



Andrew M. Cuomo
Governor

STATE OF NEW YORK
OFFICE OF INDIGENT LEGAL SERVICES

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William J. Leahy
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Joseph F. Wierschem
Counsel

Improving the Quality of Mandated Representation Throughout the State of New York

October 15, 2013

Cillian M. Flavin
Budget Examiner, Public Protection Unit
Division of the Budget
State Capitol Room 127-M
Albany, New York 12224

Re: Office of Indigent Legal Services Budget Request for FY 2014-2015

Dear Cillian,

Enclosed please find two copies of the Office of Legal Services (ILS) budget request for FY 2014-2015. We request an appropriation of \$99.5 million, consisting of \$3.5 million for State Operations and \$96 million for Aid to Localities. Please note that this budget request was approved by the Indigent Legal Services Board at its meeting on September 27, 2013.

This year's appropriation will determine whether the State of New York will bring itself into compliance with federal and state legal mandates to provide representation to people who are entitled to the effective assistance of counsel, yet who cannot afford to pay for a lawyer. See *Gideon v. Wainwright*, 372 U.S. 335 (1963), *People v. Witek*, 15 NY 2d 392 (1965), *In re Ella B.*, 30 NY 2d 352 (1972). Whether one reads the majority decision of the Court of Appeals in *Hurrell-Harring v. State of New York*, 15 NY 3d 8 (2010) or the dissent in that case, no reasonable person would dispute the assessment of even the dissenting judges that in New York "[l]egal services for the indigent have routinely been underfunded, and appointed counsel are all too often overworked and confronted with excessive caseloads[.]" *Id.*, 15 NY 3d at 33 (Pigott, J., dissenting).

What was true in 2010 is even truer today. Excessive caseloads and a pervasive lack of adequate support services, training and supervision require a much more vigorous budgetary response than has yet been forthcoming in the appropriations that have followed the decision in *Hurrell-Harring* and the commencement of this Office's operations in 2011. This appropriation request seeks the minimum amount that, in our

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Appellate and Post-
Conviction Litigation

Karen Jackuback
Grants Manager

Joanne Macri
Director of Regional
Initiatives

"The right... to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."

Gideon v. Wainwright, 372 U.S. 335, 344 (1963)

judgment, will enable New York to make measureable improvements in the quality of the representation and the quality of justice it provides to its residents. Constitutional compliance and the achievement of equal justice for all New Yorkers deserve no less a priority on the Governor's appropriation agenda than Medicaid and education reform.

State Operations: \$3,500,000

This Office was intended from the outset as a three million dollar entity that would undertake the enormous task of assessing the quality and efficiency of mandated legal representation delivered by some 145 providers in New York's 57 counties and New York City; and would provide solutions to the obvious, well-documented and longstanding deficiencies therein. Indeed, Governor Cuomo recommended a \$3 million appropriation in his FY 2011-2012 Executive Budget. However, budget negotiators cut that recommendation by half; and that inadequate \$1.5 million appropriation was maintained for FY 2012-2013. Last year the appropriation was increased by the Legislature to \$1.8 million in order to provide support for our present ten person office.

Our ability to remedy the constitutional inadequacies identified in *Hurrell-Harring* has been hamstrung by the inadequacy of our appropriations. We require an appropriation of \$3.5 million for FY 2014-2015, an increase of \$1.7 million over our current appropriation, to accomplish three vital purposes:

- \$200,000 to (i) add an Assistant Grants Manager to assure the prompt and accurate reimbursement payments to counties for utilization of state funds; (ii) afford modest salary increases to help retain the services of our highly accomplished and seriously underpaid staff; and (iii) provide sufficient support to ensure the effective operation of our assessment and reform efforts;
- \$1 million to establish our first Regional Support Centers. We remain convinced that the creation of these Centers is essential for the realization of uniform, high quality representation in every county and region. Please see **Attachment A, Proposal for Regional Support Centers**. This initial appropriation would be dedicated to establishing the first two such Centers, in areas of the greatest need for regional help.
- \$500,000 to establish a New York State Appellate Resource Center. This Center, modeled after the New York Prosecutors Training Institute (NYPTI), will provide litigation assistance to assigned counsel and mandate relief to counties by providing for state-funded appellate representation in complex cases. It will also identify and seek to rectify wrongful convictions much more speedily than is done at present. Please see **Attachment B, New York State Appellate Resource Center: A Proposal**.

Aid to Localities: \$96,000,000

At its inception, this Office had an appropriation of \$77 million for Aid to Localities -- in comparison to the \$338 million expended by the counties and New York City in 2012 for representation under article 18-B of the County Law. The \$338 million expended by the counties and City in 2012 define the unfunded state mandate, made worse by annually rising local expenditures without a sufficiently significant increase in state funding. In FY 2012-2013 the appropriation was increased by four million dollars, and it remained at \$81 million in FY 2013-2014. Please note that this overall 19.3 % state contribution toward the cost of providing counsel is far lower than that contributed by most states. This appropriation enables us to maintain state aid at the 2010 level for all 57 counties and New York City (\$70.2 million), to begin to provide counsel at arraignment in some courts in 25 counties (\$4 million), to create six regional Immigration Resource Centers (\$2.8 million), and to begin to reduce excessive caseloads and mitigate a widespread lack of essential support services upstate (\$4 million).

The true cost of bringing New York State into compliance with professionally appropriate and constitutionally compliant standards of representation far exceeds the \$15 million increase that we propose today. To bring caseloads and workloads in every county into compliance with national standards; to ensure that counsel is provided at every client's first court appearance; to improve and make uniform the quality of representation in Family Court cases; to provide sufficient support staff, investigative and forensic resources to ensure effective representation; to furnish comprehensive training in all practice areas in every locality; to ensure that only qualified attorneys are authorized to represent clients; to supervise their representation and evaluate their performance: to achieve compliance with these and other hallmarks of effective representation will require a sustained effort, and significantly more resources than can reasonably be attained in a single annual budget process. But we have identified the core deficiencies, we have made a beginning at improving the quality of representation, and we ask the Governor and the Legislature to provide us the resources that are minimally necessary to continue and to accelerate our progress.

Specifically, we request an Aid to Localities increase of \$15 million in this year's appropriation, for the following purposes:

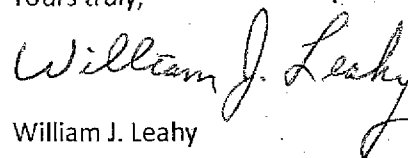
- \$8 million to continue and enhance our remediation of the twin evils of excessive caseloads, and wholly inadequate support services, supervision and oversight that continue to exist in all or virtually all upstate counties. Please see **Attachment C, Funding Announcement: Upstate Quality Improvement and Caseload Reduction Grant** (August 22, 2013) and please read our forthcoming report, *An Estimate of the Cost of Compliance with Maximum National Caseload Limits in Upstate New York*.

- \$4 million to extend the reach of counsel at first appearance – within the 25 counties that are addressing it now, and the 32 that did not respond to our initial Request for Proposals. Please see **Attachment D, Funding Announcement: Counsel at First Appearance Demonstration Grant** (November 30, 2012).
- \$3 million to address two major deficiencies in the quality of representation for parents and other adult respondents in Family Court cases: the lack of timely appointment of counsel in child protective cases, and the particular need for quality improvement in this long-neglected and vitally important area of our responsibilities. Please see **Attachment E, Timely Appointment of Counsel in Child Protective Proceedings and Family Court Practice Quality Improvement Grant**.

Each of these requests is an essential component of our effort to improve the quality of representation, as we are mandated to do by Executive Law article 30 section 832, and each is essential to curing New York's longstanding non-compliance with its obligation to provide the effective assistance of counsel to persons who cannot afford to hire a lawyer in cases where representation is mandated by law.

Thank you for your careful consideration of and support for our budget request. Please feel free to call me or ILS Counsel Joe Wierschem with any questions.

Yours truly,



William J. Leahy

cc: Mylan Denerstein, Counsel
Larry Schwartz, Secretary

ALL FUNDS BUDGET REQUEST FY 2014-2015
STATEMENT OF THE COMMISSIONER OR AGENCY HEAD

AGENCY: OFFICE OF INDIGENT LEGAL SERVICES

The New York State Office of Indigent Legal Services, created by enactment in June, 2010, did not commence operations until February 22, 2011. The mission of the agency, set out in Executive Law Article 30, Section 832 (1), is "to monitor, study and make efforts to improve the quality of services provided pursuant to article eighteen-B of the county law." The creation of this agency, and the Indigent Legal Services Board to which it reports (see Section 833), constitute the first concerted action by the State of New York since 1965 to address persistent and highly publicized concerns about the quality of the representation that the State now provides to persons in criminal and family court matters who are entitled to the assistance of counsel, yet cannot afford to hire an attorney.

BUDGET AND STAFF HIGHLIGHTS

Despite lengthy delays in the processing of appointments to the ILS staff, the Office has promoted an unprecedented level of consultation between city and county governments and their indigent legal services providers, by requiring meaningful consultation as a precondition to the distribution of monies from the Indigent Legal Services Fund. Through this collaborative and quality-enhancing approach, virtually every county and New York City entered into contracts with the Office in 2011 for \$4.4 million worth of improvements in the quality of representation. In 2012, we entered into agreements with most localities for a total of \$8.1 million annually over a three year contractual period for improving the quality of representation. In 2013, we announced a new three year distribution of \$7.4 million annually, and the Office is now working with providers and local officials for the distribution of those funds. Through these distributions, every locality may receive funding from the state that equals the amount they received in 2010.

On November 30, 2012 we issued an RFP to the counties to provide Counsel at First Appearance. We are now working on contracts with 25 counties that will receive \$12 million over a three-year period for that purpose. On August 22, 2013, we issued an RFP for Upstate Quality Improvement and Caseload Reduction, with a deadline for proposal submission of October 18. Funding pursuant to this RFP will also be \$12 million over a three-year period. We are about to finalize our third RFP, for the development of Regional Immigration Resource Centers, which will be funded in the amount of \$8.4 million over a three-year period.

Finally we are nearing completion of a major report, *An Estimate of the Cost of Compliance with Maximum National Caseload Limits in Upstate New York*, for release in October, 2013.

NEW YORK STATE
 DIVISION OF THE BUDGET
 ALL FUNDS BUDGET REQUEST FY 2014-2015
 AGENCY SUMMARY- OFFICE OF INDIGENT LEGAL SERVICES
 RECAPITULATION OF CURRENT YEAR ADJUSTED APPROPRIATIONS
 AND REQUESTED CHANGES FOR THE NEXT FISCAL YEAR

Appropriation Category/Fund Type (A)	Adjusted Appropriations 2013-2014 (B)	Requested Change (C)	Total Request (Column B + C) 2014-2015 (D)
STATE OPERATIONS General Fund Special Revenue – Federal Special Revenue – Other Enterprise Internal Service Fiduciary	1,800,000	+1,700,000	3,500,000
SUBTOTAL	1,800,000	+1,700,000	3,500,000
AID TO LOCALITIES General Fund Special Revenue Fund – Federal Special Revenue Fund – Other Enterprise Fiduciary	81,000,000	+15,000,000	96,000,000
SUBTOTAL	81,000,000	+15,000,000	96,000,000
CAPITAL PROJECTS Capital Projects Funds Special Revenue – Other Internal Service Fiduciary Enterprise	-0-	-0-	-0-
SUBTOTAL	-0-	-0-	-0-
DEBT SERVICE			
AGENCY TOTAL	82,800,000	+16,700,000	99,500,000

Attachment A

Proposal for Regional Support Centers

After two and one-half years of observing, inquiring, reading, listening, consulting, funding and assessing the quality of the representation provided under New York's delivery of legally mandated representation to people who cannot afford to retain counsel, we have determined that the creation of Regional Support Centers throughout the state is an extremely important initiative that should be implemented now to improve both the quality and the uniformity of representation throughout the State of New York.

