



# **Initial Monitoring Review of Tarrant County's Indigent Defense Systems**

**June 2020**



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**MISSION**

The Texas Indigent Defense Commission 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.

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## Background

The Texas Indigent Defense Commission (TIDC) monitors local jurisdictions' compliance with the Fair Defense Act (FDA) through on-site reviews.<sup>1</sup> These reviews 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 covered all six core requirements of the FDA:<sup>2</sup>

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, Wesley Shackelford, Claire Buetow, Kathleen Casey-Gamez, and Joel Lieurance, conducted site visits between November 18 - 20, 2019 and between February 5 - 6, 2020. For this review, TIDC examined data from FY2019, including misdemeanor, felony, and juvenile case files; appointment lists; and records of attorney continuing legal education (CLE) hours. TIDC interviewed judges and court staff and observed Article 15.17 hearings, indigence screening proceedings, and a mental health docket.

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<sup>1</sup> TEX. GOV'T CODE § 79.037(a)–(b).

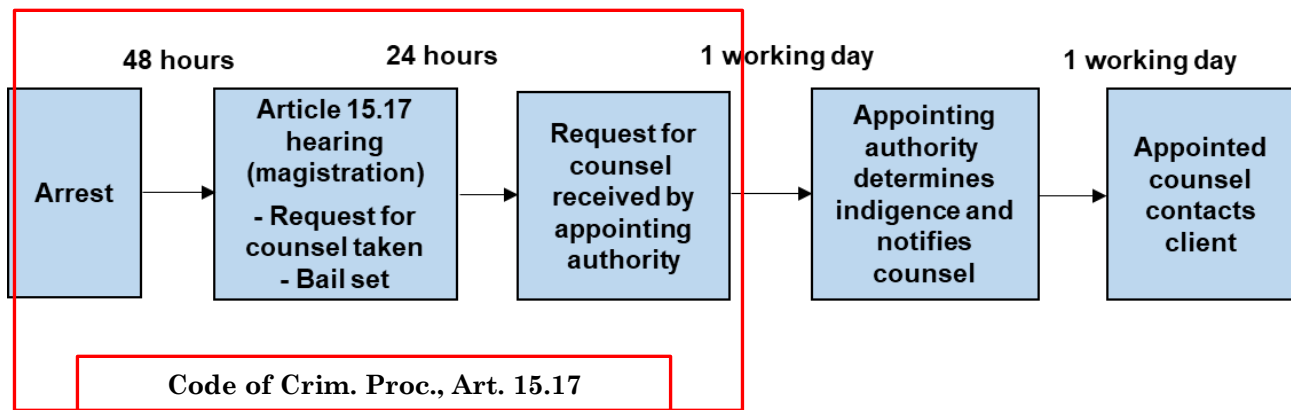
<sup>2</sup> 1 TEX. ADMIN. CODE § 174.28.

## 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.<sup>3</sup> 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 assistance of counsel.<sup>4</sup> Within 24 hours of receiving a request for counsel, the magistrate must transmit this request to the appointing authority.<sup>5</sup> 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.<sup>6</sup>

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



#### *Local Practices for Conducting Magistrate Warnings*

This past year, Tarrant County has modified its pretrial practices. Previously, most arrested persons were initially detained in municipal jails. Municipal judges conducted those magistrate warnings, which included setting bail, setting conditions of bond, and taking requests for counsel. Sometime after the hearing, arrested persons not making bail were transferred to the Tarrant County Jail. Under this system, municipal judges controlled bail amounts and bond conditions, but maintained few ties to the person. There was no way to effectively monitor whether persons arrested followed bond conditions.

<sup>3</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

<sup>4</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

<sup>5</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

<sup>6</sup> TEX. CODE CRIM. PROC. art. 15.18(a). A list of contacts to send counsel requests made by arrested persons from out-of-county warrants is available at: <http://tidc.tamu.edu/public.net/Reports/OutOfCountyArrestContacts.aspx>.

If an arrested person requested counsel but could not make bail, Tarrant County processed the request to determine indigence after the person was transported to the Tarrant County Jail. If the person requested counsel but made bail before being transported to the Tarrant County Jail, the person would have been directed to meet with Tarrant County financial screeners to determine whether he or she was indigent and qualified for appointed counsel.

