In the

Supreme Court of the United States

SUSAN COHEN,

Petitioner,

v.

CHESTERFIELD COUNTY SCHOOL BOARD and DR. ROBERT F. KELLY,

Respondents.

No. 72-1129

Washington, D.C.
October 15, 1973

Pages 1 thru 49

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v.	:	No. 72-1129
CHESTERFIELD COUNTY SCHOOL BOARD and DR. ROBERT P. KELLY, Respondents.	:	

Washington, D. C.
Monday, October 15, 1973

The above-entitled matter came on for argument at 1:00 o'clock, p. m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

PHILIP J. HIRSCHKOP, ESQ., 110 North Royal Street, P. O. Box 234, Alexandria, Virginia 22313; for the Petitioner.

SAMUEL W. HIXON, III, ESQ., 510 United Virginia Bank Building, Richmond, Virginia 23219; for the Respondents.

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 72-1129, Cohen against Chesterfield County School Board.

Mr. Hirschkop, you may proceed when you are ready

ORAL ARGUMENT OF PHILIP J. HIRSCHKOP, ESQ., ON BEHALF OF THE PETITIONER

MR. HIRSCHKOP: Mr. Chief Justice, and may it please the Court:

The issue in this case is clearly presented as one of sex discrimination and the issue joined between the two parties as to whether or not it is sex discrimination. And the Fourth Circuit very clearly went to that issue also.

We submit to the Court, especially in light of the foregoing argument, the one that just preceded, that there is no question of sex discrimination in this case, that the only basis for these regulations in fact is appearance.

In the course of this case, the Cohen case, we had the opportunity to depose the School Board, and we took each deposition separately before the lawyers presently in the case could sit down with them and chat about legal rationale or they say other opinions and could then form opinions as to the basis of the school regulation.

Three members of the Board and the Superintendent believe the rate of absenteeism of a teacher increases in the

last four months of pregnancy, and the references are on page 4 of our brief, that I am referring to here, as to the appendix references where their different testimony is found.

They all conceded, however, that they had no experience for statistics or whatever with that. In fact, since they terminated women at the end of the fifth month, they had no idea what the absentee rate would be in the last three months, the last trimester of of pregnancy.

But, in point of fact, both doctors were clear it would be lower, if anything, in the last three months. The difficult months of pregnancy are the first three months.

The Superintendent and three members felt that it would be dangerous for a pregnant woman to walk down school halls, and climb steps. They later or at the same time discussed the question of fire regulations. And, indeed, a fire marshal was put on the stand at the trial of this matter to show that occasionally there were some fires in schools and were fire drills.

There was some perhaps rather ludicrous questioning in retrospect about, "Well, what do you do about fat men?"

They said women who were pregnant could not fit through narrow places. And we said, "What do you do about fat men?"

And then three members of the School Board felt that it was not good for students to see women whose pregnancy

becomes conspicuous to others, and indeed we quoted the ludicrous language of one of them about children seeing his teacher of eleventh grade history and thinking she may have a watermelon in her belly. Now, that comment perhaps should not be in a Supreme Court brief other than it was stated in testimony, but it points out what is really the basis of these regulations.

When we say the continuity of teaching argument is the real basis of these things as the appellee would have you believe from their brief, we must submit to this Court that it is just not so. They are legal arguments thought up in retrospect.

The convincing aspect of that is on page 26 of our brief at page 116 of the appendix, where Superintendent Kelly in questioning by the Court, by Judge Merhige, agreed that he had thought of that reason in retrospect at the time of the litigation.

But for the litigation indeed, it is obvious that would not have been the reason.

QUESTION: That is very typical, is it not, of Equal Protection Clause litigation?

Usually when you are dealing with a State statute, for example, you have no legislative history. Then when the validity of a statute is attacked as violating the Equal Protection Clause, then the effort is made post hoc, if you

will, to find rational justifications to the law. That is very typical in Equal Protection Clause, is it not?

MR. HIRSCHKOP: It is not unusual, Your Honor, where it differs here --

QUESTION: And indeed the law generally is. If any rational support can be found for the law, then it does not violate the Equal Protection Clause. That is a so-called conventional test.

MR. HIRSCHKOP: Only if the Court applies the rational basis test.

QUESTION: Right.

MR. HIRSCHKOP: If the compelling interest test is applied to this case, we submit it wouldn't ever succeed, although we would submit it will not succeed on a rational basis test, Your Honor.

Justice Stewart, you have to look, I think, at this other matter that they raise, and that is the appearance, because that is the real background of these things.

There was a question raised in the previous case, or at least discussion, of the widespread nature of these type of regulations, and indeed they are very widespread. And maybe the real importance of this case, outside of just the question of law, of the tests to be applied under the Equal Protection Clause, is the thousands and thousands of teachers that are subjected to just this type of arbitrary regulation.

QUESTION: Does the fact that they are very widespread, is that evidence that they are arbitrary or capricious?

Would that not, if it is evidence of anything, be that there might be some rationality behind it?

MR. HIRSCHKOP: No, sir, I think not.

QUESTION: If you found, for example, one School Board in the whole country that had this kind of regulation, you would have a pretty good case going. You and I should suppose that it is arbitrary and capricious. But if you have half the School Boards in the country with these sorts of regulations, I suppose the presumption going in would be that there must be some sort of rationality behind it.

MR. HIRSCHKOP: I would think not, Your Honor.

It would be a logical inference but I would say not a legal one. For instance, in the mixed marriage cases, there were twenty-six States with mixed marriage laws. In the segregation cases there were many States with segregation laws, and that did not lend validity to those laws.

With regard to these regulations, there is a trend away from them. If there is any inference to be drawn, it is the overwhelming weight of authority against these laws. Just today Civil Service Commission's Bureau of Policies and Standards has recommended against having such standards at all in the hiring laws of the employees of the government.

