

# Historical Context of Public Defender Funding

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for the  
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## Introduction

The Public Defender Subcommittee is tasked with recommending to the Law and Justice Interim Committee (LJIC) what dollar amounts should be used in calculating the 2007 entitlement share reductions in the following counties to help fund the statewide public defender system enacted by SB 146 (Ch. 449, L. 2005): Cascade, Flathead, Gallatin, Lewis and Clark, Missoula, and Yellowstone Counties.

## Discussion

Volatile costs, unpredictable funding. Public defender costs have always been volatile. Not only have costs varied greatly county to county, but a county's costs could skyrocket if a large criminal case had to be prosecuted in the county. In 1979, the legislature passed a bill allowing counties to impose a mill levy for district courts and to authorize state grants to help offset some county district court costs to the extent money was appropriated for that purpose. In addition to the grant program, the 1985 legislature imposed a fee on light vehicles and trucks and enumerated what District Court expenses could be reimbursed to counties using available revenue.

Statewide system, funding, accountability desired. In 2002, the ACLU sued the state and six counties for failing to provide adequate public defender services in criminal district court proceedings. During the 2003 session, a bill was introduced to provide a statewide system for indigent defense in district court criminal cases. This was SB 218. However, SB 218 failed based on concerns that the cost for the statewide system was unknown and not fully funded. Subsequently, the 2003-2004 LJIC engaged in a study that eventually resulted in SB 146, the Montana Public Defender Act. The act created a statewide public defender system to cover all public defender services (criminal or civil) required by law in any court (city, municipal, justice, or district).

Because cost was one of the primary issues in the failure of SB 218, the LJIC worked to identify actual costs of public defender services. State-level funding through "district court assumption" was only part of the picture because state funding did not cover all costs incurred by counties for public defender services.

County portion of the costs difficult to identify. To determine the county component of total costs, the LJIC had to rely on survey data from the counties. The LJIC focused on the counties with the highest public defender expenses and that had been named in the ACLU lawsuit. In each of those counties, except in Flathead County, public defender services, the county had established public defender offices. A legislative fiscal report to the LJIC estimated that in the five counties with public defender offices (Missoula, Gallatin, Lewis & Clark, Yellowstone, and Cascade County), public defender costs not reimbursed by the state amounted to a total of \$643,157.

As introduced, SB 146 provided for a cost-sharing formula. based on how much the state and local governments had historically paid. Under the formula the state, of the total actual costs, the state was to be responsible for 77.7% , counties for 15.6%, and cities for 6.7%. When actual costs were know, they were to be allocated to each county based on three factors -- taxable value, population, and crime rate and to each city based on two factors -- taxable value and population. For counties, the crime rate factor was to be replaced by caseload data when the data was available.

Entitlement share reduction becomes funding method for local government share of costs. During the 2005 session, SB 146 was amended so that a one-time reduction in FY 2007 entitlement share payments was to fund the local government share of public defender costs. For counties, the reduction amount was based on the reported costs for public defender services in Justice Courts. In the five counties with public defender offices, the reduction amounts a;sp included District Court public defender costs that had not historically been reimbursed by the state either because the expense was not eligible for reimbursement or there was a shortfall in available funds.

Reduction amounts in five counties debated, audit required. The accuracy of the estimated amount of unreimbursed District Court public defender costs in the five counties were hotly disputed. Consequently, a legislative audit of actual costs in these counties was included in SB 146, and the LJIC was tasked with introducing legislation in 2007 to adjust these figures based on the audit findings.

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## Policy questions and options

The policy questions facing the Subcommittee can be broken out into two basic questions:

**Question 1: Should the entitlement share reductions for the audited counties include District Court public defender costs that had not been covered by the state?**

**YES** - include District and Justice Court public defender costs paid by the county

**NO** - include only the Justice Court public defender costs.

**Question 2: Which fiscal year's audit numbers should be used?**

**For District Court?**

FY 1999, FY 2000, FY 2001, FY 2002, FY 2003, or FY 2004

**For Justice Court?**

FY 1999, FY 2000, FY 2001, FY 2002, FY 2003, or FY 2004

Table 1 below shows the District Court public defender costs estimated during the LJIC's 2003-2004 interim study compared to the FY 2001 and FY 2004 public defender costs found by the legislative audit that were not reimbursed by the state under 3-5-901, MCA.

