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BILL ANALYSIS

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House Bill 4630 (Substitute H-3 as passed by the House)
Sponsor: Representative Sarah Lightner
House Committee: Criminal Justice
Senate Committee: Committee of the Whole

Date Completed: 10-19-23

## INTRODUCTION

Generally, the bill would specify that indigent defense systems would serve indigent adults and indigent youth. It would expand the Michigan Indigent Defense Commission's (MIDC) membership to include an attorney with experience defending youth. It also would establish a formula for determining an indigent defense system's share of costs for representing indigent youth. It would require the MIDC to distribute grant awards in four installments, the first totaling 40% of the award, the subsequent three totaling 20% of the award each. It also would require the MIDC to continually review and approve documentation by the system to distribute grant installments. Additionally, the bill would delete current standards for determining indigency, require the MIDC to establish new standards, and require the MIDC to establish further procedures for resolving a dispute with a noncompliant indigent defense system.

The bill would take effect October 1, 2024.

## BRIEF FISCAL IMPACT

The bill would have a significant negative fiscal impact on the Department of Licensing and Regulatory Affairs (LARA) and an indeterminate fiscal impact on local units of government. The costs to LARA would be expended by the MIDC.

## PREVIOUS LEGISLATION

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

The bill is a companion bill to Senate Bill 424.

MCL 780.983 et al.

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**CONTENT**

**The bill would amend the Indigent Defense Commission Act to do the following:**

**-- Specify that the MIDC would serve indigent adults and indigent youths.**
**-- Modify the certain definitions to delete the term "criminal".**
**-- Delete certain requirements that would qualify an individual as indigent.**
**-- Expand the MIDC from 18 members to 19 members.**
**-- Allow the MIDC to email certain notices to indigent defense systems.**
**-- Prohibit youth from waiving the right to counsel unless the youth were advised on the consequences of waiver and the waiver was made on the record and in writing.**
**-- Prescribe requirements for MIDC grant installments to an indigent defense commission.**
**-- Require the MIDC to establish procedures to resolve specified disputes with a noncompliant defense system.**

Modified & Added Definitions

Under the Act, "indigent" means an individual who meets certain conditions under Section 11(3). Instead, under the bill, "indigent" would mean an inability to obtain competent legal representation for oneself without substantial financial hardship to oneself or one's dependents, as determined using standards and procedures under the Act.

"Indigent criminal defense services" means local legal defense services provided to a defendant and to which the following apply:

-- The defendant is being prosecuted or sentenced for a crime for which an individual may be imprisoned upon conviction, beginning with the defendant's initial appearance in court to answer to the criminal charge.
-- The defendant is determined to be indigent.

The term does not include services authorized to be provided under the Appellate Defender Act.

The bill would modify the term. It would delete "criminal" from "indigent criminal defense system" and the term would refer instead to "indigent defense services." Under the bill, the term would mean local legal defense services provided to any of the following:

-- *An indigent adult* who is being prosecuted or sentenced for a crime for which the adult may be imprisoned upon conviction, beginning no later than the initial appearance in court to answer to the criminal charge.
-- *An indigent youth* who is, or is alleged to be, under the jurisdiction of the court under Section 2(a), 2(d), or 2(h) of the juvenile Code, beginning no later than the youth's first appearance in court.

(Generally, under the juvenile Code, Section 2(a) provides the family court with exclusive original jurisdiction in proceedings concerning juveniles under most conditions. Section 2(d) specifies that a family court will have concurrent jurisdiction if the court finds that voluntary services have been exhausted or refused for a juvenile between 17 and 18 years of age facing drug or alcohol addiction, criminal association, involvement in illicit activities, or disobedience

to authority. Section 2(h) gives the family division of a circuit court jurisdiction over the issuance of personal protection orders concerning minors.)

The term would not include services authorized to be provided under the Appellate Defender Act or *services provided by a lawyer-guardian ad litem under Section 17c(7) to (10) of the juvenile Code.* (Section 17c(7) to (10) of the juvenile Code specifies the procedures for appointing a guardian that represents the child's legal interests in certain legal proceedings.)

