

THE COUNCIL OF THE CITY OF NEW YORK

Hon. Corey Johnson
Speaker of the Council

Hon. Adrienne Adams
Chair, Committee on Public Safety



Report of the Finance Division on the
Fiscal 2022 Preliminary Financial Plan

The Legal Aid Society and Indigent Defense

March 16, 2021

Finance Division

Monica Pepple, Financial Analyst
Eisha Wright, Unit Head

Latonia McKinney, Director
Regina Poreda Ryan, Deputy Director

Nathan Toth, Deputy Director
Paul Scimone, Deputy Director

Table of Contents

Indigent Defense Services Overview	1
Indigent Defense Fiscal 2022 Preliminary Budget	2
Agency Funding.....	3
Issues and Concerns.....	4
Historical Overview.....	6

Indigent Defense Services Overview

<p>State law requires New York City to assume sole responsibility for funding legal representation to indigent criminal defendants, or those who are unable to pay.</p>	<p>The Mayor’s Office of Criminal Justice (MOCJ) manages the Assigned Counsel (18-b) Program and contracts with several legal service providers that represent indigent criminal defendants.</p>	<p>The City’s indigent defense program ensures that all eligible individuals charged with crimes will have fair, just, and effective counsel at both the trial and appellate levels.</p>
---	--	--



The Legal Aid Society (LAS) is the City’s primary indigent defense service provider. LAS provides indigent criminal defense services at the trial and appellate levels, which includes handling conflict and homicide cases. LAS is the sole institutional provider for Richmond County and on Riker’s Island for indigent parole revocation defense. There are five additional indigent defense providers in the City: New York County Defenders (NYCD), Brooklyn Defender Services (BDS), Bronx Defenders (BXD), Queens Law Associates, P.C. (QLA) and the Neighborhood Defender Service of Harlem (NDS). Lawyers appointed to the 18-b Program represent indigent defendants in all five boroughs.



In the Appellate Courts, LAS, 18-b Attorneys and three other alternative contractors: Appellate Advocates (AA), Center for Appellate Litigation (CAL), and the Office of the Appellate Defender (OAD) handle cases.



On a limited basis, the City provides legal representation to indigent parents or guardians in Family Court for Article 10 abuse and neglect cases. The providers are the Center for Family Representation (CFR), which handles cases in Manhattan and Queens; Brooklyn Defenders Services (BDS) in Kings County; Bronx Defenders (BXD) in Bronx County; and Neighborhood Defender Service of Harlem (NDS), which represents defendants from northern Manhattan.

The indigent defense providers’ Fiscal 2022 Preliminary Budget totals \$312.2 million across all contract types. LAS, the City’s primary provider, makes up \$116.3 million of this total. The overall indigent defense budget represents less than one percent of the City’s total projected budget of \$92.3 billion in Fiscal 2020. The budget for indigent defense supports providers that have contracts with the City, therefore, budgeted headcount is not applicable. This report offers an overview of the providers’ Fiscal 2022 Preliminary Budget by funding source, provider and case type, issues and concerns, followed by a historical overview of the providers’ budget and caseload.

Indigent Defense Fiscal 2022 Preliminary Budget

Funding for the public defense providers is scheduled in the Miscellaneous Budget and is allocated through contracts with MOCJ. The table below provides an overview of the Adopted Budget for Fiscal 2021 and planned expenditures for Fiscal 2021 and Fiscal 2022 as proposed in the Preliminary Financial Plan for Fiscal 2021-2025 (the Plan or Preliminary Plan) by contract type and provider.

