

ANALYSIS

Item 2: Public Defense Services Commission Financial Update and Rebalance

Analyst: John Borden

Request: Acknowledge receipt of a financial update report and approve a budget rebalance.

Analysis: The budget report for HB 5030 (2021), the primary budget measure for the Public Defense Services Commission (PDSC), included the following budget note:

The Public Defense Services Commission is directed to report to the Joint Committee on Ways and Means during the Legislative Session in 2022, and quarterly thereafter to the Legislative Emergency Board, on the Commission's restructuring and modernization efforts. The release of special purpose appropriation to the Commission is contingent upon the Commission's satisfactory progress, as determined by the Legislature and/or the Legislative Emergency Board, in executing the Legislative direction in HB 5030 budget report, and as related to Legislative expectations regarding the restructuring, modernization, financial controls, quality management, performance metrics, and governance of the agency. Reporting is to also include, but is not limited to, updated caseload and financial forecasts; procurement activities, including contract amendments and the alignment of contracting with the biennial budget process as well as the separation of adult criminal and juvenile trial-level contracts; and human resources activities, including the hiring of positions, staff turnover, unbudgeted position actions, compensation plan changes, and staff morale.

The genesis of the budget note was the Legislature's desire to be kept apprised of PDSC's efforts to restructure and modernize the agency for the effective delivery of state public defense services. PDSC is providing a report on the financial status of the agency as well as the transfer of appropriations between programs ("rebalance"), which the agency has chosen to submit as a separate report from reorganization efforts. A rebalance was also requested and approved at the June 2022 meeting of the Emergency Board (Item #5).

On November 21, 2022, the Legislative Fiscal Office (LFO) was notified by PDSC of a material change to the agency's original report and rebalance request. PDSC is now reporting \$14 million in Federal as Other Funds from the federal Title IV-E program received from the Oregon Department of Human Services (DHS) cannot be fully expended in the Juvenile Division and therefore, the Division will not have available \$4 million in General Fund savings to rebalance or transfer to the Court Mandated Expenses Division. PDSC is requesting to revise the agency's original rebalance request as follows: (1) remove the transfer of \$4 million General Fund from the Juvenile Division to the Court Mandated Expense; (2) reduce \$4 million Other Funds expenditure limitation (Title IV-E) from the Juvenile Division and establish a \$4 million Other Funds expenditure limitation for the Trial Criminal Division to pay for eligible federal Title IV-E expenses associated with non-Parent Child Representation Program juvenile contracts; and (3) transfer an additional \$4 million General Fund from the Trial Criminal Division to Court Mandated Expense for a total transfer out of \$5 million General Fund.

Financial Projection and Qualifications

PDSC's financial projection requires qualification. The projection is a financial rather than a caseload projection. PDSC is unable to identify or assign cost based upon the agency's forecasted caseloads. Such a critical disconnect presents a material risk to the accuracy of the agency's underlying projections. PDSC's projection is based on actual expenditures through the fiscal month ending September 30, 2022 (15 months into biennium or 62.5% of biennium lapsed) and nine months of projected expenditures.

Other important qualifications related to the projection are: (a) excludes the requested rebalance; (b) includes administratively-authorized the expenditures of \$14.8 million General Fund to address the unrepresented defendant/persons issue (discussed in more detail below); (c) includes a significant number of accounting corrections or reclassifications between appropriations totaling \$14.4 million General Fund and \$16.6 million Other Funds that have yet-to-be completed in the accounting system; (e) includes the impact of a significant mis-coding of expenditures between appropriations; (f) excludes the impact of a \$52.7 to \$58 million estimated General Fund liability for nonroutine expenses (discussed in more detail below); (g) includes a General Fund backfill to address an estimated revenue shortfall of \$429,181 in the Application Contribution Program; (h) includes either no carryforward expenditures being incurred from the prior 2019-21 biennium in the 2021-23 biennium nor carrying forward any 2021-23 biennium expenditures into the 2023-25 biennium (other those related to retained General Fund reversions under statute).

Lastly, the 2021-23 legislative approved budget used by PDSC is outdated and excludes Emergency Board actions approved in September 2022. In addition, the agency's budget continues to include two errors totaling \$52,771 General Fund in two separate appropriations (the following analysis uses the correct budget figures).

Agency-Wide

PDSC's 2021-23 legislatively approved budget (as of September 2022) totals \$456.6 million total funds, which includes \$438.2 million General Fund and \$18.5 million Other Funds. The approved budget includes 113 positions (107.56 FTE). The total funds budget is \$89.9 million (or 24.5%) more than the 2019-21 legislatively approved budget.

