

ILS-195 FAQs - Part 1

LOGISTICS AND SCOPE OF THE ILS-195

Does the ILS-195 replace the Indigent Legal Services Annual Expense Report that counties must submit?

No. This report is still required. More information about the report can be found here: <https://www.ils.ny.gov/content/indigent-legal-services-annual-expense-report>.

If an assigned counsel system does not have a formal administrator, who is required to submit the form?

ILS is mandated to collect caseload data for all providers of mandated representation statewide. ILS will work with all counties, including those where no assigned counsel administrator exists, therefore, to obtain needed data to fulfil its basic reporting obligations.

Who does the ILS-195 survey link go to?

The ILS-195 survey link is currently sent to the Chief Defender or Administrator of the program if one exists. ILS will be working with providers to ensure that the link goes to the person responsible for filling out or submitting the form.

Does the county submit one ILS-195 for all providers, or does each provider submit their own ILS-195?

Each indigent defense provider is required to submit their own ILS-195.

Who is responsible for completing and submitting the ILS-195?

This decision is left to the provider of representation. If the provider would like to complete and submit the ILS-195, they may do so. They may also delegate this responsibility to the county's Data Officer.

If our county has a contract with a regional program to provide representation (e.g. Rural Law Center, Regional Appellate Program, Legal Aid Society representation in Family Court cases), who is responsible for submitting that program's information?

The program who holds the contract to provide mandated representation is responsible for submitting an ILS-195. These programs will need to complete an ILS-195 for each contract they have. The county who has the contract is not responsible for completing an ILS-195 for the contracted program.

COUNTING EMPLOYEES AND CONTRACTORS

It is critical that employees and contractors are correctly categorized as attorneys, investigators, social workers, or other staff. It is also critical that employees and contractors are distinguished, as the reporting requirements for each are distinct. Last, since each provider must file a separate ILS-195, it is also critical that providers understand which contractors or employees are reportable by them, which can be challenging if providers overlap in terms of budgets or personnel. The form offers general instructions on how to perform these breakouts. The information here serves to refine and expand on those instructions.

If providers share personnel, budgets, or other infrastructure (e.g. office space) which provider reports the staffing and expenditures associated with that infrastructure?

There are various potential scenarios where one provider may house infrastructure that actually pertains to another provider. ILS is aware of some instances where public defender office employees act as assigned counsel administrators. In one county, an ‘assigned counsel resource center’ has been constructed inside a legal aid society for the purpose of providing support to assigned counsel attorneys.

In these situations, it is critical to separate the work for each program/provider. Employees of one provider are acting under the auspices of a different provider and should be counted on the ILS-195 of that latter provider. Although this may not reflect the administrative approach taken to mandated representation in the county in question, it is essential that ILS receive ILS-195 submissions which reflect the operations of each program respectively. Where assigned counsel systems are administratively subsumed within public defender or similar offices, ILS must nevertheless receive data on those systems separately from one another.

Separating out personnel and expenditures on each provider in situations where they are administratively combined may be complicated. As a general principle, employees should be counted in the ILS-195 submitted by the provider to which they are affiliated. If their time is split (as, for example, where in addition to acting as assigned counsel administrator they also perform work for the public defender’s office) they may appear as ‘part-time’ employee on both the public defender and assigned counsel ILS-195s. Personal services or OTPS expenditures associated with that person should also be split between the two ILS-195 reports, proportionately to the split of time. For ‘other OTPS’ expenditures – those expenditures relating, for example, to building maintenance and hardware – those too should be split between the two programs in the event they are sharing office space or hardware. This split should be in proportion to the total FTE staffing of each provider as reported in their respective ILS-195 forms.

If a public defender office contracts with assigned counsel attorneys (e.g. to provide coverage for counsel at first appearance), are these attorneys contractors to be reported by the public defender on their ILS-195 submissions, or assigned counsel attorneys to be reported on that ILS-195 submission?

