



Criteria and Procedures for Determining Assigned Counsel Eligibility

Report on Implementation in the *Hurrell-Harring* Counties

April 4, 2023



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

TABLE OF CONTENTS

INTRODUCTION.....	2
I. COUNTY UPDATES	3
Onondaga County	3
Ontario County	7
Schuyler County.....	8
Suffolk County	10
Washington County	13
II. ACCESS TO COUNSEL.....	15
CONCLUSION	19

INTRODUCTION

In April 2016, per the terms of the *Hurrell-Harring v. The State of New York* settlement (the settlement) and Executive Law § 832(3)(c), the New York State Office of Indigent Legal Services (ILS) issued *Standards for Determining Financial Eligibility for Assigned Counsel* (Eligibility Standards).¹ The Eligibility Standards initially applied only in criminal matters but in February 2021, ILS updated them to include Family Court mandated representation.² Since their initial promulgation in 2016, the Eligibility Standards have described criteria and procedures for determining whether a person is financially eligible to receive mandated representation under County Law Article 18-B, and the five settlement counties (Onondaga, Ontario, Schuyler, Suffolk, and Washington) have worked to implement them to ensure those who cannot afford to pay for counsel in Article 18-B matters receive timely access to assigned counsel.

The settlement requires ILS to issue an annual report analyzing the criteria and procedures each settlement county uses for financial eligibility determinations and whether they comport with the Eligibility Standards.³ This obligation is facilitated by the cooperation of the five settlement counties, each of which collects and shares with ILS the data and information required for a complete analysis of their eligibility practices.

In this seventh report, we note that each of the five settlement counties continues to make efforts to comply with the Eligibility Standards, as they have done since beginning implementation in 2016. All five counties now have well-established processes in place for making eligibility determinations and they continue to rely on the criteria set forth in the Eligibility Standards when doing so. This past year, some of the settlement counties continued refinements to their eligibility determination process to further streamline these decisions. However, this year we learned that County Law § 722-b's low statutory payment rates for assigned counsel panel attorneys and the State's failure to raise these rates in the final enacted State budget for Fiscal Year 2022-2023 exacerbated existing problems with retaining enough attorneys who accept mandated case assignments to meet caseload needs. In some cases, the lack of available attorneys to accept assignments caused delays in appointment of counsel, threatening compliance with ILS Eligibility Standard III.⁴ The *Hurrell-Harring* plaintiffs identified timely access to counsel and delays in appointment of counsel as issues in their original complaint, and ILS similarly identified this as an issue prior to issuing the Eligibility Standards.⁵ The settlement sought to

¹ *Hurrell-Harring v. The State of New York* Settlement, § VI(B).

² The current *Standards for Determining Financial Eligibility for Counsel* (February 16, 2021) are available here: [Eligibility Standards Final 021621.pdf \(ny.gov\)](#)

³ Section VI(C) of the settlement provides that “such report shall, at a minimum analyze: (1) the criteria used to determine whether a person is eligible; (2) who makes such determinations; (3) what procedures are used to come to such determinations; (4) whether and to what extent decisions are reconsidered and/or appealed; and (5) whether and to what extent those criteria and procedures comply with the criteria and procedures” described in section VI(A) of the settlement. Previous reports are available here: [Eligibility Reports | New York State Office of Indigent Legal Services \(ny.gov\)](#).

⁴ Standard III states, “Counsel shall be assigned at the first court appearance or be provided immediately following the request for counsel, whichever is earlier. Eligibility determinations shall be done in a timely fashion so that representation by counsel is not delayed.”

⁵ See *Hurrell-Harring, et.al. v. The State of New York*, Amended Complaint, at para. 314, available at <https://www.ils.ny.gov/files/Hurrell-Harring%20Complaint.pdf> (“In many counties, the system for determining eligibility results in serious delays and barriers to the appointment of counsel. For example, there are often delays in

eliminate barriers to timely access to counsel by ensuring counsel at arraignment and streamlining the eligibility determination process. Mandated representation providers in the settlement counties implemented systems to meet these goals. Still, the diminished number of attorneys on assigned counsel panels compromises these systems, causing delays in assignment of counsel to varying degrees in the five settlement counties.

With this context, in Section I below, we review each county's established procedures for determining financial eligibility for assignment of counsel, their 2022 data, any updates, and, where appropriate, any challenges faced this year in ensuring timely assignment of counsel.

In Section II, we survey the impact implementation of the Eligibility Standards has had on access to counsel within the five counties as we approach the final year of the settlement.

I. COUNTY UPDATES

Onondaga County

Procedures for Assigned Counsel Eligibility Determinations

The Onondaga County Bar Association Assigned Counsel Program (ACP) is Onondaga County's primary provider of mandated criminal defense. It is also responsible for screening applicants for assigned counsel eligibility and for making assignment recommendations to the county's courts. The ACP's screening and eligibility recommendation procedures are now well-established and continue to comply with the Eligibility Standards.

Generally, initial screenings for assigned counsel eligibility are undertaken by ACP attorneys assigned to cover arraignments in Syracuse City Court, the Onondaga County Centralized Arraignment Part Court (CAP), and in the county's 28 town and village courts (the justice courts). The procedure for collecting the necessary information varies depending on where the arraignment is conducted.

In the justice courts, an ACP attorney is assigned to cover all regularly scheduled non-custodial arraignments (all the county's custodial arraignments are conducted in the CAP or in Syracuse City Court). These attorneys meet with applicants on the day of their arraignment and enter relevant information into the ACP's vouchering and case management program IntelLinx on their mobile device or computer. Panel attorneys remain provisionally assigned until a final determination of eligibility is made.

