

## OCTOBER 4, 2019 MEETING MINUTES

### Commission on Indigent Defense Services

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**Commissioner Attendees:** Darrin Jordan (Chair), Dorothy Hairston (Vice Chair), Art Beeler, Brian Cromwell, Staples Hughes, Caitlin Fenhagen, Lisa Menefee, and Stacey Rubain attended all or some of the meeting.

Commissioners Chris Mumma and Jan Pritchett attended all or some of the meeting by telephone.

**Staff Attendees:** Susan Brooks (Public Defender Administrator), Whitney Fairbanks (Deputy Director), Margaret Gressens (Research Director), Carmen Jarmon (Financial Analyst), Thomas K. Maher (Executive Director), Susan Perry (Legal Associate), Mario Richardson (Contract Administrator), Elisa Wolper (Financial Officer)

**Local Public Defender Program Attendees:** Chuck Caldwell (Public Defender), Bert Kemp (Public Defender), Jonathan McInnis (Public Defender), David Norris (Assistant Public Defender), Laura Powell (Public Defender), David Snipes (Assistant Public Defender)

**State Defender Programs:** LaTobia Avent (Office Manager/ Communications), Willia Mills (Assistant Special Counsel), Chad Perry ((Assistant Special Counsel), ( Rob Sharpe (Capital Defender), Wendy Sotolongo (Parent Defender), Dolly Whiteside (Chief Special Counsel); Eric Zogry (Juvenile Defender)

**Other Attendees:** Christina Becker (ACLU), Jennifer Gibbs (ReEntry, Inc.), Moira Reardon (OSBM)

The meeting was called to order by Vice Chair, Dorothy Hairston. Hairston proceeded with the welcome and conducted a roll call of members participating via telephone. Commissioner Mumma was present on the phone. Commissioner Pritchett also was present on the phone.

#### **Approval of July 12, 2019 Quarterly Commission Meeting Minutes**

Vice Chair Dorothy Hairston opened up the floor for members to discuss the minutes from the July 12, 2019 Commission Meeting. Commissioner Hughes moves that the phrase “questioned Wolper” on page four be changed to “had a question about.” All Commissioners present approved the amendment. Jordan moved to approve the minutes with the amendment. The minutes were approved by unanimous vote.

#### **State Government Ethics Act Reminder**

Vice Chair Dorothy Hairston reminded the Commissioners of their responsibilities under the State Government Ethics Act. Commissioner Hughes reminded the Commission that he also served on the Board for North Carolina Prisoner Legal Services, a contractor with IDS.

#### **Oath by New Commissioners**

Judge Menefee administered the oath to new Commissioners Caitlin Fenhagen and Stacey Rubain.

#### **Chair Election**

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Hairston opened the floor to nominations for Commission Chair. Hairston nominated Darrin Jordan to serve as Chair. Jordan accepted. All Commissioner present voted to appoint Jordan as Commission Chair. Hairston then turned the meeting over to Jordan.

#### **Budget Discussion**

Elisa Wolper, IDS CFO, presented the Commission with an update on the fiscal year that just ended and early projections for the fiscal year.

Wolper began by explaining that her predictions for the new fiscal year were complicated by the fact that the General Assembly had yet to override the Governor's veto of the 2019-20 budget. She then launched into a broad overview of how we pay counsel in court appointed cases.

Highlights for IDS's FY2019 spending:

- IDS spends about \$45 million each year on the Local Public Defender programs (LDP). In FY18, the collectively recorded over 90,000 dispositions. Dispositions are unweighted. Most of their work was on adult criminal cases.
- IDS spends about \$66 million each year on Private Assigned Counsel (PAC). Last year PAC submitted approximately 157,000 fee applications.
- IDS spent about \$7 million on criminal contract counsel and another \$1.7 million on civil and delinquency contracts.
- IDS spent \$2.6 million on administrative costs.
- IDS has seen a drop, year to year, in total dispositions. The dispositions in the local public defender offices, peaked at almost 110,000 in 2011. Some of the drop is related to the elimination of counsel in Class 3 misdemeanor cases. The decrease does not appear to be related to cases being assigned outside of Public Defender offices because there was no corresponding increase in PAC cases during the year.
- The upward trend in spending in LPDs appears to be driven by legislative increases to state employee pay, which also increases IDS's contributions to state employee benefits. The average APD salary is \$71,137 per year. Many also receive a generous longevity payment that adds about 9% to their compensation.
- In 2019, Buncombe County was able to add two positions with County and MacArthur Grant funding. In Mecklenburg, the County provides for positions plus an additional salary supplement. Durham has one attorney that the County has funded off and on for several years now.
- Adding four new counties to the LDPS, a new program in 29A and expansion of the program in Carteret County to include Craven and Pamlico Counties, also strained the budget in 2019.
- The four new counties reported almost 1,600 dispositions last year. Rutherford opened in December, 2018 and Craven and Pamlico Counties started taking cases in January and February, 2019. While LDPs often ramp up slowly, these ramped up quickly, in large part because attorneys who were doing private counsel work joined the Public Defender Office and brought cases with them. The migration of attorneys from private practice to Public Defender offices can make IDS's numbers look off

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because the attorney has to withdraw as a PAC and get reappointed as an APD. This means they get paid out for their time worked in private practice, which leads to a surge in spending.