TABLE 1  
*District Court Costs Not Reimbursed*

	Interim Estimate	FY 2001	FY 2004
Cascade	\$ 58,000	\$121,812	\$ 71,023
Gallatin	155,162	46,411	236,385
Lewis & Clark	129,995	(13,635)	66,479
Missoula	150,000	\$216,570	\$62,864
Yellowstone	150,000	196,094	243,280
	<b>\$643,157</b>	<b>\$567,252</b>	<b>\$680,031</b>

Notes: (1) Although no District Court costs were allocated to Flathead County, Flathead County was included in the list of counties to be audited because it was among the counties with the highest public defender costs.

(2) The other fiscal years audited are not shown because a working group of stakeholders decided that only FY 2001 and FY 2004 should be part of the discussion because FY 2001 was the base year for the entitlement share reductions and FY 2004 was the year for which Justice Court public defender costs were reported to MACo.

Table 2 below shows the Justice Court public defender cost estimates forwarded by MACo

compared to the FY 2001 and FY 2004 Justice Court public defender costs found by the audit.

TABLE 2  
*Justice Court Public Defender Costs*

	MACo Survey	FY 2001	FY 2004
Cascade	\$85,752	\$13,970	\$6,175
Gallatin	50,683	52,716	21,711
Lewis and Clark	101,549	98,574	94,333
Missoula	137,844	116,931	147,647
Yellowstone	94,035	71,515	94,046
	<b>\$469,863</b>	<b>\$353,706</b>	<b>\$363,912</b>

### Legislative history

The following is a legislative history relevant to what district court expenses have historically been eligible for state funding.

- 1979 Ch. 692 Counties allowed to impose a special mill levy for district court costs. State MAY grant money to counties for "emergency" District Court costs. Grants to be paid from money appropriated for that purpose. Sunset on June 30, 1983, but sunset later repealed). See history of section 7-6-2352, MCA.
- 1981 Ch. 465 State grant money to be available to counties for district court costs that exceed county mill levy revenue. State grants only available "to the extent money is appropriated for that purpose". The list of eligible costs included:
- ✓ juries
  - ✓ witnesses
  - ✓ *fees and litigation* expenses of court-appointed attorneys
  - ✓ transcripts
  - ✓ court reporter salaries
  - ✓ psychological and medical treatment or evaluations ordered by district court at county expense
  - ✓ actual and necessary travel expenses
  - ✓ other similar expenses
- 1983 Ch. 254 The amount of grant money for each county was based a formula using actual costs and county District Court mill levy revenue collected. *"Eligible court expenditures for grant purposes include all costs of the county associated with the operation and maintenance of the district court, from whatever fund paid, except costs for building and capital items and library maintenance, replacement, and acquisition."* This law also

required an audit of each county and repealed the sunset on optional county mill levy for District Courts.

- 1985 Ch. 680 Section 3-5-901, MCA, was initially enacted: "Effective July 1, 1985, the state shall, *to the extent that money is appropriated*, fund the following district court expenses in *criminal cases*:"
- ✓ court reporter salaries
  - ✓ transcripts
  - ✓ witness fees and expenses
  - ✓ juror fees
  - ✓ *indigent defense*
  - ✓ psychiatric examinations
- 1985 Ch. 685 The legislature increased the fee in lieu of tax on light vehicles to provide funding for District Courts criminal expenses enumerated in SB 25 (section 3-5-901, MCA).
- 1987 Ch. 416 Any money left after state funding of District Court criminal expenses under section 3-5-901, MCA, was to be used for the district court grant program.
- 1991 Ch. 704 Administration of state funding for District Courts under section 3-5-901, MCA and for the grant program was transferred to the Office of Court Administrator.
- 1991 Ch. 781 Appellate Defender Act. Established the state appellate defender commission and office. Required that funding appropriated for the purposes of section 3-5-901, MCA, be used first to fund appellate defense.
- 1993 Ch. 330 Language providing for state funding of certain district court expenses in criminal cases is changed to read: "to the extent revenue is available" from the portion of light vehicle taxes earmarked for District Court expenses listed in 3-5-901, MCA.
- 1995 Ch. 535 Added certain expenses for postconviction relief and habeas corpus proceedings to the list of District Court expenses eligible for state funding. Officially designated the state funding program as the "district court criminal reimbursement program".
- 1999 Ch. 394 Added certain child abuse and neglect costs to the list of expenses eligible for state reimbursement under section 3-5-901, MCA.
- 2001 Ch. 574 The "big bill" (HB 124). Revised laws governing local government and state revenue collection and allocation. Enactment of local government

