NEW YORK STATE
Unified Court System
OFFICE OF COURT ADMINISTRATION
LAWRENCE K. MARKS
CHIEF ADMINISTRATIVE JUDGE

EILEEN D. MILLETT
COUNSEL

MEMORANDUM

To: All Interested Persons

From: Eileen D. Millett

Re: Request for Public Comment on Adopting a New Section 205.19 of the Uniform Rules of the Family Court to Develop Uniform Standards of Eligibility for Assigned Counsel That Would Apply in All Family Court Proceedings

Date: June 3, 2022

==========

The Administrative Board of the Courts is seeking public comment on a proposal, proffered by the Chief Judge's Commission on Parental Legal Representation (the "Commission"), to issue a new Section 205.19 of the Uniform Rules of the Family Court (Exhibit A, 22 NYCRR § 205.19) that would implement a uniform standard of eligibility for assigned counsel that would apply in all Family Court proceedings and would include a presumption of eligibility for counsel in child welfare proceedings. (Exhibit B – *Interim Report to the Chief Judge*, p. 30.) The Commission, chaired by former Presiding Justice Karen Peters, proposed in its February 2019 *Interim Report to Chief Judge Janet DiFiore* (Ex. B) that uniform standards of eligibility in Family Court proceedings be developed and implemented. The Office of Indigent Legal Services has developed these uniform standards and issued the *Standards for Determining Financial Eligibility for Assigned Counsel* in revised form on February 16, 2021 (Exhibit C – "ILS standards"). The proposed rule (Ex. A) closely tracks the ILS standards and provides the uniformity recommended by the Commission for all assignments of counsel for adults in civil cases pursuant to Family Court Act § 262, Surrogates Court Procedure Act § 407, and custody and visitation proceedings in Supreme Court under Judiciary Law § 35(8).

In the specific context of Family Court child welfare proceedings, the proposed rules state that counsel must be provided:

> (i) upon the filing of a petition or pre-petition request under Article 10 of the Family Court Act for an order for immediate removal of a child or temporary order of protection; (ii) where the court has received notice of an

> extra-judicial emergency removal of a child; or (iii) upon the filing of a petition alleging abuse or neglect against the parent or person legally responsible.

(Ex. A, Section 205.19 (a)(3)). According to the proposed rules, counsel may be provided during the investigative phase of a child protective proceeding prior to the filing of a petition. Tracking the ILS standards (Ex. C), the proposed rules provide several presumptions of eligibility, including, among others, cases in which the person seeking counsel earns at or below 250% of the federal poverty level, is confined or incarcerated, is receiving need-based public assistance or, within the past six months, has received assigned counsel in another proceeding (Ex. A, Section 205.19 (b)).

The Commission submits that the promulgation of such a court rule is authorized under the New York State Constitution, according to *Levenson v. Lippman,* 4 N.Y.3d 280 (2005). The Commission further states that the promulgation of Section 205.19 falls within the Chief Administrative Judge's regulatory power, in conjunction with the Administrative Board, under the New York State Constitution and supervisory authority over the courts under the Judiciary Law and Family Court Act. *See* NY Constitution Article VI §28(b); Judiciary Law §212(1); Family Court Act §212(a). The Commission also notes that many public hearings were conducted in 2018 and 2019 in advance of drafting the proposed rules, with four public hearings devoted to the issue of financial eligibility issues. The Commission submits that there was widespread support for uniform eligibility standards and for timely access to counsel, especially when the loss of the care of a child is at issue.

==========

Persons wishing to comment on the proposal should e-mail their submissions to rulecomments@nycourts.gov or write to: Eileen D. Millett, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York, 10004. Comments must be received no later than August 3, 2022.

All public comments will be treated as available for disclosure under the Freedom of Information Law and are subject to publication by the Office of Court Administration. Issuance of a proposal for public comment should not be interpreted as an endorsement of that proposal by the Unified Court System or the Office of Court Administration.

Exhibit A

Section 205.19 (additions underlined):

Section 205.19. Financial eligibility for publicly funded counsel.

A person entitled to publicly funded counsel pursuant to section 262 of the Family Court Act, section 407 of the Surrogate's Court Procedure Act, or section 35(8) of the Judiciary Law shall be financially eligible for counsel when the person's current available resources are insufficient to pay for a qualified private attorney, the expenses necessary for effective representation, and the reasonable living expenses of the person and any dependents. Counsel shall be provided unless the person is conclusively ineligible based upon the criteria in this section. The provisions of this section shall be applied uniformly, consistently, and with transparency.

(a) Timely access to counsel.

(1) Counsel shall be provided at the first court appearance or immediately following the request for counsel, whichever is earlier. Eligibility determinations shall be made in a timely fashion so that representation by counsel is not delayed.

(2) Counsel shall be provided to persons who have not obtained counsel prior to initiation of a proceeding which may result in detention, in removal of children from their care or where there is an unavoidable delay in the eligibility determination, subject to judicial approval once the court proceeding has begun. For timely access to counsel, a person seeking counsel prior to the filing of a petition shall be provided with the contact information of the entity which has the primary responsibility in the jurisdiction for providing representation.

(3) A parent or legally responsible person, as defined by law, shall be entitled to and provided with immediate representation by counsel: (i) upon the filing of a petition or pre-petition request under Article 10 of the Family Court Act for an order for immediate removal of a child or temporary order of protection; (ii) where the court has received notice of an extra-judicial emergency removal of a child; or (iii) upon the filing of a petition alleging abuse or neglect against the parent or person legally responsible. In accordance with this entitlement, counsel shall be provided sufficiently in advance of the person's first court appearance and shall also be provided for parents during a child protective agency investigation, consistent with paragraph (2) of this subdivision.

(b) Presumptions of eligibility. The following presumptions of eligibility shall apply and are rebuttable only where there is compelling evidence that the person seeking counsel has the financial resources sufficient to pay for a qualified private attorney, the expenses necessary for effective representation in this and related proceedings, and the reasonable living expenses of the party and any dependents:

(1) The person's net income is at or below 250% of the Federal Poverty Guidelines, provided, however, that a person with an income in excess of 250% of the guidelines shall not be denied counsel if other criteria are met;
(2) The person is incarcerated, detained, or confined to a mental health institution;
(3) The person is currently receiving, or has recently been deemed eligible pending receipt of, need-based public assistance, including but not limited to Family Assistance (TANF), Safety Net Assistance (SNA), Supplemental Nutrition Assistance (SNAP), Supplemental Security Income (SSI)/New York State Supplemental Program (SSP), Medicaid, or Public Housing assistance; or
(4) The person has, within the past six months, been deemed financially eligible for counsel in another court proceeding in that jurisdiction or another jurisdiction.

(c) Additional considerations. The following factors shall be considered in determining a person's financial eligibility for publicly funded counsel:

(1) Debts and other financial obligations, including the obligation to provide reasonable living expenses of the person and his or her dependents; and
(2) The actual cost of retaining a private attorney in the relevant jurisdiction for the type of matter for which publicly funded counsel is sought.

(d) Exclusions from assets of an applicant seeking publicly funded counsel.

(1) Non-liquid assets shall not be considered unless such assets have demonstrable monetary value and are readily convertible to cash without impairing the person's ability to provide for the reasonable living expenses of themselves and their dependents. Ownership of a vehicle shall not be considered where such vehicle is necessary for basic life activities. The person's primary residence shall not be considered unless the fair market value of the home is significant, there is substantial equity in the home, and the person is able to access the equity in an amount and within a time-frame sufficient to retain private counsel promptly.

(2) Any income from receipt of child support or need-based public assistance shall not be considered in determining eligibility for publicly funded counsel.

(3) Third-party resources. The resources of a third party shall not be considered available to the person seeking publicly funded counsel unless the third party expressly states a present intention to pay for counsel, the person seeking counsel gives informed consent to this arrangement, and the arrangement does not interfere with the person's representation or jeopardize the confidentiality of the attorney-client relationship. Neither the resources of a spouse nor the resources of a parent of a person seeking publicly funded counsel shall be considered, except as provided in this subdivision.

(e) Process for determining eligibility.

(1) Each judicial district shall establish a procedure developed in accordance with guidelines and a uniform screening tool promulgated and approved by the Chief

Administrative Judge. The court has the ultimate authority to determine eligibility but may delegate the responsibility for screening and making an eligibility recommendation to entities that are independent and conflict-free, including, but not limited to, entities providing representation.

(2) The eligibility process, including the documentation required to be submitted, shall not be unduly burdensome for the person seeking publicly funded counsel. Counsel shall not be denied where the person has made a good faith, but unsuccessful, effort to produce required documentation or has made minor inadvertent or technical errors. Nor shall a person be required to demonstrate an unsuccessful effort to retain private counsel to be deemed financially eligible for publicly funded counsel.

(3) The court or delegated screening entity shall preserve the confidentiality of the information presented as part of the financial eligibility determination and shall take steps to ensure that the screening and determination are done in a confidential setting and that information identifying the person seeking counsel is not accessible to the public.

(f) Reconsideration and review of a denial of publicly funded counsel.

(1) A determination denying counsel by either the court or delegated screening entity shall be in writing, shall include reasons for the denial and procedure for seeking reconsideration, and shall be provided to the person seeking counsel.

(2) In addition to a procedure for seeking prompt reconsideration from the court or delegated screening entity, each judicial district shall establish a procedure for prompt supervisory administrative review upon request by a person who has been denied publicly funded counsel or for whom an order for payment under section 722-d of the County Law has been issued. These procedures shall be in writing, shall be posted on the judiciary's public website and in each courthouse, and shall be furnished to any person who has been denied publicly funded counsel or who has been issued an order directing payment under section 722-d of the County Law.

Exhibit B

Commission on Parental Legal Representation

Interim Report to Chief Judge DiFiore

FEBRUARY 2019

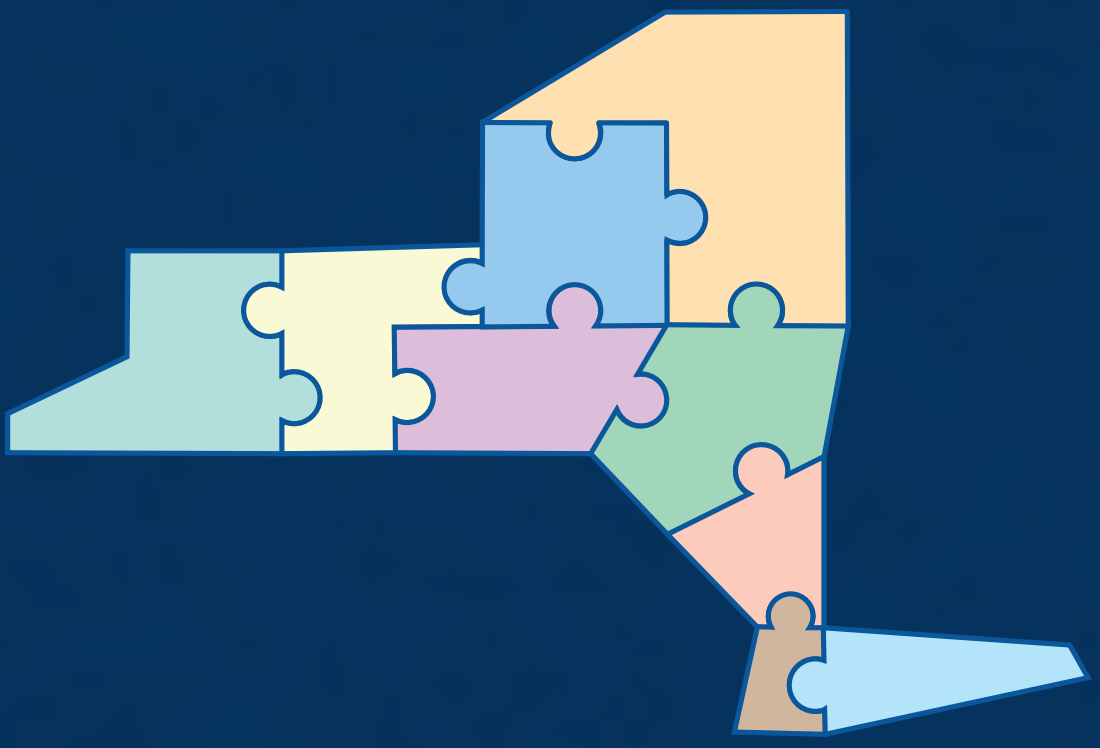

TABLE OF CONTENTS

PREFACE

On behalf of the Commission on Parental Legal Representation, I present this Interim Report. Created just one year ago, Chief Judge DiFiore has charged us with examining the current state of mandated Family Court representation.

The twenty members of the Commission have held public hearings across the state, considered advice from experts and sought input from members of the judiciary, parents, panel attorneys, and institutional providers. As we conducted our searching inquiry, we were acutely aware that at the southern border of our country children were being snatched from the arms of their parents by immigration authorities and separated from each other for weeks or months. And as we watched these family tragedies unfold, we decried the lack of due process - the basic right to receive advice and counsel and the opportunity to be heard before a child is separated from a parent.

Here in New York the right of parents to publicly funded legal representation in child welfare cases is well established and has been expanded to encompass a broad range of matters affecting fundamental family rights and interests. Yet, during the hearings we held across our state, we heard testimony from attorneys and parents to the effect that children are removed from their parents every day and that often - but not always - both parents and children have counsel to assist them through this heart wrenching experience. And we learned that when counsel is provided, the attorney is often overloaded with cases, overworked and underpaid.

As I heard the testimony of each and every witness in Rochester, Albany, Mineola and New York City, read every word of each written testimony received and chaired each meeting of the dedicated Commissioners, I am compelled to share some personal observations. Having served as both an assigned counsel and an attorney for the child prior to becoming a judge, I was profoundly impressed by the dedication shown and frustration expressed by most attorneys who testified before us. Moreover, my more than three decades of judicial experience on the Family, Supreme and Appellate Division of this great state convince me that while the problems described by both parents and attorneys are deeply entrenched, our proposed transformation of child welfare representation will serve the needs of our children and parents and guarantee due process.

Every parent and child in our Empire State must receive timely, quality legal counsel before a family unit is torn asunder. Our focus upon child welfare matters in our Interim Report reflects our grave concern that the crisis in legal representation for parents in this arena requires immediate attention. The members of the Commission are unanimous in their belief that a transformation of our publicly funded system of parental representation in child welfare matters is urgently needed. While representing diverse perspectives, the Commissioners speak with one voice in this, our Interim Report.

On behalf of all members of the Commission I express my deepest appreciation to our Counsel, Janet Fink, our co-counsel Shane Hegarty and our Special Advisor Angela Burton, as well as Cynthia Feathers and Lucy McCarthy.

We continue to be inspired in our work by Chief Judge DiFiore's commitment to strengthening the quality and efficiency of Family Court representation. This year we will continue to fulfill our broad mission to provide a blueprint for how our state can strengthen the quality and efficiency of Family Court representation to ensure fairness and effectiveness for our entire family justice system.

Karen K. Peters

EXECUTIVE SUMMARY

In her February 6, 2018 State of Our Judiciary address, Chief Judge Janet DiFiore announced the creation of the Unified Court System's Commission on Parental Legal Representation. The Commission's mandate is to examine the current state of representation for indigent parents in constitutionally and statutorily mandated family-related matters, and to develop a plan to ensure the future delivery of quality, cost-effective parental representation across the state.[1]

After a searching inquiry, comprehensive review of the evidence, and thoughtful deliberation, the Commission concludes that a complete transformation is urgently needed in New York's publicly funded system of parental representation in child welfare[2] matters. Our conclusion is not a revelation. The systemic problems in our underfunded, county-based system are well-documented, as are the harmful effects of inadequate representation on families and Family Courts. For decades, reports have chronicled the crisis in parental representation, particularly regarding child welfare proceedings. Instances of inadequate representation, delays in access to representation, and the outright denial of representation, are all too frequent.

The crisis in parental legal representation goes to the core of the judicial function - to make "reasoned determinations of fact" and "proper orders of disposition."[3] Without meaningful parental representation, Family Courts may lack the comprehensive information and evidence needed to make reasoned determinations and render proper dispositional orders. Without State funding and oversight, attorneys lack all the resources necessary to deliver the effective assistance to which parents are constitutionally entitled. Those messages clearly emerged in testimony to the Commission.

In addressing lapses in the quality of parental representation, the Commission points to the lack of the resources and support attorneys require to deliver consistently effective representation. The Commission emphasizes the need for significant and swift State action to address systemic problems, thus enabling attorneys to provide effective representation and Family Courts to make sound decisions that will best meet the needs of families.

---

1 Chief Judge Janet DiFiore, The State of Our Judiciary 2018, p. 14, New York State Unified Court System (Feb. 6, 2018), available at http://www.nycourts.gov/ctapps/news/annrpt/AnnRpt2018.pdf.

2 In this Interim Report, the terms, "child welfare," "child protective," and "State intervention" are used interchangeably and refer generally to abuse and/or neglect proceedings pursuant to Article 10 of the Family Court Act, as well as foster care placement, termination of parental rights, surrender, destitute minor, and permanency planning proceedings. Child protective services agencies are referred to as "CPS" or "DSS" agencies.

3 Family Court Act § 261.

In creating this Commission, Chief Judge DiFiore emphasized that the court system is "focused on supporting the well being of children by supporting the legal needs of their parents."[4] Testimony provided to the Commission made it clear that inadequate representation of parents has a particularly pernicious impact in state intervention proceedings: it can cause the unnecessary separation of children from their families. Such avoidable separations cause avoidable disruption, stress, and trauma to families and avoidable financial cost to government. For these reasons, the Commission has determined that decisive remedial action is needed most urgently in the child welfare realm. While we defer, for now, our recommendations about how to improve all parental representation mandated under Family Court Act § 262, we are mindful that child welfare cases are often interconnected with other types of Family Court cases. As explained by one witness, parents' attorneys represent *people*, not cases:

> *The child support willfulness case that morphed into a custody case that grew into a family offense which sprouted a neglect that invited the grandparents' guardianship petition–the Assigned Counsel is there throughout. Parental representation in Family Court means representing respondents, petitioners, and interested parties.*[5]

[4] State of Our Judiciary, *supra* n 1.

[5] Written testimony of Rhonda Weir, Association of Private Court Assigned Counsel, Appellate Division, Second Department.

SUMMARY OF RECOMMENDATIONS

1. We recommend that parents be timely provided with relevant information about the right to counsel, and that parents be granted access to counsel during a child protective agency investigation and sufficiently in advance of the first court appearance.

2. We recommend the establishment of a State Office of Family Representation (the Office) to provide oversight of parental representation. That Office, in turn, would oversee representation in child welfare cases by institutional offices and well-resourced attorneys to ensure the delivery of client-centered, interdisciplinary, holistic parental representation throughout the state.

3. We recommend that the proposed Office of Family Representation develop uniform standards of eligibility for assigned counsel that would apply in all Family Court proceedings, and would include a presumption of eligibility for counsel in child welfare proceedings, to be established by legislation.

4. We recommend that the State fund a study to determine appropriate maximum caseload standards for attorneys representing parents in Family Court proceedings. Until such a study has been completed, we recommend a caseload maximum for attorneys representing parents in child welfare cases of 50 to 60 pending clients per attorney, to be established by legislation or rule.

5. We recommend that the State pay for all costs associated with parental representation in child welfare proceedings to ensure quality representation and eliminate disparities among localities.

6. We recommend that the hourly rates for assigned attorneys be increased to $150 per hour, and a mechanism for periodic review and adjustment be instituted.

INTRODUCTION

New York parents who are unable to afford a lawyer have a constitutional and statutory right to publicly funded legal representation in many types of family law cases[6] ("mandated parental representation," "parental representation," or "representation"). When codifying the parental right to counsel in the Family Court Act in 1975, New York delegated fiscal and administrative responsibility for its implementation to the counties,[7] just as it had done in 1965 with the constitutional right to counsel for persons accused of a crime. In the ensuing decades, indigent litigants in New York's criminal courts and Family Courts often have not received effective representation. New York has made significant strides in improving the representation of indigent criminal defendants in recent years.[8] However, parental representation in Family Court cases has been excluded from these reforms.

In her State of Our Judiciary address on February 6, 2018, Chief Judge Janet DiFiore observed that New York's parental representation system "has suffered from many of the same deficiencies that once afflicted our criminal defense system, including excessive attorney caseloads, inadequate training, and insufficient funding for support staff and services." She declared that the Unified Court System is committed to "supporting the well-being of children by supporting the legal needs of their parents." To that end, Judge DiFiore gave the Commission on Parental Legal Representation the mission of examining the current state of parental representation and developing a plan "to ensure the future delivery of quality, cost-effective parental representation" across the State.[9]

The Commission is chaired by the Hon. Karen K. Peters, former Presiding Justice of the Appellate Division, Third Department, who served for a decade as a Family Court Judge in Ulster County. The diverse group of 20 Commissioners, listed in Appendix A, includes a parent affected by the child welfare system, judges, legal service providers, child welfare experts, and county and State officials. Public hearings were held in fall 2018 in Rochester, New York City, Albany, and Mineola. The Commission received written and oral testimony from a broad range of persons with diverse perspectives. The witnesses, listed in Appendix B, included parents, parent advocates, Family Court judges, attorneys serving at institutional offices and on assigned counsel panels, representatives of community organizations, the New York State Bar Association and

6 *Matter of Ella B.*, 30 NY2d 352 (1972); Family Court Act §§ 261, 262; Surrogate's Court Procedure Act § 407. The parental right to assigned counsel applies in cases involving custody, visitation, guardianship, paternity, and family offenses, in addition to cases involving alleged child neglect or abuse, foster care, termination of parental rights, and adoption. Individuals charged with contempt of court or willful violation of a Family Court order (with the potential for incarceration) are also entitled to assigned counsel. Further, a judge may assign an attorney to represent an adult in any other Family Court proceeding, upon a determination that "such assignment of counsel is mandated by the constitution of the state of New York or of the United States." Family Court Act § 262 (b).

7 Family Court Act § 262 (c).

8 For a discussion of the history of reform in New York's indigent criminal defense system, see William J. Leahy, *The Right to Counsel in the State of New York: How Reform was Achieved After Decades of Failure*, 51 Indiana L Rev 145 (2018); see also *Hurrell-Harring v State of New York*, 66 AD3d 84, *affd as mod* 15 NY3d 8 (2010).

9 State of Our Judiciary 2018, *supra* n 1.

local bar associations, as well as representatives from national organizations concerned with the quality of representation in child welfare proceedings. The Commission also met regularly to discuss the testimony and information provided, to formulate recommendations, and to hear from guest speakers, both from within New York State and nationally (listed in Appendix C). Finally, the Commission conducted and reviewed surveys of clients impacted by CPS agencies and Family Court; attorneys who practice in Family Court; Family Court judges; and the Commissioners.

The overwhelming weight of testimony received concerned child welfare cases, with the ever-present threat of separation of a child from his or her family by the State. Child welfare proceedings in New York are governed primarily by Article 10 of the Family Court Act. The statutory scheme is designed "to establish procedures to help protect children from injury or mistreatment and to help safeguard their physical, mental and emotional well-being[,]" and "to provide a due process of law for determining when the state, through its family court, may intervene against the wishes of a parent on behalf of a child so that his needs are properly met."[10] Effective representation for parents protects constitutional rights; contributes to the efficient functioning of the child welfare system; and ensures that judges receive the most accurate and complete information upon which to make life-altering decisions about families.[11] Without effective parental representation, courts may only have information about the parent and the parent's family from CPS, which is most often in an adversarial position to the parent.

Numerous witnesses recounted the enormous costs to families and the State caused by inadequate parental representation in child welfare cases. Children can face unnecessary, prolonged and sometimes permanent separations from their families and communities, resulting in confusion, mistrust, trauma, and an irreparable sense of loss.[12] The State must pay for court-related costs, as well as significant expenses related to foster care, guardianship, and adoption subsidies. Just as the costs of inadequate representation are great, the benefits of meaningful representation are profound: more individualized social services to families in crisis; fewer unwarranted removals of children; more placements of children with relatives; earlier reuniting of children and parents; and faster permanency through guardianship or adoption.[13]

---

10 Family Court Act § 1011.

11 *See e.g.* Information Memorandum, *High Quality Legal Representation for All Parties in Child Welfare Proceedings*, Children's Bureau, Administration for Children and Families, United States Department of Health and Human Services, ACYF-CB-IM-17-02 (Jan. 17, 2017), available at https://www.acf.hhs.gov/sites/default/files/cb/im1702.pdf.

12 *See Nicholson v. Scoppetta*, 3 NY3d 357, 379-80 (in deciding whether to remove a child, courts must do more than identify the existence of a risk of serious harm, "[r]ather, a court must weigh….whether the imminent risk to the child can be mitigated by reasonable efforts to avoid removal" and "balance that risk against the harm removal might bring… ".); *see also Removal from the Home: Resulting Trauma*, The UPenn Collaborative on Community Integration, available at http://tucollaborative.org/wp-content/uploads/2017/04/Trauma-The-Impact-of-Removing-Children-from-the-Home.pdf; Joseph J. Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effect of Foster Care*, 97 Amer Econ Rev 1583, 1584 (2007) (concluding that significant benefits from foster care placement appear unlikely for children at the margin of foster care placement), available at http://www.mit.edu/~jjdoyle/fostercare_aer.pdf.

13 *See e.g.* Vivek S. Sankaran, *Using Preventive Legal Advocacy to Keep Children from Entering Foster Care*, 40 Wm Mitchell L Rev 1036 (2014); Mark E. Courtney and Jennifer Hook, *Evaluation of the Impact of Enhanced Parental Legal Representation on the Timing of Permanency Outcomes for Children in Foster Care*, Children & Youth Serv Rev, Vol. 34(7) (July 2012).

For all these reasons, the Commission decided to focus on child welfare proceedings in this Interim Report and address other aspects of parental representation in our Final Report. Moreover, the longevity of the crisis validates our resolve that prompt action by the State is required to transform child welfare parental representation. Our Final Report will provide further discussion and recommendations regarding measures that can yield high quality, cost-effective representation in all mandated parental representation, at both the trial and appellate levels.

GUIDING PRINCIPLES

Several fundamental principles emerged from the Commission's discussions, and provide a general framework for our Initial Recommendations regarding how to transform the delivery of parental representation in child welfare cases.

- **Equal access to justice must be provided to parents, children, and their families.** In our Family Courts, the rights and interests of children, parents, and families of limited means are no less important than the rights and interests of more financially advantaged New Yorkers. Moreover, these recommendations are made with regard to all parents in New York, irrespective of their immigration status.
- **The dignity of parents, children, and their families must be respected.** Due regard must be given to the effects of policies, procedures, and actions of government on the quality of parents' interactions with the child protection and Family Court systems, and on the well-being of children and their families.
- **Parental legal representation services must have real value.** Publicly funded legal services for parents must enhance outcomes for children, parents, and families and may advance the efficient and effective functioning of the courts.
- **The Commission's recommendations must be feasible**. Suggested reforms must be practically and fiscally viable.

THE PARENTAL RIGHT TO COUNSEL IN NEW YORK: A BRIEF HISTORY

An integral part of the Unified Court System established by the State Constitution, the New York Family Court was created in 1962 to replace the Children's Court.[14] The Family Court Act "defines the conditions on which the Family Court may intervene in the life of a child, parent and spouse," and gives Family Court judges "a wide discretion," "grave responsibilities," and "a wide range of powers for dealing with the complexities of family life."[15]

Parents have a fundamental liberty interest in the care and custody of their children as a component of the constitutionally protected right to family integrity and autonomy.[16] In child welfare cases, those rights are threatened, as parents face the potential temporary or permanent loss of custody of their child to the State, and sometimes the possibility of criminal charges.[17] Moreover, the legal rights and interests of children in the parent-child relationship are at stake in child welfare proceedings.[18] The New York Court of Appeals has acknowledged the fundamental principle that, just as a parent has a right to rear his or her child, the child has a right to be reared by his or her parent.[19] Similarly, the U.S. Supreme Court has observed that, in termination of parental rights proceedings, until the State proves parental unfitness, "the child and his parents share a vital interest in preventing erroneous termination of their natural relationship."[20]

New York has long recognized a parent's right to counsel in proceedings affecting family relationships. In a pioneering 1972 decision, *Matter of Ella B.*, 30 NY2d 352, the New York Court of Appeals recognized the equal protection and due process rights of indigent parents to assigned counsel in child neglect cases. Three years later, Family Court Act §§ 261, 262, and 1120 codified a broad parental right to counsel. New York's parental right to counsel has expanded many times and now covers a range of family-related matters.[21] Additionally, numerous provisions throughout Article 10 of the Family Court Act address implementation of the parental right to counsel in child welfare proceedings.[22]

---

14 *See* NY Const, art. VI, § 1 (a); L 1962, ch 686; Family Court Act § 113.

15 Family Court Act § 141.

16 *See e.g. Troxel v Granville*, 530 US 57, 65 (2000) (interest of parents in care, custody, and control of their children is perhaps oldest of fundamental liberty interests recognized by the Court); *Parham v.* J. R., 442 US 584, 602 (1979) (our jurisprudence historically has reflected Western civilization concepts of family as unit with broad parental authority over minor children).

17 *Matter of Ella B.*, *supra* n 6; Family Court Act § 261.

18 *See e.g. Troxel v Granville, supra*, at 88 (Stevens, J., dissenting) (to the extent parents and families have fundamental liberty interests in preserving their intimate relationships, so do children); *Duchesne v Sugarman*, 566 F2d 817, 825 (2d Cir 1977) (reciprocal rights of both parent and children include children's interest in not being dislocated from emotional attachments derived from the intimacy of daily association with parent).

19 *Matter of Bennett v Jeffreys*, 40 NY2d 543, 546 (1976); *see also Rankel v County of Westchester*, 135 AD3d 731, 733 (2016) (parents have a liberty interest in care and custody of their children, and children have a parallel liberty interest in not being dislocated from their family).

20 *Santosky v Kramer*, 455 US 745, 760 (1982).

21 *See* Family Ct Act § 262, Surrogate's Court Procedure Act § 407, and Judiciary Law § 35 (8).

22 Family Court Act §§ 1022, 1022-a, 1023, 1024 (b) (iii), 1026 (a) (i), 1027 (a) (i), 1033-a, 1033-b, 1090 (b).

To implement the parental right to counsel, in 1975 the Legislature added parental representation to County Law Article 18-B, thereby requiring counties to shoulder the entire cost.[23] Three decades later, a comprehensive 2006 study, prepared for then Chief Judge Judith Kaye, found that this mandate had created a "severely fractured and under-funded system" of public defense.[24] The list of deficiencies documented by the Kaye Commission included, among others, the absence of clear standards for determining financial eligibility for counsel; the lack of statewide performance standards and a mechanism to enforce standards; excessive caseloads; lack of adequate support services and training; and minimal client contact and investigation.[25] Although focused exclusively on indigent criminal defense, the Kaye Commission observed that "identical problems affect representation of adults in Family Court. This representation, carried out by the same 18-B providers, with the same staff, under the same statutory scheme… needs to be addressed."[26]

Numerous studies and reports dating back at least 30 years have called attention to serious shortcomings in parental representation in child welfare cases.[27] The Commission's examination of the current system for providing parental representation in child welfare cases confirms that the crisis continues. Fortunately, oases of excellence exist and can guide reform efforts. Since 2007, the New York City Mayor's Office of Criminal Justice has adopted an interdisciplinary model of parental representation through contracts with the Bronx Defenders, Brooklyn Defender Services, the Center for Family Representation and Neighborhood Defender Services of Harlem. In these organizations, attorneys work with other professionals—including social workers, parent advocates, paralegals, investigators, and experts—to provide effective representation for parents in child welfare cases. This interdisciplinary "family defense" approach is deemed a best

---

23 Family Court Act § 262 (c); County Law Article 18-B.

24 The Spangenberg Group, *Status of Indigent Defense in New York: A Study for Chief Judge Kaye's Commission on the Future of Indigent Defense Services*, Final Report to the Chief Judge, pp ii-iv, 15-19 (June 2006).

25 Leahy, *The Right to Counsel in New York*, *supra* n 8.

26 Commission on the Future of Indigent Defense Services, Interim Report, p 16, n 27 (Dec. 1, 2005).

27 *See e.g.* Jules Kerness and Constance R. Warden, *Child Protection and the Family Court: A Study of the Processes, Procedures, and Outcomes Under Article Ten of the New York Family Court Act*, NYS Senate Standing Committee on Child Care (Sen. Mary Goodhue, Chair) (National Center on Child Abuse and Neglect, December 1989), available at https://www.ncjrs.gov/pdffiles1/Digitization/126665NCJRS.pdf; Roger Green and William Parment, *Losing our Children: An Examination of New York's Foster Care System* (NYS Assembly, Children and Families Committee and Oversight, Analysis, and Investigation Committee, May 1999) at 29; Mark Green & Child Planning & Advocacy Now (C-PLAN), *Justice Denied: The Crisis in Legal Representation of Birth Parents in Child Protective Proceedings* (May 2000); Appellate Division, First Department Committee on Representation of the Poor, *Crisis in the Legal Representation of the Poor: Recommendations for a Revised Plan to Implement Mandated Governmentally Funded Legal Representation of Persons Who Cannot Afford Counsel* (March 23, 2001); Child Welfare Advisory Panel, *Advisory Report on Front Line and Supervisory Practice: Special Report On Family Court*, Annie E. Casey Foundation (2000); *Families in Limbo: Crisis in Family Court, Recommendations and Solutions*, Child Welfare Watch (Winter 1999); Sherri Bonstelle and Christine Schessler, *Adjourning Justice: New York State's Failure to Support Assigned Counsel Violates the Rights of Families in Child Abuse and Neglect Proceedings*, 28 Fordham Urb L J 1151 (2001); Special Child Welfare Advisory Panel, *Advisory Report on Front Line and Supervisory Practice: Special Report On Family Court*, Annie E. Casey Foundation (2000), http://files.eric.ed.gov/fulltext/ED439189.pdf; Julia Vitullo-Martin and Brian Maxey, *New York Family Court: Court User Perspectives* (Vera Inst. of Justice (Jan. 2000); B. Harrow and S. Jacobs, *Report of the Parental Representation Working Group*, 70 Fordham L Rev 399 (2001); Ann Moynihan, et. al, *Foreword, Fordham Multidisciplinary Conference—Achieving Justice: Parents and the Child Welfare System*, 70 Fordham L Rev 287, 309-313 (2001).

practice model by national child welfare experts.[28] The model has been successfully implemented in other states, such as North Carolina, Washington, and Colorado.

Standards of practice are vital to effective parental representation. In 2015, the New York State Office of Indigent Legal Services (ILS) published Standards for Parental Representation in State Intervention Matters (ILS Parental Representation Standards),[29] designed to define the baseline for effective representation of parents in child welfare cases. These comprehensive standards built upon existing guidelines, performance standards, and best practices from around the State and the country, including standards for parental representation adopted by the American Bar Association (ABA)[30] and the New York Bar Association's child representation and mandated representation standards.[31] The Commission supports the client-centered, interdisciplinary, holistic approach embodied in the ILS Standards. Essential elements of such representation include timely entry of counsel and zealous advocacy throughout the representation.[32]

In recent years, State funding and oversight have led to significant improvements in the delivery of indigent criminal defense, while parental representation has been left behind. In 2014, the State settled a lawsuit[33] that charged the State and five named counties with systemic violations of the right of indigent criminal defendants to effective assistance of counsel. The State agreed to pay the costs to implement uniform financial eligibility standards; ensure counsel at arraignment; reduce attorney caseloads; and provide quality control measures and nonattorney professional services, such as investigators, social workers, paralegals, and experts. In 2017, statutory amendments expanded these reforms statewide, with the State to assume responsibility for the costs over a five-year period. ILS was given responsibility for developing and implementing plans for these reforms.[34] The funding and oversight reforms are not applicable to parental representation.

---

28 The federal government's indicators of whether parties are receiving quality, effective representation include whether parents' attorneys have access to other multi-disciplinary professionals as partners, team members or employees. *Indicators of Quality Legal Representation*, Attachment B, State Court Improvement Program (CIP) Program Instruction ACYF-CB-PI-12-02 (Children's Bureau, ACF, US DHHS (Jan. 11, 2012), available at http://www.acf.hhs.gov/sites/default/files/cb/pi1202.pdf. *See also* American Bar Association Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases, Standard 26 (attorneys should engage in case planning and advocate for appropriate social services using a multidisciplinary approach to representation when available), available at http://www.americanbar.org/content/dam/aba/publications/center_on_children_and_the_law/parentrepresentation/ABA-Parent-Attorney-Standards.authcheckdam.pdf, and ABA National Project to Improve Parental Representation: An Investment That Makes Sense, available at http://www.americanbar.org/content/dam/aba/administrative/child_law/ParentRep/At-a-glance%20final.authcheckdam.pdf.

29 https://www.ils.ny.gov/files/Parental%20Representation%20Standards%20Final%20110615.pdf.

30 American Bar Association *Standards of Practice*, *supra* n 28.

31 NYSBA, Standards for Attorneys Representing Children in Child Protective, Foster Care, Destitute Child and Termination of Parental Rights Proceedings (2015), available at https://www.nysba.org/StandardsforAttorneysRepresentingChildren; NYSBA, 2015 Revised Standards for Providing Mandated Representation, available at https://www.nysba.org/WorkArea/DownloadAsset.aspx?id=44644.

32 Preamble, ILS Standards for Parental Representation, supra n 29.

33 *Hurrell-Harring v State of New York* (Sup Ct, Albany Co, Index No. 8866/2007).

34 Executive Law § 832 (4).

The New York State Bar Association has endorsed a Report by its Committee on Families and the Law that supports State funding for mandated parental representation. The report, approved in April 2018, supports this proposition: "The State should pay the entire cost of mandated parental representation, or at least for the cost to elevate the quality of representation being provided, and should provide a mechanism for statewide oversight of such representation."[35]

In accordance with Chief Judge DiFiore's charge to "determine how best to ensure the future delivery of quality, cost-effective parental representation,"[36] in this Interim Report, the Commission offers a new vision for delivering high quality parental representation to all parents in every part of the State. Given the high stakes involved for families—as well as the courts—and the testimony dramatizing an ongoing crisis, the Commission has determined to focus on parental representation in child welfare cases as an initial matter. We stress that, although we leave for the Final Report a treatment of representation in other types of cases, our recommended structural changes transcend child welfare practice and would improve all parental representation. It is our hope that the State will take immediate steps to begin implementation of our Initial Recommendations.

[35] Memorandum in Support of State Funding for Mandated Parental Representation, p. 16, Families and the Law Committee, New York State Bar Association (January 2018) (adopted by the New York State Bar Association House of Delegates, April 14, 2018), available at https://www.nysba.org/familylawreport/.

[36] State of Our Judiciary 2018, *supra* n 1.

INITIAL RECOMMENDATIONS

NO. 1 – TIMELY ACCESS TO COUNSEL

RECOMMENDATION

We recommend that parents be timely provided with relevant information about the right to counsel, and that parents be granted access to counsel during a child protective agency investigation and sufficiently in advance of the first court appearance.

The Commission's recommendation that attorneys be made available during a child protective investigation contemplates changing when and how indigent parents access legal representation in child welfare proceedings. Testimony to the Commission, and our own research, convince us that families, the child welfare system, and Family Courts will benefit when parents have timely access to counsel.

This recommendation cannot be implemented under the current practice, whereby a parent's access to counsel is contingent on the filing of a petition by CPS and the parent's appearance in court. In the next section, "State Oversight and Infrastructure," we detail a proposal for revamping the way parental representation is delivered that does not hinge on a parent's appearance in court. Giving parents representation when it matters – before they appear in court - is consistent with principles of equal protection and due process; can prevent unnecessary and prolonged separation of children from their parents; and can mitigate the disruption and trauma that accompanies State intervention into the family. Timely access to counsel may also help reduce the disproportionate percentage of children of color in New York's foster care system.[37]

In recommending that parents have access to counsel during the investigation stage of a child welfare proceeding, the Commission is keenly aware of the responsibility of CPS agencies to investigate alleged maltreatment to protect children. In that regard, the New York State Defenders Association (NYSDA) testified that: "Fears that timely representation for parents will prevent child welfare agencies from protecting children in state intervention matters are misplaced. At-

[37] Written testimony of Joyce McMillan ("When looking at the number of removals from communities of color vs. white communities it is clear that communities of color are targeted by the child welfare system…The lack of timely and full legal representation for parents involved with CPS is indicative of a system that continues to disrespect and disregard the value of family in select communities….".); *see also* Written testimony of the Legal Aid Society, Juvenile Rights Division, New York City (discussing racial inequities in the child welfare system).

torneys…can play a vital role…for parents at a time of crisis and even prevent the situation from escalating to the removal of a child from the home."[38] Notably, Alan Sputz, Deputy Commissioner of the NYC Administration for Children's Services (ACS), agreed that early discussions among counsel produce valuable benefits—such as identifying potential family resources, formulating feasible visiting arrangements, and enhancing productive outcomes at the first court appearance—so that initial release or placement orders are based on full and accurate information.[39]

Any parent faced with an investigation by CPS and the possibility of their child being taken into custody by the State would understand the need for legal advice and counsel in that moment. Rather than an offer of assistance to the family, some parents experience a CPS investigation as a prosecution—a search for parental wrongdoing, as several witnesses explained. For example, Angeline Montauban, a parent who regained her child from foster care after five years, testified: "Once ACS comes into your life…they are literally prosecuting you. They are…finding reasons why they are in your life [and]…why they should keep your child in foster care basically."[40] Jeannette Vega, a parent affected by the child welfare system and Training Director at Rise Magazine, summarized parents' experiences as follows:

> *I did a little focus group at work and spoke to parents who had the investigation phase of a child welfare case, and they felt so defeated. You have people coming into your home, and they are so intrusive, they come in, tell you what they are going to do, what you are going to do with your family, and unless…you are privileged and have money to afford a private attorney, you don't get that…before it goes to court, these workers are investigating and…talking to people and just going within your community, talking to your neighbors, your children's school, their doctors. It is so intrusive, and as a parent you don't know what you can and cannot do at this point in time of a case…it is just frustrating that we cannot go to the court, and say…this is happening, child welfare is intruding in my life, and you cannot get assistance…unless you can afford a private attorney.*[41]

Parents who are financially able invariably seek legal representation when CPS initiates an investigation. However, New York currently does not provide representation to parents of limited means during the investigation stage of a child welfare proceeding. In fact, as numerous wit-

38 Written testimony of the New York State Defenders Association. *See also* Oral testimony of Tehra Coles, Litigation Supervisor, Center for Family Representation (describing Project Engage, a pilot program between the New York City Administration for Children's Services (ACS) and the Center for Family Representation (CFR), involving pre-petition parental representation: "[T]he ACS investigative process was neither stalled nor interfered with. ACS continued its investigation and communicated regularly with the CFR social worker about ACS concerns and what needed to be done to preserve the safety of the children.")

