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**Testimony of the Office of Indigent Legal Services**

**Joint Legislative Hearing on the 2017-2018 Public Protection Budget**

**Presented before:**

**The Senate Finance Committee**

**and**

**The Assembly Committee on Ways and Means**

**Presented by:**

**William J. Leahy**

**Director**

**Office of Indigent Legal Services**

**January 31, 2017**

Good afternoon Chairman Young, Chairman Farrell and distinguished members of the Committees.

I am William Leahy, Director of the Office of Indigent Legal Services. Thank you for the opportunity to appear before you to discuss the FY 2017-18 budget request of the Office of Indigent Legal Services and Board.

**Past support.** As I do every year, I begin by thanking you for your past support of the Office and Board. Thanks to your support, additional resources were made available in the FY 2016-17 Final Budget to continue our progress toward fulfilling both our statutory responsibility to improve the quality of mandated representation throughout New York State and the responsibility we undertook to implement the terms of the historic settlement between the State of New York and plaintiff class represented by the New York Civil Liberties Union in *Hurrell-Harring et al. v. State of New York*.<sup>1</sup> For this my Board and I thank you.

Last year, I asked this Committee to support the FY 2016-17 Executive Budget proposal which dedicated \$16.4 million in funding for the *Hurrell-Harring* settlement counties to (1) implement the written plans submitted by my Office to (a) ensure that each eligible individual charged with a crime is provided representation at his or her arraignment (\$2 million) and (b) enhance the quality of representation in criminal cases in the five counties (\$2 million); (2) add staff and other necessary resources in the five settlement counties to reduce average weighted caseloads in criminal cases so that these counties could achieve compliance with national caseload standards (\$10.4 million); and (3) ensure that the funding currently received by the four settlement counties participating in our first Counsel at First Appearance competitive grant would be guaranteed in light of the release of our second Counsel at First Appearance competitive grant (\$800,000). Through your efforts, not only were all of these funding initiatives secured, but you also provided increased funding for Office operations to further

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<sup>1</sup> On March 11, 2015, the Albany County Supreme Court approved an historic settlement between the State of New York and a plaintiff class represented by the New York Civil Liberties Union in *Hurrell-Harring et al. v. State of New York*, in which the State of New York, for the first time since 1965, when it delegated its duty to provide counsel to indigent persons charged with a crime to counties, accepted its responsibility to implement and fund constitutionally compliant representation in the five counties named in the lawsuit. My Office, under the direction of my Board, accepted the responsibility and has been engaged in the implementation of the terms of the settlement since that approval, in which the State agreed to ensure that (1) each indigent person charged with a crime is provided representation at his or her arraignment, (2) caseload/workload standards are developed by my Office and implemented in the five counties, thereby reducing the crushing caseloads currently carried by providers of indigent legal services; and (3) funding is provided that is dedicated to implementing specific quality improvements to representation provided in the counties. Under the terms of the settlement, my Office also has the responsibility to develop and issue criteria and procedures to guide courts and counties located outside of New York City in the process of determining whether a person is eligible for mandated representation in criminal court proceedings. Those criteria and guidelines were released on April 4, 2016; however, the settlement does not attach any direct funding for implementation of these guidelines.

support the eight-person *Hurrell-Harring* settlement implementation unit that was created in the FY 2015-16 Final Budget (\$200,000).

***Hurrell-Harring* Settlement.** I am very pleased that in its FY 2017-18 Budget proposal, the Executive has again fully honored its settlement obligations, by dedicating \$23.8 million to (1) implement the written plans submitted by my Office to (a) ensure that each eligible individual charged with a crime is provided representation at his or her arraignment (\$2.8 million)<sup>2</sup> and (b) enhance the quality of representation in criminal cases in the five counties (\$2 million); and (2) add staff and other resources necessary to reduce average weighted caseloads in criminal cases to ensure that the caseload standards determined by ILS are implemented and adhered to by the providers in the five settlement counties (\$19.0 million). This figure of \$23.8 million represents an increase of \$8.6 million over FY 2016-17 funding levels for the *Hurrell-Harring* settlement; and it fully funds the caseload limits established by this office in December, 2016. I therefore ask for your full support of the FY 2017-18 Executive Budget as it pertains to funding the implementation of the *Hurrell-Harring* settlement.

**Extension of Reforms Statewide.** In addition to providing the funding needed to further implement the *Hurrell-Harring* settlement, the FY 2017-18 Executive Budget proposal is historic, because it begins the process of extending the “groundbreaking advances in those five counties . . . to the rest of the state,” with the State funding “one hundred percent of the costs necessary to extend the reforms.”<sup>3</sup> In doing so, “indigent criminal defendants [in every county will] have counsel at arraignment,” “new caseload standards [will be established] so that attorneys can devote sufficient attention to each case,” and the “quality of the representation provided to those who cannot afford an attorney [will] not vary from county to county.”<sup>4</sup>

Under the Executive proposal, my Office will develop written plans to implement the reforms contained in the settlement, with the plans to be completed by December 1, 2017 and with the specific purpose of extending the *Hurrell-Harring* reforms statewide, at state expense. These plans would also include interim steps for counties and New York City to achieve full compliance by April 1, 2023. My Office willingly accepts the responsibility to develop these plans. I draw your attention to one new provision in the Executive proposal that was not a part of the *Hurrell-Harring* settlement. That is the requirement in the Executive proposal that the plans developed by my Office in consultation with our Board would be subject to approval by the Director of the Division of the Budget. I will discuss that provision in my remarks to you today.

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<sup>2</sup> The \$2.8 million appropriation ensures that the four settlement counties participating in our first Counsel at First Appearance competitive grant will continue receiving the same level of funding they received under that grant without having to apply for continued funding under the second Counsel at First Appearance RFP (released on January 6<sup>th</sup> of this year).

<sup>3</sup> See “New York State: Ever Upward, 2017 State of the State, Governor Andrew M. Cuomo,” pp. 186-187.

<sup>4</sup> *Ibid*, p. 186

## FY 2017-18 ILS Budget Request.

In September, 2016, the Indigent Legal Services Board unanimously approved an ILS budget request of \$139.6 million for FY 2017-18.<sup>5</sup> Of this amount, \$133.2 million would be devoted to Aid to Localities and \$6.4 million to State Operations.

- **Local Aid.** The \$133.2 million in Local Aid represents an increase of \$37.0 million over FY 2016-17 funding levels, which increases would consist of the following:
  - **Upstate Quality Improvement and Caseload Reduction.** The majority of the Local Aid funding request, \$19 million, would be devoted to bringing the upstate institutional providers into compliance with national caseload limits and to provide basic support for the upstate assigned counsel programs. The \$19 million funding in FY 2017-18 would be the first installment of a five-year funding plan, which would increase Local Aid funding by approximately \$19-20 million/year, or \$98.8 million over five years. This requested increase over five years is founded upon the data revealed in our *Estimate of the Cost of Compliance with Maximum National Caseload Limits in Upstate New York – 2015*, in which we estimate that in 2015 it would have cost an additional \$98.8 million to bring upstate indigent legal services providers into compliance with maximum national caseload standards.<sup>6</sup>
  - **Counsel at First Appearance Grant.** \$8 million of the Local Aid funding request would be used to extend the reach of counsel at first appearance – within the 25 counties that have been participating in our first Counsel at First Appearance Grant, and for the many counties we anticipate receiving awards under our second Counsel at First Appearance Grant, which we released on

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<sup>5</sup> The ILS Budget Request was approved by the ILS Board at its September 23, 2016 meeting to ensure that it would be timely submitted to the Division of Budget in October for the FY 2017-18 Executive Budget process. Because this submission was made prior to our determination of caseload standards under the terms of the *Hurrell-Harring* settlement in December, 2016, funding sought in this Budget Request for the reduction of caseloads in the five counties and statewide should be adjusted as needed to continue our caseload reduction progress, pending the statewide extension of the *Hurrell-Harring* settlement reforms.

<sup>6</sup> This amount is comparable to the \$99.1 million that would have been needed to bring upstate counties into compliance with caseload limits in 2014, according to the report we issued in the fall of 2015, *Estimate of the Cost of Compliance with Maximum National Caseload Limits in Upstate New York – 2014 Update*. Notably, this amount represents an 11.2% decrease on the \$111.2 million that would have been needed to bring upstate counties into compliance with caseload standards in 2012, according to the first cost estimate report we issued in the fall of 2013, *Estimate of the Cost of Compliance with Maximum National Caseload Limits in Upstate New York*. This reduction in cost (and reduction in average weighted caseloads, from 719 in 2012, to 561 in 2015) is primarily attributable to an increase in staffing levels in upstate institutional provider offices, much of which is attributable to the competitive grants and noncompetitive distribution funding of the Office of Indigent Legal Services.

January 6, 2017. While we are able to offer additional funding with the second Counsel at First Appearance Grant, the amount available is far less than is needed for upstate counties to provide this vitally important, constitutionally guaranteed representation. The request of \$8 million would represent an additional step towards establishing the minimum conditions needed for ensuring constitutionally required counsel at first appearance in upstate counties.

We are very grateful to this Legislature for passing, and to Governor Cuomo for signing Chapter 492 of the Laws of 2016, the Off-Hours Arraignment Parts law. This law will facilitate our implementation of counsel at arraignment in the counties in compliance with the law and the Constitution. We express particular gratitude to the sponsors, Assemblyman Lentol and Senator Bonacic, for their leadership on this critical issue.

- **Hurrell-Harring Settlement.** \$1 million of the Local Aid funding request would be used for additional costs to supplement the final plan developed by the Office to implement Quality Improvement initiatives in the five settlement counties.
- **Additional RFPs.** \$3 million of the Local Aid funding request would be used to supplement three RFPs to (1) address major deficiencies in the quality of representation provided by Assigned Counsel Programs; (2) create a Model Upstate Parental Representation Office; and (3) create two Wrongful Conviction Prevention Centers.
- **Compliance with ILS Eligibility Criteria and Procedures.** \$6 million of the increased Local Aid funding request would be used to reimburse counties for additional cases and costs that they may incur during FY 2017-18 as a result of judges following the guidance provided by the Office in its *Criteria and Procedures for Determining Assigned Counsel Eligibility*, which were issued pursuant to our responsibility to implement the terms of the *Hurrell-Harring* settlement.
- **State Operations.** The \$6.4 million in State Operations funding represents an increase of \$3.2 million over FY 2016-17 funding levels, which would consist of the following:
  - **New Staff and Retention.** \$400,000 to assure the continued effective operation of our office as it assumes steadily increasing responsibilities. It would fund three new administrative positions (\$300,000); an assistant grants manager, an administrative officer, and a secretary. In addition, it would fund much needed and hard-earned salary relief for eight employees who have served my Office with

great distinction for at least four years and are ineligible for the regular salary increases associated with civil service positions (\$100,000).

- **Regional Support Centers.** \$2 million to establish Regional Support Centers, which are essential for the realization of uniform, high quality representation in every county and region. This initial appropriation would support the first four such Centers, in areas of greatest need for regional help.
- **Statewide Appellate Resource Center.** \$800,000 to begin establishing a New York State Statewide Appellate Center. The Center will provide litigation assistance to assigned counsel and mandate relief to counties by providing state-funded appellate representation in complex cases and identifying and rectifying wrongful convictions more rapidly than is done at present.

### **FY 2017-18 Executive Budget Proposal**

The Executive Budget released on January 17, 2016 proposes funding of (1) \$0 in State Operations and (2) \$109.6 million in Aid to Localities, or All Funds of \$109.6 million. Overall, this represents an increase of \$10.2 million over the amount appropriated in the FY 2016-17 Final Budget. The additional \$10.2 million is primarily devoted to implementation of the *Hurrell-Harring* settlement.

- **State Operations.** The Executive proposal does not contain a State Operations appropriation for the Office of Indigent Legal Services.<sup>7</sup> The Aid to Localities proposal, however, contains language that “funds may be transferred to state operations,” without specifying an amount. I will address this matter in my testimony.
- **Local Aid.** The \$109.6 million in Local Aid represents an increase of \$13.4 million over FY 2016-17 funding levels,<sup>8</sup> with the total funding appropriated as follows:

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<sup>7</sup> The FY 2017-18 Executive State Operations Budget proposal would re-appropriate a \$500,000 contractual line in the FY 2015-16 Final Budget that allowed us to issue a Caseload Standards RFP to develop caseload standards in criminal cases in the five settlement counties and to fulfill our settlement obligation to track the caseloads of every attorney providing mandated representation in the five counties. The Rand Corporation was awarded the contract to conduct the caseloads standards study and completed that study in November of 2016.

<sup>8</sup> The FY 2017-18 Executive Budget proposal would also continue funding a total of \$15.2 million appropriated in FY 2016-17 to (1) implement the plan developed by the Office for each of the five settlement counties to satisfy the State’s obligation to provide in person representation of eligible criminal defendants at first appearance (\$2.8 million); (2) continue implementation of the plan developed by the Office to enhance quality of mandated representation in criminal cases for each of five settlement counties (\$2 million); and (3) continue providing interim relief for the five settlement counties.

- **ILS Funding for Localities and Office Operations.** Of the \$109.6 million Local Aid appropriation, \$85.8 million would be dedicated to support ILS funding to localities and Office operations. The proposal does not contain a break-out of specific funding amounts.<sup>9</sup>
- **Hurrell-Harring Settlement.** Of the \$109.6 million Local Aid appropriation, \$23.8 million would be dedicated to implementation of the Hurrell-Harring settlement, as follows:
  - \$19.0 million for the five settlement counties to add staff and other resources needed to comply with caseload/workload standards determined by ILS.
  - \$2.0 million to further implement the written plan developed by ILS to improve the quality of indigent defense in the five settlement counties; and
  - \$2.8 million to further implement the written plan developed by ILS to provide in person representation of eligible defendants at all arraignments in the five settlement counties.

#### **Sixth year operations of the Office and the Board.**

During its first six years of operations, the Board has approved the development of seven *non-competitive* distributions – in amounts sufficient to restore every county and New York City to the level of funding they received in 2010.<sup>10</sup>

The Board has also approved the development of seven *competitive* grants, each targeted to improve the quality of mandated representation under county law 18-B by using dedicated state funding to address current deficiencies in the delivery of those services. These competitive grants provide additional funding to the counties and New York City, above and beyond the 2010 level of funding provided by the non-competitive distributions.

Significantly, these initiatives - the non-competitive distributions and competitive grants - do not impose any unfunded mandates on the counties. Counties are not asked to perform any

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<sup>9</sup> If the \$85.8 million Aid to Localities appropriation is meant to provide level funding of \$81 million for the counties, \$4.8 million would be available to transfer to state operations. This \$4.8 million would be sufficient to continue office operations at their current level, and to fund the new unit we have proposed for the planning and implementation of the statewide *Hurrell-Harring* settlement reforms.

<sup>10</sup> For the first four years of operation, non-NYC counties were guaranteed by statute a percentage of the ILSF funds they received in March, 2010 (year 1 – 90%; year 2 – 75%; year 3 – 50%; year 4 – 25%). In March of 2014, the non-NYC counties received their final statutory payment under these phase-out provisions. New York City, which is guaranteed an annual sum of \$40 million, or 98% of its March, 2010 ILSF allocation, will receive its next annual sum in March, 2017.

additional service that state funding will not support – and the counties and the State will benefit from having the quality of indigent legal services improve significantly.

As indicated above, we have also been working very hard to implement the terms of the *Hurrell-Harring* Settlement Agreement in the five counties to which it applies. We are as proud of the quality of work done by our Implementation Unit as we are of the statewide progress accomplished by our small pre-existing staff, working with limited resources. Finally, I would note our establishment in 2016 of six Regional Immigration Assistance Centers serving providers of mandated representation throughout New York. These Centers make New York the first state to establish a statewide network of offices to assist attorneys in complying with their obligation to provide appropriate advice to their clients concerning the immigration consequences of conviction, as required by the United States Constitution.

### **Collaboration between County Officials and Providers**

For each of our non-competitive distributions and competitive grants, we have required, as a condition of receiving funding, that counties consult with their indigent legal services providers in the preparation of their proposals. In this sixth year of operations, we are once again pleased to report that the level of collaboration between county officials and providers continues to grow. The net effect of this growth, we believe, is a better targeting of ILSF funds toward improving the quality of legal representation.

### **Unfinished Business**

The representation of parents in Family Court and, to a much lesser extent, Surrogate's Court, is a vital component of legally mandated representation under County Law article 18-B. This representation is every bit as mandated by law as is criminal defense; yet, because it was not included in the *Hurrell-Harring* lawsuit, it was not included in the Settlement Agreement whose provisions the Executive budget proposal would extend throughout the State. This category of cases and clients, with family integrity and children's well-being at stake in every case, must not continue to be neglected. We call upon the Governor and the Legislature to include parental representation as an integral part of the planned statewide reforms.

### **Public Defense Backup Center.**

Finally, I emphasize the critical importance of the New York State Defender Association's Public Defense Backup Center receiving adequate funding to continue performing its indispensable function of providing essential training and support services, including its case management system, to indigent legal service providers throughout the state. The Office of Indigent Legal Services cannot succeed in our mission to improve the quality of representation under County Law article 18-B without a robust Public Defense Backup Center. NYSDA is essential to New York's fulfillment of its Constitutional obligation to provide competent counsel to those who cannot afford to pay for it.



**FY 2017-18 Executive Budget Proposal**  
**Office of Indigent Legal Services (ILS) (Office)**

	Final FY 2016-17	FY 2017-18 ILS Budget Request w/revisions	FY 2017-18 ILS Requested Change	FY 2017-18 Executive Budget proposal
State Operations	\$3.2 million	\$7.9 million	+\$4.7 million	\$0*
Aid to Localities	\$96.2 million	\$141.8 million	+\$45.6 million	\$109.6 million
All Funds	\$99.4 million	\$149.7 million	+\$50.3 million	\$109.6 million

**State Operations (S.2000/A.3000):**

- **Office Operations\*:**
  - Executive proposal does not contain State Operations appropriation for Office of Indigent Legal Services. The Aid to Localities proposal for ILS includes language that “funds may be transferred to state operations.”

**Aid to Localities (S.2003/A.3003):**

- **ILS Distributions and Grants; Extension of Hurrell-Harring Reforms; and Office Operations**
  - Of the \$109.6 million Local Aid appropriation, \$85.8 million would be dedicated to ILS distributions and grants, extension of *Hurrell-Harring* reforms statewide and \*Office operations. The proposal does not break-out the specific funding amounts attached to each of these three categories. The Local Aid proposal contains Article VII language to extend *Hurrell-Harring* reforms statewide (see Art. VII below).
- **Hurrell-Harring Settlement**
  - Of the \$109.6 million Local Aid appropriation, \$23.8 million would be dedicated to implementation of the *Hurrell-Harring* settlement, as follows:
    - \$19.0 million for the five settlement counties to add staff and other resources needed to comply with caseload/workload standards determined by ILS.
    - \$2.0 million to further implement the written plan developed by ILS to improve the quality of indigent defense in the five settlement counties; and
    - \$2.8 million to further implement the written plan developed by ILS to provide in person representation of eligible defendants at all arraignments in the five settlement counties.

**Art. VII (LBDC):**

- **Extension of Hurrell-Harring Reforms Statewide**
  - Executive proposal requires ILS to develop written plans, no later than December 1, 2017, to extend *Hurrell-Harring* reforms statewide. The plans would be subject to DOB approval and include interim steps for counties and NYC to achieve compliance by April 1, 2023. County expenditures to implement these plans would be reimbursable by the state. The written plans are:
    - **Counsel at Arraignment.** This plan would ensure that each criminal defendant eligible for publicly funded legal representation is represented by counsel in person at his or her arraignment.
    - **Caseload Relief.** This plan would establish numerical caseload/workload standards for each provider of constitutionally mandated representation in criminal cases.
    - **Quality Initiatives.** This plan would improve the quality of constitutionally mandated publicly funded representation in criminal cases by ensuring, *inter alia*, effective supervision and training, adequate access to investigators and experts, and properly qualified and experienced attorneys.

- Indigent Legal Services Fund (ILSF) revenue enhancers.

- The Executive proposal would increase fees to enhance Indigent Legal Services Fund (ILSF) revenues:
  - **Criminal history record check fee.** Increase the OCA criminal history records search fee from \$65 to \$80;
  - **Attorney registration fee.** Increase the biennial attorney registration fee from \$375 to \$425; and
  - **Termination of license suspension fee.** Increase the termination of license suspension fee from \$70 to \$105.

**FY 2017-18 ILS Budget Request\*\***

	Final FY 2016-17	FY 2017-18 initial Budget Request	FY 2017-18 revised Budget Request	Requested Change (per revised Request)
State Operations	\$3.2 million	\$6.4 million	\$7.9 million	+\$4.7 million
Aid to Localities	\$96.2 million	\$133.2 million	\$141.8 million	+\$45.6 million
All Funds	\$99.4 million	\$139.6 million	\$149.7 million	+\$50.3 million

**State Operations (additions):**

1. **Office Operations:**
  - o \$400,000 to (a) add three positions (\$300,000), consisting of an assistant grants manager, administrative officer and secretary, and (b) increase salaries for eight long-serving ILS employees (\$100,000), to ensure continued effective operation of Office.
2. **Extend Hurrell-Harring reforms statewide:**
  - o \$1.5 million to create a ten person unit to ensure that counsel at arraignment, caseload standard reform, and quality improvements are extended throughout the State with appropriate accountability and results. The unit would include a Chief Implementation Attorney, three-person team dedicated to NYC, two persons each dedicated to implementation of reforms in the 52 counties and a researcher position.
3. **Regional Support Centers**
  - o \$2 million to begin establishing Regional Support Centers, which are essential for the realization of uniform, high quality representation in every geographic region. This initial appropriation would support the first four such Centers, in areas of greatest need for regional help.
4. **NYS Appellate Resource Center**
  - o \$800,000 to establish a NYS Appellate Resource Center. Modeled after the New York Prosecutors Training Institute (NYPTI), this Center will provide litigation assistance to assigned counsel and mandate relief to counties by providing state-funded appellate representation in complex cases.

**Local Aid (additions):**

1. **Upstate Quality Improvement and Caseload Reduction**
  - o \$19 million to enhance our remediation of excessive caseloads and wholly inadequate support services, supervision and oversight that exist in upstate counties. This request is supported by our November, 2016 report, *Estimate of the Cost of Compliance with Maximum National Caseload Limits in Upstate New York – 2015 Update*, which revealed that New York would have had to spend an additional \$98.8 million in 2015 to achieve compliance with maximum national caseload limits.
2. **Counsel at First Appearance**
  - o \$8 million to extend the reach of counsel at first appearance in the 52 upstate counties that are addressing it now through our counsel at first appearance RFPs (2<sup>nd</sup> CAFA RFP released in December, 2016).
3. **Compliance with ILS eligibility criteria and procedures**
  - o \$6 million to enable providers of mandated representation to comply with the criteria and procedures issued by ILS on April 4, 2016 and effective on April 1, 2017 in the 52 upstate counties. These criteria and procedures serve to guide courts in their determination of eligibility for mandated representation in criminal cases.
4. **Hurrell-Harring Settlement**
  - o \$8.6 million to fully implement caseload standards pursuant to the caseload standards determination made by ILS on December 8, 2016.
  - o \$1 million for additional costs to implement Quality Improvement initiatives
5. **Three Additional RFPs**

- o \$3 million to supplement three RFPs being developed to (1) address major deficiencies in the quality of representation provided by Assigned Counsel Programs; (2) create one or two Model Upstate Parental Representation Offices; and (3) create two Wrongful Conviction Prevention Centers.

