

## **Public Defender Service for the District of Columbia EO 13985 Equity Action Plan**

### **Executive summary**

The **Public Defender Service for the District of Columbia (PDS)** is a federally funded, independent organization of approximately 200 employees governed by a Board of Trustees. PDS, the only local public defender office funded by federal appropriation, was established in 1970 to comply with the constitutional mandate to provide defense counsel for people who cannot afford an attorney. The mission of PDS is to provide and promote quality legal representation for adults and children facing a loss of liberty in the District of Columbia and to thereby protect society's interest in the fair administration of justice. While PDS attorneys can, and sometimes do, appear in cases in the federal courts of the District of Columbia, PDS's primary mission is to represent clients in the local criminal, juvenile, and mental health systems.

The work of public defenders is civil rights work as public defenders litigate to protect their clients' constitutional rights. PDS's civil rights-oriented mission directly ties in with EO 13985's mandate for federal entities to advance racial equity and support for underserved communities.<sup>1</sup> PDS's clientele largely consists of members of underserved communities: more than 90% are African-American and Hispanic or Latinx, and as they must be financially unable to hire an attorney, PDS's clients are also usually persons adversely affected by persistent poverty. In carrying out its mission, PDS advances equity by insisting that the criminal, juvenile, mental health, special education, and parole systems provide PDS's clients "consistent and systematic fair, just and impartial treatment."<sup>2</sup>

While in an important sense, all of PDS's work advances equity, PDS is taking two actions in particular to implement EO 13985. PDS will increase the number of clients it represents who have criminal matters and who exclusively or primarily speak Spanish. Within the context of the court system, every defendant's constitutional rights should be respected, and PDS should do its best to ensure that those rights are respected equitably as a civil rights matter. PDS is therefore seeking to increase the number of defendants who receive the quality of services PDS provides. The second action is related to procurement; PDS is working to expand the number of African-American and Hispanic or Latinx mental health experts it actively considers retaining to work with and for PDS clients.

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<sup>1</sup> "The term 'underserved communities' refers to populations sharing a particular characteristic, as well as geographic communities, that have been systematically denied a full opportunity to participate in aspects of economic, social and civic life..." EO 13985, Sec. 2(b), at page 1.

<sup>2</sup> See EO 13985, Sec. 2(a), at page 1. ("The term 'equity' means the consistent and systematic fair, just, and impartial treatment of all individuals, including individuals who belong to underserved communities that have been denied such treatment, such as Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities, lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality.")

### **Early accomplishments**

In keeping with its overall aim to examine and improve how PDS serves clients who, by their numbers, constitute a minority of PDS clientele, PDS undertook steps to improve its representation of clients who are LGBTQIA+, including engaging in cultural competence training and legal strategy training. On June 2, 2021, PDS held a 2-hour training for all staff on LGBTQIA+ issues. Although attending the training was voluntary, more than half of all PDS staff attended. The training was designed to make staff aware of and sensitive to issues their colleagues and their clients who are LGBTQIA+ face.

In addition, the PDS Training Director organized a training for the attorneys and social workers to improve representation and litigation on behalf of clients who are transgender. For example, the training addressed the possible need for jury *voir dire* questions designed to identify bias, including implicit bias, against LGBTQIA+ persons and provided a sample jury instruction that includes language referencing the D.C. Human Rights Act prohibition on discriminating against individuals on the basis of race, ethnicity, sex, sexual orientation, or gender identity or expression, among other protected characteristics.

Relatedly, on May 11, 2021 PDS joined as co-counsel with the ACLU of the District of Columbia to file a lawsuit against the District of Columbia in the U.S. District Court for the District of Columbia for injunctive and declaratory relief to stop the D.C. Department of Corrections from enforcing against PDS's client, and others similarly situated, a discriminatory policy that only considered a person's gender assignment at birth when making housing decisions.

