



New York State Office of
Indigent Legal Services

Testimony of the Office of Indigent Legal Services

Joint Legislative Hearing on the FY 2023-24 Public Protection Budget

Presented before:

The Senate Finance Committee

and

The Assembly Committee on Ways and Means

**Presented by:
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Office of Indigent Legal Services
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On behalf of the New York State Office of Indigent Legal Services (ILS) and the ILS Board, thank you for this opportunity to discuss ILS' FY 2023-24 budget request. Thank you also for your consistent support of our Office and Board throughout our 12 years of existence. Because of the support of both the Legislative and Executive branches, substantial resources have been appropriated in recent years to help ILS fulfill one part of our statutory mission: improving the quality of mandated public criminal defense representation throughout New York State, including the ongoing work of implementing the historic settlement in *Hurrell-Harring et al. v. State of New York*¹ (HH settlement) and its expansion statewide (HH statewide).

This year, ILS would like to emphasize three important points to the Legislature as you deliberate on the FY 2023-24 budget:

- 1) The **State investment is having a demonstrable impact** in improving the quality of mandated criminal representation through HH settlement implementation and its expansion statewide.
- 2) But **sustained progress is jeopardized unless the State funds an increase of the assigned counsel rates**. While we are appreciative that the proposed Executive budget accomplishes one part of this imperative—increasing the rates—it is vital that the counties and New York City not be burdened with the cost of this increase.
- 3) The **quality of representation provided to parents in Family Court matters is in crisis**. There is a dire need for a meaningful State investment in improved quality Family Court representation, which is just as constitutionally and statutorily mandated as mandated criminal defense.

Attachment A summarizes ILS' FY 2023-24 budget request and the relevant portions of Governor Hochul's FY 2023-24 Executive budget proposal. Below are key summary points:

- *HH settlement*: The Executive has continued its commitment to fund ongoing implementation of the HH settlement reforms in the five lawsuit counties by including \$23.8 million in the ILS Aid to Localities budget for the HH settlement program, which is the same as the FY 2022-23 budget. This amount does not include the State funding needed for increased assigned counsel rates in the five HH

¹ On March 11, 2015, the Albany County Supreme Court approved the 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) all people charged with a crime and unable to retain counsel are 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.

counties—an imperative for successful settlement implementation and the subject of a legal enforcement action the HH settlement plaintiffs recently filed in Albany County Supreme Court.

- *HH statewide:* The Executive has funded the ongoing implementation of the HH settlement reforms statewide by including \$250 million in the ILS Aid to Localities budget for the HH statewide program. As is the case with the HH settlement, the sustained success of the HH statewide initiative is in jeopardy unless the assigned counsel rates are increased, and the State funds the increase.
- *Family Court representation:* The Executive included \$4.5 million in the ILS Aid to Localities budget to improve the quality of mandated representation of parents in Family Court matters (Family Court representation). This funding honors and continues the \$4.5 million that the Legislature included in last year’s enacted budget for this purpose. But it is \$23.5 million less than the \$28 million we are seeking for this program and a fraction of what is needed to meaningfully reform the quality of Family Court representation.
- *State Operations:* The Executive left ILS’ State Operations budget functionally flat, which means we will not be able to add the three requested new positions needed to continue our statutory mission of improving the quality of mandated representation—criminal and Family Court—under County Law Article 18-B.

Demonstrated Progress:
Improving the Quality of Mandated Criminal Defense

We are encouraged that the Executive has continued its commitment to improving the quality of constitutionally and statutorily mandated criminal defense by funding the HH settlement and its statewide implementation at last year’s level. Attachment B is an overview of the progress to date of statewide expansion of the HH settlement. Highlights of this progress include the following:

- 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.
- 624 new attorneys have been hired, placed on contract, or had their hours substantially increased.

- 362 non-attorney professionals have been hired, placed on contract, or had their hours substantially increased.
- The average weighted criminal caseload per attorney statewide, which is a measure of progress for institutional providers (public defender offices and Legal Aid Societies), has consistently decreased since 2017. Fewer weighted cases means that attorneys have more time for quality representation.
- In 2021, the average assigned counsel program spending per weighted criminal case statewide, which is a measure of progress for assigned counsel programs, increased more than \$100 over 2020. This increased spending reflects more quality time and resources spent on cases.
- New Public Defender Offices have been created in three counties (Clinton, Delaware, and Hamilton), a fourth county (Oswego) is in the process of doing so, and one county (Essex) has created a Conflict Defender Office.

This progress was achieved even though implementation has occurred amid the Covid-19 pandemic, the worst public health crisis in over a century. This ongoing progress would not be possible without continued State fiscal support. But progress will stall if the problems below are not addressed.

Sustained Progress in Jeopardy:
The Imperative for the State to Fund Increased Assigned Counsel Rates

ILS has consistently noted that increasing the assigned counsel rate is an imperative to achieve the interrelated goals of improved quality representation and reduced attorney caseloads. Currently, assigned counsel attorneys in New York are paid less than half that of their counterparts in the federal system—a clearly unfair and untenable situation. The stagnant, insufficient rate has produced a crisis in ACPs throughout the state, with people entitled to assigned counsel facing delays in representation, judges struggling to find attorneys willing to take additional cases, and overwhelming caseloads for those attorneys who do accept new cases.

