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 24, 2023

Senator Cedric Hayden
900 Court Street NE S315
Salem OR 97301

Re: A-engrossed House Bill 2395 (2023)

Dear Senator Hayden:

You asked further questions regarding A-engrossed House Bill 2395 following the delivery of our opinion LC 4493, Services provided to minors under A-engrossed House Bill 2395 (2023).[1] We set out each of your questions, with adjusted numbering, and our answers below. Note that your questions regarding the scope of parental rights under the Fourteenth Amendment to the United States Constitution are beyond the scope of the questions we answered in LC 4493. That opinion focused on when, under current law, a juvenile court could intervene in a specific minor's medical care decisions. Your new inquiries regarding constitutional protections for parental rights have more to do with the limits on state authority when enacting generally applicable legislation that affects the rights of parents, minors and the state's interests in the well-being of children. These questions require a different and more involved constitutional analysis and will require additional time for us to answer in full. For these reasons, we omit those questions here and answer them in a separate opinion, LC 4545.

1. "[House Bill] 2395-A will remove the lower age limit for substance use treatment without parental consent, and therefore, please confirm my understanding of your opinion that:

   a. A child can be treated for substance abuse using any pharmaceutical means other than methadone, so long as it is within the provider's scope of practice to have prescribing authority for the drug they're using to treat the child.
   b. A child's parent would have no civil recourse, absent a situation where a child is medically injured, and even then, that's going to be fact-specific and might still leave room for a provider to be absolved on medical injury of a child.
   c. A child who [is] 13 [years of age] or younger could be treated medically for the substance abuse issue and any underlying treatment, absent parental consent, except for a parent would need notice at the end of the course of treatment.
      i. What does "end of the course of treatment" mean? How long, who decides (the doctor or the child)?
      ii. If a child starts treatment at the lower age limit proposed by HB 2395-A, and treatment goes beyond the time when the age of consent changes (from 13 to 14 or 14 to 15), would a provider ever have to have an "end of the course of treatment" consultation with the parent?
      iii. If the child is only being treated for substance abuse and not any underlying cause, does the statute as amended require any notice to parents ever, or

[1] Op. Leg. Counsel LC 4493 (April 11, 2023).

only if the provider is treating for some other issue not within the scope of the bill?"

1.a. Yes, a "mental health care provider"[2] who has prescriptive authority may prescribe a prescription drug to a minor as part of the minor's substance use disorder treatment under HB 2395-A. The current version of ORS 109.675 allows such a prescription for purposes of treatment of "a chemical dependency"[3] for a patient who is "[a] minor 14 years of age or older."[4] ORS 109.675, as amended by HB 2395-A, allows that prescription for purposes of "treatment of a substance use disorder"[5] for a minor of any age.

1.b. The parent or guardian of a minor who seeks treatment for a substance use disorder without parental consent under existing law or HB 2395-A may not bring an action for damages against the mental health care provider solely because the mental health care provider did not obtain parental consent for treating the minor's substance use disorder. This is because law allows the minor to seek substance use disorder treatment without first obtaining parental consent and ORS 109.685 expressly provides the mental health care provider with immunity from any civil liability for providing such treatment without parental consent, so long as the care is provided in good faith. In other words, the parent or guardian does not have a right of action based on the provision of care without parental consent because the provision of care without parental consent is lawful. Depending on the facts and circumstances, the mental health care provider could be held civilly liable if the mental health care provider was somehow negligent in the provision of the substance use disorder treatment.

1.c. No. Under HB 2395-A, a minor who is 13 years of age may obtain treatment only for a substance use disorder without parental consent,[6] but must have parental consent to obtain any other type of treatment. The mental health care provider providing substance use disorder treatment to the minor in this example "shall have the parents of the minor involved before the end of treatment,"[7] except for in particular circumstances.[8]

1.c.i. The phrase, "the end of treatment" is not defined for purposes of ORS 109.675 or HB 2395-A. Determining the specific meaning of this language requires statutory interpretation.

---

[2] HB 2395-A section 16 (1) provides, "'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."

[3] ORS 109.675 (1).
[4] *Id.*
[5] HB 2395-A section 17 (1)(a).
[6] *Id.*
[7] ORS 109.675 (2).
[8] ORS 109.675 (2) requires that the parents of a minor receiving treatment under ORS 109.675 (1) be involved "unless the parents refuse or unless there are clear clinical indications to the contrary, which shall be documented in the treatment record. The provisions of this subsection do not apply to:

(a) A minor who has been sexually abused by a parent; or
(b) An emancipated minor[.]"