The public defender office should report expenditures for these attorneys on their form. The expenditures should be recorded in the provider's response to the ILS-195 Part 1 question "Please report the provider's total expenditures on all other than personal services (OTPS) items last year," in the category "Attorneys."

Although these attorneys are also assigned counsel providers, in this instance they are working as contractors for the public defender office, and expenditures for their work are coming from public defender office funds. Therefore, these expenditures should be reported on the public defender's ILS-195 submission.

If a program retains an attorney as a contractor, but that attorney is providing services other than direct representation (e.g. is acting as a mentor or trainer) should those contractual expenditures be reported under "Attorneys" or "Other persons"?

Such expenditures should be reported under "Attorneys", even if such attorneys are not performing direct representation.

For assigned counsel programs, the "Attorneys" category under the question "Please report the provider's total expenditures on all other than personal services (OTPS) items last year" should therefore include a combination of all expenditures on attorneys for direct representation, as well as expenditures associated with work similar to that described in this question. Nowhere in the ILS-195 form do we request the total expended on vouchers for representation to be separated out; rather the total expended on vouchers will be included within this category, but may be combined with other totals expended for any other work by attorney contractors.

What are contractual expenditures for attorneys?

This generally refers to the voucher payments that Assigned Counsel Programs make to panel attorneys (who are not employees of the program). Institutional providers will typically not have contractual expenditures for attorneys' costs unless the institutional provider has a contractual relationship with an attorney rather than an employment relationship (in which case, those expenses would fall under this category).

How is part-time status quantified if employment contracts are not explicit on the proportion of full-time that a person works?

If a person is not a full-time employee, we ask that a good faith effort is made to represent accurately the proportion of full-time they work. Often, employees are explicitly expected to work 50% of full-time, or a specific number of hours per week, but

where such numbers are not explicit, we instead ask that an estimate is made of the amount of time the employee works weekly, and that this is expressed as a proportion of full-time employment. For example, if the employee works 10 hours a week and full-time employees work 40 hours a week, this employee would be counted as 0.25 of a full-time employee.

Note that non-employee contractors may also not be required to work specific numbers of hours per week. For example, some contractor assigned counsel administrators are required to perform the function of administrator for a certain fee, but no mention is made of the amount of time this is expected to take. In this situation, a contractor is not an employee, so computing their proportion of a full-time employee will not be necessary. Instead, the only reporting required is of the amount of the contract, which should be reported in the response to the ILS-195 Part 1 question “Please report the provider’s total expenditures on all other than personal services (OTPS) items last year.” For further information on how to distinguish contractors from employees see <https://www.acf.hhs.gov/css/resource/the-difference-between-an-independent-contractor-and-an-employee>.

If a person performs investigative tasks or social work tasks but this is not his or her primary role, how are they counted?

The ILS-195 requires that reported employees are broken into the categories: attorney, investigator, social worker, and ‘other staff.’ Generally, such persons should only be categorized as investigators or social workers if they meet the definitions put forth in the ILS-195, and if these are their *primary* roles. Thus, a person who does occasional investigative work would not be counted as an investigator if that was not their primary role.

For reference, the ILS-195 definitions of investigator and social worker respectively are as follows:

‘Investigators’ includes all persons responsible for assisting defense counsel with factual investigation including but not limited to identifying and interviewing witnesses and reviewing evidence. Do not include persons in this category if their primary responsibilities are process serving and/or screening of clients for financial eligibility.

‘Social workers’ includes all persons licensed as social workers pursuant to Title 8, Article 154, Section 7704 of New York State Education Law and Part 74 and Section 52.30 of the Regulations of the Commissioner of Education, as well as persons performing sentencing advocacy services, client and/or case management services, or mitigation investigation services, whether or not as licensed social workers.

If an assigned counsel administrator is not an attorney, how should they be reported?

