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July 7, 1997

TO: Carol Elliott, Family Planning Coordinator, Health Division

FROM: Paul S. Cosgrove, Consultant

RE: Child Abuse Reporting Requirements and Suggested Guidelines

CONFIDENTIAL - ATTORNEY/CLIENT PRIVILEGE

You have asked for advice about how family planning clinic personnel can comply with the requirement to report suspected child abuse, consistent with preserving the confidentiality of a client's request for family planning information or services. This memorandum analyzes the relevant statutory and regulatory requirements and suggests guidelines for family planning clinic staff.

I. What constitutes "Child Abuse"

Oregon statutes define child abuse to include certain sex crimes, sexual abuse and sexual exploitation involving a "child" (an unmarried person under the age of 18). ORS 419B.005(2). The "sex crimes" are defined by reference to the Oregon criminal statutory definitions for rape, sodomy, unlawful sexual penetration and incest. ORS 419B.005(1)(c). "Sexual abuse" is also defined by reference to the Oregon criminal statutes. ORS 419B.005(1)(d). "Sexual exploitation" is defined by reference to the crime of contributing to the delinquency of a minor, and as "any other conduct" in which a child is involved in some aspect of child pornography. ORS 419B.005(1)(e).

¹ Child abuse includes other conduct, including physical abuse and neglect, but this memorandum does not address those issues because reporting such abuse does not raise the same confidentiality problems; family planning clinic personnel should ensure that reports of these other kinds of child abuse are made in such a way that the client's request for family planning information and services is kept confidential. See

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A. Sex Crimes - ORS 419B.005(1)(c)

Most of the sex crimes listed in this section of the child abuse statute are defined in Oregon's criminal statutes by degree (first degree, second degree, and sometimes third degree) depending on the circumstances. First degree rape, sodomy and unlawful sexual penetration involve either "forcible compulsion," a victim under 12 years of age (under 16 for rape or sodomy if the victim is a sibling, child or step-child), or a victim that is incapable of consent because of mental defect, mental incapacitation or physical helplessness. ORS 163.375, 163.405, 163.411. Other degrees of these crimes do not involve forcible compulsion, and the victim is someone older than 11.

Incest is defined as marriage to or sexual intercourse with a person known by the actor to be related as an ancestor, descendant or sibling. ORS 163.525. The age of the participants and the participants' consent is immaterial.

For purposes of the criminal statutes, a person under the age of 18 (or mentally defective, mentally incapacitated or physically helpless) is considered incapable of consenting to a sexual act. ORS 163.315. However, it is a defense to the crimes of rape and sodomy (except first degree rape or sodomy) that the actor is less than three years older than the victim at the time of the alleged offense. ORS 163.345.

B. Sexual Abuse - ORS 419B.005(1)(d)

Sexual abuse is defined in Oregon's criminal statutes to include sexual contact (including touching of genitals for the purpose of sexual gratification) without consent. The three year difference in age defense applies to all three degrees of sexual abuse. ORS 163.345.

C. Sexual Exploitation - ORS 419B.005(1)(e)

Sexual exploitation is different from the other forms of sexual child abuse in that it is defined by reference to a specific crime (contributing to the sexual delinquency of a minor), but the definition also refers "any other conduct" in which the minor is involved in producing pornography, a sex show, or the like. The implication is that "sexual exploitation" for the purposes of child abuse reporting is something more than simply having sex when one of the persons is younger than 18 and

below.

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the other is 18 or older - the criminal law definition of contributing to the sexual delinquency of a minor in ORS 163.435. This implication is supported by the definition of "sexual exploitation" in the rules of the State Office for Services to Children and Families ("SOSCF"), the agency charged with enforcing Oregon's child abuse laws. Those rules define sexual exploitation as "forcing/allowing/permitting or encouraging the child to watch pornographic material or sexual activities" and "engagement of a child in various behaviors or poses for pornographic materials, and permitting or allowing a child to engage in prostitution." OAR 413-030-0120(2)(C)(vi) and (2)(D). The interpretations of an agency charged with enforcing a law should be given great weight in determining what the law means.

D. Summary - Definition of Sexual Child Abuse

Based on the analysis above, sexual child abuse is:

- Sex with a minor who is 11 or younger;
- Sex with a minor 12 or over where there is more than a three year difference in age;
- Sex with a minor who is forcibly compelled;
- Sex with a minor who is mentally defective, mentally incapacitated or physically helpless;
- Sex with a minor who is a brother or sister, child or step-child;
- Sex with a minor involving production of pornography or prostitution.

II. Reporting Requirements / Confidentiality

A. Child Abuse Reporting Requirements

All "public or private officials" are required to report child abuse if they have "reasonable cause to believe" that abuse has occurred or is occurring. ORS 419B.010(1). "Public or private official" specifically include physicians, nurses, employees of a county health department and licensed professional counselors. ORS 419B.005(3)(a)(d)(e)(o). The normal confidential communication privileges in ORS Chapter 40 do not apply to child abuse reporting except for psychiatrists, psychologists, clergypersons and attorneys if the information was received in confidence. ORS 419B.010(1). A person who makes a

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child abuse report in good faith is immune from any civil or criminal liability if the person had reasonable grounds for the report. ORS 419B.025. A violation of the reporting obligations subjects the person to a fine in the maximum amount of \$1,000. ORS 419B.010(2).