In interpreting the meaning of statutes, courts first look to the text and context of the statutes, and then to any relevant legislative history.[9] If a word or term is not defined, we look to the plain meaning. The plain meaning of "end" is the "cessation of a course of action, pursuit, or activity"[10] and the plain meaning of "treatment" is "the action or manner of treating a patient medically or surgically."[11] Accordingly, the "end of treatment" is the time at which the action of medically treating a patient ceases. Unfortunately, this is not particularly illustrative. Thus, we look to the legislative history of ORS 109.675. Although the legislative history may not be dispositive, our review of the 1985[12] committee hearing transcripts indicates that some witnesses and legislators understood the phrase to mean that the mental health care provider would involve a minor's parents in the minor's treatment as soon as clinically practicable.[13] Because the specific details of a course of treatment for substance use disorder will likely be dictated by facts such as the age of the patient, the type of substance abused and the mental health care provider who is providing treatment, we are unable to provide a certain time or action that marks the "end of treatment." However, considering the plain meaning of the phrase and the legislative history, we understand the end of treatment to be a clinical determination made by the mental health care provider, likely in discussion with the patient.

1.c.ii. Yes, the parents of a minor who obtains treatment under the current law or under HB 2395-A must be involved prior to the end of treatment, except for in the particular circumstances noted above. This requirement applies if the minor begins treatment at 13 years of age and turns 14 during the course of treatment, or if the minor begins treatment at 14 years of age and turns 15 during the course of treatment. Only if a patient initially obtains treatment as a minor and during the course of treatment turns 18, which is the age of majority,[14] is it possible that the requirement to involve the patient's parents would not apply.

1.c.iii. Yes, both the current law and HB 2395-A require that the provider who is treating the minor for a substance use disorder or chemical dependency involve the parents of the minor before the end of treatment, except for in the particular circumstances noted above.

2. "From Page 8 of the opinion: *'A mental health care provider may provide in that course of substance use disorder treatment <u>any services</u> that are within the mental health care provider's scope of practice and authority.'* Again, to be clear, because substance use disorders fall into the mental health treatment statutes, please clarify that a provider, in the scope of their license, can provide any treatment other than methadone to a child under 14 to (1) address the substance abuse issue and (2) the underlying causes of the substance use disorder. Please also clarify what 'any services' could include."

---

[9] *State v. Gaines*, 346 Or. 160, 171-172 (2009).

[10] *Merriam-Webster Unabridged Dictionary*, https://unabridged.merriam-webster.com/unabridged/end (last visited April 21, 2023).

[11] *Merriam-Webster Unabridged Dictionary*, https://unabridged.merriam-webster.com/unabridged/treatment (last visited April 21, 2023).

[12] The Legislative Assembly enacted ORS 109.675 in 1985. *See* House Bill 2651 (1985), chapter 525, Oregon Laws 1985.

[13] Representative Bunn recommended amending the bill to allow the child to get help without initial family knowledge and consent, but require that the family be brought into the process at some point. *See* Minutes, House Judiciary Committee, House Bill 2651 (1985), April 19, 1985. House Bill 2651 "[s]tates a clear policy directive to the professionals and the State Mental Health Division that parents are to be involved in the treatment plan as soon as it is clinically feasible." Exhibit R - Letter from Robert King, Senate Judiciary Committee, House Bill 2651 (1985), June 6, 1985.

[14] HB 2395-A section 16 (2) provides, "'Minor' means a person who has not arrived at the age of majority, as described in ORS 109.510." ORS 109.510 provides, "[e]xcept as provided in ORS 109.520, in this state any person shall be deemed to have arrived at majority at the age of 18 years" and ORS 109.520 provides, "all persons shall be deemed to have arrived at the age of majority upon their being married according to law." Thus, a minor is an unmarried person under 18 years of age.

Under current law and HB 2395-A, a mental health care provider may provide to a minor treatment for a substance use disorder, other than methadone treatment, without parental consent. Under current law, the minor must be at least 14 years of age to obtain treatment without parental consent. Under HB 2395-A, the minor may be of any age to obtain substance use disorder treatment without parental consent, but must be at least 14 years of age to obtain treatment for a mental or emotional disorder without parental consent. Thus, under HB 2395-A, if a minor who is 13 years of age obtains substance use disorder treatment without parental consent and, during treatment, the mental health care provider determines that the substance use disorder is caused by an underlying mental or emotional disorder, the minor may obtain treatment for the underlying mental or emotional disorder only with parental consent.

