



# **TEXAS INDIGENT DEFENSE COMMISSION**

## **Fiscal Monitoring Report**

**Bexar County, Texas**

**FY 2017 Indigent Defense Expenses**

**Final Report**

**January 3, 2019**

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# EXECUTIVE SUMMARY

Bexar County's on-site fiscal monitoring visit was conducted February 26-28, 2018 and follow-up email exchanges continued through May 11, 2018 to complete the record review. The fiscal monitor reviewed financial records to determine whether grant funds were spent in accordance with the terms and conditions of Texas Indigent Defense Commission (TIDC) grants.

The expenditure period of October 1, 2016 to September 30, 2017 (FY2017) was reviewed during the fiscal monitoring visit.

## SUMMARY OF FINDINGS

- General court expenditures were included with the criminal indigent defense expenses in the FY 2017 Indigent Defense Expenditure Report (IDER) submitted under Texas Government Code Section §79.036 (e).
- Written explanations from judges for variance in amounts requested and amounts approved on attorney fee vouchers were not present on vouchers as required by Article 26.05(c) of the Texas Code of Criminal Procedure.
- Bexar County uses a contract defender system for specialty courts; however, they do not comply with the contract defender rules outlined in the Texas Administrative Code (TAC), Chapter 174, Subchapter B.

## OBJECTIVE

The objectives of this review were to:

- Determine the accuracy of the Indigent Defense Expenditure Report;
- Determine the accuracy of the discretionary grant expenditure reports;
- Determine whether grant funds were used for authorized purposes in compliance with laws, regulations, and the provisions of the grant;
- Validate policies and procedures relating to indigent defense payments;
- Provide recommendations pertaining to operational efficiency; and
- Assist with any questions or concerns on the indigent defense program requirements.

## SCOPE

The County's indigent defense expenditures were monitored to ensure compliance with applicable laws, regulations, and the provisions of the grants during FY2017. Records provided by the Bexar County auditor's office were reviewed. Compliance with other statutory indigent defense program requirements was not included in this review.

## METHODOLOGY

To accomplish the objectives, the fiscal monitor met with the County Auditor and an Assistant County Auditor. The fiscal monitor reviewed:

- Random samples of paid attorney fees;
- General ledger transactions provided by the Bexar County Auditor's Office;
- IDER;
- Quarterly discretionary grant reports;
- Attorney fee schedule;
- Any applicable contracts; and
- The county's local indigent defense plan filed with TIDC.

# DETAILED REPORT

## BACKGROUND INFORMATION

### County Background

Bexar County was created in 1836 after Texas gained its independence from Mexico on March 2<sup>nd</sup> and created the sovereign country of The Republic of Texas. Bexar County included almost the entire western portion of the Republic of Texas, which claimed land as far north as Wyoming. After the Republic of Texas became the 28<sup>th</sup> state of the United States on February 19, 1846, 128 counties were carved out of Bexar County. The county is named for San Antonio de Béxar, one of the 23 Mexican municipalities of Texas at the time of its independence.

The county seat is San Antonio. Bexar County serves an estimated population of 1,913,559 and occupies an area of 1,256 square miles, of which 16 square miles is water. Bexar County is in south-central Texas and is bordered by Kendall, Comal, Guadalupe, Wilson, Atascosa, Medina and Bandera counties.

For 2017 there were 13 criminal district courts and 14 county courts at law courts that reported appointed attorney expenditures in criminal cases in Bexar County.

### Commission Background

In January 2002, the Texas Legislature established the Texas Task Force on Indigent Defense. In May 2011, the Legislature changed the agency's name to the Texas Indigent Defense Commission effective September 1, 2011. The Commission is a permanent standing committee of the Texas Judicial Council and is administratively attached to the Office of Court Administration (OCA).

TIDC provides financial and technical support to counties to develop and maintain quality, cost-effective indigent defense systems that meet the needs of local communities and the requirements of the constitution and state law.