Additionally, PDS staff collaborated to update internal policies by establishing a response protocol for management when a member of PDS staff experiences race-based, or based on another protected characteristic, discriminatory or harassing conduct in their interactions with outside system actors or entities, such as judges, Deputy U.S. Marshals, and prosecutors.

### **Equity Action – Increase the number of clients with criminal matters who are Spanish-speaking**

Because all of PDS's clients are members of underrepresented communities, PDS decided to give attention to improving equity for those persons who, by their numbers, are a minority of PDS's clients. PDS focuses this action on clients whose primary or exclusive language is one other than English.<sup>3</sup> Spanish is the language most frequently spoken by PDS clients whose exclusive or primary language is not English. From an equity standpoint, it is particularly impactful that many clients whose primary or exclusive language is not English are also clients who are not U.S. citizens.<sup>4</sup> Non-citizen clients have distinct legal needs, and defense attorneys

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<sup>3</sup> Each year for the years of 2104 through 2019, approximately 4% of the criminal cases assigned to PDS for representation had clients who were identified as speaking a language other than English.

<sup>4</sup> To be clear, that a client is not a U.S. citizen does not necessarily mean that the client is not in the U.S. legally. A client could be in the U.S. legally but still face immigration consequences as a result of contact with the criminal legal system. For example, the client could be legally in the

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have the additional responsibility, as required by the U.S. Constitution, to advise non-citizen clients of the immigration consequences of the potential outcomes of their cases, including a guilty plea or verdict.<sup>5</sup>

To improve the equity of the delivery of PDS's services, PDS has set an action goal that, at a minimum, the Trial Division will undertake to represent at each of its criminal practice levels its "proportionate share" of cases where the client was identified as Spanish-speaking.

Framing the action as taking at least its "proportionate share" at each criminal trial practice level tracks the court's approach to case assignments. The more serious or complex the case, the more likely it is that the court will appoint PDS as counsel. The less serious the case, the more likely it is that the court will appoint a CJA panel attorney to the case. That general approach should be maintained even for cases where the client is identified as Spanish-speaking. The "proportionate share" approach uses the percentage assignments at each practice level of cases where the clients speak English as the control or target. PDS aims to take at least the same percentage of cases where the clients are Spanish-speaking. For example, in 2019, PDS was assigned to 100% of the most serious cases, Felony 1 cases, where the client was identified as Spanish-speaking in comparison to being assigned to 68% of the English-speaking Felony 1 cases.<sup>6</sup> Thus, in 2019, PDS was assigned to more than its "proportionate share" of Felony 1 cases. In contrast, that same year PDS was assigned to represent no Spanish-speakers in the less serious General Felony cases. Because 11% of the General Felony cases to which the court appointed PDS in 2019 had English-speaking clients, the "proportionate share" of Spanish-speaking General Felony clients would have been 11%.

Increasing the number of Spanish-speaking clients who have criminal matters advances equity because the expertise and resources PDS brings to cases improves the outcomes for those clients it represents. In the criminal legal system in the District of Columbia, the court appoints PDS attorneys to the more serious and complex cases and appoints to less serious and less complex cases CJA panel attorneys, private attorneys on a panel established pursuant to the Criminal Justice Act to accept such appointments. This appointment practice is because PDS attorneys overall are more highly trained and much better resourced than individual CJA panel attorneys. Because a client whose exclusive or primary language is not English and because many such clients will also be non-citizens, such a client is likely to have the type of complex case that would benefit from PDS representation.

With approximately 17% of the attorneys in the PDS Trial Division able to speak Spanish fluently, it is very likely that Spanish-speaking clients will be represented by an attorney who speaks Spanish fluently. The PDS team might also include a Spanish-speaking investigator or a Spanish-speaking forensic social worker. In addition to the language supports that PDS can bring

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U.S. on a "green card," but their eligibility for citizenship may be jeopardized as a result of the contact with the system.

<sup>5</sup> See *Padilla v. Kentucky*, 559 U.S. 356 (2010).

