JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

Item No.: 22-031
For business meeting on: January 21, 2022

Title
Trial Court Budget: Funding Allocation Methodology for General Fund Supplement to Address Federally Funded Dependency Representation Program Shortfall

Rules, Forms, Standards, or Statutes Affected
None

Recommended by
Trial Court Budget Advisory Committee
Hon. Jonathan Conklin, Chair
Ms. Rebecca Fleming, Vice-Chair

Agenda Item Type
Action Required

Effective Date
January 21, 2022

Date of Report
December 14, 2021

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Executive Summary

The Trial Court Budget Advisory Committee recommends that up to $30 million provided for court-appointed counsel in dependency cases appropriated in the 2021–22 Budget Act be allocated and distributed according to a methodology that will ensure that any shortfall in federal foster care funding because of federal guidance limiting eligible activities for reimbursement can be addressed consistent with the intent of the Legislature in appropriating the funds.

Recommendation

The Trial Court Budget Advisory Committee recommends that the Judicial Council, effective January 21, 2022, adopt the recommendations of the Trial Court Budget Advisory Committee on the allocation and distribution of funds for the shortfall in federal funding for court-appointed counsel as follows:

1. Approve the allocation and distribution methodology for 2021–22 that funds all providers with Federally Funded Dependency Representation Program contracts for the full amount of the shortfall between their contract and total billing in one lump sum payment, provided that

they submit invoices for each month of the contract or demonstrate extenuating circumstances preventing them from invoicing;

2. Revise this approach for future years to make the payments on a quarterly basis;

3. Approve a proportional allocation approach with each provider receiving their share of the $30 million based on their contract share of total Federally Funded Dependency Representation Program funding up to their full contract amount if the shortfall exceeds $30 million; and

4. Direct Judicial Council staff to monitor Federally Funded Dependency Representation Program invoicing to ensure that this allocation methodology is maximizing the drawdown of federal title IV-E funds.

This recommendation was presented to the Judicial Branch Budget Committee on November 4, 2021 and approved for consideration by the Judicial Council.

Relevant Previous Council Action

Since court-appointed counsel in dependency matters was designated as a court operations expense in 1988 in the Brown-Presley Trial Court Funding Act (Sen. Bill 612/Assem. Bill 1197; Stats. 1988, ch. 945), and again, via the Lockyer-Isenberg Trial Court Funding Act of 1997 (Assem. Bill 233; Stats. 1997, ch. 850)—which provided the funding for, and delineated the parameters of, the transition to state trial court funding that had been outlined in the earlier legislation—the Judicial Council has taken an active role in trying to improve the quality of representation in dependency proceedings. That role includes sponsoring legislation that makes such representation mandatory, identifying appropriate caseloads, and working to allocate funding across the state in an equitable manner. Most recently, the council took on a key role to ensure that court-appointed counsel in dependency proceedings could claim federal title IV-E foster care funds to match the state's investment in this representation and thereby lower caseloads and improve the quality of representation across California.

At its meeting on July 19, 2019, the council approved a recommendation from the Family and Juvenile Law Advisory Committee to undertake a process to determine the interest of the courts and providers in participating in the federal funding opportunity and to allocate the available federal funds based on each provider's existing allocation for court-appointed counsel funding and to report back to the council on those efforts at the end of the 2020 fiscal year (FY). The council received that report at its September 23, 2020 meeting.

Analysis/Rationale

Background

The Federally Funded Dependency Representation Program (FFDRP) was established in 2019 to support the courts and court-appointed counsel (CAC) providers in gaining access to newly available federal funds[1] to support enhanced legal representation services for families and children in dependency proceedings (Link A). When the program was initiated, Judicial Council Center for Families, Children & the Courts (CFCC) staff worked with the state's title IV-E administrator, the California Department of Social Services (CDSS), to determine program parameters and anticipated funding availability (Link B).

Using CDSS's title IV-E match calculator, it was determined that federal funding had the potential to provide up to an additional $57 million. That amount was allocated to providers based on their existing share of the total CAC budget, and every provider that was interested in obtaining the additional funds—and had the consent of its superior court—entered into a contract for FFDRP that specified the maximum amount that could be claimed.