PDSC currently projects expending \$426.4 million General Fund out of the \$438.2 million legislatively approved budget, resulting in a (unexpended) surplus of \$11.7 million General Fund and 97.3% of the budget projected to be expended for the biennium. The agency's report did not include any Other Funds projections.

Unrepresented Defendant/Persons Crisis Funding

The response to the unrepresented defendant/persons crisis can be categorized as being either: (a) legislatively directed supplemental funding requested by PDSC; or (b) administratively directed actions of the Commission and self-fund within PDSC's existing 2021-23 legislatively approved budget.

At present, the state's financial commitment to the crisis totals \$27.2 million General Fund or about \$49,000 per unrepresented defendant/persons/person (based on 555 defendant/persons/persons as of November 14, 2022).

The 2022 Legislature funded PDSC's plan by appropriating \$12.8 million General Fund, on a one-time basis, to address the current backlog of unrepresented defendant/persons in in Multnomah, Washington, Marion, and Lane counties and provide increased attorney capacity for the remainder of the biennium.

Administratively, the Commission has authorized, from existing budgeted resources totaling \$14.4 million General Fund, the following six discrete actions: (1) increase, temporarily, the hourly rate for non-contract attorneys from \$105/hour to \$158/hour (\$2.1 million General Fund); (2) fund, temporarily, training, supervision, and investigation costs for all public defender offices (\$7.5 million General Fund); (3) increase, temporarily, the hourly rate for attorneys that are contracted for less than 1.00 FTE caseload from \$105/hour to \$158/hour (\$1.5 million General Fund); (4) provide, temporarily, up to two incentive payments for public defender offices, who did not receive emergency funding, to hire new attorneys (\$800,000 General Fund); (5) provide, temporarily, up to two incentive payments for consortia and private attorney offices to hire new attorneys (\$2.4 million General Fund); and (6) increase, temporarily, the hourly rate for investigators who work on cases in which the attorney is representing an individual who had been in-custody and unrepresented from \$40/hour to \$75/hour (\$225,000 General Fund). The Commission limited the effective duration of these initiatives. Eligibility for the increased hourly attorney and investigator rates expires on December 31, 2022; however, the increased hourly costs will continue into next biennium, as they are authorized until the conclusion of a case. The remaining initiatives sunset no later June 30, 2023, or at the conclusion of the current biennium. PDSC has not provided an estimate of the 2023-25 cost. Total costs are also understated, as PDSC has been unable to estimate the associated non-attorney expenses (e.g., transcriptionists, investigators, interpreters, mitigators, social workers, psychologists, polygraph examiners, and forensic experts, such as firearm experts, arson experts, deoxyribonucleic acid (DNA) experts, and medical experts).

These actions were done with the explicit direction by the Commission that the actions could be fully absorbed or self-funded within PDSC's 2021-23 legislatively approved budget and that no supplemental funding would be required of either the Emergency Board or the Legislature. Lastly, the projections, according to PDSC, include all Commission-approved administrative actions related to internal funding of unrepresented defendant/persons initiatives; however, these expenditures have not been discretely tracked or presented in PDSC's financial report.

Trial Criminal Division

The Trial Criminal Division (TCD) has a 2021-23 legislatively approved budget of \$259 million General Fund (as of September 2022) with actual and projected expenditures of \$246.4 million General Fund for the biennium, which leaves a \$12.6 million General Fund (unexpended) surplus and 95.1% of the approved budget projected to be expended for the biennium before the rebalance action. If approved, the revised rebalance plan would reduce the projected savings by \$5 million General Fund to \$7.6 million and the budget would become 97% expended. The rebalance would also establish for the TCD a \$4 million Other Fund expenditure limitation to fund a portion of non-Parent Child Representation Program juvenile provider contracts (refer to a more complete discussion under the Juvenile Division).

The projection includes all contracted fiscal year 2022 and 2023 costs for adult criminal and juvenile (excluding the Parent Child Representation Program, which is budgeted discretely), as well as over 50 contract amendments. The projected surplus generally arises from an under-expenditure of a \$12.8 million General Fund appropriation for unrepresented defendant/persons. To-date, PDSC has only obligated \$6.9 million leaving \$5.8 million unspent. PDSC also reports provider contract savings due to vacant or unfilled contracted positions, which PDSC only funds if filled by an incumbent.

The projection does include the Commission-approved administrative actions related to internal funding of unrepresented defendant/persons initiatives associated with TCD, which totals an estimated \$10.7 million General Fund and for which does not require a rebalance action.

