

HB 1022  
N.D. Comm. on Legal Counsel for Indigent  
House Appropriations: Government Operations Division  
Budget Presentation  
January 13, 2023



## North Dakota Century Code and Major Statutory Responsibilities

- The Commission operating statute is N.D.C.C. 54-61

The Statutory responsibilities of the Commission are found in NDCC 54-61-02

- The Commission is tasked with developing standards governing the delivery of indigent services. 54-61-02(1)(a)
- The Commission is tasked with implementing a process of contracting for legal services for indigents. 54-61-02 (1)(b)
- The Commission is tasked with establishing public defender offices in regions of the state as it considers necessary and appropriate. 54-61-02 (1)(c)
- The Commission is tasked with establishing a method for accurately tracking and monitoring caseloads of contract counsel and public defenders. 54-61-02 (1)(d)
- The Commission is tasked with approving and submitting a biennial budget to the Office of Management and Budget. 54-61-02 (1)(e)
- The Commission is further given statutory authority to do the following:
  - Enter into agreements with a County or City to provide services in which the County or city would have to provide. 54-61-02(2)
  - Adopt rules for the exercise of its authority. 54-61-02(3)
  - Request records from other agencies to verify indigence. 54-61-02(4)

## The Purpose of the Agency's Various Programs

- The Commission is the agency which provides the attorneys and related services to indigent persons when there is a constitutional, statutory, or rule-based right to counsel at public expense.
- 54-61-01 provides that the Commission was “established for the purpose of developing and monitoring a process for the delivery of state-funded legal counsel services for indigents which are required under the Constitution of North Dakota and the United States Constitution and any applicable statute or court rule. The commission shall provide indigent defense services for indigent individuals determined by the court to be eligible for and in need of those services pursuant to standards and policies of the commission governing eligibility for such services.”
- The North Dakota Commission on Legal Counsel for Indigents' mission is to provide high quality, professional, and effective legal representation to eligible clients, consistent with the guarantees of the constitutions of the United States and North Dakota, and applicable North Dakota statutes and rules, at reasonable cost to the community.
- The Commission consists of 7 members: 1 member of the legislature from each house, 2 appointed by the Governor (one must be from a county of not more than 10 thousand), 2 appointed by the Chief Justice (one must be from a county with a population of not more than 10 thousand) and one member appointed by the Board of Governors, State Bar Assoc.
- The Commission has 8 total offices: 7 regional public defender offices and the administrative office in Valley City.
- Org chart is attached to my testimony

## **Report on financial audit findings and actions taken**

- The latest financial audit for the biennium ending June 30, 2021 as released by the office of the State Auditor did not identify any exceptions or defaults.

## **Full Time Equivalent Positions**

- The Commission is requesting the FTE number be increased to 43.
- The three new positions would be for investigator positions.
- Currently the Agency has 40 FTE's

## **Funding and Collections:**

- The Commission is funded through one line
- The one line consists of the general fund and the Indigent defense administration fund (282)
- Fund 282 is funded through the collection of statutory fees assessed in criminal cases:
  - 1) A \$35 indigent defense application fee pursuant to NDCC 29-07-01.1; and
  - 2) A portion of the \$100 court administration/indigent defense fee pursuant to NDCC 29-26-22(2). This fee is split pursuant to statute between the indigent defense administration fund and the court facilities improvement and maintenance fund, with the first \$750,000 collected per biennium going to the indigent defense administration fund, the next \$460,000 going to the court facilities improvement and maintenance fund, and any additional collections are split equally between the two
- The fee's are collected by the Judiciary and deposited with the State Treasurer.
- During FY 2022, \$154,547.65 was collected from the Application fees and \$750,000 received from Court Administration fee.
- The Court may also order Attorney Fee reimbursement which is deposited in the general fund

## **Funding in Comparison to Last Biennium with Executive Recommendation**

- The total funds for the current Biennium are \$21,289,213
  - \$19,294,363 from the General Fund
  - \$1,994,850 in spending authority from the Special Fund, Fund 282
- The total funds recommended in the Governor's Executive Recommendation are \$23,249,322
  - \$21,230,966 from the General Fund
  - \$2,018,356 in spending authority from the Special Fund, Fund 282
    - The Executive Budget includes 3 FTE for investigator positions
    - The Executive Budget includes funding to allow the Commission to increase contract rates from \$75-80 per hour
- There are no one time funds contemplated in the Executive Recommendation.