The First Annual Report of the Indigent Legal Services Board advocated for the establishment of state-funded Regional Resource Centers to help all localities improve the quality of indigent defense and parent representation, and to provide mandate relief to the counties:

The current county-based system cannot long survive if it is not supplemented by Regional Resource Centers, operating as integral parts of the Office, to assist counties in each region. These resources can include not only the already-planned Immigration Consequences Resource Centers, but also such areas as investigation, social services, litigation training, forensic assistance, appellate representation, certification of counsel, and others: many of which have been identified in the 2012 *Report on Sharing Resources* of the New York State Bar Association Committee to Ensure the Quality of Mandated Representation.

ILSB First Annual Report at 13-14 (November, 2012).

The failure of New York's primarily county-funded system to provide uniformly competent representation has been repeatedly documented both in state reports ("The current indigent defense 'system' is a haphazard, patchwork composite of multiple plans that provides inequitable services across the state to persons who are unable to afford counsel." *Status of Indigent Defense in New York* [Final Report, The Spangenberg Group, (2006) at 155]); ("The current method of providing indigent

defense services in New York imposes a large unfunded mandate by the state upon its counties [and] results in a very uneven distribution of services[.]” Commission on the Future of Indigent Defense Services, *Final Report to the Chief Judge of the State of New York*, [2006] at 20-21); and in every recent national assessment, including *Gideon’s Broken Promise* (ABA, 2004), *Justice Denied* (The Constitution Project, 2009) and *Securing Reasonable Caseloads* (ABA, 2011).

Every locality is in need of access to state-funded and locally accessible expertise, training, consultation and support. Once established, these Centers will help to assure that the quality of justice one obtains in New York does not fluctuate and often fail, depending solely on the happenstance of where one’s case arises, or which provider assumes responsibility for one’s representation. The State of New York cannot and must not tolerate the continuation of such inequity in the provision of counsel; a right that is “fundamental and essential to fair trials[.]” *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

We therefore propose the creation of state-funded Regional Support Centers that will assist local providers of indigent defense and parent representation by providing them with assistance in the following areas: 1) criminal defense and mandated family court representation expertise, 2) legal research and advice, 3) appellate and post-conviction advice and assistance, 4) locally-based litigation and supervisory training; and 5) development of and access to investigative, forensic and other litigation support services.

We envision a total of nine Centers: one in each of the upstate Judicial Districts 3 through 9, one on Long Island (JD 10), and one in New York City. Each Center would be staffed by a training director, a criminal defense attorney, a family court representation attorney, an appellate and post-conviction attorney, an investigative and forensic support resource person, and an office manager/paralegal. Ultimately, we estimate the annual cost of operating each of these Centers to be in the vicinity of \$800,000 – one million dollars annually, or a total annual expenditure of approximately \$8 million. Given the pace at which it is feasible to inhabit space and employ Executive Branch employees, however, we believe it is realistic to request a limited appropriation of one million dollars in the startup year FY 2014-2015.

Attachment B

New York State Appellate Resource Center: A Proposal

Mandated appellate representation is fragmented in New York State. In New York City, institutional defenders represent most indigent defendants, while in upstate New York, there are three institutional providers that represent only a small fraction of the criminal defendants in the remaining 57 counties. This proposal, to create a state-wide appellate resource center in Albany, the State capital, would save the State and counties money by diverting the complex cases to an institutional defender office, staffed by highly-qualified experienced attorneys, and assisted by support staff including a paralegal, investigator, and a social worker, who would provide reentry assistance and mitigation support. Because of economies of scale, this state-funded office would be more cost-effective than individual panel attorneys who are assigned to these cases now. And, because of the office's ability to engage in collateral litigation at the earliest opportunity, wrongful convictions may be overturned years earlier than is the case now, where an attorney is obligated to litigate the issues in the Appellate Division before going back to the trial court on a motion to vacate the conviction.

In New York City, The Legal Aid Society Criminal Appeals Bureau represents clients in all five counties in the city of New York (Kings, Queens, New York, Bronx, and Richmond). There are three additional institutional providers: two in the First Department (comprising the Bronx and Manhattan); and one in the Second Department, which includes Kings (Brooklyn), Queens, and Richmond (Staten Island). The Office of the Appellate Defender and the Center for Appellate Litigation represent clients in the First Department. Appellate Advocates represents clients in the three New York City counties encompassed in the Second Department. All of the institutional defenders in New York City have experienced attorney staffs, social work programs, and the flexibility to engage in collateral litigation prior to filing the direct appeal if the attorney deems it in the best interest of his or her client.

In addition to the three New York City counties, the Second Department comprises seven additional counties: Nassau, Suffolk, Westchester, Orange, Dutchess, Putnam, and Rockland. The suburban counties, Nassau, Suffolk, and Westchester, all have legal aid societies with appeals units; two of the remaining counties, Dutchess and Rockland, have public defenders offices in which a single appellate attorney handles appeals. Neither Putnam County nor Orange County Legal Aid Societies handle appeals.

The Third and Fourth Departments comprise the remaining 50 counties in the state. The Third Department is comprised of 28 counties; the Fourth Department is comprised of 22 counties. In the Third Department, while a handful of the public defender offices have a single appellate attorney,¹ there is no public defender office or legal aid society with an appeals unit. The Fourth Department has three

¹ The Albany County Public Defender office has one attorney who handles appeals full time, and a second attorney who devote half of his time to trial work and the other half to appeals. Columbia and Ulster counties each have a single appellate attorney.

down of the number of appeals handled by institutional defenders and by assigned counsel in the Third and Fourth Departments:

Third Department Assignments, 2012

Assigned Counsel, 18-B	Assigned Public Defender*
441	70

*Public Defender Assignments By County; TOTAL: 70

Albany	Broome	Chenango	Columbia	Essex	Madison	Rensselaer	Ulster	Warren
27	6	8	4	2	2	15	3	3

4th Department Assignments, 2012

Legal Aid Buffalo	Monroe County Public Defender	Hiscock Legal Aid Society	Conflict/Other PD*	Assigned counsel
141	119	76	104	221

*Conflict/Other PD: Breakdown of the 104 appeals:

Monroe Conflict	Niagara PD	Niagara Conflict	Oneida PD	Ontario PD	Wayne PD	Wyoming PD
36	9	7	19	19	6	8

The total number of criminal appellate assignments in 2012 in the Third Department was 511; the total number of criminal appellate assignments in the Fourth Department in 2012 was 680; the total for the 50 upstate counties was 1191. The state-wide appellate center would accept approximately ten percent of the assignments in these 50 counties, plus an additional 15-20 cases from the Second Department, totaling approximately 135 cases each year.

The State of New York would be well-served by creating an appellate resource center to handle complex criminal appeals. The staff attorneys at the resource center would be available to litigate the most serious cases, such as those where the defendant has been sentenced to life without parole, or a life sentence, or cases that raise particularly complex facts and legal issues, as well as litigate appeals of civil commitment pursuant to Article 10. Currently –outside of New York City – the task of filing appeals in these cases primarily falls upon individual solo practitioners on the assigned counsel plan. The hours needed to litigate these complex cases often result in costs that exceed the statutory cap of \$4,400.²

² In a meeting with Justice Peters and the staff at the New York State Supreme Court, Appellate Division, Third Department on February 26, 2013, Angela Burton and I were told that in 2012, of 520 payment orders, 65 exceeded the statutory cap.

needed to litigate these complex cases often result in costs that exceed the statutory cap of \$4,400.² Staffing the office with at least one attorney with expertise in Article 10 commitment proceedings is critical, because very few criminal appellate attorneys have experience and expertise in Article 10 appeals.

If the most complex and serious cases were diverted to a state-funded appellate office, staff attorneys with experience in litigating complex criminal appeals would save the counties money by being able to collaborate, share their research and expertise,³ and create statewide resources including a brief bank that would collect briefs by subject matter that could be made available to any attorney representing an indigent defendant on appeal. The creation of such an office would not obviate the need for panel attorneys, as those attorneys would be necessary to be assigned to conflict cases of codefendants, and to handle the majority of appeals that would not be diverted to the resource center.⁴ Nor would the creation of an appellate resource center diminish the need for the existing institutional upstate defenders: Monroe County Public Defender's Appeals Unit, The Hiscock Legal Aid Society in Syracuse, or the Buffalo Legal Aid Bureau, all of which handle a substantial number of appeals in a competent and professional manner. The attorneys at the resource center would, however, be available to any public defender, legal aid society attorney, or panel member, who needed research assistance, including access to the appellate resource center's brief bank, motion support practice, and mitigation reports by a certified social worker.

The staff attorneys at the appellate resource center would also be available to engage in collateral motions that challenge the validity of the conviction based on evidence outside the appellate record in the 57 counties. The most common such challenges are ineffective assistance of counsel claims and Brady claims (claims that exculpatory evidence has been withheld by the prosecution). In addition to collateral litigation, the staff attorneys at the resource center would be available to consult with trial attorneys at legal aid societies and public defender offices that do not have appeals attorneys on staff by providing pre-trial and trial litigation support (e.g., legal research and motion writing for issues that arise prior to and during trial). Further, through this litigation, challenges to wrongfully convicted defendants

² In a meeting with Justice Peters and the staff at the New York State Supreme Court, Appellate Division, Third Department on February 26, 2013, Angela Burton and I were told that in 2012, of 520 payment orders, 65 exceeded the statutory cap.

³ At a meeting on May 13, 2013, with the Frances Cafarell, Esq., Clerk of the Appellate Division, Fourth Department, Ms. Cafarell noted that the more experienced attorneys on the panel were more efficient, and that they submitted vouchers for less money than less experienced attorneys on comparable cases. She believes that is because more experienced attorneys are more efficient at reading the record, spotting issues, researching issues, and writing, than those with less experience.

