

**LEGISLATIVE PUBLIC HEARINGS  
ON THE 2015-2016 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 year's budget provides the Legislature a unique opportunity.**

Since the last budget, the Executive has entered into a settlement agreement in the 2007 class action suit regarding deficiencies in public defense services. The Judicial Branch recognized the settlement's importance, with the Chief Judge noting the following during his recent State of the Judiciary address. "The historic settlement last fall of the *Hurrell-Harring* lawsuit means that, for the first time, the State has acknowledged that it bears responsibility to set standards and provide funds necessary to ensure the high and uniform quality of representation for low-income people in criminal cases."

In this budget, the Legislature – the third branch of government to address this settlement – can begin to fulfill the State's obligation to make sure that the public defense portion of the justice system functions well. I ask you to do so, and to do so unstintingly.

The settlement is a legal document. There would be ramifications to ignoring its provisions. But the heart of the agreement is bigger than its written provisions, and ignoring that would have broader ramifications. I am here today to explain why, given the settlement, funding the Indigent Legal Services (ILS) Office and the Public Defense Backup Center of the New York State Defenders Association (NYSDA) at requested levels is pragmatic as well as just.

**The State Must Fully Fund the Indigent Legal Services Office.**

The ILS Office is designated to implement the *Hurrell-Harring* settlement. The Executive Budget commendably provides initial funding for the implementation, in an amount that would allow the ILS Office to hire staff and set up processes integral to this new responsibility. The Executive also added \$3 million to Aid to Localities funding – monies which the ILS Office distributes to counties for public defense – with the additional money being for counties named in the *Hurrell-Harring* settlement only.

The Executive Budget flat funds Aid to Localities outside the five counties and ILS Office operations.

To understand why this flat funding is unwise requires some background. The New York Civil Liberties Union (NYCLU) and Schulte Roth & Zabel LLP sued the State, not counties; the plight of plaintiffs in Onondaga, Ontario, Schuyler, Suffolk, and Washington Counties was used to exemplify New York State's failure to satisfy the right to counsel statewide. As I said here in 2014, the State fought the suit at every turn for several years. During that process, a judge added the five counties as defendants. Now, the settlement requires specific action to improve public defense services in those five defendant counties.

But increasing state funding for public defense *only* in those counties leaves the other counties with no means to improve *their* public defense services. And deficiencies exist everywhere. New York State has long been on notice of that – see, for example, the 2006 report of then-Chief Judge Kaye's Commission on the Future of Indigent Defense Services, cited early in the *Hurrell-Harring* complaint, and NYSDA's testimony here over many years. Any improvements that have been made are small in comparison to the overall problem.

Counties continually seek relief from the state mandate to provide public defense services. Nearly a year ago, on the fifty-first anniversary of the landmark right to counsel decision in

*Gideon v Wainwright*, NYSDA and spokespersons for several counties called on the State to take over the funding and administration of public defense services using *Hurrell-Harring* as a step toward full reform. At least fifteen counties have passed similar resolutions over the last year. For the State to make no increased effort to assist those that were not named in *Hurrell-Harring*, even as settlement of the lawsuit demonstrates that public defense deficiencies lead to liability, would invite further lawsuits. And it would be unfair as well as unwise.

***Fund Reduction of Excessive Caseloads and Provide Counsel at First Appearance.***

The ILS Office asked for additional Aid to Localities funds to address specific key deficiencies that were identified in *Hurrell-Harring* and exist in all counties. **The Legislature should provide the additional \$20 million sought – or more – to help counties achieve caseload reduction and quality improvement.**

What I said here in 2009 remains true: studies and hearings have repeatedly found caseloads in public defense programs around the state greatly exceeding even the highest limits considered acceptable. Excessive workloads mean attorneys lack the time to perform all the tasks necessary for proper representation of every client. This ongoing crisis leads to triage of cases and unfairness to many. The NYCLU found in a 2014 study focusing on the lawsuit counties that “[i]n parts of New York State, public defense attorneys have been known to carry ... nearly three times the recommended maximum.” Eight years before, the Kaye report pointed to excessive workloads across the state – not just in what became *Hurrell-Harring* counties – as a major reason for recommending a complete overhaul of the State’s public defense system. And last year an ILS Office study found that “despite modest progress in 2013, upstate caseloads continue to exceed maximum national limits by an unconscionable margin.” Twenty million dollars will not end excessive caseloads outside the lawsuit counties, but it will go much further than the flat-funding of Aid to Localities proposed in the Executive Budget.