B. Family Planning Confidentiality Requirements

Child abuse reporting requirements do not supersede Oregon's statutory policy on the protection of health care records, nor federal family planning rules and guidelines. Oregon's health care record confidentiality statute (ORS 192.525) states that it is the "right of an individual to have the medical history of the individual protected from disclosure" except as is necessary "but only to benefit the patient." This statute has been amended this year in Senate Bill 253 (copy enclosed).² As amended by SB 253, ORS 192.525 will require an authorization signed by the patient before medical records are released. SB 253, section 1, subsection (2).

Federal family planning rules require confidentiality of personal facts and circumstances obtained by project staff about individuals receiving services, which information cannot be disclosed without the client's consent except as "required by law..." 42 CFR 59.11. Bureau of Community Health Services Program Guidelines for Project Grants for Family Planning Services require that adolescents receiving services be assured that the services are confidential and "that any necessary follow-up will assure the privacy of the individual." BCHS Program Guidelines, paragraph 8.7. The regulations of SOSCF provide that most of its records remain confidential, OAR 413-010-0030(1), including the records relating to family planning services provided by SOSCF to minors who are 15 years of age or older - the age that minors may consent to their own health care services pursuant to ORS 109.640.

C. Harmonizing Both Requirements

It is a general rule of law that all statutory and regulatory requirements should be given full force and effect without abrogating any of them unless the requirements are irreconcilably inconsistent. Reporting of suspected child abuse, where a person

² SB 253 passed both houses of the legislature, and is awaiting the expected signature by Governor Kitzhaber. If signed by the governor, it will be effective 90 days after July 5, 1997.

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required to report has reasonable grounds, must be done in a way that protects the privacy of a minor client's health care records, recognizes the legal authority of many minors to consent to their own health care and preserves the confidentiality of the information and services provided to the client by the family planning program. The child abuse report should be oral, or if made in writing, should not include or attach any part of the client's family planning clinic record. The report should be made by agency staff who are not identified as "family planning clinic staff," or if the agency (such as Planned Parenthood) is as a whole identified as a family planning provider, the child abuse report should be made anonymously as permitted by SOSCF Rules. OAR 413-020-0350(4). The child abuse report should not reveal that information regarding suspected child abuse was obtained during the provision of family planning information or services.

III. Suggested Guidelines for Clinic Personnel

You have informed me that there is no medical reason to seek information regarding a family planning clinic client's partner's age. I recommend that guidelines be adopted that state that the age of a client's partner should not be requested by family planning clinic personnel, either in forms clients are requested to fill out or during counseling or examination.

In those instances where family planning clinic personnel learn of facts that give them reasonable cause to believe that a family planning clinic client is a victim of sexual child abuse as defined in I. D. above (or any other form of child abuse), guidelines should specify who the staff member should consult with in the agency prior to making any report and who should make the report so as to preserve to the maximum extent possible the confidentiality of the client's reason for visiting the agency.

Finally, since many of the local community policies and procedures regarding child abuse are formulated and implemented by Multi-Disciplinary Teams, I recommend that these family planning clinic guidelines be discussed with and (if possible) approved by the Multi-Disciplinary Team in the community in which the family planning clinic operates.

B-Engrossed Senate Bill 253

Ordered by the House June 26
Including Senate Amendments dated April 25 and House Amendments
dated June 26

Printed pursuant to Senate Interim Rule 213.28 by order of the President of the Senate in conformance with pre-session filing rules, indicating neither advocacy nor opposition on the part of the President (at the request of Joint Interim Judiciary Committee for the Procedure and Practice Committee of the Oregon State Bar)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure.

Requires health care provider to disclose patient's medical records after receiving written release authorization signed by patient or other specified representative. Specifies form for release authorization. Defines medical records and health care provider. Requires notification of documents not released. Allows health care provider to charge fees for copies. Provides civil immunity for health care provider releasing patient information if provider relied in good faith on proper written release authorization.

A BILL FOR AN ACT

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Relating to medical records; amending ORS 192.525.

Be It Enacted by the People of the State of Oregon:

SECTION 1. ORS 192.525 is amended to read:

192.525. (1) The Legislative Assembly declares that it is the policy of the State of Oregon to protect both the right of an individual to have the medical history of the individual protected from disclosure to persons other than the health care provider and insurer of the individual who needs such information, and the right of an individual to review the medical records of that individual. It is recognized that both rights may be limited, but only to benefit the patient. These rights of confidentiality and full access must be protected by private and public institutions providing health care services and by private practitioners of the healing arts. The State of Oregon commits itself to fulfilling the objectives of this public policy for public providers of health care. Private practitioners of the healing arts and private institutions providing health care services are encouraged to adopt voluntary guidelines that will grant health care recipients access to their own medical records while preserving those records from unnecessary disclosure.