### **Federal Funds**

- The agency did not apply for any federal funds.
- There has been some preliminary negotiations with the Department of Health and Human Services about potential to access IV-E funds for parent representation in juvenile matters

## Expenses

- The Agency is a single line and must pay for all expenses out of the single line.
- The major components making up the base level appropriation are salaries and benefits, professional fees and services (legal fees), ITD expense, and rent of office space
  - As of November 30, 2022, this constituted 96.5 % of the expenses so far this

## Case Assignments

- The majority of the expenses of the Commission go directly to providing attorneys and services to persons who are constitutionally or statutorily entitled to legal representation
- The last time we presented a budget in front of the Committee, we were in the height of rebound from the Covid 19 pandemic.
  - At that time we predicted a rebound which we did in fact see. FY 2021 and FY 2022 have the two busiest years the Commission has seen. Through November 2022 in FY 2023, we are on pace to have the busiest year to date.
  - See Attached Graph

## Other Bills Effect

- There are several bills working their way through the session that may have impact
  - Expansion of Pre-trial services: May be more administrative costs
  - SB 2107 seeks to add minimum mandatory penalties
    - May increase amount of time spent on cases increasing contract amounts
    - Any bills dealing with crime and penalties → Difficult to quantify

## Accomplishments

- Our staff, attorneys and contractors continue to do incredible work against all odds and for less pay than their counterparts
- The agency served as an integral part in the continued expansion of the pretrial service pilot program in three judicial district
  - We were able to absorb the administrative oversight required without additional funding. However, continued expansion may cause need for more staff
- The Commission was able to staff and assign increases to the number of juvenile cases. The Commission estimated last session we would see an increase of 50%. Through the end of FY 2022, which was the first full year, the total was a 46% in juvenile cases
- The Commission participated substantially and continues to be an active partner in addressing the mental health impact on our courts
- We continue to give North Dakota a national presence and have been able to bring back national best practices to North Dakota and our clientele

## Challenges

- The two biggest challenges facing the agency are the same now as they have been for the last few sessions:
  - 1) Turnover due to lack of competitive pay
    - We have been unable to recruit and retain employees. We had 10 of our 40 FTE turn over in the last calendar year and currently have 4 attorney spots we are trying to fill. When fully staffed I have 20 attorneys, which is a current vacancy rate of 20%
    - However, turnover continues to be vast, and exit interviews suggest it is a compensation issue. We have exceeded the turnover rate of the average of state agencies.
    - Last session I advised we will need to eventually address this issue or face a constitutional crisis. We did not receive any funds to address the issue. We do in fact now find us very near a crisis. I have had the displeasure of having to notify the Courts in the NWJD of the potential of not having enough attorneys to cover our responsibilities. In the event this does occur, we will need to enter a prioritization plan.
      - Several states that have instituted plans are facing litigation for doing so
- We did include a request for \$450,000 in this years' decision packages. The Executive recommendation did not include this request. The Governor did propose a pot of money to address positions, one of which is attorneys.



