



# Office of the Ohio Public Defender

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*Timothy Young, State Public Defender*

## **Testimony Regarding the Budget of the Ohio Public Defender Commission HB166, Sponsor Representative Oelslager**

Chairman Kunze, Vice Chair Gavarone, Ranking Member Williams, and members of the Senate Higher Education Committee, thank you for the opportunity to testify regarding the budget of the Ohio Public Defender Commission. I am Tim Young, the Ohio Public Defender.

The Office of the Ohio Public Defender (OPD) supports and appreciates the increase in funding to county-level indigent defense that Governor DeWine proposed in his budget, and the important and necessary changes made by the House in Substitute House Bill 166 to increase funding to state-level indigent defense services through OPD's operational budget. The OPD has two primary requests for the Senate, if these changes are not made in the House: First, a minor statutory change that will allow OPD, when appointed by a court, to bill for legal fees in the same way as all other appointed counsel across the state. Second, the creation of a legislative task force to study and make recommendations to improve the delivery of indigent defense services in Ohio.

A brief review of the history of indigent defense in Ohio makes clear why the funding supported by the Governor and the House is critical. OPD and the entire indigent defense system in Ohio have long suffered from severe underfunding. This underfunding, combined with a patchwork of indigent defense delivery models at the county level, has led to an ineffective and inefficient indigent defense system for Ohioans. In Ohio, each county selects the method by which indigent defense will be provided in that county (whether through a public

defender office, appointed counsel, or contracting with the OPD to provide the services). There are nine counties in Ohio that have rates for appointed counsel that were set in the 1980s. The county-level system as a whole needs to allocate more funding for indigent defense in order for the system to be effective. The OPD, as the State Public Defender Office, has a number of statutory duties – not the least of which include oversight and distribution of reimbursement funds to each county for their costs of indigent defense, oversight and enforcement of the quality of Ohio’s indigent defense system, and providing counsel in certain matters (e.g. parole board hearings) – just to name a few. Despite increasing caseloads, increasing demands, and inflationary costs, funding for OPD’s operating budget increased only 7.7% from FY 2000 to FY 2015. During that same time period, the Consumer Price Index increased 37%. The cost and size of Ohio’s criminal justice system consistently grows 2.5 – 3% annually, but funding has not been allocated accordingly. As a result, in 2015, OPD was forced to lay off staff (the second layoff in the last 17 years) and to make drastic choices about which of its statutory duties OPD would be able to fulfill.

When considering funding to the indigent defense system, it is important to note that OPD actually oversees four separate budgets:

1. The OPD operational budget funds the State Public Defender’s Office, which is primarily used to employ staff to help meet our statutory duties prescribed in Revised Code 120 – among which is oversight and administration of the reimbursement funds;
2. The reimbursement budget provides funding for reimbursement to all 88 counties for the county-level costs of indigent defense;



3. The operational budget for OPD's branch offices provides funding for OPD's county-level indigent defense services to ten counties (Adams, Athens, Brown, Fayette, Jackson, Pickaway, Pike, Ross, Trumbull and Washington) as a result of those counties contracting with the OPD to provide indigent defense services in those respective counties. Contracting with the OPD to provide a county public defender office is one of the methods available to counties to provide for indigent defense;
4. The fourth budget solely serves as a pass through to the Ohio Legal Assistance Foundation – or Legal Aid, which is an agency that serves needy Ohioans on civil matters. Legal Aid does not provide indigent defense services, so their budget does not impact criminal defense representation.

I'd like to make clear and reinforce that the funds in the reimbursement budget may only be used to reimburse the counties – OPD is not permitted to use any of those funds to support our operations and meet our statutory duties.

In light of the chronic underfunding I have just reviewed with you, OPD is thankful that Governor DeWine's proposed budget included an additional \$60 million per year in general revenue funds (GRF) for reimbursement to the counties for indigent defense. The House amended this proposed increase in Substitute HB166 to \$59 million– for a total of \$120.9 million in funding for FY2020 between GRF and 5DY0 funds; and an increase of \$95 million in GRF – for a total of \$156.9 million in FY2021 between GRF and 5DY0 funds for county reimbursement. However, those increases in funding only addressed part of the systemic problems and did not offer any support to the OPD. This is a point which the House recognized, and took steps to address in Substitute HB166, by providing an additional \$980,000.00 in FY2020, and \$1.5 million in FY2021 to OPD's operating budget.



