



**Public Defense Services Commission ♦ Office of Public Defense Services**  
1175 Court St. NE ♦ Salem, OR 97301 ♦ [www.oregon.gov/opds](http://www.oregon.gov/opds) ♦ Phone: 503-378-3349 ♦ Fax: 503-378-4463

# Public Defense Services Commission

Office of Public Defense Services

Executive Director's Biennial Report to the  
Oregon Legislative Assembly  
July 1, 2013 – June 30, 2015

Nancy Cozine  
Executive Director  
(October 2015)

## Contents

<b>I. INTRODUCTION .....</b>	<b>3</b>
(A) AGENCY MISSION .....	3
(B) THE RIGHT TO COUNSEL .....	3
(C) ROLE IN JUVENILE AND CRIMINAL JUSTICE SYSTEMS.....	4
(D) OREGON’S PUBLIC DEFENSE DELIVERY MODEL .....	4
<b>II. AGENCY ORGANIZATION AND OPERATION.....</b>	<b>5</b>
<b>III. PDSC’S ACCOMPLISHMENTS IN 2013-2015 .....</b>	<b>7</b>
(A) CONTRACT SERVICES.....	7
(B) FINANCIAL SERVICES .....	7
(C) QUALITY ASSURANCE .....	7
1. <i>Statewide Surveys</i> .....	8
2. <i>Complaint Program</i> .....	8
3. <i>Contract Revisions</i> .....	8
4. <i>Peer Reviews</i> .....	9
5. <i>Service Delivery Reviews</i> .....	10
6. <i>Parent Child Representation Program</i> .....	10
(D) DIVERSITY TRAINING .....	11
(E) APPELLATE DIVISION.....	11
1. <i>Criminal Appellate Section</i> .....	12
2. <i>Juvenile Appellate Section</i> .....	13
<b>IV. PDSC’S CHALLENGES IN 2013 – 2015 .....</b>	<b>14</b>
(A) ENSURING QUALITY REPRESENTATION .....	14
(B) RECRUITMENT AND RETENTION .....	14
(C) COMPENSATION .....	14
(D) FUNDING FOR 2015-2017 .....	15
<b>V. CONCLUSION.....</b>	<b>16</b>
<b>APPENDIX A .....</b>	<b>17</b>

# *The Right to Counsel*

The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

*Gideon v. Wainwright*, 372 US 335, 344 (1963)

“The right to representation by counsel is not a formality. ...It is the essence of justice.”

*Kent v. United States*, 383 U.S. 541, 561 (1966).

## **I. Introduction**

The Public Defense Services Commission (PDSC) is an independent commission within the judicial branch of state government. In July of 2003 it assumed full responsibility for administering Oregon’s public defense system, which delivers trial level and appellate legal services in criminal, juvenile, civil commitment, post-conviction relief, and habeas corpus cases across the state.

### **(a) Agency Mission**

In carrying out its responsibilities, the PDSC’s mission is to establish and maintain a public defense system that ensures the provision of public defense services in the most cost-efficient manner consistent with the Oregon Constitution, the United States Constitution and Oregon and national standards of justice.<sup>1</sup>

### **(b) The Right to Counsel**

The legal services provided by PDSC represent an essential component of Oregon’s public safety system. Under the United States Constitution, the Oregon Constitution and Oregon statutes, financially eligible individuals charged with a crime, parents and children in abuse and neglect cases, and individuals facing involuntary commitment due to mental health concerns are entitled to representation by court-appointed counsel at trial and on appeal. During the 2013-2015

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<sup>1</sup> ORS 151.216(1)(a).

biennium, circuit and appellate courts appointed attorneys to represent clients in approximately 341,000 cases.

### **(c) Role in Juvenile and Criminal Justice Systems**

Court appointed attorneys defend the rights of all Oregonians by asserting the constitutional and statutory protections afforded to the criminally accused, family members who are involved in juvenile dependency or delinquency proceedings, and the rights of allegedly mentally ill persons, to ensure that they are not inappropriately deprived of their liberty or fundamental rights. Indeed, the state cannot legally prosecute crime, remove children from their parents, or involuntarily commit those in need of treatment without providing mandated representation to financially eligible individuals subject to these proceedings.

