



Monitoring Review of Tom Green County's Indigent Defense Systems

January 2022



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Mission: Protecting the right to counsel, improving public defense

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Executive Summary

The Texas Indigent Defense Commission (TIDC) monitors the compliance of local jurisdictions with the Fair Defense Act through on-site reviews.¹ TIDC observed court, interviewed officials, and reviewed FY2019 data² from Tom Green County, and made three findings of noncompliance: In misdemeanor cases, the timeliness of counsel appointments did not meet TIDC's 90% timeliness threshold. Some misdemeanor defendants never received a ruling on a counsel request and instead entered uncounseled pleas. In juvenile cases, few qualified attorneys are available for appointments, and a large percent of appointments went to a single attorney.

TIDC thanks Tom Green County officials and staff for their assistance in completing this review. TIDC staff stand ready to provide technical and financial assistance to remedy these issues. TIDC will conduct a follow-up review regarding its noncompliance findings within two years.³

Background

The Texas Indigent Defense Commission (TIDC) monitors local jurisdictions' compliance with the Fair Defense Act (FDA) through on-site reviews.⁴ These reviews are conducted to promote local compliance and accountability with the requirements of the Fair Defense Act and to provide technical assistance to improve county indigent defense processes.

This review covers the first five of the six FDA core requirements, and an accompanying fiscal review covers the sixth requirement:

REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE ARTICLE 15.17 PROCEEDINGS

REQUIREMENT 2: DETERMINE INDIGENCE ACCORDING TO STANDARDS DIRECTED BY THE INDIGENT DEFENSE PLAN

REQUIREMENT 3: ESTABLISH MINIMUM ATTORNEY QUALIFICATIONS

REQUIREMENT 4: APPOINT COUNSEL PROMPTLY

REQUIREMENT 5: INSTITUTE A FAIR, NEUTRAL, AND NONDISCRIMINATORY ATTORNEY SELECTION PROCESS

REQUIREMENT 6: REPORT DATA REQUIRED BY STATUTE

TIDC staff members Lindsay Bellinger, Claire Buetow, Bill Cox, and Joel Lieurance conducted the review virtually and with an on-site visit. TIDC examined

¹ TEX. GOV'T CODE §§ 79.037(a)–(b).

² TIDC began the review during 2020, but COVID-related factors delayed the completion of the review.

³ 1 TEX. ADMIN. CODE § 174.28(c)(2).

⁴ TEX. GOV'T CODE §§ 79.037(a)–(b).

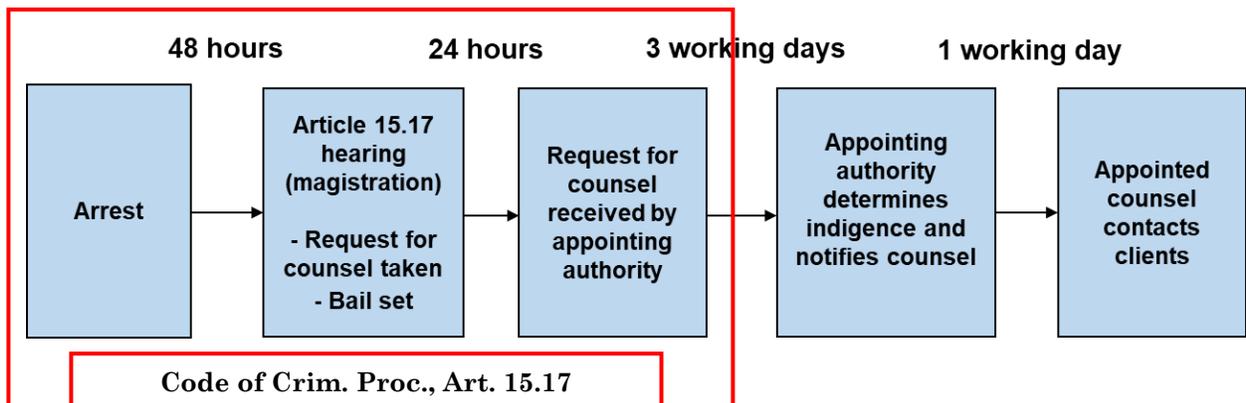
FY2019 data, including misdemeanor and felony case files; summary juvenile records examined by county staff; the local indigent defense plan; appointment lists; and records of attorney continuing legal education (CLE) hours. TIDC interviewed judges and court staff and observed Article 15.17 hearings, felony dockets, and misdemeanor dockets.

