

## ANALYSIS

### Item 4: Public Defense Services Commission SB 578 (2021) Implementation

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**Analyst:** John Borden

**Request:** Establish a \$453,653 General Fund appropriation and authorize the establishment of one permanent full-time Operations and Policy Analyst 3 position (0.75 FTE).

**Analysis:** The Public Defense Services Commission (PDSC) is requesting \$453,653 General Fund and the establishment of one permanent full-time Operations and Policy Analyst 3 position (0.75 FTE) to implement SB 578 (2021). The Public Defense Services Commission did not vote on the submission of this budget request to the Joint Interim Committee on Ways and Means.

The Legislature in 2021 enacted SB 578 and the measure was signed into law on June 23, 2021 (Oregon Laws 2021 chapter 444). The law is related to the appointment of legal counsel for certain persons in protective proceedings. The law allows for the payment of court-appointed counsel at state expense for qualified individuals when the estate of the protected person is insufficient to pay the expense of a private counsel.

A protective proceeding is a legal proceeding to appoint a guardian or conservator to protect the person and property of an individual who lacks the capacity to make decisions to effectively manage her/his affairs. A guardianship is a protective proceeding created by state statute in which a court gives a person or entity the duty and power to make decisions for another. Statute outlines the requirements for guardians to report to the court on the well-being of the protected person (ORS 125.325). Circuit courts in civil proceedings may monitor guardianship for years or even decades. A conservator is an individual entrusted to manage and protect the assets of incapacitated adults. Statute states that conservators must “account to the court for the administration of the protected estate” annually and at the conclusion of the conservator’s appointment (125.475).

Section 1(6) of SB 578 states:

- (6) If the court appoints counsel under subsection (5) of this section:
  - (a) The court shall order payment of attorney fees and costs from the guardianship or conservatorship estate of the respondent or protected person if sufficient funds exist to pay all or a portion of the attorney fees and costs due; or
  - (b) The court may determine that a respondent or protected person is financially eligible for appointed counsel at state expense and, if so, the compensation for legal counsel and costs and expenses necessary for representation of the respondent or protected person shall be determined and paid by the public defense services executive director as provided under ORS 135.055.

The law establishes a pilot program in three counties to provide counsel for persons in protective proceedings. Multnomah and Lane counties are to begin providing legal services on or after January 2, 2022 followed by Columbia County, which is to begin on or after January 2, 2023. The state’s remaining 33 counties are to begin on or after January 2, 2024. The measure also establishes various reporting requirements to the Legislature.

Prior to the enactment of SB 578, statute gave circuit courts the authority to appoint counsel for proposed protected persons but did not require counsel. Some cases were handled by court-appointed pro bono (without charge) attorneys while others were handled by nonprofit entities that provide volunteers to monitor protected persons under guardianships in certain counties. The remainder of appointments were attorneys paid by the estate of the protected person. State agencies, such as the Department of Human Services, may also provide funding for court-appointed attorneys in private practices for protective proceedings.

During the Legislative session in 2021, PDSC placed an indeterminate fiscal impact on SB 578; however, with this request PDSC now has a determinate fiscal impact, which includes: one permanent full-time Operations and Policy Analyst 3 position (0.75 FTE) budgeted at Step 5 with a start date of January 1, 2022. For the 2021-23 biennium, personal services would be \$183,360 and associated services and supplies would be \$22,793 for a total cost of \$206,153 General Fund. In addition, PDSC has estimated private attorney costs for the three pilot counties, as followings:

Pilot County	CY 2022 (12-months)	CY 2023 (6-months)	2021-23 Case Estimate	Private Counsel/ 12 Hours per case	2021-23 Est. \$75/hour
Multnomah	100	50	150	1,800	\$135,000
Lane	60	30	90	1,080	\$81,000
Columbia	--	30	30	360	\$27,000
Total	160	110	270	3,240	\$243,000

Caseload estimates were based on conversations with pilot county circuit court judges, according to PDSC. The courts and PDSC are anticipating a significant increase in the number of cases deemed by the court to be financially eligible for state support. Private attorneys would be paid a standard \$75 per hour on a case-by-case basis (i.e., non-contract). PDSC will reply upon a list of qualified private attorneys currently maintained by individual probate judges. Probate judges would no longer appoint pro bono attorneys, according to PDSC. A contract attorney could be eligible for any non-attorney expenses per section 1(6)(b) of the law; however, PDSC believes non-attorney hourly expenses are not reimbursable under the law and therefore has provided no cost estimate as part of the agency’s budget request. The 2023-25 biennium roll-up cost of this request is indeterminate; PDSC plans to submit a policy package request for next biennium.

PDSC is working with OJD to establish financial eligibility requirements, with PDSC noting the following:

The immediate plan is to have the court appoint [counsel] without regard to the ability to pay, and, after the work is completed, have the guardian or conservator complete a declaration of eligibility. The Office of Public Defense Services [PDSC] is working with OJD [Oregon Judicial Department] and the local courts to establish an eligibility criterion and develop forms that take into account the financial issues faced by those who require the services of a guardian or conservator.