**The ILS Office’s budget request also sought an additional \$8 million in Aid to Localities to help counties provide counsel at first appearance.** The Court of Appeals has said that providing counsel at arraignment is constitutionally required, not optional. And it noted the *Hurrell-Harring* complaint showing that “defendants are with some regularity going unrepresented at arraignment and subsequent critical stages ....” *Hurrell-Harring v State of New York*, 15 NY3d 8, 21-23 (2010). Failure to provide counsel at early, critical stages of criminal proceedings is not limited to the five *Hurrell-Harring* counties. Before the settlement – indeed, from the inception of their targeted funding – the ILS Board and Office had fashioned requests for proposals and distribution of funding for counsel at first appearance. But they can only distribute what the State makes available. The Legislature should include in the FY 2015-2016 budget the full funding requested.

***Provide Full Funding to Allow the ILS Office and Board to Fulfill Their Statutory Duties.***

The ILS Office has many statutory duties in addition to the new task of implementing the *Hurrell-Harring* settlement. An annual operating budget of \$3 million was envisioned from the Office’s inception but a budget based on half that amount has unfortunately become the baseline for year after year of austerity budgets. Like the underfunded public defense programs it is required to study, monitor, and make efforts to improve, the ILS Office has been hampered by underfunding in meeting its obligations.

Article 30 of the Executive Law requires the ILS Office to monitor the provision of public defense services under County Law article 18-B, and make efforts to improve representation. Among other tasks designated as part of those efforts are:

- recommend a variety of standards and criteria as well as establishing measures of performance and obtaining reports from counties and programs as to those measures;
- help counties develop plans for providing representation in conflict-of-interest cases;
- develop recommendations to improve public defense services, including the distribution of grants pursuant to specified criteria;
- target grants for innovative means of enhancing the provision of quality representation; and
- make recommendations to the ILS Board as to distribution and expenditure of Indigent Legal Services Fund and other appropriated monies. (The ILS Board, informed by the work of the ILS Office, is authorized to evaluate public defense services and determine the type of services that will best serve the interests of public defense clients; accept, reject, or modify the ILS Office's recommendations as to the allocation of state funds for public defense; and consult with and advise the ILS Office.)

To carry out all these tasks in relation to the many counties of the Empire State would be daunting at best. NYSDA, in providing assistance to the ILS Office, has observed at close hand the challenges that office faces in doing so with limited staff and resources.

Targeted grants have been developed, with Requests for Proposals (RFPs) and distributions made for some grants. The ILS Board has authorized the development of six targeted (competitive) grants. Two of them are operational: (1) providing counsel at first appearance and (2) upstate caseload reduction for institutional providers and the development of quality control measures in upstate assigned counsel programs. As is true in the current Executive Budget, the amount of funding provided by the State for these grants has in past years failed to increase as was envisioned when dedicated funding streams were created to flow into the Indigent Legal Services Fund for distribution. As a result, counties have not received the amount of funding needed to make real inroads on the targeted problems, though incremental successes are to be lauded. In addition, counties have struggled with the paperwork inherent in state grants and the ILS Office has struggled, with limited staff, to assist them.

In the years since its inception, the ILS Office completed, and the ILS Board approved, "Standards and Criteria for the Provision of Mandated Representation in Cases Involving a Conflict of Interest," later adopted for all public defense representation, and "Appellate Standards and Best Practices." The Office produced an "Estimate of the Cost of Compliance with Maximum National Caseload Limits in Upstate New York" and a one-year update of that report. In addition to the work done to create and implement the targeted grants above, ILS Office staff have created contracts with counties for distribution of funds through non-competitive grants intended to preserve the annual amount of funding counties received under a prior formula for revenue sharing created in 2003. Such funding must be used to improve the quality of public defense services, not cover the costs of continuing deficient services.

Without additional staffing, ILS is unable to develop a systematic mechanism to receive and analyze reports on compliance with the new standards statewide or create a blueprint for helping counties develop plans for providing representation in public defense cases that meet all statutory requirements and ILS standards. Last July the ILS Board did approve the ILS Office

recommendation to develop legislation to transfer authority from the Chief Administrative Judge to the ILS Office for approving assigned counsel and conflict defender office plans and for receiving the annual UCS-195 reports, and to also receive annual mandated representation spending reports. This legislative authority would greatly increase the ILS Office's ability to improve the quality of mandated representation that clients receive statewide as well as the working conditions for the providers of such representation. But without sufficient staff, the ILS Office cannot develop this and other legislative recommendations, much less implement any resulting legislative mandates.

