

Report of the

**CHIEF DEFENDERS ASSOCIATION
OF NEW YORK**

on the

Indigent Legal Services Office's Criteria and
Procedures for Determining Assigned
Counsel Eligibility Issued April 4, 2016

April 26, 2016

Chief Defenders Association of New York
177 Livingston St., 7th Floor
Brooklyn, New York 11201

Introduction

On April 4, 2016 the Office of Indigent Legal Services issued new “Criteria and Procedures for Determining Assigned Counsel Eligibility” (hereinafter “eligibility criteria”).¹ The new eligibility criteria are intended “to guide courts...in determining whether a person is eligible for publicly funded representation”² and address a longstanding problem in New York: the failure to have uniform eligibility criteria for use by all providers of indigent defense services (hereinafter “providers”) across New York State. The new eligibility criteria are scheduled to become effective on October 3, 2016.³

There is certainly much to admire in the new eligibility criteria. The eligibility criteria will create a uniform system of eligibility screening, and resolve a number of issues that lead to either a delay in the appointment of counsel for eligible defendants, or an outright deprivation of the right to counsel.

However, as can be seen below, the new eligibility criteria will significantly alter how providers determine eligibility for indigent defense services. Furthermore, the eligibility criteria will increase caseloads of most non-NYC providers, and impose additional administrative requirements (and costs) on providers. The higher caseloads and increased administrative responsibilities will have significant, adverse effects on providers unless there is additional funding appropriated to support providers in complying with the new eligibility criteria.

The new eligibility criteria have been issued by New York State without any additional State funding to support providers in their implementation. Furthermore, the vast majority of counties will not be willing (or able) to provide the additional resources necessary for providers to implement the eligibility criteria while continuing to provide quality representation to clients.

To help determine the impact of the new eligibility criteria on non-NYC providers, the Chief Defenders Association of New York⁴ (hereinafter “CDANY”) requested that non-NYC providers complete a survey designed to solicit their opinions on the impact of the eligibility criteria on their counties and programs. The following is an explanation of the survey, the results received, and CDANY’s

¹The new eligibility criteria may be found here: <https://www.ils.ny.gov/content/eligibility-documents>

² Email from Director William J. Leahy, NYS Office of Indigent Legal Services, to the ILS Board, county leaders, and providers, dated April 4, 2016.

³ “In accordance with the [Hurrell-Harring] Settlement, these criteria and procedures are written for criminal court proceedings in the counties outside of New York City.” Criteria and Procedures for Determining Assigned Counsel Eligibility at page 6. CDANY believes that the criteria will be applied to family court throughout New York. See FN 17.

⁴ The Chief Defenders Association of New York is an organization of New York indigent legal services providers. In 2015, CDANY members represented over 400,000 people in the criminal, family law, and appellate courts of New York.

position on the potential impact of the eligibility criteria on non-NYC providers as well as recommendations for the implementation of the new eligibility criteria.⁵

Current Status of Non-NYC Caseloads

In November of 2015, the Office of Indigent Legal Services (hereinafter "ILS") released the Estimate of the Cost of Compliance with Maximum National Caseload Limits in Upstate New York - 2014 Update (hereinafter "the ILS Report").⁶ The ILS Update Report reveals the significant hardships of upstate providers in handling their existing caseloads.⁷

The ILS Update Report noted that "[i]n the 72 institutional providers of indigent legal services operational in upstate New York for the whole of 2014, attorneys handled an average of **616** new weighted cases. This exceeds the maximum national caseload limit of 367 new weighted cases per attorney per year by 68%".⁸ The ILS Report determined that in order for upstate providers to comply with national caseload limits, upstate providers would need to add **468** new staff attorney positions, as well as an additional **265** non-attorney staff positions.⁹ ILS estimated the total amount of money necessary for upstate providers to comply with national caseload standards **would exceed \$99,000,000**.¹⁰ ILS characterized the need for additional funding as "acute".¹¹

The ILS Update Report was simply the latest in a series of reports and studies that have determined that excessive caseloads are prevalent amongst the vast majority of New York indigent legal services providers.^{12,13}

The findings of the ILS Update Report certainly reflect the reality of the vast majority of non-NYC indigent defense providers. Under existing eligibility standards (which are unique to each county), non-NYC providers are operating

⁵ This Report concentrates on the anticipated caseload impact and financial impact of the new eligibility criteria on non-NYC providers. CDANY believes there are additional issues relating to the practical application of the eligibility criteria to provider's programs, but those concerns are beyond the scope of this Report.

⁶ The ILS Report may be found here: <http://tinyurl.com/jutmaxf>

⁷ See also Commission on the Future of Indigent Defense Services, Final Report to the Chief Judge of the State of New York (June 18, 2006). That Report may be found here: <https://www.ils.ny.gov/files/Kaye%20Commission%20Report%202006.pdf>

⁸ ILS Report at page 2.

⁹ ILS Report at page 2.

¹⁰ ILS Report at page 2. Emphasis added.

¹¹ ILS Report at page 3.

¹² See, e.g., Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel (The Constitution Project, 2009) at page 67 (<https://www.ils.ny.gov/files/Justice%20Denied.pdf>); STATUS OF INDIGENT DEFENSE IN NEW YORK: A Study for Chief Judge Kaye's Commission on the Future of Indigent Defense Services (<http://nycourts.gov/ip/indigentdefense-commission/SpangenbergGroupReport.pdf>); FN4.

¹³ In 2009 legislation was enacted providing for a four-year phase-in of caseloads caps (and increased funding) in New York City. This has largely ameliorated the caseload issues that existed in NYC prior to that legislation.

under caseloads that are significantly above national caseload limits.¹⁴ Despite this, since the release of the original 2013 ILS Report¹⁵, State funding for non-NYC providers of indigent defense has remained flat (with the exception of funding provided to implement the terms of the *Hurrell-Harring* settlement).¹⁶

Overview of Survey

CDANY developed an on-line survey designed to solicit feedback from the providers on the potential impact on their counties and programs should the new eligibility criteria become effective. The survey asked providers to assume that the new eligibility criteria would be effective for criminal cases, cases in family court¹⁷, and the appellate courts.

The purpose of the survey was to determine: (1) whether the new eligibility criteria would have an impact on the caseloads of the respondent providers; (2) whether the caseload impact, if any, would be significant; (3) in what practice areas, if any, there would be an impact; (4) the potential cost for the provider to comply with the new eligibility criteria, should there be a caseload impact; and (5) whether providers believed their county would provide additional financial resources, if needed, to comply with the new eligibility criteria.

