In *Wood v. Strickland*, 420 U.S. 308, 311 (1975), two sixteen-year-old girls who were in the tenth grade at an Arkansas school "spiked" the punch with malt liquor at a meeting of an extracurricular school organization attended by parents and students. After the school board voted to expel them from school for the remainder of the semester, they challenged their expulsion in court on due process grounds. *Id.* at 312. Defendant school board members claimed absolute immunity from suit under 42 U.S.C. § 1983. *Id.* at 314. The dissent stated, "in the specific context of school discipline, we hold that a school board member is not immune from liability for damages under §1983 if he knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student." *Id.* at 329. *Board of Education v. McCluskey*, 458 U.S. 966, 967 (1982), involved a substantive due process claim by a tenth-grade student who also was expelled for the remainder of the semester after he left school without permission following the first period, consumed alcohol and became intoxicated, and then returned to school. The lower courts held in his favor, and on appeal to the Supreme Court, the issue was whether alcohol came within the scope of a Board of Education rule prohibiting possession of "narcotics or other hallucinogenics, drugs, or controlled substances." *Id.* at 970-71. The board of education deemed alcohol a "drug," but the federal district and circuit courts disagreed. *Id.* at 968-69. The Supreme Court held that the school board's interpretation of its regulation, which justified the student's suspension, was reasonable, that this interpretation controlled under *Wood*, and therefore that the lower courts had erred in replacing it with "their own notions" under the facts of the case. *Id.* at 971.

118. *Ector County Indep. Sch. Dist. v. Hopkins*, 518 S.W.2d 576, 583 (Tex. Civ. App. 1974).

119. *Warren v. National Assoc. of Secondary Sch. Principals*, 375 F. Supp. 1043, 1048 (N.D. Tex. 1974).

in Lubbock, Texas who had been elected to the NHS in his sophomore year and was quarterback of a successful football team and class salutatorian.¹²⁰ Four days before his eighteenth birthday, when this would have become legal, he ordered a beer and drank six ounces of it while present with several fellow students at a Pizza Hut restaurant.¹²¹ This was observed by Barbara Kitchens, a member of the Tahoka High School NHS faculty council, who reported what she had seen to her colleagues.¹²² While Miss Kitchens had informed the NHS chapter on a prior occasion that drinking alcoholic beverages violated the chapter's rules of conduct, no written rule or regulation to this effect was offered in evidence at the trial.¹²³ Four days after the incident, on his eighteenth birthday, Warren was called into the principal's office, where he admitted the facts about his drinking.¹²⁴ Although an emergency meeting of the Tahoka NHS chapter was held to discuss the matter, no hearing was afforded Warren, nor was he given written notice of the charges against him, an opportunity to present witnesses on his behalf, or the opportunity to be represented by counsel.¹²⁵ Instead, the four faculty members of the faculty council sent him a notice of dismissal from the NHS several days later.¹²⁶

Warren brought a civil rights action to challenge his dismissal in federal court.¹²⁷ The court concluded that the NHS faculty council members were acting "under color of law" since they were all employees of the school district, and the NHS chapter utilized school facilities and premises.¹²⁸ Accordingly, a section 1983 action would be appropriate. If his dismissal were allowed to stand, Warren could very well suffer injury to his "good name, reputation, honor, or integrity," so the court concluded that defendants' action in dismissing him had deprived him of a liberty interest.¹²⁹

While emphasizing that "it is not for this court to pass judgment on whether or not the acts of the plaintiff were sufficient to warrant his

120. *Id.* at 1045.

121. *Id.* at 1045-46.

122. *Id.* at 1046.

123. *Id.*

124. *Id.*

125. *Id.* at 1048.

126. *Id.* at 1047.

127. He sued under 42 U.S.C. § 1983.

128. *Warren*, 375 F. Supp. at 1047.

129. *Id.* at 1048 (quoting *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972)). The court further observed that "it is obvious that this black mark of a dismissal, which will remain a part of the permanent school records, could very well have adverse effects on his future, including his further educational and employment careers." *Id.*

dismissal from the Tahoka chapter of the National Honor Society,"¹³⁰ the court found that Warren had been deprived of procedural due process because of the way his dismissal had been handled.¹³¹ In particular, defendant Kitchens, who testified that she felt that Warren had deliberately caused her a personal affront by drinking beer in her presence, acted as both accusing witness before the principal and faculty council and as a judge in the dismissal proceedings.¹³² Furthermore, the dismissal procedure followed in this case violated official NHS procedures: Section 7 of the National Constitution specified that a majority vote of the entire faculty was required to remove a student member who had fallen below the standards required for membership, whereas Warren's dismissal was decided only by the principal and the three other members of the faculty council.¹³³ Moreover, the local chapter's constitution required that the faculty council be composed of the principal and four teachers, whereas the council which dismissed Warren consisted of the principal and only three teachers.¹³⁴ Consequently, the court entered a permanent injunction ordering all defendants to expunge and remove from all their records any mention or indication that Warren had been dismissed from the NHS or from the Tahoka NHS chapter and prohibiting defendants from communicating to anyone the fact that Warren had been dismissed.¹³⁵

The court in *Warren* obviously was most favorably impressed by the plaintiff. It stated, "He has been generally recognized as a leader in all student activities and his scholastic ability, character and service to the school have been acknowledged by all parties as exceptional."¹³⁶ The court plainly thought it regrettable that by his indiscretion he might compromise a promising future.¹³⁷ The court might have been swayed by the absence of explicit rules against drinking, the fact that Warren was only four days short of the legal drinking age at the time, and that as in *Cazares* and *Pfeiffer*, other NHS members at the school had been guilty of the same misconduct but were not threatened with dismissal from the NHS.¹³⁸ In

130. *Id.* at 1046.

131. *Id.* at 1048. The court concluded that these procedural discrepancies were "significant," and that it was "faced here with a situation where the plaintiff was denied both the constitutional minimum of a fair hearing before an impartial body and the additional procedural due process rights granted to him as a member of the Tahoka chapter of the National Honor Society." *Id.*

132. *Id.* at 1047.

133. *Id.* at 1045.

134. *Id.* at 1048.

135. *Id.*

136. *Id.* at 1045.

