



# NYCLU

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**Reproductive Rights Project**  
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## MEMORANDUM

To: Interested Parties  
From: Donna Lieberman, Galen Sherwin  
Date: June 6, 2008  
Re: Parental Consent for HPV Vaccine<sup>1</sup>

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This memorandum discusses the legal grounds under New York law for permitting minors to provide informed consent for inoculation with the vaccine for the Human Papillomavirus (HPV). It was initially issued in response to inquiries from numerous providers around the state regarding their authority to administer the vaccine to teens who present for healthcare on their own, without parental involvement. Many health care providers who work with adolescents believe that when teens are being treated for other confidential services to which they are entitled to consent on their own,<sup>2</sup> they should also be given the option of receiving the HPV vaccine on a confidential basis. Teens who are receiving such services are not likely to wish to obtain parental approval for the vaccine, as this would compromise their confidentiality. Failure to make the vaccine available to teens who are sexually active (or who are about to become sexually active) is a missed opportunity for prevention.

The New York State Department of Health has informed the NYCLU that it believes that parental consent is required for provision of the vaccine. However, it is the NYCLU's position that New York law provides authority for provision of the HPV vaccine without parental consent because (a) there is no affirmative requirement in state or federal law for parental notice or consent prior to vaccination, and a range of adult relatives are authorized to consent to immunization on a minor's behalf; (b) mature minors can consent on their own under New York common law to all types of health care; (c) physicians can provide treatment to minors who have been exposed to sexually transmitted infections without parental consent, and HPV is a sexually transmitted

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<sup>1</sup> This memorandum presents an update of the information presented in an earlier memo, dated July 18, 2007, on the same topic. Specifically, it includes a more complete discussion of the implications of the federal requirement that a Vaccine Information Statement (VIS) be provided to a minor's parent or legal representative.

<sup>2</sup> Under New York law, teens are entitled to obtain a range of reproductive and sexual health care services confidentially, without parental consent; some minors, such as married, emancipated, or pregnant and parenting minors, can make all healthcare decisions on their own. *See, e.g.*, New York Pub. Health Law §§ 2504, 2305 (McKinney 2006). *See generally* NYCLU, *Teenagers, Healthcare and the Law* (2002), available at <http://www.nyclu.org/health1.html>.

infection; and (d) refusal to recognize minors' authority to consent to the vaccine contravenes New York's strong public policy of providing minors with confidential access to services related to reproductive and sexual health.

Please note that this memorandum does not constitute individualized legal advice, but rather sets forth general legal arguments supporting provision of the vaccine in the absence of parental consent. Health care providers should seek the advice of legal counsel when setting their own policies or addressing particular cases in this area.

## I. Background

The term HPV (human papillomavirus) commonly refers to a group of viruses that can cause precancerous cervical lesions and/or genital warts. HPV is estimated to be the most common sexually transmitted infection (STI):<sup>3</sup> about 1 in 4 women between the ages of 14 and 59 have a strain of HPV at any given time,<sup>4</sup> and anywhere from 50-90% of sexually-active people are infected with HPV at some point in their lifetime.<sup>5</sup> The highest rates of HPV infection occur among adolescents and young adults 15-24 years old.<sup>6</sup> Moreover, HPV infection is a necessary cause of virtually all cases of cervical cancer worldwide.<sup>7</sup> In the U.S., almost 4,000 women die from cervical cancer each year.<sup>8</sup>

Two HPV strains (16 and 18) in particular are linked to 70% of all cervical cancer cases, and two other strains (6 and 11) are linked to 90% of cases of genital warts. Merck's Gardasil™, currently the only FDA-approved HPV vaccine, protects against all four of these strains of the virus.<sup>9</sup> Approved for use in women ages 9-26, Gardasil™ has been proven 100% effective in preventing the strains that cause cervical cancer, and 99% effective in preventing against the strains that cause genital warts.<sup>10</sup>

Shortly after FDA approval of the HPV vaccine for girls 9-26, the New York State Department of Health issued a "Guidance" stating that parental consent is required

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<sup>3</sup> Dunne et al., *Prevalence of HPV Infection Among Females in the United States*, 297 JAMA 813, 813-819 (2007); Centers for Disease Control and Prevention (CDC), *HPV and HPV Vaccine: Information for Healthcare Providers*, <http://www.cdc.gov/std/hpv/hpv-vacc-hcp-3-pages.pdf> at 2 (Aug. 2006). The statute discussed later in the text, New York Public Health Law § 2305, uses the term "sexually transmitted disease." In this memorandum, the term "sexually transmitted infection" is used except where referring specifically to the statute's terms.

<sup>4</sup> Dunne, *supra* note 2.

<sup>5</sup> *Id.*; Natalya V. Revzina, *Prevalence and Incidence of Human Papillomavirus Infection in Women in the USA: A Systematic Review*, 16(8) Int'l J. of STD & AIDS 528 (Aug. 2005).

<sup>6</sup> Dunne, *supra* note 2; CDC, *supra* note 2, at 2; Hillard Weinstock et al., *Sexually Transmitted Diseases Among American Youth: Incidence and Prevalence Estimates, 2000*, 36 Persp. on Sexual & Reprod. Health 1, 4 (2004).

<sup>7</sup> CDC, *supra* note 2, at 3; Jan M. Walboomers et al., *Human Papillomavirus is a Necessary Cause of Invasive Cervical Cancer Worldwide*, 189(1) J. of Pathology 12-9 (1999).

<sup>8</sup> CDC, *supra* note 2, at 3; American Cancer Society, *Detailed Guide: Cervical Cancer: What Are the Key Statistics About Cervical Cancer?*, [http://www.cancer.org/docroot/CRI/content/CRI\\_2\\_4\\_1X\\_What\\_are\\_the\\_key\\_statistics\\_for\\_cervical\\_cancer\\_8.asp?sitearea=](http://www.cancer.org/docroot/CRI/content/CRI_2_4_1X_What_are_the_key_statistics_for_cervical_cancer_8.asp?sitearea=) (Aug. 4, 2006).

<sup>9</sup> See Gardasil Questions and Answers, <http://www.fda.gov/cber/products/hpvmr060806qa.htm> (last visited July 11, 2007).

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

in order for minors to be vaccinated against HPV.<sup>11</sup> According to conversations with DOH attorneys, this position was based on two grounds: (1) that provision of the HPV vaccine does not constitute “treatment” under New York Law, and (2) that section 2504 of the Public Health law requires parents or guardians to consent to all immunizations. After we shared the analysis outlined in this memorandum with DOH attorneys, the Department removed the statement from its website. However, it has not yet issued an affirmative statement that parental consent is not required under all circumstances. Instead, it sought clarification of the law through a legislative proposal, which has since been stalled in Albany.

It is our hope that the State Department of Health will change its position on this issue as soon as possible, in order to provide minors with increased access to this important medical option. As Part II of this memorandum explains, we believe that such a position is both authorized by New York law and beneficial as a matter of sound public health policy.

## II. Discussion

### A. There is no Specific Requirement for Parental Notice or Consent to Immunizations

#### 1) New York Public Health Law Does Not Specifically Require Parental Consent for Immunizations.

In New York, physicians must obtain informed consent before providing any medical treatment.<sup>12</sup> The general rule in New York, as in all other states, is that minors may not give informed consent on their own, but require parental approval prior to obtaining treatment. This stems not from any specific statutory provision, but rather from the common-law rule that minors are not generally considered capable of consenting on their own for medical treatment, and the concomitant rule that parents have authority to consent on their behalf.

