

# The Impact of Eligibility Standards in Five Upstate New York Counties

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## Executive Summary

This report contains research conducted by the New York State Office of Indigent Legal Services (ILS) into the implementation of new *Criteria and Procedures for Determining Assigned Counsel Eligibility (Criteria and Procedures)* in five upstate New York counties in 2016.

We examined whether the implementation of the *Criteria and Procedures* changed either the rate at which people applied to obtain counsel, or the rate at which applicants were actually found eligible for counsel. We then projected the likely change in caseloads for counties.

The conclusions of this report should be thought of as preliminary because the *Criteria and Procedures* have not been in place for very long: their true impact may only be known with time.

### Changes in application rates

- Ontario, Schuyler and Suffolk counties show no evidence of any increase in the number of applications for counsel received by providers of indigent legal services.
- A modest increase in application rates was observed in Washington County, but was likely due to the introduction of a new ‘counsel at first appearance’ program directly before the *Criteria and Procedures* were implemented.
- In Onondaga County, the application rate increased by approximately 27%. The reasons for this are unclear. Judges may be referring more people for representation or attorneys may be clearing out backlogged applications that could not be submitted under the old rules.

### Changes in eligibility rates

- The percentage of applicants found financially ineligible declined in all four counties for which we had comprehensive data. Incomplete data for Suffolk County also showed a decline.

	Percentage of Applicants for Counsel Denied for Financial Reasons	
	Before implementation	After implementation
Onondaga	5.3%	1.9%
Ontario	2.3%	0.6%
Schuyler	3.1%	0.9%
Suffolk*	5.1%	1.4%
Washington	6.0%	0%
Average	4.4%	1.0%

\*Suffolk County figures are for a subset of cases and may not be representative of the county as a whole.

### Caseload impact

- In Ontario, Schuyler and Washington counties, caseloads are projected to increase by 1.7%, 2.3% and 6.4% respectively because of the reduced numbers of persons being denied counsel.
- In Onondaga, we project that overall caseloads will increase by approximately 32%. This is in part because of the higher rate at which applications are now being received by the program, but also due to a reduction in the number being denied counsel for financial reasons.
- In Suffolk County we had insufficient data to make a projection for the county as a whole.

## Introduction

In March of 2015, the Stipulation and Order of Settlement in the case *Hurrell-Harring et al. v. State of New York* became effective. It required that the New York State Office of Indigent Legal Services (ILS) implement reforms to the representation of accused persons in criminal cases in five counties in upstate New York (Ontario, Onondaga, Schuyler, Suffolk and Washington). Under the terms of the settlement, ILS was charged with implementing reforms which would assure the presence of counsel at all arraignment sessions, provide relief from excessive caseloads, bring improvement to the quality of legal representation, and overhaul existing standards for determining financial eligibility for representation.

On the subject of financial eligibility, the Settlement instructed ILS as follows:

ILS shall, no later than 6 months following the Effective Date, issue criteria and procedures to guide courts in counties outside of New York City in determining whether a person is eligible for Mandated Representation.<sup>1</sup>

Notably, this requirement, as with all requirements of the Settlement, applied only to cases in criminal court. Family court representation was not covered by the Settlement, and accordingly any standards put forth by ILS would not apply there.

On April 4, 2016, ILS released its *Criteria and Procedures for Determining Assigned Counsel Eligibility*.<sup>2</sup> The *Criteria and Procedures*, as they will hereinafter be known, describe how the financial eligibility of persons applying for assignment of counsel as a criminal defendant should be assessed. The eight *Criteria* set standards for which types of financial resources should or should not be considered, and describe the conditions under which a person should be considered ‘presumptively eligible’, such as being a recipient of needs-based public assistance. The eight *Procedures*, meanwhile, focus on the eligibility determination process, stressing the need for consistency, confidentiality, alacrity, and the defendant’s right that any determination be reviewable, among other matters. The five counties named in the *Hurrell-Harring* lawsuit were required to undertake best efforts to implement the *Criteria and Procedures* for all criminal defendants seeking counsel no later than October 3, 2016.

The issuance of the *Criteria and Procedures* was followed by a report by the *Chief Defenders Association of New York* (CDANY) which raised the concern that the caseloads of providers of indigent legal services would increase as a consequence of their implementation.<sup>3</sup> As the report noted, and as ILS has documented, defenders around the state often work under intolerable workload burdens.<sup>4</sup> Responding to these concerns, and to fiscal concerns raised by counties, legislators and other interested stakeholders, the parties to the *Hurrell-Harring* Settlement agreed to delay the effective date of the *Criteria and Procedures* in upstate counties other than those in the *Hurrell-Harring* lawsuit until April 1,

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<sup>1</sup> *Hurrell-Harring et al. v. New York*, Stipulation and Order of Settlement, section VI(A), available here:

<https://goo.gl/hWAI3d>.

<sup>2</sup> The *Criteria and Procedures* can be found here: <https://goo.gl/DpEqZU>.

<sup>3</sup> Chief Defenders Association of New York (2016). *Report...on the Indigent Legal Services Office's Criteria and Procedures for Determining Assigned Counsel Eligibility Issued April 4, 2016*. (CDANY: Brooklyn, NY). On file with ILS. ILS also heard from other parties concerned about this impact.

<sup>4</sup> See, for example, our *Estimate of the Cost of Compliance with Maximum National Caseload Limits in Upstate New York – 2015 Update*, showing defenders in 2015 shouldered an average weighted caseload of 561, 52% above national standards. Full report available here: <https://goo.gl/dPYDXi>.

2017. This was intended to allow for an opportunity to secure additional local and state funding for possible increased caseloads, and to give ILS a chance to study the issue.

In ensuing discussions with stakeholders and other interested parties around the state, we identified two key ways in which it was expected the *Criteria and Procedures* might increase caseloads. First, more defendants might apply for counsel, either because they believed that the *Criteria and Procedures* increased their chances of being found eligible, or because the lawyers, judges and administrators responsible for soliciting applications would encourage more people to apply. Second, among those who applied, more defendants might be found eligible for counsel because the *Criteria and Procedures* would allow counsel to be provided to more applicants than previously.

This report examines the impact of the implementation of the *Criteria and Procedures* in the five *Hurrell-Harring* counties. Its findings are necessarily preliminary: while the *Criteria and Procedures* have clearly had an impact in the five counties, the short time that has elapsed since implementation requires us to be cautious about the conclusions we reach about the likely size of those effects. Nevertheless, to the extent our data enable us, we present straightforward estimates on the possible impact of the *Criteria and Procedures* in the counties examined, should the changes observed in this initial period prove enduring.

## Data and Analysis

Our research was guided by two specific questions:

- 1) Since the implementation of the *Criteria and Procedures*, have the numbers of people applying for counsel changed?
- 2) Since the implementation of the *Criteria and Procedures*, has the proportion of applicants determined eligible for counsel changed?

We sought data from each of the five counties on the numbers of applications for counsel in criminal cases and the numbers denied on grounds of financial ineligibility for a period beginning no later than January 1, 2015 to the present.

Obtaining these data was not always straightforward. While many providers customarily report eligibility statistics, for example, some report on all persons applying for counsel combined, whether in criminal or family court.<sup>5</sup> Others report totals for all persons denied counsel without distinguishing those who were denied specifically for their ability to pay.<sup>6</sup> Family court representation is beyond the scope of the *Criteria and Procedures*, and including non-financial denials in our analysis would have obscured the impact that changes in financial screening were having on the eligibility determination

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<sup>5</sup> Representation of family court litigants – totaling approximately 25% of the caseload of providers statewide – has been a mandated responsibility of providers of indigent legal services across the state since 1975 under the Family Court Act, see *In Re Ella B.*, 30 N.Y.2d 352 (1972) (recognizing a constitutional right to assigned counsel in family-related matters). Several counties have in fact chosen to implement equivalent eligibility standards for applicants in family court, finding it either impractical or inconsistent to do otherwise. This decision might, of course, have resulted in changes to the caseloads of the programs in question. Following the parameters of the settlement, however, we do not examine those caseloads here.

<sup>6</sup> Non-financial reasons for declining a person's application might include that the applicant had no right to counsel in the case, that their application was incomplete, or that the applicant themselves later withdrew the application, among other possibilities.

process. In cases where these were included, we were obliged to seek more refined information. Ultimately, we were able to collect the data we needed in four of the five counties; in the fifth, Suffolk, we obtained complete data for only a subset of cases in the county.

In each county, we conducted the same four analyses. First, we described the numbers of applications and financial denials recorded in the data across the entire period. Second, we examined the rates at which applications were received by the programs before and after implementation of the *Criteria and Procedures*. We calculated the average number of applications a program received per day, including weekends. And third, we examined the rates at which persons were deemed ineligible for assignments of counsel before and after implementation of the *Criteria and Procedures*. Last, we calculated the likely impact on caseloads of changes in both rates of applications and ineligibility determinations.

### Five different contexts

In 2015, at least seventy separate procedures for determining eligibility were in place in New York.<sup>7</sup> The number is likely little diminished today, and we recognized in the course of our research that our findings could only be understood in local context. Understanding what went before the *Criteria and Procedures* in each county is critical for understanding their impact, and we relied where we could on discussions with local providers and others to learn what they thought had really happened after the implementation of the standards. We obtained some basic information from the *Census Bureau* and elsewhere on local demographics, geography, poverty and caseloads which set some basic parameters for understanding characteristics of each county that might relate to eligibility.<sup>8</sup> We hope that in presenting these data and reporting on these discussions, not only will our findings be clearer, but also that readers from other counties may better be able to identify a jurisdiction among these five that is most similar to their own.

We tailored our analysis in each county to account appropriately for differences in the implementation process itself. Notwithstanding that the effective date of implementation was October 3, each county in fact implemented, at least partially, on some date earlier than that; one county rolled out the standards in two stages, while another implemented at different times in different courts. Accordingly, we had to determine the appropriate ‘cut-points’ in the timeline that would most clearly show the impact of the introduction of the *Criteria and Procedures*, and also which periods best represented ‘baseline’ and ‘implementation’ periods for comparison.

Each county used a different set of eligibility determination processes prior to implementation – effectively differentiating the ‘baseline’ conditions in each, potentially moderating the impact of the *Criteria and Procedures* across counties. We therefore present below, in addition to our statistical

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<sup>7</sup> See ILS (2016), *Determining Eligibility for Assignment of Counsel in New York: A Study of Current Criteria and Procedures and Recommendations for Improvement*, page 5, at <https://goo.gl/P2ntsK>.

<sup>8</sup> We retrieved county populations, median income and poverty rates. U.S. Census Bureau. (2016, March). *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2015*. Retrieved January 12, 2017, from <https://factfinder.census.gov/faces/tableservices/isf/pages/productview.xhtml?src=CF>; U.S. Census Bureau. (2016, March). *2011-2015 American Community Survey 5- Year Estimates*. Retrieved January 12, 2017, from [https://factfinder.census.gov/faces/nav/isf/pages/community\\_facts.xhtml](https://factfinder.census.gov/faces/nav/isf/pages/community_facts.xhtml). We also reviewed basic crime statistics for each county found here <http://www.criminaljustice.ny.gov/crimnet/oisa/dispos/all.pdf>. When reporting ‘violent felony’ statistics, we follow the DCJS definition of ‘violent felony’ found in Appendix A of this report: <http://www.criminaljustice.ny.gov/crimnet/oisa/nys-violent-felony-offense-processing-2015.pdf>.

analysis, a description of the eligibility determination process prior to the *Criteria and Procedures* in each county using information that ILS collected in 2015.<sup>9</sup> These descriptions, based on survey responses and documentation provided to us by various people involved in eligibility determination in the counties at that time, cover matters including whether applicants for counsel were required to present documentation in support of their application, whether certain applicants automatically qualified for counsel, and what types of income and assets were considered in assessing their ability to pay for representation, among other matters.

More broadly, the five counties examined here were each undergoing a variety of simultaneous reforms to their provision of indigent legal services across the periods we examined – in particular, the expansion of counsel at first appearance (CAFA), which was also mandated under the *Hurrell-Harring* settlement. Several providers warned us that it was likely that these programs were also influencing their caseloads, and so we took care in our analysis to attempt to isolate such impacts to the extent we were able in order that we could more confidently assess the impact of the *Criteria and Procedures* themselves.

Finally, we were mindful that the specific period for implementation of the *Criteria and Procedures* (effective October 3, 2016) was the fall and winter, generally a time when courts have lower caseloads anyway. For that reason, we were careful both to request two years of data from each county – allowing us to compare implementation periods in 2016 to the same periods in 2015 – and to obtain monthly arraignment counts from the New York State Division of Criminal Justice Services for each county going back to 2010 with which we could identify obvious seasonal trends.

Most important of all in this process of analyzing and then understanding our data was the help, time and understanding we received from providers in all five counties, who shared not only their data but also their knowledge and insights into what might explain what we found. Through these consultations we were made yet more aware of the unique circumstances in each county and the possible impact of those circumstances on the application and eligibility rates we observed. Their insights informed our ultimate conclusions at several points, as is indicated in the text.

We are confident in our conclusions about the changes in application and eligibility rates we observe after the implementation of standards. Of course, it is always possible that we may have missed the real explanation for the trends in the data that we see. The timeline on this analysis is short – just a few months post-implementation – and the true, long-term impact of the standards may not be known for some time. Further analysis using more refined analytical techniques could reveal more about what is driving caseload change in the counties and any role the *Criteria and Procedures* may have played. All conclusions of this report should accordingly be thought of as preliminary, and based on available data at the time of writing. Nevertheless, we hope our report is useful, its methods clear, and its conclusions informative.

