



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

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

April 2, 2021



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 Assigned Counsel Eligibility:**

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

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## INTRODUCTION

ILS submits this report pursuant to § VI (C) of the *Hurrell-Harring v. The State of New York* Stipulation and Order of Settlement (“*Hurrell-Harring* Settlement” or “Settlement”). Section VI (C) requires ILS to submit annual reports assessing “the criteria and procedures used to determine whether a person is eligible to receive [m]andated [r]epresentation in each of the Five [Settlement] Counties,” and to identify if the criteria and procedures being used deviate from those set forth in the *Criteria and Procedures for Determining Assigned Counsel Eligibility* (“Eligibility Standards” or “Criteria and Procedures”), which ILS issued in April 2016.<sup>1</sup>

To date, ILS has submitted four annual reports, from April 2017 through April 2020. As with the previous reports, this fifth update report assesses the continued implementation of the Standards in the five counties and analyzes the data collected in 2020. Additionally, 2020 presented unique challenges with implementing bail reform and the significant and abrupt disruption to the criminal justice system created by the COVID-19 pandemic. Thus, the report will also highlight how each provider adapted to ensure that access to the eligibility application process was not disrupted and that, in most cases, people had access to counsel pre-arraignment. The report will also discuss the efficacy of the now fully implemented technology which, at the time of the 2020 report, Onondaga County was pursuing to improve the efficiency of its information and screening ability.

The report is based on information gleaned from conversations between ILS staff and the providers in each county, our review of the 2020 data each provider sent to ILS, and written and/or telephonic structured interviews we conducted with providers and their staff members who are involved in the eligibility determination process. Because of pandemic-related safety concerns, ILS did not conduct any in-person court observations in 2020.

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

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<sup>1</sup> Notably, on February 16, 2021, ILS issued the *Standards for Determining Financial Eligibility for Assigned Counsel*, which apply in both criminal and family law cases. As ILS Director Bill Leahy noted in his transmittal email, the Standards, newly denominated “Eligibility Standards” in lieu of “Criteria and Procedures,” build upon and supersede the April 2016 *Criteria and Procedures for Determining Assigned Counsel Eligibility*. Because this report discusses Eligibility Standard compliance in 2020, any reference to the Standards are to the 2016 *Criteria and Procedures for Determining Assigned Counsel Eligibility* then in effect.

### *Structured Interviews*

In February 2021, for each county, ILS staff conducted written and/or telephonic structured interviews of the administrators and support staff of providers involved in determining assigned counsel eligibility, 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 Wesley A. Roe

**Suffolk ACP:** Deputy Administrator Stephanie McCall

**Suffolk LAS:** Chief Investigator Brennan Holmes

**Washington ACP:** Administrator Marie DeCarlo-Drost; Supervising Attorney Thomas N. Cioffi

## BAIL REFORM, THE COVID-19 PANDEMIC, AND THE JUDICIAL RESPONSE

New York’s 2019 criminal justice reforms included a series of amendments to sections of the Criminal Procedure Law (CPL)<sup>2</sup> to eliminate the imposition of cash bail and pretrial detention in nearly all misdemeanor and non-violent, non-sex cases. Significant changes to the use of Desk Appearance Tickets mean that, with limited exceptions, the issuance of appearance tickets to persons arrested for any misdemeanor or class E felony offense is now required in lieu of taking the person into custody for arraignment. Additionally, CPL § 150.20(1)(a) now mandates that a person criminally charged via appearance ticket is expected to appear in court for arraignment no later than 20 days following the issuance of the ticket, or the next scheduled court date if the court does not meet within the 20 day period, unless they are enrolled in a pre-arraignment diversion program. As described in the April 2020 Update Report, the *Hurrell-Harring* providers anticipated that these changes would require them to alter their current eligibility screening practices, and they prepared accordingly in advance of the January 1, 2020 effective date.

However, three months into implementation of the bail reform legislation, the United States found itself in the throes of the global COVID-19 pandemic. To mitigate the spread of the virus, on or about March 20, 2020, New York Governor Cuomo signed the “New York State on Pause” Executive Order suspending in-office personnel functions in all non-essential businesses statewide as of Sunday, March 22.<sup>3</sup> For similar reasons, particularly as it impacted “the users, visitors, staff, and judicial officers of the Unified Court System,” on March 16, 2020, Chief Administrative Judge Hon. Lawrence K. Marks issued Administrative Order 68/20,<sup>4</sup> directing, among other things, that most non-custodial arraignments were to be administratively adjourned until further notice. Thereafter, on March 22, 2020, Governor Cuomo issued Executive Order

<sup>2</sup> See Part JJJ, Revenue Bill (A-2009c|s-1509-c).

<sup>3</sup> See <https://www.governor.ny.gov/news/governor-cuomo-issues-guidance-essential-services-under-new-york-state-pause-executive-order>.

<sup>4</sup> Administrative Order 68/20 can be viewed here: <https://www.nycourts.gov/whatsnew/pdf/AO-68-20.pdf>.

202.8, tolling, until April 19, 2020, “any specific time limit for the commencement, filing, or service of any legal action . . . , as prescribed by the procedural laws of the state, including . . . the criminal procedure law.”<sup>5</sup> This tolling of any specific time limit was later modified and extended pursuant to several subsequent Executive Orders.<sup>6</sup>

Pursuant to the recent Executive and Administrative Orders, as of March 2020, Administrative Judges throughout the State ordered the temporary closure of the local Town and Village courts and adjourned all non-essential proceedings, including appearance ticket arraignments, for at least 90 days. That same month, in at least five of New York’s 13 judicial districts, judges signed Administrative Orders which effectively suspended the financial screening of all applicants for assignment of counsel, deeming them qualified regardless of their financial ability to obtain counsel. Three of the *Hurrell-Harring* counties (Onondaga, Schuyler, and Ontario, in the 5<sup>th</sup>, 6<sup>th</sup>, and 7<sup>th</sup> Judicial Districts, respectively) were directly affected by these orders. By subsequent amended orders dated June 29 and 30, 2020, the orders suspending eligibility screening in these three judicial districts were rescinded.

As in all areas of the criminal justice system, bail reform and the pandemic brought changes and, in some cases, challenges to the eligibility determination process. For each of the five counties, the providers’ responses to these changes and challenges will be discussed below following an overview of the processes for deciding assigned counsel eligibility in each county.

## **IMPLEMENTATION OF THE ELIGIBILITY CRITERIA AND PROCEDURES IN THE *HURRELL-HARRING* COUNTIES**

### **Onondaga County**

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

As the primary provider of mandated representation in Onondaga County, the Onondaga County Bar Association’s Assigned Counsel Program (ACP) remains responsible for screening applicants and making assigned counsel eligibility recommendations. To do so, 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.

As described more fully below, on January 1, 2020, the ACP launched IntelLinx, their new case management and electronic vouchering system. With this launch, all collected client information is now entered digitally into IntelLinx on the day the person is arraigned. The ACP staff receives the information and makes a final recommendation on eligibility.

Assigned counsel eligibility in Onondaga County is assessed depending on the court in which the individual is arraigned. Changes in court operations due to the pandemic required the ACP to adapt quickly. However, their now firmly established systems for determining eligibility for

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<sup>5</sup> See E.O. 202.8, which can be viewed here: <http://nycourts.gov/whatsnew/pdf/EO-202.8-ocr.pdf>.

<sup>6</sup> See, e.g., E.O. 202.14; E.O. 202.38; E.O. 202.48; and E.O. 202.67 (ordering the expiration of the tolling provisions of the Criminal Procedure Law as of November 18, 2020).

assigned counsel eased these transitions. 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 digitally via IntelLinX for the ACP's review and recommendation.

