



MONTANA STATE PUBLIC DEFENDER

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June 14, 2024

Chair Mercer
Interim Budget Committee, Sub-D
Via email to Walker Hopkins, LFD

RE: OPD Responses for June 20th, 2024, IBC Hearing

Chair Mercer and Members of the Committee,

Please find OPD's Responses to the Committee's Requests for the June 20th, 2024, IBC hearing.

Best,

/s/ Brett D. Schandelson

Brett D. Schandelson
Director

Discussion regarding HB 133 of the 2017 Session. How much costs savings has the department realized due to this legislation and how does that compare to the original fiscal note?

OPD did not realize bottom line cost savings as a result of HB 133, though it did experience a reduction in the volume of work in excess of its resources due to a one-time drop in misdemeanor filings.

At the time HB 133 went into effect, OPD had no ECM workload standards, and FTE public defenders were overburdened with uncapped case assignments. As such, removing certain misdemeanors from these public defenders' incoming work did not result in any cost-savings, as our public defenders were – at best – only slightly less, but still unsustainably, overburdened. Without enforced workload limits, these one-time changes to the incoming volume of work did not result in a reduction of costs, as the reductions only marginally reduced the excess workload but did not alter OPD's FTE numbers or its need for contractors.

Today, however, a reduction of incoming work *would* result in cost-savings, as through OPD's ECM workload standard, all new work in excess of our public defender's capacity is assigned to the private market until an FTE public defender has capacity. Due to the continuing nature of OPD's work exceeding its available resources, any reduction in incoming work would see a reduction in assignments to contractors, which would, overtime, result in a reduction of contractor billing.

Unfortunately, high-quality, granular data from pre-HB 133 is not available to OPD due to its then-existing data structure issues and lack of centralized data controls. OPD can only reliably compare and report as far back as FY 2018, and is therefore unable to make a more detailed comparison between pre-HB 133 and post-HB 133, and is left to discuss the aggregate level only.

And in the aggregate, OPD did experience a one-time reduction in the filing of new misdemeanors as a result of HB 133, which can be seen from OPD's published data regarding misdemeanor filings from FY 2017 to FY 2018 and beyond. This one-time reduction did not result in any bottom-line cost savings because it only reduced the volume of excess work OPD FTE public defenders were handling, did not allow a reduction of OPD's FTEs, and did not result in a reduction in the need for contracted counsel.

Comments on appropriations for dependency and neglect / child representation legislation from the 2023 Session (HB 16, HB 555, SB 148)

These three bills affected OPD's representation in DN proceedings in three distinct ways:

- HB 16 formalized a statewide Emergency Protective Services (EPS) hearing, at which all parties must be represented;
- HB 555 mandates certain training and standards for DN attorneys, especially those representing kids;
- SB 148 requires all youths subject to a DN petition to be appointed counsel.

HB 16 regarding EPS hearings provided \$300,000 in funding, which was scoped and utilized, in part, to provide assignment incentives to contract attorneys to represent parties at EPS hearings. OPD anticipates the appropriation for EPS hearings to be sufficient for the current biennium.

HB 2 provided roughly \$31,000 to implement the requirements of HB 555 regarding the training and standards for counsel in DN matters. OPD anticipates the appropriation for these requirements to be sufficient for the current biennium.

