

Audit Report

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**Office of the Public Defender**

January 2018

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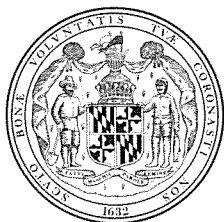
**OFFICE OF LEGISLATIVE AUDITS**  
DEPARTMENT OF LEGISLATIVE SERVICES  
MARYLAND GENERAL ASSEMBLY

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DEPARTMENT OF LEGISLATIVE SERVICES  
OFFICE OF LEGISLATIVE AUDITS  
MARYLAND GENERAL ASSEMBLY

Victoria L. Gruber  
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Legislative Auditor

January 11, 2018

Senator Craig J. Zucker, Co-Chair, Joint Audit Committee  
Delegate C. William Frick, Co-Chair, Joint Audit Committee  
Members of Joint Audit Committee  
Annapolis, Maryland

Ladies and Gentlemen:

We have conducted a fiscal compliance audit of the Office of the Public Defender (OPD) for the period beginning July 1, 2013 and ending September 22, 2016. OPD is primarily responsible for providing legal services to eligible indigent individuals charged with violating State, county, or municipal laws involving possible incarceration or a fine greater than \$500.

Our audit disclosed that OPD did not ensure that all applications for legal representation were adequately supported and maintained on file, and that client eligibility determinations were subject to supervisory review as required. Consequently, there was a lack of assurance that certain clients were eligible to receive services. A law change effective October 1, 2017 transferred OPD's responsibility for determining eligibility for its services in most cases to the State's Judiciary. Nevertheless, OPD is still required to determine eligibility for some cases, primarily those pertaining to juveniles (11,000 cases opened in calendar year 2015). Our audit also disclosed that OPD did not ensure that administrative fees were assessed to all applicable clients.

We also noted that OPD had no formal process for updating attorney caseload standards, which have not been revised since 2005. These caseload standards help OPD evaluate services rendered to clients and assess the caseload allocation among its attorneys. While average attorney caseloads have decreased in all three courts – Circuit, District, and Juvenile – the average attorney caseloads continue to exceed OPD's existing standards for both Circuit and District Courts.

OPD's response to this audit is included as an appendix to this report. We wish to acknowledge the cooperation extended to us during the course of this audit by OPD.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "TJ Barnickel III". The signature is fluid and cursive, with a large initial "TJ" and a stylized "Barnickel III".

Thomas J. Barnickel III, CPA  
Legislative Auditor

## Table of Contents

<b>Background Information</b>	4
Agency Responsibilities	4
Law Change	4
Financial Operations and Budgets (Performance Audit Follow-up)	5
Status of Findings From Preceding Audit Report	6
<b>Findings and Recommendations</b>	7
<b>Client Eligibility</b>	
* Finding 1 – The Office of the Public Defender (OPD) did not ensure that applications for legal representation were always adequately supported and maintained on file, and that eligibility determinations were subject to supervisory review as required.	7
<b>Client Billings</b>	
* Finding 2 – OPD did not ensure that administrative fees were assessed to all applicable clients.	8
<b>Attorney Caseload Standards (Performance Audit Follow-up)</b>	
* Finding 3 – OPD has not implemented a formal process to determine whether existing attorney caseload standards should be revised. Average attorney caseloads for Circuit and District Courts continue to exceed current standards.	9
<b>Audit Scope, Objectives, and Methodology</b>	11
<b>Agency Response</b>	Appendix

\* Denotes item repeated in full or part from preceding audit report

## **Background Information**

### **Agency Responsibilities**

The Office of the Public Defender (OPD) is primarily responsible for providing legal services to eligible indigent individuals charged with violating State, county, or municipal laws involving possible incarceration or a fine greater than \$500. Legal representation is provided in criminal and juvenile proceedings, post-conviction proceedings, probation and parole revocations, involuntary commitments to public or private institutions, and termination of parental rights proceedings. OPD provides these services through a central headquarters and 48 offices located in 12 districts throughout the State.

According to the State's records, during fiscal year 2016, OPD had 913 authorized positions and operating expenditures totaled approximately \$104.2 million, primarily for salaries, wages, and fringe benefits. According to its annual reports for fiscal years 2017 and 2016, OPD opened approximately 172,000 and 194,000 new cases during calendar years 2016 and 2015, respectively.