More recently, Tarrant County has attempted to centralize magistrate warnings. At the time of this review, only two municipalities, North Richland Hills and Grand Prairie, still conduct magistrate warnings. For all other municipalities, arrested persons are now transferred to the Tarrant County Jail, where screeners conduct interviews for purposes of determining financial status and bail risk. After meeting with financial screeners, magistrates conduct Article 15.17 hearings, at which bail amounts and conditions are set and at which counsel can be requested.

With centralized magistration, Tarrant County magistrate judges can set more consistent bail amounts and bond conditions. When judges set bond conditions, Tarrant County CSCD monitors whether the bond conditions are followed. Since Tarrant County has adopted centralized magistration, the percent of misdemeanor cases with personal bonds has increased. According to interviews, persons receiving personal bonds are more likely to adhere to bond conditions than persons posting surety bonds.

#### *Article 15.17 Hearing Observations*

TIDC observed multiple Article 15.17 hearings. Magistrates conduct Article 15.17 hearings at the Tarrant County Jail, both as in-person hearings and as video hearings. Regardless of the method, all arrested persons are apprised of their rights and are asked if they want to request court appointed counsel. If a person requests counsel, he or she is given an orange card. Those persons with orange cards are directed to interview with a financial screener. They cannot go back to their cells until the financial screening is complete. After the interview, the person swears to the application, and the interviewer notifies the person whether he or she qualified for appointed counsel.

TIDC also observed an Article 15.17 hearing at the City of North Richland Hills. Arrested persons there also receive the required warnings and are asked if they wish to request counsel. When arrested persons request counsel at the municipal level, the request is faxed to the Tarrant County criminal courts and sent with the person upon transfer to Tarrant County. The indigence screening interview does not occur until a later time.

**1.a. Timeliness of Warnings**

An arrested person must be brought before a magistrate within 48 hours of arrest.<sup>7</sup> TIDC presumes a county is in substantial compliance with the prompt magistration requirement if at least 98% of Article 15.17 hearings are conducted within 48 hours.<sup>8</sup> To determine the timeliness of Article 15.17 warnings in Tarrant County, TIDC staff examined 342 sample case files in which staff could determine the time from arrest until the Article 15.17 hearing. All but one sample case had Article 15.17 hearings occurring within two days of arrest, indicating Tarrant County is providing warnings in a timely manner (see Table 1).

**Table 1: Timeliness of Article 15.17 Hearings**

	<b>Sample Size</b>	<b>Percent</b>
Article 15.17 hearing occurs x days after arrest:	342	
0 days	145	42.4%
1 day	161	47.1%
2 days	35	10.2%
<b>Timely Hearings</b>	<b>341</b>	<b>99.7%</b>
More than 2 days	1	0.3%

**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 he or she wants to request counsel, and record whether the person requests counsel.<sup>9</sup> Of sample case files examined by TIDC, 63% of felony arrestees requested counsel, and 59% of misdemeanor arrestees requested counsel. This is an indication that arrested persons understand their right to counsel at the Article 15.17 hearing and regularly request counsel.

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

At Article 15.17 hearings, magistrates must ensure the arrested person has reasonable assistance in completing the necessary forms for requesting counsel.<sup>10</sup> In Tarrant County, the forms necessary for requesting counsel are completed at interviews with financial screeners. These forms are typically completed prior to the Article 15.17 hearing. When arrested persons from the municipalities of North Richland Hills and Grand Prairie request counsel and make bail before being transported to the Tarrant

<sup>7</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

<sup>8</sup> 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.

<sup>9</sup> TEX. CODE CRIM. PROC. art. 15.17(a), (e).

<sup>10</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

County Jail, they are directed to meet with financial screeners at the Tarrant County Courthouse.

***1.d. Transmitting Forms to the Appointing Authority***

Within 24 hours of a person requesting counsel, the magistrate must transmit this request to the entity authorized to appoint counsel.<sup>11</sup> For persons arrested on out-of-county warrants, the magistrate must transmit the request to the warrant issuing county.<sup>12</sup> In Tarrant County, requests for counsel are recorded in the TechShare case management system. Financial screeners review these applications and have authority to appoint counsel for those who qualify as indigent.

