



Follow-up Policy Monitoring Review of Montgomery County's Indigent Defense Systems

October 2024



209 W. 14th Street, Room 202 (Price Daniel Building)
Austin, Texas 78701
Phone: 512.936.6994; Fax: 512.463.5724
www.tidc.texas.gov

Chair:

Honorable Missy Medary
Corpus Christi, Presiding Judge, 5th
Administrative Judicial Region of Texas

Ex Officio Members:

Honorable Sharon Keller	Presiding Judge, Court of Criminal Appeals
Honorable Nathan L. Hecht	Austin, Chief Justice, Supreme Court of Texas
Honorable Brandon Creighton	Conroe, State Senator
Honorable Bill Gravell, Jr.	Georgetown, Williamson County Judge
Honorable Emily Miskel	McKinney, Justice, Fifth Court of Appeals
Honorable Joe Moody	El Paso, State Representative
Honorable Reggie Smith	Sherman, State Representative

Members Appointed by the Governor:

Mr. Alex Bunin	Houston, Chief Public Defender, Harris County Public Defender's Office
Mr. Jim Bethke	San Antonio, Executive Director, Bexar County Managed Assigned Counsel Program
Mr. Jay Blass Cohen	Houston, Attorney, Blass Law PLLC
Honorable Valerie Covey	Georgetown, Williamson County Commissioner
Honorable Richard Evans	Bandera, Bandera County Judge
Honorable Missy Medary	Corpus Christi, Presiding Judge, 5th Administrative Judicial Region of Texas
Honorable J.R. Woolley, Jr.	Waller, Waller County Justice of the Peace, Pct. 2

Staff Directors and Managers:

Scott Ehlers	Executive Director
Wesley Shackelford	Deputy Director
Edwin Colfax	Director of Grant Funding
William R. Cox	Director of Public Defense Improvement
Sarah Gammell	Research Director
Crystal Leff-Pinon	Director of Family Protection Representation

Mission: Protecting the right to counsel, improving public defense.

Contents

Executive Summary.....	3
Background	3
REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE ARTICLE 15.17 PROCEEDINGS ...	5
REQUIREMENT 4: APPOINT COUNSEL PROMPTLY	7
Conclusion.....	12

Executive Summary

The Texas Indigent Defense Commission (TIDC) monitors local compliance with the Fair Defense Act through policy reviews.¹ In this follow-up review, TIDC observed misdemeanor dockets, juvenile dockets, and Article 15.17 hearings; interviewed local officials and staff; and reviewed FY2023 case file records. TIDC found Montgomery County has addressed four of the initial five findings. The finding dealing with untimely appointments of counsel in juvenile cases for youths released from custody, remains pending.

TIDC thanks Montgomery County officials and staff for their assistance in completing this review. TIDC will conduct a second follow-up review regarding its finding within two years.²

Background

In June 2021, TIDC issued its initial policy monitoring report of Montgomery County’s indigent defense practices. The report found that some defendants who received personal bonds were not asked if they wanted to request appointed counsel at the Article 15.17 hearing. Counsel appointments were not always timely. The report made findings regarding the timely appointment of counsel in felony, misdemeanor, and juvenile cases. In misdemeanor cases, some counsel requests were not ruled upon prior to a defendant’s waiver of counsel.

Montgomery County responded to the findings by stating magistrates would ask all defendants if they wanted to request counsel. The Office of Indigent Defense would interview defendants prior to the Article 15.17 hearing. In juvenile cases, the County Attorney’s Office would notify the Juvenile Department when it files a petition. The Juvenile Department, in turn would notify parents of the need to have an attorney and would provide contact information to the Office of Indigent Defense.

¹ TEX. GOV’T CODE § 79.037(a)–(b).

² 1 TEX. ADMIN. CODE § 174.28(c)(2).

