Oregon Justice Resource Center
Advocate. Educate. Engage.

April 21, 2023

Oregon Board of Parole
1321 Tandem Ave NE
Salem, Oregon 97301

RE: Statements to Senate Judiciary Committee on Senate Bill 1027

Chairperson Greta Lowry and Executive Director Dylan Arthur:

We are writing to address the written and oral testimony you provided to the Senate Judiciary Committee on March 23, 2023, during a public hearing on Senate Bill (SB) 1027, which mischaracterized not only the process of the related parole hearings but also the law. As a state agency, you have a responsibility to the public to be accurate in your understanding of your agency's standards and policies and to represent them accurately. This responsibility is of the utmost importance, not only because it affects the agency's credibility and public confidence, but also because all parties involved are intimately affected by the Board's representation of standards and policies. These parties include victims, as well as the adults in custody engaged in the parole hearing process. The importance of transparency to victims goes without saying. Transparency and reliable standards also have a significant impact on the behavior and rehabilitation of adults in custody, and therefore impacts community well-being. For these reasons, it is of great importance that we bring your public misrepresentations to your attention.

In addition to identifying key misleading points in your testimony, we write to inform you and the Oregon Board of Parole that your statements promulgated a new Board rule in violation of the Administrative Procedure Act and to request that you immediately repeal this rule.

SB 1027 proposed amending the three-hearing parole process for the crimes of murder and aggravated murder by reducing the process to one hearing, the murder review hearing (aka rehabilitation hearing), and eliminating the subsequent two hearings which review issues already assessed in the murder review hearing.

Your testimony mischaracterized the parole hearing process and SB 1027, and included statements contrary to law.

Your testimony generally mischaracterized the three-hearing parole process and SB 1027. A few examples include the following. Your testimony placed a heavy emphasis on the hearings following the murder review hearing, while glossing over the intensive and substantive nature of the murder review hearing, which covers an extensive criterion assessing a person's rehabilitation and readiness to join the community, involves appointment of counsel and hours of testimony from the adult in custody and others, and is by far the longest, most resource intensive, and substantive hearing. You also stated that SB 1027 does not allow for a safe transition from

PO Box 5248, Portland, Oregon 97208
T: 503-944-2270
F: 971-279-4748
www.ojrc.info

prison because it would require release within 60 days from a finding of likely rehabilitation following the murder review hearing. This fails to acknowledge that a person must have a release plan for their murder review hearing and ignored the fact that those release plans would be more successful when a release date is known and impending. It also fails to acknowledge the Oregon Department of Corrections and the Board often releases adults in custody in a far shorter time frame than 60 days, and that persons convicted of aggravated murder and murder are currently released around 60 days following a favorable finding at their exit interview. You also mischaracterized the extent of victims' knowledge about the parole hearing process and their expectations when a defendant is sentenced for aggravated murder or murder. Because the vast majority of attorneys and public officials do not understand and cannot explain the parole process, it is very unlikely that victims, at sentencing, have an accurate understanding of the time that a defendant will serve in prison and what to expect of the parole process.

However, even more problematic than your mischaracterizations were your statements that contradict current law and are without legal authority. At least three of your statements, provided below, contain inaccurate readings of the law. The final set of statements identified below is of particular concern and created a new Board rule in violation of the Administrative Procedure Act.

1. **"[A] number of AIC's convicted of murder and aggravated murder . . . would be released into the community prior to a finding by the Board that they do not have a present severe emotional disturbance such as to constitute a danger to the health or safety of the community."**[1]

This statement is untrue. Any person who has successfully demonstrated that they are likely to be rehabilitated under the murder review hearing process in ORS 163.105 and ORS 163.115, does so after the board has considered the criterion of whether:

> "The inmate does/does not have a mental or emotional disturbance, deficiency, condition or disorder predisposing them to the commission of a crime to a degree rendering them a danger to the health and safety of the community[.]"

OAR 255-032-0020(8).

2. **"SB 1027, by eliminating the Exit Interview under ORS 144.125, also eliminates the Board's clear authority to *order* a psychological evaluation for the use in parole decisions, as well as the requirement that an AIC undergo a psychological evaluation prior to release. . . . the Board would have no recourse but to proceed and potentially release an AIC" who has refused to participate in a psychological evaluation.**[2]

---

[1] Written Testimony of Greta Lowry at 2, Senate Judiciary Committee, SB 1027, Mar 23, 2023, (submitted by Dylan Arthur on behalf of the Board of Parole) (emphasis in original), https://olis.oregonlegislature.gov/liz/2023R1/Measures/Testimony/SB1027. *Id*. at 2.
[2] *Id*. at 1.