TIDC's purpose is to promote justice and fairness for all indigent persons accused of crimes, including juvenile respondents, as provided by the laws and constitutions of the United States and the State of Texas. TIDC conducts these reviews based on the directive in Section 79.037(c) Texas Government Code, to "monitor each county that receives a grant and enforce compliance by the county with the conditions of the grant...", as well as Section 173.401(a), Texas Administrative Code, which provides that "the Commission or its designees will monitor the activities of grantees as necessary to ensure that grant funds are used for authorized purposes in compliance with laws, regulations, and the provisions of the grant."

### Formula Grant

The County submitted the FY 2017 indigent defense on-line grant application to assist in the provision of indigent defense services. Bexar County met the formula grant eligibility requirements and was awarded \$1,756,293 for FY 2017. An additional \$84,066 was awarded for the Supplemental Capital Defense Formula Grant

## Discretionary Grant

Bexar County received \$160,719.17 in discretionary grant funding for FY 2017. This discretionary grant award was for the second year of a multi-year award for representation of defendants with mental illness at magistration.

## DETAILED FINDINGS AND RECOMMENDATIONS

### **Finding One**

Bexar County included general court expenditures with criminal indigent defense expenses in the FY 2017 IDER submitted under Texas Government Code Section §79.036 (e).

One hundred attorney fee vouchers were reviewed and tested for necessary attributes. One of these attorney fee vouchers appears to be for an attorney in the role of a juvenile referee. If the attorney is appointed as a defense attorney, the expense would be allowable, but the role of referee is not an allowable expense for the IDER.

Twenty-nine vouchers from the expert witness, investigation, and other direct litigation expense categories were reviewed. Of these, 12 were related to mental health evaluations. However, none of the mental health evaluation vouchers included an *ex parte* motion from the defense attorney indicating that the expense was related to the preparation of a defense. Eight of these vouchers listed that the psychological exam was ordered to determine competency to stand trial or fitness to proceed. One voucher appeared to be in the best interest of a child, apparently a civil matter, with an agreed order with the Department of Family and Protective Services. Another voucher was for a request for a physician's certificate, and two vouchers were for half-day testimony. It is unclear if the testimony was expert testimony requested by the defense, or if the testimony was related to the court's determination of the defendant's competency.

A request for a mental health evaluation to determine competency to stand trial is typically a general court expense. The mental health examinations that are considered indigent defense expenses are those requested by the defense counsel where the results are shared exclusively with the defense team. No mental health evaluations requested by the judge or prosecuting attorney should be reported as indigent defense expenses. Support that the expense is for a mental health expert working for the defense under derivative attorney-client privilege to assist in the criminal defense of an indigent defendant must be documented to include the expenditure on the IDER. An order granting an *ex parte* defense motion requesting funds for a mental health defense expert is generally sufficient to establish eligibility as an indigent defense expenditure.

The expenditures detailed above should not be included in the criminal indigent defense expense report. The IDER overstated the County's criminal indigent defense expenditures due to the inclusion of these ineligible costs. FY 2018 formula grant funding for Bexar County may have been greater than would have been authorized if reported without the ineligible expenses. Please refer to the Indigent Defense Expenditure Report Procedure Manual: <http://www.tidc.texas.gov/media/57810/fy17-ider-manual.pdf>

### **Recommendation:**

Procedures to identify and record expenses for mental health expert expenses requested by the appointed defense counsel for the exclusive use of defense counsel in preparation of a defense should be developed. Procedures must distinguish such expenses from examinations ordered by the court to determine competency to stand trial, which are considered general court expenses.

Procedures must be developed to identify and record expenses unrelated to the defense of indigent defendants to ensure that they are not included in the IDER.

**County Response:**

*Bexar County included costs related to referee vouchers within its IDER expenditures. Bexar County also included mental health evaluations that were considered general court expenses under the expert witness category. The audit reviewed mental health evaluations which did not include a defense motion requesting funds for a mental health expert. Most of those reviewed were to determine competency to stand trial. Per the audit, these were determined not to be related directly to the defense of the client. Bexar County Auditor's Office evaluated the courts budgets and, along with the Court administrators, came up with a way to report these costs so that they will not be included in future years so as to not overstate indigent defense costs. The county's intent is to not overstate indigent defense expenditures due to inclusion of any ineligible costs.*

