

ANALYSIS

Item 3: Public Defense Services Commission Unrepresented Defendant/Persons Crisis Hourly Program

Analyst: John Borden

Request: Allocate \$5,000,000 General Fund from the special purpose appropriation to the Emergency Board for the unrepresented defendant/persons crisis and appropriate \$3,100,000 General Fund for the Temporary Hourly Rate Increase Program to address the unrepresented defendant/persons crisis.

Analysis: The Public Defense Services Commission (PDSC) is requesting \$8.1 million for the extension the Temporary Hourly Increase Program (THIP) (aka “Enhanced Hourly Rate Program”), which was developed in response to the unrepresented defendant/persons crisis. The program serves as a mechanism to increase attorney and investigator capacity through enhanced hourly rates of pay above standard hourly scheduled rates of pay. The program is limited to in-custody defendants.

The Legislature renamed PDSC to the Oregon Public Defense Commission (OPDC) with an operative date of January 1, 2024 (SB 337, 2023). For the purposes of this request and recommendation, the agency will continue to be referred to as PDSC to remain consistent with the agency’s request letter and current Oregon chapter law.

Current State of the Crisis (December 2023)

As of December 27, 2023, there are a total of 4,289 unrepresented defendant/persons on the Judicial Department’s Unrepresented Persons dashboard. This includes: 132 defendants in-custody, 2,324 defendants out-of-custody pretrial, 268 defendants out-of-custody probation violation, 1,365 defendants on active warrant status, three Department of Corrections defendants on post-disposition, and 196 non-criminal persons lacking representation for other cases like civil commitments, juvenile delinquency, juvenile dependency, habeas corpus petition, post-conviction relief, and adoption. The offense class faced by most unrepresented defendant is a misdemeanor or a Class C felony charge(s). The crisis is currently most acute in Jackson, Multnomah, Marion, Washington, Douglas, Clackamas, Clatsop, Umatilla, Linn, and Lincoln Counties.

In summary, the unrepresented defendant/persons crisis continues to stabilize around 4,250 cases since 4,254 cases were last reported, as of October 20, 2023. Of concern, is that the unrepresented defendant/persons crisis list or dashboard incorporates nonunanimous jury convictions caseloads, which potentially overstates the actual crisis.

Temporary Hourly Increase Program

On July 29, 2022, the Commission administratively approved the establishment of the “Enhanced Hourly Rate Program,” which was later renamed THIP. The program was one of several efforts to address the unrepresented defendant/persons crisis. Initially, the program was limited to in-custody adults and juveniles and to private (non-provider contract) attorneys. The program was an effort to match the \$158 hourly rate paid to private bar members by the federal Office of the Public Defender - District of Oregon. THIP is for in-custody defendants in local jails/jurisdiction. Cases are assigned under the THIP based on data set out in the Oregon Judicial Department’s Unrepresented Persons dashboard.

On August 18, 2022, PDSC expanded the eligibility of the program to include contract providers who are at less than one Maximum Attorney Caseload (MAC). In March 2023, the PDSC again authorized the expansion of the THIP, but this time to allow all contract providers, regardless of the level of contracted MAC, to participate in the program if the provider affirmed in writing that the attorney had the ethical capacity to exceed their caseload MAC. On October 20, 2022, the PDSC further expanded the program to include paying investigators an enhanced rate of \$75 per hour, which was \$35 per hour above their standard rate of \$40 at that time. The current rate is \$55 per hour for monolingual investigators and \$60 for bilingual investigators.

On January 19, 2023, the Commission approved a five tier hourly pay structure for the program beginning with \$200 per hour for the most serious offenses to \$125 per hour for lower-level offenses. PDSC's standard rate for hourly attorneys for those not on the unrepresented defendant/persons list was between \$75 to \$105 per hour. The current rate is \$145 for major felonies and juvenile cases and \$130 for all other case types.

