



Commonwealth of Massachusetts  
Office of the State Auditor  
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*Making government work better*

Official Audit Report – December 19, 2011

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## Newburyport District Court Probation Department's Indigency Determination Process for State-Sponsored Legal Services

For the period July 1, 2009 through June 30, 2011



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In accordance with Chapter 11, Section 12, of the Massachusetts General Laws, the Office of the State Auditor conducted an audit (No. 2011-1104-3C), in accordance with generally accepted government auditing standards, of certain activities of the Committee for Public Counsel Services (CPCS) for the period July 1, 2007 through June 30, 2011. Although the CPCS is statutorily responsible for providing legal services to indigent individuals within Massachusetts, Chapter 211D of the General Laws assigns to the Chief Probation Officer assigned to each court the responsibility of ensuring that a person claiming to be indigent meets the definition of indigence established by Rule 3:10, Section 1, of the Supreme Judicial Court. Consequently, as part of our audit of the CPCS, we selected a representative sample of 27 district courts to review. The objective of our work at each district court was limited to determining the extent to which probation staff in these courts were complying with their mandated responsibility established by Chapter 211D to ensure that a defendant claiming to be indigent meets the definition of indigence. The Newburyport District Court (NDC) was one of the 27 courts selected for our review.

Based on our review, we determined that the NDC Probation Department was not in compliance with Chapter 211D of the General Laws in terms of ensuring that a defendant claiming to be indigent meets the definition of indigence as defined by Rule 3:10, Section 1, of the Supreme Judicial Court. We also found that the NDC Probation Department was not maintaining its records, including those related to determining whether a defendant is indigent, in accordance with the record retention schedule established by the Administrative Office of Trial Court (AOTC).

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Our audit found that, contrary to the requirements of Chapter 211D of the General Laws, the NDC Probation Department does not routinely conduct verifications of information provided to it by defendants in order to ensure that these defendants are indigent and entitled to receive state-sponsored legal representation. We also determined that the Probation Department was not in compliance with the record retention guidelines established by the AOTC in that court officials told us that they routinely dispose of various probation records even though the court is required to maintain these records for a period of 10 years. As a result of these conditions, there is inadequate assurance that all of the state-sponsored legal counsel services that the NDC provided to 1,081 defendants during fiscal year 2010 were appropriate.

## INTRODUCTION

### ***Background***

The Committee for Public Counsel Services (CPCS) was established by Chapter 673 of the Acts of 1983, which added Chapter 211D to the Massachusetts General Laws. Chapter 211D charges the CPCS with the responsibility of providing legal counsel services to indigent persons entitled to representation by law. This statute also requires the CPCS to establish the standards for the determination of indigence but assigns the responsibility of determining whether a person meets the definition of being indigent as defined by Rule 3:10, Section 1, of the Supreme Judicial Court to the Chief Probation Officer assigned to each court, including the Newbury District Court (NDC).

The NDC is located at 188 State Street, Newburyport. During fiscal year 2010, the CPCS assigned public counsel to 144,376 individuals in the 27 district courts selected for our review. During this same period, the NDC provided legal counsel services to 1,081 of these individuals determined to be indigent by the NDC Probation Department.

### ***Audit Scope, Objectives, and Methodology***

In accordance with Chapter 11, Section 12, of the Massachusetts General Laws, the Office of the State Auditor conducted an audit (No. 2011-1104-3C), in accordance with generally accepted government auditing standards, of certain activities of the CPCS for the period July 1, 2007 through June 30, 2011. As part of our audit of the CPCS, we elected a representative sample of 27 of the Commonwealth's 70 district courts to review. The NDC was one of the 27 district courts selected for our review.

One of the objectives of this audit was to determine whether the Office of the Commissioner of Probation (OCP), through district court probation departments, is effectively administering state-sponsored legal counsel services to defendants who claim to be indigent in compliance with Chapter 211D of the General Laws as well as other applicable laws, rules, and regulations. The objective of our work at each district court was limited to determining the extent to which the probation staff in these courts were complying with their mandated responsibility as established by Chapter 211D to ensure that a defendant claiming to be indigent meets the definition of indigence as defined by Rule 3:10, Section 1, of the Supreme Judicial Court.

In order to achieve our objectives, we first identified 27 of the 70 district courts in Massachusetts in which to conduct our audit testing based on a representative sample of courts across the Commonwealth. We then selected a statistical sample of 119 files of defendants who were determined to be indigent and provided with state-sponsored legal counsel during fiscal year 2010 at these 27 district courts. Our sample was designed to achieve a 95% confidence level in the results of the testing.