137. *Id.* at 1048.

138. *Id.* at 1046. The court stated:

any event, the court's finding that Warren had a liberty interest in his reputation, which was implicated by his dismissal from the NHS, and its conclusion that his procedural due process rights had been violated,¹³⁹ constitute the most significant victory to date for a dismissed NHS member on due process grounds.

Warren was relied upon in *Ector County Independent School District v. Hopkins*, a case from Odessa, Texas, less than 200 miles from Lubbock, which was litigated in state court the same year.¹⁴⁰ Karen Hopkins, a senior at Permian High School who had been a NHS member for two years, admitted to the assistant principal on a Monday that she and two other girls had gone home from school during lunch hour and had drunk wine on the preceding Friday.¹⁴¹ She further admitted that she knew that this violated school rules.¹⁴² The assistant principal suspended her for the next day, Tuesday.¹⁴³ When she returned to school on Wednesday, she was given a letter from the NHS sponsor, a Permian High School teacher, dismissing her from the NHS for misconduct.¹⁴⁴ She received neither prior notice nor a hearing before her expulsion from the NHS.¹⁴⁵ The faculty sponsor later testified that she had consulted the other members of the Faculty Board individually before writing the letter to Karen but they had not had a meeting on the matter.¹⁴⁶ The faculty sponsor further testified that a month after Karen was dismissed from the NHS, two male NHS members drank beer on a school sponsored trip and had initially been suspended from the organization.¹⁴⁷ After a hearing by the full faculty board at which the faculty sponsor apparently argued for leniency, the boys were reinstated

There is no written rule or regulation that has been produced to this court stating that a member could not drink. Indeed, the testimony indicated that several other members of the National Honor Society also drink on occasion. The reason others have not been reprimanded and punished for these violations is that no witness has come forward to present the charges to the faculty council. Unfortunately for Weldon, his offense was committed in the presence of a council member who was able to testify personally as to each detail of the event.

Id.

139. *Id.* at 1048. Given the court's due process holding, one might ask why it did not order Warren reinstated in the NHS. But the case does not indicate whether Warren sought such relief, and the court did not reach this question.

140. *Ector County*, 518 S.W.2d at 581-82.

141. *Id.* at 578.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 579.

147. *Id.*

with an official warning and reprimand.¹⁴⁸

Feeling aggrieved by the disparate and apparently discriminatory treatment that Karen Hopkins had suffered, her parents appealed her suspension to the Board of Trustees of the Ector County Independent School District, which affirmed the dismissal.¹⁴⁹ They sued the school district for injunctive relief in state district court, which granted a permanent injunction just before Karen's graduation, ordering her reinstated in the NHS but leaving the one-day suspension in effect.¹⁵⁰ The school district appealed, contending that the action was barred by the Hopkins' failure to exhaust their administrative remedies by appealing to the Commissioner of Education and the State Board of Education before going to court.¹⁵¹

The Texas Court of Civil Appeals agreed with Hopkins that no administrative exhaustion is required where, as here, no issues of fact remained but only the legal issue of whether her suspension from school and expulsion from the NHS without a hearing deprived her of due process.¹⁵² That court found state action present because Karen's suspension and expulsion were carried out by public employees of the school district.¹⁵³ Citing *Warren*, it agreed with the district court that denying her notice and an opportunity to be heard before her expulsion from the NHS would have constituted a denial of due process, but that this defect was cured by Hopkins' subsequent hearing before the School District Board of Trustees.¹⁵⁴ The court reversed and remanded the case to the district court for consideration of the fact issue of whether her punishment was excessive under the circumstances.¹⁵⁵

In a more recent case, a similar dispute was kept out of court by the administrative action of a principal. The five-member faculty council at Hanover High School in Hanover, Massachusetts excluded several student candidates from NHS membership because they were among 73 students present at house parties broken up by police at which alcohol had been found.¹⁵⁶ It was undisputed that the students in question had not

148. *Id.* The court commented, "[a]pparently, the change in severity of the punishment to the boys resulted from the fact that a teacher gave permission for the boys to buy the beer." *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 581-82.

153. *Id.* at 582.

154. *Id.* at 581-82.

155. *Id.* at 583.

156. Beth Minneci, *Turmoil Rocks High School Honor Society - Ban of Arrested*

themselves partaken of the alcoholic beverages.¹⁵⁷ The students appealed to Principal Thomas Nee, who urged the faculty council to reverse its decision and admit the students.¹⁵⁸ All five faculty council members resigned, claiming that their integrity had been challenged.¹⁵⁹ Principal Nee thereupon took it upon himself to add the students to the NHS chapter, a decision which drew much criticism.¹⁶⁰

Acting under a similar "constructive possession" theory, the school board for Westminster High School in Carroll County, Maryland suspended a number of students from the NHS and other extracurricular activities for having attended a weekend, off-campus party at which alcohol was consumed.¹⁶¹ The students sought in federal court a temporary restraining order, which the court treated as a petition for a preliminary injunction. While the court found that exclusion from the NHS and the other activities would cause the students irreparable injury, it denied them injunctive relief because "there simply is no prospect of success at all on any federal claim in this lawsuit."¹⁶² Plaintiffs had argued that their exclusion from the NHS because of their presence at the party violated their First Amendment right of freedom of association: The court concluded that children have no First Amendment right to be present at a party where alcohol is being consumed by minors.¹⁶³ It further found that the Due Process Clause of the Fourteenth Amendment did not protect the interest of students in participating in extracurricular activities.¹⁶⁴ Not only was no federal right implicated by the case, according to the court, but it was not in the public interest for a federal court to interfere in a matter which was up to the local school board to decide.¹⁶⁵

Students Stir Outcry, Resignations, PATRIOT LEDGER, Feb. 17, 1998, at 15S.

157. *Id.* The Hanover police force had cracked down on underage drinking by enforcing the "constructive possession" part of a Massachusetts law that allows police to arrest people under 21 at a party where alcohol is present even if they are not drinking. *Id.*

158. Editorial, *Hanover Honor Society Issue*, PATRIOT LEDGER, Feb. 25, 1998, at 20.

159. *Id.*

160. Beth Minneci, *13 Students Protest Honor Society Ruling - Hanover Principal Lets Youths at Party Join*, PATRIOT LEDGER, Feb. 24, 1998, at 1.

