



Deborah Richardson, Executive Director  
Tim Macdonald, Legal Director

December 8, 2023

**SENT VIA EMAIL**

Councilmember Crystal Murillo  
Councilmember Steve Sundberg  
Councilmember Ruben Medina  
Councilmember Alison Coombs  
Councilmember Francoise Bergan  
Councilmember Curtis Gardner  
Councilmember Danielle Jurinsky  
Councilmember Angela Lawson  
Councilmember Dustin Zvonek  
Councilmember Stephanie Hancock

***Re: City Council Resolution Concerning the Aurora Public Defender's Office***

Dear Councilmembers,

On Monday, October 9, 2023, a majority of Aurora City Councilmembers approved a resolution for a Request for Proposals (“RFP”) to contract out the constitutionally required legal representation provided by the Aurora Public Defender’s Office (“Resolution 2023-118”).<sup>1</sup> This resolution is the latest attack by the City of Aurora on the independence of the Public Defender’s Office and should be repealed.

As explained in more detail below, the process contemplated by the Resolution poses significant conflicts of interest and would be inconsistent with state and municipal law. Under current law, the Aurora Public Defender Commission is the only entity with legal authority to contract out the indigent defense services currently provided by the Public Defender’s Office.

Moreover, privatization of indigent defense services will likely cost the City of Aurora millions of dollars long-term. A free-standing public defender office, which the City of Aurora

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<sup>1</sup> See Agenda Packet for the October 9, 2023 City Council Meeting at Pages 233-37, “Evaluating Alternative Methods of Providing Legal Defense Representation,”

<https://www.auroragov.org/common/pages/DownloadFileByUrl.aspx?key=qGdlgDri9Xew4uap13fe3ZKyt3027dgh6NFQ%2b2eghvBmvRPTrdrgGwQU5kK7MuFH6Kcwn6sKB4fq18WTXXIFJDG3oQXBjclE96KLmkGeFSNnaFkiPtte8pHY6eMVcwuEDwH2HG%2fU4%2f2xq9o8e0rnkim0xMA9iagmiWYcYP8cAqvTQWJxrJI9mVtwsonTTCpi510xNg%3d%3d>

has had for 30 years, is the gold standard of public defense. The decision to provide any other kind of indigent defense—whether by flat fee or hourly rate—would be a step backwards for the City and its residents.

We write to urge you to repeal the resolution.

**I. Under state law and the current municipal code, the authority to contract out indigent defense services lies with the Public Defender Commission**

Pursuant to Resolution 2023-118, the RFP is to be handled and overseen by the Presiding Judge, Judge Day, and the Interim City Manager, Jason Batchelor, without the involvement or consent of the Public Defender Commission. The Judge and the City Manager are directed to then share out the results of the RFP with the Council. Implicit in the Resolution is the conclusion that the Council will decide whether to move forward with the Aurora Public Defender’s Office or contract out the City’s indigent defense services.

Councilmembers should be aware that the Public Defender Commission is the only entity with legal authority to make that decision under state law and the current municipal code.

The Public Defender Commission was established by Aurora Municipal Code Sec. 50-166, *et seq.* The municipal code gives the Commission the responsibility to “appoint and discharge the municipal public defender and his or her assistants.” *Id.*; Aur. Mun. Code § 50-169. The Commission must ensure that indigent defendants are “represented independently of any political consideration.” Aur. Mun. Code § 50-166.

Colo. Rev. Stat. § 13-10-114.5 requires each municipality to provide defense counsel for each indigent defendant charged with a municipal code violation for which there is a possible sentence of incarceration. *See* § 13-10-114.5(3)(a). The same statute requires that a nonpartisan entity independent of the municipal court and municipal officials oversee or evaluate indigent defense counsel. *Id.* A municipality could satisfy that requirement through the creation of a local independent indigent defense commission. *Id.* Aurora had previously established the Public Defender Commission, which was deemed to be in compliance with the state statute. *Id.* at 114.5(3)(d)(I). Under Colo. Rev. Stat. § 13-10-114.5(3)(d)(IV), a local indigent defense commission “has the responsibility and exclusive authority to appoint indigent defense counsel” and the “sole authority” to discharge him or her for cause.

Therefore, because Aurora established the Public Defender Commission in its municipal code, and state law gives the Commission the sole and exclusive authority to appoint and discharge indigent defense counsel, City Council cannot contract out indigent defense without a change in law. City Council currently lacks authority to discharge the Public Defender’s Office or appoint a third-party as indigent defense counsel, so the RFP process would be a fruitless waste of time and resources.