- Historically, IDS has funded new LDPs when the General Assembly authorizes their creation by transferring money from the PAC fund. This year, IDS transferred \$2 million to ramp up the new offices but at year's end had spent only \$1.2 million, which means IDS was able to transfer some of the money back into the PAC fund.
- The Statewide Defender Programs (SDP) include the Capital, Appellate, Parent, and Juvenile Defenders and The Office of Special Counsel. IDS bears the operating costs for the SDPs, which are generally the biggest part of the cost for an office. Much of the operating costs for the LDPs is born by the counties.
- In addition to direct representation, the SDPs also play a role in the creation of performance standards, policy development, attorney training, recruitment, and consultation.
- Capital spending, which is generally about 60% of IDS's total spending, increased in FY2019. Before that it was relatively flat with increases in FY2018 related to the office decentralizing and reaching full staff. This year's increase appears to be related to case expenses.
- District court is 30% of the work IDS funds but only 20% of its costs because the attorneys are only paid \$55 an hour and they were generally shorter cases. The big changes for the PAC in district courts is the two counties that withdrew from the Uniform Fee Program.

#### FY2020

- The 2019 Appropriation Bill includes a Public Defender office in Cleveland/ Lincoln Counties.
- A so-called "mini-budget" provided a 2.5% pay increase for all state employees this year and another 2.5% next year.
- Historically IDS has ended most FY years with some unpaid fee application or "carry-forward debt." IDS has spent less than its budget in order to chip away at that debt and finally eliminated it two years ago.
- IDS then began identifying small amounts of available funds and asking the Commission to approve small, targeted rate increases that would not lead to carry-forward debt.
- IDS always has some carry-forward debt at the end of the FY, often because the state shuts down its financial systems a couple of days before the end of the fiscal year. IDS cannot process fee application while the state systems are down. This year, IDS had actual carry forward debt and would not have had the money to process all fee applications at the end of the FY.
- It is difficult to predict carry-forward debt. There's nothing IDS can point to that would explain why it has spent 5% more this year than it had at the same time last year. As a result, IDS usually examines a 12 month rolling average.
- At this early point in FY2020, it looks like IDS will see real growth in demand.

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- Because the budget did not become law and PAC funding was not included in a mini-budget, IDS's appropriation in FY2020 is the same as it was in FY2019. Availability is affected by receipts from recoupment, lapsed salary in LPDs and SPDs offices generated by vacancy and by keeping below 100% of the allotment.
- Operating budgets for IDS, SDPs, and LDPs, are increasingly tight. While it may be a "small-dollar problem" not being able to afford a computer when you need one has a real impact on productivity.
- **IDS's** opportunities to bring in outside money are limited. The first year of a \$400 thousand federal grant just wrapped and IDS expects another 15 months of work from it. IDS and the Office of the Parent Defender (OPD) are working with DHHS on getting federal funds for parent defenders. Wolper cautiously estimate around \$2 million annualized from this reimbursement.
- A final concern if that AOC will one day begin charging IDS for costs it has not historically charged.

Commissioner Jordan expressed concern that many Judges do not fully understand where and how IDS's money comes from, particularly recoupment and debt set-off. Wolper advised the Commission that while IDS takes the position that attorneys fee only be docketed from the fee application, it appears clerks have been advised to docket it from criminal judgments, too. This can and has led to double docketing. Public Defender Kemp encouraged IDS to present at every District and Superior Court Judges' conference.

Executive Director Maher informed the Commission of a recent Court of Appeals case which held that fees, fines, and other costs can be assessed only once when multiple related counts disposed of in a single session of court. IDS is unsure how this will affect recoupment.

Wolper then turned the discussion to what the Commission would do if the budget becomes law and IDS receives an additional \$4 million appropriation. She relayed the consensus of the budget committee in order of its prioritization.

- A modest increase to \$60 in district court would affect a lot of public defense system attorneys.
- Increase low-level felonies from \$60 to \$65 in all courts.

Doing both would consume the \$4 million appropriation unless IDS receives the federal funds for parent representation. In that case, IDS would actually have a little bit more left to spend. Other smaller dollar options discussed by the Budget Committee include:

- Increase all capital cases by \$5 (\$170,000).
- Increase pay for transcriptionist and for paralegals would have a fairly modest impact on IDS's total spending. (No dollar estimate but expected to be low.)
- Increase high-level felonies by \$5 again (\$1 million).

Wolper then posed the question: If the budget passes and IDS gets the \$4 million appropriation, does the Commission want to address its highest priority, even if that means the resulting increase in spending is over \$4 million?