**Bexar County Action Plan**

- A. For attorney fee vouchers for attorneys in the role of referee, the vouchers will now be posted within each courts administrative budget under an account called special services. Referee vouchers will no longer be posted to each courts appointed attorney fees account. While reviewing and discussing this issue, court administration identified another expense similar to referees being reported as attorney fees. Payment for Voucher Review Committee member's fee vouchers were also being posted to court appointed attorney fees. These costs will now be posted to special services in each court's budget going forward as well.*
  
- B. The mental health evaluations which Bexar County has been posting to the expert witness expense category has been evaluated and discussed between the Auditor's Office and Court administration. The audit recommends that we draft procedures that would identify mental health expert expenses requested by appointed defense counsel and that including an ex parte defense motion to these requests would be sufficient. It would be problematic for the county to include such orders as there becomes a possibility of jeopardizing the case. Court administration has determined that the volume is too few in such instances, therefore Bexar County finds it not feasible to try to include them. Bexar County elects to no longer include any costs for mental health evaluations under the expert witness category going forward.*

**Contact person(s):** Cynthia Gonzales

**Completion date:** October 1, 2018 – Beginning of FY 2019

**TIDC Response to Corrective Action Plan:**

*First, thank you for identifying the additional expenses that were unallowable for the IDER and the county's plan to ensure that they are not included in the future. The proposed plan to exclude all mental health-related expenditures, however, is inconsistent with the county's obligation under Gov't Code Section 79.036 (e) to report all indigent defense expenditures. TIDC will work with*

*Bexar County to identify processes that allow Bexar County to identify those mental health related expenditures that are defense-related costs. The suggested attachment of the ex parte motion to the expense voucher was just one example of a procedure that could be used.*

**Finding Two**

Written explanations from judges for variance in amounts approved and amounts requested on attorney fee vouchers were not present as required by Article 26.05(c) of the Texas Code of Criminal Procedure.

The Code of Criminal Procedure (CCP) Article 26.05(c) reads in part, “if the judge or director disapproves the requested amount of payment, the judge or director shall make written findings stating the amount of payment that the judge or director approves and each reason for approving an amount different from the requested amount.”

In Bexar County, a committee reviews itemized vouchers submitted by attorneys. The committee meets every two weeks and reviews itemized vouchers submitted by attorneys on state jail and third-degree felony cases. The committee also reviews itemized vouchers on higher level felonies if the judge chooses. If the committee makes recommendations for a variance, and the judge agrees, the committee review form is attached to the voucher to satisfy the explanation requirement.

One hundred attorney fee vouchers were reviewed, and it appeared that the judges approved the attorney requested amount on all but one voucher. That voucher was approved and paid \$2,150 less than the amount requested; however, no explanation was provided. This voucher was for a higher-level felony and was not presented to the committee for review. Additionally, the attorney fee voucher does not provide space for a judge to write an explanation.

**Recommendation:**

Judges should provide a written explanation for any variance in the amount approved and the amount requested by the attorney to comply with CCP 26.05 (c).

The attorney fee voucher could be revised to include space for the judge to write an explanation for a variance.

**County Response:**

- A. *The Criminal District Court Judges and their court coordinators have been reminded by email that CCP Art. 26.05(c) requires the judge to make written findings stating the reason for approving an amount different from the attorney’s original requested amount. The current voucher form does provide space for these written findings, in the area to the left of the judge’s signature, where the form states “APPROVED in the total amount of \$\_\_\_\_\_.*  
*Comments:\_\_\_\_\_*  
\_\_\_\_\_”

- B. *Furthermore, Bexar County has initiated an e-invoice project that seeks to automate the entire voucher process, to be implemented sometime in 2019. In this new system, when a judge approves*

*an amount different from the attorney's original requested amount on a voucher, the voucher will not be able to move forward in the process unless the judge makes written findings in the system.*

### **Bexar County Action Plan**

*See above*

**Contact person(s):** *Melissa Barlow Fischer*

**Completion date:** *A: November 1, 2018. B: Sometime in late 2019 upon completion of the e-invoice project.*

### **Finding Three**

Bexar County uses a contract defender system for specialty courts; however, they do not comply with the contract defender rules outlined in the Texas Administrative Code (TAC), Chapter 174, Subchapter B.