Defenders also contribute directly to public safety by (1) advocating for effective criminal sanctions that help clients avoid future involvement in the criminal justice system; (2) finding resources for families involved in dependency cases that help them avoid or limit disruption of the family unit, lead to reunification or, when reunification is not possible, help children find permanent safe and supportive homes; and (3) assisting allegedly mentally ill persons find safe and effective alternatives to involuntary hospitalization.

On both the state and local level, defenders play a valuable role in shaping our criminal and juvenile justice systems. Defenders participate in public safety planning groups and provide critical insights to policy makers regarding effective approaches to controlling crime, protecting children, providing for the mentally ill, and facilitating the efficient operation of the courts and the public safety system as a whole. Additionally, appellate level defenders raise important issues, resulting in court opinions that clarify the law and enhance its consistent application across the state.

### **(d) Oregon's Public Defense Delivery Model**

The PDSC provides representation in most criminal and juvenile dependency appeals directly through state employee lawyers and staff in the Appellate Division (AD) at the Office of Public Defense Services.

PDSC provides representation for all trial level cases and appellate cases not handled by the Appellate Division through contractual and hourly agreements administered by the Office of Public Defense Services.

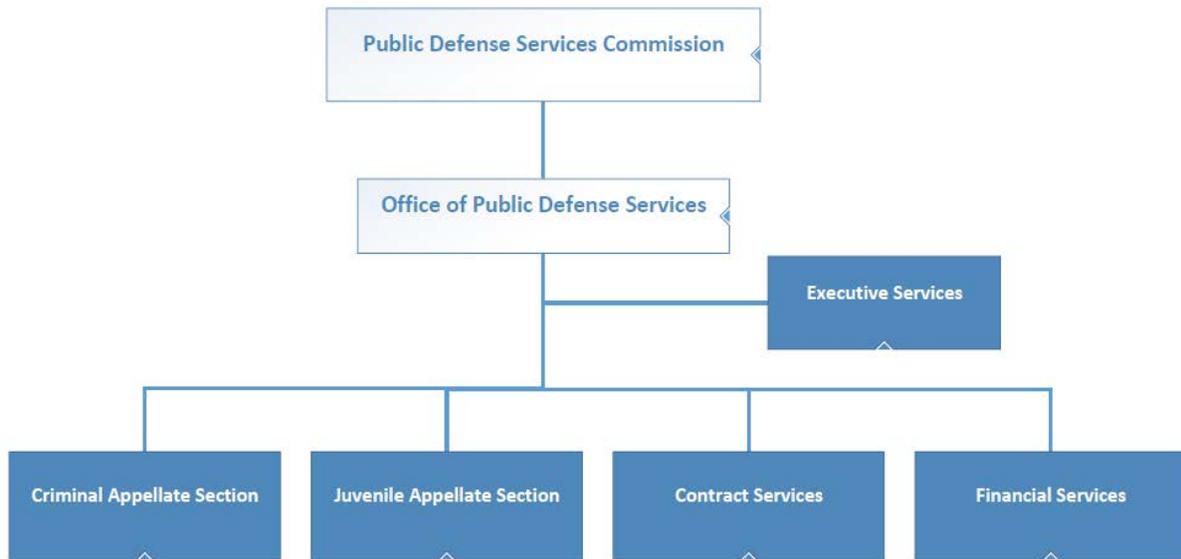
## **II. Agency Organization and Operation**

The Public Defense Services Commission is a seven-member commission that serves as the governing body for Oregon's public defense system. It provides policy direction and oversight for administration of the system. The commissioners are civic-minded, uncompensated volunteers who are appointed by the Chief Justice, who serves as an *ex officio*, non-voting member. By statute, two members must be non-attorneys, one must be a former prosecutor, and another must be an attorney engaged in criminal defense practice who does not serve as a court-appointed attorney compensated by the state. The current members of the PDSC are listed in Appendix A.

