

# They Can Pump Up the Volume but Can They Pump Out Their Milk? Public Secondary Schools Should be Required to Accommodate Lactating Students

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## I. INTRODUCTION

Jaielyn Belong, a sophomore at Lake Forest High School in Felton, Delaware gave birth to a baby boy in December 2012.<sup>1</sup> She wanted to exclusively breastfeed her child, which would mean nursing her child whenever possible and expressing and storing her breast milk once she returned to school,<sup>2</sup> but the high school administration initially refused Jaielyn's request for accommodations to express her breast milk during the school day.<sup>3</sup>

Jaielyn's story first came to light in a blog post on January 30, 2013 on "Examiner.com."<sup>4</sup> Jaielyn's desire to breastfeed stemmed from the financial and health benefits associated with breastfeeding.<sup>5</sup> However, because she wished to maintain her breast milk while continuing her education, certain accommodations would be needed to express breast milk at school, such as a private place to sit and refrigeration for the expressed milk.<sup>6</sup>

The school's initial response to Jaielyn's request was a decisive "no." Without accommodations from the school to support her continued breastfeeding, Jaielyn might have had to choose between providing essential nutrients for her child and not going back to high school.<sup>7</sup> The

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<sup>1</sup> Emily Goodman, *Teen Mom Denied Reasonable Breastfeeding Accommodations*, EXAMINER.COM (Jan. 30, 2013), <http://perma.cc/4UXW-2YAJ>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Jaielyn could have weaned her child; however, the benefits of breastfeeding—described later in this article—were likely paramount in her mind. She also might have had the option of attending a school for young mothers in the district that might have accommodated her; however, those institutions

school nurse, a counselor, and an administrator all told her that she should breastfeed prior to and after school hours.<sup>8</sup> Jaielyn's mother explained that the school nurse called her and said that "the electric pump is noisy and will draw attention to my daughter. Pumping milk is time consuming. They're not even sure she'll be pumping milk when she says so."<sup>9</sup> The school was concerned about providing proper supervision while she was expressing milk, and it did not want to be responsible for providing refrigeration for the breast milk.<sup>10</sup>

The breastfeeding community is "plugged in," and word of Jaielyn's breastfeeding woes traveled quickly through breastfeeding internet sites.<sup>11</sup> A Facebook page titled "We support Jaielyn Belong's right to feed her baby" popped up and quickly had more than 2,500 "likes."<sup>12</sup> In turn, these informal sources of news attracted the attention of the local media and politicians.<sup>13</sup> As a result, a small army of breastfeeding advocates came to Jaielyn's defense.<sup>14</sup>

Lake Forest School District Superintendent, Dan Curry, was interviewed after Jaielyn made her breastfeeding accommodation request.<sup>15</sup> Mr. Curry made it clear that if an employee made the request, then surely, the employee would be able to find space in the school to express breast

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often have subpar educational opportunities for new mothers. For an in depth discussion of alternative schools for pregnant and parenting teens, see Tamara S. Ling, *Lifting Voices: Towards Equal Education for Pregnant and Parenting Students in New York City*, 29 *FORDHAM URB. L.J.* 2387 (2002).

<sup>8</sup> *Delaware Teen Mom Denied Breastfeeding Accommodations*, MOMMATRAUMABLOG.COM (Jan. 29, 2013), <http://perma.cc/A7FU-WEVA>.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *A Tale of a School, a Teen, a Baby, and a Global Community*, THE LEAKY BOOB (Feb. 14, 2013), <http://perma.cc/6TX-DJX6>; *Teen Mom Breastfeeding*, BABYCENTER COMMUNITY (Nov. 30, 2013), <http://perma.cc/SLN8-GDJK>.

<sup>12</sup> *We Support Jaielyn Belong's Right to Feed Her Baby*, FACEBOOK, <http://perma.cc/X8G7-Q8XT?type=pdf> (last visited Feb. 26, 2014); Shirley Min, *Delaware School Now Accommodating Breastfeeding Mom*, NEWSWORKS.ORG (Feb. 7, 2013), <http://perma.cc/NH7R-4FJ7>.

<sup>13</sup> Min, *supra* note 12.

<sup>14</sup> Breastfeeding advocates are becoming more active and vigilant when they believe a fellow nursing mother has been treated unfairly. "Nurse In" protests are being held where nursing mothers come together and breastfeed their children at a site where breastfeeding had been publically discouraged or disallowed. For example, in November of 2011, a Houston mother was asked to stop nursing her infant at a Target Store, despite the fact that she had covered herself and the child with a blanket. As a result, "Best for Babes," a Facebook page supporting nursing mothers, set up a nationwide protest about a month later. Mothers coast to coast protested that treatment by sitting on the floor at Target and publically nursing their babies. See Ryan Jaslow, *Breastfeeding Moms Stage "Nurse-In" Protests at Target Stores*, CBS NEWS (Dec. 29, 2011), <http://perma.cc/KPN8-9D6Y>. The possibility of a "nurse-in" was also discussed in Jaielyn's case, but once the school decided to accommodate her, the demonstration was cancelled. See *Protesting the Protest: Delaware Advocates Refuse to "Nurse-In" after Breastfeeding Rights Granted to Teen Mom*, MOMMATRAUMABLOG.COM (Jan. 31, 2013), <http://perma.cc/B93A-RR9G>.

<sup>15</sup> *Superintendent Responds: Delaware Teen Mom Denied Breastfeeding Accommodations*, MOMMATRAUMABLOG.COM (Jan. 30, 2013), <http://perma.cc/DEZ4-XPZU>.

milk and arrange breast milk expression around her work schedule.<sup>16</sup> Without specifically referring to Jaielyn, he said there was a “health and safety” concern involved with a student breastfeeding at school.<sup>17</sup> He believed that students need to be supervised at school.<sup>18</sup> Additionally, he was also concerned about milk storage and stated, “I don’t believe it’s a taxpayer’s responsibility to provide a refrigerator [for breast milk storage].”<sup>19</sup>

Mr. Curry suggested an alternative school within the district, which focuses on teenage mothers, that might be a more appropriate setting for a student who wished to breastfeed.<sup>20</sup> That school, Delaware Adolescent Pregnancy Initiative, was in a separate location from Jaielyn’s neighborhood high school.<sup>21</sup> Mr. Curry said he was unsure whether the school had a legal obligation to accommodate a breastfeeding student.<sup>22</sup> Mr. Curry also indicated that he was not sure whether the laws which required the district to accommodate employees would apply to students, who are required to be in school all day but are not employed by the school district.<sup>23</sup>

In response to the media attention surrounding Jaielyn’s story, the Breastfeeding Coalition of Delaware (“BCD”) sent a letter to the Lake Forest School District.<sup>24</sup> The BCD offered its assistance in “ensuring that in the future the district protects and supports all mothers’ rights to breastfeed, students and employees alike.”<sup>25</sup> The letter cited the Fair Labor Standards Act (FLSA),<sup>26</sup> which requires employers to provide a nursing mother reasonable break times to express her breast milk, as well as a place to do so.<sup>27</sup>

The school quickly changed its position about accommodating Jaielyn; within thirty-six hours of the initial news blog, the school agreed to

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<sup>16</sup> Presuming the school district has fifty or more employees, Mr. Curry’s perception that it is up to an employee to find space to express milk does not conform with the requirements of the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 207(r) (2010), which requires employers to provide a space and reasonable amount of time for the expression of breast milk, see the discussion of that law below.

<sup>17</sup> MOMMATRAUMABLOG.COM, *supra* note 15.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Superintendent Responds: Delaware Teen Mom Denied Breastfeeding Accommodations*, MOMMATRAUMABLOG.COM (Jan. 30, 2013), <http://perma.cc/DEZ4-XPZU>.

<sup>24</sup> *Letter from Breastfeeding Coalition of Delaware Sent to Lake Forest School District*, MOMMATRAUMABLOG.COM (Jan. 31, 2013), <http://perma.cc/F76B-VSHM>.

<sup>25</sup> *Id.*

<sup>26</sup> Fair Labor Standards Act, 29 U.S.C. § 207(r) (2010).

<sup>27</sup> *Id.*

provide Jaielyn with the time and space to express breast milk.<sup>28</sup> A donor purchased a small refrigerator and breastfeeding supplies.<sup>29</sup> It is unclear what prompted the school to change its position. Perhaps the school district was pressured or motivated by the media attention to the story to ensure it was meeting its legal obligations to the student. Even though the school district was ultimately persuaded to accommodate Jaielyn, no consensus emerged on which source of law might apply regarding the issue.

A breastfeeding teenage mother is a bit like a mermaid; you have heard about her but you are not sure she actually exists—Jaielyn’s story received so much attention because it was an issue that the particular school district had never dealt with before.<sup>30</sup> After all, teenage mothers have so much on their plates; the demands of parenting competing simultaneously with adolescent immaturity. It is likely that this would be an unusual request at almost any high school in the country. Of the one million teenagers who give birth each year, 70% of them will drop out of high school.<sup>31</sup> Many of the young mothers who actually make it back to school are probably not contemplating breastfeeding their child.

With the vast array of barriers student mothers encounter while trying to fulfill their educational ambitions, you may wonder whether the issue of student breastfeeding is worth much thought. This Article argues that the issue of accommodating a breastfeeding student matters because of all of the potential benefits that breastfeeding can provide an adolescent mother and her young child. The health and emotional payback breastfeeding delivers may in fact help these mothers and their children deal with the financial, emotional, and health issues that they will likely face in the years to come.

This Article analyzes the potential benefits of promoting breastfeeding by teenage mothers.<sup>32</sup> Beyond the health and financial benefits associated with breastfeeding, successful breastfeeding may be the first step in instilling parental confidence in these young women.<sup>33</sup> Based on scientific research and statistics, this Article argues that teenage mothers interested

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<sup>28</sup> Eleanor La Prade, *Lake Forest Student’s Breastfeeding Becomes Issue*, DEL. STATE NEWS (Feb. 14, 2013), <http://perma.cc/GMD4-XP6>.

<sup>29</sup> *Id.*

<sup>30</sup> MOMMATRAUMABLOG.COM, *supra* note 15.

<sup>31</sup> *Finishing School as a Mom*, TEENPREGNANCYSTATISTICS.ORG, <http://perma.cc/GAD5-Q9ZR> (last visited Feb. 26, 2014).

<sup>32</sup> Although this article argues that schools should accommodate lactating students, it does not imply that schools should in any way force students to breastfeed. This author opines that breastfeeding is a personal choice that each mother should make after educating herself about the process and the possible benefits to her and her child.

<sup>33</sup> Lori Feldman-Winter & Ulfat Shaikh, *Optimizing Breastfeeding Promotion and Support in Adolescent Mothers*, 23 J. OF HUM. LACTATION 362, 363 (2007).

in breastfeeding should feel that the adults in their lives, including school personnel, are supportive of their breastfeeding.

To date, there are no published court decisions on the issue of whether a secondary school is required to accommodate a lactating student. This Article explores the various sources of law that might be evaluated by the courts. The Article looks at breastfeeding cases in other arenas and finds that the overall trend in case law about breastfeeding, generally, supports a woman's desire to breastfeed at work and in public.<sup>34</sup> That case law bolsters the argument that schools should accommodate teenage mothers who wish to either breastfeed or express breast milk at school.<sup>35</sup> The Article also explores education laws. When a student makes an accommodation request, a school is typically only looking at what one student needs. The issue of breastfeeding is unique because it also deals with the well-being of a student's young child. Case law involving disability issues, reasonable accommodations,<sup>36</sup> and sex discrimination are considered.

In conclusion, this Article explores legislative proposals that support student breastfeeding and argues that there should be strong and certain legislation requiring schools to accommodate breastfeeding students. Current sources of law may be inadequate to protect students' breastfeeding rights. The concluding section also suggests that schools should proactively initiate policies and programs that accommodate lactating mothers.

## II. BENEFITS AND OBSTACLES TO ADOLESCENT BREASTFEEDING

After watching several episodes of MTV's Teen Mom series, you might think that teenage mothers are largely irresponsible parents, often falling into lives filled with drug dependency, abusive boyfriends, and criminal behavior. Although not all young mothers fit this mold, the actual statistics regarding teenage mothers are in fact daunting. In 2011, there

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<sup>34</sup> See *infra* Section III (discussing case law).

<sup>35</sup> There is a presumption that most students would likely request facilities to express breast milk during the school day, however, this article does not preclude the possibility that a student may have a means of having her infant transported to her at school for nursing.

<sup>36</sup> There is an in depth discussion on disability law as it relates to lactation in Section IIIC(3) of this article. Regulations promulgated by the Office of Civil Rights under the federal Department of Education explain that a school must accommodate disabled students. See 34 C.F.R. §104.44(a). "A 'reasonable accommodation' is one that gives the otherwise qualified plaintiff with disabilities 'meaningful access' to the program or services sought." *Henrietta v. Bloomberg*, 331 F.3d 261, 282 (2d Cir. 2003). If a school views the student's request for breastfeeding accommodations as an accommodation request, this puts the student in the position of having to argue that feeding her child is akin to a request for an accommodation for a medical disability. Women will likely be offended that breastfeeding a child, which is a natural source of nourishment for babies, is considered to be a malady.

were 329,797 infants born to women aged fifteen to nineteen.<sup>37</sup> The rate of teenage motherhood is declining,<sup>38</sup> but life for a teen after having a child is statistically bleak. Pregnancy and childbirth were the primary reasons female students dropped out of high school.<sup>39</sup> Approximately 50% of teen mothers received a high school diploma, compared to 90% of female students who did not give birth.<sup>40</sup> Unfortunately, less than 2% of girls who give birth before reaching the age of eighteen receive college diplomas.<sup>41</sup>

There is a strong correlation between teen pregnancy and academic failure.<sup>42</sup> The loss of education robs these adolescents of the credentials and skills necessary for meaningful employment and independence.<sup>43</sup> Beyond failures in education, these young women are at risk of living in poverty and are susceptible to physical and mental illness.<sup>44</sup> Many of these new mothers are victims of violence and abuse before, during, and after the pregnancy.<sup>45</sup> Teenage mothers often find themselves homeless because they are asked to leave their childhood homes upon discovery of the pregnancy.<sup>46</sup>

Children of teenage mothers share their own set of obstacles in life. These children are at risk for child abuse, neglect, and abandonment.<sup>47</sup> The educational outlook for the offspring of teenage mothers is no better than their mothers' chance of succeeding academically. They have a 50% chance of repeating a grade level and are less likely than their peers to receive a high school diploma.<sup>48</sup> Children of teenage mothers are also likely to live in poverty, experience health problems, and receive substandard health care.<sup>49</sup> The sons of teenage mothers are more likely to be incarcerated and daughters are more likely to experience teenage

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<sup>37</sup> *Teen Pregnancy*, CTRS FOR DISEASE CONTROL AND PREV., <http://perma.cc/NVA5-ZFHL> (last visited Apr. 20, 2014).