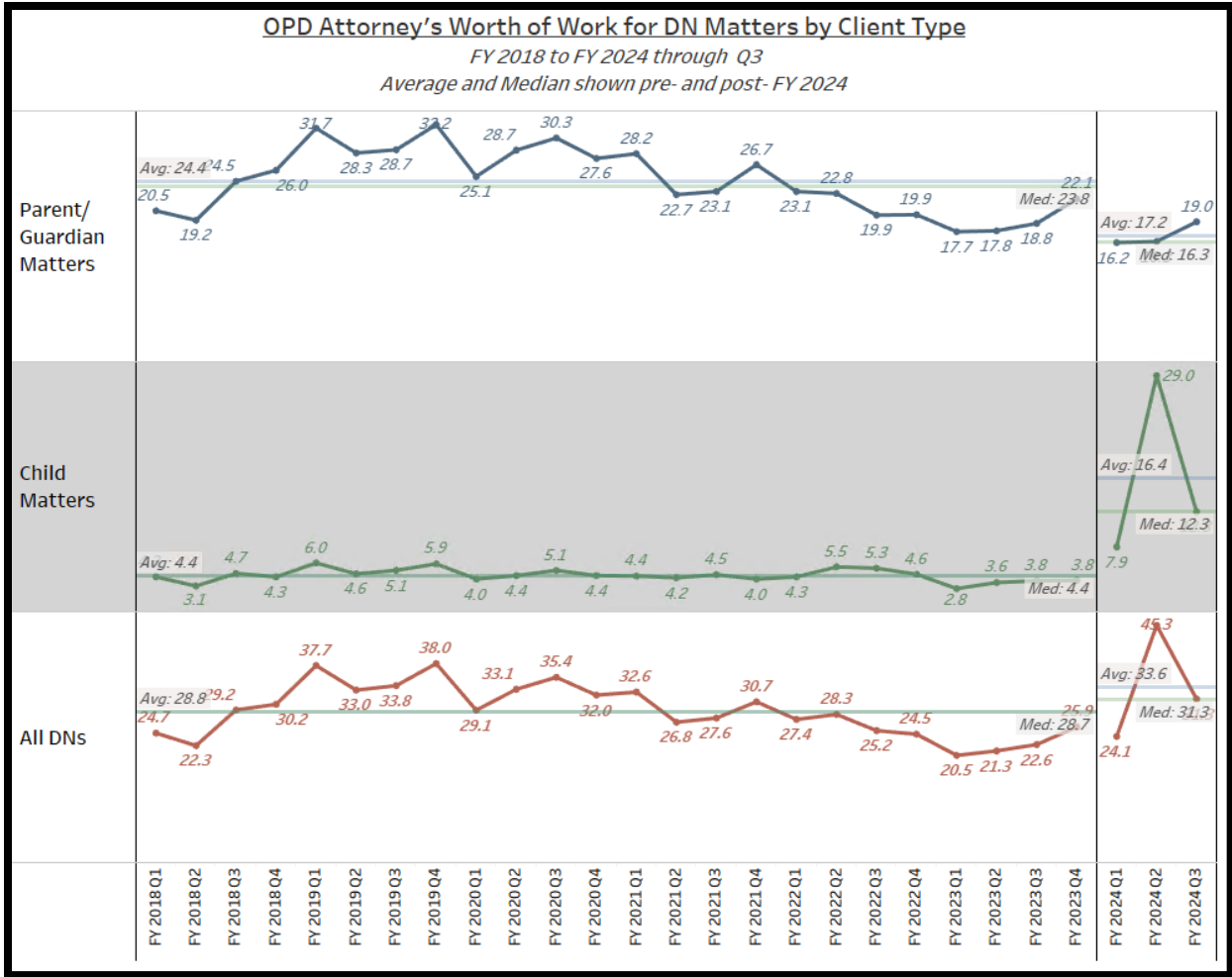
HB 2 provided roughly \$815,000 for the FY 25 biennium to implement the requirements of SB 148 regarding providing counsel to all youths in DN matters. This funding was consistent with OPD's fiscal note that SB 148 would result in OPD being appointed in 413 additional youth DN matters per fiscal year, which is roughly 5.5 FTE public defender's worth of work.

Unfortunately, OPD's fiscal note did not account for the initial, one-time need to assign public defenders to all of the *existing* youth matters that lacked counsel at the time SB 148 came into effect.

Unfortunately, there was no easy way for OPD to determine the volume of unrepresented children subject to an active DN matter. Since October 1, 2023, OPD has provided a public defender to more than 1,100 youths, far in excess of the number of new DN matters filed in FY 24. Rather than the 5.5 FTEs worth of ongoing work anticipated by OPD, DN youth appointments in FY 24 resulted in monthly averages of over 15 FTEs with the median being over 10 FTEs worth of work. OPD believes these FY 24 numbers are a one-time, backfill spike created by the volume of unrepresented youths in existing, pre-FY 24 DN matters that now required assignment of counsel under SB 148. OPD has learned from this inability and is working to improve its fiscal note process for these kinds of changes in the future.

While OPD believes it has now received and found counsel for the bulk of the existing youth matters, it is too early to determine whether OPD's estimate of 5.5 FTE public defender's worth of work from new DN matters was accurate, though the volume of incoming DN matters is trending towards that number.

OPD has been tracking DN matters and assignments closely and will provide a more complete analysis as the biennium moves forward. For now, please see the chart below showing the number of DN matters received by type and overall, from FY 2018 to FY 2024, through Q3.



Discussion of any protocols issued/adopted pursuant to 47-1-104 in FY 2024 including updated current caseload numbers which shows the breakout of cases by those including felony and misdemeanor charges.

OPD provided a substantive update on protocols under MCA 47-1-104 in its December 2023 responses. There have been no material changes to the protocols since, although several smaller changes have been made. For example, weighting for unassigned initial appearances and treatment courts are now automatically calculated in the same manner as travel weights, which brings all OPD's Ethical Case Management weights in-line at the monthly level. OPD will be ready and able to discuss any questions regarding its assignment protocols with the committee.

Please see the attached sheet titled "Active Matters by County and Type as of June 11, 2024" for a detailed breakdown of active matters by county and type.

