

Testimony of the Office of Indigent Legal Services

Joint Legislative Hearing on the 2017-2018 Public Protection Budget

Presented before:

The Senate Finance Committee

and

The Assembly Committee on Ways and Means

Presented by:

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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 2017-18 budget request of the Office of Indigent Legal Services and Board.

Past support. As I do every year, I begin by thanking you for your past support of the Office and Board. Thanks to your support, additional resources were made available in the FY 2016-17 Final Budget to continue our progress toward fulfilling both our statutory responsibility to improve the quality of mandated representation throughout New York State and the responsibility we undertook to implement the terms of the historic settlement between the State of New York and plaintiff class represented by the New York Civil Liberties Union in *Hurrell-Harring et al. v. State of New York*.¹ For this my Board and I thank you.

Last year, I asked this Committee to support the FY 2016-17 Executive Budget proposal which dedicated \$16.4 million in funding for the *Hurrell-Harring* settlement counties 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 necessary resources in the five settlement counties to reduce average weighted caseloads in criminal cases so that these counties could achieve compliance with national caseload standards (\$10.4 million); and (3) ensure that the funding currently received by the four settlement counties participating in our first Counsel at First Appearance competitive grant would be guaranteed in light of the release of our second Counsel at First Appearance competitive grant (\$800,000). Through your efforts, not only were all of these funding initiatives secured, but you also provided increased funding for Office operations to further

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*, in which the State of New York, for the first time since 1965, when it delegated its duty to provide counsel to indigent persons charged with a crime to counties, accepted its responsibility to implement and fund constitutionally compliant representation in the five counties named in the lawsuit. My Office, under the direction of my Board, accepted the responsibility and has been engaged in the implementation of the terms of the settlement since that approval, 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) funding is provided that is dedicated to implementing specific quality improvements to representation provided in the counties. 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. Those criteria and guidelines were released on April 4, 2016; however, the settlement does not attach any direct funding for implementation of these guidelines.

support the eight-person *Hurrell-Harring* settlement implementation unit that was created in the FY 2015-16 Final Budget (\$200,000).

***Hurrell-Harring* Settlement.** I am very pleased that in its FY 2017-18 Budget proposal, the Executive has again fully honored its settlement obligations, by dedicating \$23.8 million 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 (\$2.8 million)² and (b) enhance the quality of representation in criminal cases in the five counties (\$2 million); and (2) add staff and other resources necessary to reduce average weighted caseloads in criminal cases to ensure that the caseload standards determined by ILS are implemented and adhered to by the providers in the five settlement counties (\$19.0 million). This figure of \$23.8 million represents an increase of \$8.6 million over FY 2016-17 funding levels for the *Hurrell-Harring* settlement; and it fully funds the caseload limits established by this office in December, 2016. I therefore ask for your full support of the FY 2017-18 Executive Budget as it pertains to funding the implementation of the *Hurrell-Harring* settlement.

Extension of Reforms Statewide. In addition to providing the funding needed to further implement the *Hurrell-Harring* settlement, the FY 2017-18 Executive Budget proposal is historic, because it begins the process of extending 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.”³ 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.”⁴

Under the Executive proposal, my Office will develop written plans to implement the reforms contained in the settlement, with the plans to be completed by December 1, 2017 and with the specific purpose of extending the *Hurrell-Harring* reforms statewide, at state expense. These plans would also include interim steps for counties and New York City to achieve full compliance by April 1, 2023. My Office willingly accepts the responsibility to develop these plans. I draw your attention to one new provision in the Executive proposal that was not a part of the *Hurrell-Harring* settlement. That is the requirement in the Executive proposal that the plans developed by my Office in consultation with our Board would be subject to approval by the Director of the Division of the Budget. I will discuss that provision in my remarks to you today.

² The \$2.8 million appropriation ensures that the four settlement counties participating in our first Counsel at First Appearance competitive grant will continue receiving the same level of funding they received under that grant without having to apply for continued funding under the second Counsel at First Appearance RFP (released on January 6th of this year).

³ See “New York State: Ever Upward, 2017 State of the State, Governor Andrew M. Cuomo,” pp. 186-187.

⁴ *Ibid*, p. 186

FY 2017-18 ILS Budget Request.

In September, 2016, the Indigent Legal Services Board unanimously approved an ILS budget request of \$139.6 million for FY 2017-18.⁵ Of this amount, \$133.2 million would be devoted to Aid to Localities and \$6.4 million to State Operations.