Nonroutine Expenses

Nonroutine Expenses (NRE) has a 2021-23 legislatively adopted budget of \$50.5 million General Fund with PDSC actual and projected expenditures of \$44.4 million General Fund, which leaves \$6.1 million General Fund (unexpended) surplus and 87.9% of the approved budget projected to be expended for the biennium before the rebalance action. If approved, the revised rebalance plan would reduce the projected savings by \$5 million General Fund to \$1.1 million, and the budget would become 97.6% expended.

PDSC's report makes no mention of what the agency has reported previously as an outstanding and unbudgeted liability for obligated NRE expenses of between \$52.7 and \$58 million General Fund. How much of this obligation will need to be paid and when continues to remain uncertain. The NRE projection is also likely understated as the agency made no estimate of related non-attorney expenses of the Commission-approved unrepresented defendant/persons initiatives (e.g., transcriptionists, investigators, interpreters, mitigators, social workers, psychologists, polygraph examiners, and forensic experts, such as firearm experts, arson experts, deoxyribonucleic acid (DNA) experts, and medical experts).

The projection does include the Commission-approved administrative actions related to internal funding of unrepresented defendant/persons initiatives associated with NRE, which totals an estimated \$225,000 General Fund and which does not require a rebalance action.

Court Mandated Expenses

The Court Mandated Expenses Division has a 2021-23 legislatively approved budget of \$39.6 million General Fund with PDSC actual and projected expenditures of \$51.3 million General Fund, which leaves a \$11.8 million General Fund deficit and 129.7% of the approved budget projected to be over expended for the biennium before the rebalance action. If approved, the revised rebalance plan would be an increase of \$12 million General Fund would resolve the deficit and leave an (unexpended) surplus of \$236,758 and the budget being 99.5% expended.

The projection does include the Commission-approved administrative actions related to internal funding of unrepresented defendant/persons initiatives associated with Court Mandated Expenses, which totals an estimated \$3.6 million General Fund.

The Division also has a 2021-23 legislatively approved budget of \$4.5 million Other Funds supported with revenue from the Application Contribution Program (ACP). Of this amount, \$3.6 million is to be transferred to the Oregon Judicial Department (OJD) to fund the verification specialist positions. The ACP provides judges the authority to order those who apply for court-appointed counsel to pay the administrative costs of determining their eligibility and a "contribution amount" toward the anticipated cost of the public defense prior to conclusion of the case. PDSC provided no actual or projected expenditures for ACP. PDSC does not have a formal cost split methodology between General Fund and ACP for this program, which remains of concern and underscores an area where financial management practices are ad hoc and need to be written, reviewed and approved. For this program, PDSC has to reclassify \$2.6 million of General Fund expenditures to Other Funds.

Juvenile Division

The Juvenile Division has a 2021-23 legislatively adopted budget of \$41 million General Fund and \$14 million Other Funds with a PDSC forecasted funding requirement of \$40.6 million General Fund, which

leaves a \$343,436 General Fund surplus and 99.2% of the approved budget projected to be expended for the biennium before the rebalance action. If approved, the revised rebalance plan would reduce by \$4 million the Other Funds expenditure limitation for the division.

The Division's 2021-23 legislatively approved budget of \$14 million Other Funds is supported with Title IV-E funds received by the agency from the DHS. PDSC provided no actual or projected expenditures for Title IV-E funding as part of the original financial update report. After the submission of PDSC's Emergency Board request, the agency reported that a memorandum of agreement (MOU) had been signed between DHS and PDSC guaranteeing the flow of Title IV-E funds (Federal as Other Funds) between the agencies for a second biennium; however, PDSC is now reporting that while PDSC and DHS have a signed MOU, the federal government has yet-to-approve the agreement. PDSC has only just discovered that out of the \$14 million in anticipated Title IV-E reimbursement budgeted under the Juvenile Division, only an estimated \$10 million of expenses associated with two quarters of the 2019-21 biennium and the first six quarters of the current biennium are eligible for reimbursement. Thus, PDSC now states that the Juvenile Division no longer has \$4 million in projected General Fund savings to transfer or rebalance to the Court Mandated Expense Division. Instead, the Juvenile Division, according to PDSC, needs to retain the projected General Fund savings to sustain the division's expenses through the end of the biennium and that the division would have \$4 million of unneeded Other Funds expenditure limitation.

PDSC will now have to reclassify \$10 million of General Fund expenditures to Other Funds. PDSC does not have a formal cost split methodology between General Fund and Title-IV-E for this program, which remains of concern and underscores an area where financial management practices are ad hoc and need to be written, reviewed and approved.

