

2021.04.09 Meeting Minutes

Commission on Indigent Defense Services Legislative

Quarterly Meeting – April 9, 2021

Location: North Carolina State Bar

Commissioner Attendees: Darrin Jordan (Chair), Dorothy Hairston (Vice Chair), William “Gus” Anthony, Art Beeler, Brian Cromwell, Joseph Crosswhite, Caitlin Fenhagen, Staples Hughes, Channing Jones, Lisa Menefee, Jan Pritchett, Stacey Rubain.

Staff Attendees: Susan Brooks (Public Defender Administrator), D. Tucker Charns (Chief Regional Defender), Kristen DeSimone (Legal Associate), Whitney Fairbanks (Deputy Director), Margaret Gressens (Research Director), Angela Henderson (Juvenile Contracts Administrator), Carmen Jarmon (Financial Analyst), Sarah Olson (Forensic Resource Counsel), Susan Perry (Legal Associate), Mary S. Pollard (Executive Director), Elisa Wolper (Financial Officer)

Local and State Public Defender Program Attendees: Dawn Baxton (District 14), Glenn Gerding (Appellate Defender), Robert Kemp (District 3A), Samuel Snead (District 28), Wendy C. Sotolongo (Parent Defender), , Dolly Whiteside (Chief Special Counsel), Eric Zogry (Juvenile Defender)

The meeting was called to order by Jordan by conducting a roll call of Commissioners. Jordan then welcomed Chief Justice Paul Newby of the North Carolina Supreme Court. Justice Newby addressed the Commission noting its and the Agency’s importance.

Approval of January 22 Quarterly Commission Meeting Minutes

Jordan opened the floor for members to discuss the minutes from the January 22, 2021 Commission Meeting.

Commissioner Cromwell moved to approve the minutes without amendment. The minutes were approved by unanimous vote.

State Government Ethics Act Reminder

Jordan reminded the Commissioners of their responsibilities under the State Government Ethics Act.

Director’s Report on IDS Business

Contracts Evaluation Project

Pollard began by giving the Commission a refresher on the program. She relayed that a now expired 2013 session law required IDS to issue Requests for Proposals (RFPs) in all districts for legal representation in all areas of service. The result was the development of unit contracts in adult criminal cases in eighteen counties. In four counties the contracts supplement public defender offices; in the remaining counties the contract system is the primary service delivery model.

Pollard walked the Commission through the program design. She explained that the model employed units comprised of minimum/ maximum case credits, e.g. 21-25 case credits (cases) equal one unit of high-level felonies. She then explained that the compensation model included a monthly set fee per unit with the possibility of extraordinary pay and case credits during the term of the contract and the possibility of an overage at the termination.

After reminding the Commission that as early as her interview for the director's position she had expressed concerns about the system and that she intended to study it thoroughly, Pollard turned to the findings in the Research Department's recently completed review. She informed the commission that the high-level conclusion of the study was that the contract delivery system was somewhat more expensive than the alternative delivery systems.

While acknowledging that, due to a lack of accurate data reporting, the study did not make any qualitative findings, Pollard expressed her opinion that IDS should not continue the system as currently designed. She identified two important reasons for this opinion as:

1. The current system does not allow IDS to meet its statutory mandate to collect data
2. It is more expensive than any of the other delivery models, including public defender/ private assigned counsel (PAC) and PAC only models.

Pollard cautioned that IDS could not simply shut them down without first developing an alternative system and then building the infrastructure to support it. She underscored the beneficial aspects of the contracts system:

- the regional defender program,
- increased oversight,
- and predictability in pay for the attorneys and spending for IDS.

Pollard concluded by informing the Commission of her decision not to renew the cohort of contracts set to expire November 30, 2021. Instead she intended to extend the cohort for six months, which would allow further work to replace the system.

Jordan asked whether it would be worthwhile to press the legislature to convert RFP contract programs into public defender (PD) programs. Pollard noted that she intended to further discuss PD program expansion during her eight-year plan discussion.

Crosswhite expressed serious concerns about the ability to recruit and maintain a roster of qualified attorneys willing to take court appointed work in his district, which he characterized as mid-sized.