**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 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 Tarrant County, a person is indigent if he or she has a household income at or below the Living Wage Calculator guidelines as established and revised periodically by the Massachusetts Institute of Technology (MIT), and whose

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<sup>11</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

<sup>12</sup> TEX. CODE CRIM. PROC. art. 15.18 (a-1).



liquid assets do not exceed \$15,000.<sup>13</sup> The court may also consider the complexity of the case, the estimated cost of presenting a legal defense, the fees charged by lawyers in the community for providing defense services in similar cases, or whether the defendant has retained counsel in related legal matters.

Tarrant County's longstanding procedure has been for defendants to interview with a financial screener from the Office of Attorney Appointments who uses the MIT Calculator and whose determination is reviewed by a judge only if a person does not qualify for counsel. During TIDC's November visit, the County followed this procedure.<sup>14</sup> During TIDC's February visit, the misdemeanor courts had recently begun having a judge review indigence determinations and consider the income of all other persons related by birth, marriage, or adoption who reside with the defendant, which was allowed by the indigent defense plan.<sup>15</sup>

TIDC observed a misdemeanor docket in February. At the docket, the judge reviewing indigence determinations questioned defendants who had requested counsel and been interviewed by screeners. He asked one defendant about his mother's income and a second defendant about his grandmother's income (both defendants lived with family, and one was a student with no income).

Parental income of adult defendants is not an indigence factor listed in Article 26.04(m). Article 26.04(m) only references the income of the defendant and spousal income available to the defendant. Additionally, *Abdnor v. State*, 712 S.W.2d 136 (Tex. Crim. App. 1986), restricts indigence determinations to considering the income of only the persons who are legally bound to pay for the defendant's legal expenses. Parents are not legally bound to pay their adult children's legal expenses.

Additionally, in questioning defendants, the judge told defendants that the law presumes they can afford a lawyer and that "indigent" means that they are on Supplemental Security Income (SSI), or cannot afford to feed and clothe themselves.<sup>16</sup> Article 1.051 of the Code of Criminal Procedure states that, for the purposes of Article 26.04, "indigent" means a person who is not financially able to employ counsel." There

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<sup>13</sup> The Tarrant District Court Indigent Defense Plan is available at <http://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=117>. The Tarrant County Court Indigent Defense Plan is available at <http://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=130>.

<sup>14</sup> See Requirement 4, below, for observations from this visit.

<sup>15</sup> The misdemeanor courts' indigent defense plan had included this provision for many years, but the courts did not follow this standard. Instead, they only considered the financial condition of the defendant and the defendant's spouse.

<sup>16</sup> The judge also questioned defendants about matters beyond the scope of the indigence determination and in a manner that would likely discourage them from asserting their right to counsel. To a 20-year-old defendant, for example, he said, "This is embarrassing. You're living off your grandma."

is no presumption that a person can employ counsel. Tarrant County uses the MIT Calculator as its default indigence standard, which accounts for expenses beyond food and clothing. The indigent defense plan allows the court to depart from the standard based on the estimated cost for an attorney, which may be well beyond what a defendant has available for basic necessities. Moreover, a person is not required to forego basic necessities to pay for an attorney.

Tarrant County must, in its plan and in practice, make indigence determinations that comply with Article 26.04(m) and *Abdnor v. State*. The County reported in March that the judges have returned to not considering non-spousal income and having screeners from the Office of Attorney Appointments interview defendants. The judges planned to meet in April to formally update the indigent defense plans to reflect this change but were delayed by the COVID-19 pandemic. TIDC will continue to monitor for this update.

### **2.b. Indigence Determinations in Juvenile Cases**

In Tarrant County juvenile cases, if the income of the person responsible for the juvenile is less than 125 percent of the Federal Poverty Guidelines, the juvenile is presumed to be indigent.<sup>17</sup> The juvenile may also be determined to be indigent if the judge finds the liabilities of the responsible person are more than his assets or if the person is unable to pay for any attorney qualified to represent the juvenile. TIDC observed juvenile detention hearings and reviewed case files and did not observe practices contrary to this standard. TIDC found that Tarrant County is in substantial compliance with Requirement 2 for juvenile cases.

## **FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 2**

### **Determination of Indigence.**

**FINDING 1:** Indigence determinations must comply with Article 26.04(m) and *Abdnor v. State*. Indigence determinations may not consider the income of persons who are not legally bound to pay for the defendant's legal expenses.

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<sup>17</sup> The Tarrant Juvenile Board Plan is available at <http://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=421>.