However, New York law makes several statutory exceptions to this rule, for example, for the provision of care related to pregnancy and for the treatment of sexually transmitted infections, both of which minors may consent to on their own.<sup>13</sup> Another such exception is in the realm of immunizations. New York Law provides that:

[W]here not otherwise already authorized by law to do so, any person in a parental relation to a child as defined in section twenty-one hundred sixty-four of this chapter and, (i) a **grandparent, an adult brother or sister, an adult aunt or uncle, any of whom has assumed care of the child** and, (ii) an adult who has care of the child and has written authorization to consent from a person in a parental relation to a child as defined in section twenty-one hundred sixty-four of this chapter, may give effective consent for the immunization of a child. However, a person other than one in a

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<sup>11</sup> N.Y. State Dep’t of Health, *Questions and Answers about Human Papillomavirus (HPV) Vaccine*, [http://www.health.state.ny.us/prevention/immunization/human\\_papillomavirus/](http://www.health.state.ny.us/prevention/immunization/human_papillomavirus/) (last visited July 11, 2007).

<sup>12</sup> N.Y. Pub. Health Law § 2805-d (McKinney 2006).

<sup>13</sup> See, e.g., N.Y. Pub. Health Law §§ 2504, 2305 (McKinney 2006); see generally *Teenagers, Healthcare and the Law*, *supra* note 11.

parental relation to the child shall not give consent under this subdivision if he or she has reason to believe that a person in parental relation to the child as defined in section twenty-one hundred sixty-four of this chapter objects to the immunization.<sup>14</sup>

When NYCLU spoke to DOH officials regarding our interpretation, they asserted that this provision of the Public Health Law amounts to a requirement of parental consent for all immunizations. However, this provision, on its face, does not amount to a parental consent requirement. Rather, it merely expands the scope of persons who may consent on behalf of a minor in the context of immunizations *beyond* the parents or guardians to include other enumerated relations. The purpose of this provision is to make clear that the default rule of parental consent for healthcare *does not* apply to immunizations, in order to provide access to immunizations to as many children as possible.

This provision permits healthcare providers to provide the HPV vaccine to a minor upon the consent of a grandparent, adult sibling or adult aunt or uncle who has “assumed care of the child,” as long as that relative does not have reason to believe that the parent objects to the immunization. There is no requirement that the adult have been officially appointed by a court as the legal guardian for that child—had the statute meant this, then that is what it would have said. Rather, to effectuate the purpose of the statute to provide broader access to child immunizations, a designated relative may be understood as having “assumed care” of the child when he or she has assumed some caretaking responsibility for the child and/or has accompanied the child on the doctor’s visit.

It should also be noted that the statute implies that the parent’s objection must be actual rather than hypothetical—that is, where a parent actually “objects” to a particular immunization, or where the parent objects on principal to all immunizations. Moreover, the statute does not impose any obligation on the provider to independently ascertain whether a parent actually objects, but rather, permits the provider to rely in good faith on the representation of the adult relative that the parent does not object to the immunization. If the law were meant to impose a presumption of parental objection or require notification of parents in order to ascertain their views, it would have done so explicitly.

The provider would thus have the authority to administer the vaccine to an authorized adult relative where the parent has no objection generally to immunizations and has not indicated any particular objection to HPV immunization, even if the parent is unaware that this particular immunization is planned. However, if the provider him/herself has an independent reason to believe that the parent actually does object to administration of the vaccine or to administration of vaccines generally (for example because the relative or the minor has stated that they do), then the adult relative would not be authorized to consent. In such cases, the provider would have to rely on one of the alternative arguments set forth below permitting the minor to consent on her own for care. Either way, this provision does not amount to a blanket parental consent requirement, but rather seeks to broaden children’s access to immunizations.

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<sup>14</sup> N.Y. Pub. Health Law § 2504 (McKinney 2006).

2) Federal Law Does Not Require Parental Notice or Consent for Immunizations.

There is no federal law requiring parental consent for immunizations. Federal law does, however, require the Secretary of the Department of Health and Human Services to “develop and disseminate vaccine information materials for distribution by health care providers to the legal representatives of any child or to any other individual receiving a vaccine set forth in the Vaccine Injury Table.”<sup>15</sup> Because HPV is included in the Vaccine Injury Table, health care providers are required to provide these materials to the “legal representative” of the child.<sup>16</sup> This federal law thus appears to amount to a requirement of notification (in the form of a Vaccine Information Statement or VIS), rather than consent, for a child’s immunization. The law does not require that the VIS be provided in person, or specify any penalty for failing to provide it.

This requirement does not change the result that a provider may administer the vaccine to a minor without a parent’s involvement. This is because, as discussed above, New York law permits other adults besides a parent to consent to immunization on behalf of a minor in their care. Moreover, New York Law permits minors to consent *on their own* to the administration of treatments for STIs, and providers who offer this treatment to a mature minor without parental consent would be protected by the “mature minor” doctrine, as they would be in any other context. (*See* section II.B, below).

Federal law requires the VIS be provided to a “legal representative,” which is defined as “a parent or an individual who qualifies as a legal guardian under State law.”<sup>17</sup> There is no precise, all-purpose definition of “legal guardian” in New York State; rather, state statutes refer to a person who is “legally responsible” for a child. For example, for purposes of defining a person who can be held liable for child abuse or neglect, the Family Court Act defines a “person legally responsible” for a child as including the “child’s custodian, guardian, [or] any other person responsible for the child’s care at the relevant time. Custodian may include any person continually or at regular intervals found in the same household as the child[.]”<sup>18</sup> Various courts have noted the failure of New York law to adequately define such terms as “guardian,”<sup>19</sup> “guardian ad litem,”<sup>20</sup> “non-agency guardian,”<sup>21</sup> and “law guardian.”<sup>22</sup> One court resorted to a law dictionary

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<sup>15</sup> 42 U.S.C. § 300aa-26.

<sup>16</sup> 42 U.S.C. § 300aa-26(d) (“[E]ach health care provider who administers a vaccine set forth in the Vaccine Injury Table shall provide to the legal representatives of any child or to any other individual to whom such provider intends to administer such vaccine a copy of the information materials developed pursuant to subsection (a) of this section, supplemented with visual presentations or oral explanations, in appropriate cases. Such materials shall be provided prior to the administration of such vaccine.”)

<sup>17</sup> 42 U.S.C. § 300aa-33(2).

<sup>18</sup> New York Family Ct. Act § 1012(g).

<sup>19</sup> *See, e.g., Cramer v. Henderson*, 473 N.Y.S.2d 672, 675 (N.Y. Sup. Ct., Yates County 1984).

<sup>20</sup> *See, e.g., Scott L v. Bruce N.*, 509 N.Y.S.2d 971, 973 (N.Y. Fam. Ct., New York County 1986).

<sup>21</sup> *See, e.g., Matter of Adoption of Baby Boy, O.G.*, 547 N.Y.S.2d 806, 806 (N.Y. Sur. Ct., Nassau County 1989).

definition because New York does not define a guardian: A guardian is basically defined as “a person to whom the law has entrusted the custody and control of an infant.”<sup>23</sup>

However, as discussed above, New York law does grant legal authority to a wide range of individuals to consent specifically to the administration of immunizations to a child, including “a grandparent, an adult brother or sister, an adult aunt or uncle, any of whom has assumed care of the child” or anyone who has written authorization from the parent.<sup>24</sup> New York law thus “entrust[s] the care of an infant” to these individuals for purposes of childhood vaccinations.

