



# **Criteria and Procedures for Determining Assigned Counsel Eligibility**

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## **Report on Implementation in the *Hurrell-Harring* Counties**

April 4, 2022



Submitted by the New York State Office of Indigent Legal Services in accordance with Section VI(C) of the *Hurrell-Harring v. The State of New York* Stipulation and Order of Settlement

**NEW YORK STATE  
OFFICE OF INDIGENT LEGAL SERVICES**

**Criteria and Procedures for Determining Financial Eligibility for Assigned Counsel:**

**A Report on Implementation in the *Hurrell-Harring* Counties**

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## INTRODUCTION

In April 2016, the New York State Office of Indigent Legal Services (ILS) issued *Criteria and Procedures for Determining Assigned Counsel Eligibility* (“Criteria and Procedures”) pursuant to the *Hurrell-Harring v. State of New York* Stipulation and Order of Settlement (“*Hurrell-Harring* Settlement” or “Settlement”). On February 16, 2021, ILS revised the Criteria and Procedures, issuing *Standards for Determining Financial Eligibility for Assigned Counsel* (“Eligibility Standards”) which build upon and supersede the original text and apply to both criminal and family law cases.<sup>1</sup> The Eligibility Standards now include an added presumption for parents or legally responsible persons in Family Court Act Article 10 cases but for criminal cases are substantively unchanged.

Focusing specifically on financial eligibility for assignment of counsel in criminal cases, Section VI(C) of the Settlement requires ILS to submit annual reports assessing the criteria and procedures being used in the five Settlement counties “to determine whether a person is eligible to receive [m]andated [r]epresentation” and whether the criteria and procedures being used are consistent with those set forth in the Eligibility Standards.

ILS submits this sixth report in accordance with the Settlement. For this report, we provide a brief overview of the processes in each of the five *Hurrell-Harring* counties for deciding assigned counsel eligibility, highlighting any changes made in 2021. The report will otherwise focus on the demonstrated and ongoing commitment of every provider, in the face of unprecedented pandemic-related challenges that carried over from 2020 and in some ways intensified in 2021, in ensuring that eligible individuals had timely access to counsel. The report will also address other occurrences during this reporting period that impacted the eligibility determination process, namely, the extension of the Eligibility Standards to family law cases and the recent legislative enactment of Criminal Procedure Law (CPL) § 380.55(2) streamlining the assignment of counsel on appeal.

In preparation of this report, we once again relied on conversations held between ILS staff and the providers in each county, our review of the 2021 data each provider sent to ILS, and written and/or telephonic interviews with providers and their staff members involved in the eligibility determination process. Because of the ongoing pandemic, ILS did not conduct any in-person court observations in 2021.

Below is a summary of the provider interviews conducted in preparation of this report:

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<sup>1</sup> The Standards were issued pursuant to Executive Law § 832(3)(c) and approved by the ILS Board during its December 4, 2020 meeting. The Standards can be accessed here: <https://www.ils.ny.gov/files/Eligibility%20Standards%20Final%20021621.pdf>.

## *Interviews*

In January and February 2022, ILS staff conducted written and/or telephonic interviews of the administrators and support staff of providers involved in determining assigned counsel eligibility in the five *Hurrell-Harring* counties, as follows:

**Onondaga ACP:** Executive Director Kathleen M. Dougherty

**Ontario PD:** Public Defender Leanne Lapp

**Schuyler/Tompkins Regional ACP:** Supervising Attorney Lance N. Salisbury

**Schuyler PD:** Public Defender Valerie Gardner

**Suffolk ACP:** Deputy Administrator Stephanie McCall

**Suffolk LAS:** Lead Investigator Brennan Holmes and Legal Director Agnes Neldner

**Washington ACP:** Administrator Marie DeCarlo-Drost

## **IMPLEMENTATION OF THE ELIGIBILITY STANDARDS IN THE *HURRELL-HARRING* COUNTIES**

For the sixth year since implementation of the Eligibility Standards, each of the five *Hurrell-Harring* counties has screened for and determined eligibility for assignment of counsel in criminal cases consistent with the Eligibility Standards and as outlined in the Settlement. With a few limited exceptions, as demonstrated below, the processes and mechanisms each county employed during this reporting period remained unchanged since the 2021 report.

### **ONONDAGA COUNTY**

As the primary provider of mandated representation in Onondaga County, the Onondaga County Bar Association's Assigned Counsel Program (ACP) is responsible for screening applicants and making assigned counsel eligibility recommendations for Syracuse City Court, the Centralized Arraignment Part (CAP), and the county's 28 Town and Village courts ("justice courts").

#### **A. Process for deciding assigned counsel eligibility**

To facilitate its screening responsibilities, the ACP relies on the collection of information and an initial assessment of eligibility by arraignment attorneys and then reviews each application to make a final recommendation. All collected client information is entered digitally into the ACP's case management and electronic vouchering system IntelLinx on the day the person is arraigned. The ACP staff reviews the information to ascertain whether the applicant qualifies for assigned counsel, or whether additional information should be requested from the applicant before a final eligibility determination is made. The ACP then either (i) informs the assigned attorney that the applicant is eligible for assigned counsel and the attorney should continue on the case; (ii) sends

the attorney a “pending” notice identifying missing information, and asking the attorney to obtain and provide the missing information; or (iii) sends the attorney an “ineligible” notice stating that the applicant is not eligible for assigned counsel and the attorney must submit a motion to withdraw as counsel to the court. In the latter cases, the attorney must also provide an ineligible notice to the applicant as well as a written notice provided by the ACP (i.e., the “Notice of Right to Seek Review”) of the right to request reconsideration or to appeal the denial, or to do both. If the court denies the motion to withdraw, the attorney is ordered to continue to represent the applicant (a/k/a, a “judge-ordered” assignment). If the motion is granted, the applicant is instructed to retain counsel.

Eligibility determinations are generally made within a day of the ACP’s receipt of the application, or within three days if there is missing information or the applicant’s information was received on a Friday. Because attorneys are strongly encouraged to enter all necessary information at the time of arraignment, IntelLinx has improved the turnaround time for applications.

Where appropriate, the ACP assigns counsel provisionally for individuals seeking counsel pre-charge. Otherwise, assignment of counsel in Onondaga County is made depending on the court in which the individual is arraigned. Regardless of where a person was arraigned, every assigned attorney is notified of the assignment by the court, the ACP, or both.

The following processes are consistent with those detailed in previous reports:

*i) Town and Village Courts*

An ACP attorney provides representation and retains the case as the provisionally assigned attorney unless the person has a private attorney or has another assigned attorney on a pending case. The arraigning attorney then obtains the financial information needed for an eligibility assessment and submits it via IntelLinx for the ACP’s review and recommendation.

*ii) Syracuse City Court (for in-custody individuals)*

For in-custody arraignments,<sup>2</sup> the ACP assigns two or three attorneys to provide representation at arraignment. During normal court operations, starting at 7:00 a.m., the arraignment attorneys meet with people at the jail, where they interview them and collect case and financial information on iPads provided by the ACP. In court, the attorney informs the judge whether it appears the person qualifies for counsel, and if so, the judge provisionally assigns an attorney to

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<sup>2</sup> This is also considered the morning portion of the county’s CAP, which means that people arrested after-hours throughout Onondaga County and detained prior to arraignment are arraigned in this session, not just individuals arrested in the City of Syracuse.

represent them. The arraignment attorney then enters the person's information into IntelLinx for the ACP's review. In 2021, due to the pandemic and a transport deputy staffing shortage, the in-custody arraignments were conducted virtually, and attorneys had to adjust their practice accordingly. Still, they were able to interview and collect relevant information prior to the virtual appearance via a confidential phone line.