Are there ways to change laws related to misdemeanor cases such that the OPD would not be required to provide defense?

OPD sees two types of legislative changes that could be made to affect OPD's misdemeanor workload.

First, the right to a public defender in a criminal case is implicated when there is any possibility of incarceration as a penalty for any offense charged. If incarceration were removed as a possible penalty for the conviction of a crime there would be no corollary right to a public defender for that crime. The legislature could explore removing jail time as a potential penalty for certain misdemeanors as defined in the Montana Code Annotated, which would, in turn, reduce the number of misdemeanors in which OPD is appointed. Please note, however, that in the event an individual obtains multiple charges, if *any* charge could lead to incarceration upon conviction, OPD would still be appointed in the matter, regardless of whether there are other, non-jailable offenses present.

Second, the legislature could seek to place up-stream diversions, interventions, incentives, or barriers from certain misdemeanors from being filed into court, and thus trigger the right to a public defender, until certain criteria are met. OPD is unable to suggest specific policies to the legislature, however, one type of policy the legislature could enact to affect the volume of misdemeanors could include a formal criminal diversion structure within the MCA. Such a structure would set the criteria for diversion from the court system, such as what types of crimes and/or individuals are eligible, criteria for completing the diversion, and the process by which this happens. Such a program could easily be applied to felonies as well. While there would absolutely be costs associated with diversions, there are models from other states to learn from. It would be up to the legislature to determine if the upstream investments lead to downstream savings and/or better outcomes for our communities.

Q3 FY 2024 Reports

Number of cases in which the office of state public defender moved for waiver of the cost of counsel pursuant to 46-8-113(1) and the basis for the motion.

Please see the table below showing the number of OPD fees ordered by county and court.

Matter: Court: Court County	Matter: Court: Name	Created Date	Q3 FY2024
<input type="checkbox"/> Big Horn	Twenty-Second Judicial District Court, Big Horn County	# of OPD Fees Ordered	1
<input type="checkbox"/> Broadwater	First Judicial District Court, Broadwater County	# of OPD Fees Ordered	1
<input type="checkbox"/> Carbon	Red Lodge City Court	# of OPD Fees Ordered	1
	Twenty-Second Judicial District Court, Carbon County	# of OPD Fees Ordered	1
<input type="checkbox"/> Carter	Carter County Justice Court	# of OPD Fees Ordered	1
<input type="checkbox"/> Cascade	Eighth Judicial District Court, Cascade County	# of OPD Fees Ordered	6
<input type="checkbox"/> Custer	Sixteenth Judicial District Court, Custer County	# of OPD Fees Ordered	6
<input type="checkbox"/> Fallon	Fallon County Justice Court	# of OPD Fees Ordered	1
	Sixteenth Judicial District Court, Fallon County	# of OPD Fees Ordered	1
<input type="checkbox"/> Flathead	Columbia Falls City Court	# of OPD Fees Ordered	4
	Eleventh Judicial District Court, Flathead County	# of OPD Fees Ordered	2
<input type="checkbox"/> Gallatin	Bozeman Municipal Court	# of OPD Fees Ordered	6
<input type="checkbox"/> Hill	Twelfth Judicial District Court, Hill County	# of OPD Fees Ordered	1
<input type="checkbox"/> Lake	Twentieth Judicial District Court, Lake County	# of OPD Fees Ordered	9
<input type="checkbox"/> Lincoln	Nineteenth Judicial District Court, Lincoln County	# of OPD Fees Ordered	6
<input type="checkbox"/> Missoula	Fourth Judicial District Court, Missoula County	# of OPD Fees Ordered	1
<input type="checkbox"/> Powder River	Sixteenth Judicial District Court, Powder River County	# of OPD Fees Ordered	1
<input type="checkbox"/> Ravalli	Twenty-First Judicial District Court, Ravalli County	# of OPD Fees Ordered	9
<input type="checkbox"/> Richland	Seventh Judicial District Court, Richland County	# of OPD Fees Ordered	8
<input type="checkbox"/> Sanders	Twentieth Judicial District Court, Sanders County	# of OPD Fees Ordered	1
<input type="checkbox"/> Stillwater	Stillwater County Justice Court	# of OPD Fees Ordered	12
<input type="checkbox"/> Valley	Seventeenth Judicial District Court, Valley County	# of OPD Fees Ordered	1
<input type="checkbox"/> Yellowstone	Billings Municipal Court	# of OPD Fees Ordered	3
	Laurel City Court	# of OPD Fees Ordered	6
	Thirteenth Judicial District Court, Yellowstone County	# of OPD Fees Ordered	39
Total		# of OPD Fees Ordered	128

Current employee and contractor time for FY 2024 in cases involving defendants in capital cases.

