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2017

Joint Committee on Finance

Paper #485

Block Grant Appropriation for Program Operations and Position Authority (Public Defender)

[LFB 2017-19 Budget Summary: Page 338, #2]

CURRENT LAW

Both the United States Constitution and the Wisconsin Constitution provide the right to counsel for individuals accused of a crime. The Sixth Amendment to the United States Constitution provides, in part, that, "In all criminal prosecution, the accused shall enjoy the right...to have the Assistance of Counsel for his defense." Article I, Section 7 of the Wisconsin Constitution provides that, "In all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel..." In *Gideon v. Wainwright* (1963), the United States Supreme Court held that the constitutional right to counsel guaranteed by the United States Sixth Amendment requires the government to provide counsel to indigent criminal defendants. However, under subsequent United States and Wisconsin Supreme Court decisions, there is no absolute right to the appointment of counsel in non-criminal cases carrying no threat of loss of physical freedom.

The cost of providing required counsel to the indigent in Wisconsin is generally the responsibility of the state through the Office of the State Public Defender (SPD). The SPD employs trial and appellate attorneys who represent clients who qualify for SPD representation. Generally, the State Public Defender provides legal representation for indigent persons: (a) facing a possible sentence that includes incarceration; (b) involved in certain proceedings under the Children's and Juvenile Justice Codes (Chapter 48 and 938 of the Wisconsin statutes); (c) subject to petitions for protective placement (Chapter 55 of the Wisconsin statutes); (d) facing involuntary commitment; (e) involved in certain post-conviction or post-judgment appeals; and (f) undergoing proceedings for modification of a bifurcated sentence, if representation has been requested by the indigent person or the case have been referred by a court, and the Public Defender determines that the case should be pursued. Further, unless the individual knowingly and voluntarily waives counsel or appoints his or her own counsel, the SPD must provide

counsel to the following individuals without a determination of indigency: (a) those involved in certain proceedings under the Children's and Juvenile Justice Codes; (b) those subject to petitions for protective placement; and (c) those facing involuntary commitment.

Position Authority

The Legislature may create GPR positions through the budget, a legislative act, or through Joint Committee on Finance (JFC) under s. 13.10. Most positions authorized for state agencies are provided through the biennial budget or by specific provision included in other legislative enactments. Specifically, the Committee may, under s. 13.101(2) of the statutes, act upon a request from any state agency to change the agency's number of authorized positions that are funded by segregated or general fund monies. In addition, the Committee is authorized under s. 16.505 of the statutes to approve requested changes in an agency's number of authorized program revenue funded positions under a 14-day passive review process.

Appropriation Structure

Under current law, the Public Defender has seven GPR appropriations. Six of the appropriations are annual appropriations and one (private bar and investigator reimbursement) is a biennial appropriation. Base funding for these seven GPR appropriations totals \$84,620,300. Following is a list of the seven appropriations and the funding under each one for 2017-18 and 2018-19.

TABLE 1

Current Public Defender GPR Appropriations

	<u>2017-18</u>	<u>2018-19</u>	<u>Positions</u>
Program Administration			
Base	\$2,757,900	\$2,757,900	18.4
Standard Budget Adjustments	30,600	102,800	
Governor's Modifications*	<u>0</u>	<u>0</u>	
Subtotal	\$2,788,500	\$2,860,700	
Appellate representation			
Base	\$4,581,700	\$4,581,700	43.35
Standard Budget Adjustments	-496,900	-490,400	
Governor's Modifications	<u>0</u>	<u>0</u>	
Subtotal	\$4,084,800	\$4,091,300	
Trial representation			
Base	\$53,657,300	\$53,657,300	542.85
Standard Budget Adjustments	-2,533,000	-2,481,200	
Governor's Modifications	<u>0</u>	<u>0</u>	
Subtotal	\$51,124,300	\$51,176,100	
Private bar and Investigator reimbursement			
Base	\$21,210,400	\$21,210,400	0
Standard Budget Adjustments	0	0	
Governor's Modifications	<u>3,404,100</u>	<u>3,404,100</u>	
Subtotal	\$24,614,500	\$24,614,500	
Private bar and investigator payments; administration costs			
Base	\$606,000	\$606,000	5.25
Standard Budget Adjustments	25,400	26,100	
Governor's Modifications	<u>0</u>	<u>0</u>	
Subtotal	\$631,400	\$632,100	
Salary adjustments			
Base	\$481,300	\$481,300	0
Standard Budget Adjustments	0	0	
Governor's Modifications	<u>0</u>	<u>0</u>	
Subtotal	\$481,300	\$481,300	
Transcripts, discovery and interpreters			
Base	\$1,325,700	\$1,325,700	0
Standard Budget Adjustments	81,800	81,800	
Governor's Modifications	<u>0</u>	<u>0</u>	
Subtotal	\$1,407,500	\$1,407,500	
Total	\$85,132,300	\$85,263,500	609.85

