

State Notes

TOPICS OF LEGISLATIVE INTEREST

Spring 2018



Funding Michigan Indigent Defense Commission Grants By Josh Sefton, Fiscal Analyst

On October 13, 2011, Governor Snyder issued Executive Order (E.O.) 2011-12, which created the Indigent Defense Advisory Commission, and tasked it with making recommendations to the Governor and the Legislature for improvements to Michigan's indigent defense (ID) system. In response to those recommendations, Public Act 93 of 2013 was signed into law. Public Act 93 created the Michigan Indigent Defense Commission (MIDC), and authorized it to develop a set of minimum standards for indigent criminal defense in Michigan. For further background on the Indigent Defense Advisory Commission and the MIDC, please see the Senate Fiscal Agency Summer 2013 *State Notes* article entitled *Indigent Criminal Defense in Michigan: A New Approach*.¹

The MIDC has released a total of eight standards, the first four of which were approved in May 2017. The four approved standards are as follows:

- **Education and Training of Defense Counsel.** This standard requires counsel to have reasonable knowledge of Michigan and Federal law, to have reasonable knowledge of forensic and scientific issues that may arise in a criminal case, to be reasonably able to use applicable technology, and to complete annual continuing legal education courses.
- **Initial Interview.** This standard requires that counsel conduct a client interview as soon as practicable and conduct subsequent interviews as necessary. Client interviews must be held in a private and confidential setting. Additionally, the standard requires counsel to obtain any relevant documents, and to conduct an assessment of the client's status.
- **Investigation and Experts.** This standard requires counsel to conduct an independent investigation of the charges and to request funds to retain an investigator and/or experts to assist with the client's defense, when appropriate. The standard also states that counsel has a continuing duty to evaluate a case for appropriate defense investigation or expert assistance.
- **Counsel at First Appearance and Other Critical Stages.** This standard requires that counsel be assigned as soon as a defendant is determined to be indigent, and that indigent defendants have appointed counsel at pre-trial proceedings and other critical stages, both in and out of court.

Cost of the First Four MIDC Standards

Public Act 93 of 2013 specified that the cost to implement minimum standards set by the MIDC would be covered by the State, and that local indigent defense systems must submit their plans for compliance not later than 180 days after the approval of a standard. As the first four standards were approved in May 2017, all 134 local ID systems had submitted compliance plans and cost analyses for the first four standards by November 2017. The total of those cost analyses was \$85,250,902.

¹ Available online at:
<http://www.senate.michigan.gov/sfa/publications%5Cnotes%5C2013notes%5Cnotessum13sl.pdf>



Certain types of costs were disallowed by the MIDC. Those included additional prosecution staff, ancillary staff not directly related to providing ID services, and construction projects over \$25,000. The MIDC also assumed an additional 10% discretionary reduction for costs not yet identified. Table 1, below, details the initial estimate from the MIDC and the State Budget Office.

Table 1

MIDC Grant Amount Calculation	
Total local requests	\$85,250,902
Less prosecution staff	(3,578,986)
Less ancillary staff	(9,352,259)
Less construction over \$25k	(4,699,704)
Subtotal MIDC cost estimate	\$67,619,953
Less 10% discretionary reduction	(6,761,995)
Total MIDC cost estimate	\$60,857,958

The State Budget Office took the cost estimate of \$60.9 million and subtracted \$15.3 million in assumed partially indigent collections (detailed later), leaving \$45.6 million that would be necessary from the State General Fund. That number was rounded to \$46.0 million, which, in combination with \$15.3 million in partially indigent revenue, totals the Governor's recommendation of \$61.3 million for these grants.

The MIDC is still in the process of reviewing plans and cost analyses. Of the 134 systems, 16 have had both their compliance plans and their cost analyses approved. As time goes on, more systems will likely have their plans and cost analyses approved, which will give a clearer picture of the amount of funding that will be needed to implement these standards.

