

## DECEMBER 13, 2019 MEETING MINUTES

### Commission on Indigent Defense Services

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Quarterly Meeting – December 13, 2019, 10:00AM – 3:00PM  
School of Government, UNC-Chapel Hill  
Chapel Hill, NC

**Commissioner Attendees:** Caitlin Fenhagen, Mark Hullender, Staples Hughes, Dorothy Hairston, Lisa Menefee, Chris Mumma; Commissioner(s) Stacey Rubain attended by phone

**Staff Attendees:** Susan Brooks (Public Defender Administrator), Tucker Charns (Chief Regional Defender), Jeff Connolly (Regional Defender), Whitney Fairbanks (Deputy Director), Angela Henderson (Juvenile Contracts Administrator), Carmen Jarmon (financial analyst) Thomas K. Maher (Executive Director), Sarah Olson (Forensic Resource Counsel), Susan Perry (Legal Associate), Mario Richardson (Contracts Administrator), Elisa Wolper (Financial Officer)

**Local and State Public Defender Program Attendees:** Jim Black (Investigator), Chuck Caldwell (Public Defender), Glenn Gerding (Appellate Defender), Bert Kemp (Chief Public Defender), Jonathan McInnis (Chief Public Defender), John Neiman (Chief Public Defender), David Norris (Assistant Public Defender), Laura Powell (Public Defender), David Snipes (Assistant Public Defender), Dolly Whiteside (Chief Special Counsel), Eric Zogry (Juvenile Defender)

**Other Attendees:** Mary Pollard (NCPLS), John Rubin (School of Government)

The meeting was called to order by Vice- chair, Dorothy Mitchell. Mitchell proceeded with the welcome and conducted a roll call of members participating via telephone.

#### **Approval of October 4, 2019 Quarterly Commission Meeting Minutes**

Vice-chair Dorothy Hairston Mitchell opened the floor for members to discuss the minutes from the October 4, 2019 Commission Meeting. Commissioner Hughes moved to approve the minutes without amendment. Commissioner Mumma seconded the motion. The minutes were approved by unanimous vote.

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

Vice-chair Dorothy Mitchell 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.

#### **Commission Business**

##### Adopt 2020 Commission Meeting Calendar

After discussing the merits of four shorter meetings per year versus three longer meetings, the Commission decided to continue meeting four times per year. Commissioner Hughes moved and Commissioner Mumma seconded the adoption of the proposed 2020 quarterly meeting calendar. All Commissioners present concurred. The Commission will meet on

- March 27
- July 17

- September 25, and
- December 11

### Revised Committees and Assignments

Tom Maher led a short discussion about the revised committee line-up and assignments. He highlighted committee's staff thought could be dissolved as well as new ones. He noted that as staff considered dissolving a committee it considers the committee's scope, staffing resources, and the agency mission.

#### Dissolved Committees:

- Capital Committee: Staff recommends moving its current work to the personnel committee.
- Contract Committee: Staff recommends dissolving and moving its work to a proposed Delivery System Committee.
- Juvenile Committee: Staff recommends moving its current work to the personnel committee.
- Long Term Planning Committee: Staff recommends renaming this Committee as proposed Appointment Committee and clarifying its scope.

#### New Committees:

- Communications: Noting that over the course of the prior year, the Executive Director, Deputy Director, Chair, and Vice-chair had met bi-weekly to discuss the ongoing legislative session staff proposed a communications committee. Communications Committee.
- North Carolina Public Defense System: Staff recommends creating a committee to engage in long-term planning for the North Carolina public defense system through the evaluation of data, trends, and policy, including top level evaluation and comparisons of outcomes for clients across delivery models. The North Carolina Public Defense System Committee also would serve as an umbrella committee for issues related to all existing and proposed service delivery and compensation models, as well as all case types covered by the IDS Act.

