



# 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**

Chair Rulli, Vice Chair Schuring, Ranking Member DeMora, and members of the Senate General Government Committee, I am Tim Young - the Ohio Public Defender. Thank you for the opportunity to testify regarding Substitute HB33 and our state's criminal defense budget.

There are three areas in which the Office of the Ohio Public Defender (OPD) is requesting a change to HB33 – two concern indigent defense reimbursement to Ohio's 88 counties, and one concerns the OPD's operating budget – specifically services the OPD provides with the Ohio Department of Rehabilitation and Correction (DRC).

Before I expand on these three requests, I'd like to provide a brief overview of the status of Ohio's indigent defense system. Children and adults in Ohio who are alleged to have committed a crime or are subject to an abuse/neglect/dependency case and cannot afford a lawyer are entitled to one. This is a constitutional and statutory mandate and one that supports fundamental fairness in our justice system. Since 1976, Ohio has elected to meet our constitutional duty by having the 88 counties and the State share in the responsibility. The premise being counties would select and control how indigent defense services were provided, and the State would reimburse 50% of those costs. Chapter 120 of the Revised Code provides each county's commission with the sole and independent authority to determine the county's indigent defense delivery method(s) and its level of funding. The State then reimburses counties for those costs. It is important to note that from FY1999 – FY2019<sup>1</sup>, there were only 10 months where the State funded reimbursement to counties at 50%. The remainder of the time reimbursement fell well below that level, with the average reimbursement rate across those 20 years equaling 37%. This financial strain resulted in many deficits within Ohio's indigent defense system.

Beginning with FY20, the DeWine-Husted Administration and the General Assembly significantly invested in Ohio's indigent defense system, resulting in an average reimbursement rate of 75% in FY20, 75% in

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<sup>1</sup> [https://opd.ohio.gov/static/County%20Resources/Reimbursement/Reimbursement-Percent-History\\_02-2023.pdf](https://opd.ohio.gov/static/County%20Resources/Reimbursement/Reimbursement-Percent-History_02-2023.pdf)

FY21, and 100% in FY22. FY23 reimbursement requests are projected to result in an 80% average reimbursement rate. This increase in funding allowed counties to start making necessary improvements to a broken system. But the damage from decades of underfunding is hard to overcome and counties are doing their best to improve their systems. Right now, in Ohio, many areas lack qualified lawyers willing to serve in the indigent defense field. The OPD receives a number of calls from courts requesting assistance in finding qualified counsel every week. The President of the County Commissioner's Association of Ohio (CCAO), Glenn Miller, testified before the House Finance Committee that his constituents want the State to take over and administer indigent defense in Ohio.<sup>2</sup> Suffice to say Ohio's indigent defense system as presently structured is struggling to meet the needs of parties.

The long-term answers to address the fundamental structural problem with Ohio's indigent defense system will likely come from two task forces. The Ohio State Bar Association currently has a task force examining Ohio's indigent defense system structure, and HB150 created a legislative task force that will also examine the present funding and structure of indigent defense in Ohio. Recommendations from both bodies should address funding, attorney shortage challenges, and propose solutions. These solutions will be focused on finding a balance between local control of these matters and funding from the State that works cooperatively and fairly for all 88 counties. However, those recommendations were not available before consideration of the FY24/FY25 biennial budget began.

During the House's consideration of HB33, the CCAO and some members of the House sought possible interim solutions to help counties during FY24/FY25, while awaiting the long-term system recommendations from the two respective task forces. The OPD responded to those requests with some suggestions of how Ohio's current indigent defense structure could be bolstered to support counties during this interim period. Those suggestions centered on ensuring all counties had a high level of reimbursement funding, and for some counties that may want to delegate indigent defense services in large part to the State - the possibility of contracting with the OPD for indigent defense services. While it is an option under current code for a county

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<sup>2</sup> <https://www.ohiochannel.org/video/ohio-house-finance-committee-4-20-2023> - Question and then testimony at 3:15:58 - 3:18:00.



commission to contract with the OPD to provide indigent defense services – the OPD is at capacity, has been at capacity for county contracts for several years, and cannot accommodate further counties beyond the 10 counties that have long contracted with the OPD for these services without additional financial support.