⁴ The creation of an appellate resource center as proposed would handle less than 10% of the appeals state-wide. While some states that have created a state-wide appellate defender office handle virtually all of the indigent criminal appeals, e.g., Illinois, other states that have created state-wide appellate offices typically handle only a small percentage of the appeals throughout the state. For example, the State Appellate Defender Office in Michigan represented only 17% of indigent criminal defendants pursuing an appeal in 2011; the remaining 83% were represented by private assigned counsel.

would be filed at the earliest possible moment, thereby saving the State money in continued incarceration and in lessening the amount of civil damage awards. According to the National Registry of Exonerations, a joint project of University of Michigan Law School and Northwestern Law School, there have been 115 exonerations in the state of New York from 1983 through May 13, 2013.⁵

The first line of defense against wrongful convictions is a post-conviction litigation by appellate attorneys. In New York, each of the institutional appellate providers in the City of New York has a unit that litigates wrongful convictions.⁶ Yet none of the upstate institutional providers have such a unit, and some institutional providers are barred from engaging in post-conviction litigation outside of the direct appeal. Thus, for example, when Nathaniel Johnson was convicted of a robbery in the City of Buffalo, his case was assigned to the Appeals Unit of the Legal Aid Bureau of Buffalo. In his appeal, his attorney asserted, among other issues, that the verdict was against the weight of the evidence and that exculpatory evidence was withheld until after the trial had commenced (i.e. that there was a Brady violation). The Appellate Division rejected the weight of the evidence claim and rejected the Brady claim on the basis that it concerned matters outside the record and could be raised only by filing a motion pursuant to N.Y. Crim. Proc. Law §440.10. See *People v. Johnson*, 88 A.D.3d 1293, 1294 (4th Dep't 2011). Although the appellate attorney continued to investigate the case, a motion to vacate the conviction pursuant to N.Y. CPL §440.10 could not be filed until an attorney was assigned through the Erie County Assigned Counsel Plan on the trial attorney panel. This did not occur until two years after the original appellate attorney was assigned. See "Freed From Prison After Wrongful Conviction, Man Now 'Just Enjoying Life'" *The Buffalo News*, May 11, 2013, by Jay Tokasz, available at: <http://www.buffalonews.com/apps/pbcs.dll/article?AID=/20130511/CITYANDREGION/130519804/1109>

Had there been an appellate resource center, the motion to vacate the conviction could have been filed prior to the direct appeal, and Mr. Johnson could have been released from incarceration two years earlier. In the past few years, there have been significant judgments and settlements by the State, counties and New York City, to wrongfully convicted people. Those wrongfully convicted in New York State may sue for redress under the Unjust Conviction and Imprisonment Act, Court of Claims Act §8-b (McKinney), in addition to pursuing other litigation remedies such as federal claims for violation of civil rights.

⁵ The registry is available at: <http://www.law.umich.edu/special/exoneration/Pages/about.aspx>

⁶ In the First Department, the Center for Appellate Litigation, the Office of the Appellate Defender have dedicated staff that pursue litigation for their wrongfully convicted clients, as does Appellate Advocates in the Second Department. The Legal Aid Society, which handles indigent criminal appeals in both the First and Second Departments does not have a formal wrongful conviction review unit, but does pursue direct appeals as well as collateral litigation for wrongfully convicted clients.

Since 2011, the State of New York, or the counties have settled, or been ordered to pay, more than twenty million dollars on wrongful conviction claims:

L. DeJac ⁷	J. Deskovich ⁸	S. Fappiano ⁹	M. Clancy ¹⁰	D. Gristwood ¹¹	A. Baba-Ali ¹²
Federal civil rights lawsuit	Federal civil rights lawsuit	Court of Claims Wrongful Conviction	Court of Claims Wrongful Conviction	Court of Claims Wrongful Conviction	Court of Claims Wrongful Conviction
2.7 million settlement against NY State, 11/2012	6.5 million against Westchester County 4/2011.	2 million settlement against NY State 5/2013	2 million settlement against NY State. 9/2012	5.5 million verdict 5/2013 against NY State	1.350 million (verdict that was modified downward on appeal - 6/2012)
murder	Rape/murder	Sexual assault	murder	att. murder	Child sexual assault
Erie County	Westchester County	Kings County	Bronx County	Onondaga County	Queens County

Finally, creation of a state-wide appellate office would serve the interests of justice by creating parity between the defense and the prosecution. As it stands now, a prosecution office that does not have the resources or ability to represent the People on appeal can refer its appeals to the New York Prosecutors Training Institute (NYPTI), and a staff attorney there handles the appeal on behalf of the People of the State of New York. NYPTI also has the resources to send its attorneys to any prosecutor's office in the state to assist prosecutors at trial. Although the New York State Defenders Association is available as a resource center for defense counsel, NYSDA is limited to providing training and research assistance to attorneys representing indigent clients; it does not engage in direct representation, nor does it have the resources to send attorneys to consult during trial.

⁷ See <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3169>;
<http://bigstory.ap.org/article/ny-woman-get-27m-wrongful-conviction>

⁸ See <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3171>

⁹ See <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3211>

¹⁰ See <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3106>

¹¹ See <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3266>

¹² See <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3171>;
Baba-Ali v. State, 19 N.Y.3d 627 (2012)

New York State Office of Indigent Legal Services

Funding Announcement

Attachment C to Budget Request, 10/15/13

Upstate Quality Improvement and Caseload Reduction Grant

NYS Office of Indigent Legal Services Request for Proposals

The Office of Indigent Legal Services (Office) and nine-member Indigent Legal Services Board (Board) were created by legislation enacted in 2010, found in Executive Law Article 30, sections 832 and 833. As part of its statutory mission "to monitor, study and make efforts to improve the quality of services provided pursuant to Article 18-B of the county law," the Office, operating under the direction and pursuant to policies established by the Board, assists county governments in the exercise of their responsibility to provide effective and meaningful representation of persons who are legally entitled to counsel but cannot afford to hire an attorney. The assistance provided by the Office and Board includes distributing state funds and targeting grants to counties in support of innovative and cost-effective solutions to enhance the quality of indigent legal services.

Timelines for This Request for Proposals

RFP Release Date	Thursday, August 22, 2013
Questions Due By	Thursday, September 26, 2013
Questions Posted By	Friday, October 4, 2013
Proposal Due Date	6:00 p.m. ET, Friday, October 18, 2013
Award Announcement	December 2013
Tentative Contract Start Date	February 1, 2014

Intent of this Request for Proposals

The intent of this Request for Proposals (RFP) is to support local initiatives aimed at supporting improvements in quality of representation in upstate indigent legal service provider programs. The provision of effective representation to clients is an essential component of an efficient and effective justice system. Improvements in this area can save counties money by reducing both incarceration costs and the need for other services. *Projects that produce a replicable model or practice that is usable, adaptable, or scalable by other localities or counties are encouraged.* The purpose of this grant is to fund projects or programs that demonstrate new approaches to a certain problem, in this case, counties experiencing challenges providing quality indigent legal

services. Such projects often provide a basis for decisions about critical policy issues and frequently advance the state of knowledge about the issues they address. In addition, they often result in model programs that can be adapted to other counties or regions with the anticipation of similar results. To that end, **all eligible counties are strongly encouraged to apply**, as we are interested in identifying promising practices and strategies that you put in place that can be shared with other counties.

Background

Providers of indigent legal services in New York face multiple challenges in providing effective representation to clients. The most prominent of these challenges among institutionalized providers (e.g., public defender offices, legal aid societies and conflict defender offices) is the lack of sufficient personnel to handle assigned caseloads. In assigned counsel programs, providers may face other equally problematic obstacles such as difficulties in overseeing the quality of representation to which clients are legally entitled. While the systemic problems may be different, the fundamental problem in all programs is the same: resource constraints and other obstacles prevent attorneys and programs from providing optimal representation.

The Office recognizes that excessive caseloads and insufficient resources for staffing are the principal obstacle to the delivery of effective legal services by institutional providers located in upstate counties. In New York, the 2006 report of the *Commission on the Future of Indigent Defense Services* (the 'Kaye Commission') reported that 'virtually all' the defenders it heard from labored under excessive caseloads.¹ The Commission's report recounted the struggles of counties to adequately fund indigent legal services, and of providers shouldering workloads so excessive it was impossible for them to provide adequate representation. Referring to the Commission's findings, Justice Pigott drew the connection between excessive caseloads and reduced quality of representation when he wrote in his dissent in the *Hurrell-Harring* case that "Legal services for the indigent have routinely been underfunded, and appointed counsel are all too often overworked and confronted with excessive caseloads, which affects the amount of time counsel may spend with any given client."² Indeed, the ability to limit caseloads has been described as "the very bedrock of quality control."³

The Office has sought information from providers about the principal obstacles they confront in their work, and caseload issues continually rise to the top as the most prominent issue facing institutional providers. We have heard repeatedly that offices need urgently either to recruit new attorney staff, or to recruit investigative, social worker, or administrative staff to free up attorneys' time for their core duty of providing representation. Providers have indicated to us that such recruitment would improve client representation by facilitating more frequent attorney-client visitation, increased vertical representation, more likely representation at first appearance, and less frequent continuances due to attorney scheduling conflicts. Benefits to clients may also accrue through improved supervision of attorneys within offices, enhanced range and depth of expertise among staff and more time available for preparation.

We are encouraged by the outcomes of several research projects which have shown the benefits that accrue from reducing caseloads in institutional providers for the representation clients

¹ *Final Report of the Commission on the Future of Indigent Defense Services* (2006) at 17.

² *Hurrell-Harring et al. v. State of New York*, 15 N.Y.3d 8, 33 (2010) (Pigott, J., dissenting).

³ Norman Lefstein, *Securing Reasonable Caseloads: Ethics and Law in Public Defense* (American Bar Association, 2011) at 200 (footnote omitted).

receive. Two pilot projects in Washington State which reduced caseloads for providers of indigent criminal defense and family representation respectively showed a range of benefits in both contexts. In criminal courts, reduced caseloads were associated with increased numbers of jury trials, swifter appearance of counsel, and increased diversion away from incarceration and toward drug treatment for criminal defendants.⁴ In family court, the reductions resulted in increased rates of family reunification, improved engagement by parents with their attorneys, and speedier case resolution.⁵ A Harvard study of the Federal Defender system showed that caseload pressures were related to higher rates of guilty pleas and lengthier sentences for clients of institutionalized providers.⁶ In New York, meanwhile, a 1997 study of the Harlem's Neighborhood Defender Service suggested that the reduced caseloads of its attorneys was one of the components which allowed that program to reduce the time its clients spent incarcerated.⁷ These examples encourage ILS to believe that similar empirically demonstrable gains may be realized in New York's counties.

Assigned counsel programs represent a second, equally important system of indigent legal service provision in the state. Represented in every single county in some form, assigned counsel systems may also suffer from caseload issues when they are forced to make excessive numbers of assignments to certain attorneys, or find that it is necessary to curtail services to clients in an effort to control costs. The American Council of Chief Defenders has stressed that individual assigned counsel attorneys may become unable to provide quality representation when appointed to large numbers of cases – a problem which may be compounded where the attorney also has large numbers of paying clients.⁸ Assigned counsel programs may also suffer from unique challenges unrelated to caseload concerns. Due to resource constraints, attorneys in these programs may lack ready access to investigative or social services, and may receive inadequate training, support or oversight. As such, assigned counsel attorneys are at least as susceptible to finding themselves in challenging situations when it comes to advocating effectively for their clients in court.

The measures of quality representation laid out by ILS standards⁹ are the same, whatever system of representation is in place. Clients must have regular access to attorneys beginning at the earliest possible stage in a case. Those attorneys must have adequate access to the support and expert assistance that they require to do their jobs. They must be supported by the organizations they work for as they represent their clients' interests. They must provide

⁴ Luchansky (2010) *The Public Defense Pilot Projects: Washington State Office of Public Defense*, available at http://www.opd.wa.gov/Reports/TrialLevelServices/1006_PilotProject.pdf.

⁵ Harper, Brennan, MSW, and Szolnoki (2005), *Dependency and Termination Parents' Representation Program Evaluation Report 2005*, available at <http://www.opd.wa.gov/Reports/Dependency%20&%20Termination%20Reports/2005%20Evaluation%20Report.pdf>

⁶ Iyengar (2007) *An Analysis of the Performance of Federal Indigent Defense Counsel*, National Bureau of Economic Research, working paper series # 13187, available at <http://www.nber.org/papers/w13187>

⁷ Anderson, David C. (1997), *Public Defenders in the Neighborhood: A Harlem Law Office Stresses Teamwork, Early Investigation* available at: <https://www.ncjrs.gov/pdffiles/163061.pdf>.

