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Legislative Counsel Committee

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To: Senator Cedric Hayden

From: Suzanne C. Trujillo, Senior Deputy Legislative Counsel

Subject: A-engrossed House Bill 2395-A7 amendments

You requested amendments to HB 2395-A to do the following:

- Restore the requirement that a minor be at least 14 years of age to obtain outpatient substance use disorder treatment without parental consent.
- Make changes to the sections regarding the administration of short-acting opioid antagonists in schools.
- Prohibit a minor from possessing certain drug harm reduction items, except in certain circumstances.
- Prohibit a mental health care provider who provides outpatient substance use disorder treatment to a minor without parental consent from treating any underlying condition or disease without parental consent.
- Specify that, if a minor is under 14 years of age, the mental health care provider may not provide outpatient substance use disorder or treatment to the minor without parental consent, unless otherwise authorized pursuant to a court order.
- Require that, upon request, a mental health care provider treating a minor under 14 years of age provide the minor's parent or legal guardian with certain information regarding the minor's treatment.
- Require a mental health care provider treating a minor under 14 years of age for a substance use disorder to report the minor's substance use to the Department of Human Services and require the department to investigate the minor's substance use to determine whether it is evidence of child abuse, as defined in ORS 419B.005, or evidence that the parent or legal guardian has been negligent in securing substance use disorder diagnosis or treatment for the minor.
- Create a judicial procedure through which a minor who is under 14 years of age can petition the court to waive the parental consent requirement for the minor to obtain outpatient substance use disorder diagnosis or treatment.

The enclosed -7 amendments to HB 2395 achieve the objectives listed above.

Section 11 (3)(d)(B)(ii) of the enclosed -7 amendments refers to a school district informing the parent or legal guardian of a minor student of the student's substance use on school premises. Generally, parents may access a student's education record and could, therefore, be informed of any drug use that is included in the education record. Access to this information under the Family

Educational Rights and Privacy Act[1] (FERPA) causes a conflict with other federal laws and regulations related to disclosure of information about treatment for alcohol or drug abuse treatment services, including 42 C.F.R. part 2[2]. It is possible that a student's previous drug use would not rise to the level of inclusion in an education record if the use did not result in an entry as a disciplinary action or a health record (usually, a record made or collected by a nurse). In that case, the drug use would not become part of the education record and other federal laws protecting the student's privacy would come into play. The Family Educational Rights and Privacy Act does not create a private cause of action for improper disclosure or denial of disclosure. A possible recourse for a parent or legal guardian is notification to the Student Privacy Policy Office,[3] but that office can seek only voluntary compliance and can address only systemic violations instead of individual harms. Thus, it may be unfeasible to require a school to disclose previous drug use unless the previous drug use is part of the education record and the parent or legal guardian requests access to the record.

Please note that judicial bypass procedures have generally been recognized by the courts as constitutionally appropriate limits on state actions that create undue burdens on a minor exercising the minor's rights to access the specific health care at issue, not as a way of minimizing the burden on the parent's rights to direct the care of their minor children. As a result, there really aren't comparable statutes to base this procedure on. and in light of the time constraints of session we had to make the following decisions, which you can either keep or change, depending on your policy goals:

- The judicial bypass procedure is placed in ORS chapter 125 because the probate courts already consider on a regular basis whether someone has decision-making capacity. The other options would be to place it in ORS chapter 419B with the child welfare provisions or in ORS chapter 109 with the family law provisions.
- The minor's rights under section 19e (2) and (3) are modeled on Michigan's judicial bypass procedure for minors to obtain abortion services.[4]
- Section 19e (4) and (5) set out the petition and notice requirements and largely mirror those for other protective orders under ORS chapter 125.
- Section 19e (6) is based on the ex parte hearing requirement under ORS 107.716 when a person files a petition for a protective order under the Family Abuse Prevention Act.
- Section 19e (8), (9) and (10) largely mirror the third-party custody/guardianship/visitation provisions under ORS 109.119.

Please let us know if we can be of further assistance with these amendments.

Encl.

[1] 20 U.S.C. 1232g; 34 C.F.R. part 99.
[2] 42 C.F.R. part 2, Confidentiality of Substance Use Disorder Patient Records, https://www.ecfr.gov/current/title-42/chapter-I/subchapter-A/part-2 (last visited May 2, 2023).
[3] U.S. Department of Education, Student Privacy Policy Office, https://studentprivacy.ed.gov/ (last visited May 5, 2023).
[4] Mich. Comp. Laws Ann. 722.904 (West).