Program Assessment

REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE ARTICLE 15.17 PROCEEDINGS

Under Article 15.17 of the Code of Criminal Procedure, an arrested person must be brought before a magistrate within 48 hours.⁵ At this hearing, the magistrate must inform the person of his or her right to counsel, inform the person of the procedures for requesting counsel, and ensure the person has reasonable assistance in completing the necessary forms for requesting counsel.⁶ Magistrates must transmit requests for counsel to the appointing authority within 24 hours.⁷ If a person is arrested on an out-of-county warrant, the magistrate must perform the same duties as if the person were arrested on an in-county warrant.⁸

Figure 1a: Timeline for Appointment of Counsel in Adult Criminal Cases



Local Practices for Conducting Magistrate Warnings

1.a. Timeliness of Warnings

In Tom Green County, many misdemeanor arrestees are released from custody on peace officer bonds prior to magistrate warnings. If an arrested person remains in custody, the person is brought before a magistrate for the Article 15.17 hearing. TIDC presumes a county is in substantial compliance with the prompt magistration

⁵ TEX. CODE CRIM. PROC. ART. 15.17(a).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* A list of contacts to send out-of-county requests is available at <http://tidc.tamu.edu/public.net/Reports/OutOfCountyArrestContacts.aspx>.

requirement if at least 98% of Article 15.17 hearings are conducted within 48 hours.⁹ To determine the timeliness of Article 15.17 warnings in Tom Green County, TIDC staff examined 238 sample case files in which staff could determine the time from arrest until the Article 15.17 hearing.¹⁰ For those persona remaining in custody, all sample cases had Article 15.17 hearings occurring within two days of arrest, indicating Tom Green County is providing warnings in a timely manner (see Table 1).

Table 1: Timeliness of Article 15.17 Hearings

	Sample Size	Percent
Article 15.17 hearing occurs x days after arrest:	238	
0 days	63	
1 day	169	
2 days	6	
Timely Hearings	238	100%
More than 2 days	0	0%

1.b. Ability of Arrested Persons to Request Counsel

At the Article 15.17 hearing, the magistrate must inform an arrested person of the right to counsel, ask whether the person wants to request counsel, and record whether the person requests counsel.¹¹ According to monthly reports to the Office of Court Administration (OCA) for FY2019, about half of misdemeanor arrestees and three quarters of felony arrestees requested counsel at the Article 15.17 hearing. These statistics are an indication that defendants understand the right to request counsel at the Article 15.17 hearing.

Table 2: FY2019 Requests for Counsel as Reported to OCA¹²

	Misd. Req.	Misd. Warnings	% Misd. Req.	Fel. Req.	Fel. Warnings	% Fel. Req
JP1	194	387	50.1%	298	404	73.8%
JP2	153	395	38.7%	274	485	56.5%
JP3	211	306	69.0%	343	202	169.8%
JP4	140	365	38.4%	227	407	55.8%
County Total	698	1,453	48.0%	1142	1,498	76.2%

⁹ 1 TEX. ADMIN. CODE § 174.28(c)(1). Article 15.17(a) requires magistrate warnings occur within 48 hours of arrest. To simplify time measurement, TIDC assumes warnings are timely if they occur within 2 days of arrest.

¹⁰ TIDC excluded all cases in which it could not determine timeliness.

¹¹ TEX. CODE CRIM. PROC. ART. 15.17(a), (e).

¹² Under 1 TEX. ADMIN. CODE § 171.7, justices of the peace are required to make monthly reports to OCA as part of their Judicial Council Monthly Court Activity Reports.

1.c. Reasonable Assistance in Completing Forms for Requesting Counsel

At the Article 15.17 hearing, a magistrate must ensure the arrested person has reasonable assistance in completing the necessary forms for requesting counsel.¹³ In Tom Green County, the indigent defense coordinator assists defendants with requests and collects affidavits of indigence from requesting defendants before they go back to their cells.¹⁴

1.d. Transmitting Forms to the Appointing Authority

Within 24 hours of a person requesting counsel, the magistrate must transmit the request to the entity authorized to appoint counsel.¹⁵ For persons arrested on out-of-county warrants, the magistrate must transmit the request to the warrant-issuing county.¹⁶

If a defendant requests counsel at the Article 15.17 hearing, the defendant is interviewed by the indigent defense coordinator at the Tom Green County Jail.¹⁷ The coordinator sends felony counsel requests to the district clerk and misdemeanor counsel requests to the statutory county court judges.¹⁸

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 1

Conduct prompt and accurate magistration proceedings

Requirement satisfied. No findings.

REQUIREMENT 2: DETERMINE INDIGENCE ACCORDING TO STANDARDS DIRECTED BY THE INDIGENT DEFENSE PLAN

Under Article 26.04(l) of the Code of Criminal Procedure, counties must adopt procedures and financial standards for determining whether a defendant is indigent. Article 26.04(m) lists the factors courts may consider in determining indigence:

In determining whether a defendant is indigent, the court or the courts' designee may consider the defendant's income, source of income, assets, property owned, outstanding obligations, necessary expenses, the number and ages of dependents, and spousal income that is available to the defendant. The court or the courts' designee may not consider whether the defendant has posted or is capable of posting bail, except to

¹³ TEX. CODE CRIM. PROC. ART. 15.17(a).

¹⁴ On weekends, jail staff collect affidavits of indigence.

¹⁵ TEX. CODE CRIM. PROC. ART. 15.17(a).

¹⁶ TEX. CODE CRIM. PROC. ART. 15.18 (a-1).

¹⁷ On weekends, defendants complete affidavits and submit them to jail staff. The indigent defense coordinator collects these affidavits on Monday.

¹⁸ The coordinator rotates between the county court at law judges.

the extent that it reflects the defendant's financial circumstances as measured by the considerations listed in this subsection.

