



New York State Office of
Indigent Legal Services

Testimony of the Office of Indigent Legal Services

Joint Legislative Hearing on the FY 2024-25 Public Protection Budget

Presented before:

The Senate Finance Committee

and

The Assembly Committee on Ways and Means

Presented by:

Patricia Warth

Director

Office of Indigent Legal Services

January 25, 2024

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 2024-25 budget request. Thank you also for your consistent support of ILS throughout our 13 years of existence. Because of the support of both the Legislative and Executive branches, substantial resources have been appropriated since 2016 to help ILS fulfill one part of our statutory mission: improving the quality of legally mandated 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*ⁱ (HH settlement) and its expansion statewide (HH statewide).

This year, ILS emphasizes these important points to the Legislature as you deliberate on the FY 2024-25 budget:

- 1) 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 defense, which is another part of our statutory mission and just as constitutionally and statutorily mandated as criminal defense. **ILS is seeking a total of \$50 million (an increase of \$45.5 million above the Executive budget proposal) for improved quality Family Court defense.**
- 2) The State investment in funding the **HH settlement and HH statewide** is having a demonstrable impact on improving the quality of mandated criminal defense. But this funding has been flat for years, rendering it impossible for public defense providers to keep the staff they have hired and maintain the quality improvement programs they have established. **ILS is seeking a modest but necessary COLA increase of 3% above the Executive budget proposal for these foundational ILS programs.**
- 3) Last year the State took the necessary and long-awaited step of increasing the hourly rates paid to assigned counsel. **The State needs to continue to fund 50% of county and New York City expenditures for this increase.** Counties and New York City are facing extraordinary pressure to manage the costs of the assigned counsel rate increase. If the State does not fund it, counties and New York City will cut their funding in other public defense areas to do so, rolling back the quality improvement progress made to date. **ILS supports the Executive budget proposal to once again appropriate \$92 million for State reimbursement of 50% of county and New York City expenditures related to last year's increase of the statutory assigned counsel hourly rates.**
- 4) The Executive budget proposal includes authorization for the State to transfer \$234 million from the Indigent Legal Services Fund (ILS Fund), established via State Finance Law § 98-b, to the General Fund. Of this proposed transfer, \$114 million is for increased assigned counsel costs, including the State's reimbursement of 50% of counties' and New York City's expenditures for this increase. But there is no public defense-related purpose for the additional \$120 million the State seeks to sweep from the ILS Fund. **ILS urges the Legislature to reject this proposed sweep and**

ensure that the ILS Fund is used for its statutory purpose—funding quality improvements in both criminal and Family Court representation.

Attachment A summarizes ILS' FY 2024-25 budget request and the relevant portions of Governor Hochul's FY 2024-25 Executive budget proposal. Below are key summary points:

- *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 is a \$10 million reduction from the enacted FY 2023-24 budget, and \$45.5 million less than the \$50 million ILS is seeking as a three-year phase-in of the \$150 million needed to bring family representation providers into compliance with ILS caseload standards, which is foundational to improved quality representation. The fact that the Executive budget proposal seeks to sweep \$120 million from the ILS Fund to the General Fund shows there is ample money available in the ILS Fund to sustain a fiscal investment in improved quality Family Court representation.
- *HH settlement:* The Executive has continued its commitment to fund ongoing implementation of the HH settlement reforms in the five lawsuit counties by including \$23.97 million in its budget proposal for this program. This year's appropriation includes an additional \$160,000 reflecting an agreement between the *Hurrell-Harring* parties to fund an additional Assistant Public Defender position in Schuylers County. HH settlement funding has otherwise been flat since FY 2019-2020. While ILS appreciates the State's ongoing commitment to the HH settlement, full State funding necessitates a modest 3% COLA.
- *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 State fully funds it by including a modest 3% COLA increase.
- *ILS Program:* This program funds the distributions and grants foundational to the HH settlement and HH statewide. The Executive budget proposal funds this program at \$81 million, which is the amount at which it has been funded since FY 2013-14. A 3% COLA increase is necessary to sustain the staff hired and programs implemented with this funding.
- *State Operations:* The Executive left ILS' State Operations budget functionally flat, which means we will not be able to add the four requested new positions needed to continue our statutory mission of improving the quality of mandated representation under County Law Article 18-B.

