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STATE OF OREGON
LEGISLATIVE COUNSEL COMMITTEE

May 4, 2023

Representative Maxine Dexter
900 Court Street NE H283
Salem OR 97301

Re: A-engrossed House Bill 2395—Minor consent under ORS 109.675

Dear Representative Dexter:

You asked several questions regarding issues raised about ORS 109.675 at the House Bill 2395-A public hearing on April 24, 2023. Your questions and our responses follow below:

1. What does "end of treatment" mean in ORS 109.675?

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. In interpreting the meaning of statutes, courts first look to the text and context of the statutes, and then to any relevant legislative history.[1] 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"[2] and the plain meaning of "treatment" is "the action or manner of treating a patient medically or surgically."[3] 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[4] 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.[5] 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.

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[1] *State v. Gaines*, 346 Or. 160, 171-172 (2009).
[2] *Merriam-Webster Unabridged Dictionary*, https://unabridged.merriam-webster.com/unabridged/end (last visited May 4, 2023).
[3] *Merriam-Webster Unabridged Dictionary*, https://unabridged.merriam-webster.com/unabridged/treatment (last visited May 4, 2023).
[4] The Legislative Assembly enacted ORS 109.675 in 1985. *See* House Bill 2651 (1985), chapter 525, Oregon Laws 1985.
[5] 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.

2. Does A-engrossed HB 2395 remove the ability of parents to initiate a civil cause of action against a mental health care provider for failing to provide parental notice that the parent's minor child is receiving treatment under ORS 109.675?

No. Both the current version of ORS 109.675 and the statute as amended by HB 2395-A require that a mental health care provider "shall have the parents of the minor involved before the end of treatment[.]"[6] In order to involve the parents in the minor's treatment, the parents would necessarily have to be notified of the treatment. Thus, except in particular circumstances,[7] the mental health care provider must notify and involve the parents in the treatment. If a mental health care provider does not involve the parents in the minor's treatment and one of the exceptions to the involvement requirement does not apply, a parent would be able to initiate a civil cause of action against the mental health care provider for failing to involve the parents in the treatment.

We also note that HB 2395-A does not change civil liability protection in ORS 109.685 for a mental health care provider that provides treatment to a minor without consent of the minor's parents. ORS 109.685 provides that a "**mental health care provider** who in good faith provides diagnosis or treatment to a minor as authorized by ORS 109.675 [*shall not be*] **is not** subject to any civil liability for providing such diagnosis or treatment without consent of the parent or legal guardian of the minor."[8] 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.

3. Does A-engrossed HB 2395 modify a mental health care provider's duty to report suspected child abuse under ORS 419B.005?

No. If a mental health care provider comes into contact with either a child the provider reasonably suspects has been abused or another person that the provider reasonably suspects has abused a child, the provider is required under ORS 419B.010 to report the suspected abuse to the Department of Human Services or a law enforcement agency.

4. Do the amendments to ORS 109.675 by A-engrossed HB 2395 unconstitutionally interfere with a parent's rights under the Fourteenth Amendment to the United States Constitution on the basis that removing the lower age limit which a minor may consent to treatment is not the least restrictive alternative available to achieve the

[6] Section 17 (2) of HB 2395-A, amending ORS 109.675.

[7] 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 . . . ."

[8] Section 19 of HB 2395-A, amending ORS 109.685.

same policy objective and the amendments fail to include a judicial bypass procedure for minors who are unable to obtain parental consent to initiate substance use disorder treatment?

Oregon courts have not addressed whether statutes like ORS 109.675, granting minors the right to consent to certain medical treatment without parental consent, unconstitutionally interfere with parental rights, and neither has the Ninth Circuit Court of Appeals or the United States Supreme Court. In addition, this is a sensitive and complicated area of law and there is no bright-line rule for when legislation enacted to protect the well-being of children is facially invalid. Accordingly, if the amendments to ORS 109.675 by section 17 of HB 2395-A are challenged, we cannot say with certainty how the court would resolve the issue. Nevertheless, we believe that, if challenged, a court would find that the Legislative Assembly's public health policy decision to amend ORS 109.675 to remove legal barriers to minors obtaining substance use disorder diagnosis and treatment is rationally related to a legitimate and articulated state interest and does not unconstitutionally interfere with parental rights to the care, custody and control of their children.

