



Testimony of the Office of Indigent Legal Services

Joint Legislative Hearing on the 2021-2022 Public Protection Budget

Presented before:

The Senate Finance Committee

and

The Assembly Committee on Ways and Means

Presented by:

William J. Leahy

Director

Office of Indigent Legal Services

February 10, 2021

On behalf of the New York State Office of Indigent Legal Services (ILS) and the ILS Board, I appreciate this opportunity to discuss ILS' FY 2021-22 budget request.

Our Appreciation for Your Support

Thank you for your consistent support of ILS and our Board throughout our ten years of existence. Because of the support of both the Legislative and Executive branches, substantial additional resources have been appropriated in recent years to help us fulfill our statutory responsibility to improve the quality of mandated public criminal defense representation throughout New York State. Since 2015, our responsibilities have increased significantly to include implementation of the historic settlement between the State of New York and the plaintiff class in *Hurrell-Harring et al. v. State of New York*¹ (HH). As a result, the five HH counties now have the staffing and resources needed to comply with the caseload standards, ensure defense counsel representation at all arraignments, and improve the overall quality of criminal defense representation.²

In 2017, the enactment of Executive Law § 832(4) authorized ILS to implement the HH reforms statewide. In the FY 2018-19, FY 2019-20, and FY 2020-21 Final Budgets, the Executive and the Legislature fully funded the first three years of the five-year phase-in of those statewide reforms. By 2019, ILS had reached agreement with each of the 52 non-HH counties and with New York City for contracts to extend the HH reforms statewide pursuant to Executive Law § 832(4). As a result of this funding:³

¹ 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 et al. v. State of New York*. With this settlement, the State of New York, for the first time since 1965 when it delegated to counties the duty to provide counsel to indigent persons charged with a crime, accepted its responsibility to implement and fund constitutionally compliant representation in the five counties named in the lawsuit. ILS, under the direction of its Board, accepted the responsibility and has since implemented the terms of the settlement, in which the State agreed to ensure that: 1) each person charged with a crime and unable to retain counsel is provided representation at their arraignment; 2) caseload/workload standards are developed by ILS and implemented in the five counties, thereby reducing the crushing caseloads previously carried by providers of public defense services; and 3) funding is provided to implement specific quality improvements to public defense services.

² Internal assessments of our settlement implementation progress in the five lawsuit counties may be found in two reports published last year: **Implementing Hurrell-Harring Caseload Relief: Building Lasting Infrastructures That Enable Quality Public Defense** and **Implementing Caseload Relief and Quality Improvement Initiatives in Assigned Counsel Programs: Lessons Learned from Settlement Implementation in the Hurrell-Harring Counties**. These and other reports and settlement highlights are available on our website at: <https://www.ils.ny.gov/content/hurrell-harring-settlement-and-implementation-information>.

³ The information comes from two reports about HH statewide implementation: 1) **Performance Measures Annual Report**, July 1, 2020 and 2) **Statewide Plan for Implementing Counsel at Arraignment: Year Two Report**, September 30, 2020. Both reports are available in the archives section of ILS' website at: <https://www.ils.ny.gov/>.

- 3 counties have created new Public Defender Offices (Clinton, Delaware, Hamilton).
- 288 new attorneys have been hired or placed on contract, and there has been a substantive increase in hours and responsibility for an additional 64 attorneys.
- 202 non-attorney positions have been hired or placed on contract, and there has been a substantive increase in hours and responsibility for an additional 29 non-attorney professionals.
- Between April 2019 and March 2020, 523 training events were fully or partially funded by HH statewide implementation.
- All counties in New York now have programs in place for either partial or full arraignment coverage, with nearly all having programs for full arraignment coverage.
- All counties have funding to create or bolster their Assigned Counsel Program (ACP) infrastructure to ensure that no client receives sub-par representation because of a conflict with the county's institutional provider.
- To further improve the quality of representation provided by ACPs, ILS has extended an effective HH settlement initiative – regular ACP Summits – to the entire state, hosting two Statewide ACP Summits in 2020 with a third scheduled in late February 2021.

At last year's Joint Legislative Public Protection Budget Hearing, I asked this Committee to support the FY 2020-21 Executive Budget proposal that allocated \$23.8 million in funding to implement the HH settlement reforms in the five defendant counties, as well as the \$150 million allocated for the third year of the five-year Statewide implementation plan. Through your efforts, the funding for the *Hurrell-Harring* settlement and its extension to the entire State was fully secured.