Although this question has not been definitively addressed by any court, this list should be used as the functional definition of “legal guardian,” under New York law, and thus of “legal representative” for purposes of the federal VIS statute. New York law expressly permits those individuals listed to consent to vaccination on behalf of a minor child who lacks the capacity to consent on her own. This interpretation effectuates the purpose of the New York vaccine provision, which is to ensure access to immunization to as broad a range of children as possible. This also accords with the purpose of the law requiring that a VIS be provided to a parent or guardian, which is to ensure that a person who receives a vaccine understands the risks and benefits involved. Because a child is not ordinarily considered to have the capacity to provide informed consent for medical treatment, the requirement that a healthcare provider give a VIS to the “legal representative” of the child presumes that this purpose is accomplished by providing such information to the person who gives informed consent on behalf of the minor. Similarly, in states like New York where children of a certain age or maturity are capable of providing consent on their own to medical treatment, the purpose of the law is fulfilled by providing the minor him or herself with the VIS.<sup>25</sup>

A representative from the CDC confirmed both that the state immunization law listing other adults authorized to consent on behalf of minors should control the definition of “legal representative” for purposes of the federal law, and that minors themselves may serve as their own legal representatives under certain circumstances. Explaining that “state laws . . . vary on the age at which a child would be eligible to receive a VIS on his or her own without representation,” he clarified that:

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<sup>22</sup> See *Scott L.*, 509 N.Y.S.2d at 973.

<sup>23</sup> See *Cramer*, 473 N.Y.S.2d at 675, citing *Ballentine’s Law Dictionary* 540 (1969).

<sup>24</sup> N.Y. Pub. Health Law § 2504 (McKinney 2006).

<sup>25</sup> Courts have recognized this principal in other contexts. For example, in at least one case, a court recognized that a formal requirement of parental involvement did not make sense when the juvenile was of sufficient age and maturity to be responsible for himself. The court, in a juvenile delinquency proceeding, in effect waived the statutory requirement that a juvenile be released to the custody of his parent or legal guardian, reasoning that given his age, he could be released on his own. *Matter of Solomon D.*, 574 N.Y.S.2d 643 (N.Y. Fam. Ct., New York County 1991) (juvenile could be charged with “bail jumping,” because he could be released on his own, with a requirement that he return to court). *But see Matter of David G.*, 476 N.Y.S.2d 758 (N.Y. Fam. Ct., Kings County 1984) (bail jumping charge could not stand against a juvenile because the court is required to release the juvenile to the custody of a parent or guardian, but instead, released the juvenile on his own); see also *In re Natasha C.*, 580 N.Y.S.2d 334 (App. Div. 1st Dept. 1992) (same).

States have their own laws regarding who can be a child’s legal representative for purposes of immunization—but this could include grandparents, siblings, aunts or uncles, or others. . . . It is unlikely that a minor child would present for immunizations unaccompanied by some adult—and most likely this adult would be authorized to accept the VIS on the child’s behalf. . . . The spirit of the law is that someone—either the vaccine recipient, or if the recipient is too young or is incompetent, a legal representative—be aware of a vaccine’s benefits and risks before the vaccine is administered. The law itself is written in general enough terms that it should be able to accommodate virtually any situation.<sup>26</sup>

The Federal law does not set out any penalty for failure to comply with a VIS. However, this does not mean that a provider who administers an HPV to a minor without providing a VIS to a parent or guardian is absolutely shielded from liability; a lawsuit could still be brought against a provider if the minor-patient experienced adverse effects from the vaccine and the parent seeks redress. The provision of a VIS may provide an affirmative defense in such a suit.<sup>27</sup> Nonetheless, the NYCLU has reviewed existing case-law for claims made against vaccine manufacturers and health care providers who administered vaccines and found no cases where a provider was held liable for failing to provide a VIS. Moreover, the same principle that has protected healthcare providers from liability in general cases where their authority to treat minors without parental consent has been challenged—i.e. the “mature minor” doctrine—would be applicable as a defense here. (*See* section II.B, below).

Federal law thus imposes no absolute parental (or guardian) notification obligation on administering health care professionals. Although federal law requires a health care professional who administers a vaccine to provide a VIS to the parent or legal representative of a child, this does not amount to a requirement of parental notification, because the federal law defers to state law on the question of who is a child’s legal representative. Since a number of adult relatives besides parents (as well as minors themselves), are authorized to act as “legal representatives” for purposes of receiving HPV vaccination, healthcare providers may administer the vaccine to a minor without prior parental consent, as long as there is no reason to believe the parent objects. The VIS may be sent to an adult who has been authorized to care for the child, including, as

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<sup>26</sup> E-mail from Skip Wolfe, Health Education and Information Specialist, National Immunization Program, Centers for Disease Control & Prevention, to Emilie Adams, legal intern, New York Civil Liberties Union (June 15, 2007, 15:17 EST) (on file with NYCLU).

<sup>27</sup> *See, e.g., Mazur v. Merck & Co., Inc.*, 767 F. Supp. 697, 699 (E.D. Pa. 1991). Where parents have brought actions for damages against manufacturers when their children have suffered injury or death as a result of a vaccination, the fact that information about the vaccine was provided served as a defense in those proceedings. In *Mazur v. Merck*, a parent whose child was rendered disabled as a result of a measles, mumps, and rubella vaccine claimed she had not given consent to have her daughter vaccinated, and did not receive any information about the vaccine. *Id.* at 700. Because the parent had not brought suit against the health care provider, however, the court never reached the issue of whether this failure to obtain consent or to provide information, created liability for the health care provider. *Id.* at 711. In another case which was brought against a health care provider who administered a vaccine, the court looked to the question of whether informed consent was obtained from the plaintiff’s mother in deciding the defendant’s motion for summary judgment. *Snawder v. Cohen*, 749 F. Supp. 1473, 1477 (W.D. Ky. 1990). The provision of a VIS in that case, however, was not at issue because the vaccine was administered years before the law requiring provision of a VIS was in effect.

the public health law makes clear, a “grandparent, an adult brother or sister, or an adult aunt or uncle”<sup>28</sup>—or, as discussed below, to the minor herself.

## **B. The Mature Minor Doctrine Permits Minors To Consent on Their Own to the Vaccine**

### **1) The Mature Minor Doctrine, Which Permits Minors to Consent to Their Own Medical Care, Is Widely Accepted.**

In addition to the statutory exceptions that exist permitting minors to consent on their own to medical care under certain circumstances, many states, including New York, permit a “mature” minor—a minor who is emotionally and intellectually mature enough to give informed consent and who lives under the supervision of a parent or guardian—to make health care decisions without parental consent. This is commonly known as the “mature minor” doctrine.

