

Legislative Analysis



DEFENSE SERVICES FOR INDIGENT YOUTH

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House Bill 4070 as introduced
Sponsor: Rep. Sarah Lightner
Committee: Judiciary
Complete to 3-12-25

Analysis available at
<http://www.legislature.mi.gov>

SUMMARY:

House Bill 4070 would amend the Michigan Indigent Defense Commission Act to do all of the following, in addition to related changes described below:

- Expand the scope of the act and responsibilities of the Michigan Indigent Defense Commission (MIDC) to include legal representation for indigent youth in the juvenile justice system. (In this context, “indigent” generally describes someone who cannot afford to contribute to their legal defense. It is particularly determined under the act as described below.)
- Require the MIDC to develop minimum standards for the local delivery of defense services providing effective assistance of counsel for indigent youth.
- Require the MIDC to establish standards and procedures for the determination of indigency.
- Provide procedures for modifying proposed or approved MIDC minimum standards.
- Revise the MIDC membership and qualifications for membership.

The act established the MIDC to develop and oversee the implementation of minimum standards for the effective representation of indigent adults by local indigent criminal defense systems (the local governments that fund trial courts). These minimum standards address, for example, attorney training, compensation, independence from the judiciary, and workloads.¹ Each local system pays a share toward providing indigent services that meet the minimum standards, with the state providing funding when the cost of meeting a minimum standard exceeds a local system’s share. The local system’s share is based on the amount it spent for indigent defense services before the act took effect. The local system must work with MIDC to develop a plan and cost analysis for meeting the minimum standards. MIDC then can provide grants to cover the costs in meeting those standards that exceed that local system’s share. Local units of government and trial courts must comply with a system’s approved plan. A local system must maintain its local share of indigent defense spending. The act provides mechanisms for resolving disputes regarding a system’s provision of the required services.

In general, the bill would add legal representation of indigent youth in the juvenile justice system to the processes and procedures described above, which now apply only to the defense of indigent adults (or minors charged as adults) in the criminal justice system.

Definition of “indigent” and determination of indigency

Currently, the term *indigent* as used in the act means meeting one or more of the conditions described in section 11(3), which prescribes factors and thresholds to consider when making a determination of indigency and requires the MIDC to issue objective standards to be used in

¹ <https://michiganidc.gov/standards/>

determining whether a defendant is indigent or partially indigent (and thus able to contribute some amount toward their defense).² Among other things, section 11(3) provides that a defendant is considered to be indigent if the defendant is unable, without substantial financial hardship to themselves or their dependents, to obtain competent, qualified legal representation on their own.

The bill would replace the determination of indigency provisions in section 11(3) with a requirement that the MIDC establish standards and procedures for determinations of indigency, and it would define *indigent* as meaning an inability to obtain competent legal representation for oneself without substantial financial hardship to oneself or one's dependents, as determined using those standards and procedures established by the MIDC.

Scope of indigent defense services

Currently under the act, *indigent criminal defense services* means local legal defense services provided to a defendant who is determined to be indigent under section 11(3) (as described above) and who is being prosecuted or sentenced for a crime for which they may be imprisoned upon conviction, beginning with the defendant's initial appearance in court to answer to the criminal charge.

The bill would change the term used to *indigent defense services*³ and define it as local legal defense services provided to either of the following:

- An indigent *adult* who is being prosecuted or sentenced for a crime for which they may be imprisoned upon conviction, beginning not later than their 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), (d), or (h) of the juvenile code (Chapter XIIA of the Probate Code), beginning not later than their initial appearance in court.⁴

Adult means an individual 18 years old or older. Under any of the following conditions, an individual under 18 years old at the time of the commission of a felony is also an *adult* for purposes of the act:⁵

- During consideration of a petition filed under section 4 of the juvenile code to waive jurisdiction to try the individual as an adult and upon granting a waiver of jurisdiction.

² See <https://www.legislature.mi.gov/Laws/MCL?objectName=mcl-780-991>

³ The bill would change “indigent criminal defense” to “indigent defense” throughout the act, as in the terms *indigent defense system* and *indigent defense services*. These changes appear to reflect the bill's proposed inclusion of juvenile adjudications in the scope of the act. Juvenile adjudications are not criminal prosecutions.