The survey was composed of twenty-one (21) questions. Questions 1-8 were designed to obtain information about the responding provider's program. Questions 9-11 asked respondents about the current standards they use to determine eligibility. Questions 12-21 asked respondents about the potential impact of the new eligibility criteria on their counties and programs (caseload impact as well as fiscal impact).

¹⁴ "At 616 per attorney, caseloads in the average provider of indigent legal services in upstate New York continue to exceed levels last seen in New York City in 2009. Since that year, in recognition of the unsustainable nature of these numbers, significant new state funding has been made available to New York City to drive down caseloads." Report at page 3.

¹⁵ The 2013 Report may be found here: <http://tinyurl.com/lxkm7x6>

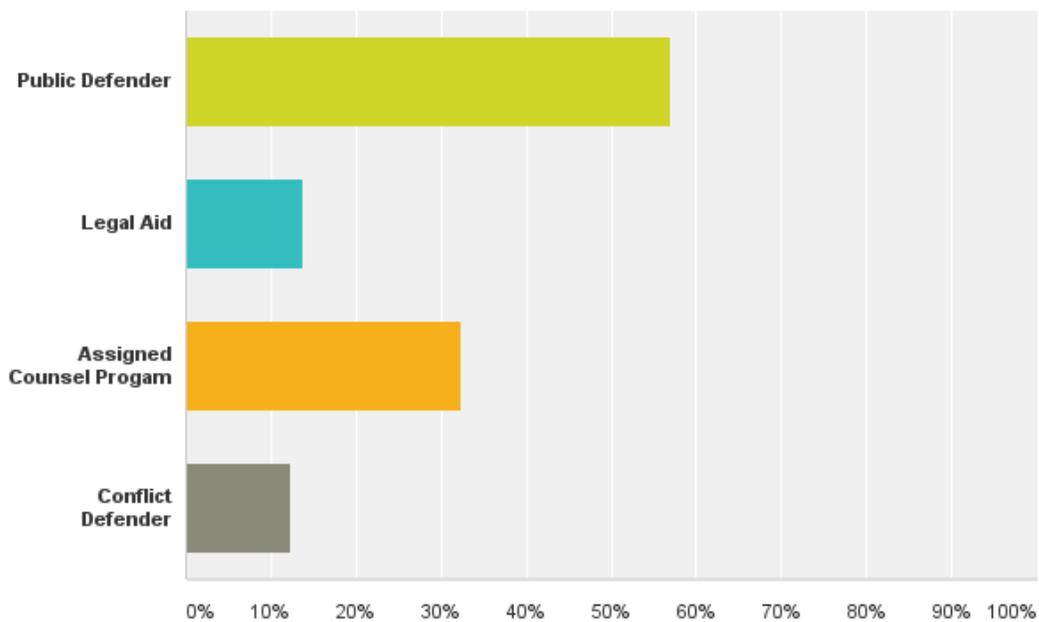
¹⁶ That settlement provides funding to improve indigent defense services in only five counties: Onondaga County, Ontario County, Schuyler County, Suffolk County, and Washington County. Information on the settlement may be found here: <https://www.ils.ny.gov/content/hurrell-harring-settlement-information>

¹⁷ Although the eligibility criteria are ostensibly for the criminal courts, CDANY believes that the eligibility criteria will also be quickly adopted in the family courts. A number of providers currently handling cases in both the criminal and family courts have expressed the opinion that they cannot have two separate eligibility standards for their clients. Furthermore, in a large number of upstate counties, county court judges handle both criminal and family court cases, and it is unlikely they will use two separate eligibility standards. Finally, as noted by ILS Director Leahy in his email to providers dated April 4, 2016: "As explained at page six, second paragraph, these Criteria and Procedures apply to criminal court proceedings in the counties outside of New York City. However, we hope that they will provide guidance also to judges making eligibility determinations in criminal cases in New York City, and to Family Court judges statewide."

The survey was emailed to providers on April 11, 2016. CDANY asked providers to provide responses by April 22, 2016. CDANY received 65 responses¹⁸ from non-NYC providers.¹⁹ The responding providers were from 47 (of the 57) non-NYC counties.²⁰ Respondents were from a variety of program types and sizes, with responses from public defender offices, conflict defender offices, assigned counsel programs, and legal aids. Responses were received from providers in all practice areas relevant to indigent defense, and from a broad array of counties. CDANY believes that the survey accurately reflects the positions of non-NYC indigent defense providers on the anticipated impact of the new eligibility criteria.

Q3 What type of program do you oversee?

Answered: 65 Skipped: 0



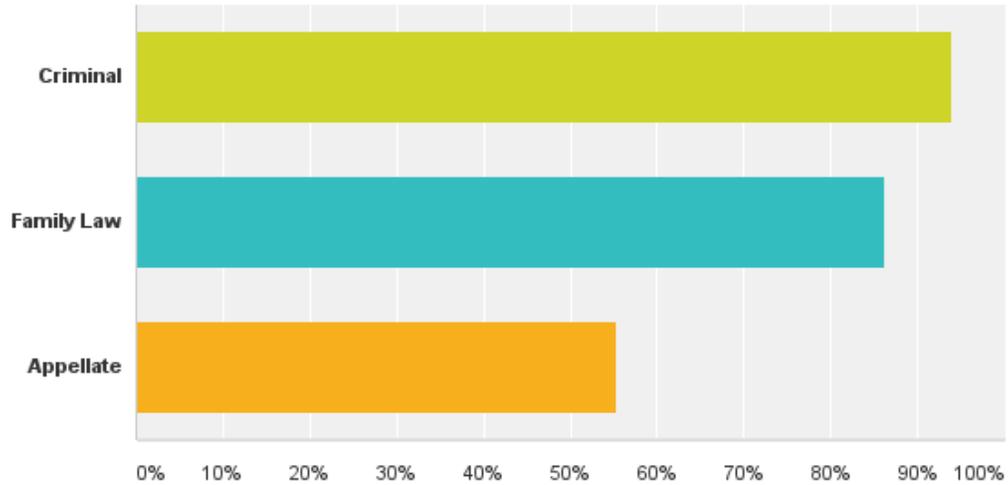
¹⁸ This represents approximately 50% of all providers in upstate New York.

¹⁹ As the new eligibility criteria are not applicable to New York City (and the providers there operate under caseloads caps) data received from NYC providers is removed from the analysis discussed in this Report.

²⁰ As of the date of this Report, there was no chief defender in Herkimer County.