A similar process is used for non-custodial arraignments in Syracuse City Court; ACP attorneys conduct a confidential interview with clients on the day of their appearance, upload relevant eligibility information to IntelLinx, and are provisionally assigned pending a final determination.

the appointment of counsel because of confusion on the part of applicants regarding the process for applying, the failure of judges to properly inform eligible defendants about the process, failure to appoint counsel immediately at arraignment, and difficulties in sorting out conflicts in multiple defendant felony cases.”); see also ILS Background Study, *Determining Eligibility for Assignment of Counsel in New York: A Study of Current Criteria and Procedures and Recommendations for Improvement* (2016), available here: <https://www.ils.ny.gov/files/Background%20Study%20Full%20FINAL%20021216.pdf>.

For custodial arraignments in Syracuse City Court (including the morning session of the CAP, which is conducted in Syracuse City Court), the assigned ACP attorneys screen potential clients for eligibility in the jail before their court appearance. In the past, this was done in person at the jail on the morning of their arraignment. However, with the onset of the Covid-19 pandemic, attorneys were instead given access to a confidential phone line to interview their clients. We note that due to persistent staffing shortages at the Onondaga County Sheriff's Office, custodial arraignments in Syracuse City Court and the CAP's morning session continue to be conducted "virtually" (i.e. via videoconferencing technology), and attorneys continue to interview and screen potential clients telephonically on the morning of their arraignments.⁶

The CAP has two sessions per day, seven days a week. As described above, the morning session is essentially merged with the morning session of Syracuse City Court. The evening session begins at 5:00 PM. We noted in our 2022 Eligibility report that all CAP arraignments were virtual through 2021, with initial eligibility screenings occurring telephonically as in Syracuse City Court. Since that report was issued, the evening session of CAP resumed in-person proceedings and ACP attorneys have likewise resumed their practice of visiting potential clients in jail prior to the start of the CAP evening session. After attorneys conduct their interviews, they enter eligibility and case information into IntelLinx, and incarcerated applicants are transported to the CAP court, which is held in an adjacent building, for arraignment. For cases that are not resolved at arraignment, the court provisionally assigns an ACP attorney from the original jurisdiction's "Attorney Core" pending a final determination by the ACP.⁷

Regardless of where an arraignment occurs, after the ACP attorneys enter all relevant application information into IntelLinx, two ACP staff members, Eligibility Specialists, are notified and review each application. In addition to deciding whether to confirm or reject the arraigning attorney's initial eligibility recommendation, the Eligibility Specialist can also mark an application pending when more information is required to reach a final decision. In cases where the Eligibility Specialist determines that an applicant is eligible, the ACP notifies the assigned attorney so the attorney can continue representing their client. In cases where the ACP determines that an applicant is ineligible, the ACP notifies the assigned attorney to move to withdraw from representation. In these cases, the ACP also informs the applicant in writing that their application for assigned counsel has been denied and provides written instructions regarding the applicant's rights to request a reconsideration and to appeal the ACP's decision. When a judge denies an ACP attorney's motion to withdraw, the attorney is ordered to continue representation.

Final eligibility determinations on complete applications are generally made within one business day of the ACP's receipt of the arraigning attorney's initial recommendation. But when the Eligibility Specialist receives an application that is incomplete or when more information is

⁶ The County Legislature recently voted to close the Jamesville Correctional Facility and move all incarcerated individuals to the Justice Center in downtown Syracuse. See, Libonati, C., *Onondaga County Legislature votes to close Jamesville Correctional Facility*, Central Current, February 7, 2022, available at: <https://centralcurrent.org/onondaga-county-legislature-votes-to-close-jamesville-correctional-facility/>. This consolidation is intended to address the jail and transport staffing issues and should result in resumed in-person arraignments. The Legislature set an April 1, 2023 deadline however, to date, the closure has not occurred. ILS will continue to monitor this issue.

⁷ An "Attorney Core" is a list judges maintain of attorneys who accept cases in their court.

needed to make a final eligibility determination, it is not always possible to reach a final determination within one day. In the past, the ACP sent biweekly emails to the panel listing all pending applications and what additional information was required to make a final eligibility determination. According to ACP Executive Director Kathleen Dougherty, this process tended to provoke a large quantity of email replies from panel attorneys all at once, which in turn slowed the ACP's response rate for determinations on pending applications to around three days. Since our last report, the ACP worked with IntelLinx to improve this process. The update now allows the Eligibility Specialist to click a button at the end of each application review to automatically inform the provisionally assigned attorney of the outcome of the screening. For applications that are marked pending, a list of any additional information required is also conveyed to the provisionally assigned panel attorney. This improved process has led to a much faster turnaround time for pending applications and has resulted in a more stable workload for ACP office staff.

Occasionally, the ACP will receive a request for assigned counsel prior to the applicant's arraignment (according to Ms. Dougherty, this happens two or three times per month on average). This may be after the applicant has received an appearance ticket but before their scheduled arraignment or during the law enforcement investigation before any charges have been filed. While the exact course of such applications is, to a large degree, determined by the circumstances of the applicant, ACP staff are generally able to decide whether it is reasonably likely that situation could result in formal charges being filed, and if so, to immediately screen for financial eligibility.

Data

Data ILS received from the Onondaga ACP show that between January 1, 2022, and December 31, 2022, a total of 11,089 individuals applied for assigned counsel, of which 10,230 applications were processed in 2022.⁸ Of those:

- 10,013 total applicants were deemed eligible.
 - 9,975 applicants were deemed eligible by the ACP.
 - 38 applicants successfully appealed and were deemed eligible by a judge.
- 217 applicants were deemed ineligible.

The ACP reports that virtually every person deemed eligible for assignment of counsel qualified based on one of the four eligibility presumptions set forth in the Eligibility Standards, with approximately 85% qualifying pursuant to the income presumption in Eligibility Standard II(A).⁹

⁸ The ACP reports the number of applications that are "pending" (220 at the close of 2022). 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 (138); applicants whose cases were resolved at arraignment (465); applicants whose cases were removed to Family Court (35); 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 (1).

