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Melissa Prober

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Please Don't Tell My Parents

THE VALIDITY OF SCHOOL POLICIES MANDATING PARENTAL NOTIFICATION OF A STUDENT'S PREGNANCY

School administrators face the difficult task of balancing students' rights against parental rights. This becomes particularly challenging in the area of student health care, especially when it concerns sexual activity and reproductive issues. In recent years, some schools confronted with teenage pregnancy have enacted policies requiring disclosure to parents of a student's pregnancy status, even if the school learns about the pregnancy through confidential communications between the pregnant student and school-based health care providers.¹ Such notification policies raise serious concerns regarding the violation of students' rights.

Recently, in a case of first impression, a judge for the Eastern District of New York denied a motion for a preliminary injunction to prohibit the Port Washington School District from enforcing a policy requiring that parents of pregnant students be informed when school officials, including school nurses, learn of a student's pregnancy.² The court reasoned that the U.S. Constitution and state laws do not prevent schools from disclosing such information.³

This Note argues that, notwithstanding the Eastern District of New York decision, mandatory disclosure policies do, in fact, violate students' constitutional and statutory rights. Moreover, regardless of the legal implications, these policies work against community interests by deterring students from

¹ Memorandum from Dr. Geoffrey N. Gordon, Port Washington School District, Office of the Superintendent, Re: Reporting Student Pregnancy (Nov. 12, 2002), Complaint at Ex. A., Port Wash. Teachers' Ass'n v. Bd. of Educ. of the Port Wash. Union Free Sch. Dist., 361 F. Supp. 2d 69 (E.D.N.Y. 2005) (No. 04 Civ. 1357) [hereinafter Port Washington Memorandum].

² Port Wash. Teachers' Ass'n v. Bd. of Educ. of the Port Wash. Union Free Sch. Dist., 361 F. Supp. 2d 69, 81 (E.D.N.Y. 2005).

³ *Id.* at 77-81.

using school-based health care providers as a source for confidential health care, counseling, and information.

Section I of this Note explores mandatory notification policies, including the one enacted by the Port Washington School District, and reviews the Eastern District's decision in *Port Washington Teachers' Association v. Board of Education of the Port Washington Union Free School District*. Section II argues that mandatory notification policies are unconstitutional. Section III addresses various state and federal laws that allow minors to consent to medical and mental health care and protect their confidential communications. Section IV examines the conflict between mandatory notification policies and sound public policy, specifically their potential to deter students from using available health care at school and place some adolescents at risk of child abuse. Section V offers recommendations for school officials to consider in order to promote school health care to adolescents and to protect the confidential communications of their students.

I. HOW MANDATORY NOTIFICATION POLICIES WORK

Notification policies vary depending on the goals of school officials. Some may only require school-based health care providers to reveal the names of pregnant students to school administrators. School officials may use this information to provide special care for the student, such as elevator access. However, while some administrators may use this information solely to provide adequate accommodations for pregnant students, other administrators may seek the names of pregnant students to "counsel" them out of school, meaning to encourage them to continue their education elsewhere.⁴

⁴ "Counseling out" occurs when pregnant students are told by school counselors or administrators that they should attend an alternative school, stay home during their pregnancy, or drop out entirely. See generally Tamara S. Ling, Note, *Lifting Voices: Towards Equal Education for Pregnant and Parenting Students in New York City*, 29 FORDHAM URB. L.J. 2387 (2000) (explaining how New York's pregnant students are pushed out of regular schools and told they must instead attend inferior schools for pregnant and parenting teens). In Fullerton, California, Mary Beth Holt, a counselor for the Bellflower High and Middle School, was allegedly fired for refusing to disclose the names of pregnant students to a vice-principal who wanted Holt to counsel pregnant students to transfer from Bellflower to an inferior school. *Holt v. Super. Ct.*, No. BC257305, 2002 Cal. App. Unpub. LEXIS 6135, at *2 (Cal. Super. Ct. June 28, 2002). The vice-principal allegedly informed Holt that the policy was a board directive. Complaint at 4-5, *Holt*, 2002 Cal. App. Unpub. LEXIS 6135 (No. BC257305).

Other policies, such as the one enacted by the Port Washington School District, go a step further and require⁵ that the parents of the pregnant student be notified regarding that student's pregnancy. This Note focuses on this latter type of policy.

The Port Washington School District in New York enacted a written policy to "clarify the right and responsibility of district staff, including school nurses, to inform a student's parents that she is pregnant."⁶ The policy warns that "a student's disclosure to any staff member that she is pregnant is not a communication protected by a legal privilege, but rather may trigger legal reporting obligations depending on the circumstances."⁷ It instructs staff to refrain from "represent[ing] to a student that such a disclosure will be kept in confidence" and informs them that any staff member, including the school nurse or psychiatrist, who learns about a student's pregnancy should tell the school social worker,⁸ who in turn will encourage the student to reveal her pregnancy to her parents.⁹ If the student agrees to voluntary disclosure, the social worker should "confirm that such a disclosure was made."¹⁰ If a student refuses to tell her parents about her pregnancy, "the social worker should offer to meet with the

⁵ At the hearing to determine whether a preliminary injunction should be granted, Dr. Geoffrey Gordon, the superintendent of the school district, testified that the policy was just a "guideline." Transcript of Hearing at 215, *Port Wash. Teachers' Ass'n*, 361 F. Supp. 2d 81 (No. 04 Civ. 1357). Thus, the court concluded that the policy was not mandatory, but discretionary. *Port Wash. Teachers' Ass'n*, 361 F. Supp. 2d at 75. However, by Dr. Gordon's own interpretation of the policy, it only becomes discretionary in situations of "grave concern," such as where a difficult home situation exists. Transcript of Hearing at 216, *Port Wash. Teachers' Ass'n*, 361 F. Supp. 2d 81 (No. 04 Civ. 1357). Thus, it follows that in the "typical" situation where a student is pregnant and there is no indication of abuse or other such problems, school-based health care providers are required to adhere to the policy and make the required notifications. Therefore, the analysis in this Note focuses on the aspects of the policy that are non-discretionary. Also considered are the facts that minors often do not reveal abuse and that a parent's knowledge of the minor's pregnancy could lead to the first instance of abuse. See *infra* Part IV.B. Moreover, it is argued that when a student makes a confidential communication about her pregnancy to a school-based health care provider, any disclosure of that communication to a third-party, including a school official, violates the student's rights. Finally, the purpose of this Note is to address mandatory notification policies in general, using the Port Washington policy as just one example of a policy that mandates disclosure.

⁶ Port Washington Memorandum, *supra* note 1.

⁷ *Id.*

⁸ This policy also applies to communications by the pregnant student made directly to the social worker. *Id.*

⁹ *Id.*

¹⁰ *Id.*

parents and the student to help the student inform her parents and/or offer to inform the student's parents without the student being present."¹¹ If the pregnant student continues to resist disclosure to her parents, however, "the social worker should inform the student that she/he will inform the parents [and a]fter consultation with the Principal and Superintendent, the social worker should inform the parents."¹²

Although the memorandum has provisions for suspected victims of rape or incest,¹³ it does not mention the possibility that disclosure may not be in the student's best interest or that she may be mature enough to make a decision about her pregnancy without the involvement of her parents. In fact, the policy does not make a distinction based on the age of the student. Indeed, seemingly under the policy, an eighteen-year-old student – an adult under the law¹⁴ – would be treated the same as a fourteen-year-old student. Nor are there any provisions outlining the process by which a student could challenge the notification or appeal the school's decision to disclose her pregnancy to her parents before such a notification is made.

On March 22, 2005, the Eastern District of New York denied a motion by the Port Washington Teachers' Association seeking a preliminary injunction to prohibit the enforcement of Port Washington's mandatory notification policy.¹⁵ The court held, as an initial matter, that the plaintiffs did not have standing.¹⁶ The court reasoned that "where the Plaintiffs purport to bring suit on behalf of a third party, the Plaintiffs must still establish the threshold requirement that they have

¹¹ *Id.*

¹² Port Washington Memorandum, *supra* note 1.

¹³ In cases of rape and incest, the social worker should inform the principal or superintendent immediately "so that legally required reporting can be made to the appropriate authorities." Port Washington Memorandum, *supra* note 1.

¹⁴ N.Y. PUB. HEALTH LAW § 2504(1) (McKinney 2005).

¹⁵ Port Wash. Teachers' Ass'n v. Bd. of Educ. of the Port Wash. Union Free Sch. Dist., 361 F. Supp. 2d 69, 81 (E.D.N.Y. 2005) The case was filed on March 1, 2004 by the Port Washington Teachers' Association, and on September 5, 2004, plaintiffs filed a motion for a preliminary injunction. *Id.* at 73. Also on that day, the New York Civil Liberties Union Foundation, along with the American Academy of Pediatrics, the Association of Reproductive Health Professions, the New York State Association of School Nurses, the New York State Nurses Association, the New York State Society for Clinical Social Work, and the Society for Adolescent Medicine sought leave from the court to file an *amici curiae* brief, which was granted by the court. *Id.* After a two-day evidentiary hearing on the preliminary injunction motion held on November 8-9, 2004, the court denied the plaintiffs' request for a temporary restraining order. *Id.*

¹⁶ *Id.* at 74.

suffered an ‘injury-in-fact’ before asserting the third party’s interest.”¹⁷ The court went on to hold that the plaintiffs had not suffered an injury-in-fact “because they face no repercussions from the Policy.”¹⁸ The court further held that the case was not ripe for judicial review because there was “no direct or immediate dilemma.”¹⁹

These holdings alone would have been sufficient grounds to deny the issuance of a preliminary injunction. However, the court also based its decision on whether the plaintiffs were likely to succeed on the merits.²⁰ The court found that they were not.²¹

The court examined the constitutionality of the policy and held that the cases regarding a minor’s right to an abortion without “blanket” parental involvement²² do not apply.²³ The court concluded that a distinction exists between notification of pregnancy and consent or notification for abortion.²⁴ The court stated that the “Plaintiffs may not stretch the protections that apply to a minor seeking an abortion to cover the disclosure of her pregnancy to her parents.”²⁵ It reasoned such parental notification “does not intrude on the student’s right to ultimately seek an abortion or to carry her fetus to term.”²⁶ Moreover, the court stated that the school has an “unquestioned obligation to inform parents of the conditions that affect the health, safety, and welfare of their child.”²⁷

According to the court, the policy does not violate state law or professional confidentiality obligations.²⁸ Moreover, the court points to the Family Educational Rights and Privacy Act of 1974 (“FERPA”),²⁹ stating that it “seem[s] to require that a school disclose a student’s pregnancy to her parents.”³⁰ The court reasoned that the broad definition of “educational

¹⁷ *Id.* (citation omitted).

