

ANALYSIS

Item 4: Public Defense Commission Temporary Hourly Increase Program

Analyst: John Borden

Request: Allocate \$1,429,976 General Fund from the Emergency Fund and \$1,020,768 General Fund from the special purpose appropriation made to the Emergency Board for public defense expenses to the Public Defense Commission for extension of the Temporary Hourly Increase Program from January 1 to June 30, 2025.

Analysis: The Public Defense Commission (PDC) is requesting that the Emergency Board acknowledge extension of Temporary Hourly Increase Program (THIP) from January 1 to June 30, 2025, and requests that the Emergency Board allocate \$1.4 million from the general purpose Emergency Fund and allocate \$1 million from the special purpose appropriation (SPA) made to the Emergency Board for public defense expenses for the program's extension. The estimated 2025-27 cost of the request is \$13 million General Fund for the payment of previously authorized case costs and does not represent continuation of the program in the next biennium.

THIP (aka "Enhanced Hourly Rate Program") 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 on the Oregon Judicial Department's (OJD) unrepresented/defendant/persons list, and has not been expanded to out-of-custody defendants released under the federal court ruling in *Betschart et al. v. Garrett et al.*, Case No 3:23-cv-01097-CL.

Current State of the Crisis

On November 22, 2024, there were a total of 5,420 unrepresented defendant/persons on OJD's Unrepresented Persons dashboard. This includes: 165 defendants in-custody with 32 potentially subject to *Betschart* release and 133 non-*Betschart* cases. There are 5,255 unrepresented defendants out-of-custody, of which 1,707 are on active warrant status, 3,179 are on pretrial release, 362 post-disposition with an additional seven on Department of Corrections post-disposition, and 106 have a non-criminal case (e.g., juvenile dependency, termination of parental rights, adoption, etc.). The crisis remains most severe in Multnomah, Jackson, Marion, Washington, Douglas, and Coos counties. In overall numbers, and across sub-categories, the crisis has reached a new record high.

Program History

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 has since been limited to in-custody defendants in local jails/jurisdictions on OJD’s unrepresented/defendant/persons list. Cases are assigned under the THIP based on data set out in the OJD’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 extension 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 attested 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 per hour at that time. The current standard 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. Hourly rates for the 2023-25 biennium are set at: \$200 for murder and Jessica Law cases; \$175 for Ballot Measure 11 and felony sex offense cases; \$164 for all other case-types, including juvenile dependency. Investigators under THIP are paid \$75 per hour. An administrative decision by the Commission in the fall of 2023 added to the reimbursement of travel expenses the hourly provider’s rate at 100% of their hourly rate and, for flat rate providers (i.e., investigators), at \$75 per hour. The current standard hourly 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 allocated \$10 million of General Fund to address the crisis in December 2022. Of this amount, \$2.9 million was used to continue THIP until the end of the 2021-23 biennium. The 2023 Legislature extended THIP from July 1 to September 30, 2023, or until such time as state employees under the Adult Trial Division Regional 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 regional pilot program, the Commission voted

to extend THIP from October 1 to November 30, 2023, at the existing enhanced hourly rate structure. The Commission then voted again to extend the program from December 1, 2023, to June 30, 2024. Funding for these extensions, totaling \$7.9 million General Fund, was approved by the 2024 Legislature (SB 5701). Of this amount, \$5.7 million was to be used to pay enhanced hourly rates to attorneys and \$2.1 million was to be used to fund related costs such as expert witness and investigation expenses (“Preauthorized Expenses”) and attorney and investigator travel and other allowable expenses.

PDC requested funding from the Emergency Board in May 2024 to extend the program from July 1 to December 31, 2024, at the existing enhanced hourly rate structure. PDC originally estimated the cost of the extension at \$5 million General Fund for the 2023-25 biennium. However, an updated projection estimated the cost to be \$5.9 million, including \$3.6 million to pay enhanced hourly rates to attorneys and \$2.3 million to fund investigators and preauthorized expenses. The 2025-27 cost of the requested extension was estimated by PDC to be \$13 million General Fund, which includes \$7.9 million in hourly rates to attorneys and \$5.2 million in preauthorized expenses. This would bring the total cost of the July 1 to December 31, 2024, extension to \$18.9 million General Fund. The Emergency Board acknowledged extension of the program, deferred the associated funding request, but approved a reservation of \$5 million in the public defense contingency SPA to cover the estimated cost to extend the program.

