

ANALYSIS

Item 9: Public Defense Commission Temporary Hourly Increase Program

Analyst: John Borden

Request: Allocate \$5 million General Fund from a special purpose appropriation for public defense expenses to extend the Temporary Hourly Increase Program from July 1 to December 31, 2024.

Analysis: The Public Defense Commission (PDC) is requesting a \$5 million allocation from a special purpose appropriation made to the Emergency Board for a general public defense contingency extend 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.

Current State of the Crisis (May 2024)

On December 27, 2023, there were a total of 4,289 unrepresented defendant/persons on the Judicial Department’s Unrepresented Persons dashboard and as of May 15, 2024, there are a total of 4,400 reported on the dashboard. This includes: 77 defendants in-custody, 44 in-custody but in another jurisdiction (technically not unrepresented, as the defendant is not unrepresented in the jurisdiction); 2,490 defendants out-of-custody pretrial, 269 defendants out-of-custody probation violation, 1,460 defendants on active warrant status, seven Department of Corrections defendants on post-disposition, and 106 non-criminal persons lacking representation for other cases, including civil commitments (1), habeas corpus petition (2), post-conviction relief (72), juvenile delinquency (16), juvenile dependency (10), termination of parental rights (2), permanent guardianship (1), and court procedural (2). The offense class faced by most unrepresented defendants is a misdemeanor or Class C felony charge(s). The crisis is currently most acute in Jackson, Multnomah, Marion, Washington, and Douglas counties and growing more severe in Clatsop and Klamath counties (with the exception of Clatsop County, the other counties are covered, in part, by state-employed attorneys and staff in recently established regional pilot programs).

A recent report by the Judicial Department (dated April 2024) noted the following:

- The number of unrepresented defendants/persons continues to increase, although the rate of growth has stabilized;
- Defendants/persons who are out of custody with pending felony cases continue to wait longer, on average, than defendants/persons who are out of custody with misdemeanor cases, but significant improvements have been made for people in-custody.
- Most unrepresented cases are misdemeanors and minor felonies.
- Unrepresented defendants/persons with multiple unrepresented cases in the same county make up half of the unrepresented criminal caseload.

PDC has begun to evaluate the difference between maximum provider contract capacity and provider reported capacity, which, on average, is an 88% utilization rate statewide and an 86% utilization rate in counties with crisis plans. PDC continues to add new capacity through Regional Pilot Offices staffed with

state employees and \$3 million of funding recently added for an additional ten provider attorneys (SB 5701, 2024).

Recent developments in Deschutes County represents a microcosm of the public defense crisis whereby the precarious balance of the demand and the supply of public defenders can easily be disrupted by any number of factors, including the uncoordinated actions of public safety system partners. Five Deschutes public defenders resigned over a six week period, thereby compromising a portion of the county's public defense system. After becoming aware of the crisis, PDC was able to react quickly by developing a four-prong plan in an attempt to restore public defense capacity to the county, but admitted that the mitigation strategies, including the use of THIP, would likely be less than effective over the short-term given the acute shortage of public defenders both locally and statewide.

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, PDC expanded the eligibility of the program to include contract providers who are at less than one Maximum Attorney Caseload (MAC). In March 2023, PDC 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, PDC 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. PDC'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.

PDC initially funded THIP with one-time budgetary savings and no formal request to the Legislature or the Emergency Board for funding up until the time that the Emergency Board in December 2022 allocated \$10 million of General Fund to address the crisis. Of this amount, \$2.9 million was used to continue THIP 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 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.

In an attempt to continue to meet the demand for hourly public defense services, and in part 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 December 1, 2023 to June 30, 2024. Funding for this extension, totaling \$7.9 million General Fund, was approved by the 2024 Legislature (SB 5701). Of this amount, \$5.7 million will be used to pay enhanced hourly rates to attorneys and \$2.1 million will be used to fund related costs such as expert witness and investigation expenses ("Preauthorized Expenses") and attorney and investigator travel and other allowable expenses.

This request is to again extend the program from July 1 to December 31, 2024. PDC estimates the cost of the extension at \$5 million General Fund. Of this amount, \$3.3 million will be used to pay enhanced hourly rates to attorneys and \$1.7 million will be used to fund Preauthorized Expenses. PDC was unable to provide supporting documentation as to how these figures were derived and or how many cases would be funded. With that stated, PDC's request is viewed as being prudent, as the agency is first seeking funding before extending the program. Of importance is that THIP represents a continuing financial obligation to the state until a case assigned under the program is resolved. Thus, expenditures may continue to be incurred, or billings received for payment, beyond the end of the program or into the last six months of the biennium and potentially into the 2025-27 biennium. Such costs are indeterminate.