- **Local Aid.** The \$133.2 million in Local Aid represents an increase of \$37.0 million over FY 2016-17 funding levels, which increases would consist of the following:
 - **Upstate Quality Improvement and Caseload Reduction.** The majority of the Local Aid funding request, \$19 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 \$19 million funding in FY 2017-18 would be the first installment of a five-year funding plan, which would increase Local Aid funding by approximately \$19-20 million/year, or \$98.8 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 – 2015*, in which we estimate that in 2015 it would have cost an additional \$98.8 million to bring upstate indigent legal services providers into compliance with maximum national caseload standards.⁶
 - **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 have been participating in our first Counsel at First Appearance Grant, and for the many counties we anticipate receiving awards under our second Counsel at First Appearance Grant, which we released on

⁵ The ILS Budget Request was approved by the ILS Board at its September 23, 2016 meeting to ensure that it would be timely submitted to the Division of Budget in October for the FY 2017-18 Executive Budget process. Because this submission was made prior to our determination of caseload standards under the terms of the *Hurrell-Harring* settlement in December, 2016, funding sought in this Budget Request for the reduction of caseloads in the five counties and statewide should be adjusted as needed to continue our caseload reduction progress, pending the statewide extension of the *Hurrell-Harring* settlement reforms.

⁶ This amount is comparable to the \$99.1 million that would have been needed to bring upstate counties into compliance with caseload limits in 2014, according to the report we issued in the fall of 2015, *Estimate of the Cost of Compliance with Maximum National Caseload Limits in Upstate New York – 2014 Update*. Notably, this amount represents an 11.2% 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 561 in 2015) is primarily attributable to an increase in staffing levels in upstate institutional provider offices, much of which is attributable to the competitive grants and noncompetitive distribution funding of the Office of Indigent Legal Services.

January 6, 2017. While we are able to offer additional funding with the second Counsel at First Appearance Grant, the amount available is far less than is needed for upstate counties to provide this vitally important, constitutionally guaranteed representation. The request of \$8 million would represent an additional step towards establishing the minimum conditions needed for ensuring constitutionally required counsel at first appearance in upstate counties.

We are very grateful to this Legislature for passing, and to Governor Cuomo for signing Chapter 492 of the Laws of 2016, the Off-Hours Arraignment Parts law. This law will facilitate our implementation of counsel at arraignment in the counties in compliance with the law and the Constitution. We express particular gratitude to the sponsors, Assemblyman Lentol and Senator Bonacic, for their leadership on this critical issue.

- **Hurrell-Harring Settlement.** \$1 million of the Local Aid funding request would be used for additional costs to supplement the final plan developed 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 a Model Upstate Parental Representation Office; and (3) create two Wrongful Conviction Prevention Centers.
- **Compliance with ILS Eligibility Criteria and Procedures.** \$6 million of the increased Local Aid funding request would be used to reimburse counties for additional cases and costs that they may incur during FY 2017-18 as a result of judges following the guidance provided by the Office in its *Criteria and Procedures for Determining Assigned Counsel Eligibility*, which were issued pursuant to our responsibility to implement the terms of the *Hurrell-Harring* settlement.
- **State Operations.** The \$6.4 million in State Operations funding represents an increase of \$3.2 million over FY 2016-17 funding levels, which would consist of the following:
 - **New Staff and Retention.** \$400,000 to assure the continued effective operation of our office as it assumes steadily increasing responsibilities. It would fund three new administrative positions (\$300,000); an assistant grants manager, an administrative officer, and a secretary. In addition, it would fund much needed and hard-earned salary relief for eight employees who have served my Office with

great distinction for at least four years and are ineligible for the regular salary increases associated with civil service positions (\$100,000).

- **Regional Support Centers.** \$2 million 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 begin establishing 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 2017-18 Executive Budget Proposal

The Executive Budget released on January 17, 2016 proposes funding of (1) \$0 in State Operations and (2) \$109.6 million in Aid to Localities, or All Funds of \$109.6 million. Overall, this represents an increase of \$10.2 million over the amount appropriated in the FY 2016-17 Final Budget. The additional \$10.2 million is primarily devoted to implementation of the *Hurrell-Harring* settlement.