⁸ American Council of Chief Defenders (2010). *Implementation of the ABA's Ten Principles in Assigned-Counsel Systems*, available at: http://www.nlada.org/Defender/Defender_ACCD/DMS/Documents/1285271312.2/NLADA%20best%20prac%209-12-10mt%20final.pdf.

⁹ In June, 2012, the ILS Board approved *Standards and Criteria for the Provision of Mandated Representation in Cases Involving a Conflict of Interest*, effective July 1, 2012. In September, 2012, the ILS Board extended these standards to apply to primary mandated representation in criminal and family trial courts, effective January 1, 2013.

effective representation for every client. While the systemic obstacles that obstruct the achievement of those goals may differ for assigned counsel and institutionalized service providers, the necessity of providing effective representation for all clients requires that the fundamental goals of each remain identical.

This RFP encourages providers of indigent legal services in New York's counties to put forward their best ideas for improving the quality of representation in upstate New York. By providing the funding to implement those ideas, the Office intends not only to tackle some of the systemic issues that frustrate the provision of effective representation, but also to assess the extent of the benefits that accrue to clients when those conditions are ameliorated. This project therefore represents an opportunity to test which approaches to improving quality work best in New York, and what progress can be made in improving the quality of representation that clients receive.

Project Description – What is this RFP Seeking to Achieve?

The Office has therefore established this RFP to assist counties to implement a model that effectively improves the quality of representation in upstate counties.

Counties should submit a proposal that is developed through consultation with representatives of each of the County Law Article 18-B criminal defense providers in the county, including the person with administrative responsibility for overseeing the assigned counsel program.

No county may submit more than one proposal.

Proposals that request funding for assigned counsel programs that have not been approved by the State Administrator (Chief Administrative Judge) will not be funded.

Proposals that request funding for an office of conflict defender, as that term is used in County Law § 722(3), for which a plan has not been submitted to the State Administrator (Chief Administrative Judge) in accordance with County Law § 722 (3) (b) or (c) will not be funded.

Proposals that rely for their implementation on statutory changes will not be funded.

Funding of this proposal is limited to the provision of Article 18-B services. Specifically, proposals are sought for the provision of mandated representation to eligible persons through enhancement of existing services or creation of new and innovative approaches which address the quality of representation, including reduced attorney caseloads and improved supervision of attorneys and staff, by means such as:

- ***Reduced caseloads:*** Proposals that will not only reduce excessive caseloads for attorneys providing 18-B mandated representation but ensure that the quality of such representation is enhanced are strongly encouraged. Such enhancements may relate to, for example, facilitating more frequent attorney-client visitation, increased vertical representation, more likely representation at first appearance, increased filing of motions, and less frequent continuances due to attorney scheduling conflicts.

- *Supervision and Oversight:* Proposals that promote increased oversight or supervision of attorneys and staff by supervisors or administrators who are thereby better able to promote and assess quality representation.
- *Compliance with ILS standards:* Proposals that include ways for an institutional provider or assigned counsel program to achieve greater compliance with ILS standards.
- *Increase resources:* Proposals that involve recruitment of administrative, investigative or social worker resources are encouraged. Recruitment of such staff may free up attorneys' time for their core duty of providing representation, and will also directly contribute to the improved representation of clients through increased attention to all aspects of the case.

Because the purpose of this RFP is twofold – to begin immediate improvement in alleviating the burden of excessive caseloads and to explore the most efficient and effective ways of supporting improvements in quality of representation in upstate indigent legal service provider programs – counties need not propose solutions that cover a provider's entire program of providing mandated representation. Applicants should state the bases upon which the determination was made to select those parts of the provider's program that were chosen to be included in the proposal, such as representation for certain classifications of cases (felony or misdemeanor/ criminal or family court), representation in specialty courts, geographic considerations, or amenability to collaboration among the criminal justice entities involved in the proposal. No one specific basis is required nor do the bases noted here constitute an exclusive list.

Funding and Contract Period

The total available funds for award are \$12 million (\$4 million per year for each of three years). The total available funds will not necessarily be divided equally, nor will selected applicants be guaranteed the entire amount requested.

The maximum amount to be awarded to any one county is \$100,000 per year for three years. The minimum amount to be awarded to any one County is \$60,000 per year for three years. Counties may submit proposals either at or less than the maximum amount.

Grants will be issued for a period of three years. The Office reserves the right to reduce the award amount of any application based on reasons that include but are not limited to: cost effectiveness and reasonableness of proposed budget, demonstrated need, or inconsistent appropriation levels.

Who Is Eligible To Apply for This Request for Proposals

Only New York State counties other than counties wholly encompassed by a city, are eligible to apply for funds. Proposals should be submitted by an authorized county official, employee or designee. There is no match or any other cost to the counties to participate in this project.

The RFP is available online at www.ils.ny.gov. Requests for the RFP may be made by e-mail to Karen.jackuback@ils.ny.gov or by telephone at 518-486-9713 or 518-486-2028.

RFP Questions and Updates

The Office will respond to questions that are submitted until the "*Questions Due By*" date shown on the cover of this document. Questions may be submitted in writing (email preferred) or via telephone by calling (518) 486-9713 and should be directed to Karen Jackuback (karen.jackuback@ils.ny.gov) and secondarily to Joe Wierschem (joseph.wierschem@ils.ny.gov). When corresponding by e-mail, clearly indicate the subject as: *Upstate Quality Improvement and Caseload Relief RFP*. The name of the party submitting the question will not be posted.

Questions and answers will be posted on the RFP "*Questions Posted By*" date as stated on the cover of this RFP at the following webpage address:
<https://www.ils.ny.gov/content/upstate-quality-improvement-and-caseload-reduction>.

Instructions for Completing This Request for Proposals

Application Submission (*mail, hand delivery, electronic*)

All submissions must contain the complete application.

If submitting an application by mail or hand delivery, this RFP requires the submission of **one (1) original, and four (4) copies (for a total of five)**.

Applications must be delivered to:

By mail:

Karen Jackuback, Grants Manager
Office of Indigent Legal Services
Capitol Bldg., Room 128
State Street
Albany, New York 12224

Hand delivery:

Please call the Office of Indigent Legal Services in advance to arrange for building security clearance (518-486-2028 or 518-486-9713).

Office of Indigent Legal Services
Alfred E. Smith Building (*directly behind the State Capitol Building*)
29th Floor
80 South Swan Street
Albany, New York 12210

Electronic applications:

Electronic copies will be accepted.

Submit to karen.jackuback@ils.ny.gov. Indicate in the *Subject* area of the electronic transmission that the submission is for the “**Upstate Quality Improvement and Caseload Reduction Grant.**”

Application format:

The following components must be included in the application in order for the submission to be complete:

1. Project Summary (less than one page)
2. Proposal Narrative (less than 10 pages)
3. Itemized Budget (less than 4 pages)
4. Budget Justification (1-2 pages)

All applications must be received by Friday, October 18, 2013, by 6:00 p.m. Late applications will not be considered.

Only complete applications will be reviewed and evaluated.

Proposal Application

I. PROJECT SUMMARY (not scored)

Please provide:

- Identification of the county requesting funds;
- Contact person, telephone, fax and email for this grant;
- Fiscal intermediary name and address (identify the department and/or individual responsible for fiscal reporting for this project);
- Amount of funding requested; and
- A one or two paragraph description of the proposed project.

II. PROPOSAL NARRATIVE

Please address every item listed and do so in the order and format in which they are presented, i.e., responses should be made in the same order as requested and each response should identify the specific item being addressed. Applicants will be evaluated on the information they provide. *Please do not submit any information that was not specifically requested.*

A. Plan of Action (54 points)

Problem Statement

1. Describe the issue or problem in providing quality 18-B mandated representation that your plan is intended to improve or correct, including, but not limited to, the impact of excessive caseloads in providing such quality representation, or lack of adequate supervision or monitoring of attorneys or staff. **(5 points)**
2. Document the nature and extent of the problem to be addressed, including any data collection or analysis related to the problem. **(4 points)**

Plan Implementation

3. Describe how you will implement a plan to address these obstacles to providing quality improvement. The plan must specify the specific problem(s) being addressed (e.g. excessive caseloads; absence of ancillary services available to attorneys, such as investigative, paralegal, social worker or mental health services, inadequate supervision and monitoring of attorneys and staff, etc.). **(16 points)**
4. Describe how you will structure your professional and non-professional staffing to implement your plan, including whether existing staff will perform tasks, or if new staff will need to be hired. **(10 points)**
5. Identify any training or mentoring you may need to accomplish your plan objectives, how you intend to acquire or provide such training/mentoring, and which positions, including supervisory staff, will receive the training/mentoring. **(8 points)**
6. Describe how you will assure the program is feasible, and will monitor the program such that obstacles to implementation can be identified and necessary adjustments made. **(6 points)**

Plan Objectives

7. Specify how the project will improve the quality of representation that clients receive and achieve greater compliance with ILS standards. **(5 points)**

B. Data Collection, Performance Measurement, and Evaluation (20 points)

This section will discuss how you will measure the impact of your project. Descriptions of what data will be collected and how data will be collected are required in this section.

Implementation

8. Describe how you will demonstrate that your plan has been successfully implemented. For example, if your plan will reduce caseloads, specify how you will measure caseloads in a way that is appropriate to verify the implementation of your plan. Alternatively, if your plan will increase support staff or other resources for attorneys, specify how you

will show that these resources, or attorney access to them, were increased. If your plan will improve the quality of supervision and monitoring of attorneys or staff, specify how you will show that such supervision and monitoring has improved, including, if applicable, the ratio of supervisors to attorneys. Please also provide 'baseline' information on any quantitative measures you propose, or a narrative account if appropriate, describing relevant features of your program as it stands at present, prior to implementation. (7 points)

Evaluation and Impact

9. Describe the expected improvements in quality of representation that will result from your plan, and how these will also be measured. Such measures should reflect attorney behaviors that you expect will change when your plan is implemented. Examples include the average number of attorney visits with clients or client families per case, the average number of hours attorneys spend preparing cases, attorney requests for investigative, social work, mental health or other support resources and the number of such requests that were granted, if applicable, the average number of motions, by type, filed per case, average number of attorney requests for continuances, the rate at which attorneys are present at a defendant's first appearance in court, the rate at which attorneys are able to provide vertical representation to clients or other measures as appropriate to the quality goals of your plan. Please also provide 'baseline' figures for the measures you will use which reflect the situation in your program as it stands at present, if they are available. (7 points)

Infrastructure

10. Describe how you plan to track relevant data in relation to points 8 and 9 above for every case in ways that are valid, accurate and reliable and who will input the data. (3 points)
11. Describe any changes you would need to make to track required data, and how these would be accomplished. (3 points)

C. Applicant Capability and Personnel (6 points)

12. Who will be the lead person(s) responsible for project implementation? (2 points)
13. Describe how and to what extent you consulted with the leader of each provider of criminal defense and family court representation under Article 18-B of the County Law. If applicable, describe the willingness of other agencies to cooperate in the implementation of the program. (4 points)

D. Budget and Cost (20 points)

Grant applications will be evaluated and rated on efficient use of funds and overall cost-effectiveness, which includes budget plans that are consistent with the proposed action plan, administrative costs, justification for each requested budget line and cost benefit. Complete the attached Budget Form and return with the proposal, being sure to address the following:

14. *Budget:* Provide a detailed, annualized three-year budget containing reasonable and necessary costs. The budget for the proposed project must be

consistent with the terms of the RFP and provide a justification for all expenses.
(7 points)

15. *Subcontracting*: Describe whether the proposed budget will include subcontracting with another service provider in order to complete the terms described in this RFP and, if so, provide a brief description of the purpose of the subcontract. (2 points)
16. *Budget Justification*: Include a brief narrative for each budget line justifying the budget request and relating the requested line budget amount to the plan of action and expected results. The narrative should be mathematically sound and correspond with the information and figures provided in the Budget Form.
(7 points)
17. The *Budget Justification* must also describe how the county will monitor expenditures during the life of the grant to ensure that the project stays within the budget. (4 points)

Complete the attached Budget Form and return with the proposal.

