



STATE OF NEW YORK
OFFICE OF INDIGENT LEGAL SERVICES

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

July 13, 2016

Robert Mujica
 Director
 NYS Division of the Budget

Re: Plan for allocation of \$800,000 appropriation in FY 2016-17 ILS Aid to Localities Budget

Dear Mr. Mujica,

The final FY 2016-2017 state budget for the Office of Indigent Legal Services ("Office" or "ILS") includes an Aid to Localities appropriation of \$800,000 "[f]or services and expenses related to the implementation of the settlement agreement in the matter of Hurrell-Harring, et al, v. State of New York in Ontario, Onondaga, Schuyler, Suffolk and/or Washington counties ["Settlement Counties"], as deemed necessary and pursuant to a plan developed by office of indigent legal services and approved by the director of the budget." (See attached FY 2016-17 ILS Aid to Localities Budget).

The Office today submits this plan to the Director of Budget to allocate so much of the \$800,000 appropriation in the FY 2016-17 ILS Aid to Localities Budget as is necessary to continue the provision of counsel at arraignment in the four Settlement Counties that both (1) entered into the Settlement and (2) participated in the Office's 2013 three-year Counsel at First Appearance Demonstration Grant ("Counsel at First Appearance Grant").¹

Specifically, we propose the allocation of \$726,283, in the following amounts to the following counties:

Ontario County	\$250,000
Onondaga County	\$196,000
Schuyler County	\$31,283
Suffolk County	\$249,000

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¹ With the exception of Washington County, the four Settlement Counties - Ontario, Onondaga, Schuyler and Suffolk – participated in the Office's 2013 Counsel at First Appearance Demonstration Grant. These four counties received awards in the following amounts: Ontario County (\$750,000 over three years; or \$250,000/yr.); Onondaga County (\$588,000 over three years; or \$196,000/yr.); Schuyler County (\$93,849 over three years; or \$31,283/yr.) and Suffolk County (\$747,000 over three years; or \$249,000/yr.). The total award for these four counties was \$2,178,849 over three years; or \$726,283/yr.

As we understand it, the \$800,000 appropriation is intended to ensure that the Settlement Counties participating in the 2013 Counsel at First Appearance Grant continue to receive the same level of funding as was awarded them under that grant. Indeed, the continuation of this grant funding was a critical assumption made by this Office in the written plan it submitted on November 12, 2015 to implement the counsel at arraignment component of the *Hurrell-Harring* Settlement.² Without the continuation of this funding, the State is at risk of failing to fulfill its obligation under the Settlement to provide representation at arraignment for each criminal defendant within the Settlement Counties who is eligible for publicly funded legal representation.

This assurance of continued funding in the FY 2016-17 ILS Aid to Localities Budget is necessary because the initial three-year Counsel at First Appearance Grant will end during this fiscal year, and a second three-year Counsel at First Appearance Grant will be re-issued. However, as with the issuance (or re-issuance) of any competitive grant, there is no assurance that applicant counties will receive awards in the same amount as they received in the initial grant, or indeed whether they will receive any award at all. It is expected that most if not all of the 57 eligible counties will apply for this second Counsel at First Appearance Grant, as compared with the 25 counties that have participated in the first grant, which presents a very significant risk that the level of funding for the 25 counties – including the four Settlement Counties - will decrease for this second grant.

We propose the following for the allocation of the \$800,000 appropriation:

- That \$726,283 of the \$800,000 appropriation, which amount represents the entirety of the awards made to the four Settlement Counties participating in the first Counsel at First Appearance Grant (one year of the three year funding), be allocated directly to the four counties in the same amount as was awarded under the first Grant. As noted above, these amounts are as follows: Ontario (\$250,000); Onondaga County (\$196,000); Schuyler County (\$31,283) and Suffolk County (\$249,000). By allocating the funding directly to the Settlement Counties, these Counties would be assured of receiving the level of funding needed to satisfy the State's obligation to provide counsel at arraignment for each criminal defendant within the Settlement Counties who is eligible for publicly funded legal representation.
- We do not favor the alternative – requiring the Settlement Counties to submit a proposal and compete with up to 52 other counties in the second Counsel at First Appearance Grant program – because it introduces a level of uncertainty that could jeopardize the State's ability to fulfill its obligation to provide counsel at every arraignment in the Settlement Counties. Section III of the Settlement sets the date by which the State must fulfil this obligation - November 11, 2016.³ Requiring these Settlement Counties to engage in an RFP process that will very likely extend well beyond November 11, 2016 would create an unnecessary and wholly avoidable risk of noncompliance.⁴

² *“Implementing the Counsel at Arraignment Obligations in the Hurrell-Harring v. The State of New York Settlement: Final Plan,”* [https://www.ils.ny.gov/files/Hurrell-Harring/Counsel At Arraignment/Hurrell-Harring Final Counsel At Arraignment Plan 111215.pdf](https://www.ils.ny.gov/files/Hurrell-Harring/Counsel%20At%20Arraignment/Hurrell-Harring%20Final%20Counsel%20At%20Arraignment%20Plan%20111215.pdf) at pages 4 (overview), 9 (Onondaga), 18 (Ontario), 25 (Schuyler), 30 (Suffolk).