Hughes asked Regional Defender Charns whether she consulted only with contract attorneys. She explained that while most of her program's consults are with contract attorneys, she has seen the use expand beyond the program. In recent years both regional defenders have contracted with more non-contract PAC in contract districts and PAC in non-contract districts. Hughes expressed his concern that ending the contract system would erode IDS's ability to monitor quality in non-PD districts.

Beeler asked whether there was any intention to gather the missing data. Gressens, Research Director, noted that the complications in data collection appeared to be unique to the contract program. She also noted that the complications were greatest in the high-level felony category. She opined that the lack of incentives IDS could offer coupled with limited staff time to oversee retroactive data entry would make it nearly impossible to gather. Pollard added that the data is at least sufficient to conclude that the contract system is the most expensive system. She reiterated her conclusion that since the contract system was never likely to generate sufficient qualitative data, IDS needed to design one that provided the benefits of the contract system (oversight, predictability) and generated sufficient and reliable qualitative and quantitative data.

Lunch with the Public Defenders

Pollard highlighted her weekly lunch with the Public Defenders for the Commission, noting that as of April 9, she had met with about six offices and was looking forward to meeting with the rest over the course of the next few months. She noted, however, that she very much looked forward to visiting their offices in person once the pandemic resolved.

Eight Year Plan for Indigent Defense Services

Pollard outlined her eight-year plan for the North Carolina public defense system for the Commission. She advised the Commission that, in her opinion, the North Carolina Commission on the Administration of Law and Justice (NCCALJ) 2016 report recommendations for improving public defense were sound but the implementation would require roadmap. To provide such a roadmap, she said she had begun working with staff to develop a thoughtful, predictable approach to improving the system. She expressed her preference for using the National Center for State Courts given its knowledge of the NC court system, including IDS and the defender programs; and the fact that the Center already had compiled a significant amount of data during its workload study.

Remarks from the Defense

Glenn Gerding, North Carolina Appellate Defender, provided the Commission with an update on the work of the Office of the Appellate Defender. Gerding gave the Commission a brief overview of the office history, statutory creation, and work providing direct representation in appeals and supervising and supporting a sixty member PAC roster. He also explained the broad scope of the offices work—from criminal convictions to involuntary commitments to habeas petitions.

Gerding highlighted his offices efforts to oversee and support PAC. He described its training efforts, attorney-on-call protocol (a service to trial and appellate attorneys), appellate brief reviews, and moot court services.

Gerding rounded up his presentation by summarizing the effect of the pandemic on his office. He noted that in a year-to-year comparison, there was a steep decline in new and closed cases from FY 2020 to FY2021. He explained that the impact was delayed compared to trial work but

only by a month or two. Gerding also emphasized that the impact born disproportionately by PAC because it meant he did not have cases to assign them and, therefore, they saw a steep decline in work.

On behalf of the Commissioner, Jordan thanked Glenn and his staff for their hard work during difficult times.

Training Update

Professor John Rubin provided the Commission with an update on training during the pandemic. The Public Defender Education (PDE) team successfully pivoted to virtual training, which meant they were able to provide both informational and skill-based training throughout the year. He predicted that PDE training would once again be mostly in person by August 2021. Other training and resource matters Rubin updated the Commission on:

1. an upcoming guardianship guide for attorney who work as guardians ad litem;
2. a compendium of Covid-19 related resources; and
3. continued consultation services and manual updates.

Jordan, on behalf of the Commission thanked Rubin and IDS for working to provide high quality, low cost continuing legal education for PAC during pandemic induced austerity.

Fiscal Report

Update on 2021FY Spending & Recoupment

Wolper opened by advising that IDS had sufficient funds to finish the fiscal year. She also relayed her recent confirmation that the PAC fund was a non-reverting fund. She noted this discovery was timely given IDS would not exhaust PAC funds this year. Other matters Wolper updated the Commission on:

1. Debt Set-Off: Office of State Budget and Management (OSBM) allowed IDS to move money into an interest-bearing account in case to insure against any risk that may have been created when Department of Revenue (DoR) changed its debt set-off policies during the 2020 tax season. She also noted that set-off notices had been sent to last year's taxpayers and that notices were sent using a mix of short-term fixes to this year's taxpayers. AOC and IDS staff continue to work with DoR and Department of Internet Technology for a longer-term process.
2. Discussions with NC Department of Social Services on IVE funding for parent defense had seen some movement but recently slowed so that NCDSS could consult with the Children's Bureau (federal agency) on how IDS planned to spend the money.