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She cautioned that if the Commission decided to address its highest priority, then, using a 15 growth estimate, she projects \$2 million in carry-forward by the end of FY2020. She reminded the Commission that while that would not create a significant delay in compensation at the end of FY2020, the \$2 million in carry-forward would be repaid from FY2021 funding, and any carry-forward in FY2021 would be repaid from FY2022. Carry-forward would then grow for year-to-year.

Wolper noted that the implementation date for the increase could be used to delay carry-forward debt. If, for example, the increase is not effective until March 2020, then the carry-forward would not begin to accumulate until end of FY2021. But, she cautioned that this would merely delay the inevitable.

Commissioner Beeler asked if there was any increase or decreases related to Raise the Age (RtA). Wolper noted those projections were done a couple of years ago and were addressed in a mini-budget.

Executive Director Maher asked the Commissioners how they think the \$4 million would be best spent. He encouraged the Commission to make the decision despite the uncertainty of the budget because the administrative difficulty of changing rates means it cannot be done overnight; the need is far greater than the actual appropriation and IDS and the Commission need to begin working on getting a meaningful increased for PAC and Public Defender in 2021. He turned the Commissions attention to a rate raise survey (survey) IDS recently conducted. (Survey and report available online.)

Commissioner Hughes expressed concern with attempting to ease the burden of the low rates with policies that vest approval with the judge rather than IDS. He expressed discomfort with using a policy that aims to make it easier to get a paralegal as a way to relieve the burden on the attorneys because a trial judge could refuse to approve the time.

The Commission then discussed the idea of using some of the \$4 million to pay attorneys who devote all or a significant amount of their professional time to the public defense system with a “hardship supplement.” Commissioner Cromwell expressed concern about attorney frustration with whatever metrics the Commission approved. However, he noted that it sounded like a reasonable way to try and reward the people who are doing the most work. It also was noted that the \$4 million was earmarked for raising the rates and the “hardship supplement” model was not truly a rate increase. Maher acceded that he could not predict how the General Assembly would react to the model.

Maher asked if the Commission felt it needed additional information from staff before it could make a decision. Commissioner Jordan suggested sending the matter back to the budget Committee for full recommendation.

The discussion broke for a presentation followed by lunch.

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**Presentation by Jennifer Gibbs, acting Executive Director with ReEntry, Inc. in Wake County. Audio available on request.**

Public Defender Laura Powell gave the Public Defenders' Report.

The Commission returned to debating how best to spend the \$4 million appropriation. Commissioner Beeler moved to raise the district court rate from \$55 to \$60 and to use the remaining money to implement the "hardship supplement" outlined in the Executive Director's memorandum.

Commissioner Hughes seconded Beeler's motion.

Commissioner Menefee moved to amend Commissioner Beeler's motion by replacing the "hardship supplement" with an increase to the low level felony rates from \$60 to \$65 dollars.

Commissioner Fenhagen seconded Commissioner Menefee's motion to amend. The motion then pending before the Commission was to raise the district court rate from \$55 to \$60 and the low level felony rates from \$60 to \$65 dollars.

Commissioner Mumma moved to amend the amended motion by striking the raise to the low level felony rates and delaying a decision to spend any money left over after the district courts rates were raised.

Commissioner Hughes seconded Commissioner Mumma's motion to amend the amended motion.

The Chair called a vote on Commissioner Mumma's motion to amend the amended motion.

The motion failed.

The motion then pending before the Commission was to raise the district court rate from \$55 to \$60 and the low level felony rates from \$60 to \$65 dollars. The Chair called a vote.

Commissioners Hughes, Mumma, and Cromwell voted no. Commissioners Fenhagen, Menefee, Beeler, Hairston, and Pritchett voted yes. The motion carried.

The Commission will raise the district court rate from \$55 to \$60 and the low level felony rates from \$60 to \$65 dollars. The Commission defers to staff on implementation date and process. The raises are contingent on the 2019 Appropriations Act becoming law.

IDS Contract Administrator Mario Richardson gave the regional defenders' report and the Contract/ Grants report.

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Juvenile Defender Eric Zogry gave the Juvenile Defender's report. Commissioner Jordan took the opportunity to thank Zogry for agreeing to speak at the 12th annual Rowan County Bar Association Criminal Law CLE.

IDS Research Director Margaret Gressens updated the Commission on the Public Defense Portal (PDP).

IDS Public Defender Administrator Susan Brooks updated the Commission on the uniform qualification standards.

#### **Presentation by Christina Becker of the North Carolina ACLU. Audio available on request.**

Maher updated the Commission on a number of projects and issues staff currently is working on.

- Continued need for additional resources including sufficient staffing Public Defender offices as identified in the General Assembly mandated workload study.
- Clarification of appointment of Public Defender whose district straddles multiple superior court districts.
- Realignment of IDS Commission Committees.

Fairbanks presented the Quarterly Misconduct Report. The Commission requested Fairbanks relay the need to monitor contract attorneys who have been reprimanded and failed to respond to the bar to the regional defenders/

**Commissioner Jordan adjourned the meeting at 2:47pm.**