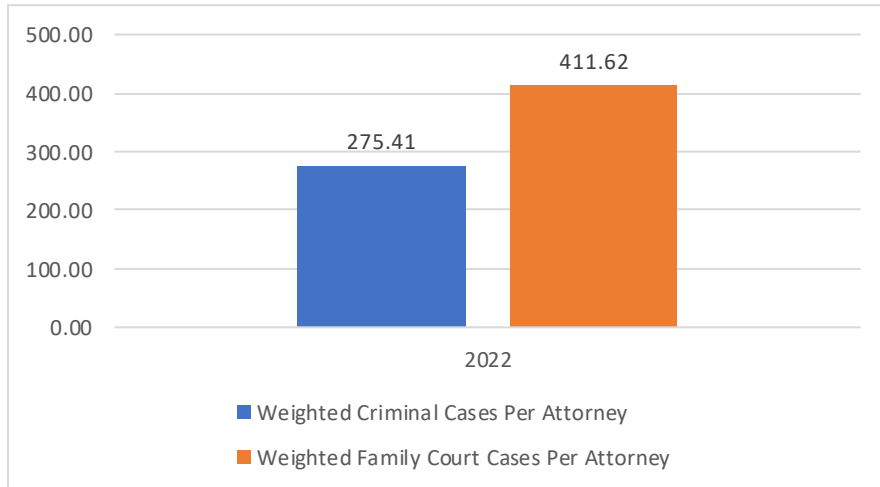
The Urgency of State Funding for Improved Quality Family Court Representation

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 defense of low-income New Yorkers in criminal cases, but also the defense of low-income parents in Family Court matters.

Though publicly funded defense of parents in Family Court matters is every bit as legally required as criminal defense, 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 FY 2023-24 final enacted budget appropriated only \$14.5 million for improved quality Family Court representation, \$10 million of which was added by the Legislature. While we are grateful for the Legislature's recognition of the importance of parent defense, the fact remains that even with this legislative add, the FY 2023-24 financial commitment to improved quality Family Court representation is just 3% of the total State funding for mandated representation. The Executive's proposed FY 2024-25 budget exacerbates this disparity, decreasing State funding for parent representation to just 1.2% of the total State funding for mandated representation.

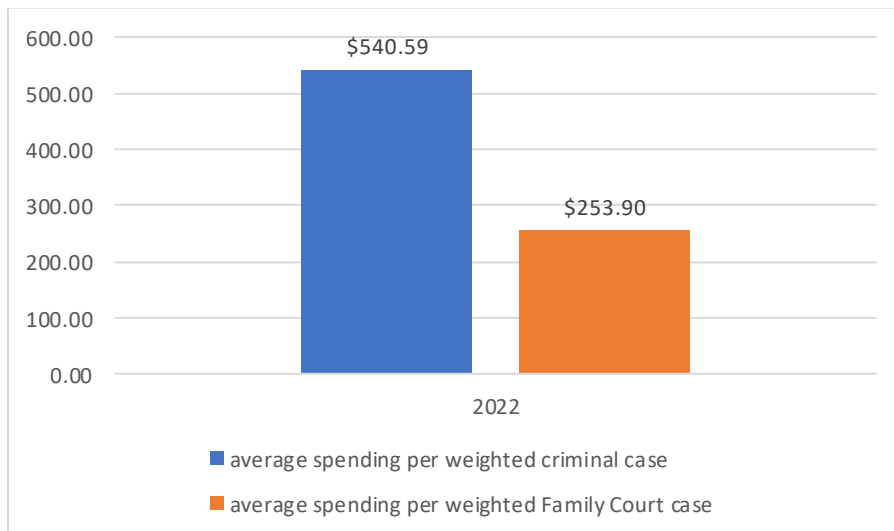
The data public defense providers have reported to ILS highlights the stark difference between criminal defense, in which the State has made a fiscal investment, and Family Court representation, in which the State has not. ILS looks at two measures to gauge progress in improving the quality of mandated representation. 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 2022, the statewide average weighted cases per attorney was 275.41 in criminal cases, but it was significantly higher—411.62—in Family Court cases, as the table below depicts.ⁱⁱ Notably, the Family Court weighted caseloads have increased markedly over the past three years, growing from 373.89 in 2020 to 390.46 in 2021, to the 2022 level of 411.62.ⁱⁱⁱ