39 Written testimony of Alan Sputz, Deputy Commissioner, New York City Administration for Children's Services.

40 Oral testimony of Angeline Montauban, New York City Public Hearing.

41 Oral testimony of Jeannette Vega, New York City Public Hearing.

nesses testified, and case law confirms,[42] indigent parents are sometimes not provided with legal representation at critical stages when it is constitutionally promised—during court hearings at which a judge decides whether to remove a child into government custody or to continue an extrajudicial CPS removal that has already occurred.

For example, Robert Convissar, Administrator of the Assigned Counsel Program in Erie County, identified an alarming situation that would occur prior to establishing an "Attorney of the Day" program (for which attorneys are not paid): "[R]emands were often heard in the absence of legal counsel for the parents. *Children were literally taken away from parents in absence of legal counsel.*"[43] Kate Woods, Deputy Director of Operations for Legal Assistance of Western New York (LAWNY) testified: "Often, the most critical moment in any Article 10 proceeding is the removal hearing. The outcome of that hearing—whether or not a child is taken from his or her home—dictates the tone of all of the litigation that follows." Where Ms. Woods practices, the vast majority of removal hearings take place before the petition is filed. Further, parents are given little notice of the hearing and are sometimes unable to attend. "In those instances where the parents are present, they are without counsel…[and] parents have requested counsel at a removal hearing and [have] been denied. The impact on their due process rights cannot be overstated."[44] Data provided to the Commission by the Office of Court Administration indicates that, during the period 2015 through 2018, in 2,521, or 12% of cases in which a child was removed at an initial appearance, a parent was present in court but was not accompanied by counsel. The data confirms the urgent need to ensure that parents have representation in advance of the first appearance in court.

In 1990, amendments to the Family Court Act were enacted to ensure that indigent parents involved with CPS could obtain publicly funded representation before the commencement of a court proceeding. Family Court Act §§ 1021 to 1024 and 1026 require that parents be given written notice of their right to counsel and instructions for obtaining a free lawyer whenever a child is removed before a court proceeding is initiated. The notice requirement, enacted as a result of a comprehensive study of child welfare proceedings in New York's Family Courts, aims to facilitate parents' access to counsel at "critical stages" of CPS intervention before a court petition is filed.[45]

Despite these statutory measures, the prevalent practice is that parents are not informed of their right to counsel unless and until CPS files a petition. Moreover, in many cases, even if a parent is informed of the right to counsel upon appearing in court, he or she may not actually meet with the assigned lawyer until much later, after the issuance of orders that significantly impact the family. Carla Palumbo, President and CEO of the Legal Aid Society of Rochester, told the Com-

42 See e.g. *In re Hannah YY*, 50 AD3d 1201 (2008) (adjudication of neglect reversed; respondent was not advised of her right to counsel until after removal hearing was over, at which point Public Defender's office was assigned to represent her).

43 Written testimony of Robert Convissar, Administrator, Erie County Assigned Counsel Program (emphasis in original).

44 Written testimony of Kate Woods, Deputy Director of Operations, LAWNY.

45 *Child Protection and the Family Court: A Study of the Processes, Procedures, and Outcomes, supra* n 27.

mission that: "One of the most significant issues is parents' timely access to counsel…parents are not meaningfully informed of their right to counsel until their first court appearance, and therefore, do not appear with counsel until at least several weeks after the filing of the initiating petition."[46] An assistant public defender in Ontario County noted that the practice of delaying notice of the right to counsel until the parent's first court appearance, combined with the application process to determine financial eligibility, results in a multiple-week delay before counsel is able to meet with, and properly advise, the client.[47]

An assigned counsel attorney who represents both parents and children in Delaware County said: "There is no pre-petition access or procedure for access to counsel in advance of a first court appearance in child protective cases; usually, prior to the first appearance, an attorney for the child will have been assigned, but never assigned counsel [for the parent]."[48] She added that this is particularly problematic when, after a parent has asked to have counsel assigned, the court proceeds to ask DSS if it seeks any temporary relief. "Sometimes, having solicited DSS' wishes, the court, despite [the] respondent having invoked her right to counsel, will grant a temporary order on the basis that the petition contains 'serious allegations.'"[49]

Often, many significant events affecting the family have already occurred by the time an assigned lawyer contacts the parent. A similar finding was made by the State Senate Standing Committee on Child Care almost three decades ago, [50] and the Commission concludes that the situation persists today. For example, Emma Ketteringham, Managing Attorney of the Family Defense Practice at the Bronx Defenders testified that:

> *Attorneys often meet their clients after they have already been in contact with City agencies for weeks, even months, or sometimes years. They have already been interviewed by caseworkers and detectives and asked to cooperate further. They have been asked to make their children available for inspection, interviews, and medical evaluations, and asked to submit to evaluations by mental health professionals. They have been asked to attend services, to have their children attend services, and to accede to the supervision of their homes. They have been given numerous other directives to show up at conferences, meetings, drug tests or other events, with little understanding of the context or potential consequences.*[51]

46 Written testimony of Carla Palumbo.

47 Written testimony of Chelsea Carter, Ontario County Public Defender's Office.

48 Written testimony of Larisa Obolensky; *see also* written testimony of Mark Funk, Monroe County; Kate Woods, LAWNY; New York Legal Assistance Group; Chelsea Carter, Ontario County; Cassandra E. Louis, Policy and Advocacy Association, The Children's Village.

49 Written testimony of Larisa Obolensky.

50 *Child Protection and Family Court: A Study of Processes, Procedures, and Outcomes*, pp. 131-132, *supra* n 27 (noting that "a number of highly significant events occur prior to the initial appearance and prior to the initial appointment of representation for the respondent. All of these events occur on an ex parte basis and many of the events are of a magnitude to shake the family structure of the respondent.")

51 Written testimony of Emma Ketteringham, Family Defense Practice, Bronx Defenders.

The Commission heard from numerous other witnesses that, during the critical investigation period, parents are not informed of their rights, leaving them vulnerable to being misinformed and misunderstood, often divulging information that is used against them, including information not relevant to the families' current situation.[52] Many parents are unaware that the CPS caseworker has the ability, and often the intent, to file a neglect or abuse case against them. Potential litigants and their children are interviewed without the advice of counsel; and their statements are then used as evidence in emergency removal hearings and in neglect proceedings. Often caseworkers do not address the family's individualized needs - despite child welfare agencies' obligation to provide services to avoid the placement of children into foster care or to employ reasonable efforts to make possible the prompt, safe return of children to their families.[53]

Research demonstrates that separation of children from their families, even for short periods of time, exacts an enormous emotional cost for parents and children, especially children placed in stranger foster care. These costs endure for the children, who are less able to succeed as adults because of their experiences in foster care.[54] Judges responding to the Commission's survey noted that, even when attorneys are present at the removal hearing, they are often not prepared, as they have just met their client. Access to counsel by parents well in advance of that first hearing will give attorneys sufficient time to prepare and to provide judges with the most comprehensive information possible, lessening the possibility of unwarranted family separations.

Timely access to counsel benefits parents and their children, parent attorneys, the courts—and taxpayers. Benefits to the government of timely legal representation by competent, well-resourced counsel can be quantified. Two New York City organizations that provide parental representation in child welfare cases—Bronx Defenders and the Center for Family Representation—provided particularly compelling testimony. In 2018, Bronx Defenders advised hundreds of parents during investigations by the Administration for Children's Services (the local social services agency in New York City). Forty-three percent of these parents were never charged with abuse or neglect. Where abuse and/or neglect petitions were filed, nearly half of the families remained together throughout the course of the case. In more than one-fourth of the cases, if removal occurred, the children were temporarily placed with relatives or friends suggested by the parents and known to the children. In only 16 of the 381 cases—four percent—were children placed in foster care with strangers.[55]

---

52 *See e.g.* written testimony of Joyce McMillan; New York State Defenders Association; Rhonda Weir; Lauren Shapiro, Family Defense Practice Director, Brooklyn Defender Services; Rylan Ritchie, Albany County Public Defender, Family Court Unit; The Children's Law Center, New York City; Coalition of the Suffolk County Bar, Nassau County Bar and Suffolk County Matrimonial Bar; and Russell Fox, Managing Attorney, Attorneys for Children Unit, Buffalo Legal Aid Bureau.

53 42 USC §§ 671 (a) (15) and 672 (a); see Oral testimony of Joan Kohout, Family Court Judge, Monroe County at Rochester Public Hearing, p 35, ln 24, p 36, ln 1 ("I put together the case plans on my cases because every single dispositional plan looks the same.")

54 Joseph J. Doyle, Jr., *Child Protection and Adult Crime: Using Investigator Assessment to Estimate Causal Effects of Foster Care*, 116(4), J. of Pol. Econ. 746 (2008), available at http://www.mit.edu/~jjdoyle/doyle_jpe_aug08.pdf.

55 Written testimony of Emma Ketteringham, Family Defense Practice, Bronx Defenders.

Further, the Bronx Defenders reported that, through its privately funded Healthy Mothers, Healthy Babies (HMHB) Program, it prevented needless removals of newborns from their mothers during the critical period of attachment after birth. The result of that program during FY 2018 was that of the 81 newborns born, 58 (72%) remained at home with their mothers, and 17 (20%) were placed with caretakers the mothers chose. Only six babies born to mothers working with HMHB (8%) were placed in foster care with strangers.[56]

In 2004 and 2005, the Center for Family Representation (CFR) and the Administration for Children's Services (ACS) participated in a pilot program called "Project Engage," which was funded by the State Office of Children and Family Services. ACS connected parents with CFR during the initial investigation stages.[57] CFR reported that parents were "more willing to engage in services because they had their own independent team of advocates to support them, helping them to decide or to push back on the seemingly unreasonable request, or to understand when a request wasn't quite as unreasonable as they thought."[58]

In 2014, the statewide average length of a stay for a child in foster care was 29 months, according to CFR. However, for that organization, the period was less than five months.[59] As a result of the timely entry of CFR attorneys and interdisciplinary teams in the case, the organization could work closely with the family and the social services agency to identify appropriate services and assist the family with accessing those services. In about half of the cases, CFR kept children out of foster care entirely. As of 2017, CFR estimated that, since it was established in 2002, its services have reduced the NYC cost of foster care by more than $37 million. While the minimum cost of keeping one child in foster care in New York is $30,000 per year, CFR services cost only $6,500 per family, regardless of the number of children. [60]

Judges and parents' attorneys responding to the Commission's surveys overwhelmingly favored pre-court access by parents to legal representation. Several judges observed that representation for parents during CPS investigations could discourage filings in questionable cases and promote early access to services to support the family. One judge commented: "This is crucial. I believe it could avoid a substantial number of cases that are filed. When caseworkers and potential respondents are not getting along, cases tend to be filed." The judge added that, once a respondent was represented, numerous cases were quickly resolved.

---

56 *Id.*

57 *See* written testimony of CFR ("Project Engage was a unique partnership between CFR and ACS that supported parents in Community District 10, an area that in 2004 had a high volume of child protective investigations and removals. Essentially, in a small number of cases, ACS agreed to refer a parent to CFR's interdisciplinary staff at the point in an investigation when an "elevated risk" was identified by ACS workers investigating a family. At that time, one of the conferences employed by ACS was referred to as an 'Elevated Risk Conference' and was designed to bring a parent, his or her community supports and any providers already working with a family together. The goal of the conference was to determine if a removal would be necessary or could be avoided. Of the 48 families supported by Project Engage, in 38, there was no child protective removal and no filing in Family Court.")

58 Oral testimony of Tehra Coles, Litigation Supervisor, Center for Family Representation, New York City Public Hearing.

59 CFR, 2014 Report to the Community.

60 CFR, *Our Results*, https://www.cfrny.org/about-us/our-results/.

Parents' attorneys responding to our survey supported earlier access to counsel for myriad reasons, including the need to protect substantive and procedural due process rights; the need to help parents make informed decisions about the wisdom or inadvisability of cooperating with an investigation; and the benefits of assisting families to access services. They also noted success in preventing petitions from being filed altogether, and in the event a proceeding is initiated, the increase in court efficiency that flows from timely access to counsel.

National and state standards of practice support the Commission's recommendation for making representation available to parents at the earliest possible stage of CPS intervention.[61] The NYSBA 2015 Revised Standards for Providing Mandated Representation (NYSBA 2015 Revised Standards) recommend pre-court, investigation stage representation in both criminal and Family Court matters, and urge that systematic procedures should be established to ensure that prompt mandated representation is available particularly "where a child has been removed by a governmental agency from the person's home."[62] Those standards were recently revised to provide that: "Effective representation includes representation during both the pre- and post-petition stages of a Family Court case, including, but not limited to representation in emergency removal hearings and advocacy for the provision of social work, counseling, mental health, and other services."[63]

In November 2018, the federal Children's Bureau included parental representation in its information memorandum discussing primary prevention approaches to prevent child maltreatment and avoid unnecessary parent-child separations.[64] According to the memorandum, the Detroit Center for Family Advocacy—which provides pre-petition, interdisciplinary parent representation—is among particularly effective or promising approaches to support families through primary prevention. [65]

The New York State Defenders Association stressed that representation during a CPS investigation is "timely," not "early," representation.[66] Timely access to counsel for parents in child welfare proceedings may: contribute to more expeditious provision of appropriate, individualized services to families; assist in placing children with relatives, rather than in foster care with strangers; prevent unnecessary removals of children; and avoid unnecessary court proceedings.

---

61 *See e.g.* ILS Standards for Parental Representation, Standard I, *supra* n 29; ABA Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases, Standard 4, *supra* n 28; and *High Quality Legal Representation for All Parties in Child Welfare Proceedings*, pages 6-7, Children's Bureau, ACF, US DHHS (Info Memo ACYF-CB-IM-17-02, Jan. 17, 2017), supra n 11.

62 New York State Bar Association 2015 Revised Standards, Standards B-3 and B-4, *supra* n 31; *see also People v Rankin*, 46 Misc 3d 791 (2014) (indigent individuals cannot receive quality representation where assignment of counsel is delayed pending judicial appointment of counsel).

63 Memorandum in Support of an Amendment to the Revised NYSBA Standards for Providing Mandated Representation, NYSBA Committee on Mandated Representation (March 26, 2018), available at http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=87408 .

64 *Reshaping Child Welfare to Focus on Strengthening Families Through Primary Prevention of Child Maltreatment and Unnecessary Parent-child Separation*, at 8, ACYF-CB-IM-18-05, Children's Bureau, ACF, US DHHS (Nov. 16, 2018).

65 *Id.*, at 19-20.

66 Written testimony of the New York State Defenders Association.

The testimony of Russell Fox, Managing Attorney, Attorneys for Children Unit, Buffalo Legal Aid Bureau, succinctly captures the importance of representation for parents during all critical stages of CPS intervention.

> *In sum, for both parents and children, timely access to counsel would help to level the playing field between families at risk and the vastly greater resources and expertise of agency investigators, thereby promoting fairness and accuracy in these critical determinations. Our current system too often generates inaccurate information on the basis of slipshod investigations, results in protracted court proceedings by attorneys who cannot be prepared to properly represent parents and children at the typical abrupt arraignment, and creates unnecessary trauma for the children it is intended to protect.*[67]

[67] Written testimony of Russell Fox (emphasis omitted).

NO. 2 – STATE OVERSIGHT AND INFRASTRUCTURE

RECOMMENDATION

We recommend the establishment of a State Office of Family Representation (the Office) to provide oversight of parental representation. That Office, in turn, would oversee representation in child welfare cases by institutional offices and well-resourced attorneys to ensure the delivery of client-centered, interdisciplinary, holistic parental representation throughout the state.

The current county-based system for delivering parental representation fails to ensure high quality representation throughout the State. In the absence of State investment, the caliber of representation received by parents is largely dependent on the wealth, priorities, and political will of the counties. There are no enforceable statewide standards governing the qualifications, training or performance of parental representation attorneys. There is neither an organizational structure to enforce standards nor a mechanism to provide non-attorney professional services for attorneys representing parents. For the aforementioned reasons, the county-based approach precludes quality parental representation statewide.

Testimony to the Commission highlighted the need for a professional culture that emphasizes the value of effective representation; enforceable performance and caseload standards; regular training in substantive law and skills; and resources needed for interdisciplinary and holistic representation. One experienced appellate lawyer stated that many 18-B attorneys assigned to represent Family Court litigants lack appellate training and expertise. "They may be familiar with family law and may have represented the litigant in the proceedings in the trial court, but do not know the basics of appellate practice."[68] An assistant public defender noted that: "The additional support of social workers, investigators and paralegals would be instrumental to assist not only in identifying [service] providers, but guiding our clients on how to access these providers, and attending meetings with them."[69] This same witness expressed the need for independent interpreting services in child welfare proceedings. "We are required to review a multi-page petition written in English with our clients and discuss their rights, including hearings to return chil-

[68] Written testimony of Kelly Egan, Rural Law Center Appeals Program.

[69] Written testimony of Maritza Buitrago, Monroe County Public Defender's Office.

dren home, placement and visitation resources, as well as their right to testify and present witnesses."[70] A New York City institutional provider noted that:

> *It is critical that attorneys have access to expert[s] as they prepare for and conduct pre-trial hearings and fact-finding trials. While we have been able to allocate some funding to secure expert testimony, much more work could and should be done to ensure that the court hears all of the relevant information needed to make sure that allegations of abuse and neglect are legitimately founded.*[71]

Another New York City institutional provider stated:

> *It has become increasingly difficult to find experts who will accept the [County Law §] 722c rate to testify in child protective cases…While we have been fortunate to have had some success in retaining highly qualified experts, we frequently have to pay over the 722c rate. In our experience, experts are reluctant to agree to assist us in assessing and defending a case (especially when testimony is likely), when we are unable to pay them at the rate they'd like.*[72]

The Commission concludes that a centralized, independent State Office of Family Representation must be established to ensure meaningful parental representation statewide. The responsibilities of such Office would be broad and would include:

- distributing State funding;
- determining the optimal mix of delivery models for trial and appellate parental representation;
- creating and implementing uniform client financial eligibility criteria and procedures;
- developing, supporting, and monitoring compliance with attorney caseload and performance standards;
- developing and promoting uniform attorney qualification and evaluation criteria and procedures;
- coordinating training programs;

70 *Id.*

71 Written testimony of Michelle Burrell, Neighborhood Defender Services of Harlem.

72 Written testimony of Center for Family Representation.

- developing and supporting mentoring and consultation programs for trial and appellate attorneys;
- managing resources necessary for effective legal representation;
- advocating for reforms necessary to ensure that standards can be achieved; and
- managing relationships among relevant stakeholders, including governmental bodies, community organizations, and the client community.

Child welfare law is a specialized and complex area of practice. Effective representation in this area must be client-centered, interdisciplinary, and holistic; and it should be overseen by a State entity to ensure consistent quality statewide. The Commission concludes that the best chance of successful implementation of its recommendations is through statewide expansion of institutional providers and attorneys specializing in child welfare law. The use of attorneys dedicated to, and proficient in, such representation would improve the quality, efficiency, and cost-effectiveness of parental representation statewide.

As previously discussed, the interdisciplinary approach, delivered through an institutional office, is seen as the most effective model for providing child welfare parental representation. Given the ever-present need for specially trained conflict attorneys to represent other parties, as well as to manage caseload overflow, the Commission recommends that the Office have the authority to create institutional offices and contract with private attorneys. Contracts that incorporate basic qualifications, training, and oversight requirements will allow for the development of an experienced and specialized group of attorneys. Such contracts will help to attract and retain talent, because attorneys and social workers will be able to rely on a steady and reliable income. Moreover, contracts are a means to provide ongoing support for attorneys in their practice, enforce performance standards and caseload caps, and assure accountability for standards through review of past performance. The presenters from North Carolina and Washington discussed with us the various benefits of using contracts, and we are persuaded that this approach is a viable one for parental representation in New York.

Implementation of our recommendations also requires that attorneys have easy access to necessary resources. The Commission therefore recommends that the Office establish Regional Offices to provide appellate representation; coordinate training and practice support for trial and appellate attorneys; and provide nonattorney professional services, such as experts, social workers, parent advocates, investigators, paralegals, and interpreters. These regional offices would efficiently elevate the level of parental representation by consolidating and managing resources on a regional basis for attorneys representing parents in child welfare matters.

The New York State Bar Association, the National Association of Counsel for Children, the American Bar Association (ABA), and various witnesses endorsed the creation of a statewide oversight entity to enhance parental representation. The ABA recommended a statewide oversight entity that:

> *[I]ncreases the support and accountability for all counties, while not unduly restricting those counties that are already providing excellent representation for parents…This statewide office should be charged with creating and enforcing Standards of Practice; helping to increase the number of lawyers who specialize in this practice; overseeing equitable caseloads and compensation; spreading the interdisciplinary model; and providing consistent training across the state. Each of these elements is essential to high quality legal representation.*[73]

The State Bar Committee on Families and the Law concurred: "Statewide standards, state monitoring and oversight, coordination of training, supervision and non-attorney professional assistance resources are essential to ensure uniformly high quality parental representation throughout the state."[74] The National Association of Counsel for Children, which was involved in the development of Colorado's recently established Office of Respondent Parents' Counsel, stated that the delivery of high-quality legal services "requires an infrastructure which provides attorneys with the time, training, compensation, and resources necessary for effective representation, and a system of statewide funding and oversight to safeguard its success."[75]

There are numerous examples of successful implementation of the interdisciplinary model recommended by the Commission. The ABA reported that 23 states have implemented some version of the model, in at least one court or county. Further, according to the ABA:

> *New York City continues to be a leader in the field on how to best serve clients under this model . . . . there is no doubt that this model provides the highest quality of representation for parents and leads to the best outcomes for families. Teaming social workers and parent mentors with lawyers is a practice that is spreading across the country and should be replicated throughout all of New York.*[76]

Directors of the statewide parental representation programs in North Carolina (Wendy Sotolongo) and Washington (Joanne Moore) shared with the Commission their experiences with implementation of the interdisciplinary approach in their states. Ms. Sotolongo stressed the value of establishing a holistic, multidisciplinary approach in North Carolina. Ms. Moore said that social workers and parent advocates add "enormous value" to the representation of parents in child welfare cases in Washington. A study of the Washington program showed that it reduced time

---

73 Written testimony of American Bar Association, Government Affairs Office.

74 Written testimony of New York State Bar Association, Committee on Families and the Law.

75 Written testimony of National Association of Counsel for Children.

76 Written testimony of American Bar Association, Government Affairs Office.

to permanency.[77] Ms. Moore reported that family reunifications in Washington increased from 32% before program implementation to 57% in fiscal year 2018. As a result, that state has enjoyed huge savings in costs related to foster care and adoption subsidies.

Since 2007, New York City has employed an interdisciplinary approach that is viewed nationally as the ideal model for parental representation in child welfare cases.[78] As previously noted, through contracts with New York City's Mayor's Office of Criminal Justice, most such representation is provided by four nonprofit organizations: the Center for Family Representation; Brooklyn Defender Services, Family Defense Practice; The Bronx Defenders, Family Defense Practice; and the Neighborhood Defender Service of Harlem, Family Defense Team.[79] The New York City interdisciplinary model uses a team of skilled professionals devoted to helping parents navigate the complex and interrelated social services and Family Court systems.[80] In collaboration with social work staff, an attorney helps parents deal with the social services and court systems and provides legal advocacy both in and out of court. The social worker assesses the strengths and needs of the family, provides case and crisis management, and accesses appropriate, individualized services. The parent advocate—ideally someone who has successfully navigated the child welfare system—provides emotional support, accompanies the parent to meetings, assists with challenging interactions as needed, and helps the parent to stay motivated and engaged with services.[81]

The Commission does not take a position on whether a new entity should be created to serve as the State Office of Family Representation or whether an existing entity should serve that purpose. The central point is that, whatever entity plays that role, its independence is crucial to promoting clients' best interests, and must remain at the center of the Office's mission as it car-

---

77 Mark E. Courtney and Jennifer L. Hook, *Evaluation of the Impact of Enhanced Parental Legal Representation on the Timing of Permanency Outcomes for Children in Foster Care*, Children and Youth Services Review, Vol. 34(7) (July 2012).

78 Martin Guggenheim and Susan Jacobs, *A New National Movement in Parental Representation*, 47 Clearinghouse Rev 44 (2013) (*National Movement*); Heather Appel, *New Influx of Lawyers Coming to Family Court*, City Limits (April 16, 2007), available at http://citylimits.org/2007/04/16/new-influx-of-lawyerscoming-to-family-court/. For a discussion of the development of the interdisciplinary family defense model, see Chris Gottlieb, Martin Guggenheim, and Madeline Kurtz, *Discovering Family Defense: A History of the Family Defense Clinic at New York University School of Law*, 41 NYU Rev of Law & Soc. Change 539 (2017), available at https://socialchangenyu.com/review/discovering-family-defense-a-history-of-the-family-defense-clinic-at-new-york-university-school-of-law/.

79 *See* Report on the Fiscal Year 2015 Executive Budget for MOCJ, The Council of the City of New York (May 20, 2014).

80 See ILS Parental Representation Standards, Standard G (Model of Representation – Multidisciplinary Practice); *see generally* Guggenheim and Jacobs, *National Movement, supra*, n 78, at 36-46; University of Michigan Law School, *Detroit Center for Family Advocacy Pilot Evaluation Report, 7/2009-6/2012*, p. 2 (February 2013); *see also* Vermont Parental Representation Center, *Program Model*, http://vtprc.org/program-model/; Diane Boyd Rauber, *From the Courthouse to the Statehouse: Parents as Partners in Child Welfare*, Child Law Practice, Vol. 28, No. 10 (ABA, Dec. 2009) (describing parent advocate programs operating around the country), available at http://www.hunter.cuny.edu/socwork/nrcfcpp/info_services/parent-partner1.pdf; Diane Boyd Rauber, *Working With Parent Partners to Achieve Better Case Outcomes for Families*, Child Law Practice, Vol. 28, no. 11 (ABA, Jan. 2010) (providing suggestions to parents' attorneys for working with parent advocates and parents), available at http://www.hunter.cuny.edu/socwork/nrcfcpp/info_services/parentpartner2.pdf.

81 *National Movement, supra*, at n 78.

ries out its duties.[82] Considerations of feasibility suggest that housing the Office within ILS, under the guidance of the Indigent Legal Services Board, might prove to be the most efficient path to improving parental representation. The ABA observed that the oversight tasks essential to ensuring the delivery of quality parental legal representation "could logically fall" to ILS, which has "begun to play a leadership role in child welfare, or a new entity could be created. Either way, it is important that the oversight role is clearly articulated and the entity has independence from the judicial branch."[83]

82 American Bar Association, Ten Principles of a Public Defense Delivery System, Principle One (2002) ("The public defense function, including the selection, funding, and payment of defense counsel, is independent. The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel. To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems. Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense."), available at: https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf

83 Written testimony of American Bar Association, Government Affairs Office. *See also* written testimony of Mark Funk, Conflict Defender, Monroe County ("The Monroe County Conflict Defender's Office has the highest respect for the New York State Office of Indigent Legal Services (ILS). They have done a remarkable job in overseeing the State-wide expansion of the *Hurrell-Harring* settlement. ILS should be given the resources to see that similar reforms are implemented in Family Court."); written testimony of Robert Convissar, Erie County Assigned Counsel Program Administrator ("We wholeheartedly endorse the concept that the New York State Office of Indigent Legal Services, similar to the responsibilities they have under the Hurrell-Harring settlement and subsequent statewide implementation now just beginning, should be empowered and funded by the State to address the numerous issues which face the Family Courts and which are being considered by this august Commission.").

NO. 3 – UNIFORM ELIGIBILITY STANDARDS AND PRESUMPTION OF ELIGIBILITY

RECOMMENDATION

We recommend that the proposed Office of Family Representation develop uniform standards of eligibility for assigned counsel that would apply in all Family Court proceedings, and would include a presumption of eligibility for counsel in child welfare proceedings, to be established by legislation.

Currently, there are no statewide eligibility criteria and procedures applicable to Family Court proceedings. Indeed, testimony before the Commission, as well as responses to our surveys of attorneys and judges, demonstrated that criteria and procedures for determining financial eligibility vary even within the courthouse in counties where there is more than one Family Court judge.[84]

Uniform standards of eligibility for assigned counsel are necessary to prevent inconsistent decisions and inadequate protection of the right to counsel.[85] The standards for determining financial eligibility for publicly funded representation in Family Court proceedings should be easily understandable, equitable, efficient, and fair. In child welfare proceedings, we recommend a presumption of eligibility that would be codified in legislation. This may require an amendment to the Social Services Law to provide counsel with access to necessary records, in addition to an amendment to section 262 of the Family Court Act regarding the right to counsel.

Numerous witnesses reported inconsistencies in financial eligibility determinations in Family Court and the inappropriate denial of counsel.[86] Lance Salisbury, Administrator of the Tompkins and Schuyler Assigned Counsel Program, said that: "We can often assign someone for the criminal matters but not for the family court matter unless a judge overrides our decision. Judges

---

84 *See, e.g.* written testimony of Sanctuary for Families; Lois Schwaeber, The Safe Center; Bridget Burke, The Legal Project; Darryl Bloom, Cattaraugus Public Defender; Mark Funk, Monroe County Conflict Defender; Oral testimony of Joan Kohout, Judge, Monroe County Family Court, Rochester Public Hearing.

85 *See* New York State Bar Association, Task Force on Family Court: Final Report, at 87 (2013) (urging that assigned counsel eligibility determinations need to be examined because there is a high likelihood that some litigants are denied for reasons that are difficult to quantify uniformly).

86 Written testimony of New York State Defenders Association.

have commented to us regularly how unfair a process this is for the parties before the court."[87] Similarly, Sanctuary for Families reported that judges are inconsistent in determining financial eligibility, and many litigants with modest incomes are found ineligible.[88] According to The Legal Project, two individuals in virtually the same situation can have very different results when they apply for assigned counsel, if they live in different counties.[89]

Responses to the Commission's surveys confirmed the use of widely varying criteria for determining eligibility of litigants. Some respondents reported that a percentage of the U.S. Federal Poverty Guidelines (FPG) is used (varying from 125% to 250%). Others said that a general review of the person's financial situation is used. Still others reported use of a detailed financial application.

The New York State Defenders Association suggested that the existing ILS Criteria and Procedures for criminal cases be made applicable to all parental representation. Since County Law § 722 uses the same standard for the appointment of counsel in all cases – "financially unable to obtain counsel" - it follows that the same general criteria and procedures should be used for eligibility determinations in all mandated representation matters.[90] Eligibility decisions for Family Court litigants, like eligibility decisions for individuals charged with a crime, must be equitable and fair. Uniform standards will also save the time and resources of the parties, the courts, and others involved in the eligibility determination process. As articulated by the New York State Bar Association Committee on Families and the Law:

> *Effective and prompt provision of counsel to parents is critical for one facing a loss of liberty or parental rights, and counsel should be assigned whenever one demonstrably possesses inadequate financial ability to hire an attorney. Gross differences between jurisdictions and among providers that result in a deprivation of the right to counsel in some jurisdictions must be addressed. Fair and reasonable criteria for determining presumptive eligibility for assigned counsel that allow for discretionary factors in the interest of justice should be established with some uniformity.*[91]

The Commission recommends that the proposed Office of Family Representation be responsible for issuing statewide standards for determining financial eligibility of litigants in Family Court cases. The Office could develop such standards in Family Court cases in conjunction with ILS, which has already promulgated comprehensive statewide eligibility standards for criminal court

87 Written testimony of Lance Salisbury.

88 Written testimony of Sanctuary for Families Center for Battered Women's Legal Services.

89 Written testimony of The Legal Project.

90 Written testimony of New York State Defenders Association.

91 Written testimony of New York State Bar Association Committee on Families and the Law.

matters, pursuant to the *Hurrell-Harring* Settlement.[92] As ILS noted in its *Hurrell-Harring* eligibility criteria and procedures report, the agency has the authority under Executive Law § 832 (3) (c) to issue the same for Family Court matters, and "intends to issue separate criteria and procedures relating specifically to determining eligibility for mandated representation in Family Court…Such criteria and procedures will build upon and be consistent with these criteria and procedures, but will be tailored as needed to Family Court realities."[93]

In child welfare proceedings, a presumption of eligibility for counsel, codified in legislation, would ensure that parents are represented, upon request, during a CPS investigation, and in any event, well in advance of their first appearance in court. The proposed Office of Family Representation should be vested with the authority to enforce this presumption.

Tied by necessity to our recommendation regarding Timely Access to Counsel, a presumption of eligibility for all parents in state intervention matters is essential to better protect their right to meaningful representation. One witness noted that, during an ongoing CPS investigation, because parents do not have access to counsel until after a petition is filed, he or she "makes admissions, signs releases, and often times, even consents to placement of their children in foster care without having been properly advised of the consequences."[94] Another witness reported: "I have read transcripts of removal hearings where parents have repeatedly asked the Court for counsel. They have been told 'no, no. We will get to that when we're done with this bit of business'; that, of course, being the removal of their children."[95]

Moreover, most parents involved in child welfare proceedings cannot afford a lawyer. The Commission therefore recommends that standards for determining eligibility in Family Court matters include a rebuttable presumption of eligibility for counsel for all parents involved in child welfare proceedings, whether a petition has been filed, or the parents are being investigated by CPS and a petition has not yet been filed. As one witness explained:

> *Parents coming to court at risk of having their children removed from their home or being excluded from their home are rarely notified of their right to an attorney. The shock of this process does not come with any warnings or advice to bring their most recent paystubs and tax returns. If we are not going to require any notice of rights upon the first encounter with CPS, then justice demands affording litigants some benefit of the doubt regarding their financial qualifications for assigned counsel.*[96]

---

92 ILS Criteria And Procedures For Determining Assigned Counsel Eligibility: Final (April 2016) (ILS Eligibility Standards), https://www.ils.ny.gov/files/Hurrell-_Harring/Eligibility/Final%20Eligibility%20Standards/Eligibility%20Criteria%20and%20Procedures%20FINAL%20FULL%20April%204%202016.pdf.

93 *Id.*, at 6.

94 Written testimony of Chelsea Carter, Ontario County Public Defender's Office.

95 Oral testimony of Kate Woods, Rochester Public Hearing, p. 6, lns 17-22.

96 Written testimony of Joel Serrano, Secretary, Assigned Counsel Association of Queens Family Court.

A rebuttable presumption of eligibility for all child welfare involved parents would make access to counsel simple and immediate. The ILS criminal eligibility standards include certain presumptions. Applicants are presumptively eligible for counsel if: their net income is at or below 250% of the Federal Poverty Guidelines; they are confined in a mental health institution; they are receiving public assistance; or they have been deemed eligible for assignment of counsel in another matter within the last six months.[97] Notably, Family Court Act § 1118 applies a presumption of eligibility for appellate assigned counsel based on a previous finding of eligibility for assigned counsel at the trial level.

ILS reports that indigent criminal defense providers have found that the use of presumptions saves time and resources. Practitioners from North Carolina and Washington, who met with the Commission and who oversee parent representation in their states noted that using such a presumption means that neither court staff nor attorneys need to use precious time on the first day a parent comes to court to engage in potentially burdensome and time-consuming assessments. Rather, they are able to focus on preparing for the first appearance, and the parent need not wait hours, days or weeks to receive representation.

The ILS eligibility standards for criminal defense require: "Counsel shall be assigned at the first court appearance or immediately following the request for counsel, whichever is earlier."[98] The commentary to that provision states that, "an eligibility determination should be made as soon as possible for a person who 'reasonably believes that a process will commence that could result in a proceeding where representation is mandated.'"[99] The same reasoning applies with equal force to child welfare proceedings, as acknowledged by the New York State Bar Association's recent revision of the 2015 Revised Standards to specify: "Effective representation includes representation during both the pre- and post-petition stages of a Family Court case."[100] Our recommendation of a legislative presumption of eligibility will ensure that child welfare involved parents receive representation without delay.

97 ILS Eligibility Standards, at 20-24.

98 *Id.*, at 41.

99 *Id.*, at 43, quoting New York State Bar Association 2015 Revised Standards, Standard B-3.)

100 *See* Memorandum in Support of an Amendment to the NYSBA Standards for Providing Mandated Representation, NYSBA Committee on Mandated Representation (March 26, 2018), supra, n. 63.

No. 4 – CASELOAD STANDARDS

RECOMMENDATION

We recommend that the State fund a study to determine appropriate maximum caseload standards for attorneys representing parents in Family Court proceedings. Until such a study has been completed, we recommend that caseload maximum for attorneys representing parents in child welfare cases of 50 to 60 clients per attorney be established by legislation or rule.

In New York, parents' attorneys carry excessive caseloads, resulting in inadequate representation and denial of parents' due process rights. This systemic deficiency impedes judges' ability to make fully informed, just decisions for families.

At the outset, we note that parent attorneys typically represent clients, at both the trial and appellate levels, in all categories of Family Court mandated representation cases, and often, in criminal court cases as well. The Commission therefore recommends that the State fund a study to determine the relative weights of all categories of representation under Family Court Act § 262 to ensure that attorneys with mixed case dockets have manageable caseloads. State funding for parental representation, as discussed in the next section of this Interim Report, should be sufficient to ensure that attorneys providing parental representation have manageable caseloads.

Effective representation in child welfare cases demands active out-of-court and in-court advocacy, and regular communication with the client, family members, and other professionals including CPS caseworkers.[101] Interlocutory appeals may be advisable in some cases, particularly in child welfare cases, where they are available as of right, pursuant to Family Court Act § 1112 (a). Other proceedings such as custody, guardianship, family offense or paternity proceedings, may be initiated over the course of a child welfare case, further complicating a client's circumstances and needs. Counsel may need to address collateral issues that have a direct bearing on a par-

[101] *See e.g.* New York City Administration for Children's Services, Guidelines for Working with Attorneys for Parents and Children, Guidance #2012/01 (Oct. 24, 2012) ("It is the policy of Children's Services to encourage communication regarding families' and children's needs, the provision of individualized services, and optimal family visiting plans. Attorneys for parents and children can work with caseworkers to facilitate the sharing of information that will allow us to meet families' needs. This…protocol is intended to provide guidance to Children's Services child protective specialists and provider agency case planners to enhance communication with attorneys for parents and children.")

ent's ability to continue or resume parenting. Child welfare cases generally require more court appearances and last longer than other types of Family Court cases.

Testimony from parents, attorneys, and judges confirmed that excessive caseloads prevent the delivery of effective parental representation. Unmanageable caseloads often prevent attorneys from carrying out even basic lawyering tasks, with negative effects on the attorney-client relationship, judicial case management and decision-making, and outcomes for children. For all these reasons, the Commission's vision for transforming parental representation in New York cannot be accomplished without sound caseload standards.

Parent attorneys across the State labor under unmanageable caseloads.[102] Our State lacks a caseload cap for parental representation and a statewide mechanism to monitor caseloads. Thus, attorneys providing parental representation are often "over-worked and overwhelmed."[103] Incredibly high caseloads often cause delays in case disposition, keeping families in high-conflict proceedings for longer than necessary. "Such high caseloads for a litigation attorney mean that the attorney is nearly always in court, with limited days in the office during which they can meet with clients, or have settlement conferences with other counsel."[104]

Because both trial and appellate attorneys are burdened by excessive caseloads, in many cases, they may not preserve the clients' right to appeal and promptly and effectively perfect the appeals that are taken.[105] Unmanageable caseloads "prevent the appropriate pursuit of interlocutory appeals which are often the only available mechanism for preventing irreparable harm to families while a Family Court case makes its way slowly through the system." [106] One appellate attorney commented that: "[I]t seems that as time goes on, there are fewer and fewer attorneys willing to take assigned counsel appeals in the Fourth Department. My caseload is large, and I have had to reject assignments because I am overburdened with work."[107]

---

102 See, e.g., written testimony of the New York State Bar Association Committee on Families and the Law (in some jurisdictions, attorneys have ongoing caseloads that exceed 100 or more cases, "making it impossible to provide effective representation without undue hardship."); written testimony of the Monroe County Public Defender (staff attorneys are routinely assigned over 350 new cases per year (approximately 250 new clients), on top of already pending cases); written testimony of the Monroe County Conflict Defender (family law staff handled an average of 286 cases per attorney in 2017); written testimony of Albany County Public Defender Office (3-4 attorneys handled 999 cases in 2016, and 1,062 cases in 2017). The Albany office reported that the numbers "very likely do[] not accurately reflect the larger number of actual individual matters assigned to the public defenders office in family court" because the case tracking system used by the office was not intended for use in Family Court. Written testimony of the Albany County Public Defender Family Court Unit. The Commission notes that family court caseload numbers translate into a much heavier actual workload, since each client typically has multiple petitions, such as custody, family offense and violation petitions that are connected to the child welfare case. Moreover, attorneys' workloads encompass not only parental representation cases, but also cases they may handle in other areas, such as indigent criminal defense or private cases.

103 Written testimony of Coalition of the Nassau and Suffolk County Bar Associations and the Suffolk County Matrimonial Bar Association ("There are currently no procedures in place to ensure that counsel are not assigned to more cases than are appropriate. This results in those attorneys who are still willing to accept assigned counsel cases being unable to devote the necessary time and resources to those cases. Under the present system, attorneys who do accept assigned counsel cases are over-worked and overwhelmed with the number of cases they carry.")

104 Written testimony of New York Legal Assistance Group, New York City.

105 Written testimony of Linda Gehron, President and CEO, Hiscock Legal Aid Society, Syracuse, New York.

106 *Id.*

107 Letter to Commission from Cara Waldman.

Judges confirmed the impact of high caseloads on the quality of representation attorneys can provide to parents. These overburdened attorneys rarely: file written motions to further a client's goals; file ex parte motions for funding for experts and other nonattorney professional services under County Law § 722-c; or take interlocutory appeals, obtain stays pending appeal, and perfect meritorious appeals.