To give just one example of why this additional funding is critical for OPD to minimally meet our statutory duties – OPD’s reimbursement staff must review county reports to ensure compliance with the standards and guidelines and notify the county if it is not meeting these requirements. This must be done for all of 13,000 - 14,000 individual requests for reimbursement OPD receives each month. The additional funding provided in Substitute HB166 will allow OPD to minimally meet our statutory duties, and provide oversight and accountability in distributing the reimbursement funds. Again, this oversight would not be possible with OPD’s current funding levels to our operating budget. That is why it is imperative that OPD receive the funding proposed by the House so that we can provide the statutorily required oversight and put in place guardrails against misuse of public funds, whether those public funds are at current funding levels or include an additional \$95 million.

Ultimately, the stewardship of public funds is not about simply saving money, it is about spending taxpayer dollars wisely. If the government is attempting to prosecute a case with the intention of potentially spending hundreds of thousands of dollars to take someone’s liberty, then a wise use of public funds is to hire competent and effective counsel for the client and fairly compensate that counsel. From an economic perspective, doing these cases right the first time is a huge economic benefit. From a policy perspective, if we do not pay fair and appropriate compensation in these cases then the justice system has failed. The importance of providing good stewardship through these increases is perhaps most notable in the broad support from across the political spectrum – from the ACLU to AFP.

Both Governor DeWine and the House have taken steps to address the state of the indigent defense system. However, there are two more steps, with relatively no fiscal impact to



the budget, that OPD submits are necessary to take at this time and are cost neutral but provide significant service support and potential systemic improvement.

First, OPD requests a minor statutory language change to ensure that OPD does not lose funds from our operating budget when one of our attorneys is appointed to a case by a court. The proposed change is included in the addendum attached to this testimony. When the OPD is appointed to represent an individual in a county, the OPD is required by R.C. 120.06 to first subtract the reimbursed percentage (currently 42%) from the legal fees and submit the remainder of the attorney fees (currently 58%) along with 100 percent of the expenses, for payment by the county. The result of subtracting the reimbursed percentage is that the OPD is paying the remaining amount from its operating budget instead of from the subsidy budget. The proposed language change would correct this and allow the OPD to submit 100% of its legal fees and expenses to the county, the county would then pay the bill, and the bill would then be submitted to the OPD by the county for reimbursement, allowing the reimbursement payment to come from the subsidy budget. This change would not noticeably impact the percentage of reimbursement counties receive for indigent defense costs. However, this change is particularly important given the House's recommendation of reimbursement at 70 – 75% the first year and 100% the second year. The larger state contribution would result in a greater amount of money coming out of OPD's operating budget instead of the subsidy budget, resulting in a loss of approximately \$275,000 - \$300,000 to the OPD, which equals the salaries of three staff people, including benefits and overhead. If this amendment is not made, it would negatively impact the number of cases the OPD would be able to take when counties call and are in need of counsel – which usually occurs in very complex and difficult cases where the county is unable to appoint other counsel.



OPD's second request is for the creation of a legislative task force to study Ohio's indigent defense system. Ohio's current system of paying appointed counsel, has wide variances and artificially suppressed rates, which result in increased costs in other areas of the criminal justice system, including jail and prison populations and costs.<sup>1</sup> Good defense attorneys can reduce societal costs and improve public safety. But, as the data shows, good attorneys continue to leave the defense practice because the rates are so low. Numerous counties have kept rates the same for over 20, even 30 years, with no adjustment for inflation. Recent studies of outcomes in indigent criminal cases have found that Ohio's chronic underpaying of appointed counsel leads to worse outcomes for people who are involved with the criminal justice system.<sup>2</sup> Further, Ohio is a rare jurisdiction where judges receive campaign contributions, are elected, appoint defense counsel, and control the compensation of appointed counsel. These are a few of the reasons the Office of the Public Defender, the County Commissioner's Association of Ohio (CCAO), Americans for Prosperity, and the ACLU of Ohio support the establishment of a legislative task force to study Ohio's indigent defense system. The task force would make recommendations regarding any reforms that may be needed to ensure Ohio is utilizing the best practices.

