

Testimony of the Office of Indigent Legal Services

Joint Legislative Hearing on the 2014-2015 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. I am here today to present to you the FY 2014-15 budget of the Office and the 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 second appearance before this Joint Legislative Public Protection Budget hearing, I asked you to consider restoring \$4 million in Local Aid funding which had been cut in the FY 2013-14 Executive Budget, in order to allow our Upstate Quality Improvement and Caseload Reduction competitive grant to become reality. This grant represents the first step to alleviating excessive attorney caseloads and inadequate supervision in upstate New York. Through your efforts, \$4 million was restored in the Final FY 2013-14 Budget, and this past August, our Office released a three year, \$12 million "Upstate Quality Improvement and Caseload Reduction Grant" RFP. I am pleased to report that 45 counties submitted proposals in response to this RFP and that we expect all 45 counties to receive an award. With reduced caseloads and increased support, 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.

FY 2014-15 ILS Budget Request.

In September, 2013, the Indigent Legal Services Board unanimously approved an ILS budget request of \$99.5 million for FY 2014-15. Of this amount, \$96 million would be devoted to Aid to Localities and \$3.5 million to State Operations.

- I. **Aid to Localities:** The \$96 million in Local Aid represents an increase of \$15 million over FY 2013-14 funding levels, which would be broken down as follows:
 - **Upstate Quality Improvement and Caseload Reduction Grant.** \$8 million to supplement our Upstate Quality Improvement and Caseload Reduction grant. As indicated in our recently released report, "An Estimate of the Cost of Compliance with Maximum National Caseload Limits in Upstate New York," we estimate that in 2012 it would have cost an additional \$111 million to bring upstate indigent legal service providers into compliance with maximum national caseload standards¹. Our request of \$8 million constitutes a modest and essential second step towards establishing the

¹ This report, *An Estimate of the Cost of Compliance with Maximum National Caseload Limits in Upstate New York*, was published on December 11, 2013, and may be found at <http://www.ils.ny.gov>.

minimum conditions needed for providing adequate representation to clients in upstate counties;

- **Counsel at First Appearance Grant.** \$4 million to supplement our Counsel at First Appearance grant. This past year, 25 counties received awards under our initial, three-year, \$12 million Counsel at First Appearance grant. With this additional funding, I believe many additional counties will be able to provide this vitally important representation, which is required under our laws and our Constitution.
- **Family Court Initiative.** \$3 million for a new initiative to support improved representation in Family Court and to provide early representation in protective custody cases.

II. State Operations: The \$3.5 million in State Operations funding represents an increase of \$1.7 million over FY 2013-14 funding levels. In addition to a \$200,000 increase for Office operations in order to add a much needed Assistant Grants Manager position to help manage our burgeoning number of county contracts, and to provide ILS staff with a small merit salary increase, we request funding for two important structural reforms:

- **Regional Support Centers.** \$1 million to establish our first two Regional Support Centers. We believe that providing regional support to counties is essential for the realization of uniform, high quality representation in every county and region.
- **Statewide Appellate Resource Center.** \$500,000 to establish a Statewide Appellate Center. Like the New York Prosecutors Training Institute (NYPTI), this Center would provide state-funded appellate representation in complex cases.

FY 2014-15 Executive Budget.

The Executive Budget released on January 21, 2014 proposes flat funding of \$1.8 million in State Operations and \$81 million in ILS Aid to Localities. Thus the All Funds total of \$82.8 million would match our current appropriation.

- I am very pleased that, unlike the FY 2013-14 Executive Budget, this year's proposed Budget does not reduce Aid to Localities by \$4 million. This Budget would ensure that adequate funding is available for the distributions and grants heretofore authorized by the ILS Board - including the third year of funding for the three year Upstate Quality Improvement and Caseload Reduction grant.
- Likewise, I am pleased that, unlike the FY 2013-14 Executive Budget, this Budget does not reduce State Operations. Last year we faced the prospect of not having adequate funding for the continued operation of the ILS Office.
- But in order for this Office to fulfill its statutory mission of "improving the quality of" County Law 18-B mandated representation, additional resources beyond a flat budget are needed. The implementation of our two \$4 million/year (\$12 million over three years)

competitive grants - Counsel at First Appearance and Upstate Quality Improvement and Caseload Reduction – are an important first step toward addressing constitutional deficiencies in the delivery of 18-B mandated representation, but they are just that – a first step. Every stakeholder in the system knows that significantly increased state funding, sustained over time, is essential to their ultimate success. We therefore prioritize and emphasize to you the importance of providing additional funding to enable us to expand upon the beginning we have made with these two historic initiatives.

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, infrequent or non-existent 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 who are 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.

Third year operations of the Office and the Board.