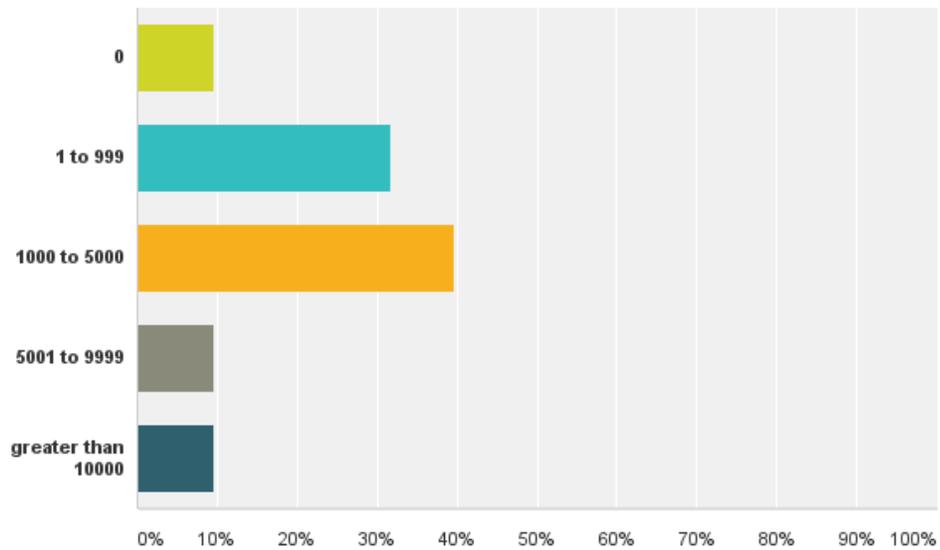
Q4 What types of cases does your program handle?

Answered: 65 Skipped: 0



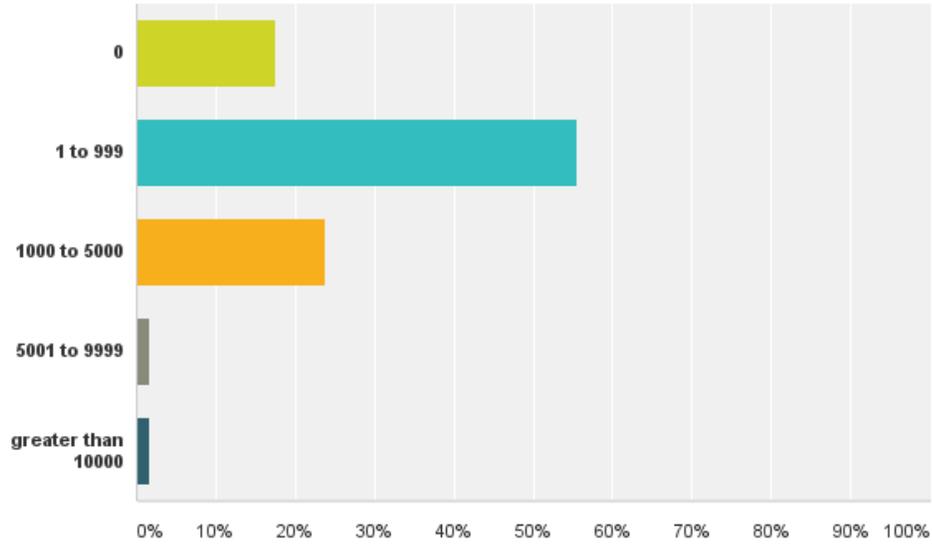
Q5 Approximately how many non-conflict Criminal cases did your office open (or close) in 2015?

Answered: 63 Skipped: 2



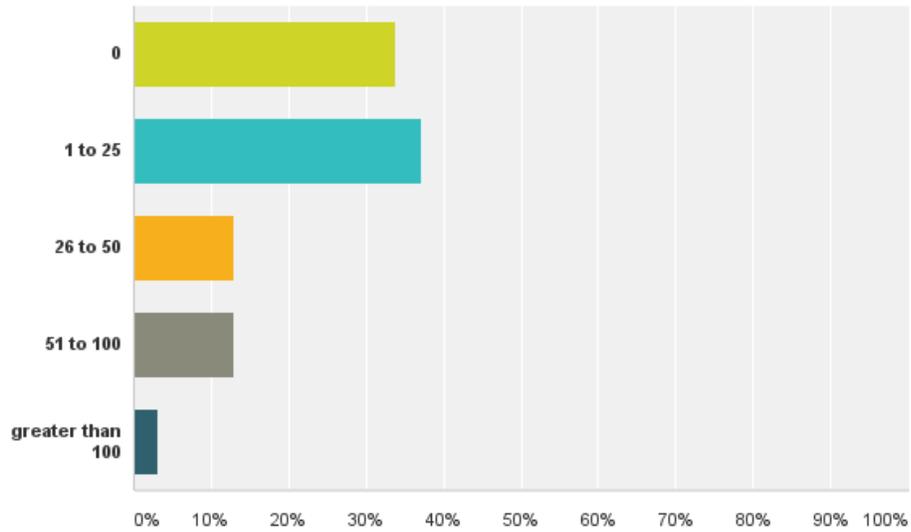
Q6 Approximately how many non-conflict Family Law cases did your office open (or close) in 2015?

Answered: 63 Skipped: 2



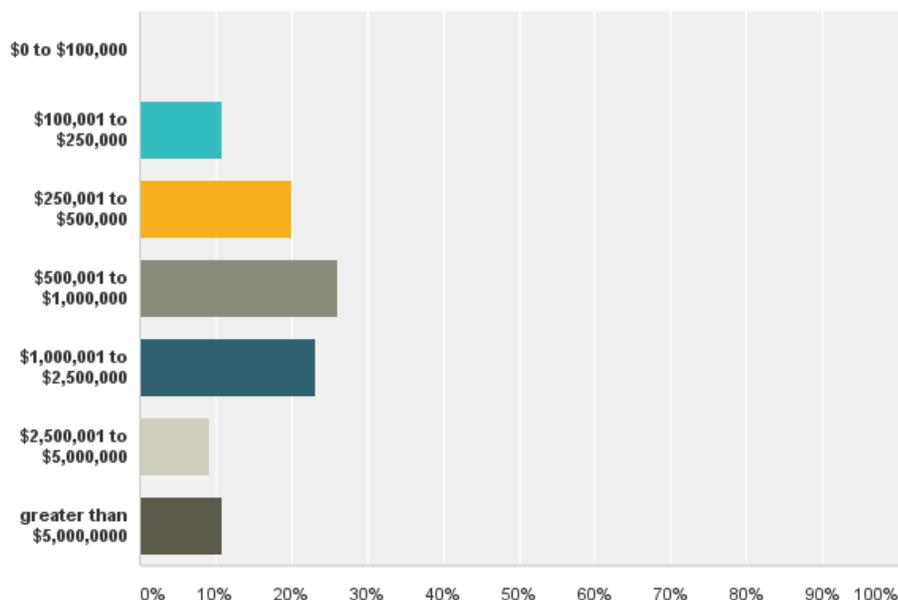
Q7 Approximately how many non-conflict Appeals cases did your office open (or close) in 2015?

