

**LEGISLATIVE PUBLIC HEARINGS
ON THE 2018-2019 EXECUTIVE BUDGET PROPOSAL**

**Testimony before
The New York State Senate Finance Committee
and
The New York State Assembly Ways and Means Committee
*on the Public Protection Budget***

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New York State Defenders Association: Backup Support for All Public Defense

Each year, these Joint Committees hear from the New York State Defenders Association (NYSDA) about the core functions of NYSDA's Public Defense Backup Center and projects like its Veterans Defense Program. In addition to recounting its own achievements and upcoming plans, NYSDA informs the Legislature through these hearings about current key issues relating to public defense and justice. Thank you for the opportunity for the Association to again, through a new Executive Director, address you.

This year's testimony focuses on the historic public defense reforms that the Legislature and Governor achieved last year and the vital role NYSDA plays in implementing those reforms. New York's criminal justice system needs other reforms as well, and this testimony will touch on how those reforms and the public defense function interrelate and affect the interests of clients. And NYSDA's continuing backup support for lawyers representing parents in Family Court, the too-often-neglected aspect of public defense, must not be overlooked.

To ensure that the Public Defense Backup Center can continue to provide its integral services to the public defense system, NYSDA requests that the Legislature add \$1,059,000, as it has in past years, to restore the Backup Center to its base operating budget of \$2,089,000.

NYSDA also seeks a legislative add of \$500,000 for its Veterans Defense Program (VDP), the same as last year.

NYSDA's full request is for funding at last year's appropriation level: \$2,589,000.

Public Defense Backup Center Core Functions: CLE, Publications, Direct Defender Services, and Technical Assistance

Every aspect of New York State's public defense system relies on the Public Defense Backup Center's support services. The Backup Center saves the State and counties money by centralizing services and functioning as a clearinghouse for all parts of that system. These services include free and low-cost continuing legal education (CLE) programs for public defense attorneys, training for public defense investigators and social workers, consultation and legal research assistance, publications and email updates, expert referrals, and NYSDA's Public Defense Case Management System (PDCMS).

New York State has funded NYSDA's Public Defense Backup Center since 1981. Currently, funding must cover assistance to over 130 public defense programs (public defender offices, legal aid societies, conflict defender offices, and assigned counsel programs) and over 6,000 attorneys working within those programs. And, with the expansion of the *Hurrell-Harring (H-H)* settlement, as discussed below, counties around the state will be calling upon NYSDA even more, seeking training, data management, and other support services to improve the quality of representation they provide.

Hurrell-Harring Settlement and Expansion to All Counties

By expanding to all counties the settlement conditions of the *H-H* lawsuit that applied to the five counties named in that class action, the State took a huge step in 2017 toward justice equality. But change by a host of institutions must occur for counties—their taxpayers and public defense clients alike—to secure the benefits of that historic legislation. NYSDA stands both eager and qualified to help counties, public defense programs and lawyers, and the Office of Indigent Legal Services (ILS) to comply with the training, data collection, and other requirements of last year’s legislation.

Since 2015, NYSDA has worked closely with ILS in the implementation of the *H-H* settlement. This work includes helping to identify *H-H*-related training needs. A long-standing [provider of high quality CLE](#), accredited by the NYS Continuing Legal Education Board, NYSDA brings its experience to trainings offered in the *H-H* counties to help improve the quality of representation, a key aspect of the settlement.

In addition to providing CLE events to improve the quality of representation, NYSDA cosponsored with ILS a series of training sessions on the ILS [Criteria and Procedures for Determining Assigned Counsel Eligibility](#) after those guidelines were issued as part of the settlement. The guidelines, applicable to all counties outside New York City, were drafted after examination of a great deal of information, including NYSDA’s 1994 report, *Determining Eligibility for Appointed Counsel in New York State: A Report from the Public Defense Backup Center*, ILS found that report to be “just as relevant today as it was” when issued.