### **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.<sup>18</sup> Assigned counsel attorneys must be approved by a majority of judges presiding over criminal and juvenile matters.

#### ***3.a. Felony Cases***

The District Courts' plan includes five separate appointment lists for felony cases: state jail felony and extradition cases; second and third degree felony and motion to revoke / adjudicate community supervision cases; first degree felony cases; appeals; and post-judgment writs and post-conviction DNA motions. Attorneys on any list must obtain at least 15 hours of CLE in criminal law each year, and for offenses higher than a state jail felony, they must obtain at least 20 hours each year. Additionally, the plan sets qualifications for attorneys representing non-English speaking defendants. Attorneys on any felony list must complete an annual mental health training approved by the Tarrant County Criminal Court and must have conducted at least five non-class C criminal jury trials on the merits (two of which were felony cases) in the last five years.

#### ***3.b. Misdemeanor Cases***

The County Courts' plan includes a single appointment list for misdemeanor cases. Attorneys on the list must obtain at least 15 hours of CLE in criminal law each year, have conducted at least five criminal trials in the last ten years, and have taken at least 20 guilty pleas (all in non-class C cases). Additionally, the plan sets qualifications for attorneys representing non-English speaking defendants.

#### ***3.c. Juvenile Cases***

Attorneys approved to take juvenile appointments must obtain at least 6 hours of CLE in juvenile law each year or be certified in juvenile law by the Texas Board of Legal Specialization. The juvenile plan includes four appointment list levels:

- LEVEL ONE: Qualifications for Appointments for Conduct in Need of Supervision
- LEVEL TWO: Qualifications for Appointments for Delinquent Conduct and where an Indeterminate Commitment to the Texas Juvenile Justice Department is an authorized disposition
- LEVEL THREE: Qualifications required for appointments for Determinate Sentencing or Certification proceedings

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<sup>18</sup> Title 1 TEX. ADMIN. CODE §§ 174.1 – 4. Attorneys may be Board Certified in criminal or juvenile law in lieu of the annual CLE requirement.

- LEVEL FOUR: Qualifications required for appointments for Appeals

**Assessment**

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

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 3

**Establish Minimum Attorney Qualifications.**

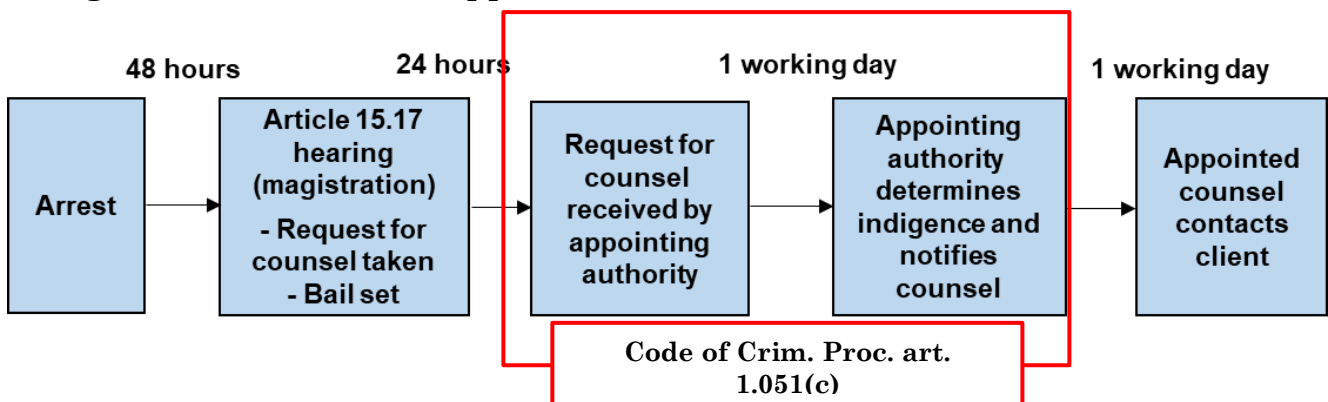
Requirement satisfied. No findings.