Given the crisis, it is not surprising that the failure to raise the assigned counsel rates has resulted in three recent lawsuits against the State:

- *New York County Lawyers Association v. The State of New York, et al*, (Index No. 156916/2021) (“2021 NYCLA lawsuit”) a class action lawsuit in New York City
- *New York State Bar Association v. The State of New York* (Index No. 160191/2022) (“NYSBA lawsuit”) which replicates the NYCLA lawsuit for counties outside of New York City

- *The Plaintiff Class Certified in Hurrell-Harring et al. v. State of New York et al, v. The State of New York and Governor Kathleen Hochul* (Index No. 9090435-22) (“*Hurrell-Harring* enforcement action”)

While we appreciate that the Executive budget includes a proposal to increase the hourly rate paid to assigned counsel attorneys, the proposal suffers from significant flaws that jeopardize the sustained progress of HH settlement implementation and its extension statewide. Moreover, if enacted as currently drafted, the proposal will fail to resolve the ongoing litigation and will likely produce additional litigation. ILS urges that the final enacted budget include the following changes to Part P of the PPGG Article VII bill:

1) *The State must fund the assigned counsel rate increase.*

The core flaw with the Executive budget proposal is its failure to provide State funding for the increase, leaving the counties and New York City with this fiscal burden. Forcing the counties and New York City to pay for the increase would produce an unfunded mandate for a vital public function that has always been a State responsibility. It would also constitute a failure to learn from two historic lessons. The first is the lesson set forth in the *Commission on the Future of Indigent Legal Services, Final Report to the Chief Judge of the State of New York*, June 2006 (“Kaye Commission Report”).² The Kaye Commission Report, which led directly to the 2007 *Hurrell-Harring v. State of New York* class action lawsuit, concluded that New York’s county-financed system of public defense “fails to satisfy the state’s constitutional and statutory obligations to protect the rights of the indigent accused.”³ While the State has sought to remedy this constitutional failure by funding the HH settlement and its extension statewide via Executive Law § 832(4), the HH settlement and HH statewide funding does not address the need to increase the assigned counsel rates. Allocating State funding to assigned counsel rate increase is a necessary corollary of the State’s commitment to meet its constitutional and statutory obligations.

The second lesson is from 2004, the last time the assigned counsel rates were raised in response to a 2002 class action lawsuit in New York City, *New York City Lawyers Association v. The State of New York* (“2002 NYCLA lawsuit”). In amending County Law § 722-b to increase the hourly rates, the Legislature did not amend County Law § 722-e which requires counties and New York City to fully pay assigned counsel fees. As a result, the counties and New York City bore the fiscal burden of paying for the full increase. To manage this fiscal burden, counties and New York City sought to cut mandated representation costs in other ways, diminishing the overall quality of representation delivered. This diminished quality representation led directly to the 2006 Kaye

² The Kaye Commission Report can be found here: https://nycourts.gov/ip/indigentdefense-commission/IndigentDefenseCommission_report06.pdf.

³ Kaye Commission Report, at 15.

Commission report and its conclusion that improved quality representation cannot be achieved and sustained unless the State funds public defense.⁴

With the pending litigation against the State, history has repeated itself. But this time, the State can avoid the mistake that was made in 2004 when the Legislature increased the assigned counsel rates but failed to fund the increase; this time, the State can meet its constitutional and statutory responsibility by increasing the assigned counsel rates and investing State funds to pay for the increase.

- 2) *Capping what attorneys can be paid for time spent on a case (“case caps”) discourages quality representation, undermining the HH settlement and HH statewide goal of encouraging assigned attorneys to spend the time and resources needed for quality representation.*

ILS has consistently urged that the case caps on attorney compensation set forth in County Law § 722-b be eliminated, as these caps discourage attorneys from providing quality representation, particularly in the more serious and complex cases. The case caps also encourage attorneys to compel their clients to plead guilty rather than exercise the right to trial, as trials take time and resources.⁵ This is true even though County Law § 722-b currently allows for an exception to the statutory cap upon a showing of “extraordinary circumstances”—a high bar to meet to be compensated for the time necessary for quality representation.

The Executive proposal not only maintains the case caps, albeit it with an increase commensurate with the hourly rate increases, but it eliminates the “extraordinary circumstances” exception to the case caps, rendering it statutorily impossible for attorneys to be paid more than the caps. Maintaining the compensation caps and simultaneously eliminating any exception to them exacerbates the disincentives to provide quality representation. Worse, it would likely create a third problem: attorneys will outright refuse to accept assignments to the more serious and complex cases because they know they will not be adequately compensated, making it even harder if not impossible for ACPs and judges to assign quality attorneys to these cases.

- 3) *The hourly rate paid to assigned attorneys rate should be the same statewide; creating a difference in the rate based on geography would make it nearly impossible for ACPs and judges in more rural communities to find qualified attorneys to take assignments.*

⁴ Id.

