

INDIGENT LEGAL SERVICES BOARD

AGENDA

November 22, 2013

Association of the Bar of the City of New York

- I. Opening Remarks by the Chief Judge**
- II. Approval of Minutes from September 27, 2013 Board Meeting**
- III. Update on Board Appointments/Reappointments**
- IV. Second Annual Report of the ILSB (April 1, 2012 - March 31, 2013)(See Attachment A with Exhibits)**
- V. An Estimate of the Cost of Compliance with Maximum National Caseload Limits in Upstate New York (See Attachment B)**
- VI. Status Reports**
 - Quality Enhancement (non-competitive) Distributions; Release of Distribution #4
 - Competitive Grants: Counsel at First Appearance, Upstate Quality Improvement and Caseload Reduction, Regional Immigration Assistance Centers
 - National Developments; letter to Attorney General Holder
- VII. Proposed Schedule for 2014 Board Meetings**
 - Friday, March
 - Friday, June
 - Friday, September
 - Friday, November
- VIII. Concluding Remarks**

Minutes for ILS Board Meeting

September 27, 2013

11:00 A.M.

Association of the Bar of the City of New York

Board Members Present: Chief Judge Lippman, Sheila DiTullio, John Dunne, Joe Mareane, Sue Sovie, Lenny Noisette, Mike Breslin and Gail Gray

ILS Office Attendee(s): Bill Leahy, Joseph Wierschem, Angela Burton and Risa Gerson

I. Opening Remarks by the Chief Judge

The Chief Judge welcomed and thanked all for attending. He also welcomed newly nominated, but not yet confirmed board member, Judge Carmen Ciparick. Judge Ciparick was nominated by the Assembly in August and is currently awaiting confirmation by the Governor.

II. Approval of Minutes from March 5, 2013 and June 2, 2013 Board Meetings

The Chief Judge inquired whether the board members present had received copies of the minutes from the prior meetings. The board members acknowledged that they had in fact received the minutes. The Chief then asked the Board to vote to approve both sets of minutes.

John Dunne moved to approve the minutes; his motion was seconded by Sheila DiTullio and unanimously approved as to both sets.

III. Update on Board Appointments/Reappointments

Bill noted that there has been no further gubernatorial activity so Lenny Noisette remains the only reappointed board member. As of July 31, 2013, all other members, except the Chief Judge, have expired terms. As previously noted, the Assembly nominated Carmen Ciparick to replace Susan John and the Senate nominated Vince Doyle to replace Gail Gray. NYSAC and OCA re-nominated their current members.

IV. JCOPE Requirements and Training

Joe Wierschem explained that he will provide the ethics training required by JCOPE and two dates - October 29 and November 1 - were selected as potential dates.

The extended deadline for current board members to complete the training is November 8, 2013. So, either date will satisfy that deadline. An email will be sent to confirm the date and time. In addition, each member will be contacted in advance to make sure their computers are compatible with the equipment at ILS.

V. Status Report

Bill spoke briefly about the newly decided Maryland Supreme Court case (*DeWolfe v. Richmond*, 9/25/13) regarding the right to counsel at arraignment. The decision brings this issue to the forefront.

- *Quality Enhancement Distributions*

Bill then referred members to the distributed ILS Fact Sheet and Funding Chart which was formatted by county and specific distribution. Bill then explained that these Quality Enhancement (non-competitive) Distributions permit counties to be maintained whole at 2010 funding levels. In order to receive funding, counties had to demonstrate, among other things, that the proposals actually enhanced the quality of representation and that the county consulted with the 18b providers.

John Dunne asked how ILS knew that the providers were consulted. Bill said that the consultation was made part of the written proposal and also there were personal conversations had with both the providers and the counties that provided further assurance. Mike Breslin noted that, as a former county executive, it makes sense to have the providers involved.

Lenny Noisette asked what is ILS' engagement when counties have not or have not consistently submitted proposals. Bill said that they make calls and personal visits to those counties and explain that ILS can't act without a proposal.

- *Competitive Grants*

Bill then turned to the Competitive Grants and reported that there are 25 contracts for the counsel at first appearance grant; regarding the upstate caseload relief, Bill noted the October 18 deadline for responses to the RFP. He also mentioned that they are well into the (soon-to-be published) study.

The Chief asked how quickly we can get upstate counties to where we are in NYC and Bill said we'll have better information when the study is published.

Finally, the *Padilla* RFP should be out within a month or two. Once the draft RFP is completed, ILS will work with the Comptroller's Office to obtain final approval.

- *Development of Standards for Appellate and Family Representation*

Bill re-introduced his ILS Directors Angela Burton (Family) and Risa Gerson (Appellate) and asked them to explain to the board the progress they've made with their recently formed committees.

Angela was pleased with the responses she received from practitioners and noted that they are excited about the prospect of having standards developed. She noted that they are moving at a reasonable pace.

Lenny inquired about other models for such standards and Angela explained that they were looking at the ABA standards (2006) and some from the 13-14 states that have standards in place for respondents.

Risa then spoke about the institutional and solo practitioners from around the state that are part of her committee. She said they too are looking at existing state and national standards. Risa noted that they have met several times already and there has been an incredible and enthusiastic response.

The members of both committees are listed on the ILS website.

- *National Developments*

Bill spoke again about the proposals discussed at the Spring meeting in Washington. He noted that a national committee requires congressional approval. But, a White House commission on fair representation (a *Gideon* Commission) would not. A written proposal was submitted in April and, in August, he received a letter from the Attorney General indicating that it was still under consideration. While they did not initially support the idea, the NLADA and NACDL are now on board.

VI. Allocation of FY 2013-2014 Aid to Localities Appropriation

Bill directed the board's attention to his memorandum dated September 23, 2013 which set forth in detail his proposal for the 2013-2014 appropriation of the \$81 million Aid to Localities. He set forth, in detail, the five priorities that were previously authorized by the board and asked the board to approve the appropriation. The Chief asked the board to vote.

Sue Sovie moved to approve the proposed appropriation; her motion was seconded by Joe Mareane and unanimously approved by the board.

VII. Budget Request for FY 2014-2015

A memorandum to the board dated September 23, 2013 set forth the ILS budget request. Bill highlighted some of its main points.

Bill noted that ILS was originally proposed as a \$3 million agency and they are currently operating at \$1.8 million. He would like to propose an operating budget of \$3.5 million. Bill noted that the grant manager needs to hire an assistant to keep up with the paper responsibilities and that staff salaries are low. He also explained that management confidential employees may see salary increases and he needs to make sure that his budget is sufficient to handle any increases.

The operating budget would include salaries for the articulated positions. Ultimately, there would be nine proposed regional support centers: one in NYC, one in Long Island and seven upstate. The support centers would be comprised of a criminal defense expert, a family representation expert, an appellate expert, a training director, an office manager and an investigative/expert resource person. The centers would be supervised by the central office. The concept was discussed with NYSAC and they supported it in principle.

Joe Mareane suggested that such a concept be approached cautiously. The Chief inquired about the details of the proposal. Lenny suggested a pilot and asked where the need was the greatest. Bill noted that the Southern Tier and the North Country had the greatest need. Mike cautioned that such a concept would be expensive and suggested some places may have similar centers (e.g. Bob Lonski in Western New York).

Risa then proposed a small statewide appellate office based in Albany - similar to the Michigan model. It would handle complex cases with senior attorneys and also act as a resource to attorneys around the state. It would have a brief bank.

Sue Sovie asked if it would include Family Court Appeals and Risa noted they would be open to including those types of cases. Bill then said they would amend Risa's proposal to include Family Ct cases.

The Chief then asked the board to vote only on the ILS budget request.

John Dunne moved to approve the proposed budget request and it was unanimously approved by the Board.

VIII. Remaining 2013 Board Meeting

- Friday, November 22

IX. Concluding Remarks

The Chief thanked everyone for attending and left the meeting in the hands of board member John Dunne.

John Dunne moved for the meeting to go into Executive Session; his motion was seconded by Sue Sovie and unanimously approved by the remaining Board members.

At the conclusion of the Executive Session, no action was taken. Sue Sovie moved to adjourn the meeting and her motion was seconded by Mike Breslin.

The meeting adjourned at 12:48 P.M.

The Second Annual Report of the Indigent Legal Services Board

Covering the period April 1, 2012 – March 31, 2013 (Fiscal Year 2012-2013)

“There is progress being made, but it is painstakingly slow and it is not close to being adequate to remedy the deficiencies that were identified in the Kaye Commission report and Hurrell-Harring [v. State of New York].”

William Leahy, Director, Office of Indigent Legal Services

“I think we are finally on track...but it’s a slow train.”

Seymour James, President, New York State Bar Association

The assessments quoted above, which appeared in the New York Law Journal story on March 18, 2013, the 50th anniversary of the landmark right to counsel decision in *Gideon v. Wainwright*, 372 U. S. 335 (1963), serve as accurate shorthand descriptions of the state of progress in New York as the Indigent Legal Services Board (Board) and Office completed their second year of operations.* On a positive note, the office had reached its funded capacity of ten (10) staff members, had begun to distribute quality improvement funds to the localities,

*For a description of the history leading up to the creation of the Board and Office, please see the Board’s First Annual Report (November 21, 2012) at pp. 2-5.

had issued its first competitive Request for Proposals and was preparing two others, and it was beginning to assess the quality of services being provided statewide by means of site visits, reports, and data analysis. On the other hand, Office funding and staff were barely more than half of the original legislative and executive intention, the staffing of the Office and the distribution of funds had been subject to lengthy delays, and the appropriations for local aid had barely scratched the surface of what would be needed. Yet, at the end of the budget deliberations which coincides with the closing date for the year covered by this report, the Legislature provided critical funding for relief of excessive caseloads in upstate defender offices, and lack of adequate support in assigned counsel programs.

Staffing of the Office: As the fiscal year began, the Office was composed of five employees: the Director, Counsel, Executive Assistant, Director of Research, and Manager of Information Services. During the year, the Director's appointments of a Grants Manager, Directors of Quality Enhancement for Criminal Trials, for Parent Representation, and for Appellate and Post-Conviction Litigation, and also a Director of Regional Initiatives were finalized. As of January 7, 2013, twenty-two months after it began operations, Office staff reached its funded level of ten. Now, the Office could send an expert in each practice area for which it bore responsibility into the field to consult with providers, and could reach out to experts in their respective areas. Now, the Office could undertake comprehensive rather than piecemeal analyses of data provided by our Director of Research and our Manager of Information Services. Now our Grants Manager and Counsel could work with our Quality Enhancement Directors and our Director of Regional Initiatives to better direct state funding to improve the quality of representation statewide. Now we could begin in earnest our effort to improve the quality of representation throughout New York.