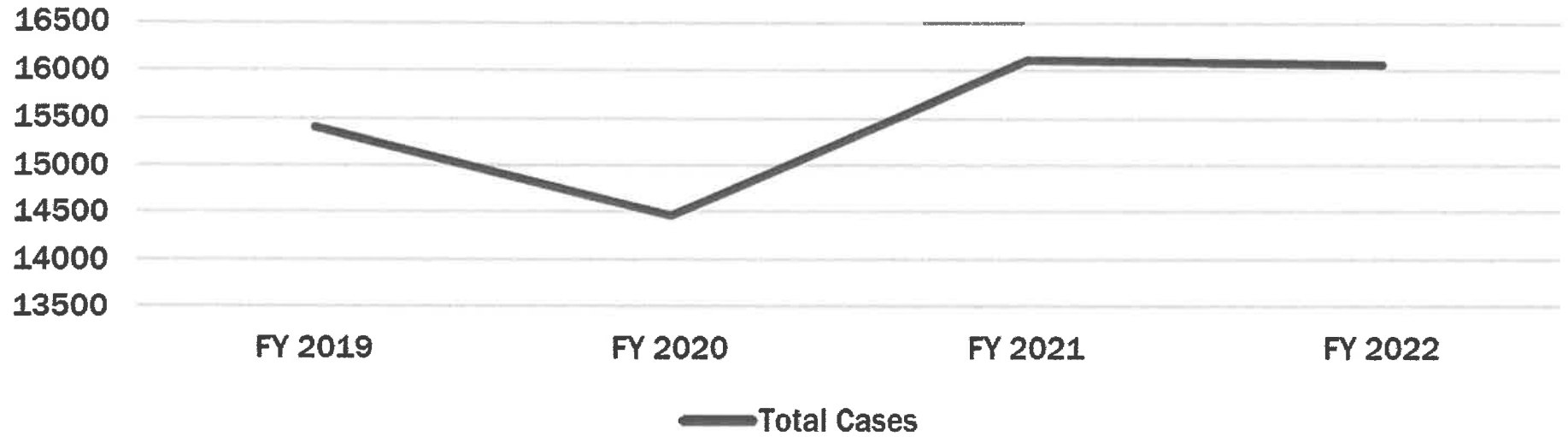
## Challenges

- The second major challenge is difficulty in finding contractors to provide attorney services.
  - 2) Difficulty in finding contract attorneys given contractor rate of compensation
    - Our current rate of contractor compensation has not changed since 2012.
    - The Commission currently pays \$75 dollars an hour, in comparison the Federal CJA Pane rate for 2022 was \$158 per hour.
    - In 2019, the Governor recommended to increase this by \$5 per hour, which was not funded.
    - We did not seek funds for this increase last session given we were directed to submit a budget with a 10% reduction.
    - We did request it this session and the Governor's Executive recommendation agreed by proposing money to fund a \$5 per hour increase.
- Another challenge facing the Commission is not having access to qualified investigators
  - We can only pay investigators \$65 per hour given our hourly attorney rate
  - Very few in the state willing to provide that service
  - We as attorneys have an ethical duty to investigate each and every case, and with the caseload of a public defender, this is difficult to do without an investigator.
  - One of, if not the last state run system to not have investigators on staff
  - We did request 3 FTE, and the Governor did recommend the same in his executive recommendation.

## Agency Budget Requests / Executive Recommendations

- The Commission authorized the undersigned to submit a budget with three decisions packages.
- \$450,000 to provide equity increases to employees to combat turnover and to assist in recruiting attorneys. The Governor **did not** recommend equity specific to the agency but has recommended an equity package in which specific positions are identified. It is believed the Commission would receive some money in that recommendation for attorney positions. All of this would be an increase to current biennium levels.
- Three FTE Investigator Positions with an anticipated total of \$391,756.92. The Governor **did** include this in his executive recommendation. This would move the total FTE for the Commission from 40 this biennium to 43 FTE next biennium.
- \$630,453 in funding next biennium and beyond to fund an increase in the Contractor rate of pay from \$75 per hour to \$80 per hour. The Governor **did** recommend this increase in his executive budget recommendation.

## Total Cases by Fiscal Year



## Case Types by Fiscal Year