(2) Except as otherwise provided by law, a health care provider must disclose a patient's medical records after receiving a written release authorization that directs the health care provider to produce the patient's medical records. If the patient is able to give consent to the release, the authorization must be signed by the patient. If the patient is not able to give consent to the release, the authorization must be signed by a person authorized by law to obtain the medical records sought under the authorization.

(3) A written release authorization under this section must be in substantially the following form:

NOTE: Matter in boldfaced type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted. New sections are in boldfaced type.

AUTHORIZATION TO DISCLOSE MEDICAL RECORDS

This authorization must be written, dated and signed by the patient or by a person authorized by law to give authorization.

I authorize _____ (name of hospital/health care provider) to release a copy of the medical information for _____ (name of patient) to _____ (name and address of recipient).

The information will be used on my behalf for the following purpose(s):

By initialing the spaces below, I specifically authorize the release of the following medical records, if such records exist:

___ All hospital records (including nursing records and progress notes)

___ Transcribed ___ Clinician office hospital reports chart notes

___ Medical records ___ Dental records needed for

continuity of ___ Physical therapy care records

___ Most recent five ___ Emergency and year history urgency care records

___ Laboratory ___ Billing statements reports ___ Other

___ Pathology _____ reports

___ Diagnostic imaging reports

___ Please send the entire medical record (all information) to the above named recipient. The recipient understands this record may be voluminous and agrees to pay all reasonable charges associated with providing this record.

___ *HIV/AIDS-related records

___ *Mental health information

___ *Genetic testing information

*Must be initialed to be included in other documents.

___**Drug/alcohol diagnosis, treatment or referral information:

**Federal Regulation, 42 CFR Part 2, requires a description of how much and what kind of information is to be disclosed.

1 — This authorization is limited to the following treatment:

2 _____

3 — This authorization is limited to the following time period:

4 _____

5 — This authorization is limited to a workers' compensation claim for
6 injuries of _____ (date).

7

8 This authorization may be revoked at any time. The only exception is when action has been
9 taken in reliance on the authorization. Unless revoked earlier, this consent will expire 180
10 days from the date of signing or shall remain in effect for the period reasonably needed to
11 complete the request.

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14 _____
(Date) (Signature of patient)

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16 _____
(Date) (Signature of person authorized by law)

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19 (4) A health care provider may withhold another health care provider's medical record
20 after receiving a written release authorization in the form provided for in subsection (3) of
21 this section. If a health care provider withholds any medical record for any reason after re-
22 ceiving a written release authorization in the form provided for in subsection (3) of this
23 section, the withheld medical record must be identified by the health care provider in the
24 response to the release authorization by disclosing the author of the medical record and the
25 date of the medical record.

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27 (5) Notwithstanding subsection (2) of this section, if, in the professional judgment of a
28 physician licensed under ORS chapter 677 or in the professional judgment of a licensed
29 mental health care provider, the disclosure of a medical record or any part of a medical re-
30 cord would be injurious to a patient, the health care provider may withhold a medical record
31 or provide an accurate and representative summary of the factual information contained in
32 the medical record. A health care provider must give notice if a medical record is withheld
33 or a summary is provided under this subsection in the response to the release authorization.

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35 (6) A health care provider may charge a reasonable fee for responding to a release au-
36 thorization under this section.

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38 (7) A patient may not maintain an action for damages against a health care provider for
39 disclosures made by the health care provider in good faith reliance on a properly executed
40 written release authorization as provided for in this section.

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42 (8) For the purposes of this section, "medical records" includes chart notes, reports,
43 laboratory reports, correspondence, transcribed records, patient questionnaires and any
44 other record concerning the patient's care, diagnosis or treatment. "Medical records" does
45 not include personal office notes of the health care provider that do not concern the patient's
46 care, diagnosis or treatment.

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48 (9) For the purposes of this section, "health care provider" means a person licensed by
49 one of the following agencies, or any employee of a person licensed by one of the following
50 agencies:

- 1 (a) State Board of Examiners for Speech-Language Pathology and Audiology;
 - 2 (b) State Board of Chiropractic Examiners;
 - 3 (c) State Board of Clinical Social Workers;
 - 4 (d) Oregon Board of Licensed Professional Counselors and Therapists;
 - 5 (e) Oregon Board of Dentistry;
 - 6 (f) State Board of Denture Technology;
 - 7 (g) Board of Examiners of Licensed Dietitians;
 - 8 (h) State Board of Massage Technicians;
 - 9 (i) State Mortuary and Cemetery Board;
 - 10 (j) Board of Naturopathic Examiners;
 - 11 (k) Oregon State Board of Nursing;
 - 12 (L) Board of Examiners of Nursing Home Administrators;
 - 13 (m) Oregon Board of Optometry;
 - 14 (n) State Board of Pharmacy;
 - 15 (o) Board of Medical Examiners;
 - 16 (p) Occupational Therapy Licensing Board;
 - 17 (q) Physical Therapist Licensing Board;
 - 18 (r) State Board of Psychologist Examiners; or
 - 19 (s) Board of Radiologic Technology.
- 20 (10) For the purposes of this section, "health care provider" includes a health care facil-
21 ity described in ORS 442.015 (14) and emergency medical technicians certified by the Health
22 Division.
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