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

For in-custody arraignments,<sup>7</sup> the ACP assigns two or three attorneys to provide representation at arraignment. 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 that the person qualifies for counsel, and if so, the judge provisionally assigns an attorney to represent them. The arraignment attorney then electronically enters the person's information into IntelLinX for the ACP's review.

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

For out-of-custody individuals, an ACP office clerk sits at a desk outside the entrance to Part 4 (the arraignment Part in City Court), where, starting at 9:00 a.m., she meets with individuals who wish to have an attorney assigned to their case. As of January 1, 2020, applicants are no longer required to complete a paper application form. Rather, the office clerk collects their information on an iPad or laptop and enters it into IntelLinX. The arraigning attorney reviews the information and informs the judge whether the individual appears to qualify for an assignment of counsel. The judge will provisionally assign 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 Centralized Arraignment Part 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 this Part. 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.

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<sup>7</sup> This is also considered the morning portion of the county's Centralized Arraignment Program (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.

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Regardless of where a person was arraigned, every assigned attorney is notified by the court, the ACP, or both, of the assignment.

With IntelLinx, eligibility application information is collected and transmitted electronically to an ACP eligibility specialist for review to ascertain whether the applicant qualifies for assigned counsel, or whether additional information should be requested of the applicant before a final determination of eligibility is made. The ACP then either (i) informs the assigned attorney that the applicant is eligible for assigned counsel and that the attorney should continue on the case; (ii) sends the attorney a “pending” notice identifying missing information, thus making it incumbent upon 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 to the court a motion to withdraw as counsel. 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.

**B. The criteria and procedures the County is using compared to the ILS Criteria and Procedures**

Except for the changes resulting from the installation of IntelLinx, which has enabled even greater compliance with the Eligibility Standards, the criteria and procedures used by the ACP in assessing eligibility for counsel have been consistent and they remain in compliance with the Standards, as demonstrated below.

<b>ILS Eligibility Criteria and Procedures</b>	<b>County Criteria and Procedures</b>	<b>Comments</b>
<i>Criteria I (core eligibility standard)</i>	Consistent with ILS C&P	IntelLinx facilitates the ACP’s thorough and efficient assessment of each application to ensure that applicants who need counsel are assigned counsel promptly.
<i>Criteria II (eligibility presumptions)</i>	Consistent with ILS C&P	Though reportedly difficult to ascertain in light of the March 2020 administrative suspension of eligibility screening ( <i>see</i> p. 3, above), Executive Director Kathleen Dougherty estimates that approximately 75% of the eligibility decisions made in 2020 were based on an eligibility presumption.
<i>Criteria III (ability to post bond or pay bail)</i>	Consistent with ILS C&P	The ACP asks about an applicant’s release status, but for reasons unrelated to eligibility.

<i>Criteria IV (third-party resources)</i>	Consistent with ILS C&P	
<i>Criteria V (non-liquid assets)</i>	Consistent with ILS C&P	Though the ACP asks about non-liquid assets, in 2020, very few applicants had any that would impact the outcome of an application for assigned counsel. IntelLinx ensures that applicants are being asked about the primary residence and vehicles not being used for basic necessities exceptions by barring electronic submission of the application until the information is filled in.
<i>Criteria VI (child support and public assistance)</i>	Consistent with ILS C&P	
<i>Criteria VII (financial obligations)</i>	Consistent with ILS C&P	The ACP considers a non-exclusive list of applicants' financial debts and liabilities in assessing eligibility for counsel. If an applicant lists an expense which, to the screener, raises a question, the screener will confer with Ms. Dougherty.
<i>Criteria VIII (cost of retaining counsel)</i>	Consistent with ILS C&P	In assessing the actual cost of retaining counsel locally, Ms. Dougherty relies on her personal knowledge and that of her attorney staff.
<i>Procedure X (responsibility for screening)</i>	Consistent with ILS C&P	The ACP screens for assigned counsel eligibility. The number of times judges have had to intervene and deem someone eligible has significantly declined.
<i>Procedure XI (confidentiality)</i>	Consistent with ILS C&P	Judges no longer ask detailed questions about financial circumstances in open court, and the ACP has implemented protocols to protect the confidentiality of the information applicants disclose.
<i>Procedure XII (timeliness of decision)</i>	Consistent with ILS C&P	Eligibility determinations are generally made within 1-2 days of the ACP's receipt of the application; 3 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.

<i>Procedure XIII (burden of application process)</i>	Consistent with ILS C&P	The ACP asks for verification only when there is missing information or reason to believe that applicants may have under-reported their financial resources. In 2020, the ACP had no reason for making such request.
<i>Procedure XIV (written notice of ineligibility decision)</i>	Consistent with ILS C&P	No applicant is deemed ineligible until the ACP office staff has reviewed the application. Every ineligible decision is provided in writing, accompanied with a Notice of Right to Seek Review.
<i>Procedure XV (partial payment orders)</i>	Consistent with ILS C&P	The ACP notice of ineligibility no longer prompts judges to issue partial payment orders at the time of assigning counsel, and no judge has so ordered since implementation of the Eligibility Standards.

### C. Data

Procedure XVI requires the collection, maintenance, and reporting of data pertaining to the assigned counsel eligibility process. In addition to the quarterly reports the ACP sent ILS for calendar year 2020, the ACP also sent a cumulative report which shows that between January 1, 2020 and December 31, 2020, a total of 10,887 individuals applied for assigned counsel, of which 10,058 applications were processed in 2020.<sup>8</sup> Of those:

- ❖ 9,906 total applicants were deemed eligible.
  - 9,869 applicants were deemed eligible by the ACP.
  - 37 applicants were deemed eligible by a judge.
    - 1 was a case that the judge reassigned after the previously assigned attorney moved for an order to discontinue.
    - 33 were cases that were successfully appealed to the judge.
    - 3 were instances in which no reason was provided.
- ❖ 152 applicants were deemed ineligible.

This data clearly shows that the ACP has continued to transform its pre-Settlement practice of deeming a significant percentage of people ineligible for counsel, only to have judges reverse

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<sup>8</sup> Each quarter the ACP reports the number of applications that are “pending” at the end of that quarter (241 cumulatively for 2020). 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, for obvious reasons, the ACP did not make an eligible, ineligible, or pending determination: applicants who retained an attorney (116); applicants whose cases were disposed of at arraignment (439); applicants whose cases were removed to Family Court (16); and persons whose applications the ACP deemed “undetermined” because, for instance, the judge made the assignment pre-arraignment, or the assigned attorney opened the case in IntelLinx but did not follow through with collecting the necessary financial information (17).

that decision and assign counsel. This practice needlessly delayed the assignment of counsel. As we reported in 2017, the ACP's ineligibility rate for the last two months of 2016, soon after implementation began, was 15.1% in November 2016, and 17% in December 2016. In 2017, the ineligibility rate dropped to 7.42%. Now for three consecutive calendar years – 2018, 2019, and 2020 – the ACP's ineligibility rate has averaged approximately 1%. Eligible people are assigned counsel when they need it, and judicial intervention to correct needlessly rigid eligibility determinations is no longer necessary.

#### **D. Additional Information**

Under Ms. Dougherty's leadership, the ACP has consistently sought and applied innovative ways to improve the assigned counsel eligibility process to ensure that those who need counsel get counsel, and promptly. As earlier reported, the ACP's implementation of IntelLinX better facilitates the way in which applicants' financial information is collected and assessed. The ACP's launch of IntelLinX coupled with the ACP's continuous compliance with the Eligibility Standards, enabled it to take on the challenges to the eligibility determination process brought on by the COVID-19 pandemic and bail reform.

