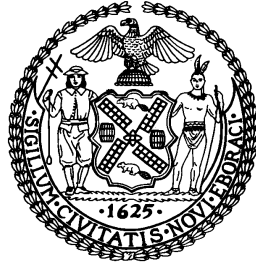


Committee on Justice System
Maxwell Kampfner-Williams, Legislative Counsel
Kieshorne Dennie, Policy Analyst
Zachary Harris, Finance Analyst



THE COUNCIL OF THE CITY OF NEW YORK

Committee Report and Briefing Paper of the Justice Division
Jeffrey Baker, Legislative Director
Brian Crow, Deputy Director

COMMITTEE ON THE JUSTICE SYSTEM
Hon. Rory Lancman, Chair

October 25, 2018

Oversight: Pay Parity and Retention Rates for ADAs and Public Defenders

PROP. INT. NO. 1103

By Council Members Lancman and Ayala

TITLE:

A Local Law in relation to establishing a temporary task force on pay parity for public defenders and assistant district attorneys with city agency attorneys.

I. Introduction

On September 20, 2018, the Committee on the Justice System chaired by Council Member Rory Lancman will hold a hearing to examine salaries and retention rates for Assistant District Attorneys (ADAs) and public defenders in comparison to attorneys for other city agencies. The Committee will also hear Introduction Number 1103 (Int. 1103), sponsored by Council Members Lancman and Diana Ayala which seeks to establish a temporary task force on pay parity.

II. Indigent Defense Providers

Under state law, New York City (the City) is required to fund legal representation for indigent criminal defendants.¹ Through the Mayor's Office of Criminal Justice (MOCJ), the City contracts with community-based legal service providers that represent indigent criminal defendants.² These providers are the Legal Aid Society, New York County Defenders, Bronx Defenders, Brooklyn Defender Services, Queens Law Associates, P.C., and Neighborhood Defender Services.³ The Legal Aid Society, the City's primary provider, provides trial and appellate representation, while the other indigent defense providers offer trial representation.⁴

City funding to indigent defense providers has remained relatively the same for the past four fiscal years. In FY18, the Legal Aid Society received a \$108.8 million appropriation from the City for indigent criminal defense and the alternate indigent defense providers received \$50.3 million collectively. See **Chart A** and **B**. These figures are in line with previous fiscal years. From FY15 to FY17, city funding to the Legal Aid Society and the alternate indigent defense providers averaged \$105 million and \$47.2 million, respectively.⁵ But, the Legal Aid Society and the

¹ County Law § 722.

² New York City Council, FY19 Preliminary Budget: The Legal Aid Society and Indigent Defense (March 2018), available <https://council.nyc.gov/budget/wp-content/uploads/sites/54/2018/03/FY19-The-Legal-Aid-Society-and-Indigent-Defense.pdf>

³ Id.

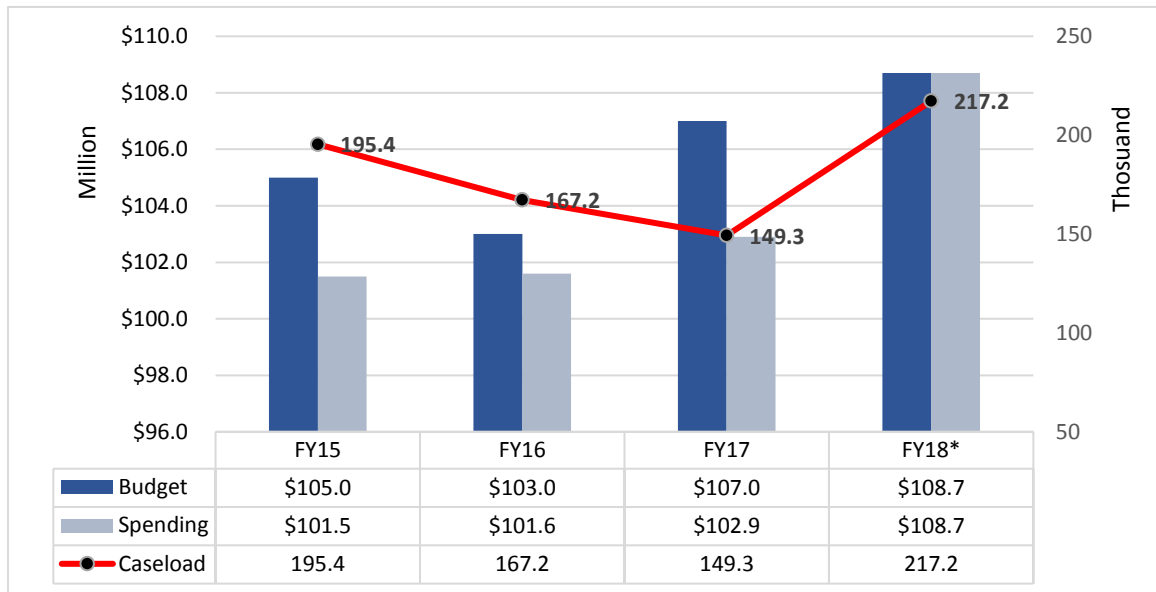
⁴ Id.

