Oregon Justice Resource Center
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March 22, 2023

To: Senate Committee on Judiciary
From: Brian Decker, Transparency and Accountability Director, OJRC
Re: **Testimony in Opposition to SB 1060**

Chair Prozanski, Vice-Chair Thatcher, and Members of the Committee,

My name is Brian Decker, and I am the Transparency and Accountability Director for the Oregon Justice Resource Center (OJRC). I am submitting this testimony on behalf of the OJRC in opposition to SB 1060 and to express the OJRC's concerns. I am a former federal prosecutor and public defender, having spent most of my 16-year attorney career practicing criminal law in Oregon and other jurisdictions, at both the trial level and appellate level.

The OJRC promotes civil rights and improves legal representation for communities that have often been underserved in the past, including people living in poverty and people of color. We serve underrepresented populations, train future public interest lawyers, and educate our community on issues related to civil rights and civil liberties.

Assault against a person who is nonverbal due to a disability is assault, just the same as it would be against anyone else. While we sympathize with the intent of SB 1060 to clarify this principle, the bill's reach exceeds this goal. Its passage would result in sweeping more people into the criminal justice system for more serious charges, even in cases wholly unrelated to victims who are nonverbal due to a disability. Because people with disabilities are also overrepresented among criminal defendants, this would have the effect of disproportionately impacting them. These are the OJRC's concerns:

1. Section 4 should be omitted from this bill. It has very little to do with the purpose of the bill, but it will greatly expand the conduct that is swept into felony criminal mistreatment in the first degree. This turns misdemeanor harassment—noninjurious physical contact—into a felony, which would make it unique in Oregon. Any parent in an ordinary dependency proceeding could be prosecuted for felony criminal mistreatment under this proposal. And mandatory reporters would have a greatly expanded reporting duty, because now anything as simple as seeing a mom poke her kid in the chest for misbehaving at the store would trigger the reporting requirement. The result would be not just a DHS dependency case but a felony charge, which would commonly result in a loss of employment and housing.
2. Section 2's reference to "proof" should be replaced with "evidence." Section 2 enumerates types of evidence that count as "proof" of physical injury, but those types already are admissible evidence of physical injury. A competent prosecutor can and would make a case where this evidence is present—which highlights the fact that cases

with evidence of assault on a person with disabilities can already and should be prosecuted under current law. Enumerating these pieces of evidence as “proof” lets the prosecution skip a step, suggesting that they are conclusive instead of pieces of the evidence puzzle. In addition, subsection 5 should be eliminated, because, though a jury can make and rely on such “reasonable inferences,” they are in and of themselves neither proof nor evidence.

3. Section 1 should be eliminated, for two reasons.
    a. Adding a new term "physical trauma" is unnecessarily complicated. And the new subsection B of the definition of "physical injury" is grammatically ambiguous. The intent appears to be that, for people who are "incapable of expressing pain," in addition to the existing definitions of physical injury, there's also "fractures, cuts, punctures, bruises, burns or other wounds." But the comma uses in subsection B make the sentence hard to parse. And what defines "incapable of expressing pain?" If the intent is to affect nonverbal people, many nonverbal people can still express pain nonverbally, by gesture, crying, shouting, body language, or facial expression.
    b. The effect of this expanded definition of injury will spread far beyond cases involving people with disabilities. The provision is likely to greatly broaden the prosecution of assaults on children. That is so because the additional definition lessens the burden to prove that a mark on a child is an actual injury. For instance, if you bruise a child who is “incapable of expressing pain” (or cause some vague “other wound”), but the child doesn't experience pain at all from the bruise, that's not assault under current law. But under this bill, you would nevertheless be charged with an assault, because the text of this bill presumes that a bruise or other wound is the equivalent to “substantial pain,” regardless of whether it actually causes such pain. Juries are fully capable of sorting the wounds that are reasonable evidence of injury from those that are not, and the law should allow them to.

In short, this bill represents an expanded reach of felony prosecution far beyond its purported aim. Moreover, current law neither requires victims to testify nor precludes prosecution of assaults against victims who cannot testify. Armed with compelling video evidence, expert testimony, and the other sorts of evidence contemplated here in section 2, under current law any competent prosecutor should be able to successfully secure not only an indictment but a conviction against the assailant.

The OJRC urges the committee not to overcorrect in response to isolated failures to uphold the law as it stands.