STATE OF NEW YORK

3864

2019-2020 Regular Sessions

IN ASSEMBLY

January 31, 2019

Introduced by M. of A. PRETLOW -- read once and referred to the Committee on Judiciary

AN ACT establishing the New York state public defense commission, providing for the members, powers and duties thereof, and providing fiscal relief to localities; and to amend the county law, in relation to public defense services

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Legislative findings and declaration. The legislature finds and declares that in certain proceedings the state is required to provide high quality legal assistance to persons otherwise financially unable to obtain counsel and/or afford the necessary expenses of representation. Providing public defense services to those who face an economic barrier to obtaining legal counsel serves the ends of justice in accordance with rights and privileges guaranteed by the constitution of the state of New York and the constitution of the United States of America. The availability of high quality public defense services affirms the faith of our citizens in our government of laws.

The legislature further finds that the present system of requiring localities to provide public defense services with little state financial assistance and no state oversight does not and cannot meet the foregoing objectives. The existing statutory limit on fees for counsel assigned to provide public defense services has resulted in a shortage of qualified lawyers to provide defense services, thereby denying or delaying the representation to which public defense clients are entitled. The present system has caused court congestion and delay, and eroded public trust and confidence in the legal system.

The legislature further finds that localities are struggling to carry the increasing burden of fulfilling the state mandate to provide defense services, and cannot bear alone the cost of raising assigned counsel

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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fees to reasonable levels. Local property owners should be given some relief from the obligation of providing public defense services.

The legislature further finds that no mechanism currently exists for state oversight of the provision of public defense services, despite its character as a state mandate and the appropriation of some state funds to support public defense services. Sound fiscal and governmental policy requires oversight of defense services to ensure that the state mandate is being met, and to determine the most effective and efficient future allocation of state funds. Certain defense services can most efficiently and effectively be provided by an independent commission. Some localities, especially those with smaller populations, could benefit by a mechanism for delivering defense services directly by the state.

The legislature further finds that public defense services must be provided in a manner that ensures the independence of public defense providers.

Therefore, to address these needs, the legislature establishes in this act the New York state public defense commission to oversee public defense services in this state, reimburse localities for public defense expenditures, and provide defense services in extraordinary circumstances.

§ 2. Short title. This act shall be known and may be cited as the "New York state public defense commission act".

§ 3. Definitions. As used in this act, the following terms are defined as follows:

1. "Client" means a person who is currently receiving or received in the past public defense services.

2. "Client community" means clients, their families, geographic neighborhoods in which a significant number of clients live, and organizations dedicated to providing support and/or advocacy to clients and their families and neighborhoods.

3. "Commission" means the New York state public defense commission established pursuant to section four of this act.

4. "Committee" shall mean the nominating committee established pursuant to section five of this act.

5. "Director" shall mean the director of public defense services appointed pursuant to section six of this act.

6. "Eligible person" means any person financially unable to obtain counsel and/or afford the necessary expenses of representation, when such person is suspected or accused of, charged with, or convicted of committing an offense, or is a party in family court, surrogate's court or other proceedings, and is entitled to counsel by law.

7. "Locality" means a county, except that within any county in the city of New York such term shall mean the city of New York.

8. "Public defense services" or "defense services" means publicly financed legal representation, including the services of an attorney and all necessary ancillary services, provided to persons financially unable to obtain counsel and/or afford the necessary expenses of representation, when such persons are suspected or accused of, charged with, or convicted of committing an offense, or are parties in family court, surrogate's court or other proceedings, and are entitled to counsel by law.

§ 4. New York state public defense commission. 1. There is hereby established the New York state public defense commission, a body corporate and public constituting a public benefit corporation. The commission shall be composed of thirteen members.