<sup>38</sup> *Trends in Teen Pregnancy and Childbearing*, THE OFF. OF ADOLESCENT HEALTH, <http://perma.cc/3DRF-4Y3R> (last updated Apr. 20, 2014).

<sup>39</sup> *About Teen Pregnancy*, CTRS FOR DISEASE CONTROL AND PREV., <http://perma.cc/A7BM-WNPC> (last updated Nov. 21, 2012).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *See Id.*

<sup>43</sup> *When Children Have Children*, AM. ACAD. OF CHILD & ADOLESCENT PSYCHOL., <http://perma.cc/Q9SX-95LB> (last updated Apr. 20, 2014).

<sup>44</sup> *Id.*

<sup>45</sup> Sally Leiderman & Cari Almo, *Interpersonal Violence and Adolescent Pregnancy: Prevalence and Implications for Practice and Policy*, CTR FOR ASSESSMENT & POL'Y DEV. (2001), available at <http://perma.cc/8V5C-5W36>.

<sup>46</sup> *NN4Y Issue Brief: Pregnant and Parenting Unaccompanied Youth*, NAT'L NETWORK FOR YOUTH (2007), available at <http://perma.cc/R4RQ-UGUN>.

<sup>47</sup> *Unique Needs of Children Born to Teen Parents*, HEALTHY TEEN NETWORK, <http://perma.cc/XK38-395Y> (last visited Apr. 20, 2014).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

pregnancy themselves.<sup>50</sup> One study found that by the time the children of teenage mothers reached the age of twenty-four, 30% were not in school, working, or even seeking employment.<sup>51</sup>

The lives of pregnant and parenting high school students are not easy.<sup>52</sup> There is a scholastic environment of discouragement where pregnant and parenting students are pressured to leave school, directly and indirectly.<sup>53</sup> School personnel and fellow students also treat these young mothers differently than other students:<sup>54</sup> schools often treat pregnant students as “bad” people or “lost causes”<sup>55</sup>; punitive absence policies are enforced against students who leave school for pregnancy related medical appointments or to care for a sick child;<sup>56</sup> school districts often segregate students into alternative programs which may “operate as drop out factories” for teenage mothers;<sup>57</sup> new mothers are routinely denied homebound or online schooling postpartum;<sup>58</sup> and when students are ready to go back to school, they often lack childcare or transportation to childcare.<sup>59</sup> As one commentator pointed out, “[i]nstead of providing support, some schools compound the challenges inherent in being a young mother by creating environments that are unwelcoming at best and hostile and discriminatory at worst.”<sup>60</sup>

Despite all the obstacles facing teenage mothers returning to schools, there are students, like Jaielyn, who wish to go back to school and continue to breastfeed their babies. The “Breast is Best” campaign has raised public awareness to the many advantages of breastfeeding. The federal special supplemental nutrition program for Women, Infants and Children (“WIC”) encourages breastfeeding for its participants.<sup>61</sup> Babies digest breast milk more easily than formula. Breastfeeding can also act as a preventative measure to many childhood illnesses such as lower respiratory infections, obesity, asthma, Type 2 diabetes, childhood leukemia, gastrointestinal

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<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> See generally *A Pregnancy Test for Schools: The Impact of Education Laws on Pregnant and Parenting Students*, NAT’L WOMEN’S LAW CTR. (2012), <http://perma.cc/TH9P-AADS>.

<sup>53</sup> *Id.* at 3.

<sup>54</sup> *Id.* at 4.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 5.

<sup>57</sup> *Id.*

<sup>58</sup> *A Pregnancy Test for Schools: The Impact of Education Laws on Pregnant and Parenting Students*, *supra* note 52, at 6.

<sup>59</sup> *Id.*

<sup>60</sup> Liz Watson & Peter Edelman, *From Fragmentation to Integration: A Comprehensive Policy Approach to Serving Young Mothers and their Families Through School-Based Interventions*, 20 GEO. J. ON POVERTY L. & POL’Y 269, 279 (2013).

<sup>61</sup> 7 C.F.R. § 246.1; See *Women, Infants, and Children (WIC): Breastfeeding Promotion and Support in WIC*, USDA, <http://perma.cc/FQ58-AFXZ> (last visited Apr. 20, 2014).

disease, and skin rashes.<sup>62</sup> Mothers benefit from breastfeeding as well. Breastfeeding has been shown to lower the risks for Type 2 diabetes, breast and ovarian cancer, and postpartum depression.<sup>63</sup> Breastfeeding also saves new mothers money. Mothers can avoid the cost of formula, which can add up to over \$1,500 per year.<sup>64</sup> Breastfeeding mothers who are on WIC benefits are provided with breastfeeding support, education, and counseling.<sup>65</sup>

Despite the numerous benefits breastfeeding provides, most adolescent mothers are not likely to breastfeed. Only 50% of adolescent mothers initiated breastfeeding in 2005 compared to 68% of mothers ages twenty to twenty-nine and 78% of mothers ages thirty and older.<sup>66</sup> Moreover, when young mothers initiated breastfeeding, they were less likely to breastfeed past the six month and one year points, and the vast majority did not breastfeed exclusively.<sup>67</sup>

Adolescent breastfeeding mothers face unique barriers that their adult counterparts do not typically face. Teen mothers often are embarrassed, self-conscious, unprepared, and eager to move on with their lives after the birth of a child. These factors make it difficult for teenage mothers to follow through with breastfeeding.<sup>68</sup> Returning to work or school is also a major obstacle.<sup>69</sup> New mothers initiate breastfeeding because they have been educated to understand its value; however, women who continue to breastfeed do so because they are supported.<sup>70</sup>

We do not know how many students would be helped with supportive breastfeeding programs at school; there are no national statistics of the number of pregnant or parenting mothers that have attended secondary schools.<sup>71</sup> Although adolescents are not likely to breastfeed, they have the most to gain from breastfeeding.<sup>72</sup> Women who successfully breastfed were likely supported by family, friends, health professionals, birthing classes, self-help publications, lactation consultants, or a combination of

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<sup>62</sup> *Why Breastfeeding is Important*, WOMEN'S HEALTH.GOV, <http://perma.cc/NU64-EFGS> (last updated Aug. 1, 2010).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Breastfeeding Promotion and Support in WIC*, USDA, <http://perma.cc/NK26-FNSA> (last updated Jan. 14, 2014).

<sup>66</sup> Feldman-Winter & Shaikh, *supra* note 33, at 362.

<sup>67</sup> *Id.*; exclusive breastfeeding means that “the infant only receives breast milk without any additional food or drink, not even water.” *Nutrition: Exclusive Breastfeeding*, WHO, <http://perma.cc/3Z8R-X5MW> (last visited Feb. 2, 2014).

<sup>68</sup> Feldman-Winter & Shaikh, *supra* note 33, at 363.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 364.

<sup>71</sup> *A Pregnancy Test for Schools*, *supra* note 52, at 6.

<sup>72</sup> Feldman-Winter & Shaikh, *supra* note 33, at 366.

these supports.<sup>73</sup> Teenage mothers may need more support than their adult counterparts in initiating and continuing to breastfeed.<sup>74</sup> Teenage mothers who participate in “support programs that enhance adolescent mothers’ sense of being cared for” have a better chance of successfully breastfeeding.<sup>75</sup> Success in breastfeeding a child can instill parental confidence and, in turn, “[p]erceived self confidence in parenting is likely to improve self-esteem.”<sup>76</sup> Successful breastfeeding teens need to rely on support and assistance from the adults around them to achieve their infant feeding goals.

As seen in Jaielyn’s case, a school may be averse to having a student breastfeed or express milk at school. Teenage mothers are already stigmatized in having obviously engaged in premarital sex; these girls already bear an invisible scarlet letter.<sup>77</sup> Allowing the students to handle their breasts during the school day may make some school administrators cringe. Americans tend to view breasts as sexual objects, while there has been little media attention paid to breasts’ “nurturing function.”<sup>78</sup> Teenagers are inundated with television, movie, and print images conveying breasts as objects of sexual desire while teenagers are unlikely to have seen a woman breastfeeding in the mass media.<sup>79</sup> School administrators may be uncomfortable with breastfeeding; there is currently a national uneasiness about it. Most adults in the United States do not

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<sup>73</sup> Lindsey K. Grossman et al., *The Infant Feeding Decision in Low and Upper Income Women*, 29 *CLINICAL PEDIATRICS* 30, 32 (1990).

<sup>74</sup> Breastfeeding is not necessarily intuitive. New mothers need to learn how to properly get their baby to latch on to the breast in a way that is comfortable for themselves and effective for their child. The mother needs to ensure the child is getting the proper amount of breast milk. Expressing and storing breast milk requires preparation. A mother needs to bring along a breast pump and storage bags and make sure the equipment is properly cleaned after use. Breast milk needs to be refrigerated and discarded if not used in a timely manner. See *Breastfeeding*, WOMENSHALTH.GOV, <http://perma.cc/K59D-43MH> (last updated Aug. 1, 2010). All of these issues make breastfeeding especially challenging for teenagers.

<sup>75</sup> Feldman-Winter & Shaikh, *supra* note 33, at 364.

<sup>76</sup> *Id.*

<sup>77</sup> The scarlet letter refers to Nathaniel Hawthorne’s novel titled *THE SCARLET LETTER* where a young woman became pregnant in Puritan New England after an affair and as a result of her adultery was forced to wear a scarlet letter “A” for adultery on her dress. In an effort to discourage teen pregnancy many schools have taken actions that have resulted in stigmatizing pregnant teens. For example, recently in North Carolina a high school refused to post a yearbook photo of a student who posed with her newborn son. See Lee Moran, *N.C. Teen Mom Banned from Holding Baby Son in High School Yearbook Photo*, *DAILY NEWS* (May 3, 2013), available at <http://perma.cc/3L6D-Q6C7>. A Louisiana school banned pregnant students from attending school on its campus and even forced students to take pregnancy tests to enforce the policy. *School Policy Forces Students to Take Pregnancy Tests, Bans Pregnant Teens*, *FOXNEWS.COM* (Aug. 2, 2012), available at <http://perma.cc/5GSW-BXWH>.

<sup>78</sup> *The Surgeon General’s Call to Action to Support Breastfeeding*, U.S. DEP’T OF HEALTH & HUMAN SERV. (2011), available at <http://perma.cc/SMD4-MLC4>.

<sup>79</sup> *Id.*

believe that women should have the right to breastfeed in public.<sup>80</sup> Breastfeeding in a public place is not automatically considered different from indecency; in fact, only twenty-eight states, the District of Columbia, and the Virgin Islands specifically exempt breastfeeding from public indecency laws.<sup>81</sup>

Proper lactation requires women to breastfeed or express breast milk regularly throughout the day.<sup>82</sup> Students attending school full time will need to breastfeed or express their milk during the school day. Schools will need to accommodate these young mothers. With so many benefits for the student and her child, it seems obvious that schools should support student mothers' decision to breastfeed.

### III. SOURCES OF LAW RELATED TO BREASTFEEDING RIGHTS

This section looks at possible sources of law that might determine whether a public secondary school is required to provide accommodations to a lactating student. There are two legal issues a student will face when they ask for breastfeeding accommodations at school. The student will first need to establish her legal right to breastfeed or express breast milk at school. The student will then have to show that the school is legally required to provide a time and space for that activity. Although there is no case specifically on this issue, a review of related case law illustrates how the courts have ruled on breastfeeding issues and in what direction the courts may be willing to go on the topic.

A student who wants to breastfeed or express breast milk at school will likely ask the school to provide certain accommodations such as a private space to pump milk, refrigeration to store the milk, and time during the school day to accomplish the task. In the area of disability law, employers and schools are accustomed to providing students with accommodations for disabilities.<sup>83</sup> In the employment context, employers are mandated to provide reasonable accommodations to employees: "an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities."<sup>84</sup> In the education context, most accommodations are adjustments made for a disabled student to participate in school, with changes in rules or routines that assist a student in

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<sup>80</sup> *Id.*

<sup>81</sup> *Breastfeeding Laws*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://perma.cc/6MTU-W8M3?type=image> (last updated August 2011).

<sup>82</sup> Reasonable Break Time for Nursing Mothers, 75 FED. REG., 80073, 75 (Dec. 21, 2010).

<sup>83</sup> See *infra* Section III(C & D).

<sup>84</sup> 29 C.F.R. § 1630.2(o) (1997).

succeeding academically.<sup>85</sup> An examination of case law and statutes may help determine whether a public secondary school is required to provide accommodations to a lactating student.

