

State of New Hampshire Supreme Court

NO. 2015-0032

2015 TERM
AUGUST SESSION

Appeal of Demetria McKaig

APPEAL FROM NEW HAMPSHIRE BOARD OF EDUCATION

BRIEF OF *AMICUS CURIAE*,
PLANNED PARENTHOOD OF NORTHERN NEW ENGLAND

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

I. PPNNE Provides Important Health Care and Education Services in Northern New England and Serves a Diverse Population of Patients Including Teenagers

Planned Parenthood of Northern New England (“PPNNE”) is the largest provider of reproductive health care services and sexuality education in Northern New England. PPNNE has operated in New Hampshire, Maine, and Vermont for 50 years and is committed to offering expert care regardless of patients’ ability to pay. PPNNE works to provide, promote, and protect access to reproductive health care and sexuality education so that all people can make voluntary choices about their reproductive and sexual health.

PPNNE currently operates 21 health centers across New Hampshire, Maine, and Vermont, and in 2014 provided care to 41,643 patients. At its five health centers located in New Hampshire, in 2014 PPNNE served 14,188 patients. These health centers provide a full range of sexual and reproductive services, including annual exams; birth control; testing and treatment for sexually transmitted disease, including HIV; screening for cervical, breast, testicular, ovarian, uterine and colorectal cancer; testing and treatment for urinary and vaginal infections; colposcopy and cryotherapy; pregnancy testing; preconception education; medical and surgical abortion; pre- and post-menopausal care; transgender care; and immunizations for HPV, flu, and hepatitis. Two of the five New Hampshire PPNNE health centers provide abortion services. In recent years, between three and six percent of patients who came to PPNNE sought abortion services. Of all its patients in 2014, about sixteen percent were teenagers.

PPNNE also engages in extensive education and outreach efforts. For example, PPNNE has a YouTube channel that provides sexual health information which has had over 1.7 million views. PPNNE has established a peer education program in Vermont and is in the process of

launching a similar program in New Hampshire. The organization has also received grants to participate in the federal government's Navigator program (under the Affordable Care Act) in Vermont and New Hampshire and has helped nearly 10,000 uninsured people enroll in health insurance coverage since open enrollment began in October 2013.

PPNNE has a longstanding commitment to providing health care services to poor, uninsured patients. Many of PPNNE's patients could not otherwise afford high quality reproductive health care. Sixty-two percent of PPNNE's patients have incomes of less than \$17,505 per year.¹ In 2014, PPNNE provided \$7.3 million in free or discounted health care to its patients.

II. PPNNE is Uniquely Qualified to Illuminate the Relationship Between the Employment Action in this Case and the Constitutionally Protected Interest That the Dismissed Teacher Sought to Help Her Student Vindicate

PPNNE has extensive experience counseling teens who are coping with unwanted pregnancy, including experience with the waiver ("judicial bypass") provision of New Hampshire's parental notification law, RSA 132:34, at the heart of this case. PPNNE was involved in drafting certain portions of the statute to ensure it met constitutional standards, including its robust confidentiality provisions and expedited court proceedings. Among its provisions, RSA 132:34 permits a pregnant minor to petition the court to bypass the parental notification law and obtain an abortion.² Judicial bypass protects pregnant minors' rights in

¹Under the Federal Poverty Guidelines for fiscal year 2015, \$17,505 represents 150 percent of the Federal Poverty Level for a single person. *See* United States Department of Health & Human Services, Administration for Children & Families, Federal Poverty Guidelines for FFY 2015, <http://www.liheapch.acf.hhs.gov/profiles/povertytables/FY2015/popstate.htm>. This figure is a benchmark for eligibility for a variety of health and welfare programs.

²The Judicial Branch's rules, and the Supreme Court's adoption of those rules and amendments, appear at <http://www.courts.state.nh.us/pn/>.

reproductive decision-making, and as a practical matter, also protects those who are fearful that, among other things, their parents may react to their minor child's unwanted pregnancy by ejecting the minor from their home, forcing the minor to continue with the pregnancy, or committing obstructive or violent acts against the minor or another. Following the statute's enactment, PPNNE was involved in rulemaking and also provided the superior court input regarding the standardized forms to be used for judicial bypass proceedings. PPNNE also trained a group of volunteer lawyers concerning the judicial bypass process under RSA 132:34, including the statute's confidentiality requirements. Training included how to assist those pregnant minors with abusive home lives and limited financial resources. PPNNE distributed information about the volunteer lawyers to the clerks of the superior court and to family planning clinics.³

PPNNE's commitment to facilitating the implementation of the waiver provision stems from its dedication to respecting, protecting, and promoting the reproductive choices of all patients who walk through its doors, including minors. PPNNE empowers women to make their own informed and autonomous reproductive health decisions, in part because PPNNE recognizes that such decisions are critically important and have with lasting implications. As part of PPNNE's commitment to protecting the integrity of its patients' reproductive health decisions, PPNNE provides all patients, including its minor patients, with reproductive information and counseling services, and encourages minors to involve trusted adults, if practical and safe for the patient.

