Dexter A. Johnson
LEGISLATIVE COUNSEL

900 COURT ST NE S101
SALEM, OREGON 97301-4065
(503) 986-1243
FAX: (503) 373-1043
www.oregonlegislature.gov/lc

STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

April 11, 2023

Senator Cedric Hayden
900 Court Street NE S315
Salem OR 97301

Re: Services provided to minors under A-engrossed House Bill 2395 (2023)

Dear Senator Hayden:

You asked four questions about the services that may be provided to minors under A-engrossed House Bill 2395. We first provide an overview of the current law, followed by a summary of HB 2395-A, and finally answer each of your questions.

Current law regarding minors and medical treatment.

As discussed in detail below, under existing law, a minor[1] who is under 14 years of age generally requires parental consent to receive most medical treatment. Beginning at age 14, a minor has statutory authority to consent to certain physical, behavioral and mental health care provided by specified health care providers without parental consent.

The United States Supreme Court has long recognized a parent's fundamental right to make decisions concerning the care, custody and control of the parent's minor children.[2] That right is also expressly recognized in Oregon statutory law. As the Oregon Legislative Assembly has explained:

> It is the policy of the State of Oregon to guard the liberty interest of parents protected by the Fourteenth Amendment to the United States Constitution and to protect the rights and interests of children as provided in [ORS 419B.090 (2)]. The provisions of [ORS chapter 419B] shall be construed and applied in compliance with federal constitutional limitations on state action established by the United States Supreme Court with respect to interference with the rights of parents to direct the upbringing of their children, including, but not limited to, the right to . . . make health care decisions for their children. . . .[3]

[1] Unless otherwise specifically stated, as used in this opinion, "minor" means an individual who is unmarried and under 18 years of age.
[2] *Troxel v. Granville*, 530 U.S. 57, 66 (2000), *citing Stanley v. Illinois*, 405 U.S. 645 (1972); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Parham v. J.R.,* 442 U.S. 584, 602 (1979); *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).
[3] ORS 419B.090 (4).

Accordingly, absent some legitimate state interest or legislative action, until a minor reaches the age of majority, the minor's parent has the authority to make health care decisions on the minor's behalf. However, parental decision-making authority is not absolute.[4] Under Oregon law, minors are recognized as "individuals who have legal rights"[5] and the state may interfere with parental decision-making to protect those rights.[6]

In 1969, the Oregon Legislative Assembly began to recognize limited rights of minors to consent to certain medical treatment without parental consent. ORS 109.610 (enacted in 1969 and originally codified as ORS 109.105) grants a minor of any age the authority to consent to medical treatment for certain sexually transmitted infections.[7] ORS 109.640 (enacted in 1971) permits certain medical professionals to provide a minor of any age with birth control information and services and grants minors who are at least 15 years of age the ability to consent, without the consent of a parent or guardian, to treatment by hospitals, certain medical professionals, dentists and optometrists.[8] Finally, and relevant to your questions, ORS 109.675 (enacted in 1985) provides that a minor who is at least 14 years of age "may obtain, without parental knowledge or consent, outpatient diagnosis or treatment of a mental or emotional disorder or a chemical dependency, excluding methadone maintenance" by certain health care providers.[9] Each of these statutes conveys upon the minor the affirmative, legal right to consent to certain treatment without parental notification or consent. If a minor is below the age of consent or if the type of treatment the minor seeks to receive is not of the type to which the minor is old enough to consent by statute, the minor must have parental consent to receive the sought-after treatment.[10] Nevertheless, if the state determines that a minor's parent is neglecting or abusing the minor or refusing to consent to necessary emergency medical care, the state may intervene and, depending on the circumstances, make medical decisions on behalf of the minor.