These are just some examples of how underfunding of the ILS Office prevents it, despite its best efforts, from meeting the full panoply of duties required of it. And while other government agencies may make similar credible claims, the improvement of mandated representation with which the ILS Office and Board are charged has a constitutional aspect that cannot be ignored in light of the *Hurrell-Harring* settlement.

The Legislature should fully fund the ILS Office.

### **The State Must Fully Fund the NYSDA Public Defense Backup Center.**

Since 1981, NYSDA has been receiving state funds to help the State meet its Sixth Amendment responsibility to provide constitutionally mandated legal services. NYSDA assists counties with constitutionally and statutorily imposed mandates for public defense services in both criminal and family courts by, among other things, providing centralized resources that would cost counties statewide hundreds of thousands of dollars to establish locally. The Backup Center offers services to over 6,000 overburdened public defense lawyers in over 120 programs across the state. NYSDA's services must be maintained and expanded to continue its support in *all* counties as the State works to strengthen the deficient systems specifically addressed in *Hurrell-Harring*.

The Executive Budget provides only \$1.089 million for the Backup Center – a million dollars less than last year's appropriation, amounting to a 48% cut. Nothing is included for the NYSDA Veterans Defense Program, an initiative begun last year with seed money, which has proven invaluable to public defense clients whose involvement in criminal or family court proceedings can be linked to their military service. Last year, NYSDA had to supplement the Backup Center functions with \$1 million in private sources. That emergency funding has run out, and state funding at the level proposed by the Executive will lead to staff layoffs and to substantial cuts in services, harming counties as well as public defense clients. To provide the same level of service as in FY 2014-15, the Backup Center needs \$3.089 million in state funding for FY 2015-2016.

We have been here before. But this time is different in a profound way, even as it bears similarities to years past.

### ***The Hurrell-Harring Settlement Increases the Need to Invest in NYSDA's Services.***

The Backup Center has survived countless cuts, and threats of cuts, and continued to provide its core services and many new ones in the face of ever-changing societal, legal, and economic challenges. That survival is a credit to those in state government who recognize the fundamental importance of our work, to those in the field who, year in and year out, let you and the Executive know the value of our work, and to the commitment and patience of a staff that works tirelessly to help public defense clients and lawyers.

Now, the *Hurrell-Harring* settlement makes FY 2015-2016 the time to invest heavily in NYSDA's top quality, cost-effective services. Investing \$3.089 million in NYSDA leverages millions of more dollars in efficiencies, savings, and quality outcomes throughout the justice system. As it is no secret that the chronic problems documented in the five lawsuit counties exist elsewhere as well, continuation of high quality backup services in the remaining 57 counties is vital. And, while the State focuses on addressing the flawed public defense systems in the five lawsuit counties, NYSDA is well-positioned to partner with the Executive, the ILS Office, and counties not only as to the settlement counties but on the task of fundamentally improving public defense everywhere.

For instance, the settlement requires the five counties to establish caseload and workload standards, develop training requirements, and monitor and report on their obligations. Counties need to utilize a system that internally coordinates their various actions and allows for effective monitoring and reporting. Such infrastructure is already in place in 65 programs that use NYSDA's Public Defense Case Management System (PDCMS), described below. Through PDCMS, NYSDA can help the State and five counties comply with the settlement order in a cost-effective and efficient manner. In addition, continued support, expansion, and refinement of PDCMS statewide can assist individual programs in managing their cases and allow them to provide data that will help the ILS Office, NYSDA, and others diagnose and address public defense needs in every county.

The Backup Center helps the Legislature and Executive, just as it assists counties and public defense programs, meet their responsibilities as to the constitutional and practical function of ensuring that the justice system works smoothly and fairly. We must continue this, and our many other roles, in the post-*Hurrell-Harring* era. The settlement highlights what we long ago learned from the horror stories embodied in requests for assistance from public defense providers struggling with excessive caseloads, inadequate resources, and the resulting lack of ability to advocate for clients: systemic reform is required to end the recurring deficiencies inherent in the current status quo. Our services that seek to alleviate deficiencies on many fronts are vital, none more so than our advocacy for the fundamental change inherent in the *Hurrell-Harring* suit.

