



WRITTEN TESTIMONY OF:

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On behalf of the Chief Defenders Association of New York, I would like to thank the New York State Senate Standing Committees on Judiciary and Children and Families and Senator Hoylman-Sigal and Senator Brisport for holding today's joint oversight hearing on New York State's family court system. We are grateful for the opportunity to have provided oral testimony at the hearing and our written testimony.

The Chief Defenders Association of New York (CDANY) is a membership organization of the appointed Public Defenders, Conflict Defenders, Executive Directors of non-profit public defense offices and Administrators of Assigned Counsel Panels throughout New York State. Our organizations collectively represent most people prosecuted in every county of New York State—hundreds of thousands of people each year. Collectively, our public defense offices represent close to 400,000 people in the criminal, family, and appellate courts of New York State every year. Many of our member organizations also represent low-income parents and caretakers in Article 10 proceedings in family court across the state. Some of our member organizations represent children in Family Court.

The Family Court System is “Broken” and “Ineffective”

The clear message from approximately eight hours of testimony heard by the Standing Committees is that New York's Family Court is a “broken” system. This word was used by multiple people who testified. Ms. McMillan, who as a child was removed from her home and placed in foster care, described the system using the word “broken.” Angela Burton, a highly respected advocate for Family Court reforms, including as an advisor to the Commission on

Parental Representation, remarked that Family Court was “ineffective.” How else can you describe a system which succeeds in its primary goal only half of the time. The primary goal of the child welfare system is to keep children safe while keeping families together. According to the Unified Court System’s Court Improvement Project, children removed from their parents were reunited with their families only 50% of the time after three years and five years (statistics as of June 30, 2020-the last available).

“The Crisis in Parental Legal Representation” in New York

When a parent or caretaker is accused of child abuse or neglect, they have a constitutional and statutory right to counsel if they cannot afford to hire an attorney. This undeniable fact has been ignored by New York State for far too long. The Commission on Parental Representation noted that in 12% of proceedings where children were removed from their parent’s care an attorney was not present to represent the parents. Commission Report, p. 18.

While the right to counsel in family court is not limited to Family Court Act Article 10 child welfare proceedings, these cases are among the most traumatic for families. Given what is at stake in Article 10 proceedings, including the temporary or permanent loss of custody of a child, it is critical that parents are represented by quality counsel with the expertise, time, and resources necessary to dedicate to these important cases.

Parents describe Article 10 investigations and court proceedings as some of the most frightening and stressful experiences in their family history¹. When a family is brought to family court in an Article 10 case, where a parent is alleged to have committed an act of child abuse or neglect, a child may have already been removed from their home on an emergency basis or may be at risk of being removed from their home at the very first court date. To keep children home or to reunify families, attorneys representing parents must build a relationship with their clients, understand the needs of their clients and their families, work hard to identify, and ensure access to critical services and resources for those families, advocate for expanded contact between their clients and their children, and prepare motions and represent their clients in hearings to move cases forward and reunify families. Family defense attorneys are doing all this work with increasingly high caseloads and limited resources, which impact the clients they represent and their families and contribute to the length of time that children remain in foster care.

Poor communities and communities of color are disproportionately impacted by the state’s [child welfare system](#)². In every phase of a child welfare proceedings, communities of color are disproportionately impacted: calls to the hotline, decisions to investigate and remove and case outcomes are all disproportionate. Consequently, in New York, Black children make up 40% of

¹ <https://www.risemagazine.org/2018/09/cps-approach-investigations/>

² <https://ocfs.ny.gov/main/reports/maps/counties/New%20York%20State.pdf>

the children in the foster system yet make up only 15% of the children in the state. Yet, white children who make up 48% of the children in New York State, make up 25% of the children in the foster system. Black children also fare far worse in the foster system and have much longer placements in the system. Strengthening New York’s mandated parental representation will ensure that families in crisis have access to quality representation and have better outcomes in their Family Court cases.

