

**Department of Legislative Services**  
 Maryland General Assembly  
 2017 Session

**FISCAL AND POLICY NOTE**  
**Enrolled - Revised**

Senate Bill 714

(Senator McFadden)

Judicial Proceedings

Judiciary

**Criminal Procedure - Indigent Individual - Indigency Determination**

This bill requires a District Court commissioner to determine whether a person qualifies as indigent for purposes of eligibility for representation by the Office of the Public Defender (OPD).

**Fiscal Summary**

**State Effect:** General fund expenditures increase by a net of approximately \$1.1 million in FY 2018 to transfer responsibility for eligibility determinations from OPD to the District Court (which reflects an increase in costs for the Judiciary of an estimated \$1.5 million and a decrease in costs for OPD of an estimated \$430,000). The FY 2018 budget restricts \$1.5 million of the Judiciary’s budget for the purposes of implementing the bill, contingent upon the enactment of this bill. General fund revenues decrease by \$5,000 annually beginning in FY 2019 due to the elimination of fees charged to OPD by the Department of Labor, Licensing, and Regulation (DLLR) for access to its databases.

(in dollars)	FY 2018	FY 2019	FY 2020	FY 2021	FY 2022
GF Revenue	\$0	(\$5,000)	(\$5,000)	(\$5,000)	(\$5,000)
GF Expenditure	\$1,092,500	\$1,105,400	\$1,150,400	\$1,197,600	\$1,247,000
Net Effect	(\$1,092,500)	(\$1,110,400)	(\$1,155,400)	(\$1,202,600)	(\$1,252,000)

*Note: ( ) = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate increase; (-) = indeterminate decrease*

**Local Effect:** Assuming that implementation of the bill does not affect local pretrial detention times, the bill is not expected to materially affect local finances.

**Small Business Effect:** None.

## Analysis

**Bill Summary:** An individual charged with a crime that carries a penalty of incarceration may apply for representation by OPD to a District Court commissioner during commissioner operating hours. For the purpose of an initial appearance proceeding or bail review, a District Court commissioner must make a preliminary determination as to whether an individual qualifies as indigent. An indigent individual must be represented by OPD if the initial appearance or bail review is before a judge. Representation at the initial appearance must terminate at the conclusion of the proceeding, unless the commissioner has made a final determination that the individual qualifies as indigent and OPD has entered a general appearance.

The commissioner must (1) make a final determination as to whether an individual is indigent and qualified for OPD services or is not qualified for OPD services or (2) determine that the individual's financial status is subject to further verification. If the commissioner makes a final determination, the commissioner must notify the individual in writing of the determination. An individual whose financial status is subject to further verification may submit to the commissioner additional information to be qualified for OPD services.

### Current Law:

*Representation of Indigent Individuals:* Under the Public Defender Act (Title 16 of the Criminal Procedure Article), representation of an indigent individual may be provided in accordance with the provisions of the Public Defender Act by the Public Defender or specified attorneys subject to the supervision of the Public Defender.

Indigent defendants or parties must be provided representation under the Public Defender Act in:

- a criminal or juvenile proceeding in which a defendant or party is alleged to have committed a serious offense;
- a criminal or juvenile proceeding in which an attorney is constitutionally required to be present prior to presentment being made before a commissioner or judge;
- a postconviction proceeding for which the defendant has a right to an attorney under the Uniform Postconviction Procedure Act;
- any other proceeding in which confinement under a judicial commitment of an individual in a public or private institution may result;
- a proceeding involving a Child in Need of Assistance; or
- specified family law proceedings.

Representation must be provided to an indigent individual in all stages of the proceedings listed above, including in criminal proceedings, custody, interrogation, bail hearing before a District Court or circuit court judge, preliminary hearing, arraignment, trial, and appeal. However, under the Public Defender Act, representation is not required to be provided to an indigent individual at an initial appearance before a District Court commissioner.

*Application for Office of the Public Defender Services:* An individual may apply for OPD services as an indigent individual if the individual states in writing under oath or affirmation that the individual, without undue financial hardship, cannot provide the full payment of an attorney and all other necessary expenses of representation in specified proceedings.