⁴ See <https://legislature.mi.gov/Laws/MCL?objectName=MCL-712A-2>. Generally speaking, section 2(a) pertains to individuals under the age of 18 who are accused of violating a law or ordinance or of committing a *status offense* (an offense, such as truancy or being a runaway, that is an offense because of their status as a minor—i.e., is not an offense for adults). The provisions of section 2(d) are sometimes called “wayward minor” provisions and pertain to 17-year-olds found to engage, or repeatedly engage, in certain specified behaviors, such as problematic drinking or drug use or associating with prostitutes or thieves. Section 2(h) pertains to personal protection order (PPO) proceedings in which an individual under 18 years old is the respondent (the person the PPO would restrain).

⁵ As described here, the act already applies to individuals under 18 years old under the listed conditions (essentially, when tried as an adult). The bill would expand the scope of the act to include individuals under 18 years old who are the subject of a delinquency petition (called *youth* in the bill).

- The prosecuting attorney designates the case under section 2d(1) of the juvenile code as a case in which the juvenile is to be tried in the same manner as an adult.
- During consideration of a request by the prosecuting attorney under section 2d(2) of the juvenile code that the court designate the case as a case in which the juvenile is to be tried in the same manner as an adult.
- The prosecuting attorney authorizes the filing of a complaint and warrant for a specified juvenile violation under section 1f of chapter IV of the Code of Criminal Procedure.

Youth would mean an individual who is under 18 years old and is the subject of a delinquency petition (a petition alleging they come under the provisions of section 2 of the juvenile code or have violated probation).

In addition, the act now provides that indigent defense services do not include services authorized to be provided under the Appellate Defender Act. The bill would add that indigent defense services also do not include services provide by a lawyer-guardian at litem under sections 17c(7) to (10) and 17d of the juvenile code.⁶

Waiver of right to counsel and assignment of counsel

The act currently requires trial courts to assure that each criminal defendant is advised of their right to counsel. It also requires that all adults, except those appearing with retained counsel or who have made an informed waiver of counsel, must be screened for eligibility (indigency), and that counsel must be assigned as soon as an indigent adult is determined to be eligible for indigent criminal defense services. (The reference to *adults* includes minors charged as adults.)

The bill would require trial courts to ensure that each defendant *or youth* is advised of the right to counsel. The bill would also newly provide that a defendant or youth cannot waive the right to counsel without first consulting with counsel on the consequences of waiver. If a defendant or youth waives the right to counsel, it would have to be on the record and in writing.

The bill would further provide that, except for a defendant⁷ appearing with retained counsel or who has made an informed waiver of counsel, each defendant must be screened for eligibility (indigency) under the act, and counsel must be assigned as soon as an indigent defendant is determined to be eligible for indigent defense services.

Local share

Currently, a system's local share means its average annual expenditure for indigent criminal defense services in the three fiscal years immediately preceding the creation of the MIDC under the act (which took effect July 1, 2013), excluding money reimbursed to the system by individuals determined to be partially indigent.

⁶ <http://legislature.mi.gov/doc.aspx?mcl-712A-17c> and <http://legislature.mi.gov/doc.aspx?mcl-712A-17d> Generally speaking, these provisions apply to lawyers-guardians ad litem who are appointed to represent the interests of minors who are under the jurisdiction of the court for their own protection or custodial support and care.

⁷ The term *defendant* is not defined by the bill. However, it appears to *not* include youth (juveniles in an adjudication proceeding), given that the previous provision refers to a "defendant or youth," implying that they are different categories.

The bill would add to this amount the system's average annual expenditure for indigent youth defense services in the three fiscal years immediately preceding the fiscal year in which the bill takes effect. Under both the bill and current law, the local share is annually inflation-adjusted by up to 3%.

Grants

The bill would add a new section to the act to provide for all of the following related to grants under the act:

- The MIDC could not make a grant unless the indigent defense system has an approved plan and cost analysis.
- The grants would be provided in four installments, with the first being 40% of the indigent defense system's grant award, and the three subsequent grant installments being 20% of the grant award.
- The three later grant installments described above would be based on the MIDC's review and approval of documentation provided to the MIDC by the indigent defense system, including documentation of expenditures and unexpended funds. The bill would require that the indigent defense system's documented expenditures for the prior quarter must be at least 25% of the total approved plan and cost analysis.
- The MIDC could allow an indigent defense system to request to be exempt from the above requirements for unforeseeable conditions that could prohibit the system's timely expenditure processing.

