

New York State Defenders Association

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MEMORANDUM

To: New York State Chief Defenders
From: Susan C. Bryant, Executive Director
Date: February 9, 2025
Re: Making an Informed Eligibility Determination

The constitutional and statutory standard for determining eligibility is “financially unable to afford counsel,”¹ not indigency. The Court of Appeals has ruled that courts must “make a sufficient inquiry into the defendant’s ability to engage a lawyer.”² Income measures, such as a percentage of the poverty guidelines, may be a useful shorthand for making an initial eligibility finding, but the failure to meet income guidelines alone cannot be a basis to deny the appointment of counsel.

According to the New York State Office of Indigent Legal Services (ILS) 2021 [Standards for Determining Assigned Counsel Eligibility](#),³ applicants are presumptively eligible for assignment of counsel under County Law article 18-B (including in criminal and family court proceedings) if their net income is at or below 250% of the Federal Poverty Guidelines (FPG). Again, exceeding income guidelines is not determinative of ineligibility, but must be considered with other factors, including: an individual’s assets and debts; seriousness of the charge(s), complexity of the case, and anticipated need for other representation expenses (such as investigative and expert services); and actual cost of private counsel in the relevant jurisdiction for the type of family court proceeding or category of crime charged. These and other factors are set forth in ILS’s guidelines.

Effective September 28, 2022, the Uniform Rules for the Family Court have been amended to add a rule governing [Financial Eligibility for Publicly Funded Counsel](#) (22 NYCRR 205.19). Public defense providers that represent clients in family court should familiarize themselves with this court rule, including the provisions regarding presumptive eligibility, exclusions from assets, and the process for determining eligibility. The rule directs “[t]imely access to counsel,” which includes that “[c]ounsel 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.”

Below is a chart with 250% of FPG, as well as 350% of FPG and, for reference only, the Legal Services Corporation (LSC) income guidelines, which are used for some civil legal services program eligibility determinations.

| Family Size | Annual Income by % of Federal Poverty Guidelines* (Effective 1/15/2025) | | |
|--------------------|---|---|-----------|
| | 125% (LSC- civil legal services) | 250% Presumptive eligibility: ILS Standards & Rule 205.19 | 350% |
| 1 | \$19,563 | \$39,125 | \$54,775 |
| 2 | \$26,438 | \$52,875 | \$74,025 |
| 3 | \$33,313 | \$66,625 | \$93,275 |
| 4 | \$40,188 | \$80,375 | \$112,525 |
| 5 | \$47,063 | \$94,125 | \$131,775 |
| 6 | \$53,938 | \$107,875 | \$151,025 |
| 7 | \$60,813 | \$121,625 | \$170,275 |
| 8 | \$67,688 | \$135,375 | \$189,525 |
| Each Add'l. Person | \$6,875 | \$13,750 | \$19,250 |

*These guidelines are based upon the current official poverty guidelines by family size as determined by the Department of Health and Human Services (available at <https://aspe.hhs.gov/poverty-guidelines>).

¹ See Criminal Procedure Law Articles 170 and 180; County Law article 18-B.

² *People v. McKiernan*, 84 NY2d 915 (1994).

³ These guidelines and related documents, available at <https://www.ils.ny.gov/topics/11/eligibility-representation>, were released pursuant to ILS’s statutory authority, see Executive Law § 832(3)(c), and the settlement agreement in *Hurrell-Harring v. State of New York* (Supreme Ct., Albany Co.). Unless otherwise specified, the 2021 ILS Standards apply to all proceedings under County Law article 18-B.