



Criteria and Procedures for Determining Assigned Counsel Eligibility

Report on Implementation in the Hurrell-Harring Counties

April 4, 2020



**Indigent
Legal Services**

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:

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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 being used in the five Settlement counties to determine whether a criminal defendant is financially eligible for an assignment of counsel, and to identify the extent to which, if at all, the criteria and procedures being used deviate from the criteria and procedures set forth in the *Criteria and Procedures for Determining Assigned Counsel Eligibility* (“Eligibility Standards” or “Criteria and Procedures”), which ILS issued in April 2016. Put simply, the focus of this report, the fourth since the issuance of the Standards in 2016, is on the status of continued implementation of the Criteria and Procedures in the five counties.

ILS issued its first two annual reports on April 4, 2017 and April 4, 2018. In each report, entitled *Criteria and Procedures for Determining Assigned Counsel Eligibility: Report on Implementation in the Hurrell-Harring Counties*, we discussed for each of the five counties the criteria and procedures used prior to implementation of the Eligibility Standards, the steps taken to implement the Eligibility Standards, an assessment of compliance with the Eligibility Standards since implementation, and the barriers and ongoing challenges to implementation.

The third report, issued on April 4, 2019, focused primarily on whether the providers’ current criteria and procedures for determining assigned counsel eligibility were consistent with the ILS Eligibility Standards and included a brief analysis of the data for calendar year 2018 collected from each county. The conclusion focused on information from the providers unanimously attesting that the Criteria and Procedures were achieving the goal of fairly and efficiently discerning between those defendants who can afford to retain counsel and those who cannot.

As with the third report, this fourth report assesses the extent to which the criteria and procedures employed by the providers are consistent with those of the Eligibility Standards and briefly analyzes each county’s data for 2019. The report also discusses the extent to which one county is using technology to enhance its ability to collect an applicant’s financial information and screen more efficiently.

Additionally, with 2019’s significant changes to both bail and discovery laws, *Hurrell-Harring* providers spent the months leading up to the January 1, 2020 implementation date preparing for changes to both their defense practice and eligibility determination processes. They examined each area to determine what, if any, changes were necessary and took the opportunity to further enhance their advocacy. Although it is too early to report the impact of the recent statutory reforms, this report highlights steps some providers took to prepare and the early effect the reforms have had on the way providers assess eligibility and assign counsel. Notably, because the providers were already in compliance with the Criteria and Procedures, particularly Procedure XII’s requirement of pre-charge assignment, each was fully equipped to take on any challenge presented by the reforms.

This report is based on information gleaned from conversations between ILS staff and the providers in each county, our review of the 2019 data each provider sent to ILS, the court

observations we made over the past year, and the structured interviews we conducted of providers and their staff members who are involved in the eligibility determination process.

Below is a summary of the court observations and structured provider interviews that were conducted between April 2019 and March 2020:

Court Observations

In 2019, ILS observed several court sessions in all five counties, including the following:

Onondaga County: Syracuse City Ct. (CAP, A.M. Session); Van Buren Town Ct; Camillus Town Ct; Lysander Town Justice Ct.

Ontario County: Ontario County Jail (CAP, P.M. Session); County Ct.; Hopewell Town Ct.; Geneva Town Ct.; Victor Town Ct.; Canandaigua City Ct.; Drug Treatment Ct.; Canandaigua Town Ct; Naples Town Ct; Manchester Town Ct; Geneva City Ct.

Schuyler County: Watkins Glen Village Ct.; County Ct.; Catharine Town Ct.; Montour Village Ct.; Hector Town Ct.; Montour Falls Town Ct.

Suffolk County: District Court (Street Appearance Part D-44); Southampton Village Ct.; Village of Quogue Ct.

Washington County: Kingsbury Town Ct.; Fort Edward Village Ct.; Whitehall Village Ct.

Structured Interviews

In February and March 2020, ILS staff conducted 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; Eligibility Specialist Ishmael Hawkins; and other staff members involved in the Eligibility determination process

Ontario PD: Public Defender Leanne Lapp

Schuyler/Tompkins Regional ACP: Program Coordinator Julia P. Hughes; Supervising Attorney Lance N. Salisbury

Schuyler PD: Public Defender Wesley A. Roe

Suffolk ACP: Administrator Daniel A. Russo; Deputy Administrator Stephanie McCall; Street Appearance Part Screener Andrew McCall

Suffolk LAS: Chief Administrative Officer Joe King; Chief Investigator Brennan Holmes

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

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

Onondaga County

A. Current 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 defendants and making assigned counsel eligibility recommendations. To do so, the ACP relies on an initial assessment by arraignment attorneys and then reviews each application to make a final recommendation. There are four different processes for assessing assigned counsel eligibility in Onondaga County depending on whether the defendant is arraigned (i) in one of the Town and Village Courts; (ii) in Syracuse City Court as an in-custody arraignment; (iii) in Syracuse City Court on an appearance ticket arraignment; or (iv) in the Centralized Arraignment Part (CAP). Most processes are consistent with those reported previously, with a few exceptions as noted.

For arraignments done in the **Town and Village Courts**, an ACP attorney provides representation and retains the case as the provisionally assigned attorney, unless the defendant has a private attorney or has another assigned attorney on a pending case. The arraiving attorney then obtains from the defendant the information needed to complete the ACP's assigned counsel application form and submits the completed application to the ACP for review.