PDSC initially funded THIP with one-time budgetary savings with no formal request to the Legislature or the Emergency Board for funding up until the Emergency Board in December 2022 allocated \$10 million of General Fund of which \$2.9 million was used to continue the program until the end of the 2021-23 biennium. The program was to sunset on June 30, 2023 at the close of the biennium. The following table summarized the currently hourly rate structure and the change from the 2021-23 biennium.

Temporary Hourly Increase Program Attorney/Investigator	2021-23 Hourly Rate	2023-25 Hourly Rate	\$ Chg.	% Chg.
Murder and Jessica's Law cases	\$200.00	\$200.00	\$0.00	0.0%
Ballot Measure 11 and felony sex offense cases	\$175.00	\$175.00	\$0.00	0.0%
Class A and B felony, juvenile dependency, juvenile delinquency, juvenile probation violations, habeas corpus, post-conviction relief, civil commitment, Psychiatric Security Review Board cases; waiver co-counsel; discretionary co-counsel; material witness representation; fugitive/extradition appeals	\$164.00	\$164.00	\$0.00	0.0%
Class C felony and felony drug possession cases	\$158.00	\$164.00	\$6.00	3.8%
Misdemeanor, contempt, and probation violation cases	\$125.00	\$164.00	\$39.00	31.2%
Investigator	\$75.00	\$75.00	\$0.00	0.0%

The 2023 Legislature funded a Western Oregon Regional Pilot starting October 1, 2023 (Washington, Multnomah, and Clackamas counties) and a Southern Oregon Regional Pilot starting December 1, 2023 (Jackson, Douglas, and Klamath counties), as well as a position for overall program administration. The pilot programs are expected to take more in-custody unrepresented cases and result a steadily diminishing number of cases assigned to THIP. PDSC's standing up of the pilot programs are behind schedule and overbudget, with the Western pilot only begin taking a few cases in mid-December.

The 2023 Legislature also extended the THIP from July 1 to September 30, 2023, or until such time as state employees under the Adult Trial Division pilot program could assume the work of the program (aka "Bridge Funding"). This funding totaled \$2 million General Fund.

Due to delays in standing up the state employee pilot program, the Commission voted to extend the program from October 1 to November 30, 2023. The Commission then voted again to extend the

program from October 31, 2023 to June 30, 2024. PDSC's 2023-25 legislatively adopted budget does not have the General Fund resources to fund the latter two extensions nor a shortfall in funding from the July 1 to September 30, 2023 period. PDSC now requires retroactively supplemental funding to be authorized by the Legislature for the program to continue until June 30, 2024.

Of important note is that THIP represents a continuing financial obligation to the state until a case assigned under the program is resolved. Thus, expenditures may continue into the second year of the biennium and potentially in to the 2025-27 biennium for unadjudicated cases.

In addition, THIP costs include payment for not just hourly attorneys, but related costs such as expert witness and investigation expenses ("Preauthorized"), which can be material. THIP attorneys and investigators may also be reimbursed for travel and other allowable expenses. Of note is that PDSC's request failed to differentiate hourly attorney and preauthorized expenses. The request also mistakenly included one month of funding for the 2025-27 biennium, which will be removed from the recommendation.

THIP not a perfect program, but perhaps a needed exigency given the unrepresented defendant/persons crisis. The specific concerns with THIP are that the program is more costly than provider contract attorneys or investigators, and therefore disenfranchises some providers and standard hourly paid vendors; disincentivizes contract providers from adding Maximum Attorney Capacity under current contract terms; and potentially creates an ethical dilemma by financially incentivizing contract provides to take on cases above their ethical capacity.

Expenditures To-Date

On December 14, 2023, the Public Defense Services Commission received a report from the agency on the THIP. The report reflected that PDSC has spent \$10.8 million General Fund to-date and that THIP has been provided to 3,294 defendants/persons with 4,608 cases. Of these costs, \$7.3 million, or 68%, is for attorneys and \$1.5 million, or 14%, for investigation. This translates to \$3,269.58 per defendant under THIP. On a per case basis, these costs are 50% lower than what PDSC is currently requesting at \$5,987 per case. This difference merits further analysis, as PDSC has been unable to provide more specific budget, expenditure, and caseload information for both the 2021-23 and 2023-25 biennium.

