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Testimony of the Office of Indigent Legal Services

Joint Legislative Hearing on the 2015-2016 Public Protection Budget

Presented before:

The Senate Finance Committee

and

The Assembly Committee on Ways and Means

Presented by:

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Good afternoon Chairman DeFrancisco, Chairman Farrell and distinguished members of the Committees.

I am William Leahy, Director of the Office of Indigent Legal Services. Thank you for the opportunity to appear before you to discuss the FY 2015-16 budget of the Office of Indigent Legal Services and its Board.

Past support: I'd like to begin by thanking you for your past support of the Office and Board. Last year I asked this Committee to consider increasing funding for Office operations so that we could add a much needed Assistant Grants Manager position to help manage our burgeoning number of county contracts. Through your efforts, an additional \$100,000 was added in the Final FY 2014-15 Budget, and this past October, we were able to hire a very capable Assistant Grants Manager. As a result, our Office is now better able to expeditiously process the increasing number of claims for reimbursement, thereby ensuring that counties will continue to receive their payments in a timely manner.

Hurrell-Harring Settlement: On October 21, 2014, the State of New York and the plaintiff class entered into a final settlement agreement which ended seven years of litigation in *Hurrell-Harring v. New York*. In this historic agreement the State of New York for the first time acknowledged its responsibility to implement and to fund constitutionally compliant representation in the five counties named in the lawsuit. Under this settlement, the State agreed to ensure that (1) each indigent person charged with a crime is provided representation at his or her arraignment, (2) caseload/workload standards developed by my Office are implemented in the five counties, thereby reducing the crushing caseloads currently carried by providers of indigent legal services; and (3) State funding is provided to implement specific quality improvements to legally mandated representation in these counties.¹

Significantly, the parties to the settlement vested the responsibility for implementing the settlement's provisions with our professionally staffed and independent Office and Board, thus complying with the first and most important of the American Bar Association's *Ten Principles of A Public Defense Delivery System* (2002). Governor Cuomo, Attorney General Schneiderman and the plaintiffs' attorneys, the New York Civil Liberties Union and Schulte Roth & Zabel LLP, deserve enormous credit for getting these bedrock principles right – and my Office and Board are honored that we are the entity that has been asked to implement the terms of the settlement agreement.

I am pleased that, in its 2015-16 Budget proposal, the Executive has honored its settlement obligations by dedicating \$4 million to (a) taking interim steps to funding the provision of counsel at a defendant's first appearance in court, (b) developing caseload tracking systems and standards, (c) enhancing the quality of mandated representation in criminal cases, and (d) establishing a Hurrell-Harring Implementation Unit in my Office, consisting of lawyers and support staff, to implement the terms of the settlement. In this way, the limited staffing

¹ The counties participating in the settlement are Onondaga, Ontario, Schuyler, Suffolk and Washington.

resources of my Office will not be diverted away from our constant effort to improve the quality of representation in the localities that do not benefit from the settlement.

I therefore ask for your full support of the FY 2015-16 Executive Budget as it pertains to funding the implementation the Hurrell-Harring settlement.

The “Forgotten 52.” My plea to you today is for the 52 upstate counties that were unable to participate in the state-funded New York City caseload reduction program or the state-funded Hurrell-Harring settlement. These counties have equally serious unmet needs with respect to the terms of the settlement: the lack of counsel at arraignment, excessive caseloads, and an absence of adequate support services such as investigators, sentencing advocates and expert witness assistance that are necessary if representation is to be effective. As impressive as the FY 2015-16 Executive Budget is with providing the funding necessary to implement the five county Hurrell-Harring settlement, it provides no additional funding for the remainder of the upstate counties.

To illustrate this disparity in funding between the settlement and non-settlement counties, I would direct your attention to the chart attached to my testimony (see Attachment A). Unless the Legislature provides funding to continue our quality improvement work in these counties, the progress we have made toward reducing caseloads and otherwise improving quality in these counties will come to a halt; and their vulnerability to lawsuits, as well as the state’s vulnerability, will be extreme.