For **in-custody arraignments in Syracuse City Court**,¹ the ACP assigns two or three attorneys, depending on the day of the week, to represent defendants at arraignment. Starting at 7:00 a.m. each morning, the arraignment attorneys meet with the defendants at the jail before they are transported to court. As of 2019, these attorneys are provided with iPads, which they take into the jails where they interview the defendants and collect case and financial information needed to complete the assigned counsel application form. Once the case is called, the attorney informs the judge whether it appears that the defendant qualifies for counsel, and if so, at the conclusion of the arraignment, the judge provisionally assigns an attorney (usually someone other than the arraignment attorney) to represent the defendant. The arraignment attorney then electronically transmits the assigned counsel application form to the ACP for review.

The procedure is different for the **out-of-custody arraignments in Syracuse City Court**. The ACP assigns an office clerk to sit at a desk just outside the entrance to Part 4 (the arraignment Part in City Court). Starting at 9:00 a.m., the clerk announces to all persons who approach the courtroom to stop and see her if they wish to have an attorney assigned to their case. The arraignment attorney also makes the announcement inside the courtroom before the start of the court session. The office clerk then assists defendants in completing the application form to ensure that the form is filled out accurately. She then passes each completed form to the arraiving attorney, who reviews it and informs the judge whether the defendant appears to

¹ 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.

qualify for an assignment of counsel. The judge will provisionally assign an attorney to represent the defendants deemed eligible. The arraigning attorney then submits the completed application form to the ACP for its review.

As described more fully below, on January 1, 2020, the ACP launched IntelLinx, the new case management and electronic vouchering software it developed. Since its launch, each day, the office clerk brings iPads and a Wi-Fi Hotspot from the ACP office so that the arraigning attorneys can use the new IntelLinx system to collect client information electronically. Since, all client information is being entered digitally into IntelLinx.

It is too early in its implementation to assess the effectiveness of IntelLinx; accordingly, we will report more fully on its efficacy next year. As described in this report, the process for deciding eligibility pertains to the ACP's work in 2019 only, prior to the launch of IntelLinx.

Defendants 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 the evening session. The ACP generally assigns two attorneys to cover arraignments in this Part. Starting at 4:00 p.m. each day, the attorneys meet with an ACP office clerk at the Public Safety Building next door to the jail. The clerk gives the attorneys iPads, which they bring to the jail to interview the defendants to be arraigned and collect information to complete the application form. The defendants are then transported to the Public Safety Building, 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 submit the completed applications to the ACP electronically.

* * * * *

Every officially assigned attorney is notified by the court, the ACP, or both, of the assignment. In City Court, following each arraignment session, the arraigning attorney no longer returns the charging documents to the court clerk to be held for the assigned attorney, as was previously done. Instead, as of summer 2019, the documents are brought to the ACP clerk who sits outside Part 4 who transports them back to the ACP Office where they are held for the assigned attorney to pick up. After two weeks, the documents are shredded (the ACP maintains a scanned copy). Copies, if needed thereafter, must be obtained from the Court Clerk's Office. In CAP, the charging documents are electronically transmitted via iPad to the ACP and the provisionally assigned attorney. The "hard copies" of the charging documents from CAP are maintained at the Public Safety Building, and the assigned attorneys can retrieve copies of the charging documents there as well. In the Town and Village courts, the assigned attorney maintains the documents.

Prior to IntelLinx, in 2019, upon receiving the application forms from the attorneys, the ACP staff would immediately scan the forms, enter the scanned forms in an electronic folder, and enter the data from them into their case management system. Now, as noted previously, this information is collected and transmitted electronically. Regardless of how it is transmitted, an ACP eligibility specialist then reviews every application 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 do both. If the court denies the motion to withdraw, the attorney is ordered to continue to represent the defendant (a/k/a, a “judge-ordered” assignment). If the motion is granted, the defendant is instructed to retain counsel.

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

ILS Eligibility Criteria and Procedures	County Criteria and Procedures	Comments
<i>Criteria I (core eligibility standard)</i>	Consistent with ILS C&P	The ACP thoroughly assesses each application to ensure that applicants who need counsel are assigned counsel.
<i>Criteria II (eligibility presumptions)</i>	Consistent with ILS C&P	Staff estimates that approximately 90% of the eligibility decisions made in 2019 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 a defendant’s release status, but for reasons unrelated to eligibility.
<i>Criteria IV (third-party resources)</i>	Consistent with ILS C&P	The ACP does not assume that the resources of third parties, such as a parent, spouse, or other household member, are available to the applicant to pay for private counsel.
<i>Criteria V (non-liquid assets)</i>	Consistent with ILS C&P	Though the ACP asks about non-liquid assets, in 2019, very few applicants had any that would impact the outcome of an application for assigned counsel. The ACP’s new IntelLinx electronic system ensures that applicants are being asked about the primary residence and vehicles not being used for basic necessities exceptions by barring the 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, appears questionable, the screener will confer with Executive Director Kathleen 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 defendants detailed questions about their 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 application was delivered on a Friday. ACP staff anticipates that Intellinx will improve 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.
<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 C&P.