One provider explained that increasing caseloads mean that attorneys have less time to file motions, to read discovery in advance to assess defenses, to reach out to opposing counsel to propose settlement of cases, to think long term about their cases, and to strategize with social workers to resolve family problems. The provider stated: "Attorneys can only act in a defensive posture and are left with insufficient time outside of court to resolve cases through strategic planning and negotiation. This type of practice is not sustainable and results in higher attrition rates, causing caseloads to grow even further."[108]

This courtroom culture leaves little time for attorneys to engage in this critical out-of-court legal and social work advocacy that is often equally, if not more, important for the family than in-court work. Attorneys report that they are in court all day, every day, leaving little time for client contact and other important aspects of parental representation. "Meetings with clients occur between court appearances, during lunchtime, or briefly after work. Telephone calls are returned before or after court, and often in a rushed manner."[109]

Numerous witnesses said that parents' attorneys do not have enough time to meet with all of their clients. Thus, they do not "learn about the underlying issues, develop and enhance the attorney-client relationship, and strategize with their clients on how to best obtain the desire[d] result [and]…are forced to triage their cases to the detriment of a significant percentage of their clients."[110] Establishment of a professional, trusting, lawyer-client relationship is impossible in this environment. As the American Bar Association indicated, in these circumstances, "[l]awyers with more clients are unable…to form relationships with clients in which the client trusts the lawyer and believes the lawyer has a true duty of loyalty to him or her."[111]

Typically, parents meet their assigned attorney for the first time right before their case is called, often as they are walking into the courtroom. There is no time to meet with clients after the appearance either, as the lawyer's next case is usually called immediately. A former client who now works as an advocate for parents stated that common concerns among parents are that their attorneys only speak to them minutes before each court appearance; there is no communication between court dates; and attorneys leave court without explaining what happened.[112] Another client noted that his experience has been that assigned counsel attorneys are "always in court

108 Written testimony of Brooklyn Defender Services.

109 Written testimony of Tim Donaher and Adele Fine, Monroe County Public Defender's Office.

110 *Id.*

111 Written testimony of Thomas Susman, American Bar Association, Governmental Affairs Office.

112 Written testimony of Joyce McMillan.

and never accessible."[113] The New York Legal Assistance Group reported that their office receives hundreds of calls per month from low-income New Yorkers seeking representation in family and matrimonial proceedings. Many litigants are "dissatisfied with their Assigned Counsel because they are unable to speak with or meet with their attorney except in the few moments before their case is called."[114]

Court operations are affected by high attorney caseloads. Hon. Robert Mulroy, writing in his capacity as President of the New York City Family Court Judges Association, told the Commission that the "crushing caseloads" of assigned counsel, and the resulting lack of adequate time to confer with their clients, often mean that the court is unable to call and hear cases in a prompt, efficient manner.[115] "It also means that trials may have to be adjourned or trial dates truncated, resulting in multiple court appearances that could otherwise be avoided if the attorneys were not required to divide their time among so many different parts for so many different cases."[116] New York Legal Assistance Group indicated that, because of high assigned counsel caseloads, cases are not timely settled and are adjourned repeatedly; some cases go to trial unnecessarily; and other cases are delayed because the assigned counsel attorney is held up in other court parts. This situation "wastes the litigants', the Court's, and the other attorneys' time."[117]

The impact of excessive attorney caseloads on the lives of parents and families beyond the courtroom can be devastating. Judge Mulroy described litigants waiting for hours at the courthouse before meeting with their new attorney for the first time. He observed that:

> *These are hours that litigants frequently cannot spare due to work obligations and child care responsibilities. The litigants must wait around to meet with the assigned attorneys for their case to be called or recalled, adding to their own frustration and to the overcrowding of our already bustling waiting areas. There have even been instances where no attorney was available at all and the litigant was told to return another day.*[118]

Similarly, New York Legal Assistance Group reported that: "Litigants (families) are often unable to maintain stable employment, access services, or have any sense of stability if they are engaged in protracted litigation…On many occasions, [they] have acquiesced to an unfavorable

113 Written testimony of Joshua Colistra.

114 Written testimony of New York Legal Assistance Group; *see also* written testimony of Legal Information for Families Today (LIFT) ("Litigants express to us that they have difficulty communicating with or asking questions of their attorneys - they may have difficulty reaching their attorney at an office telephone number, for example.")

115 Written testimony of Hon. Robert Mulroy.

116 Id.

117 Written testimony of New York Legal Assistance Group.

118 Written testimony of Hon. Robert Mulroy.

settlement, or simply withdrawn their petition, because they could not continue to come to court with no end in sight."[119]

The conditions described demonstrates that the constitutional promise of meaningful and effective representation for parents is all too often not delivered. As one provider explained: "An attorney who has a caseload that precludes that attorney from providing effective representation to the attorneys' clients effectively deprives those clients of counsel."[120] The value of publicly paid legal services will be significantly enhanced by appropriate caseload caps and the State funding needed to comply with the caps.

Reasonable caseloads make possible many significant benefits. Neighborhood Defender Services of Harlem reported that manageable caseloads allow attorneys to dedicate the time needed on each case and client, and lead to better outcomes. Powerful and successful advocacy requires significant motion and trial practice; and that is only possible when caseloads are manageable.[121] Center for Family Representation pointed out that manageable caseloads permit attorneys to pursue Family Court Act §§ 1027 and 1028 hearings on short notice; make frequent motions related to visits, services and placement; pursue interim appeals; and engage in contested litigation on numerous issues. Moreover, out of court, manageable caseloads allow attorneys to meet with, and be responsive to, clients. Social work staff can accompany clients to conferences, public benefits appointments, and administrative hearings related to Medicaid, housing or other entitlements. These activities contribute to preventing or shortening foster care.[122]

The Commission's proposed caseload cap of 50 to 60 pending clients at a time is endorsed by the New York City institutional providers, who have more than 10 years' experience providing parental representation in child welfare cases.[123] Joanne Moore, the presenter from Washington, reported a target of no more than 65 parents per attorney; Wendy Sotolongo, the presenter from North Carolina, suggested an ideal caseload limit of no more than 60; and the American Bar Association (ABA) recommended a cap of 50 to 60 pending clients. The ABA reported that its recommendation derives "from consultation with experts on this topic throughout the country," and is based on the current best understanding among national experts.[124] The Commission understands that caseload ranges must take into account many factors, including the experience

119 Written testimony of New York Legal Assistance Group.

120 Written testimony of Tim Donaher and Adele Fine, Monroe County Public Defender's Office.

121 Written testimony of Neighborhood Defender Services of Harlem.

122 Written testimony of Center for Family Representation.

123 Written testimony of Center for Family Representation, Bronx Defenders, Brooklyn Defender Services, and Neighborhood Defender Services of Harlem.

124 Written testimony of American Bar Association, Government Affairs Office. *See e.g.* ABA, Indicators of Success for Parental Representation, at ii-iii (describing results of evaluation of a Texas pilot project setting a cap of 50 clients and finding that after six months, "the model had already improved the quality of representation for parents," and resulted in reduced continuances and delays). *See also* ILS Model Upstate Parental Representation Office Request for Proposals ("Given the unique complexities involved in state intervention cases, caseload limits are essential to permit attorneys to comply with their ethical responsibilities. This RFP therefore contemplates an office average of no more than 50 clients per attorney at any given time."), available at https://www.ils.ny.gov/files/Parent%20Representation/RFP-Upstate%20Model%20Parental%20Representation%20Office%20Grant%20032017.pdf.

and expertise of the attorney; the nature, complexity, and duration of the case; the collateral issues to be addressed; and the level of support available from nonattorney professional services.[125]

In making a specific caseload recommendation for child welfare cases, the Commission recognizes that many attorneys handling such cases also provide representation in other types of Family Court cases. The Commission therefore recommends that the State fund a study to determine the relative weights of all categories of Family Court Act § 262 cases to ensure that attorneys with mixed case dockets have manageable caseloads, and therefore the time to provide effective representation for all clients. The Commission notes that a paradigm for the type of rigorous study needed to develop sound caseload standards already exists in the caseload study commissioned by ILS pursuant to the *Hurrell-Harring* Settlement.[126]

While we recommend a rigorous study to further assess the appropriate cap for all mandated parental representation cases, a study will take time. Therefore, as to our immediate focus on improving child welfare parental representation, our recommended cap of 50 to 60 pending clients should be promptly codified in state statute or rule so that providers have a basis for determining the funding necessary to achieve compliance with the caseload cap. We note that caseload caps already exist for attorneys representing children.[127] Further, pursuant to the *Hurrell-Harring* Settlement reforms and their statewide expansion pursuant to 2017 legislation,[128] the State is providing funding to counties to ensure compliance with caseload caps by attorneys representing indigent criminal defendants.

In accordance with our next recommendation regarding State funding, the Commission urges that the State provide the funding necessary to ensure compliance with the recommended caseload caps for child welfare cases. This includes sufficient funding not only for attorneys, but also for nonattorney professional services and support staff. The importance of statewide caseload standards and State funding was articulated by one witness, who observed that the quality of representation provided to a parent "should not depend upon the geography of where they live in New York and the willingness of local leaders to meet their responsibilities here - it is an equity issue that needs to be met by having the state bear the burden of these processes it mandates to the counties."[129]

---

125 *See e.g.* ILS Model Upstate Request for Proposals, supra, n. 124, at 13; 22 NYCRR § 127.5 (Workload of Attorney for the Child).

126 ILS, *A Determination of Caseload Standards, ILS, A Determination of Caseload Standards pursuant to § IV of the Hurrell-Harring v State of New York Settlement* (Dec. 2016), available at https://www.ils.ny.gov/files/Hurrell-Harring/Caseload%20Reduction/Caseload%20Standards%20Report%20Final%20120816.pdf.).

127 22 NYCRR § 127.5.

128 Executive Law § 832 (4); ILS, *A Determination of Caseload Standards*, *supra* n. 126.

129 Written testimony of Lance Salisbury, Tompkins and Schuyler County Assigned Counsel Program.

No. 5 – STATE FUNDING

RECOMMENDATION

We recommend that the State pay for all costs associated with parental representation in child welfare proceedings to ensure quality representation and eliminate disparities among localities.

Successful implementation of the Commission's recommendations requires a reliable stream of funding sufficient to ensure the effective representation of parents in child welfare cases. The counties have not been able to provide such funding. Furthermore, inherent conflicts militate against county responsibility for both funding and oversight of parental representation. The caliber of parental representation should not depend on the fiscal constraints, priorities, and political will of localities. For these reasons, the State should assume full responsibility for the costs of such representation. For fiscal feasibility, such State responsibility could be phased in over a short period of time. The Commission emphasizes that its recommendation for full State funding must be provided in a manner that does not adversely affect those jurisdictions and programs that already provide comprehensive, high quality, effective representation.

Currently, the costs of providing parental representation falls to the counties under County Law Article 18-B. Because data is currently not collected about the amounts spent statewide on parental representation, it is impossible to specify exact costs. Nevertheless, the New York State Association of Counties stressed that: "Counties cannot afford to take on any new or increased function, no matter how important, without the State meeting the accompanying fiscal costs. Counties do not have the revenue streams nor the reserves to add any additional service costs."[130]

Indisputably, the State is equally responsible for both criminal court and Family Court mandated representation. As explained by the New York State Bar Association in its Memorandum in Support of State Funding for Mandated Parental Representation:

[130] Written testimony of New York State Association of Counties.

There is no justifiable basis for distinguishing between these two categories of mandated representation. The fact that the right to counsel in criminal defense is grounded in the U.S. Constitution, whereas the broad right to counsel for parents is found in the State Constitution, does not provide a sound rationale for repairing the broken system for one set of litigants, but not the other. Both species of mandated representation have a profound impact on the fundamental rights of New Yorkers. Both realms require sweeping improvements and State funding and oversight to ensure quality representation.[131]

Effective representation of parents in child welfare cases requires an interdisciplinary team approach, with lawyers working closely with various non-attorney professionals. Other than in New York City, which has adopted an interdisciplinary approach, parents' attorneys generally do not have the resources necessary to provide meaningful representation.

The Nassau Legal Aid Society observed that many parents remain at risk of losing their children to foster care because their lawyers lack adequate resources, and urged that funding should be provided to hire social workers, parenting coordinators, and independent forensic experts.[132] A lawyer with the Albany County Public Defender noted that: "Our office has a very limited budget for things like experts, social workers, etc.…we may be able to get funding for a case or two a year, and that is if we can find a professional in the field who will accept a county voucher pending payment."[133] The attorney further noted that, in cases involving allegations of neglect or abuse, "it would be extremely valuable to have the ability to call our own expert to interview [clients]," and that while the county has a psychologist who conducts family assessments and makes recommendations, the parents' attorneys lack an equivalent resource.[134]

Similarly, the Monroe County Public Defender explained that effective representation is impossible without sufficient support staff, social workers, parent advocates, and investigators, because parents' success or failure in reunifying with their children is dependent on having such resources available to help the parents successfully navigate the various administrative bureaucracies associated with CPS.[135] Without State funding, such resources will not be available statewide for parental representation. As one attorney explained, in State intervention cases, parents' contacts with workers is limited to DSS employees or contractors of DSS advancing State, not parents,' goals. "We need to have service providers whose goal is helping the parents address whatever issues have contributed to the state intervention."[136]

---

131 New York State Bar Association, Memorandum in Support of State Funding for Mandated Parental Representation, *supra* n 35, at 16.

132 Written testimony of Nassau Legal Aid Society.

133 Written testimony of Rylan Ritchie, Albany County Public Defender Office, Family Court Unit.

134 *Id.*

135 Written testimony of Tim Donaher and Adele Fine, Monroe County Public Defender's Office.

136 Written testimony of Barbara Kelly, Allegany County Public Defender.

The Commission concludes that direct State funding for the costs of child welfare parental representation, through the proposed Office of Family Representation, is the most efficient and effective way to ensure meaningful parental representation in State intervention cases. We note that other jurisdictions provide State funding for family defense, including Arkansas, Colorado, Massachusetts, New Jersey, North Carolina, Oregon, Utah, and Washington.[137] The Commission is grateful to the directors of the North Carolina and Washington programs, Wendy Sotolongo and Joanne Moore, respectively, who shared with us valuable information about the parental representation programs in their states.

We recognize that State assumption of all parental representation costs in child welfare cases will require a significant investment. In accordance with the Guiding Principle that its recommendations must be feasible, the Commission suggests that the State's assumption of fiscal responsibility be phased in over 3 to 5 years, with careful oversight and modifications for efficiency. This approach would have an immediate impact not only on the quality of parental representation, but also, over time, on the bottom line for New York taxpayers.

The New York State Bar Association has adopted the position that: "Ultimately, the new vision for parental representation in Family Court and related proceedings should embrace a statewide system that is fully financed and administered by the State. Such an approach would better ensure that the rights of parents *and* children are protected."[138] The Commission concludes that State investment in parental representation in case welfare cases is critical to true reform and will lead to less family separations and more efficient and cost-effective representation. There is no justifiable basis for distinguishing between legally required criminal defense and parental representation. Both forms of representation have a profound impact on constitutional rights of indigent New Yorkers and require reform. Given the lessons learned from the *Hurrell-Harring* litigation, there is every reason to act now to bring reform to parental representation.

137 Angela Burton, *Reimagining Family Defense*, 20 CUNY L Rev 1, 18 (2016).

138 New York State Bar Association, Memorandum in Support of State Funding for Mandated Parental Representation, *supra* n. 35, at p. 4.

No. 6 – COMPENSATION RATES

RECOMMENDATION

We recommend that the hourly rates for assigned attorneys be increased to $150 per hour, and a mechanism for periodic review and adjustment be instituted.

The hourly compensation rate under Article 18-B of County Law has not changed since 2004. At that time, rates for assigned counsel were increased to $75 per hour.[139] The maximum compensation was set at $4,400, with the proviso that additional compensation may be paid upon a showing of extraordinary circumstances. The current rate is woefully insufficient to compensate attorneys for the important service they provide to New Yorkers of limited means. Moreover, the inadequate compensation rate has led to a growing shortage of qualified attorneys, adding to the problem of excessive caseloads and the resulting poor quality of representation for clients, as numerous witnesses testified.

Hon. Robert Mulroy, President of the NYC Family Court Judges Association, reported: "It is evident that the need to increase the number of attorneys on the assigned counsel plan is pressing, if not desperate…the best way to accomplish this is by increasing both the hourly rate…as well as the maximum amount that can be charged per case absent extraordinary circumstances."[140] Robert Convissar, Administrator of the Erie County Assigned Counsel Program indicated that: "The inability to recruit effects [sic] our current panel members, forcing some to leave because they get 'burned out' handling excessive caseloads of this critically important work."[141] The New York Legal Assistance Group stated that the current compensation discourages attorneys from "spending the same amount of time on an assigned case as they might any other case because they will not be paid for their time spent. Rather, it incentivizes accepting a high volume of cases and necessitates picking up private pay cases to supplement their earnings in order to make a living."[142]

The Commission's stance on the compensation rate is consistent with the position taken by the New York State Bar Association. A report by the Association's Criminal Justice Section and Com-

139 County Law § 722-b

140 Written testimony of Hon. Robert Mulroy.

141 Written testimony of Robert Convissar, Administrator of the Erie County Assigned Counsel Program.

142 Written testimony of New York Legal Assistance Group.

mittee on Mandated Representation advocated an increase in assigned counsel rates.[143] The resolution approved by the State Bar House of Delegates urged enactment of legislation to increase rates for all mandated representation, including parental representation. The NYSBA proposal calls for an annual review process and adjustment, using a formula similar to the one employed under the federal Criminal Justice Act, and for the increased rates to be at State expense, not through unfunded mandates to the localities. Increasing assigned counsel rates is a State legislative priority for the Association for 2019. The State Bar declared that rates of compensation to all assigned counsel should be increased to prevent the exodus of practitioners from representation panels across the State, since a shortage of such lawyers undermines the administration of justice in New York State.[144]

CONCLUSION

In this Interim Report, the Commission on Parental Legal Representation has focused on the area of child welfare law. We have concluded that New York State's responsibility for providing constitutionally and statutorily required parental representation will best be achieved through a statewide system that is fully funded by the State and administered through a State entity. This will ensure quality, cost-effective parental representation in every locality. Thus, the Commission recommends that a State Office of Family Representation be created to oversee parental representation statewide.

For child welfare cases, the Office should be authorized and funded to oversee a network of specialized providers and Regional Offices to ensure the delivery of client-centered, interdisciplinary, holistic representation throughout the State. The Commission envisions that the Office will make information about the child welfare system and Family Court processes widely available; that parents who come into contact with CPS will immediately be given notice of their right to counsel and how to obtain counsel; and that counsel will be available to those parents, upon request, at every critical stage of CPS intervention, including during the investigation stage. To facilitate timely entry of counsel, the Commission recommends a presumption of eligibility for counsel, codified in legislation, for all parents in child welfare proceedings so that counsel will be promptly provided at all critical stages.

Caseload caps on the number of State intervention cases to be carried by each attorney must also be implemented. The Commission recommends that attorneys providing parental representation handle a maximum number of 50 to 60 child welfare clients with active cases at any given time. The Commission also recommends that a rigorous caseload study be undertaken by

143 New York State Bar Association, Criminal Justice Section, The Need to Increase Assigned Counsel Rates in New York, available at http://www.nysacdl.org/wp/wp-content/uploads/2018/06/Assigned-Counsel-Report.pdf.

144 We note that the compensation rates for nonlawyer professionals were increased effective as of January 1, 2018, pursuant to an Administrative Order of the Chief Administrative Judge of the Courts. (AO/446/17, December 19, 2017).

the proposed Office of Family Representation to determine caseload standards for mixed docket parental representation practice, including the relative weights of all categories of cases set forth in Family Court Act § 262. Further, as has already been done for attorneys for children and attorneys for criminal defendants, caseload standards for parent attorneys should be codified by statute or rule. Finally, to attract and retain excellent attorneys, assigned counsel rates must be raised.

New York State has adopted, in Executive Law §§ 990-991, "family policy guidelines," designed to "ensure that all state and local planning and provision of services are effectuated in a manner that maximizes support and strengthening of the family structure." Those standards are "directed toward stemming the human and financial costs of the unnecessary placement of children outside their homes, while ensuring the safety and well-being of children." As Chief Judge DiFiore recognized in creating this Commission, the quality of representation received by parents inevitably impacts the well-being of their children. Properly implemented, with full State funding and oversight, the Initial Recommendations set forth in this Interim Report promise to have a profound impact on the quality of life of children in New York.

As pointed out in a recent article in the American Bar Association's Child Law Practice Online: "While courts have focused on what they should do, they've paid far less attention on how they should do it, particularly as it relates to how parents experience the child welfare process. As a result, parents frequently feel left out of the process, feeling even more hopeless about their prospects of getting their children back after the court process begins."[145] Collectively, the Commission's Initial Recommendations are a blueprint for a comprehensive plan to transform how New York provides representation for parents involved with the child welfare system. We recognize that, because the problems we address are so deeply entrenched and have been ignored for as long as mandated representation has been promised, the solution must be far-reaching and enduring. To that end, while our Initial Recommendations focus on immediate changes aimed at improving child welfare representation, we stress that all aspects of the system are interrelated. Our recommendations represent the beginning, not the end, of New York's journey toward more effective legal services for parents in all Family Court mandated representation cases.

145 Vivek S. Sankaran, *My Name is Not "Respondent Mother,"* ABA Child Law Practice Online, June 6, 2018, available at https://www.americanbar.org/groups/child_law/resources/child_law_practiceonline/january-december-2018/my-name-is-not-_respondent-mother/.

APPENDIX A: MEMBERSHIP OF THE COMMISSION

Chair:

Hon. Karen K. Peters*	Former Presiding Justice of the Appellate Division, Third Department, Chair of The New York State Permanent Judicial Commission on Justice for Children

Members:

Hon. Kevin M. Carter	Family Court, Erie County
Hon. Craig Doran	Administrative Judge, 7th Judicial District
Hon. Gayle P. Roberts	Acting Supreme Court Justice, Supreme Court Youth Part, New York County
Hon. Jeanette Ruiz	Administrative Judge, NYC Family Court
Hon. Kathie E. Davidson	Administrative Judge, 9th Judicial District
Hon. Dean Kusakabe	Family Court, Kings County
Hon. Margaret T. Walsh	Justice, Supreme Court, 3rd Judicial District
Hon. Theresa Whelan	Supervising Judge, Suffolk County Family Court and Surrogate, Suffolk County
Barbara J. Kelley, Esq.	Allegany County Public Defender
Linda Gehron, Esq.	President & CEO, Hiscock Legal Aid Society
Michele Cortese, Esq.	Executive Director, Center for Family Representation
Tasha Lloyd, Esq.	Associate Counsel, Justice Initiatives, NYC Mayor's Office of Criminal Justice
Prof. Sarah Rogerson	Director, Immigration Law Clinic, Albany Law School
Prof. Martin Guggenheim	New York University School of Law
Susan B. Lindenauer, Esq.	Chair, NYS Bar Association Committee on Families and the Law
Jeannette Vega	Parent Advocate Training Director, RISE Magazine
Michael Hein	Ulster County Executive (Commissioner until February 7, 2019)
Michael Williams	Chief Clerk, Family Court, Suffolk County

Advisors:

Angela Olivia Burton, Esq.*	Director of Quality Enhancement, Parent Representation, New York State Office of Indigent Legal Services
Lucy McCarthy, Esq.*	Parental Representation Attorney, New York State Office of Indigent Legal Services
Cynthia Feathers, Esq.*	Director of Quality Enhancement, Appellate and Post-Conviction Representation, New York State Office of Indigent Legal Services
Betsy Ruslander, Esq.	Director, Office of Attorneys for Children, NYS Supreme Court, Appellate Division, Third Department
William C. Silverman, Esq.	Partner, Proskauer Rose LLP

Counsels:

Janet Fink, Esq.*	Deputy Counsel, NYS Office of Court Administration
Shane T. Hegarty, Esq.*	Asst. Deputy Counsel, NYS Office of Court Administration

Ex Officio

Hon. Edwina G. Mendelson	Deputy Chief Administrative Judge for Justice Initiatives

*Denotes members of the Drafting Committee for the Commission on Parental Legal Representation Report

APPENDIX B: PUBLIC HEARINGS WITNESS LIST AND ADDITIONAL WRITTEN STATEMENTS

NEW YORK STATE UNIFIED COURT SYSTEM COMMISSION ON PARENTAL LEGAL REPRESENTATION PUBLIC HEARINGS WITNESS LIST:

Rochester - September 13, 2018

Kate Woods, Esq., Deputy Director of Operations, Legal Assistance of Western New York
Honorable Joan S. Kohout, Monroe County Family Court
Mark Funk, Esq., Monroe County Conflict Defender

New York County - September 27, 2018

Michael Miller, Esq., President, New York State Bar Association
Susan B. Lindenauer, Esq., Chair, New York State Bar Association Committee on Families and the Law
Joyce McMillan, Former Program Director, Child Welfare Organizing Project
Jeanette Vega, Training Director, RISE
Angeline Montauban, Parent
Alan Sputz, Esq., Deputy Commissioner, New York City Administration for Children's Services
Rhonda Weir, Esq., Association of Private Court Assigned Counsel, Appellate Division, Second Department
Brian Zimmerman, Esq., President, Association of Private Court Assigned Counsel, Kings County
Ronald Fisher, Esq., Bronx Family Court Bar Association
Michelle Burrell, Esq., Neighborhood Defender Service of Harlem
Tehra Coles, Esq., Litigation Supervisor, Center for Family Representation
Lisa Schreibersdorf, Esq., Executive Director, Brooklyn Defender Services
Lauren Shapiro, Esq., Family Defense Practice Director, Brooklyn Defender Services
Emma Ketteringham, Esq., Managing Director, Family Defense Practice, The Bronx Defenders
Caitlin Becker, M.S.W., Managing Director, Social Work Practice, The Bronx Defenders
Barbara Kryszko, Esq., Director, Brooklyn Legal Project, Family Justice Center, Sanctuary for Families
Nancy Erickson, Esq., Private Attorney

Albany - October 10, 2018

Susan C. Bryant, Esq. Acting Director, New York State Defenders Association
William Leahy, Esq., Director, New York State Office of Indigent Legal Services
Gerard Wallace, Esq., Director, New York State Kinship Navigator Program
Amanda McHenry, Esq., Supervising Attorney, Family Court Program, Hiscock Legal Aid Society Syracuse, New York
Stephen J. Acquario, Esq., Executive Director, New York State Association of Counties

Monica Kenny-Keff, Esq., Panel Attorney, Catskill, New York

Kim Dvorchak, Esq. Executive Director, National Association of Counsel for Children

Joyce McMillan, Parent Organizer, Sinergia Inc.

Mineola - October 23, 2018

Scott Banks, Esq., Legal Aid Society of Nassau County

Jorge Rosario, Esq., Bureau Chief Supervising Attorney, Children's Law Bureau, Legal Aid Society of Suffolk County

Thomas Sartain, Esq., Family Court Bureau Chief, Legal Aid Society of Suffolk County

Lynn Poster-Zimmerman, Esq., President-Elect, Suffolk County Bar Association

Jennifer Rosenkrantz, Esq., Suffolk County Bar Association

Lois Schwaeber, Esq., Director of Legal Services, The Safe Center of Long Island

Sarah Tirgary, Esq., Assigned Counsel Association of Queens Family Court

Joel Serrano, Esq., Assigned Counsel Association of Queens Family Court

Linda Hassberg, Esq., Senior Staff Attorney, Empire Justice Center

Professor Theo Liebmann, Director of the Youth Advocacy Clinic at Hofstra University Law School and Co-chair, NYS Unified Court System Advisory Council on Immigration Issues in Family Court

Additional Written Statements List:

Thomas N. N. Angell, Public Defender, & Eric J. Knapp, Family Court Unit Bureau Chief, County of Dutchess Office of the Public Defender

Rylan Ritchie, Family Court Unit, Office of the Public Defender, Albany County

Amy Barash, Esq., Executive Directory, Hamra Ahmad, Esq., Director, Legal Services, & Rachel L. Braunstein, Esq., Managing Policy Attorney, Her Justice, New York, NY

Ruth C. Balkin, Esq., Chair, Unified Court System Statewide Advisory Committee on Attorneys for Children

Carl D. Birman, Esq., Attorney At Law, Law Offices of Carl D. Birman, White Plains, NY

Darryl R. Bloom, Esq., Public Defender, Office of the Public Defender, Cattaraugus County, Olean, NY

Maritza Buitrago, Esq., Office of the Public Defender, Monroe County, Rochester, NY

Bridgit Burke, Esq., Legal Director, The Legal Project, Inc., Albany, NY

Chelsea B. Carter, Esq. Assistant Public Defender, Public Defender Office, Ontario County, Canandaigua, NY

The Children's Law Center, New York, NY

Robert N. Convissar, Esq., Chief Defender/Administrator, Assigned Counsel Program, Erie County Bar Association, Buffalo, NY

Kelly L. Egan, Esq., Appeals Director, Rural Law Center of New York, Inc., Plattsburgh, NY

John Ferrara, Esq., Law Office of John Ferrara, Monticello, NY

Adele Fine, Esq., Special Assistant Public Defender, Family Court Bureau Chief, & Timothy P. Donaher, Esq., Monroe County Public Defender, Office of the Public Defender, Monroe County, Rochester, NY

Karen Freedman, Esq., Executive Director, Lawyers For Children, New York, NY

Honorable Michael F. Griffith, Supervising Judge of Family Courts, Erie County Family Court

Helma Hermans, Esq., Staff Attorney, Legal Aid Society of Suffolk County

Susan Kaufman, Esq., Counsel, Matrimonial Practice Advisory and Rules Committee (MPARC)

Barbara J. Kelley, Esq., Allegany County Public Defender

Nicole R. Kilburg, Esq., Law Offices of Nicole R. Kilburg, Albany, NY

Leon Koziol, Parenting Rights Institute, Utica, NY

David J. Lansner, Esq., Lansner & Kubitschek, New York, NY

Legal Information for Families Today (LIFT), Brooklyn, NY

Cassandra E. Louis, Policy and Advocacy Associate, The Children's Village, Dobbs Ferry, NY

Jessica E. Marsico, M.A., New York State Family Court Researcher, Social & Public Policy Analyst, Albany, NY

Marion McCue de Velez, L.C.S.W., The Children's Village, New York, NY

Ronald J. McGaw, Esq., The Law Offices of Ronald J. McGaw, Poughkeepsie, NY

Michael Mercure, Esq., Washington County Public Defender, Fort Edward, NY

Dawne Mitchell, Attorney In Charge, Juvenile Rights Practice, & Jayne Cooper, Staff Attorney, Juvenile Rights Special Litigation and Law Reform Unit, The Legal Aid Society, New York, NY

Honorable Robert Mulroy, President, New York City Family Court Judges Association

New York Legal Assistance Group ("NYLAG")

Larisa Obolensky, Esq., Attorney At Law, Delhi, NY

Danial L. Pagano, Esq., Law Offices of Daniel L. Pagano, Yorktown Heights, NY

Pro Bono and Legal Services Committee, New York City Bar Association

Lance Salisbury, Esq., Supervising Attorney, Tompkins and Schuyler County Assigned Counsel Programs

David C. Schopp, Esq., CEO/Executive Director, The Legal Aid Bureau of Buffalo, Inc., Buffalo, NY

Statewide Central Register ("SCR") Practice Group

Thomas M. Susman, Esq., Director, Governmental Affairs Office, American Bar Association, Washington, D.C.

John J. Westman, Esq., The Westman Law Firm, Jamestown, NY

APPENDIX C: GUEST PRESENTATIONS TO THE COMMISSION

September 20, 2018, Commission Meeting:

Wendy Sotolongo, Esq. - Indigent Defense Services of North Carolina Parent Defender

Joanne Moore, Esq. - Director of Washington State Office of Public Defense Parent Representation Program

October 17, 2018, Commission Meeting:

Lisa Schreibersdorf, Executive Director of Brooklyn Defender Services

Denise Wirsig, Senior Operations Officer, Brooklyn Defender Services

November 19, 2018, Commission Meeting:

Joanne Macri, Esq., Director of Regional Initiatives, New York State Office of Indigent Legal Services

Patricia Warth, Esq., Chief Implementation Attorney, Hurrell-Harring, New York State Office of Indigent Legal Services

EXHIBIT C

Standards for Determining Financial Eligibility for Assigned Counsel

February 16, 2021

NEW YORK STATE OF OPPORTUNITY. | Indigent Legal Services

The Scope of the Right to Assigned Counsel in Family Matters

In family related matters, the right to assigned counsel is articulated in Family Court Act §§ 261, 262, and 1120 and in Surrogate's Court Procedure Act § 407. The right to assigned counsel of parents and others in a parent-like relationship to a child ("legally responsible persons") is grounded in constitutional principles of due process and equal protection. In 1972, in the case of *In re Ella B*., which involved allegations of child neglect, the New York State Court of Appeals ruled that "an indigent parent, faced with the loss of a child's society, as well as the possibility of criminal charges is entitled to the assistance of counsel."[50] Emphasizing the constitutional right of parents to the care and custody of their children, the Court concluded that "it is fundamentally unfair, and a denial of due process of law for the state to seek removal of the child from an indigent parent without according that parent the right to the assistance of court-appointed and compensated counsel."[51] Moreover, the Court declared, failure to provide the parent with a lawyer would constitute not only a violation of due process but, "in light of the express statutory provision for legal representation for those who can afford it, a denial of equal protection of the laws as well."[52]

Building on those fundamental principles, in 1975, the New York State Legislature acknowledged a constitutional right to assigned counsel in a range of family law proceedings in which persons may face "the infringements of fundamental interests and rights, including the loss of a child's society and the possibility of criminal charges."[53] Currently, the parental right to assigned counsel extends to certain delineated persons in cases brought in Family Court and Surrogate's Court involving child custody and visitation; child protective (abuse/neglect); foster care placement and review; termination of parental rights; destitute child; adoption; paternity; family offense (domestic violence); as well as to any person charged with contempt of court for violation of a prior court order (including willful violation of a child support order) and persons "in any other proceeding in which the judge concludes that "such assignment of counsel is mandated by the constitution of the State of New York or of the United States."[54]

---

[50] 30 N.Y.2d 352 (1972).

[51] *Id*. at 357.

[52] *Id.* at 356-57.

[53] N.Y. Family Court Act § 261.

[54] N.Y. Family Court Act § 262; Surrogate's Court Procedure Act § 407.

STANDARDS FOR DETERMINING ASSIGNED COUNSEL ELIGIBILITY

I. An applicant shall be eligible for assignment of counsel when the applicant's current available resources are insufficient to pay for a qualified attorney, release on bond, the expenses necessary for effective representation, and the reasonable living expenses of the applicant and any dependents.

A. Whether an applicant is eligible for assignment of counsel shall be determined in accordance with the Standards set forth below.

B. Counsel shall be assigned unless the applicant is conclusively ineligible.

II. To streamline the eligibility determination process, there shall be presumptions of eligibility. A presumption of eligibility is rebuttable only where there is compelling evidence that the applicant has the financial resources sufficient to pay for a qualified attorney and the other expenses necessary for effective representation.

A. Applicants are presumptively eligible for assignment of counsel if their net income is at or below 250% of the Federal Poverty Guidelines.

B. Applicants who are incarcerated, detained, or confined to a mental health institution shall be presumed eligible for assignment of counsel.

C. Applicants who are currently receiving, or have recently been deemed eligible pending receipt of, need-based public assistance, including but not limited to Family Assistance (TANF), Safety Net Assistance (SNA), Supplemental Nutrition Assistance (SNAP), Supplemental Security Income (SSI)/New York State Supplemental Program (SSP), Medicaid, or Public Housing assistance, shall be deemed presumptively eligible for assignment of counsel.

D. Applicants who have, within the past six months, been deemed eligible for assignment of counsel in another case in that jurisdiction or another jurisdiction shall be presumed eligible. Appellate courts shall assign appellate counsel to appellants who were deemed eligible for assigned counsel by their trial court.

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

A. Counsel shall be provided for applicants whenever they have not obtained counsel prior to a proceeding which may result in their detention or whenever there is an unavoidable delay in the eligibility determination, subject to judicial approval once the court proceeding has begun.

B. Where a petition or pre-petition request has been filed under Family Court Act Article 10 for an order for immediate removal of a child or temporary order of protection, a person who is a parent or legally responsible person, as defined by law, shall be entitled to immediate representation by counsel. In accordance with this entitlement, counsel shall also be provided for parents in child welfare proceedings during a child protective agency investigation and sufficiently in advance of their first court appearance, consistent with (A) above. As with subsection (A), this provision of counsel may be subject to judicial review once a court proceeding is commenced.

IV. Ability to post bond shall not be sufficient, standing alone, to deny eligibility for assignment of counsel.

V. The resources of a third party shall not be considered available to the applicant unless the third party expressly states a present intention to pay for counsel, the applicant gives informed consent to this arrangement, and the arrangement does not interfere with the representation of the applicant or jeopardize the confidentiality of the attorney-client relationship.

A. The resources of a spouse shall not be considered available to the applicant, subject to the above exception.

B. The resources of a parent shall not be considered as available to minor applicants, subject to the above exception.

VI. Non-liquid assets shall not be considered unless such assets have demonstrable monetary value and are readily convertible to cash without impairing applicants' ability to provide for the reasonable living expenses of themselves and their dependents.

A. Ownership of a vehicle shall not be considered where such vehicle is necessary for basic life activities.

B. An applicant's primary residence shall not be considered unless the fair market value of the home is significant, there is substantial equity in the home, and the applicant is able to access the equity in a time frame sufficient to retain private counsel promptly.

VII. **An income from receipt of child support or need-based public assistance shall not be considered as available to applicants in determining eligibility for assignment of counsel.**

VIII. **ebts and other financial obligations, including the obligation to provide reasonable living expenses of the applicant and his or her dependents, shall be considered in determining eligibility for assignment of counsel.**

IX. **Eligibility determinations shall take into account the actual cost of retaining a private attorney in the relevant jurisdiction for the type of family court proceeding or category of crime charged.**

X. **These Standards shall be applied uniformly, consistently, and with transparency.**

XI. **Courts have the ultimate authority to determine eligibility but may delegate the responsibility for screening and making an eligibility recommendation.**

- **A. Entities responsible for screening and making a recommendation should be independent and conflict-free.**
- **B. Where there is no entity that is independent and conflict-free, courts may delegate the screening responsibility to the provider of mandated representation.**

XII. **The confidentiality of all information applicants provide during the eligibility determination process shall be preserved.**

- **A. The eligibility screening process, whether done by another entity or the court, shall be done in a confidential setting and not in open court.**
- **B. Any entity involved in screening shall not make any information disclosed by applicants available to the public or other entities (except the court).**
- **C. Any documentation submitted to the court shall be submitted *ex parte* and shall be ordered sealed from public view.**

XIII. **The eligibility determination process shall not be unduly burdensome or onerous.**

A. Applicants shall not be required to attest under penalty of perjury to the truth of the information provided as part of the eligibility determination process.

B. Applicants shall not be denied assignment of counsel for minor or inadvertent errors in the information disclosed during the eligibility determination process.

C. Applicants shall not be required to produce unduly burdensome documentation to verify the financial information provided; nor shall they be denied assignment of counsel solely for the failure to produce documentation where they have demonstrated a good faith effort to produce requested documentation.

D. Applicants shall not be required to demonstrate that they were unable to retain private counsel to be deemed eligible for assignment of counsel.

XIV. The determination that applicants are ineligible for assignment of counsel shall be in writing and shall explain the reasons for the ineligibility determination. Applicants shall be provided an opportunity to request reconsideration of this determination or appeal it, or both.

A. Screening entities shall promptly inform applicants of their eligibility recommendation. If their recommendation is that the applicant be denied assignment of counsel, they shall provide the reason for the denial in writing along with written notice that the applicant can ask the screening entity to reconsider or can appeal to the court, or both.

B. If a court determines that an applicant is ineligible for assignment of counsel, the court shall inform the applicant of this decision in writing with an explanation as to the reason for the denial. The court shall also entertain an applicant's request to reconsider a decision that the applicant is ineligible for assignment of counsel.

XV. A determination that a person is eligible for assignment of counsel may be re-examined only in accordance with County Law §722-d, which shall only be used after an assignment of counsel has been made, and only if prompted by assigned counsel as therein provided. Counsel shall not be assigned contingent upon a requirement that the person make partial payments to the provider of mandated representation or to the county.

XVI. Procedure regarding data maintenance

A. Data shall be maintained regarding the:

- **i) number of applicants who apply for assignment of counsel;**
- **ii) number of applicants found eligible;**
- **iii) number of applicants found ineligible and the reasons for the ineligibility determination;**
- **iv) number of reconsiderations and appeals requested;**
- **v) results of these reconsiderations and appeals;**
- **vi) number of reports made pursuant to County Law § 722-d regarding the assignment of counsel; and**
- **vii) number of orders issued for partial payment or termination of the assignment of counsel under County Law § 722-d.**

B. To ensure the confidentiality of information submitted during the eligibility determination process, the data shall be made available in aggregate form only, meaning that no individual applicant can be identified in the data itself.

Standards for Determining Financial Eligibility for Assigned Counsel

February 16, 2021

NEW YORK STATE OF OPPORTUNITY. | Indigent Legal Services

NEW YORK STATE
OFFICE OF INDIGENT LEGAL SERVICES

Standards for Determining Financial Eligibility for Assigned Counsel

TABLE OF CONTENTS

ACKNOWLEDGEMENTS

In an effort to learn as much as possible about the current process for determining financial eligibility for the assignment of counsel in New York State, in 2015 and again in 2019, the Office of Indigent Legal Services (ILS) surveyed judges and providers, conducted public hearings, and elicited written commentary. We are indebted to the Office of Court Administration for its assistance in distributing surveys to judges and securing venues for the public hearings, and to members of the ILS Board and the New York State Unified Court System's Commission on Parental Legal Representation (hereinafter, the "DiFiore Commission") for participating in the hearing process. We wish to acknowledge the many magistrates, judges, and providers of mandated representation who took the time and made the effort to complete the surveys. We also wish to acknowledge the many people who participated in the public hearings, either through oral testimony, written commentary, or both. These individuals are identified in Appendix C to these Standards.

