

LEGISLATIVE PUBLIC HEARINGS
ON THE 2017-2018 EXECUTIVE BUDGET PROPOSAL

Testimony before
The New York State Senate Finance Committee
and
The New York State Assembly Ways and Means Committee

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This testimony covers familiar territory that has undergone a seismic shift. The broad terrain is, as in past years, what New York State needs to do to ensure quality of the legal representation required by our constitutions and statutes. One detail of the territory I map relates to what the New York State Defenders Association (NYSDA) needs to play its part in helping the State guarantee quality public defense. That detail looks very similar to what I have presented many times before.

What has changed is that last year the Legislature ventured much further than ever before into the broad terrain of public defense reform. By unanimously passing the Justice Equality Act last June, you acknowledged that the State has a responsibility to fully fund mandated legal services. From then until New Year's Eve, I hoped that my testimony at this hearing would consist largely of "thank you for your historic action last session" and "this is what the Backup Center needs." But instead, I must follow my description of NYSDA's budget request with an exhortation to re-pass the Justice Equality Act; it was a good bill in 2016 and remains so today.

NYSDA

Since 1981, New York State has funded NYSDA's Public Defense Backup Center to provide centralized services to public defense lawyers and clients across the 62 counties of New York. The Backup Center works to ensure that individuals eligible for publicly-paid representation receive services of requisite quality. The duties of defense counsel in criminal and family matters have grown in number and complexity over those decades, requiring increased support. Today, NYSDA offers a wide variety of training, publications, direct defender services, and technical assistance to the over 6,000 lawyers and more than 120 programs providing mandated representation statewide. The breadth of Backup Center work is reflected on its website – www.nysda.org – and is not set out in detail here. Suffice it to say that our Public Defense Case Management System and other forms of technical assistance help public defense programs efficiently and effectively manage their work; our direct defender services and materials provide public defense lawyers with research, referrals, and other information when confronted with new or unusual issues; our trainings increase the level of performance of new and experienced attorneys, and our advocacy on specific issues as well as for broad reform improves the justice system – for public defense lawyers and clients, and overall.

The Executive Budget would cut funding for NYSDA by 60% from last year's appropriation; the figure provided is 5% less than was included in the Governor's previous budget, which the Legislature recognized was insufficient. Meanwhile, NYSDA must respond to increased demand for training and other services as counties seek to meet standards and requirements to improve deficiencies in their provision of public defense.

NYSDA's Veterans Defense Program (VDP) has received increasing requests for its assistance in the two years that the State has provided basic funding for its work. VDP fulfills its role in ensuring high-quality indigent defense for veterans primarily through two means: 1) providing training of defense attorneys and 2) direct support to individual veteran's cases. Since its establishment in 2014, the VDP has trained over 900 lawyers through Regional Point Person veteran defense seminars, county-based continuing legal education programs, and focused assistance to individual defender offices. Such trainings increase the veteran cultural competency

of the defense community and provide invaluable tools to obtain dispositions sensitive to veteran vulnerabilities.

The VDP, however, remains a resource for veterans and their defenders even after the conclusion of such training sessions. Routinely, in the wake of those sessions, attendees seek VDP assistance on individual cases. Such support commonly pertains to obtaining and interpreting military documentation, conducting veteran-centric interviews, and finalizing mitigation material. Proper execution of those tasks requires intensive effort on the part of VDP's two attorneys. Given the ever-increasing caseload, VDP's current staffing can no longer provide the mitigation presentation that each and every veteran deserves, particularly in the downstate area with its heavy veteran population concentration. To expand its vital service, the VDP needs a budget that will allow opening a downstate office as well as maintaining or increasing its upstate staff.

To fulfill the many roles that NYSDA's Backup Center and VDP play in the provision of constitutionally and statutorily mandated legal services, NYSDA needs state funding of \$4,019,000. That includes \$2,569,000 for the Backup Center's traditional services to public defense lawyers, including a growing number of training events, an increase of \$480,000 over last year's appropriation – and \$1,450,000 for VDP – a \$950,000 increase over the \$500,000 that the State has provided each of the last two years during which VDP has proven its worth.

The Justice Equality Act

Turning now to the broader issue of the State's responsibility to fully and adequately fund public defense services, I offer the "Thank you!" I've been holding onto since last June. Thank you for passing the bipartisan Justice Equality Act. While the Act was vetoed, its unanimous passage lighted a beacon that cannot be extinguished.