C. Data

Procedure XVI requires the collection, maintenance, and reporting of data pertaining to the assigned counsel eligibility process. The ACP sent ILS quarterly reports for calendar year 2019 which show that between January 1, 2019 and December 31, 2019, a total of 14,294 defendants applied for assigned counsel, of which 14,139 applications were processed in 2019.² Of those:

- ❖ 13,938 total applicants were deemed eligible.
 - 13,899 applicants were deemed eligible by the ACP.
 - 39 applicants were deemed eligible by a judge.
 - 5 were reversals of the ACP's ineligibility determination.
 - 30 involved instances in which there was no application. This could be because the judge *sua sponte* assigned counsel or because the panel attorney asked the judge to assign counsel without utilizing the application process.
 - 4 were instances in which no reason was given or for other reasons, (i.e., defendant not cooperative).
- ❖ 201 applicants were deemed ineligible.³

This data, when compared to the data reported in the April 2017 and April 2018 reports, clearly show that the ACP continues to make fewer ineligibility recommendations that are subsequently overturned by a judge, and thus judges are involved in eligibility determinations far less frequently than before implementation of the Eligibility Standards. 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 had dropped to 7.42%. For calendar years 2018 and, now 2019, the ACP's ineligibility rate is approximately 1%. Ms. Dougherty recently reiterated that judges continue to appreciate not having to be involved in this decision-making process, knowing that the ACP is using a fair and efficient process.

D. Additional Information

Under the leadership of Ms. Dougherty, the Onondaga ACP has done an admirable job in implementing the ILS Eligibility Standards and continues to find ways to ensure that defendants who need counsel are assigned counsel without delay. In order to improve efficiency in the eligibility determination process, the ACP recently transitioned from its former case management and vouchering system to the IntelLinx ACP System, a new case management and electronic vouchering program that will improve the way applicants' case and financial information are collected, while being intuitive and user-friendly for the staff and panel attorneys who collect, record, and review that information. Panel attorneys who interview defendants at the jail or at arraignment can access IntelLinx on their cell phones, iPads, or on their personal electronic

² Each quarter the ACP reports the number of applications that are "pending" at the end of that quarter (155 cumulatively for 2019). 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.

³ 22 of these applicants appealed to the judge and the ACP has not received a clear directive from the judge or any follow up, so it is possible that some of these applicants were ultimately deemed eligible.

devices to collect the required eligibility information for the ACP staff to review. The program highlights certain fields which identify specific information that needs to be collected and maintained. Unless those fields are completed, the interviewing attorney will be unable to move to the next program screen or complete the process by hitting “Send.”

The information collected is sent instantaneously to the ACP staff, who review it and make a determination as to the client’s eligibility for counsel. The attorneys can still collect the information on paper, but they must enter the information into IntelLinx by 3:00 a.m. the following morning or be automatically locked out of the case, consequently requiring the intervention of the ACP administrators to access the case. The 3:00 a.m. deadline was instituted to ensure that the assigned attorney would have access to the client’s collected information as quickly as possible, while still allowing time for the CAP arraignment attorneys to complete their data entry.

With IntelLinx, the job of the ACP staff has become one of auditing and decision-making, rather than of data-entering, thus creating a more expeditious process whereby clients are informed sooner as to whether they have been assigned counsel.

Additionally, consistent with Procedure XII of the Eligibility Standards and in accordance with its commitment to being more responsive to existing and potential clients, the ACP continues to utilize protocols to ensure that eligible people who need representation have it, even if they have not been charged. Today, it is even more critical that these protocols are in place in light of the new Bail Reform legislation and the anticipated increase in appearance tickets. Ms. Dougherty reports that, over the past year, the ACP received calls from individuals who had received a Grand Jury subpoena and requested counsel. Another individual learned that he was being investigated by the police, and, in fact, had been contacted by them. After speaking with each caller, Deputy Director Dave Savlov identifies and assigns an appropriately qualified attorney.

Ms. Dougherty recently noted that prior to Eligibility Standard implementation, because the previous application process was so onerous, many panel attorneys had adopted the practice of not completing the assigned counsel application and asking the judge to be assigned as counsel.⁴ This practice created a host of data issues for the ACP, because they would often learn of the case belatedly – sometimes after it was resolved. Ms. Dougherty addressed the issue internally, including explaining to the attorneys the need to cease the practice.

⁴ The previous application process required significant verification documentation and multiple steps that often resulted in an ineligibility determination which the judge ultimately overruled.

Ontario County

Since its creation in 2010, the Ontario County Public Defender Office, headed by Leanne Lapp,⁵ has been 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.

A. Current process for deciding assigned counsel eligibility

As set forth in ILS' 2017 report about the progress of Settlement implementation⁶ and subsequent update reports, the Ontario County Public Defender Office (PD Office) has programs in place to represent all defendants at arraignment. Since the implementation of the Centralized Arraignment Plan (CAP) in 2018, eligibility decisions continue to be more streamlined and efficient. As discussed in the Additional Information section below, anticipating the increase in appearance tickets under the new Bail Reform laws, Ms. Lapp has ensured this efficiency extends to those clients given appearance tickets at arrest.

Time permitting, defense counsel appearing at arraignments screen defendants for assigned counsel eligibility and notify the judge if the defendant is eligible, thereby enabling the judge to assign counsel at that point. If they are unable to do so, counsel instructs the defendants to contact the PD Office so they can be interviewed and screened for assigned counsel eligibility, either by phone or in person. In the CAP, defendants are almost always screened prior to arraignment. Defendants who are already being 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.

To ascertain whether there were any missed arraignments, staff from the PD Office check the jail logs 6 days weekly, and, if there are any such defendants, staff visit with and interview them that day. Ms. Lapp has described this process as an effective safety net. The interview conducted by staff is designed not only to determine eligibility for assigned counsel, but also to ascertain if there is a need to immediately calendar the case, for example, to argue that the defendant should be released. And, in the rare instances in which defendants are arraigned without counsel and not detained, judges will typically advise them to contact the PD Office to apply for assigned counsel.