**iii) *Syracuse City Court (for out-of-custody individuals)***

For out-of-custody individuals, prior to the pandemic an ACP office clerk sat at a desk outside the entrance to the arraignment part in City Court and met with individuals requesting to have an attorney assigned to their case. The clerk collected their information on an iPad or laptop and entered it into IntelLinx. The arraigning attorneys reviewed the information and informed the judge whether the individuals appeared to qualify for assignment of counsel. However, this practice changed slightly due to the pandemic when appearance ticket arraignments were administratively adjourned for long periods. Since the court resumed in-person appearance ticket arraignments in late July 2021, there have been fewer arraignments than prior to the pandemic and the ACP realized that the on-site presence of a clerk is not currently needed. The information collection and input are instead handled by the arraigning attorneys. The ACP will monitor the need to revert to the previous practice of an on-site clerk.

The judge provisionally assigns an attorney to represent those deemed eligible. The arraigning attorney then enters the case assignment information into IntelLinx for the ACP to review.

**iv) *Centralized Arraignment Part***

Individuals who are arraigned in the CAP are all in custody, except for those who are brought in by outside agencies, such as the State Police, to be arraigned during this evening session. The ACP generally assigns two attorneys to cover arraignments in the CAP. During normal court operations, starting at 4:00 p.m., attorneys conduct interviews at the jail and collect case and financial information on iPads provided by the ACP. The individuals are then transported to the Public Safety Building next door to the jail, where the attorneys represent them at arraignment. Unless the case is disposed of at arraignment, the judge provisionally assigns an attorney. The arraignment attorneys then enter the collected information into IntelLinx for the ACP's review and final eligibility recommendation. Like the morning session of Syracuse City Court, the CAP custodial arraignments remained virtual throughout 2021. Prior to this virtual proceeding, attorneys most frequently met clients via a secure phone line but sometimes went in-person to the jail to gather necessary information.

## B. Data

ILS Eligibility Standard XVI requires the collection, maintenance, and reporting of data pertaining to the assigned counsel eligibility process. Data received from the ACP shows that between January 1, 2021 and December 31, 2021, a total of 10,327 individuals applied for assigned counsel, of which 9,565 applications were processed in 2021.<sup>3</sup> Of those:

- ❖ 9,253 total applicants were deemed eligible.
  - 9,248 applicants were deemed eligible by the ACP.
  - 5 applicants successfully appealed and were deemed eligible by a judge.<sup>4</sup>
- ❖ 174 applicants were deemed ineligible.<sup>5</sup>

Of the 174 applicants deemed ineligible, the ACP reported that approximately 12 were for a non-financial reason, such as where the applicant's only charge is a violation for which there is no statutory right to assigned counsel. This means that, of the 9,565 applicants processed, approximately 162 (or 1.7%) were deemed financially ineligible for assigned counsel.

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<sup>3</sup> The ACP reports the number of applications that are "pending" (225 at the close of 2021). These are cases where the ACP required additional information prior to deciding eligibility. Because we assume that each of these pending cases is subsequently moved into the eligible or ineligible category, they are included in the overall total number of applications but not in the detailed breakdown of the numbers in this report. Also included in the total number of applications but not in the detailed breakdown are the following categories of applicants who applied but for whom the ACP did not make an eligible, ineligible, or pending determination: applicants who retained an attorney (105); applicants whose cases were disposed of at arraignment (428); applicants whose cases were removed to Family Court (2); and persons whose applications the ACP deemed "undetermined" because, for instance, the judge made the assignment pre-arraignment and the financial information was not yet collected (2).

<sup>4</sup> The ACP reported 33 "judge orders to continue" in 2021. This number reflects all instances when a judge orders an attorney to continue on a case, which may happen for reasons which are not always eligibility related. For example, if a case is reassigned to another attorney, a judge might issue an order to continue. Historically, when the ACP's eligibility screening process was overly rigid and burdensome, panel attorneys frequently relied on judge orders to overrule the ACP's ineligibility determination, to circumvent the ACP's eligibility screening when clients were seemingly eligible, or both. Because of the ACP's consistent and fair application of the Eligibility Standards and uniform screening process, attorneys no longer need to rely on judge orders, and the ACP has ensured this is no longer the mechanism used in the majority of cases. For purposes of the data in this report, we included the 5 "judge orders to continue" that involved a judge overruling the ACP's ineligibility determination and assigning counsel.

<sup>5</sup> This includes 11 people who appealed to a judge after the ACP's ineligibility determination where the judge affirmed the ACP's decision.

## ONTARIO COUNTY

The Ontario County Public Defender's Office (PD Office) is responsible for screening and making recommendations about assigned counsel eligibility in criminal cases in Ontario County Court, Geneva and Canandaigua City Courts, and the county's 17 Town and Village courts ("justice courts").

### **A. Process for deciding assigned counsel eligibility**

Ontario County continues to be in compliance with the Eligibility Standards when screening clients with criminal cases. Through its established processes, the PD Office has long ensured that people are screened for assigned counsel eligibility either at, in advance of, or immediately after their arraignment. Except for a minor drafting modification to the assigned counsel application, the processes for determining eligibility have remained virtually unchanged since the implementation of the 2016 Criteria and Procedures, though, as reported previously, the pandemic's effect on criminal justice system operations has required flexibility.

For most of 2021, Ontario County had returned to in-person arraignments and PD Office attorneys were able to rely on previously established systems for eligibility screening and assignment. Even for the few months during which arraignments were conducted virtually, PD Office procedures allowed for attorneys to adjust their practice to account for virtual communication.

Defense attorneys appearing at arraignments screen for assigned counsel eligibility and notify the judge if the person is eligible, thereby enabling the judge to assign counsel at that point. If they are unable to perform the screening in advance of the arraignment, the attorney instructs applicants to contact the PD Office so they can be interviewed either by phone or in person. In Ontario County's CAP, applicants are almost always screened prior to arraignment. Individuals who are already represented by the PD Office on another case unrelated to the charge for which they are being arraigned are automatically assigned counsel on the new case. For individuals charged via an appearance ticket, the PD Office receives notice from the courts and contacts the charged individuals to be screened for eligibility prior to their scheduled court appearance. The office also screens and assigns counsel at the pre-charge stage of a case when requested.

Though data reported to ILS shows there have not been instances in which a person was not represented at arraignment ("missed arraignments") since the 2018 implementation of the CAP,<sup>6</sup> the PD Office staff continue to check the jail logs six days weekly to identify any missed

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<sup>6</sup> See *Implementing the Counsel at Arraignment Obligations in the Hurrell-Harring v. The State of New York Settlement*, 2019 Update (p. 7), 2020 Update (p.7), and 2021 Update (p.6) accessible here: <https://www.ils.ny.gov/node/57/hurrell-harring-settlement-plans-and-reports>.



arraignments so that they may conduct interviews to both determine eligibility for assigned counsel and ascertain if there is a need to immediately calendar the case. Should an individual be arraigned without counsel and released, judges have typically advised them to contact the PD Office to apply.

Office staff members review and decide most applications on the day of receipt, unless the application raises issues requiring consultation with Chief Defender Leanne Lapp. If a staff member determines that an applicant is ineligible for assignment of counsel or if there is a close call, Ms. Lapp will review for further assessment of whether the applicant can afford to pay for counsel. If deemed ineligible, applicants are immediately sent written notification of the ineligibility determination and of their right to ask the office to reconsider, appeal to the judge, or do both.

## **B. Data**

For the four quarters of 2021, the PD Office submitted to ILS timely reports in compliance with the data reporting requirements set forth in ILS Eligibility Standard XVI. The data received reveals that, in the aggregate, the office received 2,141 applications for assigned counsel, of which:

- ❖ 2,116 applicants were deemed eligible for counsel,
- ❖ 25 applicants were found to be ineligible, and
- ❖ One individual successfully requested reconsideration or appealed.<sup>7</sup>

This is an ineligibility determination rate of 1.17%. As each decision was made pursuant to a CAP arraignment interview, each person received the benefit of provisionally assigned counsel at the arraignment.

