Chair Roblan and members of the Senate Education Committee,

I **support SB 1558**, which limits nonconsensual disclosure of student health records and declares that health records, mental health records or counseling records of students may not be considered student records by college or university.

However, I hope this committee will go further:

1. **Create a Chief Privacy Officer for the State**

2. **Extend this right to children when treatment, or payment for their health care is delivered through school-based health centers. (45 C.F.R. 164.506)**

3. **Prohibit protected health information from being entered into Student Information Systems and Oregon's SLDS**

4. **Prohibit law enforcement's access to Oregon's State data repositories (All Payer All Claims database[1][1] and the P-20 State Longitudinal Data System[2][2]) without a warrant.**

Create a Chief Privacy Officer for the State

Three years ago, this committee held a courtesy hearing[3][3] at the request of Oregon Save Our Schools. I was told the bill died in committee partly because it would require revenue to fund this position. This December, at the annual business summit, Governor Kate Brown created an Education Innovation Officer.[4][4]

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[1][1] https://www.oregon.gov/OHA/OHPR/RSCH/docs/All_Payer_all_Claims/APAC_fact_sheet.pdf

[2][2] https://olis.leg.state.or.us/liz/2015I1/Downloads/CommitteeMeetingDocument/82284 The Chief Education Office is requesting $6,107,750 of General Funds for establishing three new permanent positions and a "modified off - the - shelf" system.

[3][3] https://olis.leg.state.or.us/liz/2013R1/Measures/Overview/SB567

[4][4] https://www.oregon.gov/gov/media/Pages/speeches/OR-Business-Leadership-Summit-121415.aspx

Technology and innovations are already racing far faster than laws that protect privacy can keep up. We need a Chief Privacy Officer—one who solicits privacy advocates like the ACLU and the Electronic Frontier Foundation and who will keep pace with innovations to guard these rights—especially as they pertain to education and healthcare.

Extend this right to children when treatment, or payment for their health care is delivered through school-based health centers. (45 C.F.R. 164.506).

Last year's HB 3476[5][5] was an inadequate remedy for controversies stemming from the University of Oregon's inappropriate access to a student's mental health records.

Senator Wyden and Congresswoman Bonamici asked USED to clarify FERPA. Kathleen M. Styles, chief privacy officer at the Education Department, drafted a "Dear Colleague" letter[6][6] that spelled out when campus lawyers could pull such records and asked for comments. USED additionally asked, "If this guidance is extended outside the postsecondary context to include K-12 and early childhood, what other factors need to be considered? For example, how would this guidance fit within the context of elementary and secondary school counselors, or disputes regarding special education services?"

In response to USED,[7][7] I requested additional guidance for K-12 and early childhood because HIPAA/FERPA joint guidance[8][8] is woefully out-of-date.

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[5][5] https://olis.leg.state.or.us/liz/2015R1/Downloads/MeasureDocument/HB3476

[6][6] http://ptac.ed.gov/sites/default/files/DCL%20Final%20Signed-508.pdf

[7][7] http://familypolicy.ed.gov/content/kris-alman-10012015

[8][8] http://www2.ed.gov/policy/gen/guid/fpco/doc/ferpa-hipaa-guidance.pdf

There are 76 school-based health centers (SBHCs) in 24 Oregon counties.[9][9] Medicaid pays for approximately half of the visits; most encounters are in federally qualified health care centers, sponsored by local public health authorities. Almost 1 in 4 of the students served, considered their SBHC the usual source of care for both physical health and mental.[10][10]

In 2008, an Oregon Department of Justice memorandum attempted to clarify HIPAA and FERPA in SBHCs.[11][11]

> Q: Can nurses and school based health center (SBHC) staff work in the same space if hired by different entities?
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> A: Given the constraints both FERPA and HIPAA place on information sharing between school nurses and SBHC staff, having SBHC staff and school nurses work in the same space is not advisable because it would likely be impossible to retained the confidentiality required by these laws.

> Q: Should a school district be encouraged to designate a SBHC as a school official, allowing information sharing between the school nurse and the SBHCs staff?
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> A: Whether a school district can enter into an agreement with a SBHC that would allow information sharing between the two, without written consent, is a matter that must be discussed with legal counsel and it may or may not be legal under FERPA.

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[9][9]http://public.health.oregon.gov/HealthyPeopleFamilies/Youth/HealthSchool/SchoolBasedHealthCenters/Documents/SBHC__Pubs/2016_SBHC-Status-Update.pdf 409,766 clients served in 1,384,178 visits

[10][10]http://public.health.oregon.gov/HealthyPeopleFamilies/Youth/Documents/MinorConsent2012.pdf Minors of any age are allowed to access birth control-related information and services as well as testing and treatment for sexually transmitted infections (STIs) including HIV, without parental consent. Minors, 15 and older, are able to consent to medical and dental treatment without parental consent; minors 14 years or older may access outpatient mental health, drug or alcohol treatment (excluding methadone) without parental consent.