#### *A. State and Federal Public Accommodation Statutes*

In 1999, a federal law was enacted to protect women who breastfeed in federal buildings.<sup>86</sup> Since few, if any, public secondary schools are housed in federal buildings, this provision is of little use to lactating adolescents. It is useful, however, to show greater governmental acceptance and encouragement of breastfeeding in public.<sup>87</sup>

Many states have laws addressing breastfeeding. Public accommodation statutes prohibit entities from discriminating against a group of individuals in public places.<sup>88</sup> Public accommodation laws assure people equal access to places of public accommodation within a state. Under state public accommodation statutes, women may breastfeed in any private or public location in forty-five states, as well as the District of Columbia and the Virgin Islands.<sup>89</sup>

None of the state public accommodation statutes that allow women to breastfeed in public specifically mention breastfeeding in public schools; however, some of those statutes include schools in the definitional section of the statute.<sup>90</sup> In states where the public accommodation statute includes

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<sup>85</sup> For a discussion of student disability accommodations, see *Protecting Students with Disabilities: Frequently asked Questions About Section 504 and the Education of Children with Disabilities*, U.S. DEP'T OF EDUC., <http://perma.cc/RE9C-UB6A> (last visited Feb. 26, 2014).

<sup>86</sup> “Notwithstanding any other provision of law, a woman may breastfeed her child at any location in a Federal building or on Federal property, if the woman and her child are otherwise authorized to be present at the location.” Act of Sept. 29, 1999, Pub. L. No. 106-58, 113 Stat. 430.

<sup>87</sup> Title III of the Americans with Disabilities Act (ADA) would probably not assist students either. Title III covers discrimination against disabled individuals in places of public accommodations. There is a discussion about the ADA and related disability laws later in this article. It is challenging to convince a court to find a lactating mother is disabled under any law. However, even if the student were to get past that hurdle, courts have found Title III inapplicable to public entities such as schools. See *Sandison v. Mich. High Sch. Athletic Ass'n*, 64 F.3d 1026 (6th Cir. 1995) (The Sixth Circuit held that “[p]ublic school grounds and public parks are of course operated by public entities, and thus cannot constitute public accommodations under title III.”). In a case where a public school district refused to administer a prescription drug to a student, the Eighth Circuit held that “[e]ntities subject to Title III include private schools, but not public ones.” *DeBord v. Bd. of Educ.*, 126 F.3d 1102, 1106 (8th Cir. 1997) (“[P]ublic accommodations are operated by *private entities*, not public entities.”). “Public School grounds . . . are of course operated by public entities, and thus cannot constitute public accommodations under Title III.” *Sandison*, 64 F.3d at 1036.

<sup>88</sup> *Public Accommodations*, FINDLAW, <http://perma.cc/4H3U-4ATH> (last visited Feb. 26, 2014).

<sup>89</sup> NATIONAL CONFERENCE OF STATE LEGISLATURES, *supra* note 81.

<sup>90</sup> For example Pennsylvania law defines schools as places of public accommodation in 43 PA. CONS. STAT. ANN. § 954(l) (West 2014) and also has a breastfeeding statute, 35 PA. CONS. STAT. ANN. § 636.3 (West 2014), that permits women “to breastfeed her child in any location, public or private.” Public schools are specifically included as places of accommodation under New Jersey law, N.J. STAT. ANN. § 10:5-5(l) (West 2010) and New Jersey’s law specifically mandates that a mother shall be

schools in its definition of public places, a student might successfully argue a right to breastfeed and express milk at school. Yet even with a legal right established the student may still face a school's opposition to accommodating a lactating student by providing facilities and time to do so when needed.<sup>91</sup>

Delaware's public accommodation law might support Jaielyn's right to express her milk at school.<sup>92</sup> Delaware defines a place of public accommodation to include "state agencies, local government agencies, and state funded agencies performing public functions."<sup>93</sup> This definition seemingly includes public schools. So in Delaware, a student might argue a right to breastfeed at school under Delaware's state public accommodation statute.<sup>94</sup>

A Massachusetts court found that its state public accommodation statute required an accrediting institution to provide an accommodation to a breastfeeding student in an educational setting.<sup>95</sup> In *Currier v. National Board of Medical Examiners*, a student requested additional break time and a suitable place to express her breast milk while she was sitting for her medical licensing examination.<sup>96</sup> The defendant, an examination administrator, denied this request and Currier filed suit, claiming, among other things, that the defendant's refusal to provide her with additional break time violated the state's public accommodation statute.<sup>97</sup> The

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entitled to breast feed her baby in any location of a place of public accommodation, resort or amusement wherein the mother is otherwise permitted, N.J. STAT. ANN. § 26:4B-4 (West 2014).

<sup>91</sup> This may also be a valid argument in states where the definition of public accommodation does not specifically mention schools but is broad enough to argue for their inclusion. See *Carroll K. v. Fayette Cnty. Bd. of Educ.*, 19 F. Supp. 2d 618 (S.D.W. Va. 1998).

<sup>92</sup> Delaware's public accommodation law states in relevant part, "a mother shall be entitled to breastfeed her child in any location of a place of public accommodation wherein the mother is otherwise permitted." DEL. CODE ANN. tit. 31, § 310 (West 2014).

<sup>93</sup> DEL. CODE ANN. tit. 6, § 4502(14) (West 2013).

<sup>94</sup> See *Gordy v. Bice*, No. Civ.A. 02A-10-003, 2003 WL 22064103, at \*4, (Del. Super. Ct. Aug. 21, 2003.) (The court found that "a public school is a place of public accommodation", however, that finding was not decisive in the ultimate ruling in the case.)

<sup>95</sup> *Currier v. Nat'l Bd. of Med. Exam'rs*, 462 Mass. 1, 20-21 (2012).

<sup>96</sup> *Id.* at 7-8.

<sup>97</sup> *Id.* at 17 citing MASS. GEN. LAWS ANN. ch. 272 § 98 (West 1989) which states in relevant part:

Whoever makes any distinction, discrimination or restriction on account of . . . sex . . . relative to the admission of any person to, or his treatment in any place of public accommodation, resort or amusement, as defined in section ninety-two A, or whoever aids or incites such distinction, discrimination or restriction, shall be punished by a fine of not more than twenty-five hundred dollars or by imprisonment for not more than one year, or both, and shall be liable to any person aggrieved thereby for such damages as are enumerated in section five of chapter one hundred and fifty-one B; provided, however, that such civil forfeiture shall be of an amount not less than three hundred dollars; but such person so aggrieved shall not recover against more than one person by reason of any one act of distinction, discrimination or restriction. All persons shall have the right to the full and equal accommodations, advantages, facilities and

defendant argued that even if her claim fell within the state's public accommodation statute, "there was no evidence that it restricted or interfered with Currier's use of the testing site."<sup>98</sup> In other words, its argument was that she could use the site as any other testing participant, but the statute did not require it to give her any more than anyone else received. The court disagreed, focusing on language in the statute that entitled people to all the "advantages" the location allowed.<sup>99</sup> The court explained that for women who were expressing breast milk, "all or nearly all of that break time is consumed by expressing breast milk. As a result, a subclass, comprised only of women, are [sic] denied advantages of adequate break time."<sup>100</sup>

The *Currier* court found that not only were women entitled to breastfeed under the state public accommodation statute, but also the statute also required facilities to provide accommodations for that activity.<sup>101</sup> Using the *Currier* court analysis, if a student mother can prove that her school is a place of public accommodation under a state statute, she may also succeed in claiming that the school must accommodate her under that state statute.<sup>102</sup> Perhaps a similar argument could be lodged under other laws; the right to breastfeed alone is useless without the right to have the time and space to perform the task.

### *B. Constitutional claims*

Parents have a fundamental constitutional right to raise their children as they see fit.<sup>103</sup> Fundamentally, "the custody, care and nurture of the child resides first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply or hinder."<sup>104</sup> The rights to conceive and raise children have been deemed "essential," "basic civil rights," which are "far more precious . . . than

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privileges of any place of public accommodation, resort or amusement subject only to the conditions and limitations established by law and applicable to all persons. This right is recognized and declared to be a civil right.

<sup>98</sup> *Id.* at 20.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* The court also recognized that intent was not required under that statute and recognized a claim of disparate impact.

<sup>101</sup> *Currier v. Nat'l Bd. of Med. Exam'rs*, 462 Mass. 1, 20 (2012).

<sup>102</sup> See also *Corral v. Bryant and Stratton Coll.*, No. 1:13CV0066, 2013 WL 1773821 (N.D. Ohio Apr. 25, 2013) (A pending case in the United States District Court in which a college student was dismissed from a nursing program and she claimed that dismissal violated Ohio's public accommodation statutes. The plaintiff claims she was denied the right to pump breast milk every two hours and was therefore unable to make it through one of her classes. At one point she returned to class late because she was pumping and alleged she was locked out of the classroom.)

<sup>103</sup> See *Stanley v. Illinois*, 405 U.S. 645 (1972); *Prince v. Massachusetts* 321 U.S. 158 (1944); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

<sup>104</sup> *Prince*, 321 U.S. at 166.

property rights."<sup>105</sup> Breastfeeding is an "elemental form of parental care" and is therefore a constitutional right that should be protected from "excessive state interference."<sup>106</sup>

### *I. Students' Constitutional Rights*

"It can hardly be argued that . . . students . . . shed their constitutional rights . . . at the schoolhouse gate."<sup>107</sup> But, because students are not adults with fully matured decision-making capacity, the courts have limited their constitutional rights.<sup>108</sup> Moreover, there has been a delicate balancing act between students' constitutional rights and a schools' right to maintain a safe environment for all students.<sup>109</sup>

School shootings at Sandy Hook Elementary School, Virginia Tech, and Columbine increasingly place school safety in the forefront of everyone's minds. Inherent in school safety is the notion that schools are responsible for exercising some degree of supervision over their students. After all, parents entrust schools to care for and supervise their children each day.<sup>110</sup> The doctrine of *in loco parentis* is alive and well in secondary school education law.<sup>111</sup> The Supreme Court has affirmed schools' rights to limit students' freedom of expression if that limitation is being used to protect other students. In *Bethel School District No. 403 v. Fraser*, the Supreme Court favored the school's "interest in protecting minors from exposure to vulgar and offensive spoken language" over a student's first amendment right to free speech at a school assembly.<sup>112</sup> Similarly, in

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<sup>105</sup> *Stanley*, 405 U.S. at 651 (citing *Meyer*, 262 U.S. at 399; *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

<sup>106</sup> *Dike v. Sch. Bd. of Orange Cnty., Fla.*, 650 F.2d 783, 787 (5th Cir. 1981).

<sup>107</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

<sup>108</sup> "[T]he constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986).

<sup>109</sup> "[T]he Supreme Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Tinker*, 393 U.S. at 507.

<sup>110</sup> "[T]he teachers and administrators of those schools stand *in loco parentis* over the children entrusted to them." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654 (1995).

<sup>111</sup> *In loco parentis* means "in the place of a parent." *In Loco Parentis*, THE FREE DICTIONARY, <http://perma.cc/5UHB-Q5AJ>; See *Acton*, 515 U.S. at 654; see also Susan Stuart, *In Loco Parentis in the Public Schools: Abused, Confused, and in Need of Change*, 78 U. CIN. L. REV. 969, 980 (2010).

<sup>112</sup> The Supreme Court found a school was justified when it limited students' free speech rights by editing sexual innuendoes out of a student's speech at a school assembly. The court reasoned,

The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission. A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students. Accordingly, it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the "fundamental values" of public school education.

*Hazelwood School District v. Kuhlmeier*, the court found that the school district was justified in editing out a story from the school newspaper about teen pregnancy.<sup>113</sup> Three pregnant students interviewed for the article were promised their identities would be protected; but the school administrator believed, based on the facts of the article, that the students could be identified.<sup>114</sup> The court determined that the schools' interest in protecting the privacy of the pregnant students outweighed the student journalist's first amendment rights.<sup>115</sup>

Schools have been forced to re-evaluate their roles regarding student supervision in this age of "sexting" and "cyber-bullying."<sup>116</sup> The Supreme Court has pointed out that schools have a duty to protect and supervise students beyond what would be required over "free adults."<sup>117</sup> Breastfeeding is a fundamental right associated with parenting.<sup>118</sup> Even constitutional rights may be limited if other compelling interests, such as school safety, exist. Jaielyn's school expressed safety concerns relating to her expressing breast milk at school.<sup>119</sup> Although courts tend to side with schools when it comes to supervision and safety issues, it is hard to imagine what type of safety justification a school could make when it comes to student's fundamental right to breastfeeding or expressing breast milk.

## 2. Prisoner Cases

If you can do it in jail, you can probably do it in school. Although students often jokingly refer to school as a jail, students get a reprieve from the institution when the bell rings at the end of the day. Prisoners, on the other hand, live it 24/7. That difference has not stopped courts from analogizing student and prisoner rights.<sup>120</sup> Although the issue of student

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*Bethel*, 478 U.S. at 685, 686.

<sup>113</sup> *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 274 (1988).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> Shaheen Shariff & Dianne L. Hoff, *Cyber Bullying: Clarifying Legal Boundaries for School Supervision in Cyberspace*, 1 INT'L J. OF CYBER CRIMINOLOGY 76 (2007).

<sup>117</sup> *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 655 (2009). "Even in schools that have been spared the most severe disciplinary problems, the preservation of order and a proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult." *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985).

<sup>118</sup> *Shahar v. Bowers*, 114 F.3d 1097, 1102 (11th Cir. 1997); *Southerland v. Thigpen*, 784 F.2d 713, 714 (5th Cir. 1986); *Berrios-Berrios v. Thornburg*, 716 F. Supp. 987, 990 (E.D. Ky. 1989); *Dike v. Sch. Bd. of Orange Cnty., Fla.*, 650 F.2d 783, 787 (5th Cir. July 1981) *overruled on other grounds*.

<sup>119</sup> *Hazelwood Sch. Dist.*, 484 U.S. at 266.

<sup>120</sup> See *Procunier v. Martinex*, 416 U.S. 396, 409–10 (1974) (analogizing a school's censorship of a student newspaper in *Tinker* with a prison's right to censor inmate correspondence.); *Corales v. Bennett*, 567 F.3d 554, 564–65 (9th Cir. 2009) (citing *Gaut v. Sunn*, 810 F.2d 923, 925 (9th Cir. 1987))

breastfeeding has not been the topic of any court decision, the issue of prisoner breastfeeding as a constitutional right has been raised with mixed results.

