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Senate Bill 425 (Substitute S-2 as passed by the Senate)
Sponsor: Senator Sue Shink
Committee: Civil Rights, Judiciary, and Public Safety

Date Completed: 10-23-23

INTRODUCTION

The bill would require the Appellate Defender Commission to create a system of appellate defense services for indigent youth. Generally, the bill specifies that appellate defenders would have to serve indigent adults and indigent youth in their respective appeals processes. The bill also requires a local government's indigent defense system to pay reasonable fees and expenses for services provided by locally appointed private counsel to the indigent defense system. The Commission would have to establish procedures for these fees and expenses and procedures for the reimbursement of indigent defense systems. Additionally, the bill prescribes a State reimbursement process for local governments that pay for locally appointed private counsel within their indigent defense systems.

The bill would take effect October 1, 2024.

BRIEF RATIONALE

Governor Whitmer signed Executive Order 2021-6 on June 9, 2021, which created the Task Force on Juvenile Justice Reform (Task Force) within the Department of Health and Human Services. The Task Force was charged with analyzing Michigan's juvenile justice system and recommending changes to State law, policy, and appropriations aimed to improve youth outcomes. The Task Force found that the State lacks uniform judicial justice policies and quality assurance standards, leading to disparities in outcomes for youth in the juvenile system. Accordingly, the Task Force recommended that the State expand the State Appellate Defender Office (SADO) to include services for juveniles.

BRIEF FISCAL IMPACT

The bill would implement recommendation #3(e) of the Michigan Task Force on Juvenile Justice Reform (see **BACKGROUND**). Minor costs for the State Appellate Defender Office (SADO) have already been included in the annual budget. Costs to local court systems would likely increase slightly but would be fixed after three years of compliance.

PREVIOUS LEGISLATION

(This section does not provide a comprehensive account of previous legislative efforts on this subject matter.)

Senate Bill 425 is a companion bill to House Bill 4631. Both bills are similar to House Bill 4633 of the 2021-2022 Legislative Session.

MCL 780.712 et al.

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CONTENT

The bill would amend the Appellate Defender Act to do the following:

- Increase the number of Appellate Defender Commission members, from seven to nine, and specify that the two public members would have to have been affected by the youth or adult justice system.**
- Specify that the Commission would serve indigent adults and indigent youths.**
- Create an indigent defense system that would be responsible for payment of reasonable fees and expenses for the services of appellate defenders.**
- Specify that the Commission would have to establish a standard procedure for the reimbursement of indigent defense systems and prescribe reimbursement requirements.**

Commission Membership

Under the Act, the Appellate Defender Commission consists of seven members appointed by the Governor and are as determined as follows:

- Two members recommended by the Michigan Supreme Court.
- One member recommended by the Michigan Court of Appeals.
- One member recommended by the Michigan Judges Association.
- Two members recommended by the State Bar of Michigan.
- One member who is not an attorney and is selected from the public by the Governor.

Instead, under the bill, the Appellate Defender Commission would consist of *nine* members appointed by the Governor as follows:

- Two members recommended by the Michigan Supreme Court.
- One member recommended by the Michigan Court of Appeals.
- One member recommended by the Michigan Judges Association.
- Two members recommended by the State Bar of Michigan.
- *One member who would have to be recommended by the Michigan Indian Judicial Association.*
- *Two members who are not attorneys who would be selected from the public by the Governor to represent the interests of individuals who had been affected by the youth or adult justice system.*

Commission Responsibilities

The Commission is responsible for the development of a system of indigent appellate defense services that includes services provided by SADO and locally appointed private council. Under the bill, the Commission would be responsible for the development of a system of appellate defense services for indigent adults and indigent youth. Each system would have to include the services described above.

Additionally, the Commission is responsible for developing minimum standards to which all indigent criminal defense appellate services must conform. The bill would specify that the minimum standards would have to be developed for all indigent appellate defense services for adults and youth.

Under the bill, "indigent" generally would mean that term as described in the Michigan Indigent Defense Commission Act. According to the Act, a defendant is considered indigent if the defendant is unable, without substantial financial hardship to the defendant or the defendant's dependents, to obtain competent, qualified legal representation on the defendant's own.¹ Substantial financial hardship is presumed if the defendant receives personal public assistance, including under the Food Assistance program, Temporary Assistance for Needy Families, Medicaid, or disability insurance; resides in public housing; or earns an income less than 140% of the Federal poverty guideline. A defendant is also presumed to have a substantial financial hardship if he or she is currently serving a sentence in a correctional institution or is receiving residential treatment in a mental health or substance abuse facility. A defendant who does not fall into one of these categories must be rigorously screened by the indigent criminal defense system. A defendant could be determined as partially indigent; the Act requires the MIDC to promulgate rules and standards to guide this determination.

"Adult" would mean an individual who is eligible to appeal a criminal conviction or exercise any other postconviction remedy or an individual who is eligible to appeal an order issued under Section 2d or 4 of the juvenile Code. (Sections 2d and 4 of the Code prescribe processes for a juvenile to be tried as an adult.)

"Youth" would mean an individual who is eligible to appeal an order issued under Section 2a, 2d, or 2h of the juvenile Code. (Generally, Section 2a concerns a court's continued jurisdiction beyond the maximum juvenile age of 18 under certain conditions.)

The Commission is responsible for compiling and keeping current a statewide roster of attorneys eligible for, and willing to accept, appointment to serve as criminal appellate defense counsel for indigents. Instead, under the bill, the Commission would be responsible for compiling and keeping current the following:

- A statewide roster of attorneys eligible for, and willing to accept, appointment to serve as appellate defense counsel for indigent adults.
- A statewide roster of attorneys eligible for, and willing to accept, appointment to serve as appellate defense counsel for indigent youth.