⁹ ILS Standard II provides that an individual is presumptively eligible for assigned counsel if they meet any of the following criteria: (A) their net income is at or below 250% of the Federal Poverty Guidelines; (B) they are

Of the 217 applicants deemed ineligible, the ACP reported that two were for a non-financial reason, such as where the applicant's only charge is a violation for which there is no statutory or constitutional right to assigned counsel. This means that, of the 10,230 applicants processed, 215 (or 2.1%) were deemed financially ineligible for assigned counsel.

Program Updates

As we have previously reported, in the last year the ACP and its panel attorneys have come under considerable strain due to a significant reduction in the number of panel attorneys available to take assignments. Ms. Dougherty attributes this primarily to the State's failure for 19 years to increase the assigned counsel statutory compensation rates.¹⁰ This shortage of available attorneys means that those panelists who are still accepting cases are overburdened, which has impacted the overall efficiency of the ACP's eligibility determination process. For instance, panel attorneys have less time to upload the information they collect in court during their client interviews, which in turn delays the ACP's final determination in some cases.

Ms. Dougherty also noted that the recent shortage in available panel attorneys has created a particularly difficult pressure point in Syracuse City Court (including the morning CAP session). By way of context, the ACP tracks each panel attorney's caseload. For attorneys who are at caseload capacity or who inform the ACP they are no longer accepting case assignments, their status on the ACP's list of panelists is "red lined" to indicate that they are unavailable for additional assignments indefinitely, or "yellow lined" to indicate they are temporarily not accepting assignments. This information is shared with every court in the county each week. As of December 23, 2022, the list showed only four attorneys who were not red or yellow lined accepting felonies in City Court and only seven attorneys accepting misdemeanor and violation level cases across the ten other City Court Cores (with not every attorney on every City Court Core). Thus, with so few attorneys available for assignments, in Syracuse City Court where it is already common to make assignments to attorneys without regard to the ACP's list, assignments are now more often made to attorneys who are red or yellow lined out of necessity. This creates additional delays if case reassignment is needed. Ms. Dougherty is working with the judiciary to address this issue, but the shortage of available panelists will continue to impede the assignment process. Consequently, despite the ACP's continued refinement and improvement of their eligibility determination process, the stagnant statutory rates and the related shortage of panelists presents a critical threat to the ACP's ability to assign counsel in a timely manner as required by Eligibility Standard III.

incarcerated, detained, or confined to a mental health institution; (C) they receive, or recently have received, need-based public assistance; or (D) they have been deemed eligible for assigned counsel in any jurisdiction within the past six months.

¹⁰ County Law § 722-b(1) currently provides that private counsel accepting assignments for clients eligible for assigned counsel shall be paid a fixed rate of sixty dollars per hour for misdemeanor-level representation, and seventy-five dollars per hour for all other cases (including felony-level, family court, and appellate representation).

Ontario County

Procedures for Assigned Counsel Eligibility Determinations

The Ontario County Public Defender's Office (PD Office), Ontario County's primary provider of mandated criminal defense representation, is responsible for screening for financial eligibility people seeking assigned counsel. As PD Office attorneys cover virtually all the county's arraignments,¹¹ much of the initial eligibility screening is done by PD Office attorneys at or before arraignment. As we have reported in previous years, the PD Office receives notice from the justice courts, prior to the scheduled arraignment, of any new appearance tickets. This allows the PD Office staff to reach out to potential clients prior to their arraignment and inform them of their right to assigned counsel if they are unable to retain counsel, which in turn allows the PD Office to determine need and eligibility for assigned counsel before a person's arraignment. If the person does not request assigned counsel prior to arraignment, PD Office attorneys screen applicants on the day of their appearance ticket arraignment. In these cases, if the person is eligible, the attorney informs the arraigning judge, and the judge assigns counsel during the arraignment. On the rare occasion that an eligibility screening cannot be conducted prior to a person's appearance ticket arraignment, the PD Office attorney advises the person to contact the PD Office as soon as possible to be screened. Such screenings can be done in person or over the phone.

For custodial arraignments, which are heard in the county's CAP, eligibility screenings are almost always conducted prior to arraignment. Before each of the CAP's two daily sessions, PD Office attorneys call the jail to learn if anyone is in custody awaiting arraignment. If so, PD Office attorneys interview the person at the jail and, if the person requests assigned counsel, screen for eligibility before the CAP session begins.

Upon completion of the eligibility screening, PD Office attorneys return eligibility intake forms to the PD Office. Chief Defender Leanne Lapp reviews all applications in which it appears the person may be ineligible or where eligibility is not immediately clear. In such cases, Ms. Lapp ensures a thorough follow-up is done by a staff investigator to confirm the accuracy of the initial information collected. In several cases, this system of checks has resulted in the PD Office identifying errors or missing information on the initial application, and as a result determining that a person is financially eligible despite the initial application suggesting otherwise.

If an applicant is ultimately determined to be ineligible, the PD Office immediately sends the applicant written notification along with information regarding their rights to seek a reconsideration and to appeal.

¹¹ Between July 1, 2021 and June 30, 2022, there were 1,548 arraignments eligible for assigned counsel. Of those arraignments, the PD Office covered 1,477 or 95%, with the Conflict Defender Office (CD Office) providing the coverage for the remaining 5% of cases. The majority of arraignments covered by the CD Office occur during the two CAP shifts covered by the CD Office each month. For these cases, the CD Office attorney covering the shift screens for eligibility at arraignment and forwards the information to the PD Office. Thus, the eligibility determination procedure is essentially the same for these cases as it is for cases covered by the PD Office. See *Implementing the Counsel at Arraignment Obligations in the Hurrell-Harring v. The State of New York Settlement 2022 Update Report*, available at: <https://www.ils.ny.gov/files/Hurrell-Harring%20Counsel%20at%20Arraignment%202022%20Update%20Report.pdf>.

Data

Data ILS received from the Ontario PD Office show that between January 1, 2022, and December 31, 2022, a total of 2,188 individuals applied for assigned counsel. Of those:

- 2,166 total applicants were deemed eligible.
- 22 applicants were deemed ineligible.
- 0 applicants requested reconsideration or appealed to a judge.