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<sup>9</sup> This data collection is described fully in *Determining Eligibility*, *supra* note 7.



## Onondaga County

Onondaga County is a moderately-sized (806 sq. mi.) county in central New York containing a large urban center, the city of Syracuse. In 2015, 15.4% of its population of 468,463 lived below the poverty line and median household income was around 93% of the state average, at \$55,092. DCJS recorded a total of 10,669 arrests disposed that year. Almost precisely a third were felonies, and 9.5% were violent felonies.<sup>10</sup>

All trial-level representation for indigent persons in Onondaga County is provided by the Assigned Counsel Program (ACP), which also plays a role in screening defendants for financial eligibility. At their first appearance in court, a judge will ask a defendant whether they wish to be considered for assignment of counsel.<sup>11</sup> At the judge's discretion an attorney may then be provisionally assigned and the defendant referred to the ACP for financial screening. In order for screening to begin, the attorney must gather together an application form and any required supporting documentation from their prospective client and submit it to the ACP. That program then makes its assessment and provides a recommendation to the court which it may accept or reject. If the applicant is determined eligible – either on the recommendation of the ACP, or pursuant to a judge's rejection of its recommendation to deny counsel – the assignment of the defendant to an attorney is finalized.

### Determining Eligibility Prior to the *Criteria and Procedures*

Prior to the implementation of the *Criteria and Procedures*, applicants for counsel in Onondaga County were required to fill out an application and provide supporting documentation such as recent paystubs.<sup>12</sup> Persons incarcerated or receiving certain welfare benefits were presumed to be eligible, as were those with incomes below 125% of the Federal Poverty Line. The income of third parties such as parents and spouses was included in the income calculation, however. These provisions are summarized in Table 1.

Individuals who were not found presumptively eligible would be subjected to an assessment of their ability to afford counsel. That assessment would consider not only the applicant's income from employment, but also any income from child support, alimony, pensions and disability or unemployment benefits among others. It would account for the value of a person's savings, home and automobile; if a person reported they made mortgage payments, this made them less likely to be eligible for assignment of counsel because it implied home-ownership. Certain

*Table 1: Presumptive Eligibility and the Consideration of Third Party Resources in Onondaga County Prior to the Criteria and Procedures*

Persons presumptively eligible for counsel

- Incarcerated
- Receiving public benefits (welfare)
- Income below 125% of Federal Poverty Line

Third parties whose income could be considered in the eligibility determination

- Applicant's spouse or partner
- Parents

<sup>10</sup> All sources cited *supra* note 8.

<sup>11</sup> Defendants are, in fact, represented at these appearances following the implementation of 'counsel at first appearance' provisions across the county. The judge's question thus refers to whether they would like to receive continuing representation.

<sup>12</sup> In response to ILS' 2015 survey, the Executive Director of the assigned counsel program wrote that the type of documentation required would 'depend on income source.'

entitlements to welfare could render a person more likely to be eligible as could child support obligations, but, as noted in Table 2, several other types of financial obligation, including outstanding medical bills, credit card or student loan debt, rent, utility bills, and the need to meet basic living expenses, were all excluded from consideration in the assessment of a person’s ability to afford counsel (see Table 2).

*Table 2: Considerations in Income Assessment in Onondaga County Prior to Implementation of the Criteria and Procedures*<sup>13</sup>

Earns income from employment	
Receives pension payments	
Must make monthly mortgage payments	
Owens a home	
Has savings	
Owens an automobile which is not essential to their employment	
Owens an automobile which is essential to their employment	Less likely to be eligible
Receives child support	
Receives welfare (e.g., TANF, cash assistance, food stamps)	
Receives other public benefits	
Receives Alimony	
Receives disability benefits	
Receives unemployment benefits	
Post bond	
Receives other public benefits	
Is unemployed	More likely to be eligible
Must make child support payments	
Must pay utility bills	
Has credit card debt	
Has outstanding medical bills	Not considered
Has student loans	
Must pay rent	
Must meet basic living costs (e.g., transportation, food)	

#### The Impact of the *Criteria and Procedures* on Caseloads

Onondaga County ACP implemented the *Criteria and Procedures* on September 19, 2016, and they were applied to all incoming applications after that date, as well as any prior applications which were reconsidered for any reason.<sup>14</sup> We obtained monthly totals for assignments in the years 2015 and 2016 from the Executive Director of the ACP, through the end of October, 2016. The Executive Director left the program in December of 2016, and at the time the data for November were still being entered and

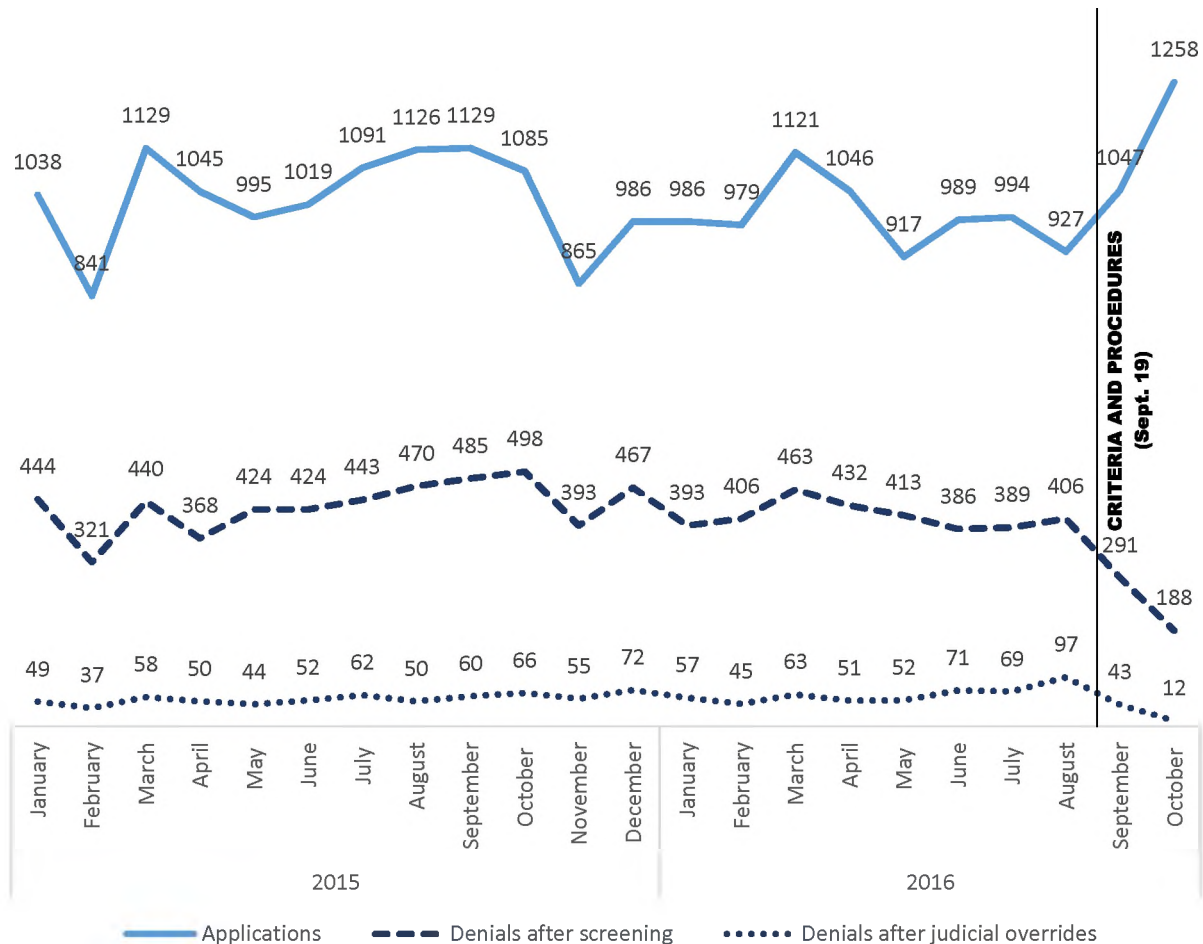
<sup>13</sup> The information shown here was drawn from responses to ILS’ 2015 survey on eligibility determination procedures. The responses to that survey lacked information in several categories, however, so we also relied on a memorandum issued by the assigned counsel program titled 2015 Eligibility Guidelines in which the manner in which several of these factors were also discussed.

<sup>14</sup> The Executive Director noted, in a call during December, 2016, that reconsideration had happened only rarely. Reconsideration changed the status of the case in the ACP’s data system permanently, so it is impossible to know how often this had actually happened.

were not available. Accordingly, we have data for a period of only approximately six weeks (September 19 to October 31) following implementation of the *Criteria and Procedures*.

Onondaga’s data capture the multi-stage nature of its eligibility determination procedure. First, they note if a person was determined eligible under the assigned counsel program screening process. Second, from those who were not deemed eligible, they note how many had their eligibility restored by a judicial override of that determination. Third, they also record the number of applications received that were incomplete (typically because required paperwork had not been submitted, according to the Executive Director). Notably, this number could change over time as defendants whose applications were outstanding returned to complete them.<sup>15</sup> In order to analyze the change in screening procedures that began on September 19, we restricted our analysis only to completed applications. Figure 1 shows the numbers of applications and denials in Onondaga County for the years 2015 and 2016.

Figure 1: Applications for Counsel and Denials in Criminal Cases in Onondaga County 2015-2016



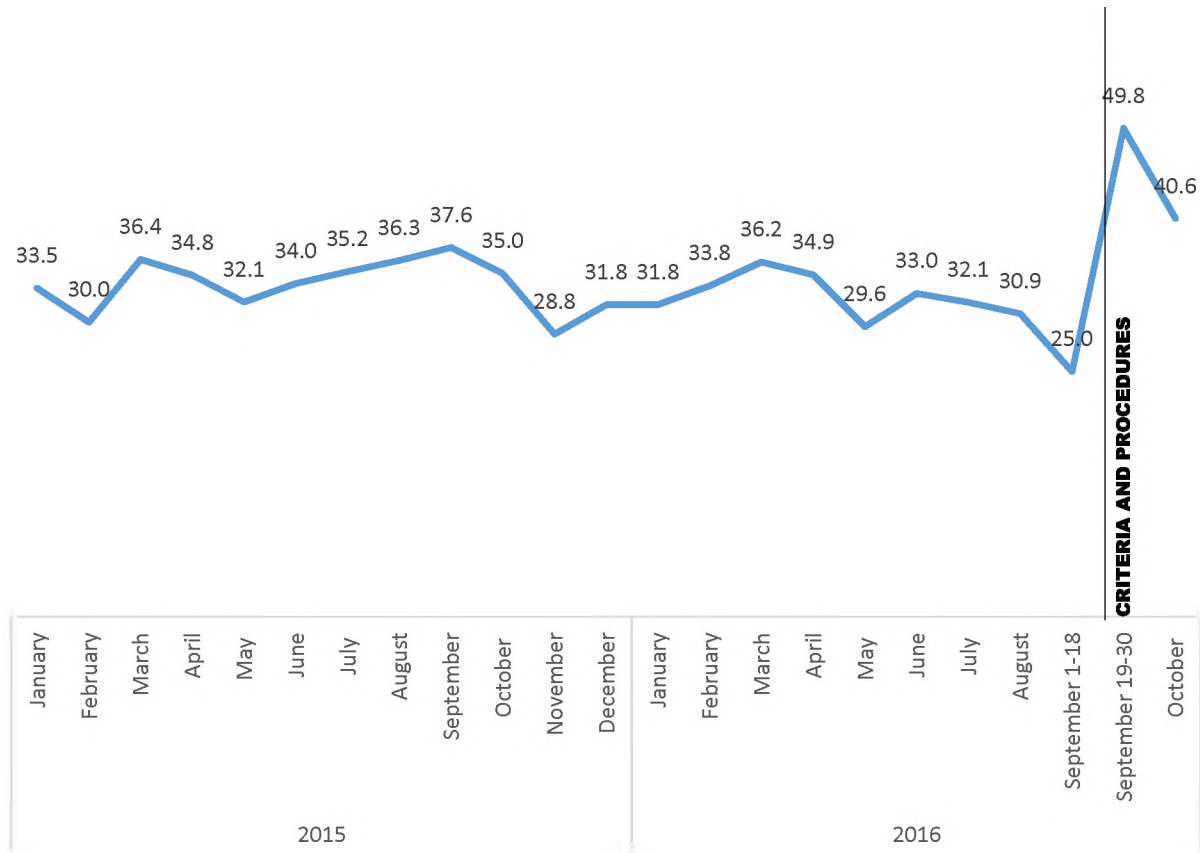
<sup>15</sup> We did, in fact, notice that the number of applicants with ‘pending’ or incomplete applications were higher in later months in our data. These data are not presented here but are on file with ILS. The ACP Executive Director told us she expected the number of incomplete applications to drop because the requirements for supporting documentation were relaxed under the *Criteria and Procedures*.

We note that the ‘judicial override’ mechanism is a critical stage in the determination of eligibility in Onondaga County. As we review in more detail below, whereas an average of over 40% of persons have historically been found ineligible by the assigned counsel program’s screening process, this is reduced to just 5 or 6% after judicial overrides, meaning that Onondaga County judges override the assigned counsel plan’s ineligibility determinations more than 80% of the time.

### Application rates

Immediately after implementation of the Criteria and Procedures, the data we received showed an increase in the number of applications per day in the Onondaga Assigned Counsel Program. Whereas historically applications were received at the rate of slightly over 30 per day, the rate after implementation has been in excess of 40 per day.<sup>16</sup> Figure 2 and Table 3 contain more data.