The statutory mission of the Office and Board is to improve the quality of mandated representation statewide, not just in one city or five counties. Our FY 2015-16 Budget Request that I am about to outline for you contains our plan to move all of the counties in the State forward towards accomplishing that objective.

FY 2015-16 ILS Budget Request.

In September, 2014, the Indigent Legal Services Board approved an ILS budget request of \$117.5 million for FY 2015-16. Of this amount, \$112 million would be devoted to Aid to Localities and \$5.5 million to State Operations. In October, 2014, the Board approved an increase in the ILS budget request to \$118.45 million, with the additional \$950,000 dedicated to establishing a Hurrell-Harring Settlement Implementation Unit within the Office (revised State Operations total: \$6.45 million).

Local Aid. The \$112 million Local Aid request represents an increase of \$31 million over FY 2014-15 funding levels, and includes the following components:

- **Upstate Quality Improvement and Caseload Reduction.** The majority of the Local Aid funding request, \$20 million, would be devoted to beginning the task of bringing the 72 upstate institutional providers into compliance with national caseload limits, and to provide basic structural support for the 58 upstate assigned counsel programs. The \$20 million funding in FY 2015-16 would be the first installment of a five-year funding plan, which would increase Local Aid funding by \$20 million/year, or \$100 million over five

years. The amount of the increase over five years is founded upon the data compiled in our *Estimate of the Cost of Compliance with Maximum National Caseload Limits in Upstate New York – 2013*, in which we estimate that in 2013 it would have cost an additional \$105.2 million to bring upstate indigent legal services providers into compliance with maximum national caseload standards.²

- **Counsel at First Appearance Grant.** \$8 million of the Local Aid funding request would be used to extend the reach of counsel at first appearance – within the 25 counties that are addressing it now, and the 32 that did not respond to our initial Counsel at First Appearance competitive grant. Many counties that did not participate in this 2013 grant process are now in a position to provide this vitally important, constitutionally guaranteed representation. The request of \$8 million would represent a modest second step toward establishing the minimum conditions needed for providing constitutionally required counsel at first appearance in every county.
- **Additional RFPs.** \$3 million of the Local Aid funding request would be used for three RFPs to (1) address major deficiencies in the quality of representation provided by Assigned Counsel Programs; (2) create two Model Upstate Parental Representation Offices; and (3) create two Wrongful Conviction Prevention Centers.

State Operations. The \$6.45 million in State Operations funding represents an increase of \$4.55 million over FY 2014-15 funding levels, which would consist of the following:

- **Regional Support Centers.** \$2 million to establish Regional Support Centers, which are essential for the realization of uniform, high quality representation in every county and region. This initial appropriation would support the first four such Centers, in areas of greatest need for regional help.
- **Statewide Appellate Resource Center.** \$800,000 to begin establishing a New York Statewide Appellate Center. The Center will provide litigation assistance to assigned counsel and mandate relief to counties by providing state-funded appellate representation in complex cases and identifying and rectifying wrongful convictions more rapidly than is done at present.

² This amount represents a 5.4% decrease on the \$111.2 million that would have been needed to bring upstate counties into compliance with caseload limits in 2012, according to our previous report, *Estimate of the Cost of Compliance with Maximum National Caseload Limits in Upstate New York*. This reduction in cost (and average weighted caseloads, from 719 in 2012 to 680 in 2013) is attributable in large part to an increase in staffing levels in upstate institutional provider offices of 47 attorneys and 38 support staff. Many of these additional positions were facilitated by the targeted funding of the Office of Indigent Legal Services.

- **Adequate ILS staffing.** \$800,000 to add sufficient staff to accelerate progress toward improving the quality of representation in every locality.
- **Hurrell-Harring Settlement.** \$950,000 to establish a Hurrell-Harring Settlement Implementation Unit, comprised of a Chief Implementation Attorney, four additional attorneys and three paralegals, at least one of whom will have expertise in research and data analysis.

FY 2015-16 Executive Budget.