For example, from her employment on January 7, 2013 through the end of March, our Director of Quality Enhancement for Appellate and Post-Conviction Representation, Risa Gerson, visited with the Presiding Justices of all four of New York's Judicial Departments, and with the heads of virtually every upstate institutional appeals unit; including those in Buffalo, Rochester, Syracuse, Nassau and Westchester, and appellate lawyers in the Columbia, Dutchess and Ulster County Public Defender offices. Our new Director of Regional Initiatives, Joanne Macri, who began her employment on the same date, laid the groundwork for regional plans by visiting public defender and/or assigned counsel offices in Albany, Cattaraugus, Erie, Genesee, Kings, Monroe, Oneida, Onondaga, Westchester and Wyoming counties; and by consulting with law professors and advocates with experience in the immigration consequences of criminal convictions and allegations of deficient parenting.

Our Manager of Information Services, Peter Avery, designed and installed our agency website, <http://www.ils.ny.gov>, which became fully operational in September, 2012. Our Director of Research, Andrew Davies, worked very effectively with providers to amass an unprecedented amount of data about every program, thereby providing a critical base upon which we may build an accurate assessment of each program's performance and resource needs. Through his participation on the National Legal Aid and Defenders Association's Research and Data Analysis committee, Andy brings to New York the most current and advanced research and assessment techniques. Our Grants Manager Karen Jackuback and Counsel Joe Wierschem worked tirelessly with providers and county officials to reach agreement on work plans and budgets for the quality improvement distributions and the counsel at first appearance proposals. Our Executive Assistant and Office Manager, Tammeka Freeman, kept the office staff informed, supplied and highly motivated, even as she negotiated her way through complicated state government processes on our behalf.

Matt Alpern and Angela Burton, our directors of Quality Enhancement for Criminal Trials and Parent Representation, respectively, began their employment on September 4, 2012. During their first months, they engaged in active outreach to providers throughout the state, promoting increased communication and more effective advocacy. They encouraged providers to conduct regular meetings within their judicial districts, brought together practitioners from diverse regions, made connections with existing bar association and judicial groups, and commenced planning for increased training and the development of practice standards in cases of alleged child abuse or neglect.

As we did in our First Annual Report, the Board wishes to acknowledge its appreciation for the important role played by the Governor's Counsel Mylan Denerstein in reducing the delays in staffing the Office. Without her assistance, a troublesome situation could have become seriously disabling.

Quality Improvement Distributions and Grants:

Non-Competitive Distributions: At its meeting on September 28, 2012, the Board approved the development of a third Quality Improvement Distribution, known as Distribution #3. The Board authorized funding in the amount of almost \$7.4 million per year over a three-year period, or a total amount of \$22.1 million. The Board's action continued and reaffirmed its commitment to assuring every county and New York City that they would receive at least the level of state support they received in 2010; that their funding would not decrease in a time when they were being asked to work with the ILS Office and Board to improve the quality of representation. As the period covered by this report concluded, the Office was awaiting approval by the Office of State Comptroller to solicit proposals for funding under Distribution #3.

Meanwhile, 54 contracts with localities had been finalized for Distribution #1, with approximately 70% of the \$4.4 million having been expended. For Distribution #2, 51 contracts totaling \$20.6 million for a three-year period had been sent to the counties for approval; and 43 of these had been finalized by the Office and the State Comptroller.

Competitive Grants: At its meeting on September 28, 2012, the Board approved the development of a third competitive grant, intended to address the problem of excessive caseloads and inadequate support staff in the 57 upstate counties, and to begin the process of achieving their compliance with maximum national caseload standards. The Board authorized this grant in an amount of \$4 million per year over a three-year period, in the total amount of \$12 million. The Office was drafting an RFP, to be entitled the Upstate Quality Improvement and Caseload Reduction Grant, as this reporting period concluded.

On November 30, 2012, the Office released its RFP for the Counsel at First Appearance Demonstration Grant, previously authorized by the Board in the amount of \$12 million over a three-year term, or \$4 million per year. This RFP, which was written to promote effective representation of persons charged with crime at their first appearance before a judge, is attached hereto as Attachment A. By the due date of February 15, 2013, 25 counties had submitted proposals in a total amount of almost \$13.5 million, which were under review at the fiscal year's end with awards to follow.

Other Significant Activities: The Office established a Chief Defender Advisory Group (CDAG), which is composed of 20 criminal defense and family practitioner leaders from across the state, including representatives of institutional defenders and assigned counsel programs. The group began meeting in November, 2012, and is an important mechanism for allowing in-depth group discussion of critical issues between local practitioners and Office staff.

On June 8, 2012, the Board approved *Standards and Criteria for the Provision of Mandated Representation in Cases Involving a Conflict of Interest*, pursuant to Executive Law section 832(3)(d), and made them effective as of July 1, 2012. These Standards serve two important purposes. First, they are being used by the Office and Board to work with counties and providers to generate improvements in the quality of mandated legal services. Second, they will be used by the State Administrator (Chief Administrative Judge) in reviewing plans for conflict defender offices submitted under County Law article 18-B, section 722.

At its meeting on September 28, 2012, the Board approved the extension of the Standards to encompass all trial-level representation, effective as of January 1, 2013. Subsequently, Office staff began planning to form workgroups to examine the issues of best practices and standards in the areas of family representation, appellate and immigration consequences.

State Funding: At its meeting on September 28, 2012, the Board approved an FY 2013-2014 appropriation request for the Office of \$94 million, an increase of \$11.5 million over its FY 2012-2013 appropriation of \$82.5 million.

Of the \$94 million, \$3 million was sought for the expenses of the Office, and \$91 million for Aid to Localities. The latter funding sought to increase state funding by \$10 million for three specific purposes: \$4 million to further reduce excessive caseloads in upstate counties; \$3 million to increase funding for counsel at arraignment; and \$3 million to enable counties to comply with the ILS *Standards and Criteria for the Provision of Mandated Representation*, which were coming into effect on January 1, 2013. This budget request was submitted to the Executive Branch on October 16, 2012. However, the Executive Budget released in January, 2013 contained none of the requested increases. In fact, it reduced the FY 2012-2013 appropriation from \$82.5 million to \$78.5 million, by removing the \$4 million intended for the relief of excessive upstate caseloads.

On February 6, 2013, Director Leahy testified at the legislative budget hearing hosted by the Senate Finance Committee and the Assembly Committee on Ways and Means. He emphasized that "[i]t is both appropriate and necessary for the State of New York to provide much more significant financial support to the 57 counties and the City of New York, which have borne the lion's share, and also an ever-increasing share, of the cost of providing legally mandated counsel." (Attachment B, at page 10). The Legislature responded favorably by restoring the \$4 million for upstate caseload and support funding, and by increasing the office budget by \$300,000 to the level of \$1.8 million. Thus the final appropriation for FY 2013-2014 was \$82.8 million.

The restoration of the \$4 million meant that the Office could proceed with development of its RFP for a multi-year Upstate Quality Improvement and Caseload Reduction grant program, and the increase of \$300,000 meant that the Office staff could proceed with their assessment of and efforts to improve the quality of representation as required by our statute. The Board wishes to express its gratitude to the leadership of the Assembly and the Senate for their support of the right to counsel at this critical moment. In particular, we thank Senator John DeFrancisco, Chairman of the Senate Finance Committee and Assemblyman Joe Lentol, Chairman of the Assembly Codes Committee for their strong leadership.

Necessary Actions to Achieve Improved Quality of Services: If the quality of representation for clients who are entitled by law to the assistance of counsel yet cannot afford to retain an attorney is to improve, as directed by Article 30 of the Executive Law, four major reforms must be undertaken or, where they have begun, must be consistently supported. They are:

I. Sufficient Funding and the Elimination of "Sweeps" :

First, the annual Aid to Localities appropriation must be increased by a significant amount. Simply put, the counties cannot continue to contribute more than 80% of all funding to support the State's obligation to provide counsel. It is simply unsustainable. There must be a significant increase in state funding if the serious defects identified by the Court of Appeals in its 2010 decision in *Hurrell-Harring v. State of New York* are to be remedied. Second, the specific, targeted reforms proposed by the Office and Board in each annual appropriation request should be funded. Third, the transfers or "sweeps" from the Indigent Legal Services Fund to the general fund must cease. The ILSF monies must be preserved in full for their intended purpose of supporting improvements in the quality of legally mandated representation.

II. Independence:

The independence of the Office and the Board from political interference is a centerpiece of Article 30. The authority of the Director to make appointments under section 832(2)(d) must continue to be honored. Furthermore, there must be no interference with the Board's authority to disburse quality improvement funds to localities via non-competitive distributions as well as by competitive grants.

III. Regional State-Funded Support:

The county-based system cannot flourish unless it is supplemented by Regional Support Centers, funded by the state and operating under the Office, to assist counties in every region. These Centers would provide support in such areas as training, mentoring, and supervision; expertise in appellate, family and criminal defense practice; and assistance with obtaining investigative, forensic and other necessary client services.

IV. Enforcement Authority:

The Office and Board must be given the enforcement authority that is needed to assure uniformly high quality representation throughout the state. Specifically, the Office should have the authority to approve assigned counsel and conflict defender office plans, and the authority to enforce the standards and criteria and performance measures established by the Office and the Board.

Respectfully submitted on this ____ of November, 2013.

Jonathan Lippman, Chair

Michael G. Breslin

Sheila DiTullio

John R. Dunne

Gail Gray

Susan V. John

Joseph C. Mareane

Leonard Noisette

Susan Sovie

**New York State
Office of Indigent Legal Services**

*Funding
Announcement*

**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			

Testimony of Office of Indigent Legal Services

Joint Legislative Hearing on the 2013-2014 Public Protection Budget

Presented before:

The Senate Finance Committee

and

The Assembly Committee on Ways and Means

Presented by:

William J. Leahy

Director

Office of Indigent Legal Services

February 6, 2013

Good afternoon Chairman DeFrancisco, Chairman Farrell and distinguished members of the Committees.

I am William Leaby, Director of the Office of Indigent Legal Services. Thank you for this opportunity to appear before you to discuss the FY 2013-14 budget of the Office and Indigent Legal Services Board.

I'd like to begin by thanking you for your past support of the Office and Board. Last year, at my first appearance before these Joint Legislative Public Protection Budget hearings, I asked that you consider increasing the level of Local Aid funding recommended in the FY 2012-13 Executive Budget to alleviate excessive attorney caseloads in upstate New York. Through your efforts, an additional \$4 million was added in the Final FY 2012-13 Budget. With reduced caseloads, upstate attorneys will be better able to provide effective assistance of counsel to individuals unable to afford counsel, as our Constitution requires. We are deeply grateful to you for allowing us to begin the process of promoting reduced caseloads and better representation for clients, who are entitled to the *effective* assistance of counsel throughout the state of New York.