In September 2024, PDC requested that the Emergency Board fund an extension of the program from January 1 to June 30, 2025, at the existing enhanced hourly rate structure. PDC estimated the cost to extend the program through the end of the biennium at an additional \$5.9 million General Fund. Of this amount, \$3.6 million would be used to pay enhanced hourly rates to attorneys and \$2.3 million would be used to fund investigators and preauthorized expenses. The Emergency Board deferred consideration of the request to its December 2024 meeting pending more a detailed financial reconciliation from the agency.

For the December 2024 meeting of the Emergency Board, and this item, PDC is again requesting the Emergency Board acknowledge extension of the THIP program from January 1 to June 30, 2025. The \$2.4 million estimated cost to extend the program through the end of the biennium is \$3.5 million less than the agency’s September request. Of this amount, \$1.8 million will be used to pay enhanced hourly rates to attorneys and \$630,708 will be used to fund investigators and preauthorized expenses. PDC made no revision to the 2025-27 cost of the six-month extension, which in September was estimated to be \$13 million General Fund. When combined, the cost of the July 1 to December 31, 2024, extension totals \$15.4 million General Fund.

As evidenced by the THIP programs out-biennia rollup costs, the program 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 this biennium and into the 2025-27 biennium. Such costs do not represent the extension of the program to new unrepresented defendant/person cases in the 2025-27 biennium.

Program Outcomes

According to PDC, since THIP's inception in 2022, the program has hired 254 hourly attorneys and served 4,833 clients with 7,117 cases, as of a November 8, 2024 agency presentation. Ninety percent of all THIP cases include: misdemeanors (1,546 or 32%), minor felony (1,146 or 24%), Measure 11 (543 or 11%), major felony (431 or 9%), probation violations (220 or 5%), dependency/Termination of Parental Rights (193 or 4%), murder (168 or 3%), and delinquency (105 or 2%), followed by all other case-types (481 or 10%). Between August 1, 2022 and November 8, 2024, the program has spent \$42 million, which includes attorney costs (\$26 million), investigators (\$5 million) and defense costs (\$11.1 million). This translates to an average per defendant/person cost of \$8,685, an average per case cost of \$5,898, and an average per attorney cost of \$101,933.

Program Budget

The 2023-25 legislative approved budget for THIP totals \$13.2 million General Fund for both Court Mandated Expenses (\$9.9 million) and Preauthorized Expenses (\$3.3 million). PDC is projecting 2023-25 biennial THIP expenditures of \$47.1 million, including the extension from January 1 to June 30, 2025. The difference between budgeted resources and projected expenditures leaves the program in a budget deficit of \$33.9 million. A portion of the deficit could be offset by two December Emergency Board actions, if approved, which would leave a net deficit of \$26.7 million General Fund, as outlined in the following table.

2023-25 Biennium Temporary Hourly Increase Program	Court Mandated Expenses	Preauthorized Expenses	Total General Fund
2023-25 Approved Budget (Sept. 2024)	\$ 9,935,850	\$ 3,277,524	\$ 13,213,374
PDC Projected Expenditures	\$ (38,005,107)	\$ (9,067,888)	\$ (47,072,995)
Surplus/Deficit	\$ (28,069,257)	\$ (5,790,364)	\$ (33,859,621)
Emergency Board (item #3) - Rebalance	\$ 4,731,524	\$ -	\$ 4,731,524
Emergency Board (Item #4) - THIP	\$ 1,811,036	\$ 639,708	\$ 2,450,744
2023-25 Projected Deficit	\$ (21,526,697)	\$ (5,150,656)	\$ (26,677,353)

PDC's THIP request to the Emergency Board in September 2024 (Item #9) reported that the program deficit could be entirely offset by an estimated \$48.9 million in non-THIP savings in the Court Mandated Expenses program (+\$50.1 million). However, PDC is now reporting that such savings may not exist due to the following administrative actions: (a) change in policy to

reimburse provider travel time at their full hourly rate (fall 2023); (b) reimburse flat hourly rate providers at \$75 per hour for travel (e.g., investigators)(fall 2023); (c) approval of an Emergency Billing Policy that encouraged hourly billers to bill monthly and Commission direction that all bills be paid within 30-days of receipt (August 2024); and (d) increase in standard hourly attorney billings (i.e., non-THIP) due to an increased number of assignment coordinators. PDC states that there may also be an increase in the number of psychological exams and related travel expense. PDC’s plan to address the THIP deficit is unclear, as this request only seeks funding for the January 1 to June 30, 2025, extension.