### Quarterly Misconduct Report

Fairbanks advised the Commission that the State Bar had recently censured Matthew Carl Cox of Jacksonville because he did not communicate with his court appointed clients, neglected his client's cases, and did not respond to the grievance committee. The censorious behavior included three separate court appointed clients and included leaving court appointed clients in custody for lengthy periods of time without communicating or visiting with those clients. Fairbanks informed the commission that she had drafted a letter for Tom's signature to the Onslow County, which is the county of practice, Indigent appointment committee with a copy to Mr. Cox advising him of IDS's serious concerns with Mr. Cox's appropriate- whether or not it's appropriate for Mr. Cox to continue representing court appointed clients.

Commissioner Fenhagen requested the Staff follow up with Mr. Cox and update the Commission at its next quarterly meeting.

#### 2019 Rate Increase Implementation

Maher informed the Commission that IDS had not increased any rates because the General Assembly (GA) had yet to pass a budget. He advised that until the GA passed a budget, IDS would continue to operate under the previous year's budget.

#### Discussion of IDS Rules, Policies, & Procedures

Maher directed the Commissions attention to the memorandum on rules and policies in the advance packet. He noted that when IDS was formed in 2000, one of the first things that the commissioners and staff did was work very hard to develop rules. Noting that the rules had been amended from time to time, Staff was recommending a comprehensive review of all rules and policies. The specific goals of the project are:

- identify out of date rules and policies,
- determine whether they are working as intended,
- clean up or updating rules, including memorializing informal policies
- streamline processes such as removing the Executive Defender from some funding/ approval requests.

Tom noted that the changes would consider policy, workflow, and subject matter. Policy considerations, he pointed out, would include the inherent conflict for State Defenders in recruiting qualified attorneys and cutting fee applications.

**Commissioner Hughes raised concerns about** II. A3, which prohibits substitution of attorneys in material proceedings and lists bond motions as “non-material,” noting that current practice makes it clear that bond hearings are material. Tom noted that staff shared concerns and had discussed re-examining the provision. Current rules require that attorneys be members of the same firm if one is to substitute for another at a material point in a proceeding. The same rule requirement is particularly difficult for attorneys who provide public defense to comply with because so many of them are solo practitioners.

It was decided that the changes would be sent to the new Public Defense Committee and that it could establish ad hoc rules subcommittee(s) as needed.

#### Capital Post Conviction Roster Recruitment

Maher updated the commission on the growing issue with attrition in the capital post-conviction (CPC) roster. He noted that IDS had been working closely with the Center for Death Penalty Litigation (CDPL) in the capital post-conviction arena and CDPLS was tracking the current roster and helping IDS identify new recruits. Until recently IDS had added very few new attorneys to the roster due to dearth of work in the area.

He noted that Racial Justice Act (RJA), lethal injection litigation, and the quality work of the capital bar meant that many CPC cases were just sitting; however, the recent NC Supreme Court hearing on the RJA meant that some might wake up again soon. Noting there were only eight CPC cases where only one attorney was assigned, Maher pointed out that the scope of the problem was broader because of the number of lawyers who had made it

clear to IDS that they intended to withdraw from their cases as soon as the cases started moving again.

Fairbanks noted the related issue of attrition in the ranks of attorneys willing or able to take non-capital post-conviction (NCPC) cases. When these attorneys began accepting CPC cases, they became less willing to accept NCPC. Glenn Gerding, Appellate Defender, joined Maher and Fairbanks in their concerning, noting that the RJA appellate litigation was putting pressure on his ability to recruit appellate defenders.

Maher said Staff's first plan of action is to conduct CPC and NCPC training in February 2020. CDPL and NC Prisoner Legal Services (NCPLS) would put on the training and the registration cost would be \$50. He asked anyone present who knew of attorneys they thought would be willing and able, with or without training, to start doing post-conviction in to let IDS know.

The Commission then discussed other ways to entice qualified attorneys to capital appeals, capital post-conviction, and non-capital post-conviction. Commissioner Hughes expressed his opinion that assistance with access to Lexis or Westlaw, such as a discount on the subscription price, would help.