Additionally, we are grateful for the tremendous guidance that we received from various reports, including: the National Legal Aid and Defender Association's 1976 report, *Guidelines for Legal Defense Systems in the United States*; the Third Judicial Department's 1977 Memorandum entitled, *Assignment of Attorneys to Represent Individuals Who are Financially Unable to Obtain Counsel*; the American Bar Association, *Standards for Criminal Justice: Providing Defense Services* (3d ed. 1992); the New York State Defenders Association 1994 report, *Determining Eligibility for Appointed Counsel in New York State: A Report from the Public Defense Backup Center*; the ABA *Ten Principles of a Public Defense Delivery System* (2002); the Brennan Center for Justice's 2008 report, *Eligible for Justice: Guidelines for Appointing Defense Counsel*; New York State Bar Association *Task Force on Family Court Final Report* (2013); and the Commission on Parental Legal Representation *Interim Report to Chief Judge DiFiore* (2019). We particularly want to thank the staff of the New York State Defenders Association, who have studied this issue for over three decades, and whose insight and experiences proved invaluable to the development of these Standards.

INTRODUCTION

> "Standards are the key to uniform quality in all essential governmental functions. In the indigent defense area, uniform application of standards at the state or national level is an important means of limiting arbitrary disparities in the quality of representation based solely on the location in which a prosecution is brought." -*Redefining Leadership for Equal Justice: Final Report of the National Symposium on Indigent Defense 2000,* Office of Justice Programs/Bureau of Justice Assistance, U.S. Department of Justice 2001, at 14.

In accordance with federal and New York State law, article 18-B of the County Law provides for free legal representation in criminal cases and certain family law matters for people who cannot afford to pay for a lawyer. ILS, with the approval of its Board, issues the following Standards (rev. December 2020) pursuant to its responsibility under Executive Law § 832(3)(c) to establish "criteria and procedures to guide courts in determining whether a person is eligible" for publicly funded legal representation.

In 1963, the United States Supreme Court pronounced that "[t]he right of one charged with a crime to counsel may not be deemed fundamental and essential to a fair trial in some countries, but it is in ours."[1] Thus, held the Court, individuals charged with a felony who cannot afford counsel must have one appointed to them. Two years later, the New York State Court of Appeals made it clear that the right to appointed counsel applies in non-felony as well as felony cases, and that defendants must be explicitly told at arraignment that if they cannot afford counsel, one will be appointed to them.[2] The New York State Legislature responded by enacting County Law Article 18-B, which imposes upon counties the responsibility – and hence the costs – of providing counsel for defendants who are entitled to assigned counsel.

In 1972, the New York State Court of Appeals recognized that parents involved in child welfare proceedings have a right to assigned counsel under the New York State Constitution.[3] In 1975

---

[1] *Gideon v. Wainwright,* 372 U.S. 335, 344 (1963).

[2] *People v. Witenski*, 15 N.Y.2d 392 (1965). *Witenski* involved the case of three teenaged boys who were "surprised in an orchard at about 10:30 P.M. in the act of stealing a half bushel of apples, [valued at] … $2." 15 N.Y.2d at 394. All three boys pleaded guilty at the arraignment held later that night and were sentenced to 30 days in jail and a fine. Since none of them could pay the fine, the sentence for each was 55 days total. While the boys were advised at arraignment that they had a right to counsel, they were not advised that, if they could not afford one, counsel would be appointed to them. They subsequently retained counsel to appeal their convictions and were successful.

[3] *Matter of Ella B.,* 30 N.Y.2d 352 (1972). *Ella B.* involved a child neglect proceeding under Article 10 of the Family Court Act. At Mrs. B.'s first appearance in court to respond to the local department of social services neglect petition against her, the judge informed her that if she wanted an attorney she had to find one herself and pay the attorney "out of her own funds." 30 N.Y.2d at 358. He then asked if she wanted an attorney, to which she answered "No." *Id.* After Mrs. B. answered "yes" to his question whether she admitted to "the facts in the petition", the judge entered an order finding Mrs. B's daughter a neglected child and placed the child in the custody of the department of social services. The Court of Appeals held that "an indigent parent, faced with the loss of a child's society, as well as the possibility of criminal charges, is entitled to the assistance of counsel. . . . Once the conclusion is reached that one has a

the Legislature amended the Family Court Act to codify the right to assigned counsel for parents and other specified adults in a range of family-related matters.[4] In certain circumstances, explicit notice of that right must be given to individuals.[5] And, pursuant to Family Court Act § 262(c), as with indigent criminal defense, the Legislature delegated the fiscal and administrative responsibility for parental representation to the counties under County Law Article 18-B.

Although it has long been held that courts have inherent power to provide counsel to indigent persons charged with a crime, and therefore to assess when a person is unable to afford the costs of representation,[6] in most counties providers of mandated representation make the initial determinations of financial eligibility.

Prior to 2016 when ILS adopted standards for criminal cases only, there had been no statewide standards for determining when individuals are financially eligible for the assignment of counsel. Lack of standards resulted in inconsistent decisions and often inadequate protection of the right to assigned counsel in New York.

In annual reports dating back to 1989, the New York State Commission on Judicial Conduct identified the lack of uniform standards as a critical issue adversely affecting many defendants.[7] In its 2001 report, the Commission stated as follows:

> Among the complications confronting judges in [the process of appointing counsel] are the disparate eligibility standards from county to county and the varying means by which eligibility determinations are made. . . .
>
> In one situation brought to the Commission's attention last year, a judge, based on an interpretation of written guidelines from the public defender, sought to deny assigned counsel to a minor defendant solely because the defendant's parents owned a home. Even if it were permissible to include parental assets in a determination of eligibility, further inquiry would have been required, to determine, for example, whether the parents refused to support the child, or whether they had enough equity in the house to sustain a loan against it, or whether the value of the house was sufficient to cover legal fees. In other cases, defendants whose income is below the poverty level are denied counsel. Some defendants are denied assigned counsel because they are employed or expect to be employed soon – without any effort by the judge to ascertain whether the

---

right to be represented by assigned counsel . . . it follows that one is entitled to be so advised." *Id.* at 356 –57 (internal citations omitted).

[4] Family Court Act §§ 261, 262; Surrogate's Court Procedure Act § 407.

[5] Family Court Act §§ 262, 1021, 1022, 102 A, 1023, and 1024.

[6] *See Matter of Stream v. Beisheim*, 34 A.D.2d 329, 333 (2nd Dept. 1970) (holding that a trial court has the "inherent power [as part of] its constitutional and statutory duty to furnish counsel to every indigent defendant charged with a crime," and thus to determine when a defendant is unable to afford counsel).

[7] This issue was identified in the Commission's annual reports dated 1989, 1992, 1995, and 2001.

> defendant can afford to retain counsel, notwithstanding the employment or prospective employment. . . .
>
> It has been the Commission's experience that some judges take inadequate steps to safeguard the important right to counsel.[8]

This report discussed favorably a 1994 report issued by the New York State Defenders Association (NYSDA), which had reviewed and assessed assigned counsel eligibility determination processes across New York State. In its report, NYSDA summarized its findings as follows: "empirical survey data confirm what our experience has long revealed – the inequitable, disparate and arbitrary methods used for determining eligibility for public representation in counties throughout the state critically undermine the right to counsel of all criminal defendants."[9] NYSDA called for comprehensive change to ensure consistent and uniform implementation of publicly funded defense services throughout the state.[10]

In February 2004, the Commission on the Future of Indigent Defense Services (commonly known as the "Kaye Commission") was convened by then-Chief Judge Judith Kaye to "examine the effectiveness of indigent criminal defense services across the State and consider alternative models of assigning, supervising and financing assigned counsel compatible with New York's constitutional and fiscal realities."[11] In 2006, the Kaye Commission issued its Final Report, concluding as follows:

> [T]he indigent defense system in New York State is both severely dysfunctional and structurally incapable of providing each poor defendant with the effective legal representation that he or she is guaranteed by the Constitution of the United States and the Constitution and laws of the State of New York … [and] has resulted in a disparate, inequitable, and ineffective system for securing constitutional guarantees to those too poor to obtain counsel of their own choosing.[12]

The Kaye Commission noted the lack of statewide, uniform standards for determining eligibility for assigned counsel. In this regard, the Commission found that "[t]here are no clear standards

---

[8] New York State Commission on Judicial Conduct, *2001 Annual Report*, at 34-35. This report is available at: http://www.scjc.state.ny.us/Publications/AnnualReports/nyscjc.2001annualreport.pdf).

[9] New York State Defenders Association, *Determining Eligibility for Appointed Counsel in New York State: A Report from the Public Defense Backup Center (1994)* (hereinafter, "1994 NYSDA report"), at 2. This report is available at: http://www.nysda.org/docs/PDFs/Pre2010/[335]%20Determining%20Eligibility%20for%20Appointed%20Counsel%20in%20NYS%20(NYSDA).pdf.

[10] *Id.* at 21.

[11] Commission on the Future of Indigent Defense Services, FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK, June 2006, at 1 (hereinafter "Kaye Commission report"). This report is available at: http://www.courts.state.ny.us/ip/indigentdefense-commission/IndigentDefenseCommission_report06.pdf.

[12] Kaye Commission report, at 3.

regarding eligibility determinations and procedures," and that "guidelines for the appointment of counsel exist only in a few counties and that even in those counties, the guidelines were not uniformly applied."[13] As a result, "a defendant may be deemed eligible for the appointment of counsel in one county and ineligible in a neighboring county or even in a different court within the same county."[14]

Family court litigants face similar issues in the absence of statewide, uniform financial eligibility standards. Although its mandate was limited to indigent criminal defense, in its 2005 Interim Report, the Kaye Commission noted that the same systemic deficiencies existed in both criminal court and family court representation, including the lack of uniform standards for litigant financial eligibility.[15] Similarly, testimony cited in the 2013 final report of the New York State Bar Association's Task Force on Family Court "described determinations of inability to afford counsel that were inconsistent from jurisdiction to jurisdiction and in some instances involved a broad use of discretion that did not appear to fulfill statutory intent."[16] The Family Court Task Force recommended the adoption of statewide standards for family court litigants "that would establish a greater degree of consistency, predictability and equity in the assignment of counsel through the use of agreed upon standards that jurists could apply in disparate communities."[17]

The Family Court Task Force's Subcommittee on Resources for Individual Litigants suggested practical measures to increase transparency in the system:

> Individual courthouses should offer litigants a way to assess whether or not assigned counsel can be an option for them. So-called "portals" could be established and provide forms or online information to serve this purpose. Litigants could use these portals to review county specific information as well as statewide protocols. Information could include the standard of income which qualifies someone for counsel, as well as what kinds of resources, such as houses or cars, are included or excluded from the determination of eligibility. Litigants need to know why they do not qualify for assigned counsel. If they disagree with a denial, they should be told what options they have to either question the denial or seek other avenues for free or low cost representation.[18]

---

[13] Kaye Commission report, at 15.

[14] Kaye Commission report, at 15-16.

[15] Commission on the Future of Indigent Defense Services, Interim Report to the Chief Judge of the State of New York, at 16, n. 27, http://ww2.nycourts.gov/sites/default/files/document/files/2018-05/futureofindigentdefense.pdf.

[16] NYSBA Task Force on Family Court: Final Report (2013) (hereafter, NYSBA Family Court Task Force Report), at 43. This report is available at https://nysba.org/app/uploads/2020/02/Task-Force-on-Family-Courts-Final-Report.pdf.

[17] *Id*. at 45.

[18] The Task Force on Family Court, Subcommittee on Resources for Individual Litigants, Final Report, at 87-88 (July 2012).

More recently, the February 2019 report of the DiFiore Commission documented the lack of uniform, consistently applied financial eligibility standards in family court.[19] Public testimony, written commentary, and survey responses from judges and providers "demonstrated that criteria and procedures for determining financial eligibility vary even within the courthouse in counties where there is more than one Family Court judge."[20] Summarizing core issues, one witness said that "judges are inconsistent in determining financial eligibility, and many litigants with modest incomes are found ineligible" and that "two individuals in virtually the same situation can have very different results when they apply for assigned counsel, if they live in different counties."[21]

During the public hearings held by the DiFiore Commission in 2018 and by ILS in 2019, numerous witnesses highlighted the disparity in eligibility determinations in criminal court and family court. For example, an assigned counsel plan administrator testified that: "We can often assign someone for the criminal matters but not for the family court matter unless a judge overrides our decision. Judges have commented to us regularly how unfair a process this is for the parties before the court."[22] As the New York State Defenders Association observed: "Since County Law § 722 uses the same standard for the appointment of counsel in all cases – 'financially unable to obtain counsel' – it follows that the same general criteria and procedures should be used for eligibility determinations in all mandated representation matters." [23]

The New York State Bar Association Committee on Families and the Law underscored the rationale for uniform financial eligibility determinations in family court matters:

> Effective and prompt provision of counsel to parents is critical to one facing a loss of liberty or parental rights, and counsel should be assigned whenever one demonstrably possesses inadequate financial ability to hire an attorney. Gross differences between jurisdictions and among providers that result in a deprivation of the right to counsel in some jurisdictions must be addressed. Fair and

---

[19] Commission on Parental Legal Representation, Interim Report to Chief Judge DiFiore (February 2019), http://ww2.nycourts.gov/sites/default/files/document/files/2019-02/PLR_Commission-Report.pdf, hereafter "DiFiore Commission Interim Report."

[20] DiFiore Commission Interim Report, at 30.

[21] DiFiore Commission Interim Report, at 31.

[22] DiFiore Commission Interim Report, at 30-31.

[23] DiFiore Commission Interim Report, at 31. For similar testimony, see written submission to DiFiore Commission of Daryl Bloom, Cattauraugus Public Defender (**"**It is incongruent to have two separate financial eligibility and caseload standards in the representation of indigent people: One for family court proceedings and one for criminal proceedings. Both matters are constitutionally recognized and intrinsically of equal importance. It is time for family court reform in New York State; the rule of law depends on quality representation to all people, not based on one's financial capacity."); written submission of Robert Convissar, Erie County Assigned Counsel Administrator, to ILS Family Court Eligibility Hearings ("I believe that the time has come to end the disparate treatment accorded to the indigent in family court. . . . It cannot be said that the right to the custody of one's child, the possibility of incarceration on a willful violation of support, or the termination of one's parental rights is any less significant than the result of a criminal conviction. The disparity between eligibility standards leaves many potential indigent clients unrepresented in family court.").

> reasonable criteria for determining presumptive eligibility for assigned counsel that allow for discretionary factors in the interest of justice should be established with some uniformity.[24]

To prevent "inconsistent decisions and inadequate protection of the right to counsel," the DiFiore Commission urged adoption of "easily understandable, equitable, efficient, and fair" standards for determining financial eligibility for assigned counsel in family court matters.[25] As a practical matter, the Commission observed that "[u]niform standards will also save the time and resources of the parties, the courts, and others involved in the eligibility determination process."[26]

The *Hurrell-H rring v. The State of New York* Lawsuit and Settlement

In 2007, on the heels of the Kaye Commission's report, the New York Civil Liberties Union (NYCLU) sued New York State alleging that the State has systematically and structurally denied meaningful and effective representation to defendants entitled to publicly funded representation.[27] In this lawsuit, *Hurrell-Harring v. The State of New York,* NYCLU identified several flaws of New York's public defense system, including "incoherent or excessively restrictive client eligibility standards" that result in the "wrongful denial of representation."[28]

In October 2014, the parties to *Hurrell-Harring* agreed to an Order of Stipulation and Settlement (hereinafter, the "Settlement"), which was approved by the Albany County Supreme Court on March 11, 2015. The Settlement requires New York State to enhance "constitutionally mandated publicly funded representation in criminal cases for people who are unable to afford counsel"[29] in four key areas: Counsel at Arraignment; Caseload Relief; Initiatives to Improve the Quality of Indigent Defense; and Eligibility Standards for Representation. The New York State Office of Indigent Legal Services (ILS), created in 2010 under Executive Law § 832, accepted the responsibility of working with the parties to implement the Settlement.[30]

Focusing specifically on financial eligibility for assignment of counsel in criminal cases, Section VI of the Settlement requires that ILS "issue criteria and procedures to guide courts in counties outside of New York City in determining whether a person is eligible for Mandated Representation." The Settlement prescribes that, at a minimum, the criteria and procedures shall provide that:

---

[24] DiFiore Commission Interim Report, at 3

[25] DiFiore Commission Interim Report, at 30.

[26] DiFiore Commission Interim Report, at 31

[27] Subsequently, five counties were included as defendants to this lawsuit: Onondaga, Ontario, Schuyler, Suffolk, and Washington.

[28] *Hurrell-Harring v. The State of New York*, Index No. 8866-07, Amended Class Action Complaint, at ¶¶ 11-13, available at: http://www.nyclu.org/files/Amended%20Class%20Action%20Complaint.pdf.

[29] This is the definition of "Mandated Representation" as set forth in the Settlement. *See* Settlement, § II.

[30] *See* Settlement, pp. 2-3; *see also* Exhibit A of the Settlement.

(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 consider[ed] 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.[31]

In addition to these prescriptions, the Settlement requires that ILS consider the following in establishing criminal court eligibility criteria and procedures:

(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 [the] 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.[32]

ILS Authority and Obligation to Issue Financial Eligibility Standards

In accordance with the *Hurrell-Harring* settlement, in 2016 ILS first issued criteria and procedures for determining assigned counsel eligibility for criminal cases only, and only in counties outside of New York City.[33] However, ILS' authority to issue assigned counsel

[31] Settlement, § VI (B).

[32] *Id.*

[33] New York State Office of Indigent Legal Services, *Criteria and Procedures for Determining Assigned Counsel Eligibility: Blackletter with Commentary* (April 4, 2016), available at

eligibility standards derives not just from the Settlement, but also from ILS' implementing statute. Specifically, Executive Law § 832(3)(c) authorizes ILS to establish "criteria and procedures to guide courts in determining whether a person is eligible" for representation in criminal cases and certain family matters as delineated in article 18-B of the County Law. The Executive Law also authorizes ILS to collect information and data regarding assigned counsel eligibility determinations.[34]

In 2016, ILS noted its intent to issue separate Standards relating specifically to financial eligibility for family court mandated representation in compliance with its statutory duty under Executive Law § 832(3)(c).[35] As further documented by the information received through public hearings held in 2019, ritten commentary, and surveys, as well as thorough analysis of the original criteria and procedures, ILS has determined that, as herein revised, the standards issued in 2016 are appropriately applicable to all mandated representation. Thus, separate standards are not necessary for determining eligibility for assigned counsel in family court cases.

The Process ILS Used to Develop These Eligibility Standards

1. Review of existing reports, eligibility guidelines, professional standards, and case law

ILS initiated the process of developing these eligibility determination criteria and procedures by reviewing national and state-specific research on procedures, criteria, and guidelines for determining eligibility for assignment of counsel, professional and ethical standards and guidelines, and case law. The results of this research are cited throughout the commentary that accompanies each criterion and procedure, but some documents merit highlighting. First are the 2008 guidelines promulgated by the Brennan Center for Justice, entitled *Eligible for Justice: Guidelines for Appointing Defense Counsel* (hereinafter, the "Brennan Center Guidelines"). In these guidelines, the Brennan Center notes that "neither the Supreme Court, nor any other source, has detailed how communities should determine who can afford counsel."[36] Drawing upon best practices from across the nation, the Brennan Center sets forth a series of recommended guidelines for determining financial eligibility for assignment of counsel.

While the Brennan Center Guidelines are national in scope, for New York State-specific information and guidance, ILS turned to a February 1977 Memorandum written by Richard J. Comiskey, then-Director of the Third Judicial Department, entitled "Assignment of Attorneys to Represent Individuals who are Financially Unable to Obtain Counsel." This Memorandum was prepared at the direction of Harold E. Koreman, then-Presiding Justice of the Appellate Division, Third Judicial Department, and its guidelines were intended to apply throughout the Third Judicial Department. The Memorandum begins with the principle that "[f]inancial inability to afford counsel is not synonymous with destitution or a total absence of means. Nor are the

---

https://www.ils.ny.gov/files/Hurrell-Harring/Eligibility/Final%20Eligibility%20Standards/Eligibility%20Criteria%20and%20Procedures%20FINAL%20FULL%20April%204%202016.pdf.

[34] Executive Law § 832(3)(b)(viii).

[35] 2016 ILS Criteria and Procedures.

[36] Brennan Center Guidelines, *supra,* at 1.

standards used to determine indigency for other purposes controlling."[37] The guidelines set forth in the 1977 Memorandum hold true to this principle, and for that reason, have served as an important resource for ILS' Standards. In a similar vein, ILS found helpful a 2005 Memorandum written by Hon. Joseph M. Lauria, then-Administrative Judge of the New York City Family Court, entitled "Uniform Criteria for Assignment of Counsel and Eligibility Form," which sets out guidelines for assignment of counsel to adults in New York City Family Court, including establishment of presumptive eligibility for assigned counsel at 250% of the federal poverty guidelines.

ILS also looked to the New York State Defenders Association's 1994 report, *Determining Eligibility for Appointed Counsel in New York State: A Report from the Public Defense Backup Center* (hereinafter, "1994 NYSDA report"). The information that ILS learned from surveys and public hearings, discussed next, highlights that NYSDA's report is just as relevant today as it was twenty years ago. NYSDA supplemented its 1994 report with a written statement submitted to ILS in August 2015.[38] In this statement, NYSDA sets forth a series of recommendations for determining financial eligibility for assignment of counsel. Additionally, ILS drew upon national standards regarding criminal defense, with a particular focus on the following: the American Bar Association (ABA), *Ten Principles of a Public Defense Delivery System* (2002); ABA *Standards for Criminal Justice: Providing Defense Services* (rd ed. 1992); and the National Legal Aid and Defender Association, *Guidelines for Legal Defense Systems in the United States* (1976).

Specific to financial eligibility for assigned counsel in family matters, ILS reviewed the 2013 Final Report of the New York State Bar Association's Task Force on Family Court and the 2019 Interim Report to Chief Judge DiFiore issued by the Office of Court Administration's Commission on Parental Legal Representation. Both reports amplify the extent to which litigants are inappropriately denied assigned counsel due to the lack of statewide standards for determining financial eligibility in family court proceedings.

2. Surveys of Courts and Providers

In 2015, with the assistance of the Office of Court Administration, the New York State Magistrates Association, and the New York State Association of Counties, ILS conducted an on-line survey of a representative sample of city and county courts, presidents of county magistrates associations, and providers of public defense services in each of the fifty-seven counties outside New York City on the procedures and criteria used to determine eligibility for assignment of counsel. Survey respondents were also asked for copies of written instruments – such as application forms or financial guidelines – used in determining eligibility. Appendix A details the number of responses and forms ILS received, and from which counties.

ILS undertook a similar process regarding the procedures and criteria used to determine eligibility for assignment of counsel in family court. Between July and September 2019, with the

[37] Available at: https://www.ils.ny.gov/content/eligibility-public-hearings.

[38] *See* New York State Defenders Association's Statement on the Criteria and Procedures for Determining Eligibility in New York State, submitted to ILS on August 12, 2015 (hereinafter, "2015 NYSDA Statement"), and available at: https://www.ils.ny.gov/content/eligibility-public-hearings.

assistance of the Office of Court Administration, ILS surveyed parental representation providers, as well as family court judges and administrators in each judicial district and each county. Each group was asked the same questions, and survey respondents were asked for copies of written instruments used in determining eligibility.

3. Public Hearings

In July and August 2015, ILS conducted a series of eight public hearings regarding the eligibility determination processes in criminal cases used in the fifty-seven counties outside of New York City (hereinafter, "public hearings"). Similarly, in May, June, July, and August 2019, ILS held public hearings and solicited written commentary specifically about financial eligibility for the assignment of counsel in family court matters. The notice for the 2015 criminal court hearings and the notice for the 2019 ILS family court eligibility hearings are attached as Appendix B. These hearings elicited a wealth of information from a variety of stakeholders, including providers of mandated representation, judges, magistrates, county officials, providers of civil legal services, people who had faced criminal charges or who had cases in family court, and other people who have opinions about the eligibility determination process. Attached as Appendix C is a list of the individuals who testified at each public hearing and a list of those individuals and organizations that provided written submissions at both sets of hearings.

These surveys and public hearings helped ILS better understand the current state of the eligibility determination processes for criminal and family court mandated representation across New York State, and in so doing, highlighted the need for uniform, written standards. The information learned from both the surveys and the public hearings is outlined in the report that accompanied the 2016 standards, *Determining Eligibility for Assignment of Counsel in New York: A Study of Current Criteria and Procedures and Recommendations for Improvement* (2016) (hereinafter "ILS Criminal Court Study"). Many of the recommendations submitted during the public hearings have been incorporated into these Standards.

4. Themes that emerged from the surveys, applications, and public hearings

Several important themes emerged during ILS' information gathering process. They include the following:

i. ***The need for uniformity and transparency***: Many public hearing participants discussed the inconsistency and opacity in the current assigned counsel eligibility determination processes and thus the need for uniform, consistent, easily understandable, and transparent assigned counsel Standards. Participants also stated that, although the eligibility guidelines should apply statewide, they should honor jurisdictional differences.

ii. ***The need for consistency in Standards in all mandated representation cases***: Written submissions, public hearing testimony, and survey responses submitted to ILS in 2019 regarding family court eligibility revealed overwhelming support for applying the same standards in family court and criminal court eligibility determinations. Many witnesses emphasized the need for uniform and consistently applied guidelines to ensure that adult family court litigants are not inappropriately denied access to counsel when they are unable

to afford effective representation. As one witness wrote: "It cannot be said that the right to the custody of one's child, the possibility of incarceration on a willful violation of support, or the termination of one's parental rights is any less significant than the result of a criminal conviction. The disparity between eligibility standards leaves many potential indigent clients unrepresented in family court."[39] Emphasizing that "important liberty interests are involved in Family Court, as they are in criminal matters," NYSDA urged that ILS "apply the same thorough and detailed standards of eligibility to Family Court that are provided in the ILS Criteria and Procedures for Determining Assigned Counsel Eligibility (2016), provide commentary as needed to explain their use in this setting, and set forth what few, if any, additional or different criteria and procedures are warranted."[40] Indeed, the public hearings revealed that, as of 2019 some counties were already applying the criminal court standards to family court cases. As one witness explained:

> To do otherwise would have been the source of much confusion, as well as potentially absurd outcomes. For example, a client could face a relatively minor misdemeanor charge such as aggravated unlicensed operation 3rd degree (AUO) and be eligible for an assigned attorney. But the same client could face the risk of losing custody of their child in an Article 10 [child protective case] and not be eligible for assigned counsel under a more stringent financial standard. Or there might be criminal charges against a client, as well as a custody or family offense petition arising out of the same facts. It only follows that representation should extend to all the interrelated cases.[41]

iii. ***The correct standard for assignment of counsel***: Several hearing participants stated that the term "indigent" is misleading, leading to the erroneous belief that counsel should be assigned only if the applicant is impoverished or destitute. Hearing participants reminded ILS that the correct standard is "inability to pay" for qualified counsel and effective representation, and that eligibility for assignment of counsel should not be confused with eligibility for other entitlements, such as public assistance.

iv. ***Whether the mandated provider should screen for assigned counsel eligibility*:** The hearings revealed a divergence of opinion regarding whether each county's primary provider of mandated representation should have the responsibility of screening for assigned counsel eligibility and making an initial recommendation to the court. Overall a majority of the hearing participants who addressed this issue recommended that screening for eligibility be undertaken by the mandated provider. ILS' survey responses reveal that, in criminal matters, in a majority of counties, the provider of mandated representation currently has the screening and recommendation responsibility. Information gathered by ILS indicates that, in family

[39] Written submission of Robert Convissar, Erie County Assigned Counsel Plan Administrator.

[40] Written submission of New York State Defenders Association.

[41] Written submission of Barbara Kelley, Allegany County Public Defender, ILS Family Court Eligibility Hearings.

court, financial eligibility determinations are more often made by judges or other judicial officers.[42]

v. ***The need for an early screening process to determine qualification for assigned counsel to ensure access to counsel by family c rt litigants before their first appearance in court.*** Numerous witnesses urged adoption of a prequalification process to ensure that parties can arrive at the first appearance after service is complete with a pre-determination of their financial eligibility for assigned counsel. Witnesses urged that potential litigants should be able to apply for assigned counsel services prior to preparing a petition or prior to a first appearance in response to a petition filed against them. For example, one witness recommended "the development of any system, electronic or otherwise, that encourages a faster and earlier determination of eligibility. Earlier determinations would allow for earlier assignments. Earlier assignments would allow for more time to prepare for court appearances, provide better consultations, and lead to more productive initial court appearances."[43]

vi. ***The use of presumptions of eligibility***: Most hearing participants who addressed this issue stated that use of eligibility presumptions is an effective means of efficiently screening for assigned counsel eligibility and that eligibility presumptions are already being used in their jurisdictions. The testimony is corroborated by the survey responses, which reveal that the most often-used presumptions are (a) income guidelines (as gauged by a multiple of the Federal Poverty Guidelines); (b) receipt of need-based public benefits; and (c) incarceration in a correctional facility or confinement to a mental health facility.

Idiomatic to family court representation, the 2019 hearings revealed significant support for a presumption of eligibility for parents facing the potential loss of their children to state custody as a result of allegations of child maltreatment (abuse or neglect), as recommended by the Unified Court System's DiFiore Commission. Witnesses urged that, due to the complexity of these matters and the critical importance of preserving parents' limited resources for the support and care for their children, eligibility determinations in child protective cases not be based solely upon a parent's income. Indeed, ILS' survey of judges and testimony of providers revealed that a presumption of eligibility in child protective cases is relatively common to ensure that parents have access to counsel at every critical stage of these proceedings.

vii. ***Use of income guidelines in determining eligibility***: The 2015 survey responses showed that a majority of jurisdictions used a 125% multiple of the Federal Poverty Guidelines (FPG) in assessing whether a person was eligible for an appointment of counsel, with some counties using a lower multiple and a greater number of counties using a higher multiple. The hearing participants who addressed this issue during the 2015 hearings tended to agree that it makes

[42] *See*, *e.g.*, Testimony of Nancy S. Erickson, ILS Family Court Eligibility Public Hearing (July 17, 2019) (explaining that, in New York City, financial eligibility decisions in family court "are generally made by the judge or other judicial officer asking the litigant questions about her income and assets; they are not handled by a separate office within the Family Court or another agency.")

[43] Written submission of Joel Serrano, Second Department Assigned Counsel Panel.

sense to use a multiple of the FPG for determining presumptive eligibility, though most stated that a 125% multiple of the FPG is too low. Recommendations for a higher multiple of the FPG ranged from 200% to 300%. Several participants expressed concern that using a higher multiple of the FPG could result in increased caseloads for providers of public criminal defense services.

viii. ***Consideration of third-party income***: Perhaps the greatest source of controversy during the criminal court eligibility hearings was consideration of third-party income in determining eligibility for assignment of counsel, particularly the income of parents for minor defendants. Regarding family court matters, witnesses highlighted as particularly problematic the consideration of the income of spouses and other household members. The 2015 survey responses indicated that a majority of jurisdictions ask about and consider third-party income during the eligibility determination process. However, amongst those who gave an opinion during the 2015 hearings, most recommended against considering third-party income, identifying the problems with doing so and listing several reasons to support their recommendations.

ix. ***Maintaining the co identiality of applicants' financial information***: Many hearing participants emphasized the importance of maintaining the confidentiality of the applicant's financial information. The reasons ranged from ensuring that the prosecuting attorney does not have access to information that could potentially implicate the applicant in a crime, to the fear that applicants, anticipating disclosure and the resultant embarrassment, might exaggerate their financial status, thereby diminishing their chances of being deemed eligible. Many hearing participants emphasized that it is impossible to maintain confidentiality when the eligibility screening is done in open court.

x. ***Whether applicants are required to s ear or attest under the penalty of perjury to the information provided***: A majority of the applications ILS reviewed in 2015 required applicants to swear or certify to the accuracy of the information provided or attest to its accuracy under penalty of perjury. Several participants during the 2015 hearings stated that in their jurisdiction, this practice had been discontinued to ensure that people do not face possible punishment for having to apply for assigned counsel.

xi. ***Whether "fraud" is a common problem, and thus applicants should be required to produce financial documents to verify the information on the application****:* A small number of hearing participants expressed the concern that it is common for applicants to misrepresent their financial situation to enhance the likelihood they will be assigned counsel, while a greater number stated that, in their experience, fraud is not common. Some participants noted that asking for financial documents to verify the financial information disclosed can delay the assignment of counsel, or worse, prevent applicants from completing the application process. Some hearing participants recommended that verifying financial documentation should be required only when there is incomplete financial information or a reason to believe that there is misinformation on the assigned counsel application.

xii. ***Opportunity to request reconsideration or appeal a denial of eligibility for assignment of counsel***: During the criminal court eligibility hearings, many providers stated that applicants

could seek review of a denial for assignment of counsel by asking the provider to reconsider, by appealing to the judge, or by doing both. Most providers who addressed this issue stated that they notify applicants of this right to review or appeal at the time they inform applicants of the denial recommendation, though a small number said they only tell applicants of this right if the applicant complains. Additionally, while hearing participants discussed review of a provider's ineligibility recommendation, no participant said that there is a means by which to seek immediate review of a judicial ineligibility determination, though some identified a need for such a review opportunity.

Conversely, although in one county the ILS process for appeal developed for criminal cases was being applied in family court cases, by the time of the 2019 public hearings, virtually all providers of family court mandated representation who addressed the issue indicated that there was no process for applicants to appeal a denial of assigned counsel in family court cases. Survey responses from judges and providers indicated that applicants are rarely informed, either verbally or in writing, that they can request a review and/or appeal of a determination of ineligibility. In some cases where the applicant questions the provider's ineligibility determination, the applicant is typically advised that they can "make their case" to the judge, but that the judge will usually endorse the provider's decision.

xiii. ***Use of County Law § 722-*** : The 2015 public hearing testimony revealed that County Law §722-d orders were often issued "up front" simultaneously ith the decision to assign counsel. Some hearing participants endorsed this, stating that County Law § 722-d can be used as a counter-balance to judges erring towards assigning counsel, in that providers can subsequently ask the judge to issue a repayment order if it is discovered that the defendant actually has the means to pay for counsel. Several other hearing participants, however, articulated concerns about the use of County Law § 722-d and described instances in which it is misused.

Consistent with (ii) above, ILS has revised the 2016 Criteria and Procedures for determining assigned counsel eligibility in criminal matters into one set of Standards for determining assigned counsel eligibility in family court and criminal matters.

The Scope of the Right to Assigned Counsel in Criminal Matters

It is critical to clarify the circumstances under which a person who cannot afford the costs of representation must be assigned counsel. In its 2001 report, the New York State Commission on Judicial Conduct noted that some judges are "unaware of their obligation to [assign counsel] in certain types of cases, such as city code violations or other non-traffic violations punishable by incarceration."[44] ILS' public hearings elicited testimony regarding failure to assign counsel, not because of lack of financial eligibility, but because the judge was not aware that the particular offense requires assignment of counsel for defendants who are unable to pay the costs of representation.

[44] New York State Commission on Judicial Conduct, *2001 ANNUAL REPORT*, *supra*, at 34.

New York County Law article 18-B, which was enacted in 1965 shortly after the Court of Appeals' decision in *People v. Witenski*, provides that defendants must be assigned counsel if they cannot pay for the costs of representation in any case involving a charge which authorizes a period of imprisonment, no matter the source of the law – be it a penal law provision, a public health law provision, or a local ordinance.[45]
Only traffic infractions are exempted from this requirement.[46]

Nevertheless, as a matter of constitutional law, there may be cases in which it is necessary to assign counsel to persons charged with traffic infractions. Following the 1965 enactment of County Law § 722-a, the United States Supreme Court decided two cases that extended the right to counsel articulated in *Gideon v. Wainwright*. In *Argersinger v. Hamlin*, decided in 1972, the Court held that assignment of counsel is required in any case, no matter the classification of the charged offense, "that actually leads to imprisonment even for a brief period."[47] In 2002, in *Alabama v. Shelton*, the Court held that a "suspended sentence that may 'end up in the actual deprivation of a person's liberty' may not be imposed unless the defendant was accorded 'the guiding hand of counsel' in the prosecution for the crime charged."[48]

As a result of *Argersinger* and *Shelton*, a person who is convicted of a traffic infraction cannot be sentenced to jail or a revocable sentence if that person was not provided an opportunity to apply for assignment of counsel. New York courts have recognized this and have held that, County Law § 722-a notwithstanding, in cases involving traffic infractions, counsel should be assigned if the court has not precluded the possibility of imposing a sentence of incarceration.[49]

---

[45] *See* County Law §§ 722, 722-a; *see also People v. Van Florcke*, 120 Misc.2d 273 (App Term, 2d Dept 1983) ("Although defendant was sentenced to a conditional discharge, she was charged with a violation for which a 15-day period of incarceration is authorized by statute. Thus, it was incumbent upon the court to advise defendant that, if eligible, she would be entitled to assigned counsel" [internal citations omitted].).

[46] *See* County Law § 722-a.

[47] *Argersinger v. Hamlin,* 407 U.S. 25, 33, 37-38 (1972).

[48] *Alabama v, Shelton*, 535 U.S. 654, 658 (2002) (*quoting Argersinger,* 407 U.S. at 40).

[49] *See Davis v. Shepard*, 92 Misc.2d 181 (Sup Ct, Steuben County 1977) ("Furthermore, for the edification of the local Justices, the Court also directs that pursuant to the ruling in *Argersinger v. Hamlin* (*supra*) even in traffic infraction cases, if there is a possibility of a sentence of imprisonment which is not waived by the Justice, the Defendant would be entitled to assigned counsel. . . ."); *People v. Weinstock*, 80 Misc.2d 510 (App Term, 2d Dept 1974) (same); *People v. Forbes*, 191 Misc.2d 573, 574-575 (White Plains City Ct, 2002) (holding that although there is no statutory right to counsel for traffic infractions, "if a defendant is subject to possible imprisonment, he or she must be advised of their right to counsel and to have counsel assigned where the defendant is financially unable to obtain same."). *See also Village, Town and District Courts in New York* (Thomson Reuters), § 7.24 (advising magistrates and judges that in traffic infraction cases "counsel should still be assigned to indigent defendants if the court is considering a sentence of incarceration. . . . This is in all parties' best interests, including the prosecution's: an assignment may permit a conviction and sentence to survive a subsequent constitutional challenge on appeal.").

The Scope of the Right to Assigned Counsel in Family Matters

In family related matters, the right to assigned counsel is articulated in Family Court Act §§ 261, 262, and 1120 and in Surrogate's Court Procedure Act § 407. The right to assigned counsel of parents and others in a parent-like relationship to a child ("legally responsible persons") is grounded in constitutional principles of due process and equal protection. In 1972, in the case of *In re Ella B*., which involved allegations of child neglect, the New York State Court of Appeals ruled that "an indigent parent, faced with the loss of a child's society, as well as the possibility of criminal charges is entitled to the assistance of counsel."[50] Emphasizing the constitutional right of parents to the care and custody of their children, the Court concluded that "it is fundamentally unfair, and a denial of due process of law for the state to seek removal of the child from an indigent parent without according that parent the right to the assistance of court-appointed and compensated counsel."[51] Moreover, the Court declared, failure to provide the parent with a lawyer would constitute not only a violation of due process but, "in light of the express statutory provision for legal representation for those who can afford it, a denial of equal protection of the laws as well."[52]

Building on those fundamental principles, in 1975, the New York State Legislature acknowledged a constitutional right to assigned counsel in a range of family law proceedings in which persons may face "the infringements of fundamental interests and rights, including the loss of a child's society and the possibility of criminal charges."[53] Currently, the parental right to assigned counsel extends to certain delineated persons in cases brought in Family Court and Surrogate's Court involving child custody and visitation; child protective (abuse/neglect); foster care placement and review; termination of parental rights; destitute child; adoption; paternity; family offense (domestic violence); as well as to any person charged with contempt of court for violation of a prior court order (including willful violation of a child support order) and persons "in any other proceeding in which the judge concludes that "such assignment of counsel is mandated by the constitution of the State of New York or of the United States."[54]

---

[50] 30 N.Y.2d 352 (1972).

[51] *Id*. at 357.

[52] *Id.* at 356-57.

[53] N.Y. Family Court Act § 261.

[54] N.Y. Family Court Act § 262; Surrogate's Court Procedure Act § 407.

STANDARDS FOR DETERMINING ASSIGNED COUNSEL ELIGIBILITY

I. An applicant shall be eligible for assignment of counsel when the applicant's current available resources are insufficient to pay for a qualified attorney, release on bond, the expenses necessary for effective representation, and the reasonable living expenses of the applicant and any dependents.

A. Whether an applicant is eligible for assignment of counsel shall be determined in accordance with the Standards set forth below.

B. Counsel shall be assigned unless the applicant is conclusively ineligible.

II. To streamline the eligibility determination process, there shall be presumptions of eligibility. A presumption of eligibility is rebuttable only where there is compelling evidence that the applicant has the financial resources sufficient to pay for a qualified attorney and the other expenses necessary for effective representation.

A. Applicants are presumptively eligible for assignment of counsel if their net income is at or below 250% of the Federal Poverty Guidelines.

B. Applicants who are incarcerated, detained, or confined to a mental health institution shall be presumed eligible for assignment of counsel.

C. Applicants who are currently receiving, or have recently been deemed eligible pending receipt of, need-based public assistance, including but not limited to Family Assistance (TANF), Safety Net Assistance (SNA), Supplemental Nutrition Assistance (SNAP), Supplemental Security Income (SSI)/New York State Supplemental Program (SSP), Medicaid, or Public Housing assistance, shall be deemed presumptively eligible for assignment of counsel.

D. Applicants who have, within the past six months, been deemed eligible for assignment of counsel in another case in that jurisdiction or another jurisdiction shall be presumed eligible. Appellate courts shall assign appellate counsel to appellants who were deemed eligible for assigned counsel by their trial court.