If an assigned counsel program employs an administrator who is not an attorney, that administrator should be reported as an employee in the ‘Other staff’ category, and not in

the ‘Attorneys’ category. Likewise, expenditures on the administrator should also be reported under ‘Other staff,’ in the categories of personal or other-than-personal services, as appropriate.

Do you only count staff who are paid for with ILS funds?

No, all staff providing or assisting in mandated representation must be counted regardless of the funding source.

Do expenditures for retired employees get counted if they are under the Public Defender’s budget?

Do not report expenditures for benefits paid to retirees (i.e., health insurance or other retirement benefits). However, we may ask that you send us information about these expenditures in a separate document apart from the ILS-195 to the extent that you are able to do so.

How should health insurance buyouts be counted?

Health insurance buyouts should be reported as an expenditure on personal services (these payments are not considered part of fringe, but rather bonus payments that would be properly included in the definition of “wages”).

**COUNTING STAFFING AND EXPENDITURES ON WORK
OTHER THAN MANDATED REPRESENTATION**

Questions in this section relate to how to count staff and expenditures in Part 1 of the ILS-195. In general, the questions emphasize that the ILS-195 requests staffing and expenditures for mandated representation only, and not for staff and expenditures related to services beyond mandated representation. Where providers supply other types of representation, or other types of services, we generally ask that the staffing and expenditures reported on the ILS-195 refer only to mandated representation activities. In some cases, this requires that providers break down their total staffing and expenditure figures to figure the proportions dedicated exclusively to mandated work and other work respectively. This process sometimes requires providers to count only certain types of staff and omit others; to apportion the time of certain types of staff based on the extent to which their activities relate to mandated representation and other work respectively; and to apportion expenditures in equivalent ways.

ILS recognizes that mandated representation is enhanced by provision of other services to clients where appropriate, including representation in immigration and housing court. We note that the ILS-195 also has open-ended questions where providers are invited to report any other details or information that ILS should know. Where providers are supplying enhanced representation of this or any kind, we encourage them to provide detailed reporting, including additional statistics where necessary, in their answer to that question.

If a provider supplies, through internal resources, assistance with immigration or housing issues to a mandated representation client, are the attorneys and resources associated with that assistance also reportable on the ILS-195?

The ILS-195 requires providers of representation to supply data both on the number of attorneys and non-attorney employed at a provider of representation (expressed both as a count of individuals, and in ‘full-time-equivalent’ terms), and on the total amount spent on providing that representation. As we understand this question, it is asking whether staff and resources at a provider should be counted in these totals in the event they are not expressly engaged in providing mandating representation, notwithstanding that the client in question is also a client in a mandated representation case.

Such staff and resources should not be counted. Although an important service to the mandated representation client in question, assistance in immigration or housing matters falls outside the provisions of N.Y. County Law 18-B, by which ILS’ mandate is constrained. ILS’ interest in collecting data under the auspices of the ILS-195 is primarily to monitor mandated representation that falls under County Law 18-B.

Accordingly, providers should only count as ‘attorneys’ those who are providing mandated representation pursuant to County Law 18-B. When reporting resource expenditures, providers should only count resources expended that are associated with mandated representation, and not with non-mandated representation.

When reporting staffing of, and expenditures for, non-attorney services including investigators, expert witnesses, and social workers, providers should only report staffing and expenditures in these categories where they are associated with mandated representation under County Law 18-B. Thus, if a staff investigator is assigned only to work on criminal cases, they should be counted; if their caseload is immigration matters, they should not be. Similarly, any operations staff (e.g., IT, HR manager, communications director) who are associated with mandated representation under County Law 18-B should be reported.

Where staff attorneys or non-attorneys split their work between mandated and non-mandated representation, providers should be prepared to count them as individuals, but also report them as a fraction of an FTE in proportion to the amount of time they spend on mandated representation cases.

Do Regional Immigration Assistance Centers (RIACs) have to submit separate reports?

