

MINUTES
Approved by the Committee
Public Defense Reform Interim Committee
Thursday, January 21, 2016
4:30 PM to 6:30 PM
WW53, State Capitol
Boise, Idaho

Co-chair Senator Todd Lakey called the meeting to order at 4:35 p.m. and requested a silent roll call. Members present were: Co-chair Representative Christy Perry, Co-chair Senator Todd Lakey, and Senators Dean Mortimer, Jim Guthrie, and Cherie Buckner-Webb and Representatives Lynn Luker, Janet Trujillo, Patrick McDonald and John Gannon. Senator Curt McKenzie was absent and excused. Legislative Services Office (LSO) staff members present were Ryan Bush, Jared Hoskins, and Jackie Gunn.

Others present: Dan Blocksom, Idaho Association of Counties; Alan Trimming, Ada County Public Defender; Nancy Werdel, Ada County Prosecutor's Office; Kathy Griesmeyer, ACLU Idaho; Larry Maneely, Ada County Board of County Commissioners; Tera Harden, Canyon County Public Defender; Michael Henderson, Idaho Supreme Court; Sara Thomas, State Appellate Public Defender; Adam Jarvis, Department of Financial Management; Derrick Hill, Boise State University; and Joe Shreve.

Note: Copies of presentations, handouts, and reference materials can be found at: www.legislature.idaho.gov and are also on file at the Legislative Services Office.

Senator Mortimer moved to approve the minutes of the January 13, 2016, meeting. The motion was seconded by Senator Guthrie and passed unanimously.

Local Share. The committee reviewed the definition of "local share" on page 4, line 17. Mr. Jared Hoskins presented an overview of a timeline that projects forward through fiscal year 2018. This chart can be accessed at: <http://www.legislature.idaho.gov/sessioninfo/2015/interim/defense.htm>

Mr. Hoskins explained the reasoning behind the use of "median" instead of "average" in line 22. A discussion ensued regarding the sentence, "For any given county fiscal year, a county's local share shall be the median of the annual amount in county funds expended by that county for indigent defense during each of the first three (3) of the most recently completed five (5) county fiscal years, as certified by the county treasurer." At the close of discussion on "local share," the committee members agreed in concept that the timeline sentence should read, "each of the first three (3) of the preceding five (5) county fiscal years."

Draft Revisions. Co-chair Perry pointed to the draft revisions made in response to Representative Luker's suggestions that were presented at the last meeting:

- Folded in - #2 thru #5, #7, and #8;
- Not folded in - #1, #12, and #13; and
- For committee discussion - #6 (eliminating the lawsuit process), and #9 and #10 (specificity of grant application process by statute).

Public Defense Commission. The members discussed the suggestions and concerns brought forward by the Public Defense Commission at their Tuesday meeting. Co-chair Lakey noted the commission has not yet considered whether the implementation dates expressed in the draft are practical given the Legislature's budgeting timeline. Also, he noted that on page 3, lines 27 and 28, the commission suggested inserting a phrase that will allow counties to apply to the commission for more funding only after they have used a certain percentage of their budget. And on page 3, line 33, the commission suggested inserting "reasonably" so the phrase will read "costs reasonably incurred."

Co-chair Lakey invited Ms. Sara Thomas, State Appellate Public Defender, to provide further details regarding the commission's concerns and suggestions. Ms. Thomas noted the identical language on

page 3, lines 38-42, and on page 7, lines 44-48. She suggested the use of the term "principles" instead of "standards" on page 3. Subsection (3) will now read, "Violation of or non-compliance with principles does not constitute ineffective assistance of counsel under the constitutions of the United States or the state of Idaho and does not otherwise constitute grounds for post-conviction relief." And, on page 7, in Subsection (12), the commission suggested removing "and does not otherwise constitute grounds for post-conviction relief" from the end of the sentence. Senator Mortimer asked whether Subsection (3) should be repositioned as a standalone subsection, and Senator Guthrie asked whether the subsection should simply be removed. A discussion ensued, culminating with Senator Mortimer's suggesting that Subsection (3) move to page 2, line 34, and he suggested removing Subsection (12).

Co-chair Lakey asked Ms. Thomas for her thoughts regarding the removal of Subsection (12), and she stated that the use of the term "standards" in Subsection (12) does not create a problem. Senator Guthrie noted that the term "principles" is not presently in the definitions section, and Co-chair Lakey stated that the term can be added to the definitions section of the draft. Ms. Thomas noted the counties have their own distinct requirements for what constitutes "extraordinary." Accordingly, access to the grant application process could become an equal protection issue. Consequently, she suggested that the members edit the language on page 3, lines 27 through 31. She stated that if counties can apply for additional funding only after 20% of their costs have been expended, then everyone will be on the same playing field and the equal protection issue can be avoided. Further discussion ensued regarding the idea of defining the term "extraordinary" by rule, and Co-Chair Lakey observed that the members may need to discuss rule promulgation in more depth.