The Executive Budget released on January 21, 2015 proposes funding of (1) \$2.9 million in State Operations and (2) \$84 million in Aid to Localities. Thus the All Funds total is \$86.9 million, an increase of \$4 million over the amount appropriated in the FY 2014-15 Final Budget. The additional \$4 million is exclusively devoted to implementation of the Hurrell-Harring settlement.

- **State Operations.** The \$2.9 million in State Operations funding represents an increase of \$1 million over FY 2014-15 funding levels, which would consist of the following:
 - **Caseload Tracking Systems and Standards.** \$500,000 to pay costs associated with developing a tracking system to accurately track and report (on a quarterly basis) the caseload/workload of each attorney providing mandated representation in the settlement counties.
 - **Office Operations.** \$500,000 to add sufficient Office staff to implement the Hurrell-Harring settlement.
- **Local Aid.** The \$84 million in Local Aid represents an increase of \$3 million over FY 2014-15 funding levels, which would consist of the following:
 - **Counsel at First Appearance.** \$1 million for implementation of the interim plan under which each of the five settlement counties will provide representation for eligible criminal defendants at their first court appearance.
 - **Improve Quality of Representation.** \$2 million to implement the plan developed by the Office to enhance quality of mandated representation in criminal cases for each of five settlement counties.

Implementation of the Hurrell-Harring settlement

On October 21, 2014, the State and the plaintiff class in *Hurrell-Harring v. State of New York* announced that they had agreed to settle this class action lawsuit, which alleged that the State had failed to meet its constitutional obligation to provide effective public defense representation to eligible criminal defendants in Onondaga, Ontario, Schuyler, Suffolk, and Washington counties.

The settlement agreement focused on four issues: (1) providing counsel at first appearance; (2) reducing public defense caseloads; (3) improving the quality of public defense representation; and (4) the creation of upstatewide eligibility standards.

Under the terms of the settlement agreement, the Office of Indigent Legal Services has assumed the responsibility for implementing its terms. The duties and responsibilities of the Office under the settlement agreement are extensive, with strict deadlines for compliance. Under the terms of the settlement, the duties of responsibilities of the Office include:

- within 6 months of the effective date of the settlement, the Office must develop written plans for each of the five settlement counties to (i) implement the State's obligation to provide in person representation of eligible criminal defendants at arraignment and (ii) ensure that County Law 18-B attorneys receive effective supervision and training; have access to and appropriately utilize investigators, interpreters, and expert witnesses; communicate effectively with clients (in-person interviews); have the qualifications and experience necessary to handle criminal cases; and, for assigned counsel attorneys, that case assignments include consideration of the attorney's experience and caseload;
- within 6 months of the effective date of the settlement, the Office is directed to (i) ensure that the caseload/workload (including private practice) of each 18-B attorney in the settlement counties is accurately tracked, and that such caseloads/workloads are reported at least quarterly and (ii) issue criteria and procedures to guide all courts outside of New York City in determining whether a person is eligible for mandated representation.;
- within 9 months of the effective date of the settlement, the Office is directed to determine appropriate numerical caseload/workload standards for each provider of mandated representation (public defender, legal aid society, assigned counsel program, or conflict defender) in the settlement counties, for both trial and appellate level cases.
- for the duration of the 7½ year settlement term, the Office is directed to (i) satisfy the extensive reporting requirements contained in the settlement and (ii) evaluate and monitor the settlement counties for compliance with the terms of the settlement.

Fourth year operations of the Office and the Board.

During its first four years of operations, the Board has approved the development of five annual *non-competitive* distributions designed to improve the quality of representation, in amounts sufficient to maintain every county and New York City at the level of state funding they received in 2010.³

The Board has also approved the development of six *competitive* grants, each targeted to improve the quality of mandated representation under county law 18-B by using carefully targeted state funding to address current deficiencies in the delivery of those services. These competitive grants provide additional funding to the counties and New York City, above and beyond the 2010 level of funding provided by the annual non-competitive distributions.

Significantly, these initiatives - the non-competitive distributions and competitive grants - do not impose any unfunded mandates on the counties. Counties will not be asked to perform any additional service that state funding will not support – and the counties and the State will benefit from having the quality of indigent legal services improve significantly.