**\*\* The funding sought in this Budget Request for the reduction of caseloads statewide, pursuant to the new caseload standards determined by ILS on December 8, 2016, and for counsel at arraignment and quality improvement, should be adjusted as needed to fulfill any commitment made in the Executive Budget to extend these reforms statewide.**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ALBANY

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KIMBERLY HURRELL-HARRING, et al., on  
Behalf of Themselves and All Others Similarly  
Situated,

Plaintiffs,

-against-

THE STATE OF NEW YORK, et al.,

Defendants.

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Index No. 8866-07  
(Connolly, J.)

**STIPULATION AND ORDER OF SETTLEMENT**

WHEREAS, Plaintiffs, on behalf of the Plaintiff Class, as defined by the Appellate Division, Third Department ("Plaintiffs"), commenced and are pursuing a class action lawsuit entitled *Hurrell-Harring, et al. v. State of New York, et al.*, Index No. 8866-07, in New York Supreme Court, Albany County, seeking declaratory and prospective injunctive relief for, among other things, the alleged deprivation by the State of New York and the Governor of the State of New York (the "State Defendants") of Plaintiffs' right to counsel in the counties of Onondaga, Ontario, Schuyler, Suffolk, and Washington (together the "Five Counties" and each a "County") guaranteed to Plaintiffs by the Sixth and Fourteenth Amendments to the United States Constitution, Article I, § 6 of the New York State Constitution, and various statutory provisions; and

WHEREAS, the parties have been engaged in litigation since November 2007 and the New York Court of Appeals has determined that Plaintiffs may proceed with their claims for actual and constructive denial of counsel, *Hurrell-Harring v. State of New York*, 15 NY3d 8 (2010); and

WHEREAS, the Appellate Division, Third Department determined that Plaintiffs could pursue

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the litigation as a class action in accordance with Article 9 of the New York State Civil Procedure Law and Rules ("CPLR"), *Hurrell-Harring v. State of New York*, 81 AD3d 69 (3d Dept. 2011); and

WHEREAS, in 2010, the State established the Office of Indigent Legal Services ("ILS") and the Indigent Legal Services Board ("ILSB") (Executive Law Section 832 and Section 833, respectively) to, among other things, improve the quality of the delivery of legal services throughout the State for indigent criminal defendants; and

WHEREAS, the parties have conducted extensive fact and expert discovery, and have engaged in motion practice before the Court, and the Court has set the matter down for trial; and

WHEREAS, the parties have negotiated in good faith and have agreed to settle this Action on the terms and conditions set forth herein; and

WHEREAS, the parties agree that the terms of this settlement are in the public interest and the interests of the Plaintiff Class and that this settlement upon the order of the Court is the most appropriate means of resolving this action; and

WHEREAS, the parties understand that, prior to such Court order, the Court shall conduct a fairness hearing in accordance with CPLR Article 9 to determine whether the settlement contained herein should be approved as in the best interests of the Plaintiff Class; and

WHEREAS, ILS and the ILSB have the legal authority to monitor and study indigent legal services in the state, to recommend measures to improve those services, to award grant monies to counties to support their indigent representation capability, and to establish criteria for the distribution of such funds; and

WHEREAS, the parties agree that ILS is best suited to implementing, on behalf of the State, certain obligations arising under this Agreement; and

WHEREAS, the ILSB has reviewed those obligations contemplated under this Agreement for implementation by ILS and has directed ILS to implement such obligations in accordance with  
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the terms of this Agreement, and this direction is reflected in the *Authorization of the Indigent Legal Services Board and the New York State Office of Indigent Legal Services Concerning Settlement of the Hurrell-Harring Lawsuit*, appended hereto as Exhibit A and incorporated by reference herein; and

WHEREAS, ILS is legally required to execute this direction from the ILSB; and

WHEREAS, the Plaintiff Class entered into a settlement agreement with Ontario County dated June 20, 2014, and the Court approved the settlement and dismissed the Plaintiff Class's claims against Ontario County on September 2, 2014; and

WHEREAS, the Plaintiff Class entered into a settlement agreement with Schuyler County on September 29, 2014, which is currently scheduled for a fairness hearing on November 3, 2014; and

WHEREAS, Plaintiffs and the State intend that the terms and measures set forth in this Settlement Agreement will ensure counsel at arraignment for indigent defendants in the Five Counties, provide caseload relief for attorneys providing Mandated Representation in the Five Counties, improve the quality of Mandated Representation in the Five Counties, and lead to improved eligibility determinations;

**NOW, THEREFORE, IT IS HEREBY STIPULATED, AGREED, AND ORDERED** as follows:

**I. PARTIES TO THIS AGREEMENT**

The parties to this Settlement Agreement are the parties named in the Second Amended Complaint in the Action, which are the Plaintiff Class, the State of New York, Governor Andrew Cuomo, Onondaga County, Ontario County, Schuyler County, Suffolk County, and Washington County. If a County fails to execute the Agreement, it shall not be considered a party to this Agreement.

**II. DEFINITIONS**

As used in this Agreement:

**Action** means *Hurrell-Harring v. State of New York*, Case No. 8866-07 (Supreme Court, Albany County), filed on November 8, 2007.

**Agreement** and **Settlement Agreement** mean this Stipulation and Order of Settlement dated as of October 21, 2014 between and among Plaintiffs, the State Defendants, and the Five Counties.

**Arraignment** means the first appearance by a person charged with a crime before a judge or magistrate, with the exception of an appearance where no prosecutor appears and no action occurs other than the adjournment of the criminal process and the unconditional release of the person charged (in which event Arraignment shall mean the person's next appearance before a judge or magistrate).

**Effective Date** means the date of entry of the order of Supreme Court, Albany County approving this Settlement Agreement.

**Executive** means the Office of the Governor.

**Five Counties** means Ontario, Onondaga, Schuyler, Suffolk, and Washington Counties, each of which was named as a defendant in the Second Amended Complaint filed on August 26, 2008 in *Hurrell-Harring v. State of New York*. Each of the Five Counties may also be referred to as a **County** in this Agreement.

**Mandated Representation** means constitutionally mandated publicly funded representation in criminal cases for people who are unable to afford counsel.

**Plaintiffs** or **Plaintiff Class** means the class of individuals certified by the Appellate Division on January 6, 2011 in *Hurrell-Harring v. State of New York*.



### III. COUNSEL AT ARRAIGNMENT

(A) (1) The State of New York (the "State") shall ensure, within 20 months of the Effective Date and continuing thereafter, that each criminal defendant within the Five Counties who is eligible for publicly funded legal representation ("Indigent Defendant") is represented by counsel in person at his or her Arraignment. A timely Arraignment with counsel shall not be delayed pending a determination of a defendant's eligibility.

(2) Within 6 months of the Effective Date, the New York State Office of Indigent Legal Services ("ILS"), in consultation with the Executive, the Five Counties, and any other persons or entities it deems appropriate, shall develop a written plan to implement the obligations specified above in paragraph III(A)(1), which plan shall include interim steps for achieving compliance with those obligations. That plan shall be provided to the parties, who shall have 30 days to submit comments. Within 30 days of the end of such comment period (which will be no later than 8 months after the Effective Date), ILS shall finalize its plan and provide it to the parties. Starting within 6 months of finalization of the plan, the State shall undertake good faith efforts to begin implementing the plan, subject to legislative appropriations.

(3) The parties acknowledge that the State may seek to satisfy the obligations set forth in paragraph III(A)(1) by ensuring the existence and maintenance within each of the Five Counties of an effective system for providing each Indigent Defendant with representation by counsel in person at his or her Arraignment. Nothing in this provision alters the State's obligations set forth in paragraph III(A)(1).

(4) Incidental or sporadic failures of counsel to appear at Arraignments within a County shall not constitute a breach of the State's obligations under paragraph III(A)(1).

- (B) The Executive shall coordinate and work in good faith with the Office of Court Administration ("OCA") to ensure, on an ongoing basis, that each judge and magistrate within the Five Counties, including newly appointed judges and magistrates, is aware of the responsibility to provide counsel to Indigent Defendants at Arraignments, and, subject to constitutional and statutory limits regarding prompt arraignments, to consider adjustments to court calendars and Arraignment schedules to facilitate the presence of counsel at Arraignments. If, notwithstanding the Executive's satisfaction of the terms of this paragraph III(B), lack of cooperation from OCA prevents the provision of counsel at some Arraignments, the State shall not be deemed in breach of the settlement for such absence of counsel at those Arraignments.
- (C) In accordance with paragraph IX(B), the State shall use \$1 million in state fiscal year 2015/2016 for the purposes of paying any costs associated with the interim steps described in paragraph III(A)(2). The State shall use these funds in the first instance to pay the Five Counties for the costs, if any, incurred by them in connection with the interim steps described in paragraph III(A)(2), and thereafter any remaining amounts shall be used to pay costs incurred by ILS.
- (D) ILS, in consultation with the Executive, OCA, the Five Counties, and any other individual or entity it deems appropriate, shall, on an ongoing basis, monitor the progress toward achieving the purposes set forth in paragraph III(A)(1) above. Such monitoring shall include regular, periodic reports regarding: (1) the sufficiency of any funding committed to those purposes; (2) the effectiveness of any system implemented in accordance with paragraph III(A)(3) in ensuring that all Indigent Defendants are represented by counsel at Arraignment; and (3) any remaining barriers to ensuring the representation of all Indigent Defendants at Arraignment. Such reports shall be made available to counsel for the Plaintiff Class and the public.

- (E) In no event shall the Five Counties be obligated to undertake any steps to implement the State's obligations under Section III until funds have been appropriated by the State for paragraph III(A)(1) or paragraph III(A)(2). Nothing in this paragraph shall alter the Five Counties' obligations under Section VII.

**IV. CASELOAD RELIEF**

- (A) Within 6 months of the Effective Date, ILS shall ensure that the caseload/workload of each attorney providing Mandated Representation in the Five Counties can be accurately tracked and reported on at least a quarterly basis, including private practice caseloads/workloads. In accordance with paragraph IX(B), the State shall provide \$500,000 in state fiscal year 2015/2016 to ILS for the purposes of paying any costs associated with the obligations contained in this paragraph IV(A), and ILS shall use those funds for such purposes. To the extent practicable, and subject to the specific funding commitments in this Agreement, the tracking system developed by ILS should be readily deployable across the state.
- (B) (1) Within 9 months of the Effective Date, ILS, in consultation with the Executive, OCA, the Five Counties, and any other persons or entities ILS deems appropriate, shall determine:
- (i) the appropriate numerical caseload/workload standards for each provider of mandated representation, whether public defender, legal aid society, assigned counsel program, or conflict defender, in each County, for representation in both trial- and appellate-level cases; (ii) the means by which those standards will be implemented, monitored, and enforced on an ongoing basis; and (iii) to the extent necessary to comply with the caseload/workload standards, the number of additional attorneys (including supervisory attorneys), investigators, or other non-attorney staff, or the amount of other in-kind resources necessary for each provider

of Mandated Representation in the Five Counties.

- (2) In reaching these determinations, ILS shall take into account, among other things, the types of cases attorneys handle, including the extent to which attorneys handle non-criminal cases; the private practice caseloads/workloads of attorneys; the qualifications and experiences of the attorneys; the distance between courts and attorney offices; the time needed to interview clients and witnesses, taking into account travel time and location of confidential interview facilities; whether attorneys work on a part-time basis; whether attorneys exercise supervisory responsibilities; whether attorneys are supervised; and whether attorneys have access to adequate staff investigators, other non-attorney staff, and in-kind resources.
- (3) In no event shall numerical caseload/workload standards established under paragraph IV(B)(1) or paragraph IV(E) be deemed appropriate if they permit caseloads in excess of those permitted under standards established for criminal cases by the National Advisory Commission on Criminal Justice Standards and Goals (Task Force on Courts, 1973) Standard 13.12.
- (C) Starting within 6 months of ILS having made the caseload/workload determinations specified above in paragraph IV(B), the State shall take tangible steps to enable providers of Mandated Representation to start adding any staff and resources determined to be necessary to come into compliance with the standards.
- (D) (1) Within 21 months of ILS having made the caseload/workload determinations specified above in paragraph IV(B) (which shall be no later than 30 months from the Effective Date) (the "Implementation Date") and continuing thereafter, the State shall ensure that the caseload/workload standards are implemented and adhered to by all providers of Mandated Representation in the Five Counties.

- (2) The parties acknowledge that the State may delegate to ILS the primary responsibility for overseeing the implementation, monitoring, and enforcement of the caseload/workload standards required hereunder, provided, however, that nothing in this provision alters the State's obligations set forth in this Section IV.
- (3) The parties acknowledge that the State may seek to satisfy the obligation in paragraph IV(D)(1) by ensuring the existence and maintenance within each of the Five Counties of an effective system for implementing and enforcing any caseload/workload standards adopted under this Section IV. Nothing in this provision alters the State's obligations set forth in this Section IV.
- (E) Beginning approximately 18 months after the Implementation Date, and no less frequently than annually thereafter, ILS shall review the appropriateness of any such standards in light of any change in relevant circumstances in each of the Five Counties. Immediately following any such review, ILS shall recommend to the Executive whether and to what extent the established caseload/workload standards should be amended on the basis of changed circumstances. Any proposed change to a caseload/workload standard implemented hereunder by ILS shall be submitted by ILS for approval by the Executive, provided, however, that such approval shall not be unreasonably withheld. Nothing in this provision shall limit the authority of ILS or the ILSB pursuant to Executive Law Article 30, Sections 832 and 833.
- (F) Incidental or sporadic noncompliance with the caseload/workload standards by individual attorneys providing Mandated Representation shall not constitute a breach of the State's obligations under this Section IV.

**V. INITIATIVES TO IMPROVE THE QUALITY OF INDIGENT DEFENSE**

- (A) No later than 6 months following the Effective Date, ILS, in consultation with the Five Counties, the providers of Mandated Representation in the Five Counties, and any other individual or entity ILS deems appropriate, shall establish written plans to ensure that attorneys providing Mandated Representation in criminal cases in each of the Five Counties: (1) receive effective supervision and training in criminal defense law and procedure and professional practice standards; (2) have access to and appropriately utilize investigators, interpreters, and expert witnesses on behalf of clients; (3) communicate effectively with their clients (including by conducting in-person interviews of their clients promptly after being assigned) and have access to confidential meeting spaces; (4) have the qualifications and experience necessary to handle the criminal cases assigned to them; and (5) in the case of assigned counsel attorneys, are assigned to cases in accordance with County Law Article 18-B and in a manner that accounts for the attorney's level of experience and caseload/workload. At a minimum, such plans shall provide for specific, targeted progress toward each of the objectives listed in this paragraph V(A), within defined timeframes, and shall also provide for such monitoring and enforcement procedures as are deemed necessary by ILS.
- (B) ILS shall thereafter implement the plans developed in accordance with paragraph V(A). To address costs associated with implementing these plans, ILS shall provide funding within each County through its existing program for quality improvement distributions, provided, however, that ILS shall take all necessary and appropriate steps to ensure that any distributions intended for use in accomplishing the objectives listed in paragraph V(A) are used exclusively for that purpose.
- (C) In accordance with paragraphs IX(B) and IX(E), respectively, the State shall provide to ILS \$2 million in each of state fiscal year 2015/2016 and state fiscal year 2016/2017 for the purposes of accomplishing the objectives set forth in

paragraph V(A), and ILS shall use such funds for those purposes. No portion of such funds shall be attributable to ILS's operating budget but shall instead be distributed by ILS to the Five Counties.

- (D) The Five Counties may, but shall not be obligated to, pay all or a portion of the funds identified in paragraph V(C) to ILS to provide services designed to effectuate the objectives set forth in paragraph V(A), provided such services are rendered in state fiscal years 2015/2016 and 2016/2017 and pursuant to a written agreement between ILS and the relevant County.

**VI. ELIGIBILITY STANDARDS FOR REPRESENTATION**

- (A) ILS shall, no later than 6 months following the Effective Date, issue criteria and procedures to guide courts in counties outside of New York City in determining whether a person is eligible for Mandated Representation. ILS may consult with OCA to develop and distribute such criteria and procedures. ILS shall be responsible for ensuring the distribution of such criteria and procedures to, at a minimum, every court in counties outside of New York City that makes determinations of eligibility (and may request OCA's assistance in doing so) and every provider of mandated representation in the Five Counties. The Five Counties shall undertake best efforts to implement such criteria and procedures as developed by ILS. Nothing in this paragraph otherwise obligates the Five Counties to develop such criteria and procedures.
- (B) At a minimum, the criteria and procedures shall provide that: (1) eligibility determinations shall be made pursuant to written criteria; (2) confidentiality shall be maintained for all information submitted for purposes of assessing eligibility; (3) ability to post bond shall not be considering sufficient, standing alone, to deny eligibility; (4) eligibility determinations shall take into account the actual cost of retaining a private attorney in the relevant jurisdiction for the category of crime charged; (5) income needed to meet the reasonable living expenses of the

applicant and any dependent minors within his or her immediate family, or dependent parent or spouse, should not be considered available for purposes of determining eligibility; and (6) ownership of an automobile should not be considered sufficient, standing alone, to deny eligibility where the automobile is necessary for the applicant to maintain his or her employment. In addition, ILS shall set forth additional criteria or procedures as needed to address: (7) whether screening for eligibility should be performed by the primary provider of Mandated Representation in the county; (8) whether persons who receive public benefits, cannot post bond, reside in correctional or mental health facilities, or have incomes below a fixed multiple of federal poverty guidelines should be deemed presumed eligible and be represented by public defense counsel until that representation is waived or a determination is made that they are able to afford private counsel; (9) whether (a) non-liquid assets and (b) income and assets of family members should be considered available for purposes of determining eligibility; (10) whether debts and other financial obligations should be considered in determining eligibility; (11) whether ownership of a home and ownership of an automobile, other than an automobile necessary for the applicant to maintain his or her employment, should be considered sufficient, standing alone, to deny eligibility; and (12) whether there should be a process for appealing any denial of eligibility and notice of that process should be provided to any person denied counsel.

- (C) ILS shall issue an annual report regarding the criteria and procedures used to determine whether a person is eligible to receive Mandated Representation in each of the Five Counties. Such report shall, at a minimum, analyze: (1) the criteria used to determine whether a person is eligible; (2) who makes such determinations; (3) what procedures are used to come to such determinations; (4) whether and to what extent decisions are reconsidered and/or appealed; and (5) whether and to what extent those criteria and procedures comply with the criteria and procedures referenced in paragraph VI(A). The first such report shall



be issued no later than 12 months following the establishment of the criteria and procedures discussed in paragraph VI(A).

**VII. COUNTY COOPERATION**

The Five Counties shall use best efforts to cooperate with the State and ILS to the extent necessary to facilitate the implementation of the terms of this Agreement. This obligation is in no way subject to or conditioned upon any obligations undertaken by Ontario and Schuyler Counties by virtue of their separate agreements to settle this Action. Such cooperation shall include, without limitation: (1) the timely provision of information requested by the State or ILS; (2) compliance with the terms of the plans implemented pursuant to paragraphs III(A)(2), IV(B)(1), and V(A); (3) assisting in the distribution of the eligibility standards referenced in part VI(A); (4) assisting in the monitoring, tracking, and reporting responsibilities set forth in parts III(D), IV(A), and VI(C); (5) ensuring that the providers of Mandated Representation and individual attorneys providing Mandated Representation in the Five Counties provide any necessary information, compliance, and assistance; (6) undertaking best efforts to ensure the passage of any legislation and/or legislative appropriations contemplated by this Agreement; and (7) any other measures necessary to ensure the implementation of the terms of this Agreement. County failure to cooperate does not relieve the State of any of its obligations under this Settlement Agreement.

**VIII. MONITORING AND REPORTING**

In order to permit Plaintiffs to assess compliance with all provisions of this Agreement, the State shall:

- (A) Promptly provide to Plaintiffs copies of the following documents upon their finalization and subsequent to any amendment thereto:
  - (1) The plan(s) concerning counsel at arraignment referenced in paragraph III(A)(2);

- (2) The reports concerning counsel at arraignment referenced in paragraph III(D);
  - (3) The determinations regarding caseload/workload referenced in paragraph IV(B)(1) and any changes proposed or made pursuant to paragraph IV(E);
  - (4) The plan(s) for quality improvement referenced in paragraph V(A);
  - (5) The eligibility criteria referenced in paragraph VI(A);
  - (6) The reports regarding eligibility determinations referenced in paragraph VI(C);
  - (7) The relevant portions of each Executive Budget submitted during the term of this Agreement.
- (B) Provide written reports to Plaintiffs concerning the State's efforts to carry out its obligations under this Agreement and the results thereof, including, without limitation:
- (8) Ensuring counsel at arraignment pursuant to paragraph III(A)(1);
  - (9) Coordinating with OCA pursuant to paragraph III(B);
  - (10) Implementing the tracking system referenced in paragraph IV(A);
  - (11) Implementing the caseload/workload standards referenced in paragraph IV(B) or paragraph IV(E) and ensuring that those caseload/workload standards are adhered to;
  - (12) Implementing the plans referenced in paragraph V(A).

Within 90 days of the Effective Date, the State and Plaintiffs shall meet and confer in good faith to identify the content and frequency of the specific reports

identified above that will be provided to Plaintiffs pursuant to this Section VIII.

**IX. BEST EFFORTS AND APPROPRIATIONS**

- (A) The parties shall use their best efforts to obtain the enactment of all legislative measures necessary and appropriate to implement the terms of the Settlement Agreement.
- (B) The Executive shall include in an Executive budget appropriation bill submitted to the Legislature for state fiscal year 2015/2016 sufficient appropriation authority to fund \$3.5 million for purposes of implementing paragraphs III(C), IV(A), and V(C) of this Agreement.
- (C) In order to prevent the obligation to provide counsel at Arraignment as set forth in Section III from imposing any additional financial burden on any County, the Executive shall include in an Executive budget appropriation bill submitted to the Legislature for the state fiscal year 2016/2017, and for each state fiscal year thereafter, sufficient appropriation authority for such funds that it, in consultation with ILS, OCA, the Five Counties, and any other individual or entity the Executive deems appropriate, determines, in its sole discretion, are necessary to accomplish the purposes set forth in Section III.
- (D) In order to prevent the caseload/workload standards implemented under Section IV from imposing an additional financial burden on any County, the Executive shall include in an Executive budget appropriation bill submitted to the Legislature for the state fiscal year 2016/2017, and for each state fiscal year thereafter, sufficient appropriation authority for such funds that it, in consultation with ILS, OCA, the Five Counties, and any other individual or entity it deems appropriate, determines, in its sole discretion, are necessary to accomplish the purposes set forth in Section IV. In the absence of such funds, the Five Counties shall not be required to implement the caseload/workload standards referenced in

Section IV; provided, however, that nothing in this provision alters the State's obligation to ensure that caseload/workload standards are implemented and adhered to.