OPD has a 13-member Board of Trustees with 11 members appointed by the Governor with Senate advice and consent, one selected by the Senate President, and one selected by the Speaker of the House. The Board reviews the administration of OPD, advises the Public Defender on its operations, coordinates the activities of district advisory boards, and consults on certain matters such as fees.

### **Law Change**

Chapter 606, Laws of Maryland 2017, effective October 1, 2017, transferred OPD's responsibility for determining eligibility for its services in most cases to the State's Judiciary. Specifically, an individual charged with a crime that carries a penalty of incarceration will now apply to a district court commissioner for OPD's services, rather than directly to OPD. OPD will retain the responsibility for determining eligibility for juvenile proceedings, post-conviction proceedings, probation and parole revocations, involuntary commitments to public or private institutions, and termination of parental rights proceedings. The law leaves in place long-standing criteria for determining indigency. Applying this law change to the aforementioned 194,000 new cases opened in calendar year 2015 would have resulted in the Judiciary making the eligibility determinations for approximately 183,000 of the 194,000 cases, the difference of 11,000 cases being juvenile proceedings.

## **Financial Operations and Budgets (Performance Audit Follow-up)**

In a performance audit report dated November 19, 2009, we addressed certain aspects of OPD's operations, including OPD's regular need for deficiency appropriations. In that report, we noted that OPD routinely required deficiency appropriations to fund current and prior year operating expenditures. The report further noted that, in spite of receiving these additional appropriations, OPD regularly carried unfunded expenses into the following fiscal year. Unrecorded expenses that must be reported to the Comptroller of Maryland as part of an agency's year-end budgetary closing process essentially represent amounts owed to vendors at the end of the fiscal year for which there is no available funding and must be paid from the subsequent year's appropriation.

Similar conditions were commented upon in our preceding fiscal compliance audit report on OPD, and our current audit disclosed no change in these conditions. For example, as noted in Table 1 on the following page, OPD received a deficiency appropriation totaling \$6.1 million in fiscal year 2016. Of this total, approximately \$4.9 million was necessary to cover fiscal year 2015 case-related expenses, such as costs for panel attorneys, as well as accrued leave payouts that exceeded OPD's appropriation for that year. The remaining amount was necessary to help fund an expected fiscal year 2016 deficit. Furthermore, OPD reported to the Comptroller additional unrecorded expenditures totaling approximately \$5.2 million at the end of fiscal year 2016.

The extent of case-related expenses, and in particular the cost of panel attorneys, which may not be fully known in advance, have contributed significantly to these conditions. OPD retains private attorneys, referred to as panel attorneys, to handle cases when a conflict of interest may exist, such as when a codefendant is being represented by an assistant public defender. According to OPD's records, panel attorney expenditures totaled approximately \$9 million in fiscal year 2016 while the related appropriation totaled only \$7 million. In addition, panel attorney costs represented approximately \$3.4 million of the unrecorded expenditures for fiscal year 2016.

**Table 1**  
**OPD Appropriations and Expenditures**  
**Fiscal Years 2014 – 2016**

<b>Fiscal Year</b>	<b>Appropriation</b>	<b>Deficiency Appropriations</b>	<b>Unrecorded Expenditures Carried Over to Subsequent Year</b>
2014	\$95,320,609	\$6,211,054	\$1,867,341
2015	\$97,463,177	\$2,467,341	\$4,894,813
2016	\$98,015,615	\$6,055,519	\$5,216,698

**Source:** Department of Budget and Management’s State Budget Books, Fiscal Digests, and the Joint

### **Status of Findings from Preceding Audit Report**

Our audit included a review to determine the status of the five findings contained in our preceding audit report dated August 21, 2014, which included two findings related to our November 2009 performance audit report. We determined that OPD satisfactorily addressed one of these five findings, three findings are repeated in this report, and one audit finding (financial operations and budgets) is addressed in the preceding informational item.