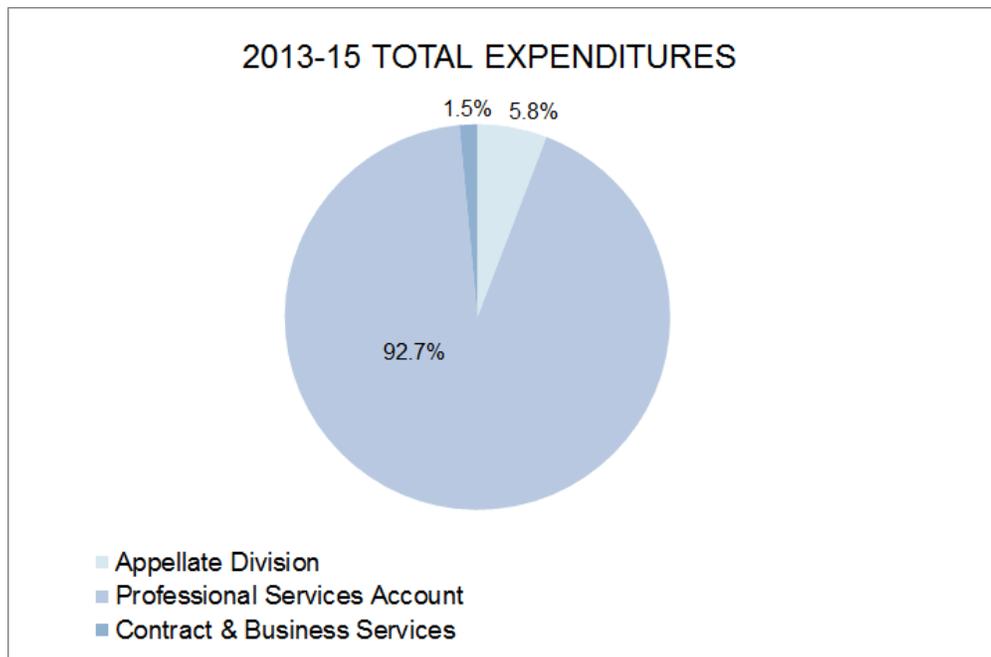
The Commission established the Office of Public Defense Services, as required by ORS 151.216(1)(b), as the administrative agency responsible for carrying out the Commission's directives and other statutorily defined duties. The Commission appoints the agency's executive director. Nancy Cozine has served as the executive director since September 7, 2011.

As shown on the Organizational Chart (next page) for 2013-2015, the Office of Public Defense Services has several work units: the Appellate Division, Contract Services, Financial Services, and Executive Services. The Appellate Division (AD) has two sections, both of which provide direct legal representation in state appellate courts. The Criminal Appellate Section provides appellate representation in criminal cases, and the Juvenile Appellate Section represents parents in juvenile dependency and termination of parental rights cases. Contract Services ensures representation in all trial level cases through contractual agreements negotiated with providers across the state, and a limited number of attorneys paid on an hourly basis. Financial Services is responsible for all budget-related functions, including processing and payment of agency expenses and contract obligations. Executive Services supports the entire agency in the areas of human resources, information technologies, and operations. Executive Services also includes the office of General Counsel, which is responsible for providing legal counsel for the entire agency and its Commission, including agency representation in contested matters (such as appeals of agency denials of expense requests),

trial-level quality assurance oversight, technical assistance for contract and hourly providers, and administration of the agency’s complaint program.



The chart below sets forth the 2013-2015 funding allocations for the two appropriations that fund the office (Appellate Division; Contract and Business Services) and for the Public Defense Services Account, which funds private contractors, hourly rate attorneys, and other private service providers such as investigators and expert witnesses.



### **III. PDSC's Accomplishments in 2013-2015**

#### **(a) Contract Services**

In order to secure consistent representation for individuals at the trial court level, Contract Services was able to negotiate contracts with more than 100 private providers in every region of the state. Through these agreements, the agency provided representation in approximately 338,000 cases. Analysts performed monthly reconciliation of contractor data reports, comparing the information received to information available through court records, and worked with courts and contractors to ensure the smooth operation of the public defense system at the trial court level.