- (E) The Executive shall include in an Executive budget appropriation bill submitted to the Legislature for the state fiscal year 2016/2017 sufficient appropriation authority to fund \$2 million to ILS for the purposes of implementing paragraph V(C).
- (F) The Executive shall use best efforts to seek and secure the funding described in paragraphs IX(B), IX(C), IX(D), and IX(E), as well as any other funding or resources necessary, as determined in the sole discretion of the Executive, to implement the terms of this Agreement including, without limitation, funding and resources sufficient for ILS to carry out its responsibilities under the Agreement. Consistent with the State Constitution and the State Finance Law, this Agreement is subject to legislative appropriation of such funding. The State shall perform its obligations under this Agreement in each fiscal year for the term of the Agreement to the extent of the enacted appropriation therefor.
- (G) Except as provided in paragraph XIII(A), nothing herein shall be construed to obligate the Five Counties to provide funding to implement any of the obligations under this Agreement.

**X. LEGISLATIVE PROCESS AND OUTCOMES**

- (A) Upon the Effective Date, this Action shall be conditionally discontinued only as to the parties that execute this Agreement, pending the enactment of the budget for the state fiscal year 2015/2016 and, if required, the completion of the meet-and-confer process described in paragraph X(B) below.

(1) No later than 21 days after the enactment of the 2015/2016 budget, the State shall provide Plaintiffs with written notice stating whether or not the

State believes that it can fully implement its obligations under this Agreement in light of the amount of funding appropriated by the Legislature.

(2) If the written notice provided under X(A)(1) sets forth the State's determination that the State can fully implement all of its obligations under this Agreement, then this Action shall be discontinued with prejudice only as to the parties that execute this Agreement. Such discontinuance shall not preclude Plaintiffs from commencing any new action pursuant to paragraph X(C)(2) below.

- (B) If at any time the State believes it cannot fully implement one or more of its obligations under this Agreement in light of the Legislature's action, the State shall notify Plaintiffs in writing of that fact and the parties shall meet and confer to determine whether they can mutually resolve the issue(s). If the parties are unable to resolve the matter within 45 days of the written notice provided by the State, the State within 10 days shall notify Plaintiffs in writing which obligation(s) the State is unable to fully implement. If the State notifies Plaintiffs that it cannot fully implement one or more of its obligations in Section III, Plaintiffs may pursue, as specified in paragraph X(C)(1) or X(C)(2), as appropriate, judicial remedies on their claims for actual denial of counsel. If the State notifies Plaintiffs that it cannot fully implement one or more of its obligations in Section IV or V of this Agreement, Plaintiffs may pursue, as specified in paragraph X(C)(1) or X(C)(2), as appropriate, judicial remedies on their claims for constructive denial of counsel. The State shall remain obligated to comply with the relevant affected provision(s) of the Agreement to the extent it has funding to do so and shall remain obligated to implement all provisions not affected by legislative action unless the State notifies Plaintiffs within 90 days of enactment of the 2015/2016 budget that it can implement no provision of Sections III, IV, and V of the Agreement, in which case the entire Agreement

shall be deemed null and void, and the relevant parties shall be restored to the same positions in the litigation that they had immediately prior to October 21, 2014.

(C) (1) State Fiscal Year 2015/2016. If the State, pursuant to paragraph X(B), notifies Plaintiffs within 90 days of enactment of the 2015/2016 budget that it cannot fully implement one or more of its obligations under the Agreement, Plaintiffs may pursue judicial remedies as allowed under paragraph X(B) by restoring this Action to the trial calendar by serving written notice upon the Court and the relevant parties that have signed the Agreement within 30 days after receiving such notice from the State, in which case the relevant parties shall be restored to the same positions in the litigation that they had immediately prior to October 21, 2014, with respect to the restored claim(s).

(2) State Fiscal Year 2016/2017 to the Expiration of this Agreement. In accordance with any notice pursuant to paragraph X(B) with respect to the 2016/2017 state fiscal year or any later state fiscal year through the expiration of this Agreement, Plaintiffs may pursue judicial remedies as allowed under paragraph X(B) only by filing a new action for declaratory and prospective injunctive relief. Nothing in the Stipulation of Discontinuance filed in this Action is intended to bar or shall have the effect of barring, by virtue of the doctrine of res judicata or other principles of preclusion, any new action as allowed under paragraph X(B) or any claims within such action. Neither the State nor any other defendant shall assert or argue that any such action or claim asserted therein is barred by virtue of the prior discontinuance of this Action.

(3) Nothing in this paragraph shall be construed to alter the parties' rights under paragraph XIII(S).

**XI. DISPUTE RESOLUTION**

- (A) If Plaintiffs believe that the State is not in compliance with a provision of this Settlement Agreement, Plaintiffs shall give notice to all parties in writing, and shall state with specificity the alleged non-compliance. Upon receipt of such notice by the State, Plaintiffs and the State will promptly engage in good-faith negotiations concerning the alleged non-compliance and appropriate measures to cure any non-compliance. Any party may request the participation of ILS in such negotiations. If Plaintiffs and the State have not reached an agreement on the existence of the alleged non-compliance and curative measures within forty-five (45) days after receipt of such notice of alleged non-compliance, Plaintiffs may seek all appropriate judicial relief with respect to such alleged non-compliance, upon ten (10) days' prior notice in accordance with the Escalation Notice terms set forth in paragraph XI(B). The State and Plaintiffs may extend these time periods by written agreement. Nothing said by either party or counsel for either party during those meetings may be used by the other party in any subsequent litigation, including, without limitation, litigation in connection with this Agreement, for any purpose whatsoever.
- (B) Plaintiffs shall provide notice ("Escalation Notice") to the individuals identified in paragraph XIII(G)(2) at least ten (10) business days before seeking judicial relief as described in paragraph XI(A), which notice shall inform such individuals that Plaintiffs intend to seek judicial relief and shall attach the notice provided under paragraph XI(A).
- (C) Notwithstanding the dispute resolution procedures set forth above, if exigent circumstances arise, Plaintiffs shall be able to seek expedited judicial relief against the State based upon an alleged breach of this Agreement, upon five (5) business days' prior notice to the individuals identified in paragraphs XIII(G)(1) and XIII(G)(2).

- (D) Plaintiffs shall not seek to enforce any provision of this Agreement against any County. No provision of this Agreement shall form the basis of any cause of action by Plaintiffs against any County. In no event shall County action or inaction relieve the State of any of its obligations under this Agreement.
- (E) If the State believes that a County is not meeting its obligations under this Agreement, it may seek relief following the same procedures as set out above in paragraphs XI(A), XI(B), and XI(C).
- (F) Venue over any disputes concerning enforcement of this Agreement (1) between Plaintiffs and the State, (2) involving all the parties to this Agreement, or (3) between the State and more than one County shall be in a court of competent jurisdiction in Albany County. Venue over any disputes concerning enforcement of this Agreement between the State and a single County shall be in a court of competent jurisdiction in that County.

**XII. ATTORNEYS' FEES AND COSTS**

- (A) The State agrees to make a payment to Plaintiffs' counsel, the New York Civil Liberties Union Foundation and Schulte Roth & Zabel LLP, in the aggregate amount of \$5.5 million, as follows:
  - (1) The sum of \$2.5 million (Two Million Five Hundred Thousand Dollars) for which an I.R.S. Form 1099 shall be issued to the New York Civil Liberties Foundation, and the sum of \$3.0 million (Three Million Dollars) for which an I.R.S. Form 1099 shall be issued to Schulte Roth & Zabel LLP in full and complete satisfaction of any claims against the State and the Five Counties for attorneys' fees, costs, and expenditures incurred by Plaintiffs for any and all counsel who have at any time represented Plaintiffs in the Action through the Effective Date.



- (2) The payment of \$2.5 million referred to in this paragraph shall be made payable and delivered to "New York Civil Liberties Union Foundation," 125 Broad Street, 19<sup>th</sup> Floor, New York, New York 10004. The payment of \$3.0 million referred to in this paragraph shall be made payable and delivered to "Schulte Roth & Zabel LLP," 919 Third Avenue, New York, New York 10022.
- (B) Any taxes on payments and/or interest or penalties on taxes on the payments referred to in paragraph XII(A) of this Agreement shall be the sole responsibility of the New York Civil Liberties Union Foundation and Schulte Roth & Zabel LLP, respectively, and Plaintiffs' attorneys shall have no claim, right, or cause of action against the State of New York or any of its agencies, departments, or subdivisions on account of such taxes, interests, or penalties.
- (C) Payment of the amounts recited in paragraph XII(A) above will be made (1) after the filing of a stipulation of discontinuance as set forth in paragraph XIV(A), upon complete discontinuance of this Action, or paragraph XIV(B), in the case of a partial restoration of this Action, and (2) subject to the approval of all appropriate New York State officials in accordance with Section 17 of the New York State Public Officers Law. Plaintiffs' counsel agree to execute and deliver promptly to counsel for the State all payment vouchers and other documents necessary to process such payments, including, without limitation, a statement of the total attorney hours expended on this matter and the value thereof and all expenditures. Counsel for the State shall deliver promptly to the Comptroller such documents and any other papers required by the Comptroller with respect to such payments. Pursuant to CPLR 5003a(c), payment shall be made within ninety (90) days of the Comptroller's determination that all papers required to effectuate the settlement have been received by him. In the event that payment in full is not made within said ninety-day period, interest shall accrue on the outstanding balance at the rate set forth in CPLR 5004, beginning on the ninety-first day after

the Comptroller's determination.

- (D) Upon receipt of and in consideration of the payment of the sums set forth in paragraph XII(A), Plaintiffs shall (1) in the case of a complete discontinuance of this Action pursuant to paragraph XIV(A), waive, release, and forever discharge the State Defendants, including the State of New York, and the Five Counties and each of their respective current and former employees in their individual capacities, and their heirs, executors, administrators, and assigns from any and all claims for attorneys' fees, costs, and expenditures incurred in connection with this Action through the Effective Date; or (2) in the case of a partial discontinuance of this Action pursuant to paragraph XIV(B), waive, release, and forever discharge the State Defendants, including the State of New York, and the Five Counties and each of their respective current and former employees in their individual capacities, and their heirs, executors, administrators, and assigns from any and all claims for attorneys' fees, costs, and expenditures incurred in connection with this Action through the Effective Date, it being specifically understood that, upon such restoration, Plaintiffs shall also be free to seek reimbursement for their attorneys' fees, costs, and expenditures incurred after the Effective Date.
- (E) Plaintiffs' counsel agree to maintain their billing records and documents evidencing payment of expenses relating to this Action for the term of this Agreement.
- (F) In the event that this Agreement becomes null and void pursuant to paragraph X(B) or Section XVI, then (1) the State shall be under no obligation to make the payments referred to in paragraph XII(A); and (2) Plaintiffs shall be free to seek reimbursement of their full attorneys' fees, costs, and expenditures incurred in connection with this Action (including those incurred both before and after the date of this Agreement).

**XIII. GENERAL PROVISIONS**

- (A) Supplementation of Funds. State funds received by a County pursuant to this settlement shall be used to supplement and not supplant any local funds that such County currently spends for the provision of counsel and expert, investigative, and other services pursuant to County Law Article 18-B. All such state funds received by a County shall be used to improve the quality of Mandated Representation services provided pursuant to County Law Article 18-B.
- (B) Modification. This Agreement may not be modified without the written consent of the parties and the approval of the Court. However, the parties agree that non-material modifications of this Settlement Agreement can be made, with the written consent of the parties, without approval of the Court. For purposes of this paragraph, written consent from a County shall be deemed to exist with respect to a modification of any provision of this Agreement other than Section VII if such County (1) has been notified in writing that Plaintiffs and the State have agreed upon such modification; and (2) does not, within ten (10) business days of receipt of such notice, object in writing to such modification.
- (C) Expiration of Agreement. This Agreement shall expire 7.5 years after the Effective Date.
- (D) Entire Agreement. This Agreement contains all the terms and conditions agreed upon by the parties with regard to the settlement contemplated herein, and supersedes all prior agreements, representations, statements, negotiations, and undertakings (whether oral or written) with regard to settlement, provided, however, that nothing herein shall be deemed to abrogate or modify the separate settlement agreements entered into between Plaintiffs and Ontario County, dated June 20, 2014, and between Plaintiffs and Schuyler County, dated September 29, 2014.

(E) Interpretation. The parties acknowledge that each party has participated in the drafting and preparation of this Agreement; consequently, any ambiguity shall not be construed for or against any party.

(F) Time Periods. If any of the dates or periods of time described in this Agreement fall or end on a public holiday or on a weekend, the date or period of time shall be extended to the next business day. A "day" shall mean a calendar day unless otherwise specifically noted.

(G) Notice.

(1) All notices required under or contemplated by this Agreement shall be sent by U.S. mail and electronic mail as follows (or to such other address as the recipient named below shall specify by notice in writing hereunder):

If to the State Defendants:

Adrienne Kerwin Assistant Attorney General The Capitol Albany, New York 12224 Adrienne.Kerwin@ag.ny.gov	Seth H. Agata Acting Counsel to the Governor New York State Capitol Building Albany, New York 12224 Seth.Agata@exec.ny.gov
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If to Plaintiffs:

Corey Stoughton New York Civil Liberties Union Foundation 125 Broad Street New York, New York 10004 cstoughton@nyclu.org	Kristie M. Blase Schulte Roth & Zabel LLP 919 Third Avenue New York, New York 10022 kristie.blase@srz.com
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EXECUTION COPY

If to Onondaga County:

Gordon Cuffy  
Onondaga County Attorney  
Department of Law  
John H. Mulroy Civic Center  
421 Montgomery Street, 10th Floor  
Syracuse, New York 13202  
GordonCuffy@ongov.net

If to Ontario County:

Michael Reinhardt  
Ontario County Courthouse  
27 North Main Street  
Canandaigua, New York 14424  
Michael.Reinhardt@co.ontario.ny.us

If to Schuyler County:

Geoffrey Rossi  
Schuyler County Attorney  
105 9th Street  
Unit 5  
Watkins Glen, New York 14891  
grossi@schuyler.co.ny

If to Suffolk County:

Dennis Brown  
Suffolk County Attorney  
H. Lee Dennison Building  
100 Veterans Memorial Highway  
P.O. Box 6100, 6th Floor  
Hauppauge, New York 11788  
dennis.brown@suffolkcountyny.gov

If to Washington County:

William A. Scott  
Fitzgerald Morris Baker Firth P.C.  
16 Pearl Street  
Glens Falls, New York 12801  
WAS@fmbf-law.com

If to ILS:

Joseph Wierschem  
Counsel  
Office of Indigent Legal Services  
Alfred E. Smith Building, 29th Floor  
80 South Swan Street  
Albany, New York 12224  
Joseph.Wierschem@ils.ny.gov

(2) Any Escalation Notice shall be sent as follows:

If to the State Defendants:

Meg Levine Deputy Attorney General Division of State Counsel Office of the Attorney General The Capitol Albany, New York 12224 Meg.Levine@ag.ny.gov	Seth H. Agata Acting Counsel to the Governor New York State Capitol Building Albany, New York 12224 Seth.Agata@exec.ny.gov
---	--

(3) Each party shall provide notice to the other parties of any change in the individuals or addresses listed above within thirty (30) days of such change, and the new information so provided will replace the notice listed herein for such party.

(H) No Admission. Nothing in this Agreement shall be construed as an admission of law or fact or acknowledgement of liability, wrongdoing, or violation of law by the State or any Ratifying County regarding any of the allegations contained in the Second Amended Complaint in this Action, or as an admission or

acknowledgment by the State or any other defendant concerning whether Plaintiffs are the prevailing party in the Action by virtue of this settlement.

- (I) Precedential Value. This Agreement and any Order entered thereon shall have no precedential value or effect whatsoever, and shall not be admissible, in any other action or proceeding as evidence or for any other purpose, except in an action or proceeding to enforce this Agreement.
- (J) No Waiver for Failure to Enforce. Failure by any party to enforce this entire Agreement or any provision thereof with respect to any deadline or other provision herein shall not be construed as a waiver of its right to enforce deadlines or provisions of this Agreement.
- (K) Unforeseen Delay. If an unforeseen circumstance occurs that causes the State or ILS to fail to timely fulfill any requirement of this Agreement, the State shall notify the Plaintiff in writing within twenty (20) days after the State becomes aware of the unforeseen circumstance and its impact on the State's ability to perform and the measures taken to prevent or minimize the failure. The State shall take all reasonable measures to avoid or minimize any such failure. Nothing in this paragraph shall alter any of the State's obligations under this Agreement or Plaintiffs' remedies for a breach of this Agreement.
- (L) No Third-Party Beneficiaries. No person or entity other than the parties hereto (a "third party") is intended to be a third-party beneficiary of the provisions of this Agreement for purposes of any civil, criminal, or administrative action, and accordingly, no such third party may assert any claim or right as a beneficiary or protected class under this Agreement. This Agreement is not intended to impair or expand the rights of any third party to seek relief against the State, any County, or their officials, employees, or agents for their conduct; accordingly, this Agreement does not alter legal standards governing any such claims, including those under New York law.

- (M) Ineffectiveness Claims Unimpaired. Nothing in this Agreement is intended to, or shall be construed to, impair, curtail, or operate as a waiver of the rights of any current or former member of the Plaintiff Class with respect to such member's individual criminal case, including, without limitation, any claim based on ineffective assistance of counsel.
- (N) Confidential Information Relating to Plaintiff Class Members. The parties acknowledge that privileged and confidential information of Plaintiff Class members, including documents and deposition testimony designated as confidential, information protected by the attorney-client privilege and/or work product doctrine, and documents revealing individuals' social security numbers, private telephone numbers, financial information, and other private and sensitive personal information, was disclosed and obtained during the pendency of this Action. None of the State Defendants or the Five Counties shall use or disclose to any person such documents or information except as required by law. If any of the State Defendants or the Five Counties receives a subpoena, investigative demand, formal or informal request, or other judicial, administrative, or legal process (a "Subpoena") requesting such confidential information, that party shall (1) give notice and provide a copy of the request to Plaintiffs as soon as practicable after receipt and in any case prior to any disclosure; (2) reasonably cooperate in any effort by Plaintiffs to move to quash, move for protective order, narrow the scope of, or otherwise obtain relief with respect to the Subpoena; and (3) refrain from disclosing any privileged or confidential information before Plaintiffs' efforts to obtain relief have been exhausted.
- (O) Binding Effect on Successors. The terms and conditions of this Agreement, and the commitments and obligations of the parties, shall inure to the benefit of, and be binding upon, the successors and assigns of each party.



EXECUTION COPY

- (P) Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of New York, without regard to the conflicts of law provisions thereof.
- (Q) Signatories. The undersigned representative of each party to this Agreement certifies that each is authorized to enter into the terms and conditions of this Agreement and to execute and bind legally such party to this document.
- (R) Counterparts. This Stipulation may be executed in counterparts, and each counterpart, when executed, shall have the full efficacy of a signed original. Photocopies and PDFs of such signed counterparts may be used in lieu of the originals for any purpose.
- (S) Covenant Not to Sue. Plaintiffs agree not to sue the State Defendants during the duration of this Agreement on any cause of action based upon any statutory or constitutional claim set forth in the Second Amended Complaint, except that Plaintiffs retain their rights to (1) restore this Action pursuant to paragraph X(C)(1); (2) commence a new action pursuant to paragraph X(C)(2); and (3) enforce the terms of this Agreement.
- (T) Authority of ILS. The parties acknowledge that the New York Office of Indigent Legal Services and the Board of Indigent Legal Services have the authority to monitor and study indigent legal services in the state, award grant money to counties to support their indigent representation capability, and establish criteria for the distribution of such funds.
- (U) ILS as Signatory to this Agreement. ILS is a signatory to this Agreement for the limited purpose of acknowledging and accepting its responsibilities under this Agreement.

**XIV. DISCONTINUANCE WITH PREJUDICE**

- (A) Without delay after the State provides the notice specified by paragraph X(A)(2), a Stipulation and Order of Discontinuance substantially in the form attached hereto as Exhibit B, shall be executed by counsel for Plaintiffs, the State Defendants, and the relevant Ratifying Counties, and filed with the Court. Nothing in the Stipulation and Order of Discontinuance so filed is intended to bar or shall have the effect of barring, including by virtue of the doctrine of res judicata or other principles of preclusion, a new action, as permitted by paragraph X(C)(2), or any claims within that action. Nor shall anything in the Stipulation and Order of Discontinuance prevent any party from enforcing this Agreement.
  
- (B) In the event that the Action is partially restored pursuant to paragraph X(C)(1), without delay after Plaintiffs provide notice as required by paragraph X(C)(1), the relevant parties shall confer and draft a stipulation of discontinuance that discontinues with prejudice all claims that are not restored pursuant to paragraph X(C)(1). Such stipulation shall be executed by counsel for Plaintiffs, the State Defendants, and the relevant Ratifying Counties, as appropriate, and filed with the Court. Nothing in such stipulation is intended to bar or shall have the effect of barring, including by virtue of the doctrine of res judicata or other principles of preclusion, a new action, as permitted by paragraph X(C)(2), or any claims within that action. Nor shall anything in such stipulation prevent any party from enforcing this Agreement.

**XV. COUNTY APPROVAL**

This Agreement shall not be binding on any County unless and until the required legislative approval in that County has been obtained and the Agreement has been signed on behalf of the County (in which case, a County may be referred to as a "Ratifying County"). In the event that any County's legislature does not approve this Agreement (a "Non-Ratifying County") and, as a result, one or more of the Counties does not become a party to this Agreement, the Agreement

shall nonetheless remain in effect and binding upon all the parties that have signed it, each of which shall perform all obligations hereunder owed to the other parties that have signed the Agreement. In the event a Non-Ratifying County fails to become a party to this Agreement, (1) this Action shall not be discontinued as against any Non-Ratifying County and Plaintiffs shall be free to pursue any claims they may have against such Non-Ratifying County and seek any and all relief to which Plaintiffs may be entitled, except insofar as such claims have been or may be dismissed pursuant to Plaintiffs' separate settlement agreements with Ontario County and Schuyler County; (2) any stipulation of discontinuance filed hereunder (including the Stipulation and Order of Discontinuance attached as Exhibit B) shall be modified to exclude any Non-Ratifying County and make clear that Plaintiffs' claims against such Non-Ratifying County are not discontinued; (3) each Non-Ratifying County shall be considered a third party pursuant to paragraph XIII(L) for purposes of this Agreement; and (4) the releases in paragraph XII(D) shall be ineffective as to such Non-Ratifying County. For the avoidance of doubt, as between Plaintiffs and the State: (a) the benefits of this Agreement, including, without limitation, the releases referred to in Section XII and the covenant not to sue referred to in paragraph XIII(S), shall accrue to the State and Plaintiffs, and (b) the State's and ILS's obligations relating to Sections III, IV, V, and VI shall remain in effect as to all Five Counties independent of County ratification of this Agreement.