There is no formal process to be declared a mature minor; generally this is to be decided at the discretion of a health care provider. Each state with such a doctrine establishes its own criteria, which may include the minor’s age, medical condition, emotional and intellectual maturity, as well as the treatment’s risks and necessity.<sup>29</sup> Courts then decide on a case-by-case basis whether the minor is sufficiently mature.<sup>30</sup>

For example, in a landmark Tennessee case, *Cardwell v. Bechtol*, the state Supreme Court determined that a licensed osteopath did not commit a tort for treating a 17-year-old girl for chronic back pains without first obtaining her parents’ consent to treat her.<sup>31</sup> The court recognized that “minors achieve varying degrees of maturity and responsibility (capacity) has been part of the common law for well over a century.”<sup>32</sup>

The Supreme Court of Kansas reached the same conclusion in a case in which a mother took action against a hospital for performing a surgical procedure on her 17-year-old daughter’s broken finger tip without first obtaining the mother’s consent.<sup>33</sup> The court determined that, “the sufficiency of a minor’s consent depends upon his ability to understand and comprehend the nature of the surgical procedure, the risks involved and the probability of attaining the desired results in the light of the circumstances which attend.”<sup>34</sup> Based on these factors, the court concluded that the minor was of sufficient

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<sup>28</sup> *See id.*

<sup>29</sup> Law, Youth & Citizenship Program, N.Y. State Bar Ass’n/N.Y. State Educ. Dep’t, *Rights & Responsibilities of Young People in New York: A Legal Guide for Educators and Human Service Providers* 88-89 (James M. Morrissey, ed., 3d ed. 1997).

<sup>30</sup> *See, e.g., In re Rena*, 705 N.E.2d 1155, 1157 (Mass. App. Ct. 1999); *In re Rosebush*, 491 N.W.2d 633 (Mich. Ct. App. 1992); *In re Swan*, 569 A.2d 1202 (Me. 1990); *O.G., P.G., & M.G. v. Baum*, 790 S.W.2d 839 (Tex. Ct. App. 1990); *In re E.G.*, 515 N.E.2d 286, 288 (Ill. App. Ct. 1987), *aff’d in part, rev’d in part*, 549 N.E.2d 322 (Ill. 1989); *Cardwell v. Bechtol*, 724 S.W.2d 739 (Tenn. 1987).

<sup>31</sup> *Cardwell v. Bechtol*, 724 S.W.2d 739, 743-45, 748 (Tenn. 1987) (looking at, among other factors, state statutes that recognize minors’ capacity to assume responsibility, such as criminal statutes that allow 16-year-olds to be tried as adults, driver’s license ages, and the minor’s ability to “appreciate her own conduct’s consequences”).

<sup>32</sup> *Id.* at 744-745

<sup>33</sup> *Younts v. St. Francis Hospital and School of Nursing*, 205 Kan. 292 (1970).

<sup>34</sup> *Id.* at 337

age and maturity to know and understand the nature and consequences and to knowingly consent to the surgery.

Similarly, the Supreme Court of Pennsylvania held that if an “intelligent child of sufficient maturity” may determine custody, waive constitutional rights, receive a life sentence, and “bring a personal injury action against [his] parents” the 16-year-old boy in the case could consent to surgery, even against his mother’s religious objections.<sup>35</sup> The court determined that “as between a parent and the state, the state does not have an interest of sufficient magnitude outweighing a parent’s religious beliefs when the child’s life is not immediately imperiled by his physical condition.”<sup>36</sup>

Several courts have relied on the existence of other statutory exceptions to permit minors to consent to their own medical care or make other important decisions. In Illinois, a 17-year-old afflicted with leukemia refused to consent to necessary blood transfusions because of religious objections.<sup>37</sup> Because the minor’s mother agreed with her daughter’s decision, the State filed a neglect petition in juvenile court. The Illinois Supreme Court relied on the fact that the state statutory scheme already contained exceptions permitting married minors and emancipated minors to consent to medical treatment, and permitting minors over the age of 12 to consent to treatment for drug abuse and venereal diseases. The court concluded that because minors are considered legally capable of consenting to medical care under certain circumstances, “a mature minor may [also] exercise a common law right to consent to or refuse medical care.”<sup>38</sup>

In addition, the mature minor rule has been recognized by the medical ethics policies of numerous medical organizations, including the American Medical Association and the American Academy of Pediatrics.<sup>39</sup> These organizations urge providers to permit a minor with adequate decision-making capacity to consent to medical care and to notify

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<sup>35</sup> *In re Green*, 292 A.2d 387, 392 (Pa. 1972).

<sup>36</sup> *Id.*

<sup>37</sup> *In re E.G.*, 549 N.E.2d 322, 324 (Ill. 1989) (relying generally on legislative history regarding the rights of married minors and emancipated minors to consent to medical treatment and the rights of minors over the age of 12 to consent to treatment for drug abuse and venereal diseases to support its acknowledgement that that a mature minor can control her own medical treatment).

<sup>38</sup> *Id.* at 328.

<sup>39</sup> Council on Ethical & Judicial Affairs, American Med. Ass’n, *Confidential Care for Minors, Ethics Opinion E-5.055* (1992) (“Where the law does not require otherwise, physicians should permit a competent minor to consent to medical care and should not notify parents without the patient’s consent”); American Acad. of Pediatrics, *Policy Statement: Informed Consent, Parental Permission, and Assent in Pediatric Practice (RE9510)*, 95 *Pediatrics* 314 (1995) (“In cases involving emancipated or mature minors with adequate decision-making capacity, or when otherwise permitted by law, physicians should seek informed consent directly from patients”); see also Christine M. Hanisco, *Acknowledging the Hypocrisy: Granting Minors the Right to Choose Their Medical Treatment*, 16 *N.Y.L. Sch. J. Hum. Rts.* 899, 922 n. 179 (2000) (quoting Nat’l Ass’n of Children’s Hosp., *Pediatric Bill of Rights* (1974) (any minor “who is of sufficient intelligence to appreciate the nature and consequences of the proposed medical care and if such medical care is for his own benefit, may effectively consent to such medical care in doctor-patient confidentiality”).

parents only with the patient's consent, in order to avoid the risk that a minor will not receive needed care because he or she will not or cannot involve a parent.<sup>40</sup>

2) New York Courts Have Recognized and Applied the Mature Minor Doctrine.

New York courts in particular have never clearly defined the criteria for determining whether a minor is mature, or definitively established that a mature minor can obtain medical care without parental consent. In one case, however, an appellate court applied the mature minor doctrine in determining whether a 17-year-old could refuse life-saving treatment on religious grounds. Although the court ultimately concluded that the boy was not a mature minor based on evidence that the patient had "never been away from home and [had] never dated a girl,"<sup>41</sup> it recognized that the doctrine exists, and thus, that a mature minor may be able to make such medical decisions. This holding suggests that a court could consider a patient's independence, relationships, and sexual experiences when determining whether a minor is sufficiently mature to consent to treatment.

Courts in New York have also recognized the mature minor doctrine in the context of minors' ability to choose their own religion.<sup>42</sup> In *Whalen v. Allers*, the court based its reasoning that a 14-year-old girl in state foster care was old enough to choose to be baptized in part on the significant constitutional and statutory rights and privileges already extended to minors.<sup>43</sup>

Moreover, New York, like Pennsylvania and Illinois, contains numerous other statutory exceptions permitting minors to consent on their own to certain types of medical care, and permitting certain groups of minors to consent to *all* medical care on their own.<sup>44</sup> This demonstrates the strong public policy of New York State to permit minors to access medical care under certain circumstances without parental consent and amounts to a recognition that minors may be sufficiently capable of giving informed consent. The

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<sup>40</sup> See American Acad. of Pediatrics, *Confidentiality in Adolescent Health Care (RE9151)* (1989) ("Ultimately, the health risks to the adolescent are so impelling that legal barriers and deference to parental involvement should not stand in the way of needed health care"). This comment recognizes that many minors are so embarrassed and sensitive about the behavior or incident that led to the need for health care, that their fear of parental disclosure would cause them to defer or avoid health care. See *infra* Section II.D.2.