In September, 2012, the Indigent Legal Services Board unanimously approved a budget request for FY 2013-14 of \$94 million. Of this amount, \$3 million in State Operations would support the Office (an increase of \$1.5 million), and \$91 million would be devoted to Aid to Localities (an increase of \$10 million, broken down as follows: \$4 million for additional upstate caseload relief; \$3 million to extend counsel at first appearance; and \$3 million to support the localities' efforts to comply with the newly-established Performance Standards and Criteria). Overall, we requested an increase of \$11.5 million over this year's appropriation of \$82.5 million.

The Executive Budget released on January 22, 2013 proposes (1) a \$4 million reduction in Local Aid funding from \$81 million to \$77 million, (2) a \$3 million pilot program for counsel at arraignment, to be administered by a yet to be named state agency, and (3) flat funding of \$1.5 million in State Operations for the ILS Office. It proposes total agency funding at \$78.5 million, which is a \$4 million reduction from our current appropriation.

- (1) The proposed \$4 million cut in Local Aid would devastate our effort to implement an effective and sustained upstate caseload reduction program. To limit the priority that you funded in the FY 2012-13 Budget to but a single year would send a message to counties that, with only one year of funding, they would be left to absorb the costs of salaries and benefits of any new hires they make under this program.
- (2) I am very pleased that the Executive Budget recommends \$3 million for a pilot program for counsel at arraignment, which is identical in purpose to the RFP for counsel at arraignment that my Office released this past November, and for which proposals are due next week. As mentioned above, \$3 million is exactly the additional amount we requested to augment our already-existing RFP for counsel at first appearance during the coming fiscal year. I do,

however, have very serious concerns about how this program will be administered, and how this funding from the Indigent Legal Services Fund is proposed to be spent.

- (3) Simply put, flat funding of \$1.5 million in State Ops will not allow for the continued operation of the ILS Office. Our staffing level of ten employees was finally reached on January 7, 2013. FY 2013-14 will be the first fiscal year in which our full allotment of 10 employees will be on the job for the entire year, and the annualized cost of salaries and fringe benefits alone for these positions will approximate \$1.37 million. That would leave inadequate funding for the Office to properly function. We need a minimum of \$1.75 million to operate this Office effectively at its current staffing level in the coming fiscal year. Before I discuss further with you the FY 2013-14 ILS Budget Request and Executive Budget, I would like to describe some of the activities and accomplishments of the Board and Office, in this our second year of operations.

The Mission of the Office and the Board.

The Office and Board were created in June, 2010, in partial response to the 2006 report issued by the Commission on the Future of Indigent Defense Services, created by then-Chief Judge Judith Kaye, and one month following the important decision in *Hurrell-Harring v. State of New York*, 15 NY3d 8. The Kaye Commission Report found glaring deficiencies in the quality of indigent legal services offered by counties. These deficiencies included excessive caseloads, inability to hire full-time defenders, lack of adequate investigative and support services, inadequate training, minimal client contact and, in some courts, outright denial of the constitutional right to counsel.

The Office, which began operating on February 22, 2011 under the direction and pursuant to policies established by the Board, is mandated to assist localities in the exercise of their responsibility under County Law Article 18-B to provide the effective assistance of counsel to those persons who are legally entitled to counsel, but cannot afford to hire an attorney. The statutory mission of the Office is as simple as it is challenging: "to monitor, study and make efforts to improve the quality of services provided pursuant to article 18-B of the county law."

The Office and Board also have responsibility for the distribution of State funds appropriated to the counties from the State's Indigent Legal Services Fund (ILSF). The State established this dedicated Fund in 2003 to assist localities in meeting the duty to provide legal representation to persons unable to afford counsel. With the discretion provided in the 2010 legislation, the Office and Board can establish criteria for distributing these funds to ensure that localities use these monies to improve the quality of indigent legal services.

Second year operations of the Office and the Board.

During its first two years of operations, the Board has approved the development of three *non-competitive* distributions – in amounts sufficient to restore every county and New York City to

the level of funding they received in 2010.¹ These non-competitive distributions serve to stabilize state funding to the counties and New York City, thereby providing assurances to the counties and City that state funding will not decrease at a time when they are being asked to improve the quality of their representation. With the approval of each of the three non-competitive distributions, the Board has reaffirmed its commitment to the proposition that counties will not be asked to do more with less.

The Board has also approved the development of three *competitive* grants, each targeted to improve the quality of mandated representation under county law 18-B by using carefully targeted state funding to address current deficiencies in the delivery of those services. These competitive grants provide additional funding to the counties and New York City, above and beyond the 2010 level of funding provided by the three non-competitive distributions.

Significantly, these initiatives - the non-competitive distributions and competitive grants - do not impose any unfunded mandates on the counties. Counties will not be asked to perform any additional service that state funding will not support - and the counties and the State will benefit from having the quality of indigent legal services improve significantly.

Another notable achievement of the Board occurred this past June, when the Board issued standards and criteria for the provision of mandated representation involving a conflict of interest. These standards and criteria, which will promote quality representation and uniformity of practice in conflict cases throughout the state, were extended by the Board at its September meeting to apply to all trial level representation in criminal and family court cases.

Non-competitive Distributions

This past September, the Office recommended and Board approved \$7.4 million in a non-competitive distribution of FY 2012-13 Local Aid funds under Executive Law Article 30, section 832 (3) (f). The Board authorized a three-year allocation of funds, in the total amount of \$22.1 million over this period.

This distribution ("Distribution #3") marks the third non-competitive distribution authorized by the Board.² It requires each county government to consult with its indigent legal service provider leaders, including the provider of Family Court mandated services, to craft a proposal, subject to approval of the Director and Board, and then submit a budget and work plan which will be formalized in contract language. It further requires that the funding be utilized to "improve the quality of services provided pursuant to article eighteen-B of the county law." Executive Law Article 30, sections 832 (1) and 833 (1).

¹ For the first four years of operation, non-NYC counties are guaranteed by statute a percentage of the ILSF funds they received in March, 2010 (year 1 - 90%; year 2 - 75%; year 3 - 50%; year 4 - 25%). New York City is guaranteed an annual sum of \$40 million, or 98% of its March, 2010 ILSF allocation.

² The Board approved \$8.1 million in a non-competitive distribution of FY 2011-12 Local Aid funds in September, 2011 ("Distribution #2") and \$4.4 million in a non-competitive distribution of FY 2010-11 Local Aid funds in March and June, 2011 ("Distribution #1"). The Board authorized a three year allocation of funds for Distribution #2, in the total amount of \$24.4 million.

Like the first two non-competitive distributions authorized by the Board (Distributions #1 and #2), Distribution #3 is essential to improving the quality of mandated representation and maintaining the progress made by counties over the past year and one-half to promote and implement county/chief defender/ILS partnerships on projects across the state. Currently, the Office is seeking the approval of the Office of State Comptroller (OSC) for the distribution of these funds³.

By requiring consultation with their indigent legal service providers as a precondition to the distribution of funds, the Office has promoted an unprecedented amount of collaboration between the city and county governments and these providers. This collaborative approach, which ensures that proposals made by the counties are informed by the experience and professional expertise of the service providers, means that ILSF funds are being better targeted toward improving the quality of legal representation, as required by law.

Use of Funds (Distributions #1 and #2)

Counties have been utilizing State funds received from the first two distributions in creative and innovative ways, which represents a sharp departure from how counties used State funds prior to 2010, when there was little or no oversight of such funds. Indeed, how Distribution #1 and #2 funds are being used by counties represents a significant change in how indigent legal services are being delivered across the state. Examples of innovative and creative uses of these funds include:

- creating a "regional appeals bureau" to handle all criminal appeals for four counties;
- establishing pilot programs to provide attorney representation at a defendant's first court appearance;
- improving access for clients to alternatives to incarceration;
- providing funding for attorneys to review and, if appropriate, challenge prior convictions as a result of problems arising from the operation, and closure, of a crime lab;
- creating Immigration attorney positions to assist clients of defender organizations (criminal and family court) and assigned counsel with immigration issues; and
- purchasing case management systems to assist counties in the collection and mandated reporting of data⁴.

Funds are also being used to hire additional attorney and support staff to reduce attorney caseloads, provide additional expert or investigative assistance, improve access to treatment, enhance attorney and staff training, and purchase much-needed computer equipment. Many of these initiatives had gone unaddressed for many years, or were at one time funded and then

³ The process of obtaining OSC approval for Distribution #2 took approximately eight months, due to OSC's initial position that the Board's authority to distribute funds was restricted to competitive grant processes.

⁴ At present, approximately 50 indigent legal service providers have had the New York State Defender's Association (NYSDA) case management system (CMS) installed in their offices.

discontinued. All contribute to improving the quality of representation, in furtherance of our statutory mandate⁵.

Competitive Grants

The Board has authorized a total of just under \$10.8 million annually (\$32.4 million over three years) in *competitive* grants in furtherance of three specific goals: 1) to bring New York closer to the goal of providing counsel at a criminal defendant's first court appearance, which is a critical moment when his or her liberty may be at stake; 2) to bring New York into compliance with the requirement established by the United States Supreme Court in *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), that every assigned lawyer must provide his or her client with accurate information as to potential immigration consequences of a conviction; and 3) to alleviate excessive caseloads in upstate public defender offices and develop quality control measures in upstate assigned counsel programs. All three of these grants are for a three year period, with total funding of \$12 million for the counsel at arraignment grant (\$4.0 million per year); \$8.4 million for the immigration consequences grant (\$2.8 million per year); and \$12 million for upstate caseload reduction (\$4 million per year). These grants represent the Board's priority to take immediate steps to address constitutional deficiencies in the delivery of 18-B mandated representation and to develop innovative models of delivering state assistance to counties through the provision of state-funded regional support and resources.

Counsel at First Appearance

On November 30, 2012 the Office released its Request for Proposals (RFP) for the Counsel at First Appearance competitive grant. The due date for counties to submit proposals under this RFP is next week, on February 15. The purpose of this RFP is to make demonstrable and measurable improvements in the delivery of indigent defense services to eligible persons at a defendant's first appearance before a judge. The RFP was designed to encourage proposals by a wide range of counties. It explicitly seeks "to fund projects that demonstrate new approaches", to support "model programs that can be easily adapted to other counties or regions", and to identify "promising practices and strategies...that can be shared with other counties."