The local standards for determining indigence are set in each county's indigent defense plans.

2.a. Indigence Determinations in Adult Criminal Cases

For adult criminal cases in Tom Green County, persons are presumed indigent if they have a household income at or below 125% of the Federal Poverty Guidelines and non-exempt assets less than \$2,500.¹⁹ A person is also considered indigent if, at the time of the request, the person has been determined to be eligible to receive food stamps, Medicaid, Temporary Assistance for Needy Families, Supplemental Security Income, or public housing.

2.b. Indigence Determinations in Juvenile Cases

The standard of indigence in juvenile cases is the same as in adult criminal cases, but the standard is based on the person responsible for the youth.²⁰

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 2

Determination of Indigence

Requirement satisfied. No findings.

REQUIREMENT 3: ESTABLISH MINIMUM ATTORNEY QUALIFICATIONS

Under Article 26.04(d) of the Code of Criminal Procedure, private attorneys wishing to take court appointments must apply to be on an appointment list. The list must contain objective qualifications, including a minimum annual continuing legal education (CLE) requirement of at least six hours per year in criminal or juvenile law.²¹ Assigned counsel attorneys must be approved by a majority of judges presiding over criminal and juvenile matters.

3.a. Felony and Misdemeanor Cases

All felony and misdemeanor attorneys who take court appointments must be board certified in criminal law or must obtain at least 8 criminal CLE hours annually. The courts approve attorneys for various offense levels. Higher offense levels require a

¹⁹ The Tom Green District and County Court Indigent Defense Plan is available at: <http://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=191>.

²⁰ The Tom Green Juvenile Board Plan is available at <http://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=200>.

²¹ 1 TEX. ADMIN. CODE §§ 174.1–4. Attorneys may be Board Certified in criminal or juvenile law in lieu of the annual CLE requirement.

greater number of trials and years of experience in criminal litigation than lower levels. Appeals cases are delineated according to experience and number of appellate briefs.

3.b. Juvenile Cases

All juvenile attorneys who take court appointments must be board certified in criminal or juvenile law or must obtain at least 6 juvenile CLE hours annually. Like adult cases, higher offense levels require greater experience and number of trials. Appeals cases are delineated according to experience and number of appellate briefs.

Table 3: Qualifications for Appointment List Levels

List	Years Experience	# of Trials as Lead Counsel or # of App. Briefs
Capital Murder	Approved capital murder list – 7 th Admin. Region.	n/a
1 st Degree Felony	3	3 felony trials, 2 by jury
2 nd and 3 rd Degree Felony	2	2 trials, 1 by jury
State Jail Felony / Misdemeanors / Motions to Revoke Probation / Waiver of Exclusive Juvenile Jurisdiction	1	n/a
Appeals – Capital Offenses and 1 st Degree Felony	3	1 appellate brief
Appeals - other	1	1 appellate brief
Writ Counsel	3	1 appellate brief
Juvenile – 1 st Degree Felony – 2 nd Degree / Motion to Revoke Probation /	3	3 felony trials, 2 by jury
Juvenile – 3 rd Degree / State Jail Felony	2	2 trials, 1 by jury
Juvenile – CHINS / Misdemeanor / Modify Probation	6 months	2 trials (adult or juvenile)
Juvenile – 1 st Degree Felony Appeal	3	1 appellate brief
Juvenile – other Appeals	1	1 appellate brief
Juvenile Writs	1	n/a

Assessment

TIDC reviewed appointment lists and CLE records, and found that Tom Green County has procedures for managing appointment lists and for ensuring that all attorneys on the lists meet their annual CLE requirement. TIDC finds Tom Green County is in substantial compliance with Requirement 3.

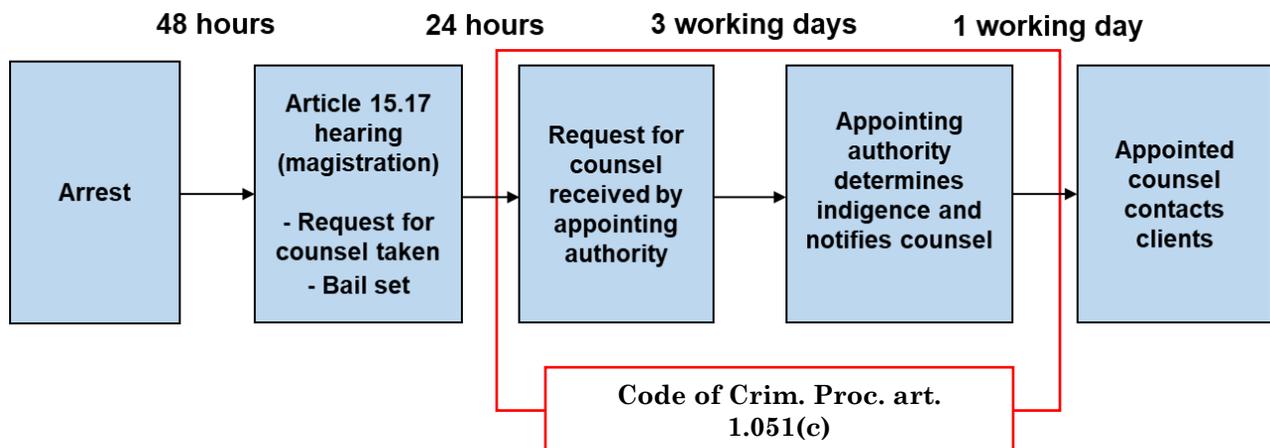
<p><u>FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 3</u></p> <p>Establish Minimum Attorney Qualifications</p> <p>Requirement satisfied. No findings.</p>
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REQUIREMENT 4: APPOINT COUNSEL PROMPTLY

