

The Second Annual Report of the Indigent Legal Services Board

Covering the period April 1, 2012 – March 31, 2013 (Fiscal Year 2012-2013)

“There is progress being made, but it is painstakingly slow and it is not close to being adequate to remedy the deficiencies that were identified in the Kaye Commission report and Hurrell-Harring [v. State of New York].”

William Leahy, Director, Office of Indigent Legal Services

“I think we are finally on track...but it’s a slow train.”

Seymour James, President, New York State Bar Association

The assessments quoted above, which appeared in the New York Law Journal story on March 18, 2013, the 50th anniversary of the landmark right to counsel decision in *Gideon v. Wainwright*, 372 U. S. 335 (1963), serve as accurate shorthand descriptions of the state of progress in New York as the Indigent Legal Services Board (Board) and Office completed their second year of operations.* On a positive note, the office had reached its funded capacity of ten (10) staff members, had begun to distribute quality improvement funds to the localities,

*For a description of the history leading up to the creation of the Board and Office, please see the Board’s First Annual Report (November 21, 2012) at pp. 2-5.

had issued its first competitive Request for Proposals and was preparing two others, and it was beginning to assess the quality of services being provided statewide by means of site visits, reports, and data analysis. On the other hand, Office funding and staff were barely more than half of the original legislative and executive intention, the staffing of the Office and the distribution of funds had been subject to lengthy delays, and the appropriations for local aid had barely scratched the surface of what would be needed. Yet, at the end of the budget deliberations which coincides with the closing date for the year covered by this report, the Legislature provided critical funding for relief of excessive caseloads in upstate defender offices, and lack of adequate support in assigned counsel programs.

Staffing of the Office: As the fiscal year began, the Office was composed of five employees: the Director, Counsel, Executive Assistant, Director of Research, and Manager of Information Services. During the year, the Director's appointments of a Grants Manager, Directors of Quality Enhancement for Criminal Trials, for Parent Representation, and for Appellate and Post-Conviction Litigation, and also a Director of Regional Initiatives were finalized. As of January 7, 2013, twenty-two months after it began operations, Office staff reached its funded level of ten. Now, the Office could send an expert in each practice area for which it bore responsibility into the field to consult with providers, and could reach out to experts in their respective areas. Now, the Office could undertake comprehensive rather than piecemeal analyses of data provided by our Director of Research and our Manager of Information Services. Now our Grants Manager and Counsel could work with our Quality Enhancement Directors and our Director of Regional Initiatives to better direct state funding to improve the quality of representation statewide. Now we could begin in earnest our effort to improve the quality of representation throughout New York.

For example, from her employment on January 7, 2013 through the end of March, our Director of Quality Enhancement for Appellate and Post-Conviction Representation, Risa Gerson, visited with the Presiding Justices of all four of New York's Judicial Departments, and with the heads of virtually every upstate institutional appeals unit; including those in Buffalo, Rochester, Syracuse, Nassau and Westchester, and appellate lawyers in the Columbia, Dutchess and Ulster County Public Defender offices. Our new Director of Regional Initiatives, Joanne Macri, who began her employment on the same date, laid the groundwork for regional plans by visiting public defender and/or assigned counsel offices in Albany, Cattaraugus, Erie, Genesee, Kings, Monroe, Oneida, Onondaga, Westchester and Wyoming counties; and by consulting with law professors and advocates with experience in the immigration consequences of criminal convictions and allegations of deficient parenting.

Our Manager of Information Services, Peter Avery, designed and installed our agency website, <http://www.ils.ny.gov>, which became fully operational in September, 2012. Our Director of Research, Andrew Davies, worked very effectively with providers to amass an unprecedented amount of data about every program, thereby providing a critical base upon which we may build an accurate assessment of each program's performance and resource needs. Through his participation on the National Legal Aid and Defenders Association's Research and Data Analysis committee, Andy brings to New York the most current and advanced research and assessment techniques. Our Grants Manager Karen Jackuback and Counsel Joe Wierschem worked tirelessly with providers and county officials to reach agreement on work plans and budgets for the quality improvement distributions and the counsel at first appearance proposals. Our Executive Assistant and Office Manager, Tammeka Freeman, kept the office staff informed, supplied and highly motivated, even as she negotiated her way through complicated state government processes on our behalf.