Ms. Lapp estimates that in 2022, 90% of the eligibility determinations were based on one of the four eligibility presumptions set forth in the Eligibility Standards, typically Eligibility Standard II(A)'s presumption based on income. The PD Office also reports that one of the 22 applicants deemed ineligible was for a non-financial reason—i.e., the person was charged with a traffic violation that is not entitled to assigned counsel. Thus, less than one percent of people who applied for counsel in Ontario County in 2022 were deemed financially ineligible.

Program Updates

The PD Office continues to have success with its pre-arraignment and pre-charge eligibility protocols. In response to an ILS Questionnaire, Ms. Lapp noted that on at least two occasions since last year's report, the PD Office received and acted upon applications for assigned counsel from clients who were likely to be charged with serious felonies based on allegations in related Family Court proceedings. Ms. Lapp also noted that they continue to assign counsel to people in appearance ticket cases, which allows the PD Office to provide these clients advice about what to expect at their arraignment and to offer them social work support where appropriate. Ms. Lapp added that for clients who have a case pending with the PD Office when they receive an appearance ticket for a new charge, pre-arraignment eligibility screenings and assignment of counsel is critical as new charges may impact the pending cases. Additionally, the screening can also be an opportunity for the PD Office to assess if the client is struggling and in need of additional support.

Like all settlement counties, Ontario County is experiencing a reduction in the number of ACP panel attorneys. In cases where a conflict is discovered, despite the PD Office's efficient systems for screening and determining eligibility for assignment of counsel, there may be delays in actual assignment of counsel as the ACP tries to find an attorney with the necessary qualifications and experience who is able to accept the case.

Schuyler County

Procedures for Eligibility Determinations

Until recently, the responsibility for Schuyler County's eligibility determination process was shared by the county's two providers of mandated criminal defense: the Schuyler County Public Defender's Office (PD Office) and the Schuyler/Tompkins Regional Assigned Counsel Program (ACP). As described below, the process was streamlined at the end of 2022, and going forward, the PD Office will complete all eligibility screenings.

Most eligibility screenings are conducted by PD Office attorneys on the day of an applicant's arraignment. Custodial arraignments are generally conducted in the county's CAP court, while appearance ticket arraignments are conducted in the county's 12 justice courts. In either case, PD Office attorneys arrive to court early with eligibility screening forms in hand. Prior to a person's arraignment, PD Office attorneys conduct a confidential interview during which they collect information regarding the person's financial eligibility for assignment of counsel. The attorneys provide this information to PD Office support staff.

Prior to November 2022, the support staff then performed conflict checks for each new applicant. If a conflict was discovered, the application was forwarded to the ACP along with all other relevant case information, and the ACP determined eligibility. In all other cases, the PD Office determined eligibility. As of November 2022, PD Office support staff now determine eligibility for each new case before performing a conflict check. Thus, for conflict cases sent to the ACP, the question of eligibility has already been decided, eliminating the need for the ACP to screen for eligibility.

People may also request assigned counsel prior to arraignment or formal charges being filed. They can do so by submitting to the PD Office an application for assigned counsel – available as a fillable PDF on the PD Office website and posted outside their office door – in person, by fax, or by mail. Chief Defender Nancy Farrell estimates they receive such applications about five times per month. In most cases, eligibility screenings are completed within a business day of the PD office receiving an application.

In cases where an application is incomplete, PD Office support staff reach out to the applicant for the additional information required to determine eligibility. Lisa Dugan, an employee of the Tompkins County Office of Opportunities, Alternatives and Resources, Inc. (O.A.R.), who works with incarcerated PD Office clients, occasionally assists in obtaining this information. In cases where the PD Office support staff are not certain whether an applicant is eligible, they forward the application to Ms. Farrell for review, and she makes a final decision. Whenever the PD Office determines an applicant is ineligible, they notify the applicant in writing and provide information regarding their right to request reconsideration or to seek an appeal.

Data

Data ILS received from the Schuyler PD Office show that between January 1, 2022, and December 31, 2022, a total of 611 individuals applied for assigned counsel. Of those:

- 608 total applicants were deemed eligible.
- 3 applicants were deemed ineligible.
- 0 applicants requested reconsideration or appealed to a judge.

Data ILS received from the Schuyler/Tompkins Regional ACP show that between January 1, 2022, and December 31, 2022, a total of 181 individuals applied for assigned counsel. Of those:

- 181 total applicants were deemed eligible.

- 0 applicants were deemed ineligible (thus, there were no requests for reconsideration or appeal).

Both the Schuyler PD Office and the ACP indicated that almost all applicants (approx. 99% and 100% respectively) deemed eligible qualified under one of the four presumptions set forth in the Eligibility Standards, with most falling under the income presumption set forth in Eligibility Standard II(A).

Program Updates

The PD Office experienced significant transition during 2022. In May 2022, then-Chief Defender Valarie Gardner resigned from the office, which greatly reduced the PD Office's capacity to take new case assignments in compliance with the ILS Caseload Standards. The PD Office and ACP collaborated with county officials and ILS to devise a system that relied on their existing caseload overflow plan to ensure the PD Office remained within ILS Caseload Standards.¹² The plan, which was in effect until a new Chief Defender was hired, called for the ACP to accept most of the county's serious felony assignments. During this period, the ACP determined assigned counsel eligibility for these cases. To provide the PD Office attorneys with guidance and support, the county engaged mentor attorney Jill Paperno. Although PD Office staff (with Ms. Paperno's assistance) and ACP staff worked diligently to ensure the overflow referral process was smooth and timely, it often took a significant amount of time for the ACP to identify an attorney with the requisite skills and experience to accept the felony case. Mr. Salisbury, Supervising Attorney for the ACP, reports that there are fewer attorneys on his panel willing to accept cases in Schuyler County at the current statutory rates. Thus, even though the eligibility determination process has been streamlined and determinations are being made in a timely manner, the decreasing number of available panel attorneys has jeopardized the county's ability to timely assign counsel as called for by Eligibility Standard III. Ms. Farrell's appointment as Chief Defender in November 2022 has allowed the PD Office to increase its caseload capacity, thereby alleviating some of the pressure on the ACP. However, Schuyler County still faces increased caseloads, limited attorney capacity, and inability to ensure timely assignments for overflow and conflict cases due to the dwindling number of ACP panel attorneys.

