

ANALYSIS

Item 6: Public Defense Services Commission Juvenile Appellate Section

Analyst: John Borden

Request: Increase General Fund by \$1,283,311 and authorize the establishment of six limited duration positions (3.48 FTE).

Analysis: The Public Defense Services Commission - Appellate Division - Juvenile Appellate Section (JAS) is requesting \$1.3 million General Fund and the authorization of six limited duration positions (3.48 FTE) for retained caseload growth. The request supports four Senior Deputy Defenders, one Legal Secretary, and one Paralegal; the positions are budgeted at Step 5 and would have a start date of May 1, 2021. The request includes \$106,362 of associated services and supplies. 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 2007 created the JAS to improve the quality of representation and timeliness of juvenile dependency appeals. The unit was originally staffed with four positions (4.00 FTE). JAS has a 2021-23 legislatively adopted budget of \$4 million General Fund and nine positions (9.00 FTE), of which there is one Chief Defender, six Senior Deputy Defenders, and two Paralegals. The most recent increase in staffing occurred when the Legislature in 2021 provided \$408,925 General Fund and one permanent full-time Senior Deputy Defender (1.00 FTE) to fund an unbudgeted position. The 2021-23 budget for JAS outside counsel is estimated by PDSC to total \$1.7 million General Fund; however, this figure requires further research to be validated. There is no Key Performance Measure approved for JAS by the Legislature.

Of note, there is some inconsistency between program resources included in the legislatively adopted budget for JAS and the level of resources the agency has administratively assigned to JAS. The legislatively adopted budget includes the aforementioned nine positions; however, PDSC has assigned only eight of the nine positions to JAS. Instead, PDSC has administratively moved one position, a Deputy Defender, from JAS to the Appellate Criminal Section.

JAS provides representation to financially eligible parents on direct appeal from juvenile dependency and termination of parental rights proceedings, and to youth on direct appeal from juvenile delinquency proceedings. Juvenile courts and trial attorneys are required to advise parties of their right to appeal. "The right to appellate review of an appealable order or judgement is largely unqualified," according to PDSC. Therefore, a parent or child that is a party to a juvenile court judgment or order may direct their court-appointed trial attorney to refer the judgment or order to JAS for direct appeal. A JAS appellant attorney, or contract appellant counsel, then reviews the trial court's legal rulings and the trial attorney's performance (e.g., claim of ineffective assistance of trial counsel) to establish the grounds for appeal. An appeal is ultimately the individual client's decision and not the decision of the appellant attorney, trial attorney, or the juvenile court.

JAS retains only the cases that the section can resolve within the established timelines with all other cases assigned to outside counsel or panel/reverted cases. PDSC approves and maintains a panel of

qualified external providers to provide appellate representation when JAS has a conflict of interest (e.g., previously represented a child or parent) or lacks the internal staffing capacity to handle cases. Dependency and Termination of Parental Rights (TPR) appeals may be expedited under Oregon Rules of Appellate Procedures adopted by Oregon’s Court of Appeals.

The following table shows JAS caseload data for the last five biennia and the number of retained versus panel/reverted cases.

Juvenile Appellate Section	2011-13	2013-15	2015-17	2017-19	2019-21
Retained Cases	357 (71%)	355 (64%)	406 (65%)	431 (64%)	432 (59%)
Panel/Reverted Cases	143 (29%)	201 (36%)	216 (35%)	247 (36%)	299 (41%)
Total	500	556	622	678	731
Chg.		56	66	56	53

For the last four biennia, the overall JAS caseload has averaged an increase of 57.8 cases per biennium and over the last five biennia JAS has, on average, retained 65% of cases and reverted or retained private contract counsel for 35% of the section’s cases. For the 2019-21 biennium, JAS experienced a relatively normal increase of 53 cases. The majority of cases are dependency followed by a lesser amount of TPR cases and relatively few delinquency cases. During the 2019-21 biennium, JAS retained 432 (59%) cases and reverted or sent to outside counsel 299 (41%) cases. While this is the highest number of retained cases in the last five biennia, the percentage of cases retained is below the 64% of cases retained for the prior three biennia. JAS per-attorney retained caseloads average 40 cases per attorney per fiscal year, which is considered acceptable.

Justification for JAS request is hindered by the fact that JAS does not have a forecasted caseload data for the current 2021-23 biennium nor specific evidence that external providers are unable to take on new cases. In addition, PDSC states that the agency “...does not have the necessary amount of funding...” to pay for external providers; however, that is difficult to substantiate, as such services have been fully funded in past biennia.