As is more fully detailed in the 2020 annual report (linked below)<sup>9</sup>, on January 1, 2020, the ACP transitioned from its former case management and vouchering system to the IntelLinX. Among its many functionalities is the enhanced efficiency in the way applicants' case and financial information are collected, recorded, and ultimately reviewed for assigned counsel eligibility determination.

Now that the program has been implemented for more than a year, Ms. Dougherty reports that IntelLinX has been a proven success in several ways. For instance, the ACP staff has been receiving more thoroughly completed applications to review. If there is missing information, the case is placed in pending status, but this does not interrupt the provisional assignment; it only impedes the assigned attorney's ability to bill on the case. Through IntelLinX, the ACP staff can generate a report identifying which cases are missing information, enhancing their efficiency in notifying the attorneys. Ms. Dougherty reports that this process has diminished the turn-around time to a final eligibility determination in "pending" cases. Additionally, because the ACP no longer relies on the submission of paper applications for assigned counsel, completing the eligibility assessment has been made much easier, facilitated by the electronic submission of the eligibility data from the attorneys. And, because attorneys are encouraged to collect and transmit the case and financial information on the day of arraignment, the ACP can make an eligibility recommendation sooner than it previously could – a primary goal met by the institution of IntelLinX.

Ms. Dougherty recently observed, "The fact that IntelLinX was implemented two months prior to the pandemic was completely fortuitous but one can only imagine how much worse the eligibility process would have been affected but for the new database."

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<sup>9</sup><https://www.ils.ny.gov/files/Implementation%20of%20Eligibility%20Criteria%20and%20Procedures%20in%20the%20Hurrell-Harring%20Counties%20040420.pdf>.

Indeed, with the launch of IntelLinx, the ACP was well-positioned to take on the challenges created by the pandemic. Upon learning of a possible outbreak of the coronavirus, Ms. Dougherty and her staff started planning for potential impacts to the panel. She ensured that all ACP staff had remote access if they needed to work from home, and because IntelLinx is cloud-based, staff can access it from home.

Ms. Dougherty also ensured that there was no disruption in the eligibility determination process. During the effective period of the administrative order suspending eligibility screening (March 20 – June 30, 2020), the ACP did not screen for financial eligibility, deeming every applicant eligible, but continued to collect applicants' financial information for other case-related purposes. Some cases would be marked as "pending" but only to remind the assigned attorney to obtain critically needed, but missing information, such as the name of the assigning judge and court.

More recently, with cases postponed administratively, some Town and Village Court judges are assigning attorneys to cases pre-arraignment, before financial information is received and before the eligibility screening is done. Presumably, the courts send the attorneys the charging documents and the person's contact information with the expectation that the attorneys will work on the case and, in some instances, be prepared to dispose of the case at arraignment.

This practice is consistent with the ILS Eligibility Standards, which contemplate pre-arraignment representation when requested, and could enable early investigation and possibly speedy resolutions in many cases. However, it has posed an unforeseen challenge for the ACP as IntelLinx is not yet equipped for this scenario. Ms. Dougherty recently explained that once a case is put into IntelLinx, attorneys cannot make changes or add information to the virtual file until the ACP staff has made a final eligibility determination. Thus, where an attorney inputs a case prior to arraignment and before collecting financial information, the attorney will not be able to update the case later with the financial information, and the staff cannot make an eligibility determination without the needed information. Ms. Dougherty and her staff are currently working on addressing this issue to ensure continued timely representation and eligibility screenings.

Indeed, anticipating the increase in appearance ticket arraignments that would result from bail reform implementation, and in accordance with the ACP's commitment to being more responsive to existing and potential clients, as early as summer 2019, Ms. Dougherty initiated discussions with county officials concerning early defense intervention, suggesting ways in which the ACP's contact information could be provided to individuals at the time that an appearance ticket is issued. Among other things, doing so would afford people the opportunity to be screened for eligibility and the assigned attorney to commence work on the case in advance of the initial court appearance. This is consistent with Procedure XII of the Eligibility Standards.

Ms. Dougherty recently noted that the bail reform legislation impacted the eligibility assessment in one significant way: with the increase in post-arraignment releases, people who, under the Eligibility Standards, might otherwise have been deemed presumptively eligible based on their incarceration at the time of applying for counsel, will not necessarily be presumed eligible and further inquiry may be required. Given the precipitous drop in the rates of pretrial detention statewide after bail reform,<sup>10</sup> it is not unreasonable to conclude that the number of assigned counsel applications that could have been decided on the incarceration eligibility presumption also decreased.

## Ontario County

The Ontario County Public Defender's 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**

The Ontario County Public Defender's Office (PD Office) has programs in place to provide representation at arraignment and the established processes for determining eligibility have remained virtually unchanged since the 2020 report though the pandemic's effect on criminal justice system operations has required flexibility.

Under normal circumstances, defense counsel 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, counsel instructs applicants to contact the PD Office so they can be interviewed either by phone or in person. In Ontario County's Centralized Arraignment Part, 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.

Though data reported to ILS shows there have not been any missed arraignments in more than two and a half years (since the 2018 implementation of the Centralized Arraignment Part),<sup>11</sup> staff from the PD Office continue to check the jail logs 6 days weekly to identify any missed arraignments and they are prepared to conduct interviews to both determine eligibility for assigned counsel and ascertain if there is a need to immediately calendar the case. Should an

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<sup>10</sup> See Vera Institute of Justice, *The Impact of New York Bail Reform on Statewide Jail Populations: A First Look* (February 2021): <https://www.vera.org/downloads/publications/the-impact-of-new-york-bail-reform-on-statewide-jail-populations.pdf>. The report, which studied the impact of bail reform on the jail population statewide through June 2020, shows, at pp 19-20, that, in selected counties outside New York City, the number of pretrial admissions (with a set bail) dropped 70.8% between October 2019 and January 2020 and fell by another 27.9% from January to June 2020.

<sup>11</sup> See *Implementing the Counsel at Arraignment Obligations in the Hurrell-Harring v. The State of New York Settlement*, 2019 Update (p. 7) and 2020 Update (p.7), accessible here: <https://www.ils.ny.gov/node/57/hurrell-harring-settlement-plans-and-reports>.

individual be arraigned without counsel and released, judges have typically advised them to contact the PD Office to apply for assigned counsel. Additionally, the PD Office receives notice from the courts of individuals charged via an appearance ticket and they are contacted to be screened for eligibility prior to their scheduled court appearance.

Office staff make decisions regarding eligibility soon after receiving the applications, most often on the day of receipt, unless the application raises issues requiring consultation with Chief Defender Leanne Lapp. If staff 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. In 2020, of the few applicants deemed ineligible, none requested reconsideration or appealed.

Ms. Lapp reports that the application form continues to serve a dual purpose: collecting information to determine financial eligibility for assigned counsel and as an intake form to elicit information on clients' life circumstances, including criminal history, medical and mental health, place of birth, and family support. Attorneys rely on this information for bail arguments and case negotiations.