Review and Selection Process

The Office will conduct a two-level review process for all submitted proposals:

- The first level entails a Pass/Fail review, conducted by Office staff, of the submitted proposals to ensure that the application is responsive to the conditions set forth in the RFP. The Office will reject any applications that do not clearly and specifically address the purposes of this funding opportunity and/or fail to meet any of the following criteria:
 1. The RFP was submitted within the designated time frames;
 2. The RFP was submitted consistent with the format requested by the Office;
 3. The applicant is an eligible entity as specified within the RFP;
 4. The proposal purpose is for that intended by the RFP;
 5. The proposal included a budget submission.
- The second level consists of a scored comprehensive proposal review that involves a thorough review of the submitted proposal specifically related to the project work plan, performance measurement and evaluation, organizational capability, overall strength of plan, and the budget and corresponding budget narrative. The proposal review and rating will be conducted using the criteria stated in this Funding Announcement. The Office will typically use staff, and others with expertise in the RFP topic area, to comprise the proposal review team. Each reviewer will assign a score up to a maximum of 100 points to each application; individual scores will be averaged to determine the applicant's score. The Office reserves the right to conduct follow-up discussions with applicants to clarify information in the submitted proposal. In addition, in the event there are any remaining funds after making awards in accordance with the Review and Selection Process, the Office reserves the right to allocate the grant funds in a manner that best suits program needs as

determined by the Office. Such a plan will be subject to review and approval by the Office of the State Comptroller.

Awarding of Grants

Contract Development Process

It is anticipated that applications will be reviewed and that successful applicants will be notified of funding decisions on or about December, 2013. All commitments are subject to the availability of state funds. The proposal review team will recommend to the Office the highest ranked proposal(s) that fully meet the terms of the RFP. All award counties will receive \$60,000 per year for three years. The balance of the funds will be awarded in rank order from the highest to the lowest proposal scores. The final total applicant score will be the cumulative total of the second level review.

The contract process and final contracts are subject to the approval of the State Attorney General and the Office of State Comptroller (OSC). Upon such approvals, the grant process will begin, and all terms of the contract become public information.

As part of the grant award process, the grantee and the Office will establish a mutually agreed upon final budget and work plan, which become the contract deliverables.

As part of the contract with the Office, grantees will be required to submit annual progress reports to the office. These reports should include narrative descriptions of successes achieved, obstacles encountered during implementation, and efforts to overcome these obstacles. Additionally, applicants should anticipate that data collected by the program in accordance with the requirements of section B of the proposal will be required to be reported in aggregate form to the office as a means of understanding the impact of the program, its successes, and the challenges that remain. ILS staff will be available to assist grant recipients with how to best collect these data in ways that are convenient to the program's capabilities, clearly assess the goals of the project, and assure the collection of information that is of the highest possible quality. The Office may suggest the use of a specific data collection protocol, or work with programs to employ existing, in-house case tracking software to produce data.

The Office reserves the right to:

- Negotiate with applicants, prior to award, regarding work plans, budget line levels, and other issues raised within the RFP review to achieve maximum impact from the grant award, and serve the best interests of New York State and ensure that budgets are consistent with proposed action plans; and
- If unable to negotiate the contract with the selected applicants within 60 days, the Office may begin contract negotiations with the next highest scoring qualified applicant(s).

Payment

Grantees may receive 25% of the total first year's award as a budget advance following contract approval by the Attorney General and the State Comptroller. Thereafter, each county will be reimbursed for expenses incurred pursuant to grant related activities including salary, benefits, travel, and related expenses. No payments will be made until the contract is fully executed and approved by the State Attorney General and the State Comptroller.

Funding Requirements

Indigent Legal Services funds distributed by the Office of Indigent Legal Services are intended to supplement county resources for supplying indigent defense services and to ensure proper legal representation for indigent defendants pursuant to Article 18-B of the County Law.

Supplanting is prohibited: Any funds awarded to a county pursuant to this RFP shall be used to supplement and not supplant any local funds, as defined in paragraph (c) of subdivision 2 of section 98-b of the State Finance Law, or state funds, including any funds distributed by the Office of Indigent Legal Services, which such County would otherwise have had to expend for the provision of counsel and expert, investigative and other services pursuant to Article 18-B of the County Law.

The issuance of this request for proposals does not obligate the Office of Indigent Legal Services to award grants.

Budget Form

County:	
Budget Contact Person's Name	
Phone	
E-mail address	

Line Item	Year 1	Year 2	Year 3
Personal Service: Position (specify) Salary: Fringe Benefits:			
Personal Service Subtotal			
Contractual Services			
Contractual Subtotal			
Equipment (specify)			
Equipment Subtotal			
Other Than Personal Service (OTPS) (specify)			
OTPS Subtotal			
Miscellaneous			
Miscellaneous Subtotal			
TOTAL			
TOTAL THREE-YEAR BUDGET			

New York State Office of Indigent Legal Services

Funding Announcement

Attachment D to Budget Request, 10/15/13

Counsel at First Appearance Demonstration Grant

NYS Office of Indigent Legal Services Request for Proposals

The Office of Indigent Legal Services (Office) and nine-member Indigent Legal Services Board (Board) were created by legislation enacted in 2010, found in Executive Law Article 30, sections 832 and 833. As part of its statutory mission "to monitor, study and make efforts to improve the quality of services provided pursuant to Article 18-B of the county law," the Office, operating under the direction and pursuant to policies established by the Board, assists county governments in the exercise of their responsibility to provide effective and meaningful representation of persons who are legally entitled to counsel but cannot afford to hire an attorney. The assistance provided by the Office and Board includes distributing state funds and targeting grants to counties in support of innovative and cost-effective solutions to enhance the quality of indigent legal services.

Timelines for This Request for Proposals

RFP Release Date	Friday, November 30, 2012
Questions Due By	Wednesday, January 9, 2013
Questions Posted By	Friday, January 18, 2013
Proposal Due Date	Friday, February 15, 2013
Award Announcement	April 2013
Tentative Contract Start Date	June/July, 2013

Intent of this Request for Proposals

The New York State Office of Indigent Legal Services (Office) is announcing the availability of funds and soliciting proposals from counties to develop new, innovative programs or practices to improve the delivery of indigent defense services at first appearance.

The intent of this Request for Proposals (RFP) is to make demonstrable and measureable improvements in the delivery of indigent defense services to eligible persons at a defendant's first appearance before a judge. The demonstration grants will serve to provide effective representation of indigent persons at their first appearance before a judge and promote the

continuous representation of such persons. *Projects that produce a replicable model or practice that is usable, adaptable, or scalable by other localities or counties are encouraged.*

The terms 'first appearance' and 'arraignment' are used interchangeably in this document and refer to *the defendant's first appearance before a judge*. These proceedings can result in loss of liberty and have other important consequences. Applications that do not address representation whenever a defendant first comes before a judge will not be considered.

The purpose of a demonstration grant is to fund projects or programs that demonstrate new approaches to a certain problem, in this case, the deprivation of counsel at first appearance. Such projects often provide a basis for decisions about critical policy issues and frequently advance the state of knowledge about the issues they address. In addition, they often result in model programs that can be easily adapted to other counties or regions with the anticipation of similar results. To that end, **all eligible counties are strongly encouraged to apply**, as we are interested in identifying promising practices and strategies that you put in place that can be shared with other counties.

Background

The right to representation in a criminal matter is a basic right guaranteed by the Constitutions of New York and of the United States and by State statutes. These rules of law guarantee that defendants in criminal cases have legal assistance for their defense. In *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Supreme Court held that states are required under the Sixth Amendment to provide representation in criminal cases for defendants who are unable to afford their own attorneys. Supreme Court Justice Hugo Black wrote in *Gideon* that "...in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him," and that in the United States, the defendant's right to counsel is fundamental and essential to a fair trial.

In 1965, in response to the *Gideon* decision and *People v. Witek*, 15 NY2d 392 (1965), New York enacted County Law Article 18-B and created a county-based system of delivering mandated legal services to indigent defendants to ensure that they receive meaningful and effective assistance of counsel. However, across New York State, this guaranteed right to effective legal representation has yet to be fully realized. In a 2006 report issued by the Commission on the Future of Indigent Defense Services, created by then-Chief Judge Judith Kaye, glaring deficiencies were found in the quality of indigent legal services offered by counties, including excessive caseloads, inability to hire full-time defenders, lack of adequate support services, lack of adequate training, minimal client contact and, in some courts, outright denial of the constitutional right to counsel.

More recently, in May of 2010, the Court of Appeals reinstated a complaint brought by the New York Civil Liberties Union on behalf of indigent criminal defendants in *Hurrell-Harring v. New York*, 15 NY3d 8 (2010) that alleged New York's indigent defense system was inadequate to ensure the constitutional right to counsel under *Gideon*. The court recognized a cognizable claim for relief based on allegations made in the complaint that indigent defendants were not represented at arraignments and were kept in custody with little or no contact with their attorneys. In *Hurrell-Harring*, the Court also recognized that an arraignment is a "critical stage of the proceeding" which requires the presence of counsel. The Court noted that, at arraignment, a defendant's "pretrial liberty interests were on that occasion regularly adjudicated

with most serious consequences, both direct and collateral, including the loss of employment and housing, and inability to support and care for particularly needy dependents.”

The Supreme Court in *Rothgery v. Texas*, 554 U.S. 191 (2008), made clear that the right to counsel attaches at arraignment. The Court stated “that the right to counsel guaranteed by the Sixth Amendment applies at first appearance before a judge at which a defendant is told of the formal accusations against him and restrictions are imposed on his liberty.”

Though some counties have made recent progress in providing counsel at first appearance, significant challenges persist. Thus, persons deemed eligible for indigent legal defense services continue to be arraigned without counsel at first appearance. Causes include, among other things, excessive caseloads, a lack of resources, statutory restrictions, and logistical challenges. This often results in unnecessary or excessive bail being set and keeps people of limited financial means in jail awaiting trial.

Project Description – What is this RFP Seeking to Achieve?

In light of reports describing the crisis in the delivery of indigent defense services throughout New York State, and the developments that have taken place over the last year to enhance the provision of legal services to persons who cannot afford them, the time is right to build on the initiatives that are occurring in indigent legal services. This plan of action recognizes these essential services as the first order of need.

The Office has therefore established this RFP to assist counties to implement a model that effectively demonstrates innovative and creative approaches to providing counsel at first appearance, with the overarching goal of strengthening the delivery of indigent defense services in New York State.

Counties should submit a proposal that is developed through consultation with representatives of each of the County Law Article 18-B criminal defense providers in the county, including the person with administrative responsibility for overseeing the assigned counsel program.

No county may submit more than one proposal.

Proposals that rely for their implementation on statutory changes concerning arraignment procedures or jurisdiction *will not be funded.*

Proposals that include contracts with private law firms or individual lawyers *will not be funded.*

Funding of this proposal is limited to the provision of Article 18-B services. Specifically, proposals are sought for the provision of direct, continuous representation to eligible persons through enhancement of existing services or creation of new and innovative approaches which address counsel at first appearance by means such as:

- *Provide lawyer at first appearance:* Proposals should provide for the physical presence of counsel with the client in court.