In Appendix A (attached) I summarize our FY 2021-22 Budget request and the relevant portions of the Executive's proposed FY 2021-22 Budget. Today, I will highlight the full funding in the Executive Budget for our implementation of the HH settlement reforms in the five lawsuit counties (\$23.8 million), and the full funding for year four of our statewide implementation of those reforms (\$200 million); and I will ask for your continued support of these initiatives. The primary focus of my remarks will address our urgent request for \$5 million in Aid to Localities funding to improve the quality of parental defense representation, which is equally mandated by our Constitution and our laws yet is not funded in the Executive Budget.

The Executive's Continued Commitment to Improving the Quality of Mandated Criminal Defense

I am pleased to tell you that in its FY 2021-22 Budget proposal, the Executive has again fully honored its commitment to improve the quality of legally mandated criminal defense

representation. Doing so amidst the fiscal crisis posed by the pandemic demonstrates the Governor’s unwavering commitment to fairness and justice for New Yorkers charged with a crime and unable to retain counsel. The Executive has fulfilled its commitment in three ways:

1) The *Hurrell-Harring* Settlement

The proposed Executive Budget dedicates \$23.8 million to implement in the five defendant counties the written plans submitted by my Office to: i) ensure that each individual charged with a crime is provided representation at his or her arraignment (\$2.8 million)⁴; ii) enhance the quality of representation in criminal cases (\$2 million)⁵; and iii) add staff and other resources necessary to comply with the caseload standards ILS issued in December 2016 (\$19 million). The \$23.8 million included in the Executive Budget proposal represents the full funding needed to implement the HH settlement.

I therefore ask for your full support of the FY 2020-22 Executive Budget as it pertains to funding the implementation of the HH settlement.

2) Statewide Expansion of the *Hurrell-Harring* Reforms

In addition to providing the funding needed to further implement the HH settlement, the FY 2018-19 Executive Budget proposal was historic because it provided first year funding of \$50 million to begin implementing the written plans ILS developed pursuant to Executive Law §832(4) to extend the HH settlement reforms statewide. We submitted those plans to the Division of Budget on December 1, 2017. They included interim steps for the counties and New York City to achieve full compliance by April 1, 2023. As previously noted, these reforms will extend the “groundbreaking advances in those five counties . . . to the rest of the state,” with the State funding “one hundred percent of the costs necessary to extend the reforms.”⁶ In doing so, “indigent criminal defendants [in every county will] have counsel at arraignment,” “new caseload standards [will be established] so that attorneys can devote sufficient attention to each case,” and the “quality of the representation provided to those who cannot afford an attorney [will] not vary from county to county.”

With your support, the first, second, and third years of funding were secured in the FY 2018-2019 Final Budget (\$50 million), FY 2019-20 Final Budget (\$100 million), and FY 2020-21 Final Budget (\$150 million). In its FY 2021-22 Budget proposal, the Executive has continued to fully honor this commitment by including an additional \$50 million to finance the implementation of the fourth year of the five-year Statewide Expansion of the HH reforms, for a

⁴ The \$2.8 million appropriation request combines the \$2 million request for counsel at arraignment and the \$800,000 request to continue funding for the four counties that participated in our first Counsel at First Appearance competitive grant.

⁵ Significantly, the terms of the settlement did not require that quality improvement funding be provided beyond FY 2016-17, but the Executive has very commendably requested this continued funding in each succeeding year.

⁶ See “New York State: Ever Upward, 2017 State of the State, Governor Andrew M. Cuomo,” pp. 186-187.

total funding amount of \$200 million which represents the entirety of our FY 2021-22 Aid to Localities Budget Request for statewide implementation. The additional \$50 million not only provides the funding needed to finance the fourth year of the Statewide expansion, but it allows us to remain on target for full implementation of the statewide reform plans by April 1, 2023 – when the total estimated annual cost to achieve compliance with our plans will be approximately \$250 million.

I therefore ask for your full support of the FY 2021-22 Executive Budget as it pertains to funding our statewide implementation of the HH reforms as set forth in Executive Law § 832(4).

