

## CHAPTER SIX

### INFORMAL ADJUSTMENT AND JUVENILE DIVERSION

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I.	IMPLEMENTATION PROCEDURE.....	1
A.	TIMING OF INFORMAL ADJUSTMENT OR JUVENILE DIVERSION .....	1
1.	Legislature Envisioned Informal Adjustment and Juvenile Diversion Programs before Filing of Delinquency Petition.....	1
2.	Some Courts Require Filing of Delinquency Petition before the Informal Adjustment Program .....	1
B.	PROBABLE CAUSE OF DELINQUENCY, REFERRAL, APPROVAL OF COURT, AND ACCEPTANCE BY CHILD AND A REPRESENTATIVE.....	1
C.	DEPARTMENT OF CHILD SERVICES (“DCS”) APPROVAL REQUIRED IF SERVICES TO BE PAID BY DCS.....	3
1.	DCS Approval before Submission of Program to Juvenile Court.....	3
2.	DCS Shall Respond to Request within 3 Days.....	4
3.	Court Must Accept DCS Recommendation Unless Exceptions Apply .....	4
4.	Written Consent from DCS Before Payment of Services for Family.....	5
5.	Emergency Placement Allowed without Immediate DCS Approval .....	5
D.	Child and Child’s Parent, Guardian, Custodian, or Attorney Must Consent to Program of Informal Adjustment.....	6
II.	DURATION OF PROGRAM .....	6
A.	PROGRAM MAY NOT EXCEED SIX (6) MONTHS.....	6
B.	COURT MAY ORDER A THREE (3) MONTH EXTENSION (UNTIL JULY 1, 2023) .....	6
III.	IF PARENT, GUARDIAN, CUSTODIAN, OR CHILD FAILS TO COMPLY WITH PROGRAM...	6
A.	PETITION FOR PARENT, GUARDIAN OR CUSTODIAN COMPLIANCE MAY BE FILED.	6
B.	HEARING ON PARENT, GUARDIAN, OR CUSTODIAN’S FAILURE TO COMPLY .....	6
C.	CONTEMPT OF COURT POSSIBLE FOR PARENT, GUARDIAN, OR CUSTODIAN’S NONCOMPLIANCE .....	7
D.	IF CHILD FAILS TO COMPLY .....	7
IV.	FEEES FOR INFORMAL ADJUSTMENT PROGRAM .....	7
A.	FEEES TO BE PAID BY CHILD OR THE CHILD’S PARENTS .....	7
1.	Amount of Fees .....	7
2.	Parent or Guardian of The Estate Is Financially Responsible Until July 1, 2023 .....	7
3.	Parent or Guardian of Estate Must Complete Child Support Obligation Worksheet .....	8
4.	Court May Find That Parent or Guardian Is Unable to Pay or That Justice Would Not Be Served by Ordering Payment.....	8
B.	PROBATION DEPARTMENT TO COLLECT PROGRAM FEEES.....	9
C.	COUNTY AUDITOR TO DEPOSIT FEEES IN COUNTY USER FEE ACCOUNT.....	9
V.	IMPACT OF INFORMAL ADJUSTMENT ON EXPUNGEMENT OF RECORDS.....	9



# CHAPTER SIX

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### I. IMPLEMENTATION PROCEDURE

#### A. TIMING OF INFORMAL ADJUSTMENT OR JUVENILE DIVERSION

##### 1. Legislature Envisioned Informal Adjustment and Juvenile Diversion Programs before Filing of Delinquency Petition

As envisioned when the informal adjustment statute (Ind. Code 31-37-9) was drafted, an informal adjustment was to occur before the petition alleging delinquency was filed in juvenile court. It was believed that the filing of the petition alleging delinquency formalized procedures such that informal adjustment would become impossible.

A program of informal adjustment can serve as an alternative to the filing of a formal delinquency petition. See *In re Spencer*, 798 N.E.2d 175, 183 (Ind. 2003). If a program of informal adjustment is implemented, implementation must take place *after* a preliminary inquiry and approval by the juvenile court. Ind. Code 31-37-9-1(a).

With the creation of the juvenile diversion framework, the legislature made clear that successful completion of the terms of juvenile diversion will prevent the filing of a delinquency petition. Ind. Code 31-37-8.5-5 (eff. July 1, 2023).