³Since the notification statute became effective in January 2012, a total of 17 petitions for judicial bypass have been filed; eight in 2012, three in 2013, four in 2014, and two in 2015 to date. Of those, 16 were granted, and one had a disposition of "order issued." EMAIL FROM PATRICIA LENZ, SUPERIOR COURT ADMINISTRATOR, TO JOSHUA L. GORDON, ESQ. (June 18, 2015) (not in the record).

Because of PPNNE’s experience in counseling minors about their reproductive choices, and its particular experience with judicial bypass in New Hampshire, PPNNE has an interest in ensuring that minors are able to continue to seek counsel from trusted adults in the process of seeking judicial bypass pursuant to RSA 132:34. Thus, PPNNE is uniquely qualified to assist this Court in understanding why the school guidance counselor’s conduct here was not “insubordination,” but rather an attempt to protect a minor consistent with the provisions of RSA 132:34 and longstanding United States Supreme Court precedent.⁴ Indeed, it was the school principal, a government official, who attempted to act unlawfully and sought to violate the constitutional and statutory rights of Student A in this case.⁵

Ms. McKaig, the school guidance counselor, should not face retaliation for helping to ensure her students’ access to their constitutionally and statutorily guaranteed rights. As a trusted adult, Ms. McKaig’s actions were consistent with and supported by the law stated in both the numerous precedents protecting minors’ access to the courts through judicial bypass, and in the express terms of RSA 132:34. For this reason, the State Board of Education’s decision should be affirmed.

⁴PPNNE takes no position on the breach of confidentiality question before this Court.

⁵The pregnant minor was referred to in the record as “Student A,” and that convention is followed here.

SUMMARY OF ARGUMENT

Ms. McKaig should not face non-renewal for her involvement in a court case that sought to prevent the violation of a pregnant minor's constitutional and statutory rights. The Farmington School Board's interpretation of the application of RSA 132:34 was incorrect, and its brief on this appeal does not even acknowledge the constitutional and statutory rights of the minor, Student A.

First, RSA 132:34 grants minors the right to confidential judicial bypass proceedings to obtain abortion services without parental notification. This access is guaranteed not only under New Hampshire law, but also under unambiguous Supreme Court precedent. Ms. McKaig's actions reflect her efforts to help Student A vindicate her protected rights.

Second, Ms. McKaig's actions prevented the principal from circumventing and overriding the protections granted to minors under RSA 132:34 and the federal constitution by notifying Student A's parents. Ms. McKaig's actions cannot be considered insubordinate in the circumstances presented here.

Finally, trusted adults like Ms. McKaig serve a vital role in assisting pregnant minors who cannot consult their parents about their pregnancies. Any ruling that Ms. McKaig was insubordinate – and that her consequent non-renewal was justified – would deter other trusted adults in the position of guidance counselors from helping pregnant minors in comparable situations, and would also effectively authorize school officials to circumvent the judicial bypass regime which New Hampshire has expressly provided.

The State Board of Education correctly rejected the Farmington School Board's conclusions, and this Court should affirm the State Board of Education's decision.

STATUTORY BACKGROUND

I. New Hampshire's Parental Notification Statutory Scheme

A. The Parental Notification Requirement: RSA 132:33

New Hampshire's parental notification statute⁶ provides, in relevant part, "No abortion shall be performed upon an unemancipated minor or upon a female for whom a guardian or conservator has been appointed . . . , until at least 48 hours after written notice of the pending abortion has been delivered." RSA 132:33, I. The written notice must be delivered to the minor's parent or guardian either personally by the physician or the physician's agent, or by certified mail "with restricted delivery to the addressee, which means the postal employee shall only deliver the mail to the authorized addressee." RSA 132:33, II-III.

B. The Waiver Provision: RSA 132:34

The parental notification statute also contains a waiver provision, RSA 132:34, which creates a "judicial bypass" of the parental notification requirement. The statute provides:

I. No notice shall be required under RSA 132:33 if:

(a) The attending abortion provider certifies in the pregnant minor's medical record that a medical emergency exists and there is insufficient time to provide the required notice; or

(b) The person or persons who are entitled to notice certify in writing that they have been notified.

II. If such a pregnant minor elects not to allow the notification of her parent or guardian or conservator, any superior court judge shall, upon petition, or motion, and after an appropriate hearing, authorize an abortion provider to perform the abortion if said judge

⁶The current statute replaces an earlier New Hampshire parental notification law, the Parental Notification Prior to Abortion Act. RSA 132:24-132:28 (Supp. 2005), which was the subject of extensive litigation, including a decision by the United States Supreme Court in *Ayotte v. Planned Parenthood*, 546 U.S. 320 (2006). That earlier statute was enjoined as unconstitutional after a challenge by PPNNE and other plaintiffs, and was ultimately repealed by the legislature in 2007 without ever going into effect. See generally *Planned Parenthood of N. New Eng. v. Ayotte*, 571 F. Supp. 2d 265, 268-71 (D.N.H. 2008). The current statute became effective on January 1, 2012.

determines that the pregnant minor is mature and capable of giving informed consent to the proposed abortion. If said judge determines that the pregnant minor is not mature, or if the pregnant minor does not claim to be mature, the judge shall determine whether the performance of an abortion upon her without notification of her parent, guardian, or conservator would be in her best interests and shall authorize an abortion provider to perform the abortion without such notification if said judge concludes that the pregnant minor's best interests would be served thereby.