Diane Southerland was pregnant when she was imprisoned for embezzlement.<sup>121</sup> After she went into labor, she was transferred to a hospital where she gave birth to her son and began to breastfeed.<sup>122</sup> When the state attempted to remove her from the hospital, she sought a restraining order and injunction to prevent separation from her infant to continue to breastfeed.<sup>123</sup> Southerland argued that her decision to breastfeed her child was a fundamental constitutionally protected privacy right and was not outweighed by the state's compelling interest of operating its correctional system.<sup>124</sup> The court acknowledged that Southerland might ordinarily have a privacy right to raise her child as she saw fit, which would presumably include the right to breastfeed.<sup>125</sup> The court ultimately denied her right to breastfeed in jail, because of the special rules necessary to operate a safe and effective correctional institution.<sup>126</sup>

Prisoner Luz Berrios-Berrios fared better than Southerland in her quest to nurse her infant.<sup>127</sup> Berrios was incarcerated when she gave birth to her daughter and also breastfed her child while she was in the hospital.<sup>128</sup> She asked to be allowed to breastfeed her infant in the prison during visitation when a friend was willing to bring the child daily.<sup>129</sup> The prison denied her request and Berrios also sought an injunction. The court agreed with Berrios that she did have a "fundamental interest in her decision to breastfeed her child."<sup>130</sup> The court found that the prison had not suggested a "single rational interest" to prevent her from breast-feeding during regular visitation periods.<sup>131</sup>

The courts in both of these prisoner cases agreed that there is a fundamental constitutional right to breastfeed one's child. The *Berrios* case provides a foundational directive that some breastfeeding

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(determining a school administrator's threatening words to a student were not actionable, in part because similar words used by a prison guard were found not actionable).

<sup>121</sup> *Southerland*, 784 F.2d at 714.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 715.

<sup>125</sup> *Id.* at 715-16.

<sup>126</sup> *Id.* at 718.

<sup>127</sup> *Berrios-Berrios v. Thornburg*, 716 F. Supp. 987, 991 (E.D. Ky. 1989).

<sup>128</sup> *Id.* at 988.

<sup>129</sup> *Id.*; (The inmate also requested a thirty day furlough from prison to care for her daughter.).

<sup>130</sup> *Id.* at 990.

<sup>131</sup> *Id.* She also asked to store her expressed milk in the prison refrigerator. In terms of the breast milk expression and storage, the court held that the correctional facility did have compelling reasons to disallow breast milk storage, which included the cost of refrigeration, the time-consuming task of handling the storage and delivery of the breast milk, and the difficulty in dealing with inherent safety issues when materials come in and out of a prison. *Id.*

accommodations should be provided. If a student's parent is willing to bring an infant to school to breastfeed during the day, similar to prisoner Berrios, the school may have a hard time in justifying why that should not be allowed. After all, should a student not, minimally, have the same rights as a prisoner?<sup>132</sup>

### 3. Teacher Cases

Teachers have raised constitutional issues relating to pregnancy and motherhood. In *Cleveland v. LaFleur*, the Supreme Court found that an overly restrictive maternity leave rule in a public school violated the Due Process Clause of the Fifth Amendment and the Fourteenth Amendment.<sup>133</sup> In *Dike v. School Board of Orange County*, the court held that a school teacher's decision to breastfeed was protected under the Fourteenth Amendment as a "fundamental 'personal liberty.'"<sup>134</sup> Dike filed a complaint when her employer refused to allow her to breastfeed during the school day. Dike's husband or babysitter was bringing the child onto the school campus during her free period.<sup>135</sup> The school told Dike that such activity violated its policy that teachers cannot bring their children onto the school campus.<sup>136</sup> The court found that Dike was entitled to a trial to determine whether the school's safety interests were strong enough to overcome Dike's constitutional rights.<sup>137</sup>

Similar to teachers and prisoners, the constitutional right to breastfeed

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<sup>132</sup> Women visiting prisons may have to breastfeed elsewhere. See *CHRO ex rel. Vargas v. State Dep't of Corr.*, No. HHBCV 136019521S, 2014 WL 564478 (Conn. Super. Ct. Jan 10, 2014) (a Connecticut court recently addressed a woman's right to breastfeed her child while she was visiting the child's father in prison. The case was decided under the state's public accommodations law and the prison's visiting room was found not a place of public accommodation under the state statute. The court was persuaded by the inherently dangerous nature of the prison and the correctional facilities' right to maintain safety standards.)

<sup>133</sup> *Cleveland Bd. Of Educ. v. LaFleur*, 414 U.S. 632, 650 (1974).

<sup>134</sup> *Dike v. Sch. Bd. of Orange Cnty., Fla.*, 650 F.2d 783, 787 (5th Cir. 1981), *overruled on other grounds*; *Shahar v. Bowers*, 114 F.3d 1097, 1102 (11th Cir.1997).

<sup>135</sup> *Dike*, 650 F.2d at 785.

<sup>136</sup> *Id.*

<sup>137</sup> Citing cases involving the privacy interests inherent in other family related relationships, the court reasoned:

Breastfeeding is the most elemental form of parental care. It is a communion between mother and child that, like marriage, is "intimate to the degree of being sacred." *Griswold v. Conn.* 381 U.S. 486, 85 S. Ct. at 1682, 14 L.Ed. 2d at 516. Nourishment is necessary to maintain the child's life, and the parent may choose to believe that breastfeeding will enhance the child's psychological as well as physical health. In light of the spectrum of interests that the Supreme Court has held specifically protected we conclude that the Constitution protects from excessive interference a woman's decision respecting breastfeeding her child.

*Id.* at 787; *see also Carey v. Population Servs. Int'l*, 431 U.S. 678, 686 (1977); *Roe v. Wade*, 410 U.S. 113, 152-53 (1973); *Id.* at 209-12, (Douglas, J., concurring); *Griswold v. Connecticut*, 381 U.S. 479, 479 (1965).

can only be overridden if a school can provide a strong enough interest in disallowing that activity. Dan Curry, the superintendent of Jaielyn's school, discussed "health and safety" problems involved with a student breastfeeding at school.<sup>138</sup> Certainly, safety concerns at school are less than the security concerns of an institutional facility. Any apprehension a school might have about nudity and breastfeeding is easily addressed. Expressing milk can be done modestly, with less nudity than students using the restrooms. Health issues relating to breast milk storage may exist, but those same issues would be present when any student brings food into school. Students bring lunch into school every day without the school monitoring for proper food storage.<sup>139</sup> Even if a student successfully argues that the right to breastfeed is a fundamental constitutional right, the student would still need to convince a court that a school's failure to accommodate her breastfeeding is also unconstitutional.

### C. Employment Laws

This section examines civil rights statutes which affect working mothers. Courts often analogize from one civil rights statute to another.<sup>140</sup> These cases may be persuasive to a court if it were to decide whether the schools need to allow breastfeeding or expression of breast milk at school and what type of accommodations might be reasonable.<sup>141</sup>

#### 1. Fair Labor Standards Act of 1938 as amended by the Nursing Mothers Amendment

In its letter to the school board, the BCD suggested the Fair Labor Standards Act of 1938 ("FLSA") might be applicable to Jaielyn's request

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<sup>138</sup> MOMMATRAUMABLOG.COM, *supra* note 23.

<sup>139</sup> Obviously a secondary school would play a role in setting up accommodations for a breastfeeding student; likely the same type of accommodations that an employer would provide under the FLSA. A private place to express the milk (other than a bathroom), a sink to clean the pump and related supplies and a refrigerator to store the milk would probably need to be provided. However, the school would not necessarily need to supervise the student.

<sup>140</sup> See *Alexander v. Choate*, 469 U.S. 287, 292-94 (1985) (analogizing Title VI to Section 504 of the Rehabilitation Act); *Alexander v. Yale Univ.*, 459 F. Supp. 1, 3 (D. Conn. 1977), *aff'd* 631 F. 2d 178 (2d Cir. 1980) (Court analogized Title IX to Title VII).

<sup>141</sup> Civil rights statutes are used to analyze each other. Title IX was patterned after Title VI of the Civil Rights Act, which prohibits discrimination of race, color, or national origin in federally funded programs. Section 504 of the Rehabilitation Act was also modeled after Title VI. Therefore, the analytical framework of one should be applicable to all. U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., *Title IX Legal Manual*, Jan. 11, 2001, at 64, available at <http://www.justice.gov/crt/about/cor/coord/ixlegal.pdf> (citing *Alexander*, 469 U.S. 287, 294 (1985)). Similarly, courts have used Title VII to interpret Title IX. *see id.* at 98-99 (citing *Alexander*, 459 F. Supp. 1, 4 (D. Conn. 1977) *aff'd* 631 F.2d 178 (2d Cir. 1980)).

to express breast milk at school.<sup>142</sup> When the Patient Protection and Affordable Care Act and the Reconciliation Act of 2010 were passed in March 2010, Congress also amended the FLSA, adding the Nursing Mothers Amendment.<sup>143</sup> The FLSA specifically mandates that employers accommodate breastfeeding, working mothers and is the most specific law regarding breastfeeding at work.<sup>144</sup> This law requires an employer to provide a reasonable break time for an employee to express breast milk for one year after the birth of a child.<sup>145</sup> An employer is also required to provide a place, other than the bathroom, to express the milk.<sup>146</sup> Employers with fewer than fifty employees may be exempt from the law if it imposes an undue hardship.<sup>147</sup>

Although the statute itself does not provide specific guidance as to what reasonable break times and specific facilities for breastfeeding mothers should be provided under the statute, the Department of Labor has issued informal guidance on the issue.<sup>148</sup> In a Question and Answer fact sheet, the Department of Labor explained the frequency and duration of breaks will be different for each mother.<sup>149</sup> In the Federal Register, the

<sup>142</sup> MOMMATRAUMABLOG.COM, *supra* note 24.

<sup>143</sup> Fair Labor Standards Act, 29 U.S.C. § 207(r) (2010).

<sup>144</sup> Another federal law which addresses postnatal issues is the Family Medical Leave Act (“FMLA”). The FMLA is unlikely to assist working mothers who want to breastfeed. Although the FMLA provides up to twelve weeks of unpaid leave within a year after the birth of a child, it provides no protection to mothers who want to return to work and breastfeed their child after doing so. *See*, 29 U.S.C. § 2612(a)(1) (2009). In addition, there is no provision to take short breaks throughout the day to breastfeed or express breast milk. In fact, in materials prepared by the Department of Labor specifically stated, “The Department does not believe that breaks to express breast milk can properly be considered to be FMLA leave or counted against an employee’s FMLA leave entitlement.” 75 Fed. Reg., 244, (Dec. 21, 2010), <http://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=24540>.

<sup>145</sup> Section 7 of the Fair Labor Standards Act of 1938 (29 U.S.C. 207) is amended by adding at the end the following:

- (1) An employer shall provide – A. a reasonable break time for an employee to express milk for her nursing child for 1 year after the child’s birth each time such employee has to express milk, and B. a place other than the bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.
- (2) An employer shall not be required to compensate an employee receiving reasonable break time under paragraph (1) for any work time spent for such purpose.
- (3) An employer that employs less than 50 employees shall not be subject to the requirements of this subsection, if such requirements would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer’s business.
- (4) Nothing in this subsection shall preempt a State law that provides greater protections to employees than the protections provided for under this subsection.

29 U.S.C. § 207 (r) (2010).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Break Time for Nursing Mothers*, U.S. DEP’T OF LABOR, WAGE AND HOUR DIVISION, <http://perma.cc/BP6-H5SU> (last visited Apr. 20, 2014).

<sup>149</sup> *Fact Sheet #73: Break Time for Nursing Mothers under the FLSA*, U.S. DEP’T OF LABOR, WAGE AND HOUR DIVISION, <http://perma.cc/PU2Q-N9E3> (last visited Apr. 20, 2014).

Department of Labor provided guidance and regulations which provide guidelines to implement the reasonable break time requirement.<sup>150</sup>

Coverage under the FLSA requires a mother to be an employee.<sup>151</sup> In Jaelyn's case, the BCD argued that being a full time student is equivalent to working a full-time job.<sup>152</sup> While this might be true, it is unlikely that a court would find a student, whose education is funded by tax dollars and who earns no money, is an employee. Although the FLSA is not likely to apply to students, it is relevant to this discussion because it is the only federal law that specifically speaks to accommodating breastfeeding mothers. The related regulations provide a roadmap for what type of accommodations schools should provide for students.<sup>153</sup> Much like working breastfeeding mothers, breastfeeding students are generally inside the same building for most of the day and need time and space either to express their milk or feed their child.<sup>154</sup>

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<sup>150</sup> 75 Fed. Reg. 80,075 (Dec. 21, 2010) provides,

The frequency of breaks needed to express breast milk varies depending on factors such as the age of the baby, the number of breast feedings in the baby's normal schedule, whether the baby is eating solid food, and other factors. In the early months of life a baby may need as many as 8 to 12 feedings per day. A nursing mother produces milk on a constant basis. If the baby does not take milk directly from the mother, it must be removed by a pump about as frequently as the baby usually nurses. If the mother is unable to express breast milk while she is away from her baby, she may experience a drop in her milk supply which could result in her being unable to continue nursing the child. The inability to express milk may also lead to an infection . . . the Department expects that nursing mothers will need breaks to express milk two to three times during an eight hour shift . . . the act of expressing milk alone typically takes about 15 to 20 minutes . . .

<sup>151</sup> 29 U.S.C. § 203(e) (2006).

<sup>152</sup> MOMMTRAUMABLOG.COM, *supra* note 24.

<sup>153</sup> 75 Fed. Reg. 80,073, 80,075 (Dec. 21, 2010).

<sup>154</sup> Unfortunately, the FLSA provides no real penalty for employers who choose not to comply with the law. The Department of Labor takes complaints regarding noncompliance. While an expedited investigation has been promised, given the time sensitive nature of the issue the only real remedy the Department of Labor is likely to obtain is compliance with the law. In materials provided by the Department of Labor to give guidance on the law it states:

Section 7(r) of the FLSA does not specify any penalties if an employer is found to have violated the break time for nursing mothers requirement. In most instances, an employee may only bring an action for unpaid minimum wages or unpaid overtime compensation and an additional equal amount in liquidated damages. 29 U.S.C. 216(b). Because employers are not required to compensate employees for break time to express breast milk, in most circumstances there will not be any unpaid minimum wage or overtime compensation associated with the failure to provide such breaks.

