



**Andrew M. Cuomo**  
Governor

STATE OF NEW YORK  
**OFFICE OF INDIGENT LEGAL SERVICES**

STATE CAPITOL, ROOM 128  
ALBANY, NEW YORK 12224  
Tel: (518) 486-2028 Fax: (518) 474-5050  
E-Mail: [info@ils.ny.gov](mailto:info@ils.ny.gov)  
<http://www.ils.ny.gov>

**William J. Leahy**  
Director

**Joseph F. Wierschem**  
Counsel

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

Howard Snyder, Ph.D.  
Erinn Herberman, Ph.D.  
Tracey Kyckelhahn, Ph.D.  
Bureau of Justice Statistics  
810 Seventh Street, NW  
Washington, DC 20531

**Matthew Alpern**  
Director of Quality  
Enhancement,  
Criminal Trials

**Peter W. Avery**  
Manager of  
Information Services

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**Angela Burton**  
Director of Quality  
Enhancement, Parent  
Representation

Dear Drs. Snyder, Herberman and Kyckelhahn,

**Andrew Davies**  
Director of Research

Thank you for taking the time last week to speak with me about the data for New York in your recent reports titled *State Government Indigent Defense Expenditures, FY 2008-2012* and *Indigent Defense Services in the United States, FY 2008-2012*. I found our conversation most constructive, and hope you all did too. In keeping with what we discussed, I've spoken with a few colleagues who work at the state and national levels and suggested they write to you with detailed responses on any issues they detected with the data or narrative commentaries for their states. As promised, I am writing now to pass on some specific observations regarding the data for New York.

**Tammeka Freeman**  
Executive Assistant

**Risa Gerson**  
Director of Quality  
Enhancement,  
Appellate and Post-  
Conviction Litigation

First, allow me to reiterate how glad I am that the Federal government and its statistical agencies are paying attention to indigent legal services. There is so little research and data in this area that we are far behind other parts of the justice system when it comes to establishing a scientific or otherwise data-driven basis for policy analysis and reform. Your studies are an important step in the right direction.

**Karen Jackuback**  
Grants Manager

**Joanne Macri**  
Director of Regional  
Initiatives

In what follows, I'd like to first outline the data I have enclosed reflecting what I believe to be the most complete picture available of state funding to indigent legal services in New York for fiscal years 2008-9 to 2012-13 and point out what I think are substantial differences with the data in your reports. Second, I'd like to draw your attention to a few of the issues I saw in the description of New York's indigent defense system itself. And third, I'd like to raise some concerns that I have regarding the attempt to compare or aggregate states on their spending on indigent legal services.

I – New York Spending data

I have two concerns with the spending data in the reports for New York – first, that they appear to be an incomplete representation of the amount of state funding that was in fact dedicated to indigent legal services in the years in question, and second that they give a

misleading impression that state funding has fallen across the period (by no less than 41.7%)<sup>1</sup> when it is my belief that state funding has in fact increased.

I've enclosed a table (titled 'State Funding for Indigent Legal Services to Adults in New York State, FY 2008-9 to FY 2012-13) which lays out what I consider to be the most authoritative available data on state spending on indigent legal services in New York for those years. As you'll see, our data show that in 2012-13 the state funded indigent legal services for adults in the total amount of \$109,255,672 for adults, with an additional \$115,384,350 for the representation of juveniles.<sup>2</sup>

Further, the trend in state funding is clearly upward across the period 2008-9 to 2012-13. This is largely the result of a major new commitment made by the state to reduce the caseloads of providers of criminal defense in New York City through a state-funded hiring program (you'll see those totals under 'Case cap funding' in the table). It's also important to note that, although the table doesn't show appropriated funds that remained unspent, there were indeed yet further additional funds appropriated beginning in 2011-12 for three programs to increase the provision of counsel at first appearance, reduce caseloads among upstate New York providers, and improve representation of clients with immigration issues respectively. The contracts for distributing these funding streams to counties were not drawn up before the end of the period you examined, so accordingly I didn't count them here.<sup>3</sup> Nevertheless, these appropriations, when combined, represent the assurance of additional state funding in excess of an additional \$10 million per year to localities. Other state funding streams, meanwhile, have remained relatively stable across the period. For those reasons, I respectfully disagree with the finding in your report that state funding in New York State as a whole dropped in these years.

