



New York City Council

Christine C. Quinn, Speaker

Finance Division

Preston Niblack, Director

Jeffrey Rodus, First Deputy Director

**Hearing on the Mayor's Fiscal Year 2012 Preliminary Budget &
the Fiscal Year 2011 Preliminary Mayor's Management Report**

Legal Aid/Indigent Defense Services

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Committee on Fire and Criminal Justice Services

Hon. Elizabeth Crowley, Chair

Andy Grossman, Deputy Director, Finance Division

Eisha Wright, Supervising Legislative Financial Analyst

Summary and Highlights

Indigent Defense Providers as of the Fiscal 2012 Preliminary Plan Miscellaneous Budget – Unit of Appropriation 005

	FY2011	FY2012
18-B Assigned Counsel Program	\$75,272,570	\$75,272,570
Legal Aid Society (Primary Provider)	\$79,535,500	\$73,885,500
NY County Defenders	\$6,079,139	\$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. (Staten Island)	\$2,808,720	\$0
Alternative Providers - Trial Level sub-total	\$24,512,272	\$21,703,552
Appellate Advocates	\$4,283,220	\$4,283,220
Center for Appellate Litigation	\$3,783,320	\$3,783,320
Alternative Providers - Appellate Level sub-total	\$8,066,540	\$8,066,540
Neighborhood Defender Services (Upper Manhattan)	\$3,937,498	\$4,749,996
Office of the Appellate Defender	\$1,916,500	\$1,624,000
Center for Family Representation (Manhattan)	\$2,380,430	\$2,380,430
Center for Family Representation (Queens)	\$1,321,500	\$2,711,427
Bronx Defenders	\$3,987,925	\$3,987,925
Legal Services for New York City (Brooklyn)	\$3,604,543	\$3,604,543
Family Court Providers sub-total	\$11,294,398	\$12,684,325
Funding to Cover Estimated New Costs Emanating from RFP	\$15,786,987	\$52,561,799
TOTAL Indigent Defense Services Budget	\$220,156,515	\$250,675,032

Legal Aid/Indigent Defense Services

By State statute, New York City has the sole responsibility for funding counsel and supportive services for indigent defendants charged with crimes in New York City. 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 (18-B) 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 generally 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 four 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, with the exception of the Neighborhood Defender Service (NDS) which was recently awarded a new multi-year contract.

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.

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 aforementioned 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 and Fiscal 2010, the City's actual expenditures for indigent defense services totaled approximately \$212.6 million and \$224.9 million, respectively. In Fiscal 2011, the Adopted appropriation was \$200.7 million (including \$7.15 million in City Council discretionary funding), an amount increased to \$220.2 million as of the Fiscal 2012 Preliminary Plan.

The Preliminary Fiscal 2012 budget for indigent defense rises to \$250.7 million. The increases for Fiscal 2011 and Fiscal 2012 reflect efforts by the Mayor's Office of Management and Budget (OMB) to estimate increased costs associated with the letting of new trial-level indigent defense contracts. These increased costs are anticipated to include (1) the baselining of prior-year City Council funding for the Legal Aid Society and the Neighborhood Defender Service into the City's Financial Plan; (2) start-up funding for Legal Aid to resume primary provider status on Staten Island; (3) funding for all trial level providers reflecting increased overhead costs and/or an expansion of responsibilities and caseloads; and (4) funding for institutional providers to assume a portion of the 18-B caseload as anticipated in the Request for Proposals (RFP) issued February 3, 2010. (See below for further detail.)

The portion of indigent defense funding provided by the State is forecast in the Fiscal 2012 Preliminary Plan to be \$41 million in Fiscal 2011 and Fiscal 2012.

4-Year Indigent Defense Budget Data	
	in millions
Fiscal 2009 - Actual Spending	\$212.6
Fiscal 2010 - Actual Spending	\$224.9
Fiscal 2011 - Adopted Appropriation	\$200.7
Fiscal 2011 - Modified Budget	\$200.7
Fiscal 2011 - As per the Preliminary Plan	\$220.2
Fiscal 2012 – As per the Preliminary Plan	\$250.7

Status of Request for Proposals (RFPs) for Appellate & 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.

The City's Criminal Justice Coordinator (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. 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).

Subsequent delays ensued and the RFP for trial-level contracts was not released until February 3, 2010. The new contract start date -- January 1, 2011 -- required additional contract extensions through December 31, 2010, half-way through Fiscal 2011. As of this writing, legal challenges to the City's Indigent Defense Plan and RFP process have once again delayed the finalization of the trial-level contracts, with extensions in place through June 30, 2011. It's unclear whether these legal challenges will be resolved in the City's favor, allowing for a shift to institutional providers of a portion of conflict cases currently being handled by 18-B attorneys. It is also unclear when the legal resolution, in whatever form it takes, will occur. OMB has included in the current February Plan sufficient supplemental funding for the remaining months of Fiscal 2011 and the entirety of Fiscal 2012 to either support newly negotiated contracts or, if necessary, a continuance of the existing contract extensions. Due to the uncertainty caused by the existing legal entanglements, the February Plan does not contain adjusted funding for Fiscal 2013 and beyond; funding for all indigent defense services is baselined at only \$190.7 million, fully \$60 million less than the proposed appropriation for Fiscal 2012.