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

A. Counsel shall be provided for applicants whenever they have not obtained counsel prior to a proceeding which may result in their detention or whenever there is an unavoidable delay in the eligibility determination, subject to judicial approval once the court proceeding has begun.

B. Where a petition or pre-petition request has been filed under Family Court Act Article 10 for an order for immediate removal of a child or temporary order of protection, a person who is a parent or legally responsible person, as defined by law, shall be entitled to immediate representation by counsel. In accordance with this entitlement, counsel shall also be provided for parents in child welfare proceedings during a child protective agency investigation and sufficiently in advance of their first court appearance, consistent with (A) above. As with subsection (A), this provision of counsel may be subject to judicial review once a court proceeding is commenced.

IV. Ability to post bond shall not be sufficient, standing alone, to deny eligibility for assignment of counsel.

V. The resources of a third party shall not be considered available to the applicant unless the third party expressly states a present intention to pay for counsel, the applicant gives informed consent to this arrangement, and the arrangement does not interfere with the representation of the applicant or jeopardize the confidentiality of the attorney-client relationship.

A. The resources of a spouse shall not be considered available to the applicant, subject to the above exception.

B. The resources of a parent shall not be considered as available to minor applicants, subject to the above exception.

VI. Non-liquid assets shall not be considered unless such assets have demonstrable monetary value and are readily convertible to cash without impairing applicants' ability to provide for the reasonable living expenses of themselves and their dependents.

A. Ownership of a vehicle shall not be considered where such vehicle is necessary for basic life activities.

B. An applicant's primary residence shall not be considered unless the fair market value of the home is significant, there is substantial equity in the home, and the applicant is able to access the equity in a time frame sufficient to retain private counsel promptly.

VII. An income from receipt of child support or need-based public assistance shall not be considered as available to applicants in determining eligibility for assignment of counsel.

VIII. ebts and other financial obligations, including the obligation to provide reasonable living expenses of the applicant and his or her dependents, shall be considered in determining eligibility for assignment of counsel.

IX. Eligibility determinations shall take into account the actual cost of retaining a private attorney in the relevant jurisdiction for the type of family court proceeding or category of crime charged.

X. These Standards shall be applied uniformly, consistently, and with transparency.

XI. Courts have the ultimate authority to determine eligibility but may delegate the responsibility for screening and making an eligibility recommendation.

A. Entities responsible for screening and making a recommendation should be independent and conflict-free.

B. Where there is no entity that is independent and conflict-free, courts may delegate the screening responsibility to the provider of mandated representation.

XII. The confidentiality of all information applicants provide during the eligibility determination process shall be preserved.

A. The eligibility screening process, whether done by another entity or the court, shall be done in a confidential setting and not in open court.

B. Any entity involved in screening shall not make any information disclosed by applicants available to the public or other entities (except the court).

C. Any documentation submitted to the court shall be submitted *ex parte* and shall be ordered sealed from public view.

XIII. The eligibility determination process shall not be unduly burdensome or onerous.

A. Applicants shall not be required to attest under penalty of perjury to the truth of the information provided as part of the eligibility determination process.

B. Applicants shall not be denied assignment of counsel for minor or inadvertent errors in the information disclosed during the eligibility determination process.

C. Applicants shall not be required to produce unduly burdensome documentation to verify the financial information provided; nor shall they be denied assignment of counsel solely for the failure to produce documentation where they have demonstrated a good faith effort to produce requested documentation.

D. Applicants shall not be required to demonstrate that they were unable to retain private counsel to be deemed eligible for assignment of counsel.

XIV. The determination that applicants are ineligible for assignment of counsel shall be in writing and shall explain the reasons for the ineligibility determination. Applicants shall be provided an opportunity to request reconsideration of this determination or appeal it, or both.

A. Screening entities shall promptly inform applicants of their eligibility recommendation. If their recommendation is that the applicant be denied assignment of counsel, they shall provide the reason for the denial in writing along with written notice that the applicant can ask the screening entity to reconsider or can appeal to the court, or both.

B. If a court determines that an applicant is ineligible for assignment of counsel, the court shall inform the applicant of this decision in writing with an explanation as to the reason for the denial. The court shall also entertain an applicant's request to reconsider a decision that the applicant is ineligible for assignment of counsel.

XV. A determination that a person is eligible for assignment of counsel may be re-examined only in accordance with County Law §722-d, which shall only be used after an assignment of counsel has been made, and only if prompted by assigned counsel as therein provided. Counsel shall not be assigned contingent upon a requirement that the person make partial payments to the provider of mandated representation or to the county.

XVI. Procedure regarding data maintenance

A. Data shall be maintained regarding the:

i) number of applicants who apply for assignment of counsel;
ii) number of applicants found eligible;
iii) number of applicants found ineligible and the reasons for the ineligibility determination;
iv) number of reconsiderations and appeals requested;
v) results of these reconsiderations and appeals;
vi) number of reports made pursuant to County Law § 722-d regarding the assignment of counsel; and
vii) number of orders issued for partial payment or termination of the assignment of counsel under County Law § 722-d.

B. To ensure the confidentiality of information submitted during the eligibility determination process, the data shall be made available in aggregate form only, meaning that no individual applicant can be identified in the data itself.

STANDARDS FOR DETERMINING ASSIGNED COUNSEL ELIGIBILITY: WITH COMMENTARY

The purpose of the Standards is to ensure equitable, efficient, and fair implementation of the statutory and constitutionally guaranteed right to counsel in certain criminal and family court proceedings[55] pursuant to New York County Law Article 18-B. These Standards govern decisions or recommendations made by any entity involved in the screening process regarding the ultimate determination of whether a person is entitled to the assignment of counsel.

Unless otherwise specified, these Standards apply to determinations of financial eligibility for representation of persons pursuant to article 18-B of the County Law. To promote the implementation of these Standards, ILS has created an Application for Assignment of Counsel under County Law § 722-a. This form, with instructions, is included in Appendix D.

I. An applicant shall be eligible for assignment of counsel when the applicant's current available resources are insufficient to pay for a qualified attorney, release on bond, the expenses necessary for effective representation, and the reasonable living expenses of the applicant and any dependents.

A. Whether an applicant is eligible for assignment of counsel shall be determined in accordance with the standards set forth below.

B. Counsel shall be assigned unless the applicant is conclusively ineligible.

Commentary:

For nearly four decades, New York courts have recognized that, under County Law § 722, financial inability to afford counsel is "not synonymous with destitution or a total absence of means."[56] Indeed, as the American Bar Association explains, "[n]o state uses only 'indigency' as

---

[55] *Gideon v. Wainwright*, 332 U.S. 335 (1963); *People v. Witenski*, 15 N.Y. 2d 392 (1965); *Matter of Ella B.*, 30 N.Y.2d 352 (1972).

[56] 1977 Memorandum written by Richard J. Comiskey, the then-Director of the Third Judicial Department, regarding, "Assignment of Attorneys to Represent Individuals who are Financially Unable to Obtain Counsel," (hereinafter, "1977 Third Department Memo and Guidelines"), at 1, available at: https://www.ils.ny.gov/content/eligibility-public-hearings; *see also People v. King*, 41 Misc.3d 1237(A) (Bethlehem Justice Ct, Albany County 2013) (noting that it is a defendant's "financial inability to retain counsel and not indigency which governs the determination of eligibility for court-appointed representation"); New York State Defenders Association, *Determining Eligibility for Appointed Counsel in New York State: A Report from the Public Defense Backup Center*, *supra*, at 3 (hereinafter, "1994 NYSDA report") (noting that the constitutional right to assigned counsel applies to those unable to afford counsel, and stating that "New York's parallel statutory authority implementing the constitutional right to appointed counsel likewise emphasizes that it is financial inability to retain counsel and not 'indigency' which governs the determination of eligibility for court-appointed representation."); Brennan Center for Justice, *Eligible for Justice: Guidelines for Appointing Defense Counsel*, Guideline 4, pp. 12-21, *supra*; *see also Commentary,* ABA Standards for Criminal Justice: Providing Defense Services, Standard 5-7.1 (3d ed. 1992) (hereinafter, "1992 ABA Standards") ("The fundamental test for determining eligibility for

the basis for providing counsel. This test is rejected because it confuses the question of the right to be provided counsel with issues about eligibility for public welfare assistance and suggests a rigid standard for every defendant without regard to the cost of obtaining legal services for a particular case."[57]

This Standard recognizes that the right to assigned counsel includes not only having a qualified attorney, but also the resources necessary for effective representation. These resources may include investigative services, experts, social work assistance, evidence testing, sentencing advocacy, parenting capacity assessments, and the costs associated with advising the person on and mitigating significant enmeshed consequences of a conviction or of a family court finding or disposition.[58]

---

counsel should be whether persons are 'financially unable to obtain adequate representation without substantial hardship'"); National Study Commission on Defense Services/NLADA Guidelines for Legal Defense Systems in the United States (1976) (hereinafter, "1976 NLADA Guidelines for Legal Defense Systems in the United States"), Section 1.5 ("Effective representation should be provided to anyone who is unable, without substantial hardship to himself or his dependents, to obtain such representation"). Notably, this standard for assignment of counsel is nearly identical to the federal standard. *See* United States Judicial Conference, *Guide to Judiciary Policy, Vol. 7-Defender Services, Part A: Guidelines for Administering the CJA and Related Statutes,* Ch. 2, § 210.40.30(a) (hereinafter, "CJA Guidelines").

[57] *See* 1992 ABA Standards, Standard 5-7.1, *supra; see also* National Association of Criminal Defense Lawyers, *Gideon at 50: A Three-Part Examination of Indigent Defense in America, Part 2 – Redefining Indigence: Financial Eligibility Guidelines for Assigned Counsel* (March 2014), at 9 ("[I]t should be noted that the term 'indigent' is itself a misnomer. While those defendants who are 'too poor to hire a lawyer' are typically referred to as 'indigent,' courts have never required that defendants be wholly without means before they are eligible for assigned counsel.").

[58] *See* 1977 Third Department Memo and Guidelines, *supra*, at 1 ("The key test for determining eligibility is whether or not the defendant, at the time need is determined, is financially unable to provide for the full payment of adequate counsel and all other necessary expenses of representation."); *see also* County Law § 722 (dictating that "[e]ach plan [for representation under Article 18-B] shall also provide for investigative, expert and other services necessary for an adequate defense."); 1976 NLADA Guidelines for Legal Defense Systems in the United States, *supra*, Section 1.5(b) ("The cost of representation includes investigation, expert testimony, and any other costs which may be related to providing effective representation.") (Black Letter summary available at http://www.nlada.net/sites/default/files/nsc_guidelinesforlegaldefensesystems_1976.pdf); National Conference of Commissioners on Uniform State Laws, *Model Public Defender Act* (1970), Section 1 Definitions ("'expenses,' when used with reference to representation under this Act, includes the expenses of investigation, other preparation, and trial") (available at http://www.nlada.org/Defender/Defender_Standards/Model_Public_Defender_Act#4). During the public hearings, Hon. David Steinberg detailed this issue: "So I have a concern, these are the eligibility requirements that when you make – when the providers are making the decision, whoever is going to make the decision, about how that person, not only is going to afford counsel, but in some instances are going to have to afford an investigator, they're going to have to afford a consultant, they're going to have to afford possibly a transcript, or even going to have to afford as basic hire someone to go out and serve process to get their witnesses into court to have that subpoena served. And so when we're talking about eligibility and what it's going to cost to hire a lawyer, let's not forget about the cost that cases need to be investigated." Testimony of Hon. David Steinberg, Town Justice, Hyde Park, 9th Judicial District public hearing transcript, pp. 58-59, available at: https://www.ils.ny.gov/content/eligibility-public-hearings.

A determination that an applicant is able to afford counsel should be made only after the funds needed to pay bond have been subtracted from any calculation of available resources.[59] An applicant should not have to choose between paying the costs of bail and paying for the costs of a defense. *See* Standard IV.

Nor should applicants have to choose between retaining private counsel and providing basic life necessities for themselves and their dependents. Applicants should not have to risk having their lives de-stabilized (i.e., losing a home, a car needed for employment, and the ability to pay for food, clothing and utilities) to pay the costs of representation. In this regard, this Standard honors the mandate set forth in the *Hurrell-Harring* Settlement that the criteria and procedures used for assigned counsel eligibility require that "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, … not be considered available for purposes of determining eligibility."[60]

To fully honor an applicant's right to assignment of counsel, counsel should be assigned unless the applicant is conclusively ineligible for assignment of counsel.[61] This rule is consistent with the rules and procedures in other jurisdictions, including the federal government.[62]

II. To streamline the eligibility determination process, there shall be presumptions of eligibility. A presumption of eligibility is rebuttable only where there is compelling evidence that the applicant has the financial resources sufficient to pay for a qualified attorney and the other expenses necessary for effective representation.

Commentary:

The use of presumptions of eligibility will obviate the need for a detailed, complex analysis, thereby making the eligibility determination process more efficient and less costly. As stated in the Brennan Center Guidelines: "In practice, it is not necessary to engage in a time-consuming

---

[59] *See, e.g.,* 1977 Third Department Memo and Guidelines, *supra*, at 3; 1976 NLADA Guidelines for Legal Defense Systems in the United States, *supra*, Section 1.5(a) ("Nor should the fact of whether or not the person has been released on bond . . . be considered."); Revised Code of Washington § 10.101.010(2) (2011) (for purposes of determining eligibility for assigned counsel, defining "available funds" as "liquid assets and disposable net monthly income calculated after provision is made for bail obligations.").

[60] *See Hurrell-Harring* Settlement, *supra*, § VI (B)(5).

[61] Written submission of Elizabeth Nevins, Associate Clinical Professor and Attorney-in-Charge of the Criminal Justice Clinic, Hofstra University's Maurice A. Deane School of Law, dated August 12, 2015 (hereinafter "Nevins written submission"), p. 8 ("To the extent that a person is 'on the bubble,' or there is some conflicting information regarding a person's eligibility that cannot be avoided, courts should assign counsel rather than risking a Sixth Amendment violation by failing to do so."), available at: https://www.ils.ny.gov/content/eligibility-public-hearings. *See also* 1976 NLADA Guidelines for Legal Defense Systems in the United States, *supra*, Section 1.5 ("The accused's assessment of his own financial ability to obtain competent representation should be given substantial weight.").

[62] *See, e.g.,* CJA Guidelines, *supra*, Ch. 2, § 210.40.30(b) ("Any doubts as to a person's eligibility should be resolved in the person's favor; erroneous determinations of eligibility may be corrected at a later time."). *See also* Brennan Center Guidelines, *supra*, at 20-21 noting several jurisdictions instruct those who screen for assigned counsel eligibility to resolve close questions "in favor of eligibility.").

eligibility assessment for each defendant, because there are shortcuts that jurisdictions can and should take."[63] ILS' surveys and public hearings revealed that many jurisdictions are already using eligibility presumptions and that in most instances, an applicant will be deemed eligible based on one of their oft-used presumptions.[64]

The following presumptions of eligibility shall apply.

A. Applicants are presumptively eligible for assignment of counsel if their net income is at or below 250% of the Federal Poverty Guidelines.

Commentary:

Testimony both at the public hearings and in written submissions revealed that many counties are already relying on a multiple of the Federal Poverty Guidelines ("FPG") as a method for determining financial eligibility for assignment of counsel.[65] Yet, it was also apparent from the testimony that often there was not sufficient justification for the particular multiple used. One hearing participant stated that he realized that using a low multiple of the FPG was confusing "indigency" with "the ability to afford competent counsel" and in employing such a standard, "we do ourselves a disservice."[66] He explained:

> The thing that changed my mind about the 125 [% of the FPG] . . . this document, the self sufficiency standard of New York State, this one is 2010, it's available online, and it is an eye-opener. . . . [I]f you take a look at this, not only does it contain the rationale for dealing with assignment of counsel in a different way than indigency, but it lists all of the counties, every one of them, and talks about the different standards of living and what is required in each of those counties. And that's why when I looked at this - - and I think page 91/92 has a summary of all 62 counties and what it costs to provide the necessities of life, so families at one, two, three level, you know, no matter how many members. I looked at that and I think Wyoming County was at about 232% of the poverty lines -- guidelines, and so I was conservative, I went to 200.[67]

Similarly, Merble Reagon, the Executive Director of the Women's Center for Education and Career Advancement, testified that the Self-Sufficiency Standard is a better reflection than the

---

[63] Brennan Center Guidelines, *supra,* at 21. *See* New York State Defenders Association Statement on the Criteria and Procedures for Determining Eligibility in New York State (2015 NYSDA Statement), *supra*, at 4-5.

[64] See *Determining Eligibility for Assignment of Counsel in New York: A Study of Current Criteria and Procedures and Recommendations for Improvement*, § III, A.

[65] *Id.*, at § III, B.

[66] Testimony of Norman Effman, Wyoming County Public Defender and Executive Director, Wyoming-Attica Legal Aid Bureau, 8th Judicial District public hearing transcript, p. 106, available at: https://www.ils.ny.gov/content/eligibility-public-hearings.

[67] Testimony of Norman Effman, *id.,* at 108-109; *see* http://www.selfsufficiencystandard.org/docs/New-York-State2010.pdf.

FPG of the income required to meet life's basic necessities in a specific locality without relying on financial public assistance.[68] However, she also recognized that, "it doesn't make sense to think of our 62 counties having different eligibility criteria; it's just not practical in general. But doing the math that you just did and then doing the simulation to other counties, I think…that a multiple of the poverty measure could come closer than we are today in terms of those eligibility criteria."[69] As a result, Ms. Reagon used the Self-Sufficiency Standard to support her recommendation of a multiple of 250% of the FPG.[70]

Like the above-referenced speakers, ILS used the Self-Sufficiency Standard as a guide[71] to conclude that a multiple of 250% of the FPG best captures the income necessary to meet life's basic necessities in New York.[72] Notably, in 2005, Hon. Joseph M. Lauria, then-Administrative

---

[68] Testimony of Merble Reagon, Executive Director, Women's Center for Education and Career Advancement, 9th Judicial District public hearing transcript, pp. 68-69, available at: https://www.ils.ny.gov/content/eligibility-public-hearings, describing the Self-Sufficiency Standard and defining "reasonable living expenses" as "a family's basic needs: [h]ousing, childcare, food, transportation, healthcare, taxes, including income taxes, payroll taxes, and sales taxes, as well as a ten percent of miscellaneous expenses, which we add, which includes household products, telephone, clothing, shoes, and other household expenses. There is no recreation, there is no entertainment, there is no savings, and no debt repayment in this budget. In other words, we're talking about bare-bones budget, a no-frills budget with no extras." *See, e.g., Adkins v. E.I. DuPont de Nemours & Co.* 335 U.S. 331, 339 40 (1948) ("We cannot agree with the court below that one must be absolutely destitute to enjoy the benefit of the statute. We think an affidavit is sufficient which states that one cannot because of his poverty 'pay or give security for the costs . . . and still be able to provide' himself and dependents 'with the necessities of life.' To say that no persons are entitled to the statute's benefits until they have sworn to contribute to payment of costs, the last dollar they have or can get, and thus make themselves and their dependents wholly destitute, would be to construe the statute in a way that would throw its beneficiaries into the category of public charges. The public would not be profited if relieved of paying costs of a particular litigation only to have imposed on it the expense of supporting the person thereby made an object of public support. Nor does the result seem more desirable if the effect of this statutory interpretation is to force a litigant to abandon what may be a meritorious claim in order to spare himself complete destitution."); *see also* CJA Guidelines, *supra*, Ch. 2, § 210.40.30(a)(1) ("A person is 'financially unable to obtain counsel' within the meaning of 18 U.S.C. § 3006A(b) if the person's net financial resources and income are insufficient to obtain qualified counsel. In determining whether such insufficiency exists, consideration should be given to . . . the cost of providing the person and his dependents with the necessities of life.").

[69] Oral testimony of Merble Reagon, *supra*, at 73-74.

[70] Oral testimony of Merble Reagon, *supra*, at 73-74. Notably this recommendation is more conservative than her written recommendation to use a 300% multiple of the FPG. *See* written submission of Merble Reagon, Executive Director, Women's Center for Education and Career Advancement (available at https://www.ils.ny.gov/content/eligibility-public-hearings).

[71] ILS explored the possibility of using solely the Self-Sufficiency Standard to establish income-based eligibility presumptions for each county. However, in addition to the concern about the impracticality of divergent standards from county to county, the Self-Sufficiency Standard is not updated annually. The last report was issued in 2010, meaning it cannot currently be used as a measure for presumptive income eligibility purposes.

[72] To achieve this, ILS compared the 2010 Self-Sufficiency Standard Report to the 2010 Federal Poverty Guidelines and calculated the multiple of the FPG that most closely matched the Self-Sufficiency income

Judge for the Family Court of the City of New York issued a memorandum addressed to "All Supervising Judges, Judges, Referees, Support Magistrates, Court Attorneys, and Clerks of Court." In the memorandum, Judge Lauria outlined "guidelines for eligibility for assignment of counsel to adults in New York City Family Court." Noting the "enormous" range of income levels being used among the courts, Judge Lauria declared:

> To establish some uniformity, the following shall be eligible income levels. They are 250% of the federal (HHS) poverty guidelines. Of course, you retain the discretion to make [adjustments] based upon extraordinary expenses, or any other factors you deem appropriate.[73]

Accordingly, any person whose net income is at or below 250% of the FPG is presumptively eligible for counsel. "Net income" means an individual's wages, interest, dividends or other earnings after deductions for state, federal and local taxes, social security taxes, Medicare taxes, any union dues, retirement contributions or other withholdings - in other words, "take home pay." Gross income shall not be used as it is not an accurate measure of one's ability to pay for the costs of private counsel and still provide oneself and any dependents with the "necessities of life."[74]

---

data. *See* http://www.selfsufficiencystandard.org/docs/New-York-State2010.pdf; http://aspe.hhs.gov/hhs-poverty-guidelines-remainder-2010.

[73] Hon. Joseph M. Lauria, *Uniform Criteria for Assignment of Counsel and Eligibility Form* (March 1, 2005)

[74] *See* CJA Guidelines, § 210.40.30(a)(1), *supra*. It is also important to note that, in some areas of civil legal services, where there is no right to counsel, eligibility determinations are based on multiples of up to 200% of the FPG. *See, e.g.,* written submission of Peter Racette, Deputy Director, Legal Aid Society of Northeastern New York, p. 2, available at: https://www.ils.ny.gov/content/eligibility-public-hearings, stating that LASNNY's three major funders – LSC, IOLA and JCLS – use various multiples of the FPG, from a base of 125% up to 200%, when considering additional factors (depending on the funding stream) to dictate income eligibility. IOLA does not even have a 200% "cap" on consideration of income and household expenses, and it also requires providers to consider the actual cost of retaining private counsel in the matter. *Id.* Additionally, Mr. Racette noted that private "[r]etainers in felony cases or custody disputes are often many thousands of dollars and cannot be realistically afforded by many people even if their income is over 200% of poverty given routine household expenses." *Id.* at 3. S*ee generally* Gross, John P., *Too Poor to Hire a Lawyer but Not Indigent: How States Use the Federal Poverty Guidelines to Deprive Defendants of Their Sixth Amendment Right to Counsel*, 70 Wash. & Lee L. Rev. 1173; s*ee also*, 1977 Third Department Memo and Guidelines, *supra*, p. 2 ("A person charged with a crime [or] otherwise entitled to assigned counsel, is eligible for assigned counsel when the value of his present *net* assets and his current *net* income are insufficient to enable him promptly to retain a qualified attorney, obtain release on bond and pay other expenses necessary to an adequate defense, while furnishing himself and his dependents with the necessities of life.") (emphases added); Testimony of James T. Murphy, Legal Services of Central New York, 6th Judicial District public hearing transcript, pp. 52-53, available at: https://www.ils.ny.gov/content/eligibility-public-hearings ("First of all, we talked about eligibility guidelines this morning and percentages of poverty. No one has said whether they're looking at net income or gross income in those calculations. The Third Department got it right in '78 it ought to be net.").

As stressed by Judge Lauria, the 250% multiple of the FPG should not be seen as a rigid cut-off for determining whether a person is unable to afford counsel and therefore eligible for assignment of counsel. Especially in Family Court proceedings, applicants whose income exceed 250% of the FPG should not automatically be deemed ineligible for assignment of counsel. Rather, the 250% multiple should be viewed as a baseline criterion when assessing presumptive eligibility.

B. Applicants who are incarcerated, detained, or who are confined to a mental health institution shall be presumed eligible for assignment of counsel.

Commentary:

During the public hearings, there was consensus amongst those who addressed the issue of presumptions that persons who are incarcerated, detained, or confined to a mental health institution should be presumed eligible for assignment of counsel, and in fact, many testified that in their jurisdiction, such persons are already presumed eligible.[75] Having a presumption of eligibility for those who are incarcerated, detained, or confined to a mental health institution is also consistent with the practice in other jurisdictions.[76]

C. Applicants who are currently receiving, or have recently been deemed eligible pending receipt of, need-based public assistance, including but not limited to Family Assistance (TANF), Safety Net Assistance (NA), Supplemental Nutrition Assistance (SNAP), Supplemental Security Income (SSI)/New York State Supplemental Program (SSP), Medicaid, or Public Housing assistance, shall be deemed presumptively eligible for assignment of counsel.

---

[75] See *Determining Eligibility for Assignment of Counsel in New York: A Study of Current Criteria and Procedures and Recommendations for Improvement*, § III, A.

[76] *See* Brennan Center Guidelines, *supra* at 22-23 (noting that states would save time and resources by establishing presumptions of eligibility for defendants who are incarcerated or confined to a mental health facility). Several states have established such presumptions of eligibility. *See, e.g.,* Ohio Admin. Code, 120-1-03(B)(2), (3) (presumptions of eligibility for defendant confined to a mental health institution and for defendants confined to a state prison); Mass. Gen. Laws, Supreme Judicial Court Rule 3:10 (presumption of eligibility for persons in a mental health facility and persons in a correctional facility); Colorado Chief Justice Directive 04-04 (amended Nov. 2014) (dictating that defendants who are incarcerated are automatically eligible for appointment of counsel and need not complete the application); 2005 Washington Revised Code § 10.101.010(1)(b) ("'Indigent' means a person who, at any stage of a court proceeding, is . . . [i]nvoluntarily committed to a public mental health facility"); Nevada Supreme Court, *In the Matter of the Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases*, ADKT No. 411 (Jan. 4, 2008) (court rule establishing presumption of eligibility for defendants who are "currently serving a sentence in a correctional institution or [are] housed in a mental health facility"); Michigan Criminal Procedure 780.991, Sec. 11(3)(b) (presumption of assigned counsel eligibility for those "currently serving a sentence in a correctional institution or . . . [housed] in a mental health . . . facility"); Idaho Code § 19-854(2)(c) (same); Louisiana Rev. Stat. § 15.175(A)(1)(b) (same).

Commentary:

As with the foregoing presumption, ILS' research into current practices in New York revealed that many counties currently use presumptions of assigned counsel eligibility for applicants who receive need-based public assistance.[77] Such applicants have already undergone a thorough and comprehensive assessment of their financial situation and have been deemed unable to pay for reasonable life expenses without assistance. Conducting another assessment of their finances would require a needless expenditure of resources.[78] Moreover, common sense suggests that if a person needs government assistance to pay for basic life necessities, like food or housing, then the person lacks the resources needed to fund a competent defense. Finally, having a presumption of eligibility for applicants who are in receipt of need-based public assistance is consistent with that which is done in many other states.[79]

D. Applicants who have, within the past six months, been deemed eligible for assignment of counsel in another case in that jurisdiction or another jurisdiction shall be presumed eligible. Appellate courts shall assign appellate counsel to appellants who were deemed eligible for assigned counsel by their trial court.

Commentary:

During the public hearings, many participants told stories of applicants who had been assigned counsel in one jurisdiction, but denied counsel in another jurisdiction when facing similar charges.[80] Though these stories were conveyed to illuminate the need for statewide eligibility

---

[77] See *Determining Eligibility for Assignment of Counsel in New York: A Study of Current Criteria and Procedures and Recommendations for Improvement*, § III, A.

[78] The National Institute of Justice (NIJ) also recommends this presumption in its 1986 report because it will streamline the process. *See* NIJ, *Containing the Costs of Indigent Defense Programs: Eligibility Screening and Cost Recovery Procedures* (September 1986), at 69 (hereinafter, the "1986 NIJ Report") ("The presumptive test regarding public assistance should be applied in each case since it appears that a large number of criminal defendants fall into this category.").

[79] *See* Brennan Center Guidelines, *supra*, p. 22 ("Many jurisdictions already presume defendants to be eligible for free counsel when they receive certain need-based public benefits."); *see also* National Association of Criminal Defense Lawyers, *Redefining Indigence: Financial Eligibility Guidelines for Assigned Counsel*, *supra,* at 15, 24-42 (noting that "some states find defendants who are already receiving certain needs-based federal benefits automatically eligible for assigned counsel" and identifying the following states as establishing automatic, or presumptions of, eligibility for defendants receiving certain types of public assistance: Alaska, Hawaii, Idaho, Massachusetts, Minnesota, Missouri, North Dakota, Ohio, Rhode Island, Virginia, and Wisconsin). Other states that presume assigned counsel eligibility for applicants who receive public assistance include: Washington (2005 Washington Revised Code § 10.101.010(1)(a)); Florida (Fla. Stat. Ann. § 27.52(2)(a)); Nevada (Nevada Supreme Court, *In the Matter of the Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases*, ADKT No. 411 (Jan. 4, 2008) (court rule)); Michigan (Michigan Criminal Procedure 780.991, Sec. 11(3)(b)); Idaho (Idaho Code § 19-854(2)(b)); Louisiana (Louisiana Rev. Stat. § 15.175(A)(1)(b)).

[80] *See Determining Eligibility for Assignment of Counsel in New York: A Study of Current Criteria and Procedures and Recommendations for Improvement*, § I.

standards, they also highlight an opportunity to streamline the eligibility determination process through adoption of a common-sense presumption of eligibility for any applicant who has recently been deemed eligible for assignment of counsel in the same or another jurisdiction. For similar reasons, it also makes sense that appellate courts assign appellate counsel to applicants who were deemed eligible for assigned counsel by their trial court.[81] Notably, Family Court Act § 1118 applies a presumption of eligibility for appellate assigned counsel based on a previous finding of eligibility for assigned counsel at the trial level.

With regard to the information needed to verify these foregoing presumptions, documentation should not be required to verify that a person is incarcerated, detained, or confined to a mental health institution, since this is self-evident. Nor should documentation be required to verify that an applicant has, within the past six months, been deemed eligible for assignment of counsel in another case, since that information can easily be verified through the provider of representation or the court in the other case. For the presumption regarding the receipt of need-based public assistance, the production of a public benefits card or an award letter shall constitute sufficient verification.

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

A. Counsel shall be provided for applicants whenever they have not obtained counsel prior to a proceeding which may result in their detention or whenever there is an unavoidable delay in the eligibility determination, subject to judicial approval once the court proceeding has begun.

B. Where a petition or pre-petition request has been filed under Family Court Act Article 10 for an order for immediate removal of a child or temporary order of protection, a person who is a parent or legally responsible person, as defined by law, shall be entitled to immediate representation by counsel. In accordance with this entitlement, counsel shall also be provided for parents in child welfare proceedings during a child protective agency investigation and sufficiently in advance of their first court appearance, consistent with (A) above. As with subsection (A) this provision of counsel may be subject to judicial review once a court proceeding is commenced.

Commentary:

In criminal cases, the right to counsel, which attaches at arraignment if not sooner, and lasts until the disposition of the case, now clearly encompasses the right to counsel at first appearance in New York.[82] Often, the early stages of a criminal case are the most critical because it is then that,

[81] *See* 2015 NYSDA Statement, *supra*, at 4 n. 11.

[82] *Hurrell-Harring v. State of New York*, 15 N.Y.3d 8 (2010) (holding that arraignment is a critical stage); *Massiah v. United States*, 377 U.S. 201 (1964) (Sixth Amendment right to counsel attached once adversarial proceedings have begun); *Rothgery v. Texas,* 554 U.S. 191 (2008) (the Sixth Amendment right

among other things, issues pertaining to the defendant's pre-trial liberty are determined, evidence is collected or lost, and legal rights are preserved. More than twenty years ago, the New York State Defenders Association emphasized the importance of immediate assignment of counsel, stating as follows:

> The necessity for prompt and accurate judicial determinations of eligibility for appointed counsel cannot be over-emphasized. . . . Effective representation of the accused, which includes the constitutional right to present a defense, compels the appointment of counsel at the earliest possible stage of the proceedings. Indeed, all professional standards for the provision of defense services recommend that counsel be provided as soon as feasible after custody begins, and in fact contemplate intervention of counsel even before the defendant's first appearance before a judicial officer or the filing of formal charges.[83]

It is critical that counsel be assigned not only at first appearance, but also sooner if a request for counsel is made.[84] Thus, for example, a determination as to a person's eligibility for assignment of counsel should be made even prior to arraignment for a person who has been issued an appearance ticket and requests assignment of counsel prior to arraignment. Similarly, an eligibility determination should be made as soon as possible for a person who "reasonably believes that a process will commence that could result in a proceeding where representation is

---

to counsel attaches at the arraignment of the defendant); *Miranda v. Arizona*, 384 U.S. 436 (1966) (the Fifth Amendment right to counsel attaches when a person is subjected to custodial interrogation).

[83] New York State Defenders Association, *Determining Eligibility for Appointed Counsel in New York State* (1994 NYSDA report), *supra*, at. 4, *citing ABA Standards for Criminal Justice: Providing Defense Services*, 5-6.1 (1990); *National Advisory Commission on Criminal Justice Standards and Goals, Courts*, 13.1 and *Commentary* (1973); *National Study Commission on Defense Services*, 1.2-1.4 (19 *National Legal Aid and Defender Association Standards for Defender Services*, II 2b, II 2e (1976); *NLADA Standards for the Administration of Assigned Counsel Systems*, 2.5 (1989). More recent standards have similarly stated that counsel must be assigned as soon as possible. *See, e.g.,* ABA, *Ten Principles of a Public Defense Delivery System* (2002), Principle 3 ("Clients are screened for eligibility, and defense counsel is assigned and notified of appointment, as soon as feasible after clients' arrest, detention, or request for counsel."); NYSBA 2015 *Revised Standards for Providing Mandated Representation* (hereinafter, "NYSBA 2015 Revised Standards"), Standard B-1 (Provision of counsel shall not be delayed while a person's eligibility for mandated representation is being determined or verified."); New York State Office of Indigent Legal Services, *Standards and Criteria for the Provision of Mandated Representation in Cases Involving a Conflict of Interest* (2012), Standard 5 (county programs for mandated representation must "[p]rovide representation for every eligible person at the earliest possible time and begin advocating for every client without delay, including while client eligibility is being determined . . . .").

[84] *See* ABA, *Ten Principles of a Public Defense Delivery System*, *supra*, Principle 3 (noting that eligibility should be determined and counsel assigned as soon as possible after a request for counsel is made); NYSBA 2015 Revised Standards, *supra*, Standard B-3; *see also id.*, Standard B-1 (Effective representation should be available for every eligible person whenever counsel is requested during government investigation or when the individual is in custody."); Sixth Amendment Center and The Pretrial Justice Institute, *Early Appointment of Counsel: The Law, Implementation, and Benefits* (2014), p. 8 (noting that assigning counsel to people who reasonably know that they are the subject of a criminal investigation would foster "quicker, less-costly, and more accurate" case outcomes).

mandated."[85] Thus, persons who learn that they are being investigated by law enforcement for their possible involvement in a crime should be screened for assigned counsel eligibility upon request, and an eligibility determination should be made immediately.[86]

In child welfare matters, legal representation for parents at all phases of their family's interaction with the child welfare and family court systems is essential to the fair administration of justice. Moreover, most parents involved in child welfare proceedings can afford neither a qualified attorney nor the other expenses necessary for effective representation.[87] In its 2019 Interim Report to Chief Judge DiFiore, the Unified Court System's Commission on Parental Legal Representation recommended that parents involved in child welfare proceedings be deemed presumptively eligible for assigned counsel representation.[88] In connection with its recommendation that child welfare involved parents be given assigned counsel during a child protective investigation and sufficiently in advance of the first court appearance, the Commission

---

[85] NYSBA 2015 *Revised Standards*, Standard B-3 (Counsel shall be available when a person reasonably believes that a process will commence that could result in a proceeding where representation is mandated."); New York State Office of Indigent Legal Services, *Standards and Criteria for the Provision of Mandated Representation in Cases Involving a Conflict of Interest* (2012), Standard 5(a) (noting that counsel not only must be present at arraignment, but "earlier when an individual has invoked a constitutional or statutory right to counsel in an investigatory stage of a case . . . .").

[86] In unique circumstances, it may be necessary for the provider of mandated services to assert the person's right to counsel prior to a court order appointing counsel. This was the situation presented to the court in *People v. Rankin*, 46 Misc.3d 791 (County Ct, Monroe County 2014), in which the Monroe County Public Defender's Office asserted the defendant's right to counsel while he was being subjected to police custodial interrogation, and after an initial eligibility determination had been made. In holding that the police had unlawfully failed to cease interrogating the defendant after they had been notified by the Public Defender's Office to do so, the Court acknowledged that the notification of the Public Defender's Office preceded a court determination of assigned counsel eligibility. In so holding, the Court relied on well-established New York law regarding the indelible right to counsel and on professional standards regarding the early entry of counsel, and stated: "To be clear, this [C]ourt readily recognizes and in no way seeks to supplant the well settled existing law that the final determination of indigency is reserved for the judge. In reconciling that rule with the customary practice of submitting an order of appointment, the highly regarded standards for effective representation of indigent individuals promulgated by the ABA and NYSBA, and the immeasurable importance of safeguarding the constitutional right to counsel, *this [C]ourt holds that the Public Defender, following a preliminary eligibility determination for a witness, suspect, or defendant, must have unconstrained liberty to act swiftly in defense of his clients, no different than attorneys in the private sector*." 46 Misc.3d at 811 (emphasis added).

[87] Commission on Parental Legal Representation Interim Report to Chief Judge DiFiore (2019) (hereafter, DiFiore Commission Interim Report). The Commission recognized that effective legal representation in child welfare cases includes non-attorney professional services such as experts, social workers, parent advocates, investigators, paralegals, and interpreters. *Id*. at pp. 24-29.

[88] *Id*. at p. 30 ("We recommend that the proposed Office of Family Representation develop uniform standards of eligibility for assigned counsel that would apply in all Family Court proceedings, and would include a presumption of eligibility for counsel in child welfare proceedings, to be established by legislation.").

emphasized that a rebuttable presumption of eligibility "is essential to better protect their right to meaningful representation" and "would make access to counsel simple and immediate."[89]

The Unified Court System's Family Court Advisory and Rules Committee (FCARC) similarly pressed the importance of presumptive eligibility in its response to ILS' 2019 Notice of Public Hearings on Financial Eligibility for Assignment in Family Matters. In the words of FCARC co-chair Hon. Michele Pirro Bailey:

> [T]he determination of eligibility for assignment of counsel in Family Court has significant implications for access to justice and fundamental fairness. This is particularly true in Family Court Article 10 removal proceedings where the need for counsel is urgent and the lack thereof can have long-lasting consequences with respect to the disruption of the family, mental and emotional stress on children and parents, and upon the Court's ability to address safety and risk concerns with options other than removal.[90]

Family court practitioners also stressed the need for presumptive eligibility in child welfare proceedings. One witness stated that, "given the speed at which decisions regarding placement are made, there may not be time to complete, submit and evaluate applications for financial eligibility. Early involvement in the case goes hand-in-hand with presumptive eligibility."[91]

Currently, in most jurisdictions, parents are not advised of their right to counsel, or that they have the right to an assignment of counsel if they cannot afford one, until after a neglect or abuse petition is filed with the court, despite the clear provisions in the Family Court Act requiring written notice "of the right to be represented by counsel and the procedures for those who are indigent to obtain counsel in proceedings brought pursuant to this article."[92] As a result, parents and persons legally responsible often make admissions, sign releases, and even consent to placement of their children in foster care or with third parties outside of the formal foster care system without having been properly advised of the consequences. Waiting until the first court appearance to advise parents of the right to counsel, "combined with the application process to determine financial eligibility, results in a multiple-week delay before counsel is able to meet with, and properly advise, the client."[93]

Nevertheless, responses by judges to ILS' survey and testimony submitted to ILS by providers indicate that such a presumption is already being applied in some jurisdictions. Using a

---

[89] DiFiore Commission Interim Report at 32, 33.

[90] Written submission of Hon. Michele Pirro Bailey, Co-Chair of the Family Court Advisory and Rules Committee (FCARC), dated July 18, 2019, ILS Family Court Eligibility Public Hearings. The FCARC "is one of the standing advisory committees established by the Chief Administrative Judge of the Courts pursuant to Section 212(1)(q) of the Judiciary Law and Section 212(b) of the Family Court Act." *Id.*

[91] Written submission of Barbara J. Kelley, Allegany County Public Defender, ILS Family Court Eligibility Public Hearings.

[92] *See* Family Court Act §§ 1021, 1022, 1022-A, 1023, 1024, 1033-b.

[93] DiFiore Commission Interim Report at p. 19.

presumption of eligibility for child welfare matters "means that neither court staff nor attorneys need to use precious time on the first day a parent comes to court to engage in potentially burdensome and time-consuming assessments. Rather, they are able to focus on preparing for the first appearance, and the parent need not wait hours, days or weeks to receive representation."[94] Statewide, uniform and consistent use of presumptive eligibility for assigned counsel in child welfare proceedings can be expected to "make access to counsel simple and immediate," and "will ensure that child welfare involved parents receive representation without delay."[95]

When delay is unavoidable, counsel must be provisionally appointed until eligibility for assignment of counsel is determined. A majority of magistrates and providers who responded to ILS' survey indicated that counsel is provisionally appointed pending a final decision regarding eligibility for assigned counsel. Still, a sizeable minority of magistrates and providers responded that there is no such process.[96] And during ILS' public hearings, some witnesses spoke of a long and needless delay in the assignment of counsel, during which defendants and family court litigants, including respondents in child protective proceedings, had no access to counsel.[97]

Courts and entities involved in the screening process must ensure that persons are not constructively denied the right to counsel because of a needless delay in the eligibility determination process or because of failure to provisionally appoint counsel when delay is unavoidable.