Commission-approved administrative actions related to internal funding of unrepresented defendant/persons initiatives were apart from the Juvenile Division and therefore had no impact on the division's projections.

Appellate Division

The Appellate Division has a 2021-23 legislatively adopted budget of \$24.8 million General Fund with a PDSC forecasted funding requirement of \$22 million General Fund, which leaves a \$2.8 million General Fund (unexpended) surplus and 88.7% of the approved budget projected to be expended for the biennium before the rebalance action. If approved, the revised rebalance plan would reduce projected savings by \$2 million General Fund and the budget would become 96.5% expended. Of projected surplus, \$2.5 million General Fund is due to lower personal service costs, which PDSC attributes to the hiring of attorneys below budgeted cost.

Executive Division

The Executive Division has a 2021-23 legislatively adopted budget of \$3.7 million General Fund with a PDSC forecasted funding requirement of \$3.5 million General Fund, which leaves a \$222,294 General Fund (unexpended) surplus and 94.1% of the approved budget projected to be expended for the biennium.

Compliance, Audit, and Performance Division

The Compliance, Audit and Performance Division (CAP) has a 2021-23 legislatively adopted budget of \$5 million General Fund with a PDSC forecasted funding requirement of \$4.3 million General Fund, which

leaves a \$573,195 General Fund (unexpended) surplus and 86.2% of the approved budget projected to be expended for the biennium.

Administrative Services Division

The Administrative Services Division (ASD) has a 2021-23 legislatively approved budget of \$14.2 million General Fund with a PDSC forecasted funding requirement of \$13.7 million General Fund, which leaves a \$521,162 General Fund (unexpended) surplus and 96.7% of the approved budget projected to be expended for the biennium. Of note is that PDSC figures overstate the legislatively approved budget for the division by \$52,771 General Fund.

Special Programs, Contracts, and Distribution Division

The Special Programs, Contracts, and Distribution Division (SPCDD) has a 2021-23 legislatively approved budget of \$380,436 General Fund with a PDSC forecasted funding requirement of \$126,431 General Fund, which leaves a \$254,005 General Fund (unexpended) surplus and 33.2% of the approved budget projected to be expended for the biennium. The variance calls into question the agency's SB 578 (2021) implementation and the appointment of legal counsel for certain persons in protective proceedings in the three pilot counties of Multnomah, Lane, and Columbia. PDSC's projection for SPCDD may be illustrative of the problem encountered when using a financial rather than a caseload projection.

Summary of Requested Rebalance Actions

PDSC is requesting the transfer of appropriations between programs to realign General Fund appropriations with expenditure activities. Commonly referred to as a "rebalance," the net result of these actions is zero and therefore is a legally allowable action that may be undertaken by the Emergency Board. The PDSC rebalance request includes making the following transfers totaling \$12 million from four appropriations into the Court Mandated Expenses appropriation:

- Transfer personal service budget savings from the Appellate Division to the Court Mandated Expenses to primarily fund a \$9.2 million in deficit spending in psychiatric evaluation fees, interpreter fees, and discovery reimbursements (\$2 million General Fund reduction);
- Transfer professional services line-item savings from the Criminal Trial Division to the Court Mandated Expenses to primarily fund a \$9.2 million in deficit spending in psychiatric evaluation fees, interpreter fees, and discovery reimbursements (\$5 million General Fund reduction);
- Transfer services and supplies budget from Nonroutine Expenses to Court Mandated Expenses to primarily fund a \$9.2 million in deficit spending in psychiatric evaluation fees, interpreter fees, and discovery reimbursements (\$5 million General Fund reduction);
- Reduce Other Funds expenditure limitation for the Juvenile Division (\$4 million); and
- Establish an Other Funds expenditure limitation for the Criminal Trial Division to fund non-Parent Child Representation Program juvenile provider contracts (\$4 million).

Of note is that no action included in the rebalance request is related to any of the Commission-approved administrative actions related to internal funding of unrepresented defendant/persons initiatives. Instead, the actions realign budget with actual or anticipated expenditures.

2023-25 Biennial Budget

An approved, ongoing (i.e., not one-time) Emergency Board action after April in even numbered years has implications to an agency's budget for the following biennium, as any such approved actions are not included as part of an agency's 2023-25 budget. In addition, PDSC submitted no policy package request

related to the re-alignment of the agency's budget between programs. Therefore, such an action will need to be undertaken during the 2023 legislative session, which should eliminate or at least reduce substantively the need for major rebalance actions during the 2023-25 biennium.