**REQUIREMENT 4: APPOINT COUNSEL PROMPTLY**

**4.a. Adult Cases**

Article 1.051(c) of the Code of Criminal Procedure requires the court or its designee to appoint counsel by the end of the first working day following receipt of the request for counsel.<sup>19</sup> If a defendant makes bail, Article 1.051(j) sets the deadline for appointing counsel to be the defendant’s first court appearance or the initiation of adversarial judicial proceedings, whichever comes first. *Rothgery v. Gillespie County* clarified that the initiation of adversarial judicial proceedings occurs at the Article 15.17 hearing.<sup>20</sup> Since the *Rothgery* decision, the meaning of the language from Article 1.051(j) cannot be construed to allow for a ruling on a request for counsel to be delayed because the defendant makes bond. Once adversarial judicial proceedings have been initiated, courts must provide a method for defendants to request and obtain appointed counsel.<sup>21</sup>

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



<sup>19</sup> The time frame is three working days for counties with a population under 250,000.

<sup>20</sup> *Rothgery v. Gillespie County*, 554 U.S. 191, 212 – 13 (2008).

<sup>21</sup> 1 Tex. Admin Code § 174.51.

*Timeliness of Appointment in Felony Cases*

To assess the timeliness of Tarrant County’s current appointment procedures in felony cases, TIDC staff examined 180 sample felony cases filed in FY2019 (October 2018 – September 2019). Counsel was appointed timely in 126 of 134 cases having a request for counsel (**94% timely**) (see Table 2), which exceeds TIDC’s 90% timely threshold for presuming a jurisdiction’s procedures ensure prompt appointment of counsel in felony cases.

**Table 2: Times to Appointment in Tarrant County Felony Cases (FY 2019)**

	Sample Size	Number from sample	Percent
Number of case files examined	180		
Total cases with a counsel request		134	
<b>Appointment / denial of indigence occurred in:</b>			
0 work days		100	
1 work day + 24 hour transfer		26	
<b>Total timely appointments / denials</b>		<b>126</b>	<b>94%</b>
2 - 4 work days + 24 hour transfer		4	
More than 4 work days + 24 hour transfer		4	
No ruling on request		0	
Total untimely appointments / denials		8	6%

*Timeliness of Appointments in Misdemeanor Cases*

To assess the timeliness of Tarrant County’s current appointment procedures in misdemeanor cases, TIDC staff examined 221 sample misdemeanor cases filed in FY2019 (October 2018 – September 2019). Counsel was appointed in a timely manner in 132 of 139 cases having a request for counsel (**95% timely**), which exceeds TIDC’s 90% timely threshold for presuming a jurisdiction’s procedures ensure prompt appointment of counsel in misdemeanor cases.

**Table 3: Times to Appointment in Tarrant County Misdemeanor Cases (FY 2019)**

	Sample Size	Number from sample	Percent
Number of case files examined	221		
Total cases with a counsel request		139	
<b>Appointment / denial of indigence occurred in:</b>			
0 work days		96	
1 work day + 24 hour transfer		36	
<b>Total timely appointments / denials</b>		<b>132</b>	<b>95%</b>
2 to 4 work days + 24 hour transfer		4	
More than 4 work days + 24 hour transfer		3	
No ruling on request		0	
Total untimely appointments / denials		7	5%

*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, he or she must sign a written waiver, the language of which must substantially conform to the language of Article 1.051(g).<sup>22</sup>

TIDC reviewed case files and observed hearings to determine whether defendants improperly waived their right to counsel. In its file review, all sample cases with misdemeanor requests for counsel were ruled upon, so no defendants waived their right to counsel while having a pending request.

On November 18 and 20, TIDC observed initial appearance misdemeanor dockets. Defendants checked into the docket with a bailiff and marked whether they

<sup>22</sup> 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)"

wanted to request counsel. When the judge entered the courtroom, she explained the procedures for requesting counsel for later arrivals.

Defendants who requested counsel spoke to a financial screener from the Office of Attorney Appointments, who entered their financial information into TechShare and generated a determination of indigence, based on the MIT Living Wage Calculator. If they qualified, they waited in court for the Office of Attorney Appointments to appoint counsel. They then spoke to a coordinator from the Office of Attorney Appointments to receive their next court date and their attorney's information.

Defendants who did not request counsel spoke to the coordinator about the status of their case and next court date. Some were unaware that they had previously been appointed counsel and so received their attorney's information. Others had retained counsel. For those who were unrepresented after multiple court settings, the coordinator warned them about the dangers of self-representation and provided the option to apply for counsel.

