



# Staff Memorandum

## HOUSE OF DELEGATES Agenda Item #9

**REQUESTED ACTION:** Approval of the report and recommendations of the Committee on Families and the Law.

Attached is a report from the Committee on Families and the Law recommending that the Association support State funding and oversight of mandated representation provided to indigent parents pursuant to the Family Court Act and the Surrogate's Court Procedure Act. The report notes that last year, the state budget included provisions to improve the quality of criminal defense statewide; in the committee's view, mandated parental representation is as important as indigent criminal defense. The report notes flaws in the existing system of mandated parental representation, including a lack of standards of performance, caseload, and financial eligibility; insufficient resources for non-lawyer professional services; failure to provide access to counsel in a timely manner; inadequate client contact; and lack of state oversight and funding. Further, existing laws and policy recognize that high-quality representation is essential to protect fundamental familial rights and interests. Accordingly, the report recommends that the State should pay the entire cost of mandated parental representation, or at least the cost of elevating the quality of representation being provided, and should provide a mechanism for statewide oversight of such representation.

The report was submitted in January 2018 and posted in the Reports Community. The Erie County Bar Association and the NYSBA Committee on Women in the Law have indicated their support for the report.

The report will be presented at the January 26 meeting by committee co-chair Susan B. Lindenauer and member Angela O. Burton.

**NEW YORK STATE BAR ASSOCIATION  
COMMITTEE ON FAMILIES AND THE LAW**

**MEMORANDUM IN SUPPORT OF  
STATE FUNDING FOR MANDATED PARENTAL  
REPRESENTATION**

**January 2018**

**Opinions expressed in this Memorandum are those of the NYSBA Committee on Families and the Law and do not represent those of the New York State Bar Association unless and until they have been adopted by the NYSBA's Executive Committee or House of Delegates.**

**NEW YORK STATE BAR ASSOCIATION  
COMMITTEE ON FAMILIES AND THE LAW**

**MEMORANDUM IN SUPPORT OF  
STATE FUNDING FOR MANDATED PARENTAL REPRESENTATION**

**January 2018**

The Committee on Families and the Law urges the New York State Bar Association (“NYSBA”) to adopt a Resolution calling for the State to fund and oversee all constitutionally and statutorily required representation provided—pursuant to §§ 262 and 1120 of the Family Court Act, and § 407 of the Surrogate’s Court Procedures Act—to litigants who are financially unable to obtain counsel (“mandated parental representation” or “parental representation”).

***Introduction***

In April 2017, Governor Andrew Cuomo fulfilled a promise to reimburse 100% of the costs to the counties and New York City for certain statewide improvements in criminal defense provided to persons who are financially unable to obtain counsel (“indigent criminal defense” or “criminal defense”). The final FY 2018 State budget included two groundbreaking statutory amendments. Executive Law § 832 (4) now gives the New York State Office of Indigent Legal Services (“ILS”) the authority and duty to develop plans to: (a) ensure that each criminal defendant eligible for mandated representation is represented by counsel at arraignment; (b) establish numerical caseload/workload standards for each provider of indigent criminal defense representation; and (c) improve the quality of representation in indigent criminal defense statewide. ILS submitted those plans on December 1, 2017. Further, County Law § 722-e was amended to specify that the State will cover the costs to implement the reform plans produced by ILS, thereby relieving the counties of the burden to alone pay for indigent criminal defense.

This progress was achieved partly thanks to NYSBA’s staunch support of State funding and oversight of indigent criminal defense. Such leadership was consistent with the important role played by the State Bar for decades, including advocating for an increase in assigned counsel rates and creating the Special Committee to Ensure the Quality of Mandated Representation (now the Committee on Mandated Representation).

The next frontier is mandated parental representation. This realm is as important as indigent criminal defense, and NYSBA should advocate for similar State leadership and commitment to reform in this area. Just as in criminal defense, constitutionally protected rights are at stake. Whereas the U.S. Constitution guarantees the right to assigned counsel in criminal cases where physical liberty is implicated, the New York State Constitution guarantees the right to counsel to indigent parents in matters involving fundamental liberty interests in the parent-child relationship. First recognized by the New York State Court of Appeals in 1972, the parental right to assigned counsel has been codified in State statute since 1975.

The impact of the quality of representation is as profound for parents experiencing a family crisis as for persons accused of committing a crime. Certain Family Court proceedings involve allegations that can result in the temporary separation of a child from his or her family, with the potential for permanent destruction of the parent-child relationship, and, in some instances, for criminal charges against the parent. More generally, Family Court cases determine life-altering matters affecting the safety of children and parents and the integrity and autonomy of families. Recognizing that the “objective of any [mandated] representation plan should be to ensure high quality legal services for every individual represented under the plan,” the NYSBA *Standards for Providing Mandated Representation*, issued by the Committee to Ensure the Quality of Mandated Representation, cover parental representation, as well as criminal defense.<sup>1</sup>

With groundbreaking reform well underway in criminal defense, similarly intense attention needs to be focused on improving parental representation. Both areas of practice suffer myriad problems under the framework established by County Law Article 18-B, which requires each county and the City of New York to maintain a plan for the provision of assigned counsel.<sup>2</sup> These problems include, among others, lack of clear, uniform, and enforceable standards of performance, attorney workload/caseload, and litigant financial eligibility; inadequate training and supervision of attorneys; lack of sufficient resources for non-attorney professional services; failure to provide access to assigned counsel in a timely manner; inadequate client contact; and lack of State oversight and funding.<sup>3</sup> Indeed, more than a decade ago, while noting that its “mandate was limited to indigent criminal defense,” Chief Judge Judith Kaye’s Commission on the Future of Indigent Defense in New York (the “Kaye Commission”), in its 2005 Interim Report, emphasized that “identical problems affect representation of adults in family court. This representation, carried out by the same 18-B providers, with the same staff, under the same statutory scheme . . . needs to be addressed.”<sup>4</sup>

