

# New York State Defenders Association

194 Washington Avenue, Suite 500  
Albany, New York 12210  
(518) 465-3524 • info@nysda.org

## MEMORANDUM

**To:** New York State Chief Defenders  
**From:** Susan C. Bryant, Executive Director  
**Date:** January 26, 2022  
**Re:** Making an Informed Eligibility Determination

The constitutional and statutory standard for determining eligibility is “financially unable to afford counsel,”<sup>1</sup> not indigency. The Court of Appeals has ruled that courts must “make a sufficient inquiry into the defendant’s ability to engage a lawyer.”<sup>2</sup> Income measures, such as a percentage of the poverty guidelines, may be a useful shorthand for making an initial eligibility finding, but the failure to meet income guidelines alone cannot be a basis to deny the appointment of counsel. The receipt of public assistance benefits such as Temporary Assistance, SSI, or food stamps should indicate an individual’s inability to retain counsel.

**According to the New York State Office of Indigent Legal Services (ILS) 2021 Criteria and Guidelines for Determining Assigned Counsel Eligibility,**<sup>3</sup> applicants are presumptively eligible for assignment of counsel under County Law article 18-B (including in criminal and family court proceedings) if their net income is at or below 250% of the Federal Poverty Guidelines (FPG). Again, exceeding income guidelines is not determinative of ineligibility, but must be considered with other factors. In addition to income, a court (or any program or office that may make an initial eligibility recommendation) must consider other relevant information to determine an individual’s ability to afford counsel, including:

- an individual’s assets and debts;
- seriousness of the charge(s), complexity of the case, and anticipated need for other representation expenses (such as investigative and expert services); and
- actual cost of private counsel in the relevant jurisdiction for the type of family court proceeding or category of crime charged.

These and other factors are set forth in ILS’s guidelines.

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

Family Size	Annual Income by % of Federal Poverty Guidelines* (Effective January 12, 2022)		
	125% (LSC- civil legal services)	250% ILS presumptive eligibility	350%
1	\$16,988	\$33,975	\$47,565
2	\$22,888	\$45,775	\$64,085
3	\$28,788	\$57,575	\$80,605
4	\$34,688	\$69,375	\$97,125
5	\$40,588	\$81,175	\$113,645
6	\$46,488	\$92,975	\$130,165
7	\$52,388	\$104,775	\$146,685
8	\$58,288	\$116,575	\$163,205
Each Add'l. Person	\$5,900	\$11,800	\$16,520

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

<sup>1</sup> See CPL Articles 170 and 180; County Law article 18-B.

<sup>2</sup> *People v. McKiernan*, 84 NY2d 915 (1994).

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