



New York State Office of
Indigent Legal Services

Testimony of the Office of Indigent Legal Services

Joint Public Hearing on New York State Family Court

Presented before:

**The Senate Standing Committee on Judiciary
and
The Senate Standing Committee on Children & Families**

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November 1, 2023**

A Proposal to Address the Urgent Need for State Investment in New York’s Long Neglected System of Constitutionally Mandated Representation of Parents in Family Court

New York’s County-Based System for the Constitutionally Mandated Representation of Parents in Family Court Matters is in Crisis

In its 1972 decision, *Matter of Ella B*,¹ the New York Court of Appeals held that low-income parents facing the loss of their child in a Family Court matter are entitled to assigned counsel. In so holding, the Court emphasized that a “parent’s concern for the liberty of the child, as well as for their care and controls involves too fundamental an interest to be relinquished to the State without ... assigned counsel if the parent lacks the means to retain a lawyer.”²

Three years later New York sought to codify the right to assigned counsel for parents in Family Court matters by amending County Law Article 18-B to include this right. County Law Article 18-B had originally been enacted in 1965 to codify *Gideon v. Wainwright*, which established the constitutional right to assigned counsel in criminal matters. Under *Gideon* and *Ella B*, the State has the ultimate responsibility of effectuating the constitutional right to assigned counsel,³ yet in enacting County Law Article 18-B, the State delegated the fiscal and administrative responsibilities for these vitally important rights to counties and New York City. In 2006, a report issued by the Commission on the Future of Indigent Legal Services (“Kaye Commission”) found that this delegation of fiscal and administrative responsibilities resulted in a crisis in the delivery of constitutionally mandated criminal defense services throughout New York. As the Kaye Commission explained: “New York’s experience since 1965 has demonstrated that a system of minimal state funding with primary responsibility at the county level does not work.”⁴ The Kaye Commission recommended that “New York ... join the majority of states that fund 100 percent of all costs of their indigent defense system.”⁵

Though the Kaye Commission’s investigation was limited to legally mandated representation in criminal cases, it acknowledged that its findings were just as applicable to legally mandated representation in Family Court matters.⁶ Not surprisingly, in 2019 the Unified Court System’s Commission on Parental Legal Representation (“Parent Representation Commission”)—convened to investigate the quality of representation provided to parents in Family Court matters—similarly found that the State has failed its constitutional and statutory mandate. The Parent Representation Commission concluded that “a complete transformation is urgently needed

¹ 30 N.Y.2d 352 (1972)

² *Id.* at 356. The United States Supreme Court has also emphasized that parents’ interest in their children is a fundamental right and liberty interest. See, e.g., *Troxel v. Granville*, 530 U.S. 57 (2000).

³ See American Bar Association, *Ten Principles for a Public Defense Delivery System*, Principle #2.

⁴ Commission on the Future of Indigent Defense Services, *Final Report to the Chief Judge of the State of New York*, 2006, at page 32.

⁵ *Id.*

⁶ Specifically, the Kaye Commission noted that “[t]hrough the Commission was not charged with studying Family Court mandated representation, the criminal defense programs studied ... were, in many instances, inseparable from the programs providing Family Court representation.” Commission on Parental Legal Representation, *Interim Report to Chief Judge DiFiore*, February 2019, at 20, n. 33.

in New York’s publicly funded system of parental representation in child welfare matters.... The systemic problems in our underfunded, county-based system are well-documented, as are the harmful effects of inadequate representation on families and Family Court.”⁷ Mirroring the Kaye Commission’s recommendations, the Parent Representation Commission recommended that “the State pay for all costs associated with parental representation in child welfare proceedings, to ensure quality representation and eliminate disparities among localities.”⁸

The Crisis in the Quality of Representation of Parents in Family Court Matters Contributes to Racial Disparities and Needless Removal of Children From Their Homes

As research shows, because race is a defining feature of the child welfare system, the crisis in parent representation has an outsized and unfair impact on Black and brown families. Racial bias impacts every stage of the system, from reporting, to foster care placements, to termination of parental rights.⁹ The reasons for this sharp disproportionality include limited access to services and implicit biases of child welfare professionals.¹⁰ Often our child welfare system focuses on the harmful effects of poverty and casts blame on vulnerable families, mostly Black and brown, for their vulnerability, rather than providing needed support and services.¹¹

Ensuring that parents have quality legal representation is a necessary anecdote to this unfair treatment of Black and brown families and the misdirected punitive focus on families in poverty. When attorneys have access to resources, such as social workers and parent advocates, they can make an individualized assessment of their clients’ needs, connect their clients to needed supports, and assist their clients in following-through with these supports. When attorneys have the time needed to learn of their clients’ personal circumstances and life histories, they are better positioned to help decision-makers—child protection agencies and courts—honor their clients’ innate humanity and dignity to overcome implicit bias. Put differently, with sufficient time and resources, parent attorneys can counter the “bad parent” narrative with the more complete narrative of parents who love their children and need support to overcome the particular challenges they face, such as poverty, a history of trauma, systemic racism, or mental health issues.

⁷ Commission on Parental Legal Representation, *Interim Report to Chief Judge DiFiore*, February 2019, at 6.

⁸ *Id.* at 9.