Since its establishment in 2010, ILS has made modest inroads toward improving mandated parental representation, but much more must be done. Parental representation in some counties has benefitted from sorely needed, yet woefully inadequate State funds distributed by ILS for attorneys and non-attorney professional services, such as experts, investigators, and social work staff. In 2015, ILS initiated *Families Matter: Parental Defense in New York*, a now biannual statewide training conference co-sponsored by ILS, the Office of Court Administration’s (“OCA”) Child Welfare Court Improvement Project, and the New York State Defenders Association. Also in 2015, the ILS Board adopted *Standards for Parental Representation in State*

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<sup>1</sup>NYSBA, *2015 Revised Standards for Providing Mandated Representation*, pp. 4-5 (“The standards are also intended to apply to Family Court cases in which counsel is assigned to represent an adult or to represent a child.”), <http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=44644>.

<sup>2</sup>County Law § 722.

<sup>3</sup>The Spangenberg Group, *Status of Indigent Defense in New York: A Study for Chief Judge Kaye’s Commission on the Future of Indigent Defense Services: Final Report*, pp. ii -iv, 15-19 (June 16, 2006), <https://www.nycourts.gov/ip/indigentdefense-commission/SpangenbergGroupReport.pdf>.

<sup>4</sup>Commission on the Future of Indigent Defense Services, *Interim Report to the Chief Judge of the State of New York*, p. 16, fn. 27, <http://www.nycourts.gov/reports/futureofindigentdefense.pdf>.

*Intervention Matters*, developed by ILS in collaboration with lawyers and social work professionals across the State, to guide attorneys in providing high-quality representation in child protective and termination of parental rights (“state intervention”) cases.<sup>5</sup> While significant, these initiatives only scratch the surface of the reforms needed to ensure effective mandated parental representation.

In contrast to the flawed county-based system, there is precedent for a different approach to parental representation. Decades ago, a pioneering statewide system, fully funded and administered by the State, was established for representation of children—the Attorneys for the Child (“AFC”) (formerly Law Guardian) Program. The AFC Program has demonstrated the wisdom and value of a State-based, rather than county-based, approach to mandated representation in Family Court matters. Ultimately, the new vision for parental representation in Family Court and related proceedings should embrace a statewide system that is fully financed and administered by the State. Such an approach would better ensure that the rights of parents *and* children are protected.

### ***High-Quality Parental Representation Protects Constitutionally Recognized Liberty Interests of Parents and Children***

Our Family Courts address the safety of children and other family members, as well as the integrity, autonomy, and financial stability of families. In child welfare proceedings, Family Courts determine whether children are at risk of harm and, if so, how they should be protected, whether by providing services to the family or removing the child and placing him or her in foster care. When orders of protection are needed in cases of domestic violence, when parents have custody disputes, or when child support orders are violated, Family Courts provide needed relief.

The U.S. Supreme Court has long emphasized that the Constitution recognizes and protects parents’ interests in the parent-child relationship and the integrity of the family unit.<sup>6</sup> The Court has specifically recognized parents’ fundamental liberty interest in the care and custody of their children.<sup>7</sup> Indeed, depriving a parent of the right to raise his or her own child is viewed by many as “more grievous” than a prison sentence,<sup>8</sup> and the determination of parental rights is often referred to as the “civil death penalty.”<sup>9</sup> Even in

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<sup>5</sup>*Standards for Parental Representation in State Intervention Matters*, ILS (2015),

<https://www.ils.ny.gov/files/Parental%20Representation%20Standards%20Final%20110615.pdf>.

<sup>6</sup>*E.g. Troxel v. Granville*, 530 U.S. 57, 65 (2000) (“The liberty interest at issue in this case – the interest of parents in the care, custody, and control of their children – is perhaps the oldest of the fundamental liberty interests recognized by this Court.”); *Parham v. J. R.*, 442 U.S. 584, 602 (1979) (“Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course.”).

<sup>7</sup>*Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

<sup>8</sup>*Lassiter v. Department of Social Services*, 452 U.S. 18, 59 (1981) (Stevens, J., dissenting).

<sup>9</sup>*E.g. Stephanie N. Gwillim, The Death Penalty of Civil Cases: The Need for Individualized Assessment and Judicial Education When Termination Parental Rights of Mentally Ill Individuals*, 29 St Louis U Pub L Rev 341 (2009) (citing *In re K.A. W.*, 133 S.W.3d 1, 12 (Sup. Ct., Mo. 2004); see also *In re Smith*, 77 Ohio App.3d 1, 16 (1991) (“A termination of parental rights is the family law equivalent of the death penalty in a

cases of alleged maltreatment, parents' fundamental liberty interest in raising their children does "not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State...parents retain a vital interest in preventing the irretrievable destruction of their family life."<sup>10</sup> Likewise, the New York Court of Appeals has emphasized that "governmental interference with the liberty of a parent to supervise and rear a child" is prohibited, "except upon a showing of overriding necessity."<sup>11</sup>

Children also have liberty interests in the parent-child relationship.<sup>12</sup> Our Court of Appeals has recognized the fundamental principle that "[a] parent has a 'right' to rear [his or her] child, and the child has a 'right' to be reared by [his or her] parent."<sup>13</sup> Similarly, the U.S. Supreme Court has observed that, in termination of parental rights proceedings, until the State proves parental unfitness, "the child and his parents share a vital interest in preventing erroneous termination of their natural relationship."<sup>14</sup>

These fundamental principles are embedded in our statutes. As noted by the Court of Appeals, "[l]ooking to the child's rights as well as the parents' rights to bring up their own children, the Legislature has found and declared that a child's need to grow up with a 'normal family life in a permanent home' is ordinarily best met in the child's 'natural home.'"<sup>15</sup> In 1990, the Legislature adopted "Family policy guidelines, set out in Executive Law §§ 990-992, to "ensure that all state and local planning and provision of services are effectuated in a manner that maximizes support and strengthening of the family structure." These standards are "directed toward stemming the human and financial costs of the unnecessary placement of children outside their homes, while ensuring the safety and well-being of children" by providing them and their families with necessary services, or, when appropriate, providing for permanency for children through other means.<sup>16</sup>

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criminal case. The parties to such an action must be afforded every procedural and substantive protection the law allows.").

