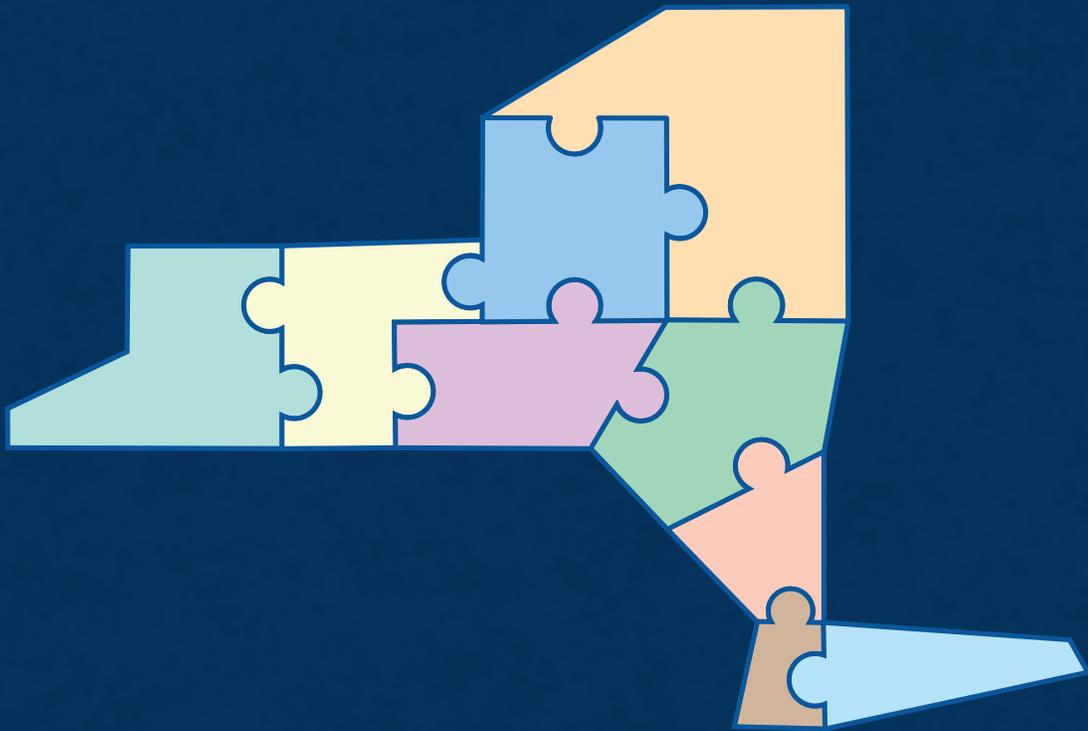




# Commission on Parental Legal Representation

Interim Report to Chief Judge DiFiore

FEBRUARY 2019





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## PREFACE

On behalf of the Commission on Parental Legal Representation, I present this Interim Report. Created just one year ago, Chief Judge DiFiore has charged us with examining the current state of mandated Family Court representation.

The twenty members of the Commission have held public hearings across the state, considered advice from experts and sought input from members of the judiciary, parents, panel attorneys, and institutional providers. As we conducted our searching inquiry, we were acutely aware that at the southern border of our country children were being snatched from the arms of their parents by immigration authorities and separated from each other for weeks or months. And as we watched these family tragedies unfold, we decried the lack of due process - the basic right to receive advice and counsel and the opportunity to be heard before a child is separated from a parent.

Here in New York the right of parents to publicly funded legal representation in child welfare cases is well established and has been expanded to encompass a broad range of matters affecting fundamental family rights and interests. Yet, during the hearings we held across our state, we heard testimony from attorneys and parents to the effect that children are removed from their parents every day and that often - but not always - both parents and children have counsel to assist them through this heart wrenching experience. And we learned that when counsel is provided, the attorney is often overloaded with cases, overworked and underpaid.

As I heard the testimony of each and every witness in Rochester, Albany, Mineola and New York City, read every word of each written testimony received and chaired each meeting of the dedicated Commissioners, I am compelled to share some personal observations. Having served as both an assigned counsel and an attorney for the child prior to becoming a judge, I was profoundly impressed by the dedication shown and frustration expressed by most attorneys who testified before us. Moreover, my more than three decades of judicial experience on the Family, Supreme and Appellate Division of this great state convince me that while the problems described by both parents and attorneys are deeply entrenched, our proposed transformation of child welfare representation will serve the needs of our children and parents and guarantee due process.

Every parent and child in our Empire State must receive timely, quality legal counsel before a family unit is torn asunder. Our focus upon child welfare matters in our Interim Report reflects our grave concern that the crisis in legal representation for parents in this arena requires immediate attention. The members of the Commission are unanimous in their belief that a transformation of our publicly funded system of parental representation in child welfare matters is urgently needed. While representing diverse perspectives, the Commissioners speak with one voice in this, our Interim Report.

On behalf of all members of the Commission I express my deepest appreciation to our Counsel, Janet Fink, our co-counsel Shane Hegarty and our Special Advisor Angela Burton, as well as Cynthia Feathers and Lucy McCarthy.

We continue to be inspired in our work by Chief Judge DiFiore's commitment to strengthening the quality and efficiency of Family Court representation. This year we will continue to fulfill our broad mission to provide a blueprint for how our state can strengthen the quality and efficiency of Family Court representation to ensure fairness and effectiveness for our entire family justice system.

Karen K. Peters

## EXECUTIVE SUMMARY

In her February 6, 2018 State of Our Judiciary address, Chief Judge Janet DiFiore announced the creation of the Unified Court System’s Commission on Parental Legal Representation. The Commission’s mandate is to examine the current state of representation for indigent parents in constitutionally and statutorily mandated family-related matters, and to develop a plan to ensure the future delivery of quality, cost-effective parental representation across the state.<sup>1</sup>

After a searching inquiry, comprehensive review of the evidence, and thoughtful deliberation, the Commission concludes that a complete transformation is urgently needed in New York’s publicly funded system of parental representation in child welfare<sup>2</sup> matters. Our conclusion is not a revelation. The systemic problems in our underfunded, county-based system are well-documented, as are the harmful effects of inadequate representation on families and Family Courts. For decades, reports have chronicled the crisis in parental representation, particularly regarding child welfare proceedings. Instances of inadequate representation, delays in access to representation, and the outright denial of representation, are all too frequent.

The crisis in parental legal representation goes to the core of the judicial function - to make “reasoned determinations of fact” and “proper orders of disposition.”<sup>3</sup> Without meaningful parental representation, Family Courts may lack the comprehensive information and evidence needed to make reasoned determinations and render proper dispositional orders. Without State funding and oversight, attorneys lack all the resources necessary to deliver the effective assistance to which parents are constitutionally entitled. Those messages clearly emerged in testimony to the Commission.

In addressing lapses in the quality of parental representation, the Commission points to the lack of the resources and support attorneys require to deliver consistently effective representation. The Commission emphasizes the need for significant and swift State action to address systemic problems, thus enabling attorneys to provide effective representation and Family Courts to make sound decisions that will best meet the needs of families.

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<sup>1</sup> Chief Judge Janet DiFiore, The State of Our Judiciary 2018, p. 14, New York State Unified Court System (Feb. 6, 2018), available at <http://www.nycourts.gov/ctapps/news/annrpt/AnnRpt2018.pdf>.

<sup>2</sup> In this Interim Report, the terms, “child welfare,” “child protective,” and “State intervention” are used interchangeably and refer generally to abuse and/or neglect proceedings pursuant to Article 10 of the Family Court Act, as well as foster care placement, termination of parental rights, surrender, destitute minor, and permanency planning proceedings. Child protective services agencies are referred to as “CPS” or “DSS” agencies.

<sup>3</sup> Family Court Act § 261.

In creating this Commission, Chief Judge DiFiore emphasized that the court system is “focused on supporting the well being of children by supporting the legal needs of their parents.”<sup>4</sup> Testimony provided to the Commission made it clear that inadequate representation of parents has a particularly pernicious impact in state intervention proceedings: it can cause the unnecessary separation of children from their families. Such avoidable separations cause avoidable disruption, stress, and trauma to families and avoidable financial cost to government. For these reasons, the Commission has determined that decisive remedial action is needed most urgently in the child welfare realm. While we defer, for now, our recommendations about how to improve all parental representation mandated under Family Court Act § 262, we are mindful that child welfare cases are often interconnected with other types of Family Court cases. As explained by one witness, parents’ attorneys represent *people*, not cases:

*The child support willfulness case that morphed into a custody case that grew into a family offense which sprouted a neglect that invited the grandparents’ guardianship petition—the Assigned Counsel is there throughout. Parental representation in Family Court means representing respondents, petitioners, and interested parties.*<sup>5</sup>

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<sup>4</sup> State of Our Judiciary, *supra* n 1.

<sup>5</sup> Written testimony of Rhonda Weir, Association of Private Court Assigned Counsel, Appellate Division, Second Department.

## SUMMARY OF RECOMMENDATIONS

1. We recommend that parents be timely provided with relevant information about the right to counsel, and that parents be granted access to counsel during a child protective agency investigation and sufficiently in advance of the first court appearance.
2. We recommend the establishment of a State Office of Family Representation (the Office) to provide oversight of parental representation. That Office, in turn, would oversee representation in child welfare cases by institutional offices and well-resourced attorneys to ensure the delivery of client-centered, interdisciplinary, holistic parental representation throughout the state.
3. We recommend that the proposed Office of Family Representation develop uniform standards of eligibility for assigned counsel that would apply in all Family Court proceedings, and would include a presumption of eligibility for counsel in child welfare proceedings, to be established by legislation.
4. We recommend that the State fund a study to determine appropriate maximum caseload standards for attorneys representing parents in Family Court proceedings. Until such a study has been completed, we recommend a caseload maximum for attorneys representing parents in child welfare cases of 50 to 60 pending clients per attorney, to be established by legislation or rule.
5. We recommend that the State pay for all costs associated with parental representation in child welfare proceedings to ensure quality representation and eliminate disparities among localities.
6. We recommend that the hourly rates for assigned attorneys be increased to \$150 per hour, and a mechanism for periodic review and adjustment be instituted.

## INTRODUCTION

New York parents who are unable to afford a lawyer have a constitutional and statutory right to publicly funded legal representation in many types of family law cases<sup>6</sup> (“mandated parental representation,” “parental representation,” or “representation”). When codifying the parental right to counsel in the Family Court Act in 1975, New York delegated fiscal and administrative responsibility for its implementation to the counties,<sup>7</sup> just as it had done in 1965 with the constitutional right to counsel for persons accused of a crime. In the ensuing decades, indigent litigants in New York’s criminal courts and Family Courts often have not received effective representation. New York has made significant strides in improving the representation of indigent criminal defendants in recent years.<sup>8</sup> However, parental representation in Family Court cases has been excluded from these reforms.

In her State of Our Judiciary address on February 6, 2018, Chief Judge Janet DiFiore observed that New York’s parental representation system “has suffered from many of the same deficiencies that once afflicted our criminal defense system, including excessive attorney caseloads, inadequate training, and insufficient funding for support staff and services.” She declared that the Unified Court System is committed to “supporting the well-being of children by supporting the legal needs of their parents.” To that end, Judge DiFiore gave the Commission on Parental Legal Representation the mission of examining the current state of parental representation and developing a plan “to ensure the future delivery of quality, cost-effective parental representation” across the State.<sup>9</sup>

The Commission is chaired by the Hon. Karen K. Peters, former Presiding Justice of the Appellate Division, Third Department, who served for a decade as a Family Court Judge in Ulster County. The diverse group of 20 Commissioners, listed in Appendix A, includes a parent affected by the child welfare system, judges, legal service providers, child welfare experts, and county and State officials. Public hearings were held in fall 2018 in Rochester, New York City, Albany, and Mineola. The Commission received written and oral testimony from a broad range of persons with diverse perspectives. The witnesses, listed in Appendix B, included parents, parent advocates, Family Court judges, attorneys serving at institutional offices and on assigned counsel panels, representatives of community organizations, the New York State Bar Association and

<sup>6</sup> *Matter of Ella B.*, 30 NY2d 352 (1972); Family Court Act §§ 261, 262; Surrogate’s Court Procedure Act § 407. The parental right to assigned counsel applies in cases involving custody, visitation, guardianship, paternity, and family offenses, in addition to cases involving alleged child neglect or abuse, foster care, termination of parental rights, and adoption. Individuals charged with contempt of court or willful violation of a Family Court order (with the potential for incarceration) are also entitled to assigned counsel. Further, a judge may assign an attorney to represent an adult in any other Family Court proceeding, upon a determination that “such assignment of counsel is mandated by the constitution of the state of New York or of the United States.” Family Court Act § 262 (b).

<sup>7</sup> Family Court Act § 262 (c).

<sup>8</sup> For a discussion of the history of reform in New York’s indigent criminal defense system, see William J. Leahy, *The Right to Counsel in the State of New York: How Reform was Achieved After Decades of Failure*, 51 Indiana L Rev 145 (2018); see also *Hurrell-Harring v State of New York*, 66 AD3d 84, *affd as mod* 15 NY3d 8 (2010).

<sup>9</sup> State of Our Judiciary 2018, *supra* n 1.

local bar associations, as well as representatives from national organizations concerned with the quality of representation in child welfare proceedings. The Commission also met regularly to discuss the testimony and information provided, to formulate recommendations, and to hear from guest speakers, both from within New York State and nationally (listed in Appendix C). Finally, the Commission conducted and reviewed surveys of clients impacted by CPS agencies and Family Court; attorneys who practice in Family Court; Family Court judges; and the Commissioners.

The overwhelming weight of testimony received concerned child welfare cases, with the ever-present threat of separation of a child from his or her family by the State. Child welfare proceedings in New York are governed primarily by Article 10 of the Family Court Act. The statutory scheme is designed “to establish procedures to help protect children from injury or mistreatment and to help safeguard their physical, mental and emotional well-being[,]” and “to provide a due process of law for determining when the state, through its family court, may intervene against the wishes of a parent on behalf of a child so that his needs are properly met.”<sup>10</sup> Effective representation for parents protects constitutional rights; contributes to the efficient functioning of the child welfare system; and ensures that judges receive the most accurate and complete information upon which to make life-altering decisions about families.<sup>11</sup> Without effective parental representation, courts may only have information about the parent and the parent’s family from CPS, which is most often in an adversarial position to the parent.