[11][11]https://public.health.oregon.gov/HealthyPeopleFamilies/Youth/HealthSchool/SchoolBasedHealthCenters/Documents/Training1208_DOJfaqs.pdf; https://public.health.oregon.gov/HealthyPeopleFamilies/Youth/HealthSchool/SchoolBasedHealthCenters/Documents/Training1208_DOJmemo.pdf

> Q: What if risk management in the district wants to talk to a school nurse about a student incident?
>
> A: If risk management has a legitimate educational interest in the information and is a "school official" as that is defined under FERPA, a school nurse may discuss the incident with risk management.

Risk management is far more complicated since 2009. ARRA stimulus money incentivized the implementation of electronic medical[12][12] records and P-20 longitudinal data systems; [13][13] and states created All Payer Claims databases.[14][14] This changed privacy and confidentiality in immeasurable ways as big data analytics commenced.

In September 2013, 60 SBHC sites in Oregon used some form of electronic health records. 51 of those 60 sites used OCHIN Epic. Headquartered in Portland, Oregon, OCHIN is a health information network[15][15] spanning 18 states and serving over 4,500 physicians. OCHIN has created a complex graphic as part of their 2012 position paper, "Student Treatment Records under HIPAA vs. FERPA.[16][16]"

> Some schools, school districts, universities and colleges, generally referred to collectively as School Based Health Centers (SBHC), employ nurses, physicians, psychologists, or other healthcare providers who serve their students. Thus, the SBHC is a "healthcare provider" as defined by HIPAA. *However, the SBHC is only considered a covered entity under HIPAA if it conducts any covered transactions electronically in connection with the health care it provides, such as billing insurance electronically. If the SBHC is a covered entity, then it must comply with the HIPAA Transactions regulations with respect*

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[12][12] https://www.cms.gov/Regulations-and-Guidance/Legislation/EHRIncentivePrograms/index.html

[13][13] http://www2.ed.gov/programs/slds/factsheet.html

[14][14] http://www.apcdcouncil.org/state/map

[15][15] https://ochin.org/about-us/

[16][16] https://ochin.org/media/FERPA-versus-HIPAA-School-Based-Health-Center-Records-OCHIN-Position-Paper-131014.pdf

to those covered transactions. ***These SBHCs generally will not be required to comply with the HIPAA Privacy regulations because the records they maintain are "education records" or "treatment records" under FERPA, which are excluded from the HIPAA Privacy regulations****. In that case, FERPA privacy requirements apply to their records.* School based health centers that do not conduct covered transactions, such as billing insurance electronically, do not have to comply with any of the HIPAA regulations. However, the FERPA privacy requirements do apply to their records.

If I were a practitioner in a SBHC, I would be absolutely perplexed about how I would adequately protect students' health records.

Prohibit protected health information from being entered into Student Information Systems and Oregon's SLDS

Well-care data and comprehensive health assessments[17][17] from SBHC encounters are required CCO metrics. Optional measures include screening for Chlamydia, depression and substance use. With disparate sources of revenue for SBHCs, who is responsible for storing and analyzing these sensitive data?

The HIPAA Privacy Rule applies uniformly to all protected health information, without regard to the type of information. One exception to this general rule is for psychotherapy notes, which receive special protections.[18][18]

How will SBHC practitioners safeguard student mental health? Will the psychotherapist-patient privilege[19][19] apply to k-12 students in SBHCs if the center is not staffed with a licensed psychotherapist? If so, how will Oregon laws balance that privilege such that SBHCs and school staff can work in the best interest of the child, while maintaining records with a sufficient firewall to protect them from unintended "school officials."

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[17][17] Well-care visit and comprehensive health assessment are required core measures

[18][18] http://www.hhs.gov/hipaa/for-professionals/special-topics/mental-health/index.html

[19][19] http://www.oregonlaws.org/ors/40.230

LEAs should not include protected health information (including those used for special education or 504 evaluations) in their student information system. By creating these absolute firewalls, the SLDS won't gain access to this sensitive information.

Prohibit law enforcement's access to Oregon's State data repositories (All Payer All Claims database and the P-20 State Longitudinal Data System) without a warrant.

Oregonians are unaware that large databases like the APAC database and the SLDS collect vast data and metadata *without notice and consent.*

Oregonians wouldn't know, as I do, that these databases may have errors that are not correctable. [20][20] My son was miscoded as a drop-out four times in the k-12 SLDS.

