THE NEW YORK STATE UNIFIED COURT SYSTEM PUBLIC HEARINGS

ON QUALITY REPRESENTATION FOR PERSONS ELIGIBLE FOR ASSIGNED COUNSEL IN FAMILY LAW MATTERS

Testimony before
The New York State Unified Court System
Commission on Parental Legal Representation

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NEW YORK STATE UNIFIED COURT SYSTEM
COMMISSION ON PARENTAL LEGAL REPRESENTATION

Testimony of the New York State Defenders Association, Inc.

NYSDA's mission—to improve the quality and scope of publicly-supported legal representation to people who cannot afford a lawyer—embraces representation by counsel assigned in family law matters. Such representation of adults in family matters is mandated under the state constitution and statutory law. NYSDA has long advocated for systemic change to ensure the independence and funding necessary for quality representation by family defenders. It therefore welcomes the Commission's examination of critical issues regarding parental legal representation. Through this submission and subsequent testimony, NYSDA seeks to assist the Commission in determining steps needed to ensure quality representation across the state.

NYSDA is a not-for-profit membership association of more than 1,700 public defenders, legal aid attorneys, assigned counsel, and individuals dedicated to the right to counsel. With funds provided by the State of New York, NYSDA operates the Public Defense Backup Center (the Backup Center). It offers legal consultation, research, and training to nearly 6,000 public defenders. In fielding requests for information and assistance from across the state, the Backup Center obtains a statewide view of the obstacles and difficulties family defenders face in the current system. The Backup Center gains further insight into these matters through the technical assistance it gives to counties, including through the provision of its Public Defense Case Management System. Requests for assistance come from counties considering changes and improvements in their public defense systems and from those struggling to meet the state mandate of providing family representation with little state financial help. The information and experience NYSDA has gained from all its work underlie these comments.

We are grateful to Chief Judge Janet DiFiore, Justice Karen Peters, and the Commission on Parental Legal Representation for undertaking this important work. The breadth of the topics on which the Commission seeks information makes responding to its notice a daunting task. That breadth also illustrates the far more daunting task facing the Commission itself.

The following comments stress issues that require both urgent and thorough examination to secure the change needed for public defenders to properly represent parents and other adults in family court proceedings. **Those fundamental issues include the need for the defense function to be independent; the need for sufficient resources and time to provide quality representation to every person unable to afford counsel in matters in which counsel is mandated; and the essentiality of timely access to counsel and holistic representation.**

Start with the Basics

Many people, within and outside of the legal community, do not have a good understanding of family defense, the rights of adults in family court proceedings, and what quality family defense looks like. This Commission has the opportunity to generate this understanding. Not only would this provide a meaningful education for all New Yorkers, it would also serve as a baseline for future discussions about how to ensure quality representation, including any judicial, legislative, or administrative reforms.

Another beginning, but crucial step in the process of ensuring quality representation is to require that family defense attorneys be part of any discussions regarding changes to family court. While this happens sometimes, it must happen all the time and representatives from a range of family defense providers and regions must be included.

Importance of Family Defense and the Need for Study

Families across New York State that could safely be preserved or reunited are instead needlessly shattered due to lack of effective legal assistance in family court and related proceedings. Even positive resolutions are too often delayed. People threatened in family court or other proceedings with loss of their liberty interest in raising their children as they see fit have a right to counsel. New York's County Law article 18-B and related provisions delegate to localities the duty to provide public defense services for adult respondents in civil family proceedings who cannot afford to hire a lawyer. Due to local fiscal constraints and a lack of independence, the scope and quality of representation provided to parents and other adults varies widely across the state. Rushed, under-resourced attorneys cannot identify and present to the court all the information necessary to show that their clients have not committed alleged acts or omissions and that they are, or can become, able to provide what their children need.

The Commission on the Future of Indigent Defense Services (also known as the Kaye Commission), which was created in May 2004 and issued its final report in June 2006, excluded family defense.[1] Family defense was not at issue in *Hurrell-Harring v State of New York,* the class action suit that was settled in 2014 and received court approval in March 2015. And, most recently, family defense was excluded from the public defense legislation enacted in 2017 (L 2017, ch 59, part VVV, sections 11-12), which provides funding to expand the provisions of the *Hurrell-Harring* settlement to the entire state. [2]

Adult representation in family court has not been given the time and attention it deserves. Complete and accurate statistics for public defense representation in family court and

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[1] http://www.nycourts.gov/ip/indigentdefense-commission/IndigentDefenseCommission_report06.pdf.

[2] The 2017 legislation was introduced after the Governor vetoed another bill (S8114/A10706 [2016]) that included state funding for family defense representation. *See* Veto Message No. 306 (12/31/2016).

related matters statewide are not available.[3] Each county reports public defense data, including family court data, annually, but the information is often incomplete and/or contradictory as to a given county, and inconsistent from county to county. At least until after 2006, the required UCS 195 form did "not require the counties to separate their family court expenditures from their criminal court expenditures, [although] the statewide total for county expenditures includes the cost of representation of indigent adults in family court." 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* (2006), p. 26, available at www.nycourts.gov/ip/indigentdefense-commission/SpangenbergGroupReport.pdf.

Before it makes its recommendations, we urge this Commission to engage in a thorough study of the gamut of family defense[4] similar to the study commissioned by the Commission on the Future of Indigent Defense Services and conducted by The Spangenberg Group. Important reforms that are intended to improve the criminal defense side of public defense have ignored or set aside family defense, resulting in a gap between them, within individual public defense providers and counties. Instead of widening that gap and, in an effort to avoid unintended consequences, any study should include an examination of the connections between criminal defense and family defense, both of which are part of the larger public defense system. Criminal defense and family defense often overlap, both in individual cases and more broadly. Their connection provides opportunities for collaboration on structural reform and substantive legal matters.

Independence

Providing mandated representation for individuals is a unique governmental function. Family defenders represent adults when an arm of the State seeks to end or limit the clients' parental rights or another person invokes judicial process relating to the clients' ability to be with and make decisions about their child. For family defenders to ethically represent their clients, they must be free from interference, direct or indirect, by the governmental entities involved in their clients' cases.[5] These lawyers' need for resources sufficient to provide quality representation must not be subordinated to the needs of their governmental adversaries, the decision-makers in their cases, or funders. Protecting independence, a key principle for provision of public defense services of all types, has been

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[3] One report from 2007 is an example of an effort to gather this information. *See* National Legal Aid and Defender Association, *Justice Impaired: The Impact of the State of New York's Failure to Effectively Implement the Right to Counsel* (October 2007), available at http://www.nlada.net/sites/default/files/ny_nladafranklin10-2007.pdf.

[4] This includes representation mandated by County Law § 722 and Family Court Act §§ 262, 1120.

[5] A blog post on the recently-released 2017 Report of the Ad Hoc Committee to Review the Criminal Justice Act noted: "Whether in a state or federal court, when public defense attorneys are provided through a system controlled by the judges, the defense attorneys inevitably bring into their calculations what they think they need to do to stay in favor with the judge who appoints and pays them, thereby not focusing solely on providing constitutionally effective representation to each and every defendant as is their duty." David Carroll and Phyllis Mann, "Federal committee recommends independence of the defense function" (9/13/2018), at http://sixthamendment.org/federal-committee-recommends-independence-of-the-defense-function/.

and remains at the core of NYSDA's work. See, for example, a newsletter article that NYSDA published, entitled "Implementing *Hurrell-Harring* Statewide, Maintaining Independence," which refers to the American Bar Association's *Ten Principles of a Public Defense Delivery System* and other authorities recognizing the centrality of independence.[6] NYSDA's own standards for mandated representation, which include family defense, emphasize independence.[7] Other state and national standards similarly call for independence of the defense function.[8]

Independence is often compromised in county-based systems. County governments rationally engage in limiting county expenses to maintain balanced budgets, and courts need to keep cases moving. But when the conditions governing the engagement of lawyers to represent public defense clients reflect government interests instead of those of clients, attorneys' ability to function properly is compromised. For example, some assigned counsel attorneys who regularly demand discovery, file motions, and advise clients to exercise their right to request and participate in hearings have reported receiving fewer assignments due to the amount of time those attorneys spent to achieve client goals. Similarly, institutional providers employing zealous and conscientious family defense attorneys who take those same steps may find their programs (or the positions of their managers) at risk because the work was deemed to be wasteful of county resources.

Another example of how independence is compromised by the current system occurs when counties do not provide a budget for family defenders to secure expert services. When counsel then asks for funds under County Law § 722-c, some courts have notified the government (the County Attorney or the Department of Social Services) of the request so they may take a position on the granting of the request. This is contrary to the language of the statute, which calls for such request to be considered ex parte. Beyond that, § 722-c applications are often denied, even at the current rates that include an unrealistically low cap, despite supporting evidence that utilizing experts (including social workers to facilitate successful engagement of a parent in child welfare proceedings) as part of holistic defense reduces the number of children in foster care and government expense overall. Assigned counsel attorneys' ability to gauge the needs of clients and further their interests are fundamentally compromised by practices such as these.

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[6] NYSDA, *Public Defense Backup Center REPORT* (November-December 2017), p. 4, available at https://cdn.ymaws.com/www.nysda.org/resource/resmgr/pdf-the_report/17-nysda_report-nov-dec.pdf.