#### **XVI. COURT REVIEW AND APPROVAL**


This Settlement Agreement is subject to approval by the Court pursuant to CPLR 908. In the event that the Court does not approve the Settlement Agreement, then the parties shall meet and confer for a period of 30 days to determine whether to enter into a modified agreement prior to the resumption of litigation. If the parties have not entered into a modified agreement within such 30-day period, then this Agreement shall become null and void, and the relevant parties shall request the case be restored to the trial calendar and shall be restored to the same positions in the litigation that they had immediately prior to October 21, 2014.

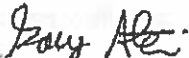
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NEW YORK CIVIL LIBERTIES UNION  
FOUNDATION

Dated: 10/21/2014

Dated: 10/21/2014

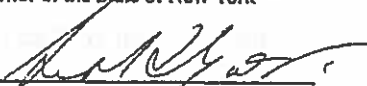
*Attorneys for Defendant New York State and  
Governor Andrew M. Cuomo*

*For Defendant Governor Andrew M. Cuomo*

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By:   
ADRIENNE J. KERWIN, *Assistant  
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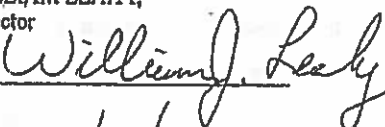
By:   
SETH H. AGATA, *Acting Counsel to  
the Governor*

Dated: 10/21/2014

Dated: 10/21/2014

*New York State Office of Indigent Legal Services*

WILLIAM LEAHY,  
Director



Dated: 10/21/2014

EXECUTION COPY

*Attorneys for Defendant Onondaga County*

GORDON J. CUFFY, County Attorney

\_\_\_\_\_

Dated: \_\_\_\_\_

*For Defendant Washington County*

JAMES T. LINDSAY,  
Chairman of the Board of Supervisors

\_\_\_\_\_

Dated: \_\_\_\_\_

*Attorneys for Defendant Suffolk County*

DENNIS M. BROWN, County Attorney

\_\_\_\_\_

Dated: \_\_\_\_\_

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JOHN PARK, County Attorney

By: \_\_\_\_\_

MICHAEL REINHARDT

Dated: \_\_\_\_\_

*Attorneys for Schuyler County*

GEOFFREY ROSSI, County Attorney

\_\_\_\_\_

Dated: \_\_\_\_\_

So Ordered.

Dated: \_\_\_\_\_

\_\_\_\_\_

HON. GERALD W. CONNOLLY

STIPULATION AND ORDER OF SETTLEMENT  
EXHIBIT A

**AUTHORIZATION OF THE INDIGENT LEGAL SERVICES BOARD  
AND THE NEW YORK STATE OFFICE OF INDIGENT LEGAL  
SERVICES CONCERNING SETTLEMENT OF THE  
HURRELL-HARRING V. STATE OF NEW YORK LAWSUIT**

Pursuant to New York State Executive Law §832, the Office of Indigent Legal Services ("ILS") has the authority to act in pursuit of its statutory responsibility to make efforts to improve the quality of mandated legal representation in the state of New York. See §832 (1) and (3) (a) through (k). ILS has the further responsibility under §832 (3) (l) "to make recommendations for consideration by the indigent legal services board." ("the Board"). The Board has the authority "to accept, reject or modify recommendations made by the office[.]" §833 (7) (c); and once it has done so, the Office has a duty under §832 (3) (m) to execute its decisions. The Board and ILS have reviewed the agreement settling the action of Hurrell-Harring, et al. v. State of New York, et al., Index No. 8866-07 ("the Agreement"), and the State's obligations contained therein that are expressly intended for implementation by ILS. The Board and ILS acknowledge that those obligations constitute measures that, once implemented, will improve the quality of indigent legal services. Consequently, the Board accepts the recommendation of ILS that ILS implement the obligations under the Agreement and hereby authorizes and directs ILS to implement those obligations in accordance with the terms of the Agreement. The Board represents and warrants that it is authorized to take this action. Moreover, ILS represents and warrants that it has reviewed the obligations contained in the Agreement, and agrees to implement the obligations identified in the Agreement. The Board hereby authorizes ILS to sign the Agreement.

Dated: October 21, 2014

Dated: October 21, 2014

INDIGENT LEGAL SERVICES BOARD

OFFICE OF INDIGENT LEGAL SERVICES

By: 

By: 

JOHN DUNNE, Board Member

WILLIAM LEAHY, Director

# The Impact of Eligibility Standards in Five Upstate New York Counties

Andrew Davies, Ph.D., Director of Research  
Alyssa Clark, M.A., Research Analyst

January 2017



**Office of Indigent  
Legal Services**

Improving the quality of mandated representation  
throughout the state of New York

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## Acknowledgments

This report could not have been completed without the cooperation and assistance of providers of indigent legal services in Onondaga, Ontario, Schuyler, Suffolk and Washington counties who not only provided data but also checked drafts of this report for factual errors. We are also very grateful to the New York State Division of Criminal Justice Services for providing us with data on the numbers of arraignments in each county. The analysis and conclusions provided herein are solely the work of the New York State Office of Indigent Legal Services.

## Executive Summary

This report contains research conducted by the New York State Office of Indigent Legal Services (ILS) into the implementation of new *Criteria and Procedures for Determining Assigned Counsel Eligibility (Criteria and Procedures)* in five upstate New York counties in 2016.

We examined whether the implementation of the *Criteria and Procedures* changed either the rate at which people applied to obtain counsel, or the rate at which applicants were actually found eligible for counsel. We then projected the likely change in caseloads for counties.

The conclusions of this report should be thought of as preliminary because the *Criteria and Procedures* have not been in place for very long; their true impact may only be known with time.

### Changes in application rates

- Ontario, Schuyler and Suffolk counties show no evidence of any increase in the number of applications for counsel received by providers of indigent legal services.
- A modest increase in application rates was observed in Washington County, but was likely due to the introduction of a new 'counsel at first appearance' program directly before the *Criteria and Procedures* were implemented.
- In Onondaga County, the application rate increased by approximately 27%. The reasons for this are unclear. Judges may be referring more people for representation or attorneys may be clearing out backlogged applications that could not be submitted under the old rules.

### Changes in eligibility rates

- The percentage of applicants found financially ineligible declined in all four counties for which we had comprehensive data. Incomplete data for Suffolk County also showed a decline.

	Percentage of Applicants for Counsel Denied for Financial Reasons	
	Before implementation	After implementation
Onondaga	5.3%	1.9%
Ontario	2.3%	0.6%
Schuyler	3.1%	0.9%
Suffolk*	5.1%	1.4%
Washington	6.0%	0%
Average	4.4%	1.0%

\*Suffolk County figures are for a subset of cases and may not be representative of the county as a whole.

### Caseload impact

- In Ontario, Schuyler and Washington counties, caseloads are projected to increase by 1.7%, 2.3% and 6.4% respectively because of the reduced numbers of persons being denied counsel.
- In Onondaga, we project that overall caseloads will increase by approximately 32%. This is in part because of the higher rate at which applications are now being received by the program, but also due to a reduction in the number being denied counsel for financial reasons.
- In Suffolk County we had insufficient data to make a projection for the county as a whole.

## Introduction

In March of 2015, the Stipulation and Order of Settlement in the case *Hurrell-Harring et al. v. State of New York* became effective. It required that the New York State Office of Indigent Legal Services (ILS) implement reforms to the representation of accused persons in criminal cases in five counties in upstate New York (Ontario, Onondaga, Schuyler, Suffolk and Washington). Under the terms of the settlement, ILS was charged with implementing reforms which would assure the presence of counsel at all arraignment sessions, provide relief from excessive caseloads, bring improvement to the quality of legal representation, and overhaul existing standards for determining financial eligibility for representation.

On the subject of financial eligibility, the Settlement instructed ILS as follows:

ILS shall, no later than 6 months following the Effective Date, issue criteria and procedures to guide courts in counties outside of New York City in determining whether a person is eligible for Mandated Representation.<sup>1</sup>

Notably, this requirement, as with all requirements of the Settlement, applied only to cases in criminal court. Family court representation was not covered by the Settlement, and accordingly any standards put forth by ILS would not apply there.

On April 4, 2016, ILS released its *Criteria and Procedures for Determining Assigned Counsel Eligibility*.<sup>2</sup> The *Criteria and Procedures*, as they will hereinafter be known, describe how the financial eligibility of persons applying for assignment of counsel as a criminal defendant should be assessed. The eight *Criteria* set standards for which types of financial resources should or should not be considered, and describe the conditions under which a person should be considered 'presumptively eligible', such as being a recipient of needs-based public assistance. The eight *Procedures*, meanwhile, focus on the eligibility determination process, stressing the need for consistency, confidentiality, alacrity, and the defendant's right that any determination be reviewable, among other matters. The five counties named in the *Hurrell-Harring* lawsuit were required to undertake best efforts to implement the *Criteria and Procedures* for all criminal defendants seeking counsel no later than October 3, 2016.

The issuance of the *Criteria and Procedures* was followed by a report by the *Chief Defenders Association of New York* (CDANY) which raised the concern that the caseloads of providers of indigent legal services would increase as a consequence of their implementation.<sup>3</sup> As the report noted, and as ILS has documented, defenders around the state often work under intolerable workload burdens.<sup>4</sup> Responding to these concerns, and to fiscal concerns raised by counties, legislators and other interested stakeholders, the parties to the *Hurrell-Harring* Settlement agreed to delay the effective date of the *Criteria and Procedures* in upstate counties other than those in the *Hurrell-Harring* lawsuit until April 1,

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<sup>1</sup> *Hurrell-Harring et al. v. New York*, Stipulation and Order of Settlement, section VI(A), available here: <https://goo.gl/hWAI3d>.

<sup>2</sup> The *Criteria and Procedures* can be found here: <https://goo.gl/DpEqZU>.

<sup>3</sup> Chief Defenders Association of New York (2016). *Report...on the Indigent Legal Services Office's Criteria and Procedures for Determining Assigned Counsel Eligibility Issued April 4, 2016*. (CDANY: Brooklyn, NY). On file with ILS. ILS also heard from other parties concerned about this impact.

<sup>4</sup> See, for example, our *Estimate of the Cost of Compliance with Maximum National Caseload Limits in Upstate New York – 2015 Update*, showing defenders in 2015 shouldered an average weighted caseload of 561, 52% above national standards. Full report available here: <https://goo.gl/dPYDXi>.

2017. This was intended to allow for an opportunity to secure additional local and state funding for possible increased caseloads, and to give ILS a chance to study the issue.

In ensuing discussions with stakeholders and other interested parties around the state, we identified two key ways in which it was expected the *Criteria and Procedures* might increase caseloads. First, more defendants might apply for counsel, either because they believed that the *Criteria and Procedures* increased their chances of being found eligible, or because the lawyers, judges and administrators responsible for soliciting applications would encourage more people to apply. Second, among those who applied, more defendants might be found eligible for counsel because the *Criteria and Procedures* would allow counsel to be provided to more applicants than previously.

This report examines the impact of the implementation of the *Criteria and Procedures* in the five *Hurrell-Harring* counties. Its findings are necessarily preliminary: while the *Criteria and Procedures* have clearly had an impact in the five counties, the short time that has elapsed since implementation requires us to be cautious about the conclusions we reach about the likely size of those effects. Nevertheless, to the extent our data enable us, we present straightforward estimates on the possible impact of the *Criteria and Procedures* in the counties examined, should the changes observed in this initial period prove enduring.

## Data and Analysis

Our research was guided by two specific questions:

- 1) Since the implementation of the *Criteria and Procedures*, have the numbers of people applying for counsel changed?
- 2) Since the implementation of the *Criteria and Procedures*, has the proportion of applicants determined eligible for counsel changed?

We sought data from each of the five counties on the numbers of applications for counsel in criminal cases and the numbers denied on grounds of financial ineligibility for a period beginning no later than January 1, 2015 to the present.

Obtaining these data was not always straightforward. While many providers customarily report eligibility statistics, for example, some report on all persons applying for counsel combined, whether in criminal or family court.<sup>5</sup> Others report totals for all persons denied counsel without distinguishing those who were denied specifically for their ability to pay.<sup>6</sup> Family court representation is beyond the scope of the *Criteria and Procedures*, and including non-financial denials in our analysis would have obscured the impact that changes in financial screening were having on the eligibility determination

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<sup>5</sup> Representation of family court litigants – totaling approximately 25% of the caseload of providers statewide – has been a mandated responsibility of providers of indigent legal services across the state since 1975 under the Family Court Act, see *In Re Ella B.*, 30 N.Y.2d 352 (1972) (recognizing a constitutional right to assigned counsel in family-related matters). Several counties have in fact chosen to implement equivalent eligibility standards for applicants in family court, finding it either impractical or inconsistent to do otherwise. This decision might, of course, have resulted in changes to the caseloads of the programs in question. Following the parameters of the settlement, however, we do not examine those caseloads here.

<sup>6</sup> Non-financial reasons for declining a person's application might include that the applicant had no right to counsel in the case, that their application was incomplete, or that the applicant themselves later withdrew the application, among other possibilities.

process. In cases where these were included, we were obliged to seek more refined information. Ultimately, we were able to collect the data we needed in four of the five counties; in the fifth, Suffolk, we obtained complete data for only a subset of cases in the county.

In each county, we conducted the same four analyses. First, we described the numbers of applications and financial denials recorded in the data across the entire period. Second, we examined the rates at which applications were received by the programs before and after implementation of the *Criteria and Procedures*. We calculated the average number of applications a program received per day, including weekends. And third, we examined the rates at which persons were deemed ineligible for assignments of counsel before and after implementation of the *Criteria and Procedures*. Last, we calculated the likely impact on caseloads of changes in both rates of applications and ineligibility determinations.

### Five different contexts

In 2015, at least seventy separate procedures for determining eligibility were in place in New York.<sup>7</sup> The number is likely little diminished today, and we recognized in the course of our research that our findings could only be understood in local context. Understanding what went before the *Criteria and Procedures* in each county is critical for understanding their impact, and we relied where we could on discussions with local providers and others to learn what they thought had really happened after the implementation of the standards. We obtained some basic information from the *Census Bureau* and elsewhere on local demographics, geography, poverty and caseloads which set some basic parameters for understanding characteristics of each county that might relate to eligibility.<sup>8</sup> We hope that in presenting these data and reporting on these discussions, not only will our findings be clearer, but also that readers from other counties may better be able to identify a jurisdiction among these five that is most similar to their own.

We tailored our analysis in each county to account appropriately for differences in the implementation process itself. Notwithstanding that the effective date of implementation was October 3, each county in fact implemented, at least partially, on some date earlier than that; one county rolled out the standards in two stages, while another implemented at different times in different courts. Accordingly, we had to determine the appropriate 'cut-points' in the timeline that would most clearly show the impact of the introduction of the *Criteria and Procedures*, and also which periods best represented 'baseline' and 'implementation' periods for comparison.

Each county used a different set of eligibility determination processes prior to implementation – effectively differentiating the 'baseline' conditions in each, potentially moderating the impact of the *Criteria and Procedures* across counties. We therefore present below, in addition to our statistical

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<sup>7</sup> See ILS (2016), *Determining Eligibility for Assignment of Counsel in New York: A Study of Current Criteria and Procedures and Recommendations for Improvement*, page 5, at <https://goo.gl/P2ntsK>.

<sup>8</sup> We retrieved county populations, median income and poverty rates. U.S. Census Bureau. (2016, March). *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2015*. Retrieved January 12, 2017, from <https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=CF>; U.S. Census Bureau. (2016, March). *2011-2015 American Community Survey 5- Year Estimates*. Retrieved January 12, 2017, from [https://factfinder.census.gov/faces/nav/jsf/pages/community\\_facts.xhtml](https://factfinder.census.gov/faces/nav/jsf/pages/community_facts.xhtml). We also reviewed basic crime statistics for each county found here <http://www.criminaljustice.ny.gov/crimnet/ojsa/dispos/all.pdf>. When reporting 'violent felony' statistics, we follow the DCJS definition of 'violent felony' found in Appendix A of this report: <http://www.criminaljustice.ny.gov/crimnet/ojsa/nys-violent-felony-offense-processing-2015.pdf>.

analysis, a description of the eligibility determination process prior to the *Criteria and Procedures* in each county using information that ILS collected in 2015.<sup>9</sup> These descriptions, based on survey responses and documentation provided to us by various people involved in eligibility determination in the counties at that time, cover matters including whether applicants for counsel were required to present documentation in support of their application, whether certain applicants automatically qualified for counsel, and what types of income and assets were considered in assessing their ability to pay for representation, among other matters.

More broadly, the five counties examined here were each undergoing a variety of simultaneous reforms to their provision of indigent legal services across the periods we examined – in particular, the expansion of counsel at first appearance (CAFA), which was also mandated under the *Hurrell-Harring* settlement. Several providers warned us that it was likely that these programs were also influencing their caseloads, and so we took care in our analysis to attempt to isolate such impacts to the extent we were able in order that we could more confidently assess the impact of the *Criteria and Procedures* themselves.

Finally, we were mindful that the specific period for implementation of the *Criteria and Procedures* (effective October 3, 2016) was the fall and winter, generally a time when courts have lower caseloads anyway. For that reason, we were careful both to request two years of data from each county – allowing us to compare implementation periods in 2016 to the same periods in 2015 – and to obtain monthly arraignment counts from the New York State Division of Criminal Justice Services for each county going back to 2010 with which we could identify obvious seasonal trends.

Most important of all in this process of analyzing and then understanding our data was the help, time and understanding we received from providers in all five counties, who shared not only their data but also their knowledge and insights into what might explain what we found. Through these consultations we were made yet more aware of the unique circumstances in each county and the possible impact of those circumstances on the application and eligibility rates we observed. Their insights informed our ultimate conclusions at several points, as is indicated in the text.

We are confident in our conclusions about the changes in application and eligibility rates we observe after the implementation of standards. Of course, it is always possible that we may have missed the real explanation for the trends in the data that we see. The timeline on this analysis is short – just a few months post-implementation – and the true, long-term impact of the standards may not be known for some time. Further analysis using more refined analytical techniques could reveal more about what is driving caseload change in the counties and any role the *Criteria and Procedures* may have played. All conclusions of this report should accordingly be thought of as preliminary, and based on available data at the time of writing. Nevertheless, we hope our report is useful, its methods clear, and its conclusions informative.

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<sup>9</sup> This data collection is described fully in *Determining Eligibility*, *supra* note 7.

## Onondaga County

Onondaga County is a moderately-sized (806 sq. mi.) county in central New York containing a large urban center, the city of Syracuse. In 2015, 15.4% of its population of 468,463 lived below the poverty line and median household income was around 93% of the state average, at \$55,092. DCJS recorded a total of 10,669 arrests disposed that year. Almost precisely a third were felonies, and 9.5% were violent felonies.<sup>10</sup>

All trial-level representation for indigent persons in Onondaga County is provided by the Assigned Counsel Program (ACP), which also plays a role in screening defendants for financial eligibility. At their first appearance in court, a judge will ask a defendant whether they wish to be considered for assignment of counsel.<sup>11</sup> At the judge's discretion an attorney may then be provisionally assigned and the defendant referred to the ACP for financial screening. In order for screening to begin, the attorney must gather together an application form and any required supporting documentation from their prospective client and submit it to the ACP. That program then makes its assessment and provides a recommendation to the court which it may accept or reject. If the applicant is determined eligible – either on the recommendation of the ACP, or pursuant to a judge's rejection of its recommendation to deny counsel – the assignment of the defendant to an attorney is finalized.

### Determining Eligibility Prior to the *Criteria and Procedures*

Prior to the implementation of the *Criteria and Procedures*, applicants for counsel in Onondaga County were required to fill out an application and provide supporting documentation such as recent paystubs.<sup>12</sup> Persons incarcerated or receiving certain welfare benefits were presumed to be eligible, as were those with incomes below 125% of the Federal Poverty Line. The income of third parties such as parents and spouses was included in the income calculation, however. These provisions are summarized in Table 1.

Individuals who were not found presumptively eligible would be subjected to an assessment of their ability to afford counsel. That assessment would consider not only the applicant's income from employment, but also any income from child support, alimony, pensions and disability or unemployment benefits among others. It would account for the value of a person's savings, home and automobile; if a person reported they made mortgage payments, this made them less likely to be eligible for assignment of counsel because it implied home-ownership. Certain

*Table 1: Presumptive Eligibility and the Consideration of Third Party Resources in Onondaga County Prior to the Criteria and Procedures*

#### Persons presumptively eligible for counsel

- Incarcerated
- Receiving public benefits (welfare)
- Income below 125% of Federal Poverty Line

#### Third parties whose income could be considered in the eligibility determination

- Applicant's spouse or partner
- Parents

<sup>10</sup> All sources cited *supra* note 8.

<sup>11</sup> Defendants are, in fact, represented at these appearances following the implementation of 'counsel at first appearance' provisions across the county. The judge's question thus refers to whether they would like to receive continuing representation.

<sup>12</sup> In response to ILS' 2015 survey, the Executive Director of the assigned counsel program wrote that the type of documentation required would 'depend on income source.'

entitlements to welfare could render a person more likely to be eligible as could child support obligations, but, as noted in Table 2, several other types of financial obligation, including outstanding medical bills, credit card or student loan debt, rent, utility bills, and the need to meet basic living expenses, were all excluded from consideration in the assessment of a person's ability to afford counsel (see Table 2).

*Table 2: Considerations in Income Assessment in Onondaga County Prior to Implementation of the Criteria and Procedures<sup>13</sup>*

Earns income from employment	
Receives pension payments	
Must make monthly mortgage payments	
Owens a home	
Has savings	
Owens an automobile which is not essential to their employment	
Owens an automobile which is essential to their employment	Less likely to be eligible
Receives child support	
Receives welfare (e.g., TANF, cash assistance, food stamps)	
Receives other public benefits	
Receives Alimony	
Receives disability benefits	
Receives unemployment benefits	
Post bond	
Receives other public benefits	
Is unemployed	More likely to be eligible
Must make child support payments	
Must pay utility bills	
Has credit card debt	
Has outstanding medical bills	
Has student loans	Not considered
Must pay rent	
Must meet basic living costs (e.g., transportation, food)	

### The Impact of the *Criteria and Procedures* on Caseloads

Onondaga County ACP implemented the *Criteria and Procedures* on September 19, 2016, and they were applied to all incoming applications after that date, as well as any prior applications which were reconsidered for any reason.<sup>14</sup> We obtained monthly totals for assignments in the years 2015 and 2016 from the Executive Director of the ACP, through the end of October, 2016. The Executive Director left the program in December of 2016, and at the time the data for November were still being entered and

<sup>13</sup> The information shown here was drawn from responses to ILS' 2015 survey on eligibility determination procedures. The responses to that survey lacked information in several categories, however, so we also relied on a memorandum issued by the assigned counsel program titled 2015 Eligibility Guidelines in which the manner in which several of these factors were also discussed.