Partially Indigent Collections

Partially indigent revenue is collected when a defendant who purports to be indigent is found to have the means to have paid for at least some portion of his or her own defense. Once this discovery is made, the ID system will pursue reimbursement for its costs to defend that defendant.

Part of the Governor's proposal for MIDC grants is to amend statute to redirect 90% of partially indigent collections to the State. The State would then use those funds, in combination with the State General Fund, to pay grants back to local indigent defense systems to cover their costs related to MIDC standards.

There is currently no standard for the means an ID system may undertake to make partially indigent collections, which means that some systems have very robust and successful collection programs that generate a significant amount of revenue, while others do not. Generally, larger systems with a significant number of partially indigent defendants will have a greater incentive to pursue these collections than a smaller one would, as the system must incur certain costs to make the collections (staff time, mailing, etc.), or simply sell the accounts to a collection agency for what likely would be pennies on the dollar.

The argument for this portion of the Governor's proposal is that the costs incurred for providing criminal defense for partially indigent defendants are a part of the statutory calculation for the local share, but the collections the ID systems make on those partially indigent defenders are not. By

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not including those collections in the local share, an ID system is able to effectively pay less than its local share, as it is receiving a reimbursement for a portion of the costs that comprise the local share. For example, an ID system spends \$300,000 on indigent defense, spends \$150,000 on partially indigent defense, receives \$75,000 in collections from those partially indigent defenders, and has a total system spending plan approved by the MIDC of \$750,000. Deducting the reimbursements, the effective local share is \$375,000. Table 2, below, details this example.

Table 2

Effective Local Share Under Current Law	
Indigent defense	\$300,000
Partially indigent defense	\$150,000
Statutory - Local indigent defense share	\$450,000
Less 100% partially indigent collections retained by ID system (total \$75,000)	(\$75,000)
Effective - Local indigent defense share	\$375,000
Additional costs for MIDC compliance for first four minimum standards.....	\$300,000
TOTAL MIDC approved plan	\$750,000
Statutory - Local indigent defense share	\$450,000
State MIDC grant	\$300,000
<i>GF/GP</i>	\$300,000
<i>Local partially indigent collections</i>	\$0

Under the Governor's proposal to require 90% of partially indigent collections to be remitted to the State, the example would be as shown in Table 3.

Table 3

Effective Local Share Under Governor's Proposal	
Indigent defense	\$300,000
Partially indigent defense	\$150,000
Statutory - Local indigent defense share	\$450,000
Less 10% partially indigent collections retained by ID system (total \$75,000)	(\$7,500)
Effective - Local indigent defense share	\$442,500
Additional costs for MIDC compliance for first four minimum standards	\$300,000
TOTAL MIDC approved plan	\$750,000
Statutory - Local indigent defense share	\$450,000
State MIDC grant	\$300,000
<i>GF/GP</i>	\$232,600
<i>Local partially indigent collections (90%)</i>	\$67,500

It should be noted that the example under both current law and the Governor's proposal assumes that the local unit spends all of its partially indigent collections on indigent criminal defense.

Representatives of various local units of government have raised a number of issues with the Governor's proposal.

The first is that requiring 90% of partially indigent collections to be remitted to the State would create a disincentive for ID systems to attempt to make these collections, as the cost of undertaking collections is fixed, and still would fall entirely on the ID system. The counterargument is that the Governor's proposal would create standards for partially indigent collections to ensure that those collection practices are continued. However, the standards for those collections could themselves result in additional costs - particularly for small ID systems that would have little revenue to gain and subsequently remit to the State by increasing collection efforts.

The second argument is related to the first. Since much of the total universe of partially indigent collection revenue is generated by a few of the State's largest ID systems, the proposal effectively would redistribute that revenue, and make the systems that generate most of the revenue worse off, and the systems that do not generate much revenue better off. Aside from being an issue of perceived fairness, it would create a disincentive for the larger ID systems to continue their current collection practices.