From TIDC's observations, Tarrant County informs defendants of the procedures for requesting counsel and carefully guards against invalid waivers of counsel.

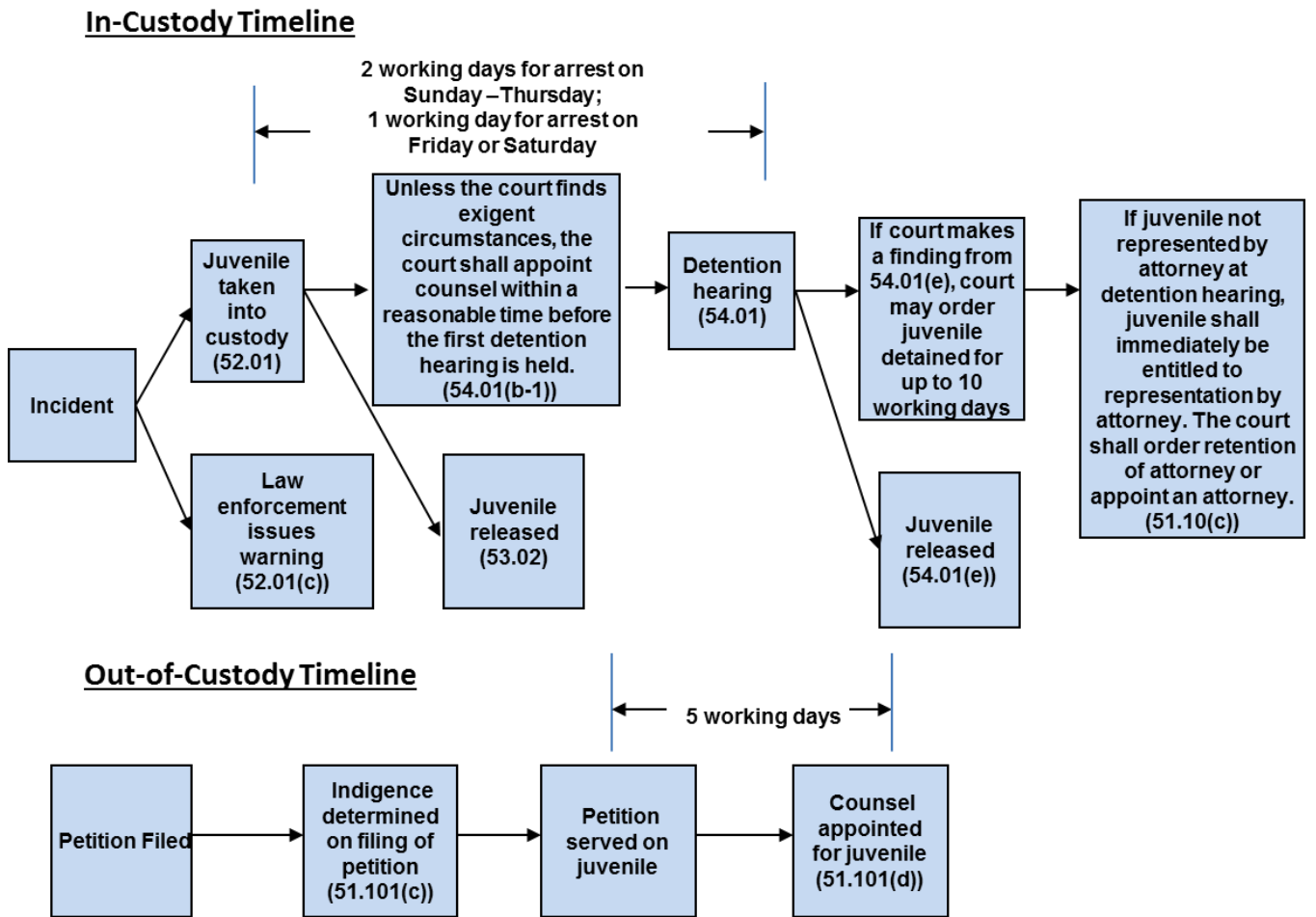
#### ***4.b. Juvenile Cases***

Counsel must be appointed for juveniles alleged to have engaged in delinquent conduct when the juvenile is brought to a detention hearing and when the juvenile is served with a copy of the petition alleging misconduct.<sup>23</sup> 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 petition is served on the juvenile, the court has five working days to appoint counsel or order the retention of counsel for the juvenile.