And we cite Labor Department, Defense Department, and other standards where these are a trend away.

In Virginia, every county had them at one time. The Richmond School Board does not now have such a policy, although Enrico and the surrounding counties do.

I submit to the Court that we cannot, from the widespread nature of the laws, draw any inference at this time. The 49 percent figure I am not sure. I should think it would be higher, in all candor. It does apply to major School Boards. And our experience in this case and a companion case now coming up through the Fourth Circuit or class action in Virginia indicates that practically all of the counties in Virginia have such a regulation.

There was a question raised as to the five months versus another time. And it is conceded in this case that there is nothing magical about five months, it is just that they have to draw a specific time; so they lock on five months. It could be four or six or seven. The testimony was so in our case.

QUESTION: And when is the notice required in Chesterfield?

MR. HIRSCHKOP: Well, they require it as soon as you know, but you cannot -- you must leave after the fifth month.

QUESTION: Yes, but when must you give notice?

MR. HIRSCHKOP: I do not have the precise date. I

will get that, Your Honor.

QUESTION: I would think that would have a good deal to do, that would have a good deal of bearing on the continuity argument, would it not?

MR. HIRSCHKOP: It would, Your Honor, and we do not resist a notice. This was raised in the prior case. We have no question, the School Board may ask people who have any kind of disability which they know in advance will require them leaving the school at one point or another, to notify the employer.

QUESTION: And not just the day before.

MR. HIRSCHKOP: Oh, yes, sir.

We have no problem with that. That is not an issue in this case.

There is a separate issue which again points out the arbitrariness of it on the return. The regulations in this jurisdiction, in this School Board, say that following their pregnancy, they can return the beginning of the next year basically. Now, in depositions it was pointed out that they return to a position open at the point, the time of return, if there is a position open, plus the regulation clearly shows they are not guaranteed return to the same job, the same teaching position, for which they originally contracted. And they must file a certificate or give the school assurance that the child will be taken care of okay.

And, of course, this starts smacking of the Martin Marietta case, because men do not have to give such assurances as to who is to care for an already born baby, which again I think points out what they are really concerned about, is the old-fashioned look of women and child rearing and childbirth.

We submit to the Court that the record is abundant here, not just because of watermelons and things like that, Your Honor, on the notice dated six months prior to the expected birth they should give notice.

QUESTION: So, that means two months' notice, is that it?

MR. HIRSCHKOP: Yes, sir.

QUESTION: Two months' notice?

MR. HIRSCHKOP: Yes, sir.

QUESTION: Two months prior to leaving?

MR. HIRSCHKOP: Yes, sir.

Now, we have no problem with when the notice is. They may say notice six months, the notice eight months; that is not the problem we have in this case. The problem essentially is that there is just no reason to make women leave work when they are perfectly capable of working, other than these old-fashioned notions of childbirth.

QUESTION: Were there individual employment contracts in this case?

MR. HIRSCHKOP: Yes, sir.

QUESTION: Did the contracts have anything to say about this subject?

MR. HIRSCHKOP: The contracts have a clause. I will try to find one. I do not have the exact contract here, I am sorry, Your Honor. But the contracts have a clause referring to the sick leave policies. For the purpose of the case, we would have stipulated in the Court below that even if there was a specific section in the contract outlining this, that that would not be a bar. There have been other teacher cases with these contract provisions. You cannot contract away your Constitutional rights.

QUESTION: You might have stipulated it, but you did not, and it might have something to do with the merits of this case, whether or not this teacher agreed in advance that this would be a term and condition of her contract.

Do you know or do you not?

MR. HIRSCHKOP: No, Your Honor, there is a section of contract on the sick leave policies and a section of contract on the School Board policies, that they will adhere to the School Board policies. I do not believe there was a section in the contract specifically on maternity leave policies.

Now, they do have in the School Board policies in the Teachers Handbook, the maternity leave policies spelled out specifically as we have it here, as it appears at page, I think, 20 and 21 of our appendix.

We submit to the Court in this case there was medical testimony that the woman could teach. In this case her own principal asked that she be allowed to finish out the semester. In this case she had asked to continue first until April 1st, which is shortly before the expected date of birth; and later went before the School Board and asked at least could she stay til mid-January, January 20th, I believe, when the semester would end, so she could finish the semester with her students.

They forced her to leave on December 18th, apparently just before the Christmas vacation, although there is nothing in the record that would indicate they did it for that reason alone. The fact still remains that there is nothing in this record to show the continuity argument. There is nothing in the record to buttress their other arguments advanced at the time of deposition. There is nothing to show the absentee argument or give any truth or validity to that. There is nothing to show the injury argument.

Indeed, if you start comparing this to other matters -- for instance, a man with his leg in a cast as a result of a skiing accident and what have you -- he certainly would not be of any great benefit in the middle of a fire drill, running down a hall on crutches, but there is no prescription against him.

With regard to the predictability of disabilities

which was raised earlier, again this is discrimination, going after a select class, which I think just lends to our position that it is appearance that they are really concerned about. Certainly a woman once pregnant is able to predict through medical testimony or medical doctors can predict the exact date of birth, but so can most people for cosmetic surgery and many other things.

There is no regulation on cosmetic surgery. A man or a woman could make a choice that we want certain cosmetic surgery and then pick a date and go to the School Board, take their leave of absence, be out as long as they want in essence.

QUESTION: Is it not a different matter when you are dealing with a situation like this where, as you suggest, the terminal period is predictable and you have a predictable situation all the way through in terms of medical testimony?

When you talk about a man with his ankle or his leg in a cast, that is one isolated situation; but with a pregnancy, you have a whole series of consequences which are within the range of possibilities, do you not, in terms of potential disability and limitation?