(a) Such a pregnant minor may participate in proceedings in the court on her own behalf, and the court may appoint a guardian ad litem for her. Any guardian ad litem appointed under this subdivision shall maintain the confidentiality of the proceedings. The court shall, however, advise her that she has a right to court-appointed counsel, and shall, upon her request, provide her with such counsel.

(b) Proceedings under this section shall be held in closed court, shall be confidential and shall ensure the anonymity of the minor. All court proceedings under this section shall be sealed. The minor shall have the right to file her petition in the court using a pseudonym or using solely her initials. All documents related to this petition shall be confidential and shall not be available to the public. These proceedings shall be given such precedence over other pending matters so that the court may reach a decision promptly and without delay so as to serve the best interest of the pregnant minor. In no case shall the court fail to rule within 2 court business days from the time the petition is filed, except that the 2 court business day limitation may be extended at the request of the minor. A judge of the court who conducts proceedings under this section shall make in writing specific factual findings and legal conclusions supporting the decision and shall order a record of the evidence to be maintained including the judge's own findings and conclusions. If the court fails to rule within the 2 court business day period and an extension was not requested, then the petition shall be deemed to have been granted, and the notice requirement shall be waived.

(c) An expedited confidential appeal shall be available, as the supreme court provides by rule, to any such pregnant minor for whom the court denies an order authorizing an abortion without notification. The court shall make a ruling within 2 court business days from the time of the docketing of the appeal. An order authorizing an abortion without notification shall not be subject to appeal. No filing fees shall be required of any such pregnant minor at either the trial or the appellate level. Access to the trial court for the purposes of such a petition or motion, and access to the appellate courts for purposes of making an appeal from denial of the same, shall be afforded such a pregnant minor 24 hours a day, 7 days a week.

(d) The supreme court shall make rules to ensure that procedures followed in the appeals process are handled in an expeditious manner and protect the confidentiality of the parties involved in the appeal to satisfy the requirements of the federal courts.

RSA 132:34. The New Hampshire courts have established procedures to address petitions by minors seeking waivers of the parental notification requirement in a rapid and confidential manner. See N.H. Judicial Branch, *Filing A Petition For Judicial Waiver Of Parental Notification Before An Abortion Can Be Performed*, <<http://www.courts.state.nh.us/pn/>>. The Judicial Branch web page for minors contemplates that trusted supporters may accompany minors at the hearing on their petition. *Id.* (“You can bring people to talk to the judge about your situation or to be support for you such as your doctor, nurse, family planning counselor, friend, relative, or anyone else.”).

II. Ms. McKaig's Actions in Light of RSA 132:34

Ms. McKaig served as Student A's guidance counselor at Farmington High School. C.R. at 32, 149.⁷ On November 26, 2012, Student A, who is a minor, confided to Ms. McKaig that she was pregnant and she wanted to terminate her pregnancy. C.R. at 32. Ms. McKaig urged Student A to tell her mother about the pregnancy, but Student A was adamant that her mother not be told because she feared for her safety and the safety of her boyfriend if her mother were to learn of the pregnancy. C.R. at 32.

At a weekly staff meeting concerning at-risk students three days later, Ms. McKaig discussed Student A's situation with the team, including the school principal. C.R. at 33, 149. The principal stated he felt that Student A's parents should be told of the pregnancy, revealing either ignorance of or personal opposition to the student's legal rights under RSA 132:34. C.R. at 33, 149. McKaig disagreed and stated her belief that the student had a right to confidentiality. C.R. at 33. Following the meeting, during which the disagreement was not resolved, McKaig contacted an attorney at the New Hampshire Civil Liberties Union, who apparently advised that RSA 132:34 protected the disclosure of Student A's pregnancy and abortion. C.R. at 34, 149-50.

On December 3, the principal instructed the school nurse to meet with Student A and inform Student A that if she did not tell her parent about her pregnancy by December 5, then the school would apprise the parent. C.R. at 34. When the nurse met with Student A, she denied her pregnancy to the nurse. C.R. at 34. The next day, December 4, Ms. McKaig, acting on her concern for Student A's privacy and safety, filed a request for a restraining order in the superior court on behalf of the student to prevent the principal from informing Student A's

⁷The certified record of the proceeding before the State Board of Education is cited herein as "C.R. ___." The record also contains two transcripts of hearings before the Farmington School Board on July 22 and 31, 2013. They are cited herein as *Trn. I* and *Trn. II*, respectively.

parents of her pregnancy. C.R. at 34. On December 10, 2012, the student obtained a judicial bypass order to receive an abortion. C.R. at 35. The superior court issued a temporary restraining order against the principal the following day. C.R. at 35. The court ordered the record remain sealed. C.R. at 35.