Contingency Reserve Funding

Apart from PDSC's budget, the Legislature set-aside the following contingency reserve funding: (a) \$6.2 million General Fund for a public defense contingency; (b) \$5 million General Fund for the Commission's transfer to the executive branch of government; (c) \$5 million General Fund for the unrepresented defendant/persons crisis, including \$1.4 million for a potential Central Regional Pilot program of state employees; (d) \$3 million General Fund for adult and juvenile caseload changes; and (e) \$1 million for nonunanimous jury convictions. In addition to contingency reserve funding, PDSC is estimated to carryforward \$12 million in 2021-23 General Fund savings into the 2023-25 biennium that could utilized as a source of contingency funding.

Request and Recommended Funding

PDSC requested to fund this request using \$5 million General Fund from a special purpose appropriation establish for the unrepresented defendant/persons crisis and appropriate and additional \$3.1 million General Fund; however, as noted, only \$3.6 million of the special purpose appropriation establish for the unrepresented defendant/persons crisis is available because the remainder is reserved for potential

Central Regional Pilot program of state employees. Therefore, the Legislative Fiscal Office recommendation on this request reflects the following adjustments:

- \$3.6 million General Fund from the \$5 million special purpose appropriation for the unrepresented defendant/persons crisis, with the remaining \$1.4 million reserved for a potential Central Regional Pilot program of state employees.
- \$4.3 million General Fund that can be reimbursed by the agency from any unspent General Fund balances from the 2021-23 biennium. The amount also eliminates \$248,207 attributable to the 2025-27 biennium.

The Legislative Fiscal Office will need to work with PDSC to breakout the agency's request by appropriations, as is standard budget protocol, and as should have been done in the agency's request.

Recommendation: The Legislative Fiscal Office recommends that the Joint Interim Committee on Ways and Means recommend appropriating \$3,581,645 General Fund, with a corresponding decrease in the special purpose appropriation to the Emergency Board for the unrepresented defendant/persons crisis, and appropriating \$4,270,148 General Fund for the Public Defense Services Commission in a budget reconciliation bill during the 2024 legislative session for the Temporary Hourly Increase Program.

Public Defense Services Commission Gehring

Request: Appropriate \$3,100,000 from the General Fund to extend the Temporary Hourly Increase Program (THIP) and allocate \$5,000,000 from the Special Purpose Appropriation made to the Emergency Board for expenses related to the unrepresented defendants/persons crisis.

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

Discussion: The Public Defense Services Commission (PDSC) is requesting an appropriation of \$3.1 million General Fund to fund an extension of THIP through June 30, 2024, and allocation of the \$5.0 million Special Purpose Appropriation for THIP expenditures related to the unrepresented persons crisis, as appropriated in Senate Bill 5506 (2023).

PDSC is responsible for maintaining Oregon's public defense system and ensuring the availability of qualified, competent counsel for all those so entitled. In recent years, Oregon's public defense services capacity has experienced challenges in keeping pace with evolving representation needs. This has resulted in increases in the number of persons who do not have the court-appointed counsel to which they are entitled and the average number of days in which that circumstance continues. On November 2, 2023, the United States District Court for Oregon ruled in a temporary restraining order that Oregon jails must release a person held in custody without legal representation for more than seven days. While the order has been stayed pending an appeal to the 9th Circuit Court of Appeals, this highlights the ongoing public defense crisis.

Temporary Hourly Increase Program

PDSC first authorized THIP on July 29, 2022, in response to the number of persons who are in custody and entitled to but currently without a court-appointed lawyer. THIP enables PDSC to purchase attorney and investigator time on an ad-hoc basis to represent persons who are on Oregon Judicial Department's unrepresented list. Through THIP, PDSC has appointed counsel for 3,294 unrepresented individuals.

