

**Testimony of Office of Indigent Legal Services**

**Joint Legislative Hearing on the 2013-2014 Public Protection Budget**

**Presented before:**

**The Senate Finance Committee**

**and**

**The Assembly Committee on Ways and Means**

**Presented by:**

**William J. Leahy**

**Director**

**Office of Indigent Legal Services**

**February 6, 2013**

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

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 funds<sup>3</sup>.

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 data<sup>4</sup>.

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

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<sup>3</sup> 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.

<sup>4</sup> 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.

### **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](http://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.<sup>6</sup> 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.

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<sup>6</sup> 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.

**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

**Concluding Point:** Next month, on March 18, the nation will celebrate the 50<sup>th</sup> 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**

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

#### **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 measurable 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

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.



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](http://www.ils.ny.gov). Requests for the RFP package may be made by e-mail to [Karen.jackuback@ils.ny.gov](mailto: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](mailto:karen.jackuback@ils.ny.gov)) and secondarily to Joe Wierschem ([joseph.wierschem@ils.ny.gov](mailto: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.

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.

## **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**

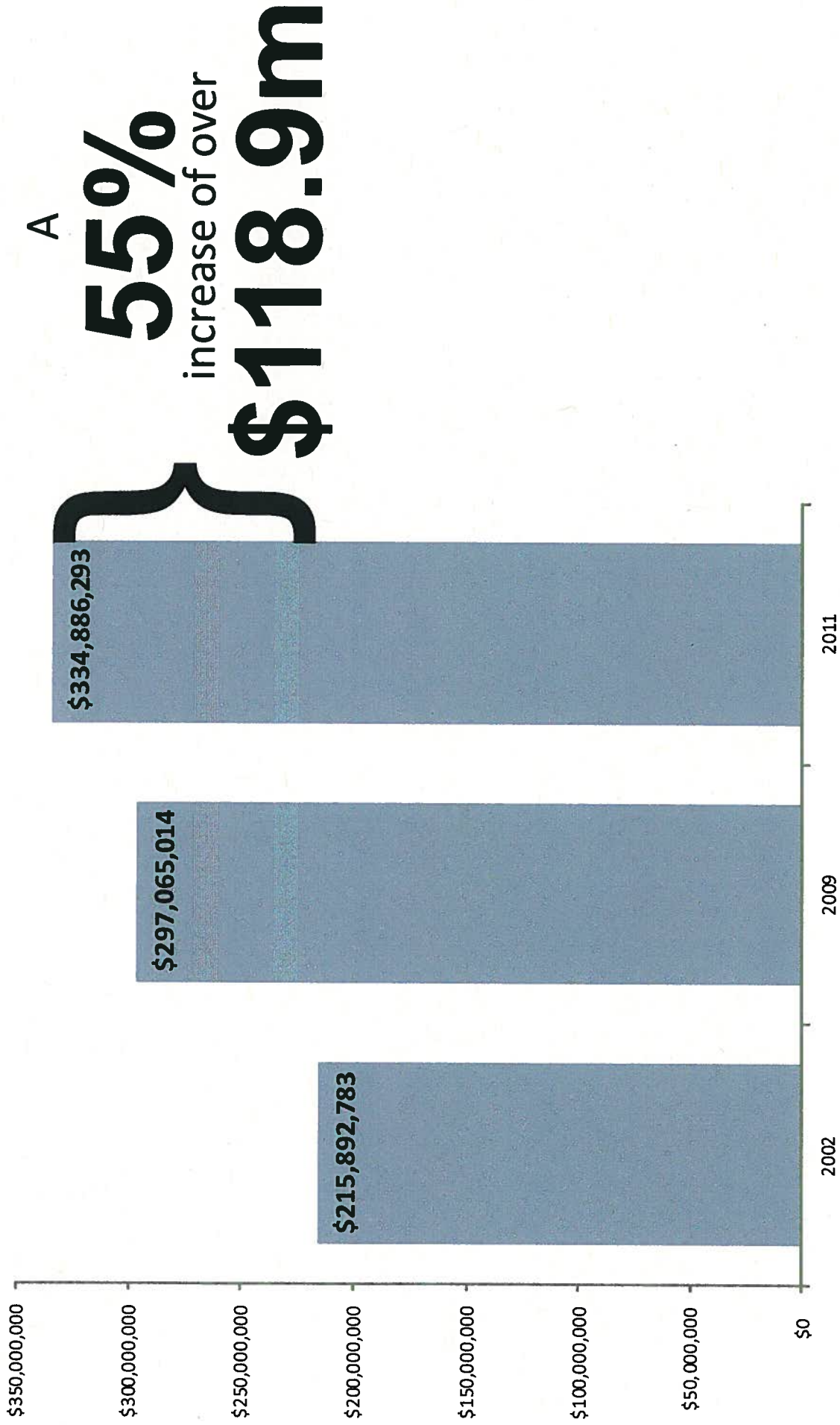
Grantees may receive 25% of the total first year's award as a budget advance following contract approval by the Attorney General and the State Comptroller. Thereafter, each county will be reimbursed for expenses incurred pursuant to grant related activities including salary, benefits, travel,