⁵ Supra 2.

alternate indigent defense providers have spent, on average, \$102 million and \$47.4 million, respectively in the same period.

In the recent budget cycle, the Legal Aid Society requested \$3 million in additional funding for salary increases to retain talented attorneys.⁶ According to Tina Luongo, attorney-in-charge for the criminal defense practice at the Legal Aid Society, “for new lawyers saddled with law school debt who are living and working in one of the most expensive cities in the country, the pay is not enough to keep them from leaving public service law.”⁷ But, the Legal Aid Society’s request of additional funding for salary increases was not included in the final budget that the New York City Council adopted for FY19.⁸

Chart A: Budget, Spending, & Caseload for Legal Aid Society FY15-FY18



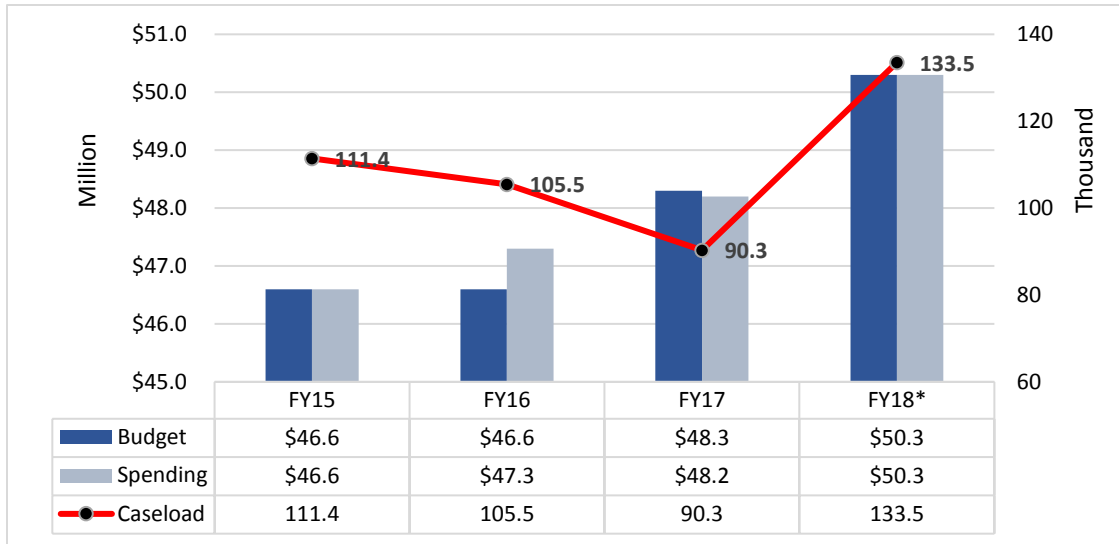
Source: Finance Division, New York City Council
 *Projected Caseload and Spending

⁶ Andrew Denney, NYC Legal Aid Society Says City Should Provide More Funding for Pay Raises (June 29, 2018), New York Law Journal, available at <https://www.law.com/newyorklawjournal/2018/06/29/nyc-legal-aid-society-says-city-should-provide-more-funding-for-pay-raises/>

⁷ Id.

⁸ Id.