Current Review

TIDC’s policy monitoring rules require follow-up reviews where the report included noncompliance findings.³ Ashley De La Garza and Joel Lieurance conducted the follow-up review, with a site visit on June 5 and 6, 2024. TIDC examined whether Montgomery County successfully addressed the findings from the June 2021 report. The current review focuses on the following core requirements of the Fair Defense Act:

REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE ARTICLE 15.17 PROCEEDINGS.

REQUIREMENT 4: APPOINT COUNSEL PROMPTLY.

TIDC observed misdemeanor and juvenile dockets, and Article 15.17 hearings; and also met with judges, judicial staff, and the Office of Indigent Defense.

Table 1: History of Monitoring Findings

FDA Core Requirement	Description and Initial Year of Finding	Status after 2024 Review	
		Satisfied	Pending
1. Magistrate Warnings	Magistrates did not ask defendants who received personal bonds if they wanted to request counsel. (2021)	✓ (2024)	
4. Prompt Appointment	The timeliness of indigence determinations in sample felony cases did not meet TIDC’s threshold for presuming a jurisdiction’s processes ensure timely appointments. (2021)	✓ (2024)	
4. Prompt Appointment	The timeliness of indigence determinations in sample misdemeanor cases did not meet TIDC’s threshold for presuming a jurisdiction’s processes ensure timely appointments. (2021)	✓ (2024)	
4. Prompt Appointment	Some misdemeanor defendants waived counsel without their requests being ruled upon. (2021)	✓ (2024)	
4. Prompt Appointment	The timeliness of indigence determinations in sample juvenile cases for youths released from custody did not meet TIDC’s threshold for presuming a jurisdiction’s processes ensure timely appointments. (2021)		✓

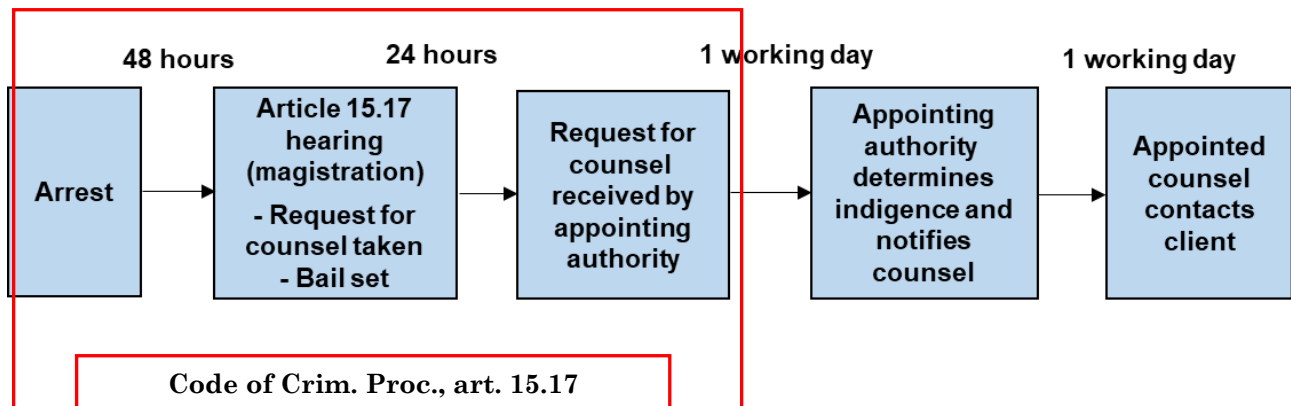
³ 1 TEX. ADMIN. CODE § 174.28(d)(3).

