

## **The Fourth Annual Report of the Indigent Legal Services Board**

**Covering Fiscal Year 2014-2015 (April 1, 2014 - March 31, 2015)**

**“WHEREAS**, Plaintiffs and the State intend that the terms and measures set forth in this Settlement Agreement will ensure counsel at arraignment for indigent defendants in the Five Counties, provide caseload relief for attorneys providing Mandated Representation in the Five Counties, improve the quality of representation in the Five Counties, and lead to improved eligibility determinations;

**NOW, THEREFORE, IT IS HEREBY STIPULATED, AGREED, AND ORDERED....”**

Critical language in the Stipulation and Order of Settlement in *Hurrell-Harring v. The State of New York*, Supreme Court, Albany County, No. 8866-07 (Connolly, J.) (March 11, 2015)

**“While the settlement agreement pertains to only five counties, its criteria establish a standard for providing indigent legal services that should apply statewide.”**

- A. 6202-A, Section 1, introduced by Assemblywoman Fahy of Albany (March 17, 2015)

- I. **Significant Staff Activity:**

The fourth year of operations of the Indigent Legal Services Board and the Office of Indigent Legal Services (ILS) was characterized by significant progress on a number of fronts. New York’s first-ever *Appellate Standards and Best Practices* were promulgated by ILS on January 5, 2015, after receiving the Board’s approval on November 7 and Director of Quality Enhancement for Appellate and Post-Conviction Representation Risa Gerson explained the standards to the NYSBA Committee to Ensure the Quality of Mandated Representation on November 21.

Standards for Parental Representation in State Intervention Matters were being developed by Director of Parental Representation Angela Burton and her Working Group for consideration by the Board later in 2015; Standards for Assigned Counsel Programs were under development by Director of Criminal Defense Representation Matt Alpern and his Working Group and Best Immigration Practices were being formulated by Director of Regional Initiatives Joanne Macri and her Working Group. Both are targeted for presentation to the Board in 2016.

Earlier in 2014, Attorney Gerson, who is also Chair of the Criminal Justice Operations committee of the New York City Bar Association, was instrumental in planning a May, 2014 forum on Access to Justice for the Poor. Panelists included Stephen Bright of the Southern Center for Human Rights, Tina Luongo from the Legal Aid Society, Corey Stoughton of the NYCLU, and Professor Steven Zeidman from CUNY Law School.

In September, 2014, Attorneys Alpern and Gerson expanded the ILS criminal appellate listserv to include criminal trial lawyers. The number of users thereby grew significantly as a result. Likewise Angela Burton's listserv for Family Court practitioners in mandated representation cases has grown and thrived. We are learning that these listserves are a very effective way for lawyers in all types of programs and all over the state to seek assistance from each other and to improve their practices as they learn from each other.

ILS has worked with other organizations such as the New York State Defenders Association (NYSDA), NYSBA, the National Association of Criminal Defense Lawyers (NACDL) and its New York affiliate (NYSACDL) and with local providers of mandated representation to present basic and advanced training opportunities to practicing lawyers and their support staff. The Monroe County Public Defender in Rochester and the Oneida County Public Defender in Utica have been particularly strong training partners among local upstate providers. For example, attorney Alpern has worked with the Monroe County PD Training Director to develop the Western New York Advanced Trial Skills Program, and he and attorneys Gerson and Macri have participated as trainers in the frequent trainings that have been offered in Utica.

Angela Burton continues to be an active participant on the federally mandated Statewide Multidisciplinary Team of the NYS Child Welfare Improvement Project. She is also a member of the NYS Permanent Judicial Commission on Justice for Children chaired by former Chief Judge Judith S. Kaye. Angela and Joanne Macri are invited members of a group of advocates who are developing training materials for statewide use by judges and practitioners regarding immigration issues in Family Court proceedings. As this fiscal year came to a close, Angela was engaged in initial planning of the first-ever statewide training conference on effective parental representation, which has now come to fruition and will take place in Albany on November 13-14, 2015.

Joanne Macri, Director of Regional initiatives for ILS, has led the office's effort to build a statewide network of Regional Immigration Assistance Centers. Proposals were submitted in each of the six regions, and were under review at the close of this period. When they go into operation, New York will become the first state to provide comprehensive training and advice concerning the immigration consequences of criminal convictions and Family Court involvement to providers of mandated representation in every locality. Joanne has also worked with Risa Gerson and local appellate providers to create two exciting regional appellate programs, one in western New York under the leadership of the Erie County Legal Aid Bureau, and one in the North Country operating under the Rural Legal Services office in Plattsburgh.

Attorney Macri has also conducted a number of training programs on the impact of immigration consequences in both criminal and family court proceedings. She recently accepted an invitation to participate as a member of the Advisory Council on Immigration Issues in Family Court.

The Director of Research for ILS, Andrew Davies, in collaboration with Professor Alissa Worden of SUNY Albany, secured a federal grant from the National Institute of Justice to study the impact upon client outcomes of providing counsel at a person's first court appearance. The study is underway in six upstate counties, with results expected in 2017. This period also saw the completion of our study of arraignment representation in Ontario County, showing reduced time in pretrial custody and reduced bail amounts. We also conducted the first survey of Town and Village Court magistrates on counsel at first appearance in these courts. Ninety percent of responding judges indicated that counsel is "seldom or never" available at a person's first court appearance when it occurs outside of regularly scheduled court sessions.

