

Committee Staff:

Committee on Public Safety

Brian Crow, Legislative Counsel

Beth Golub, Legislative Analyst

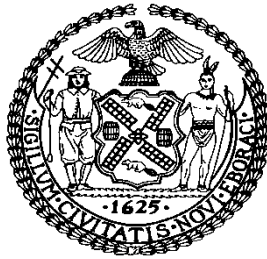
Laurie Wen, Legislative Policy Analyst

Ellen Eng, Legislative Financial Analyst

Committee on Courts and Legal Services

Josh Hanshaft, Counsel

Eisha N. Wright, Unit Head, Finance Division



THE COUNCIL

Briefing Paper of the Governmental Affairs Division

Matt Gewolb, Legislative Director

Rachel Cordero, Deputy Director, Governmental Affairs

COMMITTEE ON PUBLIC SAFETY

Hon. Vanessa L. Gibson, Chair

COMMITTEE ON COURTS AND LEGAL SERVICES

Hon. Rory Lancman, Chair

January 26, 2015

OVERSIGHT: Examining how the City Evaluates the Effectiveness of the Provision of Indigent Criminal Legal Defense

I. INTRODUCTION

On January 26, 2015, the Committee on Public Safety, chaired by Council Member Vanessa L. Gibson, and the Committee on Courts and Legal Services, chaired by Council Member Rory Lancman, will hold an oversight hearing examining how New York City evaluates the effectiveness of the provision of indigent criminal defense services.

II. BACKGROUND

In *Gideon v. Wainwright*, the United States Supreme Court ruled that the Sixth Amendment creates a right to court appointed counsel in all criminal prosecutions.¹ In *People v. Witenski*, the New York State Court of Appeals ruled that defendants in all criminal cases have a fundamental right to appointed counsel if they cannot afford a lawyer and that the right to counsel must be made “meaningful and effective.”² That same year, New York State enacted Article 18-B of the County Law, which required each county and the City of New York to establish a plan for the provision of counsel to indigent defendants.³ The law allowed localities to choose among several options, including: (i) create a public defender office and appoint an attorney through the locality’s governing body to fill the position; (ii) designate a legal aid society; or, (iii) adopt a plan set forth by a county bar association to secure the services of private counsel on a rotational schedule. The law also allowed a county to adopt a combination of these options.⁴

In accordance with New York City Mayoral Executive Order No. 178 of 1965, the Legal Aid Society (“Legal Aid”) was designated as the primary provider of indigent defense services within New York City, and counsel designated by the county bar association were to provide

¹ *Gideon v. Wainwright*, 372 U.S. 335 (1963).

² *People v. Witenski*, 15 N.Y. 2d 392 (1965) at p.395 (1965).

³ Final Report to the Chief Judge of the State of New York, Commission on the Future of Indigent Defense Services, 2006.

⁴ *Id.* at p.7.

representation when Legal Aid had a conflict of interest or declined to represent a defendant for an “appropriate reason.”⁵ A conflict typically arises when more than one defendant is charged in the same crime, or when a defendant in one case is a complaining witness in another.

From 1990 to 1996, the Neighborhood Defender Service of Harlem acted as an additional institutional defender in the City representing indigent defendants at trial-level proceedings. In addition to the institutional defenders, a large panel of private attorneys—known as the 18-B panel as a result of the county law program—provided representation in all homicide cases and all trial and appellate level conflict cases not handled by Legal Aid and the Neighborhood Defender Service.⁶

In 1994, then Mayor Rudolph Giuliani canceled Legal Aid’s contract with the City after Legal Aid began a strike. The cancellation was later rescinded, a new modified contract was let, and the City also began contracting with additional institutional providers for indigent defense work. Starting in July of 1996, the City contracted with five such providers for criminal defense services and two for appellate advocacy.⁷

In June 2008, then Mayor Michael Bloomberg issued Executive Order No. 118, which repealed Executive Order No. 178 of 1965 and provided that the Office of the Criminal Justice Coordinator (“CJC”) should choose indigent defense providers through a competitive procurement process.⁸

On January 6, 2010, the City adopted chapter 13 of title 43 of the Rules of the City of New York, which provides, “In any case where, due to conflict of interest or other appropriate

⁵ NYC Exec. Order No. 178 (1965).

⁶ Status of Indigent Defense in New York: A Study of Chief Judge Kaye’s Commission on the Future of Indigent Defense Services, The Spangenberg Group, 2006, at p.124.

⁷ NYC Council hearing on the Mayor’s Fiscal Year 2012 Preliminary Budget & the Fiscal Year 2011 Preliminary Mayor’s Management Report, Legal Aid/Indigent Defense Services, at p.5, March 11, 2011.