#### Allison v. Allen (ACLU and CRC pre-trial detention litigation)

Maher updated the Commission on Allison v. Allen, the lawsuit filed in the Middle District of North Carolina by the ACLU and Civil Rights Corps (CRC) alleging that the way Alamance County handles pre-trial release is unconstitutional. Noting IDS was not a named defendant, he explained that IDS had been involved in discussion with plaintiffs and defendants as early representation was part of the settlement discussion.

According to Maher, both the plaintiffs and defendant wanted IDS to provide counsel in a more meaningful and timely fashion. Maher reminded the Commission that IDS would not be subject to a federal court order to do this, relaying that both plaintiffs and defendants offered to implead IDS if that would make things easier.

Maher said he was considering something like what IDS had done in Haywood and Jackson Counties. He highlighted the differences between the Haywood/Jackson and Alamance projects for the Commission. Alamance will be broader because it will not be limited to misdemeanors and low-level felonies. It might involve representation on first appearances in Superior Court, as well as District Court, but the primary focus would be District Court. Other highlights he noted include:

- Regional Defender Jeff Connolly was serving as IDS' boots on the ground in Alamance. While Maher was discussing matters with plaintiffs and defendants, Connolly had been discussing implementation issues with judges and attorneys in Alamance County
- Because of its higher volume, Alamance might be easier to handle.
- If the project works well in Alamance, other districts might consider adopting something similar processes.
- Other districts may have current practices that are in fact worse than Alamance, which also may lead to more litigation.

- Many Public Defender offices (PDO) already provide representation at first appearance.
- Providing clients effective representation early in the case has many benefits, including reduced jail costs and improved outcomes.

### NCPLS Board Appointment

NCPLS Executive Director, Mary Pollard, took a moment to let the Commission know that NCPLS's post-conviction attorneys were very busy and doing great. They were preparing for a flood of letters if the GA passed the First Step Act. She noted that on the civil side, NCPLS was litigating some individual claims that the federal courts asked it to handle following frivolity review as well as two class actions or potential class actions, one on Hepatitis C treatment in prison and the other on the misuse of solitary confinement. She explained that NCPLS was able to litigate those cases because it received private grant funding to cover litigation expenses.

Pollard went on to inform the Commission that NCPLS also recently received some grant funding from that would allow it to upgrade its website to make it usable for the public, friends, and family members of inmates, and lawyers who do post-conviction work. In addition, it would cover some training on equity and inclusion and a staff-wellness program. However, she noted that money was not available to increase salaries and expressed frustration that it was becomingly. She said she was grateful to IDS for doing what it could to maximize the money coming into the organization, NCPLS needed more money.

Pollard then moved to the IDS commission designee for the NCPLS board. The current IDS delegate was Danielle Carman who had recently taken a job as Deputy Director of AOC and been advised that she needed to step down from the NCPLS board because of possible conflicts of interest. Pollard then submitted two names to the IDS commission for consideration: Kelly Mannelle and Mary Beth Carol. Because a quorum was not present it was decided that the names would be circulated to the Commission via email and that the vote would be read into the minutes at the next Commission meeting.

**The IDS Commission went into Executive Session at 12:35pm to discuss personnel matters. The minutes of the Executive Session are being withheld from public inspection pursuant to and to G.S. 143-318.11(a)(6). It returned to open session at 12:45pm.**

### **Updates**

#### Uniform Appointment Plan Roll-out

Maher updated the Commission on the new uniform appointment plan:

- July 1, 2019 – IDS finalized the plan on
- 2019-2020 – IDS conduct outreach by contact every state bar president, informing them of the plan, and requesting they set up a time for IDS to update the local bar
- 2020 – Districts must adopt it as is or request modifications
- January 2, 2021 – approved plan or IDS model plan becomes effective in all districts

Susan Brooks, Public Defender Administrator, then updated the Commission on her progress with Public Defender District adoption plans. She noted that Districts 17 districts

made work on the plans slow-going but expressed optimism that all PD districts would have a plan in place by January 2021.