If an employer refuses to comply with the requirements of section 7(r), however, the Department may seek injunctive relief in federal district court, and may obtain reinstatement and lost wages for the employee. 29 U.S.C. § 217. Reasonable Breaks for Working Mothers, 75 Fed. Reg. 800,073–800,079 (Dec. 21, 2010), *available at* <http://perma.cc/7VY4-69MK>.

### 2. State Statutes for Breastfeeding Employees

State laws may provide additional rights to breastfeeding working mothers. The District of Columbia, Puerto Rico, and twenty-four states all have laws that protect women's rights to breastfeed or express breast milk at work.<sup>155</sup> These laws may be more expansive than the FLSA. For example, Hawaii's law is quite robust, creating a cause of action for unlawfully terminating an employee because she breastfed or expressed breast milk at the workplace.<sup>156</sup>

### 3. Americans with Disabilities Act of 1990

Some litigants have asked courts to find that lactation is a disability that an employer must accommodate under the Americans with Disabilities Act of 1990 ("ADA").<sup>157</sup> The ADA prohibits discrimination based on an individual's disability and defines a disabled person as an individual who has a "physical or mental impairment that substantially limits one or more major life activities, or has a record of such impairment, or is regarded as having such impairment."<sup>158</sup> Under the ADA, an employer is required to make "reasonable accommodations" to qualified individuals with disabilities, unless an employer can show that the accommodation would be an undue hardship on the employer.<sup>159</sup> With few exceptions, the courts have refused to find that pregnancy and its related complications are disabilities under the ADA.<sup>160</sup> These cases tend to rationalize that pregnancy is a normal health condition, rather than a disability.<sup>161</sup> Even in cases where a pregnancy resulted in a miscarriage, the courts were unwilling to find that miscarriage was a disability under the ADA.<sup>162</sup>

The argument that lactation is a disability has also largely failed under the ADA.<sup>163</sup> The leading case on the issue is *Martinez v. NBC*.<sup>164</sup> Alicia

<sup>155</sup> *Breastfeeding Laws*, *supra* note 81.

<sup>156</sup> Haw. Rev. Stat. § 367-3 (1999).

<sup>157</sup> See *Kennebrew v. N.Y.C. Hous. Auth.*, No. 01 CIV 1654 (JSR) (AJP) 2002 WL 265120, at \*18 (S.D.N.Y. Feb. 26, 2002); *LaCoparra v. Pergament Home Ctrs., Inc.*, 982 F. Supp. 213, 228 (S.D.N.Y. 1997); *Gudenkauf v. Stauffer Commc'ns, Inc.*, 922 F. Supp. 465, 473 (D. Kan. 1996); *Lehmuller v. Inc. Vill. of SAG Harbor*, 944 F. Supp. 1087, 1093 (E.D.N.Y. 1996); *Byerly v. Herr Foods*, No. CIV. A. 92-7382, 1993 WL 101196, at \*4 (E.D. Pa. Apr. 6, 1993).

<sup>158</sup> 42 U.S.C. § 12101(b) (2006).

<sup>159</sup> 42 U.S.C. § 12102(a) (2009).

<sup>160</sup> See *Dantuono v. Davis Vision Inc.*, No. 07-CV-2234 (TCP) (ETB) 2009, WL 5196151, at \*4 (E.D.N.Y. Dec. 29, 2009); *Kennebrew*, 2002 WL 265120, at \*18; *LaCoparra*, 982 F. Supp. at 228; *Gudenkauf*, 922 F. Supp. at 473; *Lehmuller*, 944 F. Supp. at 1093; *Byerly*, No. CIV. A. 92-7382, 1993 WL 101196, at \*4.

<sup>161</sup> *Id.*

<sup>162</sup> See *Conley v. UPS*, 88 F. Supp. 2d 16, 19 (E.D.N.Y. 2000); *Minott v. Port Auth. of N.Y. & N.J.*, 116 F. Supp. 2d 513, 525 (S.D.N.Y. 2000).

<sup>163</sup> See *EEOC v. Hous. Funding II*, 717 F.3d 425, 429 n.6 (5th Cir. 2013).

<sup>164</sup> *Martinez v. NBC*, 49 F. Supp. 2d 305 (S.D.N.Y. 1999).

Martinez worked as a producer for the defendant's cable news network.<sup>165</sup> After her maternity leave, she returned to work part time and brought a breast pump with her in order to express her breast milk approximately three times a day in twenty-minute intervals.<sup>166</sup> She experienced problems with coworkers trying to gain access to the empty editing room she was using to express breast milk.<sup>167</sup> Two months later, Ms. Martinez returned to work full time, often being asked to work extra hours for breaking news stories.<sup>168</sup> Along with other issues raised to Human Resources, Martinez claimed that on at least three occasions, male employees made offensive comments to her about her breastfeeding.<sup>169</sup> Martinez ultimately found other employment, but sued her employer, claiming that it failed to afford her with a "safe, secure, sanitary and private area to breast pump" in violation of the ADA.<sup>170</sup> With little analysis, the court denied the claim and held that breastfeeding is not a disability under the ADA.<sup>171</sup> It reasoned that if pregnancy is not a disability under the relevant case law, neither is breastfeeding.<sup>172</sup> The court cited a circuit judge's reasoning that "[i]t is simply preposterous to contend a woman's body is functioning abnormally because she is lactating."<sup>173</sup> Apparently, the court believed a condition must be an abnormality to be considered a disability under the ADA.

The Americans with Disabilities Act Amendments Act of 2008 ("ADAAA") amended the ADA to explain the scope of what is considered a disability and broaden the category of major life activities that substantially limit the individual with the disability under the statute.<sup>174</sup> The changes to the ADA were made in response to the judicial trend of constricting rights under the statute.<sup>175</sup> In a publication about pregnancy discrimination, the EEOC explains, "[i]f a woman is temporarily unable to perform her job due to a medical condition related to pregnancy or childbirth, the employer or other covered entity must treat her the same

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<sup>165</sup> *Id.* at 307.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Martinez v. NBC*, 49 F. Supp. 2d 308 (S.D.N.Y. 1999).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 309 (citing *Bond v. Sterling*, 997 F.Supp. 306, 311 (N.D.N.Y. 1998)).

<sup>174</sup> Lawrence D. Smith & Molly Hughes Cherry, *The ADA Amendments Act of 2008: Practical Implications for Employers in 2012 and Beyond*, 79 DEF. COUNS. J. 32, 33 (2012).

<sup>175</sup> See *Sutton v. United Air Lines*, 527 U.S. 471 (1999) (describing a pre-amendment case in which the Court determined that mitigating measures limit the scope of a disability under the ADA); *Toyota Motor Mfg. v. Williams*, 534 U.S. 184, 192 (2002) (describing a pre-amendment case in which the Court held that diagnosis of a medical condition was not sufficient for coverage under the ADA, that medical condition must also substantially limit the specific major life activity at issue.).

way as it treats any other temporarily disabled employee. For example, the employer may have to provide light duty, alternative assignments, disability leave, or unpaid leave.<sup>176</sup> The publication goes on to state, “[t]he ADA Amendments of 2008 makes it much easier to show that a medical condition is a covered disability,”<sup>177</sup> implying that the courts may be more open to finding pregnancy and related medical issues to be disabilities under the ADA amendments.

In 2012, one commentator suggested that the ADAAA’s relaxed definition of disability, in terms of scope and duration, opens the door for disability claims under the ADA for a normal pregnancy.<sup>178</sup> Recent court decisions give new life to the argument that lactation is a disability covered under the ADA.<sup>179</sup> For example, one court refused to grant a motion to dismiss a disability discrimination claim filed for medical condition related to pregnancy that extended beyond the pregnancy itself.<sup>180</sup> Another court found that pregnancy related impairments could be disabilities that should be accommodated if a complaint alleged severe enough complications.<sup>181</sup> If a court is willing to find lactation is a disability, then the right to accommodate under the ADA should follow.<sup>182</sup> This line of cases opens the door for similar student claims under related educational laws.

#### 4. Title VII and the Pregnancy Discrimination Act

Title VII of the Civil Rights Act prohibits employment discrimination on the basis of sex.<sup>183</sup> The Pregnancy Discrimination Act (“PDA”)<sup>184</sup> amended Title VII. The PDA was passed by Congress in 1978 to overrule the Supreme Court’s decision in *General Electric Co. v. Gilbert*, which

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<sup>176</sup> *Pregnancy Discrimination*, EEOC, <http://perma.cc/JD6H-2W28> (last visited Apr. 20, 2014).

<sup>177</sup> *Id.*

<sup>178</sup> Jeannette Cox, *Pregnancy As A Disability and the Amended Americans with Disabilities Act*, 53 B.C. L. REV. 443 (2012) (“[W]orkers with temporary physical limitations comparable to pregnancy may receive ADA accommodations, courts should conclude the ADA’s goal-to reshape the workplace to accommodate previously excluded persons-extends to pregnancy.”).

<sup>179</sup> See *Nayak v. St. Vincent Hosp. & Health Care Ctr.*, No. 1:12-CV-0817-RLY-MJD, 2013 WL 121838 (S.D. Ind. Jan. 9, 2013); *Mayorga v. Alorica, Inc.*, No. 12-21578-CIV, 2012 WL 3043021 (S.D. Fla. July 25, 2012).

<sup>180</sup> *Nayak*, No. 1:12-cv-08170RLY-MJD, 2013 WL 121838, at \*4.

<sup>181</sup> *Mayorga*, No. 12-21578-CIV, 2012 WL 3043021, at \* 11 (“Whether these complications are of such severity and nature as to entitle Mayorga to relief under the ADA or FCRA are factual questions and are not properly resolved on a motion to dismiss.”).

<sup>182</sup> It is foreseeable that some women will not want to argue that lactation is a disability because it places an unnecessary stigma on breastfeeding mothers. This author is suggesting that one way to enforce a right to accommodation may be to find that lactation is legally a disability that employers and schools are mandated to accommodate.

<sup>183</sup> 42 U.S.C. § 2000e (1994).

<sup>184</sup> *Id.*

held that pregnancy discrimination was not sex discrimination.<sup>185</sup> The PDA does not expressly provide employees with the right to workplace accommodations; instead, it provides pregnant workers the right to be free from discrimination based on pregnancy in the workplace.<sup>186</sup> The PDA “makes clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions.”<sup>187</sup> Although the PDA requires an employer not to discriminate against a pregnant employee, courts have held that the PDA does not require the employer to accommodate the employee as a result of normal pregnancy-related infirmities.<sup>188</sup>

When women have sought post-pregnancy accommodations, courts have perceived these requests as more akin to requests for accommodating parental choices rather than requests for reasonable accommodations for medical conditions. For example, in a case where a mother sought an extension of her maternity leave because she was not mentally ready to leave her child, the court opined that the “desire to avoid leaving her infant son was not a ‘medical condition’ within the meaning of the PDA.”<sup>189</sup> Another mother sought an extension of maternity leave to attend to her twins’ medical appointments because the treatments would be “time consuming and emotionally trying.”<sup>190</sup> The court found that “[a]ll pertinent authorities since the inception of the PDA are in accord that Title VII does not prohibit discrimination on the basis of child-rearing activities or parental leave.”<sup>191</sup>

Similarly, courts have generally concluded that Title VII does not cover breastfeeding women.<sup>192</sup> “[S]ex plus’ discrimination [is] when a person is subjected to disparate treatment based not only on her sex, but on

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<sup>185</sup> See *California Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 277 (1987). The PDA provides a definition of “because of sex” or “on the basis of sex”: “to include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions, and women effected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefits programs, as other persons not so affected but similar in their ability or inability to work.” 42 U.S.C. § 2000e (1994).

<sup>186</sup> 42 U.S.C. § 2000e (1994).

<sup>187</sup> *Newport News Shipbuilding & Dry Dock v. EEOC*, 462 U.S. 669, 684 (1983).

<sup>188</sup> See *Falk v. City of Glendale*, No. 12-CV-00925-JLK, 2012 WL 2390556, at \*4 (D. Colo. June 25, 2012) (“The Pregnancy Discrimination Act does not require any affirmative accommodations; it simply prohibits employers from treating pregnancy-related conditions ‘less favorably than other medical conditions.’”).

<sup>189</sup> *Hollstein v. Caleel & Hayden, LLC*, No. 11-CV-00605-CMA-BNB, 2012 WL 4050302, at \*4 (D. Colo. Sept. 14, 2012).

<sup>190</sup> *Barnes v. Hewlett-Packard Co.*, 846 F. Supp. 442, 443 (D. Md. 1994).

<sup>191</sup> *Id.* at 444.

<sup>192</sup> See *Wallace v. Pyro Mining Co.*, No. 90-6259, at \*1 (6th Cir. 1991); *Barrash v. Bowen*, 846 F.2d 927, 932 (4th Cir. 1988); *Martinez v. NBC, Inc.*, 49 F. Supp. 2d, 305, 311 (S.D.N.Y. 1999); *McNeill v. N.Y.C. Dep’t of Corr.*, 950 F. Supp. 564, 571 (S.D.N.Y. 1996).

her sex considered in conjunction with a second characteristic.”<sup>193</sup> Women have been unsuccessful in using the “sex plus” theory of discrimination for breastfeeding claims. One court found there was no “sex plus” discrimination because there was no comparable subset of breastfeeding men.<sup>194</sup> This court failed to discuss the PDA and its impact on Title VII in its analysis.