Suffolk County

Procedures for Assigned Counsel Eligibility Determinations

With its densely populated suburban West End and its more rural and sparsely populated East End, Suffolk County has implemented a bifurcated approach to eligibility determination procedures. In the West End, almost all arraignments happen in District Court. Individuals in custody appear in the D-11 part of District Court for arraignment, where Suffolk County Legal Aid Society (SCLAS) attorneys represent people at arraignment. Non-custodial appearance ticket arraignments are conducted in the Street Appearance Part (SAP), where the Suffolk County Assigned Counsel Defender Program (SCACP) schedules attorneys to represent people at

¹² See, NYS Office of Indigent Legal Services, *A Determination of Caseload Standards Pursuant to § IV of The Hurrell-Harring v. The State of New York Settlement*, December 8, 2016 (available at: [Caseload Standards Report Final 120816.pdf \(ny.gov\)](#)).

arraignment. The process for eligibility determinations varies depending on whether the arraignment occurs in D-11 or the SAP.

In D-11, the Suffolk County Department of Probation (Probation) conducts an interview with each individual awaiting arraignment. The purpose of this interview is twofold – Probation assesses whether the individual should be recommended for release on recognizance, and they assess whether the individual is presumptively eligible for assigned counsel under any of the four presumptions set forth in the Eligibility Standards. Probation shares its recommendations with the court. In most cases, the court accepts Probation’s recommendation as to eligibility. In cases where the applicant does not appear to be presumptively eligible, the judge determines if further screening is necessary. In many cases, the judge may perform a brief inquiry and assign from the bench. In rare cases, if the person is released, the judge may direct the person to follow up with SCACP for screening or to hire an attorney.

In SAP, SCACP attorneys are present at each session and available to represent any individual who has not retained counsel. Clients who want to apply for an assigned attorney are told they can apply after their arraignment at the SAP’s Screening Office, located on the fourth floor of the District Courthouse. SCACP provides its SAP attorneys with written forms containing all the relevant information people need to be screened, including instructions on how to get to the Screening Office and what documents to bring with them. We reported last year that, due to the Covid-19 pandemic, the Screening Office was closed, and screenings were occurring by phone or at the SCACP offices across the street from District Court. As of January 2022, the Screening Office resumed in-person operations in the District Court building.

In the Screening Office, the SCACP screener sits with applicants in a confidential space and assists them in completing the application for assigned counsel. Once the form is complete, it is reviewed by SCACP staff. In most cases, a determination is made immediately. If the information provided by the applicant leaves doubt as to eligibility, the application is submitted to SCACP administration for further review. Once a determination is made, the applicant is provided with written notice of the outcome. For those who are deemed eligible, the notice includes a recommendation that the court assign counsel, and instructions to the applicant to present the recommendation to the court at their next appearance. For people deemed ineligible, the notice contains information on the reason for SCACP’s recommendation and they are given a copy of ILS’s Sample Right to Seek Review.

In the East End, arraignments occur in the justice courts. Generally, if a person is in custody at the time of their arraignment, they are presumed eligible and the judge assigns SCLAS from the bench (or refers the case to SCACP if there is a known conflict). For non-custodial arraignments, the arraigning judge generally makes a brief inquiry as to a person’s financial eligibility for assigned counsel. If there is any doubt, the person is referred to SCLAS for screening. As part of this process, judges give people who want to apply a form with detailed instructions on how to contact SCLAS and what documents might be required as part of the screening process.

SCLAS eligibility screenings are performed in person or by phone. Given the limited transportation options available to low-income people in the county’s East End, phone screenings are an effective option to ensure people can apply for assigned counsel. SCLAS

reports that, since the onset of the Covid-19 pandemic, phone interviews have become predominant even after SCLAS offices resumed normal operations. During these screenings, applicants speak to a trained SCLAS screener who completes an application based on information provided by the applicant. Eligibility determinations are generally made within a day of the interview except in borderline cases, which are referred to SCLAS's lead investigator for review and follow-up. Except in these borderline cases, applicants are informed of the outcome of their eligibility screening at the time the interview is completed. If a person is determined to be ineligible, they are informed of their right to request a reconsideration and to appeal. If the applicant appeals or requests reconsideration, SCLAS seeks to resolve the appeal or reconsideration as soon as possible.

Data

Data received from the Suffolk County Department of Probation shows that between January 1, 2022, and December 31, 2022:

- 7,508 applicants were screened for presumptive eligibility in D-11.
 - 5,538 total applicants (73.76%) were deemed presumptively eligible.

Data received from SCACP shows that between January 1, 2022, and December 31, 2022:

- 1,465 applicants were screened for eligibility in SAP
 - 22 applicants were determined to be ineligible.
 - 1 applicant appealed and was ultimately found eligible resulting in 21 ineligible findings (1.43%).

Data received from SCLAS shows that between January 1, 2022, and December 31, 2022:

- 47 applicants were screened for eligibility in the East End justice courts.
 - 1 applicant was determined to be ineligible (and did not appeal).

SCACP reported that approximately 95% of individuals they determined to be eligible were qualified based on Eligibility Standard III(A) (income presumption). Similarly, SCLAS reported at least 85% of their eligible applicants qualified based on this presumption.