<sup>41</sup> *In Re Long Island Jewish Med. Ctr.*, 557 N.Y.S.2d 239, 242-43 (Sup. Ct. Queens Co. 1990).

<sup>42</sup> See e.g., *Bruker v. City of New York*, 337 F. Supp. 2d 539 (S.D.N.Y. 2004) (citing *Whalen v. Allers*, 302 F. Supp. 2d 194, 204 (S.D.N.Y. 2003) ("Courts have regularly upheld the right of a mature minor not emancipated; to pursue his or her own choice of religion regardless of parental attempts to exercise their Constitutional right to raise their children in their own faith"))).

<sup>43</sup> *Whalen v. Allers*, 302 F.Supp.2d 194, 203-04 (S.D.N.Y. 2003) (relying on minors' ability to donate blood, engage in business, petition a court to appoint a General Guardian or a Guardian *ad litem*, join in an adoption petition or a change of name petition, engage in executory contracts which are not void, but merely voidable, and become liable for his or her negligence). The court found that a 14-year-old minor in state custody was mature enough to make her own decisions regarding her religion, even when it conflicted with her mother's wishes.

<sup>44</sup> See *infra* Section II.D.1.

same reasoning that courts have used in adopting the mature minor doctrine in other states thus applies here.<sup>45</sup>

3) The Mature Minor Doctrine Protects Providers from Liability.

Provision of health care under the mature minor doctrine is rarely challenged. Indeed, the New York State Bar Association has not “located a single reported case where a physician was held liable for providing medical treatment to a mature minor without parental consent.”<sup>46</sup> There appears to have been no reported case, in New York or elsewhere, in which a physician has been held liable, solely on the basis of a failure to obtain consent from a parent or guardian, for providing non-negligent care to a mature minor who has given informed consent, “where the care was not controversial and was solely for the benefit of the minor.”<sup>47</sup>

When the mature minor doctrine has been challenged, it has only been in cases of a minor’s refusal of life-saving treatment or intervention. However, courts that determine that parents have a duty to override a minor’s decision to refuse certain life-saving medical procedures still recognize a mature minor’s right to control his or her own medical care in non-life-threatening circumstances.<sup>48</sup>

4) The Mature Minor Doctrine Can Be Applied to Minors Seeking the HPV Vaccine.

The HPV vaccine is a medically appropriate treatment for minors. The CDC’s Advisory Committee on Immunization Practices (ACIP) has recommended the vaccine for girls ages 11-12, and both ACIP and the FDA have approved its use for girls as young as nine.<sup>49</sup> And while the vaccine is recommended for girls who are not yet sexually active, older teens and young women also benefit from the vaccine because they may not yet have been exposed to all four of the strains against which the vaccine prevents.<sup>50</sup>

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<sup>45</sup> See, e.g., *In re E.G.*, 549 N.E.2d 322 (Ill. 1989); *In re Green*, 292 A.2d 387 (Pa. 1972).

<sup>46</sup> Law, Youth & Citizenship Program, N.Y. State Bar Ass’n/N.Y. State Educ. Dep’t, Rights & Responsibilities of Young People in New York: A Legal Guide for Educators and Human Service Providers 88 (James M. Morrissey, ed., 3d ed. 1997).

<sup>47</sup> Jeffrey Blustein, *The Adolescent Alone* 86 (1999); see also Thomas A. Jacobs, *Children and the Law: Rights and Obligations* § 10.6 (May 2007).

<sup>48</sup> See, e.g., *In re E.G.*, 549 N.E.2d 322, 324 (Ill. 1989) (noting that the common law right derived from the mature minor doctrine must be weighed against the state’s interest in the preservation of life); *Commonwealth v. Nixon*, 718 A.2d 311, 313 (Pa. Super. 1998) (although the patient, “as a mature minor, had a right to refuse medical treatment pursuant to her constitutional right to privacy, this right does not discharge her parents’ duty to override her decision *when her life is in immediate danger*”) (emphasis added), *overruled on other grounds by Commonwealth v. Mouzon*, 812 A.2d 617 (Pa. 2002); *In re Long Island Jewish Med. Ctr.*, 557 N.Y.S.2d at 729 (finding that although there is a common law right to consent to or refuse medical treatment as a mature minor, in the case of life-saving treatment, “when the patient is a minor, the court must act *parens patriae* (in place of the parents); because parents may throw their own lives away, if they wish, but they cannot make martyrs of their children”).

<sup>49</sup> Lauri E. Markowitz et al., Centers for Disease Control and Prevention, *Quadrivalent Human Papillomavirus Vaccine: Recommendations of the Advisory Committee on Immunization Practices (ACIP)* (March 23, 2007), [http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5602a1.htm?s\\_cid=rr5602a1\\_e](http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5602a1.htm?s_cid=rr5602a1_e).

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

Moreover, while it is generally true that younger minors are less likely to be considered “mature,” there is no bottom cut-off for a minor to be considered sufficiently mature to make her own health care decisions. Rather, the determination of maturity is an individual assessment performed by a health professional that takes several factors into account. Therefore, a sufficiently mature minor who understands the risks and benefits of the treatment in question as well as the possible alternatives should be able to consent to treatment regardless of her age, as she may with respect to other serious healthcare decisions.

Therefore, there is no principled reason that the mature minor doctrine does not apply with equal force in the context of the HPV vaccine as it does when it comes to other types of medical care.

### **C. New York Public Health Law § 2305 Permits Minors to Consent on Their Own to Receive the Vaccine Because It Is a Treatment for Exposure to a Sexually Transmissible Disease.**

New York statutory law provides an additional basis for provision of the HPV vaccine without parental consent. New York Public Health Law § 2305(2) provides that “[a] licensed physician, or in a hospital, a staff physician, may diagnose, treat or prescribe for a person under the age of twenty-one years without the consent or knowledge of the parents or guardian of said person, where such person is infected with a sexually transmissible disease, or has been exposed to infection with a sexually transmissible disease.” Because HPV is a “sexually transmitted disease,” because sexually active minors have been exposed, and because the HPV vaccine is a treatment, physicians may provide it without parental consent under the statute.

DOH has taken the position that the HPV vaccine is not a “treatment” for purposes of the statute. The NYCLU believes this is an unnecessarily narrow interpretation of the law that contravenes established principles of statutory interpretation.

#### 1) A Vaccination is a Medical Treatment Under Its Plain Meaning.

Public Health Law § 2305 does not define “treat” as used in the statute. When the legislature does not provide a definition of terms used, courts employ the plain meaning of the word to fulfill legislative intent.<sup>51</sup> Under common medical definitions, a vaccine is a “medicinal material which, when introduced properly into the body, is capable of causing the body to produce certain substances (antibodies) that overcome invading viruses, bacteria, or their poisons.”<sup>52</sup> Vaccinations are designed to build up immunity for the purpose of preventing the onset of disease. Thus, a vaccination is a medical treatment given to patients before the presence of disease has been identified.