Like the three non-competitive distributions, counties are required to submit a proposal that is developed through consultation with each indigent legal defense provider in the county, including the person with responsibility for overseeing the assigned counsel program. Based on our conversations with counties and indigent legal service providers, we are expecting a robust response from the counties next week.

⁵ For Distribution #1, we approved 57 proposals and finalized 53 contracts (52 counties and NYC) with a total value of approximately \$4.3 million. For Distribution #2, we have approved proposals and sent contracts to 50 counties (total value of \$20.4 million); we expect to approve proposals by the remaining 8 localities within the next month or two. Of the 50 contracts we have offered to date, 33 have been executed by the counties and returned to the Office; and 25 of these contracts have received final approval by the Attorney General's Office and Office of State Comptroller.

Padilla compliance regional resource centers

The Board's *Padilla* compliance grant will provide counsel with the training and support necessary to fulfill his or her professional obligations with respect to immigration consequences under the United States Supreme Court's *Padilla* decision in 2010. It will involve the creation of several regional resource and training centers that will serve every attorney within New York State who provides representation for a client under article 18-B. These resource and training centers will serve as a model for future ILS efforts to regionalize additional services in order to better assist counties in providing effective representation.

The RFP for the *Padilla* compliance grant is currently being developed in concert with the Office of the State Comptroller, with an anticipated release in the near future.

Upstate Caseload Reduction

As I noted in my opening remarks, I want to thank you for your addition of \$4 million in the FY 2012-13 Final Budget to reduce upstate caseloads.

That excessive caseloads impair the quality of legal representation that indigent legal service lawyers can provide is a given. No lawyer, however well qualified, can provide the effective assistance of counsel that our Constitution requires if he or she is saddled with an excessive caseload. The need for manageable caseloads is emphasized in all published state and national standards, and in numerous state and national reports on deficiencies in mandated representation. See, for example, *Securing Reasonable Caseloads: Ethics and Law in Public Defense*, Norman Lefstein (ABA Standing Committee on Legal Aid and Indigent Defendants, 2011), available at www.indigentdefense.org.

Significantly, as part of the FY 2009-2010 Final Budget, the Legislature passed a landmark law authorizing the Chief Administrative Judge to enact caseload standards for indigent defense providers in New York City that would be phased in over four years.⁶ This law was enacted to ensure that low income New Yorkers who are accused of crimes - sometimes wrongfully - in New York City will be represented by lawyers with proper caseloads that do not exceed maximum national norms.

The Board's avowed intention in authorizing the development of the upstate caseload reduction grant is twofold: to alleviate excessive caseloads in upstate public defender and other staffed offices, and to develop quality control measures in upstate assigned counsel programs. This funding is designed to afford upstate attorneys and their clients the same type of relief that New York City defender offices and their clients are now receiving from the workload reduction program initiated in 2009.

⁶ In FY 2012-13, NYC institutional providers received approximately \$29 million for the purpose of reducing caseloads. These funds are derived from the Judiciary Budget.

Standards of Representation

At its June, 2012 meeting, the Indigent Legal Services Board approved the *Standards and Criteria for the Provision of Mandated Representation in Cases Involving a Conflict of Interest*, effective July 1, 2012. The standards and criteria hew closely to the established and widely admired New York State Bar Association Revised Standards for Providing Mandated Representation (revised 2010), which indeed are cross-referenced throughout; but they derive also from other state standards and nationally recognized criteria.

The standards and criteria, issued in fulfillment of this Office's responsibility under the Executive Law, serve a twofold purpose. First, the standards and criteria will be utilized by the Office and Board to work cooperatively with counties and legal service providers to generate improvements in the quality of mandated legal services, with the objective of achieving compliance with the standards. Indeed, the issuance of these standards and criteria was accompanied by a preamble that stressed the importance of the statutory role of the Office "to assist counties." Secondly, under County Law section 722 (3) (b) & (c), the State Administrator (Chief Administrative Judge) is directed to "employ the guidelines established by the [Office]" when considering approval of an office of conflict defender.

At its September, 2012 meeting, the Board extended these standards to apply to all trial level representation in criminal and family court, effective as of January 1, 2013.

FY 2013-14 ILS Budget Request

Our budget request of \$91 million for Aid to Localities and \$3 million for State Operations warrants your full support. In light of the Executive Budget, the following aspects of our request are of utmost concern.

First, the four million dollars for caseload reduction relief in upstate counties that was eliminated in the executive budget must be restored, and should be increased. Excessive defender office caseloads and the absence of quality assurance structures in assigned counsel programs in upstate counties are pervasive. Until they have been remedied, the State of New York will remain vulnerable to the criticism that it has failed to comply with its fundamental constitutional responsibility to provide counsel – effective counsel – for people who are legally entitled to the assistance of an attorney, and do not have the means to hire one. In 2009, this Legislature authorized and funded a multi-year program to alleviate excessive public defender caseloads in New York City. Last year, you authorized an initial appropriation of \$4 million to allow us to begin redressing that same constitutional infirmity in the 57 upstate counties. That amount should be increased in this appropriation to \$8 million, if significant progress is to be achieved. At the very least, however, the \$4 million must be appropriated, so that the Office can offer and the counties may apply for three years of funding with the assurance that state funding will not dry up after a single year of progress. This is an urgent matter of mandate relief, fundamental fairness, and constitutional compliance.

Second, the Office must be funded at a sufficient level to permit its effective operation during the full fiscal year. The Office of Indigent Legal Services was envisioned from the outset as a \$3 million operation with twenty employees. During our first two fiscal years, when we had extremely limited staffing, the reduced State Operations appropriation of \$1.5 million was sufficient to pay for salaries and the cost of office operations. However, since five of our ten employees joined us during the current fiscal year – one in July, two in September, and two in January, 2013 – the coming fiscal year will be the first in which all ten employees will be employed throughout the fiscal year. As mentioned above, salary and fringe benefit assessments alone will total \$1.37 million. Therefore, we require a minimum of \$1.75 million if we are to operate effectively in FY 2013-14.

Third, the \$3 million we requested for Provision of Counsel at Arraignment should be made a part of our appropriation, as its purpose of improving the quality of representation is our core statutory responsibility. During the past two years, small pilot programs to expand the provision of counsel at arraignment have taken hold or been planned in upstate counties such as Chautauqua, Erie, Onondaga, Ontario and Tompkins. We have provided advice, assistance and in some cases funding to encourage these initiatives. On November 30, 2012, we released our RFP for the Counsel at First Appearance Demonstration Grant (see attached copy), with an application deadline of February 15, 2013, just nine days from now. Interest in this funding opportunity has been widespread and robust. Given the extensive scope of the problem and the strong interest in fixing it, we requested an additional \$3 million for this purpose in our FY 2013-14 budget request. The Executive Budget indeed allocates \$3 million from the Indigent Legal Services Fund as requested; but inexplicably fails to allocate the money to the Office that alone possesses the expertise, the experience and the statutory responsibility to repair the constitutional damage. The funds should be made part of the Aid to Localities component of this Office's appropriation.

Your affirmation of these three urgent agency priorities would add a total of \$4.25 million to the overall state appropriation, and would transfer the aforementioned \$3 million from the "Miscellaneous" ledger to the Office appropriation. This would result in an appropriation of \$85.75 million; \$84 million in Aid to Localities and \$1.75 million in State Operations. These changes would result in a total increase of \$3.25 million or 3.9% over the current appropriation. If the additional \$4 million we have requested to augment our upstate caseload reduction program were funded, as we have urged, the total appropriation would be \$89.75 million, an increase of \$7.25 million or 8.8%.

These actions are essential, if we are to advance the progress we have made in our first two years to improve the quality of representation in cases where such representation is legally mandated throughout the state of New York. As importantly, they are essential if New York is to bring itself into compliance with minimal constitutional standards for the provision of counsel in these cases. While the cost of providing counsel borne by the counties and New York City has soared by \$119 million in the past ten years, and by almost \$38 million between 2009 and 2011 (see

attached "Local Expenditures on Indigent Legal Services Statewide, 2002, 2009 and 2011"), state appropriations since FY 2009-10 to date have been essentially flat (see attached "Indigent Legal Services Fund Local Aid Appropriations". Indeed, under the Aid to Localities recommendation contained in the Executive Budget, the state Indigent Legal Services Fund allocation of \$77 million to localities in FY 2013-14 would increase not one dollar from the FY 2010-11 appropriation.

It is both appropriate and necessary for the State of New York to provide much more significant financial support to the 57 counties and the City of New York, which have borne the lion's share, and also an ever-increasing share, of the cost of providing legally mandated counsel. As an important first step, I therefore ask you to approve our full \$91 million request for Aid to Localities. This funding would enable the localities and their indigent legal services providers to reduce caseloads, to provide counsel at a defendant's first court appearance, and to work toward compliance with the performance standards which have been promulgated by the Office as required by law. Every dollar of this requested increase would be dedicated to improving the quality of representation.

Finally, we have requested a total of \$3 million in State Operations, which funds the activities of this Office. As argued above, we need a minimum of \$1.75 million to conduct our necessary operations effectively in the coming fiscal year. We propose to dedicate the remaining \$1.25 million to creating four state-funded Regional Support Centers during the course of the fiscal year. These Regional Support Centers would be of great assistance to localities in their effort to improve the quality of representation in a cost-effective way. These Regional Centers would identify and make more easily available essential support such as investigation, diversion, forensic assistance, treatment resources, certification, appellate representation and other resources, as described in *The First Annual Report of the Indigent Legal Services Board* (November, 2012) at 13-14 (see attached copy of cover page and pages cited). These regional centers have great promise to improve the quality of representation in a very cost-effective manner.

Finally I must emphasize that the mission of the Office of Indigent Legal Services to improve the quality of representation throughout the State of New York cannot succeed if the New York State Defender Association's Public Defense Backup Center is not adequately supported in this appropriation. For decades, the Backup Center has been the one source that provides essential training and legal advice to thousands of public defenders and assigned counsel throughout the state. Its services are also threatened by the inadequacy of the appropriation proposed in the Executive Budget. As I said last year: "My office cannot succeed, and New York cannot meet its Constitutional obligation to provide competent counsel to those who cannot afford to pay for it, if the Backup Center is allowed to fail for lack of funding."

Concluding Point: Next month, on March 18, the nation will celebrate the 50th anniversary of the famous decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963). Every lawyer and law student is familiar with the Court's proud proclamation that echo through our national history and are quoted on our office stationery: "The right...to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours." To date, New York has failed to live up to the constitutional standards that have been established in the *Gideon* decision and its progeny. The time to act is now. Thank you for your attention and your support for the right to counsel in New York.

An Estimate of the Cost of Compliance with Maximum National Caseload Limits in Upstate New York

A Report of the Office of Indigent Legal Services
November, 2013.