Weighted Cases Per Attorney in Institutional Providers in the 52 non-Hurrell-Harring Counties and New York City, 2022



For assigned counsel programs, ILS gauges progress by assessing average spending per weighted case. In 2022, the average spending per weighted case statewide for assigned counsel programs in criminal cases was \$540.59, while for Family Court it was \$253.59. 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, 2022



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.

The poor quality of Family Court defense, and the deeply negative impact it has on Family Court proceedings, was discussed at length during the Senate’s November 1, 2023 Joint Public Hearing on New York State Family Court.^{iv} Impacted parents presented compelling testimony describing the sub-par – and in some instances, non-existent – defense they received, and how it led to the needless removal of their children. The testimony of these courageous parents, all of whom were low-income and most of whom were Black or brown, also highlights the disparate impact that our current child welfare system has on low-income parents of color, and why quality Family Court defense is a vital antidote to this disparity.

In last year’s written testimony, ILS summarized the most compelling reasons for the Executive and the Legislature to act with urgency in funding Family Court representation, including the unfair disparate impact our child welfare system has on low-income and Black and brown families and the lingering threat of a class action lawsuit against the State if the crisis in representation is not addressed. In Attachment C, we again summarize the need to act with urgency.

ILS’ Proposal To Address the Crisis in Family Court Representation

ILS proposes that the State fund caseload standard compliance for mandated parent defense just as it has for mandated criminal defense. The funding should come from the ILS Fund, established pursuant to State Finance Law § 98-b to assist counties and New York City in funding improvements to the quality of representation provided under County Law Article 18-B. To date, the ILS Fund has been utilized almost exclusively 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 defense.

As part of our statutory mission to improve the quality of parent defense, in 2021 ILS partnered with Welfare Research Institute on a workload study to determine caseload standards for parent representation.^v At its June 2021 meeting, the ILS Board approved these standards, 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 it would cost the State \$150 million. Like the HH statewide initiative, ILS proposes that the funding be phased-in, though we suggest a three-year rather than a five-year phase-in. Accordingly, for FY 2024-25, ILS requests that \$50 million be included in the ILS Aid to Localities budget for improved quality parent representation.

As with the funding for HH statewide, 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. This plan would then be converted to a line-item budget and workplan for the cost reimbursement contract as the vehicle for disbursing the funding to each county and New York City. Having taken similar steps for the HH settlement and HH statewide, 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, which is sufficiently robust to fund this vital quality improvement initiative.

This State fiscal investment 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.

We respectfully reiterate our plea that the Legislature work with Governor Hochul to provide this crucial funding in the FY 2024-25 enacted budget.