[7] NYSDA, *Standards for Providing Constitutionally and Statutorily Mandated Legal Representation in New York State* (2004), Standard II, available at http://66.109.34.102/ym_docs/04_NYSDA_StandardsProvidingConstitutionallyStatutorilyMandatedRepresentation.pdf.

[8] *See, e.g.,* New York State Bar Association (NYSBA or State Bar), *Revised Standards for Providing Mandated Representation* (2015), Section A; National Legal Aid and Defender Association (NLADA), *Standards for the Administration of Assigned Counsel Systems* (1989); and other standards, which are available on NYSDA's website at https://www.nysda.org/page/PDStandards.

Some courts even require that family defenders remain in a courtroom throughout the day, waiting for case assignments. Not only does this practice keep family defenders from completing the tasks that ensure effective representation during working hours, it also communicates to clients and attorneys alike that the attorney serves the interests of the court, not the client.

As noted above, NYSDA's Public Defense Backup Center serves as a resource for New York family defenders. Some of the calls we receive are made because a defender understands that there has been a development in case law and needs a citation or research. Some calls are for a sample filing that is not already part of a defender's arsenal. Other attorneys request specialized training or strategy discussion. But a disturbing number of calls are from defenders flummoxed by an unwritten policy or procedure they have encountered—one that cannot be addressed from reading or citing the relevant statutes and case law. Examples of this include the court telling counsel that they "don't do trials" in that part; caseworkers listening to telephone calls between a defender and her client and recording the discussion in case notes; agency attorneys, citing the attorney/client privilege, forbidding family defenders (and Attorneys for Children) from communicating with caseworkers; and informal but regularly scheduled "court supervision" that can include jail sanctions for parents who are no longer part of any active court case, but are subject to a current order of protection—even when there is no allegation of wrongdoing. Issues that appear to be straightforward, such as that a court cannot make a factual finding when no evidence has been presented, defy easy resolution where it is a long-standing practice and no one has ever challenged such practice or objections have been consistently denied. Independence from county interests would allow defenders to confront these problems directly. With independence, the role of family defenders would be clearer to all parties, and clients' needs would have priority.

Independence is specifically mentioned in the Commission's Notice of Public Hearing under Structural Issues, and impacts every topic area on which the Commission requested information. As discussed briefly later in this submission, family defenders must be free to take advantage of opportunities to provide legal assistance to clients at the earliest possible time, without interference by policymakers who view invocation of clients' legal rights as an improper impediment to governmental investigation. Independence of the defense function is necessary for many of the changes needed to ensure quality representation.

Client Involvement

To effectively evaluate existing services and determine what changes are needed to ensure quality representation requires meaningful input from those affected. The observations of former clients and members of the community who have seen what happens to families in the current system should inform the discussion of all issues. This should include listening to individuals from groups affected by particular laws and circumstances, such as immigrants, Native Americans, and people with disabilities. Setting up a mechanism for receiving and resolving specific complaints is also essential, but more is needed.

On July 27, 2000, NYSDA's Board of Directors adopted a "Statement on Client Involvement and Satisfaction, Quality Representation and Vigorous Advocacy." It calls on public defense

providers to "seek the advice and continued assistance of the client community in assessing and insisting upon a system" that provides "committed and competent representation." Just as parent advocates—individuals who have personally experienced the child welfare system—are invaluable members of a family defense team,[9] people who have experienced public defense representation can contribute insights about its improvement. NYSDA's own Client Advisory Board developed *Client-Centered Representation Standards*[10] that reflect what clients want from their lawyers. Most of these standards have application to any type of public defense representation, though a few are specific to criminal cases.

Mechanisms to provide for client involvement in ensuring quality representation by public defense lawyers can take different forms. NYSDA's Client Advisory Board offers one example. The National Legal Aid and Defender Association (NLADA) "draws on the expertise of three bodies – the Civil Council, the Client Council, and the Defender Council – to help develop programs and policies …."[11] NLADA's Standards for the Administration of Assigned Counsel Systems, which call for assigned counsel programs to have a governing board to ensure independence, note that at least one board member could be a member of the client community.[12]

Timeliness and Other Access to Counsel Issues

Those who can afford to hire an attorney can seek legal advice before they are in legal difficulty, and before they take any action that might seriously alter their legal position.[13] People who cannot afford an attorney must wait until they appear in court before counsel is assigned. As part of its mission to improve the *scope* of family defense, NYSDA advocates for the earliest possible entry of public defense counsel, because timely representation increases the quality of the representation and therefore presents the opportunity for better outcomes. Some family defense advocates refrain from referring to assignment of counsel at an earlier stage in a proceeding as "early assignment" because most people who can afford counsel in the same situation would consult counsel sooner rather than later; having help understanding the consequences of their choices and options for action is "timely," not "early," representation. To the extent that legislative changes are needed to

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[9] New York State Office of Indigent Legal Services (ILS), *Standards for Parental Representation in State Intervention Matters* (2015), Commentary to Standard G-2, available at https://www.ils.ny.gov/files/Parental%20Representation%20Standards%20Final%20110615.pdf.

[10] https://www.nysda.org/page/ClientAdvisory.

[11] http://www.nlada.org/tools-technical-assistance/councils.

[12] NLADA, *Standards for the Administration of Assigned Counsel Systems* (1989), Commentary to Standard 3.2.1, at p 73, note 3: "[I]t is recommended that at least one member of the Board not be an attorney; this person could represent the client community, or another non-legal segment of the community. Diversity of interests should ensure insulation from partisan politics."

[13] Dan Beckley, "Need a lawyer? Here are 5 things you need to know," Ohio State Bar Association (5/31/2017) ("**Find an attorney sooner rather than later.** The best time to go to an attorney is before you are in legal difficulty. It is best to consult your attorney before you sign papers or take other action that might seriously alter your legal position."), available at https://www.ohiobar.org/NewsAndPublications/News/OSBANews/Pages/Need-a-lawyer-Here-are-5-things-you-need-to-know.aspx.

make more timely appointment of counsel possible, NYSDA urges the Commission to recommend such changes.

Benefits of Timely Access to Counsel

Fears that timely representation for parents will prevent child welfare agencies from protecting children in state intervention matters are misplaced. Attorneys for parents can play a vital role as a support for a parent at a time of crisis and even prevent the situation from escalating to the removal of a child from the home. James Milner, Associate Commissioner of the Children's Bureau, U.S. Department of Health and Human Services, recently authored an article in the *ABA Child Law Practice Today* about how lawyers can play a role in prevention in the child welfare system: "Aggressive efforts to keep families together safely, working diligently to promote child and family well-being, and recognizing the role of community supports are key areas where the legal and judicial communities can make a difference."[14] Other references from the ABA include the 2011 article, "Representing Parents During Child Welfare Investigations: Precourt Advocacy Strategies"[15] and a 2009 piece entitled "Cornerstone Advocacy in the First 60 Days: Achieving Safe and Lasting Reunification for Families."[16]

Because the current system only requires appointment when a matter is first in court, parents may not have any idea of their rights and responsibilities in relation to state intervention or how to obtain assistance. *See* FCA §§ 1023, 1024, and Bill Jacket for L 1990, ch 336 (amendments to FCA §§ 1022 – 1024) [attached]. This occurs despite the requirements of the Family Court Act that local departments of social services inform parents upon the removal of a child that they are entitled to consult with an attorney.

For bureaucracies that investigate and prosecute allegations of child mistreatment protecting the privacy rights of the parents they investigate is often not a priority. Sometimes caseworkers insist that a parent sign full releases for information about every aspect of the parent's life. This includes areas not related to imminent risk (imminent risk being the determining factor in removal from a home and therefore, the baseline for parent conduct). Once the agency has access to any potentially compromising or unflattering information about the parent, no matter how irrelevant to imminent risk, the agency often requires the parent to engage in additional services. Furthermore, in some family courts, before counsel is assigned, the court will order parents to sign full releases so agencies

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[14] "Reshaping Child Welfare in the United States: Lawyers as Partners in Prevention" (7/5/2018), available at https://www.americanbar.org/groups/child_law/resources/child_law_practiceonline/child_law_practice/clp-today-2018/january---december-2018/reshaping-child-welfare-in-the-united-states--lawyers-as-partner.html.

[15] Elizabeth Fassler and Sanjiro Gethaiga, *ABA Child Law Practice* (April 2011), available at https://www.cfrny.org/wp-content/uploads/2012/04/Representing-Parents-During-Child-Welfare-Investigations-April-2011.pdf.

[16] Jillian Cohen and Michele Cortese, *ABA Child Law Practice* (May 2009), available at https://www.cfrny.org/wp-content/uploads/2012/04/Cornerstone-Advocacy-in-the-First-60-Days-ABA-May-2009.pdf.

have access to every aspect of a parent's life. As a result, supplemental filings alleging neglect or abuse can run to 30 or 40 pages. They sometimes include details of a parent's mental health or substance abuse treatment years before (and sometimes even decades earlier if a parent was in foster care himself and the agency has access to those childhood records) the family was a focus of agency attention. This practice changes the proceedings from an examination of parenting at a specific point in time, to an examination of a parent's past morals, choices, and social history. Timely appointment of counsel to advise parents and limit the scope of releases of information could prevent this improper and unwarranted expansion of investigations and redirect the agency to help address current difficulties that the family may be facing.

