

2023.10.20 Meeting Minutes

Commission on Indigent Defense Services

Quarterly Meeting – October 20, 2023

Location: In-Person | The N.C. Administrative Office of the Courts, Raleigh, NC

Commissioner Attendees:

The Honorable Dorothy Hairston-Mitchell (Chair), Art Beeler (Vice Chair), Tonya Barber, Brian Cromwell, Marshall Ellis, Staples Hughes, Bryan Jones

Staff Attendees:

Jamie Blackwell (Business Analyst), Chad Boykin (Assistant General Counsel, Financial Services), Kevin Boxberger (Regional Defender), Amanda Bunch (Communications Specialist), Tucker Charns (Regional Defender), William Childs (Budget Manager), Whitney Fairbanks (Deputy Director/General Counsel), Aaron Gallagher (Finance Officer), Angela Henderson (Contracts Administrator), Carla Huff (Recruitment and Training Coordinator), Stephen Lich (Senior Researcher), Mary S. Pollard (Executive Director), Chris Sadler (Research Director), Max Silva (Legal Assistant), Shannon Simmons (Accounts Payable Manager), Rebecca Whitaker (Defender Policy and Planning Attorney)

Local and State Public Defender Program Attendees:

Dawn Baxton (District 14), Jason DeHoog standing in for Laura Gibson (District 2), Glenn Gerding (Appellate Defender), Jonathan McInnis (District 16A), John Nieman (Virtual-District 18), Eric Zogry (Juvenile Defender), Lindsey Moore Standing in for Chad Perry (Office of Special Counsel), Woodrena Baker Harrell (District 15B)

Other Attendees:

Beth Hopkins Thomas (NCPLS), Phil Dixon (UNC SOG), Jackie Parker (OSBM), Emily Mehta (NC Judicial Branch-Research, Policy, and Planning Manager), Julianna Kirschner (Research & Policy Associate), Meagan Pittman (Research & Policy Associate)

Call to Order

The meeting was called to order at approximately 10:10 a.m. by the Honorable Dorothy Hairston-Mitchell, who then proceeded with welcoming guests and by asking all attendees to introduce themselves.

Adoption of the Agenda

Commissioner Bryan Cromwell moved to approve the agenda. Commissioner Marshall Ellis seconded the motion. The agenda was adopted unanimously.

State Government Ethics Act

Chair Hairston-Mitchell read/reminded the Commissioners of their responsibilities under the State Government Ethics Act.

Minutes from July 28, 2023

Commissioner Art Beeler made a motion to approve the minutes from the July 28 meeting of the Commission on IDS. Commissioner Bryan Jones seconded the motion, and the vote to approve was unanimous.

Remarks from the Chair

Chair Hairston-Mitchell read a press release that honored Vice Chair Art Beeler, who was nominated and selected earlier in the year for the One Voice United National Medal of Honor's Lifetime Achievement Award for his work with the Federal Bureau of Prisons.

Chief Public Defender John Nieman of Guilford County will retire on November 30. Chair Hairston-Mitchell recognized this milestone by reading highlights from his career and by thanking him for serving 27 years in public defense and leadership. Executive Director Mary Pollard, Commissioner Staples Hughes, Whitney Fairbanks, Woodrena Baker Harrell, and Chair Hairston-Mitchell shared well wishes with Mr. Nieman. Mr. Nieman appreciated the kind words.

Chair Hairston-Mitchell applauded the IDS staff for managing the "ensuing chaos" from the October 9 launch of eCourts in Mecklenburg County as well as the October 10 launch of NCFS, the new North Carolina Financial System, which went live across the entire state. Kevin Boxberger served as the only PAC resource for attorneys navigating eCourts for the first time in Mecklenburg County. Timelines were adhered to by IDS contracts and fiscal staff. And every email and inquiry received timely and appropriate response.

The John Rubin Award presentation was postponed until after lunch.

Director's Report on IDS Business

2023 Legislative Session:

IDS Executive Director Mary Pollard reported that the Legislature supported Public Defender Office Expansion by authorizing eight (8) new offices to cover an additional 22 counties. She stated it took 50 years to cover 38 counties; next year, it will go from 38 counties to 60; and then hopefully all 100 counties by the end of the decade.

2023 Appropriations Act – Became Law October 2: (PD Expansion; PD and PAC Funding):

The approved expansion created 134 new FTE positions: 84 new assistant public defenders, 8 chief public defenders, and support staff. However, the Legislature did not approve additional funding to raise PAC rates. The last PAC rate increase was in 2022 after ten years of the rate staying the same. Even with PD expansion, PAC will still be needed across the state to assist with court appointed cases. She called for a grassroots movement of lobbying the legislators from individuals other than IDS staff. "We just have to do better by them (PAC)," she said. The salary allotments for chief public defenders increased by 10% for assistant public defenders: 4% across the board, with the remaining 6% to be used at the discretion of the chiefs. Six additional positions were funded for District 5 because they expanded from just New Hanover County into Pender County as well.