Chart B: Budget, Spending, & Caseload for Alternate Providers FY15-FY18



Source: Finance Division, New York City Council
 *Projected Caseload and Spending

III. District Attorney’s Offices

The city’s five district attorney’s Offices, one in each borough, are primarily funded with city tax levy appropriations.⁹ “There is no requirement in city or state law that funding be allocated to district attorneys based on any type of formula involving factors such as borough population, reported crime, arrest levels, or any other quantitative measure. Instead, the respective levels of city tax levy appropriations that support the operations of the five district attorney’s offices are determined by the Mayor and New York City Council through the budget process.”¹⁰ City funding comprised over 90 percent of FY19 budget of the district attorney’s offices.¹¹ The remaining funds came from the state, federal, intra-city funding along with private, non-governmental funding, with the latter often in the form of monies from assets forfeiture.¹²

⁹ New York City Council, FY19 Preliminary Budget: District Attorneys and Office of Special Narcotics Prosecutor (March 2018), available <https://council.nyc.gov/budget/wp-content/uploads/sites/54/2018/03/FY19-District-Attorneys-and-Office-of-Special-Narcotics-Prosecutor.pdf>

¹⁰ Independent Budget Office, Letter to Councilmember Brad Lander (May 2011), available at <http://www.ibo.nyc.ny.us/iboreports/may162011letterall.pdf>

¹¹ Supra 9.

¹² Id.

In the past several budget cycles, all five district attorneys requested additional funding for pay parity to recruit talented attorneys. The general presumption among the five district attorneys is that the burden of law school debt coupled with the cost of living in the City makes it hard to recruit talented law school graduates from diverse socio-economic backgrounds at a relatively low pay. In response, the City Council included \$5.5 million in additional funding for the city's district attorney's offices in its approved FY19 budget to increase starting salaries and give pay raises to more experienced prosecutors.¹³ Since the adoption of FY19 budget, it is unclear what the increase in starting salary is for entry-level attorneys at all five district attorney's offices.

IV. Salary Disparity

The starting salary for attorneys at the five district attorney's offices and public defender offices that contract with the city differs considerably. Entry-level attorneys at the Brooklyn DA have a starting salary of about \$60,000,¹⁴ the lowest among the city's five district attorney's offices, whereas the starting salary for entry-level attorneys at the Staten Island DA is about \$68,000,¹⁵ which is the highest among the district attorney's offices. See **Chart C**. The starting salary for indigent defense attorneys who have been admitted to the bar falls between the two extremities. For entry-level attorneys at the Legal Aid Society and Brooklyn Defender Services, the starting salary is about \$62,700 and \$61,000, respectively. See **Chart C**. New York County Defender Services increased starting salary for entry-level attorneys from \$62,000 to \$68,000 in September 2018 to remain competitive with local organizations and city agencies.¹⁶ Still, based on available data, there is a significant disparity in starting salary among the five district attorney's

¹³ Supra 6.

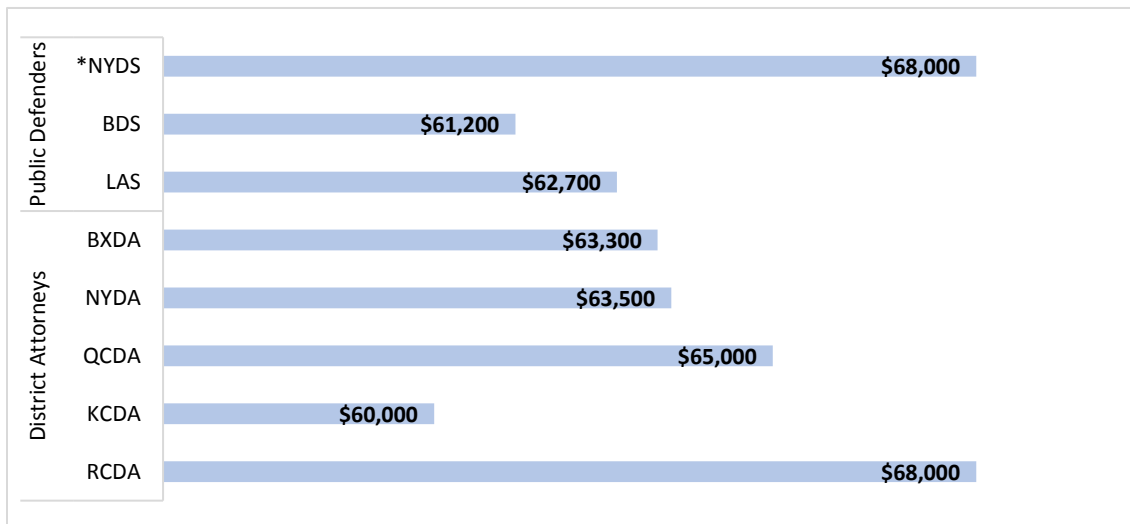
¹⁴ New York City Council Fiscal Year 2019 Executive Budget Hearing Testimony (May 2018), available at [file:///C:/Users/kdennie/Downloads/Hearing%20Testimony%20\(5\).PDF](file:///C:/Users/kdennie/Downloads/Hearing%20Testimony%20(5).PDF)

¹⁵ Id.