##### 2. Some Courts Require Filing of Delinquency Petition before the Informal Adjustment Program

Some courts require the petition alleging delinquency be filed before the juvenile court will approve a program of informal adjustment. While this procedure may be contrary to the original intent of the legislature, nothing in the juvenile code prohibits such a procedure.

However, Ind. Code 31-37-8.5-5 (eff. July 1, 2023) provides that “[i]f the child successfully completes the terms of diversion, a petition shall not be filed with the court and no further action shall be taken.”

<p><b>PRACTICE POINTER:</b> Remember if the court approves the filing of the petition alleging delinquency, the court must hold an initial hearing and appoint counsel if the child does not have an attorney and has not waived the right to counsel.</p>
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#### B. PROBABLE CAUSE OF DELINQUENCY, REFERRAL, APPROVAL OF COURT, AND ACCEPTANCE BY CHILD AND A REPRESENTATIVE

After the preliminary inquiry and upon approval of the juvenile court, the intake officer may implement a program of informal adjustment if the officer has probable cause to believe that the child is a delinquent child. Ind. Code 31-37-9-1(a). Under the statute, the intake officer is tasked with making a probable cause determination.

A new chapter of the Indiana Code was added in 2022 – Ind. Code 31-37-8.5 – addressing “Juvenile Diversion.” Beginning July 1, 2023, after the preliminary inquiry involving the use of a risk screening tool, the intake officer may also refer the child to a program of juvenile diversion. Ind. Code 31-37-8-2(6) (eff. July 1, 2023).

Ind. Code 31-37-8.5 (eff. July 1, 2023) provides:

- (a) As used in this chapter, under the policies on juvenile diversion established by the statewide juvenile justice oversight body described in IC 2-5-36-9.3, “juvenile diversion” means:
  - (1) a decision made by the prosecutor that results in legal action not being taken against a child, and instead provides or refers a child to juvenile probation or a community based organization for supervision and services, as necessary; and
  - (2) an effort to prevent further involvement of the child in the formal legal system.
- (b) As used in this chapter, “restorative justice services” means services focused on repairing the harm caused to victims and the community as a result of a child's behavior.
- (c) As part of the preliminary inquiry described in IC 31-37-8, the intake officer shall use a validated risk screening tool to inform its recommendation to the prosecutor.
- (d) Results from the risk screening tool and the intake officer's recommendation described in subsection (c) shall be made available to the prosecutor to inform a recommendation for participation in juvenile diversion.
- (e) After the preliminary inquiry, which includes use of a risk screening tool, and prior to a petition being filed, the intake officer may recommend to the prosecuting attorney that the child participate in juvenile diversion if the intake officer has probable cause to believe that the child is a delinquent child.
- (f) Information obtained:
  - (1) from the risk screening tool described in subsection (c); and
  - (2) in the course of any screening, including any admission, confession, or incriminating evidence;

from a child in the course of any screening or assessment in conjunction with the proceedings under this chapter is not admissible into evidence in any factfinding hearing in which the child is accused. The child is not subject to subpoena, any other court proceeding, or any other purpose described in this section.

- (g) If the prosecuting attorney approves a child's participation in juvenile diversion described in subsection (a), juvenile probation, as part of a child's juvenile diversion program, may:
  - (1) refer a child to community-based programs or service providers, if necessary;
  - (2) provide case management and service coordination;
  - (3) provide assistance with barriers to completion; and
  - (4) monitor progress;

so the child can complete the terms of juvenile diversion offered to the child.

A risk screening tool shall be used to inform recommendations for the use of informal adjustment and juvenile diversion. Ind. Code 31-37-9-1 (eff. July 1, 2023); Ind. Code 31-9-2-112.8. A risk screening tool means “a validated screening instrument approved by the judicial conference of Indiana: that (1) measures a child’s risk to reoffend; and (2) is used to inform a child’s eligibility to participate in juvenile diversion and informal adjustment.” Ind. Code 31-9-2-112.8.