When the initial estimate was generated, it was assumed that the bulk of work billed to the CAC program would be eligible for FFDRP matching. This assumption was based on analogizing the work of CAC providers to child welfare social workers. However, in spring 2021, clarification was received from the federal title IV-E agency, the Administration for Children and Families (ACF), indicating that the expansion of title IV-E claiming to include legal representation should be interpreted more narrowly as an expansion for a specific activity and not to include all the costs of the provider more broadly.

Moreover, a number of activities that the council considers within dependency legal representation, such as seeking a restraining order or attending a collaborative court proceeding for a client, were specifically excluded by ACF. It was then apparent that CAC providers could not actually receive the full $57 million augmentation in federal funding that had been anticipated.

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[1] Title IV-E of the Social Security Act enables states and counties to seek reimbursement from the federal government for eligible foster care–related expenditures. Traditionally this has included social workers and their attorneys (typically county counsel). A 2019 revision of the Child Welfare Policy Manual extended the availability of title IV-E match funds to dependency counsel who provide legal representation to children in foster care and their parents.

To address this gap, the 2021 Budget Act included a provision making up to $30 million General Fund available to address any shortfall in federal reimbursement for eligible program costs (Link C).[2] This budget item was not related to a Judicial Council budget change proposal. The Judicial Council is required to report to the Legislature by April 1, 2022, on the size of the expected shortfall and the proposed allocation and distribution plan for the additional funds, which will then trigger the release of the funds.

FFDRP Funding to Date

The council entered into a contract with CDSS to administer the FFDRP funds in 2019, and providers were able to begin submitting retroactive invoices for 2019–20. In that initial year, approximately $26 million was paid out to 61 dependency representation providers in 29 courts. Adapting a new system of invoicing and documentation to meet state and federal requirements imposed a significant new workload on providers that needed to present a record to support their eligible workload and expenses, and submit detailed proof of expenditures and payments to receive the matching funds. CFCC staff were active in reviewing and seeking clarification or additional documentation for invoices to ensure they would meet all requirements and pass any future audit. In addition, as a result of these burdens, a number of providers opted to invoice the work for the retroactive period in a more limited fashion. As a result, the $26 million that was paid out was significantly less than the $49 million maximum that had been budgeted for 2019–20.

For 2020–21, there are 65 providers in 31 courts currently invoicing for FFDRP under contracts that would allow a maximum of just under $54 million to be claimed. Because CFCC staff were awaiting guidance from the federal ACF on the precise scope of eligible activities, invoicing for 2020–21 was delayed. Most of those issues have now been resolved, and providers are in the process of submitting invoices for the fiscal year that just ended. Based on the invoices received,

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[2] SEC. 6. Item 0250-102-0932 of Section 2.00 of the Budget Act of 2021 reads: "2. Upon order of the Department of Finance, the Controller shall increase Schedule (1) by up to $30,000,000 to address any shortfalls in federal reimbursements pursuant to Title IV-E of the federal Social Security Act (42 U.S.C. Sec. 670 et seq.) that supplement funding for court-appointed counsel for children, nonminor dependents, and parents in juvenile court dependency proceedings pursuant to subdivisions (b) and (c) of Section 317 of the Welfare and Institutions Code and paragraph (4) of subdivision (a) of Section 77003 of the Government Code. The Judicial Council shall report by April 1, 2022, to the chairpersons of the committees and appropriate subcommittees that consider the State Budget the following information: (a) the total federal reimbursements invoiced statewide in the first two quarters of the current fiscal year; (b) any projected shortfalls through the end of the current fiscal year as compared to the $57,000,000 in expected federal reimbursements; and (c) a proposed allocation and distribution of any portion of the $30,000,000 necessary to address projected shortfalls. 3. The Judicial Council shall work in collaboration with court-appointed dependency counsel providers to ensure timely submission, review, and payment of monthly invoices attributable to the 2021–22 fiscal year so that determination of the statewide total of federal reimbursements and any portion of the funding described in Provision 2 needed to address any remaining shortfall can be made no later than September 30, 2022. Distribution of funds to address any shortfall shall be made by the Judicial Council using the methodology customarily employed to distribute statewide court-appointed dependency counsel funding as described in Provision 1. Any funds described in Provision 2 not encumbered by October 1, 2022, for eligible activities attributable to the 2021–22 fiscal year shall revert to the General Fund." Senate Bill 129 (Skinner), Budget Act of 2021, https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB129.

it is estimated that providers will be able to receive approximately $37 to $45 million, leaving a gap of approximately $8 to $16 million. In 2021–22, additional providers may join the program, so a final total FFDRP contract amount is not yet available. It is expected to be similar to 2020–21, such that, the shortfall will be less than the $30 million available through this allocation.