During its first three years of operations, the Board has approved the development of four *non-competitive* distributions – in amounts sufficient to restore every county and New York City to the level of funding they received in 2010.² These non-competitive distributions serve to

² 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 statutory distribution of \$40 million, or 98% of its March, 2010 ILSF allocation.

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 the annual cost of providing counsel is increasing, and when they are being asked to improve the quality of their representation. With the approval of each of these annual distributions, the Board has reaffirmed its commitment to the proposition that localities 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 begin 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 four 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.

Collaboration between County Officials and Providers

For each of our non-competitive distributions and competitive grants, we have required, as a precondition of receiving funding, that counties consult with their indigent legal services providers in the preparation of their proposals. As we begin our fourth year of operations, we are pleased to report continued progress in developing collaboration between county officials and providers. It is now commonplace for county officials to arrange conference calls with our Office to discuss their non-competitive proposals, with county officials, providers and ILS staff all participating. For some counties, this amounts to a cultural shift; providers have been empowered to be more proactive in requesting the resources they need to provide quality representation for their clients. The net effect of these changes, we believe, is a better targeting of ILSF funds toward improving the quality of legal representation.

Non-competitive Quality Improvement Distributions

This past September, the Office recommended and Board approved \$7.4 million in a non-competitive distribution of FY 2013-14 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 #4”) marks the fourth non-competitive distribution authorized by the Board.³ It requires each county government to consult with its indigent legal service provider

³ The Board approved a \$4.4 million non-competitive distribution of FY 2010-11 Local Aid funds in March and June, 2011 (Distribution #1), \$8.1 million in a non-competitive distribution of FY 2011-12 Local Aid funds in September, 2011 (Distribution #2), and \$7.4 million in a non-competitive distribution of FY 2012-13 Local Aid funds in

leaders, including the provider of Family Court mandated services and of assigned counsel representation, 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). Proposals for Distribution #4 were due on January 31, 2014. As of today, 22 proposals have been received, and we are working with the remaining counties and service providers to finalize their proposals.

Like the first three non-competitive distributions authorized by the Board, Distribution #4 is an essential step to improving the quality of mandated representation and furthering the progress made by counties over the past three years to implement county/chief defender/ILS partnerships on projects across the state. Significantly, it took less than one week to receive the approval of the Office of State Comptroller (OSC) for Distribution #4, a substantially shorter period of time than was the case for Distributions #2 and #3⁴. The elimination of this delay enables us to distribute state quality improvement funds to the localities much more efficiently.

Use of funds (Distribution #3)

Counties have been utilizing State funds received from the first three 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 guidance or oversight. Now, counties are using ILS quality improvement funds to make targeted improvements in the quality of representation they provide. Examples of innovative and creative uses of Distribution #3 funds include:

- establishing a pilot program to provide early representation for parents and other adult respondents in Family Court proceedings;
- developing a regional, advanced trial skills program for experienced lawyers;
- creating a criminal defense/immigration specialist position (“Immigration Defense Specialist”);
- developing a training, evaluation and certification program for an assigned counsel panel;
- expanding a Family Court Unit in a Public Defender’s office to provide representation before additional Family Court judges;
- supplementing funding of a Regional Appellate Program (established with Distributions #1 and #2 funding) to handle all criminal appeals for four counties;
- adding staff and temporary attorneys to an Appeals Unit to reduce excessive delay in affording appellate review;

September, 2012 (Distribution #3). The Board authorized a three year allocation of funds for Distributions #2 and #3, in the total amounts of \$24.4 million (including \$2.3 million for NYC) and \$22.1 million, respectively.

⁴ It took approximately eight months for OSC to approve Distributions #2 and #3, due to a concern that the Board’s authority to distribute funds was restricted to competitive grant processes, which we firmly believe is not the case. With the speedy approval of Distribution #4 funds, that delay has been eliminated.

- adding a Sentencing Specialist position to provide evaluations of clients for sentencing purposes; and
- contracting with sentencing experts to provide more effective sentencing advocacy.

Distribution #3 funds are also being used to hire additional attorney and support staff, provide expert and investigative support services, purchase case management systems, and upgrade computer technology and equipment. All of these initiatives 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 every criminal defendant's first court appearance, 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 August 6, 2013, final awards were announced for each of the 25 counties that had submitted a proposal for the Counsel at First Appearance competitive grant (see attached list). This three year grant, with total available funding of \$12 million (\$4 million per year), was authorized by the Board to bring New York closer to the goal of providing counsel at a criminal defendant's first court appearance, a critical moment when his or her liberty may be at stake.