The following table summarizes total estimated expenditures for THIP since the program’s inception in 2022 for case costs authorized in the 2021-23 and 2023-25 biennia, but concluding in 2025-27 biennium. Overall, THIP is estimated to expend \$81.7 million General Fund if expenditures have been reasonably projected.

Temporary Hourly Increase Program				
Sub-Program/Biennia	2021-23	2023-25	2025-27	Total Est.
Court Mandated Expenses	\$ 6,345,655	\$ 38,005,107	\$ 16,221,956	\$ 60,572,718
Preauthorized Expenses	\$ 1,392,351	\$ 9,067,888	\$ 10,657,858	\$ 21,118,097
Total Estimated Expenditures	\$ 7,738,006	\$ 47,072,995	\$ 26,879,814	\$ 81,690,815
<i>*includes January 1 to June 30, 2025 extension.</i>				

The THIP extension cannot be viewed in isolation but within the context of other material legislative investments including, but not limited to: (1) added funding to bring MAC 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; among other investments in public defense. Resourcing related to the recriminalization of drug offenses (HB 5204, 2024) are excluded from this list, as they are indirectly related to the unrepresented defendant/persons crisis. In short, the outcome of these crisis investment should lessen the need for THIP, but that has yet-to-be evidenced, as the cost of such investments are running concurrently with, rather than reducing, THIP costs, which continue to escalate.

Analysis

THIP is an imperfect 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 MAC under current contract terms; and potentially creates an ethical dilemma by financially incentivizing contract providers to take on cases above their ethical capacity. The higher hourly rates under the program may also be a disincentive to a timely resolution of a case. The financial sustainability of extraordinary or enhanced hourly rates is also of concern. In addition, PDC has yet-to-develop any performance or other measures to gauge the quality of representation being provided through THIP or the timely resolution of cases. There has been no internal or external financial or performance audit of THIP and none are currently planned.

At this time, PDC is also unable to report on case-by-case actual expenditures for THIP. Such costing is viewed as critical in understanding the program's net fiscal position, but to also THIP's financial and budgetary impact on non-THIP programs of CME and PAE.

PDC's 2025-27 agency request budget does not include a policy package to extend THIP beyond June 30, 2025, and into the 2025-27 biennium, other than the funding required to pay for previously authorized cases from the 2021-23 and 2023-25 biennia (\$26.9 million General Fund under Policy Package #107). However, PDC has not developed a plan to phase-out or terminate THIP on June 30, 2025. While THIP had been presented as being a temporary program, PDC is now referring to THIP as a second "bridge" program to transition the agency's current hourly rate structure, both THIP and non-THIP, to even higher ("market") hourly rates for the 2025-27 biennium and beyond.

The Legislative Fiscal Office recommendation is to fully fund PDC's request, but entirely from public defense SPA. Additional detailed financial information is needed from PDC to ascertain whether further supplemental funding will be needed for the program's current biennium costs during the 2025 legislative session.

Recommendation: The Legislative Fiscal Office recommends that the Emergency Board allocate \$2,450,744 General Fund from the special purpose appropriation made to the Emergency Board for public defense expenses to the Public Defense Commission for extension of the Temporary Hourly Increase Program from January 1 to June 30, 2025.

4
Oregon Public Defense Commission
Daniel

Request: Allocate \$1.0 million from the Special Purpose Appropriation made to the Emergency Board for expenses related to public defense and allocate \$1.5 million from the State Emergency Fund to extend the Temporary Hourly Increase Program (THIP) through June 30, 2025.

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

Discussion: 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 capacity to provide public defense services has experienced challenges in keeping pace with evolving representation needs. OPDC first authorized THIP (formerly known as the Enhanced Hourly Rate Program) on July 29, 2022, to increase attorney and investigator capacity in response to the unrepresented persons crisis. Since then, nearly 7,000 cases representing almost 5,000 clients have gone through THIP, averaging around 200 cases per month. THIP has been an essential part of the response to the state’s unrepresented persons crisis.

