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Testimony of Office of Indigent Legal Services

Joint Legislative Hearing on the 2016-2017 Public Protection Budget

Presented before:

The Senate Finance Committee

and

The Assembly Committee on Ways and Means

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Good afternoon Chairman Young, Chairman Farrell and distinguished members of the Committees.

I am William Leahy, Director of the Office of Indigent Legal Services. Thank you for the opportunity to appear before you to discuss the FY 2016-17 budget of the Office of Indigent Legal Services and its Board.

Past support. First I want to thank you for your consistent support of our Office and our independent Board. None of our many accomplishment over these past five years would have been possible without your support and the appropriations you provide: not our first in the nation statewide network of Regional Immigration Assistance Centers; not our annual Quality Improvement Distributions of state funds to the counties and New York City; not our grants to 47 counties to reduce public defender caseloads and support assigned counsel programs; and not our grants to 25 counties to provide counsel at a defendant's first court appearance; everything we have accomplished is thanks to your support.

Last year, I asked you to support the FY 2015-16 Executive Budget proposal to establish a unit within my Office to implement the settlement of the 2007 lawsuit, *Hurrell-Harring v. State of New York*, and to increase funding for Office operations to provide additional support for the management of our county contracts. Through your efforts, we have been able to establish a fully-funded Hurrell-Harring implementation unit and an additional \$100,000 was added for Office operations to more expeditiously process the ever increasing number of claims for reimbursement submitted by counties, thereby ensuring that counties will continue to receive their payments in a timely manner.

The Good News: Executive Budget Funding for the Hurrell-Harring Settlement. On March 11, 2015, the Albany County Supreme Court approved an historic settlement between the State of New York and a plaintiff class represented by the New York Civil Liberties Union in *Hurrell-Harring v. State of New York*, in which the State for the first time accepted its responsibility to implement and fund constitutionally compliant representation in the five counties named in the lawsuit. My Office, under the direction of our Board, accepted the responsibility to implement the terms of the settlement, in which the State agreed to ensure that (1) each indigent person charged with a crime is provided representation at his or her arraignment, (2) caseload/workload standards are developed by my Office and implemented in the five counties, thereby reducing the crushing caseloads currently carried by providers of indigent legal services; and (3) State funding is provided that is dedicated to implementing specific quality improvements to representation provided in the counties.¹

¹ Under the terms of the settlement, my Office also has the responsibility to develop and issue criteria and procedures to guide courts and counties located outside of New York City in the process of determining whether a person is eligible for mandated representation in criminal court proceedings. However, the settlement terms do not attach any funding for implementation of these guidelines.

I am very pleased that in its FY 2016-17 Budget proposal, the Executive has honored its settlement obligations by dedicating \$16.4 million in this year's proposal to (1) implement the written plans submitted by my Office to (a) ensure that each eligible individual charged with a crime is provided representation at his or her arraignment (\$2 million) and (b) enhance the quality of representation in criminal cases in the five counties (\$2 million); (2) add staff and other resources necessary to reduce average weighted caseloads in criminal cases in the five lawsuit counties to more appropriate levels (\$10.4 million); and (3) create a contingency fund to ensure that the funding currently received by the four settlement counties participating in our Counsel at First Appearance competitive grant will be maintained when we re-issue the grant in 2016 (\$800,000). In addition, the Executive Budget proposal provides the funding needed to fully support the operation of our Hurrell-Harring Implementation Unit, which consists of lawyers and support staff to implement the terms of the settlement (\$1.2 million). I therefore ask for your full support of the FY 2016-17 Executive Budget as it pertains to funding the implementation of the Hurrell-Harring settlement.