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<sup>51</sup> See, e.g., *Orens v. Novello*, 783 N.E.2d 492, 495 (N.Y. 2002) (“If the terms of a statute are clear and unambiguous, a court should construe it so as to give effect to the plain meaning of the words used...In cases where the term at issue does not have a controlling statutory definition, courts should construe the term using its usual and commonly understood meaning”).

<sup>52</sup> J.E. Schmidt, *Attorneys’ Dictionary of Medicine & Word Finder* V-1 (1983).

The modern definition of medical treatment also includes prophylactic treatment, and is not limited to those measures taken only after disease or injury strikes.<sup>53</sup> This understanding and use of treatment is supported by a number of legal and medical dictionaries.<sup>54</sup> For example, *Dorland's Medical Dictionary* defines "treatment" as encompassing active treatment (directed immediately to the cure of the disease or injury), causal treatment (directed against the cause of a disease), and prophylactic or preventive treatment (preventing the occurrence of a disease).<sup>55</sup>

HPV is the single greatest cause of both cervical cancer and genital warts. Accordingly, the HPV vaccine is both a causal and a prophylactic treatment. The distinction the Department of Health has made between preventive medical care and medical treatment is a false one.

## 2) Courts Have Recognized Vaccinations as Medical Treatments.

As courts around the country, including New York, have recognized, when the term has been left undefined by the legislature, the plain meaning of treatment encompasses comprehensive preventive treatment, including vaccine treatments.<sup>56</sup> For

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<sup>53</sup> See, e.g., *The American Heritage Steadman's Medical Dictionary* (2d ed. 2004), <http://medical-dictionary.thefreedictionary.com/prophylactic+treatment>.

<sup>54</sup> See, e.g., *Dorland's Medical Dictionary for Health Consumers* (2007), available at <http://medical-dictionary.thefreedictionary.com/treatment> (defining treatment as the "management and care of a patient or the combating of disease or disorder"); *The American Heritage Steadman's Medical Dictionary* (2d ed. 2004), available at <http://medical-dictionary.thefreedictionary.com/treatment> (defining treatment as the administration or application of remedies to a patient or for a disease or an injury; medicinal or surgical management; therapy. Further defining "prophylactic treatment" as "the institution of measures designed to protect a person from an attack of a disease to which the person has been or is liable to be exposed"); *Webster's Third New International Dictionary Unabridged* 2435 (3d ed. 1981) (defining "to treat" as "to care for medically or surgically; deal with by medical or surgical means...to seek cure or relief of"); *Black's Law Dictionary* 1502 (6<sup>th</sup> ed. 1990) (defining treatment as "a broad term covering all steps taken to effect a cure of an injury or disease"); see also, Roscoe N. Gray & Louise J. Gordy, *Attorney's Textbook of Medicine* P.33.12, at 33-4 (3d ed. 1990) ("the most effective treatment of an infectious disease is obviously its prevention" by immunization or vaccination).

<sup>55</sup> *Dorland's Medical Dictionary*, *supra* note 54.

<sup>56</sup> See, e.g., *Kemp by Wright v. State*, 687 A.2d 715, 718 (N.J. 1997) (holding that the examination received prior to a rubella vaccine was an examination "for the purpose of treatment"); *People, on Complaint of Burke, v. Steinberg*, 73 N.Y.S.2d 475, 477 (N.Y. Mag. Ct. 1947) (holding that "vaccination is a treatment given to a human being, even though no disease is present" and the administration of a vaccine is "treatment as well as preventive medicine"). In areas as different as medical malpractice law and family law, vaccines have been recognized as medical treatments for the purposes of actions and court orders in a number of state and federal courts. *Titchnell v. U.S.*, 681 F.2d 165, 170-1 (3d Cir. 1982) (holding that the administration of a flu shot to the plaintiffs fell below the standard of care required for "the treatment of a patient"); *Calabrese v. Trenton State College*, 392 A.2d 600, 606 (N.J. Super. Ct. App. Div. 1978), *aff'd*, 413 A.2d 315 (N.J. 1980) (holding that the "administration of a given drug", here, an anti-rabies vaccine, is a treatment for the purpose of medical malpractice actions); *Boyd v. Louisiana Medical Mut. Ins. Co.*, 593 So. 2d 427, 428-29 (La. Ct. App. 1991) (finding that while Louisiana law requires "physicians...to provide patients with information sufficient to permit the patient to make an informed and intelligent decision on whether to submit to a proposed course of treatment," the risks associated with receiving a polio vaccine were not adequately material to prevent a reasonable person from consenting to the treatment); *In re Christine M.*, 595 N.Y.S.2d 606, 613 (N.Y. Fam. Ct. 1992) (considering, among other factors, "the possibility of a cure (or prevention)" and "the risk associated with the recommended treatment" to conclude

example, the New Jersey Supreme Court has held that “the plain meaning of treatment encompasses the administration of a vaccine.”<sup>57</sup>

In a decision dating back to 1947, a New York magistrate court held in *People, on Complaint of Burke, v. Steinberg*, that:

[A smallpox vaccination] is treatment as well as preventive medicine. In our modern age, the great progress of science is evidenced among other things by preventive medicine which is adopted even before disease makes its appearance and precisely to bar it from the human organism. That, too, must be construed to be the practice of medicine.<sup>58</sup>

The availability and wide use of vaccine treatments supports the inclusion of inoculations into broader conceptions of medical treatment. Indeed, in advancing wide-ranging public policies, numerous courts have found it unnecessary and contrary to legislative intent to distinguish between prevention and treatment in the context of regulation of, and access to, medical care.

In particular, in cases dealing with parental neglect, prisoners’ rights, Social Security disability payments, and mandatory school inoculations, courts in New York have recognized that medical treatment encompasses prophylactic measures focused on preventing the occurrence of disease or illness.<sup>59</sup> By using the terminology of prophylactic treatment, preventive treatment, and medical treatment interchangeably, New York courts have found it unnecessary to distinguish prevention from other types of medical treatment in a variety of different situations. The same should be true here.

3) The HPV Vaccine is a Treatment for a “Sexually Transmitted Disease” or Infection.

Pursuant to Public Health Law § 2311, the Commissioner of the Department of Health is responsible for promulgating a list of sexually transmissible diseases, which “constitutes the definition of sexually transmissible diseases” under section 2305.<sup>60</sup> This list was last amended in 2000. However, the statute does not require that every sexually

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that the parents’ failure to inoculate their children against measles was deprivation of treatment constituting medical neglect).

<sup>57</sup> *Kemp by Wright*, 687 A.2d at 718.

<sup>58</sup> *Burke*, 73 N.Y.S.2d at 477.

<sup>59</sup> *Davis-Atkinson v. Barnhart*, 2003 U.S. Dist. LEXIS 4471, at\*4-\*5 (S.D.N.Y. 2003) (investigating whether “prophylactic treatment” of seizures left plaintiff physically able to work); *Myrick v. City of New York*, 1980 U.S. Dist. LEXIS 15672, at \*8, 9 (S.D.N.Y. 1980) (finding that there was no medical mistreatment because “proper prophylactic treatment was administered”); *Pierce v. Board of Education*, 219 N.Y.S.2d 519, 520-21 (N.Y. App. Div. 1961) (concluding that the threat of small pox necessitated preventive measures of “treatment and control” including inoculations); *In re Christine M.*, 595 N.Y.S.2d at 613 (citing the legislature’s determination that inoculations are treatments constituting sound medical care).