MR. HIRSCHKOP: Yes, Your Honor.

Mr. Chief Justice, the medical evidence in this case says basically there is no disability during the teaching period.

Now, the one thing that there is, is there is a certain anxiety, but there is nothing before this Court -- and we submit that there could be nothing -- which shows that despite the anxiety of the condition of pregnancy, it materially interferes with the teacher's ability to teach.

Quite the contrary, we have amicus in this case, the National Education Association. That is an association of over a million members, representing teachers, who are not here to blindly say they have got to work no matter what happens, but have in conscience, I believe, said that education is not hampered by teachers being in school who are pregnant, and I think we could recognize the overwhelming number of members that they have women teachers.

QUESTION: Of course, we do not resolve the Constitutional issue by taking a plebiscite or poll, do we?

MR. HIRSCHKOP: No, sir, nor do our amicus to the other side.

But, Mr. Chief Justice, we have to, I think, in this case -- the Court has to in this case, decide is what they are representing to us, that this is really a continuity argument, at all true; does it hold any water?

We submit it does not. Even if you put aside the depositions and deal with it as it is before the Court right now, that let us look at this point on the Constitutional framework if there is any validity to that statute. Let us see

if we can find a reasonable basis. I submit you cannot. As in the case before us, our teacher was terminated when it disrupted continuity.

In fact, while they have an element in this regulation that a teacher can be continued past the fifth month, if the Superintendent determines that it is for the good of the school system, we also have the testimony that he had in the case that he just does not continue anybody past the fifth month. And this case here, in a day when there is a wide market, lots of teachers readily available, where they terminate a woman in December who could have finished the term and gone right through to April.

QUESTION: Is State action in this area to be influenced by whether school teachers are in a buyers' market or a sellers' market?

MR. HIRSCHKOP: We submit that it should not be, Your Honor. But their argument is buttressed by the buyers' and sellers' market.

QUESTION: Five years ago, more or less, teachers were almost impossible to come by; is that not correct?

MR. HIRSCHKOP: Yes, sir, in certain fields especially.

QUESTION: And now there may be somewhat of a surplus.

MR. HIRSCHKOP: In practically all fields.

But, Your Honor, it is their argument that I am

trying to get to. They believe that you have to have the continuity because you might not have a teacher available later on. And if you put aside whether teachers are available or not, the whole continuity argument would fall on its face if there are plenty of teachers available. Either way, there is just no question of this being a discriminatory statute if not only looked at as applying to women teachers compared to other teachers, but as applying to the teaching profession as compared to the other professions.

I think an incident that happened in the course of this litigation is very fruitful here. When we showed up to argue this case in the Fourth Circuit, Judge Young's law clerk, who was a District Judge sitting by designation, was in her sixth month of pregnancy, and anticipated working through her eighth month of pregnancy.

Now, what is so important about teachers that is not so important about law clerks? Or, if such a time comes as clearly will come, when a woman or more than one woman rise to this bench, will this Court, whoever determines such regulations, say you cannot sit beyond your fifth month of pregnancy?

Or will you say that to judges on trial courts?

Or does anyone require that of court clerks here?

We believe they do not, nor does the government require it. Just because teachers in the unique situation historically of the year-to-year contract is no reason they

should submit to that type of discrimination which is practiced nowhere else, whether it be in the court system, in the Civil Service system at this time; it is just an anachronism that must be done away with.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Hixon?

ORAL ARGUMENT OF SAMUEL W. HIXON, III, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. HIXON: Mr. Chief Justice, may it please the Court:

My name is Sam Hixon, and I am here representing the Chesterfield County School Board.

Perhaps I am taking the reverse approach to this case, but I wish to skip over temporarily the question of what kind of tests should be applied in this case and move directly to the question of what is the basis, the reasonable and rational basis, for the Chesterfield maternity leave provision.

The School Board recognizes in these cases that there is an educational advantage to having a teacher full-time throughout the year, who can work with the individual student on an individual basis. And it is for that reason that the School Board requires that each individual teacher sign a written contract at the beginning of her employment, guaranteeing that she will be employed for a one-year period of time. This contract is a part of the record in this case.

By having one teacher without any interruption during the whole course of one year, the objective of continuity in education is accomplished. With this in mind, and for many reasons, the School Board recognizes that it is making the transition from one teacher to the next as smooth and as non-disruptive as possible, by the application of the Chesterfield maternity provision.

QUESTION: Mr. Hixon, I could fully understand your continuity argument if the Chesterfield County School Board had a rule that no teacher who anticipated being pregnant during that school year would be hired, or if you required immediate notice as soon as the teacher knew she was pregnant.

But here it does not seem to me -- you tell me why I am mistaken in this -- that it does not make any difference so far as your continuity argument goes, whether the teacher leaves after four months pregnant, or after eight months pregnant, or after eight months and three weeks pregnant, so far as continuity goes. Because the pregnancy is going to be, just by the ordinary pattern of events. It could be any time during the school year, and the four months could be any time during the school year, when you take a large sample of pregnant women teachers.

MR. HIXON: Yes, Your Honor.

To answer that question, though, let me say first to your initial question, that I believe that the School Board

could have a regulation which prohibited pregnant women from beginning the contract term, because they knew and know at that very point that there will be an interruption during the year.

QUESTION: Whether or not it could, at least your continuity argument would have great force in support of that sort of regulation, which we are not faced with here.

MR. HIXON: But this regulation has an advantage, Your Honor, in that it requires only one affirmative act on the part of the teacher.

She is required six months before the expected date of delivery of her child, which is three months after she becomes pregnant, she is required to come in at that point and give the School Board notice; and with that one affirmative act on her part, the School Board automatically at that point triggers an administrative procedure for preparing for her replacement. They can go out at this point; they can interview, they can talk to teachers, and they can offer them a position at a fixed point in time. That is, the termination of the six months of the employment.