Maher pointed out that many of the smaller, non-PD district bars only meet once a year and noted that IDS would need to push them. He also expressed his suspicion that many of the district will not fully implement the plans even after they adopt them noting that the courts in rural areas present challenges not presented in larger urban districts.

#### Planning for Golden Anniversary of Public Defender Offices

Brooks provided the Commission with an update on IDS' ongoing planning for the NC Public Defender Offices' 50<sup>th</sup> Anniversary. She highlighted the work of the 50<sup>th</sup> Anniversary Committee as summarized below.

- Work with State Bar, Bar Association, and NCAJ on formal recognition of the offices
- Forums at local law schools including Elon and Campbell
- Public Defender Panel for March 2020 Commission meeting
- Video montage celebrating the past, present, and future
- Work with NCAOC communications division on printed materials and pressers
- Established March 18 as first ever North Carolina Public Defender Day, to coincide with Gideons and National Public Defense Day
- Requested proclamations on importance of public defense from various officials
- Designed combative T-shirts

#### Public Defender Workload Study

Brooks then filled in the Commission on IDS and the PDOs work on implementing the workload study. She and Maher brought Cynthia Lee (National Center for State Courts) in to meet with a group of chief and assistant public defenders to talk about how they might implement the workload study in bite-size steps. Three ideas emerged from the meeting:

1. Working on local court system inefficiencies,
2. Working with pretrial release, and
3. Transfer clerical work that the attorneys are doing to administrative staff to free up the attorney time for more substantive and value-added work.

Brooks added that at a subsequent Chiefs' meeting, the chief public defenders decided not to pursue number three. Subsequently, IDS created a survey for the Chiefs using all the Delphi panel recommendations from the workload study. She explained that IDS intended to use the survey results to determine staffing for full-time positions, which it then would include in its annual budget request to the governor and legislature.

#### Observations on 2019 Long Session/ Planning for 2020 Short

Maher provided a legislative update. He reminded the Commission that the 2019 Long Session was not technically over and that there was speculation that the GA would be able to override the Governor's budget veto. He outlined IDS' approach to communicating with the GA over the last session including its work with Conservatives for Criminal Justice Reform; staffing a booth at the GOP State Convention; and work with the State Bar. He pointed the Commission to the State Bar President Colon Willoughby's recent op-ed on the importance of public defense.

Maher's update:

- A reminder to the Commission that in addition to funding requests, IDS had made some procedural requests that passed committee and were included in the Appropriation Act. He noted that IDS would need to continue pursuing changes to the PD appointment process in 2020, perhaps through a "mini-budget" or AOC omnibus bill.
- Other provisions in the Appropriations Act that would affect IDS if passed and that IDS did not request include a provision that allotted a specific number of assistants to each PDO and one that established a new PDO in Lincoln/Cleveland counties and some money to address start-up and transition costs associated with opening a new PDO.
- The GA passed "mini-budget" that provided a 5% legislative increase (at 2.5% per year of the biennium) to state employee salaries.
- IDS' request to include PAC money in a mini-budget went unaddressed. Commission Chair Jordan met with Senator Britt about this but was unable to get any traction on it.

Maher then transitioned the conversation to planning for 2020. He expressed his opinion that IDS should continue to request a large appropriation. because it was what was needed and there was no reward to asking for smaller appropriations. He reminded the Commission that IDS had requested \$17 million recurring for the PAC in 2019 and suggested it ask for that again in 2020 with an additional request to provide PDOs with resources the workload study had identified as necessary. He said that he predicted the request would need to \$20 million. Noting the work on the workload study, the follow-up survey, and the alarming results of the Research's overhead study, he opined that IDS could make a compelling case for more resources; that it could not ask for all of what was really needed which was something like \$50 million or \$60 million, but that it could make a full throated argument for \$20 million or \$25 million.

