



Legislative Fiscal Bureau

One East Main, Suite 301 • Madison, WI 53703 • (608) 266-3847 • Fax: (608) 267-6873

December 14, 2006

TO: Members
Joint Committee on Finance

FROM: Bob Lang, Director

SUBJECT: Public Defender: Section 13.10 Request for Additional Funding for Private Bar Reimbursement -- Agenda Item V

REQUEST

The Office of the State Public Defender (SPD) is requesting that the Joint Committee on Finance act under its authority under s. 13.101 of the statutes to provide \$12,700,000 GPR in additional funding to the SPD's biennial private bar and investigator reimbursement appropriation. The purpose would be to address a projected shortfall in funding for private bar reimbursements.

BACKGROUND

Both the United States Constitution and the Wisconsin Constitution provide the right to legal counsel for individuals accused of a crime. Both the United States Supreme Court and the Wisconsin Supreme Court have ruled that this right to counsel requires the government to provide counsel to indigent criminal defendants. The cost of providing required counsel to the indigent in Wisconsin is generally the responsibility of the state through the SPD.

The SPD is constitutionally and statutorily required to provide representation to indigent criminal defendants facing a sentence that includes incarceration, certain children involved in proceedings under the Children's and Juvenile Justice Codes (Chapters 48 and 938), indigent persons facing involuntary civil commitment, and certain appellants.

The SPD determines indigency based on an analysis of the applicant's income, assets, family size and essential expenses. If a person's assets, less "reasonable and necessary living expenses" (both factors as determined by Wisconsin statutes and administrative rules), are not sufficient to cover the anticipated cost of effective representation when the likely length and complexity of the

proceedings are taken into account, the person is determined to be indigent. "Reasonable and necessary living expenses" under the current SPD financial eligibility standard are linked to a 1987 Aid to Families with Dependent Children cost of living table, plus other specified, emergency or essential costs. If an individual does not meet the statutory indigency standard, but is nonetheless determined by a circuit court to have a constitutional right to counsel, the court may appoint an attorney at county, rather than state, expense.

The SPD is required to determine whether a person has some ability to pay the costs of representation. The Public Defender Board is required to establish, by rule, fixed payments for the cost of SPD representation in various types of cases. Known as the prepayment option, an indigent defendant may elect to prepay the amount if a determination has been made that the person has some ability to pay for his or her representation. If an indigent person elects to pay this fixed amount, the individual cannot be held liable for any additional payment for counsel. For the 2005-07 biennium, the SPD increased these prepayment amounts for SPD clients by 20%. Persons determined to be indigent who receive SPD representation and do not exercise the prepayment option are required to pay for the cost of SPD representation, subject to their ability to pay.

The SPD utilizes client fees to offset the cost of providing private bar counsel to the indigent. In 2005-06, the SPD utilized \$1,404,100 PR in client fees to offset the costs of private bar counsel. It is estimated that there will be \$1,563,800 PR in client fees in 2006-07 that will be available to offset the costs of private bar counsel.

The SPD has trial (280.0 full-time equivalent (FTE) positions) and appellate (27.5 FTE positions) staff attorneys who provide representation to indigent defendants. Each trial division attorney (and generally each attorney supervisor) must meet one of the following annual statutory caseload requirements: (a) 184.5 felony cases; (b) 15.0 homicide or sexual predator cases; (c) 492.0 misdemeanor cases; (d) 246.0 other cases; or (e) some combination of these categories. The SPD sets the caseload standard for each appellate attorney between 54 and 60 cases per year, depending on the complexity of the attorney's case mix and the attorney's level of experience. In 2005-06, 74,131 new cases were assigned to SPD staff attorneys.

Private bar attorneys are assigned: (a) overflow cases; and (b) cases where a staff attorney has a conflict of interest that precludes the attorney from providing representation. In 2005-06, 70,729 new cases were accepted by private bar attorneys. Private bar attorneys are paid in two ways: (a) an hourly rate of \$40 for in-court and out-of-court time; and (b) for some misdemeanor cases, a flat, per case contracted amount. Prior to 1995 Wisconsin Act 27 (the 1995-97 biennial budget act), private bar attorneys were paid \$50 per hour for in-court time and \$40 per hour for out-of-court time. Under Act 27, the in-court rate was reduced to \$40 per hour.