¹⁸ *Id.*

¹⁹ *Id.* at 77.

²⁰ *Port Wash. Teachers’ Ass’n*, 361 F. Supp. 2d at 77.

²¹ *Id.* at 77-81.

²² *See infra* note 45.

²³ *Port Wash. Teachers’ Ass’n*, 361 F. Supp. 2d at 78.

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 79.

²⁷ *Id.* at 78 (citing N.Y. COMP. CODES R. & REGS. tit. 8, § 136.3(a)(5) (2005)).

²⁸ *Port Wash. Teachers’ Ass’n*, 361 F. Supp. 2d at 79.

²⁹ 20 U.S.C. § 1232g (2005).

³⁰ *Port Wash. Teachers’ Ass’n*, 361 F. Supp. 2d at 79 (citing § 1232g).

records” includes records “evidencing the pregnancy of a student.”³¹

The court concluded that state statutes regarding public health do not create a duty of confidentiality.³² It held that the laws discussing abortion or prenatal care are not applicable because the policy “does not on its face implicate these decisions.”³³

In addition, the court held that “any law dealing with confidentiality of records in a hospital is irrelevant to such records in a school”³⁴ because the school must act in the position of *in loco parentis* and therefore “must inform parents of any relevant information regarding their child.”³⁵ It concluded the “if anything, New York State law counsels toward disclosure to the parents.”³⁶ Moreover, the court concluded that New York law provides for a duty of confidentiality for private social workers but that it does not apply because the “school social worker is a paid employee of the school district who does not receive compensation from students or their parents.”³⁷

Thus, the court decided that the plaintiffs were not likely to succeed on the merits³⁸ and concluded that “[n]o facts or circumstances of irreparable harm” were present.³⁹ The court, therefore, denied the plaintiffs’ motion for a preliminary injunction.⁴⁰

³¹ *Id.* at 79-80 (citing § 1232g(a)(4)(A)(i)-(ii)).

³² *Id.* at 80.

³³ *Id.* (citing N.Y. PUB. HEALTH LAW § 17 (McKinney 2005)); N.Y. PUB. HEALTH LAW § 2504(3)) (McKinney 2005).

³⁴ *Id.* (citing N.Y. COMP. CODES R. & REGS. tit. 10, § 405.7(c)(13) (2005)).

³⁵ *Port Wash. Teachers’ Ass’n*, 361 F. Supp. 2d at 80.

³⁶ *Id.* (citing tit. 8, § 136.3(a)(5) (“providing that ‘it is the duty of the trustees and boards of education . . . “to advise, in writing, the parent or guardian of each child in whom any aspect of the total school health service program indicates a defect, disability or other condition which may require professional attention with regard to health””).

³⁷ *Id.* (quoting Bd. of Educ. of N.Y., 31 Ed. Dep’t Rep. 378, 381 (1992), available at <http://www.counsel.nysed.gov/Decisions/volume31/d12673.htm> (indicating that plaintiff’s reliance on N.Y. C.P.L.R. 4508 (McKinney 2005) was incorrect)).

³⁸ *Id.* at 77.

³⁹ *Id.* at 81.

⁴⁰ *Port Wash. Teachers’ Ass’n*, 361 F. Supp. 2d at 81.

II. MANDATORY NOTIFICATION POLICIES VIOLATE PREGNANT STUDENTS' CONSTITUTIONAL RIGHT OF PRIVACY

The Eastern District rejected the plaintiffs' claim that minors have a constitutional right to privacy regarding pregnancy.⁴¹ It concluded that the case law regarding parental notification of a minor's abortion is not applicable in the context of notification of a pregnancy.⁴² This analysis does not withstand scrutiny. Pregnancy and abortion are inextricably linked and the right to an abortion means nothing if the law can be circumvented by requiring the disclosure of a minor's pregnancy to her parents.

Mandatory notification policies do, in fact, violate young women's constitutional right to privacy by eliminating their right to seek an abortion without parental involvement. Indeed, if a school requires notification of a student's pregnancy to her parents, it simultaneously eliminates her right to seek an abortion free from parental involvement. While traditional common law prohibits a minor from consenting to medical care,⁴³ the Supreme Court has created exceptions that allow minors to consent to certain types of reproductive health care, such as contraception and abortion.⁴⁴ Under *Bellotti v. Baird* and its progeny, minors are able to consent to an abortion without "blanket" parental

⁴¹ *Id.* at 79.

⁴² *Id.* at 78 ("The Policy at issue here does not even address abortion, but merely provides for notification of a student's pregnancy.")

⁴³ See generally JAMES M. MORRISSEY ET. AL., CONSENT AND CONFIDENTIALITY IN THE HEALTH CARE OF CHILDREN AND ADOLESCENTS 1-6 (1986) (describing the historical perspective of the parent-child relationship). A minor traditionally has been dependent upon her parents, possessing no legal rights of her own until she reaches the age of maturity. *Id.* Although the past century has seen an expansion of the legal rights of minors, the law still generally reflects society's belief that children are unable to maturely and intelligently make complicated decisions and, therefore, benefit from parental involvement and experience, particularly when making medical choices. ROGER J.R. LEVESQUE, ADOLESCENTS, SEX, AND THE LAW 78 (2000). However, a number of exceptions allow minors to consent to medical treatment, depending on the type of health care and the circumstances. *Id.* at 77-80. For example, a doctor may treat a minor in a medical emergency, and a minor may consent to medical care if she is legally emancipated. J. Shoshanna Ehrlich, *Grounded in the Reality of Their Lives: Listening to Teens Who Make the Abortion Decision Without Involving Their Parents*, 18 BERKELEY WOMEN'S L.J. 61, 72, 74 (2003). Moreover, some states allow "mature minors" to consent to medical treatment. *Id.* at 69. Significantly, a large number of states permit minors to consent on their own to at least some type of reproductive health care. See The Alan Guttmacher Inst., *State Policies in Brief: Minors' Access to Contraceptive Services*, http://www.guttmacher.org/statecenter/spibs/spib_MACS.pdf (last visited Sept. 10, 2005).

⁴⁴ *Bellotti v. Baird*, 443 U.S. 622, 643-44 (1979).

involvement⁴⁵ because a state may not grant a third-person absolute veto power over a patient's abortion decision.⁴⁶ Indeed, minors must be afforded the opportunity to go before a neutral, detached decision-maker to seek an abortion free from any sort of parental involvement. Thus, policies that require parental notification of a student's pregnancy, yet do not provide the student with the required judicial bypass procedure, effectuate an unconstitutional regime because they take away the ability of the student to seek an abortion without the involvement of a third-party.

The Supreme Court's expansion of the constitutional right of privacy to minors⁴⁷ flows from the Court's holdings that the penumbras of the Fourteenth Amendment grant men and women a constitutional right to privacy and bodily integrity.⁴⁸

⁴⁵ See, e.g., *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 417 (1983) [hereinafter *Akron I*] (following *Bellotti* by invalidating a consent statute that made "a blanket determination that all minors under the age of 15 are too immature to make an abortion decision or that an abortion never may be in the minor's best interests without parental approval"); *Bellotti*, 443 U.S. at 643 (striking down a requirement for parental consent unless an expeditious, confidential alternative with other safeguards was provided); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 694 (1977) (holding that the State may not impose a "blanket prohibition" or "a blanket requirement of parental consent" on a minor's abortion decision); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976) (prohibiting a blanket provision, such as spousal or parental consent, because the State lacks the constitutional authority to grant a third-person an absolute, and potentially arbitrary, veto over a patient's abortion decision).

⁴⁶ *Danforth*, 428 U.S. at 74.

⁴⁷ *Carey*, 431 U.S. at 693 (holding that a statute prohibiting the sale of contraceptives to minors was unconstitutional because the "right to privacy in connection with decisions affecting procreation extends to minors as well as to adults"). See also *Bellotti*, 443 U.S. at 633 n.12; *Danforth*, 428 U.S. at 74 ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.").

In addition to the right of privacy, the Court has found that minors possess equal protection rights, procedural due process protection, and a right to freedom of speech. *Ingraham v. Wright*, 430 U.S. 651, 676 (1977) (holding that minors possess a liberty interest in procedural safeguards that minimize the risk of wrongful punishment); *Goss v. Lopez*, 419 U.S. 565, 581 (1975) (holding that public school students are entitled to notice and a formal hearing prior to suspension); *In re Winship*, 397 U.S. 358, 368 (1970) (holding that minors may be guilty only upon proof of a reasonable doubt and that they may assert the privilege against compulsory self-incrimination); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969) (holding that minor students are "persons" under the Constitution); *In re Gault*, 387 U.S. 1, 13 (1967) ("[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone.").

⁴⁸ *Roe v. Wade*, 410 U.S. 113 (1973); see also *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (finding that a law prohibiting the distribution of contraceptives to unmarried individuals violates the Equal Protect Clause of the Fourteenth Amendment); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (declaring that a law prohibiting the use of contraceptives by married couples is unconstitutional).

This right of privacy encompasses a woman's interest in independently making certain important decisions,⁴⁹ including whether to bear a child, which is "at the very heart of th[e] cluster of constitutionally protected choices."⁵⁰

In the landmark decision of *Roe v. Wade*, the Court balanced a woman's abortion decision with the State's interest in protecting the woman's health and the potential life of the fetus.⁵¹ The Court held that the Constitution protects the right to choose prior to fetal viability, and, therefore, the government may not prohibit or regulate abortions before viability.⁵² After the first trimester of a woman's pregnancy – the point when, according to the Court's analysis, the fetus becomes viable – the State may regulate abortions in order to promote its interest in maternal health in ways that are "reasonably related" to the health of the mother.⁵³ Under this analysis, the State may also regulate, and even proscribe, abortions after viability to promote its interest in the potential of human life, except where an abortion is necessary to protect the life or health of the mother.⁵⁴

Two decades later in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁵⁵ the Court articulated the undue burden standard where, in some instances, the State's interest in protecting potential life is compelling after fetal viability.⁵⁶ Before viability, however, the State may not prohibit abortion or impose a "substantial obstacle" to a woman's right to choose.⁵⁷

The State's interest in protecting minors allows the State to limit a minor's access to abortion in ways not tolerated if applied to adults.⁵⁸ In his plurality opinion in *Bellotti*,

⁴⁹ *Carey*, 431 U.S. at 684.