The Ontario PD Office uses the application for assignment of counsel to collect the defendants' financial information, not only to determine eligibility for assigned counsel, but also for bail arguments and plea negotiations. Ms. Lapp reports that the form, which she considers to be an intake form, is also used to elicit as much information as possible about defendants, including their criminal history, medical and mental health history, place of birth, and family. As such, the intake form is considered a privileged document with confidential client information, and therefore is not disclosed to any entity outside the PD Office.

⁵ Ms. Lapp assumed her role as Public Defender in 2012.

⁶ See *Implementing the Hurrell-Harring v. The State of New York Settlement: 2017 Update*.

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 Ms. Lapp. If staff determine 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, in fact, afford to pay for counsel. If deemed ineligible, those 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 2019, one applicant who was deemed ineligible requested reconsideration. Ms. Lapp reported that the judge ultimately reversed the ineligibility decision and assigned counsel.

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

ILS Eligibility Criteria and Procedures	County Criteria and Procedures	Comments
<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 2019, “almost all” 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 2019, 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 to the applicant 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 made soon after the applications are received, most often within 24 hours. 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 defendants to make partial payments for the costs of their representation.

C. Data

In compliance with the data collection requirements set forth in Procedure XVI of the Criteria and Procedures, the Public Defender Office sent us timely reports for the four quarters of 2019. Our review of the data reveals that, in calendar year 2019 the office received 3,460 applications for assigned counsel, 613 more than they did in 2018. Of those:

- ❖ 3,419 were deemed eligible for counsel,
- ❖ 41 applicants were found to be ineligible, and
- ❖ 1 of the ineligible applicants requested reconsideration and was ultimately deemed eligible.

This is an ineligibility determination rate of about 1.2%. The PD Office also reports that during calendar year 2019, there were no orders issued pursuant to County Law § 722 for payment of assigned counsel fees.

D. Additional Information

Although it is too soon to definitively identify the impact of the 2019 Bail Reform legislation on Ontario County, Ms. Lapp, working with County stakeholders, was prepared on January 1, 2020 to take whatever actions were required to protect the 6th Amendment rights and address the needs of every financially-eligible defendant. For example, with the change to CPL 150.20(1)(a), which now mandates appearance tickets for most misdemeanors and E felonies, there was some concern in the County that defendants in need of services would not receive early intervention if

released at arrest (and issued an appearance ticket as opposed to remaining in custody for immediate arraignment). Because of Ms. Lapp's existing system and protocols for early eligibility screening and assignment, she has been able to fill this gap and connect clients in need of mental health, substance abuse, and other services to programs prior to arraignment. The PD investigators are also able to work on the cases early and collect evidence that otherwise might have gotten lost during the period between the issuance of the appearance ticket and the initial court appearance.

For the appearance ticket defendants, Ms. Lapp arranged to have the individual courts notify the PD Office of all appearance tickets that are filed in a given day in advance of the defendants' first court appearances. Ms. Lapp said that all the courts, except one, have complied with her request, even sending the PD a full arraignment packet in some cases. The PD Office reviews each appearance ticket and determines whether the Office has a conflict or cannot represent that defendant for a statutory reason, and whether the defendant is a past or current client. If the defendant is a current client, the Office proceeds to open a file for the new charge; if a past client, the Office telephones the defendant to ascertain whether he needs an attorney. The Office sends written notice to those defendants who are not former clients of the Office, informing them of how to apply for an assignment of counsel should they need one. It also explains that every applicant for assigned counsel must fall within the financial eligibility guidelines and states the PD Office's contact information.

Ms. Lapp describes the process as labor-intensive but recognizes that it operates to the benefit of her clients. Ms. Lapp reports that the Office already has received many walk-ins and telephone calls from defendants in response to the notice that her Office sends – thus far, approximately 3-4 daily. She is pleased with this notification process as she recognizes that many defendants would not have otherwise known how to access counsel before their court date, and it allows for an early eligibility determination in advance of the court date.

Schuyler County

Until 2016, the Schuyler County Public Defender Office (PD Office), headed by Wesley A. Roe, conducted all the financial screening for assigned counsel eligibility in criminal cases in the County Court and the 11 Town and Village Courts ("justice courts"). As part of its initiative to improve the quality of public criminal defense, in April 2016, the County terminated its Conflict Defender contract and, through an Inter-Municipality Cooperative Agreement ("IMA") with Tompkins County, contracted for a regional Assigned Counsel Program ("ACP") to be administered by the Tompkins County Assigned Counsel Program. The regional ACP handles only those cases in which the Public Defender Office is conflicted or otherwise disqualified from representing a defendant, and pursuant to the terms of the cooperative agreement, it screens for assigned counsel eligibility in known conflict cases. The PD Office screens for eligibility in non-conflict cases and in cases where a conflict is not immediately apparent.

A. Current process for deciding assigned counsel eligibility

i. The Schuyler County Public Defender Office

With the exception of a minor drafting modification to its assigned counsel application, since the April 2019 annual report, there have been no other 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. Schuyler County continues to be in full compliance with the Eligibility Standards.

To ensure the rights of defendants to assigned counsel, Mr. Roe has instituted several avenues by which a defendant in need of assigned counsel can apply. PD Office attorneys bring the assigned counsel applications to arraignments. The judge, the defense attorney, or both inform defendants of their right to have counsel assigned if they cannot afford to retain one. Time permitting, the attorney assists each defendant in completing the application, which the attorney then brings back to the office for processing. “It is always better when we assist them with the application,” Mr. Roe once told ILS. If time does not allow, the attorney tells the defendant how to complete and submit the application. The PD Office attorneys continue to represent these defendants provisionally until an eligibility determination is made. Defendants in custody are presumed eligible for counsel, but the PD Office staff have them complete the application so that the Office can collect relevant information and data. As in Ontario County, the Schuyler PD Office uses the assigned counsel application for more purposes than determining eligibility. The PD Office has contracted with the Tompkins County Office of Opportunities, Alternatives and Resources (O.A.R.), to have an O.A.R. staffer meet with defendants at the jail and assist them in filling out the assigned counsel application. In the few cases where a defendant was not represented at arraignment, the O.A.R. staffer meets with that person immediately and assists the person in completing the assigned counsel application.

