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MEMORANDUM

DATE: May 21, 2021

TO: Lynne McGuire, Department of Enterprise Services
Jason Siems, Department of Enterprise Services
Cheri Keller, Office of Financial Management
Tyler Lentz, Office of Financial Management

FROM: Jennifer S. Meyer, Deputy Attorney General, AGO

SUBJECT: **FY 21-23 Torts IAA**

The State's tort liability exposure and the work required to defend that exposure have both increased significantly during the past biennium. Because the cost of defending the State's tort liability has increased, additional funding by way of an increase to the Attorney General's Office (AGO) Torts-Department of Enterprises Services (DES) inter-agency agreement (IAA) is required. As outlined below, we request that additional funding be allocated for two purposes:

- (1) to expand the Torts Division's in-house litigation capacity, initially by adding attorneys and staff to existing litigation teams and, if warranted, by building out an additional litigation team in the second half of the biennium; and
- (2) to cover the fees and costs of cases that have been and will be assigned to out-of-house Special Assistant Attorneys General (SAAGs) while we build this in-house capacity.

This represents an investment to expand Torts' litigation capacity of approximately \$8,050,000, a roughly 15% increase over the current IAA budget (initial expansion of \$5,850,000, with potential further expansion of \$2,200,000). In addition, we estimate that SAAGs costs and fees to complete the currently assigned cases will be approximately \$9,500,000, plus an additional \$2,750,000 for every additional 10 SAAG assignments that are necessary while that expansion is implemented.

We recommend expanding the Torts Division's litigation capacity as the most effective and economical means of defending increasing state tort liabilities. Torts Division attorneys and staff are better trained to, and more cost-effective at, defending tort cases filed against state employees and client agencies than the alternative option of relying on private practice (SAAGs. (The shortcomings of the SAAG option have been plainly demonstrated while we have employed it out of necessity over the current biennium.) To implement this expansion, beginning in July

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2021, we would hire additional Torts staff in all job classes (attorneys, paralegals, investigators, and legal support staff) to join existing litigation teams. The singular focus of this effort will be to build capability and capacity on the existing teams. Then, if warranted in the second half of the biennium by the rates of increase in new claims and lawsuits, we would further expand in-house litigation capacity by also creating an entire additional litigation team.

In the meantime, additional funds will be required to cover the fees and costs associated with the cases already sent to SAAGs and the additional cases we anticipate we will need to send to SAAGs while we build the capacity and capability described above. Estimates for those fees and costs have been derived from those existing cases where we have requested budgets from SAAGs as a contract management tool. The dollar amount is expected to be in the range of \$9,500,000 for cases currently assigned to SAAGs, plus an estimated \$2,750,000 for every additional 10 cases it is necessary to assign to SAAG while the capacity of Torts is expanded. As noted in the draft IAA that accompanies this memo, we propose that those SAAG costs be paid by DES outside of the DES-AGO agreement.

Background

Since it was issued, we have followed the impact of the State Supreme Court's decision in *H.B.H. v. State*, which has dramatically expanded state tort liability for child welfare. During the current biennium, the Division has struggled with an increase in cases against the Department of Children Youth and Families (DCYF) cases flowing from that expanded liability, on top of pre-existing upward trends in overall claims and cases, and increases in the complexity and risk of those cases. These challenges have been exacerbated by workload and court slowdowns attributable to the pandemic.

The increase in new tort lawsuits is significant. FY 20 saw the highest number of incoming lawsuits in the past 9 years with an increase of 23 cases over the prior year.¹ FY 21 is on track to exceed that number. DCYF cases now make up more than a quarter of the state tort caseload.² These cases are the hardest to defend and carry the most risk in terms of total payout. The cases are litigated by an aggressive well-funded plaintiffs' bar, involve terrible facts of abuse and maltreatment of children and youth, and typically involve decades of records. As a percentage of the total Torts caseload, those cases have increased from around 11% of the caseload in 2010 to more than 25% of the caseload today.

Of particular note is the ongoing increase in DCYF Facilities cases. The Division has seen a huge increase in the number of these types of cases. Before 2019, only two facilities were the basis of claims and cases filed against DCYF: OK Boys Ranch (OKBR) and Kiwanis Vocational Home (KVH).³ In early 2019, when we started to see an increase in claims and cases against

¹ April 19, 2021, DES Briefing Materials, Attachment B.