Program Updates

Suffolk County's eligibility determination procedures have been relatively stable in the year since the 2022 report was submitted. However, the SCLAS and SCACP have made a handful of small changes that have refined the process, making it easier for people to request assigned counsel. For instance, SCLAS reports that the practice of completing eligibility screenings over the phone has become very common. This eliminates the need for applicants to find transportation to SCLAS's offices. SCACP also reported that, although they reopened the Screening Office in the District Courthouse, they continue to receive phone calls from applicants and is it now a part of their practice to complete a telephone screening if possible. SCACP also

notes that it is now common practice for the presiding District Court judge and/or court staff to tell people of the option to apply for counsel by phone.

While Suffolk County's providers have fine-tuned their eligibility screening procedures, there are still barriers to timely access to assignment of counsel after the initial screening is performed. One of these barriers is that the screening process for appearance tickets in District Court creates a potential gap in representation during the time the SCACP deems an individual eligible for SCLAS representation and their subsequent assignment at the person's next court date. This gap in representation is commonly up to a month long, which can create issues relating to discovery, case investigation, and the attorney-client relationship. This year, we worked with SCLAS and SCACP to develop strategies for minimizing this gap. These strategies include ensuring that SCACP notifies SCLAS daily of those deemed eligible and SCLAS administrative staff working with the court to get client files and information prior to the next scheduled court appearance. There remains resistance by some courts to allowing access to these files prior to the court's formal assignment. ILS is working the Office of Court Administration (OCA) and relevant stakeholders on this issue.

Another barrier we learned of this year is that at least one judge who oversaw felony cases in District Court was disregarding Probation's eligibility recommendations. This frequently led to delays in assignment of counsel on these felony matters. In working with OCA and the providers on this issue, we are told the judge in question is no longer in the felony courtroom and this issue does not appear to be widespread. Still, ILS will monitor whether this issue persists.

Suffolk County has also experienced some delays in identifying ACP attorneys with the requisite skills and experience who can accept conflict assignments. As with the other settlement counties, this is because several ACP panel attorneys will no longer accept new cases because of the low statutory compensation rates. The ACP has less difficulty identifying qualified panel attorneys to take new cases in courts where judges are ordering enhanced rates, but the continued delays in access to counsel will persist until the statutory compensation rates are increased for all cases and in all courts.

Washington County

Procedures for Assigned Counsel Eligibility Determinations

The Washington County Assigned Counsel Program (ACP) processes all applications for assigned counsel in Washington County. Because the Washington County Public Defender's Office (PD Office) is the county's primary provider of mandated representation, this requires ongoing collaboration between the two programs. The PD Office provides representation at most of the arraignments in Washington County. At arraignment, PD Office attorneys inform each person of their right to assigned counsel and provide a packet with the assigned counsel application form and a cover letter listing the arraigning attorneys name and information about completing and submitting the application.

The ACP accepts applications in person, by mail, email, fax, and text message. Prior to the Covid-19 pandemic, the ACP also staffed two of the county's remote justice courts monthly to

accept application on site. ACP Supervising Attorney Tom Cioffi reports that this process was halted during the peak of the pandemic and has not resumed because applicants overwhelmingly submit their applications by text or email, obviating the need to travel to the ACP office with physical application.

Upon receipt of an application, an eligibility determination is almost always made within hours unless the application is incomplete. In such cases, ACP staff reach out to applicants to obtain the information needed to process their application. In the rare event that ACP staff question whether an applicant is eligible, the application is reviewed by Mr. Cioffi. Once a determination of eligibility is made, the ACP alerts the PD Office or, where there is a conflict of interest, assigns a panel attorney and sends a notice of conflict assignment to the relevant court. If an applicant is ineligible, ACP staff send them a notice of ineligibility explaining the reason for the denial and informing them how to request a reconsideration or pursue an appeal. In most cases, this notice is sent by email to inform the applicant as quickly as possible. Throughout this process and until a final eligibility or conflict determination is made, the PD Office remains provisionally assigned to anyone they represent at arraignment.

Occasionally, the ACP receives an application for assignment of counsel from someone who has not yet been charged or arraigned. In these cases, Mr. Cioffi determines whether there is a reasonable risk of criminal liability. If so, the ACP adheres to the process described above.

While the formal eligibility determination process described above has remained relatively unchanged, judges in Washington County are increasingly assigning counsel at arraignment. This is true especially for incarcerated people, who are assigned counsel at arraignment as a matter of course. But even for appearance ticket arraignments, the PD Office reports that they are increasingly requesting judges assign counsel at arraignment. As part of their pre-arraignment interview process, PD Office attorneys frequently obtain information from their clients which makes it clear they are presumptively eligible. In many cases, the judges rely on the PD Office attorneys' recommendations and assign counsel, negating the need for the process described above.

Data

Data ILS received from the Washington ACP show that between January 1, 2022, and December 31, 2022, a total of 1,550 individuals applied for assigned counsel. Of those:

- 1,550 total applicants were deemed eligible.
- 0 applicants were deemed ineligible (thus, no applicant requested reconsideration or appealed to a judge).

The ACP reports that between 90% and 100% of applicants qualified based on one of the four presumptions set forth in the Eligibility Standards, most often because people report that they are receiving needs-based public assistance (Eligibility Standard III(c)).

Program Updates

In August 2022, longtime ACP Administrator Marie DeCarlo-Drost resigned and in September 2022, the ACP hired Julie Eagan as their new Administrator. Ms. Eagan, who came to the ACP from the Washington PD Office, noticed that in conflict cases, there was sometimes a delay between the ACP's eligibility determination and the assignment of a panel attorney to take the case. After investigating the issue, Ms. Eagan realized that many of the ACP's panel attorneys have very busy schedules, often carrying caseloads from two or three different counties. As a result, they typically cannot respond to ACP communications on the day they receive them. After consulting with Mr. Cioffi, Ms. Eagan decided to email all panelists a questionnaire asking them how they would like to be contacted for new case assignments. Ms. Eagan estimates that about 95% of panel attorneys responded to the survey, and many requested that the ACP forward assignment inquiries to their respective secretaries. Mr. Cioffi and Ms. Eagan agree that this small change has had a marked effect on the speed at which assignments are made.