The Bad News: the "Tale of Two Counties." My plea to you today is on behalf of the fundamental statutory responsibility of the Office of Indigent Legal Services and the Indigent Legal Services Board, under Executive Law sections 832 and 833: to "make efforts to improve the quality of services provided pursuant to article eighteen-B of the county law." It is a plea for the 52 upstate counties that did not participate in the settlement, but have equally serious unfunded obligations: the obligation to provide counsel at arraignment, the obligation to bring excessive caseloads/workloads into compliance with established national standards; and the obligation to support improvements in the quality of their mandated representation. From Albany alphabetically to Yates, from Clinton in the northeast to Chautauqua in the southwest, from Niagara in the northwest to Nassau in the southeast, New York State is failing to assist counties in their efforts to comply with the most basic legal requirements, and the very fundamentals of effective representation. As impressive as the FY 2016-17 Executive Budget proposal is with respect to implementation of the *Hurrell-Harring* settlement in five counties, it does not provide any additional funding for these forgotten 52 counties. By ignoring their legitimate need for funding, it exacerbates the disparity between the settlement and non-settlement counties. Unless it is supplemented by the appropriation of similar levels of funding for the counties overlooked in the settlement, the FY 2016-17 Executive Budget proposal would contribute to the creation of two separate and unequal systems of justice for the residents of different counties in New York State.

The FY 2016-17 ILS Budget Request that I am about to outline for you contains our plan to improve the quality of indigent legal services in every locality in the State, in compliance with our statutory responsibility.

FY 2016-17 ILS Budget Request.

In September, 2015, the Indigent Legal Services Board unanimously approved an ILS budget request of \$139.26 million for FY 2016-17. Of this amount, \$133.26 million would be devoted to Aid to Localities and \$6.0 million to State Operations.

- **Local Aid.** The \$133.26 million in Local Aid represents an increase of \$49.26 million over FY 2015-16 funding levels, which would consist of the following:
 - **Upstate Quality Improvement and Caseload Reduction.** The majority of the Local Aid funding request, \$20 million, would be devoted to bringing the upstate institutional providers into compliance with national caseload limits and to provide basic support for the upstate assigned counsel programs. The \$20 million funding in FY 2016-17 would be the first installment of a five-year funding plan, which would increase Local Aid funding by \$20 million/year, or \$100 million over five years. This requested increase over five years is founded upon the data revealed in our *Estimate of the Cost of Compliance with Maximum National Caseload Limits in Upstate New York – 2014*, in which we estimate that in 2014 it would have cost an additional \$99.1 million to bring upstate indigent legal services providers into compliance with maximum national caseload standards.²
 - **Counsel at First Appearance Grant.** \$8 million of the Local Aid funding request would be used to extend the reach of counsel at first appearance – within the 25 counties that are addressing it now, and the 32 that did not respond to our initial Counsel at First Appearance competitive grant. Many counties that did not participate in this grant are now prepared to apply for funding to provide this vitally important, constitutionally guaranteed representation. The request of \$8 million would represent a modest second step towards establishing the minimum conditions needed for providing constitutionally required counsel at first appearance in upstate counties, and would ensure that the level of funding received by the 25 counties currently participating in the grant is not jeopardized when the grant is re-issued in 2016.

² This amount represents a 5.8% decrease on the \$105.2 million that would have been needed to bring upstate counties into compliance with caseload limits in 2013, according to the report we issued in the fall of 2014, *Estimate of the Cost of Compliance with Maximum National Caseload Limits in Upstate New York – 2013 Update*. Notably, this amount represents a 10.9% decrease on the \$111.2 million that would have been needed to bring upstate counties into compliance with caseload standards in 2012, according to the first cost estimate report we issued in the fall of 2013, *Estimate of the Cost of Compliance with Maximum National Caseload Limits in Upstate New York*. This reduction in cost (and reduction in average weighted caseloads, from 719 in 2012, to 680 in 2013, and to 616 in 2014) is primarily attributable to an increase in staffing levels in upstate institutional provider offices, much of which has been facilitated by the targeted funding of the Office of Indigent Legal Services.