*Does not include renaming and consolidation of the appropriation.

GOVERNOR

Position Authority

Create statutory language that would allow the SPD to request increased GPR position authority from the Joint Committee on Finance under a 14-day passive review process. If within 14 working days after notification the Committee does not schedule a meeting to review the SPD's request, the SPD's request would be approved. No ability to increase funding is authorized under the new provision.

Appropriation Structure -- Block Grant

Consolidate the GPR appropriations and all statutory language associated with appellate representation; trial representation; private bar and investigator reimbursement; administration costs of private bar and investigator reimbursement; salary adjustments; and transcripts, discovery, and interpreters into the current appropriation for program administration. Convert the appropriation for program administration (base funding of \$2,757,900 and 18.4 positions annually) from an annual appropriation to a biennial appropriation and rename the appropriation as "program operations" funded at \$85,132,300 in 2017-18 and \$85,263,500 in 2018-19 with 609.85 positions in 2017-18 and 604.9 positions in 2018-19. Of this amount, transferred funding is \$82,343,800 in 2017-18 and \$82,402,800 in 2018-19 and position authority accounts for 591.45 positions for trial and appellate representation in the renamed program operations' appropriation. Modify current law provisions to allow payments to be made from the program operations appropriation instead of from the repealed appropriations. Under the administration's recommendations, the seven appropriations shown in Table 1 would be combined into one biennial appropriation as shown below.

		<u>2017-18</u>	<u>2018-19</u>	<u>Positions</u>
Program Operations	GPR	\$85,132,300	\$85,263,500	609.85

DISCUSSION POINTS

Background

1. The cost of providing counsel to the indigent in Wisconsin is generally the responsibility of the state through the SPD. The Office is primarily funded through general purpose revenue, which is utilized to support trial and appellate staff attorneys as well as reimbursements to private bar attorneys who are assigned indigent legal defense cases. Base resources for the SPD are \$84,620,300 GPR and \$1,348,200 PR, as well as 614.85 GPR positions and 5.0 PR positions. Of the 586.2 positions employed by the SPD, 372.2 positions are assistant state public defenders (ASPDs). Under 2015 Act 55, the Office of the State Public Defender was provided with an increase of \$2,304,200 GPR in 2015-16 and \$2,686,000 GPR in 2016-17, and 35.0 positions annually, to its trial representation appropriation. Associated with an increase in SPD staffing, funding for private bar reimbursements was reduced by \$1,677,000 GPR in 2015-16 and \$3,354,000 GPR in 2016-17.

2. In order to provide representation for indigent clients, the SPD has both a trial division and an appellate division. The trial division is comprised of 36 local trial offices located throughout Wisconsin, while the appellate division is comprised of two appellate offices, located in Madison and Milwaukee. Base resources for the SPD's trial division are \$53,657,300 GPR and 542.85 GPR positions, and base resources for the appellate division are \$4,581,700 GPR and 43.35 GPR positions.

3. Wisconsin statute establishes that each trial division assistant state public defender must meet one of the following annual caseload requirements: (a) 184.5 felony cases; (b) 15 first-degree homicides; (c) 15 sexual predator cases; (d) 492 misdemeanor cases; (e) 246 other cases; or (f) some combination of these categories. [Note that "other" cases generally litigated by the SPD include civil commitment proceedings, felony delinquency proceedings, protective placement proceedings under Chapter 55 of the statutes, juvenile cases, felony diversion cases, revocation hearings, termination of parental rights cases, juvenile waiver proceedings, as well as other miscellaneous cases.] Wisconsin statutes allow the SPD, however, to exempt up to 10 full-time supervisory ASPDs from the caseload requirement due to those attorneys' additional responsibilities.