The PD Office also reports that during calendar year 2021, there were no orders issued pursuant to County Law § 722 for payment of assigned counsel fees.

## **SCHUYLER COUNTY**

Since 2016, the Schuyler County Public Defender's Office (PD Office) and the Schuyler/Tompkins Regional Assigned Counsel Program (ACP) have shared responsibility for screening applicants for assigned counsel eligibility in criminal cases in the County Court and the 11 Town and Village Courts ("justice courts"). The PD Office screens for eligibility in non-conflict cases and in cases where a conflict is not immediately apparent. The regional ACP

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<sup>7</sup> This individual initially applied in 2020 and is not included in the total number of 2021 applicants.

handles cases in which the Public Defender's Office is conflicted or otherwise disqualified from providing representation, and screens for assigned counsel eligibility in known conflict cases.

#### **A. Process for deciding assigned counsel eligibility**

##### **i) *The Schuyler County Public Defender's Office***

As with the other four counties, in criminal cases, Schuyler County continues to assess assigned counsel eligibility in total conformity with the Eligibility Standards. Its firmly established processes for screening continued to allow for flexibility in 2021 when changes in court operations vacillated with the ebb and flow of the COVID-19 pandemic. Nonetheless, the processes for deciding eligibility for assigned counsel under normal circumstances have not changed since our last report.

As previously reported, recognizing that Schuyler County is rural and that many applicants lack transportation to travel to the PD's Office to be interviewed, the Office continued to ensure that people have other avenues by which to apply for assigned counsel. As of June 2021, Schuyler County now conducts custodial arraignments in a CAP; appearance ticket arraignments continue to be heard in the justice court of jurisdiction. In late June 2021, all courts returned to in-person arraignments. When courts are operating in-person, PD Office attorneys bring assigned counsel applications to arraignments. Time permitting, the attorney assists with completing the application, which the attorney then returns to the office for processing. If time does not allow, or when courts were operating virtually, the attorney instructs the applicant on how to complete and submit the application. Until an eligibility determination is made, the attorney provisionally represents the applicant.

People in custody are presumed eligible for counsel, but the PD Office staff have them complete the application to collect relevant information and data for purposes other than determining eligibility. Pursuant to their contract with the PD Office, the Tompkins County Office of Opportunities, Alternatives and Resources (O.A.R.) continues to have a staffer meet with those incarcerated at the jail and assist them in filling out the assigned counsel application. If there is a case where an individual was not represented at arraignment, the O.A.R. staffer is prepared to meet with the person immediately and assist them in completing the application.<sup>8</sup> Notably, when the courts were operating virtually due to the pandemic and non-attorney access to the jails was restricted, the O.A.R. staff person communicated with the jailed individuals in writing, through messages passed by designated family members, and by telephone access facilitated by Ms. Gardner which enabled the O.A.R. staffer to assist individuals with their assigned counsel

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<sup>8</sup> Since 2020, Schuyler County has not reported any missed arraignments. *See Implementing the Counsel at Arraignment Obligations in the Hurrell-Harring v. The State of New York Settlement*, 2020 Update (p. 10) and 2021 Update (p. 8), *supra*, n. 6.

applications. Ms. Gardner also worked with jail administrators to obtain special permission for the staffer to visit with jailed clients when needed.

Additionally, individuals with appearance tickets who have not yet had their first court appearance may visit the PD Office to complete the application form. Applications can be obtained from the bulletin board outside the office, on the PD Office's website to which Ms. Gardner recently added an electronically fillable application form, or, by mail or email to the applicant upon request. Completed applications can then be faxed, emailed, mailed, or personally delivered to the office. Once received, staff reviews them and determines eligibility promptly, often within the same day of receipt. For those individuals who are unable to travel to the PD Office, staff will also conduct screening interviews over the telephone.

It is noteworthy that the PD Office screens and, where appropriate, assigns counsel at the pre-charge stage when requested. Having several established methods for requesting counsel proved useful in ensuring continued eligibility screening even as in-person office staff operations were curtailed due to the ongoing pandemic.

#### *ii) The Schuyler/Tompkins Regional ACP*

Once the PD Office identifies a conflict on a case, they immediately refer the case to the Schuyler/Tompkins Regional ACP which then becomes responsible for screening and making a recommendation on assigned counsel eligibility. The ACP uses the same assigned counsel application form as the Schuyler County PD Office and conducts screening of the conflict criminal cases in accordance with the ILS Eligibility Standards.

### **B. Data**

Pursuant to the data collection, maintenance, and reporting requirements set forth in ILS Eligibility Standard XVI, both the PD Office and the ACP submitted 2021 eligibility data to ILS. The data ILS received shows the following:

- ❖ Of the 500 applications considered by the Schuyler County Public Defender's Office:
  - 10 applicants were deemed ineligible
    - 7 of which were for a non-financial reason.
  - There were no requests for reconsideration or an appeal, or for partial payment orders pursuant to County Law § 722-d.
- ❖ Regarding the 136 criminal conflict cases sent to the Schuyler/Tompkins ACP:
  - 1 applicant was deemed ineligible.
  - There were no requests for County Law § 722-d orders.

In total, 636 people applied for assigned counsel, with a 1.7% rate of ineligibility, but as noted, seven applicants were ineligible for non-financial reasons, i.e., ineligible charge, thus only 0.63% were deemed financially ineligible.

## SUFFOLK COUNTY

In Suffolk County, eligibility determinations are made by one of three entities, using different processes and mechanisms, depending on whether a person is arraigned in the District Court or in one of the 10 East End Town and Village Courts (“justice courts”).<sup>9</sup> The Suffolk County Department of Probation and the Suffolk County Assigned Counsel Defender Program conduct screenings in District Court. The Suffolk County Legal Aid Society conducts screenings for the East End justice courts.

### **A. Process for deciding assigned counsel eligibility in Suffolk County**

The processes in District Court and the East End justice courts for determining eligibility remain unchanged from those reported last year.

#### ***1. District Court***

District Court conducts arraignments in two court parts: 1) D-11, where people who are detained after their arrest are arraigned; and 2) the Street Appearance Part (SAP), where people who are issued summonses or appearance tickets following their arrest are arraigned. In D-11, the Suffolk County Legal Aid Society (SCLAS) provides primary representation and attorneys from the Suffolk County Assigned Counsel Defender Program (SCACP) provide conflict representation. In SAP, SCACP attorneys provide primary representation.<sup>10</sup>

##### ***i) D-11***

The Suffolk County Department of Probation (“Probation”) conducts pre-arraignment screenings of in-custody individuals to assess whether they should be released on their own recognizance (“ROR screening”). As part of this assessment, Probation also collects information needed to determine if the person is presumptively eligible for assignment of counsel and records this information on screening documents it shares with the judge.

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<sup>9</sup> Suffolk County’s criminal court system is divided between the District Court, located in Central Islip on the county’s West End, and 10 justice courts on the East End. Criminal cases typically originate either in the District Court – which has criminal court jurisdiction for the five West End towns – or in the East End justice courts. Accordingly, most eligibility decisions are initially determined in District Court or in one of the East End justice courts. The County Court is located on the East End in Riverhead.

<sup>10</sup> If SCLAS has a pre-existing case with a client and is aware of a new matter in SAP, SCLAS will appear for their client’s arraignment.

Probation consistently provides ILS with written monthly reports of the number of individuals screened, and, of these, the number Probation deemed presumptively eligible for assignment of counsel. This data is further discussed below. However, as reported previously, neither Probation nor the court collect and maintain data as to how frequently judges accept or reject recommendations of presumptive eligibility, or the extent to which courts rely on the information provided by Probation. ILS is told that D-11 judges accept Probation's recommendations in most cases, though we were unable to confirm that with court observations this year.