- Procedures for effective advocacy: Proposals that describe procedures that will not only place a lawyer at a client's side before the arraignment court, but will ensure that the lawyer has the opportunity to effectively advocate on the client's behalf. Such procedures may relate to, for example, allowing adequate time for counsel to obtain and use information from the client, charging documents, criminal history, and other available sources on the client's behalf with regard to entry of a not-guilty plea, bail/pretrial detention, and any other matter arising at arraignment.
- Facilitate pre-arraignment representation: Proposals that include ways to facilitate pre-arraignment representation are encouraged, including consulting with the defendant while detained in a holding facility or jail.
- Continue or expand existing programs: The continuation or expansion of existing counsel at first appearance pilot programs, including programs previously funded by the Office, is encouraged, where those programs can demonstrate their effectiveness.
- Improve investigation: Proposals that make investigation services promptly available for pretrial detention issues are encouraged.
- Collaborate with other agencies: Proposals that demonstrate collaboration among agencies and entities involved in any facet of the arraignment practice (such as courts, the law enforcement agency/agencies responsible for ensuring the presence of the person being arraigned, pretrial detention services, and investigative services) are encouraged. No specific entity must be included, nor do those entities noted here constitute an exclusive list.
- Increase staffing: Proposals that involve increasing defender staffing in order to increase the number of attorneys available to attend arraignment sessions are encouraged.

Because the purpose of this RFP is twofold – to begin immediate improvement in meeting the requirement that counsel routinely be provided at arraignment and to explore the most efficient and effective ways of meeting that requirement in the varied jurisdictions across the state – counties need not propose county-wide, all-courts solutions. Arraignments in city courts, as well as in town or village courts, may be included. Applicants should state the bases upon which the determination was made to select the courts that were chosen in the proposal, such as high volume of arraignments or pretrial detention of persons arraigned, geographic considerations, or amenability to collaboration among the criminal justice entities involved in the proposal. No one specific basis is required nor do the bases noted here constitute an exclusive list.

Funding and Contract Period

The total available funds for award are \$12 million (\$4 million per year for each of three years). Funds may be allocated and divided among multiple eligible applicants in accordance with the individual program needs and the criteria set forth herein. The total available funds will not necessarily be divided equally, nor will selected applicants be guaranteed the entire amount requested. Budget proposals will be evaluated on efficient use of funds and overall cost-effectiveness.

The maximum amount to be awarded to any one county is \$250,000.00 per year for three years. Counties may submit proposals either at or less than the maximum amount. If additional funds become available, the Office reserves the right to approve additional projects under the authority of this funding announcement.

Grants will be issued for a period of three years. The Office reserves the right to adjust the award amount of any application that is funded within an eligible jurisdiction.

Who Is Eligible To Apply for This Request for Proposals

Only New York State counties other than counties wholly encompassed by a city, are eligible to apply for funds. Proposals should be submitted by an authorized county official or employee. There is no match or any other cost to the counties to participate in this project.

Instructions for Completing This Request for Proposals

The application package is available online at www.ils.ny.gov. Requests for the RFP package may be made by e-mail to Karen.jackuback@ils.ny.gov or by telephone at 518-486-9713.

RFP Questions and Updates

The Office will respond to questions that are submitted until the "*Questions Due By*" date shown on the cover of this document. Questions may be submitted in writing (email preferred) or via telephone by calling (518) 486-9713 and should be directed to Karen Jackuback (karen.jackuback@ils.ny.gov) and secondarily to Joe Wierschem (joseph.wierschem@ils.ny.gov). When corresponding by e-mail, clearly indicate the subject as: *Counsel at First Appearance RFP*. The name of the party submitting the question will not be posted.

Questions and answers will be posted on the RFP "*Questions Posted By*" date as stated on the cover of this RFP at the following URL address: <http://www.ils.ny.gov/content/counsel-first-appearance>.

Application Submission

One signed and complete original application, plus three copies of application, must be submitted (for a total of 4). All submissions must contain the complete application. All applications must be delivered to:

Karen Jackuback
Office of Indigent Legal Services
Capitol Bldg., Room 128
Albany, New York 12224

Electronic or faxed copies will not be accepted. All applications must be complete to be considered for review.

Applications must be received by Friday, February 15, 2013 by 4:00 p.m. Late applications will not be considered.

The following components must be included in the application in order for the submission to be complete:

1. Project Summary (less than one page)
2. Proposal Narrative (less than 10 pages)
3. Budget Summary (less than 4 pages)
4. Budget Justification (1-2 pages)

Only complete applications will be reviewed and evaluated.

Proposal Application

I. PROJECT SUMMARY (not scored)

Please provide:

- Identification of the county requesting funds;
- Contact person, telephone, fax and email for this grant;
- Fiscal intermediary name and address (identify the department and/or individual responsible for fiscal reporting for this project);
- Amount of funding requested; and
- A one or two paragraph description of the proposed project.

II. PROPOSAL NARRATIVE

A. Plan of Action (50 points)

Answer all questions in the order in which they are presented. Applicants will be evaluated on the information they provide. *Please do not submit any information that was not specifically requested.*

Project Rationale

1. Describe the problem that is being addressed for counsel at first appearance in court(s) identified within the county.
2. Document the nature and extent of the problem.

Quality of Representation

3. Describe how you propose to deliver quality indigent legal services at first appearance that includes the physical presence of counsel with the client in court.
4. The Office prefers continuous representation of a client by the same attorney or provider from the start of a criminal case to its conclusion. How would your proposal meet this objective? Would the attorney who represented the defendant at first appearance represent the defendant through the remainder of the case? If not, what process would you implement to ensure that information obtained at first appearance is made available to the attorney representing the client for the remainder of the case, and that no gaps in representation occur?

5. How would you assure effective representation for clients whose cases are resolved prior to trial?
6. Describe how you would assign attorneys to work in the court(s) included in your proposal and how you would supervise their performance.
7. Describe how support staff, including investigators (if applicable), will be used to provide support to attorneys.
8. Describe the qualifications and training required of attorneys providing representation under this initiative.
9. Describe your plan for accommodating the needs of non-English speaking clients and non-citizens.

Client Contact

10. Describe how you would ensure that attorneys have sufficient time to provide effective representation at first appearance, including consulting with clients.

B. Data Collection, Performance Measurement, and Evaluation (20 points)

11. Describe how you plan to track relevant data on individual cases in ways that are accurate and reliable, including any existing software or record-keeping system you employ (if applicable), and who typically inputs data.
12. Describe how and when staff from your office would be able to gather critical information on individual cases including the presence or absence of attorneys at arraignment, bail outcomes, time client spent in jail, and the time from arraignment to disposition.
13. Describe the present state of information collected by your program, including whether 'baseline' information on the presence or absence of attorneys at arraignment, bail outcomes, time spent in jail, and the time from arraignment to disposition, are already available for past cases.
14. Describe any changes you would need to make to track required data, and how these would be accomplished.

C. Applicant Capability and Personnel (10 points)

15. Who will be the lead person(s) responsible for project implementation?
16. Describe how and to what extent you consulted with the leader of each provider of criminal defense representation under Article 18-B of the County Law.
17. Identify the extent of collaboration with other stakeholders in the criminal justice system in this initiative. To the extent necessary, provide evidence of the willingness of other agencies to cooperate in the implementation of the program.

D. Budget and Cost (20 points)

Grant applications will be evaluated and rated on efficient use of funds and overall cost-effectiveness, which includes budget plans that are consistent with the proposed action plan, administrative costs, justification for each requested budget line, cost benefit, and highest potential for successful outcomes. Complete the attached Budget Form and return with the proposal, being sure to address the following:

18. Provide a detailed, **annualized three-year budget** containing reasonable and necessary costs. The budget for the proposed project must be consistent with the terms of the RFP and provide a justification for all expenses.

19. Describe whether you intend to subcontract with another service provider in order to complete the terms described in this RFP.
20. Include a brief narrative for **each** budget line justifying the budget request and relating the requested line budget amount to the plan of action and expected results. The narrative should be mathematically sound and correspond with the information and figures provided in the Budget Form.
21. The budget narrative must also describe how the county will monitor expenditures during the life of the grant to ensure that the project stays within the budget.

Complete the attached Budget Form and return with the proposal.

Review and Selection Process

The Office will conduct a two-level review process for all submitted proposals:

- The first level entails a Pass/Fail review, conducted by Office staff, of the submitted proposals to ensure that the application is responsive to the conditions set forth in the RFP. The Office will reject any applications that do not clearly and specifically address the purposes of this funding opportunity and/or fail to meet any of the following criteria:
 1. The RFP was submitted within the designated time frames;
 2. The RFP was submitted consistent with the format requested by the Office;
 3. The applicant is an eligible entity as specified within the RFP;
 4. The proposal purpose is for that intended by the RFP;
 5. The proposal included a budget submission.
- The second level consists of a scored comprehensive proposal review that involves a thorough review of the submitted proposal specifically related to the project work plan, performance measurement and evaluation, organizational capability, overall strength of plan, and the budget and corresponding budget narrative. The proposal review and rating will be conducted using the criteria stated in this Funding Announcement. The Office will typically use staff, and others with expertise in the RFP topic area, to comprise the proposal review team. Each reviewer will assign a score up to a maximum of 100 points to each application; individual scores will be averaged to determine the applicant's score. No entity with an aggregate reviewer score averaging less than 60 points in the second level review will be considered for funding. The Office reserves the right to conduct follow-up discussions with applicants to clarify information in the submitted proposal. In addition, in the event there are any remaining funds after making awards in accordance with the Review and Selection Process, the Office reserves the right to allocate the grant funds in a manner that best suits program needs as determined by the Office. Such a plan will be subject to review and approval by the Office of the State Comptroller.

Awarding of Grants

Contract Development Process

It is anticipated that applications will be reviewed and that successful applicants will be notified of funding decisions on or about April, 2013.

The proposal review team will recommend to the Office the highest ranked proposal(s) that fully meet the terms of the RFP. Awards will be made in rank order from the highest to the lowest proposal scores. The contract process and final contracts are subject to the approval of the State Attorney General and the Office of State Comptroller (OSC). Upon such approvals, the grant process will begin, and all terms of the contract become public information.

As part of the grant award process, the grantee and the Office will establish a mutually agreed upon final budget and work plan, which become the contract deliverables. For multiple year contracts, these deliverables will be negotiated annually.

As part of the contract with the Office, grantees will be required to collect and report some data that reflects basic information about the grantee's proposed project. Programs may be obliged to report to the Office accurate data on activities such as:

- whether clients are provided with counsel at arraignment;
- whether they are granted and post bail;
- how much time they spend in jail; and
- amount of time to the next scheduled appearance and ultimately to dispose cases.

ILS will be available to assist grant recipients with how to best collect these data in ways that are convenient to the program's capabilities, clearly assess the goals of the project, and assure the collection of information that is of the highest possible quality. The Office may suggest the use of a specific data collection protocol, or work with programs to employ existing, in-house case tracking software to produce data.

Grantees will also be required to report on successes achieved, obstacles encountered during implementation, and efforts to overcome these obstacles, in annual progress reports, according to individual program goals and objectives.

The Office reserves the right to:

- Reject any applications that do not meet the intent of this RFP;
- Negotiate with applicants regarding work plans, budget line levels, and other issues raised within the RFP review to achieve maximum impact from the grant award and serve the best interests of New York State, and
- If unable to negotiate the contract with the selected applicants within 60 days, the Office may begin contract negotiations with the next highest scoring qualified applicant(s).