**B. The criteria and procedures the County is using compared to the ILS Criteria and Procedures**

<b>ILS Eligibility Criteria and Procedures</b>	<b>County Criteria and Procedures</b>	<b>Comments</b>
<i>Criteria I (core eligibility standard)</i>	Consistent with ILS C&P	Ms. Lapp reviews close calls and ineligibility determinations to ensure compliance.
<i>Criteria II (eligibility presumptions)</i>	Consistent with ILS C&P	Ms. Lapp estimates that in 2020, 90% of the eligibility decisions were based on one of the four presumptions.
<i>Criteria III (ability to post bond or pay bail)</i>	Consistent with ILS C&P	
<i>Criteria IV (third-party resources)</i>	Consistent with ILS C&P	Though the intake form elicits information about parental income, the PD Office does not use this information in its eligibility assessments.
<i>Criteria V (non-liquid assets)</i>	Consistent with ILS C&P	In 2020, the PD Office did not encounter any applicant who had sufficient equity in a non-liquid asset to affect the outcome of the assigned counsel application.
<i>Criteria VI (child support and public assistance)</i>	Consistent with ILS C&P	The intake form elicits information about need-based public benefits to determine presumptive eligibility.

<i>Criteria VII (financial obligations)</i>	Consistent with ILS C&P	The PD Office considers hardship factors, such as the cost of providing care for an ill relative, or that the applicant is receiving chemotherapy because of a cancer diagnosis.
<i>Criteria VIII (cost of retaining counsel)</i>	Consistent with ILS C&P	In assessing the actual cost of retainers, Ms. Lapp relies on information she receives from applicants who have obtained quotes from private attorneys.
<i>Procedure X (responsibility for screening)</i>	Consistent with ILS C&P	Ms. Lapp reports that courts accept the recommendations of the PD Office.
<i>Procedure XI (confidentiality)</i>	Consistent with ILS C&P	The PD Office treats information it receives during the intake interview as privileged and confidential; and staff take steps to protect the clients' confidentiality.
<i>Procedure XII (timeliness of decision)</i>	Consistent with ILS C&P	Eligibility decisions are generally made soon after the applications are received, most often within 24 hours, unless there is a need to consult with Ms. Lapp and she is not immediately available. The office screens and assigns counsel at the pre-charge stage of a case, when requested.
<i>Procedure XIII (burden of application process)</i>	Consistent with ILS C&P	The PD Office requires verifying documentation only when necessary, such as when the financial information disclosed does not make sense, or when applicants are self-employed, and their net income cannot be easily discerned.
<i>Procedure XIV (written notice of ineligibility decision)</i>	Consistent with ILS C&P	No determination of ineligibility is made until Ms. Lapp has personally reviewed the application.
<i>Procedure XV (partial payment orders)</i>	Consistent with ILS C&P	The PD Office no longer recommends to courts that counsel be assigned contingent upon a County Law § 722-d order authorizing partial payments for the costs of representation.

### C. Data

In compliance with the data collection requirements set forth in Procedure XVI of the Criteria and Procedures, the Public Defender's Office sent us timely reports for the four quarters of 2020. Our review of the data reveals that, in calendar year 2020, the office received 2,174 applications for assigned counsel. Of those:

- ❖ 2,163 applicants were deemed eligible for counsel,
- ❖ 11 applicants were found to be ineligible, and
- ❖ None of the ineligible applicants requested reconsideration or appealed.

This is an ineligibility determination rate of about 0.5%. The PD Office also reports that during calendar year 2020, there were no orders issued pursuant to County Law § 722 for payment of assigned counsel fees.

#### **D. Additional Information**

In the last update report, we described Chief Defender Lapp's actions to preemptively address any issues with timely client access and representation due to the anticipated increase in appearance tickets under bail reform.<sup>12</sup> Ms. Lapp worked with stakeholders to implement a system of early notification of issued appearance tickets and she developed office protocols for ensuring timely representation, including screening for eligibility. One year later, Ms. Lapp reports that this initiative has allowed her staff to efficiently screen clients for eligibility in advance of their first court appearance enabling the PD Office to begin timely representation and connect clients to necessary services.

This new protocol has also proven useful as court operations shift due to the pandemic. With the administrative postponement of court proceedings, discussed above (pp. 2-3), law enforcement began issuing tickets with return dates three months after issuance. Because of Ms. Lapp's existing system and protocols for early notification, eligibility screening, and assignment, once appearance ticket arraignments resumed, the PD Office attorneys were effectively prepared at clients' first court appearances, in many cases with a previously negotiated disposition of each case. For people charged with Aggravated Unauthorized Operation of a vehicle, for instance, early access to counsel enabled attorneys to assist clients in preparing hardship affidavits prior to court to increase their chances of being granted limited driving privileges while the case is pending.

For in-custody individuals, Ms. Lapp has actively ensured that conversations are held privately and confidentially, particularly with those in CAP where people are almost always interviewed before arraignment. With limited access to the jails during the pandemic, the Sheriff assigned a dedicated phone line inside the jail at Ms. Lapp's request through which staff from the PD Office can Skype with their clients. While this is not ideal as it is not an in-person communication, it provides an assurance of confidentiality which is critical to the initial interview where clients' financial information is collected and is consistent with Procedure XI of the Criteria and Procedures.

As previously noted (p. 3 above), the March 20 pandemic-related Administrative Order suspended the financial screening of all applicants in Ontario County until its rescission on June 30. Neither Ms. Lapp nor the data reported to ILS indicated an increase in applications during these three months.

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<sup>12</sup> See CPL § 150.20(1)(a), as amended, which, as part of the 2019 criminal justice reforms, now mandates police-issued appearance tickets for nearly all people charged with misdemeanors and most class E felonies.

## 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 the financial screening 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 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*

Since the April 2020 annual report, there have been no changes to the paperwork and the processes the PD Office utilizes in assessing who is eligible for an assignment of counsel and who is not. Indeed, their firmly established processes for screening allowed for flexibility when changes in court operations occurred due to the pandemic. Schuyler County continues to be in full compliance with the Eligibility Standards.

Recognizing that Schuyler County is rural and that many applicants lack transportation to travel to the office to be interviewed, the PD Office instituted several avenues by which people can apply for assigned counsel. 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 brings back to the office for processing. If time does not allow, or courts are operating virtually, the attorney tells the applicant how to complete and submit the application. Until an eligibility determination is made, the PD Office attorneys continue to represent these individuals provisionally.

People in custody are presumed eligible for counsel, but the PD Office staff has them complete the application to collect relevant information and data, which they use for purposes other than determining eligibility. Pursuant to their contract with the PD Office, Tompkins County Office of Opportunities, Alternatives and Resources (O.A.R.) continues to have an O.A.R. staffer meet with those incarcerated at the jail and assist them in filling out the assigned counsel application. In the few cases where an individual was not represented at arraignment, the O.A.R. staffer meets with that person immediately and assists them in completing the assigned counsel application. Notably, when the courts are operating virtually due to the pandemic and non-attorney access to the jails is restricted, the O.A.R. staff person communicates with these individuals by phone.

Additionally, some individuals with appearance tickets who have not yet had their first court appearance may come to the PD Office to complete the application form. The staff also conducts screening interviews over the telephone for those individuals who are unable to travel to the PD's Office. The application form can be obtained from the bulletin board outside the office, on the PD Office's website, or, upon request, mailed or emailed to the applicant. Completed applications can then be faxed, emailed, mailed, or personally delivered to the office. Once

received, staff reviews them and determines eligibility within 3 days. Having several established methods for applying proved useful in ensuring continued eligibility screening even as in-person operations shifted to increased remote work due to the pandemic. Most applications are still decided on the same day as they are received.

In 2020, the PD Office deemed all applicants eligible for counsel.

**ii. The Schuyler/Tompkins Regional ACP**

Once the Public Defender’s Office identifies a conflict on a case, they immediately refer the case to the Schuyler/Tompkins Regional ACP who then become responsible for screening and making a recommendation on assigned counsel eligibility. The ACP uses the same assigned counsel application as the Schuyler Public Defender’s Office and conducts screening of the conflict cases in accordance with the ILS Eligibility Standards.