⁵⁰ *Id.* at 685.

⁵¹ *Roe*, 410 U.S. at 155.

⁵² *Id.* at 163.

⁵³ *Id.* at 164.

⁵⁴ *Id.* at 164-65.

⁵⁵ 505 U.S. 833 (1992).

⁵⁶ *Id.* at 876-77.

⁵⁷ *Id.* at 877. If the purpose or effect of a law places a substantial obstacle in the path of women who want an abortion before the fetus reaches viability, an undue burden exists, and such a statute is unconstitutional. *Id.*

⁵⁸ *Bellotti v. Baird*, 443 U.S. 622, 635 (1979) (explaining that "although children generally are protected by the same constitutional deprivations as are adults, the State is entitled to adjust its legal system to account for children's vulnerability and their needs against constitutional deprivations for 'concern, . . . sympathy, and . . . paternal attention'" (citation omitted). See also *Carey v. Population Servs. Int'l*, 431 U.S. 678, 693 (1977) ("State restrictions inhibiting privacy rights of minors

Justice Powell explained that the constitutional rights of minors are not equal with those of adults for three reasons: “the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing.”⁵⁹ Still, the decision to have an abortion greatly differs from other choices made during minority. Thus, Justice Powell concluded that the uniqueness of abortion and the importance of the constitutional right of privacy requires the State to act with “particular sensitivity” when enacting legislation mandating parental involvement in a minor’s abortion decision.⁶⁰ Observing that “there are few situations in which denying a minor the right to make an important decision will have consequences so grave and indelible,”⁶¹ the plurality recognized the danger that parents may obstruct the minor’s choice in such a significant matter.⁶²

The Supreme Court, therefore, limits the extent to which a State may infringe upon a minor’s right to privacy, particularly by prohibiting “blanket” parental involvement in a minor’s pregnancy.⁶³ Under *Bellotti* and subsequent cases, the Supreme Court has held that parental consent⁶⁴ and notification⁶⁵ laws do not impose an undue burden on minors

are valid only if they serve ‘any significant state interest that is not present in the case of an adult.’”) (quoting *Danforth*, 428 U.S. at 75 (1976)).

⁵⁹ *Bellotti*, 443 U.S. at 634. The statute challenged in *Bellotti* required consent of the minor’s parents or judicial approval for the abortion in a proceeding in which a court determined whether an abortion was in the best interests of the minor, without considering whether the minor was mature enough to make an informed abortion decision. *Id.* at 625-26. The Court held that the statute was unconstitutional because it unduly burdens the right to seek an abortion. *Id.* at 651.

⁶⁰ *Id.* at 642.

⁶¹ *Id.*

⁶² *Id.* at 647 (explaining that because “many parents hold strong views on the subject of abortion, and young pregnant minors, especially those living at home, are particularly vulnerable to their parents’ efforts to obstruct both an abortion and their access to court[, i]t would be unrealistic . . . to assume that the mere existence of a legal right to seek relief in superior court provides an effective avenue of relief for some of those who need it the most”).

⁶³ See *supra* note 45.

⁶⁴ Parental consent laws require one or both parents to provide actual consent for a minor to have an abortion. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992); *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 507 (1990) [hereinafter *Akron II*]; *Planned Parenthood of Kan. City v. Ashcroft*, 462 U.S. 476, 479 n.4 (1983); *Bellotti*, 443 U.S. at 625; *Danforth*, 428 U.S. at 58.

⁶⁵ Parental notification laws require the minor, the minor’s doctor or other health care providers to notify one or both parents of the minor’s abortion decision prior to the abortion. Usually, accompanying these laws is a twenty-four to forty-eight hour wait period after the notification and before the minor may undergo an abortion.

seeking an abortion if the law also grants the minor the opportunity to an expeditious, anonymous bypass procedure before a neutral decision-maker where she can demonstrate that she is mature enough to make the abortion decision on her own, or, if not, that an abortion is nevertheless in her best interests.⁶⁶

Although the Court has not decided whether a law requiring the notification of just one parent must include a bypass procedure,⁶⁷ the Court has noted that a bypass procedure that passes the constitutional requirements necessary for a valid consent statute will suffice for a notice statute,⁶⁸ and nearly all lower courts have required a bypass procedure for a notice statute.⁶⁹ Arguably, a judicial bypass procedure is necessary to protect minors' rights even where notification of only one parent is required by law.⁷⁰

Therefore, it follows that if a student discloses in a confidential conversation with a school-based health care

See, e.g., Lambert v. Wicklund, 520 U.S. 292, 293 (1997); *Hodgson v. Minnesota*, 497 U.S. 417, 422 (1990); *H.L. v. Matheson*, 450 U.S. 398, 412 n.21 (1981).

⁶⁶ *Bellotti*, 443 U.S. at 643. In a concurrence in *Ashcroft*, Justice Powell further discussed the standard required in a judicial bypass procedure. *Ashcroft*, 462 U.S. at 490-93. A majority of the Court explicitly adopted the *Bellotti* bypass criteria in *Akron II*, 497 U.S. at 511-14. *See also Hodgson*, 497 U.S. 417 (1990) (extending judicial bypass requirements to two-parent notification laws).

⁶⁷ *Lambert*, 520 U.S. at 295 (citing *Akron II*, 497 U.S. at 510). *See, e.g., Planned Parenthood of Cent. N.J. v. Farmer*, 762 A.2d 620, 629 (N.J. 2000). Indeed, the Court has not articulated in a majority opinion the "precise extent to which a minor female's abortion choices can be subject to a requirement of parental notification or parental consent." JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 892 (6th ed. 2000).

⁶⁸ *Akron II*, 497 U.S. at 511. In fact, a bypass provision that satisfies the standard for a consent procedure as set out in *Bellotti* satisfies, *a fortiori*, any criteria that may be constitutionally required for a parental notification statute. *Lambert*, 520 U.S. at 295.

⁶⁹ *See, e.g., Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1460 (8th Cir. 1995) (holding that one parent notification law without a bypass is facially unconstitutional); *Akron Ctr. for Reprod. Health v. Slaby*, 854 F.2d 852, 861 (6th Cir. 1988) (same); *Zbaraz v. Hartigan*, 763 F.2d 1532, 1539-44 (7th Cir. 1985) (holding unconstitutional parental notice law whose bypass did not meet *Bellotti* requirements), *aff'd*, 484 U.S. 171 (1987); *Ind. Planned Parenthood Affiliates Ass'n v. Pearson*, 716 F.2d 1127, 1132 (7th Cir. 1983); *cf. Planned Parenthood of the Blue Ridge v. Camblos*, 155 F.3d 352, 375-77 (4th Cir. 1998) (relying on bypass to find statute provided abused minors protection required under *Hodgson*); *Causeway Med. Suite v. Ieyoub*, 109 F.3d 1096, 1109-12 (5th Cir. 1997) (holding one-parent consent law unconstitutional where law permitted parental notification if court denied bypass).

⁷⁰ *Miller*, 63 F.3d at 1460-62. *See, e.g., Hodgson*, 497 U.S. at 464-79 (Marshall, J., concurring in the judgment in part and dissenting in part) (describing the psychological impact of compelled notification and the health risks of delay in receiving an abortion); *Matheson*, 450 U.S. at 437-41 (Marshall, J., dissenting) (recognizing that the "threat of parental notice" endangers minors' health, leads to delays, self-administered abortions, or illegal abortions, or forces minors to give birth).

provider that she is pregnant, the provider – or any public school official who learns of the pregnancy through these confidential communications – may not notify her parents of her pregnancy because to do so would take away the minor’s ability to have an abortion without parental involvement via a judicial bypass procedure. Indeed, “every minor must have the opportunity – if she so desires – to go directly to a court without first consulting or notifying her parents.”⁷¹ The decision in *Port Washington Teachers’ Association* ignores this rule, and the court misinterprets the constitutional precedents when it states that “[p]arental notification of a student’s pregnancy does not intrude on the student’s right to ultimately seek an abortion or to carry her fetus to term.”⁷²

Thus, for a mandatory notification policy to withstand constitutional scrutiny, the school district would have to provide an expeditious, confidential bypass procedure where the pregnant student could demonstrate that she is mature enough to make a reproductive medical decision on her own or, even if she is not, that an abortion is in her best interests.⁷³ Moreover, school officials themselves arguably could not administer the bypass procedure since it must be conducted by an independent, neutral decision-maker.⁷⁴ Finally, the pregnant student would be entitled to representation during the bypass proceeding⁷⁵ and to an appeal if the bypass is denied.⁷⁶ Needless to say, those requirements are beyond the scope of the school officials’ duties and would prove difficult to administer within the school system in a manner that is constitutionally permissible.

⁷¹ *Bellotti*, 443 U.S. at 647. Naturally, states without parental consent or notification laws do not have a judicial bypass procedure in place. See The Alan Guttmacher Inst., State Policies in Brief: Parental Involvement in Minors’ Abortions, http://www.guttmacher.org/statecenter/spibs/spib_PIMA.pdf (last visited Sept. 10, 2005) for an overview of parental involvement laws in each state. Thus, in states like New York where no judicial bypass procedure exists, a school cannot effectuate a notification policy without also creating a bypass system that passes constitutional muster.

⁷² *Port Wash. Teachers’ Ass’n*, 361 F. Supp. 2d at 79

⁷³ See *supra* note 66 and accompanying text.

⁷⁴ *Planned Parenthood v. Ashcroft*, 462 U.S. 476, 492 n.20 (1983); *Miller*, 63 F.3d at 1461-62.

⁷⁵ *Pearson*, 716 F.2d at 1137-38; *Planned Parenthood of S. Ariz. v. Neely*, 804 F. Supp. 1210, 1218 (D. Ariz. 1992) (observing that statute was unlikely to ensure access to judicial bypass without providing for either a court-appointed attorney, appointment of a *guardian ad litem*, or the ability of a minor to proceed through a “next friend”).

⁷⁶ *Pearson*, 716 F.2d at 1134-36.