Caseload Standards for Defenders

Defender Policy and Planning Attorney Rebecca Whitaker discussed public defender workloads and the national caseload study. The purpose of her presentation was to give a preview to the Commission of what was involved in developing the current “accepted” workload standards. The Commission, by statute, must develop/establish workloads for public defenders and public appointed counsel in North Carolina, and is a reported 22 years late on this. A recent national study was conducted by the RAND Corporation (in collaboration the National Center for State Courts (NCSC); the American Bar Association (ABA) Standing Committee on Legal Aid and Indigent Defense (ABA SCLAID); and Stephen F. Hanlon, Principal, Law Office of Lawyer Hanlon). The report was published in September 2023. Whitaker began by exploring, first, the ethical considerations for defense work. She covered the Rules of Professional Conduct and discussed professional guidelines intended to prevent burnout and attrition. These, along with their usefulness in budgeting, personnel, and resource needs, are reasons to have caseload limits.

With the foundation for the study set, Whitaker went on to emphasize national headlines, which painted a picture of public defense, nationwide, being “underfunded” and “struggling.” Then, she covered the three primary, cursory frameworks that currently exist in the United States and North Carolina for caseload standards: (1) The 1973 NAC Standards, which have become the de facto authority. (2) The 2019 a NC-specific study by the National Center for State Courts ordered by the General Assembly. And (3) the new 2023 national workload study released in September from the NAPD and RAND Group. For each model, she gave background information, the “how” of the development of standards, and resulting numbers for each model.

The 1973 NAC standards were “never intended to be the monolith authority.” Still, these are what most states go by. The 1973 data were not empirically based; they did not account for various types of cases, for example high level and low-level felonies. And, in general, they are too high. Plus, research was done more than 50 years ago. This is why data from that study cannot be used as a basis for establishing caseload standards in NC.

From the 2019 North Carolina Assessment: Whitaker began by defining the terms case weights and weighted caseloads. She shared that the DELPHI Method was used in the NC study (and the 2023 NAPD study). The North Carolina research / assessment began in 2017. It examined how much time attorneys were spending on cases over a seven-week time span involving journal reports. Additional surveys were used to gauge how attorneys felt about their time. Delphi panels published the findings. Results called for a very tall order/unrealistic number to aim for.

The 2023 NAPD study made six recommendations. Essentially, the recommendations across the board are to either increase staffing or reduce caseloads. The 2023 national study was published in September. The collaboration included RAND, etc. and took into consideration the 2019 North Carolina study. It did not, however, include capital murder,

juvenile, parent rep, civil commitment—it was only for adult criminal cases, to the exclusion of capital murder. The NAPD study acknowledges that differences across states cannot be accounted for.

In conclusion, Whitaker stated that the NAPD study could be a basis or a starting point for our own state study. Caseload standards are a statutory mandate, and at the time of the meeting, IDS staff recommended allowing the strategic planning committee to delve into the task. The goal would be to adopt caseload standards to fulfill the requirements of the law and to use as guidelines for our own Public Defender offices. Staff are ready to assist with the task.

Commissioner Staples Hughes thanked Whitaker for the presentation and the good information here. Executive Director Pollard echoed the sentiment. Noting strong bi-partisan support, Pollard stated that IDS needed reliable numbers to work with. She challenged the Commission to work through this mandate with the Strategic Planning Subcommittee and to be in a place to adopt new NC standards by the October 2024 IDS Commission meeting.

****SHORT BREAK****

Report from General Counsel

Changes to State Torts Claims Act

IDS Deputy Director and General Counsel Whitney Fairbanks reported that the budget includes two specific, substantive law changes in addition to the PD expansion reported earlier by the Executive Director. (1) Previously, “confidentiality” would expire after three years; with the new 2023 Appropriations Act, confidentiality will “last” for any duration that the General Counsel and the IDS Commission deem necessary. (2) Section 143-291 was modified such that moving forward, the N.C. Industrial Commission is the sole forum for hearing all state negligence claims. (Note: There is a limit of \$1 million per incident.) Stemming from deposition in recent litigation, IDS reported to have guidelines and standards in place from 2004. Fairbanks reported that with expansion and increasing numbers of assistant public defenders and chief public defenders, it would behoove IDS to update existing guidelines and standards and to expand and improve those guidelines and standards; the Office of the General Counsel will undertake this task in the coming months.

Fiscal Reports

IDS Chief Fiscal Officer Aaron Gallagher re-introduced and praised Shannon Simmons, IDS Accounts Payable Manger for her outstanding work. Gallagher reported that the fiscal team recently attended the N.C. Deputy Clerks Conference in Wilmington to rebuild and establish rapport with clerks on the role of IDS and working together to process fee apps more efficiently. He also thanked several IDS staff for their outstanding efforts.