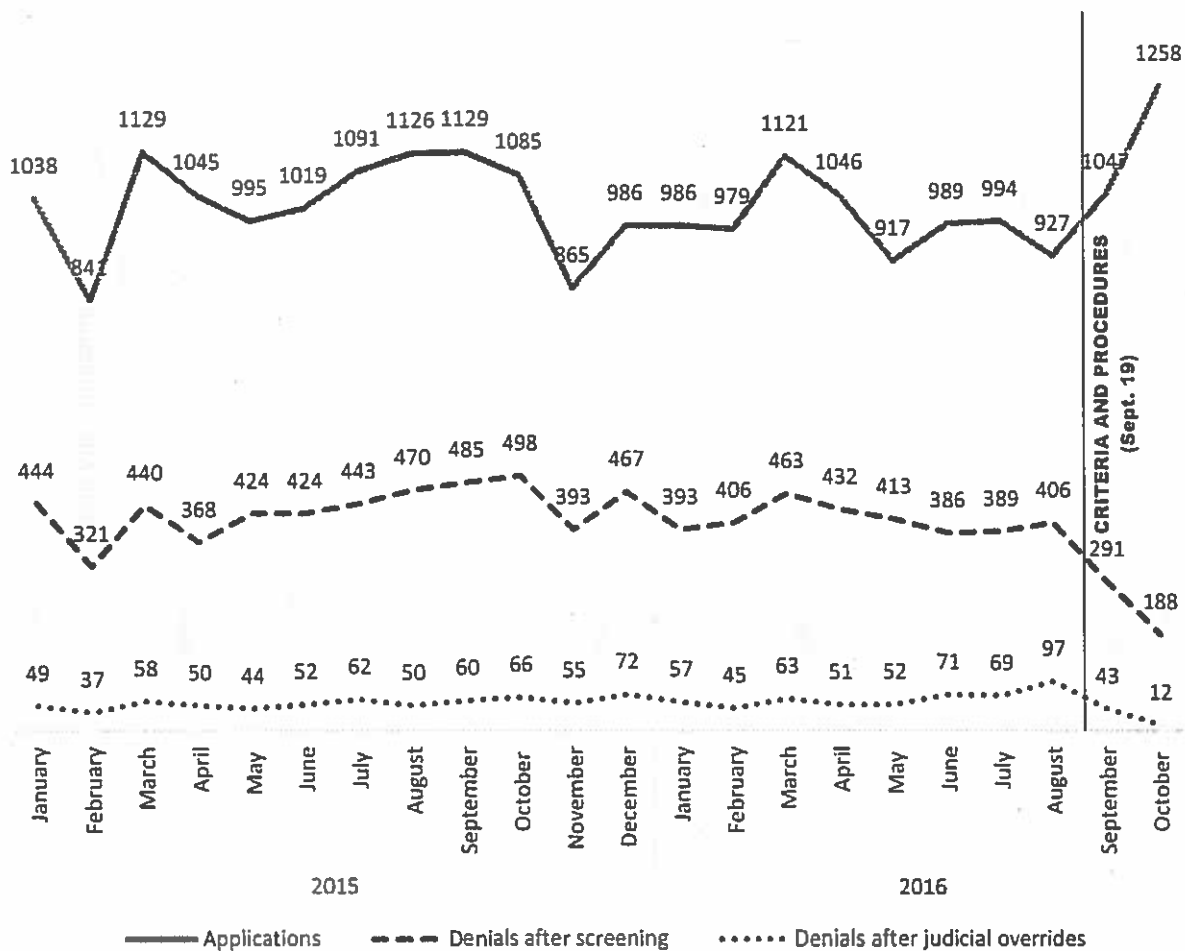
<sup>14</sup> The Executive Director noted, in a call during December, 2016, that reconsideration had happened only rarely. Reconsideration changed the status of the case in the ACP's data system permanently, so it is impossible to know how often this had actually happened.



were not available. Accordingly, we have data for a period of only approximately six weeks (September 19 to October 31) following implementation of the *Criteria and Procedures*.

Onondaga’s data capture the multi-stage nature of its eligibility determination procedure. First, they note if a person was determined eligible under the assigned counsel program screening process. Second, from those who were not deemed eligible, they note how many had their eligibility restored by a judicial override of that determination. Third, they also record the number of applications received that were incomplete (typically because required paperwork had not been submitted, according to the Executive Director). Notably, this number could change over time as defendants whose applications were outstanding returned to complete them.<sup>15</sup> In order to analyze the change in screening procedures that began on September 19, we restricted our analysis only to completed applications. Figure 1 shows the numbers of applications and denials in Onondaga County for the years 2015 and 2016.

Figure 1: Applications for Counsel and Denials in Criminal Cases in Onondaga County 2015-2016



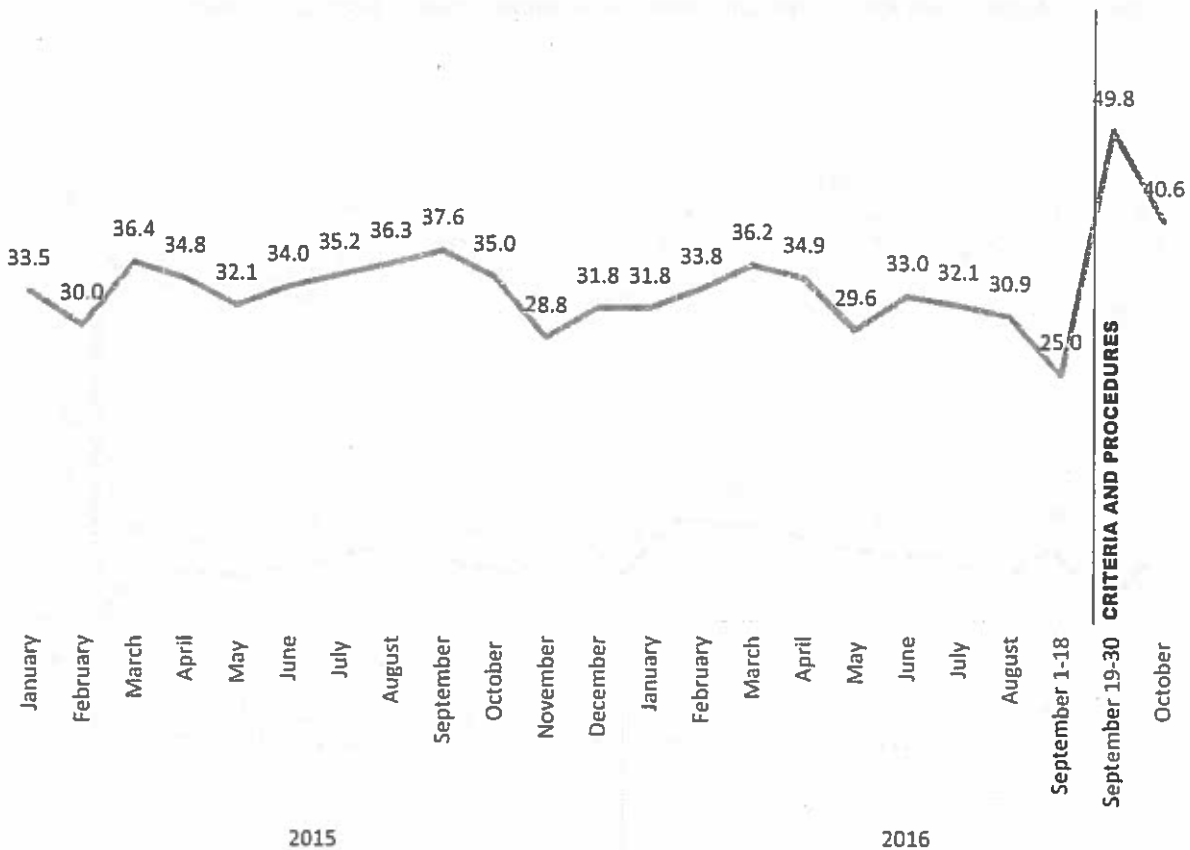
<sup>15</sup> We did, in fact, notice that the number of applicants with ‘pending’ or incomplete applications were higher in later months in our data. These data are not presented here but are on file with ILS. The ACP Executive Director told us she expected the number of incomplete applications to drop because the requirements for supporting documentation were relaxed under the *Criteria and Procedures*.

We note that the 'judicial override' mechanism is a critical stage in the determination of eligibility in Onondaga County. As we review in more detail below, whereas an average of over 40% of persons have historically been found ineligible by the assigned counsel program's screening process, this is reduced to just 5 or 6% after judicial overrides, meaning that Onondaga County judges override the assigned counsel plan's ineligibility determinations more than 80% of the time.

### Application rates

Immediately after implementation of the Criteria and Procedures, the data we received showed an increase in the number of applications per day in the Onondaga Assigned Counsel Program. Whereas historically applications were received at the rate of slightly over 30 per day, the rate after implementation has been in excess of 40 per day.<sup>16</sup> Figure 2 and Table 3 contain more data.

Figure 2: Rate of Applications Received Per Day in Onondaga County, 2015-2016.



<sup>16</sup> Note that the unusually low number in early September, and the large number in late September, may be influenced by the uneven distribution of weekends among these periods.

Table 3: Application Rate in Onondaga County Before and After Criteria and Procedures Implementation

Period	Average number of applications per day
2015	33.8
2016 to September 18	32.2
2016 September 19 to October 31	43.1

The Executive Director of the program anticipated this finding on delivering the data to us, explaining that October 2016 had been the busiest month in the history of the program (an observation which our data supports). She attributed responsibility for the increase to changes in the ways judges were making the decision to refer defendants to her program. Whereas prior to the implementation of the *Criteria and Procedures*, she said, judges would have made a preliminary assessment of a defendant's likely eligibility and instructed any who seemed wealthy that they would have to retain counsel, they now chose to refer all defendants – even those who seemed wealthy – to the program, believing that the new standards would likely find them eligible. ILS has not conferred with judges in Onondaga County on their opinions on this matter, however, which is clearly worthy of further investigation.

Another possible reason for this surge in applications is that the *Criteria and Procedures* reduced the amount of documentation required to be submitted to apply to the ACP, and that attorneys in the program responded by submitting large numbers of applications which had previously been backlogged. The requirements for supporting documentation prior to the *Criteria and Procedure* could be extensive (such as the production of rent receipts, bank statements or third party affidavits). ILS is aware of examples of cases in which attorneys took weeks or even months to prepare applications for assignment. Applications received after September 19 were processed without the need for such extensive documentation, even if the original assignment was received prior to that date – a fact which ILS made clear both in a memorandum to ACP attorneys and also in follow-up conversations with panelists.<sup>17</sup> Attorneys may have recognized this as an opportunity to submit applications that would previously have been rejected summarily as incomplete.

These two possible explanations have different implications for the future: if Onondaga County judges have changed their behavior, application numbers are likely to be sustained at high levels. If the attorneys were simply submitted some backlogged applications, the surge is likely to diminish. We cannot tell which of these is most likely at this stage, though future monitoring of the number of applications coming into the program should provide greater clarity.

For our analysis, we simply compared application numbers after the *Criteria and Procedures* with those received before. In 2015, 12,349 completed applications for representation were received by the Onondaga assigned counsel plan, or approximately 33.8 per day. If the rate of applications in that year had been 43.1 per day, as shown in our data since implementation, the total number of applications in 2015 would have been 15,732. This would have represented an increase of a total of 3,383 applications for representation.

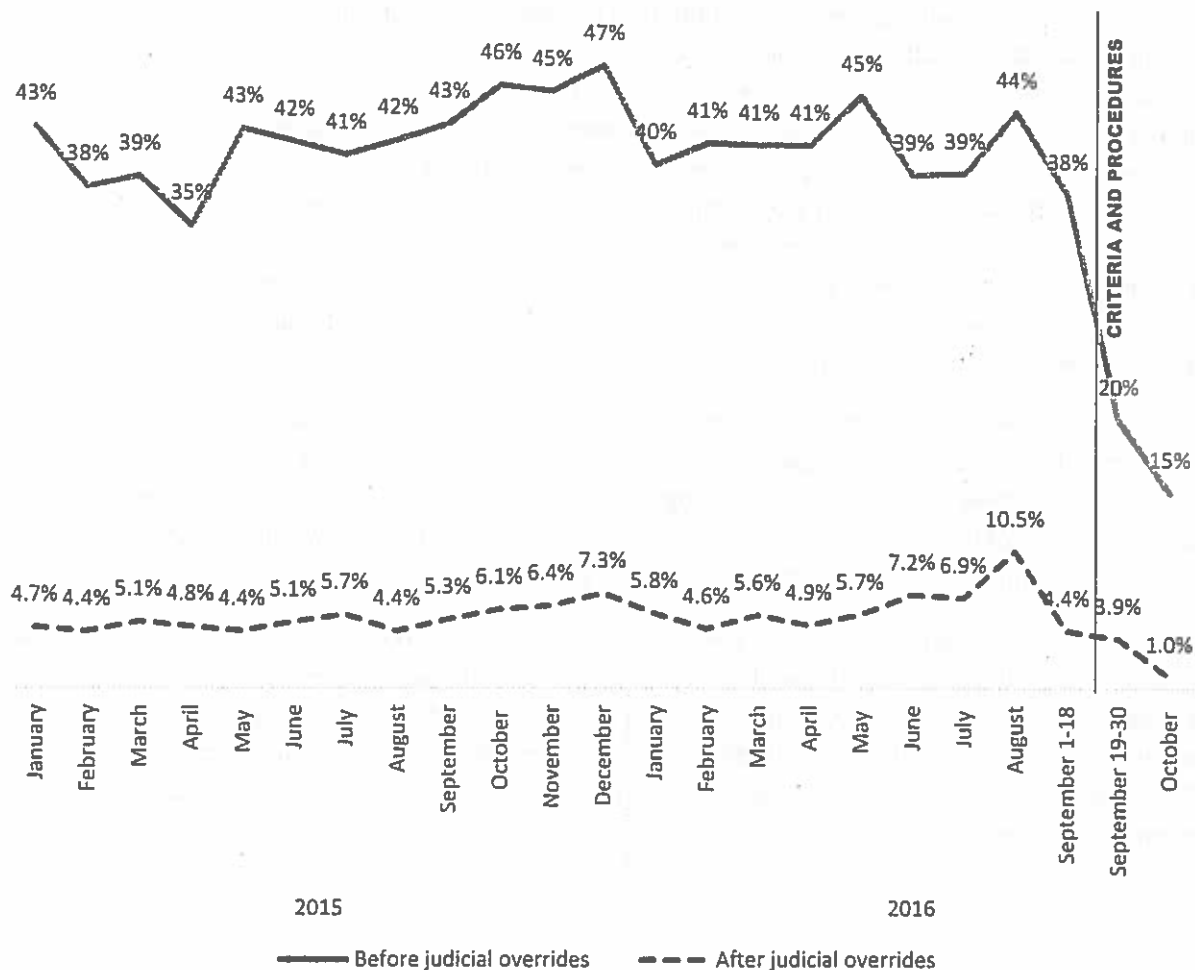
<sup>17</sup> This was communicated to ACP attorneys via a September 13, 2016, memorandum, on file with ILS.

### Eligibility rates

Following the implementation of the *Criteria and Procedures* the rate at which defendants were found ineligible by the assigned counsel program’s screening process dropped from its historical rate of over 40% to just 17% (see Figure 3 and Table 4 below). The rate at which persons were found ineligible after judicial override also dropped – from 5 or 6% to under 2% – though we note that it does not appear that it was the judges who had changed their behavior. Just as prior to the *Criteria and Procedures*, judges overrode over 80% of determinations (86% in fact), that rate was little changed – 89% – after implementation. Accordingly, we conclude that the reduction in the numbers of ineligible persons in Onondaga County following the implementation of the *Criteria and Procedures* was a consequence principally of the changing number found ineligible by screening by the ACP.

In 2015, Onondaga County provided representation to 11,694 out of 12,349 applicants under the assigned counsel program, for an overall denial rate of 5.3% (see Table 4). If the number of applications had instead been 15,732 (as calculated above) and the ineligibility rate just 1.9%, the total number of persons accepted for representation would have been 15,435, an overall increase of 3,741, or approximately 32%.

Figure 3: Ineligibility Rate by Month, Onondaga County, 2015 and 2016



**Table 4: Ineligibility Rate in Onondaga County Before and After Criteria and Procedures Implementation**

<b>Period</b>	<b>Ineligibility rate after screening</b>	<b>Ineligibility rate after judicial overrides</b>
2015	42%	5.3%
2016 to September 18	41%	6.2%
2016 September 19 to October 31	17%	1.9%

## Ontario County

Ontario is a moderately-sized county (663 sq. mi.) located in Western New York containing two small cities. Indigent legal services are provided through a public defender office with a conflict defender office and an assigned counsel panel handling conflict cases. Its 2015 population was 109,561 of which 10.4% lived below the poverty line. Median household income was \$57,416, approximately 97% of the state average. 69% of the 1,766 fingerprintable arrests recorded by the New York State Division of Criminal Justice Services as disposed in 2015 were charged at the misdemeanor level; the other 31% were felonies. Violent felonies made up 5% of the total.<sup>18</sup>

### Determining Eligibility Prior to the *Criteria and Procedures*

In Ontario County, all eligibility determinations have historically been performed by the Public Defender Office prior to the determination of conflicts of interest. In rare cases where a conflict is known in advance, eligibility interviews could be performed with the conflict defender present. Applications from all persons denied representation were reviewed personally by the public defender who would sometimes revise those decisions; denied applicants would be reminded of their right to ask a judge to review the issue. The appropriate defender would then make a recommendation to the court as to the eligibility of the prospective client, and the court would make the final determination.

Applicants for counsel in Ontario County might be required to present supporting evidence of their financial status. The public defender responded to a 2015 survey as follows:

*If numbers don't add up, we will request additional materials. If person has substantial debt, we will request verification. If there is any confusion as to person's actual income, we will request verification. If person owns own business, [we] will typically request tax returns, as they show a good picture of net income after expenses.*

Applicants were presumed to be eligible if they were living in public housing, were receiving welfare benefits, or if they had an income below some multiple of the Federal Poverty Line. That multiple changed depending on the type of case and was set at 125% for misdemeanors and violations, 140% for all DWIs and D or E felonies, and 185% for A, B and C felonies, or any felony sex offense. The income of persons other than the applicant (such as a spouse or parent) would only be considered if the client first consented to the public defender contacting that person. Full details of these rules can be found in Table 5.

Income assessments were used for applicants who did not fall into a category of 'presumptively eligible' person. These considered the applicant's assets (income of various kinds, savings and home) but also

*Table 5: Presumptive Eligibility and the Consideration of Third Party Resources in Ontario County Prior to the Criteria and Procedures*

#### Persons presumptively eligible for counsel

- Receiving public benefits (welfare)
- Living in public housing
- Income below specified levels (depending on charge seriousness).

#### Third parties whose income could be considered in the eligibility determination

- Spouses or parents (with client consent to contact)

<sup>18</sup> All sources cited supra, note 8.

subtracted out liabilities such as debt or fixed expenses. The full list of considerations is shown in Table 6.

*Table 6: Considerations in Income Assessment in Ontario County Prior to Implementation of Criteria and Procedures*

Earns income from employment	
Receives child support	
Receives alimony	
Receives pension payments	Less likely to be eligible
Has savings	
Owens a home	
Owens a car	
Receives welfare (e.g., TANF, cash assistance, food stamps)	
Receives disability benefits	
Receives unemployment benefits	
Receives other public benefits	
Is unemployed	
Must make monthly mortgage payments	
Must pay rent	More likely to be eligible
Must pay utility bills	
Has credit card debt	
Has outstanding medical bills	
Has student loans	
Must make child support payments	
Must meet basic living costs (e.g., transportation, food)	
Post bond	Not considered

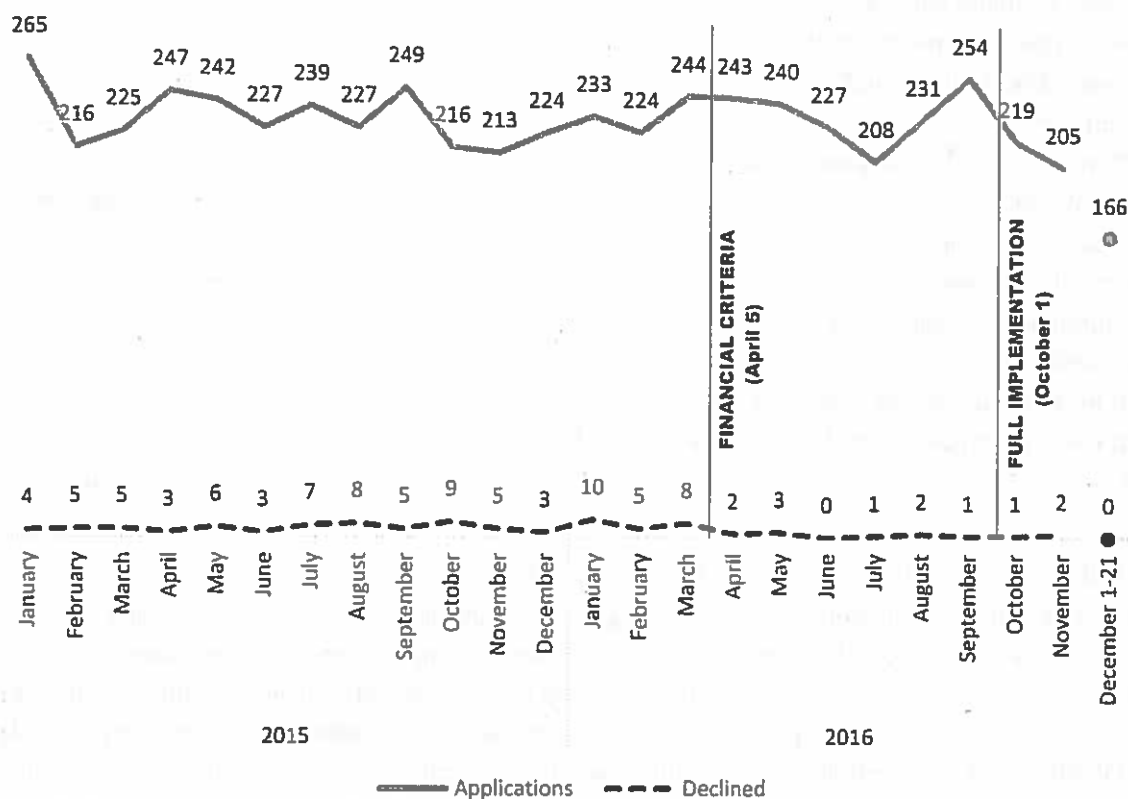
### The Impact of the *Criteria and Procedures* on Caseloads

The Ontario County Public Defender Office changed the financial criteria in use for eligibility determination on April 5, 2016, immediately after the *Criteria and Procedures* were issued. In our analysis below, we refer to this period as the 'Financial Criteria' period. Full implementation of certain provisions (particularly those requiring that decisions on eligibility be appealable) were not put in place until October 1, as were certain final decisions about the content of the application form. At the time of data collection (December 21, 2016) no requests to appeal decisions had been made – though the public defender did inform us subsequently (on January 20, 2017) that a small number of determinations of ineligibility had been subjected to challenge. It is possible, therefore, that the numbers 'denied' in the data we collected might be revised downward in the future.