Thus, both the process and the cost to determine financial eligibility is currently indeterminate. A statutory clarification may be needed to define legislative expectations around the eligibility process, as the process and determination of financial eligibility by the courts for civil cases would differ

substantively from what is currently practiced in criminal and other civil cases that fall under PDSC's jurisdiction (i.e., Application Contribution Program). Of note is that PDSC does not plan to conduct an independent review of eligibility determinations during the pilot phase of the law's implementation.

The Legislative Fiscal Office (LFO) notes that PDSC has requested position authorization to begin January 1, 2022. However, LFO recommends that the position's start date be moved to July 1, 2022, which would allow PDSC the opportunity to develop a position description and allow time for a competitive recruitment. LFO also recommends that the position be authorized as limited duration until such time as long-term program needs are better ascertained. As recommended, the 2021-23 biennium personal services costs for the position totals \$122,241 and associated services and supplies costs total \$15,195 for a total cost of \$137,436 General Fund. To this amount would be added \$243,000 General Fund for professional services to pay for hourly attorney fees. LFO also notes the need to establish a new budgetary structure in the state's budget system (i.e., Summary Cross Reference) as it is important to keep constitutionally required budget and expenditures for criminal-related public defense segregated from non-constitutionally required civil-related services, such as those provided in SB 578.

**Recommendation:** The Legislative Fiscal Office recommends that the Joint Interim Committee on Ways and Means recommended including the establishment of a \$380,436 General Fund appropriation, on a one-time basis, and authorizing the establishment of one limited duration full-time position (0.50 FTE) for the Public Defense Services Commission in a budget reconciliation bill during the 2022 legislative session to implement SB 578 (2021) and the payment of private counsel, with instruction that the agency work with the Legislative Fiscal Office to establish a new budget structure in the state's budget system for civil-related activities.

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Public Defense Services Commission  
Gibson

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**Request:** Appropriate \$435,653 General Fund and establish one new, permanent Operations and Policy Analyst 3 position (0.75 FTE) to support Senate Bill 578 (2021) mandating court-appointed representation for eligible individuals who are subjects of a petition for guardianship or conservatorship.

**Recommendation:** The Public Defense Services Commission is not under Executive Branch budgetary authority.

**Discussion:** Senate Bill 578 (2021) mandates court-appointed representation for eligible individuals who are subjects of a petition for guardianship or conservatorship. The bill directed the Public Defense Services Commission (PDSC) to start implementing the program in both Lane and Multnomah counties in January 2022, adding Columbia County in 2023, and statewide by January 2024.

In the request, PDSC outlines a high-level plan for implementing Senate Bill 578 (2021). The plan starts with convening workgroups to identify best practices by the end of December 2021. As of December 6, 2021, PDSC was working to identify stakeholders needed for the initial workgroups. The Agency intends to utilize information gathered from the workgroups as well as information gathered from the statewide probate systems survey to inform a full implementation plan and determine future funding needs. The plan continues with PDSC submitting a policy package next biennium for the identified funds.

In the interim, PDSC is working directly with Lane and Multnomah County probate judges to create a short-term plan for both assigning and paying qualifying attorneys within their respective jurisdictions for the scheduled January 2022 program start date. The details regarding how the courts will determine eligibility for PDSC payments has yet to be determined.

PDSC is requesting a General Fund appropriation of \$435,653 for estimated caseload costs and to establish one new Operations and Policy Analyst 3 position (0.75 FTE) to manage the implementation of Senate Bill 578 (2021).

**Estimated Cost Breakdown:**

YEAR	COUNTIES	EST. CASELOAD	EST. ATTORNEY PAYMENTS*	
			2021-23 Budget	2023-25 Budget
2022	Multnomah, Lane	160	\$ 144,000	--
2023	Multnomah, Lane, Columbia	190	\$85,500	\$85,500

*\*The Agency estimates each case will take approximately 12 hours at a payment rate of \$75/hour.*

POSITION	COUNT	FTE	POSITION COST	
			2021-23 Budget	2023-25 Budget
Project Mgr. (OPA3)	1	0.75	\$ 206,153	\$ 295,922

PDSC estimates the cost during the 2021-23 biennium to be \$435,653. The full cost for 2023-25 is not yet known due to undetermined statewide caseload estimates. Additionally, a specific appropriation for Senate Bill 578 does not currently exist in the budget structures of PDSC. The

Agency is requesting position funding be appropriated to the Administrative Services Division appropriation and caseload cost be appropriated to the Court Mandated appropriation.

**Legal Reference:** Appropriate \$206,153 from the General Fund to supplement the appropriation made by chapter 444, section 1(8), Oregon Law 2021, for the Public Defense Services Commission, Office of Public Defense Services for the 2021-23 biennium.

Appropriate \$229,500 from the General Fund to supplement the appropriation made by chapter 444, section 1(6), Oregon Law 2021, for the Public Defense Services Commission, Office of Public Defense Services for the 2021-23 biennium.