Indigent Defense Funding Summary	Adopted	Preliminary		*Difference
<i>Dollars in Thousands</i>	FY21	FY21	FY22	2021-2022
18-b Assigned Counsel Program (City)	\$10,598	\$10,598	\$9,605	(\$993)
18-b Assigned Counsel Program (State)	39,751	39,751	39,751	0
Total 18-b Assigned Counsel Program - Subtotal	\$50,349	\$50,349	\$49,356	(\$993)
Legal Aid Society - Trial	\$93,246	\$93,246	\$93,246	\$0
Legal Aid Society - Appellate	9,481	9,481	9,481	0
Legal Aid Society - Conflict	5,643	5,643	5,643	0
Legal Aid Society - Subtotal	\$108,370	\$108,370	\$108,370	\$0
NY County Defenders	\$9,066	\$9,066	\$9,066	\$0
Bronx Defenders	13,878	13,878	13,878	0
Brooklyn Defender Services	18,775	18,775	18,775	0
Neighborhood Defender Services	4,936	4,936	4,936	0
Queens Law Associates	11,448	11,448	11,448	0
Alternative Providers - Trial Level Subtotal	\$58,103	\$58,103	\$58,103	\$0
Non-Homicides New Contracts	\$7,800	\$7,800	\$7,800	0
Indigent Defense - Homicides New Contracts	19,999	19,999	19,999	0
New Contracts - Subtotal	\$27,799	\$27,799	\$27,799	\$0
Appellate Advocates	\$5,448	\$5,448	\$5,448	\$0
Center for Appellate Litigation	5,505	5,505	5,505	0
Office of the Appellate Defender	2,079	2,079	2,079	0
Alternative Providers - Appellate Level Subtotal	\$13,032	\$13,032	\$13,032	\$0
Bronx Family Defense Practice - Bronx Defenders	\$7,251	\$7,251	\$7,251	\$0
Brooklyn Family Defense Project - BDS	7,606	7,606	7,606	0
Center for Family Representation	5,952	5,952	5,952	0
Neighborhood Defender Services - CA Harlem	2,574	2,574	2,574	0
Family Court Providers - Subtotal	\$23,383	\$23,383	\$23,383	\$0
Indigent Defense Contract Total:	\$281,036	\$281,036	\$280,043	(\$993)
Indigent Defense Providers' Salary Adjustment	\$3,690	\$3,690	\$3,690	\$0
Criminal Justice Reform Implementation	\$9,375	9,375	9,431	56
Immigration Defense	0	827	551	551
Expedited 730 Exams	0	588	0	0
Hurrell-Harring Settlement Grant	0	43,587	0	0
Office of Court Administration Grant	0	47,829	0	0
Indirect Cost Rate	824	824	824	0
Wage Adjustments	6,029	6,029	\$6,029	0
Cost of Living Adjustments	8,451	8,451	8,451	0
Miscellaneous	3,195	3,182	3,194	(1)
Other Subtotal:	\$31,564	\$124,382	\$32,170	\$606
Grand Total:	\$312,600	\$405,418	\$312,213	(\$386)
<i>Funding source</i>				
City	\$258,769	\$259,345	\$257,832	(\$938)
State	50,297	142,539	50,848	551
Federal	3,533	3,533	3,533	0
TOTAL	\$312,600	\$405,418	\$312,213	(\$386)

*The difference of Fiscal 2021 Adopted Budget compared to Fiscal 2022 Preliminary Budget

The Fiscal 2022 Preliminary Budget for indigent defense totals \$312.2 million, \$386,000 less than the Fiscal 2021 Adopted Budget of \$312.6 million. In June, the projected Fiscal 2022 Budget of \$311.6 million was \$937,690 less than the Fiscal 2021 Adopted Budget of \$312.6 million. Since the adoption of the Fiscal 2021 Budget, financial plan updates have introduced a number of changes to the indigent defense Fiscal 2021 and 2022 Budget. These include \$92.8 million and \$551,421 in other adjustments in Fiscal 2021 and Fiscal 2022 respectively. The majority of the Fiscal 2021 budget increase is attributed to the recognition of State funding from the Hurrell-Harring settlement. For Fiscal 2022, changes include the recognition of \$551,421 for immigration defense, offset by a decrease of \$993,690 in City-tax levy funding for 18-b providers. These actions reconcile the indigent defense contracts to its current budget of \$405.4 million for Fiscal 2021 and \$312.2 million for Fiscal 2022. Highlights are below.

Agency Funding

Funding Sources

The below graphic represents the funding sources for the City’s indigent defense contracts in Fiscal 2022 as of the Preliminary Plan.