A-engrossed House Bill 2395 (2023)

House Bill 2395-A, "relating to substance use," seeks to address "the opioid crisis in which [the residents of the State of Oregon] see ourselves"[11] with "a multipronged approach focused on substance use prevention, harm reduction and treatment."[12] More specifically, the bill does the following:

[4] *Parham*, 442 U.S. at 604.
[5] ORS 419B.090 (2).
[6] ORS 419B.090 (4).
[7] ORS 109.610.
[8] ORS 109.640.
[9] ORS 109.675 (1).
[10] However, if the minor's access to the sought-after treatment or ability to refuse consent to sought-after treatment implicates the minor's constitutional rights, it is possible that a court may find that the minor has the right to consent or refuse consent to the specific treatment at issue. *See, e.g., Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976) (holding that the state may not impose a blanket provision requiring the consent of a parent as a condition an unmarried minor to exercise the minor's then constitutional right to access abortion services); *Bellotti v. Baird*, 443 U.S. 622, 643 (1979) (holding that, although the state may have special interest in encouraging a minor to consult with their parents regarding important medical decisions, "the unique nature and consequences of the abortion decision make it inappropriate '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'").
[11] House Bill 2395-A preamble.
[12] *Id*.

- Increases access to short-acting opioid antagonists[13] by allowing the distribution and administration of short-acting opioid antagonists by more individuals and to more individuals and entities than current law allows;[14]
- Allows the Public Health Officer or physician employed by the Oregon Health Authority (OHA) to issue a standing order to prescribe short-acting opioid antagonists to specified individuals and entities;[15]
- Allows the owner of a building or facility to which the public has legal access to store one or more short-acting opioid antagonist kits in a location easily accessible to the public for use by members of the public;[16]
- Allows a school administrator, teacher or other school employee to administer a short-acting opioid antagonist to a student who experienced or is experiencing an opioid overdose without written permission and instructions from the student's parents or guardian;[17]
- Exempts certain items from the definition of "drug paraphernalia;"[18]
- Removes the lower age limit for an individual who is a minor to obtain outpatient diagnosis or treatment of a substance use disorder by a mental health care provider without parental knowledge or consent;[19]
- Directs OHA to establish guidance for communication among local mental health authorities regarding the death of an individual who is 24 years of age or younger when the presumed manner of death is suspected to be the result of an opioid overdose or other overdose;[20] and
- Provides protection from civil, and in some cases criminal, liability, for the administration or failure to administer a short-acting opioid antagonist, or the provision of substance use disorder treatment.[21]

The only changes that HB 2395-A makes to a minor's ability to consent to treatment and to the disclosure of treatment information to the minor's parents are as follows:

- The amendments to ORS 109.675 by section 17 of HB 2395-A remove the lower age limit at which a minor may consent, without parental consent, to substance use disorder treatment.
- Section 16 of HB 2395-A moves the definition of "mental health care provider" from ORS 109.680 into its own section and expands the list of providers from which a minor may obtain outpatient treatment for mental or emotional disorders and for substance use disorders to include chiropractic physicians licensed under ORS chapter 684 and organizational providers, as defined in ORS 430.637, that hold a certificate of approval.
- Section 16 of HB 2395-A defines "minor."

---

[13] House Bill 2395-A, section 1, amending ORS 689.681 (1), provides, "'[s]hort-acting opioid antagonist' means any short-acting drug approved by the United States Food and Drug Administration for the complete or partial reversal of an opioid overdose." This definition replaces the term "naloxone" throughout the Oregon Revised Statutes.
[14] *See* HB 2395-A section 1, amending ORS 689.681; section 2, amending ORS 689.682; section 3, amending ORS 689.684; and section 4, amending ORS 689.686.
[15] HB 2395-A section 7.
[16] HB 2395-A section 8.
[17] HB 2395-A section 12, amending ORS 339.870.
[18] HB 2395-A section 21, amending ORS 475.525.
[19] HB 2395-A section 17, amending ORS 109.675.
[20] HB 2395-A section 26.
[21] *See*, for example, HB 2395-A section 1, amending ORS 689.681; section 13, amending ORS 339.871; and section 19, amending ORS 109.685.

- The amendments to ORS 109.680 by section 18 of HB 2395-A clarify that the exceptions to disclosure of the minor's treatment and diagnosis information under the new subsection (2) also apply to the requirement that the provider involve the minor's parents in the minor's treatment before the treatment is concluded.