⁵ For Distribution #1, 32 contracts have been paid out in full; initial contract extensions ended March 31, 2013; 22 counties have requested extensions of 9 months or less; 3 counties have requested extensions of up to one year. For Distribution #2, a total of 55 contracts have been assembled (total value: \$23,608,125); 52 of these contracts have been finalized. For Distribution #3, 39 proposals have been received; 28 contracts have been sent to counties; 19 of these 28 contracts have been signed and forwarded to OSC for approval. For Distribution #4, twenty-two proposals have been received.

Innovative and creative plans were submitted by these 25 counties, with a total requested amount of almost \$13.5 million. These proposals will be helpful guides for the counties that did not participate in this grant, once additional funding becomes available. These 25 proposals included the following:

- a total of 14 plans would provide attorney representation for indigent defendants at over 90% of the arraignment hearings held within the county, including hearings held in County, City, Town and Village Courts;
- a total of 13 plans would provide for a system of “on-call,” rotating attorneys or teams of attorneys to provide representation at individual arraignments held outside regularly scheduled court sessions, such as weekday evenings and weekends;
- for a number of plans, the cooperation of law enforcement agencies was obtained, thereby reducing the amount of time it would take for the hearing to take place;
- a majority of the plans would provide representation at first appearance at high volume, regularly scheduled court sessions in County, City, Town or Village Courts.

From our discussions with counties and providers, we anticipate that many of the counties that did not submit a proposal for this Counsel at First Appearance grant would do so in the future, when additional funding becomes available. Several counties that did not submit proposals have used non-competitive distribution funding to develop pilot programs for counsel at first appearance within their county.

Upstate Quality Improvement and Caseload Reduction

As I noted in my opening remarks, I want to thank you for restoring the \$4 million in Local Aid in the FY 2013-14 Final Budget. The restoration of these funds made possible multiple year funding of the Upstate Quality Improvement and Caseload Reduction grant.

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.

On January 17, 2014, our Office sent a tentative award list for this competitive grant to the Office of the State Comptroller. (See attached list). If approved, the final award list will include all 45 counties that submitted a proposal for this grant funding. As evidenced in our recently released report, “*An Estimate of the Cost of Compliance with Maximum National Caseload Limits in Upstate New York*,” an infusion of resources far in excess of the \$4 million available for this grant will be needed to bring upstate indigent legal services providers into compliance

with national maximum caseload standards, but that does not diminish its historic importance as a first step toward achieving this goal.

The vast majority of counties submitted thoughtful proposals, seeking additional attorney positions or support staff for institutional providers that would directly translate into reducing overall caseloads. For assigned counsel programs, proposals ranged from expanding attorney coverage in specialized courts to providing additional resources to assigned counsel programs, in order to provide better training, support and quality control for the representation they provide.

While this initial grant is but a first step, the importance of providing this funding to counties cannot be overstated. As noted in one proposal, a Public Defender Office that has been “consistently underfunded” and “never been allowed . . . investigative services” will add an attorney position and, for the first time, will have dependable access to investigative services.

Regional Immigration Assistance 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 six regional resource and training centers that will serve every attorney within New York State who provides representation for a client under article 18-B; and will develop protocols for representation cases which include potential immigration consequences.

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

Transfers from the Indigent Legal Services Fund (ILSF)

At each of my previous appearances before this Committee, I have stressed the importance of ending transfers (“sweeps”) of ILSF funds to the General Fund. If the fund-specific sweeps authorized in FY 2013-14 are carried out, the total amount of sweeps between FY 2008-9 and FY 2013-14 will total over \$56 million. These lost funds would have been available to provide mandate relief to the counties through increased annual Aid to Localities and State Operations appropriations. I cannot emphasize strongly enough that any further sweeps from the Indigent Legal Services Fund would pose an extremely grave threat to our ability to continue improving the quality of legal services in New York.

Public Defense Backup Center

Finally, as I have testified before this Committee for each of the three years I have been ILS Director, it is imperative that the New York State Defender Association’s Public Defense Backup Center receive adequate funding to continue performing its indispensable function of

providing essential training and support services to the indigent legal service providers throughout the state. New York could not meet its Constitutional obligation to provide competent counsel to those who cannot afford to pay for it, if the Backup Center were to fail for lack of funding.

Conclusion

For almost fifty years, local governments have borne the burden of the State of New York's Constitutional responsibility to provide counsel to those who are entitled to the assistance of counsel, but cannot afford to hire an attorney. Now, with your support, we have finally begun to make very modest but unmistakable progress. Our annual non-competitive Quality Improvement funding is achieving quality gains in virtually every locality; and our competitive grants are providing first-ever state funding dedicated to the remediation of longstanding Constitutional deficiencies. We deeply appreciate your past support, and we ask you to help us again this year as we help the counties and New York City provide the effective assistance of counsel to which every New Yorker is entitled.