"Local share" or "share" means an indigent criminal defense system's average annual expenditure for indigent defense services in the three fiscal years immediately preceding the creation of the MIDC, excluding money reimbursed to the system by individuals' determined to be partially indigent. If the Consumer Price Index (CPI) has increased since November 1, of the prior State fiscal year, the local share must be adjusted by that number or by 3%, whichever is less. The bill would modify this definition, and instead, the term would mean an indigent defense system's average annual expenditure for indigent adult defense services in the three fiscal years immediately preceding the creation of the MIDC *and indigent youth defense services in the three fiscal years immediately preceding January 1, 2024.*

"Youth" would mean an individual who is less than 18 years of age and who is subject to delinquency petition.

Indigent Defense Service Minimum Standards

The MIDC is an autonomous entity within LARA and is responsible for proposing minimum standards for the local delivery of indigent defense services. The bill would specify that these services would apply to adults and youth.

Once approved, a minimum standard is final. Under the bill, the MIDC could amend an approved minimum standard at any time. If a proposed minimum standard had been recommended to LARA but not yet approved or rejected, the MIDC could modify the proposed standard. If the MIDC modified the standard, the MIDC would have to reconvene a public hearing before recommending the modified standard to LARA.

MIDC Membership

Under the Act, the MIDC includes 18 voting members appointed by the Governor and the Supreme Court Chief Justice or his or her designee who serves as an ex officio member without a vote. Under the bill, the MIDC would include 19 members and the Supreme Court Chief Justice or his or her designee. The Governor would have to appoint the 19th member from a list of three names submitted by the children's law section of the State Bar of Michigan who was experienced in defending youth in delinquency proceedings. Additionally, the Governor would have to appoint at least two individuals who were licensed attorneys and at least one individual with substantial knowledge of the juvenile justice system, replacing a requirement that the Governor appoint at least two individuals who are not attorneys.

The Act specifies that appointed members of the MIDC must have significant experience in the defense or prosecution of criminal proceedings or have demonstrated a strong commitment to providing effective representation in indigent defense services. The bill would specify that an appointed member of the MIDC would have to have one of the qualifications listed above or have significant experience in the defense or prosecution of youth in juvenile proceedings.

The Act requires the MIDC to establish minimum standards, rules, and procedures to effectuate the following provisions:

-- The delivery of indigent services must be independent of the judiciary but ensure that judges are permitted and encouraged to contribute information and advice concerning the delivery.
-- If the caseload is sufficiently high, the services may consist of the defender office and the active participation of other members of the State Bar.
-- Trial courts must ensure that each criminal defendant is advised of the right to counsel.
-- All adults, except those appearing with retained counsel or those who have made an informed waiver of counsel, must be screened for eligibility under the Act and counsel must be assigned as soon as an indigent adult is determined eligible.

Under the bill, youth could not waive the right to counsel without first consulting with counsel on the consequences of waiver. If a youth waived the right to counsel, it would have to be on the record and in writing.

Appointment of Indigent Criminal Defense Services

The Act prescribes requirements for the application and appointment of indigent criminal defense services. Generally, there must be a preliminary inquiry regarding the determination of the indigency of any defendant; the determination is made by considering the defendant's ability to pay. The defendant is considered indigent if he or she is unable, without substantial financial hardship, to obtain competent, qualified legal representation which is presumed based on certain criteria, such as the dependent earning less than 140% of the Federal poverty guidelines, receiving certain public assistance, or currently serving a sentence in a correctional facility, among other things. Additionally, the Act prescribes the process for determining whether a defendant is partially indigent.

The bill would delete these provisions. Instead, the MIDC would have to establish standards and procedures of indigency.

Partially Indigent Reimbursement

Under the Act, a court must collect money from individuals determined to be partially indigent. The court must remit all the funds collected to the indigent defense system in which the court sits, and 20% of these remitted funds must go to LARA. The MIDC must spend the funds received by LARA in support of indigent criminal defense systems in the State. Under the bill, the MIDC would have to spend the funds received by LARA to implement the MIDC's minimum standards and to ensure that indigent defense systems complied with the minimum standards.