Answered: 62 Skipped: 3



Q8 What is your current total budget?

Answered: 65 Skipped: 0



Summary of Current Eligibility Criteria

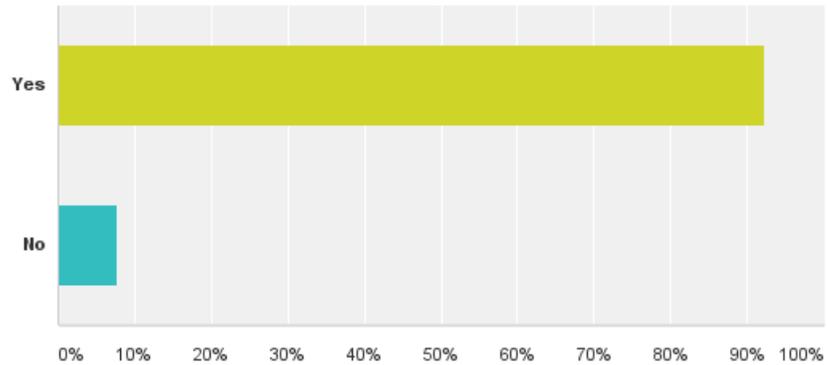
Currently, counties are free to determine eligibility for indigent defense services using whatever criteria they believe appropriate. Most counties or providers use a percentage of the federal poverty guidelines to determine presumptive eligibility for indigent defense services.²¹

Responding providers were asked if their county currently uses the federal poverty guidelines as a factor in determining eligibility:

²¹ Various percentages of the FPG are calculated and forwarded to defense providers by the New York State Defender’s Association (hereinafter “NYSDA”) annually, with an accompanying memorandum. The NYSDA memorandum indicates that “these guidelines are based upon the current official poverty guidelines...[which] are typically updated in the beginning of each year and published in 45 CFR Part 1611 et seq.” 45 CFR Part 1611 part 2(i) defines income as “actual current annual total cash receipts before taxes of all persons who are resident members and contribute to the support of an applicant's household”. As such, many providers have traditionally determined eligibility based upon pretax earnings.

Q10 Does your county currently use the Federal Poverty Guidelines (FPG) as a factor in determining eligibility?

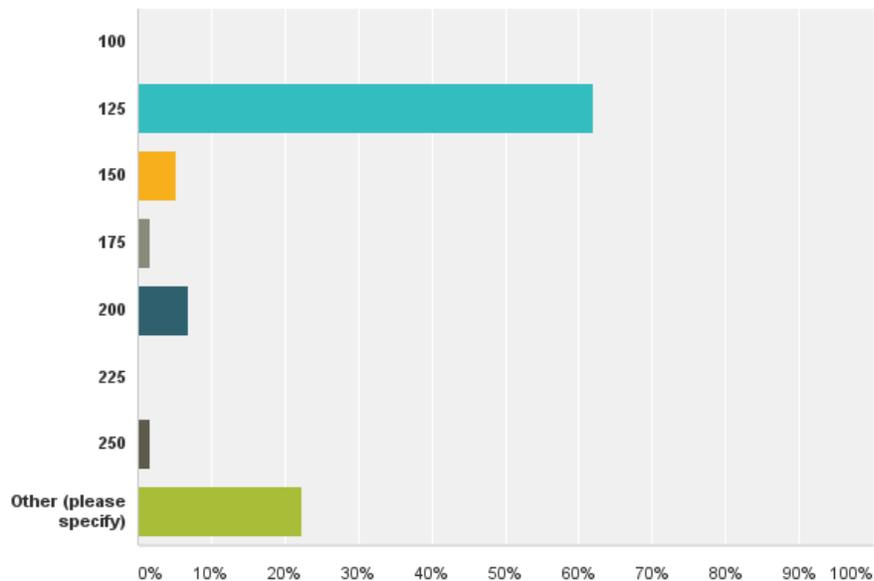
Answered: 65 Skipped: 0



If the providers used a percentage of the FPG as a factor in determining eligibility, they were asked to provide the percentage:

Q11 If your answer to question 10 was "yes" what percentage does your county currently use? (If your county has multiple providers using differing guidelines, please select "other" and explain.)

Answered: 58 Skipped: 7



The most prevalent percentage used is 125% of the federal poverty eligibility criteria,²² with some counties using a higher percentage, or multiple percentages based upon the severity of the applicant's charges. Of the 65 responding providers, only one provider is currently using 250% of the FPG as a presumptive level of eligibility.²³

Furthermore, some counties currently impute spousal income as well as parental income (for minors) in determining eligibility for indigent defense services.²⁴

Summary of the New Eligibility Criteria

The new eligibility criteria significantly alter current procedures for determining eligibility in most non-NYC counties. Under the new eligibility criteria, the following circumstances make an applicant presumptively eligible for indigent defense services:

1. If the applicant's net income is at or below 250% of the currently-updated Federal Poverty Eligibility criteria.²⁵ To make this determination, counties are directed to refer to the FPG Income Eligibility Chart provided by ILS, using the information about the applicant's net (take-home) pay²⁶ and number of dependents in the household.²⁷

²² 36 responding providers used 125% of the FPG as a factor in determining eligibility.

²³ The "other" responses included providers that used several percentages of the FPG based upon the severity of the offense (with no percentage higher than 200%), a percentage of the FPG not listed in the answer choices (e.g., 133%), or an indication that the judges in that jurisdiction determined eligibility.

²⁴ See "Determining Eligibility for Assignment of Counsel in New York: A Study of Current Criteria and Procedures and Recommendations for Improvement, Final Report", Page 64 (<http://tinyurl.com/h9xj4vd>)

²⁵ The 250% of the FPG presumption applies regardless of the level of offense or location of the State where the person was charged (e.g., a person charged with a violation level offense in Rochester City Court would be presumptively eligible for representation by an indigent defense provider if that person made \$29,500 "after deductions for state, federal and local taxes, social security taxes, Medicare taxes, any union dues, retirement contributions or other withholdings".) CDANY submitted a written submission, dated August 26, 2015, to ILS noting this concern: "A single presumptive eligibility standard employed in all non-NYC counties [e.g. 250% of the federal poverty eligibility criteria] no matter the jurisdiction or type of case would likely be either over-inclusive or under-inclusive in many jurisdictions throughout the State."

