



Written Testimony of
Chief Defenders Association of New York
Presented before
The New York State 2022 Joint Legislative Budget Hearing
January 25, 2022

On behalf of the Chief Defenders Association of New York, we would like to thank the New York State Senate Finance Committee Chair Liz Krueger and Assembly Ways and Means Committee Chair, Helene E. Weinstein for holding today’s important budget hearing on Public Protection, and for accepting 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 child welfare proceedings across the State.

Our written testimony below addresses (1) the need to invest in parental representation in Article Ten and Termination of Parental Rights cases, (2) an increase to New York’s Assigned Counsel payment rate, (3) full funding needed for New York’s Indigent Parolee Representation Program and (4) Legal Service Attorney Loan Forgiveness Program

Family Court Funding

Over the last four years, New York State has invested \$500 million in indigent criminal defense, while investing only \$2.5 million in Family Court parental representation. The funding for criminal defense services across the State has strengthened the right to counsel in criminal cases

by ensuring that lawyers have the time they need to follow leads on the factual allegations, research and argue issues of law and to visit with and interview clients. The additional funds also allowed criminal defense offices to provide social work and other related services to clients, which in turn allows for more options in the underlying case. It is now time for New York to make a similar investment in parental representation to address the crisis in our Family Courts.

“The Crisis in Parental Legal Representation” in New York

When a parent or caretaker is accused of neglect or abuse of their child, they have a constitutional and statutory right to counsel if they cannot afford to hire an attorney. Given what is at stake in child welfare 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 and children describe child welfare investigations and court proceedings as some of the most frightening and stressful experiences in their lives¹. When a family is brought to Family Court in an Article Ten case, the child may have already been removed from their home or may be at risk of being removed from their home at any time. 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 visitation 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 currently doing this work with high caseloads because the counties have not dedicated the resources needed for this work to be done at the level that properly serves the clients and their families.

Some examples of the types of Article Ten cases that are filed against parents and families are as follows:

- Due to poverty, a family may not have heat in their home or sufficient food.
- A child with a physical or intellectual disability may not be getting the services they need, often complicated by a parent’s inability to navigate the complex systems that provide those services.
- A parent may have a health issue, such as cancer, that prevents them from being fully available for parenting.
- Parents with mental health issues may be in relapse or may not have received the proper mental health care to make them able to care for their children.
- A parent with a developmental disability may be seen as unable to care for their child.
- A doctor may see an injury of a child as inconsistent with the explanation that was given at the hospital

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

- A parent may not seek medical attention for their child as quickly as an agency caseworker feels is appropriate
- A parent could be accused of failing to protect a child because there is violence in the home.
- A working parent may not have access to adequate child care during their work hours
- A parent may be forced to leave the home because of an arrest
- A serious allegation of physical or sexual abuse, which requires a full investigation and analysis of police reports and other documents, videos and evidence.

The need for an attorney cannot be overstated. It is always possible that an allegation is not true or that an expert review of records reveals a different analysis of an injury or illness. The outcome of family separation may not be necessary. Furthermore, access to services and resources to which the families are entitled may be complicated and parents need assistance to assure services for them and their child are obtained.

Poor communities and communities of color are disproportionately impacted by the State’s foster system². In New York, Black children make up 40% of the children in the foster system yet make up only 15% of the children in the State. 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 and have much longer placements in the system.

The Investment Needed to Improve Parental Legal Representation:

In February 2019, Chief Judge DiFiore’s Commission on Parental Representation issued a report on the status of parental representation across New York State³. The Commission report, like many others across two decades addressing the issue⁴, determined that parental representation is in “crisis” mode and stated that a “complete transformation is needed” to address the crisis. Despite this report, and the decades of other reports that have reached the same conclusions, little has been done to address the Commission’s recommendations.

