



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

August 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
Honorable Nathan L. Hecht
Honorable Brandon Creighton
Honorable Joe Moody
Honorable Reggie Smith
Honorable Sherry Radack
Honorable Vivian Torres
Presiding Judge, Court of Criminal Appeals
Austin, Chief Justice, Supreme Court of Texas
Conroe, State Senator
El Paso, State Representative
Sherman, State Representative
Houston, Chief Justice, First Court of Appeals
Rio Medina, Medina Statutory County Judge

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 J.R. Woolley, Jr.
Waller, Waller County Justice of the Peace,
Pct. 2

Staff Directors and Managers:

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

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

Contents

Executive Summary.....	4
Background	4
REQUIREMENT 1: CONDUCT PROMPT AND ACCURATE ARTICLE 15.17 PROCEEDINGS ...	6
REQUIREMENT 2: DETERMINE INDIGENCE ACCORDING TO STANDARDS DIRECTED BY THE INDIGENT DEFENSE PLAN.....	8
REQUIREMENT 4: APPOINT COUNSEL PROMPTLY	9
Conclusion.....	15
Findings and Recommendations from the 2024 Review	16

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 felony, misdemeanor, and juvenile dockets, interviewed local officials and staff, and reviewed FY2022 case file records. TIDC found one of the previous report's nine findings regarding untimely appointments of counsel in juvenile cases for youths released from custody, remained pending.

TIDC thanks Hays 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 September 2018, TIDC issued its initial policy monitoring report of Hays County's indigent defense practices. The report found that when defendants requested counsel at the Article 15.17 hearing, the County did not have procedures to ensure assistance with financial affidavits or to ensure requests were transmitted to the appointing authority within 24 hours. TIDC's file review included an instance in which the local standard of indigence was not followed, resulting in a denial of indigence for an adult defendant based on the father's income. 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. In juvenile cases, initial detention hearings were sometimes waived, despite the Family Code's prohibition of this waiver.³

Current Review

TIDC's policy monitoring rules require follow-up reviews where the report included noncompliance findings.⁴ Joel Lieurance conducted the follow-up review, with site visits on April 19, 26, and 27, and on May 8, 9, 16, and 18, and on June 6, 2023. TIDC examined whether Hays County successfully addressed the findings and recommendations from the September 2018 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 2: DETERMINE INDIGENCE ACCORDING TO STANDARDS DIRECTED BY THE INDIGENT DEFENSE PLAN.

¹ TEX. GOV'T CODE § 79.037(a)–(b).

² 1 TEX. ADMIN. CODE § 174.28(c)(2).

³ TEX. FAM. CODE § 54.01(e).

⁴ 1 TEX. ADMIN. CODE § 174.28(d)(3).

REQUIREMENT 4: APPOINT COUNSEL PROMPTLY.

TIDC examined felony, misdemeanor, and juvenile case files. TIDC observed felony, misdemeanor, and juvenile dockets, as well as Article 15.17 hearings. TIDC met with district and county judges, associate judges, judicial staff, and the indigent defense coordinator. TIDC also conducted a survey of criminal defense attorneys as part of this report’s quality supplement.