As the bill made its way through the Legislature, some supporters emphasized the need for public defense reform to achieve justice, while others praised the bill's recognition that public defense is a state mandate that should be paid for with state revenues. Both were vital aspects of the legislation, as discussed further below. Also important was the bill's recognition that state reimbursement of local public defense expenditures should be overseen by the Indigent Legal Services Office (ILS).

Independence is Paramount

Since its inception, ILS has worked to help localities achieve improvement in the quality of public defense representation statewide. In settling the *Hurrell-Harring* lawsuit that challenged constitutional deficiencies in public defense across New York, the State – along with the five counties added as defendants at the State's behest because they were used as exemplars of those deficiencies – agreed that ILS was the proper entity to oversee implementation of the settlement. That is among the reasons that recognizing ILS as the proper entity to administer reimbursement for public defense costs made sense.

The most important reason for ILS to take that role is its independence. ILS is governed by a Board designed to ensure the independence of public defense from political and undue governmental influence. Individuals represented by public defense lawyers face loss of liberty or

liberty interests at the behest of the government. Prosecutors and child welfare agencies ask courts to deprive justice-involved public defense clients of their freedom, their autonomy; defense lawyers advocate against those efforts. To do so effectively, lawyers must be conflict-free; the resources and time they need to represent their clients effectively must not be controlled by entities with opposing interests. National and state standards for public defense explicitly require independence. See for example, Principle 1 of the American Bar Association's Ten Principles of a Public Defense Delivery System (2002), Section A, Independence, of the New York State Bar Association's 2015 Revised Standards for Providing Mandated Representation, and many other standards, including NYSBA's own, listed at <http://www.nysda.org/?page=PDStandards>. The Justice Equality Act passed last year met the requirement for independence.

The Article VII bill proposed by the Executive in place of the Justice Equality Act, while a welcome indication that public defense reform is a priority, does not meet the requirement of independence. Part D of the proposed Criminal Justice Reform Act calls for state funding of steps to implement the *Hurrell-Harring* settlement in all counties, but the plans for such implementation would be subject to approval by the Executive-controlled Division of the Budget. NYSBA strongly opposes this and any public defense proposal that contravenes the well-recognized need for independence.

That is one of many reasons I urge that you re-pass the Justice Equality Act instead of a suggested half-measure.

The Foundation, Not Just an Upper Story, of Public Defense Must be Paid For

The Justice Equality Act, reintroduced in the Assembly as A.1903, addresses the problems of New York's public defense at the base, where they reside. Since 1965, when the State delegated its public defense responsibility to localities, it has become ever more obvious that localities cannot and will not meet that responsibility. Counties cannot properly design, administer, insulate, maintain, or improve services that they cannot afford, that they are not trained to provide, and that their constituents fail to support. Public defense is a state responsibility, and the State has an obligation to ensure that quality public defense services are in place in every jurisdiction. Local fiscal conditions or political whims must not dictate variances in justice.

To avoid that, the State must fully and adequately fund public defense services from the ground up. The Justice Equality Act, which would do so, constitutes mandate *fulfillment*.

That counties cannot fulfill the State's public defense obligation becomes clearer every year. A host of factors has expanded public defense requirements. For one thing, the constitutional requirements that led to the passage of County Law 18-B in 1965 – set out in the decisions in *Gideon v Wainwright* and *People v Witek* – have been followed by others, including the 1972 parental defense case, *In Re Ella B*. State legislation has expanded the scope of criminal law and its enmeshed consequences as well as family law. Growth in the use of forensic evidence, new challenges to such evidence, along with progress in the social sciences and evolving expectations as to the judicial system's role in affecting human behavior, have fundamentally altered the daily work of public defenders. NYSBA's work to equip lawyers to meet these new roles, ILS grants targeting specific problems, and even proposed state underwriting of counsel at first appearance,

caseload relief, and some quality improvements constitute necessary but not sufficient state-funded efforts to ensure the necessary, uniform level of quality public defense services that our constitutions, statutes, and justice require.

Furthermore, efforts to *reimburse* localities for *Hurrell-Harring* requirements of counsel at first appearance, caseload relief, and specific quality improvements – *rather than provide that money up front*, as the settlement does for the five counties – seem likely to backfire.

By not providing resources up front – as the *Hurrell-Harring* settlement does – the Governor’s proposal threatens to undermine itself. For example, assume a county’s public defense budget in the prior year was \$1 million. If the new quality improvement plan called for by the Article VII bill to reduce caseloads and implement counsel at first appearance will cost \$217,000 dollars, and the tax cap stays in place, how will the county finance the reforms, *knowing that reimbursement for the \$217,000 is a year away*? Most likely, the basic public defense budget will be dropped to \$783,000; along with the \$217,000 earmarked for the caseload and first appearance improvements, that will create a new total public defense budget of – \$1 million. Since no county that I know of has \$1 of “fat” in its public defense budget, much less \$217,000 of “fat,” the end result will be that some other aspect of public defense will be cut to pay for the new changes.