⁵ Systemic pressures to plead guilty rather than go to trial not only hurt individual clients, but also undermine the transparency and fairness of the criminal legal and Family Court systems, harming the entire community. See, National Association of Criminal Defense Lawyers and the New York State Association of Criminal Defense Lawyers, Defense Lawyers, *The New York State Trial Penalty: The Constitutional Right to Trial Under Attack*, (2021) at 3-4 (forward by former Chief Judge Jonathan Lippman)

Currently County Law § 722-b distinguishes between the hourly rate paid to assigned attorneys for misdemeanors versus all other types of cases (felonies, Family Court matters, and appeals). The Executive proposal eliminates that distinction, consistent with the federal assigned counsel program, which has one hourly rate for all types of cases. Instead, and unlike the federal system, the Executive proposal establishes different rates based on the geography of the case, with attorneys who take cases from downstate urban and suburban areas being paid \$158 per hour, while attorneys who take cases from upstate counties, which tend to be more rural, are paid nearly \$40 per hour less (\$119 per hour). If enacted as is, the Executive proposal would exacerbate the crisis that many rural communities are facing in recruiting lawyers.⁶ Attorneys would flock to take assignments in higher paying counties, leaving courts and assigned counsel programs in the lower paying counties with a dearth of qualified attorneys. Moreover, the \$119 proposed hourly rate for most counties is simply not enough to encourage attorneys to take assigned cases in these counties, and ACPs and judges will continue to face challenges in assigning cases to attorneys, particularly cases that require more experienced and skilled attorneys who can make far more money taking federal assigned cases or doing retained work.

4) There needs to be a mechanism for periodic assigned counsel rate increases.

Since its enactment in 1965, County Law § 722-b has not included a mechanism for a periodic increase of the assigned counsel hourly rates. In 2002, this omission resulted in a crisis in assigned counsel programs across the state and the 2002 *NYCLA* class action lawsuit against the State, which produced a court order requiring that assigned counsel attorneys be paid the federal assigned counsel rate. Soon after, in 2003, legislation was enacted to raise the rate, to go into effect in 2004, but the legislation did not provide for a periodic rate increase. This omission has produced the current crisis in ACPs and litigation against the State. A mechanism for periodic increases is necessary to avoid lurching from crisis to crisis and lawsuit to lawsuit—a reality recognized by Justice Lisa Headley of the New York County Supreme Court, who granted a preliminary injunction in favor of the 2021 *NYCLA* plaintiffs in July 2022 that included, among other things, a directive to the State to “revisit and consider an increase in salary for assigned counsel...at the same rate and at the same time the federal assigned counsel receive an increase in compensation.”⁷

ILS urges that the FY 2023-24 final enacted budget include an assigned counsel rate increase, but with these necessary elements: 1) the State funding the increase; 2) the elimination of case compensation caps; 3) no geographic distinction in the hourly rate; and 4) the inclusion of a mechanism for periodic increases.

⁶ See New York State Bar Association, *Report and Recommendations of the Task Force on Rural Justice: Interventions to Ameliorate the Access-to-Justice Crisis in Rural New York*, April 2020, at 9-11 (noting that the vast majority of registered attorneys in New York are based in non-rural counties, leaving urban areas generally with a 1 to 40 attorney to resident ratio, and many rural areas with 200 to 1 resident to attorney ratio). This report is available here: [Report-and-Recommendations-of-the-Task-Force-on-Rural-Justice-as-of-3.18.2020.pdf \(nysba.org\)](https://www.nysba.org/3.18.2020.pdf).

⁷ See *New York County Lawyers Ass’n v. State of New York*, No. 156916/2021 (Sup. Ct. N.Y. Jul. 25, 2022), at *4.

Unfinished Business:
State Investment in Improving the Quality of Mandated Family Court Representation

ILS' mission under Executive Law § 832 to make efforts to improve the quality of representation provided under County Law Article 18-B includes not only the legal representation of low-income New Yorkers in criminal cases, but also the representation of low-income parents in Family Court matters. While the Kaye Commission report, discussed above, focused on the quality of mandated criminal representation, what is often overlooked is what the Commission said about mandated Family Court representation:

Though the Commission was not charged with studying Family Court mandated representation, the criminal defense programs studied by TSG were, in many instances, inseparable from the programs providing Family Court representation. As TSG observed, “[f]amily court matters are an integral part of New York’s indigent defense system and cannot be completely removed from an overall consideration of the current system.” ...⁸

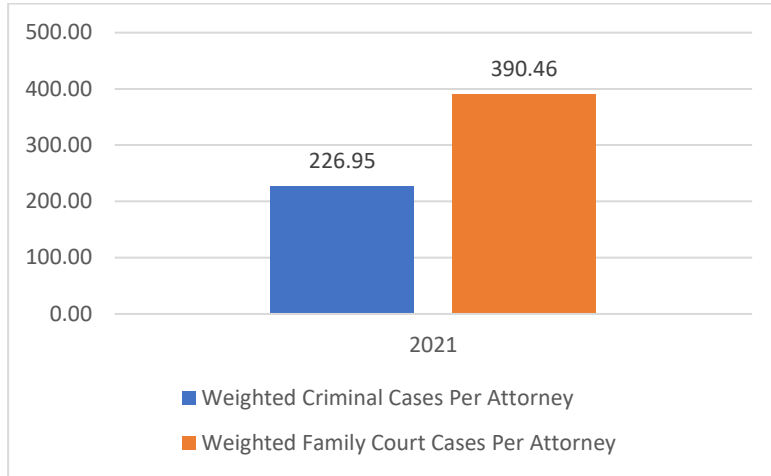
Unfortunately, the Kaye Commission’s warning has gone unheeded. Though publicly funded representation of parents in Family Court matters is every bit as legally required as criminal representation, there has been no comparable effort by the State to appropriate the funding needed to bring the quality of Family Court representation to a constitutionally compliant level. The State’s current financial commitment to improved quality parental representation in Family Court matters is just 1.6% of the total State funding for mandated representation, even though Family Court representation constitutes 33% of all legally mandated representation costs under County Law Article 18-B.