3) ILS Staffing to Implement These Reforms

The FY 2015-16 Final Budget included the State Operations funding needed for ILS to hire an eight-person team to fulfill our obligation to implement the *Hurrell-Harring* settlement. Similarly, the FY 2018-19 Final Budget included the funding needed for ILS to hire an eight-person team to work with the State, counties, and New York City on implementing the HH settlement reforms statewide. Subsequent state budgets have continued the funding for these essential ILS staff positions. Another essential component of this ongoing reform is adequate staff for our Grants Unit, which processes all the contracts and claims through which ILS issues funding to counties and New York City. Thanks to your support and that of the Executive, the last three final state budgets have included the necessary additional staff for our Grants Unit.

Our proposed FY 2021-22 Budget includes the funding needed for one additional position (described in more detail in Appendix A). While the proposed FY 2021-22 Executive Budget does not fund this additional position, we are pleased that it does not cut funding from last year’s approved State Operations budget. Keeping ILS’ approved staffing pattern intact is critical to the ongoing successful implementation of the settlement and its expansion statewide. I therefore ask your full support of this component of the Executive Budget.

Unfinished Business: **State Investment in Improving the Quality of Mandated Parental Defense**

The simple fact is this: publicly funded representation of parents who are financially unable to retain counsel in Family Court cases is every bit as legally required as is public defense representation in our Criminal Courts. Yet there has been no comparable effort by the State to appropriate the funding or authorize the implementation plans that are necessary to bring the quality of parental representation to a consistent and constitutionally compliant level.

Many people have concluded that only litigation like *Hurrell-Harring* will spur action by the State. But litigation is a last resort. We urge legislative action on two fronts. *First*, act upon the reasonable and specific recommendations issued in February, 2019 by Chief Judge DiFiore’s Commission on Parental Legal Representation, chaired by former Presiding Justice Karen Peters, which offers a blueprint for comprehensive statewide reform. *Second*, approve our request for \$5 million in Aid to Localities that will provide immediate relief for overburdened county providers

of parental representation, will enable them to upgrade their client services, and will give them and their clients hope that their noble work to preserve families and communities will not continue to be neglected.

In previous budget years, ILS has requested additional Aid to Localities funding for mandated parental representation, but this funding has not been included in final budgets. This year, our Board has authorized me to once again ask for an additional \$5 million in Local Aid funding to improve the quality of mandated parental defense. This authorization came despite the fiscal crisis because this category of cases and clients, with family integrity and children's well-being at stake in every case, and with such enormous impact upon low-income communities and communities of color, has been neglected for far too long and must be addressed now.

Unfortunately, this request was not included in the proposed FY 2021-22 Executive Budget. We call upon the Governor and the Legislature to include mandated parental representation funding as an integral part of this year's FY 2021-22 Final Budget by now supporting \$5 million in Local Aid for disbursements to counties for improvements in mandated parental representation.

The Crisis in Parental Representation Must be Addressed Now, in This Budget

Both the 2018 *Memorandum in Support of State Funding for Mandated Parental Representation* issued by the NYSBA Committee on Families and the Law which was approved by the NYSBA House of Delegates, and the 2019 Interim Report by Chief Judge DiFiore's Commission on Parental Legal Representation, have conclusively stated the case that the representation of parents in Family Court cries out for support and guidance by the State. In these cases – where not only the established legal rights of parents but the integrity of families is often at stake – the poor parent far too often finds herself represented too late, by a lawyer who is overburdened by far too many cases, and who utterly lacks support resources.

The contrast between the State of New York's necessary and constitutionally compliant funding and guidance of comprehensive public criminal defense reforms under the *Hurrell-Harring* settlement (2015) and Executive Law § 832(4) (2017), and its total failure to support parental representation could not be more stark. Nor could the contrast between the resources that enable the provision of high quality holistic representation to parents in New York City, and the inadequacy of resources that abounds in the rest of the state.

Our request for \$5 million to begin reducing the crushing caseloads of parents' attorneys in the rest of the state, and providing their clients with essential resources like a social worker or a parent advocate, may strike some as too little. In a strictly long-term sense, it *is* too little. But parents and children live in the here and now. We simply cannot wait any longer. Our plan to provide immediate support to counties to improve the quality of their parental representation follows a tried and true model, which we used from 2012-2014 - before the HH settlement - to jump-start public criminal defense reform. It is a practical and effective way to begin, using a proven technique, and building upon a successful precedent. It will provide the foundation upon

which comprehensive parental representation reform will be built. Please read the memorandum from our FY 2021-22 Budget Request, **Improving Parental Representation in a Time of Fiscal Crisis**, attached as Appendix B.