Additionally, some defendants with appearance tickets who have not yet had their first court appearance come to the PD Office and apply for assigned counsel. A staff member assists defendants who request help in completing the form. The staff also conduct screening interviews over the telephone for those defendants who are unable to travel to the PD’s Office. The application form is also available for pick up from the bulletin board outside the office, on the PD Office’s website, or, upon request, mailed or emailed to the defendant. Completed applications can then be faxed, emailed, mailed, or personally delivered to the office. Once received, staff review them and determine eligibility within 3 days at most. Mr. Roe recently confirmed that most applications are decided on the same day as they are received.

The PD Office deemed nine applicants ineligible for assigned counsel in 2019. According to Mr. Roe, all applicants were notified in writing of the ineligible decision and the reason for it, and were also provided with written notice of their rights to request reconsideration or to appeal.

ii. The Tompkins/Schuyler Regional ACP

Pursuant to the Inter-Municipality Cooperative Agreement mentioned above, once the Schuyler County Public Defender determines that his office is conflicted on a case, he immediately refers the case to the Tompkins/Schuyler Regional ACP, which then becomes responsible for screening and making a recommendation on assigned counsel eligibility. Under the IMA, the ACP uses the same assigned counsel application as is used by the Schuyler Public Defender Office and conducts its 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

ILS Eligibility Criteria and Procedures	County Criteria and Procedures	Comments
<i>Criteria I (core eligibility standard)</i>	Consistent with ILS C&P	The PD Office and ACP staff use forms that ensure that applicants' debts, financial obligations, income and assets are considered in the eligibility assessment.
<i>Criteria II (eligibility presumptions)</i>	Consistent with ILS C&P	The PD Office and ACP staff estimate that, in 2019, between 90%-95% 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 2019, no 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 need-based public assistance, but only to decide 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	
<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	Defendants are not required to disclose their financial information in open court, and both providers take steps to maintain the confidentiality of the information they receive.

<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.
<i>Procedure XIII (burden of application process)</i>	Consistent with ILS C&P	Both the PD Office and the ACP ask for verifying information when necessary, such as when there is incomplete information.
<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

Regarding the data collection, maintenance, and reporting requirements set forth in Procedure XVI of the Eligibility Standards, both the PD Office and the ACP submitted 2019 eligibility data to ILS. The data ILS received show the following:

- ❖ Of the 487 applications considered by the Schuyler County Public Defender Office, 9 applicants were deemed ineligible. There were no requests for eligibility screening reconsiderations, appeals, or County Law § 722-d orders.
- ❖ Regarding the criminal conflict cases sent to the Schuyler/Tompkins ACP, none of the 108 applicants screened was deemed ineligible. There were no requests for eligibility screening reconsiderations, appeals, or County Law § 722-d orders.
- ❖ In total, 595 people applied for assigned counsel, nine of whom were deemed ineligible – 6 for statutory reasons; 3 for financial reasons. This is an ineligibility rate of approximately 1.5%.

D. Additional Information

There continue to be no identifiable barriers to implementing the Eligibility Standards in Schuyler County. Recognizing that the population in Schuyler County is relatively poor and that many applicants do not have the transportation to travel to the provider’s office to be interviewed, both the PD and the ACP have accommodated applicants by accepting applications by fax, email, or mail, or by conducting a telephone interview of the applicant. Additionally, while early implementation of Bail Reform has not dramatically impacted the way eligibility applications are screened and assignments made in Schuyler County, both the PD and ACP already have systems in place for early intervention, if need be.

The PD and ACP take steps to ensure that applicants who need counsel get counsel. Supervising Attorney Lance Salisbury attributes the low ineligibility rate to the reality that people generally do not apply for assigned counsel unless they lack the resources to retain counsel, stating, “we’ve found that if the defendant has the money, he will go and retain an attorney rather than apply to us.”

Suffolk County

Unlike three of the other *Hurrell-Harring* counties, where assigned counsel eligibility screening is primarily conducted by a single entity (either the Public Defender Office or the office of an Assigned Counsel Program),⁷ in Suffolk County, there is no single entity that conducts all the screenings for assigned counsel eligibility. As a result, eligibility determinations are made using different processes and mechanisms, depending on whether the defendant is arraigned in the District Court or in one of the East End justice courts.

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.

A. Current processes 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. Notably, however, Suffolk County has already seen a need to enhance capacity and possibly alter previously existing procedures to implement the new Bail Reform laws, as described in more detail below.

1. District Court

District Court conducts arraignments in two court parts: 1) D-11, where defendants who are detained after their arrest are arraigned; and 2) the Street Appearance Part (SAP), where defendants who are issued summonses or appearance tickets following their arrest are arraigned. In both parts, Suffolk County has taken advantage of ILS’ grant and distribution funding to ensure that defendants are represented by defense counsel at arraignment. In D-11, arraignments are covered by attorneys from the Suffolk County Legal Aid Society (SCLAS), unless there is a conflict, or after preliminary screening, described in more detail below, the defendant is deemed presumptively ineligible for assigned counsel, in which case, the arraignment is handled by a Suffolk County Assigned Counsel Defender Program (SCACP) attorney. In SAP, arraignments are handled by one of two SCACP attorneys who staff each arraignment session, unless the

⁷ As previously stated, in Schuyler County, the Public Defender Office and the Regional Schuyler/Tompkins ACP coordinate efforts to screen defendants for assigned counsel eligibility.