IV. Ability to post bond shall not be sufficient, standing alone, to deny eligibility for assignment of counsel.

---

[94] *Id*. at p. 33

[95] *Id*. at p. 33.

[96] *See Determining Eligibility for Assignment of Counsel in New York: A Study of Current Criteria and Procedures and Recommendations for Improvement*, § II, G.

[97] *See, e.g.*, Testimony of Elizabeth Nevins, Associate Clinical Professor and Attorney-in-Charge of the Criminal Justice Clinic, Hofstra University's Maurice A. Deane School of Law, 10th Judicial District public hearing transcript, at 92 (describing the long delays in the eligibility determination process in Nassau County, and stating that "[d]efendants in Nassau County district court are structurally denied access to counsel for months. . . . This must change."); Testimony of Jay Wilbur, Broome County Public Defender, 6th Judicial District public hearing transcript, pp. 35-38, available at: https://www.ils.ny.gov/content/eligibility-public-hearings (noting that in some cases, there can be a 2-3 week delay in the assignment of counsel); Testimony of Sabato Caponi, East End Bureau Chief, Legal Aid Society of Suffolk County, 10th Judicial District public hearing transcript, pp. 134-136, available at: https://www.ils.ny.gov/content/eligibility-public-hearings (noting that on Suffolk County's East End, counsel is often not assigned until after the defendant has appeared 5-6 times at court without a lawyer). The issue of delay in assignment of counsel was also highlighted during the public hearings that the Kaye Commission conducted in 2005. *See e.g.,* Testimony of Vince Warren, American Civil Liberties Union, before the Kaye Commission, Feb. 11, 2005 transcript, at 378 ("And delays in the initiation of client contact are ubiquitous throughout the state").

Commentary:

The American Bar Association (ABA) has stated strongly and succinctly that "[c]ounsel should not be denied . . . because bond has been or can be posted."[98] In the commentary accompanying this rule, the ABA explains that the "ability to post bond is rejected as a basis for denying counsel because it requires the accused to choose between receiving legal representation and the chance to be at liberty pending trial. Since a person's freedom prior to trial often is essential to the preparation of an adequate defense, placing the defendant in this dilemma is arguably a denial of the effective assistance of counsel."[99] Other professional standards agree that it is not a permissible practice to deny counsel to defendants based solely on the fact that they posted bail.[100]

There are additional reasons to refrain from denying assignment of counsel solely because an applicant has posted bail. First, the bail could have been posted by someone other than the applicant, such as a friend, an employer, or a relative, and thus, does not reflect the applicant's financial ability to retain private counsel.[101] As fully discussed in Standard V, the right to counsel is a personal right, and the ability of a third party to post bail for the applicant should not be factored into an assessment of whether or not the applicant qualifies for assigned counsel.[102] Second, applicants might be able to post bail, but only because they know that the funds will be returned. Permanent relinquishment of these funds to retain counsel might not be possible without jeopardizing their ability to provide reasonable living expenses for themselves or their dependents. Third, if applicants are required to choose between eligibility for assignment of counsel or posting bond, they may choose the former, and as a result languish in jail at the county's expense, which is needlessly costly for taxpayers.[103] Finally, this Standard comports

---

[98] ABA Standards for Criminal Justice: Providing Defense Services (1992 ABA Standards), *supra*, Standard 5-7.1.

[99] *See also U.S. v. Scharf*, 354 F. Supp. 450, 452 (E.D. Penn., 1973), *affd* 480 F.2d 919 (3d Cir 1973) (in appeal context, noting that it violates due process to force defendants into choosing between posting bail or putting forth a defense).

[100] *See, e.g.,* 1976 NLADA Guidelines for Legal Defense Systems in the United States, Section 1.5(a) (stating that the fact that a person has been released on bond should not be considered); National Advisory Commission on Criminal Justice Standards and Goals: The Defense, Chapter 13, Standard 13.2(1) (1973) (hereinafter, "1973 NAC Standards") ("Counsel should not be denied to any person merely… because he has posted, or is capable of posting, bond.") (available at http://www.nlada.org/Defender/Defender_Standards/Standards_For_The_Defense); *see also* National Conference of Commissioners on Uniform State Laws, *Model Public Defender Act*, Section 4(b) ("In determining whether a person is a needy person and the extent of his ability to pay, the court may consider such factors as income, property owned, outstanding obligations, and the number and ages of his dependents. Release on bail does not necessarily disqualify him from being a needy person.").

[101] *See, e.g., U.S. v. Scharf*, *supra*, 354 F.Supp. at 452 (noting that courts "have generally agreed that the ability to post bail is not a proper criterion to consider…" because the "money could have come from persons who have no legal or moral obligation to the petitioner, such as friends and distant relatives. . . .").

[102] *See* 1994 NYSDA report, *supra,* at 11, *citing*, *Hardy v. United States*, 375 U.S. 277, 289 n. 7 (1964) and *Fullan v. Commissioner of Corrections of State of N.Y.*, 891 F.2d 1007, 1011 (2d Cir. 1989).

with the *Hurrell-Harring* Settlement, which provides that "ability to post bond shall not be consider[ed] sufficient, standing alone, to deny eligibility."[104]

V. The resources of a third party shall not be considered available to the applicant unless the third party expressly states a present intention to pay for counsel, the applicant gives informed consent to this arrangement, and the arrangement does not interfere with the representation of the applicant or jeopardize the confidentiality of the attorney-client relationship.

A. The resources of a spouse shall not be considered available to the applicant, subject to the above exception.

B. The resources of a parent shall not be considered as available to minor applicants, subject to the above exception.

Commentary:

The right to the assignment of counsel is an individual right that requires an individual eligibility assessment, and "[t]he accused's assessment of his own financial ability to obtain competent representation should be given substantial weight."[105]

Fundamentally, the relationship between an attorney and his or her client is exclusive and premised on the concept that an attorney acts solely at the client's request and advocates only on the client's behalf.[106] A person must consult with his or her attorney to make crucial decisions at every stage of a case. Each decision can have far-reaching consequences for the client, including the potential loss of physical liberty or limits on the parent-child relationship, including the temporary or permanent loss of custody of a child. As such, the right is wholly individual, "and the assignment of counsel should not be dependent on the income or assets of anyone other than the [client]."[107]

---

[103] *See* Brennan Center Guidelines, *supra*, p. 17.

[104] *See Hurrell-Harring* Settlement, § VI (B)(3).

[105] NLADA Black Letter "Summary of Recommendations" – National Study Commission on Defense Services/NLADA Guidelines for Legal Defense Systems in the United States, Section 1.5 (available at http://www.nlada.net/sites/default/files/nsc_guidelinesforlegaldefensesystems_1976.pdf).

[106] *See* Rules of Professional Conduct [22 NYCRR 1200.0] Rule 1.2(a) ("Subject to the provisions herein, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. . . . In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify"); *see also Jones v. Barnes*, 463 U.S. 745, 751 (1983) ("It is also recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal"); *see also ABA Standards for Criminal Justice: Defense Function,* Standard 4-5.2 a) (1993) (discussing decision-making in the context of the attorney-client relationship).

[107] Written submission of the Chief Defenders Association of New York (CDANY), dated August 26, 2015, p. 2, available at: https://www.ils.ny.gov/content/eligibility-public-hearings; s*ee also* 1976 NLADA

Considering a third party's assets as part of assigned counsel eligibility determinations creates inherent danger of conflict and unconstitutional delay.[108] Denying eligibility for assignment of counsel based upon a third party's resources is tantamount to requiring this third party to pay for private counsel. Payment by a third party can compromise an attorney's ethical obligation under the New York State Rules of Professional Conduct. [109] Rule 1.8 requires attorneys not only to

---

Guidelines for Legal Defense Systems in the United States, *supra*, Section 1.5(a) (stating that the "resources of a spouse, parent or other person" shall not be considered in determining assigned counsel eligibility); *ABA Standards for Criminal Justice: Providing Defense Services* (rd ed.), Standard 5-7.1 ("Counsel should not be denied because … friends or relatives have resources to retain counsel.…"); 1973 NAC Standards, Standard 13.2(1), *supra* ("Counsel should not be denied to any person merely because his friends or relatives have resources adequate to retain counsel.") (available at http://www.nlada.org/Defender/Defender_Standards/Standards_For_The_Defense); 2015 NYSDA Statement, *supra*, p. 6, available at: https://www.ils.ny.gov/content/eligibility-public-hearings ("Since the constitutional guarantee of counsel is a personal right, the income of parents and spouses should not be considered available to the defendant for the purpose of determining eligibility. There is no freestanding spousal obligation to pay for legal representation. Also, it is improper to take parental income into account in determining whether to assign counsel to represent a minor in criminal court. A parent has no obligation to hire counsel to represent a minor child in criminal court and owes none to the government or the child" [internal footnotes omitted]); Written submission of David P. Miranda, President, New York State Bar Association (NYSBA), dated August 26, 2015, p. 2, available at: https://www.ils.ny.gov/content/eligibility-public-hearings ("[I]n the case of a minor, an individual under the age of 21, the determination of eligibility should be based on that person's individual financial ability to retain counsel. The constitutional right to counsel is a personal right. . . . The income of a minor's parents should not be considered available to the defendant in a criminal proceeding for the purpose of determining eligibility. A parent is under no obligation to hire counsel to represent a minor child in a criminal proceeding.") (*citing Fullan v. Commissioner of Corrections of State of N.Y.,* 891 F.2d 1007, *cert denied* 496 U.S. 942 (1990) and *People v. Ulloa,* 1 A.D.3d 468 (2d Dept. 2003)); CJA Guidelines, *supra*, Ch. 2 § 210.40.50 (directing that the "initial determination of eligibility should be made without regard to the financial ability of the person's family unless the family indicates willingness and financial ability to retain counsel promptly. At or following the appointment of counsel, the judicial officer may inquire into the financial situation of the person's spouse (or parents, if the person is a juvenile) and if such spouse or parents indicate their willingness to pay all or part of the costs of counsel, the judicial officer may direct deposit or reimbursement."); Written submission of Elizabeth Nevins, Associate Clinical Professor and Attorney-in-Charge of the Criminal Justice Clinic, Hofstra University's Maurice A. Deane School of Law, dated August 12, 2015 ("Nevin's written submission"), *supra*, at 4 ("An individual must be assessed for eligibility on his own . . . without regard to the finances of other household members, family, or friends, unless such individuals indicate their willingness to pay in a timely way.").

[108] The potential delay that can flow from requiring consideration of third-party resources was illuminated in the 2005 testimony before the Kaye Commission. *See* Testimony of William Cuddy, Jail Ministry of Syracuse, Public Hearing Regarding the Commission on the Future of Criminal Indigent Defense Services, March 23, 2005, Transcript at 195-196, available at: https://www.ils.ny.gov/content/eligibility-public-hearings (telling of a 19 year-old Hispanic teen who, after being arraigned on a petit larceny charge, spent three months in jail without a lawyer or a court appearance because his mother, who was not English-speaking, did not understand that she needed to make appointments to sign the assigned counsel eligibility application).

[109] *See* Rules of Professional Conduct [22 NYCRR 1200.0] Rule 1.8(f) ("A lawyer shall not accept compensation for representing a client, or anything of value related to the lawyer's representation of the

obtain "informed consent" from a client before accepting payment from a third party, but also to ensure that there will be "no interference with the lawyer's independent professional judgment or with the client-lawyer relationship" while maintaining "the client's confidential information."[110] Denying eligibility for assignment of counsel based on a third party's resources can also result in a litigant not obtaining counsel at all if, after analysis, an attorney concludes that third-party payment cannot be accepted.

Additionally, requiring a third party to pay for an attorney can denigrate a litigant's interests or create an imbalanced relationship dynamic that influences the person on key decisions, or both. The obvious example is an accused person who wishes to go to trial but who is relying on a third party to pay the legal bills. This accused person might be pressured by that third party to avoid the increased costs of trial and may be induced to plead guilty notwithstanding the consequences. During ILS' public hearings, providers repeatedly cited cases involving accusations between two household members, e.g., domestic violence allegations, where it is potentially dangerous to assess the same household member's finances in order to determine the accused person's eligibility for counsel.[111] Clearly it is a conflict when a person who is a possible complainant, opposing party, or witness is required to pay the legal fees of an accused person.

These principles are equally applicable in family law cases. As the New York State Defenders Association noted in its written submission to ILS during the 2019 eligibility hearings:

> "The constitutional and statutory guarantee of counsel is a personal right. Therefore, the income of household members, and spouses (regardless of whether they live in the same household), should not be considered available to the person applying for assigned counsel in a family court case when determining eligibility. This has long been NYSDA's position (see NYSDA's 2015 Statement). This standard is especially relevant in Family Court matters where many cases involve relatives, as well as other household members on opposing sides of a case, or co-respondents with divergent interests. (For example, a petitioner and a respondent in a family offense proceeding, or co-respondents in an Article 10 proceeding,

---

client, from one other than the client unless: (1) the client gives informed consent; (2) there is no interference with the lawyer's independent professional judgment or with the client-lawyer relationship; and (3) the client's confidential information is protected as required by Rule 1.6.").

[110] *Id.*

[111] *See, e.g.,* Nevins written submission, *supra*, p. 5 ("Indeed in domestic violence cases, this could mean asking the victim of the offense to be responsible for the defendant's fees."). Further, in the civil legal services arena, this danger of conflict is recognized in the Code of Federal Regulations ("C.F.R."), which dictates, "[n]otwithstanding any other provision of this part, or other provision of the recipient's financial eligibility policies, every recipient shall specify as part of its financial eligibility policies that in assessing the income or assets of an applicant who is a victim of domestic violence, the recipient shall consider only the assets and income of the applicant and members of the applicant's household other than those of the alleged perpetrator of the domestic violence and shall not include any assets held by the alleged perpetrator of the domestic violence, jointly held by the applicant with the alleged perpetrator of the domestic violence, or assets jointly held by any member of the applicant's household with the alleged perpetrator of the domestic violence." C.F.R. § 1611.3(e).

when the allegation involves domestic violence being committed in front of the child."[112]

Echoing NYSDA's concerns, the Volunteer Lawyers Project of Onondaga County, Inc. urged that "[t]he way the Assigned Counsel Program in Onondaga County assesses eligibility in criminal cases should be the same for Family Court . . . household income should not need to be reported especially if household members have no obligation or intent to cover the cost of legal services."[113]

The New York State Defenders Association noted in its 1994 report that "[t]he personal nature of the right to court-appointed counsel is equally applicable to minor defendants as to their adult counterparts."[114] Yet, the surveys and public hearings revealed that many counties are currently considering parental income in the case of minors based on the analysis that parents have a legal responsibility to provide certain life necessities to a child.[115] While it is true that generally, absent emancipation, parents have such a legal responsibility up to the age of 21,[116] in a criminal case where current New York State law treats some individuals as young as 13 years old as adults, [117] this responsibility does not extend to paying for defense counsel. With regard to minors, unlike in Family Court where the parents are often parties to the litigation, a criminal case is personal to the individual charged and no other party has the same vested interest, nor is there jurisdiction over any other party.[118] A minor who is accused of a crime faces the same

---

[112] Written submission of New York State Defenders Association, ILS Family Court Eligibility Public Hearings.

[113] Written submission of the Volunteer Lawyers Project of Onondaga County, Inc., ILS Family Court Eligibility Public Hearings.

[114] New York State Defenders Association, *Determining Eligibility for Appointed Counsel in New York State* ("1994 NYSDA report"), *supra*, p. 11 (*citing* N.Y. Penal Law § 30.00; N.Y. Crim. Proc. Law §§ 170.10, 180.10, 210.15).

[115] *See Determining Eligibility for Assignment of Counsel in New York: A Study of Current Criteria and Procedures and Recommendations for Improvement*, § III, H. Though many counties consider third-party income, including parental income, during the eligibility determination process, as ILS' Study reveals, the vast majority of hearing participants who offered an opinion on this issue recommended against doing so.

[116] *See* N.Y. Family Court Act §§ 413, 416.

[117] *See* P.L. § 30.00.

[118] *See People v. Clemson*, 149 Misc. 2d 868 (Justice Ct, Wayne County 1991) (distinguishing between the line of family court cases holding parents responsible for minor's legal fees and finding the criminal court does not have jurisdiction to order the parents to pay a minor defendant's legal fees); *see also People v. Kearns*, 189 Misc. 2d 283 (Sup. Ct, Queens County 2001) (same). Though both *Clemson* and *Kearns* ultimately determined that the minor defendant's parental income should be considered, both courts focused on the personal nature of a minor defendant's right to counsel and the fact that there is no jurisdiction to force a non-charged parent to pay a minor defendant's legal fees. As a result, it is clear from the courts' analysis that any parental support obligations should not be litigated in criminal court at the expense of a minor defendant. As NYSDA noted on page 7 of its July 8, 2015 memo, entitled *Assigned Counsel Eligibility of Minors in Criminal Court: No Parental Liability*, "[t]he issue of whether the payment of counsel fees on behalf of a minor constitutes a support obligation is in all accounts a question of fact dependent on the circumstances of the family and the parent-child relationship and cannot

consequences as an adult, including the loss of liberty. When a parent is required to pay irrespective of the minor's personal wishes, the representation of the minor runs the risk of being subordinated to the parent's will.[119] Consequently, the risks are the same as in any other third-party scenario if appointment of counsel for a minor is postponed or not achieved because of a need for parental income analysis.[120]

Should a third party state that he or she will help the person pay for counsel promptly, and the person agrees to accept such an offer,[121] that third party's income and resources can be considered an available resource for the purposes of the eligibility determination so long as it

---

be cursorily resolved against a parent by a criminal court in the course of a determination of the minor accused's right to the assignment of counsel."

[119] In one of the public hearings, Edward Nowak, President of the New York State Defenders Association and former Monroe County Public Defender, testified that it was all too common in Monroe County and across the State to encounter parents who are unwilling to assist their child or want to use the criminal justice system to teach their child a lesson (s*ee* 7th Judicial District public hearing transcript, at 24-25, available at: https://www.ils.ny.gov/content/eligibility-public-hearings). Mr. Nowak also described parents who refused to return phone calls and refused to pay for their child's defense, thereby creating delays in appointment of counsel. Unfortunately, Mr. Nowak's experiences are not exceptional. ILS staff heard from other providers that these types of scenarios occur frequently. Mark Williams, Cattaraugus County Public Defender, testified: "If I had a dollar for every time I heard a parent say, let him sit in jail for a few days, or let her sit in jail for a few days, I'd probably be a rich man and I wouldn't have any need to be a public defender in Cattaraugus County, I could retire." (8th Judicial District public hearing transcript, p. 19, available at: https://www.ils.ny.gov/content/eligibility-public-hearings). And, in her testimony, Essex County Assistant Public Defender Molly Hann stated: "As for applicants 21 and under, we never consider parental or grandparent or, you know, custodial income because they are our client, that minor is our client. And so just because their parents might be a millionaire with several houses throughout the country or the world or, you know, have the ability to hire private counsel, if the parents choose not to pay for their child's mistakes and want them to learn a lesson, if – we only look at that child's ability." (4th Judicial District public hearing transcript, at 104, available at: https://www.ils.ny.gov/content/eligibility-public-hearings).

[120] The 1977 Third Department Memo and Guidelines, *supra*, allows for the consideration of parental income of minors (and other family income for all defendants), but cautions care, stating, at p. 3, "HOWEVER, THE SIXTH AMENDMENT RIGHT TO COUNSEL IS PERSONAL, THEREFORE, ASSIGNMENT OF COUNSEL CANNOT BE DENIED IF OTHER FAMILY MEMBERS REFUSE TO CONTRIBUTE TOWARD THE COST OF COUNSEL." (emphasis in original).

[121] *See* Rules of Professional Conduct [22 NYCRR 1200.0] Rule 1.8(f)(1), *supra*.

does not cause unwarranted delay in appointment of counsel.[122] However, absent such a statement, the analysis should focus solely on the person's individual ability to pay.[123]

VI. Non-liquid assets shall not be considered unless such assets have demonstrable monetary value and are readily convertible to cash without impairing applicants' ability to provide for the reasonable living expenses of themselves and their dependents.

A. Ownership of a vehicle shall not be considered where such vehicle is necessary for basic life activities.

B. An applicant's primary residence shall not be considered unless the fair market value of the home is significant, there is substantial equity in the home, and the applicant is able to access the equity in a time frame sufficient to retain private counsel promptly.

Commentary:

It is well recognized that non-liquid assets should not be considered in determining whether an applicant is eligible for assigned counsel[124] because such assets typically cannot be converted to

---

[122] Similarly, the CJA Guidelines § 210.40.50 require that "[t]he initial determination of eligibility should be made without regard to the financial ability of the person's family unless the family indicates willingness and financial ability to retain counsel promptly. At or following the appointment of counsel, the judicial officer may inquire into the financial situation of the person's spouse (or parents, if the person is a juvenile) and if such spouse or parents indicate their willingness to pay all or part of the costs of counsel, the judicial officer may direct deposit or reimbursement."

[123] Again we note that the *ABA Standards for Criminal Justice: Providing Defense Services* ("1992 ABA Standards"), *supra*, echo this point in Standard 5-7.1, stating that "[c]ounsel should not be denied . . . because friends or relatives have resources to retain counsel."

[124] *People v. King*, 41 Misc.3d 1237(A)(Bethlehem Justice Ct, Albany County 2013) ("Only available liquid assets should be considered, and non-liquid assets, such as a home used as a primary residence, or an automobile necessary to sustain employment, and reasonable household furnishings should be excluded from the net asset inquiry."); *see also* 2015 NYSDA Statement, *supra* at 5 ("Only non-liquid assets that have demonstrable monetary value and marketability or are otherwise convertible to cash may be considered, and only if converting such assets to cash would not create substantial hardship for the prospective client or persons dependent upon the prospective client."); Nevins written submission, *supra*, at 5 ("If the question is whether a person can actually pay a lawyer for a matter as time-sensitive as a pending criminal case, the fact that she owns a home or a car that she needs to get to work may be patently irrelevant."); Brennan Center Guidelines, *supra* at 15 ("However, just as jurisdictions should consider unavailable all revenue used for the basic expenses of daily living or to maintain employment, jurisdictions should consider unavailable all assets used for such purposes, such as a defendant's primary residence, household furnishings, and clothing, and the car a defendant uses to get to work"); 1976 NLADA Guidelines, *supra*, Section 1.5(a) ("Liquid assets include cash in hand, stocks and bonds, bank accounts and any other property which can be readily converted to cash. The person's home, car, household furnishings, clothing and any property declared exempt from attachment or execution by law, should not be considered in determining eligibility.") (Black Letter "Summary of Recommendations," available at www.nlada.org/DMS/Documents/998925963.238/blackletter.doc). Other states similarly

cash quickly enough to retain private counsel. For instance, an asset may have value, but no substantial equity against which a loan can be secured. And even if the asset does have substantial equity, if it cannot be readily converted to cash, then the applicant does not have the present ability to retain counsel – a criterion for determining eligibility for appointed counsel.[125]

Ownership of a vehicle may not be considered if the vehicle is used for basic life necessities, such as employment, educational, or medical purposes.[126] This requirement is in accord with the *Hurrell-Harring* Settlement.[127] Nor shall ownership in a home normally be considered if the home is the applicant's primary residence. An applicant's primary residence may be considered only if the fair market value of the home is significant, there is substantial equity in the home, (for example, the equity is more than 50% of the home's fair market value), and the applicant is able to access the equity in a time frame sufficient to retain private counsel promptly.[128] Moreover, with regard to home ownership of applicants involved in domestic violence situations, "victims may be the co-owner of a marital home, but due to relatively low income and the spouse's financial abuse and non-payment of the mortgage, the home may be at risk of or in foreclosure proceedings, and thus not a financial asset to the litigant."[129]

VII. A income from receipt of child support or need-based public assistance shall not be considered as available to applicants in determining eligibility for assignment of counsel.

provide that generally, non-liquid assets should not be considered in assigned counsel eligibility determinations. *See e.g.* Massachusetts Supreme Judicial Court Rule 3:10, Section 1(h) (equity in non-liquid assets can be considered only if such equity "is reasonably convertible to cash."); Texas Access to Justice Foundation 2015 Financial Income Guidelines, Client Income Eligibility Standards (defining as liquid assets "[t]hose assets that can readily and promptly be converted to cash by the individual seeking assistance, prior to the time that the assistance is required.").

[125] *See* Brennan Center Guidelines, at 16 n. 63, *citing*, *inter alia*, *Barry v. Brower*, 864 F.2d 294, 299-300 (3d Cir. 1988) ("The Constitution requires states to meet a 'present' need for counsel. If by their nature an accused's assets cannot be timely reduced to cash and cash is required, the 'present' financial inability to obtain counsel which defines indigence for Sixth Amendment purposes appears.").

[126] "Medical purposes" is defined broadly to include medical and behavioral health needs. Thus, for example, if a car is needed to transport a dependent child to behavioral health appointments (such as occupational therapy for an autistic child), ownership of the car shall not be considered in determining eligibility.

[127] *See Hurrell-Harring* Settlement, § VI(B)(6) (requiring that "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.").

[128] A home's fair market value is significant if, for example, it is three times the median listing prices of homes in the city or town in which the home is located. The median listing prices of homes in specific geographic areas can be found on commercial real estate websites.

[129] Written submission to DiFiore Parental Representation Commission of Sanctuary for Families.

Commentary:

By law, child support receipts are intended for the well-being of the child, not the parent.[130] Generally, the law precludes the consideration of need-based public assistance in making other assessments regarding government benefits, or in determining a person's taxable income.[131] Thus, the receipt of child support and any income that is derived from a need-based source of public assistance, described in Standard II, C, should not be considered income for purposes of assessing financial eligibility.

VIII. Debts and other financial obligations, including the obligation to provide reasonable living expenses for the applicant and his or her dependents, shall be considered in determining eligibility for assignment of counsel.

Commentary:

Determining whether an applicant has the current available resources to pay for qualified counsel and the other expenses of representation requires consideration of the applicant's liabilities as well as resources.[132] Such debts and financial obligations include the following: fixed household expenses, such as rent or mortgage, utility payments, and food; employment or educational-related expenses, such as child or dependent care, transportation, clothing, supplies, equipment or automobile insurance payments; child support paid to another; minimum monthly credit card payments; educational loan payments; health insurance payments; unreimbursed medical payments; and non-medical expenses associated with age or disability. Denying eligibility for

---

[130] *See* Family Court Act § 413(1)(a), (b)(2) ("Child support shall mean a sum to be paid pursuant to court order or decree by either or both parents or pursuant to a valid agreement between the parties *for care, maintenance, and education of any unemancipated child* under the age of twenty-one years.") (emphasis added).

[131] *See, e.g.,* 7 U.S.C. § 2017(b) (with regard to SNAP benefits, providing as follows: "The value of benefits that may be provided under this chapter shall not be considered income or resources for any purpose under any Federal, State, or local laws. . . ."); *accord* 42 U.S.C. § 407(a) (Social Security and SSI benefits); New York Social Services Law § 97(3) (HEAP benefits). Under federal law, need-based public assistance is not considered income for tax purposes. *See* https://www.irs.gov/publications/p525/index.html.

[132] *See* 1977 Third Department Memo and Guidelines, *supra* at 5 ("Unusual, necessary, recurring expenses can make an otherwise ineligible individual eligible. [E.g., child care expenses, recurring medical expenses, alimony, or child support.]"); *see also* 1976 NLADA Guidelines, *supra*, Section 1.5 ("Effective representation should be provided to anyone who is unable, without substantial financial hardship to himself or to his dependents, to obtain such representation. This determination should be made by ascertaining the liquid assets of the person which exceed the amount needed for the support of the person or his dependents and for the payment of current obligations."); Brennan Center Guidelines, *supra*, p. 17 ("Before considering any liquid or illiquid assets, or even income, available to pay for private counsel, jurisdictions should subtract the value of any debt the individual owes."). During ILS' public hearings, several hearing participants identified the importance of considering financial obligations during the assigned counsel eligibility determination process. *See Determining Eligibility for Assignment of Counsel in New York: A Study of Current Criteria and Procedures and Recommendations for Improvement*, § III, E.

assignment of counsel because of failure to consider these liabilities can have immediate adverse consequences, such as jeopardizing applicants' ability to pay reasonable living expenses and maintaining the stability of themselves and their dependents. It can also lead to serious long-term consequences, such as bankruptcy. Additionally, as set forth in the *Hurrell-Harring* Settlement, the income needed to meet the reasonable living expenses of the applicant and his or her dependents is a liability which must not be considered as available to the applicant in determining the applicant's financial eligibility for assignment of counsel.[133]

Litigants in family law cases often face particular financial constraints that affect their ability to afford effective representation. For example, in testimony submitted to the DiFiore Commission, Sanctuary for Families asserted that: "In cases of domestic violence, abusers often limit the economic opportunities of their victims, such as by prohibiting them from working or advancing their education. Having eligibility standards which account for a variety of financial constraints is crucial as domestic violence survivors often have modest incomes, very limited assets or significant debt."[134]

IX. Eligibility determinations shall take into account the actual cost of retaining a private attorney in the relevant jurisdiction for the type of family law case or category of crime charged.

Commentary:

In assessing an applicant's ability to retain private counsel, it is critical that the actual costs of representation for the particular type of family law case or criminal charge and in the particular jurisdiction be considered.[135] As set forth in the *Hurrell-Harring* Settlement, "eligibility

---

[133] *See Hurrell-Harring* Settlement, § VI(B)(5).

[134] Written submission to Difiore Commission of Sanctuary for Families. Similarly, Lois Schwaeber, The Safe Center Long Island wrote: "The question of what resources may be considered is much more complex, especially if the litigant is a victim of financial abuse, as many of my clients are. The litigant may own the home but not have cash resources available and while she may be a joint owner, the house and/or mortgage payments may be in arrears or foreclosure. The guidelines should consider what other debts she has and whether she has access to family funds."

[135] *See People v. King*, *supra*, 41 Misc.3d 1237(A), *2 (Bethlehem Justice Ct, Albany County 2013) (noting that in making eligibility determinations, courts should give substantial consideration to, among other things, "the complexity of the case, and the cost of privately retained counsel in the jurisdiction where the representation will occur."); *see also* NLADA Guidelines for Legal Defense Systems in the United States ("1976 NLADA Guidelines"), *supra*, Section 1.5 ("If the person's liquid assets are not sufficient to cover the anticipated costs of representation as indicated by the prevailing fees charged by competent counsel in the area, the person should be considered eligible for publicly provided representation."); NIJ, *Containing the Costs of Indigent Defense Programs: Eligibility Screening and Cost Recovery Procedures* ("1986 NIJ Report"), *supra* at 23, noting that "[o]btaining private defense counsel can be a costly proposition. Even defendants whose assets exceed their liabilities could experience hardships due to the cost of hiring an attorney." In this report, the NIJ examined studies done in both Massachusetts and Los Angeles, California, and reported that the Massachusetts study found that the cost of criminal private representation "varied not only by type of case (juvenile, misdemeanor, felony, or appeal), but also by the seriousness of the charges within each category; thus, both variables

determinations shall take into account the actual cost of retaining a private attorney in the relevant jurisdiction for the category of crime charged."[136] This requires consideration of the following: the seriousness of the particular charge, the anticipated complexity of the given case, the need for other necessary expenses of representation (such as investigative and expert services), and the actual cost for retaining an attorney to represent the applicant in the particular jurisdiction. After all, an applicant with limited resources might be able to afford the cost of representation on a simple violation, but might be unable to pay the costs of a competent defense of a more complex case, especially when the cost of such other related services, such as case investigation and expert services, are factored in.

Special considerations related to the costs of retaining counsel in family law matters also exist. Witnesses quoted hourly rates for family law cases ranging from $300 to $590 in upstate counties,[137] and a 2018 report on legal trends found that in New York City the average hourly rate charged by a private attorney was $368.[138] Furthermore, as one witness explained to ILS, retaining an attorney for family law cases imposes a substantial financial hardship on litigants and their children:

> Privately retaining an attorney for family court proceedings is a complicated process because family court proceedings are inherently complicated. Family court proceedings are unpredictable. There is no way to guarantee the amount of time or the number of court appearances needed to complete a family court proceeding. Attorneys, who may face challenges from the Court if they seek to be relieved after submitting their notice of appearance, justifiably want to ensure they will be paid for the work they perform. Attorneys, hired for family court proceedings, will typically charge a rate per hour or per court appearance. Additionally, those attorneys will typically charge retainer fees costing thousands of dollars.[139]

In child welfare cases, "it is important to consider all that goes into ensuring quality representation," including, in addition to rigorous investigation and defense of the allegations: court advocacy at conferences and meetings; developing individualized visiting arrangements for parents and their children who have been removed from their custody; developing individualized service plans; and identifying out-of-home placement arrangements that support a child's

---

should be factored into the eligibility decision." *Id.* at 23-24. Following its analysis, Los Angeles decided to include, in its assessments for eligibility determinations, the question of "whether or not a competent private attorney would be interested in representing the defendant in his or her present economic circumstances." *Id.* at 24. As a result, NIJ ultimately recommends that "eligibility screeners . . . take into consideration in making indigency determinations the prevailing rates in their jurisdiction for retaining private counsel in different types of cases." *Id.* at 70.

[136] *See Hurrell-Harring* Settlement, § VI(B)(4).

[137] Written submission of Catherine Stuckart, ILS Family Court Eligibility Public Hearings.

[138] Written submission of Center for Family Representation, ILS Family Court Eligibility Public Hearings.

[139] Written submission of Joel Serrano, Queens Assigned Counsel Panel, ILS Family Court Eligibility Public Hearings.

connection to his or her parents and community.[140] Other costs that may be associated with assessing the actual cost of obtaining an attorney and effective representation in a child welfare case include: costs of defending against a concurrent criminal court case; costs associated with the applicant's removal from the primary home pursuant to the issuance of a temporary order of protection; costs associated with consulting and retaining expert witnesses; and costs associated with recommended or mandated services.[141]

X. These Standards shall be applied uniformly, consistently, and with transparency.

Commentary:

During ILS' public hearings, nearly every person who addressed this issue emphasized the need for uniform, written, comprehensive, yet easily understandable eligibility standards.[142] These sentiments mirror the *Hurrell-Harring* Settlement, which requires that "eligibility determinations shall be made pursuant to written criteria."[143] Uniform standards are necessary to ensure that individuals are not denied their right to assigned counsel because of the indiscriminate application and consideration of improper criteria, to enable predictability for counties and mandated providers in the forecasting of their future resources and budgetary needs,[144] to ensure that similarly-situated individuals are treated in a similar manner, and to guard against personal prejudices and implicit bias informing decisions about assigned counsel eligibility.[145] As set forth in the New York State Defenders Association's written submission:

> The purpose of these criteria and procedures is to ensure equitable, efficient, and fair implementation across the state of the right to counsel as guaranteed by constitutional and statutory provisions. . . . These guidelines can eliminate the

---

[140] Written submission of Center for Family Representation, ILS Family Court Eligibility Public Hearings.

[141] *Id*. For similar testimony, see written submission of New York State Defenders Association ("Family Court proceedings can last for significant periods of time and involve many court appearances, out-of-court advocacy, and the need for non-attorney professionals, such as social workers and parent advocates. Attorneys who provide representation in retained cases take this into account when setting their fees.").

[142] *See Determining Eligibility for Assignment of Counsel in New York: A Study of Current Criteria and Procedures and Recommendations for Improvement*, § I.; ILS Family Court Study.

[143] *See Hurrell-Harring* Settlement, § VI(B)(1).

[144] *See* Brennan Center Guidelines, *supra*, at 6-7.

[145] *See* NLADA, *The Implementation and Impact of Indigent Defense Standards* (2003), p. 16, available at https://www.ncjrs.gov/pdffiles1/nij/grants/205023.pdf. ("Standardized procedures for client eligibility screening serve the interest of uniformity and equality of treatment of defendants with limited resources. . . . The National Study Commission on Defense Services suggested that . . . unequal application of the Sixth Amendment constitutes a violation of both due process and equal protection.") (*citing* the 1976 National Study Commission on Defense Services/NLADA Guidelines for Legal Defense Systems in the United States, *supra*, *Commentary,* at 72-74).

substantial amount of idiosyncratic, divergent, and improper practices that are depriving individuals of their right to appointed counsel.[146]

The promulgation and implementation of written standards will diminish arbitrary eligibility determinations. If the same eligibility factors are applied by all involved in the eligibility determination process, regardless of their location, the chance that a person deemed eligible in one jurisdiction will be deemed ineligible in another similar jurisdiction under the same set of circumstances will be greatly reduced. The fair treatment of all applicants for assigned counsel can revive public trust in the justice system.[147]

Transparency means that potential applicants know how their application for assigned counsel will be processed and decided.[148] Thus, it is imperative that these eligibility determination standards be widely disseminated – for example, posted in courthouses, in the offices of mandated providers, and on the websites of courts and mandated providers.

XI. ourts have the ultimate authority to determine eligibility but may delegate the responsibility for screening and making an eligibility recommendation.

A. Entities responsible for screening and making a recommendation should be independent and conflict-free.

B. Where there is no entity that is independent and conflict-free, courts may delegate the screening responsibility to the provider of mandated representation.

Commentary:

In New York State, courts have the ultimate authority for determining eligibility for assigned counsel.[149] Courts may, and often do, assign to other entities the responsibility of screening for eligibility and making a recommendation as to the applicant's eligibility for assignment of counsel.[150] Regardless of the entity to which these responsibilities are assigned, it is ideal that the

---

[146] New York State Defenders Association, Statement on the Criteria and Procedures for Determining Eligibility in New York State ("2015 NYSDA Statement"), *supra*, pp. 7, 8 (available at: https://www.ils.ny.gov/content/eligibility-public-hearings).

[147] Brennan Center Guidelines, *supra*, pp. 6-7

[148] 2015 NYSDA Statement, *supra*, at 7 ("To ensure the broadest possible distribution of this critically important information, the standards should require that, in addition to being prominently displayed on posted signs and available in writing, court and public defense websites should include this information.").

[149] *See* County Law § 722; Criminal Procedure Law ("CPL") §§ 170.10(3)(c); 180.10(3)(c); *People v Rankin*, 46 Misc. 3d 791, 802-803 County Ct, Monroe County 2014) (citing both case law and statutes to support the concept that, in New York State, "an indigent defendant's eligibility determination rests with the court") (citations omitted).

[150] *People v. King*, *supra* (noting that courts may delegate to another entity the responsibility for financial data collection). *See Determining Eligibility for Assignment of Counsel in New York: A Study of Current Criteria and Procedures and Recommendations for Improvement*, § II, A (ILS' Study reveals that in most

eligibility screening process be conducted by an entity that is independent and free from political influence or financial pressures – a prerequisite to ensuring fair outcomes and protecting the rights of those unable to afford counsel. Having an independent screening entity ensures that eligibility determinations are not motivated by impermissible factors, such as pressure to minimize costs to the county or to manage caseloads. For that reason, in its 2008 Guidelines, the Brennan Center emphasizes the importance of ensuring that those involved in the eligibility screening process "be free of any conflict of interest or other ethics violation."[151]

Under New York's county-based system, there currently is no entity involved in screening for assigned counsel eligibility that does not have a conflict of interest. All entities that screen – whether it is a provider of mandated representation or a third-party screening entity – are currently funded by the counties, and thus have an inherent incentive to control costs by diminishing the number of applicants deemed eligible. This reality emerged during the public hearings, during which several county providers acknowledged the pressure imposed upon them to apply rigid screening criteria so as to reduce the number of applicants deemed eligible for assigned counsel. As one provider stated, her county's assigned counsel committee "bases our performance as an office on how low we can keep the 18-b line, which is just a horrible thing. It doesn't take into account our representation of these clients who just desperately need our help. All that they care about is how much the county part is going to be at the end of the year, and we work very hard to try to keep that line low. . . . [U]nfortunately, the county considers it to be a bad thing if the assigned counsel line, which we have absolutely no control over, exceeds our budget for the year." [152] And in at least one other county, judges were reportedly asked by the provider to refrain from overriding the provider's eligibility denials "because those overrides increased [the provider's] caseloads."[153]
Other providers acknowledged that being involved in the eligibility determination process can create a potential for applicants to question the providers' loyalty.[154]

---

counties, the responsibility for screening and making a recommendation regarding assigned counsel eligibility is delegated to the provider of mandated representation).

[151] Brennan Center Guidelines, *supra,* p. 8.

[152] *See* Testimony of Karri Beckwith, Administrator, Chenango County Assigned Counsel Program, 6th Judicial District public hearing transcript, at 85-86, available at: https://www.ils.ny.gov/content/eligibility-public-hearings; s*ee also Determining Eligibility for Assignment of Counsel in New York: A Study of Current Criteria and Procedures and Recommendations for Improvement*, § II, A.

[153] *See* Written submission of John A. Curr, III, Director of Western Regional Chapter, New York Civil Liberties Union, at 3, available at: https://www.ils.ny.gov/content/eligibility-public-hearings.

[154] *See, e.g.,* Testimony of Andrew Correia, First Assistant, Wayne County Public Defender Office, 7th Judicial District public hearing transcript, at 79-80, available at: https://www.ils.ny.gov/content/eligibility-public-hearings.

On the other hand, the public hearings revealed compelling advantages of delegating the screening and initial recommendation responsibility to providers of mandated representation.[155] The following are some of the advantages identified:

- Because the providers are now regularly appearing at arraignments, when providers are responsible for eligibility determinations, a decision often can be made quickly, thereby facilitating the early entry of counsel and diminishing the possibility of gaps in representation.

- The provider is in the best position to maintain the confidentiality of information obtained during the eligibility determination process.[156] This is important because prosecuting attorneys or other entities have sought to obtain, and to use against applicants, financial information gathered during the eligibility screening.

- The information gathered during the eligibility determination process is the same information that defenders need to advocate for pre-trial release or bail applications. Having the provider responsible for screening is more respectful of the applicant because it reduces the number of people to whom the applicant must disclose the same personal information.

- Perhaps most importantly, the provider of mandated representation is the only entity that is professionally and ethically obligated to align its interests with those who are in need of public representation.[157]

---

[155] *See generally Determining Eligibility for Assignment of Counsel in New York: A Study of Current Criteria and Procedures and Recommendations for Improvement*, § II, A.