Adult Cases

Under Article 1.051(c) of the Code of Criminal Procedure, courts in counties with a population less than 250,000 must rule on a request for counsel within three working days of receiving the request.

Figure 1b: Timeline for Appointment of Counsel in Adult Criminal Cases



Under Article 15.17 and local procedures, the first opportunity for most defendants to request counsel is at the Article 15.17 hearing, when a defendant appears before a magistrate and is informed of the charges. If a defendant makes bail before the Article 15.17 hearing (or is never brought before a magistrate), the defendant has the first opportunity to request counsel at the initial appearance in the trial court.

In Tom Green County, an indigent defense coordinator interviews defendants at the jail after the Article 15.17 hearing and transmits the financial data to the felony and misdemeanor courts. In felony cases, staff is designated to rule on requests and appoint counsel. In misdemeanor cases, each judge rules on requests.

To assess the timeliness of local appointment procedures, TIDC examines case files and measures the time from counsel request until appointment of counsel. This review examined cases filed in FY2019 (October 2018 to September 2019).

4.a. Timeliness of Appointment in Felony Cases

TIDC examined 169 sample felony cases filed in FY2019. Counsel was timely appointed in 143 of 148 cases having a request for counsel (**97% timely**). This exceeds TIDC's 90% threshold for presuming a jurisdiction's practices ensure timely appointment of counsel.

Table 4: Times to Appointment in Felony Cases

	Sample Size	Number from sample	Percent
Number of case files examined	169		
Total cases with a counsel request		148	
Appointment / denial of indigence occurred in:			
0 work days		100	
1 to 3 work days + 24-hour transfer		43	
Total timely appointments / denials		143	97%
More than 3 work days + 24-hour transfer		5	
No ruling on request		0	
Total untimely appointments / denials		5	3%

4.b. Timeliness of Appointments in Misdemeanor Cases

TIDC examined 221 sample misdemeanor cases filed in FY2019. Counsel was timely appointed in 69 of 91 cases having a request for counsel (**76% timely**). This falls below TIDC's 90% threshold for presuming a jurisdiction's practices ensure timely appointment of counsel. Under Article 1.051(c)(1), the County must rule on all requests for counsel within three working days. The County must implement practices that satisfy Article 1.051(c)(1)'s timeline in misdemeanor cases.

Table 5: Times to Appointment in Misdemeanor Cases

	Sample Size	Number from sample	Percent
Number of case files examined	221		
Total cases with a counsel request		91	
Appointment / denial of indigence occurred in:			
0 work days		57	
1 -3 work days + 24 hour transfer		12	
Total timely appointments / denials		69	76%
4 to 5 work days + 24 hour transfer		2	
More than 5 work days + 24 hour transfer		9	
No ruling on request		11	
Total untimely appointments / denials		22	24%

Waivers of Counsel in Misdemeanor Cases

Article 1.051 of the Code of Criminal Procedure addresses waivers of counsel and allows waivers that are voluntarily and intelligently made. Under Article 1.051(f-1), the prosecutor may not initiate a waiver and may not communicate with a defendant until any pending request for counsel is denied, and the defendant waives the opportunity to retain private counsel. Under Article 1.051(f-2), the court must explain the procedures

for requesting counsel to an unrepresented defendant and must give the defendant a reasonable opportunity to request counsel before encouraging the defendant to communicate with the attorney representing the state. If a defendant enters an uncounseled plea, the defendant must sign a written waiver, the language of which must substantially conform to the language of Article 1.051(g).²²

TIDC's misdemeanor case samples included seven cases in which misdemeanor defendants requested counsel at the Article 15.17 hearing and later entered uncounseled pleas without their requests being ruled upon. The absence of a ruling on a pending request raises the possibility of several statutory violations, including untimeliness (Art. 1.051(c)) and invalid waiver of counsel (Art. 1.051(f-2)). Tom Green County must ensure that its procedures for ruling on counsel requests meet the requirements of both Article 1.051(c) and 1.051(f-2).

Submission of Documents

As part of the file review, TIDC observed misdemeanor dockets, at which defendants who requested counsel were required to submit either paychecks, tax returns, or proof of federal poverty benefits. TIDC's review could not determine whether these requirements impacted timeliness of counsel appointments, because requests for counsel were dated at the time of submittal of documents rather than at the time defendants requested counsel at the court docket. Once a defendant makes a request for counsel to the court, the court has three working days to rule on the request.