This statement is also untrue. First, ORS 144.223 authorizes the board to "require any prisoner being considered for parole to be examined by a psychiatrist or psychologist before being released on parole." ORS 144.223 is made applicable to persons convicted of murder and aggravated murder "regardless of the date of the crime." Or Laws 1999, ch 782, § 2.

Murder review hearings under ORS 163.105, which are mirrored in ORS 163.115 and ORS 163.107, have been interpreted as being "parole consideration hearings" under rules implementing ORS 163.105. *Engweiler v. Board of Parole and Post-Prison Supervision*, 340 Or 361, 372, 133 P3d 910 (2006).

Because ORS 144.223 authorizes the board to "require any prisoner being considered for parole to be examined by a psychiatrist or psychologist being released on parole" and the murder review hearings under ORS 163.105, ORS 163.115, and ORS 163.107 are "parole consideration hearing[s]," the board clearly has the power to order a mental health evaluation prior to the murder review hearing.

Second, the Court of Appeals has held pursuant to ORS 144.223 that the board may require any prisoner being considered for parole to be examined by psychiatrist or psychologist and that "if the prisoner refuses to participate in such an examination, the board is not obligated to release him or her." *Gholston v. Palmateer*, 183 Or App 7, 10, 51 P3d 617 (2002); *Turner v. Thompson*, 157 Or App 182, 968 P2d 858 (1998), *rev'd on other grounds*, 330 Or 361 (2000).

3. "[A]ctual rehabilitation would no longer be a requirement for release[.]"[3]

This statement is also untrue and particularly concerning as it strongly suggests that the Board is making decisions beyond its legal authority and has promulgated a rule in violation of the Administrative Procedure Act.

Neither the remaining two hearings under ORS 144.120 and ORS 144.125, nor any other provision under ORS chapter 144, require a prisoner to show or require the board to find that a prisoner is rehabilitated before being released. There has never been such a requirement under OAR chapter 255 of the board's administrative rules. This has never been a standard under Oregon's indeterminate matrix system or, for that matter, Measure 11, and Oregon felony sentencing guidelines.

Your testimony emphasized this inaccurate and concerning point at least three times. Specifically, you submitted written testimony, representing your oral testimony, stating:

> "SB 1027 removes the safeguard of *actual* rehabilitation, requiring only that an adult in custody be found likely to be rehabilitated within a reasonable period of time prior to release into the community."[4]

---

[3] *Id*. at 1.

[4] Oral Testimony of Greta Lowry at 2, Senate Judiciary Committee, SB 1027, Mar 23, 2023 (written version submitted by Dylan Arthur on behalf of Chair Greta Lowry) (emphasis in original), https://olis.oregonlegislature.gov/liz/2023R1/Measures/Testimony/SB1027.

Prior to the public hearing, you offered written testimony that stated, in part:

> "**I. Requires the Board to release *before* rehabilitation *actually* occurs.**
>
> "SB 1027 only requires that an Adult in Custody (AIC) demonstrate that they are likely to be rehabilitated within a reasonable period of time prior to being released to the community; it does not require an AIC to demonstrate *actual,* meaningful rehabilitation consistent with public safety. The ultimate outcome of this approach is that AICs who are not yet safe to be in the community will be released, within 60 days of their hearing, if the Board finds them to be rehabilitated within a reasonable period of time. As actual rehabilitation would no longer be a requirement for release, the necessary balance of risk and rehabilitation, and the exploration of the dynamic factors implicit in both, would fail to be addressed."[5]

Then, at the March 23, 2023, public hearing you testified that:

> "Clearly, the intent of SB 1027 is to reduce the three hearings process down to a single hearing. In its current form, however, a number of safeguards provided by the current process are lost. SB 1027 removes the safeguard of actual rehabilitation, requiring only that an adult-in-custody be found likely to be rehabilitated within a reasonable period of time prior to release to the community."[6]

Thus, on three separate occasions you represented to the members of the Senate Judiciary Committee and the public that the law governing the board's release process for persons convicted of murder and aggravated murder "require[s] an AIC to demonstrate *actual,* meaningful rehabilitation." It was your position that the effect of SB 1027 would be to "remove" that "requirement for release."