## 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:			
<b>Personal Service Subtotal</b>			
Contractual Services			
<b>Contractual Subtotal</b>			
Equipment (specify)			
<b>Equipment Subtotal</b>			
Other Than Personal Service (OTPS) (specify)			
<b>OTPS Subtotal</b>			
Miscellaneous			
<b>Miscellaneous Subtotal</b>			
<b>TOTAL</b>			
<b>TOTAL THREE-YEAR BUDGET</b>			

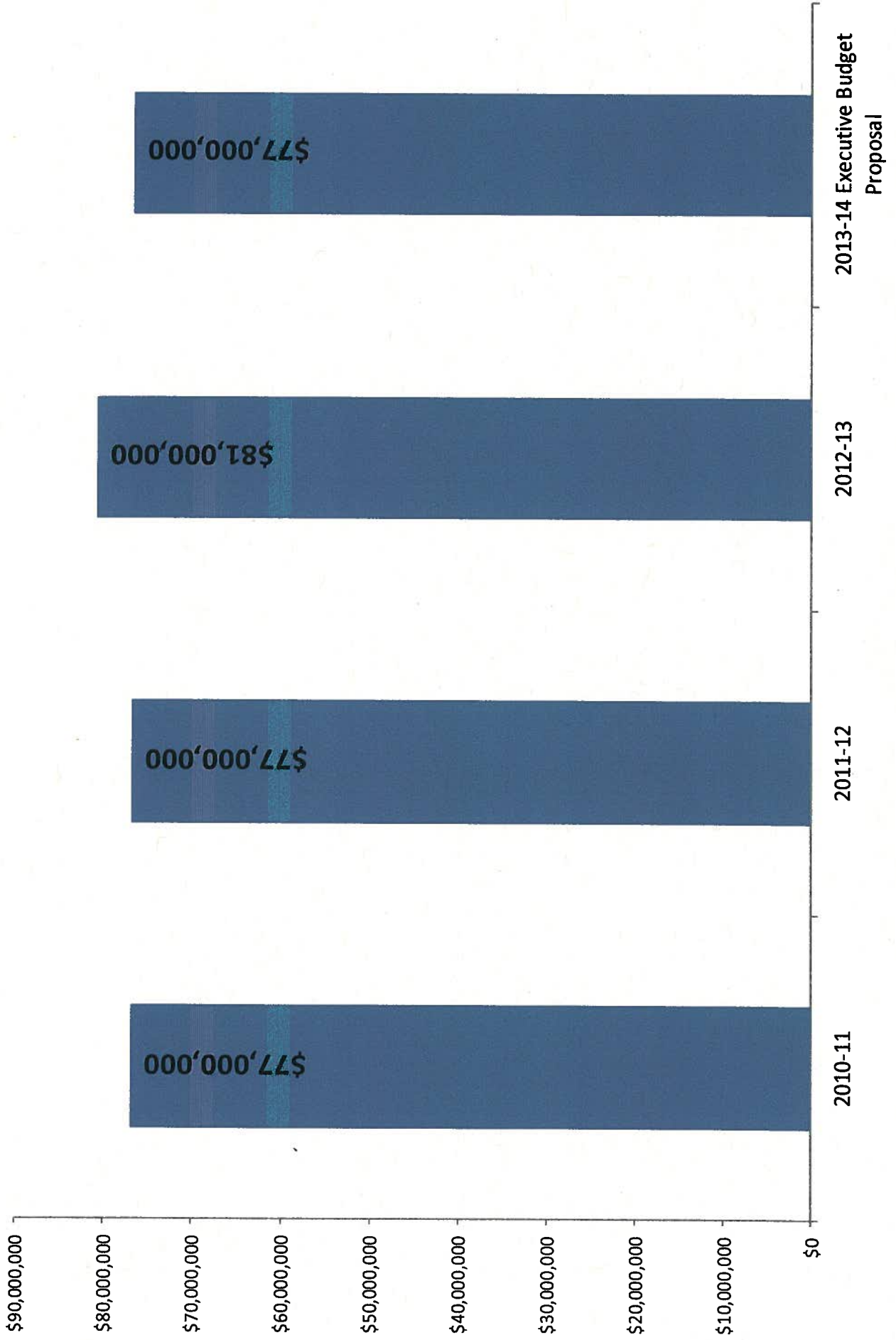
# Local Expenditures on Indigent Legal Services Statewide, 2002, 2009 and 2011



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 72<sup>nd</sup> 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

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*