4.d. Juvenile Cases

Counsel must be appointed for youths alleged to have engaged in delinquent conduct when the youth is brought to a detention hearing and when the youth is served with a copy of the petition alleging misconduct.²³ Under Section 54.01(b-1) of the Family Code, unless the court finds the appointment of counsel is not feasible due to exigent circumstances, the court shall appoint counsel within a reasonable time before the first detention hearing. Under Subsections 51.101(c) and (d) of the Family Code, once a

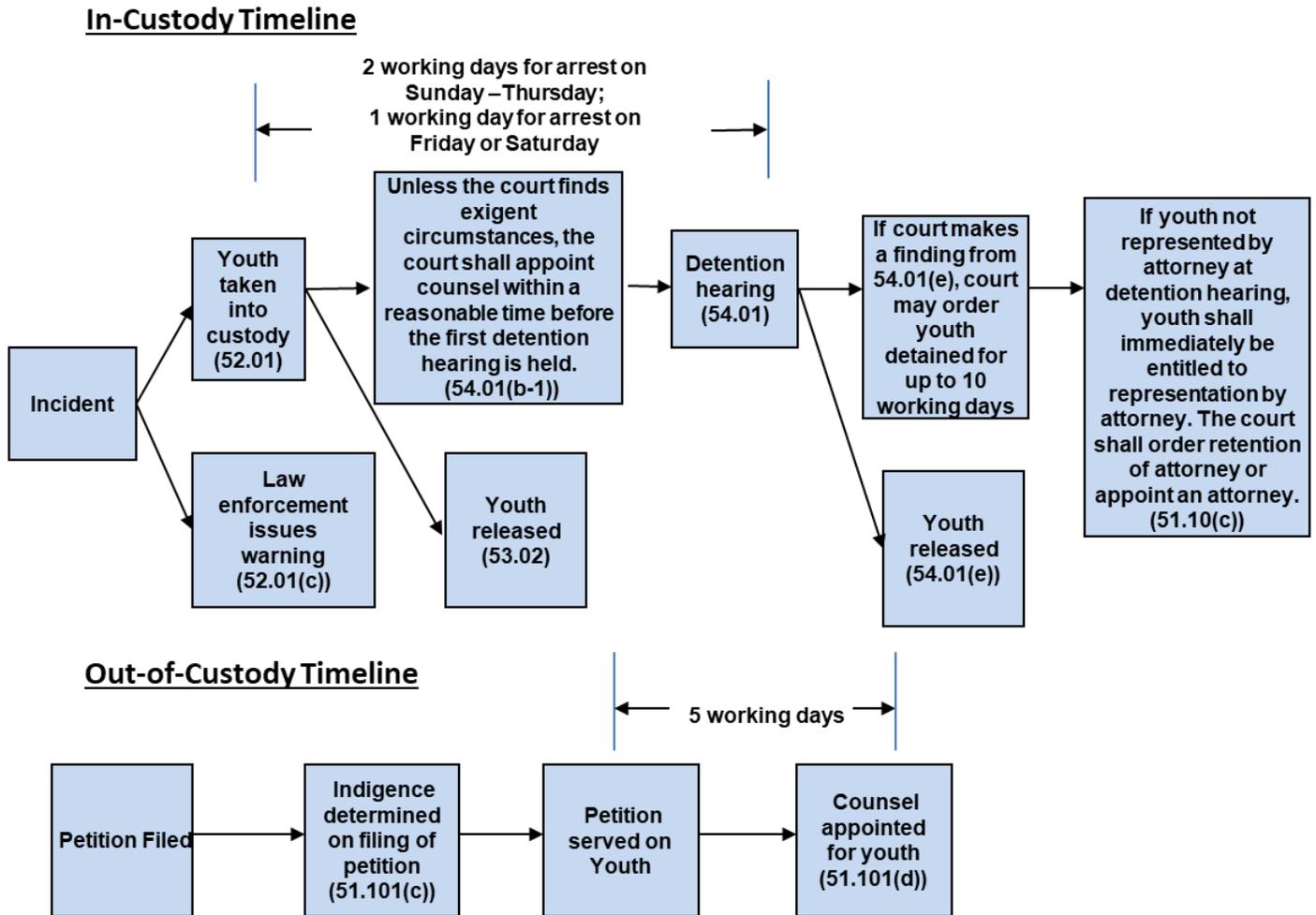
²² The waiver language of Article 1.051(g) states:

"I have been advised this _____ day of _____, 2____, by the (name of court) Court of my right to representation by counsel in the case pending against me. I have been further advised that if I am unable to afford counsel, one will be appointed for me free of charge. Understanding my right to have counsel appointed for me free of charge if I am not financially able to employ counsel, I wish to waive that right and request the court to proceed with my case without an attorney being appointed for me. I hereby waive my right to counsel. (signature of defendant)"

²³ TEX. FAM. CODE § 51.10(f).

petition is served on the youth, the court has five working days to appoint counsel or order the retention of counsel for the youth.²⁴

Figure 2: Timeline for Appointment of Counsel in Juvenile Cases



²⁴ If the person responsible for the youth fails to retain counsel, under Section 51.10(b) of the Family Code, the youth’s right to representation by an attorney shall not be waived in

- (1) a hearing to consider transfer to criminal court as required by Section 54.02;
- (2) an adjudication hearing as required by Section 54.03;
- (3) a disposition hearing as required by Section 54.04;
- (4) a hearing prior to commitment to the Texas Juvenile Justice Department as a modified disposition in accordance with Section 54.05(f); or
- (5) hearings required by Chapter 55.