PDSC has used \$4.9 million General Fund to serve unrepresented persons from PDSC's 2023-25 Legislatively Adopted Budget (Senate Bill 5532, 2023) to continue to fund the need for representation in the community while the first state employed public defenders are recruited. To this end, PDSC has hired the chief deputy defender and a senior deputy defender to represent the most vulnerable unrepresented persons. The agency is currently hiring other defenders, paralegals, and investigators and expects to fill all vacant positions established by Senate Bill 337 (2023).

PDSC has found THIP to be the most flexible tool at its disposal to meet existing needs while efforts to bring more public defenders into the system are also underway. THIP has been renewed several times since its inception, and the Commission met again on November 16, 2023, and voted to extend the program again through June 30, 2024,

while PDSC completes the hiring of state public defenders and other associated positions. PDSC projects the overall impact of extending THIP to be \$8.1 million General Fund, which includes both the prior extension of the program to November 2023 and the most recent extension the program to July 2024. In its request, PDSC has based its projections on assumptions of current public defenders' behavior with THIP as an incentive, as well as the gradual onboarding of state public defense capacity.

Legal Reference: Increase the General Fund appropriation made by chapter 481, section 1(7), Oregon Laws 2023, for the Public Defense Services Commission, Court Mandated Expenses, by \$8,100,000 for the 2023-25 biennium.

Decrease the General Fund Special Purpose Appropriation made to the Emergency Board by chapter 605, section 8(1), Oregon Laws 2023 for expenses related to the unrepresented defendants/persons crisis by \$5,000,000 for the 2023-25 biennium.



Oregon

Public Defense Services Commission

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December 4, 2023

The Honorable Elizabeth Steiner, Co-Chair
The Honorable Tawna Sanchez, Co-Chair
Interim Joint Committee on Ways and Means
900 Court Street NE
H-178 State Capitol
Salem, OR 97301-4048

Dear Co-Chairs:

Nature of the Request

The Public Defense Services Commission (PDSC) is requesting the allocation of the \$5 million special purpose appropriation for expenditures related to the unrepresented persons crisis, as appropriated in Senate Bill 5506 (2023) and an additional \$3.1 million dollars in General Fund authority to fund an extension of the Temporary Hourly Increase Program (THIP) through June 30, 2024.

Agency Action

Unrepresented Background and Current Status

As Justice Black said of the 6th Amendment right to counsel in 1963, “Any person jailed into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided.”

Oregon does not have enough public defenders to provide constitutionally competent and effective legal representation for all qualified individuals. The state struggles with the same retention and recruitment problems that plague public defense across the country which are rooted in a systemically under resourced public defense system. The Oregon legislature has taken significant steps to address these systemic issues through both reform legislation and large financial investments. While the number of in-custody individuals who qualify for a public defender but who do not have counsel has decreased over the last 6 months, the number of out-of-custody unrepresented increased substantially over the last year and has remained steadily high over the last 6 months. As of December 1, 2023, there are 3,060 such individuals; 130 of those individuals are detained in jails across the state without legal representation.

The consequences to the individual, to the justice system, and to our communities are grave. On the individual level, people are deprived of their liberty without due process of the law. Those who are in jail have lost their physical autonomy and risk the further loss of employment, housing, access to medical care, and family. Those who are not in jail live under the cloud of

criminal accusation and are subject to restrictions as to where they can go, whom they can associate with, whether they can drive a car, and are burdened with repeated court dates that require time off from work, childcare, and transportation. The persistent violation of individual rights erodes trust in the justice system. Communities cannot move forward with the resolution of conflicts that impact individual safety and monetary damages through the court system.

Currently, both the state and federal courts are attempting to address this shortage. Some state courts have appointed public defenders to additional cases despite their objections that they do not have sufficient room in their caseloads to provide the competent and effective representation they are ethically required to provide. These actions have led to a mandamus in the Oregon Supreme Court. The Oregon federal district court ruled in a temporary restraining order that Oregon jails must release a person held in custody without legal representation for more than 7 days. That order is stayed pending appeal to the 9th Circuit Court of Appeals. Without additional public defenders, Oregon risks either providing incompetent legal representation, which may present significant costs in post-conviction relief and resulting proceedings down the road, or the release of persons facing serious charges from jails without regard to the public safety risk that decision may present.