NYSDA's other services likewise provide both immediate and long-term benefits. Our staff provides award-winning training, legal research, materials from a statewide clearinghouse, and legal and technical assistance to public defense attorneys, their clients, and their counties. They have responded to hundreds of thousands of requests for assistance in criminal defense and adult family court cases over the years. Let me talk in detail about just a few of the things the Backup Center offers to counties and public defense providers statewide.

***Support for NYSDA's High Quality Training Programs is Cost Effective.***

New public defense lawyers attend NYSDA's Basic Trial Skills Program (BTSP) to learn through hands-on practice how to try a criminal or family court case and how to address the aspects of many public defense clients' lives, including poverty and racism, that uniquely affect their cases. BTSP training has been praised and supported by the New York State Judicial Commission on Minorities, the National Legal Aid and Defender Association, and the New York Bar Foundation. With public discussions of racism in the justice system occurring at a level not seen in some time, NYSDA's ability to offer BTSP to new lawyers this year must be assured.

Small counties and underfunded public defense offices of all sizes cannot provide the level or quantity of training available to their lawyers through NYSDA. This includes not only BTSP but also over 30 other affordable, high-quality programs that NYSDA, as an accredited provider of mandatory Continuing Legal Education (CLE) presents or cosponsors each year. At NYSDA's Annual Conference, attorneys can obtain a year's worth of required CLE credits on subjects relevant to public defense practice. Through regional training events, NYSDA helps lawyers in different parts of the state learn about the latest legal, scientific, and technological developments affecting the defense of people accused of crime or threatened with the loss of parental rights or contact with their children. Moreover, NYSDA works closely with public defense offices, bar associations, and others to augment and enhance the quality of local training efforts. The State's support of such training is a form of mandate relief as well as fulfillment of its responsibility to provide effective public defense representation.

### ***NYSDA Provides Vital Legal Resources and Technical Assistance.***

In addition to training events, NYSDA provides timely written updates about new caselaw, changes in forensic science, and state legislation or regulatory amendments affecting clients' cases. Formats for such updates include NYSDA's website, which receives over 30,000 hits per month (and is undergoing an overhaul to make it even more helpful), the bi-weekly e-bulletin *News Picks from NYSDA Staff* begun in late 2013, and a periodic newsletter that allows more in-depth discussion and contains summaries of appellate cases, practice tips, and more.

Technical Assistance ranges from consultation with county officials and providers of public defense services about requirements under County Law article 18-B and other laws to installation and support for the PDCMS, mentioned above. This information system, specifically designed for NYS defender offices enables defense providers to efficiently respond to client needs and track every aspect of a case from arrest to arraignment to disposition, while providing data to maximize county resources and manage caseloads.

Currently, it is in used in 45 counties. Without PDCMS and the dedicated, award-winning PDCMS team that updates and supports it, public defense providers would have to adapt non-dedicated software or create their own. The PDCMS is integral to meeting the increasing demands for more data collection and analysis compelled under the *Hurrell-Harring* settlement and other requirements of the ILS Office and other state agencies.

The above description highlights some of NYSDA's most important services, though time and space do not allow a description of everything we do, and many of you are familiar with our work. Our Annual Report, available on our website ([www.nysda.org](http://www.nysda.org)) contains more, including a report of our Public Defense Investigation Support Project.

I wish to describe below one critically essential NYSDA project for which we need the help and funding of the State Legislature.

### ***NYSDA's Veterans Defense Program, Defending Those Who Defended Us, Has Proven its Worth and Should be Funded at \$1 million.***

For eight years, we asked the State to fund an initiative regarding the defense of people whose military service affected them in ways that led to their involvement in criminal or family court

proceedings. In past years, tough economic times and other budget priorities prevented funding of the Program.

Last year, we could wait no longer in the face of a crisis situation – growing numbers of veterans impacted by service-related mental health conditions lost in the justice system. Using one-time seed funding from other sources, we established the Veterans Defense Program (VDP) to meet the critical needs of hundreds of justice-involved veterans suffering from the invisible wounds of war.

Its staff brings to VDP deep experience working with veterans and award-winning legal and military backgrounds. VDP provides comprehensive legal assistance to support zealous representation of veterans, helping the most vulnerable of our veterans with service-related behavioral illnesses, such as Post Traumatic Stress Disorder or Traumatic Brain Injury, and facilitating treatment and recovery. The Program provides training and legal assistance to county-based public defender offices, legal aid societies, and assigned counsel offices, with expert case support for strategic cases, and is launching a clearinghouse of resources and a Veteran Restorative Justice Pilot Project.