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.⁴ At this hearing, the magistrate must inform the person of the 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.⁵ If the magistrate has authority to appoint counsel, the magistrate must appoint counsel according to the timelines set in Article 1.051.⁶ If the magistrate does not have authority to appoint counsel, the magistrate 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



Montgomery County's Article 15.17 Procedures

Following arrest, officers bring arrestees to the Montgomery County Jail for booking and processing. Montgomery County uses associate judges to conduct Article 15.17 hearings. These judges are able to devote greater time to matters such as bail amounts and bail conditions than justices of the peace were previously able to give. Judges conduct Article 15.17 hearings at the jail every morning. The judge, defendants, jail staff and Office of Indigent Defense staff are physically present at

⁴ TEX. CODE CRIM. PROC. ART. 15.17(a).

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

⁶ TEX. CODE CRIM. PROC. ART. 15.17(a).

⁷ TEX. CODE CRIM. PROC. ART. 15.17(a).

⁸ TEX. CODE CRIM. PROC. ART. 15.18(a). A list of contacts to send out-of-county requests is available at: <http://tidc.tamu.edu/public.net/Reports/OutOfCountyArrestContacts.aspx>.

the jail. A prosecutor and defense attorney appear by zoom. During TIDC's 2021 review, defense attorneys were physically present for the hearing, but according to interviews, defense attorneys no longer wished to appear in person.

Prior to the Article 15.17 hearing, Office of Indigent Defense staff interview defendants to see if they qualify for appointed counsel and to provide relevant bail information to the judge overseeing the hearing. If a requesting defendant qualifies as indigent, the Office appoints counsel, often that same day.

The hearings occur in three phases. First, there are defendants requiring an interpreter. Montgomery County uses Spanish language interpreter services provided by the Office of Court Administration (OCA). Next are bail review hearings. If a defendant requests a bail review hearing, the defendant is brought back the next day, and the judge considers whether to adjust the bail amount and whether changed conditions should be set. From TIDC's file review, about 5% of sample felony defendants and 2% of misdemeanor defendants requested a bail review. Finally, English-speaking defendants with new charges appear before the judge.

The hearings are large, and regularly include more than 50 defendants. For each defendant, the prosecutor explains reasons for probable cause and then provides a recommended bail amount. The judge then determines whether probable cause exists, sets bail, and asks each defendant whether the defendant would like to request court appointed counsel and whether the defendant would like a bail review hearing the next day. TIDC observed that the judge asked all defendants booked for jailable offenses if they wanted to request counsel. A majority of sample defendants from TIDC's case file review requested counsel at the Article 15.17 hearing (72% of felony defendants and 62% of misdemeanor defendants).

Additional Observations

The following comments are not findings but are merely qualitative remarks from TIDC staff. From TIDC's observations, the defense attorney was not able to meet with defendants in advance of the hearing and provided no active role in the hearing. Given that a prosecutor is participating in these hearings, one could interpret them as being adversarial judicial proceedings. Article 1.051(a) of the Code of Criminal Procedure states, ". . . The right to be represented by counsel includes the right to consult in private with counsel sufficiently in advance of a proceeding to allow adequate preparation for the proceeding." Defense attorneys may wish to appear in person for the hearing to be able to consult with defendants and to provide a more active role in the hearing.

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 1

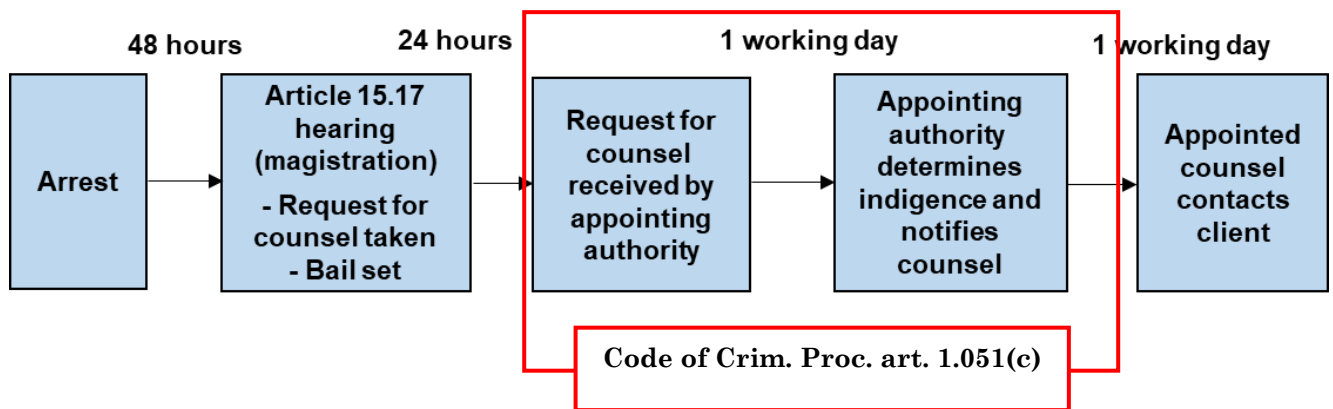
Conduct prompt and accurate magistration proceedings.