The Commission's Unrepresented Actions

The Public Defense Services Commission has taken many steps to address the attorney shortage. PDSC participated in the tri-branch workgroup and the presiding judge 337 crisis groups. The Commission also implemented a number of initiatives to increase the number of public defenders and increase capacity for public defenders.

The majority of trial level public defense in Oregon is delivered by public defenders who have a contract with the state. The contract purchases the percentage of the professional time attorneys spend representing public defense clients. The initiatives impacting Maximum Attorney Capacity (MAC) have been to (1) increase the number of lawyers contracted across the state, (2) increase compensation for lawyers and investigators across the state, (3) pay for hiring and retention incentives, and (4) invest in training and supervision for the non-profit law firms so they can recruit and train the next generation. These initiatives have succeeded in increasing statewide MAC by nearly 20%.

The Public Defense Services Commission plans to continue these efforts in 2024 by (1) request access to SPA funds to add additional MAC¹, (2) rebalancing existing resources to add additional MAC², (3) distribute the \$9.9 million allocated by the legislature in 2023 to retain existing public defenders, (4) rebalance existing funds to pay for training, supervision, and investigation in the second year of contracts², and (5) build, staff and expand state regional trial level public defense offices¹.

The Public Defense Services Commission has also implemented the Temporary Hourly Increased Program (THIP) to purchase attorney and investigator time on an ad-hoc basis to

¹ Requests will be made during 2024 session.

² See PDSC request letter re: Agencywide Rebalance.

represent persons who are on Oregon Judicial Department's unrepresented list. This critical tool has allowed the agency to tap into a new pool of resources, namely the private bar and public defenders who work on federal cases. Historically, the hourly rate for public defense has been so far below market value that many criminal defense attorneys would not accept appointment on public defense cases. Although the THIP rates are still below market value with the private bar they are competitive with federal rates for attorneys. Through this program the agency has appointed counsel for 3,294 persons.

Temporary Hourly Increase Program

The PDSC first authorized the Temporary Hourly Increase Program (THIP) on July 29, 2022, in response to the number of persons who are in custody and entitled to but currently without a court-appointed lawyer. The initial THIP had a five-tier hourly rate structure and was available for all unrepresented individuals, in and out of custody. It has since been pared back to a three-tier structure in September 2023.

The 82nd Legislative Assembly appropriated \$4,948,021 in General Fund to serve unrepresented persons in Senate Bill 5532 (chapter 481, Oregon Laws 2023). Over half that amount is designed to bridge the gap between July 1, 2023, and when the first state employed public defenders begin taking cases. Recently, the agency hired the chief deputy defender and a senior deputy defender to represent the most vulnerable unrepresented persons. The agency is currently hiring other defenders, paralegals, and investigators and is expected to fill all vacant positions established by Senate Bill 337 (2023).

On September 21, 2023, the Commission adopted an eight-week extension to the THIP, narrowing the program to only unrepresented persons in-custody. This extension was set to expire on November 30, 2023. The Commission recognized that state employees would not be taking cases for a few months while attorneys were hired and on-boarded. It would be irresponsible to end such a critical program to the unrepresented crisis before a replacement (state employees) were fully in place. To that end, the commission met again on November 16, 2023, and extended the program to June 30, 2024, which is the genesis of this request.

The THIP is the most flexible tool that the Commission can use to meeting the existing needs while efforts to bring more public defenders into the system are also underway. This short-term tool is especially critical for the population of people in custody without access to legal representation because it allows the agency to partner with the Oregon Judicial Department to quickly identify a lawyer on an ad-hoc basis.