Under Ind. Code 31-37-8-4 (eff. July 1, 2023), the intake officer shall:

- (1) Send the prosecuting attorney a copy of the preliminary inquiry.
- (2) Recommend whether to:
  - (A) file a petition;
  - (B) file a petition and recommend that the child be referred for an assessment by a dual status assessment team as described in IC 31-41-1-5;
  - (C) refer the child to juvenile diversion;
  - (D) refer the child to juvenile diversion as described in IC 31-37-8.5 and recommend that the child be referred for an assessment by the dual status assessment team as described in IC 31-41-1-5;
  - (E) informally adjust the case;
  - (F) informally adjust the case and recommend that the child be referred for an assessment by a dual status assessment team as described in IC 31-41-1-5;
  - (G) refer the child to another agency; or
  - (H) dismiss the case.
- (h) The prosecuting attorney and the court may agree to alter the procedure described in subsection (a).

The child and the child’s parent, guardian, custodian, or attorney must consent to the program of informal adjustment or juvenile diversion. Ind. Code 31-37-9-2; Ind. Code 31-37-8.5-2 (eff. July 1, 2023).

**PRACTICE POINTER:** If an attorney is available to the child and the child desires an informal adjustment or, after July 1, 2023, a program of juvenile diversion, defense counsel should contact the intake officer as soon as possible in an effort to influence the decision to recommend an informal adjustment or juvenile diversion program.

## **C. DEPARTMENT OF CHILD SERVICES (“DCS”) APPROVAL REQUIRED IF SERVICES TO BE PAID BY DCS**

### **1. DCS Approval before Submission of Program to Juvenile Court**

Until July 1, 2023, if the program of informal adjustment includes services requiring payment by DCS under Ind. Code 31-40-1, the intake officer shall submit a copy of the proposed program to the department before submitting it to the juvenile court for approval. Upon receipt of the proposed program, the department may submit its

comments and recommendations, if any, to the intake officer and the juvenile court. Ind. Code 31-37-9-1(b).

Pursuant to Ind. Code 31-37-5-8(a) and -8(b), except as provided by Ind. Code 31-37-5-8(c) (emergency placement), before a juvenile court orders or approves a service, a program, or an out-of-home placement for a child:

- (1) That is recommended by a probation officer or proposed by the juvenile court;
- (2) For which the costs would be payable by the department (DCS) under Ind. Code 31-40-1-2; and
- (3) That has not been approved by the department;

the juvenile court shall submit the proposed service, program, or placement to the department for consideration.

## **2. DCS Shall Respond to Request within 3 Days**

The department shall, not later than three (3) business days after receipt of the recommendation or proposal, submit to the court a report stating whether the department approves or disapproves the proposed service, program, or placement. Ind. Code 31-37-5-8(b).

### **a. If DCS Approves the Suggested Program**

If the department approves the service, program, or placement recommended by the probation officer or juvenile court, the juvenile court may enter an appropriate order to implement the approved proposal. Ind. Code 31-37-5-8(d).

### **b. If DCS Does Not Approve the Suggested Program**

If the department does not approve a service, program, or placement recommended by the probation officer or proposed by the juvenile court, the department may recommend an alternative service, program, or placement for the child. Ind. Code 31-37-5-8(d).

## **3. Court Must Accept DCS Recommendation Unless Exceptions Apply**

Pursuant to Ind. Code 31-37-5-8(e), the juvenile court shall accept the recommendations of the department regarding any predispositional services, programs, or placement for the child unless the juvenile court finds a recommendation is:

- (1) Unreasonable, based on the facts and circumstances of the case; or
- (2) Contrary to the welfare and best interests of the child.

### **a. If the Court does not Accept the DCS Recommendation**

Pursuant to Ind. Code 31-37-5-8(f), if the juvenile court does not accept the recommendations of the department in the report submitted under Ind. Code 31-37-5-8(b), the court:

- (1) May enter an order that:
  - (A) Requires the department to provide a specified service, program, or placement, until entry of a dispositional decree or until the order is otherwise modified or terminated; and
  - (B) Specifically states the reasons why the juvenile court is not accepting the recommendations of the department, including the juvenile court's findings under Ind. Code 31-37-5-8(e); and
- (2) Must incorporate all documents referenced in the report submitted to the probation officer or to the court by the department into the order so that the documents are part of the record for any appeal the department may pursue under Ind. Code 31-37-5-8(g).

