Eligibility FAQs

This section is a method by which to provide uniform responses to questions that have been raised during the course of implementation of the Eligibility Criteria and Procedures, and to ensure that these responses are disseminated widely. I have read the Criteria and Procedures, and have a lot of questions. Where do I go to get my questions answered and get some help?
We are here to support you. Please send any eligibility questions to: Jessica Bogran, jessica.bogran@ils.ny.gov

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Eligibility for Representation

Will ILS be providing eligibility-determination forms in Spanish?

Yes. A Spanish translation of the Eligibility Criteria and Procedures Blackletter, the Assigned Counsel Eligibility Application Form, the Sample Notice of Eligibility Recommendation, the Sample Notice of Applicant's Right to Seek Review and the Sample Notice of Judge's Ineligibility Decision are forthcoming and will be posted on ILS' website once completed.

Do the Eligibility Criteria and Procedures apply to Family Court proceedings?

No. Pursuant to the Hurrell-Harring Settlement, ILS created the Criteria and Procedures to guide courts in the counties outside New York City in making eligibility determinations in criminal cases. However, as ILS Director, Bill Leahy, stated in his April 4, 2016 E-Mail transmittal accompanying the issuance of the Criteria and Procedures, "we hope that [the Criteria and Procedures] will provide guidance also to judges making eligibility determinations in criminal cases in New York City, and to

Family Court judges statewide." ILS intends to develop eligibility criteria and procedures for Family Court that will build upon these Criteria and Procedures, while taking into account the unique circumstances of Family Court practice. We do not yet have a timeframe for doing so. Once such Criteria and Procedures are developed, we will provide training for mandated providers and work with OCA on the training of Family Court judges and other appropriate personnel.

Is the word "dependent" defined in the Criteria and Procedures? Should we be using the tax law definition?

"Dependent" is not specifically defined in the Eligibility Criteria and Procedures. In using this term, ILS seeks to include any person for whom the applicant is providing financial support on an ongoing basis, even if the caretaking arrangement is informal. We intentionally do not use a formal definition because we recognize that many caretaking arrangements are not formalized, yet are still quite significant in terms of the caretaker's financial responsibilities.

Does receipt of Social Security Disability or Social Security survivors' benefits render an applicant presumptively eligible?

No. Unlike Supplemental Security Income (SSI), Social Security Disability (SSD) and Social Security survivors' benefits are not need-based programs. Instead, these programs are based on the work history of the recipient (or the recipient's parent or spouse). Of course, often the monthly payments for these benefits are quite low, so it may be that, while an applicant is not presumptively eligible based on receipt of SSD or Social Security survivor's benefits, an applicant might be otherwise presumptively eligible because his or her income is below 250% of the Federal Poverty Guidelines (FPG).

Should a defendant who depends on service-related military disability income be deemed presumptively eligible for assignment of counsel?

The answer to this question turns on whether the income is Veteran Disability Pension or Veteran Disability Compensation. Like SSI, Veteran Disability Pension is a

need-based benefit paid to wartime Veterans over 65 years old and with permanent and total non-service connected disability. Defendants who depend upon Veteran Disability Pension payments are presumptively eligible for assignment of counsel, and these payments should not be counted as income for assigned counsel eligibility purposes. Veteran Disability Compensation is not need-based, but is based on a disability rating which the VA assigns based on evidence of a relationship between the veteran's current disability and his in-service injury (see https://benefits.va.gov/BENEFITS/factsheets.asp and https://www.va.gov/disability/). As such, Veteran Disability Compensation should be treated the same as SSD in the financial eligibility assessment, and be counted as income. Of course, if the monthly payments of these benefits are quite low, it may be that, while the veteran is not presumptively eligible based on his receipt of the Veteran Disability Compensation, he might otherwise be presumptively eligible because his income is below 250% of the Federal Poverty Guidelines (FPG).

Can Question 3 of the Sample Application be expanded to include Family Court, so that the question posed asks whether the applicant has been deemed eligible in a Family Court matter, as well as in other criminal matters?

The Eligibility Criteria and Procedures do not require that a person who has recently been deemed eligible for assigned counsel in a Family Court matter be presumed eligible for counsel in a criminal case. However, while not required, it would not be contrary to the Eligibility Criteria and Procedures to do so.

Can the application be expanded to include other information, such as a defendant's citizenship status or Social Security Number?

Yes. The sample application includes only information pertinent to assigned counsel eligibility. However, providers may use the application to collect additional information pertinent to the representation of the defendant so long as doing so does not delay the application process.