We have examined all relevant statutory provisions in SB 1027, ORS chapter 144, as well as existing and historical rules under OAR chapter 255. None of those statutes or regulations require a person to demonstrate "actual rehabilitation" as a requirement for release after a murder review hearing.

Given that these statements regarding "actual rehabilitation" suggest that the Board is acting outside of its authority, we request that you provide legal authority in support of these statements to the legislature.

Your statements about "actual rehabilitation" promulgated a rule in violation of the Administrative Procedures Act and must be repealed.

---

[5] Written Testimony of Greta Lowry at 1. (emphasis in original).

[6] *See* Oral Testimony of Greta Lowry at 1:20:30, Senate Judiciary Committee, SB 1027, Mar 23, 2023, https://olis.oregonlegislature.gov/liz/mediaplayer/?clientID=4879615486&eventID=2023031305.

We believe that your statements to the Senate Judiciary Committee indicating that a person needs to demonstrate "actual rehabilitation" after the murder review hearing promulgated a new Board rule. Agency statements, "whatever its precise form and whatever informality attending its promulgation,"[7] constitute a rule under the Administrative Procedures Act (APA). Under the APA, a "rule" is broadly defined as "any agency * * * statement of general applicability that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of any agency."[8] As board chairperson, your public statements to the Senate Judiciary Committee about how the law is being applied to persons convicted of murder and aggravated murder satisfy the definition of a rule under the APA.

Administrative rules are not to be secretly adopted and applied to citizens in Oregon. Almost 50 years ago, the court explained that:

> "Compliance with the Administrative Procedures Act is much more than an act of technical legal ritual. Unwritten standards and policies are no better than no standards and policies at all. Without written, published standards, the entire system of administrative law loses its keystone. The ramifications affect every party and every procedure involved in the fulfillment of the agency's responsibility under the law, e.g., the public, the applicant, agency personnel, the participants in the hearing, the commission, the legislature and the judiciary.
>
> "The policies of an agency in a democratic society must be subject to public scrutiny. Published standards are essential to inform the public. Further, they help assure public confidence that the agency acts by rules and not from whim or corrupt motivation. In addition, interested parties and the general public are entitled to be heard in the process of rule adoption under the Administrative Procedures Act."

Sun Ray Drive-In Dairy, Inc. v. Oregon Liquor Control Comm'n, 16 Or App 63, 70–71, 517 P2d 289 (1973).

Given those principles, and the fact that there is no identifiable legal authority to support your statements, we request that you immediately repeal the unwritten rule that requires persons convicted of murder and aggravated murder to demonstrate "actual rehabilitation" after the murder review hearing before being released from prison.[9] That rule remains effective until properly repealed under the APA or declared invalid by the court.[10] Should the board decide not

---

[7] *Burke v. Children's Services Division*, 288 Or 533, 537-538, 607 P2d 141 (1980).
[8] ORS 183.310(9); *see also Smith v. Board of Parole and Post-Prison Supervision*, 250 Or App 345, 351, 284 P3d 1150 (2012) ("the board was required to follow the rulemaking procedures of the APA in adopting [rule]"); OAR 255-001-0010(1) (so stating).
[9] *See Burke,* 288 Or at 537 ("An agency's failure to employ proper procedures when adopting a rule does not eliminate the need to employ proper procedures when repealing it.")
[10] *Id*. at 538 (so stating).

to repeal the rule, we would request you stay enforcement of the rule until resolution of a rule challenge under ORS 183.400, which we intend to initiate within the next 14 days.[11]

Finally, due to the importance of reliable and accurate statements from the Board about its standards and policies, we request that the Board issue a statement to the Senate Judiciary Committee correcting the other misrepresentations in your testimony including but not limited to those we have identified in this letter.

Your attention to this matter is appreciated.

Sincerely,

Zach Winston
Director of Policy and Outreach

Brian Decker
Transparency and Accountability Director

Julia Yoshimoto
Senior Advisor and Women's Justice Project Director

Cc: Constantin Severe, Public Safety Advisor, Office of the Governor
Senator Floyd Prozanski, Chair of the Senate Committee on Judiciary
Senator Kim Thatcher, Vice-Chair of the Senate Committee on Judiciary
Senator Sara Gelser Blouin, Senate Committee on Judiciary
Senator James Manning Jr., Senate Committee on Judiciary
Senator Dennis Linthicum, Senate Committee on Judiciary

[11] We intend to seek costs and attorney fees if required to bring a challenge under ORS 183.400.