

2021.10.29 MEETING MINUTES

Commission on Indigent Defense Services

Legislative

Quarterly Meeting – October 29, 2021

Location: UNC-CH, School of Government

Commissioner Attendees: Darrin Jordan (Chair), Dorothy Hairston (Vice Chair) Art Beeler, Brian Cromwell, Caitlin Fenhagen, Staples Hughes, Brian Jones, Channing Jones, Lisa Menefee, Jan Pritchett, Stacey Rubain

Staff Attendees: Chad Boykin (Financial Services Staff Attorney), Susan Brooks (Defender Administrator), D. Tucker Charns (Chief Regional Defender), Jeff Connolly (Regional Defender), Kristen DeSimone (Legal Assistant), Whitney Fairbanks (Deputy Director), Angela Henderson (Juvenile Contracts Administrator) Susan Perry (Legal Assistant), Mary S. Pollard (Executive Director), Elisa Wolper (Financial Officer),

Local and State Public Defender Program Attendees: Dawn Baxton (District 14), Cynthia Black (District 12), Ronald Foxworth (District 16B), Paul James (District 21), Terry Johnson, (Assistant Juvenile Defender), A. Burcu Hensley (Assistant Juvenile Defender), Robert Kemp (District 3A), John Neiman (District 18), Robert Sharpe, Jr. (Capital Defender), Deonte Thomas (District 10), Dolly Whiteside (Chief Special Counsel), Eric Zogry (Juvenile Defender)

The meeting was called to order by Commission Chair Darrin Jordan, who then proceeded with the welcome and conducted a roll call of members participating via telephone.

Approval of July 30, 2021 Quarterly Commission Meeting Minutes

Darrin Jordan opened the floor for members to discuss the minutes from the last Quarterly Commission Meeting.

Commissioner Beeler moved to approve the minutes without amendment. Commissioner Hairston seconded the motion. The minutes were approved by unanimous vote.

State Government Ethics Act Reminder

Chair Jordan 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.]

Adoption of Quarterly Commission Meeting Minutes

The Commission unanimously adopted the proposed 2022 Commission meeting calendar.

Updates

Report of the Appointment Committee

Commissioner Hairston Mitchell reported to the Commission that the Appointment Committee recommended Karen S. Franco to the Commission for consideration as a replacement for outgoing Commissioner R. Channing Jones. Chair Jordan opened the matter up for discussion and then vote. All Commissioners present voted to appoint Ms. Franco.

Chair Jordan then turned to the meeting to Chair and Vice-Chair election noting that his term as Chair would expire at end of the day. He relayed the Appointment Committee's recommendation that Vice-Chair Hairston Mitchell be elevated to Chair and that Commissioner Art Beeler be elevated to Vice-Chair. All Commissioners presented voted in favor of the Committee's recommendation.

Director's Report on IDS Business

Alamance County Early Representation Project. Pollard advised the Commission that IDS had elected to terminate the contracts associated with the Alamance County Early Representation Project. By way of rationale for the decision, Pollard advised that discovery had just begun in the suit, which meant that it was unlikely to resolve before 2023. She also pointed out that recent legislation reiterated the General Assembly's view it did not intend to fund counsel at first appearances, thus making exceedingly difficult to justify spending private assigned counsel funding (PAC Fund) on the project.

Commissioner Fenhagen expressed concern with the recent legislation's failure to include the right to counsel. While noting that money was an issue, she opined that being brought into the litigation would be far more expensive than continuing to pay for counsel pursuant to the project. Pollard conceded that was a concern but explained that IDS was not authorized to pay for counsel through the PAC fund. Commissioner Fenhagen then asked if IDS could use other funding. Pollard explained that IDS had used lapsed salary to pay for it on a much smaller scale several years ago but that it lacked sufficient lapsed salary to fund the Alamance project. Commissioner Fenhagen stated her belief that it was a critical issue and that, as the state agency in charge of the public defense, IDS has an obligation to look beyond the legislation and the PAC money. She asked that staff consider looking for grant funding.

Contract Defender Program Update. After reminding the Commission that IDS was in the process of winding down the unit based contracted system, Pollard pointed Commissioners to a memo in the meeting materials outlining the Managed Assigned Counsel Project ("MAC"). She explained that IDS was working on an RFP for a contract management system and hoped to have it closed by the end of the year. While the management system was foundational to moving the project forward, Defender Administrator Susan Brooks was simultaneously working with staff to flesh out the MAC system.