**b. DCS May Appeal**

If the juvenile court enters its findings and order under Ind. Code 31-37-5-8(e) and (f), the department may appeal the juvenile court's order under any available procedure provided by the Indiana Rules of Trial Procedure or the Indiana Rules of Appellate Procedure to allow any disputes arising under this section to be decided in an expeditious manner. Ind. Code 31-37-5-8(g).

**(1) If DCS Wins the Appeal**

Pursuant to Ind. Code 31-37-5-8(h), if the department prevails on an appeal initiated under Ind. Code 31-37-5-8(g), the department shall pay the following costs and expenses incurred by or on behalf of the child before the date of the final decision:

- (1) Any programs or services implemented during the appeal, other than the cost of an out-of-home placement ordered by the juvenile court.
- (2) Any out-of-home placement ordered by the juvenile court and implemented after entry of the court order of placement, if the court has made written findings that the placement is an emergency required to protect the health and welfare of the child.

**4. Written Consent from DCS Before Payment of Services for Family**

Before payment for services to the family may be paid, written consent must also be obtained from the department. Ind. Code 31-37-9-2.

**5. Emergency Placement Allowed without Immediate DCS Approval**

If the juvenile court makes written findings and concludes that an emergency exists requiring an immediate out-of-home placement to protect the health and welfare of the child, the juvenile court may order or authorize implementation of the placement without first complying with the procedure specified in Ind. Code 31-37-5. Ind. Code 31-37-5-8(c).

**a. Court Must Later Submit Copy of Order to DCS**

After entry of an order for emergency placement, the juvenile court shall submit a copy of the order to the department for consideration under Ind. Code 31-37-5 of possible modification or alternatives to the placement and any related services or programs included in the order. Ind. Code 31-37-5-8(c).

**b. If Court Fails to Make Required Findings**

If the court has not made written findings that the placement is an emergency, the department shall file a notice with the Indiana judicial center. Ind. Code 31-37-5-8(h).

**D. Child and Child's Parent, Guardian, Custodian, or Attorney Must Consent to Program of Informal Adjustment**

The child and the child's parent, guardian, custodian, or attorney must consent to the program of informal adjustment. Ind. Code 31-37-9-2.

**II. DURATION OF PROGRAM**

**A. PROGRAM MAY NOT EXCEED SIX (6) MONTHS**

Until July 1, 2023, a program of informal adjustment may not exceed six (6) months, except by approval of the juvenile court. Ind. Code 31-37-9-7. Beginning July 1, 2023, a program of informal adjustment may not exceed six (6) months. Ind. Code 31-37-9-7 (eff. July 1, 2023).

Juvenile diversion may not exceed six (6) months. Ind. Code 31-37-8.5-3 (eff. July 1, 2023).

**B. COURT MAY ORDER A THREE (3) MONTH EXTENSION (UNTIL JULY 1, 2023)**

Until July 1, 2023, the juvenile court may extend a program of informal adjustment an additional three (3) months. Ind. Code 31-37-9-7.

**III. IF PARENT, GUARDIAN, CUSTODIAN, OR CHILD FAILS TO COMPLY WITH PROGRAM**

**A. PETITION FOR PARENT, GUARDIAN OR CUSTODIAN COMPLIANCE MAY BE FILED**

If (1) the child is an alleged delinquent child; and (2) the child's parent, guardian, or custodian fails to participate in the program of informal adjustment, the probation department or DCS may file a petition for compliance. Ind. Code 31-37-9-3.

**B. HEARING ON PARENT, GUARDIAN, OR CUSTODIAN'S FAILURE TO COMPLY**

Upon the filing of a petition for compliance and after notice and a hearing on the petition for compliance, the juvenile court may order the parent, guardian, or custodian of a child to participate in a program of informal adjustment. Ind. Code 31-37-9-4(a).



### **C. CONTEMPT OF COURT POSSIBLE FOR PARENT, GUARDIAN, OR CUSTODIAN'S NONCOMPLIANCE**

A parent, guardian, or custodian who fails to participate in a program of informal adjustment ordered by the court may be found in contempt of court. Ind. Code 31-37-9-4(b).