- **Hurrell-Harring Settlement.** \$15.26 million of the Local Aid funding request would be used to further implement the HH settlement in the five settlement counties, consisting of:
 - **Caseload Standards.** \$13.26 million for caseload relief for both criminal and Family Court mandated representation cases, as demonstrated in our 2015 Upstate Cost Estimate (see above);
 - **Counsel at First Appearance.** \$1 million for additional costs to fully implement the final plan developed by the Office for each of the five settlement counties to satisfy the State's obligation to provide in person representation of eligible criminal defendants at first appearance.
 - **Quality Improvement.** \$1 million for additional costs to supplement the final plan developed to by the Office to implement Quality Improvement initiatives in the five settlement counties.
- **Additional RFPs.** \$3 million of the Local Aid funding request would be used to supplement three RFPs to (1) address major deficiencies in the quality of representation provided by Assigned Counsel Programs; (2) create Model Upstate Parental Representation Offices; and (3) create Wrongful Conviction Prevention Centers.
- **Compliance with ILS Standards.** \$3 million of the Local Aid funding request would be used to enable providers of mandated representation to comply with Standards issued (or soon to be issued) by ILS with respect to trial, appellate and post-conviction representation, Family Court proceedings and the administration of Assigned Counsel programs.
- **State Operations.** The \$6.0 million in State Operations funding represents an increase of \$3.0 million over FY 2015-16 funding levels, which would consist of the following:
 - **Hurrell-Harring Settlement Implementation Unit.** \$200,000 to support our Hurrell-Harring Implementation Unit, consisting of a Chief HH Implementation Attorney, four HH Implementation attorneys, and three paralegal/research assistant positions.
 - **Regional Support Centers.** \$2 million to begin to establish Regional Support Centers, which are essential for the realization of uniform, high quality representation in every county and region. This initial appropriation would support the first four such Centers, in areas of greatest need for regional help.

- **Statewide Appellate Resource Center.** \$800,000 to establish a New York State Statewide Appellate Center. The Center will provide litigation assistance to assigned counsel and mandate relief to counties by providing state-funded appellate representation in complex cases and identifying and rectifying wrongful convictions more rapidly than is done at present.

FY 2016-17 Executive Budget Proposal

The Executive Budget released on January 13, 2016 proposes funding of (1) \$3.2 million in State Operations and (2) \$96.2 million in Aid to Localities, or All Funds of \$99.4 million, which represents an increase of \$12.4 million over the amount appropriated in the FY 2015-16 Final Budget. The additional \$12.4 million is exclusively devoted to implementation of the Hurrell-Harring settlement.³

- **State Operations.** The \$3.2 million in State Operations funding represents an increase of \$200,000 over FY 2015-16 funding levels, which would consist of the following:
 - **Office Operations.** \$200,000 to support our Hurrell-Harring Settlement Implementation Unit, consisting of a Chief HH Implementation Attorney, four HH Implementation attorneys, and three paralegal/research assistant positions.
- **Local Aid.** The \$96.2 million in Local Aid represents an increase of \$12.2 million over FY 2015-16 funding levels,⁴ which would consist of the following
 - **Counsel at First Appearance.** \$1 million to fully implement the final plan developed by the Office for each of the five settlement counties to satisfy the State's obligation to provide in person representation of eligible criminal defendants at first appearance.
 - **Caseload Standards.** \$10.4 million to begin adding staff and other resources necessary under the terms of the settlement for the five counties to come into compliance with caseload/workload standards.

³ The FY 2016-17 Executive Budget proposal would also re-appropriate a \$500,000 contractual line in the FY 2015-16 Final Budget that will allow us to go forward with issuing a Caseload Standards RFP to develop caseload standards in criminal cases in the five settlement counties and to fulfill our settlement obligation to track the caseloads of every attorney providing mandated representation in the five counties.

⁴ The FY 2016-17 Executive Budget proposal would also continue funding a total of \$3 million appropriated in FY 2015-16 to (1) implement the interim plan developed by the Office for each of the five settlement counties to satisfy the State's obligation to provide in person representation of eligible criminal defendants at first appearance (\$1 million); and (2) implement the plan developed by the Office to enhance quality of mandated representation in criminal cases for each of five settlement counties (\$2 million).

- **Counsel at First Appearance RFP.** \$800,000 represents contingency funding to ensure that the four settlement counties participating in the Office’s Counsel at First Appearance Demonstration Grant will continue to receive at least the same level of funding when the Grant is reissued in 2016.

Fifth year operations of the Office and the Board.

During its first five years of operations, the Board has approved the development of six *non-competitive* distributions – in amounts sufficient to restore every county and New York City to the level of funding they received in 2010.⁵

The Board has also approved the development of six *competitive* grants, each targeted to improve the quality of mandated representation under county law 18-B by using carefully targeted state funding to address current deficiencies in the delivery of those services. These competitive grants provide additional funding to the counties and New York City, above and beyond the 2010 level of funding provided by the five non-competitive distributions.

Significantly, these initiatives - the non-competitive distributions and competitive grants - do not impose any unfunded mandates on the counties. Counties will not be asked to perform any additional service that state funding will not support – and the counties and the State will benefit from having the quality of indigent legal services improve significantly.