1. You asked us to opine on the following comment:

> Proponents of [HB 2395-A] argue it's necessary to provide medical autonomy for treatment to minors under age 14 because the parental situation at home could be such that a child would be in danger if parents knew that their minor child had a substance abuse issue. However, if a child was at such a risk (experiencing a substance abuse issue and the parents were a harm risk to the child) wouldn't that (a) trigger under current law the need for a mental health provider to mandatorily report the threat of abuse to DHS and (b) wouldn't DHS have the ability to step in through the courts and intervene in the health of that child through a judicial procedure? It seems that if the concern here is for children with parents that have the potential to harm the child for finding out that their child has a substance abuse issue, that's a different issue that needs addressing rather than giving a blanket statute to all minors of any age to seek treatment outside of their home without initial parental guidance and knowledge.

Restating your question as we understand it, if a minor under 14 years of age is experiencing a substance use disorder and the minor is at risk of being harmed by the minor's parents if the minor must obtain the parent's consent to receive substance use disorder treatment:

(a) Is a mental health care provider required to report the minor's risk of harm by the parents as suspected child abuse?

(b) Under what circumstances would the Department of Human Services (DHS) be authorized to intervene on the minor's behalf?

(c) Is there a judicial procedure through which the minor could obtain substance use disorder treatment without parental consent?

Child abuse reporting

In Oregon, certain persons, including the health care providers authorized to provide services to a minor under ORS 109.640 and 109.675 without parental consent,[22] have a duty to report suspected child abuse to the relevant authorities when the person has "reasonable cause

[22] Although ORS 40.235 recognizes physician-patient privilege, that privilege does not obviate a physician's duty to report suspected child abuse. ORS 419B.010 (1) provides that:

> Nothing contained in ORS 40.225 to 40.295 or 419B.234 (6) affects the duty to report imposed by this section, except that a psychiatrist, psychologist, member of the clergy, attorney or guardian ad litem appointed under ORS 419B.231 is not required to report such information communicated by a person if the communication is privileged under ORS 40.225 to 40.295 or 419B.234 (6).

to believe that any child with whom the [person] comes in contact has suffered abuse."[23] ORS 419B.005 (1)(a) defines "abuse" for purposes of Oregon's child abuse reporting statutes and sets forth a number of acts which, if committed against a minor, constitute child abuse. Those acts include assault, certain mental injuries, rape, sexual abuse, sexual exploitation, negligent treatment or maltreatment, threatened harm, human trafficking, permitting a child to be present where methamphetamines are being manufactured and the unlawful exposure to controlled substances. The most relevant types of abuse that may be implicated by your hypothetical would likely be abuse by assault, negligent treatment or maltreatment of the child or threatened harm to the child. ORS 419B.005 provides:

> (1)(a) "Abuse" means:
>
> (A) Any assault, as defined in ORS chapter 163, of a child and any physical injury to a child which has been caused by other than accidental means, including any injury which appears to be at variance with the explanation given of the injury.
>
> . . .
>
> (F) Negligent treatment or maltreatment of a child, including but not limited to the failure to provide adequate food, clothing, shelter or medical care that is likely to endanger the health or welfare of the child.
>
> (G) Threatened harm to a child, which means subjecting a child to substantial risk of harm to the child's health or welfare.
>
> . . .
>
> (b) "Abuse" does not include reasonable discipline unless the discipline results in one of the conditions described in paragraph (a) of this subsection.

You asked whether a health care provider would be required to report as suspected abuse parental actions that create a risk of harm to the minor in response to the minor's notifying the parent of the minor's substance use disorder in the process of obtaining parental consent to treatment. A mandatory child abuse reporter who has reasonable cause to believe that a minor with whom the reporter has come in contact has been abused or that any person with whom the reporter has come in contact has abused a minor, is required to immediately report the suspected abuse to either DHS or a law enforcement agency.[24] As discussed above, all of the health care providers listed in ORS 109.640 and 109.675 are mandatory reporters of child abuse. Accordingly, if the parent of a minor under 14 years of age consents to the minor receiving substance use disorder treatment and the minor is receiving treatment from a mandatory child abuse reporter, then yes, if the health care provider reasonably believes that the minor has been abused by the minor's parents, the health care provider would be required under ORS 419B.010 to report the suspected abuse.