SCLAS already represents the defendant on another matter and knows of the new case, in which case, a SCLAS attorney will appear and represent the defendant at this arraignment.

i. D-11

The Suffolk County Department of Probation conducts pre-arraignment screenings of defendants who are arrested and detained prior to arraignment (“in-custody defendants”) to assess whether the defendants should be released on their own recognizance (“ROR screening”). As part of this assessment, Probation also collects information needed to determine if the defendant is 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 defendants 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.

For defendants who are not presumptively eligible for assignment of counsel, the court must determine if further screening is necessary. Generally, judges assign counsel to those defendants 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. In last year’s report, we noted our observations that some judges give defendants a one-page written notice instructing them to bring an array of documents to their next court appearance to be screened for eligibility, while one judge urges defendants to retain counsel instead of telling them how to apply for assigned counsel. ILS has continued to monitor these issues, which are not widespread in the District Court. Still, we remain alert to their potential recurrence and will take steps to address these issues should they recur.

ii. SAP

Since May 2017, the SCACP has been staffing an office on the 4th Floor of the District Court building to screen SAP defendants for assigned counsel eligibility. ILS has visited the 4th floor screening office on several occasions, and, during a recent visit to the SCACP offices, met with SCACP Administrator Daniel Russo, Deputy Administrator Stephanie McCall, and screener Andrew McCall regarding the processes currently being used for screening SAP defendants for assigned counsel eligibility. ILS confirmed that the process for eligibility screening has remained consistent and is as follows:

In SAP, at the beginning of the court calendar, judges announce to everyone in the courtroom that defendants have the right to counsel and the right to an assigned counsel if they cannot afford an attorney. The arraigning attorney also does, and, as observed by ILS, repeats the announcement at various times during the court proceedings to ensure that it is heard by everyone who enters the courtroom.

Following arraignment, the judge refers those defendants whose cases are adjourned and who request counsel to the 4th floor SAP Screening Office for screening.

Additionally, the arraigning attorney provides written notification to those defendants, 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 those defendants 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.⁸

At the screening office, the eligibility interview is conducted in a confidential setting where Mr. McCall assists each defendant in completing the application form. He reviews the information provided and makes a decision while the applicant is still in the office. He then fills out a three-part Notice of Financial Eligibility Recommendation, listing the applicant’s name, address, docket number of the case, and the name of the judge, and indicating that a recommendation will be made to the judge that the applicant is either financially eligible for an assignment of counsel, or is not. He retains the original of the document for the SCACP files, and hands the remaining two copies to the defendants 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. He also tells them 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, unless there is a conflict, in which case the matter is assigned to the SCACP panel attorney assigned to that courtroom.

For those defendants whom the SCACP deems ineligible, a Reason for Ineligibility Recommendation form, which concisely explains the reasons that the application has been denied, is given to the defendant. Additionally, the screener provides the defendant 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 all except one of the judges consistently send defendants to the SAP screener to be screened. The judge who does not use the SAP Screening Office conducts a brief on-the-record inquiry to determine if defendants are eligible for assigned counsel.

The SCACP has reported to ILS the data it has collected and maintained 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.

⁸ ILS assisted the SCACP in finalizing this notice. It, and any other document mentioned in this report, can be made available for review upon request.

2. East End Justice Courts

The eligibility determination process is different on the County's East End. As noted in the last Eligibility Report, if a defendant is arraigned and remanded in one of the East End justice courts, the judge presumes the defendant financially eligible and assigns counsel, unless the defendant is already being represented by private counsel. If the defendant is not remanded, the judge generally conducts a brief inquiry into the defendant's financial situation, asking, for example, whether or not the defendant is working. If it is obvious that the defendant cannot afford to retain counsel, the judge assigns counsel. If the defendant's ability to pay for counsel is not obvious, the judge instructs the defendant to go to SCLAS to apply for assigned counsel and provides the defendant with 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.

Defendants who go to SCLAS are interviewed by a trained screener (either in person, or by phone for those defendants 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. Notably, in Spring 2019, SCLAS used Settlement funding to open a new East End Bureau in Downtown Riverhead. This move changed the manner in which eligibility screenings were done. Now, support staff and an investigator screen eligibility applications from the new location, while Chief Investigator Brennan Holmes, who has been screening applications for many years, remains at the County Court location and serves in a supervisory/consultation capacity, fielding questions or close call queries from the Downtown Riverhead location screeners. Thus, the physical separation allowed SCLAS to create an additional layer of support for eligibility screening further ensuring a credible and fair process for applicants.

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 we gleaned from court observations ILS conducted in 2019, the conversations ILS held with staff members of the SCLAS and SCACP, and our review of the data we received:

i. D-11

As previously stated, in D-11, Probation screens for presumptive eligibility of those defendants who are detained pre-arraignment and, in so doing, uses the presumptive factors set forth in the Eligibility Standards.

