

Public Defense Services Commission					
	2019-21 Actual	2021-23 Legislatively Adopted	2023-25 Legislatively Approved *	2023-2025 Current Service Level	2023-25 Governor's Budget**
General Fund	353,130,198	321,184,175	449,250,967	368,774,821	482,844,951
Other Funds	13,615,153	18,449,667	18,449,667	17,937,116	17,937,116
Total Funds	366,745,351	339,633,842	467,700,634	386,711,937	500,782,067
Positions	90	108	114	104	166
FTE	86.48	104.72	107.81	103.80	164.22
* Includes Emergency Board and administrative actions through December 2022					
**Excludes \$40 million special purpose appropriation the Emergency Board					

Program Description

The Public Defense Services Commission (PDSC) was established as an independent state agency in 2001. By statute, the Commission is to “establish and maintain a public defense system that ensures the provision of public defense services in the most cost-efficient manner consistent with the Oregon Constitution, the United States Constitution, and Oregon and national standards of justice.”

The budget is organized into the following program areas or divisions: Executive; Compliance, Audit and Performance Management; Appellate; Trial Criminal; Non-Routine Expenses; Court-Mandated Expenses; Juvenile; Administrative Services; and Special Programs, Contracts, and Distributions.

Eligible persons are entitled to adequate legal representation in state court, at state expense, under provisions of the Oregon and federal constitutions and Oregon statutes. Oregon statute broadly defines who is financially eligible for public defense. A person is presumed eligible for services if the applicant’s income is less than or equal to the eligibility level for the federal food stamp program unless the applicant has liquid assets that could be used to hire an attorney. If an applicant’s income exceeds food stamp standards, the applicant is eligible for state-paid counsel only if the applicant’s income and liquid assets are determined to be insufficient to hire an attorney suitable for the type of case pending against the applicant.

As an independent agency within the Judicial Branch of government, PDSC operates with uncommon or plenipotentiary autonomy. The Executive Branch makes no recommendations and exercises no budgetary control over PDSC’s budget since the Commission resides in a separate branch of government. The Chief Justice also makes no recommendation and exercises no budgetary control over the Commission because the Judicial Branch does not have a unified budget like the Executive Branch. In other words, neither the Chief Justice nor the Governor reviews or approves the Commission’s recommended budget nor monitors PDSC’s expenditures or business practices. Additionally,

PDSC is statutorily exempt from many common statutes governing operations that apply to Executive Branch agencies, such as human resources, procurement, and information technology. Under the current statutory construct, oversight responsibility for PDSC falls exclusively to the Legislature.

PDSC is supported predominately by General Fund. Other Fund revenues includes Federal as Other Funds from Title IV-E moneys as reimbursement from the Department of Human Services and the Application Contribution Program from defendants for the payment of administrative costs of determining their eligibility and a contribution amount toward the anticipated cost of their state defense. By statute, PDSC retains unspent General Fund carryforward (i.e., reversions). The 2021-23 carryforward amount has yet-to-be determined.

CSL Summary

The 2023-25 current service level budget for the agency totals \$368.7 million total funds, including \$368.8 million General Fund and \$17.9 million Other Funds. The budget includes 104 positions and 103.80 FTE. The CSL is \$69.9 million, or 15.3%, less than the 2019-21 legislatively approved budget of \$456.6 million and has 10 fewer position (4.01 FTE) that the approved budget. The CSL budget is comprised of \$40.5 million, or 10.5%, personal services and \$343.1 million, or 88.7%, services and supplies (predominately professional service payments to providers), and \$3.1 million or 0.8%, special payments.

Current Service Level Qualification - There exist a high degree of budgetary risk and uncertainty surrounding PDSC's CSL budget because the budget is based on a financial rather than caseload projection. The CSL also does not reflect any of PDSC's General and Other Funds rebalance adjustments that occurred during the 2023 Legislative Session and Emergency Board meetings in June, September, and December of 2022. PDSC has yet-to-submit a comprehensive rebalance/realignment plan for the agency's 2023-25 current service level budget to re-alignment budget with anticipated expenditures.

