



May 14, 2021

Re: Additional Information on Questions Asked During PDSC's 5/5/2021 Public Hearing

Dear Co-Chair Gorsek, Co-Chair Sollman, and members of the Joint Committee on Ways and Means, Public Safety Subcommittee:

Thank you for the opportunity to present the Public Defense Services Commission (PDSC) budget to you on May 5, 2021. Enclosed are responses to questions asked by committee members during the hearing. We would be happy to answer any additional questions that may have come up after the conclusion of our presentation or follow-up with more information on anything described below.

1. Out of the total number of cases for juvenile delinquency and juvenile dependency cases in Oregon, what percentage of those cases require appointment of public defense counsel?

In 2019, the most recent year with data for appointed counsel not affected by COVID-19 case backlogs, 96 percent of juvenile delinquency cases and 97 percent of dependency (foster care) cases required appointed counsel through public defense providers.

2. Under what circumstances may a polygraph exam arise as a public defense expense that the PDSC must fund? What ways in which are polygraphs used at the trial level, in light of their general inadmissibility as evidence of a person's guilt?

Polygraphs, also called "lie detector tests," are among case-related expenses that a court may order or a defendant's case may require, under certain circumstances. As a general matter, polygraphs are inadmissible as evidence of a defendant's guilt in criminal cases.¹ Under ORS 135.005(3)(a), a person "determined to be eligible for appointed counsel is entitled to necessary and reasonable fees and expenses for investigation, preparation and presentation of the case for trial, negotiation and sentencing." Given the ways in which polygraphs pop up in the pendency of criminal cases, they sometimes arise as necessary case-related expenses. For example, defendants accused of sex offenses may be required to submit psychosexual evaluations, many of which include a polygraph examination.

Additionally, law enforcement may submit defendants to polygraph examinations during interrogation as a means of leveraging the polygraph results to solicit information, regardless of whether the actual results of that exam are admissible as evidence. When that occurs, the defendant may seek an independent polygraph examination to counter the previous results. Defense counsel may then seek to leverage the secondary polygraph examination as a negotiating tool with prosecutors making charging decisions or during plea agreement negotiations.

¹ *State v. Lyon*, 304 Or 221, 231 (1987) (holding that "polygraph test results are inadmissible as evidence in the courts of this state, even when admissibility has been stipulated by the parties").

Over a two-year period, the PDSC typically spends about \$300,000 on polygraph examinations. The agency would be happy to have a conversation with legislators and stakeholders regarding the appropriate role and utility of polygraphs in the bigger criminal justice landscape.

3. How are caseloads managed under the new contracting model? How does this model prevent a provider from exceeding the caseload standards set by the PDSC?

Under the previous case-credit model, attorney-providers were incentivized to take on as many cases as possible, as compensation was a flat-fee structure and no caseload cap existed. Under the new caseload model, each attorney-provider operates under the PDSC's caseload standards for each case type. Attorney-providers are compensated only for the maximum number of cases under the caseload standards now in place. Caseloads are managed through providers reporting their caseloads to agency contract analysts. Providers are on notice that they are not to exceed the caseload standards. If a provider goes over the caseload cap set by the PDSC, the provider and the contract analyst may negotiate as to whether the provider may acquire more staffing to accommodate the caseload overage.

Additionally, if a provider's caseload decreases to the point where the amount of FTE covered in the contract is more than required, the provider's contract may be amended down to respond to the actual caseload at hand. Real-time caseload management is a key component of the new contracting model, and the PDSC is engaged in ongoing work with providers to ensure that this new management system is responsive and continually improving.

4. Does the agency engage in a peer-review process?

Under ORS 151.216(1)(g), the PDSC is required to establish a peer review system. Previously, this work was conducted by agency staff, in the jurisdictions where providers practiced, by way of making site visits that took place over the course of several days. These reviews involved interviewing persons involved in all component parts of the system (such as judge, prosecutors, clients, and so forth). Following the site visits, agency staff would write reports on service delivery of providers in that jurisdiction. Due to agency staffing constraints and the time in which it takes to perform these in-depth reviews, it takes approximately 10 years to survey the entire state of providers.

Over the last few years, the agency has moved much of the quality assurance work into the office of General Counsel, which has three attorneys who are assigned counties to monitor. The agency is working on building up this review and compliance capacity by engaging our contract analysts to perform more monitoring and compliance work. Monthly provider calls and caseload reporting for both the trial criminal and Parent Child Representation Program contracts are one example of this ongoing oversight capacity building. Increasing quality assurance in service delivery is among the PDSC's key focuses for agency transformation over the next few years.

