

ONLINE LEGISLATIVE PUBLIC HEARING

Testimony before

**The New York State Assembly
Standing Committee on Judiciary**

**On the Impact of Proposed Budget Cuts on
The Court System in New York**

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Testimony**

Thank you, Chairman Dinowitz and members of the Assembly Judiciary Committee, for the opportunity to testify about the issue of judiciary budget cuts. My name is Susan Bryant and I am the Executive Director of the New York State Defenders Association. My testimony will focus specifically on the impact that proposed cuts will likely have on clients who are represented by public defense attorneys in criminal and family courts around the state, on those attorneys and other members of the public defense team, and on clients' families and communities.

The New York State Defenders Association is a non-profit, membership organization with more than 1,600 members. Our mission is to improve the quality and scope of public defense representation. NYSDA receives state funding to operate the Public Defense Backup Center, which provides resources and support to defenders around the state. This includes research assistance, training, publications, our Public Defense Case Management System, and other services. We also run the state-funded Veterans Defense Program (VDP), which provides training, support, and legal assistance to promote trauma-informed effective representation of veterans and service members in New York State's criminal and family court systems. The Backup Center began receiving state funds in 1981 to assist the State in meeting its constitutional duty to provide effective counsel to those financially unable to hire a lawyer. VDP, launched in response to a growing crisis in the number of veterans with service-related mental health illnesses who were lost in the criminal and family legal systems, began receiving state funding in 2015. Both the VDP and the Backup Center were groundbreaking entities at their creation and continue work vital to fairness in the criminal and family legal systems.

Our work puts us in daily touch with defenders from across the state. We hear about the problems defenders experience, and anticipate others in the wake of new developments. Obviously, COVID-19 and the resulting economic crisis—including the projected judiciary budget cuts—is affecting every aspect of defenders' work and their clients' lives.

People who lack financial means were struggling under unfair burdens in our legal system before the pandemic. Efforts to end such unfairness, like the passage of a bill to end suspension of driver's licenses for being unable to pay fines and fees, must continue. We hope the Governor will sign that bill, and that the Legislature and Governor will continue working to end the criminalization of poverty. Budget shortfalls will further crush people hardest hit by the pandemic and resulting economic downturn.

Let me turn to some specific issues to consider in the face of projected judiciary budget cuts.

Backlogs and Delays Will Harshly Impact Public Defense Clients and Providers

We do not have a clear picture of the specific cuts that the Office of Court Administration will impose based on the announced 10 percent budget reduction for the current State Fiscal Year, or the possible cuts for the upcoming fiscal year. But it is safe to say that cuts will result in a growing backlog of cases.

Backlogs and delays stemming from cuts to the judiciary budget will exacerbate backlogs that have already resulted from the COVID-19 pandemic.¹ Increased backlogs will impact public defense providers and their clients, causing multiple adjournments that waste everyone's time, interfere with clients' rights through the deprivation of speedy resolution of legal matters and concomitant separation from family via incarceration or child welfare authorities, and erode trust in the judicial system. For many, the harm from backlogs and other results of judiciary budget cuts will be magnified by existing racial and economic disparities, as noted in the Special Adviser's report discussed later in this testimony.

While backlogs due to short-term budget cuts may be inescapable, the need to deal with COVID-19 fallout (both budgetary and procedural) presents an opportunity to end practices that contribute to backlogs while taking care that changes do not cause further harm. There is no perfect way to deal with backlogs or with cuts, but I provide some comments and cautions here.

Cuts Must Not Result in Overuse of Virtual Proceedings that Undercut Fairness

Judiciary budget cuts may create financial pressure to continue major reliance on virtual proceedings. Reducing *unnecessary* in-person court appearances by litigants and lawyers may benefit all, but there are dangers in expanding use of this technology for certain proceedings. This is especially true for public defense clients and other litigants who lack financial means. A Brennan Center [report](#)² in September urged caution in the use and expansion of remote technology. Among other things, it noted that “[o]ne study of criminal bail hearings found that defendants whose hearings were conducted over video had substantially higher bond amounts set than their in-person counterparts, with increases ranging from 54 to 90 percent, depending on the offense.” [Footnote omitted.]

The National Association for Public Defense has similarly urged caution. Its “[Statement on the Issues With the Use of Virtual Court Technology](#)” emphasizes that remote technology should be used only with the consent of the client or in circumstances where “it either enhances access to justice or avoids a shutdown of access that clearly would be worse than the temporary limitations posed by the technology ...” And the Online Courts Working Group of the Commission to Reimagine the Future of New York’s Courts (OCWG) recognized in its recent [report](#)³ that “expanding the use of remote proceedings on a non-emergency basis should occur only after careful analysis and deliberation.” (p. 6). That report recognized that virtual proceedings might “worsen existing inequalities” and negatively impact the client-attorney relationship (p. 13). It also recognized that there is currently a “deficiency of meaningful study of potential effects on the outcomes in judicial proceedings.” Concerns noted include the effects on “a defendant’s ability to present his/her case in person to a judge, the diminished ability to confront and cross-

¹ See, e.g., “N.Y.’s Legal Limbo: Pandemic Creates Backlog of 39,200 Criminal Cases,” *New York Times* (6/22/2020), available at <https://www.nytimes.com/2020/06/22/nyregion/coronavirus-new-york-courts.html>.

