

**NEW YORK STATE OFFICE OF INDIGENT LEGAL SERVICES
PUBLIC HEARINGS ON ELIGIBILITY FOR
ASSIGNMENT OF COUNSEL**

**Prepared for the
10th Judicial District Public Hearing**

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**New York State Defenders Association Statement on
*Criteria and Procedures for Determining Eligibility in New York State***

**New York State Defenders Association Statement on
*Assigned Counsel Eligibility of Minors in Criminal Court: No Parental Liability***



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New York State Defenders Association Statement on the Criteria and Procedures for Determining Eligibility in New York State

Introduction

On March 11, 2015, a settlement agreement between the State of New York and the plaintiff class in *Hurrell-Harring v. State of New York* was approved by the Albany County Supreme Court. The agreement vests the New York State Office of Indigent Legal Services (ILS) with the responsibility for developing and issuing criteria and procedures to guide courts in counties located outside of New York City¹ in determining whether a person is unable to afford counsel and eligible for mandated representation. ILS is conducting 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. In light of the ILS hearings and in an effort to assist ILS in issuing criteria and procedures on eligibility determinations, the New York State Defenders Association (NYSDA), based on its many years studying eligibility practices across the state, makes the following examination of the issue.

I. Scope of the Eligibility Problem

As early as 1994, NYSDA documented in a statewide study² the improper practices and abuses in determining eligibility for appointed counsel. Then, as now, individuals are wrongfully denied their constitutional right to counsel due to financial eligibility determinations that are based on improper standards or the consideration of inappropriate factors.³ These abuses prompted the parties to the *Hurrell-Harring* settlement to direct ILS to promulgate financial eligibility criteria and procedures. Applying uniform and legal eligibility standards will stop the deprivation of counsel to individuals who are unable to afford lawyers that currently occurs, resulting in more individuals being found eligible. Defender programs will have more clients and will need more resources to represent them. **The State should provide additional funding to cover the increased costs to counties that will result from having defender systems function with legally appropriate eligibility standards.**

¹ Presumably, since Executive Law § 832(3)(c) requires that ILS “establish[] criteria and procedures to guide courts in determining whether a person is eligible for [mandated] representation,” we can expect that the criteria developed for the five counties and those outside the City of New York will also be made applicable within the city of New York and to mandated representation in Family Court, which was not at issue in *Hurrell-Harring*.

² NYSDA, *Determining Eligibility for Appointed Counsel in New York State: A Report for the Public Defense Backup Center* (1994) [*Determining Eligibility for Appointed Counsel in NYS*].

³ In addition to inappropriate factors discussed within, many courts and public defense programs currently use the Legal Services Corporation (LSC) income guideline of 125% of the Federal Poverty Guidelines (FPG) improperly as an income cap. Others use different percentages of the FPG, such as 133%, 187%, 200%, or 350%. As discussed below, 125% is too low for presumptive eligibility in New York. In counties where the 2015 LSC guideline is used as a cap, a single individual making more than \$14,713 would be ineligible for counsel.

II. Applying the Correct Financial Eligibility Standard

The constitutional and statutory standard for determining eligibility is financial inability to afford counsel, not indigency.⁴ County Law § 722 uses the phrase “financially unable to obtain counsel” as the standard for court appointment of a lawyer. The statute mirrors the federal standard contained in 18 U.S.C. § 3006a, which requires appointment for those who are “financially unable to obtain adequate representation.”⁵ The New York Court of Appeals in *People v. Witek*, 15 N.Y.2d 392 (1965), the watershed case which gave rise to the establishment of County Law Article 18-B, referred to those who had “no money to pay attorneys.” The standard under the New York State Constitution, Article I, section 6, and the United States Constitution, Amendments VI and XIV is “inability to pay.” The use of the word “indigent” has done much damage in this State, where counties have mandates continuously imposed and resources continually withdrawn. As a result, local officials often confuse the constitutional right to counsel with “entitlement programs” and also improperly equate eligibility for federal civil legal service programs with the constitutional right to appointed representation.

III. ILS Obligation to Promulgate Eligibility Determination Criteria and Procedures Under the *Hurrell-Harring* Settlement and the Executive Law

As noted above, ILS has the obligation to establish criteria and procedures to guide courts in determining whether a person is eligible for mandated legal representation pursuant to the settlement in *Hurrell-Harring v. State of New York* and Executive Law § 832(3)(c).

IV. *Hurrell-Harring* Settlement Eligibility Requirements

The *Hurrell-Harring* settlement sets forth a number of agreed-upon and now required criteria and procedures for eligibility determinations that NYSDA unequivocally supports and has recommended since its 1994 statewide study, *Determining Eligibility for Appointed Counsel in NYS*:

- eligibility determinations shall be made pursuant to written criteria;
- confidentiality shall be maintained for all information submitted for purposes of assessing eligibility;
- ability to post bond [or bail] shall not be considered sufficient, standing alone, to deny eligibility⁶;
- eligibility determinations shall take into account the actual cost of retaining a private attorney in the relevant jurisdiction for the category of crime charged;

⁴ The United States Supreme Court cases establishing the right to counsel use language that extends beyond the concept of indigence. See *Powell v. Alabama*, 287 U.S. 45, 60 (1932); *Betts v. Brady*, 316 U.S. 455, 456-457 (1941) (“unable to employ counsel”); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (“too poor to hire a lawyer”); *Argersinger v. Hamlin*, 407 U.S. 25, 39 (1972) (“unable to retain counsel on his own”).

⁵ Significantly, United States Attorney General Robert Kennedy noted in 1963 regarding S.1057, which established 18 U.S.C. § 3006a, “S.1057 studiously avoids the term ‘indigent.’” Hearings on S.63 and S.1057 before the Senate Comm. on the Judiciary, 88th Cong. 1st Sess. 11 (1963).

⁶ The posting of bond or bail should not be considered at all when determining eligibility. Individuals should not be forced to choose between pre-trial freedom and getting an assigned lawyer.

- 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
- 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.⁷

V. Policy Questions Regarding Eligibility Posed in the *Hurrell-Harring* Settlement

In addition to the criteria and procedures the settlement agreement explicitly requires, ILS must consider the following policy questions when setting eligibility guidelines:

A. “Whether screening for eligibility should be performed by the primary provider of Mandated Representation in the county.”

NYSDA Position: The authority to make eligibility determinations should be delegated to and performed by the primary provider of mandated representation.

Rationale

As affirmed in our 1994 study, the obligation to determine financial eligibility for counsel is a judicial function. “This eligibility determination, which so directly affects access to legal representation, and is therefore of critical constitutional import, is, under current law, a responsibility expressly reserved to the judiciary. See N.Y. County Law § 722 (McKinney 1991); *Matter of Stream v. Beisheim*, 34 A.D.2d 329, 333 (2d Dept. 1970); *People v. Wheat*, 80 Misc. 2d 844 (Suffolk County Ct. 1975). The appointment of counsel is made ‘in the exercise of the trial court’s inherent power and in the discharge of its constitutional and statutory duty to furnish counsel to every indigent defendant charged with a crime ...’ *Matter of Stream v. Beisheim*, 34 A.D.2d at 333 (2d Dept. 1970).” *Determining Eligibility for Appointed Counsel in NYS*, at 4; see also *People v. McKiernan*, 84 N.Y.2d 915 (1994).

We recommend that the judicial responsibility for determining eligibility be delegated to the primary provider of public defense representation in the first instance. That way, as with clients retaining private counsel, discussions of financial eligibility could take place in a confidential setting rather than in open court⁸ and would be protected by the attorney-client privilege. Moreover, much of the information defense counsel would solicit from a client for the bail application overlaps with an inquiry as to financial eligibility – employment status, number of dependents, residence, etc. Also, if the client is facing charges and proceedings in several courts within the county, an initial eligibility determination by defense counsel would obviate the need for determinations by each court. While the duty to make eligibility determinations would be an additional burden on some defender offices⁹ and raises the specter that some offices would try to impose restrictive standards as a means to manage the office’s caseload or conserve limited resources,¹⁰ the great majority, if not all, of

⁷ As discussed below, ownership of an automobile that is necessary to maintain school enrollment or for transportation to medical care for the applicant or the applicant’s dependents should not be considered when determining eligibility.

⁸ This is in line with the settlement requirement that “confidentiality ... be maintained for all information submitted for purposes of assessing eligibility.”

⁹ It should be noted that many defender offices are already responsible for eligibility determinations.

¹⁰ See *The Status of Indigent Defense in Schuyler County* (NAACP Legal Defense Fund 2003) (noting that eligibility determinations were used to limit the number of clients that the office would represent). As noted above, defender

defenders are committed to providing representation to all those who need and cannot afford it and, on balance we believe that defenders will do more to safeguard the rights of potential clients than others would.

We also expect that eligibility determinations by public defense providers would facilitate the early entry of counsel and foster active representation in the early stages of the case, which will ultimately benefit clients and the system. While significant strides have recently been made to ensure that counsel is present at first appearance, this right would be rendered illusory if an eligibility determination process delays assignment and prompt engagement of defense counsel.

Because fiscal and staffing pressures on defenders can create conflicts of interest when providers are responsible for determining eligibility, some have recommended that screening be done by a third party. *See* Brennan Center for Justice, *Eligible for Justice: Guidelines for Appointing Defense Counsel* (2008) [*Brennan Center Report*] (recommending that screening be done “by someone who does not have a conflict of interest”). Some defenders also believe that, for the moment, it is better for courts or third parties to decide eligibility, thereby relieving them of the conflict and outside pressures they might otherwise face. However, those who have urged using third-party entities as screeners have overlooked the conflicts that manifest when these entities actually determine eligibility in our county-based defender system, and the impossibility, at present, of finding a truly independent entity, one that is not somehow affiliated with county government and does not have conflicting fiscal interests. Courts, too, are often conflicted despite the obligation they have long possessed to assure the right to counsel. We expect that, should the data collected by ILS show that improper practices are being used, ILS will re-examine the eligibility criteria and procedures and make any necessary changes to ensure that those who cannot afford counsel are found eligible.

B. “Whether persons who receive public benefits, cannot post bond, reside in correctional or mental health facilities, or have incomes below a fixed multiple of federal poverty guidelines should be deemed presumed eligible and be represented by public defense counsel until that representation is waived or a determination is made that they are able to afford private counsel.”