Under Section 51.10(e), the court may appoint counsel and order the person responsible for the youth to pay a reasonable attorney’s fee set by the court.

Juvenile Detention Hearings

To assess the timeliness of Tom Green County’s appointment procedures in juvenile cases, Tom Green County staff examined 34 cases filed in FY2019 (October 2018 to September 2019). Section 54.01(b-1) of the Family Code requires counsel be appointed prior to the initial detention hearing, unless appointment is not feasible due to exigent circumstances.²⁵ Of the 34 sample cases, 18 involved detention hearings. Counsel was present for the initial detention hearing in all 18 cases (**100% timely**), which exceeds TIDC’s 90% threshold.

Appointment After Service of the Petition

Under Subsections 51.101(c) and (d) of the Family Code, once a petition is served on the youth, the court has five working days to appoint counsel or order the retention of counsel for the youth. Of 34 sample cases, 33 involved service of the petition on the youth. Counsel was timely appointed or retained for all 33 cases (**100% timely**), which exceeds TIDC’s 90% threshold.

Table 6: Times to Appointment in Juvenile Cases

	Sample Size	Number from Sample	Percent
Total juvenile cases examined	34		
TIMELINESS OF COUNSEL APPOINTMENTS FOR DETENTION HEARINGS			
Case files with detention hearings		18	
Cases with attorney present at initial hearing		18	100%
TIMELINESS OF COUNSEL APPOINTMENTS WHERE YOUTH SERVED WITH A PETITION			
Case files in which youth served with a petition	33		
Counsel appointed within 5 working days of service		31	
Indigence denied or counsel retained within 5 working days of service ²⁶		2	
Total cases with timely presence of counsel		33	100%
Cases where counsel not present in a timely fashion		0	0%

²⁵ TEX. FAM. CODE §54.01(b-1) states:

Unless the court finds that the appointment of counsel is not feasible due to exigent circumstances, the court shall appoint counsel within a reasonable time before the first detention hearing is held to represent the child at that hearing.

²⁶ TIDC considered a denial of indigence to be synonymous with an order to retain counsel.

RECOMMENDATION FOR REQUIREMENT 4

Appoint Counsel Promptly

FINDING 1 (MISDEMEANOR CASES): Tom Green County's misdemeanor appointment process did not meet TIDC's threshold for timely appointment of counsel (90% timely). Under Article 1.051(c)(1), the County must rule on all requests for counsel within three working days. The County must implement practices that satisfy Article 1.051(c)(1)'s timeline.

FINDING 2 (MISDEMEANOR CASES): The absence of a ruling on a pending request raises the possibility of several statutory violations, including untimeliness (Art. 1.051(c)) and invalid waiver of counsel (Art. 1.051(f-2)). Tom Green County must ensure that its procedures for ruling on counsel requests meet the requirements of both Article 1.051(c) and 1.051(f-2).

REQUIREMENT 5: INSTITUTE A FAIR, NEUTRAL, AND NONDISCRIMINATORY ATTORNEY SELECTION PROCESS

Article 26.04(b)(6) of the Code of Criminal Procedure requires that local procedures for appointing counsel ensure appointments are allocated among qualified attorneys in a fair, neutral, and nondiscriminatory manner.

Tom Green County uses rotational systems of appointment for felony, misdemeanor, and juvenile appointments.²⁷ Under the rotational system, the court appoints the attorney who is next on the appointment wheel, and once an appointment is received, the attorney moves to the bottom of the list.

TIDC examined the distribution of attorney appointments in Tom Green County by case level for FY2019.²⁸ TIDC attempts to consider only those appointments to attorneys who were on the appointment list for the entire year. Based on this analysis, the felony and district court levels had appointment distributions in which the top ten percent of attorneys received less than 3.0 times their respective share of cases paid, indicating that they comply with this requirement.

In juvenile cases, the courts noted that few attorneys are both interested in taking juvenile appointments and are available to immediately act upon notice of appointment. A majority of cases went to a single attorney. The distribution of appointments in juvenile cases did not meet TIDC's threshold for presuming a fair, neutral, and

²⁷ The description of the appointment system follows the rotational method. However, the adult indigent defense plan notes that the County has adopted an alternative appointment program for appointing counsel.

²⁸ If a jurisdiction can track its appointments, TIDC uses the jurisdiction's data. If not, TIDC uses cases paid data reported by the county auditor for this analysis.

nondiscriminatory appointment system. The courts must put in place a system that ensures appointments are made in a fair, neutral, and nondiscriminatory manner.

Under an improvement grant from TIDC, Tom Green County is putting a regional public defender office in place. The office will take appointments in felony, misdemeanor, and juvenile cases. The creation of the public defender office should address issues involving a lack of qualified attorneys available to take juvenile cases.

