MANDATORY REPORTING AND ANTIRETALIATION PROTECTION

Policy Position | 2024-2025 Policy Council

INTRODUCTION

On December 22, 2023, the Supreme Court of Texas decided *Baylor Scott & White Memorial Hospital v. Thompson*. The case involved a nurse who reported suspected abuse and neglect to Child Protective Services (CPS) and was terminated by her employer for doing so. The court ruled in favor of the employer determining that Section 261.110(b) of the Texas Family Code imposed a but-for causation standard and that the employer would have terminated the nurse when it did even if she had not reported her concerns to CPS. This case raised serious concerns in the nursing community about the strength or weakness of the antiretaliation standard in Section 261.110(b) of the Texas Family Code. The Texas Legislature should amend the standard to provide broader protections for professionals subject to the mandatory reporting requirements of the Texas Family Code.

FACTS OF THE CASE

On or about May 4, 2016, after office hours, Thompson answered a phone call from the child's mother wherein the mother reported that both parents, acting independently, had been seeking treatment with different physicians. As a result, the child was being seen by two doctors, Dr. Kokash and another neurologist in Austin, Texas. The mother reported that Medicaid would not cover expenses from both neurologists; and there was an apparent issue with the child's medication. Id. Both neurologists had prescribed different anti-seizure medications for the child. Learning of these circumstances,

Thompson had concerns about the child receiving different medications depending on which parent had custody. Thompson called the child's father, left a message, but was not able to speak with him.

Thompson then informed Dr. Kokash of her conversation with the child's mother. Dr. Kokash responded that it was necessary to figure out which physician would remain as the child's treating doctor. Thompson proceeded to contact the other neurologist, Dr. Kerr, who stated he would notify the mother that his office would no longer treat the child until the child stopped seeing Dr. Kokash. Thompson then contacted the nurse at the child's middle school. Thompson had concerns the parents were not giving medications as prescribed. Thompson advised the school nurse that "mom had called and said she was giving one medicine and that the other parent was giving another medicine." The school nurse informed her there had been some increased behavioral issues, which was unusual for the child, and the child had been to an "in-patient psych center" due to such issues. The school nurse reported she would "keep an eye out" for worsened behavior or seizure activity. After these efforts, Thompson advised her charge nurse, Melissa O'Neal, of the circumstances disclosed by the mother of the child, and her concerns about the medications. O'Neal replied, "if you feel that there is a danger you need to make a report."

On May 6, 2016, Thompson contacted the Texas Department of Family and Protective Services, Child Protective Services (CPS), and made a report of suspected abuse or neglect of a child. Thompson reported possible harm in regard to seizure medication not being dispensed properly between divorced parents. She asserted the parents had arranged for the child to be treated by two different neurologists and each prescribed a different medication. Thompson relayed to CPS that the mother had said she was not giving the medication Dr. Kokash prescribed, and the father was not giving the medication the other doctor prescribed. Days later, on May 10, 2016, the mother of the child came to the clinic, but Thompson did not speak with her at the direction of O'Neal.

The Hospital issued an "Employee Counseling Form," dated May 19, 2016, terminating Thompson's employment. The form was signed by Thompson and by the director of nursing, Melissa Rennert. Thompson acknowledged signing the form but asserted she did not insert the date of May 19, 2016, as she recalled she was terminated on May 15, 2016.

> The Employee Counseling Form stated:
>
> On 5/10/2016, [the Hospital] received complaint of [ ] Thompson inappropriately contacting a school nurse to discuss a patient without a signed release of information from the parent. This is a violation of HIPAA and patient rights. As a

result of this violation your employment is being terminated immediately. … An Audit revealed that [Thompson] contacted a school nurse without a [Release of Information]. Furthermore, a CPS referral was made without all details known to [ ] Thompson. It is a violation of a patient's rights under HIPAA to share information with outside parties without a current [Release of Information].