<sup>6</sup> Although there are other reasons, conflicts of interest as defined by the legal ethics rules are the primary reason PDS is not assigned to a Felony I case. For example, if there are multiple people charged in the same case, PDS can only represent one of the persons charged. The other person or persons charged will have CJA attorneys appointed to represent them.

to the representation, compared to an individual CJA panel attorney, PDS is better equipped to hire the necessary experts on a case, to assign a mitigation specialist who will develop a sentencing plan that is a viable alternative to incarceration, to litigate complex and novel legal issues or to litigate special education or other collateral civil matters. Most importantly for the Spanish-speaking clients who are not U.S. citizens, PDS has immigration attorneys on staff for whom PDS clients are the priority.<sup>7</sup> For all of these reasons, PDS advances equity and improves outcomes when it undertakes to represent more clients who speak exclusively or primarily Spanish.

The long-term goal is for PDS to be appointed to a proportionate share of cases with Spanish-speaking clients at each of the three criminal trial practice levels: Felony 1, Serious Felony, and General Felony. Presently, due to the COVID-19 pandemic the court operations that produce the data PDS can use to analyze case assignments and the language spoken by each person charged in the case are suspended. When those operations resume, PDS's short term goal will be to ensure that it has at least a proportionate share of Felony 1 cases with Spanish speaking clients and the mid-term goal will be to have a proportionate share of Serious Felony cases. The goals will be measured based on new appointments as the backlog of cases and the missing linguistic information caused by the reduced court operations during the pandemic render an assessment of PDS's entire criminal trial caseload impossible to achieve. The goals include not only being appointed to the trial cases, but having the resources, particularly sufficient immigration attorneys, to provide those clients constitutionally required effective representation.

One way that PDS will hold itself accountable in making progress towards and ultimately achieving these goals is with the PDS strategic plan priority of improved representation of Spanish-speaking clients. In addition, the PDS Equity Team will regularly report its progress to PDS's Internal Racial Justice Committee,<sup>8</sup> to all staff, and to the PDS Board of Trustees. PDS staff are motivated to ensure that PDS serves those most in need of its services, such as persons with language access issues who might also have immigration issues. While PDS will only be tracking criminal cases, reporting progress on proportional share representation will provide a sense of the demographics of those persons currently having contact with the District's legal systems, which could prompt other PDS divisions to monitor their caseloads to make sure that they are also serving these clients and have the resources to do so.

### **Equity Action – Increase the diversity of mental health experts**

PDS attorneys use the procurement process to retain a wide variety of experts in the course of their work on behalf of clients. For example, an attorney might contract with a lab to test DNA evidence, or hire a medical doctor to review medical records or an eyewitness identification expert to testify at trial. Expert hiring presents an opportunity for advancing equity. Diversity among those experts who work directly with PDS clients could benefit clients who share similar identity characteristics and improve the quality and outcome of the expert-client interaction, which should positively impact the client's case and overall representation by PDS. In addition,

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<sup>7</sup> CJA attorneys, on behalf of their clients, sometimes seek the advice of the PDS immigration attorneys.

<sup>8</sup> PDS's Internal Racial Justice Committee was established in late 2020 to focus on racial justice issues affecting PDS staff's interactions with each other and with clients.

there is the equity benefit of providing business opportunities and exposure to experts who are members of underserved communities. However, because client-centered representation is the *raison d'être* of PDS, the effort to increase the diversity of the experts PDS retains must be grounded in the goal of improving outcomes for clients. To that end, PDS is taking action to meet a target of having the group of mental health experts PDS staff actively considers retaining for cases include at least 5% who are African-American experts and 5% who are Hispanic or Latinx.

PDS is focusing its action of increasing the diversity of its expert hiring on mental health experts because they interact directly with PDS clients compared to, for example, a DNA lab or accident reconstruction expert.<sup>9</sup> A diverse pool of those experts who interact directly with clients will have a greater impact on clients and lead to better outcomes. African-American and Hispanic or Latinx clients may be more likely to establish a more trusting and beneficial working relationship with an expert whom they are more likely to view as someone that will understand their background.

