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New York has recognized that education in predominantly Negro schools tends to be inferior.\textsuperscript{28} The equal protection clause does not sentence the state to feigned indifference of such inadequacy; it does not require situations which are different in fact or opinion to be treated as though they were the same.\textsuperscript{29} It seeks only invidious discrimination.\textsuperscript{30}

Since the state has a natural interest in the well-being of its populace, it seems entirely reasonable for it to take voluntary affirmative action to correct deficiencies accruing to one class alone. The mere fact that a scheme to accomplish such a purpose might cause discontent among classes hitherto favorably situated, whose future risk is only that of equal educational opportunity, should present no bar to a plan which may some day benefit all.

W. W. Walker, Jr.

SCHOOLS — RULES AND REGULATIONS AFFECTING MARRIED STUDENTS — REASONABLENESS AND VALIDITY


The Ohio General Assembly has vested in the boards of education the power to make rules and regulations for the government of public school pupils.\textsuperscript{1} This power confers upon the boards the authority and responsibility for the proper conduct, control, regulation, and supervision of its employees, pupils, and the entire school system of the district.\textsuperscript{2}
In *State ex rel. Baker v. Stevenson*, Michael Baker, a seventeen year old high school senior, claimed that the school board abused its statutory power by adopting a rule which prohibited all married students from participation in extracurricular activities. Baker was married in February 1962 at the age of sixteen, and in the fall of 1962 he attempted to compete for a position on the basketball team. The high school administration invoked the new school board rule and precluded his participation in this extracurricular activity. Baker sought a writ of mandamus to restrain enforcement of the rule on the grounds that it was arbitrary, unreasonable, and discriminatory against married students. The court ruled that the school board's rule was not so unreasonable, arbitrary, or discriminatory to married students as to violate the public policy favoring marriage; and that since the legislature had defined the minimum age of marriage as twenty-one, without parental consent, or eighteen for males and sixteen for females, with parental consent, marriage under these ages was contrary to public policy. The court of common pleas also found that it was not an abuse of discretion to bar a married student from extracurricular activities in light of the fact that high school marriages cause many to quit school and that married students set a pattern for their fellow students to imitate, especially if they excel in an extracurricular activity.

The problems between the schools and its pupils have traditionally been many and diverse. But the problems between schools and married students have become particularly acute in

4. Extracurricular activities included but were not limited to the following: Leadership in school organizations, athletic activities, scholarship activities, member of band and glee club, social events, dramatic events and musical activities, cheerleader, and school sponsored trips. *Id.* at 183.
5. Baker was married under the provisions of *Ohio Rev. Code* § 3101.04, which provides *inter alia*: "when the condition of a minor female is such as imperatively to impel the marriage estate by reason of approaching maternity, or when an illegitimate child has been born, the matter shall be inquired into by the juvenile court. . . . The probate court may thereupon issue a license, notwithstanding either or both the contracting parties for the marital relation are under the minimum age prescribed in section 3101.01 of the Revised Code . . . ."
9. *Id.* at 185.
recent years, due mainly to the trend toward a lower age of first marriage. The limited number of cases dealing with the validity of school board rules and regulations relative to this problem may be broadly classified into three groups. The board’s ruling either: (1) totally excluded the married student from school; (2) attempted to force married students to attend school through compulsory attendance laws; or (3) partially excluded the married pupil by either (a) total exclusion for a limited time, or (b) permanent exclusion from part of the school’s activities. The earliest cases in this area dealt with the first issue, i.e., whether a school board had the power to expel a married student. The courts uniformly held that barring a student entirely from school was arbitrary and unreasonable and therefore was void despite the board’s claims that married students had a detrimental effect on the school and its pupils, lacked the necessary parental supervision, and held views on life that should not be known to unmarried students. Thus, the prevailing view at that time as expressed by an early Mississippi decision was that “marriage is a domestic relation highly favored by the law... And... it is commendable in married persons of school age to desire to further pursue their education...”