Since its creation, VDP has assisted many public defense attorneys and veterans. The Program is strongly supported by many statewide veteran organizations. Praise received for VDP and its work include the following:

- “I had the honor of presenting at the [VDP] 2014 statewide training, and was blown away by the quality and depth of their program. This group is literally breaking new ground—the first of its kind in the country—using sophisticated veterans defense knowledge to assist criminally-charged veterans across NYS, as well as to train other attorneys in the art and science of defending veterans.” *Attorney Brockton Hunter, national veteran defense expert, U.S. Army veteran, and co-author, The Attorneys Guide to Defending Veterans in Criminal Court*
- “The VDP is a small group of legal professionals whose services are desperately needed here in New York. They should flourish and expand so that more of our veterans, damaged in the service of their country, can be helped through their own individual nightmare.” *Assemblyman Marc Butler*
- “[The VDP’s] assistance, resources, tips and techniques were invaluable in formulating an effective defense strategy. The VDP helped me steer the case towards a treatment program to address my client’s pathology and prevent a reoccurrence, rather than incarceration, allowing this individual to remain a productive member of society rather than a mere statistic.” *Aaron Dean, Chenango County Assistant Public Defender*
- “I am truly grateful for your incredibly speedy responses and helpfulness. What a tremendous resource you provide.” *Staff Attorney Stephanie Pope, The Legal Aid Society*

**The Senate and Assembly should ensure that this valuable program endures with a \$1 million appropriation.**

**Conclusion: Fully fund the ILS Office and NYSDA’s Public Defense Backup Center.**

The funding requested by the ILS Office and NYSDA, constituting a small portion of the overall FY 2015-2016 state budget, will help avoid further litigation against the State and counties as well as the continuing injustice that deficiencies in public defense services have wrought. Fully funding these organizations provides mandate relief, constitutes another step toward ending public defense deficiencies, and amounts to wise governance.





## New York State Defenders Association **Veterans Defense Program**



The Veterans Defense Program provides in-depth training and support to facilitate and encourage informed and zealous representation of veterans involved in criminal or family court matters. The VDP helps the most vulnerable of our veterans by assisting defense attorneys in providing justice to veterans with mental health issues arising out of their service, such as Post-Traumatic Stress Disorder (PTSD) or Traumatic Brain Injury (TBI) and facilitating treatment to begin healing their wounds of war.

- Training and expert legal assistance to attorneys in 120 county-based public defender offices, legal aid agencies, and assigned counsel offices, with direct litigation and expert case support for strategic cases.
- Clearinghouse of Veteran Defense Resources to include Templates, Defense Checklists and Practice Manuals.
- Launching a Veteran Restorative Justice Pilot Project and a Veteran Community Partnership Pilot Project.

### **Veterans Defense Program Testimonials: *Defending Those Who Defended Us***

“After three years and two heart attacks, and trying to get the justice system to understand my dilemma, I was desperate and disabled. VDP acted immediately and restored my dignity and faith in the system. It is the best thing to come along for a veteran who needs help in criminal matters; an organization that has a heart and soul. They have truly saved me and my family from years of anguish.” *Lawrence Fuchs, U.S. Army veteran*

“In my travels, I have never come across anything like the VDP. I had the honor of presenting at their 2014 statewide training, and was blown away by the quality and depth of their program. This group is literally breaking new ground—the first of its kind in the country—using sophisticated veterans defense knowledge to assist criminally-charged veterans across NYS, as well as to train other attorneys in the art and science of defending veterans.” *Attorney Brockton Hunter, national veteran defense expert, and U.S. Army veteran*

“The Veterans Defense Program showed compassion and care when it seemed no one else could or would [for an Afghanistan veteran]. The VDP is a small group of legal professionals whose services are desperately needed here in New York. They should flourish and expand so that more of our veterans, damaged in the service of their country, can be helped through their own individual nightmare.” *Assemblyman Marc Butler*

The VDP’s “assistance, resources, tips and, techniques were invaluable in formulating an effective defense strategy. VDP helped me steer the case towards a treatment program to address my client’s pathology and prevent a reoccurrence, rather than incarceration allowing this individual to remain a productive member of society rather than a mere statistic.” *Aaron Dean, Chenango County Assistant Public Defender*

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