NYSDA's Public Defense Backup Center.

Finally, as I do every year, I emphasize the critical importance of the New York State Defender Association's (NYSDA) Public Defense Backup Center receiving adequate funding. NYSDA's Backup Center provides three services that promote successful implementation of the HH settlement and its expansion statewide. First, NYSDA provides a Public Defense Case Management System (PDCMS), which is the case management system used most frequently by mandated providers throughout the state. Support of this PDCMS is critical to ILS obtaining the data needed to assess the pace and success of HH settlement and statewide implementation. Second, NYSDA hosts high-quality defense trainings and Continuing Legal Education (CLE) programs for defenders across the state. As specifically recognized by the HH settlement and Executive Law § 832(4), training is a key component of quality improvement. Since the onset of the pandemic, NYSDA has successfully pivoted to make these trainings available to defenders virtually. Third, NYSDA's Backup Center provides defenders with support, legal expertise, and written materials. Public defense providers all over the state of New York depend upon the immediate and accurate legal advice they receive from NYSDA staff, every day. This support is indispensable to maintaining the quality of representation provided to clients who cannot afford to hire counsel. Simply stated, NYSDA is essential to New York's fulfillment of its Constitutional obligation to provide competent counsel to those who cannot afford to pay for it.

APPENDIX A

FY 2021-22 ILS Budget Request and the FY 2021-22 Proposed Executive Budget

Below is a summary of ILS's requested FY 2021-22 Budget and the proposed FY 2021-22 Executive Budget as it applies to ILS.

FY 2021-22 ILS Budget Request.

At its September 25, 2020 meeting, the Indigent Legal Services Board unanimously approved our budget request of \$316.33 million for FY 2021-22. Of this amount, \$309.81 million would be devoted to Aid to Localities and \$6.5 million to State Operations.

- **Local Aid.** The \$309.81 million in Local Aid represents an increase of \$55.0 million over FY 2020-21 funding levels, with proposed increases consisting of the following:
 - **Statewide Expansion of Hurrell-Harring Reforms.** \$50 million of the additional Local Aid funding request would be used to finance the fourth year of the five-year implementation of the written plans developed by our Office pursuant to Executive Law § 832(4) and filed with the Division of Budget on December 1, 2017. These plans to extend the reforms of the *Hurrell-Harring* settlement statewide would ensure that, by April 1, 2023, i) each indigent person charged with a crime in New York State is provided representation at his or her arraignment, ii) caseload/workload standards are fully implemented in the non-Hurrell-Harring counties and the City of New York in accordance with the caseload standards the Office issued in December, 2016 and iii) adequate funding is provided to implement specific support services and quality improvements to public defense representation.
 - **Support Centers.** \$2.5 million of this Local Aid appropriation would be used to establish two Support Centers, which are essential for the realization of uniform, high quality representation in every county and region. The first Center, which has been approved by the Division of Budget but not yet implemented because of the state hiring freeze, will be located in Western New York in the 8th Judicial District. The second is a Statewide Appellate Support Center, to be based in Albany. This Center is a cost-effective yet powerful way to advance the quality of appellate and post-conviction public criminal defense representation statewide as well as providing effective litigation support to defenders statewide.⁷

⁷ Our written plans submitted on December 1, 2017 to extend the *Hurrell-Harring* reforms statewide included funding for the establishment of a statewide network of eight Regional Support Centers. The FY 2018-19 Final Local Aid Budget included language to authorize the transfer of Local Aid funding to State Operations, which is needed to establish these Centers. The Executive's FY 2021-22 Proposed Budget continues to include this language.

- **Parental Representation.** \$5 million of the additional Local Aid funding request would be used to improve the quality of mandated parental representation in Family Court, by replicating ILS’s low-cost, high-impact, pre-*Hurrell-Harring* offering of targeted funding to county providers for the purposes of reducing caseloads and accessing appropriate support services such as investigators, social workers, and parent advocates.

