TO: Members of the House Judiciary Committee

FROM: Peter Mersereau, Attorney at Law, on behalf of the Special Districts Association of Oregon and the Oregon School Boards Association Property and Casualty for Education Trust

DATE: April 12, 2013

RE: **House Bill 3478 Opposition Testimony**

Members of the House Judiciary Committee, thank you for the opportunity to appear before you today to provide testimony regarding HB 3478. The Special Districts Association of Oregon's (SDAO) membership consists of approximately 950 special service districts that provide a range of services including but not limited to water, wastewater, irrigation, parks and recreation, 9-1-1 and rural fire protection. Nearly half of our member districts have 5 or fewer FTE and 40% of our member districts have budgets of $100,000 or less.

Background

1. Current Law:

Currently, claims based on sexual abuse of a child, when committed by a non-governmental actor (such as a priest, minister, Boy Scout leader, etc.), are subject to a much more lenient statute of limitations than are similar claims committed by an employee or agent of a governmental entity (such as a public school teacher or a public parks and recreation employee).

ORS 12.117 applies to such non-governmental actors. ORS 12.117 provides that an individual who was a minor when he or she was subjected to "child abuse" by a private actor may bring an action for damages until he or she reaches age 40 or within five years from the date that the individual discovered or should have discovered the causal connection between the injury and the child abuse, whichever is longer. This lenient statute of limitations has led to the many highly publicized lawsuits against the Catholic Church and the Boy Scouts of America – to name just the most prominent defendants – seeking money damages based on alleged child abuse that occurred decades ago, and in some cases, more than 50 years ago.

By contrast, claims for "child abuse" allegedly committed by public employees are subject to the much stricter statute of limitations set forth in the Oregon Tort Claims

Act. To meet the requirements of the OTCA, a plaintiff who was a minor at the time of any alleged loss or injury (including "child abuse") must give notice of a tort claim within 270 days and must commence a lawsuit within two years following the alleged loss or injury. ORS 30.275.

2. The "Lake Oswego" Case:

The Oregon Supreme Court's recent decision in *Jack Doe 1, et al., v. Lake Oswego School District, et al.* (March 7, 2013) did not change the above statutes of limitations. Rather, the court in the *Lake Oswego* case, applying the OTCA, held that the applicable limitations periods set forth in ORS 30.275 were subject to the so-called "discovery rule." The discovery rule is a principle of law created by the courts. Under the discovery rule, the limitations period does not begin to run (that is, the clock does not start) until the injured party discovers that he or she was injured and that his or her injury was caused by the wrongful conduct of the defendant.

Applying the discovery rule to the facts in the *Lake Oswego* case, the court held that the limitations periods under the OTCA – both the 270-day notice period and the two-year period for filing a lawsuit – did not necessarily begin to run until the plaintiffs became aware that the alleged sexual touching by their teacher had been wrongful (or "tortious").

The school district's attorneys in the *Lake Oswego* case had argued that any fifth grade student would have known the wrongfulness of the teacher's conduct when it happened. (There were seven plaintiffs and the sexual touching was alleged to have happened between 1968 and 1984.) Both the trial court and the Court of Appeals agreed with this defense argument and held that the OTCA limitations periods began to run in 1984 at the latest. Thus, the claims were time-barred.

The Supreme Court, however, rejected this argument. The plaintiffs claimed to have been deceived into trusting whatever their teacher did. They also claimed that he had "groomed" them to accept his sexual touching without complaint. Therefore, the court held, they should have an opportunity to prove to a jury that they did not recognize – nor should they have recognized – that the sexual touching was wrongful until shortly before they gave the school district formal notice of their tort claims and filed their complaint.

The Supreme Court emphasized, however, that the defendant school district would, on remand to the trial court, be afforded the opportunity to prove that the plaintiffs were aware, or reasonably should have been aware, of the wrongfulness of the teacher's sexual touching for longer than the OTCA limitations periods for giving notice or filing a lawsuit. If such facts are proved, the court held, then the plaintiffs' claims would be timed-barred under the provisions of ORS 30.275.

The Supreme Court did not hold in the case–and has never ruled–that the current OTCA limitations periods as applied in minor sex abuse cases are unconstitutional on the basis they are more restrictive than the limitations periods applicable to such cases involving non-governmental actors. **The Effect of HB 3478**

HB 3478 would abolish both the requirement of a timely tort claim notice for claims of child abuse and, even more significantly, it would abolish the two-year statute of limitations within which a person claiming to have been the victim of child abuse committed by a public employee must file a lawsuit for money damages.

In place of the present two-year limitations period specified under ORS 30.275(9), HB 3478 would substitute the provisions of ORS 12.117 that are now applicable only to private actors. Under this proposed change in the law, any claimant alleging "child abuse" could wait until age 40 before filing a lawsuit. Thus, claims from the late 1980s and early 1990s would appear. Even after age 40, such a claimant could file a claim on the allegation that he or she had "not discovered the causal connection between the injury and the child abuse, nor in the exercise of reasonable care should have discovered the causal connection between the injury and the child abuse," until five years before the lawsuit was filed.ORS 12.117. As a practical matter, defending against such claims becomes difficult, sometimes nearly impossible, because the alleged perpetrator has died or disappeared and because witnesses and documentary evidence that might have disproved the claims have become unavailable or unreliable simply due to the passage of time.

Conclusion

The recent Oregon Supreme Court's recent decision in *Jack Doe 1, et al., v. Lake Oswego School District, et al.* has already made clear that any claimant alleging "child abuse" has a reasonable period of time to file a claim from the date he or she discovered the abuse.

HB 3478, however, seeks to open the floodgates to decades-old "child abuse" claims against school districts and other public entities. It bears noting that, under the severe financial burden of multitudes of claims for damages arising from alleged sexual abuse of minors going back more than 50 years, the Catholic Archdiocese of Portland – like other churches – was forced to declare bankruptcy. There is no reason to suppose that a similar – or perhaps greater – financial burden would not descend on public entities throughout the state of Oregon, the vast majority which are self-insured or part of a self-insured pool, in the unfortunate event that HB 3478 were to become law.

Thank you for the opportunity to submit testimony regarding HB 3478 I would be pleased to answer any questions committee members may have.