THE RIGHT TO COUNSEL IN NEW HAMPSHIRE

Evaluation of Trial-Level Indigent Defense Representation in Adult Criminal and Juvenile Delinquency Cases

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SIXTH AMENDMENT CENTER
The Right to Counsel in New Hampshire: Evaluation of Trial-Level Indigent Defense Representation in Adult Criminal and Juvenile Delinquency Cases
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Prepared by
The Sixth Amendment Center is a non-partisan, non-profit organization providing technical assistance and evaluation services to policymakers and criminal justice stakeholders. Its services focus on the constitutional requirement to provide effective assistance of counsel at all critical stages of a case to the indigent accused facing a potential loss of liberty in a criminal or delinquency proceeding. See SIXTH AMENDMENT CENTER, https://sixthamendment.org/.

For this evaluation, the Sixth Amendment Center worked in partnership with the Defender Initiative of the Seattle University School of Law. The Defender Initiative is part of the Fred T. Korematsu Center for Law and Equality, whose mission is to advance justice and equality through a unified vision that combines research, advocacy, and education.

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Executive Summary

Providing the Sixth Amendment right to effective counsel is an obligation of the states under the due process clause of the Fourteenth Amendment. The State of New Hampshire has vested in the New Hampshire Judicial Council (judicial council) the entirety of the state’s Fourteenth Amendment obligation to ensure effective Sixth Amendment services. However, inadequate funding and systemic deficiencies prevent the judicial council from meeting the state’s constitutional obligations under the Sixth and Fourteenth Amendments.

New Hampshire has many well-qualified, skilled, and passionate defense attorneys providing representation all across the state. However, those attorneys are placed in an untenable situation in which they are asked to carry excessive caseloads while being undercompensated. As more experienced attorneys leave the system, the remaining attorneys are forced to take on even more cases, causing a cycle of greater frustration and burnout, and indigent defendants wait longer and longer to have an attorney assigned to represent. The onset of a worldwide pandemic exacerbated these issues.

Moreover, the judicial council has only three staff members to try to annually ensure effective representation of approximately 39,000 cases of indigent defendants heard in 42 trial court locations before 58 judges, while contemporaneously trying to find attorneys willing to take cases for inadequate compensation. That is an impossible task for even the most dedicated of employees.

Chapter I details the origins and methodology of this evaluation. The judicial council requested the U.S. Department of Justice, Bureau of Justice Assistance (BJA) to evaluate the indigent representation services provided through the judicial council in adult criminal and juvenile delinquency cases in the trial courts. BJA authorized the Sixth Amendment Center, in cooperation with Seattle University School of Law, to objectively evaluate New Hampshire’s indigent defense services through a combination of legal research, data collection and analysis, interviews with justice system stakeholders, and courtroom observations.

Chapter II describes the courts, prosecutors, and indigent defense system that together make up New Hampshire’s justice system. New Hampshire is the only state in the country that contracts with a single private, non-profit law firm to serve as the statewide public defender office. Whenever the New Hampshire Public Defender office (NHPD) declares that it is unavailable in a specific case, the Conflict Case Administrator Office (CCAO, operated and administered by the NHPD) works with the judicial council’s executive director to reassign the case to either a private attorney contracted with the judicial council to provide representation in a limited number

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of appointed cases and known as “contract counsel” or a private attorney paid an hourly rate and known as “assigned counsel.”

Chapters III through VII evaluate the indigent representation system as it is implemented throughout the trial-level courts of New Hampshire. Collectively, these chapters show that New Hampshire’s indigent defense system is inadequately funded and lacks the structural safeguards necessary to ensure the provision of effective assistance of counsel to every indigent defendant, as required by the federal and state constitutions, allowing for the possibility of both actual and constructive denial of the right to effective assistance of counsel to at least some indigent defendants.

As detailed in these chapters, the judicial council is not adequately funded or staffed and thus cannot obtain the data or reports necessary to know whether and when indigent defendants who are constitutionally entitled to public counsel are in fact receiving an attorney or whether there is a sufficient number of attorneys with sufficient time and resources to provide effective assistance of counsel to every indigent defendant. As a result of inadequate funding and insufficient staffing for the judicial council, the taxpayers and policymakers in New Hampshire do not know on an ongoing basis how many attorneys are actually required and provided to represent indigent defendants in all the trial court locations in the state. They do not know on an ongoing basis how much funding is actually required and spent on the necessary fiscal components of representing indigent defendants. All of this information is necessary for policymakers and justice system stakeholders to understand in order to plan for the future needs of New Hampshire’s indigent defense system and ensure effective representation to each indigent defendant.