For individuals who are not presumptively eligible for assignment of counsel, the court must determine if further screening is necessary. Generally, judges assign counsel to people who are remanded to pre-trial detention and say they cannot afford to retain counsel. Additionally, judges are more likely to assign counsel to those who are arraigned on felony offenses. ILS has learned that, in rare cases, depending on the judge, individuals are either told to go to SCACP for screening or told to hire an attorney. To the extent that we can, ILS will continue to monitor this latter issue, which is not widespread in the District Court.

*ii) SAP*

Since May 2017, the SCACP has maintained an office on the 4th Floor of the District Court building to screen SAP-arraigned individuals for assigned counsel eligibility. However, because of the COVID-19 pandemic, this office was closed in March 2020 and remained closed throughout 2021. During this period, all eligibility screenings were conducted from the SCACP office across the street from the District Court. Appearance ticket recipients who contacted the court requesting counsel were directed to the SCACP offices to be screened, and would be interviewed in-person upon appointment, or by phone. ILS has confirmed that the process for eligibility screening has otherwise remained consistent and is as follows:

In SAP, at the beginning of the court calendar, judges announce that people have the right to counsel and the right to an assigned counsel if they cannot afford an attorney. The arraigning attorney repeats the announcement at various times during the court proceedings to ensure it is heard by everyone who enters the courtroom. Following arraignment, the judge refers individuals whose cases are adjourned and who request counsel to the SAP Screening Office. Additionally, the arraigning attorney provides written notification to those people, informing them of the time, date, and location of their next court appearance, and informs them to retain an attorney for that next scheduled date. For individuals who cannot afford to pay for an attorney and wish to apply for an assignment of counsel, the notice instructs them to "immediately go to the SAP Screening Office on the 4th floor of the [courthouse] building," and bring with them all the paperwork

pertaining to their cases.<sup>11</sup> During 2021, this notice was modified to direct individuals instead to the SCACP office to be screened.

At the screening office, the eligibility interview is conducted in a confidential setting where an ACP staff member assists each applicant in completing the application form. The application form is reviewed, and the applicant typically receives an immediate decision unless there is a question or close call. A three-part Notice of Financial Eligibility Recommendation, listing the applicant's name, address, docket number of the case, the name of the judge, and recommendation to the judge on the applicant's financial eligibility for assignment of counsel, is created. The original document is retained for the SCACP files, and the remaining two copies are provided to the applicant with instructions that on their next court date they should provide one copy to the court to inform the court that they have been screened and found eligible, and they should retain the second copy for their records. Applicants are informed that on the adjourned date an attorney will be assigned to their case unless the judge disagrees with the eligibility recommendation. Since SCLAS staffs all court appearances in the District Court, a SCLAS attorney is always present at that second court appearance to accept the assignment, unless there is a conflict, in which case the matter is assigned to the SCACP panel attorney assigned to that courtroom.

For those applicants whom the SCACP deems ineligible, a Reason for Ineligibility Recommendation form explaining the reasons that the application has been denied is given to the applicant. Additionally, the screener provides the applicant with a copy of ILS' Sample Right to Seek Review, which the SCACP adopted for its use.

The SAP calendar is rotated weekly to a different court part, and thus each week a different District Court judge presides over the SAP cases. ILS has learned that, despite the administrative closure of the Street Appearance Part for most of 2020 through April 4, 2021, judges in the non-SAP Parts that remained open sent people to the SAP screener to be screened. The SAP resumed appearance ticket proceedings on April 5, 2021.

As discussed last year, Suffolk County continues to monitor the need for increased screening capacity for appearance ticket applicants in District Court, which, in 2021, became more critical with the potential for increased volume as courts continued to resume appearance ticket arraignments. However, to date, there has not been a need to alter the existing processes.

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<sup>11</sup> ILS assisted the SCACP in finalizing this notice. It, and any other document mentioned in this report, can be made available for review upon request.

## **2. East End Justice Courts**

The eligibility determination process is different on the county's East End. As has been the practice for several years, if a person is arraigned and remanded in one of the East End justice courts, the judge may presume the person financially eligible and assign counsel, unless they are already represented by private counsel. If the person is not remanded, the judge generally conducts a brief inquiry into their financial situation, asking, for example, whether or not the person is working. If it is obvious that the person cannot afford to retain counsel, the judge assigns counsel. If the person's inability to pay for counsel is not obvious, the judge instructs them to go to SCLAS to apply for assigned counsel and provides a form containing the directions to SCLAS and a list of the documents to bring.

Applicants who contact SCLAS are interviewed by a trained screener (either in person, or by phone for people who are unable to travel to the SCLAS office) and assessed for assigned counsel eligibility. To ensure legibility, the trained staff member personally completes the application based on the information the applicant provides. Any questions or close calls are referred to SCLAS' lead investigator for review.

### **B. Data**

#### ***i) D-11***

In D-11, Probation uses the presumptive factors set forth in the Eligibility Standards to screen people in custody for eligibility. The data received for calendar year 2021 shows 7,358 individuals were screened by Probation in D-11, of which approximately 5,483<sup>12</sup> (or 74.52%), were presumed eligible – close to the percentage (73.71%) presumed eligible during calendar year 2020.<sup>13</sup>

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<sup>12</sup> Since October 3, 2016, Probation has consistently collected, maintained, and reported to ILS on a monthly basis, data representing the number of eligibility screenings it conducted in D-11, and, of those, the number of applicants it deemed presumptively eligible for Legal Aid. As of November 2020, Probation improved its eligibility data reporting by including the number of presumptively eligible applicants for both Legal Aid and the conflict cases sent to the ACP. This improved data is included in this report and will be in future reports.

<sup>13</sup> Notably, the number of people screened in D-11 in 2021 (7,358) was comparable to the number of people screened in 2020 (7,326). These numbers are significantly less than in previous years (2019 (11,831), 2018 (12,614), and 2017 (13,345)) and prior to implementation of bail reform and the COVID-19 pandemic. This is not surprising since D-11 only hears custodial arraignments and bail reform was intended to reduce reliance on pre-arraignment and pre-trial custody.

*ii) SAP*

Consistent with ILS Eligibility Standard XVI's data collection requirements, the SCACP reports to ILS the data it collects and maintains on the number of applicants screened and, of these, the number deemed eligible and the number deemed ineligible, as well as the names of the arraigning judges.

SCACP submitted quarterly reports to ILS showing that, during calendar year 2021, 933 applicants were screened by the SAP screener, of which 10 were deemed financially ineligible for assigned counsel. One applicant requested reconsideration and was ultimately assigned counsel, while two applicants successfully appealed the denial to a judge. This is an ineligibility rate of 0.8%.

*iii) East End Justice Courts*

Similarly, SCLAS has collected and reported to ILS its eligibility data for calendar year 2021. According to the data reported, during that period, SCLAS screened 63 applicants on the East End. Of those, three applicants were deemed financially ineligible. No appeal or request for reconsideration was made.

**WASHINGTON COUNTY**

The Washington County Assigned Counsel Program ("ACP") maintains the responsibility for screening and making recommendations for assigned counsel eligibility in the County Court and the 24 Town and Village Courts ("justice courts").

**A. Process for deciding assigned counsel eligibility**

The process for deciding assigned counsel eligibility in Washington County has not changed since the 2021 report. Applications are still accepted by personal delivery, fax, mail, email, and text-messaging. Under normal circumstances, ACP staffers are also positioned once monthly at two outreach court locations in the northernmost (Whitehall Town and Village Court) and southernmost (White Creek Town Court) locations of the county. However, for health concerns related to the pandemic, the ACP temporarily closed the two satellite locations during most of 2020 through 2021. If the applicant does not have a computer or smart device or is unable to travel to the ACP office, the ACP will interview the applicant by phone. Currently, most applicants email the ACP a photographed copy of the completed application from their cell phones – the ACP staff's preferred method of delivery.