NYSDA Position: Yes

Rationale

“Substantial hardship” and resulting eligibility should be presumed for prospective clients who: receive public assistance, including but not limited to assistance provided through Temporary Assistance programs, the Supplemental Nutrition Assistance Program, Supplemental Security Income, Medicaid, and similar programs; reside in public housing; are currently detained in or serving a sentence in a correctional facility; are housed in a mental health facility; or earn income in an amount less than 250 percent of the Federal Poverty Guidelines (FPG), or a higher percentage/amount where local economic factors so require.¹¹

offices must not be placed in the untenable position of weighing budget concerns or caseload burdens when making constitutionally informed eligibility determinations.

¹¹ Although not referred to in the settlement questions, it is essential that ILS include within its standards an additional eligibility presumption. Appellate courts should presumptively continue a defendant’s status as a poor person when that status has been recognized in the trial court and assign counsel for the appeal after notice of appeal has been filed, similar to the practice used for Family Court appeals.

It has been our experience that the vast majority of people coming before the criminal and family courts cannot afford to retain their own lawyers.¹² As pointed out in the *Brennan Center Report*, this should give rise to easily applied standards of presumptive eligibility. That report makes clear: “Given the poverty of the vast majority of the prospective client population, most defendants can quickly and appropriately be deemed eligible simply because their income is beneath the level defined as poor by the federal poverty guidelines.... The best practice – which is followed in many jurisdictions – is to use a multiple of the guidelines in determining eligibility. Jurisdictions with particularly high costs of counsel or of living should use even higher multiples.” [Footnote omitted.]¹³

The State of Nevada has generally embraced our view of what should be done. In a January 4, 2008 order, the Nevada Supreme Court stated, in pertinent part:

“Substantial hardship” is presumptively determined to include all defendants who receive public assistance, such as Food Stamps, Temporary Assistance for Needy Families, Medicaid, Disability Insurance, reside in public housing, or earn less than 200 percent of the Federal Poverty Guideline.¹⁴ A defendant is presumed to have a substantial hardship if he or she is currently serving a sentence in a correctional institution or housed in a mental health facility.

C. “Whether (a) non-liquid assets and (b) income and assets of family members should be considered available for purposes of determining eligibility.”

NYSDA Position: (a) Yes and (b) No

Rationale

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. Such assets include: real estate other than a residence occupied by the prospective client or persons who are dependents of the prospective client; automobiles other than those necessary to maintain

¹² For example, in 2014, of the public defense programs that reported on the number of cases where representation was declined, an average of 2.5% of the clients referred for representation were declined for non-indigency. *See* 2014 UCS-195 reports (these reports are filed pursuant to County Law § 722-f).

¹³ The *Brennan Center Report* cites a 2001 study that found that “29% of families with incomes under 200% of the poverty level experience critical hardships, such as lack of food, medical care, housing, or basic utilities. Seventy-four percent experience serious hardships, such as worrying about having enough food, being forced to rely on inadequate medical care (such as emergency rooms) or child care. Heather Boushey et al., Economic Policy Institute, *Hardships in America: The Real Story of Working Families* 2, 4, 28 (2001).”

¹⁴ Examination of the New York Self Sufficiency Standard shows that New York’s percentage threshold should be higher than both 125% and 200% of the FPG, which organizations funded by the Legal Services Corporation usually use to determine eligibility for civil legal services. While 250% appears to work for single adults charged in criminal or family court, for parents with children even 250% would represent a bare bones budget and a higher percentage would be required. *See* New York State Self Sufficiency Standard Steering Committee, *The Self Sufficiency Standard for New York State* (2010). In New York City, it is our understanding that the current presumptive eligibility guidelines are 250% for misdemeanors and 350% for felonies; those percentages were established in 1991 and they may no longer be sufficient. Further discussion of the FPG appears below.

employment or school enrollment or for transportation to medical care for the prospective client or persons dependent on the prospective client;¹⁵ and luxury items.

Child support received for any child for whom the prospective client is currently responsible, including any child whose education costs the prospective client is paying in whole or in part, should not be considered.

Since the constitutional guarantee of counsel is a personal right,¹⁶ 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.¹⁷ 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. The rulings that uphold recovery of attorney's fees from parents for the representation of a minor charged with a criminal offense are unsound and promote unlawful policy and practice. See *attached Assigned Counsel Eligibility of Minors in Criminal Court: No Parental Liability* (NYSDA July 8, 2015).

D. "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."

NYSDA Position: No

Rationale

Non-liquid assets, such as a home used as a primary residence, an automobile necessary to sustain employment, school enrollment, or medical care, and reasonable household furnishings, should be excluded from the net asset inquiry.¹⁸

¹⁵ As noted above, the settlement requires 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." We recommend that this standard be expanded to include an automobile that the prospective client or a dependent needs for school or transportation to medical care. Further discussion of a primary residence and automobiles appears below.

¹⁶ *Fullan v. Commissioner of Corrections of State of N.Y.*, 891 F.2d 1007, cert denied 496 U.S. 942; *People v. Ulloa*, 1 A.D.3d 468 (2d Dept. 2003) ("A defendant's status as an indigent is not altered merely because his or her family and friends retain private counsel to represent him or her at trial" [citations omitted].)

¹⁷ Section 412 of the Family Court Act makes clear that "[a] married person is chargeable with the support of his or her spouse and, if possessed of sufficient means or able to earn such means, may be required to pay for his or her support a fair and reasonable sum, as the court may determine, having due regard to the circumstances of the respective parties." This support standard is the common law traditional obligation to provide spousal "necessaries." Mandated legal representation provided under the County Law is not a "necessary." There have been occasions in New York case law where this principle has been extended to having one party pay the other party's counsel primarily in contested domestic relations matters. Nothing about the § 412 obligation however indemnifies the county for its expenditure under County Law § 722-e. See Family Court Act § 262 ("[A]ny order for the assignment of counsel issued under [FCA § 262] shall be implemented as provided in article eighteen-B of the county law."). Nor does it authorize a cause of action by the state or local government to recover the legal fees incurred while defending a spouse on criminal or family court charges.

¹⁸ See *Determining Eligibility for Appointed Counsel in NYS*, at 10.

E. “Whether debts and other financial obligations should be considered in determining eligibility.”

NYSDA Position: Yes

Rationale

Debts and other financial obligations of the prospective client should be carefully considered in determining eligibility,¹⁹ and their value should be subtracted as part of the calculus. *See Brennan Center Report*, at 12-13, 15, 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.”) *See also State Bar 2015 Revised Standards for Providing Mandated Representation*, Standard D-4 (addressing partial payment, the Standard refers to considering “all aspects of the person’s family circumstances, including but not limited to ... indebtedness.”)

F. “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.”

NYSDA Position: Yes

Rationale

There should be a process for appealing any denial of financial eligibility. A denial of eligibility must be made in writing and must include the basis for the denial. Any person denied counsel must receive notice of the right to appeal and the appeal process. The appeal process should ensure prompt resolution; when denial of eligibility is upheld, explanation of the denial must be confidential and made part of a sealed record relating to the matter for which counsel was sought.

VI. Additional Considerations on Eligibility Determinations (from ILS Eligibility Hearing Notice)

A. The process and/or method for disseminating information regarding the criteria for determining eligibility.

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. They should be detailed enough to make the eligibility process transparent, guide those who make eligibility determinations, and inform and aid those who rely on them to be applied fairly on their behalf. All criteria and procedures should be made publicly available by the courts in which litigants who may be eligible for mandated representation appear and by public defense programs. Instructions concerning criteria and procedures should be presented in a manner and language that each prospective client can understand. 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.

¹⁹ Income guidelines should never be employed as cut-offs, but should be considered with the debts and other expenses of the applicant. *Determining Eligibility for Appointed Counsel in NYS*, at 20.

B. The advantages and disadvantages of proposing uniform and comprehensive criteria and/or guidelines to determine eligibility.

As noted above, NYSDA's 1994 study described the random, poorly designed disparate eligibility determination procedures being used at the time around New York. NYSDA has every reason to believe that through its present inquiry, ILS will find that this state of affairs continues to this day. Nothing has changed in the last twenty years except the settlement's demand that "criteria and procedures to guide courts in counties outside of New York City in determining whether a person is eligible for Mandated Representation" be created.

Nearly four decades of experience providing backup services to public defense attorneys and offices, providing technical assistance to counties, and fielding complaints from clients denied access to counsel in violation of their constitutional right to it, lead us to conclude that despite the difficulties of promulgating constitutionally and legally based standards in an underfunded county-based system, uniform and comprehensive criteria and statewide standards to determine eligibility are required.

C. Any related social and economic benefits and/or consequences related to the impact of standardizing eligibility determinations.

Standardized criteria and procedures for determining financial eligibility for the appointment of counsel will bring a variety of benefits. These guidelines can eliminate the substantial amount of idiosyncratic, divergent, and improper practices that are depriving individuals of their right to appointed counsel. The eligibility standards would send a clear signal to defenders, courts, and counties as to what is required, how decision-making should proceed, the basis for the standards and the method and purpose for their implementation. For people of good faith, the standards will lay to rest many of the problems identified. They can also provide a means by which ILS can collect data on eligibility applications and rates of acceptance and denials across the counties.

We expect that a consequence of standardizing eligibility determinations and making them coextensive with constitutional and statutory mandates will increase the cost of implementing the right to counsel. **ILS, defenders, judges, county officials, the private bar, and the client community must join forces to demand the adequate financing of defender systems appropriately finding eligible those who legally deserve the appointment of counsel. And all three branches of New York State government must become fully responsive to this need, funding it appropriately.**²⁰

²⁰ In 2015, Assemblywoman Patricia Fahy and twenty five other members of the Assembly introduced A.6202-A, which would amend County Law § 722-e to require state reimbursement for county public defense expenditures. This bill would incrementally lead within three years to the State reimbursement of all county public defense expenditures. This bill can provide mandate relief and fund improvements in the 57 counties not covered by the *Hurrell-Harring* settlement.

VII. Other considerations

A. Using Income Guidelines as a Cap on Eligibility.

Income measures, such as a percentage of the FPG, as discussed above, can be used to find someone presumptively eligible for counsel, but exceeding an income guideline alone cannot be a basis to deny the appointment of counsel.²¹ Meeting or exceeding income guidelines is not determinative of eligibility, but must be considered with other factors. In addition to income, other relevant information to determine an individual's ability to afford counsel should be considered, including: an individual's assets and debts; the seriousness of the charge(s); the complexity of the case; and the cost of private representation in the relevant jurisdiction.

B. Partial payment and illegal cost recovery.

Courts read County Law § 722-d too expansively, fashioning co-payment and sliding fee schemes which are not authorized by law. The standards should make clear that a strict reading of the law is mandatory.