entitlement share and language reading: "From amounts estimated in subsection (1) for each county government, the department shall deduct fiscal year 2001 county government expenditures for district courts, less reimbursements for district court expenses." (Section 15-1-121(2)(a), MCA) Section 3-5-901, MCA, was amended to read: "To the extent revenue is available under 61-5-509(3), as that subsection read prior to the amendment of 61-3-509 in 2001, the state shall fund... ." Section 61-3-509(3), MCA, required counties to forward 10% of the light vehicle registration fee as a district court fee for the funding of expenses listed in section 3-5-901, MCA. Retained section 7-6-2511, MCA, authority for counties to impose a mill levy to pay for certain district court costs which were not paid by the state revenue collected for funding section 3-5-901, MCA, costs.

2001 Ch. 585

SB 176, state assumption of district courts, specifically excluded county attorneys, public defenders, and clerks of district court from the Judicial Branch pay plan. District Court Council created. Section 3-5-901, MCA, amended to read: "There is a state funded district court program. Under this program, the state shall fund all district court costs, except as provided in subsection (2). These costs include but are not limited to: ... ."

Subsection (4)(a) of section 3-5-901, MCA, provided state funding for:

- ✓ indigent defense in district court criminal cases
- ✓ indigent defense in abuse and neglect cases
- ✓ appointed counsel for youth in youth court cases
- ✓ appointed counsel for the parent, guardian, or other person having custody of a youth in a youth court case

Subsection (4)(b) states: "If money appropriated for the expenses listed in subsection (4)(a) is insufficient to fully fund those expenses, the county is responsible for payment of the balance." This subsection terminated on June 30, 2003.

2001 Ch. 278

Generally revising laws related to local government accounting, budgeting and financial managemen. (SB 138). Repealed section 7-6-2352, MCA, state grants to district courts. Enacted new section codified as section 7-6-4023, MCA, for the state grant program. Language governing state grants read: "To the extent funds are available after expenses provided for in 3-5-901 are funded, the state shall make grants to the governing body for the district courts, as provided in this section."

2003 Ch. 583 SB 490: Revising laws governing state assumption of district court costs. Clarifying when district court expenses must be paid directly by the state or paid by the counties and reimbursed by the state. Deleted language in section 3-1-130, MCA (judicial branch pay plan) stating the pay plan did not cover "county attorneys, deputy county attorneys, salaried public defenders, assistant public defenders, employees of the offices of public defenders, clerks of district court, and employees of the offices of the clerks of district court." Inserted language in Section 3-5-901, MCA, that state-funded district court costs included "expenses for indigent defense that are paid under contract or at an hourly rate" in criminal cases. This change was a clarification of what was already being paid by the state as a direct cost rather than a reimbursement. Coordination language stated that if SB 218 passed: "(1) In addition to the district court costs assumed by the state under the state-funded district court program, as provided in 3-5-901, the state shall fund the expenses of the statewide criminal trial and appellate public defender system....(2) These expenses are separate from district court expenses assumed under 3-5-901 and must be allocated to and paid by the department of administration." SB 218 failed to pass. Thus, this coordination language was not enacted.

2005 Ch. 449 SB 146: Statewide public defender system. State and local governments to share costs. Entitlement share payments for FY 2007 were reduced based on numbers amended into section 15-1-121, MCA. A legislative audit was required of actual costs for District and Justice court public defender services in Yellowstone, Gallatin, Cascade, Flathead, Lewis and Clark, and Missoula Counties. Adjustments to entitlement share reductions in these six counties were to be presented to the 2007 legislature by the LJIC.

## Summary

The Subcommittee must recommend to the LJIC what numbers should be used to adjust the entitlement share reductions included in SB 146 (Ch. 449, L. 2005) for the six counties subject to the legislative audit required by SB 146. The Subcommittee's recommendation hinges on deciding whether the reduction amounts for the counties should include both District Court and Justice Court public defender costs or only the Justice Court costs. The next decision point is to decide on which fiscal year's audit numbers should be used.

The legislative history shows that state-level funding through a grant program as well as a reimbursement program has historically been provided for only to the extent revenue and appropriations were available. Complicating matters, public defender costs at state and county levels never needed to be accounted for separately. Thus, the actual total cost of public defender services will not be known for sure until the statewide system has been in place for at least a few years.