In Washington County, the Public Defender's Office (PD Office) is the primary provider of arraignment representation, though the ACP provides arraignment representation on some



Vehicle and Traffic Law cases.<sup>14</sup> At arraignment, PD Office attorneys regularly inform people of their right to assigned counsel and provide a packet containing the application form and a cover letter, which lists the arraignment attorney's name. The cover letter details the ways in which the application can be delivered to the ACP and encourages applicants to provide the ACP with the charging documents and a form of identification to assist the ACP in its determination of eligibility. The packet also contains a list of alternative sentencing classes and programs, and a notice of a person's right to remain silent should they be remanded to custody.

The ACP will screen and assign counsel pre-charge, if requested and there is a reasonable potential of criminal liability. There are also increasing instances where counsel is assigned at arraignment. The arraignment attorney will ask the court to assign counsel if it is evident that a person cannot afford to pay for private counsel, such as where they are homeless, unemployed, or a student; in some courts, the judge will, *sua sponte*, assign counsel. Individuals who are remanded to pre-trial detention are also assigned counsel. If they are subsequently released, they may be asked to complete an assigned counsel application.

Unless a case is disposed of at arraignment, the arraignment attorney remains on the case as provisionally assigned, until a determination of eligibility is made. If the PD Office identifies a conflict, the ACP assumes responsibility for the case after arraignment.

Generally, the ACP screens and decides all eligibility applications within hours of receiving them, unless more information is needed from the applicant, or the case presents a problem that needs to be discussed with Supervising Attorney Tom Cioffi. If the decision is that the applicant is eligible for counsel, the ACP notifies the PD Office. If there is a conflict, the ACP assigns the case to a panel attorney and sends a notice of the conflict assignment to the court of jurisdiction. The ACP also sends an approval letter to the applicant, identifying the name and contact information of the assigned attorney. For applicants deemed ineligible for assigned counsel, the ACP notifies them in writing, explaining the reason for the denial and informing them of the right to request reconsideration, an appeal, or both. The ACP staff strives to ensure immediate notification of its eligibility decision by notifying as many applicants as possible by email rather than by regular mail.

## **B. Data**

The ACP has consistently reported data to ILS on a quarterly basis in conformity with the data collection, maintenance, and reporting requirements of ILS Eligibility Standard XVI. The data shows that, in calendar year 2021, the ACP received 1,606 applications and deemed no applicant

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<sup>14</sup> See *Implementing the Counsel at Arraignment Obligations in the Hurrell-Harring v. The State of New York Settlement*, 2019 Update, pp. 16-17, available at <https://www.ils.ny.gov/files/Hurrell-Harring%20Final%20Counsel%20at%20Arraignment%20Report%202019.pdf>.

ineligible for counsel. Accordingly, there were no requests for reconsideration or an appeal, and no requests were made for partial payment orders pursuant to County Law § 722-d.

## **EXTENT TO WHICH THE CRITERIA AND PROCEDURES COUNTIES USE ARE CONSISTENT WITH THE ILS ELIGIBILITY STANDARDS**

The following is an abbreviated representation of each county’s compliance with the Eligibility Standards over the past year:

ILS Eligibility Standards	County Criteria and Procedures ☑ (Consistent with ILS Standards)				
	Onondaga	Ontario	Schuyler PD and ACP	Suffolk LAS and ACP	Washington
<b>Standard I</b> <i>(core eligibility standard)</i>	☑	☑	☑	☑	☑
<b>Standard II</b> <i>(eligibility presumptions)</i>	☑ Executive Director Kathleen Dougherty estimates that approximately 80% of the eligibility decisions made in 2021 were based on an eligibility presumption.	☑ Ms. Lapp estimates that in 2021, 95% of the eligibility decisions were based on one of the four presumptions.	☑ Ms. Gardner represents that 100% of all eligibility decisions in 2021 were based on an eligibility presumption; the ACP staff estimates their decisions at 70%-80%.	☑ Though, reportedly, they do not track this data, SCLAS’ screening staff estimates that, in 2021, 70%-80% of applicants were deemed eligible based on a presumption. For SCACP, the estimate is 99%.	☑ The ACP estimates that last year, “nearly 100%” of the applications received were decided based on the income guidelines eligibility presumptions.
<b>Standard III</b> <i>(timely access to counsel)</i>	☑	☑	☑	☑	☑
<b>Standard IV</b> <i>(ability to post bond or pay bail)</i>	☑	☑	☑	☑	☑
<b>Standard V</b> <i>(third-party resources)</i>	☑	☑	☑	☑	☑
<b>Standard VI</b> <i>(non-liquid assets)</i>	☑	☑	☑	☑	☑

<b>Standard VII</b> (child support and public assistance)	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
<b>Standard VIII</b> (financial obligations)	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
<b>Standard IX</b> (cost of retaining counsel)	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
<b>Standard XI</b> (responsibility for screening)	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
<b>Standard XII</b> (confidentiality)	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
<b>Standard XIII</b> (burden of application process)	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
<b>Standard XIV</b> (timeliness and written notice of ineligibility decision)	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>

## ADDITIONAL INFORMATION

Due to the ongoing COVID-19 pandemic, millions of Americans, particularly the most vulnerable, have endured unprecedented human and financial challenges – death, job losses, evictions, and abject poverty. In many communities, low-income individuals additionally faced systemic barriers to accessing legal assistance and the courts.<sup>15</sup> However, for many New Yorkers, especially those living within the five *Hurrell-Harring* counties, the Settlement’s resources and the unwavering commitment of each *Hurrell-Harring* provider in ensuring people’s unimpeded ability to access counsel and the criminal justice system prevented this outcome.

This was evident in 2021 as court operations were restored and court proceedings resumed after the prior year’s pandemic-related temporary administrative court closures, suspensions of court proceedings, and elimination of statutory deadlines, creating new and even greater challenges for

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<sup>15</sup> See, e.g., Report of Maryland Attorney General Brian E. Frosh’s COVID-19 Access to Justice Task Force: *Confronting the COVID-19 Access to Justice Crisis* (Jan. 2021), addressing the systemic challenges to accessing the civil justice system faced by Marylanders. This document is accessible at <https://abell.org/sites/default/files/files/Access%20to%20Justice%20final.pdf>.

providers.<sup>16</sup> With the resumption of in-person proceedings, including jury trials, grand juries, and appearance ticket arraignments that had been administratively adjourned, providers had to navigate hectic court schedules, assign attorneys to increasing numbers of new indictments, and monitor the swell in attorney workload that resulted from the backlog of pending cases occasioned by the prior year's suspension of certain court proceedings.

Simultaneously, providers were creating plans to transition staff back to fully in-person or hybrid work arrangements, while ensuring support and resources were available for continued implementation of relatively new criminal justice reforms. These unprecedented issues undoubtedly challenged the indomitable spirit of every *Hurrell-Harring* provider who nonetheless made it a priority to safeguard the right of every eligible person to timely access to counsel.

*i) Ensuring that there were no barriers to applying for counsel*

In Onondaga County, for instance, where the pandemic-related issues were already manifold, the ACP also experienced panel recruitment and retention issues. In addition to the workload crunch that panel attorneys were already facing, the ACP was simultaneously confronted with an increase in new violent felony and homicide cases which made finding qualified attorneys for case assignment challenging.

Yet, amid these challenges, throughout 2021 panel attorneys continued to collect and transmit assigned counsel applications to the ACP staff who continued to make timely eligibility determinations. This is a true testament to the panel attorneys' and ACP's continued commitment to ensuring that people do not face needless obstacles in accessing assigned counsel. As a result, by the end of the year, ACP staff had received 10,327 assigned counsel applications and had screened 9,565 applicants for financial eligibility. This enormous feat was facilitated by the timely launch and implementation of IntelLinx only two months before the pandemic hit. In its second year of implementation, IntelLinx better enabled the ACP's continued operations throughout 2021, even during those times when staff was telecommuting and court proceedings were being conducted virtually. Panel attorneys were encouraged to collect and transmit case and financial information on the day of arraignment, and, because IntelLinx is cloud-based and ACP staff could access the necessary financial information virtually, staff could make eligibility recommendations sooner than previously.