Table 1: History of Monitoring Findings

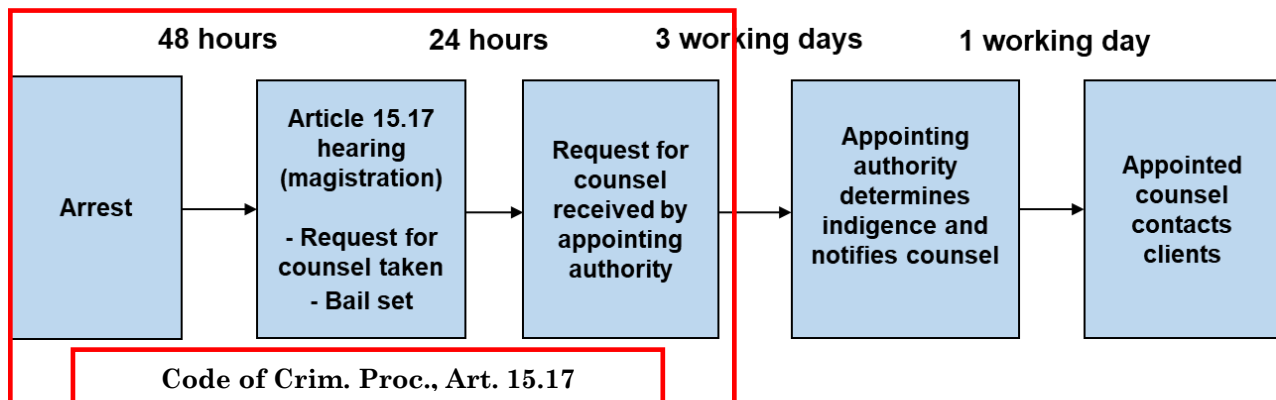
FDA Core Requirement	Description and Initial Year of Finding	Status after 2024 Review	
		Satisfied	Pending
1. Magistrate Warnings	The County did not always ensure reasonable assistance with affidavits of indigence. (2018)	✓ (2024)	
1. Magistrate Warnings	Requests for counsel were not always transmitted to the appointing authority within 24 hours. (2018)	✓ (2024)	
2. Indigence Standard	Determinations of indigence did not always follow the local standard set in the indigent defense plan. (2018)	✓ (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. (2018)	✓ (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. (2018)	✓ (2024)	
4. Prompt Appointment	Misdemeanor defendants sometimes waived counsel without their requests being ruled upon. (2018)	✓ (2024)	
4. Prompt Appointment	The timeliness of indigence determinations in sample juvenile cases involving a detention hearing did not meet TIDC’s threshold for presuming a jurisdiction’s processes ensure timely appointments. (2018)	✓ (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. (2018)		✓
4. Prompt Appointment	Initial juvenile detention hearings were periodically waived. (2018)	✓ (2024)	

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 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.⁶ If the magistrate has authority to appoint counsel, the magistrate must appoint counsel according to the timelines set in Article 1.051.⁷ If the magistrate does not have authority to appoint counsel, the magistrate must transmit requests for counsel to the appointing authority within 24 hours.⁸ 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.⁹

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



Hays County's Article 15.17 Procedures

Following arrest, officers bring arrestees to the Hays County Jail for booking and processing. Hays County now uses associate judges to conduct Article 15.17 hearings. These judges are able to devote time to matters such as bail and bail conditions that justices of the peace were previously unable to give. Jail staff assist with affidavits of indigence and forward them to the indigent defense coordinator after the hearing. Courts and court staff make notes if defendants appear to be

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. 15.17(a).

⁹ 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>.

confused with the affidavit or have mental health issues. Once the indigent defense coordinator receives the affidavits, she typically rules on them that same day or the next business day.

A majority of sample defendants from TIDC's case file review requested counsel at the Article 15.17 hearing (62% of felony defendants and 60% of misdemeanor defendants). This indicates that arrestees are being informed of the right to appointed counsel and are able to request counsel at the Article 15.17 hearing.

Reasonable Assistance in Completing Forms for Requesting Counsel

At the Article 15.17 hearing, magistrates must ensure that the accused has reasonable assistance in completing the necessary forms for requesting counsel.¹⁰ In Hays County, jail staff assist with the completion of affidavits of indigence. According to interviews, jail staff give affidavits of indigence to arrestees prior to the Article 15.17 hearing and provide assistance filling them out if needed. TIDC's file review confirmed the effectiveness of this process, as almost all counsel requests were ruled upon in a timely manner.

Transmitting Forms to the Appointing Authority

Within 24 hours of a defendant requesting counsel, the magistrate must transmit the request to the entity authorized to appoint counsel.¹¹ Jail staff collect the affidavits prior to returning arrestees to their cells and scan them for review by the indigent defense coordinator. Based on file review and interviews, this process appears to be generally effective. However, in rare instances, defendants may initially decline to request counsel, then change their minds, only to realize they will shortly thereafter make bail. The defendants turn their focus to getting out of jail rather than applying for counsel. These defendants sometimes either (1) fail to turn in an affidavit of indigence or (2) refuse to complete the affidavit after making a counsel request.