Since October 3, 2016, Probation has consistently collected, maintained, and reported to ILS on a monthly basis, data representing the number of eligibility screenings it conducted in D-11, and, of those, the number of applicants it deemed presumptively eligible for assigned counsel. The data received for calendar year 2019 reveals that, in that year, 11,831 defendants were screened, of which 8,664 (or 73%), were presumed eligible – slightly lower than the average percentage (75%) deemed eligible during calendar year 2018.

ii. SAP

ILS Eligibility Criteria and Procedures	County Criteria and Procedures	Comments
<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 85%-90% of the applications were decided based on one of the eligibility presumptions in 2019.
<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 2019, 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 defendants referred from the Street Appearance Part, the SCACP reports that District Court judges from non-SAP Parts increasingly send unrepresented defendants to the Screening Office to be screened. The SCACP reports that judges accept the recommendations of the screener.
<i>Procedure XI (confidentiality)</i>	Consistent with ILS C&P	The SCACP takes steps to maintain the confidentiality of the defendants' financial information, including 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 defendants 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 defendant gave 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, 2019 to December 20, 2019 (the last day of the year that the District Court conducted SAP arraignments before the start of the new year). The data reveals that, for this period, 1,606 defendants were screened by the SAP screener, 19 defendants were deemed ineligible for assigned counsel, 1 requested reconsideration, and, when denied, appealed. This is an ineligibility rate of 1.2%.

While there is no data from the courts to indicate how many of the 1,587 defendants deemed eligible for assigned counsel were actually assigned counsel by the judge, there is reason to believe that judges are generally following the SCACP's eligibility recommendation and that the SAP screening program continues to be beneficial to the District Court. As previously stated, an increasing number of judges are using the program even when they are not presiding over the Street Appearance Part.

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:

ILS Eligibility Criteria and Procedures	County Criteria and Procedures	Comments
<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	Screening staff estimate that, in 2019, approximately 75%-80% of applicants were deemed eligible 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	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 defendants detailed questions about their financial ability to retain counsel in open court, and SCLAS staff take steps to ensure the confidentiality of the information
<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 defendant appears to have sufficient income to pay for counsel, but has significant financial debt or liabilities, or where the defendant 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 2019. According to the data reported, during that period, SCLAS screened 239 applicants on the East End, and, of those, no applicant was deemed financially ineligible. Thus, no appeal or request for reconsideration was made.

C. Additional Information

As we reported last year, although a few District Court judges continue to screen and make their own eligibility determinations, having Probation screen in-custody defendants in D-11 for presumptive eligibility for assigned counsel, and, concomitantly, the SCACP screening for assigned counsel eligibility in the Street Appearance Part, have proven helpful in bringing a sense of uniformity and consistency to the screening process in District Court. However, because Probation collects data on only the number of people screened and the number it finds eligible for assigned counsel representation, there is still no reliable information on how often judges accept or reject Probation’s recommendations.

For those defendants who appear in the SAP, the SCACP is able to conduct a more thorough screening for financial eligibility of counsel so defendants can be assigned counsel on their next court date, and ILS has learned that more often District Court judges are referring defendants to be screened by the SCACP. Although this program has been successful in promoting implementation of the Eligibility Standards, in 2019, the program was at capacity in the number of people they could screen each day. This problem was exacerbated by the implementation of the 2019 Bail Reform laws which has resulted in an increase of appearance tickets since January. A second SAP Part was opened 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. As a result, there is a critical need for enhanced screening capacity – whether by enabling the SCACP to hire an additional screener or developing an alternative screening system. In the interim, SCACP is covering the current screening workload and ILS is working with the County and SCACP to ensure that there is a sustainable, long-term solution in place.

On the East End, the number of defendants screened for eligibility by SCLAS has significantly declined since 2017: 506 in 2017; 181 in 2018 and 239 in 2019. During a recent meeting with SCLAS’ Chief Administrative Officer Joe King and Chief Investigator Brennan Holmes, Mr. Holmes surmised that fewer defendants are being screened by SCLAS, in part, because the judges are assigning attorneys from the bench without a screening referral to SCLAS after asking a few questions that make it obvious the defendant lacks resources to retain counsel. This practice is beneficial to the many East End defendants who cannot travel the 30-mile distance to SCLAS’ Riverhead offices to be screened.

ILS will continue to work with the Suffolk County officials and Court administrators to address those issues identified above so as to achieve the goal of ensuring that defendants who cannot afford to retain counsel can apply for and be assigned counsel.

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. Current process for deciding assigned counsel eligibility

With a few minor exceptions, the process for deciding assigned counsel eligibility in Washington County has remained virtually unchanged since the 2019 annual report: applications are accepted by personal delivery, as well as by fax, mail, email, text-messaging, and 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. 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. Ms. DeCarlo-Drost recently reported that most applications are received from applicants who email a photographed copy of the completed application from their cell phones.

As the primary provider in Washington County, the Public Defender’s Office provides arraignment coverage for most defendants and coordinates with the ACP for arraignment appearances in a small number of cases. At arraignment, the arraigning attorneys regularly inform defendants of their right to assigned counsel. The arraigning attorneys provide a packet containing the application form and a cover letter, on which an attorney’s name is indicated as having represented a defendant at arraignment. The cover letter also informs the defendants of the ways that the application can be delivered to the ACP, and that, to assist the ACP in its determination of eligibility, the defendants are encouraged to provide the ACP with the charging documents and a form of identification. More recently, the packet has also contained a list of alternative sentencing classes and programs, as well as a notice of defendants’ right to remain silent should they be remanded to custody.

If it is evident that the defendant cannot afford to pay for private counsel, such as where the defendant is 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. Defendants who are remanded to pre-trial detention are 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.

Upon receipt of the completed application forms, ACP staff immediately review them and generally make 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 Office and, if there is a conflict, assigns an ACP panel attorney to the case, then sends a notice of the conflict assignment to the court from which the charges originated. If the arraignment is done in a Centralized Arraignment Part (CAP), notice of the assignment is sent to the judge 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 no applicant ineligible for counsel during calendar year 2019.