The two amendments regarding county reimbursement included in HB33 were not fully what the OPD had discussed with the CCAO and House members as a possible interim solution and stand to create more issues than assistance. As such, the OPD is requesting these two amendments be removed.

#### **100% Reimbursement to Counties that Contract with the OPD**

HB33 changed the reimbursement rate to counties that contract with the OPD to 100% but did not add additional funding such that all counties, regardless of whether they contract with the OPD or elect to use another indigent defense method (appointed counsel, form a county public defender office, contract with a non-profit) would receive a reimbursement rate approaching 100%. This amendment by the House will have a disparate impact on indigent defense funding across the state. The Revised Code currently provides counties the opportunity to contract with the OPD to provide indigent defense services. However, the reimbursement rate is uniform for each county regardless of which indigent defense delivery model is elected by the respective county commissions. The OPD supports having a uniform rate of reimbursement across all counties and all methods of indigent defense and requests that the provision providing 100% reimbursement to counties that contract with OPD be removed from HB33.

#### **Limits on Indigent Defense Reimbursement to Ohio's 88 counties**

Additionally, the House amended HB33 to include a limit on reimbursement to counties at a rate set by the General Assembly – which was specified in temporary law to be the greater of \$75 per hour or the rate established by the county as of April 1, 2023. The General Assembly has not previously had the authority to set the rate to limit reimbursement. That authority rests with the State Public Defender (see R.C. 120.04(B)(7)-(9)). More importantly, the limit did not account for capital cases. Revised Code 120.33(D) gives authority to the Capital Case Attorney Fee Council within the Ohio Supreme Court regarding the rates paid to counsel in capital cases. The Council has set the current hourly rate paid to counsel in capital cases at \$125 per hour (the same



rate that has been in place since 2016) and announced last week that the rate will increase to \$140 per hour beginning July 1, 2023.

In addition, a byproduct of the proposed rate cap would be to disadvantage counties that rely on an appointed counsel system solely rather than those counties that also utilize a county public defender office. In a system that is otherwise designed to provide a pro-rata share of reimbursement and equitable State support to counties regardless of the manner of indigent defense services chosen by the county, a cap on appointed counsel rates stands to disadvantage some counties more than others.

The OPD understands the intent of the cap was to provide some fiscal control and predictability in the level of county indigent defense reimbursement budgeting. The OPD respectfully submits this amendment will not achieve this goal and as outlined above, will have a number of unintended and negative consequences.