¹⁰ TEX. CODE CRIM. PROC. art. 15.17(a).

¹¹ TEX. CODE CRIM. PROC. art. 15.17(a).

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 1

Conduct prompt and accurate magistration proceedings.

2018 FINDING 1: Article 15.17(a) requires reasonable assistance in completing financial paperwork be provided to persons requesting counsel at the time of the 15.17 hearing. Hays County must put in place a system in which all persons requesting counsel receive assistance in completing financial affidavits. *Successfully Addressed.*

2018 FINDING 2: Article 15.17(a) requires requests for counsel to be transmitted to the courts within 24 hours of the requests being made. Hays County must ensure that whenever a request for counsel is made at the 15.17 hearing, the associated paperwork is sent to the courts within 24 hours of the request being made. *Successfully Addressed.*

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. Article 26.04(m) states:

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.¹² For felony and misdemeanor cases in Hays County, defendants with an income below 125% of the Federal Poverty Guidelines are presumed indigent. Defendants with an income above 125% of the Federal Poverty Guidelines can still be found indigent if unable to retain counsel without substantial hardship. For juveniles, the same financial standards are used, except indigence is based upon the person having custody of the juvenile.

¹² Hays County has three indigent defense plans:

- a district court plan (<http://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=555>);
- a county court plan (<http://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=558>); and
- a juvenile board plan (<http://tidc.tamu.edu/IDPlan/ViewPlan.aspx?PlanID=557>)

In 2018, TIDC found one instance in which a defendant over the age of 30 was denied indigence with the statement, “Denied: Father makes \$2000 per month.” In the current review, TIDC found several counsel requests that were denied, but all denials were either because defendants needed to provide more information on the affidavit or because defendants were found not to be indigent.

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 2

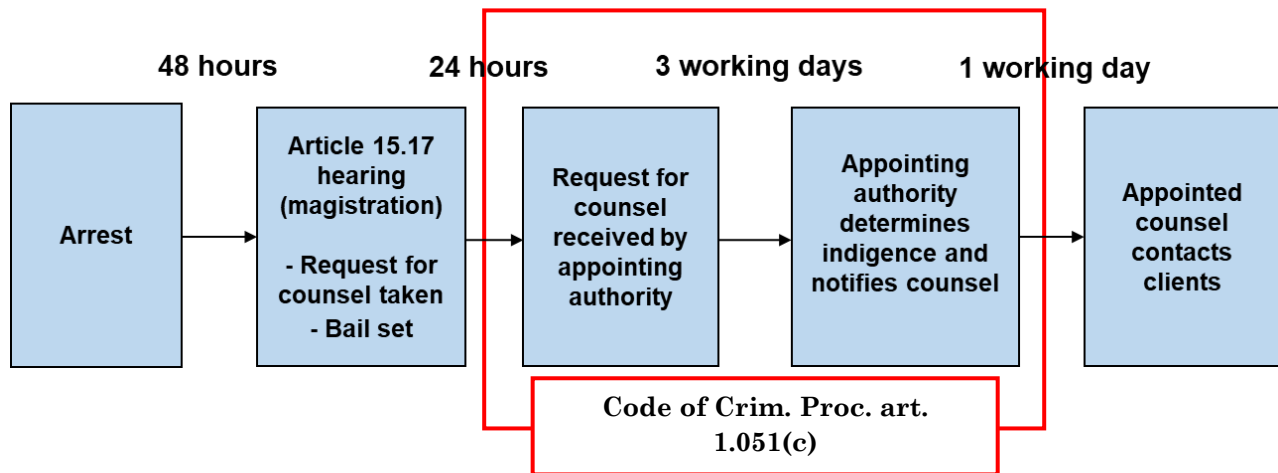
Determination of Indigence.