The limited available caseload data provided by the NHPD shows that, under conservatively applied national caseload limits, the NHPD required 116.09 full-time equivalent (FTE) attorneys to handle only the number of cases newly assigned to the NHPD during FY 2021 (not including cases assigned in previous years that remained open), plus an additional 11.61 FTE supervising attorneys, for a total attorney staff of 127.7 FTE attorneys. This is before taking into consideration the additional number of attorneys that are necessary to fulfill all other workload demands made on the time of the NHPD attorneys.

The National Advisory Commission (NAC) caseload limits require that an FTE attorney devote 100% of their time to directly representing clients, while NHPD staff attorneys have significant workload demands beyond their representation of indigent defendants. These workload demands reduce the amount of time that the NHPD staff attorneys have available to devote to the cases of the indigent defendants whom they are assigned to represent. As a result, a greater number of NHPD attorneys is required under national standards.

Additionally, for a trial-level caseload that requires 127.7 FTE attorneys under the NAC standards, national standards require that the NHPD must also have at least:
- 31.9 FTE legal secretaries/assistants (one full-time legal secretary/assistant for every four FTE attorneys);
- 42.6 FTE investigators (one full-time investigator for every three FTE attorneys); and
• 42.6 FTE social service caseworkers (one full-time social service caseworker for every three FTE attorneys).

For cases in which the NHPD is unavailable, the limited available caseload data provided by the judicial council shows that, under conservatively applied national caseload limits, 20.10 FTE attorneys are required to handle only the number of cases newly assigned to contract counsel attorneys and/or assigned counsel attorneys during FY 2021 (not including cases assigned in previous years that remained open). To whatever extent the contract counsel attorneys and assigned counsel attorneys devote professional hours to duties other than the New Hampshire indigent defendants they are assigned by the judicial council to represent, then more FTE attorneys are required.

For a trial-level caseload that requires 20.10 FTE attorneys under the NAC standards, national standards require that, to assist those attorneys, there must also be at least:
- 2 FTE attorney supervisors (one full-time supervisor for every 10 FTE attorneys);
- 5 FTE legal secretaries/assistants (one full-time legal secretary/assistant for every four FTE attorneys);
- 6.7 FTE investigators (one full-time investigator for every three FTE attorneys); and
- 6.7 FTE social service caseworkers (one full-time social service caseworker for every three FTE attorneys).

Where these support resources are not available, an attorney requires more time to perform the work that would otherwise be performed by these personnel, and so more FTE attorneys are required.

In United States v. Cronic, the U.S. Supreme Court said: “an indispensable element of the effective performance of [defense counsel’s] responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation.” On the same day in Strickland v. Washington, the Court declared that “independence of counsel” is “constitutionally protected,” and “[g]overnment violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense.”

Heeding these admonitions from the Court, national standards call for independence of the defense function. The first of the ABA Ten Principles of a Public Defense Delivery System explains that, in a properly constituted system, “[t]he public defense function, including the selection, funding, and payment of defense counsel, is independent,” and the indigent defense system and the attorneys it provides must be “independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel.”

Despite these prohibitions under national standards, the judicial council lacks sufficient independence from the judicial and political branches of government. Both judges and prosecutors serve on the judicial council that is responsible for administering the entirety of New

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Hampshire’s indigent defense delivery system and for ensuring its quality and cost effectiveness. Additionally, many members of the judicial council have conflicts of interest between their role in overseeing the provision of the right to counsel and their role as a judge or prosecutor, while other members of the judicial council may themselves benefit financially from decisions they participate in making.\(^5\) Furthermore, the provision of indigent defense is not the judicial council’s only duty, so from the outset the judicial council as a whole has divided loyalties imposed on it by state law.