### **D. IF CHILD FAILS TO COMPLY**

C.W. v. State, 643 N.E.2d 915, 917 (Ind. 1994) (Case relied on previous juvenile code statutory provision for speedy trial, now found at Ind. Code 31-37-11-5, as well as referencing Criminal Rule 4(C). Where child failed to comply with informal adjustment contract, delay was attributable to child and speedy trial time periods were properly extended by appropriate amount; if child had chosen not to participate in the informal adjustment program, State would have been required to proceed on delinquency petition within one year.).

Under Ind. Code 31-37-8.5-5 (eff. July 1, 2023):

- (a) If the child fails to complete the terms of diversion or commits a new offense, juvenile probation shall inform the prosecuting attorney at least fourteen (14) days prior to the end of the child's juvenile diversion.
- (b) If the child fails to complete the terms of the juvenile diversion described in this chapter, the prosecuting attorney may petition the juvenile court for authorization to file a delinquency petition.
- (c) Unless a delinquency petition is filed as described in subsection (c), the prosecuting attorney shall close the child's file in regard to the diverted matter not later than six (6) months after the date the diversion is initiated.

## **IV. FEES FOR INFORMAL ADJUSTMENT PROGRAM**

### **A. FEES TO BE PAID BY CHILD OR THE CHILD'S PARENTS**

#### **1. Amount of Fees**

Until July 1, 2023, the juvenile court may order each child who participates in a program of informal adjustment or the child's parent to pay an informal adjustment program fee of (1) at least five dollars (\$5), but (2) not more than fifteen dollars (\$15) for each month that the child participates in the program instead of the court cost fees prescribed by Ind. Code 33-37-4-3. Ind. Code 31-37-9-9. The statutory provision is repealed effective July 1, 2023.

#### **2. Parent or Guardian of The Estate Is Financially Responsible Until July 1, 2023**

Until July 1, 2023, a parent or guardian of the estate of a participant in a program of informal adjustment approved by a juvenile court is financially responsible, as provided by Ind. Code 31-40-1, for any services provided by or through the department. Ind. Code 31-40-1-3(a)(2).

Matter of Garrett, 631 N.E.2d 11, 13 (Ind.Ct.App. 1994), *trans. denied* (A delinquent child's parents are financially responsible for any services ordered by court and must reimburse the county unless the court determines they are unable

to pay for them, payment would be unreasonable hardship on family, or justice would not be served.).

Effective July 1, 2023, parents or guardians of juveniles participating in a program of informal adjustment no longer are financially responsible for services provided by or through the department.

### **3. Parent or Guardian of Estate Must Complete Child Support Obligation Worksheet**

Until July 1, 2023, each person described in Ind. Code 31-40-1-3(a) [a parent or guardian of the estate of a participant in a program of informal adjustment], shall, before a hearing under Ind. Code 31-40-1-3(c) [before a detention hearing, a hearing on payment of costs by DCS, a dispositional hearing, or any other hearing to consider modification of a dispositional decree] concerning payment or reimbursement of costs, furnish the court and the department with an accurately completed and current child support obligation worksheet on the same form that is prescribed by the Indiana Supreme Court for child support orders. Ind. Code 31-40-1-3(b).

### **4. Court May Find That Parent or Guardian Is Unable to Pay or That Justice Would Not Be Served by Ordering Payment**

At: (1) a detention hearing; (2) a hearing that is held after the payment of costs by the department under Ind. Code 31-40-1-2; (3) the dispositional hearing; or (4) any other hearing to consider modification of a dispositional decree; the juvenile court shall order the child's parents or the guardian of the child's estate to pay for, or reimburse the department for the cost of services provided to the child or the parent or guardian unless the court makes a specific finding that the parent or guardian is unable to pay or that justice would not be served by ordering payment from the parent or guardian. Ind. Code 31-40-1-3(c).

In re E.I., 653 N.E.2d 503, 511 (Ind. Ct. App. 1995) (Juvenile court's order requiring payment for services ordered by the court must abide by mandates of statute setting out scheme for paying costs of such services.).

Carnahan v. State, 558 N.E.2d 845, 848 (Ind. Ct. App. 1990) (Failure to comply with statutory scheme under which county may be reimbursed for services rendered to child who had been adjudicated delinquent is fatal.).