Nothing in § 722-d authorizes a court to prospectively order partial payment of assigned counsel fees during the initial eligibility determination process. At most, the statute provides that if, at some point during the course of representation, appointed counsel determines that the assigned representation should be terminated based on the represented individual's newly discovered ability to hire counsel, then under County Law § 722-d, counsel *may* seek to withdraw or ask the court to order reimbursement for services rendered. Section 722-d does not authorize courts to act *sua sponte* with regard to payment for legal services of assigned counsel. See *Matter of Legal Aid Society v. Samenga*, 39 A.D.2d 912 (2d Dept. 1967).²²

Other illegal cost recovery practices have involved the use of recoupment schemes. These too should be prohibited by the ILS standards, perhaps by a simple citation to 1985 N.Y. Op. (Inf.) Att'y Gen. 78, which concludes that counties may not implement a plan requiring individuals to repay the cost of counsel if they "subsequently acquire[] the means to bear the costs of the legal defense."

C. Verification of financial status may undermine timely appointment of counsel.

As the *Brennan Center Report* made clear, most people coming before both the criminal and family courts require the appointment of counsel and can be deemed eligible quickly through the use of reasonable and fiscally prudent presumptive categories. Lengthy and onerous eligibility practices,

²¹ Problems with using the LSC guidelines as an income cap are exacerbated when the guidelines are misapplied. For example, non-cash benefits, such as food stamps and housing subsidies, are sometimes counted as income, even though LSC regulations specifically exclude them.

²² The reason that this procedure is left in the hands of the attorney is to assure that the client will not be prejudiced or placed at a strategic disadvantage under the partial payment scheme. Considerations which counsel must take into account before making the application include the 6th Amendment concerns associated with length of preparation, complexity of the case, current counsel's unique command of the facts, capacity of another attorney to competently replace present counsel in the time allowed, the nature of the rapport and depth of the attorney client relationship which already exists, inroads painfully made at overcoming interpersonal difficulties with the client, and any other concern which affects a client's right to counsel which might be undermined by a misapplication of 722-d.

which in other contexts derive their ability for “governmental savings” by discouraging applicants seeking services,²³ 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. Further a national study on eligibility conducted by the U.S. Department of Justice in 1986 concluded that verification of all financial information in each application for appointed counsel wastes scarce resources and causes unnecessary delay in the proceedings.²⁴ The study recommended that eligibility information be verified only when financial data is missing or when there are legitimate grounds to suspect it is inaccurate. A more recent study has made similar findings on the cost-effectiveness of verification procedures.²⁵ *See also Brennan Center Report*, at 21.

D. Data collection and reporting on eligibility applications, denials and appeals.

Defender offices and the courts (reviewing appeals from denials) should maintain all confidential financial eligibility applications and report to ILS, at least annually, the number of applications for appointed counsel, denials of eligibility, appeals from denials, and results of such appeals. In addition to the public policy benefits that arise from collecting and analyzing such data, including evaluating the effectiveness of eligibility practices, Executive Law § 832(3)(b)(viii) requires that ILS collect eligibility determination data: ILS has the responsibility to collect and receive information and data regarding, among other things, “the number of persons considered for and applicants denied such services, the reasons for the denials, and the results of any review of such denials, including the number of orders issued pursuant to section seven hundred twenty-two-d of the county law.”

Conclusion

New York State has reached an important moment in its history. The Judiciary, the Executive, and the Legislature along with defenders and the organized bar are keenly alert to the possibility of real improvements being made to our public defense system. And now for the first time, New York State will soon have criteria and procedures for determining eligibility for mandated representation. This is a critical moment for clients, many of whom have needlessly suffered from a lack of clear standards designed to protect their right to counsel.

²³ *See generally* Michael Lipsky, *Street Level Bureaucracy: Dilemmas of the Individual in Public Services* (30th Anniversary expanded ed. 2010).

²⁴ National Institute of Justice, *Containing the Costs of Indigent Defense Programs: Eligibility Screening and Cost Recovery Procedures* (September 1986).

²⁵ “The project’s verification component in its current configuration does not seem effective in uncovering financial information that results in a denial of public defender appointments that, but for verification, otherwise would have occurred.” Elizabeth Neely & Alan Tomkins, *Evaluating Court Processes for Determining Indigency*, 43 *COURT REVIEW* 4, 10 (2007).



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Assigned Counsel Eligibility of Minors in Criminal Court: No Parental Liability.

Introduction

In response to the growing fiscal crisis surrounding the funding of public defense, a major development has been the improper practice of mining individuals and families for funds to cover the costs of assigned representation by distorting the standards of eligibility. In this vein, there is a defective body of law that suggests that parents may be held liable for the expense of legal fees incurred by a county when counsel is assigned to represent a minor in the criminal courts. *See e.g. inter alia Matter of Plovnick v Klinger*, 10 A.D. 3d 84 (2d Dept. 2004); *People v Kearns*, 189 Misc. 2d. 283 (Supreme Court Queens County 2001); *Matter of Cheri H.*, 121 Misc. 2d 973 (Fam. Ct., Bronx Co. 1983); Op Att. Gen. [Inf] 89-44; also *People v Clemson*, 149 Misc. 2d 868 (Vill. Ct., Newark, Wayne Co. 1991); *Matter of Heysham*, 131 Misc. 2d 1007 (Fam. Ct., Oneida Co. 1986).¹

The reasoning applied in this line of cases reveals a careless and conclusory merger of the statutory parental obligation for support under Family Court Act [FCA] § 413 as it may apply to the appointment of an Attorney for the Child in juvenile actions and the authority of a criminal court to terminate or modify a previously issued order of assignment of counsel to permit partial payment of attorneys fees under County Law § 722-d.

The analysis below will demonstrate that the reasoning of these few cases is fundamentally flawed and that there is in fact no binding parental obligation to bear the expense of legal fees necessary to represent a minor being prosecuted as an adult in criminal court. Specifically, the following conclusions will be established:

1. The rulings which uphold recovery of attorney's fees from parents for the representation of a minor for a criminal offense are unsound and promote unlawful policy and practice.
2. It is improper to take parental income into account in the first instance of determining whether it is necessary to assign counsel to represent a minor in criminal court.
3. A parent has no obligation to hire counsel to represent a minor child in criminal court -- no obligation to the government, no obligation to the child.

¹ This line of cases was cited without analysis by the Appellate Division, Fourth Department in *Roulan v County of Onondaga*, 90AD3d 1617 (4th Dept 2011) *mod* 21 NY3d 902 (2013) as support for permitting a local Assigned Counsel Program to consider parental income in eligibility determinations for minors charged in criminal courts. However, the Court of Appeals subsequently ruled that the petitioners in the case had no standing in the matter and vacated the Fourth Department's ruling on this issue rendering it inconsequential.

1. The rulings which uphold recovery of attorneys' fees from parents for the representation of a minor for a criminal offense are unsound and promote unlawful policy and practice.

The Supreme and Family Court cases that underlie the concept that a parent may have an obligation to cover the cost of counsel for a minor being prosecuted in criminal court derive from non-criminal proceedings commenced in courts of separate jurisdiction than the criminal courts and address the appointment of Attorneys for the Child. *See e.g. Matter of Plovnick v Klinger*, 10 A.D. 3d 84 (2d Dept. 2004). Beyond this hollow precedent, there is no binding authority that upholds a criminal court's exercise of jurisdiction over parents to make a support finding and order the payment of attorney's fees; nor is there any binding interpretation of County Law § 722-d that allows a cause of action against non-party parents to recover the costs of assigning counsel to a minor in a criminal matter.

Rulings that maintain that parental income may be considered in determining eligibility of a minor for the assignment of counsel in a criminal case, or might permit the recovery of fees paid by the county for assignments of counsel using County Law § 722-d, are faulty in that they suggest action by a court without competent jurisdiction and promote causes of action not authorized by law. *See e.g. People v Kearns*, 189 Misc. 2d. 283 (Supreme Court Queens County 2001).

In particular, the consideration of parental income in an eligibility determination for the assignment of counsel in a criminal matter is theoretically founded in a support obligation pursuant to Family Court Act § 413 as it may pertain to costs related to the appointment of Attorneys for the Child in juvenile matters. As noted in *Matter of Plovnick, supra*, “[w]hile necessities have traditionally been defined to include a child's most basic needs, such as food, clothing, shelter, and medical care, in appropriate circumstances the duty to provide necessities may obligate a parent to provide a child with counsel [citations omitted].” Even under this authority, before any order may be issued requiring parents to enter proceedings and be subjected to an income determination, a support action would have to be initiated in the first instance in Family or Supreme Court to determine whether the circumstances are appropriate and the obligation exists. A criminal court where charges are pending against a minor simply does not have jurisdiction over non-party parents to conduct such an inquiry nor make such an order.

In the case of recovering assigned counsel fees pursuant to County Law § 722-d, this section provides no standing to counties to initiate a claim to collect assigned counsel fees against parents of a minor represented by assigned counsel in a criminal court. Contemporaneous orders of partial payment issued at the time of the assignment of counsel are likewise not authorized by § 722-d. This statute only authorizes an acting assigned attorney in a pending matter to revisit the question of previously approved eligibility if circumstances arise to indicate that the *client* may no longer be eligible to receive the services of assigned counsel.

Analysis of the Flaws in the Underlying Case Law

The root of the confusion of issues and the basis for suggesting a parental obligation to pay for counsel in a criminal case on behalf of a minor child lies in the decision of *Matter of*

Cheri H., 121 Misc. 2d 973 (Fam.Co., Bronx Co. 1983). In that case, a Family Court [Judge Judy Sheindlin presiding], applying a convoluted analysis of inapposite law, ruled that a parent is responsible for attorneys' fees for the representation of a juvenile by a Law Guardian in Family Court pursuant to County Law § 722-d. The conclusion in this never reviewed case is unsustainable. The attorney in *Cheri H.* was a Law Guardian appointed to represent a juvenile in delinquency proceedings pursuant to Family Court Act § 249. The County Law, specifically article 18-B in which § 722-d is codified, has no bearing on the appointment of Law Guardians.