Governor's Budget

Wolper updated the Commission on the expansion budget IDS submitted to the Governor's office. Except for one request, which OSBM felt was more appropriately addressed through the General Assembly, the Governor's budget incorporated IDS's requests. She opined that IDS's use of long-term planning as a template for the requests was well received by OSBM.

As a segue to Pollard's discussion of the legislative session, Wolper pointed the Commission to the Budget Committee's meeting report. The report was styled as a "road map" for spending based on different funding options. In other words, what would spending priorities be if the General Assembly appropriated \$7 million? What if it appropriated \$5 million? The document reflected the thorough Budget Committee discussion, which included input from the state defenders.

Discussion of Legislative Session

Pollard provided a very brief update on the ongoing legislative session. She informed the Commission that fiscal research staff at that General Assembly presented the IDS budget to Justice and Public Safety on March 18. She characterized the members present as engaged. There was a lot of discussion of public defender workloads, PAC rates, and other spending issues confronting IDS.

Pollard also shared a recent email from Robert Sharpe, Jr., NC Capital Defender, concerning alarming increases in capital case appointments. IDS staff subsequently shared Sharpe's email with members of JPS.

Public Defender Expansion

IDS's Public Defender expansion request was for the three offices previously identified: Cleveland/Lincoln, Pender expansion, separation of Districts 1 and 2.

Other Legislation of Interest

Pollard pointed the Commission to the AOC Omnibus that was moving through Committees, highlighting a provision that would significantly expand the use of virtual appearances.

Public Defender Appointment Process, a presentation by the Sixth Amendment Center

Pollard reminded the Commission that IDS and the Public Defenders wanted technical corrections to the current statutory appointment process for Chief Public Defenders. She provided as example that at least one PD office spanned multiple Superior Court Districts leaving with whom the authority to appoint rested in question. She noted that since the corrections were not immediately necessary, she and the PDs had decided to take a measured approach and seek input and education on best practices. To begin that process, she invited David Carrol of the Sixth Amendment Center to address the Commission on the right to counsel across the U.S. Mr. Carrol's presentation is available on request.

Commission Business

Report of the Diversity Committee

Vice-Chair Mitchell addressed the Commission on the work of the Diversity Committee. As a starting point, Mitchell provided the Commission with a primer on terminology such as diversity, equity, and inclusion. She then presented the Committee's six goals and related strategies for the implantation and integration of the statement:

1. Draft statement,

2. Commission adoption
3. Develop process to facilitate plan and collect data,
4. Review data, and
5. Update statement and plan as needed.

Jordan opened the floor to questions and comments. Hearing none he entertained a vote to adopt the statement. All Commissioners voted to adopt the proposed diversity statement.

Cromwell asked whether IDS would be able to allocate resources to support the integration of the plan. Pollard relayed that at least in the near term, staff felt that it would be able to absorb the work without additional expenditure. Cromwell expressed his desire that, when appropriate and if necessary, the Commission consider providing additional resources for full implementation and integration.

Having no further Commission business, Commissioner Crosswhite moved that the Commission go into executive session. Mitchell seconded. All Commissioners supported the motion.

The IDS Commission went into Executive Session at 1:15 pm to discuss litigation matters and the Professor John Rubin Excellence in Training nominees. The minutes of the Executive Session are being withheld from public inspection pursuant to G.S. 143-318.11(a)(2.) and to G.S. 143-318.11(a)(3).

The Commission returned to open session at 1:30 pm. The Commission voted unanimously to confer the training award to Antoan Whidbee in gratitude for his generosity in time and expertise to training for public defense attorneys.

The meeting was adjourned by acclamation at 1:35 pm.