Collaboration between County Officials and Providers

For each of our non-competitive distributions and competitive grants, we have required, as a precondition of receiving funding, that counties consult with their indigent legal services providers in the preparation of their proposals. In this fifth year of operations, we are once again pleased to report that the level of collaboration between my Office, county officials and providers continues to grow. The net effect of this growth, we believe, is a better targeting of ILSF funds toward improving the quality of legal representation.

Non-competitive Distributions

This past September, the Office recommended and Board approved \$7.4 million in a non-competitive distribution of FY 2015-16 Local Aid funds under Executive Law Article 30, section 832 (3) (f). The Board authorized a three-year allocation of funds, in the total amount of \$22.1 million over this period. The \$7.4 million represents the first year of a new three-year allocation of funds (“Distribution #6”), which represents the continuation of funding authorized by the Board at its September, 2012 meeting (Distribution #3). Since the Board has previously

⁵ For the first four years of operation, non-NYC counties were guaranteed by statute a percentage of the ILSF funds they received in March, 2010 (year 1 – 90%; year 2 – 75%; year 3 – 50%; year 4 – 25%). In March of 2014, the non-NYC counties received their final statutory payment under these phase-out provisions. New York City, which is guaranteed an annual sum of \$40 million, or 98% of its March, 2010 ILSF allocation, will receive its next annual sum in March, 2016.

allocated funding for each of the three years for Distribution #3, a new authorization was required for this component of the funding.

Competitive Grants

The Board has authorized a total of just under \$10.8 million annually (\$32.4 million over three years) in *competitive* grants in furtherance of three specific goals: 1) to bring New York closer to the goal of providing counsel at a criminal defendant's first court appearance, a critical moment when his or her liberty may be at stake; 2) to bring New York into compliance with the requirement established by the United States Supreme Court in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), that every assigned lawyer must provide his or her client with accurate information as to potential immigration consequences of a conviction; and 3) to alleviate excessive caseloads in upstate public defender offices and develop quality control measures in upstate assigned counsel programs. All three of these grants are for a three year period, with total funding of \$12 million for the counsel at arraignment grant (\$4.0 million per year); \$8.4 million for the immigration consequences grant (\$2.8 million per year); and \$12 million for upstate caseload reduction (\$4 million per year). These competitive grants represent the Board's priority to take steps to address constitutional deficiencies in the delivery of 18-B mandated representation and to develop innovative models of delivering state assistance to counties through the provision of state-funded regional support and resources.

In addition, the Board authorized the development of three *competitive* RFPs, each in the amount of \$870,139 annually (\$2.6 million over three years) to (1) address major deficiencies in the quality of representation provided by Assigned Counsel Programs; (2) create a Model Upstate Parental Representation Office; and (3) create two Wrongful Conviction Prevention Centers.

Public Defense Backup Center.

Finally, as I have testified before this Committee for each of the five years I have been the Director of the Office of Indigent Legal Services, I strongly emphasize the critical importance of the New York State Defender Association's Public Defense Backup Center receiving adequate funding to continue performing its indispensable function of providing essential training and support services, including its case management system, to providers of mandated representation throughout the state. We cannot succeed in our mission to improve the quality of representation under County Law article 18-B without a robust Public Defense Backup Center operating alongside our Office. New York cannot meet its Constitutional obligation to provide competent counsel to those who cannot afford to pay for it, if the Backup Center is allowed to fail for lack of funding. We therefore fully support the appropriation request of the New York State Defenders Association.

FY 2016-17 ILS Budget Request

	Final FY 2015-16	FY 2016-17 Request	Requested Change
State Operations	\$3.0 million	\$6.0 million	+\$3.0 million*
Aid to Localities	\$84.0 million	\$133.26 million	+\$49.26 million**
All Funds	\$87.0 million	\$139.26 million	+\$52.26 million

***State Operations:**

1. Hurrell-Harring Settlement

- \$200,000 to fully establish a Hurrell-Harring Settlement Implementation Unit, consisting of a Chief HH Implementation Attorney, four HH Implementation attorneys, and three paralegal/research assistant positions (assumes continuation of \$1.0 million of FY 2015-16 State Ops funding)

2. Regional Support Centers

- \$2 million to begin establishing Regional Support Centers, which are essential for the realization of uniform, high quality representation in every geographic region. This initial appropriation would support the first four such Centers, in areas of greatest need for regional help.