It is also worth noting that SB 18-203 intended to insulate indigent defense counsel from the political whims of municipal officials and the judicial economy concerns of municipal judges.<sup>2</sup> Pursuant to SB 18-203, “independent indigent defense requires, at minimum, that a

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<sup>2</sup> Stakeholders that included the ACLU of Colorado and a group of municipal judges, including Judge Day, drafted SB 18-203. SB 18-203 was motivated in part by the trend of municipal judges appointing criminal defense attorneys who disposed of cases fastest—typically via plea deal. In so doing, municipalities would prioritize judicial economy over zealous advocacy for indigent defendants.

nonpartisan entity independent of the municipal court and municipal officials oversee or evaluate indigent defense counsel.” Resolution 2023-118 directs the presiding judge and the city manager to effectively compare the Public Defender’s Office to alternative methods of providing indigent defense counsel via RFP process. That comparison is fundamentally an evaluation of the Public Defender’s Office, and the presiding judge and city manager are precisely the kinds of partial individuals who should not be tasked with the evaluation of indigent defense counsel.

**II. Privatization of public defense would cost the City of Aurora far more while providing less, no matter what model is selected**

***a. Flat-fee systems are widely rejected by states and the American Bar Association because they financially disincentivize zealous advocacy and lead to constitutional deprivations***

Under a flat-fee arrangement, attorneys receive a flat fee per case. Generally, all trial expenses (such as experts or investigators) are paid out of the same flat fee, meaning that a lawyer’s pay is negatively impacted by seeking outside assistance. These arrangements financially incentivize lawyers to do as little work as possible on cases, creating a significant conflict of interest between a client’s right to counsel and the lawyer’s financial interest. The more work done on the case, the lower the hourly rate for the attorney. These arrangements also incentivize attorneys to take on as many cases as possible to supplement their income, detracting from the number of hours that can be spent on any individual case.

Because of the perverse financial incentives established by this structure, flat-fee arrangements are banned in several states across the country and are discouraged by the American Bar Association.<sup>3</sup> Idaho and Michigan have banned flat-fee contracts via state statute. *See* Idaho Code § 19-859 (providing contracts with indigent defense attorneys “shall not include any pricing structure that charges or pays a single fixed fee for the services and expenses of the attorney”); *Michigan Indigent Defense Commission Act*, Mich. Comp. Laws § 780.991(11)(2)(b) (providing “[e]conomic disincentives or incentives that impair defense counsel’s ability to provide effective representation must be avoided”). Other states have banned them through judicial order. *See, e.g.*, Washington Court Rule 1.8 (observing that flat-fee contracts create an “acute financial disincentive for the lawyer” and “involve an inherent conflict between the interests of the client and the personal interests of the lawyer”); *In the Matter of the Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases*, Case No. ADKT0411 (Nev. Jul. 23, 2015) (Nevada Supreme Court order disallowing flat-fee contracts).

Exemplifying the problems with flat-fee contracts, some municipalities have been held liable for the constitutional deprivations caused by those arrangements. In a class action lawsuit against two Washington cities brought by the ACLU of Washington, the plaintiffs succeeded at

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<sup>3</sup> According to ABA Principle 2, assigned counsel “should be paid a reasonable fee that reflects the cost of overhead and other office expenses, as well as payment for work.” *Ten Principles of a Public Defense Delivery System* (Aug. 2023), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls-sclaid-ten-princ-pd-web.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls-sclaid-ten-princ-pd-web.pdf). That involves separately funding expert, investigative, and other litigation support services. *See* ABA Standing Committee on Legal Aid and Indigent Defendants, *Ten Principles of a Public Defense Delivery System* (2002), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_tenprinciplesbooklet.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf).

trial in demonstrating a systemic deprivation of their Sixth Amendment right to counsel. *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122 (W.D. Wash. 2013). The federal court held the defendant municipalities liable for the constitutional deprivation under 42 U.S.C. § 1983, finding that the “municipal policymakers ha[d] made deliberate choices regarding the funding, contracting, and monitoring of the public defense system that directly and predictably caused the deprivation.” *Id.* at 1124, 1133. The court called the use of flat-fee contracts an “[i]ntentional choice” that purposefully “left the defenders compensated at such a paltry level that even a brief meeting [with clients] at the outset of the representation would likely make the venture unprofitable.” *Id.* at 1132.