ILS also selected NYSDA’s PDCMS for data collection related to the settlement conditions, including counsel at first appearance, caseload reduction, and quality improvements. The PDCMS is installed and supported in 70 programs in 45 counties, including *H-H* counties; it improves caseload management, reduces redundant data entry, and streamlines workflow so that county public defense resources are spent on client representation. NYSDA customized PDCMS so programs could comply with the data collection requirements included in ILS guidelines.

In all these ways, NYSDA has provided backup services to ILS, the *H-H* counties, and beyond in the settlement implementation. The Backup Center will similarly be an integral part of implementing *H-H* statewide, particularly in the areas already noted: training, data collection relating to quality improvements and caseload analysis, and case management services.

NYSDA’s request that the Legislature add the \$1,059,000 for the Backup Center that was omitted in the Executive Budget will merely bring NYSDA back to its baseline funding, which is essential for NYSDA to support ILS and counties to implement the *H-H* settlement and expansion.

Other Services to ILS and ILS-funded Regional Immigration Assistance Centers

Beyond the *H-H* settlement and expansion, NYSDA supports the public defense system in other ways. For example, experienced Backup Center legal staff extensively assisted in drafting several ILS [standards](#), including standards for mandated representation in trial courts, parent representation, and appellate practice. Currently, a NYSDA Backup Center staff attorney with a national reputation in standards development is working with ILS to [draft](#) standards for assigned counsel programs. This assistance draws on NYSDA’s experience both in promulgating

standards, including the *Client-Centered Representation Standards* created by its Client Advisory Board, and in urging the use of [national, state, and local standards](#) to improve the quality of public defense representation.

NYSDA also supports four ILS-funded [Regional Immigration Assistance Centers](#) (RIACs), which were established to provide expert immigration expertise for public defense counsel. NYSDA developed and supports a case intake system used by those four Centers and provides the Centers with CLE and training support as well.

Assisting Public Defense Providers Representing Parents in Family Court

The *H-H* lawsuit and expansion did not address the enormous amount of public defense representation occurring on behalf of parents and other adult respondents in Family Court where they face the loss of time with their children or even their right to act as parents. It has been estimated that about a quarter of public defense spending in New York State goes to these cases.¹ The State's continuing, nearly-total delegation of this aspect of public defense to counties makes NYSDA's centralized services and assistance invaluable in localities struggling to carry the burden. The services include training lawyers on issues specific to parent representation, maintaining an experienced Family Court Staff Attorney at the Backup Center to provide knowledgeable direct defender services, and working closely with ILS to further the goal of improving the quality of public defense representation of parents. Cuts to these services will detrimentally affect families and localities.

More information about what NYSDA does can be seen in its Annual Reports, available online at: <http://www.nysda.org/?page=AnnualReports>. **The Backup Center's services to improve the quality of public defense representation in Family Court is among the many reasons the Legislature needs to add the \$1,059,000 for NYSDA's Public Defense Backup Center that was omitted in the Executive Budget.**

The Veterans Defense Program

The client-centered representation at the heart of NYSDA's mission requires that lawyers, working with their clients, identify and solve problems that may seem outside of, but often affect, the legal matters that counsel is handling with zealous legal advocacy. Some problems affect so many clients that those problems should be addressed in a systemic, though still individualized, way. As with the growing intersection of immigration law and public defense cases that led NYSDA to develop a focused way of supporting quality representation of noncitizens beginning at least as far back as 1997, the problems that many justice-involved veterans share caused the Association to create a Veterans Defense Program (VDP).

VDP provides in-depth training, support, and legal assistance to engender informed and zealous representation of veterans and service members in criminal and family courts, offering assistance in dealing with military-service-related mental health issues such as Post-Traumatic Stress Disorder and Traumatic Brain Injury and facilitating treatment to heal these war wounds. Because state funding for VDP has come from outside the Public Protection budget, VDP staff is offering separate budget testimony during the Human Services hearing on February 6, but support from all Legislators is needed. For the past three years, the Assembly and Senate have

¹ See Stashenko, Joel, "Counsel Costs for Indigent Family Court Litigants Often Overlooked," *New York Law Journal*, Jan. 5, 2017 (citing ILS Director William Leahy).