Decades of Documented Failure to Invest in Parental Representation

As early as 2000, New York City’s Public Advocate issued a report outlining the crisis in the representation of birth parents in Article 10 proceedings. Later that same year, the Appellate Division First Department’s Committee on Representation of the Poor held public hearings and invited experts to examine the quality of governmentally funded legal representation of the poor and issued a report in 2001 which concluded, among other findings, that low-income parents did not have sufficient legal representation. Although New York City changed their model of representation for parents and made some investment in related social work services, there has never been sufficient financial investment to assure all low-income parents receive the robust interdisciplinary legal representation they need to keep their families together and to which they are legally entitled. Even with these changes, New York City providers are still operating at less than 50% of the funding needed to meet standards and provide appropriate representation for clients. In other parts of New York State, the situation is even more dire, where some counties are providing only a tiny percentage of what is required.

Nearly two decades later, the Chief Judge’s Commission on Parental Legal Representation released a report on the status of parental representation across the state. The 2019 *Interim Report to Chief Judge DiFiore* describes the crisis in New York’s parental legal representation and made six initial recommendations, including the need to reduce caseloads among family defense attorneys³.

In June 2021, ILS released *Caseload Standards for Parents’ Attorneys in New York State Family Court Mandated Representation Cases* to determine appropriate maximum caseload standards. Current caseloads across the state are much higher than these recommendations⁴.

On December 19, 2022 the Franklin H. Williams Judicial Commission of the New York State Courts, a permanent commission of the New York State Courts which seeks to eradicate racism

³ http://ww2.nycourts.gov/sites/default/files/document/files/2019-02/PLR_Commission-Report.pdf

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<https://www.ils.ny.gov/files/Caseload%20Standards%20Parents%20Attorneys%20NYS%20Family%20Court.pdf>

in the court system, issued a report on New York City’s family courts⁵. The comprehensive report echoes the calls for increased funding for infrastructure repair, development, technology enhancements and increased counsel rates for attorneys that were included in Chief Judge DiFiore’s 2019 report. It makes several additional recommendations, including, increasing the diversity on the family court bench, addressing and eliminating the dehumanizing culture in family court, the need for mandatory, annual anti-bias training for judges and court personnel, and the prioritization of parents in the scheduling of court appearances, among others.

Access to High Quality Parental Representation is a Racial Justice Issue

Race and poverty are defining characteristics of the family regulation system. Not surprisingly, these systems disproportionately surveil and target Black, Indigenous and immigrant people, particularly those from low-income communities. In New York, Black children make up 40% of the children in the foster system yet make up 15% of the children in the state, whereas white children make up 25% of the children in the foster system and 48% of the children across the state⁶. The New York State Bar Association recently called on New York State lawmakers to urgently “end the unnecessary disruption and destruction of Black families caused by the child welfare system⁷.”

Ensuring more equitable access to representation to those families subject to losing their children is one way to reduce the likelihood of family separation, reduce the number of children of color in the state’s foster system and to protect the rights and integrity of Black and low-income families in New York.

The Investment Needed to Improve Parental Legal Representation:

Additional funding in Family Court is necessary to assure long overdue reforms such as infrastructure repair, development of holistic family defense programs, technology enhancements and state-funded increases for assigned counsel rates and salary increases for institutional providers to ensure availability and quality representation.

1. Expand State Funding for Parental Representation: New York’s Office of Indigent Legal Services (ILS) is a state agency that oversees criminal and family legal services. Over the past decade, and especially in the last five years, New York has increased its investment in public defense services as it relates to criminal matters, when people have been arrested. The spending has had a positive impact on the quality of services available to low-income people across the state who have been arrested, including allowing attorneys the time to identify programs that can divert their clients from jail and prison as well as to fully investigate cases to avoid wrongful convictions.