The rights of parents to the care, custody and control of their children are among the oldest of the rights recognized by the U.S. Supreme Court under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.[9] However, those rights are not absolute. State and federal law recognize that children also have rights.[10] In addition, for nearly as long as the courts have recognized parental rights to make decisions on behalf of their children, courts have recognized the right of the state to interfere with those rights as the legislature determines is necessary to protect the rights of the child or to ensure the welfare of a child pursuant to a legitimate, articulated state interest.[11]

A. Reliance on *Troxel* is misplaced.

Opponents of minor consent statutes like ORS 109.675 may argue that such statutes are facially unconstitutional in light of the U.S. Supreme Court's plurality decision in *Troxel v. Granville*, which, they may assert, requires the state to show that a parent is unfit and that there is a risk of harm to the child anytime the state interferes with parental rights. The *Troxel* plurality reiterated the Court's longstanding recognition of parents' fundamental rights to the care, custody and control of their children under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.[12] The *Troxel* plurality found that, as applied to the specific facts of that case, a Washington grandparent visitation statute unconstitutionally interfered with the parent's parental

[9] *See, e.g., Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Parham v. J.R.*, 442 U.S. 584 (1979); *Troxel v. Granville*, 530 U.S. 57 (2000).

[10] *See* ORS 419B.090; *In re Gault*, 387 U.S. 1 (1967) (holding that juvenile delinquency proceedings must include basic due process protections); *Parham v. J.R.*, 442 U.S. 584 (1979) (holding that voluntary civil commitment by parent of child to state-run institution must include minimum due process); *In re H.K.D.S.*, 305 Or. App. 86 (2020) (finding that parent could not consent to warrantless search of body of child who was the suspect in a criminal investigation).

[11] *See State v. Shorey*, 48 Or. 396, 399 (1906) ("The supervision and control of minors is a subject which has always been regarded as within the province of legislative authority. How far it shall be exercised is a question of expediency and propriety which it is the sole province of the Legislature to determine."); *Meyer v. Nebraska*, 262 U.S. at 399-400 ("[Substantive due process rights] may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect."); *Parham v. J.R.*, 442 U.S. at 603 ("[A] state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized.").

[12] *Troxel v. Granville*, 530 U.S. 57, 65 (2000) ("The liberty interest at issue in this case -- the interest of parents in the care, custody, and control of their children -- is perhaps the oldest of the fundamental liberty interests recognized by this Court.").

rights because (1) it allowed any person at any time to petition the court to order the child's parent to allow visitation and because (2) it authorized the court to make a determination about whether such visitation was in the child's best interests without any corresponding requirement to consider the preferences of the parent.[13]

We believe reliance on *Troxel* for the proposition that statutes are facially unconstitutional is misplaced when applied to minor consent statutes like ORS 109.675. First, the precedential value of *Troxel* is questionable because a majority of the justices disagreed with the reasoning of the *Troxel* plurality.[14] In addition to the plurality decision, five other justices filed separate opinions: Justices Souter and Thomas concurred with the judgment but for different reasons, and Justices Stevens, Scalia and Kennedy dissented. Furthermore, the Oregon Supreme Court has recognized that the only things that are clear from the six different *Troxel* opinions is that (1) parents have a fundamental right under the Due Process Clause of the Fourteenth Amendment to the care, custody and control of their children and (2) that, if a case is before a court that would interfere with those rights, the court must give at least some consideration to the decision of the parent regarding what is in the best interest of the child.[15] In other words, "*Troxel* holds only that the Due Process Clause requires that 'some special weight' be given to the interest of the legal parent"[16] by the court.

Second, the *Troxel* plurality and Justice Kennedy (dissenting) took care to point out that the "constitutionality of any standard for awarding visitation turns on the specific manner in which that standard is applied and that the constitutional protections in this area are best 'elaborated with care.'"[17] In other words, cases involving parental rights and the interests of children are so fact-dependent that the courts have been reluctant to establish bright-line rules that are applicable to every case regardless of the specific facts and circumstances of the parties involved. For these reasons, we think it is unlikely that a court would find ORS 109.675 facially invalid.