Expenditures To-Date

PDC reports having spend \$21.7 million General Fund to-date on the THIP program since the program's inception on July 29, 2022. Of this amount, \$14.3 million was used to pay enhanced hourly rates to attorneys, \$4.3 million paid for Preauthorized Expenses, and \$3.1 million paid for enhanced hourly rates to investigators. Payments were made to 166 attorneys of whom 104, or 63%, were hourly attorneys and 62, or 37%, were existing contract providers. THIP served 3,989 clients with 5,661 cases across 10 counties (Clackamas, Multnomah, Washington, Linn, Klamath, Malheur, Marion, Douglas, Jackson, and Coos). These figures translate to an average of \$3,827 per case or \$5,430 per defendant. The types of cases range from felonies, misdemeanors, juvenile delinquency, juvenile dependency, termination of parental rights, and other miscellaneous case types and both in and out-of-custody. Only beginning on

October 1, 2023, was the program limited to in-custody defendants. PDC continues to experience difficulty responding to routine requests for financial information related to THIP, such as budget versus actual expenditures, by biennium, and for each expansion of the program. This level of information would be helpful in both the monitoring of the program's legislatively approved budget, but also useful to inform future budget requests.

Contingency Reserve Funding

Apart from PDC's budget, the Legislature set-aside a contingency reserve of \$6.2 million General Fund in a special purpose appropriation for public defense, of which the entire amount remains available through the December 2024 meeting of the Emergency Board.

Analysis

THIP is 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 providers to take on cases above their ethical capacity. In addition, PDC has yet-to-develop any performance or other measures to gauge the quality of representation being provided through THIP.

The THIP extension also cannot be viewed in isolation but within the context of other legislative investments including, but not limited to: (1) added funding to bring Maximum Attorney Capacity to meet available supply of contract providers; (2) state-employed attorneys and staff in a Western Oregon Regional Pilot starting October 1, 2023 (Washington, Multnomah, and Clackamas counties), a Southern Oregon Regional Pilot starting December 1, 2023 (Jackson, Douglas, and Klamath counties), and a Central Oregon Regional Pilot (Willamette Valley/statewide) starting March 1, 2024; (3) Supervised Civil Bar Attorney Program for civil or private bar attorneys to provide uncompensated legal representation in misdemeanor cases; and (4) funding for law schools to provide training and supervision of court certified law students to undertake misdemeanor cases.

The extension of the *existing* THIP is necessary given the status of the unrepresented defendant/persons crisis and absent a more viable alternative. Funding of the extension, however, can be deferred into the future without jeopardizing the implementation of the program, as the 2023-25 legislatively approved budget remains sufficient to temporarily fund the extension. This will also give PDC time to substantiate the cost of the extension. The special purpose appropriation for a public defense contingency can be reserved for the extension, which would make it unavailable for alternate contingency use unless otherwise decided by the Emergency Board.

Lastly, the Emergency Board in September 2024 could benefit from receiving an update from PDC and the Judicial Department on the unrepresented defendant/persons crisis, including how PDC's Regional Pilot Programs are performing and how Judicial Crisis Plans are being implemented.

Recommendation: The Legislative Fiscal Office recommends that the Emergency Board acknowledge the extension of the existing Temporary Hourly Increase Program from July 1 to December 31, 2024, defer funding of the extension to a future meeting of the Emergency Board, and hold in reserve up to \$5 million of a \$6.2 million special purpose appropriation for public defense expenses to fund the extension of the program.

09
Oregon Public Defense Commission
Gehringer

Request: Allocate \$5,000,000 from the Special Purpose Appropriation (SPA) made to the Emergency Board for public defense contingency to fund an extension of the Temporary Hourly Increase Program (THIP) through December 31, 2024.

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

Discussion: The Oregon Public Defense Commission (OPDC) is requesting an allocation of \$5.0 million from a SPA to fund an extension of THIP through December 31, 2024, as appropriated in Senate Bill 5506 (2023).