161. *Farver v. Board of Educ.*, 40 F. Supp. 2d 323, 323 (D. Md. 1999). The Westminster High School Student-Parent Handbook for 1998-99, which the suspended students were accused of violating, provided in relevant part that "[s]tudents may not use [or] be in actual or constructive possession of . . . alcohol, the possession, use, transfer, or sale of which is prohibited by law, at any time, on or off school premises." *Id.* The students were not suspended from school attendance. *Id.*

162. *Id.* at 324. The court also dismissed the case for lack of federal subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12 (b)(3). *Id.* at 326.

163. *Id.* at 325.

164. *Id.* at 324.

165. *Id.* at 325. In addressing the public interest factor of the traditional four-part test

As the foregoing cases demonstrate, courts are hesitant to intervene when schools discipline high school students for drinking alcoholic beverages, even though this takes place away from school. Courts are also unlikely to regard suspension or expulsion from the NHS as an unreasonable penalty for such an infraction. The relatively sympathetic reception which Weldon Robert Warren and Karen Hopkins received in court is attributable to the failure of their schools to follow proper procedures in dismissing students from the NHS. In addition, the school had no explicit rule against students' drinking in Warren's case,¹⁶⁶ and there was clear evidence of discriminatory application of the rule in Hopkins's case.¹⁶⁷ Where such special factors were lacking, in *Farver v. Board of Education*, plaintiff students' claims were summarily rejected.¹⁶⁸

III. DUE PROCESS CLAIMS

The relative success of the pregnant unmarried NHS applicants in

for preliminary injunctive relief, the federal court echoed American courts' long-standing respect for and deference to local control of public education:

[C]ertainly, there is a public interest in seeing that children are not punished arbitrarily, but there is also an extremely strong public interest in allowing local school boards to regulate local education. The federal court does not have a roving commission to disrupt the relationship, which is peculiarly local in nature, between the students and the county school board. And I think it would be highly contrary to the public interest for this Court, on what would be a virtually nil prospect of success on the merits, to engage itself in an inquiry calling into question the wisdom of what the Carroll County School Board has done in this case in terms of applying its constructive possession regulations.

Id.

166. *Warren*, 375 F. Supp. at 1046.

167. *Ector County*, 518 S.W.2d at 582.

168. Perhaps in recognition of the weakness of such a claim, another student who sued after being dismissed from the NHS for drinking did not even challenge her dismissal in court. *Katzman v. Cumberland Valley Sch. Dist.*, 479 A.2d 671 (Pa. Commw. Ct. 1984). Deborah Katzman, an eleventh grade student at Cumberland Valley, Pennsylvania High School, drank a glass of wine with four classmates in a New York City restaurant while on a field trip with her Humanities class. *Id.* at 672. Upon her return home, she was questioned by school administrators and admitted the incident. *Id.* As a result, she was suspended for five days, expelled from the cheerleading squad, prohibited from taking part in school activities for five days, and permanently expelled from the NHS. *Id.* Katzman, however, did not contest any of these penalties, but only the additional draconian sanction of having all her grades for that marking period reduced by 10% (i.e., 2% for each day of suspension). *Id.* Deborah Katzman ranked tenth in a class of approximately 600 pupils. *Id.* at 673. The Court of Common Pleas and the Commonwealth Court agreed that the grade reduction penalty was “harsh” and “excessive” and not authorized by the Pennsylvania Public School Code of 1949. *Id.* Accordingly, the Commonwealth Court affirmed the Common Pleas Court order that Katzman's grades as originally fixed by her teachers be reinstated. *Id.* at 674.

court was due, as noted above, to the special statutory protection conferred on them by Title IX and the inherent infeasibility of policing male premarital sexual activity, which enabled them to argue persuasively that they had been denied equal protection. In the beer and alcohol cases, the students had already been admitted to the NHS and the basis for their dismissal was an identifiable, discrete act: the issue was clearly whether drinking alcoholic beverages was a legally sufficient reason for their dismissal.

In many other cases, however, students with superior grades were denied admission to the NHS because faculty council members concluded that their qualities of character, leadership or service were inadequate. Most such rejections were based not on discrete palpable factors like pregnancy or drinking but instead on overall assessments by faculty council members, formed over extended periods in consultation with their colleagues, that the applicants were simply not sufficiently outstanding to merit admission. Such appraisals, while inevitably subjective and often rather vague and general, are no less likely to receive in court the deference which judges traditionally accord to the professional judgment of educators.¹⁶⁹

The disappointment of applicants with excellent grades who are rejected on general grounds is likely to be at least as keen as that of those disqualified for such specific reasons as pregnancy or drinking. The very opaqueness and general nature of the reasons for their rejection, however, make it difficult for them to challenge it in court. About the only available avenue for a legal challenge in such cases is to allege a denial of due process, and this has been the most common argument such plaintiffs have made in court. It is to a description of these cases that we now turn.

A. Origins of Student Academic Due Process Rights

The legal origin of student lawsuits claiming that academic penalties violated their due process rights is a series of cases in the 1970's in which the United States Supreme Court significantly expanded the scope of procedural due process protection of various individual rights.¹⁷⁰ The Court extended due process rights to public school students in the landmark

169. See generally Schweitzer, *supra* note 24, at 312.

170. See, e.g., *Fuentes v. Shevin*, 407 U.S. 67, 80-84 (1972) (holding due process requires notice and hearing before state can seize property under state replevin laws); *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970) (finding pre-termination evidentiary hearing is necessary to provide due process to welfare recipient); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 342 (1969) (concluding that prejudgment garnishment of wages without notice or prior hearing violates procedural due process).

case *Goss v. Lopez*, in which it held that before a student could be suspended from school for ten days for misconduct, he must be given at least informal notice of the charges against him, an explanation of the evidence against him, and an opportunity to reply.¹⁷¹

No similar evolution occurred in the case of students challenging in court penalties imposed for academic deficiencies. As has been noted, courts have traditionally given great deference to teachers' academic evaluations of students, and only in a handful of reported cases have students below the college level sued because of poor grades, academic dismissals, or other negative academic evaluations.¹⁷²

In contrast, far more college and graduate and professional school students have challenged their academic dismissals and other adverse academic evaluations in court,¹⁷³ and some of them won remedies for violation of their due process rights. In *Greenhill v. Bailey*, for instance, a medical student was dismissed for poor clinical performance and the assistant dean of the medical school reported to the Association of American Medical Colleges that the dismissal resulted from a "lack of intellectual ability or insufficient preparation."¹⁷⁴ Since the association made this information available to all the accredited medical schools in the country, the court concluded that Greenhill would effectively be prevented from being admitted to any other medical school.¹⁷⁵ It held that by denigrating his intellectual ability, and not merely his academic performance, the school had deprived Greenhill of "a significant interest in liberty," and he was therefore entitled to written notice of his alleged academic deficiency and an informal hearing before the administrative body which dismissed him.¹⁷⁶

171. 419 U.S. 565, 583-84 (1975).