Table 7: Share of Cases Paid to Top 10% of Attorneys in Tom Green County (FY 2019)

Level	Attorneys on List	Top 10% Attorneys ²⁹	Respective Share of Cases ³⁰ [Column A]	Actual Share of Cases [Column B]	Top 10% Received 'x' Times Their Respective Share [Col. B] / [Col. A]
Felony	20	2	10%	15.1%	1.5
Misd.	25	3	12%	18.8%	1.6
Juvenile	9	1	11.1%	64.2%	5.8

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 5

Attorney Selection Process

FINDING 3 (JUVENILE CASES): The distribution of appointments in juvenile cases did not meet TIDC’s threshold for presuming a fair, neutral, and nondiscriminatory appointment system. The courts must put in place a system that ensures appointments are made in a fair, neutral, and nondiscriminatory manner.

REQUIREMENT 6: REPORT DATA REQUIRED BY STATUTE

Under Section 79.036(e) of the Texas Government Code, the county auditor (or other person designated by the commissioners court) must annually prepare and send indigent defense data to the Commission. This data must include the total expenses for cases in which an attorney was appointed for an indigent defendant or indigent juvenile in each district court, county court, statutory county court, and appellate court. Since FY2014, financial data reports must include attorney-level information.³¹

TIDC conducted a fiscal monitoring review of Tom Green County’s indigent defense expenses and shares its findings in a separate report.

²⁹ The number Top 10% Attorneys is equal to the number of Attorneys on List for Entire Year multiplied by 0.10, rounded to the nearest whole number.

³⁰ The percent Respective Share of Cases is equal to the number of Top 10% Attorneys divided by the number of Attorneys on List for Entire Year.

³¹ TEX. GOV’T CODE § 79.036(a-1).

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 6

Statutory Data Reporting

TIDC conducted a fiscal monitoring review of Green County's indigent defense expenses and shares its findings in a separate report.

Conclusion

TIDC thanks Tom Green County officials and staff for their assistance in completing this review. TIDC will conduct a follow-up review regarding its noncompliance findings within two years.³² TIDC staff stand ready to provide technical and financial assistance to remedy these issues and ensure full compliance with the Fair Defense Act.

Summary of Findings and Recommendations

Tom Green County must respond in writing how it will address the report's findings.

REQUIREMENT 4: APPOINT COUNSEL PROMPTLY.

FINDING 1 (MISDEMEANOR CASES): Tom Green County's misdemeanor appointment process did not meet TIDC's threshold for timely appointment of counsel (90% timely). Under Article 1.051(c)(1), the County must rule on all requests for counsel within three working days. The County must implement practices that satisfy Article 1.051(c)(1)'s timeline.

FINDING 2 (MISDEMEANOR CASES): The absence of a ruling on a pending request raises the possibility of several statutory violations, including untimeliness (Art. 1.051(c)) and invalid waiver of counsel (Art. 1.051(f-2)). Tom Green County must ensure that its procedures for ruling on counsel requests meet the requirements of both Article 1.051(c) and 1.051(f-2).

REQUIREMENT 5: ATTORNEY SELECTION PROCESS.

FINDING 3 (JUVENILE CASES): The distribution of appointments in juvenile cases did not meet TIDC's threshold for presuming a fair, neutral, and nondiscriminatory appointment system. The courts must put in place a system that ensures appointments are made in a fair, neutral, and nondiscriminatory manner.

³² 1 TEX. ADMIN. CODE § 174.28(c)(2).

Appendix: Monitoring Review Checklist

The monitoring review of the FDA's core requirements consisted of an examination of the items from the following checklist. If a box is marked, the specific requirement was met. If a box is not marked, the requirement either was not satisfied or is not applicable.

REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE ARTICLE 15.17 PROCEEDINGS

- The accused must be brought before a magistrate within 48 hours of arrest.³³
 - A person arrested for a misdemeanor without a warrant must be released on bond in an amount no more than \$5,000 not later than 24 hours after arrest if a magistrate has not determined probable cause by that time.³⁴
- The magistrate must inform and explain the right to counsel and the right to appointed counsel to the accused.³⁵
- The magistrate must ensure that reasonable assistance in completing forms necessary to request counsel is provided to the accused.³⁶
- A record must be made of the following:
 - the magistrate informing the accused of the accused's right to request appointment of counsel;
 - the magistrate asking whether accused wants to request appointment of counsel;
 - and whether the person requested court appointed counsel.³⁷
- If authorized to appoint counsel, the magistrate must do so within one working day after receipt of request for counsel in counties with a population of 250,000 or more and within three working days in counties under 250,000.³⁸

NOT APPLICABLE: Magistrates (aside from trial court judges) are not designated with appointing authority.
- If not authorized to appoint counsel, the magistrate must transmit or cause to be transmitted to the appointing authority an accused's request for counsel within 24 hours of the request being made.³⁹

³³ TEX. CODE CRIM. PROC. ART. 14.06(a).

³⁴ TEX. CODE CRIM. PROC. ART. 17.033.

³⁵ TEX. CODE CRIM. PROC. ART. 15.17(a).

³⁶ *Id.*

³⁷ TEX. CODE CRIM. PROC. ART. 15.17(e).