In addition to negotiating and administering contracts for the provision of legal services, the staff in Contract Services reviewed non-routine expense requests for investigators, expert witnesses, discovery materials provided by other parties, and other expenses necessary for the preparation and presentation of an adequate defense. The agency uses a peer-review process in public defender offices to obtain input from experienced attorneys about which expenses are truly "reasonable and necessary," as required by ORS 135.055. There were more than 35,000 such requests during the biennium.

#### **(b) Financial Services**

The Financial Services group processed over 40,000 payments during the 2013-15 biennium. Responses to OPDS's Customer Service Survey in 2014 indicated high satisfaction with the agency's helpfulness, accuracy, timeliness, knowledge and expertise. The Financial Services manager is responsible for the agency budget, and worked with staff to prepare the 2015-17 biennium budget proposal for approval by the Commission.

#### **(c) Quality Assurance**

The Office of General Counsel is responsible for monitoring and ensuring the quality of representation statewide. The mechanisms

used are varied, including peer reviews, statewide surveys, a complaint program, and training sessions for public defense attorneys.

### **1. Statewide Surveys**

In January 2015, OPDS conducted its eighth annual statewide public defense performance survey. The agency asks judges, prosecutors, Citizen Review Board coordinators, and juvenile department directors to evaluate and comment upon the performance of public defense providers in each judicial district. The survey this year showed general satisfaction with public defense services, although there was concern that caseloads remain too high in many jurisdictions. Respondents made 150 narrative comments, either complimenting public defense providers or expressing concerns. OPDS staff was able to follow-up with respondents and providers to address many of the concerns. The PDSC has asked that the next survey include more opportunities for respondents to leave detailed and focused comments.

### **2. Complaint Program**

OPDS receives complaints from public defense clients and their families, prosecutors, courts, and occasionally from legislative staff responding to constituent concerns. Pursuant to the PDSC complaint policy and procedure, OPDS will investigate complaints that raise a facially reasonable concern regarding either the performance of public defense providers or the expenditure of public defense funds. OPDS is able to quickly resolve many concerns by facilitating communication between attorneys and clients. In other instances, OPDS will work with contract administrators to ensure that adequate training, supervision, and oversight protocols are in place that can address concerns about attorney performance. On rare occasions, OPDS will suspend an attorney's eligibility to serve on public defense cases.

### **3. Contract Revisions**

In preparation for release of the Request for Proposals for contracts to provide public defense services in 2016-2017,

General Counsel directed a comprehensive review of the general terms applicable to most public defense services contracts. The resulting revisions, made after consultation with public defense providers, clarify PDSC requirements, in keeping with state and national performance standards, for representation of public defense clients and for the administration of public defense providers. The revised general terms also enhance the ability of OPDS to gather data from providers to analyze provider performance.

#### **4. Peer Reviews**

Peer reviews are an essential component of OPDS's quality assurance program. These reviews, staffed by teams of volunteer lawyers from around the state and coordinated by General Counsel, include an intensive three-day on-site investigation into the quality of services provided by individual public defense contractors. Peer review reports seek to identify especially effective practices that can be recommended to other providers, and to make recommendations for improvement when teams find concerns about performance. Peer review reports may also make recommendations to OPDS and PDSC regarding contract management in particular jurisdictions.

Depending upon the findings and recommendations of peer review reports, various follow-up actions may be required of the provider under review and OPDS. Under current practice, in most instances the PDSC will conduct a service delivery review about a year after a peer review report is finalized. The service delivery review, as described in more detail in the next section, will look at developments since the peer review report, as well as examine other needs and issues in a jurisdiction.

During the 2013–2015 biennium, three peer review processes were completed or started. The Marion County peer review, started in May 2013, continued through the remainder of the year and generated positive changes in the county. In September 2014, General Counsel completed a peer review in Washington County. Initial planning began for a review of Clackamas County providers.