It's important to understand, given your report's distinction between direct and intergovernmental expenditures, that the vast majority of New York State funding of indigent legal services is distributed to local governments. Very little indeed is paid out to attorneys or institutionalized providers of services directly.<sup>4</sup> It is difficult to know what the direct expenditure totals in Appendix Table 1 to your first report (*Indigent Defense Services in the United States, FY 2008-2012*) actually represent, therefore. Moreover, it is doubly difficult to explain why those direct expenditure figures hold steady around \$60-70 million for the years 2008-11, before dropping to almost zero in 2012. (Meanwhile the total for intergovernmental expenditures in 2012 appears to jump to a level almost equal to the amount for direct expenditures in prior years.) It is quite difficult to reconcile these numbers with anything in our data (though I note they seem close to the Indigent Legal Services Fund statutory distribution figures), and I have no explanation at all for the apparent shift from direct to intergovernmental spending. Certainly there was no policy shift between those years that could account for it.

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<sup>1</sup> Appendix Table 1, *State Government Indigent Defense Expenditures, FY 2008-2012*.

<sup>2</sup> Although it was not the subject of your report, I would note for the record that these totals were dwarfed by the \$338,940,898 paid out by localities (county governments and New York City respectively) for those services.

<sup>3</sup> Specifically, \$4 million was allocated for the purpose of providing counsel at first appearance and \$2.789m for immigration issues in 2011-12. These amounts have been renewed every year since then. An additional \$4 million was appropriated and subsequently allocated for caseload reduction in the year 2012-13, which has also been renewed in all subsequent years.

<sup>4</sup> The exceptions would be the programs which reimburse attorneys for their work on individual cases (titled 'Corrections law 606', 'Judiciary Law 35', and, to a limited extent, 'Indigent Parolee Program' in the enclosed table.) The 'Case cap funding' contracts are also made with 501-c.3 defense providers directly, and not local governments. Some of the funding under two other contractual programs ('Aid to Defense' and 'Defender-based advocacy') may also be considered direct rather than intergovernmental inasmuch as some (but not all) of it is also distributed directly to 501-c.3 providers. I would also note, however, that the entire system of juvenile representation, funded at over \$115m in 2012, could also be characterized as 'direct' state funding in this way.



Our agency has been in existence since 2011 and is mandated to collect detailed information on spending on indigent legal services in the state. As we discussed, it is frequently the case in New York that funds appropriated to agencies are subsequently distributed to localities for defense services, a fact that (depending on the budget year) is not necessarily visible in either the budget legislation or even to staff in state budget offices. We have sought and obtained data on those funding streams directly from the state agencies concerned (as shown in the enclosed table), though in some instances we have data for only the year 2012-13. It has become my understanding in the course of seeking these data that some of these figures have never been broken out and tracked before the existence of our agency – a point I make only to suggest it is possible that the census data in your report, and the individuals who originally produced the data, may not have been able to capture these streams of funding as well as we are now able to do.<sup>5</sup>

As you review the tables enclosed, you'll see there are some things to be borne in mind when interpreting these data. In the hope I can make those considerations explicit, I would note the following:

- 1) **Not all the data are 'actual spending' amounts.** Some of these data are actual amounts distributed by the state.<sup>6</sup> Others are the total amounts of contracts into which the state entered with local governments or agencies.<sup>7</sup> In the case of contracts, the money is typically not received in the locality or agency immediately, but rather is disbursed gradually following a voucher submission process. Accordingly, counties do not ordinarily actually receive the entire funds from a contract in the year in which it is signed, but rather are often in the position of vouchering for the funds in subsequent years. Although I have sought 'actual spending' data from state agencies in charge of these funding streams, not all have yet provided it to me. Note, however, that I have *not* used appropriation numbers, which refer only to funds allocated, and not funds expended or contracted for. Had I used appropriation numbers, they would have reflected an even larger growth in state commitment to defense across this period, as described above in my discussion of the three new initiatives for counsel at first appearance, caseload reduction and immigration representation respectively.
- 2) **The exact dates of contract years vary.** The state of New York's fiscal year starts on April 1, but much of this funding operates on the basis of contract years, which begin on the date the contract is finalized, and so can vary, even among localities within a single funding stream. It's also notable that the voucher payments for two of the streams are in fact for calendar years (January 1 – December 31).
- 3) **I don't have data for all funding streams for all years.** Since we were formed in 2011, we've worked hard to get a grasp on these funding streams, and in some cases we have historical data going back some time. I provided subtotals for the streams for which we have data in every year since 2008 in the enclosed table in the hope they would be the best indicator of what the likely trend in total state funding was across these years. I also provided totals for all known data,

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<sup>5</sup> I should note that these data, which I collected directly from the state agencies concerned, are not the only source of information on state funding of defense in the state. Counties themselves report their level of state funding for indigent legal services in an annual reporting form to the NY Office of the State Comptroller. In reviewing those data, however, we realized that frequently counties are not aware of state funding to defense in cases where that funding is paid directly to individual attorneys who voucher for their services direct to state agencies, or directly to Legal Aid Societies, which are non-governmental entities that contract with counties to provide indigent legal services. These problems resulted in the underreporting of state funding for defense, and are what led us to try and get the data directly from the agencies concerned.