However, we understand your hypothetical to assume that the minor's parents have consented to the minor receiving treatment for the substance use disorder and it is during this treatment that the health care provider learns of the suspected abuse. If the minor is under 14, under current law, the minor would not be able to initiate treatment without parental consent. If the parent's reaction to the minor disclosing a substance use disorder is to abuse the minor, it is possible that the parent may elect to withhold consent to the minor obtaining treatment for the

[23] ORS 419B.010 (1); *see* ORS 419B.005 (6)(a) (defining "public or private official" to include a "[p]hysician or physician assistant licensed under ORS chapter 677 or naturopathic physician, including any intern or resident").
[24] *See* ORS 419B.010 (1).

substance use disorder. In such a circumstance, unless the health care provider has some other contact with either the parent or the minor and reasonable cause to believe that the parent is abusing the minor, it is not clear how the health care provider's duty to report the suspected abuse would be triggered.

Juvenile court jurisdiction

You also asked under what circumstances DHS would be authorized to intervene on the minor's behalf. As described above, one of the forms of child abuse includes negligent treatment or maltreatment of the minor, including the failure to provide adequate medical care if the failure is likely to endanger the health or welfare of the minor.[25] Depending on the minor's particular circumstances, it is possible that the parent's refusal to consent to the minor's treatment for a substance use disorder, in and of itself, could rise to the level of reportable child abuse if the refusal to consent "is likely to endanger the health or welfare of the [minor]." Assuming that DHS becomes aware of the situation, or receives some other report of abuse, it is possible that DHS could try to intervene in the minor's situation by filing a petition for juvenile court jurisdiction under ORS 419B.100.

ORS 419B.100 provides several paths through which the juvenile court may assert dependency jurisdiction in a case involving a person under 18 years of age. The paths most likely relevant to your hypothetical are ORS 419B.100 (1)(c), which provides juvenile court jurisdiction over a minor "whose condition or circumstances are such as to endanger the welfare of the [minor] or of others," or ORS 419B.100 (1)(e)(C), which provides juvenile court jurisdiction over a minor "[w]hose parents or any other person or persons having custody of the person have . . . [s]ubjected the person to cruelty, depravity or unexplained physical injury."

As discussed above, the policy of the State of Oregon is to balance parental rights to the care, custody and control of their minor against the minor's interests and rights, including the right be free from physical, sexual or emotional abuse or exploitation and freedom from substantial neglect of basic needs.[26] To that end, the juvenile court may exercise jurisdiction over a case involving a minor if "the [minor's] condition or circumstances give rise to a current threat of serious loss or injury that is reasonably likely to be realized"[27] and DHS has the burden of "providing a connection between the allegedly risk-causing conduct and the harm to the [minor]."[28]

Returning to your hypothetical, if a minor who is under 14 years of age requires substance use disorder treatment but, upon requesting parental consent to obtain treatment, is subjected to abuse by the parent, it is possible that DHS could intervene on the minor's behalf if:

- DHS becomes aware of the situation;
- DHS is able to prove that the parent's reaction to the finding out that the minor has a substance use disorder requiring treatment is reasonably likely to create a current threat of serious loss or injury to the minor; and
- The juvenile court agrees with DHS's position.

If the juvenile court asserts jurisdiction over the matter:

[25] ORS 419B.005 (1)(a)(F).
[26] *See* ORS 419B.090 (2).
[27] *Matter of T.W.* 305 Or. App. 75, 81 (2020).
[28] *Id*.

- ORS 419B.110 authorizes the court to consent to emergency medical care for the minor.
- ORS 419B.352 authorizes the juvenile court to direct that a minor be examined or treated by specified health care providers or to receive other special care or treatment in a hospital or a facility, subject to the parent's rights to make health care decisions for their children.[29]
- ORS 419B.373 authorizes the person or entity appointed by the court as the minor's custodian to consent to "ordinary medical, dental, psychiatric, psychological, hygienic or other remedial care and treatment" for the minor.
- ORS 419B.376 authorizes the person or entity appointed by the court as the minor's guardian to consent to surgery on the minor's behalf.
- ORS 418.307 authorizes specified health care providers to provide treatment to the minor without consent if the health care provider determines that "prompt action is reasonably necessary to avoid unnecessary suffering or discomfort or to effect a more expedient or effective cure" and the provider is unable to obtain consent from the minor's parent or legal guardian.