Update on Eight Year Plan. Pollard told the Commission that IDS had identified a researcher who was willing to work with IDS to develop its Eight Year Plan. She pointed out that IDS had worked on a strategic plan for OSBM, which was included in the packet. She praised the OSBM plan, especially the statement of values, but noted it was not the equivalent of a long-term strategic plan.

Other Long-term Planning. Pollard once again raised concern that the thinning rosters of PAC was reaching crisis level. Pollard added that steadily increasing caseloads and an increasingly difficult recruitment environment suggested a crisis loomed in the PD program too. She referred the Commission to the NC State Bar’s “PAC Caseload Compensation Study,” which articulated well a number of these concerns and likely would be useful to long-term planning.

Discussion of Legislative Session. Pollard advised the Commission that legislative session was still a going concern. However, she advised that most of what IDS knew of the ongoing budget negotiations was positive, at least with respect to PAC appropriation.

Fiscal Report [Slides available upon request.]

Review of Fiscal Year 2020 – 2021. Pointing out that dispositional data is the most useful data for analyzing trends in IDS spending, Wolper advised that FY2020 and FY2021 dispositions, were unnaturally depressed due to Covid 19. Given that, she had opted to use FY2019 when projecting FY2022 spending. She noted that the first quarter of FY2022 looked a lot like spending during the same time in FY2019. She cautioned the Commission, however, that the persistent Covid 19 backlog and the continued outpacing of closed cases by new cases was concerning.

Wolper reminded the Commission that IDS has three principal funds: 1.) the PAC fund, which is limited to supporting Private Assigned Counsel and expenses related to their cases; 2.) the PD Fund, which is principally used for personnel costs in the Public and State Defender programs; and 3.) the IDS fund, which supports the administration.

Projections for Fiscal Year 2021 – 2022. Using FY2019 as a model, while factoring in a third quarter FY2021 rate increases, Wolper projected that IDS would end FY2022 with a moderate amount of unspent money in the PAC fund. However, she reminded the Commission that end of year shortfalls, which IDS had not seen since 2016, tended to snowball and cautioned them to keep the risk of returning to year end shortfalls in mind.

Wolper explained why IDS would recommend spending \$10M if the FY2022 Budget was likely to include \$6.8M increase. Considerations in making the recommendation included:

- The possibility of IV-E reimbursements, which Wolper and NC Parent Defender Wendy Sotolongo had been working with the NC DHHS on for over two years.
- Approximately \$4.5M in a reserve fund that would become available if the budget included safe harbor language for 2020 set off debt issues.
- The modest balance left in the PAC fund at the end of the last fiscal year.
- The possibility that the forthcoming budget would include a PD Office in Cleveland/ Lincoln Counties, which would require IDS transfer money from the PAC fund (one of the only times it was authorized to make such a transfer).

The Budget Committee’s Recommendation:

		Current	Proposed
Low-Level Felonies in all courts to \$65	\$1.7 Million	\$60	\$65
High-Level Felonies in all courts to \$85 (inc provisional capital)	\$800,000	\$80	\$85
All other District Court and Superior Court to \$65	\$5.7 Million	\$55 dist/\$60 Superior	\$65
Non-Capital Appeals -\$85 (HLF)-\$75 other types	\$350,000	\$80/\$60	\$85/\$75
Capital Trial (inc Appeal and Post-Con) to \$100	\$350,000	\$90	\$100
Potentially Capital proceeding non-capital to \$100 (include LWOP)	\$420,000	\$80	\$100
\$5 Increases Private Investigators & Mitigators	\$360,000	\$50 PI, mitigators \$35-\$55	

Commissioner Beeler asked if IDS could afford not to approve a rate increase given the alarming level of attrition in the ranks of PAC. Chair Jordan reminded them that the Budget Committee’s recommendation was contingent on a budget bill a \$6.8 increase in the PAC Fund. He stated his position that IDS should not leave money on the table given the need in the PAC community. Noting that IDS had a solid history of being good stewards of taxpayer money, he advised his support for the proposed increase.

Capital Defender Robert Sharpe, Jr. expressed his belief that the increase to \$100 in capital work would keep good attorneys on the list and attract new talent. Sharpe pointed out that the Commission had discussed the looming capital defense crisis during its October 2020 meeting and stated that without the proposed increase, the crisis would no longer be looming.