Despite these positive changes, Mr. Cioffi reports that for very serious or complicated cases, they sometimes have difficulty finding panel attorneys with the appropriate skills and experience available to take the assignment. Because of the widespread nature of this problem, and because the ACP's attorneys are often panelists in multiple counties, there is tremendous demand for attorneys who are qualified to handle the most serious cases. If the current trend toward diminishing panel sizes continues, delays in assignments for more serious cases will likely become more frequent.

II. ACCESS TO COUNSEL

In the *Hurrell-Harring* litigation, the plaintiffs noted that “the lack of statewide eligibility standards results in incoherent and poorly designed processes for determining whether defendants are financially eligible for public representation and for ensuring prompt assignment of counsel.”¹³ The plaintiffs further asserted that adoption and uniform application of eligibility standards was required “to ensure that defendants who need public representation are not denied their right to counsel.”¹⁴ From the outset of litigation, the *Hurrell-Harring* plaintiffs underscored how the manner in which eligibility determinations are made necessarily and profoundly affects whether those who need counsel obtain it, and whether – once obtained – it is timely. In this section we will first describe the transformative effect the Eligibility Standards have had on the fairness, transparency, and efficiency of the eligibility determination process itself. We will then address the current crisis in timely appointment of counsel as required by Eligibility Standard III.

Eligibility Determination Process

With the relationship between eligibility and access to counsel in mind, we distributed questionnaires to each *Hurrell-Harring* provider in advance of this report. The questionnaire included an opportunity to reflect on the effectiveness of the Eligibility Standards in ensuring that those who need counsel get it. The discussion that follows is informed by the responses we received.

¹³ Amended Complaint, *supra.*, at para. 299.

¹⁴ *Id.* at para. 301.

The overwhelming sentiment expressed in the responses we received related to the effectiveness of the Eligibility Standards in quickly and fairly identifying those who were entitled to assignment of counsel. For some providers, this means that the determination process has become more coherent, consistent, and timely. Brennan Holmes, Lead Investigator at the Suffolk County Legal Aid Society, noted that the eligibility determination process governed by the Eligibility Standards “works well. The changes implemented in the past years have become the norm and that has helped the process run smooth. It seems all parties (clients, courts and attorneys) understand the process and follow it. This has allowed clients to obtain representation in a more effective way.” Leanne Lapp, Ontario County Public Defender, shared a similar sentiment, noting that the Eligibility Standards “have streamlined the eligibility process so that determinations can be made more quickly. They lead to consistency between counties, so that a client isn’t assigned counsel in one county but not another.” Kathleen Dougherty, Executive Director of the Onondaga County ACP, agreed that “the standards to obtain free representation are fair in criminal court.”¹⁵

Other providers remarked on the fact that the Eligibility Standards also serve to insulate eligibility determinations from being affected by “competing concerns such as county funding and workload” and other “inappropriate factors.”¹⁶ On this subject, Ms. Lapp noted that the Eligibility Standards “set black letter guidelines so that when someone outside of the office thinks a person shouldn’t have assigned counsel our determination can be easily explained.” Tom Cioffi, Washington County ACP Supervising Attorney, also remarked that having the Eligibility Standards has served to “remove doubt” regarding eligibility determinations.

As we have described above, most eligibility determinations in the five counties are made within a day of the application is received. This is dramatically different from the state of affairs before the Eligibility Standards were implemented. The *Hurrell-Harring* Amended Complaint is replete with examples of a long, arduous, and inscrutable eligibility determination process. These issues are summarized in the Amended Complaint:

In many counties, the system for determining eligibility results in serious delays and barriers to the appointment of counsel. For example, there are often delays in the appointment of counsel because of confusion on the part of applicants regarding the process for applying, the failure of judges to properly inform eligible defendants about the process, failure to appoint counsel immediately at arraignment, and difficulties in sorting out conflicts in multiple-defendant felony cases.¹⁷ ... In Ontario County, for example, it is not uncommon for incarcerated clients to wait several days before learning the names of their attorneys and

¹⁵ Ms. Dougherty also noted that since adopting the Eligibility Standards for criminal cases, most of the requests for reconsideration the Onondaga ACP has received have originated from Family Court litigation due to stricter guidelines. However, she notes that with the recent “promulgation of a new section 205.19 of the Uniform Rules for the Family Court, *Financial Eligibility for Publicly Funded Counsel*, effective September 28, 2022, we implemented the same eligibility standards for Family Court cases as criminal cases. This change has increased our caseload but seems much more equitable.”

¹⁶ Amended Complaint, *supra.*, at para. 300 (quoting Commission on the Future of Indigent Defense Services, *Final Report to the Chief Judge of the State of New York* (2006) at 16).

¹⁷ *Id.* at para. 315.

having an opportunity to communicate with them. In Onondaga County, one client languished in jail for three weeks before learning the name of his assigned counsel.¹⁸ ... In Schuyler County, clients sometimes must wait a month or more after arrest before being assigned an attorney. One client applied for counsel the day she was arrested but, after not hearing from the public defender's office for over a month, gave up and asked a public defender from an adjacent county to represent her.

It is unsurprising, then, that providers in the five counties consistently described their current eligibility determination process as streamlined, efficient, and fair. For example, Mr. Cioffi remarked that "we've simplified the process, [the Eligibility Standards] make it as easy as possible, and the clear standards streamline the process."