Emergency medical care

Regardless of whether a dependency petition has been filed, "if a child requires emergency medical care, including surgery, and no parent is available or willing to consent to the care, a judge of the juvenile court may authorize the care."[30] Accordingly, if the minor's situation escalates to an emergency and the minor's parents are unavailable or unwilling to consent to the minor's treatment, ORS 419B.110 does provide a judicial procedure through which emergency treatment may be authorized by the court. Although ORS 419B.110 was enacted in 1993, we are unaware of any case law regarding the application of this statute in which the court authorized a minor to obtain treatment for a nonemergency situation over the objection of the minor's parents. As discussed above, it is the policy of this state to "guard the liberty interest of parents protected by the Fourteenth Amendment to the United States Constitution."[31] Therefore, while it is possible that the court may intervene and authorize emergency medical treatment if the minor is under 14 years of age and the minor's substance use disorder is so severe that they require emergency medical intervention to prevent life-threatening withdrawal symptoms, any court action must weigh the particular facts of the minor's situation against the parents' rights to make medical decisions on behalf of their child. Absent a finding that the parents are unfit or a life-threatening emergency, we believe it is more likely that the court would defer to the minor's parent's regarding the minor's medical treatment.[32]

2. "Would it be safe to infer since [methadone] is the only drug excluded, and because many of the professions described as mental health [care] providers otherwise have prescribing authority elsewhere in statute, that this measure would allow them to provide any other prescription drug or non-prescription therapy in the course of their treatment for substance abuse?"

Yes, a mental health care provider who has prescriptive authority may prescribe a prescription drug as part of substance use disorder treatment under both the current and amended versions of ORS 109.675. House Bill 2395-A provides,

---

[29] *See Department of Human Services v. S.M*, 256 Or. App. 15, 23 (2013).
[30] ORS 419B.110.
[31] ORS 419B.090.
[32] The court's decision to intervene and authorize medical treatment over the objection of a minor's parents is necessarily fact-dependent. If you have a specific fact pattern that you would like us to analyze in more detail, we would be happy to provide a supplemental opinion addressing that set of specific facts.

> "Mental health care provider" means a:
> (a) Physician licensed under ORS chapter 677;
> (b) Physician assistant licensed under ORS 677.505 to 677.525;
> (c) Psychologist licensed under ORS 675.010 to 675.150;
> (d) Nurse practitioner licensed under ORS 678.375 to 678.390;
> (e) Clinical social worker licensed under ORS 675.530;
> (f) Licensed professional counselor licensed under ORS 675.715;
> (g) Licensed marriage and family therapist licensed under ORS 675.715;
> (h) Naturopathic physician licensed under ORS chapter 685;
> (i) Chiropractic physician licensed under ORS chapter 684;
> (j) Community mental health program established and operated pursuant to ORS 430.620 when approved to do so by the Oregon Health Authority pursuant to rule; or
> (k) Organizational provider, as defined in ORS 430.637, that holds a certificate of approval.[33]

A mental health care provider may provide in the course of substance use disorder treatment any services that are within the mental health care provider's scope of practice and authority, except that if the patient is a minor seeking treatment under ORS 109.675, a mental health care provider may not provide methadone treatment to the patient. Some of the individuals included in the definition of mental health care provider, such as a physician licensed under ORS chapter 677,[34] have authority to prescribe drugs. A physician who is providing substance use disorder treatment to a minor may, in the professional judgment of the physician, prescribe to the minor a prescription drug in the course of the minor's substance use disorder treatment. A clinical social worker licensed under ORS 675.530,[35] however, does not have prescriptive authority so may not prescribe a prescription drug in the course of substance use disorder treatment, but may provide any service that is within the licensed clinical social worker's scope of practice.[36]

As discussed above, when the Legislative Assembly enacted ORS 109.675 in 1985, it made a policy decision to exclude methadone maintenance from the chemical dependency treatments to which a minor could consent without parental consent.[37] That policy decision is carried forward in HB 2395-A, which simply removes the lower age limit for consent to chemical dependency treatments but does not expand or limit the scope of treatments to which a minor may consent.

Thus, under current law and under HB 2395-A, a mental health care provider who has prescriptive authority may prescribe a prescription drug, other than methadone treatment, in the course of treating a minor for a substance use disorder under ORS 109.675.