Numerous witnesses recounted the enormous costs to families and the State caused by inadequate parental representation in child welfare cases. Children can face unnecessary, prolonged and sometimes permanent separations from their families and communities, resulting in confusion, mistrust, trauma, and an irreparable sense of loss.<sup>12</sup> The State must pay for court-related costs, as well as significant expenses related to foster care, guardianship, and adoption subsidies. Just as the costs of inadequate representation are great, the benefits of meaningful representation are profound: more individualized social services to families in crisis; fewer unwarranted removals of children; more placements of children with relatives; earlier reuniting of children and parents; and faster permanency through guardianship or adoption.<sup>13</sup>

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<sup>10</sup> Family Court Act § 1011.

<sup>11</sup> See e.g. Information Memorandum, *High Quality Legal Representation for All Parties in Child Welfare Proceedings*, Children’s Bureau, Administration for Children and Families, United States Department of Health and Human Services, ACYF-CB-IM-17-02 (Jan. 17, 2017), available at <https://www.acf.hhs.gov/sites/default/files/cb/im1702.pdf>.

<sup>12</sup> See *Nicholson v. Scopetta*, 3 NY3d 357, 379-80 (in deciding whether to remove a child, courts must do more than identify the existence of a risk of serious harm, “[r]ather, a court must weigh...whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal” and “balance that risk against the harm removal might bring... ”); see also *Removal from the Home: Resulting Trauma*, The UPenn Collaborative on Community Integration, available at <http://tucollaborative.org/wp-content/uploads/2017/04/Trauma-The-Impact-of-Removing-Children-from-the-Home.pdf>; Joseph J. Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effect of Foster Care*, 97 *Amer Econ Rev* 1583, 1584 (2007) (concluding that significant benefits from foster care placement appear unlikely for children at the margin of foster care placement), available at [http://www.mit.edu/~jdoyle/fostercare\\_aer.pdf](http://www.mit.edu/~jdoyle/fostercare_aer.pdf).

<sup>13</sup> See e.g. Vivek S. Sankaran, *Using Preventive Legal Advocacy to Keep Children from Entering Foster Care*, 40 *Wm Mitchell L Rev* 1036 (2014); Mark E. Courtney and Jennifer Hook, *Evaluation of the Impact of Enhanced Parental Legal Representation on the Timing of Permanency Outcomes for Children in Foster Care*, *Children & Youth Serv Rev*, Vol. 34(7) (July 2012).

For all these reasons, the Commission decided to focus on child welfare proceedings in this Interim Report and address other aspects of parental representation in our Final Report. Moreover, the longevity of the crisis validates our resolve that prompt action by the State is required to transform child welfare parental representation. Our Final Report will provide further discussion and recommendations regarding measures that can yield high quality, cost-effective representation in all mandated parental representation, at both the trial and appellate levels.

## GUIDING PRINCIPLES

Several fundamental principles emerged from the Commission's discussions, and provide a general framework for our Initial Recommendations regarding how to transform the delivery of parental representation in child welfare cases.

- **Equal access to justice must be provided to parents, children, and their families.** In our Family Courts, the rights and interests of children, parents, and families of limited means are no less important than the rights and interests of more financially advantaged New Yorkers. Moreover, these recommendations are made with regard to all parents in New York, irrespective of their immigration status.
- **The dignity of parents, children, and their families must be respected.** Due regard must be given to the effects of policies, procedures, and actions of government on the quality of parents' interactions with the child protection and Family Court systems, and on the well-being of children and their families.
- **Parental legal representation services must have real value.** Publicly funded legal services for parents must enhance outcomes for children, parents, and families and may advance the efficient and effective functioning of the courts.
- **The Commission's recommendations must be feasible.** Suggested reforms must be practically and fiscally viable.

## THE PARENTAL RIGHT TO COUNSEL IN NEW YORK: A BRIEF HISTORY

An integral part of the Unified Court System established by the State Constitution, the New York Family Court was created in 1962 to replace the Children’s Court.<sup>14</sup> The Family Court Act “defines the conditions on which the Family Court may intervene in the life of a child, parent and spouse,” and gives Family Court judges “a wide discretion,” “grave responsibilities,” and “a wide range of powers for dealing with the complexities of family life.”<sup>15</sup>

Parents have a fundamental liberty interest in the care and custody of their children as a component of the constitutionally protected right to family integrity and autonomy.<sup>16</sup> In child welfare cases, those rights are threatened, as parents face the potential temporary or permanent loss of custody of their child to the State, and sometimes the possibility of criminal charges.<sup>17</sup> Moreover, the legal rights and interests of children in the parent-child relationship are at stake in child welfare proceedings.<sup>18</sup> The New York Court of Appeals has acknowledged the fundamental principle that, just as a parent has a right to rear his or her child, the child has a right to be reared by his or her parent.<sup>19</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>20</sup>

New York has long recognized a parent’s right to counsel in proceedings affecting family relationships. In a pioneering 1972 decision, *Matter of Ella B.*, 30 NY2d 352, the New York Court of Appeals recognized the equal protection and due process rights of indigent parents to assigned counsel in child neglect cases. Three years later, Family Court Act §§ 261, 262, and 1120 codified a broad parental right to counsel. New York’s parental right to counsel has expanded many times and now covers a range of family-related matters.<sup>21</sup> Additionally, numerous provisions throughout Article 10 of the Family Court Act address implementation of the parental right to counsel in child welfare proceedings.<sup>22</sup>

<sup>14</sup> See NY Const, art. VI, § 1 (a); L 1962, ch 686; Family Court Act § 113.

<sup>15</sup> Family Court Act § 141.

<sup>16</sup> See e.g. *Troxel v Granville*, 530 US 57, 65 (2000) (interest of parents in care, custody, and control of their children is perhaps oldest of fundamental liberty interests recognized by the Court); *Parham v. J. R.*, 442 US 584, 602 (1979) (our jurisprudence historically has reflected Western civilization concepts of family as unit with broad parental authority over minor children).

<sup>17</sup> *Matter of Ella B.*, *supra* n 6; Family Court Act § 261.

<sup>18</sup> See e.g. *Troxel v Granville*, *supra*, at 88 (Stevens, J., dissenting) (to the extent parents and families have fundamental liberty interests in preserving their intimate relationships, so do children); *Duchesne v Sugarman*, 566 F2d 817, 825 (2d Cir 1977) (reciprocal rights of both parent and children include children’s interest in not being dislocated from emotional attachments derived from the intimacy of daily association with parent).

<sup>19</sup> *Matter of Bennett v Jeffreys*, 40 NY2d 543, 546 (1976); see also *Rankel v County of Westchester*, 135 AD3d 731, 733 (2016) (parents have a liberty interest in care and custody of their children, and children have a parallel liberty interest in not being dislocated from their family).

<sup>20</sup> *Santosky v Kramer*, 455 US 745, 760 (1982).

<sup>21</sup> See Family Ct Act § 262, Surrogate’s Court Procedure Act § 407, and Judiciary Law § 35 (8).

<sup>22</sup> Family Court Act §§ 1022, 1022-a, 1023, 1024 (b) (iii), 1026 (a) (i), 1027 (a) (i), 1033-a, 1033-b, 1090 (b).

To implement the parental right to counsel, in 1975 the Legislature added parental representation to County Law Article 18-B, thereby requiring counties to shoulder the entire cost.<sup>23</sup> Three decades later, a comprehensive 2006 study, prepared for then Chief Judge Judith Kaye, found that this mandate had created a “severely fractured and under-funded system” of public defense.<sup>24</sup> The list of deficiencies documented by the Kaye Commission included, among others, the absence of clear standards for determining financial eligibility for counsel; the lack of state-wide performance standards and a mechanism to enforce standards; excessive caseloads; lack of adequate support services and training; and minimal client contact and investigation.<sup>25</sup> Although focused exclusively on indigent criminal defense, the Kaye Commission observed 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>26</sup>

Numerous studies and reports dating back at least 30 years have called attention to serious shortcomings in parental representation in child welfare cases.<sup>27</sup> The Commission’s examination of the current system for providing parental representation in child welfare cases confirms that the crisis continues. Fortunately, oases of excellence exist and can guide reform efforts. Since 2007, the New York City Mayor’s Office of Criminal Justice has adopted an interdisciplinary model of parental representation through contracts with the Bronx Defenders, Brooklyn Defender Services, the Center for Family Representation and Neighborhood Defender Services of Harlem. In these organizations, attorneys work with other professionals—including social workers, parent advocates, paralegals, investigators, and experts—to provide effective representation for parents in child welfare cases. This interdisciplinary “family defense” approach is deemed a best

<sup>23</sup> Family Court Act § 262 (c); County Law Article 18-B.

<sup>24</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 TO THE CHIEF JUDGE, pp ii-iv, 15-19 (June 2006).

<sup>25</sup> Leahy, *The Right to Counsel in New York*, *supra* n 8.

<sup>26</sup> Commission on the Future of Indigent Defense Services, Interim Report, p 16, n 27 (Dec. 1, 2005).

<sup>27</sup> See e.g. 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*, NYS Senate Standing Committee on Child Care (Sen. Mary Goodhue, Chair) (National Center on Child Abuse and Neglect, December 1989), available at <https://www.ncjrs.gov/pdffiles1/Digitization/126665NCJRS.pdf>; Roger Green and William Parment, *Losing our Children: An Examination of New York’s Foster Care System* (NYS Assembly, Children and Families Committee and Oversight, Analysis, and Investigation Committee, May 1999) at 29; Mark Green & Child Planning & Advocacy Now (C-PLAN), *Justice Denied: The Crisis in Legal Representation of Birth Parents in Child Protective Proceedings* (May 2000); 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* (March 23, 2001); Child Welfare Advisory Panel, *Advisory Report on Front Line and Supervisory Practice: Special Report On Family Court*, Annie E. Casey Foundation (2000); *Families in Limbo: Crisis in Family Court, Recommendations and Solutions*, Child Welfare Watch (Winter 1999); Sherri Bonstelle and Christine Schessler, *Adjourning Justice: New York State’s Failure to Support Assigned Counsel Violates the Rights of Families in Child Abuse and Neglect Proceedings*, 28 Fordham Urb L J 1151 (2001); Special Child Welfare Advisory Panel, *Advisory Report on Front Line and Supervisory Practice: Special Report On Family Court*, Annie E. Casey Foundation (2000), <http://files.eric.ed.gov/fulltext/ED439189.pdf>; Julia Vitullo-Martin and Brian Maxey, *New York Family Court: Court User Perspectives* (Vera Inst. of Justice (Jan. 2000)); B. Harrow and S. Jacobs, *Report of the Parental Representation Working Group*, 70 Fordham L Rev 399 (2001); Ann Moynihan, et. al, *Foreword, Fordham Multidisciplinary Conference—Achieving Justice: Parents and the Child Welfare System*, 70 Fordham L Rev 287, 309-313 (2001).

practice model by national child welfare experts.<sup>28</sup> The model has been successfully implemented in other states, such as North Carolina, Washington, and Colorado.

Standards of practice are vital to effective parental representation. In 2015, the New York State Office of Indigent Legal Services (ILS) published Standards for Parental Representation in State Intervention Matters (ILS Parental Representation Standards),<sup>29</sup> designed to define the baseline for effective representation of parents in child welfare cases. These comprehensive standards built upon existing guidelines, performance standards, and best practices from around the State and the country, including standards for parental representation adopted by the American Bar Association (ABA)<sup>30</sup> and the New York Bar Association's child representation and mandated representation standards.<sup>31</sup> The Commission supports the client-centered, interdisciplinary, holistic approach embodied in the ILS Standards. Essential elements of such representation include timely entry of counsel and zealous advocacy throughout the representation.<sup>32</sup>

In recent years, State funding and oversight have led to significant improvements in the delivery of indigent criminal defense, while parental representation has been left behind. In 2014, the State settled a lawsuit<sup>33</sup> that charged the State and five named counties with systemic violations of the right of indigent criminal defendants to effective assistance of counsel. The State agreed to pay the costs to implement uniform financial eligibility standards; ensure counsel at arraignment; reduce attorney caseloads; and provide quality control measures and nonattorney professional services, such as investigators, social workers, paralegals, and experts. In 2017, statutory amendments expanded these reforms statewide, with the State to assume responsibility for the costs over a five-year period. ILS was given responsibility for developing and implementing plans for these reforms.<sup>34</sup> The funding and oversight reforms are not applicable to parental representation.

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<sup>28</sup> The federal government's indicators of whether parties are receiving quality, effective representation include whether parents' attorneys have access to other multi-disciplinary professionals as partners, team members or employees. *Indicators of Quality Legal Representation*, Attachment B, State Court Improvement Program (CIP) Program Instruction ACYF-CB-PI-12-02 (Children's Bureau, ACF, US DHHS (Jan. 11, 2012), available at <http://www.acf.hhs.gov/sites/default/files/cb/pi1202.pdf>. See also American Bar Association Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases, Standard 26 (attorneys should engage in case planning and advocate for appropriate social services using a multidisciplinary approach to representation when available), available at [http://www.americanbar.org/content/dam/aba/publications/center\\_on\\_children\\_and\\_the\\_law/parentrepresentation/ABA-Parent-Attorney-Standards.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/center_on_children_and_the_law/parentrepresentation/ABA-Parent-Attorney-Standards.authcheckdam.pdf), and ABA National Project to Improve Parental Representation: An Investment That Makes Sense, available at [http://www.americanbar.org/content/dam/aba/administrative/child\\_law/ParentRep/At-a-glance%20final.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/child_law/ParentRep/At-a-glance%20final.authcheckdam.pdf).

<sup>29</sup> <https://www.ils.ny.gov/files/Parental%20Representation%20Standards%20Final%20110615.pdf>.

<sup>30</sup> American Bar Association *Standards of Practice*, *supra* n 28.