Our review at the NDC was limited to an assessment of the policies and procedures being utilized by the NDC Probation Department during fiscal years 2010 and 2011 to ensure compliance with the applicable requirements of Chapter 211D of the General Laws and a review of two case files from our statistical sample and eight additional, randomly selected files of individuals who had been assigned public counsel during the period July 1, 2009 through June 30, 2010. We reviewed all the documentation in these case files, which should have included such items as the Affidavit of Indigency (also referred to as the Indigency Determination Form), the Pre-Trial Intake Form, the Defendant Waiver of Access Form, and any reports or documentation regarding the 60-day and six-month re-assessments of indigency that Probation Department employees are required to conduct if a defendant is to continue to receive state-sponsored legal counsel. We also spoke with Probation Department staff to determine the extent to which the department is complying with the requirements of Chapter 211D of the General Laws, relative to ensuring that only eligible individuals are provided with state-sponsored legal counsel services, and to obtain an understanding of the internal controls, including any policies and procedures, that the NDC Probation Department has implemented to ensure compliance with these statutory requirements.

At the conclusion of our audit, a copy of our draft report on the CPCS was provided to CPCS and OCP officials for their review and comments. We offered the opportunity for the OCP to obtain comments from officials at the 27 individual courts we visited during our audit, including the NDC. All comments that were provided were considered in the drafting of the overall CPCS report and the separate reports issued to the 27 courts included in our audit. We also met with the Acting Commissioner of Probation and discussed the results of our 27 court audits, including our audit of the NDC Probation Department.

In response, the Acting Commissioner stated that, rather than soliciting specific comments from each of the individual courts, he would offer the following general comments:

*We have received and reviewed the data collected for the study period FY 2010. That data documents significant deficiencies in our indigency verification process, which we take very seriously. We recognized early this calendar year - even before being contacted by the Auditor's office - that reform was urgently needed and initiated a corrective process with the convening of a state-wide Chief Probation Officers meeting in February of 2011. That process is certainly significantly informed by your Office's findings.*

*In the wake of the February meeting, I can report that a number of subsequent steps have been taken to bring our efforts in line with "best practices" (The details of those efforts have been specified in a series of three memos to your office). During this period, I have received the cooperation of Chief Probation Officers throughout the state in applying their efforts to establishing sound practices locally. Our data collection systems indicate that substantial improvements have occurred and we are committed to staying on that path. Our four-court pilot study - which commenced on October 1, 2011 - will yield significant insights into optimal practices for indigency verification and court review, as well as data on the extent of misrepresentation of financial standing. We expect to be able to make an initial report of our findings in January, 2012.*

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## AUDIT RESULTS

### **NONCOMPLIANCE WITH STATE LAWS GOVERNING INDIGENCY DETERMINATION, VERIFICATION, AND DOCUMENTATION HAS RESULTED IN INADEQUATE ASSURANCE THAT ONLY ELIGIBLE DEFENDANTS ARE PROVIDED WITH STATE-SPONSORED LEGAL SERVICES**

Our audit found that, contrary to the requirements of Chapter 211D of the Massachusetts General Laws, the Probation Department of the Newburyport District Court (NDC) does not routinely conduct verifications of information provided to it by defendants in order to ensure that these defendants are indigent and entitled to receive state-sponsored legal representation. In addition, we determined that the NDC Probation Department was not in compliance with record retention guidelines established by the Administrative Office of the Trial Court (AOTC) in that department officials indicated that they routinely dispose of various probation records even though the court is required to maintain these records for a period of 10 years. As a result of these conditions, there is inadequate assurance that all of the state-sponsored legal counsel services that the NDC provided to 1,081 defendants during fiscal year 2010 were appropriate.

Although the Committee for Public Counsel Services (CPCS) is statutorily responsible for providing legal services to indigent individuals, in accordance with 211D, Section 2½, of the General Laws, the various probation departments within the courts are assigned the responsibility of ensuring that a person claiming to be indigent actually meets the definition of indigency established by Supreme Judicial Rule 3:10. In this regard, Chapter 211D, Section 2½ states, in part:

*Any appointment of counsel by the court is at all times subject to verification of indigency by the chief probation officer assigned to each court. Not later than 60 days after the appointment of counsel, the chief probation officer or his designee shall complete a re-assessment of the financial circumstances of the person for whom counsel was appointed to ensure that such person continues to meet the definition of indigency. . . . Not later than 6 months after the appointment of counsel, and every 6 months thereafter, the chief probation officer or his designee shall conduct a further re-assessment of the financial circumstances of the person for whom counsel was appointed to ensure that he continues to meet the definition of indigency. . . . Upon completion of a re-assessment, the chief probation officer shall prepare a written report of his findings.*

Rule 3:10, Section 1, of the Supreme Judicial Court defines an indigent person as an individual who is:

- Receiving one of the following types of public assistance: Aid to Families with Dependent Children; Emergency Aid to Elders, Disabled and Children; poverty-related veterans benefits, food stamps, refugee resettlement benefits, Medicaid, or Supplemental Security Income;
- Having an annual income, after taxes, one hundred twenty-five percent or less of the then current poverty threshold;
- Residing in a tuberculosis treatment center or a public or private mental health, mental retardation or long-term care facility, including the Bridgewater State Hospital and the Treatment Center, or the subject of a proceeding in which admission or commitment to such a center or facility is sought, or who is the subject of a proceeding in which a substituted judgment determination concerning treatment is sought or provided;
- Serving a sentence in a correctional institution and has no available funds; or
- Being held in custody in jail and has no available funds.