Gallagher began the report by emphasizing the IDS agency values and the importance of working as a team to ensure IDS is a responsible steward of taxpayers' monies. The Financial services team is made up of two distinct sections: Fiscal and Budget. The Fiscal section deals with accounts payable, compensation for PAC, experts, capital attorneys, capital experts, contract attorneys, training and travel for staff, and trade vendors. The counterpart to those duties is providing excellent customer service at every turn. Gallagher shared that IDS successfully processed 123,400 fee apps in FY 2022 and 119,532 in FY 2023. He shared data about peak months (esp. June) when IDS pays out the most in fee apps and he reported that the PAC are the group that receives the largest amount of compensation/payout from IDS. The volume of work that is done in the department is "tremendous." All work is still paper based. "It is not perfect, but we are getting the work done," said Gallagher. IDS has also been fortunate enough to be able to reimburse for parking, bar dues, and travel for staff; this can continue until there is no more money in the budget to cover these extra expenses. Gallagher shared some of the current challenges with eCourts and the new North Carolina Financial System (NCFS)—both of which have slowed down payments. And he projected additional challenges in the coming months as IDS continues to adjust to eCourts and the NCFS. He stated that attorneys deserve faster turnaround time for the vital work done for such an important cause. On the horizon, software like DefenderData and other automations of processes will further streamline efforts and ensure that work gets done more efficiently and effectively.

****LUNCH****

Budget Reports

Update on 2022-23FY Spending

Will Childs, IDS Budget Manager, reported spending in FY2023 was \$159.1 million. The FY2024 budget has not yet been certified, but it will be a \$164.4 million budget; in 2024, seven of the eight new PD Offices will be funded. The PAC Fund is being reduced so the money can go to the expansion of PD Districts. In FY2025, the eighth office (Johnston County) will be funded. This is only possible because the PAC fund will be decreasing to support PD expansion.

Projections for 2023-24 Budget

Childs projected, with the current demand, what the PAC spending would look like with NO further PD expansion. "This is not good," he said. Childs made the budget projections to the Commission: Child's noted that his current projections indicated IDS might be \$5 million short in FY2025, with no increases in appropriations. He explained that the new offices required a \$4.7 million cut in the PAC fund this year, and followed by \$9.7 million next, noting that those were recurring debts. The cuts will happen *before* the new demand is there. The money has already been moved from the PAC Fund; it will take the year to catch it up. "If you move the money before the demand moves, IDS is

going to take a hit.” It is the hope that the General Assembly will consider increasing appropriations to IDS so the problem of losing attorneys is not further exacerbated. But if not, IDS will run out of money (to pay PAC) in 2025. Example: In 2015 IDS stopped paying PAC in April. Each year, IDS must pay up the deficit before “starting” the new fiscal year.

Childs shared projections on PAC Demand through 2028 if PD expansion continued according to plan. If the General Assembly provided more money for PAC, IDS would have to make up the shortfall first. But an increase in *any* amount of money from the GA for the PAC Fund would eventually be used to increase PAC rates and address attorney deserts.

The General Assembly is investing in IDS in a way it has never before. Pollard said that IDS will remain “optimistic.”

Remarks from the Defense

Attorney Shortages and Recruitment

IDS Regional Defender Tucker Charns reported that she and Kevin Boxberger offer support and guidance to 18 counties in NC, working with contract attorneys. To illustrate the dire status of not having attorneys to do court appointed work, she used Vance County as an example. In this attorney desert, not one local attorney was available to represent clients. Charns herself was appointed to hundreds of cases, and even Amanda Bunch IDS Communications Specialist, was appointed to cases. Though she is not an attorney, Ms. Bunch started receiving calls from clients who stated the judge had given them her name and contact number, and they thanked her for being assigned to their case. Contract attorneys are paid monthly, and they do not have to wait until disposition to be paid. Contract attorneys can also “pause” their contracts as personal and professional needs require—still, caseloads are the number one reason attorneys terminate contracts. These “perks” of being a contract attorney enabled Charns and Boxberger to recruit enough attorneys to address the cases in Vance County. After much effort, there are now 6 attorneys who can take cases in Vance County. This was not a light undertaking.

Overview of Private Investigatory Project Pilot

IDS Regional Defender Kevin Boxberger reported that the pilot will make a way for attorneys to apply for investigator funding outside the court system. It is designed to promote a streamlined process and to encourage attorneys to use investigators. eCourts has complicated the process in the pilot counties because of workflow—complexity of e-signing sequences and other e-processing holdups. There is not an implementation date at this time. Aside from encouraging use, this pilot project will allow IDS to track the usage of and spending on investigators.