5. Following the revision of the contracting model, how many providers needed more staff than they had previously?

During the 2021 contract negotiations, five contracts were identified as falling short of the minimum number of attorney-to-staff ratio of 1 attorney to .5 FTE support staff. These five provider contracts have now added support staff and are compliance with the new terms of the contract

model. Additionally, within consortia contracts, five attorney providers did not have enough staff per the new contract model and added support staff to those attorneys to reach compliance.

6. How did the agency arrive at its Fiscal Impact Statement for Senate Bill 817?

Senate Bill (SB) 817, in relevant part, eliminates fees, court costs, and fines associated with juvenile delinquency matters and provides for appointment of counsel at state expense in all juvenile delinquency matters. With the passage of SB 817, the PDSC expects more youth to request counsel upon entering into formal accountability agreements and a corresponding increase in the number of appointed counsel. The PDSC also expects to see an increase in appointment of counsel in juvenile delinquency court proceedings because associated financial barriers have been removed, thereby increasing the number of youth eligible for state-funded counsel. Finally, the PDSC expects to see a nominal increase in juvenile delinquency proceedings where parents are ordered to engage in treatment.

The PDSC anticipates potentially needing additional juvenile trial-level FTE to meet any increased appointment of counsel. SB 817 also removes all financial eligibility requirements for juveniles and their parents or guardians for court-appointed counsel in appeals from juvenile delinquency proceedings. Based on an already-increasing number of juvenile delinquency appeals during 2018 and 2019, the PDSC anticipates that additional FTE may be needed for the increased caseload based on one appellate attorney handling approximately 25 appeals per year. The PDSC submitted a prior fiscal impact statement on SB 817 that is presently being revised to reflect additional data on trial-level system impacts and will submit that revised fiscal to the Legislative Fiscal Office early next week.

7. What is the impact of SB 651 on the agency's requirements to provide appointed counsel?

SB 651 modifies ORS 137.540, which establish general conditions of probation, as well as the process for modifying those provisions. Currently, the court can modify probation conditions if the probation department requests. To do so, the probation officer must notify the defendant and the district attorney in writing of the proposed modification of conditions. SB 651 requires the probation officer to also notify the defendant's attorney, if the defendant is already represented by counsel. The agency's analysis demonstrates no fiscal impact to this proposed change in law, as no additional appointment is required of attorney providers and this stage of proceedings is already covered by providers in existing contracts.

8. What are considerations to bear in mind around ensuring adequate resource balances exist between trial-level public defenders, funded through state contracts, versus trial-level prosecutors, funding through individual counties?

As a general matter, trial-level public defense providers across the state have not reached overall resource parity with trial-level prosecutors, nor has that been the goal of the PDSC in changing its contracting model. Rather, constitutionally adequate caseloads and better compensation than previously delivered has been the aim of the contract model in the near-term. The new contracting model contracting rates are set, for trial-level criminal representation, at an urban rate range of \$205,000 to \$211,150, and at a non-urban rate range of \$190,000 to \$195,700. This is best viewed like a small business's gross receipts, as the attorney-provider's salary, staff salary, rent, and all other overhead expenses *all* must come out of that base range.

By contrast, county prosecutors receive a salary commensurate with experience level and the county government salary scheme, which includes receiving PERS benefits and health care. Additionally, some counties have the capacity to include hiring benefits for prosecutors that the PDSC cannot offer to defense providers. For example, in a Jefferson County job posting for a deputy district attorney, closing May 6, 2021, the position included the potential for a hiring bonus up to \$3,000, coverage of moving costs up to \$2,000, and the potential rental of a county-owned home to support interested parties in taking the job. While these potential benefits are not standard in county hiring of deputy district attorneys, they are one example of how counties have more flexibility in what they may offer their potential employees than the PDSC presently has in offering its potential contractors. The PDSC will keep the Legislature updated on the investments in public defense funding in light of trial-level resources within district attorney offices.

9. What is the agency’s plan for an interim director position?

At the PDSC’s May 11, 2021 meeting, the Commission opted to launch an interim director search, which opened May 12, 2021. The Commission is seeking applicants through close of business on May 19, 2021, and the PDSC expects the interim director to serve in this role for between four and nine months, while a rigorous search for an executive director takes place.

Thank you for the opportunity to provide more information. Please let us know if you have further questions. We would be happy to help.

Sincerely,

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