The third argument is that the exclusion of partially indigent collections from counting toward the local share was intentional, and was included as an incentive for ID systems to be able to offset a portion of their costs. The counterargument is that when the legislation creating the MIDC was enacted, this revenue was assumed to be minimal - less than \$1.0 million per year statewide, and hence it was not worth attempting to account for that revenue when calculating each ID system's local share. Later, it was discovered that total partially indigent collections statewide are about \$17.0 million per year. The validity of this argument or the Governor's counterargument is difficult to determine.

Calculating the Local Share

Under current law, local indigent defense systems are required to continue to pay a local share, which is calculated as the average of their expenditures for indigent defense, not including partially indigent collections, for the three fiscal years prior to the creation of the MIDC. This local share is similar to the concept of a maintenance-of-effort requirement that applies to some other programs, particularly those that are federally funded. Going forward, then, ID systems will pay a constant amount, determined by taking the average of their ID expenditures for fiscal years 2009-10, 2010-11, and 2011-12. This amount is not adjusted for inflation.

The Governor has proposed to effectively increase this amount by establishing a floor of \$7.25 per capita, and adjusting this amount for inflation. From the limited available data, this would increase the local share of ID systems. Table 4, below, details the impact of this proposed change on ID systems with compliance plans and cost analyses that have been approved to date. It is important to note that the savings to the State and increased cost to locals that would occur under this proposal are not assumed as part of the \$61.3 million included in the Governor's recommendation for the fiscal year 2018-19 budget.



Table 4

Change in Local Share under Governor's Proposal							
ID System	Population	Total System Cost	Current Local Share	Local Share (\$7.25 per capita min.)	Local Share Increase	Current Approved Grant	Grant Based on New Local Share
Alcona County	10,352	\$150,106	\$40,129	\$75,052	\$34,923	\$109,069	\$75,054
Allegan and Van Buren Counties	190,771	2,746,775	529,260	1,383,090	853,830	2,217,515	1,363,685
Alpena County	28,704	579,002	159,845	208,104	48,259	419,157	370,898
Ann Arbor (Dist. 15)	120,782	399,184	202,062	875,670	673,608	197,122	0
Cass County	51,599	349,240	248,867	374,093	125,226	100,373	0
Chippewa County	37,724	505,268	219,544	273,499	53,955	285,724	231,769
Emmet County	33,182	457,360	159,324	240,570	81,246	298,036	216,791
Huron County	31,481	286,376	79,426	228,237	148,812	206,841	58,139
Lapeer County	88,174	483,783	107,480	639,262	531,781	376,303	0
Livingston County	188,624	1,390,173	916,689	1,367,524	450,835	473,484	22,649
Montmorency County	9,250	255,173	16,551	67,063	50,512	238,622	188,111
Muskegon County	173,408	1,580,029	662,294	1,257,208	594,914	917,735	322,821
Ogemaw County	20,981	458,830	144,667	152,112	7,445	314,163	306,718
Oscoda County	8,287	275,237	53,168	60,081	6,913	222,069	215,156
Southgate (Dist. 28)	<u>29,085</u>	<u>205,488</u>	<u>4,586</u>	<u>210,866</u>	<u>206,280</u>	<u>200,902</u>	<u>0</u>
TOTAL	1,022,404	\$10,122,025	\$3,543,892	\$7,412,429	\$3,868,537	\$6,577,115	\$3,371,790

Conclusion

Providing funding for local compliance with the MIDC's standards for indigent criminal defense is an issue that the Legislature will have to address during the budget process each year for the foreseeable future. For fiscal year 2018-19, the costs submitted by local ID systems total \$85.3 million, and the Governor's recommendation is to include \$61.3 million for grants to cover those costs and make statutory amendments to address the State's exposure to the costs. As the MIDC works to approve the compliance plans and cost analyses for additional local ID systems, the true cost of the standards will become more apparent. Whatever the actual number, it will cover only the four standards that have been fully vetted through the MIDC and the process prescribed in statute. There are currently four additional standards the MIDC is working on, and if approved, each will result in additional costs that will have to be factored into the State budget, likely on an ongoing basis.