## **5. Service Delivery Reviews**

In pursuit of its mission to assure high quality, cost-effective public defense services during the biennium, PDSC completed a service delivery review in Clatsop County, and conducted service delivery review in Marion County. The service delivery review process includes holding public meetings in various locations in the state, gathering information from judges, prosecutors, other officials and citizens, evaluating the need for changes in the structure and delivery of local public defense services and directing the Commission's management team to implement needed changes.

There are three phases in the process. The Executive Director and other agency representatives perform an initial investigation. The Commission then meets in the region to hear directly from the stakeholders in the local justice system. The Commission then develops a service delivery plan, which is incorporated into a final report. This report serves as a blueprint for agency staff contracting with providers in the region. All of these reports appear on the agency's website.

In previous biennia, PDSC completed investigations in, and evaluations of, most of Oregon's local public defense systems.<sup>2</sup> It developed service delivery plans to improve the structure and operation of local systems, and to raise the quality of legal services in those jurisdictions. Service delivery reviews have also examined substantive areas of practice, devoting reports to representation in death penalty cases, juvenile representation, post-conviction cases, and management of drug courts.

## **6. Parent Child Representation Program**

The Parent Child Representation Program (PCRP), aimed at improving the quality of legal representation for parents and children in juvenile dependency and termination proceedings,

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<sup>2</sup> As they are completed these plans are posted on the PDSC website: [www.oregon.gov/OPDS/PDSCReports.page](http://www.oregon.gov/OPDS/PDSCReports.page).

launched in Linn and Yamhill counties in August 2014. The PCRP is modeled on a similar program in Washington State which, through repeated independent evaluation, has shown to be effective at reducing the use of foster care and expediting permanency for children. Key components of the program include caseload limits, additional training and oversight requirements, and a multidisciplinary approach to representation.

Although the PCRP is in its infancy, initial results are positive. Attorneys are spending significantly more time with clients, independent investigation is regularly occurring, attorneys are present at all court proceedings including initial shelter hearings, and local system improvement is underway.

#### **(d) Diversity Training**

OPDS continued its practice in 2015 of presenting a biennial diversity training program for its entire staff. The program this year was in two parts. The first focused on better understanding the current debates about immigration enforcement and reform, and how that affects the communities in which our staff live and work. The program featured an experienced immigration law practitioner and a young immigration activist. The second part of the program examined in depth a recent major case from the Oregon Supreme Court.

#### **(e) Appellate Division**

The Appellate Division (AD) has two sections: criminal appellate (CAS) and juvenile appellate (JAS). The division provides legal representation in the state appellate courts on direct appeal in criminal cases, parole appeals, juvenile dependency appeals, and appeals from the termination of parental rights. Peter Gartlan was the Chief Defender and manager of the Appellate Division until his retirement on March 31, 2015. Ernest Lannet assumed the role of Chief Defender of the Criminal Appellate Section upon Mr. Gartlan's departure. Shannon Storey is the Chief Defender in the Juvenile Appellate Section.

Appellate Division managers continue to meet regularly with the Chief Judge of the Court of Appeals and the Solicitor General of the

Department of Justice to advance and promote practices that improve the appellate process without prejudicing the rights of clients.

In addition, representatives from the Appellate Division, the Attorney General's office, and appellate court operations meet quarterly to address operational issues that affect system efficiencies, for example, issues concerning the quality and timeliness of transcript production, access to trial court files through the Odyssey system, eFiling, and appellate case docketing.

The division provides ongoing support to the trial level juvenile and criminal defense bar. AD lawyers sit on the executive committees of the Oregon State Bar's criminal law, juvenile law, constitutional law, and appellate law sections, as well as the executive and educational committees for the Oregon Criminal Defense Lawyers Association (OCDLA). AD lawyers regularly present at continuing legal education (CLE) seminars sponsored, for example, by the Oregon State Bar and the Oregon Criminal Defense Lawyers Association. The division's attorneys field email and telephone inquiries from the juvenile and criminal defense trial bar on a daily basis and provide briefing and memoranda to trial practitioners.