Timely appointment would also have a major impact in proceedings concerning custody and visitation and family offenses as to a parent or other adult who is not the respondent. Because the current system requires pro se filing of petitions for those actions, those who cannot afford to retain counsel file without legal advice or assistance. The amount of court time spent returning incomplete filing to petitioners is not known to family defenders. But, in situations where a pro se petition is accepted and counsel is assigned, the family defender often must modify or correct the initial petition. If appointed on request of a person considering filing a petition, counsel would be able to advise the client on the merits of a case and likely reduce the number of petitions filed that will not bear fruit.

Another instance in which timely access to counsel would benefit not only parents but the system itself is when parents are seeking provision of counsel at support proceedings. Assigning counsel only at the point when a parent is about to be held in contempt for nonpayment is counterproductive. Counsel could help ensure reasonable support orders that non-custodial parents *can* afford to pay, thereby avoiding unfair and unmanageable arrears and avoidable incarceration for nonpayment, while ensuring that the parents are contributing to the support of their children. Attorneys assigned only when contempt proceedings have been initiated can do little to help clients meet or modify their obligations, making the right to counsel virtually meaningless.

Meaningful and timely access to counsel includes the ability of a parent to consult with an attorney, in person if possible, about their choices and opportunities before rushing to make a decision or making any statements. Often, even when counsel is assigned at a first court appearance, the court will make immediate decisions based on what the moving party is requesting. As there is little to no time to establish a professional relationship, let alone gather information crucial for the lawyer to know at that stage, the assignment of counsel is in name only.

Meaningful access to counsel also includes representation in other proceedings directly related to those in which counsel has been assigned. Some family defenders try to address all the issues related to a current open case. For example, if a father has filed for a modification of custody and parenting time based on an injury or loss of a job, counsel may try to determine if the client is still able to meet existing child support obligations. If the father is not able to meet those obligations, a retained attorney would also file for a modification of a child support order. But in New York, since assigned counsel for that

proceeding is not mandated by statute, courts will not assign for this related purpose. Unless the attorney works in an institutional program that provides holistic services and is able to provide non-mandated representation using nongovernmental funds, the attorney has to choose between delivering pro bono assistance or advising the client to proceed pro se in the modification proceeding.

Holistic Representation Gets Results

As illustrated by the work of the Center for Family Representation and, more recently, three other New York City providers of family defense,[17] holistic representation not only results in fewer children experiencing the trauma of removal from their homes, it also results in reduced government spending on foster care and unnecessary services. The Office of Indigent Legal Services (ILS) *Standards for Parental Representation in State Intervention Matters* embody holistic representation.[18] NYSDA, well-known for its client-centered approach to public defense, offers assistance to family defenders seeking to grow the holistic nature of their practice.[19] NYSDA has observed that slowly, upstate counties have begun adding social workers to the staff of public defense offices, but much needs to be done to make holistic representation available across the state.[20]

Trauma from Unnecessary Removal and State Interference

As exemplified by the recent removal of children from their parents who are seeking asylum and the public outcry against the separation of families, trauma is a natural consequence of isolating a parent from a child. Left with terrifying uncertainty, children may be provided basic food and shelter while separated, but the security and comfort that a

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[17] Center for Family Representation: https://www.cfrny.org/about-us/our-results/. Brooklyn Defender Services, Family Defense Project: http://bds.org. The Bronx Defenders, Family Defense Practice: https://www.bronxdefenders.org/our-work/family-defense-practice/. The Neighborhood Defender Service of Harlem, Family Defense: http://www.ndsny.org/index.php/practice-areas-2/family-defense/.

[18] "These standards are based on existing guidelines, standards, and best practices from around the state and the country, and are meant to define what constitutes meaningful and effective assistance of counsel in state intervention matters. They embody an approach that is client-centered, multidisciplinary, and **holistic**, and emphasize timely entry into the case and diligent, zealous advocacy throughout." [Emphasis supplied.] https://www.ils.ny.gov/files/Parental%20Representation%20Standards%20Final%20110615.pdf.

[19] For example, at its Fall 2014 CLE, co-sponsored by NYS and ILS, a session titled "Integrating Social Workers into Family and Criminal Defense Practice" was offered, and at the 2018 Families Matter Conference, there was a presentation titled "Collaboration: Making Interdisciplinary Practice Work for Your Clients."

[20] For example, in March 2017, ILS released a Request for Proposals that would provide funding for an upstate model parental representation office. https://www.ils.ny.gov/files/Parent%20Representation/RFP-Upstate%20Model%20Parental%20Representation%20Office%20Grant%20032017.pdf. Ten counties applied for that funding. After review, Monroe County was selected to receive the grant. However, the County ultimately rejected that funding. *See* Bennett Loudon, *Monroe County turns down $2.6 million grant*, The Daily Record (1/19/2018); Michele Cortese, *Commentary: Monroe County erred in turning down grant*, The Daily Record (1/24/2018). The current status of the RFP is unknown.

parent provides, even if less than perfect, may be forever compromised by the separation.[21] If appointed in a timely manner, family defense attorneys, working with their clients, can reduce the likelihood of removal by addressing conditions that may make a home unsafe for a child.

Family Defense Representation Funding and Resource Needs

Increased State Funding

To improve the quality of family defense representation, which is constitutionally and statutorily mandated, New York State needs to substantially increase the funding it provides for family defense. For a variety of reasons, counties cannot and should not be required to provide this increased funding. Further, state funding should not be distributed on a reimbursement basis; many counties are not able to expend the amount necessary and wait for reimbursement.

The question of how much added funding is needed can only be answered by the type of study discussed above, and ongoing analysis. There is no accurate data on the amount of money currently being spent, both by counties and the State, for family defense representation. And the amount of the increase will depend upon the representation standards and caseload/workload standards that must be developed, which are discussed later in this testimony.

If the county-based system of public defense representation remains in place, the increased state funding for family defense should be distributed by ILS, which already distributes state funds for public defense, some of which are used for family defense. Any funds distributed should be tied to ILS standards and recipients must be required to report on the use of those funds to ensure compliance with those standards.

Caseload/Workload Standards Are Critical to Quality Representation

Family defense attorneys need sufficient time to establish a professional relationship and strategize with their client, investigate defenses, execute demands for discovery, identify and interview witnesses, procure materials and services that will assist the client, and prepare for hearings. But many clients find themselves without any opportunity to speak

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[21] *See, e.g.,* Society for Research in Child Development, *Statement of Evidence, The Science is Clear: Separating Families has Long-term Damaging Psychological and Health Consequences for Children, Families, and Communities* (6/20/2018), available at https://www.srcd.org/sites/default/files/documents/the_science_is_clear.pdf; The National Child Traumatic Stress Network (NCTSN), *Children with Traumatic Separation: Information for Professionals* (2016), available at https://www.nctsn.org/sites/default/files/resources//children_with_traumatic_separation_professionals.pdf; NCTSN, *Key Points: Traumatic Separation and Refugee & Immigrant Children* (2018), available at https://www.nctsn.org/sites/default/files/resources/tip-sheet/key_points_traumatic_separation_and_refugee_immigrant_children.pdf.

with their attorney outside the courtroom doorways or before even the most consequential hearings. Even when counsel is appointed as required by statute, counsel is often unable to meet with clients outside the time immediately before a court appearance because they are in court every day just to cover all of their cases.

Reasonable caseloads also ensure that time spent in court is productive. Reasonable caseloads mean it is less likely that the court will need to reschedule cases because the attorneys involved have not had an opportunity to perform the work necessary for meaningful hearings and conferences.

Although the importance of and need for caseload/workload standards is well-documented,[22] and state and national standards call for establishment of caseload/workload standards,[23] we do not currently have such standards for parent defense. Now is the time to create those standards and implement them.[24]

Data gathered during a study of family defense representation in New York, as recommended at the beginning of our testimony, along with the ILS family defense representation standards, can be used to develop appropriate caseload/workload standards. Because of the differences between institutional providers and assigned counsel, standards should be developed for each group. As noted above, those standards should be used to determine the amount of state funding needed to ensure quality family defense representation.

Related Resource Needs

Families who are subject to state intervention, and to some degree other families as well, may need specialized services to "fix" what is not working for the family. This may mean subsidized day care, therapy or substance abuse treatment, or economic support until a parent is better situated to care for the children. But many times these "treatment services" are required uniformly of parents in the child welfare system. Uniformity in this context does not make sense.

Family defense attorneys, appointed as early as possible and given appropriate resources, can help address the need for services within a community and tailor services to what a parent actually needs to successfully care for their children. If counsel has the time necessary to become more involved in identifying and acquiring services, either alone or

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[22] *See, e.g.,* American Bar Association, *Securing Reasonable Caseloads: Ethics and Law in Public Defense* (2011), available at https://www.americanbar.org/content/dam/aba/publications/books/ls_sclaid_def_securing_reasonable_caseloads.authcheckdam.pdf; The Constitution Project, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel* (April 2009), available at https://constitutionproject.org/wp-content/uploads/2012/10/139.pdf.