<sup>31</sup> NYSBA, *Standards for Attorneys Representing Children in Child Protective, Foster Care, Destitute Child and Termination of Parental Rights Proceedings* (2015), available at <https://www.nysba.org/StandardsforAttorneysRepresentingChildren>; NYSBA, 2015 Revised Standards for Providing Mandated Representation, available at <https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=44644>.

<sup>32</sup> Preamble, ILS Standards for Parental Representation, *supra* n 29.

<sup>33</sup> *Hurrell-Harring v State of New York* (Sup Ct, Albany Co, Index No. 8866/2007).

<sup>34</sup> Executive Law § 832 (4).

The New York State Bar Association has endorsed a Report by its Committee on Families and the Law that supports State funding for mandated parental representation. The report, approved in April 2018, supports this proposition: “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.”<sup>35</sup>

In accordance with Chief Judge DiFiore’s charge to “determine how best to ensure the future delivery of quality, cost-effective parental representation,”<sup>36</sup> in this Interim Report, the Commission offers a new vision for delivering high quality parental representation to all parents in every part of the State. Given the high stakes involved for families—as well as the courts—and the testimony dramatizing an ongoing crisis, the Commission has determined to focus on parental representation in child welfare cases as an initial matter. We stress that, although we leave for the Final Report a treatment of representation in other types of cases, our recommended structural changes transcend child welfare practice and would improve all parental representation. It is our hope that the State will take immediate steps to begin implementation of our Initial Recommendations.

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<sup>35</sup> Memorandum in Support of State Funding for Mandated Parental Representation, p. 16, Families and the Law Committee, New York State Bar Association (January 2018) (adopted by the New York State Bar Association House of Delegates, April 14, 2018), available at <https://www.nysba.org/familylawreport/>.

<sup>36</sup> State of Our Judiciary 2018, *supra* n 1.

## INITIAL RECOMMENDATIONS

### NO. 1 – TIMELY ACCESS TO COUNSEL

#### RECOMMENDATION

We recommend that parents be timely provided with relevant information about the right to counsel, and that parents be granted access to counsel during a child protective agency investigation and sufficiently in advance of the first court appearance.

The Commission's recommendation that attorneys be made available during a child protective investigation contemplates changing when and how indigent parents access legal representation in child welfare proceedings. Testimony to the Commission, and our own research, convince us that families, the child welfare system, and Family Courts will benefit when parents have timely access to counsel.

This recommendation cannot be implemented under the current practice, whereby a parent's access to counsel is contingent on the filing of a petition by CPS and the parent's appearance in court. In the next section, "State Oversight and Infrastructure," we detail a proposal for revamping the way parental representation is delivered that does not hinge on a parent's appearance in court. Giving parents representation when it matters – before they appear in court - is consistent with principles of equal protection and due process; can prevent unnecessary and prolonged separation of children from their parents; and can mitigate the disruption and trauma that accompanies State intervention into the family. Timely access to counsel may also help reduce the disproportionate percentage of children of color in New York's foster care system.<sup>37</sup>

In recommending that parents have access to counsel during the investigation stage of a child welfare proceeding, the Commission is keenly aware of the responsibility of CPS agencies to investigate alleged maltreatment to protect children. In that regard, the New York State Defenders Association (NYSDA) testified that: "Fears that timely representation for parents will prevent child welfare agencies from protecting children in state intervention matters are misplaced. At-

<sup>37</sup> Written testimony of Joyce McMillan ("When looking at the number of removals from communities of color vs. white communities it is clear that communities of color are targeted by the child welfare system...The lack of timely and full legal representation for parents involved with CPS is indicative of a system that continues to disrespect and disregard the value of family in select communities..."); see also Written testimony of the Legal Aid Society, Juvenile Rights Division, New York City (discussing racial inequities in the child welfare system).

torneys...can play a vital role...for parents at a time of crisis and even prevent the situation from escalating to the removal of a child from the home.”<sup>38</sup> Notably, Alan Sputz, Deputy Commissioner of the NYC Administration for Children’s Services (ACS), agreed that early discussions among counsel produce valuable benefits—such as identifying potential family resources, formulating feasible visiting arrangements, and enhancing productive outcomes at the first court appearance—so that initial release or placement orders are based on full and accurate information.<sup>39</sup>

Any parent faced with an investigation by CPS and the possibility of their child being taken into custody by the State would understand the need for legal advice and counsel in that moment. Rather than an offer of assistance to the family, some parents experience a CPS investigation as a prosecution—a search for parental wrongdoing, as several witnesses explained. For example, Angeline Montauban, a parent who regained her child from foster care after five years, testified: “Once ACS comes into your life...they are literally prosecuting you. They are...finding reasons why they are in your life [and]...why they should keep your child in foster care basically.”<sup>40</sup> Jeannette Vega, a parent affected by the child welfare system and Training Director at Rise Magazine, summarized parents’ experiences as follows:

*I did a little focus group at work and spoke to parents who had the investigation phase of a child welfare case, and they felt so defeated. You have people coming into your home, and they are so intrusive, they come in, tell you what they are going to do, what you are going to do with your family, and unless...you are privileged and have money to afford a private attorney, you don’t get that...before it goes to court, these workers are investigating and...talking to people and just going within your community, talking to your neighbors, your children’s school, their doctors. It is so intrusive, and as a parent you don’t know what you can and cannot do at this point in time of a case...it is just frustrating that we cannot go to the court, and say...this is happening, child welfare is intruding in my life, and you cannot get assistance...unless you can afford a private attorney.<sup>41</sup>*

Parents who are financially able invariably seek legal representation when CPS initiates an investigation. However, New York currently does not provide representation to parents of limited means during the investigation stage of a child welfare proceeding. In fact, as numerous wit-

<sup>38</sup> Written testimony of the New York State Defenders Association. See also Oral testimony of Tehra Coles, Litigation Supervisor, Center for Family Representation (describing Project Engage, a pilot program between the New York City Administration for Children’s Services (ACS) and the Center for Family Representation (CFR), involving pre-petition parental representation: “[T]he ACS investigative process was neither stalled nor interfered with. ACS continued its investigation and communicated regularly with the CFR social worker about ACS concerns and what needed to be done to preserve the safety of the children.”)

<sup>39</sup> Written testimony of Alan Sputz, Deputy Commissioner, New York City Administration for Children’s Services.

<sup>40</sup> Oral testimony of Angeline Montauban, New York City Public Hearing.

<sup>41</sup> Oral testimony of Jeannette Vega, New York City Public Hearing.

nesses testified, and case law confirms,<sup>42</sup> indigent parents are sometimes not provided with legal representation at critical stages when it is constitutionally promised—during court hearings at which a judge decides whether to remove a child into government custody or to continue an extrajudicial CPS removal that has already occurred.

For example, Robert Convissar, Administrator of the Assigned Counsel Program in Erie County, identified an alarming situation that would occur prior to establishing an “Attorney of the Day” program (for which attorneys are not paid): “[R]emands were often heard in the absence of legal counsel for the parents. *Children were literally taken away from parents in absence of legal counsel.*”<sup>43</sup> Kate Woods, Deputy Director of Operations for Legal Assistance of Western New York (LAWNY) testified: “Often, the most critical moment in any Article 10 proceeding is the removal hearing. The outcome of that hearing—whether or not a child is taken from his or her home—dictates the tone of all of the litigation that follows.” Where Ms. Woods practices, the vast majority of removal hearings take place before the petition is filed. Further, parents are given little notice of the hearing and are sometimes unable to attend. “In those instances where the parents are present, they are without counsel...[and] parents have requested counsel at a removal hearing and [have] been denied. The impact on their due process rights cannot be overstated.”<sup>44</sup> Data provided to the Commission by the Office of Court Administration indicates that, during the period 2015 through 2018, in 2,521, or 12% of cases in which a child was removed at an initial appearance, a parent was present in court but was not accompanied by counsel. The data confirms the urgent need to ensure that parents have representation in advance of the first appearance in court.

In 1990, amendments to the Family Court Act were enacted to ensure that indigent parents involved with CPS could obtain publicly funded representation before the commencement of a court proceeding. Family Court Act §§ 1021 to 1024 and 1026 require that parents be given written notice of their right to counsel and instructions for obtaining a free lawyer whenever a child is removed before a court proceeding is initiated. The notice requirement, enacted as a result of a comprehensive study of child welfare proceedings in New York’s Family Courts, aims to facilitate parents’ access to counsel at “critical stages” of CPS intervention before a court petition is filed.<sup>45</sup>

Despite these statutory measures, the prevalent practice is that parents are not informed of their right to counsel unless and until CPS files a petition. Moreover, in many cases, even if a parent is informed of the right to counsel upon appearing in court, he or she may not actually meet with the assigned lawyer until much later, after the issuance of orders that significantly impact the family. Carla Palumbo, President and CEO of the Legal Aid Society of Rochester, told the Com-

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<sup>42</sup> See e.g. *In re Hannah YY*, 50 AD3d 1201 (2008) (adjudication of neglect reversed; respondent was not advised of her right to counsel until after removal hearing was over, at which point Public Defender’s office was assigned to represent her).

<sup>43</sup> Written testimony of Robert Convissar, Administrator, Erie County Assigned Counsel Program (emphasis in original).

<sup>44</sup> Written testimony of Kate Woods, Deputy Director of Operations, LAWNY.

<sup>45</sup> *Child Protection and the Family Court: A Study of the Processes, Procedures, and Outcomes*, supra n 27.

mission that: “One of the most significant issues is parents’ timely access to counsel...parents are not meaningfully informed of their right to counsel until their first court appearance, and therefore, do not appear with counsel until at least several weeks after the filing of the initiating petition.”<sup>46</sup> An assistant public defender in Ontario County noted that the practice of delaying notice of the right to counsel until the parent’s first court appearance, combined with the application process to determine financial eligibility, results in a multiple-week delay before counsel is able to meet with, and properly advise, the client.<sup>47</sup>

An assigned counsel attorney who represents both parents and children in Delaware County said: “There is no pre-petition access or procedure for access to counsel in advance of a first court appearance in child protective cases; usually, prior to the first appearance, an attorney for the child will have been assigned, but never assigned counsel [for the parent].”<sup>48</sup> She added that this is particularly problematic when, after a parent has asked to have counsel assigned, the court proceeds to ask DSS if it seeks any temporary relief. “Sometimes, having solicited DSS’ wishes, the court, despite [the] respondent having invoked her right to counsel, will grant a temporary order on the basis that the petition contains ‘serious allegations.’”<sup>49</sup>

Often, many significant events affecting the family have already occurred by the time an assigned lawyer contacts the parent. A similar finding was made by the State Senate Standing Committee on Child Care almost three decades ago,<sup>50</sup> and the Commission concludes that the situation persists today. For example, Emma Ketteringham, Managing Attorney of the Family Defense Practice at the Bronx Defenders testified that:

*Attorneys often meet their clients after they have already been in contact with City agencies for weeks, even months, or sometimes years. They have already been interviewed by caseworkers and detectives and asked to cooperate further. They have been asked to make their children available for inspection, interviews, and medical evaluations, and asked to submit to evaluations by mental health professionals. They have been asked to attend services, to have their children attend services, and to accede to the supervision of their homes. They have been given numerous other directives to show up at conferences, meetings, drug tests or other events, with little understanding of the context or potential consequences.<sup>51</sup>*

<sup>46</sup> Written testimony of Carla Palumbo.

<sup>47</sup> Written testimony of Chelsea Carter, Ontario County Public Defender’s Office.

<sup>48</sup> Written testimony of Larisa Obolensky; see also written testimony of Mark Funk, Monroe County; Kate Woods, LAWNY; New York Legal Assistance Group; Chelsea Carter, Ontario County; Cassandra E. Louis, Policy and Advocacy Association, The Children’s Village.

<sup>49</sup> Written testimony of Larisa Obolensky.

<sup>50</sup> *Child Protection and Family Court: A Study of Processes, Procedures, and Outcomes*, pp. 131-132, *supra* n 27 (noting 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> Written testimony of Emma Ketteringham, Family Defense Practice, Bronx Defenders.

The Commission heard from numerous other witnesses that, during the critical investigation period, parents are not informed of their rights, leaving them vulnerable to being misinformed and misunderstood, often divulging information that is used against them, including information not relevant to the families' current situation.<sup>52</sup> Many parents are unaware that the CPS caseworker has the ability, and often the intent, to file a neglect or abuse case against them. Potential litigants and their children are interviewed without the advice of counsel; and their statements are then used as evidence in emergency removal hearings and in neglect proceedings. Often caseworkers do not address the family's individualized needs - despite child welfare agencies' obligation to provide services to avoid the placement of children into foster care or to employ reasonable efforts to make possible the prompt, safe return of children to their families.<sup>53</sup>

Research demonstrates that separation of children from their families, even for short periods of time, exacts an enormous emotional cost for parents and children, especially children placed in stranger foster care. These costs endure for the children, who are less able to succeed as adults because of their experiences in foster care.<sup>54</sup> Judges responding to the Commission's survey noted that, even when attorneys are present at the removal hearing, they are often not prepared, as they have just met their client. Access to counsel by parents well in advance of that first hearing will give attorneys sufficient time to prepare and to provide judges with the most comprehensive information possible, lessening the possibility of unwarranted family separations.

Timely access to counsel benefits parents and their children, parent attorneys, the courts—and taxpayers. Benefits to the government of timely legal representation by competent, well-resourced counsel can be quantified. Two New York City organizations that provide parental representation in child welfare cases—Bronx Defenders and the Center for Family Representation—provided particularly compelling testimony. In 2018, Bronx Defenders advised hundreds of parents during investigations by the Administration for Children's Services (the local social services agency in New York City). Forty-three percent of these parents were never charged with abuse or neglect. Where abuse and/or neglect petitions were filed, nearly half of the families remained together throughout the course of the case. In more than one-fourth of the cases, if removal occurred, the children were temporarily placed with relatives or friends suggested by the parents and known to the children. In only 16 of the 381 cases—four percent—were children placed in foster care with strangers.<sup>55</sup>

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<sup>52</sup> See e.g. written testimony of Joyce McMillan; New York State Defenders Association; Rhonda Weir; Lauren Shapiro, Family Defense Practice Director, Brooklyn Defender Services; Rylan Ritchie, Albany County Public Defender, Family Court Unit; The Children's Law Center, New York City; Coalition of the Suffolk County Bar, Nassau County Bar and Suffolk County Matrimonial Bar; and Russell Fox, Managing Attorney, Attorneys for Children Unit, Buffalo Legal Aid Bureau.