For FY 2017, Bexar County reported indigent defense expenditures in 13 district courts and 14 county courts at law. Some of these courts operate specialty courts, and the expenditures for the defense attorneys paid for these specialty courts were included on the IDER. Examples of the types of specialty courts provided include DWI court, veteran's treatment court, mental health court, drug court, and prostitution court. It appears that attorneys were selected to represent defendants at the specialty court dockets without an open notification process for the selection of the attorneys. There appears to be an agreed rate requested on vouchers for representation in these specialty courts, but a formal contract has not been executed. Attorneys submit the docket call sheet for each payment request voucher; however, this list only provides the cases called for the docket, but does not provided the number of disposed cases, which the county auditor would need to complete the IDER.

### **Recommendation:**

To comply with TAC 174 Subchapter B the County should have

- an open notification process for the selection of the attorneys per TAC 174.11;
- a contract outlining the required elements of TAC 174.15- 174.25 with each attorney; and
- the attorneys should provide the number of disposed cases on the payment request voucher per TAC 174.10 (5).

### **County Response:**

- A.** *The Criminal District Court Judges and the Juvenile District Court Judges operate various specialty dockets as well as some specialty courts. We have not considered the services provided by the defense attorney member of the court/docket team to be the equivalent of a contract defender system as defined in the Texas Administrative Code for several reasons. First, the*

*defendants/respondents who participate in these specialty dockets/courts do so only after having had counsel represent them in their underlying case. That is, the participants have had either retained counsel or court-appointed counsel represent them pre-adjudication or during adjudication prior to their referral and acceptance into one of the programs. If, for any reason, the defendant/respondent is terminated from the program, they will again be represented by either retained counsel or a court-appointed attorney for any resolution of their underlying case. Second, the participants in these programs do not have to be indigent to qualify for participation; therefore, the services provided by the defense attorney member of the specialty court/docket team are not necessarily provided to a group of "indigent" defendants. Finally, the defense attorney member of the court team is not responsible for nor compensated for any "disposition" of the underlying case.*

- B. The County Court Judges operate several misdemeanor specialty courts. The defense attorneys who are selected to assist with the specialty courts do receive specialized training at the annual Drug Court conferences (State and National). The County Courts do not consider their services to fall under the contract defender system as set forth in the Texas Administrative Code. The dockets for our specialty courts are mainly post-adjudication, although there are some instances where the cases are placed on a special pre-adjudication track for purposes of pre-trial diversion programs after approval from the District Attorney's office.*

*For the post-adjudication cases, where the defendant enters the specialty court, after they have been adjudicated and placed on probation, the defendants have already had court appointed or retained counsel represent them on their underlying case(s). However, if the defendant is terminated from the specialty court, they will be represented by an attorney for any Motions to revoke hearings (MTRs).*

*The participants in these specialty courts do not have to be indigent to qualify for representation by the defense attorney in the specialty court. The defense attorney is mainly responsible for explaining the specialty court contract and benefits of specialty court participation to the defendant and represents the defendant at court staffings with the specialty court team. The defense attorneys for the misdemeanor specialty courts are paid a fixed rate for the weekly staffings/hearings (to represent multiple defendants at each staffing/hearing) and submit separate voucher forms.*

- C. If the TIDC believes our interpretation of the rules is in error, we would like some clarification and guidance regarding how to properly report these expenditures, as we would have to set up a fairly elaborate system to distinguish what percentage of the fees paid would be allocated directly to services provided to "indigent defendants/respondents," so as not to run afoul of IDER reporting requirements.*

### **Bexar County Action Plan**

*Bexar County will make sure to distinguish any fees paid to the defense attorney members of any specialty docket/court as a general court administrative expense so that they will no longer be included in the criminal indigent defense report.*

*If through analysis and clarification it is determined that these programs do indeed fall into the category of contract defender systems, Bexar County will follow the rules and procedures set out in the Texas Administrative Code that pertain to contract defender programs.*

**Contact person:** *Melissa Barlow Fischer (Criminal District Courts) Laura Angelini (Juvenile District Courts) Dianne Garcia (County Courts)*