Aurora City Councilmembers should heed the warning provided by the *Wilbur* court and reject a flat-fee contract arrangement:

The Court is sensitive to the Cities' interests in controlling the manner in which they perform their core functions, including the provision of services and the allocation of scarce resources. Having chosen to operate a municipal court system, however, defendants are obligated to comply with the dictates of the Sixth Amendment, and the Court will “not shrink from [its] obligation to enforce the constitutional rights of all persons.”

*Id.* at 1134 (citing *Brown v. Plata*, 563 U.S. 493, 511 (2011)).

***b. Hourly rate, or assigned-counsel, systems cost jurisdictions exorbitant prices without the benefits of a free-standing public defender office***

News reports of the financial consequences of hourly rate systems (also known as “assigned-counsel systems”) provide a warning sign for the City of Aurora. For example, Harris County, Texas, spent \$60 million in 2022 to contract with private counsel to provide indigent defense services.<sup>4</sup> One private attorney was paid over \$1 million. Seven others were paid more than \$400,000. Receiving an hourly fee, private attorneys took on hundreds of cases a piece, calling into question the adequacy of representation in each case. Those services could have been provided at a fraction of the cost by the public defender’s office in the jurisdiction, where the average annual salary of an attorney was \$115,000.

Empirical research across multiple states demonstrates that it is more cost-effective to provide indigent criminal defense through public defense offices than assigned-counsel systems. See Eve Brensike Primus, *Defense Counsel and Public Defense*, Reforming Criminal Justice: Pretrial and Trial Processes, Phoenix, AZ: Academy for Justice, 121, 131-32 (2017) (collecting studies) (projecting cost savings of between \$125 and \$200 per case in New York and Iowa, and cost savings of 23% to 31% per misdemeanor and 8% to 22% per felony in Texas, totaling \$13.7 million statewide).<sup>5</sup>

These cost savings stem in part from the pooled resources and knowledge offered by freestanding public defender offices. Experts recognize that public defender offices offer many

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<sup>4</sup> Neena Satija, “\$1 million from taxpayers to 1 private attorney in 1 year: A look inside Harris County courts,” Houston Chronicle (Feb. 27, 2023), <https://www.houstonchronicle.com/news/investigations/article/harris-county-taxpayers-public-private-attorneys-17805594.php>.

<sup>5</sup> Available at [https://repository.law.umich.edu/book\\_chapters/113](https://repository.law.umich.edu/book_chapters/113).

advantages over contract systems.<sup>6</sup> They provide more training, mentorship, and supervision of entry-level attorneys. Their coworking relationship catalyzes collaboration, the sharing of information, and the development of collective expertise, which promotes efficiency and improves quality of representation. And their group structure allows them to better utilize investigative, expert, and staff support.

In Aurora's case, the Public Defender's Office provides each of these advantages plus the invaluable benefit of the Aurora Sustained program, a partnership between the Public Defender's Office and Aurora Mental Health and Recovery (AMHR). Aurora Sustained provides daily mental health screenings and other support to individuals interacting with the municipal court throughout the court process. This saves costs for the court by streamlining the competency process and reduces recidivism by connecting individuals with mental health, substance use, or homelessness services.

This institutional expertise makes public defenders not only more cost-effective but ultimately better at their jobs. Studies have shown that public defender offices perform better than assigned-counsel systems. One study of federal criminal cases from 51 districts found that public defenders delivered lower conviction rates and shorter sentences than court-appointed attorneys.<sup>7</sup> Another study of indigent criminal defense in Philadelphia found that public defenders reduced convictions by 19% and the length of sentences by 24%.<sup>8</sup>

***c. Eliminating the Public Defender's Office would likely thwart City Council's stated goal of cost savings by increasing detention and litigation costs***

Jurisdictions across the country have demonstrated the burdensome costs associated with providing indigent criminal defense without a fully staffed, freestanding public defender office. Because defense attorneys in flat-fee and assigned-counsel systems obtain worse outcomes for their clients, Aurora can anticipate that moving to either system would lead to higher pretrial detention rates, higher conviction rates, and longer sentences. This, in turn, would cost the City an unquantifiable amount in increased costs of detention both pre- and post-trial.