2021 FINDING 1: Article 15.17(e) requires magistrates to ask and record whether each defendant requests counsel. Magistrates must ask each defendant whether he or she requests counsel, regardless of bail bond status. *Successfully Addressed.*

REQUIREMENT 4: APPOINT COUNSEL PROMPTLY

Under Article 1.051(c)(2) of the Code of Criminal Procedure, courts in counties with a population over 250,000 must rule on a request for counsel within one working day of receiving the request.

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



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 Montgomery County, counsel requests are taken and ruled upon by the Office of Indigent Defense.

To assess the timeliness of local appointment procedures, TIDC examines case files and measures the time from counsel request until appointment of counsel or denial of indigence. This review examined cases filed in FY2023 (October 2022 to September 2023).

Timeliness of Appointments in Felony Cases

TIDC examined 166 sample felony cases. The County made timely appointments of counsel in 125 of 127 cases in which counsel was requested (**98% timely**). This exceeds TIDC’s 90% threshold for presuming a jurisdiction’s practices ensure timely appointment of counsel.

Table 2: Times to Appointment in Felony Cases

	Sample Size	Number from sample	Percent
Number of case files examined	166		
Total cases with a counsel request		127	
Appointment / denial of indigence occurred in:			
0 work days		98	
1 work day + 24 hour transfer		27	
Total timely appointments / denials		125	98%
2 to 3 work days + 24 hour transfer		1	
4 to 7 work days + 24 hour transfer		1	
More than 7 work days + 24 hour transfer		0	
No ruling on request		0	
Total untimely appointments / denials		2	2%

Timeliness of Appointments in Misdemeanor Cases

TIDC examined 200 sample misdemeanor cases. The County made timely appointments of counsel in 127 of 130 cases in which counsel was requested (**98% timely**). This exceeds TIDC’s 90% threshold for presuming a jurisdiction’s practices ensure timely appointment of counsel.

Table 3: Times to Appointment in Misdemeanor Cases

	Sample Size	Number from sample	Percent
Number of case files examined	200		
Total cases with a counsel request		130	
Appointment / denial of indigence occurred in:			
0 work days		59	
1 work day + 24 hour transfer		68	
Total timely appointments / denials		127	98%
2 to 3 work days + 24 hour transfer		0	
4 to 7 work days + 24 hour transfer		1	
More than 7 work days + 24 hour transfer		2	
No ruling on request		0	
Total untimely appointments / denials		3	2%

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).⁹

All sample counsel requests were ruled upon. TIDC commends Montgomery for its front-end procedures that ensure counsel requests are promptly ruled upon.