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<https://www.nycourts.gov/LegacyPDFS/IP/ethnic-fairness/pdfs/FHW%20-%20Report%20on%20the%20NYC%20Family%20Courts%20-%20Final%20Report.pdf>

⁶ <https://ocfs.ny.gov/main/reports/maps/counties/New%20York%20State.pdf>

⁷ <https://nysba.org/app/uploads/2022/03/Committee-on-Families-and-the-Law-April-2022-approved.pdf>

Chief Judge DiFiore's Commission on Parental Representation recommends similar reforms in Family Court as those that have been implemented successfully in criminal courts due to the *Hurrell-Harring* lawsuit. Such reforms include parents being provided with timely information regarding their right to counsel and access to counsel sufficiently in advance of the first court appearance. This corresponds with Executive Law § 832(4)(a), which requires counsel at a criminal defendant's first court appearance. This recommendation was made because the Commission found that it is not uncommon for parents to have their children removed from their care and placed into the foster system without having an attorney to assist them.

Not only do New York parents need timely access to counsel, but they deserve interdisciplinary defense teams to represent them in these complex and high-stakes cases that impact the care and custody of their children. Interdisciplinary family defense representation reduces time children spend in the foster system and saves money. A 2019 study found that interdisciplinary teams representing parents at risk of losing their children, made up of attorneys, social workers and parent advocates, reduced time children spent in the foster system by 4 months without any increased risk⁸. The same study calculated the cost savings in New York City at \$40 million.

Unfortunately, the model of interdisciplinary representation for parents who face Article 10 of the Family Court Act is not available to parents outside of New York City or to most assigned counsel (18-b attorneys) in the State. On average in New York State, children remain in the foster system for **26 months**. An interdisciplinary model of family defense, which links attorneys, social workers and parent advocates to provide low and no-income parents with comprehensive representation, is recognized as the most effective model of representation of its kind in the nation.

Access to interdisciplinary defense teams is essential in providing early advocacy for parents under investigation by a local child protective services agency, before a case is ever filed in court. Teams of defense attorneys, social workers and parent advocates work with parents to identify what, if any, appropriate services and resources they and their family may need to avoid unnecessary and traumatic family separation. In New York City, where the local city council has funded early defense services for families, they have been able to keep family court cases from ever being filed against hundreds of families. Families outside of New York City, across our state, deserve access to these services that result in tremendous fiscal savings for the city and greatly reduced trauma to children and parents.

This year, ILS is requesting that New York State's budget for FY25 include \$50 million for attorneys for cases in family court, expanding over the next three years to \$150 million. Our organizations support this request and believe its key that this money be baselined and made available to ILS every year for the next five years.

Parental representation providers across the state are experiencing a crisis of attrition of qualified staff, especially in child welfare cases. As a Chief, I have experienced first hand the frustration

⁸ <https://www.sciencedirect.com/science/article/pii/S019074091930088X>

of recruiting attorneys to this field of practice. Moreover, retention of existing attorneys is challenging given the low rate of pay relative to other public sector jobs.

2. State Commitment to an Equitable Assigned Counsel Rate: While the rate paid to assigned counsel attorneys was finally addressed in the SFY 2023-2024 budget in an effort to improve the quality of representation and attract attorneys to accept family court assignments, the harm to assigned counsel panels around the State and the clients who are represented by assigned attorneys due to nineteen years of no rate increase is incalculable. The State must show its continued commitment to our poor families by funding the full increase in assigned counsel rates, including an annual increase tied to cost of living.

3. Increase Funding for Attorneys for Children Programs: Many of our member organizations also provide representation for children in Family Court proceedings under the Attorney for the Child program (“AFC”) administered by the New York State Office of Court Administration. AFC offices across the state are suffering an unprecedented crisis of underfunding that threatens the very safety and well-being of the children being represented. Equal justice in our courts cannot be attained without addressing gross salary inequities and crushing caseloads that have plagued attorneys representing children in our family courts for years. All AFC offices have struggled with attrition issues as well, seeing many attorneys drawn away from AFC work to higher paying jobs elsewhere in the public sector. This is a crisis that affects the most vulnerable in our court system – the children. We implore the state to show a commitment to improving our system of justice designed to serve them and their families.