Family Court Act § 249 requires the Family Court to assign an Attorney for the Child [formerly known as a Law Guardian] to represent a juvenile in, *inter alia*, all delinquency and supervision proceedings under Articles 3 and 7. FCA §249 (a). Attorneys for the Child are assigned in accordance with whatever plan the Office of Court Administration has established pursuant to FCA § 243. Compensation for these services is provided for under FCA § 245 at the rates set forth in Judiciary Law § 35. The costs for Attorneys for the Child under § 245 are to be paid by the State as prescribed in FCA § 248. Nowhere in any of these sections of law is there any provision regarding the State recovering legal fees for Attorney for the Child from either the child or the parents.²

In *Matter of Cheri H.* the court's conclusion that the County Law applied to create a right of the State to recover the costs of the juvenile's attorneys fees in a delinquency proceeding was nothing short of a specious ruling. The representation of a minor in delinquency proceedings was and continues to be a state obligation and a state expense, payable pursuant to a system authorized and funded through the Office of Court Administration, in accordance with the rates set forth in Judiciary Law § 35. The County Law is irrelevant in such proceedings and no court has authority to order parents of a juvenile respondent in Family Court to cover any costs of representation under County Law § 722-d.

Compounding the confusion, the Attorney General irrationally adopted the reasoning of *Cheri H.* and opined that the precedent applied equally in the criminal courts to recover the costs of assigned counsel fees from parents arising from the representation of minors by assigned counsel. Op.Att.Gen [Inf] 89-44 [opinion rendered to county attorney wherein *Cheri H.* was cited as authority to support the issuance of § 722-d orders against the parents of minors as an obligation under FCA § 413].

Reliance on *Cheri H.* in later cases, such as *Matthews v Matthews* [30 Misc. 2d 681 (Sup.Ct., Nassau Co, 1961)] and *Fanelli v Barclay* [100 Misc. 2d 471 (D.C. Nassau Co. 1979)] as well as by the Attorney General has been consistently misplaced. These cases dealt strictly with the issue of attorneys' fee awards in matrimonial support enforcement actions and specifically noted that as a matter of law attorneys' fees *may* be considered as a support obligation when the legal services are rendered in an enforcement action for previously ordered support for which the parent is derelict. *Matthews, supra*, at 685, *accord Fanelli v Barclay, supra*. Both decisions are drawn on old, non-existent or re-codified sections of law, including the Children's Court Act and the Rules of Civil Practice.

² Conversely, counsel for indigent *adult* parties in specified Family Court proceedings are specifically authorized by statute to be assigned pursuant to the County Law article 18-B plan under FCA § 262.

FCA § 438 now specifically authorizes a Family Court to order the payment of attorneys' fees, payable directly to a party's attorney, in an action to *enforce* a support obligation when the failure to meet the obligation is found to be willful. This section also specifically provides for the recovery of counsel fees for the expenses incurred by a DSS attorney. In no manner do these cases or statutes create a general liability of parents to pay counsel fees for the representation of their minor children in either criminal or Family Court proceedings or to reimburse a county for the costs of assigned counsel fees under the County Law.

Steps toward Refining the Issues

Matter of Heysham, 131 Misc. 2d 1007 (Fam. Ct. Oneida Co. 1986) addressed the discrete issues and correctly arrived at the opposite conclusion by an examination of more relevant law. *Heysham* considered the question of whether it was appropriate for the Family Court to consider parental income in determining whether a juvenile was eligible for assigned counsel on appeal. Citing CPLR § 1101(a), which governs applications to proceed as a poor person, the Oneida Family Court ruled that the statutory language permitted only the resources of the applicant to be considered. The court stated further that

[i]n interpreting this provision, we are guided by McKinney's Consolidated Laws of NY, Book 1, Statutes 74, which provides: "A court cannot by implication supply in a statute a provision which it is reasonable to suppose the Legislature intended intentionally to omit; and the failure of the Legislature to include a matter within the scope of an act may be construed as an indication that its exclusion was intended."

Since the Legislature contemplated that the statute may be invoked on behalf of infants but did not provide that in such instance the resources of the parents would be considered, the court must construe such omission as an indication that such omission was intended. The court may not add, by implication, a provision to a statute which is clearly absent. *Heysham at 1010-1011*.

Heysham ultimately and correctly ruled that it would be improper to consider parental income in determining eligibility.

Regrettably the *Heysham* Court went on to muddy the once cleared waters by suggesting the possibility of a plenary action instituted by the county government in a court of competent jurisdiction to seek reimbursement for expenses incurred without specifying what court might have jurisdiction for such an action. Reference was again made to cases in which attorneys' fees have been ordered in matrimonial support proceedings as possible precedents, but as discussed above, these precedents do not properly support a general obligation to cover assigned counsel fees in criminal courts or any other non-support action.

A well reasoned attempt at identifying the troubling aspects of this practice can be found in *People v Clemson*, 149 Misc. 2d 868 (Vill.Ct., Newark, Wayne Co. 1991). As in *Heysham*, the court in *Clemson* examined the jurisdictional defects of an order against parents to cover the costs of counsel fees for a minor charged in criminal court. *Clemson* highlighted the importance of providing counsel at the earliest possible moment noting that an inquiry into parental assets should not postpone the assignment of counsel. The court then explained why the criminal court is not authorized to take up such inquiry or issue an order against parents over whom it lacks *in personam* jurisdiction. The court in *Clemson* likewise concluded that the only way the county might claim against parents for the costs of representing a minor in a criminal matter would be in some “plenary proceeding” in an unspecified court of competent jurisdiction.

Heysham and *Clemson* are on the right track in condemning an illegal practice. However, when the analysis is pursued, it is clear that there is no cause of action available to initiate such a plenary proceeding.

Statutory and Jurisdictional Constraints

As noted in *Clemson*, given the jurisdictional and statutory constraints, any attempt to order parents to hire counsel or reimburse the county for the cost of representing a minor in criminal court would generate a procedural quagmire that would improperly delay the assignment of counsel in the first instance. *See also Hurrell-Harring v State of New York*, 15 N.Y.3d 8 (2010).

Before non-party parents may be forced to hire a lawyer or re-pay the county for the costs of assigning counsel to a minor in a criminal prosecution, a petition for a support inquiry would have to be initiated in Supreme or Family Court. If after such an inquiry, parents were not ordered to hire counsel, the matter would have to go back before the criminal court to conduct its required inquiry into whether the minor is eligible for assigned counsel as an individual or whether the child must proceed *pro se* if no assignment of counsel were granted. If, in the alternative, the parents were ordered to hire counsel as a support obligation and failed to do so for whatever reason, the criminal court would still have to make an inquiry into whether the minor may be individually eligible for the assignment of counsel. If the criminal court determined that the child must be assigned counsel, an assignment order should be issued. Only at that point would it be appropriate for the assigned attorney to consider whether to make an application to the assigning criminal court under § 722-d to have representation terminated or partial payment ordered. Subject to the discretion of the assigned attorney as provided in the statute, a previously issued support order might arguably be proffered as some evidence of the appropriateness of a § 722-d order, however in such circumstances any § 722-d order issued would be against the child, not the parents, because the parents are not subject to the jurisdiction of the criminal court.

This was the threshold conclusion reached by the court in *People v Kearns, supra* [189 Misc. 2d 283 (Sup. Ct. Queens Co 2001)], the most recent criminal court to address the tortured reasoning of *Cheri H., et al.* In *Kearns*, the court conceded that as “a court presiding over a criminal trial it [has] no compulsory authority to direct an unwilling parent, who is not a party to the criminal action, and over whom the court lacks jurisdiction, to provide counsel for an

unemancipated minor.” *Kearns*, *supra* at 288, citing *People v Clemson*, *infra*, 149 Misc. 2d 868 (Vill.Ct., Newark, Wayne Co. 1991).

Despite the lack of jurisdiction over the parents, the court in *Kearns* ultimately issued an order for the parents to cover the costs of the child’s representation. In the absence of any existing procedure to effect some kind of parental contribution as contemplated by *Cheri H.* or its progeny, the *Kearns* court held that “the governmental entity furnishing such services to an unemancipated child can maintain a cause of action against any responsible parent, over whom jurisdiction can be obtained, which may be prosecuted in any court of competent jurisdiction by its attorneys (i.e., the Corporation Counsel of the City of New York in the case of New York City).” *Kearns* at 289-290. This, of course, begs the question as to what authority the *Kearns* court had to declare the right to a cause of action of one non-party against another non-party.

In the *Kearns* “Final Determination,” the court ordered: “The Legal Aid Society is directed to submit a bill to the defendant’s father, Alan Kearns, for the cost of the legal representation to his son from the inception of their involvement in this matter through trial, and for any further proceedings on his behalf in accordance with the rate schedule set forth pursuant to County Law § 722-b, applicable to assigned counsel.” *Ibid.*

Given that in this instance, it was defense counsel that raised the issue before the court after assignment, as necessitated under County Law § 722-d, such a direction may hypothetically be supportable, but only if the above-described procedure were undertaken resulting in a valid underlying support finding reached by a Supreme or Family Court with requisite subject matter and personal jurisdiction over the non-party parents authorized to subject them to a civil monetary claim in favor of the non-party county government. There is no subsequent history related to the *Kearns* case indicating whether the court’s decision or order was indeed actionable in any forum.

2. It is improper to take parental income into account in the first instance of determining whether it is necessary to assign counsel to represent a minor in criminal court.

The responsibility of the judiciary to appoint counsel to all criminal defendants who are financially unable to hire a lawyer is a principle of fundamental constitutional import. *People v Witenski*, 15 N.Y.2d 392 (1965); *Gideon v Wainwright*, 372 U.S. 335, 344 (1963); *Argersinger v Hamlin*, 407 U.S. 25 (1972). The right to counsel is personal to the defendant and may be given up only upon a knowing, intelligent, and voluntary waiver. *Johnson v Zerbst*, 304 U.S. 458 (1938).

“Indigency” or the inability to pay, likewise, is personal, and in determining whether a person should be permitted to proceed as a poor person the State may not take into account the financial ability of relatives or friends. *Fullan v Commissioner of Corrections of the State of New York*, 891 F.2d 1007 (2d Cir. 1989); *Matter of Heysham*, *supra*. See also Memorandum of the Judicial Conference of the State of New York (Nov. 11, 1965); ABA Standards for Criminal Justice, Providing Defense Services (1982), Standard 5-6.1 *Eligibility*; NLADA, Standards for Defender Services Standard II(1) *Eligibility and Scope of Representation*; National Advisory

Commission on Criminal Justice Standards and Goals, Courts (1972) Standard 13.2 Payment for Public Representation.

A minor over the age of 16 years is subject to the jurisdiction of the criminal court under Penal Law § 30.00 and is, therefore, entitled to all the benefits of an adult in any criminal proceeding. CPL §§ 180.10, 180.75, 725, *et seq.*

Criminal courts have no jurisdiction or authority to issue a collateral order of liability against a non-party parent for the payment of legal fees for assigned counsel in a criminal court based upon an alleged support obligation under FCA § 413. FCA § 115; *Cf. Rush v Mordue*, 68 NY2d 348 (1986) [holding, *inter alia*, that prohibition lies when a court acts in excess of authorized power in matters over which it has jurisdiction].