¹⁶ Data from New York County Defender Services.

offices and between public defender offices and the district attorney’s offices. Entry-level attorneys at the Brooklyn DA’s Office make about \$8,000 less than their counterpart at the Staten Island DA’s Office, while entry-level attorneys at the Legal Aid Society and Brooklyn Defender Services make about \$5,300 and \$6,800 less, respectively, than entry-level attorneys at the Staten Island DA’s Office.

Chart C: Attorney’s Starting Salary at the DA’s and Public Defender Offices



Source: FY19 Preliminary Budget Hearing; Public Defender Offices
 *Starting salary as of Sept. 2018

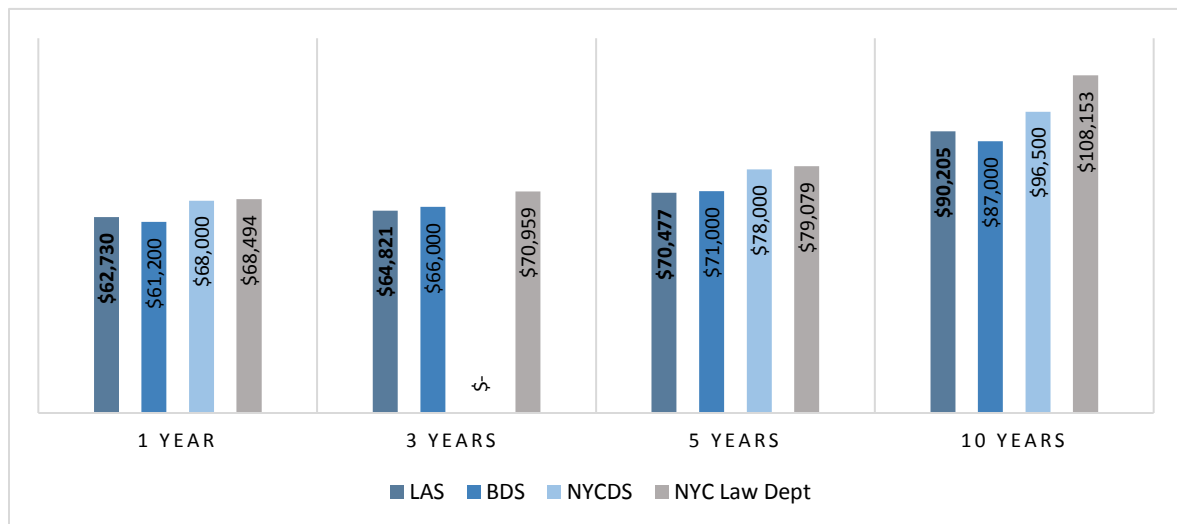
The disparity in salary is even more pronounced when experience is factored in. An attorney at the Manhattan DA’s Office with at least three years of experience makes about \$69,500, given an estimated \$3,000 per year raises in the second and third years, whereas an attorney at the Staten Island DA’s Office with similar years of experience make an average of \$76,000.¹⁷ In other words, an attorney at the Manhattan DA’s Office makes on average \$6,500 less than their counterpart at the Staten Island DA’s Office with the same years of experience. The disparity is greater between attorneys at the public defender offices and the district attorney’s offices. An

¹⁷ New York County District Attorney’s Office, FY18 ADA Salary Parity Request (July 2017).

attorney at the Legal Aid Society with three years of experience makes about \$64,800,¹⁸ which is \$11,200 less than an attorney at the Staten Island DA and \$4,700 less than an attorney at the Manhattan DA with the same years of experience.

