

SB 337 A STAFF MEASURE SUMMARY

Senate Committee On Judiciary

Action Date: 04/03/23

Action: Do pass with amendments and requesting referral to Ways and Means. (Printed A-Engrossed.)

Vote: 3-2-0-0

Yeas: 3 - Gelser Blouin, Manning Jr, Prozanski

Nays: 2 - Linthicum, Thatcher

Fiscal: Fiscal impact issued

Revenue: Revenue impact issued

Prepared By: Amie Fender-Sosa, LPRO Analyst

Meeting Dates: 3/30, 4/3

WHAT THE MEASURE DOES:

BRIEF OVERVIEW: Modifies the makeup of the Oregon Public Defense Commission (commission) to include appointments or recommendations from each branch of government (January 1, 2024); transfers the commission from the judicial branch to the executive branch (January 3, 2025); disallows economic incentives or disincentives in the pay structure that could interfere with the ability of appointed counsel to provide effective assistance of counsel and prohibits flat fee model; requires the commission to hire trial-level employee attorneys; directs the commission to contract with providers, making the commission responsible for selecting, appointing, paying, and supervising the individual attorneys appointed to represent indigent defendants (July 1, 2025); requires the commission to promulgate and enforce standards, provide oversight and supervision, collect specific data, and regularly report to the Legislative Assembly on progress and needs. Declares emergency, effective upon passage.

DETAILED SUMMARY:

Changes the name of the Public Defense Services Commission to Oregon Public Defense Commission (commission). Removes the title of Office of Public Defense Services.

COMMISSION MEMBERSHIP

Modifies membership of the commission. Removes directive that the Chief Justice of the Supreme court serve as an exofficio, nonvoting member. Directs the Chief Justice to appoint nine voting members, three of which must be chosen from recommendations of the Legislative Assembly, and three of which must be chosen from recommendations by the Governor, and four nonvoting members, which are a member of the Senate, a member of the House, and two public defense attorneys, one from an urban area and one from a rural area. Specifies qualifications to serve on the commission and specifies who may not serve on the commission. Sets term limits. Allows the Chief Justice to remove any member of the commission for cause. Provides 45 days for the Chief Justice to fill a vacancy; if vacancy not filled within 45 days, allows commission to fill the vacancy. Entitles the members to the statutory per diem rate for service and allowable expense reimbursement. Staggers initial terms of the commissioners. New commission takes effect January 1, 2024.

DUTIES OF COMMISSION

Directs the commission to appoint a director, who has a term of office of four years, which may be terminated for cause after notice and a hearing. Allows for reappointment. Sets out other duties and restrictions, including establishing minimum standards for the delivery of public defense services that provide for the effective assistance of counsel to eligible persons throughout the state, and must meet Oregon and U.S. constitutional requirements. Requires the commission to develop and oversee implementation, enforcement and modification

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of minimum policies, procedures, standards and guidelines to ensure the public defense providers are providing effective assistance of counsel consistently. Policies will apply to employees and any entity with which the commission contracts. Requires the commission to establish procedures for the mandatory collection of certain data.

Requires of the commission: reporting to the Legislative Assembly, Governor and the Chief Justice every two years concerning compliance with minimum policies, recommendations for legislative changes, etc.; centralizing services and resources; and in consultation with the Oregon Judicial Department, ensuring the existence of policies that create a standardized process for determining and verifying financial eligibility for public defense services.

Provides principled guidelines for the commission, including disallowing economic incentives or disincentives that could impair the ability of appointed counsel to provide effective assistance of counsel, and reviewing appointed counsel for efficiency and effective representation according to commission standards.

Directs the commission to hire trial-level attorneys who are employed by the commission, and allows the commission to establish a trial division. Requires commission's policies to be available on commission website. Directs the executive director to appoint a deputy director and hire staff for the commission.

TRANSFER OF COMMISSION TO THE EXECUTIVE BRANCH

Transfers the Oregon Public Defense Commission from the judicial branch to the executive branch on January 3, 2025, and allows commission members and the executive director to finish serving their terms.

Allows the commission, with approval of a majority of the members of the commission, to advocate for or against legislation, policies or budgets being considered by the Legislative Assembly. Allows the commission to adopt administrative rules, pursuant to the Administrative Procedures Act. Directs the Department of Administrative Services to issue state public defense population forecasts.