[23] *See, e.g.,* NYSDA Standards, Standard IV. Workload; NYSBA Standards, Standard G; ABA *Ten Principles of a Public Defense Delivery System*, Principle 5.

[24] Developing caseload/workload standards is a complex undertaking. See, for example, the list of factors that should be considered when creating such standards in NYSDA Standards, Standard IV.B.

with the assistance of a defense social worker, counsel may find or help create community assets that provide more appropriate assistance for particular clients.

Increased Assigned Counsel Rates

The adequacy of rates paid to private lawyers for providing public defense services, set by statute in New York, is a recurring issue. Low rates make finding attorneys willing to accept assigned cases in family court difficult, yet this perennial problem has been addressed only at crisis stage. The rates were last increased in 2004, and only after protracted efforts by NYSDA and others. A Unified Court System report in 2000 described the drastic decline in the number of attorneys on family court panels at a time when family court filings were surging, disrupting court proceedings and increasing the number of clients represented by less experienced and overburdened attorneys handling larger caseloads. The report recommended not only fee increases but other changes to address the problem, including establishment of a commission to examine rates on a periodic basis.[25] The next year, NYSDA issued a report addressing the rate crisis in the context of overall problems in the public defense system. Its recommendations for full public defense reform included a call for a rate increase and an indexing procedure to keep future rates in line with cost of living increases.[26] The eventual increase in the rates, to $75/hour except in misdemeanor cases, which was set at $60/hour, "was enacted swiftly on the heels of Justice Lucindo Suarez's injunction in *NYCLA v Patkai* raising rates to $90 per hour."[27]

Still no mechanism has been put in place to ensure that rates will be regularly adjusted. NYSDA has joined recent calls for a rate increase *and* procedures for adjusting the rates without legislation.[28] NYSDA urges the Commission to strongly support not just a rate increase, but implementation of procedures to maintain rates at an appropriate level. This should include an increase, if not abolition, of the per-case cap that fails to take into account the variation in time needed to complete cases that may not be deemed "extraordinary." The current cap of $4,400 in County Law § 722-b provides for just under 59 hours of work on a case. This is insufficient for many family court matters, which

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[25] Unified Court System, *Assigned Counsel Compensation in New York: A Growing Crisis* (2000), available at https://www.ils.ny.gov/files/Assigned%20Counsel%20Compensation%20Crisis%20-%20NYS%20Unified%20Court%20System,%20January%202000.pdf.

[26] NYSDA, *Resolving the Assigned Counsel Fee Crisis: An Opportunity to Provide County Fiscal Relief and Quality Public Defense Services* (2001), available at https://cdn.ymaws.com/www.nysda.org/resource/resmgr/PDFs--reports/01_ResolvingtheAssignedCouns.pdf.

[27] NYSDA, *Public Defense Backup Center REPORT* (July-September 2003), available at https://cdn.ymaws.com/www.nysda.org/resource/resmgr/PDF-The_Report/03-NYSDA_Report-Jul-Sep.pdf.

[28] NYSDA wrote in support of a NYS Bar Association resolution that calls for: rates that are "comparable to a percentage increase of judicial and elected district attorney salaries"; an "annual review process and adjustment using a formula similar to that of the federal Criminal Justice Act"; and the increase to be paid at state expense, avoiding an unfunded mandate to localities. News Picks from NYSDA Staff (7/5/2018), available at http://myemail.constantcontact.com/News-Picks-from-NYSDA-Staff---July-5--2018.html?soid=1111756213471&aid=lqV6GUrHm3w.

involve multiple court appearances and work outside of court, and can remain open for a period of years.

When rates are increased, as they must be, there must be assurances that the increased governmental costs will not be avoided by cutting vouchers submitted by counsel for work done.[29] For that matter, assurances are needed that attorneys are always paid for work done on behalf of public defense clients.

While many of the issues being considered by the Commission require detailed evaluation of existing practices before recommendations can reasonably be made, the work on assigned counsel rates has already been done; existing recommendations to permanently solve the problem should be selected and implemented.

Increased Guidelines and Caps for Non-Attorney Professional Services

Given the growing recognition that non-attorney professional services in family matters improves the quality of representation, we fully expect the demand for social workers and other non-attorney professionals will increase. Compensation for such professionals must be sufficient to attract qualified individuals. Yet, the per-case statutory cap on compensation of non-attorney professionals remains low.

Furthermore, constitutional, statutory, and professional mandates regarding public defense representation require use of a variety of experts, from psychiatrists to investigators. These requirements can only be meaningfully fulfilled if the necessary expert services can be obtained. And that can only happen if statutory rates and court guidelines authorize reasonable fees that non-attorney professionals are willing to accept.

Last year, NYSDA wrote in support of the proposal to increase the hourly compensation rates for experts appointed pursuant to County Law § 722-c and Judiciary Law § 35.[30] The proposal included anticipation that the Unified Court System will seek a legislative amendment to the statutory compensation caps in County Law § 722-c and Judiciary Law § 35(4). While gratified that the Chief Administrative Judge did issue an order raising the hourly rate guidelines,[31] NYSDA urges the Commission to recommend an increase or elimination of the cap.

Additionally, as NYSDA said in its comments on the guidelines, the noted rates should be just that—guidelines—not a ceiling, as they are sometimes regarded. Like assigned counsel rates, they should also have a mechanism for review and adjustment.

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[29] "Moreover, after the increase in 18-B attorney fees in 2003, many counties increased their focus on cost-saving measures. Some assigned counsel programs increased their focus on scrutinizing and cutting 18-B vouchers …." 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* (2006), p. iii.
[30] http://files.constantcontact.com/fdc85d9d201/27ad3201-35f0-4bf2-bb23-ea75c514f08f.pdf.
[31] http://files.constantcontact.com/fdc85d9d201/be76b474-0e63-4cf2-acc2-fec14cb6ccc3.pdf.

As noted previously, requests to courts for funds to obtain non-attorney professional services must be ex parte, to avoid interference by governmental officials concerned about cost, as well as to avoid premature disclosure to an adversary of a litigant's potential legal strategy. Here, in the context of compensation rates, it should further be noted that courts, while empowered to rule on requests for funding under County Law § 722-c, should not act as fiscal gatekeepers, requiring family defenders to use less-expensive and/or less appropriate services.

Expand Existing ILS Standards to Cover All Family Defense Representation

ILS has developed extensive representation standards for state intervention matters.[32] As noted on the ILS website,[33] these standards were "developed by a diverse group of seasoned professionals with deep experience in the child welfare system …." While some of the standards are specific to "state intervention matters," most are relevant to all types of family defense and should be used now to guide the work of all family defenders. We recommend that these standards be expanded to all family defense. To the extent that additions or modifications are necessary, NYSDA stands ready to assist ILS in this work.

Eligibility Criteria and Procedures

The Office of Indigent Legal Services has promulgated Criteria and Procedures for Determining Assigned Counsel Eligibility.[34] However, those Criteria and Procedures are currently limited to criminal defense representation. There are no uniform criteria or procedures used to make eligibility determinations in family court.

This Commission should recommend that the existing Criteria and Procedures be made applicable to all family defense representation. ILS has the statutory authority to do so.[35] And since County Law § 722 uses the same standard for the appointment of counsel in all cases, financial inability to obtain counsel, it follows that the same general criteria and procedures should be used for all cases. There may be differences between criminal and family cases, but those primarily relate to issues such as the cost to retain counsel in a particular family court case vs. a criminal court case.[36] Eligibility decisions for family court litigants, like eligibility decisions for individuals charged with a crime, must be equitable

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[32] https://www.ils.ny.gov/files/Parental%20Representation%20Standards%20Final%20110615.pdf.

[33] https://www.ils.ny.gov/content/family-court-representation.

[34] https://www.ils.ny.gov/content/eligibility-documents.

[35] https://c.ymcdn.com/sites/nysda.site-ym.com/resource/resmgr/PDFs--other/ILS_Eligibility_Hearings_Tes.pdf, fn 1.

[36] One Family Court sought to apply, in an eligibility determination, the Domestic Relations Law and Family Court Act provisions that permit the imputation of income potential in child support and spousal maintenance determinations. The Fourth Department rejected use of these provisions in the eligibility context. *Carney v Carney*, 160 AD3d 218 (4th Dept 2018). This is an example of how eligibility determinations do *not* vary between criminal and family court matters.

and fair. Uniform criteria will also save the time and resources of the courts and other parties.

Along with the expansion of the ILS Criteria and Procedures to family defense, ILS must be required to examine and issue public reports on the implementation of those Criteria and Procedures.

Support and Expand Funding for NYSDA's Public Defense Backup Center

The State's continuing, nearly-total delegation of family defense to counties makes NYSDA's centralized services and assistance invaluable in localities struggling to carry the burden. These services include training lawyers on issues specific to family defense representation,[37] maintaining an experienced Family Court Staff Attorney at the Backup Center to provide knowledgeable direct defender services, installing and supporting our Public Defense Case Management System in offices that provide family defense representation,[38] and working closely with ILS to further the goal of improving the quality of public defense representation of parents. However, our current state funding only allows us to scratch the surface.

With additional funds, NYSDA will be able to respond to more requests for assistance, provide more of the vital and successful training we currently offer, covering more areas of the state and more issues, and offer other technical assistance to family defense providers, such as research and consultation on best practices, from administrative functions to the incorporation of technology into family defense work.