<sup>53</sup> 42 USC §§ 671 (a) (15) and 672 (a); see Oral testimony of Joan Kohout, Family Court Judge, Monroe County at Rochester Public Hearing, p 35, ln 24, p 36, ln 1 ("I put together the case plans on my cases because every single dispositional plan looks the same.")

<sup>54</sup> Joseph J. Doyle, Jr., *Child Protection and Adult Crime: Using Investigator Assessment to Estimate Causal Effects of Foster Care*, 116(4), J. of Pol. Econ. 746 (2008), available at [http://www.mit.edu/~jjdoyle/doyle\\_jpe\\_aug08.pdf](http://www.mit.edu/~jjdoyle/doyle_jpe_aug08.pdf).

<sup>55</sup> Written testimony of Emma Ketteringham, Family Defense Practice, Bronx Defenders.

Further, the Bronx Defenders reported that, through its privately funded Healthy Mothers, Healthy Babies (HMHB) Program, it prevented needless removals of newborns from their mothers during the critical period of attachment after birth. The result of that program during FY 2018 was that of the 81 newborns born, 58 (72%) remained at home with their mothers, and 17 (20%) were placed with caretakers the mothers chose. Only six babies born to mothers working with HMHB (8%) were placed in foster care with strangers.<sup>56</sup>

In 2004 and 2005, the Center for Family Representation (CFR) and the Administration for Children’s Services (ACS) participated in a pilot program called “Project Engage,” which was funded by the State Office of Children and Family Services. ACS connected parents with CFR during the initial investigation stages.<sup>57</sup> CFR reported that parents were “more willing to engage in services because they had their own independent team of advocates to support them, helping them to decide or to push back on the seemingly unreasonable request, or to understand when a request wasn’t quite as unreasonable as they thought.”<sup>58</sup>

In 2014, the statewide average length of a stay for a child in foster care was 29 months, according to CFR. However, for that organization, the period was less than five months.<sup>59</sup> As a result of the timely entry of CFR attorneys and interdisciplinary teams in the case, the organization could work closely with the family and the social services agency to identify appropriate services and assist the family with accessing those services. In about half of the cases, CFR kept children out of foster care entirely. As of 2017, CFR estimated that, since it was established in 2002, its services have reduced the NYC cost of foster care by more than \$37 million. While the minimum cost of keeping one child in foster care in New York is \$30,000 per year, CFR services cost only \$6,500 per family, regardless of the number of children.<sup>60</sup>

Judges and parents’ attorneys responding to the Commission’s surveys overwhelmingly favored pre-court access by parents to legal representation. Several judges observed that representation for parents during CPS investigations could discourage filings in questionable cases and promote early access to services to support the family. One judge commented: “This is crucial. I believe it could avoid a substantial number of cases that are filed. When caseworkers and potential respondents are not getting along, cases tend to be filed.” The judge added that, once a respondent was represented, numerous cases were quickly resolved.

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<sup>56</sup> *Id.*

<sup>57</sup> See written testimony of CFR (“Project Engage was a unique partnership between CFR and ACS that supported parents in Community District 10, an area that in 2004 had a high volume of child protective investigations and removals. Essentially, in a small number of cases, ACS agreed to refer a parent to CFR’s interdisciplinary staff at the point in an investigation when an “elevated risk” was identified by ACS workers investigating a family. At that time, one of the conferences employed by ACS was referred to as an ‘Elevated Risk Conference’ and was designed to bring a parent, his or her community supports and any providers already working with a family together. The goal of the conference was to determine if a removal would be necessary or could be avoided. Of the 48 families supported by Project Engage, in 38, there was no child protective removal and no filing in Family Court.”)

<sup>58</sup> Oral testimony of Tehra Coles, Litigation Supervisor, Center for Family Representation, New York City Public Hearing.

<sup>59</sup> CFR, 2014 Report to the Community.

<sup>60</sup> CFR, *Our Results*, <https://www.cfrny.org/about-us/our-results/>.

Parents' attorneys responding to our survey supported earlier access to counsel for myriad reasons, including the need to protect substantive and procedural due process rights; the need to help parents make informed decisions about the wisdom or inadvisability of cooperating with an investigation; and the benefits of assisting families to access services. They also noted success in preventing petitions from being filed altogether, and in the event a proceeding is initiated, the increase in court efficiency that flows from timely access to counsel.

National and state standards of practice support the Commission's recommendation for making representation available to parents at the earliest possible stage of CPS intervention.<sup>61</sup> The NYSBA 2015 Revised Standards for Providing Mandated Representation (NYSBA 2015 Revised Standards) recommend pre-court, investigation stage representation in both criminal and Family Court matters, and urge that systematic procedures should be established to ensure that prompt mandated representation is available particularly "where a child has been removed by a governmental agency from the person's home."<sup>62</sup> Those standards were recently revised to provide that: "Effective representation includes representation during both the pre- and post-petition stages of a Family Court case, including, but not limited to representation in emergency removal hearings and advocacy for the provision of social work, counseling, mental health, and other services."<sup>63</sup>

In November 2018, the federal Children's Bureau included parental representation in its information memorandum discussing primary prevention approaches to prevent child maltreatment and avoid unnecessary parent-child separations.<sup>64</sup> According to the memorandum, the Detroit Center for Family Advocacy—which provides pre-petition, interdisciplinary parent representation—is among particularly effective or promising approaches to support families through primary prevention.<sup>65</sup>

The New York State Defenders Association stressed that representation during a CPS investigation is "timely," not "early," representation.<sup>66</sup> Timely access to counsel for parents in child welfare proceedings may: contribute to more expeditious provision of appropriate, individualized services to families; assist in placing children with relatives, rather than in foster care with strangers; prevent unnecessary removals of children; and avoid unnecessary court proceedings.

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<sup>61</sup> See e.g. ILS Standards for Parental Representation, Standard I, *supra* n 29; ABA Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases, Standard 4, *supra* n 28; and *High Quality Legal Representation for All Parties in Child Welfare Proceedings*, pages 6-7, Children's Bureau, ACF, US DHHS (Info Memo ACYF-CB-IM-17-02, Jan. 17, 2017), *supra* n 11.

<sup>62</sup> New York State Bar Association 2015 Revised Standards, Standards B-3 and B-4, *supra* n 31; see also *People v Rankin*, 46 Misc 3d 791 (2014) (indigent individuals cannot receive quality representation where assignment of counsel is delayed pending judicial appointment of counsel).

<sup>63</sup> Memorandum in Support of an Amendment to the Revised NYSBA Standards for Providing Mandated Representation, NYSBA Committee on Mandated Representation (March 26, 2018), available at <http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=87408>.

<sup>64</sup> *Reshaping Child Welfare to Focus on Strengthening Families Through Primary Prevention of Child Maltreatment and Unnecessary Parent-child Separation*, at 8, ACYF-CB-IM-18-05, Children's Bureau, ACF, US DHHS (Nov. 16, 2018).

<sup>65</sup> *Id.*, at 19-20.

<sup>66</sup> Written testimony of the New York State Defenders Association.

The testimony of Russell Fox, Managing Attorney, Attorneys for Children Unit, Buffalo Legal Aid Bureau, succinctly captures the importance of representation for parents during all critical stages of CPS intervention.

*In sum, for both parents and children, timely access to counsel would help to level the playing field between families at risk and the vastly greater resources and expertise of agency investigators, thereby promoting fairness and accuracy in these critical determinations. Our current system too often generates inaccurate information on the basis of slipshod investigations, results in protracted court proceedings by attorneys who cannot be prepared to properly represent parents and children at the typical abrupt arraignment, and creates unnecessary trauma for the children it is intended to protect.<sup>67</sup>*

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<sup>67</sup> Written testimony of Russell Fox (emphasis omitted).

## NO. 2 – STATE OVERSIGHT AND INFRASTRUCTURE

### RECOMMENDATION

We recommend the establishment of a State Office of Family Representation (the Office) to provide oversight of parental representation. That Office, in turn, would oversee representation in child welfare cases by institutional offices and well-resourced attorneys to ensure the delivery of client-centered, interdisciplinary, holistic parental representation throughout the state.

The current county-based system for delivering parental representation fails to ensure high quality representation throughout the State. In the absence of State investment, the caliber of representation received by parents is largely dependent on the wealth, priorities, and political will of the counties. There are no enforceable statewide standards governing the qualifications, training or performance of parental representation attorneys. There is neither an organizational structure to enforce standards nor a mechanism to provide non-attorney professional services for attorneys representing parents. For the aforementioned reasons, the county-based approach precludes quality parental representation statewide.

Testimony to the Commission highlighted the need for a professional culture that emphasizes the value of effective representation; enforceable performance and caseload standards; regular training in substantive law and skills; and resources needed for interdisciplinary and holistic representation. One experienced appellate lawyer stated that many 18-B attorneys assigned to represent Family Court litigants lack appellate training and expertise. “They may be familiar with family law and may have represented the litigant in the proceedings in the trial court, but do not know the basics of appellate practice.”<sup>68</sup> An assistant public defender noted that: “The additional support of social workers, investigators and paralegals would be instrumental to assist not only in identifying [service] providers, but guiding our clients on how to access these providers, and attending meetings with them.”<sup>69</sup> This same witness expressed the need for independent interpreting services in child welfare proceedings. “We are required to review a multi-page petition written in English with our clients and discuss their rights, including hearings to return chil-

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<sup>68</sup> Written testimony of Kelly Egan, Rural Law Center Appeals Program.

<sup>69</sup> Written testimony of Maritza Buitrago, Monroe County Public Defender’s Office.

dren home, placement and visitation resources, as well as their right to testify and present witnesses.”<sup>70</sup> A New York City institutional provider noted that:

*It is critical that attorneys have access to expert[s] as they prepare for and conduct pre-trial hearings and fact-finding trials. While we have been able to allocate some funding to secure expert testimony, much more work could and should be done to ensure that the court hears all of the relevant information needed to make sure that allegations of abuse and neglect are legitimately founded.<sup>71</sup>*

Another New York City institutional provider stated:

*It has become increasingly difficult to find experts who will accept the [County Law §] 722c rate to testify in child protective cases...While we have been fortunate to have had some success in retaining highly qualified experts, we frequently have to pay over the 722c rate. In our experience, experts are reluctant to agree to assist us in assessing and defending a case (especially when testimony is likely), when we are unable to pay them at the rate they'd like.<sup>72</sup>*

The Commission concludes that a centralized, independent State Office of Family Representation must be established to ensure meaningful parental representation statewide. The responsibilities of such Office would be broad and would include:

- distributing State funding;
- determining the optimal mix of delivery models for trial and appellate parental representation;
- creating and implementing uniform client financial eligibility criteria and procedures;
- developing, supporting, and monitoring compliance with attorney caseload and performance standards;
- developing and promoting uniform attorney qualification and evaluation criteria and procedures;
- coordinating training programs;

<sup>70</sup> *Id.*

<sup>71</sup> Written testimony of Michelle Burrell, Neighborhood Defender Services of Harlem.

<sup>72</sup> Written testimony of Center for Family Representation.

- developing and supporting mentoring and consultation programs for trial and appellate attorneys;
- managing resources necessary for effective legal representation;
- advocating for reforms necessary to ensure that standards can be achieved; and
- managing relationships among relevant stakeholders, including governmental bodies, community organizations, and the client community.

Child welfare law is a specialized and complex area of practice. Effective representation in this area must be client-centered, interdisciplinary, and holistic; and it should be overseen by a State entity to ensure consistent quality statewide. The Commission concludes that the best chance of successful implementation of its recommendations is through statewide expansion of institutional providers and attorneys specializing in child welfare law. The use of attorneys dedicated to, and proficient in, such representation would improve the quality, efficiency, and cost-effectiveness of parental representation statewide.

As previously discussed, the interdisciplinary approach, delivered through an institutional office, is seen as the most effective model for providing child welfare parental representation. Given the ever-present need for specially trained conflict attorneys to represent other parties, as well as to manage caseload overflow, the Commission recommends that the Office have the authority to create institutional offices and contract with private attorneys. Contracts that incorporate basic qualifications, training, and oversight requirements will allow for the development of an experienced and specialized group of attorneys. Such contracts will help to attract and retain talent, because attorneys and social workers will be able to rely on a steady and reliable income. Moreover, contracts are a means to provide ongoing support for attorneys in their practice, enforce performance standards and caseload caps, and assure accountability for standards through review of past performance. The presenters from North Carolina and Washington discussed with us the various benefits of using contracts, and we are persuaded that this approach is a viable one for parental representation in New York.

Implementation of our recommendations also requires that attorneys have easy access to necessary resources. The Commission therefore recommends that the Office establish Regional Offices to provide appellate representation; coordinate training and practice support for trial and appellate attorneys; and provide nonattorney professional services, such as experts, social workers, parent advocates, investigators, paralegals, and interpreters. These regional offices would efficiently elevate the level of parental representation by consolidating and managing resources on a regional basis for attorneys representing parents in child welfare matters.