Figure 2: Rate of Applications Received Per Day in Onondaga County, 2015-2016.



<sup>16</sup> Note that the unusually low number in early September, and the large number in late September, may be influenced by the uneven distribution of weekends among these periods.

Table 3: Application Rate in Onondaga County Before and After Criteria and Procedures Implementation

Period	Average number of applications per day
2015	33.8
2016 to September 18	32.2
2016 September 19 to October 31	43.1

The Executive Director of the program anticipated this finding on delivering the data to us, explaining that October 2016 had been the busiest month in the history of the program (an observation which our data supports). She attributed responsibility for the increase to changes in the ways judges were making the decision to refer defendants to her program. Whereas prior to the implementation of the *Criteria and Procedures*, she said, judges would have made a preliminary assessment of a defendant's likely eligibility and instructed any who seemed wealthy that they would have to retain counsel, they now chose to refer all defendants – even those who seemed wealthy – to the program, believing that the new standards would likely find them eligible. ILS has not conferred with judges in Onondaga County on their opinions on this matter, however, which is clearly worthy of further investigation.

Another possible reason for this surge in applications is that the *Criteria and Procedures* reduced the amount of documentation required to be submitted to apply to the ACP, and that attorneys in the program responded by submitting large numbers of applications which had previously been backlogged. The requirements for supporting documentation prior to the *Criteria and Procedure* could be extensive (such as the production of rent receipts, bank statements or third party affidavits). ILS is aware of examples of cases in which attorneys took weeks or even months to prepare applications for assignment. Applications received after September 19 were processed without the need for such extensive documentation, even if the original assignment was received prior to that date – a fact which ILS made clear both in a memorandum to ACP attorneys and also in follow-up conversations with panelists.<sup>17</sup> Attorneys may have recognized this as an opportunity to submit applications that would previously have been rejected summarily as incomplete.

These two possible explanations have different implications for the future: if Onondaga County judges have changed their behavior, application numbers are likely to be sustained at high levels. If the attorneys were simply submitting some backlogged applications, the surge is likely to diminish. We cannot tell which of these is most likely at this stage, though future monitoring of the number of applications coming into the program should provide greater clarity.

For our analysis, we simply compared application numbers after the *Criteria and Procedures* with those received before. In 2015, 12,349 completed applications for representation were received by the Onondaga assigned counsel plan, or approximately 33.8 per day. If the rate of applications in that year had been 43.1 per day, as shown in our data since implementation, the total number of applications in 2015 would have been 15,732. This would have represented an increase of a total of 3,383 applications for representation.

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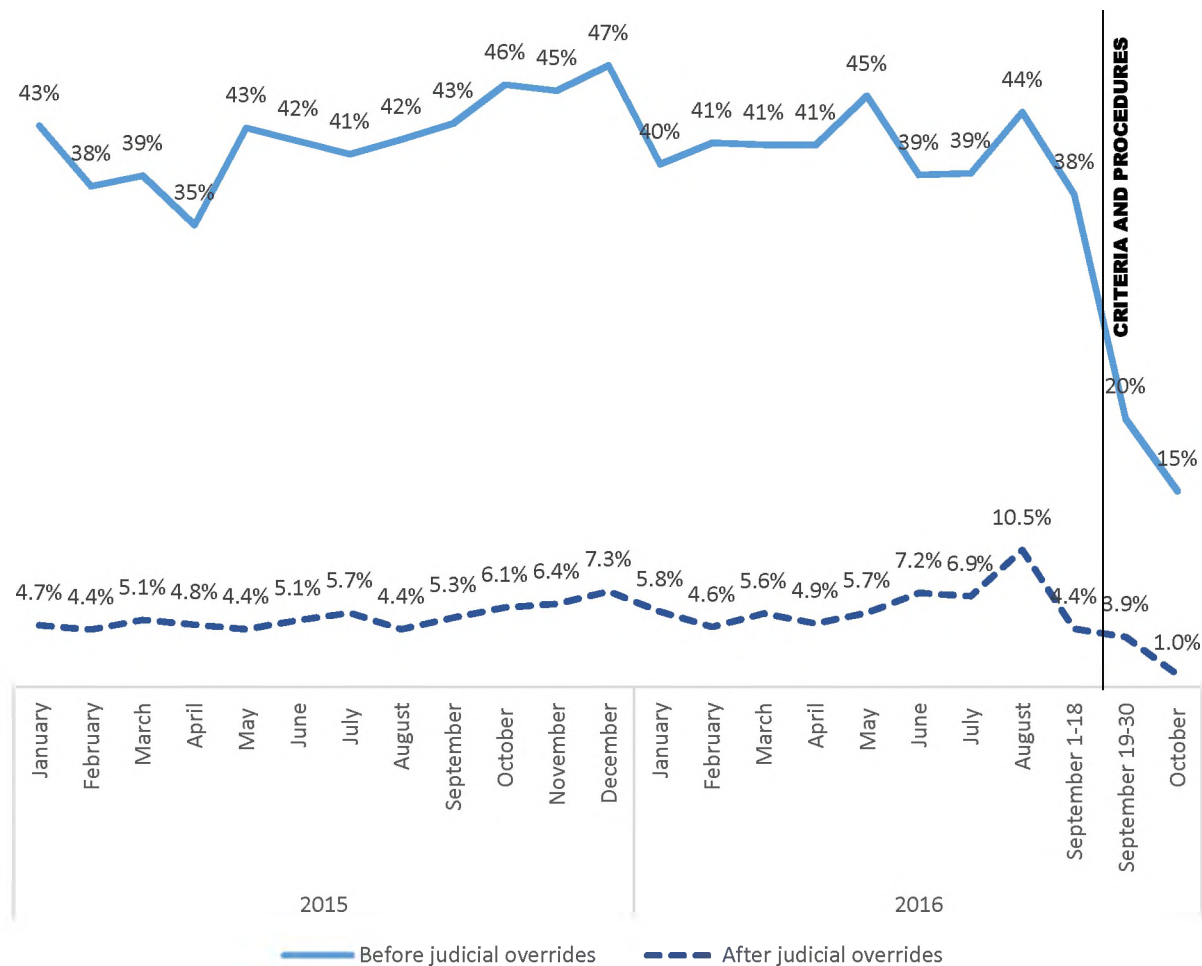
<sup>17</sup> This was communicated to ACP attorneys via a September 13, 2016, memorandum, on file with ILS.

## Eligibility rates

Following the implementation of the *Criteria and Procedures* the rate at which defendants were found ineligible by the assigned counsel program’s screening process dropped from its historical rate of over 40% to just 17% (see Figure 3 and Table 4 below). The rate at which persons were found ineligible after judicial override also dropped – from 5 or 6% to under 2% – though we note that it does not appear that it was the judges who had changed their behavior. Just as prior to the *Criteria and Procedures*, judges overrode over 80% of determinations (86% in fact), that rate was little changed – 89% – after implementation. Accordingly, we conclude that the reduction in the numbers of ineligible persons in Onondaga County following the implementation of the *Criteria and Procedures* was a consequence principally of the changing number found ineligible by screening by the ACP.

In 2015, Onondaga County provided representation to 11,694 out of 12,349 applicants under the assigned counsel program, for an overall denial rate of 5.3% (see Table 4). If the number of applications had instead been 15,732 (as calculated above) and the ineligibility rate just 1.9%, the total number of persons accepted for representation would have been 15,435, an overall increase of 3,741, or approximately 32%.

Figure 3: Ineligibility Rate by Month, Onondaga County, 2015-2016



*Table 4: Ineligibility Rate in Onondaga County Before and After Criteria and Procedures Implementation*

<b>Period</b>	<b>Ineligibility rate after screening</b>	<b>Ineligibility rate after judicial overrides</b>
2015	42%	5.3%
2016 to September 18	41%	6.2%
2016 September 19 to October 31	17%	1.9%

## Ontario County

Ontario is a moderately-sized county (663 sq. mi.) located in Western New York containing two small cities. Indigent legal services are provided through a public defender office with a conflict defender office and an assigned counsel panel handling conflict cases. Its 2015 population was 109,561 of which 10.4% lived below the poverty line. Median household income was \$57,416, approximately 97% of the state average. 69% of the 1,766 fingerprintable arrests recorded by the New York State Division of Criminal Justice Services as disposed in 2015 were charged at the misdemeanor level; the other 31% were felonies. Violent felonies made up 5% of the total.<sup>18</sup>

### Determining Eligibility Prior to the *Criteria and Procedures*

In Ontario County, all eligibility determinations have historically been performed by the Public Defender Office prior to the determination of conflicts of interest. In rare cases where a conflict is known in advance, eligibility interviews could be performed with the conflict defender present. Applications from all persons denied representation were reviewed personally by the public defender who would sometimes revise those decisions; denied applicants would be reminded of their right to ask a judge to review the issue. The appropriate defender would then make a recommendation to the court as to the eligibility of the prospective client, and the court would make the final determination.

Applicants for counsel in Ontario County might be required to present supporting evidence of their financial status. The public defender responded to a 2015 survey as follows:

*If numbers don't add up, we will request additional materials. If person has substantial debt, we will request verification. If there is any confusion as to person's actual income, we will request verification. If person owns own business, [we] will typically request tax returns, as they show a good picture of net income after expenses.*

Applicants were presumed to be eligible if they were living in public housing, were receiving welfare benefits, or if they had an income below some multiple of the Federal Poverty Line. That multiple changed depending on the type of case and was set at 125% for misdemeanors and violations, 140% for all DWIs and D or E felonies, and 185% for A, B and C felonies, or any felony sex offense. The income of persons other than the applicant (such as a spouse or parent) would only be considered if the client first consented to the public defender contacting that person. Full details of these rules can be found in Table 5.

Income assessments were used for applicants who did not fall into a category of 'presumptively eligible' person. These considered the applicant's assets (income of various kinds, savings and home) but also

*Table 5: Presumptive Eligibility and the Consideration of Third Party Resources in Ontario County Prior to the Criteria and Procedures*

Persons presumptively eligible for counsel

- Receiving public benefits (welfare)
- Living in public housing
- Income below specified levels (depending on charge seriousness).

Third parties whose income could be considered in the eligibility determination

- Spouses or parents (with client consent to contact)

<sup>18</sup> All sources cited supra, note 8.



subtracted out liabilities such as debt or fixed expenses. The full list of considerations is shown in Table 6.

*Table 6: Considerations in Income Assessment in Ontario County Prior to Implementation of Criteria and Procedures*

Earns income from employment	Less likely to be eligible
Receives child support	
Receives alimony	
Receives pension payments	
Has savings	
Owens a home	
Owens a car	More likely to be eligible
Receives welfare (e.g., TANF, cash assistance, food stamps)	
Receives disability benefits	
Receives unemployment benefits	
Receives other public benefits	
Is unemployed	
Must make monthly mortgage payments	
Must pay rent	
Must pay utility bills	
Has credit card debt	
Has outstanding medical bills	
Has student loans	
Must make child support payments	
Must meet basic living costs (e.g., transportation, food)	
Post bond	Not considered

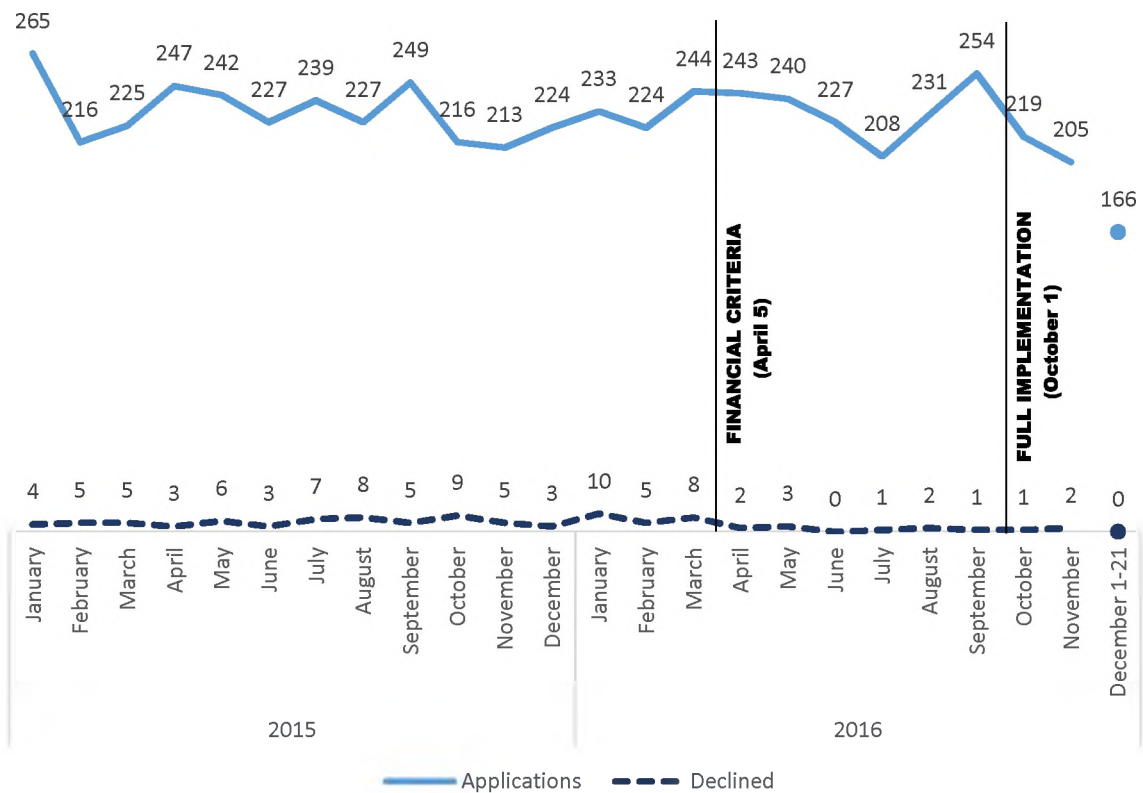
### The Impact of the *Criteria and Procedures* on Caseloads

The Ontario County Public Defender Office changed the financial criteria in use for eligibility determination on April 5, 2016, immediately after the *Criteria and Procedures* were issued. In our analysis below, we refer to this period as the ‘Financial Criteria’ period. Full implementation of certain provisions (particularly those requiring that decisions on eligibility be appealable) were not put in place until October 1, as were certain final decisions about the content of the application form. At the time of data collection (December 21, 2016) no requests to appeal decisions had been made – though the public defender did inform us subsequently (on January 20, 2017) that a small number of determinations of ineligibility had been subjected to challenge. It is possible, therefore, that the numbers ‘denied’ in the data we collected might be revised downward in the future.