provided matching support for VDP. Continuation of that funding in the FY 2018-2019 budget is critical to maintaining the many ways that VDP assists the most vulnerable of the nation's veterans, as set out in its last [Annual Report](#). **NYSDA seeks a legislative add of \$500,000 for its Veterans Defense Program, the same as last year.**

Indigent Legal Services Office, Aid to Localities and State Operations: The *Hurrell-Harring* settlement and reform expansion made clear that additional State resources should supplement, not supplant, existing state support of the public defense system. NYSDA supports the Executive Budget Aid to Localities proposal of \$155,530,000 for public defense, which provides the base support of \$81 million for counties and New York City, \$23,810,000 for the *H-H* settlement, and \$50,720,000 for the first year of expansion of the *H-H* settlement reforms to the rest of the state.

Last year's legislative changes to County Law 722-e and Executive Law 832 represented a critical step toward ensuring that public defense clients receive quality representation. It directed ILS to promulgate plans regarding every county for the provision of counsel at first appearance, caseload/workload reductions, and quality improvements.

Crucially, the legislation maintained the independence of ILS by limiting the Division of the Budget's review and approval of those plans "solely to the plan's projected fiscal impact of the required appropriation for the implementation of such plan" However, while the Executive appears to have accepted the plans submitted by ILS on December 1, 2017 by appropriating \$50,720,000, the appropriation language provides that no expenditures shall be made from the appropriation until the plan is approved by the Division of the Budget and, additionally, that "no expenditures shall be made from this appropriation until the director of the division of the budget approves an operational plan, submitted by the director of the office of indigent legal services, for the implementation of plans developed pursuant to [Executive Law 832(4)]." The statute does not require the development of an "operational plan." Further, there is no timeline for approval of the plans submitted last December and there is no deadline for the submission of any "operational plan" or approval thereof; ILS's ability to assist all counties should not be hampered by unnecessary approval requirements or delay. The plans submitted in December have not been released to the public, making it difficult for public defense providers, counties, and NYSDA to prepare for implementation. NYSDA asks the Legislature to ensure that all relevant appropriations maintain the independence of ILS so that it may develop and refine the substance of those plans without interference.

NYSDA also supports the Executive Budget proposal for a total State Operations appropriation to ILS of \$5,717,000. As noted above, the Public Defense Backup Center will continue to assist and support ILS, and stands ready to help ILS and the counties to implement the plans it has designed to achieve the reforms this Legislature set in motion last year.

Aid to Defense: At a time when the State has recognized its responsibility to fund improvements to the public defense system, as discussed above, the Executive Budget proposes to decrease Aid to Defense Funding by 5% and moves the majority of the appropriation out of the DCJS General Fund. Aid to Defense, created as a counterpart to Aid to Prosecution to offset some of the increased costs of certain law enforcement initiatives,

currently provides financial support to 25 counties and The Legal Aid Society in New York City.² Any reduction in this funding means these localities are less able to focus on the quality improvements promised in last year's budget and which are necessary to ensure that the state meets its constitutional obligations. Last year's final appropriation for Aid to Defense was \$8,099,000, with \$5,507,000 from the General Fund and \$2,592,000 from the Legal Services Assistance Fund. **NYSDA asks the Legislature to restore the base funding of \$8,099,000 for Aid to Defense.**

Indigent Parolee Program (IPP): As in prior years, the Executive has left it to the Legislature to fund IPP. This Program provides partial reimbursement to counties³ that provide representation to individuals in parole revocation hearings and in appeals from adverse parole release or revocation decisions. **NYSDA asks the Legislature to, at a minimum, restore the base appropriation of \$600,000 for IPP.**

Prisoners' Legal Services of New York (PLS): This year's proposed appropriation for PLS is 25% less than last year's final appropriation of \$2,950,000. NYSDA asks the Legislature to work with the Executive to appropriate the same amount as last year. The decline in the number of people held in New York State prisons, while very welcome, will not decrease the need for PLS's services; PLS has never been able to address all requests, and new problems continue to arise. This includes the aging nature of the population in prison, which increases the need to help older individuals secure appropriate medical and other services and conditions of confinement.