Chief Judge DiFiore’s Commission on Parental Representation made the following six recommendations to improve parental representation in New York State: (1) Timely Access to Counsel; (2) State Oversight and Infrastructure; (3) Uniform Eligibility Standards and Presumption of Eligibility; (4) Caseload Standards; (5) State Funding; (6) Raising Compensation Rates for Assigned Counsel.

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

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

⁴ Examples include: Mark Green & Child Planning & Advocacy Now (C-PLAN), *Justice Denied: The Crisis in Legal Representation of Birth Parents in Child Protective Proceedings*, at 44-45 (May 2000) (“[i]f parents have access to adequate representation, everyone will gain: money will be saved, Family Court will function more effectively, and children will receive the stability and permanence to which they are entitled.”); Status of Indigent Defense in New York: A Study for Chief Judge Kaye’s Commission on the Future of Indigent Defense Services, Final Report (June 16, 2006)(the system for providing mandated family law representation suffers from the same systemic deficiencies as exist in the criminal defense system).

Last year, the New York State Office of Indigent Legal Services offices created standards for representation of parents and caretakers, yet there is insufficient funding to support these standards⁵. Just as New York State made an investment in indigent criminal defense representation through a fund that was phased in over five years, a similar approach to ensure family court representation is able to meet these case standards and provide the services and resources needed to support clients and improve outcomes for families is needed.

\$25 Million (Over 5 Years) Investment in Parental Defense in Art Ten and Termination Cases

CDANY is asking for \$25 million to be added to the state budget to support caseload reduction and quality improvements to mirror the same process that has been implemented and works well for criminal defense, utilizing the expertise and capacity of New York State's Office of Indigent Legal Services.

Increase in Assigned Counsel Fees

The New York State Constitution, the United States Constitution, and the landmark Supreme Court decision of *Gideon v. Wainwright* mandate competent counsel in criminal matters, regardless of one's ability to pay. There is a comparable right to quality counsel in many family court proceedings. However, without attorneys willing and able to take up the defense of indigent persons, the entire criminal and family court systems would collapse. Across New York State, we have an abundance of experienced and knowledgeable criminal and family court defense attorneys unwilling to accept assignments to represent people who are eligible for counsel due to the excessively low Assigned Counsel rates set by Article 18-b of the County Law.

Currently, Article 18-b sets compensation rates paid to attorneys for Assigned Counsel work at \$60 per hour for misdemeanor matters and \$75 per hour for felony, family court representation, and other matters. Statutory maximums of \$2,400.00 per misdemeanor case and \$4,400.00 for felonies, family court cases, and other matters also limit Assigned Counsel attorney fees. The only possible way to receive payment in excess of these caps is to petition the court and demonstrate extraordinary circumstances.

Assigned Counsel rates have been raised only once in the last 35 years and have remained unchanged since 2004. In contrast, since 2002 the federal government, pursuant to the Criminal Justice Act, has increased rates for federal assigned defense counsel frequently and substantially. Federal assigned counsel rates have increased 13 times over that time span with a 72% increase in rates, from \$90 per hour to \$155 per hour. (See graph below). Federal law includes an annual cost of living adjustment and further sets maximum limits for case charges far above those for the State. The cases adjudicated within the State system are no less complicated or perilous for

⁵ <https://www.ils.ny.gov/files/Caseload%20Standards%20Parents%20Attorneys%20NYS%20Family%20Court.pdf>

our clients than federal cases. They should not be treated so dissimilarly in terms of compensation.

Pursuant to the settlement of the Hurrell-Harring lawsuit, the New York State Office of Indigent Legal Services was given a mandate to ensure that counties improve the quality of Assigned Counsel Programs across the State. Recruitment and training of qualified assigned counsel and retention of those trained is a necessary element to maintaining a strong and capable defense bar. However, much like the situation that led to the rate increase in 2004, Assigned Counsel Panels are trending towards, or already in, a crisis. The caseloads of Assigned Counsel Panel attorneys are increasing exponentially, while the number of attorneys willing and able to accept assignments is decreasing alarmingly fast. For example, the Onondaga County Assigned Counsel Program has seen a 13% reduction in their panel since 2005. Onondaga County expects, without a change in rates, the decline to continue in years to come. Assigned Counsel Programs across the State are finding it more difficult to retain quality attorneys in their programs while keeping caseloads manageable.