Proposed Allocation Methodology

The funds in the budget were provided to address the shortfall between what California estimated it could claim from title IV-E and what is able to be claimed; thus the methodology assumes that only those providers who have an FFDRP contract would be eligible for funding.

To ensure that the report to the Legislature is accurate, it is recommended that providers who are not currently in an FFDRP contract that wish to join the program must have submitted a notice of intent to do so by December 31, 2021, to be eligible for funding in the 2021–22 cycle or for subsequent years. The other proposed eligibility requirement would be that each provider submit an invoice for every month under the contract or provide an explanation for the extenuating circumstances that resulted in no invoice being submitted for a given month. This requirement is included to demonstrate that the program is making every effort to maximize the drawdown of federal funds, and relying on the supplemental funding only to address the shortfall resulting from federal restrictions on eligible activities for reimbursement. TCBAC considered requiring a minimum threshold for billing into FFDRP but concluded that the program is too recent to determine a fair and equitable level for such a threshold. Instead, the committee recommends that staff use the current year to gather information on how the distribution of the shortfall funding impacts providers, and make recommendations on improvements for future years as needed.

Because the funds were intended to address the shortfall, and the total gap is expected to be less than $30 million, funding should be provided to each eligible provider to bridge the full difference between their FFDRP contract and the amount that the provider was able to claim via FFDRP. If this shortfall exceeds $30 million, it is proposed that each provider get their proportional share of the $30 million based on their contract share of total FFDRP funding up to their full contract amount. Because the report to the Legislature on the proposed allocation is not due until April 2022, it is recommended that the shortfall funding be distributed in a lump sum at the end of 2021–22. For future fiscal years, these distributions would be made on a quarterly basis to ease cash flow and provide flexibility for providers that may not participate for an entire fiscal year.

Policy implications

Court-appointed counsel in dependency cases are vital to ensuring that children and families get the services they need to achieve permanency and stability. A fair and equitable means for allocating the shortfall funds will incentivize providers to maximize the draw-down of federal funds for eligible activities while also ensuring that there is adequate funding available for crucial services that are not federally eligible but advance the goals of dependency proceedings such as obtaining special immigrant juvenile status findings, attending or participating in collaborative court proceedings, activities related to the issuance of restraining orders, and attending individualized education plan meetings.

Comments

The budget language required that the council consult with dependency legal representation providers as this allocation and distribution plan was being developed. Judicial Council staff met with providers on a number of occasions, and they provided written feedback to TCBAC on the proposal. The recommendations before the council are consistent with their preferences and concerns and will ensure that all providers in FFDRP have the opportunity to have receive their full contract amount using the funds allocated for the shortfall.

Alternatives considered

TCBAC considered requiring that eligible providers invoice for a minimum percentage of their total FFDRP contract to receive the shortfall funding, but the committee concluded that it was premature to set such a threshold given the novelty of the program and the other variables that impact that percentage, such as the organizational structure of the provider and the extent to which specific court practices integrate ineligible activities such as collaborative courts.

Fiscal and Operational Impacts

Judicial Council staff will need to prepare a report to the Legislature based upon this methodology that will estimate the shortfall funding that will be distributed to each provider based on this methodology. Once that report has been submitted, council staff will need to complete the review and approval of all invoices for FY 2021–22 expeditiously so that distributions can be made to providers by the September 30, 2022 deadline. In future years, these calculations and distributions will need to be undertaken quarterly.

Attachments and Links

1. Link A: Judicial Council report, June 28, 2019, Item 19-152, *Juvenile Law: Distribution of Federal Title IV-E Reimbursement for Dependency Counsel*, https://jcc.legistar.com/View.ashx?M=F&ID=7490062&GUID=00E5A572-FA1C-4405-9C24-82CA6EB8305E
2. Link B: Judicial Council report, September 3, 2020, Item 20-085, *Juvenile Law: Federally Funded Dependency Representation Program*, https://jcc.legistar.com/View.ashx?M=F&ID=8766467&GUID=17E19209-5AA7-4382-B7A7-257AAEE206F2
3. Link C: Senate Bill 129 (Skinner), Budget Act of 2021 (Stats. 2021, ch. 69), https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202120220SB129