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STATE OF OREGON
Legislative Counsel Committee

March 8, 2021

To: Representative Ron Noble

From: Lori Anne Sills, Deputy Legislative Counsel

Subject: House Bill 3139-1 and the Health Insurance Portability and Accountability Act

Enclosed please find House Bill 3139-1. As we discussed on February 26, 2021, this amendment attempts to effect the policy goals reflected in the language provided to you on February 25, 2021, by the Oregon Psychiatric Physicians Association ("OPPA"), taking into consideration the disclosure limitations and privacy protections under the federal Health Insurance Portability and Accountability Act of 1996 ("HIPAA").[1]

At your request, I am including a detailed discussion of the relevant state and federal laws that are implicated by HB 3139-1. This memorandum contains the following sections:

- Parental rights to a minor's treatment information under HIPAA and Oregon law.
- Permissible third party disclosures under HIPAA.
- Introduced HB 3139 and HIPAA.
- HB 3139-1 summary and explanations.

1. Parental rights to a minor's treatment information

The right of a parent[2] to access the protected health information of a minor[3] is governed by both state and federal law. The complicated analysis follows, but the general rule under HIPAA is summarized below:

General rule[4]

(1) Regardless of state law to the contrary, a health care provider has the discretionary authority to decline to disclose information to a minor's parent if the health care provider reasonably believes that the parent will abuse the minor (or has done so in the past), that the disclosure will otherwise endanger the minor or that the disclosure is not in the minor's best interest.

[1] P.L. 104-191.
[2] For the purposes of this memorandum, "parent" includes a minor's legal guardian or other person acting in *loco parentis*.
[3] For the purposes of this memorandum, "minor" refers to a person under 18 years of age who has not been emancipated.
[4] *See*: 45 CFR 164.502 (g).

(2) Provided (1) does not apply, a parent has the right to access the medical records of a minor to the extent permitted or prohibited by state law; but

(3) If state law is silent on parental access to the records of a minor, a licensed health care provider may disclose information to the parent regarding the minor's treatment, to the extent the provider deems appropriate and consistent with applicable law:

(a) Despite the parent having waived the right to access the minor's records; or

(b) If state law does not require parental consent for the minor's treatment.

As applied to Oregon law

As stated above, a health care provider may decline to disclose a minor's treatment records to a parent if the provider reasonably believes the parent may abuse the minor (or has done so in the past), that the disclosure will endanger the minor or that the disclosure is not in the minor's best interest. Provided that none of those situations applies, because ORS 109.675 allows a minor to consent to mental health treatment without the consent of the minor's parent, pursuant to HIPAA the parent's right to access the minor's mental health treatment information is subject to Oregon law.

ORS 109.675 (2) and 109.680 (2019 Edition) currently provide that, if a minor who is at least 14 years of age has consented to mental health treatment:

- The minor's health care provider must involve the parents of the minor in the minor's treatment before the end of the minor's treatment unless: (a) the parents refuse; (b) parental involvement is clinically contraindicated; (c) the minor has been sexually abused by a parent; or (d) the minor is emancipated;[5] and

- The minor's health care provider may, without the minor's consent, advise the minor's parent of the minor's treatment or diagnosis if the minor requires inpatient treatment because: (a) the minor's condition has deteriorated; (b) the minor is at a high enough risk of a suicide attempt; or (c) the minor requires detoxification in a residential or acute care facility.[6]

HIPAA and parental rights to minor's health information

HIPAA requires the Secretary of the United States Department of Health and Human Services to issue privacy regulations governing individually identifiable health information and to protect the privacy of personal medical records and information. The final regulations, called the HIPAA Privacy Rule,[7] became effective in April 2003.

Default parental access and exceptions when parent is not required to consent to treatment

Pursuant to the HIPAA Privacy Rule, a health care provider is, with limited exceptions, authorized to disclose a minor's health care information to the minor's parent.[8] The exceptions to this general rule are:

[5] ORS 109.675 (2).
[6] ORS 109.680 (2019 Edition).
[7] 45 C.F.R. Part 160 and Part 164, Subparts A and E.
[8] 45 C.F.R. 164.502 (g)(3)(i).

- Where a minor has consented to the health care service, no other consent is required by state law (regardless of whether the parent also consented to the treatment) and the minor has not requested that the parent be treated as the minor's personal representative;[9]

- Where the minor is authorized under state law to obtain the health care service without the consent of a parent and the minor, a court or another authorized person has consented to the health care services;[10] or

- Where the minor's parent has assented to an agreement of confidentiality between the minor and the health care provider with respect to the health care service.[11]

Therefore, in general under federal law, a parent has the right to access a minor's protected health information:

- Unless the minor or a person other than the parent has consented to the treatment and the law does not require parental consent for the minor to obtain the treatment; and

- As long as the parent has not waived the right to access the information.