OPDC 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, it illustrates the necessity of being able to quickly secure qualified defense counsel.

Temporary Hourly Increase Program

OPDC 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 OPDC to purchase attorney and investigator time on an ad-hoc basis to represent persons who are on Oregon Judicial Department's unrepresented list. OPDC 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 in progress. The agency is currently hiring other defenders, paralegals, and investigators to fill all vacant positions established by Senate Bill 337 (2023). As of May 13, 2024, OPDC has appointed counsel for 3,989 unrepresented individuals through THIP rates.

OPDC has utilized funding dedicated to reducing the number of unrepresented persons to extend THIP several times, including \$4.9 million from Senate Bill 5532 (2023) to fund the program through 2023, and \$7.9 million from November 2023 to June 2024 (from Senate Bill 5701, 2024). In the requests, OPDC 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. The request does not include a plan to draw down or replace THIP other than staffing up OPDC capacity. The alternative OPDC offers is for the agency to monitor THIP costs and request additional funds from the Emergency Board in September 2024, if necessary.

Legal Reference: Allocation of \$5,000,000 from the Special Purpose Appropriation made to the Emergency Board by chapter 605, section 9(1), Oregon Laws 2023 to supplement the appropriations made by chapter 481, section 1(7) Oregon Laws 2023, for the Oregon Public Defense Commission, Court Mandated Expenses by \$3,300,000 and chapter 481, section 1(6), Oregon Laws 2023, Preauthorized Expenses by \$1,700,000 for public defense contingency for the 2023-25 biennium.



Oregon

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May 3, 2024

Senator Rob Wagner, Co-Chair
Representative Julie Fahey, Co-Chair
State Emergency Board
900 Court Street NE
H-178 State Capitol
Salem, OR 97301

Dear Co-Chairs:

Nature of the Request

The Oregon Public Defense Commission (OPDC) requests the allocation of \$5 million of the \$6.17 million special purpose appropriation for public defense contingency, as appropriated in Senate Bill 5506 (2023), to fund an extension of the Temporary Hourly Increase Program (THIP) through December 31, 2024.

Agency Action

Oregon is facing a severe shortage of public defenders. As a result, many people eligible for legal representation are not receiving timely representation. This problem is not unique to Oregon, as public defense systems across the country are plagued by issues related to recruitment and retention. However, Oregon has addressed this systemic problem by implementing reform legislation and investing more money into public defense. Although progress has been made in reducing the number of in-custody individuals without legal counsel, the number of people outside of custody who lack representation has remained consistently high, though steady, since July 2023. As of April 18, 2024, there are 2,835 unrepresented persons in Oregon, 82 of them being held in jails across the state without legal counsel.

There has been a decrease in the number of people without legal counsel in custody and a stabilization of out-of-custody numbers. Under the 2022-23 public defense contracts, many providers reached their annual caseload maximums several months before the end of the contract cycle. This dramatically increased the number of unrepresented persons across the state in the spring of 2023. Oregon saw unrepresented persons stabilize when new two-year public defense contracts began in July 2023. The new contracts restarted annual caseload maximums, allowing public defenders to accept new clients under contract. The contracts also implemented lessons learned from the frontloading of previous annual caseload maximums. They imposed monthly prorated maximums to avoid the dramatic uptick in unrepresented persons we experienced last spring. Significantly, the legislature invested in increasing the number of public defenders, so the 2023-25 contracts included increasing the number of public defenders providing representation

across the state. The representation provided by contracted public defenders significantly decreases and stabilizes Oregon's unrepresented persons numbers.

The decrease in in-custody numbers can also be attributed, in part, to the new state trial offices. Oregon now has three state trial offices in Portland, Medford, and Salem. These offices are the first in Oregon, with state-employed attorneys and staff who prioritize cases from the unrepresented in-custody list. As these offices become more established, OPDC anticipates they will take on even more cases than they are currently.

Temporary Hourly Increase Program (THIP)

Since July 2022, OPDC has also relied on the Temporary Hourly Increase Program (THIP) as a third public defense option in addressing the unrepresented numbers. THIP pays attorneys and an enhanced hourly rate to take cases from the in-custody list. The initial goal of THIP was two-fold: (1) to incentivize existing public defense attorneys to accept additional in-custody clients and (2) to attract additional attorneys into public defense work by raising rates closer to the federal panel rates.