²⁶ It is important to note that counties were free to consider "before tax" income, and not "take home pay" when referring to the FPG. The U.S. Department of Health and Human Services has noted: "When determining program eligibility, some agencies compare before-tax income to the poverty eligibility criteria, while other agencies compare after-tax income. Likewise, eligibility can be dependent on gross income, net income, or some other measure of income. Federal, state, and local program offices that use the poverty eligibility criteria for eligibility purposes may define income in different ways." (<https://aspe.hhs.gov/frequently-asked-questions-related-poverty-eligibility-criteria-and-poverty>).

²⁷ The FPG chart may be found here: <http://tinyurl.com/glxm4vy>. According to the chart, the greater the number of dependents the higher the after-tax income of the applicant that would render the applicant presumptively eligible- no matter the income of the spouse, which is not to be imputed to the applicant. It is unclear if dependents are to be imputed to an applicant's spouse whose income is significantly higher than 250% of the FPG. It is also unclear

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 eligibility criteria), 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.

Additionally, the following assets or income cannot be imputed to the applicant:

1. Third-party income, including parental and spousal income²⁸ (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 significant²⁹, there is substantial equity³⁰ 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.
6. Other non-liquid assets: Other non-liquid assets, such as secondary residences, retirement accounts, and vehicles not used for

whether an employed spouse is to be considered part of the family unit, despite his or her income not being imputed to the applicant.

²⁸ Notably, the U.S. Census Bureau considers any income from all family members, before tax, in making determinations about family poverty levels. (<http://tinyurl.com/6opjr6l>). It should be noted that the constitutional standard for assignment of counsel - "unable to afford counsel" - is not to be equated with indigency or poverty.

²⁹ According to the commentary to the new eligibility criteria "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." (See Criteria and Procedures for Determining Assigned Counsel Eligibility, page 32, FN 81 [emphasis added].)

³⁰ "Substantial equity" is referred to as "the equity is more than 50% of the home's fair market value". (See Criteria and Procedures for Determining Assigned Counsel Eligibility, page 32.)

basic life necessities, shall not be considered as assets unless such assets have a demonstrable monetary value and are readily convertible to cash³¹ without impairing applicants' ability to provide for the reasonable living expenses of themselves and their dependents.

Finally, the reasonable living expenses of the applicant and dependents (including, for example, minors, parents, spouses, or domestic partners) "are to be considered", as well as other debts and financial obligations.³² These include the following: medical expenses, including health insurance, of the applicant or any dependents; mortgage or rent payments needed to maintain the applicant's primary residence; utility payments; food costs; automobile insurance and loan payments needed to maintain an automobile necessary for work, education, medical appointments, and other basic life necessities; employment- or educational-related expenses, such as child or dependent care, transportation costs, clothing and supplies; child support payments made by the applicant to another; minimum monthly credit card payments; educational loan payments; and non-medical expenses associated with age or disability.³³

Administrative Responsibilities Created by the New Eligibility Criteria

The new eligibility criteria impose various, additional administrative responsibilities upon providers. These responsibilities have several components, beginning with the application forms and screening procedures. For example, to complete the new eligibility forms promulgated by ILS, providers are required to determine the cost of retaining counsel in the provider's jurisdiction in each applicant's case. Ostensibly, providers would have to regularly familiarize themselves with the average retainer fee on all levels of offenses within their respective jurisdictions.

Providers are further tasked with determining whether an applicant's home has a "significant" fair market value, which involves determining the median listing prices of homes in the applicant's home town or city.³⁴ Similarly, eligibility screeners would be required to determine whether secondary homes, retirement accounts, and other non-liquid assets of the applicant have "demonstrable monetary value and are readily convertible to cash", a phrase that is not defined within the guidelines.³⁵

³¹ The new eligibility criteria provide no instruction on how providers are to determine "readily convertible to cash".

³² It is unclear why these expenses are to be considered, and potentially excluded from an applicant's income. Presumably an applicant's "after tax" income that exceeds the presumptive eligibility criteria (taking into account dependents) should be sufficient to pay these expenses and also retain counsel (especially when the applicant is charged with a violation or misdemeanor offense).

³³ See ILS "Instructions for Assigned Counsel Application" which may be found here: <http://tinyurl.com/h4rcqkj>

³⁴ See FN 26, supra.

³⁵ See FN 28, supra.

Additionally, the new eligibility criteria impose new requirements on providers to correspond in writing with all applicants seeking assignment of counsel. Applicants deemed eligible must be sent a letter informing them of same.³⁶ While both the “Blackletter” Criteria and Procedures for Determining Assigned Counsel Eligibility and the corresponding commentary are silent as to whether such notification is required of providers, the “Assigned Counsel Application: Instructions” would seem to indicate that such a notice is necessary.³⁷ Applicants who are deemed ineligible must be notified of the finding of ineligibility in writing. An explanation for the finding must be set forth in detail, and the applicant must be provided with a procedure to request that the provider reconsider the determination, a method to appeal to the court, or the option to pursue both.³⁸

In addition to the above, the new eligibility criteria require providers to create and maintain various collections of data that can easily be accessed, transmitted and reviewed. Providers must account for:

1. the number of applicants who apply for assignment of counsel;
2. the number of applicants found eligible;
3. the number of applicants found ineligible, and the reasons for the ineligibility determination;³⁹
4. the number of reconsiderations and appeals requested;
5. the results of these reconsiderations and appeals;
6. the number of reports made pursuant to County Law 722-d regarding the assignment of counsel; and
7. the number of orders issued for partial payment or termination of the assignment of counsel under County Law 722-d.

To comply with the requirements above, a provider would have to implement a procedure to be notified that an applicant appealed his or her finding of ineligibility to the court, and of the court’s finding after hearing such an appeal.

Added administrative responsibilities are also implicated in the methods required for collection of the above data. Data must be maintained in “aggregate form only”, meaning that providers must compile the required information into a

³⁶ See “Sample Notice of Eligibility Recommendation” (<http://tinyurl.com/jomjrwe>). This form includes a notification that an applicant is “financially eligible for an assignment of counsel.”

³⁷ See FN 30. (See final page, final section “Notice to the Applicant.”)