Other courts have similarly been unwilling to find breastfeeding covered under Title VII or the PDA. In *Wallace v. Pyro Min. Co.*, the court found that there was no cause of action for the refusal to extend the plaintiff’s maternity leave to wean her son.<sup>195</sup> Even when the breastfeeding request relates to a child’s health, a court was still unwilling to find an actionable claim under the PDA. In *McNill v. New York City Department of Corrections*, the plaintiff’s child was born with cleft palate and lip.<sup>196</sup> The mother alleged that breastfeeding her son was medically necessary due to his medical condition and inability to bottle-feed. The court found the plaintiff’s inability to bottle-feed was not a medical condition covered under the PDA.<sup>197</sup> Even when the breastfeeding request related to a child’s health, the court was still unwilling to find an actionable claim under the PDA. The court reasoned that a medical condition related to a newborn did not relate to the mother’s pregnancy.<sup>198</sup>

The tides may be changing, ever so slowly. Last year in *EEOC v. Houston Funding II, Ltd.*, the Fifth Circuit Court of Appeals held that a female employee who alleged discrimination based on her lactation may have a cause of action for sex discrimination in violation of Title VII.<sup>199</sup> The court reasoned that Congress responded to the Supreme Court’s ruling in *General Electric Co. v. Gilbert* by enacting the PDA, which added specific language including discrimination based on “pregnancy, childbirth, or related medical conditions.”<sup>200</sup> The *Houston* court found that in employment discrimination cases, courts have interpreted Title VII to cover a variety of conditions related to the female employee’s physiology,

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<sup>193</sup> See *Martinez*, 49 F. Supp. at 310. The Supreme Court first recognized sex plus discrimination in *Phillips v. Martin Marietta Corp.*, a case where the plaintiff was a working mother with childcare obligations. 400 U.S. 542, 544 (1971).

<sup>194</sup> *Martinez*, 49 F. Supp. at 310.

<sup>195</sup> *Wallace v. Pyro Mining Co.*, 789 F. Supp. 867, 869 (W.D. Ky. 1990) (“While it may be that breastfeeding and weaning are natural concomitants of pregnancy and childbirth, they are not ‘medical conditions’ related thereto.”).

<sup>196</sup> *McNill*, 950 F. Supp. at 570.

<sup>197</sup> *Id.* at 571.

<sup>198</sup> *Id.* at 570 (“The fact that children are born without cleft palates and lips demonstrates that whatever biological mechanism is the cause of this unfortunate condition, it is *not* the condition of being pregnant.”).

<sup>199</sup> *EEOC v. Hous. Funding II, Ltd.*, 717 F.3d 425, 425 (5th Cir. 2013).

<sup>200</sup> 42 U.S.C. § 2000e(k) (1994).

such as the regularity of an employee's menstrual cycle.<sup>201</sup> For this reason, the court believed there is a cause of action under Title VII if an employee is terminated because she was "lactating or expressing milk."<sup>202</sup> The Houston court also held that lactation is covered under the PDA, reasoning that, "[l]actation is the physiological process of secreting milk from mammary glands and is directly caused by hormonal changes associated with pregnancy and childbirth."<sup>203</sup> The PDA's mandate against discrimination for medical conditions relating to childbirth and lactation clearly fell under the plain meaning of the statute.<sup>204</sup> In a footnote, however, the court distinguished the case from other cases where the employer refused to accommodate a female who wished to express milk at work.<sup>205</sup> In a concurring opinion, Circuit Judge Edith Jones pointed out that if the employee had asked for facilities or additional time to express her breast milk at work, she would not have a cause of action under Title VII or the PDA.<sup>206</sup> Although the *Houston* court determined that the act of lactation is covered under Title VII and the PDA, the footnote and concurring opinion shows a reluctance to require employers to accommodate the functions associated with lactation, breastfeeding a child, and/or expressing breast milk under those statutes.<sup>207</sup> Courts thus may be unwilling to take the next logical step and mandate an accommodation for breastfeeding and related activities without a clear legislative directive.

##### 5. State Employment Discrimination Statutes

Litigants who have brought cases related to breastfeeding at work

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<sup>201</sup> *Hous. Funding II*, 717 F.3d at 429–30 ("policy of requiring women who have been on pregnancy leave to have sustained a normal menstrual cycle before they return to work clearly deprives female employees of employment opportunities and imposes on them a burden which males need not suffer") (citing *Harper v. Thiokol Chem. Corp.*, 619 F.2d 489, 491–92 (5th Cir. 1980)).

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 429 ("[I]t is difficult to see how an employer who makes an employment decision based upon whether a woman is lactating can avoid unlawful sex discrimination.").

<sup>205</sup> *See id.* at 429 n.6, citing *Martinez v. NBC*, 49 F.Supp.2d 305, 308–10 (S.D.N.Y. 1999) (pregnancy and related disabilities are not conditions that an employer must accommodate under the ADA); *Urbano v. Cont'l Airlines*, 138 F.3d 204, 207 (5th Cir. 1998) (there is no accommodation requirement under the PDA); *Falk v. City of Glendale*, No.12-CV-009250JKL, 2012 WL 2390556, at \*4, (D. Colo. June 23, 2012) (there is no duty to provide accommodations under the PDA); *Vachon v. R.M. Davis, Inc.*, No. 03-234-P-4, 2004 WL 1146630, at \*10 (D. Me. Apr. 13, 2004) (the allegation that the employee was not provided with breastfeeding accommodations was not an adverse employment action); *Wallace v. Pyro Mining Co.*, 789 F. Supp. 867, 869 (W.D. Ky. 1990) (a woman seeking additional time to breastfeed her child can not allege a cause of action under the PDA for denial of that leave time).

<sup>206</sup> *Hous. Funding II*, 717 F.3d at 430.

<sup>207</sup> *Id.* ("[I]f providing a plaintiff with special accommodation to pump breast milk at work were required, one wonders whether a plaintiff could be denied bringing her baby to the office to breastfeed during the work day.").

under various state antidiscrimination laws have had mixed results. In *Board of School Directors of Fox Chapel Area School Dist. v. Rossetti*, the court found that a failure to grant an extension of leave to a mother to tend to her newborn, including to breastfeed her child as a preventative measure against future allergies, was not actionable.<sup>208</sup> The court determined that the Pennsylvania's Human Relations Act, which addressed sex discrimination, did not cover this type of discrimination because men were not given an extension of leave in similar situations.<sup>209</sup> In comparison, in *Allen v. Totes/Isotoner Corp.*, the court determined that "gender-discrimination claims arising from lactation are cognizable under Ohio's FEPA [Fair Employment Act]."<sup>210</sup>

#### *6. Working Breastfeeding Mothers Compared to Breastfeeding Students*

The strongest legal support for a working breastfeeding mother is the FLSA, which clarifies that a woman must be accommodated with time and a place to express breast milk.<sup>211</sup> This is only useful to a working mother if her employer is large enough to be covered by the FLSA and does not fall within any of the exemptions from that law.<sup>212</sup> The reason it is important to have a cause of action under the ADA or the PDA is simple; the plaintiff is entitled to money damages under those statutes including compensatory and punitive damages.<sup>213</sup> Unless courts are willing to find a cause of action under the ADA or the PDA, or strengthen penalties under the FLSA, working mothers are only slightly better off than student mothers. Unfortunately, there is no parallel law mandating breastfeeding accommodations for student mothers.

#### *D. Education Laws*

##### *1. Section 504 of the Rehabilitation Act and the ADA*

There are several federal educational laws that might apply to

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<sup>208</sup> Bd. of Sch. Dir. of Fox Chapel Area Sch. Dist. v. Rossetti, 411 A.2d 486, 489 (Pa. 1979).

<sup>209</sup> *Id.* at 489.

<sup>210</sup> Allen v. Totes/Isotoner Corp., 915 N.E.2d 622, 630 (Ohio 2009).

<sup>211</sup> FLSA, 29 U.S.C. § 207(r) (2006).

<sup>212</sup> Even with this bright-line rule requiring accommodation, the FLSA has its downfalls. The only remedy under FLSA is an investigation by the Department of Labor. Many employers are likely to comply with the law, but many others may take their chances with a Department of Labor Investigation in which the worst case scenario is that they will be told to comply with the law.

<sup>213</sup> See 42 U.S.C. §§ 1981(a), 2000(e) (2006).

breastfeeding student mothers.<sup>214</sup> Students may seek accommodations for their disabilities under Section 504 of the Rehabilitation Act of 1973.<sup>215</sup> Accommodations might include extended time to take tests, specially formatted learning materials, and school nurse services to administer medication. The Act, which covers all public secondary schools receiving federal funding, uses the same definition of an “individual with a disability” that is found in the ADA.<sup>216</sup> Section 504 requires schools to provide disabled students the ability to “obtain the same result, to gain the same benefit, or to reach the same level of achievement” as non-disabled students.<sup>217</sup>

There has been some litigation on the issue of whether pregnancy and related complications are disabilities under the ADA and Section 504 in the higher education context.<sup>218</sup> As discussed above, in the employment context, a finding that these types of conditions are disabilities opens the door for a finding that breastfeeding is also a disability that should be accommodated. *Darian v. University of Massachusetts Boston* presented the question of whether the plaintiff’s pregnancy-related health complications were considered disabilities as defined by the ADA and Section 504 of the Rehabilitation Act.<sup>219</sup> Darian became pregnant during her senior year as an undergraduate nursing student at the defendant

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<sup>214</sup> The Individuals with Disabilities Education Act (IDEA) is not discussed in this article. The IDEA requires public schools to provide a free appropriate public education to students with disabilities who qualify in a specific category, such as autism, certain learning disabilities, speech and language impairment, emotional disturbance, traumatic brain injury, visual impairment, and other specific disabilities as detailed by that law. See 20 U.S.C. § 1432(5) (2006). In order to qualify under the IDEA, a student’s disability must adversely impact her educational performance. The IDEA defines a learning disability as “a disorder in [one] or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell or do mathematical calculations.” To fit pregnancy or lactation into this definition would be akin to putting a square peg into a round whole, it just doesn’t fit. Some students might be able to make an argument that schools should accommodate student lactation under their state special education law which specifically relate to pregnancy and parenting. For example, Texas enacted a specific law to assist pregnant and postnatal students. See TEX. EDUC. CODE ANN. § 29.081(d) (West 2013).

<sup>215</sup> 29 U.S.C. § 794 (2008).

<sup>216</sup> 29 U.S.C. § 705(20)(B); see 29 U.S.C. § 794 (2006).

<sup>217</sup> 34 C.F.R. § 104.4 (2012).

<sup>218</sup> The higher education cases were filed under Title II or III of the ADA, in addition to the Section 504 of the Rehabilitation Act. “Title II of the ADA covers state funded schools such as universities, community colleges and vocational schools. Title III of the ADA covers private colleges and vocational schools. If a school receives federal dollars regardless of whether it is private or public it is also covered by the regulations of Section 504 of the Rehabilitation Act requiring schools to make their programs accessible to qualified students with disabilities.” Deborah Leuchovius, *ADA Q & A: Section 504 & Postsecondary Education*, PACER CENTER (2003), <http://perma.cc/3LHN-VQUS> (last visited Apr. 20, 2014). The employment cases previously discussed were filed under Title I of the ADA.

<sup>219</sup> *Darian v. Univ. of Mass. Bos.*, 980 F. Supp. 77, 79 (D. Mass. 1997).

university.<sup>220</sup> Midway through the fall semester, she began experiencing medical complications associated with her pregnancy.<sup>221</sup> Meanwhile, Darian's clinical coursework required her to work at a medical site with patients and related medical records for two days per week for about six hours a day.<sup>222</sup> After missing two clinical days, her doctor prescribed partial bed rest and told her that she should avoid seeing patients.<sup>223</sup> The next month, her condition worsened and she requested to go home early each day to work on patient charts with her feet up.<sup>224</sup> Her professor ultimately told her that it was "not working out" and she failed the class for missing too many clinical hours.<sup>225</sup>

Darian argued that her pregnancy related complications were disabilities and sued the University for failing to accommodate her disabilities. The threshold issue in Darian was whether her medical ailments were disabilities as defined by the ADA and Section 504 of the Rehabilitation Act.<sup>226</sup> The court distinguished Darian's claims from the employment-related cases, which did not involve access to education.<sup>227</sup> Although the court ultimately found the accommodations Darian sought were unreasonable, this case opens the door for a broader interpretation of a disability under the ADA in an educational context than in the employment context.<sup>228</sup>

In *Hogan v. Ogden*, a student filed a claim under the ADA and Section 504 of the Rehabilitation Act, alleging that the university failed to accommodate her pregnancy related complications.<sup>229</sup> The court held that the defendant denied the plaintiff reasonable accommodations for her pregnancy-related health issues.<sup>230</sup> Hogan was enrolled in a video production class in which attendance and participation were key elements of the grading scheme for the class.<sup>231</sup> Students were also required to take certain certification examinations.<sup>232</sup> When health complications arose

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<sup>220</sup> *Id.* at 80.

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at 80–81.

<sup>224</sup> *Id.*

<sup>225</sup> *Darian v. Univ. of Mass. Bos.*, 980 F. Supp. 77, 81 (D. Mass. 1997).

<sup>226</sup> *Id.* at 85 ("The analysis of whether a plaintiff has alleged a "disability" is basically the same under the Rehabilitation Act and the ADA.").

<sup>227</sup> *Id.* at 86.

<sup>228</sup> In speaking of the ADA in an educational context the court stated the ADA is "remedial legislation and should be broadly construed." *Id.* at 87 (citing *Tcherepnin v. Knight*, 389 U.S. 332, 335, (1967); *Kinney v. Yerusolim*, 812 F.Supp. 547, 551 (E.D. Pa.), *aff'd*, 9 F.3d 1067 (3d Cir. 1993), *cert. denied*, 511 U.S. 1033 (1994)).

<sup>229</sup> *Hogan v. Ogden*, No. CV-06-5078-EFS, 2008 WL 2954245, at \*3 (E.D. Wash. July 30, 2008).

<sup>230</sup> *Id.* at \*10

<sup>231</sup> *Id.* at \*1.