² Bannon and Adelstein, “The Impact of Video Proceedings on Fairness and Access to Justice in Court” (9/10/2020).

³ OCWG, “Initial Report on the Goals And Recommendations for New York State’s Online Court System” (11/9/2020), available at <http://www.nycourts.gov/whatsnew/pdf/OCWG-Report.pdf>.

examine one's accuser, and being able to bring support from family and the community to proceedings." (p. 14).

NYSDA has issued its own statement on virtual proceedings in criminal court,⁴ which continues our long-standing position that client consent must be required before critical proceedings can be held via technology. We are eager to work with the judiciary to ensure that virtual proceedings are used only in ways that increase efficiency without impinging on constitutional rights and fairness for public defense clients and all litigants. But virtual proceedings for arraignments and other substantive hearings that impact individuals' liberty interests or parental rights, without explicit, uncoerced consent of the litigant, should not be employed.

Town and Village Courts Present Particular Concerns

Many local courts sit only once a week, or at even longer intervals. Adjournments can mean a potential delay of several weeks in moving cases forward. The bail reform of 2019 meant that few clients would be incarcerated pretrial during such delays; rollback of portions of that reform has exposed more people who are presumed innocent but unable to afford bail to long periods of pretrial detention. This is a problem that will be exacerbated by budget-cut-caused delays in every court, at every level, but its effects in town and village courts should not be overlooked.

Also, we have heard of instances in which town and village courts fail to provide adequate precautions for safe in-person proceedings during the continuing—and intensifying—COVID-19 crisis in New York State. Some courts have been unwilling or unable to follow basic protocols. Some local court facilities cannot be configured for any safe appearances. Others lack areas where individuals can safely wait. Some have instituted measures that are difficult or impossible for public defense clients to comply with, such as staying in a parking lot to await a cell-phone call or text that their case is being called. These litigants may not have a vehicle or even a cell phone. Many suffer from serious medical conditions, and others must bring their children with them to court due to a lack of childcare. It is not acceptable to present litigants with a choice between miserable, even dangerous, exposure to inclement weather and missing an appearance delayed far into the evening or night due to backlogs and/or a high volume of cases. Issuance of bench warrants or defaults in these instances compound the unfairness.

The budgetary, jurisdictional, and political complications inherent in addressing problems in local courts are beyond the scope of my testimony here, but we would be remiss in not raising the issue. Finding ways for the State to ensure that litigants, lawyers, judges and other court personnel, and the public, can safely access these courts, and that cases can proceed in timely fashion, will present enormous difficulties going forward. Cuts to the judiciary's overall budget will compound such difficulties.

⁴ https://cdn.ymaws.com/www.nysda.org/resource/resmgr/pdfs--other/NYSDA_Statement_on_Virtual_C.pdf

Raise the Age Impact on Courts and Budgets

A question was raised during my oral testimony that relates both to concerns about town and village courts and to the judiciary budget as a whole. The question related to Raise the Age (RTA) legislation that changed jurisdiction for many offenses charged against youth aged 16 and 17. Where these matters used to be heard in local courts, they are now centralized in the Family Court that covers the entire county.

Certainly any shifted or increased costs resulting from RTA must be considered when establishing the budget for the judiciary in the coming year. But now is not the time to change RTA. COVID-19 descended before a great deal of information could be collected and analyzed about how RTA was affecting courts (and youth). And one of NYSDA's fears about the budget cuts is that they will damage the ability of the court system to engage in that necessary data collection. No changes to RTA should be made on the basis of immediate budget cuts, and the costs of handling expeditiously the cases of young people should be considered an investment. Allowing budget cuts to inflict harm on youth will have devastating personal, social, and ultimately fiscal costs down the road.

I note that any movement of cases from family court back to adult court would shift, not end, the cost of their representation. New York State's fragmented public defense system places the cost of representation of juveniles in the judiciary budget and the cost of representation of adults on counties that have only recently begun to receive additional state funding to make an appreciable, positive difference in the quality of representation. That progress must not be halted or reversed by increasing the caseloads in adult court without providing funds; since providing representation in criminal and delinquency matters is ultimately a state responsibility, the budget line should not matter.

Interlocking Budget Effects

Cuts to the judicial function may affect not only the capacity and efficiency of courts, but also the work of others. For example, the judiciary budget includes funding that allows for caseload reductions for public defenders representing individuals in New York City criminal courts. Attorneys for the Child (AFC) are funded through the judiciary budget. Cuts to contracts with institutional providers of AFC services will have an impact on representation of adolescents who have cases transferred from the Youth Part to family court. It will also impact the ability of AFCs to handle other types of family court cases. The judiciary budget also provides the funding for the Mental Hygiene Legal Service (MHLS) offices that operate in each of the four judicial departments. *See* Mental Hygiene Law article 47. MHLS provides legal assistance and services to persons who are in the custody of the Commissioner of the Office of Mental Health. Many commitments, including those under Criminal Procedure Law articles 330 and 730 and Mental Hygiene Law article 10, involve public defense clients. Cuts to MHLS will curtail their ability to provide representation, to the detriment of those they are meant to serve and to the ability of the courts to properly determine such matters.