City funding makes up most of the indigent defense providers' budget **(83%)** and supports every type of contract.



State funding makes up a the second-largest portion of the indigent defense providers' budget **(16%)** which goes solely to 18-b and Family Court contracts



Federal funding makes up the smallest portion of the Indigent Defense contracts budget **(1%)** and goes solely to support Family Court contracts.

Preliminary Plan Actions. The graphic below provides an overview of the other adjustments introduced in the Preliminary Plan. The Preliminary Plan introduced changes to Fiscal 2021 only, with the exception of one item supporting immigration defense. This action includes \$827,129 in Fiscal 2021, \$551,421 in Fiscal 2022, and \$275,708 in Fiscal 2023. The Preliminary Plan did not introduce any new needs or savings for indigent defense. The November 2020 Plan did not introduce any meaningful changes to the indigent defense budget.

Type:	Action:	FY21	FY22
Other Adj:	Indigent Defense Settlement Court Grants	\$91,415	0
Other Adj:	Immigration Defense	827	551
Other Adj:	Expedited 730 Exams	588	0

**Dollars in Thousands*

Indigent Defense Settlement and Court Grants. The Preliminary Plan includes one-time funding of \$91.4 million in Fiscal 2021 only for the Hurrell-Harring settlement (HHS) and OCA grants. The HHS, which was approved in March of 2015, found that New York State’s indigent defense system is “dysfunctional and structurally incapable” of providing defendants with the effective legal representation that is guaranteed by the Constitution. The HHS requires NYS to improve its delivery of public defense services in four key areas:

- 1) **Counsel at Arraignment.** Mandates that every criminal defendant will have a lawyer from the very beginning of the process, at their first court appearance.
- 2) **Caseload Relief.** Mandates the setting of caseload caps any lawyer can carry at one time, thus ensuring quality attention and defense on each case.
- 3) **Initiatives to Improve the Quality of Indigent Defense.** Improves the qualifications, training, and supervision of lawyers representing indigent defendants. Requires providers to hire investigators and support staff such as social workers.
- 4) **Eligibility Standards for Representation.** Mandates the creation of uniform criteria and procedures for assessing financial eligibility.

Under the terms of the Settlement, the State is required to fund these initiatives. As such, the State’s proposed Fiscal 2022 Budget included Local Assistance funding for the fourth year of a five year phase-in, bringing the total budget for this line item to \$91.4 million for New York City for the HHS and OCA grants. The Settlement is managed by the State’s Office of Indigent Legal Services, which has created a Hurrell-Harring implementation team that works with New York State counties to ensure compliance with the terms of the settlement. In New York City, funding specifically supports the third key area, “initiatives to improve the quality of indigent defense,” by hiring investigators and social workers. Funding is mainly focused in this area because counsel at arraignment and caseload caps had already implemented in the City prior to the HHS. Of the \$91.4 million total, \$57.2 million is recognized in LAS’ budget and \$34.2 million is recognized in the alternate providers’ budgets. Although funding has been recognized in the indigent defense budget, the contracts have yet to be amended to reflect the funding that will be dispersed to the providers. According to MOCJ, this action will likely happen after the State adopts its Fiscal 2022 Budget, and subsequently, the funding will be accurately reflected in the outyears.

Expedited 730 Exams. The Preliminary Plan introduced \$588,264 in Fiscal 2021 only to support expedited 730 Exams. Under Criminal Procedure Law 730 exams may be ordered to determine whether an individual is fit to proceed to trial on the basis of behavioral health issues, or be diverted to the Department of Health and Mental Hygiene for community-based services in lieu of trial and detention. Funding for 730 exams typically has been recognized in MOCJ’s criminal justice programs contract budget, but as of the Fiscal 2022 Preliminary Plan, is recognized in the indigent defense contract budget in Fiscal 2021 only.

Issues and Concerns

Pay Parity. The Fiscal 2020 Budget adoption deal required the Administration to fund pay increases for lawyers with less than five years of work history employed by legal service providers, including indigent defense contractors. Subsequently, the November 2019 Plan added \$7.3 million for pay parity across the indigent defense providers’ baselined contracts managed by MOCJ and HRA’s Office of Civil Justice (OCJ), with \$3.7 million for each Office respectively.