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<sup>23</sup> TEX. FAM. CODE § 51.10(f).

**Figure 2: Timeline for Appointment of Counsel in Juvenile Cases**



*Juvenile Detention Hearings*

To assess the timeliness of Tarrant County’s appointment procedures in juvenile cases, TIDC staff examined 79 cases filed in FY2019 (October 2018 – 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.<sup>24</sup> Of the 79 sample cases, 49 involved detention hearings. Counsel was present for the initial detention hearing in all 49 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 juvenile, the court has five working days to appoint counsel or order the retention of counsel for the juvenile. Of 79 sample cases, 74 involved service of the petition on the juvenile. Counsel was appointed timely for 69 cases involving the service of a petition

<sup>24</sup> 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.



on a juvenile (**93% timely**), which exceeds TIDC’s 90% threshold. TIDC finds Tarrant County to be in substantial compliance with Requirement 4 for felony, misdemeanor, and juvenile cases.

**Table 4: Times to Appointment in Tarrant County Juvenile Cases (FY 2019)**

	Sample Size	Number from Sample	Percent
Total juvenile cases examined	79		
<b>TIMELINESS OF COUNSEL APPOINTMENTS FOR DETENTION HEARINGS</b>			
Case files with detention hearings		49	
<b>Cases with attorney present at initial hearing</b>		<b>49</b>	<b>100%</b>
<b>TIMELINESS OF COUNSEL APPOINTMENTS WHERE JUVENILE SERVED WITH A PETITION</b>			
Case files in which juvenile served with a petition	74		
Counsel appointed within 5 working days of service		63	
Counsel retained within 5 working days of service		6	
Indigence denied within 5 working days of service <sup>25</sup>			
<b>Total cases with timely presence of counsel</b>		<b>69</b>	<b>93%</b>
Cases where counsel not present in a timely fashion		5	7%

**FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 4**

**Appoint Counsel Promptly.**

Requirement satisfied. No findings.

**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. TIDC presumes a jurisdiction has a fair, neutral, and nondiscriminatory appointment system if (for assigned counsel and managed assigned counsel systems) the top 10% of attorneys receiving cases at a given level (felony, misdemeanor, and juvenile) receive no more than three times their respective share of appointments. If a county can track appointments by appointment list, this analysis is made on each appointment list. A county can overcome the presumption by providing evidence as to why the system is fair, neutral, and nondiscriminatory.

Tarrant County uses rotational systems of appointment for felony, misdemeanor, and juvenile appointments. Under the rotational system, the court appoints the

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<sup>25</sup> TIDC considered a denial of indigence to be synonymous with an order to retain counsel.

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 by case level during FY2019. TIDC attempts to consider only those attorneys who were on the appointment list for the entire year. TIDC split this analysis between Spanish-designated attorneys and all other attorneys on the appointment lists. Based on this analysis, all 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 all three court comply with this requirement.

**Table 5: Share of Cases Paid to Top 10% of Attorneys in Tarrant County (FY 2019)**

Level	Attorneys on List <sup>26</sup>	Top 10% Attorneys <sup>27</sup>	Respective Share of Cases <sup>28</sup> [Column A]	Actual Share of Cases [Column B]	Top 10% Received 'x' Times Their Respective Share [Col. B] / [ Col. A]
Felony - English	151	15	9.9%	18.3%	1.8
Felony - Spanish	14	1	7.1%	11.9%	1.7
Misd. - English	178	18	10.1%	19.5%	1.9
Misd. - Spanish	21	2	9.5%	16.5%	1.7
Juvenile - English <sup>29</sup>	40	4	10.0%	21.2%	2.1

**FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 5**

**Attorney Selection Process**

Requirement satisfied. No findings.

<sup>26</sup> TIDC considered an attorney had been on the list for the entire year if the attorney received payment for disposing a case in FY2019, the attorney was also on a November 2019 appointment list, and the attorney was on the September 2018 appointment list. If an attorney did not meet these three conditions, the attorney was excluded from the analysis.

<sup>27</sup> 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.

<sup>28</sup> 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.

<sup>29</sup> For juvenile cases, TIDC did not make an analysis of the distribution of cases to Spanish-designated attorneys as only two Spanish-designated attorneys were on the juvenile list for the entire year.