Conclusion

NYSDA thanks Chief Judge DiFiore for recognizing the importance of ensuring the quality of representation for persons eligible for assigned counsel in family court, and Justice Peters and all the members of the Commission for taking on the work involved in getting this right.

[37] For many years, NYSDA has provided free and low-cost family defense training programs. From at least 2000 to 2012, NYSDA sponsored one or more family defense CLE programs each year. Beginning in 2013, NYSDA has made efforts to increase the number of family defense programs and we are now offering programs in a variety of locations around the state. Our programs feature state and national experts and they are consistently well-received by participants.

[38] The Center for Family Representation chose NYSDA's PDCMS for its office and we customized PDCMS to meet CFR's needs. NYSDA is able to use that work and the expertise to help other family defense offices manage their cases.

When we began preparing this testimony, we noted the daunting breadth of the topics included in the Notice of Public Hearing. In our response to that Notice, we have:

- highlighted the importance to families of effective legal assistance for those whose parental roles are threatened in family court proceedings;
- stressed the critical value of ensuring the independence of public defense providers; and
- discussed several structural and procedural issues, including the benefits of timely representation and holistic representation; the trauma resulting from isolating parents and children; funding and resource needs; and standards for representation and determination of financial eligibility.

Still, not everything of consequence could be covered. We appreciate the Commission including us among those invited to testify in person. There, we hope to address and questions the Commission has about this written testimony.

We also hope to discuss, among other things, the need to be sure family defense lawyers understand[39] and address the ways that the societal ills of poverty and racism impact families who find themselves in family court proceedings.[40] One former legal aid lawyer has observed about the lack of legal training on such issues: "Given that race and privilege are interwoven into almost every practice of law, what we are now doing – or not doing – is arguably malpractice."[41] NYSDA's Client Advisory Board observed, in its *Client-Centered Representation Standards*, that clients want an attorney who recognizes and acts to shield them from the lawyer's own bias and understands the client's life.[42]

Additionally, we hope to address issues that arise in the public hearings preceding our testimony. For example, a set of questions asked at one hearing raised the possibility of using video technology in family court proceedings. Having long opposed video

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[39] For over thirty years, NYSDA has demonstrated through hands-on workshops at its annual Basic Trial Skills Program (BTSP) that learning about clients' lives, including the systemic racism and endemic poverty that traumatize many, improves defense representation. The program received the endorsement of the New York State Judicial Commission on Minorities for "enhancing the competence and racial sensitivity of public defenders," with "hopes that it will become a model for similar programs across the state and nation," in 1991 and again in 2011. While BTSP was initially developed for criminal defense representation, its approach is no less important for those offering representation in family matters. Their clients too often experience this trauma.

[40] A recent article on the subject of race and poverty in child welfare, "Black Families Matter: How the Child Welfare System Punishes Poor Families of Color," is just one of many writings on this topic. Dorothy Roberts and Lisa Sangoi (3/26/2018), available at https://theappeal.org/black-families-matter-how-the-child-welfare-system-punishes-poor-families-of-color-33ad20e2882e/.

[41] Alecia Wartowski, "Apology for a Legacy of Ignoring Race: A Letter to my Former Legal Clients," 8 DePaul J for Soc. Just. 161 (Spring 2015), available at https://via.library.depaul.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1107&context=jsj.

[42] *See* Standards 8 and 9, available at http://66.109.34.102/ym_docs/05_ClientCenteredStandards.pdf.

appearances that remove clients from courtrooms in criminal matters,[43] NYSDA has great concerns about the effect of similar use of technology in family court. Court appearances place clients before the judges who will make discretionary decisions affecting them. On-screen appearances do not provide the opportunities that in-person presence affords, such as the ability to present ones' best qualities. Also, the interaction between client and attorney, possible only when they are seated next to each other and experiencing hearings the same way, is crucial to advancing a client's interests. While cognizant of the challenges that clients in rural areas face, including "geography and lack of public transportation" as mentioned in the Notice of Public Hearing topics list, NYSDA urges careful consideration of the possibly dehumanizing effect that use of such technology to address those challenges may have.

No doubt other specific questions about the many topics being addressed by the Commission will arise in the course of the hearings and the Commission's consideration of the information it receives. Such additional questions, and possible consequences of any proposals for improvements, should be carefully considered. This written submission therefore circles back to its earlier statements about the need for thorough study before making recommendations. Representation in family court of parents and those in parental roles must at long last be given the scrutiny and support it deserves. But overdue improvements should not be made too hurriedly as that can have unintended consequences.

We look forward to assisting Justice Peters and the Commission in setting priorities and shining a light on a sometimes overlooked, but vital, function of public defense.

[43] NYSDA, *Statement in Opposition to Audio-Visual Arraignments* (12/5/2012), available at http://66.109.34.102/docs/PDFs/2013-2014/2012%2012%2005%20Statement%20in%20Opposition%20to%20Audio-Visual%20Arraignments.pdf.

S RECALLED 5/29/90

CHAPTER 336

LAWS OF 19 90

SENATE BILL _____ ASSEMBLY BILL 10112

S. 7367 A. 10112

SENATE - ASSEMBLY

March 6, 1990

IN SENATE -- Introduced by Sens. GOODHUE, MARINO, SKELOS, BRUNO, COOK, DALY, DONOVAN, FARLEY, JOHNSON, LACK, LaVALLE, E. LEVY, N. LEVY, LIBOUS, McHUGH, MEGA, PADAVAN, PRESENT, ROLISON, SEWARD, SHEFFER II, SPANO, STAFFORD, TRUNZO, TULLY, VELELLA -- read twice and ordered printed, and when printed to be committed to the Committee on Child Care

IN ASSEMBLY -- Introduced by M. of A. NORMAN, VANN -- read once and referred to the Committee on Children and Families

AN ACT to amend the family court act, in relation to defining "initial appearance" for purposes of child protective proceedings

Bill compared by _____

DATE RECEIVED BY GOVERNOR: 5/24 6/31

ACTION MUST BE TAKEN BY: 6/5 7/3

GOVERNOR'S ACTION:

DATE JUN 30 1990

_____ Memorandum No. _____

C00001

C99009

SENATE VOTE 53 Y 0 N

Date 4/6/90

ASSEMBLY VOTE 147 Y 0 N

Date 3/26/90

HOME RULE MESSAGE ___ Y ✓ N

Bill is disapproved

_____

Counsel to Governor

A. 10112

NEW YORK STATE ASSEMBLY
TWO HUNDRED THIRTEENTH SESSION

REPRINT
DATE: 03/26/90

DATE: 03/26/1990
TIME: 03:18:22 PM

BILL: A10112 CAL. NO: 196 SPONSOR: NORMAN (MS)

Defines "initial appearance" for purposes of child protective proceedings

Y	Abbate PJ	Y	Gantt DF	Y	Ortloff C		
Y	Abramson E	Y	Genovesi AJ	Y	O'Shea CJ		
Y	*Anderson RR*	Y	Gottfried RN	Y	Parment WL		
Y	*Balboni MA*	Y	Graber VJ	Y	*Parola FE*		
Y	Barbaro FJ	Y	Grannis A	Y	Passannante WF		
Y	*Barnett HW*	Y	Green RL	Y	*Pataki GE*		
Y	*Barraga TF*	Y	Greene A	Y	Pheffer AI		
Y	*Becker GR*	Y	Griffith E	Y	Pillittere JT		
Y	*Behan JL*	Y	Harenberg PE	Y	Pordum FJ		
Y	Bennett LE	Y	*Harris GH*	Y	*Prescott DW*		
Y	Bianchi IW	Y	*Hasper J*	Y	*Proskin AW*		
Y	*Bonacic JJ*	Y	*Hawley RS*	Y	Proud G		
Y	Boyland WF	Y	*Healey PB*	Y	*Rappleyea CD*		
Y	Bragman MJ	Y	Hevesi AG	Y	*Reynolds TM*		
Y	Brennan JF	Y	Hikind D	Y	Robach RJ		
Y	Brodsky RL	Y	Hill EH	Y	*Saland SM*		
Y	*Brown HC*	Y	Hillman MC	Y	Sanders S		
Y	*Bush WE*	Y	Hinchey MD	Y	*Sawicki J*		
Y	Butler DJ	Y	*Holland JR*	Y	Schimminger RL		
Y	Canestrari RJ	Y	Hoyt WB	Y	Schmidt FD		
Y	*Casale AJ*	Y	Jacobs RS	Y	Seabrook L		
Y	Catapano TF	Y	Jenkins C	Y	*Sears WR*		
Y	*Chesbro RT*	Y	Kaufman SB	Y	Seminerio AS		
Y	Clark BM	Y	Keane RJ	Y	Siegel MA		
Y	*Cochrane JC*	Y	*Kelleher NW*	Y	Silver S		
Y	Colman S	Y	*King RL*	Y	*Singer CD*		
Y	Connelly EA	Y	Koppell GO	Y	*Straniere RA*		
Y	Conners RJ	Y	Lafayette IC	Y	Sullivan EC		
Y	*Conte JD*	Y	*Larkin WJ*	Y	*Sullivan PM*		
Y	*Cooke AT*	Y	Lasher HL	Y	Sweeney RK		
Y	*Coombe RI*	Y	*Leibell VL*	Y	Tallon JR		
Y	Crowley J	Y	Lentol JR	Y	*Talomie FG*		
Y	*D'Andrea RA*	Y	Lopez VJ	Y	*Tedisco J*		
Y	Daniels GL	Y	Luster MA	Y	Tocci RC		
Y	*Davidsen DR*	Y	*Madison GH*	Y	Tokasz P		
Y	Davis G	Y	Marshall HM	Y	Tonko PD		
Y	Dearie JC	Y	Martinez I	Y	Vann A		
EOR	Del Toro A	Y	Mayersohn N	Y	Vitaliano EN		
Y	Diaz HL	Y	*McCann JW*	Y	*Warren GE*		
Y	DiNapoli TP	Y	*McGee PK*	Y	Weinstein HE		
Y	Dugan EC	Y	*Miller RH*	Y	Weisenberg H		
Y	*Esnnace RJ*	Y	Murphy MJ	Y	Weprin S		
Y	Eve AO	Y	Murtaugh JB	Y	*Wertz RC*		
Y	Farrell HD	Y	Nadler J	Y	*Winner GH*		
Y	*Faso JJ*	Y	*Nagle JF*	Y	Yevoli LJ		
Y	Feldman D	Y	Nolan CT	Y	Young GP		
Y	*Flanagan JJ*	Y	Norman C	Y	Zaleski TM		
Y	Friedman G	Y	*Nortz HR*	Y	Zimmer MN		
Y	*Frisa D*	Y	*Nozzolio MF*		Mr. Speaker		
Y	*Gaffney RJ*	Y	*O'Neill JG*				