Data ILS received from providers that deliver mandated representation highlights the stark difference between mandated criminal representation, in which the State had made a fiscal investment, and mandated Family Court representation, in which the State has not. As stated above, ILS looks at two measures of progress towards statewide implementation of the HH settlement quality improvement reforms. For institutional providers (public defender offices and legal aid societies), ILS assesses attorney weighted caseloads, with the goal of weighted caseloads being less than 300 weighted cases in both criminal and Family Court matters. In 2021, the statewide average weighted cases per attorney was 226.95 in criminal cases, but it was significantly higher—390.46—in Family Court cases, as the table below depicts.⁹

⁸ Id. at 20 (emphasis added)

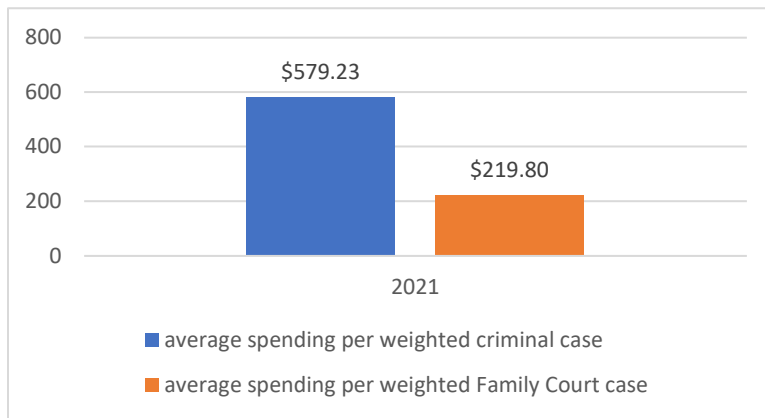
⁹ Please note that this data set does not include the *Hurrell-Harring* settlement counties, which are assessed via separate, settlement required reports. Moreover, though the statewide aggregate weighted caseloads are less than 300, there is a great deal of variation from provider to provider across the state, with some providers having much higher average weighted caseloads. More detailed information can be found at the ILS *Statewide Plan for Implementing Quality Improvement and Caseload Relief: Year Four Report*, available here: [Report-and-Recommendations-of-the-Task-Force-on-Rural-Justice-as-of-3.18.2020.pdf \(nysba.org\)](https://www.nysba.org/reports-and-recommendations-of-the-task-force-on-rural-justice-as-of-3.18.2020.pdf).

Weighted Cases Per Attorney in Institutional Providers in the 52 non-Hurrell-Harring Counties and New York City, 2021



For assigned counsel programs, ILS gauges progress by assessing average spending per weighted assigned counsel case. In 2021, the average spending per weighted case statewide for assigned counsel programs in criminal cases was \$579.23, while for Family Court it was less than half that at \$219.80. This means that assigned attorneys in Family Court cases are spending less than half the time and resources needed for quality representation than they are in criminal cases, as depicted in the table below.

Average Spending Per Weighted Criminal and Family Court Case in Assigned Counsel Programs in 52 non-Hurrell-Harring Counties and New York City, 2021



Viewed through the criminal defense lens, the disparities in weighted caseloads and average spending per weighted case highlights the progress that can be made when there is a State fiscal commitment to improved quality: attorney caseloads are lower, spending per case is higher, and a quality improvement infrastructure is built to ensure that this progress translates to meaningful improvement in the quality of representation. When

viewed through the Family Court lens, however, the disparity highlights what happens when there is no similar State fiscal commitment—defense attorneys work under crushing caseloads with insufficient resources, and low-income parents in crisis do not receive quality representation.

Several recent reports provide further details of the crisis that exists in Family Court representation. In its 2019 *Interim Report of the Commission on Parental Representation*, the Commission, convened by Chief Judge Janet DiFiore,¹⁰ found that the providers of mandated Family Court representation face overwhelming attorney caseloads, insufficient access to essential supports and resources, and failure to provide parents with timely access to counsel. A 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, emphasized that the representation of parents in Family Court cries out for support and guidance by the State. Both reports noted that 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.

There are many compelling reasons for the Executive and Legislature to act with urgency and prioritize ILS' request for \$28 million for Family Court representation during this year's budget discussions, including the following:

- 1) *An investment in the quality of Family Court representation is an investment in families.*

There is no question that an investment in the legal representation of parents in Family Court matter is an investment in families. As noted in the 2019 *Interim Report of the Commission on Parental Legal Representation*, the power of well-resourced quality parental representation to help keep families together has been exemplified by offices such as the Bronx Defenders and the Center for Family Representation (CFR) in New York City.¹¹ For example, in a recent report, the Bronx Defenders indicated that 43% of parent clients were not charged with abuse or neglect. Where petitions were filed, nearly half of families remained intact. In more than one-fourth of the cases, if removal occurred, children were temporarily placed with relatives or friends. In only 4% of cases were children placed in foster care with strangers.¹² The significant savings that can flow from a State investment in Family Court representation is illustrated by a report revealing that CFR reduced the stay for a child in foster care from the statewide average of 29 months to an average of less

¹⁰ *Commission on Parental Legal Representation: Interim Report to Chief Judge DiFiore*, at 4. This report is available at: http://ww2.nycourts.gov/sites/default/files/document/files/2019-02/PLR_Commission-Report.pdf.

¹¹ *Id.* at 4.