The City should also be wary of potential litigation costs related to inadequacy of counsel on a systemic level and in individual cases, including attorneys' fees. *See, e.g., Wilbur, supra* page 4 (holding defendant municipalities liable for systemic deprivation of right to counsel under §1983); *Idaho's Public Defense Reform Story*, ACLU of Idaho (Apr. 9, 2021) (ACLU of Idaho class-action lawsuit concerning constitutionality of Idaho's statewide public defense system, which has been pending for 8 years);<sup>9</sup> *Settlement begins historic reformation of public defense in New York state*, ACLU of New York (Oct. 21, 2014) (settlement reached in ACLU of New York lawsuit concerning constitutionality of New York's public defense system after 7 years of litigation).<sup>10</sup>

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<sup>6</sup> *See, e.g., Defense Counsel and Public Defense, supra* page 5; Eve Primus, *Culture as a Structural Problem in Indigent Defense*, Minnesota Law Review 1769, 1806-07 (2016) <https://repository.law.umich.edu/articles/1838>.

<sup>7</sup> Radha Iyengar, National Bureau of Economic Research, *An Analysis of the Performance of Federal Indigent Defense Counsel* (2007), [https://www.nber.org/system/files/working\\_papers/w13187/w13187.pdf](https://www.nber.org/system/files/working_papers/w13187/w13187.pdf).

<sup>8</sup> *See* James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make?: The Effect of Defense Counsel on Murder Case Outcomes*, 122 YALE L.J. 154 (2012).

<sup>9</sup> Available at [https://www.acluidaho.org/sites/default/files/field\\_documents/aclu\\_tucker\\_lawsuit\\_timeline\\_2021-04-09.pdf](https://www.acluidaho.org/sites/default/files/field_documents/aclu_tucker_lawsuit_timeline_2021-04-09.pdf).

<sup>10</sup> Available at <https://www.nyclu.org/en/press-releases/nyclu-sues-enforce-public-defense-reforms-new-york-state;> *see also NYCLU sues to enforce public defense reforms in New York state*, ACLU of New York (Dec. 15, 2022),

Additionally, the City should consider its potential exposure to liability for employment-type claims given the Public Defender Office’s history of whistleblowing. In the last three years, the Public Defender’s Office has reported excessive force and unconstitutional arrests by the Aurora Police Department in cooperation with the Attorney General’s investigation that resulted in the finding that APD has a pattern and practice of racially biased policing and use of excessive force, as well as the Consent Decree. The Public Defender’s Office has also shed light on the prosecution’s failure to disclose constitutionally mandated evidence, ultimately filing a grievance against the City after they concealed 14 Brady letters containing evidence of police misconduct bearing on truthfulness.<sup>11</sup> Retaliation against public defenders for such advocacy may be actionable in court. *See Montgomery County reaches \$310K settlement in suit brought by former public defenders*, Pottstown Mercury (Mar. 24, 2021) (Pennsylvania county settled wrongful discharge lawsuit brought by former chief and deputy chief public defenders alleging they were fired in retaliation for exposing the county’s “unlawful bail practices” in an amicus brief on behalf of the ACLU of Pennsylvania).<sup>12</sup>

For all the reasons above, the City’s attempt to save money by privatizing the Aurora Public Defender’s Office is likely to lead to worse outcomes for individuals and greater legal and financial risk for the City.

### **III. Conclusion**

In conclusion, Aurora’s freestanding public defender office—which has been an integral part of the community for 30 years—is the gold standard of indigent defense models. It represents huge cost savings for the City of Aurora over either a flat-fee or assigned-counsel model, and Aurora would take a significant step backward by abandoning it. Further, under state law and Aurora’s municipal code, Aurora City Council lacks the legal authority to eliminate the Public Defender’s Office or contract out the indigent defense services that office provides. Aurora City Council should repeal Resolution 2023-118 and properly fund the Aurora Public Defender’s Office.

Sincerely,



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Attorney Reg. No. 52811  
ACLU of Colorado

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<https://www.nyclu.org/en/press-releases/nyclu-sues-enforce-public-defense-reforms-new-york-state> (subsequent lawsuit against New York State alleging violations of settlement agreement).

<sup>11</sup> *See Prosecutors ordered to review cases after Aurora office failed to provide defendants with knowledge of discredited cops*, Colorado Sentinel (Mar. 28, 2022), <https://sentinelcolorado.com/metro/prosecutors-ordered-to-review-cases-after-aurora-office-failed-to-provide-defendants-with-knowledge-of-discredited-cops/>.

<sup>12</sup> Available at <https://www.pottsmmerc.com/2021/03/24/montgomery-county-reaches-310k-settlement-in-suit-brought-by-former-public-defenders-2/>.

Cc Mayor Mike Coffman  
Presiding Judge Shawn Day  
Interim City Manager Jason Batchelor  
Public Defender Commission Members Brown, Kaplan, Williamson, Tobiassen, Ashburn,  
McDermott, and Hildebrand