The second group of cases arose when school boards attempted to compel married students to attend school under compulsory school attendance laws. In a pair of Louisiana decisions, it was held that upon marriage the school child was emancipated and thus was no longer subject to the compulsory attendance law. The rationale was that the requirement of school attendance might come in conflict with the married student’s right to live with her spouse, and it was “not only her right but her duty to live with her husband at the matrimonial domicile and to follow him wherever he chooses to reside.”

The third category of cases involved the question of whether a

14. E.g., La. REV. STAT. § 17.221 (Rev’d ed. 1964); cf. Ohio REV. CODE § 3321.01.
school board had the power to suspend a married student from school for a limited time. In a recent Kentucky case, the court struck down a school board's ruling which required a student to withdraw for a period of one year following marriage. In determining that many married students would probably never return to school after a year's absence, the court took judicial notice of the increasing demand for education in today's society and observed that "there is no reason to suppose that the marriage of a student will diminish the need of that student for an education — indeed, just the contrary would appear the case." A Tennessee court, however, upheld a very similar regulation that suspended a pupil for the remainder of the semester in which she married. The court's holding was based on expert testimony of a school administrator which tended to show that married students were a particularly difficult problem immediately after marriage, but "settled down" after the "newness" wore off.

A variation of this same question is the validity of a school board ruling that permits a married student to attend school, but permanently prohibits such a student from participation in school activities. In a case directly in point with the subject case, a Texas court refused an injunction to arrest a rule that limited married students wholly to classroom work. The court held that the public policy in favor of marriage was only for those above lawful age, and therefore the board's rule was reasonable. A similar rule was upheld by a Utah court, wherein a student claimed a constitutional right to participate in all school activities. The court held he had a right to attend school under the Utah Constitution, but extracurricular activities were provided solely at the discretion of the local school boards. Since these functions are discretionary, the local boards have the right to select who will participate in such activities. But, in Cochrane v. Mesick Consol. School Dist. Bd. of Educ., a divided Michigan court held to the contrary. There it was found that a rule which prohibited married students from participating in extracurricular activities was arbitrary and unreasonable and therefore void. The court

18. Id. at 680.
22. 360 Mich. 390, 103 N.W.2d 569 (1960) (advisory opinion since relator's graduation made the case moot).
reasoned that "denying a married student the right to education, whether a partial denial such as denying the right to participate in extracurricular activities, or a complete denial such as expulsion or suspension, was not a reasonable exercise of authority . . . ."23

In order to inquire into the wisdom of the Baker holding, it is necessary to determine whether the school board's rule was unreasonable or deprived the married student of his rights.24 The stated purpose of the rule was to discourage juvenile marriages which the board assumed resulted in school drop-outs. While this is a logical assumption, there is considerable evidence to the contrary. Sociologists and educators maintain that, generally, marriage does not cause drop-out; rather, that both marriage and quitting school are a result of the fact that a student has reached, or feels that he has reached, the limit of his educational ability and intellectual maturity.25 Thus, both marriage and drop-out are the effect of a central cause; one is not the cause and the other the effect.

In the Baker case, the court found that married students often set a pattern of behavior that other students tend to imitate; that this is especially true if a married student excels in school activities. This influence, it was maintained by the board, has an undesirable effect on the other members of the married student's class. But in McLeod v. State ex rel. Colmer,26 a Mississippi court rebutted a similar argument with the following statement: "When the [marriage] relation is entered into . . . the effect on the husband and wife is refining and elevating, rather than demoralizing. Pupils associating in school with a child occupying such a relation, it seems, would be benefited instead of harmed."27 To determine which view is correct, the Baker court suggests that expert testimony of school superintendents and administrators should be considered. There is justification for this position.28 Since the problem of student marriages is national as well as local, it would be appropriate to determine how a majority of school principals, administrators, and superintendents view this prob-

23.  Id. at 401, 103 N.W.2d at 575.
26. 154 Miss. 468, 122 So. 737 (1929).
27.  Id. at 475, 122 So. at 738.
Married Students in Schools

lem. Some research has already been done in this area. A recent survey of over 16,000 school executives indicates that slightly over one-third thought that married students should or could be excluded from extracurricular activities, but the majority were either of a contrary opinion, or reserved comment on the problem. Thus, there is indeed some question as to whether any of the sanctions thus far imposed by school boards have any effect in curbing teen-age marriages.