*An Estimate of the Cost of Compliance
with Maximum National Caseload Limits
in Upstate New York*

Contents

Executive Summary	1
Introduction	2
Caseload Limits.....	3
Institutional Providers	3
Assigned Counsel Providers.....	5
Should Limits Be Lower?	6
Data Collected	8
Caseloads.....	8
Staffing.....	9
Expenditures.....	10
Analysis.....	10
Institutional Providers	10
Assigned Counsel.....	12
Conclusion.....	14

Tables and Figures

Table 1: Ratios Used in Analysis.....	5
Table 2: Example of Institutional Provider Analysis.....	11
Table 3: Example of Assigned Counsel Program Analysis.....	13
Figure 1: How Many Cases Are Attorneys Taking in Upstate Institutional Providers?	10
Figure 2: By What Percentage Did Institutional Provider Spending Need to Increase?.....	12
Figure 3: By What Percentage Did Assigned Counsel Spending Need to Increase?.....	14

An Estimate of the Cost of Compliance with Maximum National Caseload Limits in Upstate New York

Executive Summary

- In 2012, the 57 upstate counties of New York State spent \$165,934,692, largely from county funds, to provide legally mandated representation to indigent persons under NY County Law Article 18-B.
- Maximum national caseload limits published in the 1970s stipulate that the weighted caseloads of attorneys in institutional providers of indigent legal services should average no more than 400. In the 71 such providers in upstate New York in 2012 the average weighted caseload was 719.
- In order to comply with maximum national caseload limits in 2012, New York would have had to spend an additional \$111,214,533 on indigent legal services in upstate counties.
- \$69,360,191 of this amount was needed in the 71 institutional providers of representation in upstate counties. This would have paid for 567 new staff attorneys in addition to the 654 employed that year. It would also have funded 324 new non-attorney staff in addition to the 297 who were already employed. Expenditures in each of these programs would have had to increase by an average of 92%.
- \$41,854,342, or the remainder of the total, would have been required to bring the 58 upstate assigned counsel programs into compliance with national standards. Expenditures in each of these programs would have had to increase by an average of 67%.
- This estimate is grounded on conservative assumptions with respect to both the caseload limits used, which have been criticized as excessively high, and the methods by which caseloads, salaries and expenditures were quantified. This was to avoid overstating the cost of bringing New York's upstate counties into compliance with national caseload maxima.

An Estimate of the Cost of Compliance with Maximum National Caseload Limits in Upstate New York

At the Commission's four public hearings, virtually all institutional defenders testified to having to labor under excessive caseloads.

Commission on the Future of Indigent Defense Services
Final Report to the Chief Judge of the State of New York, 2006, p. 17.

Introduction

Since the 2006 publication of the Final Report of the Commission on the Future of Indigent Defense Services, there has been some effort to ameliorate the crushing caseloads under which providers of indigent defense in New York State labor. In 2009, a program of state funding was begun with the objective of reducing the average caseloads of attorneys employed by six service providers in New York City to a level below 400 misdemeanor or 150 felony assignments annually.¹ Compliance with these limits is required by April 1, 2014, and \$40 million was budgeted for that purpose in fiscal year 2013-14.²

For the 135 providers of indigent legal services in the fifty-seven upstate counties of New York State,³ however, little has changed either in terms of the workloads with which they contend or the availability of

¹ See Rules of the Chief Administrative Judge §127.7, Workload of Attorneys and Law Offices Providing Representation to Indigent Clients in Criminal Matters in New York City, available at <http://www.nycourts.gov/rules/chiefadmin/127.shtml#07> (accessed 11/6/13). The rule reads in part as follows: "The number of matters assigned in a calendar year to an attorney appointed to represent indigent clients in criminal matters pursuant to Article 18-B of the County Law in New York City shall not exceed 150 felony cases; or 400 misdemeanor cases; or a proportionate combination of felony and misdemeanor cases (at a ratio of 1:2.66)."

² This figure comes at the culmination of a period of progressively increased funding since 2009, during which progress toward national caseload limits in these six providers has been tracked. Although this report does not address New York City, it is notable that the caseload reduction program now in place covers just six of the fifteen providers of indigent legal services that were active in the city in 2012. The providers receiving funding were the Legal Aid Society, Bronx Defenders, Brooklyn Defender Services, Neighborhood Defender Services of Harlem, Queens Law Associates and New York County Defender Services. The remaining providers include three providers of appellate representation (Appellate Advocates, Office of the Appellate Defender and the Center for Appellate Litigation), two providers of representation to parents in family court (the Center for Family Representation and the Brooklyn Family Defense Project), and four assigned counsel programs (two each in the first and second judicial departments, covering family and criminal defense respectively.) The total number of providers is now only fourteen, following the merger of the Brooklyn Family Defense Project with Brooklyn Defender Services in January of 2013.

³ The fifty-seven counties include all counties outside of the five boroughs of New York City.

external funding. For that reason, on August 22, 2013, the Office of Indigent Legal Services (ILS) issued a Request for Proposals titled *Upstate Quality Improvement and Caseload Reduction Grant*, aimed at providing an initial outlay of resources to reduce the stresses under which upstate providers are working, and empowering those providers to tailor locally-crafted solutions to the unique caseload and quality challenges they face. The grant program will provide a total of \$4 million annually in funding to as many as 45 of the 57 eligible counties over three years.⁴

The purpose of this report is to assess the true size of the financial need for caseload relief in upstate New York. In 2012, a total of \$165,934,692 was spent on indigent legal services in upstate counties.⁵ The analysis that follows estimates an additional \$111,214,533 would have been required to fully fund compliance with maximum national caseload limits in upstate counties in that year alone.

Throughout this analysis, ILS strove to base its calculation of needed resources on conservative assumptions and available data. This analysis of the resources needed to fund deficiencies in representation in upstate New York therefore represents a reliable, yet conservative, estimate of the amount needed.

Caseload Limits

The purpose of caseload limits is to establish the minimum conditions under which it is possible to provide adequate representation to clients. Compliance with such limits does not necessarily mean such services will be adequate, but evidence of non-compliance is an indication that it would be presumptively impossible for any lawyer, no matter how competent, to provide adequate representation. Such limits specify the maximum numbers of cases a lawyer may be assigned in a given year, and also the levels of supervision and support from other staff that would be necessary to make satisfactory representation possible. Consequently, it is possible to use such limits to determine the caseload levels below which an indigent legal services provider must stay to avoid providing inadequate representation.

Institutional Providers

Institutional providers of indigent legal services include public defender offices and legal aid societies with staffs of attorneys. The National Advisory Commission on Criminal Justice Standards and Goals (NAC) stated in 1973 that the maximum number of cases attorneys in such agencies could reasonably be expected to handle should not average over 400 misdemeanors, 150 felonies, or 25 appeals per attorney per year.⁶ The standards also went on to say that for every ten line attorneys a supervising attorney with

⁴ The Office of Indigent Legal Services sought additional funding in both FY 2012-13 and FY 2013-14 in response to the acute level of concern among providers of indigent legal services about this issue.

⁵ Data obtained from county reports to the Office of State Comptroller and provider reports to the Office of Court Administration on file with the Office of Indigent Legal Services. Of this amount, \$89,088,578 was spent in institutional provider offices, and \$76,846,114 was spent in assigned counsel programs.

⁶ National Advisory Commission on Criminal Justice Standards and Goals, *Courts* (United States Government Printing Office, Washington DC, 1973). See Chapter 13, 'The Defense', and Standard 13.12, Workload of Public Defenders, available at

http://www.nlada.org/Defender/Defender_Standards/Standards_For_The_Defense#thirteentwelve (accessed 11/6/13).

reduced caseload ought also to be present.⁷ In the First Judicial Department in New York City, the Indigent Defense Organization Oversight Committee has stipulated that the caseload of that supervisor should be equal, at most, to 10% of that of a regular attorney.⁸ Taken together, these standards suggest that when an office's staffing and cases are combined the average caseload per attorney should not exceed 367 misdemeanors, 138 felonies or 23 appellate cases, rounding to the nearest case.⁹ Put another way, felony cases should be weighted as equivalent to 2.67 misdemeanors, and appellate cases weighted as equivalent to 16 misdemeanors.¹⁰

We applied the same limit for parent representation cases as in felony criminal cases, setting the ratio at 138 cases per lawyer after accounting for supervision. This standard is conservative when compared to those in place in other states such as Massachusetts, where providers are limited to 125 cases.¹¹ We were also guided by national standards issued by the American Bar Association, which suggest that attorneys for parents should be limited to between 50 and 100 cases at any one time. New York has not established a limit for parent representation, though it is instructive that attorneys for children in the state's family courts may not exceed 150 open cases.¹²

Recognizing that adequate representation cannot be provided in the absence of "[s]ocial workers, investigators, paralegal and paraprofessional staff as well as clerical/secretarial staff," national standards also stipulate the ratio of attorney to non-attorney staff that organizations require.¹³ The Model Contract for Public Defense Services, drawn up in 2000 under the joint auspices of the Federally-funded Criminal Court Technical Assistance Project and the National Legal Aid and Defender Association, stipulates that investigators and social workers should be provided at a rate of one for every 450 felony cases respectively (suggesting a ratio of one of each for every three attorneys), in addition to one legal assistant

⁷ Ibid.

⁸ General Requirements for All Organized Providers of Defense Services to Indigent Defendants, July 1, 1996. *Indigent Defense Organization Oversight Committee (IDIOC)*. See standard V.B.2.c.

⁹ More precisely, combining supervisory and staff attorney caseloads in this way results in standards of 367.27 misdemeanor cases, 137.72 felony cases, and 22.95 appellate cases per attorney per year.

¹⁰ The concept of 'weighted caseload' has been used commonly in New York City, where providers sometimes quantify their progress as an attempt to achieve a 'weighted caseload' of 400.

¹¹ See Standard 16, *Policies and Procedures Governing Billing and Compensation*, 2011, available at http://www.publiccounsel.net/private_counsel_manual/CURRENT_MANUAL_2010/MANUALChap5links3.pdf (accessed 11/6/13).

¹² For the American Bar Association standards see Commentary to Obligation 2 of Attorney Managers ('Determine and set reasonable caseloads for attorneys', p. 32, available at http://www.americanbar.org/content/dam/aba/administrative/child_law/ParentStds.authcheckdam.pdf (accessed 11/6/13). For attorneys for children in New York, see Rules of the Chief Administrative Judge, §127.5 Workload of the Attorney for the Child. Available at <http://www.nycourts.gov/rules/chiefadmin/127.shtml#05> (accessed 11/6/13). We also note that Washington State limits parent attorneys to 80 open cases, see Standard 3, *Washington State Bar Association Standards for Indigent Defense Services*, 2011, available at [http://www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/-/media/Files/Legal%20Community/Committees_Boards_Panels/Council%20on%20Public%20Defense/Standards%20for%20Indigent%20Defense%20Services%20\(2011\).ashx](http://www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/-/media/Files/Legal%20Community/Committees_Boards_Panels/Council%20on%20Public%20Defense/Standards%20for%20Indigent%20Defense%20Services%20(2011).ashx) (accessed 11/6/13).