2. a. The members of the commission shall be appointed as follows:

(i) seven members shall be appointed by the governor in accordance with the provisions of paragraph c of this subdivision;
(ii) one member shall be appointed by the temporary president of the senate;
(iii) one member shall be appointed by the speaker of the assembly;
(iv) one member shall be appointed by the minority leader of the senate;
(v) one member shall be appointed by the minority leader of the assembly;
(vi) one member shall be appointed by the chief judge of the court of appeals; and
(vii) one member shall be appointed by the administrative board of the courts.

b. No member of the commission shall be a judge, prosecutor, law enforcement officer or employee thereof, or public official, unless such official is engaged exclusively in providing and/or administering public defense services.

c. (i) Five of the seven members appointed by the governor shall be appointed as follows:
(A) one with the qualifications enumerated in paragraph a of subdivision three of section five of this act, shall be appointed upon the recommendation of the New York State Association of Criminal Defense Lawyers;
(B) one with the qualifications enumerated in paragraph b of subdivision three of section five of this act, shall be appointed upon the recommendation of the Vera Institute of Justice;
(C) one with the qualifications enumerated in paragraph c of subdivision three of section five of this act, shall be appointed upon the recommendation of the Community Action Association of New York;
(D) one with the qualifications enumerated in paragraph d of subdivision three of section five of this act, shall be appointed upon the recommendation of the New York State Defenders Association; and
(E) one with the qualifications enumerated in paragraph e of subdivision three of section five of this act, shall be appointed upon the recommendation of the New York State Bar Association.
(ii) In the case of members to be appointed pursuant to subparagraph (i) of this paragraph, the governor may request the provision of additional recommended qualified candidates from the appropriate recommending entity. The two members of the commission appointed solely by the governor and all other members appointed by the other appointing authorities shall be selected from the pool of candidates provided by the committee pursuant to section five of this act. A majority of the members of the commission shall be attorneys admitted to practice in this state.

d. The members of the commission shall serve terms of four years; provided, however, that the members initially appointed shall serve the following terms:
(i) two members appointed by the governor, two years;
(ii) two members appointed by the governor, and the members appointed by the chief judge of the court of appeals and the administrative board of the courts, three years; and
(iii) all remaining members, four years.
All members may be reappointed to additional terms and shall serve until their successors are appointed. Vacancies on the commission shall be filled for the remainder of the term in the manner provided for by the original appointment.

3. The members of the commission shall receive no compensation for their services, but shall be allowed their actual and necessary expenses incurred in the performance of their duties.

4. The powers of the corporation shall be vested in and shall be exercised by the commission at any meeting duly called and held where a quorum of eight members is present. No action shall be taken by the commission except pursuant to the favorable vote of at least seven members present at the meeting at which such action is taken.

5. Any action required or permitted to be taken by the commission or any committee thereof may be taken without a meeting if all members of the commission or the committee consent in writing to the adoption of a resolution authorizing such action. The resolution and the written consents thereto by the members of the commission or committee shall be filed with the minutes of the proceedings of the commission or committee.

6. The members of the commission or any committee thereof may participate in a meeting of such commission or committee by means of a conference telephone or similar communications equipment allowing all persons participating in the meeting to hear each other at the same time; participation by such means shall constitute presence in person at such meeting.

7. The commission shall establish an advisory committee representative of public defenders, attorneys-in-charge of private legal aid bureaus or societies and not-for-profit corporations, voluntary associations, organizations providing public defense services, and assigned counsel administrators in all areas of the state.

§ 5. Nominating committee. 1. There is hereby established the public defense commission nominating committee. Such committee shall be composed of eleven members as follows:

a. the commissioner of criminal justice services, or his or her designee;

b. a representative of the New York State Association of Counties;

c. a representative of the New York State Bar Association;

d. a representative of the Vera Institute of Justice;

e. a representative of the Community Action Association of New York;

f. a representative of the Fund for Modern Courts;

g. a representative of the Puerto Rican Legal Defense and Education Fund;

h. a representative of the National Association for the Advancement of Colored People Legal Defense and Educational Fund;

i. a representative of the New York State Association of Criminal Defense Lawyers;

j. a representative of the New York State Defenders Association; and

k. the president or chief executive officer of the League of Women Voters of New York state, or their designee, who shall chair the committee.

2. The committee shall deliberate upon and apply the categories established in subdivision three of this section to select and maintain a pool of not less than twenty nor more than thirty-five qualified candidates for appointment to the commission. In such selection, it shall take into account the need for broad representation reflecting the geographic, racial, ethnic, gender and cultural diversity of the state's public defense clients. Organizations including, but not limited to, the following shall be solicited on a need basis to recommend candidates:

a. entities or plans providing public defense services and related human services;

b. professional legal organizations, including bar associations; and

c. social justice organizations and civic organizations, especially organizations composed of or concerned with persons or groups who have been public defense clients and communities that include a high percentage of public defense clients.