The public defender office does very little family court representation, and only takes cases where the parent is already a client in a criminal case. No separate eligibility determination procedure is undertaken for the family ‘side’ of representation in such a case. Most family court representation is performed by the assigned counsel panel, however, and in those cases the administrator reported to us that she is now ‘using 250%’ as the income guideline.

We were able to obtain a complete dataset for all eligibility decisions in the county from the public defender. Though she originally provided us with four years of data (back to January 1, 2013), she also reported to us that the definition of ‘ineligible’ that was used in the data was wider than was appropriate for our research, and included not only persons who had been screened and found financially ineligible, but also individuals who indicated during the screening process that they intended to retain private counsel.<sup>19</sup> Since our analysis was focused on the impact of the change in eligibility screening procedures, we needed to distinguish persons who were ‘screened out’ from those who ‘opted out’ by indicating their intent to retain. With the assistance of the public defender, we were able to obtain these more refined data, though archiving of records meant that it was only practical to obtain them back to January 1, 2015. The number of applications for counsel, and the number determined ineligible, are shown in Figure 4.

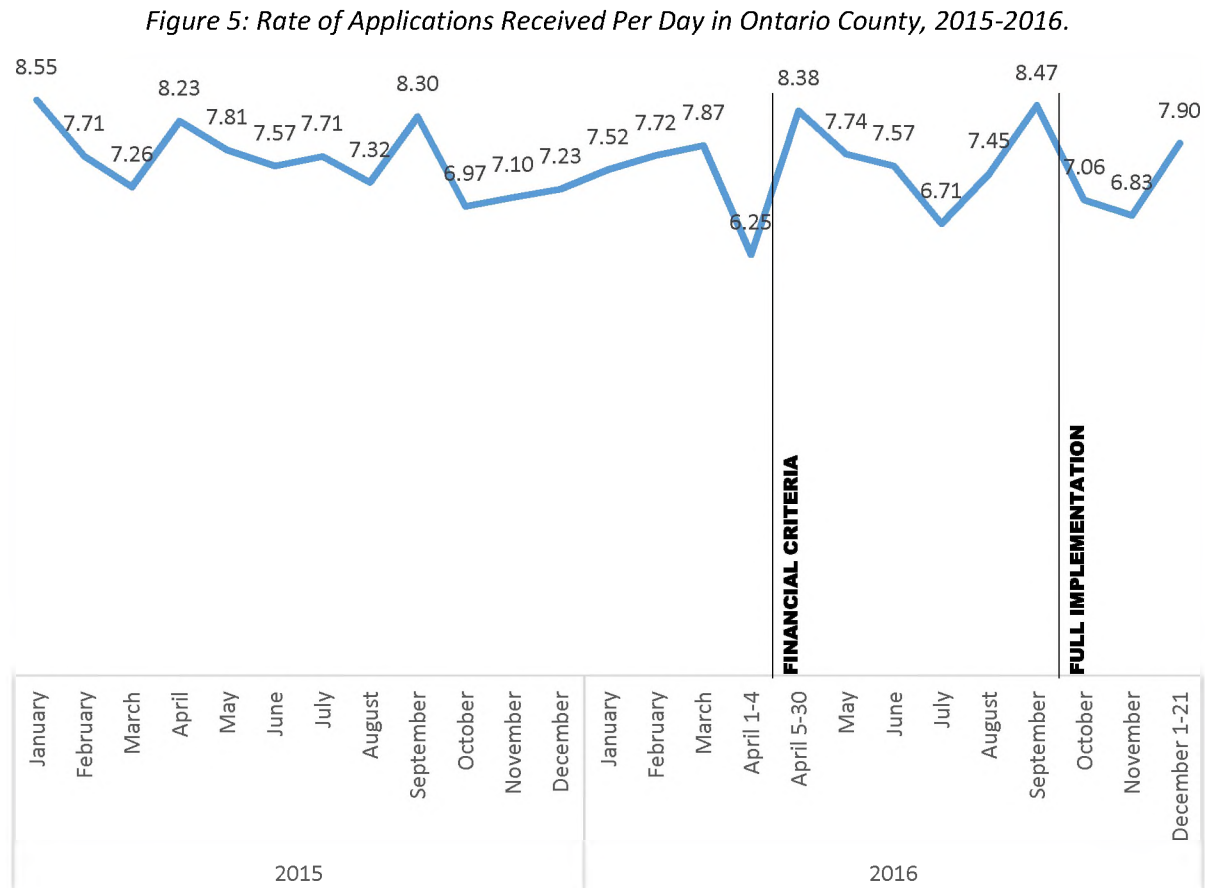
Figure 4: Applications for Counsel and Denials in Criminal Cases in Ontario County 2015-2016



<sup>19</sup> The public defender counts these individuals as ‘ineligible’ to facilitate comparison to the assigned counsel program in the county. In that program, no bill for services could be submitted by a lawyer whose client proved ineligible or who immediately retained counsel and no longer required assigned counsel services. Further, in opting immediately to retain counsel, the public defender inferred such defendants could be presumed to be able to afford counsel - in keeping with the appropriate statutory standard for a finding of ineligibility.

## Application rates

Figure 5 shows the application rate in Ontario County for months in 2015 and 2016. Table 7 shows this same statistic, broken out for more gross periods.<sup>20</sup>



*Table 7: Application Rate in Ontario County Before and After Criteria and Procedures Implementation*

Period	Average number of applications per day
2015	7.64
2016 to April 4	7.56
2016 April 5 to December 21	7.59

<sup>20</sup> We examined DCJS data on monthly arraignments in Ontario County courts to ascertain whether the period April-December generally had abnormal rates of activity. We concluded it did not. For the years 2010-2015, January-March account for 24% of all arraignments, rising to 26% for the next two quarters before falling back to 24% for October-December. Data for 2016 itself were incomplete, but we do not have any basis to assume that the comparison in Table 7 would be in any way confounded by differences in the underlying rates of court activity.

The rate of applications received after the implementation of the *Criteria and Procedures* in Ontario County was little changed from prior periods. Assuming applications continued to be submitted at the same rate to the end of 2016, Ontario would in fact have ended up with approximately 2,770 applications in 2016 – twenty fewer than in 2015.

### Eligibility rates

0.6% of applications have been deemed ‘ineligible’ since the implementation of the *Criteria and Procedures*, a reduction on prior periods. Monthly totals are shown in Figure 6; a more gross breakout by period is shown in Table 8.

Figure 6: Ineligibility Rate by Month, Ontario County, 2015-2016

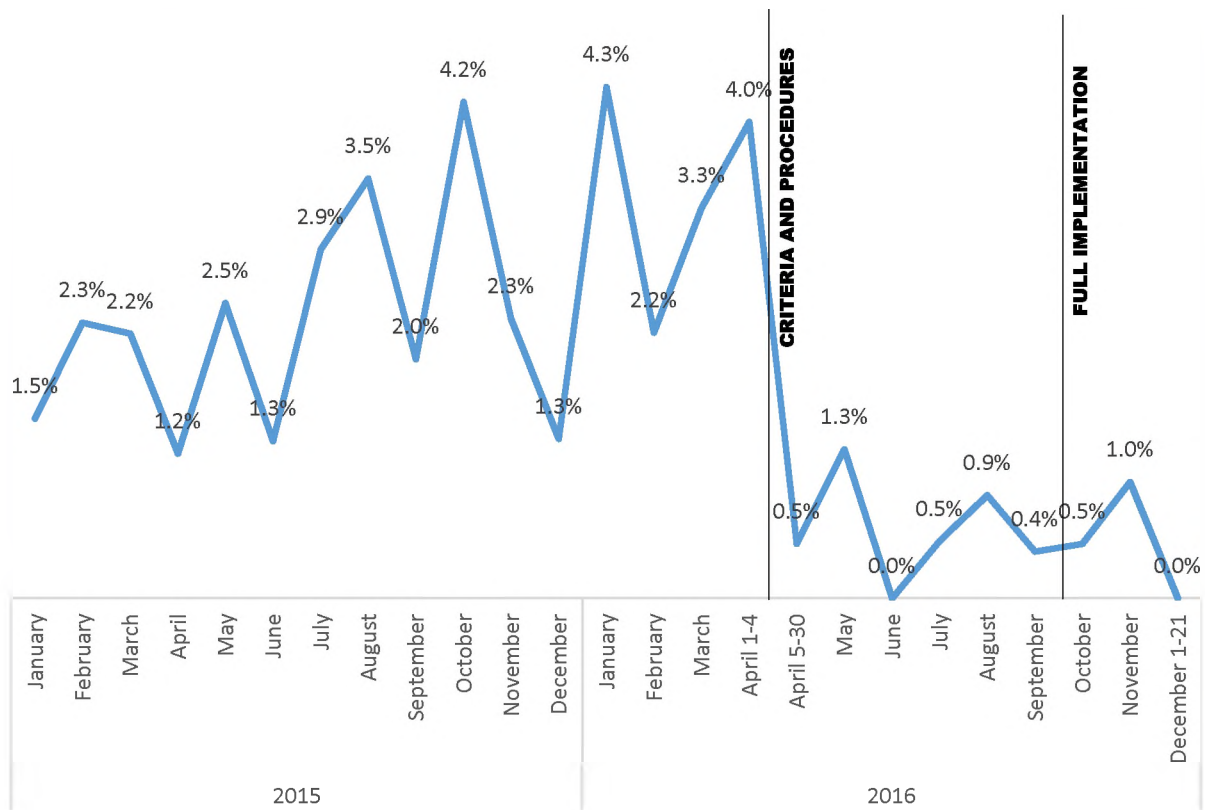


Table 8: Ineligibility Rate in Ontario County Before and After Criteria and Procedures Implementation

Period	Ineligibility rate
2015	2.3%
2016 to April 4	3.3%
2016 April 5 to December 21	0.6%

The implementation of the *Criteria and Procedures* in Ontario County coincided with a distinct drop in the numbers of persons being found ineligible. Applying the new rate of ineligibility (0.6%) to the 2,790 applications received in 2015 would have resulted in approximately 16 applicants being rejected, rather than the 63 that were refused representation on grounds of financial eligibility that year. Accordingly, we estimate that the impact of the *Criteria and Procedures* will be an increase of roughly 47 eligible defendants per year in the county, or approximately 1.7%.

## Schuyler County

Schuyler is a small (342 sq. mi.), largely rural county in Western New York providing indigent legal services through a public defender office and an assigned counsel panel for conflict cases. In 2016, the county ended its conflict defender program and expanded the role of assigned counsel, which was in turn overhauled in April of that year through an agreement which shifted operational responsibility to administrators in Tompkins County. The new administrators also took over eligibility screening in cases in which the public defender had a conflict.

Schuyler's 2015 population was 18,186, of which 14.5% lived below the poverty line. Median household income was \$47,680, approximately 80% of the statewide average. 51% of the 119 criminal fingerprintable arrests recorded by the New York State Division of Criminal Justice Services as disposed in 2015 were charged at the misdemeanor level; the other 49% were felonies. Violent felonies made up 5% of the total.<sup>21</sup>

### Determining Eligibility Prior to the *Criteria and Procedures*

Prior to the implementation of the *Criteria and Procedures*, eligibility determination in Schuyler County was generally performed by the public defender office. Defendants seeking representation would submit an application to that office which would review it and make an eligibility recommendation to the court. Following the creation of the new assigned counsel panel overseen in Tompkins County, responsibility for eligibility screening shifted to that program in cases where the public defender office had a conflict. If the recommendation was to find a defendant ineligible, the public defender office informed the defendant in writing of the reason, and laid out the process by which they could appeal to the judge for reconsideration should they wish to. Those denied assignment after such an appeal was complete also received a letter explaining the reasons why.

Applicants for counsel in Schuyler County were not generally required to present supporting evidence of their financial status, though in some cases it was requested if eligibility was unclear. Applicants were presumed to be eligible for counsel if they received welfare benefits or had an income below 125% of the Federal Poverty Line. The income of persons other than the applicant was sometimes considered – but only if that person was a spouse who was not themselves an adverse party in the case. Minor applicants were automatically approved for representation. Full details of these rules can be found in Table 9.

Assuming an applicant's income (including that of any cohabiting spouse) summed to over 125% of the Federal Poverty Line, and they were not presumptively eligible for any other reason, an analysis would then be conducted in which their income (including any child support, alimony, pensions, disability or unemployment benefits) would be examined. For a full list of considerations, see Table 10.