<sup>6</sup> Specifically, the Indigent Legal Services Fund statutory distribution, Corrections Law 606 payments and Judiciary Law 35 payments.

<sup>7</sup> Specifically, the Indigent Legal Services Fund 2010-11, 2011-14 and 2012-15 contracts; Aid to Defense; Case cap funding; and defender-based advocacy.

though you should obviously bear in mind there are pieces missing in the earlier years (indicated by 'not known' in the table.)

With those caveats in mind, I hope the enclosed gives some sense at least of the diversity and volume of state funding flowing to indigent defense in New York. If you have any suggestions, questions or further thoughts about these data – particularly how I could improve them to actually suit the needs of a report like yours – I'd be grateful to hear your thoughts, and more than willing to work to produce data that suited your purposes more exactly.

## II – Describing public defense in New York

The description of New York's public defense system on page 20 of *Indigent Defense Services in the United States, FY 2008-2012* is a little confused on certain details. I would offer the following specific observations.

The report refers to the Capital Defender Office in the present tense, stating 'funding for this office has dropped significantly because fewer and fewer capital cases have existed.' In fact, the Capital Defender Office (CDO), though technically still in existence in 2008, was totally disbanded that year in the wake of the state's abolition of the death penalty in 2004. This use of the present tense, and the statement that caseloads have dropped, seems rather enigmatic, and could obviously lead to confusion.

I found the paragraph headed 'Indigent Legal Services Fund (est. 2003)' rather unclear, and incorrect or incomplete on the two following points:

- The last sentence mentions the Public Defense Act of 2009 and suggests it created a statewide indigent defense commission. I believe this refers to a 2009 bill which was actually never passed into law, with the result the commission that the report mentions was (obviously) never created. This is important as the Commission envisioned in that bill was intended to completely take over indigent legal services in the state and would therefore have been significantly more powerful than the Office of Indigent Legal Services that presently exists (and which was brought into being by different legislation). In short, all mention of this bill should be omitted.
- The first sentence of the paragraph omits that counties may establish a conflict defender office (as an alternative to a public defender office, a legal aid society, or an assigned counsel program, which are mentioned).

## III – Apples-to-apples comparisons across state lines

As you hint in your reports, the different structures of indigent defense service provision by state make it difficult either to compare or to aggregate state funding totals. First, I would suggest it's important to be clear whether the services being provided include only adult criminal representation or both adults and juveniles. Second, it is important to be clear on the scope of services that 'indigent defense' represents. Many providers of indigent criminal defense also provide related but distinct legally mandated services such as representation of adults in family courts or other civil proceedings. Third, although you did not seek to report on local funding systematically, it is worth noting that distinguishing state and local expenditures is a complex matter, and that local spending is an important part of the picture when comparing states. I offer the following observations, based partly on the New York data, as illustrations of some of the issues that would bedevil these tasks.

- 1) **Representation for adults and juveniles is provided by completely separate systems in New York, but that isn't true everywhere.** In New York, representation of juveniles is not handled by public defender agencies, but rather through a statewide system of attorneys for children,



assigned and paid by the hour under the auspices of the Office of Court Administration (and, in New York City, through contracts with institutional providers). Juvenile representation doesn't fall under the auspices of our agency at all, therefore, and I usually wouldn't include that funding in any of our statistics. Juvenile defense is entirely state-funded in New York, however, so I made a note of the 2012 total for juvenile defense in the enclosed table.