Modification of minimum standards

The bill would add language allowing the MIDC to amend an approved minimum standard at any time in accordance with the procedures set forth in the act for proposing a minimum standard. In addition, the MIDC could modify a proposed minimum standard that has been submitted to the Department of Licensing and Regulatory Affairs (LARA), as provided for in those procedures, but has not yet been approved or rejected. The MIDC would have to convene a public hearing before submitting to LARA any proposed minimum standard that was modified under these provisions.

Dispute resolution procedures

The bill would require the MIDC to establish procedures related to resolving a dispute with an indigent defense system that is not in compliance with section 13 or 17 and make those procedures available on a public website.⁸ If a dispute between the MIDC and an indigent defense system concerning compliance with section 13 or 17 cannot be resolved through these dispute resolution procedures, the MIDC or system could bring an action seeking equitable relief in the circuit court only as follows:⁹

- Not later than 60 days after the MIDC's issuance of an approved plan and cost analysis.

⁸ These sections, generally speaking, require a local system to develop and comply with a plan and cost analysis approved by MIDC for meeting the minimum standards for indigent defense services. Both sections are included in, and would be amended by, the bill.

⁹ These provisions for bringing a court action are already in current law and apply in cases when a dispute arises between the MIDC and a local system concerning the approval of an annual plan or cost analysis. The act prescribes a mediation process to resolve such disputes, and allows the MIDC or local system to bring an action described above is aggrieved by the final plan or cost analysis. However, although these provisions are already in the law, the bill would newly add the last three items bulleted above to the breach-of-duty provision (i.e., noncompliance with a cost analysis, a grant contract provision, or a provision of section 13 or 17).

- Not later than 60 days after the system receives grant funds, if the plan, cost analysis, or both, required a grant award for implementation of the plan.
- Not later than 30 days after the MIDC’s determination that the indigent defense system has breached its duty to comply with any of the following:
 - An approved plan.
 - A cost analysis.
 - A grant contract provision.
 - A provision of section 13 or 17.

Michigan Indigent Defense Commission members

The MIDC currently consists of 18 voting members appointed by the governor to four-year terms from lists of candidates submitted by different specified individuals and groups, such as the Speaker of the House of Representatives, the State Budget Office, the Prosecuting Attorneys Association of Michigan, and the Michigan Association of Counties.¹⁰ The chief justice of the Michigan Supreme Court, or their designee, serves as a nonvoting member.

The bill would add a new voting member to the commission, giving it 19. The new member would have to be experienced in defending youth in delinquency proceedings and would be appointed from a list of three names submitted by the Children’s Law Section of the State Bar of Michigan.

Moreover, every individual nominated to serve on the MIDC now must either have significant experience in the defense or prosecution of criminal proceedings or have demonstrated a strong commitment to providing effective representation in indigent criminal defense services. The bill would allow, as a third option for qualification, nominated individuals to have significant experience in the defense or prosecution of youth in juvenile proceedings.

The bill also would specifically require that at least one of the 19 appointed members of the MIDC have substantial knowledge of the juvenile justice system.

Finally, an individual who receives compensation from the state or an indigent defense system for either prosecuting or representing indigent adults in state courts is now ineligible to serve on the MIDC. The bill would also bar those who receive that compensation for prosecuting or representing indigent youth.

MCL 780.983 et seq. and proposed MCL 780.994

The bill would take effect on the first October 1 that follows its enactment.

BACKGROUND:

Right to counsel

The right of the accused in a criminal prosecution to have the assistance of counsel for their defense is included in the Sixth Amendment to the United States Constitution and has similarly been included in every Michigan constitution since the state’s founding in 1835. (The provision is currently in section 20 of Article I of the state constitution.) In 1963, the U.S. Supreme Court

¹⁰ <https://michiganidc.gov/michigan-indigent-defense-commission/>

unanimously held in *Gideon v Wainwright* that the Sixth Amendment right to legal counsel requires states and the federal government, as applicable, to provide an attorney to a criminal defendant who cannot afford to hire a lawyer. Four years later, in *In re Gault*, the Court held that juveniles accused of crimes in a delinquency proceeding also have many due process rights held by adults, including the right to representation by legal counsel.