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 Senate Bill 5701 (2024) to extend the program from December 2023 to June 2024. OPDC made a request in May 2024 for a program extension from July 1 to December 31, 2024, and another request in September 2024 for a program extension from January 1 to June 30, 2025, which was deferred until the December 2024 meeting of the Emergency Board.

For the December meeting of the Emergency Board, OPDC requests an extension of THIP from December 31, 2024, to June 30, 2025. The estimated cost to extend the program to the end of the biennium with the current caseload is \$2.5 million. OPDC requests the \$1,020,768 remaining in the special purpose allocation for public defense and an additional \$1,429,976 of general-purpose allocation from the Emergency Board. However, due to changes in subsequent funding requests expected during the December 2024 meeting of the Emergency Board, the full amount requested can now be allocated from the Special Purpose Appropriation for public defense.

OPDC estimates that each six-month extension of THIP costs an additional \$18.9 million. The \$2.5 million in this request will be used for payments through the end of the biennium. This does not include the cost of attorneys taking on new unrepresented persons cases in the same time period; however, this funding, if provided, will continue to cover payments made to attorneys, investigators, and expert witnesses involved in cases previously assigned by THIP. Additionally, the Governor’s Recommended Budget includes assumed funding for Policy Package 107 to cover roll-up costs of THIP through the 2025-27 biennium.

Legal Reference: Allocation of \$2,450,744 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 \$1,811,036 and chapter 481, section 1(6), Oregon Laws 2023, for the Oregon Public Defense Commission, Preauthorized Expenses by \$639,708 for the 2023-25 biennium.



Oregon

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Nov. 8, 2024

The Honorable Rob Wagner, Co-Chair
The Honorable 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 that the Emergency Board approve an extension of the Temporary Hourly Increase Program (THIP) from Jan. 1, 2025, to June 30, 2025. Based on projections, OPDC requests access to the special purpose appropriation for public defense to defray the incremental cost of extending the program. The agency also requests a general-purpose allocation from the Emergency Board to completely fund the request.

In May, the Emergency Board agreed to extend THIP from July 2023 to December 2024; funding was deferred until a future Emergency Board meeting. In September, OPDC submitted a report on that extension with a request to extend THIP through June 2025. The report was accepted, and the request for extension was deferred until December 2024.

On May 23, 2024, Gov. Tina Kotek requested that the commission submit a plan by Aug. 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.” The commission submitted that plan to the governor. The plan included interventions that OPDC was taking, or planned to, take within existing resources. It also included interventions that would require legislative approval, funding through the Emergency Board, or both. This request is in line with that crisis plan.

Agency Action

Temporary Hourly Increase Program and Other Programs

When it comes to assigning counsel to a person eligible for public defense, OPDC contractors are first in line. Under normal circumstances, the court assigns an available attorney upon arraignment. However, when no attorney is available due to lack of capacity or conflicts of

interest, the court will assign OPDC as a placeholder. This puts the defendant on the unrepresented list and notifies the commission of the need to find counsel. The commission's most effective tool for locating counsel is the Temporary Hourly Increase Program (THIP). Beginning in August 2022, THIP began paying attorneys a higher hourly rate for taking unrepresented cases. THIP has brought in attorneys who would not otherwise serve some of the most vulnerable population. It has been an essential part of the response to the unrepresented persons crisis.

Intended to be a temporary emergency program, it was later extended as a bridge until state employees started taking cases. It has been incredibly successful. Through THIP, the commission has assigned an average of 200 cases per month directly off the in-custody, unrepresented list. Since its inception, 6,994 cases representing 4,829 clients have been taken through THIP. Since narrowing to only in-custody unrepresented cases, the program has taken 1,442 cases, representing 947 clients.

The program has also brought new lawyers into the system. Before 2022, when the rates were \$75 and \$105 an hour, about 1% of OPDC-assigned cases were taken hourly. Of the 252 currently active attorneys handling THIP cases, 166 are not contracted providers with OPDC. Attorneys under contract must reach their monthly maximum attorney caseload (MAC) before they are able to take on a THIP case, ensuring that OPDC is using contracted capacity before paying hourly providers.