# Oregon

## Public Defense Services Commission

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December 6, 2021

Senator Elizabeth Steiner Hayward, Co-Chair  
Representative Dan Rayfield, Co-Chair  
Interim Joint Committee on Ways and Means  
900 Court Street NE  
H-178 State Capitol  
Salem, OR 97301-4048

Dear Co-Chairpersons:

### **Nature of the Request**

In the 2021-23 legislative session, the Oregon State Legislature passed SB 578, which created a new mandate for the Public Defense Services Commission to provide representation in certain circumstances for individuals who are the subjects of a petition for the creation of a guardianship or a conservatorship. This legislation directs the commission to manage the program and fund the representation. The Public Defense Service Commission (PDSC) requests \$435,653 General Fund and position authority for one permanent Operation Policy Analyst 3 position (0.75 FTE) to begin the program on January 2, 2022.

### **Agency Action**

In the 2021 session the Oregon Legislature passed SB 578, which mandated court-appointed representation for certain individuals. Under this new law, in many cases, individuals who are the subjects of a petition for the creation of a guardianship or a conservatorship will be provided with an attorney at state expense, if a court finds them financially eligible. There are two distinct aspects to the implementation of SB 578. First, the PDSC is directed to start providing attorneys in appropriate cases in Lane and Multnomah Counties starting in January of 2022, adding Columbia County in January of 2023. The PDSC is further directed to have a statewide program for providing attorneys in guardianship cases starting in January of 2024.

To create the statewide system, we are organizing a workgroup of stakeholders and other interested parties to research current and best practices and submit a policy option package to the 2023 Legislature. We are currently meeting with stakeholders, the Oregon Judicial Department (OJD), and local court staff to identify appropriate members of the workgroup. The goal is to have members selected and begin meeting by the end of December 2021. OJD has separately been funded to administer a survey of the statewide probate system, and while that survey has a projected completion data later than optimal for our purposes, there will be helpful data collection undertaken for that survey.

To address the immediate challenge of funding attorneys in appropriate cases in the three counties between January of 2022 and January of 2024, the PDSC will work with the relevant probate judges, their court staff, and the local bar in each jurisdiction to create an interim plan for assigning qualified attorneys to eligible respondents and pay those attorneys for the work that they do. To identify the qualified attorneys, we will rely on the lists used by the probate judges to assign cases. List members will be invited to participate in the program, and with the approval of the probate judge, submit their fees to PDSC for payment. PDSC will pay the hours billed and approved at our standard rate of \$75 per hour for financially eligible people.

How the courts will determine eligibility for PDSC payments has yet to be determined. The presence of a simultaneous conservatorship may be a useful way to sort guardianships into presumptively eligible and presumptive ineligible groups. As part of any agreement the PDSC enters with the panel attorneys, we expect that those attorneys will not seek or accept additional payments from other sources, for the cases in which they are court-appointed. In addition, we would want advance judicial approval of any fees more than some specific limit (for example 15 hours).

Multnomah County reports that there are approximately 225 cases filed each year. Fifty of those cases are “pro bono” appointments. Under this new legislation, it is anticipated that will grow to approximately 100 appointments. Lane County also believes that the rate of appointments will increase under the new law. There are roughly sixty appointments expected in Lane County, which is also about twice the current level. Combined, the forecast for this program is 160 cases the first year (2022) and, with Columbia County estimated to add 30 cases annually, 190 cases in the second year (2023).

We estimate that most of these cases will be resolved in 10 hours or less of attorney time. Some cases may require upwards of 25 hours, therefore, to provide an estimated cost, the agency will use an average of 12 hours a case. With an expectation of 350 cases during the first two years, the payments to attorneys would be \$144,000 during calendar year 2022 and \$190,000 for calendar year 2023 (\$85,500 during the first six months of calendar year 2023).

This program will need additional resources beyond the 2021-23 Legislatively Approved Budget staffing levels to implement the statewide program, which is scheduled to start in January of 2024. The PDSC intends to seek funding beyond the first year contract payments at \$144,000 to recruit and hire a policy analyst to act as a project manager and to provide day-to-day supervision of the pilot program in addition to administratively supporting the work group’s effort to define and create a statewide program.

The estimated cost for attorney fees in the first year (2022) will be the \$144,000 and \$190,000 in 2023, with \$85,500 attributable to the current biennium. The 2021-23 costs for a project manager will be \$206,153 and estimated at for \$295,922 for the 2023-25 biennium. The total cost for the 2021-23 biennium is therefore estimated to be \$435,653.

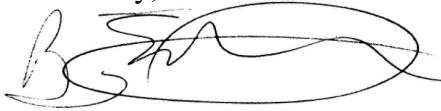
**Action Requested**

The Public Defense Services Commission requests \$435,653 of General Fund appropriation and expenditure authority and position authorization for one permanent Operations and Policy Analyst 3 position (0.75 FTE).

**Legislation Affected**

Oregon Laws 2021 Chapter 444, section 1(2)(8).

Sincerely,

A handwritten signature in black ink, appearing to read "Brian DeForest", with a large, sweeping flourish underneath.

Brian DeForest  
Deputy Director

cc:

John Borden, Principal Legislative Analyst, LFO  
Laurie Byerly, Legislative Fiscal Officer  
George Naughton, Chief Financial Officer  
April McDonald, Policy and Budget Analyst, CFO