

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:

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

I am William Leahy, 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.

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.

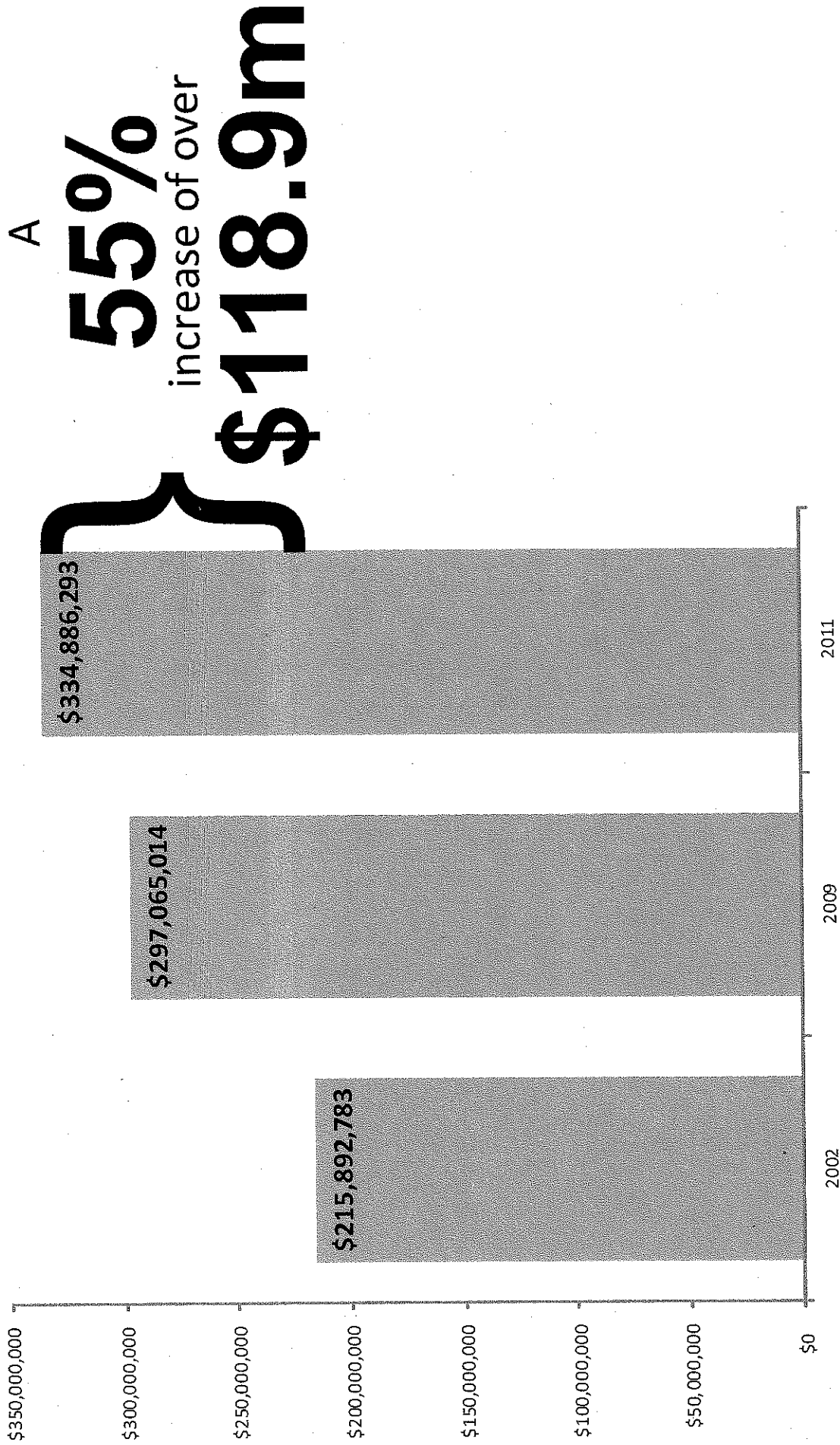
Budget Form

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			

Local Expenditures on Indigent Legal Services

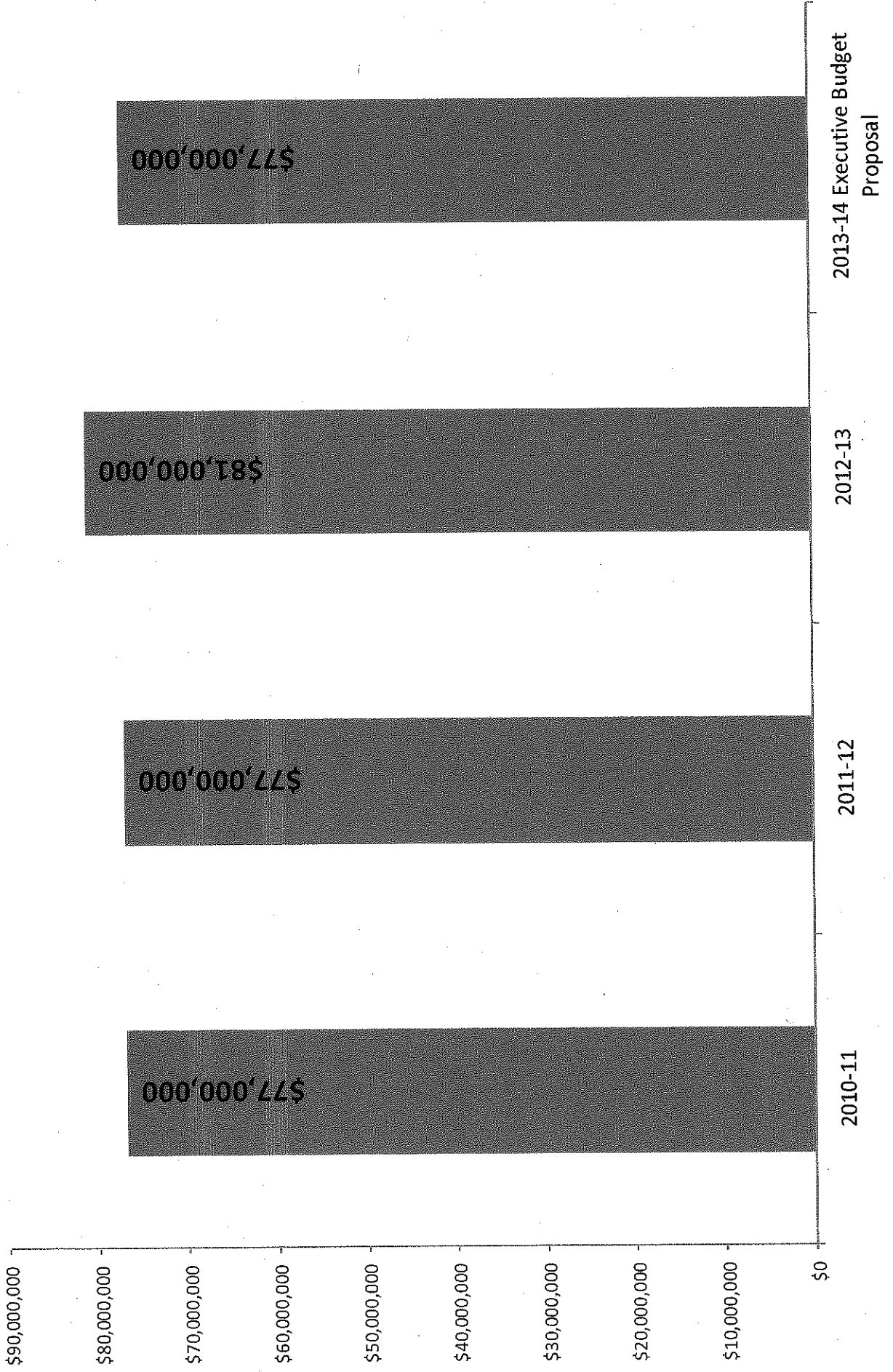
Statewide, 2002, 2009 and 2011



Sources: Office of State Comptroller annual Indigent Legal Services Fund reports; Office of Indigent Legal Services research.

Indigent Legal Services Fund Local Aid Appropriations

FY2010/11 – FY2012/13 Local Aid Appropriations and FY2013-14 Executive Budget Proposal



The First Annual Report of the Indigent Legal Services Board

Covering the period from February 22, 2011 through March 31, 2012

“Where, after all, do universal human rights begin? In small places, close to home. Such are the places where every man, woman and child seeks equal justice, equal opportunity, equal dignity.”

Eleanor Roosevelt’s eloquent words, inscribed on the monument to her legacy at Riverside Drive and West 72nd Street in Manhattan, have particular pertinence to the 2010 creation of the Office of Indigent Legal Services and the Indigent Legal Services Board, whose mission is to improve the quality of representation provided to persons who are entitled by law to the assistance of counsel, yet who cannot afford to retain an attorney, in the entire array of courts throughout this vast and variably populated State, including almost 1,300 Town and Village Courts. Roosevelt’s message reminds us that at the center of every case, in every court, there is a person, a human being who is entitled to “equal justice”. That fundamental right is best preserved and can often be obtained only by a lawyer’s capable and zealous representation. Further, her words remind us that *dignity* is inseparable from justice; that every poor client must be treated with the same respect

and consideration as the affluent. Forty-nine years after the landmark decision in *Gideon v. Wainwright*, and forty-seven years following the enactment of County Law article 18-B, these goals have yet to be uniformly achieved in New York State. It is the mission of the ILS Office and Board to achieve them.

