

MICHIGAN INDIGENT DEFENSE COMMISSION ACT

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House Bill 5804 (Substitute H-2)

Sponsor: Rep. Tom McMillin

Committee: Judiciary

Complete to 9-26-12

A REVISED SUMMARY OF HOUSE BILL 5804 AS REPORTED BY COMMITTEE

The bill would create the Michigan Indigent Defense Commission Act to create the Michigan Indigent Defense Commission, provide for its duties and powers, provide for constitutionally effective assistance of counsel to represent indigent defendants in criminal cases, provide standards for the appointment of legal counsel, and provide funding for certain functions of the MIDC and to implement the standards in courts around the state. The bill specifies that nothing in the bill should be construed to overrule, expand, or extend, either directly or by analogy, the decision reached by the U.S. Supreme Court in *Strickland v Washington*, 466 US 688 (1984), or its progeny in the Michigan Supreme Court. A more detailed description of the bill follows.

Michigan Indigent Defense Commission

- Would be created as an autonomous entity in the judicial branch of state government.
- Would propose minimum standards for the local delivery of criminal trial defense services providing constitutionally effective assistance of counsel to indigent adults throughout the state and identify and encourage best practices for delivering that assistance. A minimum standard would take effect upon the Michigan Supreme Court's approval or 120 days after submission to the court for review, whichever came first, unless the proposed minimum standard was rejected.
- Define "adult" to mean either an individual 17 years of age or older or an individual less than 17 years of age at the time of the commission of a felony under conditions specified in the bill (e.g., the juvenile was tried as an adult).
- Would be subject to the Open Meetings Act and Freedom of Information Act, except that confidential case information would be exempt from disclosure under FOIA.

MIDC Membership

- The MIDC would consist of 14 members, 13 by gubernatorial appointment chosen from the following: two members submitted by the Speaker of the House of Representatives and two by the Senate Majority Leader; one representing the general public; one representing local units of government; one from names submitted by bar associations whose primary mission or purpose is to advocate

for minority interests; two members from a list of 6 names submitted by the Criminal Defense Attorney Association of Michigan; and one from a list of three names submitted by each of the following -- the Supreme Court Chief Justice, Michigan Judges Association, Michigan District Judges Association, and State Bar of Michigan. The Supreme Court Chief Justice would serve as the 14th member.

- Only individuals having significant experience in the defense or prosecution of criminal proceedings or who have demonstrated a strong commitment to high-quality representation in indigent criminal trial defense matters could be nominated for Commission membership.
- At least two members would have to be non-attorneys, and no more than three judges (whether former judges or sitting judges) could serve at the same time. Anyone receiving public compensation for providing representation to indigent adults in state courts would be ineligible for appointment.
- Members would serve a four-year term, with the initial terms staggered. The bill would provide for appointment of a chairperson; appointments to fill a vacancy; and removal for incompetence, dereliction of duty, malfeasance, misfeasance, or nonfeasance in office or for any good cause.

MIDC Authority and Duties

Among other things, the MIDC would have the following authority and duties:

- Develop and oversee the implementation, enforcement, and modification of minimum standards, rules, and procedures to ensure criminal trial defense services providing effective assistance of trial counsel are consistently delivered to all indigent adults in the state consistent with the safeguards of the U.S. Constitution, state constitution, and the bill.
- Investigate, audit, and review the operation of local indigent criminal trial defense delivery systems to assure compliance with Commission standards, rules, and procedures.
- Hire appropriate staff, including an executive director.
- Establish procedures regarding the collection of certain data; receiving and resolving complaints and implementing certain recommendations; and submitting annual reports to the Governor, Legislature, and Supreme Court.
- To the extent feasible, establish metrics for determining the resources necessary for compliance by local governments.

- Emphasize the importance of criminal trial defense services provided to juveniles under the age of 17 who are tried, or who may be sentenced, in the same manner as adults and to indigent adults with mental impairments.
- Be mindful that defense attorneys representing the indigent are equal partners with the prosecution, law enforcement, and the judiciary in the criminal justice system and should be adequately funded in order to fulfill their role.
- Be mindful that the local indigent criminal trial defense systems should be adequately funded in order to fulfill their roles.
- Provide criminal defense services to indigent adults if, or to the extent, a local indigent criminal trial defense system fails or is unable to meet the Commission minimum standards.
- Convene a public hearing before a proposed policy became effective.
- Place the MIDC policies in an appropriate manual, made publicly available on a website, and made available to all attorneys and professionals providing public defense services, the Supreme Court, the Senate and House Appropriations committees, and the Senate and House Fiscal Agencies.
- Apply for and obtain grants from any source, at its discretion, to carry out the purposes of the act.

MIDC Minimum Requirements, Rules, and Procedures

The above would be established to effectuate the following:

- Delivery of indigent criminal trial defense services (includes selection, funding, and payment of defense counsel) independent of the judiciary yet ensuring that judges are permitted and encouraged to contribute information and advice concerning the delivery of indigent criminal trial defense services.
- Active participation of other members of the Bar with an indigent criminal defender office when indigent criminal trial defense services caseloads are sufficiently high.
- Assure that each criminal defendant is advised of his or her right to counsel. All indigent adults, except those appearing with retained counsel or those who have made an informed waiver of counsel, shall be screened for eligibility and assigned counsel as soon as feasible after formal charges are filed.
- In establishing the above, adhere to the following principles: provide defense counsel with sufficient time and space where confidentiality is safeguarded for meetings with clients; control workload to permit high-quality representation;

match the defense counsel's ability, training, and experience with the nature and complexity of cases to which he or she is appointed; have the same defense counsel continuously represent the client, with some exceptions, at every court appearance throughout the pendency of the case; provide with and require defense counsel to attend relevant continuing legal education; and the systematical review of defense counsel for quality and efficiency of representation according to MIDC standards.