**B. The criteria and procedures the County is using compared to the ILS Criteria and Procedures**

<b>ILS Eligibility Criteria and Procedures</b>	<b>County Criteria and Procedures</b>	<b>Comments</b>
<i>Criteria I (core eligibility standard)</i>	Consistent with ILS C&P	The PD Office and ACP staff use forms that ensure a thorough assessment of applicants’ income, assets, and financial obligations.
<i>Criteria II (eligibility presumptions)</i>	Consistent with ILS C&P	The PD Office and ACP staff estimate that, in 2020, between 80%-90% of applications were decided based on a presumption.
<i>Criteria III (ability to post bond or pay bail)</i>	Consistent with ILS C&P	
<i>Criteria IV (third-party resources)</i>	Consistent with ILS C&P	
<i>Criteria V (non-liquid assets)</i>	Consistent with ILS C&P	The PD Office and ACP staff report that, in 2020, almost no applicant had sufficient equity in a non-liquid asset to affect the outcome of the assigned counsel application, and, when they did, staff applied a sense of equity and fairness in assessing whether counsel should be assigned. This year, the PD Office encountered an applicant with a “significant” retirement fund, but, recognizing that this was the applicant’s only source of income for the rest of his life, approved the application for counsel.
<i>Criteria VI (child support and public assistance)</i>	Consistent with ILS C&P	

<i>Criteria VII (financial obligations)</i>	Consistent with ILS C&P	
<i>Criteria VIII (cost of retaining counsel)</i>	Consistent with ILS C&P	
<i>Procedure X (responsibility for screening)</i>	Consistent with ILS C&P	Schuyler County judges and magistrates have consistently followed the eligibility recommendations of the PD Office and the ACP staff.
<i>Procedure XI (confidentiality)</i>	Consistent with ILS C&P	Both providers have always taken steps to maintain the confidentiality of the information they receive. Unsure of the confidential nature of their communications with in-custody clients from the jail's dedicated phone lines during the pandemic, the PD attorneys solicit just enough non-confidential information to do the arraignment, and conduct a formal interview of the client in-person or by the client's personal phone once the client is released.
<i>Procedure XII (timeliness of decision)</i>	Consistent with ILS C&P	Both the PD Office and the ACP decide eligibility applications promptly, usually within the same day of receiving them, unless the screener has questions, or the application is delivered on a Friday. Additionally, the PD Office screens and, where appropriate, assigns counsel at the pre-charge stage, when requested. These processes were not affected by the pandemic.
<i>Procedure XIII (burden of application process)</i>	Consistent with ILS C&P	
<i>Procedure XIV (written notice of ineligibility decision)</i>	Consistent with ILS C&P	
<i>Procedure XV (partial payment orders)</i>	Consistent with ILS C&P	The PD Office and the ACP do not request that judges issue partial payment orders at the time of assigning counsel.

**C. Data**

Pursuant to the data collection, maintenance, and reporting requirements set forth in Procedure XVI of the Eligibility Standards, both the PD Office and the ACP submitted 2020 eligibility data to ILS. The data ILS received shows the following:

- ❖ Of the 342 applications considered by the Schuyler County Public Defender’s Office, every applicant was deemed eligible, and there were no requests for County Law § 722-d orders.
- ❖ Similarly, regarding the 80 criminal conflict cases sent to the Schuyler/Tompkins ACP, every applicant screened was deemed eligible and there were no requests for County Law § 722-d orders.
- ❖ In total, 422 people applied for assigned counsel, none of whom were deemed ineligible.

#### **D. Additional Information**

Implementation of bail reform and the pandemic have not dramatically impacted the way eligibility applications are screened and assignments made in Schuyler County. As noted above (p. 14), this is due in large part to the pre-existing structures in place in both programs, and, in lesser part, to the decline in applications received during this period (422 total, compared to 602 in 2017, 509 in 2018, and 595 in 2019). Indeed, from March 20, 2020 through June 29, 2020, when the Order temporarily suspending eligibility screening was in effect, the programs received and processed no greater than 45 applications for assigned counsel.

As in Onondaga County, former Public Defender Wesley Roe noted that the only significant change resulting from the implementation of bail reform concerns appearance ticket recipients who, before the new legislation, would otherwise have been presumed eligible for assigned counsel due to their incarceration but are no longer presumptively eligible based on that ground.<sup>13</sup> Though the Schuyler PD Office does not consistently get notice of the appearance tickets before the arraignment, both the Schuyler PD Office and the Schuyler/Tompkins ACP had systems in place for early intervention. Additionally, Mr. Roe reported that once appearance ticket arraignments were adjourned pursuant to the pandemic-related administrative orders, PD Office attorneys actively tried to stay connected with those individuals who contacted the office and qualified for counsel, and, where possible, attempted to negotiate case dispositions in advance of court.

Despite the daily operational challenges occasioned by the pandemic, the PD Office and ACP continued to take steps to ensure that applicants who need counsel get counsel. As Mr. Roe recently enunciated: “They need our service. They apply, and they get it,” and the Standards “mak[e] it easier for people to apply and get qualified.” Indeed, for the effective period of the Administrative Order suspending eligibility in Schuyler County, the PD Office ensured that every applicant was deemed qualified for counsel, though it required applicants to complete the application for conflict checks and other data-related purposes.

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<sup>13</sup> In March 2021, Mr. Roe left the PD Office and Schuyler County appointed a new Public Defender, Valerie Gardner.

## 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 East End justice courts.<sup>14</sup>

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

To a large extent, the processes in District Court and the East End justice courts for determining eligibility remain unchanged from those reported last year, with exceptions as noted. As discussed last year, Suffolk County monitors the need for increased screening capacity for appearance ticket applicants in District Court. This monitoring has become more critical with the administrative adjournment of appearance tickets during the pandemic and the potential for increased volume as courts resume appearance ticket arraignments. However, to date, there has not been a need to alter existing processes.

#### ***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>15</sup>

##### ***i. D-11***

The Suffolk County Department of 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.

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 collects and maintains data as to how frequently the judge accepts or rejects the recommendation of presumptive eligibility, or the extent to which courts rely on the information provided by Probation. Still, though we were unable to confirm with court observations this year, we are told that D-11 judges accept Probation’s recommendations in most cases.

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<sup>14</sup> Suffolk County’s criminal court system is divided between the District Court, located in Central Islip on the county’s West End, and ten town and village courts (“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>15</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.

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. This year, ILS learned that, in other 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 been staffing 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 has been closed since March 2020. During this period, all eligibility screenings have been conducted from the SCACP office across the street from the District Court. Appearance ticket recipients who contact the court requesting counsel are directed to the SCACP offices to be screened. 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 4th floor 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>16</sup>

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 that 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. SCLAS staffs all court appearances in the District Court, and thus a SCLAS attorney will always be present at that second court appearance to accept the assignment,

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<sup>16</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.

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, judges in the non-SAP Parts that remained open sent people to the SAP screener to be screened.

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. This data is discussed in more detail below.

## ***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 presumes the person financially eligible and assigns 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 ability 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. If SCLAS has a conflict, the case is referred to the SCACP.

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 because of transportation issues) 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' chief investigator for review.

### **B. The criteria and procedures the County is using compared to the ILS Criteria and Procedures**

The following assessment of the county's compliance with the Eligibility Standards over the past year is based on the information gleaned from conversations ILS held with staff members of the SCLAS and SCACP, and our review of the data we received:

*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 2020 reveals that, in that year, 7,326 individuals were screened by Probation in D-11, of which 5,400 (or 73.71%), were presumed eligible – slightly lower than the average percentage (73.98%) deemed eligible during calendar year 2019.