*Table 9: Presumptive Eligibility and the Consideration of Third Party Resources in Schuyler County Prior to the Criteria and Procedures*

Persons presumptively eligible for counsel

- Receiving public benefits (welfare)
- Living in a mental health facility
- Income below 125% of Federal Poverty Line

Third parties whose income could be considered in the eligibility determination

- Spouse (living with defendant, is not an opposing party)

<sup>21</sup> All sources cited supra, note 8.

Table 10: Considerations in Income Assessment in Schuyler County Prior to Implementation of Criteria and Procedures

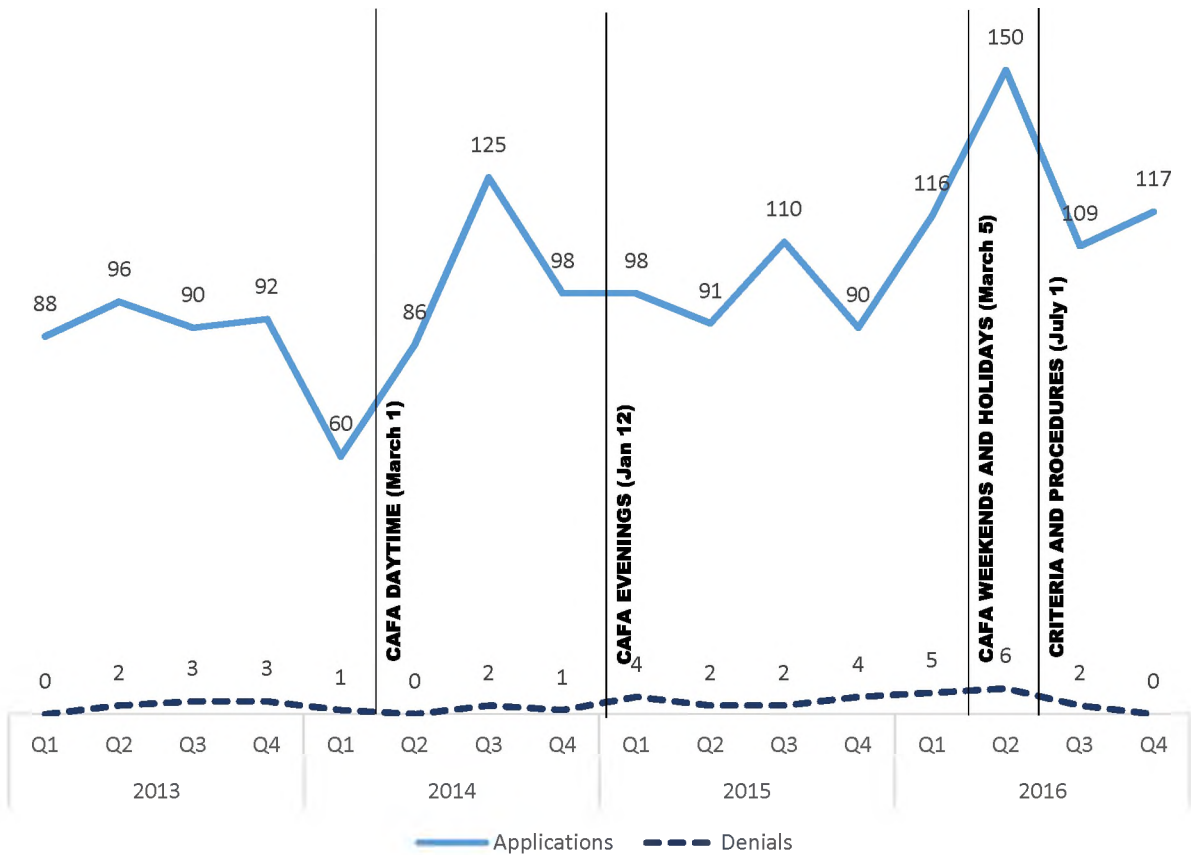
Earns income from employment	Less likely to be eligible
Receives child support	
Receives Alimony	
Receives pension payments	
Receives disability benefits	
Receives unemployment benefits	
Has savings	
Owns a home	
Receives welfare (e.g., TANF, cash assistance, food stamps)	More likely to be eligible
Receives other public benefits	
Is unemployed	
Must make child support payments	
Owns an automobile which is not essential to their employment	Not considered
Owns an automobile which is essential to their employment	
Must make monthly mortgage payments	
Must pay rent	
Must pay utility bills	
Has credit card debt	
Has outstanding medical bills	
Has student loans	
Must meet basic living costs (e.g., transportation, food)	
Posted bond	

### The Impact of the *Criteria and Procedures* on Caseloads

The Schuyler County Public Defender Office implemented the *Criteria and Procedures* at the beginning of July, 2016 in all courts in the county including in family court. Although the public defender office does not actually determine eligibility for defendants for whom it has a conflict of interest, the office does record that the application was received. Subsequently, the office is notified, through letters from the courts, of the outcome of the eligibility decision in the case (including details of any reconsiderations). Accordingly, we were able to obtain data on the total numbers of applications and denials in the whole county from the public defender office (see Figure 7).

The public defender reported to ILS that it was his opinion that the roll-out of the counsel at first appearance (CAFA) program in Schuyler County had resulted in a steady increase in applications for representation prior to the issuance of the eligibility standards. Attorneys representing defendants at first appearances are able to explain the importance of the right to counsel, encourage and assist defendants in completing the paperwork, and take the completed applications with them when they leave court, saving the defendant from having to submit it themselves either in person or by mail. CAFA provisions in Schuyler have expanded steadily since early 2014 when the program rolled out to cover first appearances during business hours. In early 2015 the program was expanded to cover evenings and in early 2016 it covered weekends and holidays, as shown in Figure 7.

Figure 7: Applications for Counsel and Denials in Criminal Cases in Schuyler County 2013-2016



### Application rates

Figure 8 shows the rate of applications per day for Schuyler by quarter for the period 2013-2016. Table 11 provides a more gross breakout.

There is little evidence in these numbers to suggest that the implementation of the *Criteria and Procedures* resulted in an increase in the number of applications submitted to the program. The two quarters following implementation have, if anything, seen application rates decline – though we note the especially high rate of applications in Q2 of 2016 is largely attributable to an usually large case involving the arrest of 25 co-defendants for alleged production and use of methamphetamine.<sup>22</sup> That said, there is clearly a long-term trend of increasing numbers of applications for counsel in the county predating the introduction of the *Criteria and Procedures* – from 366 in 2013 to 492 in 2016, an increase of 34%. This may provide support for the public defender’s suggestion that CAFA has resulted in higher rates of application for counsel.

<sup>22</sup> For more on this case, see ILS’ report, *Implementing the Quality Improvement Objectives in the Hurrell-Harring v. The State of New York Settlement: 2016 Update*, at p. 10, available here; <https://goo.gl/ZCmfAU>.



Figure 8: Rate of Applications Received Per Day in Schuyler County, 2013-2016.

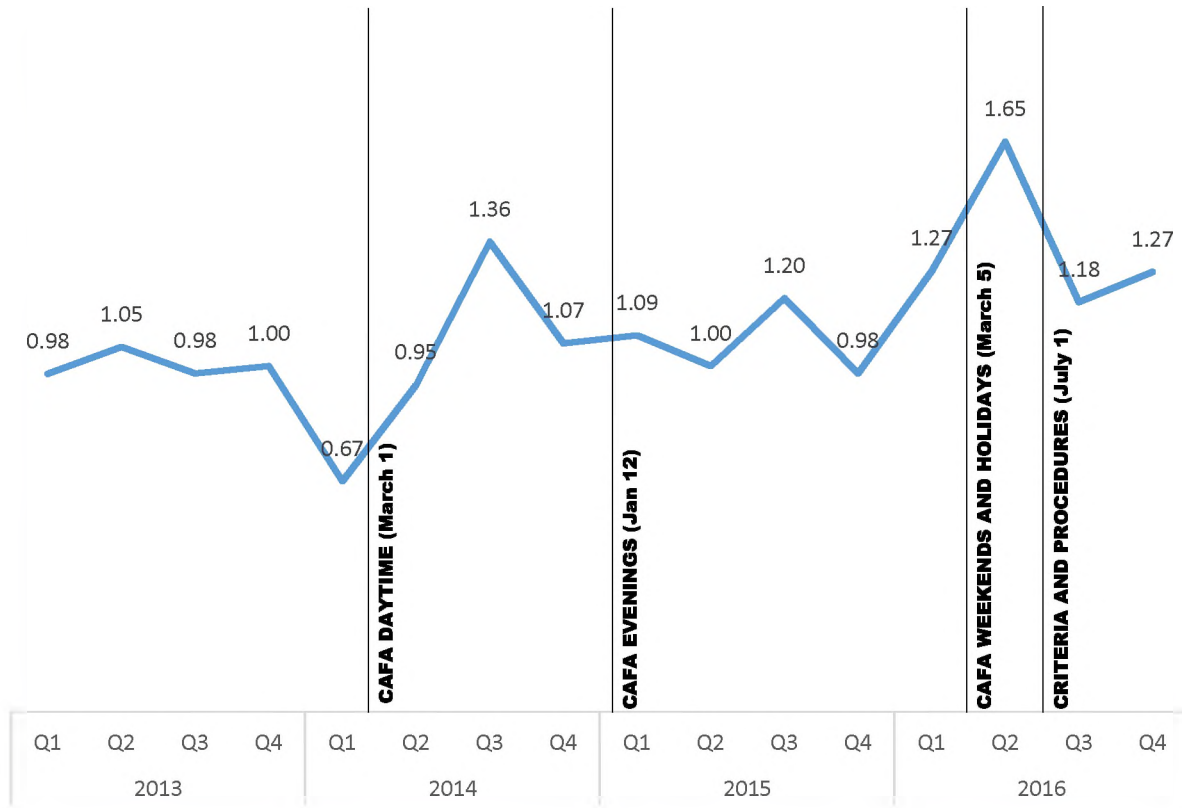


Table 11: Application Rate in Schuyler County Before and After Criteria and Procedures Implementation

Period	Average number of applications per day
2013	1.00
2014	1.01
2015	1.07
2016 to June 30	1.46
2016 July 31 to December 31	1.23

#### Eligibility rates

The number of people declined for financial reasons since the implementation of the *Criteria and Procedures* – two – was lower than the total for the prior two quarters (eleven) and lower than for the same period in prior years (2013: 6, 2014: 3, 2015: 6). As a percentage, just 0.9% of applicants were declined for representation since the *Criteria and Procedures* were introduced, compared to rates of between 1.1% and 3.1% in prior years (see Figure 9 and Table 12 for a comparison of rates before and after implementation).

Figure 9: Percentage of Applications Found Ineligible in Schuyler County, 2013-2016



Table 12: Ineligibility Rate in Schuyler County Before and After Criteria and Procedures Implementation

Period	Ineligibility rate
2013	2.2%
2014	1.1%
2015	3.1%
2016 to June 30	4.1%
2016 July 1 to December 31	0.9%

The numbers above suggest that the introduction of the *Criteria and Procedures* coincided with an increase in the proportion found eligible for counsel in Schuyler County. For consistency with our other analyses, we compared the post-implementation rate of 0.9% with 2015 as a baseline, when the rate of rejection was 3.1%. At that rate, approximately 15 of the 492 applications for representation received in 2016 would have been denied. Under the new standards, with a rejection rate of 0.9%, that number would have been around 4, suggesting a total annual increase of 11 per year as a result of the new standards. This would represent an increase in the number of applicants accepted for representation of 2.3%.

## Suffolk County

Suffolk is a relatively large (2,373 sq. mi.) suburban county comprising the eastern-most end of Long Island. It provides indigent legal services principally through a sizeable Legal Aid Society with an assigned counsel panel for conflict cases. Its population in 2015 was just over 1.5 million, of which 7% lived below the poverty line, while median household income was \$88,663, around 150% of the state average. Of the 21,460 disposed arrests for fingerprintable offenses counted by the Division of Criminal Justice Services in 2015, 75% were misdemeanors, 25% were felonies and 5% were violent felonies.<sup>23</sup>

Eligibility determination occurs through a variety of different procedures in Suffolk County. At the District Court in Central Islip, persons who are in custody prior to their arraignment are screened for eligibility by the Suffolk County Probation Department (SCPD) as a part of a more general screening related to release recommendations. Persons arriving to the same court out of custody are screened by and have their eligibility determined by the judge directly. In the county's town and village courts, of which there are over thirty, practice is divided. In the courts in the Eastern end of the county, applicants for counsel are generally provided with a referral slip instructing them to go to the Suffolk County Legal Aid Society (SCLAS) offices for screening, whereas elsewhere the judges perform the screening directly. Defendants in all parts of Suffolk County occasionally have eligibility re-assessed later in the case, such as at a probable cause hearing pursuant to Criminal Procedure Law 180.80, or upon arraignment at County Court, where some question arises over their continuing eligibility or where they cannot any longer afford counsel previously retained. These subsequent screenings are also performed by the Legal Aid Society.

### Determining Eligibility Prior to the *Criteria and Procedures*

Prior to the introduction of the *Criteria and Procedures*, SCLAS conferred automatic eligibility for counsel on a range of classes of persons. Applicants living in public housing, who were incarcerated or living in a mental health facility, who received welfare or whose income fell below 125% of the Federal Poverty Line – all of these were presumptively entitled to counsel based on their status. Table 13 summarizes these provisions.

If income was assessed, applicants were typically required to produce pay stubs by way of documentation in support of their application, and the income of spouses and parents of applicants could also be considered. During the assessment, information on income as well as assets and debts was solicited from the applicant. SCLAS clarified that “those were the only real factors we used to determine eligibility” and that while in certain combinations (e.g. high debt, low income) a person would be found eligible, “It would be better stated that the ‘less likely’ list were considerations that, if too high, might lead to being found ineligible.” Details of the process are shown in Table 14.