¹³ Standard 4.1, *Guidelines for Legal Defense Systems in the United States*, Final Report of the National Study Commission on Defense Services (National Legal Aid and Defender Association, Washington DC, 1976), http://www.nlada.org/Defender/Defender_Standards/Guidelines_For_Legal_Defense_Systems#fourone (accessed 11/6/13). The NSC standards go on to stipulate that one investigator should be provided for every three attorneys, but do not specify ratios for other types of non-attorney staff.

for every four attorneys. All told, these standards suggest a ratio of 0.92 non-attorney staff for every attorney.¹⁴ State standards in Indiana suggest a ratio of 0.75:1, while those in Washington State suggest ratio of 0.5:1 though the latter mentions only secretarial and investigative support, while stipulating that social work, mental health and interpretive staff must be provided in addition.¹⁵ In this report, we applied a conservative standard of 0.5 non-attorney staff per attorney.¹⁶

Table 1: Ratios Used in Analysis

Criminal cases per attorney	
Misdemeanors	367:1
Felonies	138:1
Appeals	23:1
Family cases per attorney	138:1
Non-attorney staff per attorney	0.5:1

Assigned Counsel Providers

Assigned Counsel systems of representation provide indigent legal services through individual lawyers appointed by the court and paid hourly for their time. Among assigned counsel providers of indigent representation, the application of caseload limits presents unique problems. The total caseloads of assigned attorneys cannot usually be known because they may take cases on private retainer in addition to their indigent legal services work. Assigned attorneys do, however, bill for a specific number of hours

¹⁴ National Legal Aid and Defender Association, 2000. *Model Contract for Public Defender Services*, section VII.F. The ratio of 0.92:1 non-attorney-to-attorney staff is obtained by combining the ratios of 0.333:1 for investigators, 0.333:1 for social workers, and 0.250:1 for legal assistants.

¹⁵ The Washington standard, providing for one legal assistant for every four attorneys and one investigator for every four attorneys but also noting social work staff, mental health professionals, and interpreters must be available in addition, can be found here: http://your.kingcounty.gov/mkcc/agendas/ljhs/20120911-ljhs-additional.pdf?sm_au=iVV4qV61R5kSQVQ5 (accessed 11/6/13). The Indiana standard, providing that one secretary/paralegal, one investigator/paralegal, and one other supporting staff member should be available for every four attorneys, is available here (see Table 2): http://www.in.gov/judiciary/pdc/files/indigent-defense-non-cap.pdf?sm_au=iVV4qV61R5kSQVQ5 (accessed 11/6/13).

¹⁶ The reason for the leniency of the standard is to assure the estimates of the need for additional staff were not unjustly inflated. We do not endorse this standard as sufficient, however, but regard the need to establish a truly adequate standard as a matter for future research and consultation. Additionally, we did not attempt to distinguish between types of non-attorney staff (investigator, social worker, administrative, etc.) because we are aware these categories are quite elastic. Workload pressures frequently require staff with 'investigator' job titles to engage in administrative or other activities unrelated to the factual investigation of cases. For that reason, correctly quantifying the number of 'investigators' retained on staff in New York would require detailed knowledge of their occupational roles. In addition to this problem, national standards are not in consensus over ratios of specific types of supporting staff within a defender office, though all assert the critical importance of investigative, paralegal, social work and administrative support in some combination. For the present analysis, therefore, a gross measurement of the total number of non-attorney staff was employed in combination with a conservative benchmark (0.5:1) for which support could reasonably be deduced from national standards.

worked on each case, and expectations for hours spent per case can be inferred from caseload standards.¹⁷ Assuming a total working year has 1,875 hours,¹⁸ an attorney with 367 misdemeanors or 138 felony or family court assignments should spend 5.1 and 13.6 hours on cases of each type respectively. Similarly, a single appellate case should demand 81.7 hours of work.¹⁹ We used these standards as the benchmarks for the analysis of assigned counsel providers that follows.

Support and supervision are no less necessary for indigent legal services provided under the auspices of assigned counsel programs than for institutional providers. We accounted for supervision through the use of the same caseload standards employed for institutional providers, which incorporate a prorated caseload reduction for supervising attorneys. Likewise, to account for support from non-attorney personnel, we assumed that for every hour that an attorney works, a non-attorney should work for 0.5 hours.

Should Limits Be Lower?

The caseload limits used in this report are of national pedigree and relatively long historical standing. Nevertheless, the benchmarks they set have frequently and fairly been criticized as out-of-date, empirically unsupported, and, above all, too high. Created in an historical period before the massive increase in both the complexity of the criminal trial process and also the seriousness of the consequences of a criminal conviction, the NAC standards do not account for the increases in the severity of the criminal penalties and civil consequences to which defendants have been subjected since 1973.²⁰ They also do not account for innovations which have created new kinds of work for defenders such as problem-solving courts and the civil commitment of sex offenders.²¹ ILS is aware, for example, that several defenders in upstate counties provide representation to all defendants at regular drug court status conferences – including those who have retained private counsel.

The standards also provide no empirical justification for the setting of the benchmarks at the levels they do, and even at the time of writing included the caveat that lower limits might be appropriate in certain localities.²² Evidence produced since that time has examined the link between caseloads and the actual

¹⁷ It is pertinent to note here that the rates of compensation for assigned counsel work remain at the level set in 2004, namely \$60 per hour for misdemeanor cases and \$75 per hour for all other cases. Per-case caps are set at \$2,400 and \$4,400 respectively and can be exceeded only in 'extraordinary circumstances'. (See NY County Law §722-b.) ILS has heard numerous reports around the state of these rates and caps being insufficient to assure quality representation.

¹⁸ According to www.workingdays.us (accessed 11/6/13) New York State had 250 working days in 2012 after accounting for weekends and State holidays. We allocated 7.5 billable hours to each day.

¹⁹ More precisely, the standards require that programs average at least 5.105 hours per misdemeanor case, 13.614 hours per felony or family case, and 81.683 hours per appellate case.

²⁰ See *Justice Denied: America's Continuing Neglect of our Constitutional Right to Counsel*, Report of the National Right to Counsel Committee, 2009, at www.constitutionproject.org/pdf/139.pdf (accessed 11/6/13) especially pages 38-39.

²¹ It is also worth noting a subtly different problem observed in some New York counties whereby providers of indigent legal services are charged with responsibilities which are outside the scope of providing representation. The most common instance of this is the de facto practice of defenders performing checks on the financial eligibility of clients for services – a function properly the preserve of the judiciary, and one which consumes resources intended for the provision of representation.

²² National Advisory Commission on Criminal Justice Standards and Goals, *Courts* (United States Government Printing Office, Washington DC, 1973). The text of the commentary to the caseload standard raises "the caveat that

work that attorneys do, and has established not only the negative relationship between caseloads and the quality of representation, but has also been used to generate new, lower caseload limits in some places.²³ These findings, combined with the changes in the nature of the work indigent legal services providers are expected to perform, confirm that the NAC was right to be circumspect about setting caseload standards at the levels it did. In 2002, the American Bar Association declared that the NAC numbers “should in no event be exceeded.”²⁴ Moreover, the most recent and authoritative national assessment of caseloads concluded flatly that “the NAC’s maximum caseload numbers per attorney per year are too high.”²⁵

The caseload limits used here are best understood as absolute maxima – levels beyond which any defender office or assigned counsel program should be considered inherently crippled and presumptively unable to provide adequate services. With further study, we may conclude that these maxima should be set lower. In the interest of producing only a conservative estimate of the necessary investment of resources required to bring upstate New York in line with what are the most widely-recognized maximum caseload limits, however, we employ them here.

particular local conditions – such as travel time – may mean that lower limits are essential to adequate provision of defense services in any specific jurisdiction” (page 277, commentary to Standard 13.12).

²³ For evidence that caseloads are related to case outcomes, see Luchansky (2009) *The Public Defense Pilot Projects: Washington State Office of Public Defense*, available at <http://digitalarchives.wa.gov/WA.Media/do/0C9435A31893A6A3C504FA4AA28678A5.pdf> (accessed 11/6/13); Harper, Brennan and Szolnoki (2005), *Dependency and Termination Parents' Representation Program Evaluation Report 2005*, available at http://www.opd.wa.gov/documents/0048-2005_PRPEvaluation.pdf (accessed 11/6/13); 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> (accessed 11/6/13); 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> (accessed 11/6/13). For specific guidance on lower caseload standards based on a workload assessment, see *Lancaster County Public Defender Workload Assessment*, July 2008 (recommending a limit of 127 felony assignments per attorney) available at <http://ppc.unl.edu/userfiles/file/Documents/projects/Public%20Defender/Public%20Defender%20Workload%20Assessment.pdf> (accessed 11/6/13). See also Massachusetts Committee for Public Counsel Services, *Policies and Procedures Governing Billing and Compensation*, (2011), Standard 16, setting a limit of 100 Superior Court (i.e. serious felony) cases per attorney and 250 District Court (misdemeanors and lesser felony) cases per attorney, available at:

http://www.publiccounsel.net/Private_Counsel_Manual/CURRENT_MANUAL_2010/MANUALChap5links3.pdf (accessed 11/6/13). We also note the well-established understanding among providers of appellate representation in New York State that 25 criminal appellate assignments a year is significantly above what a single attorney can handle if they are expected to provide adequate representation. Practitioners in this area in New York City have established policies whereby attorneys typically handle no more than ten to fourteen such assignments annually. ILS continues to study the issue of appropriate caseload limits for trial and appellate work, and our use of the NAC’s standards should not be read as an endorsement.

²⁴ American Bar Association, 2002. *Ten Principles of a Public Defense Delivery System*. See commentary to Standard 5. Available at: http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet_authcheckdam.pdf (accessed 11/6/13).

²⁵ Lefstein, N., 2012. *Securing Reasonable Caseloads: Ethics and Law in Public Defense*, American Bar Association Standing Committee on Legal Aid and Indigent Defendants, page 47, available at: http://www.americanbar.org/content/dam/aba/publications/books/ls_sclaid_def_securing_reasonable_caseloads_authcheckdam.pdf (accessed 11/6/13).