The *Hurrell-Harring* Amended Complaint focused heavily on the long delays in eligibility determinations and assignment of counsel after criminal proceedings had commenced. But with the implementation of the Eligibility Standards, providers have also been empowered to assign counsel before formal charges are filed when it appears reasonably likely that charges are forthcoming.¹⁹ Many providers informed ILS that this expansion of access to counsel has positively impacted their clients. Nancy Farrell, Schuyler County Public Defender, gave an account of two cases in which attorneys were assigned before charges had been filed:

There was a woman with pretty significant learning disabilities. She was accused of not reporting income earned by DSS and they wanted her to sign an agreement that she would pay back the money and be ineligible for public assistance for the year, if she didn't sign they would criminally charge her. We worked with her to review her bank records, her application, but also to get her history of learning disabilities and were able to assist her in understanding her rights and what her options were. There was another woman who was fired from her job for allegedly making false returns. She was extremely distraught and didn't understand what was going on. She had freely talked with NYS police before she was fired and they were verbally aggressive with her. We were able to get her story while it was fresh in her mind, advise the NYS police that they could no longer speak with her, and our investigator, who is a former NYS trooper, was able to explain to her what they were trying to do in their interview with her. He was also able to do a limited investigation. To date, no charges have been filed but she felt relieved to better understand what was happening and what would likely happen if she is charged.

Ms. Lapp shared a similar anecdote:

¹⁸ *Id.* at para. 316.

¹⁹ Standard III provides, "[c]ounsel shall be assigned at the first court appearance or be provided immediately following the request for counsel, *whichever is earlier.*" (Emphasis added). The commentary to Standard III goes on to state that "an eligibility determination should be made as soon as possible for a person who reasonably believes that a process will commence that could result in a proceeding where representation is mandated." (Internal quotations omitted).

In two cases that immediately come to mind, we were able to assign counsel in very serious felony matters before the clients were charged or had been interviewed by law enforcement because the cases came in through Family Court, and in reading the relevant Petitions we could easily determine that there would be criminal charges forthcoming. Both cases are still in the legal process, but I can unequivocally say that this was a benefit to the clients – from both a legal perspective and because the client was able to feel like they had an advocate and support in the highly stressful time between investigation and formal charge. We continue to assign counsel for people requesting attorneys on appearance tickets, allowing these clients to have some idea of what will transpire on their initial court appearance (thereby lessening the stress of uncertainty), and to offer them social work support where appropriate. It’s also helpful to know when current clients have new charges that resulted in appearance tickets; this could impact the legal status of their current case, and also informs us that the client may be struggling in some manner.

Mr. Cioffi told ILS that “on one occasion, a client was put on notice that CPS was looking at her for child neglect. She came down and spoke to us and they were able to get her an attorney for the prepetition proceeding. Although this was a family court case, they treat it like a potential criminal case due to the possibility of EWOC [Endangering the Welfare of a Child] charges.” Ms. Dougherty spoke of a client who “stated that she was contacted by the police and asked her to come to the police station for questioning as a ‘witness.’ Quality Enhancement Director Laura Fiorenza and Deputy Director Dave Savlov handled the call. We created the case in the IntelLinx database and collected her financial information, determining her to be eligible. We then contacted an attorney to represent her, so that she had counsel at the police station.”

While the cases described above are infrequent (generally the *Hurrell-Harring* providers report receiving requests for pre-charge assignment of counsel only a handful of times per year), the fact is that the providers – in compliance with and guided by the Eligibility Standards – have demonstrated a commitment to ensuring that eligibility determinations are accomplished with all possible dispatch, and counsel is afforded to any eligible applicant who needs it. Lance Salisbury, Supervising Attorney of the Schuyler/Tompkins Regional ACP, summarized this progress in a compellingly simple remark: “[t]he clients that are in need of an attorney are getting one.”

Timely Assignment of Counsel

It is clear that, since implementation of the settlement and adoption of Eligibility Standards, the process for deciding who is entitled to assigned counsel has become more fair, less burdensome, and much faster. However, despite this dramatic improvement in the eligibility decision-making process, the five counties face a growing crisis in their ability to make timely assignments. In other words, while providers in the five counties have wholeheartedly embraced the Eligibility Standards, and while they have worked continuously to refine and improve their eligibility determination processes, their ability to translate these improvements into faster assignment of counsel has been hampered by factors beyond their control. According to the feedback ILS has received from providers in the five counties, this crisis – caused primarily by a growing number

of ACP panel attorneys refusing to accept new case assignments – is driven by the State’s failure to increase the assigned counsel compensation rates.

This problem is experienced most keenly in the counties that rely more on their ACP for mandated representation in criminal cases. Onondaga County, for instance, relies exclusively on its ACP for trial level cases, and is therefore facing a significant crisis. Ms. Dougherty has reported that her panel size continues to shrink, noting that since 2017, her ACP panel size has decreased by 81 attorneys. She also reports that those attorneys who are still accepting cases are almost always at or near their caseload capacity. In 2022, Schuyler County was also relying more on its ACP due to the PD Office’s staffing issues and reduced caseload capacity. Unsurprisingly, Ms. Farrell and Mr. Salisbury have reported several instances in which it was impossible to find an attorney willing to accept a serious felony assignment, resulting in days or weeks during which eligible applicants had no assigned attorney.

Without healthy ACP panels, it is unlikely that the *Hurrell-Harring* counties can continue to maintain compliance with their obligation to assign counsel to each eligible applicant in a timely fashion.

CONCLUSION

The United States and New York State Constitutions guarantee effective assistance of counsel for all those who are charged with a crime.²⁰ For low-income people, full realization of this right relies on a fair and efficient financial eligibility determination process. With the promulgation and adoption of ILS Eligibility Standards, and the continuing implementation efforts of the five counties and their providers, people in the five counties who need assigned counsel can expect a timely, fair, and transparent eligibility determination process. As demonstrated by the information and data ILS has collected from providers, they continue to adhere to the Eligibility Standards as required by the settlement. Moreover, as demonstrated by the responses to the ILS eligibility questionnaire, it is also clear that access to counsel has continued to expand as providers and the general public become better acquainted with the scope of the Eligibility Standards. However, this success has been tempered by the State’s failure to increase the compensation rates for assigned counsel attorneys and the resulting crisis for the ACPs. Despite the best efforts of the counties and their providers, it is likely that the delays in assigning counsel to eligible applicants described above will persist until the assigned counsel rates are increased.

²⁰ U.S. Const., amend. VI; NY Const. art. 1, § 6; see also *Gideon v. Wainwright*, 372 US 335 (1963).