The committee shall meet biennially to select a new pool of candidates which may include candidates selected for previous pools. The League of Women Voters of New York State shall be entitled to reasonable expenses incurred in organizing the work of the committee.

3. The following shall be the categories of qualifications that the nominating committee shall utilize in nominating candidates for the commission:

a. experienced and distinguished trial and appellate criminal defense practitioners with a demonstrated and deep-rooted sensitivity to the complex issues affecting people in poverty and a proven commitment to enhancing the constitutional rights of clients and the client community;

b. persons with established credentials that demonstrate the ability to make innovations designed to conserve public resources while enhancing legal or other human services to low income clients in the criminal justice system;

c. former consumers of public defense services who, having been exonerated or having paid their debt to society by service of a sentence, have demonstrated a commitment to the improvement of legal services for those unable to afford counsel;

d. persons with a proven commitment to enhancing the constitutional rights of low income clients and who administer or have administered a public defense system in this state or a state public defense system in one of the United States of America whose experience can aid New York in formulating an organized statewide approach to ensuring quality local defense services; and

e. lawyers from moderate to large sized general practice law firms with an established and demonstrated commitment to resolving problems associated with the representation of low income people whose experience in the representation of clients can enhance the ability of public sector lawyers to take advantage of private sector firm management techniques.

§ 6. Director of public defense services. The commission shall appoint a full time director of public defense services who shall be the chief administrative officer of the commission. The director shall be committed to the professional representation of low income people, admitted or eligible and willing to seek admission to the practice of law in this state, have significant experience as an administrator of or practitioner in a public defense program or service and be appointed for a renewable term of four years. The salary of the director shall be not less than the salary of the highest paid district attorney in the state.

§ 7. General powers of the commission. The commission shall have power:

1. to sue and be sued, and to participate in actions and proceedings, whether judicial, administrative, arbitrative or otherwise;

2. to have a corporate seal, to alter such seal at pleasure, and to use it by causing it or a facsimile to be affixed or impressed or reproduced in any other manner;

3. to purchase, receive, take by grant, gift, devise, bequest or otherwise, lease, otherwise acquire, own, hold, improve, employ, use, and otherwise deal in and with real or personal property, or any interest therein, wherever situated;

4. to purchase, take, receive, subscribe for, otherwise acquire, own, hold, vote, employ, sell, lend, lease, exchange, transfer, otherwise dispose of, mortgage, pledge, use, and otherwise deal in and with bonds and other obligations, shares, or other securities or interests issued by others, whether engaged in similar or different business, governmental or other activities;

5. to offer participation in the New York state and local employees' retirement system for all its officers and employees, and to establish and carry out other retirement plans authorized pursuant to the retirement and social security law, which may be offered to all of its officers and employees not participating in the New York state and local employees' retirement systems, and to establish and carry out other incentive and benefit plans, trusts and provisions for any or all of its officers and employees, subject to the applicable provisions of article fourteen of the civil service law;

6. to fix, compromise and collect rates, rentals, fees, lease payments and other charges for the services rendered by it or for use of the facilities owned, controlled or administered by, or in the exercise of the powers of the commission;

7. to conduct the activities of the commission and have offices and exercise the powers granted by this act but not to interfere with the professional responsibilities of any attorney to any client absent a clear violation by the attorney of the disciplinary rules of the code of professional responsibility set out in part 1200 of title 22 of the New York codes, rules and regulations;

8. to appoint such officers, employees and agents as the commission may require for the performance of its duties and to fix and determine their qualifications, duties and compensation;

9. to retain or employ counsel, auditors and other private consultants on a contract basis or otherwise for rendering professional, management or technical services and advice;

10. to make, adopt, amend, enforce and repeal rules for its governance and internal management and personnel practices;

11. to make and alter by-laws for its organization and management;

12. to designate the depositories of its money;

13. to establish its fiscal year; and

14. to do all things necessary, convenient or desirable, including ancillary and incidental activities, to carry out its purposes and for the exercise of the powers granted in this act.