4. In order to ensure that SPD offices are appropriately staffed with support personnel, the SPD tries to maintain the following ratios between support personnel and staff attorneys: (a) one legal secretary for every five ASPDs; (b) one investigator for every 10 ASPDs; and (c) one client service specialist for every 20 ASPDs. To assist SPD attorneys, public defender investigators interview witnesses, visit crime scenes to gather evidence, prepare diagrams, take photographs, and obtain other information to identify defense issues. Client service specialists provide support to SPD attorneys and SPD clients by: (a) gathering pertinent information regarding an individual client's problems and needs; (b) investigating placement, treatment, and educational programs that could assist the client; and (c) preparing written recommendations to be considered at sentencing and revocation hearings.

5. While the SPD employs trial and appellate staff attorneys to represent clients who qualify for SPD representation, SPD staff attorneys do not represent all clients who qualify for SPD representation. Due to an overflow of cases in excess of what can be assigned to SPD staff, as well as conflict of interests that may exist between SPD staff and potential clients, the SPD assigns certain cases to private bar attorneys. Base GPR funding for the biennial private bar and investigator reimbursements appropriation is \$21,210,400 GPR annually. In addition to GPR, the SPD utilizes a portion of the program revenue generated from clients who are able to provide modest payments for legal representation to support private bar reimbursements. In 2015-16, the SPD utilized \$977,000 PR from client collections to support private bar reimbursements.

6. Private bar attorneys are compensated pursuant to either: (a) a statutorily defined rate totaling \$40 per hour for time spent related to a case in and out of court, and \$25 per hour for travel of more than 30 miles; or (b) a flat, per case contracted fee that may not result in the attorney receiving more than he or she would under the statutory rate. Except for a number of misdemeanor cases, private bar attorneys are generally compensated pursuant to the statutory rate.

7. Private bar attorneys compensated at the statutory rate are assigned cases on a

rotational basis. Private attorneys who desire indigent legal defense cases must submit their name, legal education, and legal experience that qualifies them to provide representation in the types of cases they have expressed an interest in litigating. For each county, the SPD must annually prepare, certify, and update a list of these private attorneys seeking to litigate indigent legal defense cases.

8. During the 2013-15 biennium, the SPD expended \$54,858,000 on private bar payments (\$52,885,000 GPR and \$1,973,000 PR). Due to auditing of private bar reimbursements, approximately \$7 million in unpaid private bar bills carried over into the 2015-17 biennium. Based on appropriated GPR amounts and projected client payment receipts, the SPD is estimated to have a total of \$44,664,200 (\$44,097,800 GPR and \$566,400 PR) to pay private bar reimbursements in 2015-17. The SPD anticipates receiving a total of \$53.3 million in private bar bills during 2015-17. [It should be noted that, due to variability in the length of cases as well as the fact that private bar attorneys may bill for an appointment as far back as six fiscal years, bills submitted in this biennium may be from appointments made in previous biennia.]

9. In 2015-16, 138,429 new cases were assigned to SPD staff attorneys and private bar attorneys. Of the newly assigned cases, 79,938 trial and 1,315 appellate (58.7%) cases were assigned to SPD staff, while private attorneys were assigned the remaining 57,176 cases (41.3%). Of the 57,176 cases assigned to private bar attorneys, 37,133 were overflow (although over 8,353 cases were instances where a client with a private bar attorney is charged in another case, and so that case also goes to the private bar attorney) and 19,124 were conflict of interest cases.

10. The SPD manages its caseload by balancing cases between staff and the private bar. As will be discussed in the position authority section below, there are situations in which assigning a case to either a private bar or staff may be more efficient. To assign a case, the SPD first tries to ensure that the case is not needed to maintain a staff attorney's statutory caseload and then finds a private attorney willing to take the case. However, as indicated previously, the SPD does not have enough staff positions to assign all cases for all defendants who qualify for a public defender to a staff attorney, which makes assigning a case to a staff attorney, when it would be more efficient, a more complex task.