Commissioner Fenhagen asked whether Sharpe thought it was critical to also increase the rate in potentially capital/ proceeding non-capitally cases from \$80 to \$100. Sharpe noted that this was the only case type where the prosecutor sets the rate by either pursuing a capital designation or letting the case proceed undesignated. He further posited that, because it did not make financial sense to so, defense attorneys might not always vigorously pursue a non-capital designation.

Vice-Chair Hairston Mitchell brought the Commission back to Commissioner Beeler’s point that the public defense system could not afford to do nothing. She reminded everyone present that

not only should the Commission consider fiscal wherewithal but also the positive impact of the increase on the attorneys and clients.

Pollard directed the Commission's attention to Wolper's prediction that a \$9.6M increase might lead to a shortfall as early as end of FY2024. While she expressed concern, Pollard explained that she had poured over the proposed rate increases could not decide where she would trim it. The modest increases for each case type were easily justified. She expressed again her frustration with the continued uncertainty about when or, indeed, if NC DHHS would ever transfer the federal IV-E money reimbursements to IDS, despite the two years Wolper and Sotolongo had spent working on it.

Commissioner Cromwell asked if an increase that inevitably led to a shortfall risked the ire of the legislature. Pollard and Wolper said again the federal IV-E funds reimbursement would minimize and delay the risk of a shortfall. Commissioner Cromwell then asked whether there was a risk that the IV-E money would not eventually come through to which Wolper responded that was no apparent reason it would not eventually come through. Commissioner Menefee opined that the consequences of not increasing the rates outweighed that risk.

Commissioner Cromwell moved the Commission to approve the \$10M rate increase consistent the Budget Committee's proposed line-item rate increases and contingent up the adoption of an FY2022 budget that included:

- \$5M recurring increase to the PAC fund;
- \$1.8M recurring through an annualized realization of new court fees; and
- safe harbor language that would allow IDS to access approximately \$4.5M currently in reserves.

Commissioner Beeler seconded the motion. Chair Jordan called the motion to vote and all Commissioners present voted to approved the motion.

Other Business

IDS Rules – Revise Rule 1.10 (Supporting Services in Non-capital Criminal and Non-criminal Proceedings). Deputy Director Whitney Fairbanks advised the Commission that due to frequently expressed concerns from the bench and bar that expert services were not being adequately used in the field, Forensic Resource Counsel Sarah R. Olson had brought several alternatives ways of doing business to Pollard. Olson had proposed contracting with certain experts and/or piloting an expert approval system for non-capital cases based on the one used in capital cases. General Counsel determined that an enabling change to Rule 1.10 was necessary before any pilot could be implemented. As rewritten, Rule 1.10 allows IDS to pilot alternative delivery and compensation models for experts in non-capital criminal and non-criminal cases.

Commissioner Fenhagen moved to amend the Rule. Commissioner Menefee seconded the motion. The Commission voted unanimously to approve the rule change.

Updates from the Field

NC Prisoner Legal Services. Beth Hopkins Thomas, Executive Director, updated the Commission on the work of NC Prisoner Legal Services.

Informational Update on OJD Planning for Youth Homicide Appointments & Training Taskforce. NC Juvenile Defender, Eric Zogry, introduced Assistant Juvenile Defenders Terry Johnson and Burcu Hensley to the Commission.

Zogry announced that OJD had just learned that it had received an additional \$392,000 grant from federal grant. This was in addition to an earlier state grant of around \$118,000.

Zogry then detailed his office's plan to improve juvenile representation in juvenile life without parole/ life with possibility of parole cases. Based on case reviews both OJD and other organizations such as NCPLS had firmly concluded that the representation being provided these children was, at a minimum, inadequate. In response, OJD intended to create a roster of attorneys qualified to represent children facing LWOP and LWPP in both the juvenile and criminal divisions. OJD would take over the responsibility of securing and appointing counsel and authorizing fees and experts. As groundwork,

- OJD contracted with former Assistant Juvenile Defender Kim Howes to manage the project;
- Howes was working with the state defenders who manage rosters, including Gerding and Sharpe; and
- Chief Regional Defender D. Tucker Charns was developing training with OJD and the School of Government.

Commission Business

Waiver(s) of 1-year Fee Application Deadline. Financial Services Staff Attorney, Chad Boykin, presented an exceptional request for relief from the estate of Cumberland County Attorney Harvey Butch Raynor. The Commission approved the recommended waiver.

Meeting adjourned by acclamation at 4:15pm.