Provider's discretion to permit parental access to information

Even where a parent does not have a right to access the minor's protected health information because the parent waived the right or because someone other than the parent consented to the treatment and state law does not require parental consent, if there is no other state law addressing permissible and prohibited parental access to the minor's records, a licensed health care provider may disclose the minor's information to the parent without the minor's consent, to the extent the provider deems appropriate in the provider's professional judgment and as consistent with state or other applicable law.[12]

Provider's discretion to decline parental access to information

Nevertheless, the HIPAA Privacy Rule anticipates that the disclosure of a minor's protected health information will be governed by state law.[13] Therefore, if a state law authorizes a parent to access the minor's protected health information, the state law will control[14] unless:

- The health care provider has a reasonable belief that the parent may subject the minor to abuse (or has done so in the past) or that disclosing the information to the parent may endanger the minor;[15] or

- The health care provider, in the provider's professional judgment, believes that the disclosure of the information to the parent is not in the minor's best interest.[16]

[9] 45 C.F.R. 164.502 (g)(3)(i)(A).
[10] 45 C.F.R. 164.502 (g)(3)(i)(B).
[11] 45 C.F.R. 164.502 (g)(3)(i)(C).
[12] 45 C.F.R. 164.502 (g)(3)(ii)(C).
[13] HIPAA 2002 implementing rule, 67 F.R. 53182 (2002).
[14] 45 C.F.R. 164.502 (3)(ii)(A) and (B).
[15] 45 C.F.R. 164.502 (g)(5)(i).
[16] 45 C.F.R. 164.502 (g)(5)(ii).

Summary

Accordingly, pursuant to the HIPAA Privacy Rule:

- A health care provider may, in the provider's discretion, decline to disclose the minor's protected health information if the health care provider reasonably believes that the disclosure of the information will endanger the minor or that the disclosure is not in the minor's best interest
- Provided neither of the above situations apply, the provider shall disclose a minor's protected health information to the minor's parent if the parent consented to the minor's treatment, to the extent permitted or prohibited by state law, unless:

- The parent waived the right to access the records or state law does not require parental consent, unless:

- State law is silent on the rights of a parent to access the information and a licensed health care provider determines, in the provider's professional judgment and consistent with applicable law, that it is in the best interest of the minor to disclose the information.

Current Oregon law

ORS 109.675 permits a minor who is at least 14 years of age to consent to outpatient mental health treatment without parental consent.[17] However, a health care provider who is treating the minor must involve the minor's parents before the end of the minor's treatment, unless:

- The parent declines to participate;

- The minor has been sexually abused by a parent; or

- The provider determines that the participation of the parent is clinically contraindicated.[18]

ORS 109.680 (2019 Edition) provides additional statutory authority for a health care provider to disclose the minor's treatment under ORS 109.675 without the minor's consent. Currently, ORS 109.680 (2019 Edition) permits, but does not require, the provider to advise the minor's parent of the minor's diagnosis and treatment only if:

- The minor requires inpatient treatment due to a deterioration of the minor's condition or due to the risk the minor may attempt suicide, or if the minor's condition requires detoxification in a residential or acute care facility; and

- The provider determines that the disclosure is appropriate and will serve the best interests of the minor's treatment.[19]

[17] ORS 109.675 (1).
[18] ORS 109.675 (2). It is worth noting that, although ORS 109.675 (2) is silent as to whether the health care provider must obtain the minor's consent before contacting the minor's parent, because the minor's objection is not included in the exceptions to the requirement that the provider involve the parent, it appears that the provider's obligation to involve the parent in the minor's treatment applies regardless of whether the minor consents or objects to the involvement, unless the provider determines the involvement to be clinically contraindicated.
[19] ORS 109.680 (2019 Edition).

In addition, if a provider makes the disclosure to the parent without the minor's consent, the provider is immune from civil liability for the disclosure.[20]

Because ORS 109.675 allows a minor who is at least 14 years of age to consent to mental health treatment without parental consent, under the default HIPAA Privacy Rule the minor's parent would not have a right to access the minor's protected health information; however, because ORS 109.675 and 109.680 (2019 Edition) expressly provide for disclosure of information to the minor's parent without the minor's consent, the parent's rights to access the minor's records are subject to the limits under ORS 109.675 and 109.680 (2019 Edition), and those limits are subject to the HIPAA Privacy Rule's overarching exception to disclosure in the discretion of the health care provider.

2. Permissible third-party disclosures under HIPAA

Disclosures to prevent serious or imminent threat

The HIPAA Privacy Rule permits a health care provider, without the patient's consent, to disclose a patient's health information, consistent with applicable legal and ethical standards, to certain third parties to avert a serious and imminent threat to the health or safety of the patient or others.[21] Specifically, the health care provider may disclose protected health information if:

- The health care provider, in good faith, believes that the disclosure is necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public; and

- The health care provider, in good faith, believes the disclosure is to a person reasonably able to prevent or lessen the threat.[22]

Accordingly, when applied to the disclosure of a minor's mental health information based on the health care provider's reasonable belief that the minor is at risk of attempting suicide, the health care provider must believe that:

- The person is at a serious and imminent threat of attempting to commit suicide;

- The disclosure is necessary to prevent that attempt; and

- The person to whom the provider makes the disclosure is reasonably able to intervene and lessen the likelihood of the attempt.