The Importance of Sustaining the Progress Made in Improving the Quality of Criminal Defense Through a Modest COLA Increase

While the Executive has continued its commitment to improving the quality of constitutionally and statutorily mandated criminal defense by funding the HH settlement and HH statewide at prior years' level, full funding for these programs necessitates a modest 3% COLA increase in State funding for the HH settlement program, the HH Statewide expansion program, and the ILS program, which is foundational to these initiatives.^{vi}

There is no question that the State investment to date in improved quality public criminal defense has had a significant impact. 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.
- New Public Defender Offices have been created in four counties (Clinton, Delaware, Hamilton, and Oswego), and three counties (Columbia, Essex, and Clint) have created Conflict Defender Offices.
- 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 providers.
- Since implementation began, 740 new attorneys and 444 other professionals have been hired, placed on contract, or had their hours substantially increased.
- Over the past two years, HH statewide funding has resulted in a significant increase in the use of experts and investigators. Between 2021 and 2022, the use of experts funded via HH statewide funding increased by 139% while the use of investigators increased by 58%. Between 2022 and 2023, the use of experts funded via HH statewide funding increased by 102% and the use of investigators increased by 9%

This progress was achieved even though implementation occurred amid the Covid-19 pandemic. Ongoing progress relies upon the State adequately funding the ILS program, the HH settlement program, and the HH statewide program. Yet State fiscal support for these programs has been flat for 10 years, five years, and three years, respectively, while salaries, fringe, and fixed costs (i.e., space, equipment, legal research materials, etc.) have increased significantly because of high inflation rates: for 2021, the annual inflation rate was 7%, in 2022 it was 6.5%, and in 2023 it is estimated to be 3.5%.^{vii} Counties, New York City, and their providers of mandated representation are struggling to maintain the staff hired and programs they have implemented with State funding.

Compared to the high inflation rates over the past three years, ILS' request for a 3% COLA increase for the three criminal public defense programs is modest. Yet it would go far in ensuring that there are no roll backs to the quality improvement progress made to date.

Accordingly, ILS respectfully requests that the final enacted FY 2024-25 budget includes \$83.4 million for the ILS Program, \$24.7 million for the HH Settlement Program,^{viii} and \$257.5 million of the HHS Statewide Program.

The Imperative for the State to Fund the Increased Assigned Counsel Rates

After years of noting the dire need to amend County Law § 722-b to increase the hourly rates paid to assigned counsel, ILS was pleased to see that the final enacted FY 2023-24 budget did so, increasing the rates to \$158 per hour. We remain concerned, however, that the final enacted budget did not also amend County Law § 722-e to require the State to fund the full increase. Instead, the FY 2023-24 budget includes an appropriation of \$92 million to ILS to reimburse counties for 50% of their expenditures for the increased assigned counsel rates.

Forcing the counties and New York City to pay for the increase has resulted in an unfunded mandate for a vital public function that has always been a State responsibility. It also ignores 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”).^{ix} 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.”^x 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. Then, as is the case now, the counties and New York City were forced to bear the burden of the increase. To manage this 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 Commission report and its conclusion that improved quality representation cannot be achieved and sustained unless the State funds public defense.^{xi}

ILS is already witnessing history repeat itself. We have spoken with county officials and public defense leaders who have told us that, even with the State reimbursing 50% of their expenditures for the assigned counsel rate increase, counties must explore ways to manage their increased costs. Some counties are considering hiring or contracting with one or more part-time conflict attorneys to reduce the number of assigned counsel cases. This is a strategy that several counties adopted in the wake of the 2004 assigned counsel rate increase, and one that ultimately diminished the quality of representation provided to people in criminal and Family Court matters. Another strategy being considered is conducting more court proceedings virtually to reduce attorney travel and court time. While ILS believes there are situations in which virtual court proceedings may be appropriate, if decisions about virtual proceedings are driven by costs and convenience, the

use of virtual proceedings will inevitably diminish the quality of representation provided to public defense clients as well as the fairness of the legal system.