And this is very important to the School Board, because I do not agree with what my colleague has said, that the only purpose is to provide a replacement. The purpose is to provide a replacement who is well qualified, who is well trained, and can do the job adequately.

And with this two months lead time, which is effectively what we have, the School Board can go out and hire and look for the most qualified teacher to come in at the end of that six months period of time.

Of course, the Chesterfield provision is much more flexible than others. It provides that the School Board can extend past the fifth month of employment the teacher, if the teacher so requests and the teacher has the permission of her doctor and if the School Board determines that it is in the best interests of the students, because this is essentially what we are dealing with here.

Now, I have no doubt that the School Board, if the final date of the five months period would fall on, let us say, May 1st, and the end of the school year was May 15th, then -- I have no doubt but that the School Board would continue her until May 15th, because it would have accomplished the objective of continuity.

But here we do not have that situation. We had here a situation in which Mrs. Cohen wished to teach until her ninth month of pregnancy. She initially requested that she teach up until April 1st. She later changed her mind and decided to terminate her employment on January 19th. But here we have a question of where the School Board made a decision on its own whether or not it would be better from the standpoint of the students to continue the employment of Mrs. Cohen

until a date that she so specified or whether it would be better for the student body and for the students to terminate her employment at the Christmas recess, which I submit seems to them to be a reasonable date for termination of employment.

The record in this case clearly justifies and supports the rationality of that argument. Upon Mrs. Cohen's termination, there was a replacement who was available, who the School Board was able to go out and hire, to offer her a job on a fixed date, that is, the day beginning after the Christmas vacation -- to offer her that position and have her come in and remain with the students for the rest of the year. This is the continuity which was accomplished by the administrative procedure which is set up here.

The replacement was a duly qualified teacher with a master's degree.

This is not an argument which I have contrived for purposes of arguing to this Court or to the Fourth Circuit. It is an argument that is clear in the record in this case.

Dr. Kelly, who is the Divisional Superintendent, testified in the appendix at page 109 and also at page 113 why this regulation existed, and why this rule existed. And it is entirely in line with the continuity argument that I have presented to this Court. But even if it were not, the question of whether or not the rule or regulation is to fall or stand under the attacks under the Equal Protection Clause,

does not depend upon the rationality which is directed towards that rule or regulation by a particular member of the School Board.

It can, as this Court has said on many occasions, come from the arguments which are made by counsel, or it can come from the Court itself. This Court has said that if there is any reason which we can conceive to support this regulation, then it should be upheld under the Equal Protection Clause.

QUESTION: Under the School Board's rule, after pregnancy, does the teacher have any preference for rehiring over any other applicant for any existing vacancy?

MR. HIXON: Yes, she does. She will be guaranteed re-employment not later than the beginning of the next year from the period of time that she is placed on maternity leave.

QUESTION: You mean the beginning of the next school year after she is declared eligible for re-employment?

MR. HIXON: Right, not later than that date.

If there is a position available, that they can move her into, the regulation provides that she can be offered re-employment at any time. And the regulation also provides --

QUESTION: But she is only guaranteed re-employment as of the date of the beginning of the next term?

MR. HIXON: Yes, sir, not later than that date.

QUESTION: Or year, school year?

MR. HIXON: It is the beginning of the next school

year, Your Honor. The teacher does not lose her right to seniority, she does not lose her right to personnel benefits, she does not lose her tenure.

QUESTION: But she does not accrue seniority while she is on leave, I take it?

MR. HIXON: No, sir, she does not.

She only accrues seniority for the period of time that she has actually completed. The only thing that the school teacher loses here is a period of employment when she loses wages. This is the only complaint that the school teacher can have in this case.

In this case, the school teacher wishes really to accomplish the best of two worlds. It is not an attack here by the school teachers on the maternity provision itself. The record in this case shows that the maternity provision was adopted in part by school teachers who participated, women school teachers who participated, in the rules adoption.

So, we are not really here talking about the merits or demerits of maternity leave, because it is conceded that the petitioner in this case wants the merits of maternity leave. Her only objection is to one clearly defined area, and that is "I wish to choose the manner in which the maternity provision is implemented as opposed to having the School Board make this choice."

And that is really the only issue involved in this

case, and whether or not that precise issue is guaranteed by the Constitution.

In addition to this continuity argument that I have presented here -- we do not wish to not rely upon the medical reasons which justify the regulation -- the record in this case and also Ia Fleur's, are complete in the fact that there are certain conditions that occur only in a pregnant woman, and there are certain conditions or disorders of pregnancy that can occur only in the last trimester, which is perhaps one reason why the fifth month date was picked out.

For example, toxemia, anemia, and hemorrhagic conditions related to the placenta. These are conditions that occur only in a pregnant woman in these latter stages of her pregnancy.

In addition, there are obvious conditions that relate only to a pregnant woman. For example, she has a lack of balance caused by the size of the foetus in the latter months of pregnancy. She is more subject to falling. Her center of gravity changes and this record shows that there is the possibility that a pregnant woman will be subject to pushing and shoving in the school. And this record also shows that a pregnant woman will have to visit her obstetrician thirteen times during her pregnancy, with the more frequent visits being in the last several months of her pregnancy.

QUESTION: Mr. Hixon, may I ask you this question:

I think the record shows there are about 1400 teachers in the Chesterfield system.

MR. HIXON: That is correct.

QUESTION: Of whom 80 percent, approximately, are women.

Does the record show -- I just do not recall -- what percentage of that 80 percent are of childbearing age?

MR. HIXON: No, the record does not show that, Your Honor. The record only touches on that indirectly. It will reflect that at the time Mrs. Cohen applied to the School Board in the month of December, that there were three other women who were applying for an extension of the maternity provision in the same month. That is the only way in which the record in this case reflects on the question that you have asked.