In March of 2013, the superintendent and the principal began an investigation of Ms. McKaig's actions. C.R. at 35. On April 9, 2013, Ms. McKaig received a notice of non-renewal. C.R. at 171. This proceeding challenging Ms. McKaig's non-renewal, which began with a hearing before the Farmington School Board, followed.

ARGUMENT

I. The Waiver Provision of RSA 132:34 Reflects the Constitutional Right of a Pregnant Minor to Seek a Judicial Bypass Without Parental Involvement

The Farmington School Board's erroneous finding of insubordination was based on a misunderstanding of New Hampshire's parental notification statute, RSA 132. As the State Board of Education correctly concluded, Ms. McKaig's actions stemmed from her concern for Student A's rights under the statute in light of Student A's desire to obtain an abortion and Student A's safety concerns. C.R. at 33-34. RSA 132:34 includes a waiver provision which reflects this constitutionally-required safety valve and allows unemancipated and mature pregnant minors to obtain judicial consent for an abortion procedure without notifying their parents.

New Hampshire's parental notification law is constitutional only because it contains the bypass provision. The Supreme Court has repeatedly held that parental notification statutes that lack a bypass provision are unconstitutional. *See Bellotti v. Baird (Bellotti II)*, 443 U.S. 645, 647 (1979); *Hodgson v. Minnesota*, 497 U.S. 417, 444-455 (1990); *see also Ohio v. Akron Center for Reproductive Health (Akron II)*, 497 U.S. 502, 511-20 (1990) (affirming *Bellotti II* and *Hodgson*); *Planned Parenthood v. Casey*, 505 U.S. 833, 895, 899 (1992) (affirming *Bellotti II*, *Hodgson*, and *Akron II*); *Lambert v. Wicklund*, 520 U.S. 292, 295-99 (1997) (affirming *Bellotti II*, *Hodgson*, and *Akron II*).

A. RSA 132:34 Contains a Waiver Providing Minors with Access to an Abortion Procedure Without Parental Notification Through a Highly Confidential and Expedited Proceeding

In conjunction with its parental notification requirement, New Hampshire has adopted a judicial bypass procedure for situations in which a pregnant minor "elects not to allow the

notification of her parent or guardian or conservator.” RSA 132:34. The statute contains several key features that underscore the sensitivity of the bypass proceeding. For example, the statute mandates that bypass proceedings are “confidential and ensure the anonymity of the minor.” RSA 132:34, II(b). The proceedings are sealed. *Id.* The minor has the right to file her petition for bypass “using a pseudonym or using solely her initials,” and the petition may not be made available to the public. *Id.* The statute also requires that similar confidentiality precautions be employed in any appeal of a denial of a petition for waiver. RSA 132:34, II(d).

The statute mandates that courts act quickly on any petition for waiver of the parental notification by requiring that superior court judges rule on bypass petitions within two court business days from the date of filing. RSA 132:34, II(c). If the judge fails to rule within the two-day window, the petition is deemed granted and the notice requirement is waived. *Id.* In the event a judge denies the bypass petition, the minor has a right to an expedited confidential appeal, which likewise requires a ruling within two court business days. *Id.* Indeed, the statute provides pregnant minors with the right to have access to the trial and appellate courts “24 hours a day, 7 days a week.” *Id.*

Recognizing the important role of adults in assisting pregnant minors with this process, the statute provides them with a right to court-appointed counsel to assist with the court proceedings and authorizes judges to appoint a guardian *ad litem*. RSA 132:34, II(a). Similarly, the website for the New Hampshire Judicial Branch providing “Information for Minors” informs minors who wish to petition to seek an abortion without parental notification that trusted support persons may assist them at the hearing, including a “doctor, nurse, family planning counselor, friend, relative, or anyone else.” See N.H. Judicial Branch, *Filing A Petition For Judicial Waiver, supra*.

In PPNNE’s experience with judicial bypass petitions to date, superior court judges and clerks have taken their responsibilities under the statute very seriously. For example, court clerks and judges schedule bypass hearings after school hours to avoid interfering with school attendance, permit minors and their counsel to access court buildings through private entrances to avoid encounters with members of the public, and conduct hearings in judges’ chambers so minors can feel at ease and less intimidated by the process.