III. STATUTORY LAW: MINORS' RIGHT TO CONSENT AND CONFIDENTIALITY

In addition to the constitutional limitations placed on mandatory notification policies, depending on the state, laws may prohibit school-based health care professionals from disclosing the names of pregnant students to third-parties, including the students' parents. If state law grants minors the ability to consent to certain kinds of medical and mental health care, then communications or information revealed by the treatment must remain confidential. Thus, the student engaging in confidential communications must consent to any disclosures of confidential information to third parties, including her parents or school officials.⁷⁷

As a result of legislative policy decisions that place the health of young adults above parents' right to involvement, minors are typically given the right to consent to care related to reproductive health, alcohol and substance abuse, and mental health.⁷⁸ Twenty-seven states and Washington, D.C. have laws or policies that specifically allow pregnant minors to receive prenatal care and delivery services without parental consent or notification.⁷⁹ In New York, pregnant minors can

⁷⁷ See *infra* note 88 and accompanying text. Of course, this does not apply to the special circumstances where disclosure is required by statute, such as in the case of child abuse. See *infra* note 102 and accompanying text.

⁷⁸ The Alan Guttmacher Inst., *Lawmakers Grapple with Parents' Role in Teen Access to Reproductive Health Care* (1995), <http://www.guttmacher.org/pubs/ib6.html> (explaining that "[o]ver the last 20-30 years . . . states have recognized that, in fact, many minors are capable of making informed decisions about medical care and that confidentiality can be essential to encouraging young people to address sensitive health concerns in a timely manner").

For example, the exception that allows minors to consent to medical treatment of sexually transmitted infections is not based on minors' maturity or decision-making skills, but as a result of the growing incidents of sexually transmitted diseases among minors and the assumption that they would not seek treatment if they were required to first notify their parents. Christine M. Hanco, Note, *Acknowledging the Hypocrisy: Granting Minors the Right to Choose Their Medical Treatment*, 16 N.Y.L. SCH. J. HUM. RTS. 889, 912 (2000); MORRISSEY, *supra* note 43, at 61-62 (explaining the public policy reasons why almost every state allows minors to consent to treatment related to the diagnosis and treatment of sexually transmitted diseases and arguing that the policy would not be served if parental notification was required). See, e.g., CAL. FAM. CODE § 6926 (Deering 2005) (allowing minors twelve years in age or older to consent to the diagnosis and treatment of sexually transmitted diseases); N.Y. PUB. HEALTH LAW § 2504(2) (McKinney 2005) (allowing minors to consent to treatment of sexually transmitted diseases without parental involvement).

⁷⁹ The Alan Guttmacher Inst., *State Policies in Brief: Minors' Access to Prenatal Care*, http://www.guttmacher.org/statecenter/spibs/spib_MAPC.pdf (last visited Sept. 10, 2005); Heather Boonstra & Elizabeth Nash, *The Alan Guttmacher Inst., Minors and the Right to Consent to Health Care*, 3 GUTTMACHER REP. ON PUB.

consent on their own to all “medical, dental, health and hospital services relating to prenatal care.”⁸⁰ Pennsylvania allows any minor who “has been pregnant” to consent to medical, dental and health services for herself, even without the consent of the minor’s parents or any other person.⁸¹ Minors in California may consent to medical care relating to the prevention or treatment of pregnancy.⁸² Moreover, a recent opinion by California’s Attorney General advised that school districts may not require students to get written parental consent prior to releasing the student from school to receive confidential medical services nor may the school adopt a policy of notifying a parent when a student leaves school to obtain confidential medical services.⁸³ Even in states with laws requiring parental consent or notification before a minor can obtain an abortion, minors are usually able to consent to confidential, minor medical procedures, such as pregnancy testing and related counseling,⁸⁴ which would include such services provided by school-based health care providers.⁸⁵

Moreover, a student’s disclosure to a school-based health care provider that she is pregnant may be protected by laws allowing minors to consent to mental health care. As of 2000, laws in twenty states and Washington, D.C. grant minors explicit authority to consent to outpatient mental health

POL’Y 4, 5 (Aug. 2000), available at http://www.guttmacher.org/pubs/ib_minors_00.html.

⁸⁰ § 2504(3). Indeed, “[e]ven in the absence of a specific statute, however, minors probably have a constitutionally protected privacy right to consent to sex-related health care, and thus there is little doubt that a minor may consent to pregnancy-related health care – assuming, of course, that the minor can give informed consent.” MORRISSEY, *supra* note 43, at 64. The New York Civil Liberties Union argues that since “prenatal care” is construed broadly, almost all necessary health care that a pregnant minor may seek – including counseling by a social worker or psychologist – can be considered “prenatal care.” Memorandum from the N.Y. Civil Liberties Union Reprod. Rights Project, Student Pregnancies Are Not Reportable to School Officials or to Parents (March 25, 2003) [hereinafter Student Pregnancies Are Not Reportable]. See also MORRISSEY, *supra* note 43, at 64 (stating that while most state statutes do not define prevention and treatment of pregnancy, pregnancy testing, pelvic examinations, and prenatal care would be included).

⁸¹ 35 PA. CONS. STAT. § 10101 (2005).

⁸² CAL. FAM. CODE § 6925 (Deering 2005).

⁸³ 87 Op. Att’y Gen. Cal. 168 (2004), 2004 Cal. AG LEXIS 37, at *6, 15.

⁸⁴ For example, Virginia law requires parental consent before a minor may receive an abortion, VA. CODE ANN. § 16.1-241(V) (2005), but allows minors to consent to “medical and health services required in case of birth control, pregnancy or family planning,” VA. CODE ANN. § 54.1-2969(E)(2) (2005).

⁸⁵ Since school-based health care professionals do not provide abortions, state laws requiring parental involvement prior to a minor’s abortion are not implicated.

services.⁸⁶ For example, in California, minors may consent to outpatient mental health treatment or counseling, including services performed by a licensed educational psychologist or a credentialed school psychologist.⁸⁷

Once it has been determined that a minor has the right and capacity to consent to certain health care and counseling, any information relating to that care must remain confidential.⁸⁸ Confidentiality, which “refers to the privileged and private nature of the information provided during the health care transaction,” serves as the “cornerstone” of the health care provider-patient relationship.⁸⁹ It is vital to establish trust between the patient and her health care professional and encourages the patient to disclose full and accurate information.⁹⁰

Some states specifically require by statute that certain health care professionals maintain the confidentiality of their patients. In New York, for example, confidentiality laws apply to those authorized to practice medicine, registered as professional nurses, licensed as practical nurses, psychologists, and certified social workers, among other health care providers.⁹¹ In addition, medical records regarding a minor’s

⁸⁶ Boonstra & Nash, *supra* note 79, at 5.

⁸⁷ CAL. FAM. CODE § 6924 (Deering 2005).

⁸⁸ See MORRISSEY, *supra* note 43, at 17 (explaining that minors’ ability to keep health care confidential from their parents naturally flows from their ability to consent to such treatment); see also Ehrlich, *supra* note 43, at 70 (discussing that the provider’s duty of confidentiality flows to the party consenting to the medical care).

⁸⁹ Council on Sci. Aff., Am. Med. Ass’n, *Confidential Health Services for Adolescents*, 11 JAMA 1420, 1420 (1993) [hereinafter *Confidential Health Services for Adolescents*].

⁹⁰ *Id.* See discussion *infra* Part IV.A. (discussing the benefits and necessity of promising confidentiality to students seeking health care).

⁹¹ N.Y. C.P.L.R. 4504(a) (McKinney 2005) (privilege of medical records for physicians, nurses), 4507 (psychologists), 4508 (social workers); N.Y. COMP. CODES R. & REGS. tit. 8, § 29.1(8) (2005); N.Y. EDUC. LAW §§ 6509(9), 6511 (McKinney 2003) (disclosure of communications obtained in professional capacity by members of various professions certified by New York State, including medicine, social work, psychology and nursing, constitutes professional misconduct).

The New York law applying to social workers provides an example. See N.Y. C.P.L.R. 4508 (McKinney 2005). In *Port Washington Teachers’ Association*, the court held that communications between a student and a school social worker are not privileged. *Port Wash. Teachers’ Ass’n v. Bd. of Educ. of the Port Wash. Union Free Sch. Dist.*, 361 F. Supp. 2d 69, 80 (E.D.N.Y. 2005) (citing *Bd. of Educ. of N.Y.*, 31 Ed. Dep’t Rep. 378, 380 (1992)). The court states in its analysis that the “school social worker is a paid employee of the school district who does not receive compensation from students or their parents. No decision of the courts or the Commissioner of Education has yet granted privilege status to communication between a student and school personnel.” *Id.* at 80 (quoting *Bd. of Educ. of N.Y.*, 31 Ed. Dep’t Rep. at 380). It should first be noted that the opinion quoted here is not a court opinion as the *Port*

abortion or sexually transmitted disease may not be released or disclosed to her parents without the minor's consent.⁹² California law provides extensive protection for minors' communications with care providers with a statute protecting information of a "personal nature" disclosed to a school counselor by students twelve years of age or older.⁹³

Federal law provides additional safeguards. When federal drug and alcohol funding supports a school counselor's position, even in part, the counselor is bound by federal laws requiring stringent protection of clients' confidentiality.⁹⁴ Moreover, when a student receives any treatment from such a counselor, including treatment unrelated to substance abuse, the communications and information relating to the treatment must remain confidential.⁹⁵ Because confidentiality generally follows consent,⁹⁶ if a student is able to consent to certain medical and mental health care, the provider must follow normal confidentiality rules.

FERPA does not change the analysis. In *Port Washington Teachers' Association*, the court relied on FERPA for the proposition that FERPA requires that schools disclose a

Washington Teachers' Association court suggests but a Board of Education Commissioner decision. *Id.* (misidentifying the quoted opinion as one coming from a "Court").

Moreover, courts construe the term "client," as it applies in an analysis regarding privilege, to refer to the individual who is consulting with the social worker in the social worker's professional capacity. *See Lichtenstein v. Montefiore Hosp. & Med. Ctr.*, 392 N.Y.S.2d 18, 21 (N.Y. App. Div. 1977) (concluding that a wife's conversations with husband's social worker are not privileged); *see also People v. Bass*, 529 N.Y.S.2d 961, 963-64 (N.Y. Sup. Ct. 1988). Therefore, a child is considered the social worker's client when the child is the "chief party in interest of the social worker . . ." *People v. Easter*, 395 N.Y.S.2d 926, 930 (Albany County Ct. 1977). The factors used in determining whether a person is a social worker's client include: 1) whether the social worker is asked to assess the individual's mental health issues; 2) whether the individual intends for her statements to be confidential; and 3) whether the social worker is being asked to treat or recommend treatment for the individual. *Bass*, 529 N.Y.S.2d at 963-64.