QUESTION: Does the record show for a full school year, for example, how many teachers were on maternity leave?

MR. HIXON: No, sir, the record does not show. There was no statistical data produced in the records of this case to show or to support the contention that there were an increase in absences of teachers during the last trimester of their pregnancy. That evidence just does not exist, except for the fact that we do know that pregnancy in and of itself will cause a teacher to increase her visits to her obstetrician, which could very well lead to her absence from her teaching chores, particularly in the last trimester that is involved

here.

QUESTION: How many times does a person having tests for allergies visit their physician?

MR. HIXON: I am sorry, I do not understand.

QUESTION: How many times does a person having tests for allergies visit his or her physician?

MR. HIXON: Of course, the record in this case will not reflect that. I look at allergies as an entirely different situation.

QUESTION: When pregnant you are going to the doctor, you have mentioned that three times. You do not have to go to the doctor during the school period, do you?

Is there something peculiar about Chesterfield County that they only hold doctor's services while school is in session?

MR. HIXON: Well, sir, the record shows clearly in this case, the doctor who testified here, that his normal hours that he would accept patients would be between the hours of nine and four o'clock in the afternoon.

QUESTION: Are there any doctors in Chesterfield County that have night hours?

MR. HIXON: I would have no idea of the answer to that, Your Honor. I do know that the doctor who was deposed in this case said he did not work at night and he also did not work on weekends.

I also know some doctors who do not work but two days a week, too.

I just do not see why you put so much emphasis on the fact that the person has to go to a doctor regularly.

MR. HIXON: Sir, I put that emphasis only because it points out clearly that there is a likelihood during the last three months that a woman will be absent because --

QUESTION: Is the last three months before us?

MR. HIXON: Yes, sir.

QUESTION: I thought it was more than three months.

MR. HIXON: It is within the last four months, Your Honor, correct.

But I used generally -- because the doctors seem to break it up into trimesters, the first, the second, the third, and their testimony relates only to the last trimester.

But there is nothing magic about the fifth month; it could be the fourth month or the fifth month or the sixth month.

QUESTION: It could be.

MR. HIXON: It could be.

But here we are dealing with a question of whether or not one is reasonable --

QUESTION: And it could be that a man could be just as unstable on his feet as a pregnant woman.

MR. HIXON: That could be.

QUESTION: And it could be that a man is just as fat as a pregnant woman.

MR. HIXON: Yes, Your Honor.

QUESTION: And it could be that a man could not stand being pushed around in a hall.

MR. HIXON: But let me point out that we are dealing here with a problem that exists in the Chesterfield County School Board. If we find out that there is another problem in terms of conditions which are peculiar only to men or only peculiar to all people, I think the School Board could easily regulate that condition.

But here they are dealing with a condition which they know exists and which they know creates a problem for them.

And does the Constitution require that they regulate every potential condition causing a disruption in the School Board, or does it only require that there be a rational basis, or a reasonable basis for the regulation that we have got here?

That is the issue.

QUESTION: I thought we were talking about the rational basis. I thought that was what I was talking about.

MR. HIXON: Yes, sir, and that is what I tried --

QUESTION: Is it rational that if 80 percent of pregnant women do such and such a thing, that the other 20 percent should be punished?

Is that right?

MR. HIXON: I am sorry, but I do not understand the question.

QUESTION: You say that normally pregnant women do this and this.

Does this record show that there are some pregnant women who do not?

MR. HIXON: Well, I think the School Board can very clearly regulate and direct its regulations to a condition of potential import and a condition of potential disruption. The School Board need not wait until an injury occurs to a pregnant mother in a school system during the last several months of pregnancy in order for them to justify this rule as being rational. They can regulate as to potential disruptions that may occur.

I do not say that the condition of disruption will occur in every pregnant school teacher.

QUESTION: Suppose the record shows that 80 percent of the male teachers in Chesterfield County are "unstable on their feet."

Could you adopt a rule which says, "We are not hiring any male teachers"?

Would that be rational?

MR. HIXON: I would say that under those circumstances, if you could relate the condition of a man's instability with his ability to teach, which is a question in and

of itself, if you could relate that matter, I believe that a regulation directed towards that condition after the facts that you have given me, would be a rational and reasonable regulation.

QUESTION: All men could be denied employment, all men. I have got 80 percent and 100 percent.

Did you say that because 80 percent are unstable, then you could adopt a resolution that no men could be hired because 80 percent are unstable?

MR. HIXON: I would say that if you could show that the instability that you are talking about here would have a direct effect on the ability of teachers, particularly men teachers, in the school system, you could have a regulation directed towards that.

But we do not have that here, Your Honor.

QUESTION: I know you do not.

MR. HIXON: The kind of condition here is where 100 percent of the people affected by the rule are in fact pregnant. And we do know one thing, that they --

QUESTION: Are a 100 percent unable to teach?

MR. HIXON: A 100 percent are not unable to teach, that is correct.

QUESTION: That is my point.

MR. HIXON: That is correct.

QUESTION: And you do not see any problem with that?

MR. HIXON: No, sir, because I think that the rule

here can be clearly justified on the basis that it accomplishes continuity in the educational process by having an orderly procedure for replacement of teachers who become pregnant.

There is only one person, only one class of people, that are affected by this rule, and that is pregnant women who are at least five months pregnant and who wish to choose for themselves what date they will terminate their employment, rather than having the School Board terminate their employment.

And that is the only class of person that is affected by this rule.

QUESTION: Why do you want to plan for continuity at a certain particular -- why do you not wait until two weeks before pregnancy?

MR. HIXON: Sir, I think --

QUESTION: You could have continuity whatever the definite cutoff date was.

MR. HIXON: There is no question about that.

QUESTION: So, why do you pick five months or four months?