#### Fiscal report

Chief Financial Officer Elisa Wolper provided the fiscal report turning the Commission's attention to a document contained in the advance packet. Wolper advised the Commission that fiscal continued to feel as it had in September that IDSs current funding would not be enough to allow payment to PAC through the end of the FY20. Possible contributing factors included transition and start-up for new PDOs. She then explained that by any measure she looked at IDS' spending year to date was more in FY20 than it was at the same point in FY19. Through November 2019, IDS had spent 6% more than it had by November 2018. Wolper told the Commission that she had looked into why spending was increasing including looking for an increase in court activity; the average hours for the same type; and delays and court time waiting, that could increase the average hours for lower-level cases. However, nothing seemed to rise to the level of 6%. Wolper turned to the rolling average which also showed an increase of 3.7% increase. She pointed out the number of fee applications received had dropped about 1.2% and that the number of contract dispositions even more.

Considering a 1% growth rate and a shortfall, Wolper predicted IDS would end FY20 with a \$1.7 million shortfall. A shortfall of that size would result in one to two weeks' delay in payment, which might not have a serious impact on attorneys if IDS is able to catch up right

away in July. She explained that the real problem with the \$1.7 million shortfall this year is that it would take the first \$1.7 million of the next year's budget before the year even got started. Unless something happened to reverse the cycle, the shortfall would compound from year-to-year. Wolper said that if IDS had received \$4 million annualized to increase in rates when it started FY20, it would be able to cover any shortfall.

Wolper then walked the Commission through a crude review of our annualized spending to date. She noted that contracts are our biggest chunk of spending, which makes it hard to do a lot of analysis. She also noted, however, that spending on contracts did not really change this year compared to last year. While noting some growth in non-attorney spending, such as on experts and other support services for the attorneys, she again concluded that it was not enough to account for 6% growth.

Wolper provided the Commission with a couple of funding Scenarios.

1. The GA overrides the Governor's budget veto when it comes back into session in January 2020 and gives IDS a \$2 million new appropriation and a new fee coupled with receipts; the earliest IDS could implement a widescale rate increase would be March 2020. It also would eliminate the shortfall for FY20.
2. The GA passes a new one-year budget in the upcoming 2020 short session and provides IDS an appropriation on July 1. In that scenario, IDS would not be able to eliminate the shortfall but would have adequate funding to pay it down and increase rates as of July 1.
3. Nothing happens with the budget this year or next year.
4. IDS receives federal funding for parent defense through Title IV.
5. IDS receives federal funding for parent defense through Title IV and a new state appropriation through a budget override or new one-year budget.

Wolper reminded the commission that she and Parent Defender Wendy Sotolongo were continuing to work with DHHS on realizing a federal reimbursement for parent defenders. She lamented that DHHS was moving slowly in developing a system that addressed its concerns about only reimbursing in eligible cases. When that funding stream opened, IDS' ability to address other PAC rates also would open up. She expressed optimism that IDS would know more by the end of this calendar year.

#### Report of the Public Defenders

Laura Powell, Chief PD Rutherford/McDowell, gave the report. She began by welcoming new Chiefs John Neiman and Stuart Higdon. She then conveyed the Chiefs' shared sorrow at the loss of Carteret/Craven/ Pamlico Counties Chief James Wallace earlier in the year. She further informed that the PDOs were meeting the new demand created by Raise the Age (RtA); continuing to work with OAD on satellite-based monitoring hearings; and that her district had welcomed a new Chief District Court Judge.

#### Other Reports

Fairbanks reminded asked if any of the Commissioners had any questions or comments about the written reports from the Juvenile Defender, Regional Defenders, and Contract Administrator contained in their advance packets.



Vice-chair Mitchell asked Juvenile Defender Eric Zogry to provide the Commission an update on RtA. Zogry gave an update on ongoing training and his office's efforts to provide field support, including the addition of another Assistant Juvenile Defender to the west of the triangle. Commissioner Fenhagen asked Zogry about some of the materials developed by law enforcement and other system actors. Zogry noted that much of that was developed by the School of Government. He said there had been some collaboration in their development. Commissioner Hughes asked why traffic offenses were not included in RtA and Zogry explained that some had feared the volume of traffic cases would overrun juvenile court.

Meeting adjourned by acclamation at 1:04pm EST.