⁹² N.Y. PUB. HEALTH LAW § 17 (McKinney 2005).

⁹³ CAL. EDUC. CODE § 49602 (Deering 2005). Furthermore, school counselors are prohibited from releasing such confidential information to the student's parents when the counselor "has reasonable cause to believe that the disclosure would result in a clear and present danger to the health, safety, or welfare of the pupil." *Id.* § 49602(e). The statute specifically protects school counselors from incurring "any civil or criminal liability as a result of *keeping that information confidential.*" *Id.* (emphasis added).

⁹⁴ 42 U.S.C. § 290dd-2(a)-(b) (2005).

⁹⁵ *Comm'r of Soc. Servs. v. David R.S.*, 436 N.E.2d 451, 453-55 (N.Y. 1981).

⁹⁶ Ehrlich, *supra* note 43, at 70. Therefore, "the provider's duty to maintain confidentiality flows to the party who consents to the medical care." *Id.*

student's pregnancy to her parents.⁹⁷ However, FERPA pertains only to "education records" and not to oral communications to a school nurse, counselor, psychologist, or social worker.⁹⁸ Also, FERPA does not apply to records of students aged eighteen years of age or older.⁹⁹

Importantly, the court's analysis fails to consider that FERPA does not impose an affirmative reporting requirement on the school. Instead, it only applies when parents request their children's educational records and merely directs that federal funding be denied to institutions that do not follow its dictates.¹⁰⁰ As such, FERPA does not trump the laws of any state. Thus, when attempting to determine the substance of the law regarding communications between students and school nurses, counselors, psychologists and social workers in states like New York, FERPA is irrelevant.

In sum, in many states, health care professionals may only disclose the student's confidential communications and disclosures to a third party – including parents or school officials – if the student consents to the release¹⁰¹ or unless otherwise required by law.¹⁰² A policy requiring that providers

⁹⁷ *Port Wash. Teachers' Ass'n*, 361 F. Supp. 2d at 79-80 (citing 20 U.S.C. § 1232g (2005)).

⁹⁸ 20 U.S.C. § 1232g(a)(4)(A) (defining "education records" as "records, files, documents, and other materials which (i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution.").

⁹⁹ *Id.* § 1232g(a)(4)(B)(iv).

¹⁰⁰ *Id.* § 1232g(a)(1)(A) ("No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which effectively prevents, the parents of students who are or have been in attendance at a school of such agency or at such institution, as the case may be, the right to inspect and review the education records of their children Each educational agency or institution shall establish appropriate procedures for the granting of a request by parents for access to the education records of their children within a reasonable period of time, but in no case more than forty-five days after the request has been made.").

¹⁰¹ *Id.*

¹⁰² For example, in New York, a school-based health care provider may be required to disclose a pregnancy status if she suspects abuse of the student by a parent, guardian, N.Y. SOC. SERV. LAW § 413(1) (McKinney 2005), or school employee, N.Y. EDUC. LAW § 1125 (McKinney 2005); if the student discloses her intent to harm herself or another or commit a crime, N.Y. MENTAL HYG. LAW § 33.13(c)(6) (McKinney 2005) (allowing psychologists and psychiatrists to breach confidentiality to notify an endangered person and/or the police if a patient presents a serious and imminent danger to that individual), N.Y. C.P.L.R. 4508(a)(2) (McKinney 2005) (permitting social workers to not treat communications made to them that indicate an intent to commit a crime or harmful act as confidential); or if the student has committed a dangerous school-related crime, N.Y. EDUC. LAW § 2801 (McKinney 2005) (requiring school board to establish procedures for the reporting of violent incidents that take place on or near school property and/or at school functions); N.Y. COMP. CODES R. & REGS. tit. 8,

disclose the pregnancy status of students to third parties, when the provider learned about the pregnancy through confidential communications, generally runs afoul of federal law and state law in a number of states.

IV. PUBLIC POLICY COUNSELS AGAINST MANDATORY NOTIFICATION POLICIES

Mandatory notification policies are not only legally problematic, they are also adverse to sound public policy. Indeed, such policies deter students from receiving necessary and available health care, do not necessarily improve family communications, put some students at risk of abuse, and unfairly restrict mature adolescents from making an abortion decision without parental involvement.

A. *Promising Confidentiality Encourages the Use of School-Based Health Care Providers*

The promise of confidentiality is critical to establish trust between a patient and her health care provider.¹⁰³ This is no different for minors. When deciding whether to consult with a health care provider, confidentiality is one of the most important factors considered by minors seeking care for reproductive health issues, including pregnancy.¹⁰⁴ Teenagers are reluctant to seek certain types of medical care if their

§ 100.2(gg) (2003) (including weapons possession or use; homicide; assault or harassment; sex crimes; use or possession of drugs or alcohol; theft; burglary; bomb threats; and arson among those crimes reportable under this law), and the professional is unable to report the situation without revealing the confidential communications that the minor is pregnant.

However, school boards and health care providers must understand that the mere fact that a minor engages in sexual activity (as evidenced by a pregnancy or otherwise) does not establish a reasonable suspicion of child abuse. See N.Y. CIVIL LIBERTIES UNION REPROD. RIGHTS PROJECT, CHILD ABUSE REPORTING AND TEEN SEXUAL ACTIVITY: CLARIFYING SOME COMMON MISCONCEPTIONS (May 2003), http://www.nyclu.org/child_abuse_qa_051603.pdf.

¹⁰³ See Valerie J. Gilchrist, *Preventive Health Care for the Adolescent*, 43 AM. FAM. PHYSICIAN 869, 869-78 (1991).

¹⁰⁴ See, e.g., Jeannie S. Thrall et al., *Confidentiality and Adolescents - Use of Providers for Health Information for Pelvic Examinations*, 154 ARCHIVES OF PEDIATRICS & ADOLESCENT MED. 885, 888-91 (2000); Laurie S. Zabin & Samuel D. Clark, Jr., *Institutional Factors Affecting Teenagers' Choice and Reasons for Delay in Attending a Family Planning Clinic*, 15 FAM. PLAN. PERSP. 25, 26 (1983) (finding that "doesn't tell parents" was the most important reason why teenagers chose a particular family planning clinic for birth control); Laurie S. Zabin et al., *Reasons for Delay in Contraceptive Clinic Utilization: Adolescent Clinic and Non-Clinic Populations Compared*, 12 J. ADOLESCENT HEALTH CARE 225, 229 (1991).

parents have access to information about their medical treatment.¹⁰⁵ Conversely, adolescents are most likely to utilize the medical and mental health services available to them at school if they are confident that their providers will not reveal their need for care and treatment to school officials and their parents.¹⁰⁶ Thus, mandatory notification policies deter students from seeking health care and counseling available to them at school. Since schools provide the easiest access to medical care for teens – one of the most important factors when teens decide where to go for reproductive health services¹⁰⁷ – without the guarantee of confidentiality, many pregnant students will forgo seeking advice and treatment from any health care providers whatsoever.¹⁰⁸

Medical professionals agree. The American Medical Association, the American Public Health Association, the

¹⁰⁵ See Carol A. Ford et al., *Influence of Physician Confidentiality Assurances on Adolescents' Willingness to Disclose Information and Seek Future Health Care*, 278 JAMA 1029, 1029 (1997) [hereinafter *Influence of Physician Confidentiality Assurances*]; Diane M. Reddy et al., *Effect of Mandatory Parental Notification on Adolescent Girls' Use of Sexual Health Care Services*, 288 JAMA 710, 713 (2002). Some surveys have revealed that for adolescents with a history of foregoing health care, the leading reason for not getting the necessary services was not wanting their parents to know about their treatment. Carol A. Ford et al., *Foregone Health Care Among Adolescents*, 282 JAMA 2227, 2228 (1999) (citing studies conducted by the Commonwealth Fund). Another study found that nearly one-fifth of adolescents had declined past treatment out of fear that their parents would find out. *Influence of Physician Confidentiality Assurances*, *supra*, at 1032.

¹⁰⁶ *Influence of Physician Confidentiality Assurances*, *supra* note 105, at 1032; Nancy Rappaport, *Psychiatric Consultation to School-based Health Centers: Lessons Learned in an Emerging Field*, 40 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1473, 1473-75 (2001).

¹⁰⁷ Zabin & Clark, *supra* note 104, at 25-26 (finding that “doesn’t tell parents” was the most important reason why teenagers chose a particular family planning clinic for birth control).

¹⁰⁸ John Loxterman, *Adolescent Access to Confidential Health Services*, (July 1997), <http://www.advocatesforyouth.org/publications/iag/confhlth.htm>. In addition, assurances of confidentiality increased the likelihood of future visits. *Influence of Physician Confidentiality Assurances*, *supra* note 105, at 1033. In one study, over two-thirds of adolescents who were promised confidentiality by a physician reported that they would seek additional care from that doctor. *Id.* However, of those minors who were not assured confidentiality, only 53% said they would return to see the physician. *Id.*

In addition, once a school has a reputation for breaching medical confidence, a chilling effect on other areas of school-based care may occur. As the student body realizes that certain private communications can be disclosed without their consent, students needing treatment for substance abuse, sexually transmitted diseases, and psychological problems are more likely to forgo care. Indeed, distrust among the student population will lead to decreased use of school-based health care professionals, and potentially all providers. Thus, notification policies will impair care even in those areas where no disclosure is required, such as drug and alcohol counseling.

Society for Adolescent Medicine, and the American College of Obstetricians and Gynecologists “recognize that confidentiality is essential to ensure that adolescents have meaningful access to reproductive health care services.”¹⁰⁹ In addition, the American College of Obstetricians and Gynecologists, the American Academy of Pediatrics, and the American Academy of Family Physicians believe that minors are entitled to the same degree of confidentiality as adult patients.¹¹⁰ The American Academy of Pediatrics’ Committee of Adolescence warns that “[l]egislation mandating parental involvement does not achieve the intended benefit of promoting family communication, but it does increase the risk of harm to the adolescent by delaying access to appropriate medical care.”¹¹¹ Thus, professional health care organizations advocate that parental involvement in a minor’s pregnancy should be encouraged, not compelled.