2018 FINDING 3: Not all determinations of indigence follow the financial standard set by the indigent defense plan and Article 26.04(m). The courts must follow this standard in determining indigence. *Successfully Addressed.*

REQUIREMENT 4: APPOINT COUNSEL PROMPTLY

Under Article 1.051(c) of the Code of Criminal Procedure, courts in counties with a population under 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



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 against him or her. 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 Hays County, counsel requests are sent to the courts’ designee, the indigent defense coordinator.

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. From these samples, almost all requests were ruled upon in a timely manner, however there were a few instances in which requests were not ruled

upon timely. It appears that the root cause in these cases may be a lack of documentation where defendants refused to complete affidavits of indigence.

Timeliness of Appointments in Felony Cases

TIDC examined 120 sample felony cases filed in FY2022 (October 2021 – September 2022). The courts made timely appointments of counsel in 90 of 97 cases in which counsel was requested (**93% 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	120		
Total cases with a counsel request		97	
Appointment / denial of indigence occurred in:			
0 work days		48	
1 – 3 work days + 24 hour transfer		42	
Total timely appointments / denials		90	93%
4 to 10 work days + 24 hour transfer		2	
More than 10 work days + 24 hour transfer		4	
No ruling on request		1	
Total untimely appointments / denials		7	7%

Timeliness of Appointments in Misdemeanor Cases

TIDC examined 150 sample misdemeanor cases filed in FY2022. The courts made timely appointments of counsel in 95 of 100 cases in which counsel was requested (**95% 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	150		
Total cases with a counsel request		100	
Appointment / denial of indigence occurred in:			
0 work days		50	
1 – 3 work days + 24 hour transfer		45	
Total timely appointments / denials		95	95%
4 to 10 work days + 24 hour transfer		1	
More than 10 work days + 24 hour transfer		0	
No ruling on request		4	
Total untimely appointments / denials		5	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).¹³

TIDC found four sample cases in which misdemeanor defendants requested counsel without their requests being ruled upon. These cases appear to be the result of defendants who requested counsel but did not submit affidavits of indigence. Three of those cases involved defendants who later retained counsel. In the other case, a defendant waived counsel to enter a guilty plea, but the court vacated the judgment. 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)). Hays County should continue to be vigilant about ensuring all counsel requests are ruled upon before any defendant waives counsel.

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.