The New York State Bar Association, the National Association of Counsel for Children, the American Bar Association (ABA), and various witnesses endorsed the creation of a statewide oversight entity to enhance parental representation. The ABA recommended a statewide oversight entity that:

*[I]ncreases the support and accountability for all counties, while not unduly restricting those counties that are already providing excellent representation for parents...This statewide office should be charged with creating and enforcing Standards of Practice; helping to increase the number of lawyers who specialize in this practice; overseeing equitable caseloads and compensation; spreading the interdisciplinary model; and providing consistent training across the state. Each of these elements is essential to high quality legal representation.<sup>73</sup>*

The State Bar Committee on Families and the Law concurred: “Statewide standards, state monitoring and oversight, coordination of training, supervision and non-attorney professional assistance resources are essential to ensure uniformly high quality parental representation throughout the state.”<sup>74</sup> The National Association of Counsel for Children, which was involved in the development of Colorado’s recently established Office of Respondent Parents’ Counsel, stated that the delivery of high-quality legal services “requires an infrastructure which provides attorneys with the time, training, compensation, and resources necessary for effective representation, and a system of statewide funding and oversight to safeguard its success.”<sup>75</sup>

There are numerous examples of successful implementation of the interdisciplinary model recommended by the Commission. The ABA reported that 23 states have implemented some version of the model, in at least one court or county. Further, according to the ABA:

*New York City continues to be a leader in the field on how to best serve clients under this model . . . there is no doubt that this model provides the highest quality of representation for parents and leads to the best outcomes for families. Teaming social workers and parent mentors with lawyers is a practice that is spreading across the country and should be replicated throughout all of New York.<sup>76</sup>*

Directors of the statewide parental representation programs in North Carolina (Wendy Sotolongo) and Washington (Joanne Moore) shared with the Commission their experiences with implementation of the interdisciplinary approach in their states. Ms. Sotolongo stressed the value of establishing a holistic, multidisciplinary approach in North Carolina. Ms. Moore said that social workers and parent advocates add “enormous value” to the representation of parents in child welfare cases in Washington. A study of the Washington program showed that it reduced time

<sup>73</sup> Written testimony of American Bar Association, Government Affairs Office.

<sup>74</sup> Written testimony of New York State Bar Association, Committee on Families and the Law.

<sup>75</sup> Written testimony of National Association of Counsel for Children.

<sup>76</sup> Written testimony of American Bar Association, Government Affairs Office.

to permanency.<sup>77</sup> Ms. Moore reported that family reunifications in Washington increased from 32% before program implementation to 57% in fiscal year 2018. As a result, that state has enjoyed huge savings in costs related to foster care and adoption subsidies.

Since 2007, New York City has employed an interdisciplinary approach that is viewed nationally as the ideal model for parental representation in child welfare cases.<sup>78</sup> As previously noted, through contracts with New York City's Mayor's Office of Criminal Justice, most such representation is provided by four nonprofit organizations: the Center for Family Representation; Brooklyn Defender Services, Family Defense Practice; The Bronx Defenders, Family Defense Practice; and the Neighborhood Defender Service of Harlem, Family Defense Team.<sup>79</sup> The New York City interdisciplinary model uses a team of skilled professionals devoted to helping parents navigate the complex and interrelated social services and Family Court systems.<sup>80</sup> In collaboration with social work staff, an attorney helps parents deal with the social services and court systems and provides legal advocacy both in and out of court. The social worker assesses the strengths and needs of the family, provides case and crisis management, and accesses appropriate, individualized services. The parent advocate—ideally someone who has successfully navigated the child welfare system—provides emotional support, accompanies the parent to meetings, assists with challenging interactions as needed, and helps the parent to stay motivated and engaged with services.<sup>81</sup>

The Commission does not take a position on whether a new entity should be created to serve as the State Office of Family Representation or whether an existing entity should serve that purpose. The central point is that, whatever entity plays that role, its independence is crucial to promoting clients' best interests, and must remain at the center of the Office's mission as it car-

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<sup>77</sup> Mark E. Courtney and Jennifer L. Hook, *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*, Vol. 34(7) (July 2012).

<sup>78</sup> Martin Guggenheim and Susan Jacobs, *A New National Movement in Parental Representation*, 47 *Clearinghouse Rev* 44 (2013) (*National Movement*); Heather Appel, *New Influx of Lawyers Coming to Family Court*, *City Limits* (April 16, 2007), available at <http://citylimits.org/2007/04/16/new-influx-of-lawyerscoming-to-family-court/>. For a discussion of the development of the interdisciplinary family defense model, see Chris Gottlieb, Martin Guggenheim, and Madeline Kurtz, *Discovering Family Defense: A History of the Family Defense Clinic at New York University School of Law*, 41 *NYU Rev of Law & Soc. Change* 539 (2017), available at <https://socialchangenyu.com/review/discovering-family-defense-a-history-of-the-family-defense-clinic-at-new-york-university-school-of-law/>.

<sup>79</sup> See Report on the Fiscal Year 2015 Executive Budget for MOCJ, The Council of the City of New York (May 20, 2014).

<sup>80</sup> See ILS Parental Representation Standards, Standard G (Model of Representation – Multidisciplinary Practice); see generally Guggenheim and Jacobs, *National Movement*, *supra*, n 78, at 36-46; University of Michigan Law School, *Detroit Center for Family Advocacy Pilot Evaluation Report*, 7/2009-6/2012, p. 2 (February 2013); see also Vermont Parental Representation Center, *Program Model*, <http://vtprc.org/program-model/>; Diane Boyd Rauber, *From the Courthouse to the Statehouse: Parents as Partners in Child Welfare*, *Child Law Practice*, Vol. 28, No. 10 (ABA, Dec. 2009) (describing parent advocate programs operating around the country), available at [http://www.hunter.cuny.edu/socwork/nrcfcpp/info\\_services/parent-partner1.pdf](http://www.hunter.cuny.edu/socwork/nrcfcpp/info_services/parent-partner1.pdf); Diane Boyd Rauber, *Working With Parent Partners to Achieve Better Case Outcomes for Families*, *Child Law Practice*, Vol. 28, no. 11 (ABA, Jan. 2010) (providing suggestions to parents' attorneys for working with parent advocates and parents), available at [http://www.hunter.cuny.edu/socwork/nrcfcpp/info\\_services/parentpartner2.pdf](http://www.hunter.cuny.edu/socwork/nrcfcpp/info_services/parentpartner2.pdf).

<sup>81</sup> *National Movement*, *supra*, at n 78.

ries out its duties.<sup>82</sup> Considerations of feasibility suggest that housing the Office within ILS, under the guidance of the Indigent Legal Services Board, might prove to be the most efficient path to improving parental representation. The ABA observed that the oversight tasks essential to ensuring the delivery of quality parental legal representation “could logically fall” to ILS, which has “begun to play a leadership role in child welfare, or a new entity could be created. Either way, it is important that the oversight role is clearly articulated and the entity has independence from the judicial branch.”<sup>83</sup>

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<sup>82</sup> American Bar Association, *Ten Principles of a Public Defense Delivery System, Principle One* (2002) (“The public defense function, including the selection, funding, and payment of defense counsel, is independent. The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel. To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems. Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense.”), available at: [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_tenprinciplesbooklet.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf)

<sup>83</sup> Written testimony of American Bar Association, Government Affairs Office. See also written testimony of Mark Funk, Conflict Defender, Monroe County (“The Monroe County Conflict Defender’s Office has the highest respect for the New York State Office of Indigent Legal Services (ILS). They have done a remarkable job in overseeing the State-wide expansion of the *Hurrell-Harring* settlement. ILS should be given the resources to see that similar reforms are implemented in Family Court.”); written testimony of Robert Convissar, Erie County Assigned Counsel Program Administrator (“We wholeheartedly endorse the concept that the New York State Office of Indigent Legal Services, similar to the responsibilities they have under the *Hurrell-Harring* settlement and subsequent statewide implementation now just beginning, should be empowered and funded by the State to address the numerous issues which face the Family Courts and which are being considered by this august Commission.”).

## NO. 3 - UNIFORM ELIGIBILITY STANDARDS AND PRESUMPTION OF ELIGIBILITY

### RECOMMENDATION

We recommend that the proposed Office of Family Representation develop uniform standards of eligibility for assigned counsel that would apply in all Family Court proceedings, and would include a presumption of eligibility for counsel in child welfare proceedings, to be established by legislation.

Currently, there are no statewide eligibility criteria and procedures applicable to Family Court proceedings. Indeed, testimony before the Commission, as well as responses to our surveys of attorneys and judges, demonstrated that criteria and procedures for determining financial eligibility vary even within the courthouse in counties where there is more than one Family Court judge.<sup>84</sup>

Uniform standards of eligibility for assigned counsel are necessary to prevent inconsistent decisions and inadequate protection of the right to counsel.<sup>85</sup> The standards for determining financial eligibility for publicly funded representation in Family Court proceedings should be easily understandable, equitable, efficient, and fair. In child welfare proceedings, we recommend a presumption of eligibility that would be codified in legislation. This may require an amendment to the Social Services Law to provide counsel with access to necessary records, in addition to an amendment to section 262 of the Family Court Act regarding the right to counsel.

Numerous witnesses reported inconsistencies in financial eligibility determinations in Family Court and the inappropriate denial of counsel.<sup>86</sup> Lance Salisbury, Administrator of the Tompkins and Schuyler Assigned Counsel Program, said that: “We can often assign someone for the criminal matters but not for the family court matter unless a judge overrides our decision. Judges

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<sup>84</sup> See, e.g. written testimony of Sanctuary for Families; Lois Schwaeber, The Safe Center; Bridget Burke, The Legal Project; Darryl Bloom, Cattaraugus Public Defender; Mark Funk, Monroe County Conflict Defender; Oral testimony of Joan Kohout, Judge, Monroe County Family Court, Rochester Public Hearing.

<sup>85</sup> See New York State Bar Association, Task Force on Family Court: Final Report, at 87 (2013) (urging that assigned counsel eligibility determinations need to be examined because there is a high likelihood that some litigants are denied for reasons that are difficult to quantify uniformly).

<sup>86</sup> Written testimony of New York State Defenders Association.

have commented to us regularly how unfair a process this is for the parties before the court.”<sup>87</sup> Similarly, Sanctuary for Families reported that judges are inconsistent in determining financial eligibility, and many litigants with modest incomes are found ineligible.<sup>88</sup> According to The Legal Project, two individuals in virtually the same situation can have very different results when they apply for assigned counsel, if they live in different counties.<sup>89</sup>

Responses to the Commission’s surveys confirmed the use of widely varying criteria for determining eligibility of litigants. Some respondents reported that a percentage of the U.S. Federal Poverty Guidelines (FPG) is used (varying from 125% to 250%). Others said that a general review of the person’s financial situation is used. Still others reported use of a detailed financial application.

The New York State Defenders Association suggested that the existing ILS Criteria and Procedures for criminal cases be made applicable to all parental representation. Since County Law § 722 uses the same standard for the appointment of counsel in all cases – “financially unable to obtain counsel” - it follows that the same general criteria and procedures should be used for eligibility determinations in all mandated representation matters.<sup>90</sup> Eligibility decisions for Family Court litigants, like eligibility decisions for individuals charged with a crime, must be equitable and fair. Uniform standards will also save the time and resources of the parties, the courts, and others involved in the eligibility determination process. As articulated by the New York State Bar Association Committee on Families and the Law:

*Effective and prompt provision of counsel to parents is critical for one facing a loss of liberty or parental rights, and counsel should be assigned whenever one demonstrably possesses inadequate financial ability to hire an attorney. Gross differences between jurisdictions and among providers that result in a deprivation of the right to counsel in some jurisdictions must be addressed. Fair and reasonable criteria for determining presumptive eligibility for assigned counsel that allow for discretionary factors in the interest of justice should be established with some uniformity.<sup>91</sup>*

The Commission recommends that the proposed Office of Family Representation be responsible for issuing statewide standards for determining financial eligibility of litigants in Family Court cases. The Office could develop such standards in Family Court cases in conjunction with ILS, which has already promulgated comprehensive statewide eligibility standards for criminal court

<sup>87</sup> Written testimony of Lance Salisbury.

<sup>88</sup> Written testimony of Sanctuary for Families Center for Battered Women’s Legal Services.

<sup>89</sup> Written testimony of The Legal Project.

<sup>90</sup> Written testimony of New York State Defenders Association.

<sup>91</sup> Written testimony of New York State Bar Association Committee on Families and the Law.

matters, pursuant to the *Hurrell-Harring Settlement*.<sup>92</sup> As ILS noted in its *Hurrell-Harring* eligibility criteria and procedures report, the agency has the authority under Executive Law § 832 (3) (c) to issue the same for Family Court matters, and “intends to issue separate criteria and procedures relating specifically to determining eligibility for mandated representation in Family Court...Such criteria and procedures will build upon and be consistent with these criteria and procedures, but will be tailored as needed to Family Court realities.”<sup>93</sup>

In child welfare proceedings, a presumption of eligibility for counsel, codified in legislation, would ensure that parents are represented, upon request, during a CPS investigation, and in any event, well in advance of their first appearance in court. The proposed Office of Family Representation should be vested with the authority to enforce this presumption.

Tied by necessity to our recommendation regarding Timely Access to Counsel, a presumption of eligibility for all parents in state intervention matters is essential to better protect their right to meaningful representation. One witness noted that, during an ongoing CPS investigation, because parents do not have access to counsel until after a petition is filed, he or she “makes admissions, signs releases, and often times, even consents to placement of their children in foster care without having been properly advised of the consequences.”<sup>94</sup> Another witness reported: “I have read transcripts of removal hearings where parents have repeatedly asked the Court for counsel. They have been told ‘no, no. We will get to that when we’re done with this bit of business’; that, of course, being the removal of their children.”<sup>95</sup>

Moreover, most parents involved in child welfare proceedings cannot afford a lawyer. The Commission therefore recommends that standards for determining eligibility in Family Court matters include a rebuttable presumption of eligibility for counsel for all parents involved in child welfare proceedings, whether a petition has been filed, or the parents are being investigated by CPS and a petition has not yet been filed. As one witness explained:

*Parents coming to court at risk of having their children removed from their home or being excluded from their home are rarely notified of their right to an attorney. The shock of this process does not come with any warnings or advice to bring their most recent paystubs and tax returns. If we are not going to require any notice of rights upon the first encounter with CPS, then justice demands affording litigants some benefit of the doubt regarding their financial qualifications for assigned counsel.*<sup>96</sup>

<sup>92</sup> ILS Criteria And Procedures For Determining Assigned Counsel Eligibility: Final (April 2016) (ILS Eligibility Standards), <https://www.ils.ny.gov/files/Hurrell-Harring/Eligibility/Final%20Eligibility%20Standards/Eligibility%20Criteria%20and%20Procedures%20FINAL%20FULL%20April%204%202016.pdf>.