Third, as discussed in more detail below, the state interference at issue in *Troxel* is distinguishable from that at issue in ORS 109.675. In *Troxel* and other cases in which the courts have found that state action unconstitutionally interfered with parental rights, the state was either requiring or prohibiting some activity.[18] By contrast, ORS 109.675 relieves a minor of the legal incapacity of age with respect to initiating substance use disorder diagnosis and treatment, providing the minor with the opportunity to voluntarily seek out and obtain help overcoming a substance use disorder.[19] With respect to the application of ORS 109.675, there is no state constraint or compulsion requiring minors to obtain treatment without parental consent and the

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[13] *Id*. at 73.
[14] *See Nichols v. United States*, 511 U.S. 738, 746 (1994) (The "degree of confusion following a splintered decision … is itself a reason for reexamining that decision.").
[15] *In re Marriage of O'Donnell-Lamont*, 337 Or. 86, 100-101 (2004) ("The absence of a majority opinion in *Troxel* and the array of viewpoints expressed in the six different opinions make it difficult to identify the scope of the parental rights protected by the Due Process Clause or the showing that the state or a nonparent must make before a court may interfere with a parent's custody or control of a child. However, two conclusions safely can be drawn from *Troxel*. First, ... the Due Process Clause protects, to some degree, a fit parent's right to make decisions for a child. Second, ... the presumption in favor of a parent's decisions was not so strong that it could be overcome only by a showing that the parent poses a risk of harm to the child.").
[16] *O'Donnell*, 337 Or. at 107.
[17] *Troxel*, 530 U.S. at 73.
[18] *See, e.g., Meyer v. Nebraska*, 262 U.S. at 403 (finding state statute prohibiting teaching of foreign languages to be "arbitrary and without reasonable relation to any end within the competency of the state"); *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 535 (1925) (finding that Oregon Compulsory Education Act compelling parents to send their children to public school had "no reasonable relation to some purpose within the competency of the state.").
[19] In addition, the minor would still be required to provide *informed* consent.

mental health care provider is required to involve the minor's parent before the end of the minor's treatment. In addition, ORS 109.675 imposes no limitation on parents' ability to consent to substance use disorder diagnosis or treatment on behalf of their minor children or from establishing household rules that the minor will not seek out such diagnosis or treatment without first discussing the issue with the parent. Furthermore, if a parent objects to a minor continuing to receive substance use disorder treatment, nothing in ORS 109.675 or related statutes prohibits the parent from petitioning the court for an injunction to stop that treatment.[20]

Finally, unlike the situation in *Troxel*, the amendments to ORS 109.675 by section 17 of HB 2395-A align with Oregon's express constitutional recognition that every resident of this state has a fundamental right to access "cost-effective, clinically appropriate and affordable health care."[21] Accordingly, there are three interests at issue when interpreting the constitutionality of a minor consent statute in this state: (1) the rights of the parent under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution to the care, custody and control of their child; (2) the fundamental right of the minor under Article I, section 47, of the Oregon Constitution, to access clinically appropriate health care; and (3) the interests of the state in ensuring the well-being of youth within its borders.[22]

B. Balancing of interests.

As discussed above, the courts have long held that parents have a fundamental right under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution to the care, custody and control of their children.[23] While important, this right is not unlimited.[24] Although, as discussed above, the specific facts and circumstances of each case may dictate a different outcome, we believe that, generally, an Oregon court is unlikely to find that the amendments to ORS 109.675 by section 17 of HB 2395-A unconstitutionally interfere with parental rights after balancing the constitutional rights of parents, the constitutional rights of minors and the state's interests in the health and welfare of its youth.

First, we do not believe that a court will find that, in general, the amendments to ORS 109.675 by section 17 of HB 2395-A interfere at all with parental rights for reasons similar to the Third Circuit's holding in *Anspach v. City of Philadelphia* and the Sixth Circuit's holding in *Doe v. Irwin*.[25] In *Anspach*, the Third Circuit found that a public health center's provision of oral contraceptives to a 16-year-old without parental notification or consent did not violate the parental rights of the minor's parents. In *Doe*, the Sixth Circuit similarly found that a publicly-funded family planning center that provided prescription contraceptives to minors without parental knowledge or consent and conducted weekly educational sessions did not violate the parents' constitutional rights. The *Anspach* court noted that "[c]ourts have recognized the parental liberty interest only where the behavior of the state actor compelled interference in the parent-child relationship.