Ms. Thomas asked for the sunset clause language on page 4, lines 40-42, to be amended to emphasize the Legislature's continuing commitment to the support of indigent defense grants beyond the three-year period. Also, she pointed out that on page 7, there should be reference to the reporting requirements for defending attorneys; such as, inserting "the most recent annual report required by Section 19-864, Idaho Code, has been filed to the satisfaction of the commission;"

Exhaustion of Remedies. The committee discussed the commission's concern regarding the parallel tracks triggered when the commission identifies that a county is in willful noncompliance. She noted that the counties employ the IDAPA process and the commission employs the court system as the final review. She added that the present draft does not provide the commission the opportunity to pursue administrative remedies while the counties can and will pursue administrative remedies. Representative Luker suggested removing Subsection (2) on page 3. Ms. Thomas agreed that the commission should work with the county that is out of compliance, meeting with them twice before moving forward with a suit. Representative Gannon stated that he agreed with Ms. Thomas regarding the need to address the problems on page 7, Subsection (9). Discussion continued regarding whether the stick of litigation is appropriate.

Co-chair Lakey stated there needs to be a back stop, once the administrative remedies have been exhausted. Ms. Thomas cautioned that there might be a conflict of interest if the administrative IDAPA process is employed by the commission to review disputes because the Attorney General would come in to represent the commission in a dispute with a county. Ms. Thomas stated that she asked the commission to consider this issue. Senator Mortimer asked the members to consider alternatives to going the lawsuit route, and he suggested employing a budget "stick"; for example, if the county is in breach, the county can be billed once the state takes over the costs for indigent defense. Also, the county can then recoup the funds from their residents' property tax assessments. The committee discussed this topic in more depth.

Representative Gannon expressed his support for the review process enunciated in the draft, and noted that Senator Mortimer's suggested process would also require some sort of review process. Representative Luker stated he likes Senator Mortimer's suggestion, as it would minimize the expense of litigation. Senator Guthrie explained that the language on page 7, in Subsection (9),

is why he just can't get there. Co-chair Lakey asked Ms. Thomas when in the court process does ineffective assistance of counsel occur and Ms. Thomas responded it occurs only in post-conviction. Co-chair Lakey indicated that he is okay with taking out the injunctive action and applying the alternative idea of the state taking over when the administrative process has been exhausted, and Representative Luker stated he agreed with Co-chair Lakey.

Ms. Thomas stated that the commission is concerned that if the stick of litigation is replaced with a process where the state bills the county for the cost, then the counties will ultimately pay less than the actual expense. Co-chair Lakey stated that the intention is for these counties to pay the full amount. Co-chair Perry reminded the members that the courts will review the state's efforts regarding both oversight and enforcement. More discussion ensued regarding whether injunctive relief should be included as the final alternative action. Co-chair Lakey again stated his support for taking out the injunctive relief subsection and inserting Senator Mortimer's suggestion. Representative Luker advised that once the state does take over paying the expenses for a county public defense office, it is important to provide the county the opportunity to reconsider participation and retake their role in the process, perhaps even partnering with another county. Co-chair Lakey observed that the majority of the members seemed to support this idea.

Closing Comments. Co-chair Lakey stated that the committee will meet again to wrap up comments and make decisions regarding the final draft. Representative Luker asked that his #10 suggestion be considered at the next meeting, as it makes it easier for the commission and the counties to appreciate what the standards are for approving a grant. Representative Gannon opined that it is essential to incorporate #10. Co-chair Lakey suggested that the draft should enumerate some points but that the commission should be in charge of the fine tuning.

Turning the focus to the fiscal impact spreadsheet provided by Mr. Hoskins, the committee discussed their thoughts regarding costs and personnel. Topics discussed by the members included: the amount of staff that will be necessary to adequately support the grant process; the number of liaisons that will be initially necessary; and whether the seven district liaison positions could be consolidated into 3 or 4 positions. Co-chair Perry concluded this final discussion topic, remarking that the commission emphasized to her the critical need for adequate staffing. Representative Luker suggested it would be helpful to hear from a member of the Public Defense Commission regarding the specific aspects of the draft, in order to explore potential efficiencies. Senator Buckner-Webb stated that the Executive Director of the Public Defense Commission would be responsible for defining the roles of the liaisons. Representative Trujillo emphasized the importance of providing adequate staffing for the administrative element.

The committee scheduled the next meeting for Thursday, January 28, 2016, at 4:00 p.m.. The committee meeting adjourned at 6:35 p.m.