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

ILS Eligibility Criteria and Procedures	County Criteria and Procedures	Comments
<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 applies all four eligibility presumptions and has estimated that over the past year, more than 90% of the applications received were decided based on a presumption.
<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. Ms. De-Carlo Drost recently remarked that, since implementation, rarely has the ACP's assessment of an application progressed to the point of considering the defendant's debts and financial liabilities, because, as previously noted, most of the applications are 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. Ms. DeCarlo-Drost observed that even for defendants who are not presumptively eligible, "the bank accounts and assets are so negligible that there is hardly anything to pay for a private attorney."
<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 a defendant's 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. Applicants can apply by mail, fax, email, phone (on an emergency basis), and personal delivery, and at two satellite locations for those with transportation issues.

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 information received by ILS show that, in calendar year 2019, the ACP received 1,898 applications and determined that all applicants were eligible for assigned counsel. Thus, there were no requests for reconsideration or an appeal, or for partial payment orders pursuant to County Law § 722-d.

D. Additional Information

Before implementation, the ACP accepted only in-person applications at its Fort Edward Office. Since assuming the role of Supervising Attorney, Mr. Cioffi has implemented many changes to make the assigned counsel application process more accessible to applicants. Applications are now accepted by various delivery methods, including by email, which, according to Ms. DeCarlo-Drost, is the most preferred method of delivery for many applicants. A growing number of applicants will photograph the completed application with their cell phone, and then email the photographed document to the ACP office. 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. They are currently contemplating the possibility of further enhancing the eligibility determination process by facilitating an applicant's ability to complete and deliver the application online.

So far, Mr. Cioffi has noticed no changes to the eligibility screening and determination processes for the two months since the 2019 Bail Reform legislation was implemented. Although it is likely too early to tell, he does not anticipate any resultant changes given the ACP's flexibility in how applications are accepted. And, as in Onondaga County, if needed, the Washington County ACP's continued compliance with the Eligibility Standards and Procedure XII ensures its ability to adapt to any changes resulting from the reforms.

Finally, as noted in last year's update, the ACP continues to face challenges due to its location. The office remains in the basement of the county municipal building, a relatively isolated location where there is little security and no interview room. When applying for counsel, applicants speak through a window in the basement hallway outside the ACP's office, which is not a confidential setting. Mr. Cioffi has addressed this issue with the County administration, and there is consensus that new space is needed. He continues to work with the County to identify new space.

CONCLUSION

Since 2016, every *Hurrell-Harring* provider primarily responsible for assessing eligibility has been consistently compliant with the ILS Eligibility Criteria and Procedures, and in doing so has implemented solid systems and protocols for efficient and fair determinations. At the start of implementation of the 2019 Bail Reform laws, each already had protocols in place, if needed, for pre-arraignment assessment of assigned counsel eligibility and attorney involvement, per Procedure XII of the ILS Eligibility Standards which provides that counsel shall be assigned "at the first court appearance or immediately following the request for counsel, whichever is earlier." As set forth in the Commentary to Procedure XII, the determination of eligibility should be made pre-arraignment where an appearance ticket was issued, and counsel is requested. Where previously, the *Hurrell-Harring* providers might not have been equipped to easily adapt to the practical effects of the changes in the law, now, they are not only prepared, but are seeing new opportunities to further enhance client representation.

In Ontario County, for instance, the benefits of early involvement proved to far outweigh the challenges of bolstering the provider's pre-arraignment intake process. Recognizing that the Bail Reform legislation would provide opportunities for pre-arraignment assessment of assigned

counsel eligibility and thus access to clients, pre-court, for persons issued appearance tickets, Ms. Lapp implemented systemic procedures to ensure that prompt representation would be made available to all such persons eligible for the services of her office. Through the notification system described above (p. 12, *supra*), Ms. Lapp 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. While the success of her efforts cannot be definitively assessed this early in implementation, Ms. Lapp has described her process as “a real game changer,” recognizing that, without the notification, many defendants would not have known how to request counsel, or access the concomitant services of her office, before their court date. She described one success story as follows:

We had a woman. This was her first arrest, for which she might have gotten an ACD. She had mental health issues. We referred one of our social workers. The woman now had someone she could talk to. If she had been in crisis, we would have been able to catch it and get her the treatment she needed. This has been our focus.

As with Ontario County, most of the other *Hurrell-Harring* counties also had solid systems in place and were prepared for any changes associated with Bail Reform implementation, if necessary.

Moreover, one of the primary goals of the Eligibility Criteria and Procedures is to efficiently discern between those defendants who are eligible for assignment of counsel and those who are not. As noted in last year’s report, an efficient process not only ensures early access to counsel, where appropriate, but also protects against the needless expenditure of administrative resources. Desirous of achieving this goal, the Onondaga ACP recently launched IntelLinx, a new case management and electronic vouchering program that promises, among other things, to enhance the collection and recording of applicants’ assigned counsel eligibility information and ensure that applications are decided sooner, and counsel assigned more promptly. Although it is too soon to evaluate the success of IntelLinx, when asked recently whether the program had thus far improved efficiency by reducing the turnaround time for assigned counsel applications, Ms. Dougherty and her staff resoundingly responded, “Definitely, yes.”

ILS will continue to monitor the ACP’s use of technology to enhance its assigned counsel eligibility determination process, as well as Ms. Lapp’s and other provider efforts to ensure early access to counsel and treatment services for all eligible defendants with appearance tickets, and will detail their progress in next year’s report.