To effectuate the \$92 million appropriated in the FY 2023-24 budget for increased assigned counsel rates, ILS swiftly implemented a procedure for reimbursement that facilitates efficient processing of claims for this funding while simultaneously providing ILS with rich data about county and New York City expenditures for assigned counsel. Even though the budget language gives counties and New York City a year to claim, to date 3/4ths of the counties and New York City have submitted claims for reimbursement. This claiming rate reflects that counties and New York City vitally need this State fiscal support. ILS' FY 2024-25 budget request asked that the \$92 million for the assigned counsel rate increase be appropriated once again. We anticipate that by this time next year, ILS will have a robust picture of the total State funding needed to pay for the full assigned counsel increase.

We were pleased to see that the proposed Executive budget includes \$92 million for the assigned counsel rate increase and respectfully request that it be included in the final enacted FY 2024-25 budget.

The ILS Fund Must be Used for Its Statutory Purpose

The Executive's Budget Proposal includes language in Part X of the PPGG Article VII bill authorizing the State to transfer \$234 million from the ILS Fund to the State's General Fund. As indicated above, the ILS Fund was established in 2003 with enactment of State Finance Law § 98-b as a special fund devoted to assisting counties and New York City "improving the quality of public defense services," including assigned counsel representation.

It is ILS' understanding, based on last year's enacted budget, that \$114 million of this proposed transfer is to fund the increased assigned counsel rates.^{xii} It appears, however, that the remaining \$120 million is being swept to the General Fund. This undermines the purpose of the ILS Fund as set forth in State Finance Law § 98-b (1) and also dilutes the dedicated funding available for vitally important and constitutionally required improvements in the quality of mandated criminal and Family Court representation. Rather than sweeping money from the ILS Fund, the State should instead invest this money in improved quality parent representation consistent with ILS' budget request. Indeed, the proposed transfer shows that the ILS Fund is sufficiently vibrant to fund the quality improvements so desperately needed for Family Court representation.

ILS urges the Legislature to reject the proposed sweep of \$120 million and that the Indigent Legal Services Fund be used for its intended purpose—to fund quality improvements in mandated criminal and Family Court representation.

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

In our State Operations FY 2024-25 budget request, ILS is seeking enough funding for four additional positions:

- 1) a **Human Resource Manager** to improve our ability to recruit, hire, and on-board new staff in a timely manner, retain current staff, help us work towards our diversity, equity, and inclusion goals, and assist in working with localities on developing effective strategies for recruitment and retention. The tremendous growth in our office over the past few years necessitates a Human Resource Manager: in 2019, ILS was staffed with 27 people; by the beginning of 2024, this number has nearly doubled to 50.
- 2) three additional positions for our Grants Unit: 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; and a **Contracts Manager** and **Assistant Grants Manager 1** to ensure that ILS continues to process contracts and claims in a timely manner and to bolster our ability to actively reach out to counties and New York City to assist them in claiming regularly and timely.

It bears noting that the work of our Grants Unit has grown exponentially over the past three years. In 2021, ILS processed 1,036 claims totaling \$82 million. In 2023, ILS processed 1,499 claims totaling \$210 million. The above 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 four 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 ongoing funding for vital discovery 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 \$3.1 million needed for its Backup Center and the \$950,000 needed for its Veterans Defense Program, but also \$1,792,000 in funding for their Discovery & Forensic Support Unit. 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.

ⁱ 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.

ⁱⁱ 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 Five Report* (October 21, 2023), available here: [Statewide Plan for Implementing Quality Improvement and Caseload Relief: \(ny.gov\)](#).

ⁱⁱⁱ *Statewide Plan for Implementing Quality Improvement and Caseload Relief: Year Five Report*, at 30.

^{iv} This hearing was conducted by the Senate Standing Committee on the Judiciary and the Senate Standing Committee on Children & Families.

^v ILS is grateful to the Office of Court Administration which provided funding for this partnership with the Welfare Research Institute.

^{vi} The Executive Budget Proposal includes an additional \$160,000 in funding for the HH settlement over last year's enacted budget. During HH settlement negotiations this past year, the HH settlement parties agreed to this additional funding as necessary to achieve caseload compliance in Schuyler County.