*ii. SAP*

<b>ILS Eligibility Criteria and Procedures</b>	<b>County Criteria and Procedures</b>	<b>Comments</b>
<i>Criteria I (core eligibility standard)</i>	Consistent with ILS C&P	
<i>Criteria II (eligibility presumptions)</i>	Consistent with ILS C&P	The SAP screener estimates that 99% of the applications were decided based on one of the eligibility presumptions in 2020.
<i>Criteria III (ability to post bond or pay bail)</i>	Consistent with ILS C&P	
<i>Criteria IV (third-party resources)</i>	Consistent with ILS C&P	
<i>Criteria V (non-liquid assets)</i>	Consistent with ILS C&P	In 2020, the SCACP did not encounter any situation in which the applicant had sufficient equity in a non-liquid asset to affect the outcome of the assigned counsel application.
<i>Criteria VI (child support and public assistance)</i>	Consistent with ILS C&P	The application asks about receipt of public assistance, but solely to determine presumptive eligibility.
<i>Criteria VII (financial obligations)</i>	Consistent with ILS C&P	
<i>Criteria VIII (cost of retaining counsel)</i>	Consistent with ILS C&P	Where necessary, the SAP screener consults with the SCACP Administrator to assess whether an applicant’s resources are sufficient to pay the actual cost of a retainer.
<i>Procedure X (responsibility for screening)</i>	Consistent with ILS C&P	Though the SCACP screening program was intended for applicants referred from the Street Appearance Part, the SCACP reports that District Court judges from non-SAP Parts have increasingly referred unrepresented people to the SAP Screener, even during 2020 when the SAP Parts were administratively closed.

<i>Procedure XI (confidentiality)</i>	Consistent with ILS C&P	The SCACP takes steps to maintain the confidentiality of the applicants' financial information, including conducting the interview in a private setting, shredding the completed applications and storing them electronically. Verification documents are promptly returned to the applicant.
<i>Procedure XII (timeliness of decision)</i>	Consistent with ILS C&P	The SAP screener decides nearly all applications within 24 hours of screening, most often while the applicant is still meeting with the screener, unless the decision is close and he must consult with the SCACP Administrator. When people from a non-SAP part of the District Court call the SCACP and request an attorney, the SCACP ensures that they are screened.
<i>Procedure XIII (burden of application process)</i>	Consistent with ILS C&P	The SAP screener knows to request documentation if, for instance, he has reason to believe that the applicant gave incomplete, inaccurate or misleading information.
<i>Procedure XIV (written notice of ineligibility decision)</i>	Consistent with ILS C&P	
<i>Procedure XV (orders for partial payment)</i>	Consistent with ILS C&P	Since implementation, no judge has issued a partial payment order at the time of assigning counsel.

Regarding Procedure XVI's data collection requirements, to date, ILS has received data from the SCACP covering the period January 1, 2020 to November 25, 2020 (the last day of the year that the District Court conducted SAP arraignments before the court again was administratively closed following a brief period of reopening). The data reveals that, for this period, 1,005 applicants were screened by the SAP screener and, of these, 5 were deemed ineligible for assigned counsel. One applicant requested reconsideration, and, when denied, successfully appealed. This is an ineligibility rate of 0.4%.

### ***3. East End Town and Village Courts***

As previously noted, SCLAS screens for financial eligibility in the East End Town and Village Courts. The following is a brief assessment of SCLAS' compliance with the Standards over the past year:

<b>ILS Eligibility Criteria and Procedures</b>	<b>County Criteria and Procedures</b>	<b>Comments</b>
<i>Criteria I (core eligibility standard)</i>	Consistent with ILS C&P	SCLAS screens every application to ensure that counsel is assigned to those who need it.
<i>Criteria II (eligibility presumptions)</i>	Consistent with ILS C&P	For 2016 through 2019, screening staff consistently estimated an average of 70%-80% of applicants who were deemed eligible based on a presumption. Staff recently informed ILS that they did not track this data but believe that this average remained unchanged in 2020.
<i>Criteria III (ability to post bond or pay bail)</i>	Consistent with ILS C&P	
<i>Criteria IV (third-party resources)</i>	Consistent with ILS C&P	
<i>Criteria V (non-liquid assets)</i>	Consistent with ILS C&P	For any non-liquid assets that are potentially considered, SCLAS obtains information about the value of the asset and any equity the applicant has in it.
<i>Criteria VI (child support and public assistance)</i>	Consistent with ILS C&P	SCLAS obtains information about need-based public assistance to assess the applicant's presumptive eligibility for an assignment of counsel.
<i>Criteria VII (financial obligations)</i>	Consistent with ILS C&P	
<i>Criteria VIII (cost of retaining counsel)</i>	Consistent with ILS C&P	Although the assigned counsel application does not prompt the screening staff to assess the actual costs of retaining counsel, SCLAS does consider this factor.
<i>Procedure X (responsibility for screening)</i>	Consistent with ILS C&P	According to SCLAS, East End magistrates generally adopt SCLAS' eligibility recommendations.
<i>Procedure XI (confidentiality)</i>	Consistent with ILS C&P	Courts generally do not ask detailed questions about financial ability to retain counsel in open court, and SCLAS staff take steps to ensure the confidentiality of the information they obtain.
<i>Procedure XII (timeliness of decision)</i>	Consistent with ILS C&P	SCLAS generally decides applications within 24 hours of receiving them, and immediately notifies applicants. Individuals who contact the office seeking counsel prior to court involvement are assigned an attorney provisionally until an eligibility screening can be conducted.

<i>Procedure XIII (burden of application process)</i>	Consistent with ILS C&P	SCLAS requests verifying documentation from applicants in close calls, such as where the applicant appears to have sufficient income to pay for counsel, but has significant financial debt or liabilities, or where the applicant is self-employed, and the net income cannot be easily discerned.
<i>Procedure XIV (written notice of ineligibility decision)</i>	Consistent with ILS C&P	
<i>Procedure XV (orders for partial payment)</i>	Consistent with ILS C&P	East End judges have traditionally not ordered partial payment orders at the time of assigning counsel, and SCLAS does not request them.

Pursuant to the requirements of Procedure XVI regarding data, SCLAS has collected and reported to ILS its eligibility data for calendar year 2020. According to the data reported, during that period, SCLAS screened 87 applicants on the East End, and, of those, only one applicant was deemed financially ineligible and no appeal or request for reconsideration was made.

### **C. Additional Information**

Starting in early 2019, in Suffolk, as in other counties, both providers and their county officials met regularly to discuss the anticipated impact of bail reform implementation on, among other things, eligibility screening. Specifically, the concern focused on SCACP’s capacity to screen the expected swell of applicants resulting from the statute’s increase of mandatory police-issued appearance tickets. Thus, on the first day of January 2020, Suffolk County had plans in place to ensure that eligibility screening in D-11, SAP, and in the East End justice courts remained uninterrupted and that counsel would be provided to persons who needed counsel and applied.

Implementation of the 2019 bail reform laws and the devastating COVID-19 outbreak impacted procedures for eligibility screening in D-11 and SAP differently. As was expected in 2020, the number of in-custody individuals decreased significantly due, in part, to the statutory curtailment of pretrial detention in nearly all misdemeanor and non-violent cases and, in other part, to the decline in the number of people arraigned during the ongoing pandemic. Thus, in D-11, the number of people screened last year (7,326) averaged 42% less than in the three previous years of data collection, i.e., 2019 (11,831), 2018 (12,614), and 2017 (13,345).