A more diverse pool of mental health experts will also lead to better evaluations, which advances equity by directly improving outcomes for clients. The mental health evaluations, particularly those necessary for an insanity defense or for mitigation work, involve a measure of subjectivity. Relevant cultural competence, which is more likely to be present when the expert shares the same cultural background as the client, can lead to more accurate evaluations. PDS has had examples where assumptions about the client's culture led experts to miss either the existence or the degree of the client's mental illness. For example, assessing whether a client's belief in witches or spirits is related to the client's religion or native culture or instead is a manifestation of mental illness would require a mental health expert with knowledge of the client's culture. A majority of PDS clients are African-American men. A mental health expert who holds racist beliefs about "Black criminality" or about "the pathologies of the Black community" might view a client's criminal or anti-social behavior as typical of the client's community and therefore might conclude that the client was not suffering from a mental defect or that the client's behavior could not be mitigated and treated with therapies. An African-American mental health expert, on the other hand, is less likely to have such (implicit) biases and likely more able to accurately evaluate a client's behavior as aberrant.

The racial, ethnic and/or cultural background of an expert is only one factor that an attorney might consider when actually identifying which expert is best to retain in a specific matter. That is why the action is to increase the diversity of the group of experts actively considered for hiring, not to set a target as to the diversity of the experts actually hired.

The primary reason PDS set a target of 5% African-American and 5% Hispanic or Latinx was due to research that showed that, in 2015, approximately 5% of psychologists in the workforce were Hispanic and 4% were African-American.<sup>10</sup> Given the number of challenges PDS expects to face in reaching these targets, setting a target higher than the representation in the overall workforce seemed a recipe for failure. That said, PDS views the 5% targets as *minimums*. Since

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<sup>9</sup> Mental health issues are present in a significant percentage of criminal cases, where they can be relevant at the merits stage of a case and at the sentencing stage.

<sup>10</sup> <https://www.apa.org/monitor/2018/02/datapoint>.

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almost all of PDS's clients are either African-American or Hispanic or Latinx, PDS would like to have significant racial diversity amongst the mental health experts it actively considers hiring in its cases.

One of the challenges PDS expects will be finding experts who are willing to work and empathize with PDS clients, many of whom are accused of having committed crimes of violence. Another possible challenge to adding a sufficient number of Black and Hispanic or Latinx mental health experts for PDS's list of eligible experts is that they will have to be willing to conduct the necessary evaluations in a District of Columbia detention facility, such as at the D.C. Central Detention Facility (also known as the D.C. Jail). Because PDS is appointed to represent persons charged with the more serious offenses, PDS clients are often detained pretrial and presentencing at the D.C. Jail. It will not be necessary that *every* mental health expert be willing to enter a detention facility, but those who are not willing to do so are less helpful to PDS and are unlikely to be hired often.

PDS will establish a baseline for tracking its progress by reviewing the database that PDS maintains of experts it has hired over many years. Because the availability of experts changes over time, and as PDS has experience working with individual experts, the list of "actively considered" experts will change. The most immediate goal of the project is to assess the level of diversity of mental health experts currently in the database. This involves filling in missing demographic data as well as confirming whether currently listed experts are still available for hiring. An interim goal, with a timeline of one to two years would be to have at least 2.5% of the actively considered mental health experts be African-American or Hispanic or Latinx. The interim goal and timeline will be assessed after the review of the updated data and appraisal of the diversity of the current list of actively considered mental health experts to make sure it is neither too modest nor too ambitious.

For accountability, reports on PDS's progress towards these goals will be shared with the attorneys in PDS's Trial and Mental Health Divisions. Prior to the issuance of EO 13985, the attorneys on those divisions were discussing the benefits to clients of improving the diversity of the experts PDS retains. The Trial and MHD attorneys, on behalf of their clients, have the greatest stake in the success of this project and will be the persons who push PDS to work to achieve and then to try exceed the goal. Progress reports will also be shared with PDS's Internal Racial Justice Committee.