The public defender office does very little family court representation, and only takes cases where the parent is already a client in a criminal case. No separate eligibility determination procedure is undertaken for the family 'side' of representation in such a case. Most family court representation is performed by the assigned counsel panel, however, and in those cases the administrator reported to us that she is now 'using 250%' as the income guideline.

We were able to obtain a complete dataset for all eligibility decisions in the county from the public defender. Though she originally provided us with four years of data (back to January 1, 2013), she also reported to us that the definition of 'ineligible' that was used in the data was wider than was appropriate for our research, and included not only persons who had been screened and found financially ineligible, but also individuals who indicated during the screening process that they intended to retain private counsel.<sup>19</sup> Since our analysis was focused on the impact of the change in eligibility screening procedures, we needed to distinguish persons who were 'screened out' from those who 'opted out' by indicating their intent to retain. With the assistance of the public defender, we were able to obtain these more refined data, though archiving of records meant that it was only practical to obtain them back to January 1, 2015. The number of applications for counsel, and the number determined ineligible, are shown in Figure 4.

Figure 4: Applications for Counsel and Denials in Criminal Cases in Ontario County 2015-2016

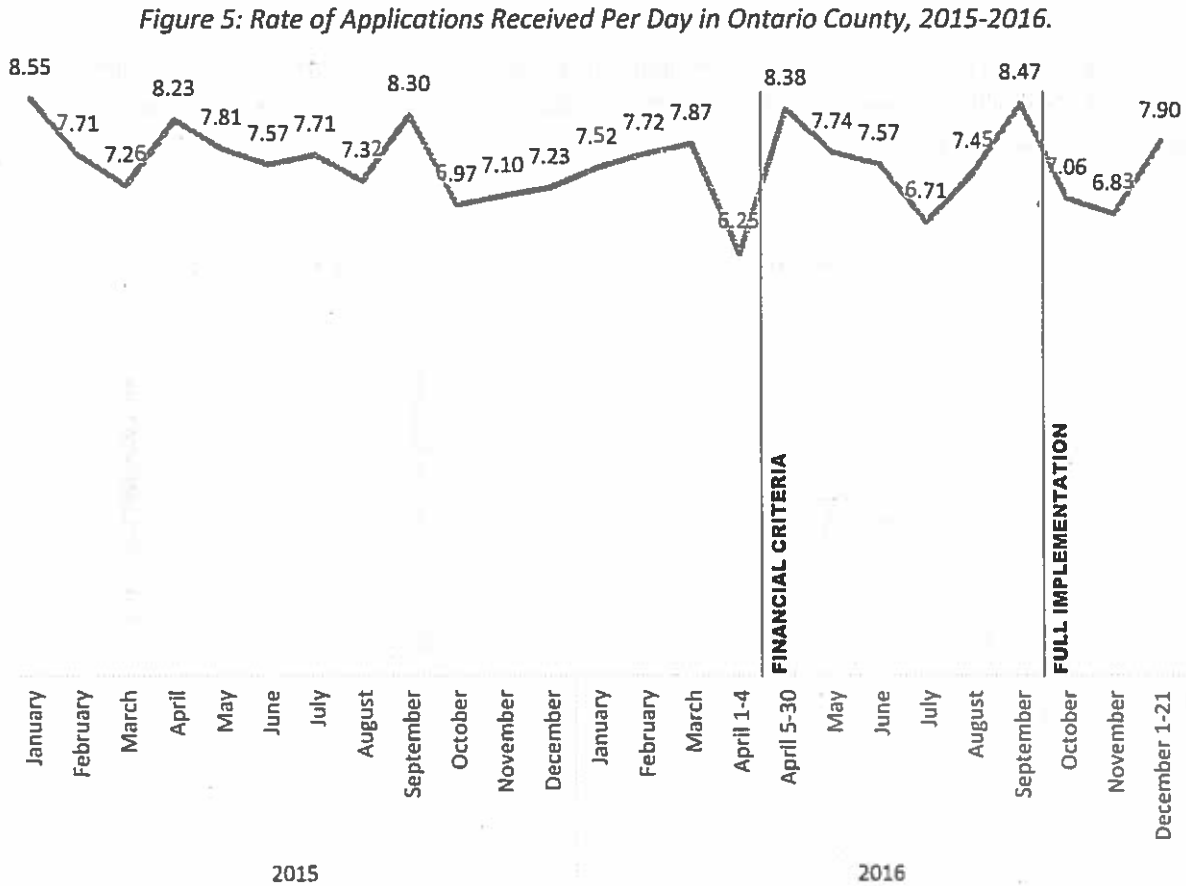


<sup>19</sup> The public defender counts these individuals as 'ineligible' to facilitate comparison to the assigned counsel program in the county. In that program, no bill for services could be submitted by a lawyer whose client proved ineligible or who immediately retained counsel and no longer required assigned counsel services. Further, in opting immediately to retain counsel, the public defender inferred such defendants could be presumed to be able to afford counsel - in keeping with the appropriate statutory standard for a finding of ineligibility.



## Application rates

Figure 5 shows the application rate in Ontario County for months in 2015 and 2016. Table 7 shows this same statistic, broken out for more gross periods.<sup>20</sup>



*Table 7: Application Rate in Ontario County Before and After Criteria and Procedures Implementation*

Period	Average number of applications per day
2015	7.64
2016 to April 4	7.56
2016 April 5 to December 21	7.59

<sup>20</sup> We examined DCJS data on monthly arraignments in Ontario County courts to ascertain whether the period April-December generally had abnormal rates of activity. We concluded it did not. For the years 2010-2015, January-March account for 24% of all arraignments, rising to 26% for the next two quarters before falling back to 24% for October-December. Data for 2016 itself were incomplete, but we do not have any basis to assume that the comparison in Table 7 would be in any way confounded by differences in the underlying rates of court activity.

The rate of applications received after the implementation of the *Criteria and Procedures* in Ontario County was little changed from prior periods. Assuming applications continued to be submitted at the same rate to the end of 2016, Ontario would in fact have ended up with approximately 2,770 applications in 2016 – twenty fewer than in 2015.

### Eligibility rates

0.6% of applications have been deemed ‘ineligible’ since the implementation of the *Criteria and Procedures*, a reduction on prior periods. Monthly totals are shown in Figure 6; a more gross breakout by period is shown in Table 8.

Figure 6: Ineligibility Rate by Month, Ontario County, 2015 and 2016

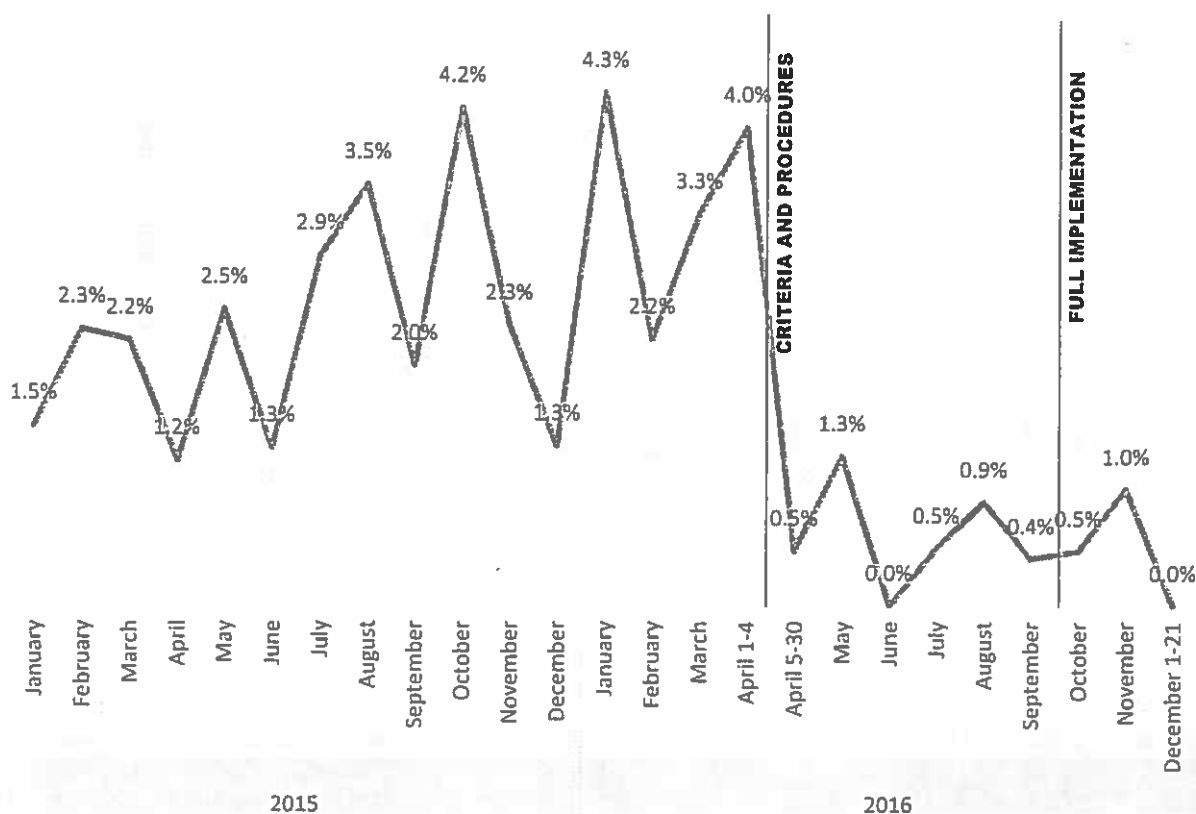


Table 8: Ineligibility Rate in Ontario County Before and After Criteria and Procedures Implementation

Period	Ineligibility rate
2015	2.3%
2016 to April 4	3.3%
2016 April 5 to December 21	0.6%

The implementation of the *Criteria and Procedures* in Ontario County coincided with a distinct drop in the numbers of persons being found ineligible. Applying the new rate of ineligibility (0.6%) to the 2,790 applications received in 2015 would have resulted in approximately 16 applicants being rejected, rather than the 63 that were refused representation on grounds of financial eligibility that year. Accordingly, we estimate that the impact of the *Criteria and Procedures* will be an increase of roughly 47 eligible defendants per year in the county, or approximately 1.7%.

## Schuyler County

Schuyler is a small (342 sq. mi.), largely rural county in Western New York providing indigent legal services through a public defender office and an assigned counsel panel for conflict cases. In 2016, the county ended its conflict defender program and expanded the role of assigned counsel, which was in turn overhauled in April of that year through an agreement which shifted operational responsibility to administrators in Tompkins County. The new administrators also took over eligibility screening in cases in which the public defender had a conflict.

Schuyler's 2015 population was 18,186, of which 14.5% lived below the poverty line. Median household income was \$47,680, approximately 80% of the statewide average. 51% of the 119 criminal fingerprintable arrests recorded by the New York State Division of Criminal Justice Services as disposed in 2015 were charged at the misdemeanor level; the other 49% were felonies. Violent felonies made up 5% of the total.<sup>21</sup>

### Determining Eligibility Prior to the *Criteria and Procedures*

Prior to the implementation of the *Criteria and Procedures*, eligibility determination in Schuyler County was generally performed by the public defender office. Defendants seeking representation would submit an application to that office which would review it and make an eligibility recommendation to the court. Following the creation of the new assigned counsel panel overseen in Tompkins County, responsibility for eligibility screening shifted to that program in cases where the public defender office had a conflict. If the recommendation was to find a defendant ineligible, the public defender office informed the defendant in writing of the reason, and laid out the process by which they could appeal to the judge for reconsideration should they wish to. Those denied assignment after such an appeal was complete also received a letter explaining the reasons why.

Applicants for counsel in Schuyler County were not generally required to present supporting evidence of their financial status, though in some cases it was requested if eligibility was unclear. Applicants were presumed to be eligible for counsel if they received welfare benefits or had an income below 125% of the Federal Poverty Line. The income of persons other than the applicant was sometimes considered – but only if that person was a spouse who was not themselves an adverse party in the case. Minor applicants were automatically approved for representation. Full details of these rules can be found in Table 9.

Assuming an applicant's income (including that of any cohabiting spouse) summed to over 125% of the Federal Poverty Line, and they were not presumptively eligible for any other reason, an analysis would then be conducted in which their income (including any child support, alimony, pensions, disability or unemployment benefits) would be examined. For a full list of considerations, see Table 10.

*Table 9: Presumptive Eligibility and the Consideration of Third Party Resources in Schuyler County Prior to the Criteria and Procedures*

#### Persons presumptively eligible for counsel

- Receiving public benefits (welfare)
- Living in a mental health facility
- Income below 125% of Federal Poverty Line

#### Third parties whose income could be considered in the eligibility determination

- Spouse (living with defendant, is not an opposing party)

<sup>21</sup> All sources cited supra, note 8.

Table 10: Considerations in Income Assessment in Schuylers County Prior to Implementation of Criteria and Procedures

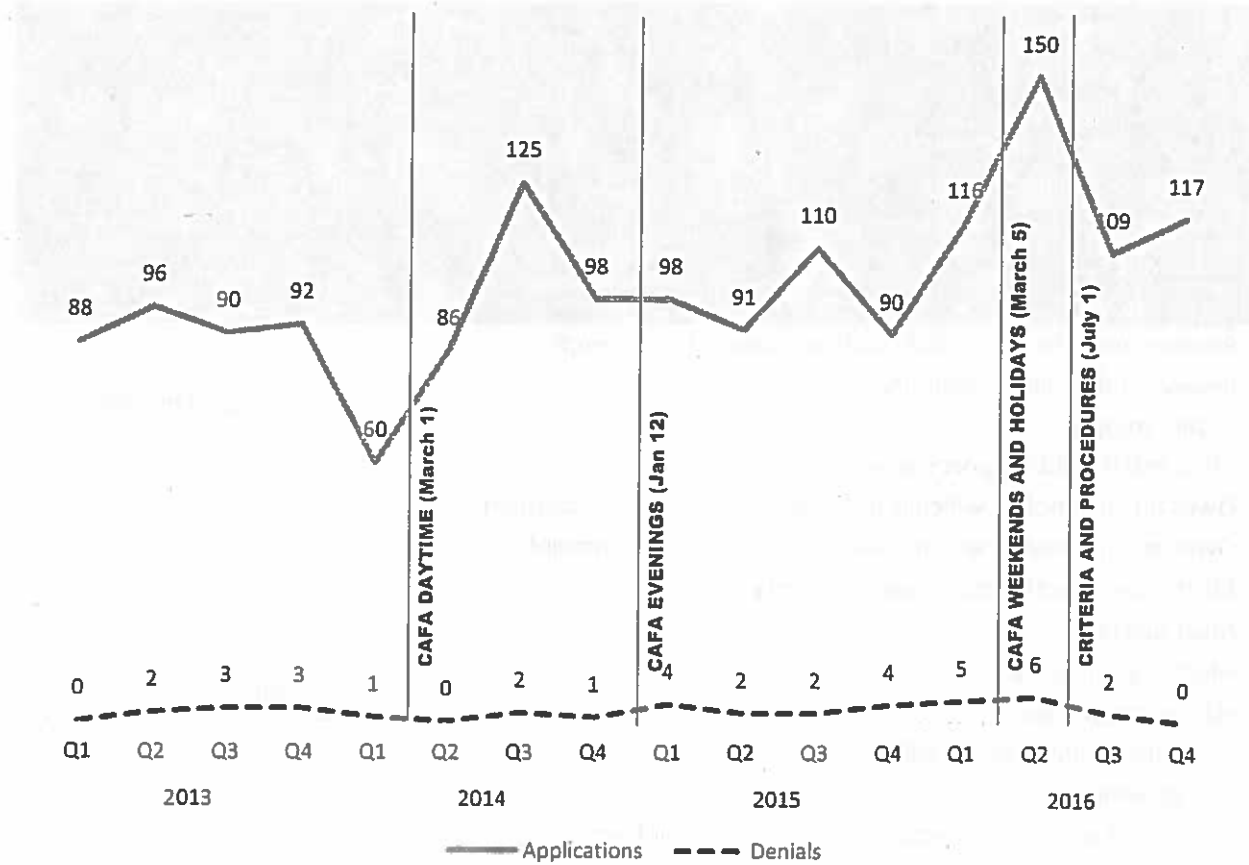
Earns income from employment	Less likely to be eligible
Receives child support	
Receives Alimony	
Receives pension payments	
Receives disability benefits	
Receives unemployment benefits	
Has savings	
Owens a home	More likely to be eligible
Receives welfare (e.g., TANF, cash assistance, food stamps)	
Receives other public benefits	
Is unemployed	
Must make child support payments	
Owens an automobile which is not essential to their employment	
Owens an automobile which is essential to their employment	
Must make monthly mortgage payments	Not considered
Must pay rent	
Must pay utility bills	
Has credit card debt	
Has outstanding medical bills	
Has student loans	
Must meet basic living costs (e.g., transportation, food)	
Posted bond	

### The Impact of the *Criteria and Procedures* on Caseloads

The Schuylers County Public Defender Office implemented the *Criteria and Procedures* at the beginning of July, 2016 in all courts in the county including in family court. Although the public defender office does not actually determine eligibility for defendants for whom it has a conflict of interest, the office does record that the application was received. Subsequently, the office is notified, through letters from the courts, of the outcome of the eligibility decision in the case (including details of any reconsiderations). Accordingly, we were able to obtain data on the total numbers of applications and denials in the whole county from the public defender office (see Figure 7).

The public defender reported to ILS that it was his opinion that the roll-out of the counsel at first appearance (CAFA) program in Schuylers County had resulted in a steady increase in applications for representation prior to the issuance of the eligibility standards. Attorneys representing defendants at first appearances are able to explain the importance of the right to counsel, encourage and assist defendants in completing the paperwork, and take the completed applications with them when they leave court, saving the defendant from having to submit it themselves either in person or by mail. CAFA provisions in Schuylers have expanded steadily since early 2014 when the program rolled out to cover first appearances during business hours. In early 2015 the program was expanded to cover evenings and in early 2016 it covered weekends and holidays, as shown in Figure 7.

Figure 7: Applications for Counsel and Denials in Criminal Cases in Schuyler County 2015-2016



### Application rates

Figure 8 shows the rate of applications per day for Schuyler by quarter for the period 2013-2016. Table 11 provides a more gross breakout.

There is little evidence in these numbers to suggest that the implementation of the *Criteria and Procedures* resulted in an increase in the number of applications submitted to the program. The two quarters following implementation have, if anything, seen application rates decline – though we note the especially high rate of applications in Q2 of 2016 is largely attributable to an usually large case involving the arrest of 25 co-defendants for alleged production and use of methamphetamine.<sup>22</sup> That said, there is clearly a long-term trend of increasing numbers of applications for counsel in the county predating the introduction of the *Criteria and Procedures* – from 366 in 2013 to 492 in 2016, an increase of 34%. This may provide support for the public defender’s suggestion that CAFA has resulted in higher rates of application for counsel.

<sup>22</sup> For more on this case, see ILS’ report, *Implementing the Quality Improvement Objectives in the Hurrell-Harring v. The State of New York Settlement: 2016 Update*, at p. 10, available here; <https://goo.gl/ZCmfAU>.

Figure 8: Rate of Applications Received Per Day in Schuyler County, 2013-2016.

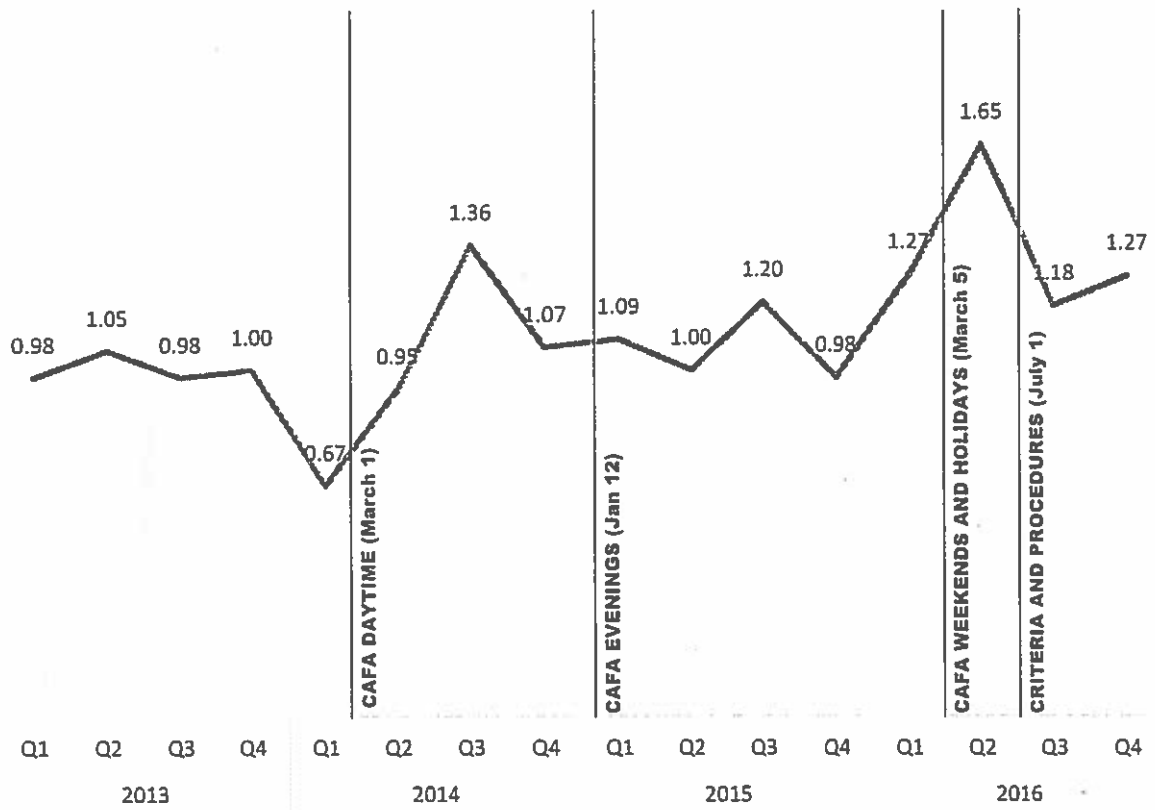


Table 11: Application Rate in Schuyler County Before and After Criteria and Procedures Implementation

Period	Average number of applications per day
2013	1.00
2014	1.01
2015	1.07
2016 to June 30	1.46
2016 July 31 to December 31	1.23

### Eligibility rates

The number of people declined for financial reasons since the implementation of the *Criteria and Procedures* – two – was lower than the total for the prior two quarters (eleven) and lower than for the same period in prior years (2013: 6, 2014: 3, 2015: 6). As a percentage, just 0.9% of applicants were declined for representation since the *Criteria and Procedures* were introduced, compared to rates of between 1.1% and 3.1% in prior years (see Figure 9 and Table 12 for a comparison of rates before and after implementation).