172. See, e.g., *Sweitzer v. Fisher*, 154 N.W. 465, 468 (Iowa 1915) (denying petition for writ of mandamus to order public high school authorities to grant petitioner diploma in absence of any claim that school board acted in bad faith); *Barnard v. Inhabitants of Shelbourne*, 102 N.E. 1095, 1097 (Mass. 1913) (rejecting student plaintiff's claim for damages for "wrongful exclusion" from public high school after he earned "deficient" grades of below 60% in three courses, and holding this academic dismissal "legal" and not reviewable by any court); *Spencer v. New York City Bd. of Higher Educ.*, 502 N.Y.S.2d 358, 359 (N.Y. Sup. Ct. 1986) (concluding that due process did not require full hearing before full-time student at Hunter College High School, an academically elite public school in New York City, was dismissed for academic deficiency and that meeting between student's mother and school officials was sufficient). But see *Cross v. Board of Trustees*, 89 S.W. 506, 508 (Ky. 1905) (authorizing mandatory injunction to reinstate public school student dismissed without any explanation or reasons being given by board of education).

173. See *Schweitzer*, *supra* note 24, at 301.

174. 519 F.2d 5, 7 (8th Cir. 1975).

175. *Id.* at 8.

176. *Id.* (citing *Board of Regents v. Roth*, 408 U.S. 564, 578 (1972)).

In *Greenhill*, the court did not reach the question of whether Greenhill had a property interest in continuing his medical education. The same year, however, the Tenth Circuit recognized a nursing student's property right in continuing her education because of the tuition she paid for enrollment and attendance at the school.¹⁷⁷ Since the nursing school had given the plaintiff guidance counseling concerning her nursing deficiencies and three hearings on her dismissal, the court concluded that this amounted to more than sufficient due process protection.¹⁷⁸

The United States Supreme Court subsequently manifested its lack of enthusiasm for student challenges to academic dismissals on due process grounds when it reversed two decisions in favor of medical students.¹⁷⁹ Charlotte Horowitz had been dismissed from medical school for lack of patient rapport, lack of clinical expertise, erratic attendance and poor personal hygiene, despite her superb academic record.¹⁸⁰ She brought a federal civil rights action against the university, alleging arbitrary and capricious action by defendants, breach of contract, an equal protection violation and deprivation of a liberty interest without due process.¹⁸¹ The district court dismissed her claim, holding that the university had afforded her more procedural due process than the law required,¹⁸² but the Eighth Circuit reversed and concluded that due process required a hearing before dismissal.¹⁸³ The Supreme Court reversed the Eighth Circuit, concluding that the review of her case by seven outside physicians which the medical school had afforded Horowitz was more than what due process required.¹⁸⁴ Significantly, however, the court did not decide whether Horowitz even had a cognizable due process liberty or property interest: It merely assumed *arguendo* these rights and her substantive due process right not to be treated arbitrarily and capriciously, and it concluded that none of her rights had been violated.¹⁸⁵

The Court revisited the issue in another case brought by a medical student seven years later.¹⁸⁶ Scott Ewing, who ranked near the bottom of

177. *Gaspar v. Bruton*, 513 F.2d 843 (10th Cir. 1975). *Cf.*, *Mahavongsanan v. Hall*, 529 F.2d 448 (5th Cir. 1976), *rev'ing* 401 F. Supp. 381 (N.D. Ga. 1975).

178. *Gaspar*, 513 F.2d at 850.

179. *Board of Curators v. Horowitz*, 435 U.S. 78 (1978); *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985).

180. *Horowitz*, 435 U.S. at 81.

181. *Id.* at 84.

182. *Id.* at 85.

183. *Id.* at 87.

184. *Id.* at 85.

185. *Id.*

186. *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985).

his medical school class, was dismissed when he failed Part I of the required National Board of Medical Examiners exam and, unlike other students in his class, was not given the opportunity to retake it.¹⁸⁷ He brought a federal civil rights action alleging contract and promissory estoppel claims as well as the claim that the denial of an opportunity to retake the test and his dismissal violated his substantive due process rights.¹⁸⁸ After a bench trial, the district court entered judgment for defendants.¹⁸⁹ The Sixth Circuit, however, reversed;¹⁹⁰ it held that under Michigan law, students had a right not to be arbitrarily dismissed, and this constituted a property interest.¹⁹¹ The court concluded that the school had violated Ewing’s substantive due process rights and had treated him “in an arbitrary and capricious manner” by denying him alone the chance to retake the national board exam.¹⁹²

The Supreme Court reversed, concluding that Ewing’s rights had not been violated.¹⁹³ Again, the Court assumed without deciding that Ewing had a property right in continued enrollment.¹⁹⁴ It agreed with the district court that even a consistent pattern of the medical school in permitting students who failed the national board exam to retake it did not confer a property interest absent some basis in state law.¹⁹⁵ It further held that in deciding whether a university had acted arbitrarily and capriciously, courts should show great respect for the faculty’s professional judgment in making academic decisions.¹⁹⁶ Restraint should be exercised where substantive due process was concerned, and courts should respect the prerogatives of educational institutions and safeguard their academic freedom.¹⁹⁷ Thus, federal courts were not the appropriate forums in which to evaluate the substance of academic decisions made by educators, and such decisions should only be overridden by courts when they constituted a substantial departure from accepted academic norms.¹⁹⁸

The Supreme Court decisions in *Horowitz* and *University of Michigan*, while tentative and equivocal about the possible existence of

187. *Id.* at 216.