DELIVERY MODELS

Directs the commission to conduct a survey and economic analysis to establish a formula for an hourly pay rate for appointed counsel who are not employees of the commission, to be completed by April 1, 2024. Creates minimum targets that 20 percent of all appointed counsel at trial level must be employed by the commission by January 1, 2031, and 30 percent by January 1, 2035. Directs the commission to establish, supervise and maintain a panel of qualified counsel that may be assigned directly to cases. Requires that payment of panel counsel may not provide a financial conflict of interest; prohibits flat fees per case starting July 1, 2025. Allows the commission to contract with nonprofit public defense firms.

OTHER

Changes "nonroutine" fees to fees "subject to preauthorization requirement." Contains conforming amendments. Requires biennial reporting to the Legislative Assembly, until December 1, 2035. Specifies contents of report. Repeals reporting requirement January 2, 2036. Declares an emergency and takes effect upon passage.

ISSUES DISCUSSED:

- Three-branch workgroup on public defense
- Sixth Amendment Center report on Oregon's provision of public defense services
- Constitutional right to effective counsel
- Oregon's complex public defense bureaucracy and lack of fiscal and qualitative oversight with current contracting delivery system; current contracting system creates a conflict of interest
- National standards
- Unrepresented persons challenges; issues attracting and retaining qualified attorneys

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- Bill would: switch compensation rate to hourly for contracted attorneys and utilize direct contracting; add salaried state employees at the trial level; and retain nonprofit firms
- Proposed changes to commission membership
- Suggestion for a longer transition period in switch from judicial to executive branch
- History of public defense services in Oregon; current system was designed to save the state money, but has led to lack of transparency and data collection
- Office of Public Defense Services (OPDS) pays for constitutionally and statutorily mandated counsel
- Public defense needs structural changes, systemic changes, delivery model changes, and more financial investments
- Executive branch can provide some support functions, such as forecasting
- Subcontracting model prohibits OPDS from ensuring that attorneys who are appointed to represent vulnerable people meet nationally recognized qualification and performance standards
- Oregon is the only state that contracts for 100 percent of its public defense trial-level services
- Concerns about the state contracting individually with employees; consortia have been arranging court appointments for over 30 years
- Administrative and communication functions consortia fulfill
- Juvenile law should be considered separately from adult criminal law because of the number of attorneys needed; consortia plays critical role for juvenile cases

EFFECT OF AMENDMENT:

Replaces the measure.

BACKGROUND:

In 1963, the U.S. Supreme Court declared in *Gideon v. Wainwright*, 372 U.S. 335(1963) that anyone accused of a crime who cannot afford the cost of a lawyer “cannot be assured a fair trial unless counsel is provided for him.” Under *Gideon*, the Sixth Amendment right to effective counsel is an obligation of the states via the due process clause of the Fourteenth Amendment.

In Oregon, the Public Defense Services Commission (PDSC) oversees the Office of Public Defense Services (OPDS) as the state agency responsible for establishing and maintaining a public defense system that provides effective defense counsel for indigent defendants in criminal proceedings, youth in delinquency proceedings, and parents and children in dependency proceedings.

In 2018, the Sixth Amendment Center, a nonpartisan, nonprofit organization that provides technical assistance and evaluation services to policymakers focusing on the constitutional requirement to provide effective assistance of counsel, assessed the PDSC, OPDS, and the systems they maintain to provide public defense for indigent defendants in Oregon's criminal Justice system.

That assessment found: [T]he state has created a complex bureaucracy that collects a significant amount of indigent defense data, yet does not provide sufficient oversight or financial accountability. In some instances, the complex bureaucracy is itself a hindrance to effective assistance of counsel. Moreover, the report concludes that this complex bureaucracy obscures an attorney compensation plan that is at root a fixed fee contract system that pits appointed lawyers’ financial self-interest against the due process rights of their clients, and is prohibited by national public defense standards.

In light of those findings, the Sixth Amendment Center made recommendations for changes to Oregon's defense system that have been under the consideration of an interim workgroup to address the Sixth Amendment Center's recommendations and ensure that the provision of public defense in Oregon is constitutional.

Senate Bill 337 A modifies the makeup of the Oregon Public Defense Commission (commission) to include appointments or recommendations from each branch of government (January 1, 2024); transfers the commission from the judicial branch to the executive branch (January 3, 2025); disallows economic incentives or disincentives in the pay structure that could interfere with the ability of appointed counsel to provide effective assistance of

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