Once a person is accused of a crime and requests state-sponsored legal representation, according to court officials, the following process is followed by the probation officers or their designees in each court to process an accused individual's claim of indigence:

1. The defendant must sign a Defendant Waiver of Access form authorizing the Probation Department to obtain tax and other information about the defendant from the Massachusetts Department of Revenue and Registry of Motor Vehicles.
2. The defendant must complete and sign a Pre-Trial Intake Form that details various biographical information about the defendant and his/her reasons for claiming to be indigent.
3. The defendant must complete and sign an Affidavit of Indigency in which he/she asserts, under pain and penalty of perjury, that he/she is indigent. This form also includes various financial information provided by the defendant, such as monthly income, expenses, etc.
4. In accordance with Chapter 211D, Section 2½, Subsection (b), of the General Laws, the Chief Probation Officer prepares a written indigency intake report that includes his/her recommendation on whether a person seeking the appointment of counsel is indigent, indigent but able to contribute, or not indigent.

5. If the person is determined by the court to be indigent or indigent but able to contribute, the judge then authorizes the CPCS to provide legal representation. A notice is sent out by the court to the CPCS that notifies it to assign counsel to the defendant in question. Once an attorney is assigned, the Clerk of the Court prepares a Notice of Assignment of Counsel form and sends a paper or electronic copy to the CPCS.

In addition to making an initial determination on whether an individual accused of a crime is indigent, the probation officers in each court must also conduct subsequent re-assessments of a person's indigent status.

Chapter 211D, Section 2½, of the General Laws specifies that these re-assessments consist of the chief probation officer or his designee accessing wage and tax information in the possession of the Department of Revenue and such other information relevant to the verification of indigence in the possession of the Registry of Motor Vehicles. In addition, Chapter 211D, Section 2½ further requires that:

*Upon completion of his re-assessment, the chief probation officer shall prepare a written report of his findings. The chief probation officer shall sign the report, certifying that the person for whom counsel was appointed either continues to meet or does not continue to meet the definition of indigency.*

During our review at the NDC, we first determined that the NDC Probation Department had established formal, written policies and procedures to verify information provided by defendants requesting state-sponsored legal representation. As part of our examination, we reviewed the case files of 10 defendants who applied for and subsequently received state-sponsored legal services at the NDC during the period July 1, 2009 through June 30, 2010. The purpose of this review was to determine whether the Probation Department employees at the NDC had actually performed the required verification of the information provided by these 10 defendants so that they could make informed determinations on whether these individuals met the established definition of being indigent. Based on our review of these case files and our discussions with Probation Department staff, we determined that the NDC Probation Department does not routinely conduct any verification of the information provided to it by defendants in order to ensure that these individuals are indigent and entitled to state-sponsored legal counsel. NDC Probation Department officials stated that the court does not have the ability to perform real-time verification of a defendant's information and elects not to conduct a manual verification of this information in the belief that doing so would significantly slow down the court's ability to process cases.



Our review of Probation Department records also noted that the department was not in compliance with the record retention guidelines established by the AOTC. Specifically, the AOTC has developed a record retention schedule, with which all courts must comply, that requires probation records to be retained for a period of 10 years. The only records that may be disposed of outside this 10-year period, in accordance with the AOTC's Record Retention Schedule, Part IV – Case Related Papers, are as follows:

*Juvenile/Adult probation case folder information, provided the individual has had no court activity for 10 years.*

Contrary to this requirement, our review of the 10 case files in our sample noted that required documentation was missing, as follows:

- Nine of the 10 files contained completed Affidavit of Indigency Forms.
- Seven of the 10 files contained completed Pre-Trial Intake Forms.
- Seven of the 10 files contained completed Defendant Waiver of Access Forms.
- Six of the 10 files contained completed reports documenting the required 60-day re-assessment.
- One of the 10 files contained completed reports documenting the required six-month re-assessment.

Accordingly, there was inadequate assurance that the NDC Probation Department performed the required verification of the information provided by clients who applied for and received state-sponsored legal services.

Regarding this matter, NDC Probation Department officials stated that it is the court's policy to retain records for the required period of time. However, contrary to this assertion, our review of the case files in our sample clearly indicates that the NDC Probation Department is not complying with the AOTC's record retention policies.

As a result of these conditions, there is inadequate assurance that the funding provided to the CPCS to retain public counsel for the 1,081 individuals deemed indigent by the NDC in fiscal year 2010 was appropriately spent.

***Recommendation***

In order to address our concerns relative to this matter, we recommend that the NDC Probation Department take measures to immediately comply with all the requirements of Chapter 211D of the General Laws. Further, the NDC Probation Department, in conjunction with the Office of the Commissioner of Probation, should develop and implement a formal, written set of policies and procedures to communicate these requirements to Probation Department employees, as well as a formalized system of internal controls designed to ensure compliance with Chapter 211D. These policies and procedures should specifically address the issue of record retention and should be designed to ensure compliance with the AOTC's record retention policies.