Appellate Defender

Under the Act, an appellate defender, deputy appellate defender, or assistant appellate defender, among other things, must represent an indigent defendant only after a conviction or entry of a guilty plea or plea of *nolo contendere* (accepting conviction while not admitting guilt) at the trial court level. Under the bill, this would apply only to an indigent adult. An appellate defender, deputy appellate defender, or assistant appellate defender also would have to represent an indigent youth only after an appealable order.

Under the Act, the appellate defender must conduct an appeal of a felony conviction or conduct other *postconviction* remedies on behalf of a person for whom the appellate defender is assigned as attorney. The bill would specify that this provision would apply to an *indigent adult* for whom the appellate defender was assigned.

¹ MCL 780.991

Additionally, the bill would require an appellate defender to conduct an appeal of an order or conduct other appropriate *predisposition* remedies on behalf of an *indigent youth* only after an appealable order and for whom the attorney was assigned.

Under the bill, the duties of an appellate defender, deputy appellate defender, or assistant appellate defender, would apply to appellate defense services for indigent adults and youth.

Special Assistant Appellate Defender

The Act allows the appellate defender to appoint special assistant appellate defenders to represent indigent persons or otherwise assist in the representation of indigent persons at any stage of the appellate or postconviction proceedings. The bill specifies that this provision would apply to indigent adults. Additionally, the bill would allow the appellate defender to appoint special assistant appellate defenders to represent indigent youth or otherwise assist in the representation of indigent youth at any stage of the appellate proceedings, upon rules adopted by the Commission.

Indigent Defense System

Under the bill, an indigent defense system would be responsible for the payment of reasonable fees and expenses for the services of locally appointed private counsel appellate defense services for indigent adults and youth.

"Indigent defense system" or "system" would mean the local unit of government that funds a trial court or if a trial court is funded by more than one local unit of government, those local units of government collectively.

The Commission would have to establish a standard procedure for the payment of locally appointed private counsel by an indigent defense system described above. The procedure would have to include rates and policies that were consistent with standards established under Section 11(2)(b) of the Michigan Indigent Defense Commission Act. (Section 11(2)(b) prescribes the minimum standards to guarantee the right of indigent defendants according to the United States Constitution and Michigan Constitution, specially adhering to a controlled workload.)

Additionally, the Commission would have to establish a standard procedure for the reimbursement of indigent defense systems providing payment to locally appointed private counsel at the rates and policies established by the Commission. Subject to appropriation, if an indigent defense system provided payment to a locally appointed private counsel in this manner, the State would have to reimburse the system for half of the expenditures to the system. After the system had complied with establishing standard procedures for payment and reimbursement for a full three fiscal years, the State would have to reimburse the system for all expenditures exceeding the system's local contribution.

"Local contribution" would mean an indigent defense system's average annual expenditure for attorney fees and expenses during the first three full fiscal years in which the system has complied with the standard procedures, including reimbursed expenditures. If the Consumer Price Index had increased since November 1 of the prior State fiscal year, the local contributions would have to be adjusted by that percentage of 3%, whichever was less.

The bill states, "it is the intent of the legislature to fully fund this reimbursement".

BACKGROUND

Governor Gretchen Whitmer signed Executive Order 2021-6 on June 9, 2021, which, among other things, created the Task Force on Juvenile Justice Reform (Task Force) as a temporary advisory body within the DHHS. The Task Force was charged with acting in an advisory capacity with the goal of developing ambitious, innovative, and thorough analysis of Michigan's juvenile justice system, and include recommendations for changes to State law, policy, and appropriations aimed to improve youth outcomes.²

The Task Force released its report and recommendations on July 22, 2022. Overall, the report found that the quality of services and case management received by youth, from defense to post-disposition placement, differs across the State. The State lacks uniform judicial justice policies and quality assurance standards, leading to disparities the State cannot address and data it cannot rely upon. Additionally, the lack of State centralization has led to discrepancies in the implementation of research-based, developmentally appropriate practices across the State. Accordingly, children participating in the judicial justice system may not receive quality care or may receive care different from their peers.

Among other recommendations, the Task Force unanimously suggested that the Michigan Indigent Defense Commission be expanded to include development, oversight, and compliance with youth defense standards in local county defense systems. Specifically, it was recommended that the State expand the State Appellate Defender Office to include services for juveniles which will include post-disposition services.³

FISCAL IMPACT

The bill is unlikely to have more than a minimal fiscal impact on the State or local units of government.

It requires the Appellate Defender Commission to develop a system of appellate defense services for indigent youth. The costs for these services would mirror the costs for current services provided to indigent adults, but to a lesser degree.⁴ Just like the current system for indigent appeals, SADO would be responsible for at least 25% of juvenile criminal appeals, while local units of government would have to cover the cost of locally appointed private counsel by the indigent defense system established by the Commission, with the State to reimburse half of appointed counsel costs. Public Act 119 of 2023 already covered the increased costs expected for SADO, with \$556,900 and 3.0 FTEs added to its annual budget for juvenile appeals.

While local court systems could see a small increase in costs for youth appeals, under the bill those costs would be fixed after three years of compliance, with the State to cover 100% of local costs exceeding the system's local contribution.

Lastly, the bill would likely add minor administrative support expenses for the Appellate Defender Commission, as it increases the Commission's membership from seven to nine.

² Executive Order 2021-6.

³ *Michigan Task Force on Juvenile Justice Reform Report and Recommendations*, p. 17, July 22, 2022.

⁴ The most recent court data available shows there were over 35,000 felony convictions statewide, but only 46 felony juvenile convictions. See *Statewide Circuit Court Summary 2021*. Available at: <https://www.courts.michigan.gov/4a8ef2/siteassets/reports/statistics/caseload/2021/statewide.pdf>.