"Any services" provided by a mental health care provider could include anything that is within the provider's licensure, scope of practice and the applicable standards of care. Although we are unable to provide an in-depth listing of all services that a mental health care provider could use in providing substance use disorder treatment, we offer as an example two professionals included in the definition of "mental health care provider." In LC 4493, we used a clinical social worker as an example of a mental health care provider, and continue that example here. 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;[15]
> (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.

A clinical social worker does not have prescriptive authority, so "any services" provided by a clinical social worker would not include the prescription of prescribed drugs. However, we generally understand clinical social workers to provide some form of talk therapy, either in an individual or group setting. Thus, "any services" provided by a clinical social worker could include a talk therapy group dedicated to treating substance use disorders of the group participants. Alternatively, "any services" may include individual talk therapy sessions between a clinical social worker and a minor to treat the minor's substance use disorder.

A "naturopathic physician licensed under ORS chapter 685"[16] is also a mental health care provider under ORS 109.675 and HB 2395-A. "'Naturopathic medicine' means the discipline that includes physiotherapy, natural healing processes and minor surgery and has as its objective the maintaining of the body in, or of restoring it to, a state of normal health."[17] A naturopathic physician providing substance use disorder treatment to a minor under ORS 109.675 or HB 2395-A could

[15] OAR 877-001-0006 (4)(a) includes a reference to the "Diagnostic and Statistical Manual of Mental Disorders (DSM) fifth edition[,]" but otherwise mirrors the statutory definition of "clinical social work."
[16] HB 2395-A section 16 (1)(h).
[17] ORS 685.010.

provide any service within the naturopathic physician's licensure and scope of practice and in accordance with any applicable standards of care. It is therefore conceivable that a naturopathic physician could provide "natural healing processes" to the minor as a form of treatment. Colloquially, we understand that naturopathic physicians often employ herbal medicines as treatment remedies. Thus, it is possible that a naturopathic physician may recommend herbal medicines as part of substance use disorder treatment for a minor.

3. "Going back to Page 6 of the opinion with regard to mandatory reporting, I'd like to clarify that in the hypothetical, HB 2395-A is not in effect and a 13-year-old child with a substance use disorder and fear of the parent comes into contact with a mandatory reporter to whom the reporter owes a duty. Here, let's say a school-based nurse practitioner who under HB 2395 would be allowed to treat the child if it were law. Would not then all the mandatory reporter requirements and judicial interventions listed in the opinion suffice to help the child if there was no provision for minors under 14 to be treated without parental consent? It appears from the opinion, that indeed the nurse practitioner would be required to report and therefore, the mandatory reporting structure with the availability of judicial review would be a least restrictive means of helping a minor under 14 if we were to remove the language in HB 2395-A that lowers the age limit of consent. Please confirm that is accurate."

We understand your question to be whether the least restrictive means of helping a 13-year-old with a substance use disorder access treatment is to amend HB 2395-A to restore the minimum age at which a minor may consent to substance use disorder treatment and rely on a school-based nurse practitioner's mandatory child abuse reporting duty to involve the juvenile court in the minor's medical decision-making.

Under existing law, nurse practitioners are already included in the list of health care providers under ORS 109.675 who may provide chemical dependency treatment to minors who are 14 years of age or older. If, as in your revised hypothetical, HB 2395-A is amended to restore the minimum age at which a minor may consent to substance use disorder treatment, the revised hypothetical would be resolved as described on page 6 of LC 4493, regardless of whether HB 2395-A is enacted into law. As described in LC 4493, under current law the nurse practitioner would not be able to provide treatment to the 13-year-old minor without parental consent, so it is not clear how the nurse practitioner's mandatory child abuse reporting duty would be triggered before notifying the parents of the minor's substance use disorder. Furthermore, the juvenile court will only become involved in the minor's treatment decisions after the minor's situation has escalated to the point that the minor has been abused or there is "a current threat of serious loss or injury that is reasonably likely to be realized."[18]

One alternative approach that would not lower the age of consent or require the minor to be abused before a court will intervene would be to create a statutory judicial bypass procedure through which a minor could ask the court to intervene without involving the minor's parent. If the court determines that the minor is sufficiently mature to consent to the desired substance use disorder treatment or that the treatment would be in the minor's best interests, the court would have the statutory authority to "bypass" the parental consent requirement and authorize the minor to obtain the desired treatment. Although a similar (but slightly different) procedure is outlined in ORS chapter 436 with respect to minors who are 15 years of age or older consenting to voluntary

[18] *Matter of T.W.,* 305 Or. App. 75, 81 (2020). As discussed in LC 4493, the juvenile court may also become involved in the minor's medical decision-making if there is an emergency requiring medical consent and the minor's parent is unable or unwilling to consent to the medical treatment. However, we do not believe that general substance use disorder treatment would be considered a medical emergency to which the court may provide consent.

sterilization services, Oregon does not currently have a general judicial bypass procedure for minors to use to overcome parental consent requirements for other treatment.