The GAO was asked to report on states' progress in making mental health records available for the FBI's National Instant Criminal Background Check System (NICS). The Federal mental health prohibitor,[21][21] established under the Gun Control Act of 1968, disqualifies identified individuals "committed to a mental institution" or "adjudicated as a mental defective" from shipping, transporting, possessing, or receiving a firearm. Federal law also prohibits individuals who are unlawful users of or addicted to any controlled substance from possessing or receiving a firearm.

In the 2012 report,[22][22] the GAO found records that involve involuntary commitments to a mental institution are typically outside the scope of law enforcement, and therefore not automatically available to the FBI.

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[20][20] http://www.opb.org/news/article/planned-oregon-education-database-raises-thorny-questions/

[21][21] Individuals who have been involuntarily committed to a mental institution; found incompetent to stand trial or not guilty by reason of insanity; or otherwise have been determined by a court, board, commission, or other lawful authority to be a danger to themselves or others or to lack the mental capacity to contract or manage their own affairs, as a result of marked subnormal intelligence or mental illness, incompetency, condition, or disease.

[22][22] http://www.gao.gov/assets/600/592452.pdf

President Obama's recent changes to the HIPAA privacy rule[23][23] permit HIPAA-covered entities to report mental health information to the NICS. The rule changes allow State designated repositories[24][24] that are also HIPAA covered entities to collect and report to the NICS. *"(W)e did not intend to require States to formally designate the entities responsible for NICS reporting, but that we would expect States to be able to identify the relevant entities."*

Where a State has not enacted a law *requiring* a HIPAA covered entity to report this data, under HIPAA, a "hybrid entity" can perform both health care and non - health care functions (e.g., NICS reporting). "Under these circumstances, the covered entity can report prohibitor information through its non - HIPAA covered NICS reporting unit without restriction under the Privacy Rule. "

The Oregon Health Authority is a HIPAA covered health care entity that maintains a data repository. The APAC collects highly sensitive protected health information,[25][25] which is de-identified by Milliman Inc.

The Oregon Health Authority should not become a hybrid entity to either allow re-identification of these individuals or allow law enforcement *direct access* to data Milliman Inc. stores for Oregon's All Payer All Claims database.

My speculations of law enforcement overreach, as it relates to the new rules, are not far fetched.

In 2013, the ACLU of Oregon represented a group of Oregon patients and a physician in a lawsuit against the Drug Enforcement Administration.[26][26] The DEA said patients gave up their privacy interest when a third party—the State of Oregon—maintained their records in a prescription database. The DEA claimed they needed only an "administrative subpoena" (which

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[23][23] https://s3.amazonaws.com/public-inspection.federalregister.gov/2015-33181.pdf

[24][24] NPRM proposed new paragraph: 164.512(k)(7)(i)

[25][25] https://www.oregon.gov/oha/OHPR/rulemaking/notices/Appendix%20A%20-%20F.pdf

[26][26] http://www.aclu-or.org/content/oregon-pdmp-v-us-dea

does not involve a judge or require the government to show probable cause) to access records in the Oregon Prescription Drug Monitoring Program.[27][27]

The ACLU prevailed. Afterwards, a spokesman for the Oregon Department of Justice said the state does not have "a categorical problem with DEA obtaining information from the program. But we feel it is important that they comply with the law in order to get it."[28][28]

Personally, I'd feel safer if there were tighter restrictions on Internet sales of firearms—especially weapons sold by unlicensed dealers and not intended for self-defense or hunting.[29][29]

But should the FBI demand legal authority to access the Oregon Health Authority's All Payer All Claims database for the National Instant Criminal Background Check System, the legislature should be informed and should strongly oppose it.

Last year, the OHA refused access to my records in the APAC.[30][30] OHA attorney Keely West[31][31] justified this, stating: "The records maintained by APAC consist of certain data elements extracted from the records submitted by providers and health plans. This information is not used by APAC to make any decisions about an individual, but is instead used to analyze the effectiveness of the health care system in Oregon as a whole. Accordingly, as the information maintained by APAC is not a designated record set for HIPAA purposes, it is not subject to the same access rights."

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[27][27] http://aclu-or.org/blog/dea-thinks-you-have-%E2%80%9Cno-constitutionally-protected-privacy-interest%E2%80%9D-your-confidential-prescrip

[28][28] http://www.oregonlive.com/portland/index.ssf/2014/02/dea_needs_warrant_to_access_or.html

[29][29] http://www.huffingtonpost.com/2013/12/13/armslistcom-illegal-sales_n_4436466.html

[30][30] https://www.ftc.gov/system/files/documents/public_comments/2015/11/00002-99806.pdf

[31][31] https://olis.leg.state.or.us/liz/2015R1/Downloads/CommitteeMeetingDocument/56345

It would be unjust and unethical if law enforcement agencies made decisions based on Oregonians' mental health records through the backdoors of the Oregon Health Authority.

Respectfully,

Kris Alman MD