⁸ NYC Exec. Order No. 118 (2008).

reason, Providers decline or are unable to represent an indigent person at the trial or on appeal in a criminal matter, counsel shall be furnished by attorneys assigned by the Assigned Counsel Plan from the appropriate Criminal Defense Panel of the Appellate Division, First or Second Judicial Department, or by alternate providers selected by the Criminal Justice Coordinator through the City's procurement process.”⁹ This is significant because it permits the assignment of conflict cases to institutional providers in addition to 18-B panel attorneys. Chapter 13 also created the Office of the Assigned Counsel Plan (“OACP”), which manages the City’s Criminal Defense Panels and is overseen by two Administrators in consultation with the Presiding Justices of the First and Second Judicial Departments.¹⁰

In February 2010, the City issued a request for proposal (“RFP”) for the provision of indigent criminal defense services and for the assignment of conflict cases. The New York County Lawyers and several bar associations challenged the City’s 2010 plan. In 2012, the New York State Court of Appeals, in *Matter of the New York County Lawyers’ Association v. Bloomberg*, concluded that the City’s 2010 plan for indigent defense constitutes a valid combination plan under County Law § 722 (4) that serves the needs of clients but also recognizes fiscal realities to be borne by the City.¹¹ In September 2013, after a competitive selection process, the City chose five institutional providers for conflict cases, replacing 18-B attorneys in many cases, with the goals of reducing costs and increasing oversight. Institutional providers also have various in-house projects aimed at improving the lives of their clients, including initiatives that address the needs of sex trafficking victims and ex-offenders returning to their communities.

⁹ See, *Matter of the New York County Lawyers’ Association v. Bloomberg*, 95 AD3d 92 (2012).

¹⁰ Id.

¹¹ Id.

Currently, institutional providers of indigent defense services that have contracts with the city include Legal Aid, the Bronx Defenders, Brooklyn Defender Services, Neighborhood Defender Service of Harlem, New York County Defender Services, and Queens Law Associates.

In addition to restructuring the City's contracts for indigent legal defense, another significant change is the 2009 state legislation that established caseload standards for indigent defense lawyers in New York City.¹² The law is aimed to ensure that attorneys have manageable caseloads in order to provide high quality representation. The case cap, which limits the number of cases per attorney to 400 a year,¹³ was phased in over a four-year period, from April 1, 2010 to April 1, 2014.

For FY 2015, the City adopted a budget that includes \$252.5 million for indigent defense. The New York City Office of Management and Budget ("OMB") had originally estimated a net savings of \$6 million a year beginning in FY 2015, crediting a lower cost per case of institutional providers compared to 18-B attorneys.¹⁴ Due to a lower number of actual contracted cases than originally projected, the FY 2015 Preliminary Budget recognizes and projects additional savings: \$3.7 million in FY 2014, \$8.6 million in FY 2015, \$9.2 million in FY 2016 and \$9.9 million in FY 2017 and the out years.¹⁵

III. REPORTING REQUIREMENTS AND PERFORMANCE INDICATORS

For several years the Council has engaged in discussions with the Mayor's Office of Criminal Justice ("MOCJ," formerly the Office of the Criminal Justice Coordinator, or CJC) regarding how best to evaluate the effectiveness of the provision of indigent defense services

¹² See transcript, NYC Council Fire and Criminal Justice Services Committee and Immigration Committee hearing, p.12-13, September 23, 2013.

¹³ A felony is weighted as the equivalent of 2.66 misdemeanors; e.g., 60 felonies and 240 misdemeanors would be counted as 400 total cases.

¹⁴ NYC Council hearing on the Fiscal 2015 Preliminary Budget & the Fiscal 2014 Preliminary Mayor's Management Report, Legal Aid Society/Indigent Defense, at p.3, March 27, 2014.

¹⁵ Id.

beyond the cost per case to the City. In a 2004 Fire and Criminal Justice Services Committee hearing on a related bill, CJC head John Feinblatt stated that when the City evaluates providers, they are not evaluated solely on the issue of cost.¹⁶ He stated that the City looks at a number of factors such as the providers' organizational and administrative capability, their qualifications and experience, the adequacy of the staff, and their ability to handle the relevant caseload and deliver essential non-legal services.¹⁷ He indicated that the problem with the evaluation criteria proposed in the legislation, such as the type of case and the average daily caseload per attorney, as well as criteria suggested by the industry, is that they only scratch the surface of the effectiveness of legal services.¹⁸

Currently, providers that contract with the City to provide indigent defense services at the trial level are required to submit monthly reports on the number of new criminal cases assigned, as well as quarterly programmatic data to the City that includes:

- a. Cases disposed at criminal court arraignment
- b. Intake at criminal court arraignment by crime type (felony, misdemeanor, violation)
- c. Cases not disposed of at arraignment by crime type
- d. Cases not accepted by contractor—number and reason
- e. Cases relieved after arraignment—number and reason
- f. Dispositions in criminal and supreme court—breakdown
- g. New assignments in criminal court (post-arraignment)
- h. New assignments in supreme court
- i. Cases pending in criminal and supreme court
- j. Number of cases from which contractor was relieved during the preceding month

¹⁶ See transcript, NYC Council Fire and Criminal Justice Services Committee hearing at p.76, October 25, 2004.