The judicial council’s lack of independence and conflicts of interest are not solved by the existence of either the judicial council’s indigent defense subcommittee or the NHPD’s board of directors. The judicial council’s indigent defense subcommittee was voluntarily created by the judicial council and can just as easily be disbanded at any time, because its existence is not mandated by law. While the members of the subcommittee have traditionally been people with knowledge of criminal defense, nothing beyond the goodwill of the judicial council ensures that this tradition will continue or that the subcommittee will continue to exist.

All indigent defense system attorneys in New Hampshire are wholly dependent on decisions made by the judicial council for their continued engagement as indigent defense system attorneys and for the resources necessary to provide effective representation to their appointed clients. Yet the judicial council perpetuates methods of compensating private attorneys in conflict cases that pit the personal financial interests of the appointed attorneys against the constitutional legal interests of the indigent defendants whom they are assigned to represent. And the judicial council has not sought from the legislature the statutory changes necessary to eliminate these conflicts between appointed attorneys and their clients.

Chapter VIII summarizes the above findings and makes the following recommendations, acknowledging that the New Hampshire Judicial Council must immediately be provided adequate funding to increase the number of attorneys willing to be appointed to represent indigent defendants and to provide sufficient judicial council staff to collect the data necessary to properly forecast future needs, while the New Hampshire Legislature works to implement the structural safeguards necessary to ensure effective assistance of counsel to each indigent defendant.

\(^5\) As explained in chapters II and V, it is not always a financial benefit – it may in fact be a financial loss – for a member of the judicial council to serve as a contract counsel and/or assigned counsel. Members of the judicial council often feel an obligation to accept appointments to represent indigent defendants because of their commitment to indigent defense, because of the lack of sufficient attorneys available for appointment, and to bring to bear their expertise on behalf of indigent defendants and as mentors to other appointed attorneys.
RECOMMENDATION 1: The State of New Hampshire should statutorily ban the use of fixed fee contracts that create financial disincentives to or otherwise interfere with appointed attorneys providing effective advocacy on behalf of indigent defendants’ legal interests.

The flat fee per case contracts currently used in New Hampshire to compensate the NHPD’s subcontractor attorneys and the judicial council’s contract counsel attorneys, and the capped hourly rates currently used to compensate assigned counsel attorneys, both cause conflicts of interest between the indigent defense attorney’s financial self-interest and the legal interests of the indigent defendant they are assigned to represent. New Hampshire should follow the lead of other states that have banned these practices. For example, in Idaho, the terms of any contract with a private attorney to represent an indigent person “shall not include any pricing structure that charges or pays a single fixed fee for the services and expenses of the attorney.”

According to rules adopted by the New Hampshire Supreme Court, assigned counsel attorneys are paid $60 per hour for most felonies and all misdemeanors. All national standards and a significant number of state courts require that “counsel should be paid a reasonable fee in addition to actual overhead and expenses.” To ensure that private attorneys appointed to represent indigent defendants are adequately compensated, New Hampshire will need to determine the typical cost of necessary overhead for an indigent defense system attorney and the amount of the fee that attorney should earn in addition to the cost of overhead. Many states provide a basis for comparison. For example, the South Dakota Supreme Court set public counsel compensation hourly rates at $67 per hour in 2000. To ensure that attorneys are perpetually paid both a reasonable fee and overhead, the court also mandated that “court-appointed attorney fees will increase annually in an amount equal to the cost-of-living increase that state employees receive each year from the legislature.” Assigned counsel compensation in South Dakota stands at $99 per hour in 2021. New Hampshire has a higher cost of living than South Dakota, so New Hampshire would have to pay $103.25 per hour to be equivalent to South Dakota’s rate.

Banning flat-fee contracts and moving to a private attorney system paying a reasonable hourly rate plus overhead will make it more difficult to predict and contain costs. For this reason, some governments have funded alternate public defender offices for conflict representation. There will always be a need for private attorneys in tertiary and other conflict situations but funding an alternate public defender office will offer New Hampshire policymakers more predictability with funding while increasing oversight and supervision.

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RECOMMENDATION 2: The New Hampshire Judicial Council should immediately be given adequate funding to significantly increase staff dedicated to overseeing indigent defense services.

Although New Hampshire has historically given its judicial council broad authority over the statewide indigent defense system, the judicial council has never had more than three full-time staff at any time during the past 40 years – a number of staff that is wholly insufficient to effectively monitor and administer the provision of the right to counsel for all indigent defendants.