Timeliness of Appointments in Juvenile Cases

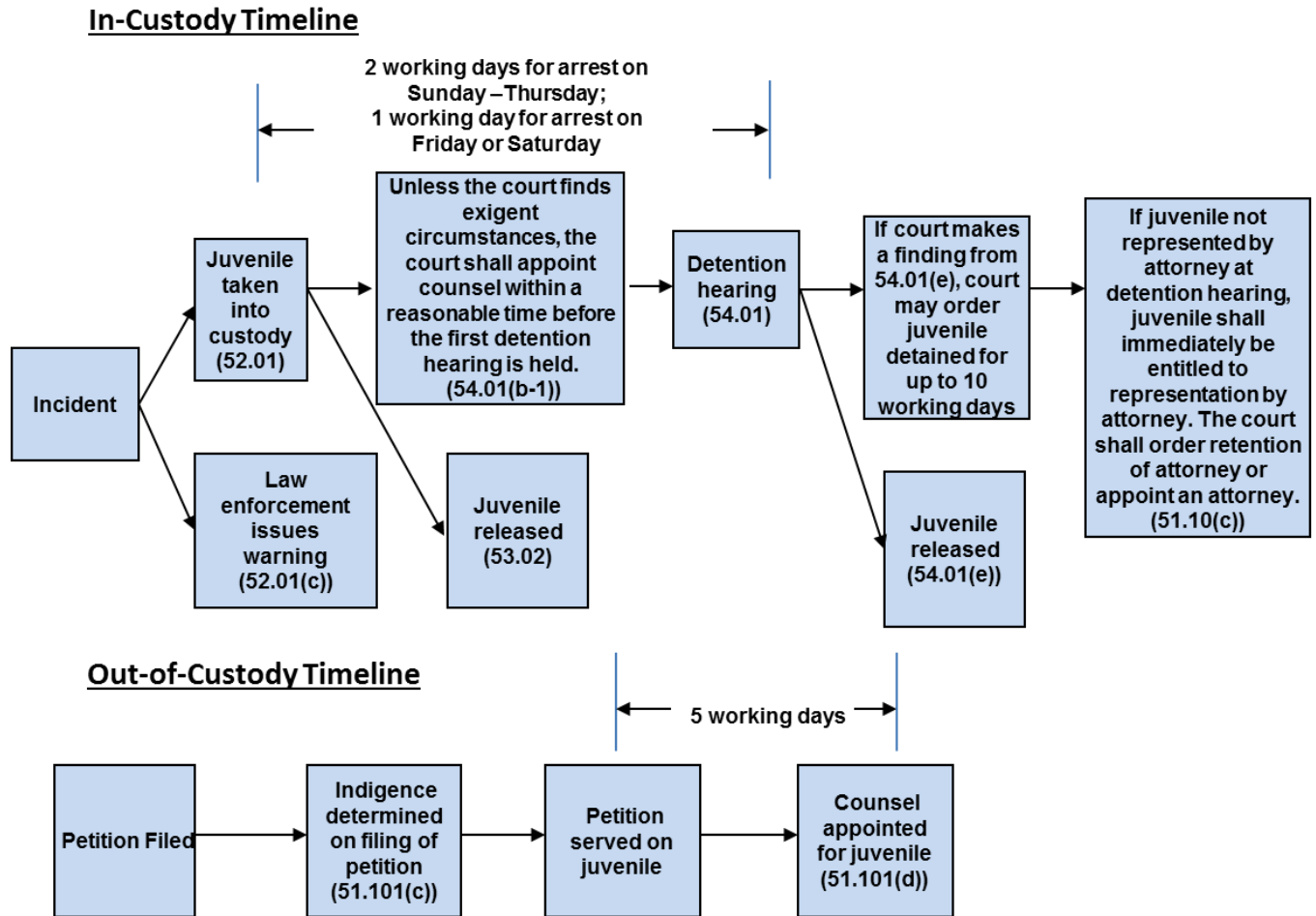
Counsel must be appointed for youth charged with delinquent conduct when the youth is brought to a detention hearing and when the youth is served with a copy of the petition alleging misconduct. Under Section 54.01(b-1) of the Family Code, unless the court finds that the appointment of counsel is not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

Subsection 51.101(c) of the Family Code directs the court to determine whether a youth's family is indigent upon the filing of the petition, with Subsection 51.101(d), requiring the court to appoint counsel, for those found to be indigent, within five working days of service of the petition on the juvenile. If the court determines that the person responsible for the youth's support is financially able to employ an attorney, Subsection 51.10(d) allows the court to order the retention of counsel.