188. *Id.* at 217.

189. *Ewing v. Board of Regents*, 742 F.2d 913, 913 (6th Cir. 1984).

190. *Id.* at 913.

191. *Id.* at 915.

192. *Id.* at 916.

193. *Univ. of Mich.*, 474 U.S. at 214.

194. *Id.* at 223.

195. *Id.*

196. *Id.* at 225.

197. *Id.* at 226.

198. *Id.*

procedural or substantive due process rights to a continued education in a public institution, did not completely rule out such claims in extreme cases. And some lower courts in subsequent cases have explicitly held that students possess a property interest in their continued enrollment.¹⁹⁹ Thus, however weak and uncertain such a claim may be after *Ewing*, a due process claim of property right is an obvious argument to make for a student claiming an entitlement to membership in the NHS.

B. NHS Due Process Cases

As noted above, the court in *Warren* held that defendants' actions in excluding plaintiff from the NHS for drinking beer deprived him of a liberty interest.²⁰⁰ Subsequent plaintiffs challenging their exclusion from the NHS in court did not fare as well. In another early case, Robert Miller was denied admission to the NHS chapter at Valley Stream South High School in Long Island by the faculty selection committee although he ranked tenth in his class, had engaged in public service and held offices in school clubs.²⁰¹ Certain faculty members regarded his leadership and service qualifications as inadequate.²⁰² After the faculty selection committee turned down his parents' request for the opportunity to argue his

199. *E.g.*, *Harris v. Blake*, 798 F.2d 419, 422 (10th Cir. 1986), *cert. denied*, 479 U.S. 103 (1987) (applying Colorado law); *Stevens v. Hunt*, 646 F.2d 1168 (6th Cir. 1981) (applying Tennessee law); *Evans v. West Virginia Bd. of Regents*, 271 S.E.2d 778, 780 (W. Va. 1980) (applying West Virginia law); *Ross v. Pennsylvania State Univ.*, 445 F. Supp. 147 (M.D. Pa. 1978) (applying Pennsylvania law).

200. *Warren v. National Assoc. of Secondary Sch. Principals*, 375 F. Supp. 1043, 1048 (N.D. Tex. 1974). Similarly, the court in *Ector County Independent School District v. Hopkins*, 518 S.W.2d 576, 580-83 (Tex. Civ. App. 1974), relied on *Warren* and held that Karen Hopkins had due process rights in the procedure the school followed in dismissing her from the NHS for drinking wine. However, it did not specify whether she had a liberty or a property interest at stake. In contrast, the court in *Farver v. Board of Education* held that high school students had neither a liberty nor property interest in participating in extracurricular activities. 40 F. Supp. 2d 323, 324-25 (D. Md. 1999); *see supra* notes 161-165 and accompanying text. Interestingly, NASSP Legal Counsel Ivan B. Gluckman was apparently unaware of the *Warren* and *Ector County* courts' due process holdings when he wrote in 1987: "Whether a specific interest is, in reality, a liberty or property interest protected by the Constitution is always difficult to decide. To our knowledge, however, *no court of record has ruled that selection for an honor is such an interest*. This being true, failure to be accorded an honor cannot be a deprivation of a right; and due process is not applicable to such situations." NASSP, *supra* note 9, at 89 (emphasis added). He continued, "[w]hile students not selected for membership in the NHS are not legally entitled to any kind of formal hearing or other kind of due process, common courtesy would suggest that they be graciously received, along with their parents, and that the selections process be re-explained to them." *Id.* at 90.

201. *Miller v. Goldberg*, 436 N.Y.S.2d 828, 829 (N.Y. Sup. Ct. 1981).

202. *Id.*

case before the committee, they appealed by letter to the office of the State Commissioner of Education, which found that the situation had been handled properly by the school.²⁰³ Foregoing the option of an appeal to the State Education Department, Miller's mother then commenced a special Article 78 proceeding²⁰⁴ in state supreme court to have the selection committee's decision set aside as arbitrary and capricious.²⁰⁵

The Supreme Court denied relief. It invoked the settled principle under New York law that courts should not interfere in matters involving academic standards; in providing for review by the board of education and thereafter by the Commissioner of Education, the legislature had intended to keep controversies involving education out of the courts.²⁰⁶ The court declared that it was inappropriate for it to substitute its judgment for the "good faith determination of the Selection Committee,"²⁰⁷ and that Miller's desire for NHS membership was not a cognizable property interest which would give rise to due process rights.²⁰⁸

Two years later, the courts in *Karnstein v. Pewaukee School Board*²⁰⁹ and *Price v. Young*²¹⁰ also held that high school students denied admission to the NHS did not have a property or liberty interest in membership. The Pewaukee, Wisconsin High School NHS faculty committee turned down Walter Karnstein's application for NHS membership although he was academically eligible, and requests for reconsideration by the principal and superintendent of schools were denied.²¹¹ After the Pewaukee School Board directed the faculty committee to reconsider Karnstein's application

203. *Id.* at 829-30.

204. N.Y. CIV. PRAC. LAW & RULES § 7801 et seq. An Article 78 proceeding is substantially similar to mandamus.

205. *Miller*, 436 N.Y.S.2d at 829. Miller, meanwhile, had been admitted to Adelphi University through its early admission program and had left school after his junior year. *Id.* Nevertheless, the court did not treat the case as moot.

206. *Id.* (quoting *Olsson v. Board of Educ.*, 402 N.E.2d 1150, 1153 (N.Y. 1980); *James v. Board of Educ.*, 366 N.E.2d 1291, 1297 (N.Y. 1977); *Bullock v. Cooley*, 122 N.E. 630, 633 (N.Y. 1919)).

207. *Id.* at 830. The court likened *Miller* to the untenured teacher in *Board of Regents v. Roth* whom the Supreme Court had held lacked a due process right to a hearing before dismissal because he had a mere desire or need to keep his job rather than a legitimate claim to it which would generate due process rights. 408 U.S. 564, 579 (1972). As the Court noted, "[t]o have a property interest in a benefit, a person must clearly have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim . . . to it." *Id.* at 577.