Juvenile justice task force

The Michigan Task Force on Juvenile Justice Reform was created by Executive Order 2021-6 as a bipartisan advisory body in the Department of Health and Human Services¹¹ to “lead a data-driven analysis of [Michigan’s] juvenile justice system and recommend proven practices and strategies for reform grounded in data, research, and fundamental constitutional principles.” In particular, in the words of its final report,¹² the task force was “charged with developing recommendations to improve state law, policy, and appropriations guided by the following objectives:

- Safely reduce placement in detention and residential placement and associated costs.
- Increase the safety and well-being of youth impacted by the juvenile justice system.
- Reduce racial and ethnic disparities among youth impacted by the juvenile justice system.
- Improve the efficiency and effectiveness of the state’s and counties’ juvenile justice systems.
- Increase accountability and transparency within the juvenile justice system.
- Better align practices with research and constitutional mandates.”

The task force issued its final report on July 18, 2022.¹³

Among the task force’s findings was that “Michigan has no centralized structure and minimal standards, supports, or resources for juvenile public defense statewide.” The task force also found both of the following:

- There is no statewide system nor are there standards or monitoring processes in place to ensure that youth in the juvenile justice system receive adequate defense services.
- Lack of statewide funding for juvenile defense has resulted in significant variation in local systems in terms of accessibility to trained, qualified defenders; the types of services that are available; and when in the court process counsel is appointed.

Among the task force’s unanimous recommendations was that the state “[e]xpand the Michigan Indigent Defense Commission (MIDC) to include development, oversight, and compliance with youth defense standards in local county defense systems.” The task force also made the following additional recommendations:

- The MIDC should align current standards, or develop new ones, with specific consideration for the representation of youth in the juvenile justice system, including specialized training on trauma, youth development, cultural considerations, scope of representation and role of counsel, and other key standards.
- The MIDC should include members knowledgeable about indigent youth defense.

¹¹ <https://www.legislature.mi.gov/documents/2021-2022/executiveorder/pdf/2021-EO-06.pdf>

¹² <https://micounties.org/wp-content/uploads/Michigan-Taskforce-on-Juvenile-Justice-Reform-Final-Report.pdf>

¹³ <https://www.michigan.gov/whitmer/news/press-releases/2022/07/18/task-force-on-juvenile-justice-reform-approves-blueprint-for-transforming-juvenile-justice>

- Standards should address the scope of representation, including appointment at the first stage of consent or formal proceedings and at every stage until the case is terminated. Youth should have counsel at the first stage of juvenile proceedings.
- Restrictions on the waiver of counsel in delinquency cases should be built into the statute or court rules and include consultation with an attorney before waiving the right.

Previous legislation

This bill is similar to both House Bill 5630 and Senate Bill 424 of the 2023-24 legislative session, which were each part of a larger group of bills intended to implement different task force recommendations, several of which were enacted into law.

As introduced, House Bill 4070 and Senate Bill 81 of the current legislature are identical.

FISCAL IMPACT:

House Bill 4070 would lead to increased costs for the MIDC and for MIDC Grants, which are distributed to district and circuit court funding units to fund compliance with minimum indigent defense standards. Expanding indigent defense services to include services for youth defendants would necessitate additional funding for the grants, since the population of eligible defendants would increase. The MIDC indicated that youth caseloads are currently estimated to be less than 10% of adult caseloads. The MIDC estimates the total cost of implementing minimum standards for youth defense services would be about \$53.9 million, noting that the actual cost increase would depend on numerous factors. The total cost is not expected to be necessary until all standards are developed and approved, which the MIDC anticipates would take at least four years after the bill is enacted. It should also be noted that MIDC Grants are funded almost entirely with general fund revenues.

The MIDC expects to require additional staff as well, though the number of additional FTEs is currently unknown.

The bill would increase the local share for funding units of circuit and district courts by including expenditures for indigent youth defense in the calculation. While this would not create any new costs for the funding units, it would increase the share that funding units would have to maintain in order to receive state grant funding for adult and youth indigent defense.

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■ This analysis was prepared by nonpartisan House Fiscal Agency staff for use by House members in their deliberations and does not constitute an official statement of legislative intent.