Although the funding was recognized in the indigent defense budget over a year ago, as of March 2021, the providers' contracts have yet to be amended by MOCJ or HRA and the Administration has not fulfilled its commitment to the deal.

Pay Parity Funding Across Providers		
Provider	Total Funding	Total Attorneys*
The Legal Aid Society	\$1,380	88.5
Bronx Defenders	934	106
Brooklyn Defender Services	391	71
Center for Family Representation	320	29
Neighborhood Defender Services	218	26.5
New York County Defender Services	139	23
Center for Appellate Litigation	137	13
Appellate Advocates	93	11
Office of the Appellate Defender	49	5
Queens Law Associates	29	26
MOCJ Total:	\$3,690	399

**Operating on MOCJ's baselined contract budget
Dollars in Thousands*

For the indigent defense providers operating on MOCJ's baselined contracts, a total of 399 attorneys are impacted by these salary adjustments. According to the providers and MOCJ, the contract amendments and dispersion of funds are ultimately pending OMB's approval. Additionally, the adjustments only cover attorneys who are working on MOCJ's baselined contracts; attorneys with zero to four years of experience working on State and City Council Discretionary contracts, nor support staff, are not included in these adjustments, which is a priority across all of the providers. Further, the agreement was for pay parity to be implemented in two phases. The first phase would include attorneys with less than five years of experience, and would be retroactive to July 1, 2019. The second phase was to be developed in 2020 and include more tenured attorneys as well as assistant district attorneys with five or more years of experience. No additional funding increases to bring indigent defense or prosecutors' salaries in line with lawyers employed by the Law Department have been made. The Committee will continue to track this issue.

Right Size Article 10 Funding. Due to an uptick in abuse and neglect cases beginning in Fiscal 2016, providers were taking on more Article 10 cases than in any year before. To address this situation, the Article 10 contract budget included one-time funding of \$8.7 million dispersed among the providers in Fiscal Years 2017 through 2020, with \$3.4 allocated from the City, and \$3.9 and \$1.3 million in State and federal funding respectively. Neither the current Fiscal 2021 Budget nor the Fiscal 2022 Preliminary Plan include this one-time funding; it is unclear if this one-time funding will be seen later in the fiscal year, or if the caseload is expected to fall back. According to MOCJ, case intake decreased in the beginning of COVID-19 but has since started to increase.

Court Operations and Impact.

- **Operational Changes.** The COVID-19 pandemic has required all Courts across New York State to adapt to virtual operations. In March of 2020 Courts began operating remotely including: New York City's Family Court, Criminal Court and Civil Court, and the New York State Unified Court System¹. In the summer of 2020, a four-phased approach began to re-open and expand in-person matters. However, due to the rise in cases during the winter months, the Courts shut down again with the exception of grand jury proceedings. All arraignments are virtual and trials have been suspended with the exception of a small

¹ The New York Unified Court System includes the Supreme Civil and Criminal Courts, Family and Surrogate Courts, and some specialized court parts.

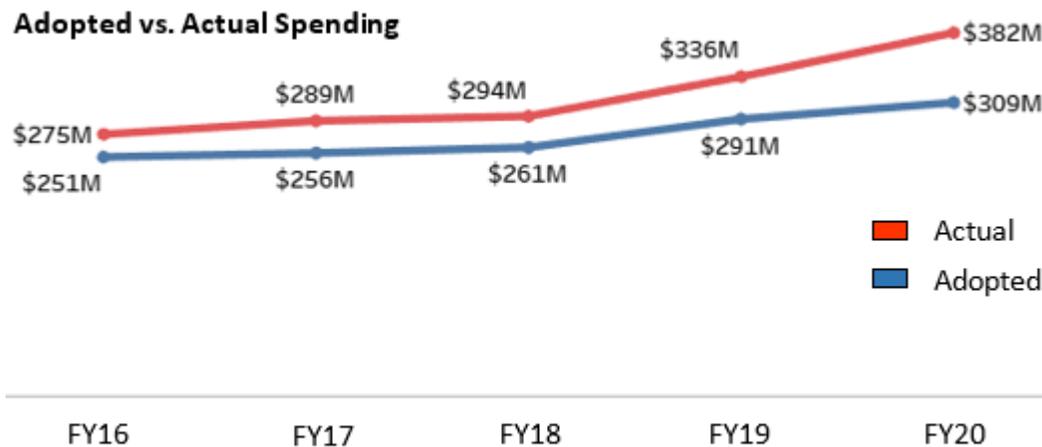
number of criminal cases being called in-person. In an effort to reduce the number of people in the courthouse at any one time, in-person appearances are scheduled. To adhere to State guidelines, extensive cleaning services are executed and individuals are screened upon arrival at the courthouse for temperature checks, and masks are provided. Courtrooms have Plexiglas barriers and seating is socially distanced.