Understatement of Current Service Level - In addition, the CSL does not account for the Emergency Board's release of a \$100 million special purpose appropriation in June of 2022, which fell outside the timeline for CSL development. An inflation and mandated caseload adjusted SPA amount is included in the 2023-25 budget as a policy package (\$113.7 million General Fund). If this amount were to have been included in the CSL, the CSL would have totaled \$500.4 million total funds, including \$482.5 million General Fund and \$17.9 million Other Funds. The CSL budget with this adjustment would have been \$32.7 million, or 7%, more than the 2021-23 legislatively approved budget of \$467.7 million. Position and FTE counts remain unchanged from the CSL.

The CSL also does not account for two Emergency Board actions, which fell outside the timeline for CSL development: (a) the reclassification of a Procurement Analyst 1 position to a Manager 2 (June - Item #8); and (b) the establishment of one permanent full-time General Counsel position (0.25 FTE) to serve as the Division Chief of the Compliance, Audit, and Performance Management Division (September - Item #8).

Other Significant Unbudgeted CSL Concerns - Other significant concerns with the CSL include: (a) the CSL does not account for an estimated unbudgeted liability for obligated Nonroutine Expenses of an estimated \$52.7 to \$58 million General Fund; (b) the phases-out of one-time unspent General Fund carryforward from the 2019-21 biennium (\$269,368 General Fund); and (c) continuation of funding for the select unrepresented defendant/persons crisis initiatives (\$3.4 million General Fund).

Base Budget Adjustment (\$910,104 General Fund; nine less positions/<3.76 FTE>) - offsetting adjustments to the base budget include standard personal service adjustments, the phase-in of permanent full-time positions, and phase-out of limited duration positions.

Phase-Outs (\$13.3 million Total Funds) - Major phase-outs include: (a) one-time costs associated with unrepresented defendants (\$12.8 million General Fund) and (b) \$512,551 Other Funds in Court Mandated Payments whose underlying revenue source is the Application Contribution Program (ACP) revenue. The ACP revenue phase-out requires further analysis, as this is a non-standard adjustment that should have been characterized as a revenue shortfall.

Phase-In (\$90,437 General Fund) - PDSC phased-in several relatively nominal ongoing costs associated with previously approved ongoing requests.

Inflation Adjustment (\$25 million General Fund) - PDSC's CSL includes standard inflation adjustments totaling \$25 million General Fund.

Mandated Caseload Adjustment (\$19.6 million General Fund) - PDSC's mandated caseload adjustments are related to the Trial Criminal Division (\$13.1 million), Nonroutine Expenses (\$4.5 million), and Court Mandated Expenses (\$2 million). The Juvenile Division's Parent Child Representation Program did not receive a mandated caseload adjustment, as PDSC did not provide the requested supporting documentation for such an adjustment to either the Department of Administrative Services - Chief Financial Officer or the Legislative Fiscal Office. Instead, the adjustment was requested as a policy package (#112). No mandated caseload adjustment was submitted for Court Mandated Expenses funded with Other Funds. The methodology for developing PDSC's mandated caseload adjustment merits further review.

Technical Adjustment (Net Zero) - PDSC was directed to begin the procurement of trial-level representation to parents in juvenile dependency cases and termination of parental rights cases as contracts separate and distinct from adult Trial Criminal procurements. This included moving the biennial budgeted cost for juvenile contracts from the Trial Criminal Division to the Juvenile Division. Other technical adjustments that should have been undertaken, but were not, include moving the Chief Trial Criminal Defender and Deputy Defender(s) and the Chief Juvenile Defender and Deputy Defender(s), who are responsible for direct program administration, from the Compliance, Audit and Performance Management Division into their respective divisions.