YEAS: 147 NAYS: 0

CONTROL: 99354452 CERTIFICATION: /S/ FRANCINE M. MISASI
CLERK OF THE ASSEMBLY

LEGEND: Y=YES,NAY=NO,NV=ABSTAIN,ABS=ABSENT,
ELB=EXCUSED FOR LEGISLATIVE BUSINESS,EOR=EXCUSED FOR OTHER REASONS.

C00003

SENATE JOURNAL
APR 6 - 1990
PAGE 32

ASSEMBLY

The Assembly Bill
by Assem. NORMAN Calendar No. 621 Assembly No. 10112
Entitled: " Sen. Rept. No.

AN ACT to amend the family court act, in relation to defining "initial appearance" for purposes of child protective proceedings

"was read the third time

The President put the question whether the Senate would agree to the final passage of said bill, the same having been printed and upon the desks of the members in its final form at least three calendar legislative days, and it was decided in the affirmative, a majority of all the Senators elected voting in favor thereof and three-fifths being present, as follows:

AYE	Dist.		NAY	AYE	Dist.		NAY
	17	Mr. Babbush			21	Mr. Markowitz	
	33				58	Mr. Masiello	EXCUSED
	43	Mr. Bruno			46	Mr. McHugh	
	25	Mr. Connor	EXCUSED		23	Mr. Mega	
	40	Mr. Cook			30	Mrs. Mendez	
	61	Mr. Daly			22	Ms. Montgomery	
	47	Mr. Donovan	EXCUSED		42	Mr. Nolan	
	44	Mr. Farley			27	Mr. Ohrenstein	
	31	Mr. Galiber	EXCUSED		14	Mr. Onorato	
	13	Mr. Gold			36	Mrs. Oppenheimer	
	32	Mr. Gonzalez			11	Mr. Padavan	EXCUSED
	37	Mrs. Goodhue			29	Mr. Paterson	
	26	Mr. Goodman			54	Mr. Perry	
	39	Mr. Gray			56	Mr. Present	
	18	Mr. Halperin			55	Mr. Quattrociocchi	
	6	Mr. Hannon			41	Mr. Rolison	
	48	Ms. Hoffmann			50	Mr. Seward	
	10	Mr. Jenkins			60	Mr. Sheffer	
	4	Mr. Johnson			9	Mr. Skelos	
	53	Mr. Kehoe			20	Miss Smith	
	52	Mr. Kuhl			19	Mr. Solomon	
	2	Mr. Lack			35	Mr. Spano	
	1	Mr. LaValle	EXCUSED		57	Mr. Stachowski	
	28	Mr. Leichter			45	Mr. Stafford	
	38	Mr. E. Levy			12	Mr. Stavisky	EXCUSED
	8	Mr. N. Levy			3	Mr. Trunzo	
	51	Mr. Libous			7	Mr. Tully	
	49	Mr. Lombardi			34	Mr. Velella	
	15	Mr. Maltese			59	Mr. Volker	
	24	Mr. Marchi			16	Mr. Weinstein	
	5	Mr. Marino					

AYES 53

NAYS 0

Ordered, that the Secretary deliver said bill to the Assembly with a message that the Senate has concurred in the passage of the same.

JC-14. (To Senate) Recall of Assembly . from Governor.

State of New York

In Assembly

Albany MAY 29 1990

By Mr. Norman

Resolved (if the Senate concur), That a respectful message be sent to the Governor requesting the return to the Assembly of Assembly bill (No. 10112) entitled "

10112 NORMAN, VANN--
An act to amend the family court act, in relation to defining "initial appearance" for purposes of child protective proceedings

."

IN SENATE
MAY 29 1990 ... 19 ..
Concurred in, without amendment
By order of the Senate
Stephen F. Sloan
Secretary

By order of the Assembly,

Francine M. Misasi

Clerk

Form No. JC-14
Rev. 2-20-86

C000095

(7B2-2P)

State of New York

Executive Chamber

Albany May 29, 1990

To the Assembly:

Pursuant to concurrent resolution of the Assembly and Senate, herewith is returned for amendment Assembly Bill, Number 10112

Entitled "An Act

to amend the family court act, in relation to defining "initial appearance" for purposes of child protective proceedings

Evan A. Davis, Counsel to the Governor

C00006

State of New York

In Assembly

Albany JUNE 21, 1990

By Mr. Norman

Resolved (if the Senate concur), That Assembly bill (No. 10112) entitled "

AN ACT to amend the family court act, in relation to defining "initial appearance" for purposes of child protective proceedings

IN SENATE
JUN 21 1990
..... 19...
Concurred in, without amendment
by order of the Senate
Stephen F. Sloan
Secretary

,"

be returned to the Governor.

By order of the Assembly,

Francine M. Misasi

Clerk

MEMORANDUM IN SUPPORT

SENATE NO._____ ASSEMBLY NO._____ __ New bill

Introduced Senate: GOODHUE __Amended bill

Introduced Assembly:_____

TITLE OF BILL: An Act to amend the Family Court Act in relation to defining "initial appearance" for the purposes of child protective proceeding.

PURPOSE OR GENERAL IDEA OF BILL: To establish a formal "initial appearance" in child abuse and neglect proceedings, and to standardize responsibilities of the court and the parties at such initial appearance.

The bill would require that, at the initial appearance, a law guardian be appointed to represent the child, if the law guardian has not been previously appointed. The court would be required to advise the respondent of the allegations in the petition and of the right to an adjournment in order to obtain counsel. At the initial appearance, counsel for an indigent respondent would be appointed and, in any case where a child was removed prior to the initial appearance, the court would advise the respondent of the right to a hearing for the return of the child, pursuant to Sect. 1028 of the Family Court Act.

The bill further provides that when a hearing on the removal of a child is held pursuant to Sect. 1022 of the Family Court Act, the court would advise the respondent of procedures for obtaining counsel.

JUSTIFICATION: Unlike other articles of the Family Court Act, i.e.: Article 7, " PINS," or Article 3, "Juvenile Delinquency," Article 10 of the Family Court Act, "Child Abuse and Neglect," makes no specific provision for procedures to be followed when the respondent first comes to court to answer allegations contained in the abuse and neglect petition. This bill sets forth those procedures, and in doing so, standardizes the responsibilities of the court with respect to appointment of counsel, appointment of a child's law guardian, and for providing notice to the respondent of the right and of the procedures for obtaining counsel to represent them in the forthcoming proceeding.

In December of 1989, the Senate Standing Committee on Child Care completed a two-year federal grant study of Article 10 child abuse and neglect proceedings entitled, "Child Protection and the Family Court - A Study of Processes, Procedures and Outcomes Under Article 10 of the New York Family Court Act," whereby the Committee studied 500 case histories of abuse and neglect proceedings throughout the State from the family's first contact with the State Central Register of Child Abuse and Maltreatment to the status of the family after adjudication and disposition of the child abuse proceedings. Among the findings in the study was that practices and procedures varied among family courts statewide, regarding critical proceedings whereby the respondent first had contact with the court to answer the allegations in the petition. This bill, if enacted, will resolve any inconsistencies in court practice and will provide all parties in family court proceedings, statewide, with the same information regarding their rights in the proceedings to come.

SUMMARY AND PROVISIONS OF BILL: This bill would add three new sections to the Family Court Act: 1022-a, 1033-a and 1033-b.