The salary for attorneys at the district attorney’s offices and the public defender offices also lags behind their counterparts in city agencies like the Department of Education (DOE) and Law Department. The hiring rate for an agency attorney with at least three years of experience in Administrative Trial Unit at DOE is \$85,000.¹⁹ However, an attorney at the Legal Aid Society and the Manhattan DA with the same years of experience make \$20,200 and \$16,000 less, respectively. Likewise, Law Department starts attorneys at about \$68,500, below the rate offered at the district attorney’s offices and public defender offices, which climbs in the third, fifth, and tenth years to about \$71,000, \$79,000, and \$108,000 respectively. See **Chart D**. In contrast, Brooklyn Defender Services starts attorneys at \$61,000, which climbs to \$66,000 in the third year, \$71,000 in the fifth year, and \$87,000 in the tenth year. See **Chart D**.

Chart D: Salary of Public Defenders and Agency Attorneys



Source: LAS, BDS, NYCDS, and New York City Law Department

¹⁸ Data from Legal Aid Society.

¹⁹ Bronx District Attorney’s Office, Parity Analysis (May 2018).

The disparity between the Law Department and the DA Offices is seen for all employees, not just attorneys. The Law Department median salary, at \$81,320, is higher than any of the city’s district attorney offices, with the exception of Special Narcotics.²⁰ With the exception of Queens, the Law Department employees are also older, and have been with the office longer. The institutional knowledge of “support staff” is easily overlooked, but essential to a high volume legal institution.

However, pay parity within these agencies should not be forgotten. Men make 9% more on average than women at the Law Department, but those internal disparities continue for each of the city’s district attorney offices. However, there are significant differences across the city – men only make 1% more at the Manhattan District Attorney Office, but 19% more in Staten Island and 17% more in Queens.²¹

V. Recruitment and Retention

The city’s district attorneys and public defenders have claimed that the relatively low salary makes it difficult to recruit law school graduates and mid-level career attorneys. The recruitment of newly minted law school graduates has been a particular challenge. According to the Manhattan District Attorney’s Office, the total number of applicants for entry-level position decreased by 45 percent since 2013.²² The office also observed a 28 percent decline in the number of applicants from diverse groups since 2014.²³ In response, Manhattan DA Vance, also citing the cost of living and law school debt, said “[w]e are unfortunately heading down a path whereby the only

²⁰ The median salaries are - Staten Island \$77,355, QNS \$79,665, Kings \$71,140, Manhattan \$78,889, Bronx \$66,961. “Tipping the Scales: Wage and Hiring Inequity in New York City Agencies,” Letitia James Public Advocate for the City of New York

²¹ Id.

²² Supra 17.

²³ Id.

individuals who can accept an ADA position within our office are those of privileged backgrounds and therefore, the applicant pool is less likely to reflect the population it is seeking to serve.”²⁴

Similarly, recruiting mid-level career attorneys to fill vacancies is difficult for some offices. According to Staten Island District’s Office, “mid-level recruits are almost impossible to find and those positions remain vacant for considerable period of time, [which] has lasting repercussions on professional development losses.”²⁵

The retention of experienced attorneys is also an issue the district attorneys and public defenders have raised. According to the Bronx District Attorney’s Office, about 67 percent of its attorneys have less than 3 years of experience, whereas 12 percent have between 6 and 16 years of experience.²⁶ Likewise, about 64 percent of attorneys at Staten Island District Attorney’s Office have no more than 5 years of experience, while 24 percent have between 6 years and 15 years of experience.²⁷ For many defender offices, the situation is similar – at Brooklyn Defender Services, 67% of their attorneys leave within the first six years at the office.²⁸

For attorneys at the Legal Aid Society, however, the retention rate is 82.2% in the 3rd year from hire, 74.5% in the 5th year, and 52.3% in the 10th year. See **Chart E**. This rate is remarkably high compared to New York City Law Department’s. For attorneys at the city’s Law Department, the retention rate is 59.3% in the 3rd year from hire, 26.2% in the 5th year, and 30% in the 10th year. See **Chart E**. Despite higher salary offering than Legal Aid Society, the city’s Law Department’s retention rate is comparatively low. This suggests that pay parity may not be the magic bullet to retain experienced attorneys at the district attorney’s offices and public defender offices.