208. *Miller*, 439 N.Y.S.2d at 830.

209. 557 F. Supp. 565 (E.D. Wis. 1983).

210. 580 F. Supp. 1 (E.D. Ark. 1983).

211. *Karnstein*, 557 F. Supp. at 566.

for membership, the committee reaffirmed its decision.²¹² The Karnsteins thereupon brought an action under 42 U.S.C. § 1983 seeking damages and a decree reversing Karnstein's exclusion unless a "new and impartial panel" were appointed for one more review of his application.²¹³

The district court acknowledged that election to the NHS was quite a distinction and undoubtedly constituted "a valuable medal to wear when applying for admission to some colleges or universities."²¹⁴ Nevertheless, it was a mere "honor" like being selected to star in a school play or to serve as captain of the basketball team, rather than a legal "entitlement."²¹⁵ Thus the court held that "an applicant for membership in the NHS has no constitutionally protected liberty or property interest in election to the society. The procedures governing the selection process, therefore, need not afford to an applicant the requirements of due process of law."²¹⁶ In any event, even assuming *arguendo* the existence of an entitlement here, the court found the procedures followed, albeit subjective, were fair.²¹⁷ Accordingly, it granted defendants' motion to dismiss the case.²¹⁸

Similarly, the court in *Price* summarily disposed of Kevin Price's

212. *Id.* The first vote in the faculty committee was 4 to 3 against Karnstein; the second vote was 5 to 2 against him. The court's opinion contains no indication of why the committee found Karnstein's application for NHS membership wanting. *Id.*

213. *Id.*

214. *Id.* at 567.

215. *Id.* The court quoted the same statement from *Roth* as the *Miller* court. See *supra* note 207.

216. *Karnstein*, 557 F. Supp. at 567; see also *Moore v. Hyche*, 761 F. Supp. 112, 114 (N.D. Ala. 1991). Interestingly, plaintiff Teresa Moore was admitted to membership in the Tuscaloosa, Alabama County High School NHS chapter, but rejected for membership in the school's chapter of the National Honorary Beta Club when the average score given by ten faculty evaluators in the areas of character and attitude, service, and leadership were insufficient. *Moore*, 761 F. Supp. at 114. Moore sued, and the federal court granted summary judgment for defendant school authorities. *Id.*

217. The court stated that:

Most honors are alike in that some individual or committee must review what someone has accomplished and make a subjective judgment of whether that conduct is deserving of reward or recognition. Inherent in such a system is the possibility of error. If Paul Newman (*The Verdict*) 'wins' the academy award instead of Dustin Hoffman (*Tootsie*), who is to say that he really is more deserving? Courts would indeed be entering into a prickly briarpatch were they to get involved in reviewing these kinds of subjective judgments. While the plaintiffs here may feel that they have been treated unfairly, they have not established that Walter William Karnstein's constitutional rights have been violated.

Karnstein, 557 F. Supp. at 567.

218. The court also "summarily dismissed" plaintiff's free speech claim, finding it totally without basis. *Id.* at 567.

lawsuit seeking a court order that he be admitted to the NHS.²¹⁹ While he was academically eligible for membership, “anonymous evaluations” submitted by teachers in the Russellville, Arkansas, School District resulted in rejection of his application.²²⁰ Relying on precedent rather than analysis, the court held that “[m]embership in the National Honor Society does not give rise to a property interest which entitles one to due process of law. . . . Plaintiff has asserted no infringed liberty interest.”²²¹ Accordingly, the court granted defendant’s motion for summary judgment.²²²

A more recent case challenging rejection of a student’s application for NHS membership, *Dangler v. Yorktown Central Schools*, not only failed to achieve its purpose but also provoked the wrath of the federal court, who imposed a \$60,000 penalty on the plaintiff for bringing a frivolous case.²²³

219. *Price*, 580 F. Supp. at 4.

220. *Id.* at 2.

221. *Id.* (citations omitted); see also *Moore*, 761 F. Supp. at 114 (N.D. Ala. 1991).

222. *Price*, 580 F. Supp. at 2. The court also rejected plaintiff’s argument that the NHS selection procedures at Price’s school were unconstitutionally vague. It further noted that membership in the NHS is not a “fundamental right,” that plaintiff had not alleged that a suspect classification was involved, and that there is no private right of action under FERPA, 20 U.S.C. § 1232. *Id.*

223. *Dangler v. Yorktown Central Schs.*, 777 F. Supp. 1175, 1179 (S.D.N.Y. 1991) [hereinafter *Dangler II*]. District Judge Goettel indicated his annoyance at plaintiffs Justin Dangler and his mother at the beginning of his opinion: “This case presents the question of whether a student should have been admitted to the National Honor Society chapter of his high school. As federal rights protected by both the first and the fourteenth amendments have allegedly been violated, this court must reluctantly project its opinion into a dispute distinctly within the realm of local educational authorities.” *Dangler v. Yorktown Cent. Schs.*, 771 F. Supp. 625, 626 (S.D.N.Y. 1991) [hereinafter *Dangler I*]. Upon granting defendant’s motion for attorney fees, Judge Goettel stated: “Our federal court system is being brought into ridicule and our Constitution is being debased by persons who proclaim themselves to be its strongest supporters: civil rights advocates and attorneys purportedly working in the public interest. By attempting to elevate mere personal desires into constitutional rights and claiming denial of their civil rights whenever their desires are not realized, these persons are demeaning the essential rights and procedures that protect us all.” *Dangler II*, 777 F. Supp. at 1176. Another federal district judge became even more exasperated in a similar case involving the claim of a constitutional right to participate in extracurricular activities. In *Bernstein v. Menard*, the mother of a high school student brought a federal civil rights action on his behalf after he was dismissed from the school band. 557 F. Supp. 90 (E.D. Va. 1982) (granting motion to dismiss), *aff’d*, 728 F.2d 252 (4th Cir. 1984). The court chastised plaintiff as follows:

This complaint is another example of a prevalent disposition by parties and lawyers to litigate over every source of unhappiness to which humankind may be subject. While it might be considered unfortunate that a boy be dismissed from the high school band, it is much more unfortunate that his mother saw fit to take the matter to court and that she was able to find a lawyer willing to do her bidding . . . While all of us, including schoolchildren, have rights under the United States Constitution, the Constitution is not a god watching over us, counting the hairs on our head, or concerned when a sparrow falls from the heavens . . . Indeed,