Matt Alpern and Angela Burton, our directors of Quality Enhancement for Criminal Trials and Parent Representation, respectively, began their employment on September 4, 2012. During their first months, they engaged in active outreach to providers throughout the state, promoting increased communication and more effective advocacy. They encouraged providers to conduct regular meetings within their judicial districts, brought together practitioners from diverse regions, made connections with existing bar association and judicial groups, and commenced planning for increased training and the development of practice standards in cases of alleged child abuse or neglect.

As we did in our First Annual Report, the Board wishes to acknowledge its appreciation for the important role played by the Governor's Counsel Mylan Denerstein in reducing the delays in staffing the Office. Without her assistance, a troublesome situation could have become seriously disabling.

Quality Improvement Distributions and Grants:

Non-Competitive Distributions: At its meeting on September 28, 2012, the Board approved the development of a third Quality Improvement Distribution, known as Distribution #3. The Board authorized funding in the amount of almost \$7.4 million per year over a three-year period, or a total amount of \$22.1 million. The Board's action continued and reaffirmed its commitment to assuring every county and New York City that they would receive at least the level of state support they received in 2010; that their funding would not decrease in a time when they were being asked to work with the ILS Office and Board to improve the quality of representation. As the period covered by this report concluded, the Office was awaiting approval by the Office of State Comptroller to solicit proposals for funding under Distribution #3.

Meanwhile, 54 contracts with localities had been finalized for Distribution #1, with approximately 70% of the \$4.4 million having been expended. For Distribution #2, 51 contracts totaling \$20.6 million for a three-year period had been sent to the counties for approval; and 43 of these had been finalized by the Office and the State Comptroller.

Competitive Grants: At its meeting on September 28, 2012, the Board approved the development of a third competitive grant, intended to address the problem of excessive caseloads and inadequate support staff in the 57 upstate counties, and to begin the process of achieving their compliance with maximum national caseload standards. The Board authorized this grant in an amount of \$4 million per year over a three-year period, in the total amount of \$12 million. The Office was drafting an RFP, to be entitled the Upstate Quality Improvement and Caseload Reduction Grant, as this reporting period concluded.

On November 30, 2012, the Office released its RFP for the Counsel at First Appearance Demonstration Grant, previously authorized by the Board in the amount of \$12 million over a three-year term, or \$4 million per year. This RFP, which was written to promote effective representation of persons charged with crime at their first appearance before a judge, is attached hereto as Attachment A. By the due date of February 15, 2013, 25 counties had submitted proposals in a total amount of almost \$13.5 million, which were under review at the fiscal year's end with awards to follow.

Other Significant Activities: The Office established a Chief Defender Advisory Group (CDAG), which is composed of 20 criminal defense and family practitioner leaders from across the state, including representatives of institutional defenders and assigned counsel programs. The group began meeting in November, 2012, and is an important mechanism for allowing in-depth group discussion of critical issues between local practitioners and Office staff.

On June 8, 2012, the Board approved *Standards and Criteria for the Provision of Mandated Representation in Cases Involving a Conflict of Interest*, pursuant to Executive Law section 832(3)(d), and made them effective as of July 1, 2012. These Standards serve two important purposes. First, they are being used by the Office and Board to work with counties and providers to generate improvements in the quality of mandated legal services. Second, they will be used by the State Administrator (Chief Administrative Judge) in reviewing plans for conflict defender offices submitted under County Law article 18-B, section 722.

At its meeting on September 28, 2012, the Board approved the extension of the Standards to encompass all trial-level representation, effective as of January 1, 2013. Subsequently, Office staff began planning to form workgroups to examine the issues of best practices and standards in the areas of family representation, appellate and immigration consequences.

State Funding: At its meeting on September 28, 2012, the Board approved an FY 2013-2014 appropriation request for the Office of \$94 million, an increase of \$11.5 million over its FY 2012-2013 appropriation of \$82.5 million.

Of the \$94 million, \$3 million was sought for the expenses of the Office, and \$91 million for Aid to Localities. The latter funding sought to increase state funding by \$10 million for three specific purposes: \$4 million to further reduce excessive caseloads in upstate counties; \$3 million to increase funding for counsel at arraignment; and \$3 million to enable counties to comply with the ILS *Standards and Criteria for the Provision of Mandated Representation*, which were coming into effect on January 1, 2013. This budget request was submitted to the Executive Branch on October 16, 2012. However, the Executive Budget released in January, 2013 contained none of the requested increases. In fact, it reduced the FY 2012-2013 appropriation from \$82.5 million to \$78.5 million, by removing the \$4 million intended for the relief of excessive upstate caseloads.