In November, 2014, Andrew Davies organized the first national gathering of empirical researchers in indigent legal defense, at the American Society of Criminology annual conference. The fruits of this historic meeting may be found in the Summer 2015 volume of the Albany Law Review, including a foreword by ILS Chair and Court of Appeals Chief Judge Jonathan Lippman which may be accessed at <http://www.albanylawreview.org/Pages/home.aspx> and is appended hereto. Davies and Angela Burton also co-authored the article "Why Gather Data on Parent Representation? The Pros, Cons, Promise and Pitfalls", which appeared in ABA Child Law Practice 34(4) at 49, 54-57 and may be accessed at [http://www.americanbar.org/publication/child\\_law\\_practice/vol-34/april-2015/why-gather-data-on-parent-representation--the-pros-cons--promis.html](http://www.americanbar.org/publication/child_law_practice/vol-34/april-2015/why-gather-data-on-parent-representation--the-pros-cons--promis.html).

In the summer of 2014, the federal Bureau of Justice Statistics (BJS) published an inaccurate report on state public defense spending. Davies worked with the National Association for Public Defense and the Sixth Amendment Center to have the data corrected for New York and other states; and a revised report was issued by BJS in the fall. Finally, in March 2015 Davies wrote a paper for the National Institute for Justice (NIJ) entitled "Barriers to Access to Counsel for Adults", which was published and may be accessed at <http://www.nij.gov/topics/courts/indigent-defense/Documents/indigent-defense-twg-march2015-notes.pdf>.

ILS continued its efforts to improve the quality of representation in all localities by implementing Counsel at First Appearance grants in 25 counties, and Upstate Quality Improvement and Caseload Reduction grants in 47 counties. ILS also continued to support and monitor the quality improvements previously funded by its annual Quality Improvement Distributions; and in November, 2014 Director Leahy announced the availability of funding for all localities under Distribution #5 in the amount of \$46,464,684 over the three year period from January 1, 2015 through December 31, 2017.

FY 2014-15 also marked a year of tremendous growth in the number of contracts managed by ILS for both competitive grants and quality improvement distributions. During the year, the number

of finalized contracts almost doubled, from 120 to 235. Claims for reimbursement submitted by localities pursuant to those contracts, meanwhile, totaled \$16 million, or almost double the total amount which had been submitted during the Office's first three years of operation.

## II. The Hurrell-Harring Settlement:

On October 21, 2014, counsel for the plaintiff class and for the defendants reached a settlement agreement in the case of *Hurrell-Harring v. The State of New York*. (The settlement agreement, formally called the Stipulation and Order of Settlement, may be accessed on the agency website, [www.ils.ny.gov](http://www.ils.ny.gov).)

On the following day, October 22, Director Leahy described the significance of the settlement:

“The settlement is pathbreaking in two historically important ways. First, this is the first time since the State of New York in 1965 delegated to each individual county the State’s duty to provide counsel to people who are entitled to the Assistance of Counsel but cannot afford to hire an attorney, that the State has accepted its responsibility to implement and to fund constitutionally compliant representation in upstate New York....Second, the parties have properly vested the responsibility for implementing the settlement’s provisions with a 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, the New York Civil Liberties Union and Schulte Roth & Zabel LLP deserve enormous credit for getting these bedrock principles right.”

Under the settlement, the State of New York accepted the responsibility to ensure that each person eligible for publicly funded legal representation in the counties of Onondaga, Ontario, Schuyler, Suffolk and Washington (“five counties”) will be represented by counsel at his or her arraignment (section III); that caseload/workload standards to be developed by ILS for the five counties will be implemented (section IV); that dedicated State funding will be provided to implement specific quality improvement initiatives in the five counties pursuant to ILS plans (section V); and that the State will undertake best efforts to pay in full for these enhancements (section IX). The settlement also empowers ILS to “issue criteria and procedures to guide courts in counties outside New York City in determining whether a person is eligible for Mandated Representation” (section VI).

As Leahy also emphasized in his statement, it would be vital to the effective implementation of the settlement agreement that the Office’s request “for a Settlement Implementation Unit,

headed by an experienced chief implementation attorney” be funded in the FY 2015-2016 state budget. We are pleased to note that the state appropriation did indeed provide that funding; and that as of the date of this Report the Office has been enriched by the hiring of a Chief implementation Attorney, Patricia Warth; a Quality Improvement Counsel, Amanda Oren; a Counsel at Arraignment Counsel, Deborah Schmeer; a Caseload Relief Counsel, Nora Christenson; and an Eligibility Standards Counsel, Lisa Joy Robertson. Under Attorney Warth’s leadership, the Unit is busily and productively engaged in establishing the plans and procedures that will guide the implementation of the settlement terms.

