



New York State Defenders Association, Inc.

Public Defense Backup Center

194 Washington Ave. • Suite 500 • Albany, NY 12210-2314

Telephone (518) 465-3524

FAX (518) 465-3249

www.nysda.org

Memorandum in Support of A.8793/S.6002

The Public Defense Act of 2009

(Amends the Judiciary Law, the County Law, and the State Finance Law
in relation to establishing the Public Defense Commission
and repeals article 18-A and 18-B of the County Law)

The New York State Defenders Association (NYSDA) is a not-for-profit membership association with a state contract to administer the Public Defense Backup Center serving public defense programs, lawyers, and their clients and providing technical assistance to county and other officials. NYSDA's mission is to improve the quality and scope of publicly supported legal representation to low income people. We are contractually obligated to "review, assess and analyze the public defense system, identify problem areas and propose solutions in the form of specific recommendations to the Governor, the Legislature, the Judiciary, and other appropriate instrumentalities." In that capacity we offer the following comments on the Public Defense Act of 2009 (A.8793/S.6002).

For two decades after the State first funded the Backup Center in 1981, we strove – and are still striving – to make improvements within the county-by-county system created in 1965. But our experiences have convinced us that more than incremental reform is required. In 2001, at the same time that an Appellate Division Committee called for state legislative overhaul and *The New York Times* endorsed the need for a blue ribbon oversight commission, NYSDA called upon the State to establish an Independent Public Defense Commission.¹ Our Board of Directors later endorsed the 2006 call of former Chief Judge Judith S. Kaye's Commission on the Future of Indigent Defense Services for a complete overhaul of public defense in New York State including not only an independent commission to oversee public defense services but to run a fully and adequately state-funded, statewide public defense system.

The Public Defense Act of 2009 does not, as the Kaye Commission recommended, provide for the State to relieve the counties of all fiscal as well as administrative responsibilities with regard to public defense. But the Act does address many core problems that NYSDA has sought with limited success to overcome.

For example, no enforceable statewide standards for providing public defense services currently exist in New York State. Promulgation and enforcement of standards was one of the principles NYSDA set out in its 2001 call for legislative action to end the crisis in public defense. The Public Defense Act of 2009 (A.8793/S.6002) addresses that principle. Under this bill, the Commission is charged with "developing policies, procedures and standards for the delivery of" public defense services. Once the Commission assumes administration of public defense, it will have the ability to enforce those standards statewide. This will end the inequities that currently

¹ *Resolving the Assigned Counsel Fee Crisis: An Opportunity to Provide County Fiscal Relief and Quality Public Defense Services*, NYSDA (March 2001). www.nysda.org/01_ResolvingtheAssignedCounselFeeCrisis.pdf

exist county to county. To take but one example, current practices mean that an individual's eligibility for public defense services differ depending on which side of a county line that individual stands. NYSDA published a report 15 years ago that described inconsistent and erroneous procedures and criteria used in various localities to determine whether a potential client is eligible for public defense services.² That report remains all too accurate. Despite the Backup Center's annual reminder to all public defense programs and others that no one factor is determinative of eligibility, individuals are still turned away based on improper or overly limited information. Tightened eligibility limits have been used to cut back on county costs rather than to fairly determine whether an individual could or could not afford to hire an attorney. Uniform standards for making that determination will greatly increase fairness.

The Act also addresses the vital principle that public defense services must be overseen by an independent governing body that avoids fiscal, professional, and political conflicts of interest. Independence is enshrined as the first principle in the American Bar Association's *Ten Principles of a Public Defense Delivery System* (2002) and is prominent in standards for public defense representation in New York State put forth by NYSDA and the New York State Bar Association.³

Specifically, this bill establishes the Commission as a public benefit corporation and provides that nominees for the 13-member Commission shall be selected from various sources including the Judiciary, the majority and minority leaders of the two legislative houses, and non-profit entities such as bar associations that have varied expertise in the justice system. Nominees are to be presented to the Governor for his or her appointment. This structure, along with other provisions such as that requiring the Commission to protect clients' confidential records, ensures that the Commission is independent of political interference and can focus on providing quality representation to clients as professional conduct rules require of all attorneys.