---

[33] HB 2395-A section 16 (1).
[34] HB 2395-A section 16 (1)(a).
[35] HB 2395-A section 16 (1)(e).
[36] ORS 675.510 (2) provides "'Clinical social work' means:
(a) A specialty within the practice of master's social work that requires the application of specialized clinical knowledge and advanced clinical skills to the assessment, diagnosis or treatment of mental, emotional or behavioral disorders or conditions, or as further defined by the [State Board of Licensed Social Workers] by rule;
(b) The application of services described in paragraph (a) of this subsection to the provision of individual, marital, couples, family or group counseling or psychotherapy; or
(c) The clinical supervision, as defined by the board by rule, of services described in paragraphs (a) and (b) of this subsection."
[37] *See* House Bill 2651 (1985), chapter 525, Oregon Laws 1985.

3. "Does the civil liability in the bill extend to [the mental health care provider] for that same treatment? So here as an example, suppose the prescribing mental health [care] provider determines that the underlying substance abuse issue is caused by an undiagnosed mental or behavioral health issue. Could that provider then be allowed under this bill to prescribe antidepressants, psychotropic drugs, or behavioral modification drugs without parental consent and without civil liability for any injury that arises from that interaction with the child?"

With some limitations, a mental health care provider may, under current law and under HB 2395-A, prescribe prescription drugs in the course of treating a minor patient for a mental or emotional disorder without parental consent. Whether a mental health care provider may be civilly liable depends on the specific facts and circumstances. House Bill 2395-A amends ORS 109.675 to provide,

> (1)**(a) A minor may obtain, without parental knowledge or consent, outpatient diagnosis or treatment of a substance use disorder, excluding methadone treatment, by a mental health care provider.**
>
> (b) A minor 14 years of age or older may obtain, without parental knowledge or consent, outpatient diagnosis or treatment of a mental or emotional disorder [*or a chemical dependency, excluding methadone maintenance,*] by a **mental health care provider**. . . .
>
> (2) [*However*,] The person providing treatment **under this section** shall have the parents of the minor involved before the end of treatment . . . .[38]

The current version of ORS 109.675 allows a minor 14 years of age or older to seek, without parental consent, treatment for a substance use disorder, and HB 2395-A removes that age limit. However, as discussed above, in most circumstances, the mental health care provider must inform the minor's parents of the treatment before the end of the treatment.

As discussed in the answer to Question 2, a mental health care provider may provide any service in the course of substance use disorder treatment that is within the mental health care provider's scope of practice. If a minor is at least 14 years old, under the current version of ORS 109.675, if the mental health care provider has prescriptive authority, the mental health care provider may prescribe a prescription drug to a minor who seeks substance use disorder treatment. If HB 2395-A is enacted, the mental health care provider who has prescriptive authority may prescribe prescription drugs to a minor of any age in the course of providing substance use disorder treatment to that minor. Note that in both cases, however, the applicable standards of care for substance use disorder treatment apply, and if prescribing drugs is not recommended by the standards of care, it is likely that the mental health care provider would not prescribe such drugs.

When treating a mental or emotional disorder, the mental health care provider may provide in the course of treatment any service that is within the mental health care provider's scope of practice. If the mental health care provider has prescriptive authority, the mental health care provider may prescribe a prescription drug to a minor who is 14 years of age or older under the current and amended versions of ORS 109.675. If a minor who is 14 years of age or older seeks

[38] HB 2395-A section 17, amending ORS 109.675.

treatment initially for a substance use disorder but the mental health care provider diagnoses the minor with a mental or emotional disorder, the mental health care provider may also treat the mental or emotional disorder if doing so is within the mental health care provider's scope of practice.

ORS 109.685 provides that a mental health care provider, "who in good faith provides diagnosis or treatment to a minor as authorized by ORS 109.675 [*shall not be*] **is not** subject to any civil liability for providing such diagnosis or treatment without consent of the parent or legal guardian of the minor."[39] In other words, under existing law and HB 2395-A, a parent or legal guardian of a minor may not bring an action for damages due to the mental health care provider's failure to obtain parental consent for treating a minor for substance use disorder or a mental or emotional disorder. Thus, if a mental health care provider, in good faith and in the course of treating a minor who is at least 14 years of age for a mental or emotional disorder without parental consent, prescribed to the minor antidepressants, psychotropic drugs or behavioral modification drugs, it is unlikely that the mental health care provider would be civilly liable for issuing such a prescription. However, the mental health care provider could be liable for negligence or malpractice committed by the provider, such as if the mental health care provider prescribed to the minor a prescription drug to which the provider knows the minor is allergic. In sum, whether a mental health care provider may be held liable for any injury resulting from treatment provided under ORS 109.675 depends largely on the specific facts in question.