**2) Funding for criminal and family court representation can't be broken out in New York; meanwhile, funding for other related agencies is not included, but arguably could be.** As you noted in the report, indigent legal services in New York also includes representation of adult respondents (and some others) in the state's family courts. In many counties public defender offices are tasked with this representation with the result that it is impossible to break out the amount they spend on criminal and family matters. That is not true in some other states, where public defender agencies deal only with criminal matters. Additionally, the data I attached omit entirely three defense-related entities which receive state funding. These are as follows:

- a. *Mental Hygiene Legal Services (MHLS)*. MHLS is a state agency that provides representation to indigent persons convicted of sex offenses facing civil commitment proceedings. I don't have data on their budget because we generally don't think of them as part of the public defender system, but we are aware that in other states the cost of such representation is included in the state funding total. The public defender system *does* handle civil commitment cases when MHLS has a conflict of interest, and funding for that representation is included in my statistics (you'll see it described under the funding stream titled 'Judiciary law 35'.)
- b. *New York State Defenders Association (NYSDA)*. NYSDA is a 501-c.3 that provides training and other 'back-up' services to county public defenders around the state, but does not generally represent clients itself. It is an essential part of the indigent defense infrastructure, though, and does receive state funding.
- c. *Prisoners Legal Services (PLS)*. PLS is a 501-c.3 that provides representation to incarcerated persons on matters such as their conditions of incarceration, parole and other issues. Again, they aren't part of the 'public defender' system per se, but they are doing similar work.

**3) Local funding is essential to consider carefully.** I raise this mostly because I think Table 3 in your second report, *State Government Indigent Defense Expenditures, FY 2008-12* may possibly have conflated expenditure data which include local revenue (in the 2007 CPDO data) with pure state funding figures (from your 2008 dataset). This may be true despite the fact the CPDO characterized those states as having a statewide defender system, and may therefore account for some of the wild discrepancies year-to-year. The truth is that in New York and elsewhere local funding is a particular bone of contention of defenders, and is susceptible to different political pressures than state funding.<sup>8</sup> In many ways, it's more important to understand the dynamics of

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<sup>8</sup> I've done some analysis of the dynamics of state and local funding data with academic colleagues, and I'd be happy to share the following articles if they would be of interest:

- Andrew Davies & Alissa Worden (2009) "State Politics and Indigent Defense: A Comparative Analysis", 43/1 *Law and Society Review* 187-220
- Alissa Worden & Andrew Davies (2009) "Protecting Due Process in a Punitive Era: An Analysis of Changes in Providing Counsel to the Poor" 47 *Studies in Law, Politics & Society* 71-113
- Alissa Worden, Andrew Davies and Elizabeth Brown (2011) "A Patchwork of Policies: Justice, Due Process and Public Defense Across American States" 74/3 *Albany Law Review* 1423-1463
- Andrew Davies & Alissa Worden (2013) "Local Governance of Public Defense: Assessing the Strengths of a 'Broken System'", presentation at the 2013 meeting of the *Law and Society Association*, Boston.

local funding than state funding in states where responsibility is split some way. The key point is that the omission of local funding because data are not available really leaves us with a picture that is incomplete.

Again, I thank you for your attention to indigent legal services, and for the time you took to speak with me about my concerns. Accuracy in our data are so important as we try to move, as a field, toward being data-driven and evidence based, and I am very reassured by the concern I felt we shared to make sure this information is as sound as possible. Please do get in touch if I can provide more information or clarification, now or at any future date.

Very best wishes,



Andrew L. B. Davies, Ph.D.  
Director of Research, NYS Office of Indigent Legal Services

CC: Jenny Mosier, Deputy Chief of Staff and Counselor to the Attorney General  
Jonathan Lippman, Chief Judge, NY Court of Appeals & Chairman, Indigent Legal Services Board  
Tim Young, Chairman, National Association of Public Defense  
Jo-Ann Wallace, President, National Legal Aid and Defender Association  
Normal Reimer, Executive Director, National Association of Criminal Defense Lawyers  
David Carroll, Executive Director, Sixth Amendment Center  
Jonathan Gradess, Executive Director, New York State Defenders Association  
Members of the NY Indigent Legal Services Board