The Assignment of Counsel in the First Instance

When an individual first comes before a criminal court, the court is obligated to ensure that the individual is represented by counsel. CPL §§ 170.10; 180.10; 210.15; *Hurrell-Harring v State of New York*, 15 N.Y.3d 8 (2010). The court must inquire as to whether the individual is able to obtain counsel. If the person is not able to obtain counsel, then counsel must be assigned to represent the individual at the expense of the government. In New York, the court must assign counsel pursuant to whatever plan the county has adopted under article 18-B of the County Law.

In this regard, the former Judicial Conference of the State of New York determined that:

Under any plan, in order to prevent any delay in arraignment, the court *should assign counsel upon a declaration of indigency*. Subsequent investigation by counsel is permissible and contemplated. If any financial questionnaire is to be completed after tentative assignment, the questions should not be unduly numerous and *no questions should be put which might be self-incriminatory or irrelevant, such as inquiries into the assets of relatives or friends*. (Italics supplied) Memorandum of the Judicial Conference of the State of New York dated 11/16/1965.

Inquiries into the assets of third parties, including the parents, are precluded. Any purported application of family law or Family Court jurisdiction related to parental support obligations in criminal court with regard to assigned counsel eligibility is inappropriate. *Id.*; see also *Matter of Heysham, supra*. The 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 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.

The only legislation in New York that contemplates partial contribution in any form is County Law § 722-d. As discussed previously, that section permits court ordered partial

payments by defendants under limited circumstances. Any other compensation scheme that would require a person to repay the county for appointed legal services for which he or she was eligible at the time of the representation would be unauthorized. Op.Att.Gen. [Inf] 85-78.

County Law § 722-d: Partial Payment Orders

Nothing in § 722-d authorizes a court to prospectively order partial payment of assigned counsel fees during the initial eligibility determination process for the assignment of counsel. At most, the statute provides that if, at some point during the course of representation, assigned counsel determines that the assigned representation should be terminated based on the represented individual's newly discovered ability to hire counsel, then under County Law § 722-d, counsel may seek to withdraw or have reimbursement for services rendered ordered. Such a motion, obviously, should not be granted unless the right to counsel continues to be protected. In other words, it would be highly inappropriate for a court to discontinue representation by assigned counsel based on some new eligibility determination if the individual is left without representation thereafter (*see People v Kearns, supra; People v Clemson, supra*). If assigned counsel is to be altogether relieved based on the ability of the individual to hire counsel, the relief order should be granted only when new counsel enters an appearance and is ready to proceed.

In addition, under this section, if during the course of the representation counsel determines that an individual is able to bear some of the costs of the representation but is not able to hire private counsel, currently assigned counsel may likewise notify the court of the need to consider an order requiring the individual to contribute to the cost of the representation.

As noted above in the discussion of *People v Kearns*, County Law §722-d authorizes criminal courts to terminate an assignment or order partial payment/contribution only upon application of counsel. This section does not authorize a court to act *sua sponte* with regard to payment for legal services of assigned counsel (*Matter of LAS v Samenga*, 39 A.D.2d 912 [2d Dept. 1967]; *see also People v Bell*, 119 Misc. 2d 274 [Sup.Ct., Queens Co. 1983]; Op.Att.Gen. [Inf] 85-78). Nor does it authorize the consideration of the income of third parties in determining whether it is necessary to appoint counsel (*Fullan v Commissioner, supra; Memorandum of the Judicial Conference, 11/15/65, supra*).

Although a criminal court may have the authority to order payment for legal services by an individual receiving assigned counsel representation upon the application of counsel under § 722-d, such an order would give rise to a cause of action only against the individual being represented and only to the extent to which the order authorizes.

Criminal Court's Lack of Jurisdiction and Limited Interest

Pursuant to FCA § 115 the Family Court has *exclusive original jurisdiction* over support matters under article 4 of the Family Court Act, which would include enforcement of the support provisions set forth in § 413. Under the circumstances, a criminal court is without jurisdiction or authority to render an order against the parents of a minor defendant as a support obligation under FCA § 413.

Once the accused is represented by counsel, by whatever process, the issue of who pays for the services becomes a collateral one and not subject to the jurisdiction of the criminal court beyond that authorized under § 722-d. An order for payment under that section may or may not be sustained depending on the circumstances.

It cannot be overemphasized that the only interest a criminal court has in eligibility issues arises out of its obligation to ensure that defendant has counsel. Whether the county can hold a parent liable for the assignment of counsel fees under FCA § 413 is a collateral matter not within the scope of the criminal trial court's authority to resolve criminal charges.

3. A parent has no obligation to hire counsel to represent a minor child in criminal court -- no obligation to the child, no obligation to the government.

The New York State Legislature has exclusive authority to legislate in the area of parental responsibility for the acts of a minor and therefore a locality has no authority to promulgate legislation in the field. *See* Op. Att. Gen. [Inf] 77-308.

At common law, parents had the obligation to bear the fair and reasonable expenses of their offspring's upbringing. This obligation encompassed basic needs: food, shelter, and clothing. In New York, this rule has been codified and defined in FCA § 413, *et seq.* According to this statute, parents are liable, within their means, for the reasonable expenses of providing "care, maintenance, and education" of their minor children up to the age of 21 years. FCA § 413. Care, maintenance, and education are statutorily defined to include "necessary shelter, food, clothing, care, medical attention, expenses of confinement, the expense of education, payment of funeral expenses, and other proper and reasonable expenses." FCA § 416.

Responsibilities under this statute flow from the parent to the child, and if the parent fails to provide any of these services, then the child is vested with a cause of action against the parent for support. Social Services Law [SSL] § 101. If or when parents fail to provide adequate and reasonable support, the government is statutorily obligated to step in and provide the necessary services. FCA § 515. As noted above, it has been held that: "While necessities have traditionally been defined to include a child's most basic needs, such as food, clothing, shelter, and medical care, in appropriate circumstances the duty to provide necessities may obligate a parent to provide a child with counsel [citations omitted]" *Matter of Plovnick v Klinger, supra*.

Taken together, these rules of law indicate, at minimum, the need for an inquiry in a proper forum into whether the prosecution of a minor as an adult in criminal court constitutes appropriate circumstances to hold parents liable for the cost of defense counsel. If such an inquiry were to be called for, standing would lie with the minor seeking to force a parent to pay attorney's fees and would involve a case-by-case determination taking into consideration all the attendant facts and circumstances. Absent a legislative mandate that currently does not exist, a county, either alone or through its assigned-counsel program, is not vested with standing to initiate this type of claim.

No Parental Duty to the Government.

FCA § 413 does not create an obligation of parents to the government to support their minor children. The statute simply codifies a common law obligation that flows from the parent to the child. The only way the government may assert this obligation as a cause of action is if the government has assumed the responsibility of support owed under § 413, in accordance with FCA § 515. Under the circumstances provided in § 515, the agent of the child, which in New York would be the Department of Social Services [DSS], may seek indemnification or contribution under Social Services Law §§ 101-a and 102 for the costs related to support that have been taken over by the government. In this regard parental liability is, as provided by the statute, a function of the parents' reasonable means to provide such support.

Nothing in these or any other Acts provides for a cause of action under § 413 by the state or local government to recover the costs of legal fees incurred while defending a minor on criminal charges.³

The obligation of the government to provide counsel in a criminal matter does not arise from any common law duty owed the child from the parent, nor is such a duty created in the statutory obligations of parents to support their children under FCA § 413. Rather, the government's obligation in this respect flows from a constitutional mandate that no individual may be held for a crime without the assistance of counsel. A county government's right to recover attorney's fees arising out of an appointment of counsel in a criminal case is not sustained by a general application of these sections of family law.

No Parental Duty to the Child: the Necessity and Purpose of an Inquiry

The existence of a parent-child duty addresses whether legal expenses fall within the catch-all phrase "other proper and reasonable expenses" of FCA § 416, thereby making parents legally obligated to hire a lawyer to represent their minor child in criminal court. The answer here again, is no, they do not. Aside from the previously noted statutory sections that exclude such obligation, the right of a minor to claim a right to support under § 413 may be deemed relinquished by the actions of the minor and the circumstances of the case.

Emancipation

In general, parental obligations to a minor child are suspended if it can be demonstrated that the minor was *emancipated*, or acting independently and outside the reasonable control and supervision of the parents. Voluntary emancipation generally results from the minor's

³ Nor is there any applicable theory of vicarious liability. In New York, there exists limited statutory parental liability for certain willful, malicious, and unlawful conduct which is codified in the General Obligations Law [GOL] § 3-112. This section creates a specific cause of action between a plaintiff and a parent of a minor malfeasant between 10 and 18 years of age for a limited civil recovery, which would not exist absent the statute. It does not create any cause of action for a third party county claimant against a non-party parent of a malfeasant (e.g., minor child-defendant) to recover the collateral costs of assigned counsel in a criminal prosecution.

renunciation of the control and authority of the parents accompanied by acts of independence, economic or otherwise.

Constructive emancipation occurs by operation of law when a minor becomes independent of the parents either by marriage, joining the military, becoming gainfully employed, or otherwise removing him-or-herself from the control and supervision of the parent without cause. See generally *Parker v Stage*, 43 N.Y.2d 128 (1977); *Roe v Doe*, 29 N.Y.2d 188 (1971). Thus, even the support statute itself, FCA § 413, has been construed to permit a court to decline to enforce the obligations thereunder where to do otherwise would be unjust or inequitable.

In both *Roe* and *Parker*, the court was faced with the question of whether a minor's conduct had resulted in the relinquishment of rights under the support statute. In the end, the court pronounced a policy that where a minor has voluntarily and without cause removed him-or-herself from the authority and supervision of the parents, then the parents may be relieved from any continuing support obligation. In *Parker*, the court specifically rejected the notion that parents are strictly liable for support obligations, and held that the discretion lies with the court of inquiry to determine whether it would be fair or equitable to compel the parents to bear the burden of support obligations.

In *Roe v Doe*, the claimant was a college-aged daughter who was suing to compel her father to pay her college expenses. The father had agreed to pay all the daughter's expenses under the stipulation that she reside in the dormitory on the campus. The daughter defied this rule and moved into an off-campus apartment with a friend. She got a job, finished the school year, and registered to return in the fall. During the summer vacation the daughter did not come home, rather she resided with the family of a friend. The daughter claimed that her father was obligated to pay her school fees so she could return to college. The Court of Appeals declined to hold the father to any statutory support obligations, finding that by her actions the daughter forfeited the right to demand support.