<sup>232</sup> *Id.*

during her eighth month of pregnancy, Hogan's doctor put her on bed rest.<sup>233</sup> At the same time, the university was administering one of the required certification tests.<sup>234</sup> Ordered by her doctor to remain in bed, the plaintiff wanted to take the exam from home or take it when she was to be released from bed rest, which she anticipated would be approximately eight days later.<sup>235</sup> She eventually withdrew from the class due to pressure from the school.<sup>236</sup> The court found that the plaintiff "did not take the test because she could not; that is, Defendant Ogden declined to accommodate alternative exam times or locations."<sup>237</sup> The court held that the issue of whether the plaintiff's condition was a "disability" was an issue of fact left for the jury to determine and allowed that claim to survive a motion for summary judgment.<sup>238</sup>

The issue of accommodating pregnancy complications was similarly raised under the ADA and Section 504 of the Rehabilitation Act by a high school student. In *Garrett v. Chicago School Reform Board of Trustees*, the court found that a high school senior who missed a great deal of school due to severe morning sickness sufficiently alleged a disability under the ADA.<sup>239</sup> The court agreed with the plaintiff that her pregnancy-related complications could be considered disabilities in light of the fact that the student had missed more classes due to the morning sickness than she had in all of her previous years at the high school.<sup>240</sup>

Courts seem willing to define disability more expansively in the educational context as compared to the employment cases.<sup>241</sup> Students may have more success convincing a court that pregnancy-related symptoms were disabilities under Section 504 and under Title II of the ADA than similar cases brought by employees under Title I of the ADA, Title VII, or the PDA.<sup>242</sup>

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<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at \*1, \*2.

<sup>235</sup> *Hogan*, No. CV-06-5078-EFS, 2008 WL 2954245, at \*2.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at \*10.

<sup>238</sup> *Id.*

<sup>239</sup> *Garrett v. Chi. Sch. Reform Bd. of Trs.*, No. 95 C 7341, 1996 WL 411319, at \*3 (N.D. Ill., E.D. July 19, 1996).

<sup>240</sup> *Id.*

<sup>241</sup> In *Hernandez v. City of Hartford*, the court was willing to find that the plaintiff's preterm labor was a disability which the defendant could be required to accommodate under § 504 of the Rehabilitation Act and Title II of the ADA. Although the plaintiff was an employee, she was able to bring these claims under § 504 because she worked for a municipality. *Hernandez v. City of Hartford*, 959 F. Supp. 125 (D. Conn. 1997).

<sup>242</sup> See *Martinez v. NBC, Inc.*, 49 F. Supp. 2d 305 (S.D.N.Y. 1999) as compared to *Hogan v. Ogden*, No. CV-06-5078-EFS, 2008 WL 2954245 (E.D. Wash. July 30, 2008); *Darian v. Univ. of Mass. Bos.*, 980 F. Supp. 77 (D. Mass. 1997); *Garrett*, No. 95 C 7341, 1996 WL 411319.

## 2. Title IX and the Pregnant and Parenting Regulations

In 1972, President Nixon signed Title IX of the Educational Amendments into law.<sup>243</sup> Title IX is the most substantive antidiscrimination law in education, prohibiting sex discrimination in federally funded programs and activities in an educational setting.<sup>244</sup> Today, Title IX is well-known for its prohibiting discrimination in schools' athletic programming; however, in 1975, regulations were promulgated in a chapter titled Marital or Parental Status, which contains a clear prohibition against discriminating against pregnant and parenting students ("Pregnant and Parenting regulations").<sup>245</sup> The regulations prohibit discrimination based on a student's "actual or potential, family or marital status" and prohibit discrimination based on pregnancy and related conditions.<sup>246</sup> Students cannot be excluded from any educational programs or activities, including extracurricular activities, unless they are physically or emotionally unable to participate.<sup>247</sup> Further, schools are required to treat these students the same as students with any other temporary disability.<sup>248</sup> The regulations also impose an affirmative obligation to accommodate, or provide special treatment to effected students.<sup>249</sup>

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<sup>243</sup> A claim under Title IX does not preclude a constitutional duty not to discriminate on the basis of sex under the 14<sup>th</sup> Amendment Equal Protection clause. *See* *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982).

<sup>244</sup> Title IX states, in relevant 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 . . ." 20 U.S.C. § 1681(a) (2014).

<sup>245</sup> 34 C.F.R. § 106.40 (2004).

<sup>246</sup> 34 C.F.R. § 106.40(a) (2004) ("A recipient 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."); 34 C.F.R. §106.40(b)(1) (2004) ("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 therefore, unless the student request voluntarily to participate in a separate portion of the program or activity of the recipient"); 34 C.F.R. § 106.40(b)(4)(2004) ("A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity"); 34 C.F.R. §106.40(b)(2) (2004) ("A recipient may require such a student to obtain the certification of a physician that the student is physically and emotionally able to continue participation so long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.").

<sup>247</sup> 34 C.F.R. § 106.40(b)(1) (2004).

<sup>248</sup> 34 C.F.R. § 106.40(b)(4) (2004).

<sup>249</sup> 34 C.F.R. § 106.40(b)(5) (2004) ("In the case of a recipient which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began." Although the accommodation section of

Litigation arising from Title IX discrimination against pregnant or parenting students in the secondary school setting has been sparse, with the case law focusing on admission to or dismissal from the National Honor Society due to pregnancy.<sup>250</sup> In the higher education pregnancy cases discussed above, the students also raised Title IX claims.<sup>251</sup> Parental rights under Title IX were at issue in a case that dealt with the needs of a group of low-income student mothers who brought an action against a community college.<sup>252</sup> The women alleged that the college violated Title IX and denied them educational opportunities by failing to provide adequate childcare for their children.<sup>253</sup> The court allowed the claim to survive summary judgment because of the potential discriminatory impact on female students.<sup>254</sup> The court, being keenly aware of the magnitude of the child care issue facing parenting mothers, stated, “[t]here can be little doubt that numerous problems of national importance lie under the surface of this litigation and that the plaintiffs have made a first move in an effort to compel the defendants to adopt a policy having pervasive implications for the community at large.”<sup>255</sup> This case is significant because the court recognized a cause of action relating to the needs of mothers as parents, above and beyond their rights as pregnant and postpartum students under Title IX.

Title IX’s Pregnant and Parenting regulations include post pregnancy medical needs; however, they do not mention lactating students.<sup>256</sup> Unlike the PDA, the Pregnant and Parenting regulations specifically prohibit discrimination based on a student’s status as a “parent.”<sup>257</sup> The inclusion of the word parent in addition to pregnancy and related conditions must have meaning. When Congress enacted Title IX, its focus was on women in the labor market and the inequality that arose from educational

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the regulation refers to pregnancy or related conditions rather than parenting students in general, an argument can be made that this section applies to other aspects of the students’ postpartum role as a parent, such as lactation.).

<sup>250</sup> See Pfeiffer v. Marion Ctr. Area Sch. Dist., 917 F.2d 779 (3d Cir. 1990); Wort v. Vierling, 778 F.2d 1233 (7th Cir. 1985); Chipman v. Grant Cnty. Sch. Dist., 30 F. Supp. 2d 975 (E.D. Ky. 1998); Garrett v. Chi. Sch. Reform Bd. of Trs., No. 95 C 7341, 1996 WL 411319 (N.D. Ill., E.D. July 19, 1996).

<sup>251</sup> Hogan v. Ogden, No. CV-06-5078-EFS, 2008 WL 2954245 (E.D. Wash. 2008); Darian v. Univ. of Mass. Bos., 980 F. Supp. 77, 91 (D. Mass. 1997).

<sup>252</sup> De La Cruz v. Tormey, 582 F.2d 45 (9th Cir. 1978), *cert. denied sub nom.*, 441 U.S. 965 (1979).

<sup>253</sup> *Id.* at 47.

<sup>254</sup> See *id.* at 59.

<sup>255</sup> See *id.* at 64.

<sup>256</sup> 34 C.F.R. § 106.40 (2004).

<sup>257</sup> 34 C.F.R. § 106.40(a) (2004).

discrimination.<sup>258</sup> Certainly, keeping women in school by supporting their parenting decisions, such as breastfeeding, would be in line with the purpose of the statute. Breastfeeding students may try to argue that under the Pregnant and Parenting regulations, they either should be accommodated because lactation is a condition related to pregnancy or recovery from pregnancy, or that lactation should be accommodated based on the student's parental status.

There are no published court cases regarding breastfeeding and Title IX or its related regulations. Even if a student could successfully argue that there is a mandate to accommodate lactating students under the Pregnant and Parenting regulations, the enforcement mechanism for these regulations is weak.<sup>259</sup> Any student who believes that the school has violated Title IX may file a complaint with the U.S. Department of Education's Office of Civil Rights ("OCR"). OCR has the authority to investigate, attempt to obtain compliance, conciliate, or institute administrative proceedings to terminate or withhold federal funding.<sup>260</sup> The OCR also has the power to conduct compliance reviews to determine whether schools are following the Title IX regulations, but has failed to take steps to assure that schools are in compliance with the Pregnant and Parenting Regulations.<sup>261</sup> According to information provided upon request from the OCR, there have not been any complaints filed on behalf of secondary school students relating to breastfeeding issues with the Office of Civil Rights.<sup>262</sup> The Office has received one complaint regarding breastfeeding at the Post-Secondary Education level; that complaint was closed due to insufficient evidence of a violation.<sup>263</sup>

Students can also file Title IX claims directly in court. A claim that a school violated a Title IX regulation, however, may be disallowed. There is no clear Supreme Court precedent allowing for a private cause of action for a violation of a federal regulation because regulations do not generally have the same legislative oversight as statutes. This may leave students

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<sup>258</sup> See 118 Cong. Rec. 274 (1972); Senator Birch Bayh explained that the law was supposed to address "the continuation of corrosive and unjustified discrimination against women," in the American educational system. 118 Cong. Rec. 5,803 (1972).

<sup>259</sup> The first point of contact for a Title IX complaint may be the school itself. Schools are required to set up a grievance procedure for Title IX complaints. *Title IX Legal Manual*, U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., Jan. 11, 2001, at 13-14, available at <http://perma.cc/AS4Q-W7KQ> (citing 65 F.R. 52867) (Each school is required to have a Title IX coordinator who would be the first point of contact for any Title IX issues or complaints. *Id.* at 111.).

<sup>260</sup> *How to File a Discrimination Claim with the Office of Civil Rights*, U.S. DEP'T OF EDUC.: OFFICE OF CIVIL RIGHTS, <http://perma.cc/85HD-9QX7?type=image> (last visited April 20, 2014).

<sup>261</sup> NAT'L WOMEN'S LAW CTR., *supra* note 52 at 9.

<sup>262</sup> E-mail from Rachel Gettler, U.S. Dep't of Educ.: Office of Civil Rights (July 2, 2013) (on file with author).

<sup>263</sup> *Id.*

with a right but no remedy if that right is violated.<sup>264</sup>

The Pregnant and Parenting regulations make pregnant and parenting students a legally protected class who cannot be targeted for discrimination.<sup>265</sup> In some circumstances, Title IX has been interpreted to make available certain affirmative obligations. For example, there is an affirmative obligation to provide additional athletic slots for female athletes when they are disproportionately represented.<sup>266</sup> Certainly the rights of student mothers should be as important as the rights of student athletes. After all, Title IX was designed to give female students an equal opportunity to participate in the educational process, which even includes athletic activities.<sup>267</sup> An equal opportunity to stay in school is paramount to that goal. To make breastfeeding as important as playing sports, that affirmative obligation should be extended to include providing accommodations for postnatal, parenting students to breastfeed or express breast milk in order to support female students with the same chance to finish school as their fellow students.

Unfortunately, the United States Department of Education may view breastfeeding accommodations as discretionary rather than mandatory under the Pregnant and Parenting regulations. On June 25, 2013, the Department of Education, Office for Civil Rights, issued a “Dear Colleague” letter along with a pamphlet of guidance to assist schools in “Supporting the Academic Success of Pregnant and Parenting Students.”<sup>268</sup> The information the Department provided in its guidance is helpful for schools in implementing the Pregnant and Parenting regulations; however, it muddies the waters for students seeking breastfeeding-related

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<sup>264</sup> “The problem for pregnant students who have suffered pregnancy discrimination is that statutory protection is always more comprehensive and beneficial than regulatory protection, and they are falling into a gap that makes filing a claim so unattractive and unlikely to succeed that it is nearly a legal fiction.” Kendra Fershee, *An Act for All Contexts: Incorporating the Pregnancy Discrimination Act into Title IX to Help Pregnant Students Gain and Retain Access to Education*, 39 HOFSTRA L. REV. 281, 286 (2010). One scholar noted that the Title IX Pregnant and Parenting regulations may be more indicative of legislative intent than other regulations because there was a law in place at the time which required all such regulations to be brought before Congress before enactment in order to ensure consistency with legislative intent. David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J. L. & GENDER, 217, 246 (2005) (citing *N. Haven v. Bell*, 456 U.S. 512, 531–32 (1992) regarding 20 U.S.C. § 1232(d)(1)(1982), repealed by Pub. L. No. 98-511, 98 Stat. 2366 (1984)).

<sup>265</sup> “A recipient 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.” 34 C.F.R. § 106.40(a) (2014).

<sup>266</sup> See *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993); *Biediger v. Quinnipiac Univ.*, 616 F.Supp. 2d 277 (D. Conn. 2009).

<sup>267</sup> *Cohen*, 991 F.2d at 897.