And cuts to those other entities will, like cuts to the judiciary budget, impact litigants, their families and communities, the public at large—and the judiciary. For example, when the backlogs and delays discussed above erode the efficiency of public defenders (which encompass lawyers in county public defender offices, non-profit legal aid programs, and assigned counsel

(18-B) lawyers), the need for NYSDA's backup services will be greater than ever. But across-the-board cuts will mean that our services too will be eroded, doubling the damage. The research, information on new laws and other developments, and other services we provide help lawyers make accurate and appropriate legal arguments. Overwhelmed attorneys who cannot access such assistance may provide incomplete support for their assertions on clients' behalf, which will make more work for law secretaries and judges and also endanger clients' case outcomes.

Cuts May Hamper Necessary Efforts to Address Issues in the Special Adviser's Report

Last month, the Special Adviser on Equal Justice in the New York State Courts released an extensive [report](#) on racial bias in the court system, finding that there is "a second-class system of justice for people of color in New York State."⁵ This long-overdue report addresses a number of issues that public defenders and their clients have struggled to deal with over the years. To correct these fundamental problems, there must be both a true commitment to systemic change at all levels of the judiciary, and a commitment of resources. Cuts to the judiciary budget at this moment present an additional barrier to systemic change. The costs to our society and the justice system are impossible to measure, but we are able to identify some of the ways that cuts would cause harm.

For example, the Special Adviser's report discussed how high caseloads in family courts results in harms to individuals of color. As noted on p. 56 of the Special Adviser's report:

A group of Family Court judges surveyed cited research showing that implicit bias is more likely to be acted upon when a decision-maker is rushed. They noted that if a judge has time to slow down, unpack the case before them, look at it from multiple angles and "surface their own biases and reactions" to the individuals involved, that judge is more likely to second-guess their own assumptions and biases. In a separate interview, another Family Court judge admitted that proceedings are often too rushed when judges are making decisions about removing a child from his or her family.

If caseloads in family courts remain at current levels, or increase as a result of budget cuts, judges will not have the time to recognize their implicit biases, let alone have any chance of overcoming them in making critical decisions about families, particularly families of color, such as the removal of a child from his or her parents. The removal of a child from the home is traumatic and has lifelong consequences for the parent, child, other siblings and family members, and the community.⁶

⁵ "Report from the Special Adviser on Equal Justice in the New York State Courts," available at <http://www.nycourts.gov/whatsnew/pdf/SpecialAdviserEqualJusticeReport.pdf>. NYSDA has issued a statement on the Special Adviser's report, "NYSDA Statement Welcoming the Report of the Special Advisor on Equal Justice," available at <https://files.constantcontact.com/fdc85d9d201/c102a7cc-959b-4b88-8eab-f2533e5e5f89.pdf>.

⁶ The American Bar Association has a web resource with links to many resources and studies regarding these issues, Trauma Caused by Separation of Children from Parents, available at <https://www.americanbar.org/groups/litigation/committees/childrens-rights/trauma-caused-by-separation-of-children-from-parents/>.

The Special Adviser also tackled the already-acknowledged issue of the judiciary's inadequate interpreter and translation services, and recommended that the court system continue its progress in this area. (p. 91). Interpretation and translation services are necessary to ensure equal access to justice for all litigants. Too often, cases involving public defense clients are delayed because of insufficient interpretation services. Cuts to existing services will lead to increased delays.

The importance of data collection by the judiciary was highlighted in the Special Adviser's report: "We regret to report that the New York State court system is far from cutting edge when it comes to understanding and combatting racial bias in case outcomes, and that its data collection and publication practices have fallen behind those of other states. Interviewees stressed that data collection and analysis on case outcomes is critically important to identifying the points at which racial disparities exist, and the first step to remedying bias in the court system." (p. 91). Recently-enacted laws require that the court system collect data about criminal charging decisions, the Police Statistics and Transparency Act, and pretrial release decisions. And, as noted above, data collection is needed to monitor implementation of the RTA law. If the proposed budget cuts reduce the staffing and technology needed to collect data, the judiciary will not be able to comply with these critical state reforms, ensure quality control in data collection, or start collecting and publicizing its own data on case outcomes and racial disparities throughout the court system.

Conclusion

Again, I thank you for the opportunity to testify, and want you to know that NYSDA stands ready to provide further assistance as you examine the many difficult decisions occasioned by the COVID-19 pandemic and its effects on the economy of New York. I ask that public defense clients, many of whom are already bearing the effects of long-standing inequities as to health care, employment, and systemic racism, not be ignored nor asked to bear further injustices wrought by judicial and other budget cuts. Related to that, I ask that defender input and participation be sought in all consideration affecting systemic planning and protocols employed by OCA, and local town and village courts.