Pretrial Justice Reform: Identifying the Devils in the Details

The Executive Budget seeks to fix three badly broken aspects of our criminal justice system: New York's shameful bail, pretrial discovery, and speedy trial laws. In the past year, state and national news stories have focused on the economic and racial injustice of outmoded laws and practices that:

- jail people who are presumed innocent simply because they cannot afford bail;
- keep them locked up so long they lose jobs, housing, family contact, and the ability to care for or retain custody of their children; and
- result in wrongful convictions because unjustly detained persons cannot help their lawyers prepare a defense, and some actually plead guilty to crimes they did not commit simply to get out of jail and resume their lives.

Unjust convictions are aided and abetted by New York's reprehensible discovery laws that allow key information to be withheld from the defense for months and, in some cases, years, and by speedy trial laws that tolerate prolonged delays and a culture of unreadiness among prosecutors.

The scourge of routine pretrial detention and court delay has negative consequences beyond injustice to the accused. These entrenched practices impose high costs on localities and the

² Aid to Prosecution, which is funded at \$12,549,000, provides financial support to district attorney offices throughout the state. Unlike Aid to Defense, the majority of Aid to Prosecution funding remains in the DCJS General Fund this year.

³ In recent years, the reimbursement rate for counties is less than 50%. Wyoming and Seneca counties receive specific funding amounts, but those amounts are unlikely to cover the entire expense in those counties.

State, from jail overhead to the expense of delivering social services to the families of persons needlessly detained. The need for reform could not be greater or more apparent. But reform efforts must proceed carefully to avoid creating new problems or exacerbating existing ones. In the coming weeks, NYSDA looks forward to working with the Executive and the Legislature to achieve just and lasting reforms.

Bail and Pretrial Detention

NYSDA applauds efforts to ensure accused persons are not held in jail before trial simply because they cannot afford to post bail. In all but the most exceptional circumstances, persons charged with misdemeanors and non-violent felonies should be released without having to post bail. Pretrial release should be unconditional (release on recognizance or ROR) or under appropriate and limited pretrial supervision conditions. The least restrictive option must be chosen and pretrial supervision programs must be administered fairly and be free of racial and other biases.

NYSDA recognizes that there may be circumstances in which some accused persons cannot be released without posting security to ensure their return to court. We support the Executive's proposal to require broader use of unsecured and partially secured bonds, and to provide for expedited review of bail amounts to ensure they are reasonable and affordable. But NYSDA remains opposed to preventive detention schemes that run counter to the presumption of innocence. We are deeply troubled by the Executive's proposal to allow for automatic detention in many cases, for up to five days, simply upon the district attorney's naked request. And we oppose the Executive's proposed preventive detention scheme, which would deny many persons the right to any form of bail.

Discovery

New York's criminal case discovery laws are among the most restrictive in the nation. Efforts to reform the discovery statute have foundered for years. And so we were excited to learn that Governor Cuomo planned to take on the cause of discovery reform this year. But the Article VII bill has disappointed [many](#), including NYSDA. A fatal flaw in the bill would give prosecutors nearly complete power to redact information from documents that must otherwise be disclosed to the defense. The heavily vetted New York State Bar Association's discovery bill (A.7292/S.6848) offers a better pathway to meaningful reform.

Speedy Trial

Finally, the State of the State message correctly noted a need for reforms to ensure the right to a speedy trial. But the Article VII bill actually proposes a step backward. Speedy trial reform is a three-legged stool because delays are caused by the courts, prosecution, and the defense. The Executive's bill leans too heavily on the defense. It seeks to restrict the defense by requiring all speedy trial waivers to be executed by the accused in writing in the presence of the judge, a heavy-handed and burdensome obstacle that would interfere with the client-attorney relationship and undermine defense counsel's ability to chart effective legal strategy. Real speedy trial reform will require attention to the significant delays caused by prosecutorial abuse of off-calendar "readiness" statements and court congestion.

NYSDA looks forward to assisting Legislators and others on these and other bills affecting public defense and public defense clients as the budget process unfolds, and to continuing its backup support of public defense in New York throughout the 2018-2019 Fiscal Year.