^{vii} See U.S. Inflation Calculator, at: [Current US Inflation Rates: 2000-2023 \(usinflationcalculator.com\)](#).

^{viii} This funding includes an additional \$160,000 for Schuyler County to fund another Assistant Public Defender. ILS identified the need for this additional attorney position based on a pattern of increasing criminal caseloads and the Public Defender Office's current funded staffing pattern.

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

^x Kaye Commission Report, at 15.

^{xi} Id.

^{xii} Last year's enacted budget (FY 2023-24) included a transfer of \$114 million from the ILS Fund to the General Fund. It was ILS' understanding that \$22 million is for the increased costs of the Attorney for the Child program under Judiciary Law § 35-b, which is overseen by the Office of Court Administration, and the rest is for the \$92 million appropriation in the ILS Aid to Localities budget to reimburse counties and New York City 50% of their expenditures for increased assigned counsel costs. Of course, the ILS Aid to Localities appropriation simply could have established the ILS Fund as the source of funding, as is done with other ILS appropriations. By using a budget transfer mechanism instead, the final enacted budget authorizes the State to transfer from the ILS Fund more than is necessary to pay for this rate increase.



ATTACHMENT A

FY 2024-25 ILS Budget Request and the Executive Budget Proposal

At its September 22, 2023, meeting, the Indigent Legal Services Board unanimously approved our budget request of \$515,822,324 for FY 2024-25. Of this amount, \$507,614,300 would be devoted to Aid to Localities and \$8,208,024 for State Operations.

Governor Hochul, in her Executive budget, proposes a total ILS budget appropriation of \$459,465,000 with \$451,470,000 devoted to Aid to Localities and \$7,995,000 devoted to State Operations.

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

	FY 2024-25 ILS Budget Request	FY 2024-25 Proposed Executive Budget
Aid to Localities		
ILS Program	\$83.4 million	\$81 million
HH Settlement Program	\$24.7 million	\$23.8 million
HH Statewide Program	\$257.5 million	\$250 million
Family Court Defense	\$50 million	\$4.5 million
Assigned Counsel Program	\$92 million	\$92 million
Aid to Localities Total	\$507,614,300	\$451,470,000
State Operations Total	\$8,208,024	\$7,995,000

Explanation of the ILS Budget Request:

Aid to Localities. The ILS request for \$507,614,300 in Aid to Localities funding represents an increase of \$46.3 million over the FY 2023-24 enacted budget. Below is a brief overview of each Aid to Localities program:

- **ILS Program (\$83.4 million requested).** Of this \$83.4 million in funding, \$40 million would be disbursed to NYC pursuant to State Finance Law § 98-b(3)(b). The

rest of the funding would be used in two ways: 1) ongoing disbursements to counties and New York City via non-competitive distributions; and 2) the following innovative programs that are foundational to the HH settlement and HH statewide 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.
 - *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 (\$24.7 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. Since FY 2019-20, the HH settlement has been funded at \$23.8 million. ILS’ requested modest increase of \$874,300 represents a 3% COLA increase and \$160,000 for an additional Schuyler County Public Defender Office attorney, which, based on the caseload data Schuyler County reports to ILS, is necessary for compliance with the settlement’s caseload standard requirements.
 - **Statewide Implementation of Hurrell-Harring Reforms (\$257.5 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 New York City 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 includes a modest 3% COLA increase—an imperative for the ongoing progress of HH statewide implementation.

- **Family Court Representation (\$50 million requested).** This amount represents one-third of the \$150 million needed to bring the Family Court defense providers into compliance with ILS caseload standards—a necessity for improved quality representation of parents in Family Court matters and for better Family Court functioning.