### **1. Criminal Appellate Section**

During the 2013-15 biennium the criminal section changed its target for PDSC's appellate Key Performance Measure, which is the median time to filing of the opening brief in criminal cases. The target had been 210 days, and after almost meeting it for several years in a row, the agency requested permission to reduce the target to 180 days. This new target represents significant progress. In 2006 the median number of days to file the opening brief was 328. The average for this biennium was about 225 days, but during the second quarter of 2015 it was down to 210 days. The agency expects that newer attorneys who are gaining experience are also becoming more efficient, and that the agency will be able to achieve the goal of 180 days to filing of the opening brief.

The criminal section had many successful appeals. Notable successes in the Oregon Supreme Court include decisions

removing procedural obstacles from obtaining review of defects in jury instructions, endorsing a defendant's right to have a jury instructed on lesser-included offenses, and abandoning a *per se* rule that discovery of an arrest warrant deprives a defendant of the right to suppress evidence found because of an unlawful detention. The Oregon Supreme Court also asked the division to provide briefs as *amicus curiae* in three other cases—one of which supplied the analysis adopted by the court in its decision.

## **2. Juvenile Appellate Section**

The division's juvenile unit, created by the 2007 Legislative Assembly, has realized the legislature's intent of effecting systemic improvement in the practice of juvenile law at both the appellate and trial court level. The Juvenile Appellate Section (JAS) represents parents in the majority of appeals in juvenile dependency and termination of parental rights cases, appearing regularly before the appellate courts in cases that produce written opinions that guide trial level practice. The unit has also provided assistance to the Oregon Law Commission and the Juvenile Court Improvement Project. JAS lawyers participated in the drafting of the Oregon State Bar's performance standards for juvenile dependency practitioners, served on the executive committees of the Juvenile Law and Appellate Practice Sections of the Oregon State Bar, routinely presented at CLE seminars concerning juvenile dependency law, and have been appointed to edit the latest draft of the Oregon State Bar Juvenile Law Bar Book. In addition, JAS lawyers devote significant time each day to assisting defense practitioners litigating trial-level juvenile dependency cases, resulting in numerous wins for families, thereby obviating the need for appeal.

Juvenile Appellate Section litigation has resulted in a body of case law effectuating the legislature's preference for family unity and autonomy in the first instance and family reunification in those cases where state interference was historically deemed necessary. Most notably the Court of Appeals has clarified that the proponent of ongoing dependency jurisdiction bears the burden of proving that dependency jurisdiction continues to be warranted, that the rules of evidence apply to all jurisdictional determinations, that

the Inter State Compact on Placement of Children (ICPC) does not apply to a child's biological parent, that a parent is not required to provide primary care to his or her child to avoid dependency jurisdiction and may instead delegate caretaking to others, and that the focus of the juvenile court's inquiry at all stages is not the parent's deficits in the abstract but rather whether—and to what degree—the parent's deficits harm or threaten to harm to the specific child at issue.

## **IV. PDSC's Challenges in 2013 - 2015**

### **(a) Ensuring Quality Representation**

The PDSC's launch of the Parent and Child Representation Program was a significant undertaking and a wonderful addition to the agency's existing quality assurance efforts. The enhanced training, monitoring, and compensation, in addition to reduced caseloads, have resulted in better representation for children and families in the pilot counties. Additionally, the data-driven monitoring of attorney performance is an enhancement to the agency's quality assurance efforts. As the agency develops its capacity for data storage, data analysis, and attorney evaluation through the pilot program, the lessons learned will be useful for development of such measures in other case types.

### **(b) Recruitment and Retention**

Public defense providers at the trial court level continue to experience difficulties attracting and retaining qualified lawyers. Over the course of the biennium, several lawyers presented information to the PDSC and the Legislature regarding public defender compensation. Practitioners explained that it is difficult to attract and keep younger lawyers, most of whom have very high law school debt, due to the low rates paid for public defense cases, and that contract rates are not keeping pace with the rising costs of running a business.