¹² *Id.* at 20.

than five months. CFR estimated that, over a 15-year period, they saved the city \$37 million in foster care costs.¹³

2) *The quality of Family Court representation has a disparate impact on Black and Brown families.*

The harm caused by state intervention in families is experienced most profoundly by families of color. Bias in our child welfare system harms families of color and impacts every stage of the system, from reporting to foster care placements to termination of parental rights.¹⁴ The reasons for this sharp disproportionality include limited access to services and implicit biases of child welfare professionals. 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.¹⁵ Quality legal representation of parents in these matters, including representation that begins during the child welfare investigation and prior to a petition being filed in Family Court, is necessary to guard against this foundational unfairness.

3) *Failure to invest in improving the quality of mandated Family Court representation will jeopardize the work being done to improve the quality of mandated criminal representation.*

Our work to use State funding to improve the quality of criminal representation has made us aware of how prescient was the Kaye Commission's statement about the inextricable link between mandated criminal representation and mandated Family Court representation. The failure to address the crisis in Family Court representation will inevitably impact the State's efforts to improve the quality of mandated criminal representation. This point was made in ILS' report, *Evaluating the Effectiveness of Caseload Standards in the Hurrell-Harring Settlement Counties: 2021 Update*. Written to comply with the settlement's reporting requirements, this report details information obtained from interviews and focus groups conducted of public defense attorneys in the five settlement counties. Though attorneys were not specifically asked about Family Court representation,

¹³ Id. at 21.

¹⁴ Several studies highlight the disparate impact the child welfare system has on communities of color. See, for example: 1) *Race and Poverty Bias in the Child Welfare System: Strategies for Child Welfare Practitioners*, December 17, 2019, American Bar Association, Center on Children and the Law. https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/january---december-2019/race-and-poverty-bias-in-the-child-welfare-system---strategies-f; 2) Monroe County, Report of the Commission on Racial and Structural Equity (RASE Commission), at p. 146, available at RASE (rocrase.com) (noting that 74% of the children in foster care are children of color, that 86% of the child protective cases involve children of color, and that 77% of the children placed into direct custody are children of color); and 3) Michael Fitzgerald, "New York City Confronts Massive Overrepresentation of Black Children in Foster Care," *The Imprint* (available at: [New York City Confronts Overrepresentation of Black Children in Care \(imprintnews.org\)](https://www.imprintnews.org/new-york-city-confronts-overrepresentation-of-black-children-in-care)).

¹⁵ 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>

at nearly every interview it emerged as an issue that demands immediate attention. Below is a summary of what we learned:¹⁶

[T]hough the *Hurrell-Harring* settlement is limited to improving the quality of mandated criminal defense, we would be remiss if we did not address the lack of parity in Family Court funding. Every provider in the five counties also provides mandated parental defense in Family Court and many of the attorneys we talked with juggle time-consuming Family Court cases with the expectations that come with significantly better resourced criminal case representation. Further, Family Court representation is not immune to the stressors we detailed above – the compounded workload with rising new cases in 2021 and low ACP rates – and has been deeply affected by the pandemic-related court disruption.

Several chief defenders told us that Family Court workloads significantly increased during the pandemic. This is creating an additional stress as the programs must continue to support now robust criminal practices while also managing an increased number of family defense matters without similar resources or adequate funding to implement caseload standards.¹⁷ One chief defender expressed concern that this is creating a culture of “the haves and have nots.” Family Court attorneys see their criminal counterparts with additional support that has improved the quality of representation. This leaves them frustrated that they do not have access to the same kind of resources. For attorneys who handle both criminal matters and Family Court matters, their ability to adequately represent their criminal clients risks being hampered by their excessive parental legal representation caseloads.

The circumstances surrounding the state of legally mandated Family Court representation in New York—a clear legal mandate, lack of State investment, contemporaneous reports detailing the crisis—share many historical echoes of the circumstances that led to the *Hurrell-Harring* lawsuit. Many have concluded that only litigation like *Hurrell-Harring* will spur action by the State. But litigation is a last resort that can and must be avoided.

¹⁶ This summary comes from the ILS report, *Evaluating the Effectiveness of Caseload Standards in the Hurrell-Harring Settlement Counties, October 2021*, available on ILS’ website at: [October 2021 Hurrell-Harring Caseload Report Full Amd 11 11 12.pdf \(ny.gov\)](#).

¹⁷ ILS issued *Caseload Standards for Parents’ Attorneys in New York State Family Court Mandated Representation Cases* on June 4, 2021 which are available at: <https://www.ils.ny.gov/files/Caseload%20Standards%20Parents%20Attorneys%20NYS%20Family%20Court.pdf>. However, while the state’s FY 2021-2022 budget included \$2.5million in aid to localities for mandated parental representation, this is not enough funding to implement these standards statewide and indeed allows ILS to issue only small awards to approximately 5 counties for the purposes of some caseload relief and quality improvement in child welfare matters.

Given the scope of the crisis in New York’s system of mandated Family Court representation, our request for \$28 million to begin reducing the crushing caseloads of parents’ attorneys 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.

We respectfully reiterate our plea that the Legislature work with Governor Hochul to provide this crucial funding in the FY 2023-24 enacted budget.

**ILS State Operations Budget:
Increased Funding for Three Additional Positions**

In our State Operations budget request, ILS sought enough funding for three additional positions:

- 1) an **Auditor** to improve our capacity to efficiently process claims from the counties and New York City in a fiscally responsible manner so that the State funding for improved quality representation seamlessly flows to counties and New York City;
- 2) an **Appellate Attorney for Improved Quality Parental Representation** to enhance our efforts to improve that quality of representation provided to parents in Family Court matters; and
- 3) a **Human Resource Manager** to improve our ability to recruit, hire, and on-board new staff in a timely manner and retain current staff.