§ 8. Public defense services standards. The commission shall adopt, maintain and publish standards for the provision of public defense services. Such standards shall reflect national professional guidelines and standards in the field and shall include, but not be limited to:

1. independence of the defense function and quality of defense services;

2. reliability and sufficiency of defense funding;

3. vertical or continuous representation at the pre-trial and trial stages by the attorney either assigned or appointed, unless the client would demonstrably benefit from a change in counsel;

4. required participation by each attorney in approved training in the fundamentals and/or advanced techniques of criminal defense practice;

5. specified caseload/workload limitation levels;

6. investigative services;

7. the provision of social services or social services referrals;

8. availability of expert witnesses to assist counsel;

9. clerical assistance, interview facilities and the availability of law library and research materials to counsel; and

10. adequate supervision provided by experienced attorneys including mentoring to less experienced attorneys.

§ 9. State financial assistance to localities and public defense providers for provision of public defense services. 1. Within amounts appropriated therefor, such moneys as are reasonable and necessary for the commission to operate and to pay the state financial assistance provided for in this act shall be disbursed to the commission.

2. Within funds appropriated therefor, the commission shall adopt a plan for state financial assistance to localities for the provision of public defense services.

3. A locality may apply to the commission for state financial assistance for defense services, or may elect to allow public defense providers that receive local funds to seek state financial assistance directly. To receive full state financial assistance pursuant to this section for the provision of defense services after the adoption by the commission of standards for the provision of defense services pursuant to section eight of this act, a locality or provider shall demonstrate to the commission that it meets such standards; provided, however, that from the effective date of this act until one year after the promulgation of the public defense services standards, pursuant to section eight of this act, compliance shall be presumed.

4. Localities providing defense services, in whole or in part, pursuant to a plan of a bar association whereby the services of private counsel are rotated and coordinated by an administrator, pursuant to subdivision 3 or subdivision 4 of section 722 of the county law and localities providing defense services, in whole or in part, through representation by a public defender appointed pursuant to article 18-A of the county law or representation by counsel furnished by a private legal aid bureau or society designated by the county or city, or by any not-for-profit corporation, voluntary association, or organization pursuant to subdivisions 1 and 2 of section 722 of the county law, may receive state financial assistance in an amount up to forty percent of the cost of such representation.

5. Financial assistance for defense services in the amount determined by the commission shall be a state charge payable on vouchers approved by the director of defense services after audit, within the restrictions of subdivision one of section sixteen of this act, by and on the warrant of the comptroller.

6. Any locality or provider receiving payments pursuant to the provisions of this section shall be obligated to expend local funds for defense services in the year it receives state assistance in an amount not less than the total amount it expended for defense services in the preceding year unless it can demonstrate to the commission that it has maintained or improved the quality of defense services with less expenditure of funds.

§ 10. Provision of defense services. The commission may establish the capability to provide defense services to public defense clients at the request of judges, public defense providers or local governments. Such services shall be provided pursuant to contract between the director and the public provider or locality.

§ 11. Guidelines for eligibility for public defense services. Within policy parameters established by the commission, the director shall establish and disseminate at least annually guidelines for determining the eligibility of persons seeking public defense services.

§ 12. Training. 1. The director shall provide training to or facilitate training of attorneys providing public defense services. Such training shall be systematic, comprehensive and at least equal in scope to that received by attorneys appearing as adversaries of defense services providers. Training for attorneys shall include:

a. intensive entry-level training; and

b. regular in-service training and participation in regional and national training programs to keep attorneys abreast of changes in law and procedure, make attorneys aware of relevant developments in science, technology and social science, and continue development of advocacy, negotiation and communication skills.

2. The director shall provide training to or facilitate training of non-legal public defense professionals in investigation, sentencing advocacy, paralegal skills and other relevant areas.

3. The director shall provide training to or facilitate training of appropriate support staff working with public defense providers, including training in the use of automation technology, communication skills and other relevant areas to increase efficiency and morale.