# Findings and Recommendations

## Client Eligibility

### **Finding 1**

**The Office of the Public Defender (OPD) did not ensure that applications for legal representation were always adequately supported and maintained on file, and that eligibility determinations were subject to supervisory review as required.**

### **Analysis**

OPD did not ensure that all applications for legal representation were adequately supported and maintained on file, and that eligibility determinations were subject to supervisory review as required. Consequently, OPD lacked assurance that all clients were eligible to receive the services provided. We tested 24 cases opened by two large district offices during the period from January 2015 through July 2016.

- Application decisions were not adequately supported for 9 of the 24 cases tested. For 6 of the 9 cases (5 from one office and 1 from the other), OPD did not verify that income claimed on the applications was supported by reports from the State's Department of Labor Licensing and Regulation (DLLR) as required by State regulations and OPD's *Intake Manual*. Income information is necessary to help determine whether the client has the ability to pay for legal representation. In addition, for 3 of the 9 cases tested (2 from one office and 1 from the other); OPD could not provide the related applications.
- Based on criteria stipulated in OPD's *Intake Manual*, 11 of the 24 cases tested should have been reviewed by supervisory personnel to ensure the propriety of client eligibility determinations made by district office staff. However, our test disclosed that 8 of the 11 cases were not reviewed by supervisory personnel. The *Intake Manual* requires supervisory review of case files, including supporting documentation that meet certain selection criteria, generally resulting in a review of 20 percent of cases statewide. In addition, OPD did not consistently use output reports from its automated case management system as the source for identifying cases requiring supervisory review. The case management system should be used in the selection process to help ensure that all such cases are in fact identified for review.

Similar conditions were commented upon in our two preceding audit reports.

Individuals requesting OPD services were required to meet with an intake worker at an OPD district office and provide certain documentation to support their financial eligibility, in accordance with State law. According to its annual report for fiscal year 2017, OPD opened approximately 172,000 new cases during calendar year 2016.

Effective October 1, 2017, State law transferred OPD's responsibility for determining eligibility for services in certain cases to the State's Judiciary, as further explained on page 4 of this report. OPD will retain responsibility for determining client eligibility for juvenile cases, which takes parental income into account when appropriate, and other cases that do not involve a crime that carries a penalty of incarceration.

### **Recommendation 1**

**We recommend OPD ensure that**

- a. applicant reported income supporting eligibility determinations is verified to reports from DLLR in accordance with State regulations, and that applications are maintained on file (repeat);**
- b. eligibility determinations are reviewed and approved by supervisory personnel as required by OPD's *Intake Manual*, and that such reviews are documented (repeat); and**
- c. the automated case management system is used as the source for identifying eligibility determinations requiring supervisory review.**

## **Client Billings**

### **Finding 2**

**OPD did not ensure that administrative fees were assessed to all applicable clients.**

### **Analysis**

OPD did not ensure that administrative fees were properly assessed to all applicable clients. State regulations require applicants seeking representation, except for unaccompanied juveniles and clients confined to a mental institution, to enter into an agreement committing them to pay an administrative fee of \$50 for adults and \$25 for juveniles.

We compared the number of new cases recorded in OPD's case management system in calendar year 2015, reduced for cases that are categorically exempt

from administrative fees by regulation (150,302), with the related accounts receivable records of cases charged administrative fees (119,336). This comparison disclosed 30,966 cases for which administrative fees were not assessed but may not have been required depending on the circumstances of the individual cases.

Our test of 15 of these 30,966 cases disclosed 8 cases that were not properly assessed fees totaling \$400. OPD acknowledged that the fees should have been charged in all 8 of these cases. For the remaining 7 cases tested, administrative fees were appropriately not assessed for various reasons. For example, the case may have been a continuation of an existing case. OPD claimed that, on a test basis, it periodically reviewed cases for which administrative fees were not assessed to determine if a fee should have been assessed; however, these reviews were not documented.

According to OPD's records for fiscal year 2016, administrative fee billings totaled \$5.8 million and collections totaled \$2 million; the accounts receivable balance totaled \$22.3 million as of June 30, 2016. A similar condition was commented upon in our two preceding audit reports.

