

New York City Council



BUDGET REPORT

Finance Division

March 2009

***Analysis of the
Fiscal 2010 Preliminary Budget
and
Fiscal 2009 Preliminary Mayor's Management Report
for the
Legal Aid Society/Indigent Defense Services
Friday, March 20, 2009***

Hon. Christine C. Quinn
Speaker

Hon. David I. Weprin, Chair
Committee on Finance

Hon. James Vacca, Chair
Committee on Fire and Criminal
Justice Services

Preston Niblack, Director

Jeffrey Rodus, First Deputy Director

Andy Grossman, Deputy Director

Eisha Williams, Supervising Legislative
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PREFACE

On March 20, 2009, at 1pm., the Committee on Fire and Criminal Justice Services, chaired by the Hon. James Vacca, will hold a hearing on the Mayor's Fiscal 2010 Preliminary Budget and Fiscal 2009 Preliminary Mayor's Management Report for the Legal Aid Society/Indigent Defense Services.

Section 236 of the New York City Charter requires the Mayor to submit by January 16th a preliminary budget for the upcoming fiscal year.^a In addition, under section 12 of the City Charter, the Mayor must make public and submit to the Council by January 30th the Preliminary Mayor's Management Report (PMMR) for the current fiscal year.^b Among other things, the PMMR must contain "proposed program performance goals and measures for the next fiscal year reflecting budgetary decisions made as of the date of submission of the preliminary budget."^c The Charter also requires the Council to hold hearings on the preliminary budget and to submit recommendations to the Mayor by March 25th.^d This year, the Council will hold joint hearings on the Fiscal 2010 Preliminary Budget and the Fiscal 2009 Preliminary Mayor's Management Report.

Beginning with the Fiscal Year 2008 Adopted Budget, the Council and the Mayor's Office of Management and Budget agreed to an additional budget presentation, referred to by OMB as the budget function analysis, and by the Council as the program budget. Two agencies were initially presented in the program budget form. Beginning with the January 2008 Financial Plan (Fiscal 2009 Preliminary Budget), a total of 16 agencies are now in program budget form. The Department of Youth and Community Development is a program budget agency.

This report was prepared by Eisha Williams, Supervising Legislative Financial Analyst, under the supervision of Deputy Director Andy Grossman.

^a The Charter prescribes specific actions that are required as part of the annual budget submission process during a fiscal year. The Charter allows for changes, via local law, in the dates in the submission of the PMMR, as well as an extension for subsequent steps in the budget process. This year, Local Law 03 of 2009 changed the date for the submission of the Preliminary Budget to January 30th, and the date for the Council's Response to the Preliminary Budget to April 8th.

^b Local Law 03 of 2009 changed the date of submission of the PMMR to February 13, 2009.

^c New York City Charter, §12(b)(2).

^d *See id.* at §247.

Legal Aid/Indigent Defense Services

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 2008, the City's actual expenditures for indigent defense services totaled approximately \$203.7 million. In Fiscal 2009, the Adopted appropriation was \$201.7 million (including \$9.65 million in City Council discretionary funding), an amount unchanged as of January. The Preliminary Fiscal 2010 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 \$33 million in Fiscal 2009 and \$41 million in Fiscal 2010.

3-Year Indigent Defense Budget Data	
	in millions
Fiscal 2008 - Actual Spending	\$203.7
Fiscal 2009 - Adopted Appropriation	\$201.7
Fiscal 2009 - Modified Budget	\$201.7
Fiscal 2009 - As per the January Plan	\$204.2
Fiscal 2010 - Preliminary Budget	\$186.0

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 request for proposals (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 last year's 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) have each recently confirmed, however, that the contracts emanating from this process will not be in place until January 2010, halfway through Fiscal 2010. The Council has been told informally by the CJC that the existing trial-level contractors (whose contracts all expire at the close of Fiscal 2009) have been asked to enter into six-month 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 January 2010). While the Office of the CJC has indicated that the interim contracts would be let on the same budgetary terms as the current contracts, terms that would seemingly include the value of the City Council's supplementary funding, OMB has 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 has essentially cut off communications with the Council regarding this matter as evidenced by a February 19 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."

- **The Legal Aid Society (LAS).** The Legal Aid Society is the City's long-time primary provider of criminal indigent defense services. In Fiscal 2009, the Society was appropriated approximately \$83.1 million. This included a baseline funding appropriation by the Administration supplemented by an \$8.65-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.

Legal Aid's Preliminary Budget for Fiscal 2010 is approximately \$72 million, a significant reduction from its Fiscal 2009 appropriation of \$83.1 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 \$8.65 million. For the past several fiscal years, a sum approximating the remaining \$2.5-million difference in the Society's year-over-year funding drop has been restored by the Administration in the Executive Budget.

**Indigent Defense Providers
As of the January 2009 Financial Plan
Miscellaneous Budget – Unit of Appropriation 005**

	FY2009	FY2010
18-B Assigned Counsel Program	\$74,507,287	\$71,038,132
Legal Aid Society	\$83,109,500	\$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	\$3,899,220	\$3,899,220
Center for Appellate Litigation	\$3,399,320	\$3,399,320
Alternative Providers sub-total	\$31,991,812	\$31,810,812
Neighborhood Defender Services	\$3,000,000	\$-
Office of the Appellate Defender	\$1,999,000	\$1,624,000
Center for Family Representation	\$2,784,100	\$2,784,100
Bronx Defenders	\$3,844,990	\$3,844,990
Legal Services for New York City	\$2,826,790	\$2,826,790
Family Court Providers sub-total	\$9,455,880	\$9,455,880
Miscellaneous	\$87,849	\$87,849
TOTAL Indigent Defense Services Budget	\$204,151,328	\$185,976,173

- 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 approaching \$32 million. The January Plan includes approximately \$32 million in funding for the seven alternative providers in Fiscal 2009, and \$31.8 million in Fiscal 2010, reflecting a decrease of \$181,000 for a single provider (New York County Defenders).

- **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 brings the Fiscal 2010 forecast up to only \$36 million against expected costs of more than \$71 million.

In keeping with other recent downward estimates in required 18-B funding, the January Plan removes \$7.5 million in City funds in Fiscal 2010 and the outyears, yielding the all-funds 18-B budget of \$71 million referenced above.

- **Neighborhood Defender Service (NDS).** 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.
- **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 provides only \$1.999 million in Fiscal 2009 and \$1.624 million in 2010 and the outyears. (The Fiscal 2009 contract amount includes 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.)

In a recent 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 is seeking \$800,000 from the City Council for Fiscal 2010, an amount that would bring the agency’s budget in line with its Fiscal 2008 appropriation.

- **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 remains the same in Fiscal 2009 and Fiscal 2010 (approximately \$9.5 million), allows for the provision of such services in three boroughs: Manhattan, the Bronx, and Brooklyn. The Office of the Criminal Justice Coordinator reports that while no contracts were 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.