Criterion VIII factors the "actual cost of retaining a private attorney in the relevant jurisdiction" for the category of crime charged. Does ILS have

plans to assist mandated providers in discerning the average cost of counsel in each jurisdiction?

ILS is currently developing an instrument that entities involved in eligibility screening may use as a tool to determine the cost of private representation for different types of cases in their jurisdictions. The instrument is a brief survey that asks for attorney costs as well as, where relevant, expenses for experts, investigators, and other professional services. Once the survey instrument is completed, ILS will make it available to entities involved in eligibility screening, who can then administer the survey online, via email, mail, or telephone.

It is understood that spousal income should not be imputed to the applicant. But, when the spouse works, should the spouse be included in determining the family size?

For purposes of determining an applicant's income level for assigned counsel eligibility, household size is calculated by including the applicant and all persons for whom the applicant bears financial responsibility. This includes a spouse who lives in the household and does not have a source of income. However, if the spouse has income greater than $10,400, the spouse should not be counted as a member of the household for household size. As reflected on the "Income Eligibility Presumption: Federal Poverty Guidelines Chart," $10,400 is the approximate amount by which each additional dependent increases the annual income a family needs to be at 250% of the Federal Poverty Guidelines. Counting as a dependent a spouse whose income is more than $10,400 would result in an artificially high income threshold for purposes of the Eligibility Criteria and Procedures' income presumption eligibility.

Regarding the ability to implement the Eligibility Criteria and Procedures:

i) How will providers be trained?
ii) When, during the course of implementation, questions about application of the Criteria and Procedures arise, what is the process for ensuring that answers to these questions are disseminated to everyone so there is uniformity in the application of the Criteria and Procedures? ILS is implementing a twofold approach to training:

(1) in-person communication with providers; and (2) ongoing updates to our website. Regarding communication, ILS recognizes the importance of training the staff of all mandated providers across the state. Full, comprehensive training is possible when each provider designates one or two staff persons (legal and non-legal) to serve as a Point Person. The Point People will:

(a) Be trained by ILS, and, using the materials and tools that ILS has developed, will, in turn, train those persons in their offices who are involved in the eligibility assessment process. (b) Be a conduit for on-going communication between the other staff members and ILS – i.e., a person to relay implementation questions to ILS, and to receive from ILS answers to implementation questions that other providers have asked. (c) Be a conduit for communication with ILS about data collection and maintenance.

To ensure widespread dissemination of responses to questions asked during implementation, ILS has created this FAQ section on its website, which will provide ongoing updates.

For providers who struggle financially to staff their offices with persons to perform the screening functions, will ILS consider dedicating some of the distribution or Upstate caseload relief monies to hiring staff to perform screening functions?

Counties may submit a proposal to use distribution funding to add staff to perform the screening function. As with any proposal that is submitted, it is subject to ILS' approval.

Is ILS working closely with the Case Management System (CMS) to collect and maintain data?

ILS has been working closely with NYSDA to update CMS, and we will be working with providers who use other case management systems as well. We will be having ongoing conversations with providers about data collection, and with NYSDA and providers that use other case management systems about data maintenance.

Will ILS consider automating the eligibility application process by using a mobile device, such as an I-Pad or an I-Phone application, in order to make it easier for individuals to apply for assigned counsel?

ILS will look into that possibility, but doing so may be complicated by the difficulty of developing a system that is compatible with CMS and the other case management systems providers use.

Regarding the 2010 Self Sufficiency Standard (SSS), what income does someone need to make in order to be deemed self-sufficient?

The Self-Sufficiency Standard for New York State 2010 sets forth, county by county, what individuals and families need to earn to meet life's basic necessities without having to rely on public assistance or private help (e.g., relying on a relative for free child care or receiving food from a food bank). In arriving at this standard, the report considers the local costs of housing, child care, food, transportation, health care, miscellaneous items, and taxes/tax credits as well as the number of people in the family and their respective ages. A person who is considered selfsufficient under this standard does not have savings, has no disposable income, lives paycheck to paycheck, and does not have extra money for recreation or entertainment – in other words, a selfsufficient person or family can simply make ends meet. The Self-Sufficiency Standard for New York State 2010 can be found at: The Self-Sufficiency Standard for New York State 2010 . Though ILS was urged to use the SSS as a sole income measure for determining assigned counsel eligibility, we chose instead to rely on the Federal Poverty Guidelines (FPG) since the SSS currently is not updated annually. However, to calculate a realistic income variable by which to gauge eligibility, we looked to the New York State SSS and compared it to the FPG scale. Doing so, we learned that, across the state, self-sufficiency hovered around a 250% multiple of the FPG.