Policy Issues

PDSC will be impacted by the recent Oregon Supreme Court ruling in *Watkins v. Ackley* (December 30, 2022) that held that the requirement of unanimous jury verdicts in serious criminal cases applies to older criminal cases as well as those still on appeal. The ruling applies to cases where a criminal conviction was final and the appeals, if any, were over before the U.S. Supreme Court ruling decision that was issued in April 2020. The 2023 Legislature is considering legislation related to unanimous jury verdicts and court rulings (SB 321).

The 2023 legislature did approve, on a one-time basis for the 2021-23 biennium, an increase of \$1.2 million for PDSC's response to the *Watkins v. Ackley* court decision (HB 5045, 2023). At present, PDSC estimated that there are 225 to 250 existing post-conviction relief cases, with approximately 83 possibly returning for new trial in the next 60 days. The total number of post-conviction case, and their timing, is unknown at this time, but could total up to 2,000 cases. The 2021-23 legislatively approved budget for PDSC already included \$1.9 million General Fund for the U.S. Supreme Court ruled in *Ramos v. Louisiana* for only those persons currently in custody and which will carryforward into the 2023-25 biennium. Cases undertaken in this biennium may continue to incur costs into the 2023-25 biennium, which is estimated to total \$2.8 million General Fund.

Legislation was also introduced to clarify policy issues around PDSC's reimbursement of indigent defense discovery costs incurred by district attorneys (HB 2474 and SB 369, 2023) and refinements to state-funded civil legal counsel for certain persons in protective proceedings (SB 578, 2021).

A legislative workgroup ("Three Branch Workgroup") was formed after 2021 Legislative session to study the systemic issues facing PDSC and make recommendations to the legislature. The workgroup formed four subcommittee: (1) commission; (2) system efficiencies; (3) data collection and forecasting; and (4) recruitment/ retention / workforce development. The Workgroup submitted legislation with the initial recommendations (HB 2841 and SB 337), but plans to continue work through next interim with further legislation possible during the 2024 Legislative Session. The overarching policy questions pertaining to PDSC are: (1) independence of the Commission; (2) accountability of the Commission; and (c) the service delivery model.

PDSC reported to the Emergency Board in December (Item #1) that the agency missed the normal timeframes to propose a legislative concept for the 2023 Legislative Session. Instead, PDSC requested that the Senate Committee on Judiciary submit two agency LCs as Committee introduced measures: (a) SB 329 authorizes Public Defense Services Commission to award grants for purpose of carrying out duties of the commission and (b) SB 397 Provides that members of Public Defense Services Commission are entitled to compensation as well as some housekeeping changes. Although PDSC states that both measures have a minimal fiscal impact, the agency does have a policy package (#111) for the budgetary impact of SB 397, which has a cost of \$112,234 General Fund. PDSC's has apparently decided against any other updates to the agency's' statutes.

Governor's Budget Summary

The 2023-25 Governor's budget totals \$500.8 million total funds, including \$482.9 million General Fund and \$17.9 million Other Funds. The budget includes 166 positions and 164.24 FTE. The requested budget is \$114.1 million, or 29.5%, more than the CSL of \$368.7 million and has 62 more position (60.42 FTE).

The Governor's budget, however, needs to be qualified, according to the Department of Administrative Services: "The Governor makes no recommendation for this budget, as it is a separate branch of government. For statutory purposes, the Governor included \$482,844,951 General Fund and \$17,937,116 Other Funds for a total amount of \$500,782,067 in her budget as a placeholder." In other words, the Governor's budget funded PDSC's budget at only the 2023-25 current service level for General Fund only. The Governor's budget left unchanged in the PDSC's Other Funds request above the current service level as well as position/FTE counts. This action, while consistent with the actions of prior governor's, distort the budgetary view of PDSC's Governor's budget.