For an individual whose assets and net annual income are less than 100% of the federal poverty guidelines, eligibility for OPD services may be determined without an assessment regarding the need of the applicant. For an individual whose assets and net annual income equal or exceed 100% of the federal poverty guidelines, eligibility for OPD services must be determined by the need of the applicant. Need must be measured according to the financial ability of the applicant to engage and compensate a competent private attorney and to provide all other necessary expenses of representation in the proceedings specified above.

An applicant's financial ability must be determined by (1) the nature, extent, and liquidity of assets; (2) the disposable net income of the applicant; (3) the nature of the offense; (4) the length and complexity of the proceedings; (5) the effort and skill required to gather pertinent information; and (6) any other foreseeable expense. If eligibility cannot be determined before OPD or a panel attorney begins representation, OPD may represent an applicant provisionally. If OPD subsequently determines that an applicant is ineligible, OPD must inform the applicant of his/her ineligibility, and the applicant must be required to engage the applicant's own attorney and reimburse OPD for the cost of the representation provided. OPD must investigate the financial status of an applicant when the circumstances warrant.

OPD may (1) require an applicant to execute and deliver written requests or authorizations that are necessary under law to provide OPD with access to confidential records of public or private sources that are needed to evaluate eligibility and (2) on request, obtain information without charge from a public record office or other unit of the State, county, or municipal corporation.

OPD may submit requests to DLLR and the Comptroller for information regarding the employment status and income of applicants. Each of these requests must be accompanied by an authorization for release of information that is signed by the applicant and in a form acceptable to the agency to which the request is submitted.

DLLR and the Comptroller must comply with requests for information made by OPD. Information may be exchanged by facsimile transmission.

**Background:** Exhibit 1 contains information on who determines indigency for the purposes of state-funded legal representation in the states.

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**Exhibit 1**  
**Indigency Determinations in the States**

<u>Decision Maker</u>	<u>States</u>
Judge	Alabama, Alaska, Arizona, Arkansas, California, District of Columbia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Michigan, Minnesota, Mississippi, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming
Public Defender	Colorado, Connecticut, Georgia, Hawaii, Maryland, Missouri, Montana, Nebraska, Ohio, Oregon, Rhode Island, West Virginia, and Wisconsin
Hybrid	Delaware, Louisiana, and Vermont
Other	Florida, Massachusetts, New Hampshire, and South Carolina

Source: *Oklahoma's Indigency Determination Scheme: A Call for Uniformity*, 66 Okla. L. Rev. 655 (Spring 2014)

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**State Fiscal Effect:** Overall, general fund expenditures increase by a net of \$1,092,532 in fiscal 2018 to transfer responsibility for determinations of eligibility for OPD legal representation from OPD to the District Court, as discussed in more detail below. This estimate reflects an increase in costs for the Judiciary of an estimated \$1.5 million and a decrease in costs for OPD of an estimated \$430,000. The estimate reflects the bill's October 1, 2017 effective date and assumes that (1) the bill does not materially affect demand and/or use of OPD services; (2) implementation of the bill does not affect turnaround times for initial appearances and pretrial detention times in Baltimore City; and (3) the bill does not affect the proceedings at which OPD must provide legal representation or the Appointed Attorneys Program, which is administered by the District Court and provides legal representation at initial appearances before a District Court commissioner. Future year expenditures reflect annualization.

The fiscal 2018 budget restricts \$1.5 million of the Judiciary’s general fund appropriation for purposes of implementing the bill and adds 19 District Court commissioner positions, contingent upon the enactment of the bill. If the bill is not enacted, \$1.5 million of the Judiciary’s general fund appropriation for the Appointed Attorney Program is reduced.

*Elimination of Office of the Public Defender Responsibility for Eligibility Determinations*

	<u>FY 2018</u>	<u>FY 2019</u>	<u>FY 2020</u>	<u>FY 2021</u>	<u>FY 2022</u>
OPD General Fund Expenditures	(\$429,962)	(\$596,621)	(\$626,493)	(\$658,200)	(\$691,871)

General fund expenditures for OPD decrease by \$429,962 in fiscal 2018 due to the elimination of 11 intake positions, based on the starting salary of an intake specialist and assuming that OPD intake workers spend approximately 10% of their work time on eligibility determinations. This estimate reflects the bill’s October 1, 2017 effective date. Future year savings reflect annualization and the elimination of OPD’s \$5,000 annual fee for access to DLLR’s databases beginning in fiscal 2019. General fund revenues and expenditures for DLLR decrease correspondingly.