## **Recommendation 2**

### **We recommend that OPD**

- a. assess administrative fees to applicants as required by State regulations (repeat), and**
- b. document its periodic review of cases not assessed a fee.**

## **Attorney Caseload Standards (Performance Audit Follow-up)**

### **Finding 3**

**OPD has not implemented a formal process to determine whether existing attorney caseload standards should be revised. Average attorney caseloads for Circuit and District Courts continue to exceed current standards.**

### **Analysis**

OPD has not implemented a formal process to determine whether existing attorney caseload standards need to be modified or new standards created as a result of changes to its operations and other relevant factors. We were advised by management that caseload standards have not been reviewed and revised since 2005. This condition was commented upon in the aforementioned performance audit report on certain aspects of OPD's operations, as well as in our preceding fiscal compliance audit report on OPD.

According to caseload data presented in State budget documents, average attorney caseloads have decreased in all three courts – Circuit, District, and Juvenile – between calendar years 2012 and 2015. However, average attorney caseloads continued to exceed OPD’s existing caseload standards for both Circuit and District Courts. See Table 2.

Notwithstanding the fact that current caseload standards are not being met, OPD believes an evaluation of current standards would likely result in the conclusion that caseload standards should be decreased further, meaning attorneys should handle even fewer cases than current standards call for. In this regard, in legislative testimony provided as part of the review of OPD’s budget in 2015, OPD referenced a June 2014 study of attorney workload standards used by the Missouri Public Defender System, which stated that caseload standards should be periodically revisited to account for potential changes in technology and technology usage, indigent defendant demographics, crime patterns, and staffing and organizational structure. Appropriate caseload standards are critical since they serve as an important monitoring tool for evaluating services rendered to OPD’s clients and for allowing OPD to assess the allocation of cases among its attorneys.

<b>Table 2 Comparison of Caseloads Per Attorney by Type of Court Calendar Years (CY) 2012 and 2015</b>				
<b>Type of Court</b>	<b>Average Attorney Caseloads Per OPD Standards</b>	<b>CY12 Average Attorney Caseloads as a Percentage of Standard</b>	<b>CY15 Average Attorney Caseloads as Percentage of Standard</b>	<b>Decrease in Average Attorney Caseloads as a Percentage of Standard from 2012 to 2015</b>
Circuit Court	171	126%	123%	3%
District Court	663	149%	136%	13%
Juvenile Court	253	95%	67%	28%

Source: State Budget Books

**Recommendation 3**

**We recommend that OPD implement a process to periodically determine if existing attorney caseload standards need to be modified, or new standards created, based on changes to OPD’s operations and other relevant factors (repeat).**

## **Audit Scope, Objectives, and Methodology**

We have conducted a fiscal compliance audit of the Office of the Public Defender (OPD) for the period beginning July 1, 2013 and ending September 22, 2016. The audit was conducted in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

As prescribed by the State Government Article, Section 2-1221 of the Annotated Code of Maryland, the objectives of this audit were to examine OPD's financial transactions, records, and internal control, and to evaluate its compliance with applicable State laws, rules, and regulations.

In planning and conducting our audit, we focused on the major financial-related areas of operations based on assessments of significance and risk. The areas addressed by the audit included client eligibility, procurements and disbursements, accounts receivable, and payroll. We also determined the status of the findings contained in our preceding audit report.

To accomplish our audit objectives, our audit procedures included inquiries of appropriate personnel, inspections of documents and records, observations of OPD's operations, and tests of transactions. Generally, transactions were selected for testing based on auditor judgment, which primarily considers risk. Unless otherwise specifically indicated, neither statistical nor non-statistical audit sampling was used to select the transactions tested. Therefore, the results of the tests cannot be used to project those results to the entire population from which the test items were selected.

We also performed various data extracts of pertinent information from the State's Financial Management Information System (such as revenue and expenditure data) and the State's Central Payroll Bureau (payroll data). The extracts are performed as part of ongoing internal processes established by the Office of Legislative Audits and were subject to various tests to determine data reliability. We determined that the data extracted from these sources were sufficiently reliable for the purposes the data were used during this audit. Finally, we performed other auditing procedures that we considered necessary to achieve our audit objectives. The reliability of data used in this report for background or informational purposes was not assessed.

OPD's management is responsible for establishing and maintaining effective internal control. Internal control is a process designed to provide reasonable assurance that objectives pertaining to the reliability of financial records, effectiveness and efficiency of operations including safeguarding of assets, and compliance with applicable laws, rules, and regulations are achieved.