Therefore, there is insufficient data to support the JAS request for six new positions; however, one new Senior Deputy Defender position could be supported based upon routine caseload growth that is expected to occur during the 2021-23 biennium. The personal services cost of the position would be \$242,242 with associated services and supplies costs of \$17,727 and a total cost of \$259,969 General Fund. The 2023-25 cost of the position would total \$445,658 General Fund.

In addition, LFO recommends that PDSC continue to work on reconciling JAS operational budget needs with the legislatively adopted budget. Such an action would also allow for an accurate development of the 2023-25 current service level budget and serve as a more precise basis for any future budget request.

Recommendation: The Legislative Fiscal Office recommends that the Joint Interim Committee on Ways and Means recommend including an increase of \$259,969 General Fund and authorizing the establishment of one permanent full-time Senior Deputy Defender position (0.58 FTE) for the Public Defense Services Commission, Appellate Division, Juvenile Appellate Section, in a budget reconciliation bill during the 2022 legislative session to address caseload growth.

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Public Defense Services Commission
Gibson

Request: Appropriate \$1.3 million General Fund and establish six new, limited duration positions (3.48 FTE) in the Juvenile Appellate Section in response to caseload increases.

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

Discussion: The Public Defense Services Commission (PDSC) governs the Office of Public Defense Services. The Office is composed of internal business and administrative sections in addition to the juvenile and criminal appellate sections. The Juvenile Appellate Section provides representation for parents and youth in juvenile delinquency cases. Due to reported caseload growth in juvenile cases, PDSC is requesting a General Fund appropriation of \$1.3 million to establish six new, limited duration positions (3.48 FTE).

The Juvenile Appellate Section recorded a 33% increase in caseload over the past 11 months. In contrast, the Section documented a 21% increase in caseload over the prior nine years (2011-2020).

PDSC attributes the increase to the following:

- Increased supreme court practices,
- Increased individual case complexity, and
- Increased availability of remote court appearances for non-criminal matters due to the COVID-19 pandemic.

The exact caseload increase driver is unknown and it is unclear when the Agency expects the caseload to return to normal growth patterns.

CALENDAR YEAR	CASELOAD	SERVED IN-HOUSE	REVERTED TO OUTSIDE PROVIDERS
2020	320	201 (63%)	119 (37%)
2021 (<i>Jan 1 – Nov 18</i>)	426	260 (61%)	166 (39%)

The Juvenile Appellate Section currently has eight positions. The request for six additional full-time positions represents a 75% increase in staffing for the 2021-23 biennium.

POSITION	POSITION COUNT	FTE	GENERAL FUND
Senior Deputy Defenders	4	2.32	\$ 1,039,876
Paralegal	1	0.58	\$ 125,648
Legal Secretary	1	0.58	\$ 117,787
2021-23 TOTAL	6	3.48	\$1,283,311

The Section reports attempting to absorb the increasing caseload by hiring a limited duration senior deputy and utilizing internal rotations from the Criminal Appellate Section to supplement the workforce. Rotations are no longer a viable option due to courts reopening and the criminal caseload increasing. The cases not handled in-house are reverted to outside providers at an expense to Professional Services funding. The Section reports neither the Professional Services funding nor the pool of qualified external resources can sustain this level of need. At the same

time, the Section reports one of the Juvenile Appellate Section Senior Defenders has been on rotation to another area of the agency.

Legal Reference: Appropriate \$1,283,311 from the General Fund to supplement the appropriation made by chapter 444, section 1(3), 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

The Public Defense Service Commission (PDSC), through the Office of Public Defense Services (OPDS), Juvenile Appellate Section requests \$1,283,311 General Fund and position authority for four limited duration Senior Deputy Defenders, one limited duration Paralegal and one limited duration Legal Secretary (3.48 FTE) for the remainder of the 2021-23 biennium. This request will allow the Juvenile Appellate Section to fulfill its obligation to provide timely appellate representation to financially eligible Oregonians and will allow the section to continue its efforts to partner with the trial bar for training and technical assistance.

Agency Action

The Juvenile Appellate Section provides appellate representation to parents in juvenile dependency cases (including jurisdiction and permanency decisions) and termination of parental rights cases. In addition, this section occasionally provides representation to parents and youth in juvenile delinquency cases. The Juvenile Appellate Section has nine permanent positions, and its workload is driven by the number of juvenile dependency and termination of parental rights cases referred for appeal. The right to appellate review of an appealable order or judgment is largely unqualified.