Section IIB of the Criteria and Procedures provides that an applicant is presumptively eligible for assigned counsel if, at the time of his application, he is incarcerated, detained or confined to a mental health institution?

A presumption of eligibility is rebutted if there is compelling evidence that the applicant has the financial resources to pay for assigned counsel. If there is compelling reason to believe that the applicant will not continue to be detained, then this presumption is rebutted and the applicant's ability to pay for counsel should be considered.

Why do the Criteria and Procedures exclude, from consideration as an asset, monies received from child support?

Child support is for the support of the child, not for the support of the parent. Money intended for the child's well-being should not be used to pay the costs of a parent's criminal defense.

What happens in cases when defenders might not have an eligibility application on them, or, for some other reason, they might be unable to conduct the screening upon meeting the applicant?

When that happens, a provisional appointment is made and the screening is done later. What, however, is the priority? Is it ensuring that someone has counsel immediately, right then and there, especially when the person is in front of a judge and his liberty is at stake, or, is it filling out the application form?

he priority is ensuring that a person has counsel. That is why the Criteria and Procedures state in Procedure XII that if there is reason for a delay in determining whether someone is eligible for assigned counsel, counsel should be appointed provisionally.

An individual is presumed eligible if he has recently been deemed eligible in another criminal case in the same or another jurisdiction. Does that not, in effect, allow one jurisdiction to make an eligibility determination for another jurisdiction?

If every county applies the Eligibility Criteria and Procedures uniformly, then decisions across counties will be consistent, and an applicant deemed eligible in one

county should, in most circumstances, be deemed eligible in another county. Of course, presumptions are rebuttable. For example, if the applicant was previously found eligible for assignment of counsel in a complicated violent felony case in another jurisdiction, and the case in the current jurisdiction involves a simple violation, the presumption may be rebutted and it would be appropriate to rescreen the applicant.

Do we simply accept the information on the application and not request documentation to verify it?

While Procedure XIll allows screeners to request documentation to verify the information on the application, verification is not required. Requiring verifying documentation in all cases is unnecessary and counter-productive because it delays the screening process and can be administratively costly. However, if there is missing information or a reason to believe the applicant is providing misinformation, verifying documentation may be requested. If verifying documentation is requested, the request should be made in accordance with Procedure XIII.

If an applicant states that he just “bounces around” and has no income, can we require proof of how the applicant is supporting himself?

Such proof should be sought only when there is reason to believe the applicant is providing misinformation. It is not uncommon for people with little or no income to “bounce around” between homeless shelters, friends, or relatives, even while occasionally working temporary, low-paying jobs. Requiring a person in such circumstances to provide proof of how he is supporting himself is administratively burdensome and will needlessly delay assignment of counsel.

Now that there are eligibility Criteria and Procedures to guide courts, do providers need to be involved in the decision-making process at all?

While judges have the authority to determine if an applicant is entitled to assigned counsel, in many jurisdictions, judges delegate to providers the responsibility to screen and make recommendations regarding the eligibility of assigned counsel.

This practice complies with Procedure X.

What is ILS doing to ensure that OCA judges and the Town and Village Court magistrates are trained in the Criteria and Procedures?

We are currently working with OCA to train judges and magistrates. OCA asked us to provide them with a menu of training options – from a webinar, to live presentations. Training the judges and magistrates will be an ongoing effort.

In order for counsel to be assigned, does there have to be court action?

Procedure XII addresses this issue, stating that counsel should be assigned upon a request for counsel, even if no court action has yet been taken. If necessary, this assignment may be provisional until a court can make a final determination regarding the applicant's financial eligibility for assignment of counsel. This procedure is necessary to comply with national and state professional standards, including the American Bar Association's Ten Principles of a Public Defense Delivery System, Principle 3, and the New York State Bar Association's 2015 Revised Standards, Standard B-3. This practice has also been recognized by at least one court as critical in protecting the rights of accused persons. See People v. Rankin, 46 Misc.3d 791, 811 (Monroe Cty. Ct. 2014) ("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").

Are the Administrative Judges in each judicial district outside of NYC in possession of the Criteria and Procedures?

Yes. On April 7, 2016, Judge Michael Coccoma, the Deputy Chief Administrative Judge for Courts outside New York City, sent a copy of the Criteria and Procedures to each of the Administrative Judges in the eight (8) judicial districts outside New York City, and to other OCA personnel.

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