Items of Note Regarding the RFP for Trial-Level Legal Services Released February 3, 2010

1) Institutional Conflict Providers

At present, individual 18-B Panel attorneys handle the bulk of trial-level conflict cases. The new RFP sought, 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 was 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 stated 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 Fiscal 2012 Preliminary Plan, 18-B expenditures are budgeted at more than \$75 million annually, with more than \$34 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, 2010, the Office of the CJC reported that in Fiscal 2009 \$48.4 million was spent on 18-B criminal cases, including approximately \$45 million 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 had 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 necessitated the annual provision of funding by the City Council to keep NDS in business. The new RFP allowed, for the first time, organizations such as NDS to propose contracts at the catchment area level.

The Providers

- **The Legal Aid Society (LAS).** The Legal Aid Society is the City's long-time primary provider of criminal indigent defense services. In Fiscal 2011, the Society has been provided with approximately \$79.5 million. This included a baseline funding appropriation by the Administration (\$73.9 million) supplemented by a \$5.65-million enhancement through City Council discretionary funds. Legal Aid's Preliminary Budget for Fiscal 2012 is approximately \$73.9 million and includes only the Administration's baseline funding.

The Society anticipates that it will again be awarded the largest number of primary criminal defense trial-level cases so that it will continue to be the primary indigent criminal defense provider in the Bronx, Brooklyn, Manhattan, and Queens. In addition, the Society has been restored to its role as the primary indigent criminal defense provider on Staten Island. The Giuliani Administration had prevented the Society from providing indigent defense representation on Staten Island beginning in the mid-1990s. Accordingly, as a result of the RFP, the Society is likely to remain the primary indigent criminal defense provider in each of the five boroughs and city-wide. The Society has also been designated to continue to serve as the sole institutional provider of indigent parole revocation defense representation on Rikers Island.

Upon resolution of the pending lawsuit and the execution of a new contract, the Administration intends to shift additional budgeted funding to Legal Aid commensurate with recognized baseline costs and new contractual responsibilities. Of note, it is the Administration's intent to baseline in Legal Aid's contract the supplemental funding that for so many years has been provided on a year-by-year basis by the City Council.

- **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 and benefits 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 \$32.6 million in Fiscal 2011.

Despite ending its contractual affiliation with the alternative provider on Staten Island (Battiste, Aronowsky & Suchow, whose workload, as discussed above, will be assumed by Legal Aid), the Administration intends to shift additional budgeted funds to one or more of the remaining alternative providers commensurate with recognized baseline costs and new contractual responsibilities. In this regard, as is the case with Legal Aid, total funding for these organizations in Fiscal 2011 and 2012 will not be known until the resolution of the pending lawsuit and the execution of their various contracts. In addition to Battiste, the current alternative providers are: New York County Defenders, Bronx Defenders, Brooklyn Defender Services, Queens Law Associates, P.C, the Center for Appellate Litigation (1st Appellate Department) and Appellate Advocates (2nd Appellate Department).

- **Assigned Council Program (18-B Attorneys).** The Court appoints private 18-B attorneys to handle cases in which representation by a given provider would create a conflict of interest (i.e., when multiple defendants need representation) 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 2010 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. The \$41-million State reimbursement figure remains unchanged in the Fiscal 2012 Preliminary Plan (though OMB reports that a portion of this sum is in jeopardy of being lost). Total 18-B costs for Fiscal 2012 are presently budgeted at \$75.3 million, an identical figure to that being funded in the current year (Fiscal 2011).

As indicated above, the RFP released last February by the CJC sought to create institutional conflict providers. If the City prevails in court and the Office of 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. The Fiscal 2012 Preliminary Plan, however, recognizes no 18-B savings.

- **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 allowed NDS, for the first time, to submit a responsive bid on a catchment area basis. An executed contract emanating from this process is in place and the current February Plan contains funding for NDS in the amount of \$3.9 million in Fiscal 2011 and \$4.8 million in Fiscal 2012.
- **Office of the Appellate Defender (OAD).** OAD is a twenty-two 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 was asked to operate under provided only \$1.999 million in Fiscal 2009, \$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 by the City Council in Fiscal 2008.)

Subsequently, 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. While the baseline funding for OAD now stands at approximately \$1.75 million, discussions are taking place between OAD and the Office of the CJC regarding a possible contractual amendment which the provider asserts is necessary to carry out its mission.

- **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 February Plan totals approximately \$11.3 million Fiscal 2011 and \$12.7 million in Fiscal 2012, allows for the provision of such services in four boroughs: Manhattan (Center for Family Representation, or CFR), the Bronx (Bronx Defenders), Brooklyn (Legal Services NYC), and Queens (CFR).