- A local indigent criminal trial defense system complying with the principles listed above would have to be permitted by the MIDC to continue to operate.

Local Units of Government

- Require to comply with Commission standards for indigent defense and cooperate with the MIDC in carrying out its duties.
- Require to cooperate and participate in the investigation, audit, and review of their local indigent criminal trial defense systems conducted by the MIDC.
- Require to maintain not less than the level of funding for indigent criminal trial defense services, adjusted for inflation per the Detroit CPI, as its average annual expenditure in the three fiscal years immediately preceding the creation of the MIDC, or the statewide average annual expenditure in the three fiscal years immediately preceding the creation of the MIDC (as specified in the bill), whichever is greater. (If additional funding is necessary to bring a local unit's indigent criminal trial defense services into compliance with MIDC standards, the additional funding shall be paid by the state, with the Legislature appropriating the necessary funds.)
- Allow a local indigent criminal trial defense system to request a review by the MIDC of its current or proposed system to determine its compliance with the commission standards. If the local system is determined to be in compliance, the maintenance of funding provisions in the bill requiring a minimum expenditure of the minimum statewide average would not apply and no state funds would be used to support that local system.

Noncompliance by Local Government

- A local government could request an opportunity to be heard by the MIDC prior to a determination it is not in compliance. The MIDC would have to identify the areas of noncompliance and allow sufficient time for compliance. If, after that time expired, the local government was still not in compliance, the MIDC would provide indigent criminal trial defense services at state cost.
- Upon the MIDC determination a local government has failed or is unable to meet the minimum standards, the MIDC shall direct the state treasurer to withhold an

amount equal to that local unit of government's maintenance of the funding requirement prescribed in the bill from any state payments to that local unit.

- No action could be taken against a local unit of government providing adult indigent criminal trial defense services for failing to maintain funding under the minimum maintenance level specified in the bill prior to the approval of the first minimum standard by the supreme court.

FISCAL IMPACT:

The bill would increase costs for state and local governments by an indeterminate amount. Some of these costs are directly associated with this legislation, while others would depend on future actions by the Michigan Indigent Defense Commission (MIDC). The state would face costs associated with supporting the MIDC, including staff compensation and resources (though actual MIDC members would not receive a salary). These costs would depend on the number of staff determined necessary to carry out the commission's objectives, as well as appropriations made by the legislature.

The bill also includes minimum spending amounts for local governments, requiring that they maintain indigent defense spending in line with either the per capita state average prior to the creation of the MIDC, or their inflation-adjusted level of spending for the three fiscal years previous to the creation of the MIDC, whichever is higher.

Spending on indigent defense in Michigan is determined at the local level, and average spending levels vary significantly. Some estimates have placed the statewide three-year average of per capita spending at \$7.38. Spending amounts for individual counties vary significantly, from \$2.56 per capita to \$17.01 per capita. However, these spending amounts include such cases as juvenile delinquency, child protective, and guardianship cases, which would not qualify as indigent criminal defense under the bill. Thus, the actual per-capita spending in Michigan is not known, and is likely lower than the \$7.38 per capita estimate.

If current estimates of per capita spending are presumed to be accurate, 45 of 84 counties currently do not spend \$7.38 or more per capita. The total cost to these counties to reach required spending levels would be approximately \$10.2 million. The MIDC may find that raising funding levels would not be necessary for some of these courts, but the criteria for determining if a court has met its obligations have not been established.

If a local government does not meet the standards set by the MIDC, the state may directly provide indigent defense services in that government's jurisdiction. This would increase costs to the state, which would be paid for through withholding other state payments to that local government. Thus, revenue for non-indigent defense purposes may be reduced for some local governments. The source of state payments that would be withheld is not specified.

Additional funding may be required to implement any future recommendations made by the MIDC. If a local government spends above the minimum amount, the bill indicates these costs should be paid by the state. Actual state payments to local governments would be dependent on appropriations made by the Legislature.

For additional information, a comprehensive HFA evaluation of Michigan's indigent defense system was published in July 2012, and is available online at: <http://www.house.mi.gov/hfa/PDFs/Indigent%20Defense%20Review%20July%202012.pdf>

POSITIONS:

The following entities testified in favor of or indicated support for the bill on 9-19-12:

Michigan Catholic Conference
Commission on Indigent Defense
Michigan District Judges Association
Michigan Council on Crime and Delinquency
Michigan Supreme Court
Michigan Campaign for Justice
Criminal Defense Attorneys of Michigan
ACLU of Michigan

The Office of Attorney General indicated a neutral position. (9-19-12)

Michigan Association of Counties indicated opposition to the bill. (9-19-12)

Representatives of Ottawa County indicated opposition to the bill as introduced, but were evaluating the H-2 Substitute. (9-19-12)

Legislative Analyst: Susan Stutzky
Fiscal Analyst: Erik Jonasson

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.