<sup>268</sup> Letter from Seth Galanter, Acting Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ., Office of Civil Rights, to Colleague (June 25, 2013), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201306-title-ix.pdf>; *Supporting the Academic Success of Pregnant and Parenting Students*, U.S. DEP’T. OF EDUC.: OFFICE OF CIVIL RIGHTS (June 2013), available at <http://perma.cc/NV9G-YHJW?type=pdf>.

accommodations. The guidance provides a list of strategies that administrators can use to implement the regulations but specifically states, “[t]hese are examples of possible strategies; unless otherwise stated they are not legally mandated by Title IX or its regulations.”<sup>269</sup> One of the “strategies” listed is: “Designate a private room for young mothers to breastfeed, pump milk, or address other needs related to breastfeeding during the school day.”<sup>270</sup> School districts may point to this document to argue that they are not required to provide lactation accommodations.<sup>271</sup>

Even if there is a duty to accommodate lactating students under the Pregnant and Parenting regulations, according to a report by the National Women’s Law Center, these regulations have had little effect on how schools treat young mothers.<sup>272</sup> Many schools are unaware these regulations even exist.<sup>273</sup> This was evident when the Superintendent of Jaielyn’s school suggested an alternative school within the district which focuses on teenage mothers as a more appropriate setting for a student who wished to breastfeed. This suggestion runs the risk of violating the Title IX regulation, which makes attendance at such an alternative school voluntary.<sup>274</sup> It is good news that the Department of Education raised the issue of lactation accommodation in the context of Title IX. At least it shows that the issue is on the Department’s radar.

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<sup>269</sup> *Id.*

<sup>270</sup> *Id.* at 16. This letter and related publications are not likely to preclude breastfeeding accommodations claims under the regulations if a student is able to show standing to make a claim in court. While courts often give deference to an agency’s interpretation of the law the agency enforces, courts are unlikely to pay much deference to guidance on a regulation which was published without the opportunity for public comment. *See Ebbert v. Daimler Chrysler Corp.*, 319 F.3d 103, 115 (3d Cir. 2003) (In analyzing whether to give judicial deference to EEOC Compliance Manual, the court stated: “An internal agency manual is not subject to the kind of deliberateness or thoroughness that gives rise to significant deference” citing *Skidmore v. Swift*, 323 U.S.134 (1944)). However, these documents may make it difficult to be successful in a claim filed with OCR.

<sup>271</sup> Recently, Rebecca Mabrey, a college student in Florida attempted to breastfeed her child while taking an examination and the proctor turned her away. Inside Higher Ed, an online source for news and opinion articles relating to issues in higher education, examined the request in light of the Department of Education June 25, 2013 “Dear Colleague Letter.” Ada Meloy, general counsel at the American Council on Education, opined that it was not clear whether the letter would be applicable to the student’s case and did not believe the letter would be controlling in the particular situation. Luiz Maatz, director of public policy and governmental relations at the American Association of University Women believed the guidance the Department of Education promulgated would be applicable to Mabrey’s situation and that the University should re think its decision. The article’s author explains that until OCR shares its results of complaints with individual institutions the guidance is very much open to interpretation. Allie Grasgreen, *No Kids Allowed*, INSIDEHIGHERED.COM (June 27, 2013), available at <http://perma.cc/GE5Y-DG5V>. As you can see from this exchange, there is still an open issue as to whether schools must accommodate lactating students under Title IX, Pregnant and Parenting regulations.

<sup>272</sup> NAT’L WOMEN’S LAW CTR., *supra* note 52 at 10.

<sup>273</sup> *Id.*

<sup>274</sup> 34 C.F.R. § 106.40(b)(3) (2004).

## III. CONCLUSION

Laws protecting breastfeeding rights are fairly novel. Most of the case law on the subject has been raised in the last two decades. Breastfeeding rights are expanding, slowly. Just as with any other protected class, protection takes time to spread across the various legal forums.

Additional legislation protecting women's right to breastfeed will likely be forthcoming. The Innocenti Declaration on the Protection, Promotion and Support of Breastfeeding's policy statement issued in 1990 called for governments to pass "imaginative legislation protecting the breastfeeding rights of working women and established means for enforcement."<sup>275</sup> The United States was a party to that declaration.<sup>276</sup> The federal government passed The Breastfeeding Promotion Program in 1992 to "promote breastfeeding and assist in the distribution of pumping equipment to women."<sup>277</sup> The Department of Health and Human Services founded the "United States Breastfeeding Committee" in 1992.<sup>278</sup> A guide to support breastfeeding titled "Blueprint for Action on Breastfeeding" was promulgated by the U.S. Department of Health and Human Services in 2000.<sup>279</sup>

The rights of working breastfeeding mothers are likely to expand. In May 2013, the Supporting Working Moms Act of 2013 was introduced in both houses of Congress and would amend existing federal law to extend the FLSA's requirement to provide a reasonable time for mothers to breastfeed or express breast milk at work to millions more employees, including elementary and secondary school teachers.<sup>280</sup> The rights of student mothers should follow suit.

New Mexico has shown a particular interest in the issue of student breastfeeding. In 2009, the legislature issued a Memorial on the subject of breastfeeding student mothers.<sup>281</sup> That Memorial cited scientific studies which all determined that "breastfeeding student mothers experience

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<sup>275</sup> Heather M. Kolinsky, *Respecting Working Mothers with Infant Children: The Need for Increased Federal Intervention to Develop, Protect, and Support a Breastfeeding Culture in the United States*, 17 DUKE J. GENDER L. & POL'Y 333, 342 (2010).

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* at 343–44 ("The United States Breastfeeding Committee (USBC) is an independent nonprofit coalition of more than 40 nationally influential professional, educational, and governmental organizations, that share a common mission to improve the Nation's health by working collaboratively to protect, promote, and support breastfeeding."); *Model Policy for Insurers Aims to Calm Chaos Surrounding Mandated Coverage of Breastfeeding Support, Supplies, and Counseling*, U.S. BREASTFEEDING COMMITTEE (last visited April 2014), <http://perma.cc/N5AH-G8PC>.

<sup>279</sup> Kolinsky, *supra* note 275.

<sup>280</sup> *Supporting Working Moms Act of 2013*, U.S. BREASTFEEDING COMM., <http://perma.cc/92BG-3SYD> (last visited May 2, 2014).

<sup>281</sup> NEW MEXICO LEGISLATURE, House Memorial 58 (2009).

increased productivity, improved study concentration and improved morale when they have support for breastfeeding in school.”<sup>282</sup> The Memorial further stated that despite the potential student-mother benefits, many educational institutions within the state did not provide those mothers with the “school environments that facilitate breastfeeding mothers.”<sup>283</sup> It suggested schools should “provide private, clean and conveniently located non-bathroom space and flexible break times from classes for the purposes of breastfeeding.”<sup>284</sup> The Memorial further called for governmental study on the issue.<sup>285</sup>

As a result of the Memorial, the New Mexico Governor’s Women’s Health Office issued a report titled *Breastfeeding Support for Student Mothers*.<sup>286</sup> That report revealed some interesting data about breastfeeding habits of working and student mothers: “[o]nly 22.6% of student mothers ages 15-17 attended a breastfeeding class during pregnancy, and only 10.6% of these same mothers had a breastfeeding class after the baby was born.”<sup>287</sup> That data also showed that at that time, “only 30% of working or student mothers reported that moms could use break time for feeding.”<sup>288</sup> The conclusions of the report show the need for legislation supporting a student’s right to breastfeed or express milk at school. If student mothers are supported, they will be more likely to stay in school. The report concluded that the current state law on breastfeeding was inadequate in that it lacks enforcement penalties and does “not address the issues of breastfeeding student mothers.”<sup>289</sup>

Arkansas has also shown leadership in the area of student breastfeeding. The Arkansas WIC program has issued a one-page publication entitled “Rights of Students when Expressing Breastmilk.”<sup>290</sup> States should be encouraged to pass legislation specifically aimed at supporting breastfeeding students.

Like Jaielyn, other students will ask for breastfeeding accommodations in secondary schools. In June 2012, the National Women’s Law Center published a fact sheet dealing with the issues that will likely be raised

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<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> NEW MEXICO GOVERNOR’S WOMEN’S HEALTH OFFICE, *HOUSE MEMORIAL 58, BREASTFEEDING SUPPORT FOR STUDENT MOTHERS, FINAL REPORT* (2009).

<sup>287</sup> *Id.* at 5.

<sup>288</sup> *Id.*

<sup>289</sup> *Id.* at 13.

<sup>290</sup> *Rights of Students When Expressing Breastmilk Fact Sheet*, ARKANSAS WIC (2009), <http://perma.cc/TUK9-U4EE>.

under Title IX in the near future.<sup>291</sup> Breastfeeding accommodation was listed as the “Next Generation Issue.”<sup>292</sup>

Legislative action is on the horizon. Federal legislation has been proposed which would specifically provide accommodations for breastfeeding students. The Pregnant and Parenting Students Access to Education Act has been raised and has gained support by various interest groups.<sup>293</sup> The bill was recently reintroduced by Representative Jared Polis on May 7, 2013.<sup>294</sup> The text of the current bill calls for grants to assist pregnant and parenting students and includes money to establish breastfeeding accommodations for students.<sup>295</sup> Whether or not the bill ultimately passes, the inclusion of the accommodations for student breastfeeding in the bill is indicative that the issue is on the minds of legislators.

Current laws do not clearly mandate secondary schools to accommodate breastfeeding students; for this reason, laws should be strengthened to do so. States and the federal government have started to explore the issue of student breastfeeding. Establishing lactation as a disability under the ADA and Section 504 puts a student in the awkward position of arguing that breastfeeding her child makes her disabled. The FLSA has removed this barrier for working mothers seeking breastfeeding accommodations.<sup>296</sup> Legislation mandating that secondary schools

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<sup>291</sup> *Title IX, 40 Years and Counting, Fact Sheet*, NAT’L WOMEN’S LAW CTR., <http://perma.cc/3B6EDKME> (last visited Apr. 26, 2014).

<sup>292</sup> The fact sheet explains:

[P]regnant and parenting students must confront their school’s unwillingness to accommodate the need for time and space for students to do so. This can pose a serious hardship for young mothers, because failure to express breast milk on a set schedule can lead to engorgement, which causes discomfort, pain, and fever, and can even lead to infection, as well as a reduction in the amount of breast milk produced. Without the opportunity for breaks of the necessary duration, breastfeeding young women will likely experience extreme pain and discomfort in school, causing a serious distraction that could negatively impact their ability to learn, and posing a risk to their health. Refusing to accommodate breastfeeding needs also sends students the message that being a mother is incompatible with educational success. Women who are nursing should not be forced to choose between going to school under disadvantageous conditions that place their health – and their academic success – at risk and postponing their education until they are no longer breastfeeding. To ensure that young mothers are not put in that position, schools should provide students with breaks of the necessary duration as well as a clean, private space (that is not a restroom) to express breast milk. *Id.*

<sup>293</sup> *Pregnant and Parenting Students Access to Education Act*, NAT’L WOMEN’S LAW CTR. & TEEN HEALTH NETWORK, <http://perma.cc/7TVT-VTDZ>, (last visited Apr. 26, 2014).

<sup>294</sup> *Pregnant and Parenting Students Access to Education Act of 2013*, H.R. 1845, 113<sup>th</sup> Cong. (2013), available at <http://perma.cc/R6MT-ZBZ5> (last visited Apr. 26, 2014).

<sup>295</sup> *Id.*

<sup>296</sup> A student could frame the issue differently and argue that the desire to breastfeed or express breast milk at school is similar to the needs of any other student who needs a lunch break and a cafeteria. Students who eat lunch at school are not being accommodated, they are simply provided the

accommodate breastfeeding students is an obvious outgrowth of the relatively new FLSA requirements. The pressures of being a new mother can turn any woman's world upside down. Teenagers have an especially uphill road ahead in achieving their parenting goals, which may include breastfeeding. Meaningful legislation is needed to make breastfeeding after returning to school a certain option for students. Unlike Jaielyn, many teenage mothers would not have the fortitude to question a school's denial of accommodations for breastfeeding.

The benefits of supporting breastfeeding students are great and the cost is small. Although teen pregnancy prevention education has been successful, the reality is that there will always be teenagers who become pregnant and decide to become mothers.<sup>297</sup> At that point, it is too late to focus on teen pregnancy as the problem. We need to shift our focus to the real problems these young mothers face and will continue to face, like poverty and limited educational achievements. Schools should do everything they can to encourage these women to stay in high school, including supporting a student's desire to breastfeed. An education increases financial stability for the mother and her child. Success in early parenting creates independence that may carry over into all aspects of the young mother's life. Supporting a teenage mother's breastfeeding may lead to more independent young mothers.

Schools should be proactive in accommodating student mothers. The Department of Education has raised student breastfeeding accommodations as an example of how schools can support teenage mothers.<sup>298</sup> After all, the goal is to keep the students in school. Success in breastfeeding may lead to confidence as a parent. Motherhood itself may be an "educational motivator" for some young mothers who are supported in their parenting and scholastic goals.<sup>299</sup> Schools should remove barriers to education and institute policies which encourage teenage mothers to finish high school.<sup>300</sup>

As women's breastfeeding rights expand, student breastfeeding rights should follow. Accommodating breastfeeding is an issue of equality and

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essentials that they need to eat lunch. Unfortunately, all of the court analysis on breastfeeding to date has uniformly viewed requests associated with breastfeeding as requests for reasonable accommodations. Until a more explicit law is passed, student mothers may be stuck with the reasonable accommodation legal analysis.

<sup>297</sup> The Centers for Disease Control and Prevention reports successful pregnancy prevention initiatives in 2005 through 2010. *Teen Pregnancy: Improving the Lives of Young People and Strengthening Communities by Reducing Teen Pregnancy*, CTRS. FOR DISEASE CONTROL AND PREVENTION (last updated Mar. 3, 2011), <http://perma.cc/NVA5-ZFHL>.

<sup>298</sup> Letter from Seth Galanter to Colleague, *supra* note 268.

<sup>299</sup> NAT'L WOMEN'S LAW CTR., *supra* note 52 at 1.

<sup>300</sup> "By eliminating discrimination . . . schools can draw pregnant and parenting students back into the classroom. Doing so would not only benefit these young women, but serve to significantly reduce a leading cause of drop out amount high school girls." *Id.* at 23.

fairness. Although teenage mothers who want to continue to breastfeed after returning to school may currently be a small minority, these young mothers have so much to benefit if they are supported in this endeavor. The accommodation is not difficult for schools to provide. It requires just a little time and space. We owe this to young mothers like Jaielyn Belong, who already have the forethought to provide what is best for their newborn children.