



**New York City Council**

Christine C. Quinn, Speaker

**Finance Division**

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**Hearing on the Mayor's Fiscal Year 2011 Preliminary Budget**

**Legal Aid/Indigent Defense Services**

March 10, 2010

**Committee on Fire and Criminal Justice Services**

Hon. Elizabeth Crowley, Chair

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# Summary and Highlights

## Indigent Defense Providers as of the Fiscal 2011 Preliminary Plan Miscellaneous Budget – Unit of Appropriation 005

	FY2010	FY2011
18-B Assigned Counsel Program	\$71,038,132	\$71,038,132
Legal Aid Society	\$87,185,500	\$71,959,500
NY County Defenders	\$6,260,139	\$6,079,139
Bronx Defenders	\$4,885,140	\$4,885,140
Brooklyn Defender Services	\$5,790,775	\$5,790,775
Queens Law Associates, P.C.	\$4,948,498	\$4,948,498
Battiste, Aronowsky & Suchow, Inc.	\$2,808,720	\$2,808,720
Appellate Advocates	\$4,283,220	\$3,899,220
Center for Appellate Litigation	\$3,783,320	\$3,399,320
<b>Alternative Providers sub-total</b>	<b>\$32,759,812</b>	<b>\$31,810,812</b>
Neighborhood Defender Services	\$3,003,500	\$-
Office of the Appellate Defender	\$1,916,500	\$1,624,000
Center for Family Representation	\$2,784,100	\$2,784,100
Bronx Defenders	\$3,987,925	\$3,844,990
Legal Services for New York City	\$3,604,543	\$2,826,790
<b>Family Court Providers sub-total</b>	<b>\$10,376,568</b>	<b>\$9,455,880</b>
Miscellaneous	\$87,849	\$87,849
<b>TOTAL Indigent Defense Services Budget</b>	<b>\$206,367,861</b>	<b>\$185,976,173</b>

## Legal Aid/Indigent Defense Services

The City provides indigent defense funding to insure that all individuals charged with crimes have effective assistance of counsel, both at the trial and appellate levels. Whereas some jurisdictions across the country have government-employed public defenders, New York City implements a plan that employs the use of contracted institutional providers, as well as a cadre of individual assigned counsel attorneys who are screened by the two appellate divisions of the court. The City also provides, on a limited basis, institutional representation for adults in Family Court. All of these institutional contracts are executed subsequent to requests for proposals (RFPs), and are for two-year terms, with two two-year renewal options.

Currently, the City has in place contracts for appellate and Family Court work (in the case of the latter, in three boroughs only). As discussed below, the contracts for trial level work have exceeded the six-year mark and are being continued on an interim basis until new contracts can be let.

The Legal Aid Society (LAS), under agreement with the City of New York, serves as the primary defender in the State Court System, at both the trial and appellate levels, for those who cannot afford private legal counsel. By State statute, New York City has the sole responsibility for funding counsel and supportive services for indigent defendants charged with crimes in the City.

Indigent criminal defendants are also represented by other entities. In the Criminal and Supreme Courts, indigent defense work is performed by five alternative contractors (one in each borough), by a Court-appointed panel of Assigned Counsel (18-B) attorneys, and by the Neighborhood Defender Service, which is a full-service agency serving Northern Manhattan. In the Appellate Courts, cases are handled by two alternative contractors, the Office of the Appellate Defender, and 18-B attorneys.

In Fiscal 2009, the City's actual expenditures for indigent defense services totaled approximately \$212.6 million. In Fiscal 2010, the Adopted appropriation was \$200.3 million (including \$14.3 million in City Council discretionary funding), an amount increased to \$206.4 million as of the Fiscal 2011 Preliminary Plan. The Preliminary Fiscal 2011 budget for indigent defense is only \$186 million, primarily reflecting the prior-year City Council funding for the Legal Aid Society and the Neighborhood Defender Service that is traditionally only included in the Adopted Budget. (See below for further detail.) The portion of indigent defense funding provided by the State is forecast to be \$41 million in Fiscal 2010 and Fiscal 2011.

<b>3-Year Indigent Defense Budget Data</b>	
	in millions
Fiscal 2009 - Actual Spending	\$212.6
Fiscal 2010 - Adopted Appropriation	\$200.3
Fiscal 2010 - Modified Budget	\$200.3
Fiscal 2010 - As per the Preliminary Plan	\$206.4
Fiscal 2011 - As per the Preliminary Plan	\$186.0

While no significant new actions relating to the indigent defense budget were contained in the Fiscal 2010 Adopted Budget, one significant event occurred last year that will alter the local indigent defense landscape in the near future. The Adopted State Budget for State Fiscal Year 2009-10 included a provision mandating a cap on public defender caseloads in New York City beginning in 2010. As a practical matter, the caseload cap will mean that defender organizations will need to have their budgets increased to hire additional attorneys. According to the State budget bill, this incremental cost in defender organization budgets would be borne by the State. Some highlights pertaining to the new caseload cap law are listed below.