B. RSA 132:34 Reflects Well-established Supreme Court Precedent Protecting Minors’ Access to Abortion Rights

The judicial bypass provision in RSA 132:34 reflects the longstanding recognition that “[m]inors, as well as adults, are protected by the Constitution and possess constitutional rights.” *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976). Among the well-established constitutional rights afforded to minors is the right of pregnant minors to seek an abortion. *Bellotti*, 443 U.S. at 647 (1979); *see also Carey v. Population Services International*, 431 U.S. 678, 693 (1977) (“[T]he right to privacy in connection with decisions affecting procreation extends to minors as well as to adults.”). Thus, the “constitutional protection against unjustified state intrusion into the process of deciding whether or not to bear a child extends to pregnant minors as well as adult women.” *Hodgson*, 497 U.S. at 435. Underlying this principle is the United States Supreme Court’s recognition that decisions relating to pregnancy, unlike many other decisions made by minors, have a lasting and serious impact on the rest of a minor’s life. For example, “motherhood may be exceptionally burdensome for a minor” “considering her probable education, employment skills, financial resources, and emotional maturity.” *Bellotti II*, 443 U.S. at 642.

The waiver provisions of RSA 132:34 are mandated by the United States Supreme Court’s decision in *Bellotti II*, where the Court struck down a statute mandating parental

involvement in the abortion decisions of minors and sketched the framework for future judicial bypass systems. 443 U.S. at 643. There, the Supreme Court held that to avoid unduly burdening the pregnant minor's constitutional rights, "every pregnant minor is entitled in the first instance to go directly to court for a judicial determination *without prior parental notice, consultation, or consent.*" *Id.* at 649 (emphasis added). Through this judicial process, a pregnant minor may bypass a state's parental consent or notification requirement if a judge determines that she is sufficiently mature and informed to make the abortion decision herself, or that the abortion would be in her best interests. *Id.* at 633-34. The Court subsequently has affirmed that framework on multiple occasions. *See, e.g., Akron II*, 497 U.S. at 511-13 (holding that a bypass procedure that suffices for a parental consent statute will also suffice for a notice statute); *Casey*, 505 U.S. at 895, 899; *Lambert*, 520 U.S. at 297 ("a judicial bypass procedure requiring a minor to show that parental notification is not in her best interests is equivalent to a judicial bypass procedure requiring a minor to show that abortion without notification is in her best interests.").

The judicial bypass determination must be made as expeditiously as possible to avoid forcing a pregnant minor into motherhood through delay. *See Bellotti II*, 443 U.S. at 642 (unlike marriage or other decisions with a constitutional dimension, a pregnant minor "cannot preserve for long the possibility of aborting, which effectively expires in a matter of weeks from the onset of pregnancy"). RSA 132:34 expressly requires expedited judicial proceedings.

Judicial bypass safeguards against the possibility of an absolute and arbitrary "parental veto" over the minor's abortion decision. *Id.* at 643-44; *see also Danforth*, 428 U.S. at 74 ("the State does not have the constitutional authority to give a third party an absolute, and possibly

arbitrary, veto over the decision of the physician and his patient to terminate the patient's pregnancy, regardless of the reason for withholding the consent.").⁸

Confidentiality is critical to safeguarding the minor's right to access the courts through judicial bypass. As the *Bellotti* Court warned, once an obstructionist parent is informed of a minor's pregnancy, that parent can prevent the minor from going to court, as well as having the abortion itself. *Id.* at 646 ("[M]any 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."). The strict confidentiality requirement of RSA 132:34 heeds the Supreme Court's concern, protecting minors from efforts by their parents or others to obstruct or otherwise veto the minor's reproductive decisions.

C. Other New Hampshire Law Reinforces the Confidentiality Requirements Established by RSA 132:34 and United States Supreme Court Precedent

Like the United States Supreme Court, this Court has held that constitutional rights do not spring into being at maturity, but rather are shared by children. *See, e.g., In re Berg*, 152 N.H. 658 (2005) ("the plain meaning of 'person' does not exclude minors."). In New Hampshire, minors have privacy rights in their medical care that can trump legally-protected parental rights. *See id.* at 661-62; *see also In re Fay G.*, 120 N.H. 153 (1980) (requiring compelling state interest to overcome minors' privacy rights). These constitutional rights are not "waived" at the schoolhouse door. In *State v. Drake*, 139 N.H. 662, 664 (1995), for instance, this Court noted

⁸Since *Bellotti II*, 38 states have enacted statutes requiring parental involvement in a minor's decision to have an abortion. Of those, 21 require consent, 5 require both consent and notification, and 12 require notification only. *Id.* at 2. All 38 have also enacted a judicial bypass procedure. *See* Guttmacher Institute, *Parental Involvement in Minors' Abortions* (June 1, 2015) at 6 <http://www.guttmacher.org/statecenter/spibs/spib_PIMA.pdf>.

that “[p]ublic school students have legitimate privacy interests.... These privacy interests are not waived when the student merely passes through the schoolhouse door.” *Drake*, 139 N.H. at 664; *In re Anthony F.*, 163 N.H. 163, 166 (2012) (search of 14-year old at school held impermissible under state constitution).