³ Section III requires the State to “ensure, within 20 months of the Effective Date and continuing thereafter, that each criminal defendant within the Five Counties who is eligible for publicly funded legal representation . . . is represented by counsel in person at his or her Arraignment.”

⁴ Requiring the four Settlement Counties to submit a proposal and compete with the 52 other counties also creates an anomaly in that only four of the five Settlement Counties would be participating. The final written plan submitted by this Office in November, 2015 provided for countywide coverage of arraignments in Washington County, without an assumption of continued grant funding, since Washington County did not participate in the first grant.

- Finally, a defining attribute of a competitive grants program is fairness. There is a serious risk that including the four Settlement Counties in the second CAFA grant process would introduce an unacceptable element of unfairness in the application and review process. At a minimum, the non-Hurrell-Harring counties would certainly perceive that they are at a competitive disadvantage, knowing that they are competing against counties that have the force of the lawsuit settlement and guarantee of state funding in their favor.⁵

Access to the appropriated funding is necessary. We therefore request that you approve our plan for the expenditure of \$726,283 of the \$800,000 appropriation, as explained above.

Yours truly,



William J. Leahy
Director

cc: Sandi Toll
First Assistant Counsel to the Governor

⁵ The ILS Office and Board have undertaken extraordinary measures to give the non-Hurrell-Harring counties a chance to begin to comply with their fundamental legal obligation to provide counsel at a defendant's first court appearance, as required by the Court of Appeals in *Hurrell-Harring v. The State of New York*, 15 NY 3d 8, (2010). Specifically, in April, 2016, the Office recommended and the Board approved shifting \$1.7 million annually that had been reserved for two other high priority quality improvement RFPs, into the funding available for the second Counsel at First Appearance grant. Due to the Board's action, the RFP will be funded at the level of \$5.7 million rather than \$4 million annually. But keeping in mind that the \$4 million annually in the first Counsel at First Appearance grant was only enough to provide partial counsel at arraignment coverage in a minority of counties, it is obvious that the \$5.7 million falls far short of what is needed for counties to comply with the law as authoritatively interpreted by the Court of Appeals in 2010.

OFFICE OF INDIGENT LEGAL SERVICES

AID TO LOCALITIES 2016-17

1 For payment according to the following schedule:

2	APPROPRIATIONS	REAPPROPRIATIONS
3 Special Revenue Funds - Other	96,200,000	181,959,000
4	-----	-----
5 All Funds	96,200,000	181,959,000
6	=====	=====

7 SCHEDULE

8 INDIGENT LEGAL SERVICES PROGRAM	96,200,000
9	-----

- 10 Special Revenue Funds - Other
- 11 Indigent Legal Services Fund
- 12 Indigent Legal Services Account - 23551

13 For payments to counties and the city of New
 14 York related to indigent legal services
 15 pursuant to section 98-b of the state
 16 finance law and sections 832 and 833 of
 17 the executive law (55502) 81,000,000

18 For services and expenses related to the
 19 implementation of the settlement agreement
 20 in the matter of Hurrell-Harring, et al,
 21 v. State of New York in accordance with
 22 paragraphs IX(C), V(C), and IX (D) of such
 23 settlement agreement.

24 Of the amounts appropriated herein,
 25 \$2,000,000 shall be made available for the
 26 purposes of accomplishing the objectives
 27 set forth in paragraph III(A)(1) of such
 28 settlement agreement in Ontario, Onondaga,
 29 Schuyler, Suffolk and Washington counties;
 30 Provided further that, of the amounts
 31 appropriated herein, \$2,000,000 shall be
 32 made available for the purposes of accom-
 33 plishing the objectives set forth in para-
 34 graph V(A) of such settlement agreement in
 35 Ontario, Onondaga, Schuyler, Suffolk and
 36 Washington counties; Provided further
 37 that, of the amounts appropriated herein,
 38 \$10,400,000 shall be made available for
 39 the purposes of accomplishing the objec-
 40 tives set forth in paragraph IV(C) of such
 41 settlement agreement in Ontario, Onondaga,
 42 Schuyler, Suffolk and Washington counties.
 43 Any funds received by a county under such
 44 appropriation shall be used to supplement
 45 and not supplant any local funds that the

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OFFICE OF INDIGENT LEGAL SERVICES

AID TO LOCALITIES 2016-17

1	county currently spends for the provision	
2	of counsel, expert, investigative and any	
3	other services pursuant to county law	
4	article 18-B (55504)	14,400,000
5	For services and expenses related to the	
6	implementation of the settlement agreement	
7	in the matter of Hurrell-Harring, et al,	
8	v. State of New York in Ontario, Onondaga,	
9	Schuyler, Suffolk and/or Washington coun-	
10	ties, as deemed necessary and pursuant to	
11	a plan developed by office of indigent	
12	legal services and approved by the direc-	
13	tor of the budget	800,000
14		-----