On February 6, 2013, Director Leahy testified at the legislative budget hearing hosted by the Senate Finance Committee and the Assembly Committee on Ways and Means. He emphasized that “[i]t is both appropriate and necessary for the State of New York to provide much more significant financial support to the 57 counties and the City of New York, which have borne the lion’s share, and also an ever-increasing share, of the cost of providing legally mandated counsel.” (Attachment B, at page 10). The Legislature responded favorably by restoring the \$4 million for upstate caseload and support funding, and by increasing the office budget by \$300,000 to the level of \$1.8 million. Thus the final appropriation for FY 2013-2014 was \$82.8 million.

The restoration of the \$4 million meant that the Office could proceed with development of its RFP for a multi-year Upstate Quality Improvement and Caseload Reduction grant program, and the increase of \$300,000 meant that the Office staff could proceed with their assessment of and efforts to improve the quality of representation as required by our statute. The Board wishes to express its gratitude to the leadership of the Assembly and the Senate for their support of the right to counsel at this critical moment. In particular, we thank Senator John DeFrancisco, Chairman of the Senate Finance Committee and Assemblyman Joe Lentol, Chairman of the Assembly Codes Committee for their strong leadership.

Necessary Actions to Achieve Improved Quality of Services: If the quality of representation for clients who are entitled by law to the assistance of counsel yet cannot afford to retain an attorney is to improve, as directed by Article 30 of the Executive Law, four major reforms must be undertaken or, where they have begun, must be consistently supported. They are:

I. Sufficient Funding and the Elimination of "Sweeps" :

First, the annual Aid to Localities appropriation must be increased by a significant amount. Simply put, the counties cannot continue to contribute more than 80% of all funding to support the State's obligation to provide counsel. It is simply unsustainable. There must be a significant increase in state funding if the serious defects identified by the Court of Appeals in its 2010 decision in *Hurrell-Harring v. State of New York* are to be remedied. Second, the specific, targeted reforms proposed by the Office and Board in each annual appropriation request should be funded. Third, the transfers or "sweeps" from the Indigent Legal Services Fund to the general fund must cease. The ILSF monies must be preserved in full for their intended purpose of supporting improvements in the quality of legally mandated representation.

II. Independence:

The independence of the Office and the Board from political interference is a centerpiece of Article 30. The authority of the Director to make appointments under section 832(2)(d) must continue to be honored. Furthermore, there must be no interference with the Board's authority to disburse quality improvement funds to localities via non-competitive distributions as well as by competitive grants.

III. Regional State-Funded Support:

The county-based system cannot flourish unless it is supplemented by Regional Support Centers, funded by the state and operating under the Office, to assist counties in every region. These Centers would provide support in such areas as training, mentoring, and supervision; expertise in appellate, family and criminal defense practice; and assistance with obtaining investigative, forensic and other necessary client services.

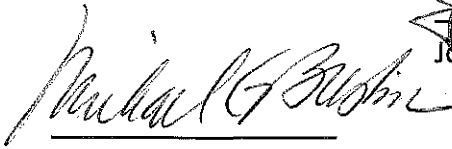
IV. Enforcement Authority:

The Office and Board must be given the enforcement authority that is needed to assure uniformly high quality representation throughout the state. Specifically, the Office should have the authority to approve assigned counsel and conflict defender office plans, and the authority to enforce the standards and criteria and performance measures established by the Office and the Board.

Respectfully submitted on this 22nd of November, 2013.



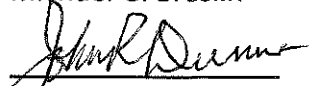
Jonathan Lippman, Chair



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Sheila DiTullio

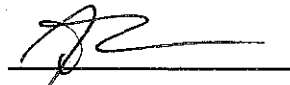


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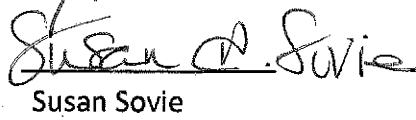


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