<sup>10</sup>*Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

<sup>11</sup>*Matter of Marie B.*, 62 N.Y.2d 352, 358 (1984)

<sup>12</sup>See e.g. *Troxel v. Granville*, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting) ("[I]t seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation."); *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977) ("[T]he reciprocal rights of both parent and children [include the interest] of the children in not being dislocated from the 'emotional attachments that derive from the intimacy of daily association' with the parent.").

<sup>13</sup>*Matter of Bennett v. Jeffreys*, 40 N.Y.2d 543, 546 (1976); see also *Rankel v. County of Westchester*, 135 A.D.3d 731, 733 ("parents have a liberty interest in the care and custody of their children, and children have a parallel liberty interest in not being dislocated from their family.")

<sup>14</sup>*Santosky v. Kramer*, 455 U.S. 745, 760 (1982).

<sup>15</sup>*Matter of Michael B.*, 80 N.Y.2d 299, 309 (1992) (citing Social Services Law § 384-b[1][a][i], [ii])

<sup>16</sup>Executive Law § 991 ("The legislature finds that the children of this state are at the same time both our most important resource and our most vulnerable citizens. Children best develop their unique potential in a caring and healthy family environment either with their birth parents or other relatives or in an adoptive family, with support from other nurturing environments, especially the schools and the community. As such, children need a special state policy to ensure the strength and viability of their families.")

To protect these vital interests, New York has long recognized a broad parental right to counsel in matters affecting the family. In 1972, in *Matter of Ella B.*, the Court of Appeals held that constitutional principles of fundamental fairness, due process, and equal protection require appointment of governmentally-funded lawyers for indigent parents in child protective proceedings.<sup>17</sup> “A parent’s concern for the liberty of the child, as well as for his care and control,” the Court said, “involves too fundamental an interest and right to be relinquished to the State without the opportunity for a hearing, with assigned counsel if the parent lacks the means to retain a lawyer.”<sup>18</sup> One year later, citing *Ella B.*, the Second Department held that indigent parents in proceedings under Family Court Act Article 4, regarding the violation of support orders, have the right to assigned counsel, in light of their possible incarceration if found to have willfully violated such an order.<sup>19</sup>

In the wake of these decisions, in 1975, the Legislature enacted legislation—drafted and introduced by OCA—which codifies a broad parental right to counsel. See Family Court Act §§ 261, 262, and 1120.<sup>20</sup> Emphasizing potential infringements of parents’ “fundamental interests and rights, including the loss of a child’s society and the possibility of criminal charges,” the Legislature recognized counsel’s “indispensable” role in the “practical realization of due process of law” and in assisting the court “in making reasoned determinations of fact and proper orders of disposition.” See Family Court Act § 261. Our courts have repeatedly emphasized that the parental right to assigned counsel means *effective assistance of counsel* under the State Constitution.<sup>21</sup>

Since its enactment, New York’s parental right to counsel statute has been expanded on numerous occasions. It currently extends to specified litigants in proceedings involving child custody and visitation, abuse/neglect, foster care placement and review, termination of parental rights, destitute children, adoption, paternity, and family offenses. Additionally, assigned counsel is available to a person charged with contempt of court for violation of a prior Family Court order (including willful violation of a child support order), and persons in any other proceeding in which the judge concludes that the U.S. or New York State Constitution requires the assignment of counsel. See Family

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<sup>17</sup> *Matter of Ella B.*, 30 N.Y.2d 352 (1972).

<sup>18</sup> *Id.* at 356.

<sup>19</sup> *Jennings v. Jennings*, 42 A.D.2d 568 (2<sup>nd</sup> Dep’t 1973).

<sup>20</sup> See Letter from Richard A. Bartlett, State Administrative Judge to Hon. Judah Gribbetz, Counsel to the Governor, (July 22, 1975), <http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=75119>.

<sup>21</sup> *E.g. Matter of Nassau County Dept. of Social Services v. King*, 149 A.D.3d 942, 944 (2<sup>nd</sup> Dep’t 2017) (“Accordingly, in support proceedings such as this one in which a party faces the potential of imprisonment and has a statutory right to counsel, we hold that the appropriate standard to apply in evaluating a claim of ineffective assistance is the meaningful representation standard.”); *Matter of Brown v. Gandy*, 125 A.D.3d 1389, 1390 (4<sup>th</sup> Dep’t 2015) (“[B]ecause the potential consequences are so drastic, the Family Court Act affords protections equivalent to the constitutional standard of effective assistance of counsel afforded defendants in criminal proceedings.”); *Matter of Eileen R. (Carmine S.)*, 79 A.D.3d 1482 (3<sup>rd</sup> Dep’t 2010) (“Indigent parents facing termination of parental rights are entitled to the assignment of counsel, and such counsel must provide effective assistance comparable to that afforded to criminal defendants.”).