Figure 9: Percentage of Applications Found Ineligible in Schuyler County, 2013-2016

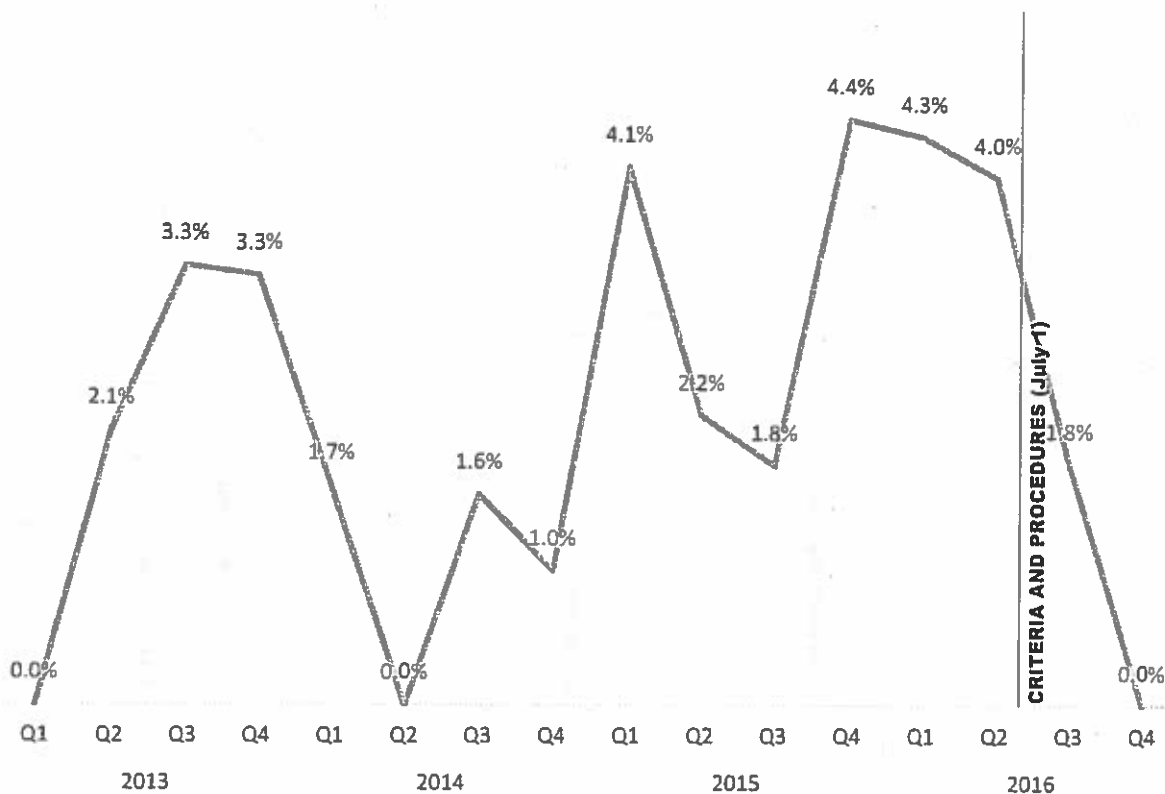


Table 12: Ineligibility Rate in Schuyler County Before and After Criteria and Procedures Implementation

Period	Ineligibility rate
2013	2.2%
2014	1.1%
2015	3.1%
2016 to June 30	4.1%
2016 July 1 to December 31	0.9%

The numbers above suggest that the introduction of the *Criteria and Procedures* coincided with an increase in the proportion found eligible for counsel in Schuyler County. For consistency with our other analyses, we compared the post-implementation rate of 0.9% with 2015 as a baseline, when the rate of rejection was 3.1%. At that rate, approximately 15 of the 492 applications for representation received in 2016 would have been denied. Under the new standards, with a rejection rate of 0.9%, that number would have been around 4, suggesting a total annual increase of 11 per year as a result of the new standards. This would represent an increase in the number of applicants accepted for representation of 2.3%.



## Suffolk County

Suffolk is a relatively large (2,373 sq. mi.) suburban county comprising the eastern-most end of Long Island. It provides indigent legal services principally through a sizeable Legal Aid Society with an assigned counsel panel for conflict cases. Its population in 2015 was just over 1.5 million, of which 7% lived below the poverty line, while median household income was \$88,663, around 150% of the state average. Of the 21,460 disposed arrests for fingerprintable offenses counted by the Division of Criminal Justice Services in 2015, 75% were misdemeanors, 25% were felonies and 5% were violent felonies.<sup>23</sup>

Eligibility determination occurs through a variety of different procedures in Suffolk County. At the District Court in Central Islip, persons who are in custody prior to their arraignment are screened for eligibility by the Suffolk County Probation Department (SCPD) as a part of a more general screening related to release recommendations. Persons arriving to the same court out of custody are screened by and have their eligibility determined by the judge directly. In the county's town and village courts, of which there are over thirty, practice is divided. In the courts in the Eastern end of the county, applicants for counsel are generally provided with a referral slip instructing them to go to the Suffolk County Legal Aid Society (SCLAS) offices for screening, whereas elsewhere the judges perform the screening directly. Defendants in all parts of Suffolk County occasionally have eligibility re-assessed later in the case, such as at a probable cause hearing pursuant to Criminal Procedure Law 180.80, or upon arraignment at County Court, where some question arises over their continuing eligibility or where they cannot any longer afford counsel previously retained. These subsequent screenings are also performed by the Legal Aid Society.

### Determining Eligibility Prior to the *Criteria and Procedures*

Prior to the introduction of the *Criteria and Procedures*, SCLAS conferred automatic eligibility for counsel on a range of classes of persons. Applicants living in public housing, who were incarcerated or living in a mental health facility, who received welfare or whose income fell below 125% of the Federal Poverty Line – all of these were presumptively entitled to counsel based on their status. Table 13 summarizes these provisions.

If income was assessed, applicants were typically required to produce pay stubs by way of documentation in support of their application, and the income of spouses and parents of applicants could also be considered. During the assessment, information on income as well as assets and debts was solicited from the applicant. SCLAS clarified that “those were the only real factors we used to determine eligibility” and that while in certain combinations (e.g. high debt, low income) a person would be found eligible, “It would be better stated that the ‘less likely’ list were considerations that, if too high, might lead to being found ineligible.” Details of the process are shown in Table 14.

*Table 13: Presumptive Eligibility and the Consideration of Third Party Resources in Suffolk County Legal Aid Society Prior to the Criteria and Procedures*

#### Persons presumptively eligible for counsel

- Living in public housing
- Incarcerated
- Receiving public benefits (welfare)
- Living in a mental health facility
- Income below 125% of Federal Poverty Line

#### Third parties whose income could be considered in the eligibility determination

- Spouses
- Parents

<sup>23</sup> All sources cited supra, note 8.

**Table 14: Considerations in Income Assessment in Suffolk County Legal Aid Society Prior to Implementation of Criteria and Procedures**

Earns income from employment	Less likely to be eligible
Receives child support	
Receives Alimony	
Receives pension payments	
Has savings	
Owens a home	
Must make monthly mortgage payments	
Must pay rent	
Must pay utility bills	
Has credit card debt	
Has outstanding medical bills	
Has student loans	
Must make child support payments	
Post bond	
Owens a car	
Receives welfare (e.g., TANF, cash assistance, food stamps)	More likely to be eligible
Receives disability benefits	
Receives unemployment benefits	
Receives other public benefits	Not considered
Is unemployed	
Must meet basic living costs (e.g., transportation, food)	

### The Impact of the *Criteria and Procedures* on Caseloads

Three separate entities – SCLAS, SCPD, and the assembled judiciary of the District, Town and Village courts – conduct eligibility determination in Suffolk County. Because of our short time-frame for this work and our guess that these data would be difficult to obtain or analyze, we did not seek to obtain data from the judiciary, though we were able to obtain data from the other two entities.

SCLAS, which performs the screening and eligibility recommendation function for East End Town and Village courts and the County Court, implemented the *Criteria and Procedures* on September 1, 2016. Between January 1, 2015 and December 8, 2016, that office processed a total of 625 applications, and was able to provide to ILS all the data we requested on the number of applicants and denials.<sup>24</sup> These data are shown in Figure 10.

SCPD implemented the new standards on exactly October 3, as required, and began tracking the numbers of applications and denials from that date forward and providing the data to ILS. No data were available for the period prior to October 3, however. These data are shown in Figure 11.

<sup>24</sup> SCLAS also performs the Family Court eligibility screening in the County, though of course those cases are not analyzed here.

Figure 10: Applications for Counsel and Denials at the Suffolk County Legal Aid Society 2015-2016

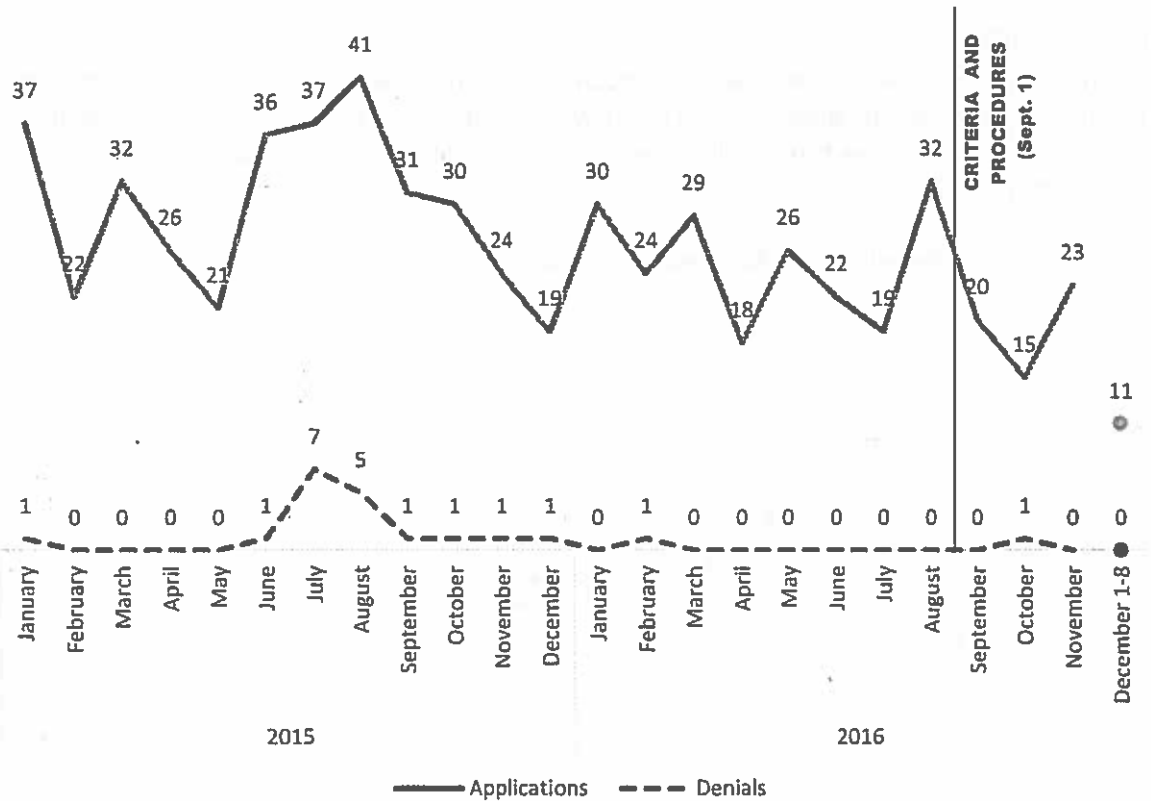
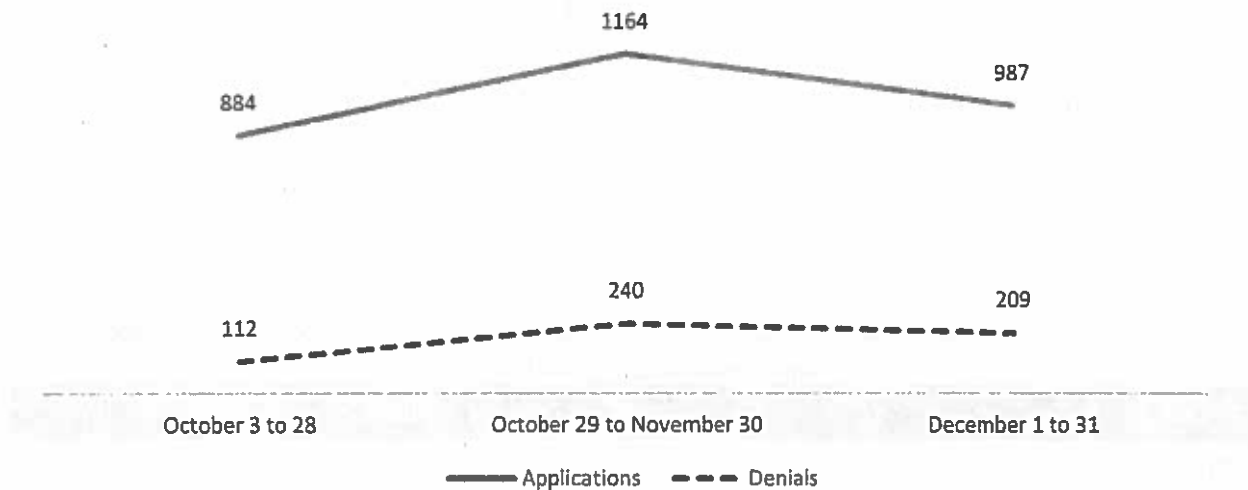


Figure 11: Applications<sup>25</sup> for Counsel and Denials at the Suffolk County Probation Department, post-implementation period



<sup>25</sup> Note that 'Applications', in this case, are actually the product of intake interviews with persons in custody. Thus the defendant does not have an option not to 'apply', and application numbers are simply a reflection of the numbers of persons arrested and detained prior to arraignment in the Central Islip District Court.

### Application rates

The rate of applications received by SCLAS across 2015 and 2016 is shown in Figure 13 with additional data in Table 13. The rate of applications received by SCLAS after implementation was lower than in months prior to it – a declining trend which appears to have predated implementation of the *Criteria and Procedures* themselves.

Figure 13: Rates of Applications Received Per Day at Suffolk County Legal Aid Society, 2015-2016

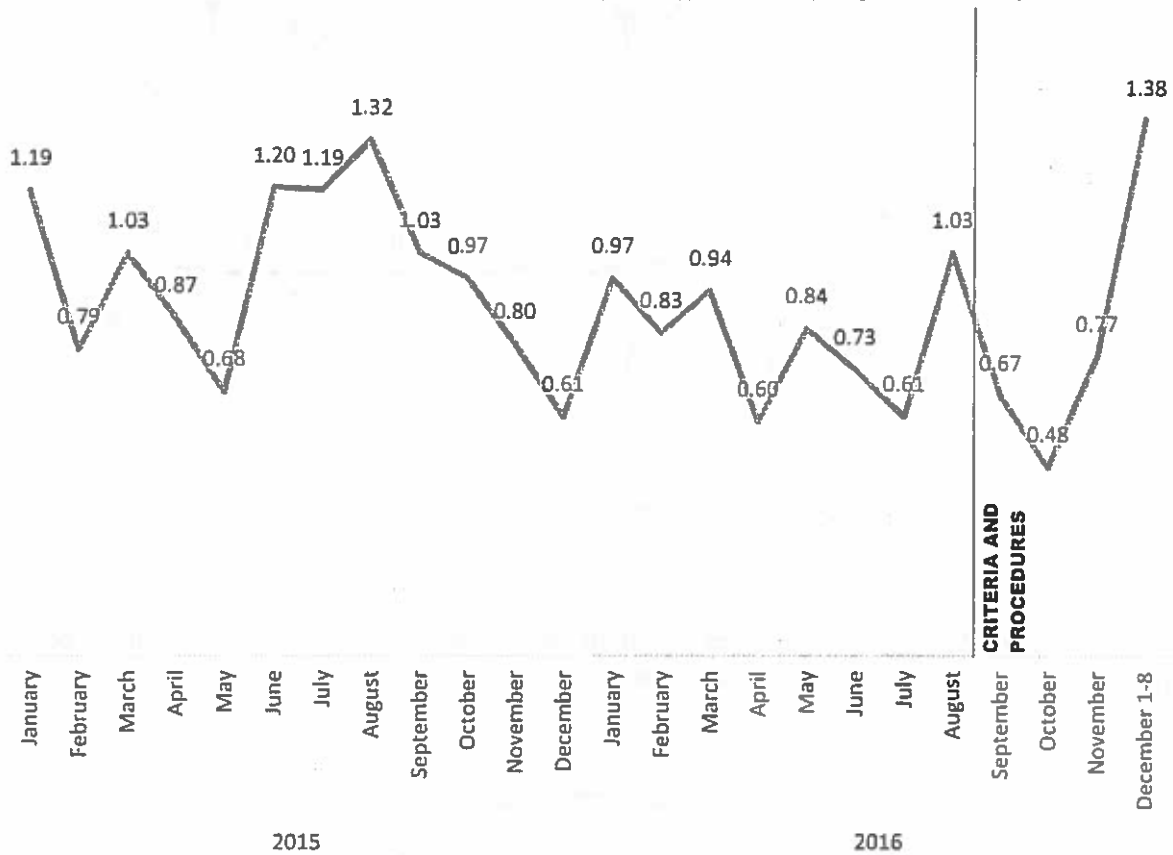
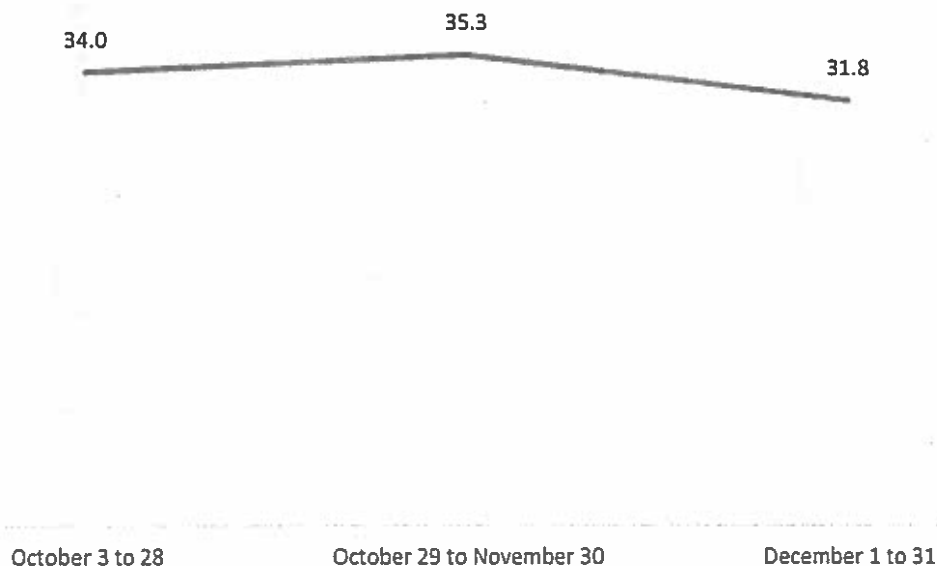


Table 13: Application Rate in Suffolk County Legal Aid Society Before and After Criteria and Procedures Implementation, selected periods

Period	Average number of applications per day
2015	0.97
2016 to August 31	0.82
2016 September 1 to December 8	0.70

Because SCPD interviews all persons in custody prior to arraignment and performs a financial screening whether the defendant would like to apply for counsel or not, the rate of 'applications' in Figure 14 is simply a reflection of the number of persons detained prior to arraignment at the Central Islip District Court, and does not reflect voluntary behavior by defendants. Nevertheless, we present the data we have on the application rate at SCPD in Figure 14.

*Figure 14: Rates of Applications Received Per Day in Suffolk County Probation Department, post-implementation period*



### Eligibility rates

With so few cases actually screened by the Suffolk County Legal Aid Society, small changes in the numbers found ineligible result in large changes in the rate, as shown in Figure 15. A few cases of ineligibility during a short period in 2015 created a high rate of denial overall for that year, whereas in early 2016 virtually no denials happened. Although the rate after implementation of the *Criteria and Procedures* appears higher than in early 2016, this is a consequence of just a single denial of eligibility occurring in October.

With events this rare, it is difficult to conclude that any statistical trend exists. Nevertheless, we can say that that even prior to the implementation of the *Criteria and Procedures* findings of ineligibility at SCLAS were very rare, with the exception of a short period in 2015 when several people were denied. Throughout 2016, both before and after implementation, rates of ineligibility have remained very low indeed.