3. NYS Appellate Resource Center

- \$800,000 to establish a NYS Appellate Resource Center. Modeled after the New York Prosecutors Training Institute (NYPTI), this Center will provide litigation assistance to assigned counsel and mandate relief to counties by providing state-funded appellate representation in complex cases and identifying and rectifying wrongful convictions more rapidly than is presently done.

****Local Aid:**

1. Hurrell-Harring Settlement

- \$15.26 million to further implement the HH settlement in the Five Settlement Counties, consisting of: (1) \$13.26 million for caseload relief, as demonstrated in our 2015 Upstate Cost Estimate (see below); (2) \$1 million for additional costs to provide counsel at first appearance (assumes continuation of FY 2015-16 funding of \$1 million); and (3) \$1 million for additional costs to implement Quality Improvement Initiatives.

2. Upstate Quality Improvement and Caseload Reduction

- \$20 million to enhance our remediation of the twin evils of excessive caseloads, and wholly inadequate support services, supervision and oversight that exist in all or virtually all upstate counties. This request is supported by our November, 2015 report, *Estimate of the Cost of Compliance with Maximum National Caseload Limits in Upstate New York – 2014 Update*, which revealed that New York would have had to spend an additional \$99.2 million in 2014 to achieve compliance with maximum national caseload limits.

3. Counsel at First Appearance

- \$8 million to expand and extend the reach of counsel at first appearance within the 25 counties that are addressing it now through awards granted under our initial counsel at first appearance RFP (32 counties did not participate in that initial RFP).

4. Three Additional RFPS

- \$3 million to supplement three RFPs being developed to (1) address major deficiencies in the quality of representation provided by Assigned Counsel Programs; (2) create one or two Model Upstate Parental Representation Offices; and (3) create two Wrongful Conviction Prevention Centers.

5. Compliance with ILS Standards

- \$3 million to enable providers of mandated representation to comply with Standards Issued (or soon to be issued) by ILS with respect to trial, appellate and post-conviction representation, Family Court proceedings and the administration of Assigned Counsel programs.

FY 2016-17 Executive Budget Proposal
Office of Indigent Legal Services (ILS)

	FY 2015-16 Final Budget	FY 2016-17 ILS Budget Request	ILS Requested Change	FY 2016-17 Executive Budget
State Operations	\$3.0 million	\$6.0 million	+\$3.0 million	\$3.2 million*
Aid to Localities	\$84 million	\$133.26 million	+\$49.26 million	\$96.2 million**
All Funds	\$87 million	\$139.26 million	+\$52.26 million	\$99.4 million

***State Operations:**

- **Hurrell-Harring Settlement Implementation**
 - Of the \$3.2 million State Ops appropriation in the FY 2016-17 Executive Budget, \$1.2 million would be dedicated to ILS Office operations for the Hurrell-Harring settlement implementation unit.

****Local Aid:**

- **Hurrell-Harring Settlement Implementation**
 - Of the \$96.2 million Local Aid appropriation in the FY 2016-17 Executive Budget, \$15.2 million would be dedicated to implementation of the Hurrell-Harring settlement, as follows:
 - \$10.4 million represents funding under the terms of the Hurrell-Harring settlement to begin adding staff and other resources necessary for the five settlement counties to come into compliance with caseload/workload standards;
 - \$2 million represents funding to implement the written plan submitted by ILS on November 12, 2015 to provide each criminal defendant in the five settlement counties who is eligible for publicly funded legal representation with in person representation at arraignment (see "Implementing the Counsel at Arraignment Obligations in the *Hurrell-Harring v. The State of New York Settlement: Final Plan*") ;
 - \$2 million represents funding to implement the written plan submitted by ILS on November 12, 2015 to improve the quality of indigent defense in the five settlement counties (see "Implementing the Quality Improvement Objectives in the *Hurrell-Harring v. The State of New York Settlement: Final Plan*") ;
 - \$800,000 represents contingency funding to ensure that the four settlement counties participating in ILS's Counsel at First Appearance Demonstration Grant continue to receive at least the same level of funding upon the reissuance of the Grant in 2016.