There were no FTE hours nor contractor hours devoted to death penalty cases in Q3 FY 24.

Number of cases in which the state has elected to seek the death penalty.

There were no new matters in which the state elected to seek the death penalty filed in Q3 FY 24.

Provide/discuss metrics regarding time to completion of cases – by Judicial district.

Please see the following table which shows the average case duration for matters **closed in Q3 FY 24** by judicial district and type.

Average Case Durations from Received Date to Closed Date for Matters Closed in Q3 FY 24 by Judicial District and Matter Types <i>includes all courts within the Judicial District</i>									
	Overall Avg.	CR & TK	DC	DD	DG	DI	DJ	DN	DPA
1st	263.4	225.2	323.1	36.0	85.5	33.5	340.8	598.4	
2nd	199.8	176.2	281.6	171.0		15.8	607.7	147.3	
3rd	250.1	200.0	282.1	35.0	103.0	26.4	490.0	714.7	
4th	298.6	303.8	360.2		313.6	33.4	214.6	263.9	280.5
5th	197.4	175.3	219.5			2.5	59.8	372.7	
6th	202.5	204.8	205.3		56.0	16.4	21.0	466.0	
7th	200.8	160.0	212.7			5.0	189.0	893.0	
8th	268.2	235.6	287.1			7.5	263.4	379.4	
9th	320.8	262.4	355.3				189.0	492.7	
10th	140.0	147.2	357.1			50.8			
11th	285.8	311.5	217.3		278.0	1.0	77.1	498.9	
12th	298.8	226.0	430.8			4.0	134.7	399.5	
13th	442.3	592.6	409.9		151.8	7.5	443.7	552.7	
14th	265.1	155.6	112.8				353.2	577.5	
15th	154.8	118.0	214.4			61.0		67.0	
16th	201.4	107.7	231.0			20.3	251.0	931.6	
17th	249.9	211.2	227.3			136.0	144.0	472.4	
18th	280.2	281.5	311.2		212.5	32.5	376.1	274.0	
19th	148.3	115.0	185.5		262.0	14.0	139.5		
20th	318.3	346.1	288.2		115.0	6.0	158.0	575.8	
21st	216.7	170.1	292.1		203.0	5.5	147.0	135.0	
22nd	181.6	125.5	188.7			8.0	833.0	567.0	

Number of cases in which the office of state public defender was appointed to represent defendants in each county, including a separate disclosure of the number of appointments to employees of the office of public defender compared to contract attorneys.

Please see the attached sheet titled “Q3 FY 24 Number of Matters by FTE – Contactor” which contains the number of matters received by whether the case is assigned to an FTE public defender, is assigned to a contract public defender, or is currently unassigned or was closed without assignment, such as when the client does not meet OPD eligibility guidelines, when they waive OPD, or when they hire private counsel.

The number of appointments made in each county for cases in which the offense or offenses charged allege violations of local ordinances and not state statutes

Please see the table below for a count of matters in which there were no Montana Code Annotated charges in which OPD was appointed in Q3 FY 24. Please note that some matters may have charges from more than one source and the row totals may not reconcile to the grand total, as such a matter would be counted once for each source row but only once in the grand total.

Statute Source	# of Matters	# of Clients
Baker City Ordinance	1	1
Billings Municipal Code	121	42
Cascade County Ordinance	2	2
Colstrip City Code	2	2
Conrad City Ordinance	4	4
Custer County Ordinance	4	3
Darby Town Code	3	3
Fergus County	1	1
Flathead County Ordinance	6	6
Gallatin County	4	3
Great Falls Municipal Code	14	14
Hamilton City Ordinance	1	1
Hardin City Ordinance	7	5
Havre City Ordinance	3	3
Kalispell Municipal Code	4	4
Libby City Ordinance	1	1
Lincoln County Ordinance	3	3
Missoula Municipal Code	10	10
Plains City Ordinance	1	1
Polson City Municipal Code	1	1

Ravalli County	1	1
Red Lodge City Court	1	1
Ronan City Ordinance	1	1
Sidney City Ordinance	2	1
Yellowstone County Ordinance	6	5
Townsend Municipal Code	2	1
Total	192	104

[For these matters], the costs incurred in each county to compensate contractors.

Please see the attached workbook titled “Non-MCA Matters with Costs” for a breakdown of costs associated with these non-MCA matters received in Q3 FY 24.

However, as has been previously discussed, the vast majority of costs that will be incurred for these matters will not be realized in the same quarter that OPD was appointed. Therefore, OPD has included a second sheet in the attached workbook that includes *all non-MCA matters* received since the start of FY 22, with the total associated costs for these matters to date. OPD hopes this additional information provides better context and insight for this discussion.