OPD advises that it has 109 intake workers who spend 10% of their time on eligibility determinations, which represents approximately 11 intake positions. The remainder of their time is spent obtaining client criminal history; entering information into a case management system; obtaining charging documents, citations, or violation of probation petitions; filing appearances and/or various motions; creating the physical client file; issuing witness subpoenas; preparing dockets; and performing other various case support functions.

*Requiring the District Court to Determine Eligibility of Applicants for Office of the Public Defender Services*

	<u>FY 2018</u>	<u>FY 2019</u>	<u>FY 2020</u>	<u>FY 2021</u>	<u>FY 2022</u>
General Fund Expenditures	\$1,522,494	\$1,707,041	\$1,781,933	\$1,860,786	\$1,943,851

General fund expenditures for the Judiciary increase by \$1,522,494 in fiscal 2018, which accounts for the bill’s October 1, 2017 effective date. This estimate reflects the cost of hiring 19 District Court commissioners to conduct eligibility determinations for applicants for OPD representation. It includes salaries, fringe benefits, one-time start-up costs, and ongoing operating expenses. As noted above, the fiscal 2018 budget restricts \$1.5 million of the Judiciary’s general fund appropriation for purposes of implementing the bill and adds 19 District Court commissioner positions, contingent upon the enactment of the bill.

Positions	19
Salaries and Fringe Benefits	\$1,251,428
Computer Reprogramming	174,000
Operating Expenses	<u>97,066</u>
<b>FY 2018 Judiciary Expenditures</b>	<b>\$1,522,494</b>

Future year expenditures reflect full salaries with annual increases and employee turnover and ongoing operating expenses.

The Judiciary advises that because indigent defendants who appear before a District Court commissioner are entitled to State-funded legal counsel at their initial appearances, District Court commissioners currently determine eligibility if a defendant (1) requests an attorney and (2) says that he or she cannot afford an attorney. While the District Court uses a different eligibility form than OPD, the forms ask for substantially similar information. However, the eligibility determination before a commissioner takes approximately 3 minutes, compared to the eligibility interview/intake by OPD, which takes approximately 10 minutes. Information is not readily available on the number of individuals who request/receive State-funded legal counsel at an initial appearance before a District Court commissioner and are subsequently represented by OPD at a judicial bail review hearing.

The information and assumptions used in calculating the estimate are stated below.

- OPD advises that it processed an estimated 241,949 intake applications in calendar 2015 and 218,370 intake applications in calendar 2016. Using the average of these figures, District Court commissioners conduct eligibility determinations for approximately 230,160 applicants for OPD representation per year.
- District Court commissioners spend 10 minutes to determine the eligibility of each applicant for OPD representation.
- Each District Court commissioner works 2,000 hours per year.

The Judiciary advises that implementation of the bill also requires computer reprogramming to develop and maintain software and a database to process and maintain OPD applications, produce paperwork, and communicate with OPD offices and applicants. The Judiciary estimates that it incurs \$174,000 in computer reprogramming costs in fiscal 2018 to implement the bill. The Judiciary may incur additional expenditures to notify applicants in writing of final eligibility determinations.

OPD currently has a memorandum of understanding with DLLR for an automated system allowing OPD access to databases in the Unemployment Insurance Division of DLLR. DLLR advises that the cost associated with establishing this access is \$3,100 in one-time

start-up costs, plus an annual maintenance cost of \$5,000, with DLLR charging up front for the entire \$8,100 amount at the beginning of the first fiscal year of access. These expenditures are to ensure that federal grants are not used to access the system, since the Division of Unemployment Insurance is 100% federally funded and federal law prohibits unemployment insurance grants from being used for purposes other than administration of the unemployment insurance program. Should the Judiciary enter into a similar agreement with DLLR, general fund expenditures for the Judiciary increase by \$8,100 in fiscal 2018 and by \$5,000 each year thereafter, although this estimate does not reflect those potential costs. For purposes of this fiscal note, it is assumed that general fund revenues decrease by \$5,000 annually beginning in fiscal 2019 due to the elimination of fees charged to OPD by DLLR for access to its databases.

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### **Additional Information**

**Prior Introductions:** None.

**Cross File:** None.

**Information Source(s):** Judiciary (Administrative Office of the Courts); Office of the Public Defender; State's Attorneys' Association; Department of Public Safety and Correctional Services; Department of Legislative Services

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