Parker v Stage, presented a similar situation where an 18-year-old daughter left the family home against the wishes of the parent and went to live with a paramour. She subsequently gave birth out of wedlock and applied for public assistance. The DSS filed a claim under SSL 101-a (3) to compel the father to pay for the support of the daughter. The Court of Appeals applied the policy announced in *Roe v Doe* and ruled that equity precluded the enforcement of the support statute in circumstances such as the ones present. The *Parker* court ruled that if the minor's conduct has been such that it would preclude recovery by the minor as a matter of equity, then the statute could not be used to summarily authorize recovery by the DSS. The right of DSS under SSL § 101-a, the court held, flows directly from, and is limited to, the extent of the minor's ability to recover.

More recently, the Appellate Division, Second Department, concluded

Although a parent's duty to support his or her child until the child reaches the age of 21 years is a matter of fundamental public policy in New York, it has long been

recognized that a child may be deemed emancipated, and thus forfeit the right to support, where the child voluntarily and without sufficient cause leaves the parent's home and withdraws from parental control and guidance. *Alice C. v Bernard G. C.*, 193 A.D.2d 97 (Second Department, 1993) citing *Matter of Roe v Doe*, 29 NY2d 188.

Based on this line of cases, then, before a parent can be compelled to make support payments under FCA § 413, at the very minimum there must be an inquiry into the nature of the relationship between the minor and the parents that would determine the equity of enforcing any obligation contemplated by that statute. In order to do so, any claimant would be required to demonstrate standing to raise the cause of action in a court of competent jurisdiction.

The criminal forum where a minor has been charged with a penal offense and seeks the appointment of counsel is not a court of competent jurisdiction for this type of inquiry and the county government has no standing to institute such a claim against the parents under SSL §§ 101-a or 102. See FCA § 115.

Constructive Emancipation and the Representation of Minors in Criminal Courts

When a minor is charged in criminal court with a penal offense, a constructive emancipation has occurred that suspends, at least pending further inquiry by a court of competent jurisdiction, the parental obligation, if any, to provide financial support or legal fees.

The Court of Appeals has ruled that parental obligations under FCA § 413 may be applied to the costs of medical care, treatment, and confinement when the minor child is before the Family Court, because the nature of the proceeding is designed to reinforce the family unit and attempt to assist the parents in fulfilling their moral and civil obligations for rearing their children. *Jesmer v Dundoni*, 29 NY2d 5 (1971). In situations where the DSS and Family Court have stepped in and made referrals to treatment programs to assist in supervising the child, the parents remain an integral part of the planning and implementation of the supervised intervention and are therefore still liable under §413 for reasonable care, maintenance, and education. *Jesmer, supra*, at 11.

However, the court in *Jesmer* distinguished between the minor being held under the supervision of the Family Courts, whose jurisdiction lies with maintaining the family unit, and a minor before the criminal courts whose jurisdiction lies with the protection of the public despite the interests of the family. In the latter case, the government is responsible for the maintenance of the minor offender in order to protect the public, and it is equitable therefore that the expense be borne by the government. An important factor in this distinction is that in Family Court the parents are, to a certain extent, participants in the proceedings, whereas in the criminal forum the interests of the parents are replaced by the interests of the public. Thus, being specifically excluded from the resolution of the criminal proceedings, the parents are equitably relieved from the financial obligations related thereto. *Jesmer* at 9-11.

The Orange County Family Court has directly addressed the issues of *constructive emancipation* and parental obligations to minor children who are charged with criminal conduct in criminal court. In *Orange DSS v Clavijo*, 172 Misc. 2d 87 (Fam. Ct., Orange Co. 1997), it was held that parents are not obligated to support a minor child between the ages of 18 and 21 who as a result of an arrest on felony charges, becomes the recipient of public assistance. The situation arose after a 19 year old minor child was arrested on burglary charges and was placed in a drug treatment program by the Department of Social Services upon being found eligible for public assistance. DSS then sought to recover the costs of the treatment from the parents under the authority of Social Services Law § 101-a and FCA § 413. The court denied the claim, citing *Roe* and *Parker* in ruling that the doctrine of *constructive emancipation* was applicable because, by his actions, the minor had placed himself beyond parental control so that he could not be supervised by his parents or accept guidance from them. The court noted that there was no showing of any derogation of a duty by the parents owed to the minor, and therefore the minor had no claim against the parents to cover the cost of “support” in this instance. If the minor had no claim, the DSS had no cause of action under SSL §§ 101-a or 102.

The significance of *Clavijo* is readily apparent. Where a minor has clearly acted of his or her own volition in a manner outside the reasonable expectations of behavior deemed appropriate by the parents, then the minor cannot retain the right to compel the parents to “support” this conduct. Under the doctrine of *constructive emancipation*, the parents are thereby relieved of any financial obligations that may arise from such conduct. *See also The Age of Majority and Emancipation*, Brandes & Weidman, 211 N.Y.L.J. 3 (June 28, 1994).

It should be beyond dispute that parents would not be presumed to condone or encourage criminal activity by a minor child if that child were in fact within the supervision and control of the parent. The reasoning is similar to negligent entrustment cases where there would be parental liability if, and only if, it can be shown that the parent knew of the dangerous activity and was in a position to control it. *See discussion LaTorre v Genesee Mgt.* 90 N.Y.2d 576 (1997). When a minor engages in criminal conduct in a situation where the parents have no knowledge of the minor’s activities, and thereby no ability to exercise control, then for purposes of parental liability, the minor is effectively, *constructively*, emancipated, and the parents are relieved of their support obligations under the statute.

The doctrine of constructive emancipation applies to prevent enforcement of support obligations under FCA § 413 and further bars recovery by the state Department of Social Services for support obligations otherwise available under law. In light of this, the complete lack of jurisdictional authority aside, it would be exceedingly unjust and inequitable to permit a criminal court to nonetheless require parents of an emancipated minor to bear the responsibility of attorneys’ fees under the very same support statute.

Conversely, there are young people who would choose to protect their parents from the anxiety that would naturally arise in such circumstances. Thus, an important consideration in this regard relates to the minor’s right to privacy in choosing not to notify either parent when facing criminal charges. As noted above, voluntary emancipation by a minor is available at the age of 16 years. Except for the prescribed drinking age under ABC § 65 and support provisions of FCA § 413, the legal age of majority is 18 years old. FCA § 119(c); Domestic Relations Law § 2;

CPLR § 105(j). Therefore, persons between the ages of 16 and 21 years of age, who stand before a court accused of a criminal offense and who are to be prosecuted as adults, are entitled to exercise their right to declare emancipation (in the case of the 16-17 year old) or proceed as an individual who has reached the age of majority without the involvement of their parents. *Compare Bellotti v Baird*, 443 U.S. 622 (1979) [to the extent that statutory provision precludes right of minor to demonstrate to court sufficient maturity and competence to make important medical decisions with treating physician without parental consultation or consent, statute is unconstitutional].

Conclusion

Any attempt by a criminal court to order a parent to make partial payment for attorney fees or reimburse the government for the expense of assigning counsel is unauthorized by law. Contemplation of parental income in an eligibility determination is irrelevant and inappropriate and undermines the constitutional right to counsel to which minors are entitled.

New York State Defenders Association Statement on the Criteria and Procedures for Determining Eligibility in New York State

Introduction

On March 11, 2015, a settlement agreement between the State of New York and the plaintiff class in *Hurrell-Harring v. State of New York* was approved by the Albany County Supreme Court. The agreement vests the New York State Office of Indigent Legal Services (ILS) with the responsibility for developing and issuing criteria and procedures to guide courts in counties located outside of New York City¹ in determining whether a person is unable to afford counsel and eligible for mandated representation. ILS is conducting 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. In light of the ILS hearings and in an effort to assist ILS in issuing criteria and procedures on eligibility determinations, the New York State Defenders Association (NYSDA), based on its many years studying eligibility practices across the state, makes the following examination of the issue.

I. Scope of the Eligibility Problem

As early as 1994, NYSDA documented in a statewide study² the improper practices and abuses in determining eligibility for appointed counsel. Then, as now, individuals are wrongfully denied their constitutional right to counsel due to financial eligibility determinations that are based on improper standards or the consideration of inappropriate factors.³ These abuses prompted the parties to the *Hurrell-Harring* settlement to direct ILS to promulgate financial eligibility criteria and procedures. Applying uniform and legal eligibility standards will stop the deprivation of counsel to individuals who are unable to afford lawyers that currently occurs, resulting in more individuals being found eligible. Defender programs will have more clients and will need more resources to represent them. **The State should provide additional funding to cover the increased costs to counties that will result from having defender systems function with legally appropriate eligibility standards.**

¹ Presumably, since Executive Law § 832(3)(c) requires that ILS “establish[] criteria and procedures to guide courts in determining whether a person is eligible for [mandated] representation,” we can expect that the criteria developed for the five counties and those outside the City of New York will also be made applicable within the city of New York and to mandated representation in Family Court, which was not at issue in *Hurrell-Harring*.

² NYSDA, *Determining Eligibility for Appointed Counsel in New York State: A Report for the Public Defense Backup Center* (1994) [*Determining Eligibility for Appointed Counsel in NYS*].

³ In addition to inappropriate factors discussed within, many courts and public defense programs currently use the Legal Services Corporation (LSC) income guideline of 125% of the Federal Poverty Guidelines (FPG) improperly as an income cap. Others use different percentages of the FPG, such as 133%, 187%, 200%, or 350%. As discussed below, 125% is too low for presumptive eligibility in New York. In counties where the 2015 LSC guideline is used as a cap, a single individual making more than \$14,713 would be ineligible for counsel.

II. Applying the Correct Financial Eligibility Standard

The constitutional and statutory standard for determining eligibility is financial inability to afford counsel, not indigency.⁴ County Law § 722 uses the phrase “financially unable to obtain counsel” as the standard for court appointment of a lawyer. The statute mirrors the federal standard contained in 18 U.S.C. § 3006a, which requires appointment for those who are “financially unable to obtain adequate representation.”⁵ The New York Court of Appeals in *People v. Witek*, 15 N.Y.2d 392 (1965), the watershed case which gave rise to the establishment of County Law Article 18-B, referred to those who had “no money to pay attorneys.” The standard under the New York State Constitution, Article I, section 6, and the United States Constitution, Amendments VI and XIV is “inability to pay.” The use of the word “indigent” has done much damage in this State, where counties have mandates continuously imposed and resources continually withdrawn. As a result, local officials confuse the constitutional right to counsel with “entitlement programs” and also improperly equate eligibility for federal civil legal service programs with the constitutional right to appointed representation.