MR. HIXON: There is one advantage to picking five months, in that the elasticity provision, the additional four months, it gives you some time to carry over the teacher, if you believe that it is in the best interests of the School Board that she be allowed to continue teaching for a period of time. For the example that I gave, May 1st, if you wanted to

continue her employment another several months, you could do so.

But I suppose that the one reason that the five month period of time was selected was because most women would prefer to stop teaching after their fifth month.

And I point out again that this maternity provision provides a benefit to women in the sense that their can breach their contract which they have entered into and they can breach their contract without any repercussion. So, we are dealing here only with --

QUESTION: But now you are dealing with a teacher who does not look at it that way.

MR. HIXON: Yes, sir, that is correct. But if there is going to be a balance drawn between the interests of the students and the interests of the children in having quality education by preventing disruptions, and there is going to be a disadvantage --

QUESTION: There would not be any disruption if you planned to have a substitute teacher come in and take over a month before.

MR. HIXON: That is exactly what the School Board is trying to avoid, a substitute teacher.

They are trying to have a replacement there who is qualified and who can remain with the school children for the rest of the year. Because having one teacher throughout the

year is admittedly a valid educational objective, and the District Judge in this case admitted, he said, "I will find or I will recognize in this case that it is good for education to have one teacher there throughout the year."

That is why we have got the one year contract.

QUESTION: This does not guarantee that.

MR. HIXON: It does not guarantee that but it does go a long way towards making a transition.

QUESTION: Maybe it guarantees it for five months rather than for four.

MR. HIXON: What really is the objective here is to --

QUESTION: And the other way might guarantee it for eight months.

MR. HIXON: What really is the objective is to do away with the disruption, which is caused by a teacher leaving without having given notice, and the disruption caused by not having a replacement available who can take over at the classroom.

That is the objective of the regulation.

QUESTION: Mr. Hixon, does the record show whether you need any specified lead time in locating exactly the teacher you needed with the requisite qualifications for the particular class to serve as the replacement?

MR. HIXON: Nothing except the facts in this

particular case, Your Honor.

In the appendix, again at page 114, it shows that Dr. Kelly testifies that he was able with this lead time in mind, to go out and solicit and to hire a replacement teacher who he hoped could be at least as qualified as Mrs. Cohen and who could come in and replace her.

And other than that example as it is applied to Mrs. Cohen, there are no statistics. But I believe the facts as they are found in Mrs. Cohen's particular case are the best justification for this regulation, because the School Board was able to go out with this lead time and with this planning device and with this planning tool, and hire a qualified replacement who was available to come in right after the Christmas recess.

QUESTION: Mr. Hixon, if a teacher wants to get married in March, can she come in to the Superintendent and say, "I know I have a contract, but I want a leave of absence. I am going to get married and I will be back in September"?

MR. HIXON: No, sir, I believe there are penalties for the breach of her employment contract in the sense that she agrees at the outset of her employment that she is going to teach for one year, and, as I have said before, that is the objective, to have a teacher there for the entire year. And I would think that under those circumstances the School Board would be justified in not offering her re-employment because

she has breached her contract voluntarily.

QUESTION: I realize that this is outside of our case, but would she have a 14th Amendment equal protection claim that pregnant teachers get more favorable treatment than young teachers who want to get married?

MR. HIXON: I see what you are driving at, Your Honor, but I would not take that position, because I believe that pregnancy is sui generis; it is a condition that is peculiar only to women and it is a condition which I believe that only the School Board is justified in treating differently than any other condition.

And, for that reason, I don't think that the person you have described would have that claim.

The petitioners in this case have asserted that this is a sex classification case. And, of course, in our brief we have taken the position and strongly represent to this Court that this is not, in fact, a classification that is based on sex for purposes of triggering the strict scrutiny test. We do not have here a classification which treats men and women differently solely because of their sex who are similarly situated. We have a condition here, or a regulation, that is directed toward a particular and easily definable area, that is, pregnant women.

It is not a classification based on sex to treat men differently in, say, their employment in the United States

Army where they may be required to shave off their beards. This is not traditionally known as a classification that is based on sex for triggering some suspect area in which the Court will look with strict scrutiny on the classification that is involved. We have here a peculiar condition that should be, and we represent to this Court, should be handled under the traditional rational basis test. And for the reasons that we have set forth, particularly the continuity and the medical conditions that exist in a woman, we would pray that the opinion of the Fourth Circuit be sustained, be upheld.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Hixon.

Do you have anything further, Mr. Hirschkop?

MR. HIRSCHKOP: Yes, sir.

REBUTTAL ARGUMENT BY PHILIP J. HIRSCHKOP, ESQ.

MR. HIRSCHKOP: The Court has asked several questions about the leave policies.

They are at page 20 and 21 of our appendix. I point out that re-employment is not automatic but only comes after a declaration of eligibility, which includes a certificate from a teacher or assurance from a teacher that she is going to care for her child or can care for her child, so that it does not materially impair her ability to function.

As far as this leeway that teachers have, we submit that it is not so after the fifth month. At page 117 of the

appendix we have the testimony of the Superintendent that no teacher is on board after the fifth month. It is their very experience which gives the lie to that belief, that the mere fact it is there is that it is used.

Now, we disagree basically with the other side on what is the issue of the case, no question about that.

All that this teacher wants, all that the women want, who want this thing set aside, is to be treated equally with other people. And they are not treated equally, because they single out this one sex related disability in terms of the fact that when a pregnancy actually occurs a woman has to be gone. The rest is just imagined.

For instance, Mr. Hixon's argument, "Well, she is going to go to the doctor thirteen times."

As someone recognized here in the Court, you can go to the doctor at other times, even though the doctor who testified does not have Saturday hours -- he is only open, I think, until 4:30.