As the previous paragraphs reveal, mandatory notification policies simply do not make good policy. A better policy is to guarantee confidentiality between students and all staff members – from teachers to counselors to nurses – in regard to sensitive areas, such as a pregnancy. Once the decision has been made to provide school-based health care to students, the school policy that naturally follows is one that encourages students to receive treatment and advice from knowledgeable professionals.¹¹² Confidentiality provides this incentive. Without it, students will avoid school-based health care and will instead rely on advice from their adolescent friends, who have limited perspectives on the sensitive and complex problem of teenage pregnancy.

B. Students Should Decide When to Confide in Their Parents

Ultimately, the pregnant student is in the best position to decide whether disclosing her pregnancy to a parent would be beneficial. School officials may argue that they have a duty

¹⁰⁹ Ehrlich, *supra* note 43, at 70-71.

¹¹⁰ Council on Ethical & Judicial Affairs, Am. Med. Ass’n, *Mandatory Parental Consent to Abortion*, 269 JAMA 82, 84 (1993) [hereinafter *Mandatory Parental Consent to Abortion*].

¹¹¹ Am. Acad. of Pediatrics, Comm. on Adolescence, *The Adolescent Right to Confidential Care When Considering Abortion*, 97 PEDIATRICS 746, 746 (1996) [hereinafter *Adolescent Right to Confidential Care*].

¹¹² See *infra* Part V.

to disclose such information because parents have the right to be involved in the upbringing of their children.¹¹³ However, the Constitution does not mandate that counselors who learn of a minor's pregnancy disclose this information to her parents.¹¹⁴ In New York – like many other states – no law requires the disclosure of the names of pregnant students to parents or school officials.¹¹⁵

When confronted with a difficult decision or a challenging situation many adolescents do, in fact, seek the advice and support of at least one parent on their own. For example, studies show that for the majority of adolescents who choose to have an abortion, at least one parent knows about their decision, even those who live in states without parental involvement laws.¹¹⁶ One study revealed that eighty-six percent of pregnant minors confided in their mothers before they made the decision whether to have an abortion.¹¹⁷ Ninety

¹¹³ See *Port Wash. Teachers' Ass'n v. Bd. of Educ. of the Port Wash. Union Free Sch. Dist.*, 361 F. Supp. 2d 69, 81 (E.D.N.Y. 2005); see, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) (holding that parents have the right to refuse to educate some children based on religion and stating that the "primary role of parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925) (granting parents the power to direct their children's education); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (holding that parents have a right to "establish a home and bring up children").

¹¹⁴ See *Arnold v. Bd. of Educ. of Escambia County, Ala.*, 880 F.2d 305 (11th Cir. 1989).

¹¹⁵ Student Pregnancies Are Not Reportable, *supra* note 80.

¹¹⁶ Stanley K. Henshaw & Kathryn Kost, *Parental Involvement in Minors' Abortion Decisions*, 24 FAM. PLAN. PERSP. 196, 199 (1992) (finding that 61% of pregnant minors informed at least one parent). Other studies had similar results. A study of 432 unmarried women seventeen years of age or younger whose unintended pregnancy resulted in birth or abortion revealed that 57% involved their parents, typically their mother, in their decision whether to have an abortion or continue with their pregnancy. *Id.* at 196 (citing R. H. Rosen, *Adolescent Pregnancy Decision-Making: Are Parents Important?*, 15 ADOLESCENCE 43 (1990)). The numbers were approximately the same for those who decided to give birth as it was for those opting to terminate their pregnancy. *Id.*

In another study, 51% of pregnant minors told their parents about their abortion decision. Mary S. Griffin-Carlson & Kathleen J. Mackin, *Parental Consent: Factors Influencing Adolescent Disclosure Regarding Abortion*, 28 ADOLESCENCE 1, 6 (1993). An older national survey found that 55% of unmarried minors having an abortion said their parents knew of their decision, and the younger the minor, the more likely her parents knew of her choice. Henshaw & Kost, *supra*, at 196 (citing A. Torres et al., *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services*, 12 FAM. PLAN. PERSP. 284, 287 (1980)). See also *Adolescent Right to Confidential Care*, *supra* note 111, at 747 (stating that minors do not make their abortion decision in isolation, with the majority voluntarily including at least one parent in their decision).

¹¹⁷ Laurie Zabin et al., *To Whom Do Inner-City Minors Talk About Their Pregnancies? Adolescents' Communications with Parents and Parent Surrogates*, 23 FAM. PLAN. PERSP. 148, 150 (1992).

percent of pregnant adolescents living with their mothers revealed their pregnancies to her.¹¹⁸ In fact, the younger the pregnant adolescent, the more likely the parents knew of the minor's choice to have an abortion.¹¹⁹ Of those who decided not to involve a parent, over half were seventeen years old and only two percent were younger than fifteen.¹²⁰ Moreover, those minors who do not inform their parents almost always tell at least one responsible adult, other than clinic staff, such as another relative, teacher, counselor, professional, or a clergy member.¹²¹

As previously discussed, experts agree that parental involvement in sensitive areas, such as pregnancy and abortion, should be encouraged and not forced upon a minor.¹²² A report by the American Medical Association found that "[w]hile parental involvement in the medical care of children is always important and is generally necessary for significant medical procedures... in certain circumstances, parental involvement can be counterproductive and, unless required by law, should not be mandatory."¹²³ In one study, those who chose not to discuss their abortion decision with their parents gave four reasons for not confiding: fear of rejection, fear of disappointing their parents, wanting to spare their parents from the problem, and wanting to handle it on their own.¹²⁴ In

¹¹⁸ *Id.* at 151. The researchers report that a "few had cited another individual as the person to whom they were responsible." *Id.*

¹¹⁹ See, e.g., *Adolescent's Right to Confidential Care*, *supra* note 111, at 748 (claiming that very young adolescents almost always voluntarily involve their parents); Griffin-Carlson & Mackin, *supra* note 116, at 6. A 1980 study found that 72% of minors fifteen years of age or younger discussed their abortion decision with their parents. Aida Torres et al., *Telling Parents: Clinic Policies and Adolescents' Use of Family Planning and Abortion Services*, 12 FAM. PLAN. PERSP. 284, 288 (1980).

¹²⁰ Henshaw & Kost, *supra* note 116, at 206.

¹²¹ *Adolescent Right to Confidential Care*, *supra* note 111, at 747. One study found that 95% of pregnant adolescents consulted at least one adult, whether a parent, surrogate parent, or some other adult. Zabin et al., *supra* note 117, at 151.

¹²² *Mandatory Parental Consent to Abortion*, *supra* note 110, at 83-84 (citing a National Research Council study that concluded that adolescents should be encouraged, not required, to involve their parents in their abortion decision). The American Medical Association, the American Public Health Association, and the Society for Adolescent Medicine agree. See *supra* note 109 and accompanying text.

¹²³ *Mandatory Parental Consent to Abortion*, *supra* note 110, at 82 (citing COUNCIL ON ETHICAL AND JUDICIAL AFFAIRS, AMERICAN MEDICAL ASSOCIATION, CONFIDENTIAL CARE FOR MINORS, IN PROCEEDINGS OF THE HOUSE OF DELEGATES 198-205 (1992)).

¹²⁴ Griffin-Carlson & Mackin, *supra* note 116, at 8. See, e.g., *Adolescent Right to Confidential Care*, *supra* note 111, at 748 (explaining that although parental involvement may sometimes be beneficial, in other cases it may be punitive, coercive,

fact, minors who strongly oppose informing their parents of their pregnancy usually predict their parents' reactions correctly.¹²⁵

Furthermore, the policy is not necessary to improve familial communications. In fact, such disclosures can lead to child abuse of pregnant teens.¹²⁶ It is the unfortunate truth that, for some teenagers, "the home falls far short of [the] ideal and may be a place of physical abuse and neglect and psychological maltreatment."¹²⁷ As a Justice of the California Supreme Court commented, "[n]ot every pregnant adolescent has parents out of the comforting and idyllic world of Norman Rockwell."¹²⁸ It is reasonable for some adolescents to fear physical abuse from one or both parents upon disclosure of their pregnancies.¹²⁹ For girls in these homes, parental involvement in their pregnancies does not serve their best interests. Unfortunately, in families with a history of domestic violence and dysfunction, domestic abuse is at its worst during a family member's pregnancy, after recent childbirth, or during the adolescence of the family's children.¹³⁰ Indeed, one-third of adolescents who decide not to disclose their pregnancy to their parents are already victims of child abuse and fear it will reoccur.¹³¹

or abusive) (citing Patricia Donovan, *Judging Teenagers: How Minors Fare When They Seek Court-Authorized Abortions*, 15 FAM. PLAN. PERSP. 259 (1983)).

Another reason is that some minors do not want to reveal their pregnancy to their parents in fear that their parents will force them to have an abortion. Henshaw & Kost, *supra* note 116, at 204. Surprisingly, while many supporters of parental notification requirements believe that parental involvement will help persuade the minor not to have an abortion, studies have shown the opposite to be true. Robert Wm. Blum et al., *Factors Associated with the Use of Court Bypass to Minors to Obtain Abortions*, 22 FAM. PLAN. PERSP. 158, 160 (1990) (citing R. Rosen et al., *Help or Hindrance: Parental Impact on Pregnant Teenagers' Resolution Decisions*, 31 FAM. REL. 271 (1982)). In fact, the Henshaw and Kost study reveals that nearly one-fifth of minors whose parents found out about their pregnancy from a third party were forced to undergo an abortion, and most parents – more than ninety percent – believe that an abortion is in their daughters' best interest. Henshaw & Kost, *supra* note 116, at 204.

¹²⁵ *Adolescent Right to Confidential Care*, *supra* note 111, at 748 (citing Brief for Petitioners at 13-16, *Hodgson v. Minnesota*, 497 U.S. 417, 422 (1989) (Nos. 88-1125 & 88-1309)).

¹²⁶ See *infra* notes 127-39 and accompanying text.

¹²⁷ *Mandatory Parental Consent to Abortion*, *supra* note 110, at 83.

¹²⁸ *Loxterman*, *supra* note 108 (citing *Am. Acad. of Pediatrics v. Lungren*, 912 P.2d 1148, 1171 (Cal. 1996) (Kennard, J., dissenting), *vacated*, 940 P.2d 797 (Cal. 1997)).