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[20] If a parent files a petition for injunction, it is likely that the court will employ the *Troxel* plurality analysis to determine the best interest of the minor, weighing the parent's preferences, the minor's rights to access health care and the state's interest in ensuring that minors have access to substance use disorder treatment. It is likely that the court would give a lot of weight to the minor's determination that they require help with a substance use disorder and it is difficult to imagine a court finding that, in that case, treatment is not in the child's best interest.
[21] Article I, section 47, Oregon Constitution.
[22] *Ginsberg v. State of N.Y.*, 390 U.S. 629, 640 (1968).
[23] *See infra* note 9 and related text.
[24] *See O'Donnell*, 337 Or. at 119-120 ("[T]he due process right that the Supreme Court affirmed in *Troxel* is important, but limited ...").
[25] *Doe v. Irwin*, 615 F.2d 1162 (6th Cir. 1980).

These cases involve coercion that is absent from the allegations in Plaintiff's Complaint."[26] Citing *Doe*, the *Anspach* court wrote:

> [T]he 'one fundamental difference' between [*Doe*] and cases where the state had interfered with the rights of parents or the rights of children was that '[i]n each of the Supreme Court cases the state was either requiring or prohibiting some activity.' The court then explained its observation as follows:
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> > In *Meyer v. Nebraska*, [262 U.S. 390 (1923)] the state forbade the teaching of foreign languages to pupils who had not passed the eighth grade. The Court held the statute not reasonably related to any end within the competency of the state and violative of parents' Fourteenth Amendment right to liberty. In *Pierce v. Society of Sisters*, [268 U.S. 510 (1925)] the statute required all children between the ages of 8 and 16 to attend public schools. The Court found that the law unreasonably interfered with the liberty interest of parents to direct the upbringing and education of their children, including the right to send them to accredited private schools. Again in *Wisconsin v. Yoder*, [406 U.S. 205 (1972)] the law in question made school attendance compulsory. The Court held that Amish parents' First Amendment rights to the free exercise of their religion were infringed by the attendance requirement. In *Prince v. Massachusetts*, [321 U.S. 158 (1944)] child labor laws were construed to prohibit street sales of religious tracts by children. In that case the Court upheld the conviction of a parent who contended that these laws unreasonably interfered with her right of free exercise of religion and her parental rights. In so holding, the Court determined that a state's authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience.
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> . . . Viewed against this legal backdrop, it is clear that Plaintiffs cannot maintain a due process violation when the conduct complained of was devoid of any form of constraint or compulsion.[27]

The *Anspach* court went on to note:

> The real problem alleged by Plaintiffs is not that the state actors *interfered* with the Anspachs as parents; rather, it is that the state actors did not *assist* the Anspachs as parents or affirmatively *foster* the parent/child relationship. However, the Anspachs are not

[26] *Anspach v. City of Philadelphia*, 503 F.3d 256, 262 (3rd Cir. 2007).
[27] *Anspach v. City of Philadelphia*, 503 F.3d at 263-264 (*citing Doe v. Irwin*, 615 F.2d at 1168).

> entitled to that assistance under the Due Process Clause. *See DeShaney [v. Winnebago County Dept. of Soc. Servs*], 489 U.S. [189,] 196 [1989] . . . Plaintiffs' arguments to the contrary ignore that the Constitution 'does not require the Government to assist the holder of a constitutional right in the exercise of that right.' *Haitian Refugee Center, Inc. v. Baker*, 953 F.2d 1498, 1513 (11th Cir. 1992); . . . As the Supreme Court recognized in *Harris [v. McRae*, 448 U.S. 297, 317-318 (1980)]: "Although the liberty protected by the Due Process Clause affords protection against unwarranted government interference . . . it does not confer an entitlement to such [governmental aid] as may be necessary to realize all the advantages of that freedom." 448 U.S. at 317-318 . . . .[28]

As in *Anspach* and *Doe*, ORS 109.675, as amended by section 17 of HB 2395-A, contains no state constraint or compulsion requiring minors to initiate substance use disorder diagnosis or treatment without parental consent or prohibiting minors from disclosing to their parents that they are receiving treatment. To the contrary, ORS 109.675 specifically requires that the parent be involved in the minor's treatment before the treatment is completed.[29] Nor is there any limitation on parents' ability to consent to substance use disorder diagnosis or treatment on behalf of their minor children or from establishing household rules that the minor will not seek out such diagnosis or treatment without first discussing the issue with the parent. Accordingly, we believe that a court is unlikely to find that the removal of the lower age at which a minor may initiate substance use disorder diagnosis or treatment without parental consent unconstitutionally *interferes* with the parent's rights. Nevertheless, even if a court does find that ORS 109.675, as amended by section 17 of HB 2395-A, interferes with parental rights, we believe that the court would find that the rights of the minor and the state overcome any constitutional infirmity.