²⁴ Andrew Denney “NYC DAs Agree: Better Pay Is Needed To Attract, Retain Top Talent” New York Law Journal May 24, 2017

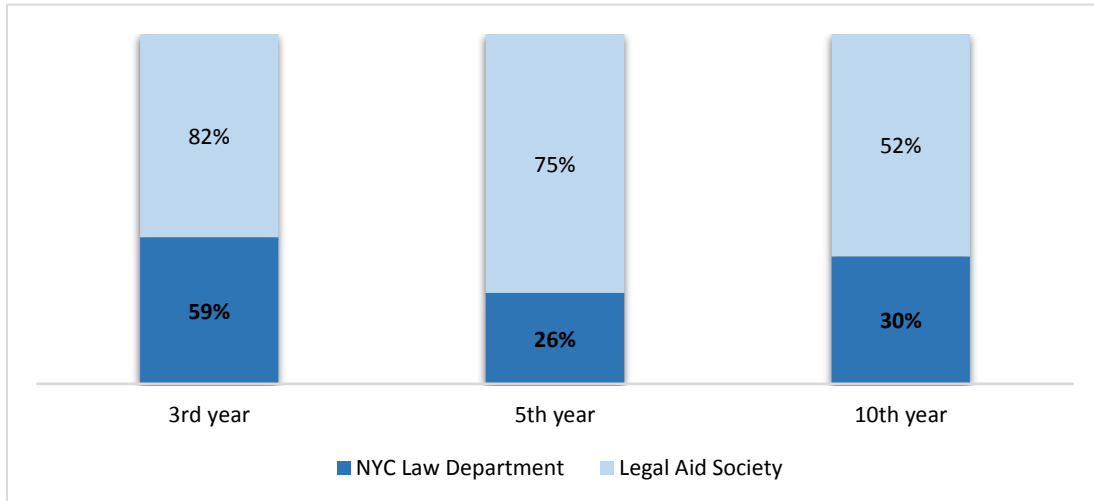
²⁵ Supra 14.

²⁶ Supra 19.

²⁷ Supra 14

²⁸ Correspondence with Lisa Schribersdorf, Executive Director, Brooklyn Defender Services, October 22, 2018

Chart E: Retention Rates for Legal Aid Society and City Law Department 2007-2018



Source: Legal Aid Society and New York City Law Department

VI. Resource Disparity

However, salaries are only part of any meaningful discussion on how DA Offices and indigent service providers effectively service their communities and retain staff; raising salaries to the level of other city attorneys does not fix disparities in resources. One of the primary rationales for pay parity is to keep attorneys at their respective offices longer, creating a higher level of practice in criminal courtrooms across the city. But even with pay parity, without resource parity the adversarial process will be skewed to one side.

Comparisons between DA Offices and indigent service providers are difficult because they obviously have different functions that the other does not match. DAs need to fund cases where a complaint is never written, so no assigned defense counsel is necessary. They also offer services for witnesses, appellate attorneys, and wrongful conviction units that indigent service providers do not offer. On the other hand, the collateral consequences of an arrest necessitate defense attorneys

to fund employment, immigration, and civil attorneys, as well as social workers that DA Offices do not.

One of the clearest disparities is between investigative and expert assistance. Prosecutors have the NYPD to investigate cases and find witnesses and crime labs to assess forensics, medical records, DNA, and supply expert witnesses, all for free. Defense attorneys, on the other hand, have neither investigative nor expert assistance readily available – instead they have to use scarce resources to supply either. As the Committee explored in depth last session, the haphazard and late discovery process used throughout the city exacerbates the issue by not sharing the evidentiary resources of DA Offices until long into the case; to cover the constitutional minimum for their clients, without discovery public defenders must invest heavily in investigatory resources to assess an offer that will be revoked post-indictment. They need to subpoena evidence, canvass for witnesses, find surveillance – using tremendous amounts of scarce funding all of the things that DA Offices essentially are given for free. In the Legal Aid Society’s FY19 forecast, \$27.6 million was spent on healthcare, and \$11.8 million on office space.²⁹ Even for smaller offices, the costs are substantial. For example, for FY 2017, the Bronx Defender’s Criminal Defense Practice spent \$1,062,129 on rent, \$1.9 million on healthcare, \$635,000 for investigators, and \$103,551 on case experts.³⁰

Another clear disparity are overhead costs. DA Offices do not pay rent, or health insurance costs for their employees. However, indigent service providers have to pay both, an especially expensive proposition for prime real estate near the Manhattan and Brooklyn courthouses especially.

²⁹ Correspondence with Tino Luongo, Chief Defender, The Legal Aid Society, October 19, 2018

³⁰ Correspondence with Justine Olderman, Executive Director of the Bronx Defenders, October 19, 2018.