¹²⁹ *Mandatory Parental Consent to Abortion*, *supra* note 110, at 83.

¹³⁰ *Id.*

¹³¹ *Adolescent Right to Confidential Care*, *supra* note 111, at 748.

Parental reaction to a daughter's pregnancy is more severe when the daughter does not disclose the pregnancy herself.¹³² When parents learn of a daughter's pregnancy from someone other than their daughter, fifty-eight percent of these pregnant teens reported at least one adverse consequence stemming from their parents' knowledge of their pregnancy.¹³³ At least six percent suffered from "relatively harmful consequences – physical violence in the home, being beaten, being forced to leave home or having the health of their parents affected."¹³⁴ In fact, compared with minors who voluntarily disclose their pregnancy to their parents, minors whose parents learned of their pregnancy from another source were two to four times as likely to face adverse consequences.¹³⁵

Blanket parental notification policies will place some pregnant students in immediate physical and psychological danger. Without an exception for these situations, a parental notification policy will cause these students serious harm. However, a case-by-case determination of whether the school should disclose the student's pregnancy to her parents does not offer the student adequate protection. In addition to potential physical abuse, the American Medical Association warns that "[d]isclosure of the pregnancy may also cause serious emotional harm to the minor" since "[p]arental notification often precipitates a family crisis, characterized by severe parental anger and rejection of the minor."¹³⁶ Because child abuse victims may not reveal their abuse to their health care providers, specific safe harbors in mandatory notification policies will not be enough.¹³⁷ Additionally, for other pregnant adolescents, parental involvement with their pregnancy may cause the first instance of physical abuse. Some may also experience psychological abuse that is extremely harmful, yet not serious enough to fall under child abuse statutes.¹³⁸ Unfortunately, parental notification laws cannot transform

¹³² Henshaw & Kost, *supra* note 116, at 207.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Mandatory Parental Consent to Abortion*, *supra* note 110, at 83 (citing J.D. Osofsky & H.J. Osofsky, *Teenage Pregnancy: Psychosocial Considerations*, 21 *CLINICAL OBSTETRICS & GYNECOLOGY* 1161, 1165 (1978)).

¹³⁷ *Id.* at 84 (explaining that victims of domestic violence are "characteristically secretive about the abuse they have suffered, and minors are particularly reluctant to reveal the existence of abuse in their homes") (citing *Hodgson v. Minnesota*, 648 F. Supp. 756, 769 (D. Minn. 1986), *aff'd*, 497 U.S. 417 (1990)).

¹³⁸ Henshaw & Kost, *supra* note 116, at 196.

dysfunctional family environments into stable homes.¹³⁹ For the many teenagers living in these environments, parental notification policies are of limited benefit, if beneficial at all.

Moreover, there is “no evidence that mandatory parental involvement results in the benefits to the family intended by the legislation.”¹⁴⁰ In fact, no studies have revealed that disclosure improves familial communications.¹⁴¹ While it is true that a parent may provide additional points of view for the minor to consider when making her abortion decision, research shows that most adolescents are capable of making reasonable decisions regarding their pregnancies, including whether parental involvement would be beneficial.¹⁴² In fact, older minors¹⁴³ “appear as mature as adults in their decision making processes and abilities.”¹⁴⁴ Most fourteen- to seventeen-year-olds have the competency of adults to consent to an abortion and are able to “understand the risks and benefits of their options for resolving an unplanned pregnancy and to make a voluntary, independent decision.”¹⁴⁵ One study revealed that all minors who considered abortion – along with older minors who did not – possess decision-making competence comparable to adults.¹⁴⁶ Another study found that the adolescent’s satisfaction regarding her abortion decision was not related to whether she confided in mother.¹⁴⁷

¹³⁹ Loxterman, *supra* note 108.

¹⁴⁰ *Adolescent’s Right to Confidential Care*, *supra* note 111, at 748.

¹⁴¹ *Id.* As the New Jersey Supreme Court articulated, “parental notification laws cannot transform a household with poor lines of communication into a paradigm of the perfect American family.” *Planned Parenthood of Cent. N.J. v. Farmer*, 762 A.2d 620, 637 (N.J. 2002).

¹⁴² LEVESQUE, *supra* note 43, at 114. Indeed “[n]o research suggests that minors over the age of 13 are unable to make reasoned decisions.” *Id.* Furthermore, those who do not disclose their pregnancy to their parents usually seek the advice of another adult. *See supra* notes 121-23 and accompanying text (discussing how most adolescents discuss their pregnancy with at least one adult).

¹⁴³ Older minors are defined as those aged fourteen through seventeen. Levesque, *supra* note 43, at 114.

¹⁴⁴ *Id.* (citing Gary B. Melton, *Knowing What We Do Know: APA and Adolescent Abortion*, 45 AM. PSYCHOLOGIST 1171, 1172 (1990)).

¹⁴⁵ P. Donovan, *Most Minors Are Mature Enough to Make Their Own Abortion Decision*, 24 FAM. PLAN. PERSP. 187, 187 (1992) (citing B. Ambuel & J. Rappaport, *Developmental Trends in Adolescents’ Psychological and Legal Competence to Consent to Abortion*, 16 L. & HUM. BEHAV. 129 (1992)).

¹⁴⁶ *Id.* at 188. The only minors who were considered less competent than adults were those aged fifteen or younger who did not consider abortion. *Id.*

¹⁴⁷ Zabin et al., *supra* note 117, at 153. Instead, for the minors who discussed their pregnancy with their mothers, satisfaction was based on whether their mother approved of and supported their decision. *Id.*

While some minors may, arguably, not be mature enough to make a decision regarding whether to terminate her pregnancy or carry it to term, minors also seek surrogate parents or other trusted adults to help them make these decisions.¹⁴⁸ The fact that some minors may not be mature enough to make an abortion decision on their own is all the more reason to establish policies that promote the use of school-based health care providers so students will voluntarily involve adults in their abortion decision. Thus, schools should promise confidentiality instead of implementing measures that scare minors away from taking advantage of available resources.¹⁴⁹ Once a student sits down with a counselor or nurse, the professional is in the best position to encourage her to discuss her pregnancy with her parents.¹⁵⁰

V. RECOMMENDATIONS

School boards should not implement policies that mandate school-based health care providers – and teachers and other staff, for that matter – to disclose the names of pregnant students to third parties, including school officials and the minors' parents. Confidentiality policies comply with students' constitutional and statutory rights and effectuate sound public policy. Schools should actively encourage students to seek counseling and treatment from school-based health care providers. In doing so, clear guidelines must be established to articulate the rights of students in regard to confidential health care at school and the duty of school-based health care professionals to protect these communications.

With consideration of the sensitive nature of pregnancy, local boards of education should take affirmative steps to protect the rights of pregnant students. Since many well-meaning educators are uninformed about the legal rights of students, clear guidelines regarding these rights should be established and disseminated to school officials, school-based health care professionals, faculty, and staff. Indeed, guidelines clarifying students' rights to confidential medical and mental health care help prevent the implementation of policies that infringe upon the liberties of pregnant adolescents.

¹⁴⁸ See *supra* note 121 and accompanying text.

¹⁴⁹ See *supra* Part IV.A.

¹⁵⁰ See *infra* notes 158-60 and accompanying text.

For example, the Los Angeles Unified School District issued a bulletin that articulates the policies and programs relating to pregnant students.¹⁵¹ The bulletin explains that the “District recognizes and protects the educational rights of pregnant and parenting students as it does the rights of all other students.”¹⁵² An entire section is devoted to informing school officials about confidentiality protections, including situations involving a student’s pregnancy.¹⁵³ The bulletin explains that, based upon California law, pregnant and parenting students have the right to have “their health and personal information kept confidential”¹⁵⁴ and that the minor’s decision regarding whether to inform others, including her parents, about her pregnancy is “left solely up to the pregnant student.”¹⁵⁵ Indeed, the bulletin clearly explains that students must consent to any third-party disclosures, including to school administrators and staff, unless otherwise required by law.¹⁵⁶

Policies articulating the confidentiality rights of pregnant students should inform school-based health care providers that, consistent with the advice of leading medical authorities, students should be encouraged to disclose their pregnancy to their parents, but not compelled.¹⁵⁷ School-based health care officials should “explain [to students] how parental involvement can be helpful and that parents are generally very understanding and supportive.”¹⁵⁸ If the minor is reluctant to disclose her pregnancy to her parents, the provider should “ensure that the minor’s reluctance is not based on any

¹⁵¹ LOS ANGELES UNIFIED SCH. DIST., BULLETIN NO. Z-65 (REV.), PREGNANT AND PARENTING STUDENTS (2001), available at <http://www.lausd.k12.ca.us/lausd/offices/eec/pdfs/prgparnt.pdf> [hereinafter LOS ANGELES UNIFIED SCH. DIST. BULLETIN]. See also CAL. WOMEN’S LAW CTR., CALIFORNIA MODEL POLICY ON THE CIVIL RIGHTS OF PREGNANT AND PARENTING STUDENTS (2003), available at http://www.cwlc.org/newsarticles/03_mod_pol_ca.pdf [hereinafter CALIFORNIA MODEL POLICY] (encouraging schools to adopt comprehensive policies on the rights of pregnant and parenting teens and assisting schools in this effort by drafting a model policy).

¹⁵² LOS ANGELES UNIFIED SCH. DIST. BULLETIN, *supra* note 151, at 1. The District finds this protection from Title IX of the Education Amendments of 1972 and the California Education Code. *Id.*

¹⁵³ *Id.* at 4.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ See *supra* note 123 and accompanying text; see, e.g., *Mandatory Parental Consent to Abortion*, *supra* note 110, at 84. The Los Angeles Unified School District Bulletin explains that counselors should encourage students to disclose their pregnancy to their parents, but that such a disclosure “may not be coerced or forced.” LOS ANGELES UNIFIED SCH. DIST. BULLETIN, *supra* note 151, at 4.