Chronologically, this report begins with the hiring of the first Director of the Office in February, 2011, and concludes thirteen months later with the enactment of the State's Fiscal Year 2012-2013 appropriation for the Office and Board. At the outset, however, it is important to state the context in which the Office and Board began their operations.

The 2010 legislation (Laws of 2010, Chapter 56, Part E) was enacted in partial response to the 2006 Report of the Commission on the Future of Indigent Defense Services. That Report, widely known as the Kaye Commission Report, did not mince words in faulting New York's enforcement of the right to counsel in cases where representation is mandated by law or constitutional provision:

to contribute 80% of all funding for what is the State's obligation to provide counsel. That is simply unsustainable. There must be a significant increase in state funding if the serious defects which the Court of Appeals identified in the 2010 *Hurrell-Harring* decision are to be remediated. Second, the Office budget and staffing must be expanded to at least the size envisioned by former Governor Paterson in 2010, and proposed by Governor Cuomo in 2011. Third, the Regional Resource Centers described below must be adequately staffed and funded. Finally, there must be an assurance that transfers ("sweeps") of ILSF funds to the General Fund will end, to ensure that ILSF funding will be available to increase annual Aid to Localities appropriations and Office and Regional Resource Center resources.

Independence and Effectiveness: The authority of the Director to implement appointments must be respected; and there must be no interference with the Board's authority to disburse funds for the purpose of improving quality by means of non-competitive quality-enhancing distributions as well as competitive grants.

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

Resources of the New York State Bar Association Committee to Ensure the Quality of Mandated Representation.

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 must have the authority to approve assigned counsel plans and conflict defender office plans, and to enforce the performance measurements, standards and criteria established by the Office and the Board.

Respectfully submitted on this 21st day of November, 2012.