RIACs do not have to submit separate reports. Many of the questions in the ILS-195 would not apply well to RIACs, and RIACs are already subject to separate reporting requirements.

Where a provider contains a RIAC – as where a public defender office has used RIAC funding to establish it under its auspices – the staffing and expenditures of that RIAC should not be included in the reported staffing and expenditures of the provider in their ILS-195.

How do you report CAFA stipends paid to attorneys on staff?

This stipend is considered a “wage” according to the IRS definition. (“Section 31.3121(a)-1(b) of the Employment Tax Regulations provides that the term ‘wages’ means all remuneration for employment unless specifically excepted under section 3121(a). Section 31.3121(a)-1(c) provides that the name by which the remuneration for employment is designated is immaterial. Salaries, fees, and bonuses are wages, if paid as compensation for employment.”)¹ Thus, this compensation should be reported in Question 6.

**DIVIDING STAFFING AND EXPENDITURES BETWEEN
CRIMINAL AND FAMILY COURT WORK**

The ILS-195 requires providers to separate staffing and expenditures into those dedicated to ‘criminal’ and ‘Family Court’ representation. In some cases, such as where a single lawyer does work in both venues, this separation can be challenging. The form guides filers to make good faith estimates of how much staff time and expenditures are dedicated to each type of work in these situations. Questions in this section deal with nuances of this problem.

For reference, the two questions where staffing and resources are divided between criminal and Family Court questions are both from Part 1 of the ILS-195, and as follows:

- Of the FTEs reported in the previous question, how many work on criminal representation, and how many on family representation, whether at the trial or appellate level?
- Of the OTPS expenditures reported in the previous question, how much was dedicated to criminal representation, and how much to family representation, whether at the trial or appellate levels?”

When counting non-attorney personnel, how is one to apportion time to criminal or Family Court cases?

Although non-attorney personnel such as administrative staff in an office are not always expressly working on either criminal or Family Court cases, we ask that a good faith attempt is made to estimate the proportion of time such staff spend in support of work in one or the other context. Critically, the ILS-195 seeks to gauge resources allocated to criminal representation and Family Court representation respectively, and this includes

¹ <https://www.irs.gov/pub/irs-drop/rr-04-109.pdf>

resources dedicated by personnel in supporting roles. In general, it is appropriate to allocate the time of personnel in such roles in proportion to the time dedicated by attorneys – such that if attorneys spend 75% of their time engaged in criminal representation, it is reasonable to assume other staff spend the same proportion of time supporting that work. When asked to break out non-attorney staff dedicated to criminal and Family Court cases, therefore, one would infer 75% of those staff were allocated to criminal cases, and 25% to Family Court cases.

Is work done in the Youth Part to be considered criminal or Family Court?

The Youth Part is a part of criminal court. All employees engaged in work in Youth Parts, or resources expended in the course of that work, should be counted in ‘criminal’ categories rather than ‘Family Court’ categories.

How do we count work done on adolescent and juvenile offender cases after they are removed to Family Court under Raise the Age legislation?

In many parts of the state, removal of a case from criminal court to Family Court under Raise the Age legislation results in the provider transferring representation to a new attorney who provides Family Court youth representation as part of the Attorney for the Child program. In other counties, a provider ‘follows’ the case – that is, the same attorney who represented the client in the Youth Part continues to represent them in Family Court. However, regardless of the system of representation, for the purposes of reporting expenditures on the ILS-195, it is important to distinguish by funding stream.

Any expenditures billed as criminal representation, i.e., as part of mandated representation under County Law 18B should be counted under “criminal.” This includes any work done during the period post-removal but prior to any appearance in Family Court. However, once an assignment is made in Family Court, providers should be billing those expenditures to the Attorney for the Child program and therefore, for our purposes, this should not be included in your totals.

If a criminal court provider handles occasional matters in Family Court (e.g. an outstanding warrant) should the time and resources expended on such matters be categorized under Family Court?