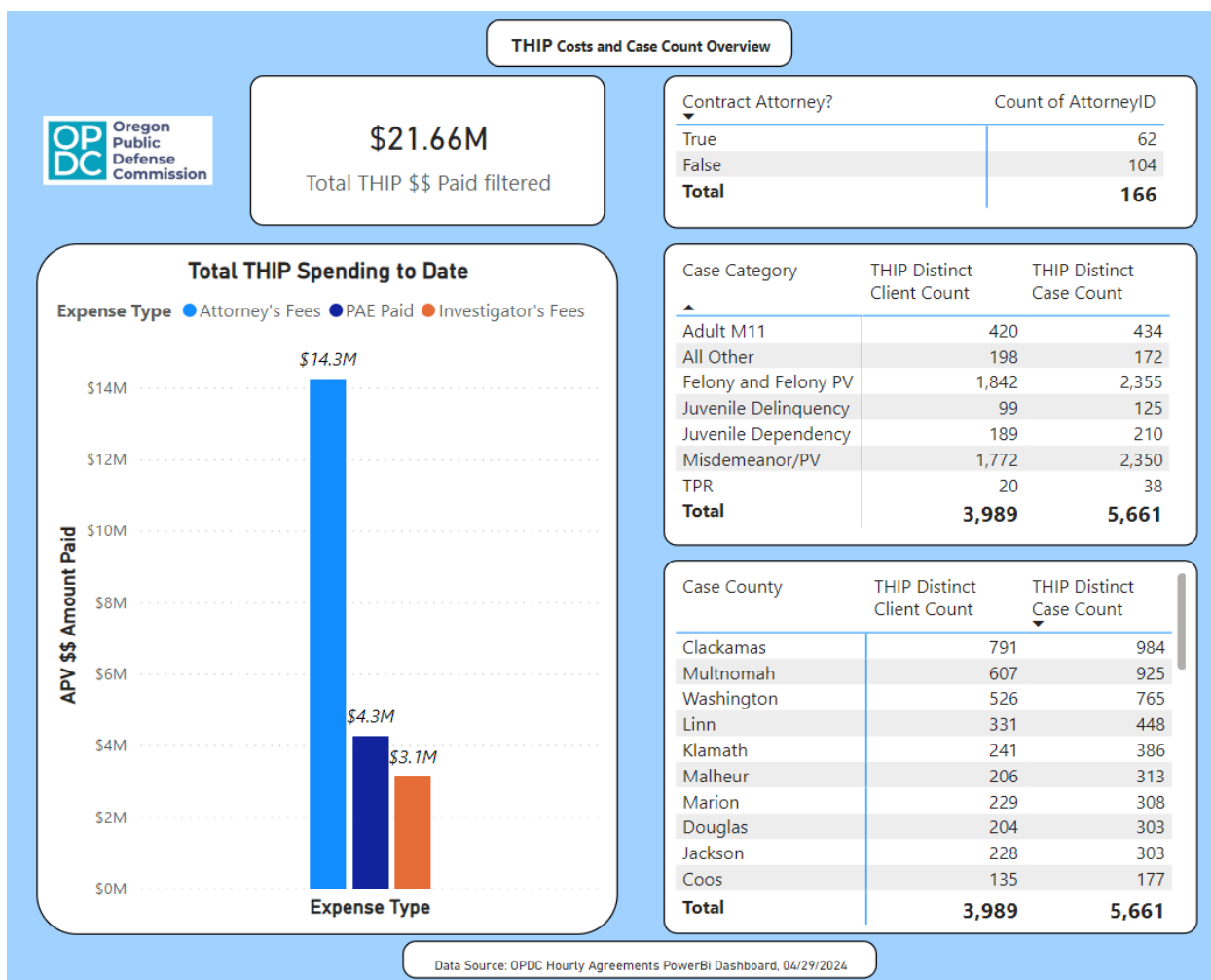
The OPDC first authorized the THIP on July 29, 2022, in response to the number of persons in custody entitled to but currently without a court-appointed lawyer. The initial THIP had a five-tier hourly rate structure and was available for all unrepresented individuals, in and out of custody. It was pared back to a three-tier structure in September 2023.

The 82nd Legislative Assembly appropriated \$4,948,021 in the 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.