**Completion date:** *Indefinite. Once we receive guidance and clarification, we will implement the necessary procedures. If it is determined that the defense attorneys associated with specialty court/dockets are contract defenders as described in TCCP 26.04 and the Texas Administrative Code, we will modify our Indigent Defense Plans and issue an NOA for each of the specialty courts/dockets; however, we anticipate that this cannot be initiated prior to March 2019.*

**TIDC Response to Corrective Action Plan:**

*Bexar County is one of several counties that have inquired about whether specialty court representation is considered indigent defense and should be reported on the IDER. Having sought guidance from TIDC's Board, for the time being, counties may choose whether to construe such representation as indigent defense. If a county considers the expense to be indigent defense and includes these cost on the IDER, then TIDC will monitor for compliance with the contract defender program rules, if applicable to the way counsel is provided. If the county does not report these expenses on the IDER, TIDC will not monitor these expenditures for compliance with the contract rules. In short, only if expenses are included on the IDER, must the county comply with the contract rules.*

*For clarification, if Bexar County decides to report the specialty court representation expenses, TIDC would not require or expect the payments for that representation to be allocated among indigent and non-indigent cases because we consider all of the costs associated with the defense attorney to be either for indigent defense or "in the interest of justice" as described in Article 1.051(c), Code of Criminal Procedure.*

# APPENDICES

## APPENDIX A – INDIGENT DEFENSE EXPENDITURE REPORT

<b>BEXAR COUNTY INDIGENT DEFENSE EXPENDITURES</b>			
<b>Expenditures</b>	<b>2015</b>	<b>2016</b>	<b>2017</b>
Population Estimate	1,862,634	1,913,559	1,932,383
Juvenile Assigned Counsel	\$733,809	\$746,131	\$665,876
Capital Murder	\$225,236	\$505,514	\$412,354
Adult Non-Capital Felony Assigned Counsel	\$5,643,954	\$5,813,514	\$6,293,745
Adult Misdemeanor Assigned Counsel	\$2,590,057	\$2,359,564	\$2,454,274
Juvenile Appeals	\$0.00	\$0.00	\$9,123
Adult Felony Appeals	\$99,556	\$174,282	\$90,701
Adult Misdemeanor Appeals	\$500	\$4,110	\$23,168
Licensed Investigation	\$231,409	\$284,577	\$313,052
Expert Witness	\$526,206	\$626,371	\$593,974
Other Direct Litigation	\$196,733	\$297,545	\$250,604
<b>Total Court Expenditures</b>	<b>\$10,247,460</b>	<b>\$10,811,588</b>	<b>\$11,106,871</b>
Administrative Expenditures	\$0.00	\$0.00	\$0.00
Funds Paid by Participating County to Regional Program	\$0.00	\$0.00	\$0.00
<b>Total Public Defender Expenditures</b>	<b>\$678,921</b>	<b>\$1,155,711</b>	<b>\$1,418,951</b>
<b>Total Court and Administrative Expenditures</b>	<b>\$10,926,381</b>	<b>\$11,967,299</b>	<b>\$12,525,822</b>
Formula Grant Disbursement	\$1,317,622	\$1,331,823	\$1,756,293
Supplemental Capital Defense Grant	\$0.00	\$74,687	\$84,066
Discretionary Disbursement	\$0.00	\$188,674	\$160,719
Reimbursement of Attorney Fees	\$779,559	\$607,638	\$414,118
Reimbursement by State Comptroller for Writs of Habeas Corpus	\$0.00	\$0.00	\$0.00
<b>Total Public Defender Cases</b>	<b>742</b>	<b>988</b>	<b>1,234</b>
<b>Total Assigned Counsel Cases</b>	<b>37,397</b>	<b>35,897</b>	<b>38,382</b>