State Operations. The ILS request for \$8.2 million in State Operations funding represents an increase of \$958,000, over the enacted FY 2023-24 funding levels. The funding requested will assure the continued effective operation of the ILS Office as we work to implement the historic HH settlement and HH statewide reforms. The requested funds support the 3% salary increases for FY 2023-24 and FY 2024-25 to which the State agreed. The funding would also enable the hiring of four new positions: a Human Resource Manager, a Grants Unit Auditor, an Assistant Contracts Manager, and an Assistant Grants Manager 1. These positions will facilitate ILS' ability to ensure fiscal accountability and oversight over ILS funds 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 (“HH statewide”) to be \$250 million. But it was not until April 2018 that the funds required for HH 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 HH statewide, 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 HH statewide implementation. Nonetheless, ILS persisted in working with county officials and mandated criminal defense providers on building plans and budgets for HH 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 HH 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 HH 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 New York City have fully engaged with ILS to develop county-specific plans and budgets for HH statewide implementation.
- All 52 non-HH counties and New York City have a fully executed contract with ILS for HH statewide implementation.
- All 52 non-HH counties and New York City have taken meaningful steps to implement their county-specific Statewide plan.

Creation of New Public Defender and Conflict Defender Offices

To ensure quality representation, seven counties have used the HH 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 September 2023, this office has a staff of eight attorneys and five other professionals.
- *Columbia County Conflict Defender Office*: This new Conflict Defender Office began with the appointment of Mark Portin as Conflict Defender and currently has three additional part-time attorneys.
- *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 three attorneys and another professional.

- *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 a full-time attorney, a part-time attorney, and a part-time other professional.
- *Oswego County Public Defender Office:* Oswego County enacted a local ordinance in 2021 to create a Public Defender Office. Since, Louis Lombardi has been appointed as Public Defender, and the office currently has eight attorney positions and five other professional positions filled and is recruiting additional staff.
- *Saratoga County Conflict Defender Office:* This new Conflict Defender Office began with the appointment of George Conway as Conflict Defender; Matt Maiello currently holds the position and supervises two additional full-time attorneys.

Creating High-Quality, Well-Managed Assigned Counsel Programs

Prior to HH 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 HH settlement, constitute the roadmap for using HH statewide funding to build high-quality, well-managed ACPs throughout New York. In accord with this roadmap, to date HH statewide implementation has achieved the following:

- 3 counties (Westchester, Orange, and Essex) 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, Damian Brady, was appointed in early 2022.

- In Essex County, legislation was recently passed to create an Independent Office of Assigned Counsel, a county department that will be staffed by an Administrator and Supervising Attorney.

36 counties (including Westchester, Orange, and Essex) have budgeted HH statewide funding to create a new ACP Administrator position or to increase the hours of an existing part-time position.

- 12 counties that previously did not have ACP Administrators now have one (Albany, Chautauqua, Dutchess, Essex, Fulton, Lewis, Madison, Montgomery, Saratoga, Schenectady, Sullivan, and Ulster), one county has an interim ACP Administrator (Broome).
 - Several counties have used HH 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 HH statewide funding for the creation of mentor programs, second chair programs, enhanced access to experts and 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 other professional staff. HH statewide funding has resulted in the following:

- As of September 2023, **740 new attorney positions have been created and filled** as a result of Statewide funding. Of these, 639 are new positions, 73 are increasing the hours of existing positions, and 25 are hired via a contract.¹
- As of September 2022, **444 other professional positions were created and filled** with Statewide funding. Of these, 397 are new positions, 41 are increasing the hours of existing positions, and 4 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.

¹ For three 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 two other professional 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.