New York can improve the quality of representation simply by increasing the rates, as a rate increase will lead to greater numbers of qualified attorneys able to accept assignments and an associated decrease in caseloads. With the cost of living increasing, and the time and effort it takes to defend criminal or family court clients growing, the inequity of extremely low rates will intensify unabated. Against the backdrop where District Attorney and Judicial salaries have risen sharply since 2004, the inequities are even starker.

We urge you to no longer ignore the growing issue of insufficient compensation for assigned counsel attorneys. The Covid-19 pandemic has resulted in an increase in the workload of assigned counsel due to a backlog of pending cases and, the economic challenges resulting from the pandemic have led to an increase in the number of people financially eligible for assigned counsel. Without a significant increase in the rates, Assigned Counsel Providers from across the state will soon be unable to meet their constitutionally and statutorily mandated duty to provide competent counsel in all criminal and family court cases. The obvious effect of this failure will be increased rates of conviction, conviction of innocent persons, increased incarceration rates, temporary and permanent separation of families, court backlog, and a lack of access to justice for those we represent. The costs of this failure, in both terms of human and monetary capital, will be far greater than simply raising the rates to match cost of living and inflation increases seen over the past 18 years.

Accordingly, we respectfully request that Section 722-b of County Law 18-b be amended as follows:

- Increase Assigned Counsel rates for 2022 to \$120 per hour for misdemeanors and \$150 per hour for felonies and other matters, for both in-court and out-of-court work.

- Add a provision that ensures an automatic annual cost of living rate increase.
- Payment for the increase in rates should be an expense absorbed by the State; with the counties continuing to pay their current share while the State pays the difference.
- The statutory maximum amounts should be eliminated in order to encourage adequate time expenditure on individual cases.

It is difficult to imagine a system that devotes over \$3 billion per year for the Department of Corrections and Community Supervision, which has resulted in the disproportionate mass incarceration of marginalized members of the community, yet turns its back on funding the fundamental right of those individuals to receive effective assistance of counsel. If properly resourced, public defenders and assigned counsel attorneys could do more for public safety than any other institution. We are in the best position to assess the needs of the clients we serve, and connect them with much needed services, not cages. Moreover, our family defenders will be better equipped to help keep families together, reducing the adverse childhood experiences the trauma of removal creates. Given the time that has passed since the last increase and the challenges ahead for providers, we believe this increase is both equitable and urgently needed for the continued provision of quality representation to all public defense clients within our State.

Fund the Indigent Parolee Representation Program

New York State Law entitled indigent parolees to court-appointed counsel in parole revocation hearings and appeals from adverse parole release or revocation decisions. The Indigent Parolee Program (IPP) was created in 1978. The program was designed to reimburse expenses incurred by counties, especially recognizing those counties with prisons in their jurisdictions who would have the responsibility of providing counsel to state incarcerated individuals who are eligible for parole release but who have received adverse decisions after their parole release interviews. This program was initially funded through the Executive Budget until the Pataki administration and, thereafter, became a Legislative add.

In FY 87/88 and for the next three fiscal years, while caseloads and county costs skyrocketed, the appropriation to IPP was frozen at \$1.7 million. In 1996, the Pataki administration did not include IPP in the Executive Budget and left the financing of the IPP program to the Assembly. Four jurisdictions - New York City, Monroe, Nassau, and Wyoming Counties had entered into contracts to perform this work while the remaining counties filed reimbursement vouchers for funding.

The IPP Program was never included in the Executive Budget during the Cuomo years and is not included in Governor Hochul's Executive Budget.