*Indigent Defense Expenditure Reporting*

Source: Texas Indigent Defense Commission records

<b>Bexar County</b>				
<b>Year</b>	<b>2015</b>	<b>2016</b>	<b>2017</b>	<b>Texas 2017</b>
Population (Non-Census years are estimates)	1,862,634	1,913,559	1,932,383	28,059,337
Felony Charges Added (from OCA report)	17,033	17,390	19,049	279,474
Felony Cases Paid	12,018	12,907	14,173	212,428
% Felony Charges Defended with Appointed Counsel	71%	74%	74%	76%
Felony Trial Court-Attorney Fees	\$5,869,190	\$6,319,008	\$6,706,099	\$123,500,620
Total Felony Court Expenditures	\$6,713,822	\$7,416,526	\$7,705,478	\$141,042,744
Misdemeanor Charges Added (from OCA report)	37,680	33,379	33,848	473,896
Misdemeanor Cases Paid	23,346	21,257	22,864	217,002
% Misdemeanor Charges Defended with Appointed Counsel	62%	64%	68%	46%
Misdemeanor Trial Court Attorney Fees	\$2,590,057	\$2,359,564	\$2,454,274	\$43,271,420
Total Misdemeanor Court Expenditures	\$2,668,975	\$2,452,551	\$2,542,649	\$44,143,098
Juvenile Charges Added (from OCA report)	2,578	2,269	2,510	29,152
Juvenile Cases Paid	2,658	2,622	2,480	39,635
Juvenile Attorney Fees	\$733,809	\$746,131	\$665,876	\$11,386,741
Total Juvenile Expenditures	\$764,607	\$762,369	\$718,853	\$11,967,965
Total Attorney Fees	\$9,293,112	\$9,603,095	\$9,949,241	\$183,294,600
Total ID Expenditures	\$10,926,381	\$11,967,299	\$12,525,822	\$265,131,386
Increase in Total Expenditures over Baseline	123%	144%	155%	199%
Total ID Expenditures per Population	\$5.87	\$6.25	\$6.48	\$9.45
Commission Formula Grant Disbursement	\$1,317,622	\$1,406,510	\$1,840,359	\$31,751,772
Cost Recouped from Defendants	\$779,559	\$607,638	\$414,118	\$10,262,531

*Indigent Defense Expenditure Reporting*

Source: Texas Indigent Defense Commission records

## APPENDIX B – CRITERIA

### Criteria

- Uniform Grant Management Standards
- Texas Government Code, Section 79.036. Indigent Defense Information
- Texas Government Code, Section 79.037. Technical Support; Grants
- Code of Criminal Procedures Art 26.04 Procedures for Appointing Counsel
- Code of Criminal Procedures Art 26.05 Compensation of Counsel Appointed to Defend
- Texas Administrative Code - Title 1, Part 8, Chapter 174 Subchapter A Rule 174.1
- Texas Administrative Code - Title 1, Part 8, Chapter 174 Subchapter A Rule 174.2
- Texas Administrative Code - Title 1, Part 8, Chapter 174 Subchapter B Definitions
- FY2017 Indigent Defense Expenditure Report Manual found at:
- <http://www.tidc.texas.gov/media/57810/fy17-ider-manual.pdf>

## APPENDIX C – DISTRIBUTION LIST

Honorable Nelson W. Wolff  
Constitutional County Judge  
Bexar County  
101 W. Nueva, Suite 1035  
San Antonio, TX 78205-3028

Honorable Peter Sakai  
Local Administrative District Judge  
100 Dolorosa, 225<sup>th</sup> District Court  
San Antonio, TX 78205

Honorable John A. Longoria  
Local Administrative Statutory County Court Judge  
300 Dolorosa, 4<sup>th</sup> Floor  
County Court at Law No.5  
San Antonio, TX 78205

Honorable Lisa K. Jarrett  
Chairman of the Juvenile Board  
235 E. Mitchell  
San Antonio, TX 78210

Ms. Susan T. Yeatts  
County Auditor  
101 W. Nueva, Suite 800  
San Antonio, TX 78210

Ms. Melissa Barlow-Fischer  
County Administrative Contact  
101 W. Nueva, Suite 301  
San Antonio, TX 78205

Mr. Geoffrey Burkhart  
Executive Director, Texas Indigent Defense Commission  
209 W. 14<sup>th</sup> Street, Room 202  
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Mr. Wesley Shackelford  
Deputy Director, Texas Indigent Defense Commission  
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