Data Collected

ILS sought data on the caseloads, staffing and expenditures of the 150 known providers of indigent legal services in the State in 2012. 15 of these were eliminated from this analysis because they were based in New York City which is presently subject to the caseload reduction program mentioned above. A further six were individual attorneys contracted to provide representation respectively in Clinton County (3 family court attorneys) and Rensselaer County (2 family and 1 appellate attorney). Data could not be obtained from either County breaking out the work of these attorneys, and the caseload and expenditure data associated with their work were therefore merged with the data of the assigned counsel program from each county.

These deletions and merges resulted in a final dataset with 129 programs. 71 of these were institutional providers, and 58 were assigned counsel programs.²⁶ For the institutional providers, we collected data on newly assigned cases in 2012, as well as the total numbers of attorney and non-attorney staff in the programs. For the assigned counsel programs, we collected caseload figures as well as data on total expenditures for 2012.

Caseloads

Every provider of indigent legal services in New York State is required to submit statistics on newly assigned homicide, felony, misdemeanor, family and appellate cases via an annual report known as the UCS-195.²⁷ For 88 of the 129 providers under study, 2012 caseload data were obtained from these submissions. Of the remaining 41 programs, one made a submission containing data on new assignments that were not broken down by case type, two made submissions that were missing data on family court caseloads, while the remaining 38 either did not submit the form at all (14 programs) or submitted forms which combined data on caseloads from multiple programs (24 programs – combined into just 11 forms).

ILS therefore contacted each of these 41 programs directly to request that they provide the data required for the analysis – in some cases for the first time, and in other cases by breaking out the numbers they had already provided in the appropriate way. 36 were able to provide data.²⁸ Of the remaining five programs, two could not provide any data, and three could provide criminal caseloads only. Thus, of the 129 programs, caseload data were obtained for 124.

Our data collection procedures were designed to prevent the over-statement of caseloads in defender offices. Indeed, there is every likelihood that caseloads are understated in this report. While data were

²⁶ Although there are 57 upstate counties, Wayne County runs its family and criminal court assignments under different auspices and reports the caseload data separately, so these were treated as separate programs here.

²⁷ See NY County Law §722-f.

²⁸ Thirty-one programs provided 2012 caseload data. Two provided 2010 data, and three provided a total number of new assignments, not broken out by case type (felony, misdemeanor etc.), from which data were inferred. In these three latter programs the total number of new assignments was divided into an estimate of felony and misdemeanor cases based upon statistics published by the Division of Criminal Justice Services (DCJS) indicating the breakdown of arrests in the county by felony vs. misdemeanor. For example, in one county, the public defender indicated that 200 criminal cases were conflicted out to assigned attorneys but could not report how many were felony and how many were misdemeanor cases. The arrest data showed that in 2012 28.7% of arrests in the county were for felony offenses. The 200 assigned cases were apportioned accordingly, resulting in an estimated 57 felony cases and 143 misdemeanors.

collected on assignments to felony, misdemeanor, family and appellate cases, we did not collect data on the representation being provided to clients undergoing treatment programs in problem-solving courts or to clients facing the possibility of civil commitment as a sex offender. We also did not apply any additional weight to serious cases such as homicides, violent felonies, or serious sex offenses, despite the large amounts of work they require. Appellate assignments in county courts, family courts, parole appeals, and Sex Offender Registration Act (SORA) hearings were also omitted from the data.²⁹ In each of these types of cases a defendant, or respondent as the case may be, is entitled to counsel. Yet, either because no data were available or no caseload limits were stipulated in the standards we reviewed, we did not factor this work into our analysis.

Staffing

We sought data on the numbers of full-time-equivalent attorney and non-attorney staff in each of the 71 institutional providers under study. In order to obtain these data, we first examined the UCS-195 submissions from these providers, where they were available, and cross-referenced any figures with memoranda prepared by ILS staff from site visits conducted in 2012. In many cases, these yielded data on both the attorney and non-attorney staffing levels of offices, though holes in the data remained. Each of the 71 providers was then contacted, shown the data that had been collected, and asked to verify or alter them as appropriate. In this way, data on attorney and non-attorney staff were successfully collated for all programs.

In order to project the cost of recruiting additional attorney and non-attorney staff in institutional providers where staffing levels were low, it was necessary to glean data on the average salaries and benefits of such individuals. Data on salaries for public defenders were obtained from the 2012 *Public Sector and Public Interest Attorney Salary Report* which indicated entry-level public defenders in the Northeast were paid an average of \$51,521 that year.³⁰ Data from the Bureau of Labor Statistics on the average wage for paralegals (\$53,570), private investigators (\$52,430) and administrative assistants (\$38,010) in New York State in 2012 were also obtained for the purpose of calculating the cost of recruiting non-attorney staff.³¹ The cost of a single non-attorney staff member was estimated to be the average of these three, or \$48,003 a year. The cost of employee benefits was calculated using Bureau of Labor Statistics data showing that the average cost of providing benefits to a local government employee was equal to 49% of their salary for management and professional employees, and 66% of their salary for clerical support workers.³² For the purposes of the assigned counsel analysis, the hourly rate for non-

²⁹ Our data on appellate caseloads of providers were obtained directly from the clerks of courts in each judicial department, to whom we are immensely grateful. These data omitted appeals from misdemeanor convictions, however, which are typically heard in county court, as well as proceedings in the other categories mentioned in the text.

³⁰ *2012 Public Sector and Public Interest Attorney Salary Report*, National Association of Legal Professionals, Washington DC, September 2012, page 14. The report goes on to show that attorneys with 2 years of experience are paid an average of \$56,019, those with 5 years \$65,778, and those with 8-10 years \$75,300. We used the entry-level salary to keep our estimate of the cost of employing additional attorneys as conservative as possible.

³¹ *May 2012 State Occupational Employment and Wage Estimates (New York)*, Bureau of Labor Statistics, available at http://www.bls.gov/oes/current/oes_ny.htm#43-0000 (accessed 11/6/13).

³² *March 2013 Employer Costs for Employee Compensation (Table 3)*, Bureau of Labor Statistics bulletin available http://www.bls.gov/news.release/archives/ccec_06122013.pdf (accessed 11/6/13). The 49% figure was applied to attorneys, the 66% figure to non-attorneys.

attorneys was calculated from these same figures to be \$42.50.³³ While we make no comment on the adequacy of these salaries, they are at least grounded in real-world data.

Expenditures

The total amounts expended in 2012 were sought for each of the 129 programs in the study. These figures were obtained from the UCS-195 submissions and each county's annual report of indigent legal services spending to the Office of State Comptroller. Where the two reports differed in the amount reported, we chose the higher amount in order to be sure we captured all spending.³⁴ Where neither source could provide the data, we contacted providers directly. Expenditure data were successfully obtained for all 129 programs.

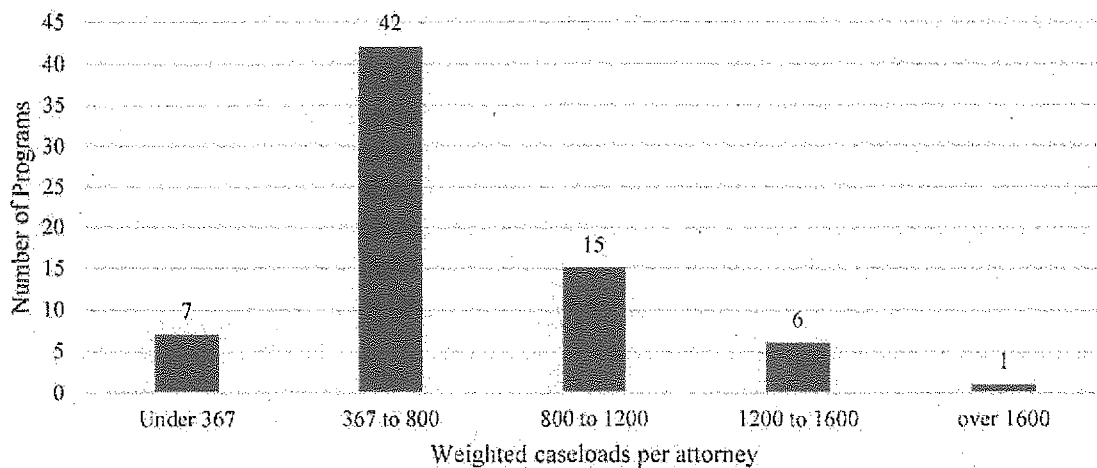
Analysis

Institutional Providers

Using the caseload and attorney staffing data, weighted caseload-per-attorney ratios were calculated.³⁵ Whereas national standards suggest the weighted caseload per attorney in each program should be 367 or lower, the 71 upstate providers in fact averaged 719 cases per attorney in 2012, almost double the maximum standards. Figure 1 shows the range in caseloads across all 71 providers.

Figure 1: How Many Cases Are Attorneys Taking in Upstate Institutional Providers?

Analysis includes all 71 providers



³³ This figure was based on the assumptions of a \$48,003 annual salary, increased by 66% for fringe benefits, divided across a working year of 1,875 hours ($\$48,003 * 1.66 / 1,875 = \42.50).

³⁴ For the two programs for which 2010 caseloads were obtained, 2010 spending figures were also used.

³⁵ Weighting cases transforms all caseload counts into misdemeanor-equivalent cases. Misdemeanor cases are therefore weighted by a factor of 1, while family court and felony cases are weighted by 2.67 and appeals weighted by 16. Stated in this way, a provider meets national maximum caseload limits when their weighted caseload is lower than 367.

Calculating the cost of bringing institutional providers into compliance with national standards required three steps. First, caseload data were used to calculate how many full-time equivalent (FTE) attorneys and FTE non-attorney personnel were needed to cover all the cases assigned to each program. Second, the numbers of FTE attorneys and non-attorneys already known to be present in each program were subtracted to find the number of additional employees needed. Third, the cost of employing these additional staff was calculated by multiplying those numbers by the salary data mentioned earlier. An example is shown in Table 2 using data from a provider in an upstate urban county.

Table 2: Example of Institutional Provider Analysis
All monetary amounts rounded to the nearest dollar.