In dealing with a school board's power to discipline, the Iowa Supreme Court has stated: "The State [by any government body] does not deprive its citizens of . . . their liberty or of any rights, except as a punishment for a crime." Has a student who has married while still in high school committed any crime which would justify a deprivation of the right to attend school and participate in all activities included in the educational program? It would seem not, unless, of course, youthful marriage as such is so considered. But even if this be the case, the matter is for the legislature, not the school board to decide. The Baker court found, however, that while youthful marriages are not a crime, they are contrary to public policy by virtue of the fact that the legislature has established the lawful age for those who wish to marry as above high school age. But, the Ohio Supreme Court stated in State v. Gans, that child marriages are contrary to public policy only when not entered into by virtue of section 3101.04 of the Ohio Revised Code; that in these instances the policy "against 'child marriages' must yield to a more important public policy based on the premise that a greater social benefit is derived from having as many members of our society as possible born and raised as 'legitimate' rather than 'illegitimate' children." This is the situation that faced the relator in the subject case.

There is some question whether extracurricular activities are a right, or merely a privilege capable of being given or withdrawn at will. A recent Ohio Attorney General's Opinion states: "In de-

34. Id. at 179, 151 N.E.2d at 712.
veloping a program of education which meets the minimum standards adopted by the state board of education for the education of Ohio youths, boards of education have uniformly included a multitude of extracurricular activities. Such activities have become an integral part of contemporary education . . . .” 

There is also case law indicating that extracurricular activities are now to be considered more than just a privilege. The United States Supreme Court has also looked into this area of abuse of power over students, using the due process clause of the fourteenth amendment to correct abuses. In Meyer v. Nebraska, the Court, in defining liberty as used in the fourteenth amendment, held that “it denotes not merely freedom from bodily restraint but also the right of the individual to contract . . . to acquire useful knowledge, to marry . . . and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.”

It is questionable whether the school board’s ruling in State ex rel. Baker v. Stevenson is logical. The primary purpose behind the “multitude of extracurricular activities” in existence in high schools today is to stimulate student interest in the school so as to reduce the number of drop-outs. To give this policy its maximum effect, it is necessary to include as many students as possible in the program. If married students are a large segment of this drop-out group, does it follow that prohibiting them from extracurricular activities will improve the likelihood of their remaining in school?

The school boards and courts are trying desperately to find a

35. 1962 Ops. Att’y Gen. (Ohio) 346, 348. The court in State ex rel. Baker v. Stevenson, however, questioned the propriety of the attorney general’s invasion into this area. But in Anderson v. Wolf, 17 Ohio L. Abs. 161 (Ct. App. 1934), the court favorably considered an attorney general’s opinion directed toward a school board official. Surely the attorney general may advise all government officials in his official capacity. See Ohio Rev. Code § 109.12; 6 Ohio Jur. 2d Attorney General § 4 (1954). Granted that an attorney general’s opinion is not binding on any court, it has been held that it should receive their careful consideration and has generally been regarded as highly persuasive. Carter v. Commission of Qualifications of Judicial Appointments, 14 Cal. 2d 179, 93 P.2d 140 (1939); Otter Tail Power Co. v. Elbow Lake, 234 Minn. 419, 49 N.W.2d 197 (1951); Jones v. Williams, 121 Tex. 94, 45 S.W.2d 130 (1931).


38. 262 U.S. 390 (1923).

39. Id. at 399.

40. 189 N.E.2d 181 (Ohio C.P. 1962).
cure for a very grave social problem. But with due respect for both, it does not appear that they are succeeding by punishing married students. The better approach would be to take corrective steps prior to when these students marry. Most sociologists and educators have concluded that the best approach is to educate young people while they are still in the lower grades or in junior high school in the wisdom of remaining single until after high school graduation.\textsuperscript{41} The school boards and courts, above all, should be the first to realize that the best way to cure social problems is by imparting knowledge and understanding, not by imposing restrictions, prohibitions, or sanctions.

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