Last year, Oregon voters adopted Article I, section 47, providing a constitutional right under the Oregon Constitution to access health care:

> (1) It is the obligation of the state to ensure that every resident of Oregon has access to cost-effective, clinically appropriate and affordable health care as a fundamental right.[30]

Although the courts have not had an opportunity to interpret Article I, section 47, we believe it is likely that the court would find that "every resident of Oregon" includes residents who are minors. If so, minors in this state have a constitutional right to access health care and the state is likely prohibited from enacting legislation that unduly burdens minors' access to health care, including laws that create unreviewable barriers to minors accessing health care, such as blanket parental consent requirements. The U.S. Supreme Court encountered a similar situation when, in the 1970s following the U.S. Supreme Court's abortion decision in *Roe v. Wade*, many states, including Oregon, enacted statutory requirements that minors obtain parental consent before being able to access abortion services. We think a court interpreting the amendments to ORS 109.675 by section 17 of HB 2395-A is likely to employ a similar balancing of interests to

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[28] *Id*. at 266-267.
[29] ORS 109.675 (2).
[30] Article I, section 47, Oregon Constitution.

that used by the U.S. Supreme Court pre-*Dobbs*[31] when it analyzed state actions burdening minors' rights to access abortion services.

When analyzing the constitutionality of statutory requirements that minors obtain parental consent to exercise their (then) constitutional right to access abortion services, the U.S. Supreme Court has held that the state may not give a third party absolute veto power over a pregnant person's right to obtain an abortion during the first trimester of pregnancy.[32] Applying that analysis to Article I, section 47, since the state must ensure that residents of this state have access to clinically appropriate health care, it is unlikely that a court would find that the state has the authority to delegate the authority to a third party, including a minor's parent, to withhold consent to such health care, absent some compelling government interest.[33] Nevertheless, the U.S. Supreme Court has recognized that the state "has somewhat broader authority to regulate the activities of children than of adults."[34] Therefore, while an Oregon court may tolerate statutes that require parental notification or consent before the minor may access health care, those statutes would need to be accompanied by an appropriate judicial bypass procedure.[35] And, considering Oregon's new constitutional rights to access health care, we believe it is unlikely that a court would find that removing barriers to a minor obtaining health care, as in the amendments to ORS 109.675 by section 17 of HB 2395-A, requires a judicial bypass procedure to protect *parental* rights.

Even if a court does not interpret Article I, section 47, as conferring a constitutional right to access health care to minors, we believe that a court would find that the amendments to ORS 109.675 by section 17 of HB 2395-A, removing the lower age at which a minor may obtain substance use disorder diagnosis or treatment, are rationally related to a legitimate and articulated state interest. If enacted, ORS 109.675, as amended by section 17 of HB 2395-A, will codify the Legislative Assembly's determination that getting Oregon residents the help they need for substance use disorders as quickly as possible is so important that every resident of this state, including minors, should be able to access those services when the determine they need them and without any barriers to such access.[36]

A person challenging ORS 109.675, as amended by section 17 of HB 2395-A, may argue that removal of the lower age limit at which a minor may initiate substance use disorder diagnosis or treatment is ambiguous and the Legislative Assembly is allowing minors to obtain medical treatment without determining whether the minor is mature enough to make the required medical decisions. This argument fails to recognize that providing an individual with the statutory authority to consent to medical treatment does not obviate the mental health care provider's duty to obtain the patient's *informed consent* before providing services.