PRIOR LEGISLATIVE HISTORY: None - new bill

EFFECTIVE DATE: [illegible]

B-203 (12/75) BUDGET REPORT ON BILLS Session Year 1990

SENATE NO RECOMMENDATION ASSEMBLY

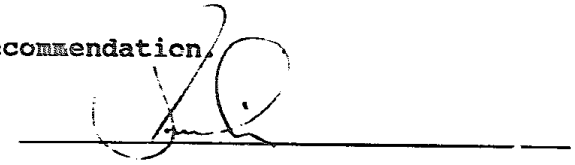
No. No. 10112

Law: Family Court Act

Title: AN ACT to amend the above law, in relation to defining "initial appearance" for purposes of child protective proceedings

The above bill has been referred to the Division of the Budget for comment. After careful review, we find that the bill has no appreciable effect on State finances or programs, and this office does not have the technical responsibility to make a recommendation on the bill.

We therefore make no recommendation.



C00093

A. 10112

THE SENATE
STATE OF NEW YORK

MARY B GOODHUE
SENATOR 37TH DISTRICT
CHAIRMAN
COMMITTEE ON CHILD CARE
VICE-CHAIRMAN
LEGISLATIVE COMMISSION ON THE MODERNIZATION AND SIMPLIFICATION OF TAX ADMINISTRATION AND TAX LAW

PLEASE REPLY TO
☐ ROOM 512 LOB
ALBANY NEW YORK 12247
518-455-3111
☐ DISTRICT OFFICE
226 EAST MAIN STREET
MT KISCO NEW YORK 10549
914-241-2541

COMMITTEES
AGING
CODES
ENERGY
HEALTH
INVESTIGATIONS, TAXATION AND GOVERNMENT OPERATIONS
JUDICIARY

June 22, 1990

Hon. Evan Davis
Executive Chamber
State Capitol
Albany, NY 12224

RE: S.7367/A.10112; S.7368-A/A.10113-A; S.7369/A.10114; S.7370-A/A.10115-A; A.10116-A; S.7372-A/A.10117-A; S.7379-A/A,10109-A;S.7428-A/A.9098-B

Dear Mr. Davis:

I respectfully urge the Governor's approval of the above-referenced bills which are the product of a two-year federal grant study by the Senate Standing Committee on Child Care. This research funded by the National Center on Child Abuse and Neglect culminated in a report of the Committee entitled, "Child Protection and the Family Court: A Study of Processes, Procedures and Outcomes Under Article 10 of the New York Family Court Act." This precedent-setting research examined 500 case histories of child abuse and neglect proceedings from the initial contact with the State Central Register of Child Abuse and Maltreatment, through Family Court proceedings under Article 10 of the Family Court Act into the status of the family after court disposition, including subsequent allegations of child abuse and neglect to the State Central Register.

The study embraced a 14 county sample representative of experiences throughout the State of New York.

Major findings documented by the research study include the following:

- Parents who have allegedly abused and neglected their children were frequently unrepresented at critical stages of family court proceedings including hearings to determine whether a child could be appropriately returned to a home after a removal.

- Although courts capably administered the fact-finding and dispositional aspects of court cases, neither the family court nor the child protective system was capable of monitoring compliance with the court's orders, the violation of those orders and the overall welfare of the children and families involved in the proceedings during open orders after court action.

- A lack of integration between indicated child abuse reports after a family's contact with the court and the repetitioning of the court for necessary additional action on behalf of the abused child. In fact, the report indicated that the child protective agencies went back to the courtroom after case disposition in only 16% of the cases where new indicated reports were made to the Hotline.

The above-referenced bills, in addition to nine other bills on this subject which the Governor has already signed into law this year, represent a bipartisan effort to address the legitimate needs for reform in the administration of child abuse and neglect proceedings and the supervision of child protective cases by the child protective services of the State of New York.

The sponsors of this legislation have been mindful of the fiscal constraints which must be part of any policy initiatives in 1990. The above legislation can, in the view of the sponsors, be implemented within available resources and will have a favorable impact upon the protection of New York's vulnerable children.

Specific rationale for each of the above-referenced bills are provided in detail in the appended memoranda in support and in the enclosed copy of the Committee's research report and policy conclusions.

These bills represent an important step forward in protecting the welfare of New York's children and in reforming the system upon which those children rely for their lives and for their safety. As such, they are worthy of the Governor's support.

Sincerely,

Mary B. Goodhue

Mary B. Goodhue
Senator, 37th S.D.

MBG:jke
Enclosures

TO COUNSEL TO THE GOVERNOR

RE: SENATE

ASSEMBLY 10112

Inasmuch as this bill does not appear to relate to the functions of the Department of Law, I am not commenting thereon, at this time. However, if there is a particular aspect of the bill upon which you wish comment, please advise me.

ROBERT ABRAMS
Attorney General

Dated: 4-9-90

C00012

A - 10112

STATE OF NEW YORK
COUNCIL ON CHILDREN AND FAMILIES
MAYOR ERASTUS CORNING 2ND TOWER
28TH FLOOR
EMPIRE STATE PLAZA
ALBANY, NEW YORK 12223

JOSEPH J. COCOZZA, PH.D.
EXECUTIVE DIRECTOR
518 474-8038

M E M O R A N D U M

April 13, 1990

TO: Evan A. Davis
Counsel to the Governor

FROM: Joseph J. Cocozza
Executive Director

SUBJECT: Assembly 10112; Before the Governor for Approval

RECOMMENDATION: Approval

Assembly 10112 defines "initial appearance" in a family court child protective proceeding, identifies the responsibilities of the court at the initial appearance and provides for notice of the initial appearance. In addition, the bill requires the court, in a preliminary proceeding concerning temporary removal of a child, to notify the respondent of the allegations in the application for temporary removal and to assign counsel for an indigent respondent.

The Council on Children and Families recommends approval of the bill. The bill does not create any new substantive rights: the right to appointment of a law guardian has already been established by Section 249 of the Family Court Act, and the right to counsel and to assigned counsel for indigent respondents has been established by Section 262 of the Family Court Act. However, the bill does for the first time identify a point in the proceeding at which the law guardian, and a counsel for indigent respondents, must be appointed; and at which the respondent must be informed of the right to be represented by counsel, of the nature of the allegations in the petition or application for temporary order and of certain procedural options that are available to the respondent. Given the variety of ways in which a child protective proceeding could be initiated -- including through a hearing on removal of a child from the home and through conversion of petitions initially brought under other Articles of the Family Court Act -- it is important that a more formal beginning of the Article 10 hearing process be recognized.

/cld

A- 10112

NEW YORK STATE
DEPARTMENT OF SOCIAL SERVICES
40 NORTH PEARL STREET, ALBANY, NEW YORK 12243 - 0001

CESAR A. PERALES
Commissioner

M E M O R A N D U M

TO: EVAN A. DAVIS
Counsel to the Governor

FROM: Cesar A. Perales Cesar A Perales

RE: Ten Day Bill
Assembly 10112

DATE: May 11, 1990

Recommendation: Approval

Statutes Involved: Sections 1022-a, 1033-a and 1033-b of the Family Court Act (FCA).

Effective Date: September 1, 1990.

Discussion:

1. Purpose and effect of bill: The purpose of the bill is to establish a formal initial appearance procedure in child protective proceedings in family court in order to make family court procedures more uniform across the State. The bill would accomplish this by adding three new provisions to Article 10 of the FCA which governs child protective proceedings.

   Section one of the bill would add a new Section 1033-a to the FCA to define the "initial appearance" as the first proceeding after filing of an abuse or neglect petition in which the respondent appears before the court. The respondent is the parent or other person legally responsible for the child who allegedly abused or neglected the child. Section one would also add a new Section 1033-b to the FCA which would require the court at the initial appearance to appoint a law guardian for the child, advise the respondent of his or her right to request an

adjournment to obtain counsel, appoint counsel for an indigent respondent, advise the respondent of the allegations in the abuse or neglect petition and, for cases in which the child has already been removed from the respondent, advise the respondent of the respondent's right to a hearing seeking return of the child under Section 1028 of the FCA. It would also require that notice of the initial appearance be given to the petitioner and respondent.

Section two of the bill would add Section 1022-a to the FCA to require that, at a hearing held pursuant to Section 1022 of the FCA seeking an order directing the temporary removal of a child from his or her parents or other person legally responsible for the child prior to the filing of an abuse or neglect petition, the court must advise the respondent, if present, of the allegations in the application for the order of temporary removal and must appoint counsel for indigent respondents.

2. Prior legislative history and other significant background: This is a new bill. There is, at present, no provision in Article 10 of the FCA establishing an initial appearance procedure in child protective proceedings or authorizing the appointment of a law guardian or attorney in such proceedings. Section 249 of the FCA provides for appointment of law guardians in Article 10 proceedings and Section 262 of the FCA provides for assignment of counsel to indigent respondents in Article 10 proceedings at their first appearance in court. Article 3 of the FCA (juvenile delinquency proceedings) has an established procedure for initial appearances (Section 320.2 of the FCA).