Because of inherent limitations in internal control, errors or fraud may nevertheless occur and not be detected. Also, projections of any evaluation of internal control to future periods are subject to the risk that conditions may change or compliance with policies and procedures may deteriorate.

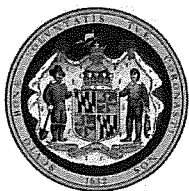
Our reports are designed to assist the Maryland General Assembly in exercising its legislative oversight function and to provide constructive recommendations for improving State operations. As a result, our reports generally do not address activities we reviewed that are functioning properly.

This report includes findings relating to conditions that we consider to be significant deficiencies in the design or operation of internal control that could adversely affect OPD's ability to maintain reliable financial records, operate effectively and efficiently, and/or comply with applicable laws, rules, and regulations. Our report also includes findings regarding significant instances of noncompliance with applicable laws, rules, or regulations.

OPD's response to our findings and recommendations is included as an appendix to this report. As prescribed in the State Government Article, Section 2-1224 of the Annotated Code of Maryland, we will advise OPD regarding the results of our review of its response.

APPENDIX

STATE OF MARYLAND



LAWRENCE J. HOGAN, JR.  
GOVERNOR

BOYD K. RUTHERFORD  
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January 3, 2018

Thomas J. Barnickel III, CPA  
Legislative Auditor  
301 West Preston Street  
Room 1202  
Baltimore, MD 21201

Re: Management's Response  
Draft Audit Report - Office of the Public Defender (OPD)  
Report Date: December 2017  
Period of Audit: July 1, 2013 to September 22, 2016

Dear Mr. Barnickel:

Please accept the attached Management's Response to the recommendations in the above-cited report draft.

If you should need further information, please contact me directly at 410-767-8479.

Sincerely,

A handwritten signature in black ink, appearing to read "P. DeWolfe", written over a horizontal line.

Paul B. DeWolfe  
Public Defender

PBD/KLM/jps

Enclosure

**Financial operations and Budgets (Performance Audit Follow-up)**

As further clarification to “OPD’s regular need for deficiency appropriations”, please note that the deficiencies relate to unfunded operating expenses carried over to the following fiscal year primarily for case-related expenses. The significant amount of carryover expenses recorded for fiscal years 2015 and 2016 resulted from 2% cuts to the Appropriations, turnover relief for excessive vacancies and funding for the relocation of IT operations.

**Recommendation 1**

**We recommend OPD ensure that**

- a. applicant reported income supporting eligibility determinations is verified to reports from DLLR in accordance with State regulations, and that applications are maintained on file (repeat);**
- b. eligibility determinations are reviewed and approved by supervisory personnel as required by OPD’s *Intake Manual*, and that such reviews are documented (repeat); and**
- c. the automated case management system is used as the source for identifying eligibility determinations requiring supervisory review.**

**Management’s Response**

Management agrees and:

- a. will continue to require DLLR reporting to verify income reported by applicants in accordance with State regulations and to require applications to be maintained on file.
  - b. will require that supervisory reviews of eligibility determinations be performed and documented, according to the policy outlined in the Intake Manual.
  - c. will implement the use of reports from the case management system to determine eligibility determinations requiring supervisory review.
- 

**Recommendation 2**

**We recommend that OPD**

- a. assess administrative fees to applicants as required by State regulations (repeat), and**
- b. document its periodic review of cases not assessed a fee.**

**Management’s Response**

Effective December 7, 2017, State regulations no longer require the assessment of administrative fees to applicants for OPD representation.

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**Recommendation 3**

**We recommend that OPD implement a process to periodically determine if existing attorney caseload standards need to be modified, or new standards created, based on changes to OPD’s operations and other relevant factors (repeat).**

**Management’s Response**

Management agrees.

Our Deputy Public Defender recently attended a national workshop on establishing attorney work standards. To develop new caseload standards, OPD must conduct time-keeping studies in every district and division of necessary case-related tasks by area of law. The time-keeping feature is a planned part of the new case management system, eDefender, which is forecast to be rolled out by calendar 2019. In the interim, Management will apply the workshop principles and other best practices to the evaluation of our attorney caseloads and standards, identify factors affecting them and determine requirements for modification, if any, on at least an annual basis.



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