[156] The 1992 ABA Standards for Criminal Justice: Providing Defense Services ("1992 ABA Standards") note, in the commentary to Standard 5-7.3, p. 96, that "[i]nformation given during the [assigned counsel eligibility] interview, if candid, may involve revelations as to the proceeds of criminal conduct. The attorney is most able to make judgments about the relationship of information given during the eligibility interview and evidence of guilt or innocence of the offense charged. . . . In addition, when the eligibility inquiry and determination are made by the [provider], the attorney-client privilege protects the information disclosed to the lawyer."

[157] The 1992 ABA Standards (*supra*) recognize this concept in the commentary to Standard 5-7.3, p. 96, stating, as follows: "The lawyer for the accused, who has a continuing and personal interest in the client's welfare, is likely to conduct eligibility interviews in a dignified manner." Similarly, during his hearing testimony, Edward Nowak, who served as Monroe County Public Defender for thirty years and currently is President of the New York State Defenders Association, was asked about his strongly-held position that the providers of mandated representation should be charged with the responsibility of screening for eligibility. He acknowledged the reality that everyone involved in a county-based system has some conflict, but then stated: "Then I would just ask, which entity in the entire State of New York . . . cares about the rights of th[e] defendant more than the defender? I submit to you, there are none. Everyone else has some type of a conflicting position and there is no one that looks out for the rights of a defendant who is charged with a crime more than the defense attorney. That is why they are the ones [who should screen for eligibility]." (7th Judicial District public hearing transcript, at 29).

For that reason, ILS acknowledges that where there exists no screening entity that is independent and conflict-free, it makes sense for courts to delegate to the providers of mandated representation the responsibility for the initial eligibility determination screening and recommendation.[158] We further emphasize that law enforcement entities, including probation departments and child protective services agencies, must not be involved in the eligibility determination process.[159]

Finally, it bears emphasizing that the inherent existence of conflict elevates the importance of adherence to these standards. Strict adherence will diminish the influence of outside pressures to control costs, thereby ensuring the integrity of the eligibility determination process.

XII. The confidentiality of all information applicants provide during the eligibility determination process shall be preserved.

A. The eligibility screening process, whether done by another entity or the court, shall be done in a confidential setting and not in open court.

B. Any entity involved in screening shall not make any information disclosed by applicants available to the public or other entities (except the court).

C. Any documentation submitted to the court shall be submitted *ex parte* and shall be ordered sealed from public view.

---

[158] This is in accord with national standards. *See*, *e.g.*, 1976 NLADA Guidelines for Legal Defense Systems in the United States, Section 1.6 ("The financial eligibility of a person for publicly provided representation should be made initially by the defender office or assigned counsel program subject to review by a court upon a finding of ineligibility at the request of such person."); ABA Standards for Criminal Justice: Providing Defense Services ("1992 ABA Standards"), *supra*, Standard 5-7.3 ("Determination of eligibility should be made by defenders, contractors for services, assigned counsel, a neutral screening agency, or by the court.").

[159] The federal system explicitly prohibits law enforcement from being involved in the assigned counsel eligibility screening process and from seeking information disclosed by the defendant during this process. *See* CJA Guidelines, § 210.40.20(e) ("Employees of law enforcement agencies or U.S. attorney offices should not participate in the completion of the [assigned counsel application form] or seek to obtain information from a person requesting the appointment of counsel."). During one of the ILS public hearings, a speaker succinctly explained why it is inappropriate to have probation involved in the screening process, stating as follows: "I have to stress this; probation has no business doing screening. Probation is law enforcement, probation is part of the entity which is prosecuting the individual. . . . The police department has no business, probation [has] no business." Testimony of Kent Moston, Attorney-in-Chief, Legal Aid Society of Nassau County, 10th Judicial District public hearing transcript, at 101, available at: https://www.ils.ny.gov/content/eligibility-public-hearings.

Commentary:

Maintaining the confidentiality of information disclosed during the eligibility determination process is necessary to protect applicants' constitutional, statutory, and privacy rights.[160] If applicants believe that the information they disclose could be sought and used against them, "as in the case of domestic violence matters (where familial relationship is an element of the crime), tax offenses (where income may be a question of fact), or even drug possession cases (where ownership of a vehicle is at issue),"[161] they could be forced to choose between exercising their constitutional right to counsel and their right against self-incrimination - a choice no person should ever have to make.[162] Nor should applicants have to choose between the right to privacy and the right to counsel.[163] Indeed, fearing public disclosure, applicants might choose privacy over the assignment of counsel and withhold embarrassing information about household expenses, or, for an applicant who is being abused or controlled by their spouse, an honest explanation as to why she lacks access to assets she holds jointly with her spouse.[164]

Additionally, "[s]hielding the information can improve the accuracy and efficiency of the screening process, and ensure that eligible people are provided with counsel."[165] When applicants know that their information will be kept confidential, they are more likely to be forthcoming, thereby facilitating an accurate eligibility determination.

For these reasons, entities involved in screening for eligibility shall take steps to ensure the confidentiality of information disclosed during the screening process,[166] a requirement of the

---

[160] *See* New York State Bar Ass'n Revised Standards for Providing Mandated Representation, Standard C-4 (2015) (Rules, regulations and procedures concerning the determination of initial eligibility and continuing eligibility for mandated representation shall be designed so as to protect the client's privacy and constitutional rights and to not interfere with the attorney's relationship with his or her client."); *accord United States v. Pavelko*, 992 F.2d 32, 34 (3rd Cir. 1993) (holding that, to protect the defendant's 5th Amendment rights, information a defendant discloses as part of the assigned counsel eligibility determination process cannot be used against the defendant on the issue of guilt).

[161] Nevins written submission, *supra*, at 6-7.

[162] *See* Brennan Center Guidelines, *supra*, at 23; *United States v. Pavelko*, 992 F.2d 32, 34 (3rd Cir. 1993).

[163] *Id.*

[164] Nevins written submission, *supra*, at 6 ("There is simply no reason that a person's personal financial information must be shared in front of a courtroom full of people. Such a public airing can lead people to exaggerate their earnings, for fear of embarrassment (but in derogation of the right to counsel and the accuracy of the information), and certainly means public disclosure of very personal information.").

[165] Brennan Center Guidelines, *supra*, p. 24.

[166] *See, .e.g.,* ABA Standards for Criminal Justice: Providing Defense Services, Standard 5-7.3, *supra* at 95 ("When the eligibility determination is not made by the court, confidentiality should be maintained, and the determinations should be subject to review by a court at the request of a person found to be ineligible."); *accord* 1976 NLADA *Guidelines for Legal Defense Systems in the United States*, *supra*, Guideline 1.6 ("The financial eligibility of a person for publicly provided representation should be made initially by the defender office or assigned counsel program subject to review by a court upon a finding of ineligibility at the request of such person. Any information or statements used for the determination should be considered privileged under the attorney-client relationship.") (Black letter "Summary of

Hurrell-Harring Settlement.[167] Generally, eligibility screening shall not be conducted in open court, but instead in a location that allows for a private conversation with the applicant. In limited situations where court facilities are such that the courtroom is the only location available to screen the applicant in a timely manner, the eligibility screening may be conducted during a court proceeding, but in a manner that preserves the confidentiality of the information disclosed (for example, at a bench conference). Applications and any other supporting information or documentation shall not be made available to the opposing counsel or to any other persons or entities for use in the case at issue or in other cases. Nor shall such information be made available to prosecutors or other governmental agencies for investigation of fraud relating to the application for assigned counsel.

Finally, while courts are not required to conduct *ex parte* proceedings to determine assigned counsel eligibility, any documentation submitted to a court for determination of eligibility shall be made as an *ex parte* submission and ordered sealed so as to guard against release to the public.[168]

XIII. The eligibility determination process shall not be unduly burdensome or onerous.

A. Applicants shall not be required to attest under penalty of perjury to the truth of the information provided as part of the eligibility determination process.

B. Applicants shall not be denied assignment of counsel for minor or inadvertent errors in the information disclosed during the eligibility determination process.

C. Applicants shall not be required to produce unduly burdensome documentation to verify the financial information provided; nor shall they be denied assignment of counsel solely for the failure to produce documentation where they have demonstrated a good faith effort to produce requested documentation.

D. Applicants shall not be required to demonstrate that they were unable to retain private counsel to be deemed eligible for assignment of counsel.

Commentary:

It is important that the integrity of the eligibility determination process be maintained to ensure that counsel is being assigned to those who cannot afford the costs of effective representation,

---

Recommendations" available at http://www.nlada.org/Defender/Defender_Standards/Guidelines_For_Legal_Defense_Systems#onesix.

[167] *See Hurrell-Harring* Settlement, § VI(B)(2) (providing that "confidentiality shall be maintained for all information submitted for purposes of assessing eligibility").

[168] *See People v. King, supra*, 41 Misc.3d 1237(A), *3 (noting that, to maintain the confidentiality of the financial information the defendant provided, "the particulars of his finances are not being included in this Decision; the financial statement itself will be maintained in the court file, and is herein being ordered to be SEALED from public view.").

and not to those who can.[169] Yet, the reality is that most people facing criminal charges or litigants in family court who apply for publicly funded counsel are too poor to pay the costs of effective representation.[170] "Therefore, the goal of a sensible screening process should be to screen in most defendants accurately and efficiently, while screening out the few individuals who are not qualified, all without spending too much money."[171]

Eligibility determination procedures should not be premised on the assumption that applicants will provide false or misleading information to be deemed eligible for assignment of counsel. This assumption is belied by research, which shows that the vast majority of applicants in criminal cases provide accurate information during the eligibility determination process. The few defendants who misstate their finances tend to overstate their resources, diminishing rather than enhancing their chances of being found eligible for assignment of counsel.[172] For that and other reasons, it is not necessary to require applicants to affirm under penalty of perjury that the information they provide is accurate.[173] Doing so does not enhance the accuracy of the information provided, but instead chills the exercise of applicants' right to assigned counsel. Nor should applicants be penalized for minor or inadvertent errors in reporting their financial resources. As was stated during ILS' public hearings: "If defendants fear prosecution based on unintentional or minor errors, they may opt to forego the screening and fail to avail themselves

---

[169] *See, e.g.,* Brennan Center Guidelines, *supra*, p. 1 ("Without fair standards for assessing eligibility, some people who truly cannot afford counsel without undue hardship are turned away. . . . On the other hand, some individuals receive counsel who should not. In these times of fiscal austerity, every dollar spent representing someone who can afford to pay for counsel robs resource-poor indigent defense systems of money that could be better spent representing people who are truly in need.").

[170] *See, e.g.,* Brennan Center Guidelines, *id.,* at 4. The information collected by ILS as a result of our surveys and eligibility determination hearings reveals that the vast majority of people who apply for assigned counsel are found to be eligible.

[171] *Id.; see also* 1992 ABA Standards: Providing Defense Services, *supra*, Standard 5-7.3 (recommending the use of a questionnaire "to determine the nature and extent of the financial resources available for obtaining representation," and explaining in the accompanying *Commentary* (p. 97) that "[t]he use of a questionnaire facilitates rapid determinations of eligibility and, in the event that eligibility is denied, provides a record that can be reviewed by the trial court.").

[172] *See* Elizabeth Neely & Alan Tompkins, *Evaluating Court Processes for Determining Indigency*, 43 Court Review 4, 9 (2007) ("These findings indicate that in a typical month, 5% of defendants provided inaccurate or false information to the court. Of those providing inaccurate information, however, only one person in 25 gave information that could have possibly increased their chances of receiving public defender services. In fact, the inaccurate information may have not even been such that it would have made a difference in eligibility. These findings are consistent with what several interviewees . . . told us: Defendants are as likely to lie to make themselves seem more financially secure than the facts would indicate.").

[173] Many states and counties do not require assigned counsel applicants to submit sworn applications. *See* Lynn Langton and Donald Farole, Jr., *Bureau of Justice Statistics Special Report: State Public Defender Programs, 2007* (2010), p. 6 (finding that one-third of states with statewide assigned counsel eligibility criteria do not require sworn applications for assigned counsel); Farole and Langton, *Bureau of Justice Statistics Special Report: County-based and Local Public Defender Offices, 2007* (2010), p. 5 (finding that about 40% of county-based or local public defender offices do not require sworn applications for assigned counsel).

of their right to counsel."[174] In the end, "[o]verzealous enforcement is unlikely to result in significant cost savings for jurisdictions."[175]

Similarly, applicants should not be required to provide voluminous or hard-to-obtain documentation to verify the financial information they disclose, as doing so also has a chilling effect on the exercise of the right to assignment of counsel.[176] Processes that are needlessly burdensome and time-consuming increase the administrative costs of the eligibility determination process and delay the appointment of counsel, but do not result in significant cost-savings to the county or state. For that reason, in a 1986 report, the National Institute of Justice advised that the financial information disclosed during the eligibility determination process be verified only when there is missing information or legitimate grounds to believe that the applicant has provided inaccurate information.[177] Of course, as is stated in the Commentary to Standard XV, when the assignment of counsel is based on intentional misrepresentation, the court has the inherent authority to re-visit the assigned counsel eligibility determination.

Finally, eligibility for assignment of counsel should not be contingent upon applicants having to provide evidence that they have repeatedly sought and failed to retain counsel because of their limited financial resources.[178]

XIV. The determination that applicants are ineligible for assignment of counsel shall be in writing and shall explain the reasons for the ineligibility determination. Applicants shall be provided an opportunity to request reconsideration of this determination or appeal it, or both.

---

[174] Nevins written submission, *supra* at 7-8 *see* 2015 NYSDA *Statement on the Criteria and Procedures for Determining Eligibility in New York State,* ("2015 NYSDA Statement"), *supra*, at 10; Brennan Center Guidelines, s*upra*, at 19-20 ("Nor should jurisdictions impose harsh punishment on defendants for unintentional or minor errors in describing their income and assets."). The problems that stem from needlessly burdensome documentation requirements and requiring applicants to swear or attest to the information disclosed were discussed during ILS' public hearings. *See Determining Eligibility for Assignment of Counsel in New York: A Study of Current Criteria and Procedures and Recommendations for Improvement*, §§ II, C, D.

[175] Brennan Center Guidelines, *supra,* at 20.

[176] Brennan Center Guidelines, *supra*, at 19 ("Jurisdictions should avoid imposing requirements that discourage qualified individuals from exercising their right to counsel."). The requirements imposed on applicants during the eligibility determination process should never be used to reduce the number of defendants who apply for assigned counsel. *See* 2015 NYSDA Statement, *supra*, pp. 9-10 ("Lengthy and onerous eligibility practices, which in other contexts derive their ability for 'governmental savings' by discouraging applicants seeking services, are wholly inappropriate in the context of the right to counsel as they can delay appointment and therefore interfere with prompt investigation, early witness location, and crime scene preservation.") (internal footnote omitted).

[177] National Institute of Justice (NIJ), *Containing the Costs of Indigent Defense Programs: Eligibility Screening and Cost Recovery Procedures*, *supra*, at 27 (September 1986) ("In general, it would seem to be wasteful of scarce resources and unnecessarily dilatory to verify all defendants' information in every case. However, screeners should be trained to watch for unusual or missing information….")

[178] *See* Brennan Center Guidelines, *supra,* at 19.

A. Screening entities shall promptly inform applicants of their eligibility recommendation. If their recommendation is that the applicant be denied assignment of counsel, they shall provide the reason for the denial in writing along with written notice that the applicant can ask the screening entity to reconsider or can appeal to the court, or both.

B. If a court determines that an applicant is ineligible for assignment of counsel, the court shall inform the applicant of this decision in writing with an explanation as to the reason for the denial. The court shall also entertain an applicant's request to reconsider a decision that the applicant is ineligible for assignment of counsel.

Commentary:

Written notice and explanation of a denial of assignment of counsel, as well as the right to ask that a denial be reconsidered or appealed, are fundamental to the fairness and transparency of the eligibility determination process. Written denials ensure clear communication and provide a record of all ineligibility determinations and the reasons for these determinations. Written decisions may also enhance an applicant's acceptance of the denial, particularly where it is clear that the denial is consistent with these Standards. Reconsideration and appeal processes provide a mechanism by which to review eligibility denials to ensure that such denial is consistent with these Standards.

By reconsideration, we mean an informal process by which an applicant can ask a screening entity to reconsider a recommendation that assignment of counsel be denied. This can be done in writing or orally, in person or by telephone. This reconsideration process is accessible to applicants because it is not needlessly formal. It offers applicants an opportunity to provide the screening entity with more information, including a better explanation of their financial situation or better documentation. During the ILS public hearings, many providers involved in screening for eligibility testified that they often reconsider eligibility recommendations if asked to do so, and it is not unusual for them to change their minds about recommending that an applicant be deemed ineligible for assignment of counsel. However, while providers are willing to reconsider, not all providers are notifying applicants in writing that they will reconsider denial recommendations; nor are all providers regularly informing applicants in writing of the reasons they are recommending that assigned counsel be denied.

Similarly, providers involved in eligibility determination screenings told us that applicants often appeal such recommendations to the court, and that it is not unusual for trial courts to disagree with what the provider has recommended. However, as with reconsiderations, not all providers are regularly notifying applicants that they can appeal a screening entity's recommendation to the court.[179]

[179] For an overview of current practices amongst providers, see *Determining Eligibility for Assignment of Counsel in New York: A Study of Current Criteria and Procedures and Recommendations for Improvement*, § II, F.

Accordingly, any entity involved in screening for assigned counsel eligibility shall provide applicants with written notice of a determination to recommend that eligibility be denied. The notice shall contain reasons for the recommendation. A Sample Notice of Eligibility Recommendation is included in Appendix E. Entities involved in screening shall also notify the applicant that she or he has the right to request that the screening entity reconsider the denial recommendation, or to appeal the denial recommendation to the court. Applicants shall be told that they can do both – ask for reconsideration, and if still denied, then appeal to the court – or they can appeal directly to the court without first asking the screening entity to reconsider. This notice shall use language that is easy to understand and shall be provided in the applicant's primary language. A Sample Notice of Right to Seek Review is included in Appendix F. Reconsideration requests and appeals shall be resolved in a timely fashion (no more than 48 hours) to guard against delay in the assignment of counsel. If delay in resolving the request for reconsideration or appeal is unavoidable, counsel shall be appointed provisionally in accordance with Standard III.

A decision by a court that an applicant is not eligible for assignment of counsel shall also be provided to the applicant in writing with an explanation as to the reason for the denial. As previously stated, written decisions ensure clear communication; they are also likely to enhance the applicant's acceptance of the denial, thereby diminishing the likelihood that the applicant will seek to challenge the denial.[180] This written decision shall also be in the applicant's primary language. Sample Notice of Judge's Ineligibility Decision is included in Appendix G.

Currently, there is no mechanism by which an applicant may seek to immediately appeal a judge's decision denying eligibility for assignment of counsel.[181] National standards, however, state that a process for appealing a judicial denial of eligibility for assignment of counsel should be made available.[182] Accordingly, ILS urges that consideration be given to enacting regulations or legislation that would authorize an administrative appeal process or an interlocutory appeal of a judge's decision denying eligibility for assignment of counsel.

XV. A determination that a person is eligible for assignment of counsel may be re-examined only in accordance with County Law §722-d, which shall only be used after an assignment of counsel has been made, and only if prompted by assigned counsel as therein provided. Counsel shall not be assigned contingent upon a

[180] Oral decisions do not have similar benefits because they do not provide an applicant the same opportunity to review the decision and discern if it accords with these criteria and procedures.

[181] If convicted, the person can raise the issue of the judge's denial of assignment of counsel on an appeal of the underlying conviction.

[182] *See* 1976 NLADA Guidelines for Legal Defense Systems in the United States, *supra*, Guideline 1.6 ("A decision of ineligibility which is affirmed by a judge should be reviewable by an expedited interlocutory appeal.") (Black Letter "Summary of Recommendations," available at www.nlada.org/DMS/Documents/998925963.238/blackletter.doc.). *See also Determining Eligibility for Appointed Counsel in New York State* ("1994 NYSDA report"), *supra*, p. 19 ("Provision of an appellate review process conducted by the judiciary is consistent with the inherent responsibility of the courts to insure proper appointment of counsel."); Vt. Stat. Ann. § 5236(c) (providing that a trial court's determination that a defendant is not financially eligible for assignment of counsel may be appealed to a single justice of Vermont's Supreme Court).

requirement that the person make partial payments to the provider of mandated representation or to the county.

Commentary:

As stated in the commentary to Standard XIII, it is important to maintain the integrity of the eligibility determination process to ensure that counsel is being assigned to those who cannot afford the costs of effective representation, and not to those who can. Thus, there may be times when a change in the financial circumstances of the person receiving mandated representation warrants a re-examination of the continued assignment of counsel. However, the eligibility determination should be re-examined only when there is concrete evidence that the financial circumstances of the person receiving mandated representation have substantially changed such that the person is now able to afford the costs of qualified counsel and the expenses necessary for effective representation.

New York County Law § 722-d sets forth a very limited process for the re-examination of eligibility for assignment of counsel. County Law § 722-d applies only after a person[183] has been deemed eligible for assigned counsel, and not as part of the initial appointment process. Once counsel is appointed, if a mandated provider learns that the person is "financially able to obtain counsel or make partial payments for representation," the mandated provider may report this fact to the court,[184] and the court may then terminate the assignment of counsel or authorize partial payment to the mandated provider. The court can do so only after conducting a detailed inquiry into the person's financial situation to determine if he or she can pay all or part of the costs of representation.[185] Only after a finding that the person is able to afford counsel may the court terminate the assignment or order reimbursement to the mandated provider.

Notably, under County Law § 722-d, the authority to order partial payment exists only after a person has been determined eligible for assigned counsel and only after the assigned attorney notifies the court that the person may be able to pay for counsel. The law does not authorize courts to *sua sponte* terminate the assignment of counsel or order persons to make partial

---

[183] While we recognize that the language of County Law § 722-d speaks in terms of "defendant", we note also that there are some court decisions in which the statute has been interpreted as applying to Family Law matters. *See*, *e.g.*, *Matter of Cherrez v. Lazo*, 102 A.D.3d 782 (2nd Dept. 2013) (citing County Law § 722-d and affirming the Family Court's order denying the father's objection to the Support Magistrate's determination that he had the financial ability to pay the entire cost of the representation provided to him by assigned counsel). *See also Abadi v. Abadi*, 48 Misc.3d 380, 387 (Sup. Ct., Kings County 2015); *Cohen v. Cohen*, 33 Misc.3d 448 (Sup. Ct., Nassau County 2011).

[184] The use of the word "may" in County Law § 722-d, instead of the mandatory "shall" is intentional and is compatible with defense counsel's ethical responsibility to maintain the confidences of their clients. Specifically, the New York State Rules of Professional Conduct prohibit attorneys from revealing their clients' "confidential information", which includes a client's financial information, unless the client consents or some other exception exists under the Rules. *See* 22 NYCRR 1200.0; Rule 1.6(a)(1), (2) and (b).

[185] *See People v. Lincoln*, 158 A.D.2d 545 (2nd Dept. 1990) (reversing the defendant's conviction where the trial court had relieved the assigned counsel without conducting a detailed inquiry into the defendant's income, financial obligations, and "other relevant economic information.").

payments for their representation.[186] Moreover, County Law § 722-d does not authorize courts to assign counsel contingent upon the person paying the partial costs of representation.[187] Thus, counsel should not be assigned simultaneously with the issuance of an order under County Law § 722-d requiring the person to partially pay the costs of representation.[188]

County Law § 722-d does not constrain judges from acting upon learning that an applicant has intentionally misrepresented his or her financial situation to obtain free counsel. When the assignment of counsel is based on intentional misrepresentation, the court has the inherent authority to re-visit the assigned counsel eligibility determination.

XVI. Procedure regarding data maintenance

A. Data shall be maintained regarding the:
- **i) number of applicants who apply for assignment of counsel;**
- **ii) number of applicants found eligible;**
- **iii) number of applicants found ineligible and the reasons for the ineligibility determination;**
- **iv) number of reconsiderations and appeals requested;**
- **v) results of these reconsiderations and appeals;**
- **vi) number of reports made pursuant to County Law § 722-d regarding the assignment of counsel; and**
- **vii) number of orders issued for partial payment or termination of the assignment of counsel under County Law § 722-d.**

B. To ensure the confidentiality of information submitted during the eligibility determination process, the data shall be made available in aggregate form only, meaning that no individual applicant can be identified in the data itself.

Commentary:

As stated in the commentary to Standard X, adherence to these standards will ensure equitable, efficient, and fair implementation of the right to counsel across New York and will enhance

---

[186] *Matter of Legal Aid Society of Nassau County, NY v. Samenga*, 39 A.D.2d 912 (2nd Dept. 1972) (holding that once a defendant has been assigned counsel, "that assignment could be terminated for reasons of nonindigency at the instance of counsel only."); *People v. Lincoln*, *supra*, 158 A.D.2d 545 (*citing Samenga*, *id.*). *See* Op.Atty.Gen [Inf.] 1989-44 (a court may not impose additional community service on an indigent defendant to repay county for cost of legal services); Op.Atty.Gen. [Inf.] 1985-78 (county cannot implement repayment plan on initially indigent person who becomes solvent after termination of action).

[187] *See, e.g.*, Op.Atty.Gen. [Inf.] 1963-17 a county cannot condition representation by public defender upon promise to reimburse county). During ILS' public hearings, participants identified several problems and issues that, in their experience, have resulted from issuing County Law § 722-d orders at the time of assignment of counsel. *See Determining Eligibility for Assignment of Counsel in New York: A Study of Current Criteria and Procedures and Recommendations for Improvement*, § II, H

[188] 2015 NYSDA Statement, *supra*, at 9 ("Nothing in 722-d authorizes a court to prospectively order a partial payment of assigned counsel fees during the initial eligibility determination process.").

public trust in the integrity of the eligibility screening process. But no standards, criteria, or procedures are self-executing. It will be critical to ensure not only that these standards are widely disseminated and made available, but also that their implementation is monitored. Therefore, courts and screening entities must maintain relevant data regarding the eligibility determination process. Pursuant to Executive Law § 832(3)(b), this data shall be made available to ILS upon request. Importantly, to ensure the confidentiality of all information applicants disclose, the data maintained shall be de-identified, meaning all information that could identify a particular applicant shall be redacted. Additionally, all submissions of data to ILS pursuant to the Executive Law need only be in aggregated form, further guaranteeing against disclosure of private or individually identifiable information.

ILS recognizes that the responsibility to collect this data may impose a burden upon some courts and screening entities. The existence and extent of this burden may vary from county to county, depending on existing systems, infrastructure, and resources. ILS will work with the Office of Court Administration, courts, indigent defense providers, and other screening entities in support of their efforts to collect the data required by this procedure.

APPENDIX A

Appendix A: Survey responses and application forms received by counties.

County	Survey responses received			Application Forms Received
	Providers of Representation	City or County Court Judges	Town & Village Court Judges	
Albany	0	2	0	1
Allegany	1	1	1	1
Broome	1	0	0	1
Cattaraugus	1	1	0	1
Cayuga	1	1	0	1
Chautauqua	0	2	1	1
Chemung	1	1	0	1
Chenango	1	0	0	1
Clinton	1	1	1	1
Columbia	1	1	2	1
Cortland	1	1	0	2
Delaware	1	1	0	1
Dutchess	1	1	0	1
Erie	1	1	0	0
Essex	1	0	0	1
Franklin	0	1	1	1
Fulton	1	0	0	8
Genesee	1	1	0	1
Greene	0	0	0	1
Hamilton	0	1	0	1
Herkimer	0	1	0	1
Jefferson	1	1	0	0
Lewis	0	0	1	1
Livingston	1	1	0	1
Madison	0	1	0	1
Monroe	1	1	1	2
Montgomery	1	1	1	1
Nassau	1	1	1	1
Niagara	1	1	0	1
Oneida	1	2	0	1
Onondaga	1	0	0	2
Ontario	1	1	1	1
Orange	1	1	1	1
Orleans	1	1	0	1
Oswego	1	2	1	0
Otsego	1	2	0	0
Putnam	0	1	0	0
Rensselaer	1	2	1	2
Rockland	0	1	0	1
St. Lawrence	2	0	0	1
Saratoga	2	1	0	1
Schenectady	0	1	0	2

Schoharie	0	0	0	0
Schuyler	1	1	0	1
Seneca	1	0	0	1
Steuben	1	0	0	1
Suffolk	1	1	0	2
Sullivan	2	0	0	1
Tioga	1	1	0	1
Tompkins	1	1	1	1
Ulster	1	1	0	1
Warren	2	1	0	1
Washington	1	1	1	1
Wayne	1	1	1	1
Westchester	0	1	0	8
Wyoming	1	1	0	1
Yates	0	0	0	1
[blank]	0	1	0	0
Total responses	**47**	**51**	**17**	**71**

APPENDIX B

New York State Office of Indigent Legal Services announces

Public Hearings on Eligibility for Assignment of Counsel

NOTICE: On March 11, 2015, a settlement agreement reached 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 Yor* was approved by the Albany County Supreme Court. The agreement vests the New York State Office of Indigent Legal Services (ILS) with the responsibility of developing and issuing criteria and procedures to guide courts in counties located outside of New York City in determining whether a person is unable to afford counsel and eligible for mandated representation.

PURPOSE: ILS will conduct a series of public hearings to solicit the views of county officials, judges, institutional providers of representation, assigned counsel, current and former indigent legal services clients and other individuals, programs, organizations and stakeholders interested in assisting ILS in establishing criteria and procedures to guide courts when determining eligibility for mandated legal representation in criminal and family court proceedings. Interested participants should provide testimony regarding current and/or recommended guidelines, policies and practices relating to the following topics:

- The criteria for determining whether an individual is eligible for court appointed counsel which may include, but not be limited to, the ability to post bond, the actual cost of retaining private counsel, the income needed to meet reasonable living expenses of the applicant and any dependents or dependent parent or spouse, the severity of the case, the ownership of an automobile that may or may not be necessary for the applicant to maintain his/her employment, the receipt of public benefits, home or other property and non-liquid assets, and income including income and assets of family members, debts and financial obligations, employment and housing status, including residence in a correctional or mental health facility, the use of fixed poverty guidelines and any other criteria that may be included for consideration.
- The process and/or method for disseminating information regarding the criteria for determining eligibility.
- The process of reviewing, appealing and/or reconsidering eligibility determinations.
- The advantages and disadvantages of proposing uniform and comprehensive criteria and/or guidelines to determine eligibility.
- The need to preserve confidentiality of information submitted to determine eligibility.
- Any related social and economic benefits and/or consequences related to the impact of standardizing eligibility determinations.

SUBMISSIONS AND TESTIMONY: The New York State Office of Indigent Legal Services Panel will consider both oral testimony and written submissions. Persons interested in presenting oral testimony or making a written submission, or both, are asked to follow the procedures and deadlines described below.

Submission of Written Testimony: Any person wishing to submit written testimony only must do so by August 26, 2015. Written testimony should be submitted to ILS at the contact information below.

Requests to Provide Oral Testimony: Because of the limited number of hearings scheduled, the Panel will accept requests to present oral testimony in advance, and will then notify individuals of the proposed date, time and duration scheduled for their testimony. If you are interested in testifying at a hearing, please forward your request via email to publichearings@ils.ny.gov no later than 7 days in advance of the hearing at which you propose to testify. Proposed testimony should be no more than 10 minutes in length.

If requesting an invitation to provide oral testimony, please provide the following information:

1. Identify yourself and your affiliation if applicable (and if you are requesting an invitation for someone else to testify, that individual's name and affiliation);
2. Attach either a prepared written statement or a brief description of the topics you wish to address at the hearing; and
3. Indicate at which of the hearing(s) the testimony is proposed to be given.

If requesting to give oral testimony, please indicate if you will need special accommodations (e.g. Americans with Disabilities Act or language access assistance) in order to testify.

NAME, ADDRESS AND AGENCY CONTACT: All written submissions and requests to testify should be forwarded to the New York State Office of Indigent Legal Services at the following addresses.

By Email: publichearings@ils.ny.gov, or

By Mail: Attention: Ms. Tammeka Freeman
Executive Assistant
New York State Office of Indigent Legal Services
80 S. Swan St., 29th Floor
Albany, NY 12210

For further information regarding the settlement please visit the New York State Office of Indigent Legal Services' website at https://www.ils.ny.gov/node/88.

DATE, TIME AND LOCATION: The New York State Office of Indigent Legal Services will conduct one hearing in each of the following judicial districts (i.e., located outside of the New York City area). The hearings will take place as follows:

3rd Judicial District
Thursday July 16, 2015, 11am
Albany County Courthouse
16 Eagle St., Courtroom 427
Albany NY 12207

4th Judicial District
Wednesday August 26, 2015, 11am
Essex County Courthouse Supreme Courtroom
7559 Court St.
Elizabethtown NY 12932

5th Judicial District
Thursday July 9, 2015, 11am
Onondaga County Courthouse, Room 400
401 Montgomery St.
Syracuse NY 13202

6th Judicial District
Thursday August 20, 2015, 11am
Broome County Courthouse
92 Court Street, Room 202,
Binghamton NY 13902

7th Judicial District
Thursday August 6, 2015, 11am
Hall of Justice
99 Exchange Blvd. Courtroom #303
Rochester NY 14614

8th Judicial District
Thursday July 30, 2015, 11am
Ceremonial Courtroom, Old County Hall
92 Franklin St.
Buffalo NY 14202

9th Judicial District
Thursday July 23, 2015, 11am
Richard J. Daronco Westchester County Courthouse Ceremonial Courtroom #200
111 Martin Luther King Jr. Blvd
White Plains NY 10601

10th Judicial District
Wednesday August 12, 2015, 11am
John P. Cohalan, Jr. Courthouse Courtroom S -24
400 Carleton Ave.
Central Islip NY 11722

NOTICE OF PUBLIC HEARING

NEW YORK STATE OFFICE OF INDIGENT LEGAL SERVICES

Public Hearings on Financial Eligibility for Assignment of Counsel in Family Matters

NOTICE: Executive Law § 832(3)(c) requires the NYS Office of Indigent Legal Services ("ILS") to issue criteria and procedures for determining whether a person is financially unable to hire a lawyer and therefore eligible for publicly-funded legal representation ("assigned counsel") in certain family law matters as set forth in Family Court Act § 262 and Surrogate's Court Procedures Act § 407.

ILS will conduct four (4) public hearings to solicit the views and experiences of institutional and individual providers of assigned counsel representation, current and former clients of assigned counsel providers, county officials, judges, and others interested in assisting ILS in fulfilling this statutory obligation.

Testimony (written and/or oral) is requested regarding current and/or recommended guidelines, policies, and practices relating to the following topics:

- The criteria for deciding whether an individual is eligible for assignment of counsel, such as: the actual cost of hiring private counsel; type and complexity of the case; income needed to meet basic life necessities of the applicant and any dependents; ownership of a vehicle necessary for basic life activities; home ownership, and ownership of other property and non-liquid assets, including the current valuation thereof; income and assets of family or other household members; income from child support or need-based public assistance; debts and financial obligations; employment status; applicant's housing status, including a person's residency in a correctional or mental health facility; the use of presumptions of eligibility, including a rebuttable presumption of eligibility for parents in child welfare (Family Court Act Article 10) cases; the use of fixed income guidelines ("poverty guidelines"); and any other criteria or factors that may be considered.
- The process of applying for assigned counsel, including the use of technology for prequalification and processing of financial eligibility applications.
- The process for reviewing, appealing and/or reconsidering eligibility decisions.
- Methods for public dissemination of information about the criteria and procedures for determining financial eligibility for assigned counsel.
- Confidentiality of information submitted by an applicant for assigned counsel.
- Any other topic pertinent to the implementation of equitable, efficient, and fair criteria and procedures for determining financial eligibility for assigned counsel.

SUBMISSIONS AND TESTIMONY: Persons interested in presenting oral testimony or making a written submission, or both, are asked to follow the procedures and timelines described below.

WRITTEN SUBMISSIONS: Any person wishing to submit written testimony **only** must do so by **5:00 p.m., Friday, July 19, 2019,** at the contact information below.

ORAL TESTIMONY: If you are interested in testifying at a hearing, please send your request by mail to ILS at the address below, or by email to publichearings@ils.ny.gov. **Your request must be received no later than fourteen (14) days before the hearing at which you propose to testify.** Oral testimony will be limited to 10-15 minutes. Due to time constraints, we cannot guarantee that you will be selected to present oral testimony.

When requesting an invitation to provide oral testimony, please provide the following information:

1. Name and organizational affiliation;
2. A prepared statement or brief description of the topic(s) that you intend to address at the Public Hearing; and
3. The Public Hearing (details below) at which you wish to testify.

If requesting to give oral testimony, please indicate any accommodations (e.g., Americans with Disabilities Act, language access services, etc.) necessary to facilitate your participation.

Selected individuals will be notified of the proposed date and time of their testimony.

NAME, ADDRESS AND AGENCY CONTACT: Please send written submissions and requests to testify as follows:

E-mail: publichearings@ils.ny.gov, or

Regular Mail: Tammeka Freeman
ATTN: Eligibility Public Hearings
NYS Office of Indigent Legal Services
80 S. Swan Street, Room 1147
Albany, New York 12210

DATE, TIME, AND LOCATION OF HEARINGS

FRIDAY, MAY 31, 2019, 1:00–4:00 P.M.
Appellate Division, First Department
27 Madison Avenue, New York, NY 10010

WEDNESDAY, JUNE 19, 2019, 1:00–4:00 P.M.
Appellate Division, Third Department
Robert Abrams Building for Law and Justice
State Street, Room 511, Albany, NY 12223

WEDNESDAY, JULY 17, 2019, 1:00–4:00 P.M.
Appellate Division, Second Department
45 Monroe Place, Brooklyn, NY 11201

WEDNESDAY, AUGUST 14, 2019, 1:00–4:00 P.M.
Appellate Division, Fourth Department
50 East Avenue, Rochester, NY 14604

APPENDIX C

Public Hearings:
Witnesses and Written Submissions

3rd Judicial District Public Hearing, July 16, 2015

***Witnesses*:**

Daniel P. McCoy, County Executive, Albany County

Robert Linville, Columbia County Public Defender

Greg Lubow, Attorney and former Chief Public Defender, Greene County

Hon. Dr. Carrie A. O'Hare, Stuyvesant Town Justice, Columbia County; current Director of the New York State Magistrates Association and former President of the Columbia County Magistrates Association

Lee Kindlon, Attorney, Kindlon Law Firm

James Milstein, Albany County Public Defender

Melanie Trimble, Director of the Capital Region Chapter of the New York Civil Liberties Union

Written submissions:

Robert Linville, Columbia County Public Defender

Daniel P. McCoy, County Executive, Albany County

Melanie Trimble, Director of the Capital Region Chapter of the New York Civil Liberties Union

Hon. Dr. Carrie A. O'Hare, Town Court Justice, Town of Stuyvesant, Columbia County; current Director of the New York State Magistrates Association and former President of the Columbia County Magistrates Association

Greg Lubow, Attorney and former Chief Public Defender, Greene County

4th Judicial District Public Hearing, August 26, 2015

***Witnesses*:**

Senora Bolarinwa, currently incarcerated at the Taconic Correctional Facility

Gerard Wallace, Director, New York State Kinship Navigator Office, and Professor at the University of Albany, School of Social Welfare

Hon. Peter J. Herne, Chief Judge, St. Regis Mohawk Tribal Court

Peter Racette, Deputy Director, Legal Aid Society of Northeastern New York

Molly Hann, Assistant Public Defender, Essex County Public Defender Office

Kellie King, Confidential Secretary, Essex County Public Defender Office

Marcy I. Flores, Warren County Public Defender

Joy A. LaFountain, Administrator/Coordinator, Warren County Assigned Counsel Plan

Thomas G. Soucia, Franklin County Public Defender

Written submissions:

Peter Racette, Deputy Director, Legal Aid Society of Northeastern New York

Daniel L. Palmer, County Manager, Essex County (on behalf of the Essex County Board of Supervisors)

Gerard Wallace, Director, New York State Kinship Navigator Office, and Professor at the University of Albany, School of Social Welfare, ("In Support of Legal Assistance for Kinship Caregivers")

Hon. Peter J. Herne, Chief Judge, St. Regis Mohawk Tribal Court

Susan L. Patnode, Executive Director, Rural Law Center of New York, Inc.

5th Judicial District Public Hearing, July 9, 2015

Witnesses:

Barrie Gewanter, Director of the Central New York Chapter of the New York Civil Liberties Union

Professor Todd A. Berger, Director of the Criminal Defense Clinic, Syracuse University College of Law, Office of Clinical Legal Education

Jason B. Zeigler, Onondaga County Assigned Counsel Panel Attorney and Member of the Onondaga County Gideon Society

Sally Curran, Executive Director, Volunteer Lawyers' Project of Onondaga County, Inc.