The Governor's budget also established a \$40 million General Fund special purpose appropriation in the Emergency Board: "...to create a state employee trial level public defense services legal team to address the urgent growing need for public defense representation including for cases deriving from the Ramos/Watkins decision."

The policy packages in the Governor's budget require further qualification, as these packages were what PDSC requested as part of the agency request budget. Since their submission, the policy packages have gone through two additional iterations in January and then March of 2023, however, the latest iteration from March 2023 was neither reviewed nor approved by the Commission. Each iteration materially changed PDSC's policy package requests.

With these qualifications stated, the Governor's budget includes the following major policy packages:

Current Service Level Funding

- Package #081 June 2022 Emergency Board (\$113.7 million General Fund) - adjusted for both inflation factor and mandated caseload.
- Package #082 September 2022 Emergency Board (\$399,975 General Fund) - Family Treatment Courts.
- Packages #090 - Analyst Adjustments (\$<345.3 million> reduction) - Governor's adjustment.

Provider Contacting

- Package #101 Provider Compensation (\$35.2 million General Fund)(Agency Priority #1) - increases attorney compensation to a level equivalent to Department of Justice and PDSC Appellate Division attorneys.
- Package #102 Provider Staffing (\$131.3 million General Fund)(Agency Priority #2) - increases provider payments intended to bring supporting staff parity across the public defense delivery system.

- Package #113 Capacity Expansion (\$118.4 million General Fund)(Agency Priority #13) - provides funding to contract for 130 attorneys to address unrepresented clients and to reduce the caseloads carried by current attorneys.

Parent Child Representation Program Expansion

- Package #103 Expansion of PCRCP (\$32.5 million General Fund)(Agency Priority #3) - Expand the program to an addition 18 counties.
- Package #112 Mandated Caseload for Juvenile (\$2.7 million General Fund)(Agency Priority #12)

Information Technology

- Package #105 Financial and Case Management System (\$7.4 million General Fund; three positions 3.00 FTE)(Agency Priority #5) - Procure an integrated financial and case management system.
- Package #107 OJD ETS Services (\$929,270 General Fund)(Agency Priority #7) - continuation of existing technology services provided by the Judicial Department. Note, the Oregon Judicial Department does not have a corresponding policy package to provide this service.

Civil Protective Proceedings (SB 578, 2021)

- Package #110 Guardianship Program (\$291,318 General Fund; one position 1.00 FTE)(Agency Priority #10) - maintains a limited duration position and limited program funding.

Compliance, Audit, and Performance Division

- Package #104 Program Design and Research (\$3.4 million General Fund; 14 positions/12.44 FTE)(Agency Priority #4) - staffing to produce written policies, procedures, and processes for both the agency and public defense providers to follow.

Administrative Investments

- Package #108 Limited Duration Positions (\$1.9 million General Fund; seven positions/7.00 FTE)(Agency Priority #8) - provides staffing for accounts payable, policy writing, human resources, data collection and data management.
- Package #109 CSS Position (\$235,394 General Fund; one position/1.00 FTE)(Agency Priority #9) - maintains an administratively established limited duration position supporting Case Support Services.
- Package #111 Commissioner Stipend (\$112,234 General Fund)(Agency Priority #11)(required substantive law change) - provides a monthly stipend to commissioners for their work on the PDSC, which would be in addition to per diem.

Other Request

- Package #106 Quick Response Unit (\$10.8 million General Fund; 36 positions/36.00 FTE)(Agency Priority #6) - establishes a team of state agency public defenders to handle Major Felony, Jessica's Law and Measure 11 crimes throughout the state to help address the current and ongoing backlog of incarcerated individuals without representation.

