

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

**Covering Fiscal Year 2015-2016 (April 1, 2015 – March 31, 2016)**

**“I am proud that we have been able to reach a resolution that results in a fairer, more humane justice system.” Governor Andrew M. Cuomo**

**“The approach outlined in this agreement can be a building block toward the kind of statewide reforms we need.” Attorney General Eric T. Schneiderman**

These statements by New York’s Governor and Attorney General applauding the settlement of the *Hurrell-Harring* class action right to counsel litigation were reported in the New York Times on October 21, 2014. (“In New York, Cuomo Pledges More Aid for Lawyers of the Indigent”). This Fifth Annual Report of the Indigent Legal Services Board will have as its primary focus the first year of implementing the historic Settlement Agreement, which became effective upon judicial review and approval on March 11, 2015. We begin with a chronology of the major milestones during the year, and then summarize the progress made as to each of the four key components of the Agreement.

## **Milestones**

**April, 2015:** The budget for FY 2015-2016 included funding for the creation of our Hurrell-Harring Implementation Unit; and the office staff undertook the task of posting the Chief Implementation Attorney position, followed by others.

Existing ILS staff under the direction of Counsel Joseph Wierschem had been gathering information and engaging in planning since January, in preparation for the Effective Date which would trigger the 7.5 year settlement implementation term.

Following judicial approval of the Settlement Agreement on March 11, Director Leahy and Counsel Wierschem scheduled visits to each lawsuit county (Onondaga, Ontario, Schuyler, Suffolk and Washington) in order to conduct preliminary conversations with county government officials and providers of mandated representation, and to secure their cooperation in the collaborative effort that would be necessary in order for implementation of the Agreement to be accomplished.

**July-August 2015:** ILS conducted public hearings in the 8 judicial districts outside of New York City regarding criteria and procedures to determine financial eligibility for assigned counsel in criminal cases. The hearings yielded approximately 1000 pages of oral testimony and 270 pages of written submissions.

ILS also sent a nineteen-question survey to providers of mandated representation and the judiciary in each of the 57 counties outside of New York City regarding current processes and criteria used to determine eligibility for assigned counsel. Finally, ILS sought copies of application forms, instructions, etc., used to determine eligibility for assignment of counsel, ultimately obtaining 71 application forms covering 51 counties.

**August 3, 2015:** Patricia J. Warth began working at ILS as the Chief Hurrell-Harring Implementation Attorney.

**September 11, 2015:** ILS submitted a Preliminary Plan for Implementing the Counsel at Arraignment Obligations in the Hurrell-Harring Settlement.

**September 14, 2015:** Amanda Oren began working at ILS as the Hurrell-Harring Implementation Attorney, Quality Initiatives

**October 5, 2015:** Lisa Joy Robertson (Hurrell-Harring Implementation Attorney, Eligibility Standards), Deborah Schneer (Hurrell-Harring Implementation Attorney, Counsel at First Appearance), and Nora Christenson (Hurrell-Harring Implementation Attorney, Caseload Relief) began working at ILS.

**October 13, 2015:** ILS submitted a Preliminary Plan for Implementing Initiatives to Improve the Quality of Indigent Defense in Accordance with the Hurrell-Harring Settlement.

**November 12, 2015:** ILS submitted the Final Plans for Implementing the Counsel at Arraignment Obligations and Initiatives to Improve the Quality of Indigent Defense in Accordance with the Hurrell-Harring Settlement.

**December 11, 2015:** Pursuant to Section VI of the Settlement, ILS issued Preliminary Criteria and Procedures for Determining Financial Eligibility for Assignment of Counsel and a draft of a companion background report entitled, "Determining Eligibility for Assignment of Counsel in New York: A Study of Current Criteria and Procedures and Recommendations for Improvement."

**January 25, 2016:** Giza Lopes and Melissa Mackey, Senior Hurrell-Harring Researchers, began working at ILS.

**February 11, 2016:** ILS released a Request for Proposals: Caseload Standards Study soliciting proposals from vendors with expertise to conduct a study to assist ILS in its determination of caseload standards in accordance with the Caseload Relief section of the Hurrell-Harring Settlement

**March 21, 2016:** Jennifer Aguila began working at ILS as the paralegal for the Hurrell-Harring implementation team.

**April 4, 2016:** In accordance with Section VI of the Settlement, ILS issued Criteria and Procedures for Determining Financial Eligibility for Assignment of Counsel. ILS also issued the final companion background report entitled, “Determining Eligibility for Assignment of Counsel in New York: A Study of Current Criteria and Procedures and Recommendations for Improvement.”