3. Budget implications: This bill would establish certain standard requirements to be followed when a respondent initially appears before the court in an Article 10 proceeding but would not specifically require a new proceeding or court appearance be added to the Article 10 process. The practical effect of the bill could be to add an additional appearance in many cases, but the matters to be dealt with at the initial appearance (appointment of a law guardian, appointment of counsel, etc.) must occur at some point in the process before a fact finding hearing can commence under the present procedures. Therefore, the initial appearance requirements should not be overly burdensome to the family courts and should not result in significantly greater costs to the courts. However, if the courts are responsible for providing notice to the parties in an Article 10 proceeding of the initial appearance, there could be some fiscal impact on the courts in the form of expenses associated with providing the notice. Since we do not know how the courts would discharge the notice responsibility, we cannot predict how significant this added expense would be.

4. Arguments in support: The Memorandum in Support refers to a study conducted by the Senate Standing Committee on Child Care which found wide discrepancies in the procedures followed in the early stages of child protective proceedings by family courts Statewide. Uniform statutory standards regulating this important stage in the Article 10 process do not currently exist. The bill would standardize the procedure for initial appearances, thus encouraging uniformity of practice among the family courts.

The bill would help ensure that the rights of children are protected by requiring appointment of law guardians at the earliest practical point in child protective proceedings. It would also help ensure that the due process rights of respondents are protected by assuring that respondents are advised at the beginning of their involvement with the courts of their right to obtain counsel, of the allegations against them and of the right to seek return of their children where the children have been removed. The initial phases of Article 10 proceedings can resolve vital issues such as whether children can be returned to their parents.

5. Arguments in opposition: Proposed Section 1033-b(2)of the FCA would require that notice of the initial appearance be given to the respondent, petitioner, law guardian (if already appointed) and respondent's attorney (if known). The bill does not specify who is responsible for providing this notice but the logical inference is that the court must provide it, since notice to all parties is mentioned. At present, Section 1035 of the FCA requires the court, on the filing of an abuse or neglect petition, to "cause a copy of the petition and a summons to be issued" requiring the respondent to appear. It is not specified who must serve this petition and summons but Section 1036 of the FCA implies that this is the responsibility of the petitioner. The bill does not alter the requirements of Sections 1035 and 1036, so it appears that there would be multiple and somewhat duplicative processes occurring in many cases: the court would be responsible for arranging notice under Section 1033-b(2) and at the same time would have to order that a petition and summons be served on the respondent by the petitioner under Sections 1035 and 1036. The requirement that the court provide notice represents a potential added cost to the courts which appears to be largely unnecessary in light of the provisions of Sections 1035 and 1036 of the FCA. It would be more appropriate to amend Sections 1035 and 1036 to provide for service on the law guardian and respondent's counsel. This would specifically provide for service on all the parties and would avoid the court having responsibility for providing notice.

Proposed Section 1033-b(1)(a) refers to appointment of a law guardian pursuant to Section 1016 of the FCA. There is no Section 1016 of the FCA. This reference should be to Section 249 of the FCA.

6. Reason for recommendation: Although there are some technical problems with the bill, it would standardize family court procedures and thereby help protect the rights of both children and respondents in child protective proceedings.

A 10112

STATE OF NEW YORK
UNIFIED COURT SYSTEM
(OFFICE OF COURT ADMINISTRATION)
270 BROADWAY
NEW YORK, NEW YORK 10007
(212) 587-2010

MATTHEW T. CROSSON
Chief Administrator of the Courts

MICHAEL COLODNER
Counsel

May 8, 1990

Honorable Evan A. Davis
Counsel to the Governor
Executive Chambers
State Capitol
Albany, New York 12224

Re: S.7367 - A.10112

Dear Mr. Davis:

This will acknowledge your request for comment on the above-designated legislation.

This measure amends the Family Court Act by adding two new sections, 1033-a and 1033-b, defining the term "initial appearance" for purposes of a child protective proceeding and setting procedures for that appearance.

This Office has no objection to the approval of this measure.

Very truly yours,

Michael Colodner

MC:jw

A.10112

STATE SCAA COMMUNITIES AID ASSOCIATION

One Columbia Place
Albany, NY 12207
(518) 463-1896

105 East 22nd Street
New York, NY 10010
(212) 677-0250

May 9, 1990

Hon. Evan A. Davis
Executive Chamber
State Capitol
Albany, NY 12224

RE: 9099
S.7365/A.10110
S.7366/A.10111
S.7367/A.10112
S.7369/A.10114
S.7371/A.10116
S.7373/A.10118
S.7374-A/A.10104-A
S.7376-A/A.10106-A
S.7377/A.10107
S.7378/A.10108

Dear Mr. Davis:

SCAA supports this package of legislation, which may modestly help safeguard abused or neglected children by providing for an expanded role for law guardians in Family Court proceedings.

In particular, we support:

- A.9099, which would authorize a child's law guardian to petition the court for provision of adequate service from a child protective agency, and
- S.7366/A.10111, which would specify the actions that a child protective agency must take to meet the terms of the court's order of supervision.

We remain concerned that there will not be sufficient law guardians to carry out the additional responsibilities this legislation provides for.

Thank you for the opportunity to comment.

Sincerely yours,

Evelyn R. Frankford
Senior Policy Associate

ERF/pl

C00018

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
42 WEST 44TH STREET NEW YORK NY 10036 (212) 382-6600

REPORT ON LEGISLATION

90--2

COMMITTEE ON FAMILY COURT AND FAMILY LAW

S. 7367
A. 10112

Sen. Goodhue
M. of A. Norman, Vann

AN ACT to amend the Family Court Act in relation to defining "initial appearance" for the purposes of child protective proceeding.

THIS BILL IS APPROVED AND WE RECOMMEND MODIFICATION

SUMMARY OF SPECIFIC PROVISIONS

Section 1 of the bill would add new subsections 1033-a and 1033-b to the Family Court Act. The new §1033-a would define "initial appearance" in a child protective proceeding as the date on which the respondent first appears before the court after the filing of the petition. The new §1033-b would clarify that counsel for an indigent respondent is to be appointed at the time of the "initial appearance". This section would also require that where a child has been removed from the respondent, the court shall advise the respondent of the right to a preliminary hearing under §1028. Finally, §1033-b would require the appointment of the law guardian for the child at this appearance if the law guardian has not been appointed at a prior court date.

Section 2 of the bill would add a new §1022-a to the Family Court Act. The new section would require that in a hearing pursuant to §1022, concerning applications for orders directing removal of the children from the home prior to the filing of a child protective petition, the court shall advise the respondent of the allegations in the application and shall appoint counsel for the respondent if the respondent is indigent.

GROUNDS FOR SUPPORT

We support the purpose of the bill as set forth in the Memorandum of Support. It is essential that respondents in child protective

proceedings have counsel at the earliest possible stage of the proceeding. It should be noted that §262(a) of the Family Court Act, concerning assignment of counsel for indigent persons, already provides for assignment of counsel "when such person first appears in court". This bill clarifies the procedure as to pre-petition appointment of counsel. In New York City there is virtually no pre-petition court activity in child protective proceedings. Counsel for respondents are routinely appointed at the respondents' first court appearances, while law guardians are routinely appointed upon the filing of the petition.

We feel that clarification is certainly required with respect to the duration of the appointment. Proposed bill A. 10117-A, S. 7372-A, concerning appointment of law guardians, would provide that the law guardian's appointment continues for the duration of any order of disposition or adjournment in contemplation of dismissal. That bill would further specify that rules of the court shall provide for remuneration for services rendered for the duration of the appointment.

Similar provisions should be included as part of the instant bill for appointment of respondent's attorneys. Clarifying the duration of the appointment would help ensure that respondent's attorneys are able to monitor and, if necessary, obtain compliance with the terms of orders of disposition or adjournments in contemplation of dismissal. The need to ensure more meaningful follow-up and compliance with dispositional orders and adjournments in contemplation of dismissal is reflected in other proposed bills.* However, under current law, respondents are often left without any effective post-dispositional remedy, since, without assistance of counsel, they are ill-equipped to make the formal motions that may be necessary to enlist the court's aid in obtaining compliance with prior court orders. As with the proposed bill concerning law guardians, it is anticipated that increased involvement of respondents' attorneys will improve the efficacy of court orders of disposition and adjournments in contemplation of dismissal.

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* See proposed bill A. 10109-A, S. 7379-A, which would require promulgation of regulations for the supervision of families and the delivery of protective services; and A. 10111, S. 7366, which would require the court to state clearly in the order of disposition the terms and conditions of supervision and the duties of respondents and child protective agencies.

New York Public Welfare Association, Inc.

Founded in 1869

119 Washington Avenue • Albany, NY 12210
Maryann Jablonowski, Executive Director

(518) 465-9305
FAX (518) 465-5633

MEMORANDUM OF NO OPPOSITION

S.7367/A.10112

Senators Goodhue, Marino, Skelos, Bruno, Cook et. al.
Assemblymembers Norman, Vann

AN ACT to amend the family court act, in relation to defining "initial appearance" for purposes of child protective proceedings.

The New York Public Welfare Association (NYPWA) has NO OPPOSITION to the above-reference legislation which establishes a formal "initial appearance" in child abuse and neglect proceedings, and standardizes responsibilities of the court and the parties at such initial appearance.

The NYPWA is the professional association representing New York's 58 local social services districts, including the Human Resources Administration (HRA) of New York City.

Although the New York City Human Resources Administration STRONGLY OPPOSES this bill, the procedure it sets in statute is largely followed by local social districts in upstate New York.

MJ:mj
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5-08-90