The goal of this request is to continue THIP, which sunsets on Dec. 31, 2024, through the end of the biennium. As the program has changed and commission-driven policy changes have matured, our budget and data teams have been able to more accurately forecast the remainder of the biennium. These new projections have produced expected overages in the CME and PAE program areas due to THIP and the unrepresented persons crisis. As a result, the agency must rebalance all its resources to remain within its budgeted authority. To do so, we will need to tap into a special purpose appropriation.

The table on the next page shows the budget, expenditures, and projections for THIP if the program were extended to the end of the biennium. The program has a legislatively approved budget of \$13,213,374. From July 1, 2023, to Sept. 30, 2024, the program's expenditures were \$26,907,983. This means THIP is \$13,694,609 over budget. Notwithstanding the current deficit, we project the program's expenditures through the end of the biennium to be \$47,063,891. This would result in a deficit of \$33,850,517 between the program's budget and expenditures.

	Court Mandated Expenses	Preauthorized Expenses	Total
2023 - 25 Legislatively Approved Budget			
Non-THIP	65,897,147	55,340,161	121,237,308
THIP	9,935,850	3,277,524	13,213,374
Total 2023 - 25 LAB	75,832,997	58,617,685	134,450,682
Forecast from July 1, 2023, to June 30, 2025			
Non-THIP	25,026,368	83,933,601	108,959,969
THIP	38,635,815	8,428,076	47,063,891
Total forecast	63,662,183	92,361,677	156,023,860

Temporary Hourly Increase Program Extension

Extending the program would result in an incremental cost of \$2.5 million. The most significant cost is attorney fees followed by investigator fees. The table below forecasts the expected incremental costs if an extension were approved. In September, the Emergency Board established additional position authority to serve the program and to dispose pending applications for enhanced rates. The commission is in the preliminary stages of providing requisition notices on the state's human resources information system, and the position authority expires at the end of the biennium. While the effect of additional resources in this program is unknown, staff believe those resources may cause a perceptible increase in the incremental costs.

Service	Status quo	Extended	Difference
Attorney fees	53,351,857	55,162,893	1,811,036
Investigator fees	29,890,558	30,521,266	630,708
Psychiatric fees	33,885,262	33,885,262	0
All other services	36,454,439	36,463,439	9,000
Grand total	153,582,116	156,032,860	2,450,744

2025-2027 Biennium

As the Legislative Fiscal Office acknowledged in its recommendation in May, THIP represents a continuing financial obligation to the state until a case assigned under the program is resolved. As such, expenditures are expected to continue to mount in the second year of the biennium and into the next biennium for unadjudicated cases. In addition, the program's costs include payment

not just for hourly attorneys but also for expenses related to expert witnesses and investigations, which can be significant. Hourly attorneys and investigators representing THIP cases may also be reimbursed for travel and other allowable expenses. Those cases also come with roll-up costs into future biennia. The commission calculated those costs to provide full transparency to this body. Those roll-up costs will be included in the commission's policy option package 107, Temporary Hourly Increase Program Carryover, offered as part of the agency's requested budget. That policy option package is not a request to continue the program but to fund bills that will come in from cases previously assigned by the program.

Action Requested

The Oregon Public Defense Commission (OPDC) requests that the Emergency Board approve a request to extend the Temporary Hourly Increase Program from Jan. 1, 2025, to June 30, 2025. The commission can defray the incremental cost of extending the program using the remaining \$1,020,768 in the special purpose appropriation for public defense; however, it also needs to request \$1,429,976 of general-purpose allocation from the Emergency Board.

Legislation Affected

Oregon Laws 2023, chapter 605, section 1.	(\$1,429,976)
Oregon Laws 2023, chapter 605, section 9.	(\$1,020,768)
Oregon Laws 2023, chapter 481, section 1(7).	\$1,811,036
Oregon Laws 2023, chapter 481, section 1(6).	\$639,708

Sincerely,



Jessica Kampfe
Executive Director

cc:

Amanda Beitel, Legislative Fiscal Officer
John Borden, Principal Legislative Analyst, LFO
Kate Nass, Chief Financial Officer
Allison Daniel, Policy and Budget Analyst, CFO