Collaboration between County Officials and Providers

For each of our non-competitive distributions and competitive grants, we have required, as a precondition of receiving funding, that counties consult with their indigent legal services providers in the preparation of their proposals. In this fourth year of operations, we are once again pleased to report that the level of collaboration between county officials and providers continues to grow. The net effect of this growth, we have observed, is a better targeting of ILSF funds toward improving the quality of legal representation.

Non-competitive Distributions

This past September, the Office recommended and Board approved \$15.5 million in a non-competitive distribution of FY 2014-15 Local Aid funds under Executive Law Article 30, section 3832 (3) (f). The Board authorized a three-year allocation of funds, in the total amount of \$46.5 million over this period. The \$15.5 million represents the first year of a new three-year allocation of funds (“Distribution #5”), which is composed of two parts: (1) \$7.4 million represents the continuation of funding that had been paid to the counties via the statutory payments that were phased out in March, 2014; and (2) \$8.1 million represents the continuation of funding authorized by the Board at its September, 2011 meeting (Distribution #2). Since the Board has previously allocated funding for each of the three years for Distribution #2, a new authorization was required for this component of the funding.

³ For the first four years of operation, non-NYC counties were guaranteed by statute a percentage of the ILSF funds they received in March, 2010 (2011 – 90%; 2012 – 75%; 2013 – 50%; 2014 – 25%). In March, 2014, the non-NYC counties received their final statutory payment under these phase-out provisions. New York City, which is guaranteed an annual sum of \$40 million, or 98% of its March, 2010 ILSF allocation, will receive its next annual sum in March, 2015. (NYC also receives an annual non-competitive distribution of \$765,000).

Competitive Grants

Prior to FY 2014-15, the Board had authorized a total of just under \$10.8 million annually (\$32.4 million over three years) in *competitive* grants in furtherance of three specific goals: 1) to bring New York closer to the goal of providing counsel at a criminal defendant's first court appearance, a critical moment when his or her liberty may be at stake; 2) to bring New York into compliance with the requirement established by the United States Supreme Court in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), that every assigned lawyer must provide his or her client with accurate information as to potential immigration consequences of a conviction; and 3) to alleviate excessive caseloads in upstate public defender offices and develop quality control measures in upstate assigned counsel programs. All three of these grants are for a three year period, with total funding of \$12 million for the counsel at arraignment grant (\$4.0 million per year); \$8.4 million for the immigration consequences grant (\$2.8 million per year); and \$12 million for upstate caseload reduction (\$4 million per year). These grants represent the Board's priority to take steps to address constitutional deficiencies in the delivery of 18-B mandated representation and to develop innovative models of delivering state assistance to counties through the provision of state-funded regional support and resources.