For out-of-custody individuals in need of screening, at the start of bail reform implementation on January 1, 2020, SAP was already at capacity in the number of people SCACP could screen each day. In January and February 2020, there was a noticeable increase of appearance tickets and a second SAP Part was opened temporarily to facilitate the overflow from the original SAP Part. As a result, the number of people screened by the SAP screener in January and February 2020 doubled from approximately 10-15 daily in 2019, to daily numbers of 20 and 30, respectively. Recognizing that there was a critical need for enhanced screening capacity, SCACP and ILS staff discussed ways to address it – whether by enabling the SCACP to hire an additional screener or developing an alternative screening system. However, before either of these plans could be

executed, the COVID-19 pandemic forced nearly all the District Court Parts including SAP to be administratively closed as of March 17, 2020. SCACP Deputy Administrator Stephanie McCall recently informed ILS that SAP will remain closed until April 5, 2021. She added that, since March 2020, there was no noticeable spike in SAP screenings, except for the brief period that the SAP Part reopened, and that overall, the SAP screener was able to handle the volume of screenings throughout the year.

Nonetheless, for most of 2020, the eligibility screening process in SAP was transformed by the pandemic. To protect the safety of the SAP screener and the applicants, in March, SCACP closed the 4<sup>th</sup> Floor screening office, which is small, poorly ventilated, and windowless. Instead, applicants who contact the courthouse are provided with a SCACP-issued written notification explaining the three ways by which they may apply: i) requesting a telephone interview; ii) faxing the application to the SCACP offices; or iii) scheduling an in-person interview at SCACP's offices during which they are expected to adhere to all safety protocols. Ms. McCall has reported that most applications are taken by phone, but there are a few applicants who stop by the SCACP office unannounced. SCACP ensures that these applicants are never turned away but are afforded an in-person interview on the spot.

In addition, despite the challenges of the pandemic, SCACP has continued to ensure that all eligibility applications are decided within hours of receipt and that applicants are notified of the eligibility recommendation by the end of the day. If an applicant does not have an email address, when possible, the applicant is instructed to retrieve a copy of the written recommendation at the front desk or from the mail slot outside the office door. And, to reduce the gap in representation, at the end of each day, SCACP emails to the Suffolk County Legal Aid Society offices a list of all applicants, with attachments containing the written recommendations, case information, and contact information.

Anticipating a spike in screening once SAP reopens in April, the SCACP administrators are currently engaging in talks with ILS to assess its options for enhancing the eligibility screening capacity and ensure that there is a sustainable, long-term solution in place.

As previously reported, on the East End, the number of applicants screened for eligibility by SCLAS has significantly declined since 2017: 506 in 2017; 181 in 2018; 239 in 2019 and 87 in 2020. Chief Investigator Brennan Holmes then surmised that fewer people were being screened by SCLAS, in part, because the judges were assigning attorneys from the bench without a screening referral to SCLAS after asking a few questions that made it obvious the person lacked resources to retain counsel. For 2020, Mr. Holmes opined that judges continued to assign from the bench to obviate the need to adjourn the cases for post-arraignment eligibility interviews by SCLAS which, otherwise, would only add to the pandemic-related chaos of the moment.

## Washington County

The Washington County Assigned Counsel Program (“ACP”), under the direction of Supervising Attorney Tom Cioffi and Administrator Marie DeCarlo-Drost, 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**

With a few exceptions occasioned by the pandemic (as discussed below), the process for deciding assigned counsel eligibility in Washington County has remained virtually unchanged since the 2020 annual report: applications are accepted by personal delivery, as well as by fax, mail, email, text-messaging, and, under normal circumstances, by ACP staffers 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.<sup>17</sup> If the individual 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.

As the primary provider in Washington County, the Public Defender’s Office, headed by Michael Mercure, provides arraignment coverage for most individuals though the ACP provides arraignment representation on some Vehicle and Traffic Law cases.<sup>18</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, on which an attorney’s name is indicated as having provided representation at arraignment. The cover letter also details the ways that the application can be delivered to the ACP, and that, to assist the ACP in its determination of eligibility, people are encouraged to provide the ACP with the charging documents and a form of identification. The packet also contains a list of alternative sentencing classes and programs, as well as a notice of a person’s right to remain silent should they be remanded to custody.

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

Unless a case is disposed of at arraignment, the arraigning attorney remains on the case as provisionally assigned, until a determination of eligibility is made. This is so, unless the Public Defender’s Office identifies a conflict, in which case the ACP assumes responsibility for the case after arraignment.

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<sup>17</sup> As is more fully discussed below (p. 26), the ACP temporarily closed the two satellite locations during most of 2020 for health concerns related to the pandemic.

<sup>18</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>.

Upon receipt of the completed application forms, ACP staff immediately reviews them and generally makes an eligibility decision within hours, unless more information is needed from the applicant, or the case presents a problem that needs to be discussed with Mr. Cioffi. If the decision is that the applicant is eligible for counsel, the ACP notifies the Public Defender’s Office. If there is a conflict, an ACP panel attorney is assigned to the case and a notice of the conflict assignment is sent to the court of jurisdiction. An approval letter is also sent 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 or an appeal of the denial, or both. The ACP staff strive to ensure immediate notification of its eligibility decision by notifying as many applicants as possible by email, rather than by regular mail.

The ACP deemed only one applicant ineligible for counsel during calendar year 2020.

**B. The criteria and procedures the County is using compared to the ILS Criteria and Procedures**

<b>ILS Eligibility Criteria and Procedures</b>	<b>County Criteria and Procedures</b>	<b>Comments</b>
<i>Criteria I (core eligibility standard)</i>	Consistent with ILS C&P	The ACP considers applicants’ total financial circumstances, ensuring that those who qualify are assigned counsel.
<i>Criteria II (eligibility presumptions)</i>	Consistent with ILS C&P	The ACP estimates that last year, “nearly 100%” of the applications received were decided based on the income guidelines eligibility presumption. Mr. Cioffi recently observed that the ACP generally sees two types of applicants: those who receive public assistance and those who work but earn minimum wages.
<i>Criteria III (ability to post bond or pay bail)</i>	Consistent with ILS C&P	The ACP does not use ability to post bond or to pay bail as a reason to deny eligibility for an assignment of counsel.
<i>Criteria IV (third-party resources)</i>	Consistent with ILS C&P	The ACP does not request proof or consider the financial resources of other household members, including those of a spouse or a parent.
<i>Criteria V (non-liquid assets)</i>	Consistent with ILS C&P	Over the past year, the ACP did not encounter any applicant with sufficient equity in a non-liquid asset to affect the outcome of the assigned counsel application.
<i>Criteria VI (child support and public assistance)</i>	Consistent with ILS C&P	The ACP asks about the applicant’s receipt of need-based public assistance only to determine if the applicant is presumptively eligible for counsel.