MIDC Plan or Cost Analysis

After a standard is approved, each system must submit a plan for the provision of indigent services to the MIDC. The plan must address how the minimum standards will be met and include a cost analysis. Within 60 days after a plan and cost analysis are submitted, the MIDC will have to approve or disapprove the plan or cost analysis, or both. If the MIDC disapproved one or both, the system must consult with the MIDC and submit a new plan or cost analyst within 30 days of the mailing date of the notice of disapproval. The bill would specify that the notice of disapproval could be emailed.

If the MIDC approves a plan, it will provide the indigent defense system with a grant to pay the approved costs for developing the plan and cost analysis. The bill would prohibit the MIDC from making a grant to an indigent defense system unless the system had an approved plan and cost analysis. The first installment to an indigent defense system would have to be 40% of the system's grant award. The three subsequent installments would have to be 20% of the total grant award each. After the first grant installment, the three subsequent grant installments would have to be based on the MIDC's review and approval of documentation provided by the indigent defense system, including documentation of expenditures and unexpended funds. The indigent defense system's documented expenditures for the prior quarter would have to be at least 25% of the total plan and cost analysis. The MIDC could allow an indigent defense system to request to be exempt from these requirements for unforeseeable conditions that could prohibit timely expenditure processing by the system.

Compliance Dispute Process

The Act requires the MIDC to establish procedures for the conduct of its affairs and promulgate policies necessary to carry out its powers and duties. Under the bill, the MIDC would have to establish resolution procedures related to a dispute with an indigent defense system that did not comply with the following requirements of the Act:

-- The system, and attorneys engaged in providing indigent defense services within the system, must cooperate and participate with an MIDC investigation, audit, and review of the system's services in an effort to make certain that the system meets MIDC standards.
-- Every local unit of government that is part of an indigent defense system must comply with an approved plan under the Act.

The procedures would have to be on a public website. If a dispute concerning compliance could not be resolved through the MIDC resolution procedure, the MIDC or indigent defense system could bring an action seeking equitable relief in the circuit court within 30 days of the MIDC's determination that the system had breached its duty to comply with any of the following:

-- An approved plan.
-- A cost analysis.
-- A grant contract provision.
-- Noncompliance with the provisions listed above.

**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 Department of Health and Human Services. 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.[1]

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

[1] Executive Order 2021-6.

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 recommended that the MIDC be expanded to include development, oversight, and compliance with youth defense standards in local county defense systems.[2]

**FISCAL IMPACT**

The bill would adjust the formula used to calculate each adult indigent defense system's local share in upcoming fiscal years. Currently, the local share is based on each individual system's average annual expenditure on indigent defense services in the three fiscal years prior to July 2013, minus any funds reimbursed to the systems by indigent defendants. If the CPI increased in the prior State fiscal year, the figure is adjusted by that number or 3%, whichever is less. The bill would revise this formula to remove the subtraction of reimbursed funds.

Based on the time that was required to develop standards and implement the grants program for adult indigent defense standards, the MIDC estimates that appropriations for juvenile justice services compliance would not be required for several fiscal years, likely in Fiscal Year (FY) 2026-27 or FY 2027-28.

The bill would add new language requiring the first grant installment paid to a system to be equal to 40% of its total award. The three subsequent payments would each be equal to 20% of the total. Payment of these installments would depend on the MIDC's review of the system's submitted documentation. The system would need to have spent at least 25% of its total plan and cost analysis in the prior quarter, although a system would be able to request an exemption if special circumstances delayed or prevented expenditures.

The MIDC estimates that it would require an addition 6.0 FTEs to undertake research, standard development, and grants planning beginning in FY 2024-25. This would include two staff for research and grant specialization as well as four field attorneys. Six FTEs would require an additional annual appropriation of approximately $825,000, based on the average FTE cost of $137,500 per year.

The cost to the State of funding future juvenile justice services compliance grants is unknown. The MIDC has estimated that the total costs would equal approximately 60% of the current adult costs, inclusive of the local share; however, this number could vary significantly depending on the adopted standards and the individual characteristics of the local juvenile justice systems that would have to reach compliance.

The specific costs of each system's local share would depend on their expenditures on indigent youth defense services in the three fiscal years prior to January 1, 2024. After the initial year of grant funding, this figure would be adjusted by the previous fiscal year's CPI increase or 3%, whichever was less.

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

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.