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 take cases for a few months while attorneys were hired and onboarded. Ending such a critical program to the unrepresented crisis would be irresponsible before a replacement (state employees) was entirely in place. The commission met again on November 16, 2023, and extended the program to June 30, 2024.

The Commission went before the Legislature in 2024 to request back funding for this extension, which was granted for \$7.8 million through June 30, 2024.

Not only has THIP provided counsel where it may otherwise not have been found, but it is also providing OPDC with significant data on THIP cases. Below is a snapshot of case types, costs, and attorneys covered by THIP from its inception through 4/29/2024. THIP has been successful at its initial goals of incentivizing existing public defense attorneys to accept additional in-custody clients and attracting additional attorneys into public defense work by raising rates closer to the federal panel rates. Sixty-two existing contracted attorneys have taken on additional cases under THIP, and 104 attorneys not currently contracted with OPDC have taken on cases. Counsel has been secured under THIP for 3,989 individuals representing 5,661 cases.



The Commission recognizes that THIP's financial costs are high. The chart above shows the total money paid by THIP so far; this does not include outstanding invoices or future invoices of ongoing cases. It should be noted that the Preauthorized expenses tied to THIP cases would have been spent on the case regardless of THIP.

However, THIP is the most flexible tool the Commission can use to meet the existing needs. Efforts to bring more public defenders into the system are also underway. As more contracted attorneys and state employees are brought on and the in-custody numbers continue to reduce, OPDC expects the cost and need for THIP to continue declining.

THIP Extension

The scope of THIP has changed over time, with the commission narrowing it in September 2023 to focus on assigning counsel to persons in custody and on OJDs' unrepresented list. The agency has gaps in its ability to estimate the total costs for this more limited version of THIP because THIP billing lags behind closing cases. Presently, the agency receives invoices for both open and closed cases appointed under earlier, more expansive versions of the program and has only received a portion of anticipated invoices for the current version of THIP. Of the 5,661 total THIP cases, 3,567 have closed.

The agency anticipates the ability to pay invoices on cases appointed through June 2024 with existing funds. However, it will need new funding to pay for invoices on THIP cases appointed after June 2024, but may not realize those expenses or be able to accurately predict the full costs until the fourth quarter of 2024 and into 2025.

The table below shows expenses paid on THIP cases since October 2023. While the total costs of \$2.2 million are well within the Legislative appropriation of \$7.8 million allocated in the 2024 session, OPDC knows that additional invoices on THIP cases will be realized. To ensure that OPDC can fully cover these future expenses, it requests additional funds.

THIP \$\$ Paid (on Appointments since 10/1/2023)							
THIP Case Category	THIP Distinct Case Count	APV Distinct Case Count	Voucher ID Count	Attorney's Fees Enhanced	Investigator's Fees Enhanced	THIP PAE paid	Total IHR Case \$\$ Paid
☐ Adult M11	52	34	203	\$270,678	\$93,266	\$100,382	\$464,326
☐ All Other	9	9	65	\$123,527	\$21,750	\$25,691	\$170,967
☐ Felony and Felony PV	229	170	778	\$848,009	\$299,875	\$414,857	\$1,562,740
☐ Juvenile Delinquency	11	10	28	\$19,719		\$20,686	\$40,406
☐ Juvenile Dependency	1	1	2	\$3,018		\$3,486	\$6,504
☐ Misdemeanor/PV	44	34	65	\$52,441	\$6,368	\$19,173	\$77,981
☐ TPR	1	1	5	\$4,428			\$4,428
Total	345	257	1099	\$1,250,362	\$414,509	\$561,983	\$2,226,854

Alternatively, OPDC could continue to monitor THIP costs and return to the Emergency Board in September 2024 to request additional funds if necessary. By then, more billing will have come in, and OPDC will have a clearer picture of outstanding costs. The risk here is that large case costs are billed during the interim, and OPDC would need to request that the Legislature backfill expenses.

Action Requested

The commission requests the allocation of \$5 million of the \$6.17 million special purpose appropriation for public defense contingency, as appropriated in Senate Bill 5506 (2023), to fund an extension of the Temporary Hourly Increase Program (THIP) through December 31, 2024

Legislation Affected

- Oregon Laws 2023, chapter 481, section 1 (7). + \$3,300,000
- Oregon Laws 2023, chapter 481, section 1 (6). + \$1,700,000
- Oregon Laws 2023, chapter 605, section 9 (1). - \$5,000,000.00

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