III. ILS Obligation to Promulgate Eligibility Determination Criteria and Procedures Under the *Hurrell-Harring* Settlement and the Executive Law

As noted above, ILS has the obligation to establish criteria and procedures to guide courts in determining whether a person is eligible for mandated legal representation pursuant to the settlement in *Hurrell-Harring v. State of New York* and Executive Law § 832(3)(c).

IV. *Hurrell-Harring* Settlement Eligibility Requirements

The *Hurrell-Harring* settlement sets forth a number of agreed-upon and now required criteria and procedures for eligibility determinations that NYSDA unequivocally supports and has recommended since its 1994 statewide study, *Determining Eligibility for Appointed Counsel in NYS*:

- eligibility determinations shall be made pursuant to written criteria;
- confidentiality shall be maintained for all information submitted for purposes of assessing eligibility;
- ability to post bond [or bail] shall not be considered sufficient, standing alone, to deny eligibility⁶;
- eligibility determinations shall take into account the actual cost of retaining a private attorney in the relevant jurisdiction for the category of crime charged;

⁴ The United States Supreme Court cases establishing the right to counsel use language that extends beyond the concept of indigence. See *Powell v. Alabama*, 287 U.S. 45, 60 (1932); *Betts v. Brady*, 316 U.S. 455, 456-457 (1941) (“unable to employ counsel”); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (“too poor to hire a lawyer”); *Argersinger v. Hamlin*, 407 U.S. 25, 39 (1972) (“unable to retain counsel on his own”).

⁵ Significantly, United States Attorney General Robert Kennedy noted in 1963 regarding S.1057, which established 18 U.S.C. § 3006a, “S.1057 studiously avoids the term ‘indigent.’” Hearings on S.63 and S.1057 before the Senate Comm. on the Judiciary, 88th Cong. 1st Sess. 11 (1963).

⁶ The posting of bond or bail should not be considered at all when determining eligibility. Individuals should not be forced to choose between pre-trial freedom and getting an assigned lawyer.

- 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
- 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.⁷

V. Policy Questions Regarding Eligibility Posed in the *Hurrell-Harring* Settlement

In addition to the criteria and procedures the settlement agreement explicitly requires, ILS must consider the following policy questions when setting eligibility guidelines:

- A. **“Whether screening for eligibility should be performed by the primary provider of Mandated Representation in the county.”**

NYSDA Position: The authority to make eligibility determinations should be delegated to and performed by the primary provider of mandated representation.

Rationale

As affirmed in our 1994 study, the obligation to determine financial eligibility for counsel is a judicial function. “This eligibility determination, which so directly affects access to legal representation, and is therefore of critical constitutional import, is, under current law, a responsibility expressly reserved to the judiciary. *See* N.Y. County Law § 722 (McKinney 1991); *Matter of Stream v. Beisheim*, 34 A.D.2d 329, 333 (2d Dept. 1970); *People v. Wheat*, 80 Misc. 2d 844 (Suffolk County Ct. 1975). The appointment of counsel is made ‘in the exercise of the trial court’s inherent power and in the discharge of its constitutional and statutory duty to furnish counsel to every indigent defendant charged with a crime ...’ *Matter of Stream v. Beisheim*, 34 A.D.2d at 333 (2d Dept. 1970).” *Determining Eligibility for Appointed Counsel in NYS*, at 4; *see also People v. McKiernan*, 84 N.Y.2d 915 (1994).

We recommend that the judicial responsibility for determining eligibility be delegated to the primary provider of public defense representation in the first instance. That way, as with clients retaining private counsel, discussions of financial eligibility could take place in a confidential setting rather than in open court⁸ and would be protected by the attorney-client privilege. Moreover, much of the information defense counsel would solicit from a client for the bail application overlaps with an inquiry as to financial eligibility – employment status, number of dependents, residence, etc. Also, if the client is facing charges and proceedings in several courts within the county, an initial eligibility determination by defense counsel would obviate the need for determinations by each court. While the duty to make eligibility determinations would be an additional burden on some defender offices⁹ and raises the specter that some offices would try to impose restrictive standards as a means to manage the office’s caseload or conserve limited resources,¹⁰ the great majority, if not all, of

⁷ As discussed below, ownership of an automobile that is necessary to maintain school enrollment or for transportation to medical care for the applicant or the applicant’s dependents should not be considered when determining eligibility.

⁸ This is in line with the settlement requirement that “confidentiality ... be maintained for all information submitted for purposes of assessing eligibility.”

⁹ It should be noted that many defender offices are already responsible for eligibility determinations.

¹⁰ *See* The Status of Indigent Defense in Schuyler County (NAACP Legal Defense Fund 2003) (noting that eligibility determinations were used to limit the number of clients that the office would represent). As noted above, defender

defenders are committed to providing representation to all those who need and cannot afford it and, on balance we believe that defenders will do more to safeguard the rights of potential clients than others would.

We also expect that eligibility determinations by public defense providers would facilitate the early entry of counsel and foster active representation in the early stages of the case, which will ultimately benefit clients and the system. While significant strides have recently been made to ensure that counsel is present at first appearance, this right would be rendered illusory if an eligibility determination process delays assignment and prompt engagement of defense counsel.

Because fiscal and staffing pressures on defenders can create conflicts of interest when providers are responsible for determining eligibility, some have recommended that screening be done by a third party. See Brennan Center for Justice, *Eligible for Justice: Guidelines for Appointing Defense Counsel* (2008) [Brennan Center Report] (recommending that screening be done “by someone who does not have a conflict of interest”). Some defenders also feel that, for the moment, it is better for courts or third parties to decide eligibility, thereby relieving them of the conflict and outside pressures they might otherwise face. However, those who have urged using third-party entities as screeners have overlooked the conflicts that manifest when these entities actually determine eligibility in our county-based defender system, and the impossibility, at present, of finding a truly independent entity, one that is not somehow affiliated with county government and does not have conflicting fiscal interests. Courts, too, are often conflicted despite the obligation they have long possessed to assure the right to counsel. We expect that, should the data collected by ILS show that improper practices are being used, ILS will re-examine the eligibility criteria and procedures and make any necessary changes to ensure that those who cannot afford counsel are found eligible.

- B. “Whether persons who receive public benefits, cannot post bond, reside in correctional or mental health facilities, or have incomes below a fixed multiple of federal poverty guidelines should be deemed presumed eligible and be represented by public defense counsel until that representation is waived or a determination is made that they are able to afford private counsel.”**

NYSDA Position: Yes

Rationale

“Substantial hardship” and resulting eligibility should be presumed for prospective clients who: receive public assistance, including but not limited to assistance provided through Temporary Assistance programs, the Supplemental Nutrition Assistance Program, Supplemental Security Income, Medicaid, and similar programs; reside in public housing; are currently detained in or serving a sentence in a correctional facility; are housed in a mental health facility; or earn income in an amount less than 250 percent of the Federal Poverty Guidelines (FPG), or a higher percentage/amount where local economic factors so require.¹¹

offices must not be placed in the untenable position of weighing budget concerns or caseload burdens when making constitutionally informed eligibility determinations.

¹¹ Although not referred to in the settlement questions, it is essential that ILS include within its standards an additional eligibility presumption. Appellate courts should presumptively continue a defendant’s status as a poor person when that status has been recognized in the trial court and assign counsel for the appeal after notice of appeal has been filed, similar to the practice used for Family Court appeals.

It has been our experience that the vast majority of people coming before the criminal and family courts cannot afford to retain their own lawyers.¹² As pointed out in the *Brennan Center Report*, this should give rise to easily applied standards of presumptive eligibility. That report makes clear: “Given the poverty of the vast majority of the prospective client population, most defendants can quickly and appropriately be deemed eligible simply because their income is beneath the level defined as poor by the federal poverty guidelines.... The best practice – which is followed in many jurisdictions – is to use a multiple of the guidelines in determining eligibility. Jurisdictions with particularly high costs of counsel or of living should use even higher multiples.” [Footnote omitted.]¹³

The State of Nevada has generally embraced our view of what should be done. In a January 4, 2008 order, the Nevada Supreme Court stated, in pertinent part:

“Substantial hardship” is presumptively determined to include all defendants who receive public assistance, such as Food Stamps, Temporary Assistance for Needy Families, Medicaid, Disability Insurance, reside in public housing, or earn less than 200 percent of the Federal Poverty Guideline.¹⁴ A defendant is presumed to have a substantial hardship if he or she is currently serving a sentence in a correctional institution or housed in a mental health facility.

C. “Whether (a) non-liquid assets and (b) income and assets of family members should be considered available for purposes of determining eligibility.”

NYSDA Position: (a) Yes and (b) No

Rationale

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. Such assets include: real estate other than a residence occupied by the prospective client or persons who are dependents of the prospective client; automobiles other than those necessary to maintain

¹² For example, in 2014, of the public defense programs that reported on the number of cases where representation was declined, an average of 2.5% of the clients referred for representation were declined for non-indigency. *See* 2014 UCS-195 reports (these reports are filed pursuant to County Law § 722-f).

¹³ The *Brennan Center Report* cites a 2001 study that found that “29% of families with incomes under 200% of the poverty level experience critical hardships, such as lack of food, medical care, housing, or basic utilities. Seventy-four percent experience serious hardships, such as worrying about having enough food, being forced to rely on inadequate medical care (such as emergency rooms) or child care. Heather Boushey et al., Economic Policy Institute, *Hardships in America: The Real Story of Working Families* 2, 4, 28 (2001).”

¹⁴ Examination of the New York Self Sufficiency Standard shows that New York’s percentage threshold should be higher than both 125% and 200% of the FPG, which organizations funded by the Legal Services Corporation usually use to determine eligibility for civil legal services. While 250% appears to work for single adults charged in criminal or family court, for parents with children even 250% would represent a bare bones budget and a higher percentage would be required. *See* New York State Self Sufficiency Standard Steering Committee, *The Self Sufficiency Standard for New York State* (2010). In New York City, it is our understanding that the current presumptive eligibility guidelines are 250% for misdemeanors and 350% for felonies; those percentages were established in 1991 and they may no longer be sufficient. Further discussion of the FPG appears below.

employment or school enrollment or for transportation to medical care for the prospective client or persons dependent on the prospective client;¹⁵ and luxury items.

Child support received for any child for whom the prospective client is currently responsible, including any child whose education costs the prospective client is paying in whole or in part, should not be considered.