## **Narratives**

### **Assigned Counsel Eligibility Standards**

The Hurrell-Harring Settlement requires ILS to “issue criteria and procedures to guide courts in counties outside of New York City in determining whether a person is eligible” for assigned counsel. This requirement draws upon ILS’ implementing statute, which similarly authorizes ILS to “issue criteria and procedures to guide courts” in making assigned counsel eligibility determinations. *See* Executive Law §832(3) (c).

In developing criteria and procedures, ILS was mindful of the Kaye Commission’s 2006 report, in which the lack of uniform standards for determining eligibility for assigned counsel was highlighted as a significant state-wide issue. As the Kaye Commission stated: “In the absence of uniform guidelines, subjective and sometimes disparate determinations are made across the state, and competing concerns, such as county funding and workloads may become inappropriate factors in the determinations.” *See* Commission on the Future of Indigent Defense Services, Final Report to the Chief Judge of the State of New York, June 2006, at 15-16. During the public hearings that ILS conducted, many people echoed the Kaye Commission and spoke of how county funding pressures – rather than financial ability to retain counsel – all too often informs who is deemed eligible for assigned counsel and who is not. As one person succinctly stated: “County funding is driving the bus here.” *See* “Determining Eligibility for Assignment of Counsel in New York: A Study of Current Criteria and Procedures and Recommendations for Improvement,” at p. 9.<sup>1</sup>

To develop the Standards, ILS not only utilized many of the recommendations made during the public hearing process, but also turned to the decades of study and work performed by the New York State Defenders Association, the Brennan Center, and the American Bar Association

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<sup>1</sup> This report is available at: ([available at: https://www.ils.ny.gov/files/Hurrell-Harring/Eligibility/Final%20Background%20Study/Background%20Study%20Full%20FINAL%20021216.pdf](https://www.ils.ny.gov/files/Hurrell-Harring/Eligibility/Final%20Background%20Study/Background%20Study%20Full%20FINAL%20021216.pdf)).

among other associations. Perhaps most importantly, ILS relied upon a memorandum concerning assigned counsel eligibility promulgated by the Third Judicial Department in 1977. In this memo, the Third Department emphasized that “[f]inancial inability to afford counsel is not synonymous with destitution or a total absence of means.” The Third Department went on to set forth the following standard: “A person is .... Eligible for assigned counsel when the value of his present net assets and his current net income are insufficient for him promptly to retain a qualified attorney, obtain release on bond and pay for other expenses necessary for an adequate defense, while furnishing himself or his dependents with the necessities of life.” ILS adopted this as the core standard for the *Criteria and Procedures* promulgated in 2016.

Ultimately, the *ILS Criteria and Procedures* bring to life the 6<sup>th</sup> Amendment right to counsel articulated by the U.S. Supreme Court in *Gideon v. Wainwright*, 372 U.S. 335 (1963) and the New York State Court of Appeals in *People v. Witek*, 15 N.Y.2d 392 (1965) and memorialized in County Law § 722: that defendants who are financially unable to retain a lawyer should have one assigned to them. The *Criteria and Procedures* constitute an important step toward making real the *Gideon* promise that all defendants who are financially unable to pay for an attorney are provided one at the public expense.

### **Counsel at Arraignment**

There have been significant advances in instituting full counsel at arraignment in the five Hurrell-Harring counties. ILS’ Final Plan for Implementing the Counsel at Arraignment Obligations sets out county specific plans developed after months of meetings with each of the five Hurrell-Harring counties to identify existing gaps in arraignment coverage and ideas for filling the gaps. Though the specific components needed for full arraignment coverage differ among the five counties, all the counties are utilizing a combination of multiple components, including development of on-call programs to cover weekend, holiday and off-hour arraignments. With ILS assistance, providers are working hard to overcome the multiple challenges posed by on-call programs, such as the need for cooperation from entities that are not parties to the Settlement, logistical and technological issues, and sustainability. The ILS plan also identifies a menu of potential systemic changes that could diminish - or altogether eliminate - the need for on-call programs, including increased use of appearance tickets, centralized arraignments, conducting arraignments in adjoining jurisdictions, court consolidations, and combined use of cut off-hours and holding cells. The counties are seriously considering such systemic alternatives.