Court Act § 262. Most of this representation occurs in Family Court proceedings, but certain types of cases may also be heard in Surrogate's or Supreme Court.<sup>22</sup>

As shown above, New York's laws and policies recognize that high-quality representation is essential when fundamental familial rights and interests are at stake. However, as the Kaye Commission found, the current system does not satisfy the State's obligations to protect those rights and interests. What is required is a structure, funded and administered by the State, that creates, monitors and enforces standards of mandated parental representation.

### ***State System of Representation for Children: Attorneys for the Child***

The establishment of the AFC Program, administered by OCA and fully funded by the State, stands in stark contrast to the parental representation system. New York's recognition of a child's right to counsel in Family Court matters pre-dated by five years the U.S. Supreme Court's 1967 recognition of a child's right to counsel in juvenile delinquency matters.<sup>23</sup> In 1962, New York became the first state to create a broad statutory right to counsel for children in juvenile delinquency and family-related matters.<sup>24</sup> The Legislature declared in Family Court Act § 241 that "minors who are the subject of family court proceedings or appeals . . . should be represented by counsel of their own choosing or by assigned counsel," and established an assigned counsel program to "help protect [children's] interests and to help them express their wishes to the court." From the outset, the State assumed both administrative and fiscal responsibility for the AFC Program. All operating costs are payable by the State, pursuant to Family Court Act § 248. For FY 2018-2019, the Judiciary budget request estimates the statewide cost of the program to be \$127,957,373.<sup>25</sup>

Full State funding and administrative oversight of the AFC program supports a framework for representation of children. Administrative responsibility for the program is

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<sup>22</sup>Surrogate's Court Procedure Act § 407 mandates County Law Art. 18-B representation for: respondents in proceedings involving termination of parental rights under Social Services Law §384-b or approval of a surrender of a child under Social Services Law §384; the parent of a child in any adoption proceeding who opposes the adoption of such child; the parent of any child seeking custody or contesting the substantial infringement of his or her right to custody of such child; any of the aforementioned persons upon an appeal in any of those proceedings; and any adult in a proceeding under the Surrogate's Court Procedure Act if the judge determines that such assignment of counsel is mandated by the constitution of this state or of the United States. Judiciary Law § 35 (8) provides that, "[w]henver supreme court shall exercise jurisdiction over a matter which the family court might have exercised jurisdiction had such action or proceeding been commenced in family court or referred thereto pursuant to law, and under circumstances whereby, if such proceedings were pending in family court, such court would be required by section two hundred sixty-two of the family court act to appoint counsel, supreme court shall also appoint counsel."

<sup>23</sup>*In re Gault*, 387 U.S. 1 (1967).

<sup>24</sup>Fam. Ct. Act Article 2, Part 4 – *Attorneys for Children*; see also Merrill Sobie, *The Meaningful Representation of Children: An Analysis of the State Bar Association Law Guardian Legislative Proposal*, 64 NY St BJ 52 (May/June 1992).

<sup>25</sup>Unified Court System Budget, Fiscal Year 2018-2019, "Attorney for the Child Program," p. 107, <http://www.nycourts.gov/admin/financialops/BGT18-19/2018-19-UCS-Budget.PDF>.

divided between OCA and the Appellate Divisions (see Family Court Act §§ 241-243). Family Court Act § 246 empowers the Administrative Board of OCA to “prescribe standards for the exercise of the powers granted to the appellate divisions under this part and may require such reports as it deems desirable.” The program is supervised by the Appellate Division presiding justices. Each Department’s AFC Director conducts initial and ongoing training programs and certifies and re-certifies panel attorneys. Over the years, NYSBA has advocated for improvements in the AFC system. In part due to reports published by NYSBA in 1984 and 1990,<sup>26</sup> significant improvements have been made, including oversight by the Directors to determine attorney compliance with standards of practice adopted by NYSBA at the behest of the Committee on Children and the Law.<sup>27</sup>

### ***Other State Systems of Representation: Capital Defender Office, Mental Hygiene Legal Services, and Parental Representation in Supreme Court***

In addition to the AFC program, other statutory schemes have provided for State funding and oversight of programs for representation of indigent New Yorkers.

Now defunct, a notable State system of indigent legal representation was the State Capital Defender Office (“CDO”). Established in 1995 by Judiciary Law §35-b, the CDO was created to ensure adequate representation for indigent persons accused of crimes punishable by death<sup>28</sup> and was funded by an appropriation from the State Operations budget.<sup>29</sup> The CDO closed in the wake of a 2004 New York Court of Appeals decision which effectively declared the State’s death penalty law unconstitutional.<sup>30</sup>

Mental Hygiene Legal Service (“MHLS”) is a State agency responsible for representing, advocating, and litigating on behalf of individuals receiving services for a mental disability. The agency provides a broad range of legal services and assistance to mentally disabled persons in State facilities. MHLS, which is funded by the State through the Judiciary budget, will have an estimated cost of \$32,853,966 in FY 2018-2019.<sup>31</sup>

As noted above, in certain situations, parents are entitled under the Judiciary Law to State-funded assigned counsel in Supreme Court cases.<sup>32</sup> Assignment of counsel in

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<sup>26</sup> Jane Knitzer and Merrill Sobie, *Law Guardians in New York State: A Study of the Legal Representation of Children*, NYSBA (1984); *Report and Recommendations of the Task Force on the Law Guardian System*, NYSBA (1990). See also Merrill Sobie, *The Representation of Children: A Summary and Analysis of the Bar Association Law Guardian Study*, NY St BJ (Feb. 1985), at 41, <http://digitalcommons.pace.edu/lawfaculty/616/>.

<sup>27</sup> NYSBA, *Standards for Attorneys Representing Children in New York*, <http://www.nysba.org/StandardsforAttorneysRepresentingChildren>.