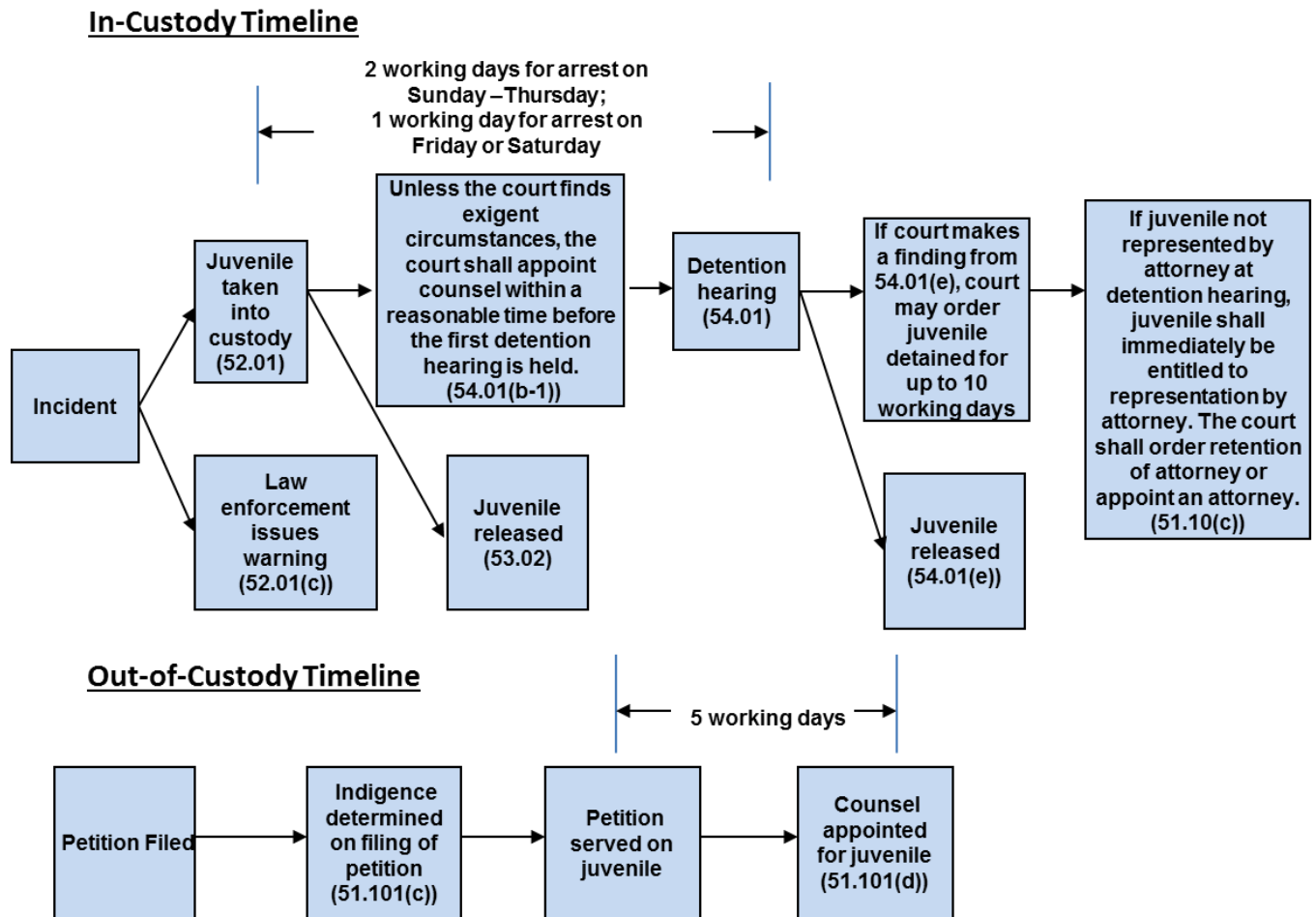
Subsection 51.101(c) of the Family Code directs the court to determine whether a youth's family is indigent upon the filing of the petition. Subsection 51.101(d) requires the court to appoint counsel, for those found to be indigent, within five working days of service of the petition on the juvenile. If the court determines that

¹³ 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)"

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.

Figure 2: Timeline for Appointment of Counsel in Juvenile Cases



Waivers of Initial Juvenile Detention Hearings

TIDC’s 2018 review of Hays County found that initial detention hearings were sometimes waived. Section 54.01(h) of the Family Code prohibits waivers of the initial detention hearing.¹⁴ In the current review, TIDC examined 53 sample cases from FY2022 (October 2021 - September 2022). Twelve cases involved youth detention. For

¹⁴ Tex. Fam. Code §54.01(h) states:

A detention order extends to the conclusion of the disposition hearing, if there is one, but in no event for more than 10 working days. Further detention orders may be made following subsequent detention hearings. **The initial detention hearing may not be waived** but subsequent detention hearings may be waived in accordance with the requirements of Section 51.09. Each subsequent detention order shall extend for no more than 10 working days, except that in a county that does not have a certified juvenile detention facility, as described by Section 51.12(a)(3), each subsequent detention order shall extend for no more than 15 working days.

six of those cases, TIDC could not determine what transpired at the initial detention hearing, as TIDC could not locate event records, such as the required findings for continued detention.¹⁵ Instead, the files included notes that attorneys stipulated to probable cause. The courts stated that initial detention hearings are no longer waived. Instead, attorneys frequently stipulate to probable cause, and there is a hearing to put the stipulation into the court record.

Appointment for the Initial Detention Hearing

To assess the timeliness of the County's appointment procedures at juvenile detention hearings, TIDC examined 53 cases filed in FY2022. Subsection 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.¹⁶ Of the 53 sample cases, twelve involved detention hearings. Counsel was present for the initial detention hearing in all twelve sample 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 53 sample cases, counsel was timely appointed, or retained, in 43 of these cases (**81% 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).