Recently reflecting on the accomplishments of the ACP in the face of these unprecedented challenges of 2021, Ms. Dougherty noted:

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<sup>16</sup> On June 24, 2021, Governor Cuomo issued Executive Order 210 rescinding Executive Orders 202-202.111 thereby revoking emergency authorization for many of the changes to court procedure due to the pandemic.

*Even with the ongoing struggles regarding COVID-19, I believe we have done a great job ensuring that clients get the representation they need.*

In Schuylers County, despite facing multiple challenges, Public Defender Valerie Gardner prioritized improving the ways in which applicants could apply to further reduce any unnecessary barriers to accessing counsel. Ms. Gardner was appointed to her role as Chief Defender in March 2021 following the departure of Wes Roe. In addition to the general pandemic-related issues discussed above, at the very start of her tenure as Chief, Ms. Gardner was immediately confronted with a host of other challenges. As Ms. Gardner was already on staff at the time of her elevation to Chief, her appointment meant that the office was down one full-time position which had a significant impact on this small office. Ms. Gardner had to immediately work to fill that vacancy, an already difficult task in a county with few resident attorneys. Soon after a qualified replacement was hired, Ms. Gardner assumed the responsibility of training the new attorney to enhance her ability to accept felony case assignments and assist with the office's felony caseload. Simultaneously, Ms. Gardner appeared in court on her own felony cases, many of which had been pending pre-pandemic and were now being scheduled for court proceedings. She did so while navigating her new supervisory and administrative responsibilities.

Yet, from the outset, Ms. Gardner never stopped thinking about how to implement new and creative initiatives for improving clients' access to counsel. She updated the PD Office's website to make it more user friendly and informative for clients, with a fillable eligibility application form which applicants can complete then text to the PD Office from their phones. And, during those periods in 2021 when non-attorney access to the jails were restricted, Ms. Gardner worked with jail officials to permit in-person visits between the jailed individuals and the O.A.R. staffer, who assisted them with completing their applications for assigned counsel. This ensured that individuals, already isolated amid pandemic-related health conditions, were alleviated of the added concern of not being able to apply for counsel in a timely manner.

Additionally, to create a more client-centered reception area in the main hallway outside the PD Office, Ms. Gardner installed an assigned counsel application station, with clipboards, a seating area, a phone, a drop box for completed applications, and a posterboard onto which pamphlets listing services, job announcements, and other client-relevant information are attached. Further, recognizing that the open hallway that runs through the suite of offices compromised privacy and confidential attorney/client communication, Ms. Gardner worked with the County to have a door installed at the intersection of this and the main hallway.

Ms. Gardner recently observed:

*The economic situation in [Schuylers County] is depressed. There are so few services available. Any time there is an impediment to accessing those services, people will not*

*jump in. Got to make it easy. . . . Transportation is hard for many, so the easier you make it, the better.*

***ii) Ensuring access to counsel even while operating remotely***

During this reporting period, the unpredictable nature of COVID-19, with its new and emerging variants, made it particularly stressful for providers to decide whether and when to return to in-person office operations or continue to function remotely. ILS learned that telecommuting during this period did not extend the time it took pre-pandemic to decide an eligibility application. Thanks in large part to the *Hurrell-Harring* Settlement funding and structures that were in place before the pandemic, providers could ensure their staff's ability to effectively telecommute and still accept and screen eligibility applications from everyone who sought counsel.

In Ontario County, for instance, Ms. Lapp was mindful of minimizing staff members' exposure to the virus and allowed only a reduced number of staff in the office on a rotation basis. Nevertheless, she ensured that someone was always in the office to screen applicants by telephone and receive completed applications via email from attorneys who collected this information at or before an arraignment. Ms. Lapp recently reported that this process did not lengthen the time it ordinarily took to process an application and decide whether or not someone was eligible for counsel.

Similarly, in Suffolk County, the infrastructure and technology established pursuant to the Settlement made it possible in 2020 for SCLAS staff to transition to remote work and to continue doing so well into 2021. SCLAS' Lead Investigator Brennan Holmes recently reported that, for applicants appearing in the justice courts on Suffolk County's East End where there is a lack of adequate public transportation, telecommuting did not delay but instead expedited the eligibility determination process. Mr. Holmes explained that pre-pandemic, whenever an arraigning judge had reason to believe that a person whose case was being adjourned did not have the ability to pay for counsel, the judge would instruct the person to go to the SCLAS office to apply for counsel, providing the person with written directions to SCLAS. Often, because of transportation issues, many people apparently believing that in-person visits to SCLAS was their only option for applying,<sup>17</sup> would not arrive at SCLAS until a week or more after arraignment. However, since the onset of COVID-19 and its related restrictions on in-office visits, applicants for assigned counsel have been telephoning the SCLAS office within a day or two after arraignment, getting interviewed by a screener, and receiving an eligibility decision sufficiently in advance of their next court date. SCLAS' Legal Director Agnes Neldner reinforced that point, observing for many applicants, the ability to telephone the SCLAS office to be screened has obviated the need to wait for available private transportation to the SCLAS office and has alleviated the resultant

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<sup>17</sup> Pre-pandemic, SCLAS would interview the few applicants who telephoned the SCLAS office because they did not have any means of travelling to Riverside where the office is located.

anxiety of not knowing whether they will be screened before their next court date. Mr. Holmes hopes that this practice will continue long after the pandemic has ended and that judges will increasingly inform applicants that they may telephone the SCLAS office to be interviewed – a process which, according to Mr. Holmes, has proven to be easier for applicants as well as for everyone else involved in the eligibility determination process.

***iii) Ensuring pre-arraignment access to counsel, when requested***

*Hurrell-Harring* providers also continued to utilize established protocols to provisionally assign counsel when requested, even to individuals who had not yet been charged with a crime. This practice is consistent with ILS Eligibility Standard III and in accordance with each provider’s continued commitment to ensuring that counsel is provided at the earliest possible stage of a criminal case. In Onondaga County, Ms. Dougherty described one such instance:

*An elderly woman who was receiving chemotherapy treatment came to our office looking for legal advice. She had been served with a grand jury subpoena but had not appeared due to her illness. We made a provisional eligibility determination and then contacted a panel attorney, who agreed to represent her. Later that day, the client called our office because the police were at her house with a material witness warrant. We intervened and notified the police that the woman was represented by counsel. The police contacted the attorney, who called the judge, and the warrant was retracted.*

Similarly, Ontario County PD Leanne Lapp told us of two noteworthy occasions when the office screened for eligibility and an attorney intervened pre-arraignment on behalf of people who had requested representation and achieved successful outcomes at the clients’ first court appearances.

In one case, a woman contacted the PD Office upon being charged with Endangering the Welfare of a Child for leaving young children in a car. Immediately, and sufficiently in advance of the woman’s first court appearance, the attorney referred her to the PD Office’s Social Worker to assist her in registering for a parenting class. At the ensuing arraignment, the client, appearing in court with her husband and mother in support, presented the judge with a favorable letter from a fellow church member and proof that she had registered for a parenting class. As a result, the court adjourned the case in contemplation of dismissal.

The client in the second case was charged with Driving While Intoxicated and contacted the PD Office in advance of his arraignment. The attorney reviewed the discovery materials and discussed with the client a potential plea offer and sentence. She also assisted him in completing a “hardship application” for a limited license allowing him to drive to work during the pendency of his case and ensured that he had completed a substance abuse evaluation. Consequently, the

charge was reduced, and the client received a favorable outcome, for which he “profusely” thanked the attorney.