Schuyler County’s counsel at arraignment plan illustrates the need for multiple components for full arraignment coverage. Police in Schuyler County are now issuing appearance tickets for specific court calendar sessions. Because the Schuyler County Public Defender’s Office already staffs these sessions, defense representation at arraignment is significantly increased, notably without any additional costs. To maximize efficient use of resources, Schuyler County combines a late-night cut-off time with use of a pre-arraignment holding cell, and prompt arraignment before a judge the next day. Finally, the County has instituted an on-call program for weekend and holiday coverage, currently staffed by members of the Public Defenders office.

Providers are reporting positive results, including increased use of appearance tickets, lower bails, favorable resolutions of cases at arraignment, better attorney-client relationships, and generally improved outcomes. Finally, a bill drafted by the Office of Court Administration’s

Advisory Committee on Criminal Law and Procedures would allow for creation of county wide arraignment parts staffed on a rotating basis by town and village justices.<sup>2</sup>

### **Caseload Relief**

On February 11, 2016, ILS issued a request for proposals seeking a vendor to undertake a sophisticated caseload study to be conducted in the five Hurrell-Harring counties. The study will employ a three-phase methodology – time tracking of current attorney time spent on various case types and activities; time sufficiency surveys performed by attorneys viewing the time tracking phase results; and a Delphi group reviewing the prior phase results. The study outcomes will assist ILS in its development of new caseload standards that will ensure that attorneys in the five counties have enough time and resources to provide effective and meaningful representation.

Also this year, ILS worked with the providers in the five counties and the New York State Defenders Association to create new systems that will allow providers to accurately track attorney caseloads and workloads. This included making certain that each provider has an up-to-date case management system that allows administrators to periodically review and report attorney caseloads and workloads and compare these findings to current caseload standards. Not only will this allow providers and ILS to understand where more resources are needed, but it will also help administrators, attorneys, and support staff to work more efficiently.

### **Quality Improvement**

ILS' Final Plan for Implementing Initiatives to Improve the Quality of Indigent Defense sets out how the counties will utilize the \$2 million allocated in the Settlement for fiscal years 2015-2016 and 2016-2017 to “jump start” improvements in the quality of representation. While counties have used the funding to hire staff (legal and non-legal staff, including investigators, experts, sentencing advocates, etc.), we have also found that when given additional financial resources, counties have adopted creative initiatives that do not necessarily involve increased staff levels. Schuyler County provides an example of one such initiative. Schuyler County, a small, rural county in the Finger Lakes Region, did not have the financial resources nor a large enough assigned counsel panel to justify creating a separate infrastructure for the assigned counsel program. Accordingly, Schuyler County reached out to its immediate neighbor, Tompkins County, which has a well-run and well respected assigned counsel program.

The two counties entered into an inter-municipal agreement providing that, for a fee (paid for by the Settlement's quality funding), Tompkins County would regionalize its assigned counsel program to include Schuyler County. The program started on April 1, 2016, and by all accounts, has been effective at ensuring that defendants entitled to assigned counsel who cannot be represented by the Schuyler County Public Defender Office receive quality representation.

Onondaga County provides another example of a creative innovation. Onondaga County utilizes an assigned counsel program as its primary provider of criminal defense representation. To improve attorney support, training, and oversight, the County decided to establish a mentor

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<sup>2</sup> This bill was passed unanimously by the New York Legislature in June 2016 and enacted into law by Governor Cuomo on November 28, 2016. It went into effect on February 26, 2017.

program. Onondaga has selected highly experienced attorneys to mentor the panel attorneys who have eight or less years of criminal practice experience. These mentors will: provide professional support and guidance to less experienced attorneys; provide additional opportunities for second chairing trials; and promote professional development through on-going CLE programs.