New Hampshire statutes also recognize the rights of minors to make independent and confidential medical decisions. For instance, by statute, New Hampshire doctors must respect the right of all persons, including minors, to make independent medical decisions.⁹ *See e.g.*, RSA 153-A:18 (civil immunity for emergency health care providers regardless of patient’s age); RSA 318-B:12-a (“Nothing contained herein shall be construed to mean that any minor of sound mind is legally incapable of consenting to medical treatment provided that such minor is of sufficient maturity to understand the nature of such treatment and the consequences thereof.”). Minors may also voluntarily submit to treatment for drug dependency and treatment for sexually-transmitted diseases without parental involvement. RSA 318-B:12-a (age 12 or older); RSA 141-C:18 (age 14 or older). A teen parent “may” place a child for adoption without parental involvement. RSA 170-B:5.

In short, New Hampshire law, as well as federal constitutional law, protects a pregnant minor from unauthorized parental notification and disclosure of her pregnancy and intended abortion.

⁹The American Medical Association Code of Medical Ethics has been incorporated by reference into New Hampshire law, RSA 329:9, V; N.H. ADMIN. R. Med 501.01(h), and has been cited by the this Court in a variety of contexts. *See e.g.*, *Appeal of Dell*, 140 N.H. 484, 495 (1995). It specifically acknowledges the importance of preventing disclosure of a mature pregnant minor’s reproductive health decisions and protecting and promoting a confidential and trusting relationship between the physician and the minor patient. *See AMA, Report of the Council on Ethical and Judicial Affairs*, CEJA Report 8-I-07 at 5 (“In assessing disclosure requirements, physicians must weigh the minor patient’s capacity to make decisions, the physical and psychosocial risks the patient faces, and the benefits of maintaining a confidential, trusting relationship.”).

II. Overturning the State Board Decision on Insubordination Would Allow Government Officials To Circumvent the Protections of RSA 132:34

The State Board of Education correctly concluded that Ms. McKaig, with the assistance of the New Hampshire Civil Liberties Union, filed a lawsuit in order to protect Student A's rights under RSA 132:34. As the Board noted, Ms. McKaig sought to "insur[e] the privacy and safety of her student under extremely difficult and time-sensitive circumstances." C.R. at 33. There is no question that Student A possessed a constitutional and statutory legal right to seek a waiver without prior notification or involvement of her parents. The only question at issue is whether Ms. McKaig's actions to protect the minor student from a threatened violation of her constitutional and RSA 132:34 rights could constitute "insubordination" sufficient to justify non-renewal. Preventing a violation of a minor's constitutional and statutory rights cannot be insubordination, and this Court should not create precedent that would permit a government official to thwart the protections of RSA 132:34.

The school district's argument before this Court rests largely on the argument that "[t]he fact that McKaig may have valid reasons to disagree with this decision does not make her actions any less insubordinate." FARMINGTON BRF. at 24. The implication of this is that a public school principal (by definition a government official) may to undermine a student's legal right to a judicial bypass by notifying her parents.

But the principal cannot be entitled to circumvent a student's constitutional and statutory rights, nor can Ms. McKaig's actions to prevent a violation of those rights be considered insubordination. *See, e.g., Chase v. Fall Mountain Regional Sch. Dist.*, 330 F. Supp. 388, 398-99 (D.N.H. 1971) ("[A] teacher in a public elementary or secondary school is protected ... against a nonrenewal decision ... which is impermissibly based."); *see also Shelton v. Tucker*, 364 U.S.

479, 487 (1969) (“[V]igilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”).

The principal’s insistence on notifying Student A’s mother flouted and sought to override the protections provided by RSA 132:34 and long-standing United States Supreme Court precedent. The principal here insisted on notifying Student A’s mother of her pregnancy, despite his knowledge that Student A intended to seek a judicial bypass and obtain an abortion. C.R. at 67; *Trn. I* at 50; *Trn. II* at 13-40 (principal’s testimony that, during the CORE meeting in which he became aware of Student A’s pregnancy, he was also informed that Student A was “looking at getting an abortion and the idea of judicial bypass.”). The record also shows that Ms. McKaig presented the school principal with the judicial bypass statute, which the principal disregarded, apparently because he “had a daughter about the age of Student A and he would want to be told if his daughter were pregnant.” C.R. at 67. In other words, the school principal threatened to disregard the protections set forth in an expressly controlling New Hampshire statute of which he had personal notice. Neither public school principals, nor other government officials, are authorized to do that.