¹⁷ Id.

¹⁸ Id.

- k. Trials in criminal and supreme court
- l. Average time in disposition by Penal Law section
- m. Actual caseload for attorneys during the preceding month¹⁹

In addition, the Indigent Defense Organization Oversight Committee to the Appellate Division, First Department, publishes a report every two years analyzing the providers' work.²⁰ Another mechanism of oversight comes from the New York State Office of Court Administration, which enforces compliance with the caseload limitation standards as well as distributes the funds dedicated to hiring additional attorneys to meet new staffing needs.²¹

On March 7, 2013, CJC Feinblatt testified at the New York City Council's Fire and Criminal Justice Services Preliminary Budget hearing and stated that the Administration was enhancing its data-driven evaluation of indigent defense.²² CJC Feinblatt acknowledged that the Council had pressed the CJC's office for many years to have "apples and apples comparisons" of the City's indigent defense providers and informed the Committee that the City would begin requiring providers to report uniform data about the cases that they handle, the outcomes they achieve, and how efficient they are.²³ With this new data, the CJC's office has been able to compare providers for the first time. For example, the CJC's office compared 18-B attorneys to institutional providers and found that felonies handled by institutional providers and 18-B attorneys result in convictions at about the same rate—59 percent of the time for institutional providers, 58 percent for 18-B attorneys.²⁴ Additionally: (i) convicted defendants represented by institutional providers were sentenced to jail or prison about 43 percent of the time versus 50

¹⁹ See, Renewal Agreement between NYC Mayor's Office of the Criminal Justice Coordinator and Brooklyn Defender Services, Exhibit A, at p. 22, June 4, 2013.

²⁰ Report of the Indigent Defense Organization Oversight Committee to the Appellate Division, First Department, for Fiscal Years 2010-2011.

²¹ Supra, note 12, at p.12.

²² See transcript, NYC Council Fire and Criminal Justice Services Committee hearing at p.185, March 7, 2013.

²³ Id.

²⁴ Id., at p.186.

percent of the time for defendants represented by 18-B attorneys; (ii) felonies handled by institutional providers were resolved in 200 days on average compared to 293 days for 18-B attorneys; and (iii) violent felonies handled by institutional providers had a conviction rate of 48 percent compared to a rate of 53 percent for 18-B attorneys. CJC Feinblatt concluded by thanking the Council for “pressing to create the kind of information systems and technology” that allow the City to continue to make these kinds of comparisons.²⁵

On May 14, 2013, CJC Feinblatt again provided testimony to the Council at the Fire and Criminal Justice Services Committee’s Executive Budget hearing. At that time, CJC Feinblatt discussed how the Administration had continued to develop its data-driven evaluation tools for indigent defense services. At the request of the Council, the CJC’s office took a further look at two questions that arose from the previous budget hearing, including (i) whether trials lengthen the average case duration for 18-B cases, and (ii) the ability of the providers to dispose of felony cases with reduced charges.²⁶ The CJC’s office found that trials have a minimal impact on average disposition time for both 18-B and institutional providers. As the CJC reported in the March hearing, the average case duration for non-homicide felonies was 293 days for 18-B and 200 days for institutional providers. When the CJC excluded trial cases, average case duration for 18-B was 282, and for institutional providers it was 194 days. The CJS therefore concluded that there is not a vast difference between time to disposition for cases that go to trial relative to cases that do not go to trial.²⁷

V. ISSUES AND CONCERNS

The Council has advocated for several years for improvements in how the City evaluates

²⁵ Id., at p.187.

²⁶ See transcript, NYC Council Fire and Criminal Justice Services Committee hearing at p.142, May 14, 2013.

²⁷ Id.

the effectiveness of the provision of indigent legal criminal defense. The Committees therefore look forward to receiving more data and analysis from MOCJ regarding information received from providers, as well as MOCJ's assessment of individual provider performance. The Committees would like to continue the discussion of why certain criteria were chosen for inclusion in reporting and others rejected and get a better understanding regarding how the data is being compiled, compared, contrasted, and utilized.

The Committees want to examine the impact of the caseload limit, which came into full effect in April of 2014 after a four-year phase-in period. Additionally, the Committees look forward to discussing how to measure the success of support programs, such as the Bronx Defenders' Marijuana Arrest Project, and Legal Aid's initiative to have social workers at arraignments to address clients' mental health needs.

2015 marks the 50th anniversary of the New York State Court of Appeals' decision in *People v. Witek*. The Council is dedicated to ensuring that "meaningful and effective" legal representation is provided to all indigent criminal defendants, in order to fulfill the promise of the landmark case.