³⁸ *See, e.g.*, TEX. CODE CRIM. PROC. ART. 15.17(a) (requiring magistrate to appoint counsel according to the timeframes set in Texas Code of Criminal Procedure Article 1.051); TEX. CODE CRIM. PROC. ART. 1.051(c) (spelling out timeframe for appointment of counsel by county population size).

³⁹ TEX. CODE CRIM. PROC. ART. 15.17(a).

REQUIREMENT 2: DETERMINE INDIGENCE ACCORDING TO STANDARDS DIRECTED BY THE INDIGENT DEFENSE PLAN.

- ☒ Provide detailed procedures used to determine whether a defendant is indigent.⁴⁰
- ☒ State the financial standard(s) to determine whether a defendant is indigent.⁴¹
- ☒ List factors the court will consider when determining whether a defendant is indigent.⁴²

REQUIREMENT 3: ESTABLISH MINIMUM ATTORNEY QUALIFICATIONS.

- ☒ Establish objective qualification standards for attorneys to be on an appointment list.⁴³
 - Standards must require attorneys to complete at least six hours of continuing legal education pertaining to criminal / juvenile law during each 12-month reporting period or be currently certified in criminal law by the Texas Board of Legal Specialization.⁴⁴
 - Standards must require attorneys to submit by October 15 each year the percentage of the attorney's practice time dedicated to indigent defense based on criminal and juvenile appointments accepted in this county. The report must be made on a form prescribed by the Texas Indigent Defense Commission for the prior 12 months that begins on October 1 and ends on September 30.⁴⁵

REQUIREMENT 4: APPOINT COUNSEL PROMPTLY (JUVENILES).

- ☒ Unless the court finds that the appointment of counsel is not feasible due to exigent circumstances, the court shall appoint counsel within a reasonable time before the first detention hearing is held to represent the child at that hearing.⁴⁶
- ☒ If the child was not detained, an attorney must be appointed on or before the fifth working day after the date the petition for adjudication, motion to modify, or discretionary transfer hearing was served on the child.⁴⁷

⁴⁰ TEX. CODE CRIM. PROC. ART. 26.04(l)–(r).

⁴¹ TEX. CODE CRIM. PROC. ART. 26.04(l).

⁴² TEX. CODE CRIM. PROC. ART. 26.04(m).

⁴³ TEX. CODE CRIM. PROC. ART. 26.04(d).

⁴⁴ 1 TEX. ADMIN. CODE §§ 174.1–.4.

⁴⁵ TEX. CODE CRIM. PROC. ART. 26.04(j)(4).

⁴⁶ TEX. FAM. CODE §§ 51.10(c), 54.01(b-1).

⁴⁷ TEX. FAM. CODE § 51.101(d).

REQUIREMENT 4: APPOINT COUNSEL PROMPTLY (ADULTS).

- Incarcerated persons: After receipt of a request for counsel, counsel must be appointed within one working day in counties with a population of 250,000 or more and within three working days in counties under 250,000.⁴⁸
- Persons out of custody: Counsel must be appointed at the defendant’s first court appearance or when adversarial judicial proceedings are initiated, whichever comes first.⁴⁹
- All unrepresented defendants must be advised of the right to counsel and the procedures for obtaining counsel.⁵⁰

REQUIREMENT 5: INSTITUTE A FAIR, NEUTRAL, AND NONDISCRIMINATORY ATTORNEY SELECTION PROCESS.

- Rotational method: The court must appoint an attorney from among the next five names on the appointment list in the order in which the attorneys’ names appear on the list, unless the court makes a finding of good cause on the record for appointing an attorney out of order.⁵¹
- Public Defender: The system must meet the requirements set out in Article 26.044 of the Code of Criminal Procedure. The appointment process must be listed in the indigent defense plan.⁵²

NOT APPLICABLE: The County does not have a public defender.

- Alternative appointment method:⁵³
 - The local processes must be established by a vote of two-thirds of the judges.
 - The plan must be approved by the presiding judge of the administrative judicial region.
 - The courts must allocate appointments reasonably and impartially among qualified attorneys.

⁴⁸ TEX. CODE CRIM. PROC. ART. 1.051(c).

⁴⁹ TEX. CODE CRIM. PROC. ART. 1.051(j); *see also Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 212 – 13 (2008) (holding that “a criminal defendant’s initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.”). This box is not checked because the timeliness of misdemeanor appointments fell below TIDC’s presumed threshold (90% timely).

⁵⁰ TEX. CODE CRIM. PROC. ART. 1.051(f-2). This box is not checked because some misdemeanor defendants requested counsel but entered uncounseled pleas without their requests being ruled upon.

⁵¹ TEX. CODE CRIM. PROC. ART. 26.04(a). This box is not checked because the distribution of juvenile appointments fell outside TIDC’s presumed thresholds.

⁵² TEX. CODE CRIM. PROC. ART. 26.044.

⁵³ TEX. CODE CRIM. PROC. ART. 26.04(g)–(h). The County has adopted an alternative appointment program for appointing counsel in adult cases, but the description follows the rotational method of appointment.