³⁸ See “Blackletter” Criteria and Procedures for Determining Assigned Counsel Eligibility at page 4. The criteria may be found here: <http://tinyurl.com/zl2bssh>

³⁹ How the provider is to aggregate data on the reasons a person is deemed ineligible is not explained. The potential reasons are numerous and varied. Combining disparate data to aggregate the reasons will be challenging. Furthermore, without additional instruction from ILS on what data to obtain and aggregate under this requirement, the collected data from providers will be useless.

summary, and maintain a system whereby data can be kept without the applicants themselves being identifiable in any way. Therefore, the providers cannot simply keep a digital copy of the ineligible applications in their case management system, or maintain redacted hard copies of these applications in some other fashion. Providers would presumably have to create an entirely new database, wherein ineligible applicants would be logged and their data compiled without the applicants' names, addresses, employers, or any other identifying information being recorded. Providers would be mandated to provide this data to ILS upon request.⁴⁰

These administrative requirements will both necessitate greater staff time, and require additional expenditures of office resources. Undoubtedly, this will require additional provider resources to enable compliance.

Caseload Impact of New Eligibility Criteria

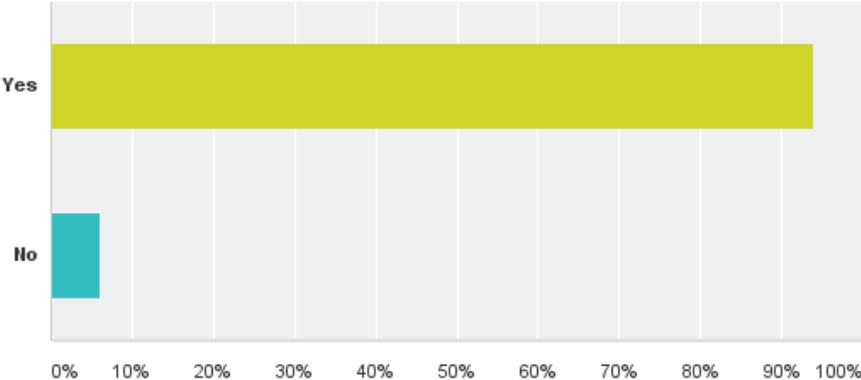
An analysis of the data supplied by responding providers compels the conclusion that the new eligibility criteria will increase the caseloads, by varying degrees, of non-NYC providers in all practice areas. The amount of the potential increase varies among non-NYC providers, and is largely attributable to the current eligibility standards employed in the responding provider's county.

Of the 65 responding providers, 61 believe that the new eligibility criteria will result in an increase of caseloads in their county and their program:

⁴⁰ See "Criteria and Procedures for Determining Assigned Counsel Eligibility" at page 51: "it will be critical to ensure ... that implementation [of the new eligibility criteria] is monitored. Therefore, courts and screening entities must maintain relevant data...Pursuant to Executive Law 832(3)(b), this data shall be made available to ILS upon request."

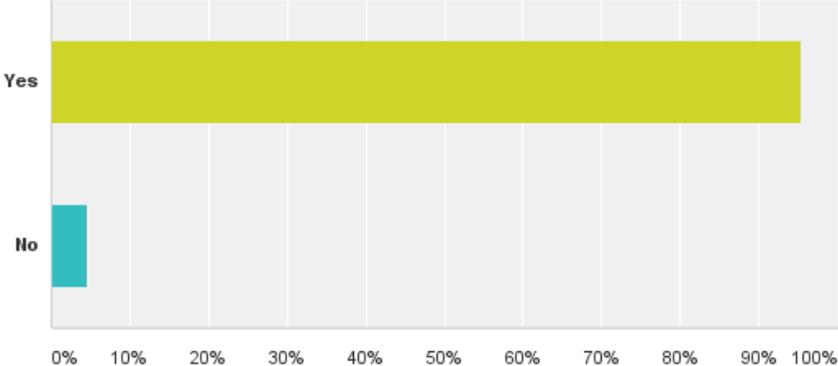
Q12 The following questions concern the impact of the new eligibility guidelines promulgated by the Office of Indigent Legal Services. For the purposes of this survey, please assume the eligibility guidelines will be implemented in the criminal courts, family courts, and appellate courts of New York (outside of New York City). Under the new guidelines, do you anticipate an increase in caseloads in your county?

Answered: 65 Skipped: 0

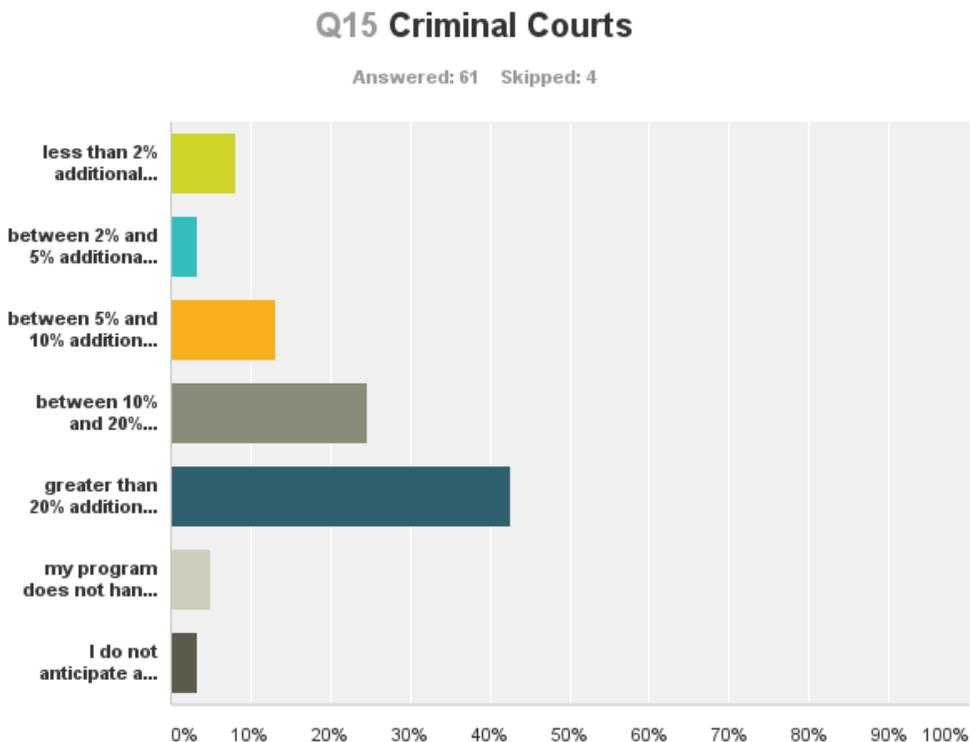


Q13 If yes, do you anticipate an increase in caseloads in your program?