11. In order to make the process of having sufficient staffing simpler, the Governor has recommended that the SPD be given position authority to add GPR positions. Position authority will be discussed first in this paper. In order allow the SPD to immediately transfer funding from other allocations to the trial representation allocation to fund staff positions, the Governor recommends consolidating appropriations (providing the SPD with a block grant), which will be discussed second in this paper.

Position Authority

12. The Legislature can add GPR positions through legislation or through the Joint Committee on Finance (JFC) acting under s. 13.10. Most positions authorized for state agencies are provided through the biennial budget or by specific provision included in other legislative enactments. Under the bill, the SPD would be allowed to request increased position authority from JFC within the general operations appropriation for GPR positions under a 14-day passive review process.

13. As indicated previously, under current law the SPD may request an increase in GPR position at any time under s. 13.10. The Department of Administration has indicated that the passive review position authority for the SPD would allow the SPD to find a balance between assigning cases to ASPDs and private bar attorneys depending on which is most cost effective. The administration believes the primary advantage of passive review position authority over a s. 13.10 proceeding is that a passive review can be brought before the JFC at any time, as opposed to waiting for a s. 13.10 meeting to be scheduled.

14. There are a number of factors that make either the private bar as opposed to assigning the case to a staff attorney (ASPD) more efficient. Some of these factors include: (a) salary and fringe benefit costs; (b) staff caseload; (c) location of the case; (d) location of the attorney; (e) prior interactions with the defendant; (f) type of case; and (g) complexity of the case.

15. Despite the fact that the state supports fringe benefits, supplies and services costs, and support staff for ASPDs, potential savings associated with employing additional ASPDs could occur because: (a) ASPDs must meet an annual caseload requirement; and (b) an ASPD's minimum salary and fringe benefits is \$33.725 (\$23.673 for salary and \$10.052 for fringe benefits) per hour while private bar attorneys are paid \$40 per hour for time spent related to a case.

16. Current law establishes a number of cases that each trial division ASPD must litigate on an annual basis. The caseload requirement is considered a minimum workload for ASPDs and does not address workload demands such as administrative tasks, training and continuing education requirements, and other justice system activities such as participating in criminal justice coordinating councils and treatment courts. Private bar attorneys assigned SPD cases do not have to meet an annual caseload requirement.

17. The further the private bar attorney is from the location of the case, defendant, and witnesses the more efficient it is for a SPD staff to handle a case as long as there is an office in the vicinity. As discussed above, private bar attorneys get paid \$25 per hour to drive more than 30 miles. The more rural the client is the more time an attorney will spend traveling to meet with the client or attend court hearings. In addition, if the case requires an investigator, the investigator will spend more time traveling and costs for both the attorney and the investigator will increase. While SPD staff may still need to travel, the staff attorney must still maintain the statutory caseload despite any travel.

18. Generally, the more complex a case is, the more cost effective it will be for a staff attorney to handle the case than by a private bar attorney. Based on billing data from 2015-16, a serious felony is three times more expensive to hire a private bar attorney for than a simple felony. However, a serious felony is weighted the same in the statutory caseload calculations for ASPD's as a simple felony. An exception to this is when a private attorney has prior experience with the client.

19. Further, it could be argued that ASPDs are able to litigate indigent legal defense cases more efficiently than private bar attorneys due to the fact that ASPDs handle multiple cases simultaneously. Private bar attorneys are typically assigned one indigent legal defense case at a time as private attorneys are generally assigned cases on a rotational basis. The SPD has indicated that certain tasks, such as discussing cases with the district attorney, can be performed more efficiently

when an attorney litigates multiple cases at a time. In light of the administration's arguments for the overall efficiencies of granting GPR position authority to the Public Defender's Office, the Committee could approve the Governor's recommendation [Alternative A1].

20. While under current law agencies may request additional PR positions under a passive review, no agency has GPR passive review authority to create positions. In order to create GPR positions, the Legislature must enact a bill or the Committee may create positions under s. 13.10. It could be argued that giving GPR position authority under passive review to the SPD could lead to other agencies requesting the same authority. In addition, providing GPR passive review authority reduces legislative oversight over the allocation of GPR resources by removing creation of GPR positions from the normal legislative process. In addition, a public hearing on the matter is not required unless there is an objection to the passive review.