- Impact on Providers.** When in-person criminal appearances were occurring in the summer, it raised concern not only for the safety of court staff, lawyers, and the public, but also for defendants who are at higher risk of being impacted by COVID-19. In July of 2020, LAS and all of the City’s alternate providers filed a complaint against the State and the Office of Court Administration (OCA) to stop in-person criminal court proceedings during the COVID-19 pandemic, claiming that OCA had violated the Americans with Disabilities Act by forcing defendants and attorneys with pre-existing medical conditions to attend court cases in-person. The motion was denied, but was immediately converted into a preliminary injunction motion that remains pending.

As a result of Court suspensions, the providers have a backlog of cases that are delayed and will only move forward once operations return to normal. This has resulted in the inability to resolve cases in a timely manner and may have a budgetary impact on the providers once cases begin to move forward again. The providers continue to connect individuals to supportive services including economic and benefits support, housing resources, personal protective equipment, and address issues of food insecurity, mental health, and substance use programs among others, as part of the Hurrell-Harring settlement requirements to improve the quality of services provided.

Historical Overview

Budget History. The Fiscal 2022 Preliminary Budget for the indigent defense providers’ contracts remains unchanged when compared to the Fiscal 2021 Adopted Budget, except for a \$993,000 decrease to the 18-b contracts. As shown in the graphic below, the average adopted budget for the indigent providers has been \$273.6 million over the past five fiscal years, with actual spending of \$315.2 million during the same time. On average, actual spending is \$42 million over, and one-shot funding is added each year for the Article 10 and 18-b contracts in the amounts of \$8.7 million and \$20 million respectively. The most recent contracts for the providers began in Fiscal 2020, with the exception of the Article 10 cases which began in Fiscal 2019, showing that the indigent defense budget is typically underfunded and that the City has poorly planned in this area.



**Indigent Defense Providers Case Intake
2015-2019**



Caseload History. The chart on the following page shows that the providers’ case intake has been steadily declining over the last five years. This decrease is, at least in-part, due to changes in criminal justice practices in New York State and New York City and reforms that aim to reduce incarceration and divert people from detention. Despite the fact that overall caseload continues to decrease, the spending has increased due to increases in wages, state mandates, including the State’s 2019 Criminal Justice Reform and the HHS, and new contracts which support a broader array of services. Thus, the City

should right size the overall budget and fund indigent defense services at the appropriate level. Beginning in calendar year 2020, contracts for criminal trial providers have shifted from intake goals to a percentage of Citywide and boroughwide cases. As the primary indigent defense provider, LAS handles the majority of trial-level cases from every borough and takes 100 percent of cases from Richmond County. The City’s alternate providers (NYCD, BXD, BDS, NDS, and QLA) accept trial-level cases and take the remainder of the projected intake not assigned to LAS. Prior to this change, LAS took an average of 152,610 cases annually between 2015 and 2019, and the alternate providers took an average of 100,938 cases annually during the same time. Over the same five years, the Family Court providers took an average of 4,183 cases and the appellate providers took an average of 1,541. As of the writing of this report, MOCJ has yet to provide the Council with actual intake data by provider and borough for Fiscal 2020, or projected intake data for Fiscal Years 2021 and 2022.