Justin Dangler, a seventeen-year-old high school junior at Yorktown High School in the New York suburbs, had a 3.93 grade point average and had taken part in many extracurricular and volunteer activities, including the Yorktown High School newspaper, the student senate, chorus, computer club, local political campaigns and Future Business Leaders of America.²²⁴ He had received awards for excelling in both science and journalism and had performed volunteer work, instructing elementary school children in chess, assisting the curator of the Yorktown Museum and helping out at a hospital cytology lab.²²⁵ Nevertheless, the five-member faculty council rejected his NHS application.²²⁶

Justin Dangler's father, Richard Dangler, asked Principal Michael Frischman to review the decision.²²⁷ Frischman did so and found that the faculty selection committee had carefully followed NHS selection guidelines.²²⁸ Dangler subsequently wrote to Superintendent of Schools John V. Doherty, asking him to review the rejection decision.²²⁹ Doherty declined to review the decision, stating that the high school principal had the final say on NHS applications, but he did send Mr. Dangler copies of the faculty rating sheets on Justin's application and copies of disciplinary referrals in Justin's file.²³⁰ At Mr. Dangler's request, the six cutting referrals, which he contended were erroneous, were removed from Justin's file, but the school authorities did not comply with his renewed request that Justin be admitted to the NHS.²³¹ Lisa Dangler, Justin's mother, thereupon filed suit seeking to enjoin the defendants from excluding Justin from the NHS, alleging that Justin was deprived of a property interest without due

if courts seriously entertain suits such as this, not only will the courts fall into disrepute, but much more gravely, the Constitution will become the subject of derision. It is a serious mistake to treat the Constitution as a brooding presence, ever present in time of need, able to right any wrong, correct any evil, set straight that which has gone awry, feed the hungry, and clothe the naked. The Constitution is a law. It provides the framework of our government and sets forth certain restrictions upon the government's ability to interfere with fundamental rights of free men and women. Suits such as this trivialize our Constitution.

Id. at 91 (footnote omitted); *see also* Raymon v. Alvord Indep. Sch. Dist., 639 F.2d 659 (5th Cir. 1981).

224. *Dangler I*, 771 F. Supp. at 626.

225. *Id.*; Foderaro, *supra* note 13.

226. *Dangler I*, 771 F. Supp. at 626.

227. *Id.* at 627.

228. *Id.*

229. *Id.*

230. *Id.* The "referrals," evidently to the Principal's office for misconduct, included six class cuts, leaving class inappropriately, and an instance in which Justin Dangler had called two school secretaries "assholes." *Id.*

231. *Id.*

process in retaliation for his and his father's exercise of their first amendment rights, and seeking \$2 million in damages.²³²

The district court denied the Dangers a preliminary injunction.²³³ The court held that plaintiffs had little chance of success on the merits of their claims since Justin merely had a desire to join the NHS - he did not have a legitimate claim of entitlement, which would be required for him to have a property interest.²³⁴ Citing *Price* and *Karnstein*, Judge Goettel stated: "Justin is not the first student to litigate this issue and unanimously, courts have concluded that membership in the National Honor Society does not give rise to a property interest which entitles one to due process of law."²³⁵ Judge Goettel emphasized that the NHS selection process necessitated subjective judgments by faculty members, and that a federal court should not intervene and review the application process unless federal constitutional rights were threatened.²³⁶

While denying a preliminary injunction, however, the court could not dismiss the case outright, because the Dangers had alleged such a constitutional violation: that Justin's rejection was due to the fact that he had written a controversial article for the Yorktown High School newspaper, an eloquent plea for racial tolerance which plaintiffs alleged Principal Frischman had not wanted published.²³⁷ Justin's article itself, however, stated that he had been assigned to write the article "with the approval of the administration," which of course included Principal Frischman.²³⁸ Moreover, plaintiff's suggestion that the erroneous disciplinary referrals were made in retaliation for his publishing the article was impossible, since the article was written in 1991 and the referrals were made before that time, in 1988, 1989 or 1990.²³⁹ Since the article was non-controversial as well, the court found that "Justin's own facts destroy his claim."²⁴⁰

As for alleged retribution by the defendants against Justin's father, the court noted that Richard Dangler had been an outspoken critic of the school board for years, had openly clashed with the school system leadership, had sued the school on occasion, and had a tense relationship with Principal

232. *Id.*

233. *Id.* at 628.

234. *Id.*

235. *Id.*

236. *Id.* at 629.

237. *Id.*

238. *Id.* at 630.

239. *Id.*

240. *Id.*

Frischman.²⁴¹ The court held that Justin could assert his father's First Amendment privilege rights in this instance, since Mr. Dangler was not a party and could not assert the right directly, and because the right was "inextricably bound up with the activity the litigant wishes to pursue."²⁴² After reviewing the Yorktown High School NHS faculty selection process, which had led to a unanimous rejection of Justin by the faculty council, the court found that the record strongly suggested that no improper motives were involved.²⁴³ Nevertheless, it deemed a hearing necessary to resolve contested fact issues in order to determine whether plaintiff was likely to succeed on the merits at trial.²⁴⁴ Accordingly, the court granted plaintiff's request that the injunction hearing and the trial on the merits be combined into one hearing in order to resolve the case speedily.²⁴⁵

The consolidated injunction hearing and trial did not go well for the Danglers. Lisa Dangler had alleged three causes of action under 42 U.S.C. § 1983: 1) the claim that Justin had been deprived of property without due process, which the court labeled "frivolous" since it was settled law that no property right giving rise to a constitutional claim to NHS membership existed; 2) the First Amendment claim that Justin was rejected for NHS membership because of his father's past litigious activities against Yorktown High School; and 3) the First Amendment claim that Justin's rejection was in retaliation for his student newspaper article.²⁴⁶ The jury found for the defendant school district and Principal Frischman at the conclusion of the trial, and Judge Goettel agreed that "the evidence presented at trial showed the claims to be factually baseless."²⁴⁷

In the first place, Justin's article did not come out until after the decision had been made to reject his NHS application.²⁴⁸ Secondly, with respect to Richard Dangler's history of criticizing and suing the Yorktown High School authorities, the court found that "there was a total absence of proof that any of this impacted upon the recommendations of the teachers or the decision of the Faculty Selection Committee."²⁴⁹ The court

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.* at 631.