¹⁵⁸ *Mandatory Parental Consent to Abortion*, *supra* note 110, at 84.

misperceptions about the likely consequences of parental involvement.”¹⁵⁹ However, as previously discussed, minors are in the best position to determine for themselves whether parental involvement is beneficial and must not be compelled to disclose their pregnancy to their parents.¹⁶⁰

The policies created to protect the rights of students’ confidentiality should also encourage school-based health care professionals to fully explain confidentiality requirements to students in order to promote candid discussions between the student and her provider. Indeed, assurances of confidentiality “increase adolescents’ willingness to discuss sensitive topics related to sexuality, substance use, and mental health and increase adolescents’ willingness to return for future health care.”¹⁶¹ Moreover, the provider should consider disclosing any limitations on confidentiality.¹⁶² In doing so, school-based health care providers should also “explain [the] important aspects of their professional relationship[] in a clear, understandable manner that is appropriate to [the student’s] age and ability to understand,” including the reasons why particular information, such as pregnancy status, is being requested and the possible outcomes regarding disclosure.¹⁶³

Resources are available to help school boards implement policies that protect students’ rights. Non-profit organizations are able to assist school districts and local governments in drafting comprehensive guidelines articulating the rights of students. For example, the California Women’s Law Center drafted a model policy on the civil rights of pregnant and

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 84-86 (explaining that professionals should “not feel or be compelled to require minors to involve their parents before deciding whether to undergo an abortion” and that the minor should decide whether parental involvement is advisable). *See supra* Part IV.B; *see also Adolescent’s Right to Confidential Care, supra* note 111, at 750.

¹⁶¹ *Influence of Physician Confidentiality Assurances, supra* note 105, at 1033.

¹⁶² *Id.* (discussing the pros and cons of disclosing any limitations on confidentiality). Indeed, some professional organizations have specified guidelines for their members to follow regarding discussing the limits of confidentiality with patients. *See, e.g.,* AM. PSYCHOLOGICAL ASSOC., ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT § 4.02 (effective date June 1, 2003), *available at* <http://www.apa.org/ethics/code2002.html#4> (establishing guidelines for discussing the limits of confidentiality with patients); AM. COUNSELING ASSOC., ACA CODE OF ETHICS AND STANDARDS OF PRACTICE § B.1.g (adopted in 1996), *available at* <http://www.cacd.org/codeofethics.html#eb> (same).

¹⁶³ NAT’L ASSOC. OF SCH. PSYCHOLOGISTS, PROFESSIONAL CONDUCT MANUAL FOR SCHOOL PSYCHOLOGY § III.B.2 (2000), *available at* <http://www.nasponline.org/pdf/ProfessionalCond.pdf> [hereinafter PROFESSIONAL CONDUCT MANUAL FOR SCHOOL PSYCHOLOGY].

parenting students.¹⁶⁴ Other organizations, such as the New York Civil Liberties Union, have in the past offered to help school boards and administrators create policies mindful of students' rights.¹⁶⁵

Once clear guidelines about the protection of students' confidential communications are established, school officials need to educate school administrators, school-based health care providers, faculty, and staff regarding these policies.¹⁶⁶ Training should be provided to explain the nature of students' rights and precisely which communications are covered.¹⁶⁷ Again, civil rights and women's organizations are often available to work with public officials and school administrators to develop proper training.¹⁶⁸

In addition, students' confidential communications should be kept in a separate file, apart from their academic records, to avoid inadvertent disclosure.¹⁶⁹ School officials should encourage confidentiality among their staff and by not asking providers about confidential information about

¹⁶⁴ CALIFORNIA MODEL POLICY, *supra* note 151 (encouraging schools to adopt comprehensive policies on the rights of pregnant and parenting teens and assisting schools in this effort by drafting a model policy); CAL. WOMEN'S LAW CTR., FEDERAL MODEL POLICY ON THE CIVIL RIGHTS OF PREGNANT AND PARENTING STUDENTS (2003), available at http://www.cwlc.org/newsarticles/03_mod_pol_fed.pdf (same).

¹⁶⁵ Letter from Rebekah Diller & Anna Schissel, N.Y. Civil Liberties Union Reprod. Rights Project to Joel Klein, Chancellor, New York City Department of Education (May 8, 2003) (alleging that school officials violated female students' rights by requiring them to undergo testing for pregnancy and sexually transmitted diseases and offering to meet with the Chancellor "to discuss the implementation of appropriate policies and training regarding student privacy rights"), available at <http://www.aclu.org/StudentsRights/StudentsRights.cfm?ID=13089&c=31> [hereinafter Letter to Chancellor Klein].

¹⁶⁶ See, e.g., Press Release, N.Y. Civil Liberties Union Reprod. Rights Project, NYCLU Gives Schools Chancellor Levy An "F" For Failing To Stop Discrimination Against Pregnant And Parenting Girls Who Are Trying To Stay In School (Mar. 23, 2002), available at <http://www.nyclu.org/boe032702.html> (urging New York City's Chancellor of Education to "implement immediate training of staff and faculty on the rights and needs of [pregnant] students" to prevent future discrimination).

¹⁶⁷ Training will also help shield the municipality from liability under 42 U.S.C. § 1983 for failure to train school staff regarding the rights of pregnant students and protecting confidential communications. See 42 U.S.C. § 1983 (2005).

¹⁶⁸ Letter to Chancellor Klein, *supra* note 165, at 4 (offering to train school officials regarding student privacy rights). Organizations have also created brochures and information packets regarding students' rights for professionals to reference. See N.Y. CIVIL LIBERTIES UNION REPROD. RIGHTS PROJECT, MINORS' RIGHTS TO CONFIDENTIAL REPRODUCTIVE HEALTH CARE IN NEW YORK STATE (2003), http://www.nyclu.org/rp_minorsrights.html.

¹⁶⁹ See, e.g., STEWART W. EHLI, INDIVIDUAL AND GROUP COUNSELING IN SCHOOLS 154 (1989) (stating that "[s]chool practitioners who become involved with counseling assume the responsibility of maintaining confidentiality").

students, such as which students are pregnant.¹⁷⁰ Indeed, administrators must lead by example and refrain from attempting to discern such status. Curiosity and gossip must give way to an appreciation of the principles of confidentiality.¹⁷¹

The creation of student-friendly materials will help encourage students to utilize the expertise of school-based health care providers. The materials should explain that communications are confidential and will not be disclosed to parents, school officials, teachers, or other students without their consent.¹⁷² Students must understand that confidential counseling regarding sensitive areas, such as pregnancy, remains confidential. As a result, students will feel more comfortable receiving treatment from school-based health care providers and will disclose the information needed to receive quality care.

Finally, school officials must treat disclosure of a student's confidential communications as a serious violation of the student's rights and, when appropriate, initiate disciplinary action. School-based health care professionals must not be compelled to disclose such communications, unless required by law, and those who exert pressure on these providers should be provided with information about students' privacy rights. In some cases, those who reveal confidential communications should face disciplinary action.¹⁷³

¹⁷⁰ See, e.g., *id.* at 151 (explaining that the "educator who becomes involved has a responsibility to keep confidences").

¹⁷¹ The Professional Conduct Manual for School Psychology of the National Association of School Psychologists explains that ethical standards require that "[s]chool psychologists discuss confidential information only for professional purposes and only with persons who have a legitimate need to know." PROFESSIONAL CONDUCT MANUAL FOR SCHOOL PSYCHOLOGY, *supra* note 163, at § III.A.10.

¹⁷² See, e.g., ACLU OF N. CAL., WE HAVE RIGHTS TOO! (2003), available at <http://www.aclunc.org/students/guide/> (explaining some of students' most important rights, including health and medical care); N.Y. CIVIL LIBERTIES UNION REPROD. RIGHTS PROJECT, THE RIGHTS OF PREGNANT & PARENTING TEENS: A GUIDE TO THE LAW IN NEW YORK STATE, available at http://www.nyclu.org/rrp_rppt1.html (last visited Sept. 11, 2005); N.Y. CIVIL LIBERTIES UNION REPROD. RIGHTS PROJECT, TEENAGERS, HEALTH CARE & THE LAW: A GUIDE TO THE LAW ON MINORS' RIGHTS IN NEW YORK STATE (2002), available at <http://www.nyclu.org/health1.html>.

¹⁷³ In fact, requiring school-based health care providers to disclose confidential information may subject them to liability or disciplinary action for professional misconduct. Indeed, in many states, health care professionals must follow the rules of privileged communications. For example, New York law requires those authorized to practice medicine, registered professional nursing, licensed practical nursing, psychologists, and certified social workers to keep the communications with their patients confidential. Therefore, health and mental health professionals, including those based in the school, who reveal personal information obtained in a professional

Guidelines and training will help the school community understand the rights of pregnant students and the importance of protecting confidential communications. This, in turn, will encourage more students to utilize school-based medical and mental health services. As a result, professionals will be able to encourage students to discuss their pregnancy with their parents, and serve as a supportive, informed parent surrogate in the limited cases where the adolescent chooses not to disclose.

VI. CONCLUSION

School boards should refrain from implementing mandatory notification policies. Notwithstanding *Port Washington Teachers' Association*, such policies violate the Constitution and state law. Furthermore, mandatory notification policies simply do not effectuate sound public policy. Instead of encouraging students to talk to responsible adults about their pregnancy, notification policies will deter students from utilizing health care professionals. As an alternative to enacting a mandatory notification policy that infringes upon the rights of students, school boards are advised to implement formal confidentiality policies and train faculty and staff regarding confidential communications. School-based health care professionals are not able to help students if they do not know about the pregnancy, and they will not know about the pregnancy unless students are promised that their innermost thoughts and problems will be protected from disclosure to third-parties, especially to their parents and school administrators.

Melissa Prober[†]

capacity without the prior consent of the patient or when not required by law to disclose, may be subject to fines, reprimands or revocation of a license and may be sued by a patient for damages resulting from the confidentiality breach. N.Y. COMP. CODES R. & REGS. tit. 8 §§ 29.1-29.2 (2005); N.Y. EDUC. LAW §§ 6509(9), 6511 (McKinney 2005); *Anderson v. Strong Memorial Hosp.*, 531 N.Y.S.2d 735, 739 (N.Y. Gen. Term 1988); *MacDonald v. Clinger*, 446 N.Y.S.2d 801, 802 (N.Y. App. Div. 1982).

[†] B.A., Trinity College; J.D. Brooklyn Law School. The author is grateful for the invaluable advice and guidance from Anna Schissel, Esq. of the New York Civil Liberties Union as well as Professor Susan Herman and Dean Jennifer Rosato of Brooklyn Law School. Thanks to the *Brooklyn Law Review* Staff, and especially Elissa Berger, Erez Davy, Anne Edinger, Erin McMurray, Ryan Micallef, Matt Moses and Michael Simpson for all of their help. Very special thanks to J. Dana Hughes and to the author's family.