4. "The opinion references the 'standard of care' for a mental health care provider with regard to the types of care they can offer.

a. Are standards of care for a profession legislatively adopted?

b. If standards of care are not legislatively adopted, is there an elected official a voter could hold accountable for the choice of the standards of care adopted and applied as it relates to how a mental health provider would be allowed to treat a child without parental consent?

c. If a medical licensing board changes the standard of care for substance use disorder to include treating the direct, underlying mental health issues that drove a minor child under 14 [years of age] to seek substance use treatment, would that then allow a mental health provider to treat both the substance use issue and the underlying direct cause of the substance use disorder without parental consent?"

4.a. No, the standards of care for mental health care providers are not explicitly adopted by the Legislative Assembly, but may be informed by the law. A standard of care can be understood as "[t]reatment that is accepted by medical experts as a proper treatment for a certain type of disease and that is widely used by healthcare professionals. [It is a]lso called best practice, standard medical care, and standard therapy."[19] Thus, a standard of care is generally accepted treatment for a particular disease that falls within the bounds of the law governing the health care profession.

4.b. No. However, a voter could request that an elected official who represents the voter propose legislation that indirectly affects the standards of care for a particular health care profession. For example, proposed legislation could limit the particular procedures or services that a mental health care provider may perform, or the patients on whom a mental health care provider may perform a certain procedure or service. Such legislation likely would result in a change to the standards of care for that mental health care provider because the proper treatment for a disease is likely limited to those treatments allowed by applicable law.

4.c. No. Allowing a minor under 14 years of age to obtain, without parental consent, any type of treatment requires an amendment to existing law. A change to a health care profession's standards of care related to substance use disorder treatment is not sufficient to override a statute.

5. "Does the section of [HB 2395-A] that decriminalizes drug paraphernalia also decriminalize that paraphernalia for possession by a minor, and if so, are there any ages [at] which a minor would be criminalized for such possession?"

House Bill 2395-A does not decriminalize drug paraphernalia because the possession of drug paraphernalia is not a crime under the current version of ORS 475.525. Instead, HB 2395-A removes the authority to impose civil penalties for the sale or delivery, or possession with intent to sell or deliver, of pipes or testing equipment, by excluding pipes and testing equipment from the definition of "drug paraphernalia" in ORS 475.525.[20] If HB 2395-A is enacted, a person of any age would not receive civil penalties for the possession of pipes or testing equipment.

---

[19] National Cancer Institute at the National Institutes of Health, https://www.cancer.gov/publications/dictionaries/cancer-terms/def/standard-of-care (last visited April 20, 2023).

[20] HB 2395-A section 21, amending ORS 475.525.

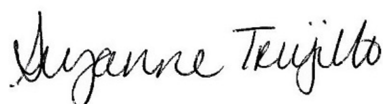
6. "Has the Oregon Supreme Court ever taken up for consideration and decided any challenges to ORS 109.675 as it relates to the issue of parental rights with regard to their fundamental liberty interest to parent the medical decisions of their minor (of any age) children? If so, please cite them and if the record is silent, please indicate that as well."

We are unaware of any case in which an Oregon court has considered whether ORS 109.675 or any other minor consent statute impermissibly interferes with a parent's liberty interest under the Fourteenth Amendment to the United States Constitution. Instead, the cases in which the United States Supreme Court has weighed the rights of a parent to consent to a minor's medical treatment against the minor's ability to consent to the treatment without parental consent have arisen in other jurisdictions from statutes requiring parental consent for a minor to access abortion services.[21]

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 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

[21] *See Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 74 (1976) ("State may not impose a blanket [statutory provision] requiring the consent of a parent ... as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy."); *Bellotti v. Baird*, 443 U.S. 622, 643 (1979) ('[I]f the State decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure whereby authorization for the abortion can be obtained."); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (finding that parental consent requirement when coupled with judicial bypass procedure does not unduly burden minor's abortion right).