# State Funding for Indigent Legal Services to Adults in New York State, FY 2008-9 to FY 2012-13.

Funding stream	Description	2008-09	2009-10	2010-11	2011-12	2012-13
Indigent Legal Services Fund statutory distribution	Distributed by the Office of State Comptroller as a lump sum payment to localities at the end of the fiscal year pursuant to a statutory formula for the purpose of improving the quality of indigent legal services. (Known as the 'statutory distribution'.)	\$ 76,478,074	\$ 70,089,369	\$ 65,769,317	\$ 62,084,027	\$ 54,722,681
Indigent Legal Services Fund 2010-11 contracts	Distributed by the Office of Indigent Legal Services through one-year contracts with counties for the improvement of the quality of indigent legal services. (Known as 'Distribution 1'.)	N/A	N/A	\$ 4,441,605	N/A	N/A
Indigent Legal Services Fund 2011-14 contracts	Distributed by the Office of Indigent Legal Services through three-year contracts with counties for the improvement of the quality of indigent legal services. (Known as 'Distribution 2'.)	N/A	N/A	N/A	\$ 8,126,902	\$ 8,126,902
Indigent Legal Services Fund 2012-15 contracts	Distributed by the Office of Indigent Legal Services through three-year contracts with counties for the improvement of the quality of indigent legal services. (Known as 'Distribution 3'.)	N/A	N/A	N/A	N/A	\$ 7,361,340
Aid to Defense (total contract amounts)	Distributed by the Division of Criminal Justice Services for criminal defense in 25 counties and the New York City Legal Aid Society based on historical crime levels.	\$ 11,174,000	\$ 9,846,000	\$ 8,708,466	\$ 8,099,000	\$ 8,099,000
Case cap funding (total contract amounts)	Distributed by the Office of Court Administration to institutional providers of indigent criminal defense located in New York City.	N/A	N/A	\$ 9,999,999	\$ 16,800,000	\$ 29,000,000
<b>SUBTOTAL for funding streams with data for all years</b>		<b>\$ 87,652,074</b>	<b>\$ 79,935,369</b>	<b>\$ 88,919,387</b>	<b>\$ 95,109,929</b>	<b>\$ 107,309,923</b>
Corrections law 606 (vouchers paid, calendar year)	Distributed by the Department of Corrections and Community Supervision for cases involving the defense of individuals accused of committing crimes while incarcerated in state correctional facility. Payments are made following submission of vouchers for representation by lawyers or defense organizations.	NOT KNOWN	NOT KNOWN	\$ 119,096	\$ 167,529	\$ 48,558
Defender-based Advocacy (total contract amounts)	Distributed by the Office for Probation and Correctional Alternatives to improve diversion from incarceration for eligible defendants. This program operates under the broader auspices of OPCA's Alternatives to Incarceration program.	NOT KNOWN	NOT KNOWN	NOT KNOWN	\$ 111,318	\$ 111,318
Indigent Parolee Program (contract amounts and voucher payments)	Provides partial funding for the defense of indigent persons at parole revocation hearings and their appeals. The program uses contracts with certain counties, and a voucher program for others. The program was defunded in 2011, and the 2012 statistic includes only contract amounts, as no voucher payments were made that year.	NOT KNOWN	NOT KNOWN	NOT KNOWN	-	\$ 216,000
Judiciary Law 35 (vouchers paid, calendar year)	Distributed by the Office of Court Administration for cases involving the representation of parents in family cases tried in county supreme courts, and individuals facing civil commitment for sex offenses where Mental Hygiene Legal Services cannot provide that representation (e.g. has a conflict of interest), and other special populations. Payments are made following submission of vouchers for representation by lawyers or defense organizations.	NOT KNOWN	NOT KNOWN	NOT KNOWN	NOT KNOWN	\$ 1,569,873
<b>TOTAL of all known funding stream data</b>		<b>\$ 87,652,074</b>	<b>\$ 79,935,369</b>	<b>\$ 89,038,483</b>	<b>\$ 95,388,776</b>	<b>\$ 109,255,672</b>

Legend	
N/A	Program not in existence this year
\$ -	Program in existence, but zero funding provided
NOT KNOWN	Funding level for this program not known for this year

**Note on juvenile representation :** state funding for juvenile representation is not included in this chart. Juvenile representation is funded entirely at the state level in New York through the 'attorneys for children' program administered by the Office of Court Administration. The program provides representation through contracted, institutional providers in New York City and individual lawyers assigned and compensated hourly in all other parts of the state. Total spending on the program in 2012 was \$115,384,350.

**Note on newly appropriated funds, 2011-12 and 2012-13 :** Beginning in FY 2011-12, New York State appropriated additional funding from the Indigent Legal Services Fund to be distributed to counties for defense services pursuant to a competitive RFP process. These funds, totaling \$6.789 million in 2011-12 and \$10.789 million in 2012-13, are allocated to three purposes - providing counsel at first appearance, caseload reduction, and improving representation on immigration issues. These appropriated funds are not included here because the RFP and subsequent contracting process had not concluded during the years shown, with the result no funding was yet disbursed to counties from these appropriations in these years.