Answered: 64 Skipped: 1



The increase in anticipated caseloads varied. When asked about the potential increase in caseloads handled by their program in the criminal courts, 26 of the 61 responding providers estimated there would be a greater than 20% increase.⁴¹ An additional 15 providers estimated the increase to be between 10% and 20%.⁴²



The anticipated increase in family court caseloads was equally significant. Of the responding providers, 23 estimated that there would be a greater than 20% increase in family court caseloads in their program.⁴³ An additional 12 providers estimated the increase to be between 10% and 20%.⁴⁴

⁴¹ 4 responding providers did not answer this question.

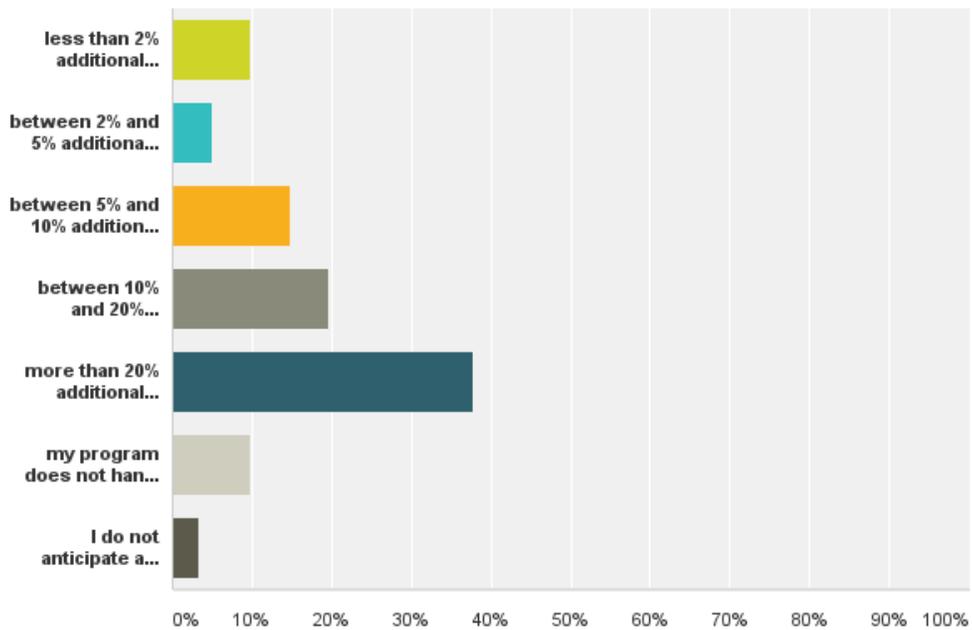
⁴² 8 responding providers estimated the increase to be between 5% and 10%; 7 providers believed the increase to be less than 5%; only 2 responding providers believed there would be no increase in criminal caseloads in their program.

⁴³ Although not captured by the data collected by the CDANY survey, a number of family court providers believed that the number of applicants for indigent defense services will increase once the new eligibility criteria are widely disseminated. This will likely further increase the number of persons eligible for representation in family court.

⁴⁴ 9 responding providers estimated the increase to be between 5% and 10%; 9 providers believed the increase to be less than 5%; only 2 responding providers believed there would be no increase in family court caseloads in their program.

Q16 Family Court

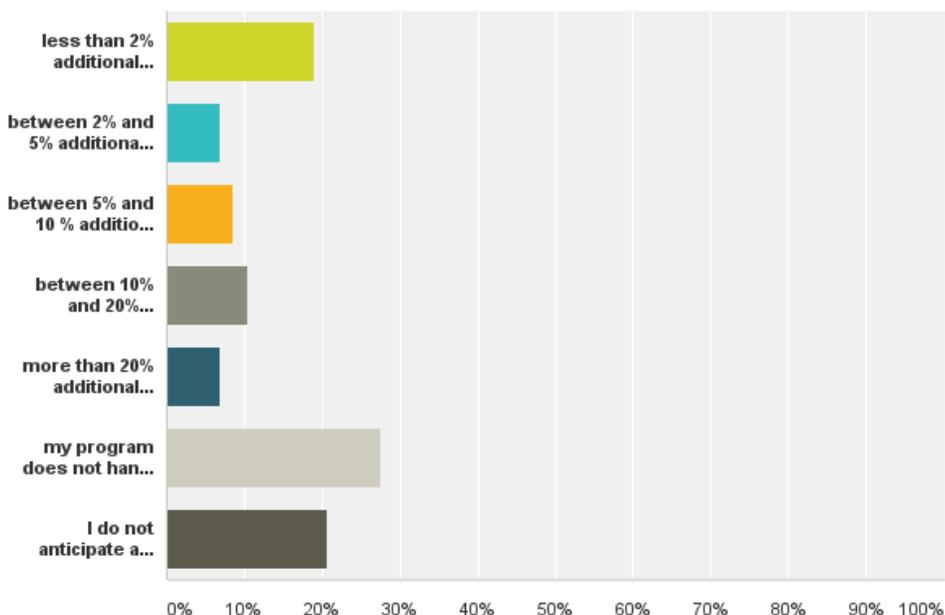
Answered: 61 Skipped: 4



The estimated increase in appellate court caseloads was less acute. Only 4 responding providers (out of the 42 responding providers that handled appeals) believed their appellate caseloads would increase by more than 20%. 6 responding providers believed the increase would be between 10% and 20%. The majority believed there would be no increase (12 responding providers) or would be less than 2% (11 providers).

Q17 Appellate

Answered: 58 Skipped: 7



The anticipated impact of the potential increase in caseloads on non-NYC programs, most of which are operating under caseloads well above national limits, cannot be easily ignored. As noted by the ILS website:

Excessive caseloads impair the quality of legal representation that indigent legal service lawyers can provide. Indeed, it is widely and properly recognized that maintaining reasonable public defender and assigned counsel caseloads is the sine qua non of effective representation. See *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel* (The Constitution Project, 2009) at 192, Recommendation 6; and *Securing Reasonable Caseloads: Ethics and Law in Public Defense* (American Bar Association, 2011) at 200 (“caseload limits...are the very bedrock of quality control”).⁴⁵

It cannot be disputed that the increase in caseloads that will likely result from the new eligibility criteria will decrease the quality of representation being currently provided by non-NYC providers, unless there is a corresponding increase in funding to the providers from either the State or counties.