<sup>28</sup> Judiciary Law § 35-b (3).

<sup>29</sup> Judiciary Law § 35-b (9).

<sup>30</sup> *People v. LaValle*, 3 N.Y.3d 88 (2004)

<sup>31</sup> Unified Court System, *Budget Request FY 2018-2019*, p. 112, accessible at <https://www.nycourts.gov/admin/financialops/BGT18-19/2018-19-UCS-Budget.PDF>.

<sup>32</sup> Judiciary Law §35 (8).

Supreme Court generally involves issues of custody, visitation, or contempt or willful violation of orders of protection or child support. In addition, Judiciary Law § 35 provides for assigned counsel in other matters, including habeas corpus proceedings involving prisoners in State institutions; commitment proceedings involving persons who are mentally ill, mentally incompetent or those with narcotic addictions; commitment of a child to an authorized agency by reason of the mental illness or retardation of his or her parent; and adoption or custody proceedings where counsel is constitutionally mandated. Pursuant to Judiciary Law § 35 (5) the costs of these services are a State charge through the Judiciary Budget. For FY 2018-2019, the costs are estimated to be \$1,985,000.<sup>33</sup>

### ***County-Based Mandated Parental Representation***

In contrast to representation of children via the State AFC Program, parental representation is relegated to the county-based system that has proven so inadequate for indigent criminal defense. In 1975, when enacting the parental right to counsel in the Family Court Act, the Legislature added the cost and administration of indigent parental representation to County Law Article 18-B, thus forcing the counties alone to shoulder this responsibility.<sup>34</sup>

Unsurprisingly, as the Kaye Commission noted in 2005, “identical problems affect representation of adults in family court” as have been identified in indigent criminal defense representation.<sup>35</sup> In 2006, the “most comprehensive study of indigent defense representation ever undertaken in New York State”<sup>36</sup> confirmed the existence of numerous, overlapping deficiencies in the county-based indigent criminal defense and mandated parental representation systems. The Spangenberg Group (“TSG”), which conducted the study on behalf of the Kaye Commission, observed that:

“Although not part of the Commission’s charge, we found that family court matters are an integral and inextricable part of New York’s indigent defense system. . . Like the provision of indigent defense representation in criminal cases, the provision of representation in family court is a severely fractured and under-funded system, and one that is quite disparate from the [Attorneys for Children] Program that provides for the representation of children in family court.”<sup>37</sup>

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<sup>33</sup>Unified Court System, *Budget Request FY 2018-2019*, p. 104, accessible at <https://www.nycourts.gov/admin/financialops/BGT18-19/2018-19-UCS-Budget.PDF>.

<sup>34</sup>County Law Article § 722; see also Joel Stashenko, “Counsel Costs for Indigent Family Court Litigants Often Overlooked,” NYLJ, Jan. 5, 2017.

<sup>35</sup>Kaye Commission Interim Report, *supra*, n. 4.

<sup>36</sup>Commission on the Future of Indigent Defense in New York, *Final Report to the Chief Judge of the State of New York*, p. 2, (June 18, 2006) (“Kaye Final Report”), accessible at [http://nycourts.gov/ip/indigentdefense-commission/IndigentDefenseCommission\\_report06.pdf](http://nycourts.gov/ip/indigentdefense-commission/IndigentDefenseCommission_report06.pdf).

<sup>37</sup>The Spangenberg Group, *Status of Indigent Defense in New York: A Study for Chief Judge Kaye’s Commission on the Future of Indigent Defense Services, Final Report*, pp. iii-iv, (June 16, 2006) (“TSG Report”), <https://www.nycourts.gov/ip/indigentdefense-commission/SpangenbergGroupReport.pdf>.

Reiterating TSG’s findings, the Kaye Commission remarked that “the criminal defense programs studied by TSG were, in many instances, inseparable from the programs providing Family Court representation” and suggested that “[t]he Indigent Defense Commission that we propose also oversee services providing for Family Court representation.”<sup>38</sup>

Providing high-quality parental representation is a difficult and challenging endeavor, requiring great skill and dedication. Many assigned attorneys throughout the State work zealously on behalf of their clients. However, far too many attorneys have little or no training or experience in family law, and minimal, if any, supervision and oversight. Many lack access to administrative staff and non-attorney professional services, such as investigators, social workers, interpreters, and experts.<sup>39</sup> These deficiencies not only undermine the goal of meaningful representation and effective assistance of counsel; they also threaten the safety and stability of children and families.

Effective representation for parents supports the safety, stability, and well-being of children and families. The federal Administration for Children and Families (“ACF”) recently issued a Technical Guidance encouraging “all child welfare agencies, courts, administrative offices of the courts, and Court Improvement Programs to work together to ensure parents, children and youth, and child welfare agencies, receive high-quality representation at all stages of child welfare proceedings.”<sup>40</sup> ACF pointed to research linking representation for all parties in child welfare proceedings to increased party engagement, improved case planning, expedited permanency, and cost savings to State government.<sup>41</sup>

New York City’s approach to parental representation illustrates the benefits of high-quality parental representation. Since 2007, the New York City Mayor’s Office of Criminal Justice has operated a multidisciplinary, institutional model of parental defense that requires the use of social workers, paralegals, investigators, experts, and parent advocates as part of the legal team. The Center for Family Representation (“CFR”) – cited in the ACF’s Technical Guidance as an “exemplary” model of parental representation - is one of several institutional providers with whom New York City contracts to provide parental representation in State intervention cases.<sup>42</sup> In 2014 the average length of stay for a child in foster care in New York was 29 months; for CFR clients’ children, the average length of stay was less than five months. As a result of CFR attorneys’ early entry into the case, they are able to work closely with the family and the social services agency to identify and access appropriate services. In about half of its cases, CFR succeeded in keeping children out of foster care entirely, while

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<sup>38</sup>Kaye Final Report, *supra* n. 36, p. 20, fn. 33.