<sup>93</sup> *Id.*, at 6.

<sup>94</sup> Written testimony of Chelsea Carter, Ontario County Public Defender’s Office.

<sup>95</sup> Oral testimony of Kate Woods, Rochester Public Hearing, p. 6, lns 17-22.

<sup>96</sup> Written testimony of Joel Serrano, Secretary, Assigned Counsel Association of Queens Family Court.

A rebuttable presumption of eligibility for all child welfare involved parents would make access to counsel simple and immediate. The ILS criminal eligibility standards include certain presumptions. Applicants are presumptively eligible for counsel if: their net income is at or below 250% of the Federal Poverty Guidelines; they are confined in a mental health institution; they are receiving public assistance; or they have been deemed eligible for assignment of counsel in another matter within the last six months.<sup>97</sup> Notably, Family Court Act § 1118 applies a presumption of eligibility for appellate assigned counsel based on a previous finding of eligibility for assigned counsel at the trial level.

ILS reports that indigent criminal defense providers have found that the use of presumptions saves time and resources. Practitioners from North Carolina and Washington, who met with the Commission and who oversee parent representation in their states noted that using such a presumption means that neither court staff nor attorneys need to use precious time on the first day a parent comes to court to engage in potentially burdensome and time-consuming assessments. Rather, they are able to focus on preparing for the first appearance, and the parent need not wait hours, days or weeks to receive representation.

The ILS eligibility standards for criminal defense require: “Counsel shall be assigned at the first court appearance or immediately following the request for counsel, whichever is earlier.”<sup>98</sup> The commentary to that provision states that, “an eligibility determination should be made as soon as possible for a person who ‘reasonably believes that a process will commence that could result in a proceeding where representation is mandated.’”<sup>99</sup> The same reasoning applies with equal force to child welfare proceedings, as acknowledged by the New York State Bar Association’s recent revision of the 2015 Revised Standards to specify: “Effective representation includes representation during both the pre- and post-petition stages of a Family Court case.”<sup>100</sup> Our recommendation of a legislative presumption of eligibility will ensure that child welfare involved parents receive representation without delay.

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<sup>97</sup> ILS Eligibility Standards, at 20-24.

<sup>98</sup> *Id.*, at 41.

<sup>99</sup> *Id.*, at 43, quoting New York State Bar Association 2015 Revised Standards, Standard B-3.)

<sup>100</sup> See Memorandum in Support of an Amendment to the NYSBA Standards for Providing Mandated Representation, NYSBA Committee on Mandated Representation (March 26, 2018), *supra*, n. 63.

## No. 4 - CASELOAD STANDARDS

### RECOMMENDATION

We recommend that the State fund a study to determine appropriate maximum caseload standards for attorneys representing parents in Family Court proceedings. Until such a study has been completed, we recommend that caseload maximum for attorneys representing parents in child welfare cases of 50 to 60 clients per attorney be established by legislation or rule.

In New York, parents' attorneys carry excessive caseloads, resulting in inadequate representation and denial of parents' due process rights. This systemic deficiency impedes judges' ability to make fully informed, just decisions for families.

At the outset, we note that parent attorneys typically represent clients, at both the trial and appellate levels, in all categories of Family Court mandated representation cases, and often, in criminal court cases as well. The Commission therefore recommends that the State fund a study to determine the relative weights of all categories of representation under Family Court Act § 262 to ensure that attorneys with mixed case dockets have manageable caseloads. State funding for parental representation, as discussed in the next section of this Interim Report, should be sufficient to ensure that attorneys providing parental representation have manageable caseloads.

Effective representation in child welfare cases demands active out-of-court and in-court advocacy, and regular communication with the client, family members, and other professionals including CPS caseworkers.<sup>101</sup> Interlocutory appeals may be advisable in some cases, particularly in child welfare cases, where they are available as of right, pursuant to Family Court Act § 1112 (a). Other proceedings such as custody, guardianship, family offense or paternity proceedings, may be initiated over the course of a child welfare case, further complicating a client's circumstances and needs. Counsel may need to address collateral issues that have a direct bearing on a par-

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<sup>101</sup> See e.g. New York City Administration for Children's Services, Guidelines for Working with Attorneys for Parents and Children, Guidance #2012/01 (Oct. 24, 2012) ("It is the policy of Children's Services to encourage communication regarding families' and children's needs, the provision of individualized services, and optimal family visiting plans. Attorneys for parents and children can work with caseworkers to facilitate the sharing of information that will allow us to meet families' needs. This...protocol is intended to provide guidance to Children's Services child protective specialists and provider agency case planners to enhance communication with attorneys for parents and children.")

ent's ability to continue or resume parenting. Child welfare cases generally require more court appearances and last longer than other types of Family Court cases.

Testimony from parents, attorneys, and judges confirmed that excessive caseloads prevent the delivery of effective parental representation. Unmanageable caseloads often prevent attorneys from carrying out even basic lawyering tasks, with negative effects on the attorney-client relationship, judicial case management and decision-making, and outcomes for children. For all these reasons, the Commission's vision for transforming parental representation in New York cannot be accomplished without sound caseload standards.

Parent attorneys across the State labor under unmanageable caseloads.<sup>102</sup> Our State lacks a caseload cap for parental representation and a statewide mechanism to monitor caseloads. Thus, attorneys providing parental representation are often "over-worked and overwhelmed."<sup>103</sup> Incredibly high caseloads often cause delays in case disposition, keeping families in high-conflict proceedings for longer than necessary. "Such high caseloads for a litigation attorney mean that the attorney is nearly always in court, with limited days in the office during which they can meet with clients, or have settlement conferences with other counsel."<sup>104</sup>

Because both trial and appellate attorneys are burdened by excessive caseloads, in many cases, they may not preserve the clients' right to appeal and promptly and effectively perfect the appeals that are taken.<sup>105</sup> Unmanageable caseloads "prevent the appropriate pursuit of interlocutory appeals which are often the only available mechanism for preventing irreparable harm to families while a Family Court case makes its way slowly through the system."<sup>106</sup> One appellate attorney commented that: "[I]t seems that as time goes on, there are fewer and fewer attorneys willing to take assigned counsel appeals in the Fourth Department. My caseload is large, and I have had to reject assignments because I am overburdened with work."<sup>107</sup>

<sup>102</sup> See, e.g., written testimony of the New York State Bar Association Committee on Families and the Law (in some jurisdictions, attorneys have ongoing caseloads that exceed 100 or more cases, "making it impossible to provide effective representation without undue hardship."); written testimony of the Monroe County Public Defender (staff attorneys are routinely assigned over 350 new cases per year (approximately 250 new clients), on top of already pending cases); written testimony of the Monroe County Conflict Defender (family law staff handled an average of 286 cases per attorney in 2017); written testimony of Albany County Public Defender Office (3-4 attorneys handled 999 cases in 2016, and 1,062 cases in 2017). The Albany office reported that the numbers "very likely do[] not accurately reflect the larger number of actual individual matters assigned to the public defenders office in family court" because the case tracking system used by the office was not intended for use in Family Court. Written testimony of the Albany County Public Defender Family Court Unit. The Commission notes that family court caseload numbers translate into a much heavier actual workload, since each client typically has multiple petitions, such as custody, family offense and violation petitions that are connected to the child welfare case. Moreover, attorneys' workloads encompass not only parental representation cases, but also cases they may handle in other areas, such as indigent criminal defense or private cases.

<sup>103</sup> Written testimony of Coalition of the Nassau and Suffolk County Bar Associations and the Suffolk County Matrimonial Bar Association ("There are currently no procedures in place to ensure that counsel are not assigned to more cases than are appropriate. This results in those attorneys who are still willing to accept assigned counsel cases being unable to devote the necessary time and resources to those cases. Under the present system, attorneys who do accept assigned counsel cases are over-worked and overwhelmed with the number of cases they carry.")

<sup>104</sup> Written testimony of New York Legal Assistance Group, New York City.

<sup>105</sup> Written testimony of Linda Gehron, President and CEO, Hiscock Legal Aid Society, Syracuse, New York.

<sup>106</sup> *Id.*

<sup>107</sup> Letter to Commission from Cara Waldman.

Judges confirmed the impact of high caseloads on the quality of representation attorneys can provide to parents. These overburdened attorneys rarely: file written motions to further a client's goals; file *ex parte* motions for funding for experts and other nonattorney professional services under County Law § 722-c; or take interlocutory appeals, obtain stays pending appeal, and perfect meritorious appeals.

One provider explained that increasing caseloads mean that attorneys have less time to file motions, to read discovery in advance to assess defenses, to reach out to opposing counsel to propose settlement of cases, to think long term about their cases, and to strategize with social workers to resolve family problems. The provider stated: "Attorneys can only act in a defensive posture and are left with insufficient time outside of court to resolve cases through strategic planning and negotiation. This type of practice is not sustainable and results in higher attrition rates, causing caseloads to grow even further."<sup>108</sup>

This courtroom culture leaves little time for attorneys to engage in this critical out-of-court legal and social work advocacy that is often equally, if not more, important for the family than in-court work. Attorneys report that they are in court all day, every day, leaving little time for client contact and other important aspects of parental representation. "Meetings with clients occur between court appearances, during lunchtime, or briefly after work. Telephone calls are returned before or after court, and often in a rushed manner."<sup>109</sup>

Numerous witnesses said that parents' attorneys do not have enough time to meet with all of their clients. Thus, they do not "learn about the underlying issues, develop and enhance the attorney-client relationship, and strategize with their clients on how to best obtain the desire[d] result [and]...are forced to triage their cases to the detriment of a significant percentage of their clients."<sup>110</sup> Establishment of a professional, trusting, lawyer-client relationship is impossible in this environment. As the American Bar Association indicated, in these circumstances, "[l]awyers with more clients are unable...to form relationships with clients in which the client trusts the lawyer and believes the lawyer has a true duty of loyalty to him or her."<sup>111</sup>

Typically, parents meet their assigned attorney for the first time right before their case is called, often as they are walking into the courtroom. There is no time to meet with clients after the appearance either, as the lawyer's next case is usually called immediately. A former client who now works as an advocate for parents stated that common concerns among parents are that their attorneys only speak to them minutes before each court appearance; there is no communication between court dates; and attorneys leave court without explaining what happened.<sup>112</sup> Another client noted that his experience has been that assigned counsel attorneys are "always in court

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<sup>108</sup> Written testimony of Brooklyn Defender Services.

<sup>109</sup> Written testimony of Tim Donaher and Adele Fine, Monroe County Public Defender's Office.

<sup>110</sup> *Id.*

<sup>111</sup> Written testimony of Thomas Susman, American Bar Association, Governmental Affairs Office.

<sup>112</sup> Written testimony of Joyce McMillan.

and never accessible.”<sup>113</sup> The New York Legal Assistance Group reported that their office receives hundreds of calls per month from low-income New Yorkers seeking representation in family and matrimonial proceedings. Many litigants are “dissatisfied with their Assigned Counsel because they are unable to speak with or meet with their attorney except in the few moments before their case is called.”<sup>114</sup>

Court operations are affected by high attorney caseloads. Hon. Robert Mulroy, writing in his capacity as President of the New York City Family Court Judges Association, told the Commission that the “crushing caseloads” of assigned counsel, and the resulting lack of adequate time to confer with their clients, often mean that the court is unable to call and hear cases in a prompt, efficient manner.<sup>115</sup> “It also means that trials may have to be adjourned or trial dates truncated, resulting in multiple court appearances that could otherwise be avoided if the attorneys were not required to divide their time among so many different parts for so many different cases.”<sup>116</sup> New York Legal Assistance Group indicated that, because of high assigned counsel caseloads, cases are not timely settled and are adjourned repeatedly; some cases go to trial unnecessarily; and other cases are delayed because the assigned counsel attorney is held up in other court parts. This situation “wastes the litigants’, the Court’s, and the other attorneys’ time.”<sup>117</sup>

The impact of excessive attorney caseloads on the lives of parents and families beyond the courtroom can be devastating. Judge Mulroy described litigants waiting for hours at the courthouse before meeting with their new attorney for the first time. He observed that:

*These are hours that litigants frequently cannot spare due to work obligations and child care responsibilities. The litigants must wait around to meet with the assigned attorneys for their case to be called or recalled, adding to their own frustration and to the overcrowding of our already bustling waiting areas. There have even been instances where no attorney was available at all and the litigant was told to return another day.*<sup>118</sup>

Similarly, New York Legal Assistance Group reported that: “Litigants (families) are often unable to maintain stable employment, access services, or have any sense of stability if they are engaged in protracted litigation...On many occasions, [they] have acquiesced to an unfavorable

<sup>113</sup> Written testimony of Joshua Colistra.

<sup>114</sup> Written testimony of New York Legal Assistance Group; see also written testimony of Legal Information for Families Today (LIFT) (“Litigants express to us that they have difficulty communicating with or asking questions of their attorneys - they may have difficulty reaching their attorney at an office telephone number, for example.”)

<sup>115</sup> Written testimony of Hon. Robert Mulroy.

<sup>116</sup> Id.

<sup>117</sup> Written testimony of New York Legal Assistance Group.

<sup>118</sup> Written testimony of Hon. Robert Mulroy.

settlement, or simply withdrawn their petition, because they could not continue to come to court with no end in sight.”<sup>119</sup>

The conditions described demonstrates that the constitutional promise of meaningful and effective representation for parents is all too often not delivered. As one provider explained: “An attorney who has a caseload that precludes that attorney from providing effective representation to the attorneys’ clients effectively deprives those clients of counsel.”<sup>120</sup> The value of publicly paid legal services will be significantly enhanced by appropriate caseload caps and the State funding needed to comply with the caps.