Lack of sufficient funding for public defense services has historically been a consistent barrier to effective and efficient representation of people unable to afford counsel. That is true not just in New York State but across the nation.⁴ New York, which was historically a leader in providing a right to counsel, delegated the fiscal and administrative responsibilities for this function to the counties and New York City in 1965. In our 2001 report, a response to problems arising from the State's failure to raise assigned counsel fees for more than a decade, we set forth the principle that "Reliable and sufficient funding is necessary for the efficient and effective provision of public defense services." Yet, every year, each of over 100 public defense programs across the

² *Determining Eligibility for Appointed Counsel in New York State: A Report from the Public Defense Backup Center*, NYSDA (1994). www.nysda.org/documents/TOC_NYSDAEligibilityReport.htm

³ *Standards for Providing Constitutionally and Statutorily Mandated Representation in New York State* (NYSDA 2004), Standard II; *Standards for Providing Mandated Representation* (NYSBA 2005) Standard A. The lack of the defense function's independence from the prosecuting arm of the State was the primary reason that NYSDA opposed a proposal in the 2008 Executive Budget to create an oversight agency headed by an Executive Director whose appointment and salary would be controlled by the Governor. See, NYSDA, *Comments on the Proposed Office of Indigent Defense Services* (2008).

⁴ See generally, for example, John Thomas Moran ed., *Gideon Undone: The Crisis in Indigent Defense Funding* (ABA 1982). See also, The Constitution Project, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel* (2009), p 52 *et seq.*

http://tcpjusticedenied.org/index.php?option=com_content&view=article&id=53&Itemid=53

state must deal with local government funders. This not only subjects public defense to untoward political pressure (public defense programs may be fiscally punished for providing good representation in unpopular cases and questioned about consistent, zealous advocacy practices) but creates administrative inefficiency. This bill addresses such issues, with the Commission specifically charged with studying “the projected cost when the system is subjected to meaningful economies of scale, reduction of waste, and elimination of duplication...” While the Commission’s independence to act in the best interests of clients is assured in the bill, it is also directed to adopt policies and procedures needed for a necessary and appropriate degree of fiscal discipline and accountability.

Efficient and effective provision of public defense services requires that clients and the client community have a formal role in the oversight of public defense services and that those who provide public defense services (who cannot serve directly on the Commission due to a conflict of interest) should have a role in improving not just the public defense system but the justice system as a whole. The Public Defense Act of 2009 as set out in A.8793/S.6002 addresses this principle, which was set out in our 2001 paper. The Act provides for one client seat on the Commission and for inclusion of the client community and public defense providers on the advisory committee formed to advise the commission about deficiencies in public defense services, potential ways to correct them, and the commission's oversight and planning functions. The Commission is also to reflect the “geographic, racial, ethnic and gender makeup of the State and the cultural diversity of the State’s public defense clients.”

In addition to addressing core concerns about public defense services the Public Defense Act of 2009 (A.8793/S.6002) deals with pragmatic matters involved in public defense reform. NYSDA, with its experience in advising counties on potential system changes and its clearinghouse of materials on public defense in New York State and nationwide, understands very well that systemic reform requires careful planning. The phase-in period provided in this bill will give the Commission time to meet the stated obligations such as: evaluating the existing county-by-county public defense system; calculating the current cost of public defense services and that cost subjected to economies of scale, reduction of waste, elimination of duplication and compliance with best practices; establishing qualifications, duties and compensation for Commission staff and appointing the state defender; setting standards for public defense services to ensure quality representation; and promulgating a strategic plan for the administration and funding of public defense services throughout the state.

This initial period also allows the State to weather the current economic downturn without increased expenditures (initial funding for the Commission is to come from the existing Indigent Legal Services Fund) without delaying further the beginning of crucial public defense reform. NYSDA supports the Public Defense Act of 2009 (A.8793/S.6002).

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Contact: Jonathan Gradess
(518) 465-3524