<i>Criteria VII (financial obligations)</i>	Consistent with ILS C&P	The application contains a non-exhaustive list of possible debts and obligations. In 2020, rarely did the ACP’s assessment of an application progress to the point of considering the applicant’s debts and financial liabilities, because, as previously noted, nearly all applications were decided based on an eligibility presumption.
<i>Criteria VIII (cost of retaining counsel)</i>	Consistent with ILS C&P	This issue has arisen infrequently, since nearly all applicants lack the financial resources to retain counsel.
<i>Procedure X (delegation of screening responsibility)</i>	Consistent with ILS C&P	Since implementation, the courts have consistently followed the ACP’s eligibility recommendations.
<i>Procedure XI (confidentiality)</i>	Consistent with ILS C&P	Washington County magistrates no longer elicit information about financial circumstances on the record, and the ACP ensures the confidentiality of the information it receives is maintained.
<i>Procedure XII (timeliness of decision)</i>	Consistent with ILS C&P	The ACP screens and decides all eligibility applications within hours of receiving them. It also screens and assigns counsel pre-charge, if requested, and there is a reasonable potential of criminal liability.
<i>Procedure XIII (burden of application process)</i>	Consistent with ILS C&P	The ACP requests verifying documentation when necessary, such as when the information disclosed on the application does not make sense. According to Mr. Cioffi, in 2020, the ACP had no need to ask for verifying documentation.
<i>Procedure XIV (written notice of ineligibility decision)</i>	Consistent with ILS C&P	
<i>Procedure XV (partial payment orders)</i>	Consistent with ILS C&P	The ACP does not request orders for partial payment at the time of assignment, and the judges have not <i>sua sponte</i> issued such orders.

**C. Data**

Regarding the collection, maintenance and reporting of eligibility data required under Procedure XVI of the Standards, the ACP has consistently reported data to ILS on a quarterly basis. The data shows that, in calendar year 2020, the ACP received 1,504 applications and deemed only one applicant ineligible for counsel. There were no requests for reconsideration or an appeal, or for partial payment orders pursuant to County Law § 722-d.

**D. Additional Information**

Because of the existing structures and procedures in place due to Settlement implementation, neither the 2019 bail reform legislation nor the COVID-19 pandemic required any significant

changes to the ways in which eligibility applications are received and processed in Washington County.

The early institution of varied delivery methods positioned the ACP to ensure that there were no disruptions to applicants' ready access to the eligibility application process during the pandemic and bail reform implementation. Now, without leaving the safety of their homes, applicants can access the eligibility application on the county's website, complete the application, and email it to the ACP. Applicants who lack access to an electronic device can call the ACP and apply by phone. Mr. Cioffi recently reported that, even with staff working remotely at times during the pandemic, there is always at least one staff member in the office to accept calls and process applications as they are received, and most applications are still decided within hours of receipt. Ms. DeCarlo-Drost noted that email is the most preferred method of delivery for many applicants. Mr. Cioffi and Ms. DeCarlo-Drost recognize the resultant efficiency in accepting applications by email and, in turn, notifying applicants of an eligibility decision in like manner making the assigned counsel process more accessible to applicants even with limited access to in-person communication during COVID-19.

To date, the only resultant changes to the eligibility screening and determination processes have been the temporary suspension of the two satellite locations in Whitehall Town and Village Court and White Creek Town Court, where, once monthly, applicants residing in these most rural areas of the county could meet with an ACP staff member to complete and deliver an application. This decision was made to mitigate any pandemic-related health concerns and to ensure the safety of both the ACP staffer and the applicant. For similar reasons, all in-person visits to the ACP office must now be by appointment only – a county-imposed requirement.

The ACP's continued compliance with the Eligibility Standards and Procedure XII ensured its ability to adapt to any changes resulting from the reforms. In early summer, while the Governor's "New York State on Pause" Order was still in effect, Mr. Cioffi observed that approximately 300 appearance ticket arraignments had been administratively adjourned, many of which were Vehicle and Traffic Law cases or criminal cases resulting from domestic-related matters on which the PD Office would be conflicted. Anticipating an increase in cases for the ACP panel attorneys when courts resumed appearance ticket arraignments, Mr. Cioffi reached out to the three largest Town Courts – in Fort Edward, Salem, and Kingsbury – and, in advance of the scheduled court dates, requested a copy of the court calendar containing the list of appearance ticket recipients so that panel attorneys could contact current and former ACP clients and attempt negotiated dispositions prior to court. Additionally, once the courts resumed in-person operations, Mr. Cioffi assigned panel attorneys to these courts and requested that the judges, upon deeming applicants eligible for counsel, immediately assign all identified conflict cases to the ACP attorney rather than further adjourn the cases for an eligibility screening and assignment by the ACP staff. Mr. Cioffi recently explained that this strategy was to assist with the backlog of cases in the courts, but ultimately it inured to the benefit of their clients by saving the time and resources of everyone involved in the eligibility determination process and ensuring that counsel was assigned more promptly.

Notably, Public Defender Michael Mercure, whose attorneys provide arraignment coverage in Washington County, has also taken proactive steps in ensuring that individuals are not waiting to

apply for counsel following their arraignment. Recently, Mr. Mercure informed ILS that he has been focusing on cases wherein PD Office attorneys should be requesting that the court appoint them rather than simply arraigning and sending people to the ACP to apply.

## CONCLUSION

Over time, writing the Eligibility update reports has become increasingly straightforward, due primarily to the consistency with which each of the *Hurrell-Harring* providers have complied with the Standards since their issuance in 2016. As each provider at some point has commented, the Standards provide a streamlined yet effective means of fairly and efficiently discerning between those who are eligible for counsel and those who are not. Because the Settlement enabled each of the *Hurrell-Harring* counties to have structures and processes in place to maintain compliance with the Standards, once faced with the challenges of bail reform implementation and the disruptive effects of the COVID-19 virus on the criminal justice system, these counties were better prepared to address the resultant issues that arose.

Across the board, providers and county officials strategized and implemented ways to best handle the anticipated increase in appearance tickets, occasioned not only by the implementation of bail reform, but also by the pandemic-related executive and administrative order postponements on return dates. Ultimately, the steps undertaken by each provider proved beneficial to people who desired and requested representation by ensuring pre-arraignment access to counsel in compliance with Procedure XII of the Eligibility Standards. They also enhanced the efficiency of the courts.

For instance, from the three largest town courts in Washington County, ACP Administrator Tom Cioffi obtains a copy of the calendar ahead of court so that panel attorneys may contact current and former clients of the ACP with appearance tickets and, where possible, negotiate a disposition before court. In Schuylers, former Public Defender Wesley Roe encouraged his attorneys to stay in touch with eligible individuals who contacted his office and negotiate possible dispositions in advance of their first court appearance. And, although the Suffolk County ACP closed its 4<sup>th</sup> Floor SAP screening office, it ensures that appearance ticket recipients on the county's West End who seek an assignment of counsel in advance of their court dates are adequately informed of how to contact the screener and apply, and, at the end of each day, informs the Legal Aid Society of the eligible individuals so that work can begin on their cases.

In Ontario County, Public Defender Leanne Lapp implemented procedures that ensured a more streamlined eligibility determination process; early social work intervention and referral of clients to appropriate treatment services, as needed; the benefit of more information at arraignment; and, possibly, a quicker and more favorable disposition of cases. Ms. Lapp recently described to ILS one of the currently pending cases resulting from her efforts:

Client B was given an appearance ticket and reached out in response to our letter. She has no criminal history and a very traumatic past which has led to severe anxiety and isolation. She had already spoken to the sheriff's office, but she was on the verge of a mental breakdown from the stress of not knowing what was happening legally since arraignments were delayed due to COVID. I connected B

with our social worker and [maintained regular contact with her] to help ease her anxiety through this process. As soon as the ADA had the charges and discovery, we discussed the case and will hopefully be able to resolve B's case at the first appearance.

Simply put, having the structures in place as a result of Settlement implementation, the support investment of the counties, and the creative initiatives of the individual providers in ensuring access to counsel in 2020 – even in the face of unprecedented challenges – speaks volumes not only to the efficacy of the Standards, but also to the consistency in and commitment to implementing them.