*Table 13: Presumptive Eligibility and the Consideration of Third Party Resources in Suffolk County Legal Aid Society Prior to the Criteria and Procedures*

Persons presumptively eligible for counsel

- Living in public housing
- Incarcerated
- Receiving public benefits (welfare)
- Living in a mental health facility
- Income below 125% of Federal Poverty Line

Third parties whose income could be considered in the eligibility determination

- Spouses
- Parents

<sup>23</sup> All sources cited supra, note 8.

Table 14: Considerations in Income Assessment in Suffolk County Legal Aid Society Prior to Implementation of Criteria and Procedures

Earns income from employment	
Receives child support	
Receives Alimony	
Receives pension payments	
Has savings	
Owns a home	
Must make monthly mortgage payments	
Must pay rent	Less likely to be eligible
Must pay utility bills	
Has credit card debt	
Has outstanding medical bills	
Has student loans	
Must make child support payments	
Post bond	
Owns a car	
Receives welfare (e.g., TANF, cash assistance, food stamps)	
Receives disability benefits	
Receives unemployment benefits	More likely to be eligible
Receives other public benefits	
Is unemployed	
Must meet basic living costs (e.g., transportation, food)	Not considered

### The Impact of the *Criteria and Procedures* on Caseloads

Three separate entities – SCLAS, SCPD, and the assembled judiciary of the District, Town and Village courts – conduct eligibility determination in Suffolk County. Because of our short time-frame for this work and our guess that these data would be difficult to obtain or analyze, we did not seek to obtain data from the judiciary, though we were able to obtain data from the other two entities.

SCLAS, which performs the screening and eligibility recommendation function for East End Town and Village courts and the County Court, implemented the *Criteria and Procedures* on September 1, 2016. Between January 1, 2015 and December 8, 2016, that office processed a total of 625 applications, and was able to provide to ILS all the data we requested on the number of applicants and denials.<sup>24</sup> These data are shown in Figure 10.

SCPD implemented the new standards on exactly October 3, as required, and began tracking the numbers of applications and denials from that date forward and providing the data to ILS. No data were available for the period prior to October 3, however. These data are shown in Figure 11.

<sup>24</sup> SCLAS also performs the Family Court eligibility screening in the County, though of course those cases are not analyzed here.

Figure 10: Applications for Counsel and Denials at the Suffolk County Legal Aid Society 2015-2016

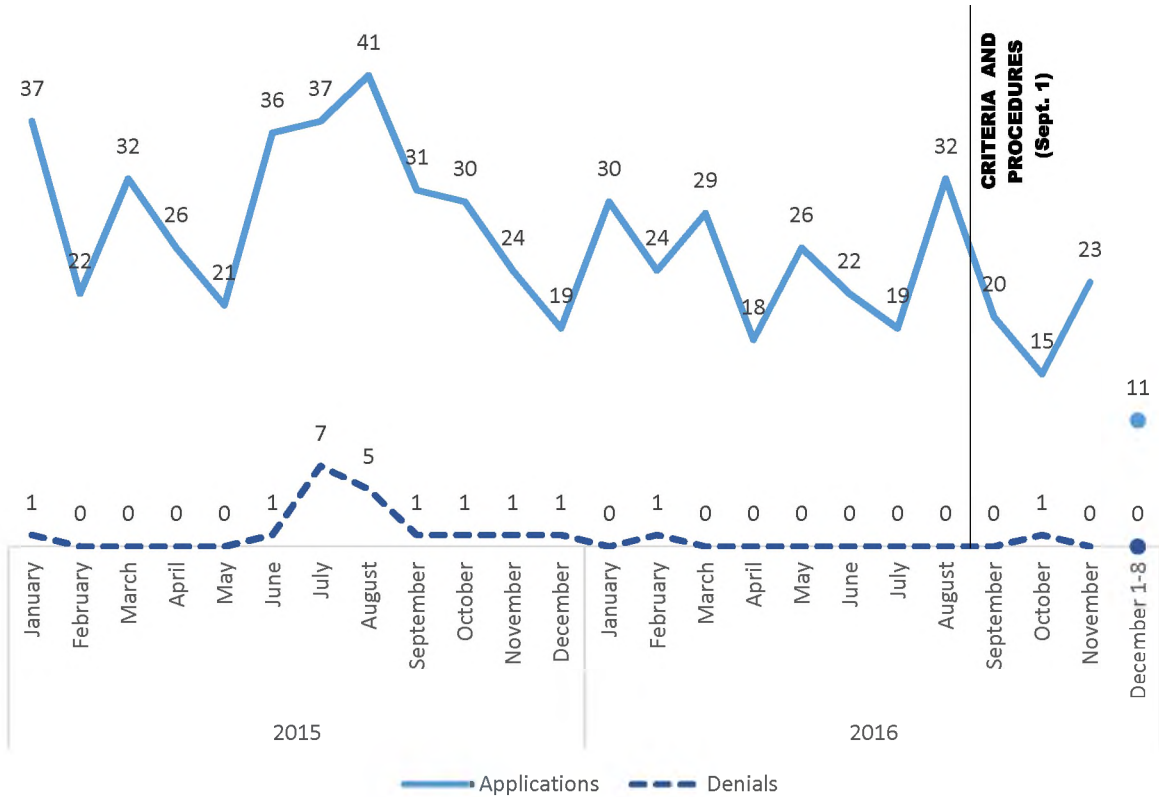
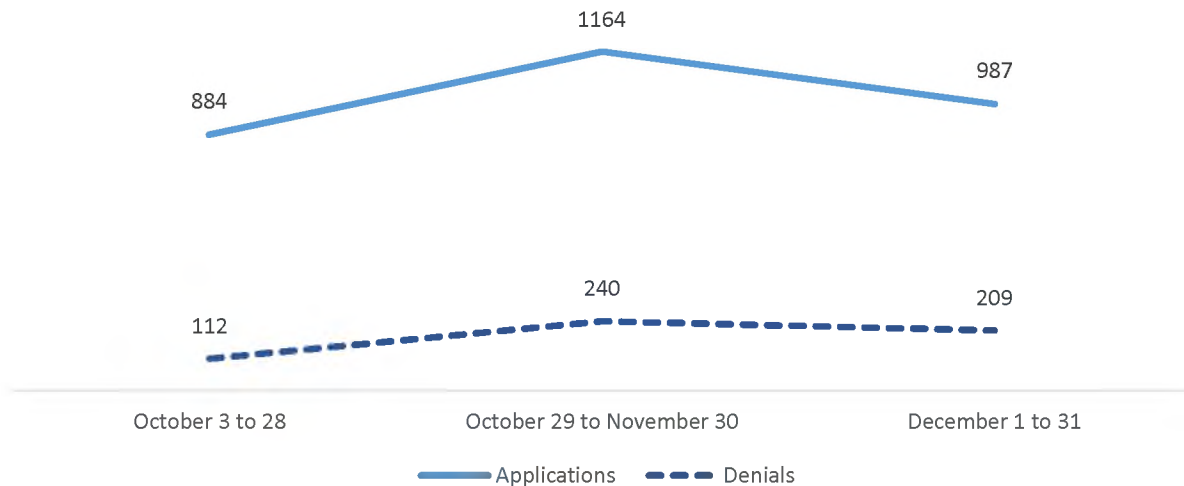


Figure 11: Applications<sup>25</sup> for Counsel and Denials at the Suffolk County Probation Department, post-implementation period



<sup>25</sup> Note that 'Applications', in this case, are actually the product of intake interviews with persons in custody. Thus the defendant does not have an option not to 'apply', and application numbers are simply a reflection of the numbers of persons arrested and detained prior to arraignment in the Central Islip District Court.

### Application rates

The rate of applications received by SCLAS across 2015 and 2016 is shown in Figure 13 with additional data in Table 13. The rate of applications received by SCLAS after implementation was lower than in months prior to it – a declining trend which appears to have predated implementation of the *Criteria and Procedures* themselves.

Figure 13: Rates of Applications Received Per Day at Suffolk County Legal Aid Society, 2015-2016

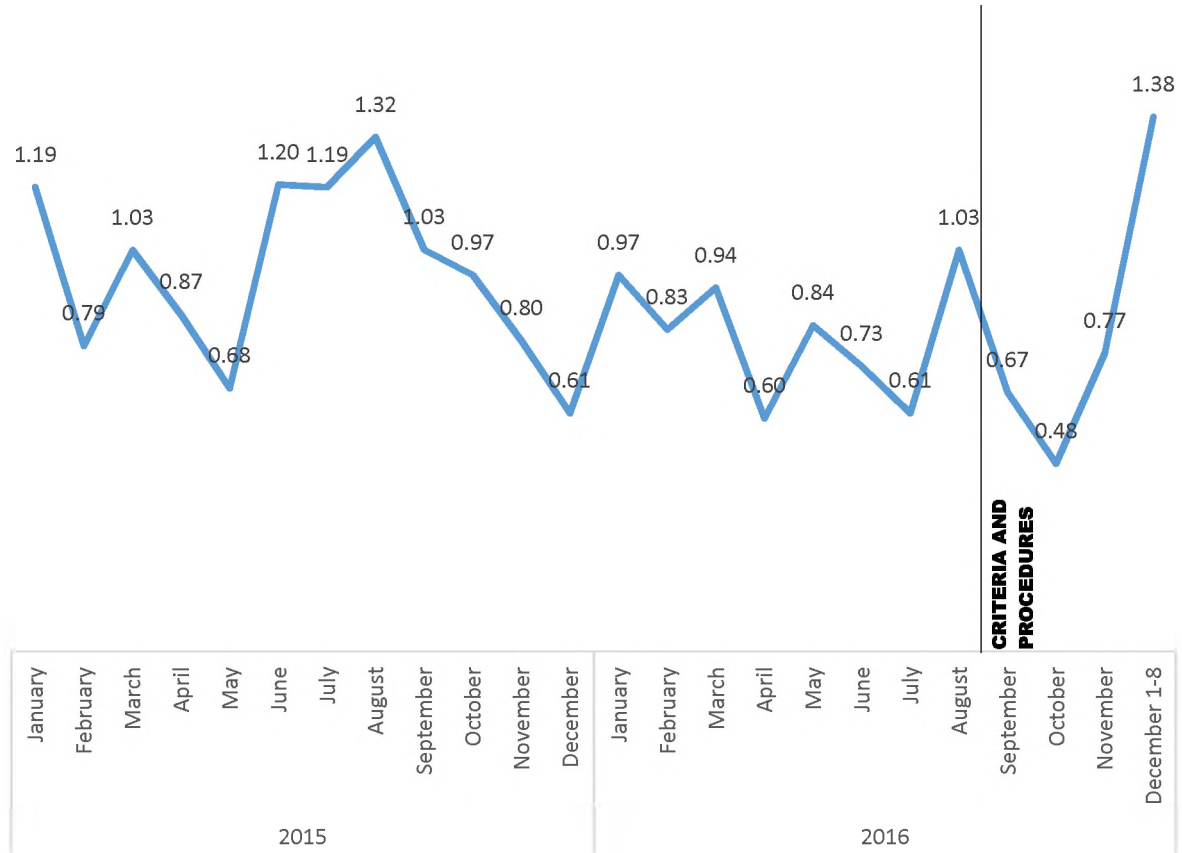
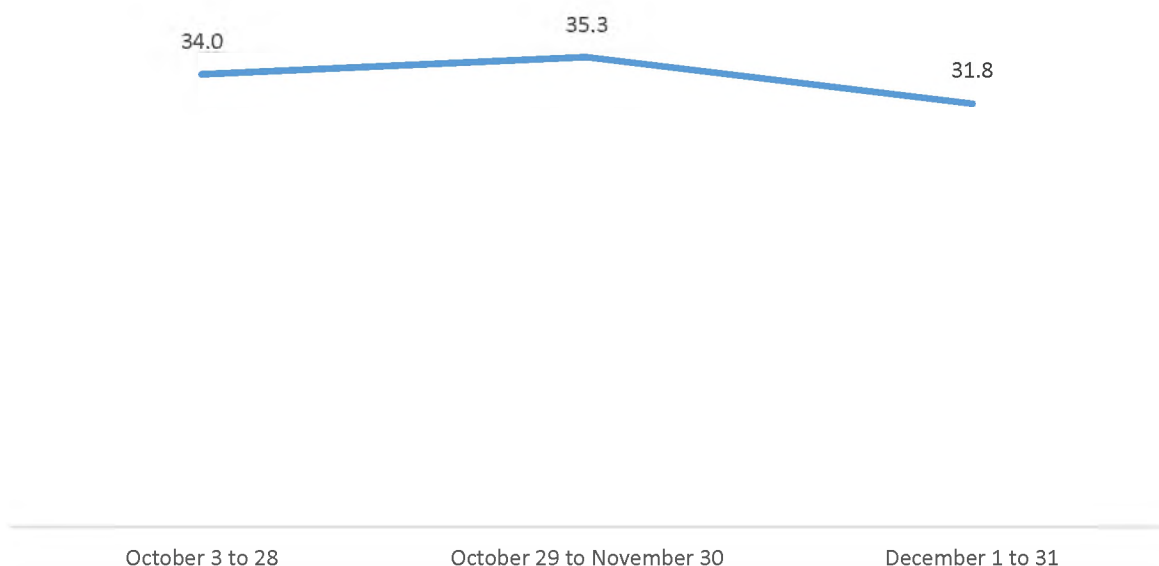


Table 13: Application Rate in Suffolk County Legal Aid Society Before and After Criteria and Procedures Implementation, selected periods

Period	Average number of applications per day
2015	0.97
2016 to August 31	0.82
2016 September 1 to December 8	0.70

Because SCPD interviews all persons in custody prior to arraignment and performs a financial screening whether the defendant would like to apply for counsel or not, the rate of ‘applications’ in Figure 14 is simply a reflection of the number of persons detained prior to arraignment at the Central Islip District Court, and does not reflect voluntary behavior by defendants. Nevertheless, we present the data we have on the application rate at SCPD in Figure 14.