The expansion of treatment courts and diversion programs also detrimentally effects resource parity. The aforementioned FY19 Council budget included \$15.3 million in additional funding for district attorney Offices, with \$5.5 earmarked for increasing the pay of line prosecutors. Additional funds also went to specific programs within DA Offices, including the OAR (Overdose Avoidance and Recovery), and CLEAR (Collaborative Legal Engagement Assistance Response), and the expansion of human trafficking units in the Bronx and Queens DA Offices. In addition, some DA Offices use asset-forfeiture to fund even more programming.

Each expansion of a program in a District Attorney Office creates costs for indigent-defense providers. OAR creates numerous additional court dates, human trafficking units creates more, better-investigated, cases. The Bronx DA's new bureau that specializes in cases against justice-involved individuals on Rikers Island similarly creates more cases. While some of that funding should result in more investigation before a complaint is written, the cases that are ultimately brought will be better documented and more zealously prosecuted. That necessitates correspondingly zealous defense, with its own extensive investigation and allocation of resources. But the Council's one-sided funding doesn't address that disparity.

VII. Legislation

A. Int. 1103-2018

This bill would create a temporary task force to analyze the starting and longitudinal salaries of the city's public defenders and assistant district attorneys, particularly in comparison to salaries of attorneys at other city agencies like the Law Department. The task force would also address District Attorney's Offices and indigent defense provider retention rates, funding, infrastructure, and caseloads. This bill would take effect 180 days after becoming law.

Int. No. 1103

By Council Member Lancman

A Local Law in relation to establishing a temporary task force on pay parity for public defenders and assistant district attorneys with city agency attorneys

Be it enacted by the Council as follows:

Section 1. Temporary task force on pay parity for public defenders and assistant district attorneys with other city agency attorneys.

a. The coordinator of criminal justice as defined in section 13 of the New York city charter, or such other person as the mayor may designate, shall establish and implement a temporary task force to address issues related to the pay parity of the city's assistant district attorney's and public defenders, with that of attorneys working for other city agencies, including the department of education, the department of correction, and the law department.

b. The task force shall consist of no less than 12 members as follows:

(1) Eight members appointed by the mayor, chosen from individuals representing relevant city agencies, provider organizations, and advocacy groups; and

(2) Four members appointed by the speaker of the council, chosen from individuals representing provider organizations and advocacy groups.

c. In addition the mayor, or the coordinator of criminal justice, shall invite the governor of the state of New York, or the governor's designee, to appoint a representative to the task force.

d. Membership on the task force shall not constitute the holding of a public office, and members of the task force shall not be required to take or file oaths of office before serving on the task force. All members of the task force shall serve without compensation.

e. The task force shall meet at least four times per year.

f. The task force shall issue recommendations to the coordinator of criminal justice, or such other person as the mayor may designate, and the mayor, and council no later than 12 months after the final member of the task force is appointed. Such report shall, to the extent practicable, include but not be limited to the following information regarding pay parity between the city attorneys:

1. An analysis of the salaries – both starting and longitudinal - between assistant district attorney's, public defenders, and attorneys in city agencies, including the department of education, the department of correction, and the law department.

2. An analysis of the organizational structure, budgetary constraints and hiring and retention policies of the city's district attorney offices and indigent defense providers, including but not limited to: (i) the unique retention issues for the agencies and nonprofits employing criminal court attorneys, including an analysis of caseloads (differentiated by felonies and misdemeanors); (ii) the funding streams for district attorney offices and indigent defense providers including state and federal contributions; (iii) attrition rates of assistant district attorney's and public defenders, within the first three to five years of practice; (iv) how office infrastructure, organizational culture, and court delay effect retention rates; (v) how other cities have approached the issue of pay parity; and (vi) how the city can work with providers to improve retention rates; and

3. Any other recommendations to assist in supporting and sustaining the city's assistant district attorneys and public defenders, including, but not limited to potential legislative reforms.

f. Following the publication of the initial report, the task force shall continue to meet at least four times a year and shall make supplemental recommendations, as needed, to the coordinator of criminal justice, or such other person as the mayor may designate. Such

coordinator or other person shall publish supplemental annual reports, as needed, updating the mayor and council on any progress in the implementation of the recommendations contained in the initial report.

g. The task force shall cease to exist four years after the publication of its initial report.

§2. This local law takes effect immediately.

MKW
LS 7467