<sup>39</sup>See e.g. *New York County Lawyers’ Ass’n v. State of N.Y.*, 196 Misc.2d 761, 771 (2003).

<sup>40</sup>U.S. Health and Human Services, *High Quality Legal Representation in Child Welfare Proceedings*, ACYF-CB-IM-17-02, (Administration for Children and Families, January 17, 2017), <https://www.acf.hhs.gov/cb/resource/im1702>.

<sup>41</sup>*Id.*, pp. 6-7.

<sup>42</sup>Currently, CFR, Brooklyn Defender Services, the Bronx Defenders, and the Neighborhood Defender Service of Harlem are the primary providers for state intervention cases in New York City.

maintaining them safely within their families of origin. As of 2017, CFR estimated that its services reduced the cost of foster care by \$37 million.<sup>43</sup>

Indeed, research has demonstrated a direct connection between high-quality parental representation and improved outcomes and timeliness to permanency for children involved in child welfare proceedings. A study of the Washington State Office of Parental Representation program (“OPR”) found that enhanced parental representation “speeds reunification with parents, and for those children who do not reunify, it speeds achieving permanency through adoption and guardianship.”<sup>44</sup> The program is also credited with contributing to fewer continuances, improved case participation by parents, and better access to services, among other benefits. Key elements of the OPR include caseload limits and professional attorney standards; access to expert services and independent social workers; supervisory oversight; and ongoing training and support. What started in 2000 in two counties has gradually expanded, and as of Fall 2017, the program operates in 34 of Washington’s 39 counties. The Washington State Legislature has provided funding to extend it to all of the remaining counties beginning in July 2018.<sup>45</sup>

Building on experiences such as those in New York City and Washington State, in August 2017, ILS announced a three-year grant for an Upstate Model Parental Representation Office in the amount of \$2,610,417 (\$870,139 per year for each of three years).<sup>46</sup> The grant will support a demonstration project which will provide high-quality, comprehensive, and multidisciplinary representation to parents in State intervention cases. ILS has included in its FY 2018-2019 budget a request for funding to enable up to four additional counties outside New York City to establish such a program.<sup>47</sup>

Timely access to counsel for indigent parents is critical. However, such parents often appear without representation at hearings where judges make critical decisions, including whether to separate a child from his or her family or to continue such separation following an *ex parte* or non-judicial removal by a local child protective services (“CPS”) agency.<sup>48</sup>

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<sup>43</sup>CFR, *2014 Report to the Community*, <https://www.cfmv.org/wp-content/uploads/2012/12/Annual-Report-2014-FINAL.pdf>; CFR, *Our Results*, <http://www.cfrny.org/about-us/our-results/>.

<sup>44</sup>Courtney, M. E., & Hook, J. L., *Evaluation of the impact of enhanced parental legal representation on the timing of permanency outcomes for children in foster care*, Children and Youth Services Review,

<sup>45</sup>See Washington State Office of Public Defense, *Parental Representation Program*, <https://www.opd.wa.gov/program/parents-representation>.

<sup>46</sup>ILS, *Request for Proposals: Model Upstate Parental Representation Office*, <https://www.ils.ny.gov/files/Parent%20Representation/RFP-Upstate%20Model%20Parental%20Representation%20Office%20Grant%20032017.pdf>.

<sup>47</sup>ILS Budget Request, October 18, 2017, <https://www.ils.ny.gov/files/Budget%20Request%20FY%202018-19.pdf>.

<sup>48</sup>See e.g. *In re Hannah YY*, 50 A.D.3d 1201 (3<sup>rd</sup> Dept. 2008); see also Judge Leonard Edwards (Superior Ct., California, ret.), *Representation of Parents and Children in Abuse and Neglect Cases: The Importance of Early Appointment*, Juv & Fam Ct J 63, no. 2 (Spring 2012), [http://www.maineourtimprovement.org/fileLibrary/file\\_52.pdf](http://www.maineourtimprovement.org/fileLibrary/file_52.pdf); Mark Hardin & Susan Koenig, *Early Appointment of Counsel for Parents*, in *Court Performance Measures in Child Abuse and Neglect Cases:*

Some indigent parents in State intervention cases do not meet their assigned counsel until weeks, and sometimes months, after their child has been taken into custody by CPS. A 1989 report by the New York State Senate Standing Committee on Child Care found that “even though 67 percent of respondents have counsel within one month of petition filing . . . a number of significant events can and frequently do occur during that first month (during which time a third of respondents have no appointed counsel).”<sup>49</sup> The report noted that preliminary hearings affecting the child’s placement occurred, and preliminary removal orders or temporary orders of protection were often issued, “in the absence of representation for the respondent, which may be prejudicial to the respondent’s interests.”<sup>50</sup> The authors emphasized that “a number of highly significant events occur prior to the initial appearance and prior to the initial appointment of representation for the respondent. *All of these events occur on an ex parte basis and many of the events are of a magnitude to shake the family structure of the respondent.*”<sup>51</sup>

Numerous standards urge access to counsel for parents at the earliest possible stage of a child protective case.<sup>52</sup> As pointed out by the U.S. Department of Justice, “[i]f the parents’ attorneys are not involved prior to the emergency removal hearing, the court is more likely to place children away from the parents,” potentially traumatizing the child and “ultimately mak[ing] it more difficult for the parent to correct the problems that led to State intervention.”<sup>53</sup> Standards issued by ILS, as well as the American Bar Association, emphasize timely access to counsel.<sup>54</sup> NYSBA’s *Revised Standards for Providing Mandated Representation* require that “[c]ounsel shall be available when a person reasonably believes that a process will commence that could result in a proceeding where representation is mandated,” (Standard B-3); Standard B-4 urges the establishment of systematic procedures “to ensure that prompt mandated representation is available to all eligible persons, particularly . . . where a child has been removed by a governmental agency from the person’s home.” Indeed, pointing to NYSBA’s standards, one judge observed that they “demonstrate, objectively, that

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Technical Guide, U.S. Department of Justice, Office of Justice Programs (2nd Printing, 2009), pp. 101-109.