Over the past several years, the IPP Program was included in the State Budget as a Legislative addition through the New York State Senate under both Republican and Democratic leadership. The appropriation of \$600,000 for the IPP program excludes the City of New York and provides \$186,000 (31%) of those funds to Wyoming County. The appropriation for Wyoming County is in recognition of the fact that the county has two large state correctional facilities and that the majority of the caseload requiring counsel assignments in Wyoming County are incarcerated individuals who are challenging denial of parole release. The majority of the caseload represents incarcerated individuals from the City of New York and the surrounding large suburban counties.

Parole Reform Cannot Be Accomplished Without Fulfilling the State's Mandate to Provide Indigent Parolee Representation

The advances made in New York State in parole reform, including but not limited to the "Less Is More" Act, will be hampered if the State fails to provide state funding for parole representation.

It is unfair to make a county or New York City pay for representation simply because a parolee is held in the county jail or state prison within that county. For this reason, the costs of providing representation to accused parolees is properly a state, and not county, charge. The Indigent Parolee Program which provides counsel in parole-related proceedings should be funded at least at last year's amount of \$600,000. The funding should be increased significantly to fulfill the obligation of the State to ensure that representation of parolees is not another unfunded mandate.

The latest information received from DCJS indicates that approximately twenty-five counties submit vouchers for reimbursement under the IPP. With the limited funds available counties receive approximately 30% of the expenses incurred by those counties providing constitutionally mandated assignment of counsel.

The New York State Defenders Association, in a report dated February 28, 1992, concluded its findings on this issue as follows:

"We conservatively estimate that for FY 92/93, an appropriation of four million is needed to restore full reimbursement for parole representation." (see Indigent Parolee Representation: A Mandate Unfulfilled, NYSDA, Inc., 2/28/92).

Thirty years later, New York State has reduced its funding from \$1.7 million to \$600,000. It is time for New York State to meet its obligation to fully fund this program to ensure due process in our parole system.

Legal Service Attorney Loan Forgiveness Program A5720/S1176 (Simon/Ramos)

Law school tuition has increased dramatically since the inception of the District Attorney and Indigent Legal Services Loan Forgiveness Program in 2017. Between 2007 and 2018, the annual cost of public law school increased 43%, from \$15,455 to \$27,591, while the average annual tuition at a private law school increased 34% from \$32,367 to \$49,095. The public defenders and civil legal service attorneys are dedicated to providing low-income New Yorkers with quality legal representation. We vigorously defend the due process rights and dignity of immigrants and their families; we help disabled people access the benefits they need to survive; we fight to keep families in their homes in housing court; and work to ensure families are not torn apart by the family regulator system. Our public defenders passionately fight for the freedom of low-income New Yorkers across the courtroom from prosecutors that have deep commitments to their communities. However, increasing student debt loads, combined with low salaries, mean that dedicated defenders and legal service attorneys cannot afford to stay in their jobs and serve their community.

New York State Higher Education Services Corporation's loan forgiveness program is often the sole support public defenders, legal services and assistant district attorneys have to pay back their loans.

We ask you to support to amend Education Law § 679-e, and raise the annual reimbursement of the District Attorney and Indigent Legal Services Loan Forgiveness Program from \$3,400 per year to \$5,500 per year, and decrease the wait-time for attorneys to access this loan from three years to two years. As student debt loads continue to climb, this program is a vital tool to recruit and retain experienced and talented public defenders, civil legal service attorneys, and prosecutors.

Conclusion

CDANY is grateful to the New York State Senate Finance Committee Chair Liz Krueger and Assembly Ways and Means Committee Chair, Helene E. Weinstein for holding today's important budget hearing on Public Protection, and for accepting our written testimony on the issue of funding for family court, assigned counsel rates and the Indigent Parolee Representation Project.

If your committees have any questions about our testimony, please contact Leanne Lapp at leanne.lapp@ontariocountyny.gov.