Recognition 2023 John Rubin Excellence in Training Award

The University of North Carolina School of Government Professor Phil Dixon awarded the 2023 “Ruby” Award to Joseph Ross, the Senior Litigator in the Federal Defender’s Office for the Eastern District of North Carolina. He tries more cases than nearly any federal defender attorney in the system. He has led multiple numbers of training courses for the University of North Carolina School of Government, the Federal Defender Services Office, his office, and other organizations around the country. Ross shared that John Rubin was the first person to ask him to consider teaching and speaking in front of crowds. After his first speaking engagement, he realized that people were listening to him and what he had to say. After that, he expanded beyond the state of North Carolina and the United States. And he would continue to teach, talk, and tell stories about his experience. Following his acceptance remarks, Ross further recognized Commissioner Marshall Ellis as a former mentee from the federal public defender office. Ellis acknowledged that he had learned much from Ross.

Commission Business

IDS Rules and Policies

IDS Remote Work Policy

Assistant General Counsel Chad Boykin reported that Section 16-12 of the Appropriations Act requires compliance and reporting on employees who work remotely. This was not an action item.

Juvenile Felony Murder Project – Implementation Update

Roster applications are open for the Juvenile Felony Murder Project. Applications can be filled out online at the website of the Office of the Juvenile Defender. To date, 13 applications had been received.

The report that created the office of the JD and the training at the SOG. Released 20 years ago this month. With problems and deficiencies, now NC is the national model for juvenile defense. This was not an action item.

Requests for Waiver of Fee App Deadline (2)

There were two action items for fee application deadline waivers.

The first was a waiver for a capital case in Wake County—an eCourts pilot county. Boykin’s recommendation was to pay the fee app with a 20% penalty, due to lack of information showing why it was prevented from being submitted on time. Pollard interjected that she believed 20% was too harsh a penalty.

The second was due to a covid-related backlog.

Commissioner Bryan Jones made a motion to pay the first waiver request in full, at 100%. Seconded by Commissioner Tonya Barber. The motion passed unanimously.

Commissioner Art Beeler made a motion to pay the second waiver request at 100%; seconded by Commissioner Tonya Barber. The motion carried.

Other Business

IDS Commission Committee Assignments

Chair Dorothy Hairston Mitchell reported that the Commission Committee assignments would remain essentially the same.

Adoption of the 2024 Commission Meeting Calendar

Proposed commission meeting dates were received. Motion to accept the 2024 meeting calendar was made by Commissioner Staples Hughes and seconded by Commissioner Tonya Barber. Motion carried.

Election of Chair and Vice Chair

Vice-Chair Art Beeler initiated the election of the Chair and Vice Chair for the upcoming year. Dorothy Hairston Mitchell and Bryan Jones agreed to serve. With no nominations from the floor, Dorothy Hairston Mitchell was elected as Chair for another year. With no other nominations from the floor, Commissioner Bryan Jones was elected as Vice Chair for one year. Both decisions received unanimous “ayes.” Chair Dorothy Hairston Mitchell thanked Art Beeler for his service.

Commissioner Art Beeler went on the record to state the reason he believes IDS is so important. “Yes, it is about representation, but it boils down to giving people who are in prison and who are not in prison, people who are on probation and who are not on probation... HOPE. And hope is not something that is talked about a lot in the criminal justice system, but hope in my view, is one of the most important parts of the criminal justice system... Most people don’t get it, but it’s a matter of giving PEOPLE who have been arrested ... hope. I hope you never lose that.”

GovOps

UNC SOG Professor Dixongave the Commission a brief update on the recently passed Gov Ops litigation, noting that SoG professor John Rubin was researching the legislation for the purposes of a possible memo. .

Amended Confederate Monument Statement

Chair Hairston Mitchell recused herself from voting. Vice Chair Beeler asked the Commissioners to review the amended statement. Language was included in the original version from December 2022, that seemed as if IDS was speaking on behalf of the Judicial Branch. Marshall Ellis recused himself from voting. The Commission voted to adopt the amended statement and post it on the IDS website. The motion was made by Bryan Jones and a second was made by Brian Cromwell. The motion carried.

Executive Session

Chair Hairston Mitchell stated that pursuant to GS 143-318 11(a)(6), the Commission needed to go into Executive Session “... to consider personnel matters.

Motion to go into Executive Session made by Art Beeler.

Second by Bryan Jones, with a unanimous vote.

The Commission returned to open meeting around 3:15PM. The Commission voted to approve proposed salary increases for the NC Chief Special Counsel, Juvenile Defender, and Parent Defender.

All agenda items having been addressed, the Chair adjourned the meeting at 3:15PM.

Next Meeting: February 2, 2024 (Location – Virtual Only)