

ANALYSIS

Item 12: Public Defense Commission Maximum Attorney Capacity

Analyst: John Borden

Request: Allocate \$4,203,413 General Fund from the special purpose appropriation made to the Emergency Board for public defense expenses to the Public Defense Commission for an additional 25 Maximum Attorney Capacity in provider contracting for adult criminal trial cases.

Analysis: The Public Defense Commission (PDC) is requesting an allocation of \$4.2 million General Fund from a special purpose appropriation (SPA) made to the Emergency Board for a public defense contingency for an increase of 25 Maximum Attorney Capacity (MAC) in provider contracting for adult criminal trial cases assigned to the Trial Criminal Division. The request is based on the \$224,182 annual rate of pay for a licensed attorney (Attorney 2). The additional MAC would begin on October 1, 2024. The 2025-27 biennial cost of this request is estimated to be at least \$11.2 million General Fund.

Apart from PDC's budget, the Legislature set-aside a contingency reserve of \$6.2 million General Fund in a SPA for public defense of which the entire amount remains available through the December 2024 meeting of the Emergency Board. However, in May 2024, the Emergency Board reserved \$5 million of the SPA for anticipated expenditures related to an extension of PDC's Temporary Hourly Increase Program (THIP) from July 1 to December 31, 2024 (May 2024 Emergency Board Item #9). After accounting for the reserve, the unreserved balance of the SPA available for other public defense expenses totals \$1.2 million. PDC has separately requested removal of the SPA reservation (September 2024 Emergency Board Item #9), which would need to be approved by the Emergency Board to make funding available for this request.

PDC's request was accompanied with no supporting caseload growth data justifying the need for 25 MAC. The request also provided no information as to how and where the requested 25 MAC would be deployed and to what impact the additional MAC would have on the unrepresented defendant/persons crisis. The request was simply to add non-geographically targeted provider attorney capacity to the public defense system and without fully quantifying the impact of such an investment. Additionally, the supplemental funding request did not address the agency's budgeted resources or any potential impacts on other programs (e.g., costs or savings, such as potential reduced demand for THIP due to increasing MAC capacity).

The request notes that contractors could add MAC due to interest in an Oregon specific bar alternative program. However, no additional information was provided on how the agency would effectively monitor the quality of representation provided through this "Supervised Provisional Practice Exam" program, which offers an alternative method for attorneys to qualify to become a member of the Oregon State Bar through a supervised apprenticeship program rather than the traditional route of passing the state's bar examination.

PDC's request is for ongoing funding, which presents challenges as the agency is proposing to move away from the MAC contracting model to a caseload and workload model beginning with the 2025-27

biennium contract cycle. If approved by the Legislature, this would result in materially higher costs than the \$11.2 million General Fund rollup cost currently estimated by the agency for the 2025-27 biennium.

The Legislative Fiscal Office recommends that the request be deferred to the December 2024 meeting of the Emergency Board, pending available resources in the public defense contingency SPA and demonstration of the need for additional MAC capacity to address the unrepresented crisis or higher than forecasted caseload.

Recommendation: The Legislative Fiscal Office recommends that the Emergency Board defer consideration of the request to the December 2024 meeting of the Emergency Board.

Request: Allocation of \$4.2 million from the Special Purpose Appropriation made to the Emergency Board for Public Defense Contingency to fund an additional 25 Maximum Attorney Caseloads (MAC) from October 2024 to June 2025.

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

Discussion: The Oregon Public Defense Commission (OPDC) highlights a crisis of unrepresented clients due, in part, to insufficient supply of attorneys, leading to a growing list of individuals without legal representation. OPDC requests \$4,203,413 from the Special Purpose Appropriation for Public Defense Contingency to fund an additional 25 MACs from October 2024 through June 2025. This funding aims to address the immediate need for more attorneys to handle misdemeanor and C felony cases.

In OPDC's 2023-25 biennial budget (Senate Bill 5532, 2023), the Legislature appropriated \$17.8 million General Fund to fund the initial 466.35 MACs to support the forecasted caseload for the current biennium. Through subsequent legislative actions, this total has been adjusted several times and OPDC reports 449.53 MACs as of July 2024.

The letter does not explicitly mention the continued cost for the 2025-27 biennium; however, the ongoing need for attorney recruitment and retention suggests similar funding levels may be requested to maintain representation.

Legal Reference: Allocation of \$4,203,413 from the Special Purpose Appropriation made to the Emergency Board by chapter 605, section 9(1), Oregon Laws 2023, to supplement the appropriation made by chapter 481, section 1(4), Oregon Laws 2023, for Oregon Public Defense Commission, Adult Trial Division for the 2023-25 biennium.