PDSC will need to submit a comprehensive rebalance/realignment plan for its 2023-25 current service level budget to the Legislative Fiscal Office that includes the impact of actions approved by the Emergency Board during the 2022 interim, as well as any additional 2021-23 rebalance actions that may be needed early in the 2023 session. The plan to realign the Commission's 2023-25 current service level budget will need to be submitted by the deadline established for budget related requests for the early session 2021-23 budget rebalance bill.

Recommendation: The Legislative Fiscal Office recommends that the Emergency Board acknowledge receipt of the report and approve the Public Defense Services Commission revised rebalance plan.

2
Public Defense Services Commission
Gibson

Request: Report on the rebalance request from the Public Defense Services Commission and transfer of appropriations made to the Trial Criminal Division, Juvenile Division, Court Mandated Expenses, Appellate Division, and Case Support Services (formerly Nonroutine Expenses) for purposes of rebalancing the budget.

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

Discussion: The Public Defense Services Commission (PDSC) requests a series of rebalance actions to align expenditures and revenues within their budget. The misalignments are primarily related to implementation of new initiatives to increase legal provider capacity. As the commission continues to consider opportunities to positively impact the provider community and gain additional legal representation capacity, the budget will need to continue shifting through rebalance actions.

As of October 2022, PDSC reports the following General Fund financial information based on actual expenditures through September 2022 accounting close:

PDSC Budget, by SCR	Fund Type	Leg. Approved Budget	Total Expenditures + Projections	Budget Variance
Executive Div.	GF	3,743,464	3,521,170	222,294
Compliance, Audit, & Perf. Div.*	GF	5,026,309	4,331,464	694,845
Appellate Div.	GF	24,818,312	22,027,336	2,790,976
Administrative Services Div.*	GF	14,139,812	13,668,650	471,162
Special Programs, Contracts & Distr.	GF	380,436	126,431	254,005
Trial Criminal Div.	GF	258,915,757	246,371,121	12,544,636
Non-Routine Expenses	GF	50,511,590	44,423,832	6,087,758
Court Mandated Expenses	GF	39,567,492	51,330,733	(11,763,241)
Juvenile Div.	GF	40,965,293	36,621,857	4,343,436
TOTAL FUND (TF)		438,068,465	422,422,594	15,645,871

() = Overage

* PDSC's financial update contained two Legislatively Adopted Budget numbers which needed to be adjusted for accuracy. The Administrative Services Division budget number was adjusted down \$50,000. The Compliance, Audit, and Performance Division budget number was adjusted up \$121,650.

Overall, PDSC's financial information shows a \$15.6 million General Fund savings. However, PDSC has multiple budget risks, including multiple lawsuits, which can negatively impact the budget, and outstanding encumbrance liabilities of over \$50.0 million related to current approvals for future reimbursable activities, which have yet to be billed. Additionally, the projections are based on shifting financial assumptions. The following is a high-level division-by-division summary of the projection changes.

Executive Division

PDSC Projection	LAB (GF)	Expenditures + Projections	Budget Variance
July 2022	3,743,464	3,230,993	512,471 Savings
October 2022	3,743,464	3,521,170	222,294 Savings
Projection Variance >>		290,177	

The October 2022 projections increased slightly, which decreased the savings; however, the division continues to report a savings.

Compliance, Audit, and Performance Division

PDSC Projection	LAB (GF)	Expenditures + Projections	Budget Variance
July 2022	4,904,660	4,552,126	352,534 Savings
October 2022	5,026,309	4,331,464	694,845 Savings
Projection Variance >>		(220,662)	

The October 2022 projections show no significant change. The division reports a slight increase in savings related to funding appropriated at the September 2022 meeting of the Emergency Board.

Appellate Division

PDSC Projection	LAB (GF)	Expenditures + Projections	Budget Variance
July 2022	24,818,312	19,991,670	4,826,642 Savings
October 2022	24,818,312	22,027,336	2,790,976 Savings
Projection Variance >>		2,035,666	

The October 2022 projections increased by \$2.0 million. The increase is related to a prior projected savings of \$2.2 million in Professional Services, which is removed

from the October 2022 projections. The division reports a reduced savings of \$2.8 million. PDSC requests the transfer of \$2.0 million General Fund from the Appellate Division to Court Mandated Expenses to cover the projected shortfall and rebalance the budget.

Administrative Services

PDSC Projection	LAB (GF)	Expenditures + Projections	Budget Variance
July 2022	14,139,812	12,077,112	2,062,700 Savings
October 2022	14,139,812	13,668,650	471,162 Savings
Projection Variance >>		1,591,538	

The October 2022 projections increased by \$1.6 million due to personnel expenses and IT related expenditures. Although reduced, the division continues to report a savings.