### **New York State Law Capping Public Defender Caseloads**

- The case cap law applies only in New York City, and only to trial-level public defenders.
- New Chief Justice Jonathan Lippman of the Court of Appeals was reportedly the impetus for the passage of the law, which had been proposed for many years.
- The law allows for a four-year phase in and requires the State Judiciary (as opposed to the City) to fund associated costs.
- Caseload caps would have to be established by the State's Chief Administrative Judge by April 1, 2010.
- The cap will most likely be a "blended" one to account for both misdemeanors and felonies (that is, some number of misdemeanors would equate to 1 felony).
- Legal Aid Society lawyers currently handle 592 cases per year, or about 103 at a time. Legal Aid is the City's primary provider of trial-level indigent defense services.
- Standards established in 1995 by the Appellate Division-First Department called for a 70-case limit; this standard was not binding, enforceable or met.
- The City's Fiscal Year 2011 will see (1) the caseload standards in place (having been established by April 1, 2010); and (2) a new set of trial-level contracts let by the Office of the Criminal Justice Coordinator through the request for proposal (RFP) process. The recently released RFP anticipates a start date of January 1, 2011, halfway into City Fiscal Year 2011.
- The RFP process was originally supposed to have been concluded in time to have new contracts in place for Fiscal 2010. The process has now been delayed by one and a half years (see below).

## **Status of Requests for Proposals (RFPs) for Appellate Legal Services & Trial-Level Legal Services**

Early in Fiscal 2009, the Office of the Criminal Justice Coordinator (CJC) entered into contracts with four institutional indigent defense entities for the provision of appellate legal representation. These contracts resulted from the issuance of a formal RFP. Because the contracts weren't finalized until after the Adoption of the Fiscal 2009 Budget, the City Council was unable to evaluate the RFP results during budget negotiations and therefore unable to determine whether supplemental funding was needed for any of the contracted organizations, such supplements having become routine as part of the yearly negotiations in which the Administration refuses to baseline City Council enhancements.

The CJC testified during the Fiscal 2009 Executive Budget hearing that the RFP process for trial-level indigent defense representation was to be completed prior to the start of Fiscal 2010, a timeline that would have allowed the City Council to evaluate its outcome prior to finalizing the Fiscal 2010 Budget. The Office of the CJC and the Mayor's Office of Management and Budget (OMB) each confirmed prior to the Fiscal 2010 Budget Hearings, however, that the contracts emanating from this process would not be in place until January 2010, halfway through Fiscal 2010. The Council was then told informally by the CJC that the existing trial-level contractors (whose contracts all were set to expire at the close of Fiscal 2009) were asked to enter into one-year negotiated acquisition contracts to bridge the service gap that would otherwise exist between the expiration of their existing contracts (June 30, 2009) and the letting of new contracts (in July 2010).

While the Office of the CJC indicated that the interim contracts would be let on the same budgetary terms as the current contracts, terms that would seemingly have included the value of the City Council's supplementary funding, OMB indicated that the value of the City Council supplements would not be included by the Administration in the interim contracts, consistent with its policy of not recognizing in its budgets the Council's funding decisions. The Office of the CJC essentially cut off communications with the Council regarding this matter as evidenced by a February 19, 2009 e-mail from the Mayor's Office of City Legislative Affairs stating that the CJC "can't provide any additional information per City procurement rules." This information embargo essentially continued through February 3, 2010 when the RFP was released and the City Council Finance Division was notified. It was only at this time that the City Council was informed of the anticipated contract start date of January, 1, 2011. At the time of this writing, it remains unclear what steps have been or need to be taken – by the Administration and/or the City Council – in order to have the existing institutional entities provide services until new contracts are executed.

## **Items of Note Contained in the Recently Released RFP for Trial-Level Legal Services**

### **1) Institutional Conflict Providers**

At present, individual 18-B Panel attorneys handle the bulk of trial-level conflict cases. The new RFP seeks, for the first time, to have entities applying for borough-based contracts also apply to handle a portion of the conflict caseload. The goal of this RFP provision is to lower indigent defense costs, improve the overall quality of services, and bring the provision of these conflict services increasingly under the direct contractual control and oversight of the City.

(Note: The RFP states that, "Anticipated funding for conflict cases annually is \$8,700,000." It is unclear how many cases might be handled with this sum or what type of budgetary savings may be generated through the utilization of institutional providers. As per the Preliminary Plan, 18-B expenditures are budgeted at more than \$70 million annually, with more than \$30 million of that sum coming from City tax levy funds. These 18-B expenditures, however, are not exclusively for trial-level indigent defense work. At the Pre-Proposal Conference on February 18<sup>th</sup>, the Office of the CJC reported that in Fiscal 2009 \$48.4 million was spent on 18-B criminal cases, including approximately \$45million for 18-B attorney hours.)