Language prohibiting “supplanting” of base funding with reimbursable spending may be suggested as a cure, but experience tells me that will not work. Several years ago NYSDA produced a white paper that examined the effectiveness of “maintenance of effort” (non-supplanting) language in legislation regarding the Indigent Legal Services Fund as it was administered prior to creation of the ILS Office. Localities, it turned out, were very creative in defining uses of local funds as public defense costs, such as apportioning part of courthouse grounds upkeep to the public defender office whose office was in the court building. I submit that they would be no less creative in finding ways to avoid any penalty for supplanting under a new plan which only provides reimbursement. The paper, “Analysis of The Indigent Legal Services Fund Maintenance of Effort Provisions” (NYSDA, March 2009) is available on the ILS website at www.ils.ny.gov/files/Maintenance%20Of%20Effort%20Analysis.pdf.

And while ILS might be tasked with enforcing a ban on supplanting, the forensic accounting that would be required for such policing would be impossible for the small ILS Office to complete. (This is true even if the Office gains the three additional staff members that appear to be included in the current Executive Budget, though the details are buried in the State Operations bill rather than in a separate ILS budget line.) More fundamentally, inciting creative bookkeeping and paying for efforts to root it out seems like a counterproductive way to proceed toward reform. The State should, simply, fund counties for the cost of providing public defense services, with ILS as the entity ensuring that costs are legitimate under documented standards for providing such services.

There are other problems with the Article VII bill, including its related cost estimates, which I would be happy to discuss during my appearance or upon inquiry from any of you at any time. But my goal here is to convince you that the Justice Equality Act should be re-passed on its own merit, without engaging in a point-by-point critique of the Executive’s much more modest bill.

Re-Pass the Justice Equality Act, and, If Necessary, Override Any Veto

In the few weeks that have passed since the Justice Equality Act was vetoed, a continuing chorus of disparate voices has explained why the veto was ill-advised. I hope that the points made by the many supporters of public defense reform will convince the Executive not to repeat the veto when the reintroduced Act is passed, as I hope it will be, in this session. Should there be a veto, I urge the Legislature to override it.

Those of you who have heard my budget presentations through the years, and observed the efforts of NYSDA and others to secure public defense reform, know that injustice occurs every day under the current system. You also know that, while NYSDA's Board of Directors maintains its position supporting a statewide, fully and adequately funded public defense system headed by an Independent Public Defense Commission, we have supported many interim efforts to improve public defense, like creation of ILS in 2010. We fully and wholeheartedly support the Legislature's passage of the Justice Equality Act in June 2016 and ask that you do it again, demonstrating to the Executive, to the public defense community, and the public at large that you, and justice, will wait no longer.

NYSDA Supports Funding for ILS

The duties imposed on ILS by statute and the *Hurrell-Harring* settlement discussed above are enormous, as is the need for the state funding that ILS transmits to counties. NYSDA supports ILS' original requested increase in Aid to Localities funding as well as that reflected in the Executive Budget and the apparent increase in operational funds for the Office. Distributing Aid to Localities funds in ways that encourage quality improvement in counties hard-pressed to provide basic public defense services, and continuing implementation of the settlement, will demand great effort and additional staff this year. Any new duties stemming from legislation associated with this year's budget would require even more. The need for additional staff, and for compensation that will help retain existing skilled and experienced staff, set out in the ILS budget request, is undeniable. Furthermore, operational funding for ILS should not be included in the Aid to Localities appropriation bill, as it currently is, but rather, as in the past, should be clearly identified as a separate appropriation in the state operations budget bill to ensure continued smooth functioning of the Office.

The Proposed Restriction on Familial Prison Visitation Must Not be Enacted

On behalf of all clients who are, or may be, incarcerated in maximum security prisons, I urge you to reject the Governor's inclusion in his budget of a plan to reduce the number of visitation days for people in maximum security facilities. It is cruel and counterproductive. Maintaining family relationships and outside contacts is vitally important to the mental health and behavior of people in prison, including those in maximum security. It is vital to their successful reentry into society upon release.

Even more importantly, depriving people of contact with their loved ones denies the humanity of those affected, and the humanity of those of us in whose name such cruelty is perpetrated. People in prison are still people who are loved, and who need to see those who love them just as we need to see our loved ones. Reject the proposed reduction of prison visitation.