Figure 14: Rates of Applications Received Per Day in Suffolk County Probation Department, post-implementation period



### Eligibility rates

With so few cases actually screened by the Suffolk County Legal Aid Society, small changes in the numbers found ineligible result in large changes in the rate, as shown in Figure 15. A few cases of ineligibility during a short period in 2015 created a high rate of denial overall for that year, whereas in early 2016 virtually no denials happened. Although the rate after implementation of the *Criteria and Procedures* appears higher than in early 2016, this is a consequence of just a single denial of eligibility occurring in October.

With events this rare, it is difficult to conclude that any statistical trend exists. Nevertheless, we can say that that even prior to the implementation of the *Criteria and Procedures* findings of ineligibility at SCLAS were very rare, with the exception of a short period in 2015 when several people were denied. Throughout 2016, both before and after implementation, rates of ineligibility have remained very low indeed.

Figure 15: Ineligibility Rate by Month, Suffolk County Legal Aid Society, 2015-2016

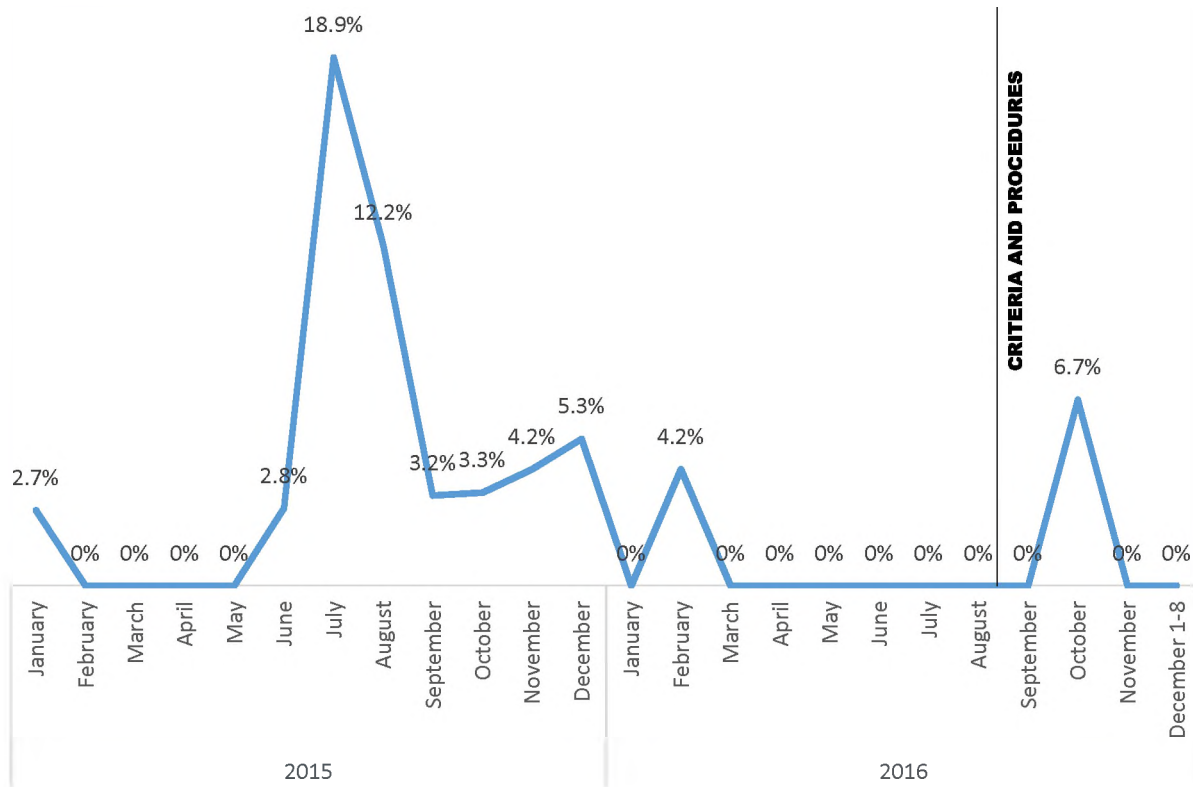


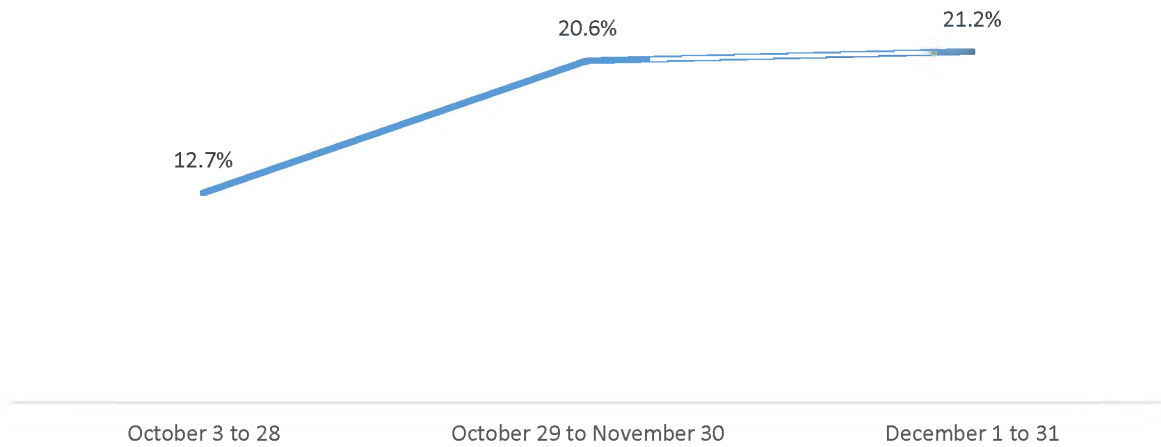
Table 14: Ineligibility Rate in Suffolk County Before and After Criteria and Procedures Implementation

Period	Ineligibility rate
2015	5.1%
2016 to August 31	0.5%
2016 September 1 to December 8	1.4%

The SCPD data reported in Figure 16 should, again, be interpreted as the rate at which persons incarcerated pre-arraignment in Suffolk County are unable to pay for counsel to represent them – and not only the rate at which persons seeking representation were denied it for financial reasons. Lacking data from periods prior to implementation, however, we make no conclusion about whether the rate of such findings of inability to pay has changed over time.



Figure 16: Ineligibility Rate, Suffolk County Probation Department, post-implementation period



Overall, our data do not allow us to draw a general conclusion about the impact of the *Criteria and Procedures* in Suffolk County as a whole. Nevertheless, the data we have suggest that to the extent persons are screened by the Suffolk County Legal Aid Society the rate of ineligibility after implementation is very low, and lower overall than it was in 2015.

## Washington County

Washington County is a moderately sized (846 sq. mi.) county located in Eastern New York, partially within the Adirondack Park. 13.5% of its 62,230 residents in 2015 lived below the poverty line. Median household income was \$51,143 that year, around 86% of the state average. 31% of the 944 fingerprintable arrests recorded by the Division of Criminal Justice Services in 2015 were felonies, while 69% were misdemeanors; 5% were violent felonies.<sup>26</sup>

The process for assigning counsel in Washington is overseen by the supervising attorney of the assigned counsel plan, though the primary provider of representation in the county is the public defender office. The supervising attorney's role is to receive applications for counsel, conduct eligibility determinations, perform checks for conflicts of interest, and pass cases on either to a public defender or a member of the assigned counsel panel as appropriate.

An exception to this process occurs in cases where the public defender is called out to provide immediate representation at a defendant's first appearance in court. In such cases, it is impossible for the supervising attorney to perform the usual screening in advance of such an appearance, and so it is typically performed afterwards, assuming an application is forthcoming from the defendant in question. New procedures in the county to increase the provision of counsel at first appearance (CAFA) services have made such cases more common, as will be seen in the analysis below.

### Determining Eligibility Prior to the *Criteria and Procedures*

Prior to the implementation of the *Criteria and Procedures*, applicants were typically asked to fill out an application form and provide tax documents and pay stubs as part of the eligibility determination process. Some form of identification and copies of charging documents were also required.

Persons incarcerated or living in mental health facilities were presumed to be eligible, as were persons whose income was below 125% of the Federal Poverty Line; receipt of welfare or residence in public housing, however, did not automatically entitle an applicant to counsel. In assessment of an applicant's income, consideration of the income of third parties such as parents and spouses was permitted. These provisions are summarized in Table 15.

*Table 15: Presumptive eligibility and the Consideration of Third Party Resources in Washington County Prior to the Criteria and Procedures*

#### Persons presumptively eligible for counsel

- Incarcerated
- Living in a mental health facility
- Income below 125% of Federal Poverty Line

#### Third parties whose income could be considered in the eligibility determination

- Applicant's spouse or partner
- Parents

Income assessments for applicants not deemed presumptively eligible included consideration of income not only from income, but also from public benefits and other sources, including pensions, alimony, and child support. Assets including a car or a house were also considered to increase an applicant's ability to afford counsel. Certain financial obligations, however, including rent, utility bills, credit card and student loan debt, and outstanding medical bills, were offset against a person's income, making an applicant more likely to be eligible (see Table 16).

<sup>26</sup> All sources cited *supra*, note 8.

Table 16: Considerations in Income Assessment in Washington County Prior to Implementation of the Criteria and Procedures.<sup>27</sup>

Receives welfare (e.g. TANF, cash assistance, food stamps)	
Receives disability benefits	
Receives unemployment benefits	
Receives other public benefits	
Earns income from employment	
Receives child support	Less likely to be eligible
Receives Alimony	
Receives pension payments	
Has savings	
Owens an automobile which is not essential to their employment	
Owens an automobile which is essential to their employment	
Owens a home	
Is unemployed	
Must make monthly mortgage payments	
Must pay rent	
Must pay utility bills	More likely to be eligible
Has credit card debt	
Has outstanding medical bills	
Has student loans	
Must meet basic living costs (e.g. transportation, food)	
Must make child support payments	Not considered
Post bond	

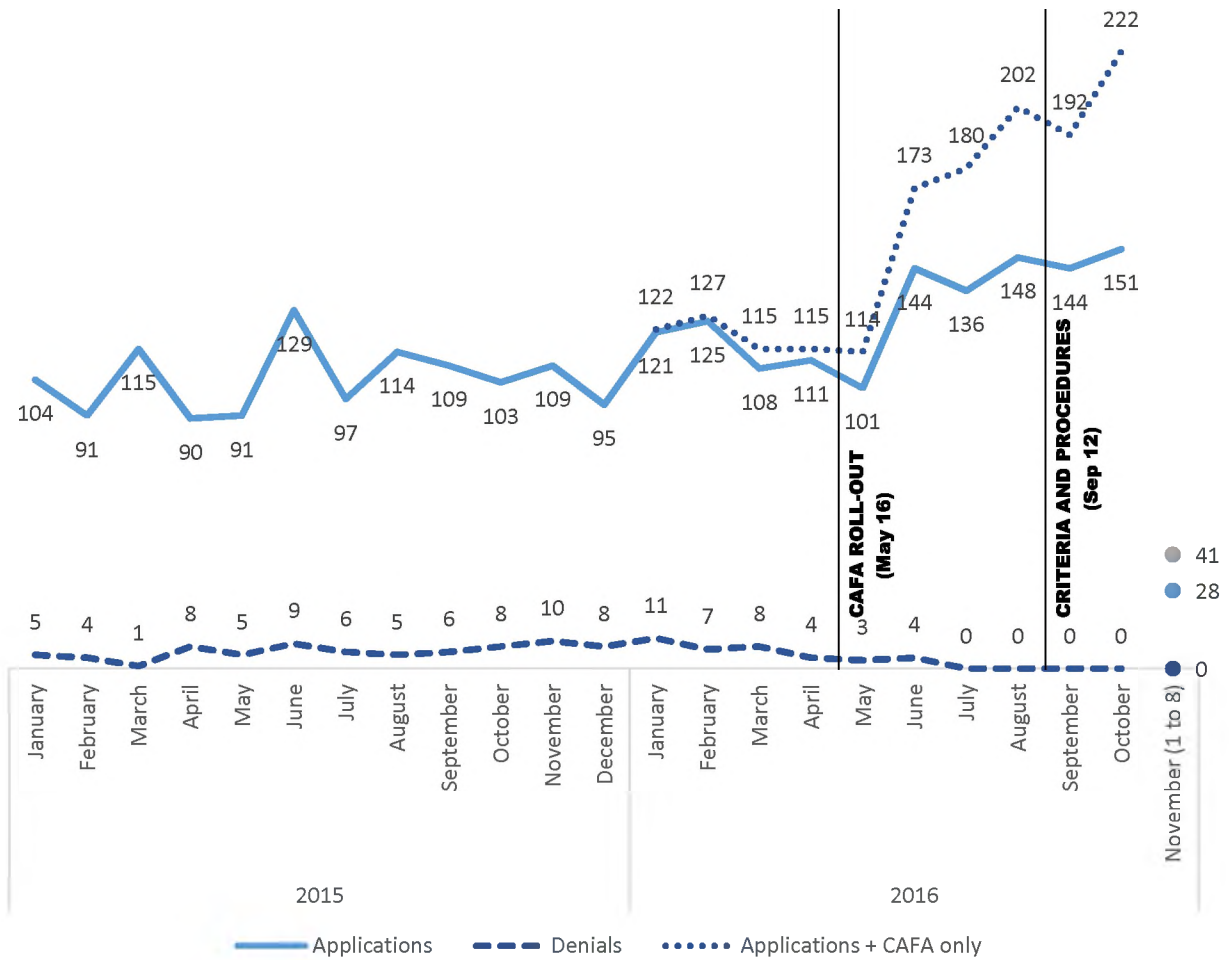
### The Impact of the *Criteria and Procedures* on Caseloads

Washington County implemented the *Criteria and Procedures* on September 12, 2016, applying them county-wide for all assignments in both criminal and family court. Almost simultaneously, in May of 2016, the county-wide program to provide counsel at first appearance was rolled out, becoming fully operational in late August. In what follows, we attempt to parse the impact of these two transitions.