<sup>49</sup>Jules Kerness and Constance R. Warden, *Child Protection and the Family Court: A Study of the Processes, Procedures, and Outcomes Under Article Ten of the New York Family Court Act*, p. 130, New York State Senate Standing Committee on Child Care, (Sen. Mary Goodhue, Chair) (National Center on Child Abuse and Neglect, December 1989), <https://www.ncirs.gov/pdf/files/1/Digitization/126665NCJRS.pdf> .

<sup>50</sup>*Id.*

<sup>51</sup>*Id.* at pp. 131-132 (emphasis added).

<sup>52</sup>Court Performance Measures, pp. 101-107.

<sup>53</sup>*Id.*, p. 101.

<sup>54</sup>ILS, *Standards and Criteria for the Provision of Mandated Representation in Cases Involving a Conflict of Interest*, Standard 5 (2012) (requiring counties to ensure that mandated legal services providers “[p]rovide representation for every eligible person at the earliest possible time and begin advocating for every client without delay, including while client eligibility is being determined or verified.”); ILS, *Standards for Parental Representation in State Intervention Cases*, Standard I – Representation Prior to Court Intervention; American Bar Association, *Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases*, Standard 4 (2006) (the parent’s attorney shall “[a]ctively represent a parent in the prepetition phase of a case, if permitted within the jurisdiction.”)

effective representation for indigent individuals entails representation without delay pending the judge's eligibility determination . . . there is no scenario under which indigent individuals would not be afforded an impaired quality of representation where the Public Defender's function as counsel is effectively disabled pending receipt of a judge's order of appointment."<sup>55</sup>

In general, early access to counsel supports the goals of Family Court Act § 261 by giving litigants the opportunity to receive advice and counsel before initiating or responding to litigation; protecting due process rights of parents and families; and providing judges with comprehensive information upon which to make critical decisions. Thus, it is crucial that the timing of access to counsel be included in reform of the parental representation system.

### **Hurrell-Harring and Criminal Defense Reform**

In 1963, the U.S. Supreme Court held in *Gideon v. Wainwright*, 372 U.S. 335, that each state is obligated to provide representation for persons facing possible incarceration who are unable to hire a lawyer. In 1965, New York State decided to impose upon the counties the fiscal and administrative responsibility for providing such representation. Without State funding, standards or oversight, the quality of representation a client receives is largely dependent on the wealth of the counties. County Law § 722, which requires localities to choose from several methods for providing assigned counsel, contains no standards regarding the quality of representation. It establishes no oversight mechanism to ensure meaningful representation and prevent disparities based on geography. For decades, the law has placed a serious financial burden on counties and led to serious shortcomings in indigent criminal defense.

In 2007, a lawsuit initiated in Albany County on behalf of a certified plaintiff class of indigent criminal defendants charged that the State was violating their constitutional rights by failing to provide effective assistance of counsel. Ultimately, the State agreed to assume responsibility for improving representation in the five defendant counties.<sup>56</sup> In 2014 the State entered into a Settlement Agreement, agreeing to address four major areas: lack of counsel at arraignment; excessive caseloads; lack of quality control and inadequate support services; and the absence of a uniform standard of eligibility for the assignment of counsel.

For the first time, the State acknowledged its responsibility to comply with the promise of *Gideon*. Further, the State vested in ILS the responsibility for implementing these reforms. However, the Settlement had significant limitations, including that its first three remedial provisions—counsel at first appearance, caseload standards, and quality

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<sup>55</sup> *People v. Rankin*, 46 Misc. 3d 801 (County Ct, Monroe County, 2014).

<sup>56</sup> *Hurrell-Harring vs. State of N.Y.*, Supreme Court, Albany County, Index No. 8866/2007. The stipulation in that matter can be accessed at: <https://www.ils.ny.gov/files/Hurrell-Harring%20Final%20Settlement%20102114.pdf>.

improvement—apply only to the five named counties. Moreover, the Settlement is applicable only to indigent criminal defense.

In 2016, State Senators Patricia Fahy and John DeFrancisco introduced legislation (the “Fahy-DeFrancisco” bill) that would have expanded the reforms of *Hurrell-Harring* statewide and would have encompassed not only indigent criminal defense, but also mandated parental representation. The bill passed unanimously in both chambers of the Legislature, but, on December 31, 2016, Governor Andrew Cuomo vetoed the bill. In his veto memorandum, the Governor promised to introduce a plan to extend the *Hurrell-Harring* criminal defense reforms to the rest of the State. In doing so, however, he characterized the inclusion of parental representation in the bill as an attempt to “transfer to the taxpayers of this State an entirely new obligation to pay for any and all existing expenses related to general defense legal work, far beyond representation of indigent criminal defendants.”<sup>57</sup> He further stated that the Fahy-DeFrancisco bill would require the State “to ultimately expend more than \$800 million dollars every year—of which nearly \$650 million a year” would go to “expenses associated with non-criminal legal defense work, including legal services in family court and surrogate [sic] court.”<sup>58</sup> No explanation was provided as to the basis for the \$650 million figure, which far exceeds the amount spent in 2015 on **all** types of indigent legal services statewide, which at the time was reported to be between \$400 and \$500 million.<sup>59</sup> Moreover, as of January 2016, of the estimated \$550 million being spent annually by the 57 counties, New York City, and the State for indigent representation, only about one-quarter was attributable to mandated parental representation.<sup>60</sup>

In January 2017, Governor Cuomo fulfilled his promise to begin improving the quality of indigent criminal defense by proposing, at State expense, the extension of the *Hurrell-Harring* reforms throughout the State. Three months later, the final FY 2018 State budget included the aforementioned statutory amendments requiring the State to pay for the reform of criminal defense and empowering ILS to develop and implement statewide plans for counsel at arraignment, caseload relief, and quality improvement. By ensuring counsel at arraignment, increasing staffing, improving training and supervision, expanding non-attorney professional services, and improving client-communications, the reforms hold the promise of significantly elevating the quality of mandated representation in criminal defense.