§ 13. Oversight. 1. Within policy guidelines established by the commission, the director shall establish methods for gathering information about the provision of defense services including, but not limited to:

a. requiring localities and/or public defense services providers to furnish information about how defense services are provided;

b. publicizing the commission's oversight function and inviting the client community, concerned citizens, defense services providers, judges, members of the criminal justice community and others to provide information and express concerns about the provision of defense services;

c. instituting formal procedures for soliciting the views of the client community on specific issues affecting defense services and the criminal justice system; and

d. establishing formal and informal relationships with governmental, non-profit, community, judicial and other groups for the purpose of gathering information and opinions about defense services.

2. Within policy guidelines established by the commission, the director shall establish methods for improving the provision of public defense services. The director shall:

a. produce reports on problems in the provision of public defense services whenever the director deems that there is sufficient information to warrant such reports;

b. bring to the attention of any individual attorney, other defense services professional, institutional public defense provider or locality complaints made known to the director about the provision of defense services by that individual, institution or locality; and

c. Where a locality or public defense provider within a locality fails to meet the standards established by the commission pursuant to section eight of this act, make such failure known to the locality or public defense services provider as soon as it is apparent to the director, and work with the locality or public defense provider to bring the locality or public defense provider into compliance.

§ 14. Annual report. The commission shall submit to the governor, temporary president of the senate, speaker of the assembly and the chief judge of the court of appeals an annual financial report on or before the thirtieth day of September. Such report shall contain all pertinent data for the prior twelve months on the operation of the commission

including cost of operation and financial assistance to localities. Such report shall also include the proposed budget for the succeeding twelve months including funds for financial assistance to localities.

§ 15. Exempt status. It is hereby found, determined and declared that the creation of the commission and the carrying out of its corporate purposes is in all respects for the benefit of the people of the state and is a public purpose. The commission shall be performing an essential governmental function in the exercise of the powers conferred upon it by this act and the commission shall not be required to pay taxes or assessments upon any of the property acquired by it or under its jurisdiction and control, or use of any moneys, revenues or other income received by the commission. All contributions made to the commission whether by gift, devise or bequest, shall qualify as deductions in computing the net taxable income of the donor for the purpose of income tax imposed by the state or any political subdivision thereof.

§ 16. Confidentiality of public defense records. 1. The commission shall protect the confidences and secrets of public defense clients in accordance with the disciplinary rules of the code of professional responsibility set out in part 1200.19 of title 22 of the New York codes, rules and regulations, including clients to whom the commission provided, directly or indirectly, assistance or services. Notwithstanding any other provision of law to the contrary, no record or report shall be deemed deficient because of the omission of information, the provision of which would result in the disclosure of any such confidences or secrets, or would otherwise compromise the interest of any public defense client.

2. Notwithstanding any other provision of law to the contrary, the commission shall be exempt from the application of any provision of articles 6 and 7 of the public officers law.

§ 17. Section 719 of the county law, as amended by chapter 682 of the laws of 1975, is amended to read as follows:

§ 719. Expenses. If a public defender serves more than one county, the expenses of salaries, maintenance and operation of [~~his~~] **such public defender's** office shall be shared by the participating counties in accordance with the provisions of the agreement establishing the office. Expenses incidental to individual cases shall be paid by the county for which the services were rendered. All expenses chargeable to a county [~~hereunder~~] **pursuant to this section** shall be a county charge to be paid upon certification by the county treasurer out of an appropriation made for such purposes**, except that certain expenses may be paid with financial assistance from the state as authorized by section nine of the New York state public defense commission act**.

§ 18. Section 720 of the county law, as amended by chapter 761 of the laws of 1966, is amended to read as follows:

§ 720. Annual report. The public defender shall make an annual report to the board or boards of supervisors **and to the New York state public defense commission** covering all cases handled by [~~his~~] **such public defender's** office during the preceding year.