Tina Hartwell, Assistant Public Defender, Criminal Division, Oneida County Public Defender Office

Frank J. Furno, Assistant Public Defender, Civil Division, Oneida County Public Defender Office

Geneva Fortune, Advocate, Jail Ministry of Syracuse

Francis Walter, former President of the Board of the Onondaga County Assigned Counsel Program

Written submissions:

Barrie Gewanter, Director of the Central New York Chapter of the New York Civil Liberties Union

Professor Todd A. Berger, Director, and Jason D. Hoge, Practitioner in Residence, Criminal Defense Clinic, Syracuse University College of Law, Office of Clinical Legal Education

Jason B. Zeigler, Onondaga County Assigned Counsel Panel Attorney and Member of the Onondaga County Gideon Society

Tina Hartwell, Assistant Public Defender, Criminal Division, Oneida County Public Defender Office

Samuel Young, Director of Advocacy, and Dennis Kaufman, Executive Director, Legal Services of Central New York

Tina C. Bennett and Beth A. Lockhart, former panel attorneys, Onondaga County Assigned Counsel Program

Patricia Moriarty, Advocate, Jail Ministry of Syracuse

6th Judicial District Public Hearing, August 20, 2015

Witnesses:

Jay Wilbur, Broome County Public Defender

Julia Hughes, Coordinator, Tompkins County Assigned Counsel Program

James T. Murphy, Legal Services of Central New York

Karri Beckwith, Administrator, Chenango County Assigned Counsel Program

Keith Dayton, Cortland County Public Defender

Jonathan Becker, Attorney

John Brennan, Chemung County Public Advocate's Office

Written submissions:

Karri Beckwith, Administrator, Chenango County Assigned Counsel Program (2013 Report to the N.Y. Unified Court System for Chenango County Public Defender)

James T. Murphy, Legal Services of Central New York

7th Judicial District Public Hearing, August 6, 2015

Witnesses:

John Garvey, Ontario County Administrator

Edward Nowak, President of the New York State Defenders Association and former Monroe County Public Defender

Timothy P. Donaher, Monroe County Public Defender

Andrew Correia, First Assistant, Wayne County Public Defender Office

Leanne Lapp, Ontario County Public Defender

KaeLyn Rich, Director of Genesee Valley Chapter of the New York Civil Liberties Union

Marcea Clark Tetamore, Livingston County Public Defender

Velma Hullum, New York State Defenders Association, Client Advisory Board

Charles Noce, Monroe County Conflict Defender

Written submissions:

Velma Hullum, New York State Defenders Association, Client Advisory Board

KaeLyn Rich, Director of the Genesee Valley Chapter of the New York Civil Liberties Union

Timothy P. Donaher, Monroe County Public Defender, (Memorandum, dated December 15, 2014, addressed to staff attorneys regarding "New assignment of counsel procedure pre-arraignment")

8th Judicial District Public Hearing, July 30, 2015

***Witnesses*:**

Mark Williams, Cattaraugus County Public Defender

Gary Horton, Director, Veterans Defense Program, New York State Defenders Association and former Genesee County Public Defender

Jerry Ader, Genesee County Public Defender

Robert Convissar, Chief Defender and Administrator, Erie County Assigned Counsel Program

David C. Schopp, Chief Executive Officer and Executive Director, Legal Aid Bureau of Buffalo

Norman Effman, Wyoming County Public Defender and Executive Director, Wyoming-Attica Legal Aid Bureau

Hon. Mark G. Farrell, former President of the New York State Magistrates Association

David J. Farrugia, Niagara County Public Defender

Robert M. Elardo, Managing Attorney, Erie County Bar Association Volunteer Lawyers Project

Written submissions:

David C. Schopp, Chief Executive Officer and Executive Director, Legal Aid Bureau of Buffalo

John A. Curr, III, Director of Western Regional Chapter, New York Civil Liberties Union

Robert M. Elardo, Managing Attorney, Erie County Bar Association Volunteer Lawyers Project, ("Equal Protection Denied in New York to Some Family Law Litigants in Supreme Court: An Assigned Counsel Dilemma for the Courts," 29 Fordham Urban Law Journal 1125 (2002))

Diana M. Straube, Supervising Attorney, Neighborhood Legal Services, Inc., Buffalo, NY

9th Judicial District Public Hearing, July 23, 2015

***Witnesses*:**

Clare J. Degnan, Executive Director, Legal Aid Society of Westchester County

Tracey Alter, Director, Family Court Legal Program, Pace Women's Justice Center, Pace University School of Law

Joanne Sirotkin, Attorney-in-Charge, Legal Services of the Hudson Valley

Hon. David Steinberg, Town Justice, Hyde Park

Merble Reagon, Executive Director, Women's Center for Education and Career Advancement

Beth Levy, Senior Associate Counsel, My Sister's Place (testifying on behalf of Karen Cheeks-Lomax, Chief Executive Officer, My Sister's Place)

Saad Siddiqui, Attorney and Board Member of the Lower Hudson Valley Chapter of New York Civil Liberties Union

Guisela Marroquin, Interim Director, Lower Hudson Valley Chapter of the New York Civil Liberties Union

Vojtech Bystricky, Attorney, 18-B misdemeanor panel, City of White Plains Criminal Court

Karen Needleman, Chief Administrator, Assigned Counsel Plan, Legal Aid Society of Westchester County

Written submissions:

Tracey Alter, Director, Family Court Legal Program, Pace Women's Justice Center, Pace University School of Law

Joanne Sirotkin, Attorney-in-Charge, Legal Services of the Hudson Valley

Karen Cheeks-Lomax, Chief Executive Officer, My Sister's Place

Merble Reagon, Executive Director, Women's Center for Education and Career Advancement, (written submission and copy of 2010 Self-Sufficiency Standard for New York State)

Guisela Marroquin, Interim Director, Lower Hudson Valley Chapter of the New York Civil Liberties Union

Patrick J. Brophy, Chief Attorney, Putnam County Legal Aid Society, Inc.

James D. Licata, Rockland County Public Defender, and Keith I. Braunfotel, Chair Administrator, Rockland County Assigned Counsel Plan

10th Judicial District Public Hearing, August 12, 2015

***Witnesses*:**

Jonathan E. Gradess, Executive Director, New York State Defenders Association, Inc.

Marguerite Smith, Attorney, New York Federal and State Tribal Justice Forum

William Ferris, former President of the Suffolk County Bar Association

Hon. Andrew Crecca, Supervising Judge of the Suffolk County matrimonial parts

Elizabeth Nevins, Associate Clinical Professor and Attorney-in-Charge of the Criminal Justice Clinic, Hofstra University's Maurice A. Deane School of Law

Kent Moston, Attorney-in-Chief, Legal Aid Society of Nassau County

Laurette Mulry, Assistant Chief Attorney-in-Charge, Legal Aid Society of Suffolk County

Sabato Caponi, East End Bureau Chief, Legal Aid Society of Suffolk County

Amol Sinha, Director of the Suffolk County Chapter of the New York Civil Liberties Union

Jason Starr, Director of the Nassau County Chapter of the New York Civil Liberties Union

Robert M. Nigro, Administrator, Nassau County Assigned Counsel Defender Plan

Michael Demers, concerned citizen

Written submissions:

Marguerite A. Smith, Attorney, New York Federal and State Tribal Justice Forum

Elizabeth Nevins, Associate Clinical Professor and Attorney-in-Charge of the Criminal Justice Clinic, Hofstra University's Maurice A. Deane School of Law

Amol Sinha, Director, Suffolk County Chapter and Jason Starr, Director, Nassau County Chapter of the New York Civil Liberties Union

Laurette D. Mulry, Assistant Chief Attorney-in-Charge, Legal Aid Society of Suffolk County

Other Written Submissions:

Edward Frankel, "Public Hearings on Eligibility for Assignment of Counsel Written Testimony – Eligibility of Children Subject to Adoption Contestment," dated June 29, 2015

New York State Defenders Association (NYSDA) "Statement on the Criteria and Procedures for Determining Eligibility in New York State," dated August 12, 2015, and "Assigned Counsel Eligibility of Minors in Criminal Court: No Parental Liability," dated July 8, 2015

Paulette Brown, President of the American Bar Association (ABA), "Eligibility for Assignment of Counsel," dated August 26, 2015

Chief Defenders Association of New York (CDANY), "Recommendations on the Criteria for Financial Eligibility Determinations," dated August 26, 2015

David P. Miranda, President, New York State Bar Association (NYSBA), letter dated August 26, 2015

Immigrant Defense Project, "Assignment of Counsel and the Immigrant Defendant/Respondent," dated July 13, 2015

Michelle Bonner, Chief Counsel, Defender Legal Services, National Legal Aid & Defender Association (NLADA), "Letter in Support of NYSDA's August 12, 2015 Statement Submitted to the New York State Office of Indigent Legal Services for Public Hearings on Eligibility for Assignment of Counsel"

Emmett J. Creahan, Director, Mental Hygiene Legal Service, Appellate Division, Fourth Department, "Determining Eligibility of County Law 18-B Assignment of Counsel," dated November 5, 2015

Letters from people in the custody of the New York State Department of Corrections and Community Supervision

NYS Office of Indigent Legal Services Family Court Eligibility Hearings
Witnesses and Panel Members:

1st Dept. Friday, May 31, 2019

Witnesses:

Frank Farance, Parent Impacted

Joyce McMillan, Parent Impacted/Parent Advocate

Panel Members:

Hon. Gayle Roberts, Bronx Family Court

Hon. Jeannette Ruiz, New York City Family Court

Lisa Robertson, Esq., *Hurrell-Harrin* Eligibility Standards Implementation Attorney, NYS Office of Indigent Legal Services

Leonard Noisette, Esq., Board Member of the NYS Office of Indigent Legal Services, and Program Director: Criminal Justice Fund, Open Society Foundations, US Programs

Angela Burton, Esq., Director of Quality Enhancement for Parent Representation, NYS Office of Indigent Legal Services

2nd Dept. Wednesday, July 17, 2019

Witnesses:

Joel Serrano, Esq., Assigned Counsel Association of Queens Family Court

Nancy Erickson, Esq. Law Office of Nancy Erickson, Brooklyn, NY

Angeline Montauban, Parent Impacted

Professor Marty Guggenheim, Fiorello LaGuardia Professor of Clinical Law, New York University School of Law

Teri Yuan, Parent Impacted

Lynne Poster-Zimmerman, Esq., President, Suffolk County Bar Association and Azra Feldman, 18-B Committee Member, Suffolk County Bar Association

Lauren Shapiro, Esq., Director, Family Defense Practice and, Lisa Schreibersdorf, Executive Director, Brooklyn Defender Services

Panel Members:

Hon. Carmen Beauchamp Ciparick, Former Associate Judge of the New York Court of Appeals, Of Counsel, Greenberg Traurig, LLP

Hon. Kathie E. Davidson, Administrative Judge - Ninth Judicial District

Hon. Theresa Whelan, Judge of the Surrogate's Court, Acting Supreme Court Justice, Suffolk Surrogate's Court

Angela Burton, Esq., Director of Quality Enhancement for Parent Representation, NYS Office of Indigent Legal Services

Lucy McCarthy, Esq., Assistant Counsel, Parent Representation, NYS Office of Indigent Legal Services

3rd Dept. Wednesday, June 19, 2019

Witnesses:

Henry Greenberg, President, and Susan Lindenauer, Co-chair, Committee on Families and the Law, New York State Bar Association

Dominic J. Cornelius, Esq., Columbia Co. Public Defender

Bruce Maxson, Esq. Otsego Co., Public Defender's Office

Rylan Richie, Esq. Albany Co., Public Defender's Office

Tim Havas, Esq., Sullivan Legal Aid Panel, Inc., Sullivan Co.

Lance Salisbury, Esq., Administrator, Tomkins Co. Assigned Counsel Program

Karri Beckwith, Administrator, Chenango Co. Assigned Counsel Plan

Panel Members

Hon. Anthony McGinty, Ulster County Family Court

Professor Suzette Melendez, Assistant Professor and Director of Children's Rights and Family Law Clinic, Syracuse University College of Law, Office of Clinical Legal Education

Bill Leahy, Esq., Executive Director, NYS Office of Indigent Legal Services
Lucy McCarthy, Esq., Assistant Counsel, Parent Representation, NYS Office of Indigent Legal Services

4th Dept. Wednesday, August 14, 2019

Witnesses:

Sara Davis, Esq., Oswego County Assigned Counsel Program Administrator

Susan Bryant, Esq. Director, and Kim Bode, Family Court Attorney, New York State Defenders Association

Gerard Wallace, Esq., Director, New York State Kinship Navigator

Barbara Kelley, Esq., Allegany County Public Defender

Rachel L. Mitchell, Esq., Supervising Attorney, Legal Assistance of Western New York

Raymond Bara, Esq., Oneida County Civil Defender

Robert Convissar. Esq., Erie County Assigned Counsel Program Administrator

Mark Funk, Esq., Monroe County Conflict Defender's Office

Panel Members:

Hon. Kevin M. Carter, Erie County Family Court Judge

Hon. Craig J. Doran, Administrative Judge, Seventh Judicial District

Bill Leahy, Esq., Executive Director, NYS Office of Indigent Legal Services

Angela Burton, Esq., Director of Quality Enhancement for Parent Representation, NYS Office of Indigent Legal Services

Lisa Robertson, Esq., *Hurrell-Harring* Eligibility Standards Implementation Attorney, NYS Office of Indigent Legal Services

APPENDIX D

Date: _____

Screened by: _____

CONFIDENTIAL

State of New York

County of _____

Application for Assignment of Counsel under County Law, Article 18-B

PART I

PERSONAL INFORMATION

Full Name: _____

Date of Birth: _____

Home Address: _____

_____

Home phone: _____

Cell phone: _____

Email: _____

Number of financial dependents in household:

_____

_____

_____

_____

CURRENT CASE INFORMATION

Arrest Date: _____ Arraignment Date: _____

Docket No. (if available): _____

Name of Court: _____

Judge: _____

Charges: _____

_____

_____

_____

Co-Defendants (If any): _____

_____

_____

Next Scheduled Court Date: _____

EMPLOYMENT

Occupation (if a student, indicate the school attending; if self-employed, indicate and describe the nature of employment):

_____

_____

Name and address of Current Employer:

_____

_____

_____

Amount of Net (Take-Home) Pay: $ _____ per ☐ Year ☐ Month ☐ Bi-weekly ☐ Weekly

Instructions for Court/Screener: Using the FPG Income chart, is the applicant's income at or below 250% of the FPG? _____ Yes _____ No

OTHER CIRCUMSTANCES:

1) Is the applicant currently incarcerated, detained, or confined to a mental health facility? ____ Yes ____ No

2) Is the applicant currently receiving need-based public assistance (or recently been deemed eligible, pending receipt)?

_____ Yes ____ No

3) W/n past 6 months, has the applicant been found eligible for assigned counsel in another criminal case? ____ Yes ____ No

Signature: _____ Date: _____

Applicant: Stop here. Await further instructions.

Instructions for Court/Screener: Is Applicant presumptively eligible for assigned counsel? _____ Yes _____ No

[If Yes, counsel shall be assigned. If No, proceed to Part II of the application]

CONFIDENTIAL

PART II

OTHER INCOME

Does the applicant currently receive pension, annuity, or retirement payments? _____ Yes _____ No

If yes, list the amount: _____

Does the applicant currently receive income from owned real estate? _____ Yes _____ No

If yes, list the amount: _____

List other sources and amount of income the applicant receives (do not include child support or need-based public assistance):

1. _____

2. _____

ASSETS

List estimated total amount currently in applicant's bank accounts (savings and checking):_____

List all real estate applicant owns (see Instructions for primary residence exception):_____

_____

Current Market Value (estimate): _____ Amount owed: _____

List any vehicles applicant owns not necessary for basic life activities:_____

_____

Current Market Value (estimate): _____ Amount owed: _____

List value of all stocks or bonds in applicant's name:

_____

_____

MONTHLY LIVING EXPENSES

Food: $ _____ Rent or Mortgage Payments: $ _____ Utilities: $ _____

Transportation/Auto Expenses (Including Payments & Insurance): $ _____

Child Care: $ _____ Child Support Paid Out: $ _____ Alimony Paid Out: $ _____

Medical Bills (Including Health Insurance, Medications, Medical Debts): $ _____

List other expenses. Include employment-related expenses, educational loans & costs, minimum monthly credit card payments, unreimbursed medical expenses, and expenses related to age or disability:

1. _____

2. _____

3. _____

Signature _____ Date_____

For Court or Screener

AMOUNT NEEDED FOR BAIL

Bail has been set: _____ Yes _____ No If Yes, indicate the amount: _____

COST OF RETAINING PRIVATE COUNSEL

What is the cost of retaining private counsel in your county for the offense the applicant is being charged with?

_____

Based on the information in the previous section (seriousness of the offense[s], income and expense information, etc.), will this applicant be able to afford the cost of counsel indicated above? _____ Yes _____ No

ELIGIBILITY

Is the applicant eligible for assigned counsel? _____ Yes _____ No

If answering no, state why: _____

_____

_____

_____

ASSIGNED COUNSEL APPLICATION: INSTRUCTIONS

The following are instructions for using the Application for Assignment of Counsel under County Law, Article 18-B to determine if an applicant is financially eligible for assignment of counsel.

Part I of the Application: Is the applicant presumptively eligible?

Part I elicits the information needed to determine if an applicant is presumptively eligible for assignment of counsel. An applicant shall be presumed eligible for the assignment of counsel in any one of the following circumstances:

1. If the applicant's net income is at or below 250% of the currently-updated Federal Poverty Guidelines. To make this determination, refer to the FPG Income Eligibility Chart, using the information about the applicant's net (take-home) pay and number of dependents in the household.

2. If the applicant is incarcerated or detained.

3. If the applicant is confined to a mental health facility.

4. If the applicant is currently receiving, or has recently been deemed eligible to receive, any need-based public assistance, including, but not limited to: Family Assistance (pursuant to TANF guidelines), Safety Net Assistance, Supplemental Nutrition Assistance (SNAP), Supplemental Security Income (SSI)/New York State Supplemental Program (SSP) assistance, Medicaid, and public housing.

5. If, within the past six (6) months, the applicant was deemed financially eligible for assigned counsel in another jurisdiction or by a court within the same jurisdiction.

A presumption of eligibility shall be overcome only if there is compelling evidence that the applicant possesses the current available financial resources to pay for a qualified attorney, the expenses necessary for a competent defense, release on bond, and reasonable living expenses.

If ANY of the above-stated presumptions applies, the applicant is presumed eligible, and counsel shall be assigned. The applicant does not have to complete Part II of the application.

If NONE of the above-stated presumptions applies, Part II of the application must be completed with assistance from the Court or screening entity.

The fact that an applicant does not meet one of these presumptions is not, in and of itself, reason to determine that an applicant is not eligible for assigned counsel.

Part II of the Application:
Applicant's resources and living expenses

For applicants who are not presumptively eligible for assigned counsel, it is essential to consider, in addition to the information elicited in Part I, more detailed information about the applicant's current available resources (income and assets), living expenses, and financial liabilities. Part II of the application elicits this information.

Other Income and Assets

In completing Part II of the application, the following assets shall **NOT** be considered (unless an exception is specified):

1) Third-party income, including parental and spousal income (unless the third party indicates a present intent to pay, the applicant consents, and the arrangement does not interfere with the applicant's representation or jeopardize the confidentiality of the attorney-client relationship).
2) Receipt of child support payments.
3) Receipt of cash or non-cash stipends under a Federal or State need-based program, including, but not limited to, Public Assistance, SSI/SSP, TANF, SNAP, Unemployment, Workers Compensation, Section 8, or Medicaid reimbursements.
4) Primary residence of the applicant unless the fair market value of the home is significant, there is substantial equity in the home, and the applicant is able to access the equity in a time frame sufficient to retain private counsel.
5) Vehicles: Any vehicle that the applicant and his or her family members use for transportation to work, school, medical appointments, or for other basic life necessities shall not be considered in determining eligibility for assigned counsel.
6) Other non-liquid assets: Other non-liquid assets, such as secondary residences and vehicles not used for basic life necessities, shall not be considered as assets *unless* such assets have a demonstrable monetary value and are readily convertible to cash without impairing applicants' ability to provide for the reasonable living expenses of themselves and their dependents.

While non-liquid assets themselves shall generally not be considered in making eligibility determinations, income or revenue generated from such assets may be considered in determining whether an applicant is eligible for counsel. For example, rent received from a secondary home may be considered as an asset.

Applicant's Monthly Living Expenses

The reasonable living expenses of the applicant and dependents (including, for example, minors, parents, spouses, or domestic partners) shall be considered, as well as other debts and financial obligations. These include the following:

1) Medical expenses, including health insurance, of the applicant or any dependents.
2) Mortgage or rent payments needed to maintain the applicant's primary residence.
3) Utility payments.
4) Food costs.
5) Automobile insurance and loan payments needed to maintain an automobile necessary for work, education, medical appointments, and other basic life necessities.
6) Employment- or educational-related expenses, such as child or dependent care, transportation costs, clothing and supplies.
7) Child support payments made by the applicant to another.
8) Minimum monthly credit card payments.
9) Educational loan payments.
10) Non-medical expenses associated with age or disability.

For Court or Screener:
Are the applicant's resources insufficient to pay for a qualified defense attorney, a competent defense, release on bond, and reasonable living expenses?

An applicant is financially eligible for assignment of counsel when the applicant's current available resources are insufficient to pay for a qualified attorney, release on bond, the expenses necessary for a competent defense, and the reasonable living expenses of the applicant and any dependents.

This assessment requires consideration of the applicant's financial resources and obligations (elicited in Parts I and II of the application), as well as the resources needed to:

1) Pay for bail; and
2) Retain a qualified attorney and pay for other costs necessary for adequate representation in the relevant jurisdiction, given the nature of the case.

    [Factors that may render a case more complex and thus more expensive include, but are not limited to: the seriousness of the charges; the need for investigative services; the need for expert services; the existence of DNA and other forensic evidence; the possibility of life-altering collateral consequences, including immigration consequences and registration or civil commitment; and the need for sentencing advocacy or social work services].

The sections of the application concerning Amount Needed for Bail and Cost of Retaining Private Counsel shall be completed. Based on all of the information elicited in the application, a determination shall be made as to whether the applicant is eligible for assignment of counsel. If it is determined that the applicant is not eligible for assignment of counsel, specify the reason.

Notice to the Applicant

The Applicant must be informed, **in writing,** of a determination that he or she is ineligible for assigned counsel. This written notice must include the reason for the ineligibility determination.

1) If the initial recommendation is made by a screening entity:

    i. Complete the "**Notice of Eligibility Recommendation**," indicate the eligibility recommendation, and provide a copy of the completed Notice to the Applicant. This Notice is available at: www.ils.ny.gov.
    ii. Provide the applicant with a copy of the document entitled, "**Your Right to Seek Review of the Recommendation That You Are Not Eligible for Assigned Counsel."** This notice of rights is available at: www.ils.ny.gov.

2) If the decision of ineligibility is made by the Court:

    i. Provide the applicant with a completed copy of the document entitled, "**Notice of Judge's Ineligibility Decision,"** which is available at: www.ils.ny.gov

Income Eligibility Presumption
Federal Poverty Guidelines Chart

An Applicant for assignment of counsel is presumptively eligible if the Applicant's net income is at or below 250% of the current Federal Poverty Guidelines.

"Net Income" means an individual's wages, interest, dividends, or other earnings after deductions for state, federal and local taxes, social security taxes, Medicare taxes, any union dues, retirement contributions, or ther withholdings - in other words, "take home pay."

2021 Income Eligibility Chart:

This chart reflects a 250% multiple of the most current Federal Poverty Guidelines (effective January 13, 2021

# of Dependents (including Applicant)	Annually	Monthl	Bi-Weekly	Weekly
1	$32,200	$2,683	$1,238	$619
2	$43,550	$3,629	$1,675	$838
3	$54,900	$4,575	$2,112	$1,056
4	$66,250	$5,521	$2,548	$1,274
5	$77,600	$6,467	$2,985	$1,492
6	$88,950	$7,413	$3,421	$1,711
7	$100,300	$8,358	$3,858	$1,929
8	$111,650	$9,304	$4,294	$2,147
Additional person, add:	$11,350	$946	$437	$218

For reference only:
2021 Federal Poverty Guidelines (100% multiple, for the 48 contiguous states and Washington, DC)

Persons In Household	Poverty Guideline
1	$12,880
2	$17,420
3	$21,960
4	$26,500
5	$31,040
6	$35,580
7	$40,120
8	$44,660
For households with more than 8 persons, add:	$4,540 (each additional person)

APPENDIX E

C O N F I D E N T I A L

-SAMPLE-

NOTICE OF ELIGIBILITY RECOMMENDATION

To: _____
(Applicant's name)

Docket No. _____
(if available)

From: _____
(Screening entity, name of screener, and contact information)

Re: Application for Assigned Counsel

Date: _____

You recently applied to have a lawyer assigned to represent you in your criminal case. We screen all applicants to ensure that they are financially eligible for assignment of counsel. We then make a recommendation to the judge, who is responsible for making the final decision.

Based on the information you gave us, we will recommend to the judge that:

☐ You are financially eligible for an assignment of counsel.

☐ You are not financially eligible for assigned counsel.

If our recommendation to the judge is that you are not financially eligible for assigned counsel, a reason is provided on the attached form, which lists the information we relied upon in making the recommendation.

Additionally, if our recommendation is that you are not financially eligible for assigned counsel, you have the right to have this recommendation reviewed. Your rights are discussed in the attached document entitled, **Your Right to Seek Review of the Recommendation that You are not Eligible for Assigned Counsel.**

C O N F I D E N T I A L

REASON FOR INELIGIBILITY RECOMMENDATION

We have decided to recommend to the judge that you are not eligible for assigned counsel because you have enough income and/or assets to pay for a qualified attorney, a competent defense, and release on bond. Your living expenses and financial obligations do not prevent you from being able to pay these costs. This recommendation is based on the following information about the case and the financial information that you provided:

1) Nature of the case

a) We considered the type of charges against you, which are:

□ Violation □ Misdemeanor □ Class C, D, or E felony □ Class A or B felony

□ Sex offense, violent felony offense, or homicide offense

b) We also considered whether there is any indication that the case against you might be complex. Examples include cases that may require hiring an expert, an investigator, or forensic specialist, or that may involve complex legal issues, or mental health or mental competence issues. In your case, we determined:

□ No indication of case complexity □ Indication of possible case complexity, as follows**:**

_____

_____

2) We considered your income, which is approximately $ _____ per week/month/year.

3) We considered your assets, which include (check all that are applicable):

□ Bank accounts in the approximate amount of $ _____

□ Securities/stocks worth approximately $ _____

□ Other assets (description and approximate value): _____

_____

4) We considered your living expenses, including those of your dependents, which are approximately $_____ per week/month/year.

5) We considered your current debt and other financial obligations, which include (check all that are applicable):

□ Medical debt of approximately $ _____

□ Educational debt of approximately $ _____

□ Other debt (describe nature and amount of debt):_____

_____

6) We considered the following information about Bail in your case (check appropriate box):

□ You were released on your own recognizance or on pre-trial release.

□ Bail was set and you have the financial resources needed to pay it.

7) Other factors we considered or other reasons for our ineligibility recommendation:

_____

_____

_____

APPENDIX F

-SAMPLE NOTICE OF RIGHT TO SEEK REVIEW-

YOUR RIGHT TO SEEK REVIEW OF THE RECOMMENDATION THAT YOU ARE NOT ELIGIBLE FOR ASSIGNED COUNSEL

You have been notified of our decision to recommend to the judge that you are not financially eligible for an assignment of counsel. If you are financially able to retain private counsel, you should do so immediately. If you are unable to retain counsel, you may exercise your right to seek review of our recommendation. There are two ways you can do this:

A. Request that we Reconsider our Recommendation that you are not Eligible

If you believe that our recommendation is incorrect, you may request that we review and reconsider your application. Your request may be made in person, by telephone, or in writing. Upon our receipt of your request for reconsideration, we will provide you with an opportunity to submit to us any additional information you may wish for us to consider, or you may explain to us why you believe you should be provided assigned counsel.

If you choose to request that we reconsider our recommendation, you are urged to do so as soon as possible. It is best for you to act as quickly as you can to minimize any delay in the possible appointment of counsel.

Following our reconsideration, we will notify you, in writing, whether your application for assigned counsel was granted or denied.

B. Request that the Judge Reconsider the Recommendation that you are not Eligible

You may also request that the judge who is presiding over your criminal case review and reconsider our recommendation that you are not eligible. You may do so whether or not you have already requested reconsideration by our office. However, if you did request our reconsideration, you should wait until you receive our written decision on your reconsideration request before making your request directly to the judge.

Please note that if you request that the judge reconsider our recommendation, we cannot guarantee the confidentiality of the information that you provided to us during the application process. The judge may order us to provide him or her with this information. Once we give it to the judge, it may become part of the court file that is available to the public.

This means that if you request the judge to reconsider our decision, you are waiving the right to confidentiality.

If you decide to ask the judge to review and reconsider our recommendation, we urge you to do so immediately. Please be advised that it is best for you to act as quickly as you can to minimize any delay in the possible appointment of counsel.

If you choose to appeal to the judge, you should wait until your next scheduled court appearance. During that appearance, you should explain to the judge that you disagree with our ineligibility recommendation. You should also tell the judge why you cannot afford to retain a lawyer and need to have one assigned to you. You should bring to court a copy of our written recommendation of ineligibility. You may also provide the judge with any additional information or documentation that you believe will be helpful to your application.

Please be advised that if you choose to request that a judge reconsider our recommendation, the judge will not necessarily treat your financial information as confidential or privileged, meaning, it may be used against you in this or any subsequent criminal proceeding. You also may be prosecuted if there is any false information contained in your application.

NOTE: **When you are communicating with the judge about your application for assignment of counsel, do not discuss what happened in your case. Limit your discussion to your financial information. DO NOT DISCUSS THE FACTS OF YOUR CASE.**

You may contact our office at (xxx) xxx-xxxx if you have any questions or need clarification of these instructions.

APPENDIX G

SAMPLE NOTICE OF JUDGE'S INELIGIBILITY DECISION

_____ COURT OF THE STATE OF NEW YORK

COUNTY OF _____

People of the State of New York,

v. **Docket No.**

_____,

Defendant.

This matter concerns Defendant's application for assignment of counsel. Defendant was arraigned on _____, 2016, on the following charges: _____

_____.

Upon review of Defendant's application, the Court determines that Defendant is not financially eligible for assignment of counsel. The Defendant has enough income and/or assets to pay for a qualified attorney, competent defense, and release on bond. The Defendant's living expenses and financial obligations do not prevent him/her from being able to pay these costs.

In reaching this decision, the Court has considered the following information:

1) Nature of the case

a) Type of charges (check applicable descriptor):

☐ Violation ☐ Misdemeanor ☐ Class C, D, or E felony ☐ Class A or B felony

☐ Sex offense, violent felony offense, or homicide offense

b) Indication that the case may be complex: ☐ **Yes** ☐ **No**

(Indicators of complexity include, but are not limited to the following: potential need for expert, investigative, or forensic services; existence of complex legal issue; existence of possible mental health or mental competence issue).

2) Defendant's income as set forth in the application for assignment of counsel.

3) Defendant's assets, which include (check all that are applicable):

☐ Bank accounts

☐ Securities/stocks

☐ Other assets (general description): _____

4) Living expenses of Defendant (including any dependents), as set forth in the application for assignment of counsel.

5) Defendant's current debt or other financial obligations (check all that are applicable):

☐ Medical debt

☐ Educational debt

☐ Other debt (general description): _____

6) Bail (check appropriate box):

☐ Defendant was released on his/her own recognizance or on pre-trial release.

☐ Bail was set and Defendant has the financial resources needed to pay bail.

7) Other factors considered or other reasons for the ineligibility determination:

_____

_____

_____

In order to maintain the Defendant's confidentiality, the particulars of his/her finances are not included in this Decision. The assigned counsel application, the reason for the ineligibility recommendation, and any other documents regarding the Defendant's financial situation will be maintained in the Court file and are ordered to be SEALED from public view.

This shall constitute the Decision and Order of the Court.

Signed: _____ Date: _____

Exhibit C

NOTICE OF PUBLIC HEARING

NEW YORK STATE OFFICE OF INDIGENT LEGAL SERVICES

Public Hearings on Financial Eligibility for Assignment of Counsel in Family Matters

NOTICE: Executive Law § 832(3)(c) requires the NYS Office of Indigent Legal Services ("ILS") to issue criteria and procedures for determining whether a person is financially unable to hire a lawyer and therefore eligible for publicly-funded legal representation ("assigned counsel") in certain family law matters as set forth in Family Court Act § 262 and Surrogate's Court Procedures Act § 407.

ILS will conduct four (4) public hearings to solicit the views and experiences of institutional and individual providers of assigned counsel representation, current and former clients of assigned counsel providers, county officials, judges, and others interested in assisting ILS in fulfilling this statutory obligation.

Testimony (written and/or oral) is requested regarding current and/or recommended guidelines, policies, and practices relating to the following topics:

- The criteria for deciding whether an individual is eligible for assignment of counsel, such as: the actual cost of hiring private counsel; type and complexity of the case; income needed to meet basic life necessities of the applicant and any dependents; ownership of a vehicle necessary for basic life activities; home ownership, and ownership of other property and non-liquid assets, including the current valuation thereof; income and assets of family or other household members; income from child support or need-based public assistance; debts and financial obligations; employment status; applicant's housing status, including a person's residency in a correctional or mental health facility; the use of presumptions of eligibility, including a rebuttable presumption of eligibility for parents in child welfare (Family Court Act Article 10) cases; the use of fixed income guidelines ("poverty guidelines"); and any other criteria or factors that may be considered.
- The process of applying for assigned counsel, including the use of technology for prequalification and processing of financial eligibility applications.
- The process for reviewing, appealing and/or reconsidering eligibility decisions.
- Methods for public dissemination of information about the criteria and procedures for determining financial eligibility for assigned counsel.
- Confidentiality of information submitted by an applicant for assigned counsel.
- Any other topic pertinent to the implementation of equitable, efficient, and fair criteria and procedures for determining financial eligibility for assigned counsel.

SUBMISSIONS AND TESTIMONY: Persons interested in presenting oral testimony or making a written submission, or both, are asked to follow the procedures and timelines described below.

WRITTEN SUBMISSIONS: Any person wishing to submit written testimony **only** must do so by **5:00 p.m., Friday, July 19, 2019,** at the contact information below.

ORAL TESTIMONY: If you are interested in testifying at a hearing, please send your request by mail to ILS at the address below, or by email to publichearings@ils.ny.gov. **Your request must be received no later than fourteen (14) days before the hearing at which you propose to testify.** Oral testimony will be limited to 10-15 minutes. Due to time constraints, we cannot guarantee that you will be selected to present oral testimony.

When requesting an invitation to provide oral testimony, please provide the following information:

1. Name and organizational affiliation;
2. A prepared statement or brief description of the topic(s) that you intend to address at the Public Hearing; and
3. The Public Hearing (details below) at which you wish to testify.

If requesting to give oral testimony, please indicate any accommodations (e.g., Americans with Disabilities Act, language access services, etc.) necessary to facilitate your participation.

Selected individuals will be notified of the proposed date and time of their testimony.

NAME, ADDRESS AND AGENCY CONTACT: Please send written submissions and requests to testify as follows:

E-mail: publichearings@ils.ny.gov, or

Regular Mail: Tammeka Freeman
ATTN: Eligibility Public Hearings
NYS Office of Indigent Legal Services
80 S. Swan Street, Room 1147
Albany, New York 12210

DATE, TIME, AND LOCATION OF HEARINGS

FRIDAY, MAY 31, 2019, 1:00–4:00 P.M.
Appellate Division, First Department
27 Madison Avenue, New York, NY 10010

WEDNESDAY, JUNE 19, 2019, 1:00–4:00 P.M.
Appellate Division, Third Department
Robert Abrams Building for Law and Justice
State Street, Room 511, Albany, NY 12223

WEDNESDAY, JULY 17, 2019, 1:00–4:00 P.M.
Appellate Division, Second Department
45 Monroe Place, Brooklyn, NY 11201

WEDNESDAY, AUGUST 14, 2019, 1:00–4:00 P.M.
Appellate Division, Fourth Department
50 East Avenue, Rochester, NY 14604

NOTICE OF PUBLIC HEARING

NEW YORK STATE UNIFIED COURT SYSTEM
COMMISSION ON PARENTAL LEGAL REPRESENTATION

The New York State Commission on Parental Legal Representation, established by Chief Judge Janet DiFiore, seeks to gather information on existing services and suggestions for reforms needed to ensure quality representation for persons eligible for assigned counsel in family law matters. The commission will conduct four (4) Public Hearings to solicit the views of county government officials, institutional providers, assigned counsel programs and attorneys, clients, and other stakeholders. The information and ideas elicited will inform the Commission's report and the resulting systemic improvements. Interested participants are requested to provide written testimony relating to the topics below, as more fully described on the following page:

- Funding and Caseloads
- Timely Access to Counsel
- Structural Issues
- Model and Scope of Representation
- Financial Eligibility Criteria and Procedures
- Statewide Oversight Role
- Global Issues

Public Hearings: Dates and Locations:

- **SEPT. 13, 2018** • 1:00 PM – 4:00 PM
  App. Div., 4th Dept., Rochester
- **SEPT. 27, 2018** • 10:00 AM – 1:00 PM
  App. Div., 1st Dept., New York City
- **OCT. 10, 2018** • 9:30 AM – 12:30 PM
  App. Div., 3rd Dept., Albany
- **OCT. 23, 2018** • 10:00 AM – 1:00 PM
  Supreme Court, Nassau Co., Mineola

Submissions and Testimony

The Commission will consider both oral testimony and written submissions. Alternatively, or additionally, individuals may complete a survey targeting these relevant Issues, which will be posted at www.nycourts.gov. Persons interested in presenting oral testimony, making a written submission, and/or completing the Commission survey, are asked to follow the procedures and deadlines described below. Please be aware that individuals are not required to present testimony regarding every question – only answer questions that are relevant to your organization or practice. **Any person wishing to testify orally or in writing must submit written testimony (or a prepared written statement in anticipation of oral testimony) to the Commission on or before August 16, 2018. Any person wishing to complete the Commission survey, which will be posted at www.nycourts.gov, must do so on or before October 1, 2018.**

Submission of Written Testimony

Written testimony should be submitted at the contact information below.

Requests to Provide Oral Testimony

Because of the limited number of hearings scheduled, the Panel will accept requests to present oral testimony in advance, and will then notify individuals of the proposed date, time and duration scheduled for their testimony. If you are interested in testifying at a hearing, please forward your request **along with your written testimony by August 16, 2018,** or via email to parentrepresent@nycourts.gov no later than 20 days in advance of the hearing at which you propose to testify **with the subject line ORAL TESTIMONY REQUEST**. Please be aware that individuals are not required to present testimony regarding every question -- only answer questions that are relevant to your organization or practice.

If requesting an invitation to provide oral testimony, please provide the following information:

1. Identify yourself and your affiliation if applicable (and if you are requesting an invitation for someone else to testify, that individual's name and affiliation);
2. Attach either a prepared written statement or a brief description of the topics you wish to address at the hearing; and
3. Indicate at which of the hearing(s) the testimony is proposed to be given.

If requesting to give oral testimony, please indicate if you will need special accommodations (e.g. Americans with Disabilities Act or language access assistance) in order to testify.

Completion of Commission Survey

The Commission survey, which will be available at www.nycourts.gov, must be completed on or before October 1, 2018. The survey can be completed on its own, or as a complement to oral/written testimony.

Name, Address and Agency Contact:

All written submissions and requests to testify should be forwarded to the New York State Unified Court System Commission on Parental Legal Representation at the following email address: parentrepresent@nycourts.gov.

The Notice of Public Hearings for the Commission is available at nycourts.gov.

NOTICE OF PUBLIC HEARING

NEW YORK STATE UNIFIED COURT SYSTEM

COMMISSION ON PARENTAL LEGAL REPRESENTATION

Funding and Caseloads

- The impact of the current funding system on the ability of institutional offices and assigned counsel programs to provide high quality parental legal representation, including the ability to recruit and retain, train and supervise, and adequately compensate assigned counsel.
- The impact of such funding on caseloads/workloads of attorneys, and the need to develop appropriate caseload standards for various types of family law cases, including appeals.
- The adequacy of the current rates for 18-B assigned counsel services and ancillary non-attorney professional services (e.g., social workers, medical and psychological experts, translators, etc.)
- The responsibility of the State vs. the counties for funding mandated parental representation.

Timely Access to Counsel

- Pre-petition access and procedures for access to counsel in advance of a first court appearance in child protective (CPS) cases to facilitate effective representation.
- Access to counsel for individuals in privately initiated cases prior or in response to the initiation of litigation.
- The potential social and economic benefits to the early entry of counsel.

Structural Issues

The advantages and disadvantages of institutional offices (Public Defenders, Conflict Defenders, and Legal Aid Societies) and assigned counsel panel programs in providing the essential elements of quality representation, including:

- Independence as to funding, eligibility determinations, assignment and compensation of attorneys, and other matters.
- Independence of individual attorneys to act as zealous advocates and make independent decisions to further the stated interests of clients.
- Sufficient office facilities, technology, legal research, and administrative resources.
- Access to, training regarding, and appropriate use of social workers, parent advocates, experts, investigators, mental health professionals, interpreters, and other non-attorney professional services.
- Training, supervision, and mentoring of attorneys providing representation in the trial court and in the appellate court.
- Procedures and practices to ensure client rights are protected from the time of the issuance of an appealable order to the assignment of appellate counsel.

Model and Scope of Representation

- Multidisciplinary or interdisciplinary team approach in various Family Court proceedings.
- Representation in related legal and administrative proceedings.
- Special litigation to vindicate clients' legal rights and challenge systemic flaws.
- Alternative Dispute Resolution.
- The advantages and disadvantages of specialized panels for specific types of cases, such as abuse/neglect or family offense.

Financial Eligibility Criteria and Procedures

- Criteria for determining eligibility for assigned counsel, including but not limited to establishing presumptive financial eligibility guidelines, and what resources may be considered, and the process for disseminating information regarding such criteria.
- The process of reconsideration upon a determination of ineligibility.
- The advantages and disadvantages of uniform eligibility standards, including any potential social and economic benefits.
- Procedures to ensure confidentiality of information submitted by individuals.
- Use of online portals and other technology in processing applications.

Statewide Oversight Role

- Promulgation and implementation of Statewide standards governing parental legal representation.
- Monitoring and oversight of parental legal representation at both institutional offices and assigned counsel programs, including the essential quality components listed above under "Structural Issues."
- Coordinating resources for attorneys, including training, supervision, mentoring, and access to non-attorney professional services, research assistance, and sample filings and other legal materials.
- Managing relationships among institutional and governmental entities regarding funding, legislative, policy, and practice reform.
- Receiving and processing feedback from current or former clients of assigned counsel and other affected individuals to help monitor the system of parental legal representation.

Global Issues

- Impact of parental legal representation on the functioning of other systems that affect children and families and on the effective resolution of cases.
- Legislative changes needed to ensure quality parental legal representation.
- Challenges in rural counties, including non-legal services, geography and lack of public transportation, and possible solutions, including creative use of technology.
- Special issues related to representation of assigned counsel eligible parents and caregivers in cases involving Native American families, Tribal Courts, and the Indian Child Welfare Act.
- Special issues related to representation of assigned counsel eligible parents and caregivers in cases involving immigrant families, and the intersection of Federal and state law