Reasonable caseloads make possible many significant benefits. Neighborhood Defender Services of Harlem reported that manageable caseloads allow attorneys to dedicate the time needed on each case and client, and lead to better outcomes. Powerful and successful advocacy requires significant motion and trial practice; and that is only possible when caseloads are manageable.<sup>121</sup> Center for Family Representation pointed out that manageable caseloads permit attorneys to pursue Family Court Act §§ 1027 and 1028 hearings on short notice; make frequent motions related to visits, services and placement; pursue interim appeals; and engage in contested litigation on numerous issues. Moreover, out of court, manageable caseloads allow attorneys to meet with, and be responsive to, clients. Social work staff can accompany clients to conferences, public benefits appointments, and administrative hearings related to Medicaid, housing or other entitlements. These activities contribute to preventing or shortening foster care.<sup>122</sup>

The Commission’s proposed caseload cap of 50 to 60 pending clients at a time is endorsed by the New York City institutional providers, who have more than 10 years’ experience providing parental representation in child welfare cases.<sup>123</sup> Joanne Moore, the presenter from Washington, reported a target of no more than 65 parents per attorney; Wendy Sotolongo, the presenter from North Carolina, suggested an ideal caseload limit of no more than 60; and the American Bar Association (ABA) recommended a cap of 50 to 60 pending clients. The ABA reported that its recommendation derives “from consultation with experts on this topic throughout the country,” and is based on the current best understanding among national experts.<sup>124</sup> The Commission understands that caseload ranges must take into account many factors, including the experience

<sup>119</sup> Written testimony of New York Legal Assistance Group.

<sup>120</sup> Written testimony of Tim Donaher and Adele Fine, Monroe County Public Defender’s Office.

<sup>121</sup> Written testimony of Neighborhood Defender Services of Harlem.

<sup>122</sup> Written testimony of Center for Family Representation.

<sup>123</sup> Written testimony of Center for Family Representation, Bronx Defenders, Brooklyn Defender Services, and Neighborhood Defender Services of Harlem.

<sup>124</sup> Written testimony of American Bar Association, Government Affairs Office. See e.g. ABA, Indicators of Success for Parental Representation, at ii-iii (describing results of evaluation of a Texas pilot project setting a cap of 50 clients and finding that after six months, “the model had already improved the quality of representation for parents,” and resulted in reduced continuances and delays). See also ILS Model Upstate Parental Representation Office Request for Proposals (“Given the unique complexities involved in state intervention cases, caseload limits are essential to permit attorneys to comply with their ethical responsibilities. This RFP therefore contemplates an office average of no more than 50 clients per attorney at any given time.”), available at <https://www.ils.ny.gov/files/Parent%20Representation/RFP-Upstate%20Model%20Parental%20Representation%20Office%20Grant%20032017.pdf>.

and expertise of the attorney; the nature, complexity, and duration of the case; the collateral issues to be addressed; and the level of support available from nonattorney professional services.<sup>125</sup>

In making a specific caseload recommendation for child welfare cases, the Commission recognizes that many attorneys handling such cases also provide representation in other types of Family Court cases. The Commission therefore recommends that the State fund a study to determine the relative weights of all categories of Family Court Act § 262 cases to ensure that attorneys with mixed case dockets have manageable caseloads, and therefore the time to provide effective representation for all clients. The Commission notes that a paradigm for the type of rigorous study needed to develop sound caseload standards already exists in the caseload study commissioned by ILS pursuant to the *Hurrell-Harring* Settlement.<sup>126</sup>

While we recommend a rigorous study to further assess the appropriate cap for all mandated parental representation cases, a study will take time. Therefore, as to our immediate focus on improving child welfare parental representation, our recommended cap of 50 to 60 pending clients should be promptly codified in state statute or rule so that providers have a basis for determining the funding necessary to achieve compliance with the caseload cap. We note that caseload caps already exist for attorneys representing children.<sup>127</sup> Further, pursuant to the *Hurrell-Harring* Settlement reforms and their statewide expansion pursuant to 2017 legislation,<sup>128</sup> the State is providing funding to counties to ensure compliance with caseload caps by attorneys representing indigent criminal defendants.

In accordance with our next recommendation regarding State funding, the Commission urges that the State provide the funding necessary to ensure compliance with the recommended caseload caps for child welfare cases. This includes sufficient funding not only for attorneys, but also for nonattorney professional services and support staff. The importance of statewide caseload standards and State funding was articulated by one witness, who observed that the quality of representation provided to a parent “should not depend upon the geography of where they live in New York and the willingness of local leaders to meet their responsibilities here - it is an equity issue that needs to be met by having the state bear the burden of these processes it mandates to the counties.”<sup>129</sup>

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<sup>125</sup> See e.g. ILS Model Upstate Request for Proposals, *supra*, n. 124, at 13; 22 NYCRR § 127.5 (Workload of Attorney for the Child).

<sup>126</sup> ILS, *A Determination of Caseload Standards*, ILS, *A Determination of Caseload Standards pursuant to § IV of the Hurrell-Harring v State of New York Settlement* (Dec. 2016), available at <https://www.ils.ny.gov/files/Hurrell-Harring/Caseload%20Reduction/Caseload%20Standards%20Report%20Final%20120816.pdf>.

<sup>127</sup> 22 NYCRR § 127.5.

<sup>128</sup> Executive Law § 832 (4); ILS, *A Determination of Caseload Standards*, *supra* n. 126.

<sup>129</sup> Written testimony of Lance Salisbury, Tompkins and Schuyler County Assigned Counsel Program.

## No. 5 – STATE FUNDING

### RECOMMENDATION

We recommend that the State pay for all costs associated with parental representation in child welfare proceedings to ensure quality representation and eliminate disparities among localities.

Successful implementation of the Commission’s recommendations requires a reliable stream of funding sufficient to ensure the effective representation of parents in child welfare cases. The counties have not been able to provide such funding. Furthermore, inherent conflicts militate against county responsibility for both funding and oversight of parental representation. The caliber of parental representation should not depend on the fiscal constraints, priorities, and political will of localities. For these reasons, the State should assume full responsibility for the costs of such representation. For fiscal feasibility, such State responsibility could be phased in over a short period of time. The Commission emphasizes that its recommendation for full State funding must be provided in a manner that does not adversely affect those jurisdictions and programs that already provide comprehensive, high quality, effective representation.

Currently, the costs of providing parental representation falls to the counties under County Law Article 18-B. Because data is currently not collected about the amounts spent statewide on parental representation, it is impossible to specify exact costs. Nevertheless, the New York State Association of Counties stressed that: “Counties cannot afford to take on any new or increased function, no matter how important, without the State meeting the accompanying fiscal costs. Counties do not have the revenue streams nor the reserves to add any additional service costs.”<sup>130</sup>

Indisputably, the State is equally responsible for both criminal court and Family Court mandated representation. As explained by the New York State Bar Association in its Memorandum in Support of State Funding for Mandated Parental Representation:

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<sup>130</sup> Written testimony of New York State Association of Counties.

*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.<sup>131</sup>*

Effective representation of parents in child welfare cases requires an interdisciplinary team approach, with lawyers working closely with various non-attorney professionals. Other than in New York City, which has adopted an interdisciplinary approach, parents' attorneys generally do not have the resources necessary to provide meaningful representation.

The Nassau Legal Aid Society observed that many parents remain at risk of losing their children to foster care because their lawyers lack adequate resources, and urged that funding should be provided to hire social workers, parenting coordinators, and independent forensic experts.<sup>132</sup> A lawyer with the Albany County Public Defender noted that: "Our office has a very limited budget for things like experts, social workers, etc....we may be able to get funding for a case or two a year, and that is if we can find a professional in the field who will accept a county voucher pending payment."<sup>133</sup> The attorney further noted that, in cases involving allegations of neglect or abuse, "it would be extremely valuable to have the ability to call our own expert to interview [clients]," and that while the county has a psychologist who conducts family assessments and makes recommendations, the parents' attorneys lack an equivalent resource.<sup>134</sup>

Similarly, the Monroe County Public Defender explained that effective representation is impossible without sufficient support staff, social workers, parent advocates, and investigators, because parents' success or failure in reunifying with their children is dependent on having such resources available to help the parents successfully navigate the various administrative bureaucracies associated with CPS.<sup>135</sup> Without State funding, such resources will not be available statewide for parental representation. As one attorney explained, in State intervention cases, parents' contacts with workers is limited to DSS employees or contractors of DSS advancing State, not parents,' goals. "We need to have service providers whose goal is helping the parents address whatever issues have contributed to the state intervention."<sup>136</sup>

<sup>131</sup> New York State Bar Association, Memorandum in Support of State Funding for Mandated Parental Representation, *supra* n 35, at 16.

<sup>132</sup> Written testimony of Nassau Legal Aid Society.

<sup>133</sup> Written testimony of Rylan Ritchie, Albany County Public Defender Office, Family Court Unit.

<sup>134</sup> *Id.*

<sup>135</sup> Written testimony of Tim Donaher and Adele Fine, Monroe County Public Defender's Office.

<sup>136</sup> Written testimony of Barbara Kelly, Allegany County Public Defender.

The Commission concludes that direct State funding for the costs of child welfare parental representation, through the proposed Office of Family Representation, is the most efficient and effective way to ensure meaningful parental representation in State intervention cases. We note that other jurisdictions provide State funding for family defense, including Arkansas, Colorado, Massachusetts, New Jersey, North Carolina, Oregon, Utah, and Washington.<sup>137</sup> The Commission is grateful to the directors of the North Carolina and Washington programs, Wendy Sotolongo and Joanne Moore, respectively, who shared with us valuable information about the parental representation programs in their states.

We recognize that State assumption of all parental representation costs in child welfare cases will require a significant investment. In accordance with the Guiding Principle that its recommendations must be feasible, the Commission suggests that the State's assumption of fiscal responsibility be phased in over 3 to 5 years, with careful oversight and modifications for efficiency. This approach would have an immediate impact not only on the quality of parental representation, but also, over time, on the bottom line for New York taxpayers.

The New York State Bar Association has adopted the position that: "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."<sup>138</sup> The Commission concludes that State investment in parental representation in case welfare cases is critical to true reform and will lead to less family separations and more efficient and cost-effective representation. There is no justifiable basis for distinguishing between legally required criminal defense and parental representation. Both forms of representation have a profound impact on constitutional rights of indigent New Yorkers and require reform. Given the lessons learned from the *Hurrell-Harring* litigation, there is every reason to act now to bring reform to parental representation.

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<sup>137</sup> Angela Burton, *Reimagining Family Defense*, 20 CUNY L Rev 1, 18 (2016).

<sup>138</sup> New York State Bar Association, Memorandum in Support of State Funding for Mandated Parental Representation, *supra* n. 35, at p. 4.

## No. 6 – COMPENSATION RATES

### RECOMMENDATION

We recommend that the hourly rates for assigned attorneys be increased to \$150 per hour, and a mechanism for periodic review and adjustment be instituted.

The hourly compensation rate under Article 18-B of County Law has not changed since 2004. At that time, rates for assigned counsel were increased to \$75 per hour.<sup>139</sup> The maximum compensation was set at \$4,400, with the proviso that additional compensation may be paid upon a showing of extraordinary circumstances. The current rate is woefully insufficient to compensate attorneys for the important service they provide to New Yorkers of limited means. Moreover, the inadequate compensation rate has led to a growing shortage of qualified attorneys, adding to the problem of excessive caseloads and the resulting poor quality of representation for clients, as numerous witnesses testified.

Hon. Robert Mulroy, President of the NYC Family Court Judges Association, reported: “It is evident that the need to increase the number of attorneys on the assigned counsel plan is pressing, if not desperate...the best way to accomplish this is by increasing both the hourly rate...as well as the maximum amount that can be charged per case absent extraordinary circumstances.”<sup>140</sup> Robert Convissar, Administrator of the Erie County Assigned Counsel Program indicated that: “The inability to recruit effects [sic] our current panel members, forcing some to leave because they get ‘burned out’ handling excessive caseloads of this critically important work.”<sup>141</sup> The New York Legal Assistance Group stated that the current compensation discourages attorneys from “spending the same amount of time on an assigned case as they might any other case because they will not be paid for their time spent. Rather, it incentivizes accepting a high volume of cases and necessitates picking up private pay cases to supplement their earnings in order to make a living.”<sup>142</sup>

The Commission’s stance on the compensation rate is consistent with the position taken by the New York State Bar Association. A report by the Association’s Criminal Justice Section and Com-

<sup>139</sup> County Law § 722-b

<sup>140</sup> Written testimony of Hon. Robert Mulroy.

<sup>141</sup> Written testimony of Robert Convissar, Administrator of the Erie County Assigned Counsel Program.

<sup>142</sup> Written testimony of New York Legal Assistance Group.

mittee on Mandated Representation advocated an increase in assigned counsel rates.<sup>143</sup> The resolution approved by the State Bar House of Delegates urged enactment of legislation to increase rates for all mandated representation, including parental representation. The NYSBA proposal calls for an annual review process and adjustment, using a formula similar to the one employed under the federal Criminal Justice Act, and for the increased rates to be at State expense, not through unfunded mandates to the localities. Increasing assigned counsel rates is a State legislative priority for the Association for 2019. The State Bar declared that rates of compensation to all assigned counsel should be increased to prevent the exodus of practitioners from representation panels across the State, since a shortage of such lawyers undermines the administration of justice in New York State.<sup>144</sup>

## CONCLUSION

In this Interim Report, the Commission on Parental Legal Representation has focused on the area of child welfare law. We have concluded that New York State's responsibility for providing constitutionally and statutorily required parental representation will best be achieved through a statewide system that is fully funded by the State and administered through a State entity. This will ensure quality, cost-effective parental representation in every locality. Thus, the Commission recommends that a State Office of Family Representation be created to oversee parental representation statewide.

For child welfare cases, the Office should be authorized and funded to oversee a network of specialized providers and Regional Offices to ensure the delivery of client-centered, interdisciplinary, holistic representation throughout the State. The Commission envisions that the Office will make information about the child welfare system and Family Court processes widely available; that parents who come into contact with CPS will immediately be given notice of their right to counsel and how to obtain counsel; and that counsel will be available to those parents, upon request, at every critical stage of CPS intervention, including during the investigation stage. To facilitate timely entry of counsel, the Commission recommends a presumption of eligibility for counsel, codified in legislation, for all parents in child welfare proceedings so that counsel will be promptly provided at all critical stages.