⁹ There is a plethora of research showing the disparate impact the child welfare system has on Black and brown families, including for example the following two publications which summarize some of the research: Detlaff, A.J., & Boyd, R., *Racial Disproportionality and Disparities in the Child Welfare System: Why Do They Exist, and What Can Be Done to Address Them?*, *The ANNALS of the American Academy of Political and Social Science*, 692 (1), 253-274 (2020); Jude Mary Cenat, Sara-Emilie McIntree, Joana N. Mukunzi, Pari-Gole Noorishad, *Overrepresentation of Black Children in the Child Welfare System: A Systematic Review to Understand and Better Act*, *Children and Youth Services Review*, Volume 120 (2021).

¹⁰ Perhaps the most compelling evidence of the race-based nature of the child welfare system is a recent internal audit of New York City’s child welfare agency, ACS, in which ACS workers “described a ‘predatory system that specifically targets Black and brown parents’ and subjects them to ‘a different level of scrutiny.’” Andy Newman, *Is N.Y.’s Child Welfare System Racist? Some of its Own Workers Say Yes*, *New York Times* (Nov. 22, 2022).

¹¹ “It’s Time to Stop Confusing Poverty with Neglect,” *The Imprint, Youth & Family News*, January 17, 2020. <https://imprintnews.org/child-welfare-2/time-for-child-welfare-system-to-stop-confusing-poverty-with-neglect/40222>

Research shows the value of quality representation in keeping families intact. Where parents are provided timely access to quality representation in child welfare matters, the number of times children are removed from their home and their lengths of stay in foster care decline significantly, saving State resources and reducing trauma to children.¹²

Increased State funding for quality parent representation is both a family integrity imperative and a racial justice imperative.

The Ongoing Failure to Address the Parent Representation Crisis Renders the State Vulnerable to Litigation

The 2006 Kaye Commission Report led directly to the 2007 *Hurrell-Harring v. State of New York* class action lawsuit, which ultimately settled in 2014 with the State agreeing to pay the costs of caseload relief and quality improvement for mandated criminal defense representation (“HH settlement”). ILS accepted the responsibility of implementing the HH settlement, including the responsibility of developing caseload standards—which are foundational to quality representation—and determining the State funding that would be needed to implement these standards. When fully funded, the State funds the settlement at \$23.8 million per year. In 2017, legislation was enacted to extend the HH settlement initiatives to the entire state, and by FY 2022-23, the State is fully funding this initiative at \$250 million per year. Today, the State’s total fiscal commitment targeted to improving the quality of mandated criminal defense is \$273.8 million per year.

Despite the compelling nature of the Parent Representation Commission’s findings and the urgency of its recommendations, the State has not meaningfully funded its legal responsibility to provide counsel to parents in Family Court matters. Rather, as of FY 2023-24, the State has committed only \$14.5 million in funding for improved quality parental representation. This is just 5% of State funding to improve mandated representation.

The crisis in the quality of legally mandated parent representation remains unaddressed, and unless the State takes immediate action, another class-action lawsuit against the State is inevitable.

ILS’ Proposal To Address the Crisis in Parent Representation

ILS proposes that the State fund caseload standard compliance for legally mandated parent representation just as it has for legally mandated criminal defense. The funding should come from the Indigent Legal Services Fund (“ILS Fund”), established pursuant to State Finance Law § 98-b to assist counties and New York City in funding and improving the quality of representation provided under County Law Article 18-B. To date, the ILS Fund has been utilized primarily for improved quality mandated criminal defense. It is past time to utilize the ILS Fund for its full intended purpose—mandated criminal defense *and* mandated parent representation.

As part of our statutory mission to improve the quality of mandated parent representation, in 2021 ILS partnered with Welfare Research Institute on a workload study to determine caseload

¹² See Commission on Parental Legal Representation, at 21.

standards for parent representation.¹³ At its June 2021 meeting, the ILS Board approved these standards, entitled *Caseload Standards for Parents' Attorneys in NYS Family Court Mandated Representation Cases*, contingent upon the State funding needed to implement them. More recently, ILS surveyed parent representation providers across the State to obtain the caseload, staffing, and expenditure information needed to determine how much it would cost to bring these providers into compliance with ILS caseload standards. After a thorough analysis of the data collected, ILS has determined that at a minimum it would cost the State \$150 million. Like the statewide implementation of the HH settlement, ILS proposes that the funding for implementation be phased-in, though we suggest a three-year rather than a five-year phase-in. For FY 2024-25, ILS proposes that \$50 million be included in the ILS Aid to Localities budget for improved quality parent representation.

As with the funding for statewide expansion of the HH settlement, ILS would disburse this funding to each county and New York City based on an assessment of the funding needed to comply with ILS caseload standards, using the data ILS obtained in its recent survey and any updated data available. ILS would then work with each county and New York City and their providers of mandated parent representation to develop specific plans for effectively using this funding, which would then be converted to a contract issued to the county and New York City. Having taken similar steps for expansion of the HH settlement, ILS is well-positioned to take advantage of lessons learned and to identify strategies for expediting plan development and issuing contracts.

Fiscal Impact of the Proposal

This proposal would require \$50 million in ILS' Aid to Localities budget for FY 2024-25, \$100 million for FY 2025-26, and \$150 million for FY 2026-27 and subsequent budget years. The funding need not come from the General Fund but should instead come from the ILS Fund.

This State investment of funding would have a meaningful impact on keeping families intact and beginning to address the outsized impact that the child welfare system has on Black and brown families. This investment would also fend off the lingering threat of a costly class-action lawsuit against the State challenging New York's long-neglected system of parent representation.

¹³ ILS is grateful to the Unified Court System, which provided funding for this partnership with the Welfare Research Institute.