Special Programs, Contracts and Distributions

PDSC Projection	LAB (GF)	Expenditures + Projections	Budget Variance
July 2022	380,436	424	380,012 Savings
October 2022	380,436	126,431	254,005 Savings
Projection Variance >>		126,007	

The October 2022 projections show no significant change. The division reports a slightly decreased savings.

Trial Criminal Division

PDSC Projection	LAB (GF)	Expenditures + Projections	Budget Variance
July 2022	258,915,757	237,661,629	21,254,128 Savings
October 2022	258,915,757	246,371,121	12,544,636 Savings
Projection Variance >>		8,709,492	

The October 2022 projections show an \$8.7 million increase in spending. The increase is directly related to increased attorney contract payments stemming from the implementation of

commission-approved initiatives, including increased contract capacity (\$6.9 million) and increased training and supervision funding (\$7.5 million). According to the report, PDSC is expecting to expend an additional \$10.0 million on incentivizing initiatives to grow attorney capacity, which is not included in the projections.

PDSC requests the transfer of \$1.0 million General Fund from the Trial Criminal Division to Court Mandated Expenses to rebalance the budget.

Nonroutine Expenses (referred to as Case Support Services by PDSC)

PDSC Projection	LAB (GF)	Expenditures + Projections	Budget Variance
July 2022	50,511,590	44,758,565	5,753,025 Savings
October 2022	50,511,590	44,423,832	6,087,758 Savings
Projection Variance >>		(334,733)	

The October 2022 projections show no significant change. The division continues to report a high savings. The savings is directly related to a budget misalignment. The discovery expenses are

budgeted in Nonroutine Expenses but realized in Court Mandated Expenses. The savings in Nonroutine Expenses offset the overage in Court Mandated Expenses. PDSC requests the transfer of \$5.0 million General Fund from Nonroutine Expenses to Court Mandated Expenses to rebalance the budget to align with the expenditures.

Court Mandated Expenses

PDSC Projection	LAB (GF)	Expenditures + Projections	Budget Variance
July 2022	39,567,492	48,623,067	(9,055,575) OVER
October 2022	39,567,492	51,330,733	(11,763,241) OVER
Projection Variance >>		2,707,666	

The October 2022 projections show an expenditure increase of \$2.7 million. This area of the budget provides the funding for two of PDSC's new initiatives, including the increase in the hourly pay rate

to \$158 per hour for attorneys and \$75 per hour for investigators for cases with unrepresented persons currently in custody. Although the pay rate initiative is only authorized through December 2022, the increased pay rate continues throughout the remaining life of the case. This means the increase in expenditures may continue to impact this area of the budget for approximately the next three years.

The two primary drivers for the increased projection are psychiatric fees and discovery-related expenses. The discovery-related expenses are budgeted in Non-Routine Expenses but realized in the Court Mandated Expenses budget. Additionally, the billing variance between counties is significant due to a lack of standards identifying allowable expenses. PDSC acknowledges the need for standard allowable discovery expenses.

Overall, the financial information reflects an overage of approximately \$11.8 million General Fund. This appropriation is anticipated to run short as early as January 2023 if no additional funding is added. To resolve the overage issues, PDSC requests a rebalance of funds from four other divisions into Court Mandated Expenses to realign the budget with expenditures.

- \$2.0 million General Fund from Appellate Division
- \$1.0 million General Fund from Trial Criminal Division
- \$5.0 million General Fund from Non-Routine Expenses
- \$4.0 million General Fund from Juvenile Division

Juvenile Division

PDSC Projection	LAB (GF)	Expenditures + Projections	Budget Variance
July 2022	40,965,293	51,601,706	(10,636,413) OVER
October 2022	40,965,293	36,621,857	4,343,436 Savings
<i>Projection Variance >></i>		(14,979,849)	

The October 2022 projections show a significant increase in savings. The savings is contingent on the receipt of \$14.0 million from Title IV-E Federal Funds transferred to PDSC from the Oregon

Department of Human Services as Other Funds. The two agencies are jointly working through an update to the memorandum of understanding (MOU) and expect the funds to begin transferring soon. PDSC will utilize the Title IV-E funding to reimburse the division for incurred General Fund expenses.

PDSC requests the transfer of \$4.0 million General Fund from the Juvenile Division to Court Mandated Expenses to rebalance the budget to align with the expenditures.