In general, before a mental health care provider may provide services to a patient, the provider is required, either by statute, administrative rule or general ethical duties, to obtain the

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[31] *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022) (overturning *Roe v. Wade*, 410 U.S. 113 (1973)).
[32] *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976).
[33] *See id.* ("[S]ince the State cannot regulate or proscribe abortion during the first stage, when the physician and his patient make that decision, the State cannot delegate authority to any particular person, even the spouse, to prevent abortion during that same period. ... [T]he State may not impose a blanket provision ... requiring the consent of a parent or person *in loco parentis* as a condition for abortion of an unmarried minor during the first 12 weeks of her pregnancy.").
[34] *Id.* (*citing Prince v. Massachusetts*, 321 U.S. 158, 170 (1944)).
[35] *Id.* at 75.
[36] *See* Maxine Dexter, Opioid Harm Reduction Policy Package - HB 2395 (-2) Omnibus, available at: https://olis.oregonlegislature.gov/liz/2023R1/Downloads/PublicTestimonyDocument/42745 (last accessed May 4, 2023) ("Anyone wanting treatment for substance use should have access to care.").

informed consent of either the patient or another person with the legal authority to provide consent.[37] The requirement that mental health care providers obtain informed consent incorporates two duties: (1) the duty to disclose information to the patient and their surrogates and (2) the duty to obtain consent before proving the medical service.[38] One component of this process is the provider determining whether the patient is capable of understanding the medical information being provided, the implications of treatment and treatment alternatives and of making an independent, voluntary decision regarding treatment.[39]

An adult patient is generally able to give informed consent to treatment unless the adult lacks the capacity to understand the information being provided to the patient. If the mental health care provider determines that the patient is unable to provide informed consent, the provider generally may not provide the health care service until another person is available to give substitute informed consent on behalf of the incapacitated patient.[40]

If the patient is a minor and the patient's parent is consenting to the medical service on the minor's behalf, then the provider is generally required to obtain informed consent for the medical service from the patient's parent. However, if the minor has the legal authority under statutory or constitutional law to consent to the medical service, the provider will obtain informed consent from the minor patient. Although not set out in statute, presumably the same standards will apply to obtaining informed consent from a minor as from an adult. In other words, if the provider determines that the minor patient is unable to understand the medical information regarding the treatment options and therefore is unable to make independent and voluntary decisions regarding the treatment, the provider's medical ethics, standards of care and interest in avoiding a potential tort claim will prevent the provider from performing the service until another person is available to give substitute informed consent on behalf of the minor patient or a court order authorizes the service.

C. Summary.

For the reasons discussed above, we believe that a court would be unlikely to find that the amendments to ORS 109.675 by section 17 of HB 2395-A unconstitutionally interfere with parental rights because (1) there is no state compulsion that a minor take advantage of the ability to initiate substance use disorder diagnosis or treatment without parental consent; (2) even if there is some interference with parental rights, it is outweighed by the minor's constitutional rights to access health care; and (3) in any event, the Legislative Assembly's determination that all Oregonians should have timely and unimpeded access to substance use disorder treatment is a proper exercise of state power.

Finally, with respect to judicial bypass procedures, as discussed above, those procedures have been approved by the courts as an appropriate limit to interfering with the minor's rights to access health care without any undue burdens rather than constitutional limits on the state's

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[37] *See, e.g.,* ORS 677.097 (physicians and physician assistants); OAR 851-055-0090 (registered nurses); OAR 858-010-0075 (adopting American Psychological Association's "Ethical Principles of Psychologists and Code of Conduct" for professionals licensed or authorized to provide services by the Oregon Board of Psychology, which includes rules regarding obtaining informed consent).

[38] *See* Katz AL, Webb SA, AAP Committee on Bioethics, "Informed consent in decision-making in pediatric practice," *Pediatrics* Vol. 138 (2), August 2016.

[39] *See* AMA Code of Medical Ethics, 2.1.1 Informed Consent, https://www.ama-assn.org/system/files/2019-06/code-of-medical-ethics-chapter-2.pdf (last visited May 3, 2023).

[40] The procedure for health care providers to obtain substitute consent for incapacitated adult patients is beyond the scope of this opinion.

interference with parental rights. Accordingly, because ORS 109.675, as amended by section 17 of HB 2395-A, does not impose undue burdens on the minor's rights to initiate substance use disorder diagnosis or treatment, we do not believe that a court would require a judicial bypass procedure.

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
Lori Anne Sills
Senior Deputy Legislative Counsel