Caseload caps on the number of State intervention cases to be carried by each attorney must also be implemented. The Commission recommends that attorneys providing parental representation handle a maximum number of 50 to 60 child welfare clients with active cases at any given time. The Commission also recommends that a rigorous caseload study be undertaken by

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<sup>143</sup> New York State Bar Association, Criminal Justice Section, *The Need to Increase Assigned Counsel Rates in New York*, available at <http://www.nysacdl.org/wp-content/uploads/2018/06/Assigned-Counsel-Report.pdf>.

<sup>144</sup> We note that the compensation rates for nonlawyer professionals were increased effective as of January 1, 2018, pursuant to an Administrative Order of the Chief Administrative Judge of the Courts. (AO/446/17, December 19, 2017).

the proposed Office of Family Representation to determine caseload standards for mixed docket parental representation practice, including the relative weights of all categories of cases set forth in Family Court Act § 262. Further, as has already been done for attorneys for children and attorneys for criminal defendants, caseload standards for parent attorneys should be codified by statute or rule. Finally, to attract and retain excellent attorneys, assigned counsel rates must be raised.

New York State has adopted, in Executive Law §§ 990-991, “family policy guidelines,” designed 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.” Those 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.” As Chief Judge DiFiore recognized in creating this Commission, the quality of representation received by parents inevitably impacts the well-being of their children. Properly implemented, with full State funding and oversight, the Initial Recommendations set forth in this Interim Report promise to have a profound impact on the quality of life of children in New York.

*As pointed out in a recent article in the American Bar Association’s Child Law Practice Online: “While courts have focused on what they should do, they’ve paid far less attention on how they should do it, particularly as it relates to how parents experience the child welfare process. As a result, parents frequently feel left out of the process, feeling even more hopeless about their prospects of getting their children back after the court process begins.”<sup>145</sup> Collectively, the Commission’s Initial Recommendations are a blueprint for a comprehensive plan to transform how New York provides representation for parents involved with the child welfare system. We recognize that, because the problems we address are so deeply entrenched and have been ignored for as long as mandated representation has been promised, the solution must be far-reaching and enduring. To that end, while our Initial Recommendations focus on immediate changes aimed at improving child welfare representation, we stress that all aspects of the system are interrelated. Our recommendations represent the beginning, not the end, of New York’s journey toward more effective legal services for parents in all Family Court mandated representation cases.*

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<sup>145</sup> Vivek S. Sankaran, *My Name is Not “Respondent Mother,”* ABA Child Law Practice Online, June 6, 2018, available at [https://www.americanbar.org/groups/child\\_law/resources/child\\_law\\_practiceonline/january-december-2018/my-name-is-not-respondent-mother/](https://www.americanbar.org/groups/child_law/resources/child_law_practiceonline/january-december-2018/my-name-is-not-respondent-mother/).

## APPENDIX A: MEMBERSHIP OF THE COMMISSION

### Chair:

Hon. Karen K. Peters\* Former Presiding Justice of the Appellate Division, Third Department, Chair of The New York State Permanent Judicial Commission on Justice for Children

### Members:

Hon. Kevin M. Carter	Family Court, Erie County
Hon. Craig Doran	Administrative Judge, 7th Judicial District
Hon. Gayle P. Roberts	Acting Supreme Court Justice, Supreme Court Youth Part, New York County
Hon. Jeanette Ruiz	Administrative Judge, NYC Family Court
Hon. Kathie E. Davidson	Administrative Judge, 9th Judicial District
Hon. Dean Kusakabe	Family Court, Kings County
Hon. Margaret T. Walsh	Justice, Supreme Court, 3rd Judicial District
Hon. Theresa Whelan	Supervising Judge, Suffolk County Family Court and Surrogate, Suffolk County
Barbara J. Kelley, Esq.	Allegany County Public Defender
Linda Gehron, Esq.	President & CEO, Hiscock Legal Aid Society
Michele Cortese, Esq.	Executive Director, Center for Family Representation
Tasha Lloyd, Esq.	Associate Counsel, Justice Initiatives, NYC Mayor's Office of Criminal Justice
Prof. Sarah Rogerson	Director, Immigration Law Clinic, Albany Law School
Prof. Martin Guggenheim	New York University School of Law
Susan B. Lindenauer, Esq.	Chair, NYS Bar Association Committee on Families and the Law
Jeannette Vega	Parent Advocate Training Director, RISE Magazine
Michael Hein	Ulster County Executive (Commissioner until February 7, 2019)
Michael Williams	Chief Clerk, Family Court, Suffolk County

### Advisors:

Angela Olivia Burton, Esq.*	Director of Quality Enhancement, Parent Representation, New York State Office of Indigent Legal Services
Lucy McCarthy, Esq.*	Parental Representation Attorney, New York State Office of Indigent Legal Services
Cynthia Feathers, Esq.*	Director of Quality Enhancement, Appellate and Post-Conviction Representation, New York State Office of Indigent Legal Services
Betsy Ruslander, Esq.	Director, Office of Attorneys for Children, NYS Supreme Court, Appellate Division, Third Department
William C. Silverman, Esq.	Partner, Proskauer Rose LLP

### Counsels:

Janet Fink, Esq.*	Deputy Counsel, NYS Office of Court Administration
Shane T. Hegarty, Esq.*	Asst. Deputy Counsel, NYS Office of Court Administration

### Ex Officio

Hon. Edwina G. Mendelson	Deputy Chief Administrative Judge for Justice Initiatives
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\*Denotes members of the Drafting Committee for the Commission on Parental Legal Representation Report

## APPENDIX B: PUBLIC HEARINGS WITNESS LIST AND ADDITIONAL WRITTEN STATEMENTS

### NEW YORK STATE UNIFIED COURT SYSTEM COMMISSION ON PARENTAL LEGAL REPRESENTATION PUBLIC HEARINGS WITNESS LIST:

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#### Rochester - September 13, 2018

Kate Woods, Esq., Deputy Director of Operations, Legal Assistance of Western New York  
 Honorable Joan S. Kohout, Monroe County Family Court  
 Mark Funk, Esq., Monroe County Conflict Defender

#### New York County - September 27, 2018

Michael Miller, Esq., President, New York State Bar Association  
 Susan B. Lindenauer, Esq., Chair, New York State Bar Association Committee on Families and the Law  
 Joyce McMillan, Former Program Director, Child Welfare Organizing Project  
 Jeanette Vega, Training Director, RISE  
 Angeline Montauban, Parent  
 Alan Sputz, Esq., Deputy Commissioner, New York City Administration for Children's Services  
 Rhonda Weir, Esq., Association of Private Court Assigned Counsel, Appellate Division, Second Department  
 Brian Zimmerman, Esq., President, Association of Private Court Assigned Counsel, Kings County  
 Ronald Fisher, Esq., Bronx Family Court Bar Association  
 Michelle Burrell, Esq., Neighborhood Defender Service of Harlem  
 Tehra Coles, Esq., Litigation Supervisor, Center for Family Representation  
 Lisa Schreibersdorf, Esq., Executive Director, Brooklyn Defender Services  
 Lauren Shapiro, Esq., Family Defense Practice Director, Brooklyn Defender Services  
 Emma Ketteringham, Esq., Managing Director, Family Defense Practice, The Bronx Defenders  
 Caitlin Becker, M.S.W., Managing Director, Social Work Practice, The Bronx Defenders  
 Barbara Kryszko, Esq., Director, Brooklyn Legal Project, Family Justice Center, Sanctuary for Families  
 Nancy Erickson, Esq., Private Attorney

#### Albany - October 10, 2018

Susan C. Bryant, Esq. Acting Director, New York State Defenders Association  
 William Leahy, Esq., Director, New York State Office of Indigent Legal Services  
 Gerard Wallace, Esq., Director, New York State Kinship Navigator Program  
 Amanda McHenry, Esq., Supervising Attorney, Family Court Program, Hiscock Legal Aid Society Syracuse, New York  
 Stephen J. Acquario, Esq., Executive Director, New York State Association of Counties

Monica Kenny-Keff, Esq., Panel Attorney, Catskill, New York  
Kim Dvorchak, Esq. Executive Director, National Association of Counsel for Children  
Joyce McMillan, Parent Organizer, Sinergia Inc.

### **Mineola - October 23, 2018**

Scott Banks, Esq., Legal Aid Society of Nassau County  
Jorge Rosario, Esq., Bureau Chief Supervising Attorney, Children's Law Bureau, Legal Aid Society of Suffolk County  
Thomas Sartain, Esq., Family Court Bureau Chief, Legal Aid Society of Suffolk County  
Lynn Poster-Zimmerman, Esq., President-Elect, Suffolk County Bar Association  
Jennifer Rosenkrantz, Esq., Suffolk County Bar Association  
Lois Schwaeber, Esq., Director of Legal Services, The Safe Center of Long Island  
Sarah Tirgary, Esq., Assigned Counsel Association of Queens Family Court  
Joel Serrano, Esq., Assigned Counsel Association of Queens Family Court  
Linda Hassberg, Esq., Senior Staff Attorney, Empire Justice Center  
Professor Theo Liebmann, Director of the Youth Advocacy Clinic at Hofstra University Law School and Co-chair, NYS Unified Court System Advisory Council on Immigration Issues in Family Court

### **Additional Written Statements List:**

Thomas N. N. Angell, Public Defender, & Eric J. Knapp, Family Court Unit Bureau Chief, County of Dutchess Office of the Public Defender  
Rylan Ritchie, Family Court Unit, Office of the Public Defender, Albany County  
Amy Barash, Esq., Executive Directory, Hamra Ahmad, Esq., Director, Legal Services, & Rachel L. Braunstein, Esq., Managing Policy Attorney, Her Justice, New York, NY  
Ruth C. Balkin, Esq., Chair, Unified Court System Statewide Advisory Committee on Attorneys for Children  
Carl D. Birman, Esq., Attorney At Law, Law Offices of Carl D. Birman, White Plains, NY  
Darryl R. Bloom, Esq., Public Defender, Office of the Public Defender, Cattaraugus County, Olean, NY  
Maritza Buitrago, Esq., Office of the Public Defender, Monroe County, Rochester, NY  
Bridgit Burke, Esq., Legal Director, The Legal Project, Inc., Albany, NY  
Chelsea B. Carter, Esq. Assistant Public Defender, Public Defender Office, Ontario County, Canandaigua, NY  
The Children's Law Center, New York, NY  
Robert N. Convissar, Esq., Chief Defender/Administrator, Assigned Counsel Program, Erie County Bar Association, Buffalo, NY  
Kelly L. Egan, Esq., Appeals Director, Rural Law Center of New York, Inc., Plattsburgh, NY  
John Ferrara, Esq., Law Office of John Ferrara, Monticello, NY  
Adele Fine, Esq., Special Assistant Public Defender, Family Court Bureau Chief, & Timothy P. Donaher, Esq., Monroe County Public Defender, Office of the Public Defender, Monroe County, Rochester, NY  
Karen Freedman, Esq., Executive Director, Lawyers For Children, New York, NY  
Honorable Michael F. Griffith, Supervising Judge of Family Courts, Erie County Family Court  
Helma Hermans, Esq., Staff Attorney, Legal Aid Society of Suffolk County  
Susan Kaufman, Esq., Counsel, Matrimonial Practice Advisory and Rules Committee (MPARC)  
Barbara J. Kelley, Esq., Allegany County Public Defender

Nicole R. Kilburg, Esq., Law Offices of Nicole R. Kilburg, Albany, NY  
Leon Koziol, Parenting Rights Institute, Utica, NY  
David J. Lansner, Esq., Lansner & Kubitschek, New York, NY  
Legal Information for Families Today (LIFT), Brooklyn, NY  
Cassandra E. Louis, Policy and Advocacy Associate, The Children's Village, Dobbs Ferry, NY  
Jessica E. Marsico, M.A., New York State Family Court Researcher, Social & Public Policy Analyst, Albany, NY  
Marion McCue de Velez, L.C.S.W., The Children's Village, New York, NY  
Ronald J. McGaw, Esq., The Law Offices of Ronald J. McGaw, Poughkeepsie, NY  
Michael Mercure, Esq., Washington County Public Defender, Fort Edward, NY  
Dawne Mitchell, Attorney In Charge, Juvenile Rights Practice, & Jayne Cooper, Staff Attorney, Juvenile Rights Special Litigation and Law Reform Unit, The Legal Aid Society, New York, NY  
Honorable Robert Mulroy, President, New York City Family Court Judges Association  
New York Legal Assistance Group ("NYLAG")  
Larisa Obolensky, Esq., Attorney At Law, Delhi, NY  
Danial L. Pagano, Esq., Law Offices of Daniel L. Pagano, Yorktown Heights, NY  
Pro Bono and Legal Services Committee, New York City Bar Association  
Lance Salisbury, Esq., Supervising Attorney, Tompkins and Schuyler County Assigned Counsel Programs  
David C. Schopp, Esq., CEO/Executive Director, The Legal Aid Bureau of Buffalo, Inc., Buffalo, NY  
Statewide Central Register ("SCR") Practice Group  
Thomas M. Susman, Esq., Director, Governmental Affairs Office, American Bar Association, Washington, D.C.  
John J. Westman, Esq., The Westman Law Firm, Jamestown, NY

## **APPENDIX C: GUEST PRESENTATIONS TO THE COMMISSION**

### **September 20, 2018, Commission Meeting:**

Wendy Sotolongo, Esq. - Indigent Defense Services of North Carolina Parent Defender

Joanne Moore, Esq. - Director of Washington State Office of Public Defense Parent Representation Program

### **October 17, 2018, Commission Meeting:**

Lisa Schreibersdorf, Executive Director of Brooklyn Defender Services

Denise Wirsig, Senior Operations Officer, Brooklyn Defender Services

### **November 19, 2018, Commission Meeting:**

Joanne Macri, Esq., Director of Regional Initiatives, New York State Office of Indigent Legal Services

Patricia Warth, Esq., Chief Implementation Attorney, Hurrell-Harring, New York State Office of Indigent Legal Services