⁹ 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)"

Figure 2: Timeline for Appointment of Counsel in Juvenile Cases



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 88 sample cases, counsel was timely appointed, or retained, in 56 of these cases (**64% timely**). This falls below TIDC’s 90% threshold for timeliness, indicating that the County is not in substantial compliance with this requirement.

The late appointments may be due to the court not making contact with parents prior to the expiration of the five-working-day requirement set in Section 51.101(d). The judge who recently assumed responsibility for the juvenile dockets was actively implementing strategies to ensure early contact with parents during TIDC’s visit.

Table 4: Times to Appointment in Juvenile Cases

	Sample Size	Number from Sample	Percent
Total juvenile cases examined	88		
TIMELINESS OF COUNSEL APPOINTMENTS WHERE JUVENILE SERVED WITH A PETITION			
Case files in which juvenile served with a petition	88		
Counsel appointed within 5 working days of service		56	
Indigence denied or counsel retained within 5 working days of service ¹⁰		0	
Total cases with timely presence of counsel		56	64%
Cases where counsel not present in a timely fashion		32	36%

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 4

Appoint Counsel Promptly.

2021 FINDING 2 (FELONY CASES): Montgomery County’s felony appointment process did not meet TIDC’s threshold for timely appointment of counsel (90% timely). Under Article 1.051(c)(2), district courts must rule on all requests for counsel within one working day. The County must implement practices that satisfy Article 1.051(c)(2)’s timeline. *Successfully Addressed*

2021 FINDING 3 (MISDEMEANOR CASES): Montgomery County’s misdemeanor appointment process did not meet TIDC’s threshold for timely appointment of counsel (90% timely). Under Article 1.051(c)(2), statutory county courts must rule on all requests for counsel within one working day. The County must implement practices that satisfy Article 1.051(c)(2)’s timeline. *Successfully Addressed*

2021 FINDING 4 (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)). Montgomery 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). *Successfully Addressed*

2021 FINDING 5 (JUVENILE CASES): For cases in which the juvenile is not detained, Montgomery County’s juvenile appointment process did not meet TIDC’s threshold for appointment of counsel (90% timely). Section 51.101(d) of the Family Code requires the appointment of counsel within five working days of petition service on the juvenile. Montgomery County must implement procedures that ensure timely appointments of counsel in cases in which a petition is served on the juvenile. *Issue Pending*

¹⁰ TIDC considered a denial of indigence to be synonymous with an order to retain counsel.

Conclusion

TIDC thanks Montgomery County officials and staff for their assistance in completing this review. TIDC will conduct a second follow-up review regarding its noncompliance findings within two years.¹¹ TIDC staff stand ready to provide technical and financial assistance to remedy these issues and ensure full compliance with the Fair Defense Act.

Findings and Recommendations from the 2024 Review

Montgomery County must provide a written response to the report's finding within 60 days after the report is received by the County. TIDC stands ready to provide technical and financial assistance to remedy these issues and ensure full compliance with the Fair Defense Act.

Core Requirement 4. Appoint Counsel Promptly.

2024 Finding 1 and Recommendation (juvenile cases): For cases in which the juvenile is not detained, Montgomery County's juvenile appointment process did not meet TIDC's threshold for appointment of counsel (90% timely). Section 51.101(d) of the Family Code requires the appointment of counsel within five working days of petition service on the juvenile. Montgomery County must implement procedures that ensure timely appointments of counsel in cases in which a petition is served on the juvenile. *Issue Pending.*

¹¹ 1 TEX. ADMIN. CODE § 174.28(c)(2).