ANALYSIS

The biennial funding requirements for the SPD's private bar appropriation are estimated by: (a) projecting the SPD biennial caseload; (b) identifying the number of SPD trial staff attorneys

available to handle budgetary caseloads; (c) estimating the number of cases appellate staff attorneys will handle; (d) identifying the remaining caseload to be assigned to the private bar; and (e) estimating the private bar cost to complete this caseload, based on average cost data collected by the SPD. Under 2005 Wisconsin Act 25 (the 2005-07 biennial budget act), the SPD's biennial private bar appropriation was budgeted \$24,294,400 GPR in 2005-06, and \$24,092,400 GPR in 2006-07. In the s. 13.10 request before the Committee, the SPD indicates that it will need an additional \$12,700,000 GPR to pay private bar costs through the end of the 2006-07 state fiscal year.

The SPD projects that it will exhaust all available funding to pay private bar costs by December 22, 2006. Under s. 20.903 of the statutes, an agency cannot commit funds before they are appropriated. The Office has raised concerns that it would violate this statutory section if it continued appointing cases to private bar attorneys without a reasonable expectation that funds will be available to pay the bills at the time they are submitted.

During 2005-07 biennial budget deliberations, based on over six years of SPD caseload and state unemployment data, it was estimated that the funding provided under Act 25 would be sufficient to meet the SPD's obligations to make private bar payments during the biennium. Since 2005-06, SPD caseloads have exceeded earlier estimates, resulting in a significant shortfall in funding for private bar costs. Further analysis has determined that in this biennium an additional variable, the number of people dropping out of the workforce entirely, has contributed significantly to the SPD's increased caseload. (An individual is considered to have dropped out of the workforce when he or she is no longer actively looking for work.)

In its request, the SPD did not identify available funds that could be utilized to address the projected shortfall. While there is an available balance in the general fund sufficient to address this deficit, the Committee does not have the authority under s. 13.10 of the statutes to transfer unappropriated monies. Unappropriated balances can only be utilized through enactment of separate legislation.

As a result, the question becomes the availability of appropriated funds for transfer to the SPD. As of December 14, 2006, \$20,246,300 GPR in balances remains in the Committee's GPR supplemental appropriation to provide emergency supplementation under s. 13.10. Of this amount, \$19,946,300 GPR is reserved funding, primarily for the Department of Corrections for health care services in 2006-07. Under 2005 Act 25, \$21,341,800 GPR was transferred from Corrections' base funding to the Committee's supplemental GPR appropriation, as follows: (a) \$12,766,000 GPR associated with the salaries and fringe benefits of 124.2 existing GPR health care positions; (b) \$8,375,700 GPR for health care costs, such as pharmaceutical costs, University Hospital and Clinics, the UW Medical Foundation, and other community hospitals; and (c) \$200,100 for rent for the Dodge Correctional Institution's pharmacy. In addition, Act 25 required Corrections to submit a plan to the Committee regarding the manner in which the Department would manage adult correctional health care and health care costs in 2006-07.

On February 3, 2006, Corrections submitted its plan indicating that the Department did not intend to contract for health care services and would continue to utilize existing state staff. It should be noted that on June 21, 2006, \$1,969,900 GPR of the reserved funding was transferred to the Department of Health and Family Services to support staffing costs at the Wisconsin Resource Center for sexually violent persons treatment. As such, \$19,371,900 GPR remains for Corrections' health care costs. While the Department has not yet requested release, it indicates that the remaining reserved funding in 2006-07 will need to be utilized for correctional health care.

As of December 14, 2006, \$300,000 GPR in unreserved balance remains in the Committee's GPR supplemental appropriation to provide emergency supplementation under s. 13.10. Utilization of this \$300,000 GPR, however, would only provide a small amount of funding to address the estimated shortfall of \$12.7 million, and would leave the Committee with no available balances in the appropriation to address requests that may be filed with the Committee through the remainder of the biennium.

If the Committee wishes to fund the SPD's request in 2006-07, \$12.7 million GPR from the reserved portion of the supplemental appropriation associated with correctional health care could be transferred to the SPD. Funding could be transferred from the following reserved amounts: (a) \$10,796,100 GPR (entire remaining reserve) from salary and fringe benefits funding for health care positions; and (b) \$1,903,900 GPR from inmate variable health care costs. Of the amounts transferred to the SPD, \$2.1 million could be provided as base building funds in 2006-07 to address anticipated expenditures during the 2007-09 biennium. The Committee should note that, to the extent that Corrections needs amounts equivalent to the transferred funding to support the salaries and fringe benefits of existing health care positions and inmate health care costs in 2006-07, separate legislative action will be necessary.