The school district’s initial position in the hearings below – now apparently abandoned on appeal – was that the principal wished to inform Student A’s mother about her pregnancy rather than Student A’s intended abortion.¹⁰ To the extent such an argument has been preserved, it elevates form over substance. RSA 132:34 permits a minor “not to allow the notification of

¹⁰The Farmington School Board posited, based on its belief that judicial bypass and parental notification are “not mutually exclusive,” that “a student whose parents knew about a pregnancy could still seek a Judicial Bypass from the court.” C.R. at 151. This argument misses the point. Although some parents who learn of a minor’s pregnancy may not try to prevent that minor from seeking a bypass, other parents will impede, obstruct, or deny altogether a pregnant minor’s access to the courts once they learn of the pregnancy. See *Bellotti II*, 443 U.S. at 646. In such situations, parental notification is tantamount to an arbitrary, absolute, and unconstitutional parental veto. *Id.* at 643-44; see also *Danforth*, 428 U.S. at 74.

her parent or guardian or conservator” of her decision to obtain an abortion. In these circumstances, there can be no question that informing Student A’s parent about her pregnancy was tantamount to disclosing the abortion that Student A wished to keep confidential. The State Board of Education correctly rejected the school district’s position that a judicial bypass of parental notice would be equally available to Student A even after the principal had notified her parent about the pregnancy. C.R. at 38.

Ms. McKaig’s actions on behalf of Student A involved not just the facilitation of Student A’s constitutional and statutory right to seek a bypass without parental involvement, but the prevention of a violation of those rights by a government official. Her actions were consistent with state and federal law on judicial bypass and privacy. These actions, therefore, do not constitute insubordination. *See Chase v. Fall Mountain*, 330 F. Supp. at 398-99.

III. Holding Ms. McKaig's Conduct "Insubordination" Would Discourage the Critical Assistance Minors Receive from Trusted Adults, Including Guidance Counselors

A holding that Ms. McKaig's conduct constituted insubordination warranting non-renewal or other discipline would discourage school guidance counselors from having conversations with female students who find themselves unexpectedly pregnant, do not wish to become teenage mothers, and seek a trusted adult for advice and assistance. PPNNE's experience with the abortion decisions of minors who have fractious parental communications confirms the importance they place on access to trusted adults such as school counselors. Seeking a judicial bypass typically occurs in a highly stressful situation where wise counsel of trusted adults is critical, and a school guidance counselor is a readily available source of wisdom.

Of the minors who obtain abortions from PPNNE in New Hampshire, the vast majority involve a parent in their decision. The younger the minor is, the more likely she is to come to a health center with a parent. If a minor has not already talked to a parent, PPNNE staff members explore with the minor her reasons for not involving a parent and encourages her to do so, unless parental involvement would be against her best interests.¹¹ In PPNNE's experience, consistent with empirical research, young pregnant women carefully consider the decision not to involve their parents. J. Shoshanna Ehrlich, *Grounded in the Reality of Their Lives: Listening to Teens Who Make the Abortion Decision Without Involving Their Parents*, 18 BERKELEY J. GENDER, L., & JUST. 61, 164 (2013). Often, after counseling, minors agree to involve a parent. Of those

¹¹Virtually all professional medical organizations encourage parental involvement where possible, and other adult involvement when not possible, including the American Medical Association, the American Public Health Association, the Society for Adolescent Medicine, and the American College of Obstetricians and Gynecologists. J. Shoshanna Ehrlich, *Grounded in the Reality of Their Lives: Listening to Teens Who Make the Abortion Decision Without Involving Their Parents*, 18 BERKELEY J. GENDER, L., & JUST. 61, 70-71 (2003) (collecting citations).

who do not choose to involve a parent, nearly all pregnant minors involve a trusted adult, such as a relative, school nurse, or school guidance counselor.

Having assisted numerous teenage patients including unemancipated minors, PPNNE health care providers are familiar with the reasons minors are unwilling to involve a parent in their abortion decisions. The small minority of minors who do not inform their parents about their pregnancy may fear serious emotional or physical abuse, being thrown out of the home, and being cut off from parental support, including financial support and college tuition. These fears are often based on a parent's past threats. Minors often have good reason to believe a parent will carry out such threats. For example, parents may have maltreated them in the past in similar stressful situations or an older sibling may already have been put out of the home or beaten when a parent learned of a pregnancy. Among PPNNE's patients have been young women from other countries who feared ostracism – even death – if their families were to learn about an out-of-wedlock pregnancy.

Sometimes the minor's parents are deeply ideologically opposed to abortion. Such minors fear an emotional rift if their parents find out about their decision or that the parent will try to prevent them from obtaining the abortion. For example, a parent active in the local New Hampshire anti-abortion movement repeatedly called a PPNNE center posing as her daughter and attempted to cancel her daughter's appointment for an abortion. On the day of the daughter's appointment, the mother arrived at the health center to attempt to prevent her daughter from obtaining an abortion.

Other minors fear further fracturing a family already experiencing significant stress. For example, a member of the minor's family may already be in trouble because of criminal activity or addiction. One PPNNE patient did not want to burden her mother, a widow who had

recently been diagnosed with cancer. A minor may fear – correctly or not – that news of her pregnancy and planned abortion will be more than a parent already under significant stress need handle. Minors whose pregnancy is the result of familial sexual abuse often believe they cannot safely share their abortion decision with their parents. Some in stressful family situations elect to go to court to protect an already fragile family unit. See, e.g., Ehrlich, *supra*, at at 94-95, 129-140, 164-72; Stanley K. Henshaw & Kathryn Kost, *Parental Involvement in Minors' Abortion Decisions*, 24 FAM. PLAN. PERSP. 196, 202-03 & Table 5 (1992). Providing minors with a confidential process to access abortion care without parental involvement also decreases the likelihood they will dangerously attempt to self-induce or otherwise harm themselves in order to terminate the pregnancy. See, e.g., AMA Council on Ethical and Judicial Affairs, *Mandatory Parental Consent to Abortion*, 269 JAMA 83 (1993).

