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January 10, 2023

The Honorable Ken Weyler, Chairman  
Fiscal Committee of the General Court and

His Excellency, Governor Christopher T. Sununu  
and the Honorable Council  
State House  
Concord, N.H. 03301

**REQUESTED ACTION**

Pursuant to RSA 604-A:1-b, Additional Funding, authorize the Judicial Council to receive an additional appropriation from funds not otherwise appropriated in the total amount of \$1,600,000.00, effective upon Fiscal Committee and Governor and Council approval, through June 30, 2023. **100% General Funds.**

Funding is to be budgeted in Fiscal Year 2023 in 02-07-07-070010-10910000 ASSIGNED COUNSEL as follows:

Class/Expense	Class Title	Current Budget	Change	Revised Budget
108/500751	Provider Payments Legal Services	\$1,492,785	\$1,600,000	\$3,092,785

**EXPLANATION**

This account funds the work of assigned counsel for both indigent criminal defendants and accused parents in abuse and neglect cases. Expenditures have exceeded our forecasts for this account. Without additional funding, the Judicial Council will be unable to pay the court-approved invoices for these services.

Pursuant to the State's statutory order of appointment, all indigent criminal defense cases are sent directly to the Public Defender program. The Public Defender reviews each case, and if an ethical conflict exists, the case is then assigned to a contract attorney. The majority of indigent criminal defense cases remain with the Public Defender. Contract attorneys are paid a flat fee and serve as the back-up to the Public Defender. If contract counsel is unavailable or if the charged conduct is a homicide that the Public Defender has conflicted out of, assigned counsel is then appointed to the case. The assigned counsel system is based on an hourly rate of payment, with a structure of fee caps in place through court rules. Unpredictable factors, such as the number of homicides and other major crimes in a fiscal year, also impact the assigned counsel expense.

This statutory order of appointment is set forth in RSA 604-A:2. It provides that “[w]henver the court makes an appointment under paragraph I, the appointment shall be made as follows: first, appointment of the public defender program under RSA 604-B if that office is available; second, in the event the public defender program is not available, appointment of a contract attorney under RSA 604-A:2-b if such an attorney is available; and third, in the event that neither the public defender program nor a contract attorney is available, the appointment of any qualified attorney under paragraph I.”

RSA 604-A:1-a provides that “[i]n cases involving a neglected or abused child, when an expressed interest attorney is appointed for the child as provided in RSA 169-C:10, the cost of such appointment shall be paid from funds appropriated for indigent defense in this chapter.” This section also provides that “[i]n cases involving a neglected or abused child, when an attorney is appointed to represent a parent determined to be indigent pursuant to RSA 169-C:10, II, at the preliminary hearing or a hearing pursuant to RSA 169-C:6-a, III, whichever occurs earlier, the cost of such appointment, including counsel and investigative, expert, or other services and expenses, shall be paid from funds appropriated for indigent defense pursuant to this chapter. Counsel shall petition the court for investigative, expert, or other services necessary to provide adequate representation.”

RSA 604-A:1-b provides that “[i]n the event that expenditures for indigent defense by the Judicial Council are greater than amounts appropriated in the operating budget, the Judicial Council may request, with prior approval of the Fiscal Committee of the General Court, that the Governor and Council authorize additional funding. For funds requested and approved, the Governor is authorized to draw a warrant from any money in the treasury not otherwise appropriated.”

Total FY22 expenditures for this account were \$1,617,217. The FY23 budget for this account was \$1,592,784. Of that amount, \$1,000,000 was budgeted for representation in criminal and delinquency cases, and \$592,784 was budgeted for representation for parents in abuse and neglect cases. In November of 2022, \$99,999 was transferred from this account to the account for ancillary non-counsel service (accounting unit 1103) resulting in the current budget of \$1,492,785.

As of December 31, 2022, year-to-date expenditures for this account were approximately \$1,408,327. The year-to-date expenditures for representation in criminal and delinquency cases has been \$697,313 (i.e., almost 70% of the budget for FY23). The year-to-date expenditures for representation for parents in abuse and neglect cases has been \$711,014 (\$118,230 or 20% more than the budgeted amount for FY23).

The FY23 balance for the assigned counsel account is \$84,457. The Judicial Council has approximately \$65,763 in pending invoices (\$36,116 for representation in criminal and delinquency cases, and \$29,647 for representation in abuse and neglect cases), which are *not* included in that balance.

There are a number of reasons why the costs for representation in criminal and delinquency cases has increased and will continue to do so through the remainder of the fiscal year: The need to appoint assigned counsel has grown significantly since the pandemic. The loss of experienced attorneys at the Public Defender, high Public Defender caseloads, and high caseloads for contract attorneys led to a critical need for assigned counsel to provide representation in criminal and delinquency cases. The indigent defense crisis prompted the New Hampshire Supreme Court to establish a Criminal Defense Task Force, which, among other things, made direct pleas to private

attorneys to accept indigent criminal cases as assigned counsel. The Supreme Court also approved a revision to the court rule that governs counsel fees and expenses in indigent criminal cases, increasing the maximum fee in criminal cases, increasing the hourly rate for attorneys, and authorizing billing for travel time. (Sup. Ct. R. 47). The base rate for most criminal cases, which had been set at \$60.00 per hour in 1992, increased to \$90.00 per hour; the rate in major crimes was increased from \$100.00 to \$125.00 per hour. The rule change went into effect on October 1, 2022, and there has been a corresponding increase in the cost for assigned counsel in indigent criminal cases. As criminal cases close and assigned counsel billing is submitted for legal services after October 1, 2022, the average monthly cost for assigned counsel is expected to rise. Additionally, the anticipated costs for representation in homicides and the YDC cases will also have a significant impact the assigned counsel budget.

The costs for representation in abuse and neglect cases is similarly affected by a change in the Supreme Court rule that sets the compensation rate in these cases. Effective October 1, 2022, the rate for representation in non-criminal indigent cases, including abuse and neglect cases, increased from \$60.00 to \$90.00 per hour. (Sup. Ct. R. 48). In the past five years, under the \$60.00 rate, the actual annual cost for representation in abuse and neglect cases ranged from \$1,158,342 (FY18) to \$955,891 (FY22). Although the annual cost consistently decreased during this five-year period, the new compensation rate will be a major factor in the actual cost for representation for abuse and neglect cases in FY23.

As noted above, the Judicial Council has an additional \$65,763 in invoices being processed and currently confronts the highest annual cost for assigned counsel representation in the Council's history. The funds currently available in account 02-07-07-070010-10910000 are insufficient to pay the court-approved invoices expected to arrive between now and the end of the current fiscal year. Based on the monthly average of expenditures since October 1, 2022 (the effective date of the rule change) and the belief that the full impact of the rule change has not yet manifest in approved invoices to date, the Judicial Council anticipates that the account will require the addition of \$1,600,000 to meet the anticipated expenditures in this account through June 30, 2023.

This Agency will remain at your service to provide any requested information concerning the critical importance of this additional funding to the orderly administration of justice.

Thank you for your consideration.

Respectfully Submitted,



Richard E. Samdperil  
Acting Executive Director