<sup>60</sup> N.Y. Pub. Health Law § 2305(2) (McKinney 2996) (“The commissioner, in determining the diseases to be included in such list, shall consider those conditions principally transmitted by sexual contact and the impact of particular diseases on individual morbidity and the health of newborns.”).

transmissible disease or infection be listed, and does not constitute an exhaustive definition of all recognized sexually transmissible diseases or infections.<sup>61</sup>

While the N.Y. Department of Health has not yet added HPV specifically, the commissioner has included “Ano-Genital Warts” in the list that “constitutes the definition of sexually transmissible diseases under that section.”<sup>62</sup> HPV is the cause of all cases of Ano-Genital warts, and New York State Department of Health publications treat Genital warts and HPV as the manifestation of a single STI.<sup>63</sup> In fact, HPV is a recognized STI,<sup>64</sup> with sexual contact as one of its principal means of transmission.<sup>65</sup>

Therefore, because the CDC, FDA, and the New York State Department of Health itself recognize HPV as a STI, and because the Commissioner’s list includes genital warts, HPV constitutes a “sexually transmitted disease” or infection for purposes of the statute.

#### 4) Sexually Active Minors are Highly Likely to Be Exposed to HPV.

Under New York law, minors who have been exposed to a STI can consent to medical treatment for that STI. Because such a high percentage of the population is known to be infected with HPV (50-90% of sexually active men or women have the virus at some point in their lives),<sup>66</sup> sexually active minors are highly likely to have already been exposed to HPV.<sup>67</sup> In fact, HPV is estimated to be the most common STI in the

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<sup>61</sup> *New York State Soc. of Surgeons v. Axelrod*, 77 N.Y.2d 677, 684-85 (N.Y. 1991) (“[T]he statute does not require that every sexually transmitted disease be listed”). At issue in *Axelrod* was the reasoning behind the Commissioner’s decision not to list HIV. The Court ruled that agency discretion was needed because of the particular privacy concerns of those infected with HIV, who faced potential discrimination as a result of the mandatory reporting and tracing requirements resulting from an STD’s listing.

<sup>62</sup> 10 N.Y.C.C.R. § 23.1. The full list is as follows: Chlamydia trachomatis infection; Gonorrhea; Syphilis; Non-gonococcal Urethritis (NGU); Non-gonococcal (mucopurulent) Cervicitis; Trichomoniasis; Genital Herpes Simplex; PID Gonococcal/Non-gonococcal; Lymphogranuloma Venereum; Chancroid; Ano-genital warts; Granuloma Inguinale; Yeast Vaginitis; Gardnerella Vaginitis; Pediculosis Pubis; Scabies.

<sup>63</sup> See N.Y. State Dep’t of Health, *Communicable Diseases Fact Sheet: Human Papillomavirus*, (2004), [http://www.health.state.ny.us/diseases/communicable/human\\_papillomavirus/docs/fact\\_sheet.pdf](http://www.health.state.ny.us/diseases/communicable/human_papillomavirus/docs/fact_sheet.pdf) (“Venereal warts...are a common sexually transmitted disease (STD) caused by the human papillomavirus (HPV)”; N.Y. State Dep’t of Health, *Genital Warts Brochure* (2005), [http://www.health.state.ny.us/diseases/aids/youth/docs/genital\\_warts\\_brochure.pdf](http://www.health.state.ny.us/diseases/aids/youth/docs/genital_warts_brochure.pdf) (“Genital warts are also called venereal warts or HPV”).

<sup>64</sup> See, e.g., Ctrs. for Disease Control & Prevention, U.S. Dep’t of Health & Human Servs., *Sexually Transmitted Diseases: Human Papillomavirus (HPV) Infection*, <http://www.cdc.gov/std/hpv/default.htm> (last visited July 12, 2007); U.S. Food & Drug Admin. Office of Women’s Health, U.S. Dep’t of Health & Human Servs., *HPV*, <http://www.fda.gov/womens/getthefacts/hpv.html> (last visited July 12, 2007); MedlinePlus, Nat’l Library of Medicine, *HPV*, <http://www.nlm.nih.gov/medlineplus/hpv.html> (last visited July 12, 2007).

<sup>65</sup> *Human Papillomavirus (HPV) Infection*, *supra* note 64 (noting that of the 100 strains or types of HPV, more than 30 of these viruses are sexually transmitted).

<sup>66</sup> Dunne et al., *supra* note 2.

<sup>67</sup> Ctrs. for Disease Control & Prevention, U.S. Dep’t of Health & Human Servs., *HPV and HPV Vaccine: Information for Healthcare Providers*, <http://www.cdc.gov/std/hpv/hpv-vacc-hcp-3-pages.pdf> at 2 (2006) (“As many as half of infected males and females with HPV are adolescents and young adults, 15-24 years of age” (citing Willard Cates, Jr., *Estimates of the incidence and prevalence of sexually transmitted diseases in the United States*, 26(4) *Am. Social Health Ass’n Panel Supp.* S2-S7 (1999))).

United States.<sup>68</sup> The highest rates of HPV infection occurs among adolescents and young adults 15-24 years old.<sup>69</sup> Moreover, because there is no HPV test for sexually active men, and because many minors who have been exposed to the virus will exhibit no symptoms,<sup>70</sup> preventive treatment is especially appropriate for the disease. Even a minor is already sexually active, the vaccine can still offer future protection against strains of HPV that s/he may not yet have encountered. Providers should thus be permitted to provide this treatment to minors without obtaining parental consent.

5) “Treatment” Should be Interpreted Broadly to Further the Intent of the Legislature and the Public Good.

Many courts have held that a broader definition of treatment should be adopted to further the legislative intent to protect public health.<sup>71</sup> In particular, a government’s interest in maintaining a healthy population can outweigh a parent’s refusal to consent.<sup>72</sup> The strong common threat of these decisions is the courts’ recognition that medical treatment can and should be read as an expansive and not restrictive term when public health interests are being advanced.

Public Health Law § 2305 should be interpreted to permit adolescents to consent on their own to administration of the vaccine because the statute is remedial in nature, and as such, should be interpreted broadly to effectuate its intended purpose.<sup>73</sup> The intent of the New York legislature in enacting § 2305 was to encourage and ensure minors’ access to confidential care related to sexual health without fear of parental involvement. The distinction being made by the DOH between treatment and prevention does not further the intent of the legislature. DOH’s narrow interpretation of the statute actually contravenes that purpose.

By discouraging minors who would otherwise receive the vaccination treatment from doing so, the DOH does not further the interest of the State in encouraging minors

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<sup>68</sup> *Id.* (citing Hillard Weinstock et al., *Sexually transmitted infections in American youth: incidence and prevalence estimates, 2000*, 36 *Persp. on Sexual & Reprod. Health* 1, 6-10 (2004)).

<sup>69</sup> Dunne, *supra* note 2; CDC, *supra* note 2, at 2; Weinstock et al., *supra* note 5, at 4.

<sup>70</sup> *Human Papillomavirus (HPV) Infection*, *supra* note 64.