Handling of minor Family Court matters in association with representation in a case where the attorney was originally appointed to provide criminal representation may be considered to be part of the criminal court representation. Time and resources expended in Family Court would then be countable in the category ‘criminal.’ Similarly, minor involvement in criminal court by providers of Family Court representation and in association with representation in an underlying Family Court case, may be counted in the category ‘Family Court.’

How are attorneys working Integrated Domestic Violence Courts counted? Are these personnel, and the resources expended on them, to be considered ‘criminal’ or ‘Family Court’ representation?

Where attorneys provide representation in Integrated Domestic Violence Court, half of their time, and half of the resources expended, should be counted under ‘criminal’, and half under ‘Family Court’

COUNTING SUPERVISORS

Is a person counted as a ‘supervisor’ if the only persons they are supervising are non-attorneys?

No. The ILS-195 question on supervision only relates to attorneys. The precise wording of the question is “Of the attorneys on staff on July 1 of last year, how many supervised the work of others?”

Is an assigned counsel administrator always considered a ‘supervisor’?

Assigned counsel administrators are not automatically considered supervisors but may be so if the oversight of the work of panel attorneys is a formal part of their job responsibilities. Assigned counsel administrators whose responsibilities are limited to making assignments and/or reviewing vouchers for service for mathematical accuracy are not considered supervisors. Note that where an assigned counsel system appoints both an administrator and a supervising attorney, the supervising attorney is generally considered the ‘supervisor’ and not the administrator.

How should a supervisor account for their administrative functions?

We ask that you reduce time spent on representation based on any other function you do other than criminal case representation.

REPORTING STAFFING AND EXPENDITURES ON DATA OFFICERS

How are expenditures on the Data Officer’s salary and/or contract to be counted?

The ILS-195 should contain reports of staffing and expenditures only on personnel that are staff or contractors with the provider in question. Where Data Officers are employees of specific providers, they would be counted as employees of that provider, and expenditures on their salary and benefits would be counted as ‘personal services’ expenditures of that provider. Where they are contractors of providers, expenditures on those contracts would be recorded as ‘other than personal services’ expenditures of that provider in the same way as all other contractors.

Where a county employs or contracts with a Data Officer in such a way that that person is not located in any specific provider, that person should not be counted in any individual provider's ILS-195 report. Similarly, no expenditures on that person should be counted in any provider's ILS-195 report.

How do you report an administrator of assigned counsel who is receiving a stipend for data officer duties?

If the administrator is on staff, a stipend for data officer duties should be reported in Q. 6 as part of the provider's expenditures on personal services.

If the Data Officer is completing the ILS-195 for an informal Assigned Counsel Program, is the Data Officer counted as staff for the Assigned Counsel Program?

No, the Data Officer is not counted as staff for that program. This Data Officer may be on staff at a different provider within the county or is an employee of the county.

THE ILS-195 AND PRIVATE PRACTICE

If an attorney in private practice receives a contract to perform mandated representation, and then uses the resources or personnel of his or her private practice to support that mandated representation on a pro bono basis, should these resources be reported on the ILS-195?

No. The ILS-195 only requests that providers report actual expenditures on employees which are explicitly supported by funding for the purpose of supplying mandated representation.

Of course, the provider in the situation described in this question is in the unfortunate position of supporting and improving the provision of mandated representation in the absence of external support. Recognizing the unsustainability of such a design, ILS urges that providers report instances of such supplementation due to shortfalls in funding in response to the question "Is there anything else you'd like us to know about the information submitted in this Part?" which occurs at the end of Part 1 of the ILS-195.

Does the ILS-195 form request any information about the private practices of assigned counsel lawyers?

No. Assigned counsel programs are required to submit a variety of data on cases where representation is supplied under County Law Article 18-B, including the numbers of cases handled and the amount of time spent by attorneys on those cases. While attorneys engaged in that representation also commonly have private practices with paying clients, no information is requested regarding those practices.