These three positions are a necessary addition to ILS’ work to achieve our statutory mission.

We respectfully request that our State Operations budget include the funding needed for these three additional ILS staff positions.

The Importance of Full Funding for NYSDA’s Public Defense Backup Center

The goal of improving the quality of mandated criminal and Family Court representation is best achieved through a collaborative approach that values the expertise of the different entities involved. Since its creation in 1967, the New York State Defenders Association (NYSDA) has played a leading role in working to improve the quality of public defense in New York, and NYSDA has consistently been a strong ally in working with ILS in pursuit of our statutory mission. For that reason, we ask the Legislature to fully support NYSDA’s request to fund its Public Defense Backup Center and its Veterans Project, as well as fund

its request for additional funding for expanded discovery support and public defense staff recruitment and retention support.

NYSDA's Backup Center provides three services that promote successful implementation of the HH settlement and its expansion statewide, and that also serve to enhance the quality of Family Court representation.

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, and to better monitor and assess the crisis in parental representation.

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. NYSDA's recently created discovery support center provides crucial expertise to attorneys across the state in complying with and effectively utilizing New York's reformed discovery statute. Public defense attorneys across New York depend upon the immediate and accurate legal advice they receive from NYSDA staff. This support is indispensable to maintaining the quality of representation provided to clients who cannot afford to hire counsel.

This year, NYSDA is not only seeking the full funding needed for its Backup Center and Veterans Defense Program, but also an additional \$450,000 in funding to expand their Discovery & Forensic Support Unit and to support mandated providers in recruiting and retaining staff. This is a modest request for resources that is vitally important in ensuring full implementation of New York's 2019 discovery reforms and full implementation of the HH settlement and its extension statewide.

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, which is why ILS urges the Legislature to fully fund NYSDA.

ATTACHMENT A

FY 2023-24 ILS Budget Request and the Executive Budget Proposal

At its September 23, 2022 meeting, the Indigent Legal Services Board unanimously approved our budget request of **\$390,527,000** for FY 2023-24. Of this amount, \$382,810,000 would be devoted to Aid to Localities and \$7,717,000 for State Operations.

Governor Hochul, in her Executive budget, proposes a total ILS budget appropriation of **\$366,560,000** with \$359,310,000 devoted to Aid to Localities, and \$7,250,000 devoted to State Operations.

The table below provides an overview of the ILS budget request compared to the proposed Executive Budget:

	FY 2023-24 ILS Budget Request	FY 2023-24 Proposed Executive Budget
Aid to Localities		
ILS Program	\$81 million	\$81 million
Hurrell-Harring Settlement	\$23.8 million	\$23.8 million
Statewide HH Implementation	\$250 million	\$250 million
Family Court Representation	\$28 million	\$4.5 million
Aid to Localities Total	\$382,810,000	\$359,310,000
State Operations Total	\$7,717,000	\$7,250,000

Explanation of the ILS Budget Request:

Aid to Localities. The ILS request for \$382,810,000 in Aid to Localities funding represents an increase of \$23.5 million over the FY 2022-23 enacted budget. Below is a brief overview of each Aid to Localities program:

- **ILS Program (\$81 million requested).** Of this \$81 million in funding, \$40 million is disbursed to NYC pursuant to State Finance Law § 98-b(3)(b), \$30.2 million is disbursed to counties and New York City via non-competitive distributions, and the remaining \$10.8 million is used for the following innovative programs:
 - *Counsel at First Appearance* – Since 2011, ILS had disbursed funding to counties to build programs that provide defense representation at first court

appearances (arraignments). Though not enough for full arraignment defense coverage, this grant has proven instrumental to jump-starting the process of full arraignment coverage that is being completed with the HH settlement and HH statewide funding.

- *Upstate Quality Improvement and Caseload Relief* – Currently 40 counties benefit from a relatively modest amount of funding (approximately \$100,000 per year) for quality improvement and/or caseload reduction initiatives. ILS replicated this model in creating the RFP to disburse the \$2.5 million for improved Family Court representation appropriated in the FY 2021-22 Aid to Localities budget.
 - *Regional Immigration Assistance Centers (RIACs)* – With this funding, ILS issued awards to create six RIACs that work statewide to support attorneys in fulfilling their obligation under *Padilla v. Kentucky* to accurately advise their clients of the immigration consequences of their arrest and possible conviction. The RIACs also serve as a resource for information about the immigration consequences of a Family Court proceeding.
 - *Upstate Model Family Defense Office* – To date, ILS has issued awards for two Upstate Model Family Representation Offices, one in Westchester County and one in Monroe County. These offices utilize the interdisciplinary approach to representation of parents in child protective proceedings highlighted in the 2019 *Interim Report of the Commission on Parental Representation*.
- **Hurrell-Harring Settlement (\$23.8 million requested)**. This funding is appropriated for compliance in the five settlement counties with the HH settlement’s core objectives of ensuring that: 1) all persons charged with a crime are provided representation at their arraignment; 2) there is ongoing compliance with the caseload standards ILS issued in December 2016; and 3) adequate funding is provided to implement quality improvement initiatives that ensure adequate supervision, training, and access to non-attorney professional services for attorneys providing mandated criminal defense representation. Please note that this \$23.8 million does not include the funding needed to pay for increased assigned counsel rates, which is an imperative for ongoing successful settlement implementation.
 - **Statewide Implementation of Hurrell-Harring Reforms (\$250 million requested)**. This is the amount needed to continue implementation of the written plans developed by ILS 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 HH settlement to all the non-HH settlement counties and NYC to ensure: 1) defense counsel representation at arraignment; 2) compliance with ILS caseload standards; and 3) implementation of quality improvement initiatives. As with the HH settlement funding, this request does not include the funding needed to pay for increased assigned counsel rates, which is an imperative for the ongoing progress of statewide implementation.