Disclosures for nonemergent treatment purposes

In a nonemergent situation, the HIPAA Privacy Rule allows a health care provider to communicate with a patient's family, friends or other persons who are involved in the patient's care.[23] The health care provider may do so with the patient's consent or if, after notifying the patient that the provider will communicate with the patient's family, friends or other persons and providing the patient with

[20] *Id.*
[21] 45 C.F.R. 164.512 (j).
[22] 45 C.F.R. 164.512 (j)(1)(i).
[23] 45 C.F.R. §164.510 (b)(1)(i).

the opportunity to object, the patient does not object.[24] When the health care provider discloses information in a nonemergent situation to a patient's family, friends or other persons, the health care provider may disclose only the health information directly relevant to the person's involvement in the patient's care.

3. House Bill 3139 and HIPAA

House Bill 3139, as introduced, appears to run afoul of the HIPAA Privacy Rule. As introduced, HB 3139 (1)(b) requires a minor's mental health provider to disclose treatment information to a minor's parent if the minor receives suicide risk assessment, intervention, treatment or support services, and it makes no exceptions for the minor's safety or best interest. As a result, HB 3139, as introduced, conflicts with the overarching exception in the HIPAA Privacy Rule, which gives the minor's health care provider the discretion to decline to disclose information regarding the minor's treatment if the provider reasonably believes that the minor's parent may abuse the minor (or may have done so in the past), the disclosure will endanger the minor or the disclosure is not in the minor's best interest.

4. House Bill 3139-1 summary and explanations

The enclosed amendment to HB 3139 diverges from the language proposed by OPPA in several places.

First, OPPA's proposed language includes several underlined passages that appear to be amendments to ORS 109.675 and 109.695. However, the underlined language in those sections already exists. Accordingly, HB 3139-1 does not include any changes to ORS 109.675 or 109.695.

Second, in an effort to make the amendments to ORS 109.680 easier to understand, I have made the following changes:

- Defined the term "mental health provider" to include the existing list of providers in ORS 109.680 (2019 Edition).

- Added references to the appropriate licensure and certification requirements for consistency with ORS 109.675.

- Reorganized the existing permissible disclosures to more clearly indicate when the disclosure is permitted. (Please note that, although I have reorganized this provision, I did not make any substantive changes to the provision.)

- Restated the immunities provision for clarity.

Third, while OPPA's proposed language regarding disclosure of a minor's treatment and diagnosis information in an emergent situation to the minor's family and friends is likely permissible, as discussed in detail in this memorandum, the rules governing disclosure in nonemergent situations and to third parties is more restrictive. Therefore, and consistent with HIPAA, I have modified the emergency requirement under subsection (2)(b) and (c) to require there to be a serious and imminent threat that the minor may attempt suicide[25] and narrowed the scope of the information a mental health care provider may disclose to community organizations

[24] 45 C.F.R. §164.510 (b)(2).
[25] 45 C.F.R.. 164.512 (j).

to that information that is directly related to the organization's involvement in the minor's treatment.[26]

Fourth, because subsection (2)(b) and (c) is now limited to those situations where there is a serious and imminent threat to the minor's safety, I have added a new paragraph (d) under subsection (2) which authorizes the mental health care provider to disclose information related to the minor's treatment in nonemergent situations as necessary to further the minor's treatment.[27]

Fifth, I've added subsection (3) which, consistent with HIPAA, authorizes the mental health care provider to decline to disclose the minor's treatment information if the provider reasonably believes the disclosure would endanger the minor or that the disclosure would not be in the minor's best interest.[28]

Sixth, the language provided by OPPA indicates the possibility that a minor's mental health information could be released to schools. In an effort to avoid conflict with the Family Educational Rights and Privacy Act[29] ("FERPA"), I have limited permissible disclosure to organizations under subsection (2)(c) and (d) to those organizations involved in the minor's treatment. The purpose of this limitation is to prevent the minor's mental health records from becoming a part of the minor's academic records, which would be subject to the confidentiality standards under FERPA. If OPPA's policy goal regarding the disclosures to schools is to permit mental health providers to disclose a minor's treatment information to the minor's teachers, rather than just for the minor's treatment, subsection (2)(c) and (d) should be revisited to reflect the disclosure limitations and privacy protections under FERPA.

I hope that the above discussion is helpful. Please feel free to contact me if you have any questions or would like to discuss these issues further.

Encl.

[26] 45 C.F.R. 164.510 (b)(1)(i).
[27] 45 C.F.R.164.510 (b).
[28] 45 C.F.R. 164.502 (g)(5).
[29] 20 U.S.C. 1232g.