The State of New Hampshire must provide adequate funding and staff to the judicial council, so that the judicial council can: carry out the state’s fiduciary duty to taxpayers to oversee the indigent defense system; and collect, analyze, and report necessary data to allow New Hampshire policymakers to know the number of cases of indigent defendants likely to require an appointed attorney each year, the amount of time necessary to provide effective assistance of counsel in each indigent defendant’s case, the number of attorneys and support staff necessary to provide effective assistance of counsel to each indigent defendant, and the amount of funding required and spent for each necessary fiscal component of representing indigent defendants.

The State of New Hampshire should appropriate state funding for the judicial council to hire a sufficient number of professional staff devoted full-time to training, compliance, finance, information technology, and research and data analysis. Most statewide indigent defense systems have a substantially larger staff than the three employees historically allotted to the judicial council to manage New Hampshire’s indigent defense system. At minimum, the judicial council should have at least the following 14 positions (although New Hampshire policymakers may choose to title roles or align their responsibilities differently than suggested here) and additional administrative support based on work required and available time:

- one executive director;
- three deputy directors: one for the trial-level public defender program; one for the trial-level conflict counsel; and one for the appellate-level;
- each deputy director should have at least two assistants (for a total of six): one for adult representation and one for juvenile representation (or alternatively, one for criminal representation and one for civil representation);
- one director of training;
- one director of administration and human resources;
- one director of information technology; and
- one director of finance and accounting.

RECOMMENDATION 3: The State of New Hampshire should statutorily vest the authority to provide and oversee all indigent defense services in a state-level independent public defense commission.

As discussed throughout this report, New Hampshire’s judicial council has responsibilities that, while important, often conflict with the State of New Hampshire’s constitutional obligation
to ensure effective Sixth Amendment right to counsel services for indigent defendants. Compounding the lack of independence, individual members of the judicial council may derive personal financial benefit from decisions made by the judicial council on which they serve. To overcome the lack of independence and the divided loyalties that underlie and cause most of the problems identified in this evaluation, New Hampshire must either: reconfigure the existing judicial council to ensure its independence and remove from it the responsibility for matters other than the indigent defense system; or remove from the judicial council the responsibility for the state’s indigent defense system and establish a new state-level independent public defense commission.

The commission should be made up of members selected by diverse appointing authorities, so that no single branch of government has the ability to usurp power over or exert outsized influence over the delivery of public defense services. The most straightforward way for New Hampshire to ensure this balance on its public defender commission is to give an equal number of member appointments to the executive, legislative, and judicial branches of government.

Many jurisdictions include one or more voices on their commission from communities affected by the indigent defense function, such as a layperson former client or, to ensure that the commission reflects the demographic makeup of the community, often by including members appointed by each of the state’s minority bar associations. States have also found that giving appointments to the deans of accredited law schools can create nexuses that help the indigent defense commission (for example, law schools can help with drafting standards, providing training facilities, etc.). Some jurisdictions select members from the urban, suburban, and rural geographical areas of the state, while some jurisdictions focus on appointing members with backgrounds and expertise in relevant fields, such as finance or forensics or adolescent development. To fill out any remaining appointments, governments often give responsibility for one or two positions to the state bar association. Appointments by non-governmental organizations generally must be confirmed by an official of some branch of state government.

In constructing its independent public defense commission, New Hampshire should follow the lead of the increasing number of states that prohibit voting members of the commission from being a sitting judge, a current prosecuting attorney, a current law enforcement employee, or a person currently paid to provide public defense services (or any employee of any person in those roles). 

RECOMMENDATION 4: The State of New Hampshire should empower the state-level independent public defense commission to decide the most effective method or combination of methods to provide indigent defense services and to promulgate and enforce statewide standards applicable to all indigent defense attorneys, with all decisions to be made in compliance with U.S. Supreme Court case law and national standards.