§ 19. Section 722-c of the county law, as amended by section 3 of part J of chapter 62 of the laws of 2003, is amended to read as follows:

§ 722-c. Services other than counsel. Upon a finding in an ex parte proceeding that investigative, expert or other services are necessary and that the defendant or other person described in section two hundred forty-nine or section two hundred sixty-two of the family court act, article six-C of the correction law or section four hundred seven of the surrogate's court procedure act, is financially unable to obtain them,

the court shall authorize counsel, whether or not assigned in accordance with a plan, to obtain the services on behalf of the defendant or such other person. The court upon a finding that timely procurement of necessary services could not await prior authorization may authorize the services nunc pro tunc. The court shall determine reasonable compensation for the services and direct payment to the person who rendered them or to the person entitled to reimbursement. [~~Only in extraordinary circumstances may the court provide for compensation in excess of one thousand dollars per investigative, expert or other service provider.~~]

Each claim for compensation shall be supported by a sworn statement specifying the time expended, services rendered, expenses incurred and reimbursement or compensation applied for or received in the same case from any other source.

§ 20. Section 722-e of the county law, as amended by section 11 of part VVV of chapter 59 of the laws of 2017, is amended to read as follows:

§ 722-e. Expenses. All expenses for providing counsel and services other than counsel [~~hereunder~~] **pursuant to this article** shall be a county charge or in the case of a county wholly located within a city a city charge to be paid out of an appropriation for such purposes**, except that certain expenses may be paid for with financial assistance from the state as authorized by section nine of the New York state public defense commission act**. Provided, however, that any such additional expenses incurred for the provision of counsel and services as a result of the implementation of a plan established pursuant to subdivision four of section eight hundred thirty-two of the executive law, including any interim steps taken to implement such plan, shall be reimbursed by the state to the county or city providing such services. Such plans shall be submitted by the office of indigent legal services to the director of the division of budget for review and approval. However, the director's approval shall be limited solely to the plan's projected fiscal impact of the required appropriation for the implementation of such plan, and his or her approval shall not be unreasonably withheld. The state shall appropriate funds sufficient to provide for the reimbursement required by this section.

§ 21. Subdivision 1 of section 722-f of the county law, as added by chapter 761 of the laws of 1966 and as designated by section 4 of part J of chapter 62 of the laws of 2003, is amended to read as follows:

1. A public defender appointed pursuant to article eighteen-A of this chapter, a private legal aid bureau or society designated by a county or city pursuant to subdivision two of section seven hundred twenty-two of this [~~chapter~~] **article**, and an administrator of a plan of a bar association appointed pursuant to subdivision three of section seven hundred twenty-two of this [~~chapter~~] **article** shall file an annual report with the [~~judicial conference~~] **New York state public defense commission** at such times and in such detail and form as [~~the judicial conference~~] **such commission** may direct.

§ 22. Subdivision 1 of section 722-f of the county law, as amended by section 3 of part MM of chapter 55 of the laws of 2018, is amended to read as follows:

1. A public defender appointed pursuant to article eighteen-A of this chapter, a private legal aid bureau or society designated by a county or city pursuant to subdivision two of section seven hundred twenty-two of this article, an administrator of a plan of a bar association appointed pursuant to subdivision three of section seven hundred twenty-two of this article and an office of conflict defender established pursuant to

such subdivision shall file an annual report with the chief administrator of the courts [~~and~~], the office of indigent legal services **and the New York state public defense commission**. Such report shall be filed at such times and in such detail and form as the office of indigent legal services **and the New York state public defense commission** may direct.

§ 23. No existing right or remedy of any character shall be lost or impaired by reason of the provisions of this act. Any public employee transferred as a result of the provisions of this act shall be transferred without further examination or qualification and shall retain his or her respective civil service classification and status.

§ 24. Severability. If any clause, sentence, paragraph, subdivision or section of this act shall be adjudged by any court of competent jurisdiction to be invalid, such judgment shall not affect, impair or invalidate the remainder thereof, but shall be confined in its operation to the clause, sentence, paragraph, subdivision or section thereof directly involved in the controversy in which such judgment shall have been rendered. It is hereby declared to be the intent of the legislature that this act would have been enacted even if such invalid provisions had not been included.

§ 25. This act shall take effect immediately; provided however that the appointment of members to the New York state public defense commission shall be completed within 90 days of such effective date, and the public defense services standards, required by section eight of this act, shall be promulgated within 180 days of the appointment of all members of the New York state public defense commission; provided further, the provisions of section twenty-two of this act shall take effect on the same date and in the same manner as section 3 of part MM of chapter 55 of the laws of 2018, as amended, takes effect.