Mrs. Cohen testified that is when she tried to get there. And we put her record before the Court in the District Court. She had missed two days, both related to colds. She had, in the five months, which part of those thirteen days encompassed, I believe, not missed any time. But even if she had, so what? People miss time for all sorts of things.

Could they pass a rule against a generic or race

related disease?

For instance, could they have a rule that people with sickle cell anemia or the tendency to sickle cell anemia could no longer teach in their school system? We know that that is basically a race related disease, and yet give people with cancer or other diseases preferential treatment.

They could not, I submit to the Court, and get away with it.

We have a law in Virginia which is cited at appendix 5 on the dismissal law which is Statewide. And where there is a disability as shown by competent medical evidence, a person can be dismissed. The State treats all disabilities equally. And our position in this case is that women should be treated equally. They have, no question, singled out one class of persons, and I think to argue whether it is sex related is foolishness. It is clearly sex related.

QUESTION: Mr. Hirschkop, it is your primary submission, as I understand it, that the compulsory termination after the fifth month of pregnancy is what violates the Equal Protection Clause; is that right?

It is not the notice requirement, is it?

MR. HIRSCHKOP: Oh, no, sir.

The Court has raised it several times. I think we should be very clear, we do not object to the notice requirement and, in fact, do not object to a set date requirement. They

cannot fix it by law this way. In other words, they can have a requirement that if a person is going to suffer some disability which will force them to leave teaching during the course of the year, that person must, as soon as they know about it, or within some specified date prior to the disability departure time, notify the employer -- the School Board in this case -- and in fact even fix a departure date.

Now, that will take care of what they say they want to go on ahead to replace a person. The basic problem -- there is no problem with that. The problem is they single out one class of people. They say, "You must give us a departure date and no one else must."

And that is discrimination.

QUESTION: You say that is also, not just the compulsory departure date? So, I guess you did not, either did not hear my question or did not answer it accurately.

MR. HIRSCHKOP: No, sir, we have no objection --

QUESTION: You say the notice requirement confined to pregnancy, I thought you said, you do not think is unconstitutional.

MR. HIRSCHKOP: We think it is unconstitutional if they confine it to pregnancy.

QUESTION: Then I mistakenly understood you to say that your objection is the compulsory termination.

MR. HIRSCHKOP: That we object to that when it is

confined to pregnancy also. If they had it for all people with disabilities, as the State law has it, with that disability job related and would meet the due process requirement and treated all people the same, men and women, female related disabilities and male related disabilities, it would not violate equal protection.

QUESTION: So it is not only the compulsory separation after the fifth month that you submit violates the Equal Protection Clause?

MR. HIRSCHKOP: Yes, sir.

QUESTION: It is not?

MR. HIRSCHKOP: It is not that. What we submit violates it is the fact they limit it just to women, that they pick out one class.

QUESTION: What is?

MR. HIRSCHKOP: The notice requirement and the compulsory leaving requirement. Taking the fifth month is purely arbitrary, as the Court has recognized. They could take the eighth month or the second month. They have just arbitrarily virtually flipped a coin to get to the fifth month, as the testimony indicates in this case.

But what we object to, Your Honor, is that they have singled out women for treatment that men do not receive. In this case --

QUESTION: Give me an example of another condition

that would predictably result in leaving the job and about which you could give some notice.

MR. HIRSCHKOP: Cosmetic surgery, Your Honor.

QUESTION: That is not a condition; that is just a choice that sometime you are going to do it.

MR. HIRSCHKOP: But it will necessitate your being in the hospital and being out of the job to have it done.

QUESTION: You mean if you have planned to be away during the school year, give notice.

MR. HIRSCHKOP: Yes.

QUESTION: But there is nothing inexorable about that as there is about pregnancy. It is quite different, in fact, different.

MR. HIRSCHKOP: No, sir, there are some male related diseases that Judge Winter points out, points out in the dissenting opinion in the Fourth Circuit with which I am not medically familiar. But there are unquestionably a number of medical conditions where you have a choice as to when you will have an operation and you can go to the school and say, "Look, I am going to have an operation either in six weeks or two months or three months."

QUESTION: The whole point is that when a woman is pregnant she does not have a choice as to when that baby is going to arrive, does she?

MR. HIRSCHKOP: No, sir.

QUESTION: Short of an abortion or a miscarriage, and the other thing about it is, and I guess part of the argument is, if the woman is pregnant, the point of having her leave at five months or four months is that during the pregnancy she is more likely to be away from work.

That is part of the argument. That is not true of cosmetic surgery.

MR. HIRSCHKOP: That is the argument.

We debate that. We say it is not true.

QUESTION: I know, but that is the argument.

MR. HIRSCHKOP: Oh, yes, sir.

QUESTION: Give me a male related condition that is like that.

MR. HIRSCHKOP: I do not have one, Your Honor. My medical knowledge is that limited.

QUESTION: Mr. Hirschkop, is not at least one of the contentions here that in addition to being gone during pregnancy, that the teacher herself loses some of her ability to teach? You say it is not material, but that is not exactly similar to cosmetic surgery where presumably up until the night before the operation the person has not lost any of their customary ability.

MR. HIRSCHKOP: Your Honor, I say it is not similar, I say it is not true.

I say a pregnant woman can teach as well as any other

person in the school system.

QUESTION: Assuming you are wrong on that --

MR. HIRSCHKOP: Well, the doctor said we were right in the record.

QUESTION: I know, but assume you are wrong, the State says you are wrong.

MR. HIRSCHKOP: Your Honor, they say I am wrong and neither do the doctors say I am right, but now we look toward the diabilities.

QUESTION: If you are wrong, I take it you think your case is in trouble?

MR. HIRSCHKOP: No, sir.

QUESTION: Then why do you not assume you are wrong for a moment and then tell me what the argument is.