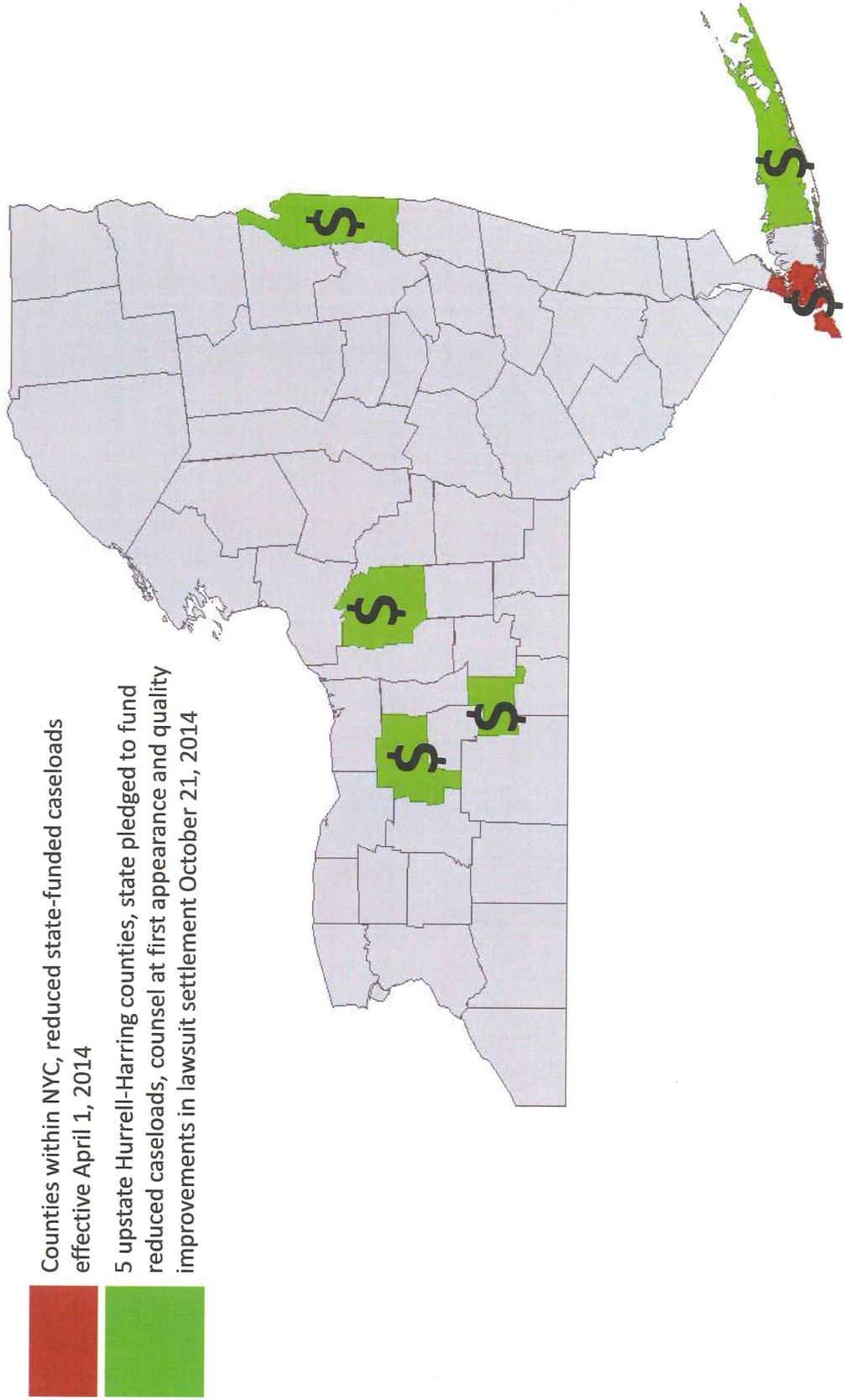
We are now contracting with 25 upstate counties to provide counsel at first appearance in criminal cases; we are contracting with 47 upstate counties to reduce caseloads and/or improve assigned counsel representation; and we are currently reviewing the responses we received in January, 2015 to our RFP for the creation of six Regional Immigration Assistance Centers to achieve statewide compliance with the *Padilla* decision.

In FY 2014-15, the Board authorized the development of three additional RFPs, each in the amount of \$870,139 annually (\$2.6 million over three years) to (1) address major deficiencies in the quality of representation provided by Assigned Counsel Programs; (2) create a Model Upstate Parental Representation Office; and (3) create two Wrongful Conviction Prevention Centers.

Public Defense Backup Center.

Finally, as I have previously testified before this Committee for each of the four years I have been the Director of the Office of Indigent Legal Services, I emphasize that the New York State Defender Association's Public Defense Backup Center must receive adequate funding to continue providing essential training and support services, including its widely utilized case management system, to the indigent legal service providers throughout the state. Our Office cannot succeed in its mission to improve the quality of representation under County Law article 18-B without a robust Public Defense Public Center operating alongside our Office. Simply put, New York cannot meet its Constitutional obligation to provide competent counsel to those who cannot afford to pay for it, if the Backup Center were to fail for lack of funding.

No County Left Behind: Fund the Forgotten 52



How much upstate caseload relief would \$20 million achieve?