### **Meetings and Actions of the Board**

**April 10, 2015:** At this meeting the Board considered the newly enacted state budget for FY 2015-2016; it heard a detailed presentation by ILS Director of Regional Initiatives Joanne Macri on the status of the six Regional Immigration Assistance Centers, for which an RFP had been issued in 2014. Attorney Macri explained the responsibilities of these Centers to (1) provide legal assistance and support to providers of mandated representation within each region; (2) provide continuing legal education on compliance with the *Padilla* decision and best practices in the representation of clients; (3) develop immigration service plans and procedures; (4) encourage collaboration by and among providers in their region; and (5) assist local providers to achieve compliance with ILS performance standards.

**June 19, 2015:** At this meeting the Board heard a progress report by Angela Burton, ILS Director of Quality Enhancement for Parental Representation, on the proposed *ILS Standards and Best Practices for Parental Representation*. Attorney Burton explained that her working group of twenty members was comprised of six subcommittees which had made tremendous strides toward a final proposal. She described the four pillars of the standards as (1) client-centered representation; (2) early representation; (3) multi-disciplinary practice with a holistic approach; and (4) zealous and proactive advocacy. Also at this meeting, the schedule of Public Hearings on Eligibility for Assigned Counsel during July and August was announced, and members of the Board agreed to volunteer to preside at these hearings.

**September 25, 2015:** At this meeting the Board voted to allocate the \$84,000,000 FY 2015-2016 Aid to Localities appropriation as recommended in Director Leahy's September 23, 2015 memorandum. Included within this amount was an allocation of \$30,210,924 for Quality Enhancement distributions in New York City and the 57 counties that lie outside the city; \$4,000,000 for Counsel at First Appearance grants; an identical amount for Quality Enhancement and Upstate Caseload Reduction grants; and \$3,000,000 for implementation of the lawsuit settlement. The Board also approved the Director's FY 2016-2017 budget request in the amount of \$139,255,210, which included funding for a network of Regional Support Centers, for a Statewide Appellate Resource Center, and additional funding for implementation of the *Hurrell-Harring* settlement. The Board also received a status report on the settlement implementation by Chief Implementation Attorney Patricia Warth.

**October 2, 2015:** On this date, Chief Judge and Board Chair Jonathan Lippman, acting on behalf of the Board, in a letter to Governor Andrew M. Cuomo, nominated William Leahy to

serve a second five-year term as Director of the Office of Indigent Legal Services. Mr. Leahy began serving his second term as Director on February 22, 2016.

**November 6, 2015:** At this meeting the Board approved the ILS *Standards for Parental Representation in State Intervention Matters*, on motion by Board member Susan Sovie, and following a presentation by Angela Burton. These Standards went into effect on December 1, 2015. The Board also approved the Fourth Annual Report of the Indigent Legal Services Board and authorized the Director to distribute it to the appropriate officials. Finally the Board received copies of ILS Research Director Andrew Davies' *Estimate of the Cost of Compliance with Maximum National Caseload Limits in Upstate New York – 2014 Update*. This annual report demonstrated that the average weighted caseload of attorneys employed by upstate institutional providers was 616 cases, or 68% higher than national maximum caseload limits; and that compliance with those limits would have required additional spending of \$99,084,243.

### **ILS Regional Immigration Assistance Centers: First in the Nation**

Early in 2016, ILS established six Regional Immigration Assistance Centers: in Western New York (Buffalo), Central New York (Rome), Northern New York (Albany), Hudson Valley (White Plains), Long Island (Central Islip), and New York City. New York thus became the first state in the nation to create a statewide network of legal resource centers dedicated to helping public defenders and assigned counsel provide effective representation to their immigrant clients in compliance with the 2010 Supreme Court decision in *Padilla v. Kentucky*. It is particularly noteworthy that this breakthrough came in a state which lacks a statewide public defender or assigned counsel system. The Board salutes ILS Director of Regional Initiatives Joanne Macri for her leadership in creating this invaluable and unprecedented support network.