The attorney recently told Ms. Lapp:

*I can say that in general the cases where I can meet with the client in advance of arraignment tend to go much smoother, resolve faster, and resolve in a more favorable manner.*

## **RECENT DEVELOPMENTS IMPACTING ELIGIBILITY FOR COUNSEL**

In 2021, there were two additional developments fortifying timely access to assigned counsel for those who lack the ability to pay for private representation. First, as noted previously, ILS revised the 2016 Criteria and Procedures, extending their applicability to mandated representation in Family Court proceedings, and creating a presumption of eligibility for parents in FCA Article 10 child welfare proceedings. Additionally, on November 15, 2021, the Governor signed into law a bill amending CPL § 380.55 which, among other things, streamlines the process for assigning counsel on appeal.

### *i) Expansion of the 2016 Criteria and Procedures to Family Law Cases*

In 2018, Chief Judge Janet DiFiore created the Commission on Parental Legal Representation (“the Commission”) “to examine the current state of mandated Family Court representation and determine how best to ensure the future delivery of quality, cost-effective parental representation.”<sup>18</sup> The Commission was tasked with working with ILS “to build upon the groundwork being done across the State to improve the quality of parental legal representation.”<sup>19</sup> In 2019, the Commission issued its Interim Report in which it identified “delays in access to representation, and the outright denial of representation” as among the factors impacting parental representation, particularly in child welfare proceedings.<sup>20</sup> In its effort to directly address these issues, the Commission recommended that “parents be granted access to counsel during a child protective agency investigation and sufficiently in advance of the first

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<sup>18</sup> See Chief Judge Janet DiFiore, *The State of Our Judiciary 2018*, pp. 14-15, located here: <https://www.ils.ny.gov/sites/ils.ny.gov/files/State%20of%20Our%20Judiciary%20Address%20020618.pdf>.

<sup>19</sup> *Id.*

<sup>20</sup> Commission on Parental Legal Representation, Interim Report to Chief Judge DiFiore, p.6 (February 2019), [http://ww2.nycourts.gov/sites/default/files/document/files/2019-02/PLR\\_Commission-Report.pdf](http://ww2.nycourts.gov/sites/default/files/document/files/2019-02/PLR_Commission-Report.pdf), hereafter “DiFiore Commission Interim Report.”



court appearance.”<sup>21</sup> Further recognizing that there were no statewide eligibility standards applicable to Family Court proceedings, the Commission also recommended the development of uniform eligibility standards “that would apply in all Family Court proceedings, and would include a presumption of eligibility for counsel in child welfare proceedings.”<sup>22</sup>

Following a public hearing process that elicited oral and written comments, on February 26, 2021, ILS issued the revised *Standards for Determining Financial Eligibility for Assigned Counsel*,<sup>23</sup> incorporating the Commission’s recommendations. This revision afforded ILS an opportunity not only to build upon the existing Eligibility Standards, which ILS recognized were equally applicable to Family Court cases, but also to reinforce the use of the Eligibility Standards in criminal matters. In furtherance of that goal, ILS promptly disseminated the Eligibility Standards to all mandated providers, both criminal and family, and collaborated with the Office of Court Administration (OCA) to ensure that they were similarly distributed to all “judges and appropriate nonjudicial personnel.”<sup>24</sup> Additionally, ILS participated in a video-recorded training for judges at the invitation of the New York State Judicial Institute, and in June 2021, conducted five separate provider trainings statewide in partnership with the New York State Defenders Association (NYSDA). These trainings served not only as an introduction to the Eligibility Standards for those who were new to applying the Standards to the eligibility determination process, but also as a refresher for those who already had been implementing them. ILS also notified every provider of its revised sample eligibility forms, with corresponding Spanish translations.<sup>25</sup>

ILS continues to work with public defense leaders and their staff as they implement the Eligibility Standards.

*ii) Amendment to CPL § 380.55*

ILS Eligibility Standard II (D) specifies: “Applicants who have, within the past six months, been deemed eligible for assignment of counsel in another case in that jurisdiction or another jurisdiction shall be presumed eligible. Appellate courts shall assign appellate counsel to

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<sup>21</sup> *Id.*, at pp 8, 16.

<sup>22</sup> *Id.*, at pp 8, 30.

<sup>23</sup> This document is available at: <https://www.ils.ny.gov/files/Blackletter%20with%20Commentary%20021621.pdf>. The ILS Board had unanimously approved these standards during its December 4, 2020 meeting.

<sup>24</sup> By letter dated March 3, 2021, Chief Administrative Judge Larry Marks directed that all Administrative Judges be asked to distribute the revised Standards “to judges and appropriate nonjudicial personnel.”

<sup>25</sup> These documents are accessible at: <https://www.ils.ny.gov/node/88/eligibility-standards-related-documents-and-resources>.

appellants who were deemed eligible for assigned counsel by their trial court.”<sup>26</sup> The goal of this presumption is to further “streamline the eligibility determination process through adoption of a common-sense presumption of eligibility for any applicant who has recently been deemed eligible for assignment of counsel in the same or another jurisdiction.”<sup>27</sup>

However, with certain exceptions,<sup>28</sup> until 2017, a person seeking assigned counsel on appeal was required to submit a request for “poor person’s relief” to the appellate court, which further complicated the eligibility determination process.<sup>29</sup> In 2017, the Criminal Procedure Law was amended to include CPL § 380.55 and streamline the assignment of appellate counsel for indigent criminal defendants. Recognizing that the trial court judge is better positioned to ascertain whether a defendant continues to be financially eligible for poor person’s relief,<sup>30</sup> CPL § 380.55 gave trial courts the discretion at the time of sentencing to entertain an application from assigned counsel who “represent[ed] a defendant at trial” to grant the defendant poor person’s relief on appeal; the actual assignment of counsel would remain the function of the appellate court. The lead sentence of the statute read:

Where counsel has been assigned to represent a defendant at trial on the ground that the defendant is financially unable to retain counsel, the court may in its discretion at the time of sentencing entertain an application to grant the defendant poor person relief on appeal.

As part of the application, assigned counsel was required to represent, in part, that the defendant continued to be eligible for assignment of counsel. If the court denied the application, the defendant could make a de novo application to the appellate court for poor person’s relief.

Despite language in the Bill sponsor’s supportive memorandum referring to defendants who are unable to hire counsel “after being convicted and sentenced”<sup>31</sup> with no specific reference to trial, over time, the prefatory language of CPL § 380.55 stating, “[w]here counsel has been assigned to represent a defendant *at trial*” (emphasis added), led to confusion and inconsistent applications

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<sup>26</sup> Blackletter, *Standards for Determining Financial Eligibility for Assigned Counsel*, Standard II (D), p. 30.

<sup>27</sup> See Commentary, *id.*, pp. 30-31.

<sup>28</sup> See Correction Law § 168-n (continuing the assignment of counsel on appeal for a sex offender granted poor person status for SORA proceedings) and Family Court Act § 1118 (applying a presumption of eligibility for assigned appellate counsel based on a previous determination of eligibility for assigned counsel at the trial level).

<sup>29</sup> See 22 NYCRR §§ 671.3(b)(3) and 671.5.

<sup>30</sup> See New York State Assembly Memorandum in Support of Legislation, dated April 15, 2016, located here: [25ad2345-f490-4afd-a4df-42ca261e9e16.pdf \(constantcontact.com\)](https://www.legis.nyc.gov/legis/assembly/memoranda/25ad2345-f490-4afd-a4df-42ca261e9e16.pdf).