⁴⁵ <https://www.ils.ny.gov/content/upstate-quality-improvement-and-caseload-reduction>

Financial Impact of New Eligibility Criteria

Responding providers were asked to provide an estimate of the additional funding that would be necessary in order to provide competent representation to the additional clients anticipated under the new eligibility criteria.⁴⁶ The majority of the responding providers estimated a dollar amount (43). The aggregate of the estimated amounts totaled \$15,775,000.

Some providers gave an estimate of the increase as a percentage increase in their overall budget. Of these, 2 providers estimated an increase of 25%; 2 providers estimated an increase of 50%; 1 provider estimated a 5% increase; 1 provider estimated a 10-20% increase.

Only 3 providers believed they would need no additional resources to comply with the new eligibility criteria. 11 providers could not quantify the potential increase in resources required.

Additionally, providers were asked to estimate any potential costs associated with complying with the administrative requirements of the new eligibility criteria.⁴⁷ The responses established that the vast majority of providers believed they would need additional funding to comply with these requirements. 44 providers believed they would need additional resources.⁴⁸ Only 10 providers believed they would not need additional resources to comply with the new administrative requirements. 10 providers were uncertain.

Importantly, when asked if their county would provide any additional funding necessary to competently handle any increased caseloads, the significant majority of responding providers answered that their county would refuse to provide any additional funding. 43 responding providers indicated that their county would not provide additional funding. 11 providers believed that their county would provide additional funding. 8 providers were unsure.⁴⁹

Non-NYC counties are fiscally stressed. Counties are still recovering from the recession. Non-NYC sales tax revenue has been largely flat,⁵⁰ and with the

⁴⁶ If a provider provided a dollar range (e.g., \$300,000 to \$400,000) the lower figure was used.

⁴⁷ The new eligibility criteria impose additional recordkeeping obligations on providers, as well as additional notifications to be provided to applicants should their request for assignment of counsel be denied. Those new requirements may be found in Criteria and Procedures for Determining Assigned Counsel Eligibility (Full Report), page 47 et. seq. The Report may be found here: <http://tinyurl.com/gtazpha>

⁴⁸ The amounts needed by providers varied greatly, and largely depended upon their existing caseloads and how eligibility determinations were made. Most providers who indicated a need for increased resources to comply with the administrative requirements believed they would need additional support staff.

⁴⁹ 2 providers did not answer the question. 1 provider believed the county would provide partial funding.

⁵⁰ Of the 57 counties outside New York, 30 exhibited a decline in sales tax revenue from 2014 to 2015. (<http://osc.state.ny.us/localgov/pubs/research/salestaxcollections0216.pdf>)

implementation of the “tax cap”,⁵¹ non-NYC counties are unable to fund large increases in funding for indigent defense. As but a single example of non-NYC counties’ distress at any increases in State mandates, several counties are loudly objecting to the relatively insignificant increase in District Attorney salaries (\$30,000) required by the State, but unfunded.⁵²

Recommendations

The results of the survey compel the conclusion that the significant majority of non-NYC providers believe that the new eligibility criteria will result in increased caseloads for their programs that would require additional resources in order for the providers to maintain existing quality.⁵³ However, the significant majority of responding providers believed they would not receive these additional resources from their county.

“The purpose of the Office of Indigent Legal Services ("Office") is ‘to monitor, study and make efforts to **improve the quality of services** provided pursuant to article eighteen-B of the county law.’ Executive Law Article 30, Section 832(1).”⁵⁴ Although the new eligibility criteria address a significant issue in the provision of uniform indigent defense throughout New York State, their implementation – if the anticipated caseload increases materialize – will **reduce the quality of indigent defense** should there be no corresponding increase in the resources allocated to non-NYC providers.

Based upon the serious concerns noted above, CDANY makes the following recommendations:

1. The implementation of the new eligibility criteria should be delayed until April 1, 2017.
2. In the interim, ILS (and other interested parties) should study the potential impact of the new eligibility criteria on caseloads in all practice areas.
3. Once the impact of the new eligibility criteria on caseloads can be accurately determined, ILS (and other interested parties)

⁵¹ Counties are likely to see the tax cap limited to less than 1% growth in 2016 and 2017. (<http://www.osc.state.ny.us/localgov/pubs/research/snapshot/taxcaptightens0715.pdf>)

⁵² See: “County officials worry indigent defense eligibility, DA salary increases could cause financial stress” Watertown Daily Times, April 21, 2016 (<http://tinyurl.com/jos9vug>); “Genesee County legislators object to state-mandated raise for DAs, change in indigent defense eligibility” Buffalo News, April 13, 2016 (<http://tinyurl.com/gm9gwge>); “Livingston County supervisors seek support for budget amendment to pay DA salary increase”, The Daily News, dated April 14, 2016 (<http://tinyurl.com/zgbueco>); See also, “Publicly funded defense eligibility increases in Cayuga County, becomes uniform across state” The Citizen (Auburnpub.com), April 20, 2016 (<http://tinyurl.com/j42pp8a>).

⁵³ In a significant number of counties, the provider believes the potential increase to be significant. 41 providers anticipated the increase in their criminal caseload would be greater than 10%.

⁵⁴ <https://www.ils.ny.gov/> [emphasis added]

should determine the amount of resources necessary to implement the eligibility criteria without a reduction in the quality of indigent defense services. The amount of the resources should include funding needed by providers to comply with the administrative requirements of the new eligibility criteria.

4. ILS should then obtain the State resources (in the State FY 2017-2018 budget) necessary to assist providers in implementing the new eligibility criteria so that there is no reduction in the quality of representation provided to the clients of non-NYC providers.⁵⁵
5. Should ILS fail to obtain the necessary State funding the new eligibility criteria should not be implemented, or should be advisory only.
6. As soon as possible, ILS should form a working group of ILS staff, representatives of OCA, and representatives of non-NYC providers to assist in resolving provider questions on the application of the eligibility criteria to their programs.

CDANY acknowledges that the eligibility criteria are the result of significant effort on behalf of ILS, and are generally well-reasoned. Furthermore, if supported by sufficient State funding, the implementation of the eligibility criteria will resolve longstanding issues leading to deprivation of the right to counsel throughout New York. Should the State funding materialize, CDANY and its member providers will enthusiastically support the implementation of the new eligibility criteria and the expansion of indigent defense services.

⁵⁵ CDANY submitted a written submission, dated August 26, 2015, to ILS noting that the State must assume the costs associated with implementing the new eligibility criteria.