Alternatively, the Committee could consider providing partial funding at this time. Under this approach, the SPD could continue to pay private bar bills until the Legislature reconvenes. During the interviewing period, the Legislature could address the remaining shortfall through separate legislation.

It is estimated that the SPD would require an additional \$3.0 million in funding to pay its private bar bills through February 5, 2007. In order to fund these costs, transfers of excess funds from two appropriations under the Department of Public Instruction (DPI) could be made as follows: (a) \$1.0 million from the tuition payments appropriation; and (b) \$2.0 million from the pupil transportation appropriation.

State Tuition and Full-Time Open Enrollment Transfer Payments. State tuition payments are made to reimburse the cost of educating children who live in properties for which there is no parental property tax base support. Specifically, school districts and county children with disabilities boards (CCDEBs) are eligible for tuition payments for the following:

a. pupils in children's homes (nonprofit organizations licensed by the Department of Health and Family Services) who have usually been placed in the home by the state or by the

county social services departments;

b. pupils whose parents are employed at, and reside on the grounds of, a state or federal military camp, federal veteran hospital or state charitable or penal institution;

c. pupils who live in foster or group homes if the home is outside the district in which the pupil's parent or guardian resides and is exempt from the property tax; and

d. pupils who live in foster or group homes outside the district in which the pupil's parent or guardian resides, if the pupil is a child with a disability and at least 4% of the pupils enrolled in the school district reside in foster or group homes that are not exempt from the property tax.

The state payment is calculated on the basis of the school district's average daily cost per pupil and the number of school days the child is enrolled in school. For pupils qualifying under the 4% provision, annual payments are at the special tuition rate only, which is the sum of instructional and specified services costs unique to that program divided by the average daily membership of all pupils enrolled in the program, including those for whom tuition is paid.

If a school district loses pupils under the full-time open enrollment program, its state aid is reduced by a per pupil transfer amount. If the amount of equalization aid and other state aid received by a school district is insufficient to cover the net transfer payments, then the balance is paid from the state tuition payments appropriation. No payments have been made to date for this purpose.

State tuition payments and open enrollment transfer payments, if any, are made from the same sum certain appropriation from the general fund. While the statutes specify that the payments cover the full cost of educating these children, if the appropriation is insufficient to fully fund payments in a given year, the payments are prorated. In 2006-07, the program is appropriated \$9,491,000 GPR. DPI estimates that, after all claims are fully funded, \$1,000,000 will remain unexpended from this appropriation at the end of 2006-07.

Aid for Pupil Transportation. In general, a pupil attending a public or private school is entitled to transportation by the school district if the pupil lives two or more miles away from the school building the pupil is entitled to attend.

School districts required by state law to furnish transportation services to public and private school pupils enrolled in regular education programs, including summer school, are eligible to receive categorical aid. The state pays a flat, annual amount per transported pupil that varies according to the distance that each pupil is transported to school. Payments are made from an annual sum certain appropriation from the general fund. If the appropriation is insufficient to fully fund payments in a given year, the payments are prorated. A total of \$27,292,500 GPR is appropriated for pupil transportation in 2006-07. DPI estimates that, after all payments are made to fully fund the program, \$2,000,000 will remain unexpended from this appropriation at the end of

2006-07.

Finally, as noted previously, the SPD has a constitutional and statutory obligation to provide counsel to the indigent. Without supplemental funding the SPD would violate the provisions of s. 20.903 of the statutes if it continued to assign cases to the private bar.

ALTERNATIVES

1. Transfer \$12.7 million GPR in 2006-07 from the Committee GPR supplemental appropriation [s. 20.865(4)(a)] to the Office of the State Public Defender's (SPD) private bar appropriation [s. 20.550(1)(d)] to eliminate the projected deficit in funding for private bar costs through the remainder of the biennium. Funding would be provided from amounts reserved for the Department of Corrections as follows: (a) \$10,796,100 GPR (entire remaining reserve) from salary and fringe benefits funding for health care positions; and (b) \$1,903,900 GPR from inmate and variable health care costs. Of the amounts provided \$2.1 million would be provided as base building funding in 2006-07 to address anticipated expenditures in 2007-09.

2. Transfer \$3,000,000 GPR in 2006-07 to the SPD's private bar appropriation [s. 20.550(1)(d)] to fund private bar costs through February 5, 2007, from: (a) tuition payments [s. 20.255(2)(cg), \$1,000,000]; and (b) pupil transportation [s. 20.255(2)(cr), \$2,000,000].

3. Deny the request.

Prepared by: Paul Onsager