Legal Reference: Transfer of \$12,000,000 General Fund appropriation made by chapter 444, section 1, Oregon Laws 2021, for the 2021-23 biennium as follows:

Subsection	Amount
(3) Appellate Division	\$-2,000,000
(4) Trial Criminal Division	\$-1,000,000
(5) Nonroutine Expenses	\$-5,000,000
(6) Court Mandated Expenses	\$+12,000,000
(7) Juvenile Division	\$-4,000,000



Oregon

Public Defense Services Commission

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October 24, 2022

The Honorable Senator Peter Courtney, Co-Chair
The Honorable Representative Dan Rayfield, Co-Chair
Joint Emergency Board
900 Court Street NE
H-178 State Capitol
Salem, OR 97301-4048

Dear Co-Chairs:

Nature of the Request

The purpose of this letter is to present a rebalance report and to request the second rebalance of the 2021-23 Legislative Approved Budget of the Public Defense Services Commission (PDSC).

Agency Action

The PDSC humbly requests to submit a rebalance report and request for rebalance to address the issues currently facing the agency. The report requests to move \$12 million General Fund to Court Mandated Expenses from the following divisions: Appellate (\$2 million), Trial Criminal (\$1 million), Case Support Services (formerly "Non-Routine Expenses" or "NRE") (\$5 million) and Juvenile (\$4 million).

The agency is aware that significant time remains in the biennium but needs to ensure that none of its standalone appropriations exceed legislative authority. The agency works hard to ensure that each division does not overspend, but there remains a constant uncertainty associated with mandated caseloads. The agency is projecting that the Court Mandated Expenses appropriation will be exhausted as early as February 2023 without this rebalance action, which will not allow the agency to pay non-contract hourly attorneys and other vendors for their services. The December 2022 Joint Emergency Board is the last opportunity for the agency to request this necessary adjustment of funds.

Action Requested

The Public Defense Services Commission requests acknowledgement and receipt of the rebalance report. The PDSC also request the movement of \$12 million General Fund to Court Mandated Expenses from the Appellate Division, Trial Criminal Division, Juvenile Division and Case Support Services to cover projected expenses.

Legislation Affected

Oregon Law 2021 Chapter 444, section 1 (6), \$12,000,000
Oregon Law 2021 Chapter 444, section 1 (3), (\$2,000,000)
Oregon Law 2021 Chapter 444, section 1 (4), (\$1,000,000)
Oregon Law 2021 Chapter 444, section 1 (5), (\$5,000,000)
Oregon Law 2021 Chapter 444, section 1 (7), (\$4,000,000)

Sincerely,

A handwritten signature in black ink, appearing to read 'B. DeForest', with a large, sweeping flourish extending to the right.

Brian E. DeForest
Deputy Director

cc:

Amanda Beitel, Legislative Fiscal Officer
John Borden, Principal Legislative Analyst, LFO
George Naughton, Chief Financial Officer
Wendy Gibson, Policy and Budget Analyst, CFO

Request to The State of Oregon December Emergency Board

Public Defense Services Commission (PDSC) Rebalance Request

October 24, 2022

Executive Summary and Nature of Request:

The Oregon Public Defense Services Commission (PDSC) is submitting this rebalance request for the 2021-23 biennium to the Emergency Board. This report reflects an anticipated need to rebalance between appropriations only. There is no anticipated need for a net increase in appropriation, rather the rebalance is moving existing authority.

Budget Issues for 2021-23

The table below summarizes the PDSC General Fund (GF) position by budgetary division. A shortfall is expected in Court Mandated Expenses, with savings expected in other divisions.

	<i>General Fund Only</i>			
	2021-23 Leg Approved Budget	September 2022 Projection	Variance	Anticipated Rebalance
Executive	3,743,464	3,521,170	222,294	0
Compliance, Audit, and Performance	4,904,659	4,331,464	573,195	0
Appellate	24,818,312	22,027,336	2,790,976	(2,000,000)
Administrative Services Division	14,189,812	13,668,650	521,162	0
Special Prog, Contracts, and Distributions	380,436	126,431	254,005	0
Trial Representation Programs				
Trial Criminal Division	258,915,757	246,371,121	12,544,636	(1,000,000)
Case Support Services (NRE)	50,511,590	44,423,832	6,087,758	(5,000,000)
Court Mandated Expenses	39,567,492	51,330,733	(11,763,241)	12,000,000
Juvenile Division	40,965,293	36,621,857	4,343,436	(4,000,000)
Total	437,996,815	422,422,594	15,574,221	0

Program Rebalance Details

This section provides discussion on the Commission's updated budget position by program area. Projections for the remainder of the biennium were made after September month-end close.