DISCUSSION

The Texas Nurses Association and Texas School Nurses Organization jointly filed an amicus brief in the Supreme Court proceedings notifying the court that healthcare providers are permitted to speak with school nurses about minor children's care *without the authorization of the student or student's parent*. This is a practical rule. The case mistakenly moved forward under the assumption that Thompson had violated HIPAA, when federal guidance on the intersection between the Family Educational Rights and Privacy Act (FERPA) and the Health Insurance Portability and Accountability Act (HIPAA) explicitly stated:

> 15. Does HIPAA allow a health care provider to disclose PHI about a student to a school nurse or physician?
>
> Yes. The HIPAA Privacy Rule allows covered health care providers to disclose PHI about students to school nurses, physicians, or other health care providers for several purposes, without the authorization of the student or student's parent.
>
> HIPAA permits covered entities to disclose PHI for treatment purposes, without the authorization of the student or student's parent. For example, a student's primary care physician may discuss the student's medication and other health care needs with a school nurse who will administer the student's medication and provide care to the student while the student is at school.
>
> The HIPAA Privacy Rule also permits a covered entity to disclose PHI to a person(s) if the covered entity has a good faith belief that: (1) the disclosure is necessary to prevent or lessen a serious and imminent threat and (2) the parent or other person(s) is reasonably able to prevent or lessen the threat. The disclosure also must be consistent with applicable law and standards of ethical conduct. See 45 CFR § 164.512(j)(1)(i).
>
> For example, a parent tells their child's therapist they are worried because the child threatened to kill a teacher and has access to a weapon. HIPAA permits the

> therapist to contact school officials if, based on a credible representation by the parent, the therapist believes the disclosure to school officials is necessary to prevent or lessen a serious and imminent threat to the teacher.

U.S. DEP'T OF HEALTH AND HUM. SERV. AND U.S. DEP'T OF EDUC., Joint Guidance on the Application of the Family Educational Rights and Privacy Act (FERPA) And the Health Insurance Portability and Accountability Act of 1996 (HIPAA) To Student Health Records (2019) (emphasis added), available at https://www.hhs.gov/sites/default/files/2019-hipaa-ferpa-joint-guidance.pdf.

The court noted, "We have received an informative amicus brief from the Texas Nurses Association and the Texas School Nurses Organization contending Thompson's disclosure in fact did not violate HIPAA. But the question before us is whether the evidence conclusively establishes that Scott & White would have terminated Thompson when it did for disclosing information to the school nurse even if Thompson had not made the report to CPS."

The court resolved that question in favor of the employer, and against the employee.

POLICY RECOMMENDATIONS

This outcome raises serious concerns for Texas nurses. The mandatory reporting law requires licensed professionals to report suspected abuse or neglect of a minor to CPS within 48 hours of learning of the suspected abuse or neglect. *See* Tex. Fam. Code § 261.101(b). Failure to do so results in serious consequences for the professional, including potential criminal liability. *See* Tex. Fam. Code § 261.109(a-1).

Given the short turnaround for reporting the violation, it is completely unrealistic to expect the professional to review internal policies and see if they impose more onerous restrictions on communication than federal law, as was the case in *Thompson v. Scott White Mem'l Hosp*. In that case, the justification for the professional's termination was sharing patient information with a school nurse without a valid release of information form—an internal policy that imposed more onerous requirements than federal law.

The antiretaliation protection in statute should be broad enough to protect an employee from an inconsequential policy violation when the public interest to be protected is the health and safety of minor children. To impose potential criminal liability on the professional for failing to report, but then also expect an employee to reconcile any

difference between internal policy and federal law within 48 hours is unrealistic. If the statute's antiretaliation protections do not protect a professional in such a situation, it does not provide meaningful protection. Federal law provides examples of broader protection with broader judicial tests than but-for causation standards. *See* e.g. *Babb v. Wilkie*, 589 U.S. 399 (2020).

The Texas Legislature should amend the antiretaliation provision in the Texas Family Code to apply a broader antiretaliation standard.