4. Sufficient Funding to Implement Family Court Caseload Standards: The Commission recommends that maximum caseload standards for Family Court matters be implemented. Caseload standards ensure that attorneys have sufficient time to provide quality representation for each client. This corresponds with Executive Law §832(4)(b), which implements maximum caseload standards for indigent criminal defense providers. The New York State Office of Indigent Legal Services (ILS) has determined caseload standards for criminal matters and Executive Law § 832 funds the implementation of these standards. In contrast, ILS recently promulgated caseload standards for family court cases but there is no associated state funding for the implementation of these standards⁹.

To ensure access to high quality representation and to improve outcomes for families with family court involvement, New York must invest in parental representation and the implementation of caseload standards. As caseloads increase, attorneys have less time to dedicate to each client which can negatively impact the trajectory of a case, the length of time a child spends apart from family and how long a case remains in court. Implementing the recommended caseload standards will ensure attorneys representing parents have adequate time to file motions, to read discovery

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<https://www.ils.ny.gov/files/Caseload%20Standards%20Parents%20Attorneys%20NYS%20Family%20Court.pdf>

in advance to assess defenses, to reach out to opposing counsel to propose settlement of cases, to refer clients for collateral services, and to strategize with social workers about how to resolve cases according to the family's needs. When attorneys have higher caseloads, they have no choice but to triage cases, which means they spend most of their time litigating emergency hearings, dealing with client emergencies and crises, responding to motions filed by opposing counsel and spending a large part of their day in court on regularly scheduled appearances. Attorneys are forced to primarily play defense and are left with insufficient time outside of court to resolve cases through strategic planning and negotiation. This type of practice is not sustainable and results in higher attrition rates, causing caseloads to grow even further.

5. Pass New York's Family Miranda Rights Act: In addition to timely access to counsel, parents under Child Protective Services (CPS) investigations have rights that they are often not aware of during an investigation. In particular, low income families of color, who are disproportionately investigated and prosecuted for charges of child maltreatment, are often left uninformed about the process and unsure of their right to make decisions about their families.

The Family Miranda Rights Act (A6792/S5484-A) requires CPS to notify parents and caretakers of their existing rights, orally and in writing, at the outset of a child protective investigation. This bill does not create any new rights. Instead, it codifies that parents must be told their existing rights. The failure to advise parents of their rights fosters an atmosphere of fear and coercion and, far too often, leads to the harmful separation of families. New York has robust safeguards that ensure that CPS is able to conduct thorough investigations into allegations of child neglect and abuse. A6792/S5484-A does not curtail these protections or limit the legal mechanisms available to child protective agencies.

6. End the Dehumanizing Treatment of Litigants in Family Court: New York's court systems have a long held culture of referring to litigants as the legal terms used in court papers or generic terms such as "the mom" rather than by their names. Family court judges and all court staff interacting with the public and litigants in the courthouse should refer to litigants respectfully, beginning with their name.

Conclusion

It is time for New York to invest in parental representation the way it has for other mandated legal representation. Chief Judge DiFiore's Commission on Parental Legal Representation found that without the state's financial investment and oversight, family defense attorneys do not have the resources needed to deliver effective assistance of counsel to parents. While the state has funded efforts to reduce caseloads on the criminal defense side of public defense, it has not taken the steps to do so on the equally important family defense side.

CDANY is grateful to the Senate Standing Committees on the Judiciary and Children and Families for hosting this hearing and listening to parents, advocates and attorneys who have been impacted by and work within the child welfare and family Court systems. We encourage these two committees to continue to provide opportunities for impacted families and family defense attorneys across New York State to share their experiences with this system and the ways it can be improved. We also urge your committees to work with the legislature and the Governor to fund parental representation, an important step in New York's commitment to improving mandated parental representation.

Thank you for your time and consideration of our comments. If you have any questions, please contact Mark Funk, Monroe County Assigned Counsel Administrator and Chair of CDANY's Family Court Committee, at MarkFunk@monroecounty.gov.