Payment

Grantees may receive 25% of the total first year's award as a budget advance following contract approval by the Attorney General and the State Comptroller. Thereafter, each county will be reimbursed for expenses incurred pursuant to grant related activities including salary, benefits, travel,

and related expenses. No payments will be made until the contract is fully executed and approved by the State Attorney General and the State Comptroller.

Funding Requirements

Indigent Legal Services funds distributed by the Office of Indigent Legal Services are intended to supplement county resources for supplying indigent defense services and to ensure proper legal representation for indigent defendants pursuant to Article 18-B of the County Law.

Supplanting is prohibited: Any funds awarded to a county pursuant to this RFP shall be used to supplement and not supplant any local funds, as defined in paragraph (c) of subdivision 2 of section 98-b of the State Finance Law, which such County would otherwise have had to expend for the provision of counsel and expert, investigative and other services pursuant to Article 18-B of the County Law.

The issuance of this request for proposals does not obligate the Office of Indigent Legal Services to award grants.

Budget Form

County	
Budget Contact Person's Name	
Phone	
E-mail address	

Line Item	Year 1	Year 2	Year 3
Personal Service:			
Position (specify)			
Salary:			
Fringe Benefits:			
Personal Service Subtotal			
Contractual Services			
Contractual Subtotal			
Equipment (specify)			
Equipment Subtotal			
Other Than Personal Service (OTPS) (specify)			
OTPS Subtotal			
Miscellaneous			
Miscellaneous Subtotal			
TOTAL			
TOTAL THREE-YEAR BUDGET			

ATTACHMENT E

2014-2015 Budget Request - Mandated Family Court Representation: *Timely Appointment of Counsel in Child Protective Proceedings and Family Court Practice Quality Improvement Grant*

The purpose of the New York State Office of Indigent Legal Services (Office) is "to monitor, study and make efforts to improve the quality of services provided pursuant to article eighteen-B of the county law." Executive Law §832(1). Under County Law Article 18-B, counties must provide lawyers for persons who are unable to afford counsel in criminal proceedings and in certain Family Court proceedings as set out in Family Court Act §262 and §1120, Surrogate's Court Procedure Act §407, and Judiciary Law §35.

In light of the long-standing inattention to the quality of representation in mandated family court proceedings, the New York State Office of Indigent Legal Services (Office) seeks funding for two important purposes: (1) to support counties' efforts to improve the overall quality of representation to all adult clients in mandated family law matters and (2) to help counties and their indigent legal services providers ensure that eligible parent respondents in child protective cases have effective, meaningful legal representation at the earliest possible stage of the proceeding.

I. Quality Improvement for Mandated Family Court Representation

Like criminal defense lawyers, providers of mandated family representation across the state face severe challenges to their ability to provide quality representation to clients. In its 2006 report, *Status of Indigent Defense in New York: A Study for Chief Judge Kaye's Commission on the Future of Indigent Defense Services*, The Spangenberg Group ("TSG") noted that "[l]ike the provision of indigent defense representation in criminal cases, the provision of representation in family court is a severely fractured and under-funded system, and one that is quite disparate from the Law Guardian Program that provides for the representation of children in family court."¹

Although family court matters were not part of the Kaye Commission's charge, TSG devoted an entire section of its report to a brief overview of family court practice in New York's public defense system. Noting the importance of family and surrogate's court matters in assessing the needs of the system, the report highlighted the "inextricable link in county systems between adult representation in criminal and family court matters."² The report stated that family court adult representation "is not only a necessary and integral part of the state's indigent defense system, but also accounts for a significant portion of the caseloads of the counties' indigent defense providers. They are a part of the providers' and counties' costs and compete with criminal cases for a portion of the counties' limited resources."³

Just as is the case with criminal defense providers, mandated family court providers are plagued by high caseloads, inadequate or non-existent support services, minimal client contact, and, in

¹ The Spangenberg Group, *Status of Indigent Defense in New York: A Study for Chief Judge Kaye's Commission on the Future of Indigent Defense Services - Final Report*, pp. iii-iv (June 16, 2006).

² *Id.* at p. 99.

³ *Id.* at p. 101.

some instances, outright denial of the lawful right to counsel. To begin to address these deficiencies in indigent criminal defense practice, on August 22, 2013 the Office released the Upstate Caseload Relief and Quality Enhancement Request for Proposals. While that RFP is not expressly limited to criminal practice, much of the discussion regarding the crisis in New York's public defense system has focused primarily, though not exclusively, on criminal practice. However, it has become clear in our discussion with providers around the state that, although family court matters make up a significant portion of the indigent defense caseload, family court practice has been even more severely neglected than criminal practice. As the TSG report noted, although a family court caseload may be lower than a criminal one, "family court matters frequently require more court appearances and take longer to resolve than criminal cases which can escalate costs."⁴ Moreover, "[t]he greater the needs in family law cases, the fewer staff and resources available for criminal cases."⁵

While family court caseloads across the state have risen dramatically,⁶ resources have not. In addition to excessive caseloads, insufficient supportive services, and other problems similar to those identified in criminal defense practice, providers point to a severe lack of access to training and continuing legal education opportunities specifically tailored to providers of adult representation in family court. Additionally, in many counties mandated family court representation is provided only by individual assigned counsel, and there is little institutional oversight, supervision or support for these attorneys.

The long-standing inattention to the problems in family court representation has led to a severe crisis in mandated family court representation which this Office now seeks to address with funding specifically earmarked for improvements in family court practice. As counties around the state have started to become more sensitized to the special needs of their mandated family court providers, the Office has received inquiries about targeted funding to address these specialized needs. The Office notes that counties and providers around the state are investigating and experimenting with greater specialization and institutionalization of family court representation, and the Office supports these innovations.⁷ Some examples include the establishment of specialized panels of assigned counsel with family law-specific qualification, training, supervision, and continuing legal education requirements, establishment of family court

⁴ *Id.* at p. 101.

⁵ *Id.*

⁶ *Id.*

⁷ See, e.g., *Spangenburg Report*, at pp. 53-54, 58. The Report noted that many jurisdictions were seeking ways to address the growing family court caseloads, and gave as examples the following:

- Albany County created a new office to handle conflict cases in criminal, family and surrogate's court.
- One of the three full-time attorneys in a newly-created conflict defender office primarily handled family law cases.
- Monroe County created a conflict defender to handle misdemeanor, family court, and some appellate cases.
- A year after creating a conflict defender office, Schenectady County added another attorney to the office to handle family law cases.
- Tioga County contracted with a single attorney to handle family court matters and criminal conflicts.
- Clinton County contracted with a few lawyers to provide representation in family court.

units within existing public defender offices, contracts with institutional providers to do family law cases, and the addition of social workers and/or family court caseworkers in both public defender offices and assigned counsel programs.

Targeted funding for innovative practices such as these is essential to begin to address the long-standing neglect of family court practice, and to help counties and providers institute programs designed to improve the quality of representation for poor families in New York.

II. Timely Appointment of Counsel in Child Protective Proceedings

Parents and other adult litigants in child protective proceedings need legal representation as early as possible. Important constitutional liberty interests are at stake, the practice is governed by a complex web of federal, state, and local laws governing the practice, and serious, life-altering decisions are made at every step of these proceedings. It is therefore critical that indigent parents and other eligible adult litigants in child protective proceedings are appointed counsel well in advance of the first court appearance. Early appointment provides the attorney the opportunity to actively and effectively assist the parent both before and after an emergency removal or filing of a petition alleging neglect or abuse. As have a growing number of courts across the country that are appointing attorneys for parents as soon as the court learns that a child has been removed from the home,⁸ the Office recognizes the need to provide access to legal representation for parents as early as possible in child protective proceedings.

A. Background: Parents' Right to Counsel in Child Protective Proceedings

A parent's right to the care, custody and management of his or her children is a fundamental liberty interest protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.⁹ Although in *Gideon v. Wainwright*, 372 US 335 (1963) the Supreme Court of the United States held that poor people in criminal cases facing possible incarceration are entitled to assigned counsel, the Court declined to extend that protection to indigent parents facing the loss of their parental rights. Instead, in *Lassiter v. Dep't of Social Services*, 452 U.S. 18 (1981), the Court said that the Constitution does not require the appointment of counsel in every parental termination proceeding. Notwithstanding the constitutional significance of the parental liberty interest and its acknowledgment that termination of parental rights works a "unique kind of deprivation", the Court held that States could allow the trial judge to decide whether to appoint counsel for an indigent parent on a case-by-case basis.¹⁰

In dissent, Justice Blackmun rejected the majority's "insensitive presumption that incarceration is the only loss of liberty sufficiently onerous to justify a right to appointed counsel."¹¹

⁸ Mark Hardin & Susan Koenig, "Early Appointment of Counsel for Parents," in *Court Performance Measures in Child Abuse and Neglect Cases: Technical Guide*, fn. 5, pp 108-109, U.S. Department of Justice, Office of Justice Programs (2nd Printing, 2009) (hereafter *Court Performance Measures*).

⁹ E.g., *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Stanley v. Illinois*, 405 U.S. 645 (1972) (noting the Court's frequent emphasis on "the importance of the family" and observing that the "integrity of the family unit has found protection" in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment); *Troxel v. Granville*, 530 U.S. 57, 65 (2000) ("[T]he interest of parents in the care, custody and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.").

¹⁰ 452 U.S. 18, 31-32.

¹¹ *Id.* at 42.

Declaring that there could “surely . . . be few losses more grievous than the abrogation of parental rights,” he explained that:

Faced with a formal accusatory adjudication, with an adversary – the State – that commands great investigative and prosecutorial resources, with standards that involve ill-defined notions of fault and adequate parenting, and with the inevitable tendency of a court to apply subjective values or to defer to the State’s “expertise,” the defendant parent plainly is outstripped if he or she is without the assistance of the guiding hand of counsel.¹²

In contrast, New York has long recognized the necessity and value of providing court-appointed lawyers to poor parents in child protective proceedings. Almost a decade prior to Justice Blackmun’s cogent dissent in *Lassiter*, the New York State Court of Appeals relied on similar reasoning in acknowledging a constitutional right to assigned counsel for parents defending their parental rights. In the seminal case of *In re Ella B.*, 30 N.Y.2d 352 (1972), the Court held, on both due process and equal protection grounds, that “[a] parent’s concern for the liberty of the child, as well as for his care and control, involves too fundamental an interest and right to be relinquished to the State without the opportunity for a hearing, with assigned counsel if the parent lacks the means to retain a lawyer.”¹³ Presaging Judge Blackmun’s *Lassiter* dissent, the *Ella B.* court highlighted the “gross inherent imbalance of experience and expertise” between the state and the parent, concluding that it is “fundamentally unfair, and a denial of due process of law for the state to seek removal of the child from an indigent parent without according that parent the right to the assistance of court-appointed and compensated counsel.”¹⁴

In 1975 the New York State Legislature codified the *Ella B.* decision in the Family Court Act. Emphasizing that “[p]ersons involved in certain family court proceedings may face infringements of fundamental interests and rights, including the loss of a child’s society and the possibility of criminal charges”, the Legislature found counsel to be essential in protecting the due process rights of litigants and in assisting the court to make “reasoned determinations of fact and proper orders of disposition.” *N.Y. Fam. Ct. Act* §261. Section 262 of the Family Court Act provides that when a respondent in a child protective proceeding “first appears in court, the judge shall advise such person before proceeding that he or she has the right to be represented by counsel of his or her own choosing, of the right to have an adjournment to confer with counsel, and of the right to have counsel assigned by the court in any case where he or she is financially unable to obtain the same.”¹⁵ The New York courts have affirmed that the right to counsel in child protective proceedings assumes meaningful representation and effective assistance of counsel comparable to that to which criminal defendants are entitled. *E.g.*, *Matter of Jaikob O.*, 88 A.D.3d 1075, (3rd Dep’t 2011); *Matter of Eileen R.*, 79 A.D.3d 1482 (3rd Dep’t 2010); *Matter of James K.*, 238 A.D.2d 962 (4th Dept. 1997).