Oregon

Oregon Public Defense Commission

198 Commercial St. SE, Suite 205

Salem, Oregon 97301-3489

Telephone: (503) 378-2478

Fax: (503) 378-4463

www.oregon.gov/opdc

August 26, 2024

Senate President Rob Wagner, Co-Chair
House Speaker Julie Fahey, Co-Chair
Joint Emergency Board
900 Court Street NE
H-178 State Capitol
Salem, OR 97301-4048

Dear Co-Chairs:

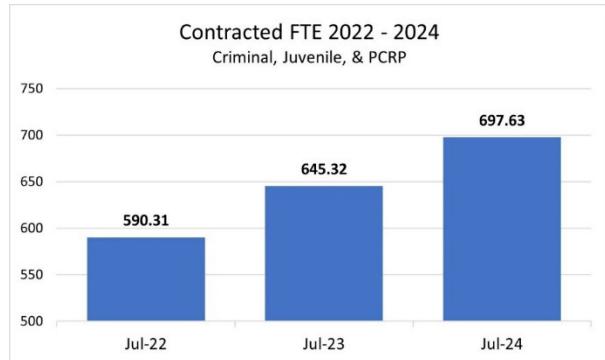
Nature of the Request

The Oregon Public Defense Commission (OPDC) requests \$4,203,413 from the Special Purpose Appropriation (SPA) for Public Defense Contingency to fund an additional 25 Maximum Attorney Caseloads (MAC) from October 2024 through June 2025.

On May 23, 2024, Governor Kotek requested that the Oregon Public Defense Commission (OPDC) submit a plan by August 1, 2024, to “eliminate Oregon’s unrepresented client crisis in both the near and long term, and that plan should be based in the realities of the current fiscal and legislative environment.” OPDC submitted that plan to the Governor. The plan included interventions OPDC was taking or planned to take within existing resources, as well as interventions that would require Legislative approval, funding through the Emergency Board, or both. This request is in line with that crisis plan.

Agency Action

OPDC prioritizes attorney recruitment and retention. OPDC contractors are the first line in preventing individuals charged with crimes from going unrepresented, as they are the primary workforce appointed to represent new clients at their first court appearance. When contractors lack sufficient attorneys to provide representation to all of those eligible for a public defender, fewer clients are appointed lawyers in the normal course, and the unrepresented list grows.



The Legislature and OPDC recognize contractors' value and have invested in additional MAC and recruitment, training, and retention incentives and programs. Since July 2022, OPDC has increased contracted MAC by 18.18% through these investments, or 107.32 MAC.

While the retention rate has improved over previous contract cycles, attorneys still regularly leave contracts, resulting in vacancies. When a vacancy occurs, the contractor has at least 60 days to fill that vacant position

in their contract and up to 120 days if they are a nonprofit public defender office or law firm primarily practicing public defense. When a vacancy expires after these time frames, OPDC may extend the vacancy should extenuating circumstances apply (e.g., the provider is actively recruiting, or the position has an offer accepted). Alternatively, OPDC will reallocate that vacancy to another provider. As of August 11, 2024, OPDC Criminal Adult Trial contractors have 14.25 vacancies.

Additionally, OPDC has unallocated MAC; this is MAC that varies from the Legislatively Adopted Budget at the end of the 2024 session. The Adult Trial Division contracted MAC has a 28.72 MAC deficit or a -6.01% variance from the adopted MAC from the 2024 Legislative session. This variance is mainly due to the additional MAC OPDC received in the 2024 session, funded in July. OPDC has requests from contractors for 32.88 additional MAC throughout the state and intends to add 26.08 MAC to contracts through amendments in September by using the existing unallocated or vacant MAC.

Type	Level	MAC/FTE (as of 12.31.2023)	2024 Session Adopted	Amendments as of 7/1/24	Variance between 2024 Leg Adopted and 7/1/24	Percent Variance
Adult Trial Division						
Misdemeanor	Attorney 1 (Misdemeanor)	88.23	13.4	66.83	-34.8	-34.24%
Minor Felony	Attorney 2 (Minor Felony, Civil Commitment)	97.42	0	94.14	-3.28	-3.37%
Major Felony	Attorney 3 (Major Felony)	153.33	10	165.56	2.23	1.37%
Murder	Attorney 4 (Capital Murder, Murder)	115.87	0	123	7.13	6.15%
	Total	454.85	23.4	449.53	-28.72	-6.01%

*Though the variance appears to be caused by a lack of qualified Attorney 1s and 2s, Misdemeanor and Minor Felony attorneys, we know that it is caused by attorneys at higher qualification levels leaving contracts. These MAC are often filled by attorneys at lower qualification levels, causing underutilization of allocated Attorney 1 and 2 MAC.

With this next round of amendments in September, OPDC will again be within 1% of full MAC, which means additional attorneys cannot be added to contracts unless other attorneys leave and vacancies are reallocated. OPDC has heard from providers that they want to hire more attorneys; this desire is especially true of nonprofits that can hire newly licensed attorneys in October 2024. Oregon is also the only state with a bar alternative program, the Supervised Provisional Practice Exam, which has attracted much interest from out-of-state law graduates. OPDC believes contractors could add 25 MAC to contracts between now and January 2025 if funding is provided.

These attorneys would take misdemeanor and C felony cases and provide added capacity in their jurisdiction to take court-appointed cases, preventing them from being added to the unrepresented list. Each additional MAC can be assigned up to 13 C felonies or 25 misdemeanors per month, which translates to up to 2,925 felony cases or 5,625 misdemeanor cases assigned to an attorney between October and the end of the biennium.

Action Requested

The Oregon Public Defense Commission requests \$4,203,413 from the Special Purpose Appropriation for Public Defense Contingency to fund an additional 25 Maximum Attorney Caseloads (MAC) from October 2024 through June 2025.

Legislation Affected

Oregon Laws 2023, Chapter 481, section 1(4) \$4,203,413
Oregon Laws 2023, Chapter 605, section 9(1) (\$4,203,413)

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