Generally, the agency expects attorneys to record, according to the nature and severity of the charges against the unrepresented persons, anywhere from 18 to 440 hours of legal representation. The agency estimated the mean range number of hours of legal representation a public defender might bill for each category of rate and custody status. Finally, the agency estimated the other costs of services that are ancillary to legal representation such as investigation and psychological or psychiatric services. Below is the chart that demonstrates the costs the commission might bear monthly to serve those unrepresented, in-custody persons.

THIP Extension to June 30, 2024

Data between October 1, 2023, to November 30, 2023

	In-custody	
	\$164 / 175	\$200
Total cases	149	12
Avg. cases per month (rounded)	75	6
Avg. cases per day (rounded)	3	< 1
Avg. hours per case	36 - 110	75 - 440
Estimated attorney fees (monthly)	411,818	922,432
Estimated investigation costs (monthly)	60,307	39,360
Estimated other costs (monthly)	465,750	37,260
Estimated fiscal impact	937,874	999,052
Expanding to in-custody only (Option 3) (incl. ancillary costs)	1,936,926	

The Extraordinary Need for the Program's Extension

The increased hourly rates, in some sense, serve as an emergency program. The commission is aware that a federal court concluded that “the Sixth Amendment entitles [unrepresented persons] to adequate representation at all critical stages of trial” and that an “indefinite delay in the appointment of counsel to in-custody defendants constitutes a violation of the Sixth Amendment and Due Process.”² While the court’s order was stayed by the Ninth Circuit Court of Appeals, the order would have otherwise mandated the release of unrepresented persons in the government’s custody for more than seven days. In the interest of public safety, both the commission and the government can appreciate the urgency in providing effective counsel to vigorously defend those who qualify for a public defender but do not have counsel.

The eight-month extension of the program depends on two major assumptions—namely, (1) that public defenders employed by the commission will prioritize unrepresented persons and (2) that additional capacity in the public defense legal services contracts will aid in that prioritization or at least meet the net burden of persons charged with crimes. The projected overall impact of the program’s extensions yields a total of \$8.1 million in General Fund costs, which are inclusive of the costs to extend the program to November 2023 and the additional \$5.2 million to extend the program to July 2024.

² Temporary Restraining Order, Betschart v. Garrett, No. 3:23-cv-01097-CL, D. Or., November 2, 2023.

	Estimated costs	Est. cases
December 2023	968,463	161
January 2024	968,463	161
February 2024	871,617	145
March 2024	784,455	131
April 2024	588,341	98
May 2024	441,256	74
June 2024	330,942	56
July 2024	248,207	42
	5,201,745	868

Because the agency intends to have two state level trial defender offices established in the high-volume areas (Portland Metro area and in Roseburg) by January 2024, the assumption is that those offices would immediately begin providing representation, which should result in the tapering of the number of unrepresented individuals in custody. The agency’s projections assume the same level of costs and cases between November 1, 2023, and January 31, 2024; thence, the projections assume that that the number of persons that need representation by hourly defenders will begin to decay. From February to March 2024, projections are discounted by ten percent; and, as state offices mature, the projections are treated with a twenty-five percent discount factor in the months from April to July 2024. Those projections include investigation at the increased rate as well as any other ancillary costs associated with trial defense.

Action Requested

The commission requests the allocation of the five-million-dollar special purpose appropriation for expenses related to the unrepresented defendants / persons crisis in SB 5506 (2023) and an additional 3.1 million dollars in General Fund authority to fund and extension of the Temporary Hourly Increase Program (THIP) through June 30, 2024.

Legislation Affected

Oregon Laws 2023, chapter 481, section 1 (7). + \$5,000,000.00 (SPA allocation)

Oregon Laws 2023, chapter 481, section 1 (7). + \$3,100,000.00 (challenge)

Oregon Laws 2023, chapter 605, section 8 (1). - \$5,000,000.00 (special purpose appropriation)

Sincerely,



Jessica Kampfe
Executive Director

cc: Amanda Beitel, Legislative Fiscal Officer
John Borden, Principal Legislative Analyst, LFO
Kate Nass, Chief Financial Officer
Zack Gehringer, Policy and Budget Analyst, CFO