Figure 17 contains data on the numbers of applications and denials by month for the years 2015 and 2016. Although we obtained data from 2013 and 2014, a new case management system was introduced at the beginning of 2015 resulting in changes to recording procedures that made comparison with data before that time misleading, and so we chose to omit those earlier years from our analysis.

<sup>27</sup> In its 2015 survey, ILS also asked about several other factors and whether or how they were considered in the eligibility determination process. For a number of these questions, responses were left blank in the submission by Washington County. Accordingly, we reviewed Washington County's eligibility determination documentation in order to complete Table 16 and confirmed the results with the supervising attorney of the assigned counsel program.

Figure 17: Applications for Counsel and Denials in Criminal Cases in Washington County 2015-2016.



### Application rates

The numbers of applications for counsel in Washington County rose substantially in 2016 following the roll-out of the new counsel at first appearance provisions.<sup>28</sup> A substantial proportion of this new caseload were so-called ‘CAFA-only’ cases (see Figure 17), wherein the public defender performed representation for a defendant at an arraignment but no application for continuing representation was received. Partly as a result of these new cases, over 200 cases were opened in August, 2016 – almost double the historical average before the program began in May.<sup>29</sup>

We exclude CAFA-only representation from our analysis because no eligibility determination took place in those cases. Even with those cases excluded, however, the program did experience an increase in applications for representation after the roll-out of the CAFA program, lending credence to the suggestion that meeting an attorney at arraignment may increase a defendant’s ability or inclination to

<sup>28</sup> The increase actually begins before May 16 – perhaps a consequence of communication with the State Police in the county in late 2015 to arrange for appearance tickets to be docketed on dates when defense could appear.

<sup>29</sup> The program averaged 107 applications a month for the period January 2015 to the end of April 2016.

apply for assignment of counsel. Figure 18 traces the rate of applications received per day across 2015 and 2016; Table 17 provides a more gross breakout by period.

Figure 18: Rate of Applications Received Per Day in Washington County, 2015-2016.

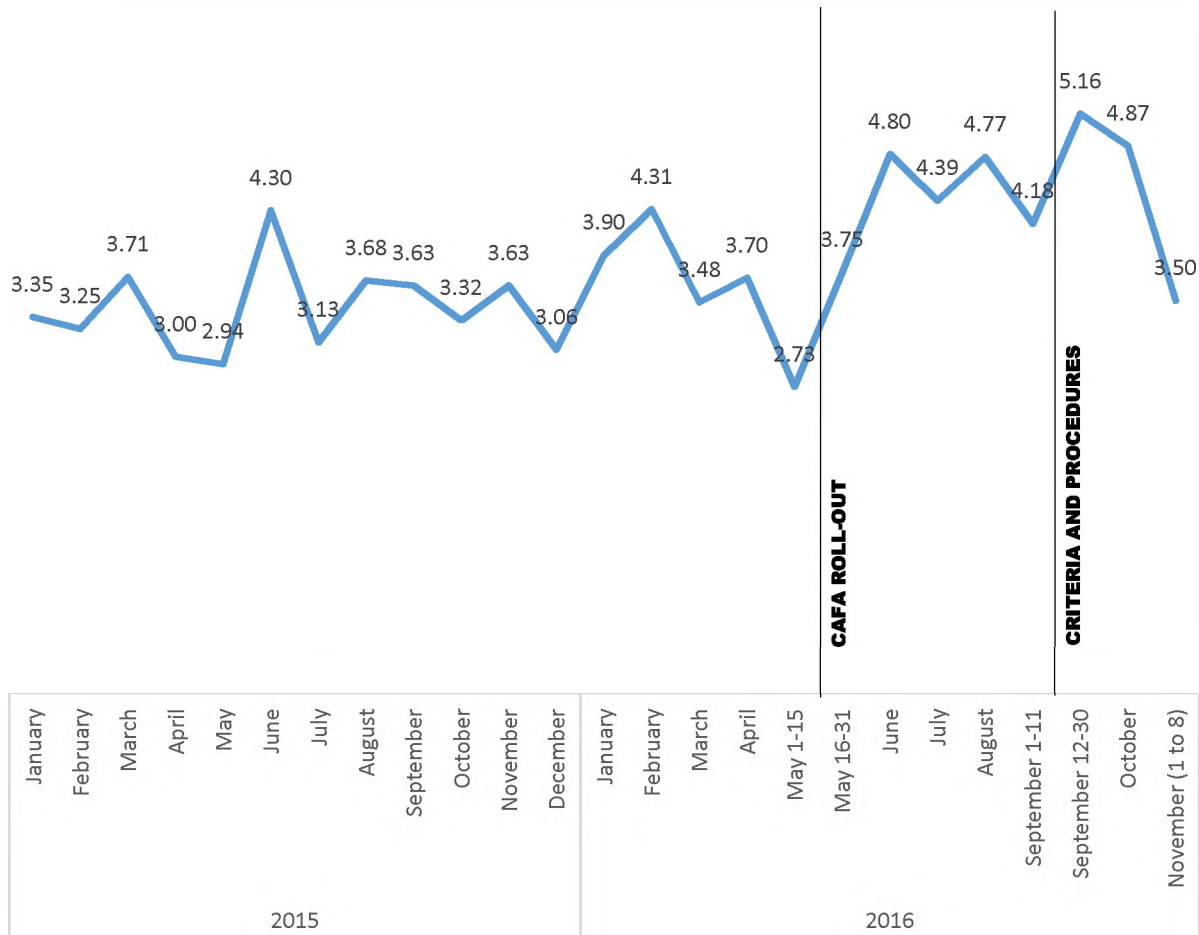


Table 17: Application Rate in Washington County Before and After Criteria and Procedures Implementation

Period	Average number of applications per day
2015	3.49
2016 to May 15	3.72
2016 May 16 to Sept 11 (CAFA roll-out)	4.52
2016 Sept 12 to Nov 8 (Criteria and Procedures)	4.82

The roll-out of the counsel at first appearance program in Washington County after May 16 was gradual. Even so, compared to the earlier part of the year, the period between May 16 and the implementation of the *Criteria and Procedures* on September 12 saw an overall increase in the application rate of 22%. Thereafter, application rates following the implementation of the *Criteria and Procedures* were higher still – around 6.6% higher than during the CAFA roll-out period.

It is impossible to know from this statistical evidence alone whether the *Criteria and Procedures* had some role in causing the higher rate of applications after September 12. At least three possibilities exist: that the *Criteria and Procedures* themselves caused more people to apply, that the continuing implementation of counsel at first appearance drove up applications even higher than it had previously, or that it was simply a statistical anomaly.

Two observations weigh against the *Criteria and Procedures* being responsible. First, in our discussions with local providers it was clear that they attributed the increase in applications to the CAFA program and not to the introduction of the *Criteria and Procedures*. The change in procedures after September 12 was not widely publicized and the assigned counsel administrator who had been in place at the time (prior to the appointment of the supervising attorney) did not believe there had been any change in the inclination of defendants to apply for counsel as a result. The introduction of CAFA, by contrast, made a clear and material difference to the likelihood an application would be forthcoming from a defendant.

Second, the number of arraignments taking place during the months of September, October and November has varied considerably in past years in this county, certainly enough to make this 6.6% jump a statistical anomaly. In 2010, for example, 359 arraignments took place in these months; in 2014 the number was just 261 – a 27% drop.<sup>30</sup> Expressed differently, these three months accounted for over 28% of the annual total of 1,276 arraignments in 2010, but under 23% of the 1,146 in 2014 – a swing equivalent to around 60 cases. In this context, a shift of 6.6% (around 20 arraignments across those three months) on historical averages should be considered to be well within normal historical ranges.

Given the many confounding factors which accompanied the roll-out of the *Criteria and Procedures*, we are reluctant to conclude that the increased number of applications received after the *Criteria and Procedures* was a direct result of their implementation, therefore. Nevertheless, we note that if the higher rate of applications after September 12 was in fact a consequence of *Criteria and Procedures* implementation, it would represent an increase of approximately 94 applications per year.<sup>31</sup>

### Eligibility rates

The data ILS received from Washington County suggests that the rate at which applicants were found ineligible for counsel was already declining prior to the implementation date of September 12. Indeed, the data suggest that not a single application was denied after July.<sup>32</sup> Figure 19 shows the ineligibility rate by month in the county for 2015 and 2016; Table 18 breaks out the numbers for relevant periods.

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<sup>30</sup> The data were obtained from the Division of Criminal Justice Services and are on file with ILS.

<sup>31</sup> We took the total number of applications received for the 365 day period prior to and including September 11, 2016 (1,423). A 6.6% increase would have represented approximately 94 additional applications.

<sup>32</sup> In conversation with the providers in late November, 2016, we did learn one individual had been denied counsel in the later part of that month.

Figure 19: Percentage of Applications Found Ineligible in Washington County, 2015-2016

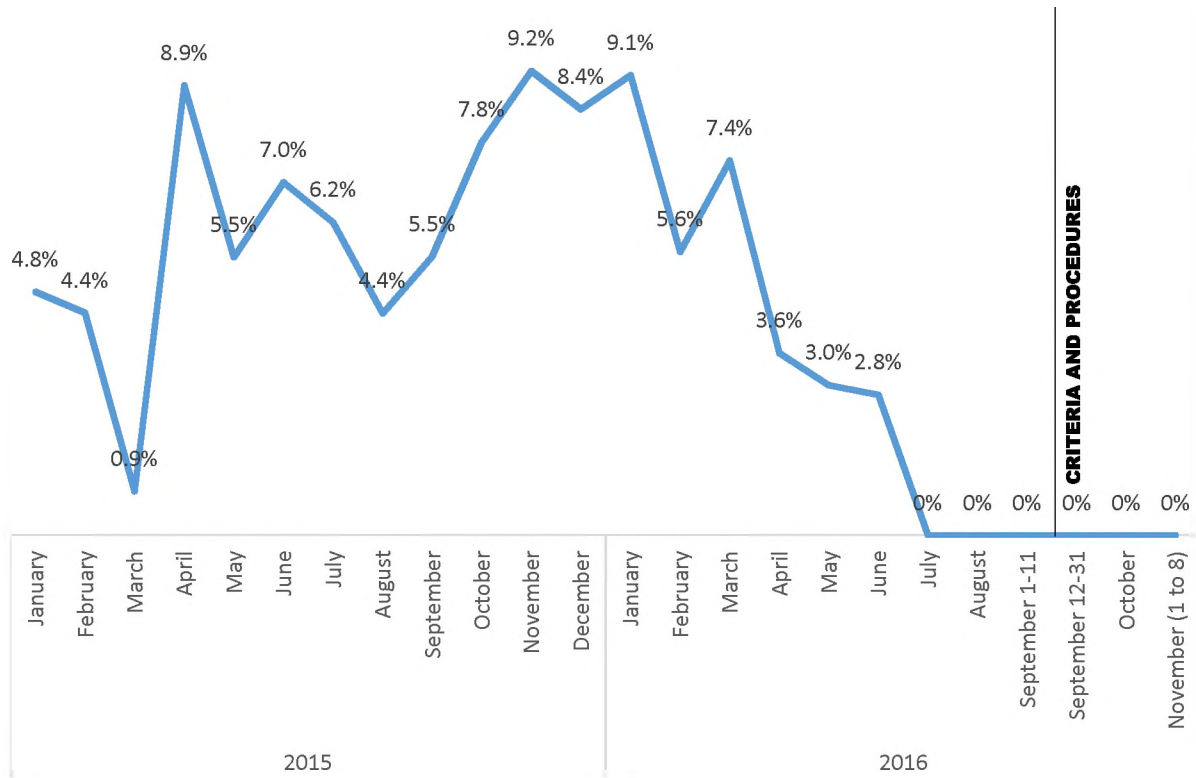


Table 18: Ineligibility Rate in Washington County Before and After Criteria and Procedures Implementation

Period	Ineligibility rate
2015	6.0%
2016 to June 30	5.2%
2016 July 1 to September 11	0.0%
2016 September 12 to November 8	0.0%

Since the implementation of the *Criteria and Procedures*, the rate at which persons have been deemed ineligible in Washington County has essentially declined to zero from a historical level of between five and six percent. Figure 19 suggests that decline may even date back to April, 2016, when the *Criteria and Procedures* were first published. Assuming that the rate of 6%, seen across 2015, is the most appropriate historical benchmark, this would translate into a caseload increase of approximately 86 cases a year, or an increase of 6.4%.<sup>33</sup>

<sup>33</sup> Assuming 1,423 applications were received (see *supra* note 31), the historical ineligibility rate of 6.0% would have resulted in 85 being rejected for representation.