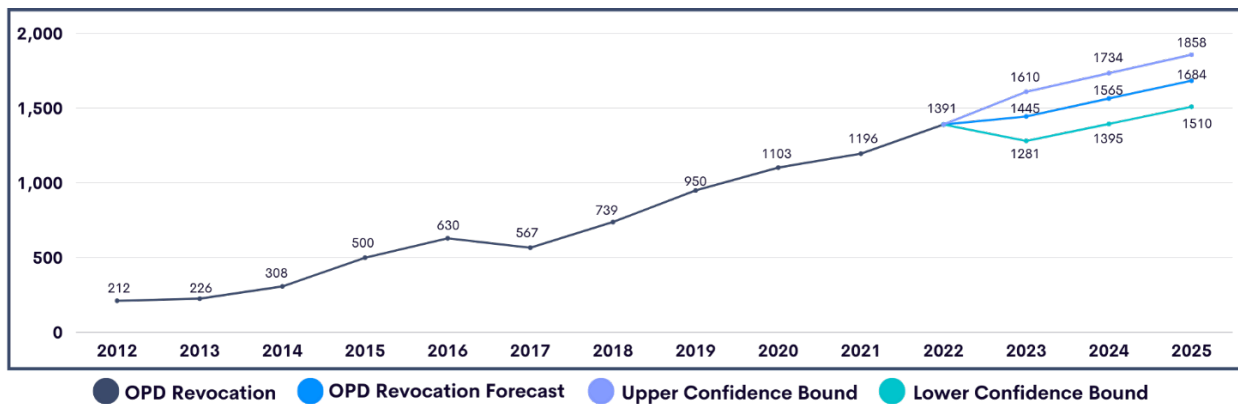
The OPD appreciates the need for predictability in indigent defense reimbursement budgeting. Unfortunately, the structure of Ohio's indigent defense system does not provide OPD with the ability to forecast the exact costs of county reimbursement. Each county is independently responsible for all indigent defense costs (which are subject to the unique needs of each county – including fluctuations in caseloads, costs of various cases, etc.). Counties are not required to notify the OPD of their estimated indigent defense budgets in advance. Rather, reimbursement requests are sent to the OPD after the expenditures are made (they are statutorily due, generally, within three months of disposition of a case for appointed counsel and two months of actual expenditures for county public defender offices/non-profits). Compounding this issue, Ohio's indigent defense system has long been underfunded, and in need of repair, so counties are finally responding by making necessary and long overdue improvements to their local systems. When a county contracts for services with the OPD, the OPD has more information about that county's needs, caseloads, etc. so it is better able to predict most of the indigent defense costs for that county. The OPD is confident that the structure needed for a more predictable system amenable to the state budget process will be found with the two task



forces. However, in the interim, the OPD requests that the provision limiting reimbursement to counties be removed from HB33.

**OPD Prison Legal Services**

The OPD is requesting an additional \$775k in FY2024 and \$900k in FY2025 be allocated to the OPD operating budget for OPD to provide prison legal services with DRC. OPD has an existing mandatory statutory duty to provide counsel at DRC revocation hearings. In fact, OPD is the only source of counsel for those hearings. The volume of DRC revocation hearings where OPD must provide counsel has exponentially increased in the past decade, from 212 hearings in 2012 to 1,391 hearings in 2022 (see below chart).



DRC revocation hearings concern individuals who are alleged to have violated the terms of their supervision – either parole or post-release control. The United States Supreme Court has held that our Constitution requires counsel be provided in some, but not all, revocation hearings. The State is required to review individuals who are alleged to have violated parole or post-release control and determine whether their case and circumstances result in a constitutional right to counsel at a revocation hearing. DRC conducts this review and, in 2022, found approximately 42% of the 2,848 individuals subject to revocation were entitled to counsel (in 2022, the total number of individuals entitled to counsel was 1,391). OPD is then required to provide representation.

As OPD is required to provide representation at DRC revocation hearings, the significant increase in those cases resulted in OPD having to reduce our work with other prison legal services – specifically parole full



board hearings and parole eligibility hearings (which are proceedings where individuals are considered for release from DRC) as well as in jail time credit work (where the OPD assists with ensuring that each day a person is held in jail pending trial, they are to be given one day of credit toward any resulting prison sentence). With the current volume of work and OPD's staffing level, it is impossible for OPD to cover all revocation hearings and still provide counsel in these other necessary areas that we collectively refer to as prison legal services. Language included in the executive budget and currently in HB33 will also allow OPD to utilize contract attorneys to provide representation. The additional funding the OPD is requesting will allow the agency additional staff members to meet these duties and coordinate contractors. By providing prison legal services, the OPD helps Ohio ensure that the correct individuals are incarcerated for the appropriate length of time. This results in a cost-efficient and effective system.

In conclusion, thank you for your support of indigent defense across the State of Ohio. I am confident that Ohio is on a long-term path to progress for indigent defense. I appreciate the opportunity to testify before your committee. I am happy to answer questions at this time.