## 2) Catchment Area Providers

For many years, the Neighborhood Defender Service (NDS) has provided indigent defense services in the Northern Manhattan catchment area. An innovative organization which began as a Vera Institute of Justice pilot program, NDS has been deemed ineligible to receive non-discretionary funding from the City since past RFPs have sought the provision of services exclusively at the borough level as opposed to a catchment area level. This contracting reality has necessitated the annual provision of funding by the City Council to keep NDS in business. The new RFP allows, for the first time, organizations such as NDS to propose contracts at the catchment area level.

## 3) The Potential Need for City Council Funding

The RFP specifically excludes City Council funding for indigent representation from the anticipated amount available for annual funding: \$101,180,000 - \$92,480,000 for non-conflict cases and \$8,700,000 for conflict cases. (This figure also excludes 18-B expenditures.) It is unclear whether the RFP assumes City Council funding will be provided to supplement one or more of the executed contracts. Additionally, as stated in the preceding paragraph, the City Council may be compelled to fund NDS for the first six months of the year until new contracts are let effective January 1, 2011 since the CJC would be prohibited from using non-discretionary funds to support an interim contract through December 31, 2010.

- **The Legal Aid Society (LAS).** The Legal Aid Society is the City's long-time primary provider of criminal indigent defense services. In Fiscal 2010, the Society has been provided with approximately \$87.2 million. This included a baseline funding appropriation by the Administration supplemented by an \$11.3-million enhancement through City Council discretionary funds. In exchange for this funding, LAS is required to pick up 88% of the cases in the arraignment parts it staffs. By contract, failure to meet this benchmark would subject the Society to liquidated damages. In contrast, as the City's default provider, should LAS be required to handle more than 88% of the cases in its arraignment parts, it would do so without compensation, an untenable situation for the organization.

According to his Fiscal 2009 Executive Budget testimony, Criminal Justice Coordinator John Feinblatt indicated that all future indigent defense contracts would mirror Legal Aid's when he stated, "We're shifting those contracts actually to look more like the Legal Aid contract." He continued by stating that this change couldn't be implemented "midstream," intimating that such change would occur via the RFP process that will soon yield new trial-level indigent defense contracts citywide. Nothing, however, either in the RFP or in the CJC's statements at the Pre-Proposal Conference suggests that the CJC intends to have all newly let contracts mirror the current Legal Aid contract (i.e., containing a provision to impose damages if arraignment part case percentages are not met, while providing no additional resources if these same benchmarks are exceeded). The continued information embargo engaged in by the CJC makes confirmation of this belief impossible.

Legal Aid's Preliminary Budget for Fiscal 2011 is approximately \$72 million, a significant reduction from its Fiscal 2010 funding of \$87.2 million. The biggest contributing factor to this reduction is the Administration's pattern of not baselining the City Council's prior-year funding, in this case \$11.3 million. The other reductions in Fiscal 2011 stem from plan increases in Fiscal 2010 only for leases and other expenditures (\$2 million) and for an upward re-estimate of Legal Aid's appellate-level contract costs (\$1.9 million).

- **Alternative Indigent Defense Contractors.** On July 1, 1996, the City began awarding contracts to newly organized entities to furnish indigent defense representation of the kind Legal Aid provides. Ultimately, seven such groups were created and funded - five that provide criminal defense services and two that provide appellate advocacy. These groups, each of which traditionally handles a fixed number of cases (unlike Legal Aid), have been generally well funded since their inception. That being said, the groups have at times indicated to the Administration and the Council that they require more funding to keep up with the increasingly high cost of doing business in the City (overhead, salaries to attract and retain high quality staff, etc.). Whereas the Fiscal 2006 Executive Budget included cost of living adjustment (COLA) increases for these offices, no other baseline additions were made at that time. The total value of their contracts was \$26.9 million in Fiscal 2006. Since that time, the City has increased the contract values for the alternative providers to a combined figure of \$32.8 million in Fiscal 2010 and a figure approaching \$32 million in Fiscal 2011.
- **Assigned Council Program (18-B Attorneys).** The Court appoints private 18-B attorneys to handle cases in which Legal Aid representation would create a conflict of interest (i.e., multiple defendants) or when the defendant is charged with a crime punishable by death or life imprisonment. As per the Fiscal 2007 Executive Plan, proposed funding for 18-B services was \$100.7 million in Fiscal 2006 and \$99.1 million in Fiscal 2007. As per the January 2007 Financial Plan, the Modified 18-B Budget for Fiscal 2007 was approximately \$92.6 million, while the Preliminary Budget for Fiscal 2008 was \$87.7 million. A portion of this sum, it should be noted, funded 18-B attorneys who represent adults in Family Court (see below).