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, HH 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, 2023, **587 new attorneys who provide representation at arraignments were hired with Statewide funding.***
- *Funding has supported the creation of **31 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:

- **94 of the 740 attorneys hired since April 2018 supervise** the work of others or provide training/mentoring.
- Over a one-year period (April 2022 through March 2023), **336 training events** were conducted using HH statewide funding.
- Over the same one-year period, **a total of \$1,735,670 in HH statewide funding was spent on contracted expert services, and \$525,792 was spent on contracted investigator services. Compared to the previous year, this is a 109% increase in the funding used for experts and a 43% increase in funding for investigations.**
- The number of clients benefitting from HH statewide funded non-attorney professional services grows each year, and compared to the previous year, **FY 2022-23 saw a 102% increase in the number of clients benefitting from expert services and an 8.7% increase in the number of clients benefitting from the use of investigative services.**



ATTACHMENT C

Reasons to Make Funding for Parent Representation a Priority

There are many compelling reasons for the Executive and Legislature to act with urgency and prioritize ILS' request for \$50 million for Family Court representation during this year's budget discussions, with the goal of \$150 million in funding by FY 2026-27, including the following:

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

Several reports detail the crisis that exists in Family Court representation. In its 2019 *Interim Report of the Commission on Parental Representation*, the Commission, convened by then-Chief Judge Janet DiFiore,¹ found that the Family Court defense providers 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 New York State Bar Association (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 note that in these cases—where not only the established legal rights of parents but the integrity of families is at stake—the poor parent far too often finds herself represented too late by a lawyer who is ill-prepared to provide meaningful representation.

There is no question that an investment in the legal representation of parents in Family Court matters 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 parent 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.² For example, in a recent report, the Bronx Defenders indicated that 43% of parent clients represented during a child protective services investigation were not charged with abuse or neglect as a result of the investigation. 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.³ 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

¹ *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.

² *Id.* at 4.

³ *Id.* at 20.

for children in foster care from the statewide average of 29 months to an average of less than five months. CFR estimated that, over a 15-year period, they saved the city \$37 million in foster care costs.⁴ In addition to saving public dollars, well-resourced representation has also saved families and children unwarranted duress and trauma.

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 part of the system, from reporting to foster care placements to termination of parents' rights.⁵ The reasons for this sharp disproportionality include limited or lack of access to services in low-income communities and implicit biases of child welfare system 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.⁶ 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 and almost certainly lead to further litigation against the State.*

In 2006, a report issued by the Commission on the Future of Indigent Legal Services (“Kaye Commission”) found that the delegation of fiscal and administrative responsibilities for mandated representation to the counties and New York City resulted in a crisis in the delivery of mandated criminal defense services throughout New York.⁷ Though the Kaye Commission’s investigation was limited to legally mandated representation in criminal

⁴ Id. at 21.

⁵ 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-foster-care)).

⁶ 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>

⁷ Commission on the Future of Indigent Defense Services, *Final Report to the Chief Judge of the State of New York*, 2006, available at: [C:\Documents and Settings\newuser\Desktop\ridiculous\01_COMMFINAL.wpd \(ny.gov\)](C:\Documents and Settings\newuser\Desktop\ridiculous\01_COMMFINAL.wpd (ny.gov)).

cases, it acknowledged that its findings were just as applicable to legally mandated representation in Family Court matters.⁸

Our work to use State funding to improve the quality of criminal defense representation has made us aware of how prescient the Kaye Commission’s statement was 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, at nearly every interview it emerged as an issue that demands immediate attention. Below is a summary of what we learned:⁹

[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.¹⁰ One chief

⁸ 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.

⁹ 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 \(ny.gov\)](https://www.ils.ny.gov/files/Caseload%20Standards%20Parents%20Attorneys%20NYS%20Family%20Court%20Report%20Full%20Amd%2011%2011%2012.pdf).

¹⁰ 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%20Report%20Full%20Amd%2011%2011%2012.pdf>. However, while the state’s FY 2021-2022 budget included \$2.5 million 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.

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 constitutional and statutory 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.

Given the scope of the crisis in New York’s system of mandated Family Court representation, our request for \$50 million to begin the process of complying with ILS caseload standards—which is foundational to improved quality representation—must be treated with urgency. We simply cannot wait any longer.