- **State Operations.** The Executive proposal does not contain a State Operations appropriation for the Office of Indigent Legal Services.⁷ The Aid to Localities proposal, however, contains language that “funds may be transferred to state operations,” without specifying an amount. I will address this matter in my testimony.
- **Local Aid.** The \$109.6 million in Local Aid represents an increase of \$13.4 million over FY 2016-17 funding levels,⁸ with the total funding appropriated as follows:

⁷ The FY 2017-18 Executive State Operations Budget proposal would re-appropriate a \$500,000 contractual line in the FY 2015-16 Final Budget that allowed us to issue 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. The Rand Corporation was awarded the contract to conduct the caseloads standards study and completed that study in November of 2016.

⁸ The FY 2017-18 Executive Budget proposal would also continue funding a total of \$15.2 million appropriated in FY 2016-17 to (1) implement the 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 (\$2.8 million); (2) continue implementation of the plan developed by the Office to enhance quality of mandated representation in criminal cases for each of five settlement counties (\$2 million); and (3) continue providing interim relief for the five settlement counties.

- **ILS Funding for Localities and Office Operations.** Of the \$109.6 million Local Aid appropriation, \$85.8 million would be dedicated to support ILS funding to localities and Office operations. The proposal does not contain a break-out of specific funding amounts.⁹
- **Hurrell-Harring Settlement.** Of the \$109.6 million Local Aid appropriation, \$23.8 million would be dedicated to implementation of the Hurrell-Harring settlement, as follows:
 - \$19.0 million for the five settlement counties to add staff and other resources needed to comply with caseload/workload standards determined by ILS.
 - \$2.0 million to further implement the written plan developed by ILS to improve the quality of indigent defense in the five settlement counties; and
 - \$2.8 million to further implement the written plan developed by ILS to provide in person representation of eligible defendants at all arraignments in the five settlement counties.

Sixth year operations of the Office and the Board.

During its first six years of operations, the Board has approved the development of seven *non-competitive* distributions – in amounts sufficient to restore every county and New York City to the level of funding they received in 2010.¹⁰

The Board has also approved the development of seven *competitive* grants, each targeted to improve the quality of mandated representation under county law 18-B by using dedicated 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 non-competitive distributions.

Significantly, these initiatives - the non-competitive distributions and competitive grants - do not impose any unfunded mandates on the counties. Counties are not asked to perform any

⁹ If the \$85.8 million Aid to Localities appropriation is meant to provide level funding of \$81 million for the counties, \$4.8 million would be available to transfer to state operations. This \$4.8 million would be sufficient to continue office operations at their current level, and to fund the new unit we have proposed for the planning and implementation of the statewide *Hurrell-Harring* settlement reforms.

¹⁰ 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, 2017.

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.

As indicated above, we have also been working very hard to implement the terms of the *Hurrell-Harring* Settlement Agreement in the five counties to which it applies. We are as proud of the quality of work done by our Implementation Unit as we are of the statewide progress accomplished by our small pre-existing staff, working with limited resources. Finally, I would note our establishment in 2016 of six Regional Immigration Assistance Centers serving providers of mandated representation throughout New York. These Centers make New York the first state to establish a statewide network of offices to assist attorneys in complying with their obligation to provide appropriate advice to their clients concerning the immigration consequences of conviction, as required by the United States Constitution.

Collaboration between County Officials and Providers

For each of our non-competitive distributions and competitive grants, we have required, as a condition of receiving funding, that counties consult with their indigent legal services providers in the preparation of their proposals. In this sixth year of operations, we are once again pleased to report that the level of collaboration between 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.

Unfinished Business

The representation of parents in Family Court and, to a much lesser extent, Surrogate's Court, is a vital component of legally mandated representation under County Law article 18-B. This representation is every bit as mandated by law as is criminal defense; yet, because it was not included in the *Hurrell-Harring* lawsuit, it was not included in the Settlement Agreement whose provisions the Executive budget proposal would extend throughout the State. This category of cases and clients, with family integrity and children's well-being at stake in every case, must not continue to be neglected. We call upon the Governor and the Legislature to include parental representation as an integral part of the planned statewide reforms.

Public Defense Backup Center.

Finally, I 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 indigent legal service providers throughout the state. The Office of Indigent Legal Services cannot succeed in our mission to improve the quality of representation under County Law article 18-B without a robust Public Defense Backup Center. 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.