The 18-B program had been plagued with systemic problems resulting in the quality of 18-B representation being called into question in recent years. One reason for the poor past performance of many 18-B attorneys was the historically low rate at which they were compensated. Compensation rates for 18-B attorneys, set at \$40/hour for in court services and \$25/hour for out of court services since 1986, were increased to \$60 for misdemeanor cases and \$75 for felony cases, beginning January 1, 2004. While the State should be commended for raising the rates and thereby attracting more attorneys to the 18-B Panel, the financial burden to subsidize this increase has rested primarily with localities, especially New York City. Whereas the Fiscal 2009 Executive Plan recognized expected State reimbursement for 18-B of \$44.7 million in Fiscal 2008, only \$33 million was anticipated in Fiscal 2009. A \$3-million January Plan increase in funding from the New York State Indigent Legal Services Fund brought the Fiscal 2010 forecast up to only \$41 million against expected costs of more than \$71 million. These figures remain unchanged in the Fiscal 2011 Preliminary Plan.

As indicated above, the RFP recently released by the CJC seeks to create institutional conflict providers. If the CJC succeeds in executing one or more such institutional contracts, the number of cases handled by 18-B attorneys, and by extension, the associated dollars paid to them, may be significantly reduced.

- **Neighborhood Defender Service.** NDS is a full service, community-based indigent defense organization. To aid NDS, the Council restored \$2.5 million to its budget in Fiscal 2005 and enhanced it by another \$500,000 in Fiscal 2006 and Fiscal 2007, bringing its funding to \$3 million to run its operations. In Fiscal 2008, the Council's support increased to \$3.25 million. Because no appropriation for NDS was included in the Fiscal 2009 Executive Budget, a City Council restoration was needed to keep NDS in operation after June 30, 2008. Due to fiscal constraints, the City Council was only able to appropriate the sum of \$3 million for NDS in Fiscal 2009 and Fiscal 2010. As discussed above, the recently-released RFP would allow NDS, for the first time, to submit a responsive bid on a catchment areas basis. Additionally, the proposed January 2011 start date for the RFP-generated contracts will have specific budgetary and contractual implications for NDS.
- **Office of the Appellate Defender (OAD).** OAD is a twenty-one year old not-for-profit firm devoted to providing representation to indigent defendants in the First Department, primarily in criminal appeals in State Court and collateral proceedings in State and Federal Court. The City Council restored \$1.8 million to OAD's budget in Fiscal 2006 and enhanced it by \$450,000, bringing its funding to \$2.25 million to adequately run its operations. This same amount was appropriated by the Council in Fiscal 2007. In Fiscal 2008, the Council increased its support for OAD to \$2.4 million.

As Fiscal 2009 approached, OAD indicated that it would require funding in the amount of \$2.4 million "to continue to perform its vital mission without reduction in services, to represent a greater number of clients, and to maintain its unique social work program." As a result of the RFP issued for appellate criminal defense services, however, the multi-year contract OAD is currently operating under provided only \$1.999 million in Fiscal 2009 and provides only \$1,916,500 in Fiscal 2010 and \$1.624 million in 2011 and the outyears. (The Fiscal 2009 contract amount included a one-time payment of \$375,000, ostensibly to help OAD transition into its lower baseline level of funding, an amount 32 percent less than the \$2.4-million funding appropriation provided in Fiscal 2008.)

Last year, in a letter to the City Council, OAD indicated that, "Without additional funding for FY 2010, OAD will be forced to reduce its legal staff by 25-30%, concomitantly reduce support staff, and impose substantial across-the-board reductions in compensation and benefits to remaining staff. The impact of these cuts on our clients will be enormous. We will be forced to curtail many of the services we currently provide, many of which can mean the difference between freedom and incarceration, and rehabilitation or recidivism, for clients. Moreover, the impact on our staff will be devastating – both as to those who will lose their jobs and to those who will remain with significantly reduced salaries and benefits." OAD sought \$800,000 from the City Council for Fiscal 2010, an amount that would have brought the agency's budget in line with its Fiscal 2008 appropriation. No City Council discretionary funds were appropriated however.

- **Family Court Providers.** As it has for the past several years, the indigent defense budget contains funding for three organizations to provide legal representation for adults in certain Family Court proceedings. This combined funding, which emanated from a formal RFP solicitation, and which according to the January Plan totals approximately \$10.4 million Fiscal 2010 and \$9.5 million in Fiscal 2011, allows for the provision of such services in three boroughs: Manhattan, the Bronx, and Brooklyn. The Office of the Criminal Justice Coordinator has reported that while no contracts have been let in Queens or on Staten Island as a result of the initial RFP, the City is desirous of beginning Family Court programs in those boroughs as well.