21. In view of the flexibility and intent of the position authority, but also acknowledging the ability of the Committee to maintain more position authority, the Committee could consider capping the number of positions the SPD could request per fiscal year. If, for example, the position authority requests were capped at three positions per year, this would allow the SPD to either create a new small office in high need rural areas comprised of two attorneys and one support staff or allow them to distribute positions to previously established offices. The SPD indicates that the smallest office it currently operates consists of two attorneys and one support staff. [Alternative A2]

22. While the bill would give passive review position authority to the SPD, it does not provide authority to increase funding. Therefore, any increase in funding for GPR positions and materials and services for those positions would need to be reallocated from resources already allocated to the SPD. However, the bill does not indicate how positions would be funded in the biennium in which created. For example, the bill does not specify if the SPD could request a salary supplement for new positions added during the biennium.

23. Under the bill, the SPD could request a salary supplement for a SPD position created under passive review in the same fiscal year. Thus, the Committee may wish to support the recommendation, but specify that the agency may not request salary and fringe benefit supplements during the biennium in which the position is created through the new position authority process. [Alternative A3]

24. With regards to the cost of supporting ASPDs, the state provides funding for the attorney's salary, fringe benefits, and necessary supplies and services. The state also funds support staff necessary to assist SPD attorney provide indigent legal defense. Under the state employee compensation plan, the minimum hourly salary for an ASPD is currently \$23.673 per hour (\$49,420 annually), while the maximum hourly salary is \$57.218 per hour (\$119,472 annually). It could be expected that any new ASPDs' salary could increase over time and, therefore, savings associated with new ASPD positions would diminish at some point over time. Given that compensation provided to assistant state public defenders may be increased in future years and produce uncertain future savings, the Committee may wish to maintain the Legislature's current level of oversight over position authority.

25. The SPD has been successful in receiving position authority from the Legislature in the

past (in the 2015-17 budget 35 new positions, including 26 new ASPDs, were created). The SPD did not request any additional positions in its 2017-19 budget request. Further, the SPD did not include a request for GPR position passive review authority. It could be argued that the current law practices under the budget process, separate legislation or s. 13.10 are sufficient. As such, the Committee could delete the provision. [Alternative A4]

Appropriation Structure -- Block Grant

26. Currently, SPD funds are divided between separate annual appropriations as shown in the Governor's recommendation table and funds can only be used for purposes related to the individual appropriation. In order to transfer funds between appropriations, the SPD needs approval from JFC under s. 13.10 or by legislation. Transferring allowable expenses from one appropriation to another or transferring funding between lines within an appropriation requires DOA approval.

27. The Department of Administration has indicated that the consolidation of appropriations into a biennial appropriation would provide the SPD flexibility in administering funding and programming.

"Under the block grant, all of the GPR funds would be in a single appropriation. Instead of seeking approval to move funds between appropriations, the SPD would be able to shift funds to different lines; requiring only SBO [State Budget Office] approval. The new appropriation could pay for all costs associated with general administration, trial and appellate representation, private bar, contracted private investigators, transcripts, discovery and interpreters. For example, the SPD has an appropriation for in-house counsel to represent indigent clients and it has an appropriation to contract with private bar attorneys to represent indigent clients. If the agency sees a cost overrun in one appropriation and comes in under budget in another, it has a difficult time reconciling the difference. In this particular example, the primary driver is the turnover rate for in-house trial attorneys within the agency, something that is largely out of its control."

28. Given the increased flexibility to the SPD, the Committee may wish to approve the Governor's recommendation and consolidate the SPD appropriations. [Alternative B1]

29. The bill significantly reduces legislative and administrative oversight through the consolidation of appropriations and making the new appropriation biennial instead of annual. When transferring allowable expenses, DOA reviews both the appropriation where the expense originated and terminates to make sure that the appropriations are related and that no statutory language prevents such an expense transfer. By consolidating the SPD appropriation, DOA will be able to transfer funds between line items without the same restrictions as transferring expenses between appropriations.

30. In addition to consolidating the appropriations, the bill would make the new appropriation a biennial appropriation. As a result, the SPD would have authority to spend the amounts appropriated throughout the biennium, rather than unencumbered balances in the first year reverting to the general fund. Generally, biennial appropriations provide agencies more flexibility to determine how to expend funding over the biennium, rather than for each year. The SPD currently has flexibility in the private bar and investigator reimbursement appropriation, because this

appropriation is a biennial appropriation. Questions could be raised whether making an annual appropriation biennial will offer additional resources if the annual appropriation is fully used each year or whether funds just be transferred from the second year to the first.