### III. State and Local Funding:

At its September, 2014 meeting, the Board approved a budget request for FY 2015-2016 of \$118,450,000. Of that amount, \$6,450,000 was sought for State Operations: for the funding of an eight-person Hurrell-Harring Implementation Unit; for the beginning of a network of Regional Support Centers; and for a New York State Appellate Resource Center. A total of \$112,000,000 was sought for Aid to Localities, including \$20 million to reduce upstate caseloads, \$8 million to provide counsel at arraignment, and \$3 million for specifically targeted grants to improve the quality of representation.

The final state appropriation for FY 2015 was \$87 million, consisting of \$3 million in State Operations and \$84 million in Aid to Localities. The appropriation did include funding for the lawsuit implementation unit, and also provided \$2 million for Quality Improvement Initiatives and \$1 million for providing Counsel at Arraignment under the settlement. It failed to provide any additional funding for any of the 52 upstate counties that derived no benefit from the 2009 legislation and subsequent state appropriations to reduce public defender caseloads in New York City, nor from the Hurrell-Harring five-county settlement.

### IV. Four Essential Principles:

We remind all who read this report of four principles that are essential to the ability of the Board and the Office to continue improving the quality of mandated representation, as our statutory provisions require. These principles are:

- a) Independence: The independence of the Office and Board from political interference is a centerpiece of Article 30 and adheres to the first of the American Bar Association’s *Ten Principles of a Public Defense Delivery System*. Independence must continue to be scrupulously honored.

- b) Adequate State Funding: There must be a significant increase in state funding in order to remedy the systemic defects acknowledged by the State of New York as to five counties in the March, 2015 settlement of the *Hurrell-Harring* litigation, and which persist in all counties.
- c) State-Funded Regional Support: The county-based system for providing mandated representation cannot operate effectively unless it is supplemented by Regional Support Centers as we have long proposed. These centers would provide vital support to local providers in the form of training, mentoring and supervision; expertise in appellate, family and criminal defense practice; and the facilitation of investigative, forensic and other necessary client services.
- d) Enforcement Authority: The Office and Board must be given the enforcement authority needed to assure uniformly high quality representation statewide. This includes the authority to approve assigned counsel and conflict defender office plans, and to enforce the standards and criteria established by the Office and the Board.

### **Our Appreciation for the Leadership and Inspiration of Chair Jonathan Lippman:**

By application of Executive Law article 833 section 1 (a), the Chief Judge of the Court of Appeals is the Chair of the Board. From its inception in 2010, through the commencement of operations of the Office in 2011 through today, Jonathan Lippman has distinguished himself in that capacity.

At the Board's first meeting following its selection of a Director for the Office, on March 8, 2011, Chair Lippman referred to the disparate backgrounds and experiences of the nine Board members, and noted that their placement on the Board had been based upon recommendations by diverse persons and organizations. But, he emphasized, each member shared the solemn and overriding responsibility to work with each other and the Director in pursuit of the statutory goal "to make efforts to improve the quality of services provided pursuant to article eighteen-B of the county law." The Board would best do this, he advised, by working together as family: by listening respectfully to each member's opinions; by being open always to divergent perspectives; and above all by keeping in mind both the individual and collective responsibility to advance the accomplishment of the statutory command.

Two months later on May 2, in his capacity as Chief Judge presiding over the Law Day ceremony in the Court of Appeals Hall, Lippman boldly addressed the "disturbing disconnect between the promise of *Gideon* and what is sometimes the reality of our criminal justice system." In particular, he singled out "the continuing practice of arraigning and jailing accused persons without affording them the assistance of counsel." And he proceeded to announce "the first major policy

objective to be undertaken by the ILS Board and Office – to address and remedy this practice, which has long been impervious to change. Our goal is to ensure that all defendants arraigned before the courts of this State are represented by counsel at their first court appearance.”

From those early days to the present, Jonathan Lippman has stood strong in defense of the right to counsel for those who cannot afford to pay for it. In Rochester this past spring, when he was recognized on the occasion of Monroe County having achieved the goal of providing representation at every accused person’s first court appearance, he stated that there was no cause for celebration, because New York should long ago have afforded this basic right to all, in every county. Perhaps this is why he is known by at least one member of the ILS Office as “our right-on Chief Judge.”

We believe it is fitting to append to this Annual Report two of Jonathan Lippman’s more recent public expressions concerning the right to counsel and indigent defense: the first is his June 6, 2014 speech at Albany Law School at the New York State Bar Association-sponsored forum, “The Past, Present and Future of Indigent Defense in New York: Where Has 10 Years of Reform Gotten Us; and Where Are We Going?” The second is his Foreword introducing the Albany Law Review’s summer, 2015 publication of a series of articles applying empirical research to the field of indigent defense. We close our appreciation with a poignant question from that Foreword that looks ahead to the post-*Hurrell-Harring* challenge facing New York: “How can it be fair that in one county, indigent defendants receive well-qualified, trained and supervised counsel and defendants from a neighboring county continue to receive representation from overworked attorneys who are unable to fully vigorously represent them under the law?”

How indeed. We join as one in saluting the massive contributions of Jonathan Lippman to the work of the ILS Office and Board; and to the cause of equal justice in New York and the nation.

Dated: November 6, 2015

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Jonathan Lippman, Chair