- **Family Court Representation (\$28 million requested).** This is an increase of \$23.5 million over last year’s appropriation of \$4.5 million for improved quality representation of parents in Family Court matters.

State Operations. The ILS request for \$7.7 million in State Operations funding represents a slight increase of \$470,000 over the FY 2022-23 funding levels (including the supplemental appropriation for staff salary increases). The funding will assure the continued effective operation of the ILS Office as we work to implement the historic HH settlement reforms in the five defendant counties and extend the settlement’s initiatives statewide. The funding would also enable the hiring of three new positions: a Grants Unit Auditor, an Appellate Attorney for Parental Representation, and a Human Resources Manager. These positions will enhance ILS’ ability to ensure fiscal accountability and oversight over ILS funds, to further the goal of improved quality representation of parents in Family Court matters, and to effectively recruit, onboard, and retain the staff needed to effectuate our mission.

ATTACHMENT B

Statewide Expansion of the *Hurrell-Harring* Settlement: Overview of Progress to Date

In October 2014, New York State settled the class action lawsuit, *Hurrell-Harring v. The State of New York* (HH settlement), agreeing to provide funding to five counties to improve the quality of mandated criminal defense. The Office of Indigent Legal Services (ILS) was vested with the responsibility of implementing the HH settlement, which focuses on three critical areas: ensuring that all people charged with a crime are represented by defense counsel at their arraignment; ensuring that mandated criminal defense providers have manageable caseloads in accordance with caseload standards set by ILS; and implementing quality improvement initiatives.

In April 2017, the State’s final FY 2017-18 budget included amendments to Executive Law § 832 and County Law Article 18-B extending the HH settlement to the entire state. Executive Law § 832 was amended to include a new subdivision (4) giving ILS the responsibility to develop and implement plans for counsel at arraignment, caseload relief, and quality improvement for all counties and New York City. County Law § 722-e was also amended to specify that any costs of implementing the ILS reform plans “shall be reimbursed by the state to the county or city providing such services” and to require that the “state shall appropriate funds sufficient to provide for the reimbursement required by this section.”

In December 2017, ILS submitted the plans for statewide counsel at arraignment, caseload relief, and quality improvement, and estimated the full cost of extending the HH settlement statewide (“Statewide”) to be \$250 million. But it was not until April 2018 that the funds required for Statewide implementation were included in the state budget, and even then, as set forth under Executive Law § 832(4), only one-fifth of the total funds needed were appropriated, with a planned five-year phase-in of state funding. Thus, the FY 2018-19 budget appropriated only \$50 million for Statewide implementation, and it was not until enactment of the FY 2022-23 budget that the full \$250 million was appropriated.

Since 2018, ILS has worked with every non-HH settlement county and New York City to develop plans and budgets to effectively use the state funding for Statewide implementation in accord with Executive Law § 832(4). Not surprisingly, this work was impacted by the Covid-19 global pandemic, which created a short-term fiscal crisis, resulting in counties and New York City, like the state, implementing freezes on hiring and other spending. The pandemic also deeply impacted the court system and mandated criminal defense provider offices, as the criminal legal system worked to transition from in-person to virtual court appearances and mandated provider offices quickly adopted protocols to ensure the safety of staff and clients. The fiscal constraints and the energy defense providers needed to devote to pandemic-related matters limited the time and resources available to focus on Statewide implementation. Nonetheless, ILS persisted in

working with county officials and mandated criminal defense providers on building plans and budgets for Statewide implementation.

Within this context—i.e., five years to achieve full state funding and an unprecedented public health crisis—the progress achieved to date on Statewide implementation has been impressive. Below are highlights of this progress:

Counties undertaking good faith efforts to implement

Under Executive Law § 832(4), the counties and New York City shall “undertake good faith efforts to implement” the Statewide expansion of counsel at arraignment, caseload relief, and quality improvement plans. To date, all 52 non-HH counties and New York City have undertaken such good faith efforts, as described below:

- All 52 non-HH counties and NYC have fully engaged with ILS to develop county-specific plans and budgets for Statewide implementation.
- All 52 non-HH counties and NYC have a fully executed contract with ILS for Statewide implementation.
- All 52 non-HH counties and NYC have taken meaningful steps to implement their county-specific Statewide plan.

Creation of New Public Defender and Conflict Defender Offices

To ensure quality representation, five counties have used the Statewide funding to create new Public Defender or Conflict Defender Offices:

- *Clinton County Public Defender Office*: This new Public Defender Office began with the appointment of Jamie Martineau as the Clinton County Public Defender. As of December 2021, this office has a staff of 7 attorneys and 3 non-attorneys all funded by the Statewide contract.
- *Delaware County Public Defender Office*: This new Public Defender Office began with the appointment of Joseph Ermeti as the Delaware County Public Defender. As of December 2021, this office has a staff of 3 attorneys and 1 non-attorney all funded by the Statewide contract.
- *Essex County Conflict Defender Office*. This new Conflict Defender Office began with the appointment of Miriam Hadden as Conflict Defender.
- *Hamilton County Public Defender Office*: This new Public Defender Office began with the appointment of Sterling Goodspeed as Public Defender. This small office

currently has 1 full-time attorney, 1 part-time attorney, and 1 part-time support staff.