4. You requested an analysis of the following:

> If a provider, in determining that the source cause of the drug addiction is some other behavioral or mental health issue (bulimia, gender dysphoria, body dysmorphia, etc.)—does "treatment" as defined in [HB 2395-A] allow for follow-on treatment as recommended by the provider and does the lack of a requirement for parental consent attach? Here as examples, a child considers themselves transgender, and is unable to get care/treatment at home, and because of the mental/emotional and possibly even hormonal issues related to the gender dysphoria, the mental health provider (a) treats the substance disorder but (b) also believes to abate the substance use disorder that hormonal therapy is necessary to soothe the child's underlying mental health issues that were the but for cause of the substance abuse issues. Extending that to a child with weight issue (a 13-year-old being morbidly obese which has led to a substance abuse issue) can the prescribing mental health provider under [HB 2395-A] provide both health care for the substance use issue, and in determining the obesity issue is the overarching cause of the substance use issue, prescribe weight loss meds or even bariatric surgery? And if so in these kinds of scenarios where the root cause of the substance use issue is strongly related to an overarching other clinical cause, can the provider under this issue then treat both issues if he determines they are attenuated, and if the mental health provider treats both under [HB 2395-A], does relief from civil liability extend across all of the treatment being proffered to the child?

[39] ORS 109.685, as amended by HB 2395-A section 19.

Here we restate your question as we understand it:

(a) If a mental health care provider determines a minor's substance use disorder is caused by another behavioral or mental health issue, does HB 2395-A allow for follow-up treatment of the other behavioral or mental health issue that is recommended by the mental health care provider, and if so, is parental consent required for the follow-up treatment?

(b) May the mental health care provider treat the minor's underlying issue that the provider determines is the cause of the substance use disorder, including by prescribing medication or performing an inpatient surgery?

(c) Would the mental health care provider be subject to civil liability for providing follow-up treatment or treatment of the minor patient's underlying issue?

Both the current and amended versions of ORS 109.675 allow a minor to obtain treatment for a substance use disorder or mental or emotional disorder, without parental consent, and require that the mental health care provider providing the treatment "have the parents of the minor involved before the end of the treatment," except in certain circumstances.[40] Thus, unless one of the exceptions applies, the minor's parents or legal guardian will be notified of and involved in the substance use disorder treatment or treatment for a mental or emotional disorder.

Whether a mental health care provider may provide additional treatment to the minor beyond that allowed under both the current and amended versions of ORS 109.675 depends on the mental health care provider's licensure and scope of practice, the applicable standards of care, the age of the minor, the type of treatment and the specific facts. You posed two examples, which we paraphrase here:

- A transgender minor seeks treatment for a substance use disorder without parental consent, and presents with mental, emotional and hormonal issues related to being transgender. May the mental health care provider, to abate the substance use disorder, treat the minor with hormone therapy that the mental health care provider believes is necessary to treat the minor's underlying mental health issues that caused the minor's substance use disorder?
- A morbidly obese minor who is 13 years of age has a substance use disorder caused by the obesity. May the mental health care provider provide substance use disorder treatment to the minor and prescribe weight loss medication or perform bariatric surgery?

As discussed in the answers to Questions 2 and 3, a mental health care provider who has prescriptive authority may, as part of the treatment provided to a minor under ORS 109.675, prescribe prescription drugs without parental consent. Conversely, a mental health care provider who does not have prescriptive authority may not prescribe prescription drugs. If the minor is at least 14 years of age, the minor may obtain treatment for a mental or emotional disorder without parental consent. If a mental health care provider has within the provider's scope of practice the prescription of hormone therapy, the minor patient is at least 14 years old and the prescription of hormone therapy is within the standards of care for the treatment of the minor's mental health issues by the mental health care provider, it is possible that the mental health care provider may, under existing law and HB 2395-A, prescribe such therapy. Whether parental involvement is