Governor's Policy Packages Adjustments

- Package 081 June 2022 Emergency Board (\$113.7 million General Fund)
- Package 082 September 2022 Emergency Board (\$399,975 General Fund)
- Package 090 [Department of Administrative Services - Chief Financial Office] Analyst Adjustments (\$345,321,177 General Fund reduction)

Other Significant Issues and Background

PDSC's re-structuring efforts, while improving, are behind schedule. Many issues both within and outside of the agency remain unresolved. In short, the public defense system remains in crisis. The 2023 Legislative Session will see an inordinately complex convergence of budget development and policy efforts aimed at resolving the crises facing the agency and the public defense system.

Unrepresented Defendant/Persons Crisis - Current reporting on the number of unrepresented defendant/persons reflects that that the current crisis is far from being resolved and will likely extend into the intermediate future and may worsen due to unresolved or not fully resolved causation issues. The Commission reported to Joint Committee on Ways on Means on the crisis. After reporting, PDSC was directed to re-report after material discrepancies were found in the agency's original report. At the current time, all PDSC's unrepresented defendant/persons initiatives will expired on June 30, 2023. The Commission has yet to approve any crisis plans for the 2023-25 biennium.

2021-23 Biennium - Budget Execution Uncertainty - PDSC reported to the Emergency Board in December (Item #2) a projected biennium budget surplus of \$11.7 million General Fund with the expectation that there will be no 2021-23 expenses carried forward to be paid from appropriations associated with the 2023-25 biennium. Whether PDSC will be able to produce said surplus as well as the internal savings required to fund to various administrative initiatives related to the unrepresented defendant/persons remains in doubt.

Provider Contract Changes - PDSC continues to make significant changes to provider contracts. Beginning in January of 2021, there have been at least two substantive changes to provider contracts, and the Commission recently voted in March of 2023 for a third substantive change to contracts for the upcoming 2023-25 biennium.

Unresolved Budget Development Variables - PDSC continues to be faced with difficulty forecasting the agency's caseloads as well as the cost of caseloads, which are foundational to support the agency's funding requests. A recently produced forecast by the agency only accounts for appointed cases rather than all open cases and therefore understates the total caseload of the agency. PDSC's inability to identify and forecast total caseloads is a significant hinderance to the budgeting and operations of the agency.

Normalization and Prioritization of Study Findings - The Commission continues to operate without a prioritization of the problems faced by the agency and the public defense system, the range of potential solutions, the desired or optional outcomes, associated best practices, and recommended solutions. Absent a well-formulated and comprehensive plan that seeks to resolve the systemic issues facing the agency, and

that can be informed and modified based on the recommendations and actions of the Three Branch Workgroup and the Legislature, PDSC will remain in crisis management. Lastly, PDSC has apparently chosen not to implement any of the recommendations of a Corragio Group consultant's study of the agency.

Compliance, Audit and Performance Division - The Commission was directed by legislative budget note to develop a comprehensive program plan for the Compliance, Audit, and Performance Division (CAP). The CAP Division's purpose is to provide for the independent assessment and reporting directly to the Commission of the agency's performance and to improve public defense outcomes through a robust monitoring of the quality-of-service delivery at all levels of public defense. PDSC's current approach and timeline for CAP will need to be reviewed as part of the Legislature's examination of the agency's 2023-25 budget request. While PDSC has a strong conceptual understanding and commitment related to the importance of CAP, a significant amount of planning work remains.

Civil Protective Proceedings (SB 578, 2021) - The law allows for the payment of court-appointed counsel at state expense for qualified individuals when the estate of the protected person is insufficient to pay the expense of a private counsel. The law establishes a pilot program in three counties to provide counsel for persons in protective proceedings. Multnomah and Lane counties are to begin providing legal services on or after January 2, 2022 followed by Columbia County, which is to begin on or after January 2, 2023. The state's remaining 33 counties are to begin on or after January 2, 2024. PDSC may be unprepared for a statewide roll-out of this program, including the absence of a budget request for the resources necessary for a statewide implementation.