Step 1: Find how many staff are needed to cover all cases assigned to the program.

$$\begin{aligned} \text{Total attorney staff required} &= (2,871 \text{ felonies} / 138) + (7,536 \text{ misdemeanors} / 367) \\ &\quad + (1,188 \text{ family} / 138) + (27 \text{ appellate} / 23) \\ &= 20.804 + 20.534 + 8.609 + 1.174 \\ &= \underline{51.12 \text{ attorney staff}} \end{aligned}$$

$$\begin{aligned} \text{Total non-attorney staff required} &= 51.12 \text{ attorney staff} / 2 \\ &= \underline{25.56 \text{ non-attorney staff}} \end{aligned}$$

Step 2: Find difference between total staff required and present staffing levels

$$\begin{aligned} \text{Additional attorneys required} &= 51.12 - 21.5 \text{ attorneys on staff at present} \\ &= \underline{29.62 \text{ additional attorney staff needed}} \end{aligned}$$

$$\begin{aligned} \text{Additional non-attorneys req.} &= 25.56 - 11 \text{ non-attorneys on staff at present} \\ &= \underline{14.56 \text{ additional non-attorney staff needed}} \end{aligned}$$

Step 3: Multiply by cost of staff salaries

$$\begin{aligned} \text{Cost of additional attorneys} &= (29.62 \text{ attorney staff}) \times (\text{salary \& benefits}) \\ &= 29.62 \times (\$51,521 \times 1.49) \\ &= \underline{\$2,273,818} \end{aligned}$$

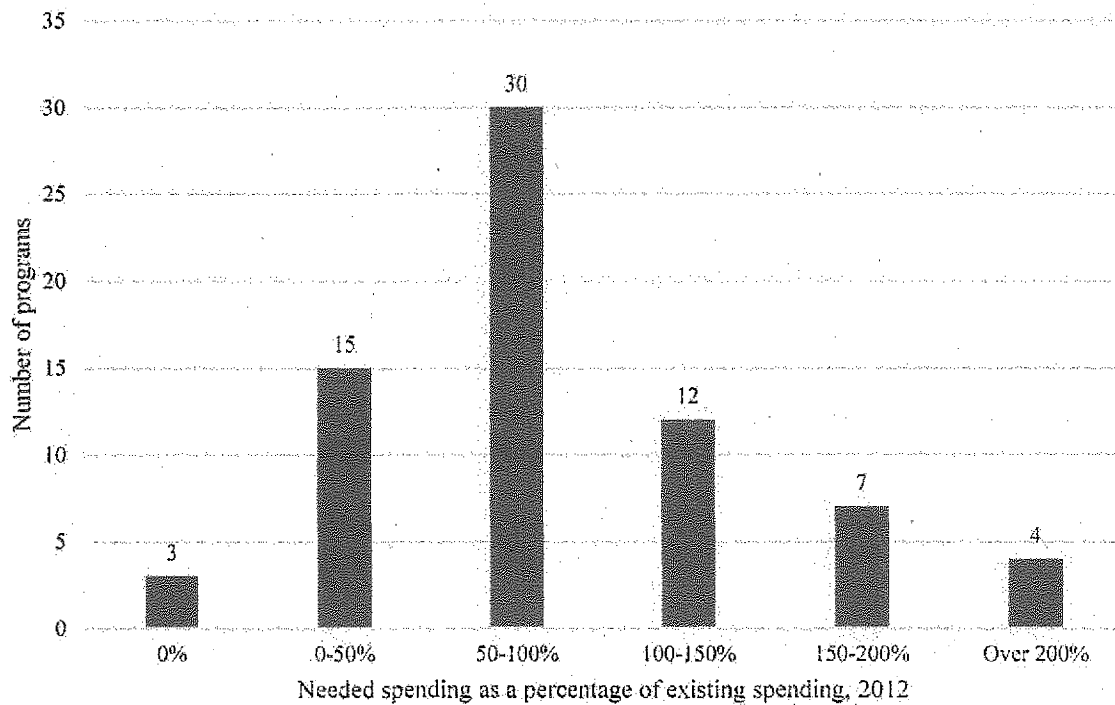
$$\begin{aligned} \text{Cost of additional non-attorneys} &= (14.56 \text{ non-attorney staff}) \times (\text{salary \& benefits}) \\ &= 14.56 \times (\$48,003 \times 1.66) \\ &= \underline{\$1,160,213} \end{aligned}$$

$$\text{Total cost of new staff} = \underline{\underline{\$3,434,031}}$$

Taking into account both attorney and non-attorney staff, just three of the 71 institutional providers were found to be staffed at levels that complied with maximum national caseload limits in 2012. In order to comply with those limits, a total of 567 new attorneys would need to have been on staff in those providers in addition to the 654 already employed. 324 new non-attorney staff would also have been required in addition to the 297 then employed. On average, employing these new staff would have required institutional providers to increase their spending by 92% over what they actually spent in 2012. Figure 2 shows the range of spending increases needed across the state. The estimated total cost of employing these required additional staff in all programs combined was \$69,360,191.

Figure 2: By What Percentage Did Institutional Provider Spending Need To Increase?

Analysis includes all 71 providers.



Assigned Counsel

Of the 58 assigned counsel providers known to ILS, caseload data were obtained for all but five, while expenditure data were obtained for every program. The five missing programs accounted for approximately 3.1% of the total spent on assigned counsel representation throughout the fifty-seven upstate counties.³⁶

Calculating the cost of bringing assigned counsel providers into compliance with national standards required three steps. First, the total number of hours for both attorneys and non-attorneys required by

³⁶ The five missing programs expended \$2,404,452 in 2012, out of a total of \$76,846,114 in all upstate counties.

standards to cover all cases assigned to the program was calculated. Second, the number of hours was multiplied by the statutory rates of compensation for attorneys (\$60/hr for misdemeanors and \$75/hr for all other cases) and the calculated rate for non-attorneys (\$42.50/hr) to find the total cost of all these hours combined. Third, the result was compared to the amount actually spent by the program. Table 3 below shows an example using data from an Assigned Counsel Program in an upstate, semi-rural county.

Table 3: Example of Assigned Counsel Program Analysis
All monetary amounts rounded to the nearest dollar.

Step 1: Calculate total hours required by NAC standards for all cases

Total felony case hours required	= 13.614 hours x 210 felony cases = 2,859 hours
Total misdem. case hours required	= 5.105 hours x 558 misdemeanor cases = 2,849 hours
Total family case hours required	= 13.614 hours x 382 family cases = 5,201 hours
Total appellate case hours required	= 81.683 hours x 15 appellate cases = 1,225 hours
Total non-attorney hours required	= (Sum of attorney hours) / 2 = (2,859 + 2,849 + 5,201 + 1,225) / 2 = 6,067 hours

Step 2: Calculate total cost of hours required by standards

Total cost misdemeanor case hours	= 2,849 hours x \$60/hour = \$170,940
Total cost all other case hours	= 9,285 hours x \$75/hour = \$696,375
Total cost non-attorney services	= 6,067 hours x \$42.50/hour = \$257,848
Total cost of all hours combined	= \$170,940 + \$696,375 + \$257,848 = \$1,125,163

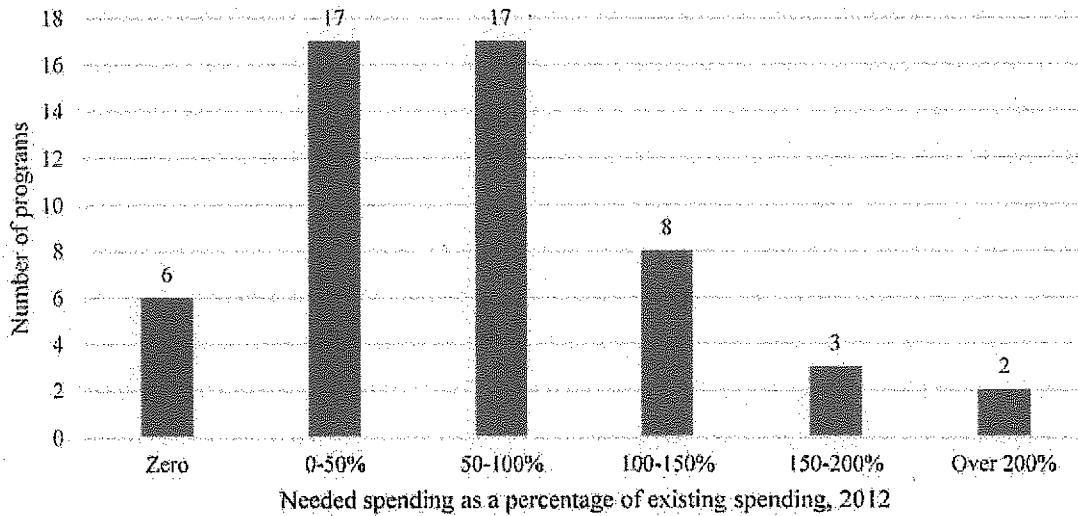
Step 3: Compare spending on attorneys by program with cost according to standards

Amount spent	= \$612,636
Amount required by standards	= \$1,125,163
Total additional spending needed	= \$512,527

47 of the 53 assigned counsel programs for which data were available were found to have spent at lower levels than standards indicated was required. On average, these programs would have needed to increase their spending by 67% in 2012 to meet national standards. Figure 3 shows the range of spending increases needed across the state. The sum of the amounts required to be spent in all of these programs combined was \$40,544,754. In order to account for the remaining 5 programs, which accounted for 3.1% of the total spent on assigned counsel in upstate counties, we increased our estimate by an equivalent proportion. Accordingly, the amount needed to bring all 58 programs into compliance with national standards was estimated to be \$41,854,342.³⁷

Figure 3: By What Percentage Did Assigned Counsel Spending Need to Increase?

Analysis based on data from 53 programs



Conclusion

Adding the totals for institutional and assigned counsel providers, we estimate that a minimum of an additional \$111,214,533 is required to bring the upstate counties of New York State into compliance with maximum national caseload limits.

³⁷ The five programs lacking data represented approximately 3.1% of assigned counsel spending in all upstate counties combined. We therefore assumed that the \$40,544,754 of verified need across 53 programs represented approximately 96.9% of the total need in all programs. Accordingly, the final estimate for all 58 programs was computed using the following arithmetic: $\$40,544,754 / 0.969 = \$41,854,342$.



Andrew M. Cuomo
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Improving the Quality of Mandated Representation Throughout the State of New York

November 15, 2013

Larry Schwartz
Secretary to Governor Cuomo
NYS Capitol, Room 207
Albany, NY 12224

**Re: An Estimate of the Cost of Compliance with Maximum National Caseload Limits
in Upstate New York**

Dear Secretary Schwartz,

Please accept and review the enclosed report, *An Estimate of the Cost of Compliance with National Maximum Caseload Limits in Upstate New York*, which I indicated in the cover letter to our FY 2014-2015 budget request on October 15 would be forthcoming when completed. This report provides compelling evidence in support of our request for increased Executive Budget funding to address the ongoing crisis in the delivery of indigent legal services in New York State.

I request and look forward to an early opportunity to meet with you to discuss the findings of this Report, and the merits of our budget proposals.

Yours truly,


William J. Leahy

cc: Mylan Denerstein, Counsel

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