The largest risk is current reliance on Other Funds of \$14,000,000 in Title IV-E funding received from the Federal Government through the Department of Human Services. While DHS is working to secure the funding and it is likely to be available, the availability is not certain at this time.

Trial Representation Programs

The bulk of the commission budget is dedicated to trial representation of indigent clients, and it is helpful to think of the detailed budgetary divisions together. The budgetary divisions that support this function are complementary and often interchangeable. For instance, when contracted attorneys funded through the Trial Criminal Division can't represent a defendant because of either a conflict or excessive existing caseloads, an attorney needs to be funded through the Court Mandated Division. The 2021-23 biennium has seen a crisis-level shortage of contract attorneys, and a related deficit is projected for the Court Mandated Expenses division.

Trial Criminal Division

The 2022 Legislature appropriated \$12.8 million in emergency funding to help address a crisis in public defense representation. This additional funding has been used to contract for additional attorney MAC (maximum attorney caseload), with about \$6.9 million committed to date, and \$5.8 million remaining.

From existing appropriations, in August 2022, the PDSC authorized \$7.5 million to augment training and supervision for nonprofit public defender offices. Funding for training and supervision is current in the projections as about \$7 million has been included in amended contracts.

When new contracts began in July 2022, there were many counties where the available attorney MAC was not sufficient to meet forecasted caseloads. These "vacancies" are being filled, but some remain. Projected expenditures through the rest of the biennium exclude MAC not currently in contracts, so expenditures are likely to be higher than the projection.

In the face of a continuing shortage of attorneys available for public defense in Oregon, the Commission is expected to authorize one or more additional incentives to increase compensation for contractors that provide representation for PDSC clients. These increases, in combination with filling targeted vacancies, are expected to cost about \$10 million through 2021-23. The funding for these actions will come from available funds, including remaining emergency funding appropriated by the 2022 Legislature.

Juvenile Division

The Juvenile Division is projected to have savings of about \$4.3 million. The entirety of this savings is based on anticipating the full \$14 million in Other Funds from Federal Title IV-E is used to offset General Fund expenses in this division.

Case Support Services

There have been significant increases in the request and approvals for services needed to support the Commission's trial representation work. This is the first biennium these expenditures have been in a distinct budget category. While expenditures within this budget category have increased, Case Support Services is currently projected to have a savings of about \$6.1 million which is likely needed to support the similar expenses in the Court Mandated Expenses budget category.

Court Mandated Expenses

This appropriation presents the biggest area of concern for the agency currently. The agency is projecting that this appropriation will be exhausted as early as February 2023, which will not allow the agency to pay non-contract hourly attorneys and other vendors for their services. It is important to note that the Commission authorized a temporary policy change to how non-contract attorneys are paid, specifically for those who accept an emergency case at \$158 per hour with the understanding that a rebalance would be necessary to cover these additional expenses. This change was to afford those attorneys and firms the opportunity to bill for payment monthly or quarterly rather than submitting a bill at case resolution. This change, while being more in line with best business and accounting practices and more beneficial to the provider, places an unbudgeted and additional strain on this appropriation.

The crisis of unrepresented clients is well known and is a primary driver of court mandated expenses shortfall of about \$11.8 million. It is also worth noting that prior to restructuring the Commission's budget, this classification was not used.

In August 2022, the Commission approved an increase in the hourly rate paid to attorneys if appointed to unrepresented clients that are in custody at the time of appointment. The prior maximum rate was \$105 per hour, and the new maximum hourly rate of \$158 per hour is available through December 2022.

Executive Division

The Executive Division budget is primarily dedicated to personal services expenditures which are relatively predictable. We anticipate about \$220,000 in savings, primarily from vacancies that have occurred through the biennium.

Compliance, Audit, and Performance Division

The Compliance, Audit and Performance Division budget is primarily dedicated to personal services expenditures which are relatively predictable. We anticipate about \$570,000 in savings based on current projections. We anticipate savings related to procuring an external audit and from vacancies that have occurred through the biennium. There are two Internal Auditor positions that have been vacant through multiple recruitment efforts.

Appellate Division

The Appellate Division budget is primarily dedicated to personal services expenditures which are relatively predictable. We anticipate about \$2.8 million in savings based on current projections. The savings are due to vacancies and having several Senior Deputy Defender positions underfilled as Deputy Defenders.

Administrative Services Division

The Administrative Services Division budget anticipates about \$520,000 in savings based on current projections. The largest source savings is in IT Professional Services.

Special Programs, Contracts, and Distributions

The Special Programs, Contracts, and Distributions Division budget is primarily dedicated to personal services expenditures which are relatively predictable. We anticipate about \$250,000 in savings based on current projections.