The methods used in New Hampshire to provide the right to counsel for indigent people were established by the legislature between 1977 and 1988, requiring a contract of no longer than two years with one or more private entities to serve as the public defender program and
allowing the contracted entities to subcontract for services, and allowing for conflict cases the options of contracting private attorneys or appointing private attorneys on a case-by-case basis or contracting with one or more private entities to serve as an alternate public defender program. These statutory mandates have tied the hands of the judicial council, in many ways preventing it from modernizing and adapting the state’s indigent defense system to keep pace with developments in the state’s broader criminal and juvenile justice systems, in case law, in technology, in changing populations, and in societal understanding of the most effective and efficient means of providing the right to counsel. The state-level independent public defense commission should have the power to implement whatever method or combination of methods it determines is most likely to ensure the provision of effective representation of each indigent defendant throughout the state and that complies with U.S. Supreme Court case law and national standards.

The state-level independent commission must consider whether one or more governmental public defender offices could more effectively and efficiently ensure the provision of the right to counsel to indigent defendants than the existing system of the state compensating only private attorneys to represent indigent defendants. Over the decades since Gideon v. Wainwright was decided, New Hampshire policymakers have expressed reluctance to add indigent defense attorneys to the state government payroll, which would be necessary if the independent public defense commission determines the right to counsel is most effectively ensured by hiring governmental-employ public attorneys. But the State of New Hampshire must move forward to exercise greater oversight of the entirety of its indigent defense system in order to address the myriad deficiencies identified in this evaluation, and in doing so the state may find itself held responsible to pay and provide benefits for the private attorneys in the indigent defense system in the same manner that it would be responsible if they were public employees.10

No matter what methods are chosen to secure the attorneys who are appointed to represent indigent defendants, the state-level independent public defense commission must be statutorily required to promulgate and enforce binding standards applicable to all indigent defense system attorneys. For example, both Louisiana and Michigan statutorily require their commissions to promulgate and enforce mandatory statewide standards for, among other things: attorney qualifications; attorney performance; attorney supervision; time sufficiency; continuity of services, whereby the same attorney provides representation from appointment through disposition; client communications; and data collection.

10 Under the laws of many states and the federal government, the question of whether a person labeled an independent contractor by a state should in fact properly be classified as an employee is decided by courts applying multi-factor tests that examine the actual working relationship of the contracting parties. In the context of a nonprofit public defense contractor employee seeking to receive government employee benefits, the Washington Supreme Court noted that “government can and should exact high standards of performance from its independent contractors. Prudent financial controls and careful oversight of contract compliance does not render a contractor an agency of the government.” Dolan v. King County, 258 P.3d 20, 30 (Wash. 2012). Ultimately, the Washington Supreme Court held that, under the facts of the case before it, “the county has exerted such a right of control over the defender organizations as to make them agencies of the county” and the “employees of the defender organizations are employees of the county” entitled to be enrolled in the government’s retirement system. Dolan v. King County, 258 P.3d 20, 31 (Wash. 2012).
In particular, the New Hampshire public defense commission must have authority to ensure attorneys have sufficient time to effectively advocate for their appointed clients. The commission should be authorized to create workload standards that require attorneys to track their time against specific performance criteria to garner a more accurate projection of what it actually takes to handle each component of a client’s advocacy needs, based on each type of case – a far more accurate method of measuring (and thereby controlling) workload than any other available. More than that, tracking time enables policymakers to tie specific variables (such as “time meeting with the client in person”) not only to specific case outcomes and dispositions, but also to systemic outcomes (like recidivism rates, or the rate of former clients now employed and contributing to the tax base).

RECOMMENDATION 5: The state-level independent public defense commission should have an office of indigent defense services to carry out the day-to-day duties of the commission, headed by an executive director attorney selected by the commission and with adequate permanent staff to fulfill the commission’s constitutional and statutory duties to ensure effective assistance of counsel to each indigent defendant.

As directed by national standards, the state-level independent public defense commission should have statutory authority to select a senior attorney to serve as executive director of the office of indigent defense services, chosen “on the basis of a non-partisan, merit procedure which ensures the selection of a person with the best available administrative and legal talent, regardless of political party affiliation, contributions, or other irrelevant criteria.” The executive director should be hired by the commission for a fixed term that is subject to renewal and should not be removed from office absent good cause shown through due process. To ensure that the indigent defense system has a voice equal to that of other justice system participants, the executive director of the commission’s office of indigent defense services should be made a permanent member of those statewide bodies in New Hampshire that are convened to consider and improve justice system policies, such as the judicial council. At minimum, a New Hampshire public defense commission’s office of indigent defense services should reflect the staffing roles contained in Recommendation 2.