<sup>71</sup> *Kemp by Wright*, 687 A.2d at 718-19 (finding that the legislature intended treatment to encompass all ordinary medical care under its Tort Claims Act immunity exception clause, and that vaccinations are ordinary medical care); *In re Christine M.*, 595 N.Y.S.2d at 613 (concluding that the legislature had properly imposed upon parents a broad affirmative duty to provide their children with adequate medical care, including inoculations, for the public health); *Pierce v. Board of Education*, 219 N.Y.S.2d at 520-21 (finding that mandatory small pox vaccination for public school students should be upheld, given the “highly contagious” disease’s necessitation of “strict measures of treatment and control”); *Burke*, 73 N.Y.S.2d at 477 (holding that the purpose of New York Educ. Law § 1263(2)(a) and its use of the general term “treat” should be read broadly to protect the “general public”). *But cf. Standbridge v. Union Pac. R.R. Co.*, 479 F.3d 936, 942 (8th Cir. 2007) (distinguishing contraception as unrelated to pregnancy because, “contraception is not a medical treatment that occurs when or if a woman becomes pregnant; instead, contraception prevents pregnancy from even occurring”).

<sup>72</sup> *See, e.g., In re Christine M.*, 595 N.Y.S.2d at 611 (“The United States Supreme Court has historically recognized that the right of parents to rear their children in accordance with their personal and religious beliefs must give way when the health or safety of children is threatened or when parental conduct poses some substantial threat to public safety”).

<sup>73</sup> *Scanlan v. Buffalo Public Sch. Sys.*, 90 N.Y.2d 662, 676 (1997).

to prevent the spread of contagious, serious disease. New York Public Health Care Law § 2305 is not given full effect if minors cannot access preventive medical treatment, including the HPV vaccine.

**D. Requiring Parental Consent Contravenes the Public Policy of New York State to Provide Confidential Access to Services Related to Reproductive and Sexual Health.**

1) New York Public Policy Supports Providing Teens With Unimpeded Access to Sexual Health Care Services.

Requiring parental consent for the vaccine also contravenes the strong public policy of New York State, embodied in numerous statutes and regulations, of providing teens with unimpeded access to medical care related to reproductive and sexual health. For example, under New York's public health law, teens can consent on their own to testing and treatment for sexually-transmitted infections, abortion services, and other health care related to pregnancy, without parental consent.<sup>74</sup> These statutes reflect recognition of the importance, from a public health perspective, of providing teens with unimpeded access to these critical services.

2) Many Teens Will Not Seek Sexual Health Care Services if Confidentiality is Compromised.

Studies have clearly shown that teens will simply not seek sexual health care services if their confidentiality is compromised. In a nationwide survey of students, the most common reason (35%) adolescents gave for failing to obtain needed health care was that they did not want a parent to know.<sup>75</sup> A 2002 study in the *Journal of the American Medical Association* showed that almost half of sexually active teens visiting a family planning clinic would stop using clinic services if their parents were notified that they were seeking birth control, and another 11% reported that they would delay testing or treatment for STIs, including HIV. Notably, though, virtually all (99%) reported that they would continue having sex.<sup>76</sup>

3) Parental Notification Could Result in Harm to the Minor.

Minors who do not wish to disclose to their parents that they are, or will soon become, sexually active often have good reasons, and threatening to compromise their

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<sup>74</sup> See N.Y. Pub. Health Law §§ 2504, 2305 (McKinney 2006).

<sup>75</sup> J.D. Klein et al., *Access to medical care for adolescents: Results from the 1997 Commonwealth Fund Survey of the Health of Adolescent Girls*, 25 J. of Adolescent Health 120 (1999).

<sup>76</sup> D.M. Reddy et al., *Effect of Mandatory Parental Notification on Adolescent Girls' Use of Sexual Health Care Services*, 288 JAMA 710 (2002); see also Carol A. Ford et al., *Influence of Physician Confidentiality Assurances on Adolescents' Willingness to Disclose Information and Seek Future Health Care*, 278(12) JAMA 1029-34 (Sept. 1997) (finding that assurances of confidentiality increased adolescents willingness to return for a future visit from 62% to 72%); Tina L. Cheng et al., *Confidentiality in Health Care, a Survey of Knowledge, Perceptions, and Attitudes Among High School Students*, 269(11) JAMA 1404-07 (March 1993) (36% of kids with health concerns they wish to keep private would forgo healthcare if their parents might find out); T.M. Meehan et al., *The Impact of Parental Consent on the HIV Testing of Minors*, 87 Am. J. of Pub. Health 1338 (1997) (finding that that the number of adolescents tested for HIV in state-funded HIV testing centers in Connecticut doubled after parental consent requirements were removed, and visits and tests of high-risk minors in particular tripled).

confidentiality can have serious consequences. In one study, 30 percent of teens who did not tell a parent that they were pregnant feared physical violence between themselves and their parents (in many cases because it had already occurred) or being forced to leave home.<sup>77</sup> Among minors whose parents found out about the pregnancy without being told by the minor herself, 58 percent reported one or more adverse consequences.<sup>78</sup> Of those, a minimum of 6 percent suffered serious consequences, including physical violence at home, being beaten, being forced to leave home or having the health of their parents affected.<sup>79</sup> Eighteen percent said their parents were forcing them to have an abortion. These consequences were two to four times as common when the parents discovered the pregnancy as when they were told by their daughter herself.<sup>80</sup>

The same concerns that animate the various statutory exceptions permitting minors to access certain types of care on their own apply equally in the case of inoculation against HPV. Minors may fear that their parents will find out they have received the vaccine (and/or that they have received other confidential services related to reproductive and sexual health), and that they will suffer harmful consequences due to their parents discovery that they are or will soon become sexually active. Minors should not be impeded from receiving this potentially life-saving treatment because of such fears.

### **III. Conclusion**

The best course for providers administering the HPV vaccine, as with any medical treatment, is of course to attempt to obtain a minor's consent to involve a parent in the immunization decision. This is particularly important in light of the current DOH position that parental consent is required for the vaccine.

However, if parental consent is not possible, it is the NYCLU's position that New York law supports the provision of the vaccine without parental consent. There is no affirmative requirement of parental consent under either New York or federal law. New York's Public Health Law explicitly permits adult grandparents, adult siblings, and aunts/uncles, as well as parents, to authorize a minor's immunization so long as the parent does not object to the immunization. However, it does not otherwise require parental consent. The federal requirement that a Vaccine Information Statement be provided to the legal representative of the child may be satisfied by providing the VIS to an adult relative authorized to consent to vaccination on the minor's behalf, because the federal law defers to state law on this issue.

Vaccination against HPV may also be authorized by, and the VIS provided to, the minor herself. Minors may consent on their own to administration of the vaccine under the mature minor doctrine, which is well-established in other states and has been recognized and applied in New York. Minors also have authority to consent under the

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<sup>77</sup> See Stanley K. Henshaw and Kathryn Kost, *Parental Involvement in Minors' Abortion Decisions*, 24 *Fam. Plan. Persp.* 196, 207 (1992).

<sup>78</sup> *Id.*

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

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

state statute governing provision of diagnosis, testing, and treatment for sexually transmitted infections because HPV is a recognized STI that causes a sexually transmitted infection (genital warts), and because sexually active minors have likely been exposed to HPV. Moreover, to require parental consent would contravene New York State's long-standing public policy of providing confidential access to reproductive and sexual health services to minors. Because New York law permits minors to consent on their own to STI treatment, and mature minors may consent for their own medical care generally, healthcare providers may administer the vaccine to minors without parental consent. If a minor does not wish the provider to notify a grandparent, adult aunt/uncle, or sibling authorized to consent on the minor's behalf, or if there is reason to believe that the parent objects to the vaccination, then the federal VIS may be provided to the minor herself.