- *Oswego County Public Defender Office*: Oswego County enacted a local ordinance in 2021 to create a Public Defender Office and is currently posting for and recruiting an experienced and committed leader to run the office. Once up and running, the County is committed to using Statewide funding to hire the attorney and non-attorney staff needed to deliver quality representation.

Creating High-Quality, Well-Managed Assigned Counsel Programs

Prior to Statewide implementation, many counties had “unmanaged” Assigned Counsel Programs (ACPs), meaning that there was no administrative infrastructure to provide quality oversight and support of panel attorneys. Even the “managed” ACPs lacked the resources needed to meaningfully support panel attorneys in delivering quality representation. In June 2019, the ILS Board approved the *ILS Standards for Establishing and Administering Assigned Counsel Programs* (“ILS ACP Standards”), which set forth the infrastructure that every ACP should have to achieve quality representation, including: an ACP Administrator; a mentor program; a second chair program; funding for non-attorney professional supports; and a vibrant training program. These ILS ACP Standards, which were informed by ILS’ work in implementing the *Hurrell-Harring* settlement, constitute the roadmap for using Statewide funding to build high-quality, well-managed ACPs throughout New York. In accord with this roadmap, to date Statewide implementation has achieved the following:

- 2 counties (Westchester and Orange) have passed local ordinances to create ACPs that comply with the ILS ACP Standards.
 - In Westchester County, the independent ACP Board appointed Sheralyn Pulver, a highly experienced and qualified defense attorney, to the ACP Executive Director position in mid-2022.
 - In Orange County, the new ACP is a county department that replaces the county’s previous contract with a private law firm for these vitally important services and ensures that a full-time Administrator is overseeing the program. This new Administrator, Damien Brady, was appointed in early 2022.
- 36 counties (including Orange and Westchester) have budgeted Statewide funding to create a new ACP Administrator position or to increase the hours of an existing part-time position.
 - 14 counties that previously did not have ACP Administrators now have one (Albany, Broome, Chautauqua, Dutchess, Essex, Fulton, Lewis, Madison, Montgomery, Saratoga, Sullivan, Rensselaer, and Ulster), with 5 additional counties working to recruit a new ACP Administrator (Greene, Jefferson, Otsego, Putnam, and Seneca).
 - Several counties have used Statewide funding to transition part-time ACP Administrators to full-time. This has been most important in counties like

Schoharie and Cayuga, where the ACP is the primary provider of mandated criminal defense.

- 50 counties have budgeted Statewide funding for the creation of mentor programs, second chair programs, enhanced access to non-attorney professionals, training, or any combination of these vitally important quality infrastructures.

Caseload Relief - Hiring the Necessary Staff

For institutional providers, compliance with ILS caseload standards requires the funding and recruitment of attorney and non-attorney staff. Statewide funding has resulted in the following:

- As of September 2022, **624 new attorney positions have been created and filled** as a result of Statewide funding. Of these, 425 are new positions, 108 are increasing the hours of existing positions, and 88 are hired via a contract.¹
- As of September 2022, **362 non-attorney positions were created and filled** with Statewide funding. Of these, 306 are new positions, 27 are increasing the hours of existing positions, and 21 are hired via a contract.²
- Despite the challenges posed by the pandemic and its lingering impact, mandated criminal defense providers continue to work towards caseload standard compliance by recruiting and hiring the necessary attorney and non-attorney staff.

Counsel at Arraignment

All counties now have programs in place which ensure that nearly all people charged with a crime are represented at arraignment. To accomplish this, Statewide funding has been used for the following:

- *Funding has been used to create new attorney positions to bolster arraignment coverage capacity. Between April 1, 2018 and September 30, 2022, **486 new attorneys who provide representation at arraignments were hired with Statewide funding.***
- *Funding has been used to compensate attorneys for being on-call to represent people at arraignment. **Forty (40) counties use Statewide funding** to compensate attorneys via stipends, increased salaries, or contract amounts for being on-call or providing representation at a Centralized Arraignment Part.*

¹ For 3 attorney positions, information on whether the position was a new hire, an upgrade of an existing position, or someone placed on contract was not included in the reported data.

² For 8 non-attorney positions, information on whether the position was a new hire, an upgrade of an existing position, or someone placed on contract was not included in the data reported.

- *Funding has supported the creation of **20 new Centralized Arraignment Programs** established pursuant to Judiciary Law § 212(1)(w).*

Quality Improvement

Executive Law § 832(4) requires counties to work in good faith with ILS to implement quality improvement measures, including supervision, training, and utilization of non-attorney professionals (investigators and other experts). Since 2018, counties have achieved the following:

- **83 of the 624 attorneys hired since April 2018 supervise** the work of others or provide training/mentoring.
- Over a one-year period (April 2021 through March 2022), **304 training events** were conducted as a result of Statewide funding.
- Over the same one-year period, **a total of \$1,197,750 Statewide funding was spent on contracted non-attorney professionals, more than a 40% increase from the previous year.**
- The number of clients benefitting from Statewide funded non-attorney professional services grows each year, and compared to the previous year, **FY 2021-22 saw a 139% increase in the use of experts and a 58% increase in the use of investigators.**