### **ILS Research Activities Break New Ground and Win National Recognition**

ILS research in New York continued to merit national attention this year. In October, 2015, ILS researchers Andy Davies and Giza Lopes received support from the National Science Foundation to host a meeting in Albany of scholars and advocates from around the country to forge a path forward for scientific research into the quality of legal representation. November saw the second annual gathering of indigent legal services researchers at the meeting of the American Society of Criminology in Washington, DC. Davies, who organized the event, made a presentation with colleagues on their work, supported by the National Institute of Justice, examining the impact of counsel at first appearance (CAFA) in six upstate counties. A collection of papers from the inaugural meeting was published in the *Albany Law Review* with a forward

by then-Chief Judge Lippman. A second collection is scheduled for publication in 2017 in the *Ohio State Journal of Criminal Law*, and will include early findings from our CAFA research.

In February, Davies was selected as faculty for the Smart Suite Research–Practitioner Fellows Academy, a program sponsored by the Bureau of Justice Assistance to support research into the American Bar Association’s *Ten Principles of a Public Defense Delivery System*. Meanwhile, he continues his research work on committees convened by the National Legal Aid and Defender Association, the National Association for Public Defense, the National Institute of Justice, the Bureau of Justice Statistics, and the Indigent Defense Commissions of Michigan and Texas.

### **Other Important Activities**

On November 7, 2015, ILS Director for Appellate and Post-Conviction Representation Risa Gerson and Director for Parental Representation Angela Burton, accompanied by Mardi Crawford of the New York State Defenders Association (NYSDA) and providers of mandated representation in Erie and Onondaga counties, presented a program entitled *Using Standards to Drive Quality Defense* at the National Legal Aid and Defender Association annual conference in New Orleans, Louisiana. This presentation utilized the ILS *Appellate Standards and Best Practices* (effective January 5, 2015) and the ILS *Standards for Parental Representation in State Intervention Matters*, and highlighted their significance before a national audience.

On November 10, Director Leahy and ILS Director of Research Andrew Davies attended the inaugural meeting of the Right to Counsel National Consortium at the Office of Justice Programs (OJP) in Washington, DC. Once again, ILS representatives were able to participate in high-level national discussions concerning the right to counsel, and highlight their ongoing reform work in New York.

On November 13-14, 2015, ILS, NYSDA and the Unified Court System’s Child Welfare Court Improvement Project sponsored a conference entitled *Because All Families Matter: Enhancing Parental Defense in New York*. This was New York’s first statewide conference for public defense attorneys who represent parents in child protective and termination of parental rights proceedings. Almost two hundred lawyers attended this conference, which featured a stirring keynote address by Professor Marty Guggenheim, and the presentation of an award to Attorney John Hand, who secured the right to counsel for parents in the seminal case *Matter of Ella B.*, 30 N.Y. 2d 352 (1972).

### **Special Appreciation**

On February 9, 2016, we learned the devastating news that a beloved member of the Board, Susan Sovie of Watertown, had died on the previous day after her hospitalization for a chronic illness. Sue Sovie was an original member of the Indigent Legal Services Board. She was the only member who possessed significant experience in the representation of parents and children in the Family Court, and she was the only member from north of the New York Thruway. As the



attached reflections by ILS Director William Leahy and the accolades by her attorney colleagues in the Watertown Daily Times obituary make clear, Sue Sovie was an invaluable member of the Indigent Legal Services Board, and of her Jefferson County legal community. It is particularly profound that at Sue's final Board meeting on November 6, 2015, she championed and moved approval of the *ILS Standards for Parental Representation in State Intervention Matters*, which will be her enduring legacy. We will always value Sue's passion and commitment to the right to effective representation, and we will always treasure her memory.

**Welcome, Chair and Chief**

In January, 2016, the Honorable Janet DiFiore became the Chief Judge of the State of New York and the Chief Judge of the Court of Appeals. And, pursuant to Executive Law section 833 (1) (a), she also became the second Chair of the Indigent Legal Services Board, succeeding former Chief Judge Jonathan Lippman. Chief Judge DiFiore began immediately to exercise her responsibilities as Board Chair, by reaching out to the members and to the Director of the office, in preparation for the annual state budget deliberations and for the Board's next scheduled meeting in April. We welcome Janet DiFiore as Chair of this Board.

Respectfully submitted on this \_\_ day of March, 2017:

Janet DiFiore, Chair

Michael G. Breslin

Carmen Ciparick

Sheila DiTullio

Vincent E. Doyle

John R. Dunne

Joseph C. Mareane

Leonard Noisette