MR. HIRSCHKOP: I sometimes have difficulty with that, Your Honor. Assuming that there is some difficulty with a woman teaching while she is pregnant, there is equally difficulty with other people teaching with broken legs, even though they will not be gone -- are you talking about the element of the teaching itself?

QUESTION: Yes.

MR. HIRSCHKOP: There is no special regulation on them, teaching with bad backs, teaching with heart impairments, teaching with other types of impairment.

QUESTION: Assume, as you dislike doing, of course,

but assume that pregnancy does impair teaching ability.

MR. HIRSCHKOP: Yes, sir.

QUESTION: The State is still disentitled Constitutionally to provide for compulsory leave?

MR. HIRSCHKOP: Yes, sir, only insofar as they single it out from other matters. If they would go by the State law and say where a disability is such --

QUESTION: You just told me you could not think of any other male related disease -- cosmetic surgery, that does not involve any impairment.

MR. HIRSCHKOP: It is not male related, then, but it could be --

QUESTION: Give me an example.

MR. HIRSCHKOP: It could be a broken leg, Your Honor.

QUESTION: With a broken leg you do not have the anticipated disability long in advance. It seems to me that the State is arguing that pregnancy combines possible disability during the term plus an anticipated definite disability at a given time. And I think Justice Stewart and Justice White have both asked if your claim is sex discriminatory, give us an example or something else the State should have included in this that represents all those things and that they did not, and I have yet to hear you answer that.

MR. HIRSCHKOP: I can only refer you to Judge Winter's dissenting opinion where he does indicate some medical

disabilities that men suffer. But again I point out to Your Honor the fact that we are making an assumption that women cannot teach during pregnancy, which the record is the opposite of. The record says they can teach.

Dr. Dunn, who is the head of the Medical College of Virginia's section on gynecology and obstetrics --

QUESTION: If there were a contrary judicial finding below, you would like us to differ with that and overrule it?

MR. HIRSCHKOP: Insofar as it is unsupported by the record, yes, sir. We say it is unsupported by the record. To the contrary, a very noted physician -- in fact, two of them -- in Virginia -- one of them even had, I think, Judge Merhige pointed out, delivered his own baby, Dr. Forrest.

But the fact is the record says just the contrary assumption you would me make, Your Honor, that a woman can teach. And our basic problem with this is that they single out women for special treatment that no one else does.

QUESTION: Where do you think that Virginia could Constitutionally draw the line? You do not like five months or six months.

At what point do you think they could draw it, or do you think they could not draw any line?

MR. HIRSCHKOP: They could draw a line on notice, Your Honor.

QUESTION: No, I am talking about the other --

MR. HIRSCHKOP: Termination? Well, according to the medical testimony here they could not draw the line. It would be up to the person, as in any other situation, to say that they can teach until such time as they can no longer adequately carry out their duties.

If they had a regulation that a person who apparently could not carry out their duties because of an impending disability -- pregnancy would be one of the obvious impending disabilities -- would have to give notice and then, in fact, would have to present a medical certificate or submit to the examination of a school doctor, that would be reasonable if it was applied across the board.

The main problem here is that they have picked out just one thing to harp on, which is unconstitutional, Your Honor.

QUESTION: You have also, it seems to me, taken a position that would preclude the School Board from saying that pregnancy, while the pregnancy goes on up until the time of childbirth, is in any way debilitating.

MR. HIRSCHKOP: Oh, no, sir. They have a State law they can operate under that if a disability is such that the person cannot carry out his duties --

QUESTION: I know, but you will not accept that.

MR. HIRSCHKOP: I will accept that.

QUESTION: No, you will not accept that. You would

accept it if pregnancy as some women experience it is really physically debilitating. But you say the woman is just as good a teacher while she is pregnant as at any other time.

You will not accept the fact that that pregnancy is a debilitating condition.

MR. HIRSCHKOP: In some people it is.

QUESTION: Of course,it is in some people.

But you would not accept a general regulation describing it as a debilitating situation.

MR. HIRSCHKOP: It is not for me to accept personally, Your Honor.

QUESTION: If you will accept that, then we have a different --

MR. HIRSCHKOP: I think, Your Honor, they cannot say that a person cannot teach because they are pregnant any more than they can say that a person cannot teach because they have got a cold. A cold can result in pneumonia. The statistics in this case are a lot more hours lost from teaching from colds during pregnancy, the statistics we have from the Labor Department.

QUESTION: Mr. Hirschkop, as I recall, the record in the Cleveland case which you had argued here, at any given time there are about 10 to 12 percent of the women in the system of childbearing age who are out on maternity leave.

Can you think of any other cause of disability or

continued absence that would produce a leave as of any given date of that magnitude such as cosmetic surgery, for example?

MR. HIRSCHKOP: Not a surgical type leave, which would require an operation.

QUESTION: Can you think of any?

MR. HIRSCHKOP: Of course, the statistics on absenteeism itself from the Labor Department had pregnancy as one of the lower causes, but it did not include the actual period the woman was gone for the birth itself. It included the period they were still employed during which they would miss for a doctor's appointment or during job related time; they were missing because of illness or something during the pregnancy.

QUESTION: But you mentioned cancer, broken legs and cosmetic surgery. Is there any other single problem in this area that causes absence on the part of a teacher for a prolonged period of time that is comparable in terms of the number of teachers it puts out of the system through pregnancy?

MR. HIRSCHKOP: Not for operable disabilities, Your Honor. I would not personally have that knowledge. I am not that familiar with the La Fleur record, although I did read it. But not for operable disabilities.

But in terms of overall disabilities -- in other words, time missed from the job itself -- there are far greater causes like the common cold. We have that statistic in the record, Your Honor, from the Department of Labor.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 1:58 o'clock, p. m., the case was submitted.)