² April 19, 2021, DES Briefing Materials, Attachment C.

³ April 19, 2021, DES Briefing Materials, Attachment D.

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more than those two facilities, we identified to DES there would be a need for a different way of managing this body of work because the division had claims and cases involving 8 facilities. Since then 11 more facilities for a total of 19 facilities now have claims or cases pending against DCYF.⁴

Options

Based on our analysis of who can best do the work, the work environment under which our attorneys and staff can best defend the cases, and with an eye toward having the most cost-effective solution, we have developed and evaluated three options:

1. Invest in the following attorney and staff increases:
 - a. Line attorney litigation positions: 6 FTE
 - b. Paralegals: 10 FTE
 - c. Legal assistants: 4 FTE
 - d. Investigators: 4 FTE (1 supervisor, 2 Senior investigators, 1 INV analyst)
 - e. Specialized attorney positions:
 - i. ERP – 1 FTE
 - ii. DCYF Program – 1 FTE
2. Maintain the status quo with *ad hoc* engagement SAAG resources.
3. Develop a SAAG pool for all DCYF facilities cases.

Our recommendation is to adopt Option 1. It allows for reduction of team leader/section chief caseloads so that each may focus on development and training of new attorneys, 27 of whom (out of 50 in the division) have been in the division less than two and a half years. It also increases paralegal resources to allow for better discovery management of our most document-intensive cases. It gets away from the outdated assumptions that inform the current staffing model, which was developed in a time before the significant discovery demands brought about by electronic discovery, and it better reflects the demands of today's practice. We expect that adding paralegals will be cost effective in the sense that one attorney can do more with increased paralegal staffing than that which can be accomplished by adding more attorneys. While legal assistants are added in fidelity to the old model, that too may require further scrutiny after we see the impacts of adding additional paralegals. Finally, with the increase in claims and lawsuits, investigator caseloads have crept up past a point where investigators can manage them.

Options 2 and 3 are both less optimal because of the disadvantages associated with relying on SAAGs as a long-term solution for state tort defense. First, SAAGs are less familiar with state agency client operations and the defenses available to tort claims against the State. This lack of knowledge and familiarity requires the Managing AAGs within the Division to spend significant

⁴ April 19, 2021 DES Briefing Materials, Attachment E.

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time assisting the SAAGs and the client agencies in working together. Second, SAAGs are also significantly more expensive, as their hourly rates greatly exceed those of the AGO.

The financial cost to the State of relying on SAAGs to litigate tort matters is significant. We estimate that the cost for SAAGs to litigate a typical set of 10 torts cases is \$2,750,000. This estimate is derived from (1) data on Torts SAAG costs for matters that have been assigned and resolved during the current biennium and (2) estimated budgets submitted by SAAGs for current Torts' matters, which we requested as a contract management tool. Applying that data to a standard litigation profile for a typical set of 10 cases yields the following:

1 case resolved through early resolution	1 x \$150,000/case
8 cases resolved after close of discovery, through motion practice or settlement	8 x \$250,000/case
1 case resolved through trial	1 x \$600,000/case
Total cost for 10 SAAG cases	\$2,750,000

This cost -- \$2,750,000 for every 10 cases litigated by SAAGs -- demonstrates that long-term reliance on SAAGs is also financially disadvantageous, in addition to the other, substantive disadvantages.

Conclusion

Defense of state tort liabilities includes many challenges. To meet these challenges successfully and in a cost-effective manner, additional staffing resources are needed within the Torts Division of the Attorney General's Office to increase capability and reduce turnover. To that end, we are requesting a total increase to the IAA of roughly 15%. For initial staffing increases, we seek \$5,850,000.00. Additional resources in the form of another litigation team at a cost of roughly \$2.2 million will likely be needed to meet the goal of reducing *all* reliance on SAAGs. And additional IAA funding will be required to cover the costs of SAAGs, as set out above, while the Torts Division expands its capacity and eliminates the necessity of relying on SAAGs. As we work toward those goals, we anticipate looking for additional ways to improve the management of this defense work to reduce defense costs, effectively manage state payouts and where possible, recoup costs.