Information Technology - PDSC is continuing to contract with Oregon Judicial Department (OJD) to outsource information technology services (help desk, desktop support, servers, information security, network/telecommunicators, Microsoft 365/mobile support, and a web team), but will insource the development of the Financial and Case Management information technology project. PDSC's various information technology initiatives have been largely nontransparent and the agency's contract. The Commission did recently vote to establish an Information Technology Subcommittee of the Commission to help oversee the agency's information technology efforts.

Revenue Concerns - The Application Contribution Program (ACP) was created with the intent to avoid some taxpayer costs related to providing court appointed counsel at public expense by an assessment of advance payment from people who could afford to make a monetary contribution toward the cost of representation and the administrative costs of determining their eligibility. The Commission enters into an intergovernmental agreement with Oregon Judicial Department (OJD) for the use of these fees for public defense verification staffing. OJD verification specialists assist the courts in determining whether a person must pay these costs. Due to the pandemic, as well as actions taken by the Chief Justice of the Oregon Supreme Court as well as circuit court judges, there is an ACP revenue shortfall; however, ongoing review of ACP revenues is necessary to determinate if a revenue shortfall issues still exists or if the ACP revenue stream is in recovery. In addition, some judges have misunderstood the distinction between the ACP contribution amount and attorney fees and have only ordered attorney fees at the conclusion of the case. This is having has an adverse effect on the financial viability of the ACP given the statutory difference in how the funds are distributed and utilized. Legislative concern continues to exist around the determination of eligibility.

Federal as Other Funds from the federal Title IV-E program received from the Oregon Department of Human Services may be of less concern given a recent agreement signed with the federal government. However, how these funds are accounted for in the 2023-25 biennium budget remains a concern. PDSC does not have a formal cost split methodology between General Fund and ACP nor Title IV-E revenue, which underscores an area where financial management practices are ad hoc and need to be written, reviewed, and approved.

Budget Note and Other Anticipated Reports - PDSC was directed to report on unrepresented defendant/persons no later than January 31, 2023 as well as the re-initiation of the planning phase of the Financial and Case Management information technology project. In addition, the 2023 Legislature can expect to receive updates on the restructuring, modernization, financial controls, quality management, performance metrics, and governance of the agency as well as an update on the implementation plan associated with the Compliance, Audit, and Performance Division.

Internal/External Audit - The Commission had established an Audit Subcommittee comprised of a subset of Commissions members with reporting to the full Commission. An internal audit plan and framework has been approved by the Commission. PDSC appears to have no immediate plans to fill the two permanent full-time Internal Auditor positions that were approved by the 2021 Legislature, but instead continue to contract out this essential function. To-date, the audit contractor appears to have only completed two internal audits of the agency. In addition, the 2021 Legislature appropriated \$350,000 General Fund for an independent external financial and performance audit of PDSC. The external audit was release in August of 2022 and contained 11 significant audit findings, four observation, and seven process improvement recommendations. PDSC reported the audit findings to the Interim Joint Legislative Audit Committee (December 2022).

Key Performance Measures

A copy of the [agency name] Annual Performance Progress Report can be found on the LFO website:

https://www.oregonlegislature.gov/lfo/APPR/APPR_PDSC_2022-10-03.pdf

The Commission was directed by the 2021 Legislature to develop Key Performance Indicators and Key Performance Measurements and report to the Legislature (i.e., Emergency Board) prior to the Legislative Session in 2023. PDSC reported to the Emergency Board in December of 2022 that following (Item #1):

The PDSC did update its current Key Performance Measures as instructed. The agency has not done any work towards creating new measures, as it is still building the basic agency infrastructure that is necessary to create effective measures. While the Commission was directed to develop Key Performance Indicators and Key Performance Measurements and report to the Legislature (i.e., Emergency Board) prior to the Legislative Session in 2023, without the creation of a basic infrastructure any agency efforts around performance measurement yield nothing of value. As the agency continues with the process of modernization and restructuring it will be better able to identify performance indicator and measurements.