<sup>31</sup> *Id.*

of the trial court’s discretion as to whether the law applied only to defendants who were convicted after trial, or equally to those who were convicted pursuant to a guilty plea.<sup>32</sup>

On November 15, 2021, Governor Kathy Hochul signed Assembly Bill A.5689, amending CPL 380.55, effective January 14, 2022, and replacing the words “at trial” with the phrase, “in a criminal action,” thereby eliminating the confusion and inconsistent interpretations and clarifying that a trial court’s exercise of discretion to entertain assigned counsel’s application for poor person’s relief on appeal applies to any defendant convicted *in a criminal action*, whether convicted pursuant to a guilty plea or trial verdict.<sup>33</sup> More importantly, the amendment added a new subsection requiring the appellate court to presume a defendant’s eligibility for assigned appellate counsel solely upon a sworn affidavit of trial counsel that the defendant continues to be financially eligible for an assignment of counsel. Specifically, subdivision 2 of CPL § 380.55 now reads as follows:

Where counsel has been assigned to represent a defendant in a criminal action on the ground that the defendant is financially unable to retain counsel, the appellate court *shall* presume the defendant eligible for assignment of counsel on appeal without further proof of eligibility, and, thereby, issue an order assigning such counsel, if counsel provides a sworn representation the defendant continues to be eligible for assignment of counsel (emphasis added).

This requirement of presuming continued eligibility on appeal is consistent not only with the provisions of Correction Law § 168-n and Family Court Act § 1118 (previously explained at p. 24, n. 28), but also with ILS Eligibility Standard II (D). It also promotes institutional efficiency in the process of determining eligibility for assigned appellate counsel. By making it mandatory that the appellate court presume eligibility under the stated circumstances, the statute effectively eliminates the needless delay in the criminal appellate process as defendants applying for assigned counsel on appeal no longer will be required to prepare and submit lengthy financial affidavits in support of their applications (as has been the practice in several appellate departments), only to have to wait many months for an eligibility determination while their appeals linger unattended in the files of the appellate court clerks. As Assembly Member Catalina Cruz, the sponsor of A.5689 recognized, “[g]iven the numerous other challenges a potential defendant may face, providing expedited and efficient methods of obtaining counsel for an appellate review would benefit both the individual and the court system.”<sup>34</sup>

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<sup>32</sup> *Id.*

<sup>33</sup> See L. 2021, ch 616, effective December 1, 2021.

<sup>34</sup> See New York State Assembly 2021 Memorandum in Support of Legislation, located here: [Bill Search and Legislative Information | New York State Assembly \(nyassembly.gov\)](https://www.nyassembly.gov/Bill-Search-and-Legislative-Information).

## CONCLUSION

“As we continue to face the challenges of COVID-19, it is more important than ever to ensure meaningful access to the legal system. Securing access to lawyers and the courts is essential for addressing the many convergent crises of the pandemic . . . . All across the country, legal service providers and other public servants on the front lines are leading this work and helping people find a way through some of the hardest times in life.”<sup>35</sup>

Such was the case in the five *Hurrell-Harring* counties during this pivotal year; the efforts of the providers during this period to connect people with counsel in a timely manner were momentous.

Though the ebb and flow of the COVID-19 pandemic continued to create challenges for criminal defense providers in 2021, one thing that remained constant throughout was the commitment of each *Hurrell-Harring* provider in ensuring that people who needed counsel in criminal matters, but were unable to pay for counsel, had meaningful, fair, timely, and unobstructed access to qualified legal assistance. Implementing the Eligibility Standards and ensuring that people had access to counsel during these tumultuous times could have seemed daunting to any provider, especially to those faced with the unprecedented challenges described above. After all, these challenges arguably could have provided reason to apply rigid screening processes so as to screen people out and reduce the number of people deemed qualified, as was commonly done in Onondaga County pre-Settlement implementation. But the reality in 2021 was that, for every *Hurrell-Harring* provider, the longstanding Settlement-funded infrastructure and processes in place coupled with the past six years of consistent Eligibility Standards implementation, instilled in each provider the confidence of knowing that they could continue to screen applicants for financial eligibility meaningfully and uninhibited by external stressors. This reality is evident in the following thoughtful reflection of the current Onondaga County ACP Eligibility Specialist after considering an applicant’s request for reconsideration:

*We are going through very tough times, and it was made very clear to me when a client called for a reconsideration. I asked for any and all expenses that the client could give me. I realized that with her hours cut at work and her bills far exceeding her income, that sometimes a number written on a form (digital or paper) does not always reflect the truth of someone’s financial burdens/struggles. I granted the client eligibility and informed her attorney that I reconsidered. This client ended up breaking down on the phone with me, crying and explaining that this was such a relief, and it made such a huge difference.*

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<sup>35</sup> White House Counsel and Assistant to the President Dana Remus, White House Interagency Round Table, *Access to Justice in the Age of COVID-19, A Roundtable Report*, September 2021, p. 10.

Having Eligibility Standards that providers have consistently described as uniform, fair, and easy to apply, undoubtedly contributed to the seamlessness with which provider staff could approach each application for assigned counsel or request for reconsideration during these periods of crisis. For instance, the Eligibility Standards made it possible for provider staff telecommuting to assess an applicant’s financial eligibility via an electronically submitted application or a telephone interview, without the need for an in-person meeting or an original signature. And, in those rare instances where supportive documentation was required, staff, as those in the Washington County ACP office, could receive the requested information digitally, by email or text-messaging from the applicant, because the Eligibility Standards do not require that documentation need to be delivered in person. Nor was it necessary for an applicant to leave the safety of their home to have an application notarized before submitting it, as was required in some counties, pre-implementation: the Eligibility Standards specifically obviated that requirement.

Asked to comment on the effectiveness of applying the Eligibility Standards during 2021, SCLAS’ Lead Investigator Brennan Holmes remarked that, over the years since the start of implementation, SCLAS had made tweaks to their eligibility paperwork, making the application process more streamlined for applicants. But, during the pandemic, he observed, the process was even more greatly enhanced when, of necessity, applicants were applying by telephone at a much greater rate than they had done previously, indirectly expanding the ways in which they formerly accessed counsel. Additionally, judges in Suffolk County’s East End courts, becoming increasingly aware of the Eligibility Standards’ effectiveness, were assigning more cases from the bench and sending fewer people to be screened by SCLAS, as was evident by the number of clients SCLAS screened over the past three years (239 in 2019; 87 in 2020; and 63 in 2021).<sup>36</sup>

In the other counties, providers took proactive efforts to augment access to counsel. In 2020 and 2021,<sup>37</sup> we reported on Ontario County PD Leanne Lapp’s innovative response to the pandemic-related postponements of appearance ticket arraignments in connecting early with past and current clients. Ms. Lapp reported that this initiative was an enormous success as many clients would not have otherwise known how to access counsel before their court date, and it enabled early eligibility screening and determination in advance of court. Like Ms. Lapp, each *Hurrell-Harring* provider, in their own way, viewed the pandemic as an opportunity to enhance access to counsel for those unable to pay for private counsel. And, in some instances, they did so through sheer creativity and ingenuity, even while dealing with arduous pandemic-related and other

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<sup>36</sup> Notably, the pandemic-related court closures in 2020 might account for the significantly reduced number of SCLAS screenings that year, but, with the reopening of courts in 2021, the number of screenings was not only drastically less (by almost 75%) than the year immediately preceding the pandemic, but was significantly less than it was in 2020 at the height of the pandemic.

<sup>37</sup> See *Criteria and Procedures for Determining Assigned Counsel Eligibility: Report on Implementation in the Hurrell-Harring Counties*, April 4, 2020, and April 2, 2021, located here: <https://www.ils.ny.gov/node/90/eligibility-reports>.

operational challenges, as was evident at the Schuyler County Public Defender's Office. The efforts of each provider in ensuring that everyone who needed counsel had access to counsel is a true testament, not only to their continued commitment to implementing the Eligibility Standards even after six years of implementation, but also to the formidable leadership of each office and its embedded organizational culture that prioritizes the needs of the vulnerable population they serve.