In PPNNE's experience, those few pregnant minors who cannot or choose not to involve their parents, generally consult other trusted adults including teachers and guidance counselors. These trusted adults play a critically important role in protecting the health and safety of minors facing an extraordinarily difficult and time-sensitive decision. See *Carey*, 431 U.S. at 685 (“The decision whether or not to beget or bear a child ... holds a particularly important place in the history of the right of privacy ... for in a field that by definition concerns the most intimate of human activities and relationships, decisions whether to accomplish or to prevent conception are among the most private and sensitive.”).

The judicial bypass process does not operate in a vacuum. For the judicial bypass system to function properly, it is imperative that pregnant minors have access to trusted adults. Trusted adults – whom pregnant minors expect to maintain their confidence – offer critical support and guidance to minors who feel they cannot turn to their parents during an extraordinarily

distressing and difficult experience. Moreover, minors may have little or no experience with the judicial system, and may only gain the knowledge and courage to seek the statutory relief available to them under RSA 132:34 with the guidance of a trusted adult.

Academic research confirms the important role played by trusted adults in the judicial bypass system. A recent study of minors in Massachusetts who obtained a bypass order found that 91.4 percent of minors spoke with an adult in making their abortion decision.¹² Of those adults, approximately 29 percent spoke with a school professional and 52 percent worked with a social worker or counselor. Ehrlich, *supra*, at 98-99, 108-09.¹³ This study indicates that the vast majority of pregnant minors who do not involve a parent seek out a trusted adult, like Ms. McKaig.

Indeed, the evidence submitted during the course of this matter is consistent with PPNNE's experience that a very small number of pregnant minors fear for their safety if they were to notify their parents. Ms. McKaig testified in the proceedings below that Student A feared for her safety and the safety of her boyfriend if her mother learned she was pregnant. *See Bellotti II*, 443 U.S. at 646 (identifying concern that "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").

¹²Massachusetts has 35 years of experience with a parental or judicial consent statute for minors. See MASS. GEN. LAWS, c. 112, §12S, (added by 1980 Mass. Stat., c. 240).

¹³In addition to these critically important adult figures, as noted PPNNE has formed and trained a panel of attorneys to assist and advise minors navigating the judicial bypass process. Those attorneys not only advise the minors themselves, but also, on occasion, interact with reproductive health care workers and other trusted adults identified by the pregnant minor, including social workers, teachers, and guidance counselors. However, the role of attorneys in the judicial bypass process – a person with whom the pregnant minor has not before interacted – is distinct from and not a substitute for the role of other trusted adults. *See Indiana Planned Parenthood Affiliates Assoc. v. Pearson*, 716 F.2d 1127, 1138 (7th Cir. 1983) ("[N]o legal proceeding is that simple. A minor, completely untrained in the law, needs legal advice to help her understand how to prepare her case, what papers to file, and how to appeal if necessary.").

Indeed, only eleven days after the CORE meeting that precipitated this case, and after Ms. McKaig's legal action resulted in an order forbidding the principal from disclosing the pregnancy, Student A obtained an abortion after a hearing through the judicial bypass procedure. C.R. at 32-33.

School guidance counselors are frequently the “trusted adults” for unexpectedly pregnant minors who need wise advice but feel unable to consult their parents.¹⁴ Such employees should not face dismissal, non-renewal, demotion, or other penalties for protecting the rights of those pregnant minors who seek their counsel.

¹⁴The loss to minors of advice from school employees such as guidance counselors or nurses would also undoubtedly lead to delay in access to abortion. *See Bellotti II*, 443 U.S. at 642 (unlike marriage or other decisions with a constitutional dimension, a pregnant minor simply “cannot preserve for long the possibility of aborting, which effectively expires in a matter of weeks from the onset of pregnancy.”). Ensuring that Ms. McKaig is not penalized as “insubordinate” for acting as a trusted adult is vital to securing the health and safety of pregnant minors.

CONCLUSION

For the foregoing reasons, this Court should uphold the State Board of Education's determination that Ms. McKaig's conduct in protecting her student's statutory and constitutional rights did not constitute insubordination.

Respectfully submitted,
Planned Parenthood of Northern New England
By its Attorneys,

Dated: August 4, 2015

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CERTIFICATION

I hereby certify that on August 4, 2015, copies of the foregoing will be forwarded to James F. Allmendinger, Esq.; Peter C. Phillips, Esq.; and Gilles Bissonnette, Esq.

Dated: August 4, 2015

Joshua L. Gordon, Esq.