J.W. v. Hendricks Cty. Office of Family & Children, 697 N.E.2d 480, 483 (Ind. Ct. App. 1998) (Parents seeking to avoid obligation of reimbursing county for costs of child's placement based upon statutory defenses have burden of proving those affirmative defenses by preponderance of evidence.).

E.M. v. State, 128 N.E.3d 1, 5 (Ind. Ct. App. 2019) (Failure by juvenile court to hold the hearing required by Ind. Code 31-40-1-3 and to inquire into whether the delinquent child's parents were unable to pay and whether the interests of justice would be served by ordering them to reimburse additional costs led to reversal of the reimbursement judgment.)

## **B. PROBATION DEPARTMENT TO COLLECT PROGRAM FEES**

Until July 1, 2023, pursuant to Ind. Code 31-37-9-10(a), the probation department for the juvenile court shall do the following:

- (1) Collect the informal adjustment program fee set under Ind. Code 31-37-9-9; and
- (2) Transfer the collected informal adjustment program fees to the county auditor not later than thirty (30) days after the fees are collected.

## **C. COUNTY AUDITOR TO DEPOSIT FEES IN COUNTY USER FEE ACCOUNT**

The county auditor shall deposit the fees in the county user fee fund established by Ind. Code 33-37-8-5. Ind. Code 31-37-9-10(b). This statutory provision is repealed effective July 1, 2023.

## **V. IMPACT OF INFORMAL ADJUSTMENT ON EXPUNGEMENT OF RECORDS**

In considering whether to grant a petition to expunge juvenile delinquency records, the juvenile court may review whether there was an informal adjustment rather than an adjudication. Ind. Code 31-39-8-3(e)(4).

Since completed informal adjustments do not result in an adjudication, these matters are eligible for expungement under Ind. Code 35-38-9-1 [Criminal Code expungement of arrest records] one year after the date of the delinquency allegation if all other requirements of Ind. Code 35-38-9-1 are met.

For juveniles alleged to be a delinquent child after June 30, 2022, “If:

- (1) a court dismisses all: ...
  - (a) juvenile delinquency allegations;  
filed and pending against a person;
- (2) one (1) year has passed since juvenile delinquency allegations were filed against a child, and:
  - (a) there is no disposition; and
  - (b) the state is not actively prosecuting the allegations; or
- (3) in a: ...
  - (a) juvenile proceeding the court finds all allegations not true, or the juvenile's true finding is later vacated;

the court shall immediately order all records related to the criminal charges or juvenile delinquency allegations expunged. An expungement order that is issued based on nonprosecution under subdivision (2) goes into effect immediately. An expungement order issued under subdivision (1) or (3) may not go into effect earlier than sixty (60) days from the date of the dismissal, acquittal, or no true finding. However, upon motion by the prosecuting attorney, if the court finds that specific facts exist in the particular case which justify a delay, the court may delay implementation of an expungement order under subdivision (1) or (3) for up to one (1) year from the date of the dismissal, acquittal, or no true finding.” Ind. Code 35-38-9-1(b).

For juveniles arrested as June 30, 2022, but not ultimately “charged,” or alleged to be delinquent, if: “(2) one hundred eighty (180) days have elapsed since the date of the arrest; and (3) no charges are pending against the person; the prosecuting attorney shall notify a judge exercising criminal jurisdiction in the county (or a designated judge, if applicable) of these facts. Upon receipt of the notification, the judge shall immediately order the expungement of all records related to the arrest.” Ind. Code 35-38-9-1(c).

**PRACTICE POINTER:** Ind. Code 31-39-8-3 places the burden upon the person wishing to have juvenile records expunged to file a petition, and whether to order expungement is left to the juvenile court’s discretion. This code provision applies to children who were alleged to be a delinquent child, i.e., against whom a delinquency petition was filed. This may include a juvenile client who ultimately successfully engaged in an informal adjustment rather than proceeded to adjudication. Ind. Code 35-38-9-1, on the other hand, requires the court to order expungement if statutory requirements are met. Review both of these statutes prior to seeking expungement to determine whether your client is entitled to expungement rather than simply eligible.