¹⁵ TEX. FAM. CODE § 54.01(e).

¹⁶ 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.

Table 4: Times to Appointment in Juvenile Cases

	Sample Size	Number from Sample	Percent
Total juvenile cases examined	53		
TIMELINESS OF COUNSEL APPOINTMENTS FOR DETENTION HEARINGS			
Case files with detention hearings	12		
Cases with attorney present at initial hearing		12	100%
TIMELINESS OF COUNSEL APPOINTMENTS WHERE JUVENILE SERVED WITH A PETITION			
Case files in which juvenile served with a petition	53		
Counsel appointed within 5 working days of service		24	
Indigence denied or counsel retained within 5 working days of service ¹⁷		19	
Total cases with timely presence of counsel		43	81%
Cases where counsel not present in a timely fashion		10	19%

FINDINGS AND RECOMMENDATIONS FOR REQUIREMENT 4

Appoint Counsel Promptly.

2018 FINDING 4 (felony cases): Article 1.051(c)(1) requires the court (or its designee) to rule on all requests for counsel within three working days (plus 24 hours allowed for transferring requests to the courts) of the request being made. The monitor’s sample of attorney appointments in felony cases fell below TIDC’s 90% timely threshold for presuming a jurisdiction’s appointment system ensures timely appointment of counsel. The County must implement practices that satisfy Article 1.051(c)(1)’s timeline in felony cases. *Successfully Addressed.*

2018 FINDING 5 (misdemeanor cases): Article 1.051(c)(1) requires the court (or its designee) to rule on all requests for counsel within three working days (plus 24 hours allowed for transferring requests to the courts) of the request being made. The monitor’s sample of attorney appointments in misdemeanor cases fell below TIDC’s 90% timely threshold for presuming a jurisdiction’s appointment system ensures timely appointment of counsel. The County must implement practices that satisfy Article 1.051(c)(1)’s appointment timeline in misdemeanor cases. *Successfully Addressed.*

2018 FINDING 6 (misdemeanor cases): The County does not have processes in place to ensure misdemeanor requests for counsel are ruled upon prior to a defendant’s waiver of counsel. As required by Article 1.051(f-2), the court must rule upon requests for counsel prior to procuring a waiver of counsel for the purpose of speaking with the prosecutor. *Successfully Addressed.*

¹⁷ TIDC considered a denial of indigence to be synonymous with an order to retain counsel.

2018 FINDING 7 (juvenile cases): Initial detention hearings for juveniles are periodically waived. Hays County must ensure detention hearings follow the requirement set in Section 54.01(h), disallowing the waiver of the initial juvenile detention hearing. *Successfully Addressed.*

2018 FINDING 8 (juvenile cases): The monitor's sample of attorney appointments where a juvenile remained in custody and received a detention hearing fell below TIDC's 90% timeliness threshold. The county must implement practices to ensure counsel is present at the detention hearing as required by Section 54.01(b-1) of the Family Code. *Successfully Addressed.*

2018 FINDING 9 (juvenile cases): The timeliness of counsel appointments in cases involving service of a petition fell below TIDC's threshold of 90% timeliness. The County must implement practices that satisfy the time frames set in Section 51.101 of the Family Code (appointment of counsel or order to employ counsel occurring within five working days of petition service on the juvenile). *Issue Pending.*

Conclusion

TIDC thanks Hays 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.¹⁸ TIDC staff stand ready to provide technical and financial assistance to remedy these issues and ensure full compliance with the Fair Defense Act.

¹⁸ 1 TEX. ADMIN. CODE § 174.28(c)(2).

Findings and Recommendations from the 2024 Review

Hays 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): The timeliness of counsel appointments in cases involving service of a petition fell below TIDC's threshold of 90% timeliness. The County must implement practices that satisfy the time frames set in Section 51.101 of the Family Code (appointment of counsel or order to employ counsel occurring within five working days of petition service on the juvenile). ***Issue Pending.***