Figure 15: Ineligibility Rate by Month, Suffolk County Legal Aid Society, 2015 and 2016

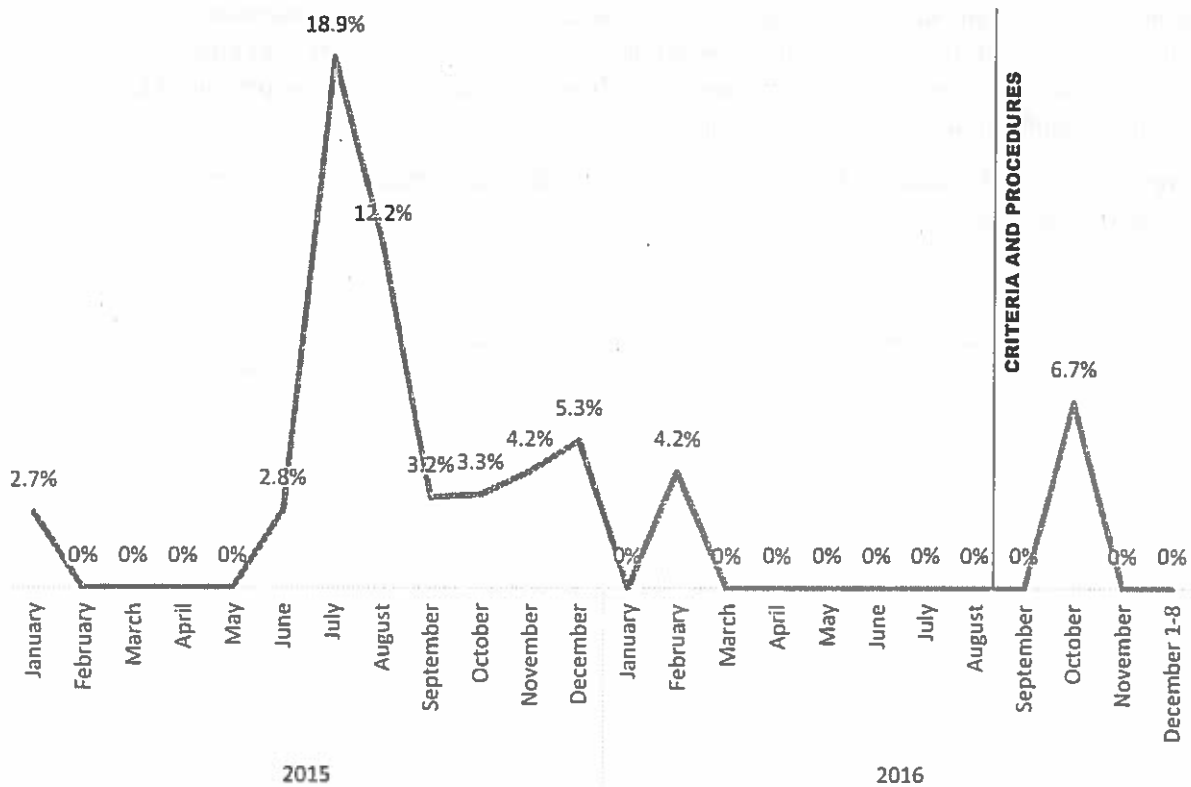
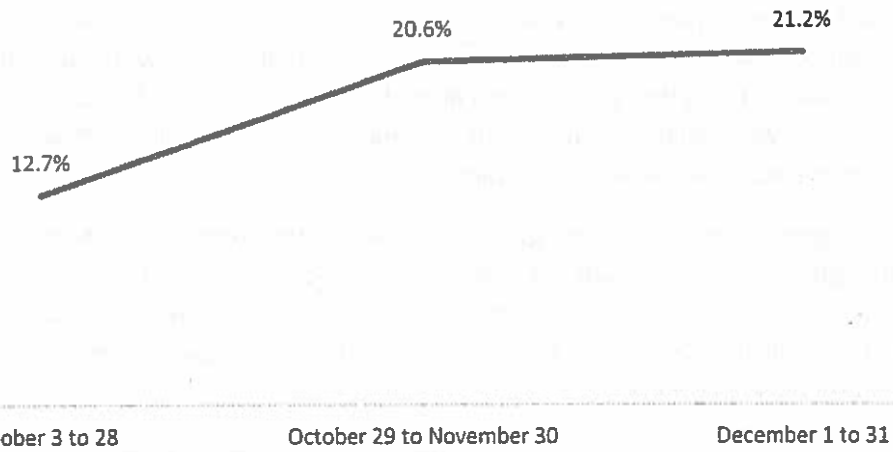


Table 14: Ineligibility Rate in Suffolk County Before and After Criteria and Procedures Implementation

Period	Ineligibility rate
2015	5.1%
2016 to August 31	0.5%
2016 September 1 to December 8	1.4%

The SCPD data reported in Figure 16 should, again, be interpreted as the rate at which persons incarcerated pre-arraignment in Suffolk County are unable to pay for counsel to represent them – and not only the rate at which persons seeking representation were denied it for financial reasons. Lacking data from periods prior to implementation, however, we make no conclusion about whether the rate of such findings of inability to pay has changed over time.

Figure 16: Ineligibility Rate, Suffolk County Probation Department, post-implementation period



Overall, our data do not allow us to draw a general conclusion about the impact of the *Criteria and Procedures* in Suffolk County as a whole. Nevertheless, the data we have suggest that to the extent persons are screened by the Suffolk County Legal Aid Society the rate of ineligibility after implementation is very low, and lower overall than it was in 2015.

## Washington County

Washington County is a moderately sized (846 sq. mi.) county located in Eastern New York, partially within the Adirondack Park. 13.5% of its 62,230 residents in 2015 lived below the poverty line. Median household income was \$51,143 that year, around 86% of the state average. 31% of the 944 fingerprintable arrests recorded by the Division of Criminal Justice Services in 2015 were felonies, while 69% were misdemeanors; 5% were violent felonies.<sup>26</sup>

The process for assigning counsel in Washington is overseen by the supervising attorney of the assigned counsel plan, though the primary provider of representation in the county is the public defender office. The supervising attorney's role is to receive applications for counsel, conduct eligibility determinations, perform checks for conflicts of interest, and pass cases on either to a public defender or a member of the assigned counsel panel as appropriate.

An exception to this process occurs in cases where the public defender is called out to provide immediate representation at a defendant's first appearance in court. In such cases, it is impossible for the supervising attorney to perform the usual screening in advance of such an appearance, and so it is typically performed afterwards, assuming an application is forthcoming from the defendant in question. New procedures in the county to increase the provision of counsel at first appearance (CAFA) services have made such cases more common, as will be seen in the analysis below.

### Determining Eligibility Prior to the *Criteria and Procedures*

Prior to the implementation of the *Criteria and Procedures*, applicants were typically asked to fill out an application form and provide tax documents and pay stubs as part of the eligibility determination process. Some form of identification and copies of charging documents were also required.

Persons incarcerated or living in mental health facilities were presumed to be eligible, as were persons whose income was below 125% of the Federal Poverty Line; receipt of welfare or residence in public housing, however, did not automatically entitle an applicant to counsel. In assessment of an applicant's income, consideration of the income of third parties such as parents and spouses was permitted. These provisions are summarized in Table 15.

Income assessments for applicants not deemed presumptively eligible included consideration of income not only from income, but also from public benefits and other sources, including pensions, alimony, and child support. Assets including a car or a house were also considered to increase an applicant's ability to afford counsel. Certain financial obligations, however, including rent, utility bills, credit card and student loan debt, and outstanding medical bills, were offset against a person's income, making an applicant more likely to be eligible (see Table 16).

*Table 15: Presumptive eligibility and the Consideration of Third Party Resources in Washington County Prior to the Criteria and Procedures*

Persons presumptively eligible for counsel
<ul style="list-style-type: none"><li>• Incarcerated</li><li>• Living in a mental health facility</li><li>• Income below 125% of Federal Poverty Line</li></ul>
Third parties whose income could be considered in the eligibility determination
<ul style="list-style-type: none"><li>• Applicant's spouse or partner</li><li>• Parents</li></ul>

<sup>26</sup> All sources cited *supra*, note 8.



Table 16: Considerations in Income Assessment in Washington County Prior to Implementation of the Criteria and Procedures.<sup>27</sup>

Receives welfare (e.g. TANF, cash assistance, food stamps)	Less likely to be eligible
Receives disability benefits	
Receives unemployment benefits	
Receives other public benefits	
Earns income from employment	
Receives child support	
Receives Alimony	
Receives pension payments	
Has savings	
Owens an automobile which is not essential to their employment	
Owens an automobile which is essential to their employment	
Owens a home	More likely to be eligible
Is unemployed	
Must make monthly mortgage payments	
Must pay rent	
Must pay utility bills	
Has credit card debt	
Has outstanding medical bills	
Has student loans	
Must meet basic living costs (e.g. transportation, food)	
Must make child support payments	
Post bond	

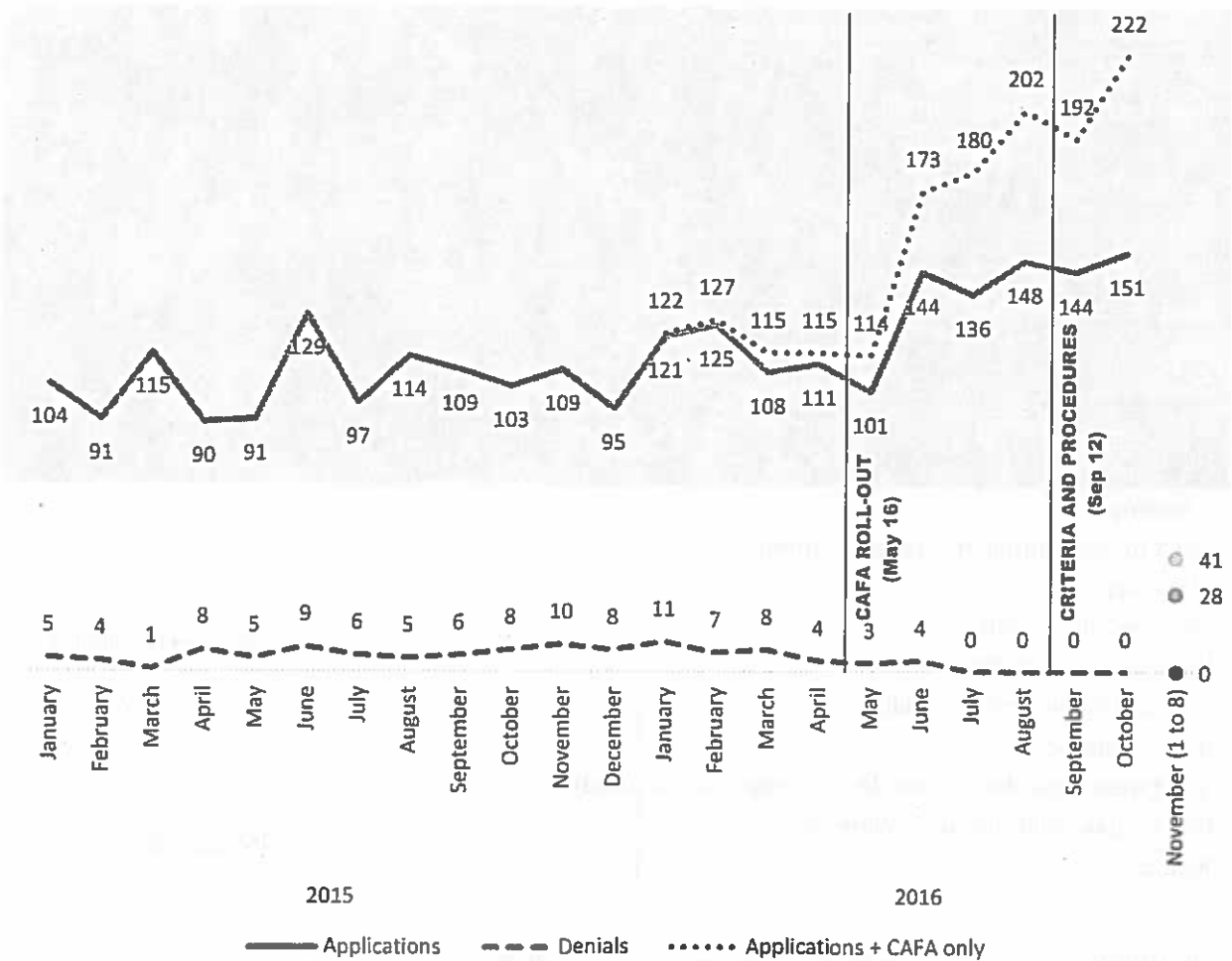
### The Impact of the *Criteria and Procedures* on Caseloads

Washington County implemented the *Criteria and Procedures* on September 12, 2016, applying them county-wide for all assignments in both criminal and family court. Almost simultaneously, in May of 2016, the county-wide program to provide counsel at first appearance was rolled out, becoming fully operational in late August. In what follows, we attempt to parse the impact of these two transitions.

Figure 17 contains data on the numbers of applications and denials by month for the years 2015 and 2016. Although we obtained data from 2013 and 2014, a new case management system was introduced at the beginning of 2015 resulting in changes to recording procedures that made comparison with data before that time misleading, and so we chose to omit those earlier years from our analysis.

<sup>27</sup> In its 2015 survey, ILS also asked about several other factors and whether or how they were considered in the eligibility determination process. For a number of these questions, responses were left blank in the submission by Washington County. Accordingly, we reviewed Washington County's eligibility determination documentation in order to complete Table 16 and confirmed the results with the supervising attorney of the assigned counsel program.

Figure 17: Applications for Counsel and Denials in Criminal Cases in Washington County 2015-2016.



### Application rates

The numbers of applications for counsel in Washington County rose substantially in 2016 following the roll-out of the new counsel at first appearance provisions.<sup>28</sup> A substantial proportion of this new caseload were so-called ‘CAFA-only’ cases (see Figure 17), wherein the public defender performed representation for a defendant at an arraignment but no application for continuing representation was received. Partly as a result of these new cases, over 200 cases were opened in August, 2016 – almost double the historical average before the program began in May.<sup>29</sup>

We exclude CAFA-only representation from our analysis because no eligibility determination took place in those cases. Even with those cases excluded, however, the program did experience an increase in applications for representation after the roll-out of the CAFA program, lending credence to the suggestion that meeting an attorney at arraignment may increase a defendant’s ability or inclination to

<sup>28</sup> The increase actually begins before May 16 – perhaps a consequence of communication with the State Police in the county in late 2015 to arrange for appearance tickets to be docketed on dates when defense could appear.

<sup>29</sup> The program averaged 107 applications a month for the period January 2015 to the end of April 2016.

apply for assignment of counsel. Figure 18 traces the rate of applications received per day across 2015 and 2016; Table 17 provides a more gross breakout by period.

Figure 18: Rate of Applications Received Per Day in Washington County, 2015-2016.

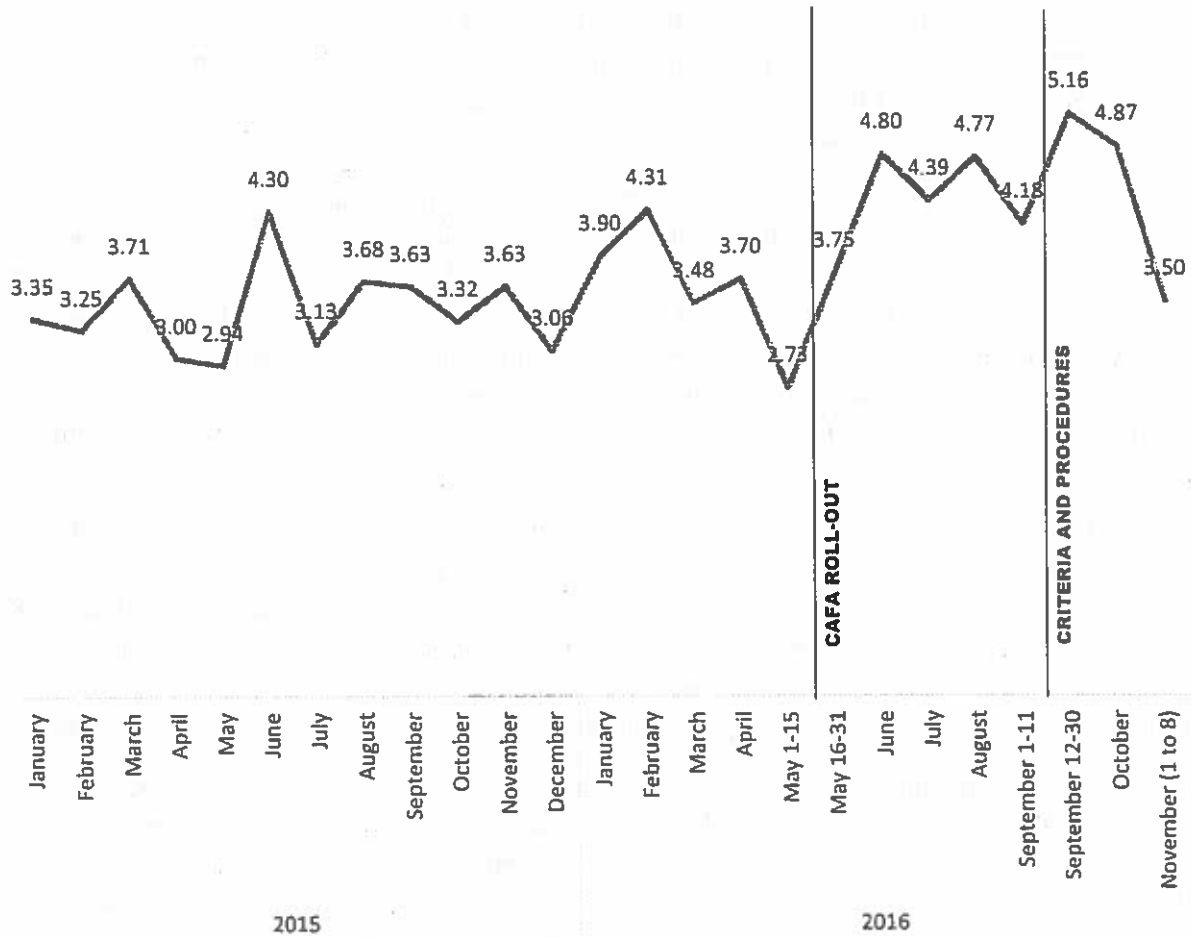


Table 17: Application Rate in Washington County Before and After Criteria and Procedures Implementation

Period	Average number of applications per day
2015	3.49
2016 to May 15	3.72
2016 May 16 to Sept 11 (CAFA roll-out)	4.52
2016 Sept 12 to Nov 8 (Criteria and Procedures)	4.82

The roll-out of the counsel at first appearance program in Washington County after May 16 was gradual. Even so, compared to the earlier part of the year, the period between May 16 and the implementation of the *Criteria and Procedures* on September 12 saw an overall increase in the application rate of 22%. Thereafter, application rates following the implementation of the *Criteria and Procedures* were higher still – around 6.6% higher than during the CAFA roll-out period.

It is impossible to know from this statistical evidence alone whether the *Criteria and Procedures* had some role in causing the higher rate of applications after September 12. At least three possibilities exist: that the *Criteria and Procedures* themselves caused more people to apply, that the continuing implementation of counsel at first appearance drove up applications even higher than it had previously, or that it was simply a statistical anomaly.

Two observations weigh against the *Criteria and Procedures* being responsible. First, in our discussions with local providers it was clear that they attributed the increase in applications to the CAFA program and not to the introduction of the *Criteria and Procedures*. The change in procedures after September 12 was not widely publicized and the assigned counsel administrator who had been in place at the time (prior to the appointment of the supervising attorney) did not believe there had been any change in the inclination of defendants to apply for counsel as a result. The introduction of CAFA, by contrast, made a clear and material difference to the likelihood an application would be forthcoming from a defendant.

Second, the number of arraignments taking place during the months of September, October and November has varied considerably in past years in this county, certainly enough to make this 6.6% jump a statistical anomaly. In 2010, for example, 359 arraignments took place in these months; in 2014 the number was just 261 – a 27% drop.<sup>30</sup> Expressed differently, these three months accounted for over 28% of the annual total of 1,276 arraignments in 2010, but under 23% of the 1,146 in 2014 – a swing equivalent to around 60 cases. In this context, a shift of 6.6% (around 20 arraignments across those three months) on historical averages should be considered to be well within normal historical ranges.

Given the many confounding factors which accompanied the roll-out of the *Criteria and Procedures*, we are reluctant to conclude that the increased number of applications received after the *Criteria and Procedures* was a direct result of their implementation, therefore. Nevertheless, we note that if the higher rate of applications after September 12 was in fact a consequence of *Criteria and Procedures* implementation, it would represent an increase of approximately 94 applications per year.<sup>31</sup>

### Eligibility rates

The data ILS received from Washington County suggests that the rate at which applicants were found ineligible for counsel was already declining prior to the implementation date of September 12. Indeed, the data suggest that not a single application was denied after July.<sup>32</sup> Figure 19 shows the ineligibility rate by month in the county for 2015 and 2016; Table 18 breaks out the numbers for relevant periods.

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<sup>30</sup> The data were obtained from the Division of Criminal Justice Services and are on file with ILS.

<sup>31</sup> We took the total number of applications received for the 365 day period prior to and including September 11, 2016 (1,423). A 6.6% increase would have represented approximately 94 additional applications.

<sup>32</sup> In conversation with the providers in late November, 2016, we did learn one individual had been denied counsel in the later part of that month.

Figure 19: Percentage of Applications Found Ineligible in Washington County, 2015-2016

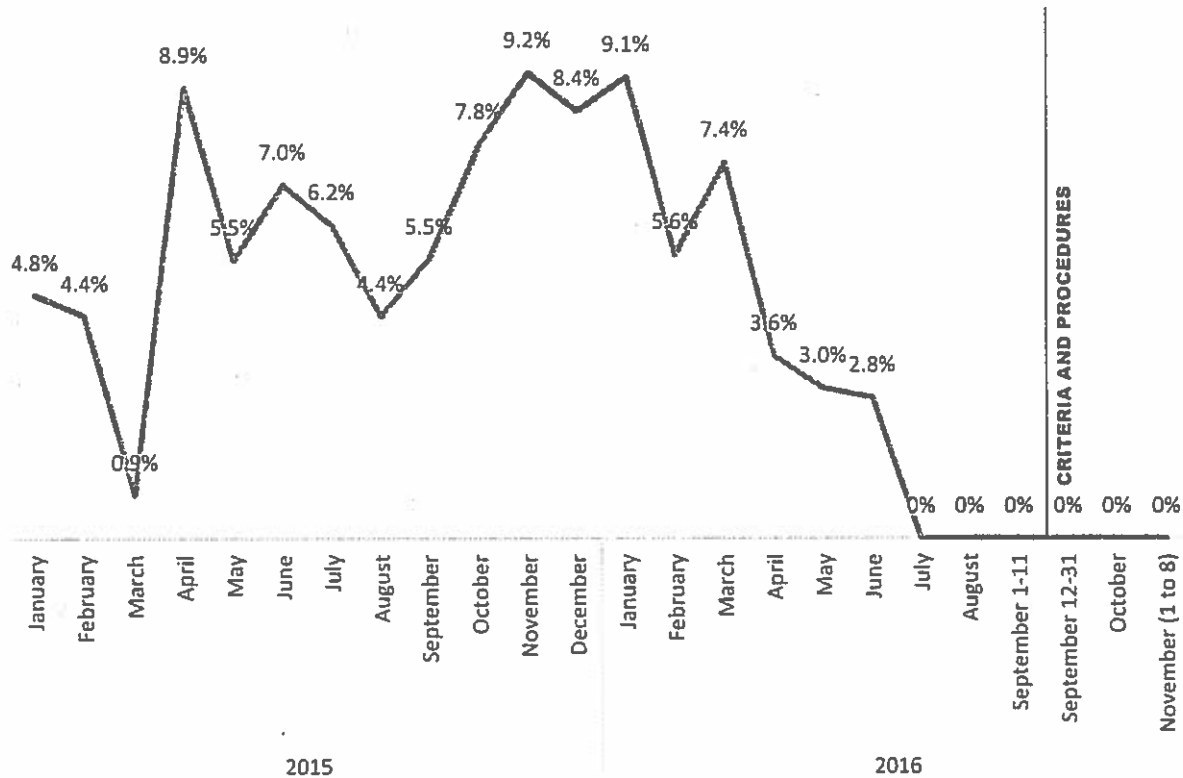


Table 18: Ineligibility Rate in Washington County Before and After Criteria and Procedures Implementation

Period	Ineligibility rate
2015	6.0%
2016 to June 30	5.2%
2016 July 1 to September 11	0.0%
2016 September 12 to November 8	0.0%

Since the implementation of the *Criteria and Procedures*, the rate at which persons have been deemed ineligible in Washington County has essentially declined to zero from a historical level of between five and six percent. Figure 19 suggests that decline may even date back to April, 2016, when the *Criteria and Procedures* were first published. Assuming that the rate of 6%, seen across 2015, is the most appropriate historical benchmark, this would translate into a caseload increase of approximately 86 cases a year, or an increase of 6.4%.<sup>33</sup>

<sup>33</sup> Assuming 1,423 applications were received (see *supra* note 31), the historical ineligibility rate of 6.0% would have resulted in 85 being rejected for representation.