31. Separate appropriations generally make reporting easier and ensure that expenditures are made as the Legislature directs, since funds cannot be transferred between appropriations without the approval of the JFC and allowable expenses cannot be transferred without the approval of the State Budget Office. The SPD indicates the potential concern that it may be more difficult to track how much is spent on trial staff attorneys versus private bar expenditures without separate appropriations. The SPD further indicates it values the information obtained from separate appropriations.

32. In recent years, the SPD has managed its finances through holding positions open, transferring allowable expenses between appropriations, using funds from turnover, and by carrying expenses from one fiscal year or biennia to the next. Generally, funds are first transferred from the salaries to materials and services line with the approval of DOA. Then allowable expenses are transferred from one appropriation to the program administration, appellate representation, or trial representation appropriations again with the approval of DOA. The SPD indicates that these requests happen only a few times a year and have been simplified with the implementation of the state's new accounting system (STAR). Despite these efficiencies and management the cost of the private bar have exceeded the amount allocated to the appropriation in previous fiscal years. It could be argued that changing the structure of funding under the SPD will have no positive impact on the SPD's management of funds.

33. If the Committee wishes to support the concept of providing increased flexibility, but also balancing the Legislature's interest in maintaining a level of legislative oversight of expenditures, the Committee could modify the Governor's recommendation to do one or both of the following:

a. approve the consolidation of the appropriations, but require that DOA separately track the current appropriations within the new appropriation (create multiple numerics within the appropriation). This would ensure that particular costs could be associated with particular functions [Alternative B2a]; and/or

b. modify the new appropriation to an annual appropriation rather than biennial appropriation. This would allow flexibility between allocations but decrease flexibility over the biennium, because funding could not be transferred from year two to year one without Committee approval. [Alternative B2b]

34. Any potential practical benefit of the block grant provision may be realized in conjunction with the GPR position authority. The effect of these two provisions together may give the SPD the flexibility to most effectively utilize and balance deployment of available resources. However, providing a block grant significantly lessens the Legislature's review authority. In addition, the block grant could create reporting and tracking issues for the agency by unifying all of the SPD's appropriations. The SPD did not request either the position authority or block grant.

35. Given that the SPD has operated effectively under the current appropriation structure, it could be argued that the block grant is unnecessary to remove any operational impediments to the SPD. Given that current practice is sufficient, the Committee may wish to maintain the Legislature's current level of oversight over each of the programs and their expenditures as well as position authority. As such, the Committee could delete the provision. [Alternative B3]

ALTERNATIVES

The following alternatives for position authority and SPD block grant may be selected separately or together.

A. Position Authority

1. Approve the Governor's recommendation to allow the SPD to request increased position authority within the general operations appropriation for GPR positions under a 14-day passive review.
2. Modify the Governor's recommendation to limit the number of positions the SPD may add in a fiscal year at three.
3. Modify the current proposal to disallow the SPD from requesting salary and fringe benefit supplements for positions created using GPR position authority during the biennium the position is created.
4. Delete the provision and maintain current law related to SPD position authority.

B. Funding -- Block Grant

1. Approve the Governor's recommendation to convert the appropriation for program administration (base funding of \$2,757,900 and 18.4 positions annually) from an annual appropriation to a biennial appropriation and rename the appropriation as program operations and transfer funding and position authority for trial and appellate representation in the renamed program operations' appropriation (\$82,343,800 in 2017-18 and \$82,402,800 in 2018-19 and position authority accounts for 591.45 positions).
2. Approve the Governor's recommendation to rename the program administration appropriation program operations, consolidate the other appropriations into the program operations appropriation, and delete the current appropriations, with the following modifications [these alternatives may be selected separately or together]:
 - a. Approve the consolidation of the appropriations, but create appropriation accounts (multiple numerics) within the appropriation.
 - b. Modify the new appropriation to an annual appropriation rather than biennial appropriation.

3. Delete the provision and maintain current law related to SPD appropriations and funding.

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