## **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.<sup>30</sup>

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

### **FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 6**

#### **Statutory Data Reporting**

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

## **Conclusion**

TIDC thanks Tarrant 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.<sup>31</sup> TIDC staff stand ready to provide technical and financial assistance to remedy these issues and ensure full compliance with the Fair Defense Act.

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<sup>30</sup> TEX. GOV'T CODE § 79.036(a-1).

<sup>31</sup> Title 1 TEX. ADMIN. CODE § 174.28(c)(2).

## Summary of Findings and Recommendations

Tarrant County must respond in writing how it will address the report's finding.

**FINDING 1:** Indigence determinations must comply with Article 26.04(m) and *Abdnor v. State*. Indigence determinations may not consider the income of persons who are not legally bound to pay for the defendant's legal expenses.

## 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.<sup>32</sup>
  - 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.<sup>33</sup>
- The magistrate must inform and explain the right to counsel and the right to appointed counsel to the accused.<sup>34</sup>
- The magistrate must ensure that reasonable assistance in completing forms necessary to request counsel is provided to the accused.<sup>35</sup>
- 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.<sup>36</sup>
- 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.<sup>37</sup>
- 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.<sup>38</sup>

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<sup>32</sup> TEX. CODE CRIM. PROC. art. 14.06(a).

<sup>33</sup> TEX. CODE CRIM. PROC. art. 17.033.

<sup>34</sup> TEX. CODE CRIM. PROC. art. 15.17(a).

<sup>35</sup> *Id.*

<sup>36</sup> TEX. CODE CRIM. PROC. art. 15.17(e).

<sup>37</sup> *See, e.g.*, TEX. CODE CRIM. PROC. art. 15.17(a) (requiring magistrate to appoint counsel according to the timeframes set in TEX. CODE CRIM. PROC. art. 1.051); TEX. CODE CRIM. PROC. art. 1.051(c) (spelling out timeframe for appointment of counsel by county population size).

<sup>38</sup> 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.<sup>39</sup>
- ☒ State the financial standard(s) to determine whether a defendant is indigent.<sup>40</sup>
- ☐ List factors the court will consider when determining whether a defendant is indigent.<sup>41</sup>

**REQUIREMENT NOT SATISFIED:** The misdemeanor courts' indigent defense plan allowed for indigence determinations to consider the income of persons not obligated to pay legal fees for the defendant.

**REQUIREMENT 3: ESTABLISH MINIMUM ATTORNEY QUALIFICATIONS.**

- ☒ Establish objective qualification standards for attorneys to be on an appointment list.<sup>42</sup>
  - 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.<sup>43</sup>
  - 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.<sup>44</sup>

**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.<sup>45</sup>
- ☒ 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.<sup>46</sup>

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<sup>39</sup> TEX. CODE CRIM. PROC. art. 26.04(l)–(r).

<sup>40</sup> TEX. CODE CRIM. PROC. art. 26.04(l).

<sup>41</sup> TEX. CODE CRIM. PROC. art. 26.04(m).

<sup>42</sup> TEX. CODE CRIM. PROC. art. 26.04(d).

<sup>43</sup> 1 TEX. ADMIN. CODE § 174.1–.4.

<sup>44</sup> TEX. CODE CRIM. PROC. art. 26.04(j)(4).

<sup>45</sup> Tex. Fam. Code § 54.01(b-1). Tex. Fam. Code § 51.10(c).

<sup>46</sup> 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.<sup>47</sup>
- ☒ 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.<sup>48</sup>
- ☒ All unrepresented defendants must be advised of the right to counsel and the procedures for obtaining counsel.<sup>49</sup>

#### **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.<sup>50</sup>
- ☐ 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.<sup>51</sup>

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

- ☐ Alternative appointment method:<sup>52</sup>
  - 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.

**NOT APPLICABLE:** The County uses a rotational system of appointment.

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<sup>47</sup> TEX. CODE CRIM. PROC. art. 1.051(c).

<sup>48</sup> 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.”).

<sup>49</sup> TEX. CODE CRIM. PROC. art. 1.051(f-2).

<sup>50</sup> TEX. CODE CRIM. PROC. art. 26.04(a).

<sup>51</sup> TEX. CODE CRIM. PROC. art. 26.044.

<sup>52</sup> TEX. CODE CRIM. PROC. art. 26.04(g)–(h).