The State can, and should, similarly transform the caliber of representation in Family Court and improve the fate of families throughout New York by providing for State

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<sup>57</sup> *Id.*

<sup>58</sup> Veto #306, State of New York, Executive Chamber (December 31, 2016).

<sup>59</sup> New York State Association of Counties, *Indigent Legal Defense Services: Balanced Justice and Mandate Relief*, p. 3 (June 2016), [http://www.nysac.org/files/NYSAC%20Indigent%20Legal%20Defense%20Services%20White%20Paper\(1\).pdf](http://www.nysac.org/files/NYSAC%20Indigent%20Legal%20Defense%20Services%20White%20Paper(1).pdf); see also Matthew Hamilton, “Supporters urge Cuomo to sign indigent legal services bill,” Capitol Confidential, Dec. 6, 2016, <http://blog.timesunion.com/capitol/archives/269921/supporters-urge-cuomo-to-sign-indigent-legal-services-bill/>.

<sup>60</sup> Stashenko, *supra*, n. 35.

funding and oversight of mandated parental representation. As discussed above, the experience in New York City and elsewhere has shown that a reformed system of mandated parental representation can also save money by, among other things, helping to more promptly resolve family disputes, to preserve family units, to reduce foster care and subsidized adoptions, and to improve the quality of decision-making by the courts.

There is no doubt that the State's delegation to the counties of its responsibility for parental representation has been "a recipe for inconsistency, inequity, and failure."<sup>61</sup> A 2001 report issued by the Appellate Division First Department Committee on Representation of the Poor concluded that "[t]he outmoded, underfunded, overburdened, and organizationally chaotic system in operation today dishonors New York's long-standing commitment to an individual's right to meaningful and effective representation, often with devastating effects on the thousands of children and indigent adults who pass through that system each year."<sup>62</sup> The Committee recommended, among other things, that the State "reconsider the entire legislative structure relating to [mandated representation] in order to assist counties and New York City in overcoming the current crisis in legal representation of the poor." In particular, the First Department Committee urged the elimination of the "bifurcation" of State fiscal and administrative responsibility for the AFC program on the one hand, and county responsibility for parental representation in Family Court proceedings on the other.<sup>63</sup>

The time is now for immediate action to address egregious deficiencies in parental representation. ILS Director William J. Leahy highlighted the urgency of the need for reform in his January 31, 2017 testimony before the Joint Legislative Hearing on the 2017-2018 Public Protection Budget testimony:

The representation of parents in Family Court, and, to a much lesser extent, Surrogate's Court, is a vital component of legally mandated representation under County Law article 18-B. This representation is every bit as mandated by law as is criminal defense; yet, because it was not included in the *Hurrell-Harring* lawsuit, it was not included in the Settlement Agreement whose provisions the Executive budget proposal would extend throughout the State. This category of cases and clients, with family integrity and children's well-being at stake in every case, must not continue to be neglected. We call upon the Governor and the

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<sup>61</sup>William J. Leahy, *The Right to Counsel in the State of New York: How Reform was Achieved After Decades of Failure*, \_\_\_ Indiana L Rev \_\_\_ (2017) (forthcoming 2018).

<sup>62</sup>Appellate Division First Department Committee on Representation of the Poor, *Crisis in the Legal Representation of the Poor: Recommendations for A Revised Plan to Implement Mandated Governmentally Funded Legal Representation of Persons Who Cannot Afford Counsel*, p. 2 (March 23, 2001), [http://www.courts.state.ny.us/press/old\\_keep/1ad-rep-poor.shtml](http://www.courts.state.ny.us/press/old_keep/1ad-rep-poor.shtml).

<sup>63</sup>Id.

Legislature to include parental representation as an integral part of the planned statewide reforms.<sup>64</sup>

The State and NYSBA leadership that helped bring us to the brink of criminal defense reform must now be directed to parental representation. There is no justifiable basis for distinguishing between these two categories of mandated representation. The fact that the right to counsel in criminal defense is grounded in the U.S. Constitution, whereas the broad right to counsel for parents is found in the State Constitution, does not provide a sound rationale for repairing the broken system for one set of litigants, but not the other. Both species of mandated representation have a profound impact on the fundamental rights of New Yorkers. Both realms require sweeping improvements and State funding and oversight to ensure quality representation.

For all these reasons, the Committee on Families and the Law makes the following Recommendation.

### **Recommendation**

- The NYSBA Executive Committee or House of Delegates should proclaim that the State should pay the entire cost of mandated parental representation, or at least for the cost to elevate the quality of representation being provided, and should provide a mechanism for statewide oversight of such representation.

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<sup>64</sup>William J. Leahy, *Testimony of ILS, Joint Legislative Hearing on the 2017-2018 Public Protection Budget* (January 31, 2017), <https://www.ils.ny.gov/files/FY%202017-18%20Legislative%20Budget%20Testimony%20013117.pdf>.