[40] ORS 109.675; HB 2395-A section 17, amending ORS 109.675. Note, as mentioned in the discussions above, that the current version of ORS 109.675 requires a minor to be 14 years of age or older to obtain treatment without parental consent, and HB 2395-A removes that age limit for substance use disorder treatment.

required depends on the particulars of why the minor did not, or is not able to, obtain parental consent for treatment. As discussed above, if the state determines that a minor's parent is neglecting or abusing the minor or refusing to consent to necessary emergency medical care, the state may intervene and, depending on the circumstances, make medical decisions on behalf of the minor. Further, as discussed below, if the minor is at least 15 years old, the minor may consent to certain treatment without parental consent beyond that described in ORS 109.675.[41]

The second example is somewhat beyond the scope of HB 2395-A. However, ORS 109.640 provides, "[a] minor 15 years of age or older may give consent, without the consent of a parent or guardian of the minor, to . . . [h]ospital care, medical or surgical diagnosis or treatment by" certain health care providers.[42] Under HB 2395-A, 13-year-old minor in the second example may obtain substance use disorder treatment from a mental health care provider without parental consent, but under both the current and amended versions of ORS 109.675, that same minor may not obtain treatment for a mental or emotional disorder without parental consent because the minor is under 14 years of age.[43] Regardless of the minor's age, both the current and amended versions of ORS 109.675 and 109.680 require parental involvement in the minor's treatment before the end of treatment. Additionally, this minor may not consent to surgical treatment without parental consent because the minor is under 15 years of age. Finally, we assume the applicable standards of care for substance use disorder treatment provided by any mental health care provider do not include performing a bariatric surgery or prescribing weight loss medications. Thus, the answer to the question in the second example is very likely no, the mental health care provider may not prescribe weight loss medications to, or perform a bariatric surgery on, a 13-year-old patient without parental consent as part of the minor's substance use disorder treatment, even if prescribing those medications or performing bariatric surgery is within the mental health care provider's scope of practice. Instead, we believe that the mental health care provider would make the appropriate referrals for the minor's further treatment.

As discussed in the answer to Question 3, ORS 109.685 provides that a mental health care provider, "who in good faith provides diagnosis or treatment to a minor as authorized by ORS 109.675 [*shall not be*] **is not** subject to any civil liability for providing such diagnosis or treatment without consent of the parent or legal guardian of the minor,"[44] and therefore a parent may not bring an action against a mental health care provider for not obtaining parental consent for substance use disorder treatment or treatment of a mental or emotional disorder of the parent's minor child. A mental health care provider, however, could be held liable for negligence or malpractice. In the first example, it is likely that the mental health care provider would not be civilly liable strictly for providing treatment if the mental health care provider's scope of practice includes the prescription of hormone therapy, the minor patient is at least 14 years old and the prescription of hormone therapy is within the applicable standards of care for the treatment of the minor's mental health issues by the mental health care provider. If the mental health care provider described in your second example were to perform bariatric surgery on a 13-year-old patient without parental consent, however, it is likely the mental health care provider could be held civilly liable and, depending on the particular facts, may be disciplined by the provider's health professional regulatory board.

The opinions written by the Legislative Counsel and the staff of the Legislative Counsel's office are prepared solely for the purpose of assisting members of the Legislative Assembly in the

[41] ORS 109.640 (2).
[42] ORS 109.640 (2).
[43] ORS 109.675; HB 2395-A section 17, amending ORS 109.675.
[44] ORS 109.685, amended by HB 2395-A section 19.

development and consideration of legislative matters. In performing their duties, the Legislative Counsel and the members of the staff of the Legislative Counsel's office have no authority to provide legal advice to any other person, group or entity. For this reason, this opinion should not be considered or used as legal advice by any person other than legislators in the conduct of legislative business. Public bodies and their officers and employees should seek and rely upon the advice and opinion of the Attorney General, district attorney, county counsel, city attorney or other retained counsel. Constituents and other private persons and entities should seek and rely upon the advice and opinion of private counsel.

Very truly yours,

DEXTER A. JOHNSON
Legislative Counsel

By
Suzanne C. Trujillo
Senior Deputy Legislative Counsel