The Juvenile Appellate Section has not had capacity to maintain the cases in-house, and external providers are often unable to take the cases. Case referrals to the Juvenile Appellate Section have risen from 264 during the 2011 calendar year, to 320 during the 2020 calendar year. There are 426 for calendar year 2021 to date. For calendar year 2020 the Appellate Division processed 201 (62%) cases in house and reverted 119 (37%) cases, while for calendar year 2021 to date (as of 11/18/21) the section has kept 260 (61%) in house and reverted 166 (39%). It is possible that due to the greater availability of remote appearances in non-criminal matters, referrals to the Juvenile Appellate Section appear to have increased during the COVID-19 pandemic. Case

referrals for 2019-21 have already exceeded 746. Additionally, over the past two biennium the section's supreme court practice has increased, as has the complexity of the appellate litigation.

Juvenile Appellate Section attorneys were able to provide representation in 73% of referred cases in the second half of the 2009-11 biennium. Due to the pandemic and unforeseen caseload increases the section sent 43% of the referred cases in the first half of the 2019-21 biennium to outside contractors that draw on the Professional Services Account, which currently does not have the necessary amount of funding to handle the increase. To address those challenges, the section has employed a limited duration senior deputy, and has entered into a rotation agreement with the Criminal Appellate Section for the services of an additional deputy defender for a twelve-month period. During much of the same time, a Juvenile Appellate Section Senior Defender has been on rotation to the agency's Parent Child Representation Program. All those positions require specialized training. Even with the additional staffing, the section was unable to retain all the non-conflict cases referred for the section's representation and was required to revert 72 cases for lack of capacity in 2021 to date. Borrowing an attorney from the Criminal Appellate Section is not a long-term option, because their case referrals are beginning to increase now, and returning to pre-COVID levels.

The agency considered several alternatives to this request including shifting positions from the Criminal Appellate Section and sending more cases out of the office to the appellate panel and contractors. As noted, the Criminal Appellate Section had been able to lend resources in the short term as, due to COVID, intake in that area had dropped. With reopening post-COVID, referrals for criminal appeals are now approaching pre-pandemic rates. Thus, the permanent reallocation of resources from the Criminal Appellate Section to the Juvenile Appellate Section is not a viable solution going forward. The agency has considered expanding outside providers to the juvenile panel to allow for more cases to be handled out-of-house, unfortunately that solution is not viable because a pool of qualified attorneys of which to draw upon does not exist. Furthermore, outsourcing more cases would conflict with the Juvenile Appellate Section's internal goal of aligning with the Criminal Appellate Section by maintaining at least 90% of all eligible appeals in-house.

The number and complexity of cases in which an appeal is requested is out of the agency's control. The number of cases timely resolved is a function of the number of appellate attorneys available. Attorneys in the Juvenile Appellate Section cannot maintain cases on a backlog basis because the cases are expedited; any case referred after the attorney's monthly case assignment capacity has been met must be sent to the limited pool of qualified outside providers. As mentioned above, the pool is limited because the practice is highly specialized, and the existing capacity does not meet the demand for appellate counsel in juvenile cases and has not for some time. Looking towards the future, providing the funding to expand in-house capacity allows for new attorneys to be properly trained in this specialized area within the confines of the structure, guidance, and oversight of the Juvenile Appellate Section's management in addition to addressing the increasing mandatory caseload.

By contrast, not funding the Juvenile Appellate Section's mandated caseload staffing increases gives rise to numerous direct and collateral risks. The gravest risk is, of course, that there will not be qualified counsel available to timely handle a juvenile case referred for expedited appeal.

In lieu of realizing that risk, the parties have had to accept additional delay in resolving cases, often to their own detriment. When there are not enough attorneys to handle the cases within the existing expedited timelines, the timelines must be extended. The alternative would be to dismiss an indigent party's appeal because, by no fault of their own, there is not a qualified attorney available to undertake the expedited appellate representation. Additionally, a positive collateral benefit to public defense state-wide is that the appellate division serves as a training ground for attorneys many of whom leave OPDS to practice individually as an OPDS appellate panel member or to provide court-appointed trial or appellate representation in a private law firm. Failing to fund increased positions risks the loss of those future competencies in the system.

This program will need additional resources beyond the 2021-2023 staffing levels to provide this mandated statewide program. PDSC through OPDS plans to address this issue through a Policy Option Package to be presented during the 2023 Legislative session.

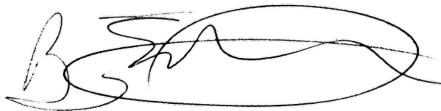
Action Requested

The Public Defense Services Commission requests that the committee approve this request for \$1,283,311 General Fund and position authority for four limited duration Senior Deputy Defenders, one limited duration Paralegal and one limited duration Legal Secretary (3.48 FTE)

Legislation Affected

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

Sincerely,

A handwritten signature in black ink, appearing to read 'Brian DeForest', written over a horizontal line.

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