OPD is thankful that this legislature is ready to address the historic underfunding of OPD's operational budget that resulted in OPD's present inability to provide oversight and to

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<sup>1</sup>For additional studies supporting the link between low attorney pay and poor outcomes, see also: Iyengar, R. (2007). *An Analysis of the Performance of Federal Indigent Defense Counsel*; and National Bureau of Economic Research – Harvard University and Roach, M. (2010). "Explaining the Outcome Gap between Different Types of Indigent Defense Counsel: Adverse Selection and Moral Hazard Effects," available at Social Science Research Network: <http://ssrn.com/abstract=1839651>.

<sup>2</sup>Roach, Michael A., *Indigent Defense Counsel, Attorney Quality, and Defendant Outcomes*, American Law and Economics Review, May 2014; and Cohen, Thomas H., *Who's Better at Defending Criminals? Does Type of Defense Attorney Matter in Terms of Producing Favorable Case Outcomes*, Social Science Research Network, 2011. Available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1876474](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1876474).



meet our other statutory responsibilities within the justice system. OPD is also grateful for the additional funding to county reimbursement. With such a significant investment it is critical that we examine if the most efficient and effective delivery models are being used. The legislative task force is necessary so that Ohio can start addressing the issues that plague our indigent defense system. If the two changes outlined above are not included in HB166 prior to leaving the House, OPD asks this committee to amend HB166 pursuant to the two requests I have presented – the task force and the statutory language change for OPD’s billing process.

Thank you for the opportunity to testify before your committee. I am happy to answer questions at this time.



## ADDENDUM

### HB166 Proposed Amendments

#### ***Indigent Defense Legislative Task Force***

Objective: To create a legislative task force to study Ohio's indigent defense system and provide recommendations to the Ohio General Assembly regarding the delivery, structure, and funding of indigent defense.

Membership: The Committee will consist of the following, appointed no later than October 15, 2019:

- The State Public Defender, Voting
- The Governor, or Designee, Voting
- Chief Justice, or Designee, Voting
- 1 judge, appointed by the Ohio Judicial Conference, Voting
- One public defender, appointed by Ohio Public Defender Commission, Voting
- One assigned counsel, appointed by Ohio Public Defender Commission, Voting
- One County Commissioner, appointed by CCAO president, Voting
- 6 legislators, as follows:
  - 2 Majority Representatives, appointed by speaker, Voting
  - 1 Minority Rep., appointed by House Minority Leader, Voting
  - 2 Majority Senators, Appointed by Senate President, Voting
  - 1 Minority Senator, Appointed by Sen. Minority Leader, Voting
- Chair of the Ohio Public Defender Commission, Voting
- Committee is co-chaired by 1 Majority Rep and 1 Majority Senator, appointed by their respective leaders.
- Ohio Attorney General, or Designee, Voting
- 1 attorney, appointed by Ohio State Bar Association, Voting

Deadline: The task force shall report back its recommendations to the Ohio General Assembly no later than August 1, 2020

The task force will be staffed by the Legislative Service Commission.

The task force shall be allocated funding for the reimbursement of travel expenses of experts invited to present to the task force.

#### ***Statutory Language Amendment***

Ohio Revised Code 120.06

(D)



(1) When the state public defender is designated by the court or requested by a county public defender or joint county public defender to provide legal representation for an indigent person in any case, other than pursuant to a contract entered into under authority of division (C)(7) of section 120.04 of the Revised Code, the state public defender shall send to the county in which the case is filed a bill detailing the actual cost of the representation that separately itemizes legal fees and expenses. The county, upon receipt of an itemized bill from the state public defender pursuant to this division, shall pay the state public defender each of the following amounts:

~~(a) For the amount identified as legal fees in the itemized bill, one hundred per cent of the amount identified as legal fees and expenses less the state reimbursement rate as calculated by the state public defender pursuant to section 120.34 of the Revised Code for the month the case terminated, as set forth in the itemized bill;~~

~~(b) For the amount identified as expenses in the itemized bill, one hundred per cent.~~