¹² *Id.* at 46.

¹³ 30 N.Y.2d at 356.

¹⁴ 30 N.Y.2d at 356-357.

¹⁵ *N.Y. Fam. Ct. Act* §262.

B. The Necessity for Early Appointment of Counsel in Child Protective Proceedings

Experience and emerging data show that meaningful and effective representation of parents in child protective proceedings significantly improves outcomes for children and families,¹⁶ and is critical in ensuring a well-functioning child welfare system.¹⁷ Given the significant governmental intrusion into the parent-child relationship at all phases of a child protective case, and the potential for permanent, legal termination of that relationship, counsel must be appointed well in advance of the first court hearing if the lawyer is to have any chance of truly providing meaningful and effective assistance of counsel for the parent.¹⁸ In accordance with that principle, New York children are guaranteed legal representation at the earliest occurrence of: (1) the court receiving notice that CPS has removed a child without a court order; (2) the filing of an application by CPS for an order for removal of the child prior to the filing of a petition, or (3) the filing by CPS of a petition alleging abuse or neglect.¹⁹ On the other hand, the parent is advised of his or her right to assigned counsel only “[w]hen such person first appears in court.”²⁰

Thus, while children are guaranteed legal assistance even *before* petition is filed when CPS has removed or *is about to* remove the child from his home,²¹ parents rarely receive assistance of counsel in the early stages of a child protective case. In fact, providers around the state have informed this Office that parents often appear at the initial hearing without representation, and this is borne out in the reported cases. For example, in one case, the Appellate Division, Third Department reversed a finding of neglect upon finding that the mother’s fundamental rights were violated where the Family Court judge did not advise her of her right to counsel, and did not assign the Public Defender’s office until after the removal hearing was over. Although the Public Defender’s office represented her in all subsequent proceedings, the Third Department held that “[w]here, as here, ‘the dictates of Family Court Act §262 have not been followed, no

¹⁶ See, e.g., Elizabeth Thornton & Betsy Gwin, *High-Quality Legal Representation for Parents in Child Welfare Cases Results in Improved Outcomes for Families and Potential Cost Savings*, Family Law Quarterly, Vol. 46, No. (Spring 2012).

¹⁷ See, e.g., Vivek Sankaren, *A Hidden Crisis: The Need to Strengthen Representation of Parents in Child Protective Proceedings*, Michigan Bar Journal, October 2010, available at <http://www.michbar.org/journal/pdf/pdf4article1749.pdf>; Mark Hardin & Susan Koenig, “Early Appointment of Counsel for Parents” in *Court Performance Measures in Child Abuse and Neglect Cases: A Technical Guide*, pp. 101-109 (U.S. Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention, 2009), available at <https://www.ncjrs.gov/pdffiles1/ojdp/223570.pdf> (hereafter *Court Performance Measures*).

¹⁸ See e.g., Judge Leonard Edwards (ret.), *Representation of Parents and Children in Abuse and Neglect Cases: The Importance of Early Appointment*, Juvenile and Family Court Journal 63, no. 2 (Spring 2012) (hereafter *Importance of Early Appointment*) (“Unless the court appoints the [attorney] well before the initial hearing and the client receives representation from the beginning of the case, the representation will likely be ineffective.”).

¹⁹ In New York, a child can be removed from parental custody in four ways. Pursuant to Article 10, Part 2 of the Family Court Act a child may be removed from the home: (1) temporarily with the parent’s consent (Fam. Ct. Act §1021); (2) by court order *after* the filing of a petition alleging abuse or neglect (Fam. Ct. Act §1027); (3) by court order *before* a petition alleging abuse or neglect is filed (“*ex parte* removal by court order”) (Fam. Ct. Act. §1022); and (4) without a court order (“emergency removal”) and the filing of a petition alleging abuse or neglect soon after the removal (Family Ct. Act. §1024). The Court of Appeals has remarked that these provisions create a “continuum of consent and urgency and mandate a hierarchy of required review” before a child is removed from home. See *Nicholson v. Scopetta*, *supra* n. 8, at 375-381 (explaining consent removal, post-petition removal, *ex parte* removal by court order and emergency removal without court order).

²⁰ N.Y. Fam. Ct. Act §262.

²¹ Prof. Merrill Sobie, *Practice Commentaries*, N.Y. Family Court Act §1016 (McKinney’s 2013).

prejudice analysis is necessary [...] reversal is mandated because a fundamental right has been denied respondent.”²²

Because it can affect the ultimate outcome of the case, “the emergency removal hearing is a critical stage of child abuse and neglect litigation.”²³ At this hearing the court decides whether to prolong the separation between parent and child following an emergency removal.²⁴ In making this determination, federal law requires the judge to make two critical findings: one, whether it would be “contrary to the best interest of the child” to remain in the home,²⁵ and, two, whether the agency has made “reasonable efforts to prevent removal of the child.”²⁶ Early appointment of counsel helps ensure that parents’ due process rights are protected and that judges have the most accurate and useful information upon which to make critical, life-altering decisions about the parent-child relationship. For these reasons, and others, relevant standards strongly recommend that counsel for the parent (and the child) be appointed sufficiently *in advance* of the initial hearing to allow attorneys the opportunity to consult with the client and quickly investigate the facts of the case, discuss the case with the caseworker and the attorneys and advocates for other parties in the litigation, and to prepare for the hearing as thoroughly as time allows.

Given the important constitutional rights implicated when CPS removes children from their parents even *before* a court order of removal is obtained or before a petition alleging abuse or neglect is filed, access to legal representation for the parent as early as possible becomes all the more imperative. Numerous published standards therefore recommend that parents have legal representation at the earliest possible stage of a child protective proceeding, including the pre-petition stages of the case.²⁷ Moreover, increasing numbers of courts across the country are

²² *In re Hannah YY*, 50 A.D.3d 1201 (3rd Dept. 2008).

²³ *Court Performance Measures*, *supra* n. 3 at 101.

²⁴ *Id.* The authors further remark that “[t]he separation of parent and child between the emergency removal hearing and adjudication may protect the child from serious, long-term harm. On the other hand, this separation may traumatize the child and ultimately make it more difficult for the parent to correct the problems that led to State intervention.” *Id.*

²⁵ Section 472(a)(2)(A)(ii) of the Social Security Act and 45 C.F.R. 1356.21(c).

²⁶ Section 472(a)(2)(A)(ii) of the Social Security Act and 45 C.F.R. 1356.21(b)(1).

²⁷ *See, e.g., Court Performance Measures in Child Abuse and Neglect Cases: Technical Guide*, pp. 101-107, U.S. Department of Justice, Office of Justice Programs (2009) (observing that parents’ attorneys “are important not only before and during the emergency removal hearing but throughout all stages of the litigation”, and that “[i]f the parents’ attorneys are not involved prior to the emergency removal hearing, the court is more likely to place children away from the parents.”); *2013 Revised Standards for Providing Mandated Representation*, New York State Bar Association, Committee to Ensure Quality of Mandated Representation (recommending that counsel be available “for any court appearance,” and “when a person reasonably believes that a process will commence that could result in a proceeding where representation is mandated;” also that “systematic procedures” be put in place “to ensure that prompt mandated representation is available to all eligible persons, particularly those held in detention facilities, and where a child has been removed by a governmental agency from the person’s home.”); *Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases*, Standard 4, American Bar Association (2006) (encouraging appointment of counsel for parents before the child welfare agency files a petition with the court “so that parents will have the benefit of counsel throughout the life of the case.”); *Standards and Criteria for the Provision of Mandated Representation in Cases Involving a Conflict of Interest*, New York State Office of Indigent Legal Services, Standard 5 (2012) (requiring counties to ensure that mandated legal services providers “[p]rovide representation for every eligible person at the earliest possible time and begin advocating for every client without delay, including while client eligibility is being determined or verified.”)

appointing attorneys for parents as soon as the court learns that a child has been removed from home,²⁸ and several projects have been established specifically to provide pre-petition representation for parents.²⁹ Pre-petition appointment for parents would more effectively advance New York's emphasis on maintaining family integrity,³⁰ giving parents' attorneys the opportunity to work with the agency to avoid the removal of a child, to work with the parent and help the parent understand the issues, and to encourage the agency to make reasonable efforts to work with the family by identifying and facilitating access to appropriate preventive services, rather than filing a petition or for an order of removal.

Similar to criminal defendants who appear without counsel at arraignment, it is commonplace for parents to appear without legal representation at emergency removal hearings where judges make critical decisions about whether to remove a child from the parent(s) or whether to continue to keep a parent and child separated following an emergency removal. Moreover, some providers report that even after they are appointed they may not actually meet the client until weeks, and sometimes months after the emergency removal hearing due to various factors such as excessive caseloads, lack of resources, delays in eligibility determination and logistical challenges. Additionally, while pre-petition appointment of counsel is required for children in some cases, parents are not afforded the same protection. The Office of Indigent Legal Services recognizes that poor parents, no less than their children, and no less than criminal defendants are entitled to meaningful representation and effective assistance of counsel. As one retired family court judge has noted:

Removing a child from parental care is perhaps the most significant governmental form of intrusion into a family. Most parents do not understand what happens in child abuse and neglect proceedings. They require assistance when facing the state with all of its resources and power. They need someone who understands the issues before the court, what the agency and court expect as the case proceeds, and how best to advise them to achieve their goals. They also need someone who understands how to reinforce messages from the court and agency that are designed to assist them, and to speak up and challenge the positions taken by the child protection agency and its attorney when those positions are not supported by the law or evidence.³¹

CONCLUSION

These proposals are intended to address long-standing problems and challenges faced by counties and providers with respect to mandated family court representation. While they are just a beginning, the Office believes that they will have a deep and positive impact on the quality of

²⁸ See *Status Report 2005: A Snapshot of the Child Victims Model Court Project* (Reno, NV: NCJFCJ, 2005), cited in *Court Performance Measures* at n. 5, pp. 108-109.

²⁹ For a discussion of three such programs, see Trine Bech et. al, *The Importance of Early Attorney Involvement in Child Welfare Cases: Representation of parents in Pre-Petition Proceedings*, prepared for the American Bar Association's Second National Parents' Attorney Conference, Washington, D.C., July 13-14, 2011, available at http://www.americanbar.org/groups/child_law/what_we_do/projects/parentrepresentation/conference_materials.html

³⁰ *Nicholson v. Scoppetta*, 3 N.Y.3d 357 (2004) (acknowledging the Legislature's expressed goal of "placing increased emphasis on preventive services designed to maintain family relationships rather than responding to children and families in trouble only by removing the child from the family" and remarking that "New York has long embraced a policy of keeping "biological families together.")

³¹ Edwards, *Importance of Early Appointment*, *supra* n. 6 at 26-27.

representation provided to poor parents and other family court litigants who have for so long been underserved by New York's public defense system.