- **State Operations.** The \$6.5 million request in State Operations funding represents a slight increase of \$63,288 over FY 2020-21 funding levels, eliminating one previously funded but unfilled staff position and adding these two new positions:
 - *Family Court Research Specialist.* This position would work with providers on collecting and analyzing parental representation data and conducting much needed qualitative and quantitative research about the quality of parental representation. This research capacity would also be instrumental in implementation of the ILS standards for determining financial eligibility for assignment of counsel in Family Court matters⁸ and well as assessing caseloads towards development and implementation of Family Court workload standards.
 - *Assistant Manager of Information Services.* At present, the technology needs of our Office are handled solely by one person, the Manager of Information Services. While this arrangement worked in the early years when ILS was small, it is no longer feasible for one person, however talented, to handle all of responsibilities attendant to an expanding Office with many new, complicated technology needs.

FY 2021-22 Executive Budget Proposal

The FY 2021-22 Executive Budget proposal, released on January 19, 2021, recommends funding for the Office in the amount of

- \$6.46 million in State Operations (no change from FY 2020-21 Final Budget)
- \$304.81 million in Aid to Localities (\$50 million over FY 2020-21 Final Budget of \$254.81 million)
- All Funds total of \$ 311.27 million (\$50 million increase over FY 2020-21 Final Budget of \$261.27 million).

⁸ At its September 25, 2020 meeting, the ILS Board approved ILS’ revised Standards for Determining Financial Eligibility. These revised standards build upon the criminal court eligibility standards ILS issued in 2016 to be applicable to both Family Court and criminal court representation.

The Executive Budget proposed increase is as follows:

- **Local Aid.** The additional Local Aid funding (\$50 million) provides full funding for the fourth year of the five-year implementation of the written plans developed by the Office to extend the *Hurrell-Harring* reforms statewide. With this additional funding of \$50 million, a total of \$200 million would be appropriated in FY 2021-22 to finance the implementation of the fourth year of the five-year plans.⁹
 - The Executive’s FY 2020-21 Local Aid budget includes language allowing for the transfer funding to State Operations, which is necessary for our Support Centers.
 - The Executive Budget does not include our request for an additional \$5 million to enhance the quality of parental representation.

⁹ In addition, the Aid to Localities language continued the language added in FY 2019-20 Final Budget of an annual reporting requirement for the statewide expansion of the HH reforms.

APPENDIX B



Andrew M. Cuomo
Governor

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Improving the Quality of Mandated Representation Throughout the State of New York

To: Indigent Legal Services Board

From: Bill Leahy

Re: Improving Parental Representation in a Time of Fiscal Crisis

Date: September 21, 2020

We currently face two realities, as the coronavirus pandemic has created a very serious fiscal crisis in New York and the nation. The first reality is that the State has extremely limited fiscal ability to sustain existing programs, much less fund new initiatives, however worthy. The second reality is that legally mandated parental representation in New York is seriously in need of comprehensive and expensive reform, as conclusively demonstrated by the Commission on Parental Legal Representation's Interim Report to Chief Judge DiFiore in February, 2019.

Neither of these realities may be ignored. We must move forward with parental representation reform energetically, creatively and persistently, while recognizing the grim fiscal atmosphere in which we operate. Our approach has been to proceed on multiple fronts, pushing reform where it is achievable and affordable. Thus, we are:

- Working with Legal Services of Hudson Valley and Westchester County to assure the success of our first Upstate Model Family Representation Office.
- Preparing an RFP for a second Upstate Model Family Representation Office, using previously appropriated funds.
- Requesting, for FY 2021-22, an Aid to Localities appropriation of \$5 million for the improvement of parental representation, and a modest State Operations appropriation to hire a dedicated Family Court Research Specialist.
- Negotiating with the State Office of Children and Family Services (OCFS) to gain access to federal funds for the improvement of parental representation in Child Welfare cases.
- Finalizing, for the Board's consideration at its December 2020 meeting, Eligibility Standards for Family Court that will assure timely access to counsel for parents, as recommended by the Commission on Parental Legal Representation.
- Presenting Family Court Workload/Caseload Standards to the Board, contingent upon the provision of state funding sufficient to permit compliance with the new Standards.
- Coordinating with logistical partners to provide, free of charge, the Families Matter CLE programming online for the family defense community. The first in the series will be *Interrupting Bias; Creating Curiosity for Stronger Family Defense Practice*, presented by Pooja Kothari, Esq., founder of [Boundless Awareness, LLC](http://BoundlessAwareness.com).