### **(c) Compensation**

The PDSC has advocated for increased compensation for Oregon's public defense lawyers each biennium in an effort to reduce caseloads and improve the quality of representation. Studies indicate that reduced

caseloads improve representation and case outcomes in criminal<sup>3</sup> and juvenile dependency<sup>4</sup> cases, but are possible only when case rates are increased to amounts that allow attorneys to handle fewer cases. Without continued improvements in case rates, the agency will struggle to ensure reasonable attorney caseloads.

#### **(d) Funding for 2015-2017**

The PDSC submitted seven substantive policy option packages (POPs) in the 2013-15 agency request budget. These packages were developed following regional meetings that included every single public defense provider across the state. These regional meetings, held between December 7, 2013, and February 4, 2014, included the following groups:

- December 7, 2013: Eastern (Baker, Grant, Harney, Malheur, Morrow, Umatilla, Union, Wallowa)
- January 10, 2014: Central (Crook, Deschutes, Gilliam, Hood River, Jefferson, Sherman, Wasco, Wheeler)
- January 14, 2014: North Coast (Clatsop, Columbia, Lincoln, Tillamook)
- January 28, 2014: Southern Oregon (Coos, Curry, Douglas, Jackson, Josephine, Klamath, Lake)
- January 30, 2014: Tri-County (Clackamas, Multnomah, Washington)
- February 4, 2014: Willamette Valley (Benton, Lane, Linn, Marion, Polk, Yamhill)

Two additional meetings were held with providers handling specialized contracts:

- March 5, 2014: Post-Conviction Relief and Habeas Corpus (trial and appeals)
- March 21, 2014: Capital Providers

While there were many challenges that were consistent in every region, there were also issues that were unique to specific areas. The

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<sup>3</sup> Luchansky, PhD. "*The Public Defense Pilot Projects, Washington State Office of Public Defense*" (March 2009). Available electronically at: <http://digitalarchives.wa.gov/WA.Media/do/0C9435A31893A6A3C504FA4AA28678A5.pdf>

<sup>4</sup> Mark E. Courtney, PhD., Jennifer L. Hook, PhD., and Matt Orme, "*Evaluation of the Impact of Enhanced Parental Legal Representation on the Timing of Permanency Outcomes for Children in Foster Care*," Partners For Our Children at the University of Washington, Discussion Paper Volume I, Issue I (February 2011). This report is available electronically at: <http://partnersforourchildren.org/pocweb/userfiles/PRP%20Discussion%20Paper.pdf>

Commission reviewed regional meeting reports, received testimony from providers, and developed seven policy option package requests directed at improving public defense services across the state.

The agency received partial funding of policy option packages 100 and 104 for the 2015-17 biennium. These funds allow the agency to ensure that consistent rates are given to similarly situated non-profit public defense providers and consortium and law firm providers, and allow the agency to add a permanent position for administration of the Parent Child Representation Program and quality assurance oversight in juvenile dependency cases statewide.

## **V. Conclusion**

Oregon's public defense system has long been considered a national leader in the provision of effective, cost-efficient representation to qualified individuals. The Legislature's support of the agency's efforts to develop data-driven performance reviews, in combined with other quality assurance efforts, and continued improvements in case rates, will allow Oregon to remain a model state. Throughout the course of the 2015-17 biennium, in addition to providing quality representation across the state, the agency will update its strategic plan and build targeted, outcome-driven policy option package requests for the 2017 legislative session.

# Appendix A

## Oregon Public Defense Services Commission Members

Chief Justice Thomas A. Balmer  
Ex-Officio Permanent Member

Barnes H. Ellis, Chair  
General Counsel & Corporate Secretary, Mercy Corps

Shaun McCrea, Vice-Chair  
Partner, McCrea PC

Per Ramfjord  
Partner, Stoel Rives LLC

Henry H. Lazenby, Jr.  
Lazenby & Associates

John R. Potter  
Executive Director, Oregon Criminal Defense Lawyers Association

Janet C. Stevens  
Co-Editor, Bend Bulletin

Hon. Elizabeth Welch  
Senior Judge