245. *Id.* at 631-32.

246. *DanglerII*, 777 F. Supp. at 1176-77.

247. *Id.* at 1177.

248. *Id.*

249. *Id.* The defendant school officials rebutted the Danglers' retaliation charge by pointing out that Justin's older sister Ellen, who was now a student at Mount Holyoke, had been admitted to the Yorktown High School NHS chapter in her junior year, at a time when her father was busily engaged in filing complaints and grievances against the school.

concluded:

To underscore the lack of merit in plaintiff's case, we note that had the jury returned a verdict in the plaintiff's favor, this court would have set it aside. The evidence overwhelmingly established that the Faculty Selection Committee evaluated Justin Dangler's application on its merits and without any consideration of an article which had not been published or read by them or the litigious activities of Justin Dangler's father. Indeed, the evidence at trial brought out substantial adverse information concerning Justin Dangler which was not known to the Faculty Selection Committee and which, had it been known, would have even more strongly justified its decision not to select him.²⁵⁰

Consequently, the court decided that defendants were entitled to an award of attorney's fees and set the amount at \$60,000.²⁵¹

Ironically, the *Warren* decision, evidently the first NHS case to be litigated by a disappointed student and one in which the federal district judge recognized a liberty interest in plaintiff's NHS membership, appears to have been the high-water mark for student due process claims of this kind. Apart from *Ector County*, which closely followed *Warren* both temporally and legally, no other court has found that high school students have either a liberty or property interest in NHS membership. The ensuing wall of precedent has been so monolithic that Judge Goettel in the *Dangler* case could deem such a due process claim by Justin Dangler “frivolous” and award defendants attorney's fees.²⁵² Thus, the 1970's “due process revolution” appears to have washed over the territory of claimed legal rights by students to participate in extracurricular activities and to have receded, leaving little trace of change in the long-standing tradition of judicial deference to educators in such areas.

CONCLUSION

When one surveys the legal landscape encompassing all the cases in which public high school students have gone to court to challenge their

Foderaro, *supra* note 13. In one instance, he had persuaded Ellen's Latin teacher to raise her grade from A to A plus so that she would qualify for high honors status. *Dangler I*, 771 F. Supp. at 627 n.1. The grade was then changed back by Principal Frischman, because he believed that grades should not be raised as favors to students. *Id.*

250. *Dangler II*, 777 F. Supp. at 1178.

251. *Id.*

252. *Id.* at 1176. “The first claim was that Justin was deprived of property without due process of law. That was clearly a frivolous claim since there exists no property right giving rise to a constitutional claim to membership in the National Honor Society. Federal Courts have so previously held.” *Id.* at 1176-77.

exclusion from or dismissal by local NHS chapters, it is bleak and forbidding for their aggrieved successors who might assume that there must be a judicial remedy for what they are likely to perceive as a gross injustice. In the hyper-competitive environment of many contemporary high schools, where students with top grades are likely to feel that they must gain admission to the most prestigious colleges if they are to succeed later in life, being rejected or dismissed by their local NHS chapter may be the first setback in their drive for success. One can empathize with the keen sense of disappointment felt by those rejected for non-academic reasons, when their academic success seemed to promise automatic admission to an organization based first and foremost on earning superior grades. Unless such students have such a special circumstance as a Title IX claim, however, prudence would counsel against their seeking relief in court, since this course is likely to yield only further disappointment.

It seems clear that *Chipman*, *Cazares*, and *Wort* were correctly decided. Title IX law controlled their outcomes, and plaintiffs' evidence that unwed mothers were treated differently from their sexual partners and from girls who had not become pregnant after premarital sex was compelling. Ironically, the very fact of nature which made the girls uniquely vulnerable to society's disapproval and censure for the consequences of their behavior - the fact that only females get pregnant and bear children, whereas many or most unwed biological fathers remain anonymous and thus escape society's disapproval - furnished plaintiffs with their strongest and most probative argument in court that they had been unfairly and unequally treated. In any event, it is hard not to admire the girls' efforts to make the best of a difficult situation by caring for their babies while working hard to maintain their superior academic records at the same time.

Plaintiffs in the beer and wine cases, who usually were violating both civil law and school regulations, elicit less sympathy from us. And no sympathy whatsoever is due those guilty of plagiarism or cheating on tests. An "honor" society which tolerated casual defiance of the law or intellectual dishonesty would be a contradiction in terms.

The more vexing problem is posed by the myriad of cases in which academically outstanding students are excluded from NHS membership because of the necessarily subjective judgments of faculty council members²⁵³ but this cannot be ascribed to any single obvious factor. Some rejections of this kind, just like some grades that teachers give, will

253. The NHS Handbook acknowledges that "[a]ll decisions concerning selection have a certain subjective element" NASSP, *supra* note 9, at 23.

inevitably be unfounded and unfair. The harsh reality, however, is that there probably is no effective way to identify such unfair judgments on appeal and to distinguish them from those that are fair and well-founded. Gross bias on the part of faculty council members against NHS candidates may be likely to be discovered on appeal, but not more subtle bias which may nevertheless sink a candidacy.

Faculty council members who have had the opportunity to observe students over many months both in and out of the classroom, in any event, are the ones who are most familiar with their qualities of leadership, service and character. Principals probably do not know individual students as well as the faculty council members, and school board members are unlikely to know them at all. School principals and school board members, moreover, are professionally obliged to afford a presumption of fairness and objectivity to the judgments of their faculty employees. And if school administrators and school board members should tread cautiously before overturning the decisions of NHS faculty councils entrusted with this duty, there is still less justification for judges or juries to intervene except in the most egregious cases of unfairness. In an imperfect world in which almost everyone has experienced the disappointment of failing to receive a job offer, college admission or distinction to which he or she felt entitled, it is probably a good thing that the due process revolution of the 1970's came to a halt where court challenges to exclusion from NHS membership are concerned.

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