Since the constitutional guarantee of counsel is a personal right,¹⁶ 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.¹⁷ 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. The rulings that uphold recovery of attorney's fees from parents for the representation of a minor charged with a criminal offense are unsound and promote unlawful policy and practice. *See Assigned Counsel Eligibility of Minors in Criminal Court: No Parental Liability* (NYSDA July 8, 2015).

D. "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."

NYSDA Position: No

Rationale

Non-liquid assets, such as a home used as a primary residence, an automobile necessary to sustain employment, school enrollment, or medical care, and reasonable household furnishings, should be excluded from the net asset inquiry.¹⁸

¹⁵ As noted above, the settlement requires 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." We recommend that this standard be expanded to include an automobile that the prospective client or a dependent needs for school or transportation to medical care. Further discussion of a primary residence and automobiles appears below.

¹⁶ *Fullan v. Commissioner of Corrections of State of N.Y.*, 891 F.2d 1007, cert denied 496 U.S. 942; *People v. Ulloa*, 1 A.D.3d 468 (2d Dept. 2003) ("A defendant's status as an indigent is not altered merely because his or her family and friends retain private counsel to represent him or her at trial" [citations omitted].)

¹⁷ Section 412 of the Family Court Act makes clear that "[a] married person is chargeable with the support of his or her spouse and, if possessed of sufficient means or able to earn such means, may be required to pay for his or her support a fair and reasonable sum, as the court may determine, having due regard to the circumstances of the respective parties." This support standard is the common law traditional obligation to provide spousal "necessaries." Mandated legal representation provided under the County Law is not a "necessary." There have been occasions in New York case law where this principle has been extended to having one party pay the other party's counsel primarily in contested domestic relations matters. Nothing about the § 412 obligation however indemnifies the county for its expenditure under County Law § 722-e. *See* Family Court Act § 262 ("[A]ny order for the assignment of counsel issued under [FCA § 262] shall be implemented as provided in article eighteen-B of the county law."). Nor does it authorize a cause of action by the state or local government to recover the legal fees incurred while defending a spouse on criminal or family court charges.

¹⁸ *See Determining Eligibility for Appointed Counsel in NYS*, at 10.

E. “Whether debts and other financial obligations should be considered in determining eligibility.”

NYSDA Position: Yes

Rationale

Debts and other financial obligations of the prospective client should be carefully considered in determining eligibility,¹⁹ and their value should be subtracted as part of the calculus. *See Brennan Center Report*, at 12-13, 15, 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.”) *See also State Bar 2015 Revised Standards for Providing Mandated Representation*, Standard D-4 (addressing partial payment, the Standard refers to considering “all aspects of the person’s family circumstances, including but not limited to ... indebtedness.”)

F. “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.”

NYSDA Position: Yes

Rationale

There should be a process for appealing any denial of financial eligibility. A denial of eligibility must be made in writing and must include the basis for the denial. Any person denied counsel must receive notice of the right to appeal and the appeal process. The appeal process should ensure prompt resolution; when denial of eligibility is upheld, explanation of the denial must be confidential and made part of a sealed record relating to the matter for which counsel was sought.

VI. Additional Considerations on Eligibility Determinations (from ILS Eligibility Hearing Notice)

A. The process and/or method for disseminating information regarding the criteria for determining eligibility.

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. They should be detailed enough to make the eligibility process transparent, guide those who make eligibility determinations, and inform and aid those who rely on them to be applied fairly on their behalf. All criteria and procedures should be made publicly available by the courts in which litigants who may be eligible for mandated representation appear and by public defense programs. Instructions concerning criteria and procedures should be presented in a manner and language that each prospective client can understand. 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.

¹⁹ Income guidelines should never be employed as cut-offs, but should be considered with the debts and other expenses of the applicant. *Determining Eligibility for Appointed Counsel in NYS*, at 20.

B. The advantages and disadvantages of proposing uniform and comprehensive criteria and/or guidelines to determine eligibility.

As noted above, NYSDA's 1994 study described the random, poorly designed disparate eligibility determination procedures being used at the time around New York. NYSDA has every reason to believe that through its present inquiry, ILS will find that this state of affairs continues to this day. Nothing has changed in the last twenty years except the settlement's demand that "criteria and procedures to guide courts in counties outside of New York City in determining whether a person is eligible for Mandated Representation" be created.

Nearly four decades of experience providing backup services to public defense attorneys and offices, providing technical assistance to counties, and fielding complaints from clients denied access to counsel in violation of their constitutional right to it, lead us to conclude that despite the difficulties of promulgating constitutionally and legally based standards in an underfunded county-based system, uniform and comprehensive criteria and statewide standards to determine eligibility are required.

C. Any related social and economic benefits and/or consequences related to the impact of standardizing eligibility determinations.

Standardized criteria and procedures for determining financial eligibility for the appointment of counsel will bring a variety of benefits. These guidelines can eliminate the substantial amount of idiosyncratic, divergent, and improper practices that are depriving individuals of their right to appointed counsel. The eligibility standards would send a clear signal to defenders, courts, and counties as to what is required, how decision-making should proceed, the basis for the standards and the method and purpose for their implementation. For people of good faith, the standards will lay to rest many of the problems identified. They can also provide a means by which ILS can collect data on eligibility applications and rates of acceptance and denials across the counties.

We expect that a consequence of standardizing eligibility determinations and making them coextensive with constitutional and statutory mandates will increase the cost of implementing the right to counsel. **ILS, defenders, judges, county officials, the private bar, and the client community must join forces to demand the adequate financing of defender systems appropriately finding eligible those who legally deserve the appointment of counsel. And all three branches of New York State government must become fully responsive to this need, funding it appropriately.**²⁰

²⁰ In 2015, Assemblywoman Patricia Fahy and twenty five other members of the Assembly have introduced A.6202-A, which would amend County Law § 722-e to require state reimbursement for county public defense expenditures. This bill would incrementally lead within three years to the State reimbursement of all county public defense expenditures. This bill can provide mandate relief and fund improvements in the 57 counties not covered by the *Hurrell-Harring* settlement.

VII. Other considerations

A. Using Income Guidelines as a Cap on Eligibility.

Income measures, such as a percentage of the FPG, as discussed above, can be used to find someone presumptively eligible for counsel, but exceeding an income guideline alone cannot be a basis to deny the appointment of counsel.²¹ Meeting or exceeding income guidelines is not determinative of eligibility, but must be considered with other factors. In addition to income, other relevant information to determine an individual's ability to afford counsel should be considered, including: an individual's assets and debts; the seriousness of the charge(s); the complexity of the case; and the cost of private representation in the relevant jurisdiction.

B. Partial payment and illegal cost recovery.

Courts read County Law § 722-d too expansively, fashioning co-payment and sliding fee schemes which are not authorized by law. The standards should make clear that a strict reading of the law is mandatory.

Nothing in § 722-d authorizes a court to prospectively order partial payment of assigned counsel fees during the initial eligibility determination process. At most, the statute provides that if, at some point during the course of representation, appointed counsel determines that the assigned representation should be terminated based on the represented individual's newly discovered ability to hire counsel, then under County Law § 722-d, counsel *may* seek to withdraw or ask the court to order reimbursement for services rendered. Section 722-d does not authorize courts to act *sua sponte* with regard to payment for legal services of assigned counsel. *See Matter of Legal Aid Society v. Samenga*, 39 A.D.2d 912 (2d Dept. 1967).

Other illegal cost recovery practices have involved the use of recoupment schemes. These too should be prohibited by the ILS standards, perhaps by a simple citation to 1985 N.Y. Op. (Inf.) Att'y Gen. 78, which concludes that counties may not implement a plan requiring individuals to repay the cost of counsel if they "subsequently acquire[] the means to bear the costs of the legal defense."

C. Verification of financial status may undermine timely appointment of counsel.

As the *Brennan Center Report* made clear, most people coming before both the criminal and family courts require the appointment of counsel and can be deemed eligible quickly through the use of reasonable and fiscally prudent presumptive categories. Lengthy and onerous eligibility practices, which in other contexts derive their ability for "governmental savings" by discouraging applicants seeking services,²² 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. Further a national study on eligibility conducted by the U.S. Department of Justice in 1986 concluded that verification of all financial information in each application for

²¹ Problems with using the LSC guidelines as an income cap are exacerbated when the guidelines are misapplied. For example, non-cash benefits, such as food stamps and housing subsidies, are sometimes counted as income, even though LSC regulations specifically exclude them.

²² *See generally* Michael Lipsky, *Street Level Bureaucracy: Dilemmas of the Individual in Public Services* (30th Anniversary expanded ed. 2010).

appointed counsel wastes scarce resources and causes unnecessary delay in the proceedings.²³ The study recommended that eligibility information be verified only when financial data is missing or when there are legitimate grounds to suspect it is inaccurate. A more recent study has made similar findings on the cost-effectiveness of verification procedures.²⁴ See also *Brennan Center Report*, at 21.

D. Data collection and reporting on eligibility applications, denials and appeals.

Defender offices and the courts (reviewing appeals from denials) should maintain all confidential financial eligibility applications and report to ILS, at least annually, the number of applications for appointed counsel, denials of eligibility, appeals from denials, and results of such appeals. In addition to the public policy benefits that arise from collecting and analyzing such data, including evaluating the effectiveness of eligibility practices, Executive Law § 832(3)(b)(viii) requires that ILS collect eligibility determination data: ILS has the responsibility to collect and receive information and data regarding, among other things, “the number of persons considered for and applicants denied such services, the reasons for the denials, and the results of any review of such denials, including the number of orders issued pursuant to section seven hundred twenty-two-d of the county law.”

Support for this Statement on the Criteria and Procedures for Determining Eligibility in New York State

New York State has reached an important moment in its history. The Judiciary, the Executive, and the Legislature along with defenders and the organized bar are keenly alert to the possibility of real improvements being made to our public defense system. And now for the first time, New York State will soon have criteria and procedures for determining eligibility for mandated representation. This is a critical moment for defense groups. The following organizations support this statement on eligibility, which is being provided to the Indigent Legal Services Office for its consideration.

²³ National Institute of Justice, *Containing the Costs of Indigent Defense Programs: Eligibility Screening and Cost Recovery Procedures* (September 1986).

²⁴ “The project’s verification component in its current configuration does not seem effective in uncovering financial information that results in a denial of public defender appointments that, but for verification, otherwise would have occurred.” Elizabeth Neely & Alan Tomkins, *Evaluating Court Processes for Determining Indigency*, 43 *COURT REVIEW* 4, 10 (2007).